underlying natural or social laws, as we shall see, legal thinkers would simultaneously argue that the common law also ended up instantiating the very same underlying natural and social laws. Where the movement of history was a progressive uncovering of underlying natural or social laws or a progressive removal of exceptions, in other words, the common law could be represented as already embodying the course of history. Where underlying natural and social laws were imagined as limits to political democracy, furthermore, the common law, to the extent that it was fused with such laws, served as democracy's limit. The reader will observe this pattern repeated in the various contexts this chapter explores: the slavery debates, politicolegal arrangements during and after the War, and mid-century legal science.

Somersett in America: A Fragment of the Antebellum Slavery Debates

Dissatisfied with the trend of American politics and law, both antislavery and proslavery legal thinkers engaged in a search for underlying natural or social laws, although the underlying laws they identified stood in sharp contrast to one another. All law – including the common law – would have to be understood in terms of these underlying natural and social laws. This positing of natural or social laws as a way of making sense of the world – and of emphasizing the gap between politics and its limit – is dramatically revealed in a discrete aspect of the extensive antebellum slavery debates, namely the discussions over the meaning and scope of Lord Mansfield's celebrated 1772 decision in *Somersett v. Stewart*.[15]

The *Somersett* decision was formally about the ability of a master to remove his slave forcibly from England. As such, it neither effected an abolition of slavery in England and the colonies nor invalidated commercial contracts related to slavery. Nevertheless, Lord Mansfield's grandiose statements about the relationships among natural law, common law, and positive law profoundly shaped the subsequent American debate over the legal sources of slavery. Denying that slavery was recognized under the English common law, Mansfield had written, "The state of slavery is of such a nature, that it is incapable of being introduced on any reasons,

[15] *Somersett v. Stewart*, Lofft 1–18, 98 Eng. Rep. 499 (K.B. 1772), reprinted at 20 Howell's State Trials 1. See also William M. Wiecek, "*Somersett*: Lord Mansfield and the Legitimacy of Slavery in the Anglo-American World," *University of Chicago Law Review* 42 (1975): 86–46.

moral or political, but only [by] positive law, which preserves its force long after the reasons, occasion, and time itself from whence it was created, is erased from memory. It is so odious, that nothing can be suffered to support it but positive law."[16] These assertions raised more questions than they answered. Did "positive law" include custom (in Mansfield's rendering, "positive law" was, curiously, imbued with the nonhistorical common law temporality of "immemoriality")? Did "positive law" require that the legislative or executive authority actually establish slavery, rather than merely recognize its existence in slave codes? If slavery was so contrary to natural law, could even "positive law" establish it?[17]

During the late-eighteenth-century emancipations, courts and legislatures in New England, coming up with their own interpretations of *Somersett*, had refused to find evidence of express establishment of slavery in their laws and had held that slavery in their jurisdictions was "merely" a matter of custom or usage. Thus, "mere" custom was distinguished from the "positive law" – and perhaps even the state common law – required to establish slavery.[18] In 1827, however, custom emerged as a powerful legal justification of slavery. In the British case of *The Slave Grace*, Lord Stowell limited the scope of *Somersett* by pointing out, *inter alia*, that slavery had a legitimate origin in "ancient custom," which was "generally recognized as a just foundation of all law" (indeed, it should be noted, this was the foundation of the English common law itself). The point of recognizing custom as a legitimate legal basis for slavery was to lend recognition to colonial slave laws and practices, which might have originated as a matter of custom, without giving them full extraterritorial

[16] *Somersett*, 20 Howell's State Trials, p. 82.

[17] I draw this discussion from William M. Wiecek, *The Sources of Antislavery Constitutionalism in America, 1760–1848* (Ithaca, N.Y.: Cornell University Press, 1977), p. 32.

[18] In the celebrated late-eighteenth-century *Quock Walker* cases that brought about judicial emancipation in Massachusetts, Chief Justice Cushing charged the jury that, although the province had long recognized the presence of slaves and slavery, 'nowhere do we find it [slavery] expressly established"; it had merely been a "usage" acknowledged by the statutes, something that had "slid in upon us." John D. Cushing, "The Cushing Court and the Abolition of Slavery in Massachusetts: More Notes on the 'Quock Walker Case,'" *American Journal of Legal History* 5 (1961): 118–144, quoted in Wiecek, *Sources of Antislavery Constitutionalism in America*, p. 47. Rhode Island's 1784 gradual emancipation statute, invoking the Declaration of Independence, found that "the holding mankind in a state of slavery, as private property, which has gradually obtained by unrestrained custom and the permission of the laws," was repugnant to the principles of the Declaration. Act of 1784, quoted in Wiecek, *Sources of Antislavery Constitutionalism in America*, p. 50.

effect in England, which *Somersett* would not allow. None other than Joseph Story considered this a definitive interpretation of *Somersett*.[19] Custom as a source of law authorizing slavery was also recognized in the United States before the Civil War. In *Miller v. McQuerry* (1853), a fugitive slave case, Justice McLean, on circuit, invoked the nonhistorical common law temporality of "immemoriality" to give slavery the status of something akin to common law in the states that recognized slavery:

> *Usage of long continuance, so long that the memory of man runneth not to the contrary, has the force of law. It arises from long recognized rights, countervened by no legislative action. This is the source of many of the principles of the common law. And this for a century or more may constitute slavery, though it be opposed, as it is, to all the principles of the common law of England.* I speak of African slavery. But such a law can only acquire potency by long usage. Now it may be admitted that in some of the Southern states, perhaps in all of them, there can not be found a statute which contains the words, "And be it enacted that slavery shall exist".... [But] usage, of great antiquity, acquires the force of law. The denial, therefore, that slavery existed by virtue of an express law, or by statute law, which was intended to be denied, was no denial at all [emphasis added].[20]

The last line of this excerpt was a direct contradiction of *Somersett*. If custom could be the legal basis of slavery, no express law – which is how many had come to interpret Mansfield's "positive law" – was required to establish slavery. To argue in terms of the absence of an express law establishing slavery, as many abolitionists were doing following the logic of *Somersett*, did not affect the legality of slavery. Indeed, as an attempt to deny slavery, Justice McLean contended, *Somersett* "was no denial at all."

Notwithstanding decisions like *The Slave Grace* and *Miller v. McQuerry*, the constitutional and legal status of slavery remained subject to debate. In the North, a moderate political abolitionist such as Salmon Chase could concede that, at the time of the framing of the U.S. Constitution, slavery had existed as a matter of positive law in the Southern colonies *and* become "interwoven with domestic habits, pecuniary interests, and legal rights." Having found slavery to be actually existing in the states as a matter of positive law (*Somersett*) *and* custom (*Slave Grace* and *Miller*), Chase argued, the framers had written their egalitarian commitments into national protocols with the understanding that slavery would

[19] *The Slave Grace* (*Rex v. Allen*), 2 Hag. Adm. 94, 166 Eng. Rep. 179 (High Court of Admiralty, 1827); Joseph Story to Lord Stowell, 22 Sept. 1828, *Life and Letters of Joseph Story*, Vol. 1, p. 558.

[20] *Miller v. McQuerry*, 17 F. Cas. 335, 336–337 (1853).

be confined within the slave states existing at the time of the framing. At the same time, Chase could maintain that slaveholding "can have no rightful sanction or support from national authority, but must depend wholly upon State law for existence and continuance."[21] Garrisonians, by contrast, had long been insisting upon disunion and rejected all readings of the U.S. Constitution as an antislavery document.

However, not all antislavery legal thinkers subscribed to Chase's reading of Southern slavery as an admixture of positive law and custom, and hence as something "saved" under both the *Somersett* and *Slave Grace* decisions at least with respect to the old slave states. Neither did they subscribe to a Garrisonian insistence on disengagement. For an example of this third view, but also one that offers an insight into how mid-nineteenth-century antislavery legal thinkers theorized slavery in relation to actually existing law and politics, let us turn to the writings of the radical antislavery Massachusetts lawyer Lysander Spooner (1808–1887). Spooner offers us a clear example of how antislavery thinkers subjected all laws, including any customs believed to sanction slavery, to natural laws believed to underlie existing law and politics.

"Even in a movement that attracted individualists and eccentrics," William Wiecek has written, "Spooner stood out." Spooner was, in fact, something of an anarchist, insistent on shrugging off all manner of legal restraints, whether they related to the minimum number of years of legal education before one could practice law or the federal mail monopoly.[22] For all his eccentricities, however, Spooner's antislavery writings obtained considerable national recognition. Although other radicals such as George F. W. Mellen and William Goodell had advanced antislavery readings of

[21] Salmon P. Chase and Dexter Cleveland, *Anti-Slavery Addresses of 1844 and 1845* (Philadelphia: J. A. Bancroft & Co., 1867), pp. 77, 87.

[22] Wiecek, *Sources of Antislavery Constitutionalism in America*, p. 257. Spooner is often seen as an exemplar of American anarchism. See the discussion in Eunice M. Schuster, *Native American Anarchism: A Study of Left-Wing American Individualism* (Northampton, Mass.: Smith College, Department of History, 1932). Spooner began his legal career in the 1830s by opening a law office in open violation of the Massachusetts requirement of a minimum of three years of legal study (he had completed only two). In the 1840s, he organized the American Letter Mail Company, one of several private mail companies seeking to defeat the federal mail monopoly, only to have his enterprise shut down. In the 1850s, after decades of involvement in antislavery activity, Spooner fell in with John Brown and drafted an antislavery memorandum to be circulated among southern nonslaveholders. After Harpers Ferry, he even hatched plans to rescue Brown. A. John Alexander, "The Ideas of Lysander Spooner," *New England Quarterly* 23 (1950): 200–217, at 202; Lewis Perry, *Radical Abolitionism: Anarchy and the Government of God in Antislavery Thought* (Knoxville: University of Tennessee Press, 1995) (1973), pp. 204–208.

the U.S. Constitution, Spooner's book, *The Unconstitutionality of Slavery* (1845), which went through four editions, was by far the most consistently and thoroughly argued of the three.[23] Widely considered the most prominent antislavery reading of the U.S. Constitution to date, the text moved Wendell Phillips to write a critical review in 1847 to combat some of its ideas.[24] Much admired by Gerrit Smith, *The Unconstitutionality of Slavery* was officially accepted by the Liberty Party in 1849 as "a perfectly conclusive legal argument against the constitutionality of slavery."[25] The American Abolition Society sent the book to every congressman. Spooner's own plans for his work were even more ambitious: he wanted it sent to each one of the nation's thirty thousand lawyers.[26]

At the opening of *The Unconstitutionality of Slavery*, Spooner raises the question "What is law?" Instead of resorting to Hobbesian or common law theories, his answer, revealing affinities to Carey's thought, rests upon analogies to the laws governing the physical world. The word "natural" is emphasized repeatedly:

> The true and general meaning of [law], is that *natural*, permanent, unalterable principle, which governs any particular thing or class of things. The principle is strictly a *natural* one; and the term applies to every *natural* principle, whether mental, moral, or physical.... And it is solely because it is unalterable in its *nature*, and universal in its application, that it is denominated law. If it were changeable, partial or arbitrary, it would be no law. Thus we speak of physical laws; of the laws, for instance, that govern the solar system; of the laws of motion, the laws of gravitation, the laws of light, &c., &c. – Also the laws that govern the vegetable and animal kingdoms, in all their various departments: among which laws may be named, for example, the one that like produces like. Unless the operation of this principle were uniform, universal and necessary, it would be no law [emphasis in the original].[27]

There was no particular difference, for Spooner, between laws governing the human and nonhuman worlds. What gave all true laws their character as laws was permanence and invariability.

[23] G. W. F. Mellen, *An Argument on the Unconstitutionality of Slavery, Embracing an Abstract of the Proceedings of the National and State Conventions on this Subject* (Boston: Saxton & Pierce, 1841); William Goodell, *Views of American Constitutional Law, in its Bearing upon American Slavery* (Utica, N.Y.: Lawson & Chaplin, 1845). I have consulted Lysander Spooner, *The Unconstitutionality of Slavery* (Boston: Bella Marsh, 1860).

[24] Perry, *Radical Abolitionism*, p. 165. Wendell Phillips, *Review of Lysander Spooner's Essay on the Unconstitutionality of Slavery* (Boston: Andrews & Prentiss, 1847).

[25] Schuster, *Native American Anarchism*, p. 145.

[26] Perry, *Radical Abolitionism*, p. 204.

[27] Spooner, *Unconstitutionality of Slavery*, pp. 5–6.

However, only selected man-made laws – something Spooner called "natural law" or "the natural rights of men" – could accede to this level of invariability.[28] Spooner dubbed all other man-made laws "temporary" and "arbitrary," mere artifacts of time (Spooner's term for what Carey would call "exceptions" or "inventions"). Temporary or arbitrary laws were not entitled to obedience: "And, as a merely arbitrary, partial and temporary rule must, of necessity, be of less obligation than a natural, permanent, equal and universal one, the arbitrary one becomes, in reality, of no obligation at all, when the two come in collision. Consequently there is, and can be, correctly speaking, *no law but natural law*."[29]

Spooner's understanding of the world as consisting of an interplay between natural and arbitrary law reflected a coherent philosophy of history. It looked something like this:

> Natural law may be overborne by arbitrary [i.e., contingent] institutions; but she will never aid or perpetuate them. For her to do so, would be to resist, and even deny her own authority. It would present the case of a principle warring against and overcoming itself. Instead of this, she asserts her own authority on the first opportunity. The moment the arbitrary law expires by its own limitation, natural law resumes her reign.[30]

In accordance with this understanding of history, Spooner could argue that, notwithstanding the utter "arbitrariness" of slavery, slaveholders, "through the corrupting influence of their wealth," had nevertheless been able to hold "their slave property in defiance of their constitutions."[31] Similarly, in his *Essay on the Trial by the Jury* (1852), Spooner argued that a range of politicolegal practices in England and America had corrupted the essential nature of the jury.[32] In the interplay of natural and arbitrary laws that history revealed, the arbitrary could often overcome the natural. But Spooner had faith that natural law would be vindicated.

Spooner's understanding of natural law as a standpoint from which to judge all laws was, to be sure, a cabining of political democracy. Like many radical abolitionists, but also like many Americans in this period, Spooner was of the view that the output of democratic majorities was not entitled to respect *as such*. At times, democratic majorities could

[28] Ibid., p. 6.
[29] Ibid., p. 7 (emphasis in original).
[30] Ibid., p. 130.
[31] Ibid., p. 125.
[32] Lysander Spooner, *An Essay on the Trial by Jury* (New York: Da Capo Press, 1971) (1852).

further natural law principles; at others, they could frustrate them. This made Spooner disdainful of the idea that law was whatever a democratic majority said it was. As he wrote in an 1845 letter to his friend George Bradburn, "I do not rely upon 'political machinery' ... because the principle of it is wrong; for it admits ... that under a constitution, the *law* depends on the will of majorities, *for the time being*, as indicated by the acts of the legislature."[33] This distaste for political democracy accounts for Spooner's refusal to belong to the Liberty Party, to the chagrin of someone like Salmon Chase.[34]

It followed that, for Spooner, any actually existing law – constitution, statute, common law principle, or custom – could also be arbitrary and in violation of the natural law underlying it. Not surprisingly, at a time when prominent antislavery voices read the U.S. Constitution as a pact with slavery, Spooner argued that constitutions were not entitled to special regard. As he put it, "[N]atural law tries the contract of government, and declares it lawful or unlawful, obligatory or invalid, by the same rules by which it tries all other contracts between man and man."[35] Because past, present, and future were all to be judged in terms of an invariable natural law, Spooner also had contempt for the weight and density of the past as a ground of law. This made him utterly hostile to arguments that grounded the legitimacy of the common law or custom in its nonhistorical temporalities of "immemoriality" and "insensibility," which in turn shaped his understanding of the legal sources of slavery.

For Spooner, no amount of sanctification by time could save slavery. Accordingly, he completely rejected the idea that slavery might receive the imprimatur of custom or common law. This translated into a strict reading of *Somersett* and a complete rejection of the *Slave Grace* and *Miller* theories about the legal sources of slavery. He described it thus: "Slavery, if it can be legalized at all, can be legalized only by positive legislation. Natural law gives it no other aid. *Custom imparts to it no legal sanction.*"[36]

Given Spooner's hostility to common law temporalities as grounds of law and his insistence on submitting all law to the test of natural law, it is noteworthy that the common law – indeed, custom itself – played an

[33] Lysander Spooner to George Bradburn, August 25, 1847, quoted in Perry, *Radical Abolitionism*, p. 200 (emphasis in original).

[34] Perry, *Radical Abolitionism*, p. 200.

[35] Spooner, *Unconstitutionality of Slavery*, p. 8.

[36] Ibid., p. 32 (emphasis added). Even if positive law were to legalize slavery, one imagines that Spooner would dub it "arbitrary," unworthy of respect.

important role in his thought. Following Wendell Phillip's 1847 critique of *The Unconstitutionality of Slavery* on the grounds, *inter alia*, that Spooner's vision of a system based on natural law was uncertain and impracticable, Spooner responded by appending a second part to the text in which he discussed the appropriate nature of the relationship of legislation to natural law. It is here that Spooner revealed himself to be a common lawyer.

Legislatively promulgated laws were valuable, Spooner argued, where they were mere "instrumentalities ... for the purpose of carrying natural law into effect."[37] But for the most part, legislation was to be avoided. Where legislation replicated natural law, it confused matters; where it differed from it, it was arbitrary. Although natural law was a "science" and the legitimate subject of treatises, Spooner maintained, it was also something that was simply and spontaneously picked up as men interacted with each other and that, as such, did not require legislative clarification or intervention:

> Men living in contact with each other, and having intercourse together, *cannot avoid* learning natural law, to a very great extent, even if they would. The dealings of men with men, their separate possessions, and their individual wants, are continually forcing upon their minds the questions, – Is this act just? or is it unjust? Is this thing mine? or is it his? And these are questions of natural law; questions, which, in regard to this great mass of cases, are answered alike by the human mind everywhere.[38]

This description of the inculcation of natural law makes it look suspiciously like custom, which arose, in the accounts of common lawyers, spontaneously, from out of the people themselves. But Spooner goes further, explicitly equating natural law and common law. For all his distaste for legislation, it turns out, the anarchistic Spooner was not ready to do away with common law courts, something that attests to the deep-rootedness of common law thinking even among the radical fringes of the American legal profession at the time. Indeed, Spooner argued that the vast majority of matters dealt with by common law courts in fact conformed to "natural principles." Common law courts might even be the best declarants of a spontaneously arising natural law. Thus:

> It is probable that, on an average, three fourths, and not unlikely nine tenths, of all the law questions that are decided in the progress of every trial in our courts, are decided on natural principles; such questions, for instance, as those

[37] Ibid., p. 140n.
[38] Ibid., p. 141.

of evidence, crime, the obligation of contracts, the burden of proof, the rights of property, &c., &c.

This assertion was immediately followed by an approving reference to, of all texts, Kent's *Commentaries*: "Kent says, and truly, that 'A great proportion of the rules and maxims, which constitute the immense code of the common law, grew into use by gradual adoption, and received the sanction of the courts of justice, without any legislative act or interference. *It was the application of the dictates of natural justice and cultivated reason to particular cases.*'"[39] In other words, for Spooner, the common law – or nine-tenths of it – instantiated natural law. History, understood to be an interplay of natural law and arbitrary law, could be used to judge all law, including the common law. As such, various aspects of the actually existing common law, especially when they could be read as sanctioning slavery, could be judged arbitrary. But where history was plotted as the progressive uncovering of natural law, the common law already embodied natural law and, as such, was itself already the engine of history.

Southern lawyers responded in kind to natural law critiques of slavery such as those advanced by Spooner. George S. Sawyer's *Southern Institutes* (1859) – one of a small number of proslavery treatises to appear before the War – matches the structure of Spooner's thought, albeit with one significant difference.[40] Where Spooner drew upon the model of an unchanging physical nature to express the invariability of underlying natural law, Sawyer invoked an equally unchanging biological nature to the same ends. In this regard, Sawyer resembled other proslavery thinkers of the time.

Slavery was founded on an inequality that was, according to Sawyer, one of the "fixed facts in the philosophy of human nature, beyond the reach of human laws, or remedy by human means" (analogies were to illness, physical disability, and insanity).[41] A sense of "fixed facts in the philosophy of human nature" was the means of testing the legitimacy of

[39] Ibid., p. 143n (emphasis in original).

[40] George S. Sawyer, *Southern Institutes: or, An Inquiry Into the Origin and Early Prevalence of Slavery and the Slave-Trade: With An Analysis of the Laws, History and Government of the Institution in the Principal Nations, Ancient and Modern, from the Earliest Ages Down to the Present Time. With Notes and Comments in Defence of Southern Institutions* (Philadelphia: J. B. Lippincott, 1858). The other prominent treatise is Thomas R. R. Cobb, *An Inquiry into the Law of Negro Slavery in the United States of America. To which is Prefixed, an Historical Sketch of Study* (Philadelphia: T. & J. W. Johnson & Co and Savannah: W. Thorne Williams, 1858). Although Cobb shares the scientistic historical style of the mid-nineteenth century, he does not, in my view, betray any particular commitment to common law modes of thinking.

[41] Sawyer, *Southern Institutes*, p. 14.

actually existing politics and law. Laws that sought to contravene such truths would be, *ab initio*, doomed to failure. Democratic politics, as such, were circumscribed. Much like Spooner's focus on natural law, Sawyer's focus on fixed facts also enabled a coherent philosophy of history that read historical time as an alternate recognition or occlusion of fixed facts. However, for the most part, Sawyer found that history had affirmed his sense of the hard limits to politics and law. He put it thus: "The social, moral, and political, as well as the physical history of the negro race bears strong testimony against them; it furnishes the most undeniable proof of their mental inferiority. In no age or condition has the real negro shown a capacity to throw off the chains of barbarism and brutality that have long bound down the nations of that race; or to rise above the common cloud of darkness that still broods over them."[42]

Even as he turned to history to illustrate the conformity of Southern slavery to "fixed facts in the philosophy of nature," and even as he sought to relativize politics and law in the name of such truths, Sawyer was powerfully committed to the idea of custom. Following the line suggested by the *Slave Grace* and *Miller* cases, Sawyer argued that custom was among "the most potent sources of law." Slavery derived its legitimacy precisely from custom. Furthermore, Sawyer drew upon the languages of the common law to fill out this legitimacy. The "faithful student of history" would find that slavery and the slave trade "came down to us as well authenticated by custom and usage, sanctioned, proved, and improved by the wisdom and experience of ages, as any other right rule for the relation of mankind towards one another."[43] This was precisely because slave customs possessed the power of "immemoriality":

> When customs are so old that the memory of man runneth not to the contrary, their origin is lost in the oracles and mythical edicts of the gods. The feeling of dependence upon the great wisdom and foresight necessary to give validity, force, and effect to the institutions of government and laws among men, has ever induced nations, in their early ages, to attribute their origin to a divine source.[44]

The common law and nature, then, worked together. This had the effect of making customs of slavery universal rather than particular. Writing the ontology of slavery as universal custom provided Sawyer with the tools

[42] Ibid., p. 192.
[43] Ibid., p. 13.
[44] Ibid., p. 17.

to combat the "freedom national, slavery local" argument that had been developed by lawyers such as Salmon Chase. Sawyer could argue:

> Thus the history of the world shows us that slavery and the slave trade are not local, and created only by special laws, as asserted by Justices McLean and Curtis, in their dissenting opinions in the Dred Scott case, but rather that they are originally universal, founded upon immemorial custom and universal principles of international law; and that all free territory, or territory where this right can no longer exist, has originated from some abrogation of this time-honored custom, or some modification of these long-established rights of property and of persons, by the potent arm of legislation.[45]

Thus, it was free territories that had abrogated the twinning of custom and nature that slavery represented; freedom was the exception to the underlying universal law of slavery. This allowed Sawyer to twist Chase's slogan into "slavery national, freedom local." Indeed, Sawyer used the congruence of custom and nature to combat the *Somersett* ruling. Where Lord Mansfield had argued that neither the common law nor nature, but only "positive law," could sustain slavery, Sawyer insisted that the common law and nature together provided the unshakable foundations of slavery. Only "the potent arm of legislation" – that is, Mansfield's "positive law" – could abrogate the dictates of custom and nature. But in doing so, it was erroneous, because slavery, like the family, was "originally universal," part of human sociality itself:

> We maintain directly the reverse of this, viz. that slavery and the slave-trade are not founded on municipal law, but on immemorial custom, incorporated into the ancient and modern code of nations. That the relation of master and slave is as old as the human family; that it rests on the same foundation as that of husband and wife, parent and child, and the distinctive rights of persons and things; that it was originally universal, and sanctioned by law public and private, human and divine; that all exceptions to its prevalence arise from the abrogation of universal custom, by the potent arm of legislation.[46]

From this perspective, it was easy to judge abolitionist legal impulses as contrary to both nature and common law. In Sawyer's reading, slavery, in conforming to nature, had a way of making nature even more natural. Slavery made white men naturally fitted for liberty and white women naturally fitted for domestic pursuits even more fitted to such pursuits.[47] Abolition would reverse this superconformity to nature; it would be an

[45] Ibid., p. 143.
[46] Ibid., p. 308.
[47] Ibid., pp. 373–376.

exception to the underlying law of nature, an abomination. But at the same time, of course, slavery was possessed of the "immemoriality" of the common law. Abolitionist activity that ripped the fabric of custom could equally be dubbed violent in a Burkean sense insofar as it destroyed the harmonious coexistence of different generations simultaneously speaking through custom. It is not surprising, then, to find Sawyer also likening abolitionists to those favorite enemies of nineteenth-century Anglo-American common lawyers, the French revolutionaries:

> The facts that are now transpiring, the history that has been forming around their footsteps, forcibly remind us of the early days of the French Revolution. France had her Robespierre, her Mirabeau, Danton, and Marat.... So the Abolitionists, arrayed in treasonable warfare against the peaceful execution of the laws of the land ... could congregate an infuriated mass ... with minds already wrought up to a pitch of desperation that required but a single spark to explode a magazine, that would have drenched the streets of Boston, like those of Paris, with the blood of her citizens.[48]

What we have in the preceding discussion of Spooner and Sawyer are instances of legal thinkers ranged on opposite sides of the fence. Both are equally moved by the slavery crisis to subject actually existing politics and law to underlying natural laws with a view to positing limits to the different political and legal impulses of the day. Both, however, argue that the common law matches the underlying natural laws they have identified. In a world in which disenchantment with democratic politics in both North and South was expressed in terms of the disjuncture between politics and natural laws, the common law could be a source of solace and hope, a limit to misguided democracy.

Slavery, Sociology, and the Common Law: The Jurisprudence of George Fitzhugh

The proslavery Virginian social thinker George Fitzhugh (1806–1881) has been variously represented as an American forerunner of European fascism, as one of the voices of American antiliberalism, and as the representative of a doomed precapitalist South in an advancing capitalist world.[49] But Fitzhugh is also important for our purposes for the following

[48] Ibid., p. 381.

[49] For a biography, see Harvey Wish, *George Fitzhugh: Propagandist of the Old South* (Baton Rouge: Louisiana State University Press, 1943). Wish sees Fitzhugh as a precursor of fascism. For other prominent treatments of Fitzhugh, see Louis Hartz, *The Liberal Tradition in America: An Interpretation of American Political Thought Since the Revolution* (New York: Harcourt, Brace & Co., 1955); C. Vann Woodward, "George