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CONTRASTING LEGAL PERSPECTIVES ON THE NECESSITY OF POSITIVE LAW TO SUSTAIN SLAVERY IN ANTEBELLUM AMERICA

Evan Matthew Gelobter

"Slavery is a wrong inflicted by force, and supported alone by the municipal power of the state or territory wherein it exists. It is opposed to the principles of natural justice and right, and is the mere creature of positive law."[1]

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[1] State v. Hoppess, 1 Ohio Dec.Reprint 105, 110–11 (Ohio 1845) (enslaved person at issue).

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I. Introduction

In 1772, in the landmark case of *Somerset v. Stewart*, the Court of the King's Bench in England set a significant legal precedent concerning the legality of slavery under English common law. The court, presided over by William Murray, 1st Earl of Mansfield, Lord Chief Justice of the Kings Bench, held that James Somerset, an enslaved African man brought to England, could not be lawfully detained as a slave because the laws of England did not explicitly recognize slavery. Lord Mansfield declared that slavery was so odious that it could only be supported by positive law—that is, explicit legislative enactments or statutes.[2] Since no such law existed in England, Mansfield decreed Somerset was set free upon setting foot on English soil. This case stands for the common law proposition that positive law was necessary to sustain the institution of slavery, declaring that in the absence of such law, an enslaved person would be free.

Eighty-five years later, in his dissenting opinion in *Dred Scott v. Sandford*, Justice McLean aligned with the Somerset precedent, arguing that slavery could not exist without positive law.[3] He asserted that, according to the general law of nations, no country was obligated to recognize the institution of slavery if it conflicted with its own policies and legal frameworks.[4] If the recognition of slavery did occur, it was an act of comity rather than an international right.[5] Justice McLean emphasized that slavery was a municipal regulation confined to the

[2] Somerset v. Stewart (1772) 98 Eng. Rep. 499, 510 (KB) (enslaved party).

[3] Dred Scott v. Sandford, 60 U.S. (19 How.) 393, 534 (1857) (enslaved party), *superseded by constitutional amendment*, U.S. Const. amend. XIV.

[4] *Id.*

[5] *Id.*

jurisdiction where the territorial laws supported it.[6] By referencing the *Somerset* case, which established that slavery could not exist in England without specific legislation, McLean reinforced the principle that not only was slavery immoral, it was entirely dependent on explicit legislative enactments, which underscored the limitations of its reach to territories that legislatively sanctioned it.[7]

Years before McLean's dissent in *Dred Scott*, the Supreme Court of Errors of Connecticut had addressed similar principles in *Jackson v. Bulloch* holding that everyone inherently possesses the right to liberty, life, property, and the fruits of their labor.[8] The court asserted that slavery stood in stark opposition to these natural rights and universal principles of justice.[9] It further emphasized that slavery was rooted in injustice and could only be sustained through explicit positive law and that it was a local institution governed entirely by the laws of the state where it existed.[10] Even as courts, including this one, recognized the moral stain of slavery, they nonetheless upheld its legality where positive law explicitly authorized it, demonstrating that moral opposition alone was insufficient to invalidate the institution in the absence of legislative action.

Even some courts in slaveholding states agreed with the principle set in Somerset. In *Rankin v. Lydia*, the Kentucky Court of Appeals articulated a recognition that the institution of slavery was a construct of positive law rather than natural law.[11] The court stated that while the municipal laws of Kentucky sanctioned slavery, the right was not grounded in natural or common law.[12]

However, a different legal theory also existed in the Antebellum South. The institution of slavery affected every aspect of Southern society, and Southern legal scholars and jurists worked to create a comprehensive set of laws to regulate, control, and perpetuate the practice of forced labor. While numerous courts and legal scholars in the antebellum United States agreed with Lord Mansfield, believing that slavery was against nature and thus required positive law to be practiced, many Southern jurists contended that slavery did not require positive law. They asserted instead that slavery was the natural state of the African race and existed as a right based on the longstanding tradition and widespread acceptance of African slavery. This perspective was deeply entrenched in the legal and social fabric of the South, reflecting the view that the institution of slavery

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[6] *Id.*
[7] *Id.*
[8] Jackson v. Bulloch, 12 Conn. 38, 40 (Conn. 1837) (enslaved party).
[9] *Id.*
[10] *Id.*
[11] Rankin v. Lydia, 9 Ky. (2 A.K. Marsh.) 467, 470 (1820) (enslaved party).
[12] *Id.*

was both a customary practice and an inherent right, perpetuated through societal norms and historical precedent rather than explicit legislative enactments.

In 1858, Thomas R.R. Cobb, a Southern lawyer who served as a Confederate officer and was later killed at the Battle of Fredericksburg, articulated this view in his legal treatise, *An Inquiry into the Law of Negro Slavery in the United States of America*. Cobb believed that the idea that all men are born free and created equal, and therefore no man should be held as a slave, was fundamentally wrong.[13] He argued that servitude was found to exist in nature and that the law of nature relating to slavery applied differently to different races.[14] Cobb believed that while all men are equal and free in a "state of nature," slavery was not repugnant to the "law of nature" because the law of nature does not command that men must remain in their native freedom.[15] According to Cobb, slavery was justified by the law of nature because it ostensibly improved the condition and nature of the African race. Cobb wrote in his treatise that slavery was their natural state and provided significant benefits and advancements for them:

> The important truth is before us from history, that the contact with the Caucasian is the only civilizer of the negro, and that slavery the only condition on which that contact can be preserved . . . [The] state of bondage, so far from doing violence to the law of his nature, develops and perfects it; and that, in that state, he enjoys the greatest amount of happiness, and arrives at the greatest degree of perfection of which his nature is capable. And, consequently, that negro slavery as it exists in the United States, is not contrary to the law of nature.[16]

Judge Ryland of the Supreme Court of Missouri similarly upheld the belief that slavery was the divinely ordained status for the African race. In his opinion in the case of *Scott v. Emerson*, he wrote:

> As to the consequences of slavery, they are much more hurtful to the master than the slave. There is no comparison between the slave in the United States and the cruel, uncivilized negro in Africa. When the condition of our slaves is contrasted with the state of their miserable race in Africa; when their civilization, intelligence and instruction in religious truths are considered, and the means now employed to restore them to the country from which they have been torn, bearing

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[13] Thomas R.R. Cobb, An Inquiry into the Laws of Negro Slavery in the United States, 13 (University of Georgia Press 2012).

[14] *Id.*

[15] *Id.*

[16] *Id.* at 51.

> with them the blessings of civilized life, we are almost persuaded, that the introduction of slavery amongst us was, in the providence of God, who makes the evil passions of men subservient to His own glory, a means of placing that unhappy race within the pale of civilized nations[17]

These legal and ideological theories led to the development of a legal framework in the slave-holding states where many presumed Africans and their descendants to be slaves unless proven otherwise. Southern legal systems were entrenched with societal norms and judicial precedents that perpetuated slavery without the explicit need for positive law. This paper explores how the Antebellum South's legal system perpetuated slavery through these entrenched societal norms and judicial precedents, contrasting sharply with the principles established in *Somerset v. Stewart.*

This paper will proceed by examining the various legal perspectives on the necessity of positive law to sustain slavery in the United States used during the Antebellum Period. Section I will explore the legal origins of slavery, highlighting significant court cases in slaveholding states that shaped the institution's legal framework. Section II will contrast these perspectives with those in non-slaveholding states, which often adhered to the precedent set in *Somerset v. Stewart*, requiring explicit legal authorization for slavery. Section III will discuss the role of domicile in determining the status of slaves, analyzing cases where the slave owner's residence influenced the legal standing of enslaved individuals. The conclusion will synthesize these findings, emphasizing the divergent regional interpretations and the critical role of positive law in sustaining or challenging the institution of slavery in Antebellum America.

II. The Legal Origins of Slavery in the United States

The legal origins of African slavery in the United States were deeply rooted in the presumption of perpetual servitude for Africans and their descendants. This presumption did not rely on a specific positive law explicitly establishing slavery; rather, it was based on the evolution of societal and legal norms of the period, which viewed Africans brought to what would become the slave-holding states as inherently enslaved. As the population of enslaved Africans increased, a legal framework emerged to codify their status, ensuring that Africans and their descendants were presumed to be slaves unless they could conclusively prove their right to freedom. This framework reinforced the racialization of slavery, making enslavement a legally and socially entrenched institution in the United States.

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[17] Scott v. Emerson, 15 Mo. 576, 587 (1852) (enslaved party).

This section examines how slaveholding states developed and enforced legal structures to uphold and justify the institution of slavery. By analyzing judicial decisions, statutes, and prevailing legal theories, this review highlights the ways in which courts and lawmakers in these states reinforced the presumption of enslavement, ensuring that slavery remained an embedded and legally sustained system.

A. Missouri

The Supreme Court of Missouri directly challenged the assumption that slavery could only exist with explicit legal authorization in *Chouteau v. Pierre*.[18] The court rejected this notion, emphasizing that the historical introduction of slavery into America did not depend on positive law.[19] The case centered on the trial court's jury instruction that slavery "does not and never did exist in either of the Canadas," which the plaintiff challenged.[20] The plaintiff believed the trial court's instruction implied that slavery could only be established by positive law, an idea the higher court found inconsistent with the historical facts of slavery's introduction in America.[21]

The court observed that while many colonial enactments recognized the existence of slavery, none expressly authorized the enslavement of Africans.[22] The court noted that European powers with American colonies, driven by economic motives, supplied these colonies with African slaves.[23] This trade, sanctioned by the mother countries, formed the basis for the colonists' right to hold slaves.[24] The court highlighted that England, in particular, continued this trade enthusiastically, even against some colonial opposition, and delighted in securing the right to supply slaves to Spanish colonies through the Treaty of Utrecht.[25] The court emphasized that in the territories that would become Missouri, previously governed by France and Spain, no laws explicitly authorized the enslavement of Africans, yet slavery existed under both regimes.[26] Similarly, no such statutes existed in British colonies despite the widespread practice of slavery.[27]

The court held that, in this case, the statute under which the slave sought his freedom required him to prove his right to it.[28] To do this, the court concluded

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[18] Chouteau v. Pierre, 9 Mo. 3 (1845) (enslaved party).
[19] *Id.* at 8
[20] *Id.*
[21] *Id.*
[22] *Id.*
[23] *Id.*
[24] *Id.*
[25] *Id.*
[26] *Id.*
[27] *Id.*
[28] *Id.* at 9.

that the slave needed to demonstrate the existence of a law prohibiting slavery.[29] Given the historical context, the court argued that it could not declare slavery illegal in places where it was practiced simply because no explicit law authorized it.[30] This case highlights the position that many courts did not see the necessity for positive law to establish or sustain slavery. Instead, they recognized slavery as an institution rooted in historical practice and economic motivations, perpetuated through customary acceptance rather than formal legislative enactments.

B. Louisiana

In Louisiana, the state supreme court upheld the notion that slavery did not require explicit positive law to exist.[31] In the case of *Seville v. Chretien*, the court emphasized that, despite arguments that slavery was unjust and contrary to natural law, the institution had persisted from ancient times to the present.[32] The court asserted the legal principle that in any government where municipal regulations did not explicitly oppose slavery, individuals already in a state of enslavement could lawfully be held as slaves.[33] This principle was extended to justify slavery even in the absence of specific legislative acts by European powers formally introducing it into their American colonies. The court noted that slavery was permitted and tolerated in all European-established American colonies, particularly concerning Africans, without any express legislation authorizing it.[34]

Similarly, in *Lunsford v. Coquillon*, the Louisiana court noted that while municipal law regulated the relationship between owner and slave, and statutes existed to manage and potentially dissolve the institution, slavery itself persisted even in the absence of specific legislative acts formally establishing it.[35] This acknowledgment highlighted the court's view that slavery did not require positive law to exist, as it was upheld through longstanding practice and societal acceptance rather than explicit statutory enactments.

By holding that slavery was implicitly accepted and did not require positive law for its establishment or continuation, the court in *Seville v. Chretien* and in *Lunsford v. Coquillon* reinforced this prevailing Southern judicial perspective. These cases illustrate how courts and jurists in slave-holding states operated under the belief that slavery was a historical and socially ingrained institution

[29] *Id.*
[30] *Id.*
[31] Seville v. Chretien, 5 Mart.(o.s.) 275, 285 (1817) (enslaved party).
[32] *Id.*
[33] *Id.*
[34] *Id.*
[35] Lunsford v. Coquillon, 2 Mart.(n.s.) 401, 402–03 (1824) (enslaved party).

that did not necessitate explicit legal authorization, thus diverging from the precedent set in *Somerset v. Stewart*.

Looking back after the Civil War, the same court, reflected in *Wainwright v. Bridges,* on the history and legal foundations of slavery, emphasizing that the institution did not rely on positive law for its existence or legality.[36] The court claimed that African slavery was not formally established through statutory law.[37] Instead, European adventurers driven by ambition and avarice introduced it to the Americas and the Caribbean.[38] The court believed that the continuation of slavery, once introduced, resulted from various economic circumstances and considerations of expediency.[39]

The court explained that the system of colonization in America and the West Indies facilitated the introduction of slavery.[40] The court noted that European governments tolerated rather than formally legalized the practice through positive laws.[41] The first form of slavery on the American continent was Native American slavery in South America during the fifteenth century, setting a precedent that would extend to African slavery.[42] Further, the court observed that when Louisiana was sold to the United States by France in 1803, it retained African slavery under the conditions of the transfer.[43] This historical analysis by the court demonstrates that slavery in Louisiana, as in other parts of the United States, persisted not merely because of legislative enactments but through deeply rooted traditions and widely accepted social practices, showing that it existed without the need for explicit positive law.

C. Virginia

The Supreme Court of Appeals of Virginia consistently placed the burden of proof on claimants to demonstrate that Africans and their descendants were not slaves.[44] This was in stark contrast to individuals of European or Native American descent, who were presumed free unless proven otherwise. Judge Tucker of the court explicitly stated that "all negroes, Moors, and mulattoes, except Turks and Moors in amity with Great Britain, brought into this country by sea, or by land, were slaves."[45] This statement reflected the entrenched

[36] Wainwright v. Bridges, 19 La. Ann. 234, 237 (1867) (enslaved persons at issue).
[37] *Id.*
[38] *Id.*
[39] *Id.*
[40] *Id.*
[41] *Id.*
[42] *Id.*
[43] *Id.*
[44] Hudgins v. Wright, 11 Va. (1 Hen. & M.) 134, 137 (1806) (enslaved party).
[45] *Id.*

presumption that Africans brought to Virginia were automatically considered slaves, a status that their descendants inherited in Africa unless they could provide evidence to the contrary.

In the case of *Maria v. Surbaugh*, the court provided a brief review of the history of slavery and servitude in the state of Virginia. It noted that African slaves were first introduced to Virginia in 1620.[46] Despite the absence of any positive law regarding their civil status until 1662, these individuals were held as absolute property.[47] Additionally, the court emphasized that the children of female slaves were unequivocally considered slaves.[48]

D. Texas

In Texas, the state supreme court addressed the status of an individual described as "a free negro of African descent."[49] The court highlighted that, in the United States, the slavery of African descendants primarily originated through birth to an enslaved mother following a legal principle first recognized in Virginia and discussed later in this paper.[50] This doctrine, known as *partus sequitur ventrem* (Latin for "offspring follow the womb"), was first established in Virginia in 1662 and subsequently adopted by other slaveholding states, including Texas.[51] It dictated that a child's status as free or enslaved was determined solely by the status of the mother.[52] This principle was upheld regardless of other statutory laws that might have been enacted for public policy reasons to define slavery.[53] The court did not cite any specific laws but rather relied on the assumption that individuals of African descent born to slave mothers were automatically considered slaves.[54] This case highlights how deeply ingrained societal norms and assumptions about race and slavery were used to determine the status of individuals, independent of any explicit legislative provisions.

E. Kentucky

The Court of Appeals of Kentucky had to decide whether skin color and possession created a presumption of slavery and whether this presumption was negated by the slave's removal from Delaware, where slavery's legality had not

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[46] Maria v. Surbaugh, 23 Va. (2 Rand.) 228, 236 (1824) (enslaved party).
[47] *Id.*
[48] *Id.*
[49] Westbrook v. Mitchell, 24 Tex. 560, 562 (1859) (enslaved person at issue).
[50] *Id.*
[51] Act XII, 1662 Va. Acts ch. 12.
[52] *Id.*
[53] *Mitchell*, 24 Tex. at 562.
[54] *Id.*

been proven.[55] The court affirmed that color and long-term possession as a slave created a strong presumption of slavery, placing the burden of proof on the person claiming freedom.[56]

The court held that the introduction of slavery by the British crown into the colonies meant courts must recognize this historical status without needing a specific positive law to re-establish it after the Revolution.[57] Thus, removing the plaintiff from Delaware did not negate the presumption of slavery, as the courts presumed Delaware, like other previous colonies, retained pre-Revolution laws unless explicitly changed.[58] The court's reasoning highlighted that the presumption of slavery for Africans did not require new legislation if their status was that of slaves upon arrival to the colonies.

In *Gentry v. McMinnis* the same court definitively ruled that, in cases concerning liberty or slavery, a Black or biracial complexion constituted prima facie evidence of enslavement. This meant that courts presumed individuals of African descent to be slaves unless proven otherwise.[59]; The court justified this presumption by referencing Virginia's historical legal framework, asserting that domestic slavery in America originated in Virginia.[60] The ruling emphasized that from 1620 to 1778, all Africans in Virginia were legally classified as slaves, reinforcing the assumption that African descent equated to enslavement.[61]Furthermore, the court reaffirmed the legal doctrine of *partus sequitur ventrem*,[62] By applying this principle, the court entrenched the practice of hereditary slavery, ensuring that the children of enslaved women were automatically born into slavery. This ruling further cemented the racialized system of bondage, making it nearly impossible for individuals of African descent to claim freedom..[63] According to the court, "all negroes are deemed slaves; all whites and Indians free, when their color is the only evidence."[64]

F. Georgia

In Georgia, the state supreme court addressed the origins and legal basis of slavery in *Neal v. Farmer*, emphasizing that the title to a slave in Georgia was not derived from positive law, either under the laws of the current state or during

[55] Davis v. Curry, 5 Ky. (2 Bibb) 238, 239 (1810) (enslaved party).
[56] *Id.* at 240.
[57] *Id.* at 240–41.
[58] *Id.*
[59] Gentry v. McMinnis, 33 Ky. (3 Dana) 382, 385 (1835) (enslaved party).
[60] *Id.*
[61] *Id.*
[62] *Id.*
[63] *Id.*
[64] *Id.*

the colonial period.[65] The court noted that the ability to hold slaves in Georgia originated from the Trustees of the Colony, who acted under the authority of the British Crown.[66] This authorization, granted in 1751 through an ordinance, allowed Georgia planters to hold slaves as a civil right.[67] However, the court explained that while the regulation and protection of slave property fell within the realm of municipal law, the actual ownership and title to slaves were not creations of statutory law..[68]

To understand this fully, the court suggested looking at the period after the Trustees' ordinance of 1751 but before any specific legislation on slavery. During this time, Georgia planters acquired slaves either directly from slave traders or from others who had purchased them from traders, who in turn obtained them from captors in Africa.[69] The court argued that the property rights of Georgia planters in their slaves were as absolute as those of the original captors.[70] In doing so, however, the court failed to acknowledge the significant distinctions between African forms of slavery—which often involved captives of war and did not typically entail the systematic dehumanization and brutality of colonial chattel slavery—and the racialized, hereditary system that developed in the Americas. In the absence of any statutory limitations on slave property, these rights were, according to the court, affirmed by international usage, which had become customary law.[71] This customary acquisition of slave property was later confirmed by Georgia statutes and recognized by the state constitution of 1798, as well as by the U.S. Constitution.[72]

This case affirms the argument that Southern legal frameworks upheld slavery through longstanding traditions and societal norms, rather than solely through explicit legislative acts. The Georgia Supreme Court's ruling in *Neal v. Farmer* highlights how the institution of slavery was entrenched in both legal and cultural practices, endorsed by both domestic and international customs. This demonstrates that slavery in the slave-holding states was perpetuated by ingrained societal and historical precedents beyond the need for formal statutory laws. Yet, it is important to remember while courts justified slavery by citing its recognition as lawful commerce under the Laws of Nations, they simultaneously

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[65] Neal v. Farmer, 9 Ga. 555, 580 (1851) (enslaved person at issue).
[66] *Id.*
[67] *Id.*
[68] *Id.*
[69] *Id.*
[70] *Id.*
[71] *Id.*
[72] *Id.*

disregarded the sovereignty of African nations from which enslaved individuals were taken.

In another case that predates *Neal v. Farmer*, the Georgia Supreme Court similarly demonstrated that positive law was unnecessary to uphold the institution of slavery. The court ruled that Africans were presumed to be slaves based on their skin color, stating, "The black color of the African race is presumptive evidence of slavery."[73] This reflected the prevailing assumption that the African race was generally enslaved. The court emphasized that historical and societal norms were sufficient to maintain the presumption of slavery, without the need for explicit positive law. Consequently, the court upheld that this presumption was adequate to classify Black individuals as slaves unless proven otherwise.

G. North Carolina

In North Carolina, the Superior Court of Law and Equity established that the presumption of a Black person's status as a slave did not require positive law but was rooted in the prevailing societal beliefs and the historical background of slavery. The court stated that being Black in this country was taken as evidence of being a slave until proven otherwise.[74] In his opinion Judge Taylor wrote, "I subscribe to the rule that a man's being black, is, in this country, evidence of his being a slave till the contrary be proved, for the reasons given at the bar; namely, that all the blacks introduced into this country originally were slaves."[75] This presumption stemmed from the court's belief that all Africans originally introduced into the country were slaves, completely disregarding the fact that many arrived as indentured servants.[76] Therefore, any Black person claiming to be free had to provide evidence of their manumission or prove the free status of their parents, particularly their mother.[77] This ruling highlights that the court did not require a specific positive law to assume a Black person was a slave. Instead, the court relied on its understanding of history, asserting that Black individuals were introduced to the country as slaves and establishing their status based on this presumption.

The Supreme Court of North Carolina in *Scott v. Williams* addressed the presumption of slavery in a similar vein.[78] At trial court, the judge instructed the jury that a Black complexion could imply a presumption of slavery while a

[73] Macon & W. Rail Rd. Co. v. Holt, 8 Ga. 157, 165–66 (1850) (enslaved person at issue).
[74] Gober v. Gober, 3 N.C. 170, 170 (N.C. Super. Ct. L. & Eq. 1802) (enslaved party).
[75] *Id.*
[76] *Id.*
[77] *Id.*
[78] Scott v. Williams, 12 N.C. (1 Dev.) 376, 377 (1828) (enslaved party).

yellow complexion would not.[79] The plaintiff argued for a more explicit directive, but the court upheld that the jury would understand the implication that a Black complexion suggested enslaved status.[80] This case further illustrates that the North Carolina courts relied on customary beliefs and racial characteristics rather than explicit legal statutes to maintain the institution of slavery

In *State v. Mann*, the same court asserted the inherent and absolute power of a slave owner over his slave, emphasizing that this authority did not require positive law for its justification.[81] The court acknowledged that there could be instances of extreme cruelty where legal intervention might be appropriate.[82] However, it highlighted the difficulty in determining where judicial oversight should begin.[83] The court argued that questioning the slave owner's power in the courts could undermine the very foundation of slavery.[84]

The court's ruling stated that for slavery to persist, the slave must recognize that there was no appeal from the slave owner's authority, which the court believed was conferred by the laws of man and, more importantly, by divine mandate.[85] This implication suggested that slavery and the absolute control of the slave owner over the slave were not only sanctioned by human laws but also ordained by God, thus requiring no additional legal justification for their existence. The court expressed reluctance in addressing this issue but ultimately declared that as long as slavery existed in its current form, or until the legislature enacted explicit laws to the contrary, judges were obligated to recognize the complete dominion of the owner over the slave.[86] This dominion was deemed essential for maintaining the value of slaves as property, ensuring the slave owner's security, and preserving public tranquility, which heavily relied on the subordination of slaves.

The court concluded that the full control of the slave owner was not only vital for the institution of slavery but also for the protection and well-being of the slaves themselves.[87] Thus, the court's holding meant that any limitations on the slave owner's power would require specific statutory enactments, reaffirming that the slave owner's natural authority did not necessitate positive law, whereas any restrictions on this power did.

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[79] *Id.*
[80] *Id.*
[81] State v. Mann, 13 N.C. (2 Dev.) 263, 267–268 (1829) (enslaved person at issue).
[82] *Id.*
[83] *Id.*
[84] *Id.*
[85] *Id.*
[86] *Id.*
[87] *Id.*

H. Maryland

In a case before the General Court of Maryland, the court examined the status of an enslaved individual imported into the state from Madagascar.[88] The petitioner argued that since the person was brought from Madagascar, where the slave trade was not commonly practiced, they should not be considered a slave under Maryland law.[89] Conversely, the defendant contended that slavery, whether derived from English villenage[90] or introduced during colonization for economic reasons, was a recognized practice, particularly pointing out that Madagascar did engage in the slave trade.[91]

The court ruled that because Madagascar was a place where the slave trade was practiced and Maryland tolerated slavery, the petitioner needed to demonstrate that her ancestor was free in Madagascar to claim freedom in Maryland.[92] This decision highlights that the court was not concerned with specific slavery laws in Maryland. Instead, the focus was on the person's status as a slave upon arrival in the state, reflecting the broader judicial view of the slaveholding states that the existence of slavery did not require explicit positive law.

Similarly, in the case of *Burke v. Negro Joe*, the Court of Appeals of Maryland upheld the presumption that an African in the state was a slave.[93] The court held that an individual seeking freedom must prove descent from a free ancestor or provide evidence of manumission by deed or will.[94] This reinforces the stance that Maryland, like many other slave-holding states, did not rely on positive law to establish slavery but instead presumed enslaved status based on historical and societal norms. Together, these cases illustrate how Maryland's legal system was able to maintain slavery through a person's status rather than through explicit legislative mandates.

In *Williams v. Johnson*, the Court of Appeals of Maryland, in a post-Civil War decision, acknowledged that the institution of slavery had not been established through statutory law.[95] According to the court, while various acts of colonial legislation recognized and protected slavery, none explicitly established

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[88] Mary v. Vestry of Williams & Mary's Par., 3 H. & McH. 501, 501–02 (Md. Gen. Ct. 1796) (enslaved party).

[89] *Id.*

[90] English villenage was a feudal system where tenant farmers, called villeins, held land at the will of a lord in exchange for performing unspecified and variable services.

[91] *Id.*

[92] *Id.*

[93] Burke v. Negro Joe, 6 G. & J. 136, 141 (Md. Ct. App. 1834) (enslaved party).

[94] *Id.*

[95] Williams v. Johnson, 30 Md. 500, 505 (1869) (enslaved person at issue).

or ordained it.[96] The court noted that an act of 1663, often cited as a foundation for slavery, actually acknowledged its pre-existing status rather than creating it.[97]

The court noted that historically, African slavery and the slave trade were recognized and protected by all of the "enlightened commercial nations of Europe", such as England, France, Spain, and Portugal.[98] These nations actively engaged in and profited from the trade, viewing the buying and selling of slaves as a universally accepted practice.[99] However, it is important to note that this so-called universal acceptance was limited to European powers that regarded themselves as the sole arbiters of civilization and commerce, excluding African kingdoms and nations from recognition as sovereign entities. The court thus observed that at the time the American colonies were established, slavery was an entrenched custom supported by the mother country, Great Britain, which encouraged its introduction to the colonies for economic reasons.[100]

The opinion cited historical authorities and emphasized that Great Britain's policy was to promote slavery in the colonies. For instance, the court referenced a 1749 act by the British Parliament aimed to extend and improve the African slave trade, deeming it advantageous for Britain and necessary for supplying the colonies with affordable labor.[101] African slavery thus became an established institution in the American colonies under the common law, shaped by local customs and the policies of the colonial powers.[102] This historical context noted by the court shows that slavery was deeply embedded in the societal and legal fabric of the colonies, existing as a matter of tradition and custom rather than through explicit positive law.

I. Arkansas

In *Daniel v. Guy*, the Arkansas Supreme Court reinforced the notion that slavery did not require positive law but was instead sustained by prevailing societal views, traditions, and racial assumptions. The court ruled that if an individual suing for freedom clearly belonged to the Black race, whether of full or mixed blood, they were presumed to be a slave.[103] This presumption was based on the

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[96] *Id.*
[97] *Id.*
[98] *Id.*
[99] *Id.*
[100] *Id* at 506.
[101] *Id.*
[102] *Id.*
[103] Daniel v. Guy, 19 Ark. 121, 134 (1857) (enslaved party).

general condition of such people in Arkansas.[104] Conversely, if it appeared that the individual belonged to the white race, they were presumed to be free.[105]

In cases where it was unclear whether the individual belonged to the white or Black race, the court suggested that it was safest to give the benefit of the doubt to the individual, ensuring that a person of the white race was not wrongly deprived of their liberty.[106] The court noted that if individuals with less than one-fourth African ancestry were generally free, a different rule might apply.[107] However, in Arkansas, the general status of such individuals was that of slavery, with only a few exceptions.[108] These exceptions included those who had been manumitted or were the rare offspring of a white mother and a father with African blood.[109] This ruling demonstrates that the Arkansas courts, like those in other slaveholding states, relied on racial assumptions and the prevailing condition of individuals rather than on explicit positive laws to determine the status of slavery.

In *Gary v. Stevenson*, the Arkansas Supreme Court further reinforced the principles established in *Daniel v. Guy*, demonstrating that the institution of slavery was upheld through societal beliefs and racial assumptions rather than the explicit need for positive law. The court found that when an individual was determined to have African ancestry, even if the admixture was small, the presumption of being a slave automatically applied.[110] This ruling aligned with the holding in *Daniel v. Guy*, which had established that anyone with a noticeable amount of African blood was presumed to be a slave.

In this particular case, the court noted that the individual in question was the child of a woman who had been held in slavery for her entire life until she was manumitted a year or two before the filing of the action.[111] The absence of any evidence challenging the mother's previous lawful status as a slave, along with testimony confirming her status as biracial, reinforced the presumption that the child was also a slave.[112] The court emphasized that the mother's status as a slave was never disputed, nor was there any indication of a claim to freedom for her or her maternal ancestors.[113]

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[104] *Id.*
[105] *Id.*
[106] *Id.*
[107] *Id.*
[108] *Id.*
[109] *Id.*
[110] Gary v. Stevenson, 19 Ark. 580, 586 (1858) (enslaved party).
[111] *Id.*
[112] *Id.*
[113] *Id.* at 587.

This case further illustrates that the Arkansas Supreme Court maintained the institution of slavery based on entrenched racial categorizations and customary beliefs rather than relying on explicit statutory law. By upholding the presumption of slavery based on racial ancestry, the court continued to operate under the assumption that those with African blood were naturally slaves unless proven otherwise.

After the Civil War and the abolition of slavery, the Arkansas Supreme Court, in *Jacoway v. Denton*, acknowledged that slavery was not a product of positive law, asserting that slavery was not a creation of statute law for which the contemporary society or its immediate predecessors were responsible.[114] Rather, the court believed that slavery was an inherited institution, entrenched in the nation from its inception and growing alongside it.[115] The court emphasized that slavery was a characteristic error of the time, perpetuated by state regulations that sustained it, but not originating from these statutes.[116]

Slavery, according to the court, was sanctioned by the collective consent of the people, becoming law through widespread acceptance rather than explicit legislation.[117] This retrospective analysis by the Arkansas Supreme Court stresses the notion that Southern legal systems perpetuated slavery through historical practices and societal consensus rather than through the need for explicit positive law. The court's reflections illustrate how deeply ingrained traditions and collective societal norms upheld the institution of slavery, even as they were later codified and regulated by state statutes.

J. Delaware

In 1838, the Delaware Superior Court examined the nature of slavery as it existed within the state in *Tindal v. Hudson*. The court characterized slavery in Delaware as an institution in which Black people had always been enslaved by white people, portraying this racial hierarchy as an inherent and defining feature of slavery within the state..[118] The court framed slavery as a product of conquest, asserting that one race had historically subjugated the other through force and emphasized that the relationship between the races was marked by stark differences.[119] The court argued that just as one race had historically subjugated the other, it would continue to do so through force.[120] The opinion included a highly

[114] Jacoway v. Denton, 25 Ark. 625, 636 (1869) (enslaved persons at issue).
[115] *Id.*
[116] *Id.*
[117] *Id.*
[118] Tindal v. Hudson, 2 Del. 441, 441 (Del. Super. Ct. 1838) (enslaved party).
[119] *Id.*
[120] *Id.* at 442.

racially charged assertion that if the Black race were stronger, it would subjugate the white race, and the current enslavers would become slaves.[121] This reasoning ignored the complex legal, political, and economic factors that led to African enslavement and instead presented slavery as an inevitable outcome of racial superiority and domination.

This case illustrates the belief held by some courts and Southern jurists that slavery was the natural state of the African race, subjugated by the white race, and did not require positive law for its existence. The court's language and reasoning reflect a view that slavery was justified by racial differences and maintained by deeply rooted cultural traditions and historical precedent rather than by explicit legislative enactments.

K. South Carolina

In *Ex parte Boylston*, the Court of Appeals of South Carolina upheld the principle that slavery did not require explicit positive law for its maintenance, particularly in relation to punishing insolence among slaves.[122] The court argued that the necessity of slavery inherently dictated that all members of the slaveholding race must wield controlling power over slaves.[123] This ruling was grounded in the various Negro Acts of the state which addressed patrols, passes, runaways, insurrections, and the correction of slaves.[124] However, the court made it clear that these laws did not create the authority of slaveholders but merely provided regulatory limits on how that authority was exercised.[125] The court noted that these Acts consistently enforced the subordination of the enslaved to all free white persons, reflecting the stern policy required by the master-slave relationship.

The court held that any behavior by a slave that contradicted due subordination was implicitly prohibited, even if not explicitly addressed by legislation.[126] Specifically, the court contended that insolent behavior towards white persons was inherently inconsistent with the established social order and thus punishable, regardless of a lack of explicit legal provisions.[127] The court dismissed the argument that the legislature's silence on insolence indicated a belief in its undefinable nature, emphasizing instead that the matter was best left to the

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[121] *Id.*

[122] *Ex parte* Boylston, 33 S.C.L. (2 Strob.) 41 (S.C. Ct. App. L. 1847) (enslaved person at issue).

[123] *Id.* at 43.

[124] *Id.*

[125] *Id.*

[126] *Id.* at 44.

[127] *Id.*

discretion of the slave owner and the established tribunals responsible for adjudicating slave offenses.[128] This perspective underscored the belief that the social hierarchy of slavery was self-sustaining and did not require detailed positive laws for enforcement.

L. Conclusion

In reviewing the legal origins and the judicial perspectives on slavery in various slaveholding states, it is evident that the institution of slavery was maintained not through positive law alone but through deeply entrenched societal norms, historical practices, and racial assumptions. Courts in slave-holding states consistently upheld the presumption that African descent equated to slavery without requiring explicit legislative enactments. This judicial perspective failed to acknowledge the presence of free African Americans, of whom there were roughly 30,000 living in Colonial America before the American Revolution. Despite their legal status, courts continued to treat African ancestry as presumptive evidence of enslavement, reinforcing racial hierarchies that disregarded the existence of free Black communities. This view diverged significantly from the precedent set in *Somerset v. Stewart*, which held that slavery could only exist through positive law.

The cases analyzed demonstrate that courts often relied on the historical context and customary acceptance of slavery to justify its existence and continuation. In Missouri, the court in *Chouteau v. Pierre* emphasized that slavery was recognized and perpetuated by customary acceptance rather than explicit legal authorization. Similarly, in Louisiana, the court in *Seville v. Chretien* held that slavery persisted due to societal and historical acceptance despite arguments against its natural injustice.

In Arkansas, both *Daniel v. Guy* and *Gary v. Stevenson* illustrated that racial assumptions about African ancestry were sufficient to uphold the institution of slavery without positive law. The Delaware Superior Court, in *Tindal v. Hudson*, explicitly noted that slavery was seen as the natural state of the African race, subjugated by the white race, and maintained by cultural traditions and historical precedent.

These cases collectively support the proposition that the legal systems of the slaveholding states did not see the necessity for positive law to establish or sustain slavery. Instead, they recognized slavery as an institution deeply rooted in societal norms and historical practice. This pervasive judicial perspective reflected the inherent racial biases and the entrenched societal structures

[128] *Id.*

that perpetuated slavery, challenging the notion that explicit legal statutes were required to maintain such an institution.

III. The Need for Positive Law

While many slaveholding states maintained that slavery did not require explicit positive law for its existence, non-slaveholding states took a markedly different approach, aligning more closely with the precedent set in *Somerset v. Stewart*. These states held that slavery could only exist where it was explicitly sanctioned by law. The Somerset decision, which declared that slavery was so odious that it could only be supported by positive law, became a cornerstone for judicial reasoning in many Northern states.

This section examines how non-slaveholding states adopted the Somerset precedent to argue that the absence of positive law meant freedom for individuals who had been enslaved. Courts in these states often ruled that any enslaved person brought into their jurisdiction, even in transit, were considered free in the absence of explicit legislation supporting slavery. This approach not only highlighted the stark legal contrasts between the slaveholding and non-slaveholding states but also played a crucial role in the broader abolitionist movement, as it provided legal grounds for freeing enslaved individuals and challenged the legal underpinnings of slavery as practiced in the United States.

The legal tension between slaveholding and non-slaveholding states was further complicated by the Fugitive Slave Clause in the U.S. Constitution. Article IV, Section 2, Clause 3 of the Constitution, which mandated that escaped enslaved individuals who fled to free states must be returned to their enslavers. This clause was a critical component of the Constitutional compromise between the slaveholding and non-slaveholding states, reflecting the contentious nature of slavery in the United States. The Fugitive Slave Clause sought to protect the property rights of slaveholders by ensuring the recovery of escaped slaves, thereby reinforcing the institution of slavery even in states that had abolished it.

The distinction between a fugitive slave escaping to a free state and a slave voluntarily brought by his owner to a free state was notably clarified by the U.S. Supreme Court in the federal case *Prigg v. Commonwealth of Pennsylvania*. The Court held that the right to seize and retake fugitive slaves, as well as the duty to deliver them to their enslavers, was an absolute positive right under the Constitution.[129] This right and duty were uniform and supreme throughout the entire Union, overriding state sovereignty and state legislation.[130] The

[129] Prigg v. Com. of Pennsylvania, 41 U.S. (16 Pet.) 539, 561, 10 L. Ed. 1060 (1842) (enslaved person at issue).

[130] *Id.*

Court affirmed that the slave owner had security and remedial justice across all states, ensuring that the fugitive slave could be retaken and transported back to the owner's domicile.[131] However, the Court's ruling created a clear distinction between fugitive slaves and slaves brought voluntarily into a free state. This meant that the slave owner's security in his right to property in persons would not apply if he voluntarily brought his slaves into a free state.

This distinction was pivotal for free states, as it provided a legal basis to liberate slaves who were brought into their territories by their owners. By emphasizing that the constitutional protections for slaveholders did not extend to slaves voluntarily brought into free states, these jurisdictions could assert their anti-slavery statutes and principles more effectively. Consequently, this legal interpretation became a powerful tool for abolitionists and free states in their efforts to undermine the institution of slavery and promote the cause of freedom within their borders.

A. Massachusetts

Before the U.S. Supreme Court ruled in Prigg, the Massachusetts Supreme Judicial Court addressed in *Commonwealth v. Aves*, whether a slave brought into the state voluntarily by a slaveholder from another state could be detained and returned to slavery.[132] The court held that, according to the Massachusetts constitution and laws, slavery was abolished in the state as it was deemed contrary to natural rights and justice.[133] Therefore, any slave brought voluntarily into Massachusetts was considered free.[134]

The court stressed that the absence of positive law authorizing slavery in Massachusetts meant that the practice could not be sustained within its jurisdiction.[135] The court cited the Somerset decision, which established that slavery could only exist by positive law, and reaffirmed that no such law existed in Massachusetts.[136] Thus, the presence of a slave in the state, brought by a slave owner from a slaveholding state, did not allow the slave owner to exercise any rights of ownership or detention over the slave. This decision aligned with the broader abolitionist sentiment in non-slaveholding states, illustrating how they adopted the Somerset precedent to argue against the legality of slavery without explicit legislative sanction.

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[131] *Id.*
[132] Com. v. Aves, 35 Mass. (18 Pick.) 193 (1836) (enslaved person at issue).
[133] *Id.* at 210.
[134] *Id.* at 217.
[135] *Id.*
[136] *Id.* at 211.

Overall, the court's ruling in *Commonwealth v. Aves* reinforced the necessity of positive law to sustain slavery and exemplified how non-slaveholding states used the absence of positive law as a basis for freeing enslaved individuals brought into their jurisdictions.

The same court later examined the constitutional provision regarding fugitive slaves and clarified its intent and limitations.[137] The court noted that the framers of the Constitution aimed to guarantee slave owners' rights within states where slavery was permitted and to ensure that free states would not become havens for escaped slaves through local laws or regulations.[138] The court believed the constitutional provision regarding fugitive slaves was designed to facilitate the peaceful and practical return of fugitive slaves to their owners.[139] However, the court emphasized that this right was strictly confined to the specific circumstances outlined in the Constitution in that it applied only to slaves who had escaped from servitude.[140]

The Court held that if a slave was brought voluntarily into Massachusetts by their enslaver or arrived through employment without escaping, they did not fall under the constitutional provision for fugitive slaves.[141] Thus, the protection and return mechanisms established by the Constitution did not extend to such cases. The court made it clear that a slave brought voluntarily into Massachusetts would be considered free, and their freedom was not a result of the slave owner's voluntary act of bringing or permitting the slave to be brought within the limits of a free state but rather because slavery was controlled by local positive law. In the absence of such law in Massachusetts, slavery could not exist.[142]

The decisions in *Commonwealth v. Aves* and subsequent cases by the Massachusetts Supreme Judicial Court collectively emphasize the court's belief in the necessity of positive law to sustain the institution of slavery. By firmly establishing that slavery could not exist in Massachusetts without explicit legislative authorization, the court not only reinforced the principles of natural rights and justice enshrined in the state's constitution but also adhered to the precedent set by the Somerset decision. This stance ensured that any enslaved individual brought into Massachusetts was considered free, reflecting the state's broader abolitionist sentiment and its commitment to human liberty.

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[137] *In re* Sims, 61 Mass. (7 Cush.) 285 (1851).
[138] *Id.* at 297.
[139] *Id.* at 298.
[140] *Id.*
[141] *Id.*
[142] *Id.*

B. Ohio

The Supreme Court of Ohio in *State v. Hoppess* also affirmed the principle that slavery could only exist by virtue of positive law, aligning with the broader legal stance that the institution was inherently contrary to natural justice and rights. The court noted that the principles of natural rights, as declared in the Declaration of Independence, would universally liberate individuals if not for the specific constitutional compromises made to allow the existence of slavery in some states, which was necessary for the formation of the Union.[143] The court emphasized that slavery, being opposed to natural justice, could only be supported by the municipal laws of the state where it existed, thus highlighting the territorial nature of the master-slave relationship.[144]

The court further elaborated that if a slave owner voluntarily brought his slave into Ohio, a free state, he lost all legal power over the slave.[145] The court held that this is because the institution of slavery was strictly territorial; once the slave was brought beyond the jurisdiction of the law that sustained slavery, the relationship between slave owner and slave dissolved, and they stood as free individuals.[146] Moreover, while acknowledging the constitutional provision for the recapture of fugitive slaves, the court clarified that this right did not extend to slaves brought voluntarily into free states.[147] The court held that the constitutional provision and the Fugitive Slave Act only authorized the recapture of slaves who escaped from one state into another, not those who were brought into a free state by their enslavers.[148] Thus, the court distinguished between the rights of a slave owner over a fugitive slave and those over a slave voluntarily brought into a free state, underscoring that the latter is unequivocally free under the law of the free state and in the absence of positive law permitting slavery.

In *Anderson v. Poindexter*, the same court made a decisive statement regarding the necessity of positive law to uphold the institution of slavery. The court ruled that, under common law, there was no inherent right of property in persons, as slavery could exist only by positive law and was inherently repugnant to natural law and reason.[149] The court emphasized that any right to ownership

[143] *Hoppess*, 1 Ohio Dec.Reprint at 110–11.
[144] *Id.*
[145] *Id.* at 114–15.
[146] *Id.*
[147] *Id.*
[148] *Id.*
[149] Anderson v. Poindexter, 6 Ohio St. 622, 627–28 (1856) (enslaved party).

over a person must be derived from municipal authority and could not extend beyond the jurisdiction that enacts it.[150]

The court again highlighted that once a slave set foot in Ohio, a state where slavery was explicitly prohibited by the Northwest Ordinance of 1787 and subsequent state laws, they were immediately freed.[151] The court held that the ordinance's unequivocal language, denying slavery any legitimacy within the state, meant that any slave brought into Ohio by their enslaver was liberated instantly.[152] This principle aligned with the broader legal and societal opposition to slavery in Ohio, where nothing short of a positive law explicitly permitting slavery would suffice to allow its existence, even temporarily. The court rejected any notion that a slaveholding state could demand Ohio recognize or uphold the institution of slavery through comity.[153] The court noted that Ohio's laws and constitution stood firmly against slavery, and the state's legal framework ensured that any slave brought into Ohio by a slaveholder was immediately freed.[154]

The court concluded that the slave, in this case, gained his freedom irrevocably upon being brought into Ohio with his enslaver's consent.[155] This liberation could not be undone by returning to Kentucky, as once freed, there was no legal mechanism to reinstate his enslaved status, the court held.[156] The ruling emphasizes that the courts of non-slaveholding states believed slavery's legality was confined to jurisdictions with explicit positive laws supporting it and that such laws have no authority beyond their borders.

The Supreme Court of Errors of Connecticut had to answer the question of whether a slave could be legally detained under the laws of that state.[157] In *Jackson v. Bulloch*, the court firmly asserted that every human being has a right to liberty and that slavery is contrary to natural law, justice, and the principles of humanity.[158] It emphasized that slavery could only be supported by positive law and that such an institution was inherently local and must be governed by the specific laws of the state where it is enforced.[159]

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[150] *Id.* at 628.
[151] *Id.* at 630.
[152] *Id.*
[153] *Id.* at 631.
[154] *Id.*
[155] *Id.*
[156] *Id.*
[157] *Bulloch*, 12 Conn. at 40.
[158] *Id.*
[159] *Id.*

The court noted that Connecticut's history and legislative actions showed a clear trajectory toward the abolition of slavery.[160] Initially, laws were passed to prevent the importation of slaves and to ensure that children born to enslaved mothers would only serve until a certain age, ultimately leading to the gradual extinction of slavery within the state.[161] The court held that these statutes aimed to prevent the increase of slavery and to protect free laborers from competition with slave labor.[162] The court referenced the Somerset case, which held that slavery was so odious that it could not exist without positive law.[163] This principle was echoed in Connecticut's legal framework, where the introduction and perpetuation of slavery were strictly regulated and ultimately dismantled by legislative actions.[164]

The court concluded that the existing laws in Connecticut were designed to abolish slavery and that state statutes in 1774 and 1784 effectively achieved this goal.[165] However, the court acknowledged that Connecticut's laws allowed slave owners from other states to transit through the state with their slaves but did not permit them to reside or "leave" their slaves there without resulting in emancipation.[166] The court debated the meaning of "left" and made it clear that leaving a slave in Connecticut for an extended period, as opposed to merely transiting through the state, resulted in emancipation.[167] Here, the slave owner had left his slave in Connecticut for two years, leading to the court's decision that the slave was free.

This case is important because it highlights the Connecticut Supreme Court's agreement with the fundamental principles of the Somerset decision that slavery could only exist through positive law. The exception for transit only existed because the court seemed to believe Connecticut law allowed for it by specifying that a slave could not be "left" in the state. This case will be further discussed in the section on domicile, as it underscores the importance of the slave owner's intent and the duration of the slave's stay in determining the status of the slave.

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[160] *Id.* at 44.
[161] *Id.* at 44–45.
[162] *Id.* at 46.
[163] *Id.* at 53.
[164] *Id.* at 54.
[165] *Id.*
[166] *Id.* at 50–51.
[167] *Id.* at 51.

C. New York

In *Lemmon v. People*, the Court of Appeals of New York reinforced the principle that slavery could not exist without positive legislative enactments. The court examined the provisions of the U.S. Constitution concerning fugitive slaves and determined that these provisions assumed a distinction between states that permitted slavery and those that did not.[168] The court explained that at the time the Constitution was drafted, several states were on the brink of abolishing slavery.[169] Once abolition occurred, the legal principles of personal liberty, as articulated in English law, would prevail.[170] The court noted the ruling in Somerset's case by Lord Mansfield had already established a precedent that temporary restraint of personal liberty under slavery could not be upheld in jurisdictions lacking positive law supporting slavery.[171] This was particularly pertinent in states where the habeas corpus remedy—a fundamental legal protection against unlawful detention—was well established.[172]

The court thus believed the Fugitive Slave Clause of the U.S. Constitution was seen as a necessary legal provision to counteract the immediate emancipation that would result from a slave escaping to a free state.[173] The court recognized that without this clause, the general principle would be that an escaped slave, upon entering a state that had abolished slavery, would automatically gain freedom.[174] The court believed the convention that framed the Constitution acknowledged this principle and thus crafted the fugitive slave provision to ensure that slaves could be returned to their owners even if they had reached a free state, thus instituting a positive law mechanism to override the freedom that would otherwise be granted under the Somerset principle.[175]

Furthermore, the court held that while the Constitution mandated the return of escaped slaves to their owners, this provision did not apply to slaves voluntarily brought into a free state.[176] Therefore, a slaveholder could not invoke federal law to reclaim a slave they had voluntarily brought into New York. This distinction underscored the court's position that while the federal requirement to return fugitive slaves was respected, it did not compel free states to uphold slavery within their own jurisdictions when slaves were voluntarily brought into

[168] Lemmon v. People, 20 N.Y. 562, 604 (1860) (enslaved persons at issue).
[169] *Id.* at 605.
[170] *Id.*
[171] *Id.*
[172] *Id.* at 606.
[173] *Id.*
[174] *Id.*
[175] *Id.*
[176] *Id.*

their territory. The court noted that the prevailing sentiment and legal principles in states like New York, where slavery was abolished, ensured that any slave brought into such a state, even if only temporarily, would immediately gain freedom.[177] This ruling highlighted New York's commitment to liberty, underscoring that only explicit positive law could uphold the institution of slavery, thus ensuring that individuals brought into the state were treated according to its laws of freedom.

D. Conclusion

The decisions in the non-slaveholding states emphasize a critical legal principle rooted in the Somerset decision: slavery could only exist where it was explicitly supported by positive law. This foundational belief was repeatedly affirmed by the courts in states like Massachusetts, Ohio, Connecticut, and New York, which systematically dismantled the institution of slavery within their jurisdictions through legislative action and judicial interpretation.

In *Prigg v. Commonwealth of Pennsylvania*, the Supreme Court of the United States distinguished between the constitutional mandate to return fugitive slaves and the status of slaves voluntarily brought into free states. This ruling emphasized that the protection and return mechanisms established by the Constitution did not extend to slaves voluntarily brought into a free state, thereby supporting the notion that the existence of slavery required explicit legal authorization.

Similarly, in *Commonwealth v. Aves*, the Massachusetts Supreme Judicial Court held that any slave brought voluntarily into Massachusetts was considered free due to the state's abolitionist laws and the absence of positive law authorizing slavery. This decision illustrated the court's commitment to natural rights and justice, rejecting the idea that societal customs or historical practices could justify slavery's existence.

The Supreme Court of Ohio, in cases like *State v. Hoppess* and *Anderson v. Poindexter*, fortified the principle that slavery could only exist through positive law. The court held that a slave owner voluntarily bringing a slave into Ohio, a state where slavery was prohibited, automatically granted freedom to the enslaved individual. This legal stance was crucial in distinguishing between the rights over fugitive slaves and those over slaves voluntarily brought into free states, emphasizing the territorial limits of slavery.

The Supreme Court of Errors of Connecticut, in *Jackson v. Bulloch*, echoed these sentiments by affirming that every individual inherently possessed the right

[177] *Id.* at 611, 615.

to liberty and that slavery, contrary to natural law and justice, required explicit legal provisions to be maintained. The court concluded that the existing laws in Connecticut aimed at abolishing slavery were effective, and any slave brought and left in the state was free in the absence of positive law supporting slavery.

In *Lemmon v. People*, the Court of Appeals of New York further emphasized that the Constitution's provision for the return of fugitive slaves did not apply to slaves brought voluntarily into a free state. The court reinforced that slavery could not exist without positive law and that New York's legal framework ensured the freedom of any individual brought into the state. This case demonstrated that the Fugitive Slave Clause needed to exist for the sake of maintaining slavery because slavery could only be instituted under positive law. Even the framers of the Constitution understood the Somerset principle to be true, acknowledging that without such a clause, the act of escaping to a free state would inherently result in a slave's emancipation. This underscores that the very foundation of the Fugitive Slave Clause was built upon the recognition that positive law was essential to sustain slavery against the prevailing common law principles of liberty and personal freedom.

Collectively, these judicial decisions in non-slaveholding states firmly established the necessity of positive law to sustain the institution of slavery. By rejecting the extension of slaveholding laws into their jurisdictions, these states upheld the principles of natural rights and justice, significantly contributing to the broader abolitionist movement and challenging the legal foundations of slavery in the United States.

IV. Domicile and the Status of a Slave

The perspective of the slaveholding states was grounded in the legal theory that the domicile, or the established place of residence, of the slave owner determined the status of the slave. According to this view, merely setting foot in, transiting through, or residing temporarily in a free state did not emancipate a slave. This legal principle held that the status of a slave remained unchanged unless the slave owner intended to change his domicile to a free state, which would then alter the legal status of the slave.

Interestingly, some non-slaveholding states also adhered to this domicile principle when freeing slaves brought into their territory. While non-slaveholding states often freed slaves brought into their jurisdictions, many of these cases did so in accordance with the domicile legal theory rather than the Somerset principle, which asserted that simply being in a free state made a slave free. Non-slaveholding courts frequently based their decisions on the recognition that a change in the slave owner's domicile to a free state was required

for the emancipation of a slave. This section explores the legal arguments and judicial decisions from both slaveholding and non-slaveholding states, highlighting how the principle of domicile influenced the legal status of slaves and the complex interplay between regional interpretations of slavery laws.

A. Illinois

This legal theory was offered by Judge Lockwood of the Supreme Court of Illinois in *Willard v. People*.[178] Judge Lockwood held that simply traveling or being in a free state for a short period should not automatically free a slave.[179] According to Judge Lockwood, under the legal theory of the comity of nations, the laws of the slave owner's domicile should be used to determine the status of the slave, emphasizing the importance of maintaining domestic tranquility.[180] However, this doctrine of comity was not a neutral principle but one selectively applied to protect the interests of slaveholders while denying agency to the enslaved. Since those subjected to enslavement were not considered parties to this legal framework; rather, it was a tool used to legitimize their continued oppression under the guise of legal reciprocity.

Judge Lockwood argued that denying the right of passage to slaveholders with their slaves from neighboring states would not only cause significant injury to those citizens but could also foster animosity and threaten the Union's stability.[181] He pointed out the necessity of allowing citizens from slaveholding states to travel through free states with their slaves, provided no harm would result to the free state's citizens.[182] This approach, he maintained, would benefit both enslaver and slave and avoid unnecessary conflict while upholding the broader principle of national unity and mutual respect among states.[183]

B. Virginia

In Virginia, a slave claimed his right to freedom based on his mother's alleged emancipation. The slave argued that his mother had acquired freedom by sojourning to and being employed in Ohio, a free state.[184] The Supreme Court of Appeals of Virginia emphasized that there was no substantial evidence to prove that the mother had a significant residence in Ohio.[185] The only evidence presented was that she was seen working at a sugar camp on a Sunday without

[178] Willard v. People, 5 Ill. (4 Scam.) 461, 476 (1843) (enslaved person at issue).
[179] *Id.*
[180] *Id.*
[181] *Id.*
[182] *Id.* at 477.
[183] *Id.*
[184] Lewis v. Fullerton, 22 Va. (1 Rand.) 15, 21 (1821) (enslaved party).
[185] *Id.*

her enslaver's presence or explicit permission.[186] The slave argued that even short-term employment within Ohio should grant freedom.[187]

The court rejected this argument, ruling that a temporary stay and work within Ohio, especially without clear consent from the slave owner, did not constitute sufficient grounds for emancipation.[188] The court asserted that such a brief occupation, likened to mere transit through the state, did not demonstrate the slave owner's intention to free the slave or establish her as a permanent resident of Ohio.[189] Therefore, the court concluded that the brief stay in Ohio did not grant the mother, and consequently, her son, the right to freedom, maintaining the principle that such transient circumstances could not dissolve slavery.[190] Here, the court adhered to the principle that the slave owner's domicile determined the slave's status; since the slave owner did not intend to change his domicile and move permanently to Ohio, the status of his slave remained controlled by the laws of the slaveholding state of Virginia. This case clearly illustrates that the court believed that unless the slave owner's domicile was changed to a free state, a slave was not freed merely by being in a free state for a brief period of time.

In *Hunter v. Fulcher*, the same court addressed a scenario where a slave owner moved permanently to another state . Here, a slave was taken from Virginia to Maryland, where the slave owner resided for twelve years.[191] The court ruled that, based on the evidence, the slave owner's domicile had effectively changed to Maryland.[192] Consequently, the slave was subjected to Maryland's laws, which, by a statute, declared all slaves brought into that state to reside to be free.[193] The court held that the slave owner's permanent relocation to Maryland and submission to its laws meant that the slave acquired a right to freedom under this Maryland law and this right could not be nullified by subsequently returning to Virginia.[194]

This decision highlights the position of a court in a slaveholding state that the domicile of the enslaver was the determining factor concerning the legal status of a slave. T his case illustrates the principle that the slave owner's

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[186] *Id.* at 22.
[187] *Id.*
[188] *Id.*
[189] *Id.*
[190] *Id.*
[191] Hunter v. Fulcher, 28 Va. (1 Leigh) 172, 181 (1829) (enslaved party).
[192] *Id.*
[193] *Id.* at 182.
[194] *Id.*

permanent residence in another state could emancipate a slave, distinguishing it from cases involving mere temporary stays or transit through free states.

The critical issue of whether the domicile of a slave owner determined the status of a slave was the issue for the Supreme Court of Appeals of Virginia in *Betty v. Horton*. The case involved Blake, a Massachusetts citizen by birth, who temporarily moved to Virginia, married, and acquired two slaves through his marriage.[195] Despite residing in Virginia with his new family and slaves, Blake returned to Massachusetts within approximately twelve months without any clear intention to permanently settle in Virginia.[196] The jury found no evidence of permanent residency, such as the purchase of property or the establishment of a business, marking Blake merely as a sojourner or a temporary resident.[197]

The court referenced precedents to underline that temporary residency, even for several years, did not alter one's original citizenship.[198] Consequently, Blake, upon his return to Massachusetts with his slaves, was deemed to have remained a Massachusetts citizen.[199] His intention to reside permanently in Massachusetts was evidenced by renting a house, opening a store, and planning to stay, only returning to Virginia due to business failure and his wife's health issues.[200]

The court held that Blake's actions demonstrated a clear intent to maintain his Massachusetts domicile.[201] As a result, when he brought his slaves into Massachusetts, they were deemed free persons by the constitution of that state, as interpreted by its judicial tribunals.[202] This established that the plaintiffs were entitled to their freedom.. This case demonstrates the judicial principle that the domicile of the slave owner, not the mere presence in a free state, governed the legal status of the slaves, thereby rejecting the Sommerset principle that simply setting foot in a free state emancipated a slave.

C. Pennsylvania

In the case of *Butler v. Hopper*, Circuit Court, D. of Pennsylvania determined that a slave owner's domicile governed the status of their slave. The facts of the case revolved around whether Ben, a slave, became free under a Pennsylvania law that emancipated slaves brought into the state, except under

[195] Betty v. Horton, 32 Va. (5 Leigh) 615, 620–21 (1833) (enslaved party).
[196] *Id.* at 621.
[197] *Id.*
[198] *Id.*
[199] *Id.*
[200] *Id.*
[201] *Id.*
[202] *Id.* at 622.

specific conditions relating to the slave owner such as being a delegate, foreign minister, consul, or a temporary resident.[203]

The plaintiff, who had resided with his family in Philadelphia since 1794, argued for an exemption based on his status as a member of Congress and later as only a temporary resident of Pennsylvania.[204] However, the court found that from 1794 onwards, the plaintiff was a resident of Pennsylvania, only occasionally visiting his plantations in South Carolina.[205] The court held that the jury's findings that the plaintiff was a resident effectively nullified his claim to the exemptions.[206]

The court concluded that merely maintaining estates in South Carolina and occasionally visiting them did not alter the fact that the plaintiff had established his domicile in Pennsylvania.[207] Therefore, the Pennsylvania law applied, and Ben was deemed free[208] underscoring the legal principle that a slave's status was dictated by the domicile of the slave owner.

The Supreme Court of Pennsylvania addressed whether a slave could gain freedom merely by being brought into the state in the case of *Butler v. Delaplaine*. The court's decision in this case reflected the belief that the status of a slave could not be changed without a change in the slave owner's domicile. The court explained that a stay in Pennsylvania must be a continuous, unbroken period of six months to affect the status of a slave according to the Abolition Act of 1788.[209] They emphasized that frequent travel between Pennsylvania and another state, such as Maryland, without a continuous stay in Pennsylvania, did not constitute a change in domicile and thus did not grant freedom to the slave.[210]

The court recognized the common practice of Southern families visiting Pennsylvania with their domestic slaves for health, pleasure, or business, often returning each season without exceeding the six-month period.[211] They ruled that summing up successive sojourns over different seasons would be contrary to the law's intention and would effectively deny Southern visitors the right of hospitality.[212] The court believed this interpretation ensured that the law did not unjustly prohibit Southern families from visiting Pennsylvania's health resorts

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[203] Butler v. Hopper, 4 F. Cas. 904, 905 (C.C.D. Pa. 1806) (enslaved person at issue).
[204] *Id.*
[205] *Id.*
[206] *Id.*
[207] *Id.*
[208] *Id.*
[209] Butler v. Delaplaine, 7 Serg. & Rawle 378, 383–84 (Sup. Ct. Pa. 1821) (enslaved party).
[210] *Id.*
[211] *Id.*
[212] *Id.*

with their slaves.[213] Ultimately, the court concluded that merely bringing a slave into Pennsylvania for short, repeated visits did not emancipate the slave. The slave's status remained unchanged unless the slave owner established a new, permanent domicile in Pennsylvania, adhering to the principle that the domicile of the slave owner determined the legal status of the slave.

D. Kentucky

In *Rankin v. Lydia*, the Court of Appeals of Kentucky ruled that when a slave owner moved with his slave to a free territory and established a domicile there, the laws of the free territory determined the slave's status.[214] Lydia, born a slave in Kentucky, was taken by her enslaver, John Warrick, to the Indiana Territory in 1807.[215] Warrick lived in Indiana with Lydia for seven years before returning to Kentucky, which indicated to the court a permanent change of domicile.[216] The Court held that because of this change in domicile, the laws of Indiana, a free territory, operated on Lydia's status, rendering her free.[217] The court emphasized that slavery could not be revived once it had been extinguished by the laws of the free territory.[218] The court noted that there was no legal basis in Kentucky law to reassert a right to slavery once it had been nullified. Any subsequent sale of Lydia as a slave was invalid, and she remained free despite her return to Kentucky.[219]

In *Graham v. Strader*, the Court of Appeals of Kentucky addressed the issue of whether slaves temporarily taken into free states or territories were automatically emancipated. The court examined the case of Henry and Reuben, who were taken to the free states of Ohio and Indiana to work temporarily as musicians.[220] The contention was that their temporary stay and work in these free states should have granted them freedom under the Northwest Ordinance, which prohibited slavery in those territories.[221]

However, the court dismissed this argument, stating that simply taking slaves temporarily into free states for work or travel did not result in their emancipation.[222] The court emphasized that the owner did not forfeit his rights over the slaves under Kentucky law by allowing them to visit or work in free states for short

[213] *Id.*
[214] *Lydia*, 9 Ky. at 468 (1820) (enslaved party).
[215] *Id.*
[216] *Id.* at 471.
[217] *Id.*
[218] *Id.*
[219] *Id.* at 472.
[220] Graham v. Strader, 44 Ky. (5 B. Mon) 173, 174–75 (1844) (enslaved persons at issue).
[221] *Id.* at 179.
[222] *Id.* at 179–80.

periods.[223] This case supports the principle that many courts held that temporary stays in free states did not affect the legal status of slaves. The Kentucky court's decision maintained that the law of the domicile of the slave owner continued to govern the status of the slaves despite temporary excursions into free territories.

The case of *Graham v. Strader* eventually reached the Supreme Court of the United States. The Court ruled that each state has the unquestionable right to determine the status and social condition of persons domiciled within its territory, except where restricted by the U.S. Constitution.[224] The Court emphasized that there was no constitutional provision that could influence the law of Kentucky in this matter.[225] Therefore, the status of the slaves as free or enslaved upon their return to Kentucky was governed solely by Kentucky law and could not be affected by Ohio law.[226]

The Supreme Court concluded that it was within Kentucky's exclusive authority to decide whether temporary employment in another state would affect the slaves' status.[227] The Kentucky Court of Appeals determined that, according to state law, the slaves remained in bondage upon their return.[228] The Supreme Court affirmed this decision, highlighting that it had no jurisdiction over the matter because it fell squarely within the purview of state law.[229] This decision reinforced the notion that the domicile of the slave owner controlled the status of the slave, and temporary stays in free states did not alter their condition under the law of the slaveholding state.

In the case of *Davis v. Tingle*, the Court of Appeals of Kentucky also supported the principle that the domicile of the slave owner determined the status of the slave. The court emphasized that when the slave owner moved to Ohio and resided there for two years with his slaves, the slaves' status changed to free under the laws of Ohio and the Northwest Ordinance of 1787.[230] The court concluded that once a slave was made free by residing in a free state, a return to a slave state could not re-enslave them.[231] This case supports the legal concept promoted by the Kentucky courts that the slave owner's domicile played a crucial role in determining the legal status of the slave.

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[223] *Id.* at 180.

[224] Strader v. Graham, 51 U.S. (10 How.) 82, 93, 13 L. Ed. 337 (1850) (enslaved persons at issue).

[225] *Id.* at 93–94.

[226] *Id.* at 94.

[227] *Id.*

[228] *Id.*

[229] *Id.* at 97.

[230] Davis v. Tingle, 47 Ky. (8 B. Mon.) 539, 545 (1848) (enslaved party).

[231] *Id.*

The Court of Appeals of Kentucky next examined a case in which a woman of color (The court did not specify her exact racial background) named America claimed her right to freedom against Collins, who asserted ownership, and Harrison, who had hired her from Collins.[232] America had traveled to Ohio, a free state, under Collins's authority, but her stay was brief, lasting only about two weeks before returning to Kentucky.[233]

The court addressed whether the brief sojourn in Ohio, where slavery was prohibited, granted America her freedom.[234] The judges stated that if Ohio's laws, which declared there should be no slavery, were applied unconditionally, then any slave entering Ohio, regardless of the circumstances, would be freed immediately.[235] However, the court's decision would emphasize that Kentucky law, where the slave owner was domiciled, governed the status of the slave. The court referred to the precedent set in *Rankin v. Lydia*, which maintained that a slave's condition would not change if the stay in a free state was temporary and the slave owner's intention was not to establish a permanent residence.[236] The court reiterated that the law of nations preserved the owner's property rights across borders, indicating that a temporary visit did not alter the slave's legal status under Kentucky law.[237] The Kentucky Court of Appeals upheld that temporary stays in free states did not change a slave's status.[238] It is clear the court's belief was that the slave owner's domicile determined the slave's status, and therefore, America's brief stay in Ohio, authorized by her enslaver, did not emancipate her.

The final Kentucky case to be discussed in this section, *Smith v. Adam,* further reinforced the principle that domicile, not temporary visits or transit through a state, determined a slave's status. The Kentucky Court of Appeals examined whether Adam, a slave, occasional visits to Indiana, a free state, made him a free man.[239] The court confirmed that visits of short duration or for temporary purposes, even if made with the owner's assent, did not grant freedom to the slave.[240] Consistent with previous rulings, the court again explicitly declared that such temporary visits to a free state were insufficient to alter the status of a slave under Kentucky law.[241]

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[232] Collins v. Am., 48 Ky. (9 B. Mon.) 565, 565 (1849) (enslaved party).
[233] *Id.*
[234] *Id.* at 568.
[235] *Id.* at 568–569.
[236] *Id.* at 572.
[237] *Id.*
[238] *Id.*
[239] Smith v. Adam, 57 Ky. (18 B. Mon.) 685, 688 (Ky. Ct. App. 1858) (enslaved party).
[240] *Id.*
[241] *Id.*

E. Connecticut

As previously discussed, the principles established in *Jackson v. Bulloch* are revisited to emphasize the significance of the slave owner's domicile in determining the status of a slave. In *Jackson v. Bulloch*, the Supreme Court of Errors of Connecticut addressed the status of a slave brought into Connecticut by his enslaver from Georgia. [242] The slave owner, who claimed Georgia as his domicile, temporarily moved to Connecticut with his family and slave in June 1835, where they stayed until June 1837.[243] Although the slave owner was absent for extended periods during this time, the slave and the enslaver's family remained in Connecticut.[244] Despite the slave owner's intention to return to Georgia with his slave, the court held that the slave was brought into and left in Connecticut within the meaning of the state's anti-slavery statutes.[245]

The court ruled that merely traveling through Connecticut with a slave did not emancipate the slave.[246] However, the court emphasized that if actions indicated the slave owner's intention to stay indefinitely, such as leaving the slave in the state for an extended period, the state's anti-slavery laws would apply.[247] In this case, the slave's prolonged stay in Connecticut without the slave owner's constant presence effectively worked as a change in domicile for the slave, subjecting him to Connecticut's laws that prohibited slavery. Consequently, the slave was declared free under Connecticut law, demonstrating that a change in the slave's status required more than mere transit; it required indications of an indefinite stay or being "left" in the state, which the court interpreted as an implicit change in the slave's domicile and therefore a change in the slave's status.

F. Louisiana

In Louisiana, the case of *Lunsford v. Coquillon* was a significant example of how the change in a slave owner's domicile to a free state impacted the legal status of a slave.[248] This case from the Louisiana Supreme Court drew attention to the principle that the status of a slave was inherently linked to the domicile of the slave owner. The court concluded that the Constitution of Ohio automatically emancipated slaves whose owners moved to Ohio with the intention of residing there.[249] The plaintiff, having been voluntarily moved to Ohio by

[242] Jackson v. Bulloch, 12 Conn. 38 (1837) (enslaved party).
[243] *Id.* at 39–40.
[244] *Id.*
[245] *Id.*
[246] *Id.* at 49–50.
[247] *Id.* at 51.
[248] Lunsford v. Coquillon, 2 Mart.(n.s.) 401, 408 (1824) (enslaved party).
[249] *Id.*

her owner, fell under the jurisdiction of Ohio's constitution and laws, which did not recognize slavery.[250] Consequently, the court believed the plaintiff was effectively emancipated by the operation of Ohio's constitution.[251] The court held that her status as a free person could not be negated by her forced removal to Kentucky or any subsequent relocation, whether voluntary or forced, to another state.[252] This decision highlights that the Louisiana court acknowledged that a change in the slave owner's domicile to a free state like Ohio resulted in the emancipation of a slave, as the laws of the new domicile did not support the institution of slavery.

In the case of *Louis v. Carbarrus*, the Louisiana Supreme Court again addressed the issue of a slave's residence in Ohio and its implications for emancipation.[253] The plaintiff, born a slave, claimed his freedom based on a two to three-year residence in Ohio, where slavery was prohibited by the state constitution.[254] However, in this case, the court's decision clearly indicated that for emancipation to occur, the slave owner must have established domicile in Ohio as a citizen and brought the slave along with him.[255] In *Louis*, it was not proven that the slave's residence alone indicated that his enslaver intended to change his domicile to Ohio.[256] The court held that the residence of a slave in Ohio, contrary to the will or without the knowledge of the slave owner, did not deprive the slave owner of his property rights.[257] However, the court seemingly left open the possibility that a slave could be emancipated if a slave owner voluntarily sent his slave to a free state to work or reside.[258]

Despite their divergent outcomes, these cases collectively illustrate the Louisiana Supreme Court's adherence to the principle that the domicile of the slave owner was crucial in determining the legal status of the slave. While *Lunsford v. Coquillon* demonstrated that a change in domicile to a free state resulted in emancipation, *Louis v. Carbarrus* reaffirmed that mere residence in a free state without the slave owner's intent to change domicile did not alter the status of the slave. This nuanced understanding underscores the importance of the slave owner's domicile in legal considerations of slavery and emancipation.

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[250] *Id.*
[251] *Id.*
[252] *Id.*
[253] Louis v. Carbarrus, 7 La. 170, 171 (1834) (enslaved party).
[254] *Id.*
[255] *Id.*
[256] *Id.* at 172.
[257] *Id.*
[258] *Id.*

The Louisiana Supreme Court again adjudicated on the matter of whether the domicile of a slave owner determined the legal status of a slave in *Haynes v. Forno*. The case involved a slave woman, Sarah Haynes, who sued for her freedom from the guardianship of Constance Mielkie, a minor residing in Texas.[259] Sarah was initially the slave of Edward C. Mielkie, who resided in Vicksburg, Mississippi, and died in 1846.[260]

In April 1843, Edward C. Mielkie granted Sarah permission to travel to Cincinnati, Ohio, with a written permit explicitly allowing her to move to any free state of her choice.[261] Mielkie arranged her passage ostensibly to facilitate her freedom.[262] However, it appears that Sarah stayed in Cincinnati only for a few days before moving to New Orleans, where she resided with brief interruptions until the lawsuit.[263] The Court noted that Sarah's brief presence in Cincinnati did not alter her status as a slave and her legal status had to be determined according to the laws of her enslaver's domicile, which was Mississippi.[264]

The Louisiana Supreme Court concluded that Sarah had not acquired any rights to freedom based on her short stay in Cincinnati or her subsequent residence in New Orleans.[265] Her legal status remained that of a slave under the laws of Mississippi, the domicile of her deceased enslaver.[266] The Court upheld the District Court's decision, ruling that Sarah's presence in a free state did not grant her freedom, as her legal status remained tied to her enslaver's domicile in a slaveholding state, reinforcing the prevailing doctrine that a slave's status was determined by the laws of the slave owner's home state rather than temporary residence in a free jurisdiction..[267]

In the case of *Mary v. Brown*, the Louisiana Supreme Court addressed whether slaves taken temporarily to a free state and emancipated there could retain their freedom upon returning to a slave state. The plaintiffs, who were formerly slaves of James Read, claimed their freedom based on an act of emancipation executed by Read in Ohio in 1846.[268] The district court ruled in favor of the plaintiffs, and the defendant appealed.

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[259] Haynes v. Forno, 8 La. Ann. 35, 36 (1853) (enslaved party).
[260] *Id.*
[261] *Id.*
[262] *Id.*
[263] *Id.*
[264] *Id.*
[265] *Id.*
[266] *Id.*
[267] *Id.*
[268] Mary v. Brown, 5 La. Ann. 269, 270 (1850) (enslaved party).

The core issue centered on James Read's domicile, which was in Adams County, Mississippi. The court emphasized that the status of the plaintiffs could only be determined under Mississippi law, where they were born slaves.[269] It was established that Read had taken them from Mississippi to Ohio specifically to emancipate them and, after executing the act of emancipation, returned with them to Mississippi.[270]

The Louisiana Supreme Court held that the act of emancipation executed in Ohio was invalid under Mississippi law.[271] Since James Read's domicile remained in Mississippi, and he intended to return there, the laws of Mississippi governed the status of the plaintiffs.[272] The court asserted that taking slaves to a free state temporarily did not change their legal status upon their return to a slave state.[273] The plaintiffs remained slaves under Mississippi law, as their emancipation in Ohio was not recognized due to the lack of compliance with Mississippi's statutory requirements for emancipation. Even the explicit intent of the slave owner to emancipate them was insufficient; Mississippi law required strict procedural adherence for manumission, reinforcing the principle that slavery could only be dissolved through explicit legal authorization.

This case reinforces the principle held by the slave-holding states that the domicile of the slave owner determines the legal status of the slave. It illustrates that the status of slaves did not change merely by being taken to a free state temporarily; the controlling law was that of the slave owner's domicile. The court's decision underscored that any change in the legal status of slaves had to comply with the specific legal formalities of the slaveholding state, thus affirming the jurisdictional limitations on the recognition of emancipation acts performed in free states.

In the case of *Young v. Egan*, the Louisiana Supreme Court addressed the matter of a slave's emancipation under the terms of a will made by Francis Gay, a resident of Alabama.[274] The court emphasized that the laws of Alabama, where the testator resided and where the will was probated, governed the disposition of Gay's property, including his slave, Albert.[275] The court concluded that since the will was intended to be carried out in Alabama, and given Alabama's restrictions on emancipation, the rights and status of the slave were to be determined

[269] *Id.*
[270] *Id.*
[271] *Id.*
[272] *Id.*
[273] *Id.*
[274] Young v. Egan, 10 La. Ann. 415, 416 (1855) (enslaved party).
[275] *Id.*

by Alabama law.[276] Thus, the slave owner's domicile dictated the legal status of the slave, reinforcing the principle that the slave owner's place of residence determined the slave's condition.

Several cases from the Louisiana Supreme Court offer a distinct perspective by examining the residence of the slave rather than the slave owner, impacting the status of the enslaved individuals. In one such case, *Frank v. Powell*, the plaintiff, Frank, was born in Pennsylvania to a slave whose owner was temporarily in the state due to sickness and inclement weather.[277] After the owner's death, Frank was taken to Cincinnati, Ohio, where he was hired out to an innkeeper under the arrangement that his wages would eventually secure his freedom.[278] Although Frank fled after a few weeks, he was later captured and brought to Kentucky, where he was sold to the defendant.[279]

The court examined whether Frank's time in Ohio, where slavery was prohibited by the state constitution, resulted in his emancipation. Unlike the cases of *Lunsford v. Coquillon* and *Louis v. Carbarrus*, where the slave owner's domicile was central to the determination of the slave's status, the court in *Frank v. Powell* focused on the slave owner's voluntary act of leaving the slave in a free state for an indefinite period. The court held that this action effectively emancipated Frank, despite the slave owner's domicile not being formally changed to Ohio.[280]

The court reasoned that by placing Frank in Ohio to work for an indefinite period of time, until a specific sum was earned, the slave owner had, in essence, subjected himself and his property to Ohio's constitution and laws, which did not recognize slavery.[281] The court stated that every person is presumed to have consented to the necessary legal consequences of their actions, and in this case, the necessary consequence of the slave owner's actions was the emancipation of the slave, as Ohio law did not permit slavery.[282]

The court emphasized that the slave owner's intention for Frank to remain in Ohio for an indefinite period, coupled with his consent to Frank's residence in Ohio, resulted in Frank's emancipation.[283] This ruling demonstrates that while the slave owner's domicile didn't formally change, his voluntary decision to place a slave in a free state for an indefinite period had the same effect as a change

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[276] *Id.* at 417.
[277] Frank v. Powell, 11 La. 499, 500–01 (1838) (enslaved party).
[278] *Id.* at 501.
[279] *Id.*
[280] *Id.* at 502.
[281] *Id.*
[282] *Id.* at 501–02.
[283] *Id.* at 502.

of domicile, leading to the slave's emancipation. This distinctly differed from a brief stay or transit through a free state.

The Louisiana Supreme Court's decision in *Thomas v. Generis* further illustrates how the voluntary actions of a slave owner could impact the status of a slave, even without a formal change in domicile. In this case, the plaintiff was purchased as a slave and held in Kentucky until she requested to be taken to Shawneetown, Illinois, for medical treatment.[284] She resided in Illinois from 1833 to 1837 with the knowledge and consent of her enslaver who had property and family in Shawneetown.[285]

Similar to *Frank v. Powell*, where the slave owner's act of leaving the slave in Ohio for an indefinite period resulted in emancipation, the court in *Thomas v. Generis* focused on the slave owner's consent for the plaintiff's extended stay in Illinois.[286] The court observed that Illinois' constitution prohibited slavery and despite the slave's enslaver not formally changing his domicile to Illinois, his consent for the plaintiff's prolonged residence there was seen as submitting to Illinois' laws, effectively emancipating her.[287] The court emphasized that the bond of slavery was dissolved under Illinois law due to the plaintiff's extended residence with her enslaver's consent.[288] Thus, *Thomas v. Generis* reinforced the notion that the slave owner's actions, whether a formal change of domicile or voluntary removal to a free state for an indefinite period, similar to a change in domicile but from the perspective of the enslaved person, could lead to the emancipation of a slave. This principle highlights the nuanced approach the Louisiana court took in recognizing the impact of a slave owner's intent and actions on the status of slaves beyond mere temporary transit or brief stays in free states.

While the general principle upheld by the courts in Louisiana was that the domicile of the slave owner determined the status of the slave, there were notable exceptions to this rule. Two significant cases, *Marie Louise v. Marot* and *Smith v. Smith*, deviated from this doctrine by reflecting unique circumstances in which a slave's status was altered irrespective of the slave owner's domicile. These cases aligned with the Somerset holding that slavery required a positive law and that merely setting foot in a jurisdiction without such a law emancipated a slave.

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[284] Thomas v. Generis, 16 La. 483, 486 (1840) (enslaved party).
[285] *Id.* at 486–87.
[286] *Id.* at 487–488.
[287] *Id.* at 488.
[288] *Id.*

Marie Louise v. Marot presents a significant deviation from the principle that the domicile of the slave owner determined the status of the slave. This case revolved around the condition of Marie Louise, a biracial woman held in slavery by the defendants.[289] The central question was whether her temporary presence in France, where slavery and involuntary servitude were not tolerated, granted her emancipation.[290]

Marie Louise's owners had taken her to France, a kingdom whose laws did not support slavery; this journey to a free country was crucial to her claim for freedom.[291] The court had to decide if her temporary stay in France, where she lived in a society that legally prohibited slavery, was enough to emancipate her permanently upon her return to Louisiana.[292]

The Louisiana Supreme Court ruled in favor of Marie Louise, emphasizing that the moment she set foot in France, she was free and could not be returned to slavery by her former owners upon their return to Louisiana.[293] This ruling highlighted how the Louisiana Supreme Court believed that the laws of France, a sovereign nation that did not recognize slavery, had a profound and permanent impact on Marie Louise's legal status, regardless of her enslaver's domicile.

The case of *Marie Louise v. Marot* seemingly set a precedent in Louisiana that emphasized the impact of foreign jurisdiction on the status of slaves. Similarly, in *Smith v. Smith*, the Louisiana Supreme Court reinforced this principle by examining the conditions under which a slave's status was altered by a temporary stay in France. The plaintiff, in this case, appealed from a judgment rejecting her claim to freedom.[294] She acknowledged that she was once the slave of the defendant, who took her to France, where she remained for three or four months before being sent back to Louisiana.[295] The Louisiana Supreme Court found that this case could not be distinguished from *Marie Louise v. Marot*.[296] In both cases, it was established that there was no slavery permitted in France and that a slave became free by merely setting foot on French soil.[297]

The Louisiana Supreme Court's decision in *Smith v. Smith*, like *Marie Louise v. Marot*, aligned with the *Somerset* holding that slavery required a positive law and that setting foot in a nation without such a law emancipated a slave. These

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[289] Marie Louise v. Marot, 9 La. 473, 476 (1836) (enslaved party).
[290] *Id.*
[291] *Id.*
[292] *Id.*
[293] *Id.*
[294] Smith v. Smith, 13 La. 441, 444 (1839) (enslaved party).
[295] *Id.*
[296] *Id.*
[297] *Id.*

rulings deviated from the general principle upheld by the Louisiana Supreme Court that the domicile of the slave owner determined the status of the slave and that mere transit or brief stays in free territories did not impact the slave's status.

The deviation seems to hinge on the laws of a foreign country, as opposed to those of a non-slaveholding state within the United States. While there is no definitive proof in the opinions to support this distinction, it is evident that the Louisiana Supreme Court treated temporary stays in France differently from those in non-slaveholding states. This distinction highlights the court's recognition of the legal authority of foreign jurisdictions and their impact on the status of slaves brought into their territories, even if only temporarily.

G. California

In the state of California, the actions of a Mississippi resident named Charles Stovall were scrutinized to determine whether his stay in a free state was a temporary sojourn or indicated a more permanent residence.[298] Although Stovall claimed he intended to return to Mississippi within eighteen months, his actions suggested otherwise.[299] He established a school, which he advertised as permanent, and engaged in business activities, including hiring out his slave, Archy, without any indication of an imminent departure.[300] This behavior was seen as violating the state constitutional prohibition of slavery, which the court believed did not permit a slave owner to maintain the status of their slave simply based on an intent to eventually leave the free state.[301]

Stovall's case hinged on whether his stay constituted an actual transit through the state or a more established residency. The court held that the determining factor was whether the individual was genuinely in transit and detained by unavoidable circumstances rather than enjoying the rights and privileges of a citizen in the free state.[302] Stovall's conduct indicated the latter, thus undermining his claim to his slave's continued status as a slave under the doctrine of comity. Ironically, while the court found that Stovall did not meet the criteria of a traveler or visitor, they chose not to enforce this ruling strictly because this was the first case under the existing law.[303] Consequently, the court decided to release the slave back into Stovall's custody, but they clearly stated their intention to enforce the rules strictly in all future cases with similar facts.[304]

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[298] Matter of Archy, 9 Cal. 147 (1858) (enslaved party).
[299] *Id.* at 156.
[300] *Id.*
[301] *Id.* at 157.
[302] *Id.* at 164.
[303] *Id.* at 164, 171.
[304] *Id.* at 171.

H. Missouri

The Supreme Court of Missouri, in *Winny v. Whitesides*, examined the impact of a slave owner's change in domicile on the status of a slave. The case involved Winny, who had been a slave in South Carolina and then moved with her enslaver and his family to Illinois, where slavery was prohibited by the ordinance of 1787.[305] After residing in Illinois for three to four years, they moved to Missouri, bringing Winny with them, and continued to hold her as a slave.[306]

The trial court instructed the jury that if the defendant and her husband resided in Illinois with the intention of making it their home, Winny would be considered free under the Northwest Ordinance of 1787.[307] This indicated that a permanent change of domicile to a free state, accompanied by the intention to settle there, would change the legal status of the slave to a free person. The court concluded that by residing in Illinois with the intention of making it their home, the slave owner had effectively freed Winny.[308] This decision affirmed that the intention to establish a permanent domicile in a free state resulted in the emancipation of slaves brought into that free state or territory.

The same court again addressed the issue of whether merely passing through a free state or territory would emancipate a slave in 1833.[309] The court concluded that for a slave to be emancipated under the constitution of Illinois, the slave owner must have intended to change the domicile to Illinois and not merely travel through it.[310] The court emphasized that the constitution of Illinois aimed to prevent the establishment of slavery by residents of Illinois, not to impede the rights of slave owners from other states passing through.[311] The court further asserted that the U.S. Constitution guarantees citizens' right to travel freely between states with their property, including slaves, without risking forfeiture.[312] The Privileges and Immunities Clause provides this protection, ensuring that citizens can pass through other states without compromising their property rights.[313] Thus, the court's decision emphasized that the intention to permanently reside, rather than mere transit, was crucial in determining the status of a slave, reinforcing the principle that only a change in the slave owner's domicile could affect the legal status of the slave.

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[305] Winny v. Whitesides, 1 Mo. 472, 472–73 (1824) (enslaved party).
[306] *Id.* at 473.
[307] *Id.*
[308] *Id.* at 476.
[309] Julia v. McKinney, 3 Mo. 270, 271–72 (1833) (enslaved party).
[310] *Id.*
[311] *Id.*
[312] *Id.*
[313] *Id.*

In 1834, the Supreme Court of Missouri had to determine whether a slave owner taking a slave into the state of Illinois and using him there as a slave or permitting him to be used as such would result in his emancipation.[314] In *Nat v. Ruddle* a slave sued for his freedom, arguing that his presence and labor in Illinois, a free state, should result in his emancipation.[315] The court, however, emphasized that simply being in Illinois did not grant freedom to a slave.[316]

The court decision highlighted that for a slave to be entitled to his freedom, it must be demonstrated that he was taken to Illinois with the intention of the owner to establish domicile there. The mere fact of traveling or temporarily staying in Illinois did not suffice. The lower court charged the jury to find for the slave only if they believed his enslaver had taken him to Illinois and used him as a slave with the intention of making Illinois their residence.[317] The court concluded that the evidence did not support the slave owner's intent to change his domicile and affirmed the judgment against the slave, reinforcing that only a change in the slave owner's domicile and not temporary residence or transit through a state could alter the status of a slave.

In *Wilson v. Melvin*, the Supreme Court of Missouri examined the implications of domicile on the status of slaves when their owners moved to a free state. The case centered on Edmund Melvin, who had moved from Tennessee to Illinois with two slaves, including Daniel Wilson, the appellant.[318] Melvin's actions and intentions were scrutinized to determine whether he was merely a transient sojourner or had established a more permanent residence in Illinois, thus impacting the legal status of his slaves. Melvin initially arrived in St. Clair County, Illinois, in March 1834 and stayed there until the fall of that year, engaging in activities that suggested a permanent residence, such as making a crop of corn on rented land.[319] Shortly after his arrival, Melvin took his slaves to St. Louis, Missouri, to hire them out, subsequently returning to Illinois to continue his activities.[320]

The court considered whether Melvin's actions constituted a temporary stay or an intention to domicile in Illinois. The evidence showed that Melvin had engaged in business, hired out his slaves, and resided in Illinois for an extended period, contradicting the notion of being a mere transient sojourner.[321] The Supreme Court of Missouri believed that the lower court's instructions misled

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[314] Nat v. Ruddle, 3 Mo. 400, 400–02 (1834) (enslaved party).
[315] *Id.*
[316] *Id.*
[317] *Id.*
[318] Wilson v. Melvin, 4 Mo. 592, 593–94 (1837) (enslaved party).
[319] *Id.* at 594.
[320] *Id.*
[321] *Id.* at 597–98.

the jury by suggesting that Melvin's stay in Illinois might not impact the legal status of his slaves.[322] However, the evidence indicated that Melvin had effectively domiciled in Illinois, making it inappropriate to treat him as a transient visitor.[323] The court emphasized that the true criterion was whether Melvin had made any unnecessary delay in Illinois, indicating a permanent residence rather than a transient visit.[324]

The court concluded that Melvin's stay in Illinois, combined with his business activities and hiring out his slaves, demonstrated an intention to establish domicile.[325] This intention subjected him to Illinois law, which prohibited slavery. This case demonstrates the principle that a slave owner's domicile governed the legal status of a slave, indicating that once Melvin took steps suggesting a permanent residence in Illinois, the state's anti-slavery laws applied to his slaves. It highlights the legal stance that temporary visits or transient stays do not alter the status of slaves, but a change in domicile does, effectively transforming their status according to the laws of the new state.

I. Iowa

Supreme Court of the Territory of Iowa addressed the status of a slave brought into the territory where slavery was prohibited and whether the slave owner's acts of ownership could continue once the slave had become a resident in a free territory.[326] The court determined that when a slave owner permits his slave to become a resident of a free territory, the slave's legal status changes.[327] The court emphasized that property in a slave could not exist without the legal institution of slavery.[328] Therefore, the prohibition of slavery in a free territory leads to the destruction of the slave owner's ownership rights, rendering the slave free.[329]

However, this decision would be overturned by the U.S. Supreme Court's Dred Scott decision, which held that the Missouri Compromise Act of March 6, 1820, which prohibited slavery in the Louisiana Purchase territory north of 36 degrees 30 minutes latitude, was unconstitutional.[330] The Court reasoned that this Act violated the Fifth Amendment's protection against deprivation of property without due process of law and that by restricting slaveholders from

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[322] *Id.*
[323] *Id.* at 598.
[324] *Id.*
[325] *Id.* at 598–99.
[326] *In re* Ralph, Morris 1, 7 (1839) (enslaved party).
[327] *Id.*
[328] *Id.*
[329] *Id.*
[330] *Dred Scott*, 60 U.S. at 452.

bringing their slaves into this territory, the Act effectively stripped them of their property rights as citizens of the United States.[331]

J. Conclusion

Examining the multitude of cases dealing with the concept of domicile and its impact on the status of slaves reveals a fairly consistent legal principle: the intention of the slave owner to establish a permanent residence in a new state determined whether slaves remained in bondage or were emancipated. When a slave owner relocated to a non-slaveholding state with the intent to remain there permanently, the status of the slaves he brought with him was directly affected by the laws of that state. Continuing to consider these individuals as slaves in a state where slavery was not recognized or had been abolished would conflict with the state's policies. The courts seemed to believe that no state in the Union could expect another to modify its social system or adopt an institution contrary to its own legal framework merely through comity. Therefore, a slave owner moving from a slaveholding state to a non-slaveholding state with the intention of establishing a permanent residence effectively emancipated the slaves he brought with him.

Conversely, if a citizen of a slaveholding state, due to necessity, had to travel through a non-slaveholding state with his slaves, the temporary nature of such a journey did not alter the status of the slaves. Transit through a free state would not emancipate the slaves as long as there was no intention to establish domicile in the non-slaveholding state. This distinction is crucial because it delineates the difference between a temporary passage and a permanent change of residence. The status of the slave remains governed by the laws of the slaveholding state during transit but changes when there is a clear intention by the slave owner to reside permanently in a state where slavery is not permitted.

Slaveholding states strongly adhered to this principle of domicile to protect their property rights in slaves taken to free states. By arguing that the domicile of the slave owner determined the legal status of slaves, these states sought to ensure that the temporary presence of slaves in free states did not result in emancipation. This legal interpretation provided a safeguard for slave owners, reinforcing their property rights despite the conflicting legal landscape between slaveholding and non-slaveholding states. Thus, the concept of domicile served as a critical legal foundation for maintaining the institution of slavery within the legal framework of slaveholding states, even when slaves were temporarily taken into free territories.

[331] *Id.* at 450.

V. Conclusion

The analysis of the Somerset precedent and its application across different jurisdictions in the United States reveals a stark divergence in legal interpretations between slaveholding and non-slaveholding states during the antebellum period. The *Somerset* decision, which declared that slavery could only exist with explicit positive law, became a critical tool for non-slaveholding states to challenge and ultimately dismantle the institution of slavery within their borders. By adhering to the principle that the absence of positive law meant freedom for enslaved individuals, these states provided a legal foundation for abolitionist efforts and affirmed the inherent rights to liberty, life, and property.

In contrast, slaveholding states vehemently rejected the *Somerset* principle, asserting that slavery did not require positive law for its perpetuation. These states relied on historical norms, societal practices, and deeply ingrained racial ideologies to maintain the institution of slavery. The principle of domicile emerged as a crucial legal doctrine in these states, ensuring that the status of a slave was determined by the slave owner's place of permanent residence. This legal interpretation allowed slaveholders to retain their property rights in slaves, even when traveling through or temporarily residing in free states.

Through a comprehensive examination of case law, including landmark decisions from both slaveholding and non-slaveholding states, this paper demonstrates how the conflicting views on the necessity of positive law for slavery's existence shaped the legal landscape of the United States. Cases such as *Commonwealth v. Aves*, *State v. Hoppess*, and *Lemmon v. People* exemplify the application of the *Somerset* principle in non-slaveholding states, leading to the emancipation of slaves brought into their jurisdictions. Conversely, rulings from slaveholding states, including *Graham v. Strader*, *Willard v. People*, and *Winny v. Whitesides*, highlight the steadfast adherence to the doctrine of domicile and the protection of slaveholders' rights.

In sum, the divergent legal interpretations of the Somerset decision underscore the deep regional divides over the institution of slavery. Non-slaveholding states leveraged the absence of positive law to advance the cause of freedom and human rights, while slaveholding states entrenched the concept of domicile to safeguard their economic and social structures. This legal divide not only intensified the abolitionist movement but also contributed to the escalating legal and political conflicts that ultimately culminated in the Civil War. The lasting impact of these judicial decisions continues to influence how we understand the legal foundations of slavery, the evolution of American law, and the broader pursuit of justice.