of slaves who returned to a slave state after having been taken by their master to one of the free states or territories carved out of the Northwest Territory. As the Mississippi Supreme Court framed the issue, "[The slaveowners] say, you take from us a vested right arising from the municipal law. The petitioners [slaves] say you would deprive us of a natural right guaranteed by the [Northwest] ordinance and the [Indiana] constitution. How should the Court decide, if construction was really to determine it? I presume it would be in favour of liberty."[169] The Kentucky court agreed, holding on neo-*Somerset* principles that since slavery was a right existing only by positive law and "without foundation in the law of nature," it would dissolve when the master took his slaves to a free jurisdiction.[170] The Louisiana court extended this analysis and endorsed the "free for a moment, free forever" principle that antislavery advocates had unsuccessfully tried to get English courts to adopt, though the Louisiana judges were less influenced by English antislavery thought than by the explicit regulation to that effect in the *Partidas*.[171]

These early Southern cases were anomalous in two respects: the courts adopted neo-*Somerset* principles without the modification suggested by *Grace* (the reattachment principle);[172] and they largely ignored the implications of their holdings for problems in the conflict of laws. This approach did not resolve or even evade conflicts questions; it simply postponed them. As the law of conflicts outgrew its roots in private international law and was used to guide the workings of American federalism, its conceptual categories increasingly shaped the American law of slavery.

Justice Joseph Story, a firm though moderate opponent of slavery and the slave trade, tried to strike a blow at the international slave trade by an extension of neo-*Somerset* principles into the conflicts area. In a case coming up in the First Circuit, *La Jeune Eugenie*,[173] Story declared that the bases of international law were threefold: natural law ("the general principles of right and wrong"), "usages" (custom), and the positive law embodied in treaties and municipal law.[174] Drawing on the ancient Roman con-

169. Harry v. Decker & Hopkins, 1 Miss. (Walker) 36, 43 (1818).

170. Rankin v. Lydia, 9 Ky. (2 A.K. Marshall) 467 (1820).

171. Lunsford v. Coquillon, 14 Mart. 465 (La. 1824); Marie Louise v. Marot, 9 La. 473 (1835). The *Partidas* provision is quoted in Delphine v. Deveze, 2 Mart. (n.s.) 650 (La. 1824). This rule was reversed by statute. La. Acts 1846, c. 189.

172. *See* text and notes at notes 86-87 *supra*.

173. United States v. The La Jeune Eugenie, 26 F. Cas. 832 (No. 15,551) (C.C.D. Mass. 1822).

174. *Id.* at 846.

cept of the *jus gentium* (the law of nations),[175] Story stated that it included every principle "that may be fairly deduced by correct reasoning from the rights and duties of nations, and the nature of moral obligation." These natural law principles, he said, were enforceable in American courts. On that basis, Story held that the international slave trade was "repugnant to the great principles of Christian duty, the dictates of natural religion, the obligations of good faith and morality, and the eternal maxims of social justice," and "inconsistent with any system of law that purports to rest on the authority of reason or revelation. And it is sufficient to stamp any trade as interdicted by public law, when it can justly be affirmed, that it is repugnant to the general principles of justice and humanity."[176] *Eugenie* was significant both because it condemned the international slave trade and because it sweepingly asserted a federal judicial power based on natural law premises as broad as those previously enunciated by Justice Samuel Chase in *Calder v. Bull*.[177]

This broad approach, however, was too much for Story's brethren. Three years later, the Supreme Court, in an opinion by Chief Justice Marshall, rejected the doctrine and implications of *Eugenie* without mentioning that decision. In *The Antelope*,[178] Marshall rejected the natural law analysis that Story had drawn from the law of nations; held that slavery was founded on captivity in war, which, though unlawful, was "a legitimate result of force"; and concluded that since the sources of international law were limited to "usages" and positive law, the great powers had legitimated the slave trade so far as American jurists were concerned.[179] After *The Antelope*, the natural law component of the *jus gentium* was no longer normative, and municipal law was consistently the starting point for questions of slavery's legitimacy.[180] Yet *The Antelope* did not completely repudiate *Somerset;* in dictum, Marshall adopted the neo-*Somerset* principle that slavery was incompatible with natural law and could therefore be established only by positive enactment or clearly defined international custom.[181]

175. *See generally* Black's Law Dictionary 997 (4th ed. 1951).

176. 26 F. Cas. at 846.

177. 3 U.S. (3 Dall.) 386 (1798).

178. 23 U.S. (10 Wheat.) 66 (1825).

179. *Id.* at 120-21.

180. Note, *American Slavery and the Conflict of Laws*, 71 Colum. L. Rev. 74, 89 (1971) [hereinafter cited as Note, *Conflict of Laws*].

181. 23 U.S. (10 Wheat.) at 122; *see* Roper, *In Quest of Judicial Objectivity: The Marshall Court and the Legitimation of Slavery*, 21 Stan. L. Rev. 532 (1969).

After *The Antelope,* conflicts cases in American courts tended to come up not in an international law setting, but rather in situations requiring the accommodation of the laws of one American state to the laws and institutions of another. At this time, the American law of conflicts was undergoing transformation at two levels. At a general level, conflicts law was shifting its basis from the idea of a universal moral obligation to the principle of *comitas gentium,* as Story had advocated in his *Conflict of Laws.*[182] Commentators and judges (Story being the exemplar of both) became hostile to notions of extraterritoriality and ubiquity, especially in questions of status derived from a *lex domicilii.*[183] On a more particular level, American conflicts law before 1830 had been premised on interjurisdictional accommodation, in which judges shaped the *lex fori* to integrate as smoothly as possible with the institutions and policies of the foreign jurisdiction.[184] After 1830, during the exacerbation of the slavery controversy, American states tended to exalt public policy considerations of the *lex fori,* and the accommodationist impulse disintegrated.

These general and particular tendencies were obvious in *Polydore v. Prince,*[185] a federal district court case in which Judge Ashur Ware of Maine carefully discriminated between a status based on the *lex domicilii* and the incidents of that status. The latter, he ruled, would not govern slaves in a free state if they were not founded in nature and particularly if they were contrary to the institutions of the forum state. The court, though relying on *Somerset,* accepted the *Grace* qualification that status would reattach when the slave returned to a jurisdiction recognizing slavery.

The emergent primacy of the *Polydore-comitas gentium* approach caused a divergence between Northern and Southern courts that culminated in outright hostility on the eve of the Civil War. In the North, antislavery activists seized upon and sometimes created *causes célèbres* to move the increasingly sympathetic Northern judiciary to antislavery positions derived ultimately from *Somerset* principles. Southern courts angrily responded by first narrowing, then repudiating entirely, *Somerset's* liberating possibilities.

The vehicles for the Northern courts' neo-*Somerset* approach to

182. J. Story, *supra* note 68, §§ 95-96a.

183. Note, *Conflict of Laws, supra* note 180, at 90-93.

184. Horowitz, *Choice-of-Law Decisions Involving Slavery: "Interest Analysis" in the Early Nineteenth Century,* 17 U.C.L.A.L. Rev. 587 (1970).

185. 19 F. Cas. 950 (No. 11,257) (D.C. Me. 1837). On the impact of *Polydore* on conflicts of law, see R. Graveson, Status in the Common Law 28, 64-87, 105 (1953).

conflicts problems were cases involving sojourners' slaves (slaves brought into the jurisdiction by and with their master for temporary residence), fugitive slaves, or *in transitu* slaves (slaves being transported through the forum jurisdiction with or without their master). In each of these cases, antislavery counsel contended that the slave's entry into a free jurisdiction accomplished a liberation that could not be defeated by the *lex domicilii* through principles of comity.

Massachusetts lawyers made a bold assault on the status of sojourners' slaves in the Med case, *Commonwealth v. Aves,*[186] and won a much more stunning victory than they could have expected from the conservative Whig and great antebellum Chief Justice of the Supreme Judicial Court, Lemuel Shaw. Med's case began when a group of Yankee dragons organized the Boston Female Anti-Slavery Society. This group included such prominent abolitionists as the Weston sisters (Anne, Caroline, and Maria Weston Chapman), Lydia Maria Child, Henrietta Sargent, and Eliza Follen. Deciding, as they put it, to "disinter the law of Massachusetts" on behalf of slaves coming into the Bay State,[187] they persuaded Ellis Gray Loring and Rufus Choate to secure a writ of habeas corpus on behalf of a six-year-old black girl, Med, brought by her mistress into Massachusetts for a visit.

In argument, Choate and Loring recited every element of Mansfield's opinion and even some points from Hargrave's argument to demonstrate that Med became free when her mistress voluntarily brought her into Massachusetts and that a Bay State court need not respect the property right claim under the principles of comity. Benjamin R. Curtis, on the other side, suggested to the court that *Grace,* rather than *Somerset,* was determinative, dismissing Mansfield's words as "highly figurative and declamatory language."

Chief Justice Shaw was indifferent if not hostile to the antislavery plea of Med's intercessors, but he was even more hostile to the extension of slavery into Massachusetts. He declared that slavery was so repugnant to natural law that it could only be established by positive municipal law. Although he did not regard slavery as contrary to the *jus gentium,* Shaw stated that Massachusetts would recognize by comity only property rights in things, not in persons.

186. 35 Mass. (18 Pick.) 193 (1836). An excellent account of this case is contained in L. Levy, The Law of the Commonwealth and Chief Justice Shaw 62-68 (1957).

187. M. Chapman, Right and Wrong in Boston, in 1836. Annual Report of the Boston Female Anti-Slavery Society; Being a Concise History of the Cases of the Slave Child, Med 48, 63-71 (1836).

Thus, the *lex domicilii* of slavery in Louisiana did not extend into Massachusetts, and a master had no power to compel a slave to return to a slave jurisdiction. The Med decision almost completely absorbed *Somerset* into American law. The Boston ladies paid a curiously effective tribute to the English precedent by literally renaming the little girl Med Maria Sommersett.

Another dramatic illustration of the disintegration of the accommodationist impulse emerged in a series of cases in two contiguous jurisdictions, one slave (Missouri) and the other free (Illinois). These states had extensive commercial and social intercourse between them. Before 1845, courts in each of the two states went out of their way to respect the social policies of the other. For example, in *Willard v. The People,*[188] the Illinois Supreme Court affirmed a slaveowner's right of transit across Illinois to Missouri with his slaves. Meanwhile, in *Rachel v. Walker*[189] an army officer had taken a slave for four years to Fort Snelling in Wisconsin Territory, which was a free area under the Northwest Ordinance. The Missouri Supreme Court held the slave free on the grounds that only "necessity" and not "interest or convenience" was an adequate ground for tolling the liberation of a sojourner's slave.

After antislavery constitutionalism had had its impact on Northern and Southern courts, the Missouri and Illinois Supreme Courts adopted a posture of increasing mutual hostility, culminating in two cases that discourteously disavowed the accommodationist spirit of *Willard* and *Rachel.* In *Rodney v. Illinois Central Railroad,*[190] a slaveowner sued a railroad for letting a fugitive slave ride on its train to freedom. The Illinois Supreme Court denied a remedy on the ground that Missouri's toleration of slaveholding was repugnant to Illinois policy. The Missouri Supreme Court, in *Scott v. Emerson,*[191] the state level predecessor to *Dred Scott,* overruled *Rachel,* holding under identical factual circumstances that the sojourner's slave did not become free. The majority bluntly stated the policy underlying this new posture:

> Times are not as they were when the former decisions on this subject were made. Since then not only individuals but states have been possessed with a dark and fell spirit in relation to slavery, whose gratification is sought in the pursuit of measures, whose inevitable consequences must be the overthrow

188. 5 Ill. (4 Scam.) 461 (1843).
189. 4 Mo. 350 (1813).
190. 19 Ill. 42 (1857).
191. 13 Mo. 576 (1852).

> and destruction of our government. Under such circumstances, it does not behoove the state of Missouri to show the least countenance to any measures which might gratify this spirit.[192]

The problem of fugitive slaves was more difficult for American courts than the sojourner issue. In the latter, the master voluntarily assumed some risks in taking his slave to a free jurisdiction. In fugitive cases, moreover, the fugitive slave clause in the United States Constitution considerably complicated the problem of interstate relations.[193] An early fugitive slave case in the Supreme Court of Michigan Territory, In re *Pattinson,*[194] suggests how relatively simple the fugitive problem might have been in American jurisdictions had it not been for the clause. In *Pattinson,* the master-claimant was a Canadian, and Justice Augustus B. Woodward could dispose of the case on "pure" conflicts grounds. He reinterpreted *Somerset* to have held that "a right of property cannot exist in the human species" and maintained that slavery was "in contravention of the rights of human nature." He concluded that to restore slaves to a British master would be to permit the *lex domicilii* to penetrate free jurisdictions in contravention of their constitutions (here, the Northwest Ordinance) and their public policy.

The fugitive slave clause added a new dimension to conflicts problems between American jurisdictions because, drafted in the passive voice, it did not specify who was to carry the burden of enforcement: "No Person . . . shall . . . be discharged . . . but shall be delivered up . . . ." All that was syntactically beyond doubt was that the clause worked a partial modification of *Somerset* in the American union, preventing a free state from modifying the status of a runaway slave from another state.[195] The Second Congress, in enacting the Fugitive Slave Act of 1793,[196] tried to settle the question of responsibility by establishing a mechanism, under federal and state auspices, through which slaveowners or their

192. *Id.* at 586.
193. "No Person held to Service or Labour in one State, under the Laws thereof, escaping into another, shall, in Consequence of any Law or Regulation therein, be discharged from such Service or Labour, but shall be delivered up on Claim of the Party to whom such Service or Labour may be due." U.S. CONST. art IV, § 2.
194. (Sup. Ct. 1807), in 1 TRANSACTIONS OF THE SUPREME COURT OF THE TERRITORY OF MICHIGAN 1805-1814, at 414-18 (W. Blume ed. 1935).
195. *See* S. CAMPBELL, THE SLAVE CATCHERS: ENFORCEMENT OF THE FUGITIVE SLAVE LAW, 1850-1860, at 26-48 (1968).
196. Act of Feb. 12, 1793, ch. 7, 1 Stat. 302.