agents could get certificates permitting removal of alleged fugitives. In the particularist phase of American conflicts doctrine, abolitionist lawyers contested the constitutionality of this hybrid machinery.

The first major challenge occurred when James Gillespie Birney and Salmon P. Chase tried to thwart the virtual kidnapping of a nearly white girl, Matilda Lawrence, who had worked as a servant in the Birney household. Birney, a former slaveowner, Alabama state legislator, and agent for the American Colonization Society, had been one of the most spectacular converts to the antislavery cause, while Chase was a rising young Cincinnati lawyer destined to become United States Senator, Secretary of the Treasury, and Chief Justice of the United States. They brought an action in an Ohio Court of Common Pleas to secure a writ of habeas corpus to prevent the girl's seizure under the Fugitive Slave Act.[197]

Their arguments in the case demonstrated how flexible and powerful neo-*Somerset* could be in American constitutional controversy. Chase began his effort with a skillful, broad restatement of the *Somerset* view of slavery, claiming that the right to hold a slave "can have no existence beyond the territorial limits of the state which sanctions it, except in other states whose positive law recognises [*sic*] and protects it. . . . The moment a slave comes within [a free state] he acquires a legal right to freedom." Chase insisted that slavery violated a natural right to individual liberty, a right given by God, "proclaimed by our fathers, in the declaration of independence, to be selfevident and reiterated in our state constitution as its fundamental axiom, that all men are born 'equally free'."[198] Sandwiched between these broad appeals was a workmanlike construction of the role of state courts and the writ of habeas corpus as guarantors of individual liberty, and an argument on the unconstitutionality of the Fugitive Slave Act. The Matilda case was a noble effort, but it tragically failed to secure the liberty of Matilda herself, who was hustled off by her captors to the impenetrable obscurity of Louisiana or Mississippi slavery.

Recognizing that such questions were beginning to pose an ominous threat to the union, Justice Joseph Story determined to grasp the nettle in an 1842 case designed to force a ruling on the

197. *See generally* B. Fladeland, James Gillespie Birney: Slaveholder to Abolitionist 149-54 (1955), on the *Matilda* case.

198. Speech of Salmon P. Chase, In the Case of the Colored Woman, Matilda 8, 38 (1837).

constitutionality of state personal liberty laws. These were a series of statutes, enacted in some Northern states beginning in the 1820s, that provided procedural safeguards like habeas corpus, jury trial, or the writ *de homine replegiando* to alleged fugitives. In *Prigg v. Pennsylvania*,[199] Story reaffirmed the validity of *Somerset* by describing slavery as "a mere municipal regulation, founded upon and limited to the range of the [domiciliary state's] territorial laws."[200] He upheld the constitutionality of the federal act, adopted the "historical necessity" thesis that the fugitive slave clause had been a *sine qua non* for Southern ratification of the federal Constitution, and concluded that the clause voided state acts inconsistent with the 1793 federal statute. He qualified this holding, however, by what he viewed as a large concession to antislavery: state officials were not obligated to assist in the enforcement of the federal law.

Story's concession did not conciliate antislavery opinion in the Northern states, nor did it dispose of slavery-related conflicts questions. As the sectional controversy intensified, Northern courts increasingly denied the extraterritorial effect of the *lex domicilii* of slavery as Illinois had done. This tendency reached its apogee in two state court decisions that were part of the Northern riposte to *Dred Scott*.[201] In *Anderson v. Poindexter*,[202] the Ohio Supreme Court held that a slave coming into a free jurisdiction (with the consent of the master) for a temporary sojourn was automatically freed because slavery was "repugnant to reason and the principles of natural law" under *Somerset*. The court refused to adopt the *Grace* reattachment principle or to recognize the continuation of slave status under principles of comity.

Lemmon v. The People,[203] involved not sojourners' slaves, but slaves *in transitu*. The slaves' mistress was on her way from Virginia to Texas, via the port of New York, and the slaves were in effect being transshipped. The New York Court of Appeals declared them free on Mansfield's principles. The case was potentially a greater jolt to the American federal system than the sojourner cases, which at least involved temporary residency; by ignoring comity arguments, the New York court elevated an antislavery neo-*Somerset* philosophy above the postulates of Chief Justice

199. 41 U.S. (16 Pet.) 539 (1842).

200. *Id.* at 611-12.

201. Scott v. Sandford, 60 U.S. (19 How.) 393 (1857).

202. 6 Ohio St. 623 (1857).

203. 20 N.Y. 562 (1860).

Taney's *Dred Scott* opinion.[204] The owner appealed the decision to the United States Supreme Court, and antislavery propagandists panicked, fearing that a reversal of the New York judgment would establish slavery itself in the free states. The onset of war aborted this possibility, and *Lemmon* today is forgotten; but in its brief historical moment it marked the uttermost expansion of the libertarian implications of *Somerset.*

Southern state supreme courts were not indifferent to these trends. In the accommodationist period of conflict of laws development, some of them had held that a slave taken into a free jurisdiction could not be reenslaved when returned to the domiciliary state;[205] but in later years Southern courts rejected *Somerset* in favor of *Grace.*[206] This anti-*Somerset* tendency culminated in the judicial doctrines voiced by Joseph Henry Lumpkin, Chief Justice of the Supreme Court of Georgia, who in 1855 vehemently said: "I utterly repudiate the whole current of decision . . . from Somerset's case down . . . which hold that the bare removal to a free country . . . will give freedom. . . . This fungus has been engrafted upon [free state] Codes by the foul and fell spirit of modern fanaticism."[207]

Southern Justices on the United States Supreme Court approached the same problem more circuitously but in a way vastly more alarming to those who wished to stop the spread of slavery or to preserve freedom in the Northern states. In *Strader v. Graham,*[208] Chief Justice Roger B. Taney, in a majority opinion replete with unsettling dicta hostile to antislavery, held that every state had power to determine the status of persons within its jurisdiction, "except in so far as the powers of the states in this respect are restrained, or duties and obligations imposed on them, by the Constitution of the United States." We do not know how far Taney had thought through the import of this proviso. He may have meant nothing more than that the fugitive slave clause restrained

204. For a contemporary discussion on the political and social atmosphere of the late 1850s, see REASONS FOR JOINING THE REPUBLICAN PARTY. REASONS OF HON. SAMUEL A. FOOT, LATE JUDGE OF THE SUPREME COURT OF NEW YORK 4 (1855) and T. PARKER, THE PRESENT ASPECT OF SLAVERY IN AMERICA AND THE IMMEDIATE DUTY OF THE NORTH 20 (1858).

205. Lunsford v. Coquillon, 14 Mart. 465 (La. 1824); Hunter v. Fulcher, 28 Va. 189, 1 Leigh 172 (1829).

206. *See, e.g.*, Graham v. Strader, 44 Ky. (5 B. Mon.) 173 (1844), *dismissed for want of jurisdiction,* 51 U.S. (10 How.) 82 (1850); Guillemette v. Harper, 4 Rich. 186, 191 (S.C. 1850) (dictum).

207. Cleland v. Waters, 19 Ga. 35, 41-42 (1855).

208. 51 U.S. (10 How.) 82, 93 (1850).

the states from liberating fugitives coming within their borders, not a startling or novel assertion. But lurking within his qualification was the possibility that some clause or construction of the federal Constitution might be held to restrain the power of the free states to repel the intrusion of slavery from without—for example, by being unable to declare sojourners' slaves free. Or worse: conceivably the proslavery majority of the Court might hold that no state could interfere in any way with a master's right of property in his slave. Then all states would be slave states. For Northerners, this possibility was epitomized in a remark widely attributed to Georgia Senator Robert Toombs, who supposedly boasted that he would call the roll of his slaves at the foot of Bunker Hill.[209]

Two events of the mid-1850s convinced antislavery and Free Soil Northerners that neither of these latter possibilities was implausible. The first was the calamity of the *Dred Scott*[210] decision, in which Justice Nelson repeated Taney's qualification nearly verbatim;[211] in which Justice Daniel insisted that *Grace,* not *Somerset,* was determinative for American courts on the reattachment of status;[212] and in which the two Justices (McLean and Curtis) who adverted to *Somerset* principles favorably were obviously outnumbered.[213] More to the point, Taney (whose opinion was taken by contemporaries to be for the Court) denied that Congress had power to exclude slavery from the territories, because of the due process clause of the Fifth Amendment.[214] Though this amendment, under the doctrine of *Barron v. Baltimore,*[215] was not binding on the states, it took little imagination to see that comparable "law of the land" (due process) clauses of the state constitutions could be construed to have the same effect, or that some other clause of the federal Constitution might be interpreted as a corresponding limitation on state power. For example, if slavery were considered to have a contractual basis, the obligation of contracts clause of article I, section 10, might be held to prohibit state interference with the "contract" between master and slave; or the full faith and credit or privileges and immunities clauses of article IV, sections 1

209. Toombs denied having said this. P. STOVALL, ROBERT TOOMBS: STATESMAN, SPEAKER, SOLDIER, SAGE 119 (1892).

210. Scott v. Sandford, 60 U.S. (19 How.) 393 (1857).

211. *Id.* at 459.

212. *Id.* at 486.

213. *Id.* at 529, 564.

214. *Id.* at 449-52.

215. Barron v. Mayor & City Coun. of Baltimore, 32 U.S. (7 Pet.) 243 (1833).