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ARTICLES

Citizens of the State

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According to conventional wisdom, state citizenship emerged out of the localism of early America and gave way to national citizenship with the ratification of the Fourteenth Amendment. This Article offers a different account of state citizenship and, with it, new resources for analyzing the Constitution. It argues that far from a primordial category that receded into irrelevance, state citizenship provided a crucial strategic tool in America's antislavery movement, as abolitionist lawyers used the label of state citizenship to build a coalition with white elites by reframing the issue of slavery from the rights of a black person to the sovereignty of a state.

In particular, beginning in the mid-1830s, abolitionist lawyers in Boston who confronted the limits of inherited arguments based on national citizenship turned to the Constitution's clause guaranteeing the privileges and immunities of state citizenship. By pairing this Article IV clause with the then-prevailing norm of a state's sovereign duty to protect its citizens, these lawyers argued that failure on the part of Massachusetts to intervene in the police laws of the southern coastal states targeting free blacks would imperil the state's beleaguered standing. These arguments in turn became the basis for the country's first challenge to the laws of the southern states

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that stripped black men of their liberty without due process, as lawmakers in Boston organized an Article IV lawsuit with the aim of vindicating the state's coequal sovereign status. Propelled by this convergence of interests, state citizenship remained a distinct status for the drafters of the Fourteenth Amendment who envisioned that states would continue to play a role in the protection of individual rights.

By excavating this neglected history, this Article reveals a constitutional terrain defined not by a feuding North and South, but by an ever-shifting number of jurisdictions, bound in a domestic economy rooted in race-based slavery. At the same time, this Article unearths a robust precedent for current state initiatives to extend protections to individuals denied national citizenship. In doing so, it offers a more expansive definition of state sovereignty: one premised not simply on a state's autonomy from the national government, but also on a state's duty to protect its citizens.

INTRODUCTION

In the midst of a New England winter long ago, young people of Boston filed into a drafty meeting hall up the road from the harbor.[1] They had assembled on that January morning in 1839 for the seventh annual meeting of the New England Anti-Slavery Society.[2] As they took their seats in anticipation of the day's proceedings—boots rumbling on the floorboards, sticks drumming on the pews—those at the podium began to speak out against the police laws of the southern states that stripped black men of their liberty without due process.[3] In time, these antislavery lawyers and activists would be remembered as northerners

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1 See *Massachusetts Anti-Slavery Society*, Emancipator (Jan 31, 1839).

2 Id.

3 Id. See also *Report on the Deliverance of Citizens, Liable to Be Sold as Slaves*, Mass HR Rep No 38, 60th Sess 9–12 (1839) (listing the police laws in question); Michael

who sought to secure the promise of national citizenship for free blacks.[4] And yet that winter, these activists whose words and deeds would later inform the drafting of the Fourteenth Amendment[5] looked beyond the language of national citizenship. Instead, they referred to the black men of Boston who had been lost to the prisons and chain gangs of the plantation coast not as citizens of America, nor as fellow children of an almighty God, but as citizens of the sovereign state of Massachusetts.[6]

In the generations since these members of America's antislavery movement seized on the State Citizenship Clause of Article IV[7] to launch what soon became one of the country's earliest and most

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Schoeppner, *Peculiar Quarantines: The Seamen Acts and Regulatory Authority in the Antebellum South*, 31 L & Hist Rev 559, 563–86 (2013) (tracing the origins and functions of the police laws in the southern states).

4 See, for example, Arthur M. Schlesinger, *New Viewpoints in American History* 230 (Macmillan 1922) (describing the emergence of an antislavery movement that looked to the national government to protect free blacks); Chester James Antieau, *Paul's Perverted Privileges or the True Meaning of the Privileges and Immunities Clause of Article Four*, 9 Wm & Mary L Rev 1, 25 (1967) (arguing that the Privileges and Immunities Clause was the "prime recognition of national citizenship"); Paul Finkelman, *States' Rights North and South in Antebellum America*, in Kermit L. Hall and James W. Ely Jr, eds, *An Uncertain Tradition: Constitutionalism and the History of the South* 125, 146 (Georgia 1989) (identifying the emergence of an antislavery nationalism in the North that easily jettisoned ideas of state sovereignty); Philip Hamburger, *Privileges or Immunities*, 105 Nw U L Rev 61, 96 (2011) ("[A]ntislavery Americans increasingly asserted that free blacks were citizens of the United States."); Thomas H. Burrell, *Privileges and Immunities and the Journey from the Articles of Confederation to the United States Constitution: Courts on National Citizenship and Antidiscrimination*, 35 Whittier L Rev 199, 277 (2014) (arguing that antislavery activists used Article IV to argue for national citizenship for free blacks); Elizabeth Beaumont, *The Civic Constitution: Civic Visions and Struggles in the Path toward Constitutional Democracy* 134–36 (Oxford 2014) (arguing that antislavery activists sought to create national citizenship for free blacks).

5 See Charles Fairman, *Does the Fourteenth Amendment Incorporate the Bill of Rights? The Original Understanding*, 2 Stan L Rev 5, 22 (1949) (describing the campaign as a "stock example" during the debates of the Fourteenth Amendment); Alfred Avins, ed, *The Reconstruction Amendments' Debates: The Legislative History and Contemporary Debates in Congress on the 13th, 14th, and 15th Amendments* 748 (Virginia Commission on Constitutional Government 1967) (listing thirteen references to the campaign during the Fourteenth Amendment debates); Akhil Reed Amar, *The Bill of Rights: Creation and Reconstruction* 236 (Yale 1998) (arguing that the history of this failed campaign "burned bright in the memories of members of Congress, who repeatedly cited the incident").

6 *Massachusetts Anti-Slavery Society*, Emancipator (cited in note 1). See also Mass HR Rep No 38 at 6–7 (cited in note 3) (challenging the laws of the southern states as violations of the State Citizenship Clause).

7 See US Const Art IV, § 2, cl 1 ("The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States."). Although scholars have traditionally referred to this clause as the Privileges and Immunities Clause or the Comity Clause, I refer to it as the State Citizenship Clause, in recognition of the significance that antebellum legal actors placed on its opening phrase of state citizenship.

prominent legal challenges to a state's deprivation of liberty without due process—a challenge whose failure to reach federal court in turn became a catalyst for the Fourteenth Amendment—our understanding of how, why, and to what ends they did so has remained hazy at best. Owing in part to a tendency within the academic literature to focus on the creation of national citizenship in the Fourteenth Amendment,[8] we have only begun to explore the long history of state citizenship that preceded the amendment. Working from the familiar assumption that concepts of national citizenship were at best vague and even nonexistent prior to the march of Lincoln's armies in the Civil War,[9] the most prominent explanation holds that antislavery lawyers enlisted the aid of the State Citizenship Clause as part of a more general effort to create national citizenship for free blacks.[10]

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[8] See, for example, Edward S. Corwin, *The Constitution and What It Means Today* 103 (Princeton 1924) ("The opening clause of [the Fourteenth Amendment] makes national citizenship primary and State citizenship derivative therefrom."); James H. Kettner, *The Development of American Citizenship, 1608–1870* 349 (North Carolina 1978) (noting that "as a consequence of the Union's victory . . . there was no longer any doubt that national citizenship was primary"); Eric Foner, *Reconstruction: America's Unfinished Revolution, 1863–1877* 258 (Harper & Row 1988) ("In establishing the primacy of a national citizenship . . . Republicans carried forward the state-building process born of the Civil War."); Bruce Ackerman, 2 *We the People: Transformations* 198 (Belknap 1998) ("[T]he opening words of the Fourteenth Amendment" declared "the primacy of national citizenship and treat[ed] state citizenship as derivative."); Akhil Reed Amar, *America's Constitution: A Biography* 381 (Random House 2006) ("The Fourteenth Amendment made clear that all Americans were in fact citizens of the nation first and foremost, with a status and set of birthrights explicitly affirmed in a national Constitution.").

[9] See, for example, William J. Novak, *The Legal Transformation of Citizenship in Nineteenth-Century America*, in Meg Jacobs, William J. Novak, and Julian E. Zelizer, eds, *The Democratic Experiment: New Directions in American Political History* 85, 92 (Princeton 2003) (arguing that national citizenship did not exist as a salient category in antebellum America); Douglas Bradburn, *The Citizenship Revolution: Politics and the Creation of the American Union, 1774–1804* 2 (Virginia 2009) ("[A]nyone who called for a strong national state or encouraged a national standard for American citizenship dissented from the common view."); Ariela J. Gross, *What Blood Won't Tell: A History of Race on Trial in America* 7 (Harvard 2008) ("Before the Civil War one could be a citizen of one's home state, but there was no such thing as national citizenship."); H. Robert Baker, *The Fugitive Slave Clause and the Antebellum Constitution*, 30 L & Hist Rev 1133, 1142 (2012) ("[T]he paramount authority for determining what privileges, protections, and restrictions belonged to each person [in the antebellum era] was the sovereign state."); Kunal Parker, *Making Foreigners: Immigration and Citizenship Law in America, 1600–2000* 65 (Cambridge 2015) ("Because of the limited powers of the federal government [in the antebellum era], however, states played a relatively greater role in shaping immigration policy through the shaping of alien legal disabilities."); Nicholas Guyatt, *Bind Us Apart: How Enlightened Americans Invented Racial Segregation* 71 (Basic Books 2016) ("Until ratification of the Fourteenth Amendment . . . the Constitution envisaged that Americans would become citizens through the laws of the state in which they were born or naturalized.").

[10] See note 8.

This Article offers a different explanation for the prominence of state citizenship in America's antislavery movement, and with it, a new set of tools for analyzing the past and present of America's Constitution. Drawing on extensive archival research, it argues that in the decades prior to the Fourteenth Amendment, the lawyers who seized on the State Citizenship Clause of Article IV did so not with the primary aim of creating national citizenship for free blacks, as is often presumed. Rather, they did so as part of a successful effort to build an antislavery coalition by reframing the issue of American slavery from the rights of a black person to the sovereignty of a free state.

In particular, these records reveal that the abolitionist lawyers who began to construct a legal challenge to the police laws of the southern states using the State Citizenship Clause did so at a moment of crisis in the antislavery movement: a time when inherited arguments premised on the natural rights of black people as Americans had proven ill suited for a North defined by deep racism and vast investments in southern slavery. Confronted with the imminent collapse of their faltering movement, a small group of commercially trained lawyers developed a new strategy, based on the State Citizenship Clause of Article IV—a clause that until then had primarily been used in private law practice to keep the cargo ships in motion along the nation's central shipping highway that connected the shipyards of Boston to the wharves of New Orleans. By pairing this clause with a government's widely recognized sovereign duty to protect its citizens, these lawyers argued that the failure of Massachusetts to challenge the southern policing of the free black men who worked Boston's cargo ships would constitute an abdication of the state's sovereign status—and thus, the unraveling of one of the world's oldest experiments in constitutional governance.[11]

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[11] For background on the history and significance of the Massachusetts Constitution, see Ronald M. Peters Jr, *The Massachusetts Constitution of 1780: A Social Compact* 13 (Massachusetts 1978) (arguing that the Massachusetts Constitution "was among the first written constitutions in the world, was the first written constitution ever based upon the fully developed concept of a constitutional convention, and was the first written constitution ever expressly approved by the people over whom it was to operate"). See also Lawrence M. Friedman and Lynnea Thody, *The Massachusetts State Constitution* 3 (Oxford 2011) ("Constitutional rule in America, in its earliest forms, began with the uses to which residents of Massachusetts put the Bay Colony's royal charter of 1629, and the Massachusetts Constitution of 1780 remains the oldest functioning written constitution in the world.").

Far from receding under the shadow of national citizenship, these state-citizenship arguments quickly ascended into the mainstream of constitutional discourse. Troubled by the waning commercial power of Boston on a continent of highly volatile territorial borders and the debris of fallen empires, Massachusetts lawmakers appropriated these state-centric arguments following a series of dramatic shifts in the constitutional terrain in the early 1840s. Most notably, in the wake of the US Supreme Court's interpretation of the Fugitive Slave Clause of Article IV in *Prigg v Pennsylvania*,[12] these lawmakers organized a corollary lawsuit based on the State Citizenship Clause with hopes of vindicating the state's coequal status in the highly visible forum of the Supreme Court. Unwilling to jeopardize New England's trade partnerships with the plantation South, however, these elites rejected the abolitionists' recommendations to resort to arms when the legislatures of South Carolina and Louisiana refused to allow this litigation to proceed. Instead, borrowing from a model of international dispute resolution first codified in the Alien Tort Statute of 1789,[13] these lawmakers made clear that in America's slave-based economy, a state would fulfill its sovereign duty of protection to its citizens not on the battlefield but through state-sponsored litigation in federal court.

In lieu of disappearing in the nation-building moment of the Civil War, this conception of state citizenship and its corollary sovereign duty of protection forged the collective memory against which the nation's lawmakers began to draft the Fourteenth Amendment following the uncertain end to American slavery. As Part III argues, when these lawmakers assembled in Washington to begin constructing the laws for a new republic, they routinely cited the history that lies at the heart of this Article: a history not of northern abolitionists steadily building toward a regime of national citizenship, but rather of a state whose agents had endeavored to use the federal courts to protect the rights of those precluded from national citizenship. Working from this shared, now-forgotten legacy of America's age of slavery, these lawmakers who hammered the category of state citizenship into the Fourteenth Amendment did so with the expectation that at a time of immense brutality and logistical constraints on federal power, the state

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12 41 US (16 Pet) 539 (1842).

13 Judiciary Act of 1789 § 9, 1 Stat 73, 76–77, codified as amended at 28 USC § 1350.

governments of America would continue to fulfill their sovereign duty to protect the rights of their citizens.

This account of the rise of state citizenship from the meeting halls of Boston to the text of the Fourteenth Amendment has broad implications for how we think about the past and present of America's Constitution. First, this work challenges the long-standing preoccupation with national citizenship as the dominant vehicle for safeguarding individual rights in America. Building on earlier accounts that have recognized the role of the states in rights protection,[14] this work allows us to see the tragic intricacies of how and why this role emerged: not only through the formal processes of amending state constitutions to create positive rights,[15] but also through the daily challenges of grassroots organizing and the geopolitical struggles for power. By examining why state citizenship became the means by which disillusioned activists sought to secure the support of commercial elites—and by which these elites, in turn, endeavored to preserve their power through the courts—this work provides an early example of what constitutional scholar Derrick Bell identified as the convergence of interests that enabled racial desegregation in the 1950s.[16]

Methodologically, this work builds on ongoing scholarly efforts to move beyond the conventional binaries that have long held center stage in the study of American federalism.[17] While

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[14] See, for example, William J. Brennan Jr, *State Constitutions and the Protection of Individual Rights*, 90 Harv L Rev 489, 491 (1977) ("State constitutions [ ] are a font of individual liberties, their protections often extending beyond those required by the Supreme Court's interpretation of federal law."); Emily J. Zackin, *Looking for Rights in All the Wrong Places: Why State Constitutions Contain America's Positive Rights* 24–27 (Princeton 2013) (attributing the robust tradition of rights protection by the states to the relative ease of convening state constitutional conventions and amending state constitutions). For a thorough account of the duties of protection owed by a government to its citizens upon which this Article builds, see generally Philip A. Hamburger, *Equality and Diversity: The Eighteenth-Century Debate about Equal Protection and Equal Civil Rights*, 1992 S Ct Rev 295. Note that, like Professor Philip A. Hamburger, I read the historical sources to mean that antebellum Americans understood the state's duty of protection to be a moral obligation, not a legally enforceable right. Id at 300 n 12. For a different interpretation, see Steven J. Heyman, *The First Duty of Government: Protection, Liberty and the Fourteenth Amendment*, 41 Duke L J 507, 546 (1991).

[15] See Zackin, *Looking for Rights in All the Wrong Places* at 24–27 (cited in note 14) (emphasizing the amendment process as the source of positive rights).

[16] See Derrick A. Bell Jr, Brown v. Board of Education *and the Interest-Convergence Dilemma*, 93 Harv L Rev 518, 524 (1980). I thank Jessica Bulman-Pozen for first suggesting this link.

[17] See Jessica Bulman-Pozen, *Our Regionalism*, 166 U Pa L Rev 377, 381 (2018) (noting federalism's conventional focus on the polarity of "State and National Government"); Judith Resnik, *Categorical Federalism: Jurisdiction, Gender, and the Globe*, 111

these efforts have tended to focus on expanding the units of analysis outward to include transnational networks and interstate regions, or downward to include ever-smaller units of local governance,[18] this Article invites scholars to take the further step of studying the actual construction of the states themselves.[19] By

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Yale L J 619, 620 (2001) (arguing that the "quaint tidiness" of federalism's analytical categories of nation and state "ought to prompt skepticism").

[18] See, for example, Resnik, 111 Yale L J at 623 (cited in note 17) (proposing a model of "multi-faceted federalism"); Heather K. Gerken, *Dissenting by Deciding*, 57 Stan L Rev 1745, 1748 (2005) (proposing a model of federalism that encompasses substate entities of local governance); Judith Resnik, *Foreign as Domestic Affairs: Rethinking Horizontal Federalism and Foreign Affairs Preemption in Light of Translocal Internationalism*, 57 Emory L J 31, 34 (2007) (proposing a model of federalism that encompasses translocal organizations); Heather K. Gerken, *The Supreme Court 2009 Term—Foreword: Federalism All the Way Down*, 124 Harv L Rev 4, 8 (2010) (proposing a model of federalism that encompasses substate entities); Bulman-Pozen, 166 U Pa L Rev at 380–82 (cited in note 17) (expanding the law's focus on nation and state to include regionalism).

[19] This Article's model of inquiry is constructed using an array of theoretical and substantive insights from scholars outside the field of American constitutional history. First, borrowing from the pioneering work of Professor Carlos Sempat Assadourian, an economic historian of colonial Latin America, this model begins by setting aside the formal spatial and temporal units of analysis that have long defined the study of American constitutional history and by instead examining the "economic spaces" that defined the movement of capital and goods between zones of production and the market. See generally Carlos Sempat Assadourian, *El Sistema de la Economía Colonial: El Mercado Interior, Regiones y Espacio Económico* (Editorial Nueva Imagen 1983). Rather than mapping these economic spaces for what they can tell us about American commercial development, however, this model of inquiry then examines the legal customs and rules that governed these spaces, taking inspiration from legal historians who have encouraged us to see the law and its discourses not as a fixed object, but as a work of construction. See generally, for example, Hendrik Hartog, *The Constitution of Aspiration and "The Rights That Belong to Us All,"* in David Thelen, ed, *The Constitution and American Life* 353 (Cornell 1988). See also, for example, Daniel J. Hulsebosch, *Constituting Empire: New York and the Transformation of Constitutionalism in the Atlantic World, 1664–1830* 7 n 27 (North Carolina 2005). To examine this work of construction, this model of inquiry begins with the assumption, borrowed from the sociologist Pierre Bourdieu, that actors within any given field of social activity operate within the inherited structures of law and entrenched habitual customs. See generally Pierre Bourdieu, *The Logic of Practice* (Stanford 1990) (Richard Nice, trans). This phase of analysis thus draws upon methodological insights from law-and-society scholars to recover the interplay between background rules of law and unwritten customs. See generally, for example, Stewart Macaulay, *Non-contractual Relations in Business: A Preliminary Study*, 28 Am Sociological Rev 55 (1963); Sally Falk Moore, *Law and Social Change: The Semi-autonomous Social Field as an Appropriate Subject of Study*, 7 L & Society Rev 719 (1973). In addition to these theoretical insights, this model of inquiry also relies on substantive insights from recent scholarship in the fields of borderlands studies, the "new" history of American capitalism, and the Atlantic world that, when pieced together, have complicated the conventional sectional map of American antebellum history. See generally, for example, Kathleen DuVal, *Debating Identity, Sovereignty, and Civilization: The Arkansas Valley after the Louisiana Purchase*, 26 J Early Republic 25 (2006); Pekka Hämäläinen, *The Comanche Empire* (Yale 2008); Juliana Barr, *Geographies of Power: Mapping Indian Borders in the "Borderlands" of the Early Southwest*, 68 Wm & Mary Q 5 (2011); Walter Johnson, *River of Dark Dreams: Slavery and Empire in the Cotton*

examining the particular historical context in which legal actors fashioned and deployed the rules governing the rights and duties of states, this approach in turn renders the construction of the states more legible, thereby denaturalizing an entity all too often presumed to be a primordial artifact of early American localism.[20] At the same time, this vantage point invites us to move beyond the familiar federalism lens that features a vertical contest between the nation and the states as static entities.[21] Instead, it allows us to see federalism as a horizontal contest between the states, whose agents assembled in the institutions of the nation's capital and whose rights, duties, and territorial borders remained constantly in flux.

More substantively, this shift in how we view the map of American constitutional history yields a deeper understanding of some of the most familiar cases in American constitutional law. On the one hand, recovering the material conditions that gave rise to state citizenship as a strategic tool in the 1830s allows us to read landmark cases, such as *McCulloch v Maryland*[22] and *Gibbons v Ogden*,[23] not simply as the triumphant rise of judicial nationalism, but also as an attempt to keep the ships of commerce in motion by instituting equal limits on the continent's erupting

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Kingdom (Belknap 2013); Juliana Barr and Edward Countryman, eds, *Contested Spaces of Early America* (Pennsylvania 2014); Brian Rouleau, *With Sails Whitening Every Sea: Mariners and the Making of an American Maritime Empire* (Cornell 2014); Michael A. McDonnell, *Masters of Empire: Great Lakes Indians and the Making of America* (Hill and Wang 2015); Calvin Schermerhorn, *The Business of Slavery and the Rise of American Capitalism, 1815–1860* (Yale 2015); Steven Hahn, *A Nation without Borders: The United States and Its World in an Age of Civil Wars, 1830–1910* (Viking 2016); Matthew Karp, *This Vast Southern Empire: Slaveholders at the Helm of American Foreign Policy* (Harvard 2016); Sven Beckert and Seth Rockman, eds, *Slavery's Capitalism: A New History of American Economic Development* (Pennsylvania 2016).

[20] I am grateful to Hendrik Hartog for suggesting the language of primordial states and to Lael Weinberger for suggesting the language of legibility and denaturalization. Note that by examining the construction of categories embedded within the federal Constitution, this approach also seeks to respond to recent calls for legal historians to broaden the conventional focus on the construction of race, gender, and class that has long defined the research agenda of civil-rights history. See Kenneth W. Mack, *Civil Rights History: The Old and the New*, 126 Harv L Rev F 258, 261 (2013).

[21] See, for example, Jack Rakove, *The Legacy of the Articles of Confederation*, 12 Publius 45, 49 (Autumn 1982) ("For the constitutional theorist, the critical issue in the creation of any federal system is the division of power between central authority and constituent units."); Alison L. LaCroix, *The Interbellum Constitution: Federalism in the Long Founding Moment*, 67 Stan L Rev 397, 400–01 (2015) ("The central issue [in the early nineteenth century] was the proper scope of Congress's power in relation to the states in the federal system.").

[22] 17 US (4 Wheat) 316 (1819).

[23] 22 US (9 Wheat) 1 (1824).

jurisdictions.[24] At the same time, understanding early American federalism as a contest between the various states on the continent reveals a long-hidden link between two of the country's most infamous cases: the search for a rule of state equality that began with Justice Joseph Story's interpretation of Article IV in *Prigg* and that ended with Chief Justice Roger Taney's opinion in *Dred Scott v Sandford*,[25] a decision that effectively foreclosed a rule of coequal Article IV obligations among the states.[26]

Beyond enriching our understanding of these canonical decisions, this work also offers us a more expansive conception of state sovereignty with which to work through open questions in American federalism today.[27] As the second half of Part III argues, owing to the dominance of the conventional map of American constitutional history featuring a nationalist North facing off against a states'-rights South, the Supreme Court and its observers have had to make do with cramped notions of state sovereignty defined by a state's degree of formal autonomy from the national government. By recovering an alternative conception of state sovereignty as one premised on a state's duty to protect its citizens, this work provides a different way of approaching a range of doctrinal questions, as well as a historical precedent for several state initiatives now underway.[28]

In the end, this analysis provides a means of venturing beyond the analytical categories that have long defined the study of American federalism. It invites us to follow in the footsteps of young, ambitious lawyers who set out to challenge the laws of discrimination using an invented language of persuasion—a language premised on a category of state citizenship that, in turn, had the potential to change the conversation from one of injustice to one of power. Today, the story of how they accomplished this feat serves as both a case study in successful constitutional innovation, as well as a cautionary tale of how ideas travel through the realm of civil society and into the text of the Constitution—reminding us of the cost of pursuing legal arguments that may

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[24] See notes 111–13 and accompanying text.

[25] 60 US (19 How) 393 (1857).

[26] See notes 254–56 and accompanying text.

[27] See Part III.B.

[28] See Part III.B. I thank Matthew Shapiro for first suggesting the possibility of using this historical analysis to expand current definitions of state sovereignty.

well prevail in gaining the attention of the powerful at the expense of the people.[29]

Part I begins by reconstructing the historical context in which America's antislavery activists first began to experiment with the State Citizenship Clause of Article IV. Part II then shifts to the legislature of Massachusetts, the self-proclaimed leading state of the Union, where a cohort of politicians appropriated these state-citizenship arguments in an attempt to vindicate the state's place in the uncertain geopolitical terrain of North America. Part III then steps back to examine how the state-sponsored litigation that these lawmakers organized in the 1840s informed the drafting of the Fourteenth Amendment, before exploring how this neglected history can help broaden our collective imagination for thinking through open questions of federalism today.

I. ORIGINS: INVENTING STATE CITIZENSHIP IN AMERICA'S AGE OF SLAVERY

According to existing accounts, the antislavery lawyers who began using the State Citizenship Clause in the antebellum era did so in an attempt to secure the rights of national citizenship for free blacks, at a time when the vocabulary and concept of national citizenship remained inchoate, at best.[30] But as those who lived through the brutal realities of America's age of slavery knew all too well, the turn to state citizenship stemmed from a different set of reasons.

As this Part argues, by the time these activists began to construct what became the country's most prominent challenge to the

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[29] See, for example, Katherine Franke, *Dating the State: The Moral Hazards of Winning Gay Rights*, 44 Colum Hum Rts L Rev 1, 4–5 (2012) (arguing for the need to "recognize and account for the manner in which [nongovernmental actors] . . . often find their work and their interests taken up and deployed by state actors").

[30] For accounts emphasizing the absence of national-citizenship claims in antebellum America, see note 9. For accounts emphasizing the interchangeability of the categories, and in particular the tendency for antislavery activists to use the State Citizenship Clause to argue for national citizenship, see Bruce E. Boyden, *Constitutional Safety Valve: The Privileges or Immunities Clause and Status Regimes in a Federalist System*, 62 Ala L Rev 111, 155 (2010) (arguing that the antebellum debates over the rights of citizens in northern states "did not distinguish sharply between state citizens and national citizens"); Hamburger, 105 Nw U L Rev at 92 (cited in note 4) (observing that "advocates for free blacks" used Article IV's State Citizenship Clause to "insist[ ] that free blacks were citizens of the United States"); Burrell, 35 Whittier L Rev at 277 (cited in note 4) (same); Antieau, 9 Wm & Mary L Rev at 25 (cited in note 4) ("[T]he Privileges and Immunities Clause . . . was the prime recognition of national citizenship.").

laws of racial discrimination using the State Citizenship Clause of Article IV, they had at their disposal a slew of inherited arguments based on national citizenship—arguments that had proven unable to build a viable movement for social change. Confronted with the limits of these older claims in a North defined by deep racism and extensive investments in southern slavery, these activists turned to state citizenship not with the primary goal of securing national citizenship for free blacks, but rather in hopes of securing the intervention of one of the oldest and once most powerful governments in the Union: the Commonwealth of Massachusetts. By drawing on legal arguments internal to the practices of commercial law and dominant understandings of state sovereignty, these lawyers sought to rescue the beleaguered abolitionist movement by reframing the issue of American slavery from the rights of a black person to the sovereignty of a free state.

A. An Inherited Discourse of National Citizenship and Its Limits

In the early 1830s, a decade before they launched their campaign against the police laws of the southern states, the newest generation of abolitionists in Boston set out with a plan to tell their fellow Americans about the wrongs of slavery. They had done so with a set of arguments premised not on state citizenship, but on national citizenship, tied to the founding documents and the promises of natural liberty.[31] Although these words of national citizenship that the Boston activists inscribed into their earliest pamphlets and preached from their pulpits would later be celebrated as the product of Lincoln's armies marching for freedom in the 1860s,[32] they had in fact emerged half a century earlier in the old Atlantic world of the Enlightenment.

One could trace this founding language of protest in the paper trail that the Boston activists had left behind: a paper trail that consisted of pamphlets and newspaper editorials, transcribed speeches and printed sermons, private letters and recorded conversations—many later stored away in the New England Anti-Slavery Society's office on Washington Street.[33] There was, to begin with, the pamphlet that several in the society credited

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[31] See notes 46–61 and accompanying text.

[32] See note 9.

[33] For the location of the society's office on Washington Street and the storage of antislavery publications, see Walter M. Merrill and Louis Ruchames, ed, 5 *The Letters of William Lloyd Garrison: Let the Oppressed Go Free, 1861–1867* 31 n 7 (Belknap 1979).

with inspiring them to take action in the first place: the infamous call to arms by a man named David Walker, who knew firsthand of the horrors of slavery.[34] Penned in 1828, Walker's pamphlet drew on a vernacular of protest that had sounded in the black churches and Quaker meeting halls of the Atlantic coast since the late 1700s, premised on a careful braiding together of the natural rights said to belong to all men and the lofty promises inscribed in the founding documents of the nation.[35]

An "Appeal . . . to the Coloured Citizens of the World," the title page of Walker's pamphlet proclaimed, "but in particular, and very expressly, *to those of the United States of America*."[36] The phrase was electric with possibilities, offering a claim of belonging that rose above the ugly interrogations of slavery: "Well, boy, who do you belong to?"[37] *Citizens of the United States*: a claim that gave the lie to the Founders' promise of equality. "Why, I thought the Americans proclaimed to the world," Walker wrote, "that they are a happy, enlightened, humane and Christian people, [and that] all the inhabitants of the country enjoy equal Rights!!"[38] Working from this label of national citizenship, Walker had urged his readers to rise up and vindicate their rights on the world stage. "Hear your language, proclaimed to the world [on] July 4th, 1776," his pamphlet read.[39] "We hold these truths to be self-evident—that ALL MEN ARE CREATED EQUAL!!"[40]

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34 See generally David Walker, *Walker's Appeal, in Four Articles; Together with a Preamble, to the Coloured Citizens of the World, but in Particular, and Very Expressly, to Those of the United States of America* (1829). See also Peter P. Hinks, *Introduction*, in Peter P. Hinks, ed, *David Walker's Appeal to the Coloured Citizens of the World* xi, xliii (Penn State 2000); *Walker's Appeal: To the Editor of the Liberator*, Liberator (Jan 29, 1831) (endorsing Walker's pamphlet as one that contained many valuable truths).

35 See, for example, Patrick Rael, *Black Identity and Black Protest in the Antebellum North* 97–106 (North Carolina 2002). See also generally, for example, Stephen Kantrowitz, *More than Freedom: Fighting for Black Citizenship in a White Republic, 1829–1889* (Penguin 2012) (tracing the rise of claims for national citizenship in the antebellum era); Andrew K. Diemer, *The Politics of Black Citizenship: Free African Americans in the Mid-Atlantic Borderland, 1817–1863* (Georgia 2016) (examining the tactics by which free blacks laid claim to the rights of national citizenship).

36 Walker, *Walker's Appeal* (cited in note 34) (emphasis added).

37 Letter from Frederick Douglass to William Lloyd Garrison (May 23, 1846), in John R. McKivigan, ed, 1 *The Frederick Douglass Papers—Series Three: Correspondence* 127, 132 (Yale 2009) (recalling how an American had approached him while in London and asked "in much the same tone which a white man employs when addressing a slave by the way-side—'Well, boy, who do you belong to?'") (emphasis omitted).

38 Walker, *Walker's Appeal* at 82 n * (cited in note 34).

39 Id at 85.

40 Id.

Such was the power of these opening words of dissent, premised on the label of national citizenship, that they continued to sound in Boston long after Walker's body was found dead near his home.[41] In the newspapers, there were reports that after the pamphlet appeared, black men and women had begun to linger longer on Boston's sidewalks, insisting on their rights.[42] The pastor of the First African Baptist Church, for one, described his congregation as being "composed of American citizens."[43] And when, two years later, the Reverend Samuel Snowden traveled to Philadelphia for the first Convention of the People of Color, he helped weave Walker's words into the organization's founding documents.[44] The nation's Constitution, the delegates proclaimed, "guarantees in letter and spirit *to every freeman born in this country, all the rights and immunities of citizenship*."[45]

Indeed, when, in December of 1830, a small group of young white journalists and lawyers gathered in one of the city's law offices to organize the New England Anti-Slavery Society, they too enlisted the language of national citizenship.[46] In the fall of that year, for example, when William Lloyd Garrison, a twenty-five-year-old writer who soon became the organization's main scribe, placed his first ad for a meeting hall in Boston where he could speak out against slavery,[47] he explained that he wished to persuade the people of the city to help "vindicate the rights of TWO MILLIONS of *American citizens*."[48] A few months later, Garrison put these same sentiments into the first issue of the

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41 For discussion of the circumstances of Walker's death, see Rufus Burrow Jr, *God and Human Responsibility: David Walker and Ethical Prophecy* 22–23 (Mercer 2003).

42 See, for example, R.I. American (Sept 24, 1830).

43 Kantrowitz, *More than Freedom* at 35 (cited in note 35).

44 See James Oliver Horton and Lois E. Horton, *In Hope of Liberty: Culture, Community, and Protest among Northern Free Blacks, 1700–1860* 213 (Oxford 1997). See also Peter P. Hinks, *To Awaken My Afflicted Brethren: David Walker and the Problem of Antebellum Slave Resistance* 76 (Penn State 1997) (describing Snowden's relationship with Walker); *Minutes and Proceedings of the First Annual Convention of the People of Color*, Liberator (Oct 22, 1831) (listing Snowden as a delegate).

45 *Minutes and Proceedings of the First Annual Convention of the People of Color*, Liberator (cited in note 44) (emphasis added).

46 For the founding of the New England Anti-Slavery Society, see Henry Wilson, 1 *History of the Rise and Fall of the Slave Power in America* 223–36 (Houghton Mifflin 1872). Those who gathered in the law offices for the founding meeting of the society included William Lloyd Garrison, a writer, as well as three lawyers: Ellis Gray Loring, Samuel E. Sewall, and David Lee Child. Id at 223.

47 Letter from William Lloyd Garrison to Oliver Johnson (Feb 5, 1874), in Walter M. Merrill and Louis Ruchames, eds, 6 *The Letters of William Lloyd Garrison: To Rouse the Slumbering Land, 1868–1879* 293, 294 (Belknap 1981).

48 Id (emphasis added).

Liberator, soon to become one of the most well-known antislavery publications in the nation.[49] Financed by subscriptions and donations from the city's black abolitionists, who were themselves regular contributors to the paper, the first issues roared with the words of national citizenship.[50] "I address you as men—I address you as freemen—I address you as countrymen," the opening editorial announced in January of 1831.[51] All men born on the soil of America, this opening editorial continued, were "*Americans by birth, and entitled to all the benefits of a republican government*."[52]

Codified in these opening pages of the *Liberator*, this refrain of national citizenship began to course through the speeches that rang through antislavery meeting halls across the state. "He contended that the American slaves are *American citizens*," a reporter observed in the autumn of 1831, after listening to Garrison speak to the men and women of Lowell, where the white hands of factory workers turned the cotton from the plantations into thread.[53] "That having been born here," the reporter continued, "this is *their home*."[54] In the spring of 1833, meanwhile, when Garrison and his colleagues traveled down to Philadelphia to lay the foundations for the American Anti-Slavery Society, they followed the lead of their black counterparts and inscribed the same phrase of national citizenship into the formal mission statement.[55] The goal of the organization, Garrison wrote, two years before he watched the sky pass overhead as a mob dragged him, legs bound, behind a wagon down State Street,[56] was "to secure to the colored population of the United States *all the rights and privileges which belong to them as men, and as Americans*."[57]

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49 *To the Free People of Color of the United States*, Liberator (Jan 15, 1831).

50 See Ira Berlin, *Slavery, Freedom, and Philadelphia's Struggle for Brotherly Love, 1685 to 1861*, in Richard Newman and James Mueller, eds, *Antislavery and Abolition in Philadelphia: Emancipation and the Long Struggle for Racial Justice in the City of Brotherly Love* 19, 36 (LSU 2011) (describing James Forten's role in financing the *Liberator*).

51 *To the Free People of Color in the United States*, Liberator (cited in note 49).

52 Id (emphasis added).

53 *Lectures on Slavery*, Lowell Mercury (Aug 27, 1831).

54 Id.

55 See *The Constitution of the Anti-Slavery Society: With the Declaration of the National Anti-Slavery Convention at Philadelphia, December, 1833, and the Address to the Public, Issued by the Executive Committee of the Society in September, 1835* 9 (American Anti-Slavery Society 1838).

56 See James Oliver Horton and Lois E. Horton, 1 *Hard Road to Freedom: The Story of African America* 129 (Rutgers 2001).

57 *Declaration of the Anti-Slavery Convention, Assembled at Philadelphia, December 4, 1833* (Library of Congress), archived at http://perma.cc/5SNM-36JD.

The same refrain provided the default vernacular for the boilerplate forms that the national organization's newly hired secretary began to prepare in the organization's rented office in Manhattan. "The people of color ought at once to *be emancipated and recognized as citizens*," the secretary wrote in the instructions sent to its agents in the field in February of 1834.[58] "[T]heir rights [ought to be] secured as such, equal in all respects to others, *according to the cardinal principle laid down in the American Declaration of Independence*."[59] Those who received commissions in the mail with these instructions to communicate the wrongs of slavery and the rights of man packed their bags and set out for the countryside. They avoided the cities, following the roads that gave way to mud and led to towns where those who knew the weight of a plough would listen and be moved to change the world in the name of America and its peoples.[60] Those who did not receive a commission on account of their sex spoke out when they could and wrote with abandon.[61]

In the frenzy of these nascent organizing efforts, no one paused to put down in writing where this category of national citizenship had come from, much less whether it could carry the weight of a movement to bring down the laws of slavery. Had they done so, these activists may well have had reason to question the rhetorical power of national citizenship. As scholars of the early republic would later begin to uncover, such claims had originally appeared with regard to people of color not owing to any wellspring of concern for their fundamental rights, but rather out of the administrative exigencies of transatlantic foreign relations and trade.[62]

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58 American Anti-Slavery Society, Commission to Theodore Weld (Feb 20, 1834), in Gilbert H. Barnes and Dwight L. Dumond, eds, 1 *Letters of Theodore Dwight Weld, Angelina Grimké Weld, and Sarah Grimké, 1822–1844* 124, 126 (Peter Smith 1965) (enclosing commission form instructions regarding Weld's appointment as an agent of the American Anti-Slavery Society) (emphasis added).

59 Id (emphasis added).

60 See id at 127; Letter from Theodore Weld to Charles Finney (Feb 28, 1832), in Barnes and Dumond, eds, 1 *Weld Letters* 66, 67 (cited in note 58); Letter from Theodore Weld to Lewis Tappan (Apr 5, 1836), in Barnes and Dumond, eds, 1 *Weld Letters* 286, 287–89 (cited in note 58).

61 See Letter from Lydia Maria Child to Louisa Loring (Apr 8, 1837), in *Lydia Maria Child Papers* (on file at Schlesinger Library, Harvard University) (describing how, although being denied a commission to lecture, she nevertheless found opportunities to speak out against slavery).

62 See generally, for example, Nathan Perl-Rosenthal, *Citizen Sailors: Becoming American in the Age of Revolution* (Belknap 2015) (tracing the emergence of claims of

Claims of belonging to a place called America, for example, dated back to the earliest days of the Revolutionary War, when men who found themselves stranded in prisons abroad spoke of themselves as belonging to the continent that lay at the other side of the Atlantic Ocean—no need to mention the states whose bordered lands had yet to crystalize on the charts of navigation.[63] In the halls of the newly independent Congress, meanwhile, where the first reference to an American citizen in the federal statute books appeared in reference to a ship owner, lawmakers enlisted the category of national citizenship to police the terms of entry to the ports along the southern Atlantic coast, where ships built in New England hauled out each day to carry the produce of the southern plantations to the markets of the world.[64] Down along the wharves of the coast, meanwhile, newly appointed customs officers handed out forms certifying that the vessels and crew bound for foreign shores were indeed American—never mind the color of a man's skin[65]—while captains carried invoices for goods that listed ownership by "citizens of the United States."[66] Indeed, years later, when abolitionists sought proof that free people of

American citizenship in the late 1700s); Elizabeth Stordeur Pryor, *Colored Travelers: Mobility and the Fight for Citizenship before the Civil War* 103–05, 132–33 (North Carolina 2016) (arguing that British ship owners provided better treatment to white Americans than to black Americans traveling across the Atlantic because of "economic self-interest" and a fear that equal treatment might create "political and social controversy," thereby increasing racial tensions on board).

63 See, for example, Letter from Thomas Barnes to John Adams (Aug 25, 1778), in Robert J. Taylor, ed, 6 *Papers of John Adams* 394, 395 (Belknap 1983) ("I am a Subject to the Continent of America."); From Robert Harrison (Oct 7, 1778), in Claude A. Lopez, ed, 27 *The Papers of Benjamin Franklin* 517, 517 (Yale 1988) ("I Was Borne in Newbery north ameraca [sic]."); The American Commissioners to Necker (Oct 9, 1778), in Lopez, ed, 27 *The Papers of Benjamin Franklin* 526, 526 (cited in note 63) ("Captain Peter Collass of Boston in America."). For the absence of state territorial borders on maps used in transatlantic trade, see, for example, John Malham, *A Correct Chart of the East Coast of North America, Engraved for Malham's Naval Gazetter* (Allen & West 1795), archived at http://perma.cc/EL29-S88V.

64 See An Act for Laying a Duty on Goods, Wares, and Merchandises Imported into the United States § 1, 1 Stat 24, 24–26 (1789).

65 See Perl-Rosenthal, *Citizen Sailors* at 221–28 (cited in note 62) (explaining the process by which customhouse officers issued certificates of citizenship to seamen, and the absence of exclusionary language for African Americans). See also *The Four Seamen*, Conn Herald (Sept 1, 1807) (reporting that four people of color aboard a merchant ship had "American protections" and were deemed to be "Americans"). For a more recent account of the centrality of the custom houses in the formation of the early administrative state, see generally Gautham Rao, *National Duties: Custom Houses and the Making of the American State* (Chicago 2016).

66 See, for example, Invoice of Sixteen Bundles (July 8, 1796), in *Moses Brown Papers* (on file in Box 4, Baker Library, Harvard Business School); Invoice of Sundries (Mar 17, 1797), in *Moses Brown Papers* (cited in note 66).

color were national citizens, they pointed to this long-standing practice by which federal administrative officials had recognized black ship owners and crewmen as Americans.[67]

Perhaps not surprisingly in light of these administrative origins, the language of national citizenship designed to keep the ships of commerce in motion had proven ill suited to bring down the edifice of slavery. As the activists who set out on the road of persuasion quickly discovered, there were profound limits to a strategy based on telling white people about the rights of their enslaved brethren. In the letters that began to arrive from antislavery agents in the field, one could hear the slow realization that theirs was a campaign whose aspirational words had failed to take root in a North where many questioned the difference between free soil and slave soil.[68]

The best writer among the activists, a woman named Lydia Maria Child, soon discovered that any time the topic of slavery came up, her sister-in-law collapsed into the sofa and waited for someone to change the subject.[69] When Child published a book referring to "Americans called Africans," meanwhile, she received a stack of angry letters containing canceled subscriptions to her magazine.[70] When Child next moved to the western hills of Massachusetts, where her husband hoped to produce sugar that had no connection to slave labor, she learned that her neighbor, a certain Mr. Napier, derived his fortune from the slave trade.[71] On Sundays, Child watched as Mr. Napier walked down to the church, where he stood before the children and told them that God had ordained Africans to slavery.[72] When Child went down to the church to see about holding an antislavery meeting,

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67 See *Speech by Mr. Storrs*, excerpted in William Yates, *Rights of Colored Men to Suffrage, Citizenship and Trial by Jury* 46, 47 (Books for Libraries 1838).

68 See, for example, Frederick Douglass, *Autobiographies*, in Michael Meyer, ed, *Frederick Douglass: The Narrative and Selected Writings* 1, 111 (Modern Library 1984) (describing the sense of alienation upon arriving in an ostensibly free state); Harriet Ann Jacobs, *Incidents in the Life of a Slave Girl.* 241 (Negro History 1861) (describing her disillusionment with the concept of a free state); Henry Bibb, *Narrative of the Life and Adventures of Henry Bibb, an American Slave, Written by Himself.* 62 (1849) (critiquing Ohio's failure as a nominally free state to offer protection for African Americans).

69 Letter from Lydia Maria Child to Caroline Weston (Aug 13, 1838), in *Child Papers* (cited in note 61). See also Letter from Lydia Maria Child to Ellis Gray and Louisa Loring (July 10, 1838), in *Child Papers* (cited in note 61).

70 Lori Kenschaft, *Lydia Maria Child: The Quest for Racial Justice* 6 (Oxford 2002).

71 Letter from Lydia Maria Child to Caroline Weston (July 27, 1838), in *Child Papers* (cited in note 61).

72 Id.

the minister shook his head.[73] No, they didn't want that sort of thing here. Of course the minister thought "slavery [was] wrong in the abstract," [74] but it would not sit well with Mr. Napier,[75] who, Child later learned, paid a third of the reverend's salary.[76]

The lecturers who followed the roads farther afield encountered challenges of their own. In the towns nestled within the tributaries of the Ohio River Valley, where newly built steamboats destined for the cotton and sugar fields had begun to pass by with an ever-quickening wake,[77] the lecturers described hopeful mass conversions but encountered angry crowds, and often rode out of town the next morning wearing damp jackets that smelled of rotten eggs and lamp oil.[78] In Cincinnati, lecturers reported that "[e]very church door is closed to abolitionists"[79] in a land preserved in memory today as part of the North, but that the lecturers knew all too well was "intimately and extensively involved with the [S]outh."[80]

Along the freshly settled coast of northern Maine, meanwhile, those who refused to be silenced discovered the blunt force of apathy. In the quiet fishing villages, people came with stones in their pockets to the meeting house where a black man was scheduled to speak. "[I]f I must be stoned, be it so," Charles Lenox Remond said, as he stood amidst the shattered window glass, his voice breaking through their jeers and escalating laughs:[81]

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73 Letter from Lydia Maria Child to Theodore Weld (Dec 18, 1838), in Gilbert H. Barnes and Dwight L. Dumond, eds, 2 *Letters of Theodore Dwight Weld, Angelina Grimké Weld, and Sarah Grimké, 1822–1844* 726, 729 (Peter Smith 1965).

74 Id.

75 Letter from Lydia Maria Child to Caroline Weston (July 27, 1838), in *Child Papers* (cited in note 71).

76 Letter from Lydia Maria Child to Theodore Weld at 729 (cited in note 73).

77 See Louis C. Hunter and Beatrice Jones Hunter, *Steamboats on the Western Rivers: An Economic and Technological History* 37–43 (Harvard 1949) (describing trade routes along the Ohio Valley down to New Orleans). See also Matthew Salafia, *Slavery's Borderland: Freedom and Bondage along the Ohio River* 118–25 (Pennsylvania 2013) (tracing the connections between slave and free states in the Ohio River Valley).

78 See, for example, Letter from Theodore Weld to Elizur Wright Jr (Mar 2, 1835), in Barnes and Dumond, eds, 1 *Weld Letters* 205, 207 (cited in note 58); Letter from J.W. Alvord to Theodore Weld (Feb 9, 1836), in Barnes and Dumond, eds, 1 *Weld Letters* 259, 260 (cited in note 58).

79 Ohio Anti-Slavery Society, *Report of the Second Anniversary of the Ohio Anti-Slavery Society* 26 (1837).

80 Id at 49.

81 Letter from Charles Lenox Remond to Austin Willey (Oct 27, 1839), in C. Peter Ripley, ed, 3 *The Black Abolitionist Papers: The United States, 1830–1846* 314, 315 (North Carolina 1991).

> [I]f they must walk over my prostrate and bleeding body, be it so; for while I lived, and a single slave clanks his chain upon the soil which gave me birth, I will exercise the prerogative of thinking and speaking in his behalf, though slaveholders, mobocrats, eggs and brickbats multiply as fast and as thick as the locusts of Egypt.[82]

Even in the cosmopolitan cities along the Massachusetts Bay, where men who proudly called themselves Federalists had long spoken out against the wrongs of slavery, decades of arguments based on the natural rights of a black man had failed to translate into any meaningful action.[83] In Boston, a city preserved in memory as the center of the abolitionist movement,[84] but where those whose mills helped finance the plantations lived in well-lit brick houses on Beacon Hill,[85] and where doorkeepers and deacons and boys in white aprons repeated the daily refrain, "[w]e don't allow n——rs in here,"[86] the language of the rights of a black man fell on deaf ears. "Boston is yet a stronghold of slavery," Garrison confided to a friend in early 1836,[87] as "many gentlemen of property and influence" began to call upon the legislature to limit the city's abolitionist society.[88]

In the New York offices of the American Anti-Slavery Society, meanwhile, things looked little better. The secretary tallied up

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[82] Id.

[83] For information on the prominence of an antislavery tradition among New England Federalists, see, for example, Marc M. Arkin, *The Federalist Trope: Power and Passion in Abolitionist Rhetoric*, 88 J Am Hist 75, 76 (2001); Matthew Mason, *"Nothing Is Better Calculated to Excite Divisions": Federalist Agitation against Slave Representation during the War of 1812*, 75 New Eng Q 531, 533 (2002).

[84] See, for example, J. Morgan Kousser, *"The Supremacy of Equal Rights": The Struggle against Racial Discrimination in Antebellum Massachusetts and the Foundations of the Fourteenth Amendment*, 82 Nw U L Rev 941, 1009 (1988) (referring to Boston as the "fountainhead of the abolitionist movement").

[85] See Frederic Cople Jaher, *The Urban Establishment: Upper Strata in Boston, New York, Charleston, Chicago, and Los Angeles* 51–52 (Illinois 1982); Richard H. Abbott, *Cotton & Capital: Boston Businessmen and Antislavery Reform, 1854–1868* 8–22 (Massachusetts 1991).

[86] Letter from Frederick Douglass to William Lloyd Garrison (Jan 1, 1846), in Philip S. Foner, ed, 1 *The Life and Writings of Frederick Douglass: Early Years, 1817–1849* 125, 128 (International 1950) (emphasis omitted).

[87] Letter from William Lloyd Garrison to Samuel J. May (Jan 17, 1836), in Wendell Phillips Garrison and Francis Jackson Garrison, eds, 2 *William Lloyd Garrison, 1805–1879: The Story of His Life, Told by His Children* 85 (Century 1885).

[88] William Lloyd Garrison, *The Boston Mob, II*, in Garrison and Garrison, eds, 2 *Garrison Letters* 1, 11 (cited in note 87). See also *Massachusetts Anti-Slavery Society*, Emancipator (cited in note 1); Letter from William Lloyd Garrison to Samuel J. May (Jan 17, 1836) at 85 (cited in note 87).

the dwindling funds in the account books and saw what could perhaps signal the beginnings of the end. "You *must* send us *something* to *publish*," the secretary wrote in May of 1835 to one of the best agents in the field, who was then still traveling through the backwoods of Ohio.[89] "Remember we are asking of the abolition public *money*. They say to us, what are you doing with money?"[90] In January of 1837, the organization decided to cut back on its publishing campaign altogether.[91] By May of that year, the organization had informed its members that "it will be impossible for the Committee to sustain their agencies, unless each agent collects an amount sufficient to pay his salary and expenses."[92] By the following winter, the number of agents had fallen from sixty to nineteen.[93]

To those who began to take stock of where things had gone so terribly wrong, the problem seemed to lie, at least in part, in the arguments on which they had built their campaign. "There was not principle enough among us to feel for the poor black man, deprived of all his rights," Garrison declared at the annual meeting in Boston in January of 1839.[94] "Men take narrow and superficial views, centering in self, instead of standing firmly on those eternal principles, which embrace the rights and happiness of every human being," Child had declared a few weeks earlier.[95] The vast majority of the abolitionists were "mere *passengers* on a pleasure sail," concluded their colleague, Theodore Weld.[96] Confronted with the limits of claims of national citizenship, those at the helm of the movement began to experiment with a new set of legal arguments—arguments constructed using ideas drawn not from the lofty promises of the nation, but from the elite world of commerce and power that promised to capture the attention of even the most ambivalent of audiences.

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89 Letter from Elizur Wright Jr to Theodore Weld (May 26, 1835), in Barnes and Dumond, eds, 1 *Weld Letters* 221 (cited in note 58).

90 Id.

91 Leonard L. Richards, *"Gentlemen of Property and Standing": Anti-abolition Mobs in Jacksonian America* 157 (Oxford 1970).

92 Id at 158.

93 Id.

94 *Massachusetts Anti-Slavery Society*, Emancipator (cited in note 1).

95 Letter from Lydia Maria Child to Theodore Weld (Dec 29, 1838), in Barnes and Dumond, eds, 2 *Weld Letters* 734, 735 (cited in note 73).

96 Letter from Theodore Weld to Gerrit Smith (Sept 16, 1839), in Barnes and Dumond, eds, 2 *Weld Letters* 795, 796 (cited in note 73).

B. The Turn to State Citizenship as a Strategic Tool

To understand how and why Boston's beleaguered lawyers and activists began to devise a new legal strategy based on state citizenship, we must first set aside the familiar map on which scholars have chronicled America's constitutional history and instead examine the particular material conditions and legal culture of the era. For theirs was an America defined not simply by a nationalist North facing off against a states'-rights South. Rather, theirs was an America defined by a centuries-old commercial corridor that ran along the Atlantic coast, encircling a continent of ever-shifting territorial borders and unstable political hierarchies. Set in that uncertain land, the category of state citizenship and corresponding claims of the rights and duties of states had become the primary means of regulating the many governments who shared the continent, while preserving the movement of property across jurisdictional borders.

The first and most prominent feature of this forgotten map of North America lay in the central artery of slavery itself: the now-forgotten commercial corridor that began in Boston Harbor and ran down to the mouth of the Mississippi in New Orleans, connecting the barren lands of New England to the rich soils of the Mississippi Delta. Although it has long since disappeared from the conventional map of American constitutional history, by the early 1830s this watery highway connecting North and South had become one of the most heavily trafficked trade routes in the Western hemisphere.[97] By 1839, some $140 million worth of goods traveled along its shores.[98] Within a single year, 400,000 barrels of flour, 2,000,000 bushels of grain, and 160,000 bales of cotton

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[97] See, for example, Samuel Eliot Morison, *The Maritime History of Massachusetts, 1783–1860* 297 (Houghton Mifflin 1921) (finding that by 1831, the coastal corridor carried more tonnage than all the transatlantic shipping routes combined); Allan Pred, *Manufacturing in the American Mercantile City: 1800–1840*, 56 Annals Assn Am Geographers 307, 309 (1966) (finding that by 1835, even "a fraction" of the amount of domestic coastal tonnage surpassed the tonnage of foreign trade vessels arriving in New York, Boston, and Philadelphia). See also Lawrence A. Herbst, *Interregional Commodity Trade from the North to the South and American Economic Development in the Antebellum Period*, 35 J Econ Hist 264, 265 (1975); Albert Fishlow, *Antebellum Interregional Trade Reconsidered*, 54 Am Econ Rev 352, 362 (1964) (observing that although the corridor constituted the most "important artery of interregional commerce," it was "one about which we know perhaps least"); Merl E. Reed, *Footnote to the Coastwise Trade—Some Teche Planters and Their Atlantic Factors*, 8 La Hist 191, 191 (1967); Diane Lindstrom, *Southern Dependence upon Interregional Grain Supplies: A Review of the Trade Flows, 1840–1860*, 44 Ag Hist 101, 104–05 (1970).

[98] See Fishlow, 54 Am Econ Rev at 360 (cited in note 97).

arrived in Boston from southern states.[99] By the time the abolitionists gathered in 1839 to take stock of their dwindling movement for emancipation, nearly half of every pig butchered in the slaughterhouses of New Orleans for export ended up on a ship bound for Boston,[100] while Boston's merchants in turn sent down shoes for every black person who could be sold on an auction block along the wharves of the Mississippi.[101]

Although long forgotten today, the activists at the helm of the movement were well aware of the corridor's role in perpetuating slavery. As Garrison was quick to point out, it was this bustling corridor of commerce, not the racist ways of backward southerners on the plantations, that fueled slavery's horrific growth. "Why are the slaves held in bondage?" he had asked his readers in 1831.[102] The answer, he explained, lay in the demands of the emerging cities along the Atlantic seaboard. "They say to her," Garrison wrote of the free states addressing the plantation coast, "Raise all the cotton that you can, and we will manufacture the raw material. We will consume your rice, your tobacco, your sugar and molasses, and give you higher prices than you can obtain elsewhere."[103] As he explained in the prospectus to the *Liberator*, "There is innocent blood upon our garments, there is stolen property in our houses; and everyone of us has an account to settle with the present generation of blacks."[104]

Born of the exigencies of trade, the key to the preservation of this corridor lay in accommodating a second feature of the North American terrain: the highly unstable interior of ever-shifting territorial boundaries and inchoate entities called states. Theirs was an America in which, within a matter of decades, ancient colonies had become states, provinces had become republics, republics had devolved back into states, states had lopped off vast districts, and districts had in turn emerged once more as states—a land where maps of the nation were rendered out of date on a near-annual basis and where it was anyone's best guess as to

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99 J. Hancock, *The Merchant's and Trader's Guide and Stranger's Memorandum Book, for the Year of Our Lord 1836* 28 (John Ford 1836).

100 Morison, *The Maritime History* at 298 (cited in note 97).

101 See Seth Rockman, *Slavery and Abolition along the Blackstone*, in *Landscape of Industry: An Industrial History of the Blackstone Valley* 110, 115 (UPNE 2009); Hancock, *The Merchant's and Trader's Guide* at 28 (cited in note 99).

102 *Editorial Remarks*, Liberator (Apr 23, 1831).

103 Id.

104 *Prospectus of the Liberator*, Liberator (June 18, 1831).

what final permutation of powers and geographic borders would ultimately emerge.[105]

In that land of integrated commerce and capricious borders, the rules governing the states and their citizens had become the currency of persuasion among the continent's feuding centers of political power. There was, to begin with, the basic rule that one of the Founders had declared to be the very edifice of union: the State Citizenship Clause of Article IV.[106] Originally appearing in draft form in the Articles of Confederation, this clause provided that the citizens of one state were entitled to the privileges and immunities in the several states.[107] Designed to facilitate mutual friendship and trade along the Atlantic coastal corridor,[108] the provision had quickly become a favorite argument among commercial

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[105] See generally, for example, Declaration of Independence (declaring the colonies to be states); Unanimous Declaration of Independence by the Delegates of the People of Texas (1836) (declaring the former Mexican province of Texas to be an independent republic); Joint Resolution of the Congress of the United States, Annexation of Texas (Mar 1, 1845), in Hunter Miller, ed, 4 *Treaties and Other International Acts of the United States of America* 689, 689 (US Government Publishing Office 1934) (declaring that the "territory properly included within, and rightfully belonging to the Republic of Texas, may be erected into a new state"); An Act Relating to the Separation of the District of Maine from Massachusetts Proper, and Forming the Same into a Separate and Independent State (June 19, 1819) (consenting to the separation of the district of Maine from Massachusetts); *Approval of the Constitution, and Admission of Missouri into the Union*, HR 493, 16th Cong, 2d Sess (1820), reprinted in 2 Am State Papers 625 (Gales and Seaton 1834). For a useful visual representation of the rapid shifts in the internal boundary changes, see generally EarthDirect, *Territorial History of the USA: Every Month for 400 Years*, in Newberry Library, *Atlas of Historical County Boundaries* (Mar 13, 2013), online at http://www.youtube.com/watch?v=9UE9uu9fKSg (visited Nov 13, 2017) (Perma archive unavailable).

[106] Federalist 80 (Hamilton), in *The Federalist* 534, 537 (Wesleyan 1961) (Jacob E. Cooke, ed).

[107] See US Const Art IV, § 2, cl 1 ("The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.").

[108] See Articles of Confederation, Art IV, § 1, reprinted in 1 Stat 4, 4 (1789):

> The better to secure and perpetuate mutual friendship and intercourse among the people of the different States in this Union, the free inhabitants of each of these States . . . shall be entitled to all privileges and immunities of free citizens in the several States; and the people of each State shall have free ingress and regress to and from any other State, and shall enjoy therein all the privileges of trade and commerce, subject to the same duties, impositions, and restrictions, as the inhabitants thereof respectively.

On the goals of the clause, see Burrell, 35 Whittier L Rev at 220 (cited in note 4) ("The aim of all three [proposed articles, which would ultimately become Article IV,] considered together was commercial harmony and antidiscrimination.").

lawyers, who had used it on behalf of their clients in the ever-growing work of collecting debts across state lines.[109]

Burrowed away in private law offices for the opening decades of the early republic, the clause's logic of a commercial union defined by property in transit over a patchwork of jurisdictional borders had supplied the default premise for many of the most prominent constitutional-law cases of the era. In a series of landmark cases decided shortly after the final defeat of the British in 1815, for example, the country's most prominent lawyers had successfully challenged the constitutionality of various state laws not on the grounds of an emerging nationalism, but rather on the grounds that they interfered with the property rights of citizens of other states. In the case of *Trustees of Dartmouth College v Woodward*,[110] for example, Daniel Webster had warned that a state that endeavored to regulate a corporation whose board seats and land holdings belonged to citizens of another state could jeopardize interstate trade.[111] Later that same year, in the case of

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[109] See, for example, *Campbell v Morris*, 3 H & McH 535, 537 (Md 1797) (lawyers using the State Citizenship Clause to argue that an out-of-state citizen in debt proceedings had the same protections as an in-state citizen); *Ward v Morris & Nicholson*, 4 H & McH 330, 333 (Md 1799) (same); *Kincaid v Francis*, 3 Tenn (Cooke) 49, 50 (1812) (same); *Sharpless v Knowles*, 2 Cranch (CC) 129, 131 (DC 1816) (lawyers using the State Citizenship Clause to argue that an out-of-state citizen could take custody of a person acting as bail in the District of Columbia); *Lavery v Woodland*, 2 Del Cases 299, 307 (1817) (state court using the State Citizenship Clause to argue that an out-of-state citizen from Maryland had the same privileges as an in-state citizen to recover in an action of trover for the conversion of his slave); *Pearl v Rawdin*, 5 Day 244, 247 (Conn 1812) (lawyers using the State Citizenship Clause to argue that an out-of-state citizen may recover an escaped prisoner); *Custis v Lane*, 3 Munf 579, 581–82 (Va 1813) (lawyers using the State Citizenship Clause to argue that a person born in territory that belonged to Virginia and subsequently became part of the District of Columbia could vote in Virginia elections); *Chirac v Chirac's Lessee*, 15 US (2 Wheat) 259, 264 (1817) (lawyers using the State Citizenship Clause to argue that Maryland could not grant particular privileges to noncitizens to hold lands in Maryland); *Barrell v Benjamin*, 15 Mass 354, 358 (1819) (state court using the State Citizenship Clause to argue that an out-of-state citizen from Connecticut had the same privileges as an in-state citizen to sue a foreigner). See also *Bingham v Cabot*, 3 US (Dall) 382, 383–84 (1798) (finding that for purposes of establishing federal diversity jurisdiction, parties needed to set forth the citizenship of the respective parties); *Admission of Missouri—Senate*, 16th Cong, 2d Sess, in 37 Annals of Cong 82 (Dec 9, 1820) ("Senate Consideration of Admission of Missouri on December 9, 1820") (statement of Sen Holmes) (describing the State Citizenship Clause as one that allowed citizens of a state to acquire lands and enforce contracts in other states).

[110] 17 US (4 Wheat) 518 (1819).

[111] See id at 566–72. See also generally Daniel Webster, *Argument*, in Timothy Farrar, *Report of the Case of the Trustees of Dartmouth College against William H. Woodward* 238 (John W. Foster and West, Richardson & Lord 1819). For contemporary media coverage of the case that emphasized the multistate nature of the corporation, see, for example, *New-Hampshire Legislature*, Boston Daily Advertiser (June 20, 1816) ("The

McCulloch, Webster and his co-counsel had used the same argument to challenge a Maryland state law that attempted to tax the property of non–state citizens held in the Annapolis branch of the national bank.[112] Perhaps emboldened by the success of this argument, in 1824, when Webster returned to the Supreme Court to challenge a New York state law in the case of *Gibbons*, he again did so not by invoking the primacy of the national government, but by enlisting the logic of an America defined by constant motion of property along an Atlantic coast of coequal states—an argument that helped secure the continuing life of the commercial corridor fueling slavery's ascent.[113]

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scheme to be adopted relative to Dartmouth College is said to be, to enact that no person shall be a trustee of the corporation who is not an inhabitant of the State."). See also An Act to Amend, Enlarge, and Improve the Corporation of Dartmouth College (June 18, 1816), reprinted in Farmer's Cabinet (June 22, 1816); *New Hampshire Legislature*, Boston Daily Advertiser (June 25, 1816); *The College Question*, Exeter Watchman (Sept 23, 1817), reprinted in Portsmouth Oracle (Sept 27, 1817) (framing the controversy as one "of which it is well known that the old Trustees lost their seats"). Working from the traditional view of federalism and a sectional map of North America, conventional accounts of the case have framed it not as a question involving the scope of a legislature's powers over the property rights of noncitizens, but rather as the scope of a legislature's powers over a corporation. See, for example, Bruce Ackerman, 1 *We the People: Foundations* 74 (Belknap 1991) (describing *Dartmouth College* as a case that "insisted that the original Constitution granted fundamental rights to citizens against violation by the states no less than the national government"). See also Paul S. Boyer, et al, 1 *The Enduring Vision: A History of the American People* 170 (Houghton Mifflin 5th ed 2006) (offering a textbook account of the case as one that "focused on New Hampshire's attempt to transform a private corporation, Dartmouth College, into a state university").

[112] *McCulloch*, 17 US (4 Wheat) at 328 (describing the national bank not as a federal institution, but as a multistate institution—not unlike the corporation at issue in *Dartmouth College*: "The United States have, and must have, property locally existing in all the States"). See also id at 396 ("The whole capital of the bank belonging to private stockholders, is drawn from every State in the Union."). After describing the bank as a multistate institution, Webster and his co-counsel then deployed the same arguments used in *Dartmouth College* to warn that allowing one state to interfere in the property rights of a non–state citizen would lead to disruption of trade and interstate relations. See id at 328 ("[W]hat hinders [Maryland] from imposing a stamp tax . . . on . . . all other documents connected with imposts and navigation? . . . [S]he can equally well shut up the custom house.").

[113] *Gibbons*, 22 US (9 Wheat) at 4–5 (describing the issue not as one between Congress and the states, but as between the laws of the various states that bordered the Atlantic coastline, and warning of the costs to trade if one state were allowed to encroach on the laws of another: "[I]f [the laws of New York] should be declared to be valid and operative, [Webster] hoped somebody would point out *where* the State right stopped, and on what grounds the acts of other States were to be held inoperative and void"). See also id at 24 ("Virginia may well exercise, over the entrance of the Chesapeake, all the power that New-York can exercise over the bay of New-York, and the waters on the shore. . . . The Chesapeake, therefore, upon the principle of these laws, may be the subject of State monopoly; and so may the bay of Massachusetts.").

Outside of the nation's law offices and courtrooms, meanwhile, the logic of the State Citizenship Clause had quickly become a primary means of gauging the relative power of the never-ending stream of new states erupting deep in the interior. In one of the most closely followed political debates of the century, for example, members of Congress had seized on the State Citizenship Clause in 1820 to challenge the attempt by a new government erected at the heart of the Mississippi River Valley, in a distant foreign land called Missouri, to close its borders to all black people not held in slavery.[114] In an era that we often associate with the beginning of American sectionalism, the State Citizenship Clause had provided politicians a means of shifting the issue from the rights of black people to the rights of the state governments vying for power.[115] Allow the nascent state of Missouri to violate the State Citizenship Clause, one politician warned, and other states would follow suit, disrupting the "*commercial relations between the several States*."[116]

As these widely publicized debates made clear, the State Citizenship Clause could be used not simply to ensure the movement of property and capital across state lines—it could also be used to sever the economic bonds that had allowed slavery to prosper. Well aware of this potential power to disrupt the commercial

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[114] For a different reading of the legislative debates surrounding the Second Missouri Crisis, see Hamburger, 105 Nw U L Rev at 83–96 (cited in note 4).

[115] *Admission of Missouri—Senate*, 16th Cong, 2d Sess, in 37 Annals of Cong 48 (Dec 7, 1820) ("[H]ow was it possible," a senator from Rhode Island proclaimed, "that the power [to ban citizens of one state from entry] could be exercised by *one of these States towards other States of the Union*?") (emphasis added); *Admission of Missouri—Senate*, 16th Cong, 2d Sess, in 37 Annals of Cong 110 (Dec 11, 1820) ("Senate Consideration of Admission of Missouri on December 11, 1820"). See also id at 112 ("Our inquiry is, and it is the point which settles the question, are they *citizens of any particular State*?") (emphasis added). Note that other participants framed the question as one of national citizenship. See *Admission of Missouri—House of Representatives*, 16th Cong, 2d Sess, in 37 Annals of Cong 596 (Dec 11, 1820) ("The main question . . . involves but this single inquiry—Are free negroes . . . citizens of the United States?"); *Senate Consideration of Admission of Missouri on December 11, 1820*, 16 Cong, 2d Sess at 110 (cited in note 115) ("The question," Senator David Morril insisted, "is not what privileges may be violated, nor how many, nor to what degree, nor whether the citizen be black or white; but *can we tamely suffer one State to deprive any citizen of any of his Constitutional rights and privileges*?") (emphasis added); *Slavery*, Patriot (Sept 19, 1820):

> [I]f Missouri has a right to prohibit one class of citizens, blacks or mulattos, from coming to, or residing in, that state, has not New-York the same right to prevent any other class of citizens in Missouri or in Virginia, owners of slaves, for instance, from coming to or residing within our limits?

[116] *Admission of Missouri—House of Representatives*, 16th Cong, 2d Sess, in 37 Annals of Cong 574 (Dec 9, 1820) (emphasis added).

corridor upon which the economy of New England depended, the antislavery lawyers of Boston began to pair it with a second, equally well-recognized rule of the era: an unwritten, customary rule said to constitute the thin line separating a novel entity called a state from the vast wilderness of North America. Elegant in its simplicity, this rule held that a sovereign was duty bound to protect those who owed it allegiance.[117] Ancient in its origins, the rule had sounded in the pine-shaded hillsides of Rome before migrating to the feudal manors of Britain and the kingdoms of renaissance Europe, where it echoed in the treatises of the early modern world.[118] According to the rule's logic, a sovereign that failed to protect its citizens from violence effectively abdicated its right to rule. As the German treatise writer Samuel von Pufendorf had explained as early as 1688, "[I]njury done to one of its members by foreigners is regarded as affecting the entire state."[119] As such, the Swiss philosopher Emmerich de Vattel clarified a century later, "Whoever ill-treats a citizen indirectly injures the State, which must protect that citizen. The sovereign of the injured citizen must avenge the deed . . . , since otherwise the citizen will not obtain the chief end of civil society, which is protection."[120]

This idea of sovereignty had flourished in the new American Republic, at a time when the concept of a state remained ill defined.[121] Carried across the Atlantic in the writings of John Locke,

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[117] See, for example, Hamburger, 1992 S Ct Rev at 302 (cited in note 14) ("Following European writers, large numbers of Americans assumed that individuals established government to obtain protection for the liberty enjoyed in the state of nature."). See also Letter from Charles Sumner to Robert C. Winthrop (Feb 9, 1843), in *Robert Winthrop Papers* (Massachusetts Historical Society) ("[T]he duty of allegiance carries with it the correlative duty of protection on the part of the crown. This is feudal, at the same time that it finds its support in the principles of natural justice.") (underlining in original).

[118] See Anthony J. Bellia Jr and Bradford R. Clark, *The Alien Tort Statute and the Law of Nations*, 78 U Chi L Rev 445, 472 (2011). See also Anne Peters, *Beyond Human Rights: The Legal Status of the Individual in International Law* 404 (Cambridge 2016) (Jonathan Huston, trans).

[119] Samuel von Pufendorf, 2 *De Jure Naturae et Gentium Libri Octo* bk VIII, ch VI, § 13 at 1305 (Clarendon 1934) (C.H. Oldfather & W.A. Oldfather, trans) (originally published 1688).

[120] Emmerich de Vattel, 3 *The Law of Nations; or, The Principles of Natural Law Applied to the Conduct and to the Affairs of Nations and of Sovereigns* bk III, ch VI, § 71 at 136 (Carnegie Institution of Washington 1916) (Charles G. Fenwick, trans) (originally published 1758). See also Bellia and Clark, 78 U Chi L Rev at 472 (cited in note 118); Douglas J. Sylvester, *International Law as Sword or Shield? Early American Foreign Policy and the Law of Nations*, 32 NYU J Intl L & Polit 1, 67 (1999) (noting ninety-two citations to Vattel in early American judicial decisions).

[121] See *Hepburn & Dundas v Ellzey*, 6 US (2 Cranch) 445, 445 (1805) ("[T]he term 'states[ ]' . . . is a vague expression."). For an example of the ways in which politicians in

the idea that a government had a duty to protect its citizens had sounded in the churches of colonial New England on Sabbath mornings,[122] reverberated through the constitutions of the newly created states,[123] and punctuated the legislative debates in the newly formed Congress.[124] Legitimized by history, this duty had become the basis by which those who enjoyed the privileges of power in the early republic sought to secure the intervention of the state government in their commercial dealings along the corridor. When, in the early 1800s, for example, Congress closed the international trading routes on which Boston's merchant community depended and later authorized federal officers to seize the property holdings of a Boston bank, the city's elites successfully invoked the duty of protection to urge the state government to intervene on their behalf.[125]

Brought to life in the contests for political power on an uncertain continent, the State Citizenship Clause and these corresponding claims of a state's duty to protect its citizenry thus offered the disillusioned activists of America a powerful set of tools for designing a new legal strategy. Beginning in the mid-1830s,

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early America described the shifting composition of the continent, see *The Substance of Two Speeches on the Missouri Bill*, Columbian Centinel (Jan 19, 1820) (quoting Senator Rufus King's comment that "[t]he territory of Missouri is a portion of Louisiana, which was purchased of France, and belongs to the United States in full dominion").

[122] See Hamburger, 1992 S Ct Rev at 304 n 22 (cited in note 14) (offering clerical examples from eighteenth-century New England that discuss the purpose of government as protection).

[123] See id at 315 n 46 (offering examples of early state constitutions that associated the government's duty of protection with obedience and allegiance). For later examples, see Ohio Const Art VIII, § 1 ("[E]very free republican government, being founded on [the people's] sole authority, and organized for the *great purpose of protecting their rights and liberties* . . . .") (emphasis added); La Const Preamble (establishing a "form of government" in order to "secure to all the citizens thereof the enjoyment of the right of life, liberty and property"); Ind Const Preamble (establishing a "form of Government" in order to "establish Justice, promote the welfare, and secure the blessings of liberty to ourselves and our posterity"); Miss Const Preamble (establishing a "form of government" in order to "secure to the citizens thereof the rights of liberty and property").

[124] *Senate Consideration of Admission of Missouri on December 9, 1820*, 16 Cong, 2d Sess at 93 (cited in note 109) (speech of Sen Otis) ("To this relationship of a free citizen to his State, protection and allegiance were the necessary incidents.").

[125] See, for example, *Report of the Massachusetts Legislature*, NY Herald (Feb 18, 1809) ("While this state maintains its sovereignty and independence, all the citizens can find protection . . . in the strong arm of the state government."); *Report of the Committee on the Memorial of the Directors of the New England Bank*, Weekly Messenger (Feb 4, 1814) (concluding that a state-chartered bank was "entitled . . . to the protection and support of the state"). For claims submitted to the legislature that cited this duty of protection, see *Portland Resolutions*, New-England Palladium (Jan 27, 1809). See also *Dignified Position, of the Legislature of Massachusetts*, NY Comm Advertiser (Feb 9, 1809).

they began to draw upon both rules as they set out to sever the central artery of commerce itself, targeting a series of state police laws that papered over the southern ports and that subjected any person of color found on board an arriving vessel to indefinite imprisonment.[126] Although such laws had previously been challenged as a violation of the rights of national citizenship and a usurpation of the powers of the national government,[127] the lawyers who had witnessed the limits of such arguments set aside this old vernacular. Instead, they enlisted the category of state citizenship in an attempt to reframe the issue of slavery from the rights of a black man to the sovereign duties—and thus, the sovereign existence—of Massachusetts.

One could see the beginnings of this shift in the spring of 1836, when the future of the antislavery movement looked particularly grim. Earlier that winter, resolutions had arrived in Boston from the state governments along the southern plantation coast, requesting that the legislature of Massachusetts do something to halt the flow of abolitionist pamphlets that continued to arrive in Charleston and New Orleans.[128] Confronted with the possibility that their offices might be shut down, the directors of the New England Anti-Slavery Society seized this opportunity to plead their case in the public forum. In a series of publications that began to appear that spring and culminated with a formal report to the state legislature in 1839, they began to challenge the laws of the plantation South by pointing to the dangers it posed to the sovereignty of the Commonwealth.

In a speech that Garrison delivered to the state legislature in March 1836, for example, he began by noting the limits of moral arguments. "I fear that moral considerations alone will not suffice, on the present occasion," Garrison declared, as he stood before the state committee charged with responding to southern requests for

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[126] For a recent historical account of the police laws in question, including a summary of the state statutes in force, see Schoeppner, 31 L & Hist Rev at 560 n 1 (cited in note 3).

[127] See, for example, Jared Bunce, et al, *Free People of Color: Memorial of Sundry Masters of American Vessels Lying in the Port of Charleston, S.C.*, in 24 Niles' Weekly Reg 31, 31 (Mar 15, 1823) (protesting South Carolina's Negro Seamen Act on the grounds that it violated the rights of "free persons of color, native citizens of the United States"); *Elkison v Deliesseline*, 8 F Cases 493 (CC D SC 1823).

[128] See Letter from William Lloyd Garrison to Helen Garrison (Mar 5, 1836), in Garrison and Garrison, eds, 2 *Garrison Letters* at 95, 95–96 (cited in note 87). See also Michael Kent Curtis, *The Curious History of Attempts to Suppress Antislavery Speech, Press, and Petition in 1835–37*, 89 Nw U L Rev 785, 836–46 (1995) (summarizing the requests from various legislatures for Massachusetts to regulate the abolitionist society).

censorship.[129] Instead of reciting the old arguments premised on national citizenship, Garrison first drew his audience's attention away from the distant plantations to the corridor along the Atlantic coast. Having reoriented the setting of slavery, Garrison then quoted the State Citizenship Clause in full, using it to reframe the issue from one of the wrongs done to the rights of black men to the rights of the state. "Where, then, are the rights of the citizens of this Commonwealth?" he asked. "Ay, sir, where are our STATE RIGHTS?"[130] If the state hoped to preserve its rights, he concluded, it would need to fulfill its duty of protection. "The Legislature of this State," he concluded, "ought to speak out in tones of thunder against a system, which is thus putting in extreme peril the property, safety, and lives of the citizens of this Commonwealth."[131]

Perhaps emboldened by the success of this argument before the state committee, which voted later that spring not to criminalize the abolitionists' activities, Garrison and his colleagues began to circulate it widely. In April of 1836, for example, a month after the hearings, Samuel Sewall, one of the lawyers who had helped found the organization, returned to the State House to urge the legislature to intervene in the southern police laws. No stranger to the rules of commerce, Sewall reached for the State Citizenship Clause that he had no doubt used in debt litigation for his clients. This time, however, he presented it alongside the duty of protection. "[T]he poor," he began, "*must look to the government under which they live for their protection*."[132] A government that failed in this duty of protection, he continued, was entitled to no respect. "It is no honor to the state of Massachusetts," he declared, "that she has . . . permitted so many of her citizens to suffer such grievances . . . under the laws of the southern States, without moving a finger to help them."[133] Immediately after invoking this duty, Sewall then cited the State Citizenship Clause as the constitutional basis for action, concluding that the petitioners had made a "very strong[ ] claim upon our Legislators, for their official interference for the protection of their constituents."[134]

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[129] *First Interview* (Mar 4, 1836), in *An Account of the Interviews Which Took Place on the Fourth and Eighth of March, between a Committee of the Massachusetts Anti-Slavery Society and the Committee of the Legislature* 11 (Massachusetts Anti-Slavery Society 1836).

[130] Id.

[131] Id at 12.

[132] *Honor to Whom Honor Is Due*, Liberator (Apr 2, 1836) (emphasis added).

[133] Id.

[134] Id.

Not long after Sewall presented these arguments to the state legislature, Seth Whitmarsh, a member of the House and leader of the Democratic Party, braided the same arguments together—perhaps with Sewall's help—to create a scathing report that Garrison published in the *Liberator*.[135] "It is a question," the authors of the Whitmarsh report began, referring to the police laws of the plantation coast, "which involves the rights, liberties and lives of our citizens, *as also the sovereignty of the State*."[136] Lest anyone miss what they meant by sovereignty, the authors of the report paused to explain: "It involves in it the question, whether the *Commonwealth shall protect its citizens against violence*."[137] Failure to act, the authors warned, would destroy the state's sovereign status. "Let the legislature pause, and reflect deeply on a subject of so deep, so vital importance to the sovereignty of this Commonwealth," the authors concluded, "if that sovereignty is to be preserved."[138]

Convinced of the power of this line of reasoning, the society's lawyers soon began to develop the argument still further, placing the State Citizenship Clause within the broader logic and text of the Constitution to argue that failure to act would not only constitute an abdication of the state's sovereign duty but would also destroy the basic logic of interstate equality. As the authors of the report pointed out, the State Citizenship Clause appeared in Article IV: a provision of the Constitution listing the obligations that the states owed to one another and that jurists had analogized to a treaty.[139] By pairing the State Citizenship Clause of Article IV to the neighboring Fugitive Slave Clause of Article IV—a clause that effectively required all states to recognize the slave laws of other states—the abolitionists began to argue that under

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[135] *Report on the Petition of George Odiorne and Others Relative to Certain Laws of Several of the Southern States*, Liberator (Apr 23, 1836) (reprinting the report warning of the imminent demise of the Commonwealth).

[136] Id (emphasis added).

[137] Id (emphasis added).

[138] Id.

[139] See, for example, *Opinion of Chief Justice Hornblower, on the Fugitive Slave Law* (Feb 1836), in 3 *Fugitive Slaves and American Courts: The Pamphlet Literature* 97, 101 (Garland 1988) (Paul Finkelman, ed) ("The stipulations respecting the rights of citizenship, and the delivery of persons fleeing from justice, . . . are in the nature of treaty stipulations, resting for their fulfillment upon the enlightened patriotism and good faith of the several states.").

the Constitution's logic of equality, Massachusetts was entitled to demand that all states recognize its citizenship laws.[140]

"Is it not right, and just, and equal," the Whitmarsh report asked, "that while we rigidly adhere in this state to that portion of our national compact [the Fugitive Slave Clause], those states should as rigidly observe the other portion of that compact [the State Citizenship Clause], which secures to the citizens of Massachusetts, in every other state, the immunities and privileges enjoyed by their own citizens?"[141] If the southern states refused to recognize the State Citizenship Clause, the authors argued, it would relieve Massachusetts of any reciprocal obligation to recognize the Fugitive Slave Clause—and thereby potentially sever the smooth functioning of the commercial corridor that was fueling slavery's rise.

By the summer of 1836, this potentially explosive argument had begun to appear not simply before the state legislature, but also in the state courts. Most notably, that August, members of the society filed a habeas corpus suit in state court in an attempt to secure the release of an enslaved child who had been brought to Massachusetts by a New Orleans woman whose father, a merchant, lived in Boston.[142] In the winning argument presented to the court, Ellis Loring, another of the society's lead lawyers trained in commercial law, cited Louisiana's refusal to recognize the citizenship laws of Massachusetts under Article IV as a justification for Massachusetts's right to ignore the slave laws of Louisiana. "[T]here is no room here for reciprocity," Loring argued, citing the Whitmarsh report. "[T]he comity which *is* due to freemen is not extended to us by the slaveholding states."[143]

In the antislavery literature, meanwhile, abolitionists continued to warn that failure on the part of the states to protect their citizens would effectively reduce the governments to barren plots of land, incapable of compelling enforcement of their laws at home

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[140] See US Const Art IV, § 2, cl 1 ("The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States."). See also US Const Art IV, § 2, cl 3:

> 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.

[141] *Report on the Petition of George Odiorne and Others*, Liberator (cited in note 135).

[142] See *Med's Case*, in *Case of the Slave-Child, Med: Report of the Arguments of Counsel, and of the Opinion of the Court, in the Case of Commonwealth vs. Aves* 3, 4 (Isaac Knapp 1836).

[143] See id at 14.

or abroad. "What is a state?" the abolitionist John Brown asked in 1838,[144] in an editorial that Garrison declared to be "well worthy of a careful perusal."[145] "It is the representative of the rights and powers of the citizens composing it," he replied.[146] And as the composite of its peoples, Brown continued, the state existed only for their protection. "The first duty of government is the protection of the rights of individuals," he reasoned."[147] Abandon this duty of protection, Brown continued, and the state was nothing: "[A]n artificial, insensate, soulless being, an abstraction, a mere ideal entity, and of itself, *entitled to no respect*."[148]

Far from remaining confined to Massachusetts, this argument premised on the State Citizenship Clause quickly began to circulate in abolitionist circles. The following year, for example, activists in New York seized on the State Citizenship Clause to protest a law of New Jersey policing the entrance of free blacks.[149] Just as the abolitionists in Boston had used the Clause to pivot the conversation from the rights of people of color to the sovereignty of Massachusetts, so too did the New Yorkers now use citizenship status to reflect back on the sovereignty of the state of New York. "You are citizens of the State," the *Colored American* announced to its black readers, before using this label of state citizenship to measure the relative power of New York and New Jersey. "[J]ust as much right has your State Legislature, to pass an act, requiring every red haired citizen to carry his free papers . . . as they have to require your compliance with a single requisition of that supplement."[150] Indeed, by 1838, a lawyer from upstate New York had placed the State Citizenship Clause as the centerpiece of his new grassroots organizing manual for abolitionists.[151]

To be sure, this emphasis on state citizenship and corresponding claims of the state's sovereign duty to protect did not

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144 A Citizen, *Mr. Calhoun and the Right of Petition*, Liberator (Apr 27, 1838).

145 *Individual and State Rights*, Liberator (Apr 27, 1838) (identifying the author of the editorial as John W. Brown of Lynn, Massachusetts, and describing him as a "friend of the friendless, and the advocate of the oppressed").

146 A Citizen, *Mr. Calhoun and the Right of Petition*, Liberator (cited in note 144).

147 Id.

148 Id (emphasis added). Note that Brown conceded that the state may be justified in its possession of power and wealth insofar as it is used so "that the rights of the citizen may be better protected." Id.

149 *Legislature of New Jersey*, Colored American (Apr 8, 1837).

150 Id.

151 See generally Yates, *Rights of Colored Men* (cited in note 67).

extinguish the older arguments based on national citizenship.[152] And yet, when, in January of 1839, members of the New England Anti-Slavery Society assembled for their annual meeting and began to plan their activities for the year ahead, they agreed to target the police laws of the corridor not by invoking the category of national citizenship that once anchored the society's publications; instead, that evening, Wendell Phillips, the most recent Harvard lawyer to join the organization, stood at the podium and invoked the label of state citizenship to describe a lone black man in the audience. Rather than using this label of state citizenship to argue for national citizenship, Phillips instead used it to reflect on the waning power of the Commonwealth. "[T]hat colored free citizen I see yonder," he declared, "if he set his foot in Savannah, is imprisoned until he can prove his own freedom."[153] Enlisting the image of the once mighty Roman Empire, Phillips then reminded his listeners of how far Massachusetts had fallen. "It was the boast of ancient Rome," he proclaimed, "that she had thrown over her own citizens the shield of her own powerful protection . . . Not so with Massachusetts; her citizens are seized in sister states and sold into slavery."[154]

Not long after this meeting, these same arguments appeared in a twenty-eight-page report addressed to the state legislature. Signed by one of the society's newest members, a young reverend from Nantucket who sent copies of his reports to Phillips, the report bore little resemblance to the organization's founding reliance on national citizenship.[155] In lieu of the earlier citations to the Declaration of Independence, it instead began with a citation to the State Citizenship Clause.[156] Following the arguments that Garrison had first sketched out three years earlier, the report then warned that failure on the part of Massachusetts to intervene in the police laws of the southern states would compromise not only the "interests and undoubted rights of [ ] merchants," but

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[152] See, for example, *Massachusetts Anti-Slavery Society*, Emancipator (cited in note 1) (quoting speeches that rested on the older tradition of natural-rights arguments); *Letter to the Editor*, Liberator (Aug 9, 1839) (calling for America to "repent of the sin of slavery, and acknowledge her black sons as freemen and members of her family"); *Yates' Rights of Colored Men*, Colored American (Mar 22, 1838) (recommending that a new manual by "Brother Yates" introducing activists to the State Citizenship Clause "ought to be canvassed and known by *all American citizens*") (emphasis added).

[153] *Massachusetts Anti-Slavery Society*, Emancipator (cited in note 1).

[154] Id.

[155] See Mass HR Rep No 38 at 6–7 (cited in note 3).

[156] Id at 5.

also "*the dignity and honor of this ancient Commonwealth*."[157] The question, the report concluded, was whether Massachusetts would submit to this ignominious treatment by her peers. "[M]ust she quietly endure it all, merely because it chances to be done by her own sister states? . . . [W]ill she not, also, do what she may to protect and preserve the personal liberty of her citizens . . . ?" the report asked.[158]

In February 1839, there was a glimmer of hope that this shift from the lofty promises of national citizenship to invocations of the state's sovereign duty of protection had, at last, prevailed in breaking through years of inaction. Within a month after the reverend from Nantucket had submitted his report, the legislature of Massachusetts issued the first formal protest against the laws of racial discrimination along the southern coast.[159] Brief and to the point, this set of resolves asserted that the laws of the southern states that authorized the arrest without trial and detainment of free black men violated the State Citizenship Clause—a clause that abolitionists had borrowed from the practices of commercial law with hopes of severing the nation's central artery of slavery, perhaps not fully realizing that the Clause would soon be put to work for very different ends.[160]

II. ASCENDANCY: THE STATE LEGISLATURE AND THE SEARCH FOR A FEDERAL FORUM

In the winter of 1844, five years after the legislature of Massachusetts issued its first official resolves against the police laws of the southern states, politicians in Boston appointed a state agent to take the unprecedented step of challenging the constitutionality of these laws in federal court.[161] In time, scholars who caught sight of this pivotal legal challenge would describe it as an attempt to secure the rights of national citizenship for free

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157 Id at 8–9 (emphasis added).

158 Id at 34.

159 See Resolves concerning Certain Laws of Other States Which Affect the Rights of Citizens of Massachusetts, 1839 Mass Acts 105.

160 1839 Mass Acts at 105.

161 Resolves Relating to the Imprisonment of Citizens of the Commonwealth in Other States, 1842 Mass Acts 568; Resolves Relating to the Imprisonment of Citizens of the Commonwealth in Other States, 1843 Mass Acts 81; *Imprisonment of Colored Seamen*, Mass HR Rep No 48, 64th Sess 2–3 (1843); Resolves concerning the Treatment of Samuel Hoar by the State of South Carolina, 1845 Mass Acts 626.

blacks.[162] But as this Part argues, archival records reveal that the lawmakers who organized this litigation did so with a different set of objectives. In particular, these records reveal that at a time of acute concern for the waning power of the Commonwealth, the organizers of the lawsuit turned to the federal courts not with the primary aim of securing national citizenship for free blacks, but rather to secure the state's sovereign status without jeopardizing the economic bonds of union. Working with a model of international dispute resolution borrowed from the Alien Tort Statute, these lawmakers made clear that in the integrated slave economy of America, a state would fulfill its sovereign duty of protection in the halls of federal court, not through the risky practices of ad hoc diplomacy or armed retaliation.

A. The Concern for State Sovereignty and the Search for a Federal Forum

When the lawmakers of Massachusetts assembled in the State House in 1839 and began to review the ever-growing number of abolitionist petitions warning of the threats that slavery posed to the sovereignty of the state, they had ample reason to pause and take notice. At a time when the region's industrializing economy remained deeply dependent on the plantations of the southern coast, concerns had begun to sound for the waning status of the ancient Commonwealth. Once heralded as the "metropolis of the American plantations," and the epicenter of

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[162] See, for example, Kurt T. Lash, *The Fourteenth Amendment and the Privileges and Immunities of American Citizenship* 76 (Cambridge 2014) (characterizing Massachusetts's decision to dispatch an agent to South Carolina as one intended to "investigate the imprisonment of free blacks"); Rebecca E. Zietlow, *Enforcing Equality: Congress, the Constitution, and the Protection of Individual Rights* 28–29 (NYU 2006) (noting the concerns of northern politicians that the laws deprived individuals of their "most basic human rights . . . solely due to the color of their skin"); Leslie Friedman Goldstein, *A "Triumph of Freedom" after All?* Prigg v. Pennsylvania *Re-examined*, 29 L & Hist Rev 763, 768, 770–71 (2011) (referring in passing to Massachusetts's challenge as one arising from concern over the mistreatment of free black sailors); Philip M. Hamer, *Great Britain, the United States, and the Negro Seamen Acts, 1822–1848*, 1 J S Hist 3, 22 (1935) (characterizing Massachusetts's challenge as one intended to protect the rights of free blacks at a time of federal inaction); Michael Alan Schoeppner, *Navigating the Dangerous Atlantic: Racial Quarantines, Black Sailors and United States Constitutionalism* *215–17, 235–45 (unpublished PhD dissertation, University of Florida 2010), archived at http://perma.cc/K3MZ-KSCG (attributing the challenge to the popularity of abolitionism in the North, federal inaction, and growing concern for the due process rights of free blacks).

commerce,[163] by the early 1840s the dramatic expansion of the plantation economy in the Mississippi River Valley and the rapid rise of the New York port had begun to present awkward questions about the fate of Boston and its hinterlands. For theirs was a city whose days of glory in the American Revolution had long since passed, a city whose decline meant that even its most esteemed families could no longer command the same level of power and influence they once enjoyed.[164]

There was, to begin with, the basic question of territorial landmass. During the phase that historians would later refer to as "territorial expansion," the land called Massachusetts that once appeared on maps with no clearly discernible western limits had contracted from 5 percent of the national landmass to less than half of 1 percent.[165] "We shrink into pigmies, while Gigantic States stride over the Western and Southern Regions," Massachusetts Senator Harrison Otis had observed back in 1819.[166] "New England will ere long need sound heads and stout hearts," the state's leading spokesman, John Quincy Adams, had written home in April of 1841, "to save her from being made the football of the South."[167] New England, he warned the following year, was "greatly reduced and daily declining in her influence as a component part of the union."[168]

The diminishing landmass was only the most visible sign of the Commonwealth's waning influence. By the late 1830s, there were indications that the commercial privileges that Boston's merchants had once enjoyed along the Atlantic shipping corridor that ran down to the plantations had begun to erode.[169] Already, merchants in other ports along the commercial corridor had begun to question their reliance on Boston. "Why should not the

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[163] See Letter from Edward Randolph to Secretary Henry Coventry (June 17, 1676), in *Calendar of State Papers: Colonial Series, America and West Indies, 1675–1676* 406, 406 (Her Majesty's Stationery Office 1893) (W. Noel Sainsbury, ed).

[164] Jaher, *The Urban Establishment* at 45 (cited in note 85).

[165] For maps depicting this territorial contraction, see Carington Bowles, *North America and the West Indies: A New Map* (1783), archived at http://perma.cc/ZAW7-XUKQ; Jean Lattre, *Etats-Unis de l'Amerique Septentrionale avec le Canada et la Floride* (1783), archived at http://perma.cc/G74B-MUCA.

[166] Letter from Harrison Gray Otis to James T. Austin (Mar 1, 1819), in *Harrison Gray Otis Papers* (Massachusetts Historical Society).

[167] Letter from John Quincy Adams to Charles Francis Adams (Apr 7, 1841), in *Adams Family Papers* Reel 154 (Massachusetts Historical Society).

[168] John Quincy Adams, *The New England Confederacy of 1643* 45–46 (Charles C. Little and James Brown 1843).

[169] See Jaher, *The Urban Establishment* at 45–46 (cited in note 85).

State of Maine import her own goods?" an editorial had asked in 1838. "*Why should our merchants go to Boston and New York for their foreign goods?*"[170] That same winter, a politician in Mississippi reminded listeners that Mississippi was by no means obliged to rely on Massachusetts. "She can, if she pleases," he declared of Mississippi, "build her own ships and man them with her own sailors."[171] Indeed, by 1842, the very existence of the shipping corridor seemed to be in jeopardy. That summer, a new tax policy conceived of by South Carolina's John C. Calhoun was due to take effect that promised to open the ports of the plantation coast to imported goods from England,[172] at a time when many questioned the exclusive privileges that Massachusetts's ships and goods had traditionally enjoyed in the southern ports. "The very coasting trade," a lawmaker in Virginia had seethed, referring to the commercial highway along the Atlantic coast, "is ruinous to the south."[173] "[I]t were as well for the coasting trade between Massachusetts and the Southern States to be abandoned at once," another observer mused.[174]

Compounding these concerns still further, by 1842, the legislature faced impending bankruptcy. Loans that the Commonwealth had issued to her sister states to help finance the revolutionary war remained unpaid, while profits from the sale of western lands that the Commonwealth had donated to the common treasury had been reallocated to the newly created western states.[175] Such was the state of affairs that in 1838, anxious lawmakers in Massachusetts set out to inventory every manufactured good within the state's borders and assess the productivity of its soil.[176]

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[170] *Steam—its Achievements in Europe and America*, Portland Weekly Advocate (Oct 9, 1838).

[171] A.B. Reid, *Prentiss of Mississippi*, Emancipator (Dec 13, 1838).

[172] John A. Moore, *"The Grossest and Most Unjust Species of Favoritism": Competing Views of Republican Political Economy: The Tariff Debates of 1841 and 1842*, 29 Essays in Econ & Bus Hist 59, 61 (2011).

[173] *Virginia House of Delegates: Speech of Mr. Cropper*, Richmond Whig (Apr 27, 1841).

[174] *Abolition in a New Spot*, Charleston Courier (June 16, 1841).

[175] See generally *Address of Gov. Davis*, Berkshire Co Whig (Jan 11, 1842).

[176] See generally, for example, John P. Bigelow, *Statistical Tables: Exhibiting the Condition and Products of Certain Branches of Industry in Massachusetts, for the Year Ending April 1, 1837* (Dutton and Wentworth 1838). See also Christopher Clark, *The Roots of Rural Capitalism: Western Massachusetts, 1780–1860* 201 (Cornell 1990).

The results were troubling.[177] "Vast amounts of money are now sent out of the State for bread," the report declared.[178]

These concerns for the financial health of the Commonwealth appeared alongside growing anxieties over its declining political influence. Owing to the Constitution's rules apportioning political representatives in Congress, the steady expansion of the slave-based agricultural sector promised to reduce the proportion of votes held by the commercial sector of New England. At a time when Massachusetts was still considered one of the large states,[179] the draftsmen of the Constitution had agreed that any new member of the Union would be entitled to additional representatives in Congress according to a classification long since obsolete in Massachusetts: "other persons" who are not free.[180] It was only after one of Virginia's most famous statesmen decided to purchase an extensive portion of the Mississippi River Valley from France in 1803 that his opponents in New England realized their mistake.[181] Without "equal rights" in the Union, the Federalist-dominated legislature of Massachusetts had declared, there would be only "ruin to themselves and posterity."[182]

To many in Boston, events in the nation's capital seemed to confirm these long-standing worries for the declining Commonwealth. Beginning in January of 1842, news arrived from Washington of two potentially seismic shifts in the political and constitutional orders. The first of these developments occurred in the halls of Congress, the only place in the country where the representatives of the states and their citizens assembled under the same roof. For years, the elected representatives from Massachusetts had enjoyed the privilege of being among the first to present their petitions to the nation's lawmakers. According to custom, the roll call for members of Congress followed the geography of the Atlantic coastline, such that the New England states always preceded the

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177 Henry Colman, *Report on the Agriculture of the County of Essex, Mass. 1837*, in *First Report on the Agriculture of Massachusetts* 11, 26 (Dutton and Wentworth 1838).

178 Henry Colman, *Report on the Culture of Wheat in Massachusetts, 1838*, in *Third Report of the Agriculture of Massachusetts, on Wheat and Silk* 49, 54 (Dutton and Wentworth 1840).

179 Lydia Maria Child, *An Appeal in Favor of that Class of Americans Called Africans* 105 (John S. Taylor 1836).

180 See Mason, 75 New Eng Q at 533 (cited in note 83).

181 Id at 542.

182 Harrison Gray Otis, *Letters Developing the Characters and Views of the Hartford Convention* 30 (National Intelligencee 1820).

southern states.[183] But beginning in the late 1830s, when Adams refused to comply with the House rule barring the prohibition of petitions against slavery, the speaker had shifted the order, such that Massachusetts was called last—or not at all.[184]

Then, toward the end of January in 1842, shortly after Adams introduced a petition from his constituents calling for a dissolution of the Union, representatives from Virginia proposed a vote of censure that would expel Adams from the House altogether. Although remembered as a great nationalist, Adams by then had become a symbol of Massachusetts. After eight years in Congress, his colleagues referred to him as the "gentleman from Massachusetts."[185] Indeed, Adams himself charged that the House rule that barred him from speaking out against slavery constituted an abridgement not only of his rights, but also of the rights of the state of Massachusetts.[186] According to Adams, his best defense against censure lay in providing proof that the southern states had violated the State Citizenship Clause of Article IV—and hence, justified his constituents who had petitioned Congress to formally dissolve the Union.[187]

While Adams began compiling evidence for this Article IV defense, word arrived in Boston of a second turn of events: a lawsuit in the US Supreme Court that promised to disrupt the increasingly fragile promise of legal equality between the states.[188] For much of the preceding four decades, disputes over the scope of the obligations that one state owed another state under Article IV had been met with well-worn customs of diplomacy, as state legislatures composed resolutions requesting the return of particular individuals claimed as slaves or free men, and state executives carried out the actual work of securing their return.[189] Now,

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183 Letter from John Quincy Adams to H.J. Bowditch and William E. Channing (Mar 1843), in *Adams Family Papers* at Reel 525 (cited in note 167).

184 Id.

185 27th Cong, 2d Sess, in 11 Cong Globe 168 (Jan 27, 1842) (statement of Rep Everett).

186 Diary Entry (Jan 22, 1842), in *The Diaries of John Quincy Adams: A Digital Collection* (Massachusetts Historical Society 2004), archived at http://perma.cc/8TD5-9MQV (arguing that the House rule barring antislavery petitions was "oppressive on the free States and especially outrageous to the rights of States").

187 Letter from John Quincy Adams to R.Y. Paine, Esq. (Mar 22, 1845), in *Adams Family Papers* at Reel 154 (cited in note 167). See also *Correspondence of the Courier*, Charleston Courier (Feb 2, 1842).

188 *Prigg*, 41 US (16 Pet) at 539.

189 See Charles Warren, *The Supreme Court and Disputes between States*, 103 World Affairs 197, 201 (1940); Joseph F. Zimmerman, *Interstate Disputes: The Supreme Court's Original Jurisdiction* 22–23 (SUNY 2006). For examples of diplomacy in the years immediately prior to *Prigg*, see *Inter-state Controversies: Georgia—Maine and Virginia—New*

however, the states of Massachusetts and Pennsylvania had decided to abandon this practice of ad hoc diplomacy and take their Article IV dispute concerning the meaning of the Fugitive Slave Clause to what some referred to as the "Supreme Court room."[190] In doing so, they all but ensured that the informal practice of interstate negotiations would be replaced with a bright-line constitutional rule assigning a new set of unilateral obligations under the Fugitive Slave Clause of Article IV—obligations with no corollary obligations under the State Citizenship Clause of Article IV.[191]

To lawmakers in Boston, this pending Article IV litigation, compounded with the silencing of its most famous spokesperson in Congress, necessitated some form of response. That February, under the leadership of Adams's son, Charles—then a first-time state senator—the legislature of Massachusetts took the unprecedented step of organizing a lawsuit designed to challenge the constitutionality of the police laws of the plantation coast. In doing so, they borrowed from a model of dispute resolution that had first emerged in the Atlantic maritime world of nations and that they now tailored for a North American continent of erupting states. As Adams and his peers would have been well aware, in 1789, the inaugural Congress of the new republic had sought to develop a judicial framework by which it could remedy wrongs its citizens had inflicted on the citizens of another nation—and

York, 1837–1843, in Herman V. Ames, ed, *State Documents on Federal Relations: The States and the United States* 232, 232–36 (University of Pennsylvania Department of History 1911). For examples of early boundary disputes resolved through ad hoc commissioners, see *The United States*, The Times; and DC Daily Advertiser (July 7, 1802); *Boundary Lines*, Columbian Centinel (Feb 21, 1825). For examples of requests for extradition, see *Report on the Petition of George Odiorne and Others Relative to Certain Laws of the Several Southern States*, Mass S Rep No 92, 57th Sess 7 (1836); Mass HR Rep No 38 at 34 (cited in note 3); Edlie L. Wong, *Neither Fugitive nor Free: Atlantic Slavery, Freedom Suits, and the Legal Culture of Travel* 206 (NYU 2009) (describing the use of executive extraditions to recover citizens claimed as slaves); Paul Finkelman, *The Protection of Black Rights in Seward's New York*, 34 Civil War Hist 211, 213 (1988) (describing "two instances [in which the governor of New York] refused to approve the extradition to Southern states of fugitives from justice accused of helping slaves escape to New York").

[190] See *Trial of the Amistad Captives*, Emancipator (Mar 11, 1841); *Session*, Emancipator (Nov 4, 1841).

[191] See *Trial of the Amistad Captives*, Emancipator (cited in note 190); W.M. Grason, *Governor's Message, Annual Message of the Executive to the Legislature of Maryland, December Session, 1840*, Easton Gazette (Jan 9, 1841).

thereby avoid military conflict with more powerful foreign nations.[192] By enacting the Alien Tort Statute, Congress had hoped to accomplish this goal, by opening the federal courts to citizens of foreign nations who had been injured by citizens of the United States.[193] Well versed in the practices of international law, Adams and his colleagues now borrowed this basic structure in an attempt to secure the state's sovereignty, while ensuring that the brewing dispute with its more powerful trade partners along the Atlantic coast did not escalate into war.

To begin with, when Adams began to draft the paperwork that would authorize a state-sponsored legal challenge to proceed, he was quick to set aside the older precedents of national citizenship. Indeed, although a group of black activists had submitted a petition protesting the same laws in question just a month earlier using the old category of American citizenship,[194] Adams made no reference to any such arguments.[195] Instead, Adams framed the lawsuit as one that hinged on the "imprisonment of any *citizen of Massachusetts* . . . within the borders of *other States of the Union*."[196] Adams's colleagues were even more explicit that the goal of the lawsuit had less to do with securing the promise of national citizenship for free blacks than it did with vindicating the sovereign status of the Commonwealth in the orderly forum of federal court. When members of the state senate reviewed Adams's proposal for commencing the suit on March 1, 1842, for example, the conversation centered on the need to "discharge all our constitutional obligations to the South, but at the same time to maintain *our own rights* with firmness."[197] According to the reporter who observed these legislative debates, "[A]ll agreed that it was becoming the *high character of our Commonwealth* to take this matter under its special charge."[198]

This same concern for maintaining the rights of the Commonwealth was also apparent in the memos that merchants outside the State House drafted that spring, as they too urged the

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192 See Bellia and Clark, 78 U Chi L Rev at 448–50 (cited in note 118). I am grateful to Henry Monaghan for suggesting that the architects of this lawsuit may well have had in mind the model of the Alien Tort Statute.

193 See id.

194 *Petitions for Sailor's Rights*, Emancipator & Republican (Mar 4, 1842).

195 See, for example, *Elkison v Deliesseline*, 8 F Cases 493, 497 (CC D SC 1823).

196 See *Draft Resolves*, in *Massachusetts Legislature*, Salem Reg (Mar 3, 1842) (emphasis added).

197 Id.

198 Id (emphasis added).

need for an Article IV lawsuit. At the helm of this lobbying effort was a merchant named John Ingersoll Bowditch,[199] who maintained a regular correspondence with the merchant houses of New Orleans[200] and who owned several ships in the coasting trade.[201] Shortly after the Supreme Court published its much anticipated Article IV decision in March of 1842—one that, as expected, had imposed unilateral limits on the police power of free states under the Fugitive Slave Clause[202]—Bowditch submitted a petition to a friend in Congress, asking for help in ensuring that a State Citizenship Clause lawsuit would be allowed to proceed in federal court.[203] "Be pleased to glance at the names of the signers," Bowditch advised, "and assure yourself that they are men who have a real and deep interest in all that concerns the commerce of the country."[204] Their goals, he continued in a separate letter, "*ought not to be connected in the minds of any one with the abolition question*."[205]

The politicians in Washington who looked over these memorials were equally clear that the aim of a lawsuit was less about securing the national rights of free blacks than of securing the sovereign status of Massachusetts. According to Senator Robert Winthrop, a corollary Article IV State Citizenship Clause case was needed to restore the constitutional logic of reciprocity and create an equivalent limit on the police power of slave states. As Winthrop explained:

> If the police power of a [free] State cannot be permitted to divest a master of his constitutional right over his slave, . . .

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199 William A. Dunning and Charles P. Bowditch, *November Meeting, 1905*, in 19 *Proceedings of the Massachusetts Historical Society* 394, 406 (Massachusetts Historical Society 1905).

200 See Letter from James Greenleaf to John Ingersoll Bowditch (Jan 14, 1838), in *Bowditch-Loring Papers* (Massachusetts Historical Society); Letter from E. Austin to John Ingersoll Bowditch (Mar 3, 1837), in *Bowditch-Loring Papers* (cited in note 200).

201 See Letter from E. Austin to John Ingersoll Bowditch (Mar 3, 1837), in *Bowditch-Loring Papers* (cited in note 200).

202 *Prigg*, 41 US (16 Pet) at 625.

203 See Undated Draft Letter from J.I. Bowditch to Robert C. Winthrop (May 1842), in *J.I. Bowditch Papers* (Massachusetts Historical Society).

204 Id.

205 Id (emphasis added).

> as little can it be suffered to divest a free citizen of his constitutional right over himself, his own actions, and his own motions, as guaranteed by the other.[206]

Indeed, Justice Story may well have envisioned precisely this type of State Citizenship Clause lawsuit when he drafted the *Prigg* opinion: in December of 1842, just months after issuing the opinion, his son's name appeared on the memorial calling for an Article IV test case.[207]

Even the timing and structure of the lawsuit pointed to the primacy of concerns for vindicating the state's sovereign status. Although Adams drafted the resolution authorizing the governor to organize a lawsuit in February of 1842, no action was taken on the matter until the following spring, after a set of resolutions had arrived from Savannah declaring that the legislature of Georgia would never recognize the citizenship laws of Massachusetts. "It has not heretofore been the desire, or the policy of Massachusetts, to make complaint of the *violation of her rights by other States*," Adams wrote in a report authorizing the governor to take the additional step of appointing state agents to travel southward and organize a lawsuit.[208] Perhaps even more striking, when the governor finally did appoint lawyers to represent the state, he ignored a proposal from the abolitionists to appoint a lawyer well known for his commitment to social justice,[209] and instead appointed a Charleston-based lawyer who had previously expressed his willingness to help "prevent any rupture of those friendly relations which subsist between Charleston & Boston,"[210] as well as a Massachusetts judge who had family friends in Charleston.[211]

In those uncertain times, this envisioned federal lawsuit promised an elegant solution to the need for Massachusetts to fulfill its sovereign duty of protection and restore a rule of Article IV

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206 Robert C. Winthrop, *The Imprisonment of Free Colored Seamen: A Report Made to the House of Representatives of the United States, January 20, 1843*, in *Addresses and Speeches on Various Occasions* 341, 346 (Little, Brown 1852).

207 Id at 352.

208 Mass HR Rep No 48 at 2 (cited in note 161) (emphasis added).

209 See Letter from Citizens of Massachusetts to Massachusetts Governor Marcus Morton (Aug 30, 1843), in *New York Historical Society: Manuscripts Relating to Slavery* (New York Heritage Digital Collections). For Amos B. Merrill's role as counsel for George Latimer, see Wilson, 1 *Rise and Fall* at 477 (cited in note 46).

210 Letter from Benjamin Faneuil Hunt to Harrison Gray Otis (Oct 4, 1831), in Samuel Eliot Morison, ed, 2 *The Life and Letters of Harrison Gray Otis, Federalist 1765–1848* 276, 278 (Houghton Mifflin 1913).

211 See Paula Ivaska Robbins, *The Royal Family of Concord: Samuel, Elizabeth, and Rockwood Hoar and Their Friendship with Ralph Waldo Emerson* 219 (Xlibris 2003).

reciprocity, albeit without compromising the trade relations with the plantation South. Originating in the same logic that had first inspired the opening of the federal courts to international disputes, the lawsuit would have provided a respectable means of safeguarding the free movement of ships along the corridor.[212] At the same time, a hearing in the Supreme Court room promised to help restore the state's reputation abroad: solidifying Massachusetts's status not as a nearly bankrupt government at risk of being excluded "from the pale of civilization,"[213] but rather as a proud sovereign no less capable of protecting her citizens than the ancient Roman Empire or the powerful British Empire. And for forward-thinking lawmakers like Charles Francis Adams—men who had long counted themselves sympathetic to the plight of free blacks—albeit, unwilling to interfere with the laws of slavery—the lawsuit provided a means of realizing the Commonwealth's founding creed that all men were created equal.[214]

Despite these hoped-for results, the search for a federal forum would be another two decades in the making. Not long after the state's lawyers arrived in Charleston and New Orleans to begin proceedings, they ran headlong into the fury of those who had enacted the police laws upholding the pillars of slavery. Within a week, Charleston's politicians had gathered in the South Carolina State House and passed a set of resolutions ordering the immediate expulsion of Massachusetts's agent.[215] Within months, the legislature of Louisiana had followed suit, prompting those in Boston to wonder aloud as to how best to safeguard the state's sovereign status, in a land where their trade partners appeared to have closed the door to the courthouse.

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[212] See generally *Prigg*, 41 US (16 Pet) 539.

[213] See *Massachusetts Legislature*, New Bedford Mercury (Feb 11, 1842).

[214] See Charles Francis Adams, Entry for Dec 23, 1837, in 7 *Diary of Charles Francis Adams, June 1836–February 1838* 367 (Belknap 1986) (Marc Friedlaender, et al, eds) (explaining that although he did not approve of slavery, his mind could not come "down to the point" of being an "entire Abolitionist").

[215] *Imprisonment of Citizens of This Commonwealth in Other States*, Mass S Rep No 4, 65th Sess 1 (Dec 6, 1844), reprinted in *Documents Printed by Order of the Senate of the Commonwealth of Massachusetts* 10 (Dutton and Wentworth 1845); Letter from Robert C. Winthrop to N. Clifford (Dec 10, 1844), in *Robert Winthrop Papers* (cited in note 117). See also *Laws of South Carolina*, Christian Watchman (Jan 31, 1845) (quoting the laws of South Carolina).

B. The Rise of State Citizenship as a Constitutional Norm

In the immediate aftermath of the expulsion of the state's lawyers, the abolitionists and politicians who had engineered the Article IV lawsuit called for a robust response on the part of the state. Citing the flagrant breach of the State Citizenship Clause, the most radical among them urged the state legislature to sever legal relations with the offending states—even if it meant a resort to arms. Unable to secure the votes in the State House needed for such a dramatic response, these activists instead turned to the court of public opinion. In formal resolutions, petitions, and speeches, they drew upon the state's sovereign duty of protection to first defend the state's appeal to the Supreme Court before invoking the same duty to call for state legislation that would protect state citizens from the reach of federal statutes. Though largely forgotten today, this public campaign ensured that, rather than simply morphing into national citizenship, the category of state citizenship remained a distinct category in constitutional discourse—one widely understood to carry a duty of protection that would be fulfilled not on the battlefield, but in federal court.[216]

The proposal to sever legal relations with South Carolina first appeared in a committee room in the Massachusetts State House in January of 1845, where the leading architect of the campaign for a federal hearing, Charles Francis Adams, proposed a dissolution of legal relations.[217] Following the same reasoning that his father had offered when he presented a petition for the dissolution of the Union in 1842, Adams now argued that the failure of South Carolina to recognize the State Citizenship Clause, coupled with the state's refusal to adjudicate the controversy in the Supreme Court, rendered Massachusetts exempt from having to fulfill any of its Article IV obligations. "Discussions took three hours," Adams confided to his diary. "At the point where the

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[216] See, for example, *Massachusetts & South Carolina*, Auburn J & Advertiser (Jan 1, 1845) ("Meetings are being held in various sections of Massachusetts, for the purpose of expressing the indignation of her people towards the recent course of South Carolina towards Mr. Hoar.").

[217] See Diary Entry of Charles Francis Adams (Jan 27, 1845), in *Adams Family Papers* at Reel 67 (cited in note 167) (describing his role in drafting the Declaration of Protest); Resolves concerning the Treatment of Samuel Hoar by the State of South Carolina, Mass S Rep No 31, 66th Sess 3 (1845) (final draft of Adams's report). See also notes 224–28 and accompanying text.

Massachusetts people are considered as absolved from their obligations to [South Carolina], which makes the gist of the paper, we came to a dead standstill. The committee are against me," he wrote.[218]

Unable to secure the votes needed for a formal dissolution of relations, Adams instead took his case to the public forum. In a remarkable document modeled on the Declaration of Independence, Adams began by compiling a list of grievances against South Carolina, focusing not on the wrongs that the state had done to black men as Americans, but rather on the wrongs done to the sovereignty of the state. "Massachusetts [ ] arraigns South Carolina," he wrote, for enacting laws "aggressive upon the *rights of her sister States*."[219] "Massachusetts denies [South Carolina's] right . . . to arrogate to herself a right of jurisdiction over the ships of Massachusetts, or *condemning her citizens without appeal*."[220] Massachusetts, he proclaimed, "will never relax in her demand *of all the rights which belong to her as a State and a member of the Union*."[221]

In presenting this argument, Adams made use of the then-familiar concepts of sovereignty to justify Massachusetts's right to challenge the constitutionality of the laws in federal court. "It is not [ ] as 'citizens of the United States,' as the State of South Carolina pretends, but *because they are citizens of Massachusetts*, that this State claims the guaranty of the Constitution of the United States to *protect her people* against wrong in the harbors of Carolina," Adams wrote, invoking the ancient duty of protection.[222] Having defended the state's course of action as the core of state sovereignty, Adams then left open the possibility that South Carolina had effectively breached the terms of constitutional union. "It becomes, then, a solemn question," Adams warned, "whether South Carolina . . . has not voluntarily forfeited all title to insist upon the execution by the citizens of Massachusetts of those other provisions [of Article IV] by which she peculiarly benefits."[223]

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218 Diary Entry of Charles Francis Adams (Jan 25, 1845), in *Adams Family Papers* at Reel 67 (cited in note 167).

219 Resolves concerning the Treatment of Samuel Hoar by the State of South Carolina, 1845 Mass Acts 627 (emphasis added).

220 1845 Mass Acts at 629 (emphasis added).

221 1845 Mass Acts at 644 (emphasis added).

222 1845 Mass Acts at 635 (emphasis added).

223 1845 Mass Acts at 644 (emphasis added).

Adams was by no means the only voice to urge a dissolution of Article IV relations. In towns and cities across the state, abolitionists seized on the logic of state sovereignty to call for an immediate phase of "commercial and political non-intercourse"—even if it meant armed warfare.[224] "Have not South Carolina and Louisiana declared war against Massachusetts?" Garrison roared in Marlboro Chapel.[225] Reciting the same logic etched out in the treatises of Pufendorf and Vattel, abolitionists in one small Massachusetts town proclaimed that the expulsion by South Carolina constituted an "indignity cast upon . . . the Executive of this State, and on us, citizens of Massachusetts."[226] In Boston, meanwhile, black abolitionists drafted a set of resolutions calling for the legislature to sever ties with South Carolina—not to secure their rights of national citizenship, but to "vindicate the Constitution of the Commonwealth,—her self-respect and honor,—her freedom, independence and sovereignty as a State,—the rights of all her people as equally sacred."[227] Even those who questioned the wisdom of picking a fight with the state's leading trade partner invoked the duty of protection. "Let us [ ] stand upon our rights," an editorial proclaimed, "[and] assert it as our *duty to afford protection to our citizens*."[228]

Despite these mounting calls for action, the state legislature refused to sever legal relations with the governments at the other end of the commercial corridor. In March of 1845, the legislature voted to publish a formal set of resolves announcing the immediate end to all "further present action in behalf of her citizens imprisoned in South Carolina."[229] To those who reflected on the reasons for this abrupt halt, the answer seemed to lay in the realities of commerce. As Story, one of the state's most well-regarded jurists, explained in a letter to a friend, "Considering our position as a commercial State," he reasoned, "it is a very difficult and delicate matter."[230] Others concurred, noting the deep financial ties that linked the Boston merchants to the plantation coast. As one editor pointed out, at a time when "slave mortgages were being

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224 *Thirteenth Annual Meeting of the Massachusetts A.S. Society*, Liberator (Jan 31, 1845).

225 *Massachusetts Anti-Texas Convention*, NY Herald (Feb 1, 1845).

226 *The People Moving*, Liberator (Jan 3, 1845).

227 *Meeting of Colored Citizens*, Liberator (Feb 7, 1845).

228 *Massachusetts and South Carolina*, Boston Courier (Jan 2, 1845) (emphasis added).

229 *Massachusetts and South Carolina*, Cincinnati Daily Gazette (Mar 28, 1845).

230 Letter from Joseph Story to Simon Greenleaf (Feb 16, 1845), in William W. Story, ed, 2 *Life and Letters of Joseph Story* 514 (Charles C. Little and James Brown 1851).

foreclosed in favor of Boston merchants, and while the profits of slave agriculture were flowing into the pockets of Boston gentlemen," Massachusetts had yet to free herself from slavery.[231] The "Boston merchants," Ralph Waldo Emerson observed in his journal, "would willingly salve the matter over."[232]

Unwilling to risk jeopardizing these trade relations with Charleston and New Orleans, members of the state legislature and executive branch instead refocused their efforts on prying open the door to the federal courthouse. Drawing on the language of sovereignty that had already reverberated through the press that spring, they sought to defend the state's search for a federal forum as part of its sovereign duties of protection. In a widely publicized executive message addressed to the legislature, for example, the governor argued that Massachusetts had followed a "respectful and constitutional course."[233] The state, he reasoned, had simply sought "to aid her defenceless citizens to seek a legal redress in the highest judicial tribunal of the Union, for serious wrongs done them."[234] Failure to use "every constitutional means within her power" to protect these citizens, he argued, would render the state "*unworthy the position which she now holds among her sister States*."[235]

In a resolution drafted that March and submitted to the state's representatives in Washington, meanwhile, state lawmakers followed the governor's recommendation and urged Congress to expand the scope of federal jurisdiction, thereby allowing citizens of the state to gain access to the courts.[236] "[A]ll that the citizens of Massachusetts ask," one congressman argued in Congress, "is[ ] that one of these cases may be brought before the Supreme Court."[237] Massachusetts, another senator echoed, had "*thought it to be her duty* to institute some means of . . . causing a judicial investigation."[238] Access to the Court, the senator explained, was

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231 *Slaveholding by Massachusetts*, Emancipator & Republican (Feb 19, 1845).

232 Ralph Waldo Emerson, *The Fugitive Slave Law: Address to Citizens of Concord, 3 May, 1851*, in Edward Waldo Emerson, ed, 11 *The Complete Works of Ralph Waldo Emerson* 183 n 1 (AMS 1904).

233 George N. Briggs, *Message*, in *Louisiana*, Emancipator & Republic (Feb 12, 1845).

234 Id.

235 Id (emphasis added).

236 See *Massachusetts and South Carolina*, Cincinnati Daily Gazette (cited in note 229).

237 30th Cong, 2d Sess, in 18 Cong Globe 418 (Feb 3, 1849) (statement of Rep Hudson).

238 31st Cong, 1st Sess, in 19 Cong Globe 1626 (Aug 23, 1850) (statement of Sen Davis) (emphasis added).

due not to the people of America, but "*due to Massachusetts*, and other States which have similar causes of complaint."[239]

As lawmakers continued to lobby for greater access to the federal courts in Washington, back in Boston, the emerging coalition of abolitionists and antislavery politicians who confronted the sobering reality that there would be no warships dispatched to Charleston began to shift their focus from targeting the laws of the southern states to the laws of the federal government. Using the now-dominant language of state citizenship and its corollary of state sovereignty, they set out to secure the enactment of a state statute that would afford procedural protections to those denied the protections of the national government. Focusing first on the federal Fugitive Slave Law of 1793[240] that denied men and women of their liberty with only the slenderest guarantees of due process, and then the revised Fugitive Slave Law of 1850[241] that authorized federal officers to assist in seizing any individuals claimed as slaves,[242] abolitionists and their allies in the State House drew upon the principles of sovereignty to erect a new sanctuary within the state's jurisdiction.

In the autumn of 1842, for example, following the arrest and imprisonment of a black man on the streets of Boston at the behest of a Virginia slaveholder, abolitionists took to the printing press to argue that the state's failure to afford judicial process for its citizens constituted an abdication of sovereignty. "[F]or Massachusetts to submit to the outrage . . . is to place the land of Lexington . . . in the *condition of a conquered province*," declared one resolution from 1842.[243] To submit to such an outrage, another editorial declared, would be to destroy the Commonwealth's global reputation. "The burning shame of the pity and contempt of Europe," the writer warned, "will fall upon this Commonwealth, unless it protests against these threatened abominations."[244]

In the State House, meanwhile, those who sought to justify the state's newly enacted laws protecting people of color from the

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[239] Id (emphasis added).

[240] An Act respecting Fugitives from Justice, and Persons Escaping from the Service of Their Masters § 3, 1 Stat 302, 302–05.

[241] 9 Stat 462.

[242] For a history of the personal-liberty laws enacted in response to federal legislation, see generally Thomas D. Morris, *Free Men All: The Personal Liberty Laws of the North, 1780–1861* (Johns Hopkins 1974).

[243] *Great Meeting at Lyceum Hall, in Lynn*, Liberator (Nov 11, 1842) (emphasis added).

[244] *Latimer's Case*, Latimer J (Nov 18, 1842).

enforcement of this federal law did so not by asserting the state's autonomy from the national government, but rather by invoking the ancient duties of protection to its citizens. In the autumn of 1846, for example, John Quincy Adams defended the state's new Personal Liberty Law[245] using the same basic principles of sovereignty that his son had used to justify the state's role in protecting a citizen's rights in federal court.[246] "It is a question," Adams declared, "whether this commonwealth is to *maintain its independence as a state or not*. It is a question," he continued, "whether your and my native commonwealth *is capable of protecting the men who are under its laws, or not*."[247] A decade later, Boston's lawmakers invoked the same arguments to again justify the state's extension of procedural protections, insisting that the states had "never parted with *their fundamental principles of sovereignty . . . the right and duty to protect the rights and liberties of its citizens and subjects*."[248]

At a time of deeply uncertain territorial borders, this logic of sovereignty as a duty to protect—whether it be through litigation in federal court or the enactment of state statutes—became part of everyday parlance, reflected in the words of the state's leading essayists and preachers. "May God help us so to redeem this oppressed and bleeding State," a pastor proclaimed on a cloudless June afternoon in 1854, in a church at the heart of the Commonwealth, heads lowered before him, palms closed.[249] "[I]f Massachusetts is merely a conquered province under martial law . . . *then I wish to know it*," the pastor continued.[250] "Massachusetts, once the proud, independent, free and brave old Commonwealth, respected abroad, revered at home, the pride of the nation . . . how art thou fallen!

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[245] See An Act Further to Protect Personal Liberty, 1843 Mass Acts 33.

[246] An Act to Protect the Rights and Liberties of the People of the Commonwealth of Massachusetts, 1855 Mass Acts 924. For a history of the enactment of these laws, see Morris, *Free Men All* at 109–17, 168–73 (cited in note 242).

[247] *Address of the Committee Appointed by a Public Meeting, Held at Faneuil Hall, September 24, 1846, for the Purpose of Considering the Recent Case of Kidnapping from Our Soil, and of Taking Measures to Prevent the Recurrence of Similar Outrages* Appx at 2 (White & Potter 1846) (emphasis added).

[248] *Extract from a Report of a Committee to the Legislature of Massachusetts on the Proposed Repeal of the Personal Liberty Bill, April 11th 1856, of Which Governor Briggs, Then a Member of the House, Was Chairman*, in William Chauncey Fowler, ed, *Local Law in Massachusetts and Connecticut, Historically Considered* 57, 58 (Joel Munsell 1872) (first emphasis in original and second emphasis added).

[249] Thomas Wentworth Higginson, *Massachusetts in Mourning: A Sermon, Preached in Worcester, on Sunday, June 4, 1854* 15 (James Munroe 1854).

[250] Id at 5.

[W]hat is thy reputation now?" one editorial asked.[251] "The whole military force of the State is at the service of . . . a slaveholder from Virginia," Henry David Thoreau declared in 1854, following yet another arrest of a black man on the streets of Boston.[252] The Commonwealth, the editorial continued, was "[c]overed with disgrace," and the "*laughing-stock of the world*."[253]

As rumors began to escalate in the late 1850s that South Carolina intended to sever all its ties with the Commonwealth, this discourse of state citizenship and its corollary duty of protection became the default language of protest in Boston—the lens through which observers described the rapidly fraying constitutional union. When, for example, word arrived in 1857 that the US Supreme Court had at last agreed to hear the question whether a person of color could gain access to the federal courthouse, observers in Boston framed the case not in the language of national citizenship for African Americans, but in the language of state citizenship. As one Boston commentator explained as the city awaited news of the decision, if the Court ruled that a black man named Dred Scott was a citizen of the state for the purposes of bringing a lawsuit in federal court, then he would also be a citizen of the state under the State Citizenship Clause of Article IV.[254] And if, on the other hand, he was not a citizen of the state, as Chief Justice Taney later held,[255] then the state itself would cease to exist. As a memorial from the city's black abolitionists published in January of 1859 explained, the *Dred Scott* decision had done more than simply declare that people of color were not national citizens: it had effectively denied the state of its sovereignty.[256] "If *we* are not citizens of Massachusetts," the memorial declared, "then *the Commonwealth is without citizens*."[257] Perhaps there was no need to elaborate further; no need to say what had already been repeated for decades: that if the Commonwealth was without citizens, the Commonwealth was no different than a tract of barren land on the Atlantic coast.

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[251] *An Immortality of Infamy*, Litchfield Rep (June 16, 1853).

[252] Henry David Thoreau, *Slavery in Massachusetts* (1854), archived at http://perma.cc/38LD-XRHA.

[253] *Immortality of Infamy*, Litchfield Rep (cited in note 251).

[254] *The Case of Dred Scott*, Daily Atlas (Jan 20, 1857).

[255] See generally *Dred Scott*, 60 US (19 How) 393.

[256] William C. Nell, *Rights of Colored Citizens*, Liberator (Jan 21, 1859) (quoting a memorial from the "colored citizens" of Massachusetts that had been presented to the legislature).

[257] Id (first emphasis added and second emphasis in original).

To those who had witnessed the rise of this way of speaking—a way of speaking that had first emerged twenty-five years earlier with the young activists who assembled in the meeting halls of Boston, before ascending into the daily discourse of politicians and essayists and preachers alike—it would thus have come as no surprise to hear the words people used when, in late 1860, news arrived of South Carolina's secession, signaling what some predicted to be the unraveling of the United States. It would have come as no surprise, for example, that when the governor of Massachusetts addressed the legislature to call for the first mobilization of troops to preserve the Union, he spoke of the sovereign duties of Massachusetts and her determined yet failed attempt to protect the rights of her citizens in federal court.[258] Nor, moreover, would it have come as a surprise that when the commanding officer who would lead the raw recruits from Boston down to the battlefield, he addressed them not only as Americans, but as citizens of Massachusetts.[259] "We go forth . . . to do our duty," the officer proclaimed on the eve of battle. "[W]e shall go feeling that we are citizens of the proud old commonwealth of Massachusetts."[260]

Theirs was a way of speaking that had emerged from a time and place in American history now lost from view, when people determined to be heard set aside older arguments premised on national citizenship and instead invoked the novel category of state citizenship. Owing to the exigencies of grassroots organizing and growing concerns for the once leading state of the Union, by the eve of the Civil War, state citizenship had become something far more than simply a placeholder for national citizenship. Instead, it had come to represent a status that carried with it a duty

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[258] See John A. Andrew, *Inaugural Address of His Excellency John A. Andrew*, in 1861 Mass Acts 565, 584 (referring to prior attempts at resolution in court); 1861 Mass Acts at 566 ("In a spirit and with the purpose of justice towards all other peoples and States, our immediate and official obligations are mainly due to that ancient and beloved Commonwealth, in whose service we are assembled."); 1861 Mass Acts at 591 (concluding his discussion of the impending conflict by noting that "Massachusetts demands, and has a right to demand, that her sister States shall likewise respect the constitutional rights of her citizens within their limits" and referring to the South Carolina and Massachusetts controversy). See also Henry Wilson, *Response of Col. Wilson*, in Frank Moore, ed, 3 *The Rebellion Record: A Diary of American Events* 174, 174 (G.P. Putnam 1862).

[259] See John Lord Parker, *Henry Wilson's Regiment: History of the Twenty-Second Massachusetts Infantry, the Second Company Sharpshooters, and the Third Light Battery, in the War of the Rebellion* 26 (Rand Avery 1887) (describing the scene at Boston Commons and the threat of rain).

[260] Wilson, *Response of Col. Wilson* at 174 (cited in note 258).

of protection on the part of the state—a duty said to define the very essence of what it meant to be a government of the people.

III. LEGACIES: RETHINKING STATE CITIZENSHIP AND SOVEREIGNTY

In the immediate aftermath of America's Civil War, when the nation's politicians assembled in Washington and began the work of building a new republic free from slavery, they hammered a phrase into the Fourteenth Amendment that would have made all the sense in the world to them: citizens of the state.[261] As a result of the tendency to focus on the amendment's creation of national citizenship, we have only a hazy sense of how and why this phrase came to be included in the Constitution's guarantee of due process—much less of the role that state citizenship might play in today's modern era of rights protection. Scholars who have ventured an explanation for the inclusion of state citizenship have helpfully pointed out that it provided a supplemental prohibition against state discrimination, as well as a technical means of preserving diversity jurisdiction under Article III.[262]

But as this Part argues, the category of state citizenship inscribed in the Fourteenth Amendment represented more than simply an additional prohibition on state discrimination or a means of securing diversity jurisdiction. In particular, a return to the legislative records suggests that lawmakers across the political spectrum understood state citizenship as a status that carried with it a sovereign duty of protection by the state—a duty that could coexist easily alongside the national government's duties of protection. Recovering this understanding of state citizenship and state sovereignty as an additive source of protection, rather than

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[261] US Const Amend XIV, § 1 ("All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the States wherein they reside."). For the role of the Fourteenth Amendment in securing the promises of emancipation, see William E. Nelson, *The Fourteenth Amendment: From Political Principle to Judicial Doctrine* 110–47 (Harvard 1988).

[262] See, for example, Paul Finkelman, *An Imperfect Union: Slavery, Federalism, and Comity* 342 (North Carolina 1981) (arguing that the inclusion of state citizenship provided a supplemental prohibition against state discrimination); Paul Finkelman, *Original Intent and the Fourteenth Amendment: Into the Black Hole of Constitutional Law*, 89 Chi Kent L Rev 1019, 1037 (2014) (same); Peter J. Spiro, *Beyond Citizenship: American Identity after Globalization* 53 (Oxford 2008) (arguing that the inclusion of state citizenship prevented a state from denying "state citizenship on the basis of race"); Richard A. Epstein, *Of Citizens and Persons: Reconstructing the Privileges or Immunities Clause of the Fourteenth Amendment*, 1 NYU J L & Liberty 334, 340 (2005) (suggesting that the inclusion of state citizenship may have been intended to preserve diversity jurisdiction).

an antagonistic sphere of government, in turn provides a useful set of resources for thinking through open questions of law and policy today.

A. The Place of State Citizenship in the Fourteenth Amendment

When the nation's lawmakers assembled in Washington after the war, they confronted an America in which the brutal end to slavery on the battlefield seemed to mean little in practice. Reports had begun to arrive from the Mississippi River Valley, describing the horrific carnage unfolding in the abandoned plantations and towns of the former Confederacy. Armed men, no longer soldiers, had set out into the night, leaving their victims to hang from the trees.[263] In the train cars lolling through the scorched fields of Georgia, white men tallied up the death rate. One in every four black people had died since the previous January, a planter estimated to his traveling companion, and there was still more dying to be done.[264]

In the nation's capital, politicians who had dedicated their lives to ending the regime of slavery considered their options. There were no legal grounds for military intervention, their critics said; the war was over.[265] Nor were there men or money enough to ensure adequate protection in the quiet enclaves of the plantations, far removed from the federal outposts left over from the war.[266] Indeed, even the most visionary of reformers recognized the limits of the reach of the federal government. "The arm of the

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[263] See, for example, *Miscellaneous*, Philadelphia Press (Jan 21, 1866) ("Abe McGee, a negro, went to the house of his former master, in Panola county, Mississippi, and took therefrom his own child. He was followed by William McGee, a son of his late master, and shot dead.").

[264] *The Loyal South*, Chicago Republican (Jan 19, 1866):

> Said a planter to me, while sitting beside him on the cars: "One fourth of the negro population of this State have died since the first of last January, and another one fourth will miserably perish this winter, from starvation and exposure." As he told me this, he rolled the information under his tongue as if it were a rich morsel.

[265] See John Fabian Witt, *Lincoln's Code: The Laws of War in American History* 314–22 (Free Press 2012).

[266] For information on the spatial limits of US military power in the South, see Gregory P. Downs and Scott Nesbit, *Zones of Occupation, September 1866*, in *Mapping Occupation: Force, Freedom, and the Army in Reconstruction*, archived at http://perma.cc/3G5Y-2TZE. See also Steven Hahn, *A Nation under Our Feet: Black Political Struggles in the Rural South from Slavery to the Great Migration* 265–313 (Harvard 2003) (describing the campaigns of paramilitary violence that engulfed the rural South following the Civil War).

federal government is long," Frederick Douglass observed that spring, "but it is far too short to protect the rights of individuals in the interior of distant States."[267]

Facing the prospect of a de facto return to the institution of slavery, leading members of the Republican Party who turned to amending the text of the nation's Constitution looked to the past for solutions that could help mitigate the violence. Throughout the legislative debates that culminated with the ratification of the Fourteenth Amendment, these lawmakers routinely invoked the specific history that lies at the heart of this Article: a history defined not by the elusive search of northerners for national citizenship for free blacks, but rather by the decades-long search by a state government to protect its citizens—and thus, preserve its sovereignty—in the halls of the country's federal courts.

Perhaps most notably, when the lead architect of the Fourteenth Amendment presented his opening arguments to Congress in January of 1866 for an amendment that would secure the fragile promise of freedom, he began not by discussing the inability of Congress to protect its citizens, but rather by reciting the inability of Massachusetts to protect its citizens in federal court. "Time was, within the memory of every man now within hearing of my voice," Congressman John Bingham of Ohio recalled, "when it was entirely unsafe for a citizen of Massachusetts or Ohio who was known to be the friend of the human race . . . to be found anywhere in the streets of Charleston or in the streets of Richmond."[268] Turning to the State Citizenship Clause, Bingham then explicitly reminded his listeners of South Carolina's expulsion of Massachusetts's agent.[269] It was only after invoking this collective memory that Bingham urged his colleagues to expand the rules of federal jurisdiction. "If the tribunals of South Carolina will not respect the rights of the citizens of Massachusetts," he declared, "I desire to see the Federal Judiciary clothed with the power to take cognizance of the question, and assert those rights by solemn judgment, inflicting upon the offenders such penalties as will compel a decent respect for this guarantee to all the citizens of every State."[270]

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[267] Frederick Douglass, *Reconstruction*, Atlantic Monthly 50 (Dec 1866).

[268] 39th Cong, 1st Sess, in 36 Cong Globe 157 (Jan 9, 1866) ("Bingham Speech"). See also *Reconstruction: Speech of Hon. John A. Bingham, of Ohio*, Cincinnati Daily Gazette (Jan 16, 1866) (reprinting the speech in full).

[269] *Bingham Speech*, 39th Cong, 1st Sess at 158 (cited in note 268).

[270] Id.

This shared memory of a state's failed efforts to protect its citizens through litigation coursed through the legislative debates, appearing on at least thirteen separate occasions.[271] When, for example, Congressman John Sherman of Ohio explained the reason why members of Congress had voted to give Congress power to open the federal courts to former enslaved men and women, he did so by once again invoking Massachusetts's determined efforts to defend its citizens in federal court.[272] Likewise, when Senator Lyman Trumbull of Illinois shortly thereafter defended an early draft of the Civil Rights Act that expanded the jurisdiction of the federal courts, he twice reminded his listeners of the time when state authorities from Massachusetts had tried to test the constitutionality of the police laws in court,[273] as did his colleague, Senator Henry Wilson.[274] Congressman John Broomall of Pennsylvania, meanwhile, echoed this history as he too argued for the passage of a federal law that would expand the federal courts' jurisdiction. "Strange as it may seem," Broomall observed, "[Congress] had no power to protect the *personal liberty of the agent of the State of Massachusetts* in the city of Charleston, or *enable him to sue in the State courts*."[275]

In addition to repeatedly citing this infamous history of a state's determined attempt to protect its citizenry, lawmakers across the political spectrum made clear that the march of Lincoln's armies had not extinguished the sovereign duty of states to protect their citizens.[276] As Bingham emphasized and other scholars have since

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[271] See note 5.

[272] 39th Cong, 1st Sess, in 36 Cong Globe 41 (Dec 13, 1865) (citing the "celebrated case of Mr. Hoar, who went to South Carolina[ ] . . . [and] was driven out, although he went there to exercise a plain constitutional right, and although he was a white man of undisputed character").

[273] 39th Cong, 1st Sess, in 36 Cong Globe 474 (Jan 29, 1866):

> Of what avail was it to the citizen of Massachusetts, who, a few years ago, went to South Carolina to enforce a constitutional right in court, that the Constitution of the United States declared that the citizens of each State shall be entitled to all the privileges and immunities of citizens in the several States?

See also id at 475 ("[I]s it not manifest that it was competent for the Congress of the United States to have passed a law that would have protected Mr. Hoar, who went from Massachusetts to South Carolina for the purpose of testing a question in the courts?").

[274] 39th Cong, 1st Sess, in 36 Cong Globe Appx 142 (Mar 3, 1866).

[275] 39th Cong, 1st Sess, in 36 Cong Globe 1263 (Mar 8, 1866) (emphasis added).

[276] See Heyman, 41 Duke L Rev at 510 (cited in note 14) (arguing that "the members of the Thirty-Ninth Congress fully shared the classical view on the right to protection. . . . A central purpose of the Fourteenth Amendment was to compel the states to fulfill this obligation, by incorporating it into the Federal Constitution and empowering the national

noted, the Fourteenth Amendment "was not intended to remove from the states 'the care of the property, the liberty, and the life of the citizen.'"[277] Instead, as Congressman Samuel Shellabarger of Ohio declared, it "was a 'self-evident' principle" that "'protection by his Government is the right of every citizen.'"[278] Others concurred. "[T]hese are the essential elements of citizenship," declared Congressman (later Senator) Justin Morrill of Vermont, "allegiance on [the] one side and protection on the other."[279] "The first duty of a government," Senator Charles Sumner observed, without distinguishing between the national and state governments, "is protection."[280]

Opponents of the Fourteenth Amendment were particularly emphatic that the duty of protection belonged exclusively to the state governments. According to these lawmakers, "'all the arrangements of life with regard to the protection of property and person'" were "exclusively committed to the states."[281] As one Republican from New York argued, the states were peculiarly well placed to police the personal rights of their citizenry. "[T]he extent of . . . the protection of personal rights," he explained, "we owe to . . . the fact that the functions of government with which the citizen has immediate relation are brought home to him, that he operates immediately upon them and they immediately upon him."[282]

To be sure, these invocations of a regime in which states had a duty of protection did not contravene efforts to create a greater role for Congress in protecting the rights of freedmen. In drafting the terms of the Civil Rights Act of 1866,[283] for example, Republican

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government to enforce it"). See also id at 546 (arguing that "[i]n accordance with the antebellum tradition, members of the Thirty-Ninth Congress regarded the right to protection as axiomatic").

[277] Id at 557, quoting 39th Cong, 1st Sess, in 36 Cong Globe 1292 (Mar 9, 1866).

[278] Heyman, 41 Duke L Rev at 546 (cited in note 14), quoting 39th Cong, 1st Sess at 1293 (cited in note 277).

[279] Heyman, 41 Duke L Rev at 546 (cited in note 14), quoting 39th Cong, 1st Sess, in 36 Cong Globe 570 (Feb 1, 1866).

[280] *Speech of Hon. Charles Sumner, Delivered in the Senate of the United States, Friday, January 18, 1867*, Wash Rptr (Jan 30, 1867). For other invocations of the duty of protection, see *Supreme Court of Indiana: Highly Important Decision*, Cincinnati Daily Gazette (Nov 2, 1866) (listing "[p]rotection by the Government" as the first principle "which belong[s] of right to the citizens of all free governments"). See also M.B.C. True, *Protection to Home Industry*, Anamosa Eurkea (Mar 29, 1866).

[281] Heyman, 41 Duke L Rev at 547 (cited in note 14), quoting 39th Cong, 1st Sess, in 36 Cong Globe 1123 (Mar 1, 1866) (statement of Rep Rogers).

[282] 39th Cong, 1st Sess, in 36 Cong Globe 1065 (Feb 27, 1866) (statement of Rep Hale).

[283] 14 Stat 27, codified as amended at 42 USC § 1981 et seq.

lawmakers took care to create a new arm of the federal bureaucracy whose civil servants would be charged with prosecuting civil-rights violations in federal court.[284] But as the repeated references to a state's duty of protection in the legislative history cited above suggests,[285] the architects of these new institutions did not view them as establishing a monopoly over the arena of rights protection in the new America.

As the Supreme Court infamously explained in its 1873 decision in the *Slaughter-House Cases*,[286] "It is quite clear [ ] that there is a citizenship of the United States, and a citizenship of a State, which are distinct from each other."[287] Indeed, when Bingham, the lead drafter of the Fourteenth Amendment, reflected on the meaning of the amendment's state and national citizenship provisions in 1871, he too explained that the amendment had preserved both categories:

> The words "citizens of the United States," and "citizens of the States," as employed in the [F]ourteenth [A]mendment, did not change or modify the relations of citizens of the State and nation as they existed under the original Constitution.[288]

These long-standing relations, Bingham argued, rested on the most basic principle of sovereignty: "the reciprocal obligation of allegiance on the one side and protection on the other."[289]

B. The Place of State Citizenship and State Sovereignty Today

In addition to offering a more granular view of America's constitutional past, this history provides resources for working through one of the enduring issues in constitutional law: the place of the states in American governance.[290] As this Section argues,

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284 Civil Rights Act of 1866 §§ 3–4, 14 Stat at 27–28.

285 See notes 268–69 and accompanying text.

286 83 US (16 Wall) 36 (1873).

287 Id at 74.

288 HR Rep No 22, 41st Cong, 3d Sess 1 (Jan 30, 1871), reprinted in *Congressional Reports on Woman Suffrage: The Majority and Minority Reports of the Judiciary Committee of the House of Representatives on the Woodhull Memorial* 96, 96 (Woodhull, Claflin, & Co 1871).

289 Id.

290 For an example of the enduring quality of the issue between state and federal power, see Deborah Jones Merritt, *Three Faces of Federalism: Finding a Formula for the Future*, 47 Vand L Rev 1563, 1563 (1994) ("The relationship between state and federal power has puzzled jurists since the nation began."). See also *New York v United States*, 505 US 144, 149 (1992) (describing questions over federal and state power as "perhaps our oldest question of constitutional law").

although federalism's past is often remembered for helping to sustain "some of the most despicable institutions in American history,"[291] the history of state citizenship presented here provides a dataset with which to "rethink what . . . state sovereignty should and do[es] mean today."[292] In particular, this history provides both a precedent for current state initiatives designed to protect individuals without national citizenship and a means of analyzing open questions in federal law, including the doctrinal rules governing when a state may sue the federal government or refuse to enforce federal law.

As scholars have pointed out, over the past decade, a great deal of civil-rights innovation has been unfolding at the subnational level.[293] In statehouses across the country, advocates have proposed extending basic rights to those denied national citizenship,[294] while exercising the power of state institutions to challenge

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[291] See, for example, Heather K. Gerken, *A New Progressive Federalism*, 24 Democracy J 37, 37 (Spring 2012) (observing that "States' rights have been invoked to defend some of the most despicable institutions in American history, most notably slavery and Jim Crow" and warning that "it is a mistake to equate federalism's past with its future").

[292] Gillian E. Metzger, *The States as National Agents*, 59 SLU L J 1071, 1073 (2015). For an early invitation to attend to the unique features of the states as governments, see Richard Briffault, *What about the 'Ism'?: Normative and Formal Concerns in Contemporary Federalism*, 47 Vand L Rev 1303, 1305–06 (1994). This Article's proposal to broaden conceptions of state sovereignty to include the historical duties of protection owed by a government to its citizenry complements and extends both Professor Gillian E. Metzger's and Professor Richard Briffault's arguments that states have a role to play in America's constitutional order precisely because they are "formally independent levels of government." Metzger, 59 SLU L J at 1072 (cited in note 292).

[293] See, for example, Olatunde C.A. Johnson, *The Local Turn; Innovation and Diffusion in Civil Rights Law*, 79.3 L & Contemp Probs 115, 115 (2016) (observing that "[i]f one is looking for civil rights innovation, much of this innovation might be happening through legislation, regulatory frameworks, and policies adopted by state and local governments").

[294] See, for example, New York Is Home Act, New York SB 7879, 237th Sess (June 16, 2014), archived at http://perma.cc/E46G-FAVM (proposing the creation of state citizenship); S. Karthick Ramakrishnan and Allan Colbern, *The California Package: Immigrant Integration and the Evolving Nature of State Citizenship*, 6 Policy Matters 1, 10–13 (Spring 2015) (describing the creation of de facto state citizenship).

the reach of federal law through state-sponsored litigation,[295] non-enforcement policies,[296] or formal state legislation.[297] In the courtroom, meanwhile, members of the judiciary have signaled a willingness to accommodate this more expansive role for the states: whether it be by opening the courthouse door to states seeking to challenge the federal government,[298] articulating limits on the ability of the national government to compel state enforcement of federal law,[299] or carving out room for state law to stand alongside federal law.[300]

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[295] For a summary of recent state challenges to the federal government, see Tara Leigh Grove, *When Can a State Sue the United States?*, 101 Cornell L Rev 851, 872–80 (2016). For a sampling of recent state-sponsored litigation against the federal government, see generally Petition for Review, *New York v Environmental Protection Agency*, Civil Action No 17-1185 (DC Cir filed Aug 1, 2017); Complaint for Declaratory and Injunctive Relief, *Massachusetts v Department of Education*, Civil Action No 17-1331 (DDC filed July 6, 2017) (available on Westlaw at 2017 WL 2875620); Brief for Appellants, *Hawaii v Trump*, Civil Action No 17-15589 (9th Cir filed Apr 7, 2017) (available on Westlaw at 2017 WL 1338049); Complaint for Declaratory and Injunctive Relief, *Washington v Trump*, Civil Action No 17-141 (WD Wash filed Jan 30, 2017) (available on Westlaw at 2017 WL 443297) ("Washington Complaint").

[296] See, for example, *The Original List of Sanctuary Cities, USA* (Ohio Jobs & Justice Political Action Committee, July 29, 2017), archived at http://perma.cc/NB7W-BPYR; Bryan Griffith and Jessica Vaughan, *Maps: Sanctuary Cities, Counties, and States* (Center for Immigration Studies, July 27, 2017), archived at http://perma.cc/VB2W-GLEE; *Lunn v Massachusetts*, 78 NE3d 1143 (Mass 2017).

[297] See, for example, California Values Act, California SB 54, 2017–2018 Sess (Sept 16, 2017), archived at http://perma.cc/Q7VY-RX6K; Oregon HB 2921, 79th Sess (Feb 15, 2017), archived at http://perma.cc/4YT6-B25K; New York SB 7879 (cited in note 294). See also Ann Morse, et al, *Report on 2016 State Immigration Laws* (National Conference of State Legislatures, Sept 1, 2016), archived at http://perma.cc/8H4H-GUFH; Tanya Broder, et al, *Inclusive Policies Advance Dramatically in the States: Immigrants' Access to Driver's Licenses, Higher Education, Workers' Rights, and Community Policing* (National Immigration Law Center, Aug 2013), archived at http://perma.cc/33DD-DA9M.

[298] See *Massachusetts v Environmental Protection Agency*, 549 US 497, 518–20 (2007); Jessica Bulman-Pozen, *Federalism as a Safeguard of the Separation of Powers*, 112 Colum L Rev 459, 494–95 (2012) (suggesting that "*Massachusetts* may suggest a broad role for states in challenging federal executive action—and federal executive inaction"); Calvin Massey, *State Standing after* Massachusetts v. EPA, 61 Fla L Rev 249, 264–66 (2009) (interpreting the *Massachusetts* decision as one that stands for the proposition that "a state has standing to assert the rights of its residents under federal law").

[299] See *New York*, 505 US at 176–77; *Printz v United States*, 521 US 898, 935 (1997). See also Neil S. Siegel, *Commandeering and Its Alternatives: A Federalism Perspective*, 59 Vand L Rev 1629, 1630–31 (2006) (arguing that the *New York* and *Printz* decisions "breathed new life" into the Tenth Amendment by, respectively, prohibiting Congress from ordering state legislatures to comply with federal instructions regulating waste and state executive officials from conducting background checks to enforce federal law).

[300] See, for example, *Altria Group, Inc v Good*, 555 US 70, 91 (2008); *Wyeth v Levine*, 555 US 555, 581 (2009); *Cuomo v Clearing House Association*, 557 US 519, 536 (2009); Gillian E. Metzger, *Federalism and Federal Agency Reform*, 111 Colum L Rev 1, 3 (2011) (arguing that these three decisions "limit administrative agencies' preemption powers in

Despite this flurry of civil-rights innovation at the subnational level, however, justifications for, and means of policing, this expansive role of states and cities have proven challenging.[301] Guided by conventional assumptions of state citizenship as a defunct category that gave way to national citizenship and confined to narrow definitions of state sovereignty made popular by southern secessionists, members of the Court,[302] state lawmakers,[303]

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ways that could have significant prospective effect in protecting state law against displacement by executive branch actions"). But see Daniel J. Meltzer, *Preemption and Textualism*, 112 Mich L Rev 1, 3 (2013) (cautioning against making "generalizations about the direction of preemption law"); Robert S. Peck, *A Separation-of-Powers Defense of the "Presumption against Preemption,"* 84 Tulane L Rev 1185, 1186 (2010) (referring to the "ping-pong nature of the Court's treatment of the antipreemption presumption").

[301] See Metzger, 111 Colum L Rev at 67 (cited in note 300) ("[While] [t]he idea that the states may have such a role to play in checking and reforming federal administration is intriguing . . . substantial analytic and normative work remains to be done for such an account to be viable."). See also Jessica Bulman-Pozen and Heather K. Gerken, *Uncooperative Federalism*, 118 Yale L J 1256, 1259 (2009) ("[W]e do not have a vocabulary for describing [the use by states of delegated federal power to reform or resist that power], let alone a fully developed account of why it happens, what it means, and what implications it holds for the doctrinal debates in which federalism scholars routinely engage."); Byron Dailey, Note, *The Five Faces of Federalism: A State-Power Quintet without a Theory*, 62 Ohio St L J 1243, 1243 (2001) (arguing that members of the Rehnquist Court have "no common theory of federalism"); Katherine Mims Crocker, Note, *Securing State Sovereign Standing*, 97 Va L Rev 2051, 2052 (2011).

[302] For examples of the Court's rationale for its anticommandeering doctrine, see *New York*, 505 US at 157 (analyzing the constitutionality of a state law by inquiring "whether an incident of state sovereignty is protected by a limitation on an Article I power"); *Printz*, 521 US at 928 (justifying the limits on congressional power to commandeer state officials as intended to ensure the "[p]reservation of the States as independent and autonomous political entities"). Note that as scholars have pointed out, the Court based the anticommandeering principle in part on a political accountability argument that, in turn, has prompted considerable criticism. See Andrew B. Coan, *Commandeering, Coercion, and the Deep Structure of American Federalism*, 95 BU L Rev 1, 13–15 (2015). For an account of the Court's justification for its state-standing doctrine, see, for example, *Snapp*, 458 US at 602, 607 (identifying three sets of interests that may justify a state's standing in federal court, including its "proprietary" interests in state-owned property, "sovereign" interests in preserving its self-government, and "quasi-sovereign" interests in protecting the "general well-being of its residents"). For the Court's rationale for the presumption against preemption, see, for example, *Wyeth*, 555 US at 565 (grounding the presumption against preemption with reference to "the historic police powers of the States"). But see Metzger, 111 Colum L Rev at 19–25 (cited in note 300) (questioning whether traditional federalism values best explain the preemption cases of the October 2008 Term).

[303] See, for example, New York SB 7879 (cited in note 294) ("[T]his state . . . asserts its historic authority to define its citizenry, and to affirmatively provide state and local public benefits to citizens of the state of New York."); Peter L. Markowitz, *State Citizenship Is a National Solution to Immigration Reform* (NY Times, Aug 18, 2015), archived at http://perma.cc/5U2Y-8H2J (arguing in favor of New York's proposed state citizenship act by invoking the state's "well-established power to define the bounds of its own political community," but without referencing the ancient sovereign duty of protection); Peter L. Markowitz, *Undocumented No More: The Power of State Citizenship*, 67 Stan L Rev 869,

county and city officials,[304] and academics[305] have instead been left to justify and police such local action by invoking a government's degree of formal autonomy from the national government or its reserved police powers under the Tenth Amendment. This conception of state sovereignty as autonomy from the national government has, in turn, produced a host of doctrinal difficulties,[306]

874–75 (2015) (exploring the "power of states to advance inclusive constructions of state citizenship" but without examining the duties a state owes to its citizens).

[304] See, for example, Complaint for Declaratory Judgment and Injunctive Relief, *City of El Cenizo v Texas*, Civil Action No 17-404, *8 (WD Tex filed May 8, 2017) (available on Westlaw at 2017 WL 1950681) ("El Cenizo Complaint") ("This lawsuit is about sovereignty and a local government's autonomy to devote resources to local priorities and to control the exercise of its own police powers, rather than being forced to carry out the agenda of the Federal government."); Complaint for Declaratory Relief, *City of Seattle v Trump*, Civil Action No 17-497, *3–4 (WD Wash filed Mar 29, 2017) (available on Westlaw at 2017 WL 1173703) ("It is fundamental that the federal government may not direct state and local governments to regulate in a particular way or to enforce a federal regulatory program."); Complaint for Declaratory and Injunctive Relief, *County of Santa Clara v Trump*, Civil Action No 17-574, *21 (ND Cal filed Feb 3, 2017) (arguing that Executive Order 13768 "grant[s] the federal executive branch untrammeled discretion to punish state and local governments for taking any action—or simply having a policy or practice—that the federal government finds inconvenient"); Complaint for Declaratory Judgment and Injunctive Relief, *City of Chelsea v Trump*, Civil Action No 17-10214, *29 (D Mass filed Feb 8, 2017) (available on Westlaw at 2017 WL 515394) ("Plaintiff Cities have exercised their right of self-governance under state law to prohibit local law enforcement from considering immigration status."); Complaint for Declaratory Judgment and Injunctive Relief, *City and County of San Francisco v Trump*, Civil Action No 17-485, *2 (ND Cal filed Jan 31, 2017) (available on Westlaw at 2017 WL 412999) ("San Francisco Complaint") ("The Executive Order is a severe invasion of San Francisco's sovereignty" because it "interferes with [the city's] ability to direct the official actions of its officers and employees.").

[305] See, for example, Gerken, 124 Harv L Rev at 12 (cited in note 18) (defining sovereignty as a "state's power to rule without interference over a policymaking domain of its own"); Jessica Bulman-Pozen, *From Sovereignty and Process to Administration and Politics: The Afterlife of American Federalism*, 123 Yale L J 1920, 1923 (2014) (observing that "existing accounts locate federalism in state autonomy"); Abbe R. Gluck, *Our [National] Federalism*, 123 Yale L J 1996, 2000 (2014) (linking state sovereignty to autonomy); Grove, 101 Cornell L Rev at 880 n 156 (cited in note 295) (emphasizing state autonomy as a core value in federalism); Ernest A. Young, *The Rehnquist Court's Two Federalisms*, 83 Tex L Rev 1, 4 (2004) (arguing that "virtually all the values that federalism is supposed to promote . . . turn on the capacity of the states to exercise self-government"); Deborah Jones Merritt, *The Guarantee Clause and State Autonomy: Federalism for a Third Century*, 88 Colum L Rev 1, 2 (1988) (arguing that "the Supreme Court should attempt to reconcile state autonomy and national power"); Roderick M. Hills Jr, *The Political Economy of Cooperative Federalism: Why State Autonomy Makes Sense and "Dual Sovereignty" Doesn't*, 96 Mich L Rev 813, 816 (1998) (proposing a foundational theory based on the assumption that "state and local governments should have 'autonomy'—that is, immunity from federal demands for regulatory services").

[306] For accounts of these doctrinal difficulties, including outdated formalism and analytical indeterminacy, see, for example, Bradford Mank, *Should States Have Greater Standing Rights Than Ordinary Citizens?:* Massachusetts v. EPA*'s New Standing Test for*

prompting some scholars to propose abandoning the model of state sovereignty altogether.[307]

The history that this Article has excavated provides a different vantage point for thinking about state citizenship and state sovereignty. Although it is not within the scope of this Article to fully explore how this history can resolve open questions in law and policy, a brief survey suggests that at the very least, a recognition of the historic role of the states in protecting the rights of noncitizens, as well as the traditional conception of state sovereignty as one measured not simply by the degree of autonomy from the national government, but by the duties owed to its peoples, has the potential to broaden the terms of a conversation long cabined by the formal categories of federalism.

Consider, for example, how this history might be brought to bear on state-level initiatives to secure protections for immigrants. Owing in part to the tendency to focus on national citizenship as the source of rights protection, states have yet to fully embrace the potential leverage of state citizenship. To date, only one state government—New York—has considered a legislative proposal to extend state citizenship to those within its borders.[308] In California, meanwhile, efforts have focused on creating a de facto form of state citizenship, based not on a formal legislative grant of citizenship, but on a cumulative series of rights and privileges.[309] In both instances, advocates have had to rely on familiar

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States, 49 Wm & Mary L Rev 1701, 1775 (2008) (standing); Heather Elliott, *Standing Lessons: What We Can Learn When Conservative Plaintiffs Lose under Article III Standing Doctrine*, 87 Ind L J 551, 558 (2012) (standing); Richard H. Fallon Jr, et al, *Hart and Wechsler's The Federal Courts and the Federal System* 263 (Foundation 6th ed 2009) (standing); Metzger, 111 Colum L Rev at 67 (cited in note 300) (preemption); Peck, 84 Tulane L Rev at 1185 (cited in note 300) (preemption); Vicki C. Jackson, *Federalism and the Uses and Limits of Law:* Printz *and Principle?*, 111 Harv L Rev 2180, 2201 (1998) (commandeering); Siegel, 59 Vand L Rev at 1642 (cited in note 299) (commandeering); Evan H. Caminker, *State Sovereignty and Subordinacy: May Congress Commandeer State Officers to Implement Federal Law?*, 95 Colum L Rev 1001, 1006 (1995) (commandeering); Daniel Halberstam, *Comparative Federalism and the Issue of Commandeering*, in Kalypso Nicolaidis and Robert Howse, eds, *The Federal Vision: Legitimacy and Levels of Governance in the United States and the European Union* 213, 231 (Oxford 2001) (commandeering).

[307] See Heather K. Gerken, *Sovereignty Is the Wrong Path for Federalism: A Response to Ilya Somin* (Balkinization, Jan 3, 2017), archived at http://perma.cc/N6HX-PR5A; Heather K. Gerken, *Federalism and Nationalism: Time for a Détente?*, 59 SLU L J 997, 1000 (2015). But see Metzger, 59 SLU L J at 1071 (cited in note 292) (pushing back against contentions that "the concepts of state autonomy and state sovereignty are now outmoded").

[308] See New York SB 7879 (cited in note 294).

[309] Ramakrishnan and Colbern, 6 Policy Matters at 11 (cited in note 294) (describing the creation of a de facto citizenship).

arguments premised on state autonomy, invoking the state's reserved powers of self-government to define the boundaries of its political community.[310]

The history that lies at the heart of this Article suggests both a precedent for these initiatives and a different set of arguments to justify such proposals. As a purely descriptive matter, this history reveals an attempt by one of America's oldest states to protect the rights of those denied national citizenship—through formal state resolutions of protest, as well as state-sponsored litigation in federal court. Far from resting simply on the oft-cited power of an autonomous government to define the boundaries of their citizenry,[311] state actors predicated these interventions on a sovereign's duty to protect its citizens' fundamental rights—a duty that abolitionist lawyers strategically invoked to build an antislavery coalition, and one that subsequently informed the drafting of the Fourteenth Amendment, in which the category has remained hidden in the shadow of national citizenship.

In addition to offering a precedent for these exercises of state power, this history also has the potential to enrich ongoing doctrinal debates in federal law, beginning with the current controversy surrounding the rules governing when a state should be able to gain admission to the federal courthouse. Under its current parens patriae state-standing doctrine, the Court has fashioned a rule of admission that looks to whether a state has articulated an injury to one of its state "interests," whether it be an injury to state-owned property, the state's sphere of autonomous self-government, or the exercise of its general police powers.[312] Among its many difficulties,[313] this rule risks divorcing the substantive injuries that plaintiff states cite in order to gain admission to the courtroom from the individual private rights that they hope to be adjudicated.

To take but one example, in their recent efforts to gain a hearing in the highest court of the nation, lawyers for the state of

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[310] See, for example, New York SB 7879 (cited in note 294); Markowitz, *State Citizenship* (cited in note 303); Ramakrishnan and Colbern, 6 Policy Matters at 11 (cited in note 294) (framing the grant of de facto citizenship as an "autonomous" form of citizenship).

[311] See Markowitz, 67 Stan L Rev at 876 (cited in note 303).

[312] See *Snapp*, 458 US at 602. See also Mank, 49 Wm & Mary L Rev at 1756–80 (cited in note 306) (describing the requirements of parens patriae standing).

[313] For accounts of the difficulties that the Court's standing doctrine presents, see Mank, 49 Wm & Mary L Rev at 1775 (cited in note 306); Elliott, 87 Ind L J at 558 (cited in note 306); Fallon, et al, *Hart and Wechsler's The Federal Courts* at 263–66 (cited in note 306).

Hawaii began their litigation against Executive Order 13780, also known as the "Travel Ban," by citing the ways in which the Order infringed on the rights of the state's Muslim residents.[314] By the time the litigation reached the judges, however, this account of the injuries to private individuals had largely disappeared from the discussion. Working with the existing doctrine, counsel and the Ninth Circuit cited injuries to the state's tourism industry and public universities, as measured by, among other facts, the equivalent of one fewer busload of tourists to the island and eleven fewer graduate students in the state's public university.[315]

By expanding this current doctrinal focus to encompass the foundational duty of a state to protect its citizens, this shift in vantage point could help generate a more transparent analysis of the issues to be adjudicated. Doing so might in turn mitigate separation-of-powers concerns by ensuring that the court's province remains solely "to decide on the rights of individuals," as well as avoid the charade of citing highly attenuated injuries simply to gain admission to a federal forum.[316] Although such a shift would represent a break with the current standing jurisprudence, it would arguably be consistent with the history of state citizenship that drafters of the Fourteenth Amendment invoked, as well as some of the court's earliest standing decisions. Perhaps most notably, in the Court's foundational case *Massachusetts v Mellon*,[317] a case most frequently cited as a prohibition on state suits against the federal government, the Court explicitly recognized the possibility that a state could bring suit to protect its citizens from an unconstitutional federal law.[318]

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[314] Second Amended Complaint for Declaratory and Injunctive Relief, *Hawai'i v Trump*, Civil Action No 17-50, *1 (D Hawaii filed Mar 7, 2017) ("Hawai'i Second Amended Complaint") ("The State of Hawai'i brings this action to protect its residents. . . . Plaintiff Ismail Elshikh . . . joins the State in its challenge because the Executive Order inflicts a grave injury on Muslims in Hawai'i."). See also Washington Complaint at *1 (cited in note 295) ("The State of Washington [ ] brings this action to protect the State—including its residents, its employers, and its educational institutions—against illegal actions of the President and the federal government.").

[315] See Hawai'i Second Amended Complaint at *28–29 (cited in note 314) (arguing that Hawaii should have standing to sue based, in part, on injury to its tourism industry, as evidenced by the decline in the number of visitors from the Middle East from 348 visitors in January 2016 to 278 in January 2017); *Hawaii v Trump*, 859 F3d 741, 764 (9th Cir 2017) (noting that "the State gave updated information, explaining that eleven graduate students from the countries affected by the Order have been admitted").

[316] See *Marbury v Madison*, 5 US (1 Cranch) 137, 170 (1803).

[317] 262 US 447 (1923).

[318] Id at 485 (observing that "[w]e need not go so far as to say that a State may never intervene by suit to protect its citizens against any form of enforcement of unconstitutional

Adopting this more expansive concept of state sovereignty may also help generate a more transparent analysis of the private rights at stake in the anticommandeering context. As in the state-standing cases, the Court has relied on invocations of a state's autonomy and reserved police powers to justify limits on Congress's ability to compel enforcement of federal law by state officials.[319] And as in the standing context, this rule has generated a gap between the individual rights at stake and the constitutional analysis. To take one example, not unlike the lawyers for Hawaii, the city and county officials who have challenged the executive order that penalizes sanctuary jurisdictions have done so by beginning with their factual concerns for protecting the city's immigrant communities.[320] And yet, as in the standing context, lawyers have grounded their constitutional claims in the preservation of the local government's autonomy.[321] As lawyers for the city of San Francisco put it, "The Executive Order is a severe invasion of San Francisco's sovereignty"—not because the order encroaches on the city's duties to protect its citizens, but rather because it "interferes with [the city's] ability to direct the official actions of its officers and employees."[322] Here, too, then, broadening our understanding of sovereignty could help shift the Court's analytical focus from the abstract preservation of autonomy to the concrete question of individual rights—while at the same time potentially justifying the extension of sovereignty-based arguments from the state to lower levels of city and county governance.

As this brief survey suggests, recognizing the history of state citizenship and corollary duties of state protection raises a host of normative and practical questions. What duties of protection should a modern state government owe to those within its borders? Should these duties of protection be based on modern concepts of a duty as a legally enforceable right, or on the nineteenth-century understandings of a moral obligation?[323] Who, moreover, should enjoy these duties of protection? Should state citizenship

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acts of Congress; but we are clear that the right to do so does not arise here," while acknowledging that "the State, under some circumstances, may sue in that capacity for the protection of its citizens").

319 See *New York*, 505 US at 157; *Printz*, 521 US at 928.

320 See, for example, San Francisco Complaint at *1–2 (cited in note 304); El Cenizo Complaint at *1–3 (cited in note 304).

321 See note 320.

322 San Francisco Complaint at *2 (cited in note 304).

323 See Hamburger, 1992 S Ct Rev at 300 n 12 (cited in note 14) (distinguishing between the duty to protect as a moral obligation and as a legally enforceable right).

be extended through ad hoc protections for those denied national citizenship, as in America's founding century, or through formal legislative enactments? What types of individual rights ought the state to protect? And how, in the end, should these duties be fulfilled and policed?

Taken together, these questions present an opportunity to venture beyond the formal analytical categories that have defined the Court's jurisprudence and the writing of America's constitutional history itself. By uncovering the intricacies of the time and place that helped give rise to the category of state citizenship as a protected status, this history thus invites us to reimagine not only the contours of America's past, but also to broaden the scope of debate for the future, reminding us that a government's sovereignty ultimately resides not simply in abstract appeals to its autonomy or power, but rather in the protection of the fundamental rights of those who constitute it.

CONCLUSION

This Article has sought to explain a basic puzzle in American constitutional history: How and why did state citizenship become a strategic tool in America's antislavery movement, before reappearing in the Fourteenth Amendment's guarantee of due process? While existing accounts have explained this puzzle as a successful attempt by northerners to secure the rights of national citizenship for free people of color, this Article offers a different account. Drawing on long-overlooked evidence using a new interdisciplinary model of inquiry, it argues that the abolitionist turn to, and subsequent ascent of, state citizenship across the antebellum era stemmed from a successful attempt to build an antislavery coalition by reframing the issue of American slavery from the rights of a black person to the sovereignty of a free state.

This neglected history of state citizenship in turn offers a new way of looking at the map of American constitutional history. It invites us to see the country's founding century as one defined not by a nationalist North facing off against a states'-rights South, but rather as one defined by a kaleidoscopic continental interior of highly volatile jurisdictions, bound together in a flourishing domestic economy rooted in race-based slavery. Surrounded by the grim realities of this geopolitical order, the country's leading abolitionist lawyers quickly discovered the limits of older, inherited arguments premised on the rights of a black man as an American

citizen. Confronted with the imminent collapse of their movement, these lawyers seized on the label of state citizenship in an attempt to build a movement premised on the sovereignty of a free state, as defined by its ability to protect its citizens from the plantations and chain gangs at the other end of the Atlantic trading corridor.

Long hidden in the shadow of national citizenship, this history of state citizenship also provides us with an additional set of concepts with which to continue ongoing conversations over the role of the states in American constitutional governance. Perhaps most importantly, it invites us to broaden our current definition of state sovereignty from one predicated simply on the state's degree of autonomy from the national government to one that encompasses a state's duty to protect its citizens. And in the end, it reminds us, once more, of the brutal, quotidian violence of America's age of slavery: an age when those fighting for justice or power, or perhaps both, reached for the promise that in an America built on slavery, all states and their citizens were created equal.