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## SLAVERY'S CONSTITUTION: RETHINKING THE FEDERAL CONSENSUS

*Maeve Glass\**

*For at least half a century, scholars of the early American Constitution have noted the archival prominence of a doctrine known as the “federal consensus.” This doctrine instructed that Congress had no power to interfere with the institution of slavery in the states where it existed. Despite its ubiquity in the records, our understanding of how and why this doctrine emerged is hazy at best. Working from a conceptual map of America’s founding that features thirteen local governments coalescing into two feuding sections of North and South, commentators have tended to explain the federal consensus either as a vestige of a much older constitutional tradition rooted in localism or as the result of a brokered political compromise between the sections. Cast as an archaic relic of the colonial era or as a one-off political compromise, the doctrine has appeared in the most recent scholarship as one that by the mid-1800s had devolved into a limp and unpersuasive rhetorical disclaimer.*

*This Essay offers a different origins story for the federal consensus, one that invites us to re-center the doctrine’s central importance in the founding constitutional order. Drawing on a model of inquiry that expands the conventional map of America’s founding to include the material modes of production and exchange, this Essay allows us to see how the bedrock principle of noninterference emerged not only from the oft cited vestiges of localism and sectionalism but also from the customary practices and exigencies of long-distance maritime trade in the Atlantic world. As economic historians have shown, long before the doctrine appeared in print in 1790, America’s merchant class had forged a trading network along the Atlantic coast, creating an interregional economy that spanned from the Massachusetts Bay to the plantation coast and outer-lying islands. Predicated on a rule of noninterference with the underlying modes of enslaved labor on which white wealth depended, these preexisting norms of racialized property ownership and commercial exchange provided a useful starting point for the rules of constitutional union at a time when the concepts and structures of public law constitutional governance in the newly created United States remained inchoate and ill-defined.*

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*By recovering this genealogy and expanding our map of the founding, this Essay offers a more complete view of the origins of one of the oldest and most consequential rules of constitutional union. In doing so, it allows us to see the institution of racial slavery not simply as one confined to a single section of the South and upheld by its peculiar doctrine of states' rights but as a fundamentally American institution, one upheld by a rule of federal and state inaction in the face of slavery's systemic taking of Black lives.*

#### INTRODUCTION

In the early months of 1790, members of the U.S. House of Representatives gathered in the temporary seat of government in New York City and announced a constitutional doctrine that would sound in the halls of national governance and courts of adjudication for decades to come.<sup>1</sup> The doctrine, laid down in a committee report drafted in response to a petition by the Pennsylvania Abolition Society,<sup>2</sup> declared that the newly created Congress of the United States had no power to interfere with the institution of slavery in the states where it existed.<sup>3</sup> Termed the “federal consensus” by a legal scholar who caught sight of it in the archives in the 1970s, this rule of noninterference reverberated across the long nineteenth century.<sup>4</sup> Today, one can see it coursing through the records of subsequent congressional debates,<sup>5</sup> hear its logic at work in the judicial opinions of the U.S. Supreme Court,<sup>6</sup> and observe from afar as it provided the opening script for a newly elected president who, on the eve of the Civil War, offered a solemn promise that in

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1. See 1 ANNALS OF CONG. 1524 (1790) (Joseph Gales ed., 1834).

2. Memorial of the Pennsylvania Society for Promoting the Abolition of Slavery to the Senate and House of Representatives of the United States (Feb. 3, 1790), *as transmitted in Letter from Benjamin Franklin to John Adams* (Feb. 9, 1790) (on file with the National Archives).

3. 1 ANNALS OF CONG. 1524 (1790) (“That Congress have no authority to interfere in the emancipation of slaves, or in the treatment of them within any of the States; it remaining with the several States alone to provide any regulations therein, which humanity and true policy may require.”).

4. See JAMES OAKES, FREEDOM NATIONAL: THE DESTRUCTION OF SLAVERY IN THE UNITED STATES, 1861–1865, at 2–8 (2013); DONALD ROBINSON, SLAVERY IN THE STRUCTURE OF AMERICAN POLITICS, 1765–1820 (1970); GEORGE WILLIAM VAN CLEVE, A SLAVEHOLDERS’ UNION: SLAVERY, POLITICS, AND THE CONSTITUTION IN THE EARLY AMERICAN REPUBLIC (2010); WILLIAM M. WIECEK, THE SOURCES OF ANTI-SLAVERY CONSTITUTIONALISM IN AMERICA, 1760–1848, at 16 (1977); SEAN WILENTZ, NO PROPERTY IN MAN: SLAVERY AND ANTISLAVERY AT THE NATION’S FOUNDING 162–63 (2018); Howard A. Ohline, *Slavery, Economics, and Congressional Politics, 1790*, 46 J.S. HIST. 335 (1980).

5. See, e.g., 11 REG. DEB. 1464 (1835) (statement of Rep. Francis Jackson) (referring to men who “disclaim all interference, or disposition to interfere, with the rights of property in slaves, or control over the slave question, within the jurisdiction of the slave-holding States”); *Republican Platform of 1860*, reprinted in NATIONAL PARTY PLATFORMS 1850–1956, at 31, 32–33 (Donald B. Johnson & Kirk H. Porter eds., 2d ed. 1956); see also CONG. GLOBE, 36th Cong., 1st Sess. 568–576 (1860) (statement of Hon. Henry Wilson).

6. See, e.g., *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1857), *superseded by constitutional amendment*, U.S. CONST. amend. XIV; *Groves v. Slaughter*, 40 U.S. (15 Pet.) 499 (1842).

America, no one would interfere with the institution of slavery in the states where it existed.<sup>7</sup>

Despite its prominence in the archival records, our understanding of how and why this doctrine emerged remains hazy at best. To date, two different views stand out. The first, and perhaps the most familiar, attributes the rule to the long-standing and deeply embedded practice of local self-governance under the British Empire.<sup>8</sup> The second view counters that, far from simply the inevitable product of localism and faith in a limited central government, the rule is best understood as the product of a brokered sectional compromise in the early 1790s, as Northern congressmen set out to secure Southern votes for pending legislation.<sup>9</sup> Working from these depictions of the doctrine as either an antiquated vestige of the colonial past or a one-off political compromise, recent scholarship has invited us to see the doctrine as one that, by midcentury, had devolved into political rhetoric, overshadowed by the rise of a powerful antislavery movement that looked to the power of the national government and seized on the Constitution's underlying abolitionist potential.<sup>10</sup>

This Essay offers a different origins story for the federal consensus, one that invites us to re-center its place in the founding constitutional order. Drawing on a model of inquiry that expands the conventional map of America's founding to include the material modes of production and exchange, this Essay allows us to see how the principle of noninterference emerged not only from the oft cited vestiges of localism and sectionalism<sup>11</sup> but also from the customary practices and material realities of long-distance maritime trade in the Atlantic world.<sup>12</sup>

As economic historians discovered nearly four years ago, long before the federal consensus first appeared in print in 1790, America's merchants had forged a robust trading network along the extended Atlantic coastline, creating an interregional marketplace that linked the continent's emerging urban and commercial centers of the northern latitudes to the agricultural zones of the southern latitudes and outer-lying islands of the Caribbean.<sup>13</sup>

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7. Proclamation No. 17 (Emancipation Proclamation), 12 Stat. 1268 (1863); Abraham Lincoln, First Inaugural Address (Mar. 4, 1861), in *POLITICAL SPEECHES AND DEBATES OF ABRAHAM LINCOLN AND STEPHEN A. DOUGLAS* 530 (Chicago, Scott, Foresman & Co. 1896).

8. See WIECEK, *supra* note 4, at 16; see also PAUL FINKELMAN, *SLAVERY AND THE FOUNDERS: RACE AND LIBERTY IN THE AGE OF JEFFERSON* 104 (1996) (arguing that "the federal consensus" of 1780 "was already in place").

9. Online, *supra* note 4, at 336.

10. See, e.g., Matt Karp, *The Mass Politics of Antislavery*, 3 *CATALYST* 131 (2019). For a similar characterization of the doctrine as one that meant little in practice, see OAKES, *supra* note 4. For the recent historiography that has sought to emphasize the antislavery and abolitionist nature of the Constitution, see WILENTZ, *supra* note 4. For a related turn towards recovering the "abolitionist soul" in the Reconstruction Amendments, see Dorothy E. Roberts, *Abolitionist Constitutionalism*, 133 *HARV. L. REV.* 1, 50 (2019) ("The abolitionist soul of the Reconstruction Amendments is experiencing a renaissance.").

11. See *infra* Part II.

12. See *infra* Parts II–III.

13. ARTHUR L. JENSEN, *THE MARITIME COMMERCE OF COLONIAL PHILADELPHIA* (1963); William I. Davison & Lawrence J. Bradley, *New York Maritime Trade: Ship Voyage*

Although never as heavily trafficked as the transatlantic shipping lanes that connected the ports of America to the central metropolis of the British Empire, these lesser-known coastal conduits that spanned from the enclaves of Boston, to Charleston, to the West Indies contributed to the ongoing conceptualization and articulation of a defined economic space called America. Dating back to the first exchanges of commodities between the Massachusetts Bay and the James River in the early 1630s, these networks rested on familiar mercantile practices of long-term contracting designed to endogenize trust and norms of reciprocity, including the foundational principle of noninterference with the modes of enslaved production on which the accumulation of white wealth and power in America increasingly depended.<sup>14</sup>

Far from remaining confined to a silo of economic space, these norms and material realities of commercial partnership supplied a useful starting point for fashioning the rules that would govern relations between the newly created entities called united states.<sup>15</sup> Most notably, when confronted in 1790 with the claim that the Constitution's Preamble conferred on Congress a power to abolish the institution of slavery, those who debated the question and codified the federal consensus in print drew on the logic of the old commercial American coast in two key ways. First, rather than rebutting the claim of federal power with conventional constitutional arguments predicated exclusively on states' rights and sectional political bargains, disputants who had come of age in an America where the territorial and institutional boundaries of states and sections had yet to take on today's reified form described a fluid landscape of property owners engaged in commerce, collectively bound by shared interests in preserving the mode of enslaved production and ideologies of a racial caste hierarchy.<sup>16</sup>

Second, working from this envisioned landscape of the American coast, disputants presented the proposed constitutional rule of noninterference not simply as a rule that governed relations between strangers but also as a rule

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*Patterns, 1715–1765*, 55 N.Y. HIST. SOC'Y Q. 309, 309 (1971); William I. Davisson, *The Philadelphia Trade*, 3 WESTERN ECON. J. 310 (1965); Albert Fishlow, *Antebellum Interregional Trade Reconsidered*, 54 AM. ECON. REV. 352, 362 (1974) (observing that although the corridor constituted the most "important artery of interregional commerce," it is "one about which we know perhaps least"); 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); David C. Klingaman, *The Coastwise Trade of Colonial Massachusetts*, 108 ESSEX INST. HIST. COLLECTIONS 217 (1972) [hereinafter Klingaman, *The Coastwise Trade of Colonial Massachusetts*]; David C. Klingaman, *The Development of the Coastwise Trade of Virginia in the Late Colonial Period*, 77 VA. MAG. HIST. & BIOGRAPHY 26 (1969); Merl E. Reed, *Footnote to the Coastwise Trade: Some Teche Planters and Their Atlantic Factors*, 8 LA. HIST. 191 (1967); James F. Shepherd & Samuel H. Williamson, *The Coastal Trade of the British North American Colonies, 1768–1772*, 32 J. ECON. HIST. 783 (1972).

14. See *infra* Part II.

15. See *infra* Part II.

16. See *infra* Part II.

that governed relations between sharers.<sup>17</sup> In particular, rather than describing the rule solely as the manifestation of an absolute, in rem right of an individual property owner to exclude all strangers for all time (including, say, the audience of citizen-petitioners who observed the congressional debates from the galleries), disputants also characterized the rule as one that governed consenting partners of the Atlantic coast: partners who had long since agreed by mutual consent to forgo their right to interfere with the modes of production in the plantations in pursuit of the profits to be gained from a long-term commercial correspondence rooted in trust and reciprocity.<sup>18</sup>

By translating the records of these legislative debates using the preexisting commercial lexicon of the coast, we can thus begin to better understand the material roots and logic of the federal consensus. Far from simply a manifestation of colonial-era localism or a one-off political bargain between feuding sections, this was at its core a powerful legal doctrine that could be actively enforced through a thick set of social and relational norms: whether it be via sanctions brought against future abolitionists who might endeavor to interfere with the institution of slavery or via regular informational exchanges between elected officials in the halls of Congress, where representatives of property owners who shared in the profits of enslavement had agreed to delegate managerial control over the institution of racial slavery to those who owned the land and labor of the plantations.

In the end, then, restoring this economic space and its internal ordering mechanisms to the conventional map of America's founding has two key implications for how we understand slavery's constitution. First, in terms of methodology, it invites us to ask a new set of questions. Instead of continuing to relitigate the familiar questions as to where, as between center and periphery or as between North and South, power resided and when this allocation of power was fixed for all time, we might productively ask how older norms of commercial partnership interacted with newly emerging and evolving norms of constitutional governance. Second, and more substantively, by encouraging us to explore how the resulting doctrine of noninterference functioned to mediate relations between strangers as well as sharers in the profits of racial enslavement, this shift invites us to see the doctrine not simply as a rhetorical rule of inaction but rather, as a profoundly consequential exercise of federal regulatory power that made possible the systematic enslavement of Black people for white profit.

To begin the work of telling this story, this Essay commences in Part I with a cursory tour of the American coast and its underlying norms of partnership, as it existed prior to the creation of the U.S. Constitution. Part II then explores how restoring this older world to the existing map of the coast's political space can help us to better translate the records of legislative debate that gave rise to the codification of the federal consensus in 1790. A caveat:

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17. For the conceptual framing of property's multiple audiences of strangers and sharers, see Thomas W. Merrill, *Property and Sovereignty, Information and Audience*, 18 THEORETICAL INQUIRIES IN L. 417 (2017).

18. See *infra* Part II.

a full account of this history is beyond the scope of this brief Essay. Instead, the aim here is simply to suggest how expanding the analytical frame can enrich our understanding of the origins and significance of the federal consensus.

#### I. AMERICA'S FOUNDING ECONOMIC SPACE: PATHWAYS AND NORMS OF PARTNERSHIP

In the waning decades of the British Empire's rule in North America, the merchant ships of New England hauled out each week from Boston with the first fair winds, bound for the ports of the plantation coast.<sup>19</sup> The largest among them could carry the annual yield of four rice plantations,<sup>20</sup> rendering a single ship more than twice as valuable as a plantation boasting three thousand acres of Carolina soil.<sup>21</sup> The smaller vessels among them could carry the full annual harvest of a single tobacco estate.<sup>22</sup> Wide hulls and flat bottoms, broad sails and shallow draughts, many of the vessels were designed explicitly to go easily over the sandy bars that lined the southern coast to where the harvest waited—"a treasure," one Bostonian later observed, "better than the mines of Peru."<sup>23</sup>

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19. See, e.g., *Ship News*, 5 ESSEX GAZETTE 85, 86 (1772); *Custom-House, Port of Salem & Marblehead, Jan. 4*, 5 ESSEX GAZETTE 89, 91 (1773); *Salem January 12: Custom-House, Port of Salem & Marblehead, Jan. 11*, 5 ESSEX GAZETTE 93, 95 (1773).

20. This figure is based on estimated yields of rice plantations in the early 1760s and the carrying capacity of 180-ton ships. See Maurice A. Crouse, *Gabriel Manigault: Charleston Merchant*, 101 S.C. HIST. MAG. 98, 103–04 (2000) (estimating that two of Gabriel Manigault's rice plantations produced 707 barrels); see also *Charles-Town, May 21, 1763*, S.C. GAZETTE, May 21, 1763 (reporting that a 180-ton ship is thought to "carry 1100 barrels of rice"); Lynn Harris, *Charleston's Colonial Boat Culture, 1668–1775*, at 161 (2002) (Ph.D. dissertation, University of South Carolina) (on file with author) (estimating a four-to-one ratio of rice barrels to each ton of vessel weight).

21. See, e.g., Lynn Harris, *Shipyards and European Shipbuilders in South Carolina (Late 1600s to 1800)* 3 (1999) (unpublished manuscript), [https://scholarcommons.sc.edu/cgi/viewcontent.cgi?article=1001&context=mrd\\_pubs](https://scholarcommons.sc.edu/cgi/viewcontent.cgi?article=1001&context=mrd_pubs) [<https://perma.cc/UB5M-XGBN>] (calculating that the planter and merchant Henry Laurens valued his 3000-acre plantation on the Cooper River at 7000 pounds sterling and his one-quarter ownership in a ship at 4000 pounds, for a total valuation of 16,000 pounds sterling).

22. See, e.g., Letter from George Washington to Robert Cary & Co. (July 2, 1759), in 6 THE PAPERS OF GEORGE WASHINGTON: COLONIAL SERIES 330, 330 (W. W. Abbott ed., 1988) ("By the Fair American . . . I send you fifteen Hhds Tobo the whole Amount of the Estates Crop this Year; one Hhd only excepted, which I could not get on board in time as it lay up Pamunky River.").

23. 2 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 89 (Jonathan Elliot ed., Washington 2d ed. 1836) [hereinafter ELLIOT'S DEBATES] ("I suppose the New England States have a treasure offered to them better than the mines of Peru; and it cannot be to the disadvantage of the Southern States."). See *London, August 10*, NEW-ENGLAND WEEKLY J., Nov. 6, 1732; see also *Imported in the Last Ships from London and to Be Sold*, BOS. NEWS-LETTER, July 24, 1760; *State of New-Hampshire*, INDEP. CHRON. & UNIVERSAL ADVERTISER (Bos.), Nov. 15, 1781; *Wanted on Hire*, N.H. GAZETTE, Nov. 9, 1770 ("Wanted on Hire, A Vessell . . . suitable for the Virginia or Carolina Trade."); Letter from Joseph Gerrish & John Barrell to Chauncey Townsend (June 14, 1738) (available in John Barrel, *Letter Book, 1738–1760*, on file with the New York Historical Society) ("What ships we design for Carolina to sail from Boston in the Month of

Unlike the wagons and trains that later crossed the continent and left behind a grid of roads and iron rails, these ships left no trace on the swells of the ocean and would soon disappear from the conventional map of America's constitutional founding.<sup>24</sup> Indeed, for a long time afterwards, accounts of colonial America would begin with an agrarian landscape defined by small farms and isolated peripheries, perhaps slowly coalescing into soon-to-be visible sections of an antislavery North and a proslavery South.<sup>25</sup> Beginning in the 1960s, however, a group of economic historians, curious as to what happened along the waterways lining the rolling fields of farms and plantations, set out to compile the movement of the merchant ships. Using the new invention of a computer, researchers tabulated ship data from the local customs offices and newspapers.<sup>26</sup> Their work revealed a clearly defined maritime economic space, one marked by pathways of commercial partnership capable of linking the colonies together in what one scholar described as "gossamer webs stronger than hooks of steel."<sup>27</sup>

As historians who have explored these networks in more detail have shown, this economic space dates back to at least the 1630s, when planters in Virginia took stock of their surplus harvests and began to scan the coastline

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Sep with a Cargo Suitable for the West Indias, where they may have a Chance for a Freight or secure a Freight in the Spring."").

24. See, e.g., Fishlow, *supra* note 13.

25. See, e.g., AKHIL REED AMAR, *AMERICA'S CONSTITUTION: A BIOGRAPHY* 21 (2006) ("British North America grew up not as one continental legal entity but rather as juridically separate colonies founded over a span of many decades. . . . before 1776 . . . [the colonies] were . . . as legally separate from one another as India and Ireland."); AKHIL REED AMAR, *THE LAW OF THE LAND: A GRAND TOUR OF OUR CONSTITUTIONAL REPUBLIC* 23 (2015) (analogizing the colonies to a "hub-and-spoke" model); JOHN WILLIAM BURGESS, *THE MIDDLE PERIOD, 1817–1858*, at 41 (1897); JOHN WILLIAM BURGESS, *POLITICAL SCIENCE AND COMPARATIVE CONSTITUTIONAL LAW* (New York, Charles Scribner's Sons 1897); JOHN FISKE, *THE CRITICAL PERIOD OF AMERICAN HISTORY, 1783–1789* (Boston, Houghton Mifflin & Co. 1888); JACK P. GREENE, *PERIPHERIES AND CENTER* ix (1986) (using an imperial framework featuring thirteen colonies as the periphery of an imperial metropolis in London); MICHAEL J. KLARMAN, *THE FRAMERS' COUP: THE MAKING OF THE UNITED STATES CONSTITUTION* 14 (2016) (noting that in 1776, "most people still thought of their state as their country."); PETER S. ONUF, *THE ORIGINS OF THE FEDERAL REPUBLIC: JURISDICTIONAL CONTROVERSIES IN THE UNITED STATES, 1775–1787*, at 130 (1983) (identifying the "thirteen colony-states" as the "basic components of the American union"); FRANCIS AMASA WALKER, *THE MAKING OF THE NATION, 1783–1817* (New York, Charles Scribner's Sons 1895); GORDON S. WOOD, *EMPIRE OF LIBERTY: A HISTORY OF THE EARLY REPUBLIC, 1789–1815*, at 2 (2009) ("Before the Revolution of 1776 America had been merely a collection of disparate British colonies."); GORDON WOOD, *THE CREATION OF THE AMERICAN REPUBLIC 1776–1787*, at 359 (1969) (reflecting on the fractured nature of the thirteen British colonies); Andrew C. McLaughlin, *The Background of American Federalism*, 12 AM. POL. SCI. REV. 215 (1918); John M. Murrin, *A Roof Without Walls: The Dilemma of American National Identity*, in *BEYOND CONFEDERATION: ORIGINS OF THE CONSTITUTION AND AMERICAN NATIONAL IDENTITY* 336 (Richard Beemen et al. eds., 1987) (arguing that "[t]he spectrum of seventeenth-century settlement produced, not one, but many Americas, and the passage of time threatened to drive them farther apart, not closer together").

26. See *infra* Part II.

27. See 2 WILLIAM BABCOCK WEEDEN, *ECONOMIC AND SOCIAL HISTORY OF NEW ENGLAND, 1620–1789*, at 592 (1963).



that led northward for nearby markets.<sup>28</sup> “The Planters are carried with a great forwardnes to seeke trade abroad, to which purpose we have now 7 or 8 pinnaces & Barques bound to New-England & the Northward,” the governor of Virginia reported to London in 1631.<sup>29</sup> Within two years, the region had produced ten thousand bushels of corn for export to “their zealous neighbours of New England,” he continued.<sup>30</sup> In Massachusetts, meanwhile, colonizers who looked over the unforgiving soil that would prove incapable of sustaining a staple agricultural export crop began the work of building a merchant fleet that could carry the produce of the plantations in the Americas to the markets that would answer. “We are in a way of building shippes,” the governor of Massachusetts reported in 1642.<sup>31</sup> The “building of ships,” the lawmakers later declared, was “of great importance for the common good.”<sup>32</sup>

Over the next century, this preliminary conduit that connected the enclaves of plantations along the James River to the shipyards of the Massachusetts Bay became a heavily trafficked corridor within the broader Atlantic world, weaving together the commercial and agricultural sectors of North America.<sup>33</sup> By 1732, for example, a census of ships anchored in Roanoke, Virginia, found that nearly every other ship in the southern port was registered to a merchant in New England.<sup>34</sup> Records from the port of New York, meanwhile, show that a third of all vessels between 1715 and 1765 had been cleared for a port along the American coast.<sup>35</sup>

By the eve of the American Revolution, the corridor was crowded with ships carrying the produce of the plantations to market, as food deficits in New England led to increasing dependence on imports.<sup>36</sup> During the first half of the 1760s, for example, planters in Virginia and Maryland supplied

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28. See Benjamin Callender, *A Correct Chart of the East Coast of North America* (illustration) (1796), in CHARLES E. GOODSPEED COLLECTION (available at the Worcester Art Museum).

29. Robert C. Johnson, *Virginia in 1632*, 65 VA. MAG. HIST. & BIOGRAPHY 458, 466 (1957).

30. Letter from Thomas Yong to Sir Tobie Matthew (Oct. 20, 1634), in 9 COLLECTIONS OF THE MASSACHUSETTS HISTORICAL SOCIETY ser. 4, at 81, 110 (Boston, Massachusetts Historical Society 1871).

31. *New England's First Fruits* (Sept. 26, 1642), in 1 COLLECTIONS OF THE MASSACHUSETTS HISTORICAL SOCIETY 248 (Boston, Monroe & Francis reprint ed. 1806) (1792).

32. *Acts to Promote the Building of Good Ships, &c (ch. 91)*, reprinted in THE CHARTERS AND GENERAL LAWS OF THE COLONY AND PROVINCE OF MASSACHUSETTS BAY 189 (Boston, T. B. Wait & Co. 1814) (1671).

33. See Klingaman, *The Coastwise Trade of Colonial Massachusetts*, *supra* note 13, at 222.

34. ALEX ROLAND ET AL., *THE WAY OF THE SHIP: AMERICA'S MARITIME HISTORY REENVISIONED, 1600–2000*, at 73 (2007).

35. Davisson & Bradley, *supra* note 13, at 314 (finding that, of the 2962 vessels recorded in colonial records between 1715 and 1765, 849 cleared out for a port in the “American Coastal Region”).

36. David Klingaman, *Food Surpluses and Deficits in the American Colonies, 1768–1772*, 31 J. ECON. HIST. 563 (1971) (“New England had probably been a net importer of foodstuffs since early in the eighteenth century and by the 1760’s was dependent on external supply sources for her marginal requirements in corn, wheat, and meat.”).

78.9 percent of the corn and wheat imports for Massachusetts, while South Carolina planters provided Massachusetts with 80 percent of its total rice imports<sup>37</sup> and North Carolina supplied 95 percent of Massachusetts's coastwise tar and turpentine imports necessary for the colony's booming shipbuilding industry.<sup>38</sup> During the same five-year period, approximately 70 percent of sugar exported from Massachusetts was purchased by Pennsylvania, Virginia, and Maryland, while 88 percent of the salt exported from the West Indies went to the three southern colonies of Virginia, North Carolina, and Maryland.<sup>39</sup>

In addition to generating profits for the merchants and planters who owned the ships and lands along the American coast, this flourishing coastwise trade contributed to the emergence of an ordering of the commercial space of America quite different from the familiar landscape of isolated colonial outposts and latent sections.<sup>40</sup> As a return to the official reports and merchant correspondence reveals, the movement of commodities across jurisdictional borders contributed to a way of speaking about America in which these bordered lines that have held center stage could recede into the backdrop of commercial speech, as a landscape of interjurisdictional exchange, predicated on internal norms of trust and reciprocity, came to the foreground.

To see how this commercial lexicon of America emerged, consider first the corpus of navigational texts and sea charts produced to facilitate movement along the coast. As these texts attest, the land that appears in leading constitutional histories today as one defined by political and jurisdictional spaces could also appear as part of an organic, smoothly hewn wedge.<sup>41</sup> "New England is that part of America in the Ocean Sea opposite to Noua Alybon," a captain describing the American coast had announced in 1616, and readers could imagine the way the land must have appeared to him from under the shade of a full sail on a summer morning.<sup>42</sup> "New France, off it, is Northward," he continued, and you could perhaps see the captain nodding over his shoulder.<sup>43</sup> "Southwardes is Virginia and all the adjoining Continent," he continued, introducing his readers to a single coast that seemed to have no beginning and no end.<sup>44</sup>

Those engaged in the work of overseeing the movement of ships along this single sweep of coastline, meanwhile, presented the ports that began to appear not simply as peripheral spokes on a wheel centered in a distant

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37. Klingaman, *The Coastwise Trade of Colonial Massachusetts*, *supra* note 13, at 224.

38. Klingaman, *supra* note 36, at 224.

39. Klingaman, *The Coastwise Trade of Colonial Massachusetts*, *supra* note 13, at 226.

40. *See supra* note 25 (summarizing the organization of space in leading constitutional histories of the United States).

41. *See, e.g.*, RICHARD STACHURSKI, LONGITUDE BY WIRE: FINDING NORTH AMERICA 6–7 (2009); *see also* Christopher Tomlins, *The Legal Cartography of Colonization, the Legal Polyphony of Settlement: English Intrusions on the American Mainland in the Seventeenth Century*, 26 LAW & SOC. INQUIRY 315, 325 (2001) (describing cartographic representations of North America as "pitched at the continental-coastal level").

42. JOHN SMITH, A DESCRIPTION OF NEW ENGLAND 21 (Paul Royster ed., 2006) (1616).

43. *Id.*

44. *Id.*

metropolis of London but also as entities linked to one another via the accumulation of commodities. “Virginia is now become the granary of all His Majesty’s northern colonies,” Governor John Harvey reported in 1634, describing the colonies in economic relation to one another.<sup>45</sup> “Boston [is] the store of all the plantation commodities,” retorted another official in 1690, once more offering a spoken geography of America in which commodities moved across jurisdictional borders to accumulate in a single port.<sup>46</sup>

One could hear the same organization of space in the accounts that merchants offered as they described the bustling trade that connected these ports, presenting the names of America’s colonies according to the geographic order in which a ship might sail down the coast and back again. “Many of our ships go to Virginia, N<sup>o</sup> and S<sup>o</sup> Carolina,” a merchant in Boston reported in 1763, verbally arranging the coast by following the movement of a ship traveling northward to southward, before turning to the cargos the ships carried: “[L]arge quantities of rum and other northern produce to purchase rice, tobacco, and naval stores and take in freight for Great Britain.”<sup>47</sup> Others described the coast in geographic reverse, beginning with the southernmost islands and then ranging back home northward: “[t]he West Indies, South Carolina, Cape Fear, Virginia and Greenland . . . these Places are the Ways by which we Generally Make our Remittance from New England,” one trader observed to his partner in London in 1738, in which names of colonies could appear interchangeably alongside names of capes and islands and regions, all under the broad, undifferentiated category of capitalized “Places” and capitalized “Ways.”<sup>48</sup>

In that land of movement along the American coast in the broader Atlantic world, references to sectional blocks of north and south routinely gave to talk of traveling to the northward and the southward,<sup>49</sup> of vessels that ought to be

45. Harold B. Gill, *Wheat Culture in Colonial Virginia*, 52 *AGRIC. HIST.* 380, 380 (1978).

46. See MARGARET ELLEN NEWELL, *FROM DEPENDENCY TO INDEPENDENCE: ECONOMIC REVOLUTION IN COLONIAL NEW ENGLAND* 75 (1998).

47. See CHARLES M. ANDREWS, *THE BOSTON MERCHANTS AND THE NON-IMPORTATION MOVEMENT* 168 (1917).

48. Letter from Joseph Gerrish & John Barrell to Chauncey Townsend, *supra* note 23.

49. See, e.g., Johnson, *supra* note 29, at 466 (“The Planters are carried with a great forwardness to seeke trade abroad, to which purpose we have now 7 or 8 pinnaces & Barques bound to New-England & the Northward.” (quoting Letter from the Governor & Council in Virginia to the Lords (Mar. 6, 1631))); Letter from the Committee of Correspondence to Charles Garth (Dec. 11, 1766), in 5 *THE PAPERS OF HENRY LAURENS* 216, 217–18 (Phillip May Hamer et al. eds., 1968) (“Several of the Provinces Northward have the valuable Privilege of choosing their own Sheriffs . . .”); Letter from Jackson & Bromfield to Henry Bromfield & Thomas Bromfield (Dec. 21, 1768), *microformed on Lee Family Papers*, Reel 18, Bound Vols., 1764–1898 (Mass. Hist. Soc’y) (referring to a captain “well acquainted on the Shore to the Southward of here”); Letter from Thomas Jefferson to John Page (Jan. 20, 1763), in 1 *THE PAPERS OF THOMAS JEFFERSON* 7, 7–8 (Julian P. Boyd ed., 1950) (“I shall . . . return through the British provinces to the northward home.”); Letter from Henry Laurens to Peter Broughton (Oct. 1, 1765), in 5 *THE PAPERS OF HENRY LAURENS*, *supra*, at 13, 13–14 (“I am going on a journey to the Southward of Georgia . . .”); Letter from Colonel Lachlan McIntosh to George Washington (Feb. 16 1776), in 3 *THE PAPERS OF GEORGE WASHINGTON: REVOLUTIONARY WAR SERIES* 325, 325 (W. W. Abbot & Dorothy Twohig eds., 1988) (describing “other parts to the southward”); Letter from George Washington to Robert Cary & Co. (Sept. 23 1761), in

kept “constantly running, backward & forward”<sup>50</sup> and “swimming Nor’wardly”<sup>51</sup> from the plantations of Virginia to the ports of Massachusetts. There was a “swarm of Northward Men . . . in the River,” the Virginia planter Benjamin Harrison observed to his business correspondent William Palfrey in Massachusetts in 1772, peering down at the James River.<sup>52</sup> The port of Charleston, another merchant reported in 1763, “is glutted with all kinds of Northern commodities,”<sup>53</sup> owing perhaps, as the newspapers later reported, to the “Rhode Islanders who come loaded with Rum and Small Truck . . . and carry back Rice.”<sup>54</sup>

The captains who navigated the ships along these routes spoke in the same vernacular, folding the land into a sea of movement, shaped by the winds and the currents. “I had but got very little to the Southward and aimed to bear away for Virginia,” one captain on a trading voyage reported, “until meeting with a Calm in the Gulph Stream, it carried me so far to the Northward, that I fetch’d but in with your capes, where I met the Wind at W.S.W., and ordered the Vessel about to go to the Southward for Virginia.”<sup>55</sup> At a time when such voyages were at the whim of the elements, overland distances between the ports could collapse, with one planter in Virginia predicting that the voyage between Boston and the James River was shorter than that between Boston and Philadelphia.<sup>56</sup>

Indeed, by the eve of the Revolution, it became possible to speak of the coast as a single unit of production. “We should be glad of your Advice, when you write us—what articles *The Produce of this Country* would serve for an export,” a merchant in Newburyport wrote to his friend in London in 1768, offering up any of the various commodities that his ships could collect from the entrepôts to the southward and bring to London,<sup>57</sup> whether it be flour from the Delaware River, tobacco from the James River, or rice and

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7 THE PAPERS OF GEORGE WASHINGTON: COLONIAL SERIES, *supra* note 22, at 73, 73 (noting the reasons that “induced me to take a trip Northward”).

50. Letter from William Holt to William Palfrey (Mar. 16, 1765) (available in the Palfrey Family Papers, Houghton Library, Harvard University).

51. Letter from William Holt to William Palfrey (Mar. 2, 1765) (available in the Palfrey Family Papers, Houghton Library, Harvard University).

52. Letter from Benjamin Harrison to William Palfrey (Dec. 27, 1772) (available in the Palfrey Family Papers, Houghton Library, Harvard University).

53. Letter from Thomas Smith to Isaac Smith (Jan. 31, 1763), *microformed on* Smith-Carter Papers, Reel 1, Loose Manuscripts (Mass. Hist. Soc’y) (discussing market prices at Charleston, trade with New England, and family news); Letter from Benjamin Smith to Isaac Smith (Jan. 21, 1764), *microformed on* Smith-Carter Papers, Reel 1, Loose Manuscripts (Mass. Hist. Soc’y) (discussing South Carolina markets).

54. *New-London, October 29*, MASS. GAZETTE & BOS. POST-BOY & ADVERTISER, Oct. 25–Nov. 1, 1773.

55. *Philadelphia, August 16.*, BOS. POST-BOY, Aug. 27, 1750.

56. Letter from William Holt to William Palfrey, *supra* note 51 (“I think most Persons [in Boston] would sooner rather to send [their ships] here [than Philadelphia] . . . . “Besides, the Voyage here, I believe to be shorter.”).

57. Letter from Jackson & Bromfield to William Ogle & John Ogle (Mar. 4, 1768), *microformed on* Lee Family Papers, Reel 18, Bound Vols., 1764–1898 (Mass. Hist. Soc’y).

indigo from the Carolinas.<sup>58</sup> Trading houses abroad, meanwhile, responded with increasingly formalized sheets of paper listing the going prices for the “Products of *your Continent*,”<sup>59</sup> as a category of “*American Produce*,”<sup>60</sup> emerged in print. Men spoke of ships traveling to “[t]his Part of the World,”<sup>61</sup> “this quarter of the world,”<sup>62</sup> or “any part of the Globe,”<sup>63</sup> while expressing hopes and confidence of an “intercourse from this place to that place.”<sup>64</sup>

This flourishing movement of ships and commodities that had helped make it possible to conceptualize an economic space called America rested on a vast trading network that spanned from Boston to the West Indies and across the Atlantic. Built on much older practices and principles of commercial exchange,<sup>65</sup> this was a trading network that had emerged to mitigate the enormous logistical and informational challenges of engaging in long-distance maritime trade in the early modern world.<sup>66</sup> Preserved in the records of the leading trading houses of the American coast, this was a network that connected merchants in port cities to planters who owned the land and labor of the coast, as well as to the third-party commission agents who acted as intermediaries.<sup>67</sup>

In its early iteration, this network was primarily limited to correspondents who were related by kin, gradually expanding to include those who had been

58. Letter from Henry Lloyd to William Purviance (Oct. 7, 1765) (available in Henry Lloyd Letter Book, 1765–1767, on file with the Baker Library, Harvard Business School).

59. Letter from John de Neufville to Lathrop & Coit (June 28, 1781) (on file with New York Historical Society).

60. See, e.g., *Norwich, February 24*, NORWICH PACKET, Feb. 17–24, 1774.

61. *Advertisement*, PROVIDENCE GAZETTE & COUNTRY J., Feb. 13, 1768.

62. Letter from Jackson & Bromfield to Henry Croger (July 31, 1769), *microformed on Lee Family Papers*, Reel 18, Bound Vols., 1764–1898 (Mass. Hist. Soc’y).

63. Letter from Stephen Hooper to John Reynell & Samuel Coates (Apr. 25, 1775), (available in the Sol Feinstein Collection of the American Revolution, on file with the American Philosophical Society Library).

64. Letter from Henry Lloyd to Hugh Hall Wentworth (Feb. 14, 1766) (available in Henry Lloyd Letter Book, 1765–1767, on file with the Baker Library, Harvard Business School).

65. See generally XABIER LAMIKIZ, *TRADE AND TRUST IN THE EIGHTEENTH-CENTURY ATLANTIC WORLD* (2010); Manuel Herrero Sánchez & Klemens Kaps, *Connectors, Networks, and Commercial Systems*, in *MERCHANTS AND TRADE NETWORKS IN THE ATLANTIC AND THE MEDITERRANEAN I* (Manuel Herrero Sánchez & Klemens Kaps eds., 2017); Francesca Trivellato, *Discourse and Practice of Trust in Business Correspondence During the Early Modern Period* (unpublished manuscript) (on file with the *Fordham Law Review*); Francesca Trivellato, *Trading Diasporas and Trading Networks in the Early Modern Period* (May 2004) (Ph.D. dissertation, Brown University) (on file with the *Fordham Law Review*).

66. See Sánchez & Kaps, *supra* note 65, at 5 (“The aim of [early modern] commercial networks was to overcome, or at least to reduce, the risks faced by early modern commercial exchange, including the difficult enforcement of contracts, shipping accidents, delays caused by weather and wars, slowness of information flow, and in relation to this, asymmetric information.”); see also BERNARD BAILYN, *THE NEW ENGLAND MERCHANTS IN THE SEVENTEENTH CENTURY* 34–35 (1955); APRIL LEE HATFIELD, *ATLANTIC VIRGINIA: INTERCOLONIAL RELATIONS IN THE SEVENTEENTH CENTURY* 89 (2004); K. G. DAVIES, *The Origins of the Commission System in the West India Trade*, 2 *TRANSACTIONS OF THE ROYAL HIST. SOC’Y* 89 (1952); Emma Hart & Cathy Matson, *Situating Merchants in Late Eighteenth-Century British Atlantic Port Cities*, 15 *EARLY AM. STUD.* 660 (2017).

67. See *infra* notes 90–129.

vetted by existing members.<sup>68</sup> Originating out of familial connections, the rules that governed correspondents who participated in the trade did not appear in any statute book. As one leading architect of the new republic later put it, “Merchants of eminence will tell you, that they can trust their correspondents without law; but they cannot trust the laws of the state in which their correspondents live.”<sup>69</sup>

Instead, at the heart of this correspondence network that existed “without law” lay the principle of mutual advantage: an expectation that any joint venture would generate mutual returns for the parties involved. When, for example, a young merchant in Newburyport drafted a letter to a commission house in Philadelphia, he began with his hopes of establishing a “[c]orrespondence for our mutual benefit.”<sup>70</sup> Writing from the southward, a merchant in Virginia recited the same phrase to a merchant in Providence, Rhode Island, expressing his hope “of an advantageous Correspondence to us both.”<sup>71</sup> In earl 1777, meanwhile, a merchant in Boston penned a note to his friend in Charleston, South Carolina, introducing a fellow merchant in Portsmouth, Virginia, with the hope of “the beginning of a Correspondence mutually profitable & agreeable.”<sup>72</sup> And on the eve of peace, a merchant in Baltimore, Maryland, wrote to a correspondent in Boston, expressing hopes of inaugurating “some mercantile transactions . . . that may operate to our reciprocal advantage.”<sup>73</sup>

In the pursuit of realizing these mutual profits, correspondents were expected to share market information that, in turn, helped to promote trust while also allowing each party a basis on which to decide whether and how to proceed with any given venture. “[P]ermit me to ask how Flour of a good quality would Sell in London?,”<sup>74</sup> one planter inquired of his commission agent, before peppering him with questions ranging from the cost of freight to the commission fee.<sup>75</sup> “I Shall . . . be much obliged to be often Informd of your Prices for Bread, Flower, Corn, Barr & Pig Iron . . . Rum, Molasses Loaf & Muscovado Sugars, Candles, Prk etc.,” William Lux of Baltimore wrote to a friend in Boston in July of 1768, observing that “Distance of miles does not Create distance of Sentiments.”<sup>76</sup> Such market information could

68. See HATFIELD, *supra* note 66, at 34–35, 89.

69. 3 ELLIOT’S DEBATES, *supra* note 23, at 282.

70. Letter from Jonathan Jackson to Samuel Smith & Son (Oct. 12, 1765) (on file with the Baker Library, Harvard Business School).

71. Letter from Carter Braxton to Nicholas Brown & Co. (Feb. 1, 1763) (on file with Brown University Library, Digital Repository).

72. Letter from Jackson, Tracy & Tracy to Henry Crouch (Feb. 5, 1777) (on file with the Baker Library, Harvard Business School).

73. Letter from William Hammond to Willing, Morris & Senwick (May 3, 1784) (available in William Hammond, Letter Book, 1784–1786, on file with the New York Historical Society).

74. Letter from George Washington to Robert Cary & Co. (June 1, 1774), in 10 THE PAPERS OF GEORGE WASHINGTON: COLONIAL SERIES, *supra* note 22, at 82, 83.

75. *Id.*

76. Letter from William Lux to John Bradford (July 15, 1768), reprinted in Pamela Satek, William Lux of Baltimore: 18th-Century Merchant 762 (1974) (M.A. thesis, University of Maryland) (on file with the *Fordham Law Review*)

also be volunteered. “We are starving for want of provisions,” a merchant in Charleston wrote to his correspondent in Newburyport in 1766, and “are much in want of your country produce—not one Potatoe yet from the northward.”<sup>77</sup> Charleston “is glutted with all kinds of Northern commodities,” one correspondent warned his partner in Boston, whom he encouraged to find something else to ship.<sup>78</sup>

Perhaps of most consequence, in addition to sharing market information, correspondents were expected to exercise their best judgment and make business decisions that would advance the interests of their partners. Owing to the physical geographies that separated correspondents from one another and the intricacies of doing business in any given jurisdiction, merchants routinely deferred to the decisions of their correspondents. As one merchant put it, a correspondent “cannot at that distance give his orders with such precision as they could wish, they must leave a great deal to my Prudence.”<sup>79</sup> In practice, this meant that merchants engaged in commerce along the American coast regularly agreed not to interfere with the business decisions of their partners, preferring instead to appeal to their shared interests in generating a profit from carrying the commodities of the coast to market. “Gent.,” one merchant in Newburyport wrote to his correspondents in Philadelphia, “I will leave it to your discretion & as you would act for yourselves, act for me.”<sup>80</sup> Working under this delegation of broad discretion, correspondents routinely assured each other that they had taken all efforts to protect and advance the material interests of the other party. “All that we can further say is, that every thing has been done for your Interest that was in our power & that we shall continue so to act until the business is completed,” Henry Laurens, a merchant in Charleston and a future president of the Continental Congress, wrote to his correspondents in Providence, Rhode Island.<sup>81</sup> “I have acted for him, as I would in the same situation wish him to so for me,” echoed William Lux of Baltimore.<sup>82</sup>

Guided by these foundational principles of a correspondence predicated on the promise of mutual advantage and delegated decision-making authority, merchants in the New England region who engaged in direct correspondence with planters abided by a tacit, at times explicit, agreement that decisions regarding the enslaved labor force upon which their joint profits rested remained entirely under the management of the plantation’s ownership. As

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77. *New-London, October 29*, MASS. GAZETTE & BOS. POST-BOY & ADVERTISER, Oct. 25–Nov. 1, 1773.

78. Letter from Thomas Smith to Isaac Smith (Jan. 21, 1764), *microformed on* Smith-Carter Papers, Reel 1, Loose Manuscripts (Mass. Hist. Soc’y).

79. Letter from William Lux to William Mollesan (Feb. 9, 1767) (available in William Lux Letter Book, 1763–1769, on file with the New York Historical Society).

80. Letter from Johnathan Jackson to Sam Smith & Son (Nov. 15, 1765) (on file with the Baker Library, Harvard Business School).

81. See Henry Laurens to Samuel Vernon & William Vernon (July 5, 1756), *reprinted in* 2 THE PAPERS OF HENRY LAURENS, *supra* note 49, at 238, 239; see also Letter from Henry Laurens to Thomlinson, Trecothick & Co. (July 11, 1757), *reprinted in* 2 THE PAPERS OF HENRY LAURENS, *supra* note 22, at 406, 407.

82. Letter from William Lux to William Mollesan, *supra* note 79.

their correspondence suggests, merchants and planters instead confined the topic of their business correspondence to the exchange of market information and the logistics of any given venture, with only occasional reference to the lives and labor of those held in bondage under local laws of property.

Consider, for example, the letters exchanged between William Palfrey, a Boston merchant who served as a clerk to the future president of the Second Continental Congress, and Benjamin Harrison V, a Virginia planter who became a signer of the Declaration of Independence. In a northward-southward correspondence that spanned multiple years, these participants in the coastal trade, who later assumed leadership roles in the new republic, shared and solicited information as to the supply and demand for various grain commodities, without engaging in discussions about the underlying modes of enslaved production. “I am the best provided . . . of any man in this Country,” wrote Harrison to Palfrey in July of 1768,<sup>83</sup> and there was no mention of the 110 people whom Harrison held imprisoned as an enslaved labor force.<sup>84</sup> “I shall be glad of your advice as often as convenient of the state of your market,” Harrison continued, following the familiar script by which correspondents exchanged market information for mutual advantage.<sup>85</sup> “The first opportunity I have I shall ship you a quantity of Bread & Flour, we have the Largest and best Crop of Wheat ever known in the Country,” he promised.<sup>86</sup> “I hope you have received my letter by your sloop with the bread and flour,” he wrote, and once again, the ships and their cargos appeared untethered from the land upon which the commerce rested.<sup>87</sup>

The same bracketing of the institution of racial slavery appeared in letters that traveled between Palfrey and the mayor of Williamsburg, Virginia. “I am further obliged to you for your endeavor to assist me in the sale of Flour,” the mayor, William Holt, wrote to Palfrey,<sup>88</sup> and there was no reference to the ten enslaved people whom the mayor held in bondage.<sup>89</sup> “I tried to get 181 for *your Tobacco*,” he continued; and notice how a Massachusetts

83. Letter from Benjamin Harrison to William Palfrey (July 22, 1768) (available in the Palfrey Family Papers, Houghton Library, Harvard University).

84. See *Appraisalment of the Estate of Benjamin Harrison of Berkeley, July 1791, as exhibited in Exhibit 14: Berkley Plantation—Independence for Some*, FREEDOM’S JUBILEE: AN AFRICAN AM. JOURNEY, <http://databases.charlescity.org/freedom/exhibit14.shtml> [https://perma.cc/Z343-9UN8] (last visited Mar. 16, 2021).

85. Letter from Benjamin Harrison to William Palfrey (Oct. 1, 1767) (available in the Palfrey Family Papers, Houghton Library, Harvard University).

86. Letter from Benjamin Harrison to William Palfrey, *supra* note 83.

87. Letter from Benjamin Harrison to William Palfrey (Mar. 3, 1768) (available in the Palfrey Family Papers, Houghton Library, Harvard University).

88. Letter from William Holt to William Palfrey (Apr. 28, 1765) (available in the Palfrey Family Papers, Houghton Library, Harvard University).

89. See David Gerard Null, *The Library of Francis Jerdone 14* (Aug. 1978) (M.A. thesis, College of William & Mary) (W&M ScholarWorks) (stating that William Holt held, in partnership with Reverend Charles Jeffrey Smith, 2500 acres in the Virginia counties of New Kent and Charles City, including Providence Forge); *Providence Forge*, 5 WM. & MARY COLL. HIST. Q. MAG. 22 (1896) (discussing a mortgage deed made by William Holt on January 1, 1775, showing that he had “ten slaves ‘employed in the forge,’” along with “eight women and two boys”).



merchant became the holder of a commodity grown by enslaved people on the banks of the southern plantation coast.<sup>90</sup>

This tacit agreement among correspondents to accept the underlying modes of enslaved production and focus instead on ensuring the smooth exchange of commodities for profit could also appear explicitly. Consider, for example, a letter dispatched by William Byrd II, in Westover, Virginia, to his colleague in Salem, Massachusetts.<sup>91</sup> Remembered by historians today as a rapist and sadist who described in remarkable detail the gruesome violence he wrought on the Black children and women whom he enslaved,<sup>92</sup> Byrd had taken it upon himself to write to his Massachusetts correspondent to report an incident involving a crew from a New England cargo ship who had dropped anchor near Byrd's waterfront plantation in the Tidewater. "Some of these Banditti anchor near my estate," he wrote his friend in Salem.<sup>93</sup> They had come, he continued, "for the advantage of trafficking with my slaves, from whom they are sure to have good Penny worths."<sup>94</sup> For Byrd, this interference with the rights of his claimed property was inexcusable. Rather than risking a direct confrontation with the crew members whom he accused of having trespassed on his claimed personal property, Byrd instead asked that his correspondent intervene to see to it that such interferences did not happen again.<sup>95</sup> "I would you would be so kind as to hang up all your Felons at home, and not send them abroad to discredit their country in this manner," he wrote, appealing to his correspondent to ensure that a long-standing principle of noninterference became a prerequisite for future movement along the American coast.<sup>96</sup>

When correspondents did discuss the enslaved labor that lay at the heart of the plantation economy, one could sometimes see hints of a racial caste order that traversed the coast's jurisdictional borders. Return again to the correspondence between Harrison, the Virginia planter who would sign his name to the Declaration of Independence, and Palfrey, the Massachusetts clerk of the future president of the Second Continental Congress.<sup>97</sup> In a folded letter that traveled between the two future leaders in the summer of 1772, Harrison told the story of a cargo ship that had recently arrived from Newport, Rhode Island, at the end of his private dock on the James River.<sup>98</sup> The ship, the planter explained, carried a "consignment of Negroes"; a

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90. Letter from William Holt to William Palfrey, *supra* note 88 (emphasis added).

91. Letter from William Byrd II to Benjamin Lyne (Feb. 20, 1735), reprinted in *Letters of William Byrd, 2d, of Westover Va.* (pt. 2), 9 VA. MAG. HIST. & BIOGRAPHY 225, 243–44 (1902).

92. Rebecca Anne Goetz, *Exposing Early Histories of Race, Misogyny, and Power in the Old Dominion*, 43 REVS. AM. HIST. 210 (2015).

93. Letter from William Byrd II to Benjamin Lyne, *supra* note 91.

94. *Id.*

95. *Id.*

96. *Id.*

97. See *supra* notes 111–18.

98. Letter from William Holt to William Palfrey (Aug. 13, 1772) (available in the Palfrey Family Papers, Houghton Library, Harvard University).

consignment, he continued, that his son had ordered from Rhode Island.<sup>99</sup> The letter told of how the ship's captain, who was also a part owner in the vessel and feeling unwell, was invited to come ashore and follow the path that led up from the dock to rest in Harrison's estate that looked over the river below.<sup>100</sup> The letter, as was custom, made no reference to the Black people who remained on the ship at the end of the planter's dock in the suffocating July heat, their lives instead dismissed under the abstract reference to a "consignment of Negroes."<sup>101</sup> Nor, moreover, was there reference to the name of the young Black girl whom the ship captain had allowed his first mate to sell to the planter's overseer.<sup>102</sup> Instead, the letter spoke only of the smallpox that the ship's captain had brought to the "Crop Negroes," whose suffering was of relevance to the conversation only for what it might mean for the prospects of next year's harvest and the joint profits of their future ventures.<sup>103</sup>

Taken together, these archival fragments invite us to consider how the daily movement of cargo ships along the American coast rested not only on an agreement among correspondents to defer to the underlying laws and practices of property in persons but also on a shared lexicon that traversed jurisdictional borders and reduced Black people to consignments of collective commodities. By the eve of the Revolution, these underlying norms of noninterference with the institution of racial slavery had been in place for at least a century, kept afloat in a corpus of commercial correspondence in which America could appear not as a coast of fragments but as a single smoothly hewn wedge of soil, in which those who owned the ships and the land and the labor had reached a tacit agreement that the pursuit of mutual advantage rested on noninterference with the institution of enslavement upon which white wealth rested.

## II. THE FIRST CONGRESS: CODIFYING A DUTY OF NONINTERFERENCE

In the opening months of 1790, while the merchant ships along the old American coast continued to sail, the lawmakers of the new nation assembled for the second session of the First Congress.<sup>104</sup> At the time, basic questions about the newly created political space of the United States remained unsettled. To begin with, none of the Constitution's named institutions of governance had secured a firm physical foothold in the soil.<sup>105</sup> Congress, for example, had yet to find a permanent institutional home, such that it appeared in a contemporary drawing as a ship, descending along the Atlantic coast in

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99. *Id.*

100. *Id.*

101. *Id.*

102. *Id.*

103. Letter from Benjamin Harrison to William Palfrey, *supra* note 52.

104. See 1 ANNALS OF CONG. 968 (1790) (Joseph Gales ed., 1834) (announcing the opening of the "Second Session of the First Congress, begun in the city of New York on January 4, 1790").

105. See generally JAMES STERLING YOUNG, THE WASHINGTON COMMUNITY, 1800–1828 (1966).

search of a place where its representatives could meet to exchange information.<sup>106</sup> States, meanwhile, remained similarly indeterminate, with legal identities that remained an object of considerable debate and territorial borders that were often at best only vaguely defined.<sup>107</sup> The situation was little better in the executive branch, where the question as to what title to use to address the president of the United States had inspired months of acrimonious debate.<sup>108</sup>

Paralleling these basic questions surrounding the ontological nature of the Constitution's institutional structures lay a substantive question of constitutional law: whether the new federal government had acquired any powers with regard to the institution of slavery. As recent scholarship has helped illuminate, almost immediately following the ratification of the document, prominent abolitionists along the American coast seized on the possibility that the Constitution held within it an implied federal power to abolish the institution of slavery.<sup>109</sup> Among those who were at the helm of this initiative was the Pennsylvania Abolitionist Society, whose members began drafting a petition to Congress in early 1790.<sup>110</sup> Signed by the society's president, Benjamin Franklin, the petition argued that although the power to abolish slavery was not among the enumerated powers in Article I, the Constitution's Preamble contained language that, at least on one reading, vested the federal government with power to emancipate those held in bondage.<sup>111</sup> As the petition explained, "The[] [petitioners] have observed with great Satisfaction that many important and salutary Powers are vested in you for 'promoting the Welfare and securing the blessings of liberty to the People of the United States.'"<sup>112</sup> From these powers, they argued, it followed that it was reasonable to expect that "nothing which can be done [by Congress] . . . will be either omitted or delayed," in ensuring "that these

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106. *Con-g-ss Emark'd on Board the Ship Constitution of America Bound to Conogochegue by Way of Philadelphia* (illustration) (1790), in BERNARD F. REILLY JR., *AMERICAN POLITICAL PRINTS, 1776–1876*, at 179 (1991).

107. See generally Craig Green, *United/States: A Revolutionary History of American Statehood*, 119 MICH. L. REV. 1 (2020).

108. See KATHLEEN BARTOLONI-TUAZON, *FOR FEAR OF AN ELECTIVE KING: GEORGE WASHINGTON AND THE PRESIDENTIAL TITLE CONTROVERSY OF 1789* (2014).

109. See generally Corey M. Brooks, *Reconsidering Politics in the Study of American Abolitionists*, 8 J. CIV. WAR ERA 291, 296 (2018) (summarizing the recent historiography of American abolitionism and works that have illustrated early efforts by antislavery activists to abolish slavery through the political process); Nicholas P. Wood, *A "Class of Citizens": The Earliest Black Petitioners to Congress and Their Quaker Allies*, 74 WM. & MARY Q. 109 (2017) (tracing early Black petitions submitted to Congress in pursuit of individual freedom claims).

110. See 1 ANNALS OF CONG. 1239–40 (1790) (Joseph Gales ed., 1834); Letter from William Loughton Smith to Edward Rutledge (Feb. 13, 1790), reprinted in George C. Rogers Jr., *The Letters of William Loughton Smith to Edward Rutledge* (pt. 2), 69 S.C. HIST. MAG. 101, 103 (1968).

111. See Memorial of the Pennsylvania Society for Promoting the Abolition of Slavery to the Senate and House of Representatives of the United States, *supra* note 2.

112. *Id.*

blessings ought rightfully to be administered, without distinction of Colour, to all descriptions of People.”<sup>113</sup>

According to the conventional frame of analysis that commentators have used to analyze the subsequent debates that gave rise to the doctrine of noninterference,<sup>114</sup> we might expect to see any number of responses to this call for federal action. On the one hand, we might expect to find a debate that sounded in the register of sovereign states seeking to protest the encroachment of a distant central government or perhaps, one premised on brokered compromises between two emerging Northern and Southern regional blocks. And to be sure, elements of states' rights and sectional compromises appear throughout the records.<sup>115</sup> But as this part argues, participants in the newly created U.S. Congress did not confine themselves to the reified blocks of jurisdictional space and sectional space that have preoccupied historians' attention. Instead, those whose words were transcribed, recorded, and ultimately published in newspapers and pamphlets across the new republic spoke of an America in the language of the coast, in which the commercial partnerships born of the exigencies of the soil and based on principles of mutual advantage and discretionary authority supplied a crucial justification for the legal relations between the newly united states.

To observe this mode of constitutional discourse that began with the coast and its existing principles of partnership, we can begin by analyzing one of the published speeches from the debates, penned by Representative William Loughton Smith, an influential lawyer from South Carolina whose words appeared in newspaper coverage of the proceedings.<sup>116</sup> Hailing from an elite family in Charleston, South Carolina, Smith was familiar with the commercial networks and conduits that linked the planters and their agents to the merchants of the northward and abroad.<sup>117</sup> From the outset of the debates, Smith had insisted that no one in Congress seriously considered the possibility that the Constitution gave the federal government power to interfere with the institution. As Smith wrote to Edward Rutledge on February 13, 1790, “[t]he Members who wished a commitment [of the petition] have assured me that it was done purely out of a compliment to the Petitioners & that they are sensible the House cannot in any respect interfere.”<sup>118</sup> In an effort to clarify and settle this shared norm that the “House cannot in any respect interfere,” Smith began drafting a formal

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113. *Id.*; see also 1 ANNALS OF CONG. 1240 (1790).

114. See *supra* note 25.

115. See, e.g., 1 ANNALS OF CONG. 1240 (1790) (“He feared the commitment of it would be a very alarming circumstance to the Southern States; for if the object was to engage Congress in an unconstitutional measure, it would be considered as an interference with their rights . . . .”); see also *id.* at 1243 (“[H]e conceived it to be a business within the province of the State Legislatures.”).

116. See *Extracts from the Proceedings of the House of Representatives of the United States*, VA. GAZETTE & ALEXANDRIA ADVERTISER, July 22, 1790 (reprinting Smith's speech).

117. See GEORGE C. ROGERS JR., EVOLUTION OF A FEDERALIST 97 (1962).

118. Letter from William Loughton Smith to Edward Rutledge, *supra* note 110, at 103.

opinion, which he presented to the House of Representatives on March 17 in the form of a speech, later reprinted for public audiences.<sup>119</sup>

The first thing to note about Smith's opinion explaining why Congress had no power to interfere in the institution of slavery is his construction of the relevant constitutional landscape. Rather than remaining confined to a constitutional landscape defined by thirteen states, two feuding sections, and one central government, Smith offered readers a verbal portrait of the old American coastline, as defined by the nature of the land and the movement of the ships that hauled in from the northward to carry the produce of the plantations to market. In his exposition, Smith called on his colleagues to consider the "nature of the soil" along the plantation coast.<sup>120</sup> This soil, he insisted, was one that could only be cultivated by enslaved labor.<sup>121</sup> "Indigo, cochineal, and various other dying materials, which are the produce of the West Indies, could only be raised by the slaves; the great staple commodities of the South would be annihilated without the labor of Slaves," Smith asserted.<sup>122</sup> From these staple commodities, Smith then turned to the networks of commerce that depended on the labor of the enslaved. "If the low country is deserted," Smith hypothesized, "where will be the commerce, the valuable exports of that country, the large revenue raised from its imports and from the consumption of the rich planters?"<sup>123</sup> Moving from this interconnected network of the merchants and planters of America, Smith then warned of the dangers that would result if the chains of commerce were broken between the northward and the southward. "The States are links of one chain: if we break one, the whole must fall to pieces," he declared.<sup>124</sup> "If you injure the Southern States, the injury would reach our Northern and Eastern brethren."<sup>125</sup>

In presenting this spoken portrait of an interlinked internal economy of America whose stakeholders shared an interest in the underlying modes of production, Smith tapped into a well-established tradition of political thought that had long emphasized the importance of commerce as the basis for a thriving society.<sup>126</sup> At a time when the legal concept of a "united state"

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119. 1 ANNALS OF CONG. 1503–14 (1790).

120. *Id.* at 1510.

121. *Id.* at 1513.

122. *Id.*

123. *Id.*

124. *Id.*

125. *Id.*

126. See generally ADAM SMITH, THE THEORY OF MORAL SENTIMENTS (Ryan Patrick Hanley ed., Penguin Classics 2010) (1761); Daniel Hulsebosch, *The Revolutionary Portfolio: Constitution-Making and the Wider World in the American Revolution*, 47 SUFFOLK U. L. REV. 759 (2014). For a helpful interpretation of what Smith meant by sentiments, see EMMA ROTHSCHILD, ECONOMIC SENTIMENTS: ADAM SMITH, CONDORCET, AND THE ENLIGHTENMENT 11 (2001) (defining economic sentiments as "the principles of those who govern and the way in which they are modified by the spirit of those who are governed"). On the reception of Smith's writings, see, for example, Edward G. Bourne, *Alexander Hamilton and Adam Smith*, 3 Q.J. ECON. 328 (1894); see also Letter from Thomas Jefferson to Thomas Mann Randolph (May 30, 1790), as reprinted in 3 CATALOGUE OF THE LIBRARY OF THOMAS JEFFERSON 438

remained inchoate, politicians looked to the realm of long-distance commerce for norms on which to build an enduring and long-lasting polity, abiding by a belief in commerce as the primary means of sociability.<sup>127</sup>

This theoretical importance of the commercial pathways along the American coast had been brought into sharp material relief by the economic crises of the 1780s, as it became clear to many merchants in New England that their counterparts in Great Britain were determined to monopolize the carrying of plantation commodities to the markets of Europe. “Great-Britain is endeavouring, by every means in her power, to annihilate [the carrying trade],” one observer had reported in Providence, Rhode Island.<sup>128</sup> She was “depriving our ships of the privilege of carrying the produce of our own country,” while the “subjects of that nation are permitted to send their vessels to any part of the continent for bread, flour, tobacco, rice, &c. and to ship them from most of the States upon the same terms with our own subjects.”<sup>129</sup> The burden, some said, fell squarely on the New England merchants and property owners, who could appear in print as a unit interchangeable with the newly created New England states. “Of all people,” wrote one observer in New York, “I pity the New-England *States* most. Their commerce is good for nothing on the present plan. Independence at present is no blessing to them in the way of trade; for from the regulations of Great-Britain they can have little or none of the carrying business.”<sup>130</sup>

By appealing directly to these established traditions of political thought and assertions of economic necessity, Smith and his colleagues who conjured up an image of the old American coast seized on the opportunity presented by the petition to lay out the legal basis of noninterference with the institution of slavery. In doing so, they offered two distinct justifications for the doctrine of noninterference, both of which rested on conceptualizing the newly created sovereign states not simply as peripheries to the central government or subparts of feuding sections but as individual property owners who had been engaged in interjurisdictional commercial exchange along the American coast for generations.

The first of these justifications rested on the familiar principle that property owners had a right to exclude nonowners.<sup>131</sup> One could hear this principle come alive in the early days of the debate, as disputants readily analogized

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(Millicent E. Sowerby ed., 1953) (“[I]n political economy I think Smith’s *wealth of nations* the best book extant . . .”).

127. This particular logic of mutual dependencies would continue to sound across the nineteenth century. See, e.g., CONG. GLOBE, 36th Cong., 1st Sess. 1616 (1860) (“Add . . . the profits of the coasting trade, which are very great, and of which the North has a monopoly, . . . and you may have some conception of the importance of slavery and of the South to the people of the North. Destroy these resources, and what becomes of the shipping, manufacturing, mercantile parts of your States, and of the vast interests dependent on them?”).

128. *Circular*, PROVIDENCE GAZETTE & COUNTRY J., May 21, 1785.

129. *Id.*

130. *Extract of a Letter Dated New-York, June 22, 1785*, STATE GAZETTE OF S.C., July 11, 1785 (emphasis added).

131. For the conceptual framework of property rules governing relations between strangers and sharers, see Merrill, *supra* note 17.

the sovereign states to individual property owners asserting their right to exclude unwanted strangers. When, for example, Smith first set out in February of 1790 to explain why the House should refuse to accept the abolitionists' petition, he invited his audience to consider an individual property owner who had traveled up from the plantation coast, passed through Philadelphia, and made his way to New York, only to find strangers in the gallery who sought to meddle with his claims of enslaved property in clear violation of the duty of noninterference. "A gentleman can hardly come from that country with a servant or two, either to this place or Philadelphia, but there are persons trying to seduce his servants to leave," Smith began.<sup>132</sup> The rule to be applied in such scenarios was simple. "[T]hey should . . . not interfere with a business in which they are not interested."<sup>133</sup> Others concurred. "The men in the gallery had come here to meddle in a business with which they have nothing to do," observed Congressman Aedanus Burke of South Carolina.<sup>134</sup>

While disputants had little difficulty applying this in rem rule of exclusion to the mass of unknown strangers who might descend on the enslavers of the American coast, Smith and his colleagues also offered a second justification: one that began with the premise that property owners who had a pecuniary interest in the institution of slavery had a right to weigh in on the future of the institution. To hear this starting premise, listen, for example, as Congressman John Page of Virginia began his remarks. Before speaking on the merits of the institution, Page clarified that he had a right to speak by virtue of his economic interest in the business of slavery. As he explained by way of a preface, "he . . . was as much interested in the business as any gentleman in South Carolina or Georgia," before announcing his judgment of the matter.<sup>135</sup> Applying the same principles, Congressman James Jackson of Georgia observed that if the strangers in the galleries who had presented the petition also had the funds to purchase the property in question, then of course they would have the right to speak on the matter of slavery. "I would beg to ask those, then, who are desirous of freeing the negroes, if they have funds sufficient to pay for them? If they have, they may come forward on the business with some propriety; but, if they have not, they should keep themselves quiet."<sup>136</sup>

Set against this background understanding that interested parties, but not strangers, had a right to "come forward," Smith and his colleagues framed the federal rule of noninterference in a way that would have resonated with those along the coast who had participated in the trade for generations. More specifically, instead of simply presenting the doctrine of noninterference as a bright-line rule among strangers—a justification that would have made little sense to the close-knit merchant community who had engaged in

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132. 1 ANNALS OF CONG. 1244 (1790) (Joseph Gales ed., 1834).

133. *Id.* at 1228; *see also id.* at 1227 (statement of Rep. Michael Jenifer Stone) ("[T]he petitioners had no more right to interfere with it than any other members of the community.").

134. *Id.* at 1227.

135. *Id.* at 1246.

136. *Id.* at 1228.

commercial exchange along the coast for over a century and a half—Smith and his colleagues also framed the rule of noninterference as one that emerged from the informed and willing consent of partners bound in links of mutual dependence.<sup>137</sup>

Consider, for example, how Smith characterized the nature of the legal relationship between the states. Rather than analogizing the states to the strangers in the room who were in need of a bright-line rule of noninterference, Smith honed in on the informed citizens of the Northern states who understood the importance of the institution of slavery to the political economy and knowingly acquiesced in its preservation.<sup>138</sup> “The truth was,” Smith explained,

that the best informed part of the citizens of the Northern States knew that slavery was so ingrafted into the policy of the Southern states, that it could not be eradicated without tearing up by the roots their happiness, tranquility and prosperity; that if it were an evil, it was one for which there was no remedy, and therefore, like wise men, they acquiesced in it.<sup>139</sup>

Having directed his audience’s attention to the “*best informed* part of the citizens,”<sup>140</sup> Smith then cited the act of informed acquiescence as the basis for a compact of noninterference: “There was then an implied compact between the Northern and Southern people that no step should be taken to injure the property of the latter, or to disturb their tranquility.”<sup>141</sup> The result, he continued, was that those deemed to be in the best position to regulate the institution of slavery were assured full discretionary authority over its governance. “[The Southern States] were the only proper judges of what was for their interest,” he explained, invoking the familiar logic of the American coast.<sup>142</sup> Based on this agreed upon compact, he concluded, “no other State had any right to intermeddle with her policy or laws.”<sup>143</sup>

In presenting this justification for noninterference, Smith had thus rooted the federal consensus not simply in today’s familiar logic of a state’s primordial autonomy from a distant center or a regional compromise between sections but in an older logic of commercial partnership rooted in the promise of mutual advantage and discretionary authority between coequal parties to a long-term agreement. Perhaps even more strikingly, Smith also made explicit the underlying ideology of racial ordering that had coursed through the merchant correspondence of the coast for generations. Appealing directly to biological constructs of race, Smith argued that failure to abide by this implied compact of noninterference would not only destroy the profits on which the property owners of America depended; it would destroy the future of the white race. “A proper consideration of this business,” he advised,

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137. *Id.* at 1508.

138. *Id.*

139. *Id.*

140. *Id.* (emphasis added).

141. *Id.*

142. *Id.* at 1507 (stating there were no petitions against slavery from the Southern states, and they were the only proper judges of what was for their interest).

143. *Id.*



must convince every candid mind, that emancipation would be attended with one or other of these consequences; either that a mixture of the races would degenerate the whites, without improving the blacks, or that it would create two separate classes of people in the community . . . which would terminate in the massacre and extirpation of one or the other.<sup>144</sup>

By invoking this prospect of the “degeneration” of the white race and warning of the ensuing violence that would result in the absence of enslavement, Smith thus concluded his defense of the foundational rule of noninterference not with appeals to states’ rights or sectional compromises but to an ideology of whiteness and racial subjugation that could course across the formal jurisdictional and sectional lines of America.

Grounded in a constitutional landscape that featured a single organic American coastline bound by underlying norms of commercial partnership and a racial hierarchy of whiteness, Smith’s opinion found a ready audience. Throughout the debates, men who had come of age along the American coastline moved easily between speaking of the well-settled rights of individual property owners and the still inchoate sovereign rights. In doing so, they, like Smith, borrowed from the familiar rules of strangers and sharers to articulate what would become the rule of noninterference for a union of states as commercial partners. “The rights of the Southern States ought not to be threatened, and *their property* endangered, to please people who would be unaffected by the consequences,” announced Burke, working from the premise that strangers could not interfere with property rights.<sup>145</sup> Likewise, when Congressman Abraham Baldwin referred to the question of property holdings in the compact of the Confederation, he too spoke in the language of the coast, warning that failure to abide by the careful agreements that had been enacted would compromise the entire venture:

[F]rom the extreme desire of preserving the Union, and obtaining an efficient Government, [the members of the Southern States] were induced mutually to concede, and the Constitution jealously guarded what they agreed to. If gentlemen look over the footsteps of that body, they will find the greatest degree of caution used to imprint them, so as not to be easily eradicated; but the moment we go to jostle on that ground, I fear we shall feel it tremble under our feet.<sup>146</sup>

By no means limited to delegates from the Southern states, congressmen from the northward who had long participated in the political economy of the coast readily applied the same framework, presenting Congress as an assembly of states, each bound by a duty of noninterference that could be analogized to individual property owners. Listen, for example, to how the merchant Elbridge Gerry of Massachusetts explained the scope of the right of Congress’s power to purchase the population of enslaved people in the Southern states. Rather than analyzing the question according to a contest between center and periphery or North versus South, Gerry presented

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144. *Id.* at 1508.

145. *Id.* at 1413–17.

146. *Id.* at 1242.

Congress as a composite of states that collectively had the right to make an offer to buy enslaved persons, a right no different than the individual petitioners who had assembled in the audience. “Congress have a right, if they see proper,” he advised, “to make a proposal to the Southern States to purchase the whole of them.”<sup>147</sup> Speaking of Congress in the plural, he continued: “He did not intend to suggest a measure of this kind; he only instanced these particulars to show that Congress certainly has a right to intermeddle in the business.”<sup>148</sup>

As intelligible to the planters of the southward as it was to these merchants of the northward, this principle of noninterference that had long coursed through the commercial records of the old American coast now appeared in the codified records of the Congress of the United States. In lieu of justifying the principle with appeals to states’ rights or sectional political bargains, the authors of the final committee report simply declared what some presumed to have been obvious from the start.<sup>149</sup> “Congress have no authority to interfere in the emancipation of slaves, or in the treatment of them within any of the States,” the final report read, “it remaining with the several States alone to provide any regulations therein, which humanity and true policy may require.”<sup>150</sup> For many observers, this rule that codified the practices of the coast was hardly a surprise. “Such things” as a federal abolition power, observed James Madison, “are not contemplated by any gentleman.”<sup>151</sup> Others concurred. “I believe there is not a wish of the kind entertained by any member of this body that Congress intend to exercise an unconstitutional authority, in order to violate their rights,” echoed another.<sup>152</sup> Rooted in the material realities and long-established norms of commercial partnership of the old Atlantic coast, this principle of noninterference had washed ashore into the records of Congress, as the ships down at the harbor continued to sail, carrying the produce of the plantations to market.

#### CONCLUSION

Long after the debates of the First Congress had concluded in the spring of 1790 and the ink on the House report had dried, legal scholars in America’s first law schools began to divide up the American coast into discrete units of constitutional time and space.<sup>153</sup> As familiar today as the flag itself, this is a conceptual map that has cast a long shadow across the field, one that accentuates the founding era’s fragments by featuring isolated peripheries whose only bond was that of deference to a distant central government and whose competing labor systems would soon splinter into sections. Working from this familiar map, scholars have tended to read the federal consensus as

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147. *Id.* at 1246.

148. *Id.*

149. *Id.* at 1524.

150. *Id.*

151. *Id.* at 1246.

152. *Id.* at 1188.

153. See Maeve Glass, *The Creation of a Public Law Paradigm*, 60 *HIST. & THEORY* (forthcoming 2021).

either the lingering vestige of colonial-era parochialism or a one-time political bargain designed to help secure votes for pending legislation.

This Essay has invited us to peer beyond this inherited map of America's founding and expand the analytical lens. By sketching out the possibilities of a constitutional landscape that encompasses the economic space of the American coast, I have suggested how a more expansive archive can both enrich our understanding of the norms of commercial partnership as well as sharpen our tradition of the norms of constitutional partnership that appeared in the formal records of Congress. In doing so, this more expansive archive invites us to see how the doctrine of noninterference that allowed slavery in America to flourish across the nineteenth century traced its most enduring roots not to a land of isolated fragments and feuding sections but to a much older America, one predicated on the promise of mutual advantage from and noninterference with the institution of racial slavery and the atrocities upon which it rested.