

THE THREE-FIFTHS CLAUSE

The U.S. Constitution was, of course, a complicated document, written by a nation in which slavery was legal and prosperous in most of the states. At the convention, slavery is debated throughout the summer of 1787. At the very beginning of the convention the question is, “How do you allocate representation in Congress?” and immediately there is a debate between those people who say [the number of representatives each state gets] should be based on the whole number of free people and those who would like it based on the whole number of people. [The more people or the bigger a state’s population was, the more representatives they would get in Congress.]

The difference, of course, is critical because Virginia has the largest population in the nation if you count slaves and free people, but if you only count free people, Pennsylvania has the largest population. Thus, the debate in the convention is about political power. Does the South get political power for its slaves or is the national government going to be based only on the contributions of free people and thus, only free people will be counted for representation?

... In the end, the Constitutional Convention adopts something called the Three-Fifths Clause. The Three-Fifths Clause says, ‘that representatives and direct taxes would be allocated in the country by counting the whole number of free people, including indentured servants and others who have some sort of servitude but are not slaves and three-fifths of all other persons.’ So, the Constitution requires that you count up all the free people, and then you count up all the slaves and multiply them by three-fifths, 60%, and that becomes the basis for representation.

Now, this clause is often misunderstood. The Three-Fifths Clause does not say that Black people are three-fifths of a person. It says that political power will be [given] to the states by counting slaves under a three-fifths rule rather than a full rule. The irony of this is as follows. Those who opposed slavery did not want to count slaves at all for representation. After all, if you counted slaves for representation, it simply gave the slaveholders more power. It didn’t give the slaves any power.

... On the other hand, Southerners said, ‘You should count all slaves for representation.’ This didn’t mean that Southerners thought Black people were equal. It certainly didn’t mean they thought slaves were equal. What it meant was the South wanted to get more political power for its slaves and the way to do this would be to count all the slaves [toward their total population]. If this had been done, then the southern states would have had probably a majority in the House of Representatives at the beginning of the nation. However, by doing the three-fifths ratio, the southern states don’t get a majority, although they have close to a majority. (12:15–15:37)

THE ELECTORAL COLLEGE

The other place where the Three-Fifths Clause matters a great deal is, of course, the election of the president. ... You could have simply said that every free adult male in the country could vote. No one was considering that women could vote at the time, so that would not have been on the table. But Madison said the other problem was if you counted just the popular vote, our slaves won't count. He actually says, 'We won't get any power because of our Negroes,' and of course, what he means by that is if you have a direct election of the president, the North with a much larger population of free people is going to overwhelm the South.

One of the delegates at the convention actually put an asterisk in his own private notes and said that Madison was really trying to make sure that Virginians got elected president because if Virginia can't count its slaves in the election of the president, then a New Yorker or a Pennsylvanian or a man from Massachusetts is going to get elected president.

The end result was that the Three-Fifths Clause is folded into that monstrosity called the Electoral College. Now, why do we have the Electoral College? Not because of states' rights, not because the delegates didn't trust voters—we have the Electoral College because it was the only way they could figure out how to count the numerical power of slaves in a country where slaves, of course, wouldn't vote. And so, the electoral votes that every state got was based on the number of members of the House of Representatives that each state had and that was based on the Three-Fifths Clause.

If you look at the presidential election of 1800 between John Adams and Thomas Jefferson, between a man, Adams, who had never owned a slave and hated slavery and had written the Massachusetts Constitution of 1780, which ended slavery in Massachusetts and on the other side you have Thomas Jefferson, who by 1800 owns at least 200 slaves... You see the power of the Three-Fifths Clause in the Electoral College.

If it had been a popular vote, Adams probably would have won because the population of the North was so much bigger than the population of the South if you excluded the slaves. In fact, if you took away from Jefferson all the presidential electors he got by counting three-fifths of the slaves' representation and therefore for electors and did the same for Adams, Adams would have won the Electoral College as well. So here is an example where this bargain over slavery in the Three-Fifths Clause affects not only Congress but also affects the President of the United States...

... If you look at the presidency, what you discover is, of the 12 presidents between Washington and Buchanan, only four of them, the two Adamses, Fillmore and Pierce, had not either owned slaves or come from slaveholding families. This, again, indicates the power of slavery in the political process, which comes from the Three-Fifths Clause in Article I of the Constitution. (15:37–21:44)

THE SLAVE TRADE CLAUSE

The other big debate at the Constitutional Convention concerned the African slave trade. Almost everybody in America realized that the African slave trade was horrendously awful and immoral, even people who believed in slavery, even people like Jefferson, who had owned slaves all his life, who would buy and sell human beings throughout his life, ... even some like Jefferson found the African slave trade to be immoral and wrong.

On the other hand, Georgia and South Carolina had lost thousands of slaves during the American Revolution, and when the British troops left the United States, tens of thousands of African Americans went with them to freedom somewhere else—some to Canada, some to England, some to the British West Indies. Sadly, some were re-enslaved in the British West Indies, but most of these former American slaves lived their lives with liberty.

So at the Constitutional Convention, the delegates from Georgia, South Carolina, and North Carolina insisted that the African slave trade get an explicit, specific protection because these delegates knew that the Congress would abolish the African slave trade immediately because it was popular and because most Americans thought the African slave trade was just horrible and wrong.

Thus, the Constitution provides, and I will read the clause because it's such a convoluted clause and it gives you an idea of how hard the delegates worked to hide what they were doing. The Constitution provides in Article I, Section 9: 'The migration or importation of such persons as any of the states now existing shall think proper to admit shall not be prohibited by the Congress prior to the year One Thousand Eight Hundred and Eight.'

If you read this today, you might have no idea what they are talking about, 'importations of such persons.' What the Constitution is saying is the Migration and Importation Clause, which we refer to as the African Slave Trade Clause, provided that Congress could not end the African slave trade until at least 1808. However, the clause did not require that the African slave trade end in 1808. Sadly, many historians, some political scientists and legal scholars don't understand this and often write in textbooks that the clause required an end to the African slave trade. It did not. It says it cannot be ended before 1808...

... What happened in the meantime [between 1789 and 1808]? At least 60,000 slaves are brought into the United States between 1803 and 1808. This is the largest importation of slaves into what became the United States in the entire history of the country. From the colonial period to 1803, you never had 60,000 slaves brought in in five years and then from 1803 to 1808 you got at least 60,000 slaves. So this is the debate over the slave trade. (22:17–26:21)

THE FUGITIVE SLAVE CLAUSE

Towards the end of the convention, Southerners demanded a clause to allow them to recover runaway slaves and Northerners, without any great debate, without very much thought, seemed to be worn out by these constant debates over slavery and they are so worn out that they allow for the Fugitive Slave Clause to be inserted into the Constitution. Like the clause on the African slave trade, the Fugitive Slave Clause is almost impossible to understand and is convoluted.

The clause read: 'No person held to service or labor 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 labor, but shall be delivered up on claim of the party to whom such service or labor may be due.' This is Article IV, Section 2, Clause 3 of the Constitution. It doesn't mention the word 'slave.' It doesn't mention the word 'fugitive.'

But the impact is clear. If a slave runs away from Virginia to Pennsylvania, he cannot become free under Pennsylvania law. If a slave runs from Kentucky into Ohio, she does not become free under Ohio law. Rather, Ohio or Pennsylvania are obligated to return the person upon the claim of the person to whom such service or labor may be due and, of course, how do you prove that claim? How do you prove you own someone else?

In 1793, Congress passes the first Fugitive Slave Law, which has almost no protections for people claimed as fugitive slaves, but it doesn't work very well in part because many Northerners simply don't help Southerners capture runaway slaves. In 1842, the Supreme Court will hear its first case on the Fugitive Slave Law. It's remarkable that the law's passed in 1793 and there's no case that reaches the Supreme Court before 1842.

But in a case called *Prigg v. Pennsylvania*, the court holds that no state can interfere in the return of a fugitive slave—that Congress has the constitutional power to pass the Fugitive Slave Law, although there were many people who thought Congress did not have this power. They thought that this was a regulation of state-to-state relations. Furthermore, the court ruled that a master had a right to seize a slave anywhere the slave was found without any judicial process. A slave catcher could simply grab someone and say, "This is my slave. I'm taking him or her back to my state," and the free state had no right to interfere. (26:22–29:16)

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