

Lesson 19

SLAVERY AND THE CONSTITUTION

Lesson Objectives:

When you complete Lesson 19, you will be able to:

- Understand that the term “slave” or “slavery” is not in the Constitution.
- Explain the purpose of the Three-fifths Clause.
- Explain how counting slaves as full persons for the purpose of representation would benefit the South.
- Describe the limitations on Congress’s power in both the first and final drafts of the Slave Trade Clause.
- Explain how and why the Framers took great care in constructing the language of the Fugitive Slave Act.
- Explain the significance of the Prohibition on Amendment: Slave Trade Clause.
- Explain the meaning of the Thirteenth Amendment: Abolition of Slavery.
- Explain the significance of Section 2 of the Thirteenth Amendment.

Since America’s genesis, there has been intense debate about the existence of slavery in American history, precisely because it raises questions about this nation’s dedication to liberty and human equality. At the time of the American Founding, there were about half a million slaves in the United States, mostly in the five southernmost states where these individuals made up 40 percent of the population. Many of the American Founders—most notably, Thomas Jefferson, George Washington, and James Madison—owned slaves. However, many others—such as John Jay, Benjamin Franklin, Benjamin Rush, Alexander Hamilton, and John Adams—did not.

In its final form, the Constitution contains three key compromises on enumeration, the slave trade, and fugitive slaves. It is important to note that the word “slave” or “slavery” never appears in the Constitution. Indeed, the escaped slave turned abolitionist, Frederick Douglass, once commented, “Abolish slavery tomorrow, and not a sentence or syllable of the Constitution need be altered.” In the following lesson, you will see why Douglass steadfastly believed that the government created by the Constitution “was never, in its essence, anything but an anti-slavery government.”

Three-fifths Clause — Article I, Section 2, Clause 3*Essay by Erik M. Jensen (pp. 54–56)*

The Three-fifths Clause is one of the most misunderstood clauses in the Constitution. The clause does not deny that blacks are full persons (in fact, *free* blacks were counted on par with whites for purposes of apportionment). Rather, it addresses whether and how slaves should be counted for the purpose of determining the number of representatives in Congress.

Though Southern slave owners asserted that slaves were held as property, Southern delegates at the Constitutional Convention wanted slaves to count as full persons for purposes of determining representation in Congress. Including slaves as part of the Southern population would give the South disproportionately greater representation in Congress and therefore more influence in forming the country's laws. By contrast, Northern delegates favored omitting slaves entirely when determining representation and therefore denying Southern states the advantage in the national legislature. The compromise allowed three-fifths of the slave population to count toward determining representation.

However, a compromise for apportionment did not satisfy the South. To break the Convention deadlock, Gouverneur Morris suggested tying taxes to apportionment as a solution. While it was not in the South's interest to count only a portion of the slave population toward apportionment of representatives, it was in the region's best interest to count only a portion of the slave population towards a state's tax liability.

Thus, even though slaves were property under the laws of the Southern states, the Constitution itself acknowledged that they were persons. By tying both representation and direct taxation to apportionment, the Framers removed any sectional benefit, and thus any proslavery taint, from the special counting rule. This compromise also protected the integrity of the census, since inflating the population numbers to gain more seats in Congress would increase a state's tax liability.

**Before You Read**

Ask: What is a census? (counting of the people in the population for purposes of representation) **Ask:** Suppose government officials wanted to estimate the number of people living in a country. What are some ways that they could do this? (Answers will vary. Students may say that they could look at birth records, death records, or Social Security numbers or require people to complete a survey asking the number of persons in their household.) **Ask:** What is a compromise? (an agreement that involves both giving and taking concessions)



Before You Read

Explain that the Three-fifths Clause was originally called the Three-fifths Compromise. **Ask:** *In what way was the Three-fifths Clause a compromise?* (The clause was a compromise between the North and the South on apportionment of representatives and taxation. The North did not want slaves counted as full persons for purposes of representation because the South would have more representatives in the national legislature. While it was not in the South's interest to count only a portion of the slave population toward apportionment of representatives, it was in the region's best interest to count a portion of the slave population toward a state's tax liability.)



Active Reading

Say: It is often asserted that the Three-fifths Clause is proof that the Founders did not consider blacks to be full persons. Applying what you read about the history of the Three-fifths Clause, explain why this assertion is incorrect. (The clause does not deny that blacks are people. Free blacks counted the same as free whites for purposes of representation. Even though slaves were property under the laws of the Southern states, the Constitution itself acknowledged that they were persons. The Three-fifths Clause addressed how the slave population would be counted for purposes of representation. The final compromise tied both representation and direct taxation to apportionment, thus removing any sectional benefit and any proslavery taint from the special counting rule.)

Slave Trade — Article I, Section 9, Clause 1

Essay by Matthew Spalding (pp. 150–152)

While the first debate at the Constitutional Convention concerning slavery focused on representation, the second debate focused on Congress's power to regulate or ban the slave trade. The Slave Trade Clause was the first independent restraint on Congress's powers. The first draft from the Committee of Detail permanently prohibited Congress from taxing exports, outlawing or taxing the slave trade, and passing navigational laws without a two-thirds majority in both houses of Congress. This draft divided the Southern delegates: Gouverneur Morris of Virginia denounced the slave trade as a nefarious institution; Georgia and South Carolina refused to support the Constitution without a safeguard for slavery.

The issue was referred to the Committee of Eleven. The committee recognized a congressional power over the slave trade but recommended that this power be restricted for 12 years. It also recommended a tax on slave importation. Southern delegates agreed to these recommendations, with the exception that Congress's

power over the slave trade be restricted for 20 years until 1808. Thus, the final draft of the Slave Trade Clause temporarily restricted Congress's commerce power.

Although protecting the slave trade was a major concession demanded by proslavery delegates, the final clause was not a permanent element of the constitutional structure. It was a temporary restriction of a delegated federal power. The restriction applied only to states existing at the time, not to new states or territories, and did not prevent individual states from outlawing slavery on their own.



Before You Read

Tell students that a Committee of Eleven consisted of one member from each state represented at the Constitutional Convention. Explain that a Committee of Eleven was consulted to settle disagreements, such as the disagreement caused by the Slave Trade Clause.



Work in Pairs

Read aloud this sentence on page 150: "George Mason of Virginia condemned the 'infernal traffic' and Luther Martin of Maryland saw the restriction of Congress's power over the slave trade as 'inconsistent with the principles of the Revolution and dishonorable.'" Pair up students and have them summarize both Mason's and Martin's position on the issue. (They both opposed slavery. Mason condemned it, and Martin saw limiting Congress's power over slavery as dishonorable.)



Active Reading

Assign students to read the *Dred Scott v. Sanford* (1857) decision. Have them write 1–2 paragraphs summarizing the case. Ask: *What did Chief Justice Roger B. Taney say about the Slave Trade Clause in *Dred Scott v. Sanford* in 1857?* (Chief Justice Roger B. Taney pointed to the Slave Trade Clause and the Fugitive Slave Clause as evidence that slaves were not citizens but property under the Constitution.) *How would a drafter of the Constitution who opposed slavery respond to Taney's argument?* (He would say that the Slave Trade Clause does not address citizenship and that the Constitution neither sanctions the institution of slavery nor considers slaves to be mere property.)



Active Reading

Point out the last two paragraphs of Spalding's commentary. Note that the Constitution of 1787 does not use the words slave or slavery. Also note that the Framers used the word person rather than property. Ask: *When did the slave trade officially end?* (January 1, 1808, the first day that the Slave Trade Clause allowed such a law to go into effect)



Discussion Question

In what way was the Slave Trade Clause a major concession to slavery? In what way was it not? (Students may say that the Slave Trade Clause did not put an end to slavery; it acknowledged slavery and allowed a tax on slaves. On the other hand, after the time limit that limited Congress's power over the slave trade expired, Congress outlawed the trade. This means that Congress did have power over the trade, including the power to ban it.)

Fugitive Slave Clause — Article IV, Section 2, Clause 3

Essay by Matthew Spalding (pp. 275–276)

A model of circumlocution, the Fugitive Slave Clause comes the closest of the so-called Slave Clauses (Article I, Section 2, Clause 3; Article I, Section 9, Clause 1; and Article V) to recognizing slavery as a protected institution. The Fugitive Slave Clause was one of the most controversial clauses in the Constitution because it provided that escaped slaves would be returned to those who claimed ownership.

The Framers carefully drafted the clause to ensure that the Constitution did not give moral sanction to slavery. The final revision emphasized that slaves were held according to the laws of individual states and that slavery was not based on natural or common law. The language also implies that a slave owner's property did not extend to federal territories if Congress chose to prohibit slavery there. Indeed, according to the legal requirements of the clause, an escaped slave was no longer a slave upon entering a state that did not recognize slavery under its law.

Unlike other clauses in Article IV, which vest power either in Congress directly or in the United States, this clause is written in the passive voice, confers no power on the federal government, but limits state authority. In 1793, though, Congress passed legislation to enforce the clause. In *Prigg v. Pennsylvania* (1842), the Supreme Court held (in a decision written by Justice Joseph Story) that Congress had exercised powers that were necessary and proper to carry out the provision and that a state law that penalized the seizure of fugitive slaves was unconstitutional. However, Justice Story also concluded that the federal government could not compel state officials to enforce the act. Consequently, some states passed personal liberty laws forbidding state officials to enforce the act.

The Compromise of 1850 led to a new federal Fugitive Slave Act. As a result, the Supreme Court in *Moore v. Illinois* (1852) held that states could impose penalties on citizens for harboring fugitive slaves. In *Dred Scott v. Sanford* (1857), Chief Justice Taney pointed to this clause (and the Slave Trade clause) as evidence that slaves were property and not citizens, but neither of these clauses addressed citizenship. These clauses were accommodations to existing slavery interests in particular states.



Check Understanding

Have students work in groups to compare and contrast the language of the Fugitive Slave Clause with that of the Interstate Rendition Clause (Article IV, Section 2, Clause 2) on page 275. (Students should note that the language of the Interstate Rendition Clause is much harsher: It speaks of criminals fleeing justice and returning these criminals to the state that has jurisdiction over the crime. The Fugitive Slave Clause does not mention the word slave. It speaks of persons held in service according to state law and parties who claim that such labor is due. The Fugitive Slave Clause does not give moral sanction to slavery.)



Research It

Matthew Spalding mentions Frederick Douglass on page 276 of your book. Research the life of Frederick Douglass and how his opinions changed about the Constitution.



Discussion Question

Why do you think the Framers wanted to avoid the implication that the Constitution legally sanctioned the practice of slavery? (Slavery is contrary to the principles of America as articulated in the Declaration of Independence.)

Prohibition on Amendment: Slave Trade — Article V

Essay by Matthew Spalding (p. 287)

The Constitution names two clauses that may not be amended: equal suffrage in the Senate (discussed in Lesson 4) and the Slave Trade Clause. The latter forbids amendment of the Slave Trade Clause and the Direct Taxes Clause prior to 1808, the time for which the Slave Trade Clause remains in effect. The origin of this clause is John Rutledge's objection that states opposed to slavery would be able to alter the clauses dealing with slavery.

This prohibition on amendment points to the delicacy and precariousness of the compromises involved in these two clauses. Protecting the Slave Trade Clause revealed Southern concerns about both the strength of antislavery opinion and the difficulty of preventing a coalition of Northern and upper Southern states from amending the Constitution on this question. Shielding the Direct Taxes Clause both indirectly emphasized the "Three-fifths Compromise" (Article I, Section 2, Clause 3) about the apportionment of direct taxes and reflected the South's concern that the taxing powers could be used to undermine the institution of slavery.

Though the clause forbids alteration of the Direct Taxes and Slave Trade Clauses, the Fugitive Slave Clause is not protected from amendment, suggesting a broad consensus for that compromise.



Active Reading

Ask: In what way did the Prohibition on Amendment: Slave Trade protect the interests of the Southern states? (The clause let the slave trade continue until 1808.)



Active Reading

Ask: What happened in 1808 when the ban on prohibition regulating the slave trade expired? (The federal government ended the slave trade.)



Discussion Question

Since the Slave Trade Clause was already agreed upon, why do you think delegates passed the prohibition on amending the Slave Trade Clause? (Southerners would not support the Constitution unless there were additional impediments to prevent anti-slavery states from amending the Constitution to stop the slave trade. The prohibition on amendment reveals the precarious nature of the compromises on taxation and the slave trade. Southern states were concerned that a coalition of Northern states and upper Southern states would amend the Constitution to limit the slave trade or tax the trade in order to undermine slavery.)

Abolition of Slavery — Amendment XIII

Essay by Herman Belz (pp. 380–384)

The text of the Thirteenth Amendment reflects its historic character as the culmination of a movement that began during the American Revolution. Eschewing originality, the authors of the amendment relied on the language of the Northwest Ordinance of 1787, sought to abolish slavery where it had been established for more than two centuries, and intended to keep slavery from being taken into national territory.

Proposed on January 31, 1865, and ratified on December 6, 1865, the Thirteenth Amendment was a positive guarantee of personal liberty, expressed in the negative form of a proscription of slavery or involuntary servitude. Viewed in historical context and in the tradition of American political thought, the amendment affirms the idea that liberty consists in the right of individuals to exercise, without interference, their natural rights. Moreover the amendment established a minimum national standard of equality: the guarantee of personal liberty for all persons in the United States.

By granting Congress the power to enforce the prohibition of slavery in the United States in Section 2, the amendment alters the relationship between the states and the federal government. For the most part, the Constitution regulates the activity of state governments or state officials. Under the Thirteenth Amendment, states no longer had the power to recognize or establish slavery, and their ability to regulate personal liberty and civil rights was curtailed. Significantly, the Thirteenth Amendment also regulated the behavior of private individuals, because a private person who keeps a slave violates the amendment.

To be sure, the scope of the amendment's enforcement power depends on the meaning of slavery and involuntary service. Specific definitions were not included in the amendment because slavery was well understood to mean one person holding another person as chattel and appropriating that person's labor through force rather than consent.

Most of the congressional debate focused on the effects of prohibiting slavery. In its most narrow interpretation, the Thirteenth Amendment affirmed an individual's right not to be held as the property of another individual. Beyond this limitation, states had the authority to regulate the civil rights of persons within their jurisdiction, and private individuals could discriminate in commercial and social interactions. Congressional authors of the amendment, however, argued that the prohibition of slavery also implied the conferral of certain basic civil rights, such as the right to labor, the right to sue, the right to enter contracts, and the right to marry. Yet the authors did not include language specifically protecting or granting civil rights to newly freed slaves.

Shortly after the ratification of the Thirteenth Amendment, Congress passed the Civil Rights Act of 1866 in response to the "black codes" that Southern states instituted to restrict the rights of blacks within their jurisdiction. The Civil Rights Act of 1866 declared that all persons born in the United States (except Indians not taxed) were citizens of the United States. The act also conferred civil rights on individuals, regardless of previous conditions of servitude, and authorized courts to protect persons whose rights were violated. Though many Members of Congress favored extending civil rights to blacks, lawmakers wanted to do so constitutionally.

The constitutionality of the Civil Rights Act was a matter of dispute. Some argued that Section 2 of the Fourteenth Amendment empowered Congress to address the treatment of black citizens in the South. Ultimately, as we discussed in Lesson 14, Congress proposed the Fourteenth Amendment to grant Congress the power to legislate civil-rights issues in the states.

Judicial construction of Section 1 of the Thirteenth Amendment has largely followed the original meaning of the amendment. The most serious judicial challenge involving the amendment has focused on labor arrangements in the post-Reconstruction South that intended to restrict the mobility of black citizens. In the early 20th century, the Supreme Court invalidated state laws restricting employment

and contract liberty as well as laws authorizing compulsory labor for indebtedness, declaring such arrangements to be involuntary servitude.

Concerning Section 2 of the amendment, the Supreme Court held in the *Civil Rights Cases* (1883) that Congress's power extended to badges and incidents of slavery, but the Court adopted a narrow interpretation of badges and incidents of slavery. In that case, for instance, the Court held that excluding black citizens from privately operated places of public accommodation was not a badge of slavery. In 1968, the Supreme Court expanded the definition of "badges and incidents of slavery" to include certain forms—but not all forms—of discrimination. The most recent cases involving the Thirteenth Amendment have relied on the narrow definition of involuntary servitude.



Active Reading

Ask: Does the Thirteenth Amendment mean anything outside the context of 19th century slavery? (Forms of involuntary servitude would be prohibited by the Thirteenth Amendment.)



Active Reading

Point out that the phrase "badges and incidents of slavery" is used several times in Belz's commentary as it relates to the Civil Rights Cases (1883). **Ask:** What does this phrase mean? (Although the formalized institution of slavery may not exist, certain characteristics of slavery may remain such as compulsory service, prohibiting property ownership, curtailing the ability to make contracts, or prohibiting the right to serve as a witness in court.)



Write About It

Belz explains that the Framers modeled the language of the Thirteenth Amendment on the language of the Northwest Ordinance of 1787. Explain that the Northwest Ordinance guaranteed civil rights and liberties to individuals in the Northwest Territory, which extended from the Ohio River to the Mississippi River. Have students research the Northwest Ordinance of 1787 and write a paragraph about the purpose of the law and how its influence is evident on the Thirteenth Amendment.



Active Reading

Read aloud this sentence from Belz's commentary on page 381: "The U.S. Constitution, for the most part, does not apply to individuals except when they act under color of law (e.g., the police officer who searches your house)." **Ask:** What do you think the phrase "color of law" means? Is there a difference between a police officer searching your house without a warrant or your per-

mission and a citizen searching your home without your permission? (Acting under the “color of law” means acting in an official capacity for the national, state, or local governments. If a private citizen searches my home, my constitutional rights have not been violated. However, if a police officer does the same thing improperly, it may violate my constitutional rights.)



Discussion Questions

1. Read Section 2 of the Thirteenth Amendment and then respond to the question: **What made Section 2 controversial?** (Students should note that the amendment altered the relationship of the states to the federal government. Section 2 gave Congress the power to enforce the Thirteenth Amendment. This was controversial because Congress would have the power (traditionally held by the states) to regulate individual behavior in some cases.)
2. How does guaranteeing individuals the right not to be held as a slave **guarantee individuals other rights as well?** (Answers will vary. However, students should note that free citizens have certain rights, such as the right to work, right to sue, and right to contract.)



Check Understanding

Have students complete the following assessment to check their understanding of Lesson 19. Review any material for questions they have missed.

Multiple Choice: Circle the correct response.

1. According to the Fugitive Slave Clause, escaped slaves must be
 - a. taken to the North.
 - b. set free.
 - c. sent to prison.
 - d. returned to those claiming ownership.**
2. Federal prohibition of the slave trade became effective on January 1,
 - a. 1789
 - b. 1800
 - c. 1808**
 - d. 1860
3. The Slave Trade Clause restricted a tax on the import of slaves for _____ years.
 - a. 8
 - b. 12
 - c. 20**
 - d. 25

4. The Thirteenth Amendment gives _____ the power to enforce the prohibition of slavery.
 - a. States
 - b. Regions
 - c. **Congress**
 - d. the President
5. The language in the Thirteenth Amendment was modeled after the
 - a. **Northwest Ordinance.**
 - b. Twelfth Amendment.
 - c. Civil Rights Act.
 - d. Civil Rights Cases.

Short answer: Write out your answer to each question.

1. What was the purpose of the Prohibition on Amendment: Slave Trade? **(Southern delegates proposed the clause to ensure that neither the Slave Trade Clause nor the Direct Taxes Clause would be altered or amended.)**
2. Why is the Three-fifths Clause not a pro-slavery clause? **(If all slaves were counted toward apportioning representatives, then the South would have had a disproportionate influence in Congress and in crafting the nation's laws.)**
3. What did the first debate over slavery at the Constitutional Convention concern? **(representation)**
4. What did the second debate over slavery at the Constitutional Convention concern? **(Southern delegates feared that an unrestricted congressional power to regulate commerce could be used against Southern commercial interests to restrict slavery.)**
5. What does Belz cite as the primary aim of the Civil War? **(to preserve the Union)**
6. What was the purpose of the Thirteenth Amendment? **(to abolish slavery)**
7. How is the application of the Thirteenth Amendment different from the application of other amendments? **(It applies to private individuals acting in their private capacities, not merely to the public actions of public actors.)**

Fill in the blank: Write the correct word or words in each blank.

1. Congress passed a federal prohibition of the _____ that went into effect January 1, 1808. (**slave trade**)
2. By conferring power on Congress to enforce the prohibition of slavery throughout the United States, the Thirteenth Amendment altered the relationship between the states and the _____.
(**federal government**)

True / False: Indicate whether each statement is true or false.

1. The Fugitive Slave Clause is one of the most controversial clauses in the U.S. Constitution. (**True**)
2. The word "slave" never appears in the Fugitive Slave Clause. (**True**)
3. In 1861, Congress proposed a constitutional amendment stating that the Constitution should never be amended to interfere with slavery in any state. (**True**)
4. In 1865, Congress proposed a constitutional amendment to abolish slavery. (**True**)