

The Origins and Uses of the Three-Fifths Clause Related to Slavery and Taxation

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Abstract

The Three-fifths clause of the 1787 U.S. Constitution is noted for having a role in perpetuating racial injustices of America's early slave culture, solidifying the document as pro-slavery in design and practice. This thesis, however, examines the ubiquitous application of the three-fifths ratio as used in ancient societies, medieval governments, and colonial America. Being associated with proportions of scale, this understanding of the three-fifths formula is essential in supporting the intent of the Constitutional framers to create a proportional based system of government that encompassed citizenship, representation, and taxation as related to production theory. The empirical methodology used in this thesis builds on the theory of "legal borrowing" from earlier cultures and expands this theory to the early formation of the United States government and the economic system of the American slave institution. Therefore, the Three-fifths clause of the 1787 U.S. Constitution did not result from an interest to facilitate or perpetuate American slavery; the ratio stems from earlier practices based on divisions of land in proportion to human scale and may adhere to the ancient theory known as the Golden Ratio.

Introduction

“Representatives and direct taxes shall be apportioned among the several States which shall be included within this Union, according to their respective Numbers, which shall be determined by adding to the whole Number of Free Persons, including those bound to Service for a Term of Years, and excluding Indians not taxed, three fifths of all other Persons.”¹

-Art. I, Sec. II, United States Constitution, 1787

For historians, the debate over meaning and interpretation of the various clauses of the Constitution for the United States of America take a seemingly never-ending cycle of re-examination and evaluation. Historians and law makers alike seek greater understanding of the nation’s founding documents whereby proper application and intent can be more accurately implored in the telling of history and the making, interpretation, and application of law at all levels. The purpose of this study is to examine and review how historical governmental practices influenced the framers of the Constitution as the debates concerning precise terminology related to the Three-fifths clause of the United States Constitution. To be more precise, this study analyzes Article I Sec. II of the Constitution of 1787, which contains language that affected citizenship, taxation, and proportionate representation through the usage of the Three-fifths clause prior to it being removed by the ratification of the Thirteenth Amendment in 1865, the Fourteenth Amendment in 1868, and the Fifteenth Amendment in 1870.² The Three-fifths clause is noted for its racial ties to slave culture in the early United States and can be considered the

¹ “United States Constitution art. I, sec. II,” www.nationalconstitutioncenter.org, Retrieved from <https://constitutioncenter.org/interactive-constitution/articles/article-i>

² Ibid.

root source for interpretation that slavery was written and protected in the fabric of the early Constitution. However, did the understanding of the Three-fifths clause, as articulated in the Constitutional Conventions, match the historic reality of how slaves were to be counted for purposes of citizenship, representation, and taxation?

The most commonly held historical view of the Three-fifths clause is that slaves are considered by law, to be only three-fifths of a human.³ This interpretation denotes an implied inhumanity of the founders based on an anachronistic view of slavery rather than examining whether the term is consistent with all modern definitions and uses. Slavery existed in many forms throughout history and very well may be a generic term used to encompass the entire system of servitude. Modern uses of the term “slavery,” more especially American slavery, uses broad strokes to paint a certain picture for the public eye. However, to define a system as complex as slavery by simplistic generalizing terms is to sweep the canvas clear of its’ accompaniment and present to the public a singular view. Ultimately this thesis raises the question of whether a common ancient concept undergirds many of the issues surrounding the creation of the Three-fifths clause. Proof of an earlier application supports the initial interest leading this thesis— in determining why the framers chose the three-fifths ratio as opposed to other proportions— by demonstrating that the practice was a learned principle transferred from other cultures. Moreover, the three-fifths ratio was a ubiquitous formula— stemming from the ancient world through the late Middle Ages— even in 18th century America. When applied to early American government, the formula justified proportions of scale that determined

³ Malik Simba, “The Three-Fifths Clause of the United States Constitution (1787),” (blackpast.org). Accessed from <http://www.blackpast.org/aah/three-fifths-clause-united-states-constitution-1787> July 11, 2018; David Azerrad, “What the Constitution Really Says About Race and Slavery,” *The Heritage Foundation*, (Dec. 28, 2015): Accessed from <https://www.heritage.org/the-constitution/commentary/what-the-constitution-really-says-about-race-and-slavery>, July 12, 2018.

production and profitability of individuals, groups, production-based industries, and governments, all of which played an influential role in determining citizenship, representation, and taxation.

Much of early North American law rests on common law English precedent that continued through colonial expansion.⁴ Normally, historians and scholars portray slavery as extraneous to the English common law tradition, since that legal system developed after chattel slavery went extinct in the British Isles around 1000 AD, having periods of resurgence in later eras that included other forms of servitude, as well as the expansion of sugar production in the West Indies in the 1600s.⁵ Consequently, the legal and philosophical justifications for slavery (and the background of the Three-fifth's clause) are attributed to things outside of the English tradition of constitutional liberty. Perhaps clarity is needed to distinguish English constitutional liberty as it related to colonization of North America from earlier English practices. The principles of slavery in John Locke's view rested on the ideology of a just war justification.⁶ Locke spoke vehemently against conquest and enslavement and supports his view with examples of Spanish conquests in the Caribbean and South America.⁷ Prior to English colonization, earlier settlements of Spanish, Portuguese, and Dutch influenced native populations and cast their influence on the earliest settlements in a way that incorporated all aspects of the developing sixteenth and seventeenth century international slave trade. Each of these societies gained knowledge of slavery from other cultures, both contemporary and ancient. But, the cultural

⁴ Lysander Spooner, *The Unconstitutionality of Slavery*, (New York: Burt Franklin, 1860): 21. Accessed from Google Play Books June 24, 2018.

⁵ David Hackett Fisher, *Albion's Seed, Four British Folkways in America*, (New York: Oxford University Press, 1989): 243; Robert L. Paquette and Mark M. Smith, ed., *The Oxford Handbook of Slavery in the Americas*, (Oxford: Oxford University Press, 2012): 135.

⁶ James Farr, "Locke, Natural Law, and New World Slavery," *Political Theory*, 36, no. 4, (Aug., 2008): 501.

⁷ *Ibid.*, 505.

norms of each society were also influenced by ancient law and governmental practices. Christianity, being also very influential in each society, contained certain common dogma stemming from earlier practices in ancient Greece and Rome. Many laws and practices concerning slavery can be traced from their European origins, through the American sugar plantations of the Caribbean, to the American colonies of North America.⁸

How then can it be that an arbitrary fractional proportion could have been implemented during the constitutional debates for the sole purpose of being applicable only to the slave population? Some historians would have everyone believe; that an institution as complex as slavery, a meticulous process as founding the legal code of a nation, or the future implications of an arbitrary mathematical fraction simply slipped off the tongue as a meaningless statement that occurred out of duress and compromise. For example, Patrick Rael of Bowdoin College believes such a claim is true and speaks with positive assurance of this claim concerning the framers at the Philadelphia Convention of 1787 stating "...they never considered ending the right of property in man."⁹ Surely, it cannot be that simple. For in other clauses of the founding documents the framers are praised for their brilliance, foresight, and intellectualism; yet, many historians bind the framers in contradiction to the very inhumane, uneducated and barbaric practices of racial inequality.¹⁰ An earlier example is found in an article by Loren Miller, published in the 1966 *California Law Review* titled "Race, Poverty, and the Law," which expressed those sentiments of racial inequality and the inhumane treatment of African Americans

⁸ Bradley J. Nicholson, "Legal Borrowing and the Origins of Slave Law in the British Colonies," *The American Journal of Legal History*, 38, no. 1 (Jan. 1994): 41.

⁹ Patrick Rael, "Racist Principles: Slavery and the Constitution," *We're History, America Then, For Americans Now*, (werehistory.org: September 21, 2015): Accessed from <http://werehistory.org/racist-principles/> July 13, 2018.

¹⁰ Michael J. Klarman, *The Framers' Coup: The Making of the United States Constitution*, (New York: Oxford University Press, 2016): 268.

as being protected by the Constitution.¹¹ Similarly, William Lloyd Garrison and the Garrisonians offer an even earlier example, their primary beliefs portrayed the Constitution as a pro-slavery document. Garrisonians stressed, the union could never be reconciled having both slave and free states under one government governed by a slave document and slave owners. The remedy for this abuse they felt, dissolve the union and re-write the Constitution, erasing the clauses they believed to be pro-slavery. Under this suspicion, they refused to participate in government, electoral, or political matters as they believed all were controlled by a slave owning society and culture.¹²

While there exists a consensus supporting a pro-slavery Constitution, others take a moderate stance and remain focused on the framers of the document. In this area of constitutional scholarship, a great amount of study has been attributed to the remarkable brilliance of the founding generation. Many might agree with Atiba R. Ellis, an Associate Law Professor at West Virginia University College of Law, who stated in a blog in 2014 that “The document they approved 227 years ago is a work of *genius*....[italics added]”¹³ It embodies some of the most brilliant principles espoused in many of the world’s most famous and historical documents causing Lawrence Friedman, author of *A History of American Law* to describe the Constitution as “....*marvelously* supple, put together with *great* political skill. [italics added]”¹⁴ Comparisons of the language used in the Constitution reflect “...the traditions, or accumulated wisdom, of the community;” those gaining influence from the laws of nature and government, as

¹¹ Loren Miller, “Race, Poverty, and the Law,” *California Law Review*, 54, no. 2, (1966): 387.

¹² Paul Finkelman, “Garrison’s Constitution: The Covenant with Death and How it was Made,” *Prologue Magazine*, 32, no. 4 (Winter, 2000).<https://www.archives.gov/publications/prologue/2000/winter/garrisons-constitution-1.html>

¹³ Atiba R. Ellis, “The Constitution, Re-Invention and Equality,” *American Constitution Society Blog*, (September 19, 2014): Accessed from <https://www.acslaw.org/acsblog/the-constitution-re-invention-and-equality> July 13, 2018.

¹⁴ Lawrence M. Friedman, *A History of American Law*, 3rd ed. (New York: Simon & Shuster, 2005): 73.

well as philosophical and biblical teaching of the day.¹⁵ Yet, according to some, this one single clause about slavery contains very little history and simply originated from the racial subconscious of some of the greatest thinkers and scholars to put quill to parchment. Of all the credit given to the founding generation for setting aside their differences and establishing a new form of government, the Three-fifths clause remains a stain on their valued reputations.¹⁶ The current view contains very little in support of the reasoning implored by the framers. Perhaps because of what is perceived as a racial tone found in the discussion it is reasonable to ask the questions contained within this thesis.

Additional oversight in gaining greater understanding of the clause involves a strict review of the process by which the clause derived. The entire process was one of legal debate, each framer defending and promoting their views on government, policy, and law. Arguments over terminology and implied meaning were carefully considered and debated to prevent future usurpation. The institution of slavery was carefully considered, which being proven by the writings of James Madison and other framers, demonstrating that the various clauses were not trivialized.¹⁷ Evidence that the application of the clause evolved throughout debate can be found in the documents leading up to both the Articles of Confederation and Constitutional Conventions. Key terms used in the various discussions may exclude from the clause the means of developing a proportional vote or taxation aside from counting slaves. Within these discussions are found real numbers, which when added resemble the proportional fraction, percentages which are equal to the fraction, or references to whom they all represent. Yet, many

¹⁵ George Anastaplo, *The Constitution of 1787, A Commentary*, (Baltimore: The Johns Hopkins University Press, 1989): 13, 21.

¹⁶ Bruce Ackerman, "Taxation and the Constitution," *Columbia Law Review*, 99, no. 1 (Jan., 1999): 11.

¹⁷ Kevin R. C. Gutzman, *James Madison and the Making of America*, (New York: St. Martin's Griffin, 2013): 121.

constitutional scholars and historians have surrendered that the Three-fifths clause of the Constitution is one of the defining statements that renders the Constitution a pro-slavery document. However, they have ignored the historical possibilities of the clause in relation to the pre-and post-uses and influential factors that the clause contributed to, which had very little, if nothing to do with slavery.

Pre-Constitutional America contained existing factors that influenced colonial leaders. Expansive government enterprise in commerce and territorial control presented opportunities to competing governments vying for dominance in North America. Each possessing policies, practices, and governmental procedures applicable to colonial commercial expansion. Acknowledgement of their intentions towards expansion and colonization must include recognition of the existing environment colonist encountered upon settlement, be it for government, commercial, or religious purposes, and heightens the importance placed on colonial reactions to their environment. The formation of the British American colonies that became the United States were based in territorial negotiations with the native tribes, foreign countries, geographic boundaries, and agricultural usage. The division between north and south, or rather areas more suited for agriculture due to the longer growing season, was based on the frost line which is located along the Maryland and Pennsylvania border. In terms of colonial slavery, the old colonial south was located much farther north than the later southern confederacy, as many northern colonies practiced servile labor systems including slavery.¹⁸ Various land companies were granted exclusive rights to settle the colonies and establish resources for trade and

¹⁸ Rosemarie Zagari, "Slavery in Pre-Revolution America," *teachinghistory.org*, (2010-2018): Accessed from <http://teachinghistory.org/history-content/ask-a-historian/25577>, July 12, 2018.

extractive commodities. To increase production from the land the requirement for laborers introduced the proposition of servile systems of labor.

The earliest surviving English settlement is Jamestown and is significant for the background information provided by its history. Jamestown, being established for governmental, commercial, and religious interests provides an early example of a colonial government body, interactive with established native cultures and environmental factors. Not only did the colonial government of Jamestown adhere to English laws, they established a colonial constitution and exercised statutes, or rather positive law, governing the colonial body which included the governance of those held to various forms of servitude. The Virginia Company established the Jamestown settlement on the coast of Virginia in 1607 following a failed attempt to settle in 1597 on Roanoke Island.¹⁹ Likewise, the Massachusetts Bay Colony was established in Plymouth in 1620. The first African slaves reportedly brought to the colonies arrived in 1619 at Jamestown. They were introduced by the Dutch and are said to have been indentured servants for life.²⁰ Prior too, in 1613, a ship carried aboard it a group of men to help protect the colony, these men were hired by the Virginia Company and considered indentures. Among the previous group of colonists was Captain John Clay, an “English Grenadier” who arrived aboard the *Treasurer* with twenty-two other men to serve in defense of the Jamestown settlement. The ship was owned by the Virginia Company of London and made several trips to and from the colony. A servant of John Clay, William Nicholls arrived aboard the *Dutie* in 1619, and Clay’s wife Ann arrived in 1623 aboard the *Ann*, all of which being owned by the Virginia Company.²¹ Exclusive

¹⁹ Clement Eaton, *A History of the Old South, second edition*, (New York: The MacMillan Company, 1967): 7.

²⁰ Robert Ergang, *Europe, From the Renaissance to Waterloo*, (New York: D. C. Heath and Company, 1939): 133.

²¹ William Clayton Torrence. "Henrico County, Virginia: Beginnings of Its Families: Part I." *The William and Mary Quarterly* 24, no. 2 (1915): 142.

rights were given to the Virginia Company to establish a colony and advertised for adventurous people who sought to settle the New World. These rights permitted settlers to establish colonial laws and practices governing the people. From this first settlement derived many of the laws governing those of a servile condition, as well as the practices influencing land boundaries, jurisdiction, commerce, citizenship, and representation. While many consider that most of the pro-slavery laws written into the Constitution came from southern representatives, they would be shocked to find that several northerners supported the same clauses, and some even introduced the most compelling arguments for application perhaps having been established in Jamestown or other origins. By this example alone, there should exist a certain degree of consideration that the utmost of concern was given to the subject of slavery as it existed in many forms prior to the North American application, and that it is possible that the system was never intended to last in the American colonies.²²

Historiography

Historians have primarily focused on the Three-fifths clause as being a very simplistic policy of counting slaves as three-fifths of a human or three-fifths of the slave population. Few recent historians have addressed the elements of the clause as they relate to the electoral college and the election of the President. Also lacking, is an examination of the language used in the article containing the clause in its entirety. Others have addressed the issue of direct taxation, but these are few indeed. In fact, of all the clauses written into the Constitution, little has been

²² Anastaplo, 1787, 22.

written on the Three-fifths clause concerning its origin and uses outside of counting slaves. Because of this it is viewed as the preeminent clause of the pro-slavery written constitutional theory and overlooked as one of the most crucial clauses of the early Constitution. The clause lends itself to several aspects of American government; it touches on the census, revenue, elections, representation, and apportionment. Without this clause, various formulae would have been needed for conducting the business of the national government. Yet, few have asked the question, why three-fifths? Why not three-quarters or any other fraction? What is so important, or more importantly, what is so unimportant about this clause that has attracted so little attention in gaining understanding? These are just a few of the gaps claiming attention pertaining to historical knowledge and the commonly held perception of the Three-fifths clause.

Another area worth delving into concerns the outcomes of known uses of the clause. Did the results after implementation of the clause produce the effects that were predicted during the debates and ratification? What was the outcome regarding the usage of the clause? Legal scholars and historians have ignored this view of the clause, or they have simply surrendered to the prevailing view that the clause had no other purpose than counting slaves for taxation and representation. The language of the Constitution itself should offer some possibilities as to how the system was intended to work, counteractive of such an uncontrollable and unreliable simplistic view of the clause. Surely the founders of one of the greatest documents of mankind would not have left something so crucial and so simple in application also so unprotected to future scrutiny. In this view, perhaps an empirical evaluation of history would be more beneficial as the outcome should be consistent when examining the subject and the catalyst. Nevertheless, some scholars have taken up the challenge of researching the various elements of the Constitution, including the Three-fifths clause in question.

Noted historian Max Farrand began to question the changing views of how the Constitutional Conventions were being displayed by historians during the rise of abolitionism prior to the Civil War. His article, “Compromises of the Constitution,” published in 1904 in *The American Historical Review* directly illustrates his concern that the issue of slavery was going to overshadow the true nature of the Convention and the compromises of the Constitution.²³ Farrand offers a critique of two historians of the mid-eighteen hundreds, Richard Hildreth, who wrote *History of the United States* in 1849, and G. T. Curtis, who wrote *History of the Constitution* in 1858. Both authors are criticized for overemphasizing the role slavery had in framing the Constitution and forming the United States.²⁴ Farrand offers a brief view of what he calls the “three-fifths myth” by a simple historical explanation of how the clause was presented as an amendment to the Articles of Confederation and during the Constitutional Convention of 1787.²⁵ Understanding the complexity and framework of the Constitution is the crux of Farrand’s article, his example of the debates deciding the presidency demonstrate how each clause is interconnected to the others, and how the course of debate exhibited the dauntless characteristics of the framers.²⁶ Most importantly, the compromise surrounding the division between large states and small states concerning representation in determining the candidates for president began as a sectional conflict to retain power in the eastern cities. Farrand builds on this theory throughout the article and concludes with acknowledging the most important compromise, that being the separation and duties of each house.²⁷

²³ Max Farrand, “Compromises of the Constitution,” *The American Historical Review*, 9, no. 3 (Apr., 1904): 479.

²⁴ *Ibid.*, 480.

²⁵ *Ibid.*, 481.

²⁶ *Ibid.*, 487.

²⁷ *Ibid.*, 489.

It was not again until the 1970s that scholars seriously understood the analysis of the Three-fifths clause. Howard Ohline, formerly of Temple University, addresses the few efforts made to analyze the clause after Farrand in his article “Republicanism and Slavery: Origins of the Three-Fifths Clause in the United States Constitution,” written in 1971 and published in *The William and Mary Quarterly*. Ohline examines the commonly held views concerning the clauses as they relate to racial tensions in the 1970s. Ohline analyzes the debates of the Philadelphia Convention for inaccuracies as they relate to historical reality. He focuses on two primary schools of thought, the first being the southern perspective which he attributes to Frank L. Owsley of Vanderbilt University; and the progressive view of political activist and historian Staughton Lynd, who takes a neo-abolitionist approach in explaining the character of the clause as it relates to class struggle.²⁸ Ohline’s analysis of the southern perspective, Marxist, Progressive, and Abolitionist historians offers a view of how the clause has been depicted in the twentieth century, which he attests was far more complex than a simple North South sectional conflict.²⁹ Ohline suggests an alternative view of the debates concerning the purpose for which the three-fifths issue was raised. He reaffirms the position that very little significance was attributed to the counting of slaves but held the stronger position of defending or tearing down state and individual sovereignty. The idea, therefore, was not based on regional support for the counting of slaves or not counting them, but rather upon a mixed combination of northern and southern states whom both supported and denied support for the enumeration clause.

Bradley J. Nicholson achieved his Juris Doctorate from the University of Pennsylvania School of Law in 1990. He wrote an article that was published in *The American Journal of*

²⁸ Howard A. Ohline, “Republicanism and Slavery: Origins of the Three-Fifths Clause in the United States Constitution,” *The William and Mary Quarterly*, 28, no. 3 (October, 1971): 563-566.

²⁹ *Ibid.*, 567.

Legal History in 1994 titled, “Legal Borrowing and the Origins of Slave Law in the British Colonies.” Nicholson identifies six historians who attribute early American slave law to the immediate needs, special interests, and improvised impressment of African slaves for the purpose of perpetuating a slave society, those six are: Paul Finkelman, who wrote *Exploring Southern Legal History* in 1984; Richard S. Dunn, author of *Sugar and Slaves: The Rise of the Planter Class in the English West Indies, 1624-1713*; Warren Billings, who in 1974 wrote *Law and Culture in the Colonial Chesapeake Area*; A. Leon Higginbotham, Jr.’s book published in 1978, *In the Matter of Color: Race and the American Legal Process: The Colonial Period*; Edmond S. Morgan, who in 1975 published *American Slavery, American Freedom: The Ordeal of Colonial Virginia*; and Michael Craton’s 1974 work titled *Sinews of Empire: A Short History of British Slavery*.³⁰ Nicholson gains support for his position through the analysis of historian Alan Watson, author of *Slave Law in the Americas*, who shares the view that the laws of societies are derived from other practices, either peer or from other cultures or periods in history.³¹ From this observation, Nicholson arrives at the theory of “legal borrowing,” which he attributes to the transfer of law from nation to nation, culture to culture, and, most important to this thesis, ancient society to modern society as the law is practiced.³² Nicholson touches on a similar theme in his examination that American law borrowed the legal practices concerning slavery from English law, which being applied in Barbados found their way to Virginia and South Carolina.³³ He offers examples of medieval English law, practices of the Tudor and Stuart

³⁰ Nicholson, “Legal Borrowing,” 38-39.

³¹ *Ibid.*, 39.

³² *Ibid.*, 40.

³³ *Ibid.*; David Eltis, “The Total Product of Barbados, 1664-1701,” *The Journal of Economic History*, 55, no. 2 (Jun., 1995): 321.

royal families, and the laws of the Americas as they relate to the various laws governing slaves in the colonial United States.³⁴

Earl M. Maltz contributed his article “The Idea of a Proslavery Constitution” to the *Journal of the Early Republic* in 1997. Maltz offers a list of noted authors, historians, and legal scholars who share similar views on the subject: Staughton Lynd’s *Class Conflict, Slavery and the United States Constitution, Ten Essays*; William M. Wiecek, who wrote *The Sources of Antislavery Constitutionalism in America, 1760-1848* in 1977; Paul Finkelman, author of the article “Slavery and the Constitutional Convention, Making a Covenant with Death;” Thurgood Marshall, who published “The Constitution’s Bicentennial: Commemorating the Wrong Document?” in *Vanderbilt Law Review*, 1987; James Oakes’ article published in *Cardozo Law Review*, “The Compromising Expedient’: Justifying a Proslavery Constitution;” A. Leon Higginbotham’s book published in 1978, *In the Matter of Color: Race and the American Legal Process: The Colonial Period*; and Peter Kolchin who published *American Slavery, 1619-1877* in 1993.³⁵ He identifies the position made by those who adhere to the thesis of a proslavery Constitution by stating that there exists language in the document that directly benefitted slaveholders all while never mentioning the word slave.³⁶ Maltz identifies the positions of Finkelman and Wiecek, which coincide with earlier abolitionists William Llyod Garrison and the Garrisonian movement. Maltz utilizes the strongest arguments for the proslavery thesis presented by noted neo-Garrisonians, who state that the southern slaveholding delegates held such strong power in the convention that they outmaneuvered, exploited, and subjugated the northern non-slaveholding delegates to their will; all while forming and supporting a great

³⁴ Ibid., 41-49.

³⁵ Earl M. Maltz, “The Idea of a Proslavery Constitution,” *Journal of the Early Republic*, 17, no. 1 (Spring, 1997): 37.

³⁶ Ibid., 40.

compromise.³⁷ While Maltz does acknowledge these arguments are inflated, he does adhere to the implied theory of a slave supported Constitution.³⁸ Maltz offers a different approach to viewing the Three-fifths clause and its relation to taxation of imports and exports; this view offers support for this thesis regarding the effectual uses and benefits of the clause.³⁹

“Interclausal Immunity,” an essay by John Hart Ely, was published in the *Virginia Law Review* in 2001, provides analysis on Supreme Court Justice William Rehnquist’s 1974 decision in *Richardson v. Ramirez*.⁴⁰ Ely assumes the position that specific language, whether written or implied, legally binds those to the rule of law. He supports his position by referencing the Equal Protection Clause as it applies to his example of a presidential candidate who is not a legal citizen; citing that the candidate would be inviolate if the citizenship requirement were not written in the Constitution.⁴¹ He likewise addresses three clauses where the implied application of slavery supported the institution though it was not written, those being the Three-Fifths Clause, 1808 Importation Clause, and the Fugitive Slave Clause.⁴² Ely discusses all three Constitutional clauses notoriously demonized as being pro-slavery. Ely does not dismiss how the clauses were applied; however, similar to this study, he does scrutinize the historical implication that each clause was specifically written for the sole intention of perpetuating slave society thus rendering the Constitution a pro-slavery document. He argues further that the application of the clauses established during the same period are not congruent with the cases for which they are applied.⁴³ His analysis is based on a history of disenfranchisement of those who

³⁷ Ibid., 39.

³⁸ Ibid., 38.

³⁹ Ibid., 50.

⁴⁰ John Hart Ely, “Interclausal Immunity,” *Virginia Law Review*, 87, No. 6 (Oct., 2001): 1186.

⁴¹ Ibid., 1186.

⁴² Ibid., 1187.

⁴³ Ibid., 1187.

are felons, non-citizens, and previous conditions that were not protected under enfranchisement clauses.⁴⁴ Although much of this may be disputed, arguments and cases are based on implied powers which contributed to the application of law in each situation.

Ely extends his analysis of Supreme Court cases and legislative actions as examples where exclusion was considered unconstitutional, however they are also based on the rational basis of the time for which they were issued. Each case and subsequent amendments surround “inferences” that are not written within the framework of the Constitution at ratification such as: slavery, poll taxes, and women’s disenfranchisement.⁴⁵ Ely addresses the issue of poll taxes at the federal and state level in *Harper vs. Virginia Board of Elections* and the addition of the Twenty-Sixth Amendment to the Constitution which lowered the minimum voting age to eighteen years. Following the argument of Progressives, Ely demonstrates that a line of “inferences” extended from the Three-fifths clause, to the reconstruction amendments, to the civil rights actions of the 1960’s.⁴⁶ Ely finalizes his position by reexamining several clauses of the Constitution, particularly those where the issue of slavery was inferred as being constitutionally protected. He makes this distinction on the grounds that eighteenth century citizens are considered to be “free persons,” whereas aliens are referred to as “other people.”⁴⁷

Malick Ghachem, a postdoctoral fellow at Yale University at the time he published his article, “The Slave’s Two Bodies: The Life of an American Legal Fiction” in 2003, discusses the Constitutional debate between person or property concerning the character of slaves. Ghachem touches on the arguments, both past a present, as they determined that slaves are considered

⁴⁴ Ibid., 1191.

⁴⁵ Ibid.

⁴⁶ Ibid., 1192.

⁴⁷ Ibid., 1196.

property and that the law reflected it. He asserts that there exists a dichotomy of two schools of thought that affect social interaction and the “rule of law” where race is concerned.⁴⁸ He analyzes the writing of Andrew Kull’s work *The Color-Blind Constitution*, where legal equality is directly linked to racial equality. This view, Ghachem believes, supports the “mixed character” view held by the framers of the Constitution.⁴⁹ He supports his position by addressing the writing of C. Vann Woodward who analyzed Jim Crow, which Ghachem states was supported by the landmark United States Supreme Court Case *Plessy v. Ferguson* in 1896.⁵⁰ The Three-fifths clause, Ghachem feels, directly reflects the national and mixed character of slaves as they were persons who were property, and property who were persons demonstrating an inverted double character.⁵¹ Misunderstanding the application of slave character through public and private law contributes to Ghachem’s theory of “legal fiction” and how it has distorted modern views of slave society, which he attributes to troubles in modern race relations.⁵²

Historical Interpretation

The study of pre-constitutional documents signifies that analytical gaps exist in the debates and the law prior to historical evaluation. These gaps in historical evidence are based on earlier interpretations and have an impact on current historical interpretation, which set the tone for how they have been and will be viewed. Further applying Nicholson’s “legal borrowing”

⁴⁸ Malick W. Ghachem, “The Slave’s Two Bodies: The Life of an American Legal Fiction,” *The William and Mary Quarterly*. 60, no. 4 (Oct., 2003): 809.

⁴⁹ *Ibid.*, 810.

⁵⁰ *Ibid.*

⁵¹ *Ibid.*

⁵² *Ibid.*, 812.

methodology, it can be noted that slave law existed before the Constitution or any previous founding American document, therefore it should be reasonable to assume that the Three-fifths clause was also a borrowed law or practice. When reviewing the clause, it is important that it be reviewed in proper context, that being: how it was applied prior to and if it was; how it affected other factors such as citizenship, taxation, and representation; and if the outcome reflects its origin. Examining ancient laws and practices provide aid in answering the many questions associated with this thesis which may reveal the origins of the clause, thus proving that the founders did not design the clause specifically for the support of the African slave trade. Observing the conditions the framers were under and the terminology used when the clause was applied before and during the Constitutional Convention establishes American uses. Analyzing the outcomes demonstrates that the clause was established under a known practice and that it was applied consistently resulting in a specified outcome. A logical analysis of this type, from beginning to end, should expose gaps in recent historical interpretation providing support for this thesis concerning current views of slaves being counted for purposes of citizenship, taxation, and representation.

Current gaps in historical understanding of the clause are exposed when reviewing the mixed interpretations of historians and legal scholars. If only three-fifths were counted, what were the other two-fifths? How were they used in the scheme of things? What was the quid pro quo for this ratio? If slaves were viewed as only being three-fifths of a person, then it may be also viewed that slaves were two-fifths something else. Rhetorical questions such as these generate ideas concerning the application of three-fifths as the understanding combines both “representation and direct taxation” under the rule.⁵³ It is widely accepted that the final

⁵³ “U.S. Constitution art. I, sec. II.”

compromise combined two characteristics, persons and property, and held that slaves were counted three-fifths for purposes of taxation and representation, once again leaving open the question concerning the other two-fifths. Ultimately, this is a common view, one that does not offer a logical explanation of the tax system or the enumeration process of the founding generation. While this supports the many theories that slavery was protected by the Constitution, it does not fit a logical assessment concerning taxing revenue.

The Articles of Confederation offer a possible accurate description of what specific terms and clauses in the Constitution were supposed to mean. Article IV offers a description of those who were removed from the privileges of free inhabitants. Article VIII provides a clue to the rate of proportionality concerning the acquisition of funds to be “defrayed” from the common treasury at a current assessed value.⁵⁴ The only mention of race occurs in Article IX, which calls for the raising of the Army and the Navy to contain only white males.⁵⁵ Another area of importance discusses the fugitive law which maintains that any fugitive from justice, when captured in another state, shall be returned to the state where the offense occurred; the violations specified are treason, felony, or high misdemeanors and are found in Article IV.⁵⁶ These articles offer support for the claims made by Max Farrand, James Wilson, and others who state that the Three-fifths clause originated prior to the constitutional compromise as an amendment to the Articles of Confederation, and later adding the issue of slavery to skew the debate in the direction of arranging proportionality in Congress during the Constitutional Convention.

When considering all the factors involved in the American colonial slave trade, a thorough examination needs to be conducted addressing such issues as: currency, science,

⁵⁴ Articles of Confederation, art. 8.

⁵⁵ Articles of Confederation, art. 9.

⁵⁶ Articles of Confederation, art. 4.

religion, philosophy, and general practice. The science of the day may also offer a clue when considering proportionality. The Golden Ratio is considered to be the ratio of the universe.⁵⁷ Being mathematically very close to three-fifths, the formula has been used by ancient societies to erect structures, sculpt and paint works of art, and promote many ancient engineering endeavors. Also known as the Divine Ratio or Divine Proportion, it encompasses the mathematics of nature and the universe, all recognized by Pythagoras and other ancient scientists, philosophers, and mathematicians.⁵⁸ Where religion is concerned, an examination of the tithe system and penalty for missing a tithe may also play an important role in the ratio. Earlier examples concerning colonial commerce, government, religion, and negotiations with the native inhabitants of North America had a resounding effect on the economic conditions the framers faced in 1776, which became a subject of great importance to the framers during the Convention. Also considered are terms such as: the lions share, the royal fifth, and just proportion. Adam Smith discusses the economies of slave societies and practices in *The Wealth of Nations*, a text that played an important role on the early American economy and is discussed at length in Chapter Three concerning the economy, war debt, and taxation. And finally, the U. S. Census, which was established at the same time during the debates and likewise worked in categories of fifths, or quintiles representing five sections for counting the population, is significant for it identifies which quintiles are enfranchised and which count in the enumeration for purposes of representation and taxation.

One of the earliest accounts where the census presented questions concerning the use of the Three-fifths clause dates to July 20, 1861 and was written in an article published by William

⁵⁷ K. K. Tung, "Fibonacci Numbers, the Golden Ratio, and the Laws of Nature?," *Topics of Mathematical Modeling*, (2007): 7; Daniel Jarvis and Thomasenia Lott Adams, "Math Roots: Mathematics and Visual Arts: Exploring the Golden Ratio," *Mathematics Teaching in Middle School*, 12, no. 8, (April, 2007): 468.

⁵⁸ Jarvis, "Math Roots," 468.

W. Harding of *The Philadelphia Inquirer*.⁵⁹ In the article section titled, “Our Censuses and Voters,” the author discusses the proportion of representation in the north and the south where free and servile black populations are in question. The author writes in the fourth section of their argument, “4. The three-fifths representation of slaves- or the compact that chattels should, in national elections, be three-fifths men, helping, through their owners, to shape the policy of Government, and control the interests of all white citizens in the Republic- was always deemed to be what it visibly is, arbitrary, irrational and unjust.”⁶⁰ The author states clearly that their understanding is that slaves were chattel and that they are considered three-fifths of a man. It then mentions that the ratio is “arbitrary,” and goes on to explain,

“Arbitrary, for why three-fifths rather than one, two or four fifths? Irrational, for, practically they helped largely in managing immense affairs, which they did not and could not know anything about. Unjust, for, if regarded as property, they should have been represented just like all other property; but if looked on as a laboring class, on a par with free laborers, then they should have been represented in whole.”⁶¹

Interestingly enough, the author states that there existed an agreement between the northern and southern delegates, whereas the southern delegates argued, “If we of the South vote our slaves as three for five, you of the North vote your colored residents five for five.”⁶² The north saw a problem in this agreement and the author points out that the south always had larger numbers of free black residents than in the north. Coupled with the white inhabitants and three-fifths of the slaves the author predicted by 1900 the south would have total control over the nation, a control which was stated in the article that should have belonged to the north had there not been a Three-

⁵⁹ “Our Censuses and Voters,” *The Philadelphia Inquirer*, (July 20, 1861): 4. Accessed from www.newspapers.com March 20, 2018.

⁶⁰ Ibid.

⁶¹ Ibid.

⁶² Ibid.

fifths clause. Needless to say, the agreement did not turn to fruition and the three-fifths ratio remained as ratified in the Constitution until its repeal.⁶³

When digging deeper into the idea of three-fifths, it becomes interesting to find that it applies to several aspects of ancient and modern life. It is easy to become affixed to the written fraction; however, to see the extent of how far the theory reaches, one must look for percentages, sums, other ratios, music, art, and modern applications. Understanding the inverse application takes time to recognize, even though it can be easily understood when thinking in terms of art, music, and even modern sports like basketball. Many ancient artists created their works of art utilizing a 40/60 ratio, or the inverse 60/40. In music, the circle of fifths demonstrates the inversions and transitions through scales. The modern sport of basketball offers a very simplistic example of the ratio by explaining how five players, each possessing five fouls, playing on a proportional court, can be used to defeat an opponent. That is, when a player receives three-fifths of their fouls they become an asset to one team and a liability to the other. These are just a few examples of how the ratio remains a part of our society despite any previous attempt to use it to embed slavery into the Constitution. With a greater understanding, it may be easier to see the amendment process as the final stage in erasing the lawyer trickery that led to the application and misunderstanding that resulted in years of subjugation based on a false theory.

It is also important to recognize the meanings of selected and commonly used terms in describing slave institutions over time. This is important because it demonstrates the evolution of each term and the changing uses as they applied to the evolving legal system that influenced the terminology applied to the Constitution and the Three-fifths clause. By definition slavery is described as one person holding another against their will for the purpose of chattel servitude

⁶³ Ibid.

whereby the slave has no human rights.⁶⁴ The earliest use of the term dates to c.1551 according to *The Oxford English Dictionary Online*.⁶⁵ Another term, bondage, uses “slavery” as the first definition, then expands on that stating, “involuntary personal servitude, captivity, villenage, villain tenure.”⁶⁶ Chattel is defined as “an item of personal property, as distinguished from real property.”⁶⁷ The first known use of the term occurred c.1240 to indicate an item of property and later became complicated by addressing whether the property was personal (movable) or real (fixed).⁶⁸ Chattel may have been purchased in the movable form as equipment or livestock by the serf or slave, yet the purchased property belonged to the lord of the manor, or more commonly referred to in both law and lay terms as master. Bondman also contains multiple characteristics and is defined in the *King James Dictionary* as “a man slave, or one bound to service without wages; in old English law, a villein, or a tenet in villenage.”⁶⁹ *The Oxford English Dictionary Online* dates the term to c.1250 defining it as “a man in bondage; a villein; a surf, slave.”⁷⁰ An alternative legal definition of bondman will be discussed in a following chapter as it directly relates to the Constitution and the discussion surrounding the Three-fifths clause.

The study of early America and earlier societies proved slavery to be a complex system that may have differed according to the dictates of a particular society; therefore slavery,

⁶⁴ “Webster’s II New Riverside University Dictionary,” Anne H. Soukhanov, ed. (Boston: New Riverside Publishing Company, 1994): 1093.

⁶⁵ “OED: Oxford English Dictionary,” *The Oxford Dictionary Online*, Accessed from <http://www.oed.com.ezproxy.liberty.edu/view/Entry/21285?redirectedFrom=bondman#eid>

⁶⁶ Henry Campbell Black, *Black’s Law Dictionary: Definitions of the Terms and Phrases of American and English Jurisprudence, Ancient and Modern*, 6th ed., (St. Paul: West Publishing Co., 1991): 125.

⁶⁷ *Ibid.*, 162.

⁶⁸ “OED: Oxford English Dictionary.”

⁶⁹ “KJV Dictionary,” The King James Bible Page at AV1611.com: KJV Dictionary Definition: Bondman, last modified October 20, 2017, accessed October 20, 2017, <http://av1611.com/kjbp/kjv-dictionary/bondman.html>.

⁷⁰ “OED: Oxford English Dictionary.”

historically, may be viewed in the generic sense as a term encompassing all forms of servitude. Many forms of servitude may be found in use throughout history, often being utilized at the same time or period as other cultures, some within the same culture at the same time. Those more commonly associated with the institution are thus recognized: bondman, serfdom, indentured servitude, villein, servant, slave and chattel property. Each of these terms share commonalities which make it understandable to congregate them under one term, such as slave, chattel, bondman, or bondage. However, this becomes problematic for historians who attempt to distinguish one from the other without making one seem less harsh or the other equal by definition.⁷¹ In all respects, each term subscribes an individual to the services of another for a determined length of time.

In gaining further understanding of the word slave as it relates to American uses, it is necessary to understand the etymology of the word slave. According to several sources, the word slave derived from the Slavic people captured and made servants from the wars of Otto the Great and dates its usage around 1290.⁷² The term “Negroe” was attached to the word slave around 1785 and is listed in Francis Grose’s 1811 *Dictionary of the Vulgar Tongue*.⁷³ According to *Meriam Webster Online Dictionary* and *The Oxford English Dictionary Online*, other terms such as slave driver, first recorded in the United States in 1792; slave state, recorded in 1809 and applied to the southern United States; were not defined until the 1800s and were associated with the American system of slavery following Grose’s depiction that may have contributed to the

⁷¹ Stanley L. Engerman, “Slavery at Different Times and Places,” *The American Historical Review*, 105, no. 2 (Apr., 2000): 480.

⁷² Douglas Harper, ed., *Online Etymology Dictionary*, www.etymonline.com

⁷³ Francis Grose, *1811 Dictionary of the Vulgar Tongue*, www.gutenberg.org

racial stigma attributed to the practice of servitude in the Americas.⁷⁴ Prior too, the term slave trade was widely used and defined in 1734 to describe the Atlantic practice of transporting slaves from the Eastern hemisphere to the West regardless of race or ethnicity.⁷⁵ Earlier terms are found in different languages but also having different meanings and applications as far back as 850 AD.⁷⁶

Thesis Objectives

The objective of this thesis is to expose some of the commonly held beliefs concerning slavery and how the Three-fifths clause of the early Constitution are viewed as related to citizenship, representation, and taxation. By analyzing the scholarship attributed to the three-fifths ratio which discusses the proportional system as it related to the distribution of money, citizenship, representation, and taxation, inconsistencies in interpretation are exposed when considering the ubiquitous applications of three-fifths. Also, the origins of the three-fifths clause begs further attention regarding examination and historical accuracy. A thorough examination of the clause, its uses, and its elimination through the amendment process may provide greater understanding of the system of slavery as it was practiced or intended to be practiced in early America. The examination of ancient societies, medieval and colonial practices offer similar ratios that provide insight as to how the framers arrived at the Three-fifths clause and how it was

⁷⁴ Merriam Webster Online Dictionary, "Slave Driver," Accessed from <https://www.merriam-webster.com/> June 12, 2018. Merriam Webster Online Dictionary, "Slave State," Accessed from <https://www.merriam-webster.com/> June 12, 2018; "OED: Oxford English Dictionary."

⁷⁵ Merriam Webster Online Dictionary, "Slave Trade," Accessed from <https://www.merriam-webster.com/> June 12, 2018; "OED: Oxford English Dictionary."

⁷⁶ Harper.

applied to American culture for purposes other than slavery. Did the clause solely pertain to slaves when few other than white, land-owning males possessed rights and privileges in early America, or did it apply to all non-enfranchised inhabitants of a state? Was the implementation of the clause the result of lawyer trickery poised at making a strong side argument such as slavery the focus, skewing the attention of others to gain compromise? Many questions arise when considering the possibility that the clause was never intended to be used for anything other than merely counting slaves, but that other applications and origins existed that allowed the framers to use it in this haunting circumstance.

In other observations, the objectives are to examine the application of the Three-fifths clause as it applied to the slave as a citizen, the slave in relation to representation, and the slave in terms of taxation. These three categories represent the crux of the three-fifths position that African slaves were not regarded as full members of society and that the clause was concocted for the sole purpose of their exploitation. An examination of similar practices, both pre and post slavery, offer insight as to the possible intentions for the American application of the institution. By examining the language used during the early period, it becomes possible to associate the term slave in a generic sense-- not to diminish the historical effectiveness of the term, but to gain greater understanding of how it was used in the American concept. By examining these focal points, the historic reality of the clause, uses, and possible origins offer a different view than has been previously projected, one that demonstrates that the three-fifths ratio held other origins than the application of slavery and should be viewed for historical consideration.

Chapter 1

Slavery and Citizenship

“Yet it shall not be so among you; but whoever desires to become great among you, let him be your servant. And whoever desires to be first among you, let him be your slave.”⁷⁷

-Matthew 20:26,27

Citizenship entails that an individual possesses transferable rights and privileges within the boundaries of a governing authority. One may adhere to the idea of being a citizen of the world under the biblical view of God’s graces, or perhaps the natural laws where one is an earthly citizen bound by the laws of nature. Psalms 24:1, A Psalm of David, states “The earth is the Lord’s, and the fullness thereof: the earth, and they that dwell therein.”⁷⁸ Similarly, Psalms 33:8 depicts the people of the world and whose authority and guidance they are under, “Let all the earth fear the Lord: let all the inhabitants of the world stand in awe of him.”⁷⁹ Through these, and other verses found in the King James Bible, an understanding of creating a governing authority and the bounds of that authority contain both citizens and inhabitants is attained. The act that extends the boundaries of welcoming those inhabitants of the earth to the rights and benefits of citizenship in heaven are found in Mark 16:15 as Jesus commanded the disciples to “Go ye into all the world, and preach the gospel to every creature.”⁸⁰ Examples of being removed from the rights, privileges, and protections of a governing authority, such as God’s

⁷⁷ Matthew 20:26, 27 (King James Version).

⁷⁸ Psalms 24:1 (King James Version).

⁷⁹ Psalms 33:8 (King James Version).

⁸⁰ Mark 16:15 (King James Version).

authority, are found in many books of the Bible. One such example, found in 2 Chronicles, explains how Israel fell from God’s graces while under the reign of Rehoboam because “he forsook the law of the Lord.”⁸¹ These biblical examples illustrate there exists a spiritual and natural citizenship where one may choose to exist under and benefit from, or exclude themselves from these laws and live within the narrow confines of self-government and an individual code. Laws under these pretenses are transferrable from parent to child, person to person, nation to nation, and culture to culture. Expanding the boundaries and jurisdiction expands certain rights and privileges to those who accept government expansion.

The framing of the Constitution adheres to both these principles through the careful consideration and knowledge each framer possessed of ancient, medieval, philosophical, and biblical values. Citizenship, a valuable asset, as it entails that rights and privileges are recognized and protected by the governing body and that the individual is a participant—either financial, active, or both— in their community, state or national government. However, this does not suggest that all citizens are equal. Throughout history, a tiered structure of citizenship is present that determines the abilities individuals have in exercising their freedoms. Some, through dependence on others, possess a minimal portion of ability to exercise their protected rights and privileges; they are dependent on another who possesses greater influence. Such is the case with slavery throughout history.

This chapter discusses the relationship of the slave in the tiered structure of citizenship, through the governing practices of ancient, medieval, colonial, and early American societies. Their relationship as defined by the intentions of the Three-fifths clause which not only affected slaves, but also others outside the ancient view of what constitutes a citizen. Examples provided

⁸¹ 2 Chronicles 12:1, 15:3 (King James Version).

in biblical accounts offer an understanding of the servile class who are under the direction and protection of higher authorities, which determines their condition as a citizen under immediate local and national laws. Binding slaves to the production of their labor rather than regarding them as “immoral” or “irrational creatures” denotes a commercial context which is discussed later. The discussion here is one of civility, whether the framers regarded slaves in the moral civilized sense. For this, it is necessary to examine citizenship as the end result of a series of transitional phases from uncivilized to a modern civilized society and how the laws governing that society accepted or rejected new citizens. Examining the influences of biblical, ancient, medieval, and colonial law offer a pre-constitutional understanding; whereas reviewing how the law was applied offers the post-constitutional application. This allows for the establishment of a consistent line of progression based on the understanding of the framers.

Commentary found in the *NIV Archaeological Study Bible*, book of “Matthew,” describes a servant as one “...who worked in another’s service.”⁸² The person described as a servant could be either free or a slave, while specifying that the slave is the property of another and in service to provide for the general “welfare of humanity and the church.”⁸³ Comparatively, Ray Stedman, author of *The Servant Who Rules, Expository Studies in Mark 1-8*, offers his view on the Gospel of Mark who tells of the servile condition of Jesus Christ. Stedman analyzes the two sections of Mark, the first being “The Servant Who Rules,” and the second, “The Ruler Who Serves.”⁸⁴ Through his analysis, the image of a consistent condition of servitude is present in the Christian philosophy regardless of status. The biblical view of servitude offers a distinction from

⁸² “Matthew,” *New International Version, Archaeological Study Bible: An Illustrated Walk Through Biblical History And Culture*, (Grand Rapids: Zondervan, 2005): 1397.

⁸³ Ibid.

⁸⁴ Ray C. Stedman, *The Servant Who Rules, Expository Studies in Mark 1-8*, (Sunnyvale: Discovery Foundation, 1991): 10.

other forms, especially those that originated under pagan practices rather than with the Hebrews and Jews. Examining the commonly held position of Christian slavery is necessary for gaining understanding of the various clauses found in the Constitution viewed as supporting slavery. The Hebrews, having served as slaves to Pharaoh in Egypt and later to the pagans of Rome, provides examples found in Christian history that acquaints the reader with the intent of a servile condition as well as being a stranger, or rather a non-citizen in a foreign land.

Historical understanding of what constitutes a citizen or free person contains similar obstacles throughout early history. Analysis extending from Greece and Rome to early America should be strongly considered when reviewing the establishment of the U.S. Constitution and the central government. Malick Ghachem makes the case in his article “The Slave’s Two Bodies: The Life of an American Legal Fiction,” that bedrock principles of constitutional law are present when concerning citizens as having both “rights” and “responsibilities.”⁸⁵ He takes his argument a step further by comparing the “political body” of the king, who is always present in the “physical body” or not.⁸⁶ His understanding denotes the legal status of an individual within a system as defined by the governing body as applied to all inhabitants. These characteristics may also be substituted to emulate the political body of representatives in Congress and the physical body of people whom members of Congress represent. Ghachem makes note that Madison’s defense of the application of the Three-fifths clause in *Federalist No. 54* is the single occurrence that binds the dual status of slaves to a fixed proportion.⁸⁷ Binding because it links the slave as person and property relating to condition, serving under a natural and legal status as a citizen.⁸⁸ Thus, Ghachem attributes Madison’s position towards convincing the convention to accept the

⁸⁵ Ghachem, “Legal Fiction,” 817.

⁸⁶ *Ibid.*, 819.

⁸⁷ *Ibid.*, 812.

⁸⁸ *Ibid.*, 816.

dual status of slaves being both property and persons, offering a skewed position of the already established Three-fifths clause.

Ghachem's analysis of Madison's argument in *Federalist No. 54* demonstrate not only the status of slaves, but of all people in relation to proportional representation and direct taxation.⁸⁹ Where slaves are concerned, dual status is the primary focus when discussed during the convention and *Federalist No. 54* provides the oppositional thought concerning their citizenship and rights.⁹⁰ In no way does this discussion state that the Constitution prescribes the status or condition of slaves, however it is the tool for deciding how their application is governed. "Publius" provides a summary of both arguments, then expresses how each state may differ in their representation based on how each state operationalizes their constitutions. It thus distinguished the separation between the states and the federal Constitution during the period before the 1808 Importation Clause became effective, rendering the U.S. government the authority over importations rather than the states.⁹¹ The focus rallied behind citizenship and rights, considering slaves as inhabitants of the states and the country just as other inhabitants, all accounted for in the enumeration. This practice resembles those of earlier societies where taxation and representation in government are considered for apportioning rights and protections to the inhabitants under governmental jurisdiction. Ghachem's analysis of *Federalist No. 54* strengthens the topic of slave citizenship as they are esteemed in the moral sense, but their labor bound them to the production of the land in the commercial sense.

⁸⁹ Ibid., 832.

⁹⁰ "Publius," "The Federalist Papers. No.54," *The Federalist Papers*, (The Avalon Project: Yale Law School): Accessed from http://avalon.law.yale.edu/18th_century/fed54.asp July 29, 2018.

⁹¹ Ibid.

Ancient societies practiced similar modes of representative government. As a principle example, Aristotle expressed his views on representation, citizenship, and slavery in his many writings based on his knowledge and observation of ancient governments.⁹² He offers a detailed structural view of a democracy and how it evolves from a tyrannical system. To understand this structure, Aristotle discussed the various degrees of citizenship and what constitutes a citizen, differentiating them from the upper class consisting of the monarchy and nobility; and the lower class of aliens and poor.⁹³ He described the citizen as being one who not only belongs to a polis or state, but most importantly one who is an active member of governmental affairs concerning the state. Aristotle builds from his definition which pertains more to what a person is doing to better humanity and what they can do to advance democracy, rather than simply being born unto citizen parents or simply existing as a contributory entity of the common citizenry. Aristotle is precise in his position on citizenship when he states, “The citizen in this strict sense is best defined by the criterion, ‘a man who shares in the administration of justice and in the holding of office.’”⁹⁴ In this view, the citizen holds a position in a level of government, either administrative or supporting agencies; or they are an influential member of society through their wealth which strengthens the economy and expands democracy. This participation through service and financial support allows for the society to grow and expand which benefits all classes and provides for an elevation of status from the lower ranks through expanding further citizen participation.

While he expresses different degrees of citizenship, Aristotle acknowledges that each citizen is governed by a different constitution, some of which are inferior to others or one

⁹² Ernest Barker, ed. & trans., *The Politics of Aristotle*, (New York: Oxford University Press, 1958): 192.

⁹³ *Ibid.*, 93.

⁹⁴ *Ibid.*

superior constitution.⁹⁵ Combined with an adequate number of citizens who hold office based on the criteria of their constitution, they form a state which is self-supporting and limited in area by proportion of the citizenry.⁹⁶ Proportionality is a key concept of civilized democratic governments, as are the qualified and responsible citizens who administer that government. Aristotle addresses the issue of those who cannot achieve citizenship but remain an integral part of the state, namely mechanics and slaves.

Examining these earlier practices is an integral part of establishing a line of progression from one culture to another. In this case, citizenship holds many similarities that are found in ancient Greece, Rome, medieval England, and early America. Likewise, those held in servitude in each of these societies are similarly bound by the same conditions and under similar laws governing their status. However, law is not the only factor determining their condition or status; slaves, like other members of society are bound by proportionality which can only accommodate a certain scale of inhabitants in the area. The three-fifths ratio determines the proportionality of citizenship and what constitutes the size and scope of government, taxation, and representation, all based on the number of inhabitants within a specific jurisdictional boundary. Aristotle recognized this, as did Madison. Both understood the complexity of a proportional arrangement, the tiered structure of social classes, and the importance of labor to the general welfare of the community. From this understanding, recognizing the dual servile condition of every member of a society cannot be over emphasized.

Greece, during Aristotle's time, differed from later slave societies in that slaves had protections against harm, made up a portion of the laboring class and therefore counted as an

⁹⁵ Ibid., 94.

⁹⁶ Ibid., 95.

inhabitant but held no distinction as a represented member of government. Mechanics form another condition of servitude as they make up a portion of the lower laboring class and are separated because their duty is wrought in service to the community or a group of subscribers, whereas the slave is in service to the individual.⁹⁷ Not only were mechanics (laborers) and slaves excluded, children of citizens were also excluded because they composed a developmental stage of life and therefore not able to rule or be ruled; likewise, mechanics and slaves did not count as full citizens and were not represented proportionally within the state as individuals.⁹⁸ It should be noted that the representation of lower classes such as mechanics and slaves is conducted on a group basis rather than an individual one as in the common citizen. If the superior constitution contains laws pertaining to these lower classes, they are therefore represented within the boundaries of that constitution. This representation does not have to be of a beneficial kind but can also be of a protected nature or parental state. Only when there has been a decrease in citizenship will the field be open to accepting others of lower status and condition, however there are criteria for inclusion based on pedigree.⁹⁹

Aristotle holds proportionality as being vitally important to the democratic state. He saw it as being equally important to both the rulers, governors, citizens, and the people. His approach in discussing how the state should be proportioned touches on several aspects of the state; monarchy, aristocracy, citizenry, and lower classes. Under these specifics land was also proportioned. Aristotle writes in *The Constitution of Athens* that the land is divided between a few whom had cultivators under their rule to produce crops necessary for paying the required

⁹⁷ Barker, *Aristotle*, 108.

⁹⁸ *Ibid.*, 108.

⁹⁹ *Ibid.*, 109.

rents, usually being one-sixth.¹⁰⁰ Under this constitution, the poor and their families fell under a condition of servitude. The cultivators risked themselves falling into this condition if they failed to make their rents. The sense of enfranchisement was not had by all; a majority of people were excluded from government participation due to their condition.¹⁰¹

Under the constitution of Draco, Aristotle states that “the lower classes were bound on the security of their persons,” implying that they were counted among the citizens but had no favor as a citizen because they did not participate in any form of government.¹⁰² It was under Solon that the constitution of Athens changed, and even then, there continued to exist an ever-present nobility along with a majority found in the lower classes. Offices of the government, under Draco were appointed similar to before, they being determined by wealth and “...in proportion to the magnitude of their assessment.”¹⁰³ Solon, who followed Draco, placed greater significance on contribution which distinguished his view from Draco.¹⁰⁴ In deciphering his view on who contributes the most he offers the analogy of the animals in protest to the lions that all of the food should be divided equally among everyone only to have the lion ask, “where are your claws and teeth?”¹⁰⁵ Thus, with this analogy the “lion’s share” of proportionality is explained. In similar terms, Aristotle utilized the examples of art, ship building, and music to describe proper proportions; that a foot cannot be painted disproportional to the body, the stern too big for the boat, and the singer too loud for the music.¹⁰⁶ All things are within a just proportion and cannot simply be done away with because they are undesirable. Proportion and

¹⁰⁰ Thomas J. Dymes, trans., *Aristotle’s Constitution of Athens*, (London, Seeley and Co., Limited, 1891): 2.

¹⁰¹ *Ibid.*, 2.

¹⁰² *Ibid.*, 8.

¹⁰³ *Ibid.*, 13.

¹⁰⁴ Barker, *Aristotle*, 132.

¹⁰⁵ *Ibid.*, 135.

¹⁰⁶ *Ibid.*, 136.

consideration of size required attention to ratios and dimensions. This affected politics in the ancient world— as exemplified by Aristotle— influenced early Christianity and continued through medieval Europe. This area of proportional understanding extended to all areas of ancient life and divided the understanding of powers resulting in an evolution in democratic thought.

Aristotle's view of the relationship between master and slave, or better termed as superior and inferior, is that under a system where the citizen is based in goodness, that is to say only those who set aside their personal ambition to improve the condition of the whole is therefore good. Under this consideration, the master should be a good person, one worthy of having a slave because he is superior in knowledge and status, and that his superior status entails a responsibility for those under his governance.¹⁰⁷ This does not suggest that all persons of superior status are or were good, nor does it suggest that because of one's status they are deserving of their condition. The view is supported by the proportionate balance of various conditions within the polis which Aristotle describes as being necessary for the proper function of the system as a whole. He explains that there cannot be an imbalance of wealthy, nor one of the poor, or one of the citizens; the proportion must be just and near equal as he described in his writings.

Aristotle recognizes this quality in Solon as he addresses his character as having the option of attending to those in politics who favor him. Solon chose neither side risking being disliked by both and instead chose the side of the people. Aristotle references Solon's poetry concerning the treatment of the poor and slaves under his rule. His attention to the different conditions whereby they found themselves indebted to their masters and the actions taken freeing

¹⁰⁷ Ibid., 15.

them of their debts suggests that under law they were in service for different terms and they transitioned from the condition of servitude to a free status by law. Solon states that some entered slavery justly and unjustly, whereas others entered through necessity. His depiction describes all forms of servitude and treatment, yet he views them all the same.¹⁰⁸

Following Solon was Pisistratus, who is considered a temperate ruler, whose administration implemented the tax on agriculture consisting of one-tenth of the produce. In return he often provided a subsidy of sorts to the poorer farmers to help them grow and expand to become more profitable. Within the city citizens had certain rights, just as those outside the city boundaries who were tied to the city as agricultural laborers possessed a lower tier of protections. Tax collectors were often sent out to patrol the lands and collect taxes. On one occasion Pisistratus himself happened upon a man from Hymettus who was attempting to cultivate a very difficult portion of property that contained mostly rocks. The man was asked what he expected to gain from his labor in this land, to which he replied, “aches and pains.”¹⁰⁹ The man did not know to whom he was speaking. Pisistratus declared his land free from taxes, establishing a precedent that lands considered to be devastated or unworkable were not to be within the city boundaries.¹¹⁰ It is possible that this man experienced a degraded status due to his lands being considered devastated they were then located outside the government boundaries, therefore outside the protections of government that all citizens enjoyed. This example may also be viewed regarding the production achieved from the land, which determined to be useless and therefore would produce nothing of taxable value. In this sense, the condition of the land altered, thereby altering the condition of the man who worked it.

¹⁰⁸ Ibid., 24.

¹⁰⁹ “Section 16,” *Athenian Constitution*, <http://avalon.law.yale.edu/ancient/athe2.asp>

¹¹⁰ Ibid.

Similar to the conditional changes discussed by Aristotle, Roman law attends to the advancement of the lower classes through changes in condition and status. In several cases, those who were born to slaves, commoners, and even foreigners elevated their condition to become consuls, patricians, and kings of Roman society.¹¹¹ Their elevation also supports the view that with wealth comes freedom. The Code of Justinian offers more evidence that the term slavery held a generic use to describe all forms of servitude. Freedom, under the Code is described as “the natural power of doing what we each please, unless prevented by force or by law.”¹¹² Under these ancient societies, citizenship determined many things concerning a person’s ability to purchase, travel, and have a voice in society. The slave is considered a citizen in these societies even though their condition placed them in the lowest tier which only allotted them certain rights. They were still required to have permission from their masters to leave the property for travel, marry, acquire possessions, and to be sold to another master.

In the second and third centuries, slavery existed as an essential element of society. It being one of the lowest on the social structure, their roles were primarily dedicated to agricultural means and mining, while others held roles as household servants to the upper classes.¹¹³ According to Paul, who wrote a letter to Philemon concerning the Christian duty of freeing slaves, there was no requirement for them to do so because they themselves were already bondsmen in the Roman Empire and a servant of Christ.¹¹⁴ Each person held a position in life that bound them to that service until called to another— this position did not have bearing

¹¹¹ “Institutions,” *The Library of Original Sources*. 3. Thatcher, Oliver J. ed. (Oliver Joseph), 1857-1937: 21. <https://babel.hathitrust.org/cgi/pt?id=nyp.33433067371280;view=1up;seq=41>

¹¹² The Code of Justinian

¹¹³ “Slavery in the Greco-Roman World,” *New International Version, Archaeological Study Bible: An Illustrated Walk Through Biblical History And Culture*: 1979.

¹¹⁴ “Philemon,” *New International Version, Archaeological Study Bible: An Illustrated Walk Through Biblical History And Culture*: 1980.

concerning social status in relation to spiritual worth.¹¹⁵ Both early and later views held the position that a person may be a slave or servant depending on their status. Their conditional characteristics remained the same whether one was a public or personal servant— as stated in Matthew— the major difference between the two is found in their status.

Servile condition did not provide a barrier against spirituality; and spirituality did not free one from their servile condition. Based on this principle, the right of baptism could not be withheld from the servant. Later colonial American statutes preserved the practice of allowing the baptism of servants such as in a South Carolina statute in 1712 that read, “Be it therefore enacted, That it shall be, and is hereby declared lawful for any negro or Indian slave, or any other slave or slaves whatsoever, to receive and profess the Christian faith, and be thereunto baptized.”¹¹⁶ However, similar to Philemon, profession of faith, and in this case baptism, did not grant the servant emancipation.¹¹⁷ This practice offers an explanation of the differences in pagan and Christian servitude, which are ownership of the person and ownership of the person’s labor. The latter being a practice of Jewish masters and holds similarities to later labor laws concerning taxation. Examples of the Christian duty to fulfill their obligation can be found in *I Timothy 6:1* concerning further submission to their duties; and in the Gnostic text the *Acts of Thomas* who reminded Christian slaves of the words of Jesus, “Although you are men...they lay burdens on you like animals without the power of reason; those with power over you suppose that you are not human beings.”¹¹⁸ This also aides in describing the difference between slave societies of the colonies compared to the harsher conditions of the Caribbean Islands. Because the servant had converted to Christianity, English law had no right to dissolve the contract made by the servant

¹¹⁵ Robin Lane Fox, *Pagans and Christians*, (New York: Alfred A. Knopf, Inc., 1989): 295

¹¹⁶ Spooner, *Unconstitutionality*, n. 33.

¹¹⁷ *Ibid.*, 33.

¹¹⁸ *I Timothy 6:1*,” (King James Version); Fox, *Pagans and Christians*, 297.

prior to conversion, they were in fact, bound to perform that duty as Christians.¹¹⁹ An example of this practice comes from the fourth century where pagan slaves who were not circumcised were given a year to consider it by their Jewish masters. When the slave refused they were then sold to a pagan master rather than forced to conform to Jewish practices.¹²⁰

Acceptance of one's position in the strict sense of servitude meant that the individual conformed to all practices of that society, including religious practices. Unwillingness to conform usually meant that the slave would be a troublemaker, causing discontent and rebellion among other slaves resulting in decreased production, moral, loyalty, as well as an increase in costs to the master. Labor being viewed as the mode of transition from an uncivilized culture to a civilized society, it became necessary that the slave conform to their condition and the cultural practices of these societies. Freehold status complicates the traditional view of slavery even more. According to the South Carolina Act of 1690, slaves are considered a freehold form of property, which meant that the master only had ownership of the slave's services, but not the individual as a person.¹²¹ This practice directly reflects the Christian view concerning ownership of labor. Freeholds are considered an elevated status and incur similar rights to those in serfdom. Ultimately, their change in condition allowed for the view that slaves held two uses, one being people and the other being chattel (property).

George Alsop, a prominent figure of early Maryland, arrived as what is described as an indentured servant to Lord Baltimore. He attained his freedom through servitude just as his brother had done. What is striking about Alsop's story is that most writings about him speak as

¹¹⁹ Ibid., 413.

¹²⁰ Ibid., 296.

¹²¹ M. Eugene Sirmans, "The Legal Status of the Slave in South Carolina, 1670-1740," *The Journal of Southern History*, 28, no. 4 (Nov., 1962): 464.

though indentured servitude was an easier path than slavery. However, in Alsop's own writing he mentions in a letter to his brother that he is in a lowly condition and that while he is being transported to America with a "clog about my neck" he thinks of his brother being transported to his destination with "a chain about your leg."¹²² Four years he suspected would be his term of indenture, though in his writing he was not so sure that would be the case. Despite having surrendered himself to an unknown future of servitude, Alsop was able to elevate himself from his condition and improve upon his status. He speaks of servitude as being necessary for developing both a lower servile class and a responsible middle to upper class. He issues the following statement concerning the order of servitude: "That there should be Degrees and Diversities amongst the Sons of men, in acknowledging of a Superiority from Inferiors to Superiors; the Servant with a reverent and befitting Obedience is as liable to this duty in a measurable performance to him he serves, as the loyalest of Subject to his Prince."¹²³

Alsop goes on to acknowledge that the greatest of historical kingdoms existed because of a temporary term of servitude. His view does not seem to be restricted to the lower classes, as he was the son of a middle-class family, he believes that submitting the child to seven years of apprenticeship is good conditioning for the child as an adult. He then reflects on the difference between practices in England to that of Maryland where he felt four years of service was easier than the two years he apprenticed in London.¹²⁴ He then proceeds to explain the process of delivering oneself up to the merchant who pays for their passage. The process includes binding themselves to a specified term of years and a set condition which they are bound to perform; the contract is to the merchant or whomever else he assigns should he not live or fulfill his

¹²² George Alsop, *A Character of the Province of Maryland, 1666*, (Cleveland: The Burrows Brothers Company, 1902): 93.

¹²³ *Ibid.*, 53.

¹²⁴ *Ibid.*, 55.

obligation.¹²⁵ While Alsop's rendition of servitude in the late seventeenth century seems a benefit to those who ventured to Maryland from England, the depiction he offers sets the tone for what many historians categorize as indentured servitude. Aside from the fact that he and his brother were bound in chains for the voyage, the condition of his terms seems quite different from those under more strenuous conditions of slavery. Nevertheless, Alsop's story provides a testimony of sorts siding with the Christian view of obligation and duty which results in a path to citizenship, in the sense Aristotle viewed citizens.

The Fundamental Constitutions of Carolina offer a direct association to the Three-fifths clause as it too is a constitution relating to an American colony or state. Framed by John Locke, the constitution espouses both security for the monarchy and nobility, while providing opportunity for those below. Article three states in similar terms the structure found in New England: "Three. The whole province shall be divided into counties; each county shall consist of eight signiorities, eight baronies, and four precincts; each precinct shall consist of six colonies."¹²⁶ This description offers an example of proportioned land, local governments, and a social hierarchy. There exists similar language used in this constitution compared to the language used in New England, in other countries, and even earlier periods in Europe. Perhaps the most striking lesson from this constitution is the description found in Article four which portrays how each area is proportioned according to its inhabitants.

"Four. Each signiory, barony, and colony shall consist of twelve thousand acres; the eight signiorities being the share of the eight proprietors, and the eight baronies of the nobility; both which shares, being each of them one-fifth of the whole, are to be perpetually annexed, the one to the proprietors, the other to the hereditary nobility, leaving the

¹²⁵ Ibid., 57.

¹²⁶ "The Fundamental Constitutions of Carolina, March 1, 1669," *The Avalon Project*. (Yale Law School, Lillian Goldman Law Library, 2008): online. http://avalon.law.yale.edu/18th_century/artconf.asp

colonies, being three-fifths, amongst the people; so that in setting out and planting the lands, the balance of the government may be preserved.”¹²⁷

Similar to the laws of medieval England, ancient Rome and Greece, the government-controlled land extended only as far as was proportional to its inhabitants or citizenry. Those whom lived outside the lands designated were considered the poor who possessed no rights as citizens. The elevation from their condition often occurred through plunder or expansion which caused them to be introduced into the transitory condition of servitude.

Land was distributed in amounts of twelve thousand acres for nobleman. Some land was divided according to the number of inhabitants, or rather the number the aristocratic owner suggested. Fraud often took place by embellishing the number of people who would be inhabiting the land; the more people, usually slaves, the more land.¹²⁸ Primogeniture often prevented the land from being sold. According to English laws, land given to an aristocrat must remain in the family or be given to another aristocrat. Quitrents prevented the land from going to poorer farmers where taxes stifled growth of smaller estates. Quitrents were used primarily in the south where production crops supplied the base of the economy in early America.¹²⁹ The system provided pressure upon the small farmers to produce or risk losing their farm to either the larger plantations or to another small farmer. Such is the case in South Carolina where the immigration of planters from Barbados sought farms and a means of elevating their status. South Carolina, having borrowed much of its legal code from Barbados, it is reasonable to assume that the practice of dividing lands found in *The Fundamental Constitutions of Carolina* derived from Barbadian practices which also having been the practices of Europeans who colonized the

¹²⁷ Ibid.

¹²⁸ Eaton, *Old South*, 22.

¹²⁹ Ibid.

Caribbean and North America. An application that influenced the use of the three-fifths ratio for commercial agricultural production of staple crops is based on the production of agricultural laborers to scale, where the majority of taxing revenue is present in the three-fifths area allotted to the lower classes of citizens.

Prior to the Philadelphia convention James Madison retracted a statement from the original Declaration of Independence. The retracted portion stated that slavery is forced upon the American plantation system despite the colonist rejecting further involvement in the African slave trade. The primary concern being, America was becoming a dumping ground for the undesirable citizens of Britain and elsewhere, resulting in further exploitation of the colonies through their dependence on staples. One person who aided in perpetuating English dependence on the trade was social scientist Samuel von Pufendorff. Pufendorff stated that the abolition of slavery gave cause to the interactions citizens had with vagabonds, thieves, and beggars; this greatly affected citizenship and therefore representation. What attracted the English Crown to this belief is that it could be used to slow the emigration of English to the American colonies if they were to ship slaves there, all the while enjoying the profits from the trade itself, thus leaving the colonists to deal with the degradation of their colonial society. This was the financial equivalent to the treatment of vagabonds, basically the unwanted people of society, during the reign of Henry the VII. Kenneth Pickthorn writes in his book *Early Tudor Government, Henry the VII*, “There were various reason for the diminution- manumission, migration, the inclination of the royal courts to freedom, and economic changes, especially those obsolescence of demesne farming, that is, the direct exploitation of large estates by lords.”¹³⁰ By forcing these conditions

¹³⁰ Kenneth Pickthorn, *Early Tudor Government, Henry VII*, (New York: Octagon Books Inc., 1967): 170.

upon the colonies, the English government was better enabled to control them with little interaction, rendering the colonies perpetually dependent.

The Royal African Company was chartered to aid in transferring African slaves to the American colonies for the purpose of increasing wages and prices on commodities thus causing the planters to purchase more slaves.¹³¹ By increasing costs on the production of products sent to the colonies for sale, colonial planters were forced to purchase more slaves to increase production and profits, enabling them to afford the products they purchased for personal use, maintenance and upkeep of their laborers. By forcing western expansion, the British government could both populate and exploit the nature of the mercantile system of the colonies. This not only placed the colonies in a perpetual condition of dependency as previously mentioned, but also in a condition of servitude. The framers vehemently spoke against the English government regarding their degraded condition, whom they argued subjected every colonist to the condition of slavery.

The retracted statement by Madison expressed the condemnation of the African slave trade perpetuated upon the American colonies by the British crown, signifying that the practice and the colonies were outside the laws of England as far as colonial resentment was concerned.

“He has waged cruel war against human nature itself; violating its most sacred rights of life and liberty in the persons of a distant people who never offended him; captivating and carrying them into slavery in another hemisphere, or to incur miserable death in the transportation thither, This piratical warfare, the opprobrium of infidel powers, is the warfare of the Christian King of Great Britain. Determined to keep an open market where men should be bought and sold, he has prostituted his negative for suppressing every legislative attempt to prohibit or restrain this execrable commerce; and that this assemblage of horrors might want no fact of distinguished die, he is now exciting those very people to rise in arms among us, and to purchase that liberty of which he has deprived them by murdering the people on whom he also obtruded them: thus paying off

¹³¹ Joseph Dorfman, *The Economic Mind of American Civilization 1606-1865, vol. 1*, (New York: The Viking Press, 1953): 26.

former crimes committed against the liberties of one people, with crimes which he urges them to commit against the lives of another.”¹³²

The condition of the colonist bears a resemblance to those whom lived outside the jurisdiction of the medieval cities of England as well as those of ancient Rome and Greece. Practices such as these may have been the result of cultural practices transferred from previous servile based societies. Where the sentiment of English citizenship weakens in the colonies, an increase in the sentiment towards American citizenship strengthens creating a bottom up structure also known as a revolution.

In New England however, a different approach formed in the regulation of who could be admitted into society. Admission into New England society meant having a skill that was desirable to the greater whole rather than simply being a contributing entity to that society. Blacksmiths, cobblers, midwives, etc... were sought after as they contributed to the needs of the greater community. They achieved sponsorship through locals who paid a subscription for their admission into society.¹³³ Considering them as indentured servants has been the general practice of historians in their attempt to either justify one form of servitude more humane than another, or an attempt to differentiate the extremes in terms of humanity while ignoring that a transitional period occurred in early America as it had in earlier societies. The elevation from one condition to another allowed for the lower classes of people to attain more freedom. In New England society bondman were required to pause in the work for which they were imported during the harvest season and attend to the greater good of those individuals who paid subscription for their

¹³² Henry D. Gilpin, *The Papers of James Madison, Purchased by the Order of Congress being His Correspondence and Reports of Debates During the Congress of the Confederation and His Reports of Debates in the Federal Convention,* vol. I, (New York: J & H. G. Langley, 1841): 9.

¹³³ William B. Weedon, *Economic and Social History of New England 1620-1789, vol. I,* (New York: Hillary House Publishers LTD., 1963): 81.

importation, this service was enforced by statute and local authorities.¹³⁴ Two differences that are often cited in distinguishing indenture from slavery are term and condition of service. By these two alone, slaves and indentures could be severely and similarly punished for refusing to perform their requirements.

Some bondmen were granted land for their personal use; however, this was based on the community who imported them, although some communities did not allow bondmen to acquire property.¹³⁵ Many accounts regard the bondmen as an apprentice providing greater understanding of the term master, which is referred to in all categories of bondmen. Servants, villeins, slaves, indentures, and various other descriptions are all found to be subjected to the rule of a master despite their condition or term. The general age at which a person bound in servitude seems to be twenty-one years of age. In most ledgers ages are not discussed unless the bond is for a child, whereas an example is provided that a child of seven years was sold into an apprenticeship until he was twenty-one years of age, which is two times as long as the typical indenture espoused by many historians.¹³⁶ Another similarity in all forms of bondmen was punishment, similar for the harshness applied for corrective actions. Servants could be whipped, fined, and imprisoned for neglecting their duties or mistreating their masters. If they exhibited rebellious tendencies, they could be sold to southern plantations or any of the other English colonies.¹³⁷ In these respects indentured servitude does not appear to be different than any of the other forms of bondmen including the generic term slavery.

¹³⁴ Ibid.

¹³⁵ Ibid., 84.

¹³⁶ Ibid., 84.

¹³⁷ Ibid., 85.

A much later example offers how territories, colonies, and slavery are viewed in the early American court system, as well as how citizenship became a primary factor in legal proceedings. Former Chief Justice William H. Rehnquist, who served on the United States Supreme Court from 1971 to 2005, offers his view on a historic landmark case of the Taney Court, *Dred Scott vs. Sandford*. In his book titled *The Supreme Court How it was, How it is*, Rehnquist discusses the provisions of the Constitution that allowed for slavery although the term was not expressly used in the language.¹³⁸ He, like others, have ignored the fact that the framers were strictly against any language written into the Constitution that could be construed in support of slavery; however, there remains little doubt that some did not and have not twisted the intentions of certain clauses to support their arguments, either for or against. Madison addressed this issue in response to a letter from Mr. Robert Walsh, Jr. in 1819, who requested Madison's explanation of both the 1808 Importation clause and the Three-fifths clause as it applied to the expansion of Missouri. Madison explains that it is very important to understand the construct from which the clause derived, that being the issue of slavery.¹³⁹ This does not mean however, that the clauses were constructed for slavery, but that the issue of slavery exposed key flaws in the document. One flaw in particular addressed citizenship and who the governing authority would be concerning immigration and the making of United States or state citizens. It exposed the condition of women, Native Americans, taxation, representation, and trade. Recognizing the future status of slaves highlighted all aspects of the Constitution that related to these areas, more importantly to the Three-fifths clause that provided a common characteristic. Specifically

¹³⁸ William H. Rehnquist, *The Supreme Court How it was, How it is*, (New York: William Morrow and Company, Inc., 1987): 135.

¹³⁹ James Madison, "From James Madison to Robert Walsh Jr., 27 November 1819," *Founders Online*, National Archives, last modified June 13, 2018, <http://founders.archives.gov/documents/Madison/04-01-02-0504>. [Original source: *The Papers of James Madison*, Retirement Series, vol. 1, 4 March 1817–31 January 1820, ed. David B. Mattern, J. C. A. Stagg, Mary Parke Johnson, and Anne Mandeville Colony. Charlottesville: University of Virginia Press, 2009, pp. 553–559.]

mentioning slaves or slavery in the Constitution was not an option favored by most framers, Madison makes note of this stating,

“They had scruples against admitting the term “Slaves” into the Instrument. Hence the descriptive phrase “migration or importation of persons”; the term migration allowing those who were scrupulous of acknowledging expressly a property in human beings, to view *imported* persons as a species of emigrants, whilst others might apply the term to foreign malefactors sent or coming into the Country. It is possible tho’ not recollected, that some might have had an eye to the case of freed blacks, as well as malefactors.”¹⁴⁰

As Madison explained, slavery was not the intent for which the clause was introduced, but that it was the issue that exposed an area that needed to be addressed in the Constitution. He supports the constructed vagueness of the clause as it relates to the Federal Government; that a state could use the clause in reference to slaves, whereas others could use the clause as it relates to any immigrant. Madison then offers his post-ratification support for the actions taken by Congress in the territories that prohibited slave importations such as at the ports of Louisiana, the Mississippi Territory, and vessels at sea.¹⁴¹ He then draws the distinction between a territory and a state, which he explains that Congress has limited power over the latter but can regulate the interactions between states, as in migrations from one to the other. This point directly reflects citizenship in a territory or a state, as well as the situation of Dred Scott’s case.¹⁴² One key point mentioned by Rehnquist that mirrors Madison concerns the view of the Missouri Supreme Court who reviewed Dred Scott’s case, stating that “....Scott’s sojourn in free territory and in a free state did not elevate him from his status as a slave...”¹⁴³ In his analysis, Rehnquist speaks to the crux of the case, that being citizenship and the expansion of slave states under previous recognition of specific ordinances and compromises. Though the state has the power of making

¹⁴⁰ Ibid.

¹⁴¹ Ibid.

¹⁴² Ibid.

¹⁴³ Rehnquist, *Supreme Court*, 135.

state citizens, it does not possess the power to make U.S. citizens; similarly, the federal government has power over territories but not states where citizenship is concerned. Because Scott was not a citizen in either he had no claim as a citizen in either as well.

Spanning interpretation from Madison to Rehnquist concerning citizenship, brings to light how the law is applied in the *Scott* case. It demonstrates the significance placed on citizenship in relation to the Constitution as drafted by the framers and interpreted during the height of tensions concerning slavery. The question of citizenship is associated with the institution of slavery throughout history and is debated among today's historical and legal scholars. Harry L. Chambers Jr. of the University of Richmond School of Law discusses Dred Scott in his analysis of citizenship and personhood.¹⁴⁴ The first issue concerning citizenship in Scott's case signified the court did not recognize him as a citizen of Missouri, which prevented him from making his claim upon being a free person by having traveled to Missouri with his master.¹⁴⁵ Chief Justice Roger Taney provided the example of what constituted a citizen and set the basis for his opinion on this premise, that citizens of the United States were citizens upon ratification of the Constitution. Meaning only those descendants from the original families who were citizens at the time of ratification are considered citizens of the United States. States had the exclusive right to make citizens of their state respectively, however those citizens could only enjoy those rights of other states and certainly not the rights of the United States. Therefore, since Scott was not descended from any persons whom obtained citizenship and that he was neither a citizen of Missouri nor another state, he lacked jurisdiction in filing a claim of citizenship to obtain his freedom. Citizens of the United States, according to Taney, were those

¹⁴⁴ Harry L. Chambers Jr., "Dred Scott: Tiered Citizenship and Tiered Personhood," *Chicago-Kent Law Review*, 82, no. 209, (2007): 212.

¹⁴⁵ *Ibid.*, 210.

who formed the political body of the citizenship in a particular state and held individual sovereignty; slaves could not be citizens unless they were descended from a citizen upon ratification of the Constitution.¹⁴⁶ Taney's view lends to the idea of tiered citizenship and personhood, which closely resembles that of Roman and medieval English law, and is similarly displayed in the structure described in *The Fundamental Constitutions of Carolina*.

Historically, citizens possessed certain rights under their respective governments and those rights are dependent more or less on the status or condition of the citizen, thus creating a tiered structure of citizenship and rights. The highest tier, consisting of persons who are full citizens actively participating in government, enjoy the greatest amount of rights and liberties of government. The second tier involved citizens who are not participants in government and enjoy only a parcel of the rights and liberties of full citizenship; women and children of early America are categorically attached to this tier. Those in the lowest tier are not active in government but are solely dependent upon another who maintained their welfare, rendering them in possession of some of the basic rights and liberties of government.¹⁴⁷ Examples are provided in Taney's lengthy opinion concerning his view of citizenship, status, and condition under the Constitution.

Chief Justice Taney's reputation has been forever tarnished by the racial tone of his opinion concerning his statement regarding the African race as having been an "inferior race" throughout history.¹⁴⁸ While Taney's tone is lacking any compassion for African slaves, or any person of color for that matter, his view of the law is consistent with medieval and ancient systems that governed slaves and other non-citizens. The dissenting opinion was delivered by

¹⁴⁶ Ibid., 211.

¹⁴⁷ Ibid., 215.

¹⁴⁸ Roger B. Taney, "Opinion of the Court, Scott vs. Sandford, 60 U.S. 393," *Legal Information Institute, Cornell Law School*, (www.law.cornell.edu):407.

Justice John McLean who offered a comparative analysis of the actions taken by President James Madison concerning the importation of slaves into the Louisiana Territory whereby he ordered that any slave transported to the territory was free upon arrival.¹⁴⁹ Each justice who offered an opinion discussed the lack of coverage in the Constitution concerning slavery based on the collective understanding that it was an issue for each state to decide. What is interesting of Taney's interpretation is he only mentions there being two clauses in the Constitution that contain implied powers governing slavery: "But there are two clauses in the Constitution which point directly and specifically to the negro race as a separate class of persons, and show clearly that they were not regarded as a portion of the people or citizens of the Government then formed."¹⁵⁰ Taney does not acknowledge the Three-fifths clause as pertaining to slaves as others offering opinions had, instead he only cites two clauses pertaining to slavery, the 1808 Importation Clause— relating to the African slave trade— and the Fugitive Slave Clause— relating to runaways into free states or territories. He affirms that "...they were not regarded as a portion of the people..." and maintains his position that the several United States are established for the white race only.¹⁵¹ He references the condition and status of Indians (Native Americans), women and children, and those inhabitants of the territory of Florida when offering support for his view of non-enfranchised, non-citizens who did not participate in the government at any time.¹⁵² From the examples offered by Taney, his view points to specific provisions of English jurisprudence concerning a tiered structure of citizenship and personhood.

¹⁴⁹ John McLean, "Dissenting Opinion, Scott vs. Sandford, 60 U.S. 393," *Legal Information Institute, Cornell Law School*, (www.law.cornell.edu): 544.

¹⁵⁰ Taney, "Opinion," 411.

¹⁵¹ *Ibid.*

¹⁵² *Ibid.*, 404.

When considering the modern view of Chief Justice Taney, making use of the Three-fifths clause in his opinion on *Scott vs. Sandford* should have been contributory to his position that all the framers of the Constitution viewed African slaves partially as persons and partial property. He discusses the views the framers held during the Convention concerning slaves and alludes to the tiered citizenship and personhood of other groups, yet he maintains the position that all other groups are not of the condition to render them a citizen of the state and or the United States as defined similarly in the historical societies he mentions.¹⁵³ Once again, where Taney fails in his argument concerns his disregard for the free inhabitants of the several states, both north and south, some of whom were of African descent as pointed out in the dissenting opinion of Justice McLean who criticized the view as a “matter of taste than of law.”¹⁵⁴ His view reflects a consistent feature among each justice who offered an opinion or dissent, that being terminology. All spoke of the condition or status, held similar views on citizenship and historical context as it applied to slaves, or the term bondmen as it appeared several times in each opinion or dissent.

Understanding the view of citizenship as a vital element of a civilized society is important because citizenship determines the size and scope of the representative government. The framers included the term “free persons” to include those inhabitants of every tier of citizenship. An earlier form of the census proposed in 1775 based the criteria of citizens “according to the number of inhabitants of all ages, including negroes and mulattoes.”¹⁵⁵ This early enumeration served two primary purposes, one to establish a mode of meeting expenses

¹⁵³ Ibid., 422.

¹⁵⁴ McLean, “Dissenting Opinion,” 533.

¹⁵⁵ Carroll D. Wright and William C. Hunt, *The History and Growth of the United States Census, Prepared for the Senate Committee on the Census*, (Washington: Government Printing Office, 1900): 12.

associated with the coming war, and the other to determine the military strength of the nation.¹⁵⁶ Both taxes and defense are indicative of citizenship which through later alterations of the Articles of Confederation and later U.S. Constitution placed that burden on white land-owning males.¹⁵⁷ The term “free persons” alludes to those inhabitants of a state or territory, not claiming residence in any other, or those counted in the enumeration clause referencing the census who are displaced or dispersed through military service also not claiming residence in any other state or territory.¹⁵⁸ “Free persons” also included those currently and formerly held in servitude that are inhabitants and not attaining full citizenship in any state, therefore being counted in the enumeration as one whole person but three-fifths according to the laws of the state which they reside for representation, which shall be discussed further in the next chapters.¹⁵⁹ Citizenship is therefore controlled by the governing bodies so that the effectiveness of the government to protect the borders and inhabitants is not diminished.

The philosophy of a small central government allowed for greater controls at the local level of each state, these too being determined by citizenship. The framers discussed ancient confederacies and examined the practices of medieval governments; they possessed an understanding of scale and proportionality as relating to all government criteria. A modern view of this same understanding is offered by independent scholar and author of *Human Scale*, Kirkpatrick Sale, who discusses the importance of Aristotle’s claim regarding the limited size

¹⁵⁶ Ibid.

¹⁵⁷ Ibid.

¹⁵⁸ Johnny H. Killian, George A. Costello, Kenneth R. Thomas. ed., *The Constitution of the United States of America, Analysis and Interpretation: Analysis of Cases Decided by the Supreme Court of the United States to June 28, 2002*, (Washington: U.S. Government Printing Office, 2004): 119-122.

¹⁵⁹ Wright, *The History and Growth of the United States Census*, 13.

and proportional government as it relates to population and governing boundaries.¹⁶⁰ Sale offers his analysis of world statistics by examining selected criteria: population, square mileage, size of government, and economic values. His view, like Aristotle's, is that smaller, well-manageable governments, in proportion to the aforementioned criteria, provide the greatest and most efficient outcomes.¹⁶¹

All of this is to prove that early Americans did not arbitrarily pick out a ration 3:5, it was not in their cultural DNA so to speak. Their knowledge of ancient concepts such as the Golden Ratio may have provided the application of these proportional understandings to all areas of life, including slavery. The Golden Ratio (.618) being mathematically very close to three-fifths (.6) may be the basis of proportional representation the framers referenced in their statements concerning proportionality.¹⁶² Citizenship therefore is outside the bounds of government in the greater sense where slavery is concerned. Slaves are tied to the individual, or group of subscribers who paid for their importation, essentially creating a smaller more localized means of representation for the slave, indenture, or any other servant. The master, in his own right, throughout history is the primary benefactor of the servant's production, and is primarily responsible for their care, education, and transition to society. The master is the protector and enforcer of rights and liberties within the bounds of personal jurisdiction, except where death and maiming result from excessive punishment. Slavery, therefore, brought to light the limitations of the federal government, exposing the areas where federal authority had little to no power over state citizens, resulting in federal authority over citizenship through the 1808 Importation clause

¹⁶⁰ Kirkpatrick Sale, "To the Size of States there is a Limit: The Human Scale of Secession," mp3, (Abbeville Institute: www.abbeville.org): Accessed from <https://www.abbevilleinstitute.org/lectures/to-the-size-of-states-there-is-a-limit-the-human-scale-of-secession-by-kirkpatrick-sale/> July 29, 2018.

¹⁶¹ Ibid.

¹⁶² Tung, "Fibonacci Numbers," 7.

thus adding another level to the tiered structure of citizenship and personhood as emphasized by the three-fifths concept.

Chapter 2

Slavery and Representation

“For they are my servants, which I brought forth out of the land of Egypt: they shall not be sold as bondmen.”¹⁶³

- *Leviticus 25:42*

Representation comes in many forms. One may represent themselves, others, a group, an area, and so forth, the list goes on and on. Slaves were beholden to their master who held a higher degree of representation through being a part of a higher tier of citizenship. Those who held slaves sought to portray the humanity of the practice, whereas those opposed dehumanized slaves in their attempt to destroy the institution. Representatives of slave states promoted individual rights and the counting of each as one whole person. Conflict arose over this concept during the convention and those opposed to slavery had the unenviable task of arguing slaves were not persons; while defenders of the institution had the irreparable task of explaining their position as humanely as possible. This is the dilemma facing the framers at the Philadelphia Convention which resulted in the application of the three-fifths ratio, previously applied as an amendment to the Article of Confederation to enhance the taxing power of the government. Michael J. Klarman, author of *The Framers’s Coup: The Making of the United States Constitution*, states that the Three-fifths clause originated as a bill proposed during the Articles of Confederation that assessed taxes based on land values; from this assessment, being based on

¹⁶³ Leviticus 25:42 (King James Version).

values, proportional representation was given. This discussion, having taken place in 1776, attached proportionality to wealth and that being based on the land. However, Klarman makes the point that no accurate census had been taken, which affected the ability to adequately proportion representation.¹⁶⁴ For this reason, it became necessary that the framers discuss who would be represented based on a rough estimate and then a decennial census would go into effect in 1790 to determine future proportions based on a determined formula.

This chapter analyzes the debates on representation as they occurred during the Philadelphia Convention. Utilization of an earlier formula—three-fifths ratio—presented conflicts between northern and southern delegates concerning the enumeration of slaves and what benefits may be enjoyed by their inclusion in the constitutional government. This debate included knowledge of ancient and medieval history, English law, philosophy, religious and moral teachings, but most of all the art of debate. The convention is often termed “the great compromise,” however, closer examination reveals more of a confluence of various styles of argumentation. Compromise is how some historians would have everyone view the founding, perhaps to promote politics or perpetuate a fallacy based on a singular application such as three-fifths. While citizenship determines the scale and proportion of the community which the government operates, representation provides the conveyance of rights, laws, ideals, and communication between the people and the government and vice versa. Also, a post ratification analysis by Thomas Jefferson exposes some of the misconceptions held since the founding, and that have resurfaced under current historical interpretation. Because of this, it is necessary to revisit the nature of representation and to whom it is applied.

¹⁶⁴ Ibid., 270.

Leviticus addresses the difference between a “servant” and “bondmen,” the former being counted in the enumeration of people whom God led, through Moses, out of the land of Egypt. The latter expressed that there existed a duty to not treat slaves poorly, not to sell them as under pagan practices, and not to sell them to another who would mistreat them.¹⁶⁵ Consistently, the children of Israel are referred to as God’s chosen people, who are under the representation of spiritual leaders who serve at God’s will and under his law. The distinct difference between the two is in personhood and property. Personhood alludes to citizenship, regardless of tiered condition or status; whereas property refers to chattel. If American slavery is considered to be chattel slavery, then it is impossible for slaves to have been counted in the enumeration and have representation in any form or ratio. Earl M. Maltz contends in his article “Slavery, Federalism, and the Structure of the Constitution,” published in *The American Journal of Legal History* in 1992, “If slaves were to be considered persons, then the representation and potential taxation of slave states would be increased; if property, then that representation and taxation would be correspondingly reduced.”¹⁶⁶ He further argues that property did not grant representation, which both conflicts with the theory of chattel slavery and any ratio of representation being granted to slaves. Eldridge Gerry, a delegate from Massachusetts, and William Patterson, a delegate from New Jersey, are two who supported the view that slaves are to be considered property, in fact chattel property, the same as any other agricultural means of production. The Three-fifths clause adds to the dilemma facing the framers and those after who attempt to decipher their intentions as the clause applied to slavery rather than the clause being constructed for slavery.

¹⁶⁵ “Leviticus 25:42,” (Online: Bible Study Tools). Accessed from <https://www.biblestudytools.com> July 20, 2018.

¹⁶⁶ Earl M. Maltz, “Slavery, Federalism, and the Structure of the Constitution,” *The American Journal of Legal History*, 36, no. 4 (Oct., 1992): 468.

An important member of the Pennsylvania delegation was James Wilson, for his views on proportional representation. Wilson, signer of both the Declaration of Independence and the Constitution, was a Scottish immigrant, attorney, and delegate to the Pennsylvania Convention, and is considered one of the most knowledgeable of law and reasoning at any of the early Revolutionary assemblies.¹⁶⁷ Wilson also holds the distinction of being the originator of the Three-fifths clause by several scholars. Randolph C. Adams discusses Wilson's legal theories in his 1920 article "The Legal Theories of James Wilson." Adams expands on Wilson who separated natural and human law "...clearly, distinctly, and serviceably" as he states that the law "was not his master, but his servant."¹⁶⁸ If this be the basis by which Wilson suggested the Three-fifths compromise, an understanding of his legal basis must provide an explanation of the "serviceability" of the clause regarding slaves. Wilson's view represents an inverted philosophy where the law works for the people who gave consent to be governed by it and it binds those who represent others through it, including the master of slaves. In this sense, serviceability addresses those who are bound to the law, as they have the greatest influence over the law while in service and preservation of the law.

Adams touches on this philosophical argument, one that plagued Wilson regarding the hierarchical positioning of law and man under natural laws; if man is bound by the law that is interpreted by those who study law, and those who study are beholden to those who make law, does that not suggest that man is bound to certain classes under natural law?¹⁶⁹ It is further extended to the state and federal government, who seemingly are more valuable under the law

¹⁶⁷ Randolph C. Adams, "The Legal Theories of James Wilson," *University of Pennsylvania Law Review and American Legal Register*, 68, no. 4 (June, 1920): 337.

¹⁶⁸ *Ibid.*, 349.

¹⁶⁹ *Ibid.*, 340-342.

based on this hierarchical structure.¹⁷⁰ Thus, a system of status and condition are established for the inhabitants of a civilized society. Wilson, a student of laws of other nations and ancient governments, as was James Madison and others who also supported the Three-fifths clause, was fascinated with the structure and practices of “ancient confederacies.”¹⁷¹ He references the changes made to law in his lectures, where he speaks on the historical progression of law more so than the practice of law in each setting as being distinctly different. Understanding Wilson’s views on both history and law holds a vital position in understanding the Three-fifths clause and how it originated. While Wilson was not the only one to mention the clause, his views on law and its application in this setting offer an important field of study in gaining greater understanding of the language used, which may have been misinterpreted or improperly applied since the founding. Considering the high character of those attending the Constitutional Conventions, it is plausible that the debates of highly contested topics such as slavery became the battleground for lawyer trickery, or skewed arguments, to enforce one particular view over another.

One example Wilson makes concerning representation and serviceability discusses knights in the king’s service as being another type of bond servant. Knights served and represented the king loyally because of the condition and status they held under his reign, or risked confiscation of their lands for non-service.¹⁷² Wilson spoke on the condition and status of knights and offered an explanation of medieval subjects (citizens), stating that certain rights are transitional and follow the citizen, regardless of condition or status, wherever they go. An early

¹⁷⁰ Ibid., 342.

¹⁷¹ Jack P. Greene, “The Background of the Articles of Confederation,” *Publius*, 12, no. 4 (Autumn, 1982): 17.

¹⁷² James Wilson, *Collected Works of James Wilson*, vol. II, ed. By Kermit L. Hall and Mark David Hall, (Indianapolis: Liberty Fund, Inc., 2007): 768.

Massachusetts charter, renewed by King William in 1688, is provided as a recent example by Wilson. He described the similarity that all Englishmen and their posterity are considered subjects of the king wherever they may travel and live, establishing citizenship and representation abroad; although the distinction may be made that subjects were of the lowest tiered citizens possessing only minimal rights and privileges. Many of the early American colonies contained a similar clause, although this one by King William was repealed upon advisement of his legal counsel.¹⁷³ Similar to the Domesday survey, later societies sought the enumeration of all inhabitants for purposes of taxation and representation through a type of census, while representation was granted on a group basis signifying colonial status as subjects—servants. Whether one was a knight, noble, freehold, or slave, they all held the classification as a servant regardless of their tiered status or condition and were thus represented through a similar structure of personhood and citizenship; meanwhile, colonists are still viewed as being outside the boundaries that granted them the same rights as English citizens.

In the years leading to the framing of declarations presented to the British government and the Articles of Confederation, the earliest formation of Congress allowed each colony to provide one representative, their reasoning being based on “The Congress not being possessed of, or at present able to procure proper materials for ascertaining the importance of each colony.”¹⁷⁴ At this point, neither slavery, wealth, nor population were considered or known to be obvious benefits to the states, or they simply were not established as the criteria for acquiring representatives. A plan for acquiring an actual enumeration allowed for the future

¹⁷³ Ibid., 781.

¹⁷⁴ *Journals of the Continental Congress, 1774-1789*. ed. Worthington C. Ford et al. (Washington, D.C., 1904-37): 25. Accessed from <https://memory.loc.gov/ammem/amlaw/lawhome.html> May 5, 2018.

implementation of a census plan. The importance of these costly first steps overshadowed the subject of slavery.

The Association of 1774 presented before the Continental Congress on Thursday, October 20, 1774 addressed the issue of slave importations and the products produced by them in other British colonies where slavery existed. The first article rejected all imports from British assets throughout the world as a means of demonstrating that the colonies, under self-determination, were self-supporting and able to exist outside the umbrella of British governance. The second article stated, “We will neither import nor purchase, any slave imported after the first day of December next; after which time, we will wholly discontinue the slave trade, and will neither be concerned in it ourselves, nor will we hire our vessels, nor sell our commodities or manufactures to those who are concerned in it.”¹⁷⁵ The Articles of Association, as they are commonly referred, were signed by the delegates of the several colonies, both north and south, slaveholding and non-slaveholding. The view for this conjoined sentiment has ties to the view that the British government, through their actions and limitations on the colonies, established a servile role on the inhabitants of the colonies as a whole, enslaving them to British rule without recourse. These sentiments are expressed in an article titled, *Address to the People of Great Britain*, which offers a plea and explanation of the colonial position:

“When a nation, led to greatness by the hand of liberty, and possessed of all the glory that heroism, munificence, and humanity can bestow, descends to the ungrateful talk of forging chains for her friends and children, and instead of giving support to freedom, turns advocate for slavery and oppression, there is reason to suspect she has either ceased to be virtuous, or been extremely negligent in the appointment of her rulers.”¹⁷⁶

¹⁷⁵ Ibid., 75.

¹⁷⁶ Ibid., 82.

Language such as this offers confusion concerning the term slavery. The colonial view implies their reduction in status and condition as they were outside the boundaries of British citizenship. Taxation, untouchable colonial overseers, standing troops to enforce adherence to British governance, and the lack of ownership in property solidified their place among the lowest statuses of British subjects. Enslavement, they argued, meant “having our lives and property in their power,” under the control of the rulers of Britain; they offered a warning to the British people, “In a word, take care that you do not fall into the piteous pit that is preparing for us.”¹⁷⁷ Richard Henry Lee further discussed the view of reduced citizenship as he explained the choices presented to the colonists, “Election between dictated submission and the threatened punishment,” choices he said are found only for slaves who agree “in petitions for redress of grievances, that equally affect all.”¹⁷⁸ It is evident that the colonist considered their condition and status had changed as the following years offered a stronger position towards self-determination.

The first attempt to establish a government resulted in the Articles of Confederation, which being critiqued for having too loose of a confederation that limited the ability of the central government to exercise taxing power. As the Constitutional Convention set forth to establish the second national government for the still newly formed and independent United States, which being comprised of the original thirteen colonies, debate ensued over the election of officers, the number of houses, and the electorate. To elect a president and members of both houses requires a significant amount of people, all of whom are considered the electorate. The electorate are established by determining who are citizens and if they possess the requirements

¹⁷⁷ Ibid., 89.

¹⁷⁸ Ibid., 98.

allowing them to vote. Resolution 7, a proposal for a single “national Executive” was submitted and agreed to early Friday, June 1, 1787 by James Wilson and seconded by Charles Pinkney.¹⁷⁹ Madison documents the discussions held during the convention and records his position concerning proportionality of both houses to the electorate based on the number of inhabitants in each state. Madison references the practices of ancient and modern confederacies in support of his position.¹⁸⁰ The discussion turned to proportionality and who possessed the right of suffrage in each state where many concerns were expressed over this topic and which house was to be the larger portion of government.

Reflecting on citizenship, representation is based on those influential to the government, either through financial support, active participation, or both. The tiered structure of citizenship separates those possessing the most influence, i.e. a magistrate has more influence at the local level than at the federal, and a federal representative has greater influence at the national level while their constituency covers a larger local area. This supports the idea of federal representatives being closer to the people they represent even though they represent them as a group, as they make up the body of influential citizens. To complicate matters, the three-fifths ratio counts the inhabitants of the area for determining representation at the federal level, however an inversion occurs where two-fifths of the most influential citizens—who are also inhabitants—possess the vote in determining who those representatives are. This structure is a resemblance of *The Fundamental Constitutions of Carolina* where the larger portion of land belongs to the proportion of three-fifths, whereas the other two portions are one-fifth each

¹⁷⁹ “Madison Debates, Friday, June 1, 1787,” *The debates of the Federal Convention of 1787, which framed the United States of America, reported by James Madison, a delegate from the state of Virginia*, Gaillard Hund and James Brown Scott, ed., (New York: Oxford University Press, 1920). Accessed from “Notes on the Debates in the Federal Convention.” The Avalon Project. Yale Law School. http://avalon.law.yale.edu/subject_menus/debcont.asp February 3, 2018.

¹⁸⁰ “Madison Debates, Wednesday June 6, 1787.”

respectfully.¹⁸¹ This proportion is critical in determining the size and scope of governmental influence as it is determined by a proportion of the citizenship with the most influence.

Proportionality, being linked to equality of state representation, is also linked to the protection of rights, which Madison felt should be protected by the larger house. However, Madison expresses his fear of tyranny of the majority, that the rights of the smaller portion would overwhelm the minority interests. Specifically, Madison feared those with a “shared interest” would impose their decision making on the lesser number of inhabitants in a given area.¹⁸² To prevent this from happening Madison argued,

“The only remedy is to enlarge the sphere, & thereby divide the community into so great a number of interests & parties, that in the 1st. place a majority will not be likely at the same moment to have a common interest separate from that of the whole or of the minority; and in the 2d. place, that in case they shd. have such an interest, they may not be apt to unite in the pursuit of it.”¹⁸³

John Dickenson agreed to the measures presented by Madison, that the one house should be voted by the people and the second house by the legislatures. William Pierce agreed, adding that the people would then be represented both “individually and collectively.”¹⁸⁴

Two things should be considered when reviewing the constitutional debates, (1) nearly all the delegates deferred??? to the laws of English government from which they had recently separated, and (2) some of the most vocal at the Constitutional Convention reflected on their knowledge of Greek and Roman history, as well as other ancient confederacies and utilized those examples in their arguments. On June 11, 1787 Roger Sherman of Connecticut introduced one clause found in Art. I, Sec. II that pertained to the number of the electorate to the House of

¹⁸¹ *The Fundamental Constitutions of Carolina.*

¹⁸² “Madison Debates, Wednesday June 6, 1787.”

¹⁸³ Ibid.

¹⁸⁴ Ibid.

Representatives; that it should be based proportionally to the number of “free inhabitants” of each state.¹⁸⁵ John Rutledge followed, that the proportion of representation in the House should be based on quotas of contribution, namely taxes. William Patterson reminded the delegates on June 9, 1787 that the Articles of Confederation were the basis and standard for which the delegation was acting, that rules had been agreed to and that certain aspects of the current discussion were in violation of the Articles. Both, Rufus King and James Wilson referenced the Articles of Confederation in their statements on June 11 and moved “that the right of suffrage in the first branch of the national legislature ought not to be according to the rule established in the Articles of Confederation, but according to some equitable ratio of representation.”¹⁸⁶ King offered an example concerning smaller bodies being overtaken by the larger; his example of English Parliament, who allowed representatives from Scotland to sit in each house, the same concerns were raised. King describes the proportion as forty members in the House of Commons and sixteen members in the House of Lords, this being a three-fifths ratio supported by the greater numbers in the House of Commons who represented the inhabitants of both nations.¹⁸⁷

Concluding the discussion on proportional representation, Benjamin Franklin offered his thoughts on the subject, which after considerable debate had changed. He wrote his thoughts in a statement which James Wilson read to the convention, outlining his belief that representation should be closer to the people represented rather than the nation as a whole. Franklin states that the practice “is not new,” and that it had been used in England with considerable success. He reaffirms King’s statement concerning the Scottish and English Parliaments in 1707, which presented a similar issue where proportionality and representation are fixed on a certain ratio.

¹⁸⁵ Christopher Collier and James Lincoln Collier, *Decision in Philadelphia The Constitutional Convention of 1787*, (New York: Ballantine Books, 1987): 191.

¹⁸⁶ “Madison Debates, Monday, June 11, 1787.”

¹⁸⁷ Ibid.

James Wilson then motioned that the clause should read as, “equitable ratio of representation in proportion to the whole number of white & other free citizens & inhabitants of every age sex & condition including those bound to servitude for a term of years and three fifths of all other persons not comprehended in the forgoing description, except Indians not paying taxes, in each state.”¹⁸⁸ This proportion was also to be determined by “quotas of contribution,” which being tied to taxation on property and the produce from that property raised a question from Eldridge Gerry, who then introduced the issue of counting the African slave population as property.

Luther Martin argued in favor of equal voting by each state where he criticized an earlier example given in an argument by James Madison. Martin used a similar tactic and offered three states as his example, that Virginia, Massachusetts, and Pennsylvania compiled more than the votes needed (42/90) based on the three-fifths ratio to sway a vote in their favor provided that the other states were not able to group together in defense. He stated that this was an act of slavery on the other states.¹⁸⁹ Madison’s rebuttal the next day provides insight that an established division of counties based on proportionality was already in practice with the purpose of protecting the interests of the wealthy and the poor. In proportion the wealthy are responsible for the taxes and loss of all, while the poor represented and gave power to the legislature that governed them. Madison states that the assembly has studied the ancient confederacies and modern governments to no avail, nevertheless they have concluded that proportionality is the best remedy against smaller bodies being controlled by the larger ones. His argument centered around the same example provided by Luther Martin and contended that they have no more interests than any other state, that Martin’s argument was based solely on those larger states

¹⁸⁸ Ibid.

¹⁸⁹ “Madison Debates, June 27, 1787.”

because of their voting capacity.¹⁹⁰ At this point in the convention, the debate concerning proportionality has carried on for over three weeks, once thought having been satisfied new issues arose following the addition of other articles to the Constitution.

The debate concerning proportional representation progressed without any foreseeable movement towards a conclusion. Old arguments began to recirculate, a request for a delegation from New Hampshire to be present was rejected claiming they knew of the convention and were able to join if they so choose. At this point of the discussion, fears of larger states, aristocracies, and monarchies were at the core of the debate, which caused a stalemate restricting any progress towards a conclusion. On June 30, James Madison attempts to stifle the fears of large states overtaking small states and shifts the argument to “peculiar interests” by stating that neither the small or the large states are different in fears of minimal power but are different in their location and climate. Climate being necessary for the production of certain crops that required the use of slave labor, skewing the discussion in this direction took the attention away from large state/ small state fears.¹⁹¹ Madison’s attempt to skew the argument away from the fears of the states in relation to usurpation by larger and smaller coalitions placed the argument on a distinguishable difference between northern and southern states. Prior to this proposal, sentiments were mixed between states in the north and those in the south, the example provided by Oliver Ellsworth concerning Pennsylvania, Massachusetts, and Virginia portrays a mixture of northern and southern states unified under one cause which exceeded three-fifths control by six votes.

On Friday, July 6, 1787, Charles Pinkney spoke out concerning the apportionment in the first house, his view was that blacks should stand on an equal footing as whites concerning the

¹⁹⁰ “Madison Debates, June 28, 1787.”

¹⁹¹ “Madison Debates, June 30, 1787.”

inhabitants of each state in proportional numbers.¹⁹² On July 9, 1787, the conversation turns back to a discussion concerning slaves as William Patterson comments that slaves could in no other way be perceived as anything but property; holding them as property removed them from the lower tiered status of citizenship. Patterson reminded the convention that the eighth article of the Articles of Confederation was changed, that it had mentioned slaves, but removed the term for fear of later embarrassment. Madison counters that the first house should be based on the number of free inhabitants and the second house on the whole number including slaves. Rufus King made the suggestion that slaves should be counted for the purpose of taxation, whereby taxation and representation are bound together.¹⁹³ Following the committee's report on the numbers of representation in each house, Williamson states that the southern states are at a disadvantage when it was suspected that they would have the majority. Based on the report, the number of slaves in the southern states did not provide them the instant advantage that was originally projected. Following the report, the northern states held the majority and the means of keeping it do to the importation of immigrants to the northern states.¹⁹⁴ Southern delegates argued that representation should be based on wealth as they possess the majority of wealth and supported the national government more than the northern states through the production of their staple crops on the global market.

Equal representation being the primary issue at stake during this portion of the convention, the smaller states were not willing to give up the opportunity to be on an equal footing with the larger states.¹⁹⁵ The need for an accurate census greatly supports the effectiveness of proportionality, the framers recognized this dilemma and made the appropriate

¹⁹² "Madison Debates, July 6, 1787."

¹⁹³ "Madison Debates, July 9, 1787."

¹⁹⁴ "Madison Debates, July 10, 1787."

¹⁹⁵ Klarman, *Framer's Coup*, 194.

decision to equalize the vote in Congress among states. When the first Congress of the United States met in 1789—following the ratification of the Constitution— the Senate composed of twenty-six representatives of the states and the House of Representatives composed of sixty-five representatives of the people. The result demonstrates a three-fifths majority favoring the citizenship through proportional representation in the House. This may appear to be mere coincidence when referring to the agreement made between England and Scotland in 1707, however, the difference in representative numbers between the houses diminishes that view.

The concept of equality among the states, rather than the south gaining an advantage through their incorporation of the slave population, renders the latter statement false. Alexander Hamilton addressed the potential results of the Three-fifths clause and proportionality in a statement made during the New York ratifying convention on June 20, 1788. “Another circumstance ought to be considered. The rule we have been speaking of is a general rule and applies to all the States. Now, you have a great number of people in your State, which are not represented at all; and have no voice in your government: These will be included in the enumeration—not two fifths—nor three fifths, but the whole. This proves that the advantages of the plan are not confined to the southern States but extend to other parts of the Union.”¹⁹⁶ Hamilton’s view differs greatly from others who contend that the southern states benefitted greatly from the compromise of the clause. He goes on to discuss the major staple products produced in the southern states and makes the case that they will be the benefit of the country due to those staples being traded on foreign markets. In this, he links slavery, taxation, and

¹⁹⁶ Alexander Hamilton, “New York Ratifying Convention. Remarks (Francis Childs’s Version), [20 June 1788],” *Founders Online*, National Archives, last modified June 13, 2018, <http://founders.archives.gov/documents/Hamilton/01-05-02-0012-0005>. [Original source: *The Papers of Alexander Hamilton*, vol. 5, *June 1788–November 1789*, ed. Harold C. Syrett. New York: Columbia University Press, 1962, pp. 16–26.]

representation as one service based on the products produced. Regarding the personhood of slaves, Hamilton states, “They are men, though degraded to the condition of slavery. They are persons known to the municipal laws of the states which they inhabit, as well as to the laws of nature. But representation and taxation go together—and one uniform rule ought to apply to both.”¹⁹⁷ His emphasis rests on slaves being persons and their economic contributions to the nation as a whole entitling them to a degree of citizenship and representation. Through this, representation and taxation must also be made uniform where each region supports the other through the production and sale of global commodities.

Thomas Jefferson provides a post-ratification view on the subject in his response to a letter from Samuel Kercheval, dated September 5, 1816. Jefferson responds by stating that there is confusion concerning equal representation and the counting of slaves within the framework of the Constitution; the confusion being between a representative republic and a “pure democracy.”¹⁹⁸ He goes on to explain that a “pure democracy” excludes certain classes of people, though it achieves governance through referendum of qualified citizens. Those excluded whom he mentions throughout the discussion are infants, women, and slaves.¹⁹⁹ These classes of citizens, he contends, have no representation as individuals as well as no one to represent them in government. Jefferson follows with his view of the republic created by the Constitution:

“It is true that, in the General constitution, our state is allowed a larger representation on account of it’s slaves. [B]ut every one knows that that constitution was a matter of compromise, a capitulation between conflicting interests and opinions. [I]n truth, the condition of different descriptions of inhabitants in any country is a matter of municipal arrangement, of which no foreign country has a right to take notice. [A]ll it’s inhabitants are men as to them. [T]hus, in the New England states, none have the powers of citizens

¹⁹⁷ Ibid.

¹⁹⁸ Thomas Jefferson, “Thomas Jefferson to Samuel Kercheval, 5 September 1816,” *Founders Online*, National Archives, last modified June 13, 2018, <http://founders.archives.gov/documents/Jefferson/03-10-02-0255>. [Original source: *The Papers of Thomas Jefferson*, Retirement Series, vol. 10, *May 1816 to 18 January 1817*, ed. J. Jefferson Looney. Princeton: Princeton University Press, 2013, pp. 367–369.]

¹⁹⁹ Ibid.

but those whom they call freemen; and none are free men until admitted by a vote of the freemen of the town. [Y]et, in the general government these non-freemen are counted in their quantum of representation, and of taxation. [S]o slaves, with us, have no powers as citizens; yet in representation in the General government they count in the proportion of 3. to 5. and so also in taxation. [W]hether this is equal is not here the question. [I]t is a capitulation of discordant sentiments and circumstances, and is obligatory on that ground. [B]ut this view shews there is no inconsistency in claiming representation for them from the other states, & refusing it within our own.”²⁰⁰

A few conclusions may be drawn from Jefferson’s statements. One, he mentions that the state has received more representation because of their slaves being counted does not necessarily imply that they received more than other states but may simply mean they received more representation than they previously held. Two, Jefferson offers the juxtaposition of the inhabitants of Virginia with the inhabitants of the New England states whereby he exposes the condition of “free men.” He implies they have no rights as citizens within their state and local governments but are represented by the states in the federal government similar to slaves of the south. In this sense, the federal government is responsible for them, rather than to them. Third, his remarks offer a deeper understanding of the attention provided to the topic of representation and inhabitants by his use of “capitulation” following “compromise.” It being used twice seems to nullify a compromise to sustain something but signifies a movement away from it, namely slavery and other lower tiered citizens.

Enlarging the sphere of representation proved to be a beneficial concept. Expansion of the nation to include colonial territories involved the wealthiest of citizens or corporations who gained control over a certain amount of land who cultivated it for potential profits. With expansion came negotiations for frontier lands with the Native American tribes who inhabited most of the continent. Addressing the issue of Native Americans and their application towards

²⁰⁰ Ibid.

citizenship and representation also illuminated areas of the Constitution for scrutiny. Mark Savage discusses the application of the Three-fifths clause as it pertained to Native Americans in his article “Native Americans and the Constitution: The Original Understanding,” which was published in the *American Indian Law Review* in 1991. Savage argues that Article I, Sec. 2 did not specifically exclude Indians from the enumeration or from paying taxes because they are included in the term “inhabitants.”²⁰¹ Inhabitants within the boundaries of a state are within the jurisdiction of multiple governments, which a portion of the allotted taxes are spent for maintaining all government fixtures they use or have access to. Savage points to Article VI of the Articles of Confederation that stipulates Native Americans are not citizens of any state, “The United States, in Congress assembled, shall also have the sole and exclusive right and power of . . . regulating the trade and managing all affairs with the Indians not members of any of the States; provided that the legislative right of any State within its own limits be not infringed or violated”²⁰² Under this view, “inhabitants” could mean any other persons not being an enfranchised citizen of the United States whom the state became responsible for while they sojourned within their borders. Three-fifths of them are therefore counted among the enumeration for purposes of representation and taxation. The delegates of the convention supported this view as it is based on the premise that adding more people to the block of representation also created a larger block from which representatives of differing views could also be elected, creating an in-state check on tyranny by the majority.²⁰³

Enfranchisement may be viewed as the defining characteristic of a citizen who is represented and who also represents. The ability to vote, to represent groups, and to have a say

²⁰¹ Mark Savage, “Native Americans and the Constitution: The Original Understanding,” *American Indian Law Review*, 16, no. 1, (1991): 68.

²⁰² *Ibid.*, 63.

²⁰³ “Publius, Federalist No. 51,” *The Federalist papers*; “Madison Debates, Wednesday June 6, 1787.”

in the affairs of government supported the structure in a republican form. Jefferson makes this known in his letter as he refers to those at the bottom of a democracy having no representation. The very fact of slavery being discussed during the convention validates the representative nature of their degree of citizenship. Remembering that the Constitution is a vague document, with the exception of rights of the people and limitations on the federal government to some degree, is important to conceptualize as it reflects the idea of representation “individually and collectively.” In their study of earlier legal societies, the framers acknowledged a progression of law, not that the laws had changed to conform to society, but that society applied to the law while at the same time creating law. In this view, it can be said that law did not create slavery, but that slavery created slave law. Comparatively, proportionality in nature, gave rise to proportionality in civil society; recognition of a natural hierarchical structure provided for a representative basis to interact between the masses of people and the minimalist structure of a republican government. However, another topic must be considered for any government to operate— taxation, which it is necessary that there be funds, a financial means of support, for the body to gain revenue and disburse the funds to the public so that the public interests are protected.

Chapter 3

Slavery and Taxation

“And pray let it be remembered, that these very Laws, the cruel Spirit of which you Englishmen are now pleased so to censure, were, when made, sent over hither, and submitted, as all Colony Laws must be, to the King in Council for Approbation, which Approbation they received, I suppose upon thorough Consideration and sage Advice.”²⁰⁴

-Benjamin Franklin

While there are limited resources on earlier governments the framers offer their understandings of these early systems through their interpretations found in their personal correspondence, public speeches, and more especially, their remarks during the Philadelphia Convention. While these are admittedly interpretations, they are the views that influenced the framing of the Constitution which originally included the Three-fifths clause. Nevertheless, the framers held a high level of understanding history and the application of policy which aided in determining the framework of the Constitution. Analysis of their economic views, in terms of taxation and slavery, offer the concept of wealth being determined by labor. From this concept the framers concluded that labor determines wealth, wealth determines taxation, taxation determines representation, and representation is determined by citizens who possess labor or who do labor. For this reason, examining the issue of slavery as it applied to labor which determined wealth and so on, captures the essence of the slave society of early America.

²⁰⁴ Benjamin Franklin, ““A Conversation on Slavery,” Printed in *The Public Advisor*, January 30, 1770,” *Benjamin Franklin Papers*, 17. (franklinpapers.org). Accessed from <http://franklinpapers.org/franklin/framedVolumes.jsp> May 23, 2018.

How the founders viewed slaves and the institution of slavery is vital in understanding the intended operation of the Three-fifths clause. Production, population, and proportionality are all linked where slavery is concerned for purposes of representation and taxation. Perhaps more important is the derivation of the system that long existed prior to America's founding. America existed under harsher conditions due to it being a colonial system with a purpose of extracting wealth and resources from the land and the inhabitants through an early form of absentee landownership utilizing the quitrents system. As colonies existed in many ancient societies for the same purpose, it is possible that similar practices evolved over time with minimal alterations. Benjamin Franklin offers a view on the cost of labor that also adds to the historical perception of wealth in his essay, "The Nature and Necessity of a Paper- Currency," dated April 3, 1729.

"For many Ages, those Parts of the World which are engaged in Commerce, have fixed upon Gold and Silver as the chief and most proper Materials for this Medium; they being in themselves valuable Metals for their Fineness, Beauty, and Scarcity. By these, particularly by Silver, it has been usual to value all Things else: But as Silver it self is of no certain permanent Value, being worth more or less according to its Scarcity or Plenty, therefore it seems requisite to fix upon Something else, more proper to be made a *Measure of Values*, and this I take to be *Labour*."²⁰⁵

It is widely known and accepted that slavery existed in nearly all ancient societies, as evidenced in classical writings such as the Holy Bible and Sumerian texts; as well as the classical writings of Herodotus, Livy, Socrates, Aristotle, and Pliny. Notable American figures such as Franklin acknowledged the history and uses of slavery in all cultures before America's founding; as well as other historical figures who later recognized the institution prior to the end of slave practices resulting from the American Civil War. An examination of these periods exposes the laws pertaining to slavery and the treatment of slaves in these societies providing additional

²⁰⁵ Benjamin Franklin, "The Nature and Necessity of a Paper-Currency, 3 April 1729," *Founders Online*, National Archives, last modified June 13, 2018, <http://founders.archives.gov/documents/Franklin/01-01-02-0041>. [Original source: *The Papers of Benjamin Franklin*, vol. 1, *January 6, 1706 through December 31, 1734*, ed. Leonard W. Labaree. New Haven: Yale University Press, 1959, pp. 139–157.]

insight as to how the system traversed antiquity to industrial America. The laws affecting citizenship, representation, rights of inhabitants, labor, and commerce, all affected the issue of taxation whereby the three-fifths ratio became the formula for equalization. Franklin, and others, examined the practices of peer societies as well as those earlier to gain an understanding of proportionality and how it was applied. Labor, in Franklin's view, determined the wealth of a nation in all ages, he goes on to explain,

“By Labour may the Value of Silver be measured as well as other Things. As, Suppose one Man employed to raise Corn, while another is digging and refining Silver; at the Year's End, or at any other Period of Time, the compleat Produce of Corn, and that of Silver, are the natural Price of each other; and if one be twenty Bushels, and the other twenty Ounces, then an Ounce of that Silver is worth the Labour of raising a Bushel of that Corn. Now if by the Discovery of some nearer, more easy or plentiful Mines, a Man may get Forty Ounces of Silver as easily as formerly he did Twenty, and the same Labour is still required to raise Twenty Bushels of Corn, then Two Ounces of Silver will be worth no more than the same Labour of raising One Bushel of Corn, and that Bushel of Corn will be as cheap at two Ounces, as it was before at one; *cæteris paribus*.”²⁰⁶

Franklin adds, “Thus the Riches of a Country are to be valued by the Quantity of Labour its Inhabitants are able to purchase, and not by the Quantity of Silver and Gold they possess; which will purchase more or less Labour, and therefore is more or less valuable, as is said before, according to its Scarcity or Plenty.”²⁰⁷ To this, his evaluation rests solely on the English system as it transitioned from earlier practices, expanding to colonial America. However, the basis of his argument represents his knowledge of earlier societies that influenced the current situation which he discusses in his analysis. Many during the debates attributed ownership of slaves with having wealth in property, not in gold or silver. Slavery, or rather labor, represented the ability to produce things of wealth and those things being acquired by local and foreign interests generated the taxable base. While slavery determined more the wealth of the master, moving

²⁰⁶ Ibid.

²⁰⁷ Ibid.

away from slavery transitioned the laborer to the wealth of the nation. The steps toward this transition are found in earlier societies as Greece, Rome, medieval England, Barbados, and America all moved from a group-based tax structure to an individual structure. A comprehensive treatment of this topic requires an interdisciplinary approach between law, ancient history, medieval history, anthropology, and archeology. Such cannot be done in this thesis. Thus, a brief survey of slavery's historic use is provided only to show the ongoing connection between slavery and taxation.

Medieval England provides such a connection as examination of the period demonstrates how slavery evolved from ancient culture to the American continent. The manorial system of England during the time of Anglo-Saxon reign demonstrates the transformation from the old system to the abolition of slavery for that period.²⁰⁸ Although there were other forms of servitude in use, history shows that the term slavery is utilized as a generic term to explain all forms of servitude as well as those who had no rights as a free person. In fifteenth century England, serfdom and villeinage held an interchangeable distinction. During the reign of Henry VII, most of the lower classes elevated themselves from the servile condition of serfs or villeins.²⁰⁹ This conditional change took nearly two centuries to occur where previously a majority of the people of England were of an unfree status.²¹⁰ Changes through uprisings, parliamentary action, and economic feasibility resulted in a series of laws governing labor, wages, land ownership, food prices, and the emergence of the social poor classes of vagabonds and beggars.²¹¹ Because England had fallen into a poor condition with the rise of the social poor,

²⁰⁸ George Burton Adams, *Constitutional History of England*, (New York: Henry Holt and Company, 1921): 37.

²⁰⁹ Pickthorn, *Tudor Government*, 167.

²¹⁰ *Ibid.*, 168.

²¹¹ *Ibid.*, 170.

Sir Thomas More wrote *Utopia* in 1516 as a template to combat this downward trend of English degraded society. From this example the Vagrancy Act of 1547 was enacted to sentence those who refused gainful employment to the condition of slavery, although the act had a short lifespan of two years due to an outcry of paid laborers in competition with those under the Vagrancy Act.²¹² An adversary to the free status of people which led to the Protestant movement was the Roman Catholic Church who held great control over the government of England and sought to gain control over the colonies it possessed.²¹³ The laws of this period directly influenced the colonial practice of law and aided in the interpretations that allowed for the imposition of slavery upon the colonies.

English law addressed several forms of servitude in the various laws governing the many intricacies of the practice. Servant, tenant, serf, villein, and slave were all used to describe the servile class, and were often used interchangeably, with slave being the most generic term. Terms are often viewed in the modern sense and applied through historical examples demonstrating the usage of the term. For this reason, examination of the term bondman as it appears in the *Vine's Expository Dictionary of New Testament Words* defined as "a slave, originally the lowest term in the scale of servitude," and *Black's Law Dictionary* defined similarly as "one bound to service for a term of years," analysis may offer proof of generic uses of slave terms.²¹⁴ The definition found in *Black's Law Dictionary* resembles a clause of Article I, Sec. II of the Constitution which gives rise to the question, which clause addresses the slave

²¹² Blackburn, "Old World Background," 85.

²¹³ Pickthorn, *Tudor Government*, 177.

²¹⁴ W. E. Vine, *Vine's Expository Dictionary of New Testament Words*, (Lynchburg: The Old-Time Gospel Hour): 131; Black, *Black's Law*, 162.

more definitively? The portion of Article I, Section II stating, “including those bound to Service for a Term of Years,” is identical to the definition of bondman as previously discussed.

Bondman is a term used to describe all people bound to service and does not distinguish a slave from any of the other forms of servitude. Throughout the several historical periods discussed in this thesis there are found terms describing the servant being held in service to the master and for a certain period of time. Also recorded are the laws governing the master and the condition of the slave. George Adams discusses the transformation of the slave to that of a serf in his evaluation of medieval law in *Constitutional History of England*. Adams cites that economic conditions are responsible for the transformation from the condition of slave where they are regarded as chattel by the manorial lord.²¹⁵ Perhaps more telling of the early systems of servitude are the protections afforded the system under those termed master. Being reminded of the terms associated with slavery, under any definition, now draws attention to the purpose for which slaves were applied, that being commercial interests or service. The master, as owner of the property, slaves, and the produce resulting from both is therefore the taxable entity which all three are represented. The master invested in land and slaves to produce a certain product by which his tax is based, which also may have increased his status as a representative and citizen.

Under the early systems, servants were considered as an investment as well as a liability. All that the servant possessed belonged to the lord of the manor. Every tool, all equipment, animals, or anything tied to the land was considered chattel because of the use it had on the manorial lands.²¹⁶ The lord is invested with the legal rights of his property and therefore is also the legal end to those under him; thus, those who served him served under the same laws and

²¹⁵ Adams, *England*, 36.

²¹⁶ *Ibid.*, 37.

were granted the same protections because the lords production from his lands served the monarchy and the country.²¹⁷ The structure of this system is multi-layered. The monarchy and nobles held a certain portion of the land; another portion was provided for those who are considered freeholders; and the remaining lands were for the poor and those not in service to any of the nobility. Being in service meant that one held a condition of providing for themselves and families, that they could also increase their status through service. Those considered to be poor did not possess the opportunity to improve their condition. Slaves were also considered non-productive and household servants; they were not to be used in the production industries or agriculture, however later applications transitioned slaves to production-based services.²¹⁸ This is a stark difference between ancient slavery and American slavery despite the many similarities. A transitional period may be identified in England around the year 1351 with the issuance of the *Statutes of Laborours*.²¹⁹ Although, to arrive at that conclusion, earlier examinations are needed which aid in identifying the progression of slave law, citizenship, taxation, representation, and the transition to the American application.

It has been argued that slaves possessed characteristics that were uncommon to other forms of bondage or servitude, the *Domesday Book* offers a different view. It is estimated according to the *Domesday Book*, that sixty percent, or three-fifths, of the land in Britain was arable, pastoral, and meadow lands used for growing staple crops, grazing lands for livestock, and cultivating hay and grain for livestock. The other forty percent, or two-fifths, as woodland

²¹⁷ Ibid.

²¹⁸ Barker, *Aristotle*, 10.

²¹⁹ Paul Halsall, "Statute of Laborers, 1351," *The Internet Medieval Sourcebook is located at the Fordham University Center for Medieval Studies*, Accessed from <https://sourcebooks.fordham.edu/seth/statute-labourers.asp>, ORB sources editor *Last Modified: Nov 4, 2011*; original source: White, Albert Beebe and Wallace Notestein, eds. *Source Problems in English History*. New York: Harper and Brother Publishers, 1915.

areas, settlements, and land that had been damaged through war or nature similar to the view Pisistratus held when he freed the man from Hymettus of his tax burden.²²⁰ The survey accounts for those considered slaves by listing them under the terms used, *servi* or *ancillae*. Historians attempt to draw a line between all other forms of human bondage and slavery, however they are bound to the characteristics that are common in all forms of servitude, which include similarities between serfdom and slavery.²²¹ Serfs, during the time of the *Domesday* survey are viewed as the lord's chattel. The lord possessed within his power, according to the law, the right to punish and treat his servants in any fashion, excluding killing or disabling them. They were not entrusted with any possession of weapons and could not leave the manor without permission from the lord.²²² But how was the bondmen to be protected? Each lord was required to pay a tallage (an arbitrary tax levied on feudal dependents by their superiors) for each servant on their lands, based on their production. This fee caused the lord of the manor to have an invested interest in their bondmen, heightened by laws protecting them from death or maiming.²²³ Servitude existed at all levels of the medieval social structure, although conditions made for varying applications, however it is necessary to remember the structure defining the divisions of land based on fifths whereby those located in the three-fifths portion contributed the most on a group basis.

If historians are bound to the view that slaves were property and nothing else, they must also abide by the tiered use of property. James Wilson spoke on the subject of property and stated: "Property is the right or lawful power, which a person has to a thing. Of this right there

²²⁰ "Agriculture," *The Domesday Book Online*, <http://www.domesdaybook.co.uk/index.html>

²²¹ Austin Lane Poole, *From Domesday Book To Magna Carta 1087-1216*, (London: Oxford University Press, 1953): 40.

²²² *Ibid.*

²²³ *Ibid.*

are three different degrees. The lowest degree of this right is a right merely to possess a thing. The next degree of this right is a right to possess and to use a thing. The next and highest degree of this right is to possess, to use, and to dispose of a thing.”²²⁴ Wilson references slaves in his lecture *On the History of Property*. He cites Tacitus, who divided the lands among the ethnic groups who acquired them according to their condition and quality. “To a certain class of their slaves,” he tells us, “the masters assigned habitations” a portion of the property for their subsistence.²²⁵ Being very knowledgeable of history, Wilson addresses many cultures and their practices of property throughout the lecture. In colonial New Plymouth, he says that severe whipping was induced to promote labor, although the practice was abolished some years later.²²⁶ He attributes the benefit of early Americans having the opportunity to build a society based on natural rights and liberty to the history of servitude in former societies. Among those rights is the right of property, although, it seems that defining a human as property was not taken lightly due to the framer’s excessive amount time devoted to the discussion, the ownership of labor being the result. Wilson also held the understanding that precise language and meaning were necessary concerning slaves and their role in American society. The misuse and interpretation of precise language has contributed to the many years of attention not being devoted to further knowledge of the Three-fifths clause.

John Adams, an affluent member of the delegation and later President of the United States, argued that not recognizing slaves as a contributory element of generating wealth offered support for the institution of slavery and ultimately resulting in the accumulation of free wealth

²²⁴ James Wilson, *Collected Works of James Wilson*, vol. I. ed. By Kermit L. Hall and Mark David Hall, (Indianapolis: Liberty Fund, Inc., 2007): 391.

²²⁵ Ibid.

²²⁶ Ibid., 396.

whereby no tax on labor or product could be acquired.²²⁷ Income generated from labor thereby became the focus of applying the tax, regardless of who produced or benefited from their or another's labor. Also, combined with Wilson's view of property, it is plausible that the product produced by slaves through their labor was the property of the master. This understanding lends to a tax structure that assesses both labor and the product while still accounting for dependency that renders a person a slave.

According to Page Smith's two volume biography of John Adams, Smith contends that the important features pertaining to the Three-fifths clause are found in the debates of the Articles of Confederation. In this work, Smith notes that Roger Sherman, a Delegate and later Senator from Connecticut, proposed a method of counting in proportion to the population and their production. Specifically, Article 11 of the Articles of Confederation discusses counting "every age, sex, and quality" of inhabitants.²²⁸ Smith also notes the arguments made concerning illogical fallacies of the day pertaining to the production of slaves versus free whites in the north. Smith analyzes a quote from Adams who mentions that five hundred slaves are equal to five hundred free men in production, thus linking the argument to manhours and what they produced rather than who produced it.²²⁹ The quotation originated in a response to Samuel Chase, Delegate from Maryland and later Associate Justice of the U.S. Supreme Court, who held the position that quotas of contribution are based only on the white inhabitants who contributed to the wealth of the state. Adams offered the following rebuttal as analyzed by Smith:

"Certainly five hundred freemen produce no more profits, no greater surplus for the payment of taxes, than five hundred slaves. . . . Suppose, by an extraordinary operation of nature or of law, one half the laborers of a state could in the course of one night be

²²⁷ Page Smith, *John Adams Volume I 1735-1784*, (Garden City: Doubleday & Company, Inc., 1962): 283.

²²⁸ "Articles of Confederation," *The Avalon Project*. (Yale Law School, Lillian Goldman Law Library, 2008): online. http://avalon.law.yale.edu/18th_century/artconf.asp

²²⁹ Smith, *John Adams Volume I*, 283.

transformed into slaves. Would the state be made poorer or the less able to pay taxes? . . . The condition of the laboring poor in most countries, that of the fishermen particularly, of the Northern states, is as abject as that of slaves. It is the number of laborers which produce the surplus for taxation, and numbers, therefore, indiscriminately, are the fair index of wealth.”²³⁰

Smith notes that Adams often reflected on the conventions, particularly the debates concerning slavery. Gaining an understanding of their view on the subject is crucial in determining the laws they ratified. For example, Adams refers to the slaves as the “great hoards of black serfs,” when contemplating the Missouri Compromise; servant, serf, and slave are often substituted in personal writings signifying no distinction between them.²³¹ This is important because it has been mentioned that the Three-fifths clause originated as an amendment for taxation purposes, then slavery became attached to the clause, which is in turn attached to representation and the article of the Constitution as applied. For this plethora of knowledge, it must be considered the framers held a much greater understanding of medieval and ancient policies than originally viewed by historians.

It is clear of both James Wilson’s legal knowledge and historical intellect why he is considered the foremost authority on legal precedent at the conventions. His views on citizenship, property, history, and individual rights offer a unique perspective on the introduction of the Three-fifths clause and provides the notion that the clause is far from a simple application. From this view, whether a person was a slave, subject, or employee their condition for taxation remained similar while their tiered status structurally altered their representation; yet all are accounted for in the enumeration of citizens or taxable producers. Wilson and Adams greatly understood the importance of the enumeration, as did others at the Convention. The enumeration

²³⁰ Ibid.

²³¹ Page Smith, *John Adams Volume II 1735-1784*, (Garden City: Doubleday & Company, Inc., 1962): 1125.

of producers being linked labor, labor to wealth, wealth to taxation, and all linked to representation and the government, which being responsible for all debt incurred by said government.

The national debt accumulated during the Revolutionary War was of great concern in the 1790s. The fledgling republic owed the French, Dutch, and others who funded the war and economic policies to promote a sustainable republic among established nations. In a letter from Tristram Dalton to John Adams dated July 16, 1783, Dalton informs and reminds Adams of the occurrences in Congress related to the paying of the national debt. Dalton alludes to an earlier decision to pay the debt off in twenty-five years, which being from 1783 would have caused the debt to be satisfied by 1808 or the year earlier. A five percent impost tax was assessed for the purpose of paying the debt, however the delegates from Rhode Island objected to the initial plan resulting in another plan offered which Dalton references.²³² Dalton states, “Congress, after waiting as long as their Necessities, and longer than the Honor and Safety of the Country, permitted, varied their recommendations in some Instances, limiting the continuance of the Impost Act, which was at first proposed to be in force untill all the public Debts were discharged, to the Term of twenty five years.”²³³ It is necessary to understand the mode by which the tax was applied and for what purposes. Dalton states that the national congress requested taxes from each state through the Impost Act which purpose paid “... the Whole debt, foreign and domestic—.” Three-fifths is mentioned as the tax requested of the state to meet the demand of

²³² “To John Adams from Tristram Dalton, 16 July 1783,” *Founders Online*, National Archives, last modified April 12, 2018, <http://founders.archives.gov/documents/Adams/06-15-02-0063>. [Original source: *The Adams Papers*, Papers of John Adams, vol. 15, *June 1783–January 1784*, ed. Gregg L. Lint, C. James Taylor, Robert F. Karachuk, Hobson Woodward, Margaret A. Hogan, Sara B. Sikes, Mary T. Claffey, and Karen N. Barzilay. Cambridge, MA: Harvard University Press, 2010, pp. 126–131.] Accessed from www.nationalarchives.gov May 4, 2018.

²³³ *Ibid.*

the debt and veteran pensions.²³⁴ It is clear that the federal government was only able to assess imposts and duties at the points of departure and entry, or to receive taxes from the several states in an equal manor. Dalton addresses this when he states "...as this Act was not to be in force untill all the States in the Confederation passed similar Ones," signifying that each state legislature must pass similar legislation applying a three-fifths impost to fulfill the request.²³⁵ The Massachusetts court rejected the act claiming they could not tax their constituency any further. The rejection of this policy strongly aids the historical view that the United States under the Articles of Confederation were unable to enforce federal taxing powers on the states to support the national debts they incurred. The inability to meet funding requisitions placed the nation in a financial crisis whereby Britain could affect Atlantic commerce.

Following the American Revolution and the turn of the nineteenth century, the British government passed the Act for the Abolition of the Slave Trade 1807 which came into effect on January 1, 1808.²³⁶ This being the first act directed at the United States to stifle the Atlantic slave trade— although it was an act primarily to avoid war— other acts were issued prior to 1806 but none attacked the fledgling U.S. economy. An Act to Regulate, for a Limited Time, the Shipping and the Carrying of Slaves on British Vessels from the Coast of Africa, 1788 (28 George III c 54) is an act poised at reducing the amount of deaths during the Middle Passage; the famous *Somerset vs. Stuart* case put an end to slave trafficking in many British cities.²³⁷ The use of these acts may be viewed as the British government applying additional pressure on the

²³⁴ Ibid.

²³⁵ Ibid.

²³⁶ JP van Niekerk, "British, Portuguese, and American Judges in Adderley Street: The International Legal Background to and Some Judicial Aspects of the Cape Town Mixed Commissions for the Suppression of the Transatlantic Slave Trade in the Nineteenth Century (Part 1)," *The Comparative and International Law Journal of Southern Africa*, 37, no. 1, (March, 2004): 2.

²³⁷ Ibid., 2 n3.4.

newly formed American economy by stifling their trade routes to and from the West Indies, France, and elsewhere.

The importance of a three-fifths system in terms of taxation have been thoroughly discussed; however, how to arrive at that principle and application only offers but a portion of the total formula. Slaves, being the producers of a product—to some degree a product of themselves—carried with them the burden of transporting goods to and from their source and destination. The ratio may be better explained by providing later examples of application where investments are made in the production industries to stimulate the economy and are pre-determined by the demand of the products they produce. In any production-based system manpower is a costly expense and therefore the cost of shipping slaves and the products they produce are but a portion of the total formula. Another explanation involving three-fifths is found in figuring the impost and tonnage formula of the shipping industry. In a letter to Samuel Hodgdon from Joshua Humphreys dated December 16, 1793, Humphreys explains the formula for determining the draught (draft) line, or water line, of the ship carrying a specified product:

“In the first place to find the length of draught rabbit forward you take $\frac{3}{5}$ of the Beam as usual; from that point to the after part of the Stern post allowing its width measurement not to exceed $\frac{1}{12}$ of the Beam. That length being determined, you then multiply it by the length of the Beam, & that product by the height of the gundeck Beams amidships on the top of the Beams, added to half of her waste amidships which last product divide by 95 which gives the number of Tons Required.”²³⁸

Some key terms need explanation for greater understanding. The draught (draft) is the vertical distance between the waterline and rabbit, the upper edge of the keel, of a ship; the keel being the bottom structural member running from fore to aft. The beam is the widest point of the ship at the waterline or draught line. The stern post is the area in the aft portion of the ship that

²³⁸ Joshua Humphreys, “Letter to Samuel Hodgdon, December 16, 1793,” *Papers of the War Department, 1784-1800*, (United States Naval Academy Museum, MSS #211).

supports the rudder. A gundeck beam is the area below the main deck and is enclosed, supporting the area where canon are located. The purpose of the formula is to determine the buoyancy of the ship when loaded with cargo.²³⁹ The same formula can be used to determine the amount of tax imposed based on the tonnage of cargo. Three-fifths of the area discussed determine the cargo hold fore and aft along the beam of the ship from keel to gundeck, this is the profit-making area of the ship. The use of three-fifths here is analogous to the use of it in terms of a slave population either on a plantation or a national tax structure. It determines whether or not the ship sinks or floats, whether it is profitable or not; in short, it is the productive part of the formula that determines proportionality as being beneficial or not, the actual money-making portion of the ship or business.

A practical view of how the three-fifth ratio is applied for determining financial profits or sustainability— such as in the cargo area of a ship— adds greater detail to the importance of the clause as a proportional determinate. However, the rejection of the clause, as presented earlier in the Dalton letter, demonstrates that the clause was met with opposition; also, that it was a temporary clause used for a specific purpose such as the national debt. At this point it is necessary to consider a possibility that the clause never became the fixed proportion of financial or representative benefit to southern slaveholders abolitionist scholars have made it out to be. A rebuttal of the Three-fifths clause was publicized in 1805 in *The Green Mountain Patriot* of Peacham, Vermont by James Elliott of the Second Congressional District of Vermont. Elliott wrote a lengthy and detailed article speaking on the misrepresentation and application of the Three-fifths clause concerning apportionment of representation. He utilizes figures gathered

²³⁹ William Nicholson, *The British Encyclopedia: Or, Dictionary of Arts and Sciences. Comprising an Accurate and Popular View of the Present Improved State of Human Knowledge, Volume 11*, (Mitchell, Ames, and White Co., 1818).

from each of the two census reports taken in 1790 and 1800 and offers a projected view of future ratios of representation where the southern states benefit more than the northern states.²⁴⁰ It is shocking that he captures this as a surprise to him and his constituents given that historians have portrayed the clause as having always benefitted the south. Elliott holds no ill-will towards the south, although he blames the representatives of the northern states for allowing this oversight. Perhaps more telling is that he states, “the apportionment of direct taxes, has never been exercised but *once*, and probably never will be again. [italics added]”²⁴¹ It is interesting to consider that a clause that has drawn so much negative attention was only exercised once, or at the least it was a non-repetitive policy.

Robert Goodloe Harper, previously a Congressman of South Carolina’s Third Congress, and United States Senator from Maryland in 1816, offers another post-ratification view that utilized the three-fifths ratio. In a letter to his constituents, namely James A. Bayard, he discusses the finances of the early republic and a need to meet the deadline for paying the debts incurred during the War of 1812 and in preparation for an impending financial crisis resulting from the war debt and little revenue from taxation. The letter addresses the proposal of a land tax to meet the required amounts for paying all debts and the many expenses of the newly founded republic having only existed for eight years at the date of the letter.²⁴² Harper states that a valuation of taxes based on “lands, houses, and slaves” is to be assessed to all of the states regardless of whether they have slaves or not.²⁴³ Harper’s statement can be understood in one of two ways if he is referring to the fixed three-fifths direct tax as stated in the debates, as

²⁴⁰ James Elliott, “Mr. Elliott to his Constituents, Letter IX,” *The Green Mountain Patriot*, VIII, no. 383, (June 18, 1805): 1. Accessed from www.newspapers.com March 20, 2018.

²⁴¹ *Ibid.*

²⁴² Elizabeth Donnan, ed. “Letters of R. G. Harper, 1797,” *Papers of James A. Bayard 1796-1815*, vol. 2, (New York: De Capo Press, 1971): 29.

²⁴³ *Ibid.*, 35.

understood by some historians. The first view can imply that all the states are responsible for slavery whether they possess slaves or not, that they are partakers in the peculiar institution and that they too have an invested interest in the practice. The second view pertains to indentures whom are of a lower tiered status of citizen accounted for in the census and possessing minimal rights because of their condition, rendering them the same category as slaves for taxation purposes.

Similar to ancient practices, each state was divided into districts containing a magistrate to enforce the law and lay assessment of the property. It was not done uniformly, and each state generated revenue in different ways. Harper mentions that the debt incurred totaling \$77,833,730, the total “price of our liberty,” was met with contributions from each state without the issue of a land tax or any other form of direct taxation to fulfill the amount requested.²⁴⁴ Earlier in the letter he mentions that imposts and tonnage duties generated revenue that aided in meeting the demands of the Dutch debt by 1803.²⁴⁵ In another letter dated July 23, 1798, Harper discusses the tax valuation on land, houses, and slaves once more. He describes the tax structure which places the tax on slaves as fixed, whereby the tax on houses and land is proportional to the cash value of the property. Slaves younger than twelve and older than fifty were exempt from taxes.²⁴⁶ In this example, Harper states that two million dollars is the collection goal assessed to all states collectively. Once the total in slave taxes is received and the total of home and land taxes exceeds the goal, the supervisor will then adjust the taxes on the houses first (the equivalent of a refund) to reduce the collected amount to meet the specified goal of two million.²⁴⁷ Harper addresses apportionment of each state and tells us, “The whole sum, two

²⁴⁴ Ibid., 36.

²⁴⁵ Ibid., 32.

²⁴⁶ Ibid., 61.

²⁴⁷ Ibid., 62.

millions of dollars, is divided among the states according to their respective numbers, including two-fifths of the slaves.”²⁴⁸ He then goes on to mention the itemized breakdown consisting of slave contributions of \$130,000; homes contribute \$1,000,000; and land adding the remaining \$870,000.

Harper writes of the confiscation of American ships going to and from the West Indies, losing their cargo and having their ship and captain detained preventing any means of revenue from entering American ports.²⁴⁹ His statement concerning slaves being taxed at two-fifths becomes clearer when considering the apportionment of three-fifths; or apportionment could mean that the direct tax was apportioned to all states equally to pay three-fifths. However, it is difficult to believe that the southern states would have approved being taxed another two-fifths on their slaves; likewise, to believe that Harper, a southerner, would suggest it. He further mentioned that there had never been a direct tax imposed, which begs the question concerning the Three-fifths clause. However, he writes that the tax be for only one year but could quite possibly be more.²⁵⁰

The proportional ratio of three-fifths touched on more than simply counting slaves as three-fifths of a person; greater uses of the ratio surround how money for capital investments and infrastructure attained funding and from whom it was funded. They received the burden of taxation because the agricultural industries that utilized all types of labor, including slaves, were the largest producers of the national economy. An article found in the *Richmond Enquirer* of 1853 offers an example of how the three-fifths ratio worked to support capital investments and

²⁴⁸ Ibid., 64.

²⁴⁹ Ibid., 38.

²⁵⁰ Ibid., 66.

infrastructure projects.²⁵¹ The author used the pseudonym “South-side” to launch his rebuttal of a legislative act that would be costly to the tax payers or place wealth in the hands of the railroad industry at the expense of the taxpayers. The two options for funding the infrastructure project were the “loan system” and the “three-fifths system.” The loan system taxpayer funds stood as a loan that paid interest back to taxpayers through dividends. This plan also required capital investments from stockholders who also received dividends from their investment. The “three-fifths system” granted three-fifths of the needed funds from the government for infrastructure projects and improvements, also monies made available through the companies themselves. The author weights the benefits of each plan by analyzing the interest to be paid to the taxpayers.²⁵²

The beginning of the article addresses the burden placed upon the southern states, or more specifically the slave states. The author also makes note that the two legislators who pushed for the use of taxpayer money to support capital investments for the private industry were exploiting the system. Exploitation of the system they felt, held the southern states responsible for paying three-fifths of their revenue to benefit northern industries and wealthy interests.²⁵³ The term subscription takes a heavy tone in this article as the author discusses “...the state subscription to three-fifths,” which the state subscribed to pay an amount of \$500,000 for a project the tax payers funded.²⁵⁴ The term “subscription” is used often throughout the article and implies a similar meaning as intended by those who subscribed for passage of particular servants where vacancies were present in the northeast.²⁵⁵ The author states that “...the State must lend to the companies in which the State is so largely interested, or else both the State and the private

²⁵¹ South-Side, “Loan Bills- Mr. Barbour of Culpepper,” *Richmond Enquirer*, Tuesday, February 1, 1853, p.g.2 (Richmond, Virginia).

²⁵² Ibid.

²⁵³ Ibid.

²⁵⁴ Ibid.

²⁵⁵ Ibid.

stockholders will have to submit to a ruinous rate of usury.”²⁵⁶ Adam Smith, the eminent philosopher, suggests the same outcome, that the unequal distribution would lead to a decline in returns from the source. The article expands further stating, “If nothing more should be done than to enlarge the capital stock of the various companies upon the three and two-fifths principle, the inevitable consequence will be that their bonds will be immediately thrown upon the money market, already flooded with such securities, and sold at a heavy sacrifice.”²⁵⁷

A later example is found in an article submitted to the *Belfast News Letter* October 7, 1834. It illustrates the discontent of the Irish people whom were subjugated under British rule and induced to pay a tithe. Daniel O’Connell submitted the article explaining his rebuttal of the tithe system and defended himself publicly in the paper, portraying his patriotism and loyalty to the Irish people. O’Connell mentions that he requested a reduced amount of the tithe because he did not expect to receive total abolition of the full amount, being three-fifths. The tithe appears to have been tied to the national debt which, according to O’Connell, the remaining balance was not made available to the people.²⁵⁸ According to his complaint, the average Irishman was considered a tenant from year to year or a tenant at will who had to pay the tithe to the clergymen while the government would collect the three-fifths tithe. The government would then disburse a portion of the tithe to the clergymen of each district. O’Connell, a staunch critic of English rule over the Irish people states,

“The first is that they know that the impost itself in Ireland was originally created, without any necessity, by English adventurers who were the enemies of the Irish nation; that they were transferred at the so-called reformation by a still more flagrant act of injustice; and that in their nature they constitute a burden which ought never to have been placed, or at least continued, on a country purely agricultural. The second objection is

²⁵⁶ Ibid.

²⁵⁷ Ibid.

²⁵⁸ Daniel O’Connell, “O’Connell’s Letter on Tithes,” *Belfast News Letter*, no. 10,154, (Belfast, Northern Ireland: October 7, 1834): 1. Accessed from www.newspapers.com March 20, 2018.

that they are a branded mark of slavery- the worst of all tokens of the servile state- a token of subjugation to malignant and still [illegible] enemies, to persons who,...always were, and still are, ready to exterminate the people of Ireland by the bayonet and the gibber; as long as tithes exist emancipation is but a mockery to the Irish people,...”²⁵⁹

The overall tone of his argument is that the Irish people understood the nature of the tithe, although they felt that it had gone on for too long and they suspected that the clergy and English government were misusing the funds, prolonging their payment of the tithe. This example of three-fifths being tied to the tithe system and English policy offers insight that English colonies were similarly treated under general practices though fixed for exploitation of the colonial people.

For economic views of the colonial and early American period Adam Smith offers a great source of understanding. Smith discusses the uses of the land tax, or “tythe,” in ancient societies as being an “interest to the sovereign in the improvement and cultivation of land.”²⁶⁰ Earlier in Chapter 2, it was noted the sovereign controls one-fifth of the land, nobility another one-fifth, and the remaining citizens are in possession of the final three-fifths. In the case of the other three-fifths, the tithe is portrayed as being either an advantage or disadvantage to the landlord depending on the quality of the land. Smith states that “The tythe, and every other land-tax of this kind, under the appearance of perfect equality, are very unequal taxes; a certain portion of the produce being, in different situations, equivalent to a very different portion of the rent.”²⁶¹ The difference, according to Smith is determined by the produce of the land which if being greater and possessing a tithe renders the farmer unable to receive any capital for future investment without an abatement on the rent. On the other hand, if produce was very poor, it

²⁵⁹ Ibid.

²⁶⁰ Adam Smith, *The Wealth of Nations*, (New York: Random House, Inc. 1937): 789.

²⁶¹ Ibid., 788.

would require “four-fifths” of the profits being swallowed up by the farmer to break even, rendering the landlord a mere one-fifth of the produce, with no tithe added.²⁶² Smith seems to allude to a fifth type of system in place similar to that mentioned in *The Fundamental Constitutions of Carolina*. All of this is based on what is produced from the land rather than who produced it. Also, for the sovereign to receive a tithe from the production of the farm would indicate that the farm and the operators of the farm were subjects to the sovereign. Of course, these may have been serfs, tenet farmers, or even perhaps slaves; Smith does not mention their condition in this section, he does however make a reference to servants of the lands being beholden to their master.²⁶³ Often times, Smith utilizes the term slave in the generic sense, exposing the variations in the conditional status of the servant.

Smith also mentions the use of slaves in several chapters throughout the text. He discusses the various scenarios under the English colonial system used to govern the conduct of both master and slave, yet he does not alter the term based on the condition of the slave. The structure of government plays a heavy role in determining the condition of the slave class. Under a monarchical government where all inhabitants are considered subjects, magistrates have authority to interject on the role of the master where care and treatment of the slave is concerned.²⁶⁴ The role of the magistrate in a free society is considerably different as magistrates are elected and are reluctant to “intermeddle” in the relations between a master and their slave, which is considered property. Under an arbitrary government, Smith believes that the slave is in a better position because it is common for the magistrate to regulate what persons do on and with their property, thereby giving the slave some protections from their masters. He provides the

²⁶² Ibid., 788.

²⁶³ Ibid., 790.

²⁶⁴ Ibid., 553.

example given by the Roman Emperor Augustus who ordered that a master emancipate all his slaves when he had considered to cut one into pieces and feed him to the fish as punishment for disobedience.²⁶⁵ Nevertheless, Smith contends that slave production is not profitable due to the fact that there are no incentives for the slave to produce.²⁶⁶ This, he attributes as the leading cause for the fall of slavery in historical societies.

For post-constitutional political economic analysis, English social theorist John Stuart Mill represents a valuable source of information and evaluation as he critiques the economics of slave society. His evaluation of the early American economic system that involved a slave-based society offers insight into the importance of commodities and the quintile system. The means of dividing known quantities for purposes of enumeration, taxation, and the evaluation of production and expense utilizes the quintile system. Dividing each of these categories into fifths provides for greater accountability of large data sets. They are primarily used to set cut-off points for any desired area of analysis. During the Constitutional Convention, the question of counting slaves as wealth caused the opposition to declare that slaves were not property but were persons. Persons or individuals are the means of producing and acquiring wealth from the instruments of wealth.²⁶⁷ Mill examines, and seems to struggle at times, with defining slavery as it existed in historical cultures. At one point he states, “The mildest form of slavery is certainly the condition of the serf, who is attached to the soil, supports himself from his allotment, and works a certain number of days in the week for his lord.”²⁶⁸ Mill’s view of mild is considerably

²⁶⁵ Ibid., 554.

²⁶⁶ Ibid., 366.

²⁶⁷ John Stuart Mill, *Principles of Political Economy*, (New York: Longmans, Green and Co., 1929): 8.

²⁶⁸ Ibid., 251.

different than the view modern historians have taken concerning the differences between slavery, serfdom, and indentured servitude to name a few.

Mill acknowledges that serfdom is slavery, however he appears to justify serfdom as the “mildest form” of slavery, taking the view that one degree of servitude is better than the other. Mill offers comparative views of other writers on the subject of slavery versus serfdom or free labor. The comparisons are in terms of production, which is the desired result of any labor category. Utilizing a passage from *Essay on the Distribution of Wealth and on the Sources of Taxation* by Rev. Richard Jones, Mill points out that comparisons among other groups of people tied to servitude were also discussed by their production; in this case Jones writes that, “In Austria , it is distinctly stated that the labour of a serf is equal to only one-third of that of a free hired labourer.”²⁶⁹ These arguments strongly suggest that the view of each of these systems was solely based on their production and not by their ethnicity. Similar to the arguments presented against American slavery, what was produced in comparison to labor sources was the driving focus in that argument, whether it be three-fifths or one-third of what free labor produced.

In terms of taxation, Mill addresses the “rule of proportional taxation” which falls more on the moderate incomes than those in the upper income brackets. He criticizes the tax system because it is a “graduated property tax” based system that punishes those of industry and their earners for being “prudent.”²⁷⁰ In this argument, he reinforces his view concerning the institutions of slavery that benefitted from the labor of slaves rather than those of industry who were the primary earners; also, the planters were still considered to be the upper class. The products which they produced are commodities and therefore contingent in price on any

²⁶⁹ Ibid., 252.

²⁷⁰ Ibid., 808.

adjustment or regulation imposed throughout the process from production to the consumer that results in the increased price of the product to match the tax imposed. Under these conditions, the producer of the raw material is beholden to the cheapest means of production regardless of efficiency.²⁷¹ Mill suggests that the rule actually hurts the larger producers who receive less in profits and subsidies than the smaller producers. This is very similar to the view Adam Smith held that an unequal tax failed to perpetuate the existence of crop production, but over a period of time diminished it to the point of failure.²⁷²

Smith and Mill both recognize the detriment of an unequal tax on a commodity-based system, as well as the lack of proportionality in a free system as it stifles additional taxing resources from free labor. Both share the view that taxing those at the source requires a subsidy to sustain certain producers, however the amount of the tax—if not made proportional—will decrease the production power of the other growers and in the end reduce those left to mediocrity. Taxing three-fifths of the slave owning producers did not perpetuate the institution, it promoted certain growers while reducing all others. Smith refers to the practice of ancient Rome when he states, “the lands of the rich were all cultivated by slaves, who wrought under an overseer, who was likewise a slave; so that a poor freeman had little chance of being employed either as a farmer or as a labourer.”²⁷³ He goes on to discuss the mercantile system which being also ran by slaves of the upper classes left little room for free entrepreneurs.²⁷⁴ Decreasing the amount of slave owners did not result in an increase in the amount of free labor. The southern economy became more reliant on slave importations, similar to colonial America under British rule. The inability to access more land or control the large amounts of slaves needed to farm

²⁷¹ Ibid., 838.

²⁷² Ibid., 839.

²⁷³ Smith, *Wealth of Nations*, 524.

²⁷⁴ Ibid.

new lands presented a problem with proportionality, which brought about the need to expand into western territories. Dividing the production base into two separate lands meant stifling growth for representation in one state through decreased citizenship, of not reducing it, and gaining minimal representation in another. For these reasons, southern slave holders were trapped in a system of exploitation. To understand this further, an examination of southern economic history provides an enlightening source of information.

Former Marxist historian Eugene Genovese offers a compelling look at the southern slave economy. In the 1990s he adopted the conservative view of the south and began writing a different view of southern slave society, however his studies from the '60s and later offer a distinct look at the characteristics of the slave economy. In the late 1960s, Genovese examined the differences in production of agriculture to the production of industrial based products. Genovese states that "Capitalism largely directs its profits into an expansion of plant and equipment, not labor; that is, economic progress is qualitative. Slavery, for economic reasons as well as for those of social prestige, directs its reinvestments along the same lines as the original investment- in slaves and land, that is economic prosperity is quantitative."²⁷⁵ He argues that this was detrimental to the slaveholders of the south who are bound to produce only a few crops and become dependent on northern growers for others, such as food crops. While tariffs and middlemen increased the costs of products, southern plantations bared the brunt of the economic stagnation.²⁷⁶ The effects the southern slaveowners experienced were very similar to those of any extractive industry whereby the resources are extracted and sent to a producer of goods who supplied them to a market by which the original producer must purchase the finished product. In

²⁷⁵ Eugene D. Genovese, *The Political Economy of Slavery, Studies in the Economy and Society of the Slave South*, (New York: Random House, 1967): 17.

²⁷⁶ Ibid.

between are found the middlemen and taxes at each stage driving the costs higher. In all societies, the value added to any product is at the manufacturing stage. This was the case in early America as noted by Adam Smith who identified an act by King George III in 1763 whereby all goods produced in the colonies were not exempt from any duty imposed by the mother country; this was done to prevent goods from being sold at a lower price in the plantations.²⁷⁷

The wealth that existed in the south prior to the Revolution found its way into the hands of those in the north and the government. Adam Smith stated the land that produced food stuffs such as corn determined the price of all other products produced and that the lands best suited for these products were retained for their use.²⁷⁸ This provides greater attention to the statement by Madison concerning different conditions for the north and south based on their “peculiar interests.” When revisiting the statements of Smith concerning the “tythe” and the form of subsidy returned to the farmer to offset the loss of profits enabling them to produce a crop for the following season; it is possible that the monies withheld and distributed for northern interests were the result of three-fifths taxation on slaveholders who produced the four staple products distributed throughout the world markets. Just as Smith predicted, the unequal burden of the tax coupled with the lack of supporting crops caused the smaller plantations to fail under the load of increased expense and smaller market prices, catering to the larger plantations who received a subsidy from the total accumulation of taxes and “tythes.” Smith speaks on these terms as they are an extension of the colonial system throughout history, a system that is very expensive to

²⁷⁷ Smith, *Wealth of Nations*, 550.

²⁷⁸ *Ibid.*, 152.

maintain. This theory sheds light on the British government who prevented products from America to be sold at cost, thus imposing a duty on all goods.

Conclusion

Of all the clauses of the Constitution where so much time has been exercised in gaining understanding, the Three-fifths clause has remained shackled under a single view and application. Very little research has been done, if any until now, concerning the historic reality, possible origins and uses of the clause as it is related to slavery, citizenship, representation, and taxation. However, much research has been conducted on the application concerning the counting of slaves and the racial connotations associated with the clause itself. Most of this research has aided in the promotion of the Constitution as a pro-slave document. Perhaps the strongest examples of scholars interpreting the Constitution as a pro-slave document came into existence after the 1930's. Many historians from that period on have reviewed the document through the lens of a Marxist class struggle. These conclusions fail to extend knowledge of the Three-fifths clause past the known application of slavery or recognize the ratio as a ubiquitous formula. At best, in all the research conducted on the subject, the understanding of the clause has been taken at face value, a narrowly tailored view based on a single instance by Madison to skew the argument to achieve compromise, ignoring the broad influences of the clause. The Three-fifths clause touches on so much more and to gain understanding means to broaden the sphere of research beyond the narrowly tailored historical argument. Race, citizenship, economics, and ancient history are all vital in achieving the view necessary for understanding the clause as well as its application. With such a clause having the impact on society it has, so little has been devoted to it in terms of research and understanding beyond racial connotations.

A majority of historical debates in this thesis concerning three-fifths rallied around what was produced rather than the individual producing it. The work of this thesis focuses on those

historians who have ignored the many statements issued throughout each era slavery existed. They have subscribed to the narrow view and supported this view by exploiting arguments presented by each framer that reflect a racial tone. The reason for this can presumably be for the purpose of promoting the guise of class and race warfare through the scope of Marxist ideology. What this thesis seeks to explain are the conditions with which the institution derived and the transitional conundrum from monarchial subjective relationships to the civilized society that has been envisioned since antiquity. Historians should find this an interesting field of study as it is an analysis of the same subject, not from a point of view such as racism, but from the view of human development and transition. Just as the laws and practices of various slave institutions have risen and collapsed with each transitional stage of development, so too does the institution itself dilute from existence in civilized countries. An example of the founders view on transitioning from old-world style practices is also found in the Constitution wherein they excluded rights and titles of nobility.²⁷⁹ Had they not done this, an old-world social class structure would have been legally supported in the United States. This offers proof of a transitional period which is detrimental in the shaping of the United States.

The biblical view of slavery is often attached to the antebellum period and cited as one of the main justifications of the southern slave institution. Various statements of both southerners and northerners who acted on or in favor of the institution of slavery have haunted the intended view or meaning behind those statements as supporting evidence of racial degradation. When viewing them in the context of the entire discussion, they offer an explanation rather than a justification of slavery or servitude that provides insight to the logic of the day. Dr. Daniel L.

²⁷⁹ William Maclay, "Journal of William Maclay, United States Senator from Pennsylvania, 1789-1791: Chapter 1. On Titles and Ceremonies," *A Century of Lawmaking for a New Nation: U.S. Congressional Documents and Debates, 1774-1875*, [https://memory.loc.gov/cgi-bin/query/r?ammem/hlaw:@field\(DOCID+@lit\(mj0017\)\)](https://memory.loc.gov/cgi-bin/query/r?ammem/hlaw:@field(DOCID+@lit(mj0017))): 28.

Anderson discusses the transitional role of a biblical servant in his book *Biblical Slave Leadership*.²⁸⁰ Anderson discusses the conversion of Paul which resembles the conversion or transition of a servant who inverts their status, yet their condition remains the same. As one develops through the harsh condition of being a servant, their condition becomes more valuable. As they invert their status, their condition retains the servile role, however they take on a greater, more important role within that society. Paul was once a receiver of preaching, then inverted into a preacher while his condition as a servant never changed.²⁸¹ While many may view the differences in slavery and servitude, preaching versus agricultural chattel; the concept of the servile condition is very similar and proves that an inversion is present in whatever form it is applied.

Post ratification of the clause does not offer a different story. The system of slavery was viewed in similar terms to serfdom by those closest to the system. Understanding the institution as they did is vital to understanding how the intended use of the Three-fifths clause. Slavery and serfdom have often been considered the same practice despite their cultural differences.²⁸² Economics being a mutual characteristic between slavery and serfdom, it was also the topic during the constitutional debates. Michael Bush explains in the introduction of *Serfdom and Slavery, Studies in Legal Bondage*, a collection of essays on the topic, “Economically and socially, slavery and serfdom served the same purpose, by providing unfree, unwaged labour and by upholding a concept of popular honour which distinguished the free,....from the unfree.”²⁸³ William C. Hine offers a comparison of the two systems of servitude in his 1975 article titled

²⁸⁰ Daniel L. Anderson, *Biblical Slave Leadership, A Stewardship from Above to Lead from Below*, (Shaburg, IL: Regular Baptist Books, 1982): 98.

²⁸¹ *Ibid.*, 83.

²⁸² Poole, *From Domesday*, 40.

²⁸³ Michael L. Bush, ed. *Serfdom and Slavery, Studies in Legal Bondage*, (New York: Pearson Education Inc., 1996): 5.

“American Slavery and Russian Serfdom,” in which he often refers to those held captive to each system as “bondsmen.”²⁸⁴ Throughout the article, Hine offers the view that other than race and hemisphere there are very little differences between the two systems. Each system, Russian serfdom and American slavery, rose to prominence around the same period and similarly each system ended in like terms. Hine discusses the startling difference in results being in terms of magnitude, whereas the emancipation of Russian serfs totaled nearly twenty million as opposed to the emancipation of American slaves at nearly four million.²⁸⁵ The economic view and social similarities of the two systems of servitude are supported by eyewitness evaluations during the months leading to the American Civil War.

In many cases, gathering the views of those closest to the subject offers a clearer perspective of the topic in question. A portion of this thesis is to gain an understanding of how those of the periods covered viewed slavery. The question is, did those of the time view slavery in a generic sense of the term? For answers, two examples are given: one being a Union general during the Civil War who previously lived in Russia and experienced Russian serfdom, the other being a Union general who offers a comparison between slavery and serfdom. This is necessary because their views provide a background historical understanding of slavery as it applied to the government, an understanding communicated over decades and millennia. Brigadier General John Turchin (Ivan Turchinov) came to America from the Crimean Peninsula of Russia. As a Cossack, his family’s history was based on the practice of serfdom. Turchin despised both systems of servitude and viewed them one in the same, not seeing any difference between

²⁸⁴ William C. Hine, “American Slavery and Russian Serfdom: A Preliminary Comparison,” *Phylon* (1960-), 36, no. 4 (4th Qtr., 1975): 378.

²⁸⁵ *Ibid.*, 380.

Russian serfdom and American slavery.²⁸⁶ As a Senator from New York, William H. Seward wrote in *The Irrepressible Conflict*, “Russia yet maintains slavery, and is a despotism. Most of the other European states have abolished slavery and adopted the system of free labor. It was the antagonistic political tendencies of the two systems which first Napoleon was contemplating when he predicted that Europe would ultimately be either all Cossack or all Republican.”²⁸⁷ Seward believed the framers of the Constitution made a very distinct choice concerning which system they preferred and chose to prosper in America. He states that they looked upon the system of servitude with “sorrow and shame,” and that they “preferred the system of free labor, and they determined to organize the government, and so to direct its activity, that that system should surely and certainly prevail.”²⁸⁸ Seward does add a statement that resembles Adams’ and Mill’s economic assessment, which addresses the Three-fifths clause as being a system that allowed the states a procedural process to move away from servile labor. He further states that for the nation to adopt the universality of slavery in every state, it will come as many violations to the Constitution.²⁸⁹ Seward likewise viewed the Cossack condition of serfdom in the generic term slavery, and from this he compared the European models of free labor and servitude to those in America. The point here is that although the two systems of bondage occurred separately in different nations, the practices of both originated from a similar source of “legal borrowing” and have similarities concerning legal standing and practice that allowed them to be viewed similarly by those of the same period in which they existed throughout history.

²⁸⁶ Stephen Chicoine, *John Basil Turchin and the Fight to Free the Slaves* (Westport, CT: Praeger Publishers, 2003): 23.

²⁸⁷ Edwin C. Rozwenc, ed., *The Causes of the American Civil War*, (Boston: D. C. Heath and Company, 1961): 12.

²⁸⁸ *Ibid.*, 13.

²⁸⁹ *Ibid.*, 14.

Another issue worth noting is found within the language of the clause itself. Have historical interpretations evaluated each term correctly? It is possible that a misunderstanding of the clauses, as Max Farrand suggested, is contained within the article and have caused confusion among generations of scholars, including the framers who exercised the law following ratification. One term may offer a change in perspective and reverse the perception that the government was taking from this group of people and only counting other groups as three-fifths; that term is “apportioned.” Apportion simply means “to divide and distribute proportionally” according to *Black’s Law Dictionary*.²⁹⁰ This would imply that three-fifths were given to the people based on their respective numbers rather than taken away from them. In this view, it seems that there was partial understanding because many recognized and feared that the southern slave holding states would possess a majority in Congress because they were given three-fifths more representation based on their slave populations. However, when coupled with the term “direct taxation,” it seems many have assumed that the southern slave holding states would be paying three-fifths more in taxation in trade for more representation.

When looking at the clause in terms of a subsidy, it is possible that the taxes collected exceeded the demand and that a type of subsidy was apportioned to the planter class in proportion to the size of their estate. This practice is still in use today and also described in the “South-Side” article when discussing the best return to those who paid for the subscription. Adam Smith and John Stuart Mill both described the subsidy as being contributory to the larger planters, however over the long run they too would suffer from the unequal tax versus their expenses of maintaining their plantations. Perhaps another view is that the tax assessed is one of the first taxes on labor in the country, especially in terms of agriculture and personal income tax.

²⁹⁰ Black, *Black’s Law*, 66.

The tax was referred to as a direct tax during the debates, yet the court and the Constitution have maintained the position, “The Constitutional provision that “no capitation, or other direct, tax shall be laid, unless it shall be apportioned among the several states which shall be included within this union according to their respective numbers.””²⁹¹ Following the ratification of the Constitution, this view of taxation has been upheld by the court, which could also explain Elliott’s statement concerning the exercise of the clause having been only applied once. Once again, Smith is correct that an unequal tithe (tax) destroys the institution it is applied to rather than supporting it. Not until the ratification of the Sixteenth Amendment did the policy change allowing the taxation of individual incomes.

Taxation, being related to production and that to labor as suggested by Benjamin Franklin supports the idea of wealth based on labor, individually what a person produces from their labor. However, if a productive person is no longer able to provide for themselves what determines the ratio of productive ability? On May 15, 1797, James McHenry issued a certificate of discharge and pension to Sergeant Thomas Fream, a soldier of the Revolutionary War who sustained injuries in combat and no longer possessed the means of subsistence. The certificate granted Fream “...three-fifths of the maximum allowance for disability.”²⁹² From this example, an evaluation of Fream’s capability of producing for himself—based on his abilities following his injuries—in terms of providing subsistence is measured by the three-fifths ratio and determines the appropriate compensation for his loss of being a full productive person. Whether rationed as an individual or a group of individuals, the percentage of productive abilities are the focus just as they were when Thomas Jefferson drafted the Declaration of Independence, where it is estimated

²⁹¹ William J. Shultz, *American Public Finance and Taxation*, (New York: Prentice-Hall, Inc., 1931): 257.

²⁹² James McHenry, “Certificate of Discharge, Thomas Fream, May 15, 1797,” *Papers of the War Department, 1784-1800*, (Nation Archives and Records Administration: Revolutionary War Service Claims Files, RG217).

that forty percent (two-fifths) of the population were slaves.²⁹³ According to the rule applied by the Three-fifths clause, three-fifths of the forty percent were counted for purposes of taxation and representation, however all were counted in the enumeration then the ratio applied for the purposes specified.

Nevertheless, throughout history there have been two constants...servitude and citizenship. However, citizenship defines all others; taxation, representation, liberty, freedom, rights, etc.... all transcend from citizenship. Servitude has existed in many forms; perhaps Americans have experienced the institutions in various other forms that will not become visible until historians recognize the trend of elevated societies over time. As each society progressed, servitude manifested within the laws of that society supporting the superior over the inferior at all times. It is important to note that the belief in the Constitution being “living law” should not imply that the law is meant to conform to the modernity of society, but the inverse should occur, that society is applied to the living law through the continued study of application over time. Slave law throughout history offers the best example of this application, as it has existed with the law through many different societies and changes in human nature, yet the law that governs the institution has remained relatively unchanged.

In conclusion, this thesis supports the view of Farrand, Spooner, and others who believe the Constitution was not framed to work iniquity among individual persons based on race, but that it states a vague position on issues that can be applied to it through temporal, economic, and social changes. The Three-fifths clause was not conceived under duress from a conflict over slavery but was an age-old formula for establishing an equal representation among the poor and the rich, large and small, lower condition and upper status, usable and unusable land, city and

²⁹³ Ron Chernow, *Alexander Hamilton*, (New York: Penguin Books, 2004): 211.

government boundaries, based on human scale. It found a use in “Commerce & navigation,” as Madison states in his letter to Robert Walsh, Jr.²⁹⁴ This view may have an origin in the shipping industry in terms of the construction and productivity of a ship’s cargo hold. As an economic factor, the clause serves as an instrument of investment and subsidy. It defines the area of taxing property held by the producers of commodities who possess the largest amount of land for production. It aides in the distribution of land where the majority of the tithable population reside and is reflected in their representation of government. In short, the Three-fifths clause did not originate for the perpetuation and protection of slavery but is a ubiquitous formula that determines many facets of the productive world and is conjoined in application to the Golden Ratio as a means of determining proportion and scale.

²⁹⁴ Madison, “From James Madison to Robert Walsh Jr., 27 November 1819.”

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