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The Three-Fifths Rule and the Presidential Elections of 1800 and 1824

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ARTICLE

THE THREE-FIFTHS RULE AND THE PRESIDENTIAL ELECTIONS OF 1800 AND 1824

MICHAEL L. ROSIN*

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* Michael L. Rosin is an independent scholar. He received an A.B. from the University of Chicago, an M.Sc. from the London School of Economics, and an M.A. from the University of Pittsburgh. Please address all correspondence to mrosin@att.net. While discussing analyses of contingent statutory factors affecting the outcome of presidential elections with Professor John Dinan of Wake Forest University, Professor Dinan suggested factoring in the role of the three-fifths rule in Jefferson's first election, something the author had already questioned. While analyzing the impact of the three-fifths rule on all other antebellum elections, the author nearly fell out of his chair when he saw the initial results for the election of 1824. The author would also like to thank Professor Michael Stokes Paulsen of the University of St. Thomas Law School for encouraging him. Finally, the author would like to thank Andrew Gauld, a former colleague at AT&T, for developing the software so critical to the analysis of North Carolina's electoral votes in the election of 1800 in a no-fifths rule Union.

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I. INTRODUCTION

Which president owed his election to the three-fifths rule? Over the last quarter-century, a distinguished array of scholars have claimed that Thomas Jefferson owed his first term in the Executive Mansion to the three-fifths rule.¹ They may well be mistaken. A much better argument can be made that John Quincy Adams was the president who owed his election to the three-fifths rule.²

In a 2013 article in the *Rutgers Law Journal*, Paul Finkelman detailed the proslavery nature of the original Constitution.³ After listing five constitutional clauses that directly sanctioned slavery,⁴ Finkelman noted that

the three-fifths clause also gave the South extra political muscle—in the House of Representatives and in the electoral col-

1. WILLIAM W. FREEHLING, *THE ROAD TO DISUNION, VOLUME 1, SECESSIONISTS AT BAY, 1776–1854*, at 147, 559 (1990); JAMES ROGER SHARP, *AMERICAN POLITICS IN THE EARLY REPUBLIC: THE NEW NATION IN CRISIS* 247 (1993) [hereinafter SHARP, *AMERICAN POLITICS*]; LEONARD RICHARDS, *THE SLAVE POWER* 43 (2000); Brian D. Humes, Elaine K. Swift, Richard M. Velelly, Kenneth Finegold & Evelyn C. Fink, *Representation of the Antebellum South in the House of Representatives: Measuring the Impact of the Three-Fifths Clause*, in *PARTY, PROCESS, AND POLITICAL CHANGE IN CONGRESS: NEW PERSPECTIVES ON THE HISTORY OF CONGRESS* 452, 464 (David W. Brady & Mathew D. McCubbins eds., 2002); Jack N. Rakove, *The Political Presidency: Discovery and Invention*, in *THE REVOLUTION OF 1800: DEMOCRACY, RACE, AND THE NEW REPUBLIC* 30, 31 (James Horn, Jan Ellen Lewis & Peter S. Onuf eds., 2002); GARRY WILLS, “NEGRO PRESIDENT”: JEFFERSON AND THE SLAVE POWER 2, 62, 234 n.2 (2003); SUSAN DUNN, *JEFFERSON’S SECOND REVOLUTION: THE ELECTION CRISIS OF 1800 AND THE TRIUMPH OF REPUBLICANISM* 192 (2004); JOHN FERLING, *ADAMS VS. JEFFERSON: THE TUMULTUOUS ELECTION OF 1800*, at 168 (2004); BRUCE ACKERMAN, *THE FAILURE OF THE FOUNDING FATHERS: JEFFERSON, MARSHALL, AND THE RISE OF PRESIDENTIAL DEMOCRACY* 34 (2005); AKHIL REED AMAR, *AMERICA’S CONSTITUTION: A BIOGRAPHY* 345–46, 599 n.44 (Random House 2d ed. 2005); MARK A. GRABER, *DRED SCOTT AND THE PROBLEM OF CONSTITUTIONAL EVIL* 115 n.30 (2006); Robin L. Einhorn, *Institutional Reality in the Age of Slavery: Taxation and Democracy in the States*, 18(1) *J. POL’Y HIST.* 21, 41 n.21 (2006); SANFORD LEVINSON, *OUR UNDEMOCRATIC CONSTITUTION: WHERE THE CONSTITUTION GOES WRONG (AND HOW WE THE PEOPLE CAN CORRECT IT)* 90 (2006); EDWARD J. LARSON, *A MAGNIFICENT CATASTROPHE: THE TUMULTUOUS ELECTION OF 1800, AMERICA’S FIRST PRESIDENTIAL CAMPAIGN* 250 (2007); JAMES ROGER SHARP, *THE DEADLOCKED ELECTION OF 1800: JEFFERSON, BURR, AND THE UNION IN THE BALANCE* 173 (2010) [hereinafter SHARP, *DEADLOCKED ELECTION OF 1800*]; Paul Finkelman, *How the Proslavery Constitution Led to the Civil War*, 43 *RUTGERS L.J.* 405 (2013). Wills, Sharp, Richards, Dunn, Ackerman, and Amar cite contemporary New England newspaper accounts of the election. Wills, Dunn, and Ferling cite Freehling.

2. Humes et al., *supra* note 1, at 464.

3. Finkelman, *supra* note 1, at 405.

4. The “three-fifths clause,” the “slave trade clause,” the “capitation tax clause,” the “fugitive slave clause,” and the provision in Article V prohibiting any amendment to the slave importation or capitation clauses prior to 1808. *Id.* at 418–19.

lege—to support that claim. Indeed, the electoral college provision might be seen as a sixth direct proslavery provision[.]⁵

He continued by asserting, “Thomas Jefferson’s victory in the election of 1800 would be possible only because of the electoral votes the southern states gained on account of their slaves.”⁶

In response, Earl Maltz disputed Finkelman’s claim “that the presidential selection process could be described as proslavery in any meaningful sense.”⁷ Maltz also disputed Finkelman’s claim concerning Jefferson’s election in 1800.⁸

Finkelman’s claim concerning the election of 1800 is not a new one. Over the last quarter-century, Finkelman and distinguished scholars such as William Freehling, James Roger Sharp, Leonard Richards, Brian D. Humes et al., Jack Rakove, Garry Wills, Susan Dunn, John Ferling, Bruce Ackerman, Akhil Reed Amar, Mark Graber, Robin Einhorn, Sanford Levinson, and Edward J. Larson have each claimed that Thomas Jefferson owed his first term in the Executive Mansion to the three-fifths rule.⁹ I do not deny that the three-fifths rule gave the South an advantage in the Electoral College (and the House of Representatives). It did. Instead, I deny that the advantage was ever *unquestionably decisive* for the South in the Electoral College.¹⁰ At best, the claim that Thomas Jefferson owed his first term to the three-fifths rule is poorly argued. At worst, the claim is mistaken. In a significant percentage of alternate, *no-fifths rule* Unions, Thomas Jefferson would have still won the electoral vote.¹¹

John Quincy Adams might very well have agreed with Freehling et al. that Jefferson owed his first election to the three-fifths rule. Commenting

5. *Id.* at 419.

6. *Id.* at 420; *see also id.* at 427.

7. Earl M. Maltz, *The Presidency, the Electoral College, and the Three-Fifths Clause*, 43 *RUTGERS L.J.* 439, 441 (2013).

8. *Id.* at 468–69.

9. Finkelman, *supra* note 1, at 412 n.38 (citing Paul Finkelman, *The Proslavery Origins of the Electoral College*, 23 *CARDOZO L. REV.* 1145, 1155 (2002)); FREEHLING, *supra* note 1, at 147, 559; SHARP, *AMERICAN POLITICS*, *supra* note 1, at 247; RICHARDS, *supra* note 1, at 43; Humes et al., *supra* note 1, at 464; RAKOVE, *supra* note 1, at 31; WILLS, *supra* note 1, at 2, 62, 234 n.2; DUNN, *supra* note 1, at 192; FERLING, *supra* note 1, at 168; ACKERMAN, *supra* note 1, at 34; AMAR, *supra* note 1, at 345–46, 599 n.44; GRABER, *supra* note 1, at 115 n.30; Einhorn, *supra* note 1, at 41 n.21; LEVINSON, *supra* note 1, at 90; LARSON, *supra* note 1, at 250; SHARP, *DEADLOCKED ELECTION OF 1800*, *supra* note 1, at 173.

10. Elsewhere, I have argued that “while Southern states disenfranchised almost all their black citizens and many of their white citizens, the Electoral College provided a mechanism to protect the states outside the South from the overwhelming influence the solid South would have had if presidential elections had been conducted by a national popular vote.” Michael L. Rosin, *The Five-Fifths Clause and the Unconstitutional Election of 1916*, 46 *HIST. METHODS* 57, 57 (2013).

11. More properly speaking, the Jefferson-Burr ticket would have edged out the Adams-Pinckney ticket by that vote. The present analysis ignores running mates Burr and Pinckney.

on the impact of the three-fifths rule during the Missouri debates of 1820, Adams made the following entry in his diary:

The impression produced upon my mind by the progress of this discussion is, that the bargain between freedom and slavery contained in the Constitution of the United States is morally and politically vicious, inconsistent with the principles upon which alone our Revolution can be justified; cruel and oppressive, by riveting the chains of slavery, by pledging the faith of freedom to maintain and perpetuate the tyranny of the master; and grossly unequal and impolitic, by admitting that slaves are at once enemies to be kept in subjection, property to be secured or restored to their owners, and persons not to be represented themselves, but for whom their masters are privileged with nearly a double share of representation. *The consequence has been that this slave representation has governed the Union.*¹²

In an ironic twist of fate, it is at least as plausible that the president who owed his election to the three-fifths rule was the very same John Quincy Adams, the most ardent foe of slavery to occupy the Executive Mansion before Abraham Lincoln.¹³ Without the three-fifths rule it is very possible that Henry Clay would have been chosen president in 1824–1825. Only one previous commentary appears to have suggested this.¹⁴

William Freehling, the earliest of these commentators on the election of 1800, makes a very specific claim.

In an Electoral College where the three-fifths clause gave *Southerners* 14 extra electors, the Republicans' Thomas Jefferson defeated the Federalists' John Adams, 73–65. . . . If no three-fifths clause had existed and House apportionment been based

12. 5 MEMOIRS OF JOHN QUINCY ADAMS, COMPRISING PORTIONS OF HIS DIARY FROM 1795 TO 1848, at 11 (Charles Francis Adams ed., New York, AMS Press 1970) (1874) [hereinafter ADAMS MEMOIRS]. Adams was serving as Secretary of State in the Monroe administration when he made this comment, which was undoubtedly about the balance of power in the House of Representatives.

13. Adams made his views on slavery very clear in his diary entries made during the Missouri debates. "I take it for granted that the present question is a mere preamble—a title page to a great tragic volume." 4 *id.* at 502. "Slavery is the great and foul stain upon the North American Union, and it is a contemplation worthy of the most exalted soul whether its total abolition is or is not practicable[.]" *Id.* at 531. "[A] law for perpetuating slavery in Missouri, and perhaps in North America, has been smuggled through both Houses of Congress. . . . The fault is in the Constitution of the United States, which has sanctioned a dishonorable compromise with slavery." 5 *id.* at 4. "If the Union must be dissolved, slavery is precisely the question upon which it ought to break." *Id.* at 12. For an account of these diary entries, see WILLIAM LEE MILLER, ARGUING ABOUT SLAVERY: THE GREAT BATTLE IN THE UNITED STATES CONGRESS 179–93 (1996).

14. Humes et al. assert this claim but provide little supporting argument. See Humes et al., *supra* note 1, at 464. It is even more ironic that in 1804, while arguing for the replacement of the three-fifths rule by a no-fifths rule, the younger Adams claimed that his father had lost the 1800 election thanks to the three-fifths rule. Publius Valerius, *Serious Reflections, Addressed to the Citizens of Massachusetts*, THE REPERTORY, Nov. 6, 1804; 3 WRITINGS OF JOHN QUINCY ADAMS 71 (Worthington C. Ford, ed., Macmillan 1914).

strictly on white numbers, Adams would have likely squeaked by, 63–61.¹⁵

Of course, the three-fifths rule applied to the nation above the Mason-Dixon line as well as below it.¹⁶ Neither Freehling nor, presumably, the contemporary New England newspaper writers noticed that, without its 1790 slave population of 21,324, New York would not have been apportioned its tenth House seat.¹⁷ Without New York's tenth and final House seat, Jefferson's electoral vote total should be diminished by one to give Adams an apparent 63–60 edge in the electoral vote.¹⁸

Or would it? Freehling et al. may declare unproblematically that in the actual election of 1800 Jefferson owed thirteen of his seventy-three electoral votes to the three-fifths rule, compared to only two for Adams. However, it is quite another matter to assert that Jefferson owed his *election* to the three-fifths rule.¹⁹ In the context of the events leading up to South Carolina's secession from the Union, Freehling has written:

The point here—the caution that should always condition might-have-been history—is that to think that one contingency will nec-

15. FREEHLING, *supra* note 1, at 147 (emphasis added).

16. Moreover, the three-fifths rule distinguished “free persons” from “all other persons,” not “white persons” from “all other persons,” as Freehling's text suggests. If the apportionment supposed by Freehling et al. had been in place, Pennsylvania and Rhode Island would have each owed their last House seat to their non-white free population.

17. The 1790 census counted a total of 340,120 persons in New York; of these, 21,324 were slaves. J. PHILLIPS, RETURN OF THE WHOLE NUMBER OF PERSONS WITHIN THE SEVERAL DISTRICTS OF THE UNITED STATES ACCORDING TO “AN ACT PROVIDING FOR THE ENUMERATION OF THE INHABITANTS OF THE UNITED STATES;” PASSED MARCH THE FIRST, ONE THOUSAND SEVEN HUNDRED AND NINETY-ONE 3 (1793). All 1790 census data is taken from this source unless otherwise noted. Forty percent of the slave count is 8,529. This reduces New York's total population from 340,120 to a federal population with the three-fifths rule to 331,591, above the 330,000 needed for a tenth seat with 1:33,000 as the ratio of representation. With no slaves counted, New York's no-fifths rule population would be 318,796, below the 330,000 threshold needed for a tenth seat with that ratio.

18. In 1941, Albert F. Simpson cited contemporary sources that recognized that Jefferson owed fifteen electoral votes to the three-fifths rule. Albert F. Simpson, *The Political Significance of Slave Representation, 1787–1821*, 7(3) J. S. HIST. 315, 321–22 (1941). Freehling's failure to deduct New York's last electoral vote from Jefferson's column is hard to fathom. Just before his analysis of the 1800 election, he reviewed the slave numbers in New York and the rest of the North during the first forty years of the republic. FREEHLING, *supra* note 1, at 131–34. At the beginning of his analysis of that election, he asks: “But did the Virginia Dynasty, spawned by the three-fifths clause, begin its reign democratically?” *Id.* at 147. He notes that “[t]hese questions are superbly explored in Arthur F. Simpson[’s article].” *Id.* at 585 n.3.

19. As Maltz notes, two large-scale surveys of the early republic have concluded that, in all probability, Jefferson would have won a direct popular election in 1800. Maltz, *supra* note 7, at 469 (citing STANLEY ELKINS & ERIC MCKITTRICK, *THE AGE OF FEDERALISM: THE EARLY AMERICAN REPUBLIC, 1788–1800*, at 741 (1993) and SEAN WILENTZ, *THE RISE OF AMERICAN DEMOCRACY: JEFFERSON TO LINCOLN* 97–98 (2005)). I have no quarrel with this contention except to note that I think it highly unlikely that a Convention unable to agree on common suffrage qualifications for electors of the House of Representatives would have agreed on common suffrage qualifications much more relevant to a nationwide popular election of the president. In this article, I will take on the analysis of the three-fifths rule in relative isolation on the assumption that it was replaced by a no-fifths rule starting with the Convention.

essarily change all subsequent history, without other surprise occurrences changing things again, is to deny the very nature of contingency.²⁰

Certainly, the other side of that historiographical coin must not be to suppose that a contingency such as the adoption of the three-fifths rule happens at one point in history and then no subsequent history changes until just the right moment.

Had the Constitutional Convention adopted a no-fifths rule, that choice would have undoubtedly had an impact on the choice of the ratio of representation for the House of Representatives, initially at the Convention and subsequently when the Second Congress reapportioned the House in 1791–1792.²¹

Part II of this article will scrutinize the steps that determined the size of the Electoral College in 1800. It will argue that a plausible case can be made that in a significant percentage of cases, Jefferson would have won the electoral vote even if the Convention had adopted a no-fifths rule.²²

On the final day of the Convention, Nathaniel Gorham proposed and George Washington seconded changing the ratio of representation from no more than 1:40,000 to no more than 1:30,000 as a means to increase representation in the future.²³ Part II.A will argue that this change in the ratio of representation is the key unknown at the Convention for understanding the result of the 1800 election in a no-fifths rule Union.

Part II.B will argue that if the Constitution had included a no-fifths rule then the ratio of representation used in the first reapportionment of the House certainly would not have been 1:33,000, as implicitly supposed by Freehling et al. but a ratio between 1:25,000, and 1:30,000.

20. WILLIAM W. FREEHLING, *THE ROAD TO DISUNION, VOLUME II, SECESSIONISTS TRIUMPHANT, 1854–1861*, at 574 n.66 (2007). Finkelman notes that “[c]ounterfactuals are of course impossible to prove, but possible and plausible scenarios help clarify these issues.” Finkelman, *supra* note 1, at 424.

21. No one has published a history of how the Convention arrived at the initial size of the House of Representatives. The most recent history of the first apportionment is more than a century old! Edmund J. James, *The First Apportionment of Federal Representatives in the United States*, 9 ANNALS OF THE AMERICAN ACAD. OF POL. & SOC. SCI. 1 (1897). The author has been at work on a large-scale analysis of the history of House apportionment among the states and how that has affected the outcome of presidential elections.

22. Several commentators have noted that in several of the states the dominant party changed the state’s method of choosing its presidential electors just prior to the 1800 election, hoping to tip the balance in their candidates’ favor. The overall outcome of these changes was that Jefferson’s electoral vote margin was smaller than the cumulative popular vote margin that the Jeffersonian Republicans achieved over the Adams Federalists. *See, e.g.*, FERLING, *supra* note 1, at 156–58; DUNN, *supra* note 1, at 175–87; SHARP, *DEADLOCKED ELECTION OF 1800*, *supra* note 1, at 116–25. There is no obvious reason to suppose that any of these state level machinations would have been any different had the federal constitution embodied a no-fifths rule rather than a three-fifths rule. Moreover, since the overall impact of these machinations favored Adams rather than Jefferson, the present analysis will leave them all in place.

23. 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 643–44 (Max Farrand, ed., Yale rev. ed. 1937).

Part II.C will argue that for ratios of 1:25,000, 1:26,000, and 1:30,000, the way in which the North Carolina legislature would have drawn a map for thirteen or eleven presidential elector districts is the key unknown for projecting the outcome of the 1800 election in a no-fifths rule Union. Jefferson's chances for a victory or even a tie are extremely slight for ratios of 1:25,000 and 1:26,000. At 1:27,000, this article projects Adams as a certain winner. For ratios of 1:28,000 and 1:29,000, North Carolina would have had twelve presidential electors in a no-fifths rule Union, just as it did in the actual three-fifths rule Union. This article projects that in the case of 1:28,000, Jefferson would have edged out Adams in the electoral vote by a count of 71–70 and that the two candidates would have tied for the case of 1:29,000. Finally, for a ratio of 1:30,000, this article projects Jefferson to have just under a twenty-five percent chance to win the electoral vote.²⁴

Part III will argue that a plausible case can be made that the president who owed his election to the three-fifths rule was John Quincy Adams,²⁵ the most ardent foe of slavery to occupy the Executive Mansion prior to Abraham Lincoln. With a no-fifths rule in place, Speaker of the House Henry Clay rather than William Crawford would have finished behind Andrew Jackson and John Quincy Adams in third place in the 1824 electoral vote. As Robert V. Remini, a leading historian of that era, has written, “In that case [Clay] would have been elected President—unquestionably.”²⁶

Part IV concludes the article by reviewing the analyses in Part II and Part III as essays in both actual history and virtual history.

II. THE THREE-FIFTHS RULE AND THE ELECTION OF 1800

The standard interpretation that Jefferson owed his first term to the three-fifths rule unproblematically supposes that in a no-fifths rule Union, the Electoral College of 1800 would have been based on a House of Representatives apportioned with 1:33,000 as the ratio of representation, as it was in the actual, three-fifths rule Union. In order to project the outcome of the election of 1800 with a no-fifths rule, the present analysis must first explain the history leading to 1:33,000 as the ratio of representation with the three-

24. In the analysis presented here, none of Jefferson's winning scenarios require eliminating the senatorial, two-vote bonus, as suggested by Joyce Appleby and Lance Banning. Joyce Appleby, *Having It All*, WASHINGTON POST (Nov. 16, 2003), https://www.washingtonpost.com/archive/entertainment/books/2003/11/16/having-it-all/99abb9f6-2737-4390-a857-ce20eb09e360/?noredirect=on&utm_term=.56664f1070c4 (reviewing WILLS, *supra* note 1); Lance Banning, *Three-Fifths Historian*, 4 CLAREMONT REV. BOOKS 54, 55 (2004) (reviewing WILLS, *supra* note 1).

25. Humes et al., *supra* note 1, at 464.

26. ROBERT V. REMINI, HENRY CLAY: STATESMAN FOR THE UNION 250 (1991) [hereinafter REMINI, CLAY]. Nearly a century earlier, John W. Burgess came to the same conclusion. JOHN WILLIAM BURGESS, THE MIDDLE PERIOD, 1817–1858, at 140 (1901). Remini's claim is based on the supposition that Clay would have received expected electoral votes in New York.

fifths rule and then rerun that history supposing a no-fifths rule. Not surprisingly, the present analysis begins with the Constitutional Convention.

A. *Setting the Ratio of Representation at the Convention*

On the last day of the Convention, George Washington rose from the chair to make his only speech of the Convention in support of Nathaniel Gorham's proposal that "the number of Representatives shall not exceed one for every forty thousand" be changed to one for every thirty thousand. There could be no opposition to Washington. The Convention unanimously approved Gorham's proposal. Forty thousand was erased in the parchment and replaced by thirty thousand.²⁷ This was the final step in the process that set the ratio of representation at no more than 1:30,000 in the Representation Clause.

1. *Sizing the Initial House with the Three-Fifths Rule*

The three-fifths rule first appeared in April 1783 when the Continental Congress passed a proposal with the following population-based tax apportionment scheme:

[A]ll charges of war and all other expences that have been or shall be incurred for the common defence or general welfare, and allowed by the United States in Congress assembled, except so far as shall be otherwise provided for, shall be defrayed out of a common treasury, which shall be supplied by the several states *in proportion to the whole number of white and other free citizens and inhabitants, of every age, sex and condition, including those bound to servitude for a term of years, and three-fifths of all other persons not comprehended in the foregoing description, except Indians, not paying taxes, in each State*; which number shall be triennially taken and transmitted to the United States in Congress assembled, in such mode as they shall direct and appoint.²⁸

On April 18, 1783, the Continental Congress applied the new tax apportionment scheme to a requisition to raise 1,500,000 dollars from the states based on population estimates recorded on April 7. Two years later, the Continental Congress twice apportioned three million dollar requisitions

27. THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 23, at 643–44.

28. 24 JOURNALS OF THE CONTINENTAL CONGRESS, 1774–1789, at 260 (Worthington C. Ford ed., 1905) (emphasis added). The Articles of Confederation required any amendment to receive the unanimous approval of all thirteen states. This proposal never received the approval of all thirteen states. AMAR, *supra* note 1, at 95. At the Pennsylvania Ratifying Convention, James Wilson remarked that the proposal had been approved by eleven states. 2 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 452 (Jonathan Elliot, ed., 2d 1836) [hereinafter ELLIOT'S DEBATES]. At the North Carolina ratifying convention, William Davie stated that it had been approved by twelve of the states. 4 *id.* at 31.

to the states in double the amounts.²⁹ Table 1 presents these population estimates and tax apportionments.

TABLE 1 ESTIMATED POPULATION AND TAX ALLOCATIONS

State	Estimated Population	\$1.5M Tax Allocation	\$3.0M Tax Allocations
New Hampshire	82,200	\$52,708	\$105,416
Massachusetts	350,000	\$224,426	\$448,854
Rhode Island	50,400	\$32,317	\$64,636
Connecticut	206,000	\$132,091	\$264,182
New York	200,000	\$128,243	\$256,486
New Jersey	130,000	\$83,358	\$166,716
Pennsylvania	320,000	\$205,190	\$410,378
Delaware	35,000	\$22,443	\$44,886
Maryland	220,700	\$141,517	\$283,034
Virginia	400,000	\$256,487	\$512,974
North Carolina	170,000	\$109,007	\$218,012
South Carolina	150,000	\$96,183	\$192,366
Georgia	25,000	\$16,030	\$32,060
Total	2,339,300	\$1,500,000	\$3,000,000

Edmund Randolph's Virginia plan had specified neither the number of representatives per state nor a total number.³⁰ However, the Convention quickly assumed that such a lower house would have about ninety members. On June 8, during a discussion of the national legislature's proposed power to nullify state legislation, Gunning Bedford complained that his small state of Delaware "would have about 1/90 [for its] share in the General Councils, whilst Pa. & Va. would possess 1/3 of the whole."³¹ The next day, the debate turned its focus to the nature of representation in the legislature with the small states complaining that they would be overrun by the large states. David Brearley observed that "by the quota of Congs. Virga. would have 16 votes, and Georgia but one."³²

29. For the population estimates, see 24 JOURNALS OF THE CONTINENTAL CONGRESS, *supra* note 28, at 231. For the \$1.5M requisition, see *id.* at 259. For the \$3M requisitions, see 28 *id.* at 217, and 29 *id.* at 745.

30. The text of the Virginia plan contains a blank space where a total number would appear. It contains a list of state names in the margin. 3 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 23, at 596.

31. 1 *id.* at 167.

32. *Id.* at 176–77.

Brearley was clearly referring to the Continental Congress's population-based tax apportionment rule³³ just discussed. Table 2 modifies Table 1 by presenting the data in descending population order, with the \$1.5M tax allocation column deleted and two columns added: (1) the quotient of that state's population divided by the smallest state's population, 25,000, and (2) that quotient rounded down to the nearest quarter, conveniently labeled "Delegates."

TABLE 2 THE WILSON TABLE RECONSTRUCTED

State	Population Estimate (1783)	Quota of \$3M tax	Quotient	Delegates
Virginia	400,000	\$512,974	16.00	16
Massachusetts	350,000	\$448,854	14.00	14
Pennsylvania	320,000	\$410,378	12.80	12 3/4
Maryland	220,700	\$283,034	8.83	8 3/4
Connecticut	206,000	\$264,182	8.24	8
New York	200,000	\$256,486	8.00	8
North Carolina	170,000	\$218,012	6.80	6 3/4
South Carolina	150,000	\$192,366	6.00	6
New Jersey	130,000	\$166,716	5.20	5
New Hampshire	82,200	\$105,416	3.29	3 1/4
Rhode Island	50,400	\$64,636	2.02	2
Delaware	35,000	\$44,886	1.40	1 1/4
Georgia	25,000	\$32,060	1.00	1

The first, third, and fifth column of this table are constructed from James Wilson's table of June 9.³⁴ The initial size of the House was determined by taking 25,000, the three-fifths rule based apportionment estimate of Georgia, which was the smallest state, using it as the ratio of representation, and rounding down.³⁵ Call this the *smallest state strategy*.

33. Paterson's comment that New Jersey would have five votes and Virginia sixteen votes, and Wilson's comment that Pennsylvania would have twelve votes and New Jersey five votes, provide additional support for this claim. *Id.* at 182–83.

34. *Id.* at 190. Farrand describes this as “[a]mong the Wilson papers in the Library of the Historical Society of Pennsylvania.” *Id.* at n.24. This same table also appears as Brearley's table. 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 23, at 574. Farrand describes this as “[a]mong the papers of Brearley relating to the Federal Convention, and turned over by his executor, General Bloomfield, to John Quincy Adams.” *Id.* at 573, at n.12.

35. In November 1775, Silas Deane, a Connecticut Delegate to the Continental Congress, proposed that “To every Twenty five Thousand Souls one Voice, or Delegate, shall be allowed, in general Congress from each Colony respectively.” Silas Deane's Proposals to Congress (November 1775), in 2 LETTERS OF DELEGATES TO CONGRESS, 1774–1789, at 418 (Paul Hubert Smith ed., 1983). There is no record that the Congress voted on or even debated Deane's proposal. CHARLES

Luther Martin from midsize Maryland offered a different objection than Bedford. Unequal confederacies can never produce good effects. Apply this to the Virginia plan. Out of the number 90, Virginia has 16 votes, Massachusetts 14, Pennsylvania 12—in all 42. Add to this a state having four votes, and it gives a majority in the general legislature. Consequently, a combination of these states will govern the remaining nine or ten states. Where is the safety and independency of those states?³⁶

He measured the top-heaviness of the Virginia plan by computing the ease with which the largest states would be able to join together to impose their will on the other states.

As June wore on, Madison wrote in his notes:

The great difficulty lies in the affair of Representation; and if this could be adjusted, all others would be surmountable. It was admitted by both the gentlemen from N. Jersey, (Mr. Brearly and Mr. Patterson) that it would not be just to allow Virga. which was 16 times as large as Delaware an equal vote only. Their language was that it would not be safe for Delaware to allow Virga. 16 times as many votes.³⁷

Another plan was needed; one that dampened the advantages of the large states and was palatable to both large and small states in what Hamilton termed “the contest for power.”³⁸

The Convention appointed a committee chaired by Elbridge Gerry of Massachusetts with one member per state, including Franklin rather than Wilson from Pennsylvania, and Mason rather than Madison from Virginia.³⁹ The fact that the Committee worked on July 3 and 4 while the Convention adjourned to celebrate the nation’s independence attests to the importance of its task. On July 5, the committee reported its proposal back to the whole Convention.

I. that in the 1st. branch of the Legislature *each of the States* now in the Union shall be allowed *1 member for every 40,000 inhabitants* of the description reported in the 7th Resolution of the Come. of the whole House [the three-fifths rule]: that each State not containing that number shall be allowed 1 member: . . . II. that in the 2d branch each State shall have an equal vote.⁴⁰

A. KROMKOWSKI, *RECREATING THE AMERICAN REPUBLIC* 163 (2002). Two years later, the Continental Congress considered and voted down proposals that each state have one delegate for every 50,000 and then 30,000. 9 *JOURNALS OF THE CONTINENTAL CONGRESS*, *supra* note 28, at 779–80.

36. 1 *THE RECORDS OF THE FEDERAL CONVENTION OF 1787*, *supra* note 23, at 440.

37. *Id.* at 321 (emphasis added to first sentence).

38. *Id.* at 466.

39. *Id.* at 516.

40. *Id.* at 526 (emphasis added). For the reference to the three-fifths rule, see *id.* at 444.

Yates' notes record that Franklin initiated the Committee's ultimate proposal.⁴¹ In spite of his age, Franklin was undoubtedly still the most mathematically gifted member of the committee.⁴² He may have noticed that increasing the divisor from 25,000, the size of the smallest state's population, to a larger number such as 40,000, one-tenth the size of the largest state, while also guaranteeing each state at least one vote, would dampen the larger states' dominance in a population-proportioned House. Such a change would curry favor with the small states. Call this the *10:1 strategy* to recognize the fact that 40,000 was exactly one-tenth of the apportionment basis of the largest state.

Interestingly, the Committee's July 5 proposal did not suggest what the state-by-state representation would be. It did not even propose what the total number would be. The committee may have lacked a population estimate that separately counted slaves. The 1783 population estimates noted by Wilson and Brearley⁴³ did not count slaves separately. However, if anyone *had* employed these population estimates,⁴⁴ they would have ended up with a fifty-six-member House. Table 3 presents the results of employing the 1783 population estimates with a divisor of 40,000, rounding down, and a minimum of one.

41. 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 23, at 523.

42. For an analysis of Franklin's mathematical prowess, see Paul C. Pasles, *The Lost Squares of Dr. Franklin*, 108 AM. MATHEMATICAL MONTHLY 489 (2001), or more generally, PAUL C. PASLES, BENJAMIN FRANKLIN'S NUMBERS: AN UNSUNG MATHEMATICAL ODYSSEY (2007).

43. *See supra* Table 2.

44. On July 6, 1787, Rufus King commented: "Delaware does not contain it is computed more than 35,000 souls." 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 23, at 541. It is likely that he did have the 1783 population estimates in mind.

TABLE 3 REPRESENTATION ACCORDING TO THE 1783 POPULATION
ESTIMATE WITH A 40,000 DIVISOR

State	Population Estimate (1783)	Quotient (dividing by 40,000)	Delegates
Virginia	400,000	10.00	10
Massachusetts	350,000	8.75	8
Pennsylvania	320,000	8.00	8
Maryland	220,700	5.52	5
Connecticut	206,000	5.15	5
New York	200,000	5.00	5
North Carolina	170,000	4.25	4
South Carolina	150,000	3.75	3
New Jersey	130,000	3.25	3
New Hampshire	82,200	2.06	2
Rhode Island	50,400	1.26	1
Delaware	35,000	0.88	1
Georgia	25,000	0.63	1
Total	2,339,300		56

On initially hearing the committee's report, Gouverneur Morris objected. He expressed concern that many delegates were there only "to truck and bargain for their particular States"⁴⁵ rather than argue from first principles. A day later, the Convention responded by naming Morris chairman of a new committee charged with proposing a first enumeration.⁴⁶ On July 9, this committee reported a proposal with a slightly different fifty-six member House that shifted representation somewhat southward.⁴⁷ Not content with this proposal, which suggested that future apportionments be based on state wealth as well as population, the Convention appointed yet another committee, chaired by Rufus King, to resolve the enumeration and to deal with the rules for future apportionments.⁴⁸ King's committee proposed a sixty-five seat House, the proposal enshrined in Article I, Section 2.⁴⁹ Table 4 compares the King committee's sixty-five seat apportionment with the fifty-six seat apportionment that Gerry's committee had proposed.⁵⁰

45. *Id.* at 529.

46. *Id.* at 540–41.

47. *Id.* at 559.

48. *Id.* at 557–62.

49. *Id.* at 568.

50. *See supra* Table 3.

TABLE 4 FIFTY-SIX AND SIXTY-FIVE MEMBER APPORTIONMENTS

State	Delegates Computed on 1783 Estimates	Gerry Committee 56 Member Proposal	King Committee 65 Member Proposal
New Hampshire	2	2	3
Massachusetts	8	7	8
Rhode Island	1	1	1
Connecticut	5	4	5
New York	5	5	6
New Jersey	3	3	4
Pennsylvania	8	8	8
Delaware	1	1	1
Maryland	5	4	6
Virginia	10	9	10
North Carolina	4	5	5
South Carolina	3	5	5
Georgia	1	2	3
Total	56	56	65

Following a brief attempt by Madison to double each state's representation,⁵¹ the ratio of representation remained at 40,000 until the Convention's final days when Hugh Williamson proposed to "make an addition of one half generally to the number allotted to the respective States; and to allow two to the smallest States."⁵² Only Washington's support could change the ratio of representation to 1:30,000 on the Convention's final day.⁵³

2. *Sizing the Initial House with a No-Fifths Rule*

How would the history of the initial setting of ratio of representation have unfolded with a no-fifths rule instead of a three-fifths rule?

Table 5 presents Greene and Harrington's estimates for the white and slave populations of the five southernmost states,⁵⁴ extended to compute the

51. 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 23, at 569–70. The proposal was defeated by a vote of 2–9. *Id.* at 570.

52. 2 *id.* at 612. Williamson's proposal was defeated by a vote of 5–6. *Id.* For explicit statements of 40,000 by the Committee of Detail and the Committee of Style, *see id.* at 178, 566, and 591 respectively.

53. *See supra* text accompanying note 27.

54. For the estimates in the order presented, see EVARTS B. GREENE & VIRGINIA D. HARRINGTON, AMERICAN POPULATION BEFORE THE FEDERAL CENSUS OF 1790, at 127, 142, 160, 176, 182 (1932). They give no white/slave estimate for Delaware.

white population as a percentage of the “federal” population computed with a three-fifths rule.

TABLE 5 WHITE/SLAVE POPULATION ESTIMATES

State	Year	Whites	Slaves	3/5 Slave Population	Federal Population	Whites: Federal
Maryland	1782	170,688	83,362	50,017	220,705	77.34%
Virginia	1782	296,852	270,762	162,457	459,309	64.63%
North Carolina	1786	164,000	60,000	36,000	200,000	82.00%
South Carolina	1785	108,000	80,000	48,000	156,000	69.23%
Georgia	1773	18,000	15,000	9,000	27,000	66.67%

Using the white-to-federal percentages in the rightmost column of Table 5, Table 6 estimates the census data the Convention would have used if it had adopted a no-fifths rule.

TABLE 6 NO-FIFTHS RULE APPORTIONMENTS

State	1783 est. (3/5 Rule)	Whites: Federal Pct	No-Fifths Rule est.	Delegates, <i>Smallest State Strategy</i>	Delegates, <i>10:1 Strategy</i>
New Hampshire	82,200	100.00%	82,200	4	2
Massachusetts	350,000	100.00%	350,000	21	10
Rhode Island	50,400	100.00%	50,400	3	1
Connecticut	206,000	100.00%	206,000	12	5
New York	200,000	100.00%	200,000	12	5
New Jersey	130,000	100.00%	130,000	7	3
Pennsylvania	320,000	100.00%	320,000	19	9
Delaware	35,000	100.00%	35,000	2	1
Maryland	220,700	77.34%	170,684	10	4
Virginia	400,000	64.63%	258,520	15	7
North Carolina	170,000	82.00%	139,400	8	3
South Carolina	150,000	69.23%	103,846	6	2
Georgia	25,000	66.67%	16,667	1	1
Total				120	53

An initial application of a *smallest state strategy* would have used 16,667 as the ratio of representation, thereby giving Massachusetts, the state with the largest apportionment basis, twenty-one delegates to Georgia’s one. In contrast, with the three-fifths rule in place, the actual Convention’s application of the *smallest state strategy* yielded a less extreme ratio of only

16:1.⁵⁵ With this 21:1 ratio even more extreme than the 16:1 ratio, it is likely that the Convention would have adopted something like the *10:1 strategy*. Dividing Massachusetts' free population of 350,000 by ten would have yielded 35,000 as the ratio of representation. That ratio would have reduced the size of the House from 120 to 53, just three shy of the total generated by the actual *10:1 strategy* with the three-fifths rule.⁵⁶

An upward adjustment of the total by nine or so seats most likely would have followed just as the King committee raised the actual total by nine seats. However, there is no reason to believe that the ratio of representation would have been altered in this alternate history until the Convention's final day when Washington supported Gorham's proposal to change the ratio as a means of increasing future representation.

Unfortunately, it may not be possible to know what ratio Gorham would have proposed if the Convention had entered its final day with a no-fifths rule apportionment of the House and a ratio of representation of 1:35,000 in Article I. He left no record of why he proposed 1:30,000.⁵⁷ Was he proposing a reduction of 10,000, a reduction of 25 percent, or did he consider 30,000 to be a magic number?⁵⁸ Perhaps all that can be said with relative certainty is that it would have been one of 1:25,000, 1:26,000, 1:27,000, 1:28,000, 1:29,000, or 1:30,000.⁵⁹

B. *The First Reapportionment of the House*

The first reapportionment of the House was in many respects the most important reapportionment. Congress recognized that reapportionment of the House needed to be enacted by legislation presented to the President. Reapportionment was a matter of paramount constitutional importance and

55. See *supra* text accompanying note 35.

56. Reducing the size of the House by more than half would have assuaged the oft-stated concerns about the expense of the national legislature. For examples of these concerns, see the comments of William Paterson, Oliver Ellsworth, and John Rutledge. 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 23, at 251–52, 569–70.

57. As a delegate to the Continental Congress, Gorham often complained about the absence of state delegations. “[T]he principle of the confederat[ion] as it respects representation & the mode of voting is calculated to encourage delinquency. . . if the representation had been apportioned according to numbers or property—and a suitable quorum established & the major vote to determine questions—this inattention would not exist.” Letter from Nathaniel Gorham to James Warren (March 6, 1786), in 23 LETTERS OF DELEGATES TO CONGRESS, *supra* note 35, at 180.

58. Note that 30,000 like 40,000 is a multiple of 5,000, as were each of the apportionment proposals made in the Continental Congress. See *supra* note 35.

59. The ratios 1:25,000 and 1:26,000 result in the same electoral vote margins and specifically in the same number of electors apportioned to North Carolina and Maryland, the two key states in the present analysis. See *infra* Tables 21 and 23. See *infra* text accompanying Tables 11 and 12, which will demonstrate that the Second Congress would have certainly replaced the ratio 1:27,000 with 1:28,000 since the former left significantly larger remainders than the latter.

not simply a matter of housekeeping that could be handled by House resolution.⁶⁰

1. *The First Reapportionment with the Three-Fifths Rule*

When the Second House began its work to reapportion the House, it read the constitutional text simply, divided each state's apportionment population by 30,000, and rounded down⁶¹—an apportionment method that has subsequently been named after Thomas Jefferson.⁶² This resulted in the 112-seat apportionment shown in Table 7.⁶³

TABLE 7 ACTUAL THREE-FIFTHS RULE HOUSE REAPPORTIONMENT OF 1791: RATIO OF 1:30,000

State	Basis Population	Seats	Remainder
New Jersey	179,570	5	29,570
Connecticut	236,841	7	26,841
Delaware	55,540	1	25,540
Vermont	85,533	2	25,533
Massachusetts	475,327	15	25,327
North Carolina	353,523	11	23,523
New Hampshire	141,822	4	21,822
Pennsylvania	432,879	14	12,879
Georgia	70,835	2	10,835
Kentucky ⁶⁴	68,705	2	8,705
Maryland	278,514	9	8,514
Rhode Island	68,446	2	8,446
New York	331,591	11	1,591
Virginia	630,560	21	560
<i>South Carolina</i>	<i>206,236</i>	<i>6</i>	<i>26,236</i>
Total (wo/SC)			229,686

60. DAVID P. CURRIE, *THE CONSTITUTION IN CONGRESS: THE FEDERALIST PERIOD* 130 (1997).

61. Proposed by John Laurance of New York on Oct. 31, 1791. 3 ANNALS OF CONG. 148 (1791).

62. For a description of Jefferson's method, see MICHAEL L. BALINSKI & H. PEYTON YOUNG, *FAIR REPRESENTATION: MEETING THE IDEAL OF ONE MAN, ONE VOTE* 10–15 (Brookings 2d ed. 2001).

63. For the 1790 census data, see 1790 CENSUS, *supra* note 17, at 3. South Carolina's final census data was not received until March 5, 1792. 3 ANNALS OF CONG. 100 (1792). I have interpolated South Carolina's final apportionment population. Prior to that date, most proposed bills omitted precise representation numbers for South Carolina.

64. The Kentucky Statehood Act became law on February 4, 1791, making provision for Kentucky to be admitted to the Union on June 1, 1792. Kentucky Statehood Act, 1 Stat. 189. A

The House quickly realized it would have to come to grips with the problem of rounding and the remainders it left.⁶⁵ Seeing that the ratio of 1:30,000 left the small states with large remainders, Hugh Williamson “observed that such a ratio should be adopted as would leave the fewest fractions, and at the same time do as much justice as possible to those States.”⁶⁶

During the course of its debate, the House heard proposals for ratios of 1:33,000, 1:34,000, 1:35,000, and 1:40,000⁶⁷ as it grappled with the problem of rounding. Table 8 presents remainders for all ratios from 1:30,000 to 1:40,000 (in increments of 1:1,000). None of the apportionments generated by any of these ratios satisfied everyone.

TABLE 8—RATIOS OF REPRESENTATION AND THEIR REMAINDERS, FIRST APPORTIONMENT WITH THREE-FIFTHS RULE⁶⁸

Ratio of Representation	Remainder (wo/SC)
1:30,000	229,686
1:31,000	247,686
1:32,000	209,686
1:33,000	142,686
1:34,000	213,686
1:35,000	224,686
1:36,000	313,686
1:37,000	338,686
1:38,000	293,686
1:39,000	211,686
1:40,000	369,686

After some debate, the House approved the choice of 1:30,000 as the ratio of representation, first by a vote of 35–23,⁶⁹ then by a vote of 43–12.⁷⁰

On December 7, the Senate voted in favor of the House bill by a margin of 13–11 and sent it on to a third reading the next day.⁷¹ With passage by both chambers almost in sight as the bill went to its third reading a day

subsequent act of February 25, 1791 provided Kentucky and Vermont each two seats in the House until reapportionment. Act of Feb. 25, 1791, ch. IX, 1 Stat. 191. Vermont became a state on March 4, 1791. Vermont Statehood Act, ch. VII, 1 Stat. 191. Hence, Vermont and Kentucky were always included in apportionment proposals even before admitted to statehood.

65. See generally CURRIE, *supra* note 60, at 128–35 and James, *supra* note 21.

66. 3 ANNALS OF CONG. 154 (1791).

67. *Id.* at 149, 154, 169, 188.

68. The total remainders have been computed using South Carolina’s final census tally, which was not received until March 5, 1792. *Id.* at 100.

69. *Id.* at 191.

70. *Id.* at 210.

71. *Id.* at 43–44.

later, the Senate “expunged” the first section of the House version (containing 1:30,000 as the ratio of representation) and considered an amended version based on 1:33,000 as the ratio of representation.⁷² Vice President John Adams broke the tie in favor of the 1:33,000 ratio when Stephen Bradley of Vermont, who had voted for the ratio of 1:30,000 the day before, cast the key vote in favor of the 1:33,000 ratio, leaving the Senate evenly divided 12–12.⁷³ Bradley must have switched his vote when he realized that a ratio of 1:33,000 produced a smaller, 105 member House in which his state had greater power than in a 112 member House.

The House and Senate remained at loggerheads over the ratio of representation for nearly three months as the Senate’s change in the ratio was seen as having “diminish[ed] the fractions to the Eastward, and increase[d] those to the Southward,” in the words of North Carolina’s Hugh Williamson.⁷⁴ With the two chambers unable to agree on a ratio of representation for Jefferson’s method, the Senate resuscitated a proposal:

Made by dividing the whole aggregate numbers of the people of the United States by thirty thousand, and apportioning them among the several States by that ratio, until they shall respectively have the number to which it will entitle them, and the residue of said members among those States having the highest fractions.⁷⁵

This proposal, using a method since dubbed the *Hamilton method of apportionment*,⁷⁶ resulted in a 120-seat House, with the eight extra seats awarded to New Hampshire, Vermont, Massachusetts, Connecticut, New Jersey, Delaware, North Carolina, and South Carolina. It barely passed the Senate by a 14–13 vote.⁷⁷

At first, the House rejected the Senate’s new apportionment by a vote of 30–31.⁷⁸ After the Senate voted to *insist* on its amendment by the same 14–13 vote,⁷⁹ the House finally capitulated by the narrow margin of 31–29.⁸⁰

The Senate’s insistence on its amendment would soon prove to have been in vain. Concerned “that the vote for and against the bill was perfectly geographical, a northern against a southern vote, and he feared he should be

72. 3 ANNALS OF CONG. 46–47 (1791).

73. *Id.* at 47.

74. *Id.* at 244. Strictly speaking, Williamson erred when he said that the southern fractions had increased. Not counting South Carolina, they had been reduced slightly from 77,677 to 71,677. But the impact on the northern states was much more dramatic, with a reduction from 152,009 to 71,009.

75. *Id.* at 105–06. March 12, 1792. The Senate voted down a motion to include this explanatory text by a vote of 7–20. *Id.* at 106.

76. For a description of the Hamilton method, see BALINSKI & YOUNG, *supra* note 62, at 16–23.

77. 3 ANNALS OF CONG. 105 (1792).

78. *Id.* at 473.

79. *Id.* at 111.

80. *Id.* at 482.

thought to be taking side with a southern party. . .”⁸¹ President Washington found constitutional grounds to issue his first veto.⁸² Following the advice of Secretary of State Thomas Jefferson, Washington made the following objections in his veto message to Congress:

First. The Constitution has prescribed that Representatives shall be apportioned among the several states according to their respective numbers; and there is no one proportion or divisor which applied to the respective numbers of the States, will yield the number and allotment of Representatives proposed by the bill.

Second. The Constitution has also provided that the number of Representatives shall not exceed one for every thirty thousand; which restriction is, by the context, and by fair and obvious construction, to be applied to the separate and respective numbers of the States; and the bill has allotted to eight of the States more than one for every thirty thousand.⁸³

Unable to override the first presidential veto,⁸⁴ the House narrowly voted for the Senate’s preferred ratio of representation, 1:33,000.⁸⁵ On April 10, the bill breezed through three readings in the Senate, which then passed the bill without recording the vote.⁸⁶ On April 14, President Washington signed the bill into law.⁸⁷

2. *The First Reapportionment with a No-Fifths Rule*

Had the Convention enshrined a no-fifths rule in the Constitution, the Second Congress would not have chosen 1:33,000 as the ratio of representation for the new apportionment starting with the third House in 1793. For the sake of clarity, the present analysis is temporarily separated into two

81. Memorandum from Thomas Jefferson (mistakenly dated as Apr. 6, 1792, most likely Apr. 4, 1792), in 4 MEMOIR, CORRESPONDENCE, AND MISCELLANIES, FROM THE PAPERS OF THOMAS JEFFERSON 466–67 (Thomas Jefferson Randolph ed., 1829). 3 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 23, at 366.

82. In addition, by April 3, word got to Washington that Supreme Court Justice James Wilson also had grave concerns about the constitutionality of the bill. 23 THE PAPERS OF THOMAS JEFFERSON 377 editor’s note (Charles T. Cullen et. al. eds., 1950) [hereinafter JEFFERSON PAPERS]. One set of Washington’s editors reports that “GW apparently had earlier requested [Attorney-General Edmund] Randolph to consult with U.S. Supreme Court justices James Wilson and John Blair about the constitutionality of the Apportionment Bill.” 10 THE PAPERS OF GEORGE WASHINGTON: PRESIDENTIAL SERIES 222 n.1 (Robert F. Haggard & Mark A. Mastromarino eds., 2002).

83. 3 ANNALS OF CONG. 539 (1792). For Jefferson’s memorandum, see 23 JEFFERSON PAPERS, *supra* note 82, at 370–76. For Alexander Hamilton’s ineffectual memorandum in support of the bill, see 11 THE PAPERS OF ALEXANDER HAMILTON 228–30 (Harold C. Syrett & Jacob E. Cooke eds., 1961–87). Jefferson’s vigorous analysis is riddled with errors, many of which were only addressed forty years later by Daniel Webster during the apportionment debate following the 1830 census. See 8 REG. DEB. 94 app. (1832).

84. 3 ANNALS OF CONG. 539 (1792). The vote was 28–33.

85. *Id.* at 548–49. The vote was 34–30.

86. *Id.* at 120.

87. See Act of Apr. 14, 1792, ch. XXIII, 1 Stat. 253 (apportioning Representatives among the several states).

parts. The first assumes that the maximal ratio of representation in the no-fifths rule Union was 1:30,000. The second supposes it was a value between 1:25,000 and 1:29,000.

If the Convention had retained the requirement that “the number of Representatives shall not exceed one for every thirty thousand,” the Second Congress would have chosen 1:30,000 as the ratio of representation for the new apportionment.

The Second House’s first gambit was to read the constitutional text as written and try out 1:30,000 as the ratio of representation.⁸⁸ In the hypothetical no-fifths rule Union, this results in the following apportionment of ninety-eight House seats shown in Table 9.

TABLE 9 NO-FIFTHS RULE HOUSE REAPPORTIONMENT OF 1791: 1:30,000 AS THE RATIO OF REPRESENTATION

State	Free Population	Seats	Remainder
Vermont	85,523	2	25,523
Massachusetts	475,327	15	25,327
Connecticut	235,182	7	25,182
Georgia	53,284	1	23,284
North Carolina	293,179	9	23,179
New Jersey	172,716	5	22,716
New Hampshire	141,727	4	21,727
Delaware	50,207	1	20,207
New York	318,796	10	18,796
Pennsylvania	430,636	14	10,636
Rhode Island	67,877	2	7,877
Maryland	216,692	7	6,692
Virginia	454,983	15	4,983
Kentucky	61,247	2	1,247
<i>South Carolina</i>	<i>141,979</i>	<i>4</i>	<i>21,979</i>
Total (wo/SC)			237,376

On seeing this large remainder, the House in the hypothetical no-fifths rule Union would have no doubt looked for a *better* ratio, as the House in the actual, three-fifths rule Union did.⁸⁹ Looking at the remainders presented in Table 10, the hypothetical House would not have found a ratio better than 1:30,000.

88. See *supra* Part II.A.1.

89. See *supra* text accompanying notes 61–66.

TABLE 10 NO-FIFTHS RULE HOUSE REAPPORTIONMENT OF 1791:
ALTERNATE RATIOS OF REPRESENTATION AND THEIR
REMAINDERS—1:30,000 TO 1:35,000

State	Free Population	Ratio of Representation					
		30,000	31,000	32,000	33,000	34,000	35,000
Delaware	50,207	20,207	19,207	18,207	17,207	16,207	15,207
Georgia	53,284	23,284	22,284	21,284	20,284	19,284	18,284
Kentucky	61,247	1,247	30,247	29,247	28,247	27,247	26,247
Rhode Island	67,877	7,877	5,877	3,877	1,877	33,877	32,877
Vermont	85,523	25,523	23,523	21,523	19,523	17,523	15,523
Small States Subtotal		78,138	101,138	94,138	87,138	114,138	108,138
New Hampshire	141,727	21,727	17,727	13,727	9,727	5,727	1,727
New Jersey	172,716	22,716	17,716	12,716	7,716	2,716	32,716
Maryland	216,692	6,692	30,692	24,692	18,692	12,692	6,692
Connecticut	235,182	25,182	18,182	11,182	4,182	31,182	25,182
Medium States Subtotal		76,317	84,317	62,317	40,317	52,317	66,317
North Carolina	293,179	23,179	14,179	5,179	29,179	21,179	13,179
New York	318,796	18,796	8,796	30,796	21,796	12,796	3,796
Pennsylvania	430,636	10,636	27,636	14,636	1,636	22,636	10,636
Virginia	454,983	4,983	20,983	6,983	25,983	12,983	34,983
Massachusetts	475,327	25,327	10,327	27,327	13,327	33,327	20,327
Large States Subtotal		82,921	81,921	84,921	91,921	102,921	82,921
Total (wo/SC)		237,376	267,376	241,376	219,376	269,376	257,376
Free States		157,784	129,784	135,784	79,784	159,784	142,784
Slave States (wo/SC)		79,592	137,592	105,592	139,592	109,592	114,592

Of the alternate ratios within hailing distance of 1:30,000, only 1:33,000 offered any relief for the remainders. That relief was modest at best and came at the expense of the smallest states and the slave states when compared to the ratio specified in the constitutional text.⁹⁰

Table 11 and Table 12 show the apportionment results that the Second Congress would have faced if the Convention had chosen a more capacious maximal ratio of representation than 1:30,000.

90. The ratio of 1:39,000 offered a remainder of 210,376 (excluding South Carolina). However, the smallest states and the slave states would have carried greater remainders in that seventy-seven-seat House than in the ninety-eight-seat House resulting from a ratio of 1:30,000.

TABLE 11 NO-FIFTHS RULE HOUSE REAPPORTIONMENT OF 1791:
ALTERNATE RATIOS OF REPRESENTATION AND THEIR JEFFERSON
APPORTIONMENT REMAINDERS—1:25,000 TO 1:30,000

State	Free Population	Ratio of Representation					
		25,000	26,000	27,000	28,000	29,000	30,000
Delaware	50,207	207	24,207	23,207	22,207	21,207	20,207
Georgia	53,284	3,284	1,284	26,284	25,284	24,284	23,284
Kentucky	61,247	11,247	9,247	7,247	5,247	3,247	1,247
Rhode Island	67,877	17,877	15,877	13,877	11,877	9,877	7,877
Vermont	85,523	10,523	7,523	4,523	1,523	27,523	25,523
Small States Subtotal		43,138	58,138	75,138	66,138	86,138	78,138
New Hampshire	141,727	16,727	11,727	6,727	1,727	25,727	21,727
New Jersey	172,716	22,716	16,716	10,716	4,716	27,716	22,716
Maryland	216,692	16,692	8,692	692	20,692	13,692	6,692
Connecticut	235,182	10,182	1,182	19,182	11,182	3,182	25,182
Medium States Subtotal		66,317	38,317	37,317	38,317	70,317	76,317
North Carolina	293,179	18,179	7,179	23,179	13,179	3,179	23,179
New York	318,796	18,796	6,796	21,796	10,796	28,796	18,796
Pennsylvania	430,636	5,636	14,636	25,636	10,636	24,636	10,636
Virginia	454,983	4,983	12,983	22,983	6,983	19,983	4,983
Massachusetts	475,327	327	7,327	16,327	27,327	11,327	25,327
Large States Subtotal		47,921	48,921	109,921	68,921	87,921	82,921
Total (wo/SC)		157,376	145,376	222,376	173,376	244,376	237,376
Free States		102,784	81,784	118,784	79,784	158,784	157,784
Slave States (wo/SC)		54,592	63,592	103,592	93,592	85,592	79,592

TABLE 12 NO-FIFTHS RULE HOUSE REAPPORTIONMENT OF 1791:
ALTERNATE RATIOS OF REPRESENTATION AND THEIR STATE-BY-STATE
JEFFERSON APPORTIONMENTS—1:25,000 TO 1:30,000

State	Free Population	Ratio of Representation					
		25,000	26,000	27,000	28,000	29,000	30,000
Delaware	50,207	2	1	1	1	1	1
Georgia	53,284	2	2	1	1	1	1
Kentucky	61,247	2	2	2	2	2	2
Rhode Island	67,877	2	2	2	2	2	2
Vermont	85,523	3	3	3	3	2	2
Small States Total		11	10	9	9	8	8
New Hampshire	141,727	5	5	5	5	4	4
New Jersey	172,716	6	6	6	6	5	5
Maryland	216,692	8	8	8	7	7	7
Connecticut	235,182	9	9	8	8	8	7
Medium States Total		28	28	27	26	24	23
North Carolina	293,179	11	11	10	10	10	9
New York	318,796	12	12	11	11	10	10
Pennsylvania	430,636	17	16	15	15	14	14
Virginia	454,983	18	17	16	16	15	15
Massachusetts	475,327	19	18	17	16	16	15
Large States Total		77	74	69	68	65	63
Total (wo/SC)		116	112	105	103	97	94
<i>South Carolina</i>	<i>141,979</i>	<i>5</i>	<i>5</i>	<i>5</i>	<i>5</i>	<i>4</i>	<i>4</i>
Free		73	71	67	66	61	59
Slave		43	41	38	37	36	35

If the Convention had chosen 1:25,000 as the maximal ratio of representation, the Second Congress might have considered changing the ratio to 1:26,000, which gave a slightly smaller total remainder. However, this slight improvement would have cost Delaware a second seat.

If 1:26,000 had been the maximal ratio of representation written into the Constitution, the Second Congress would have certainly employed that ratio when it reapportioned the House. It yielded the smallest overall remainder and any change from this maximal ratio would deny Georgia its second seat.

With 1:28,000 leaving a significantly smaller remainder of 173,376 benefitting the small states and especially the large states, the Second Congress would have been much more inclined to reject 1:27,000 in favor 1:28,000 as the ratio of representation when it resized the House. The ratio of 1:28,000 achieved its advantages by benefiting the free states much more than the slave states. This might have generated resistance to making the change from 1:27,000 to 1:28,000, but most likely not. The practical impact

of changing the ratio from 1:27,000 to 1:28,000 would have been limited to one-seat losses for Maryland and Massachusetts.

The ratio of 1:28,000 left a smaller total remainder than any less capacious ratio of representation. Moreover, a change to 1:29,000 would have cost six states a seat in the next House (plus South Carolina as it turned out). The only reason to change the ratio would have been to improve the prospects of the slave states at the expense of the free states. It is hard to imagine the slave states having the votes to make such a change, especially since it would have cost Virginia a seat.

With 1:29,000 as the maximal ratio of representation, the Second Congress would have faced the slight temptation to change the ratio to 1:30,000 to improve the total remainder. Although this would have benefited the slave states more than the free states, it would have cost Connecticut, Massachusetts, and North Carolina one seat each. It seems unlikely that the Second Congress would have made this change for such a slight improvement in the total remainder.

C. *The 1800 Electoral Vote with a No-Fifths Rule*

A literal reading of Freehling's claims is that replacing the three-fifths rule with a no-fifths rule would have resulted in Jefferson receiving twelve fewer electoral votes in 1800 than he actually did, and Adams receiving two fewer electoral votes in that election than he actually did, *and nothing more*.

In an Electoral College where the three-fifths clause gave *Southerners* 14 extra electors, the Republicans' Thomas Jefferson defeated the Federalists' John Adams 73–65. If no three-fifths clause had existed and House apportionment had been based strictly on white numbers, Adams would have likely squeaked by, 63–61.⁹¹

The analysis of the 1800 election commences by correcting Freehling's analysis, while maintaining the supposition that Congress would have employed 1:33,000 as the ratio of representation for the first reapportionment of the House. Having demonstrated that Congress would not have used that ratio, the analysis focuses on the ratios (and methods) it would have considered.

1. *Freehling's Analysis Corrected*

The three-fifths rule applied to the nation above the Mason-Dixon line as well as below it. In making his claim, Freehling failed to notice that New York would not have been apportioned its tenth House seat without its 1790 slave population of 21,324.

91. FREEHLING, *supra* note 1, at 147 (emphasis added). For a similar statement focused on the three-fifths rule's impact on just the South, see WILLS, *supra* note 1, at 2.

With the claim that the Adams ticket captured two electoral votes due to the three-fifths rule, Freehling's analysis undoubtedly supposes that one of these electoral votes is lost in Maryland and the other in North Carolina.⁹² Table 13 reconstructs Freehling's totals in a 123-member Electoral College based on 1:33,000 as the ratio of representation in a no-fifths rule Union, in which New York has eleven rather than twelve presidential electors.

TABLE 13 FREEHLING'S ELECTORAL VOTE TOTALS RECONSTRUCTED AND ADJUSTED FOR NEW YORK

State	1790 Free Population	House Seats	Electors	Jefferson Ticket	Adams Ticket
Connecticut	235,182	7	9	0	9
Delaware	50,207	1	3	0	3
Georgia	53,284	1	3	3	0
Kentucky	61,247	1	3	3	0
<i>Maryland</i>	<i>216,692</i>	<i>6</i>	<i>8</i>	<i>4</i>	<i>4</i>
Massachusetts	475,327	14	16	0	16
New Hampshire	141,727	4	6	0	6
New Jersey	172,716	5	7	0	7
New York	318,796	9	11	11	0
<i>North Carolina</i>	<i>293,179</i>	<i>8</i>	<i>10</i>	<i>7</i>	<i>3</i>
Pennsylvania	430,636	13	15	8	7
Rhode Island ⁹³	67,877	2	4	0	4
South Carolina	141,979	4	6	6	0
Tennessee	32,274	1	3	3	0
Vermont	85,523	2	4	0	4
Virginia	454,983	13	15	15	0
Total		91	123	60	63

The World Wide Web was just about to make its debut when Freehling published *The Road to Disunion* in 1990.⁹⁴ Among the many persons to take advantage of the web, none is more important to scholars of the early republic than Philip Lampi, who has devoted much of his adult life to col-

92. In addition to Maryland and North Carolina, Delaware was the only other slave state in which Adams won electoral votes. Adams could not have lost any electoral votes in Delaware, as that state had only three electors, the minimum number possible.

93. One of Rhode Island's electors cast an electoral vote for John Jay. The present analysis disregards that sloughed off vote when appropriate.

94. Posting of Tim Berners-Lee to <https://groups.google.com/forum/#!msg/alt.hypertext/eCTkkOoWTAY/bJGhZyooXzKJ> (Aug. 6, 1991).

lecting election data from that era⁹⁵ and posting it on the Internet since 2007.⁹⁶

Three states split their electoral vote in 1800: Pennsylvania, Maryland, and North Carolina. Of these, Pennsylvania had the same number of electoral votes in Freehling's no-fifths rule analysis as it had in the actual three-fifths rule election. Consequently, there is no reason to suppose that the Pennsylvania legislature would not also have chosen eight Jefferson electors and seven Adams electors in this no-fifths rule election, just as it did in the actual three-fifths rule election.

Maryland and North Carolina are another matter. Fortuitously, each loses two electoral votes in Freehling's no-fifths rule analysis compared to the actual three-fifths rule election, leaving each state with a number of presidential electors equal to the number of representatives it actually had in the three-fifths rule Union. It is certainly reasonable to suppose that the Maryland and North Carolina legislatures would have used the same eight-district and ten-district plans that they actually used for three-fifths rule congressional districts for the same number of presidential elector districts in a no-fifths rule Union. Fortunately, each of these districting plans respected county boundaries and that makes for an easy application of county level voting data for 1800 from *A New Nation Votes*.

Jefferson and Adams split Maryland's ten electoral votes in the actual three-fifths rule election. However, as shown in Table 14, in a no-fifths rule election with eight electoral districts, Jefferson wins five electoral votes and Adams only wins three.⁹⁷

95. Lampi's data is available at Phillip Lampi ed., *A New Nation Votes: American Election Returns 1787–1825*, AM. ANTIQUARIAN SOC'Y (2007), <https://elections.lib.tufts.edu> (last visited July 30, 2018) [hereinafter *A New Nation Votes*]. Unless otherwise stated, all election data is from this source. For Lampi's remarkable story, see Katherine Mangu-Ward, *The Orphan Scholar*, HUMAN., Jan.–Feb. 2008, at 36–37.

96. E-mail from Pamela Hopkins, Public Service and Outreach Archivist, Digital Collections and Archives, Tufts University, to author (July 30, 2018) (on file with author).

97. For the data, see *A New Nation Votes*, *supra* note 95, at <https://elections.lib.tufts.edu/catalog/tufts.md.presidentialelector1.1800> through <https://elections.lib.tufts.edu/catalog/tufts.md.presidentialelector10.1800> (last visited July 30, 2018) (spreadsheet on file with author).

TABLE 14 MARYLAND 1800 EIGHT ELECTORAL DISTRICT RESULTS

District	Popular Vote		Electors	
	Jefferson	Adams	Jefferson	Adams
1	67	1,114	0	1
2	1,336	1,074	1	0
3	920	2,125	0	1
4	2,482	2,182	1	0
5	2,340	672	1	0
6	1,828	753	1	0
7	1,460	613	1	0
8	196	1,485	0	1
Total	10,629	10,018	5	3

This should come as no shock to students of districting. Nor should the fact that in a no-fifths rule, ten elector districting in North Carolina, Jefferson's 8–4 vote margin completely vanishes in favor of a 5–5 split.⁹⁸ Table 15 presents the result of a ten elector districting in North Carolina.

98. See *id.* at <https://elections.lib.tufts.edu/catalog/tufts:nc.presidentialelector.edenton.1800>, <https://elections.lib.tufts.edu/catalog/tufts:nc.presidentialelector.edgecombe.1800>, <https://elections.lib.tufts.edu/catalog/tufts:nc.presidentialelector.fayetteville.1800>, <https://elections.lib.tufts.edu/catalog/tufts:nc.presidentialelector.orange.1800>, <https://elections.lib.tufts.edu/catalog/tufts:nc.presidentialelector.morgan.1800>, <https://elections.lib.tufts.edu/catalog/tufts:nc.presidentialelector.newbern.1800>, <https://elections.lib.tufts.edu/catalog/tufts:nc.presidentialelector.northampton.1800>, <https://elections.lib.tufts.edu/catalog/tufts:nc.presidentialelector.raleigh.1800>, <https://elections.lib.tufts.edu/catalog/tufts:nc.presidentialelector.rockingham.1800>, <https://elections.lib.tufts.edu/catalog/tufts:nc.presidentialelector.salisbury.1800>, <https://elections.lib.tufts.edu/catalog/tufts:nc.presidentialelector.halifax.1800>, <https://elections.lib.tufts.edu/catalog/tufts:nc.presidentialelector.wilmington.1800> (last visited July 30, 2018) (spreadsheet on file with author). *A New Nation Votes* does not present voting data for North Carolina's Edenton electoral district in the northeast corner of the state, whose elector voted for Jefferson. The Edenton district consisted of the following counties: Camden, Chowan, Currituck, Gates, Pasquotank, Perquimans, and Tyrell. These seven counties combined with Bertie and Hertford counties to form the eighth congressional district, and these two counties voted for Jefferson by 268–29 and 219–115. Consequently, Jefferson must have carried the actual eighth congressional district. The voting data presented for the eighth district is for Bertie and Hertford counties only.

Adams is the first case of not being able to fill in the blank in the following statement with a non-negative integer.

In state S, candidate C owed _____ electoral votes to the three-fifths rule.

TABLE 15 NORTH CAROLINA 1800 TEN ELECTORAL DISTRICT RESULTS

District	Popular Vote		Electors	
	Jefferson	Adams	Jefferson	Adams
1	1,374	484	1	0
2	1,058	1,794	0	1
3	1,918	1,052	1	0
4	1,338	692	1	0
5	1,555	582	1	0
6	736	1,395	0	1
7	264	1,868	0	1
8	487	144	1	0
9	1,420	1,512	0	1
10	1,342	1,401	0	1
Total	11,492	10,924	5	5

With these analyses for Maryland and North Carolina in hand, Freehling's analysis of the 1800 electoral vote can be revised to what it would have been in a no-fifths rule Union with the first apportionment of the House using 1:33,000 as the ratio of representation. Table 16 presents this revision.

TABLE 16 FREEHLING'S Electoral Vote Totals Reconstructed and Adjusted for New York, Maryland, and North Carolina

State	1790 Free Population	House Seats	Electors	Jefferson Ticket	Adams Ticket
Connecticut	235,182	7	9	0	9
Delaware	50,207	1	3	0	3
Georgia	53,284	1	3	3	0
Kentucky	61,247	1	3	3	0
<i>Maryland</i>	<i>216,692</i>	6	8	5	3
Massachusetts	475,327	14	16	0	16
New Hampshire	141,727	4	6	0	6
New Jersey	172,716	5	7	0	7
New York	318,796	9	11	11	0
<i>North Carolina</i>	<i>293,179</i>	8	<i>10</i>	5	5
Pennsylvania	430,636	13	15	8	7
Rhode Island	67,877	2	4	0	4
South Carolina	141,979	4	6	6	0
Tennessee	32,274	1	3	3	0
Vermont	85,523	2	4	0	4
Virginia	454,983	13	15	15	0
Total		91	123	64	59

In Freehling's 1:33,000, no-fifths rule Union, Adams wins the electoral vote 64–59, not 63–61.

2. *Freehling's Analysis Replaced*

Part II.B.2 demonstrated that Congress would not have employed 1:33,000 as the ratio of representation for the first reapportionment of the House in a no-fifths rule Union. Instead, it would have employed a ratio between 1:25,000 and 1:30,000, with a Jefferson-style apportionment.⁹⁹ Table 17 presents the maximum and minimum number of electors for each state for these ratios of representation and apportionment methods along with the number of electors in the actual three-fifths rule election as well as the selection method.¹⁰⁰

99. It is conceivable but unlikely that Congress would have passed and President Washington would have signed into law a Hamilton apportionment. For the sake of brevity and completeness, note 112 presents the final results for Hamilton apportionments with ratios of representation between 1:25,000 and 1:30,000. See *infra* note 112.

100. For a brief overview of elector selection methods in the early republic, see *McPherson v. Blacker*, 146 U.S. 1, 29–33 (1892).

TABLE 17 1800 ELECTORAL VOTE PARAMETERS

State	Selection Method	Split Vote	Electors		
			Actual	Maximum	Minimum
Connecticut	State Legislature	N	9	11	9
Delaware	State Legislature	N	3	4	3
Georgia	State Legislature	N	4	4	3
Kentucky	Popular, by District	N	4	4	4
<i>Maryland</i>	<i>Popular, by District</i>	<i>Y</i>	<i>10</i>	<i>10</i>	<i>9</i>
Massachusetts	State Legislature	N	16	21	17
New Hampshire	State Legislature	N	6	7	6
New Jersey	State Legislature	N	7	8	7
New York	State Legislature	N	12	14	12
<i>North Carolina</i>	<i>Popular, by District</i>	<i>Y</i>	<i>12</i>	<i>13</i>	<i>11</i>
<i>Pennsylvania</i>	<i>State Legislature</i>	<i>Y</i>	<i>15</i>	<i>19</i>	<i>16</i>
Rhode Island	Popular, Statewide	N	4	4	4
South Carolina	State Legislature	N	8	7	6
Tennessee	Popular, by District	N	3	3	3
Vermont	State Legislature	N	4	5	4
Virginia	Popular, Statewide	N	21	20	17

Three states split their electoral vote (and have a number of electors under consideration different than their actual number of electors): Pennsylvania, Maryland, and North Carolina. Projecting their electoral votes in possible no-fifths rule Union merits careful attention.

With Republicans in control of its House and Federalists in control of its Senate, Pennsylvania's legislature almost failed to choose any scheme to appoint electors.¹⁰¹ On December 1, 1800, the two chambers agreed that each would nominate eight electors and then select fifteen by joint ballot.¹⁰² With Republicans holding a majority of the two chambers combined, they got to choose the odd elector. The projections presented below suppose that if Pennsylvania has an odd number of electoral votes, then the Jefferson/Burr ticket wins the odd vote and that if Pennsylvania has an even number of electoral votes, then the two tickets split them evenly.

After choosing its electors by statewide popular vote in 1789 and 1792, the Maryland legislature switched to a ten-district system in 1795.¹⁰³ In the range of no-fifths rule possible Unions under consideration, Maryland has either ten or nine electors. For those cases in which Maryland has ten electors, it seems reasonable to suppose that it would have used the

101. See FERLING, *supra* note 1, at 157.

102. See Act of Dec. 1, 1800, ch. MMCXLIX, 16 Pa. Stat. 493–94 (directing the manner of appointing electors of a president and vice president of the United States).

103. See Act of Dec. 24, 1795, ch. LXXII, 1795 Md. Laws 66 (altering the mode of electing electors to choose the president and vice president of the United States).

same districting scheme it used in the actual, ten-elector, three-fifths rule election. Jefferson and Adams each receive five electoral votes for these cases. That leaves the cases in which Maryland has only nine electors.

Given its late autumn sessions, the Maryland legislature chose not to wait for the Second Congress to finish its resizing of the House of Representatives, an effort that lasted from late October 1791 to the middle of April 1792. Instead, in late December 1791, the Maryland legislature passed a bill to district the state for an eight or nine-member delegation. Each of the plans created eight districts. In the nine-member plan, the Fifth District, consisting of Baltimore City and Baltimore and Harford Counties, elected two representatives.¹⁰⁴ Again, it seems reasonable to presume that the Maryland legislature would have adopted the same plan in a no-fifths rule Union, in which it chose nine presidential electors.

Applying *A New Nation Votes'* data to the nine elector plan results in Adams's ticket winning only three electoral votes to six for Jefferson's ticket,¹⁰⁵ as shown in Table 18.

TABLE 18 MARYLAND 1800 ELECTOR PROJECTIONS BASED ON 1791
NINE MEMBER PLAN

District	Popular Vote		Electors	
	Jefferson	Adams	Jefferson	Adams
1	67	1,114	0	1
2	1,336	1,074	1	0
3	920	2,125	0	1
4	2,482	2,182	1	0
5	3,137	683	2	0
6	1,628	969	1	0
7	1,054	1,045	1	0
8	5	826	0	1
Total	10,629	10,018	6	3

North Carolina receives between eleven and thirteen electors in the range of no-fifths rule Unions under consideration. For twelve-elector cases, it is reasonable to suppose that the North Carolina legislature would

104. See Act of Dec. 26, 1791, ch. LXI, 1791 Md. Laws 589 (directing the mode of electing electors to choose the president and vice president of the U.S.).

105. Spreadsheets on file with author. *A New Nation Votes* provides town-by-town results for Frederick County, which the 1791 nine-member plan split between districts three and four. *A New Nation Votes*, *supra* note 95, at <https://elections.lib.tufts.edu/catalog/tufts:md.presidentialelector3.1800> (last visited July 30, 2018).

Jefferson is the second case of not being able to fill in the blank in the following statement with a non-negative integer.

In state S, candidate C owed _____ electoral votes to the three-fifths rule.

have employed the actual twelve-district plan enacted in 1792.¹⁰⁶ With that assumption in place, Jefferson receives eight electoral votes and Adams only receives four.

Unfortunately, the North Carolina legislature left no suggestions about how it might have districted the state to choose eleven or thirteen electors. North Carolina's actual, twelve-district plan respected county boundaries. So did its plan for ten congressional districts.¹⁰⁷ With fifty-eight counties, there are a myriad of possible ways to draw eleven-district or thirteen-district maps.

Rather than speculate on which districting the legislature might have chosen,¹⁰⁸ software has been developed to generate 50,000 such maps for eleven or thirteen presidential elector districts,¹⁰⁹ subject to the following constraints:

- No county is split between districts.
- Districts must consist of contiguous counties.
- A potential plan is rejected if any district's *free* population differs from the average free population per district by more than twenty percent.¹¹⁰
- In the actual ten-district and twelve-district maps drawn by the legislature, the first congressional district is identical to the first elector district. It consists of Burke, Lincoln, Rutherford, and Wilkes counties. Given the legislature's choice to retain this district in ten-district and twelve-district schemes, it is retained in the eleven-district schemes.
- As discussed previously, there is no data from *A New Nation Votes* for the twelfth elector district. Consequently, it can only be joined to counties that voted for Jefferson in the eleven-district plans. There are only two such counties adjacent to the twelfth district: Bertie and Hertford.
 - By fiat, in eleven-district plans, it is joined to Hertford County, whose free population of 3,386 produces a district closer to the statewide average, rather than Bertie, whose free population was 7,465.
 - By fiat, in the thirteen-district scheme, the twelfth elector district is retained as an elector district by itself.

106. See Act of 1792, ch. XVI, 1795 N.C. Acts 48–49 (directing the mode of electing electors to choose the president and vice president of the U.S.).

107. See Act of 1792, ch. XVII, 1795 N.C. Acts 50 (directing the division of the state into districts for the purpose of electing Representatives to Congress).

108. For discussions of the legislative politics of drawing the congressional maps, see DELBERT HAROLD GILPATRICK, *JEFFERSONIAN DEMOCRACY IN NORTH CAROLINA 1789–1816*, at 57–59 (1931); NORMAN K. RISJORD, *CHESAPEAKE POLITICS 1781–1800*, at 410–11 (1978). Neither of these sources has anything to say about drawing the map for elector districts.

109. Source code and input files on file with author.

110. In addition, each of the runs generated a small number of cases resulting in a popular vote tie in a district. These cases have been discarded from the results presented.

With these constraints in place, the software generated the results presented in Table 19 (for eleven electoral districts) and Table 20 (for thirteen electoral districts).¹¹¹

TABLE 19 NORTH CAROLINA 1800 ELEVEN ELECTOR PROJECTIONS

Cases	Percent	Electoral Votes	
		Jefferson	Adams
12	0.02%	9	2
1,288	2.59%	8	3
10,761	21.64%	7	4
22,320	44.89%	6	5
13,438	27.03%	5	6
1,888	3.80%	4	7
12	0.02%	3	8
49,719			

TABLE 20 NORTH CAROLINA 1800 THIRTEEN ELECTOR PROJECTIONS

Cases	Percent	Electoral Votes	
		Jefferson	Adams
8	0.02%	11	2
523	1.05%	10	3
4927	9.89%	9	4
15467	31.06%	8	5
18468	37.09%	7	6
8723	17.52%	6	7
1578	3.17%	5	8
103	0.21%	4	9
49,797			

With projections in place for the states that split their electoral votes, projections of the nationwide electoral vote can be made. Because of the distribution of results for North Carolina, the results are first presented exclusive of North Carolina, these results are then summarized and then the North Carolina distribution is added to complete the analysis.

Table 21 presents the results for the Jefferson-style apportionments, exclusive of North Carolina. The table displays Jefferson's electoral votes first, then Adams's. For example, the value in the cell for Pennsylvania with

111. In the eleven-electoral projections, 229 plans failed the population per district test and fifty-two resulted in a tied district. For the thirteen-electoral projections, these numbers were sixty-four and 139.

[1:]25,000 as the ratio of representation is “10–9,” means ten electoral votes for Jefferson and nine for Adams. Maryland’s results are highlighted.

TABLE 21 PRESIDENTIAL ELECTION OF 1800 PROJECTIONS, JEFFERSON–STYLE APPORTIONMENTS, NORTH CAROLINA EXCLUDED

State	Ratio of Representation					
	25,000	26,000	27,000	28,000	29,000	30,000
Connecticut	0–11	0–11	0–10	0–10	0–10	0–9
Delaware	0–4	0–3	0–3	0–3	0–3	0–3
Georgia	4–0	4–0	3–0	3–0	3–0	3–0
Kentucky	4–0	4–0	4–0	4–0	4–0	4–0
<i>Maryland</i>	5–5	5–5	5–5	6–3	6–3	6–3
Massachusetts	0–21	0–20	0–19	0–18	0–18	0–17
New Hampshire	0–7	0–7	0–7	0–7	0–6	0–6
New Jersey	0–8	0–8	0–8	0–8	0–7	0–7
New York	14–0	14–0	13–0	13–0	12–0	12–0
Pennsylvania	10–9	9–9	9–8	9–8	8–8	8–8
Rhode Island	0–4	0–4	0–4	0–4	0–4	0–4
South Carolina	7–0	7–0	7–0	7–0	6–0	6–0
Tennessee	3–0	3–0	3–0	3–0	3–0	3–0
Vermont	0–5	0–5	0–5	0–5	0–4	0–4
Virginia	20–0	19–0	18–0	18–0	17–0	17–0
Total (exclusive of North Carolina)	67–74	65–72	62–69	63–66	59–63	59–61

Table 22 presents the simple cases in which North Carolina has twelve electors.

TABLE 22 PRESIDENTIAL ELECTION OF 1800, JEFFERSON–STYLE APPORTIONMENTS, NORTH CAROLINA 12 ELECTORS INCLUDED

	Ratio of Representation					
	27,000		28,000		29,000	
Total excluding North Carolina	62–69		63–66		59–63	
North Carolina	8–4	100.00%	8–4	100.00%	8–4	100.00%
Total including North Carolina	70–73	100.00%	71–70	100.00%	67–67	100.00%

Table 23 adds in the range of North Carolina results for those cases in which the state has other than twelve electors.

TABLE 23 PRESIDENTIAL ELECTION OF 1800, JEFFERSON-STYLE
 APPORTIONMENTS, NORTH CAROLINA ELEVEN OR THIRTEEN
 ELECTORS INCLUDED

	Ratio of Representation					
	25,000		26,000		30,000	
Total excluding North Carolina	67-74		65-72		59-61	
North Carolina	11-2	0.02%	11-2	0.02%	9-2	0.02%
	10-3	1.05%	10-3	1.05%	8-3	2.59%
	9-4	9.89%	9-4	9.89%	7-4	21.64%
	8-5	31.06%	8-5	31.06%	6-5	44.89%
	7-6	37.09%	7-6	37.09%	5-6	27.03%
	6-7	17.52%	6-7	17.52%	4-7	3.80%
	5-8	3.17%	5-8	3.17%	3-8	0.02%
	4-9	0.21%	4-9	0.21%		
Total including North Carolina	78-76	0.02%	76-74	0.02%	68-63	0.02%
	77-77	1.05%	75-75	1.05%	67-64	2.59%
	76-78	9.89%	74-76	9.89%	66-65	21.64%
	75-79	31.06%	73-77	31.06%	65-66	44.89%
	74-80	37.09%	72-78	37.09%	64-67	27.03%
	73-81	17.52%	71-79	17.52%	63-68	3.80%
	72-82	3.17%	70-80	3.17%	62-69	0.02%
	71-83	0.21%	69-81	0.21%		

Table 24 summarizes the outcomes of the Jefferson-style apportionment in terms of winners and *ties*.¹¹²

112. Jefferson fares somewhat worse in the Hamilton apportionments.

Winner	Ratio of Representation					
	25,000	26,000	27,000	28,000	29,000	30,000
Jefferson	0.01%	0.02%	0.00%	0.00%	100.00%	0.00%
Tie	0.49%	1.05%	0.00%	0.00%	0.00%	0.00%
Adams	99.50%	98.93%	100.00%	100.00%	0.00%	100.00%

TABLE 24 PRESIDENTIAL ELECTION OF 1800, JEFFERSON-STYLE
APPORTIONMENTS—SUMMARY

Winner	Ratio of Representation					
	25,000	26,000	27,000	28,000	29,000	30,000
Jefferson	0.02%	0.02%	0.00%	100.00%	0.00%	24.26%
Tie	1.05%	1.05%	0.00%	0.00%	100.00%	0.00%
Adams	98.93%	98.93%	100.00%	0.00%	0.00%	75.74%

The outcome of the 1800 presidential election in a no-fifths rule Union would have depended critically on:

- The maximal ratio of representation specified in Nathaniel Gorham’s proposal on the last day of the Convention;
- Congress’s choice of a ratio of representation in the first reapportionment; and
- In some cases, the North Carolina legislature’s districting plan.¹¹³

There is even a small probability that the electoral vote would have ended in a (first-place) tie (at exactly half the total number of electors) between Jefferson and Adams (and Burr), sending those three names along with Pinckney and Jay to the House of Representatives.¹¹⁴ In that case,

113. Neubauer and Zeitlin have analyzed how the outcome of the electoral vote in 2000 critically depended on House size. See Michael G. Neubauer & Joel Zeitlin, *Outcomes of Presidential Elections and the House Size*, 36 PS: POL. SCI. & POL. 721, 721 (2003).

114. In a recent book calling for abolition of the Electoral College, Mark Weston claims that, “were it not for the early Constitution’s infamous ‘3/5’ rule that allowed southern states to count three-fifths of their slaves as population for the purpose of congressional and electoral apportionment, Adams would have narrowly beaten Jefferson by an electoral vote of 70 to 68.” MARK WESTON, *THE RUNNER-UP PRESIDENCY: THE ELECTIONS THAT DEFIED AMERICA’S POPULAR WILL* 71 (2016).

Weston provides neither analysis nor citations for this unique claim, which supposes that the Second Congress was somehow fixated on creating a House of 105 members (before the admission of Tennessee).

A 105-member House based on the 1790 census can be achieved in a no-fifths rule Union in one of two ways: a Jefferson-style apportionment based on a ratio of representation between 28,437 and 28,507, inclusive, and in round numbers, 28,500. Of course, such an analysis needs to ask whether the Second Congress would have chosen a ratio of representation not divisible by 1,000, and if so, why would it have been 28,500, which leaves New Hampshire, South Carolina, and almighty Virginia with remainders of at least 27,483.

A Hamilton apportionment based on a ratio of representation of 30,000 also yields a 105-member House based on a no-fifths rule. This is the same ratio of representation in the actual text of Article I of the U.S. Constitution, and as this article has shown, it might have been there in a no-fifths rule Union.

Amazingly, each of these apportionments yields a 70–68 electoral vote victory for Adams based on the following assumptions in the three states that split their electoral votes (showing Jefferson’s electoral votes first).

Alexander Hamilton would have had an opportunity to engineer the selection of Charles Cotesworth Pinckney as a compromise candidate.¹¹⁵

III. THE THREE-FIFTHS RULE AND THE ELECTION OF 1824

Perhaps no one has seen his presidential ambitions frustrated more cruelly than Henry Clay did in 1824. The final electoral vote recorded Andrew Jackson with ninety-nine, John Quincy Adams with eighty-four, William Crawford with forty-one, and Clay with thirty-seven.¹¹⁶ Table 25 presents these results by state.

State	Jefferson (28,500)	Hamilton (30,000)
Pennsylvania	9–8	8–8
North Carolina	8–4	8–4
Maryland	5–4	5–4

The hypothetical allocations for Pennsylvania are based on the statute passed giving the legislature the power to choose the electors. The hypothetical allocations for North Carolina match the actual outcome. Given Jefferson's small popular vote margin in Maryland, coupled with that state splitting its electoral vote 5–5, the 5–4 split *seems* reasonable, but this article has shown that a 6–3 split would have been more likely. That would have resulted in Jefferson and Adams (and Burr) each receiving sixty-nine electoral votes, leaving no one with a majority.

115. For the actual House election of 1801, see FERLING, *supra* note 1, at 175–96. For Hamilton's machinations on behalf of Pinckney, see *id.* at 142–43, 158–61.

116. 1 REG. DEB. 526 (1825).

TABLE 25 1824 ELECTORAL VOTE, ACTUAL

State	Selection Method	Electoral Votes	Jackson	Adams	Crawford	Clay
Alabama	Statewide	5	5			
Connecticut	Statewide	8		8		
Delaware	Legislature	3		1	2	
Georgia	Legislature	9			9	
Illinois	District	3	2	1		
Indiana	Statewide	5	5			
Kentucky	District	14				14
Louisiana	Legislature	5	3	2		
Maine	District	9		9		
Maryland	District	11	7	3	1	
Massachusetts	Statewide	15		15		
Mississippi	Statewide	3	3			
Missouri	District	3				3
New Hampshire	Statewide	8		8		
New Jersey	Statewide	8	8			
New York	Legislature	36	1	26	5	4
North Carolina	Statewide	15	15			
Ohio	Statewide	16				16
Pennsylvania	Statewide	28	28			
Rhode Island	Statewide	4		4		
South Carolina	Legislature	11	11			
Tennessee	District	11	11			
Vermont	Legislature	7		7		
Virginia	Statewide	24			24	
Total		261	99	84	41	37

Following the election, Clay wrote to James Brown, “*accident* alone prevented my return to the H. of R. and, as is generally now believed, my election.”¹¹⁷ In spite of the accidents he suffered, Clay would have finished ahead of Crawford in third place in the electoral vote in a no-fifths rule Union.

A. *The Electoral Vote of 1824*

Even before Congress tallied the all but unanimous electoral vote for James Monroe’s second term, well-placed observers speculated that the

117. Letter from Henry Clay to James Brown (Jan. 23, 1825), in 4 THE PAPERS OF HENRY CLAY 38 (James F. Hopkins ed., 1972) [hereinafter CLAY PAPERS].

election of his successor would devolve on the House of Representatives.¹¹⁸ Clay's strategy all along was to garner enough electoral votes to be among the "persons having the highest numbers not exceeding three on the list of those voted for as President."¹¹⁹ Clay fully expected he would win the House election.¹²⁰ Others expected his election via this scenario as well.¹²¹

1. *Clay Finishes Dead Last*

Clay's first accident came in New York, a state in which the legislature chose the electors.¹²² According to that state's law, each house of the legislature would choose a slate of thirty-six electors, with a joint vote of the two houses resolving any differences between the two slates.¹²³ Such a joint vote was in order after the Senate chose a slate of twenty-nine Crawford electors and seven Clay electors, and the Assembly chose a full slate of Adams electors with the support of the Clay and Crawford factions.¹²⁴

One hundred fifty-seven members were present when the legislature met in joint session on November 15 to finalize its choice of electors. On the first ballot, the seven Clay electors received ninety-five votes, twenty-five Adams electors received seventy-eight votes, the Crawford electors received seventy-six votes, and three ballots were left blank. With 157 members present, the Crawford forces argued that seventy-nine votes were needed for a majority. However, the Adams faction prevailed in their view

118. See Letter from William Plumer Jr. to William Plumer (Nov. 24, 1820), in *THE MISSOURI COMPROMISES AND PRESIDENTIAL POLITICS, 1820-1825*, 55 (Everett Somerville Brown ed., 1926) [hereinafter *THE MISSOURI COMPROMISES*]. For similar comments from the first half of 1822, see Letters from Rufus King, in 6 *THE LIFE AND CORRESPONDENCE OF RUFUS KING* 437, 456, 468 (Charles R. King ed., 1900) [hereinafter *RUFUS KING*].

119. U. S. CONST. amend. XII. For the recognition that this was Clay's strategy, see Letter from Rufus King to Jeremiah Mason (May 17, 1822), in *RUFUS KING*, *supra* note 118, at 471; Letter from Rufus King to Christopher Gore (June 5, 1822), in *id.* at 475; Letter from William Plumer Jr. to William Plumer (Dec. 21, 1822), in *THE MISSOURI COMPROMISES*, *supra* note 118, at 81.

120. See Letter from Henry Clay to Josephus B. Stuart (Dec. 19, 1823), in 3 *CLAY PAPERS*, *supra* note 117, at 544-45; Letter from Henry Clay to Francis T. Brooke (Jan. 22, 1824), in *id.* at 603; Letter from Henry Clay to Peter B. Porter (Jan. 31, 1824), in *id.* at 630; Letter from Henry Clay to Charles Hammond (Feb. 22, 1824), in *id.* at 654; Letter from Henry Clay to Francis T. Brooke (Feb. 26, 1824), in *id.* at 662; Letter from Henry Clay to Peter B. Porter (Apr. 26, 1824), in *id.* at 743.

121. See Letter from Willie P. Mangum to Thomas Ruffin (Jan. 20, 1824), in 1 *THE PAPERS OF WILLIE PERSON MANGUM* 109 (Henry Thomas Shanks ed., 1950); Letter from Willie P. Mangum to Seth Jones (Feb. 11, 1824), in *id.* at 116; Letter from W. H. Haywood Jr. to Willie P. Mangum (Feb. 23, 1824), in *id.* at 120.

122. Earlier in the year, Crawford's supporters in the New York Senate had beaten back an attempt to enact a law placing the selection of presidential electors in the hands of the voters. See THURLOW WEED, 1 *LIFE OF THURLOW WEED INCLUDING HIS AUTOBIOGRAPHY AND A MEMOIR EMBELLISHED WITH PORTRAITS AND OTHER ILLUSTRATIONS COMPLETE IN TWO VOLUMES* 105 (Harriet Weed ed., 1884).

123. ROBERT V. REMINI, *MARTIN VAN BUREN AND THE MAKING OF THE DEMOCRATIC PARTY* 73 (1959) [hereinafter *VAN BUREN*].

124. *Id.* at 76-77.

that a majority of the 154 *voting* members was sufficient to elect the twenty-five Adams electors and the seven Clay electors on this first ballot. A day later, the legislature awarded the final four spots to Crawford electors.¹²⁵

Had Clay received seven electoral votes from New York and Crawford four, the two of them would have ended up in a 40–40 tie in third place in the Electoral College. But New York did not cast its electoral vote that way. When the electors met on December 1, two Clay electors were absent and replaced by Adams supporters. A third Clay elector voted for Jackson.¹²⁶ With an Adams elector voting for Crawford, the New York electoral vote was twenty-six for Adams, five for Crawford, four for Clay, and one for Jackson.

Clay's second accident came in Louisiana where a coalition of Jackson and Adams forces aligned in an attempt to deny Clay the state's five electoral votes.¹²⁷ These electoral votes slipped away from Clay's grasp when four key Clay-backers in the legislature were unexpectedly absent and three more defected to the Adams-Jackson coalition. As a result, the legislature narrowly voted for a slate of three Jackson electors and two Adams electors.¹²⁸

Had Clay swept Louisiana's electoral vote, he would have finished one vote ahead of Crawford in the Electoral College, even with the unexpected outcome in New York. Had he carried Louisiana and had New York's electoral vote been cast as expected, Clay would have received forty-five electoral votes to Crawford's forty (with ninety-five for Jackson and eighty-one for Adams).

125. *Id.* at 80.

126. *Id.* at 82. Remini writes that "It is futile to guess what took place during these two short weeks [leading up to the electors' vote]." Crawford's biographer Chase Mooney writes:

Probably no one will ever know exactly what happened, but there have been several speculations and accounts. Roger Skinner, writing to Van Buren on December 1, said John Taylor (who had been appointed to one of the vacancies) was active, as was Ambrose Spencer, in trying to secure six votes for Crawford. Hammond and others, according to Skinner, said the Adamsites had violated a pledge to give Clay eight votes in consideration of Clay's friends' support of the successful ticket. Jackson's friends had attended the meeting of the electors and had sought to effect a division of the votes between Jackson and Adams.

CHASE C. MOONEY, WILLIAM H. CRAWFORD 294–95 n.63 (1974).

127. Letter from David Corbin Ker to Andrew Jackson (Nov. 23, 1824), in 5 THE PAPERS OF ANDREW JACKSON 450 (Harold D. Moser et al. eds., 1996).

128. According to Jackson's editors, two Old Hickory electors were chosen on the first ballot, as was an Adams elector. The third Jackson elector was chosen on the fourth ballot, and the second Adams elector on the fifth ballot. *Id.* at 451 n.1. Clay wrote to his friends that he had lost the balloting by a vote of 30–28. See Letter from Henry Clay to Francis T. Brooke (Dec. 22, 1824), in 3 CLAY PAPERS, *supra* note 117, at 900; Letter from Henry Clay to Peter B. Porter (Dec. 26, 1824), in *id.* at 905.

2. *The 1824 Electoral Vote with a No-Fifths Rule*

Clay's candidacy would have survived these accidents in a constitutional order grounded in a no-fifths rule.¹²⁹

Before assessing the impact of a no-fifths rule, the present analysis begins by determining which states were in play for Crawford and Clay in their contest for third place in the Electoral College.¹³⁰ The present analysis looks for a *somewhat better than actual* case for Crawford and a *somewhat poorer than actual* case for Clay to demonstrate the robustness of Clay finishing ahead of Crawford in a no-fifths rule Union.

The following states chose their electors by statewide popular vote and the present analysis supposes the same statewide winner regardless of the number of electoral votes:¹³¹ Alabama, Connecticut, Indiana, Massachusetts, Mississippi, New Hampshire, New Jersey, North Carolina, Ohio, Pennsylvania, Rhode Island, and Virginia. Of these, Virginia voted for Crawford and Ohio voted for Clay.

In Delaware, Georgia, Louisiana, New York, South Carolina, and Vermont, the legislature chose the state's presidential electors.

Delaware's legislature chose two Crawford electors and one Adams elector.¹³² The present analysis supposes that if Delaware had four electoral votes, its legislature would have chosen three Crawford electors and one Adams elector.

The present analysis supposes that Georgia's legislature would have chosen a slate of electors for its native son Crawford regardless of the size of the slate.

The present analysis takes Louisiana out of play on the supposition that its legislature would have selected only Jackson and Adams electors.

129. The task here is to demonstrate that in a no-fifths rule Union, Clay finishes in third place in the electoral vote, ahead of Crawford. This analysis supposes the changes to the presidential election process made by the Twelfth Amendment. It is conceivable that such changes would not have been made if John Adams had won the election of 1800, when an Adams elector in Rhode Island cast his second electoral vote for John Jay rather than Adams's running mate, Charles Cotesworth Pinckney. In that case, as many as five names could have gone to the House, perhaps including John C. Calhoun's, who ran for vice president. It is important to note, however, that constitutional amendments requiring electors to distinguish their presidential vote from their vice-presidential vote had been introduced in January 1797. *See* 6 ANNALS OF CONG. 1824 (1797), and February 1800, *see* 10 ANNALS OF CONG. 510 (1800).

130. *See infra*, note 169 for Jackson/Adams highlights.

131. Theoretically, a split outcome could have resulted in a state that chose its electors individually on a long ballot. There is no evidence that any of the states just listed were near to any such outcome, and the present analysis discounts its possibility.

132. In the actual election, Delaware's thirty-member legislature chose three electors from a slate of eight candidates. Joseph G. Rowland, who voted for Adams, received twenty-one votes from the legislature. Isaac Tunnell and John Caldwell, who each voted for Crawford, each received fifteen votes. *See* H. Clay Reed, *Presidential Electors in Delaware, 1789–1829*, 14 DEL. HIST. 1, 15 (1970).

New York ultimately cast five of its thirty-six electoral votes for Crawford and four for Clay, a difference of one in Crawford's favor. The present analysis supposes that if New York had had a larger number of electoral votes, then Crawford would have received one more, and that if it had fewer electoral votes, Clay would have received one less. That is, the present analysis supposes that if New York had any number of electoral votes other than thirty-six, then Crawford would have received two more than Clay.

The present analysis supposes that South Carolina's legislature would have chosen a complete slate of Jackson electors regardless of the number of electoral votes it had.

Likewise, the present analysis supposes that Vermont's legislature would have chosen a complete slate of Adams electors regardless of its number of electoral votes.

The following states chose their electors by district by popular vote: Illinois, Kentucky, Maine, Maryland, Missouri, and Tennessee.

In a hotly contested four-way race, Illinois' voters chose two Jackson electors and one Adams elector from its three districts. The analysis that follows supposes a minimal ratio of representation of 1:30,000. Illinois had a free population of 54,294 in 1820 so it always has three electoral votes regardless of the ratio of representation considered in the present analysis. As a result, neither Crawford nor Clay wins an electoral vote in any scenario considered below.

Kentucky chose its fourteen electors in three multi-electoral districts. Clay won a minimum of 69.5 percent of the votes cast in each district. The present analysis supposes that Clay wins all of Kentucky's electoral votes regardless of their number.

Missouri chose three Clay electors by district. Like Illinois, it never has more than three electors when the ratio of representation is at least 1:30,000.

Tennessee chose its eleven electors by district. With Andrew Jackson winning more than 90 percent of his home state's popular vote, the present analysis supposes that he would have won all of Tennessee's electoral votes regardless of their number.

Maryland and Maine merit detailed attention after a brief comment about the apportionment of the House following the 1820 census.

On January 7, 1822, Congress began consideration of a bill to set the ratio of representation at 1:40,000, creating a 213 seat House. Seven weeks later, it approved that ratio after a wide range of others were considered.¹³³

133. Ratios of representation between 1:37,000 and 1:75,000 were considered. All ratios greater than 1:50,000 were voted down without a recorded vote. For the opening of the debates, see 38 ANNALS OF CONG. 708 (1822). For the closing, see *id.* at 1171. For the most extreme ratios during the debate of Jan. 17, see *id.* at 736. For the final statute, see Act of Mar. 7, 1822, ch. X, 3 Stat. 651 (apportioning representatives among the several states, according to the fourth census).

The present analysis considers all ratios of representations between 1:30,000 and 1:50,000 in increments of 1,000. Table 26 presents the number of House seats apportioned to the states in play for Clay or Crawford for each of these ratios of representation.¹³⁴

TABLE 26 HOUSE SEATS BY RATIO OF REPRESENTATION IN A NO-FIFTHS RULE APPORTIONMENT: CRAWFORD, CLAY STATES IN PLAY
1824

Ratio of Repr.	House Size	DE	GA	KY	MD	ME	MO	NY	OH	VA
1:30,000	255	2	6	14	9	9	3	45	19	21
1:31,000	244	2	6	14	9	9	3	43	18	20
1:32,000	239	2	5	13	9	9	3	42	18	20
1:33,000	234	2	5	13	9	9	3	41	17	19
1:34,000	225	2	5	12	8	8	3	40	17	18
1:35,000	215	1	5	12	8	8	3	38	16	18
1:36,000	213	1	5	12	8	8	3	37	16	17
1:37,000	207	1	5	11	8	8	3	36	15	17
1:38,000	201	1	5	11	7	7	3	35	15	16
1:39,000	194	1	4	11	7	7	3	34	14	16
1:40,000	191	1	4	10	7	7	3	34	14	16
1:41,000	185	1	4	10	7	7	3	33	14	15
1:42,000	181	1	4	10	7	7	3	32	13	15
1:43,000	175	1	4	10	6	6	3	31	13	14
1:44,000	169	1	4	9	6	6	3	30	13	14
1:45,000	168	1	4	9	6	6	3	30	12	14
1:46,000	163	1	4	9	6	6	3	29	12	13
1:47,000	161	1	4	9	6	6	3	28	12	13
1:48,000	158	1	3	9	6	6	3	28	12	13
1:49,000	150	1	3	8	6	6	3	27	11	13
1:50,000	146	1	3	8	5	5	3	27	11	12

When Congress resized the House in January 1802, it apportioned an additional ninth seat to Maryland.¹³⁵ A year later, the Maryland legislature

134. Using the following counts of free persons from the 1820 census: Delaware 68,240, Georgia 191,333, Kentucky 437,585, Maryland, 299,953, Maine 298,335, Missouri 56,364, New York 1,362,724, Ohio 581,434, Virginia 640,226. *See Census for 1820*, at 18 (1821), <https://www2.census.gov/prod2/decennial/documents/1820a-02.pdf>.

135. *See Act of Jan. 14, 1802, ch. I, 2 Stat. 128* (apportioning representatives among the several states, according to the second enumeration).

drew nine districts, choosing eleven presidential electors.¹³⁶ Two districts on the western shore chose two electors; the remainder chose one each. In general, this districting respected county boundaries. However, Montgomery and Prince Georges counties on the western shore and Dorchester County on the eastern shore were split between districts.¹³⁷

This districting remained in place following Congress's resizing of the House in December 1811, which left Maryland with nine Representatives.¹³⁸ The Maryland legislature made a minor change on the eastern shore in February 1820. In 1817, it added a fifth election district to Dorchester County.¹³⁹ Three years later, in 1820, the legislature assigned Dorchester County's second election district to the state's eighth presidential electoral district.¹⁴⁰ Finally, in 1823, the legislature reassigned two election districts in Montgomery County,¹⁴¹ as Congress's resizing of the House in March 1822 left Maryland's House delegation unchanged at nine members.¹⁴² By 1824, the division of Dorchester County into six rather than five election districts resulted in election districts one through three being joined with Caroline and Talbot counties and election districts four through six being combined with Somerset and Worcester counties.¹⁴³

136. See Act of Jan. 8, 1803, ch. LXX, 1803 Md. Laws 36 ("providing for the elections of representatives of [Maryland] in the Congress of the United States, and of electors on the part of [Maryland] for choosing a president and vice-president of the United States.") The Act also drew eight districts electing nine members of the House.

137. The interested reader may wish to consult Dennis Griffith's 1795 map of Maryland. For a zoomable version of the entire state, see Dennis Griffith, James Thackara & J. (John) Vallance, [Map of the state of Maryland], 1:300,000, Library of Congress, <https://hdl.loc.gov/loc/gmd/g3840.ct000307>. For a snapshot of just Dorchester County, see *Dorchester 1795*, 1000x900, Dorchester Graves, <https://dorchestergraves.com/history/maps/#jp-carousel-147>.

138. See Act of Dec. 21, 1811, ch. IX, 2 Stat. 669 (apportioning representatives among the several states, according to the third enumeration). The Maryland Session Laws for 1811, 1812, and 1813 contain no statutes concerning redistricting congressional or presidential elector districts. See Acts of 1811, 1811 Md. Laws; Acts of 1812, 1812 Md. Laws; Acts of 1813, 1813 Md. Laws 181–227. Martis does not report a redrawing of Maryland's House districts between 1802 and 1833. See KENNETH C. MARTIS, *THE HISTORICAL ATLAS OF UNITED STATES CONGRESSIONAL DISTRICTS: 1789–1983*, at 234 (1982).

139. See Act of Jan. 27, 1817, ch. 127, 1817 Md. Laws 89 (appointing commissioners for the purpose of dividing Dorchester County into five separate election districts).

140. See Act of Feb. 14, 1820, ch. CLXXI, 1820 Md. Laws 106 (reducing into one the General Acts of Assembly respecting elections and regulating elections).

141. See Act of Feb. 24, 1823, ch. 218, 1823 Md. Laws 136 (relating to the second and third districts for choosing electors of President and Vice President of the United States).

142. See Act of Mar. 7, 1822, ch. X, 3 Stat. 651 (apportioning representatives among the several states, according to the fourth census).

143. I have not found a statute making this change in the assignment of Dorchester County's election districts. However, this is how *A New Nation Votes* reports the data. See *A New Nation Votes*, *supra* note 95, at <https://elections.lib.tufts.edu/catalog/tufts:md.presidentialelector8.1824>, <https://elections.lib.tufts.edu/catalog/tufts:md.presidentialelector9.1824> (last visited July 30, 2018). See Act of Dec. 16, 1822, ch. 5, 1822 Md. Laws 4–5 (commissioning the division of Dorchester County into six election districts).

In 1824, Crawford won only 12.39 percent of Maryland's popular vote statewide.¹⁴⁴ However, with more than 60 percent of his vote coming from the eastern shore, he managed to win the eastern shore's eighth electoral district, the middle of its three districts.¹⁴⁵ Adams won the district to the south in a close race with Crawford¹⁴⁶ and the district to the north in which Crawford was not competitive.¹⁴⁷ In a race lacking a Crawford elector, Jackson won the district containing the eastern shore's northernmost county, Cecil County, combined with Harford County on the western shore.¹⁴⁸

With Crawford winning less than 6 percent of the vote on the western shore, his only chance of winning more than one elector was on the eastern shore. That could not have happened given the apportionment ratios under consideration. With a free population of 299,953, Maryland would have had between nine and five House seats, and between eleven and seven presidential electors. Table 27 presents the average single elector district sizes that would have resulted.

TABLE 27 POSSIBLE NUMBERS OF PRESIDENTIAL ELECTORS,
MARYLAND 1824

House Ratio of Representation		Presidential Electors	Average Single Elector District
Minimum	Maximum		
1:30,000	1:33,000	11	27,268
1:34,000	1:37,000	10	29,995
1:38,000	1:42,000	9	33,328
1:43,000	1:49,000	8	37,494
1:50,000		7	42,850

Table 28 presents the votes for Adams and Crawford on Maryland's eastern shore counties from Worcester County at the southeastern end to Cecil County at the northern end.¹⁴⁹

144. For the returns by county in each electoral district, see *A New Nation Votes*, *supra* note 95, at <https://elections.lib.tufts.edu/catalog/tufts.md.presidentialelector1.1824> through <https://elections.lib.tufts.edu/catalog/tufts.md.presidentialelector9.1824>.

145. See *A New Nation Votes*, *supra* note 95, at <https://elections.lib.tufts.edu/catalog/tufts.md.presidentialelector8.1824>.

146. See *A New Nation Votes*, *supra* note 95, at <https://elections.lib.tufts.edu/catalog/tufts.md.presidentialelector9.1824>.

147. See *A New Nation Votes*, *supra* note 95, at <https://elections.lib.tufts.edu/catalog/tufts.md.presidentialelector7.1824>.

148. See *A New Nation Votes*, *supra* note 95, at <https://elections.lib.tufts.edu/catalog/tufts.md.presidentialelector6.1824>.

149. See *A New Nation Votes*, *supra* note 95, at <https://elections.lib.tufts.edu/catalog/tufts.md.presidentialelector6.1824>, <https://elections.lib.tufts.edu/catalog/tufts.md.presidentialelector7.1824>, <https://elections.lib.tufts.edu/catalog/tufts.md.presidentialelector8.1824>, <https://elections.lib.tufts.edu/catalog/tufts.md.presidentialelector9.1824>.

TABLE 28 EASTERN SHORE PRESIDENTIAL VOTE FOR ADAMS AND CRAWFORD, 1824

County	Free Population		Vote by County		Crawford Margin(/Deficit)	
	By County	Cumulative	Adams	Crawford	By County	Cumulative
Worcester	12,870	12,870	421	754	333	333
Somerset	12,343	25,213	619	288	-331	2
Dorchester	12,562	37,775	411	297	-114	-112
Caroline	8,477	46,252	317	689	372	260
Talbot	9,653	55,905	747	496	-251	9
Queen Anne	9,351	65,256	427	30	-397	-388
Kent	7,382	72,638	469	21	-448	-836
Cecil	13,646	86,284	594	0	-594	-1,430

In the actual election of 1824, Dorchester County's first and second election districts were joined with Caroline and Talbot counties to form the eighth electoral district. The remainder of Dorchester County combined Worcester and Somerset counties to form the ninth electoral district. Table 29 presents the votes in these two electoral districts with Dorchester County given in detail.¹⁵⁰

TABLE 29 DORCHESTER COUNTY DETAILED ADAMS-CRAWFORD VOTE 1824, ACTUAL ELECTORAL DISTRICT ASSIGNMENTS

County /Counties	Election District	Actual Electoral District	Adams	Crawford	Crawford Margin (/Deficit)
Caroline and Talbot		8	1,064	1,185	121
Dorchester	First District (Vienna)	8	56	49	-7
	Second District (New Market)	8	82	83	1
	Third District (Ferry)	8	13	90	77
	Fourth District (Cambridge)	9	59	8	-51
	Fifth District	9	140	61	-79
	Sixth District	9	60	6	-54
Somerset and Worcester		9	1,040	1,042	2

150. The detailed data at *A New Nation Votes* for Adams's Dorchester County vote sums to 410, one less than the total given for the whole county. *A New Nation Votes*, *supra* note 95, at <https://elections.lib.tufts.edu/catalog/tufts.md.presidentialelector8.1824>, <https://elections.lib.tufts.edu/catalog/tufts.md.presidentialelector9.1824>.

Crawford would not have won both electoral districts with the legislature's actual apportionment of Dorchester County's election districts between Caroline and Talbot counties to the north and Somerset and Worcester counties to the south and east. Nor could he have won both electoral districts with any sensible apportionment of Dorchester County's six election districts. Table 30 demonstrates how two Crawford electoral districts could be created by clairvoyantly dividing Dorchester County.

TABLE 30 DORCHESTER COUNTY DETAILED ADAMS-CRAWFORD VOTE 1824, CRAWFORD BEST CASE ELECTORAL DISTRICT ASSIGNMENT

County /Counties	Election District	Electoral District	Adams	Crawford	Crawford Margin (/Deficit)
Caroline and Talbot		X	1,064	1,185	121
Dorchester	Fourth District (Cambridge)	X	59	8	-51
	Sixth District	X	60	6	-54
	First District (Vienna)	X	56	49	-7
	Fifth District	Y	140	61	-79
	Second District (New Market)	Y	82	83	1
	Third District (Ferry)	Y	13	90	77
Somerset and Worcester		Y	1,040	1,042	2

However, this hypothetical apportionment ignores two geographic realities. First, the Vienna district was in the southeastern part of Dorchester County, across the Nanticoke River from Somerset County. Second, the Ferry and New Market districts were to the north of the Vienna district and the New Market district, especially, was closer to Talbot County than Somerset County. There is no geographically realistic way for Crawford to have won more than a single elector in Maryland.

In 1824,¹⁵¹ as in 1820,¹⁵² Maine chose two presidential electors statewide and one elector in each of its seven congressional districts. In the actual election of 1824, John Quincy Adams defeated William Crawford

151. J. Res. LXXVI, 4th Leg., 1824 Me. Laws 350–52. *A New Nation Votes* presents Maine's 1824 presidential elector data on a county-by-county basis with Penobscot and Somerset counties presented together on the same web page as is the data for Hancock and Washington counties. *A New Nation Votes*, *supra* note 95, at https://elections.lib.tufts.edu/catalog/tufts:me.electors.hancock_washington.1824, https://elections.lib.tufts.edu/catalog/tufts:me.electors.somerset_penobscot.1824 (last visited July 30, 2018). This gives the impression that, in 1824, no Maine county was split between two electoral districts. That was not the case. Some of Maine's counties were split between two congressional districts. See Act of Feb 8, ch. 223, 1823 Me. Laws 52–53.

152. J. Res. XIX, 1820 Leg., 1820 Me. Laws 31.

statewide and in all seven congressional districts to sweep Maine's nine electoral votes. What could the outcome have been if there had been a different number of electoral votes at stake?¹⁵³

In the last presidential election prior to Maine's separation from Massachusetts, the Bay State's legislature chose all of the state's electors.¹⁵⁴ Four years before that, Massachusetts chose all twenty-two of its presidential electors from six districts even though it chose its entire House delegation from single member districts.¹⁵⁵ The district of Maine had the only electoral district that chose a single elector. Maine's two other electoral districts chose three electors each.¹⁵⁶

Maine's Massachusetts heritage provided a rich variety of methods for choosing presidential electors. Popularly electing two statewide and the remainder from single elector districts was not one of them.¹⁵⁷ By choosing that method in 1820 and 1824, the Maine legislature made a clear choice not to imitate its Massachusetts past.¹⁵⁸

Crawford managed to win just under 25 percent of the vote in the race for the two electors chosen statewide.¹⁵⁹ Adams won the rest. (Neither Jackson nor Clay was on the ballot in Maine.) In the seven electoral district races, Crawford only came within hailing distance of Adams in the Cumberland district, in which the Crawford elector lost to the Adams elector by only 156 votes (5.38 percent).¹⁶⁰ Crawford's next best showing came in the neighboring York district to the south in which his electors won a mere

153. Maine was, of course, admitted as a free state on March 3, 1820. Act of Mar. 3, 1820, ch. XIX, 3 Stat. 544. The 1820 census counted no slaves in Maine. *Census for 1820, supra* note 134, at 18.

154. J. Res. XIX, 1816 Leg., 1816 Mass. Acts 233.

155. Act of February 28, 1812 ch. CXLV, 1812 Mass. Acts 300.

156. The three districts in downstate Massachusetts chose five, six, and four electors each. J. Res. LXXI, 1812 Leg., 1812 Mass. Acts. 94.

157. For a recapitulation of Massachusetts' constantly changing methods of choosing its presidential electors, see *McPherson*, 146 U.S. at 29–32. The closest Massachusetts came to the method adopted by Maine was in 1796 when the legislature chose two electors and the voters chose the remainder from each congressional district with the proviso that the legislature would choose in case no candidate had a majority in a district. *Id.* at 31.

158. In 1820, the Massachusetts legislature adopted a two-statewide plus the remainder by congressional district method a week before the Maine legislature did. J. Res. VI, 1820 Leg., 1820 Mass. Acts 245. Four years later, the Massachusetts legislature abandoned that method for the general ticket system. *McPherson*, 146 U.S. at 32.

159. *A New Nation Votes, supra* note 95, at https://elections.lib.tufts.edu/catalog/tufts:me.electors_at_large.1824.

160. *A New Nation Votes, supra* note 95, at <https://elections.lib.tufts.edu/catalog/tufts:me.elector.cumberland.1824>.

22.66 percent of the vote.¹⁶¹ Table 31 presents the popular vote for electors by district and statewide.¹⁶²

TABLE 31 1824 MAINE ELECTORAL DISTRICT VOTE

District	Adams	Crawford	Adams Margin	Crawford Percentage
York	1,642	481	1,161	22.66%
Cumberland	1,526	1,370	156	47.31%
Lincoln	1,530	248	1,282	13.95%
Kennebec	1,387	180	1,207	11.49%
Oxford	1,093	107	986	8.92%
Penobscot and Somerset	1,556	275	1,281	15.02%
Hancock and Washington	1,406	393	1,013	21.85%
Statewide	10,140	3,054	7,086	23.15%

Crawford won twelve of twenty municipalities in the actual Cumberland district. If a different number of districts had been drawn, Crawford's best chance of winning an elector in one of them would have depended on a district being constructed from just the right set of municipalities in the actual Cumberland district. Outside of the Cumberland district, Crawford won only eleven of 127 municipalities by an aggregate margin of only 326 votes. These eleven municipalities were spread out over six of Maine's other eight counties. In contrast, Adams accumulated a margin of 7,516 votes in the other 116 municipalities outside of Cumberland County.¹⁶³

161. *A New Nation Votes*, *supra* note 95, at <https://elections.lib.tufts.edu/catalog/tufts:me.electors.york.1824>.

162. *See also A New Nation Votes*, *supra* note 95, at <https://elections.lib.tufts.edu/catalog/tufts:me.electors.kennebec.1824>, <https://elections.lib.tufts.edu/catalog/tufts:me.electors.lincoln.1824>, <https://elections.lib.tufts.edu/catalog/tufts:me.electors.oxford.1824>.

163. *A New Nation Votes* reports data for all twenty-one municipalities in the Cumberland District except Thompson Pond Plantation. *A New Nation Votes*, *supra* note 95 at <https://elections.lib.tufts.edu/catalog/tufts:me.elector.cumberland.1824>. The municipality level data for the rest of the state at *A New Nation Votes* is slightly incomplete. There is no municipality level data for the Oxford district, just to the north of the York and Cumberland Districts, which contained all of Oxford County and the five northernmost municipalities in Cumberland County. *See A New Nation Votes*, *supra* note 95, at <https://elections.lib.tufts.edu/catalog/tufts:me.electors.oxford.1824>. The municipality level data for the Cumberland district includes the town of Saco, which also appears, properly, in the York district. As a result, the municipality-by-municipality data for the Cumberland district sums to totals that exceed the totals presented for the district by exactly the Saco numbers. *See A New Nation Votes*, *supra* note 95 at <https://elections.lib.tufts.edu/catalog/tufts:me.elector.cumberland.1824>. Therefore, there must be municipality level data missing for each of the districts other than Cumberland and Oxford because the district totals exceed the sum of the municipality-by-municipality data.

Understanding how the Maine legislature dealt with Cumberland and York counties in the actual sevenfold congressional districting will help projecting how it might have treated these counties while drawing a different number of congressional districts.¹⁶⁴

With seven House seats, Maine's single member congressional districts averaged 42,619 inhabitants each. The Maine legislature could have drawn up a reasonable apportionment not dividing any county into multiple congressional districts by first combining Penobscot and Somerset counties in the northern part of the state, then combining Hancock and Washington counties in the eastern part of the state, and finally leaving the other five counties intact. Table 32 shows such a seven-district plan.

TABLE 32 SEVEN MAINE CONGRESSIONAL DISTRICTS PRESERVING COUNTY BOUNDARIES, 1823

County	County Population	District Population	Deviation
York	46,283	46,283	8.60%
Cumberland	49,445	49,445	16.02%
Lincoln	53,189	53,189	24.80%
Kennebec	42,623	42,623	0.01%
Oxford	27,104	27,104	-36.40%
Penobscot	13,870	35,657	-16.34%
Somerset	21,787		
Hancock	31,290	44,034	3.32%
Washington	12,744		
Statewide	298,335	42,619	

In fact, that is just what the legislature did.¹⁶⁵ However, that would have left the Lincoln County district at nearly 25 percent above the statewide average and the Oxford County district at just more than 36 percent below the statewide average.

Table 33 summarizes the municipality shifts made by the Maine legislature to achieve a more balanced apportionment.

164. Readers of this Article may wish to consult Moses Greenleaf's 1820 "Map of the State of Maine" available in the Osher Map Library at the Smith Center for Cartographic Education at the University of Southern Maine or in the Norman B. Leventhal Map Center at the Boston Public Library. Moses Greenleaf, *A Map of the State of Maine from the Latest and Best Authorities*, 1820, OSHER MAP LIBRARY, <http://www.oshermaps.org/browse-maps?id=47014#img0>; Moses Greenleaf, *A Map of the State of Main from the Latest and Best Authorities*, 1820, NORMAN B. LEVENTHAL MAP AND EDUCATION CENTER, <https://collections.leventhalmap.org/search/commonwealth:6t053q062>.

165. Act of Feb. 8, 1823, 1823 Me. Laws 52–53.

TABLE 33 MUNICIPALITIES SHIFTED, 1823 MAINE CONGRESSIONAL DISTRICTING

Municipalities Shifted	From	To	Population Shifted
6	Lincoln	Kennebec	3,894
3	Lincoln	Oxford	4,567
3	Kennebec	Oxford	3,039
5	Cumberland	Oxford	6,690

This apportionment, which left York County in the southernmost part of Maine intact and shifted its eastern neighbor Cumberland County's five northernmost municipalities (Baldwin, Bridgton, Harrison, Minot, and Otisfield) to the Oxford district, resulted in the following sized congressional districts, shown in Table 34.

TABLE 34 ACTUAL MAINE CONGRESSIONAL DISTRICTS (1823)

District	District Population	Deviation
York	46,283	8.60%
Cumberland	42,755	0.32%
Lincoln	44,728	4.95%
Kennebec	43,478	2.01%
Oxford	41,400	-2.86%
Penobscot and Somerset	35,657	-16.34%
Hancock and Washington	44,034	3.32%
Statewide	298,335	

In this actual apportionment, the smallest district, Penobscot and Somerset, was just over 16 percent below the average district size and the largest district, York, was a mere 8.6 percent larger than the average district size.

Exclusive of Maine, Clay's projected electoral vote margin over Crawford in a no-fifths rule republic is smallest for ratios of representation of 1:45,000 and 1:49,000. For these ratios, Maine has six House seats.¹⁶⁶ Therefore, the present analysis focuses attention on how six House districts could have been drawn in Maine.

Maine's legislature would have surely begun a six-district apportionment by leaving its four largest counties (York, Cumberland, Lincoln, and Kennebec) intact, combining the three easternmost counties (Hancock, Pe-

166. See *infra* Table 40.

nobscot, and Washington) into one district, and combining its two other northern counties (Oxford and Somerset) into another. This would have resulted in the following initial apportionment that splits no county into multiple districts, as shown in Table 35.

TABLE 35 SIX CONGRESSIONAL DISTRICTS PRESERVING MAINE COUNTY BOUNDARIES (1823)

County	County Population	District Population	Difference
York	46,283	46,283	-6.92%
Cumberland	49,445	49,445	-0.56%
Lincoln	53,189	53,189	6.97%
Kennebec	42,623	42,623	-14.28%
Oxford	27,104	48,891	-1.67%
Somerset	21,787		
Hancock	31,290	57,904	16.45%
Penobscot	13,870		
Washington	12,744		
Statewide	298,335	49,723	

To improve on this initial apportionment, the legislature would have shifted municipalities from western Hancock County to the Kennebec district.¹⁶⁷ Cumberland and York counties would have been left intact.

Crawford would not have won any of these six electoral districts. Nor would he have won any electors if Maine had been apportioned only five House seats with 1:50,000 as the ratio of representation. With five House seats, Maine's average congressional district size would have been 59,667. The state's legislature would have had three options for Cumberland County.

The first option would have been to leave Cumberland County intact. That would have resulted in an Adams victory in the countywide district.

The legislature's second option would have divided Oxford County between a York district and a Cumberland district. York County is Maine's southwestern most county. Cumberland County lies up the coast to the east. Oxford lies on top of them to the north. In 1820, these three counties had a combined population of 122,832, just a little more than twice the five-district average size. If the legislature had pursued this second option, Craw-

167. Hancock County's nine westernmost municipalities (Belfast, Belmont, Brooks, Jackson, Knox, Lincolnville, Northport, Scarsmont, Thorndike) had a total population of 7,484. Shifting these municipalities to the Kennebec district would have given that district 50,107 inhabitants, a mere 0.77 percent above the six-district average. A population of 50,420 would have remained in the Hancock, Penobscot, and Washington district, just 1.40 percent above the six-district average.

ford would not have won either of these districts given his losses in the actual York and Cumberland districts and his less than 10 percent share of the Oxford district vote.

The legislature's final option would have been to split off part of Cumberland County and join it to York County in a York district. That would have been of no avail to Crawford. His aggregate margin of 403 votes in the twelve Cumberland County municipalities he carried was far exceeded by Adams' 1,161 vote margin in the actual York district.

Crawford could have won a single electoral district centered on his Cumberland County core if Maine had eight or nine House seats. With those numbers of House seats, the average district sizes would have been 37,292 and 33,148 respectively. These would have been too small for York County's 46,283 inhabitants to be left intact as a congressional district by themselves.

Crawford's Cumberland County core consisted of ten municipalities in the southern part of the county. Crawford's core includes two towns that did not vote for him: Gorham on the York County line and Portland, which is surrounded by Crawford towns. Table 36 presents the relevant data for Crawford's Cumberland core.¹⁶⁸ (The towns are presented in alphabetical order.)

TABLE 36 CRAWFORD'S CUMBERLAND COUNTY CORE

Town	Adams	Crawford	Crawford Margin	Population
Cape Elizabeth	13	67	54	1,688
Falmouth	16	39	23	1,673
Gorham	63	60	-3	2,795
Gray	34	59	25	1,479
Portland	600	416	-184	8,581
Scarborough	35	85	50	2,232
Standish	52	71	19	1,619
Westbrook	56	163	107	2,502
Windham	7	27	20	1,793
Crawford Cumberland Core Total	876	987	111	24,362

Crawford's Cumberland core combined with all of York County had a population of 70,645, just about the right size to construct two congressional districts out of a total of eight or nine. Table 37 shows how such a

168. *A New Nation Votes*, *supra* note 95, at <https://elections.lib.tufts.edu/catalog/tufts:me.elector.cumberland.1824>.

district could have been constructed while leaving the remaining part of York County with the right size population to form a district.

TABLE 37 CONSTRUCTING A CRAWFORD DISTRICT

Town	Adams	Crawford	Crawford Margin	Population	Crawford District Margin	Crawford District Size	York District Size
Crawford Cumberland Core Total	876	987	111	24,362	111	24,362	46,283
Cornish	34	4	-30	1,088	81	25,450	45,195
Limington	0	0	0	2,122	81	27,572	43,073
Parsonsfield	46	55	9	2,355	90	29,927	40,718
Limerick	41	28	-13	1,377	77	31,304	39,341
Waterborough	22	42	20	1,762	97	33,066	37,579
Alfred	7	85	78	1,271	175	34,337	36,308
Buxton	110	24	-86	2,590	89	36,927	33,718
Hollis	72	20	-52	1,762	37	38,689	31,956

To make a best case for Crawford (and worst case for Clay), the present analysis supposes that Crawford would have won a single electoral district if Maine had been apportioned eight or nine House seats in 1822.

Table 38 summarizes the suppositions just made. (EV represents the state’s number of electoral votes.)

TABLE 38—SUMMARY OF ELECTORAL VOTE ASSUMPTIONS FOR CRAWFORD AND CLAY

State	Clay	Crawford	Clay Margin over Crawford	Crawford Margin over Clay
Delaware	0	EV-1		EV-1
Georgia	0	EV		EV
Kentucky	EV	0	EV	
Maine	0	if EV>9, then 1, otherwise 0		if EV>9, then 1, otherwise 0
Maryland	0	1		1
Missouri	EV	0	EV	
New York	if EV<36 then 3, otherwise 4	if EV>36 then 6, otherwise 5		if EV=36 then 1, otherwise 2
Ohio	EV	0	EV	
Virginia	0	EV		EV

Table 39 applies the electoral vote assumptions for Clay and Crawford presented in Table 38 to the state-by-state apportionments shown just above. (In the New York column, “4–6” indicates four Clay electors and six Crawford electors.)

TABLE 39 PROJECTED ELECTORS FOR CLAY AND CRAWFORD BASED ON A NO-FIFTHS RULE APPORTIONMENT, STATES IN PLAY, 1824

Ratio of Repr.	Total Electoral Votes	Clay Electors–Crawford Electors								
		DE	GA	KY	MD	ME	MO	NY	OH	VA
1:30,000	303	0–3	0–8	16–0	0–1	0–1	3–0	4–6	21–0	0–23
1:31,000	292	0–3	0–8	16–0	0–1	0–1	3–0	4–6	20–0	0–22
1:32,000	287	0–3	0–7	15–0	0–1	0–1	3–0	4–6	20–0	0–22
1:33,000	282	0–3	0–7	15–0	0–1	0–1	3–0	4–6	19–0	0–21
1:34,000	273	0–3	0–7	14–0	0–1	0–1	3–0	4–6	19–0	0–20
1:35,000	263	0–2	0–7	14–0	0–1	0–1	3–0	4–6	18–0	0–20
1:36,000	261	0–2	0–7	14–0	0–1	0–1	3–0	4–6	18–0	0–19
1:37,000	255	0–2	0–7	13–0	0–1	0–1	3–0	4–6	17–0	0–19
1:38,000	249	0–2	0–7	13–0	0–1	0–0	3–0	4–6	17–0	0–18
1:39,000	242	0–2	0–6	13–0	0–1	0–0	3–0	4–5	16–0	0–18
1:40,000	239	0–2	0–6	12–0	0–1	0–0	3–0	4–5	16–0	0–18
1:41,000	233	0–2	0–6	12–0	0–1	0–0	3–0	3–5	16–0	0–17
1:42,000	229	0–2	0–6	12–0	0–1	0–0	3–0	3–5	15–0	0–17
1:43,000	223	0–2	0–6	12–0	0–1	0–0	3–0	3–5	15–0	0–16
1:44,000	217	0–2	0–6	11–0	0–1	0–0	3–0	3–5	15–0	0–16
1:45,000	216	0–2	0–6	11–0	0–1	0–0	3–0	3–5	14–0	0–16
1:46,000	211	0–2	0–6	11–0	0–1	0–0	3–0	3–5	14–0	0–15
1:47,000	209	0–2	0–6	11–0	0–1	0–0	3–0	3–5	14–0	0–15
1:48,000	206	0–2	0–5	11–0	0–1	0–0	3–0	3–5	14–0	0–15
1:49,000	198	0–2	0–5	10–0	0–1	0–0	3–0	3–5	13–0	0–15
1:50,000	194	0–2	0–5	10–0	0–1	0–0	3–0	3–5	13–0	0–14

Using these state-by-state electoral vote projections, Table 40 presents the outcome of the race for third-place between Clay and Crawford.¹⁶⁹

169. In the actual election based on the three-fifths rule, Jackson received 37.9 percent and Adams received 32.2 percent of the 261 electoral votes. Jackson’s share of the electoral vote based on the no-fifths rule apportionments presented here ranges from 37.56 percent to 36.79 percent, Adams’ share ranges from 34.90 percent to 34.10 percent, so Jackson’s margin over Adams ranges from 3.45 percent to 2.07 percent. Spreadsheet on file with author.

Robert Pierce Forbes claims otherwise. He claims that without the three-fifths rule, Jackson would have received 77 electoral votes to 83 for Adams. ROBERT PIERCE FORBES, *THE MISSOURI COMPROMISE AND ITS AFTERMATH: SLAVERY AND THE MEANING OF AMERICA* 218 (2007). NO

estimate is given for Crawford or Clay. Ratcliffe repeats Forbes's claim. DONALD RATCLIFFE, *THE ONE-PARTY PRESIDENTIAL CONTEST: ADAMS, JACKSON, AND 1824'S FIVE-HORSE RACE* 233 (2015) [hereinafter RATCLIFFE 1824]; Donald Ratcliffe, *Popular Preferences in the Presidential Election of 1824*, 34(1) J. EARLY REPUBLIC 45, 66 (2014).

Forbes's argument is a model of how not to estimate the outcome of an electoral vote in a no-fifths rule Union. "This figure is derived in the following manner. The total number of slaves in the United States, according to the 1820 census figures, was 1,538,125. Three-fifths of this figure gives a "federal number" of 911,400 for purposes of electoral representation." FORBES, *supra*, at 334 n.34.

Here is the first problem. Multiply 1,538,125 by $\frac{3}{5}$ and the result is 922,875. Divide 911,400 by $\frac{3}{5}$ and the result is 1,519,000. This may be government work, but in the age of spreadsheets, this is an easy calculation. Forbes continues, "The average size of a congressional district in 1824 was approximately 41,000 persons; thus slaves accounted for approximately 22 additional congressional seats, and electoral votes." *Id.*

The hidden assumption here is that Congress would have used the same ratio of representation in a no-fifths rule Union than it actually used in the three-fifths rule Union. The analysis presented in this Article frames no such hypothesis, but considers a range of ratios instead. (By the way, twenty-two additional seats result from a three-fifths rule contribution of 911,400. If the three-fifths rule contribution is 922,875, the impact is closer to twenty-three seats rather than twenty-two.) Forbes concludes:

Adams actually received 84 electoral votes; but by applying the same rule to him, his total would have declined to 83 as a result of subtracting the slave representation (the equivalent of 41,051 "federal votes") from the 6 electoral votes he received from slave states (3 from Maryland, 2 from Louisiana, and one from Delaware).

Id.

So, on this analysis, Adams loses a single electoral vote thanks to the three-fifths rule *and Jackson loses all the rest!* ($77 = 99 - 22$. Twenty-two plus one equals twenty-three!) Forbes never bothers to assess the impact on Crawford or Clay who won thirty-six and seventeen electoral votes respectively in slave states. Forbes concludes his analysis by citing William Seward's book on John Quincy Adams and his source, Calvin Colton. Neither of these mid-nineteenth century commentators make any claim about what the 1824 electoral vote would have been in a no-fifths rule Union. They simply note that Jackson received fifty-five electoral votes from slave states compared to only six for Adams. WILLIAM HENRY SEWARD, *LIFE AND PUBLIC SERVICES OF JOHN QUINCY ADAMS: SIXTH PRESIDENT OF THE UNITED STATES* 150 (1856); CALVIN COLTON, *THE LIFE AND TIMES OF HENRY CLAY* 291 (1846).

Now consider the impact of the three-fifths rule on Adams's electoral vote given Forbes's hidden assumptions. With only a single House seat, Delaware was immune to any change from a no-fifths rule.

Maryland presents a tractable problem. Maryland chose its electors by district. With a slave population of 107,398, it presumably loses two electoral votes leaving it with nine, matching number of House members it actually had in the three-fifths rule Union since 1803. In 1802, the Maryland legislature drew an eight-district, nine-representative map for its House delegation. Act of Jan. 8, 1803, 1803 Md. Laws 36; The legislature reenacted this districting in 1806. Act of Jan. 25, 1806, 1806 Md. Laws 71. The data at *A New Nation Votes* for Maryland's 1824 House elections confirms that it remained in place for the 1824 election. Spreadsheet on file with author.

With this districting in place, the county and town level data at *A New Nation Votes* reveals Adams winning five of Maryland's five electoral votes and Jackson four. *Adams gains electoral votes in a state that loses them thanks to a no-fifths rule!* See *A New Nation Votes*, *supra* note 95, at <https://elections.lib.tufts.edu/catalog/tufts.md.presidentialelector1.1824> through <https://elections.lib.tufts.edu/catalog/tufts.md.presidentialelector9.1824> (use the "previous" and "next" options at the top of the page to toggle between each district). This is yet another case of not being able to fill in the blank in the following statement with a non-negative integer.

In state S, candidate C owed _____ electoral votes to the three-fifths rule.

Louisiana's legislature chose its electors. With a slave population of 69,059, Louisiana would have lost a single elector. There is no way to tell how its legislature would have chosen four electors rather than five. However, one thing is certain: Having received only two electoral votes

TABLE 40 PROJECTED ELECTORAL VOTE TOTALS FOR CLAY AND CRAWFORD BASED ON NO-FIFTHS RULE APPORTIONMENTS, 1824

Ratio of Repr.	Total Electoral Votes	Clay Electoral Vote	Crawford Electoral Vote	Clay Margin Over Crawford	New York Electoral Votes
1:30,000	303	44	42	2	47
1:31,000	292	43	41	2	45
1:32,000	287	42	40	2	44
1:33,000	282	41	39	2	43
1:34,000	273	40	38	2	42
1:35,000	263	39	37	2	40
1:36,000	261	39	36	3	39
1:37,000	255	37	36	1	38
1:38,000	249	37	34	3	37
1:39,000	242	36	32	4	36
1:40,000	239	35	32	3	36
1:41,000	233	34	31	3	35
1:42,000	229	33	31	2	34
1:43,000	223	33	30	3	33
1:44,000	217	32	30	2	32
1:45,000	216	31	30	1	32
1:46,000	211	31	29	2	31
1:47,000	209	31	29	2	30
1:48,000	206	31	28	3	30
1:49,000	198	29	28	1	29
1:50,000	194	29	27	2	29

Given the assumptions made above for the state-by-state electoral vote, Clay finishes ahead of Crawford for all ratios of representation between 1:30,000 and 1:50,000.¹⁷⁰ Clay's margin over Crawford reflects the

in the actual election, Adams could not possibly have owed the three electoral votes to the three-fifths rule necessary to give him a net loss of one!

Given the analysis of Maryland just presented, the best conjecture for Forbes's hidden assumptions is that Jackson wins 87 or 88 electoral votes, Adams 86 or 85, Crawford 31, and Clay 35. The uncertainty stems from whether Louisiana splits its four electoral votes evenly or three-to-one for Jackson.

170. All ratios of representation between 1:30,000 and 1:50,000 have been examined. Crawford never does better than falling one electoral vote short of Clay for third place with the assumptions made here. He does this for ratios of representation between 1:44,726 and 1:45,730 inclusive

degree to which the assumptions made in the present analysis may be relaxed in favor of Crawford and against Clay.

B. *The 1825 House Election*

No apportionment based on a no-fifths rule results in a majority winner in the Electoral College, just as no apportionment based on the three-fifths rule results in a majority winner. Under all circumstances, the selection of the president falls to the House.

1. *The Actual House Election of 1825*

A state-level analysis of the actual House election involving Crawford will be useful before turning to an analysis of a hypothetical House election involving Clay. This analysis classifies states into the following categories:

firmly for Jackson,
leaning to Jackson,
firmly for Adams,
leaning to Adams,
firmly for Crawford,
in play.

Alabama, Mississippi, Pennsylvania, and Tennessee voted decisively for Jackson in the November election, giving him at least 63 percent of their popular vote. Each voted for Jackson in the actual House election with only Pennsylvania Federalist, Samuel Breck, not voting for Jackson (he voted for Adams).¹⁷¹ These states are classified as *firmly for Jackson*.

Three states gave Jackson a less decisive victory in the popular vote. Indiana gave him 47 percent of its vote compared to 34 percent for Clay. New Jersey cast 52 percent of its ballots for Jackson and 43 percent for Adams. In North Carolina, Jackson received 57 percent of the popular vote compared to 43 percent for Crawford. The House delegations from Indiana and New Jersey voted for Jackson by votes of 3–0 and 5–1 (Adams) respectively. However, the delegation from North Carolina cast its vote for Crawford with ten of its thirteen members voting for him, two voting for Adams, and only one voting for Jackson. Indiana and New Jersey are classified as *leaning to Jackson*.¹⁷² North Carolina is classified as *in play* by virtue of the fact that its House delegation voted for Crawford rather than Jackson.

(Electoral College sizes of 216 to 213) and 1:48,621 and 1:49,248 inclusive (Electoral College sizes of 203 to 198).

171. Neither the *House Journal* nor the *Register of Debates* records the details of the House election. That was left to the press and was collected by Martis. See KENNETH C. MARTIS, *THE HISTORICAL ATLAS OF POLITICAL PARTIES IN THE UNITED STATES CONGRESS 1789–1989*, at 318–19 (1989).

172. On January 24, 1825, William Plumer Jr. wrote to his father that Pennsylvania, South Carolina, Tennessee, Indiana, Mississippi, and Alabama were certain to vote for Jackson. New

John Quincy Adams received at least 70 percent of the vote in the five New England states whose electorates chose their presidential electors. (Vermont's legislature chose its electors.) Rhode Island's Samuel Eddy hesitated a long time before voting for Adams rather than Jackson,¹⁷³ a vote that would have left Rhode Island divided. Therefore, the present analysis classifies Rhode Island as *leaning to Adams*. With one exception, the delegations from the remaining four New England states voted unanimously for Adams in the House election. Only Massachusetts' Francis Baylies strayed by voting for Jackson. These four states are classified as *firmly for Adams*.

Virginia gave nearly 56 percent of its popular vote to Crawford with Adams receiving 22 percent, Jackson 19 percent, and Clay 3 percent. Twenty of Virginia's twenty-two Representatives voted for Crawford in the House election with Adams and Jackson receiving one vote each. Virginia is classified as *firmly for Crawford*.¹⁷⁴

Clay won the popular vote by large margins in his home state of Kentucky and in nearby Missouri. These states would prove to be crucial to Adams's victory in the House election. Missouri's lone representative John Scott cast his vote for Adams, in spite of the fact that the New Englander had garnered less than 5 percent of the state's popular vote.¹⁷⁵ Eight of the twelve members of the Kentucky House delegation defied the instructions of the state legislature and cast their votes for Adams.¹⁷⁶ These states are classified as *in play* since their House delegations could not vote for Clay.

There were close popular votes in Ohio, Illinois, and Maryland. Clay narrowly won the Buckeye state's winner-take-all pot of sixteen electors with 38.5 percent of its popular vote compared to 37 percent for Jackson and 24.5 percent for Adams. Adams received the votes of ten Ohio members in the House election with Jackson and Crawford each receiving two.

Illinois and Maryland each chose their electors by district. The Illinois electorate split its statewide popular vote four ways, with Adams receiving 33 percent of the vote, Jackson 27 percent, Clay 22 percent, and Crawford

Jersey is notably absent from this list. See THE MISSOURI COMPROMISES, *supra* note 118, at 134. A few days earlier, John Quincy Adams recorded Secretary of the Navy and former New Jersey Senator Samuel Southard telling him that three of New Jersey's representatives favored Adams. 6 ADAMS MEMOIRS, *supra* note 12, at 470-71. A month after the election, Stephen Van Rensselaer wrote to DeWitt Clinton that "New Jersey and Indiana would in a second or third ballot have gone over to Adams." William B. Fink, *Stephen Van Rensselaer and the House Election of 1825*, 32(3) N.Y. HIST. 323, 329 (1951) (quoting Stephen Van Rensselaer to DeWitt Clinton, March 10, 1825. DeWitt Clinton Papers).

173. MOONEY, *supra* note 126, at 296-99.

174. Plumer Jr. wrote to his father that the Virginia delegation would vote for Crawford on the first two or three ballots, and then for Adams. Letter from William Plumer Jr. to William Plumer (Dec. 24, 1824), in THE MISSOURI COMPROMISES, *supra* note 118, at 124. Also, that it would never vote for Jackson. *Id.* at 134.

175. For Scott, see Alan S. Weiner, *John Scott, Thomas Hart Benton, David Barton and the Presidential Election of 1824*, 60 MO. HIST. REV. 460 (1966).

176. See Letter from William T. Barry to Clay (January 10, 1825), in 4 CLAY PAPERS, *supra* note 117, at 11.

18 percent. Daniel Cook, Illinois' sole member of the House, voted for Adams in the House election. Adams and Jackson each captured 44 percent of Maryland's popular vote with Crawford and Clay receiving 10 percent and 2 percent respectively. However, Jackson won seven of the state's eleven electoral votes while Adams won only three and Crawford one. Adams narrowly earned Maryland's vote in the House election capturing the votes of five of its nine members with Jackson getting three and Crawford one. All three of these states are classified as *in play* by virtue of their close popular votes.¹⁷⁷

Six legislatures chose their state's presidential electors. The legislatures in South Carolina, Vermont, and Georgia selected electors who voted unanimously for Jackson, Adams, and Crawford respectively. The House delegations from these states voted in a similar unanimous fashion in the House election. Therefore, these states are classified as being *firmly for Jackson, Adams, and Crawford* respectively.

Delaware's legislatively chosen electors cast two electoral votes for Crawford and one for Adams. However, Louis McLane, the state's sole representative, was well known to be a friend of Crawford.¹⁷⁸ For this reason, Delaware is classified as *firmly for Crawford*. Clay's accidents in Louisiana and New York have already been recounted.¹⁷⁹ Adams barely won the votes of these states in the House election. He received the votes of two of Louisiana's representatives with Jackson getting the third. New York's vote in the House election went to Adams at the last moment when Stephen Van Rensselaer provided the crucial eighteenth vote¹⁸⁰ to achieve an absolute majority over Crawford, who received fourteen votes, and Jackson who received two. Had Van Rensselaer cast his ballot for Crawford or Jackson, the New York delegation would have been divided. Clearly, Louisiana and New York were *in play*.

Table 41 summarizes the classifications just made.

177. On December 15, 1824, John Quincy Adams noted that "Cook has just come from Illinois, and mentioned the result of the election of Presidential electors there. He says it leaves him at perfect liberty to vote in the House as he should think best for the public interest." 6 ADAMS MEMOIRS, *supra* note 12, at 444.

178. Letter from William Plumer Jr. to William Plumer Sr. (Dec. 25, 1824), in THE MISSOURI COMPROMISES, *supra* note 118, at 125.

179. See *supra* Part III.A.1.

180. See Fink, *supra* note 172.

TABLE 41 CLASSIFICATION OF STATES, ACTUAL HOUSE
ELECTION OF 1825

Category	Count	States
<i>Firmly for Jackson</i>	5	Alabama, Mississippi, Pennsylvania, South Carolina, Tennessee
<i>Leaning to Jackson</i>	2	Indiana, New Jersey
<i>Firmly for Adams</i>	5	Connecticut, Maine, Massachusetts, New Hampshire, Vermont
<i>Leaning to Adams</i>	1	Rhode Island
<i>Firmly for Crawford</i>	3	Delaware, Georgia, Virginia
<i>In Play</i>	8	Illinois, Kentucky, Louisiana, Maryland, Missouri, New York, North Carolina, Ohio

Of course, Henry Clay helped to deliver seven of the eight states *in play* to John Quincy Adams on the first ballot, giving Adams the minimum thirteen states needed to secure the presidency in the House election.

2. *The 1825 House Election with Clay Instead of Crawford*

Had Clay's name rather than Crawford's been before the House, then certainly the states marked as *firmly for Crawford* would have been *in play*, and the *in play* states that had unanimously given their electoral votes to Clay would have been *firmly for Clay*.¹⁸¹ As a result, Table 42 represents the likely starting point for a three-way contest among Adams, Jackson, and Clay.

181. Ohio was initially classified as *in play* by virtue of its close popular vote. Representative and future President James Buchanan, who voted for Jackson, explicitly noted that Clay controlled the vote of the Ohio delegation in the three-way contest including Crawford. Letter from James Buchanan to Thomas Elder (Jan. 2, 1825), in 1 THE WORKS OF JAMES BUCHANAN: COMPRISING HIS SPEECHES, STATE PAPERS, AND PRIVATE CORRESPONDENCE 120 (John Bassett Moore ed.) (1908) [hereinafter "WORKS OF JAMES BUCHANAN"].

TABLE 42 CLASSIFICATION OF STATES, HYPOTHETICAL HOUSE
ELECTION OF 1825

Category	Count	States
<i>Firmly for Jackson</i>	5	Alabama, Mississippi, Pennsylvania, South Carolina, Tennessee
<i>Leaning to Jackson</i>	2	Indiana, New Jersey
<i>Firmly for Adams</i>	5	Connecticut, Maine, Massachusetts, New Hampshire, Vermont
<i>Leaning to Adams</i>	1	Rhode Island
<i>Firmly for Clay</i>	3	Kentucky, Missouri, Ohio
<i>In Play</i>	8	Delaware, Georgia, Illinois, Louisiana, Maryland, New York, North Carolina, Virginia

Shortly before he learned his ultimate fate in the actual three-fifths rule Electoral College, Clay wrote to Francis Brooke, Chief Justice of the Virginia Supreme Court of Appeals,¹⁸² that even if he nosed out Crawford for third place, “I shall enter the H. so crippled that my election can scarcely be anticipated.”¹⁸³ Nevertheless, with the prize so near, Clay would likely not have abandoned his quest in the no-fifths rule Union despite the accidents he had suffered in New York and Louisiana. When Clay returned to the House at the beginning of the Eighteenth Congress in 1823, he easily wrested the Speaker’s chair from incumbent Philip Barbour with a first ballot vote of 139–42.¹⁸⁴ In contrast, two years earlier it took Barbour twelve ballots to win the speakership in Clay’s absence.¹⁸⁵

Of course, the present analysis can only entertain conjecture about how the Eighteenth House would have voted for president had it been able to vote for its Speaker, Henry Clay, rather than William Crawford, in a three-way contest with Andrew Jackson and John Quincy Adams. With the institutional advantages of the Speaker’s chair, Clay might have been able to win the House election. He surely could have forced it to go more than one ballot.¹⁸⁶

Certainly, Clay had a good chance of winning the four states that voted for Crawford in the actual House election. New Hampshire representative

182. Brooke served on the Virginia Supreme Court of Appeals from 1811 until his death in 1851. For Brooke, see 2 *ENCYCLOPEDIA OF VIRGINIA BIOGRAPHY* 62 (Lyon Gardiner Tyler ed. 1915); Brooke’s older brother Robert was of one of Henry Clay’s law teachers. DAVID S. HEIDLER & JEANNE T. HEIDLER, *HENRY CLAY: THE ESSENTIAL AMERICAN* 23–24 (2010).

183. Letter from Clay to Brooke (Nov. 16, 1824), in 3 *CLAY PAPERS*, *supra* note 117, at 888. For a similar remark made to Clay see Peter Porter’s letter of January 14, 1825. 4 *Id.* at 17.

184. 41 *ANNALS OF CONG.* 795 (1823).

185. 38 *ANNALS OF CONG.* 516 (1821).

186. For a much less optimistic view of Clay’s prospects, had his name rather than Crawford’s been before the House, see RATCLIFFE 1824, *supra* note 169, at 229–58, especially 235–37.

William Plumer Jr. wrote to his father that Virginia's delegation would never vote for Jackson nor would Delaware's sole Representative Louis McLane¹⁸⁷—assertions corroborated in Adams's *Memoirs*.¹⁸⁸ Buchanan wrote to Elder that neither North Carolina nor Georgia would vote for Adams,¹⁸⁹ and North Carolina had indeed deserted Jackson for Crawford. Buchanan also described Clay as having influence on Louisiana's delegation,¹⁹⁰ which would have had only two members under a no-fifths rule apportionment.¹⁹¹

Whether Clay could have won the votes of the larger delegations from Maryland and New York is another matter.¹⁹² If Clay won Delaware, Georgia, Louisiana, North Carolina, and Virginia, he would have been at least on par with Adams and Jackson in the early ballots. With eight states in his column, Clay might have been able to add Maryland and New York to his list leaving him three states short of the thirteen required for election. Rhode Island's two-member delegation might have been ripe for Clay's persuasions. So might New Jersey's delegation, which would have had between six and nine members under a no-fifths rule apportionment.¹⁹³

Christopher Rankin, the only representative from Mississippi, might have been the object of intense lobbying.¹⁹⁴ It is even possible that Illinois' lone member, Daniel Cook, who bore a grudge against Clay for the speaker's role in the House investigation of Cook's father-in-law, Senator Ninian Edwards, would have voted for his fellow westerner Clay.¹⁹⁵

Three weeks before the House election, Daniel Webster wrote his brother Ezekiel and asked, "Is it advisable, under any circumstances, to hold out and leave the chair to Mr. Calhoun? Would or would not New England prefer conferring the power on Calhoun, to a choice of General

187. See Letter from William Plumer Jr. to William Plumer (Dec. 25, 182) in *THE MISSOURI COMPROMISES*, *supra* note 118, at 125–26; Letter from William Plumer Jr. to William Plumer (Jan. 24, 1825), in *THE MISSOURI COMPROMISES*, *supra* note 118, at 134–36.

188. For Virginia, see Notes of a conversation with Virginia Senator James Barbour (January 13, 1825), in 6 *ADAMS MEMOIRS*, *supra* note 12, at 467. For Delaware, see Notes of a conversation with Massachusetts representative Henry Dwight (February 2, 1825). *Id.* at 490.

189. *WORKS OF JAMES BUCHANAN*, *supra* note 181, at 121.

190. *Id.* at 120.

191. With a free population of 84,343, Louisiana would not receive a third House seat for any ratio of representation above 1:28,114.

192. Willie Mangum described Clay as holding the votes of Maryland and New York in his hands. Letter from Mangum to Duncan Cameron (Jan. 25, 1825), in *THE PAPERS OF WILLIE PERSON MANGUM*, *supra* note 121, at 174. However, this most likely concerned Clay's ability to tip the scale between candidates with nearly equal backing in each of these delegations.

193. With a census count of 270,018, New Jersey would have had nine representatives with a ratio of representation as low as 1:30,000.

194. Rankin, who voted for Jackson, had meetings with Adams on December 15 and 29, 1824. 6 *ADAMS MEMOIRS*, *supra* note 12, at 442, 455.

195. For the grudge, see MARY W. M. HARGREAVES, *THE PRESIDENCY OF JOHN QUINCY ADAMS* 39 (1985). Remini suggests that Cook might have been bribed to vote for Adams. *REMINI, CLAY*, *supra* note 26, at 264 n.43.

Jackson?"¹⁹⁶ Perhaps the Eighteenth House would have expired without making a choice, thereby forcing newly elected Vice President John Calhoun to "act as president."¹⁹⁷ An unresolved stalemate in the Eighteenth House would have left the presidential election to its successor, whose first task would be to organize itself and choose a Speaker.

There are many scenarios in which John Quincy Adams would not have been inaugurated on March 4, 1825.¹⁹⁸ The nation might have had an acting president. The Age of Jackson might have commenced four years earlier. Henry Clay might have been elected after having received approximately 13 percent of the popular vote and just a handful of electoral votes in the states whose legislatures chose their electors. Would this have been the presidential game of faction envisioned by George Mason?¹⁹⁹

IV. CONCLUSION

This Article has been an essay in both *actual* history and *virtual* history.²⁰⁰ Each informs the other and each has its own challenges.

196. Letter from Daniel Webster to Ezekiel Webster (Jan. 18, 1825), in 2 THE PAPERS OF DANIEL WEBSTER: CORRESPONDENCE 14 (1974). Webster was not the only one to realize that a stalemate would make John Calhoun acting president. In his entry for December 22, 1824, John Quincy Adams recorded a conversation with Virginia Senator James Barbour who "thought it would be treason to the Constitution to hold out and prevent an election by the House until the 4th of March, so as to give the actual Presidency to the Vice-President." 6 ADAMS MEMOIRS, *supra* note 12, at 450–51. Amos Kendall wrote to Clay that he "would sooner vote for any of the three than have a Viceregent for four years." Letter from Amos Kendall to Henry Clay (Jan. 21, 1825), in 4 CLAY PAPERS, *supra* note 117, at 35.

197. "And if the House of Representatives shall not choose a President whenever the right of choice shall devolve upon them, before the fourth day of March next following, then the Vice-President shall act as President, as in the case of the death or other constitutional disability of the President." U. S. CONST. amend. XII. (Superseded by U. S. CONST. amend. XX, § 3).

198. Jenkins and Sala analyzed the charge that Adams's election by the Eighteenth House resulted from the corrupt bargain of making Clay his secretary of state. They conclude that "Adams's victory and profile of support were consistent with the sincere voting model and did not support the corrupt-bargain hypothesis." Jeffery A. Jenkins & Brian R. Sala, *The Spatial Theory of Voting and the Presidential Election of 1824*, 42(4) AM. J. POL. SCI. 1157 (Oct. 1998). Professor Jenkins has written to me that they did not analyze a three-way election involving Clay rather than Crawford. He wrote "my hunch would be that there would not have been a first ballot winner. Clay and Adams had very similar voting records, and thus had very similar NOMINATE scores, so they would have split the Adams vote in the real-world House election. This would have helped Jackson, as would Crawford not being in the race, but I doubt it would have been enough to get Jackson a first ballot majority." (Email correspondence on file with author.) Jenkins' conjecture is based exclusively on voting records in the Eighteenth House and does not consider the institutional advantages Clay would have reaped as Speaker of the House.

199. At the Convention, Mason suggested that nineteen times out of twenty the Electoral College would fail to produce a victor. THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 23, at 500. By the time of the Virginia ratifying convention, Mason raised the likelihood to forty-nine times out of fifty. 3 ELLIOT'S DEBATES, *supra* note 28, at 493. For the phrase "the game of faction," see RICHARD P. McCORMICK, *THE PRESIDENTIAL GAME* 5 (1982).

200. Others might prefer the term "counterfactual history" to "virtual history." The term "virtual history" is taken from Niall Ferguson, *Virtual History: Towards a 'Chaotic' Theory of the Past*, in VIRTUAL HISTORY: ALTERNATIVES AND COUNTERFACTUALS 1 (Niall Ferguson ed.) (1997).

In the actual election of 1824, one of Henry Clay's *accidents* occurred when three New York electors defected away from him. Writing the *actual* history of this episode, one commentator has written "It is futile to guess what took place."²⁰¹ Another has written "Probably no one will ever know exactly what happened."²⁰² Perhaps a hitherto undiscovered document will surface that will enable a future generation of historians to resolve this issue.

Writing *virtual* history has a different challenge: distinguishing plausible unrealized alternatives from implausible unrealized ones. Historian Ni-all Ferguson has recognized this challenge and proposed a response.

How *exactly* are we to distinguish probable unreali[z]ed alternatives from improbable ones? The most frequently raised objection to the counterfactual approach is that it depends on 'facts which concededly never existed'. Hence, we simply lack the knowledge to answer counterfactual questions. But this is not so. The answer to the question is in fact very simple: We should consider as plausible or probable *only those alternatives which we can show on the basis of contemporary evidence that contemporaries actually considered.*²⁰³

This is valuable advice for assessing claims made about the impact of the three-fifths rule on the outcome of presidential *elections*.

This article rests on detailed historical knowledge in two areas. The first is a detailed knowledge of the actual apportionment of the House of Representatives at the Convention, by Congress in 1791–1792, and in 1822. The second is the gold mine of data available at *A New Nation Votes*, a data set that Gordon Wood has described as "monumental" and "[i]ndispensable for understanding politics in the early Republic."²⁰⁴

Freehling et al. may declare unproblematically that in the actual election of 1800, Jefferson owed a dozen or so of his seventy-three electoral votes to the three-fifths rule, compared to only two or so for Adams. That is a matter of actual history based on the actual apportionment made by Congress in 1791–1792²⁰⁵ and the choice of presidential electors made in 1800 under that apportionment.²⁰⁶

It is quite another matter, however, to assert that Jefferson owed his *election* to the three-fifths rule. That is a matter informed by *virtual* history. It is an assertion that Adams would have defeated Jefferson in 1800 in a no-fifths rule Union, a matter of *virtual* history.

201. REMINI, VAN BUREN, *supra* note 123, at 82. See *supra* note 126 and accompanying text.

202. MOONEY, *supra* note 126, at 294–95 n.63. See *supra* note 126 for the full passage.

203. Ferguson, *supra* note 200, at 86. (emphasis in original).

204. Gordon S. Wood, *Empire of Liberty: A History of the Early Republic, 1789–1815*, at 745 (2009).

205. See *supra* Part II.B.1.

206. For the actual results, see 10 ANNALS OF CONG. 1024 (1801).

Had the Constitutional Convention adopted a no-fifths rule, the election of 1800 would not have been the first point of impact for that major alteration in American history. If the Convention had adopted a no-fifths rule, that decision would have impacted the apportionment of the House of Representatives at the Convention itself in 1787 and by the Second Congress in 1791–1792. That leaves two key unknowns: whether the minimal ratio of representation in Article I, Section 2 would have been 30,000 or something less, and what ratio would have been adopted by the Second Congress. There is no way to determine with certainty what these ratios would have been in a no-fifths rule Union.

However, it is possible to know with certainty what ratio of representation would not have been adopted by the Second Congress in 1792. It would not have been 1:33,000 as supposed by Freehling et al. Congress adopted that ratio *because* it minimized total remainders in a three-fifths rule Union.²⁰⁷ For the very same reason, Congress would not have adopted that ratio in a no-fifths rule Union.²⁰⁸ Nor would the House size have been 105 members in a no-fifths rule Union as Weston suggests.²⁰⁹ The Second Congress treated total House size as an *output*, not an *input*. The Second Congress never considered an apportionment method that began with a target House size.

The electoral votes from Maryland and North Carolina present similar challenges for a *virtual* history of the 1800 election in a no-fifths rule Union. In those cases in which the state legislature adopted a districting plan for some number of electors or representatives in the early to middle 1790s, it is reasonable to suppose such a plan would have been in place for the same number of presidential electors in the state in a no-fifths rule Union.²¹⁰ No such districting plan is available for North Carolina when it is apportioned eleven or thirteen electors. In such cases, a viable alternative is to consider a wide variety of districting plans generated by software based on a reasonable set of specifications.²¹¹

Not surprisingly, this results in a set of probabilities. Jefferson wins the election with some apportionments nationwide and in North Carolina. Adams wins with the rest. In virtual histories such as the one presented here for the election of 1800, the most that can be said is that in a non-trivial percentage of cases, one outcome follows; in another, non-trivial percentage of cases, a different outcome follows.

207. See *supra* text accompanying Table 7 and Table 8.

208. See *supra* text accompanying Table 9 through Table 12.

209. See *supra* note 114. All apportionment methods considered began with a ratio of representation that was a multiple of 1,000. A House size of 105 could only have been possible for a ratio of between 28,437 and 28,507 inclusive.

210. See *supra* text accompanying notes 103, 104, and 106.

211. See *supra* text accompanying notes 109 and 110.

A virtual history of the election of 1824–1825 presents a different set of challenges. Determining the outcome of the electoral vote in this election does not critically depend on how the Congress resized the House in 1822. Instead, it demands careful analysis of how the precise size of the House impacts the number of electoral votes won by Henry Clay and William Crawford in states that did not adopt the unit rule and chose electors who voted for one or the other of them: Delaware, Maine, Maryland, and New York.

Maine and Maryland chose electors by district in 1824. Projecting how these states might have drawn a different number of districts in 1824 begins with understanding the history of how they drew the actual districts.²¹² With that actual history in hand, it is possible to project a virtual history of how they might have drawn a different number of districts in 1824, making sure always to give Crawford any possible advantage over Clay in doubtful cases.²¹³ A similar rule advantaging Crawford over Clay applies when projecting how the Delaware and New York legislatures might have chosen an alternate number of electors.²¹⁴

Making sure that Clay never benefits at Crawford's expense from any choices made in this virtual history enables the conclusion that in a no-fifths rule Union, Clay finishes in third place in the electoral vote, ahead of Crawford. This can be known with certainty.

The outcome of a contingent House election of 1825 with the choice of Henry Clay available is another matter. The late historian Robert Remini, an authority on the era of Adams, Clay, and Jackson, adopted an air of certainty when he wrote "In that case [Clay] would have been elected President—unquestionably."²¹⁵

This Article addresses a different issue than the one addressed by Remini. He addressed the issue of whether Henry Clay would have been chosen in the House contingent election if his name rather Crawford's had been in the mix. This Article asks whether a good case can be made that John Quincy Adams owed his election to the three-fifths rule. The article has demonstrated that in a no-fifths rule Union, Clay rather than Crawford would have been the third candidate before the House.

With Speaker Henry Clay as one of three candidates for the presidency, the dynamics of the House election would have been very different. The lame duck Eighteenth House might still have elected John Quincy Adams president, but it might also have elected Henry Clay *or* Andrew Jackson instead. It might even have stalemated and been unable to make a choice in the twenty-three days remaining in its session. Vice President

212. See *supra* text accompanying notes 136 through 143 and notes 151 through 166.

213. See *supra* text accompanying Table 28 through Table 30 and Table 35 through Table 37.

214. See *supra* text accompanying note 133 and Table 38.

215. REMINI, CLAY, *supra* note 26, at 250.

John Calhoun might have become acting president on March 4, 1825. A plausible argument can be made that the House would not have elected John Quincy Adams.

Actual history and virtual history inform each other.