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The People's House?: Countermajoritarianism in the House of Representatives

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The People's House?:
Countermajoritarianism in the House of Representatives

A thesis submitted in partial fulfillment of the requirement
for the degree of Bachelor of Arts / Science in Government from
William & Mary

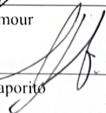
by

Andrew Hoffman

Accepted for Honors
(Honors)


C. Lawrence Evans, Director


John B. Gilmour


Salvatore Saporito

Williamsburg, VA
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Acknowledgements

This thesis is essentially an extension— albeit a lengthy one— of a project on Senate countermajoritarianism that I had the privilege of working on with Professor Larry Evans. The core idea came out of a conversation in which he suggested that countermajoritarian outcomes could possibly have occurred in the antebellum House, but it was difficult to study because district-level population data was elusive. This thesis would not have been possible without his guidance and suggestions.

I thank Professors Gilmour and Saporito for their comments and willingness to join my committee, and I should also apologize in advance for the length. My work has also benefited from conversations with Sarah Binder, Molly Reynolds, and Robert Ross.

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Finally, I should thank my friends, family, and housemates for enduring conversations with me about malapportionment, obscure Framers of the Constitution, and the Missouri Compromise throughout this process. Their interest and comments were helpful and motivating in putting this work into words. I will acknowledge, however, that their most frequent guidance— to come up with a pithier term than “countermajoritarianism” — is probably the only advice I didn’t take. On that point, they were probably right.

Introduction

Public discussion that penetrates beyond the Constitution as a national icon is virtually nonexistent. Even when in-depth analysis does occur—mainly among constitutional scholars in schools of law and departments of political science and history—the Constitution as a whole is rarely tested against democratic standards or against the performance of constitutional systems in other advanced democratic countries.

— Robert A. Dahl, *How Democratic is the American Constitution?* (2003, 156)

There is a well-developed tradition among political scientists and democratic theorists of examining our American form of government and testing it against democratic ideals. No institution has received more of such a treatment than the Senate, whose filibuster and equal-state apportionment have stood out as perhaps the most normatively incoherent features of government. This is evidenced most clearly by the titles of major books on the chamber: *Sizing Up the Senate: The Unequal Consequences of Equal Representation* (Lee and Oppenheimer 1999), *The Senate: From White Supremacy to Governmental Gridlock* (Wirks 2021), and—perhaps most polemically—*Kill Switch: The Rise of the Modern Senate and the Crippling of American Democracy* (Jentleson 2021). Scholars have probed the upper chamber and questioned the assumptions that underlie its construction— about the coherence of supermajority thresholds, the validity defending state interests over political equality, the tension between gridlock and tyranny of the majority. But the history and design of the House, which was explicitly created as a majoritarian institution, has gone mostly unassessed. While oceans of ink have been spilled over the countermajoritarian Senate, the literature lacks a comprehensive democratic assessment of the House of Representatives that spans its full history with empirical rigor.

The House was designed, and largely has been seen, as a majoritarian institution that represents the people in proportion to their numbers. While true that the House's apportionment

is population-based, it has also had critical anti-democratic defects for large periods of its history. The three-fifths clause gave considerable representation to the South in excess of its free population, and the Framers took no steps to ensure that district populations *within* states were equal. For the most part, Congress and state legislatures similarly did not enforce district equality. Even when drawing new post-census districts, legislators were shockingly apathetic about equal population as a criterion. Moreover, while the Framers and the Supreme Court both cared deeply about equality of electoral populations (one person, one *vote*), voting weights have never been equal in the House. Most significantly, during the Jim Crow era of voting disenfranchisement Southern members were systematically elected with lower levels of turnout and electoral support. All these factors combined, throughout the history of the House there is significant potential for outcomes that can be reasonably viewed as anti-democratic. But for the most part, we have continued to see the lower chamber in the terms it was envisioned: the People's House.

My goal in this thesis is to produce a survey of anti-democratic outcomes in the House of Representatives— an enterprise that, in my view, has not been adequately undertaken. Antidemocratic outcomes, of course, are often in the eye of the beholder. In the chapters that follow, I confine my attention to two: malapportionment (the drawing of vastly unequal district populations) and countermajoritarianism (roll call outcomes in which the majority coalition represents fewer individuals than the minority). To my knowledge, no previous work has empirically investigated the determinants of malapportionment of House districts in the antebellum era, and this is the first examination of countermajoritarianism in the chamber.

In Chapter 1, I return to the decisions made by the Constitution's Framers. On net, the Founders intended for a majoritarian lower chamber— and in many ways they succeeded in

designing one; the House is the most democratic element in the original Constitution. I also review the literature on malapportionment and countermajoritarianism in the Senate, and I offer some reasons to believe that such outcomes are possible— while never directly studied by political scientists— in the House’s history. Finally, I offer normative justifications for three measures of countermajoritarianism, based separately on whether members represent a majority of the free population, aggregate voting population (turnout), and electoral supporters.

In Chapter 2, I study malapportionment across the full history of the House, including the pre-*Wesberry* period, which has not received thorough scholarly treatment. Throughout this period, malapportionment was widespread, a function of interstate and intrastate population deviations. While the former is caused most directly by three-fifths apportionment, the latter is magnified by state legislatures’ failure to redistrict after the census and, even more prominently, mapmakers’ general apathy towards district equality as a redistricting criterion. I also find that deviations in electoral constituencies— potential electorates, turnout levels, and electoral support for the incumbent— are predictably even higher. In other words, the principle of one person, one vote (the constitutional basis for districting equality) is far less upheld than equal populations.

In Chapter 3, I turn my attention to countermajoritarian outcomes in the roll call record of the House. Beyond unequal district sizes, how often does malapportionment and unequal constituencies manifest in the form of countermajoritarian votes (a vote in which a majority represents fewer free individuals, voters, or electoral supporters than the opposing minority)? Free population countermajoritarianism was not widespread, but these outcomes were occasional in the antebellum era (6.11% of roll calls). Turnout and support-based measures of countermajoritarianism are markedly higher, peaking in the Jim Crow era. While there is some variance in the composition of countermajoritarian coalitions, these outcomes have primarily

served the interest of the South and are a function of malapportionment, as well as partisan alignments and conflict in the roll call record. These votes are less common on passage, but some of the most landmark legislation in American history was adopted on countermajoritarian passage votes, and countermajoritarian amendment and procedural votes were instrumental in shaping legislative content.

Finally, I delve deeper into the historical and contemporary implications of this work. In Chapter 4, I offer a broad history of legislation on slavery, the most countermajoritarian issue, including the House's notorious gag rule, DC abolition, the Compromise of 1850, and the Kansas-Nebraska Act. I argue that the three-fifths clause was often decisive on legislative outcomes, perhaps even more so than regional balance in the Senate. I also offer reasons to believe that outcomes would have looked quite different without the clause. In Chapter 5, I advance two arguments about how scholars ought to think about the contemporary House of Representatives. First, the House is a highly contingent institution and its evolution is path-dependent. Explanations of the chamber's apportionment or design that do not begin by accepting the important role of negotiated outcomes, unexpected events, and exogenous factors— factors that have nothing to do with *functional* design— are fraught. Second, while scholars have raised legitimate concerns about contemporary apportionment formulae, interstate malapportionment, gerrymandering, and urban-rural polarization, it is hard to argue against the fact that the modern House is more majoritarian than at any other point in its history. This, I think, is a greatly understated point of nuance on the redistricting literature and modern commentary on America's lower chamber.

1.

Revisiting the Great Compromise

All elections ought to be equal. Elections are equal, when a given number of citizens, in one part of the state, choose as many representatives, as are chosen by the same number of citizens, in any other part of the state. In this manner, the proportion of the representatives and of the constituents will remain invariably the same.

— James Wilson, cited in *Wesberry v. Sanders* (1964, 17)

James Wilson, a Pennsylvania delegate who later served on the Supreme Court, was one of the most active and democratic members of the Constitutional Convention. Like most of the Framers, he arrived at the Convention with a vague aspiration for a national bicameral legislature, with a lower house that derives its power most directly from the people. As Madison argued, "If the power is not immediately derived from the people, in proportion to their numbers, we may make a paper confederacy, but that will be all." Wilson similarly declared at the Convention that "equal numbers of people ought to have an equal no. of representatives" and representatives of different districts "ought clearly to hold the same proportion to each other, as their respective constituents hold to each other."

The quotes above, nearly 180 years later, would be cited by the Supreme Court in their 1964 *Wesberry v. Sanders* decision, ruling that congressional districts must be approximately equal in population. Running through the Court's redistricting decisions, the *Federalist Papers*, and innumerable speeches on the floor of Congress is a consensus that the bicameral Great Compromise produced a system where the Senate, isolated from the rash will of the people, represents the states, while the House— with two-year terms and population-based representation— is the People's House, "the forage of democracy" (MacNeil 1963), or as George

Mason declared, “the grand depository of the democratic principle of government” (Madison 1918, 48).

Naturally then, the House has been viewed as a majoritarian institution and a democratic counterweight to the Senate. This is for good reason; the House was the only directly-elected branch of the original Constitution, and when it first convened in 1789, it was probably the most democratic feature of American government. Not only did Article I mandate direct election of House members, it also required that those members be elected by all those eligible to vote for “the most numerous Branch of the State Legislatures,” which was often the broadest electorate used within the states (elections for upper chambers are governors often had narrower property qualifications). When Gouverneur Morris moved to “restrain the right of suffrage” for House elections, Wilson expressed that such a move would be “hard & disagreeable.” Only Delaware voted in support of the motion (Amar 2005, 67).

The Framers, on net, were set on designing the House to be the democratic feature of an otherwise mixed government with an aristocratic Senate and an indirectly-elected president. They also sensed that such democratic features were critical in convincing the American people to “subscribe” to the Constitution— both literally, in the states’ ratification elections, and also in lending the Federal government its legitimacy. For example, the House was also radical in its lack of property requirements for membership: just age, residency, and citizenship. By contrast, 11 of the original 13 states had property qualifications for the lower house of the state legislature, and membership in England’s House of Commons was limited to men of vast estates (Amar 2005, 64-67).

The Framers also sought to avoid another failure of the British Commons: its inability to adjust for population shifts. At the time, the Commons was a “crazy quilt of districts of widely

varying populations” (Amar 2005, 84). Except for adding 45 members for Scotland, Parliament had never reapportioned in all of the 18th century, despite huge industrial population shifts. England had also never had a national enumeration to account for how disparate district populations were. As the Framers saw it, England had imposed malapportionment on the colonies. In 1767, the King instructed his royal governors to veto any expansion to assembly sizes to account for growing populations. Nine years later, the Declaration of Independence railed against the king’s refusal to “Accomodat[e] large Districts of the People, unless those people would relinquish the Right of Representation, a Right inestimable to them, and formidable to Tyrants.” Thus, the goal of a population-based lower chamber was inextricably linked to revolutionary demands of “no taxation without representation” (Amar 2005, 84-87).

This, for Wilson and many of his compatriots, was the idea of the House: a majoritarian institution apportioned on population (free population, ideally), with a constitutionally-mandated decennial census that could “map Americans on the move” (Amar 2005, 84) and adjust apportionment accordingly. In a lecture after the Constitution was adopted, Wilson refined this idea: House districts ought to be drawn to guarantee “equal” elections, such that “a given number of citizens, in one part of the state” choose the same number of representatives as an equal group in another part of the state. This guarantees that “the proportion of the representatives and of the constituents will remain invariably the same” (see epigraph). This was a prescient statement of the one person, one vote standard adopted by the Supreme Court in *Baker v. Carr*, applied to require districts of roughly equal population in *Wesberry*.

But those decisions did not come until 1962 and 1964, respectively. Neither one person, one vote nor equal elections were enshrined in the Constitution, and the idea of equal district population went unenforced before *Wesberry*. Particularly in the debates over representation and

apportionment, political theories and ideals often yielded to political pragmatism and historical contingency. While the Framers were united behind the merits of a bicameral legislature, it was pragmatic politics and historical contingency that led the bicameral construction of the Great Compromise: an indirectly-elected Senate with two senators granted for each states and a House apportioned by the three-fifths clause (Lee and Oppenheimer 1999).

The aim of this chapter is to refine our thinking about the Great Compromise produced by the Framers, particularly the decisions and oversights of the Framers that potentialized malapportionment and countermajoritarianism. First, I review the literature on malapportionment and countermajoritarianism in the Senate, where scholars have focused most of their attention. Next, I return to the Convention of 1787 and the Framers' design of the House. I highlight two decisions they made that potentialized malapportionment. First, adopting the three-fifths clause as the apportionment formula bestowed a representational bonus unto slave-holding states. Second, the Framers made no provision to guarantee equal district populations *within* states, allowing malapportionment to run rampant. Finally, to develop three definitions of a countermajoritarian outcome—based separately on free population, turnout, and electoral support for a given incumbent—I make the normative case that the latter two populations are appropriate, narrower operationalizations of constituency.

The Countermajoritarian Senate

Scholarship on countermajoritarianism in Congress has focused on the Senate. This is justified, given that it is one of the most malapportioned chambers in the world. As Senate malapportionment has increased markedly since the era of the founders, it had tended to bolster representation of the minority party until 1956. Since then, the Senate's design has consistently

advantaged the Republican Party (Lee and Oppenheimer 1999). In terms of voting weight in the chamber, the voters that suffer most from equal-state representation are, on net, urban (Stephens 1996), ideologically liberal (Griffin 2006; Beramendi et al. 2023), and racial minorities (Baker and Dinkin 1997; Malhotra and Raso 2007).

But beyond over- and underrepresentation of groups, we need to contend with whether malapportionment, in either chamber, actually manifests itself in the roll call record. In an early article, Moffet (1895) considers final passage votes for 22 important measures from 1789 to 1893 and concludes that, in general, senators representing a minority of the population do not often vote against senators representing a majority. Similarly, Woody (1926) focuses specifically on the 65th Congress where the majority party represented a minority of the population and finds that a coalition of senators representing a minority of the population prevailed in only one in eight votes.

Taking a different approach, McCrone (1990) reconstructs a 100-seat Senate, where each state has at least one senator and the remaining seats are distributed based on population.¹ For the 1980-81 period, he re-weighs roll calls for *Congressional Quarterly* key votes, finding that 13 of 30 key votes would have reversed outcomes in a Senate of population-based apportionment. Johnson and Miller (2022) extend this analysis to 804 CQ key votes in the 1961-2019 period, finding that 17.2% would have flipped under McCrone's apportionment. Additionally, they find that these reversals are not evenly distributed across ideology or issue area; conservatives benefit most from equal state representation, and reversals are most common for the issues of gun control immigration, abortion, and social welfare.

While useful, the Woody and Moffett studies focus on small subsets of the roll call record, and McCrone and Johnson and Miller underestimate counter-majoritarian outcomes by

¹ Such a proposal was actually introduced at the 1787 Convention and supported by Wilson, Jefferson, and Madison.

guaranteeing every state at least one senator. In other words, it is possible to have a roll call outcome where the senators in the majority represent a minority of the population, but is not considered a reversal under McCrone's reapportionment scheme. Additionally, simply re-weighting senators' votes in a 100-member body is not a true counterfactual. Would those votes truly flip under McCrone's apportionment? It is quite unclear.

Evans (2023a) argues that the best approach is likely the simplest: gauging the proportion of roll calls over time where the senators in the chamber's majority represent a minority of the population. Overall, from 1789 to 2022, about 12 percent of Senate roll call votes were countermajoritarian, with significant variance over time that can be explained by two variables: the proportion of close roll call votes and the proportion of the population represented by the chamber's majority party. Interestingly, a variable for the variance in states' populations is not statistically significant. This suggests that the magnitude of difference between large and small states does not, in itself, explain countermajoritarianism in the Senate; rather, it is how such population differences interact with relevant political cleavages.

Critically, Evans (2023b) notes that using total population may be a normatively improper way to gauge countermajoritarianism. Counting slaves and legally disenfranchised populations toward the populations "represented" by senators tends to overweight slave state senators in particular. Using a separate measure based on the voting-eligible electorate shows that countermajoritarianism is generally higher with the voting-eligible electorate measure. Focusing on issues, Evans and Hoffman (2023) note that countermajoritarianism is highest for partisan and controversial issues, such as the national bank, congressional reapportionment, the Supreme Court, disputed elections, and tariffs.

This literature offers a number of insights on gauging countermajoritarianism in the House. First, it would be normatively inappropriate to use *total* population (including slaves). James Madison, who defended slavery throughout his career in Congress, had a district with 91,007 people when he arrived at the First Congress, of which 40,150 were slaves (Parsons et al. 1978). It would seem misguided to propose that he credibly represented the latter. As we will see in Chapter 2, Southern members of Congress represented a greater total population but a 25% lower free population. Second, we can see that there are good normative arguments for gauging countermajoritarianism based on more restrictive constituencies, like the voter-eligible electorate, to account for varying levels of voter turnout or disenfranchisement.

In the next section, I parse what institutional factors potentialized malapportionment in the House. In the final section, I tackle the second point above and develop three measures of countermajoritarianism based on different underlying constituencies.

Countermajoritarian Potential in the House

Unlike the literature on the Senate, scholars are far more silent on antidemocratic bias in the House of Representatives. In many ways, this makes sense; the Senate is far more malapportioned due to equal-state apportionment, so countermajoritarian outcomes are far more common. But wherever there is malapportionment— that is, wherever members of a legislature represent considerably different population sizes— there is potential for countermajoritarian outcomes. And as we will see in Chapter 2, malapportionment prior to the Supreme Court’s redistricting decisions in the 1960’s was widespread.

Both malapportionment and countermajoritarianism were potentialized in the House of Representatives by two decisions of the Framers. First, the Constitution apportioned

representation based on the three-fifths clause, which bestowed a representational bonus upon slave-holding states, leading to systematic differences in the number of free people represented in northern and southern districts. Second, neither the Framers nor Congress took any steps to guarantee equally-populated districts *within* states, and the principle of population equality was unenforced until the Supreme Court's *Wesberry* decision. Both of these factors are elaborated below.

“... three fifths of all other persons...”

Nine different principles of apportionment were proposed at the Convention of 1787, and there was never a stable consensus on one (Ballingrud and Dougherty 2018). Edmund Randolph's Virginia Plan, which began the substantive business of the Convention, proposed two chambers both based on either quotas of contribution (states' wealth, including slaves) or the number of free inhabitants (Rakove 1987). Madison, in committee, moved to delete the latter from the proposal; Hamilton opposed him. On June 11, Richard Sherman of Connecticut, an architect of the Great Compromise, proposed that representation be based on states' "numbers of free inhabitants," in the lower house and equal state representation in the upper. Two South Carolina delegates, both plantation owners, proposed quotas of contribution once more. But before the measure was voted on, a Pennsylvania delegate rose to propose that apportionment be based on "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." This was the three-fifths clause. And most shocking of all, the delegate who rose to propose it was James Wilson (Hall 1997; Ohline 1971).

From our vantage point, this is puzzling. If Wilson was a fierce democrat and an opponent of slavery, who thought “all elections ought to be equal” (which essentially required apportionment based on *free* population), then what led him to make such a proposal? Wilson would have preferred apportionment on free population, but he preferred the three-fifths clause (which had already been used for taxation) to equal-state representation or property- or revenue-based provisions. Wilson’s move was also an attempt to build a coalition of large and slave-owning states (Hall 1997; Ohline 1971). In an article on the compromise, Ballingrud and Dougherty (2018) note that:

[Wilson] would know that a majority of states would prefer [quotas of contribution] over [apportionment by free population], so he could not propose [apportionment by free population] without its quickly being defeated by [quotas of contribution] in a subsequent vote. He would also know that a majority of states would prefer [the three-fifths clause] to [quotas of contribution] and a majority would prefer [the three-fifths clause] to [equal state representation], making [the three-fifths clause] a reasonable proposal. . . . This made [the three-fifths clause] a reasonable introductory move, one that would defeat the two rules on the table and open the door for his most preferred alternative, [free population apportionment] (868-869).

His most-preferred alternative, of course, was never adopted. A committee was formed to resolve the representation dispute, reporting on July 5 with the basis for the Great Compromise: a lower chamber apportioned under the three-fifths clause and an upper chamber giving equal state representation. While Wilson could have proposed free population apportionment, it would have upset his partly-Southern coalition. When the Convention eventually voted on the three-fifths clause and free population apportionment, on August 8, the proposal was rejected 1-10, with even Wilson voting against; on net, the delegates believed the matter had been settled (Ballingrud and Dougherty 2018).

There was another critical element to Wilson’s strategy: one reason he was content with the three-fifths clause for apportionment was because he believed that slavery would soon be

eliminated. Wilson believed, incorrectly that the Constitution's provision to eliminate the Atlantic slave trade by 1808 was sufficient to extinguish the entire institution. This belief of his was bolstered by the prohibition of slavery under the Northwest Ordinance (Smith 1956, 117). Of course abolition did come, eventually, but not until long after Wilson died in 1798. The clause he proposed had enduring political effects that systematically benefited the slaveholding South for seven decades. Following the 1790 Census, for example, New Hampshire's population of about 140,000 free persons entitled it to four seats in the expanded House, while South Carolina's population of 140,000 free persons and 100,000 slaves granted it six seats. After the First Census, the South had 47 seats to the North's 58; without the three-fifths clause, the figure would be 33 to 57 (Amar 2005, 94).

And as we will see in Chapter 4, this Southern benefit in the House was most critical on the issue of slavery and might have bolstered its longevity. It influenced the Senate through state legislative apportionment and impacted states' number of electoral votes. It also disincentivized states from abolition because any state that pursued slavery abolition and emigration would lose representation. Even more critically, the clause's benefit to the South proved decisive on important roll call questions about slavery more than any other legislative issue, including motions related to the Missouri Compromise, the Kansas-Nebraska Act, and the 1840 gag rule. In sum, then, James Wilson proposed the three-fifths clause partly because he thought slavery would be abolished, but in a tragic twist of irony it was the clause itself that might have forestalled abolition.²

²See Amar (2005, 540n110). For an alternative view, see Rakove (1996, 93) and Weingast (1998).

“...these & many other points would depend on the Legislatures”

The Framers made another important decision (or non-decision, rather) about the House: they made no provisions for whether states should draw districts or elect representatives by general ballots, or what criteria ought to be used for district maps. This decision was far less controversial among the delegates and has received far less scholarly attention. While the Framers had a general preference and expectation that states would draw districts (as opposed to electing representatives by general ballot),³ there was a broad consensus at the Convention that state-level electoral matters should be left to state legislatures. As Madison expressed, “Whether the electors should vote by ballot or *viva voce*, should assemble at this place or that place; should be divided into districts or all meet at one place, ... these & many other points would depend on the Legislatures.” (Madison 1918, 424). As a result of this principle, representation was apportioned every decade based on the three-fifths clause, but there was no constitutional requirement for states to have equally-populated districts.

As the Constitution was silent on districting criteria, Congress was similarly apathetic. Before 1842, no national laws governed the drawing of district lines. The 1842 Reapportionment Act was the first to require contiguous single-member districts, but made no provision for population equality. In 1872, for the first time, Congress required “as nearly as practicable an equal number of inhabitants” (Eckman 2021, 2). This lax population requirement expired with the Reapportionment Act of 1929, after which no population requirement existed until *Wesberry*. State legislatures were also passive on the issue. According to McKay (1965), while legislatures were much more proactive about setting criteria for state legislative districts, not a single state

³ Evidence for this preference and expectation can be seen in Federalist 56 and 57 (e.g., “The Representatives of each state will bring with them a considerable knowledge of its laws, and a local knowledge of their respective districts”), as well as the Convention debates. Hamilton stated, “The natural and proper mode of holding elections will be to divide the state into districts in proportion to the number to be elected” (Schmeckebier 1941, 131). For a general discussion, see Flores (1999).

had a constitutional requirement of population equality for House districts between 1789 and 1913. It seems telling that after the *Wesberry* decision, 39 of 45 states with more than one representative were forced to redraw their congressional districts (*Congressional Quarterly's Guide to US Elections* 1994).

In sum, then, before *Wesberry v. Sanders*, the principle of one person, one vote was not constitutionally mandated, and the issue was also overlooked by Congress and state legislatures. In Chapter 2, which turns to an empirical analysis of House malapportionment, we will see that without any such requirements, districts were widely unequal in population up until the 1960's. In Chapter 3, we will see that this inequality led to countermajoritarian outcomes in the roll call record.

The Meaning of Constituency

With regards to free population, a roll call vote is countermajoritarian if and only if the members in the majority (whether voting yea or nay) represent fewer free individuals than the members of the chamber's minority. This approach offers a way to pinpoint the effects of malapportionment in the roll call record, and it is based on the assumption that free population is a valid way to operationalize a member's constituency. We should note, however, that there are other narrower but theoretically valid ways to define the population that a member truly "represents." More than any other work, Richard Fenno's *Home Style* provides the definitive framework for understanding how House members view their districts. According to Fenno, members are motivated by three goals: reelection, power within Congress, and enacting good public policy. To achieve their overriding goal of reelection, members adopt a "home style" to gain the trust of their constituents. They view their constituencies as four shrinking concentric

circles: (1) a broad geographic constituency, encompassing the entire population of a district; (2), a reelection constituency of potential voters; (3), a primary constituency of one's strongest supporters; and (4) a personal constituency of family, friends, and advisors.

The key implication of Fenno's work for this study is that total free population may be an excessively optimistic view of democratic representation. For example, as noted, Evans (2023b) explored measuring Senate countermajoritarianism based on the number of eligible voters in each state (rather than total population) to account for slavery and varying levels of disenfranchisement. Thus, in addition to gauging countermajoritarianism based on free population, it would also be justifiable to view constituencies in terms of (1) the number of eligible voters (as measured by the total turnout) or (2) their number of electoral supporters at the polls. The normative bases for both measures are described below.

Electoral Turnout

By a more stringent measure, a roll call can be considered countermajoritarian if the total electoral turnout for the members in the majority is less than that of the minority. To make this explicit, consider a vote in which 225 members defeat a coalition of 210. If the 225 members, in aggregate, represent a greater free population within their districts, but a lower number of people in their districts cast ballots (for any candidate) in the last general election, this vote would be categorized as majoritarian by the population-based measure but countermajoritarian by the turnout measure.

Is turnout a valid way to operationalize constituency? The Framers, as well as the Supreme Court, have often spoken interchangeably about districts having equal populations and equal voters. Consider the quotations that began this chapter. At the Convention, Wilson declared

that "equal numbers of people ought to have an equal no. of representatives." But this is distinct from Wilson's principle of "equal" elections expressed in the epigraph. The shift is notable: not only should members represent equal populations (a goal undermined by the three-fifths clause, which Wilson himself proposed), but they should also represent an equal number of voters (a goal additionally undermined by vastly different voter-eligible populations). Moreover, equally-populated districts do not necessarily guarantee equal elections.

In the *Wesberry* decision, the Supreme Court also muddles these two principles into one. As noted, the outcome of the decision is that districts must have roughly equal populations. But much of the Court's opinion clearly defends Wilson's idea of equal elections and the *Baker* principle of one person, one vote. In the majority opinion, Justice Hugo Black, expresses that:

It would defeat the principle solemnly embodied in the Great Compromise — *equal representation in the House for equal numbers of people*— for us to hold that, within the States, legislatures may draw the lines of congressional districts in such a way as to give some voters a greater voice in choosing a Congressman than others. The House of Representatives, the Convention agreed, was to represent the people as individuals, and on a basis of *complete equality for each voter* (14, italics added).

Again, note the disconnect here between "equal representation in the House for equal numbers of people" and "complete equality for each voter": two districts can be equal in the number of free individuals but vastly unequal in the weight of residents' votes, especially if voter discrimination is present in one of the two. Such was the case after Reconstruction: former slaves were counted among the free population, but widely discriminated from the franchise. While Northern and Southern districts were on par in terms of population, Northern districts had significantly higher levels of turnout and eligible voters. The Court did not clarify this tension between total population and voting population until the 2016 case of *Evenwel v. Abbott*, ruling that districting on total population was a "well-functioning approach to districting." But the

Court did not rule against drawing districts to guarantee equality of electoral constituencies. In a concurring opinion, Justice Thomas explicitly stated that such redistricting would be permissible. In sum, equal population and equal voting weight are two legitimate and distinct principles that the House of Representatives was founded upon, and we can gauge the extent to which the House has deviated from both.

Electoral Support

We can also gauge countermajoritarian based on electoral support. By this measure, an outcome is countermajoritarian if the side in the chamber's majority received fewer votes in their last election than the side in the minority. The reasoning here is straightforward. If free population is the outermost circle of constituency, and electoral support is a narrower measure, electoral support—the number of individuals who actually voted for the House member—is naturally even narrower.

The underlying assumption of this measure is that House members treat the interests of their electoral supporters with special attention. This is well-supported by congressional scholarship. Candidates' issue preferences do not converge on the preferences of the median voter (Ansolabehere, Snyder, and Stewart 2001; Burden 2004). And once members of Congress are elected, their roll call voting patterns are more consistent with the ideology of their party extremes (Bafumi and Herron 2010). Poole and Rosenthal (1984) find that "elected officials in the United States appear to represent relatively extreme support coalitions rather than the interests of middle-of-the-road voters" (1061). Thus, when identical constituencies elect members of opposite parties, they display vastly different voting records. Looking at same-state senators of opposite parties, Bullock and Brady (1983) use Fenno's terms explicitly, noting that

“reelection constituency has a greater direct effect than geographic constituency on roll-call behavior” (29). Poole and Rosenthal (2009) conclude that “congressional polarization is primarily a function of the differences in how Democrats and Republicans represent the same districts rather than a function of which districts each party represents or the distribution of constituency preferences” (666).

All of this is to say, it seems well-supported to conclude that a member’s most well-served constituency is her partisan supporters. Congress is simply more responsive to its re-election constituencies (their electoral supporters) than its geographic ones (the median voter within a given district). Fenno (1977) supports this view qualitatively:

As he moves about the district, a House member continually draws the distinction between those who vote for him and those who do not. ‘I do well here’; ‘I run poorly here.’ ‘This group supports me’; ‘this group does not.’ By distinguishing supporters from nonsupporters, he articulates his baseline political perception (886).

Given that members are most responsive to their supporters and co-partisans, it seems theoretically sound to give an additional, narrower definition of a members’ constituents as those that supported them at the polls.

Conclusions

In this chapter, we revisited the core logic of the House of Representatives, the institutional design actually produced by the Framers, and the factors that potentialized malapportionment and countermajoritarianism. We also refined our thinking on who ought to be viewed as constituents for the purposes of this research. The House was deliberately designed as a majoritarian legislative chamber, but the historical circumstances of the Convention of 1788 resulted in two key major deviations from majoritarian principles: the three-fifths clause, and the failure to guarantee that the states draw equally-populated districts. Since *Wesberry*, all states

redistrict to guarantee approximately equality in total population. But it is hard to discount equal voters as an important normative standard, given the logic of one person, one vote, and we can also credibly view members' electoral supporters as the most accurate definition of their constituency. This, with the literature on Senate countermajoritarianism, offers a methodological path forward for evaluating countermajoritarianism with three separate measures.

The next two chapters turn to empirical questions about malapportionment and countermajoritarianism in the House of Representatives. In the next chapter, we turn to the first empirical question of this thesis. Before *Wesberry*, how widespread was malapportionment of House districts? The answer is *very*. Next, we turn to the effects of malapportionment in the roll call record, in the forms of countermajoritarian outcomes. In the fourth chapter, I return to the issue that compelled Wilson to propose the three-fifths clause in the first place: slavery. I show that countermajoritarian outcomes were commonplace on the issue of slavery, from the Missouri Compromise to the Kansas-Nebraska Act, and these outcomes would likely have looked quite different without the malapportionment of the three-fifths clause. In the final chapter, I offer ways that this research reconceptualizes the history of the House of Representatives and places the contemporary House in the proper context.

2.

Unequal Districts, Unequal Elections: Malapportionment in the House

Detailed data have never been collected making intrastate and interstate comparisons of population inequality in congressional district formation. Whether actual disparities generally were within an upper limit of 15 percent deviation from average, or ranged with some frequency up to 50 percent or higher is unknown.

— Robert G. Dixon, *Democratic Representation* (1968, 59).

Despite the factors that potentialized malapportionment and countermajoritarianism in the House of Representatives, scholars have been relatively silent on the topic. After the Supreme Court's redistricting decisions, a vast literature developed on congressional redistricting. Scholars developed a wide array of measures for district compactness (Polsby and Popper 1991; Reock 1961; Schwartzberg 1966) and the partisan advantage of district maps (Stephanopoulos and McGhee 2015; King 1989). They have also gauged the effects of gerrymandering on partisan advantage, electoral competition, incumbent advantage, and ideological polarization (Abrahamowitz et al, 2006; Carson and Crespin 2004; McCarty et al. 2009). Yet, while malapportionment remains a fruitful topic in the Senate literature (Lee and Oppenheimer; Griffin 2006), the House has not received the same treatment.

This is for at least two reasons: disproportionate attention paid to the Senate, and a lack of data availability. Any institution looks majoritarian next to the United States Senate, and scholars have been slow to consider the potential of anti-democratic outcomes in America's lower chamber. And as Dixon (1968) alludes to above, while state population data has been carefully compiled in each census, House district populations have remained elusive. The Census Bureau did not begin to release such information until the creation of the congressional district data books with the 1960 census. As a result, scholars have little to say about House

malapportionment *before* the 1960's— the period it was most rampant. To my knowledge, only Altman (1999) has produced a thorough examination of malapportionment that includes the antebellum era. Cervas and Grofman (2020) measure malapportionment back to 1790, but they do not account for intrastate deviations and do not use actual district data. Modern scholarship on House districting has focused narrowly on contemporary interstate malapportionment (e.g., Ladewig 2011), the reapportionment formula (Balinski and Young 1979), and partisan advantage driven by gerrymandering and urban-rural polarization (e.g., Chen and Rodden 2013).

Thus, before turning to countermajoritarianism, it is worth noting the remarkable prevalence of malapportionment of House districts before the Court's *Wesberry* decision. In this chapter, I focus on three questions. First, how common was malapportionment in the House of Representatives? Second, what drove district malapportionment? Finally, how common were deviations in districts' electoral turnout and potential electorates? By using free population as a member's constituency, we exclude slaves from the count for the normative reasons outlined in the previous chapter.

Malapportionment is a grave departure from Wilson's vision for a majoritarian house and a violation of the Court's eventual standard of one person, one vote. Below I find that two factors drove malapportionment: the three-fifths clause and the inability to enforce equal population as a districting criteria. These factors drove a predictable and systematic North-South disparity in the number of free individuals per district. But *intrastate* malapportionment was also widespread; even within the same state, district populations were often significantly unequal. Finally, as noted in the previous chapter, the Framers and the Court both justified a majoritarian lower chamber on the idea of equally-weighted votes (equal elections, in Wilson's terms). Thus, there is a strong

argument that we should care about deviations in districts' *voting* populations at least as much as population.

Malapportionment: An Aerial View

In the time since Dixon wrote his landmark study of apportionment, this information has become knowable, thanks to scholars who have estimated district populations using data from the census. For the period 1788 to 1912, I manually collected House district population from the three-volume *Congressional Districts and Data* series (Parsons et al. 1978, 1986, 1990). For the remaining congresses, I relied on data from the *Congressional Directory*, E. Scott Adler, and the Census. Certain coding parameters and estimation methods have been taken to account for non-single-member districts, some missing slave data, and newly-admitted states. Complete information is available in Appendix A.

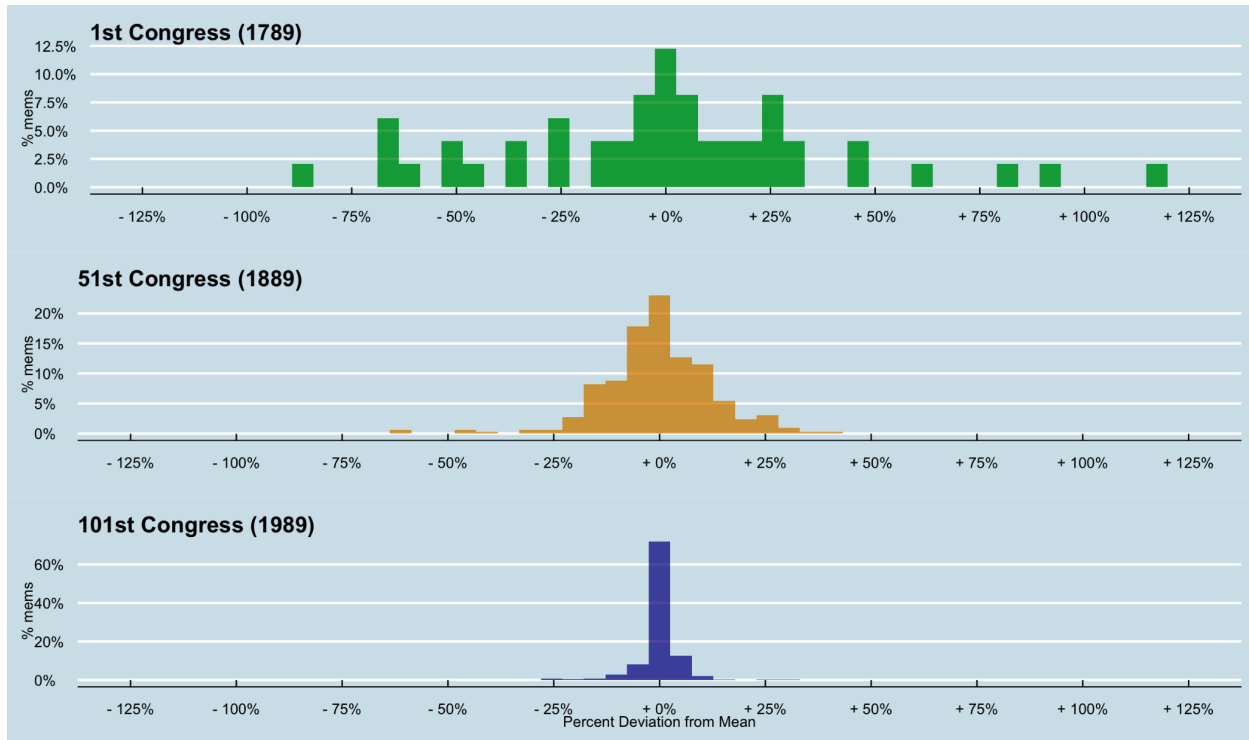
How common is malapportionment in the history of the House? The answer, it seems, is very. Consider three important snapshots: the 1st Congress, which convened in March 1789; the 51st in 1889; and the 101st in 1989. These three congresses are bisected by two important landmarks: the abolition of slavery in 1865, after which the three-fifths clause no longer influences the apportionment process, and the Court's 1964 *Wesberry* decision, after which population equality was firmly required. Figure 2.1 plots a histogram of House districts' free populations in each of these three congresses. The x axis represents a given district's percent deviation from the mean district size in a given congress:

$$Deviation_{it} = \frac{f_{it} - m_t}{m_t} \times 100$$

where f_{it} is district i 's free population in congress t and m_t is the mean free population across all congressional districts in congress t . The y axis is the percentage of members in a given range

of district deviations. m_t , can be viewed intuitively as an ideal district size: the size of each district if all districts had equal free populations.

2.1. Free population malapportionment: three snapshots (1789, 1889, 1989)



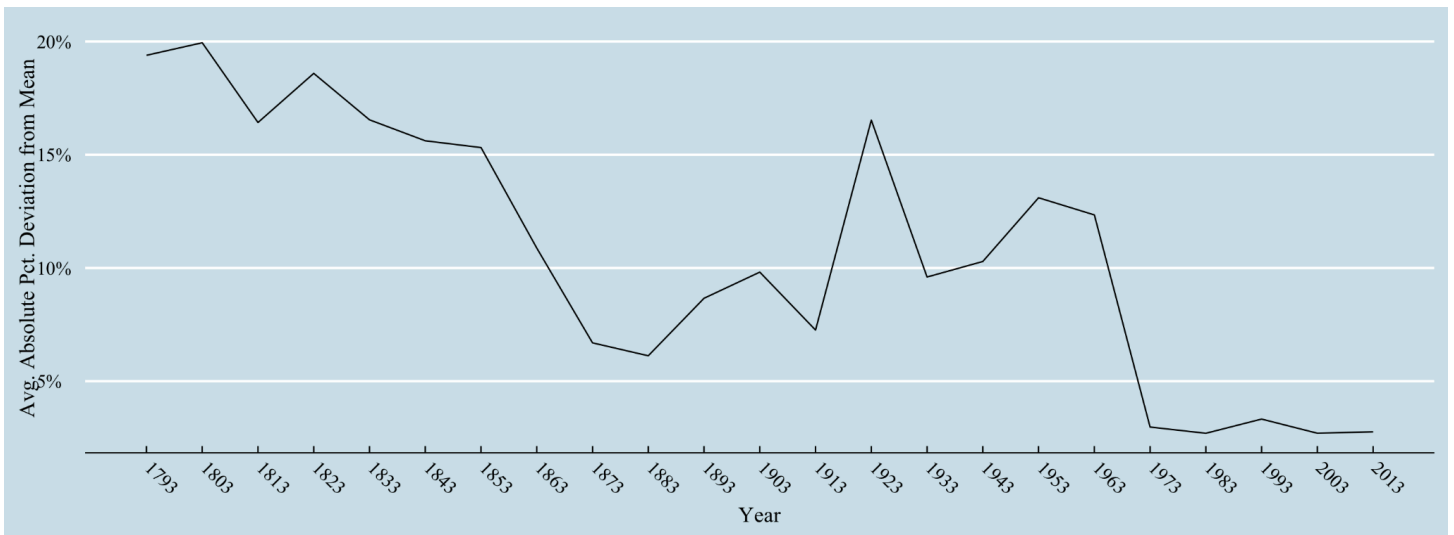
In the modern era, in compliance with the Court's redistricting decisions, nearly all House districts are very nearly equal to the ideal district size. All significant cases of malapportionment are attributable to interstate population differences (e.g., Delaware is nearly twice the size of Wyoming, but both are entitled to only one seat in the House). But modern malapportionment is negligible compared to the pre-*Wesberry* House. In the 1st Congress, fully 61% of House districts' populations exceed $\pm 15\%$ deviation from the mean. In the 51st, that figure is 20%. The latter fact suggests that House malapportionment is not entirely attributable to the three-fifths clause; even when former slaves were integrated into the free population, malapportionment remained profound.

We can gain a more comprehensive view by measuring malapportionment across the full history of the House. Scholars have developed many measures for malapportionment, borrowing some from the economic literature on inequality (see Cervas and Grofman 2020). For our general purposes, a simple measure is the average absolute percent deviation in a given congress t , simply:

$$Avg. Abs. Deviation = \frac{1}{n_t} \sum_i^n |Deviation_{it}|$$

Figure 2.2 plots this figure for each post-census congress (1793, 1803, etc.). We can see that average deviations are between 15% and 20% for the entire antebellum period. In 1873 there was a substantial drop-off after the passage of the 13th Amendment when the three-fifths clause was no longer a factor, but levels remained quite high between 5% and 12%. Predictably, they drop off substantially after post-*Wesberry* redistricting and have consistently remained around 2%, driven by interstate differences. These trends are consistent across other measurements; the Pearson correlation between the Gini coefficient and this measure is 0.997.

2.2 Malapportionment in the House, post-census congresses



What Drives Malapportionment?

In the previous chapter, I outlined two factors that potentialized malapportionment of free populations. Antebellum interstate malapportionment of free populations was made inevitable by the three-fifths clause being used for apportionment. Second, there were weak political mechanisms to guarantee intrastate population equality until *Wesberry*; if a given state neither gained nor lost representatives, it had no requirement to redistrict to adjust for population shifts.

These two factors posit two different, reinforcing stories of malapportionment. The first was largely outlined in the previous chapter. James Wilson's decision to offer the three-fifths clause as an apportionment formula bestowed the South with a representational advantage in excess of its free population. Whether that bonus was politically impactful is disputed (Humes et al. 2002), but it undeniably drove a systematic difference in the number of free individuals represented by northern and southern members of Congress. The second story, as we will see, is slightly more complicated and far less explored. It is true that states often failed to redistrict, resulting in malapportioned constituencies. But there is an overlooked corollary to this: Even when states did redistrict, they routinely failed to prioritize population equality, enacting maps that were malapportioned *ab initio*. Below I seek to disentangle these factors.

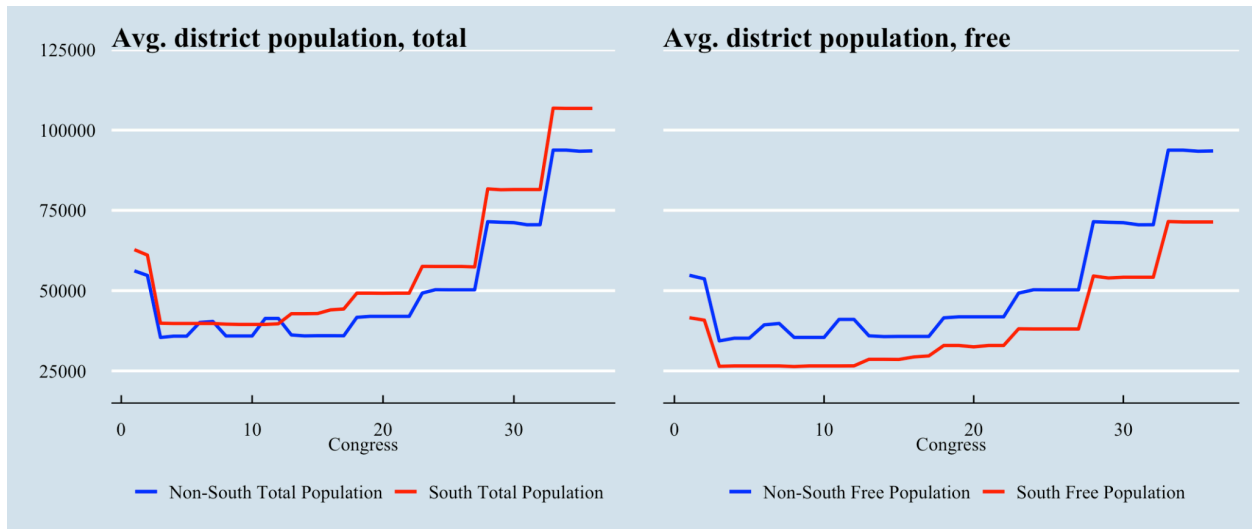
Interstate Malapportionment: The North-South Gap

The three-fifths clause had indisputable impacts on interstate malapportionment. We can see the effects in Figure 2.3, which compares the average total population of northern and southern districts on the left panel and the average free populations on the right.⁴ We see here that while southern antebellum districts routinely had larger total populations, the pattern flips when we look at the population of *free* individuals. By 1861, the average southern member of

⁴ For these purposes, southern states are here defined as the 11 states that seceded from the Union.

Congress represented a 25% lower population of free people. This is an unavoidable malapportionment that was baked into the Framers' apportionment formula of choice. As noted in the previous chapter, a southern slaveholding state with approximately equal free population to a northern one was apportioned more seats than its free counterpart.

2.3 District populations by region, total (left) vs. free (right)



Some scholars have suggested that the three-fifths clause has less pernicious effects than one might anticipate. Rakove (1996) states, for instance, that:

a case can be made that this bargain turned out to have fewer costs than [balancing in the Senate]. It was not, after all, the three-fifths clause that gave the southern states the leverage they needed to keep the Union safe for slavery, but rather the Senate, where the later Compromises of 1819-20 and 1850 did more to preserve the political equilibrium Madison sought.

This underscores an important point, and an important counterargument. The three-fifths clause bolstered the South's representation but *never gave the region control of the lower chamber*. In the Senate, on the other hand, the South exercised a veto over all legislation, most importantly provisions relating to slavery and state admission. But Rakove's point has a number of problems that will be explored in Chapter 4. The most significant is that while the three-fifths

clause did not create a southern stronghold in the lower chamber, it did have tangible impacts in the House roll call record that mattered greatly for state admission and the fate of slavery. As we will see, it is hard to argue that certain pro-slavery provisions— the Missouri Compromise, the Kansas-Nebraska Act and the notorious “gag rule”, for instance— would have passed the chamber in identical form in a House without the apportionment of the three-fifths clause.

Intrastate Malapportionment: Population Shifts, Or Legislative Apathy?

As noted, the prevalence of malapportionment after the 13th Amendment suggests that *intrastate* factors must account for some portion of malapportionment. Intrastate malapportionment can be driven by two components. First, if states fail to redistrict after each census, populations may shift in such a way that districts become vastly unequal. For example, the plaintiff in the Supreme Court’s 1962 *Baker v. Carr* alleged that the districts of the Tennessee state legislature were vastly unequal in population because the state had not drawn new lines since 1901; over that time, urban-rural population shifts were so transformative that a voter’s ballot in a small rural county was worth 19 votes in an urban one. This is the popular story of *Baker*: intrastate population movements drove malapportionment. As Dixon (1968) notes in his account of state legislative redistricting:

The inequality of voter population among election districts had become alarmingly large and senselessly erratic in a substantial majority of the states. As population had grown and shifted, sometimes in expected ways and sometimes along uncharted paths, the slippage from the near-equality common to the states in earlier days had become a national disgrace (38).

While many state legislatures were subject to stricter equal-population requirements (McKay 1965; Altman 1999), this view is simply false for congressional districts. Near-equality of population was not at all common for House district maps, even when they are drawn immediately after the census. An overlooked fact of the *Baker* decision, for example, is that

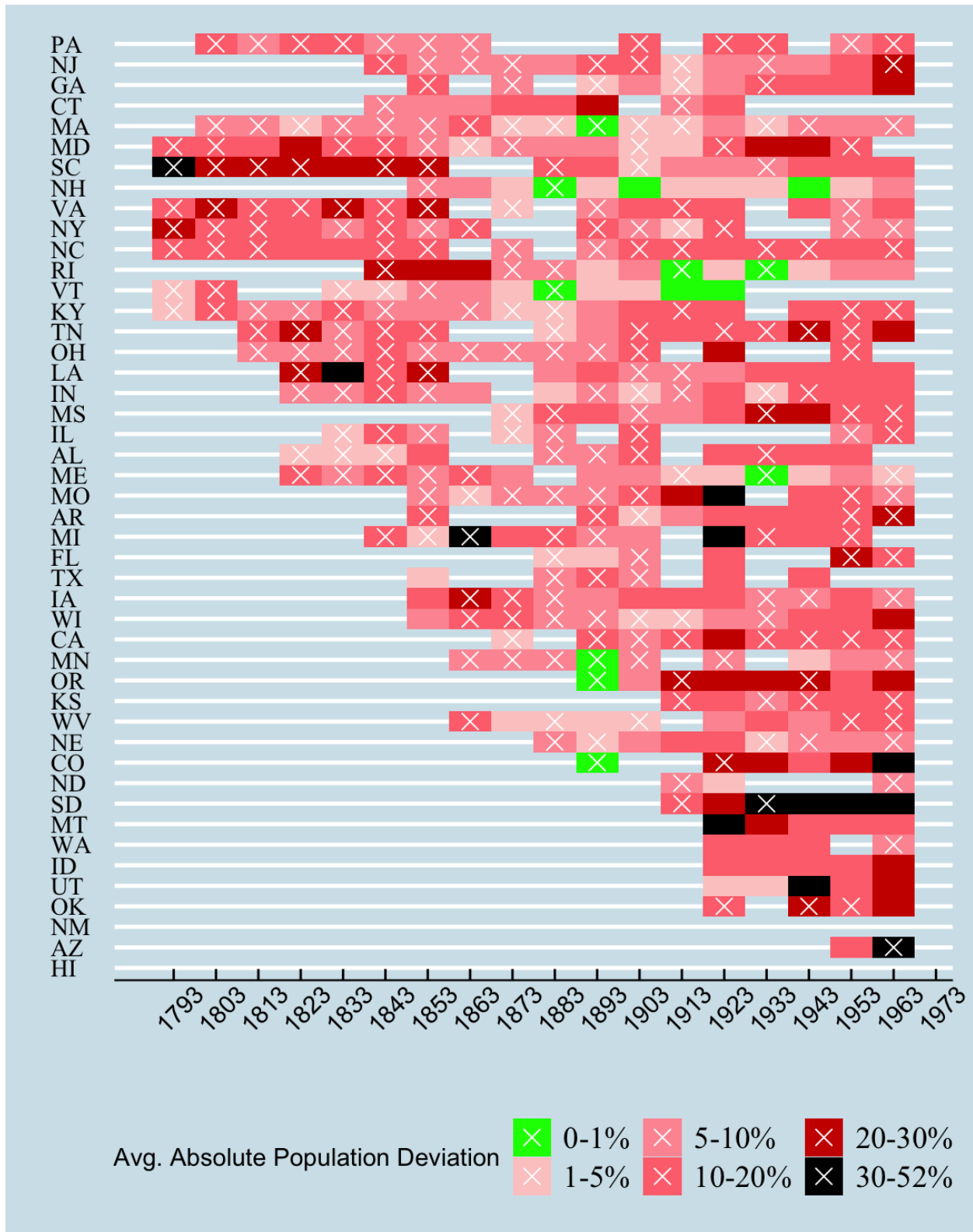
Tennessee's 1901 state legislative redistricting was grossly malapportioned to begin with; population shifts magnified districts that were already vastly unequal.

To gauge the magnitude of intrastate malapportionment, I isolate states that have only single-member districts in post-census congresses⁵ and calculate each district's absolute percent deviation from the state's mean free population, instead of the national average. The average absolute percent deviations are displayed in Figure 2.4, with "X" marks indicating if a redistricting was conducted after the census.

Clearly, intrastate malapportionment is significant. Average deviations tended to range from 5% to 30%, and remarkably few states drew districts with average deviations of less than 1%. For reference, in 1983 the Supreme Court rejected a districting plan with an average deviation of 0.1384% and stated that "absolute" population equality is the districting standard unless population deviations are justified by "some legitimate state objective", such as district compactness, respecting municipal boundaries, preserving existing districts, or avoiding contests between incumbents. Given the modern Court's preference for near-perfect population equality, almost none of the pre-*Wesberry* districting plans seem permissible under the current standards of the Supreme Court.

⁵ This excludes general tickets, states with only one representative, and states that have district maps with one or more additional at-large members.

Fig. 2.4. Intrastate malapportionment (X's indicate redistricting)


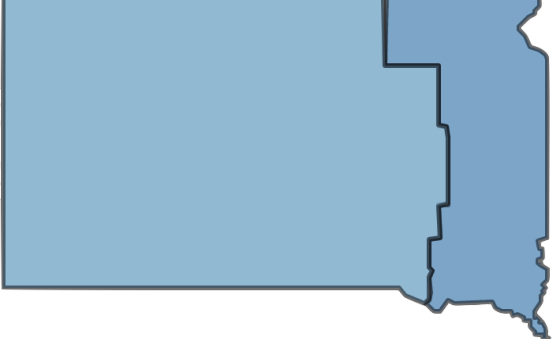


Looking at the maps with the redistricting indicator X's, another critical conclusion is that intrastate malapportionment is not simply a function of intrastate population shifts between state districtings. Post-census redistricting, while not required, was common. And although malapportionment often increased in magnitude when a state failed to redistrict, the maps drawn immediately after a census are almost all malapportioned. This is an important and understated point. The Framers, the Supreme Court, and most democratic theorists have all cared deeply about district population equality— but even when state legislators had the opportunity to draw equal districts, they largely chose not to do so.

It is worth considering why this is the case. One explanation for malapportionment, noted by Engstrom (2013), is partisan advantage: Republicans, Whigs, and Democrats tended to draw more populated districts for their partisan competitors. But simple negligence is also a critical component. South Dakota is a simple example. Following the 1930 Census, the state lost one of three congressional seats and needed to draw a two-seat map for the 73rd Congress. The resulting map, shown on the left panel of Figure 2.5, divided the state using the most prominent feature of its geography: the Missouri River that flowed through the state. But the population of eastern South Dakota surpassed the western region by about a factor of three. Notably, this is not the result of population changes between censuses: the state legislature openly dismissed population equality as a legitimate districting criteria.

Similarly, when map makers were confronted with splitting counties to achieve representational parity, they generally chose not to do so. As Altman (1998) notes, the number of county splits in House districts increased markedly after the redistricting decisions. This suggests that respecting counties as political subdivisions often prevailed over securing population equality as a redistricting criterion.

Fig. 2.5. South Dakota 1930 redistricting, before and after *Wesberry*

South Dakota (Pre- <i>Wes.</i>), weighted by population		South Dakota (Post- <i>Wes.</i>), weighted by population	
			
Eastern District	524,769	Eastern District	394,302
Western District	168,080	Western District	351,901

Multivariate Analysis

We can account more robustly for the effects of the three-fifths clause, failure to redistrict, and negligence with an ordinary least-squares regression model. The dependent variable is the absolute percent deviation of a given congressional district in a given congress. The unit of analysis is single-member districts in post-census congresses. The independent variables are:

- $ideal\ diff_{jt}$, the absolute percent difference between the statewide and national ideal district size:

$$\frac{|(Avg. State District Pop.) - (Avg. National District Pop.)|}{(Avg. National District Pop.)}$$

- $No\ Redistrict_{jt}$, an indicator variable that takes a value of 1 if a state legislature did *not* redistrict following the most recent census;

- $Cycles_{jt}$, a discrete variable for the number of cycles since the last redistricting;⁶
- $Antebellum_t$, an indicator variable that takes a value of 1 for congresses preceding the 13th amendment (before the 39th);
- $Southern_j$, an indicator variable that takes a value of 1 for southern states;
- $(Antebellum_t \times Southern_j)$, an interaction term to capture the different levels of malapportionment between antebellum northern and southern districts.
- $districts_{jt}$, the number of districts in the state; and

The ideal difference variable should capture interstate malapportionment, including differences driven by the three-fifths clause. States with higher slave populations would have significantly lower intrastate ideal district populations and higher ideal difference values. This variable also accounts for the fact that a state's ideal district size may be malapportioned compared to the national ideal population. In other words, without this control states could have perfectly equal districts, but still appear malapportioned relative to the national ideal district population. The no redistricting and cycles variables account for the phenomenon of inter-census shifting populations described above, which is only one aspect of intrastate malapportionment. The remaining controls may or may not be necessary.

Table 2.1 presents a simplified and full model of malapportionment. The simplified model seems to be sufficient; little more variation is accounted for by Model 2. Failing to redistrict is associated with a 2.0% increase in malapportionment, in addition to 0.8% for each census cycle since redistricting. The absolute distance between the statewide and national ideal district size is positively associated with malapportionment, as expected. In the full model, there

⁶ This variable does not take non-integers. It takes 0 if the state redistrict after a given census. If the state redistricted less than 10 years ago, but not following the most recent census, it takes 1 (and takes 2 if, 10 years later, it still fails to redistrict).

are weak but statistically significant relationships between the antebellum indicator variable and the number of a given state's districts. Finally, the intercept accounts for the third determinant of malapportionment, general apathy for population equality. With the ideal difference variable held at zero (perfect parity between a district's ideal free population within the state and the national ideal district size), and zero cycles since the last redistricting (the state is drawing a new post-census map), the average level of malapportionment remains a significant 8.6%. This is a less extreme illustration of the South Dakota phenomenon described above.

Table 2.1. Determinants of Malapportionment		
	<i>Dependent variable:</i>	
	Absolute Pct. Deviation	
	(1)	(2)
Ideal Difference	0.669*** (0.028)	0.767*** (0.038)
No Redistrict	0.020*** (0.007)	0.020*** (0.007)
Cycles Since	0.008** (0.003)	0.007** (0.004)
Antebellum		-0.020*** (0.006)
Southern		0.008 (0.005)
Antebellum x Southern		0.003 (0.009)
Districts		0.001*** (0.0002)
Constant	0.086*** (0.003)	0.070*** (0.005)
Observations	4,159	4,159
R ²	0.137	0.143
Adjusted R ²	0.137	0.142
Residual Std. Error	0.118 (df = 4155)	0.117 (df = 4151)
F Statistic	220.662*** (df = 3; 4155)	99.343*** (df = 7; 4151)
<i>Note:</i>	*p<0.1; **p<0.05; ***p<0.01	

Unequal Elections: Turnout, Potential Electorates, and Electoral Support

As noted in the last chapter, equal free populations is very similar but nonetheless distinct from the standard of one person, one vote. The latter principle, adopted in *Baker* and applied to House districts in *Wesberry*, relies on the idea of equally-sized electorates, ensuring equally weighted votes. Thus, in addition to gauging malapportionment based on free populations, it is also important to examine the variations in other normatively important constituencies, including electoral turnout, potential electorates, and electoral support for the incumbent candidate.

How “equal” are elections? We can evaluate this question in two ways. First, we can look at the average deviations in electoral turnout, the total number of voters in each district in a given election. No one data source includes every House election since 1788 and missing data is common, especially for early elections. However, I relied on data from Tufts’ Early American Elections project, ICPSR election results, and modern election data from MIT to construct a complete dataset of election results for every House election. To account for missing results data, I also employed a novel technique to estimate turnout and electoral support for missing data, based on averages of comparable elections. Full information on collecting and estimating this data is available in Appendix B.

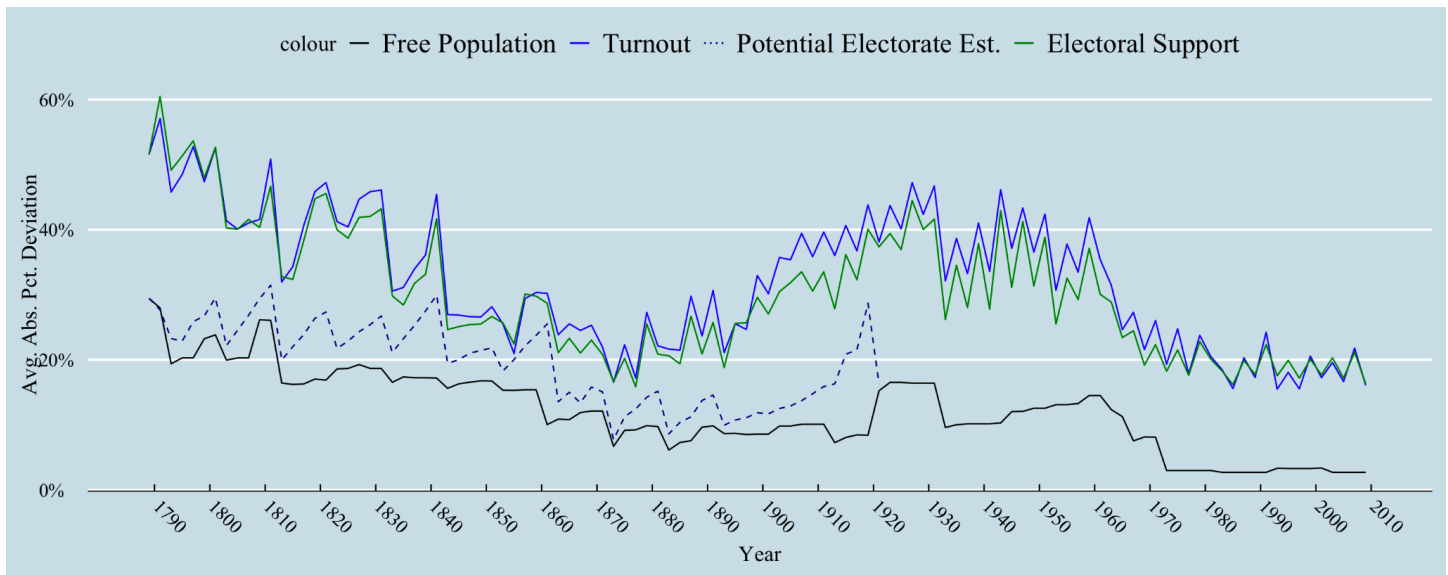
While turnout accounts for the weights of different votes in different districts, it is not a measure for how many people in a given district are *eligible* to vote. Turnout is a function of many things besides how many people have access to the ballot, including competitiveness, campaign spending, region, and urbanism (Gilliam 1985). Thus, a second way to evaluate “equal elections” is to look at deviations in states’ voting-eligible populations. To that end, I estimate districts’ potential electorates using Burnham’s state-level potential electorate estimates,

covering 1789 to 1920.⁷ Critically, Burnham electorate estimates are imperfect. His measure accounts for slavery, the legal disenfranchisement of African Americans before 1870, and restrictions on female suffrage prior to 1920. But he does not account for ballot restrictions based on immigration status, property, or— most importantly— post-Reconstruction Jim Crow provisions that blocked access to the polls until the 1960’s (Evans 2023b). Thus, his measures for the 1890 to 1920 period should be interpreted as highly conservative.

To gauge constituency dispersion over time, I calculated the average absolute deviation from the mean free population, potential electorates, turnout, and electoral support for each member of the House, displayed in Figure 2.7. Similar to our findings in Figure 2.2, we can see that House malapportionment remained high from 1790, through the antebellum era and Civil War, up to the *Wesberry* decision. Looking at Burnham’s conservative potential electorate estimates, malapportionment is slightly higher; throughout the antebellum and postbellum eras, electorates are predictably more unequal than free populations. Finally, deviations in turnout and electoral support, indelibly linked to one another, have remained high throughout the history of the House, peaking in the antebellum era, when ballot access was most restricted, and reemerging in the first half of the twentieth century, with the emergence of Jim Crow voting disenfranchisement in the South (which Burnham’s measure does not capture). In summary, malapportionment among free populations was widespread in the House, with electoral constituencies displaying an even more pronounced degree of disproportionality. The standards of one person, one vote, and Wilson’s standard of equal elections, were even less upheld than population equality.

⁷ I estimated districts’ potential electorates based on the proportion of the free population of a state’s free population that lives in a given district. More precisely, I estimate $PE_{ijt} = PE_{jt} (f_{ijt} / f_{ij})$, where PE_{ijt} is the potential electorate of district i in state j and congress t , f_{ijt} is the district’s free population, f_{ij} is the statewide free population, and PE_{jt} is Burnham’s estimate of the statewide population.

2.7. Average absolute deviations from mean: population, turnout, and potential electorate



Conclusions

States have never drawn districts to guarantee equal population or equal voting weights. And for most of its history (until *Wesberry*) Congress and state legislatures have failed to produce districts with even roughly equal populations. We can synthesize the conclusions of this chapter as follows:

- For most of the pre-*Wesberry* history of the House of Representatives, the principle of equal districts and one person, one vote was non-existent. Malapportionment was widespread throughout the antebellum era and continued after the abolition of slavery and up to the 1960's.
- Malapportionment was a function of the interstate malapportionment caused by the three-fifths clause, states' occasional post-census failure to redistrict, and a general apathy towards population equality as a redistricting criterion— even when new lines were drawn.

- While interstate malapportionment and redistricting equations remain legitimate concerns for political scientists, malapportionment in the modern era is remarkably low by comparison; the magnitude of modern malapportionment has never been lower.
- Looking specifically at electoral constituencies (potential electorate, electoral turnout, and electoral support) districts are much more unequal, particularly the election-based measures. The principle that the Supreme Court seemed most concerned with— equality of voters— was less upheld than equally-populated districts.

Most scholars who study malapportionment proceed under the assumption that voting weight is an intrinsically important standard (e.g., Dahl 1956); deviation from one person, one vote is, in itself, significant. Scholars who claim, for instance, that the Senate's apportionment scheme gives additional voting weight to whites, rural voters, and conservatives are not necessarily arguing that this pattern always has policy consequences, but that should not extinguish our normative concerns.

Still, we need to consider whether the malapportionment we have seen has effects in the roll call record, as they have in the Senate. We should expect countermajoritarianism to be a function of inter-district population deviation (highlighted in this chapter), as well as the extent to which such deviations correspond to some salient regional, ideological, or partisan cleavage. In other words, if malapportionment were randomly occurring, countermajoritarian outcomes would be relatively rare. But malapportionment is not random: the representational disparity correlated with the most important political cleavage of the antebellum era, the North-South divide. Similarly, there were systematic North-South differences in levels of turnout throughout the Jim Crow era. In the next section, I examine the extent to which these deviations manifest themselves in the roll call record.

3.

Countermajoritarianism in the Roll Call Record

It is a part of the definition . . . of tyranny, that the smaller number governs the greater.

—James Wilson, *Records of the Federal Convention of 1787* (Farrand 1911, 483)

We have now seen that malapportionment, up until the Supreme Court's redistricting decisions, was rampant. Congressional districts held vastly different amounts of free people, as well as voters and supporters of the incumbent. We now turn to whether or not these differences have real impacts in the roll call record in the form of countermajoritarian outcomes. To my knowledge, this is the first systematic study of countermajoritarianism in the House of Representatives. Recall from Chapter 1 that we can gauge countermajoritarianism based on three different measures of constituency, each of which can be viewed as an aberration from the majoritarian vision of the House:

1. ***Free Population***: A roll call vote is countermajoritarian if the members in the chamber's majority represent fewer free individuals than the members of the chamber's minority.
2. ***Turnout***: A roll call vote is countermajoritarian if the members in the chamber's majority represent fewer total voters (in the last House election) than the members of the chamber's minority.
3. ***Electoral Support***: A roll call vote is countermajoritarian if the members in the chamber's majority represent fewer electoral supporters (voters for the incumbent in the last election) than the members of the chamber's minority.

In this chapter, we look at all three measures of countermajoritarianism across the full history of the House of Representatives. This analysis is necessarily broad, and I focus my attention on five questions. First, how prevalent are countermajoritarian outcomes across the history of the House? Second, what regional and partisan coalitions are disproportionately benefited? Third, what electoral and institutional factors drive temporal patterns? Fourth, how do

these measures vary across legislative issues, motion type, and roll call significance? Finally, what is the historical and political significance of these countermajoritarian votes?

Below I answer each question in turn. I find that free-population countermajoritarianism is most common in the antebellum era. The electoral measures are significantly higher, peaking in the 20th century, and the modern House is characterized by remarkably low levels of all countermajoritarian outcomes. While there is some variance in the composition of countermajoritarian coalitions, these outcomes have primarily served the interest of the South and are a function of malapportionment, as well as partisan alignments and conflict in the roll call record. Naturally, then, countermajoritarian votes are concentrated in partisan issue areas. And while these votes are less common on passage votes, some of the most significant legislation in American history was adopted on countermajoritarian passage votes.

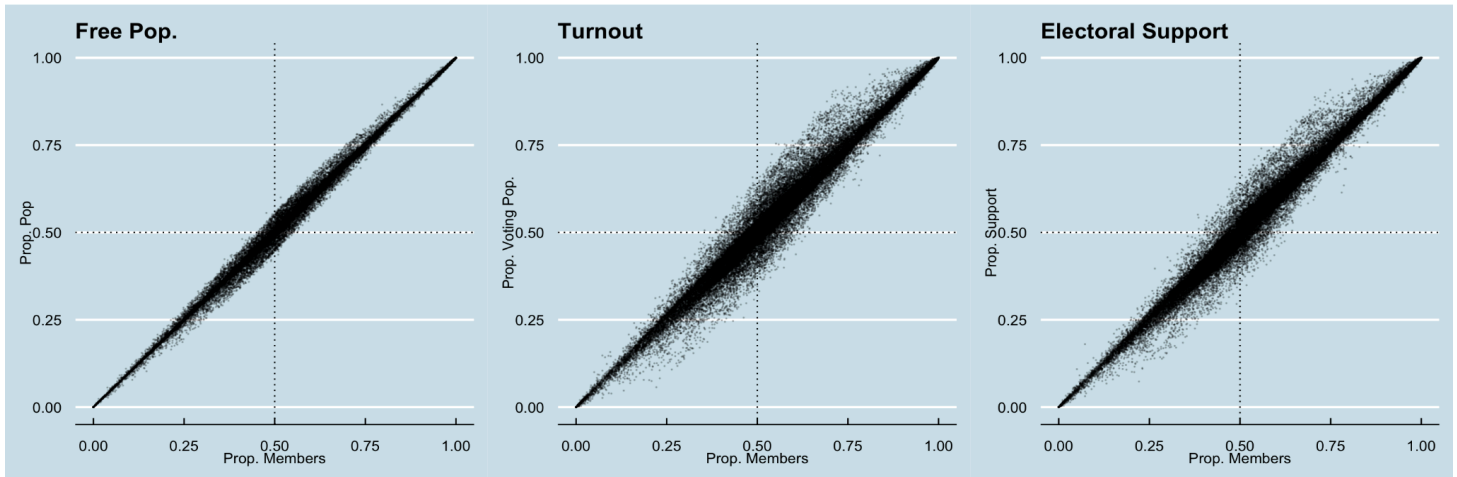
Countermajoritarianism: An Aerial View

To clarify our three measures of countermajoritarianism, consider Figure 3.1. Each panel plots every roll call vote in the House from 1789 to January 2023, with the proportion of representatives voting yea on the x axis.⁸ On the y axis—in the left, center, and right panels respectively—is the proportion of the free population, House election turnout, and electoral support represented by the yea-voting coalition. Taken together, we can see that as the proportion of members voting in the affirmative increases, the proportion of the free population, voters, and electoral supporters that they represent increases proportionally. When the yeas prevail on a roll call vote, they generally represent a majority of free individuals, voters, electoral supporters (the top-right quadrants). Conversely, when the yeas are in the chamber's minority, they tend to represent a minority of the relevant constituencies (the bottom-left). Given that population is the

⁸ House roll call data is collected from Voteview.com.

underlying basis of apportionment, it makes sense that the relationship between yea-voting members and the free population they represent most tightly follows the 45 degree line.

Fig. 3.1. Proportion of free population, turnout, and electoral support over proportion of members voting yea

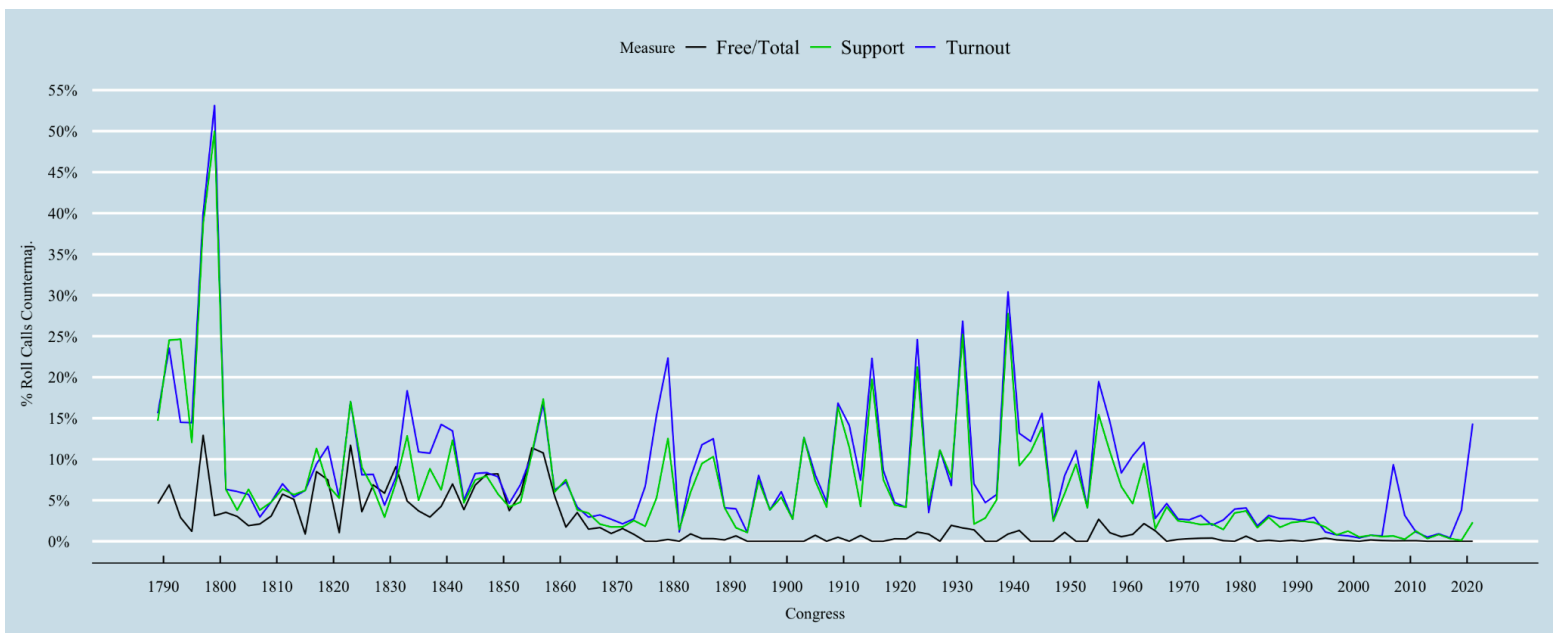


For all three measures, however, we can see that there are outcomes in the top-left quadrants (where the yea-voters do not prevail on a motion, but they represent more individuals than the members on the other side) and in the bottom-right quadrant (where the yeas prevail, but they do not represent a majority of the relevant population). By my definition, roll call votes that fall into one of these two quadrants are coded as countermajoritarian. Predictably, given apportionment, there are a higher number of countermajoritarian outcomes based on turnout and support than free population.

Figure 3.2 shows the proportion of roll call votes that are countermajoritarian across two-year congresses. Based on free population, countermajoritarian roll call votes, shown with the black line, are not rare in the antebellum era. Between 1789 and 1861, 6.11% of roll calls were countermajoritarian by free population. After the Civil War and the passage of the 13th Amendment, former slaves were counted among the free population and the measure dropped to near-zero levels. Juxtaposing this trend with the trends in malapportionment reveals something

interesting: After the Civil War but before *Wesberry*, the level of deviation in House district sizes remained quite high, but countermajoritarian outcomes remained rare. The reason is straightforward. Countermajoritarianism is a function of both inter-district population deviation, as well as some salient cleavage that corresponds to such a deviation. In the antebellum era the cleavage was, of course, region and slavery: southern slave-holding states systematically represented fewer individuals than their counterparts. After abolition, free-population malapportionment remained rampant, but it ceased to correspond with a meaningful ideological, regional, or partisan cleavage.

Fig. 3.2. Countermajoritarianism in the House, 1789-2022 (by population, turnout, and support)



Now consider turnout-based countermajoritarianism, indicated with the blue line. In the antebellum era, the measure generally follows a similar trend to the free population measure, suggesting that it reflected the same North-South cleavage. A notable exception emerged in the 5th and 6th Congresses, both narrow Federalist majorities in which the party represented a majority of the free population but a minority of the electoral constituencies. Particularly after

the end of Reconstruction, in 1877, the free population measure begins to increase choppily and peaks throughout the 20th century, along with the electoral support measure, as the South cements its rule through legal voting restrictions, as well as intimidation and violence.⁹ The electoral support trendline, shown in green, tends to track along the same pattern, with some occasional deviations. The most recent peak in turnout countermajoritarianism, in the 117th Congress, owes to the fact that the aggregate level of turnout in Democratic constituencies was lower than the Republican total.

Positive vs. Negative Countermajoritarianism

At the Convention of 1787, James Wilson voiced his opposition to equal-state representation in the Senate, declaring, “It is a part of the definition . . . of tyranny, that the smaller number governs the greater.” Oliver Ellsworth, a delegate from Connecticut, rose to respond. Stating what has come to be a common defense of the Senate, the Electoral College, and the general tedium of American democracy, he said: “The capital objection of Mr. Wilson ‘that the minority will rule the majority’ is not true. The power is given to the few to save them from being destroyed by the many” (Farrand 1911, 1:483-484).

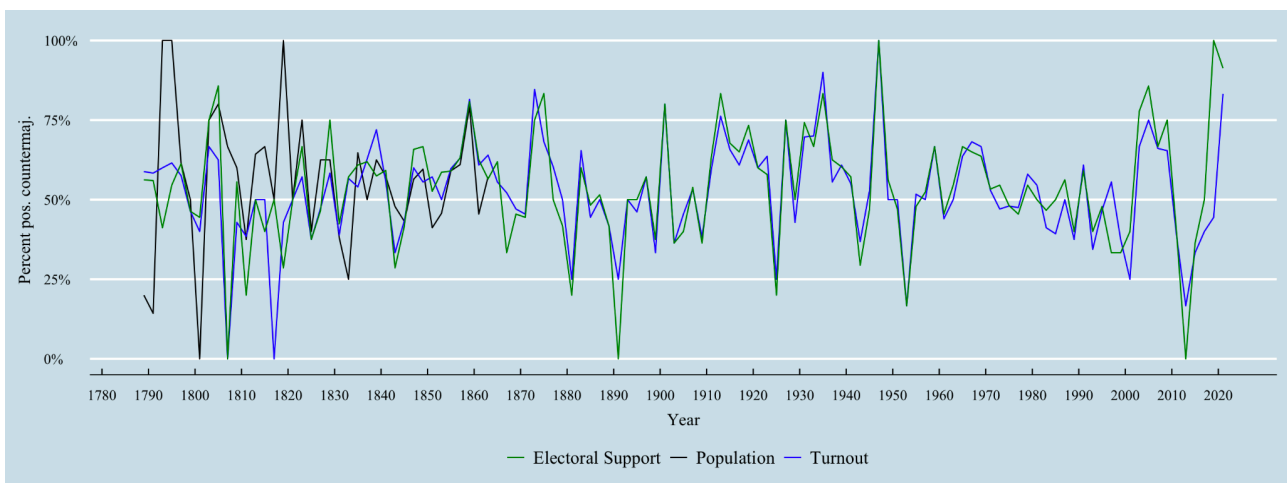
It is worth considering an implication of this point. There is a wide consensus among democratic theorists that majorities ought to rule— or at least that a simple majority ought to be a minimum standard for ruling. For example, Dahl (1989) asserts that “virtually everyone assumes that democracy requires majority rule in the weak sense that *support by a majority ought to be necessary to passing a law*” (135, italics added). Thus, from a normative perspective, we should draw an important distinction between positive and negative countermajoritarianism.

⁹ The classic account is Kousser (1974), *The Shaping of Southern Politics*. The gap in turnout between North and South did not become an enduring pattern until the turn of the twentieth century, along with the imposition of restrictive voting laws.

While the negative variety (preventing passage of a measure) is theoretically defensible on the merits of a higher threshold for passing legislation, lest the few be destroyed by the many, *positive* countermajoritarianism (passing a measure without representing a majority) seems lacking in normative or theoretical justification.

In Figure 3.3, I plot the percentage of countermajoritarian votes that result in a majority, as a gauge for positive countermajoritarian outcomes.¹⁰ Here we see that slightly more than half of countermajoritarian measures are *positive* in nature. 56 percent, 52 percent, and 54 percent, respectively, of the population-, turnout-, and support-based measures result in a majority vote. In the context of the House, which was designed as the democratic component of the Federal government, each countermajoritarian outcome violates some legitimate majoritarian principle. But countermajoritarianism, when present, has not functioned as a Madisonian check to protect some “tyranny of the majority.” Rather, these outcomes are often *positive* legislative actions.

Fig. 3.3. Positive vs. Negative Countermajoritarianism, 1789-2022



¹⁰ I argue this is an imperfect but good gauge of the proportion of countermajoritarian votes that pass. Some rules in the House require supermajorities, including veto overrides, expulsions, constitutional amendments, and votes under suspension of the rules. However, the former three cases are rare, and suspension of the rules is generally used for noncontroversial legislation. Failure is not common under suspension, and even when a suspension bill is defeated, the votes are very unlikely to be countermajoritarian because they are rarely close votes.

Countermajoritarian Coalitions

We have seen that the three-fifths clause systematically advantaged the slaveholding South. Moreover, North-South differences in turnout and electoral support existed beyond abolition, up until the passage of the 1965 Voting Rights Act. What kinds of coalitions drive countermajoritarian outcomes? For each party on each countermajoritarian roll call vote, I coded the proportion of each party that voted on the countermajoritarian side (for example, yea-voters are the countermajoritarian coalition if a vote is countermajoritarian and the motion passes).¹¹ Then, for each major party, I calculated the average percentage of members that voted on the countermajoritarian side. To gauge regional advantage, I performed the same calculation for the South.¹²

We can consider the results of this analysis for each measure in turn. First, Figure 3.4 displays the partisan and regional advantage of free-population-based countermajoritarianism, focusing on the antebellum era. The party most likely to vote in the countermajoritarian coalition is typically associated with the South and the defense of slavery: the Democratic-Republicans, then the Jacksonians, then the Democrats. But these lines are far from stable. Looking at the dotted black line representing the likelihood of Southerners voting on the countermajoritarian side, we can clearly see that the most stable and enduring trend: population-based countermajoritarianism tended to play to the South's advantage.

Looking now at the partisan and regional advantage of turnout-based countermajoritarianism in Figure 3.5, we see choppy patterns in the antebellum era, until the Democratic Party and the South generally emerges in the 1840's as the clear benefactor of this

¹¹ Crawford, Clay, and Jackson Federalists are coded as Federalists. Crawford and Adams-Clay Republicans are coded as Republicans. The Adams Party is coded as Anti-Jacksonians. Independents who caucus with a party are coded as members.

¹² The South is coded as the 11 states that joined the Confederacy.

measure of countermajoritarianism. This makes sense given the logic discussed above: the Democratic Party dominated the South where electoral turnout was generally lower. This pattern became particularly enduring following Reconstruction, as the South cemented its hegemony and Jim Crow voting segregation became rampant. Understandably, this Southern Democratic advantage declined in the mid-1960's, coinciding with the passage of the Voting Rights Act, which significantly curbed voting segregation. Interestingly, even as Southern advantage of turnout-based countermajoritarianism has declined, the measure still indicates that these countermajoritarian outcomes (although very low) are still uniquely Democratic.

Finally, we can examine the partisan and regional advantage of countermajoritarianism when we measure members' constituencies by their number of votes at the polls. In Figure 3.6, we can see clearly that up until the 1870's, no party uniquely benefited from countermajoritarianism by electoral support except the Federalists and the Anti-Jacksonians. Countermajoritarian outcomes happened often, but were not generally driven by one of the two major parties. In 1870, however, Democrats became the primary beneficiary of electoral support countermajoritarianism, mirroring the same pattern as turnout.

Fig. 3.4: Avg. percent of parties and South voting on countermajoritarian side (free population)

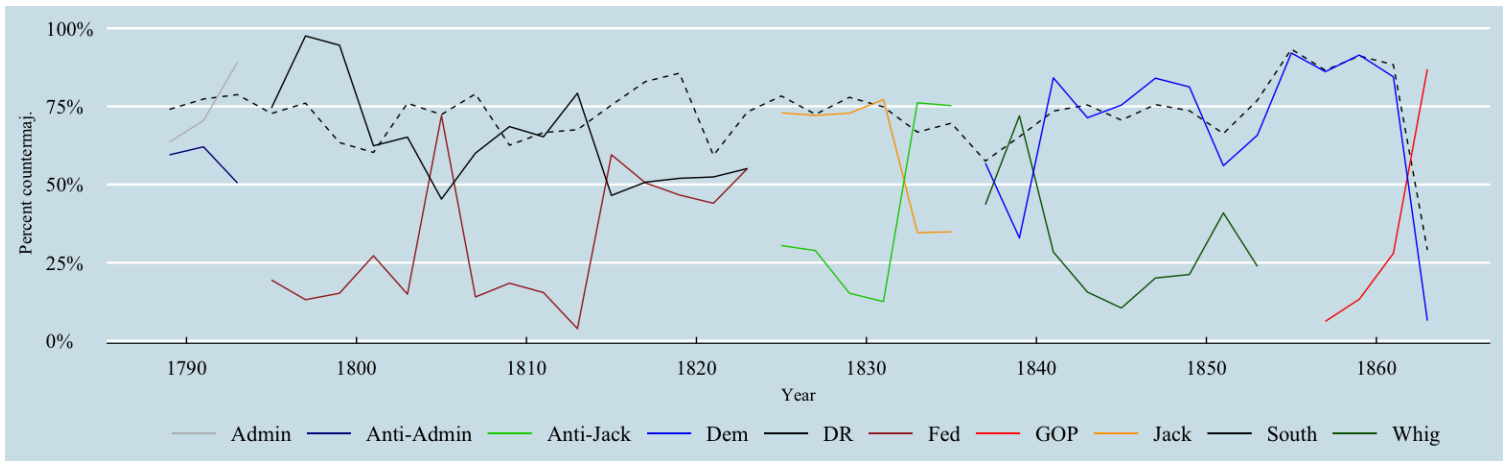


Fig. 3.5: Avg. percentage of parties and South voting on countermajoritarian side (turnout)

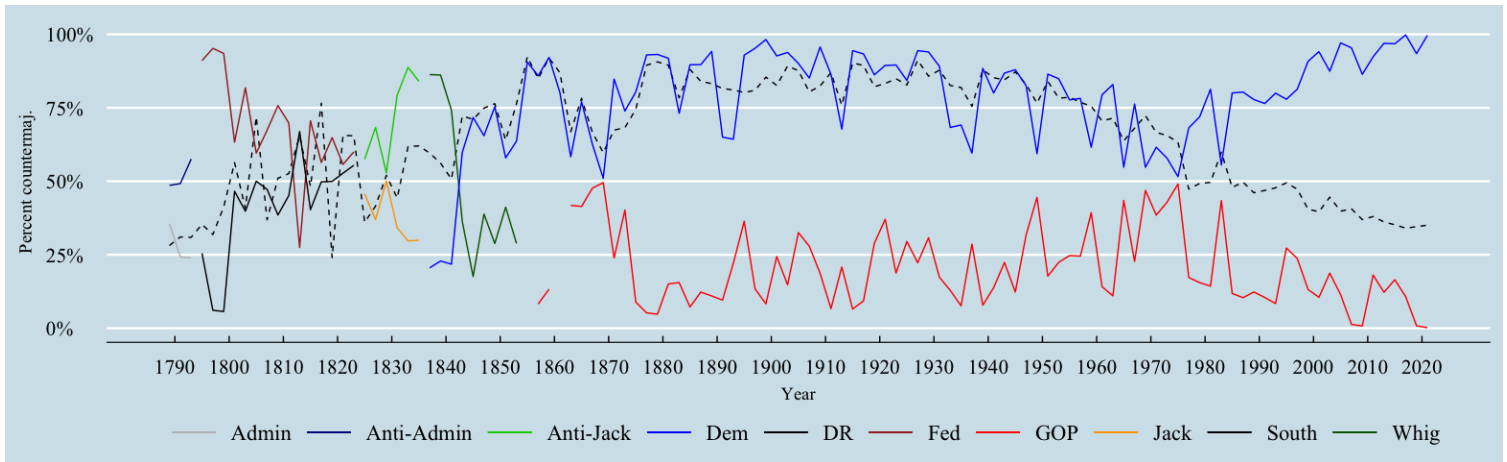
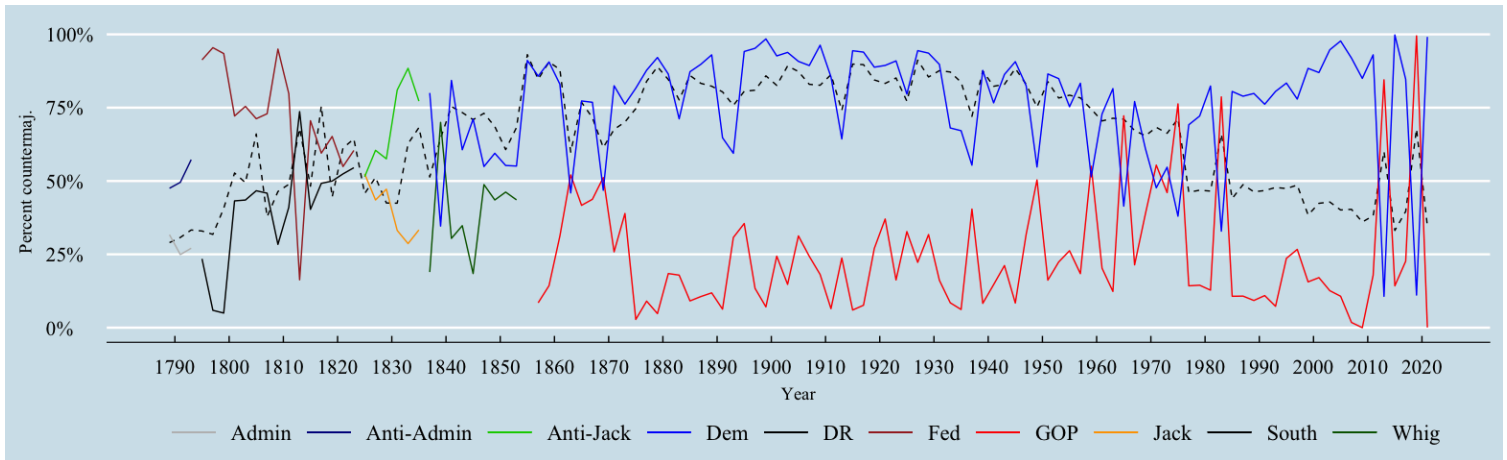


Fig. 3.6: Avg. percentage of parties and South voting on countermajoritarian side (electoral support)



What Drives Countermajoritarianism?

What drives countermajoritarianism? Most obviously, we have observed a positive relationship between countermajoritarianism and malapportionment. Levels of countermajoritarianism are higher when there is a high deviation in district constituencies. But this is not the full story. As noted, free-population countermajoritarianism drops off after the antebellum era, even though the variance in districts' free populations remains quite high. In other words, countermajoritarianism is driven not only by unequally-sized constituencies, but

also by the interaction between such inequalities and the relevant political configurations of the day. Evans (2023b) shows that countermajoritarianism in the Senate is predominantly a function of population coverage (the proportion of the population represented by the majority party) and conflict in the roll call record (the proportion of close roll call votes). In an extreme case, we should expect levels of countermajoritarianism to be highest when the majority party represents fewer people than the minority. And levels of conflict in the roll call record vary considerably over time. We should expect higher levels of countermajoritarianism when a significant proportion of roll calls are close. This logic suggests three straightforward and testable hypotheses:

***Hypothesis 1.** The frequency of countermajoritarian outcomes increases with the average absolute deviation in the relevant constituency.*

***Hypothesis 3.** The frequency of countermajoritarian outcomes increases as the proportion of the population represented by the majority party decreases.*

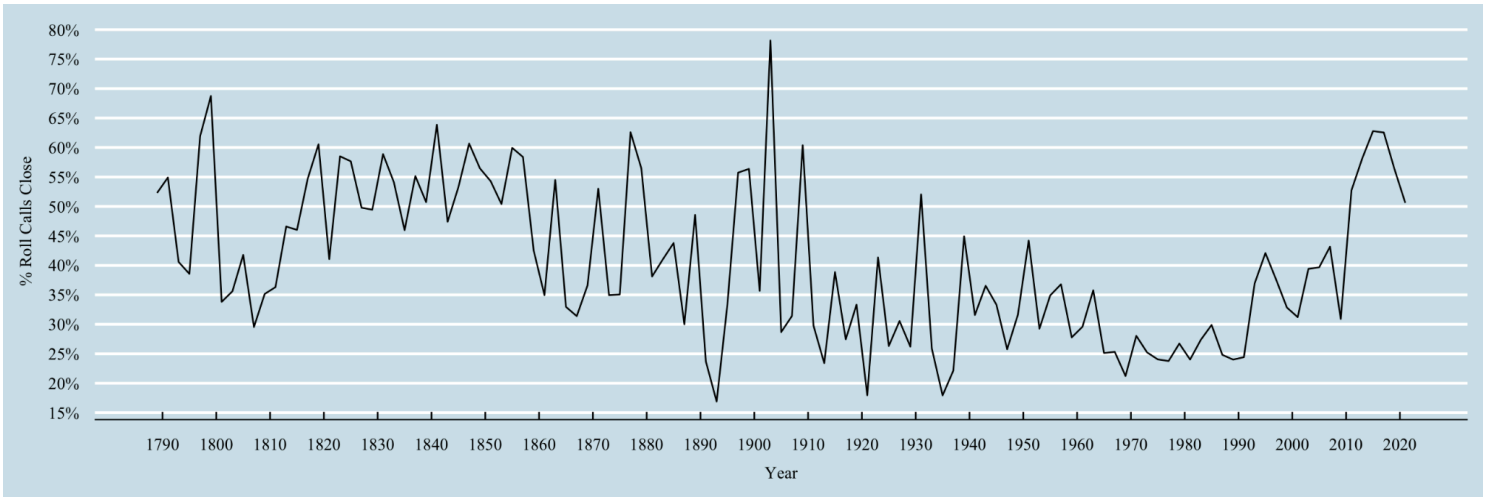
***Hypothesis 2.** The frequency of countermajoritarian outcomes increases with the proportion of close roll call votes.*

Party Conflict, Party Coverage

We can measure conflict in the roll call record by calculating the proportion of roll call votes in a congress in which the split was 60% to 40% or tighter. This proportion is shown in Figure 3.7. Close votes were generally quite common in the antebellum era, rising and falling as a function of the issue agenda and level of partisan conflict. The pattern grows choppy in the 1890-1910 period, which encompasses a series of institutional reforms within the House, following Speaker Thomas Brackett Reed's radical reinterpretation of House rules to curtail the obstruction of the minority, the repeal of Reed's Rules in 1892, Joseph Cannon's revival of the strong speakership, and the 1910 rules reforms following the revolt against Cannon (Schicker 2001).

The proportion of close votes was relatively lower for most of the 20th century until it began to rise in the 1990's, likely driven by increased polarization, close party margins, and the rise of messaging amendments (Lee 2016).

Fig. 3.7: Close votes in the House, 1789-2023



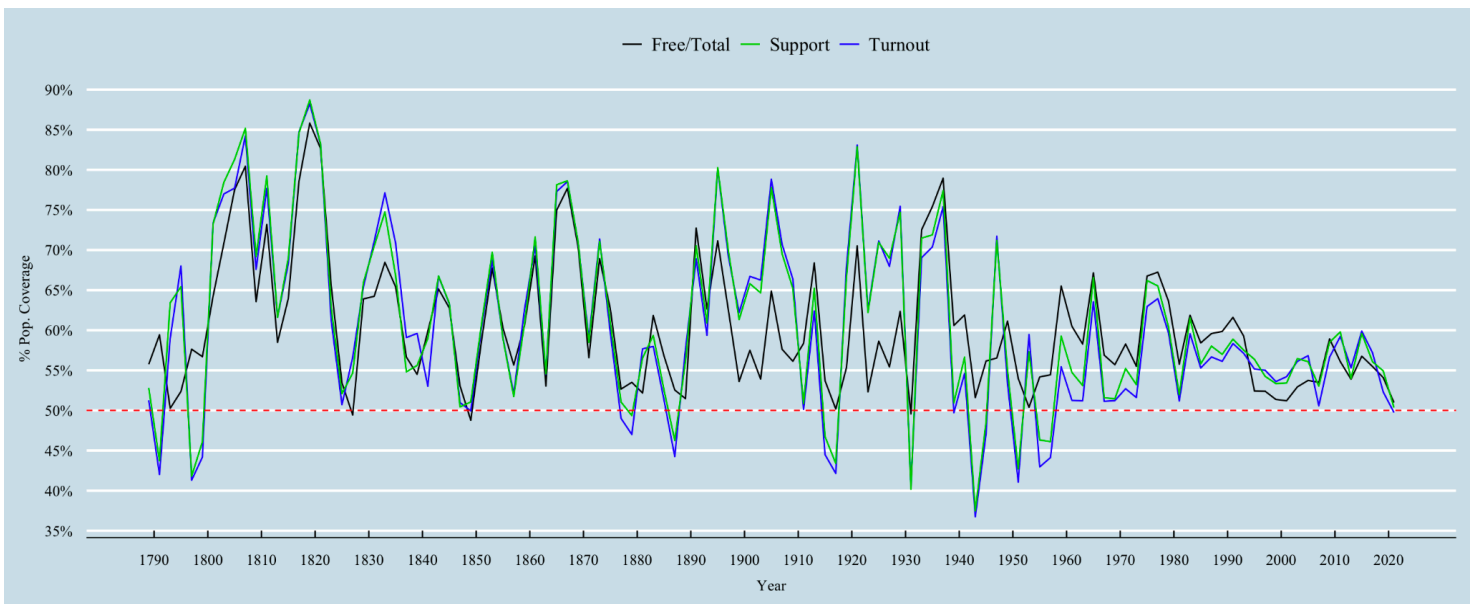
Measuring population coverage of the majority party is less straightforward. Within congresses, membership frequently changes with new states, deaths, resignations, and special elections. Independent members and third parties also abound. I calculate population coverage as the free population, turnout, and electoral support represented by the majority party, divided by the total population represented *by the two major parties*. Additionally, I only include members who are the only or first representative of that seat in a given congress.¹³

As illustrated in Figure 3.8, the variance in population coverage is significant, dipping and rising choppily throughout the antebellum era. In the early congresses, three relatively narrow Pro-Administration/Federalist majorities represented a minority of turnout and electoral support, while still representing a majority of the free population. Coverage measures rose

¹³ In practice, this was performed by using ICPSR's occupancy score, which is 0 for the only member of a seat, 1 first the first, 2 for the second, etc. Voteview notes that this variable is considered legacy or incomplete information, so the coding is imperfect. However, this offers a good general view of a given Congress's composition and very closely matches the average partisan breakdown of a given congress.

significantly as the Democratic-Republican dominated the first quarter of the 1800's, dipped slightly as the Jacksonians/Democrats dominated the second, and rose again with the emergence of the Republican Party. In the 20th century, the electoral coverage trends break away completely, correlating with the Democratic Party's systematically lower level of turnout and support in the Jim Crow era. Democratic majorities frequently represented minorities of electoral constituencies. The coverage trends settle slightly after the 1960's. In the contemporary era of narrow majorities, all measures of population coverage remain below 60%. In the 117th Congress, a narrow 222-111 Democratic majority represented 50.98% of the population, 49.75% of the turnout population, and 50.36% of electoral support.

Fig. 3.8: Population coverage of majority party



Multivariate Analysis

We can account for variations in countermajoritarianism by estimating an ordinary least-squares regression model, with the measures of countermajoritarianism in a given congress as three dependent variables. For independent variables, I include average absolute deviation and

majority population coverage of the relevant constituencies and the proportion of close votes. I also include a dummy variable for the postbellum era for the free population measure to account for the effects of abolition, as well as a dummy for the 1965 Voting Rights Act for the electoral measures. The results of the three models are shown in Table 3.1.

Table 3.1. Determinants of Countermajoritarianism			
	<i>Dependent variable:</i>		
	Free Pop. (1)	Turnout (2)	Electoral Support (3)
Deviation	0.062 (0.041)	0.345*** (0.058)	0.428*** (0.055)
Prop. Close Votes	0.046*** (0.015)	0.152*** (0.038)	0.117*** (0.036)
Coverage	0.014 (0.023)	-0.308*** (0.047)	-0.265*** (0.045)
Postbellum	-0.036*** (0.006)		
VRA		-0.028* (0.015)	-0.022* (0.013)
Constant	0.010 (0.020)	0.106** (0.042)	0.065 (0.039)
Observations	117	117	117
R ²	0.653	0.578	0.600
Adjusted R ²	0.640	0.563	0.586
Residual Std. Error (df = 109)	0.018	0.053	0.049
F Statistic (df = 4; 109)	52.662***	38.302***	42.000***
<i>Note:</i>	* p<0.1; ** p<0.05; *** p<0.01		

For free population, the percentage of close votes and the postbellum dummy are the only significant variables, but the model has an impressive R² of 0.65. The lack of significance on the deviation variable indicates that malapportionment *in itself* is not directly correlated with countermajoritarianism; more important is historical context, the issue agenda, and the degree to which malapportionment interacts with partisan alignments. I interpret the lack of significance

on the coverage variable to be a result of relatively lower significance of party in the antebellum era, as well as the lack of partisan organization in floor access and agenda-setting. The models for turnout and electoral support garner statistical significance on all three primary independent variables, as well as the Voting Rights Act. Each model also captures a high proportion of variance in countermajoritarianism. In these cases, countermajoritarianism is a function of unequal electoral populations, low population coverage, and high conflict in the roll call record.

Issues, Motions, and Significance

Thus far we have gauged the contours of countermajoritarianism by looking at all roll calls across the entire history of the House of Representatives. But all roll calls are not the same. How does countermajoritarianism— gauged separately by free population, turnout, and electoral support— vary across issues, motion types, and roll call significance?

Legislative Issues

We begin with an analysis of issues. To gauge countermajoritarianism across different policy areas, I rely on Poole and Rosenthal's issue codes, available from Voteview. Critically, these codes are not exhaustive, and many votes on landmark legislation do not have issue codes. Nevertheless, the codes pick up on some of the most significant issues and cover the full history of Congress. For this analysis, we are interested in issues that are both disproportionately countermajoritarian and salient in a given congressional era.¹⁴ For each issue present in each of six congressional eras, I calculate the percentage of votes on the issue that are countermajoritarian. I isolate salient issues that (1) have a higher level of countermajoritarianism

¹⁴ Here congressional eras are delimited by congresses and based on historical party systems: Federalists vs. Jeffersonians (March 1789 - March 1825), Jacksonians vs. Anti-Jacksonians (March 1825 - March 1855), the Civil War and Reconstruction (March 1855 - March 1893), the Progressive Era (March 1893 - March 1933), the New Deal party system (March 1933 - January 1979) and the modern party system (January 1979 - present).

than the average across all roll calls in a given era and (2) received greater than 50 roll call votes in that era. These salient, countermajoritarian issues in each era are shown in Table 3.2. When more than five issues meet the criteria, I report the top five.

Table 3.2. Disproportionately countermajoritarian issues, by era			
Era	Free Population	Turnout	Electoral Support
Federalist v. Jeffersonian	Slavery (11.9%) Public Lands (9.4%) National Bank (6.4%)	National Bank (16.0%) Public Lands (15.7%)	National Banks (18.1%) Public Lands (13.5%)
Jacksonian v. Anti-Jack.	Tariffs (11.4%) Slavery (9.7%) Public Works (6.7%) Public Lands (6.3%) Treaties (5.9%)	Public Lands (11.8%) Tariffs (11.8%) Slavery (10.7%)	Slavery (10.9%) Public Lands (8.8%) Tariffs (8.0%) Public Works (7.7%)
Civil War & Reconstruction	<u>Top Five:</u> Slavery (12.1%) The Draft (6.6%) Voting Rights (5.6%) Disputed Elections (4.6%) Banking (4.5%)	Slavery (13.3%) Disputed Elections (12.5%) Banking (12.1%) Voting Rights (10.0%)	Slavery (14.3%) Disputed Elections (10.0%) Banking & Finance (8.1%) Voting Rights (6.7%)
Progressive Era	<i>NA</i>	Agriculture (14.0%) Tax Rates (12.0%)	Agriculture (12.8%) Tax Rates (10.3%)
New Deal System	<i>NA</i>	Price Controls (18.2%) Judiciary (15.2%) Public Works (8.9%) Civil Rights (7.6%) Welfare (7.4%)	<u>Top Five:</u> Price Controls (13.8%) Judiciary (12.1%) Civil Rights (7.0%) Public Works (6.2%) Welfare (5.9%)
Modern System	<i>NA</i>	Unions & Labor (6.8%) Judiciary (5.3%) Civil Rights (3.7%)	Unions (7.4%) Arms Control (4.5%) Civil Rights (3.7%) Parks (1.4%)

The most notable takeaway is that countermajoritarianism, on all three measures, seems to be highly concentrated on a relatively narrow portion of the issue agenda. In the Federalist era, the only disproportionately countermajoritarian issues were slavery, public lands, and the national bank. Throughout the Progressive Era, it was only agriculture and tax rates. In both cases, and also throughout other eras, it is also notable how much the countermajoritarian issues

correspond. In the New Deal system, for instance, each of the issues that are countermajoritarian by turnout are also countermajoritarian by electoral support. We see that anti-democratic outcomes in the modern era are highly concentrated in issues of civil rights, law, and labor. Most of these issues are subject to disproportionately close roll call votes and were the subject of major legislation and partisan and regional tensions.

Landmark Laws

We can also assess levels of countermajoritarianism on significant votes. Many scholars have developed lists of “important”, “key”, or “landmark” legislation (Ansolabehere et al 2018; Clinton and Lapinski 2006; Mayhew 1991; Stathis 2014), but Stathis (2014) and Ansolabehere (2018) stand alone as the only two independent attempts to develop lists of significant laws for the entire history of Congress (to my knowledge), and Stathis includes a larger subset. So, for this analysis, I rely on Stathis’s list of landmark legislation, which covers the period 1789-2012, and Mayhew’s often-used lists for the remaining congresses.¹⁵

For this analysis, I define a landmark roll call as any vote related to a landmark law or its companion— whether passage, procedure, or amendment.¹⁶ The era-by-era breakdown is shown in Table 3.2. On the whole, landmark votes are no more likely to be countermajoritarian than non-landmark votes. Countermajoritarian outcomes, by all measures, are not disproportionately concentrated on insignificant legislation. Indeed, in most eras, landmark roll calls are slightly more likely to be countermajoritarian than non-landmark votes. In the Jacksonian era, for

¹⁵ Mayhew’s lists of landmark legislation are available at <https://campuspress.yale.edu/davidmayhew/datasets-divided-we-govern/>

¹⁶ Bill numbers for landmark laws and their companions were collected from Lynch and Madonna (2019). For landmark laws before 1877, the data was coded manually. In many cases, the data is imperfect. For antebellum legislation, Voteview often does not have bill numbers (e.g., “the bank bill”), so I relied on statute numbers, enactment dates, and keywords to make inferences. Not all landmark legislation is subject to a roll call vote.

instance, significant legislation is almost twice as likely to receive countermajoritarian roll calls.

In most eras, the rates are roughly equal.

Table 3.2. Landmark vs. non-landmark votes, by era						
Era	Free Population		Turnout		Electoral Support	
	Land.	Non-land.	Land.	Non-land.	Land.	Non-land.
Federalist	4.6%	4.8%	11.8%	11.4%	10.2%	11.4%
Jacksonian	9.5%	5.5%	12.0%	9.3%	7.5%	7.2%
War & Reconstruction	1.4%	2.8%	6.1%	7.3%	5.6%	5.8%
Rule of 96	0.6%	0.3%	9.0%	8.7%	7.8%	7.8%
New Deal System	0.4%	0.7%	7.6%	5.5%	5.7%	4.3%
Modern System	0.1%	0.1%	3.0%	2.8%	2.1%	1.2%
Total	1.2%	1.6%	5.2%	5.8%	4.0%	4.3%
	1.5%		5.7%		4.2%	

Motion Types

Finally, how does countermajoritarianism vary across votes related to passage, procedure, and amendments? Passage votes, especially final passage votes on significant legislation, are often associated with lopsided roll calls in the affirmative (Curry and Lee 2020; Kriebel 1998; Mayhew 2005). It seems natural to expect higher levels of countermajoritarianism on amendments and procedure. Moreover, given the heavy emphasis of congressional scholarship on passage votes, coding all votes related to landmark measures could be considered an excessively broad measure of an “important” vote. Though I think it is myopic to diminish a landmark bill’s political dynamics exclusively to its passage vote, as I will explain below, it is useful to analyze variations in countermajoritarianism across motion types. For this analysis, I coded motion types for all roll call votes related to landmark legislation into one of three

categories: passage votes, votes on amendment, and procedural votes.¹⁷ Table 3.3 reports the levels of countermajoritarianism on landmark votes by motion types, across our congressional eras. The data on free population countermajoritarianism is limited to the antebellum era, and the electoral measures are limited to pre-*Wesberry* congresses.

Table 3.3. Countermajoritarianism on landmark votes, by motion type			
Motion Type	Free Population (Pre-13th)	Turnout (Pres-<i>Wes.</i>)	Electoral Support (Pre-<i>Wes.</i>)
PASSAGE	2.0%	4.7%	3.2%
AMENDMENT	7.5%	13.8%	10.5%
PROCEDURE	8.3%	10.5%	9.1%

On the whole, our passage vs. amendments vs. procedure hypothesis above is confirmed. Procedural votes are far less likely to be countermajoritarian than amendments and procedure. In the antebellum era, 2.0% of passage votes are countermajoritarian compared to 7.5% and 8.3% for amendments and procedures, respectively. The pattern is similar for the electoral measures in pre-*Wesberry* congresses. This is the same pattern of countermajoritarianism in the Senate (Evans and Hoffman 2023): passage votes are less narrow, thus less likely to be countermajoritarian.

Taking Stock of the Landmark Votes

While countermajoritarianism is lower on passage votes, some of these votes occurred on legislation fundamentally important to the history of this nation. Consider Table 3.4, which contains a sample of countermajoritarian passage votes. The set of legislation that passed with

¹⁷ For roll calls since 1953, I relied on the motion codes of Carson, Crespín, and Rohde from the Albert Center at the University of Oklahoma (<https://www.ou.edu/carlalbertcenter/research/pipc-votes>). For the earlier congresses, I coded motion types manually. There is some subjectivity in the categorization. I coded motions to concur in Senate amendments as amendment votes, but I coded motions to table amendments as procedural. Motions to agree to conference reports as well as any initial passage votes are coded as passage votes.

countermajoritarian coalitions is staggering. Based on free population, the nation's first bankruptcy law, the formation of the Second National Bank, the Indian Removal Act, and the Kansas-Nebraska Act all passed on countermajoritarian votes. On the electoral measures, a number of other significant legislation was countermajoritarian, including the so-called "Midnight Judges Act" (the Judiciary Act of 1801) that preceded *Marbury v. Madison*, both the Alien and Sedition Acts, the protectionist Tariff of 1842 (dubbed the "Black Tariff"), and the Neutrality Act of 1939. A number of significant modern enactments are also countermajoritarian, including the crime bill of 1991, the failed energy bill of 2009, the major healthcare reforms of 2010, as well as a number of the Biden Administration's most critical legislative victories (the American Rescue Plan; the CHIPS Act; and the Build Back Better Act, which preceded the Inflation Reduction Act).

Much context and caution should be employed in interpretation. Antebellum legislation that is countermajoritarian on free population can be regarded as a product of the three-fifths clause. As discussed more in Chapter 4, the Kansas-Nebraska Act and the Missouri Compromise would very likely have passed in different forms under a counterfactual House apportionment scheme. The electoral measures, prior to the 1960's, are mostly picking up on cases in which countermajoritarianism is driven by systematic differences in electoral turnout or disenfranchisement. Neither is the case for modern cases of countermajoritarianism. While it is interesting that the American Rescue Plan passage vote was countermajoritarian based on turnout, this can probably be viewed most accurately as an idiosyncratic result of an incredibly narrow 219-212 vote and a lower population coverage for the Democrats. This type of outcome, while notable, is less pernicious than turnout differences before the 1960's and the malapportionment of the antebellum era.

Table 3.4. Selection of Landmark Countermajoritarian Passage Votes

Date	Act	Vote	Countermaj. Measure		
			Free	Turn.	Sup.
1794-03-10	Formation of the U.S. Navy (final)	50-39		✓	✓
1798-07-10	Sedition Act (final passage)	44-41		✓	✓
1800-02-21	Bankruptcy Act of 1800	49-48	✓		
1801-01-20	Judiciary Act of 1801 (final)	51-43		✓	✓
1816-03-14	Second Bank of the United States (final)	80-71	✓		
1820-03-01	Missouri Compromise of 1820 (initial)	91-82		✓	
1830-05-26	Indian Removal Act (final)	101-97	✓		
1842-07-16	Tariff Act of 1842 (final)	116-112		✓	
1854-05-22	Kansas-Nebraska Act (final)	113-100	✓	✓	
1916-05-20	Shipping Act	209-161		✓	✓
1939-11-03	Neutrality Act of 1939 (initial and final)	243-172		✓	✓
1961-08-03	Consolidated Farm and Rural Development Act of 1961 (final)	224-170		✓	
1987-10-29	Omnibus Budget Reconciliation Act of 1987 (initial)	206-205		✓	✓
1991-11-26	Violent Crime Control and Law Enforcement Act of 1991 (final)	205-203		✓	✓
1993-08-05	Omnibus Budget Reconciliation Act of 1993 (final)	218-216		✓	✓
2009-06-26	American Clean Energy and Security Act of 2009 (final)	219-212		✓	
2010-03-21	Health Care and Education Reconciliation Act of 2010 (initial)	220-211		✓	
2021-02-27	American Rescue Plan Act (initial)	219-212		✓	
2021-07-28	CHIPS Act (initial)	215 - 207		✓	
2021-11-19	Build Back Better Act (initial passage before massive Senate overhaul turned it into the Inflation Reduction Act)	220-213		✓	

Another important note about low levels of countermajoritarianism on passage votes is that amendments and procedure cannot be disregarded. As Evans and Hoffman (2023) note, it is inappropriate to reduce the political dynamics of a bill to its passage votes. Amendments and procedure have tangible policy impacts. Consider a sample of countermajoritarian amendment votes:

- A failed 25-26 vote, countermajoritarian by turnout and support, to amend the 1790 Residency Act to include Maryland in the list of proposed sites for the new capital.
- A 90-87 vote, countermajoritarian by free population, to concur in a Senate amendment to Missouri statehood to remove the House's previous amendment to prohibit slavery within the state— securing the substance of the 1820 Missouri Compromise.
- A failed 90-102 vote, countermajoritarian by all measures, to amend the 1828 so-called Tariff of Abominations to increase duties on imported spirits from 10 to 20 cents per gallon.
- A 101-99 vote, countermajoritarian by turnout, on an amendment to the 1842 Apportionment Act to require states to draw single-member districts for each representative. (The 1842 reapportionment was the first to require single-member districts.)
- A 218-205 vote, countermajoritarian by turnout and support, on an amendment to the 1968 Gun Control Act to exempt rifles, shotguns, and 0.22 caliber ammunition from the provisions of the bill.

Not all of these amendments made it into the final legislation, but they reveal an important point. From a spatial perspective, a passage vote is a choice between a policy proposal and the status quo— which is often seen near-unanimously as unacceptable. But the substance of

the legislation being voted upon is shaped significantly by more divisive amendment votes, which are critical in shaping the underlying proposal. Each of these votes are, in effect, a vote on policy; it is hard to disregard them as unimportant. For example, the fact that a substantial portion of party leaders' whipping efforts are related to amendments and procedure does not mesh well with the idea that roll call analysis should focus exclusively on passage (Evans 2018).

The same applies for countermajoritarian procedural votes, including:

- A failed 205-208 vote, countermajoritarian on turnout, to order the previous question on the 1828 Presidential Succession Act.
- Four separate failed motions to adjourn (a common dilatory tactic), all countermajoritarian on free population, during consideration of the Compromise Tariff of 1833.

Procedural votes are often instructions to conference committee members to modify legislation or vote against certain proposals. They also include previous question motions to consider or vote on legislation, as well as motions to table or debate amendments. Once again, these votes are important and it is hard to argue that they are not impactful. As these samples illustrate, to understand the importance of countermajoritarianism it is essential to move beyond aggregate results. That is precisely what we will do in the next chapter, in an analysis of the most countermajoritarian issue of congressional history: slavery.

Conclusions

To my knowledge, this is the first study of countermajoritarianism in the House of Representatives. It is unwise for political scientists to stop their work at malapportionment. It greatly matters whether malapportionment has significantly affected legislative outcomes. In this

chapter, I have argued that it has. The House is not nearly as countermajoritarian as its Senate counterpart, but scholars may have given it too much democratic credit. Specifically, we have seen that:

- Countermajoritarian outcomes, by free population, were common in the antebellum era, but have remained rare since the abolition of slavery. Measures based on turnout and electoral support peaked in the Jim Crow era of the 20th century and have fallen towards zero since the Voting Rights Act. Importantly, countermajoritarian actions are commonly positive legislative actions.
- This trend is a function of malapportionment, as well as partisan alignments and the level of conflict in the roll call record. When constituency inequalities no longer correspond to relevant political cleavages, countermajoritarianism diminishes.
- These outcomes are not evenly distributed across roll call votes. The South and pre-1960s Democratic Party have been the unique beneficiaries of countermajoritarianism. Countermajoritarianism is most prevalent on controversial and partisan legislative issues, including some of the nation's most foundational legislation.
- Slavery, by far, is the most countermajoritarian issue in the history of the House. This is the subject of the next chapter.

We should also be careful about how these measures should and should not be interpreted. My approach here captures outcomes where the structures of the House (apportionment and districting) advantage observable coalitions that represent a minority of relevant constituencies (free population, turnout, and electoral support). If all House districts had equal levels of population, turnout, and electoral support for the incumbent, these outcomes would be impossible, and chamber majorities would always represent a majority of constituents.

Electoral outcomes and the structure of the House would perfectly facilitate majoritarianism at the aggregate level. Essentially, my approach to countermajoritarianism accounts for the interaction between constituency and structure, with three different measures for constituency.

Importantly, this does not account for constituent *preferences* beyond vote choice. Attempting to capture constituent views on the substance of roll call votes is an empirical can of worms that I would prefer to keep closed. For example, can we conclude from Table 3.4 that a majority of voters would have preferred that the Violent Crime Control and Law Enforcement Act of 1991 were not enacted? Answering this is difficult, and the question is premised on an incredibly optimistic portrait of the American voter. The crime bill was highly multidimensional— providing for 100,000 new police officers, banning assault weapons, and enacting the Violence Against Women Act. It seems difficult to conclude whether Americans were for or against it, or that they were aware of it at all. The idea that voters are politically informed, have issue preferences, and vote according to those preferences constitutes what Achen and Bartels (2016) characterize as a flawed “folk theory” of democracy. For one, voters’ lack of political or policy knowledge is consistently dismal. Luskin (2002, 282) finds, in the simplest terms, that Americans “know jaw-droppingly little about politics,” and this finding has been sustained widely across time, policy space, and in other democracies around the world.

More fundamentally, Converse (1964, 51-52) famously concludes that voters “do not have meaningful beliefs, even on issues that have formed the basis for intense political controversy among elites for substantial periods of time.” The vast majority of voters are “innocent” of ideology. They “evaluated parties and candidates in terms of their expected favorable or unfavorable treatment of different social groups” (14), but “lack the contextual grasp of the system to recognize how they should respond to it without being told by elites who

hold their confidence” (15). Or their beliefs “had no shred of policy significance whatsoever” (16). Converse also observed a remarkable inconsistency of policy preferences over time. The same individuals, across three surveys given at two-year intervals, fundamentally changed their beliefs between surveys at high rates. Despite rapid developments in the media environment, the scope of government, and polarization, Converse’s conclusions remain largely sustained (Achen and Bartels 2016).

Moreover, survey responses are sensitive to a broad range of heuristics and idiosyncrasies of question wording. For example, Americans have generally been favorable to “assistance to the poor,” but opposed to “welfare.” Leading up to the Gulf War, two-thirds of Americans supported “military force,” but less than half wanted the nation to “engage in combat,” and less than a third wanted to “go to war” (Achen and Bartels 2016, 31). In other words, even if voters’ preferences were stable, complete, and well-informed, it is shockingly difficult to measure *what they are*. What all of this suggests is that while it is possible to examine broad patterns in constituent ideology and values, it is hard to make an objective claim about the aggregate views of American voters on something as specific and complex as a roll call decision. Such an analysis, however desirable, belies the basic nature of the voting public. I emphasize that measuring preferences is not the aim of my approach.

I should also re-emphasize that this is not a counterfactual analysis. We cannot say with certainty that the Second Bank of the United States would never have been formed without the three-fifths clause just because it was a countermajoritarian vote based on free population. If the state of Virginia had fewer representatives, or if the state of Massachusetts had more, we cannot be confident what the partisan or ideological composition of these delegations would be. For this reason, I avoid an approach of alternative voting weights or using the language of “flips” or

“swings” in roll call outcomes used by McCrone (1990) and Johnson and Miller (2022). In my view, the best approach we can take is to identify outcomes that are credibly countermajoritarian, not make bold claims about counterfactual policy outcomes.

However, I will advance one counterfactual claim, which I turn to in the following chapter. Based on this research, I find it hard to argue that the legislative outcomes on the issue of slavery would not have been at least modestly different without the three-fifths clause. Most scholars have focused on the North-South balance in the Senate, but the House should not be regarded as an abolitionist institution. Democratic House majorities, including Northern Democrats, had real incentives to protect slavery for their southern co-partisan. And in a sense, they did— through many narrow countermajoritarian votes to maintain regional parity, from the Missouri Compromise (1820) to the Kansas-Nebraska Act (1854). It is hard to maintain that these laws would have passed in identical form without the clause. Taking a deeper look at slavery is imperative for a full understanding of the House’s countermajoritarian history.

4.

Slave Power in the House

Under the present confederation, the states may admit the importation of slaves as long as they please; but by this article after the year 1808, the congress will have power to prohibit such importation. . . . I consider this as laying the foundation for banishing slavery out of this country; and though the period is more distant than I could wish, yet it will produce the same kind, gradual change, which was pursued in Pennsylvania. . . . and in the mean time, *the new states which are to be formed, will be under the control of congress in this particular; and slaves will never be introduced amongst them.*

— James Wilson, *The Debate on the Constitution* (Bernard 1993, 1:830, emphasis added)

As mentioned in the first chapter, James Wilson offered the three-fifths clause in part because he believed that slavery would soon be extinguished. On this point, he was rather optimistic: the trade would be eliminated after 1808, and the whole institution would fall shortly thereafter. Between 1789 and that time, he estimated that slavery would not be introduced to *any* newly-admitted state. On both points, he predicted that Congress would be the source of restrictionism. Ironically, though, we have seen that the effects of malapportionment surface most on the protection of slavery, precisely because of the three-fifths clause. So, in this chapter, we return to the consequences of Wilson’s decision. Where does countermajoritarianism surface on the issue of slavery? And what are the effects of the clause on legislative outcomes?

This case study has a dual purpose. First, the issue of slavery demonstrates some of the major themes of the previous chapter: the prevalence of countermajoritarian outcomes, the importance of amendments and procedure, and the policy impacts of such outcomes. But the legislative history of slavery is also a critical part of the House’s antidemocratic history. As we have seen, the existence of slavery in the South and an apportionment formula that gave additional representation to slave states intrinsically drove interstate malapportionment and free

population countermajoritarianism. And in the history of the House, slavery seems to be the only legislative issue that members seemed explicitly aware of countermajoritarian activity. That is, Northerners realized—albeit surprisingly slowly—that the clause was conferring significant benefits to the slave states. Thus, any account of countermajoritarianism in America’s lower chamber is incomplete without a detailed look at its defense of the “peculiar institution.”

Few delegates at the Convention of 1787, even those opposed to the three-fifths clause, were passionate in their opposition. The most prominent exception was Gouverneur Morris. After Wilson offered the clause, Morris attacked it with a vengeance. First, he denounced the notion that the clause was a “compromise.” The idea behind the clause was that it would be used for both representation as well as direct taxation, in the event that such a tax were levied. Morris, however, countered that the national government would collect revenue from excise and import duties, which would fall disproportionately on Northerners. The national government, he claimed, would never levy direct taxes except in rare emergencies. On this point, the next few decades proved him right. Perhaps more importantly, Morris claimed the clause would also introduce a moral hazard: Southern states were incentivized to import more slaves (Richards 2000). Passionately, he declared:

The admission of slaves into the representation, when fairly explained, comes to this, —that the inhabitant of Georgia and South Carolina who goes to the coast of Africa, and, in defiance of the most sacred laws of humanity, tears away his fellow creatures from their dearest connexions and damns them to the most cruel bondage, shall have more votes in a government instituted for protection of the rights of mankind, than the citizen of Pennsylvania or New Jersey, who views with a laudable horror so nefarious a practice.

There were other reasons to be wary. Beyond malapportionment, the three-fifths clause influenced the Senate through state legislative apportionment and impacted states’ number of electoral votes. In the long term, it also disincentivized states from gradual abolition because any state that pursued abolition would lose representation, given that liberated slaves would depart

from the South (Amar 2005, 540n110). And as we will see in this chapter, the clause's benefit to the South also proved decisive on important roll call questions about slavery more than any other legislative issue.

In the ratification conventions throughout the states, the debate on the three-fifths clause was astonishingly muddled. Northern opponents seemed confused about the implications. Many focused on the clause as a value judgment: why are slaves, whether North or South, *entitled* to representation? Many saw it as an insult to Northern whites, putting them on the same footing as slaves. Still others seemed to think that the clause meant slaveholders were getting additional *votes* for their slaves. Few seemed to realize that disproportionate power in the House would flow southward. Northern delegates who supported the Constitution clarified: slaves would not be truly represented, nor would slaveholders get more votes. The clause merely meant that the additional representation due to slaves would go to the *states*. As Richards (2000, 38) notes, "this argument was factually correct, but why it satisfied any of the Constitution's critics is something of a mystery."

But soon the institutional advantages to Southern interests were plain to see. By the 1840's and especially in the 1850's, Northern abolitionists had begun to notice that the deck was stacked against them. In the election of 1800, Jefferson defeated John Adams with the benefit of slave states from the three-fifths clause. As the Federalist Party broke down, Southern influence rose through the Jeffersonian Republicans, the Jacksonians, and the Democrats. In the 60 years between Washington's election and the Compromise of 1850, slaveholders held the presidency for 50 years, 18 of 31 Supreme Court justices were slaveholders, as were the longest serving Speakers of the House and the vast majority of Ways and Means chairmen (Richards 2000, 9).

Northerners soon found the right phrase for their discomfort: *slave power*— "control in and over the government which is exercised by comparatively small number of persons . . . bound together in common interest, by being owners of slaves" There existed, in other words, "an aristocracy constituted and organized on the basis of owning slaves" (Nye 1946, 263). This thesis had many forms, ranging from descriptive to downright conspiratorial, but its general idea was that slaveholders seemed to wield disproportionate power over the United States. This power had at least three primary sources. The three-fifths clause was the first. Second, the Democratic Party emerged as an electorally dominant force in the second party system, and the South used the party as a vehicle to develop consensus on the protection of slavery, among both Southerners as well as Northern Democrats. Finally, the practice of balancing free and slave state admissions preserved an enduring Southern veto over national policy.

In my view, this last factor— the Senate's balancing rule— has displaced the other two as the most significant scholarly explanation for the preservation of slavery (e.g., Weingast 2002). At first, the least populous states were Northern ones— and the South relentlessly hammered this point. But as the nation expanded and more states were admitted it became clear that Congress bent the rules for the South. While the Northwest Ordinance of 1787 set a benchmark of 60,000 free individuals for statehood, the number was dropped during the Jefferson Administration, ostensibly for the benefit of the South. After that, a new informal principle developed that any state should have more population than Delaware, the least populous of the original 13 states. But this rule was violated in the case of one northern state (Illinois) and four southern ones (Mississippi, Missouri, Arkansas, and Florida). Indeed, admitted Southern territories were consistently less populous than Northern ones, with 63,000 free individuals, on average, compared to the Northern territories' 160,000. By the 1850s, abolitionist William Jay pointed out

that South Carolina, Georgia, Alabama, Mississippi, Louisiana, and Kentucky— six slave states combined— had 190,000 less free population than PA (Richards 2000, 48-49). Why, he asked his readers, do Southern voters in such states have six times the voting power in the Senate than that of a free man in Pennsylvania? It became increasingly difficult to answer this question.

Below I offer an examination of slave power through countermajoritarian votes on the issue in the House rather than the Senate. Slavery is the most countermajoritarian salient issue (250 total issue votes as the benchmark for salience) for both the free population and electoral support measures. For turnout, it is the second most countermajoritarian issue after disputed elections. Table 4.1 shows levels of countermajoritarianism on landmark and non-landmark votes across all three measures. Free countermajoritarianism on slavery is more than double the second highest issue, tariffs. We also see that countermajoritarianism on slavery seems most activated on landmark legislation— the most significant votes on the issue. A remarkable 18% and 19% of landmark votes were countermajoritarian by free population and turnout, respectively.

Table 4.1. Countermajoritarian votes on slavery		
Measure	Landmark	Non-landmark
Free Population	17.8%	10.0%
Turnout	19.1%	10.7%
Electoral Support	9.6%	12.1%

Here it is also worth noting that this approach of identifying countermajoritarian outcomes is not designed to capture the effects of the three-fifths clause *directly*. A roll call outcome on slavery legislation above could be flipped under an alternative apportionment scheme (e.g., a re-weighting of votes based on state apportionment without the clause) and also *not* be flagged as countermajoritarian based on free population. In fact, the alternative

apportionment approach, taken by Humes et al. (2002) flags significantly *more* votes as affected by the three-fifths clause. Looking at the 4th to 36th Congresses, the proportion of their affected roll calls ranges from a *low* of 26.3% in the 34th to a high of 55.3% in the 6th. This is much higher than my results; my antebellum average of free-population countermajoritarianism is 6.11%. All this is to say that my research as well as others' seems to suggest that the three-fifths clause was quite decisive, perhaps more so than my relatively conservative figures suggest.

In the first section below, I revisit the Missouri Compromise and the prominence of North-South balance in the Senate. I also outline some scholars' arguments that have placed balancing as the most prominent feature of slave power, and I offer a number of reasons to be dubious of this view. In the second section, I turn to a broader history of countermajoritarianism on slavery votes, including the House's notorious gag rule, DC abolition, the Compromise of 1850, and the Kansas-Nebraska Act. Finally, I consolidate the evidence of the chapter by making broader claims about the effects of countermajoritarianism on the issue of slavery. I offer evidence that the three-fifths clause may be more impactful than Senate balancing, and that outcomes in the House would have looked quite different without the apportionment formula that James Wilson, in the spirit of compromise, rose to propose in 1787.

The Missouri Compromise and the Senate's Balancing Act, 1787-1820

Sectional balance was a prominent concern throughout the Constitutional Convention, especially in the debates over apportionment of the House and Senate (Lee and Oppenheimer 1999). As shown in Table 4.2, in the early congresses the South was actually represented in greater proportion in the House than in the Senate. Indeed, Madison and other Southerners believed that the Senate would serve as a predominantly Northern institution. For that reason, each Southern state, except Maryland, supported proportional representation in the upper

chamber (Richards 2000, 46). But balance was soon established in the Senate, with the 1792 admission of Kentucky and the 1796 admission of Tennessee. Following the 1803 admission of Ohio, free states possessed a one-seat Senate majority until the admission of Louisiana in 1812.

Table 4.2. North-South balance in the House and Senate				
Year	House Balance (% Slave)	Senate Balance (Free:Slave) (% Slave)	Free States	Slave States
1791	46%	8:6 (43%)	NH, MA, RI, CT, NY, PA, NJ, VT	MD, DE, VA, NC, SC, GA
1792		8:7		KY
1796		8:8		TN
1803	46%	9:8 (47%)	OH	
1812	45%	9:9 (50%)		LA
1816		10:9	IN	
1817		10:10		MS
1818		11:10	IL	
1819		11:11		AL
1820-21	42%	12:12 (50%)	ME	MO
1836	41%	12:13 (52%)		AR
1837		13:13	MI	
1845	39%	13:15 (54%)		FL, TX
1846		14:15	IA	
1848		15:15	WI	
1850	38%	16:15 (48%)	CA	
1858		17:15	MN	
1859		18:15	OR	
1861	35% ¹⁸	19:15 (44%)	KS	

¹⁸ Following the 1860 census, prior to the secession of Confederate states.

This early period lacked major confrontations over slavery, so balancing was practiced informally. When Missouri reached the required population to warrant statehood, sectional animosities began to boil over. In the House, Representative James Tallmadge of New York proposed an amendment “that the further introduction of slavery or involuntary servitude be prohibited” (Forbes 2009, 35). The Tallmadge Amendment was the subject of fierce animosity in both chambers. The House narrowly passed it, but the entire bill died in the Senate. The Tallmadge Amendment constituted a fundamental threat to the Democratic Party and the entire enterprise of antebellum stability on the issue of slavery. To understand the politics of slavery, it is critical to ascertain two things. First, the desire for some equilibrium on the issue was just as common among Northerners as it was among Southerners. By 1820, there was a widespread belief that slavery was moving northward. One abolitionist predicted that “when state has been added to state for centuries, [the Louisiana Territory] will not be exhausted; but enough will always be left to furnish another, and another, and yet another; as often as the supremacy of the Slave Country shall demand additional support” (Wieck 1977, 107). Slavery had become established in the Indiana Territory and was only narrowly rejected by Ohio in 1802; Illinois did not become a truly free state until *after* it was admitted (108). In other words, the stability of the 36°30’ line was not just a line for slavery to grow; it was also a critical defense for Northern abolitionism.

Second, the Democrats of the second party system, including Northern Democrats and Democratic presidents, had credible political commitments to slavery. The party was a large interregional coalition of both the South as well as northern farmers and laborers. Critical to the party’s unity was its defense of slavery— or, perhaps more justifiable to Northerners, the defense of individual *states’ rights*, or the non-*expansion* of slavery. Democratic presidents were

nominated under a rule that a nominee must be voted for by a $\frac{2}{3}$ majority of delegates. In essence, this guaranteed that no Democratic candidate would be nominated without the approval of the South. It also guaranteed that each candidate only drove a national agenda that had near-consensus (Weingast 2002).

All this is to say, we should understand the Tallmadge Amendment as a product of Northern anxieties over slavery, as well as a legitimate threat to the Democratic Party, both North and South. Shortly after the amendment's initial House passage, Representative John W. Taylor proposed to extend it to the Arkansas Territory—the southern portion of the old Missouri Territory. The first part of Taylor's amendment, that slavery be prohibited in Arkansas was narrowly rejected, while the House narrowly approved the second part, providing for gradual abolition for all slave children in the territory. This outcome displeased Speaker Henry Clay. The next day, after a number of parliamentary maneuvers, Clay was able to scrap the amendment entirely, and slavery was expanded into Arkansas (Richards 2000, 75-76). Countermajoritarian votes on the Arkansas amendment—the initial rejection of the first part of Taylor's amendment, as well as the subsequent rejection of the amendment entirely—are shown in Panel A of Table 4.3.

For Clay, dealing with the Tallmadge Amendment would prove more challenging. In the next congress, the House passed a similar statehood bill for Missouri with a similar amendment outlawing slavery. The Senate's compromise legislation, written in part by Clay, made two critical changes. First, the Senate married the Missouri question to Maine's statehood, admitting the former as a slave state and the latter as free. Second, the Senate adopted an amendment proposed by an Illinois senator that slavery would be prohibited north of the 36°30' parallel, Missouri's southern border (Dixon 1899).

Panel B of Table 4.3 shows countermajoritarian House votes on the first Missouri Compromise. When the bill returned to the House, the amendment to agree with the Senate to strike the Tallmadge Amendment passed on a 90-87 countermajoritarian vote. Of the 90, only 14 votes came from free states. In essence, this is the vote that secured the substance of the compromise. Then, the House agreed to the 36°30' parallel amendment and passed the bill by an overwhelming margin (Dixon 1899; Forbes 2009). This highlights a fact mentioned in the previous chapter: passage votes can be misleading indicators of bipartisan support; amendments are often just as substantively important. It also shows that there is a high likelihood that the compromise would not have passed the House in the form it did without the three-fifths clause.

Table 4.2. The Missouri Compromise					
Date	Motion	Vote	Countermaj. Measure		
			Free	Turn.	Sup.
A. Arkansas Territory					
1819-02-18	To amend the Arkansas bill, which proposes that the further introduction of slavery or involuntary servitude be prohibited except for the punishment of crimes, whereof the party shall have been duly convicted.	FAIL (70-71)	✓	✓	✓
1819-02-19	To refer the bill to a select committee with instructions to strike out; "and all children born of slaves within the said territory, shall be free, but may be held to service until the age of 25 years." (Speaker voting affirmative.)	PASS (89-88)	✓	✓	✓
1819-02-19	To concur with a select committee in an amendment to strike out: the abolition amendment.	PASS (89-87)	✓	✓	✓
1819-02-19	To amend by re-proposing the abolition amendment.	FAIL (86-90)	✓		✓
B. First Missouri Compromise					
1820-01-24	To postpone consideration.	FAIL (86-88)	✓		
1820-02-29	To concur in the amendment to abolish future slavery in Missouri and provide for the return of fugitive slaves.	PASS (94-86)		✓	
1820-03-01	Passage (initial)	PASS (91-82)		✓	
1820-03-01	To concur in the Senate amendment, which eliminates the provisions prohibiting slavery in the proposed state.	PASS (90-87)	✓		

The Missouri Compromise, and balancing more broadly, has provided the central paradigm for understanding slavery as a legislative issue. As we will see in the next section, most of the activity of 1820, the Compromise of 1850, and the Kansas-Nebraska Act of 1854 can be understood as Democratic attempts to keep North-South balance. In Weingast's (1998) view,

A system of states' rights federalism with limited national government required institutional protections to prevent either section from dominating the national government.... Many institutional devices helped sustain [this], but the most important one was the *balance rule in the Senate* (151).

Thus, most scholars have studied the endurance of slavery based on regional balance, much more than the three-fifths clause. The argument is straightforward. Without slave power in the Senate, the Tallmadge Amendment or other abolitionist provisions likely would have passed, significantly reigning in the expansion of slavery. Even with the three-fifths clause, the House was largely an anti-slavery institution, while the Senate was pro-slavery, or at least gridlocked. Senate balancing, made explicit with the 1820 Missouri Compromise, was the central element of the slave power, while the three-fifths clause played a lesser, perhaps even trivial, role. As Rakove (1996) contends,

a case can be made that [the three-fifths clause] turned out to have fewer costs than [balance in the Senate]. It was not, after all, the three-fifths clause that gave the southern states the leverage they needed to keep the Union safe for slavery, but rather the Senate, where the later Compromises of 1819-20 and 1850 did more to preserve the political equilibrium Madison sought.

In many ways, this argument is valid. Throughout the antebellum era, the House managed to pass a number of anti-slavery provisions on razor-thin margins. This includes an amendment to prohibit slavery in the Louisiana Purchase, the Tallmadge Amendment, and later the Wilmot Proviso to prohibit slavery in the territory acquired from Mexico during the Mexican-American War. These votes seem to sustain Rakove's point: the South never had majority control of the

House, so the three-fifths clause must have limited policy impacts. And because the House was population-based, Northern majorities managed to pass abolitionist measures.

But this begins to break down on deeper analysis. Rakove's argument, in essence, is based on two false binaries. The first is that two politically homogeneous coalitions, Southern and Northern, contended for majorities in the House—with the former eager to protect slavery and the latter hell-bent on its extinction. In this line of thinking, because the North won this regional struggle and held a majority of the chamber, the three-fifths clause must have negligible impacts. The issues with this view are obvious. While scholars have focused on the House's passage of abolitionist (or, perhaps more accurately, *restrictionist*) measures, more attention must be paid to the House's eventual acquiescence to the Senate's *non-restrictionist* position. In the end, fourteen free state representatives joined a solid Southern coalition to defeat the Tallmadge Amendment. This pattern, as we will see, is repeated time and time again on the issue of slavery. Northern Democrats joined their Southern co-partisans on the House's "gag rule" (prohibiting debate on anti-slavery petitions), the ultimate defeat of the Wilmot Proviso, the Compromise of 1850, and the repeal of the Missouri Compromise with the Kansas-Nebraska Act.

These "northern men with southern principles," often called "doughfaces" (Richards 2000, 86), had complicated personal and political reasons for voting with the slave states. And there were many doughfaces in the Senate. Illinois sent two slaveholders to the Senate who routinely voted with the South. One of them, stated a commentator, "defended his right to do so in language that would have done justice to a Georgian or South Carolinian" (Richards 2000, 74). Iowa's first senators were both ultimately from the South, and they both once owned slaves (108). The existence of these men seems to undercut Weingast's centrality of Senate balance. Senate votes to dispose of abolitionist provisions were not narrow; typically, the South could rely

on about six Northern senators for support, and often quite more. For instance, five Northern senators voted against the first part of Tallmadge's amendment, and fully *twelve* voted against the second. The argument that amendments such as Tallmadge's would have been successful without North-South balance is a difficult one to believe.

Rakove's second false binary is that, as a result of a Northern majority in the chamber, the House was anti-slavery and the Senate was pro (or at least gridlocked). Certainly the House managed to pass some anti-slavery provisions, but this anti-/pro- dichotomy is overly simplistic. Northern Democrats, agrarian proponents of limited government, and even Whigs faced complicated cross-cutting considerations when it came to the issue of slavery, statehood, and abolition. Regional, ideological, partisan, and stability considerations were often contradictory. Moreover, this view ignores the fact that *outcomes* on state admission, balancing, and slavery were, of course, approved by both the House and the Senate. In other words, if the Missouri Compromise, the Kansas-Nebraska Act, and every admission of a slave state to offset the admission of a free one can be credibly viewed as efforts to protect slavery (and there is a reasonable argument that each of these is), we must acknowledge the role played by the House in approving these outcomes. Without the three-fifths clause, votes of Southern acquiescence would likely not have occurred.

In sum, scholars such as Rakove and Weingast are correct that the Senate is more pro-slavery than the House. They are also correct that the House passed some anti-slavery amendments. But they are probably not correct that slavery would have been extinguished without parity in the Senate. And they are certainly wrong to say that the outcomes of the antebellum era would not have been different without the three-fifths clause. As I illustrate in more detail in the next section, the three-fifths clause seems to have often made a decisive

difference in House roll call outcomes. Given the lopsided nature of many Senate votes on slavery, there is a reasonable argument that the three-fifths clause is even more impactful than Senate balancing.

The House and the Peculiar Institution, 1830-1854

The Missouri Compromise produced a long period of silence on the issue of slavery. But throughout the 1830's, the movement for abolition strengthened, and abolitionist organizations began to use the right to petition as a mechanism to pressure Congress on a number of slavery issues. By the mid-1830's, for the first time in the decade and a half since the Missouri Compromise, the slavery issue was forced back onto the legislative agenda. In December 1835, New England representatives began to force a series of votes on abolition in Washington, D.C. While these petitions were disposed of by the Democratic majority, the South became outraged by the reemerging discussion of slavery (Meinke 2007).

As noted, this posed an issue for the Democrats, which relied on a North-South unity. Central to their dominance was the defense of slavery. The party's immediate solution was to enact a House rule to block consideration of matters related to the abolition of slavery. From the 24th to 28th Congresses, the House of Representatives operated under different versions of this notorious "gag rule":

No petition, memorial, resolution, or other paper praying the abolition of slavery in the District of Columbia, or any State or Territory, or the slave trade between the States or Territories of the United States in which it now exists, shall be received by this House, or entertained in any way whatever (Meinke 2007, 33, quoting Rule 21 of the 26th House).

The first gag rule was implemented in May 1836 with a large 117-68 vote. At the time, the House was governed by a Jacksonian majority that outnumbered the minority by a 2:1 ratio, and the rule was reenacted by subsequent Democratic majorities. Opposition was strong among

New England Whigs, led most prominently by John Quincy Adams, who made several attempts to eliminate it (Meinke 2007). There is a high level of countermajoritarian activity on both anti-slavery petitions and in the battles over the gag rule. Table 4.3 offers a mere sample of these votes. As shown in the Panel A, abolition petitions were routinely tabled (a procedural motion) in close countermajoritarian votes. In 1836, for example, a motion to proceed in order to postpone consideration of abolition resulted in a 105-105 tie. The chair voted affirmative, and the motion was tabled. This was countermajoritarian by all three measures. Similarly, as shown in Panel B, after the gag became a common House practice, several successful motions to implement the rule, as well as several failed attempts to repeal it, were countermajoritarian (also often by all three measures).

Table 4.3. DC abolition and the “Gag Rule”					
Date	Motion	Vote	Countermaj. Measure		
			Free	Turn.	Sup.
A. DC Abolition					
1835-12-18	To table a petition for the abolition of slavery in Washington presented by the inhabitants of Holliston, MA.	FAIL (95-121)		✓	
1835-12-21	To suspend the rules, in order to enable the maker of motion to offer a resolution providing that the abolition of slavery shall not be entertained by Congress and if such petitions herein after be presented, the same should be laid on the table without reading.	FAIL (100-115)		✓	
1836-01-20	To proceed to the order of the day in order to postpone further consideration of abolition of slavery. chair-affirm.	PASS (105-105 ¹⁹)	✓	✓	✓
1836-03-07	To table the motion to suspend the rules and consider a resolution that the slave trade in Washington be immediately abolished.	FAIL (80-83)	✓	✓	✓
B. The Gag Rule					
1839-12-31	To suspend the Rules of the House and submit a resolution proposing to table any resolution or petition relating to abolition of slavery, without any debate, reference or printing of same.	PASS (89-85)	✓		✓
1840-01-28	To amend the Rules of the House by excluding any matter requesting the abolition of slavery or slave trade in any state.	PASS (115-105)	✓	✓	✓

¹⁹ Chair voting affirmative.

1841-12-07	To order the previous question on the adoption of the resolution which would rescind House Rule 21.	FAIL (91-92)	✓		✓
1841-12-12	To table the resolution to rescind House Rule 21.	PASS (106-102)	✓	✓	✓
1843-12-04	To amend the resolution adopting the rules of the previous house, by adding "except the rule generally known as the 21st Rule of the House."	PASS (91-92)	✓	✓	✓

This provides one of the most direct challenges to the centrality of the Senate as a pro-slavery institution. Throughout this period, the House had Northern majorities. But it also had Democratic majorities, and the party consistently made genuine commitments to preserve slavery for the South and maintain the Southern veto in the Senate. As it was on the Missouri Compromise, the three-fifths clause was decisive in driving outcomes towards Southern acquiescence.

But the South's veto, enshrined with the Missouri Compromise, soon came under threat once more. North-South balance could only work if the two regions expanded in tandem. But that was not the case. At first, the Missouri Compromise seemed to favor the South. While the bulk of the Louisiana Purchase's territory was north of the 36°30' parallel, this land was far less desirable. As shown in Table 4.2, between the admission of Kansas in 1820 and Iowa in 1846, not a single state was formed from this territory. A second was not carved out until Kansas in 1861. But by the 1840's, the tide began to turn northward. The remaining states from the Northwest Territory began to be admitted (Michigan in 1837, Wisconsin in 1848), and it seemed that the North had substantial territory ripe for expansion.

The South did not. So the Democrats responded by embracing expansion. First, President Polk, who was both a slave owner and an expansionist, sponsored the admission of Texas in 1845. Second, his administration launched a war with Mexico in 1846, in part to provide new southern territory for the expansion of slavery. This resulted in a level of Northern anxiety over

Southern expansion that had not been experienced since the 1820's (Weingast 2002). The North countered in exactly the same way it had during the Missouri crisis: with an anti-slavery amendment, this time the Wilmot Proviso, stating,

Provided, that, as an express and fundamental condition to the acquisition of any territory from the Republic of Mexico by the United States, by virtue of any treaty which may be negotiated between them, . . . neither slavery nor involuntary servitude shall ever exist in any part of said territory (Weingast 2002, 153).

The Proviso passed the House multiple times but failed in the Senate, which at one point voted it down 21-31. The nay-voters included 26 Southern senators, joined by five Northerners: two from Indiana, one from Illinois, one from Michigan, and one from New York (Richards 2000).

This gridlock was ended with the Compromise of 1850, a package of five different pieces of legislation: the admission of California as a free state, a strengthened Fugitive Slave Act, the banning of the slave trade in Washington, DC, the establishment of Texas's boundaries and the territorial government of New Mexico (with no restrictions on slavery), and the territorial government of Utah (also with no restrictions). Table 4.4 shows countermajoritarian activity on one aspect of the bill: the Texas and New Mexico Act. During consideration of the bill in the House, Representative William Boyd proposed the New Mexico portion, with free sovereignty on the issue of slavery, as a substantial amendment. This erupted into a dispute on September 3, 4, and 5 (Hodder 1936). A flurry of these votes were countermajoritarian, albeit only one on free population.

Table 4.4. The Texas and New Mexico Act					
Date	Motion	Vote	Countermaj. Measure		
			Free	Turn.	Sup.
1850-09-04	To table the motion to reconsider the vote by which the bill was committed to the Committee of the Whole.	FAIL (103-103)	✓	✓	
1850-09-04	To reconsider the vote by which the bill was referred to the Committee of the Whole	PASS (104-101)		✓	
1850-09-04	To refer the bill to the Committee of the Whole for further consideration.	PASS (101-99)			✓
1850-09-04	To refer the bill to the Committee of the Whole	FAIL (101-103)		✓	
1850-09-05	To reconsider the vote by which Mr. Boyd's amendment was rejected.	PASS (105-99)		✓	
1850-09-05	To agree to the Boyd Amendment, which provides for a territorial government for New Mexico, excluding the Wilmot Proviso, but permitting people to allow or prohibit slavery as they decide, and the government shall not be in effect until the Texas boundary is settled.	PASS (107-99)		✓	

Clearly, the bill was a complicated matter. Simultaneously, it allowed for the expansion of slavery into more territory, forestalling the Civil War by a decade, while also admitting California and disturbing the Senate's delicate balance (see Table 4.2). Why would the South allow for another free state and an upset balance? The answer is probably a factor we have already discussed. Outcomes that protected slavery were routinely supported by all of the South, *as well as a number of Northern Democrats* (doughfaces). It is difficult to see how two voting senators from California would radically upend the institution of slavery. Both the Tallmadge Amendment and the Willmot Proviso were voted down by substantial Senate majorities, and the Democratic Party also dominated the presidency and had forged a Supreme Court sympathetic to slavery. In other words, sacrificing balance in the Senate upended the protection of slavery neither within the Senate nor across the American political system as a whole. It was a small price to pay for substantial victories: the first new fugitive slave law in two generations, territorial opportunities for expansion, and the credible commitment of the Democratic Party that

the Wilmot Proviso was off the table and new slave states would surely be formed (Weingast 2002). Indeed, the Proviso never passed, and the northern third of Mexico was annexed by the United States with no provisions outlawing the expansion of slavery (Richards 2000).

After the Compromise of 1850, attention soon shifted towards matters of internal improvements, specifically the development of a Pacific railroad. Amid competing proposals for three potential routes to the Pacific, Stephen A. Douglas, who had emerged from the Compromise of 1850 as a presidential contender, advocated for a route through Nebraska. Before any work on the railroad could begin, however, the territory would need to be organized. So in January 1854, Douglas introduced a bill to organize the territories of Kansas and Nebraska without addressing the issue of slavery. Because Nebraska laid north of 36°30', Southerners opposed the bill, thinking they would be unable to transport slaves through the territory. But Douglas responded to the South with a dramatic move: an amended bill that explicitly repealed the Missouri Compromise (Weingast 2002).

There were certainly costs to repealing the Missouri covenant; Douglas himself said the move would “raise a hell of a storm” (Forbes 2009, 278). But as with the Compromise of 1850, there were many reasons to believe that the benefits were more numerous. Building the railroad would be an enormous commercial and political success for Douglas and his party. Moreover, renegeing on the Missouri Compromise resolved an existing two-pronged dilemma for the Democrats: they were committed to reinstating North-South balance in the Senate, but the South now lacked any legal or economically viable opportunities for statehood. Given that Utah and New Mexico were both organized under natural sovereignty on the issue of slavery, the Democrats seemed convinced they could get away with extending the principle northward (Weingast 2002).

The bill, immediately, was subject to widespread backlash and prolonged debate, but it eventually passed by a substantial 37-14 out of the Senate. In the House, debate was more heated, entailing brandished weapons, threats of violence, and an arrest by the sergeant at arms. After several delaying tactics, debate began on May 8, 1854, and eventually the bill was passed 113-100, with Southern Democrats and Southern Whigs voting 57-2 and 12-7, respectively, for its passage. Northern Democrats were split, and Northern Whigs were unanimously opposed. The bill was praised as a victory for the South and viewed as a prelude to the Civil War (Dixon 1899). There is good reason to believe the Kansas-Nebraska Act, like the Missouri Compromise it repealed, would not have passed without the three-fifths clause. As shown in Table 4.5, final passage, among many motions on the bill, was countermajoritarian by free population.

Table 4.5. The Kansas-Nebraska Act					
Date	Motion	Outcome	Countermaj. Measure		
			Free	Turn.	Sup.
1854-05-11	To table a motion to end debate at 12 o'clock tomorrow	FAIL (95-100)	✓	✓	
1854-05-22	To table	FAIL (100-114)	✓	✓	
1854-05-22	To order engrossment and third reading	PASS (112-99)	✓	✓	
1854-05-22	To pass	PASS (113-100)	✓	✓	

An Alternative View

With the above, I aim to make a few things clear. First, the House managed to pass a number of bills that can be reasonably interpreted as pro-slavery measures. The Missouri Compromise aimed to secure an enduring Southern veto over national policy. When the South ran out of territory to admit, the Kansas-Nebraska Act was a boldface attempt at luring Northern territories to adopt slavery. Both measures ostensibly benefited the South (although both backfired in the end). These measures also would likely have not passed the House in identical form if not for the three-fifths clause. The same is true for a number of other provisions: the Second Missouri Compromise to approve the state's constitution, a number of slavery votes on acquisitions of the Mexican-American War such as Texas and Florida, the so-called "English Bill" promising Kansas statehood with a pro-slavery Constitution (the offer was rejected by Kansas). This clarifies a point that I find to be understated. Regional balance, as Weingast and Rakove rightly claim, is a key institutional feature in the protection of slavery, but the South's veto in the Senate was promised and maintained through a number of votes made in the House that would likely be impossible under an alternative apportionment.

Where does this leave us? In the last chapter, I cautioned against arguments about counterfactual outcomes, especially with such an empirically simplistic approach. Here, however, I will briefly depart from that guidance— for at least three reasons. As noted, the first is that I think scholars who have undercut the three-fifths clause's significance have largely missed the point. Second, the level of countermajoritarianism on the issue of slavery (especially on landmark legislation), is so significant that it seems reasonable to expect different legislative outcomes on this issue. Third, alternative outcomes on slavery without the three-fifths clause (i.e., apportionment by *free* individuals) seem much more plausible because the South is so

regionally cohesive on the issue. I noted in the first chapter that the main problem with approaches that re-weight votes (e.g McCrone 1990) is that if, for example, Virginia had three fewer representatives, one cannot assume that the proportion of the state's delegation voting ye on a question would be the same. However, on the issue of slavery (where both the North and the South voted more homogeneously than on other issues), this assumption is far more plausible. For example, if the three-fifths clause bestowed the South with 13 additional representatives and the entire Southern region voted no on an abolitionist provision (this happened often), the assumption that a smaller Southern delegation would also be entirely opposed to the provision seems believable; under an alternative apportionment, it is hard to believe that there would be abolitionists elected in Alabama, and, albeit to a lesser extent, it is not obvious why there would be a higher proportion of Northern doughfaces who vote with the South.

To consider the effects of the three-fifths clause, we can begin with the two false dichotomies discussed in the section on the Missouri Compromise: the issue of slavery was not dichotomous, and the House's position was not polar. The House should not be seen as an abolitionist institution endlessly stymied by the pro-slavery Senate. Nor should the House itself be viewed as pro-slavery. Instead, we should see it as an institution composed of actors and coalitions with differing regional and ideological interests. It rejected some legislative outcomes; it acquiesced to others. Moreover, the issue of slavery was far less binary than one might expect. The Missouri Compromise line was literally a spatial outcome, and the Compromise of 1850 was a complex aggregation of several legislative components. Outcomes on slavery did not condemn or bless it; they were negotiated equilibria that appeased both North and South with high levels of uncertainty on future events (whether the northern or southern region of the Louisiana territory would grow more, whether Kansas would choose to become a slave or free state, etc.).

Both factors combined, it seems easy to believe that outcomes on this legislation would not look the same under free population apportionment. To take a slightly more rigorous (though still not very rigorous) approach, consider a highly simplified bicameral spatial model,²⁰ portrayed in Figure 4.1. First, we reduce the issue of slavery to one dimension, a *continuum* from pro-slavery (or federalist/expansionist) to anti-slavery (or restrictionist). Second, we assume that the House and Senate both have single-peaked preferences and divergent *ideal points*— the policy the chambers, in aggregate, most prefer. Finally, we assume that the policy outcome will fall at:

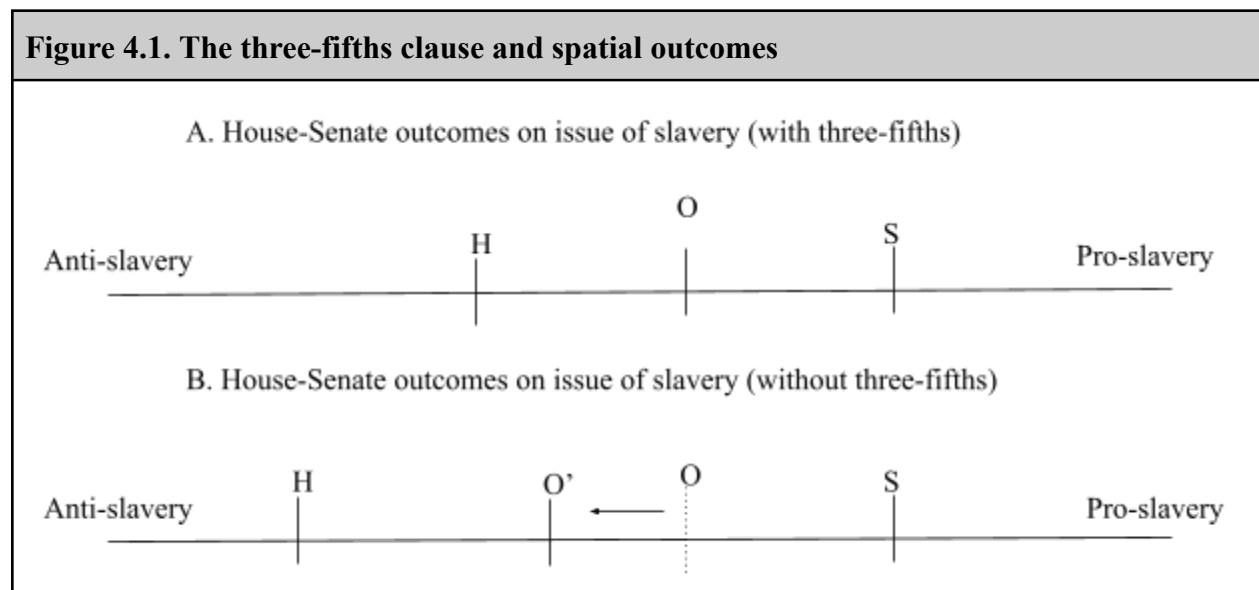
$$Policy = a(Senate) + (1 - a)(House)$$

In this view, policy outcome is a weighted average of House and Senate ideal points based on the chambers' relative weights that sum to 1 (brinkmanship, urgency, and other factors could result in one chamber's leverage over another). These assumptions are highly simplified. For one, it remains questionable what constitutes *chambers'* ideal points. We are also not considering the president or the status quo, and we are assuming that there *will* be an outcome instead of gridlock. Nonetheless, antebellum presidents were almost entirely Southern, and statehood was generally seen as an issue that must be addressed eventually. For example, on the question of Missouri's statehood or the territory of Kansas, a long-term non-outcome was generally viewed as undesirable by all parties.

This simple model illustrates my arguments about the effects of the three-fifths clause. In Figure 4.1, I plot an outcome O halfway between House and Senate ideal points, H and S respectively. This assumes that in the equation above the weight $a = 0.5$. In panel B, when we imagine a free-population reapportioned House, the House's ideal point shifts leftward, as there

²⁰ This model is a version of Fiorina's (1992) model of policy outcomes based on presidential and congressional preferences.

are fewer Southerners in the House. In practice, this means that the House is more willing to pass abolitionist measures (consider and pass DC abolition petitions, remove the gag rule before the 28th Congress, etc.) and less willing to acquiesce to Senate outcomes (removing the Tallmadge Amendment and the Wilmot Proviso, passing the Kansas-Nebraska Act in a given form, etc.). Consequently, negotiated outcomes between the House and Senate look different. In this model, the only case in which outcomes on slavery do not shift leftward (more anti-slavery or restrictionist provisions), is if the Senate has full leverage over outcomes ($a = 1$). Given the proportion of close votes in the House, the enthusiasm of Northern restrictionists, and the House rejection of many Senate bills and amendments, this is certainly not the case.



In sum, the House is complicit in maintaining slavery, and the three-fifths clause is decisive in that commitment— perhaps more so than balancing was in the Senate. And balance in the Senate was created and preserved, in part, by the House. If we take the arguments offered in this chapter seriously, there remains a chance that this formula served to extend the existence of the “peculiar institution” by creating a House sympathetic to the principles of balance, admitting low-population southern territories, enacting fugitive slave acts, and creating

procedural rules to keep abolition off the legislative agenda. Stated differently, there is a chance that when James Wilson rose to offer the clause in 1787— thinking that slavery would soon be extinguished by the Northwest Ordinance and the growth of the North— he did not foresee that the apportionment clause itself could have undermined his premises for offering it, and that slavery would be widely introduced to new states (which he predicted Congress would never allow) partly because of his choice.

Conclusions

The case study in this chapter consolidated many of the arguments of the previous three. Interstate malapportionment was rampant in the antebellum era, driven primarily by the three-fifths clause. Southern representatives systematically represented lower numbers of free people and voters, and this drove countermajoritarian outcomes on slavery more than any other issue. This was a function of this malapportionment, as well as partisan alignments (in the form of party coverage) and conflict in the roll call record. We also see here that these outcomes are present on nearly all of the most significant legislative acts on slavery and balancing— most prominently the Missouri Compromise and the Kansas-Nebraska Act. Beyond passage, many of these landmark votes were on procedure (e.g., changing the rules of the House with the gag rule) or amendments (e.g., the vote to remove the Tallmadge Amendment from the Missouri statehood bill). In my view, all this suggests that legislation on slavery might have looked quite different if not for the federal ratio. These arguments, I think, are quite important, and they run counter to much of the scholarship on the subject. But they are also historical in nature. In the next section I turn my attention to how my research applies to the modern House of Representatives. For one, how should we understand the historical development and contemporary design of the House? And how does this research contextualize the modern House?

5.

Reconstructing the House

My question, then, is this: Why should we feel bound today by a document produced more than two centuries ago by a group of fifty-five mortal men, actually signed by only thirty-nine, a fair number of whom were slaveholders, and adopted in only thirteen states by the votes of fewer than two thousand men, all of whom are long since dead and mainly forgotten?

— Robert A. Dahl, *How Democratic is the American Constitution?* (2003, 2)

In this thesis, I offer what is, in my view, a more comprehensive look at malapportionment and countermajoritarianism in the history of the House of Representatives than any existing account. To my knowledge, no previous work has empirically investigated the systematic drivers of malapportionment, and this thesis is the first examination of countermajoritarianism in the House of Representatives. Perhaps most importantly, I have also tried to raise a series of questions about the *construction* of the House that have gone mostly unasked. These include:

- Is apportionment and districting by total population a more legitimate standard than voter-based populations?
- What is the proper way to operationalize constituency— the total population, voting-eligible population, or a member's political supporters?
- How should we define a countermajoritarian outcome?
- Is malapportionment, *ipso facto*, a deviation from democratic principles, even if it has no tangible policy impacts?
- By what evaluative criteria should we assess a democratic legislature?

The House was designed, and largely has been seen, as a majoritarian institution that represents the people “in proportion to their numbers.” But in many ways, this design has not completely panned out. The three-fifths clause gave considerable representation to the South beyond its free population, and the Framers, state legislatures, and Congress were all surprisingly apathetic about requiring equally-populous House districts. Thus, malapportionment was rampant before *Wesberry*. As were three varieties of countermajoritarianism: by free population, turnout, and electoral support. This activity includes some of the nation’s most notable legislation. Since the mid-1960s, malapportionment and countermajoritarianism have been nearly zero. Of all issues, free population countermajoritarianism was most common on the issue of slavery. These were important votes, and in Chapter 4 I undertook an expansive examination of the issue. Narrowly, it seems clear to me that outcomes would have been different without the malapportionment of the three-fifths clause. Broadly, I think the case demonstrates clearly that there are tangible policy impacts of countermajoritarianism on legislative outcomes and American history.

Both of these arguments— the malapportioned, countermajoritarian House and the chamber’s role in maintaining slavery— are *historical*. In this chapter, I aim to advance two more arguments more relevant to how scholars should think about the modern House of Representatives. First, the historical development and design of the House is highly contingent— a path-dependent result of negotiated outcomes, unexpected events, and exogenous factors. Explanations or examinations that do not begin by accepting this premise— for example, ones based on *functional* design— are fraught. Second, the modern House ought to be viewed in historical context. While contemporary scholars have raised legitimate concerns about apportionment formula, interstate malapportionment, gerrymandering, and urban-rural

polarization, it is hard to argue against the fact that the modern era of the House (since the mid-1960's) is by far the most majoritarian and probably the most democratic. Both points are elaborated below.

The Contingent House

Our textbooks like to illustrate evolution with examples of optimal design—nearly perfect mimicry of a dead leaf by a butterfly or of a poisonous species by a palatable relative. But ideal design is a lousy argument for evolution, for it mimics the postulated action of an omnipotent creator. Odd arrangements and funny solutions are the proof of evolution—paths that a sensible God would never tread but that a natural process, constrained by history, follows perforce.

— Stephen Jay Gould, *The Panda's Thumb* (1980, 20-21)

In traditional biology, scientists observe the trait of an organism and explain it in terms of its functionality. *What is it designed to do? What does this adaptation optimize?* The problem with this approach is that many physical structures are not optimal at all. Human anatomy is filled with curious redundancies that cannot be explained by functionalism, from the “human tail” to the appendix. Such traits, and evolutionary development more generally, can only be understood in terms of an organism’s evolutionary history. Adaptation builds on preexisting traits, and the design of physical structures are often dependent on random events, historical contingency, and purposes that are no longer relevant.

In a similar spirit, a new institutionalist movement has developed in political science as a response to the structural-functionalist approaches common to the 1960s and 1970s (Hall and Taylor 1996). Among other features, this approach perceives institutions as historical results of unintended consequences, contingency, and path dependence. For instance, Lee and Oppheimer (1999, 27) conclude in a detailed history that equal state apportionment of the Senate “did not result from the impartial application of any general principle— such as

federalism or minority rights— but was instead the outcome of a clash between contending political interests within a particular institutional or ideological context.” Referencing paleontologist Stephen Jay Gould’s classic account of path-dependence, they refer to Senate apportionment as a “panda’s thumb”: an inefficient outcome that can be explained by historical context and contingency, not conscious design. There are many panda’s thumbs in the history of Congress. Binder (1997) surveys how House and Senate rules evolved as a result of political, path-dependent developments, not intentional design. Similarly, in the Senate the filibuster or the idea of “unlimited debate” were neither an idea of the Framers nor the original rules of the chamber (Binder and Smith 1997).

The House should be viewed in a similar light. Its uneven development into a majoritarian chamber was reliant on a series of highly contingent events, including the three-fifths compromise, the abolition of slavery, the Supreme Court redistricting decisions, and the 1965 Voting Rights Act. As I showed in Chapter 1, the Framers had certain majoritarian ideals for the lower chamber. Madison spoke of representing the people “in proportion to their numbers.” Wilson spoke of “equal” elections. Later, the Supreme Court wrote of one person, one vote. But these stated *ideals* on the function of the House are not fully congruent with the outcomes of the Great Compromise. And scholars have mostly approached the House on the terms of its constitutional majoritarian *design*, instead of recognizing the countermajoritarian *outcomes* noted in this thesis. Elections have never been equal, in a Wilsonian sense, nor were districts equal in population, and the Framers made no provisions to guarantee vision for the House. Similarly, Ballingrud and Dougherty (2018) show that the three-fifths clause was an equilibrium outcome largely dependent on coalitional instability and the departures of various states’ delegations— in other words, a contingent outcome. And even if state legislatures thought

of the House as majoritarian, they did not seem to care enough to draw equally-populated districts.

Far less acknowledged is the contingent nature of total population as the basis of compliance with one person, one vote. The tension between total population and the Court's redistricting jurisprudence was not laid bare until the Supreme Court decided the relatively obscure case of *Evenwel v. Abbott* in 2016. The plaintiffs in *Evenwell* challenged a Texas legislative map, contending that it violated the Equal Protection Clause of the Fourteenth Amendment by apportioning districts based on total population rather than registered voter population. The case raised a fundamental discrepancy in interpreting the one person, one vote principle established by *Baker* and *Wesberry* decisions. While the logic of redistricting decisions hinges on equal voting populations, all 50 states interpreted this as equal *total populations*. In a unanimous ruling, the Court asserted the constitutionality of using total population for apportioning legislative districts, based on precedent, consistent state practice, and constitutional history. Justice Ginsberg, in the majority opinion, declared that districting on total population was a "well-functioning approach to districting." But in a concurring opinion, Justice Thomas highlighted the longstanding ambiguity surrounding the one person, one vote principle. He makes the tension explicit:

For 50 years, the Court has struggled to define what right [one person, one vote] protects. Many of our precedents suggest that it protects the right of eligible voters to cast votes that receive equal weight. Despite that frequent explanation, our precedents often conclude that the Equal Protection Clause is satisfied when all individuals within a district— voters or not—have an equal share of representation. The majority today concedes that our cases have not produced a clear answer on this point (1).

In a sense, both Ginsberg and Thomas are correct. To Ginsberg's point, district equality of total population is a well-established, well-functioning precedent used by legislatures and courts for decades. It also seemed to be a normatively good standard. But Thomas raises a fair

point: this well-established precedent may not perfectly mesh with certain purposes or normative ideals. Our reliance on equal total population as a districting criterion is, in many ways, a *path-dependent outcome* of redistricting decisions and how state legislatures have chosen to interpret them. More broadly, that is the history of the entire evolution of the House of Representatives— from district equality, to the ubiquity of single-member districts and first-past-the-post election methods, to the increased prevalence of gerrymandering. However much we view common standards as set in stone, none of them are outlined in the Constitution, nor are they functionally ideal for the American political system. However genius the Framers might have been, the House is not a product of intelligent design. In Dahl’s words (2003, 7), “wise as the Framers were, they were necessarily limited by their profound ignorance.” If we fail to perceive this ignorance, or to acknowledge the contingent nature of path-dependent outcomes, it becomes near-impossible to conceptualize reform.

The Majoritarian House

But at the dawn of the 20th century, extreme right-wing forces, financed by out-of-state billionaires, took over the machinery of state government and reorganized elections in a way that killed off representative democracy across much of Wisconsin.

— John Nichols, “Wisconsin Prepares to Crush a Slithering Republican Gerrymander” (2023).

It is increasingly difficult to make optimistic arguments about American politics. And pessimistic ones have acquired an increasingly paranoid style. The themes are consistent: polarization has increased, competitive elections have decreased, and your ballot doesn’t matter. Gerrymandering, in sum, has “killed off representative democracy.” Polemics like these are often premised on an observed secular decrease in the democratic quality of institutions. For the House, there is a certain irony to this paranoid view. The scholarly conversation over

redistricting and malapportionment began after the Supreme Court's redistricting revolution and extends to the present day— precisely the period when malapportionment and countermajoritarianism is lowest. Because cases of anti-democratic outcomes prior to *Wesberry* have gone mostly unstudied, it seems that modern complaints about malapportionment and gerrymandering have gone somewhat uncontextualized.

Here my aim is not to make an optimistic argument, but I do wish to make the point that statements like the above paint a picture of the history of the House of Representatives that is limited in accuracy. The House has regressed on certain dimensions, perhaps most importantly polarization and competitiveness of elections. But on other dimensions, the House has markedly improved. And the argument that gerrymandering is an unprecedented departure from democratic representation disregards the history of slavery, Jim Crow, the rampant malapportionment before *Wesberry*, the democratization of several features of government (party primaries, direct election of senators, etc.), and the secular increase in American voting rights.

It is not difficult, moreover, to conclude that the improved dimensions outweigh the deteriorated ones. The modern House is far from perfect, and that is a valuable thing to note; there are well-developed literatures on the bias of apportionment equations, interstate malapportionment, and— perhaps most importantly of all— gerrymandering and geographical polarization. Each of these factors produces deviations from either the principle of one person, one vote or the idea of partisan symmetry. But it is also a valuable thing to note that these outcomes *generally do not produce countermajoritarian effects in the roll call record*. And the determinants of anti-democratic outcomes that existed in previous eras— malapportionment, voter discrimination, the three-fifths clause— are more pernicious than the contemporary trends highlighted by commentators.

To this, a reasonable person might respond, “of course.” But given the number of reasonable commentators who have decried the death of representative democracy in the 21st century, this seems to be a point worth clarifying. Based on the evidence, and despite the paranoid view, it is exceedingly difficult to argue that the modern era of the House of Representatives is not its most majoritarian and democratic. Below I outline this argument by responding to two different strains of literature. First, some scholars have applied the Senate malapportionment literature to the House, arguing that the lower chamber also has considerable issues of *interstate* malapportionment, even if districts are approximately equal *within* states. Second, a much larger literature has focused on the bias of districting plans— whether intentionally gerrymandered by mapmakers, or a natural result of political geography. Both of these are important concerns (especially the latter), but I offer some reasons to be skeptical about the most pessimistic forms of these arguments.

Interstate Malapportionment

Political scientists rightfully remain concerned with the principle of one person, one vote, which is ultimately limited by the fact that districts cannot cross state boundaries. While the Supreme Court has outlawed significant intrastate district deviations, *interstate* malapportionment still abounds. The average population of a district in California (about 757,000) is different from that of Texas (773,000), even if both states have nearly zero intrastate malapportionment. And both are different from the national average district size (761,000). Here the average deviations are relatively small (-0.52% for California, +1.6% for Texas), but the Supreme Court has outlawed intrastate deviations far below 1%,²¹ and the level of interstate

²¹ Ladewig (2011) provides a summary. The Supreme Court has ruled maps unconstitutional with average absolute deviations of 1.60%, 3.79%, 0.75%, 0.14% in *Kirkpatrick*, *Wells*, *White*, and *Karcher* respectively.

malapportionment grows significantly larger for smaller states. Ladewig (2011, 1125) stretches this claim as far as it can possibly go:

Since these early cases, apportionment plans that violate [one person, one vote] — even with levels of intrastate malapportionment of less than 1% — have been held to be unconstitutional. Yet, there is a much more severe form of malapportionment that continues today. . . : interstate malapportionment. The levels of interstate malapportionment are over 9,000% greater than the levels of intrastate malapportionment already found unconstitutional.

This astonishing figure is the result of a calculation comparing the magnitude of the maximum deviation percentage declared unconstitutional in *Karcher v. Daggett* and the maximum deviation between the nation's most over- and underrepresented districts. This is misleading for several reasons. While popular with the courts in determining intrastate malapportionment, the maximum average deviation is not a very revealing statistic. At the national level, the most underrepresented and overrepresented states are almost always outliers (usually with at-large members), so a maximum deviation does not account for the vast majority of districts with dramatically lower deviations. Intrastate malapportionment practiced in several states is, by definition, a more widespread issue than vast magnitudes of interstate malapportionment among a very small handful of districts. Finally, and perhaps most importantly, apportionment in the House (unlike the Senate) does not systematically advantage or disadvantage any distinct political interest. While reapportionment results in unequal district sizes, the inequalities are nearly randomly occurring.

To refine these points, consider Table 5.1, which lists the top five most and least represented states following the 2020 census. The average district populations, shown in parentheses, emphasizes the problem with using Maximum Deviation as a representative statistic for malapportionment. The fifth most underrepresented state is smaller than the first by over 170,000 people. Such a significant difference makes the maximum deviation, the

Montana-Delaware comparison, highly unrepresentative as a comprehensive measure for malapportionment. More fundamentally, we can see that the most overrepresented states (Montana, Rhode Island, Wyoming, Vermont, and Nebraska) do not look all that dissimilar from the most underrepresented states (Delaware, Idaho, West Virginia, South Dakota, Utah). In terms of region, partisan composition, and ideology, these two subsets are not systematically different.

Table 5.1. Top Five Most and Least Represented States, 118th Congress	
Overrepresented (average district pop.)	Underrepresented (average district pop.)
<ol style="list-style-type: none"> 1. Montana (543,000) 2. Rhode Island (549,000) 3. Wyoming (578,000) 4. Vermont (644,000) 5. Nebraska (654,000) 	<ol style="list-style-type: none"> 1. Delaware (991,000) 2. Idaho (921,000) 3. West Virginia (898,000) 4. South Dakota (888,000) 5. Utah (819,000)
<i>Source: Best, Ryan. "What If The House Of Representatives Had More Than 435 Seats?" FiveThirtyEight. https://projects.fivethirtyeight.com/435-representatives/</i>	

Similarly, a literature has developed on the method used to apportion the number of representatives to each state— a more complicated issue than one might expect. Congress cycled through different methods developed by Hamilton, Jefferson, John Quincy Adams, and Daniel Webster that each display different issues, including small state bias, large state bias, or peculiar behavior associated with expanding House size or state population. The current method of apportionment is Huntington-Hill, developed by a Census Bureau statistician and Harvard mathematician. Some scholars have shown that the Webster method (which is also mathematically simpler) is superior to Huntington-Hill, based on a number of criteria. For example, the Huntington-Hill apportionment formula displays a slight bias towards small states (Balinski and Young 1979).

In sum, different apportionment formulas, as well as the unavoidable reality of state borders, drives deviations from one person, one vote. But my research in this thesis suggests

three important caveats. First, malapportionment is at an all-time low, as we have seen in Chapter 2, and the magnitude of district deviations are incomparable to pre-*Wesberry* levels. Second, there is a qualitative dimension to malapportionment. There may be significant population differences between the left and right panels of Table 5.1, but these differences do not systematically correlate with political cleavages. In terms of perniciousness, the malapportionment discussed by Ladewig (2011) is several far cries away from systematic differences in free population that existed in the antebellum era, or differences in electoral turnout driven by Jim Crow. Modern district population differences are, for the most part, random.

Third, interstate malapportionment and imperfect redistricting formulas in the contemporary era of the House *does not result in countermajoritarian outcomes*. My research is not a counterfactual analysis. If the House apportioned seats by the Webster formula, perhaps certain policy outcomes would be different. But interstate malapportionment has not resulted in outcomes where overrepresented states join together systematically enough against underrepresented states to result in countermajoritarian roll call outcomes. This seems to suggest that modern (and comparatively low) levels of malapportionment does not have significant effects on outcomes, unlike the qualitatively different levels of malapportionment of the antebellum era.

Gerrymandering and Urban-Rural Polarization

Most discussion of anti-democratic outcomes in the House of Representatives has focused on gerrymandering, a central topic of contemporary political science. Gerrymandering, the drawing of district lines to benefit one party over another, is simple to define and difficult to

measure. It is not a modern problem; the original gerrymander was drawn in 1812, and Democratic and Whig legislatures both drew overpopulated districts for minority parties (Engstrom 2013). But the magnitude of gerrymandering has increased. Since the 1970's, districts have become less compact (Ansolabehere and Palmer 2015) and the partisan bias of district maps, as measured by the efficiency gap, has also grown, particularly in the 1990s, 2000s, and peaking in the 2010s (Stephanopoulos and McGhee 2015).

Chen and Rodden (2013) qualify the gerrymandering literature in an important way. They argue that the bias of legislative maps is a function of both partisan manipulation as well as political geography. Increasingly, Democrats are concentrated in large urban areas, while Republicans are spread more efficiently across rural and suburban geographies. Because of geography, Democratic votes transfer into seats less proportionally than those of Republicans. Even when maps are drawn by nonpartisan computer simulations, the Republican advantage exists. For example, in an analysis of 2020 redistricting plans, Kenny et al. (2023) estimate that if Democrats win half of the popular vote, they win only about 210 of 435 seats, and that the party must win 51.1% of the popular vote to win a House majority. However, they also find that this Republican bias is only 0.14% more than that of the nonpartisan computer-drawn maps. In other words, gerrymandering is widespread among the states, but the partisan biases mostly cancel at the national level. Most perceived Democratic bias is a function of political geography.

This urban-rural dynamic is now a critical element of modern politics. Since the 1970's, the city-centric Democrats have emerged as the party of the cosmopolitan digital elite. As a result, the structural disadvantage of the party's urban coalition has grown. Rodden (2019) finds that once Republican vote share passes 40%, the party's seat share surpasses proportionality, and we can expect the GOP to hold a majority in the House once it gets 45% of the votes. This raises

the potential of countermajoritarianism. If the Rodden effect continues to ratchet, could we see roll call outcomes in which Republicans, elected by systematically lower proportions of voters, push through roll call outcomes despite having received lower aggregate levels of electoral support?

For one reason or another, this has not played out in recent elections. We can refer to the two-party vote and seat shares of the last five House elections in Table 5.2. In 2014 and 2016, there was significant bias towards the Republicans when we look at the seat share - vote share difference. But it is worth noting that Republican majorities still received more votes. Unlike a number of House majorities of previous eras, the Republican Party, though overrepresented, still had majority population coverage. Moreover, the three most recent House elections— 2018, 2020, and 2022— do not register substantial bias towards the GOP. In each case, the majority party won a majority, and both parties were mostly represented “in proportion to its numbers,” in Madison’s terms. The biases of the modern era are incomparable to previous ones.

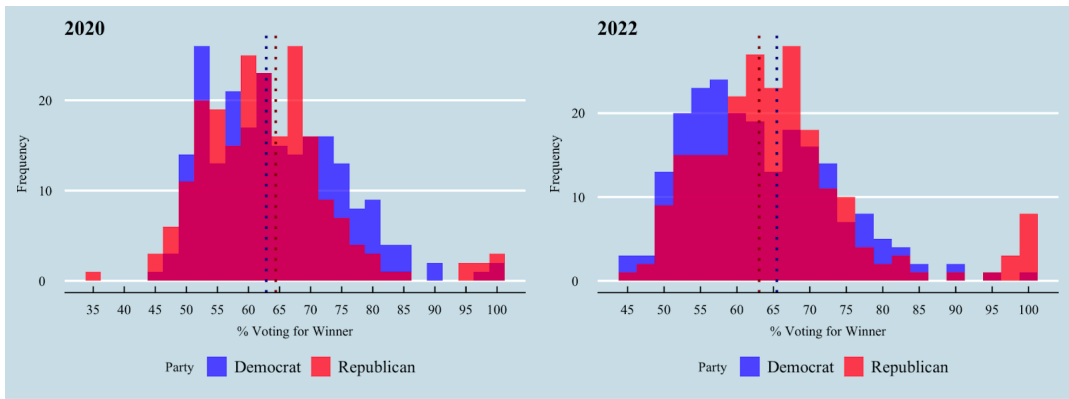
Table 5.2. House vote and seat shares, 2014-2022					
Year	Democratic Candidates		Republican Candidates		Dem. Seats % - Dem. Vote %
	% Votes	% Seats	% Votes	% Seats	
2014	47.3	43.2	52.7	56.8	-4.1
2016	49.6	44.6	50.4	55.4	-5
2018	54.4	54.1	45.6	45.9	-0.3
2020	51.6	51.0	48.5	49.0	-0.6
2022	48.6	49.0	51.4	51.0	0.4

Source: Brookings Institution, “Vital Statistics on Congress.” Vote percentages are altered to reflect two-party vote share.

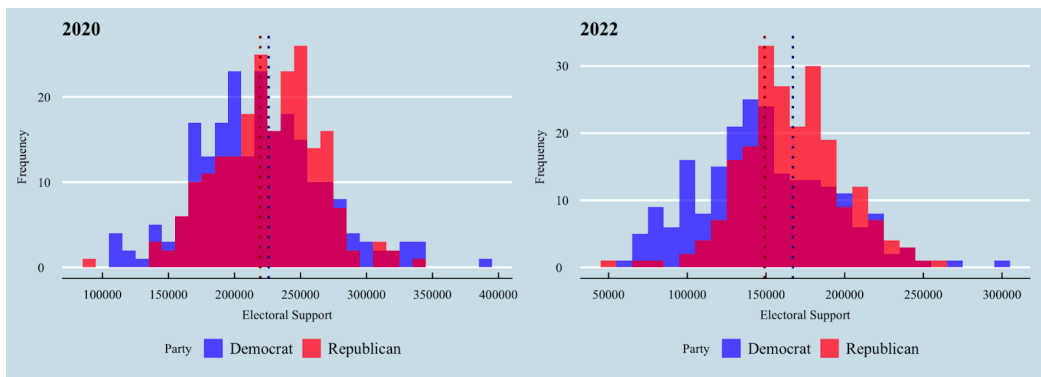
Another way to look at this is to see whether Democrats systematically represent a greater number of people. Mostly, they do not. Consider Figure 5.1, which plots the distribution of electoral support between Democrats and Republicans, both as a proportion of the total vote (Panel A) and in total votes for the incumbent (Panel B). In the 2020 House elections, the average Republican garnered 0.3% more of the vote than the average Democrat, and in the 2022 elections the average Democrat garnered 2.0% more than the average Republican. Looking instead at total electoral support, the average Democrats had higher levels of electoral support in both years. However, the difference in means is not statistically significant in 2020 and the magnitude is medium-sized in 22 (half a standard deviation).

Figure 5.1. Republican and Democratic electoral support

Panel A. Electoral support (percentage)



Panel B. Electoral support (total)



Why the disconnect between recent elections and Rodden’s simulated outcomes? It is not entirely clear. But control of the House is determined by a low number of competitive districts. On the whole, Republicans are advantaged at attaining majorities— exactly what Rodden finds. But importantly, in recent elections, the magnitude of GOP bias is small. And looking at the full distribution of Democratic and Republican support, the clustering of Democrats does not register as systematic differences. Most relevant for this analysis, these differences *do not drive any significant levels of electoral support countermajoritarianism*. Perhaps if the urban-rural effect intensifies, we will see such outcomes in the future. But for now, we do not.

All this leaves us with an understated conclusion: the contemporary era of the House of Representatives, at least based on these measures, is more majoritarian than at any other point in its history. This does not mean the House is perfect— on other dimensions it is uncompetitive and highly unrepresentative of voter ideology (Bafumi and Herron 2010). But in terms of external majoritarianism, which is a pernicious problem for the Senate, the House seems to be well-functioning.

Conclusions

My research encourages many reconsiderations of the House of Representatives. In light of the previous chapters, I proffer four conclusions that run counter to many ways that historians and political scientists have approached the House:

- The United States House of Representatives, like the Senate and other institutions, is historically contingent and path-dependent. It developed into a majoritarian institution slowly. Its modern design is characterized by a number of features that were not envisioned by the Framers and not designed to be functionally optimal.

- The House has been widely malapportioned for most of its history, and voting weights—the core of one person, one vote— have never been equal. Both things combined, many countermajoritarian outcomes in the House (previously unstudied by scholars) have occurred at varying levels. Many of these votes are on massively important legislation.
- On the issue of slavery in particular, malapportionment in the form of the three-fifths clause seems to have had large effects. Many pro-slavery or non-restrictionist votes passed the House on narrow margins where the clause seems to be decisive, particularly on the issues of statehood and sectional balance. Without the clause, there is a strong argument that legislative outcomes on slavery would have been quite different in the antebellum era.
- The House is not perfect. Its apportionment is flawed, and districts are not equally-sized. Contemporary levels of gerrymandering and urban-rural polarization also remain concerning. But none of these facts seem to drive any significant levels of countermajoritarianism in the modern era. The empirical approach taken by this thesis also suggests that, at least externally (with regards to constituencies), the House is far more majoritarian since the 1970's than in any previous period.

Speaking from the chamber's floor in 1809, Josiah Quincy of Massachusetts spoke of the House of Representatives as “this solemn assembly, the representative of the American people, the depositary of their power, and, in a Constitutional light, the image of their wisdom.” Neil MacNeil, a congressional correspondent, concludes his 1963 history of the House by quoting these words (455). In a certain sense, this encapsulates the vision of the lower chamber desired by James Wilson and other democratic Framers who were optimistic that the American people had wisdom to lend. Wilson, Madison, and others spoke highly of a chamber that gives equal

representation for equal numbers of voters and represents the masses in proportion to their numbers. It also summarizes the standard view of political scientists, journalists, and historians who have weighed the differences between America's legislative houses. My research in this thesis amends this view slightly. The House was not a perfect image of America's wisdom in 1809— nor, in many senses, was it in 1963 when MacNeil published his history; congressional districts were still vastly unequal in population and voting discrimination in the South was rampant. But in the years since then, we have moved greatly towards this ideal.

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Appendix A: Estimating Free Population

For population data, I relied on Parson et al.'s *Congressional Districts and Data* series, which includes district-specific population data from 1788 to 1913 based on the most recent Census. For the remaining Congresses, I used a combination of the *Congressional Directory*, Scott Adler's district data, and the Census's district data books. No data source is perfect, of course, and great pains were taken to correct obvious errors. In two cases, for example, the Parsons data has population totals that are ten times larger than what is contained in the *Directory*. In Adler's data, Oklahoma's first and second districts during the 103rd each have populations that exceed one million, compared to much more probable entries in the *Directory*.

Some additional notes on coding are relevant. First, prior to the second half of the 19th century, there was a diversity in House district types, requiring modifications to make populations comparable. Although single-member districts have always been the vast majority of House districts, many states elected members on general tickets, had additional at-large members (representing the entire state instead of a district), or contained multi-member districts. For multi-member districts, I simply divided the district's total population by the number of its representatives. Similarly, for statewide general ballots, I divided the state population by the number of representatives. For states with districts as well as one more at-large members, I treated the entire election as a general ticket in order to avoid giving a state's delegation a population that collectively exceeded the total state population.

Second, there are certain cases where it seems improper to rely on the previous census for a district's population, especially for states that are admitted at a time of rapid population growth. For example, Ohio was admitted and gained representation in 1803. Its population recorded in the 1800 census is a mere 6,407 people, and its population in 1810 had exploded to more than

230,000. Compared to the other district populations, using either figure as the at-large district population would be an extreme outlier. Thankfully, most of these cases, including Ohio, conducted a statewide census before admission or had an estimated population at the time of their admission, and I relied on these figures until the next census. For Ohio, for example, I used an estimate of 45,000 people in 1803, which is a much more typical district population for the period. It should be noted that these cases are quite rare.

Finally, starting with the 28th Congress, Parsons et al. switch from recording districts' slave populations to the percentage of Black residents. Therefore, I relied on an estimation of slaves for the 28th Congress to the 37th. I estimate the slave population by multiplying the Black population by the statewide percentage of Black people who are slaves, according to the census. Note that this method assumes that the *percentage* of Blacks who are free is equally distributed across a state's district. While imperfect, I believe that this method deviates minimally from the true slave population, especially since the percentage of a state's Black residents who are slaves is mostly a bimodal distribution (very high in slave states, very low in free or low-slavery states).

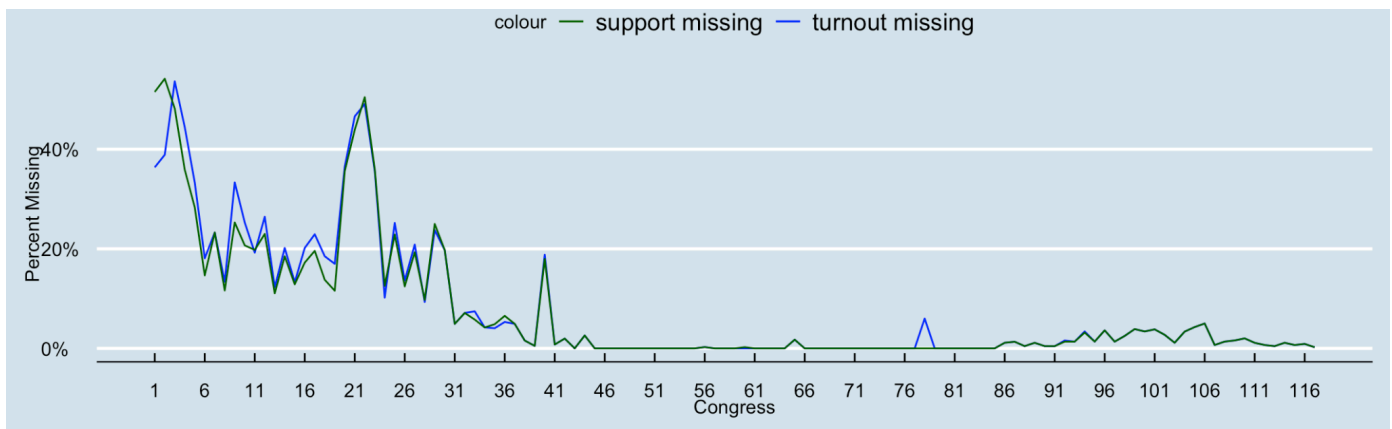
Appendix B: Estimating Turnout and Electoral Support

Election Data

No data source includes every House election since 1788 and missing data is common, especially for early elections. Therefore, I joined three commonly-used data sources to cover the 1st to 117th Congresses. I relied on Tufts' Early American Election data for Congresses 1-19, ICPSR election data for 20-93, and MIT for 93-117. If multiple elections took place for a House seat, I gauge turnout and electoral support by relying on the first election and excluding special elections and runoffs. This approach was taken to avoid idiosyncratic effects of different levels of turnout or artificially high levels of electoral support if, for example, state law requires a winning candidate to have a majority of votes.

Missing values are common in election data, particularly for early congresses. Figure A1 plots the percentage of election data missing for members of the House. Broadly, missing election data—turnout and support—is quite frequent in the antebellum congresses and quite infrequent in the postbellum congresses. This relatively high proportion demands an accurate method of approximating turnout and electoral support.

Figure A1. Percentage of Missing Election Data, By Congress



Estimating Turnout

Total election turnout was calculated for missing values through the following technique:

1. **Method 1:** Generate the average turnout percentage for elections within the same congressional district, redistricting cycle, and election type (presidential or midterm).
2. For missing values, generate a turnout estimate by multiplying the average turnout percentage (generated above) by the district's free population.
3. **Method 2:** If a district with missing election data does not have non-missing data that meet the criteria of step one (i.e., all data within a given census cycle for the same district and election type is also missing), repeat 1 and 2 for census cycles before the 33rd Congress but *without the election type criteria* (for these cycles, the data shows that there is not a significant difference in turnout between presidential and midterm elections).
4. **Method 3:** If data is still missing, repeat 1 and 2, with the following altered criteria: same state and same congress.
5. **Method 4:** If data is still missing, repeat 1 and 2, with the following altered criteria: same state, same cycle, same election type.
6. **Method 5:** If data is still missing, repeat 1 and 2, with the following altered criteria: same congress and same region.

64.6% of missing data was accounted for by the first estimation method (1,029 of 1,598 missing values). 19.5% and 12.0%, respectively, of the missing data was accounted for by the methods of Steps 3 and 4. The remaining methods accounted for less than 5% of the estimates.

How accurate were these estimation methods? On non-missing data, estimation method 1 was less than 26.27% away from the actual value for 90% of the data, and less than 7% off for 50% of the data, suggesting that most missing values were estimated with minimal divergence

from the actual level of turnout. In lieu of significant predictor variables in the election data, this estimation method performed better than regression techniques. Accuracy statistics on all 5 estimation methods is presented in Table A1.

Table A1. Accuracy of estimation techniques, electoral turnout data				
<i>Estimation Method</i>	<i>Accuracy: Average</i>	<i>Accuracy: Median</i>	<i>Accuracy: 90th Percentile</i>	<i>% missing values treated (number of cases treated)</i>
1	12.23%	7.12%	26.27%	62.83% (1226 of 1897)
2 (only for Cong. 1-32)	24.26%	13.80%	49.97%	17.40% (377)
3	18.74%	9.02%	40.45%	12.01% (203)
4	27.64%	12.56%	50.61%	1.05% (33)
5	49.67%	16.03%	87.69%	0.42% (58)

Estimating Electoral Support

For electoral support, a nearly identical method was employed. However, instead of calculating the average percent turnout of the free population and multiplying it by the free population in Steps 1 and 2, I calculated the average proportion of the electorate who voted for the winning candidate and multiplied it by the actual or estimated turnout. The method of subsetting the data remains the same. Measures of accuracy and percentages of data treated remained essentially the same, and are presented in Table A2.

Table A2. Accuracy of estimation techniques, electoral support data				
<i>Estimation Method</i>	<i>Accuracy: Average</i>	<i>Accuracy: Median</i>	<i>Accuracy: 90th Percentile</i>	<i>% missing values treated (number of cases treated)</i>
1	12.14%	7.05%	26.14%	67.08% (1192 of 1777)
2 (only for Cong. 1-32)	23.69%	13.69%	49.40%	18.57% (330)
3	18.99%	9.08%	40.78%	10.92% (194)
4	27.66%	12.54%	50.85%	1.13% (20)
5	49.35%	16.07%	88.81%	0.45% (8)