

Direct Democracy, Constitutional Reform, and Political Inequality in Post-Colonial America

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Abstract

The ratification of constitutional changes via referendum is an important mechanism for constraining the influence of elites, particularly when representative institutions are biased. While this electoral device is commonly employed, its use is far from universal. We investigate the uneven adoption of mandatory referendums by examining the divergence between Northern and Southern U.S. states in the post-independence period. We first explore why states in both regions adopted constitutional conventions as the mechanism for making revisions to fundamental law, but why only Northern states adopted the additional requirement of ratifying via referendum. We argue that due to distortions in state-level representation, Southern elites adopted a norm of discretionary referendums as a mechanism for protecting slave interests. We support our argument with both qualitative and quantitative evidence, including an analysis of roll call votes from various Southern conventions in 1861 on whether to condition secession from the Union on receiving popular ratification.

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1 Introduction

Direct democracy has not only become a prominent instrument for making policy decisions, but is also increasingly used to ratify constitutions, constitutional amendments and other revisions to a polity’s fundamental law (Blount, Elkins and Ginsburg 2012). This development is seen as critical for both legitimizing constitutional law and constraining the ability of elites to design institutions in their favor (e.g., Elster 1998). The importance of direct democracy mechanisms is emphasized by Lenowitz (2015, p. 803), who calls the ratification referendum a “common, recommended and consequential constitution-making procedure.” Yet, many advanced democracies, including the US, France, and Germany, do not require a direct vote by the electorate to ratify constitutional amendments. In fact, less than half of existing constitutions that specify explicitly an amendment process mandate a popular ratification requirement as well (Blount, Elkins and Ginsburg 2012). Despite this procedure’s prominence, surprisingly few studies have investigated the factors that might account for this institutional variation.¹

We contribute to our understanding of the use constitutional referendums by studying the adoption of different constitutional processes across American states during the Antebellum Period (1789-1860). Independence from Great Britain brought not only the need for constitutional frameworks for self-government, but also for processes by which these could be reformed. In particular, it was immediately recognized that higher reforms should not be made via ordinary statute in the state legislatures (Dodd 1910; Green 1931; Tarr 2000). As a result, constitutional conventions—temporary legislative bodies specially elected to draft a new or modify an existing constitution—emerged first in Massachusetts (1779), and were quickly adopted across all states.² While this mechanism became the standard constitution-making process for more than a quarter century, a period of widespread democratizing reforms fol-

¹There is a related literature studying when discretionary referendums are used during important constitutional changes, such as the adoption of the EU Constitution by member states (e.g., Dür and Mateo 2011; Hug 2004).

²Outside the US, these bodies are more often known as constitutional or constituent assemblies (Elster 1998).

lowing the War of 1812 brought a debate on the sovereignty of conventions.³ Reformers in the North argued that conventions alone were not sufficient to legitimize important changes to fundamental law. They saw referendums as a necessary additional step for receiving popular consent and as a check on the power of elites in state-level representative bodies (Lenowitz 2015; Dinan 2006; Tarr 2000). As a result, Northern states introduced the use of statewide referendums to ratify both the holding of constitutional conventions and the reforms resulting from them. Although similar referendums also came to be widely used in the South, their use was not institutionalized. Instead, a doctrine of a convention’s “absolute sovereignty” emerged in which it was a convention’s discretion whether to submit any constitutional changes to voters for ratification.

What explains this uneven adoption of mandatory ratification across otherwise similar political systems? We begin by relying on insights from works analyzing the policy and economic consequences of direct democracy (e.g., Romer and Rosenthal 1979; Hug 2004). Generally, direct democracy is seen as a mechanism that can offset the power of elites since it allows citizens to directly participate in the policymaking process and bypass representative institutions, which may be biased in favor of special interests (e.g., Gerber 1999; Lupia and Matsusaka 2004; Matsusaka 2008). In addition, Elster (1998) describes the mandatory referendum as a “downstream constraint” on the power of constitutional assemblies. By removing the discretion of whether to submit constitutional changes for ratification, significant shifts away from the preferences of the electorate’s median voter should be unlikely (Hug and Tsebelis 2002). Hence, this institutional innovation of the North provided an important constraint on the ability of local elites to otherwise structure the state’s constitutions in their favor (Elster 1998).

Using these insights, we provide an argument for why Southern states adopted the first constitution-making innovation, the constitutional convention, but not the second, the

³Perhaps most famously, this period saw the removal of most of the economic restrictions to white suffrage across all of the states. See, for instance, Keyssar (2001) and Wilentz (2006) for historical accounts of the many democratizing reforms and the rise of participatory politics in this period.

mandatory use of referenda. We argue that these distinct mechanisms imposed different constraints on Southern elites. In particular, the system of representation of Southern legislatures was historically and persistently biased in favor of areas with a high prevalence of slavery. Given the enormous spatial concentration and inequality in slave ownership, maintaining this bias was seen as crucial for protecting slave interests, especially from redistributive taxation (Einhorn 2008, Green 1931). Because conventions generally used the existing system of representation, their adoption did not conflict with slave interests. Yet, for the same reason, referendums could favor the less slave-dependent regions, threatening the ability of Southern elites to implement and preserve constitutional protections of slavery. Hence, they adopted discretionary—as opposed to mandatory—referendums, which allowed them to bypass the electorate when constitutional reforms divided voters along slave-dependency lines.

We use different pieces of evidence to substantiate our argument. First, using an original dataset of legislative representation between 1790 and 1860 we demonstrate that Southern legislatures persistently overrepresented slave-intensive regions. We further provide evidence that the failure to adopt mandatory referendums worked through the channel of distortions to representation rather than directly through slavery. Namely, we show that the few Northern states who did not adopt mandatory referenda also exhibited systematic distortions to their systems of legislative representation. Crucially, none of the Northern states that did adopt both devices exhibited these biases. We supplement our quantitative evidence with qualitative support from key historical episodes in which Southern elites strategically blocked referendums to promote slave interests during this period.

To illustrate the importance of this North-South divergence, we then analyze the lack of direct elections during the secession movement of 1860 and 1861, perhaps the biggest political crisis in American history. We exploit the fact that in all the states leading this movement, the decision to secede was made in conventions, each of which chose against submitting their ordinances for popular ratification. Furthermore, none of these legislatures sought

voter approval to hold conventions on the issue of secession. We argue that referendums were strategically avoided in order to bypass the perceived majority opposition to secession. Using an original dataset of roll-call votes in these conventions we show that the likelihood of delegates opposing motions conditioning secession to the ratification of voters was positively associated with the slave labor incidence of their constituencies. In addition, we show that non-slaveholders in Virginia, the only state in which a referendum was held asking the voters whether secession should require voter ratification, were largely in favor of holding a referendum on secession. This supports our claims that the shift from representative to direct democracy would harm the political interests of slaveholders, the main constituency supporting secession (Key 1984).

Our argument and evidence are relevant to various literatures. First, while there is an extensive literature on how distortions to representation influence the allocation of public resources (e.g., Ansolabehere, Gerber and Snyder 2002; Dragu and Rodden 2011), or the relationship between partisan votes and seats (e.g., Chen and Rodden 2013), no previous work has analyzed its relationship with instruments of direct democracy. We therefore expand the scope of these literatures, demonstrating that biases to representation, such as malapportionment, can play a key role in constitutional outcomes. We also contribute to studies on how elites exploit institutional biases. Most of these focus on how multiple pivots can help preserve status quo policies (e.g., Krehbiel 2010; McCarty, Poole and Rosenthal 2016) and do not consider how biases in representation interact with the strategic use of constitutional norms. Lastly, we contribute to historical and comparative works on the dominance of large slaveholders in Southern politics (e.g., Key 1984). These works highlight the importance of de facto methods of influence, such as electoral intimidation and patronage (Merritt 2017). To our knowledge, no previous work has explored the influence of slaveholders arising from the system of state-level representation or its relationship with the discretionary use of direct democracy mechanism.

2 The North-South Divergence

Modern constitution-making in the Western world likely began with the resolutions in May of 1776 from the Continental Congress, the de facto governing council of the British North American colonies, to the various colonial legislatures to create sovereign frameworks of government (Elster 1998). The process by which each state pursued this varied by both region and circumstance. The Southern slave states created their first constitutions using extralegal meetings of the various colonial legislatures (Green 1931). In Northern states threatened militarily by the British, colonial elites quickly wrote constitutions with little popular input (Shearer 2004). In Pennsylvania for instance, a group of pro-independence radicals seized power, abolished the existing colonial legislature and minimized the existing elites' control of the process by, among other means, removing property requirement for suffrage (Shearer 2004: 1034). Connecticut and Rhode Island simply continued with their colonial charter.

The first state constitutions that emerged out of the exigencies of the American Revolution lead almost immediately to demands for reform. The debates on how this should occur resulted in widespread acceptance that there was a fundamental distinction between constitutional and statutory law (e.g., Dodd 1910; Green 1931). As Tarr (2000, p. 69) argues, “The notion that a legislature, even if a ‘full and free representation of the people’, might lack sufficient authority to act for the people reflected a recognition, present from the outset, that [state] constitutions differed from ordinary statutes and that greater popular input and control were required for their adoption.” Of utmost importance was the principle that these reforms should not occur in the regular legislatures. When Massachusetts' state legislature, the General Court, proposed to draft a constitution in 1778, one town's petition against this stated, “[b]ecause a Constitution alterable by the Supreme Legislative is no Security at all to the Subject against any Encroachment of the Governing part on any, or on all of their Rights and Privileges” (as quoted in Shearer (2004, p. 579)). In 1779, the General Court

responded to this outcry by calling for a constitutional convention to be held whose elected delegates would be tasked with the sole purpose of creating the state's basic law. By the 1780s, this political innovation was adopted across the states as the primary institutional mechanism for creating and revising state constitutions (Dodd 1910; Tarr 2000). Its rapid diffusion can be seen in the use of a constitutional convention in 1787 as the process for revising the federal-level Articles of Confederation.⁴

In addition to the constitutional convention, Massachusetts employed two additional innovations to the constitutional-making process. First, a referendum was held in 1779 on whether a constitutional convention should be called. Second, and arguably more importantly, the General Court required that the convention's constitution be referred back to the voters for popular ratification. While the use of conventions was institutionalized across all states, these mechanisms of receiving direct popular approval spread more slowly. A case in point can be seen by the reforms to Pennsylvania's 'radical' 1776 constitution, which Pennsylvania elites saw as too democratic (Shearer 2004). When the state's Eastern elite regained control of the legislature in the mid-1780s, they called for a convention to be held without seeking public approval to revise the constitution. This convention, which implemented the state's separation-of-powers system that eventually became the standard American constitutional framework, chose against seeking voter approval for these revisions (Shearer 2004: 1048). This was not unusual. Other than Massachusetts (1780) and New Hampshire (1784), no state convention, in either the North or South, sought the voters' approval until 1818.⁵

With the popular ratification of constitutions in Connecticut (1818), Maine (1819) and New York (1821), the procedure for framing state constitutions in the North never deviated from the two-step process of electing delegates to a convention whose results required approval via a referendum of the state's electorate. After 1818, no Northern state promulgated a new constitution, whether replacing a previous one or producing its initial framework,

⁴Specifically, the call in February of 1787 from the Continental Congress said, "That it be recommended to the States composing the Union that a convention of representatives from the said States respectively be held for the purpose of revising the Articles of Confederation."

⁵During this period, 17 constitutional conventions were held (7 in the North and 10 in the South).

without being ratified by referendum. Furthermore, all new Northern constitutions created after 1820 required any amendments to be submitted to the electorate for ratification.⁶ As we show below, the requirement to receive ex ante voter support for holding a convention became similarly widespread in the North.

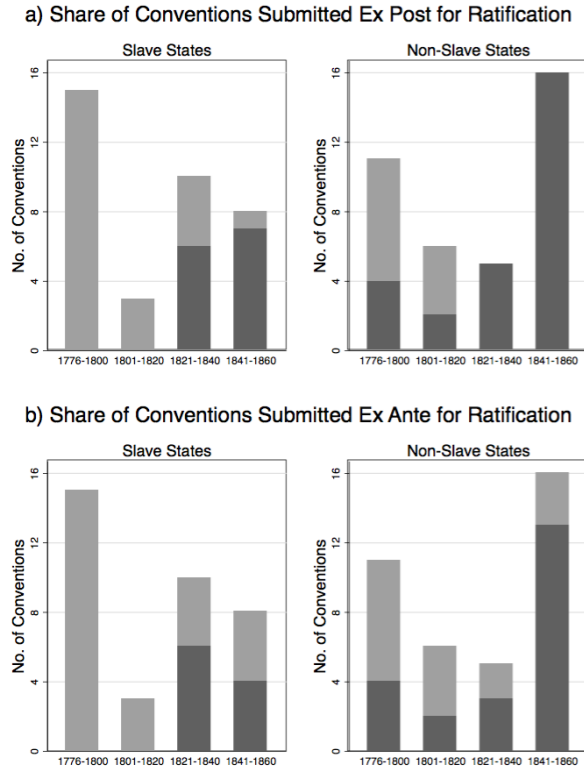
Beginning with a referendum in 1821 asking Georgia voters whether a constitutional convention should be called (Saye 2010), Southern states also began seeking popular approval to hold conventions and to ratify their results. Yet, these states deviated in terms of *requiring* voter approval and instead developed a doctrine which Freehling (2007, p. 133) describes as the “Southern gospel of a state convention’s absolute sovereignty.” To wit, while conventions in Virginia (1829), Georgia (1832, 1839), Tennessee (1834), and North Carolina (1835), submitted their results for popular ratification, conventions in Delaware (1831), Mississippi (1832), and Arkansas (1836), chose against doing so (Dodd 1910: p. 65).

This divergence between Northern and Southern states can be seen in Figures 1 and 2. The upper panel of Figure 1 shows the share of constitutional conventions held in the South (left) and North (right) in which the body’s ex-post results were submitted for popular ratification by different time periods. The first column shows the total number of conventions held (light bar) in the slave states between 1776 and 1800, which is overlaid by the number of these which were submitted to the voters (dark bar). Each subsequent bar reports this for 20-year intervals until 1860. These figures show how post-convention referendums went from rarely used in the North to being universal by the early 1820s. In the South, we see their use becomes similarly widespread, although with a lag and without the same level of ubiquity. The lower panel shows the share of these conventions in which a referendum was held on whether to call a convention. While four conventions in Rhode Island and one in New Jersey were called directly by the legislature, all other Northern conventions between 1820 and 1860 were sanctioned by the voters.

The maps in Figure 2 illustrate which states used pre- and post-convention referenda and

⁶The texts of these constitutions were located in Thorpe (1909).

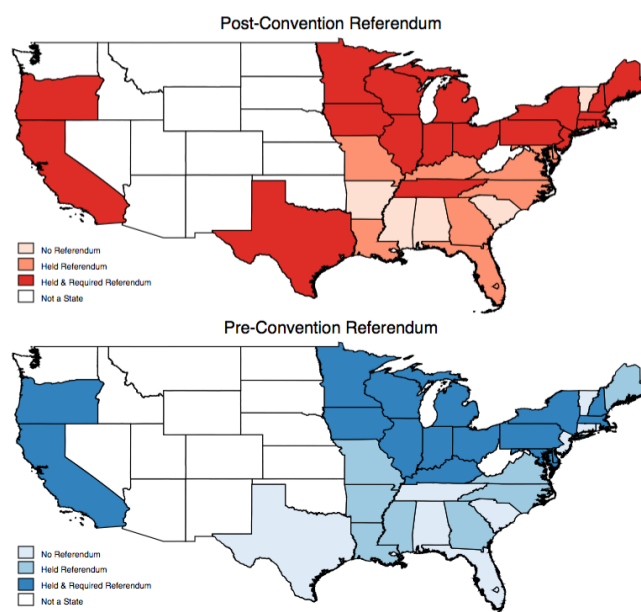
Figure 1 *Conventions and Referendums by Region, 1776-1860*



Note: Grey bars indicate the number of conventions by time period. The dark overlay indicates the number in which the post-convention (top panel) and pre-convention (bottom panel) referendums were held, respectively. See the Data Appendix for a list of conventions by state.

if so whether their use was mandatory. Namely, the top panel distinguishes between states that chose to ratify the results of at least once convention by 1860 versus those in which doing so was constitutionally required. While most Southern states used a post-convention referendum to ratify constitutional change at some point during this period, the constitutions of Tennessee and Texas were the only to require it. In the North, only Vermont neither held nor required post-convention popular ratification. The second panel shows the same for pre-convention referendums. Although not as stark, the figure, again, clearly reveals a divergence between the regions in the discretionary versus mandatory use of referendums to sanction the holding of a convention.

Figure 2 *Mandatory vs. Discretionary Use of Referendums by 1860*



Note: The top panel shows whether a state has submitted a post-convention referendum and whether doing so was mandatory by 1860. The bottom panel shows the same for referendums on whether to hold a convention. See the Appendix for sources and conventions.

3 The Importance of Discretionary Referenda

Why did the Southern states deviate from their Northern brethren in not requiring referendums for ratify constitutional conventions? This is a puzzle in part because constitutional development across these regions generally occurred in lockstep.⁷ That is, the development of this regionally distinct norm on the discretionary, as opposed to the mandatory, use of referendums was the exception rather than the rule. We argue that when issues divided a Southern electorates along slave-dependency lines, conventions could result in significant deviations from the preferences the majority non-slaveholding population. Hence, the discretionary use of referenda and the full sovereignty of conventions more generally was an important political instrument for slaveholders.

⁷Fehrenbacher (1995) stated that “(P)erhaps the outstanding feature of state constitutional development in the slave-holding South was its similarity to such developments elsewhere.”

We begin to support this claim by exploring how the legislative malapportionment that favored counties with large slaveholdings carried over to constitutional conventions. For the original six slave states, this bias in representation can be traced back to the colonial period (1619-1775), where the colonial legislatures overrepresented the highly slave-dependent coastal counties and parishes (Green 1931). As the population on the frontiers exploded, especially in the highland regions where the climate and geography did not permit the profitable use of slaves, this system protected the coastal planters from redistributive policies, such as public spending on courts, defense and infrastructure, demanded by poorer interior residents (Turner 1956). When independence arrived, these colonial bodies created governing frameworks that entrenched this form of political inequality. As explained by Green (1931, p. 97), “the unequal system established in 1776 gave the eastern sections of the South Atlantic States a majority in and, therefore control of the legislatures and governments. And it was the same eastern section which was the home of the wealthy, conservative, and aristocratic planter class.”

As new slave states entered the Union, the source of their distortions to representation varied by state. Tennessee (1796), Louisiana (1812), and Florida (1845) included slaves in the population counts for the purposes of redistricting. In others, each county had minimum representation requirements, which caused the overrepresentation of counties with many slaves and relatively few eligible voters. Furthermore, failures to redistrict caused white population movements to over-represent high slave-dependent counties. Because the system of representation used to select convention delegates was the existing basis to select state legislators, the adoption of constitutional conventions in the early independence period did not threaten the Southern elites’ ability to control state constitutions.

In this section, we first empirically demonstrate the existence of a substantial and persistent bias in the system of representation for Southern state legislatures in favor of slave-dependent constituencies. This shows that the shift from representative to direct democracy would favor the persistently underrepresented low slave-dependent districts within South-

ern states. We then contrast this source of institutional bias with its near absence in most Northern states. One of key pieces of evidence that the failure to adopt mandatory referendums in the South was due to distortions to representation - and not simply the presence of slavery - is that we show that Northern states that maintained persistently biased systems of representation *also* did not fully adopt the mandatory referenda.

3.1 Political inequality in Southern legislatures

We now support our claim of a persistent bias in the Southern state legislatures in favor of high slave share districts. We construct an original measure of county-level representation based on the number of members to a state’s upper and lower houses each county elected between 1790 and 1860. This information was coded from the decennial statutes or constitutional provisions specifying the apportionment for each legislature from 1790 to 1860.

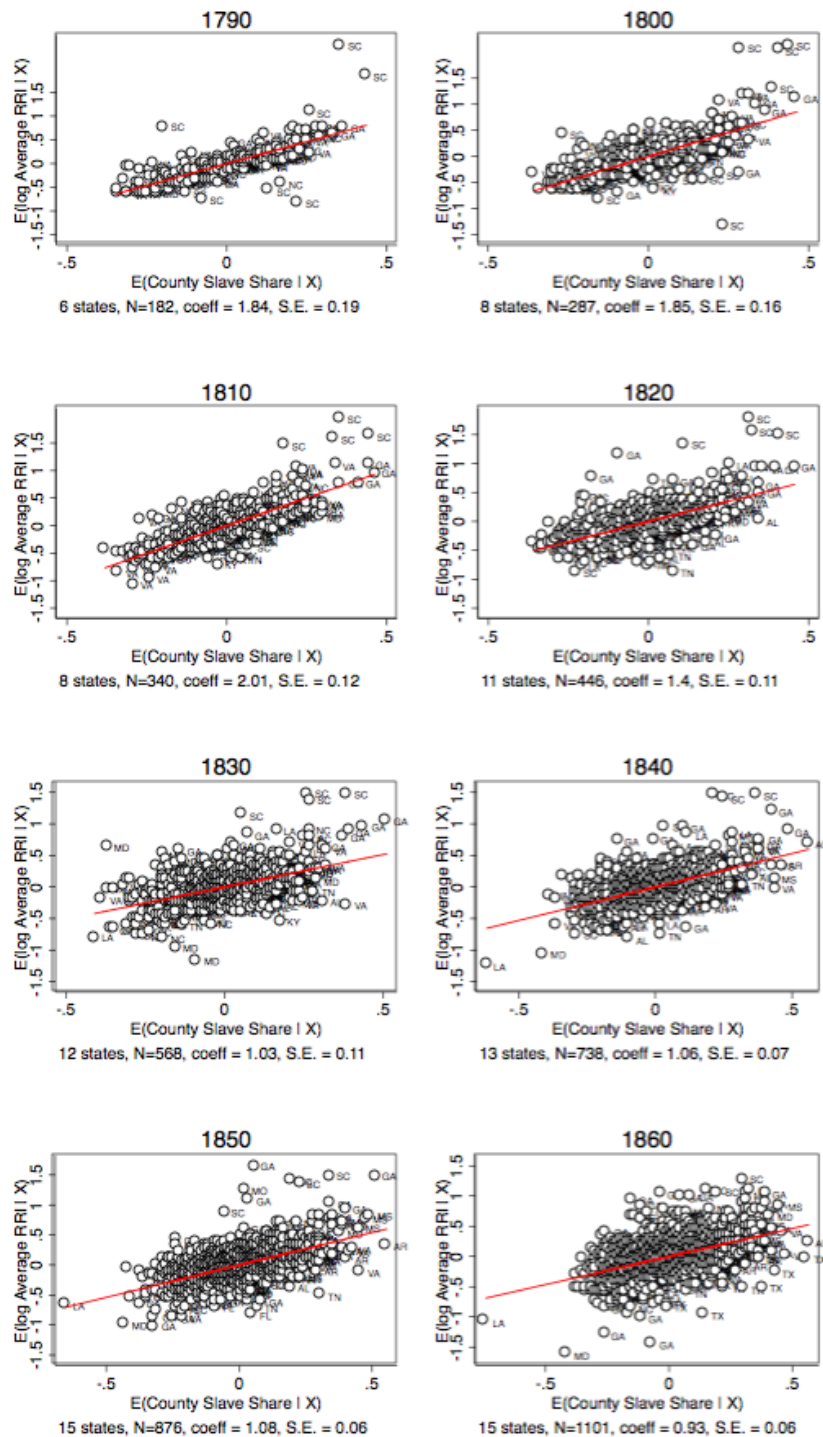
Following [Ansolabehere, Gerber and Snyder \(2002\)](#), we use a measure of local representation which is relative to the “fair” representation of a county in a particular state (which they call the Relative Representation Index-*RRI*).⁸ This index creates a common metric across legislatures by normalizing the representation of each locality by the average representation they should have according to a perfectly apportioned system. Voters in districts with an index of less (more) than 1 were under-represented (over-represented). A value close to one corresponds to a level of representation consistent with the “one person, one vote” principle. We take the log to reduce the weight of outliers and use the adult white males as a proxy for the voter-eligible population. As each state legislature was bicameral, we follow [Ansolabehere, Gerber and Snyder \(2002\)](#) and take the average across chambers.

⁸Formally, this measure is calculated as

$$RRI_i = \frac{R_{j(i)}/N_{j(i)}}{R_j/N_j},$$

where $j(i)$ indicates that county i is located in state j . R is the number of state representatives and N denotes the corresponding voting population.

Figure 3 Persistence of Southern Political Inequality, 1790-1860



Note: Each figure presents a partial regression leverage plots with the predicted (log) *RRI* against predicted county-level slave share (slaves/population) for a corresponding Census decade. Each dot represents a single county. All models partial out the effect of (log) county population and include state fixed effects. Each sample includes all states then in existence.

In Figure 3 we present a series of models predicting this representation index using the slave population of counties for each census-decade from 1790 to 1860. Namely, each panel presents a partial-regression leverage plot with the predicted *RRI* on the y-axis against the predicted county slave share on the x-axis (each marker represents a single county in the corresponding state). In all models, we control for total population, which is the primary factor associated with legislative malapportionment (Ansolabehere, Gerber and Snyder 2002). All models also include state fixed effects; therefore all slopes have a within-state interpretation. Since states entered the Union at different times, each model varies in the number of states and counties included. All demographic data was taken from the relevant decennial Census.

As shown, in each decade there is a positive relationship indicating that counties with greater slave dependency tend to be overrepresented in their state legislature. The correlation between slave incidence and overpresentation is substantial. For instance, the estimated slope coefficient of 1.84 (S.E.=0.19) in the figure corresponding to 1790 (upper left panel) indicates that a one percentage point increase in a county’s slave-population share was associated with a nearly 2% increase in the county’s *RRI*. This implies that a district having roughly 50% of its population enslaved (i.e., one standard deviation above the sample mean), is predicted to have a representation per voter that is more than three times the “fair” level in the particular state. A similarly large distortion is evident in each subsequent Census decade. While the slope of the model declines in the latter antebellum period, the coefficient on county slave share is more precisely estimated and remains quantitatively large.

3.2 Representation in the North

The rapid adoption and spread of the mandatory referenda in the 1820s occurred in a period of important and widespread democratic reforms. This era, which is often referred to as the *Jacksonian Period*, saw the rapid diffusion of democratic institutions, in particular the removal of most remaining economic restrictions to suffrage on adult white males (Keyssar

2001).⁹ While these reforms were also largely adopted in the South, Figure 3 shows that they did not substantially alter the biases in state legislatures. This is critical to our argument that it was the existing distortions to representation—and not the direct effect of slavery—that incentivized Southern elites to block the adoption of mandatory ratification of constitutional law. There are two testable implications of this argument. For one, if the maintenance of these biases is key in explaining why Southern states did not adopt the mandatory referendum, then similar distortions to representation should be less present, if not absent, in the Northern legislatures. Second, Northern states with systematic distortions should similarly be less likely to adopt mandatory referendums.

We explore these implications by measuring whether there are persistent distortions to representation in the states that adopted mandatory referendums. We estimate the persistence of inequality to representation by regressing the *RRI* index in 1860 on the corresponding value of this measure in 1830 and 1800, separately.¹⁰ Our sample for each model reflects not only whether a county was in a Northern versus a Southern state, but also by whether the state adopted mandatory pre- and post-convention referendums.¹¹ This provides evidence that we are measuring the effect of legislative representation and not simply capturing the direct effect of slavery.

The results are presented in Table 1. Again, we estimate each model by whether a county was in a Northern state that adopted both mandatory pre- and post-convention referendums (columns 1 and 2); counties in the four Northern states that did not adopt one or both (columns 3 and 4); and counties in Southern slave states (column 5 and 6). As reported in column 1, the estimate on *RRI* in 1800 is negative, though not significant, indicating that there is no significant persistence in the relative representation of Northern counties between

⁹One factor driving the diffusion of democratic reforms in this period was the admission of six (3 slave and 3 non-slave) frontier states between 1816 and 1821. None of these states enacted any economic restrictions to white male suffrage (Turner 1956).

¹⁰While we chose 1800 and 1830 to estimate long-run and intermediate-run persistence, the relationship is very similar for other Census-decade years.

¹¹Recall that four Northern states did not adopt both - Connecticut (pre), New Jersey (pre), Rhode Island (pre) and Vermont (both).

Table 1 Persistence in Political InequalityDV (each model): *(log) RRI in 1860*

	<u>Non-Slave States</u>				<u>Slave States</u>	
	Mandatory Referendums		Non-Mandatory Referendums		(5)	(6)
	(1)	(2)	(3)	(4)		
RRI_{1800}	-0.06 (0.07)		0.36*** (0.09)		0.25*** (0.05)	
RRI_{1830}		0.06 (0.05)		0.53*** (0.13)		0.48*** (0.04)
No. of States	4	8	4	4	6	12
N (Counties)	80	324	37	40	282	564

Note: Each column reports a county-level OLS model with robust standard errors in parenthesis. The dependent variable in each model is county *RRI in 1860*. The sample in columns 1 and 2 are all counties in states in which both pre- and post-convention referendums were mandatory. Columns 3 and 4 report estimates from the four Northern states in which either a pre- or post-convention referendum was discretionary (CT, NJ, RI and VT). Columns 5 and 6 reports estimates from the counties in the states in which slavery was legal. Each model includes total county population in 1860 and state fixed effects.*** p < 0.01, ** p < 0.05, * p < 0.1

soon after independence and the cusp of the Civil War. While the estimate in column 2 is now positive, there is still no significant relationship between the *RRI* in 1830 and the one in 1860.

Of course, the lack of persistence in the malapportionment of some Northern states does not explain why they adopted the mandatory referendum. Yet, this is evidence that the political geography of most Northern legislatures tended to not systematically favor the same counties across time. We argue that this lack of persistent bias should have resulted in less opposition to adopting statewide referendums, especially in a period of rapid institutional reform.

Further support of this can be seen in columns 3 and 4, which present the estimates for the Northern states that did not adopt mandatory pre-convention referendums (CT, NJ, RI and VT). VT in addition, did not adopt post-convention referendums. Whether *RRI* in 1860 is regressed on its value in 1830 or 1860, there is a strongly significant and positive relationship.

We can contrast these estimates to the those produced running the same specification on the counties of the slave states (columns 5 and 6). While the number of counties in the latter sample is much greater, the size of the estimated coefficients are very similar. This is a key piece of evidence supporting our argument that the channel through which adoption of this democratic device runs through representation rather than directly through the incidence of slaves across counties.

3.3 Qualitative evidence

Given the persistent bias in state-level representation, policies produced by Southern legislatures, and therefore laws by constitutional conventions, could deviate significantly from the majority preferences of the electorate. In particular, slaveholders saw the system of representation as critical for limiting the ability of low slave regions within their states to increase taxation on slave property.¹² This was expressed by the former US president, James Madison, in a speech at the Virginia Convention of 1829 when as a delegate he called for maintaining the existing system: “It is apprehended, if the power of the Commonwealth shall be in the hands of the Majority who have no interest in this species of property (slaves), that, from the facility with which it may be oppressed by excessive taxation, injustice may be done to its owners” (*Proceedings of the Virginia State Convention of 1829*).

Calls to reform Georgia’s biased system of representation, which lead to the holding of conventions in 1832 and 1839, illustrates how conventions often conflicted with the preferences of the electorate. When, according to [Saye \(2010, p. 172\)](#), the system of representation proposed by the 1832 convention “did little towards equalizing representation....Citizens of middle Georgia who had worked hardest for reapportionment of representatives now worked hardest to defeat the proposed amendments (in a post-convention referendum), and in this they were successful.” A second convention in 1839 similarly failed to equalize representation, as explained by one delegate who said that the amendment was intended for “the minority

¹²For instance, constitutions that did not require uniform rates of taxation applied to property allowed Southern legislatures to levy differential ad valorem tax rates on slave property ([Einhorn 2008: 204](#)).

of the people (to) govern the many—the very distinguishing characteristic and essence of aristocracy” (as cited in [Green 1931](#): 238). After opposition to the amendments in the low slave-share portions of the state lead to its defeat in a referendum, Georgia’s governor said, “this is the second time that the people have refused to sanction the proceedings of conventions, held to reform the constitution. In both instances...by the belief that the amendments offered for their approval were intended for sectional purposes” (as quoted in [Green 1931](#): 239). Following this defeat, Georgia elites chose to amend the constitution without submitting it for popular ratification ([Saye 2010](#)). This type of constitutional reform would no longer have been possible in the North. As demonstrated above, by the 1840s most Northern states had institutionalized the previous norm of requiring both ex ante and ex post voter approval of any constitutional amendment.

The political importance of this divergence is also revealed in the debates regarding that admission of Kansas to the Union in 1857-58. This episode is particularly relevant because it shows how the norm of discretionary referendums in the South was used by local elites to bypass the opposition to bringing their territory into the Union as a slave state. A sectional conflict occurred when a convention requested admission to the Union without submitting the proposed constitution to the territory’s voters for ratification.¹³ When the appointed territorial governor, Robert Walker, opposed the admission, Mississippi Congressman and future delegate to his state’s secession convention, Lucius Lamar, invoked the Southern doctrine in a letter to the US Secretary of the Treasury Howell Cobb: “our objection goes no farther than to Walker’s threat (to refuse admission without a referendum) to make such course a *sine qua non* of admission as a state to the Union.” Later in the same letter, Lamar revealed the perceived legitimacy of this process when he wrote that it was a “shameless abandonment of our right...[to] oppose the admission of a slave state, merely because her constitution was not submitted to the people” (Cobb Letters, LC). On the question of the “propriety of submitting the constitution for ratification,” Alexander Stephens, a Congress-

¹³Specifically, the convention determined that slaves already brought into the territory were permitted to remain as slaves, and this decision was not submitted for voter ratification ([Freehling 2007](#): 134).

man from Georgia and future vice president of the Confederacy, also invoked the doctrine in a letter to his constituents, “I have nothing to say, because...it is the right of the convention to do it or not, as they please (Stephens Letters, LC).” Yet, he also revealed the strategic importance of not submitting the constitution for ratification by saying “If they do thus conform (to Walker’s demand of submitting), the question (of Kansas’ status as slave state) will most probably be ended.” Cobb, a future secessionist and the first President of the Provisional Confederate Congress, wrote privately to Stephens that “refusing to submit the constitution to the people for ratification...will produce the most dangerous crisis we have yet had on the Kansas question. The reply can be made with overwhelming power that the refusal to submit was the result alone of a fear that a majority would condemn it” (Cobb Letters, LC).

The ensuing debates in Congress on the Kansas issue revealed the clear divide between free and slave states on the powers of conventions and need for ratification. In a speech to the US Senate, New York Senator, Preston King, claimed that if Kansas were admitted, then “the sovereign right of the people is denied, and the sovereign right of a convention is affirmed...[The question] is no less vital to the people of every State now in the Union, because it is the question where sovereignty resides, whether in representative bodies, or in the people.” Stephen Mallory, senator from FL, challenged King’s premise by arguing that the free states’ objections “could be summed up in this: the constitution framed at Lecompton was not submitted to the vote of the people, and it does not reflect the will of the people of Kansas. Let me ask, sir, who are the people of Kansas? The senator from NY says that the people means the majority. I deny any such doctrine.” In his famous “Cotton is King” speech to the Senate in March, 1858, South Carolina Senator James Hammond began by stating that the free states would admit Kansas if “this constitution embodied the will of the people of Kansas...the only question is, how that will is to be ascertained, and upon that point, we differ. In my opinion the will of the people of Kansas is to be sought in the act of her lawful convention elected to form a constitution, and no where else.”

4 Conventions, Referendums and Southern Secession

We conclude by exploring how discretionary referendums were strategically blocked during the Southern secession movement of 1860-61. Following a brief overview of the process by which each state chose to secede, we provide evidence of how Southern elites exploited the norm of discretionary referendums during the crisis for their advantage. First, using roll calls from several conventions, we demonstrate that delegates from high slave-population share districts successfully rejected the proposal to submit the ordinances of secession to the electorates for ratification. We also use county-level electoral returns from a referendum in Virginia, the one Southern state to hold a pre-convention referendum on whether to require voter ratification of a proposed secession convention, to show that high-slave-share constituencies were less inclined to impose a ratification requirement on such convention. Lastly, we elaborate on why the secession conventions were more likely to produce pro-secession majorities than a statewide direct votes of the electorate.

4.1 Paths to Secession

The failure to bring Kansas into the Union as a slave state contributed to rapidly deteriorating sectional tensions over slavery. In the 1850s, the Republican Party, whose primary platform was to ban the spread slavery to the Western territories, emerged solely in the Northern states. Due to the much larger population of these states, the Republican presidential nominee, Abraham Lincoln, was able to win a majority of electoral votes as a solely sectional candidate on November 6, 1860.

Soon after, most slave states convened special sessions of their legislatures to debate their response to Lincoln's election and the possibility of leaving the Union. Pro-secession legislators considered two mechanisms by which a state could declare its independence. The first was simply to secede via statute in the state legislature. While this option may have been the most expedient and certain path, it would have violated the precedent of using an elected

convention to modify a state's constitution. As he did during the Kansas crisis, Alexander Stephens explained this in a speech to the legislature of Georgia in November of 1860, by saying "the Legislature is not the proper body to sever our Federal Relations...Sovereignty is not in the Legislature...I am for...calling together an untrammelled convention, and presenting all the questions to them whether they will go out of the Union...[I] know of no way to decide great questions affecting fundamental laws except by representatives of the people".¹⁴

The second mechanism debated was a direct vote by the electorate of each state. Harbor-ing doubts about the popularity of their cause, secessionists in each state opposed any form of direct vote on secession. This was candidly expressed by Alfred Aldrich, a prominent South Carolina legislator, in a letter to US Senator James Hammond: "If the question of secession must be referred back to the people then it will be an utter failure...[I] do not believe the common people understand it, in fact, I know they will not understand it (Hammond Papers, LC)." Another state legislator from South Carolina wrote to Congressman Milledge Bonham about avoiding a referendum: "(secessionists) know that if the people decide against them, it will be decisive against separate state action for all time to come" (Bonham Papers, SCL). This concern was similarly expressed in a speech to the Georgia legislature in November of 1860 when a secessionist said, "wait not till the grog-shops and cross-roads shall send up a discordant voice from a divided people" (as cited in [Freehling 2007](#)). By contrast, those opposed to secession demanded to hold a statewide vote on whether to have a convention or to place limits on the powers of such body by requiring posterior ratification of the voters (see e.g., [Wooster 1976](#)).

In each of the first six states to secede (South Carolina, Mississippi, Florida, Alabama, Georgia, and Louisiana), secessionists were successful in passing bills calling for a convention without seeking voter approval. More importantly, these legislatures abided by the doctrine of a convention's absolute sovereignty and placed no 'upstream constraints' on its scope or power. Between the passing of this legislation and the elections for delegates, two factions

¹⁴Speech of Hon. A.H. Stephens (1860, November 22). *New York Times*.

emerged. “*Immediate secessionists*” who advocated for their state to choose to unilaterally secede in a convention. An opposing faction, which became known as “*Cooperationists*,” was a coalition of unionists, moderates, and pro-slavery supporters who, at a bare minimum, opposed unilateral secession. Their primary platform was that Southern grievances with the free states should be addressed as a bloc, which would lower the chances of conflict and strengthen their bargaining position (Crofts 2014). Cooperationists also asserted that any decision by a convention would only take effect if voters ratified it via referendum (Freehling 2007: 464; Barney 1974: 198). In all these six conventions, secessionists comprised a majority of delegates and successfully blocked both measures, passing ordinances which immediately and unilaterally removed their state from the Union.

In the remaining states, anti-secession legislators were successful in requiring direct voter input on secession. Voters in these states decided directly on whether to hold a convention and even to subject any secession resolution to a posterior ratification. For example, in North Carolina and Tennessee, voters initially rejected the holding of a convention. This defeat was anticipated by a secessionist leader in North Carolina in a letter to one of the state’s Congressmen by saying, “You cannot unite the masses of any Southern state much less those of N.C. against the Union & in favor [of] slavery alone” (as cited in Crofts 2014: 132). In Virginia, the legislature called for a convention but also held a referendum on whether secession would require a posterior popular ratification. The inclusion of this provision caused a “heated debate” and was strongly opposed by secessionists in the legislature (Wooster 1976: 141). Voters later approved by a wide margin the need for post-convention ratification. These Upper South states only seceded after conflict began with the firing on Fort Sumter in Charleston, and Lincoln’s subsequent call on April 15, 1861, for troops to suppress the movement.

4.2 Popular Ratification of Secession and Slavery

We now use roll-call votes from the Lower-South conventions to systematically explore the relationship between the opposition towards the popular ratification of secession and the slave labor incidence of constituencies. We show that the delegates representing high slave share districts were crucial to defeating the drive to have secession ordinances ratified by voters. Although historical accounts have discussed the relationship between slavery and the final vote on secession (notably [Wooster 1976](#)), no previous work, to our knowledge, has empirically explored the voting behavior of delegates on the issue of whether to hold referendums on the final ordinances of secession.

4.2.1 Data

Our measure of support for the use of direct democracy comes from key roll-call votes recorded in various of the secession conventions. Namely, we coded the available votes on resolutions to submit any secession proposal to the voters for ratification. From the six states seceding prior to the formation of the Confederacy in February, 1861, four states recorded the roll calls on whether to require voter ratification (Alabama, Florida, Louisiana, and Mississippi).¹⁵

Our main explanatory variable is the slave population of each district, as a proportion of total population.¹⁶ This measure captures in a simple way the direct economic interest of local slaveholders. We control for a set of demographic and economic factors which could influence the choice of ratification. Specifically, we control for total population, the level of urbanization, population density, and district size (in sq. km.). These variables are taken from the 1860 Census and the district size was calculated using the Atlas of Historical County Boundaries (Newberry Library, Chicago). We also control for a set of economic factors commonly associated with slave prevalence such as the level of non-slave wealth

¹⁵For Georgia, whose secession was likely pivotal to the ability to form the early Confederacy ([Freehling 2007](#)), the vote on whether to hold a referendum was held and rejected but not recorded.

¹⁶For multi-county districts we calculated population weighted averages.

inequality, proxied by a Gini coefficient of land inequality.

Lastly, we also control for delegate-specific characteristics that may have influenced their position on the institutional mechanism chosen by each state. In particular, a delegate’s personal economic interest in slavery may crucially influence his vote. We therefore control for the number of slaves each delegate owned in 1860. Our main source for this measure is the Slave Schedule of the Census, which lists slaveholdings by private individuals. Each record was located using *Ancestry.com*, which allowed us to identify the information using the name of each delegate.

4.2.2 Results

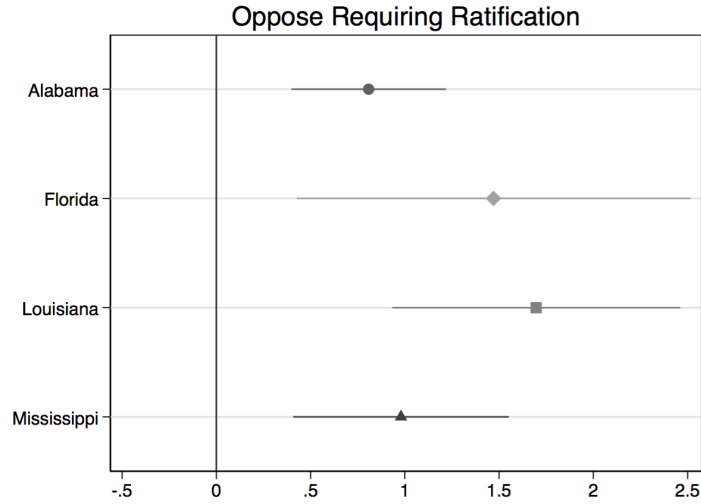
We investigate the statistical relationship between the delegate-level support for ratification and the slave dependence of their constituents using a series of logit models where the dependent variable is an indicator for either a “*yea (1)*” or a “*nay (0)*” on motions related to a ratification referendum (*yea* represents the anti-referenda position). In all models, standard errors are clustered at the delegate level and robust to arbitrary heteroskedasticity.¹⁷

Figure 4 summarizes our estimates. We plot the corresponding marginal effect, and its 95% confidence interval, of district slave share on the likelihood of delegates opposing popular ratification in the four conventions for which this vote was recorded. All models include the same set of controls. The estimate on slave share for all conventions is positive and highly statistically significant. The magnitude of these effects is also large. For instance, the estimated effect for Alabama (marginal effect equal to 0.80, S.E. of 0.2), is highly significant and implies that a delegate from a county one standard deviation above the mean slave share is expected to have around 0.17 more chance of voting against ratification than a delegate from the average county in this state (which has a slave share of 38%).

The point estimates for the other states are remarkably similar and precisely estimated. In terms of predictive probabilities, the monotonic and positive effect of slave incidence on

¹⁷Hence, our inferences are robust to any form of serial correlation arising from time-invariant characteristics, such as ideology or racial prejudice.

Figure 4 *Slavery and Roll Call Opposition to Popular Ratification*



Note: Each dot corresponds to the marginal effect of 1860 slave share in a logit model predicting opposition to requiring popular ratification of secession. Horizontal lines are 95% confidence intervals. See the Data Appendix for information on each roll call.

the likelihood of support for no ratification is clear in each convention. For instance, a delegate representing a district in the bottom 25th percentile of the slave share distribution in Mississippi has an (average) predicted probability of 32% of rejecting such referendum. This probability rises to more than 62% for a delegate representing a district in the top 25th percentile. For a delegate from the top decile this probability increases to 73%.

4.3 Popular Support for Referendums on Secession

The roll-call analysis above supports our broader claim that on controversial issues pertaining to slavery representatives from high slave-share districts strongly opposed submitting a convention's choices for voter ratification. We go one step further by also analyzing the relationship between voter support for holding referendums during the crisis and their district's dependence on slave labor. While concurrently holding elections for convention delegates, Virginia held a referendum asking whether the convention's choice to secede required popular ratification to take effect. The state legislature's agreement to hold this referendum was the

result of a compromise by anti-secessionists to agree to call for a convention on the question of secession (Wooster 1976). We use the county-level returns to show that slave interests saw ratification as harming the prospects of secession. Specifically, our main dependent variable is the share of total votes in each county *against* requiring the convention’s secession ordinance be submitted for ratification.

As with the roll-call analysis, our coefficient of interest is for the share of a county’s total population who were slaves in 1860. We also include the same economic and demographic variables as included in the roll-call analysis.¹⁸ The estimate, which is reported in column 1 of Table 2, is significant and large. The OLS point estimate of 0.98 indicates that a one standard deviation increase in county’s slave-population share is associated with an approximately 22% increase in the opposition to this ratification. Hence, voters in high slave-population share counties were significantly more likely to oppose requiring statewide ratification.

We complement this evidence by comparing it with electoral support for holding secession conventions. While this procedure would have been required in all but a handful of Northern states, only three Southern states submitted a referendum on whether to hold a secession convention. County-level returns for these referendums are available for North Carolina and Tennessee. Similar to the Virginia specification, we use these returns to create a variable measuring the share of voters in each county who supported the calling of a state convention on secession.¹⁹ When run separately for North Carolina and Tennessee, the OLS point estimates on county slave-population share for each state are significant and very similar. A one standard deviation increase in county slave-population share is associated with a 16% and 19.5% increase in support for holding a secession convention in North Carolina and

¹⁸Specifically, these controls are as follows: (log) total population, share of foreign born, (log) area, (log) population density, land inequity measured by a Gini index, the railway coverage circa 1860, the effective number of parties in the 1860 presidential election, the effective number of religious denominations, and the labor force share employed in manufacturing, all from 1860. See the Data Appendix for their description, construction and sources.

¹⁹See the Data Appendix for their description, construction and sources.

Table 2 Popular Support for Requiring Ratification & Holding a Convention

	<u>DV: Vote share against ratification</u>	<u>DV: Vote share for convention</u>	
	VA (1)	NC (2)	TN (3)
<i>Slave Share</i> ₁₈₆₀	0.98*** (0.11)	1.09*** (0.23)	1.46*** (0.3)
Controls	Y	Y	Y
N (Counties)	127	75	74

Note: Each column reports a county-level OLS model with robust standard errors in parenthesis. The dependent variable in column 1 is the county-level vote share against requiring the popular ratification of a secession choice by a state convention in Virginia (VA). The dependent variable in columns 2, North Carolina (NC), and 3, Tennessee (TN), is the county-level vote share in favor of holding a secession convention. Each model includes county-level controls for (log) total population, share of foreign born, (log) area, (log) population density, land inequity measured by a Gini index, the railway coverage circa 1860, the effective number of parties in the 1860 presidential election, the effective number of religious denominations, and the labor force share employed in manufacturing, all from 1860.*** $p < 0.01$, ** $p < 0.05$, * $p < 0.1$

Tennessee, respectively. The estimates are reported in Columns 2 and 3 of Table 2.

4.4 Political Inequality in the Conventions

We conclude by confirming that the bias in favor of higher slave-dependent districts shown in Figure 3 carried over to the secession conventions. We do this by exploring whether a district’s slave prevalence predicts its representation in the various conventions. Using the same approach as above, we use the apportionment of the conventions to construct the *RRI* for every district. This information was coded from the individual pieces of legislation passed in late 1860 and early 1861 stipulating the apportionment of each convention. In all cases, the basis of representation was based on the apportionment of each corresponding legislature.²⁰ We focus on the founding members of the Confederacy (Alabama, Florida, Georgia, Louisiana, Mississippi, and South Carolina), whose choice to secede precipitated the conflict.

²⁰Representation in the Florida, Georgia, Louisiana, and South Carolina conventions equaled the combined number of representatives and senators apportioned to each county in the state legislature. In Alabama and Mississippi apportionment was equal to the number of representatives in each state’s lower house.

Table 3 Slavery and Representation in Lower-South Secession Conventions

<i>DV: (log) County RRI, Secession Convention</i>		
	(1)	(2)
<i>Slave Share</i> ₁₈₆₀	1.46*** (0.10)	1.34*** (0.09)
Controls	N	Y
N (Counties)	361	359

Note: Each column reports a county-level OLS model with robust standard errors in parenthesis. The dependent variable in each column is the county-level *RRI* in the six lower-South secession conventions (Alabama, Florida, Georgia, Louisiana, Mississippi, and South Carolina). All models control for (log) total county population and include state fixed effects. Column 2 reports estimates additionally controlling for urban population rate, foreign-born population share, and (log) population density, all from the 1860 Census. *** $p < 0.01$, ** $p < 0.05$, * $p < 0.1$

The regression estimates are reported in Table 3. As before, each model controls for total district population and includes state fixed effects. Given the overwhelming significance in the relationship between county slave share and state legislative *RRI* in 1860, it is unsurprising that representation in the conventions were significantly biased in favor of high slave share districts. In this case, the estimated slope of 1.34 (S.E.=0.09) indicates that each percentage point increase in a district’s slave prevalence was associated with a greater than 1% increase in the district’s relative representation index. This implies that a district having 65% of its population enslaved (i.e., one standard deviation above the sample mean), is predicted to have a representation per voter that is more than twice the “fair” level in the particular state. Conversely, a district with a slave share of 21% (one standard deviation below the mean slave share), is highly underrepresented with a predicted *RRI* of just 0.65. This supports our claim that the majority preferences of the conventions were very probably more pro-secession than the electorate at large.

5 Conclusion

In this paper, we consider why some democracies develop the mandatory referendum to ratify constitutional laws. We explore this question by studying the puzzle of why Northern states adopted mandatory ex ante and ex post popular ratification, while Southern states adopted the doctrine of discretionary referendums. These institutional innovations of the North, especially the adoption of the mandatory post-convention ratification referenda, were important for limiting elite control of the constitution-making process. We argue that historical and persistent distortions to representation in favor of slave-dependent regions incentivized elites to block the adoption of mandatory ratification in the South. Namely, the mandatory use of statewide referendums would threaten an important source of institutional protection of slaveholding interests.

We explore the implications of this institutional divergence in the events leading to the Civil War. In particular, we emphasize the sectional conflict over the admission of Kansas in the late 1850s and the lack of popular ratification of all the Lower South secession conventions during the 1860-61 crisis. The consequences of this divergence also influenced outcomes far into the 20th Century. Southern states continued to use referendums inconsistently. Most notoriously, the conventions in Mississippi (1890), South Carolina (1895), Louisiana (1898), and Virginia (1901), that enacted suffrage restrictions, such as literacy tests, that largely disenfranchised African Americans until the Voting Rights Act of 1965 were not submitted for voter ratification (Dodd 1910, Keyssar 2001).

Our argument has important generalizable implications. Namely, polities in which important religious, linguistic, ethnic or economic cleavages maps onto political-geographic distortions to representation, and therefore in which referendums could result in very different preferences than those produced by legislative representatives, may be less likely to adopt mandatory referendums. In the American context, all states now require statewide ratification of any constitutional reform. Yet, the federal constitution famously contains no

mechanism for receiving nation-wide popular input. Instead, ratification requires state support, which allows less populated states to prevent constitutional reform. The difficulty of reform has no doubt preserved many institutions, such as the electoral college, that privilege particular regions and voters over others.

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