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# The Perils of “Pure Democracy”

## Minority Rights, Liquor Politics, and Popular Sovereignty in Antebellum America

KYLE G. VOLK

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One would suppose that even in a country so young as this is—more Republican, or more Democratic as some would call it, in its character than any other—that some questions would, by this time, be settled, and especially those which give to the people the power of establishing their own publicly expressed regulations.

Pittsburgh (PA) *Gazette* (1847)<sup>1</sup>

He who fears or objects to trust the people in any matters pertaining to general or national questions should have written on his forehead *anti-American*.

Select Committee of the Maryland General Assembly (1847)<sup>2</sup>

“A law which we have shown to be monstrous and abhorrent in principle, and both demoralizing and dangerous in tendency, should be swept from our living records and consigned to an oblivion from which it should be hoped the curious historian of after ages would never rescue it.” So concluded Abel E. Chandler, Samuel J. Davis, and Joseph Davis,

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1. Pittsburgh (PA) *Gazette*, Nov. 10, 1847.

2. Maryland General Assembly, *Report of the Select Committee on the License Law, February 13<sup>th</sup>, 1847* (Annapolis, MD, 1847), 12.

three New York assemblymen who in the spring of 1847 considered petitions demanding the repeal of a law, in operation scarcely a year, that empowered local voters to decide directly an issue of public policy that was previously the responsibility of government officials. These legislators, one Whig and two Democrats, agreed that the law facilitated a form of “despotism” in the Empire State. It established a “new and anti-American kind of democracy” that authorized the unchecked “will of the majority” to hold “supreme control over the minority,” leaving their “social rights” at the mercy of the popular vote. Only if the law were repealed would “the people be restored to the freedom they have lost.” Freedom and true American democracy required that power be taken away from the people.<sup>3</sup>

The law these legislators opposed concerned liquor licenses. In the mid-1840s state and territorial legislatures in the Mid-Atlantic, Midwest, and New England passed new laws that created a referendum-like mechanism for determining local license policy. Previous laws had given local administrative bodies discretionary authority to determine whether or not to issue licenses, but the new local option laws (as they would eventually be known) called voters to the ballot box for a special license election and presented them with the stark choice of “License” or “No-License.” A “License” victory authorized government officials to issue licenses and approved the sale of liquor by license holders. A “No-License” victory prohibited licenses from being issued and rendered the sale of liquor illegal. There was no space for compromise. Simple majorities ruled.<sup>4</sup>

For temperance reformers and other advocates, local option laws were beacons of freedom and emblems of democracy. To them, licensing was an immoral governmental practice that sanctioned drinking and the “drunkard-making business” of liquor dealing. It obstructed their mission to emancipate the nation from alcohol and should be abolished.

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3. “Report of the Majority of the Committee on the Internal Affairs of Towns and Counties, on the Petitions and Papers Relative to the Repeal of the Excise Law of 1845,” *Documents of the Assembly of the State of New York, Seventieth Session, 1847* (Albany, NY, 1847), 6–7, 11, 13, 16.

4. “Eleventh Anniversary of the American Temperance Union,” *Journal of the American Temperance Union* [hereafter *JATU*] 11 (Jun. 1847), 81–82; John A. Krout, *The Origins of Prohibition* (New York, 1925), 276–78.

Finding most state legislators reluctant to end licensing explicitly, reformers lobbied for laws that allowed the people to decide the license question. Drawing inspiration from the Jacksonian ethos of majoritarian democracy and popular political empowerment, advocates maintained that local option was "purely democratic in its character and tendency." It guaranteed that public policy was rooted in "public sentiment," authorized "the will of the majority" to control the sale of intoxicating liquors, and recognized that "the people . . . are the legitimate source of power—the sovereigns of the land." Local option was American popular sovereignty incarnate.<sup>5</sup>

Yet as legislators implemented local option and voters returned No-License decisions, many antebellum Americans were prompted to rethink exactly what this commitment to popular sovereignty entailed. As a consortium of liquor dealers and their allies joined together to challenge local option in multiple states and locales, a debate ensued about the wisdom of advancing temperance with legal coercion, but some also asked if the ballot-box mechanism was a legitimate mode of democratic decision making. Beginning in Delaware, liquor dealers and their attorneys, drawing from James Madison and other political thinkers, argued that local option established a "pure democracy" that made for unstable policymaking and facilitated the oppression of local minorities by local majorities. Representative government was designed to mitigate both of these evils. To them, the attempt to resolve the moral problem of liquor licensing through local popular referenda revealed a much more systemic moral problem of popular sovereignty in which the ascendant democratic postulates of majority rule and popular political empowerment were mobilized to imperil freedom.

Beyond the goals of temperance reformers and the interests and traditions of liquor dealers and drinkers, at stake in local option debates were competing visions of America's commitment to popular self-rule. Was the United States a democracy (or to some, a republic) where elected officials and government officers made policy decisions or where the people acting through their agent—the majority—would directly decide public policy at the ballot box? In considering their positions, legislators,

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5. New York *Tribune*, Mar. 17, 1845; Albany (NY) *Patriot*, May 7, 1845; *North American* (Philadelphia), Jan. 30, 1847; Maryland General Assembly, *Report of the Select Committee*, 12.

members of the bench and bar, voters, temperance reformers, liquor dealers, drinkers, Whigs, Democrats, nativists, immigrants, and other participants returned to essential themes basic to popular sovereignty. Local option, for example, asked what “public opinion” was and how it could be ascertained. It also probed the obligations of elected officials and government officers to “the people” and assessed whether public policy should always reflect public opinion. These debates also addressed the implications of early nineteenth-century democratization: the boundaries to the democratic creed of majority rule, the rights of minorities and their proper place in policymaking, and whether “the people” could ever be too involved in popular self-government. Though these issues found little permanent resolution, the ideas of direct democracy’s opponents did mature and gain legitimacy as a result of liquor dealers’ constitutional victory before the Delaware Court of Errors and Appeals. Their plea for representative democracy was employed to challenge local option and other measures of direct democracy elsewhere and would remain a fixture in future debates over ballot-box legislation.<sup>6</sup>

Unlike Progressive Era champions of initiative, referendum, and recall who pointed to the antebellum local option penchant as precedent for their own reform measures, most historians have yet to appreciate local option as a pioneering episode in the contested history of direct democracy, viewing it chiefly within narratives of temperance reform and liquor regulation. The “license question” was not the only instance in which legislators called upon the antebellum electorate to decide policy at the ballot box. Voters were asked to authorize the revision of state constitutions; decide isolated local issues, like the division of a county; and, in some states, approve internal improvement projects, state debts, and taxation for common schools. Some of these measures helped legitimate the local option call, and some even brought important early questions

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6. *Rice v. Foster*, 4 Del. 479 (1847). As will be illustrated, local option supporters conflated “republican” and “democratic” whereas detractors more eagerly drew a distinction. Some detractors used “republican” to signal representative democracy and “democracy” to signal direct democracy. On the seventeenth- and eighteenth-century background of these debates, see especially Bernard Bailyn, *The Ideological Origins of the American Revolution* (Cambridge, MA, 1967); Gordon Wood, *The Creation of the American Republic, 1776–1787* (Chapel Hill, NC, 1969); Edmund S. Morgan, *Inventing the People: The Rise of Popular Sovereignty in England and America* (New York, 1988).

about the propriety of ballot-box legislation. But because local option was enacted contemporaneously in twelve states and territories, advanced the divisive moral objectives of temperance reformers, and sparked coordinated and highly publicized resistance in various locales, it became the premier site where antebellum Americans began grappling with direct democracy.<sup>7</sup>

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7. For Progressives making links to local option, see Frederick Albert Cleveland, *The Growth of Democracy in the United States* (Chicago, 1898); Charles Sumner Lobingier, *The People's Law or Popular Participation in Law-Making from Ancient Folk-Moot to Modern Referendum: A Study of the Evolution of Democracy and Direct Legislation* (New York, 1909); Ellis Paxson Oberholtzer, *The Referendum in America, Together with Some Chapters on the Initiative and the Recall* (New York, 1911). Some scholars follow their work. See William M. Wiecek, *The Guarantee Clause of the U.S. Constitution* (Ithaca, NY, 1972); Ann-Marie E. Szymanski, *Pathways to Prohibition: Radicals, Moderates, and Social Movement Outcomes* (Durham, NC, 2003); John J. Dinan, *The American State Constitutional Tradition* (Lawrence, KS, 2006). For scholarship on temperance discussing local option, see Krout, *Origins of Prohibition*, 276–83; Alice Felt Tyler, *Freedom's Ferment: Phases of American Social History from the Colonial Period to the Outbreak of the Civil War* (New York, 1944), 347–48; Clifford S. Griffin, *Their Brothers' Keepers: Moral Stewardship in the United States, 1804–1865* (New York, 1960), 133–34; Stanley Baron, *Brewed in America: A History of Beer and Ale in the United States* (Boston, 1962), 196–97; Joseph R. Gusfield, *Symbolic Crusade: Status Politics and the American Temperance Movement* (Chicago, 1963), 53; Emil Christopher Vigilante, "The Temperance Reform in New York State, 1829–1851" (PhD diss., New York University, 1964), 223–52; Norman H. Clark, *Deliver Us From Evil: An Interpretation of American Prohibition* (New York, 1976), 46; Ian Tyrrell, *Sobering Up: From Temperance to Prohibition in Antebellum America, 1800–1860* (Westport, CT, 1979), 243; Ronald G. Walters, *American Reformers, 1815–1860* (New York, 1978), 138; W. J. Rorabaugh, *The Alcoholic Republic: An American Tradition* (New York, 1979), 217; Rorabaugh, "Prohibition as Progress: New York State's License Elections, 1846," *Journal of Social History* 14 (1981), 425–43; Jed Dannenbaum, *Drink and Disorder: Temperance Reform in Cincinnati from the Washingtonian Revival to the WCTU* (Chicago, 1984), 85–105; Jack S. Blocker, *American Temperance Movements: Cycles of Reform* (Boston, 1989), 54; John W. Quist, *Restless Visionaries: The Social Roots of Antebellum Reform in Alabama and Michigan* (Baton Rouge, LA, 1998), 202–209, 252–60; Thomas R. Pegram, *Battling Demon Rum: The Struggle for a Dry America, 1800–1933* (Chicago, 1998), 35–38. For legal and constitutional histories, see Edwin Corwin, "The Doctrine of Due Process of Law Before the Civil War," *Harvard Law Review* 24 (Apr. 1911), 466; Louis Hartz, *Economic Policy and Democratic Thought: Pennsylvania, 1776–1860* (Cambridge, MA, 1948), 209–10; William J. Novak,

Moreover, this episode offers another critical perspective on the social and intellectual contours of antebellum democracy. First, it contributes to recent scholarship considering the conduct of antebellum politics, particularly by looking at political institutions and behavior beyond the traditional foci of party politics and partisan electoral behavior. The problem of direct democracy's legitimacy was born of a highly participatory liquor politics that involved temperance and anti-temperance forces working within yet independent of the party system to shape public policy. Temperance reformers' embrace of ballot-box legislation illustrates an important technology of policy creation available both to groups wishing to circumvent partisan legislators and to legislators seeking to evade vexed questions like liquor licensing. In addition, pro-liquor groups' resort to constitutions, courts, and civil society not only textures scholarly contentions that a tradition of everyday people defining the legitimate reach and structure of public power—what some dub “popular constitutionalism”—was alive in the early republic. It also highlights each institution's fundamental importance in the antebellum political arena and their particular value for dissenters like the pro-liquor minorities who opposed local option.<sup>8</sup>

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*The People's Welfare: Law & Regulation in Nineteenth-Century America* (Chapel Hill, NC, 1996), 177–78. On other early uses of direct democracy, see Cleveland, *Growth of Democracy*, 181–229; Lobingier, *The People's Law*, 349–57; Oberholtzer, *The Referendum*; Arthur N. Holcombe, *State Government in the United States* (New York, 1926), 126–38; Wiecek, *Guarantee Clause*, 260; L. Ray Gunn, *The Decline of Authority: Public Economic Policy and Political Development in New York, 1800–1860* (Ithaca, NY, 1988), 153–96; Dinan, *American State Constitutional Tradition*, 29–84.

8. For examples, see Mary P. Ryan, *Civic Wars: Democracy and Public Life in the American City during the Nineteenth Century* (Berkeley, CA, 1997); Kimberly K. Smith, *The Dominion of Voice: Riot, Reason, and Romance in Antebellum Politics* (Lawrence, KS, 1999); Manisha Sinha, *The Counterrevolution of Slavery: Politics and Ideology in Antebellum South Carolina* (Chapel Hill, NC, 2000); Reeve Huston, *Land and Freedom: Rural Society, Popular Protest, and Party Politics in Antebellum New York* (New York, 2000); Mark Voss-Hubbard, *Beyond Party: Cultures of Antipartisanship in Northern Politics before the Civil War* (Baltimore, MD, 2002); Ronald P. Formisano, *For the People: American Populist Movements from the Revolution to the 1850s* (Chapel Hill, NC, 2008); Johann N. Neem, *Creating a Nation of Joiners: Democracy and Civil Society in Early National Massachusetts* (Cambridge, MA, 2008); Kyle G. Volk, “Majority Rule, Minority Rights: The Christian Sabbath, Liquor, Racial Amalgamation, and Democracy in Antebellum

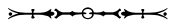
Second, local option debates force a rethinking of dominant historical narratives celebrating the majoritarian and populist currents unleashed in Jacksonian America and lamenting limitations on formal political participation. Pointing to suffrage restrictions, particularly along the lines of race, ethnicity, gender, and class, and to state constitutional revision, episodes like the Dorr War, and pro-slavery statesmen like John Calhoun, scholars illustrate how elites sought to contain majority rule and prolong nonegalitarian aspects of state and national government chiefly to protect property rights, not least slave property. We are left with the impression that restrictions on democratization and majority rule along with concerns for minority rights in this period were primarily the province of aristocratic elites and slaveholders and firmly of an anti-democratic character. Though involving influential elites and the question of slavery, the debates about local option tell a different story, revealing a more complex mixture of both popular and elite participants struggling with whether majority rule and popular political empowerment always embodied democracy and freedom, or potentially their opposites. Especially for liquor dealers, drinkers, and other everyday dissenters, local option brought them to embrace elite criticisms of majoritarian democracy specifically to defend their rights as pro-liquor minorities. In so doing, they joined other nonelite antebellum minorities who helped loosen the American tradition of questioning majority rule and democratization from its elite and anti-democratic moorings.<sup>9</sup>

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America" (PhD diss., University of Chicago, 2008). On popular constitutionalism, see Larry D. Kramer, *The People Themselves: Popular Constitutionalism and Judicial Review* (New York, 2004).

9. On these broad themes, see Arthur Schlesinger, Jr., *The Age of Jackson* (Boston, 1945); Marvin Meyers, *The Jacksonian Persuasion: Politics and Belief* (Stanford, CA, 1957); Merrill D. Peterson, ed., *Democracy, Liberty, and Property: The State Constitutional Conventions of the 1820s* (New York, 1966); Richard Hofstadter, *The Idea of a Party System: The Rise of Legitimate Opposition in the United States, 1780-1840* (Berkeley, CA, 1969); Wiecek, *Guarantee Clause*; Rush Welter, *The Mind of America, 1820-1860* (New York, 1975); George M. Dennison, *The Dorr War: Republicanism on Trial, 1831-1861* (Lexington, KY, 1975); John Ashworth, "Agrarians" & "Aristocrats": *Party Political Ideology in the United States, 1837-1846* (New York, 1983); Daniel T. Rodgers, *Contested Truths: Keywords in American Politics Since Independence* (Cambridge, MA, 1987), 80-111; Lawrence Frederick Kohl, *The Politics of Individualism: Parties and the American Character in the Jacksonian Era* (New York, 1989); Harry L. Watson, *Liberty and Power: The Politics of Jacksonian America* (New York, 1990);





The turn to direct democracy to resolve the license question resulted from the protracted struggle of temperance reformers whose movement expanded and became more radical through the 1830s. State and national organizations bolstered by countless local societies proliferated across the nation, with their members taking the teetotal pledge and condemning ever more stridently the liquor business, especially dealers who sold alcohol in small quantities to workingmen and immigrants in taverns and grog shops. The latter, reformers argued, were responsible for intemperance and the crime, poverty, sexual impropriety, and related ills that followed in their wake. Increasingly, reformers complained that “the rumselling business has fallen very much into the hands” of immigrants, especially the whiskey-drinking Irish and beer-drinking Germans, and particularly the Catholics among them, who had flooded into American port cities. In 1845 the *Journal of the American Temperance Union* (*JATU*), the leading national temperance periodical, protested that

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Lacy K. Ford, Jr., “Inventing the Concurrent Majority: Madison, Calhoun, and the Problem of Majoritarianism in American Political Thought,” *Journal of Southern History* 60 (1994), 19–58; Robert H. Wiebe, *Self-Rule: A Cultural History of American Democracy* (Chicago, 1995); William G. Shade, *Democratizing the Old Dominions: Virginia and the Second Party System, 1824–1861* (Charlottesville, VA, 1996); Laura J. Scalia, *America’s Jeffersonian Experiment: Remaking State Constitutions, 1820–1850* (DeKalb, IL, 1999); Sinha, *Counterrevolution of Slavery*; Gerald Leonard, *The Invention of Party Politics: Federalism, Popular Sovereignty, and Constitutional Development in Jacksonian Illinois* (Chapel Hill, NC, 2002); Sean Wilentz, *The Rise of American Democracy: Jefferson to Lincoln* (New York, 2005); Robin L. Einhorn, *American Taxation, American Slavery* (Chicago, 2006); Christian G. Fritz, *American Sovereigns: The People and American’s Constitutional Tradition before the Civil War* (New York, 2007); Formisano, *For the People*. On suffrage reform and its limitations, see Chilton Williamson, *American Suffrage from Property to Democracy: 1760–1860* (Princeton, NJ, 1960); Phyllis F. Field, *The Politics of Race in New York: The Struggle for Black Suffrage in the Civil War Era* (Ithaca, NY, 1982); Robert J. Steinfeld, “Property and Suffrage in the Early American Republic,” *Stanford Law Review*, 41 (1989), 335–76; Jacob Katz Cogan, “The Look Within: Property, Capacity, and Suffrage in Nineteenth-Century America,” *Yale Law Journal* 107 (Nov. 1997), 473–98; Alexander Keyssar, *The Right to Vote: The Contested History of Democracy in the United States* (New York, 2000). On the political thought and behavior of other nonelite antebellum minorities, see Volk, “Majority Rule, Minority Rights.”

"every foreigner, whether he be naturalized or not, whether he can read, or even speak our language, is permitted . . . to open a groggery, and perhaps with his own countrymen, fill up our prisons and almshouses." Even worse, these liquor dealers promoted social decay courtesy of the government, whose system of licensing upheld their destructive business.<sup>10</sup>

State legislatures passed license laws, which were a critical part of the early American regulatory state, typically authorizing county administrative bodies to grant select individuals licenses to sell liquor based on the recommendation of town selectmen. Reformers long condemned the inadequacy of licensing and sought to reduce the number of licensed establishments but increasingly disdained such gradualism and compromise and demanded the complete elimination of licensing because it lent legal sanction and moral respectability to the sale and consumption of liquor. "How can we expect to convince the rumseller that he is doing a great *wrong*," asked one temperance leader, "while his traffic is sanctioned by law?" Only if state governments ended licensing, they reasoned, could temperance advocates put liquor dealers out of business and convince all Americans to forswear alcohol. Using local option to eliminate licensing was one way to achieve this.<sup>11</sup>

A broad coalition of temperance advocates led by an elite core of reformers pushed local option initiatives, lobbying legislatures, waging public opinion campaigns, and mobilizing the "No-License" vote. In New York, for example, a cadre of evangelical Protestant clergymen, prominent businessmen, statesmen, lawyers, doctors, and others of the burgeoning white middle class printed hundreds of pamphlets, petitions, and tracts; wrote newspaper articles; and held numerous local and state-

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10. "The German Rumsellers," *JATU* 8 (Apr. 1844), 58; "Foreign Population," *JATU* 9 (Mar. 1845), 33; Robert Ernst, *Immigrant Life in New York City, 1825-1863* (New York, 1949), 90-91; Baron, *Brewed in America*, 175-83. On the antebellum temperance reform, see especially Krout, *Origins of Prohibition*; Rorabaugh, *The Alcoholic Republic*; Tyrrell, *Sobering Up*; Hampel, *Temperance & Prohibition in Massachusetts*; Dannenbaum, *Drink and Disorder*; Pegram, *Battling Demon Rum*; Quist, *Restless Visionaries*; Scott C. Martin, *Devil of the Domestic Sphere: Temperance, Gender, and Middle-class Ideology, 1800-1860* (DeKalb, IL, 2008).

11. Albany (NY) *Argus*, Mar. 5, 1846. On licensing, see Sharon V. Salinger, *Taverns and Drinking in Early America* (Baltimore, 2002); Tyrrell, *Sobering Up*; Novak, *People's Welfare*.

wide conventions. They turned local temperance societies into political infrastructure; used them as hubs of organization and communication; and spurred members to launch petition campaigns, circulate propaganda, and hold rallies of their own. Prominent New York leaders included Reverend John Marsh, Secretary of the American Temperance Union (ATU); Horace Greeley, the well-known Whig editor of the New York *Tribune*; and Abigail Powers Fillmore, wife of Whig senator, future president, and local option supporter Millard Fillmore. At the helm was one of the Empire State's wealthiest citizens, Edward C. Delavan, who oversaw New York's local option movement and underwrote many of the costs.<sup>12</sup>

Reformers' experiences in the public-policy arena and within the existing party system drove local option's ascendance as their chief policy goal. Acting locally, temperance reformers in the 1830s and early 1840s used existing laws and town meetings to persuade authorities not to issue licenses, a tactic that brought virtual prohibition in many areas. By contrast, reformers learned that obtaining a statewide law ending licensing and prohibiting alcohol was extremely difficult. Nothing shaped their education more than the Massachusetts Fifteen-Gallon Law of 1838, which imposed a statewide ban on the sale of liquor in quantities smaller than fifteen gallons. Dealers and drinkers initiated a widespread protest and concocted ways to shirk the law, including the legendary ploy of dealers charging customers for a look at a striped pig (a pig with zebra-like stripes painted on it) and providing complimentary grog. Thus, liquor was not sold but given away, and the law was not broken. Popular dissatisfaction also caused the Whig Party, which was blamed for the law, to lose the governorship in 1840, leaving legislators—Democrat and

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12. "Oneida County," *JATU* 10 (Feb. 1846), 30; Krout, *Origins of Prohibition*, 278–82; "A Voice from the Ladies of Buffalo," *JATU* 10 (Jun. 1846), 91; Tyrrell, *Sobering Up*, 88–89; Blocker, *American Temperance Movements*, 13–14. On the temperance movement's middle-class basis, see Tyrrell, *Sobering Up*; Paul E. Johnson, *A Shopkeeper's Millennium: Society and Revivals in Rochester, New York, 1815–1837* (New York, 1978); Mary P. Ryan, *Cradle of the Middle Class: The Family in Oneida County, New York, 1790–1865* (New York, 1981), 132–44; John S. Gilkeson, Jr., *Middle-Class Providence, 1820–1940* (Princeton, NJ, 1986), 23–35; Stuart M. Blumin, *The Emergence of the Middle Class: Social Experience in the American City, 1760–1900* (Cambridge, UK, 1989), 195–204; Quist, *Restless Visionaries*; Martin, *Devil of the Domestic Sphere*.

Whig alike—skittish about ending licensing with “direct legislative action.”<sup>13</sup>

Temperance leaders marketed local option as agreeable to the public and safe for legislators to enact. In returning to the local arena where they had some success restricting licensing, reformers assured legislators and others opposed to legally coercing temperance, including the Washingtonian wing of the temperance movement, that local option was unlike the “compulsory” Fifteen-Gallon Law. Because local option only operated with the explicit “consent of the people,” the public would “cheerfully yield” to the outcome of license elections. Moreover, temperance reformers praised local option’s ability to separate the license question from party politics. Legislators neutrally could place the license question before the voters without bearing any responsibility for the outcome and leaving voters only themselves to blame.<sup>14</sup>

Advocates also insisted that local option was the “*Democratic, Republican*” (terms they used interchangeably) remedy to a license system that no longer harmonized with America’s blossoming commitment to majoritarian democracy. Reformers co-opted the populist and conspiratorial rhetoric of Jacksonian Democracy, deifying the people, public opinion, majority rule, and local self-government and protesting special privilege, monopoly power, and the aristocratic governance of the few over the many. In the 1830s, Democrats drew on these concepts to combat the “Money Power” and the Second Bank of the United States, but temper-

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13. “The License Question,” *JATU* 8 (Nov. 1844), 170; Tyrrell, *Sobering Up*, 91–92, 225–43; Johnson, *A Shopkeeper’s Millennium*, 129–33. On the Massachusetts Fifteen-Gallon Law, see Krout, *Origins of Prohibition*, 270–71; Tyrrell, *Sobering Up*, 238–39; Hampel, *Temperance & Prohibition in Massachusetts*, 79–94; Ronald P. Formisano, *The Transformation of Political Culture: Massachusetts Parties, 1790s–1840s* (New York, 1983), 298–99; Neem, *Creating A Nation of Joiners*, 157–59.

14. Albany (NY) *Evening Journal*, Mar. 15, 1845; *North American* (Philadelphia), Jun. 8, 1846; Albany (NY) *Argus*, Apr. 26, 1845; “Law-Moral Suasion,” *JATU* 7 (Sept. 1843), 134; *North American* (Philadelphia), Jan. 30, 1847. On the Washingtonian temperance movement, see Krout, *Origins of Prohibition*, 182–222; Tyrrell, *Sobering Up*, 159–90; Dannenbaum, *Drink and Disorder*, 32–68; Sean Wilentz, *Chants Democratic: New York City & the Rise of the American Working Class, 1788–1850* (New York, 1984), 306–14; Teresa Anne Murphy, *Ten Hours’ Labor: Religion, Reform, and Gender in Early New England* (Ithaca, NY, 1992), 101–30; Pegram, *Battling Demon Rum*, 26–32.

ance reformers applied them to the “Rum Power”—the many liquor dealers who, they claimed, conspired with government officials to gain the monopolistic power of license even in the face of strong anti-license public sentiment. Local option would return to the people their “right, on pure democratic principles, to decide the question for themselves.” It would give “the majority,” insisted the *Ohio Washingtonian Organ*, “the liberty to say whether they will have grog-shops in their neighborhood.” Ideally, local majorities would free themselves from “the tyranny of a contemptible minority”—the Rum Power.<sup>15</sup>

This rationale was as strategic as it was principled, and it was aimed particularly at Democratic legislators and partisans. Support for majoritarian democracy began to shed its Democratic affiliation by the early 1840s, particularly as Whigs embraced two-party democratic politics. Temperance reformers, many with strong ties to the Whig Party, expected a sympathetic hearing from Whig legislators and voters, and they also counted on support from nativist politicians who similarly linked intemperance, liquor dealing, and immigrants. Democrats were another story. Not only were they more suspicious of moral regulations than their partisan foes, but they also sought political support from alcohol-friendly Irish and German immigrants. With local option, temperance reformers tested each party’s commitment to majoritarian democracy and popular political empowerment but especially the Democrats’ commitment to the central axioms that had guided the party’s ascension in the 1830s.<sup>16</sup>

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15. Morris County Temperance Society, *License! Or No License! Addressed to the Citizens of New Jersey in View of the Election on the 1<sup>st</sup> Tuesday in Dec. 1847* (New York, 1847), 6; Henry Harbaugh, *A Word In Season, or a Plea for Legislative Aid, in Putting Down the Evils of Intemperance* (Chambersburg, PA, 1846), 16–17; Pennsylvania State Temperance Society, *Address to the People of the Commonwealth of Pennsylvania, Relative to the License Question* (Philadelphia, PA, 1846), 7; Pittsburgh (PA) *Gazette*, Nov. 5, 1845; New York *Herald*, Mar. 28, 1845; “Liberty! Liberty!!,” *Ohio Washingtonian Organ & Sons of Temperance Record*, Aug. 9, 1846, 413. On the ideas of Jacksonian Democracy, see Schlesinger, *Age of Jackson*; Meyers, *Jacksonian Persuasion*; Welter, *The Mind of America*; Ashworth, “Agrarians” & “Aristocrat”; Kohl, *Politics of Individualism*; Jonathan H. Earle, *Jacksonian Antislavery & the Politics of Free Soil, 1824–1854* (Chapel Hill, NC, 2004); Wilentz, *Rise of American Democracy*.

16. On immigrants, nativism, and temperance, see Ray Allen Billington, *The Protestant Crusade 1800–1860: A Study of the Origins of American Nativism* (New York, 1938), 193–219; Kathleen Neils Conzen, *Immigrant Milwaukee 1836–1860: Accommodation and Community in a Frontier City* (Cambridge, MA, 1976);

In some states like New York, local option even forced Democrats to wrestle with their own turn to ballot-box legislation. The early stages of the local option movement overlapped with the prolonged economic depression that followed the Panic of 1837, and in states where legislatures aggressively funded public projects through state debts, the financial crisis left their credit systems impaired, driving some to reassess state involvement in internal improvements. Along with other policy prescriptions, radical New York Democrats in the early 1840s proposed state constitutional amendments requiring voters to approve at the ballot box any law creating a state debt. The so-called "People's Resolutions" would not become a part of the state constitution until 1846, after New York's 1845 local option law, but temperance reformers no doubt saw the opportunity to bring Democrats in to their fold by similarly involving the electorate in public policy. Not surprisingly, supporters framed local option as another solution to state economic woes and a measure of taxpayer relief. "The License question" was not only "one of morals, but of taxation" because licensing promoted intemperance, which bred poverty and crime, the most costly sources of taxation. "[I]n Republican Governments," champions of local option insisted, "the majority ought to decide all questions of taxation." Local option made sure of it.<sup>17</sup>

With local option, reformers and supportive legislators implicitly weighed in on two broad and interrelated questions that had been confronting the Anglo-American world since the rise of popular sovereignty.

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Dannenbaum, *Drink & Disorder*; Amy Bridges, *A City in the Republic: Antebellum New York and the Origins of Machine Politics* (Cambridge, UK, 1984), 29–33; David Gerber, *The Making of An American Pluralism: Buffalo, New York, 1825–1860* (Chicago, 1989). On temperance as an ethnocultural issue in the second party system, see Lee Benson, *The Concept of Jacksonian Democracy: New York as a Test Case* (Princeton, NJ, 1961); Ronald P. Formisano, *The Birth of Mass Political Parties: Michigan, 1827–1861* (Princeton, NJ, 1971); Herbert Ershkowitz and William G. Shade, "Consensus or Conflict? Political Behavior in the State Legislatures During the Jacksonian Era," *Journal of American History* 58, no. 3 (1971), 591–621; Ashworth, "Agrarians" & "Aristocrats," 193–205; Daniel Walker Howe, "The Evangelical Movement and Political Culture in the North during the Second Party System," *Journal of American History* 77, no. 4 (1991), 1216–39.

17. Albany (NY) *Evening Journal*, Mar. 15, 1845; *Report of the Select Committee on a Petition to Amend the Excise Laws, No. 40* (Albany, NY, 1837), 2; Gunn, *Decline of Authority*, 144–69; Dinan, *American State Constitutional Tradition*, 68–76.

First, how was “the knowledge of public sentiment” obtained in self-governing societies, and second, were elected representatives and government officials obliged to adhere to majority will when implementing public policy? Prior to local option, these questions were most readily addressed in debates over the “right of instruction”: the right of constituents to instruct their elected representatives on how to act and vote and the duty of representatives to follow those instructions. These debates centered on whether representatives were extensions of their constituents, obligated to conform to their demands and represent their specific needs, or if they were chosen to deliberate on policy issues, keep the general interest as well as their constituents’ needs in mind, and ultimately use their “own judgement” when voting on legislation or administering law.<sup>18</sup>

Local option presented an alternate position on the relationship of public opinion, elected officials, and government administrative bodies as well as a particular view of what “public opinion” was and how it was best ascertained. Representatives offered a policy choice, asked voters to register their views at the ballot box, and bound government administrators to implement the majority will, in this case by either issuing licenses or withholding them. Local option fused the public opinion-finding function to the creation and execution of public policy, removing any intermediary between law and voters and guaranteeing, supporters argued, that public policy explicitly mirrored public opinion. “Public opinion fairly expressed,” resolved the Albany County Temperance Society, “should govern in this as well as in all other matters regulating the government of a democracy.” Reformers assumed that local option constituted fair expression and praised its poll-like ability to provide

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18. “Law-Moral Suasion,” *JATU* 7 (Sept. 1843), 134; “Doctrine of Instruction,” *New Englander & Yale Review* 1 (Apr. 1843), 193. For the earlier background of these general debates, see especially J. R. Pole, *Political Representation in England and the Origins of the American Republic* (Berkeley, CA, 1966); Wood, *Creation of the American Republic*; Morgan, *Inventing the People*; John Phillip Reid, *The Concept of Representation in the Age of the American Revolution* (Chicago, 1989). On instruction, see George Figures Brasington, “Representative Government in Jacksonian Political Thought” (PhD diss., University of Illinois, 1958); Welter, *Mind of America*, 173–75; Ashworth, “Agrarians” & “Aristocrats,” 19, 57; C. Edward Skeen, “An Uncertain ‘Right’: State Legislatures and the Doctrine of Instruction,” *Mid-America* 73 (Jan. 1991), 29–47.

"tangible, reliable evidences, as to public sentiment." They conflated public opinion with the will of voting majorities, which in most states included only adult white males, and also implied that public opinion was best discovered when issues were placed in isolation and voters were given only two choices. Representatives circumscribed the range of opinion by offering only a choice of "License" or "No-License." There was no third or fourth ballot option, such as the ability to vote "Fewer Licenses," nor was there the chance to support, for example, licenses for hotels but not for taverns. Complexity was shunned; compromise positions were off the table. Such expressions of voting majorities were purportedly the purest embodiment of public opinion and democracy's truest agent.<sup>19</sup>

These constructions of public opinion were calculated as well. Local optioners were eager to divest state legislators and other government officials of their traditional ability to gauge independently public opinion and to weigh it in the context of other short-term and long-term community needs. Legislators had ignored temperance reformers' use of the more tried methods of establishing anti-license opinion through petition and memorial, and local administrators often had foiled their grassroots efforts to control local licensing. Furthermore, the traditional place of frequent elections in keeping lawmakers responsive to public opinion failed temperance reformers as state legislators backpedaled after the Massachusetts Fifteen-Gallon fiasco. Local option would authorize voters to circumvent nonresponsive legislatures and obstructionist government officials, and, by acting locally, they could assure pockets of success without having to await a statewide transformation.

As never before, temperance reformers placed popular political empowerment at the center of their agenda; "the power of free suffrage" would, they argued, "exterminate the monster Alcohol." Twenty years earlier leading reformers like Lyman Beecher advocated temperance in part to ensure that the expanding voting population, which many feared, possessed the moral qualities republican self-government required. By the early 1840s, however, leading reformers echoed other democratizers

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19. "Albany County," *JATU* 10 (Apr. 1846), 54; "Law-Moral Suasion," *JATU* 7 (Sep. 1843), 134; Gerrit Smith, *A View of the Excise Law of the State of New York* (Cazenovia, NY, 1841), 6 [Smith's emphasis]; "Maryland State Temperance Society," *JATU* 10 (Mar. 1846), 46.



by routinely complimenting the “virtue and intelligence” of the people, and some even referenced contemporary democratic reforms. “If in the selection of Judges the people could be trusted,” asked attorney John Van Cott, “how was it that they could not be trusted in the matter of establishing grogshops in the corners of the streets?” Truth be told, local option supporters went beyond arguing that adult white males were wise enough to vote for a wider range of public officials. Instead, they suggested that the electorate was moral enough to decide directly public policy and implied that bare majorities were morally superior to government officials. Responding to a critic, one supporter signaled the transformation in temperance thinking. “Our correspondent thinks the people are not to be trusted. . . . They might not have been, in old rum-drinking times, but in these cold-water days, when the judgment is cool and men begin to think about their own best interests and the interests of their children, it might be found to be quite otherwise.” The temperance reform’s successful struggle against drink now legitimated the empowerment of men who would protect their families by putting the Rum Power out of business at the ballot box.<sup>20</sup>

Temperance women were fully cognizant that local option would make them reliant upon male voters. Writing in 1846 on the heels of New York’s first local option election and during the state constitutional convention, an unnamed author, musing about the “Rights of Woman” in a New York women’s temperance magazine, *The Pearl*, queried:

If all the women in New York were voters, how long would it be before their rights would be respected, in the making and the administration of the laws? How long would they permit the existence of three thousand tipping shops in which females never enter, but which are yearly making thousands of drunkards of their brothers and sons?

For those thinking about woman suffrage in the mid-1840s, local option provided a critical context. Participation in this temperance battle catalyzed female politicization, no doubt exposing the limitations of their

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20. “Pennsylvania Responding,” *JATU* 10 (Aug. 1846), 125; Lyman Beecher, *Six Sermons on the Nature, Occasions, Signs, Evils, and Remedy of Intemperance* (Boston, 1827); Gusfield, *Symbolic Crusade*, 39–44; Albany (NY) *Argus*, Apr. 10, 1845; New York *Daily Tribune*, Mar. 25, 1847; “License by the Towns,” *JATU* 8 (May 1844), 73.

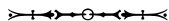
political agency but, at the same time, revealing that the vote itself was transforming. No longer merely used to elect government officials, the ballot was becoming a tool to enact social and moral change directly, and for some women (and perhaps members of other disfranchised groups) this burgeoning new power made their exclusion that much more acutely felt.<sup>21</sup>

Temperance reformers and supportive legislators, however, conveniently ignored any governmental transformation. They declared local option "in perfect harmony with the spirit and genius of our government" and demonized opposition not only as immoral enemies of temperance but also as adversaries of democratic self-rule. "They are false to Popular Government," announced Horace Greeley's *Tribune*, "who refuse the People the right to speak on this question." But amid the moralistic rhetoric, local option's license campaigns and elections opened the door for Americans, particularly those called to the polls in New England, Midwestern, and Mid-Atlantic states, to contemplate the workings of their political system and consider if local option fit. While organizing "the temperance ballot box," reformers bombarded the public with their democratic-republican rationale, and as voters brought "No-License" victories in countless towns and counties in numerous states, temperance odes to local option as the embodiment of popular sovereignty only became more strident. For some like former Ohio jurist Frederick Grimké, the framework was trans-Atlantic, and temperance

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21. *The Pearl* (New York), Jun. 6, 1846; *Ibid.*, Aug. 1, 1846. On women and temperance, see Barbara Leslie Epstein, *The Politics of Domesticity: Women, Evangelism, and Temperance in Nineteenth-Century America* (Middletown, CT, 1981); Jed Dannenbaum, "The Origins of Temperance Activism and Militancy Among American Women," *Journal of Social History* 15 (Winter 1981), 235–52; Ian R. Tyrrell, "Women and Temperance in Antebellum America, 1830–1860," *Civil War History* 28, no. 2 (1982), 128–52; Nancy A. Hewitt, *Women's Activism and Social Change: Rochester, New York, 1822–1872* (Ithaca, NY, 1984); Lori Ginzberg, *Women and the Work of Benevolence: Morality, Politics, and Class in the Nineteenth-Century United States* (New Haven, CT, 1990); Nancy Isenberg, *Sex & Citizenship in Antebellum America* (Chapel Hill, NC, 1998); Martin, *Devil of the Domestic Sphere*. On woman's suffrage and the New York Constitutional Convention of 1846, see Jacob Katz Cogan and Lori D. Ginzberg, "1846 Petition for Woman's Suffrage, New York State Constitutional Convention," *Signs* 22 (Winter 1997), 427–39; Lori D. Ginzberg, *Untidy Origins: A Story of Woman's Rights in Antebellum New York* (Chapel Hill, NC, 2005).

triumphs at the license polls were firm evidence that America's peculiar political system worked. "Let no European after this," he wrote, "indulge in the fanciful notion that the people are incapable of self-government." Reformers set out to validate American democracy by seeing "No-License" decisions enforced, but with resistance brewing this would prove difficult.<sup>22</sup>



When an 1841 New York legislative committee sponsoring local option suggested that the law presented "no aspect of coercion, except that to which all cheerfully submit, the expressed will of the majority," Democratic state assemblyman and prominent editor of the *Democratic Review* John O'Sullivan no doubt shook his head in disbelief. The law, he retorted, was loaded with "legal physical compulsion" directed "against the minority." If license elections produced pro-liquor minorities, it would matter little that the law was "imposed upon them by the local majority" and not the state legislature. Pro-liquor groups would view local option as another "tyrannical . . . interference with the private liberty of drinking or selling what they should please" and would resist.<sup>23</sup>

Four years earlier in his "Introduction" to the *Democratic Review*, O'Sullivan announced the creed of the Democratic Party: majority rule and as he put it, bringing "public opinion . . . to bear more directly upon the action of delegated powers." Local option seemed the perfect fit. Yet even as he rebuked opponents of majoritarian democracy in 1837, O'Sullivan proclaimed "strong sympathy" for minority rights, cautioned democratizers "not to go too fast," and declared "the best government is that which governs least." Local optioners had missed these caveats. They took the "democratic principle" too far, threatened minorities, and in attempting to prohibit the sale of alcohol, exceeded the legitimate

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22. "Oneida County," *JATU* 10 (Feb. 1846), 30; New York *Tribune*, Apr. 17, 1845; "Mass Meeting at Poughkeepsie," *JATU* 9 (Nov. 1845), 163; Frederick Grimké, *The Nature and Tendency of Free Institutions* [1848], ed. John William Ward (Cambridge, MA, 1968), 321. For an overview of the general results of local option elections, see "Eleventh Anniversary of the American Temperance Union," *JATU* 11 (Jun. 1847), 81-82.

23. J. L. O'Sullivan, *Report of the Minority of the Select Committee on the Bill entitled "An act relating to licensing retailers of intoxicating liquors," No. 294* (Albany, NY, 1841), 6.

bounds of government authority. The better approach, he posited, would be to abolish licensing and create a free market in liquor: to make "the whole matter open, and leave it to the undisturbed operation of public opinion, and the moral sense of men and communities." As the legislature again debated local option in 1845, O'Sullivan announced his continued opposition and urged reformers to return to their proven techniques of "moral suasion" before this foray into legal coercion tore apart every "town, village, and ward in the State."<sup>24</sup>

Though temperance reformers gained the support and votes of many Democratic legislators, Democrats like O'Sullivan provided some of the most stinging denunciations of local option. Many accused temperance reformers of being overwhelmed by a "foolish and ultra spirit," and some overtly appealed to immigrant voters, jibing that reformers next would make "possession of a temperance certificate . . . an indispensable qualification for citizenship." Democrats also expanded O'Sullivan's position on limited government, holding local option particularly problematic because it sought to restrict personal freedom in "the field of morals" in which democratic government power, the *Albany Atlas* claimed, was "limited." Notably, the *Atlas*, one of New York's leading Radical Democratic newspapers, earlier supported the People's Resolutions that required statewide voting majorities to approve debt legislation at the ballot box. This did not, however, inspire them to support local option. To the *Atlas*, the two measures were worlds apart. Where the People's Resolutions aimed to circumscribe government power to "safeguard . . . liberty," local option sought to enhance government power to restrict personal freedom by controlling the "moral conduct of the minority." Like efforts to legally coerce Sabbath observance, added the Brooklyn *Eagle*, "There are some things which even a majority cannot rightfully do." This included stipulating "what the minority should be permitted to eat and to drink." The *Eagle* concluded, "The *minority* have rights, as well as the majority; and it is the duty of a republican government to respect those of the former." Unlike advocates who viewed local option

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24. "Introduction," *United States Magazine & Democratic Review* 1 (Oct. 1837), 9, 3; O'Sullivan, *Report*; *New York Morning News*, Mar. 29, 1845; *Ibid.*, Mar. 28, 1845. On O'Sullivan, see Schlesinger, *Age of Jackson*, 371–73; Edward L. Widmer, *Young America: The Flowering of Democracy in New York City* (New York, 1999); Robert D. Sampson, *John L. O'Sullivan & His Times* (Kent, OH, 2003).

as a logical expression of popular self-government, some Democrats saw it as a tyrannical perversion.<sup>25</sup>

Local option brought the ire of some Washingtonian temperance reformers who continued to oppose “legal force” and labor spokesmen who criticized temperance’s narrow focus on liquor as the root of all social evil instead of the more treacherous “inequality of condition.” But as O’Sullivan and others anticipated, the most prolific dissenters were those directly threatened by “No License” decisions: liquor dealers, tavern owners, hotel keepers, brewers, distillers, liquor traders, landlords renting property to liquor-based establishments, their families, friends, and loyal patrons. Local option was an assault on their businesses, familial livelihoods, and, particularly for workingmen and immigrants, their cultural traditions. Like their temperance adversaries, liquor supporters embraced civil society. To defend their “rights” from an “unjust” law, they joined the antebellum rage for associations, holding meetings, pooling funds, passing resolutions, hiring legal counsel, dispatching petitions to state legislatures, and urging the election of sympathetic legislators. All this was necessary, announced one group of New York dealers, to combat the “fanatical and bigoted portion” of the temperance movement who wished to criminalize “their business, which has been sanctioned in all countries from the earliest history.”<sup>26</sup>

For most pro-liquor groups, the critical aspect of their fight came after local majorities outlawed alcohol-based businesses with “No-License” decisions. Building on the tradition of popular resistance that surfaced during the conflict over the Massachusetts Fifteen-Gallon Law, they continued to sell liquor without a license. For some, this probably amounted

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25. New York *Herald*, Apr. 15, 1845; Pittsburgh (PA) *Daily Morning Post*, Jan. 1, 1847; Albany (NY) *Atlas*, Apr. 4, 1845; *Ibid.*, Mar. 25, 1845; Gunn, *Decline of Authority*, 155; Brooklyn (NY) *Eagle*, Apr. 12, 1845. The composition of the 1845 New York General Assembly that voted for local option with little opposition, for example, contained 67 Democrats, 46 Whigs, and 15 “Native American.” *Daily Plebeian* (New York), Jan. 6, 1845.

26. A. B. Grosh, “To A.S., Norwich, N.Y.,” *Evangelical Magazine and Gospel Advocate*, Apr. 3, 1846, 111; *Young America* (New York), Mar. 7, 1846; *Ibid.*, May 24, 1845; New York *Evangelist*, Jun. 18, 1846; Brooklyn (NY) *Eagle*, Dec. 17, 1845; *Niles’ National Register* (Washington, DC), May 3, 1845; New York *Organ*, Jan. 30, 1847; “Shall Liquor Dealers Rule the State?,” *JATU* 10 (Dec. 1846), 188; “Rumsellers’ Petition,” *JATU* 11 (Feb. 1847), 25; Ernst, *Immigrant Life in New York City*, 90–1; Vigilante, “Temperance Reform,” 239–40.

to little more than business as usual, but for others, it was an intentional act of civil disobedience pregnant with a political vision that rejected local option as an inappropriate use of democratic state power. Pro-liquor groups often organized these protests, and participants expected to be arrested, hoping for the opportunity to challenge local option in court. Trials became public spectacles in which crowds heard attorneys deploy a range of arguments against local option, the most common of which was that local option was unconstitutional. A month after New York's 1846 license elections in which 80 percent of the state's 813 towns returned "No-License" majorities, the *Journal of the American Temperance Union* observed, "In every town and village the great question is raised, 'Is the License Law constitutional?'"<sup>27</sup>

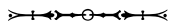
Most asking this question were latching on to speculation that all license laws, of which local option was a type, violated the commerce clause of the U.S. Constitution that empowered Congress to regulate foreign and interstate commerce. Many argued this clause prohibited state governments from interfering with the sale of liquor—an interstate and international commodity—through licensing. This question was a fixture of public debate in the 1840s as a result of a series of cases before the U.S. Supreme Court. Just as local option laws were being put into practice, the *License Cases* brought a star-studded cast of lawyers, including Daniel Webster, to weigh in on whether the license laws of three New England states violated the commerce clause. At stake was not just the propriety of licensing but also the general police power of state governments vis-à-vis the national government, which within the antebellum politics of slavery and anti-slavery had implications that threatened the Union. Temperance reformers monitoring the *License Cases* echoed states' rights advocates, apocalyptically warning that if licensing power was declared unconstitutional, the power to regulate liquor (and seemingly myriad other areas of commerce including slaves) would be stripped from states, opening the door for a much more active federal regulatory role that could spark sectional controversy.<sup>28</sup>

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27. Brooklyn (NY) *Eagle*, Feb. 2, 1847; Rorabaugh, "Prohibition as Progress"; "Constitutional Question," *JATU* 10 (Jul. 1846), 105.

28. *License Cases*, 46 U.S. 504 (1847). On the *License Cases*, see Leonard W. Levy, *The Law of the Commonwealth and Chief Justice Shaw* (New York, 1957), 260; Harold Melvin Hyman and William M. Wiecek, *Equal Justice Under Law: Constitutional Development, 1835–1875* (New York, 1982), 24, 80–82; Novak, *People's Welfare*, 176–77, 324–25.

When the Supreme Court in March 1847 ultimately affirmed states' licensing power, even suggesting that states could prohibit liquor, temperance forces celebrated it as an authorization of their agenda. "All doubt as to the 'Constitutionality of the License Laws,'" proclaimed the American Temperance Union, was "swept away" alongside "the pretended 'rights of the rumseller.'" Along with newspaper editors, both Whig and Democrat, they transposed this validation of general licensing power on to local option statutes. What effect, asked Greeley's *New York Tribune*, would it have on those who resisted "No-License" decisions "on the assumption that they were invalid because unconstitutional"? "On what pretext can they longer persist in their daily violations of the laws of the land?" Commentators presumed that those who intended to challenge local option's constitutionality would "abandon the idea," but with a new political and constitutional critique flowering in Delaware, they would be proven wrong.<sup>29</sup>



Delaware temperance forces followed reformers in other states and spurred the passage of a local option law in 1847, and, as elsewhere, dissenters ridiculed temperance men and women as "fanatical" zealots, argued that moral suasion was the only effective temperance technique, and maintained that "No-License" decisions would infringe upon individual rights. But the stakes of resistance were raised even higher as Delaware liquor dealers enlisted the critical input of two prominent citizens, Amos Wickersham and James A. Bayard, who by March 1847 had publicized a critique of local option that reached beyond the commerce clause. When pro-liquor forces organized a public protest of Delaware's local option law, it probably came as no surprise that Wickersham presided over the meeting and Bayard was the headline speaker. Their involvement would have monumental implications extending well beyond the small state and the license question.<sup>30</sup>

29. "The Great Decision," *JATU* 11 (Apr. 1847), 56; "Decision of the Supreme Court," *JATU* 11 (May 1847), 67; "Circular," *JATU* 11 (Apr. 1847), 56; *An Appeal to the Citizens of the State of Ohio*, 14; "The Great Decision," *JATU* 11 (Apr. 1847), 56; *New York Daily Tribune*, Mar. 13, 1847; *Brooklyn (NY) Eagle*, Mar. 9, 1847; *Pittsburgh (PA) Daily Morning Post*, Apr. 23, 1847.

30. *Blue Hen's Chicken & Delaware Democratic Whig* (Wilmington), Mar. 5, 1847; *Delaware Gazette* (Wilmington), Mar. 16, 1847; *Blue Hen's Chicken & Delaware Democratic Whig* (Wilmington), Mar. 5, 1847; *Delaware Gazette* (Wilmington), Mar. 26, 1847; *Ibid.*, Apr. 2, 1847. For temperance in Delaware, see Charles

Wickersham, a Delawarean whose history has been all but forgotten, achieved notoriety by publicly sparring with the Wilmington-based New Castle County Temperance Society (NCCTS) during the 1846 state legislative elections. Pledging to “vote for no man” unwilling to enact local option, the NCCTS formed a committee to ascertain candidates’ views, and chairman John McClung, a Wilmington merchant, corresponded with each of the candidates. When Wickersham, a Democratic candidate, came out against local option, reformers dubbed him a political opportunist seeking to curry favor with drinkers and an intemperate aristocrat not “*to be trusted by the people.*” His stance on local option, like that of others, became the litmus test of both his temperance principles and his democratic commitments. Much to the dismay of reformers, however, temperance censure, as well as his loss in the legislative election, only drove Wickersham to further develop and disseminate his critique of local option.<sup>31</sup>

Wickersham amplified and enhanced the arguments made by other Democrats, pleading for limited government and challenging local option’s strict majoritarianism. Pointing to the natural rights guarantees of life, liberty, and happiness in the Declaration of Independence and the Delaware Constitution, Wickersham contended these key statements on the promise of democracy established boundaries “limiting the exercise of power even by majorities.” By forgetting that in “*a free government the minority has rights* which must be respected,” local option was “anti-republican, and directly opposed to the spirit and principles of Democracy.”<sup>32</sup>

Wickersham, however, deepened Democratic criticism by suggesting that legislators, standing independent from the people, were obliged to protect minorities from majorities. Local option removed their ability to fulfill that responsibility. In Wickersham’s view, legislators were not mouthpieces of voting majorities or strictly beholden to every shift in public opinion. Rather, they had obligations to the entire community—majorities and minorities—as well as to the state constitution that pro-

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H. Bohner, “Rum and Reform: Temperance in Delaware Politics,” *Delaware History* 5 (1953), 237–69.

31. *Delaware State Journal* (Wilmington), Jul. 3, 1846; *Ibid.*, Mar. 24, 1846; *Delaware Gazette* (Wilmington), Oct. 23, 1846; *Delaware State Journal* (Wilmington), Nov. 3, 1846; *Delaware Gazette* (Wilmington), Nov. 6, 1846; *Delaware Gazette* (Wilmington), Nov. 6, 1846.

32. *Delaware Gazette* (Wilmington), Oct. 23, 1846.



tected natural rights. There rightly were limits to popular political power and involvement in lawmaking, and local option exceeded those limits. The root of the problem, Wickersham asserted, was the skewed logic offered by temperance reformers, which held that local option was a logical manifestation of the American tradition of popular sovereignty. To demonstrate the dangers this posed, Wickersham illustrated the effects if local option was used in scenarios other than licensing. Carefully selecting examples to spark the concern of all good Protestants, Wickersham wrote,

*Swine's flesh* is an abomination to the believers in Judaism. Now if the State of Delaware should contain a majority of Jews, and they should . . . ask the Legislature to pass a law referring the question of *eating pork* to the people; and prohibiting its traffic and use, wherever there was a majority of Jews, the man who should have independence enough to go the "*whole-hog*" in opposition to the law, would be unfit for a legislator and to vote for him, would be to "*vote away the right of self government.*"

Within the realm of imaginable possibility, Wickersham also envisioned many Catholic immigrants who increasingly arrived in northern Delaware falling victim to local option. "The *people*" might want to vote to demolish the churches of "certain religious societies among us, whose doctrines and tenets, are considered . . . inimical to the safety and permanency of our institutions." The commitment to self-government as temperance reformers would have it, Wickersham quipped, would prevent legislators from standing in the way of laws empowering religiously intolerant majorities to oppress minorities. Clearly something was wrong with the local option principle.<sup>33</sup>

The import of Wickersham's position emerged as it fused with the arguments of prominent Wilmington attorney James A. Bayard who hailed from one of Delaware's most prominent families. His father, James A. Bayard, Sr., was a Federalist congressman and senator through the War of 1812, and his older brother, Richard, served as a Delaware senator as well. James, Jr. had already followed this path of public service as a U.S. district attorney and would become a three-term Democratic senator during the turbulent 1850s and Civil War era. He also inherited his

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33. *Ibid.*, Nov. 6, 1846.

family's conservatism, particularly their suspicion of popular rule and belief that the *hoi polloi* needed guidance from elite men of property. These values no doubt bolstered his interest in combating a law authorizing ordinary citizens to decide public policy.<sup>34</sup>

Bayard also had rare practical experience challenging laws like local option in court. Six years earlier he tested the constitutionality of the Delaware school law, which gave localities the option of taxing themselves to fund common schools by majority vote. Bayard's client John Steward voted against the tax but was in the minority, and when the tax collector seized his cow for the nonpayment of taxes, Steward sued the tax collector. Before the Delaware Court of Appeals, Bayard claimed that the legislature unconstitutionally delegated its taxing power—a power of high discretion—to a majority of voters in school districts. This argument was likely torn from John Locke's discussion of the limitations of legislative power in his *Second Treatise of Government* in which he proclaimed, "The legislative cannot transfer the power of making laws to any other hands: for it being but a delegated power from the people, they who have it cannot pass it over to others." For Bayard, this included returning power to the people. Unfortunately for Steward (and perhaps his cow), the Court proved unimpressed and held the law constitutional without opinion. Likely eager for another opportunity to voice his perspective, Bayard found one in the contentious liquor politics surrounding Delaware's local option law.<sup>35</sup>

The popular association of Delaware's pro-liquor forces that united in early 1847 to fight local option facilitated the synthesis, elaboration, and circulation of the Wickersham and Bayard position. At public meetings and in the pages of the Democratic *Delaware Gazette* participants and readers were exposed to their arguments and asked to reconsider local option within the American political system. Was local option an "unconstitutional abandonment" of the "discretionary power entrusted to Legislators"? Did the minority viewpoint have a place in policymaking?

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34. See Roy F. Nichols, *The Disruption of American Democracy* (New York, 1948), 19–20; Jean H. Baker, *Affairs of Party: The Political Culture of Northern Democrats in the Mid-Nineteenth Century* (New York, 1998), 196–211; Joanna Dunlap Cowden, "Heaven Will Frown On Such A Cause Like This": *Six Democrats Who Opposed Lincoln's War* (Lanham, MD, 2001), ch. 3.

35. *Steward v. Jefferson*, 3 Del. 335 (1841); John Locke, *Second Treatise of Government* [1690], ed. C.B. Macpherson (Indianapolis, IN, 1980), 74–75.

Did local option allow “the imperious will of the *majority*” to threaten “*human rights*,” “*freedom*,” and “the sacredness of our liberal institutions”? Most centrally, did local option violate core characteristics of America’s type of democracy?<sup>36</sup>

This interconnected plea for minority rights and representative republican government (or representative democracy) was hardly without pedigree. In the Tenth Federalist, James Madison extolled the virtues of the new national Constitution and the large republic it created by contrasting it with a “pure democracy” in which a “small number of citizens . . . assemble and administer the government in person” without electing representatives. To Madison, pure democracies were breeding grounds for the factious majorities he so feared. They were “spectacles of turbulence and contention” and were “incompatible with personal security [and] the rights of property.” Such democracies, he warned, most threatened the survival of popular self-government. Even more recently though, American political theorist George Camp, in his 1841 treatise *Democracy*, refuted Alexis de Tocqueville’s famous charge in *Democracy in America* that America’s political system facilitated the “tyranny of the majority” by pointing to “the representative system” Americans had adopted. According to Camp, America’s representative institutions not only harnessed the majority viewpoint but also made “great provision for the sentiments and opinions of the minority” to be included in the policymaking process. This fostered consensus, produced policy rooted in the “aggregate sense of [the] community” rather than the whims of majorities, and ultimately, freed the United States from the dangers Tocqueville identified.<sup>37</sup>

Regardless of any tradition Wickersham, Bayard, and Delaware’s pro-liquor forces were joining, temperance reformers scoffed at their position and dismissed their ideas as nothing but the product of unbridled self-interest. They ridiculed the notion that local option was anti-republican, reaffirmed majority rule as the “very foundation” of American government, and mocked claims of “‘unconstitutional Legislation’” and “‘In-

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36. *Delaware Gazette* (Wilmington), Mar. 16, 1847; *Ibid.*, Mar. 19, 1847; *Ibid.*, Apr. 2, 1847.

37. J. R. Pole, ed., *The Federalist* [1787–78] (Indianapolis, IN, 2005), 51–52; George Sidney Camp, *Democracy* (New York, 1841), 185–86, 194–95.

dividual Rights'” as “false issues.” As far as the Delaware Ladies’ Temperance Convention was concerned, only the “rights of property” of a few liquor dealers were at issue, and they dwindled “into insignificance when compared with the rights of life and liberty” that local option could protect. Once the United States Supreme Court decided the *License Cases* in March 1847 and a “No-License” majority triumphed in New Castle County’s April election, Delaware temperance forces no doubt concluded that the Wickersham–Bayard critique was meaningless and mattered little to the majority.<sup>38</sup>

New Castle County’s liquor supporters, however, employed Bayard to challenge local option before Delaware’s highest court. While Bayard prepared his case, the New York local option situation was becoming increasingly volatile. Pro-license New Yorkers flooded the legislature with petitions for repeal, and a second round of license elections in 1847 yielded disastrous results for temperance forces with town after town returning “License” majorities. Not surprised by the reversal, the New York *Evening Post* suggested that it was caused by lax enforcement, the spirit of defiance surrounding the law, and the “bitter feuds” that had erupted “between the license and the no license party.” While some thought local option should stand, all in all, the reversal made it easy for the legislature to repeal the law.<sup>39</sup>

Before the reversal, however, a bipartisan New York Assembly committee considering petitions for repeal showed the distinct influence of the Wickersham–Bayard concern for representative democracy and minority rights. “All other public majorities,” they declared, “elect delegates or representatives to form organic bodies, in which measures or laws are discussed and adopted, and in which minorities can be heard; or they elect public officers who are equally the servants of the minorities.” Without representative structures there was no way for the minority voice to be included in policymaking and there was nothing “to mitigate and restrain the delegated power of the several majorities over the minorities.” Local option violated the New York state constitution and estab-

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38. *Delaware Gazette* (Wilmington), Mar. 23, 1847; *Ibid.*, Mar. 20, 1847; *Ibid.*, Mar. 23 1847.

39. *Ibid.*, May 7, 1847. On the results of the Delaware license election, see *Ibid.*, Apr. 9, 1847; “Delaware.–Victory!,” *JATU* 11 (May 1847), 73.

lished a “new and anti-American kind of democracy” that facilitated majoritarian “despotism.”<sup>40</sup>

As the Delaware anti-local option position gained currency elsewhere, Bayard prepared a test case to challenge Delaware’s law and secured the assistance of longtime friend (and notorious drinker) John M. Clayton, who was serving a second term as one of Delaware’s U.S. senators. Clayton, another of Delaware’s favorite sons, was leader of the state’s Whig Party and the former chief justice of Delaware’s highest court. His participation alongside of Bayard, a Democrat, created a bipartisan team comprising two of the most well-respected legal minds in the state, nearly guaranteeing that the case would garner widespread attention and that their arguments would be taken seriously regardless of party affiliation. Indeed, Clayton’s remarks before the court became the substance of the court’s opinion.<sup>41</sup>

The key argument Bayard and Clayton advanced would have been familiar to anyone following the Delaware debate: With local option the legislature violated the state constitution and “the limitations of legislative power necessarily involved in a representative republican form of government” by improperly delegating its legislative power “to a majority of the people of a county.” Calling on voters to decide on a law amounted to lawmaking, and though Bayard and Clayton endorsed the “ultimate sovereignty” of the people, they insisted that it was “never to be exercised” by the people “collectively.” In forming a constitution, the people had “surrendered” all lawmaking power to elected representatives “for their own good,” and barring constitu-

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40. *Report of the Majority of the Committee on the Internal Affairs of Towns and Counties, on the petitions and papers relative to the repeal of the Excise Law of 1845*, (Albany, NY, 1847), 2–4, 11–16.

41. *Rice v. Foster* was a fictional “test case” created by Bayard for the specific purpose of challenging local option before the Delaware Court of Errors and Appeals. On the relationship of Bayard and Clayton, see Joseph Parsons Comegys, *Memoir of John M. Clayton* (Wilmington, DE, 1882), 33–34. On Clayton generally, see Munroe, “Party Battles”; Richard Arden Wire, “John M. Clayton and the Search for Order: A Study in Whig Politics and Diplomacy” (PhD diss., University of Maryland, 1971); John A. Munroe, *History of Delaware* (Newark, DE, 1979), 115–17. On Clayton’s fondness for drink, see Michael Holt, *The Rise and Fall of the American Whig Party: Jacksonian Politics and the Onset of the Civil War* (New York, 1999), 565–66.

tional change, they could never reclaim and the legislature could never return such power.<sup>42</sup>

Bayard and Clayton took the opportunity to school the court and onlookers in the significant advantages of "representative Democracy" over "pure democracy." First, they broadcast that representative government made for better policymaking because representatives could calmly meet, separated from the passions of the people, for "deliberation, consultation and judgment" to balance the competing needs of society, while acting "under oath" to protect and uphold the constitution. Direct democracies, by contrast, were not deliberative and involved the masses acting "not under oath" and "not in consultation, but assembled under all circumstances of excitement; swayed by every wave of passion or prejudice; misled by every demagogue, and subjected to every influence but those which should attend calm and sound legislation." Second, representative democracy importantly allowed legislatures to consider and protect minorities like liquor dealers and drinkers when making law. "This is a right of minorities," they declared, "which it was the object of the constitution to secure." There was "no greater tyranny," they concluded, "than [local option's] mode of making or administering law."<sup>43</sup>

Clayton also predicted that local option would not stop at liquor licensing. Rather, whenever legislators "would seek to throw off the responsibility of a doubtful" or controversial law, they would "leave it to the people" to decide. In 1847 there was no shortage of contentious issues, and Clayton made telling choices: the abolition of capital punishment, the Anti-Rent Wars of upstate New York, and labor reformers' calls for property redistribution. With the latter, Clayton referenced longstanding elite fears that excessively democratic governments governed by needy majorities would infringe upon the rights of propertied minorities. Quoting labor leader George Henry Evans's 1845 land-reform circular, Clayton asked, "How long will a majority refuse to 'vote themselves farms,' when the poll is opened for that purpose?" Most assuredly, Clayton insisted, direct democracy would allow the "wild doctrines of Agrarianism" to threaten "the permanency and stability of property titles" in the future.<sup>44</sup>

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42. *Delaware Gazette* (Wilmington), June 18, 1847; 4 Del. 479.

43. *Delaware Gazette* (Wilmington), June 18, 1847.

44. *Ibid.* On debates over capital punishment in the 1840s, see David Brion Davis, "The Movement to Abolish Capital Punishment in America, 1787-1861," *American Historical Review* 63 (Winter 1957), 23-46; Philip English MacKey,

There was another form of property Clayton suggested would be soon brought to the ballot box—slave property. Just as Delaware legislators enacted local option, they also considered a bill to gradually abolish slavery in their state. The measure passed the lower house, but was postponed indefinitely by one vote in the Senate. In Clayton’s view, if “the question of slavery” was put to local referenda, Delaware’s three counties would return different results, and “the State, instead of presenting one rule of conduct . . . may present as many rules as there are Counties.” To Clayton, “general subjects” like licensing and slavery required centralized policy at the state level. With the legal difficulties slave masters encountered when sojourning with their slaves to free states widely known in the late 1840s, Clayton asked the court and the many who followed the case to imagine the problems that would ensue if slavery were legal in one of Delaware’s counties yet illegal in another. “Yet who will say,” he maintained, “that the question of slavery is not as proper to be submitted to the people’s decision in this form of legislation as the question of retailing liquor?”<sup>45</sup>

Delaware probably was not the only house dividing that concerned Clayton. Nationally, the Mexican War and the prospect of slavery’s westward expansion sparked major controversy amid local option debates. The 1846 Wilmot Proviso, which proposed that slavery be excluded from any territory acquired from Mexico, catalyzed discussions about congressional power over slavery in the territories. By early 1847, some

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*Hanging in the Balance: The Anti-Capital Punishment Movement in New York State, 1776–1861* (New York, 1982); Louis P. Masur, *Rites of Execution: Capital Punishment and the Transformation of American Culture, 1776–1865* (New York, 1989). On the Anti-Rent Wars and land reform politics in the 1840s, see Huston, *Land & Freedom*; Charles W. McCurdy, *The Anti-Rent Era in New York Law and Politics, 1839–1865* (Chapel Hill, NC, 2001); Wilentz, *Chants Democratic*; Earle, *Jacksonian Antislavery*; Mark A. Lause, *Young America: Land, Labor, and the Republican Community* (Urbana, IL, 2005).

45. *Ibid.* On slavery in Delaware and the 1847 gradual abolition bill, see Munroe, *History of Delaware*, 120; John A. Munroe, “The Negro in Delaware,” *South Atlantic Quarterly* 56, no. 4 (1957), 428–44; Patience Essah, *A House Divided: Slavery & Emancipation in Delaware, 1638–1865* (Charlottesville, VA, 1996), 158–61; William H. Williams, *Slavery & Freedom in Delaware, 1639–1865* (Wilmington, DE, 1996), 172–73. On the problem of slaves and interstate travel, see Paul Finkelman, *An Imperfect Union: Slavery, Federalism, and Comity* (Chapel Hill, NC, 1981).

congressmen suggested that territorial residents decide themselves whether slavery be permitted, and in late 1847, before his 1848 presidential run, Democrat Lewis Cass—a temperance champion from the local option state of Michigan—publicized this popular sovereignty proposal. He declared, "Leave to the people who will be affected by this question, to adjust it upon their own responsibility and in their own manner, and we shall render another tribute to the original principles of our Government, and furnish another guarantee for its permanence and prosperity." These words easily could have been mustered to support local option, but instead Cass applied them to the problem of slavery in the territories. Clayton, as a senator, would have been privy to early proposals for territorial self-determination, proposals that could result in slavery's extension. But in 1847, the Delaware state legislature, led by Whigs and representatives from New Castle County where slavery was in serious decline, advised Clayton to oppose the extension of slavery. It is possible that Clayton sought to expose the contradiction of those who supported the local option approach to the license question yet would oppose the popular-sovereignty solution to the slavery question (or perhaps vice versa). Regardless, Clayton saw legislators in both scenarios dodging responsibility by requiring voters to decide the vexed moral questions of liquor licensing and slavery at the ballot box.<sup>46</sup>

Still, there were other connections to slavery. Just days before Clayton and Bayard argued *Rice v. Foster*, the *Delaware Gazette* offered further intellectual support for the anti-local-option position. The *Gazette* published an article entitled "Popular Government" containing an extract of a letter penned by the great defender of slavery John Calhoun in which he explained his opposition to the idea that the "numerical majority . . . has the inherent and absolute right to govern, a sort of right divine like that claimed by Sir Robert Filmer for Kings." The editors urged readers,

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46. *Delaware Gazette* (Wilmington), June 18, 1847; Willard Carl Klunder, "Lewis Cass and Slavery Expansion: 'The Father of Popular Sovereignty' and Ideological Infanticide," *Civil War History* 32 (Dec. 1986), 293–317; Essah, *A House Divided*, 161. See also Klunder, *Lewis Cass and the Politics of Moderation* (Kent, OH, 1996), 65–66, 240–45; Michael A. Morrison, *Slavery and the American West: The Eclipse of Manifest Destiny and the Coming of the Civil War* (Chapel Hill, NC, 1997), 84–85; David M. Potter, *The Impending Crisis, 1848–1861* (New York, 1976); William W. Freehling, *The Road to Disunion: Secessionists at Bay, 1776–1854* (New York, 1990).



which no doubt included the jurists of Delaware's high court, to consider Calhoun's position as they pondered "the true character of government, the proper extent of popular power, the nature and objects of constitutions, and the possession of natural or reserved rights"—all themes presented by local option and particularly by dissenters. Calhoun, of course, combated democratic majoritarianism first and foremost to defend the right of white southerners to hold black slaves as property from the potential threat of an anti-slavery majority. Some challenging local option no doubt saw a connection between Calhoun's thought and the prospect of using direct democracy to decide the question of slavery either in Delaware or in western territories. Others, however, had different concerns and perhaps made no linkage to slavery. For liquor dealers, drinkers, and others unwilling to cede the right to sell and procure alcohol to an anti-license majority, local option on its own brought home the dangers of the unbounded vision of majoritarian democracy that so troubled Calhoun. As dealers and drinkers came to terms with their own minority status amid the local option fight, Calhoun's concerns no doubt registered with many of them and perhaps in ways they previously had not.<sup>47</sup>

Despite the efforts of the opposing attorney, the Delaware Court of Errors and Appeals unanimously declared local option a delegation of legislative power that unconstitutionally created a "pure democracy." Not to be outdone by Bayard and Clayton, Chief Justice James Booth, himself a Whig, crafted his own paean to representative government and, more than Bayard, Clayton, and other dissenters, attempted to reclaim the distinction between democratic and republican governments that local option's supporters and other antebellum Americans conflated. He insisted that the United States and the state of Delaware were not democracies but republics, and unlike democracies, the very nature of republics demanded representative institutions. Though Booth rooted the court's decision in the "principles, spirit, and true intent and meaning of the [Delaware] constitution," he also pointed to Article IV, Section 4 of the national constitution to preempt any future changes to the state constitution that might authorize local option-style policymaking. According to Booth, the "guarantee clause," which commands that "The United States shall guarantee to every State in this Union a Republican Form of Government," prevented "the people" from altering the state

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47. *Delaware Gazette* (Wilmington), May 28, 1847.

constitution to "establish a democracy, or any other than a republican form of government." Barring a change to the national constitution, he implied, states could never subvert "representative republican" government by authorizing voters to decide directly policy at the ballot box.<sup>48</sup>

Standing out in Booth's lengthy opinion was his alarm with the disingenuous deification of the people that facilitated local option and blinded the populace to the dangerous transformation in governance it initiated. He derided temperance reformers' use of the unassailable rhetoric of democratization and insinuated that their laudable attempt to protect the nation's moral foundations actually steered a path toward political instability and demoralization. Booth had even less tolerance for legislators who had declined their constitutional responsibilities as lawmakers. Looking to Edmund Burke's position on the value of the independent representative, he proclaimed, "*The representative owes to his constituents, not only his industry, but his judgment; and he betrays, instead of serving them, if he sacrifices it to their opinions.*" Legislators rightly were separated from the people and needed to balance momentary public opinion within a broad range of concerns. If legislators continued to pass difficult questions to the voters, Booth warned,

all barriers so carefully erected by the constitution around civil liberty, to guard it against legislative encroachments, and against the assaults of vindictive, arbitrary, and excited majorities, will be thrown down; and a pure democracy, "the worst of all political evils," will hold its sway under the hollow and lifeless form of a republican government.

With a nod toward the importance of judicial review, Booth concluded that the "independent and upright judiciary" must be the bulwark of representative government and minority rights by exorcising laws like local option from the statute book.<sup>49</sup>

Beyond Burke, Booth also justified his position with the words of James Madison: An expansive representative republic would prevent the "vices of democracy" that plagued "ancient and modern republics," not least "the majority trampling on the rights of the minority." Though Madison articulated this position in defense of the new national constitu-

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48. 4 Del. 479, 499, 488; Wiecek, *Guarantee Clause*, 252-53, 261-62.

49. 4 Del. 479, 488-89, 498-99.

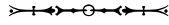
tion in 1787, nearly sixty years later Booth brought it to bear on state-level lawmaking and constitutionalism. In the process, Booth ensured the continuing relevance of Madisonian countermajoritarian political thought in antebellum debates over the limits of democratization and in future considerations of direct democracy.<sup>50</sup>

The context of Booth's turn to Madison—antebellum liquor politics and local option—also signaled a subtle and important shift in the application of American thinking about the dangers of majority rule. In the climate of the critical period of the 1780s, Madison, like many other founding elites, most feared overly democratic state governments because they were too responsive to poor and indebted majorities, threatened the property rights of creditors, and imperiled the young nation's financial future. As Madison famously observed in Federalist No. 10, the inevitable "unequal distribution of property" produced propertyless majorities hostile to propertied minorities. John Clayton's contention that local option next would be used to promote property redistribution indicated that these Madisonian apprehensions persisted in antebellum America. Nevertheless, the tyrannical majorities and oppressed minorities that actually emerged as a result of local option were not the impoverished masses pitted against the few propertied elites. Rather, pro-temperance moral majorities, brought to the ballot box by middle-class reformers with the support of wealthy elites, had threatened the property rights and cultural traditions of alcohol-friendly moral minorities. As they applauded the Delaware court's decision, pro-liquor groups, whether they knew it or not, buttressed a tradition of political thought that predominantly had been mustered to defend the property rights of an elite minority. At the same time though, their embrace of American countermajoritarianism, born of their conscious decision to resist local option, altered its significance, not least by helping to democratize the tradition for future use by other non-elite minorities in battles against hostile public policies sanctioned by majority rule.<sup>51</sup>

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50. 4 Del. 479, 485–89.

51. Pole, ed., *The Federalist*, 49–50. See especially Wood, *Creation of the American Republic*; Jennifer Nedelsky, *Private Property and the Limits of American Constitutionalism: The Madisonian Framework and Its Legacy* (Chicago, 1990); Jack Rakove, *Original Meanings: Politics and Ideas in the Making of the Constitution* (New York, 1996); Woody Holton, *Unruly Americans and the Origins of the Constitution* (New York, 2007).



*Rice v. Foster* quickly became the paradigmatic local option case, and many took notice. For some, it forced not only a rethinking of their earlier stances on local option but also a reassessment of the nature and structure of American government. For example, the Philadelphia *North American*, which like many Whig organs previously supported local option, now saw local option not simply as a question of liquor licensing, but as “a question of Elective Legislation or Representative Legislation—a question whether laws should be made at the ballot box or in a legislative chamber.” All citizens should read Clayton’s speech and, they implied, contemplate if America’s brand of popular sovereignty was a representative or a pure democracy. Meanwhile, those who opposed local option from the start gained a new way to condemn a policy they abhorred and a nuanced perspective on American democracy. The Harrisburg *Democratic Union*, for example, praised the efforts of partisan enemy John Clayton and maintained that his nondelegation of legislative power argument was “a Conservative Principle upon which the stability of the Government and the inviolability of the Constitution depended.” If Clayton and the Delaware Court were correct, the Pennsylvania local option law “must be also unconstitutional.”<sup>52</sup>

Liquor dealers and their attorneys outside of Delaware agreed. Armed with the Delaware precedent and arguments for representative democracy and minority rights, they demanded that other state courts declare local option unconstitutional and that legislatures reinstate old laws giving discretionary licensing power to government officers. In the process they kept debates about ballot-box legislation and the character of American democracy quite literally on the front page. When the Pennsylvania Supreme Court ruled against local option, for example, the Pittsburgh *Gazette* responded to the “general demand” for the Court’s opinion by foregoing the usual litany of advertisements on the first page and publishing the “very long” opinion instead. *Parker v. Commonwealth* (1847) joined *Rice v. Foster* as another touchstone statement against local option and direct democracy. Shortly thereafter a New Jersey legislative committee advocating repeal borrowed from *Rice v. Foster*, and even in the

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52. *North American* (Philadelphia, PA), June 18, 1847; *Democratic Union* (Harrisburg, PA), June 20, 1847.

middle of the Atlantic, Bermuda's legislature rejected local option, arguing that it "was tantamount to the delegating back of the power of the Legislature." Important constitutional precedents were set, but equally important, a particular vision of freedom within democratic political society was authenticated, one requiring representative political structures, the separation of popular majorities from formal lawmaking power, and the inclusion of minority interests in policymaking.<sup>53</sup>

For temperance reformers, adverse court decisions, the repeal of local option, and the reinstatement of old licensing statutes signaled not only the passing of an era of temperance action but also the existence of a conspiracy to undermine what was to them the basis of American freedom—majority rule. As the ATU explained in 1848,

The great republican principle that majorities shall govern, has been the foundation of our freedom, the security of our rights, and the stimulus in all our efforts to make this an enlightened and virtuous republic. . . . But since we have come to matters of moral reform . . . it is not what the majority say, but what will gratify these panderers to wickedness, and enrich the men who are filling poor houses and jails with miserable tenants.

Once again, they bellowed, "the rum power rules the nation." The only solution was to fill state governments with incorruptible temperance men who would adhere to public opinion and end the license system once and for all. Following the pioneering efforts of prohibition champion Neal Dow in Maine, reformers set their sights on statewide prohibitory laws, and by 1855, thirteen states and territories passed Maine Laws that outlawed the sale of liquor. For liquor dealers, immigrants, drinkers, and

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53. *Parker v. Commonwealth*, 6 Pa. 507 (1847); Pittsburgh (PA) *Gazette*, Nov. 10, 1847; *Daily National Intelligencer* (Washington, DC), Nov. 15, 1847; *Report of the Majority of the Committee of Assembly, to which were referred the Petitions for the Repeal of the License Law of the Last Legislature* (Trenton, NJ, 1848), 10; "Temperance in Bermuda," *JATU* 12 (June 1848), 92. For other local option cases where the arguments legitimated in *Rice v. Foster* and *Parker v. Commonwealth* were employed (with mixed results), see *Garner v. State*, 8 Blackf. 568 (1848); "Indiana," *JATU* 12 (Apr. 1848), 62; *Maize v. State*, 4 Ind. 342 (1853); "Illinois," *JATU* 14 (Mar. 1850), 46; *Geebrick v. State*, 5 Iowa 491 (1857); "The Constitutional Question," *JATU* 12 (Oct. 1848), 154; *State v. Copeland*, 3 R.I. 33 (1854); *State v. Swisher*, 17 Tex. 441 (1856); *Bancroft v. Dumas*, 21 Vt. 456 (1849).

others, these laws marked a new stage in antebellum liquor politics, and though typically enacted by legislatures and not directly by voters, many dissenters viewed Maine Laws as another manifestation of the "Tyranny of the Majority." Having learned the benefits of collective action during their local option fight, pro-liquor groups again would join forces to defend their interests, traditions, and vision of democracy and freedom in state houses, courtrooms, and the wider public sphere.<sup>54</sup>

Though prohibitionists and anti-prohibitionists continued to battle over majoritarian democracy elsewhere, the local option episode remained significant as ballot-box legislation took on a life of its own. On the one hand, other reformers seeking to make state government more responsive to the people built upon the tactics of temperance reformers who had pioneered an extrapartisan single-issue politics that successfully brought direct democracy to bear on the divisive license question in nearly half the states of the Union. Following their temperance predecessors, they would invoke the Jacksonian creeds of majority rule and popular political empowerment to justify their proposals. On the other hand, those challenging ballot-box legislation turned to the arguments cultivated and constitutionalized in Delaware. Whether confronting ballot-box legislation asking voters to approve taxes to support internal improvements and common schools; statewide liquor prohibition (as in Michigan); the post-Civil War revival of local option; or the explosion of initiative, referendum, and recall during the Progressive Era, dissenters argued for limits to majority rule and popular political empowerment, the protection of minority rights, and popular sovereignty in the form of representative as opposed to direct democracy. At times these arguments proved persuasive to legislators, state constitution makers, and jurists who decided against direct democracy. As evidenced by the growth of direct democracy in the late nineteenth and early twentieth century and

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54. "Recent Developments," *JATU* 12 (Apr. 1848), 56; "Twelfth Anniversary," *JATU* 12 (June 1848), 83; Boston (MA) *Weekly Messenger*, May 30, 1855. On Maine Law prohibition, see Krout, *Origins of Prohibition*, 283–96; Frank L. Byrne, *Prophet of Prohibition: Neal Dow and His Crusade* (Madison, WI, 1961); Clark, *Deliver Us From Evil*, 45–49; Tyrrell, *Sobering Up*, 252–89; Dannenbaum, *Drink and Disorder*, 106–55; Blocker, *American Temperance Movements*, 54–60; Novak, *People's Welfare*, 177–89; Pegram, *Battling Demon Rum*, 39–42; Quist, *Restless Visionaries*, 265–80.

its widespread existence today, however, this position was just as often relegated to minority reports and dissenting opinions.<sup>55</sup>

Nonetheless, the liquor politics surrounding local option sparked debates that critically uncovered, energized, and reshaped vital components

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55. The success of antebellum legal challenges to ballot-box legislation was mixed. See *Commonwealth v. Judges of Quarter Sessions*, 8 Pa. 391 (1848); *Commonwealth v. Painter*, 10 Pa. 214 (1849); *Caldwell v. Reynolds*, 10 Ill. 1 (1848); "Supreme Court of Illinois, December Term, 1848," *American Law Journal* 8 (May 1849), 487–501; "American Law Journal," *Saturday Evening Post* (Philadelphia, PA), May 19, 1849; *Johnson v. Rich*, 9 Barb. 680 (1851); *Thorne v. Cramer*, 15 Barb. 112 (1851); *Railroad Co. v. Commissioners of Clinton County*, 1 Ohio St. 77 (1852); *State v. Scott*, 17 Mo. 521 (1853); *State v. Field*, 17 Mo. 529 (1853); *Police Jury v. McDonogh*, 8 La. Ann. 341 (1853); *Sharpless v. Mayor of Philadelphia*, 21 Pa. 147 (1853); "On Municipal Subscriptions to the Stock of Railroad Companies," *American Law Register* 2 (Nov. 1853), 1–20; *Moers v. City of Reading*, 21 Pa. 1853 (1853); *Bradley v. Baxter*, 15 Barb. 122 (1853); *Barto v. Himrod*, 8 N.Y. 483 (1853); *Maize v. State*, 4 Ind. 342 (1853); *People v. Collins*, 3 Mich. 343 (1854); *City of Paterson v. Society*, 24 N.J.L. 385 (1854); *State v. Parker*, 26 Vt. 357 (1854); *Bull v. Read*, 54 Va. 78 (1855); *Santo v. Iowa*, 2 Iowa 165 (1855); *Bank of Rome v. Village of Rome*, 18 N.Y. 38 (1858); *Meshmeier v. State*, 11 Ind. 391 (1859); *Alcorn v. Hamer*, 38 Miss. 652 (1859); *Foster v. Kenosha*, 12 Wis. 616 (1860); Thomas Cooley, *A Treatise on Constitutional Limitations Which Rest Upon the Legislative Power of the States of the American Union*, 5<sup>th</sup> Ed. (Boston, 1883), 139–148. On continued debates in state constitutional conventions, see Dinan, *American State Constitutional Tradition*, 76–96. On temperance and local option in the late nineteenth century, see Jack S. Blocker, *Retreat from Reform: The Prohibition Movement in the United States, 1890–1913* (Westport, CT, 1976); Clark, *Deliver Us From Evil*, 92–117; K. Austin Kerr, *Organized for Prohibition: A New History of the Anti-Saloon League* (New Haven, CT, 1985); Richard F. Hamm, *Shaping the Eighteenth Amendment: Temperance Reform, Legal Culture, and the Polity, 1880–1920* (Chapel Hill, NC, 1995); Szymanski, *Pathways to Prohibition*, 100–21. For examples of Progressive Era commentators negotiating arguments about majority rule, minority rights, representative democracy, and the delegation of power, see William Bennett Munro, ed., *The Initiative, Referendum and Recall* (New York, 1913); Delos F. Wilcox, *Government By All the People or the Initiative, the Referendum, and the Recall as Instruments of Democracy* (New York, 1913); "The Delegation of Legislative Power," *Dickinson Law Review* 19 (Jan. 1915), 91–107; Thomas Goebel, *A Government By the People: Direct Democracy in America, 1890–1940* (Chapel Hill, NC, 2002), 48–67. Modern political scientists continue to point to the problem of majority tyranny when discussing direct democracy. For recent examples, see Richard J. Ellis, *Democratic Delusions: The Initiative Process in America* (Law-

of the American countermajoritarian tradition, lending legitimacy to a vision of democracy that was not strictly majoritarian and included minority rights. While local option seemed to mesh with the Jacksonian faith in majority rule and popular political empowerment, the challenge of liquor dealers and their attorneys pushed many to begin to reassess that faith. Especially for immigrants, partisan Democrats, and others who might otherwise have been strong proponents of majoritarian democracy's egalitarian promise, local option brought them face to face with the Jacksonian credo falling into the wrong hands and being used to justify excessive state power and limitations on popular freedom. Those who questioned local option turned to the thinking of James Madison, John Calhoun, Edmund Burke, and others with reservations about unbridled majority rule. Elites harboring their own reservations about democracy like James Bayard probably needed little convincing, but other professed democrats no doubt winced as they employed the positions of these renowned anti-democrats. Contemporaries noted these "peculiar" connections. "The old, high toned Federal party," observed the *Pittsburgh Gazette*, "hardly assumed higher ground in removing active, responsible, delegated power, from the people." Many who opposed local option in the late 1840s and continued to object to ballot-box legislation with pleas for representative institutions and minority rights, however, did not seek to oppose democracy or return to the elitist Federalist-style deferential politics of an earlier era. Instead, they saw different types of popular self-rule and favored its representative form. To them, it better ensured freedom within governments of popular sovereignty by helping avert "the tyranny of the changeable majority."<sup>56</sup>

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rence, KS, 2002); Steven L. Piott, *Giving Voters a Voice: The Origins of Initiative and Referendum in America* (Columbia, MO, 2003); John G. Matsusaka, *For the Many or the Few: The Initiative, Public Policy, and American Democracy* (Chicago, 2004); Kenneth P. Miller, *Direct Democracy and the Courts* (New York, 2009).

56. Pittsburgh (PA) *Gazette*, Nov. 10, 1847; *Ex Parte Wall*, 48 Cal. 279, 314, 316 (1874).