

## SOVEREIGNTY AND SEPARATION: JOHN TAYLOR OF CAROLINE AND THE DIVISION OF POWERS

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### INTRODUCTION

Few figures in American history have faded farther from renown to obscurity than John Taylor of Caroline. John Taylor was not only a widely respected United States Senator and leading member of Thomas Jefferson's Republican party, but he was also, in the opinion of British political scientist M.J.C. Vile, "the most impressive political theorist that America has produced."<sup>1</sup> An Antifederalist lawyer and farmer, Taylor made such thoughtful contributions to the development of the Republican party and the philosophy of states' rights that American constitutional scholar and historian Kevin R. C. Gutzman identified him as "Virginia's favorite thinker" over the course of the Revolutionary period to the antebellum era.<sup>2</sup> Taylor wrote profusely over the course of his life, devoting most of his attention to expounding the meaning of the American Revolution, the substance of the Constitution, and the principles of the American polity.<sup>3</sup> But despite consensus "[a]mong specialists in the field of American intellectual history and political thought" that Taylor "deserves the status of a major thinker," Taylor is little known by most audiences today.<sup>4</sup> And even though historians, political scientists, and legal scholars "have often agreed that Taylor was important, they have seldom agreed why."<sup>5</sup> This Comment highlights one aspect of Taylor's thought that warrants particular attention because of its

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<sup>1</sup> M.J.C. VILE, *CONSTITUTIONALISM AND THE SEPARATION OF POWERS* 183 (2nd ed., 1998).

<sup>2</sup> KEVIN R. C. GUTZMAN, *VIRGINIA'S AMERICAN REVOLUTION: FROM DOMINION TO REPUBLIC, 1776-1840*, at 171 (2007).

<sup>3</sup> See Manning Dauer and Hans Hammond, *John Taylor: Democrat or Aristocrat?*, 6 J. POL. 381, 381 (1944) (stating that Taylor "published nearly two thousand pages of formal works during his lifetime").

<sup>4</sup> CHARLES WILLIAM HILL, JR., *THE POLITICAL THEORY OF JOHN TAYLOR OF CAROLINE* 9 (1977).

<sup>5</sup> *Id.* at 9.

relevance to modern discussions of federalism, separation of powers, and states' rights in hopes of bringing Taylor's work into the light it merits.

John Taylor, perhaps more than any of his contemporaries, offered a systematic vision for the American Republic as an agrarian society supported by strong morals.<sup>6</sup> Taylor's writing "style was loose and undisciplined, and the length and repetitiveness of his works was hardly designed to make him a truly popular author."<sup>7</sup> He gained prominence as a pamphleteer, which contributed to his legacy as an "[i]nveterate Antifederalist[]." <sup>8</sup> Taylor was unique among his contemporaries because he not only responded to the political questions of the day, but he also considered their larger implications by theorizing more broadly.<sup>9</sup> Taylor's ability to abstract from the concrete to the theoretical places him among the greatest thinkers in American history, and his ideas had great influence over his contemporaries and subsequent generations.<sup>10</sup> That is why American historian Gordon S. Wood considered him to be "the philosopher of agrarian Republicanism."<sup>11</sup> Taylor's thought exhibits the characteristic aspects of Republicanism in the Jeffersonian era, including agrarianism and opposition to aristocracy and corruption through "paper and patronage."<sup>12</sup> These economic views are what led influential historian Charles A. Beard to conclude that "Taylor's *Inquiry* deserved to be ranked with the top two or three political works ever produced in the United States because it attempted to put egalitarian political democracy on sound economic foundations."<sup>13</sup> The society

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6 See VILE, *supra* note 1, at 183 (arguing that Taylor "presented the essence of Republicanism in a systematic and coherent theory of politics which few can match.").

7 *Id.*

8 ROBERT H. WIEBE, *THE OPENING OF AMERICAN SOCIETY: FROM THE ADOPTION OF THE CONSTITUTION TO THE EVE OF DISUNION* 94 (1985).

9 See Grant McConnell, *John Taylor and the Democratic Tradition*, 4 WEST. POL. Q. 17, 23 (1951) ("What distinguishes Taylor from other political pamphleteers of the time, however, is that he was led from the immediate problem of the encroachments of a particular group in his own time to a consideration of the problem in general and abstract form.").

10 See Joseph R. Stromberg, *Country Ideology, Republicanism, and Libertarianism: The Thought of John Taylor of Caroline*, 6 J. LIBERTARIAN STUD. 35, 35 (1982) (concluding that Taylor "occupies a major place in the history of Anglo-American political thought").

11 GORDON S. WOOD, *EMPIRE OF LIBERTY: A HISTORY OF THE EARLY REPUBLIC, 1789–1815*, at 659 (2009).

12 JOHN TAYLOR, *AN INQUIRY INTO THE PRINCIPLES AND POLICY OF THE GOVERNMENT OF THE UNITED STATES* 99 (1950) [hereinafter *INQUIRY*]; see also VILE, *supra* note 1, at 183 ("Taylor represented all the major characteristics of the Jeffersonian point of view. He was an agrarian, bitterly opposed to banking and financial interests, the 'aristocracy of paper and patronage' as he called them.").

13 HILL, *supra* note 4, at 10; see generally CHARLES BEARD, *ECONOMIC ORIGINS OF JEFFERSONIAN DEMOCRACY* (1915).

envisioned by Taylor therefore incorporated democratic principles both economically and politically.

This Comment attempts to examine the foundations of Taylor's thought and determine what makes them unique.<sup>14</sup> In particular, it focuses on the aspect of Taylor's thought that M.J.C. Vile considered to be "least appreciated, for the *Inquiry* is the most sustained and comprehensive defence of the extreme doctrine of the separation of powers to be found in either English or French."<sup>15</sup> It proceeds first by providing a brief introduction to Taylor's life and thought. Then, it focuses on Taylor's magnum opus, *An Inquiry into the Principles and Policy of the Government of the United States*. It argues that Taylor's hallmark principle of division of powers is derived from Taylor's commitment to the sovereignty of the people. This argument draws a previously under-emphasized connection between Taylor's firm resolve that sovereignty resides exclusively in the people, not the government, and Taylor's unmatched determination in dividing power to prevent corruption and aristocracy. More than any of his contemporaries, John Taylor believed that the people, not the state or the nation, were the true sovereigns. To protect their sovereignty, Taylor argued it was necessary to radically divide power—more than simply between the articles of the Constitution, but rather at every level of government and with every governmental power. The Comment concludes by considering the relevance of this argument and John Taylor more generally, arguing that Taylor deserves attention as a significant counterpoint to *The Federalist* and as a strong influence over Founders such as Jefferson and Madison who were instrumental in interpreting and implementing the Constitution.<sup>16</sup> Taylor's perspective also warrants consideration because of the recent resurgence of attention to Antifederalist thought and increased advocacy for states' rights, an intellectual position Taylor helped pioneer. Moreover, debates over the administrative state could be enlightened by Taylor's conception of the

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<sup>14</sup> Duncan MacLeod, *The Political Economy of John Taylor of Caroline*, 14 J. AM. STUD. 387, 388 (1980) (claiming that "too little attention" has been given to Taylor's "underlying assumptions").

<sup>15</sup> VILE, *supra* note 1, at 183.

<sup>16</sup> Given the prevalence of citations to *The Federalist* in judicial opinions, *see, e.g.*, *Seila Law LLC v. Consumer Fin. Prot. Bureau*, 140 S. Ct. 2183, 2203 (2020) (quoting FEDERALIST 70), it is noteworthy that Taylor (who opposed ratification of the Constitution and criticized *The Federalist* as propaganda that papered over the potential for the government established by the Constitution to oppress individuals and states) provides even stronger support for limited federal government power than *The Federalist*.

division of powers as a tool to preserve the sovereignty of the people.<sup>17</sup> In sum, Taylor can bring nuance and insight to contemporary discussions of some of the most pressing issues in constitutional interpretation and democratic governance.

## I. THE LIFE AND THOUGHT OF JOHN TAYLOR OF CAROLINE

For John Taylor, the American Revolution represented a turning point in history. It was a unique event that established and cemented the sovereignty of the people, which he thought was the greatest possible cause. In both his life and in his writings, Taylor's devotion to the sovereignty of the people over everything, including his own party, is evident. This Part provides a brief biography of Taylor to highlight the importance of sovereignty to Taylor and to foreground the discussion of the most significant aspects of his thought.

### A. *Taylor's Life*

John Taylor was born a Virginian, and he remained one all his life. Although he was born in Orange County in 1750, he moved to his uncle Edmund Pendleton's estate in Caroline County when he was ten years old after the deaths of his parents.<sup>18</sup> The move to Pendleton's estate was consequential not just because it would lead to Taylor formally adopting the name John Taylor of Caroline, since there was another John Taylor from Virginia with whom he might have been confused.<sup>19</sup> The move also provided for prolonged exposure to "the most important single influence" on Taylor's life, his uncle Edmund Pendleton.<sup>20</sup> Pendleton had grown up poor and with little formal education, but by the time he adopted Taylor he had developed a respectable reputation as a lawyer and jurist in Virginia.<sup>21</sup> Pendleton's

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<sup>17</sup> See, e.g., *Gundy v. United States*, 139 S. Ct. 2116, 2133 (2019) (Gorsuch, J., dissenting) ("From that premise, the Constitution proceeded to vest the authority to exercise different aspects of the people's sovereign power in distinct entities.").

<sup>18</sup> See Benjamin F. Wright, Jr., *The Philosopher of Jeffersonian Democracy*, 22 AM. POL. SCI. REV. 870, 871–72 (1928) ("John Taylor was born in Orange county, Virginia, in 1750. At the age of ten he was left an orphan and was adopted by his uncle, Edmund Pendleton, of Caroline county.").

<sup>19</sup> See ROBERT E. SHALHOPE, JOHN TAYLOR OF CAROLINE: PASTORAL REPUBLICAN 31 (1980) (noting that he adopted "the name John Taylor of Caroline in order to distinguish himself from" someone else from Taylor's home state "of the same name").

<sup>20</sup> HILL, *supra* note 4, at 36.

<sup>21</sup> See PAULINE MAIER, RATIFICATION: THE PEOPLE DEBATE THE CONSTITUTION, 1787–1788, at 256 (2010) (noting that Pendleton "had nonetheless become one of the most respected jurists" despite his humble upbringing).

renown was demonstrated by the fact that he served as “President of the Revolutionary Committee of Safety, the Virginia Convention of 1776, and the Virginia Ratification Convention of 1788.”<sup>22</sup> Although Taylor and Pendleton would disagree “on many of the most important political questions of the day” as Taylor matured, Taylor benefitted from Pendleton’s “chain of influence” that helped launch Taylor’s career.<sup>23</sup>

After receiving private tutoring, attending the college of William and Mary, and serving as an apprentice to Pendleton, Taylor was admitted to the bar of Caroline County in 1774.<sup>24</sup> His legal career was put on hold with the break of the Revolution, a cause for which Taylor joined by enlisting. He would become a major, and he served in multiple campaigns in the north.<sup>25</sup> He resigned his commission and returned to Virginia, where he was elected to the House of Delegates.<sup>26</sup> While there, Taylor raised his own volunteer regiment and became a lieutenant-colonel, and he participated in portions of the war’s final campaign.<sup>27</sup> At the war’s conclusion, Taylor continued his law practice until earning enough money to, in 1792, “purchase an estate, Hazelwood, on the Rappahannock near Port Royal, to which he retired.”<sup>28</sup> It was there he built a family with Lucy Penn, daughter of John Penn, the influential planter-statesman and signer of the Declaration of Independence. Taylor spent the rest of his life in a manner similar to that of his father-in-law by maintaining his farm, occasionally serving in government, and writing.<sup>29</sup> Although Taylor recognized slavery to be an “evil institution,” he owned 150 slaves and advocated for the preservation of slavery.<sup>30</sup> This aspect of Taylor’s life and thought is one of the unfortunate ways in which he was similar to his Virginia planter-statesman contemporaries.<sup>31</sup>

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<sup>22</sup> GUTZMAN, *supra* note 2, at 141.

<sup>23</sup> HILL, *supra* note 4, at 37.

<sup>24</sup> See SHALHOPE, *supra* note 19, at 19 (stating that Taylor “gained admission to the Caroline County bar in 1774.”).

<sup>25</sup> See Wright, *supra* note 18, at 871–72 (stating that Taylor “enlisted, rose to the rank of major, and served in a number of northern campaigns”).

<sup>26</sup> *Id.*

<sup>27</sup> *Id.*

<sup>28</sup> SHALHOPE, *supra* note 19, at 31.

<sup>29</sup> See *id.* (“The remainder of his life was devoted to agriculture, politics, and writing.”).

<sup>30</sup> See *John Taylor of Caroline: More Jeffersonian than Jefferson*, HIST. ON THE NET, <https://www.historyonthenet.com/founding-fathers-john-taylor-caroline> [https://perma.cc/U4QH-XSV4] (last visited May 6, 2022) (“He believed slavery to be an evil institution but did not favor its abolition because it was ‘incapable of removal and only within reach of palliation.’”).

<sup>31</sup> See *John Taylor*, ENCYCLOPEDIA BRITANNICA, Aug. 17, 2021, <https://www.britannica.com/biography/John-Taylor-American-politician-and-philosopher> [https://perma.cc/5CJR-WJPB] (“Like most of his fellow Southern critics of centralization, he provided slavery’s defenders with an arsenal of high-minded abstractions to invoke.”).

Taylor did not support ratification of the Constitution, but the reasons for his opposition have not been discovered.<sup>32</sup> Indeed, “no record has been found of his arguments against the Constitution” during the ratification debates.<sup>33</sup> Despite the lack of knowledge of Taylor’s arguments against ratification in the late 1780s, “[w]e have it on the testimony of Madison that he was one of the most influential Anti-Federalists in Virginia,” siding with Patrick Henry in the ratification debate.<sup>34</sup> Taylor’s decision to side with Henry, who “far more than Jefferson, Madison, Mason, or Randolph—was the acknowledged political leader” of the state of Virginia, was emblematic of the contours of his political thought that would be expounded in the decades to come.<sup>35</sup> It is likely that Taylor’s opposition to the Constitution centered on the same concerns that he expressed after ratification, which involved a fear of an overly strong national government.<sup>36</sup> Antifederalists shared a concern that the proposed Constitution did not provide sufficient protections for individual liberties.<sup>37</sup> If Taylor’s later writings are at all indicative of the nature of his opposition to ratification, the concern for the centralization of power in the national government over individuals and states loomed large for Taylor. In any case, Taylor avoided direct participation in the ratification debate, whereas his uncles Edmund Pendleton and James Taylor both were present at Virginia’s ratifying convention as Federalists.<sup>38</sup>

John Taylor had a highly unusual political career.<sup>39</sup> “Never a professional politician, he served in the Virginia legislature in 1779–81, 1783–85, and 1796–1800, and was appointed to fill out unexpired terms in

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<sup>32</sup> See Andrew C. Lenner, *John Taylor and the Origins of American Federalism*, 17 J. EARLY REPUBLIC 399, 402 (1997) (noting that Taylor “opposed the ratification of the Constitution, [but] very little is known about the nature of his opposition in 1787 and 1788”).

<sup>33</sup> SHALHOPE, *supra* note 19, at 33.

<sup>34</sup> Wright, *supra* note 18, at 871–72.

<sup>35</sup> RICHARD BEEMAN, PLAIN, HONEST MEN: THE MAKING OF THE AMERICAN CONSTITUTION 396 (2009).

<sup>36</sup> See JACK N. RAKOVE, ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION 181 (1996) (noting that for “Anti-Federalists, the decisive fact about the Constitution was how much more ‘national’ it was than the Confederation”).

<sup>37</sup> See LANCE BANNING, THE JEFFERSONIAN PERSUASION: EVOLUTION OF A PARTY IDEOLOGY 106 (1978) (“Antifederalist objections focused first on the question whether America ought to have a national government, and then on the question whether the one proposed promised sufficient safeguards for republican liberty.”).

<sup>38</sup> See SHALHOPE, *supra* note 19, at 32–33 (“When these two men met John on the court green of Caroline, James suggested that the Constitution, while needing amendments, should be adopted. Pendleton, knowing Jack well, commented: ‘No, Col. Taylor, my nephew John thinks he knows more than we do, and will support nothing which does not accord with his opinion of perfection.’”).

<sup>39</sup> See GUTZMAN, *supra* note 2, at 143 (describing Taylor’s career as “bizarre”).

the U.S. Senate in 1793–94, 1803, and 1822–24.”<sup>40</sup> Despite serving “three stints in the [Virginia] House of Delegates and three in the United States Senate,” Taylor always “voluntarily beat a hasty retreat” from governmental office.<sup>41</sup> Taylor’s repeated decisions to abandon office not long after taking it might have spoken to his fear that no one, not even “good Republicans,” were safe from the temptations that power posed to those in political office.<sup>42</sup> Additionally, serving in office took Taylor away from his farm, and “[h]e truly believed that the life of a farmer was superior to that of a politician.”<sup>43</sup> While Taylor was in office, perhaps his most significant accomplishment was introducing to the House of Delegates the Virginia Resolutions, which he had initially conceptualized, that declared the Alien and Sedition Acts unconstitutional.<sup>44</sup> Despite this major political achievement, Taylor never really fit the mold of a typical Republican politician,<sup>45</sup> as evidenced by his association with the “Tertium Quids,” a breakaway group from the Republican party that was opposed to James Madison’s succession of Thomas Jefferson and instead preferred James Monroe.<sup>46</sup> Led by John Randolph, the Quids believed that Jefferson had drifted from the true Republican ideals of limited government and states’ rights.<sup>47</sup> Taylor’s association with the Quids thus placed him on the outside of the progressing Republican party. Taylor’s identity as a Republican therefore had more to do with his opposition to the Federalists than anything else.<sup>48</sup>

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<sup>40</sup> Stromberg, *supra* note 10, at 36.

<sup>41</sup> GUTZMAN, *supra* note 2, at 143.

<sup>42</sup> SHALHOPE, *supra* note 19, at 95; *see also* William E. Dodd, *John Taylor, Prophet of Secession*, JOHN P. BRANCH HIST. PAPERS RANDOLPH-MACON COLL., June 1908, at 214, 235 (“Majority republicanism is inevitably, widely corrupted with ministerial republicanism.”).

<sup>43</sup> GUTZMAN, *supra* note 2, at 143.

<sup>44</sup> *See* Wright, *supra* note 18, at 871–72 (“[T]he Virginia Resolutions, the general theory of which he appears to have suggested to Jefferson several months before.”); *see also* Bradley D. Hays, *A Place for Interposition? What John Taylor of Caroline and the Embargo Crisis Have to Offer Regarding Resistance to the Bush Constitution*, 67 MD. L. REV. 200, 202 n.13 (2007) (“[T]he the Virginia and Kentucky Resolutions . . . declared the Alien and Sedition Acts of 1798 unconstitutional.”).

<sup>45</sup> *See* Dodd, *supra* note 42, at 228 (“When the Republican party entered upon its official career in Washington, Taylor, to the surprise of most people, began to break away.”).

<sup>46</sup> INQUIRY, *supra* note 12, at 22.

<sup>47</sup> *See* JON MEACHAM, THOMAS JEFFERSON: THE ART OF POWER 416 (2012) (“[T]he ‘Old Republicans . . . held that Jefferson had moved too far in a Federalist direction and that they, not the president or his men, were the true believers.”).

<sup>48</sup> *See* William D. Grampp, *John Taylor: Economist of Southern Agrarianism*, 11 SOUTH. ECON. J. 255, 256 (1945) (“That he was considered a Republican at all must be attributed to the greater vehemence with which he opposed the Federalists.”).

### B. Taylor's Thought

More important than his acts in office were Taylor's contributions to political thought. In the 1790s, Taylor penned pamphlets arguing against corruption in politics, particularly through patronage and the use of paper money, and especially in the Federalist party.<sup>49</sup> Taylor's "first contribution to national political debate" were six essays that "were published first in the *National Gazette* and later in Richmond newspapers and in pamphlet form."<sup>50</sup> These essays, signed "Franklin," opposed the funding system proposed by Alexander Hamilton.<sup>51</sup> Next, in 1794, Taylor published his "first major political pamphlet," *An Enquiry into the Principles and Tendencies of Certain Public Measures*.<sup>52</sup> The *Enquiry* built on Taylor's critique of Hamilton, and exalted the "birth-right of freedom in the re-examination of public measures."<sup>53</sup> The *Enquiry* was just the first in a long line of works produced by Taylor that emphasized agrarianism and republicanism in response to the social questions of the day.<sup>54</sup> Constantly concerned with corruption and aristocracy infiltrating American politics, Taylor progressed from pamphlets<sup>55</sup> to longer works. Taylor published his first book, the *Arator*, in 1810.<sup>56</sup> The *Arator* "was easily the most popular thing he ever wrote, six editions being printed by 1819. Most of the book deals with the practical problems of plantation management—care of the soil, rotation of crops, and

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<sup>49</sup> See GUTZMAN, *supra* note 2, at 117 ("His pamphlets of the 1790s were masterpieces of sometimes inspired, sometimes befuddled opposition to Federalism. In them, he argued that federal officeholders were using their control of the government to milk other Americans of money. In the end, he insisted again and again, they would convert the offices they held—those of senators and president—into lifetime fiefs in the former case, a hereditary one in the latter.")

<sup>50</sup> GARRETT WARD SHELDON AND C. WILLIAM HILL, JR., *THE LIBERAL REPUBLICANISM OF JOHN TAYLOR OF CAROLINE* 54 (2008).

<sup>51</sup> *Id.* at 54.

<sup>52</sup> *Id.* at 61.

<sup>53</sup> JOHN TAYLOR, *AN ENQUIRY INTO THE PRINCIPLES AND TENDENCIES OF CERTAIN PUBLIC MEASURES*, at iii (1794); see also SHALHOPE, *supra* note 19, at 75 ("The 'Enquiry' was a skillful blending of the libertarian persuasion with Taylor's perception of American political and social life.")

<sup>54</sup> See Stromberg, *The Constitutional Republicanism of John Taylor of Caroline*, FREEMAN, May 2008, at 35 ("Generally, Taylor's books (1814, 1818, 1822, 1823) arose from immediate political questions; they included attacks on federal economic policies and reasoned polemics against the centralizing decisions of John Marshall's Supreme Court.")

<sup>55</sup> See, e.g., JOHN TAYLOR, *AN ARGUMENT RESPECTING THE CONSTITUTIONALITY OF THE CARRIAGE TAX* (1795).

<sup>56</sup> See SHELDON AND HILL, *supra* note 50, at 69 ("John Taylor's first full length book, *Arator: Being a Series of Agricultural Essays Practical and Political* (1814), began as a series of newspaper articles in 1810 and reveal the author's Classical Republican affinity for relating economics to politics.")



the like.”<sup>57</sup> But the work, like all of Taylor’s thought, integrated political concepts with agrarian principles, as Taylor stated early in the book that “[a]griculture and politics are primary causes of our wealth and liberty.”<sup>58</sup>

Taylor’s union of agrarianism and republicanism in the *Arator* was emblematic of his overall thought, as evidenced by his subsequent works. Indeed, Taylor noted that the same “conviction that the prosperity of our country depended upon a competent share of agricultural and political knowledge” produced not just the *Arator*, but “also a larger book, entitled *An Inquiry into the Principles and Policy of the Government of the United States*.”<sup>59</sup> This latter work forms the focus of this Comment, and it likewise “drew upon [Adam] Smith’s analysis of the place of agriculture in the ‘natural’ order of economic development,” but it was not Taylor’s final contribution to political and social thought.<sup>60</sup> He would go on to publish *Construction Construed, and Constitutions Vindicated*, which criticized *McCulloch v. Maryland*,<sup>61</sup> in 1820;<sup>62</sup> *Tyranny Unmasked*, which critiqued a proposed tariff policy, in 1822;<sup>63</sup> and lastly *New Views of the Constitution of the United States*, “his final thoughts on the Framers’ intent,” in 1823, the year before he died.<sup>64</sup>

Together, Taylor’s catalogue of works puts forth a vision of a classically republican society in which agriculture was the predominant economic sector and pastoral values were upheld.<sup>65</sup> Taylor’s prioritization of agriculture was evident in the way Taylor “opposed privilege, concentration

<sup>57</sup> Wright, *supra* note 18, at 874.

<sup>58</sup> JOHN TAYLOR, *ARATOR: BEING A SERIES OF AGRICULTURAL ESSAYS, PRACTICAL AND POLITICAL: IN SIXTY-ONE NUMBERS* 50 (1977).

<sup>59</sup> *Id.* at 49.

<sup>60</sup> SHALHOPE, *supra* note 19, at 176.

<sup>61</sup> 17 U.S. (4 Wheat.) 316 (1819).

<sup>62</sup> JOHN TAYLOR, *CONSTRUCTION CONSTRUED, AND CONSTITUTIONS VINDICATED* 119 (1820); *see also* Dodd, *supra* note 42, at 243 (“The chief contentions of Taylor’s book were: That the United States Bank, which the Supreme Court had protected against taxation by the states, was unconstitutional for the reason that Congress could not lawfully create a corporation; that the spheres of activity of states and union, which Marshall had described in the opinion of the court, were legitimate indeed, but that the decision in *McCulloch v. Maryland* broke over the boundary between the two because Congress had created an institution (the bank) whose capital stock of thirty-five millions was exempted from state taxation.”).

<sup>63</sup> JOHN TAYLOR, *TYRANNY UNMASKED* (F. Thornton Miller ed.) xviii (1992); *see also* Dodd, *supra* note 42, at 247 (“It was published in Washington in 1822, and was intended as an answer to the able report of the Committee of Congress on Manufactures of January 15, 1821.”).

<sup>64</sup> JOHN TAYLOR, *NEW VIEWS OF THE CONSTITUTION OF THE UNITED STATES* (ed. James McClellan) xii (2000); *see also* Dodd, *supra* note 42, at 248 (“His main point, however, was to bring the Supreme Court into contempt by showing how far afield that institution had wandered under the leadership of Chief Justice Marshall.”).

<sup>65</sup> SHALHOPE, *supra* note 19, at 3 (stating that Taylor envisioned an “agrarian community” that could protect “the pastoral values of the agricultural sector” and preserve “republicanism in America”).

of power and corruption particularly when they appeared in conjunction with banking and commercial interests.”<sup>66</sup> He therefore harbored mistrust of corporate interests while extolling agricultural interests. Taylor’s thoughts undoubtedly were influenced by his Virginian intellectual heritage, which “tended to reinforce a Whig outlook on politics.”<sup>67</sup> Viewed in light of his commitment to Whig ideals as embodied by the Revolution, Taylor’s scholarly project could be viewed as an attempt to produce an Antifederalist interpretation of the Constitution.<sup>68</sup> His Antifederalist ideals can certainly be seen in the way that Taylor emphasized the oppressive potential of government.<sup>69</sup> His vision of an agrarian civilization, coupled with his fear of government oppression, placed Taylor squarely in the “Old Republican”<sup>70</sup> states’ rights camp, insofar as “Taylor considered individual state governments to be closest to the people’s needs and desires.”<sup>71</sup> That being said, Taylor’s views were more nuanced than a simple adherence to states’ rights, which is why he received such esteem from his contemporaries and subsequent readers.<sup>72</sup> Taylor’s lasting legacy is the way he took the heart of Republicanism and drew it to its logical conclusion.<sup>73</sup> This was particularly evident in Taylor’s analysis of the nature and structure of government in the *Inquiry*.

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<sup>66</sup> Duncan MacLeod, *The Political Economy of John Taylor of Caroline*, 14 J. AM. STUD. 387, 391 (1980).

<sup>67</sup> HILL, *supra* note 4, at 42; *see also* GORDON S. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC 1776–1787*, at 3–45 (1998) (describing the contours of Whig thought in Britain and America).

<sup>68</sup> Stromberg, *supra* note 10, at 36 (“[M]ost of his political writing represents the attempt to interpret antifederalist principles back into the Constitution once it became the law of the land.”); *see also* RON CHERNOW, *WASHINGTON: A LIFE* 443 (2010) (“[M]any Americans, influenced by Whig ideology, equated centralized power with tyranny.”).

<sup>69</sup> *See* EUGENE TENBROECK MUDGE, *THE SOCIAL PHILOSOPHY OF JOHN TAYLOR OF CAROLINE: A STUDY IN JEFFERSONIAN DEMOCRACY* 33 (1939) (noting that Taylor fixated on “the repressive functions of government”).

<sup>70</sup> Jordan T. Cash, *The Court and the Old Dominion: Judicial Review Among the Virginia Jeffersonians*, 35 L. & HIST. REV. 351, 386 (2017).

<sup>71</sup> Arthur Scherr, *John Taylor of Caroline: Pamphlets and the Press in the 1790s*, 27 AM. PERIODICALS 53, 55 (2017).

<sup>72</sup> ALBERT J. BEVERIDGE, 4 *LIFE OF JOHN MARSHALL* 335 (1919) (remarking that Taylor was “the most brilliant mind in the Republican organization of the Old Dominion”).

<sup>73</sup> *See* CHARLES MAURICE WILTSE, *THE JEFFERSONIAN TRADITION IN AMERICAN DEMOCRACY* 218 (1935) (“He was able to follow his logic through to the end, unhampered by the dictates of political expediency.”).

II. SOVEREIGNTY AND DIVISION OF POWERS IN THE *INQUIRY*

At the heart of Taylor's magnum opus, the *Inquiry*, is a connection between two principles that form the heart of this Part: sovereignty and division of powers. To foreshadow, this Part will argue that Taylor's emphasis on radically dividing powers was an effort to preserve the sovereignty of the people which had been won in the Revolution. Although the Constitution, especially the Tenth Amendment, was a step in the right direction in the effort to divide powers and protect the sovereignty of the people, Taylor believed more was necessary to prevent the coalescence of power. Given the growth of the administrative state and the power of the federal government in the centuries since Taylor's writing, his warnings in the *Inquiry* warrant close attention. Moreover, because *The Federalist* continues to be cited by judges when deriving the original public meaning of the Constitution, the arguments in Taylor's work, which criticizes *The Federalist*, should not be neglected.

A. *John Adams and The Federalist*

Widely regarded as Taylor's "most important" work, *An Inquiry into the Principles and Policy of the Government of the United States* has been estimated to be "the most considerable contribution of Jeffersonian democracy to political thought."<sup>74</sup> Indeed, the book even changed Thomas Jefferson's mind on some positions.<sup>75</sup> The 656-page book was published in 1814, but Taylor had worked on the arguments of the book for more than two decades.<sup>76</sup> As Robert E. Shalhope has remarked in his monograph on Taylor, "Taylor's book represented the culmination of prodigious reading and long, careful thought. He incorporated the insights of David Hume, John Locke, Thomas Malthus, Viscount Bolingbroke and the British libertarians, Baron de Montesquieu, William Godwin, the classical writers, and a great many others in his work."<sup>77</sup> Because in some ways it is Taylor's most considered and thoughtful work, it will be the focus of this Comment, which argues that the heart of Taylor's philosophy was a commitment to the sovereignty of the people, and that this commitment led Taylor to his theory of a division of

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<sup>74</sup> Wright, *supra* note 18, at 875–76.

<sup>75</sup> See C. William Hill, *Contrasting Themes in the Political Theories of Jefferson, Calhoun, and John Taylor of Caroline*, 6 *PUBLIUS* 73, 76 (1976) ("As early as 1816 Jefferson admitted to Ritchie that the *Inquiry* had changed his mind on a few points.").

<sup>76</sup> HENRY HARRISON SIMMS, *LIFE OF JOHN TAYLOR* 134 (1932).

<sup>77</sup> SHALHOPE, *supra* note 19, at 176.

powers.<sup>78</sup> Despite this Comment's focus on the *Inquiry*, the conclusions drawn from this Comment's analysis are consistent with Taylor's other works and overall thought because "taken as a whole, his political thought was reasonably coherent and consistent."<sup>79</sup>

The *Inquiry* was Taylor's attempt to respond "to certain theories found in John Adams's *Defence of the Constitutions of the United States* (1786–88) and in *The Federalist*."<sup>80</sup> Unfortunately, Taylor's prolonged writing process prevented the book from being published until "twenty-seven years after John Adams' volumes appeared."<sup>81</sup> For this reason, Gordon Wood claims "the book really belonged to the previous century, both in time and in thought."<sup>82</sup> Taylor's decision to delay publication accounts "for the book's awkward position in American political literature,"<sup>83</sup> especially when compared to one of the works to which it responded: *The Federalist*, which "became a classic even before it was completed."<sup>84</sup> Even Taylor admitted his delay rendered his thoughts "almost letters from the dead."<sup>85</sup> But the decades-long writing process was likely necessary for Taylor, who spent years considering not only "[t]he arguments of Adams and the authors of the *Federalist*," but also the practices of "the new government from 1789 to 1811."<sup>86</sup> These considerations led Taylor to the conclusion that the defining aspects of America were "being perverted" by the Federalists, and he singled out Adams for having mistaken the fundamental principles of American government.<sup>87</sup> Indeed, he worried that Adams and Publius "had deadened the public attention to the only means for preserving a free and moderate government."<sup>88</sup> Although Taylor's work was a response to both Adams's *Defence* and *The Federalist*, he selectively quoted only from the *Defence* "because

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<sup>78</sup> See Dodd, *supra* note 42, at 242 ("It added much to the fame of the author, and, with his former writings, gave him the foremost place, after Jefferson and Madison, among Southern publicists.").

<sup>79</sup> Stromberg, *supra* note 10, at 39. *But see* David N. Mayer ed., *Of Principles and Men: The Correspondence of John Taylor of Caroline with Wilson Cary Nicholas, 1806–1808*, 96 VA. MAG. HIST. & BIOGRAPHY 345, 353 (1988) ("Taylor . . . deviated from his strict constructionism to approve the Louisiana Purchase.").

<sup>80</sup> Wright, *supra* note 18, at 876; *see also* JOHN ADAMS, A DEFENCE OF THE CONSTITUTIONS OF THE GOVERNMENT OF THE UNITED STATES OF AMERICA (1787).

<sup>81</sup> INQUIRY, *supra* note 12, at 24.

<sup>82</sup> WOOD, *supra* note 67, at 588.

<sup>83</sup> *Id.*

<sup>84</sup> ALEXANDER HAMILTON, JOHN JAY, AND JAMES MADISON, THE FEDERALIST I (George W. Carey and James McClellan eds.) (2001).

<sup>85</sup> INQUIRY, *supra* note 12, at 34.

<sup>86</sup> *Id.* at 24.

<sup>87</sup> *Id.*

<sup>88</sup> *Id.* at 31.

its candour furnished the best materials for a distinct exhibition of certain subjects.”<sup>89</sup>

Taylor’s criticism of Adams, in the words of Charles William Hill, Jr., centered on “the *Defence*’s alleged assumption that man’s nature was chronically inclined toward selfishness and wrongdoing.” This assumption led Adams to compare American use of separated, balanced, and checked powers to the British systems, which attempted to check the ambitions of factions by balancing them against each other.<sup>90</sup> In Taylor’s words, “Mr. Adams’s system simply is, ‘that nature will create an aristocracy, and that policy ought to create a king, or a single, independent executive power, and a house of popular representatives, to balance it.’”<sup>91</sup> According to Taylor, Adams’s “system of a balance of orders, is bottomed upon the idea of some natural or political enmity, between the one, the few and the many.”<sup>92</sup> Adams held to the commonplace view, explicated by renowned American historian Bernard Bailyn, that achieving “a wise and just government” required “balanc[ing] the contending powers in society that no one power could overwhelm the others and, unchecked, destroy the liberties that belonged to all.”<sup>93</sup> Adams therefore adhered to a classic conception of “the mixed constitution.”<sup>94</sup>

Adams’s adherence to the mixed constitution perturbed Taylor because Taylor thought that America had embarked on a revolution in governance.<sup>95</sup> In contrast, Adams’s theories represented the old guard that had worn out its relevance.<sup>96</sup> Taylor asserted that Adams and Publius “had paid too much respect to political skeletons, constructed with fragments torn from monarchy, aristocracy and democracy, called, in these essays, the numerical analysis; and too little to the ethereal moral principles, alone able to bind governments to the interest of nations.”<sup>97</sup> Taylor criticized Adams for resting his system on an ancient false premise that governments possessed unlimited power, and therefore needed to be balanced against themselves to prevent

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<sup>89</sup> *Id.* at 34.

<sup>90</sup> HILL, *supra* note 4, at 139.

<sup>91</sup> INQUIRY, *supra* note 12, at 101.

<sup>92</sup> *Id.* at 219.

<sup>93</sup> BERNARD BAILYN, THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION 273 (2017).

<sup>94</sup> WOOD, CREATION OF THE AMERICAN REPUBLIC, *supra* note 67, at 580.

<sup>95</sup> *Id.* at 589 (“Taylor grounded his assault on Adams in the assumption that the American polities were different from any previous forms of government in history.”).

<sup>96</sup> See Wright, *supra* note 18, at 876 (arguing that Adams’s theories “were derived from old and outworn forms of government”).

<sup>97</sup> INQUIRY, *supra* note 12, at 31.

the obliteration of rights.<sup>98</sup> The American Revolution had rejected not only this premise, but also its derivations, including the balance of orders.<sup>99</sup> As Vile contends, Taylor “entirely rejected the view that all governments must be monarchical, aristocratic, democratic, or some mixture of these. He refused to be bound by these categories.”<sup>100</sup> Taylor thought that monarchy, aristocracy, and democracy were “inartificial, rude, and almost savage political fabricks” that did not constitute the substance of American governance.<sup>101</sup> In America, Adams’s three forms of government had been destroyed by election and division of powers.<sup>102</sup> In other words, election had destroyed the possibility of “‘a government administered by the people,’ and not ‘the right of the people to institute a government, nor the responsibility of magistrates to the people.’”<sup>103</sup> Rather, the right of the people to institute a government persisted, and the responsibility of the government to the people was secured, at least in part, through election. Although election was not a panacea, it did cure America of the ills of Adams’s old categories, replacing them instead with a new system of governance in which the people were sovereign.

### B. Sovereignty

John Taylor believed that the unique insight of the Revolution was the sovereignty of the people.<sup>104</sup> The source that confirmed this belief was the Declaration of Independence, which Taylor would later state was “the origin of our liberty, and the foundation of our form of government.”<sup>105</sup> The

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<sup>98</sup> See WOOD, CREATION OF THE AMERICAN REPUBLIC, *supra* note 67, at 591 (“In fact, said Taylor, the entire conception of mixed government arose out of the ancient belief that the power of a government was unlimited and therefore must be split into three balancing and interacting parts in order to preserve liberty. The American Revolution, however, had laid bare a new policy.”).

<sup>99</sup> See VILE, *supra* note 1, at 185 (“Taylor believed that *all* the old forms of government were to be destroyed in America.”).

<sup>100</sup> *Id.*

<sup>101</sup> INQUIRY, *supra* note 12, at vi.

<sup>102</sup> See *id.* at 97 (“[E]lection has destroyed democracy, election, responsibility and division of power, were intended also to destroy monarchy and aristocracy.”). Cf. DAVID MCCULLOUGH, JOHN ADAMS 377 (2001) (describing Adams’s view that “[t]here was inevitably a ‘natural aristocracy among mankind,’ those people of virtue and ability who were ‘the brightest ornaments and the glory’ of a nation, ‘and may always be made the greatest blessing of society, if it be judiciously managed in the constitution.’”).

<sup>103</sup> INQUIRY, *supra* note 12, at 197.

<sup>104</sup> See HILL, *supra* note 4, at 196–97 (“The states received no sovereignty from the federal Union, because their sovereignty came from the Declaration of Independence and was not relinquished by forming the Union.”).

<sup>105</sup> TAYLOR, NEW VIEWS OF THE CONSTITUTION, *supra* note 64, at 2.

Constitution continued in the vein of the Declaration by also asserting the sovereignty of the people. As Taylor explained in the *Inquiry*, “[t]he existence of national sovereignty is asserted every where by the policy of the United States, and under its auspice the general constitution sought for a sanction by the terms, ‘We the people.’”<sup>106</sup> Instead of residing in the government, sovereignty resided in the people.<sup>107</sup> The government, in turn, was subservient to the will of the people, who possessed inherent rights to self-government.<sup>108</sup> Thus, the communities comprising the United States possessed a right to govern, and they exercised this right by producing political structures.<sup>109</sup>

The primary political structures derived from the sovereignty of the people were states.<sup>110</sup> And it was the states’ role to protect the sovereignty of the people by acting only according to the powers delegated by the people.<sup>111</sup> All powers in government arose simply from the delegation of the people, not from an inherent power or sovereignty.<sup>112</sup> The people therefore retained “a vast share of political power, and as only investing their government with so much as they deem necessary for their own benefit.”<sup>113</sup> The federal government, like state governments, was “erected on that foundation” that held that sovereignty resided in the people alone, and so the federal government derived its power solely from the people’s choice to gather as states and form a union.<sup>114</sup> Thus, the federal government only derived its powers from the states; it had no valence on its own.<sup>115</sup> Moreover, whereas the Bill of Rights enumerated individual liberties, in reality the people

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<sup>106</sup> *INQUIRY*, *supra* note 12, at 489.

<sup>107</sup> *See* SHALHOPE, *supra* note 19, at 80 (“In America sovereignty resided with the people.”).

<sup>108</sup> *See id.* at 155 (“For Taylor the sovereignty of the people arose and representation flowed out of each man’s right to govern himself. Political structures emanated from this right, and individuals, in forming a society, could arrange their affairs in such forms as they pleased.”).

<sup>109</sup> Stromberg, *Country Ideology*, *supra* note 10, at 40 (“Sovereignty was the result of men’s living together in a community, and this sovereignty could organize the protection of the individual.”).

<sup>110</sup> *See* Cash, *supra* note 70, at 370 (“Specifically, sovereignty rested in the people as collected into states, and was generally defined as ‘the people’s constituent power to form a government.’”).

<sup>111</sup> *See* GUTZMAN, *supra* note 2, at 128 (“Taylor held that the Constitution obliged the states to defend their rights as a way of averting the prospect of a sovereign (that is, all-powerful and theoretically uncontrollable) federal government.”).

<sup>112</sup> *See* SHELDON AND HILL, *supra* note 50, at 95 (“Taylor argues that American political principles separate nation and government, situating power in the nation (people) which is then delegated to the government.”).

<sup>113</sup> *INQUIRY*, *supra* note 12, at 171.

<sup>114</sup> *Id.* at 491.

<sup>115</sup> *See id.* at 490 (“[T]he federal government cannot legitimately exist, except by admitting that the people are the sovereigns of governments.”).

retained all power they did not specifically delegate.<sup>116</sup> Thus, sovereignty remained with the people despite the delegation of some of their powers to the government.<sup>117</sup> In this manner, the Tenth Amendment held great significance to Taylor.<sup>118</sup> The people's choice to form a union in no way created a self-sufficient federal government that took on a life of its own once created.<sup>119</sup> State governments therefore had the responsibility of keeping watch over the federal government to prevent it from taking and consolidating the powers that the Framers had so intentionally divided. This is how Taylor arrived at a conception of states' rights.<sup>120</sup> Conversely, the federal government did not supply the state governments with any powers the people had not delegated to the states.<sup>121</sup> Thus, "[t]he policy of the United States, by acknowledging the sovereignty of the people without a balance or a rival power, and by establishing a subordination to" the people's will, protected the sovereignty of the people.<sup>122</sup>

Taylor's emphasis on the sovereignty of the people, secured through the creation of states, helps enlighten why Taylor so detested judicial review. "Self government, by responsible representation, is the essence of our policy."<sup>123</sup> The judiciary had no such representation, and thus lacked the same force of representative government. Hence Taylor thought that "[j]udicial power is considered as a mere municipal detail."<sup>124</sup> If it was going to be more than merely municipal, it required "responsibility" to the people.<sup>125</sup> That is, the judiciary "had no power to disallow a law, or change

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<sup>116</sup> See HILL, *supra* note 4, at 197 ("The state majorities had not only created the federal government through exercise of their separate sovereign capacities, but also reserved powers to demonstrate that their creation had not been given sovereignty.").

<sup>117</sup> See GUTZMAN, *supra* note 2, at 128 ("The federal government was not sovereign, but was a creature of the American sovereigns—the state peoples.").

<sup>118</sup> See Aaron N. Coleman, *The Federal Republic vs. Crony Capitalism*, L. & LIBERTY (Feb. 22, 2021), at 8, <https://lawliberty.org/classic/the-federal-republic-vs-crony-capitalism/> [<https://perma.cc/ZT9A-UEM7>] ("Rather, his federalism was one in which the states retained sovereignty and, through the Tenth Amendment, used their sovereignty to prevent 'indirect attempts to introduce a consolidated republic.'").

<sup>119</sup> See GUTZMAN, *supra* note 2, at 128 ("Yet, he feared that he detected the idea of a pact between the people and the government in Federalists' argument. From the idea of such a pact, which implied that the government existed independently of the peoples of the states, the distance to sovereignty in the federal government was short.").

<sup>120</sup> See HILL, *supra* note 4, at 273 ("State rights, in Taylor's opinion, referred to the individual rights of self-government channeled through state nations. No governments had rights.").

<sup>121</sup> See *id.* at 197 ("The states received no sovereignty from the federal Union, because their sovereignty came from the Declaration of Independence and was not relinquished by forming the Union.").

<sup>122</sup> INQUIRY, *supra* note 12, at 103.

<sup>123</sup> *Id.* at 203.

<sup>124</sup> *Id.* at 212.

<sup>125</sup> *Id.* at 208.



the constitution” unless it was going to be held accountable to the people.<sup>126</sup> Taylor’s concern here echoes his concern with all powers that were not held accountable to the people.<sup>127</sup> If the Constitution was going to be changed, it must be done through amendments, which would receive the direct assent of the sovereign people.<sup>128</sup> Otherwise, he thought, the people risked becoming subjects to a government they had never consented to form.<sup>129</sup> Thus, instead of judicial review, what was meant by judicial independence was the ability for judges and juries to decide cases fairly without influence, not to make political (i.e., Constitutional) judgments.<sup>130</sup> Taylor therefore adhered to the classic Whig view that esteemed the legislature over other branches of government.<sup>131</sup> Taylor’s assessments on the judiciary highlight the importance of keeping the power in the hands of the people as sovereigns, and it begins to show how Taylor thought that dividing power could preserve the sovereignty of the people.

Judicial review was not the only barrier to securing sovereignty. Unguarded elections, too, posed a threat to Taylor’s ideals of a sovereign people: “Election, without her ally, a national militia, and united with standing armies, hereditary orders, or separate interests, such as banking, becomes an instrument to inflict their will.”<sup>132</sup> Election thus could fall prey to aristocrats and orders who tyrannically united their powers. Likewise, militias, on their own, were “[e]qually unavailing to preserve liberty.”<sup>133</sup> Both the shortcomings of militias and “the insufficiency of election,

<sup>126</sup> *Id.* at 212.

<sup>127</sup> See SHALHOPE, *supra* note 19, at 160 (“Taylor’s remedies for the problems he perceived—to institute certain amendments to the Constitution—originated in his devotion to the sovereignty of the people.”).

<sup>128</sup> See SHELDON AND HILL, *supra* note 50, at 71 (“Constitutions were meant to be used, not worshiped, and were works in process. Frequent revisions were desirable, if based on sound understanding of the underlying republican principles and proper amending procedures were followed.”).

<sup>129</sup> See HILL, *supra* note 4, at 207 (“Taylor’s construction of the Constitution turned it into an inverse hierarchy of powers, all of which reinforced state powers and downgraded federal power. The Union was merely an extension of the revolutionary Confederacy, and federal power had been limited because it was delegated. This limitation had been explicated by the reservation of powers to the states in the Tenth Amendment.”).

<sup>130</sup> See INQUIRY, *supra* note 12, at 218 (“Our aukward [*sic*] imitation of the English policy, and misconception of its phrase, ‘judicial independence,’ is displayed in our lower judicial bench, as well in the upper.”).

<sup>131</sup> See Cash, *supra* note 70, at 370 (“Taylor opposed judicial review on philosophical principle, clearly subscribing to the Whig and Anti-Federalist intellectual tradition that prioritized legislative power and remained suspicious of executive and judicial authority.”); see also CHERNOW, *supra* note 68, at 590 (“A central component of the Whig orthodoxy that had spurred the American Revolution was the supremacy of the legislative branch, viewed as a curb to the executive.”).

<sup>132</sup> INQUIRY, *supra* note 12, at 449.

<sup>133</sup> *Id.*

exclusively, to secure political liberty . . . has suggested to mankind a multitude of other expedients.”<sup>134</sup> Of all the expedients suggested, one stands out as Taylor’s chief insight: the division of power.

### C. *Division of Power*

Taylor thought that the best way to protect the sovereignty of the people was by radically dividing power.<sup>135</sup> This is where John Adams’s failure was most evident.<sup>136</sup> Taylor contended that “[d]ivision of power is a republican, and not a monarchical principle.”<sup>137</sup> Whereas “a monarch, an aristocracy, or a parliament, possess the sovereignty of a country,” in America sovereignty resided with the people.<sup>138</sup> Thus any argument that rested on a premise that incorporated monarchy and aristocracy rested on a false premise. This is precisely the error that John Adams had committed: “Mr. Adams . . . laboured to plant state policy in British principles, which deny any species of sovereignty to the people.”<sup>139</sup> It was thus inconsistent for Adams to advocate for “the system of orders, or checks and balances, [which] cannot exist, except by admitting it to be the sovereign of the people,” while at the same time purporting to believe that the people themselves were sovereign.<sup>140</sup> Taylor therefore saw that Adams was committed to a logical contradiction that invalidated his argument in the *Defence*.

Whereas Adams’s system “arranges men into the one, the few and the many, and bestows on the one and the few, more power than he gives to the many, to counterbalance numerical or physical strength,” Taylor believed that the American system divided power to prevent “the danger of accumulating great power in the hands of one or a few, because all history proves that this species of condensation begets tyranny.”<sup>141</sup> Taylor therefore

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<sup>134</sup> *Id.* at 170.

<sup>135</sup> SHALHOPE, *supra* note 19, at 153 (“Taylor believed that American policy grounded government entirely upon the sovereignty of the people and guarded that sovereignty through a radical division of power.”).

<sup>136</sup> *See id.* at 155 (“Conversely, the balancing system arose out of the ancient opinion holding the power of government to be unlimited and sovereignty to be indivisible. Taylor believed that the American Revolution exploded that opinion and rooted out its consequences. Unlimited power could never be safely balanced, but specified and limited power could easily be divided and its effects foreseen.”).

<sup>137</sup> INQUIRY, *supra* note 12, at 203.

<sup>138</sup> *Id.* at 482.

<sup>139</sup> *Id.* at 490.

<sup>140</sup> *Id.*

<sup>141</sup> *Id.* at 85; *see also* MCCULLOUGH, *supra* note 102, at 377–78 (describing Adams’s view that the natural aristocracy “were the people who had the capacity to acquire great wealth and make use of

abandoned Adams's categories of monarchy, aristocracy, and democracy, and he likewise abandoned the traditional conception of the mixed constitution.<sup>142</sup> Instead, he replaced it with a radical division of power. As Vile contends, Taylor's conception of "[t]he American system of divided powers could not be combined with mixed government; it replaced and excluded it."<sup>143</sup> Taylor claimed that "[t]his idea of a division of power is consonant to the policy of the United States, as is evinced by the responsibility of the executive, the allotments of power to the state and the general governments, and the reservations from the powers of both, retained by the people."<sup>144</sup> Taylor's division of powers was therefore much more elaborate than Adams's simple tripartite balancing.

Taylor believed that "[t]he division and responsibility of power, and the independence of political departments of each other, are the vital principles of our policy."<sup>145</sup> Dividing power at every level and with every power of government would prevent any one individual or group from overpowering the rest and imposing their will over the will of the people.<sup>146</sup> Instead of balancing three orders against each other, Taylor's system divided power at multiple levels.<sup>147</sup> The primary division between the government and the people consisted of individual rights: "By our policy, power is first divided between the government and the people, reserving to the people, the control of the dividend allotted to the government."<sup>148</sup> Taylor thought that individual rights "constitute our most useful division of power."<sup>149</sup> These rights included freedom "of conscience and of the press," and their chief significance was that they "deprive governments of much power."<sup>150</sup> In

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political power, and for all they contributed to society, they could thus become the most dangerous element in society, unless they and their interests were consigned to one branch of the legislature, the Senate, and given no executive power.").

<sup>142</sup> See VILE, *supra* note 1, at 185 ("He rejected, therefore, the very basis of the balanced constitution, by refusing to be drawn into the age-old dispute about the alternative forms of simple or mixed government.").

<sup>143</sup> *Id.* at 186.

<sup>144</sup> INQUIRY, *supra* note 12, at 85.

<sup>145</sup> *Id.* at 227.

<sup>146</sup> See Stromberg, *Country Ideology*, *supra* note 10, at 40 ("Taylor's key idea was to divide power up so many ways, federally and departmentally, that no set of officials possessed enough of it to overawe the rest of the government or the people.").

<sup>147</sup> See VILE, *supra* note 1, at 187-88 ("Taylor followed the separation of powers to its ultimate conclusion, rejecting the controlling links and balances between the branches of government which had formed an essential part of the eighteenth-century theory of balanced government, and which had been partly incorporated into the Federal Constitution.").

<sup>148</sup> INQUIRY, *supra* note 12, at 409.

<sup>149</sup> *Id.* at 471.

<sup>150</sup> *Id.*

America, these rights maintained “a great extent of political ground, forbidden to government.”<sup>151</sup> Thus, individual rights protected the sovereignty of the people at the most fundamental level. In this way, the Ninth Amendment was indispensable.<sup>152</sup>

The division between the government and the people was merely the first of many divisions. “The dividend allotted to the government, is subdivided between its two branches, federal and state.”<sup>153</sup> Here, Taylor introduces his understanding of federalism, which he had earlier presented in an 1809 debate with Thomas Ritchie using the term “divided powers.”<sup>154</sup> As Taylor would go on to argue in *Construction Construed and Constitutions Vindicated*, “federalism is indispensable for the good government of a country so large as the United States.”<sup>155</sup> But the divisions did not end with a simple concept of federalism that merely divided governmental power between state governments and federal government.<sup>156</sup> “The portion of this subdivision, assigned to the federal government, is again subdivided between two legislative branches, two executive branches, and two judicial branches; judges and juries; all enjoying specified powers independent of each other.”<sup>157</sup> The two legislative branches were presumably the two houses of Congress, and the two executive branches were “presumably referring to the President and the Cabinet.”<sup>158</sup> Taylor’s conception of separation of powers at the federal level therefore consisted of not a tripartite division, but six divisions, as each branch had its own division.<sup>159</sup> Thus divided, the power accorded to federal government posed less of a risk coalescing into a dangerous conglomeration.<sup>160</sup>

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<sup>151</sup> *Id.*

<sup>152</sup> See U.S. CONST., amend. IX (“The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.”).

<sup>153</sup> INQUIRY, *supra* note 12, at 363.

<sup>154</sup> HILL, *supra* note 4, at 180 (“In his 1809 debate with Thomas Ritchie, Taylor had often used the term in a sense equivalent to his use of *federalism*. Even though his conceptualization of divided power had become more elaborate by the time of the *Inquiry*, it seems fair to say that to Taylor *divided power* usually meant the unimpaired operations of federalism.”).

<sup>155</sup> TAYLOR, CONSTRUCTION CONSTRUED, *supra* note 62, at 343; see also GUTZMAN, *supra* note 2, at 128 (“Federalism with the small *f* was essential if freedom—self-government—was to endure in the United States.”).

<sup>156</sup> See MUDGE, *supra* note 69, at 71 (“The basic concepts in a theory of federalism are an equality of states and complete local self-government.”).

<sup>157</sup> INQUIRY, *supra* note 12, at 363.

<sup>158</sup> HILL, *supra* note 4, at 166.

<sup>159</sup> Cf. U.S. CONST., art. I, II, III.

<sup>160</sup> See INQUIRY, *supra* note 12, at 362 (“The more power is condensed, the more pernicious it becomes.”).

State governments, too, had their powers divided. Like the federal government, each state possessed “two legislative branches, two executive, and two judicial.”<sup>161</sup> Additionally, states had militias, which retained their own set of powers.<sup>162</sup> There were yet more powers in states that were “distributed in quotas still more minute,” but Taylor did not go into detail on these divisions “because of the various modes pursued towards this end, by different states.”<sup>163</sup> Taylor also asserted that “[p]atronage, a formidable power, is divided in a multitude of ways, the chief of which consists of portions exercised by the people, by legislative bodies, and by a variety of inferior courts.”<sup>164</sup> And all of these divisions were benefitted by “the multitude and variety of its elections.”<sup>165</sup> In other words, elections also were forms of divisions of power because they helped to prevent a single individual or group from taking and consolidating power.<sup>166</sup> Thus, for Taylor, the division of powers took many forms, all of which were designed to maintain the sovereignty of the people.<sup>167</sup> In so doing, Taylor argued, “our policy cleanses the sovereignty of the people of those defects incident to its aggregate exercise; concluding that power, untampered by division, exercised by nations or their governments, is invariably the scourge of human happiness.”<sup>168</sup> The division of power was therefore not a necessity because of something in the nature of government, but rather because of something in the nature of power: undivided power necessarily led to “the ability and inclination to tyrannize.”<sup>169</sup> As Eugene Mudge remarks in his monograph on Taylor’s philosophy, “[p]ower corrupts, and absolute power corrupts absolutely.”<sup>170</sup>

Taylor’s chief insight thus was not strictly governmental, but rather something more fundamental. Taylor asserted that “[u]nlimited power

<sup>161</sup> *Id.* at 363.

<sup>162</sup> *See id.* (“A power of such magnitude, as to be relied on for national defence, immediately dependent on the people, and generally removed far from a subserviency to any other division; this is the militia, officered by the people, or by the county courts; trying offenders by its own courts, or holding commissions during good behaviour.”).

<sup>163</sup> *Id.*

<sup>164</sup> *Id.*

<sup>165</sup> *Id.* at 364.

<sup>166</sup> *See* MUDGE, *supra* note 69, at 91 (“Rotation in office and ineligibility after short terms are forms of divided power.”).

<sup>167</sup> *See* HILL, *supra* note 4, at 16 (“[O]nce division was secure, such constitutional devices as election, rotation, bicameralism, and separated powers could be retained or altered as circumstances required.”).

<sup>168</sup> INQUIRY, *supra* note 12, at 364.

<sup>169</sup> *Id.*

<sup>170</sup> MUDGE, *supra* note 69, at 89.

could never be estimated or balanced, because the human mind cannot embrace that which has no limits; but specified and limited power, can easily be divided, and its effects foreseen.”<sup>171</sup> Taylor believed that “the coalescence of political power [is] always fatal to civil liberty.”<sup>172</sup> “The more power is condensed, the more pernicious it becomes.”<sup>173</sup> Conversely, “[t]he more [power] is divided, the farther it recedes from the class of evil moral beings.”<sup>174</sup> It was here that John Adams had chiefly failed: “Our policy divides power, and unites the nation in one interest; Mr. Adams’s divides a nation into several interests, and unites power.”<sup>175</sup> Uniting power in the vein of Adams’s system would “destroy the sovereignty of the people.”<sup>176</sup> Because Americans had fought and died for the sake of civil liberty, they now possessed sovereignty. And although they had delegated some powers to state government, which in turn delegated some powers to federal government, the people retained their sovereignty. Therefore, Taylor believed that power should be divided so “that the people may maintain their sovereignty.”<sup>177</sup> The proliferation of division was necessary because “[s]mall dividends are not as liable to ambition and avarice, as great dividends.”<sup>178</sup> Dividing power was therefore the chief structural principle of American governance, as evidenced in the Constitution.<sup>179</sup> More than simply federalism or separation of powers, however, Taylor’s division of power would limit influence at every level of government and in the private sector so as to preserve the sovereignty of the people. In this way, although the Constitution was an indispensable tool toward dividing power, more yet needed to be done.

### III. THE INIMITABLE JOHN TAYLOR

In John Taylor’s eyes, the American system relied on a division of powers throughout society to prevent corruption and maintain the sovereignty of the people. Although this vision comes through clearly in the *Inquiry*, few have

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<sup>171</sup> INQUIRY, *supra* note 12, at 374.

<sup>172</sup> *Id.* at 362.

<sup>173</sup> *Id.*

<sup>174</sup> *Id.*

<sup>175</sup> *Id.* at 378.

<sup>176</sup> *Id.* at 356.

<sup>177</sup> *Id.*

<sup>178</sup> *Id.* at 362.

<sup>179</sup> See SIMMS, *supra* note 76, at 139 (noting that division of powers was Taylor’s “outstanding good principle of our government.”).

noticed it.<sup>180</sup> Indeed, as Joseph Stromberg contends, “John Taylor has been styled an agrarian philosopher, an agrarian liberal, a democrat, and a partisan of states rights.”<sup>181</sup> But the connection between Taylor’s clear emphasis on the importance of the sovereignty of the people and his argument for division of powers has been lost. Instead, Taylor has been placed into one of a few buckets: Antifederalist, states’ rights advocate, Jeffersonian republican, or separation of powers pioneer. Seeing Taylor through only one of these lenses misses the big picture that all of Taylor’s arguments fit together and depend on one another. This error is particularly notable when commentators focus exclusively on Taylor’s commitment to the division of power because doing so divorces form from function in the exact way that John Adams did in the *Defence*. Appeals to Taylor as a separation-of-powers advocate forget the essential element of his thought that separation of powers, on its own, is not enough. Taylor believed that when “[d]ivided only into three departments, such as king, lords and commons, [power] can easily coalesce, plunder and oppress.”<sup>182</sup> John Adams had erred in thinking that this tripartite separation would sufficiently prevent corruption in the United States government. “This radical error forced Mr. Adams to overlook the prime division of power, between the people and the government; the federal division of power between the general and state governments; and that beautiful division of election.”<sup>183</sup> For Taylor, proper division of powers required “a vast number of divisions.”<sup>184</sup> Thus, dividing governmental power between the three branches of government, although necessary, was not sufficient.

Focusing on Taylor exclusively as a separation-of-powers advocate also misses the mark because it concentrates on the means of separation rather than the ends of maintaining the sovereignty of the people. The whole point of Taylor’s system of division of powers was to maintain the sovereignty of the people. For Taylor, division of powers was not an end in itself. Rather, division of powers served the purpose of maintaining the sovereignty of the people by preventing corruption and the coalescence of power. That is why reducing Taylor’s views to a simple separation of powers between the three branches of government neglects his chief insight, which was principally a

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<sup>180</sup> *But see* MUDGE, *supra* note 69, at 89 (“Power must be divided in order that the people may retain their sovereignty.”).

<sup>181</sup> Stromberg, *Country Ideology*, *supra* note 10, at 39.

<sup>182</sup> INQUIRY, *supra* note 12, at 362.

<sup>183</sup> *Id.* at 356.

<sup>184</sup> *Id.* at 362.

Revolutionary insight, that sovereignty resided with the people.<sup>185</sup> In this way, as M.J.C. Vile has noted, Taylor always “represented the philosophy of 1776 rather than that of 1787.”<sup>186</sup> In other words, the distinctions between Articles I, II, and III of the Constitution were not as meaningful as the Revolutionary fight to secure the sovereignty of the people over and against a monarchical and aristocratic government.<sup>187</sup>

Understanding Taylor’s emphasis on the sovereignty of the people helps to understand Taylor’s advocacy for states’ rights.<sup>188</sup> Although Taylor continues to be seen as a states’ rights advocate, he was never simply committed to the idea that state governments possessed power against the federal government.<sup>189</sup> Taylor’s view of states’ rights had more to do with his opinion that states offered the best chance at protecting and enforcing the will of the people (albeit, the white people) who were sovereign.<sup>190</sup> That is why Keith M. Bailor has suggested Taylor “does not represent an early example of the South’s later slavery-states’ rights position.”<sup>191</sup> It should nevertheless be acknowledged that Taylor’s own commitments to slavery opened himself up to the possibility that his arguments could later be used in favor of slavery, and because of “the part he took in the development of the theory of the Virginia and Kentucky Resolutions, Taylor left the foundations on which [John C.] Calhoun could build his own, quite different, system in the context of a different political situation.”<sup>192</sup> Thus, Taylor’s status as

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<sup>185</sup> See generally WOOD, *supra* note 67, at 344–389 (describing how a philosophy that supported the sovereignty of the people emerged in the Revolutionary era).

<sup>186</sup> VILE, *supra* note 1, at 188.

<sup>187</sup> Despite Taylor’s arguments against aristocracy, his own position in the landed gentry should be acknowledged as, if not inconsistent, at least ironic. See generally Dauer and Hammond, *supra* note 3, at 403 (“The trend which Taylor followed was that of advocating a consistent agrarian program, and trying to build this on a framework of popular support, but it was an agrarianism to be in the hands of an aristocratic leadership. Taylor might call these ‘landed gentry,’ but the mere change in nomenclature does not warrant its acceptance.”).

<sup>188</sup> See HILL, *supra* note 4, at 199 (“Taylor’s concept of states as sovereign peoples, as nations, casts new light on the term *states’ rights*.”).

<sup>189</sup> See Hays, *supra* note 44, at 206 (arguing that Taylor pioneered interposition).

<sup>190</sup> See SHELDON AND HILL, *supra* note 50, at 30 (“The importance of decentralized government, or states’ rights, to Taylor is best understood in this context. The more decentralized and accessible the government is to the people, the more likely it is to remain honest, under their scrutiny, and ‘republican,’ i.e., limited to protecting citizens’ natural rights equally and impartially. The more centralized and remote (or national) the government is, the more easily it can hide from the people and deceive them with special interest schemes that rob the citizens and promote tyranny.”).

<sup>191</sup> Keith M. Bailor, *John Taylor of Caroline: Continuity, Change, and Discontinuity in Virginia’s Sentiments toward Slavery, 1790–1820*, 75 VA. MAG. HIST. & BIOGRAPHY 290, 304 (1967).

<sup>192</sup> McConnell, *supra* note 9, at 29; see also Mayer, *supra* note 79, at 348 (“[The Old Republicans] were, as Risjord describes them, ‘the missing link in the conservative tradition between the Antifederalists



slaveowner and his advocacy for slavery gives merit to arguments that put him in the states' rights camp, and at the very least troubles his legacy as a thinker and an American.<sup>193</sup>

Nevertheless, Taylor's contributions to political thought remain significant, and understanding his view of sovereignty and separation of powers sheds light on a whole era of thought that was crucial to the creation of America as we know it today.<sup>194</sup> In his time he was remembered as a man who "belonged to that constellation of great men which shone so brightly in Virginia in his day, and the light of which was not limited to Virginia, or our America, but spread through the bounds of the civilized world."<sup>195</sup> He was so well respected in Virginia that he shaped the thought not only of his contemporaries, with whom he frequently conversed, but also the "public philosophy" of entire regions of Virginia.<sup>196</sup> In the years since his death, however, Taylor has faded from view despite "the unrivaled comprehensiveness with which Taylor dealt with nearly all aspects of the theory of limited political power which played an important part in American history between 1775 and 1861."<sup>197</sup> Perhaps Taylor's abstruse writing style has played a part in his disappearance, or perhaps the awkward timing of his publications doomed him from the start. Even of those who have noticed Taylor, few have treated him "as a political theorist with intrinsically important ideas," instead viewing him in light of his influence on more notable figures such as Jefferson, Madison, and Monroe.<sup>198</sup> If this Comment is any indication, Taylor's work warrants another look, for it requires close attention to detail and thoughtful reading, the kind which Taylor himself undertook for two decades before publishing the *Inquiry*.

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of 1788 and the states' rights southerners of the Jacksonian era." (quoting NORMAN K. RISJORD, *THE OLD REPUBLICANS: SOUTHERN CONSERVATISM IN THE AGE OF JEFFERSON* 1 (1965)).

<sup>193</sup> See Carol L. Thompson, *John Taylor of Caroline: Forgotten Prophet*, 13 *CURRENT HIST.* 264, 269 (1947) ("Gradually, but with convincing consistency, Taylor was building up his doctrine of states' rights. . . . [T]his thesis in turn provided the basis for the later nullification controversies and the justification of secession.").

<sup>194</sup> See *id.* ("Right or wrong, the anti-Federalists merit contemporary study.").

<sup>195</sup> THOMAS HART BENTON, *1 THIRTY YEARS' VIEW: OR, A HISTORY OF THE WORKING OF THE AMERICAN GOVERNMENT FOR THIRTY YEARS, FROM 1820 TO 1850*, at 45 (1854).

<sup>196</sup> GUTZMAN, *supra* note 2, at 167.

<sup>197</sup> Wright, *supra* note 18, at 892.

<sup>198</sup> HILL, *supra* note 4, at 284.

## CONCLUSION

This Comment has presented John Taylor of Caroline's importance as a political philosopher by examining his greatest work, the *Inquiry*. Taylor draws together two distinct principles that can be seen in the Constitution and its subsequent interpretation: the sovereignty of the people and the division of powers. A society without the latter endangers the former. Only by radically dividing power may a society preserve its people's sovereignty. Although the words of the Constitution are a helpful preservative of the people's sovereignty, the actual practices of people in power are ultimately most consequential. Taylor's own life, with its repeated retreats from political office, demonstrates just how committed Taylor was to preventing any one individual or group from becoming too powerful. Instead, Taylor fervently believed that the power resided with the people at large.

Taylor's cautions against the encroachments of the government were well received by Democrats from Jefferson to Calhoun, but his prophecies about the coalescence of power are perhaps truer today than ever before. With a continually growing administrative state at odds with the limiting principles of the Constitution, Taylor still has something to say today. Taylor's emphasis on the division of powers at every level, not just in the federal government, also sheds light on the growing power of state and municipal governments as well as private business interests. As Antifederalists continue to receive a resurgence in scholarly and popular attention, Taylor's works should no longer be neglected. His words might have been too late to respond John Adams and Alexander Hamilton, but they need not be too late today. Moreover, because *The Federalist* continues to receive attention from judges as they derive the meaning of the Constitution at the time of the Founding, Taylor's interpretation serves as a rival interpretation that warrants examination. Renewed attention to Taylor, including his other works such as *Construction Construed* and *New Views of the Constitution of the United States*, will therefore enhance understanding of the meaning of the Constitution according to those who had initially rejected its ratification while also illuminating contemporary discussions of federalism, separation of powers, and states' rights.