I have hitherto considered each State as a separate whole, and I have explained the different springs which the people sets in motion, and the different means of action which it employs. But all the States which I have considered as independent are forced to submit, in certain cases, to the supreme authority of the Union. The time is now come for me to examine separately the supremacy with which the Union has been invested, and to cast a rapid glance over the Federal Constitution.

Chapter Summary

Origin of the first Union – Its weakness – Congress appeals to the constituent authority – Interval of two years between this appeal and the promulgation of the new Constitution.

History Of The Federal Constitution

The thirteen colonies which simultaneously threw off the yoke of England towards the end of the last century professed, as I have already observed, the same religion, the same language, the same customs, and almost the same laws; they were struggling against a common enemy; and these reasons were sufficiently strong to unite them one to another, and to consolidate them into one nation. But as each of them had enjoyed a separate existence and a government within its own control, the peculiar interests and customs which resulted from this system were opposed to a compact and intimate union which would have absorbed the individual importance of each in the general importance of all. Hence arose two opposite tendencies, the one prompting the Anglo-Americans to unite, the other to divide their strength. As long as the war with the mother-country lasted the principle of union was

kept alive by necessity; and although the laws which constituted it were defective, the common tie subsisted in spite of their imperfections. [11a] But no sooner was peace concluded than the faults of the legislation became manifest, and the State seemed to be suddenly dissolved. Each colony became an independent republic, and assumed an absolute sovereignty. The federal government, condemned to impotence by its constitution, and no longer sustained by the presence of a common danger, witnessed the outrages offered to its flag by the great nations of Europe, whilst it was scarcely able to maintain its ground against the Indian tribes, and to pay the interest of the debt which had been contracted during the war of independence. It was already on the verge of destruction, when it officially proclaimed its inability to conduct the government, and appealed to the constituent authority of the nation. [11b] If America ever approached (for however brief a time) that lofty pinnacle of glory to which the fancy of its inhabitants is wont to point, it was at the solemn moment at which the power of the nation abdicated, as it were, the empire of the land. All ages have furnished the spectacle of a people struggling with energy to win its independence; and the efforts of the Americans in throwing off the English yoke have been considerably exaggerated. Separated from their enemies by three thousand miles of ocean, and backed by a powerful ally, the success of the United States may be more justly attributed to their geographical position than to the valor of their armies or the patriotism of their citizens. It would be ridiculous to compare the American was to the wars of the French Revolution, or the efforts of the Americans to those of the French when they were attacked by the whole of Europe, without credit and without allies, yet capable of opposing a twentieth part of their population to the world, and of bearing the torch of revolution beyond their frontiers whilst they stifled its devouring flame within the bosom of their country. But it is a novelty in the history of society to see a great people turn a calm and scrutinizing eye upon itself, when apprised by the legislature that the wheels of government are stopped; to see it carefully

examine the extent of the evil, and patiently wait for two whole years until a remedy was discovered, which it voluntarily adopted without having wrung a tear or a drop of blood from mankind. At the time when the inadequacy of the first constitution was discovered America possessed the double advantage of that calm which had succeeded the effervescence of the revolution, and of those great men who had led the revolution to a successful issue. The assembly which accepted the task of composing the second constitution was small; [11c] but George Washington was its President, and it contained the choicest talents and the noblest hearts which had ever appeared in the New World. This national commission, after long and mature deliberation, offered to the acceptance of the people the body of general laws which still rules the Union. All the States adopted it successively. [11d] The new Federal Government commenced its functions in 1789, after an interregnum of two years. The Revolution of America terminated when that of France began.

Summary Of The Federal Constitution

> Division of authority between the Federal Government and the States – The Government of the States is the rule, the Federal Government the exception.

The first question which awaited the Americans was intricate, and by no means easy of solution: the object was so to divide the authority of the different States which composed the Union that each of them should continue to govern itself in all that concerned its internal prosperity, whilst the entire nation, represented by the Union, should continue to form a compact body, and to provide for the general exigencies of the people. It was as impossible to determine beforehand, with any degree of accuracy, the share of authority which each of two governments was to enjoy, as to foresee all the incidents in the existence of a nation.

The obligations and the claims of the Federal Government were simple and easily definable, because the Union had been formed with the express purpose of meeting the general exigencies of the people; but the claims and obligations of the States were, on the other hand, complicated and various, because those Governments had penetrated into all the details of social life. The attributes of the Federal Government were therefore carefully enumerated and all that was not included amongst them was declared to constitute a part of the privileges of the several Governments of the States. Thus the government of the States remained the rule, and that of the Confederation became the exception. [11e]

But as it was foreseen that, in practice, questions might arise as to the exact limits of this exceptional authority, and that it would be dangerous to submit these questions to the decision of the ordinary courts of justice, established in the States by the States themselves, a high Federal court was created, [11f] which was destined, amongst other functions, to maintain the balance of power which had been established by the Constitution between the two rival Governments. [11g]

Prerogative Of The Federal Government

> Power of declaring war, making peace, and levying general taxes vested in the Federal Government – What part of the internal policy of the country it may direct – The Government of the Union in some respects more central than the King's Government in the old French monarchy.

The external relations of a people may be compared to those of private individuals, and they cannot be advantageously maintained without the agency of a single head of a Government. The exclusive right of making peace and war, of concluding treaties of commerce, of raising armies, and equipping fleets, was granted to the Union. [11h] The necessity of a national Government was less

imperiously felt in the conduct of the internal policy of society; but there are certain general interests which can only be attended to with advantage by a general authority. The Union was invested with the power of controlling the monetary system, of directing the post office, and of opening the great roads which were to establish a communication between the different parts of the country. [11i] The independence of the Government of each State was formally recognized in its sphere; nevertheless, the Federal Government was authorized to interfere in the internal affairs of the States [11j] in a few predetermined cases, in which an indiscreet abuse of their independence might compromise the security of the Union at large. Thus, whilst the power of modifying and changing their legislation at pleasure was preserved in all the republics, they were forbidden to enact ex post facto laws, or to create a class of nobles in their community. [11k] Lastly, as it was necessary that the Federal Government should be able to fulfil its engagements, it was endowed with an unlimited power of levying taxes. [11l]

In examining the balance of power as established by the Federal Constitution; in remarking on the one hand the portion of sovereignty which has been reserved to the several States, and on the other the share of power which the Union has assumed, it is evident that the Federal legislators entertained the clearest and most accurate notions on the nature of the centralization of government. The United States form not only a republic, but a confederation; nevertheless the authority of the nation is more central than it was in several of the monarchies of Europe when the American Constitution was formed. Take, for instance, the two following examples.

Thirteen supreme courts of justice existed in France, which, generally speaking, had the right of interpreting the law without appeal; and those provinces which were styled pays d'etats were authorized to refuse their assent to an impost which had been levied by the sovereign who represented the nation. In the Union there is but one

tribunal to interpret, as there is one legislature to make the laws; and an impost voted by the representatives of the nation is binding upon all the citizens. In these two essential points, therefore, the Union exercises more central authority than the French monarchy possessed, although the Union is only an assemblage of confederate republics.

In Spain certain provinces had the right of establishing a system of custom-house duties peculiar to themselves, although that privilege belongs, by its very nature, to the national sovereignty. In America the Congress alone has the right of regulating the commercial relations of the States. The government of the Confederation is therefore more centralized in this respect than the kingdom of Spain. It is true that the power of the Crown in France or in Spain was always able to obtain by force whatever the Constitution of the country denied, and that the ultimate result was consequently the same; but I am here discussing the theory of the Constitution.

Federal Powers

After having settled the limits within which the Federal Government was to act, the next point was to determine the powers which it was to exert.

Legislative Powers [11m]

> Division of the Legislative Body into two branches – Difference in the manner of forming the two Houses – The principle of the independence of the States predominates in the formation of the Senate – The principle of the sovereignty of the nation in the composition of the House of Representatives – Singular effects of the fact that a Constitution can only be logical in the early stages of a nation.

The plan which had been laid down beforehand for the Constitutions of the several States was followed, in many points, in the organization of the powers of the Union. The

Federal legislature of the Union was composed of a Senate and a House of Representatives. A spirit of conciliation prescribed the observance of distinct principles in the formation of these two assemblies. I have already shown that two contrary interests were opposed to each other in the establishment of the Federal Constitution. These two interests had given rise to two opinions. It was the wish of one party to convert the Union into a league of independent States, or a sort of congress, at which the representatives of the several peoples would meet to discuss certain points of their common interests. The other party desired to unite the inhabitants of the American colonies into one sole nation, and to establish a Government which should act as the sole representative of the nation, as far as the limited sphere of its authority would permit. The practical consequences of these two theories were exceedingly different.

The question was, whether a league was to be established instead of a national Government; whether the majority of the State, instead of the majority of the inhabitants of the Union, was to give the law: for every State, the small as well as the great, would then remain in the full enjoyment of its independence, and enter the Union upon a footing of perfect equality. If, however, the inhabitants of the United States were to be considered as belonging to one and the same nation, it would be just that the majority of the citizens of the Union should prescribe the law. Of course the lesser States could not subscribe to the application of this doctrine without, in fact, abdicating their existence in relation to the sovereignty of the Confederation; since they would have passed from the condition of a co-equal and co-legislative authority to that of an insignificant fraction of a great people. But if the former system would have invested them with an excessive authority, the latter would have annulled their influence altogether. Under these circumstances the result was, that the strict rules of logic were evaded, as is usually the case when interests are opposed to arguments. A middle course

was hit upon by the legislators, which brought together by force two systems theoretically irreconcilable.

The principle of the independence of the States prevailed in the formation of the Senate, and that of the sovereignty of the nation predominated in the composition of the House of Representatives. It was decided that each State should send two senators to Congress, and a number of representatives proportioned to its population. [11n] It results from this arrangement that the State of New York has at the present day forty representatives and only two senators; the State of Delaware has two senators and only one representative; the State of Delaware is therefore equal to the State of New York in the Senate, whilst the latter has forty times the influence of the former in the House of Representatives. Thus, if the minority of the nation preponderates in the Senate,. it may paralyze the decisions of the majority represented in the other House, which is contrary to the spirit of constitutional government.

These facts show how rare and how difficult it is rationally and logically to combine all the several parts of legislation. In the course of time different interests arise, and different principles are sanctioned by the same people; and when a general constitution is to be established, these interests and principles are so many natural obstacles to the rigorous application of any political system, with all its consequences. The early stages of national existence are the only periods at which it is possible to maintain the complete logic of legislation; and when we perceive a nation in the enjoyment of this advantage, before we hasten to conclude that it is wise, we should do well to remember that it is young. When the Federal Constitution was formed, the interests of independence for the separate States, and the interest of union for the whole people, were the only two conflicting interests which existed amongst the Anglo-Americans, and a compromise was necessarily made between them.

It is, however, just to acknowledge that this part of the Constitution has not hitherto produced those evils which might have been feared. All the States are young and contiguous; their customs, their ideas, and their exigencies are not dissimilar; and the differences which result from their size or inferiority do not suffice to set their interests at variance. The small States have consequently never been induced to league themselves together in the Senate to oppose the designs of the larger ones; and indeed there is so irresistible an authority in the legitimate expression of the will of a people that the Senate could offer but a feeble opposition to the vote of the majority of the House of Representatives.

It must not be forgotten, on the other hand, that it was not in the power of the American legislators to reduce to a single nation the people for whom they were making laws. The object of the Federal Constitution was not to destroy the independence of the States, but to restrain it. By acknowledging the real authority of these secondary communities (and it was impossible to deprive them of it), they disavowed beforehand the habitual use of constraint in enforcing g the decisions of the majority. Upon this principle the introduction of the influence of the States into the mechanism of the Federal Government was by no means to be wondered at, since it only attested the existence of an acknowledged power, which was to be humored and not forcibly checked.

A Further Difference Between The Senate And The House Of Representatives

> The Senate named by the provincial legislators, the Representatives by the people – Double election of the former; single election of the latter – Term of the different offices – Peculiar functions of each House.

The Senate not only differs from the other House in the principle which it represents, but also in the mode of its election, in the term for which it is chosen, and in the

nature of its functions. The House of Representatives is named by the people, the Senate by the legislators of each State; the former is directly elected, the latter is elected by an elected body; the term for which the representatives are chosen is only two years, that of the senators is six. The functions of the House of Representatives are purely legislative, and the only share it takes in the judicial power is in the impeachment of public officers. The Senate co-operates in the work of legislation, and tries those political offences which the House of Representatives submits to its decision. It also acts as the great executive council of the nation; the treaties which are concluded by the President must be ratified by the Senate, and the appointments he may make must be definitely approved by the same body. [11o]

The Executive Power [11p]

> Dependence of the President – He is elective and responsible – He is free to act in his own sphere under the inspection, but not under the direction, of the Senate – His salary fixed at his entry into office – Suspensive veto.

The American legislators undertook a difficult task in attempting to create an executive power dependent on the majority of the people, and nevertheless sufficiently strong to act without restraint in its own sphere. It was indispensable to the maintenance of the republican form of government that the representative of the executive power should be subject to the will of the nation.

The President is an elective magistrate. His honor, his property, his liberty, and his life are the securities which the people has for the temperate use of his power. But in the exercise of his authority he cannot be said to be perfectly independent; the Senate takes cognizance of his relations with foreign powers, and of the distribution of public appointments, so that he can neither be bribed nor can he employ the means of corruption. The legislators of

the Union acknowledged that the executive power would be incompetent to fulfil its task with dignity and utility, unless it enjoyed a greater degree of stability and of strength than had been granted to it in the separate States.

The President is chosen for four years, and he may be reelected; so that the chances of a prolonged administration may inspire him with hopeful undertakings for the public good, and with the means of carrying them into execution. The President was made the sole representative of the executive power of the Union, and care was taken not to render his decisions subordinate to the vote of a council – a dangerous measure, which tends at the same time to clog the action of the Government and to diminish its responsibility. The Senate has the right of annulling g certain acts of the President; but it cannot compel him to take any steps, nor does it participate in the exercise of the executive power.

The action of the legislature on the executive power may be direct; and we have just shown that the Americans carefully obviated this influence; but it may, on the other hand, be indirect. Public assemblies which have the power of depriving an officer of state of his salary encroach upon his independence; and as they are free to make the laws, it is to be feared lest they should gradually appropriate to themselves a portion of that authority which the Constitution had vested in his hands. This dependence of the executive power is one of the defects inherent in republican constitutions. The Americans have not been able to counteract the tendency which legislative assemblies have to get possession of the government, but they have rendered this propensity less irresistible. The salary of the President is fixed, at the time of his entering upon office, for the whole period of his magistracy. The President is, moreover, provided with a suspensive veto, which allows him to oppose the passing of such laws as might destroy the portion of independence which the Constitution awards him. The struggle between the President and the legislature must always be an unequal

one, since the latter is certain of bearing down all resistance by persevering in its plans; but the suspensive veto forces it at least to reconsider the matter, and, if the motion be persisted in, it must then be backed by a majority of two-thirds of the whole house. The veto is, in fact, a sort of appeal to the people. The executive power, which, without this security, might have been secretly oppressed, adopts this means of pleading its cause and stating its motives. But if the legislature is certain of overpowering all resistance by persevering in its plans, I reply, that in the constitutions of all nations, of whatever kind they may be, a certain point exists at which the legislator is obliged to have recourse to the good sense and the virtue of his fellow-citizens. This point is more prominent and more discoverable in republics, whilst it is more remote and more carefully concealed in monarchies, but it always exists somewhere. There is no country in the world in which everything can be provided for by the laws, or in which political institutions can prove a substitute for common sense and public morality.

Differences Between The Position Of The President Of The United States And That Of A Constitutional King Of France

Executive power in the Northern States as limited and as partial as the supremacy which it represents – Executive power in France as universal as the supremacy it represents – The King a branch of the legislature – The President the mere executor of the law – Other differences resulting from the duration of the two powers – The President checked in the exercise of the executive authority – The King independent in its exercise – Notwithstanding these discrepancies France is more akin to a republic than the Union to a monarchy -Comparison of the number of public officers depending upon the executive power in the two countries.

The executive power has so important an influence on the destinies of nations that I am inclined to pause for an

instant at this portion of my subject, in order more clearly to explain the part it sustains in America. In order to form an accurate idea of the position of the President of the United States, it may not be irrelevant to compare it to that of one of the constitutional kings of Europe. In this comparison I shall pay but little attention to the external signs of power, which are more apt to deceive the eye of the observer than to guide his researches. When a monarchy is being gradually transformed into a republic, the executive power retains the titles, the honors, the etiquette, and even the funds of royalty long after its authority has disappeared. The English, after having cut off the head of one king and expelled another from his throne, were accustomed to accost the successor of those princes upon their knees. On the other hand, when a republic falls under the sway of a single individual, the demeanor of the sovereign is simple and unpretending, as if his authority was not yet paramount. When the emperors exercised an unlimited control over the fortunes and the lives of their fellow-citizens, it was customary to call them Caesar in conversation, and they were in the habit of supping without formality at their friends' houses. It is therefore necessary to look below the surface.

The sovereignty of the United States is shared between the Union and the States, whilst in France it is undivided and compact: hence arises the first and the most notable difference which exists between the President of the United States and the King of France. In the United States the executive power is as limited and partial as the sovereignty of the Union in whose name it acts; in France it is as universal as the authority of the State. The Americans have a federal and the French a national Government.

Chapter VIII: The Federal Constitution – Part II

This cause of inferiority results from the nature of things, but it is not the only one; the second in importance

is as follows: Sovereignty may be defined to be the right of making laws: in France, the King really exercises a portion of the sovereign power, since the laws have no weight till he has given his assent to them; he is, moreover, the executor of all they ordain. The President is also the executor of the laws, but he does not really co-operate in their formation, since the refusal of his assent does not annul them. He is therefore merely to be considered as the agent of the sovereign power. But not only does the King of France exercise a portion of the sovereign power, he also contributes to the nomination of the legislature, which exercises the other portion. He has the privilege of appointing the members of one chamber, and of dissolving the other at his pleasure; whereas the President of the United States has no share in the formation of the legislative body, and cannot dissolve any part of it. The King has the same right of bringing forward measures as the Chambers; a right which the President does not possess. The King is represented in each assembly by his ministers, who explain his intentions, support his opinions, and maintain the principles of the Government. The President and his ministers are alike excluded from Congress; so that his influence and his opinions can only penetrate indirectly into that great body. The King of France is therefore on an equal footing with the legislature, which can no more act without him than he can without it. The President exercises an authority inferior to, and depending upon, that of the legislature.

Even in the exercise of the executive power, properly so called – the point upon which his position seems to be most analogous to that of the King of France – the President labors under several causes of inferiority. The authority of the King, in France, has, in the first place, the advantage of duration over that of the President, and durability is one of the chief elements of strength; nothing is either loved or feared but what is likely to endure. The President of the United States is a magistrate elected for four years; the King, in France, is an hereditary sovereign. In the exercise of the executive power the President of the

United States is constantly subject to a jealous scrutiny. He may make, but he cannot conclude, a treaty; he may designate, but he cannot appoint, a public officer. [11q] The King of France is absolute within the limits of his authority. The President of the United States is responsible for his actions; but the person of the King is declared inviolable by the French Charter. [11r]

Nevertheless, the supremacy of public opinion is no less above the head of the one than of the other. This power is less definite, less evident, and less sanctioned by the laws in France than in America, but in fact it exists. In America, it acts by elections and decrees; in France it proceeds by revolutions; but notwithstanding the different constitutions of these two countries, public opinion is the predominant authority in both of them. The fundamental principle of legislation – a principle essentially republican – is the same in both countries, although its consequences may be different, and its results more or less extensive. Whence I am led to conclude that France with its King is nearer akin to a republic than the Union with its President is to a monarchy.

In what I have been saying I have only touched upon the main points of distinction; and if I could have entered into details, the contrast would have been rendered still more striking. I have remarked that the authority of the President in the United States is only exercised within the limits of a partial sovereignty, whilst that of the King in France is undivided. I might have gone on to show that the power of the King's government in France exceeds its natural limits, however extensive they may be, and penetrates in a thousand different ways into the administration of private interests. Amongst the examples of this influence may be quoted that which results from the great number of public functionaries, who all derive their appointments from the Government. This number now exceeds all previous limits; it amounts to 138,000 [11s] nominations, each of which may be considered as an element of power. The President of the United States

has not the exclusive right of making any public appointments, and their whole number scarcely exceeds 12,000. [11t]

Accidental Causes Which May Increase The Influence Of The Executive Government

External security of the Union – Army of six thousand men – Few ships – The President has no opportunity of exercising his great prerogatives – In the prerogatives he exercises he is weak.

If the executive government is feebler in America than in France, the cause is more attributable to the circumstances than to the laws of the country.

It is chiefly in its foreign relations that the executive power of a nation is called upon to exert its skill and its vigor. If the existence of the Union were perpetually threatened, and if its chief interests were in daily connection with those of other powerful nations, the executive government would assume an increased importance in proportion to the measures expected of it, and those which it would carry into effect. The President of the United States is the commander-in-chief of the army, but of an army composed of only six thousand men; he commands the fleet, but the fleet reckons but few sail; he conducts the foreign relations of the Union, but the United States are a nation without neighbors. Separated from the rest of the world by the ocean, and too weak as yet to aim at the dominion of the seas, they have no enemies, and their interests rarely come into contact with those of any other nation of the globe.

The practical part of a Government must not be judged by the theory of its constitution. The President of the United States is in the possession of almost royal prerogatives, which he has no opportunity of exercising; and those privileges which he can at present use are very circumscribed. The laws allow him to possess a degree of

influence which circumstances do not permit him to employ.

On the other hand, the great strength of the royal prerogative in France arises from circumstances far more than from the laws. There the executive government is constantly struggling against prodigious obstacles, and exerting all its energies to repress them; so that it increases by the extent of its achievements, and by the importance of the events it controls, without modifying its constitution. If the laws had made it as feeble and as circumscribed as it is in the Union, its influence would very soon become still more preponderant.

Why The President Of The United States Does Not Require The Majority Of The Two Houses In Order To Carry On The Government

It is an established axiom in Europe that a constitutional King cannot persevere in a system of government which is opposed by the two other branches of the legislature. But several Presidents of the United States have been known to lose the majority in the legislative body without being obliged to abandon the supreme power, and without inflicting a serious evil upon society. I have heard this fact quoted as an instance of the independence and the power of the executive government in America: a moment's reflection will convince us, on the contrary, that it is a proof of its extreme weakness.

A King in Europe requires the support of the legislature to enable him to perform the duties imposed upon him by the Constitution, because those duties are enormous. A constitutional King in Europe is not merely the executor of the law, but the execution of its provisions devolves so completely upon him that he has the power of paralyzing its influence if it opposes his designs. He requires the assistance of the legislative assemblies to make the law, but those assemblies stand in need of his aid to execute it: these two authorities cannot subsist without each other,

and the mechanism of government is stopped as soon as they are at variance.

In America the President cannot prevent any law from being passed, nor can he evade the obligation of enforcing it. His sincere and zealous co-operation is no doubt useful, but it is not indispensable, in the carrying on of public affairs. All his important acts are directly or indirectly submitted to the legislature, and of his own free authority he can do but little. It is therefore his weakness, and not his power, which enables him to remain in opposition to Congress. In Europe, harmony must reign between the Crown and the other branches of the legislature, because a collision between them may prove serious; in America, this harmony is not indispensable, because such a collision is impossible.

Election Of The President

> Dangers of the elective system increase in proportion to the extent of the prerogative – This system possible in America because no powerful executive authority is required – What circumstances are favorable to the elective system – Why the election of the President does not cause a deviation from the principles of the Government – Influence of the election of the President on secondary functionaries.

The dangers of the system of election applied to the head of the executive government of a great people have been sufficiently exemplified by experience and by history, and the remarks I am about to make refer to America alone. These dangers may be more or less formidable in proportion to the place which the executive power occupies, and to the importance it possesses in the State; and they may vary according to the mode of election and the circumstances in which the electors are placed. The most weighty argument against the election of a chief magistrate is, that it offers so splendid a lure to private

ambition, and is so apt to inflame men in the pursuit of power, that when legitimate means are wanting force may not unfrequently seize what right denied.

It is clear that the greater the privileges of the executive authority are, the greater is the temptation; the more the ambition of the candidates is excited, the more warmly are their interests espoused by a throng of partisans who hope to share the power when their patron has won the prize. The dangers of the elective system increase, therefore, in the exact ratio of the influence exercised by the executive power in the affairs of State. The revolutions of Poland were not solely attributable to the elective system in general, but to the fact that the elected monarch was the sovereign of a powerful kingdom. Before we can discuss the absolute advantages of the elective system we must make preliminary inquiries as to whether the geographical position, the laws, the habits, the manners, and the opinions of the people amongst whom it is to be introduced will admit of the establishment of a weak and dependent executive government; for to attempt to render the representative of the State a powerful sovereign, and at the same time elective, is, in my opinion, to entertain two incompatible designs. To reduce hereditary royalty to the condition of an elective authority, the only means that I am acquainted with are to circumscribe its sphere of action beforehand, gradually to diminish its prerogatives, and to accustom the people to live without its protection. Nothing, however, is further from the designs of the republicans of Europe than this course: as many of them owe their hatred of tyranny to the sufferings which they have personally undergone, it is oppression, and not the extent of the executive power, which excites their hostility, and they attack the former without perceiving how nearly it is connected with the latter.

Hitherto no citizen has shown any disposition to expose his honor and his life in order to become the President of the United States; because the power of that office is temporary, limited, and subordinate. The prize of fortune

must be great to encourage adventurers in so desperate a game. No candidate has as yet been able to arouse the dangerous enthusiasm or the passionate sympathies of the people in his favor, for the very simple reason that when he is at the head of the Government he has but little power, but little wealth, and but little glory to share amongst his friends; and his influence in the State is too small for the success or the ruin of a faction to depend upon the elevation of an individual to power.

The great advantage of hereditary monarchies is, that as the private interest of a family is always intimately connected with the interests of the State, the executive government is never suspended for a single instant; and if the affairs of a monarchy are not better conducted than those of a republic, at least there is always some one to conduct them, well or ill, according to his capacity. In elective States, on the contrary, the wheels of government cease to act, as it were, of their own accord at the approach of an election, and even for some time previous to that event. The laws may indeed accelerate the operation of the election, which may be conducted with such simplicity and rapidity that the seat of power will never be left vacant; but, notwithstanding these precautions, a break necessarily occurs in the minds of the people.

At the approach of an election the head of the executive government is wholly occupied by the coming struggle; his future plans are doubtful; he can undertake nothing new, and the he will only prosecute with indifference those designs which another will perhaps terminate. “I am so near the time of my retirement from office,” said President Jefferson on the 21st of January, 1809 (six weeks before the election), “that I feel no passion, I take no part, I express no sentiment. It appears to me just to leave to my successor the commencement of those measures which he will have to prosecute, and for which he will be responsible.”

On the other hand, the eyes of the nation are centred on a single point; all are watching the gradual birth of so important an event. The wider the influence of the executive power extends, the greater and the more necessary is its constant action, the more fatal is the term of suspense; and a nation which is accustomed to the government, or, still more, one used to the administrative protection of a powerful executive authority would be infallibly convulsed by an election of this kind. In the United States the action of the Government may be slackened with impunity, because it is always weak and circumscribed. [11u]

One of the principal vices of the elective system is that it always introduces a certain degree of instability into the internal and external policy of the State. But this disadvantage is less sensibly felt if the share of power vested in the elected magistrate is small. In Rome the principles of the Government underwent no variation, although the Consuls were changed every year, because the Senate, which was an hereditary assembly, possessed the directing authority. If the elective system were adopted in Europe, the condition of most of the monarchical States would be changed at every new election. In America the President exercises a certain influence on State affairs, but he does not conduct them; the preponderating power is vested in the representatives of the whole nation. The political maxims of the country depend therefore on the mass of the people, not on the President alone; and consequently in America the elective system has no very prejudicial influence on the fixed principles of the Government. But the want of fixed principles is an evil so inherent in the elective system that it is still extremely perceptible in the narrow sphere to which the authority of the President extends.

The Americans have admitted that the head of the executive power, who has to bear the whole responsibility of the duties he is called upon to fulfil, ought to be empowered to choose his own agents, and to remove them

at pleasure: the legislative bodies watch the conduct of the President more than they direct it. The consequence of this arrangement is, that at every new election the fate of all the Federal public officers is in suspense. Mr. Quincy Adams, on his entry into office, discharged the majority of the individuals who had been appointed by his predecessor: and I am not aware that General Jackson allowed a single removable functionary employed in the Federal service to retain his place beyond the first year which succeeded his election. It is sometimes made a subject of complaint that in the constitutional monarchies of Europe the fate of the humbler servants of an Administration depends upon that of the Ministers. But in elective Governments this evil is far greater. In a constitutional monarchy successive ministries are rapidly formed; but as the principal representative of the executive power does not change, the spirit of innovation is kept within bounds; the changes which take place are in the details rather than in the principles of the administrative system; but to substitute one system for another, as is done in America every four years, by law, is to cause a sort of revolution. As to the misfortunes which may fall upon individuals in consequence of this state of things, it must be allowed that the uncertain situation of the public officers is less fraught with evil consequences in America than elsewhere. It is so easy to acquire an independent position in the United States that the public officer who loses his place may be deprived of the comforts of life, but not of the means of subsistence.

I remarked at the beginning of this chapter that the dangers of the elective system applied to the head of the State are augmented or decreased by the peculiar circumstances of the people which adopts it. However the functions of the executive power may be restricted, it must always exercise a great influence upon the foreign policy of the country, for a negotiation cannot be opened or successfully carried on otherwise than by a single agent. The more precarious and the more perilous the position of a people becomes, the more absolute is the want of a fixed

and consistent external policy, and the more dangerous does the elective system of the Chief Magistrate become. The policy of the Americans in relation to the whole world is exceedingly simple; for it may almost be said that no country stands in need of them, nor do they require the co-operation of any other people. Their independence is never threatened. In their present condition, therefore, the functions of the executive power are no less limited by circumstances than by the laws; and the President may frequently change his line of policy without involving the State in difficulty or destruction.

Whatever the prerogatives of the executive power may be, the period which immediately precedes an election and the moment of its duration must always be considered as a national crisis, which is perilous in proportion to the internal embarrassments and the external dangers of the country. Few of the nations of Europe could escape the calamities of anarchy or of conquest every time they might have to elect a new sovereign. In America society is so constituted that it can stand without assistance upon its own basis; nothing is to be feared from the pressure of external dangers, and the election of the President is a cause of agitation, but not of ruin.

Mode Of Election

> Skill of the American legislators shown in the mode of election adopted by them – Creation of a special electoral body – Separate votes of these electors – Case in which the House of Representatives is called upon to choose the President – Results of the twelve elections which have taken place since the Constitution has been established.

Besides the dangers which are inherent in the system, many other difficulties may arise from the mode of election, which may be obviated by the precaution of the legislator. When a people met in arms on some public spot to choose its head, it was exposed to all the chances of civil

war resulting from so martial a mode of proceeding, besides the dangers of the elective system in itself. The Polish laws, which subjected the election of the sovereign to the veto of a single individual, suggested the murder of that individual or prepared the way to anarchy.

In the examination of the institutions and the political as well as social condition of the United States, we are struck by the admirable harmony of the gifts of fortune and the efforts of man. The nation possessed two of the main causes of internal peace; it was a new country, but it was inhabited by a people grown old in the exercise of freedom. America had no hostile neighbors to dread; and the American legislators, profiting by these favorable circumstances, created a weak and subordinate executive power which could without danger be made elective.

It then only remained for them to choose the least dangerous of the various modes of election; and the rules which they laid down upon this point admirably correspond to the securities which the physical and political constitution of the country already afforded. Their object was to find the mode of election which would best express the choice of the people with the least possible excitement and suspense. It was admitted in the first place that the simple majority should be decisive; but the difficulty was to obtain this majority without an interval of delay which it was most important to avoid. It rarely happens that an individual can at once collect the majority of the suffrages of a great people; and this difficulty is enhanced in a republic of confederate States, where local influences are apt to preponderate. The means by which it was proposed to obviate this second obstacle was to delegate the electoral powers of the nation to a body of representatives. This mode of election rendered a majority more probable; for the fewer the electors are, the greater is the chance of their coming to a final decision. It also offered an additional probability of a judicious choice. It then remained to be decided whether this right of election was to be entrusted to a legislative body, the habitual

representative assembly of the nation, or whether an electoral assembly should be formed for the express purpose of proceeding to the nomination of a President. The Americans chose the latter alternative, from a belief that the individuals who were returned to make the laws were incompetent to represent the wishes of the nation in the election of its chief magistrate; and that, as they are chosen for more than a year, the constituency they represent might have changed its opinion in that time. It was thought that if the legislature was empowered to elect the head of the executive power, its members would, for some time before the election, be exposed to the manoeuvres of corruption and the tricks of intrigue; whereas the special electors would, like a jury, remain mixed up with the crowd till the day of action, when they would appear for the sole purpose of giving their votes.

It was therefore established that every State should name a certain number of electors, [11v] who in their turn should elect the President; and as it had been observed that the assemblies to which the choice of a chief magistrate had been entrusted in elective countries inevitably became the centres of passion and of cabal; that they sometimes usurped an authority which did not belong to them; and that their proceedings, or the uncertainty which resulted from them, were sometimes prolonged so much as to endanger the welfare of the State, it was determined that the electors should all vote upon the same day, without being convoked to the same place. [11w] This double election rendered a majority probable, though not certain; for it was possible that as many differences might exist between the electors as between their constituents. In this case it was necessary to have recourse to one of three measures; either to appoint new electors, or to consult a second time those already appointed,or to defer the election to another authority. The first two of these alternatives, independently of the uncertainty of their results, were likely to delay the final decision, and to perpetuate an agitation which must always be accompanied with danger. The third expedient was

therefore adopted, and it was agreed that the votes should be transmitted sealed to the President of the Senate, and that they should be opened and counted in the presence of the Senate and the House of Representatives. If none of the candidates has a majority, the House of Representatives then proceeds immediately to elect a President, but with the condition that it must fix upon one of the three candidates who have the highest numbers. [11x]

Thus it is only in case of an event which cannot often happen, and which can never be foreseen, that the election is entrusted to the ordinary representatives of the nation; and even then they are obliged to choose a citizen who has already been designated by a powerful minority of the special electors. It is by this happy expedient that the respect which is due to the popular voice is combined with the utmost celerity of execution and those precautions which the peace of the country demands. But the decision of the question by the House of Representatives does not necessarily offer an immediate solution of the difficulty, for the majority of that assembly may still be doubtful, and in this case the Constitution prescribes no remedy. Nevertheless, by restricting the number of candidates to three, and by referring the matter to the judgment of an enlightened public body, it has smoothed all the obstacles [11y] which are not inherent in the elective system.

In the forty-four years which have elapsed since the promulgation of the Federal Constitution the United States have twelve times chosen a President. Ten of these elections took place simultaneously by the votes of the special electors in the different States. The House of Representatives has only twice exercised its conditional privilege of deciding in cases of uncertainty; the first time was at the election of Mr. Jefferson in 1801; the second was in 1825, when Mr. Quincy Adams was named. [11z]

The Election may be considered as a national crisis – Why? – Passions of the people – Anxiety of the President – Calm which succeeds the agitation of the election.

I have shown what the circumstances are which favored the adoption of the elective system in the United States, and what precautions were taken by the legislators to obviate its dangers. The Americans are habitually accustomed to all kinds of elections, and they know by experience the utmost degree of excitement which is compatible with security. The vast extent of the country and the dissemination of the inhabitants render a collision between parties less probable and less dangerous there than elsewhere. The political circumstances under which the elections have hitherto been carried on have presented no real embarrassments to the nation.

Nevertheless, the epoch of the election of a President of the United States may be considered as a crisis in the affairs of the nation. The influence which he exercises on public business is no doubt feeble and indirect; but the choice of the President, which is of small importance to each individual citizen, concerns the citizens collectively; and however trifling an interest may be, it assumes a great degree of importance as soon as it becomes general. The President possesses but few means of rewarding his supporters in comparison to the kings of Europe, but the places which are at his disposal are sufficiently numerous to interest, directly or indirectly, several thousand electors in his success. Political parties in the United States are led to rally round an individual, in order to acquire a more tangible shape in the eyes of the crowd, and the name of the candidate for the Presidency is put forward as the symbol and personification of their theories. For these reasons parties are strongly interested in gaining the election, not so much with a view to the triumph of their principles under the auspices of the President-elect as to show by the majority which returned him, the strength of the supporters of those principles.

For a long while before the appointed time is at hand the election becomes the most important and the all-engrossing topic of discussion. The ardor of faction is redoubled; and all the artificial passions which the imagination can create in the bosom of a happy and peaceful land are agitated and brought to light. The President, on the other hand, is absorbed by the cares of self- defence. He no longer governs for the interest of the State, but for that of his re-election; he does homage to the majority, and instead of checking its passions, as his duty commands him to do, he frequently courts its worst caprices. As the election draws near, the activity of intrigue and the agitation of the populace increase; the citizens are divided into hostile camps, each of which assumes the name of its favorite candidate; the whole nation glows with feverish excitement; the election is the daily theme of the public papers, the subject of private conversation, the end of every thought and every action, the sole interest of the present. As soon as the choice is determined, this ardor is dispelled; and as a calmer season returns, the current of the State, which had nearly broken its banks, sinks to its usual level: [12a] but who can refrain from astonishment at the causes of the storm.

Chapter VIII: The Federal Constitution – Part III

Re-election Of The President

> When the head of the executive power is re-eligible, it is the State which is the source of intrigue and corruption – The desire of being re-elected the chief aim of a President of the United States – Disadvantage of the system peculiar to America – The natural evil of democracy is that it subordinates all authority to the slightest desires of the majority – The re-election of the President encourages this evil.

It may be asked whether the legislators of the United States did right or wrong in allowing the re-election of the

President. It seems at first sight contrary to all reason to prevent the head of the executive power from being elected a second time. The influence which the talents and the character of a single individual may exercise upon the fate of a whole people, in critical circumstances or arduous times, is well known: a law preventing the re-election of the chief magistrate would deprive the citizens of the surest pledge of the prosperity and the security of the commonwealth; and, by a singular inconsistency, a man would be excluded from the government at the very time when he had shown his ability in conducting its affairs.

But if these arguments are strong, perhaps still more powerful reasons may be advanced against them. Intrigue and corruption are the natural defects of elective government; but when the head of the State can be re-elected these evils rise to a great height, and compromise the very existence of the country. When a simple candidate seeks to rise by intrigue, his manoeuvres must necessarily be limited to a narrow sphere; but when the chief magistrate enters the lists, he borrows the strength of the government for his own purposes. In the former case the feeble resources of an individual are in action; in the latter, the State itself, with all its immense influence, is busied in the work of corruption and cabal. The private citizen, who employs the most immoral practices to acquire power, can only act in a manner indirectly prejudicial to the public prosperity. But if the representative of the executive descends into the combat, the cares of government dwindle into second-rate importance, and the success of his election is his first concern. All laws and all the negotiations he undertakes are to him nothing more than electioneering schemes; places become the reward of services rendered, not to the nation, but to its chief; and the influence of the government, if not injurious to the country, is at least no longer beneficial to the community for which it was created.

It is impossible to consider the ordinary course of affairs in the United States without perceiving that the desire of

being re- elected is the chief aim of the President; that his whole administration, and even his most indifferent measures, tend to this object; and that, as the crisis approaches, his personal interest takes the place of his interest in the public good. The principle of re-eligibility renders the corrupt influence of elective government still more extensive and pernicious.

In America it exercises a peculiarly fatal influence on the sources of national existence. Every government seems to be afflicted by some evil which is inherent in its nature, and the genius of the legislator is shown in eluding its attacks. A State may survive the influence of a host of bad laws, and the mischief they cause is frequently exaggerated; but a law which encourages the growth of the canker within must prove fatal in the end, although its bad consequences may not be immediately perceived.

The principle of destruction in absolute monarchies lies in the excessive and unreasonable extension of the prerogative of the crown; and a measure tending to remove the constitutional provisions which counterbalance this influence would be radically bad, even if its immediate consequences were unattended with evil. By a parity of reasoning, in countries governed by a democracy, where the people is perpetually drawing all authority to itself, the laws which increase or accelerate its action are the direct assailants of the very principle of the government.

The greatest proof of the ability of the American legislators is, that they clearly discerned this truth, and that they had the courage to act up to it. They conceived that a certain authority above the body of the people was necessary, which should enjoy a degree of independence, without, however, being entirely beyond the popular control; an authority which would be forced to comply with the permanent determinations of the majority, but which would be able to resist its caprices, and to refuse its most dangerous demands. To this end they centred the

whole executive power of the nation in a single arm; they granted extensive prerogatives to the President, and they armed him with the veto to resist the encroachments of the legislature.

But by introducing the principle of re-election they partly destroyed their work; and they rendered the President but little inclined to exert the great power they had vested in his hands. If ineligible a second time, the President would be far from independent of the people, for his responsibility would not be lessened; but the favor of the people would not be so necessary to him as to induce him to court it by humoring its desires. If re- eligible (and this is more especially true at the present day, when political morality is relaxed, and when great men are rare), the President of the United States becomes an easy tool in the hands of the majority. He adopts its likings and its animosities, he hastens to anticipate its wishes, he forestalls its complaints, he yields to its idlest cravings, and instead of guiding it, as the legislature intended that he should do, he is ever ready to follow its bidding. Thus, in order not to deprive the State of the talents of an individual, those talents have been rendered almost useless; and to reserve an expedient for extraordinary perils, the country has been exposed to daily dangers.

Federal Courts [12b]

> Political importance of the judiciary in the United States – Difficulty of treating this subject – Utility of judicial power in confederations – What tribunals could be introduced into the Union – Necessity of establishing federal courts of justice – Organization of the national judiciary – The Supreme Court – In what it differs from all known tribunals.

I have inquired into the legislative and executive power of the Union, and the judicial power now remains to be examined; but in this place I cannot conceal my fears from the reader. Their judicial institutions exercise a great

influence on the condition of the Anglo-Americans, and they occupy a prominent place amongst what are probably called political institutions: in this respect they are peculiarly deserving of our attention. But I am at a loss to explain the political action of the American tribunals without entering into some technical details of their constitution and their forms of proceeding; and I know not how to descend to these minutiae without wearying the curiosity of the reader by the natural aridity of the subject, or without risking to fall into obscurity through a desire to be succinct. I can scarcely hope to escape these various evils; for if I appear too lengthy to a man of the world, a lawyer may on the other hand complain of my brevity. But these are the natural disadvantages of my subject, and more especially of the point which I am about to discuss.

The great difficulty was, not to devise the Constitution to the Federal Government, but to find out a method of enforcing its laws. Governments have in general but two means of overcoming the opposition of the people they govern, viz., the physical force which is at their own disposal, and the moral force which they derive from the decisions of the courts of justice.

A government which should have no other means of exacting obedience than open war must be very near its ruin, for one of two alternatives would then probably occur: if its authority was small and its character temperate, it would not resort to violence till the last extremity, and it would connive at a number of partial acts of insubordination, in which case the State would gradually fall into anarchy; if it was enterprising and powerful, it would perpetually have recourse to its physical strength, and would speedily degenerate into a military despotism. So that its activity would not be less prejudicial to the community than its inaction.

The great end of justice is to substitute the notion of right for that of violence, and to place a legal barrier between the power of the government and the use of

physical force. The authority which is awarded to the intervention of a court of justice by the general opinion of mankind is so surprisingly great that it clings to the mere formalities of justice, and gives a bodily influence to the shadow of the law. The moral force which courts of justice possess renders the introduction of physical force exceedingly rare, and is very frequently substituted for it; but if the latter proves to be indispensable, its power is doubled by the association of the idea of law.

A federal government stands in greater need of the support of judicial institutions than any other, because it is naturally weak and exposed to formidable opposition. [12c] If it were always obliged to resort to violence in the first instance, it could not fulfil its task. The Union, therefore, required a national judiciary to enforce the obedience of the citizens to the laws, and to repeal the attacks which might be directed against them. The question then remained as to what tribunals were to exercise these privileges; were they to be entrusted to the courts of justice which were already organized in every State? or was it necessary to create federal courts? It may easily be proved that the Union could not adapt the judicial power of the States to its wants. The separation of the judiciary from the administrative power of the State no doubt affects the security of every citizen and the liberty of all. But it is no less important to the existence of the nation that these several powers should have the same origin, should follow the same principles, and act in the same sphere; in a word, that they should be correlative and homogeneous. No one, I presume, ever suggested the advantage of trying offences committed in France by a foreign court of justice, in order to secure the impartiality of the judges. The Americans form one people in relation to their Federal Government; but in the bosom of this people divers political bodies have been allowed to subsist which are dependent on the national Government in a few points, and independent in all the rest; which have all a distinct origin, maxims peculiar to themselves, and special means of carrying on their affairs. To entrust the execution

of the laws of the Union to tribunals instituted by these political bodies would be to allow foreign judges to preside over the nation. Nay, more; not only is each State foreign to the Union at large, but it is in perpetual opposition to the common interests, since whatever authority the Union loses turns to the advantage of the States. Thus to enforce the laws of the Union by means of the tribunals of the States would be to allow not only foreign but partial judges to preside over the nation.

But the number, still more than the mere character, of the tribunals of the States rendered them unfit for the service of the nation. When the Federal Constitution was formed there were already thirteen courts of justice in the United States which decided causes without appeal. That number is now increased to twenty-four. To suppose that a State can subsist when its fundamental laws may be subjected to four-and-twenty different interpretations at the same time is to advance a proposition alike contrary to reason and to experience.

The American legislators therefore agreed to create a federal judiciary power to apply the laws of the Union, and to determine certain questions affecting general interests, which were carefully determined beforehand. The entire judicial power of the Union was centred in one tribunal, which was denominated the Supreme Court of the United States. But, to facilitate the expedition of business, inferior courts were appended to it, which were empowered to decide causes of small importance without appeal, and with appeal causes of more magnitude. The members of the Supreme Court are named neither by the people nor the legislature, but by the President of the United States, acting with the advice of the Senate. In order to render them independent of the other authorities, their office was made inalienable; and it was determined that their salary, when once fixed, should not be altered by the legislature. [12d] It was easy to proclaim the principle of a Federal judiciary, but difficulties multiplied when the extent of its jurisdiction was to be determined.

Means Of Determining The Jurisdiction Of The Federal Courts Difficulty of determining the jurisdiction of separate courts of justice in confederations – The courts of the Union obtained the right of fixing their own jurisdiction – In what respect this rule attacks the portion of sovereignty reserved to the several States – The sovereignty of these States restricted by the laws, and the interpretation of the laws – Consequently, the danger of the several States is more apparent than real.

As the Constitution of the United States recognized two distinct powers in presence of each other, represented in a judicial point of view by two distinct classes of courts of justice, the utmost care which could be taken in defining their separate jurisdictions would have been insufficient to prevent frequent collisions between those tribunals. The question then arose to whom the right of deciding the competency of each court was to be referred. In nations which constitute a single body politic, when a question is debated between two courts relating to their mutual jurisdiction, a third tribunal is generally within reach to decide the difference; and this is effected without difficulty, because in these nations the questions of judicial competency have no connection with the privileges of the national supremacy. But it was impossible to create an arbiter between a superior court of the Union and the superior court of a separate State which would not belong to one of these two classes. It was, therefore, necessary to allow one of these courts to judge its own cause, and to take or to retain cognizance of the point which was contested. To grant this privilege to the different courts of the States would have been to destroy the sovereignty of the Union de facto after having established it de jure; for the interpretation of the Constitution would soon have restored that portion of independence to the States of which the terms of that act deprived them. The object of the creation of a Federal tribunal was to prevent the courts of the States from deciding questions affecting the national interests in their own department, and so to form a uniform body of

jurisprudene for the interpretation of the laws of the Union. This end would not have been accomplished if the courts of the several States had been competent to decide upon cases in their separate capacities from which they were obliged to abstain as Federal tribunals. The Supreme Court of the United States was therefore invested with the right of determining all questions of jurisdiction. [12e]

This was a severe blow upon the independence of the States, which was thus restricted not only by the laws, but by the interpretation of them; by one limit which was known, and by another which was dubious; by a rule which was certain, and a rule which was arbitrary. It is true the Constitution had laid down the precise limits of the Federal supremacy, but whenever this supremacy is contested by one of the States, a Federal tribunal decides the question. Nevertheless, the dangers with which the independence of the States was threatened by this mode of proceeding are less serious than they appeared to be. We shall see hereafter that in America the real strength of the country is vested in the provincial far more than in the Federal Government. The Federal judges are conscious of the relative weakness of the power in whose name they act, and they are more inclined to abandon a right of jurisdiction in cases where it is justly their own than to assert a privilege to which they have no legal claim.

Different Cases Of Jurisdiction

> The matter and the party are the first conditions of the Federal jurisdiction – Suits in which ambassadors are engaged – Suits of the Union – Of a separate State – By whom tried – Causes resulting from the laws of the Union – Why judged by the Federal tribunals – Causes relating to the performance of contracts tried by the Federal courts – Consequence of this arrangement.

After having appointed the means of fixing the competency of the Federal courts, the legislators of the

Union defined the cases which should come within their jurisdiction. It was established, on the one hand, that certain parties must always be brought before the Federal courts, without any regard to the special nature of the cause; and, on the other, that certain causes must always be brought before the same courts, without any regard to the quality of the parties in the suit. These distinctions were therefore admitted to be the basis of the Federal jurisdiction.

Ambassadors are the representatives of nations in a state of amity with the Union, and whatever concerns these personages concerns in some degree the whole Union. When an ambassador is a party in a suit, that suit affects the welfare of the nation, and a Federal tribunal is naturally called upon to decide it.

The Union itself may be invoked in legal proceedings, and in this case it would be alike contrary to the customs of all nations and to common sense to appeal to a tribunal representing any other sovereignty than its own; the Federal courts, therefore, take cognizance of these affairs.

When two parties belonging to two different States are engaged in a suit, the case cannot with propriety be brought before a court of either State. The surest expedient is to select a tribunal like that of the Union, which can excite the suspicions of neither party, and which offers the most natural as well as the most certain remedy.

When the two parties are not private individuals, but States, an important political consideration is added to the same motive of equity. The quality of the parties in this case gives a national importance to all their disputes; and the most trifling litigation of the States may be said to involve the peace of the whole Union. [12f]

The nature of the cause frequently prescribes the rule of competency. Thus all the questions which concern maritime commerce evidently fall under the cognizance of the Federal tribunals. [12g] Almost all these questions are

connected with the interpretation of the law of nations, and in this respect they essentially interest the Union in relation to foreign powers. Moreover, as the sea is not included within the limits of any peculiar jurisdiction, the national courts can only hear causes which originate in maritime affairs.

The Constitution comprises under one head almost all the cases which by their very nature come within the limits of the Federal courts. The rule which it lays down is simple, but pregnant with an entire system of ideas, and with a vast multitude of facts. It declares that the judicial power of the Supreme Court shall extend to all cases in law and equity arising under the laws of the United States.

Two examples will put the intention of the legislator in the clearest light:

The Constitution prohibits the States from making laws on the value and circulation of money: If, notwithstanding this prohibition, a State passes a law of this kind, with which the interested parties refuse to comply because it is contrary to the Constitution, the case must come before a Federal court, because it arises under the laws of the United States. Again, if difficulties arise in the levying of import duties which have been voted by Congress, the Federal court must decide the case, because it arises under the interpretation of a law of the United States.

This rule is in perfect accordance with the fundamental principles of the Federal Constitution. The Union, as it was established in 1789, possesses, it is true, a limited supremacy; but it was intended that within its limits it should form one and the same people. [12h] Within those limits the Union is sovereign. When this point is established and admitted, the inference is easy; for if it be acknowledged that the United States constitute one and the same people within the bounds prescribed by their Constitution, it is impossible to refuse them the rights which belong to other nations. But it has been allowed,

from the origin of society, that every nation has the right of deciding by its own courts those questions which concern the execution of its own laws. To this it is answered that the Union is in so singular a position that in relation to some matters it constitutes a people, and that in relation to all the rest it is a nonentity. But the inference to be drawn is, that in the laws relating to these matters the Union possesses all the rights of absolute sovereignty. The difficulty is to know what these matters are; and when once it is resolved (and we have shown how it was resolved, in speaking of the means of determining the jurisdiction of the Federal courts) no further doubt can arise; for as soon as it is established that a suit is Federal – that is to say, that it belongs to the share of sovereignty reserved by the Constitution of the Union – the natural consequence is that it should come within the jurisdiction of a Federal court.

Whenever the laws of the United States are attacked, or whenever they are resorted to in self-defence, the Federal courts must be appealed to. Thus the jurisdiction of the tribunals of the Union extends and narrows its limits exactly in the same ratio as the sovereignty of the Union augments or decreases. We have shown that the principal aim of the legislators of 1789 was to divide the sovereign authority into two parts. In the one they placed the control of all the general interests of the Union, in the other the control of the special interests of its component States. Their chief solicitude was to arm the Federal Government with sufficient power to enable it to resist, within its sphere, the encroachments of the several States. As for these communities, the principle of independence within certain limits of their own was adopted in their behalf; and they were concealed from the inspection, and protected from the control, of the central Government. In speaking of the division of authority, I observed that this latter principle had not always been held sacred, since the States are prevented from passing certain laws which apparently belong to their own particular sphere of interest. When a State of the Union passes a law of this kind, the citizens

who are injured by its execution can appeal to the Federal courts.

Thus the jurisdiction of the Federal courts extends not only to all the cases which arise under the laws of the Union, but also to those which arise under laws made by the several States in opposition to the Constitution. The States are prohibited from making ex post facto laws in criminal cases, and any person condemned by virtue of a law of this kind can appeal to the judicial power of the Union. The States are likewise prohibited from making laws which may have a tendency to impair the obligations of contracts. [12i] If a citizen thinks that an obligation of this kind is impaired by a law passed in his State, he may refuse to obey it, and may appeal to the Federal courts. [12j]

This provision appears to me to be the most serious attack upon the independence of the States. The rights awarded to the Federal Government for purposes of obvious national importance are definite and easily comprehensible; but those with which this last clause invests it are not either clearly appreciable or accurately defined. For there are vast numbers of political laws which influence the existence of obligations of contracts, which may thus furnish an easy pretext for the aggressions of the central authority.

Chapter VIII: The Federal Constitution – Part IV

Procedure Of The Federal Courts

Natural weakness of the judiciary power in confederations – Legislators ought to strive as much as possible to bring private individuals, and not States, before the Federal Courts – How the Americans have succeeded in this – Direct prosecution of private individuals in the Federal Courts – Indirect prosecution of the States which violate the laws of the Union – The decrees of the

Supreme Court enervate but do not destroy the provincial laws.

I have shown what the privileges of the Federal courts are, and it is no less important to point out the manner in which they are exercised. The irresistible authority of justice in countries in which the sovereignty in undivided is derived from the fact that the tribunals of those countries represent the entire nation at issue with the individual against whom their decree is directed, and the idea of power is thus introduced to corroborate the idea of right. But this is not always the case in countries in which the sovereignty is divided; in them the judicial power is more frequently opposed to a fraction of the nation than to an isolated individual, and its moral authority and physical strength are consequently diminished. In federal States the power of the judge is naturally decreased, and that of the justiciable parties is augmented. The aim of the legislator in confederate States ought therefore to be to render the position of the courts of justice analogous to that which they occupy in countries where the sovereignty is undivided; in other words, his efforts ought constantly to tend to maintain the judicial power of the confederation as the representative of the nation, and the justiciable party as the representative of an individual interest.

Every government, whatever may be its constitution, requires the means of constraining its subjects to discharge their obligations, and of protecting its privileges from their assaults. As far as the direct action of the Government on the community is concerned, the Constitution of the United States contrived, by a master-stroke of policy, that the federal courts, acting in the name of the laws, should only take cognizance of parties in an individual capacity. For, as it had been declared that the Union consisted of one and the same people within the limits laid down by the Constitution, the inference was that the Government created by this Constitution, and acting within these limits, was invested with all the privileges of a national government, one of the principal of

which is the right of transmitting its injunctions directly to the private citizen. When, for instance, the Union votes an impost, it does not apply to the States for the levying of it, but to every American citizen in proportion to his assessment. The Supreme Court, which is empowered to enforce the execution of this law of the Union, exerts its influence not upon a refractory State, but upon the private taxpayer; and, like the judicial power of other nations, it is opposed to the person of an individual. It is to be observed that the Union chose its own antagonist; and as that antagonist is feeble, he is naturally worsted.

But the difficulty increases when the proceedings are not brought forward by but against the Union. The Constitution recognizes the legislative power of the States; and a law so enacted may impair the privileges of the Union, in which case a collision in unavoidable between that body and the State which has passed the law: and it only remains to select the least dangerous remedy, which is very clearly deducible from the general principles I have before established. [12k]

It may be conceived that, in the case under consideration, the Union might have used the State before a Federal court, which would have annulled the act, and by this means it would have adopted a natural course of proceeding; but the judicial power would have been placed in open hostility to the State, and it was desirable to avoid this predicament as much as possible. The Americans hold that it is nearly impossible that a new law should not impair the interests of some private individual by its provisions: these private interests are assumed by the American legislators as the ground of attack against such measures as may be prejudicial to the Union, and it is to these cases that the protection of the Supreme Court is extended.

Suppose a State vends a certain portion of its territory to a company, and that a year afterwards it passes a law by which the territory is otherwise disposed of, and that

clause of the Constitution which prohibits laws impairing the obligation of contracts violated. When the purchaser under the second act appears to take possession, the possessor under the first act brings his action before the tribunals of the Union, and causes the title of the claimant to be pronounced null and void. [12] Thus, in point of fact, the judicial power of the Union is contesting the claims of the sovereignty of a State; but it only acts indirectly and upon a special application of detail: it attacks the law in its consequences, not in its principle, and it rather weakens than destroys it.

The last hypothesis that remained was that each State formed a corporation enjoying a separate existence and distinct civil rights, and that it could therefore sue or be sued before a tribunal. Thus a State could bring an action against another State. In this instance the Union was not called upon to contest a provincial law, but to try a suit in which a State was a party. This suit was perfectly similar to any other cause, except that the quality of the parties was different; and here the danger pointed out at the beginning of this chapter exists with less chance of being avoided. The inherent disadvantage of the very essence of Federal constitutions is that they engender parties in the bosom of the nation which present powerful obstacles to the free course of justice.

High Rank Of The Supreme Court Amongst The Great Powers Of State No nation ever constituted so great a judicial power as the Americans – Extent of its prerogative – Its political influence – The tranquillity and the very existence of the Union depend on the discretion of the seven Federal Judges.

When we have successively examined in detail the organization of the Supreme Court, and the entire prerogatives which it exercises, we shall readily admit that a more imposing judicial power was never constituted by any people. The Supreme Court is placed at the head of all

known tribunals, both by the nature of its rights and the class of justiciable parties which it controls.

In all the civilized countries of Europe the Government has always shown the greatest repugnance to allow the cases to which it was itself a party to be decided by the ordinary course of justice. This repugnance naturally attains its utmost height in an absolute Government; and, on the other hand, the privileges of the courts of justice are extended with the increasing liberties of the people: but no European nation has at present held that all judicial controversies, without regard to their origin, can be decided by the judges of common law.

In America this theory has been actually put in practice, and the Supreme Court of the United States is the sole tribunal of the nation. Its power extends to all the cases arising under laws and treaties made by the executive and legislative authorities, to all cases of admiralty and maritime jurisdiction, and in general to all points which affect the law of nations. It may even be affirmed that, although its constitution is essentially judicial, its prerogatives are almost entirely political. Its sole object is to enforce the execution of the laws of the Union; and the Union only regulates the relations of the Government with the citizens, and of the nation with Foreign Powers: the relations of citizens amongst themselves are almost exclusively regulated by the sovereignty of the States.

A second and still greater cause of the preponderance of this court may be adduced. In the nations of Europe the courts of justice are only called upon to try the controversies of private individuals; but the Supreme Court of the United States summons sovereign powers to its bar. When the clerk of the court advances on the steps of the tribunal, and simply says, “The State of New York versus the State of Ohio,” it is impossible not to feel that the Court which he addresses is no ordinary body; and when it is recollected that one of these parties represents one million, and the other two millions of men, one is

struck by the responsibility of the seven judges whose decision is about to satisfy or to disappoint so large a number of their fellow-citizens.

The peace, the prosperity, and the very existence of the Union are vested in the hands of the seven judges. Without their active co-operation the Constitution would be a dead letter: the Executive appeals to them for assistance against the encroachments of the legislative powers; the Legislature demands their protection from the designs of the Executive; they defend the Union from the disobedience of the States, the States from the exaggerated claims of the Union, the public interest against the interests of private citizens, and the conservative spirit of order against the fleeting innovations of democracy. Their power is enormous, but it is clothed in the authority of public opinion. They are the all- powerful guardians of a people which respects law, but they would be impotent against popular neglect or popular contempt. The force of public opinion is the most intractable of agents, because its exact limits cannot be defined; and it is not less dangerous to exceed than to remain below the boundary prescribed. The Federal judges must not only be good citizens, and men possessed of that information and integrity which are indispensable to magistrates, but they must be statesmen – politicians, not unread in the signs of the times, not afraid to brave the obstacles which can be subdued, nor slow to turn aside such encroaching elements as may threaten the supremacy of the Union and the obedience which is due to the laws.

The President, who exercises a limited power, may err without causing great mischief in the State. Congress may decide amiss without destroying the Union, because the electoral body in which Congress originates may cause it to retract its decision by changing its members. But if the Supreme Court is ever composed of imprudent men or bad citizens, the Union may be plunged into anarchy or civil war.

The real cause of this danger, however, does not lie in the constitution of the tribunal, but in the very nature of Federal Governments. We have observed that in confederate peoples it is especially necessary to consolidate the judicial authority, because in no other nations do those independent persons who are able to cope with the social body exist in greater power or in a better condition to resist the physical strength of the Government. But the more a power requires to be strengthened, the more extensive and independent it must be made; and the dangers which its abuse may create are heightened by its independence and its strength. The source of the evil is not, therefore, in the constitution of the power, but in the constitution of those States which render its existence necessary.

In What Respects The Federal Constitution Is Superior To That Of The States

In what respects the Constitution of the Union can be compared to that of the States – Superiority of the Constitution of the Union attributable to the wisdom of the Federal legislators – Legislature of the Union less dependent on the people than that of the States – Executive power more independent in its sphere – Judicial power less subjected to the inclinations of the majority - Practical consequence of these facts – The dangers inherent in a democratic government eluded by the Federal legislators, and increased by the legislators of the States.

The Federal Constitution differs essentially from that of the States in the ends which it is intended to accomplish, but in the means by which these ends are promoted a greater analogy exists between them. The objects of the Governments are different, but their forms are the same; and in this special point of view there is some advantage in comparing them together.

I am of opinion that the Federal Constitution is superior to all the Constitutions of the States, for several reasons.

The present Constitution of the Union was formed at a later period than those of the majority of the States, and it may have derived some ameliorations from past experience. But we shall be led to acknowledge that this is only a secondary cause of its superiority, when we recollect that eleven new States [12n] have been added to the American Confederation since the promulgation of the Federal Constitution, and that these new republics have always rather exaggerated than avoided the defects which existed in the former Constitutions.

The chief cause of the superiority of the Federal Constitution lay in the character of the legislators who composed it. At the time when it was formed the dangers of the Confederation were imminent, and its ruin seemed inevitable. In this extremity the people chose the men who most deserved the esteem, rather than those who had gained the affections, of the country. I have already observed that distinguished as almost all the legislators of the Union were for their intelligence, they were still more so for their patriotism. They had all been nurtured at a time when the spirit of liberty was braced by a continual struggle against a powerful and predominant authority. When the contest was terminated, whilst the excited passions of the populace persisted in warring with dangers which had ceased to threaten them, these men stopped short in their career; they cast a calmer and more penetrating look upon the country which was now their own; they perceived that the war of independence was definitely ended, and that the only dangers which America had to fear were those which might result from the abuse of the freedom she had won. They had the courage to say what they believed to be true, because they were animated by a warm and sincere love of liberty; and they ventured to propose restrictions, because they were resolutely opposed to destruction. [12o]

The greater number of the Constitutions of the States assign one year for the duration of the House of Representatives, and two years for that of the Senate; so that members of the legislative body are constantly and narrowly tied down by the slightest desires of their constituents. The legislators of the Union were of opinion that this excessive dependence of the Legislature tended to alter the nature of the main consequences of the representative system, since it vested the source, not only of authority, but of government, in the people. They increased the length of the time for which the representatives were returned, in order to give them freer scope for the exercise of their own judgment.

The Federal Constitution, as well as the Constitutions of the different States, divided the legislative body into two branches. But in the States these two branches were composed of the same elements, and elected in the same manner. The consequence was that the passions and inclinations of the populace were as rapidly and as energetically represented in one chamber as in the other, and that laws were made with all the characteristics of violence and precipitation. By the Federal Constitution the two houses originate in like manner in the choice of the people; but the conditions of eligibility and the mode of election were changed, to the end that, if, as is the case in certain nations, one branch of the Legislature represents the same interests as the other, it may at least represent a superior degree of intelligence and discretion. A mature age was made one of the conditions of the senatorial dignity, and the Upper House was chosen by an elected assembly of a limited number of members.

To concentrate the whole social force in the hands of the legislative body is the natural tendency of democracies; for as this is the power which emanates the most directly from the people, it is made to participate most fully in the preponderating authority of the multitude, and it is naturally led to monopolize every species of influence. This concentration is at once prejudicial to a well-

conducted administration, and favorable to the despotism of the majority. The legislators of the States frequently yielded to these democratic propensities, which were invariably and courageously resisted by the founders of the Union.

In the States the executive power is vested in the hands of a magistrate, who is apparently placed upon a level with the Legislature, but who is in reality nothing more than the blind agent and the passive instrument of its decisions. He can derive no influence from the duration of his functions, which terminate with the revolving year, or from the exercise of prerogatives which can scarcely be said to exist. The Legislature can condemn him to inaction by intrusting the execution of the laws to special committees of its own members, and can annul his temporary dignity by depriving him of his salary. The Federal Constitution vests all the privileges and all the responsibility of the executive power in a single individual. The duration of the Presidency is fixed at four years; the salary of the individual who fills that office cannot be altered during the term of his functions; he is protected by a body of official dependents, and armed with a suspensive veto. In short, every effort was made to confer a strong and independent position upon the executive authority within the limits which had been prescribed to it.

In the Constitutions of all the States the judicial power is that which remains the most independent of the legislative authority; nevertheless, in all the States the Legislature has reserved to itself the right of regulating the emoluments of the judges, a practice which necessarily subjects these magistrates to its immediate influence. In some States the judges are only temporarily appointed, which deprives them of a great portion of their power and their freedom. In others the legislative and judicial powers are entirely confounded; thus the Senate of New York, for instance, constitutes in certain cases the Superior Court of the State. The Federal Constitution, on the other hand, carefully separates the judicial authority from all external

influences; and it provides for the independence of the judges, by declaring that their salary shall not be altered, and that their functions shall be inalienable.

The practical consequences of these different systems may easily be perceived. An attentive observer will soon remark that the business of the Union is incomparably better conducted than that of any individual State. The conduct of the Federal Government is more fair and more temperate than that of the States, its designs are more fraught with wisdom, its projects are more durable and more skilfully combined, its measures are put into execution with more vigor and consistency.

I recapitulate the substance of this chapter in a few words: The existence of democracies is threatened by two dangers, viz., the complete subjection of the legislative body to the caprices of the electoral body, and the concentration of all the powers of the Government in the legislative authority. The growth of these evils has been encouraged by the policy of the legislators of the States, but it has been resisted by the legislators of the Union by every means which lay within their control.

Characteristics Which Distinguish The Federal Constitution Of The United States Of America From All Other Federal Constitutions

American Union appears to resemble all other confederations – Nevertheless its effects are different – Reason of this – Distinctions between the Union and all other confederations – The American Government not a federal but an imperfect national Government.

The United States of America do not afford either the first or the only instance of confederate States, several of which have existed in modern Europe, without adverting to those of antiquity. Switzerland, the Germanic Empire, and the Republic of the United Provinces either have been or still are confederations. In studying the constitutions of

these different countries, the politician is surprised to observe that the powers with which they invested the Federal Government are nearly identical with the privileges awarded by the American Constitution to the Government of the United States. They confer upon the central power the same rights of making peace and war, of raising money and troops, and of providing for the general exigencies and the common interests of the nation. Nevertheless the Federal Government of these different peoples has always been as remarkable for its weakness and inefficiency as that of the Union is for its vigorous and enterprising spirit. Again, the first American Confederation perished through the excessive weakness of its Government; and this weak Government was, notwithstanding, in possession of rights even more extensive than those of the Federal Government of the present day. But the more recent Constitution of the United States contains certain principles which exercise a most important influence, although they do not at once strike the observer.

This Constitution, which may at first sight be confounded with the federal constitutions which preceded it, rests upon a novel theory, which may be considered as a great invention in modern political science. In all the confederations which had been formed before the American Constitution of 1789 the allied States agreed to obey the injunctions of a Federal Government; but they reserved to themselves the right of ordaining and enforcing the execution of the laws of the Union. The American States which combined in 1789 agreed that the Federal Government should not only dictate the laws, but that it should execute it own enactments. In both cases the right is the same, but the exercise of the right is different; and this alteration produced the most momentous consequences.

In all the confederations which had been formed before the American Union the Federal Government demanded its supplies at the hands of the separate Governments; and

if the measure it prescribed was onerous to any one of those bodies means were found to evade its claims: if the State was powerful, it had recourse to arms; if it was weak, it connived at the resistance which the law of the Union, its sovereign, met with, and resorted to inaction under the plea of inability. Under these circumstances one of the two alternatives has invariably occurred; either the most preponderant of the allied peoples has assumed the privileges of the Federal authority and ruled all the States in its name, [12p] or the Federal Government has been abandoned by its natural supporters, anarchy has arisen between the confederates, and the Union has lost all powers of action. [12q]

In America the subjects of the Union are not States, but private citizens: the national Government levies a tax, not upon the State of Massachusetts, but upon each inhabitant of Massachusetts. All former confederate governments presided over communities, but that of the Union rules individuals; its force is not borrowed, but self-derived; and it is served by its own civil and military officers, by its own army, and its own courts of justice. It cannot be doubted that the spirit of the nation, the passions of the multitude, and the provincial prejudices of each State tend singularly to diminish the authority of a Federal authority thus constituted, and to facilitate the means of resistance to its mandates; but the comparative weakness of a restricted sovereignty is an evil inherent in the Federal system. In America, each State has fewer opportunities of resistance and fewer temptations to non-compliance; nor can such a design be put in execution (if indeed it be entertained) without an open violation of the laws of the Union, a direct interruption of the ordinary course of justice, and a bold declaration of revolt; in a word, without taking a decisive step which men hesitate to adopt.

In all former confederations the privileges of the Union furnished more elements of discord than of power, since they multiplied the claims of the nation without augmenting the means of enforcing them: and in

accordance with this fact it may be remarked that the real weakness of federal governments has almost always been in the exact ratio of their nominal power. Such is not the case in the American Union, in which, as in ordinary governments, the Federal Government has the means of enforcing all it is empowered to demand.

The human understanding more easily invents new things than new words, and we are thence constrained to employ a multitude of improper and inadequate expressions. When several nations form a permanent league and establish a supreme authority, which, although it has not the same influence over the members of the community as a national government, acts upon each of the Confederate States in a body, this Government, which is so essentially different from all others, is denominated a Federal one. Another form of society is afterwards discovered, in which several peoples are fused into one and the same nation with regard to certain common interests, although they remain distinct, or at least only confederate, with regard to all their other concerns. In this case the central power acts directly upon those whom it governs, whom it rules, and whom it judges, in the same manner, as, but in a more limited circle than, a national government. Here the term Federal Government is clearly no longer applicable to a state of things which must be styled an incomplete national Government: a form of government has been found out which is neither exactly national nor federal; but no further progress has been made, and the new word which will one day designate this novel invention does not yet exist.

The absence of this new species of confederation has been the cause which has brought all Unions to Civil War, to subjection, or to a stagnant apathy, and the peoples which formed these leagues have been either too dull to discern, or too pusillanimous to apply this great remedy. The American Confederation perished by the same defects.

But the Confederate States of America had been long accustomed to form a portion of one empire before they had won their independence; they had not contracted the habit of governing themselves, and their national prejudices had not taken deep root in their minds. Superior to the rest of the world in political knowledge, and sharing that knowledge equally amongst themselves, they were little agitated by the passions which generally oppose the extension of federal authority in a nation, and those passions were checked by the wisdom of the chief citizens. The Americans applied the remedy with prudent firmness as soon as they were conscious of the evil; they amended their laws, and they saved their country.

Chapter VIII: The Federal Constitution – Part V

Advantages Of The Federal System In General, And Its Special Utility In America

Happiness and freedom of small nations – Power of great nations – Great empires favorable to the growth of civilization – Strength often the first element of national prosperity – Aim of the Federal system to unite the twofold advantages resulting from a small and from a large territory -Advantages derived by the United States from this system – The law adapts itself to the exigencies of the population; population does not conform to the exigencies of the law – Activity, amelioration, love and enjoyment of freedom in the American communities – Public spirit of the Union the abstract of provincial patriotism – Principles and things circulate freely over the territory of the United States – The Union is happy and free as a little nation, and respected as a great empire.

In small nations the scrutiny of society penetrates into every part, and the spirit of improvement enters into the most trifling details; as the ambition of the people is necessarily checked by its weakness, all the efforts and resources of the citizens are turned to the internal benefit

of the community, and are not likely to evaporate in the fleeting breath of glory. The desires of every individual are limited, because extraordinary faculties are rarely to be met with. The gifts of an equal fortune render the various conditions of life uniform, and the manners of the inhabitants are orderly and simple. Thus, if one estimate the gradations of popular morality and enlightenment, we shall generally find that in small nations there are more persons in easy circumstances, a more numerous population, and a more tranquil state of society, than in great empires.

When tyranny is established in the bosom of a small nation, it is more galling than elsewhere, because, as it acts within a narrow circle, every point of that circle is subject to its direct influence. It supplies the place of those great designs which it cannot entertain by a violent or an exasperating interference in a multitude of minute details; and it leaves the political world, to which it properly belongs, to meddle with the arrangements of domestic life. Tastes as well as actions are to be regulated at its pleasure; and the families of the citizens as well as the affairs of the State are to be governed by its decisions. This invasion of rights occurs, however, but seldom, and freedom is in truth the natural state of small communities. The temptations which the Government offers to ambition are too weak, and the resources of private individuals are too slender, for the sovereign power easily to fall within the grasp of a single citizen; and should such an event have occurred, the subjects of the State can without difficulty overthrow the tyrant and his oppression by a simultaneous effort.

Small nations have therefore ever been the cradle of political liberty; and the fact that many of them have lost their immunities by extending their dominion shows that the freedom they enjoyed was more a consequence of the inferior size than of the character of the people.

The history of the world affords no instance of a great nation retaining the form of republican government for a long series of years, [12r] and this has led to the conclusion that such a state of things is impracticable. For my own part, I cannot but censure the imprudence of attempting to limit the possible and to judge the future on the part of a being who is hourly deceived by the most palpable realities of life, and who is constantly taken by surprise in the circumstances with which he is most familiar. But it may be advanced with confidence that the existence of a great republic will always be exposed to far greater perils than that of a small one.

All the passions which are most fatal to republican institutions spread with an increasing territory, whilst the virtues which maintain their dignity do not augment in the same proportion. The ambition of the citizens increases with the power of the State; the strength of parties with the importance of the ends they have in view; but that devotion to the common weal which is the surest check on destructive passions is not stronger in a large than in a small republic. It might, indeed, be proved without difficulty that it is less powerful and less sincere. The arrogance of wealth and the dejection of wretchedness, capital cities of unwonted extent, a lax morality, a vulgar egotism, and a great confusion of interests, are the dangers which almost invariably arise from the magnitude of States. But several of these evils are scarcely prejudicial to a monarchy, and some of them contribute to maintain its existence. In monarchical States the strength of the government is its own; it may use, but it does not depend on, the community, and the authority of the prince is proportioned to the prosperity of the nation; but the only security which a republican government possesses against these evils lies in the support of the majority. This support is not, however, proportionably greater in a large republic than it is in a small one; and thus, whilst the means of attack perpetually increase both in number and in influence, the power of resistance remains the same, or it may rather be said to diminish, since the propensities and

interests of the people are diversified by the increase of the population, and the difficulty of forming a compact majority is constantly augmented. It has been observed, moreover, that the intensity of human passions is heightened, not only by the importance of the end which they propose to attain, but by the multitude of individuals who are animated by them at the same time. Every one has had occasion to remark that his emotions in the midst of a sympathizing crowd are far greater than those which he would have felt in solitude. In great republics the impetus of political passion is irresistible, not only because it aims at gigantic purposes, but because it is felt and shared by millions of men at the same time.

It may therefore be asserted as a general proposition that nothing is more opposed to the well-being and the freedom of man than vast empires. Nevertheless it is important to acknowledge the peculiar advantages of great States. For the very reason which renders the desire of power more intense in these communities than amongst ordinary men, the love of glory is also more prominent in the hearts of a class of citizens, who regard the applause of a great people as a reward worthy of their exertions, and an elevating encouragement to man. If we would learn why it is that great nations contribute more powerfully to the spread of human improvement than small States, we shall discover an adequate cause in the rapid and energetic circulation of ideas, and in those great cities which are the intellectual centres where all the rays of human genius are reflected and combined. To this it may be added that most important discoveries demand a display of national power which the Government of a small State is unable to make; in great nations the Government entertains a greater number of general notions, and is more completely disengaged from the routine of precedent and the egotism of local prejudice; its designs are conceived with more talent, and executed with more boldness.

In time of peace the well-being of small nations is undoubtedly more general and more complete, but they

are apt to suffer more acutely from the calamities of war than those great empires whose distant frontiers may for ages avert the presence of the danger from the mass of the people, which is therefore more frequently afflicted than ruined by the evil.

But in this matter, as in many others, the argument derived from the necessity of the case predominates over all others. If none but small nations existed, I do not doubt that mankind would be more happy and more free; but the existence of great nations is unavoidable.

This consideration introduces the element of physical strength as a condition of national prosperity. It profits a people but little to be affluent and free if it is perpetually exposed to be pillaged or subjugated; the number of its manufactures and the extent of its commerce are of small advantage if another nation has the empire of the seas and gives the law in all the markets of the globe. Small nations are often impoverished, not because they are small, but because they are weak; the great empires prosper less because they are great than because they are strong. Physical strength is therefore one of the first conditions of the happiness and even of the existence of nations. Hence it occurs that, unless very peculiar circumstances intervene, small nations are always united to large empires in the end, either by force or by their own consent: yet I am unacquainted with a more deplorable spectacle than that of a people unable either to defend or to maintain its independence.

The Federal system was created with the intention of combining the different advantages which result from the greater and the lesser extent of nations; and a single glance over the United States of America suffices to discover the advantages which they have derived from its adoption.

In great centralized nations the legislator is obliged to impart a character of uniformity to the laws which does not always suit the diversity of customs and of districts; as

he takes no cognizance of special cases, he can only proceed upon general principles; and the population is obliged to conform to the exigencies of the legislation, since the legislation cannot adapt itself to the exigencies and the customs of the population, which is the cause of endless trouble and misery. This disadvantage does not exist in confederations. Congress regulates the principal measures of the national Government, and all the details of the administration are reserved to the provincial legislatures. It is impossible to imagine how much this division of sovereignty contributes to the well-being of each of the States which compose the Union. In these small communities, which are never agitated by the desire of aggrandizement or the cares of self-defence, all public authority and private energy is employed in internal amelioration. The central government of each State, which is in immediate juxtaposition to the citizens, is daily apprised of the wants which arise in society; and new projects are proposed every year, which are discussed either at town meetings or by the legislature of the State, and which are transmitted by the press to stimulate the zeal and to excite the interest of the citizens. This spirit of amelioration is constantly alive in the American republics, without compromising their tranquillity; the ambition of power yields to the less refined and less dangerous love of comfort. It is generally believed in America that the existence and the permanence of the republican form of government in the New World depend upon the existence and the permanence of the Federal system; and it is not unusual to attribute a large share of the misfortunes which have befallen the new States of South America to the injudicious erection of great republics, instead of a divided and confederate sovereignty.

It is incontestably true that the love and the habits of republican government in the United States were engendered in the townships and in the provincial assemblies. In a small State, like that of Connecticut for instance, where cutting a canal or laying down a road is a momentous political question, where the State has no

army to pay and no wars to carry on, and where much wealth and much honor cannot be bestowed upon the chief citizens, no form of government can be more natural or more appropriate than that of a republic. But it is this same republican spirit, it is these manners and customs of a free people, which are engendered and nurtured in the different States, to be afterwards applied to the country at large. The public spirit of the Union is, so to speak, nothing more than an abstract of the patriotic zeal of the provinces. Every citizen of the United States transfuses his attachment to his little republic in the common store of American patriotism. In defending the Union he defends the increasing prosperity of his own district, the right of conducting its affairs, and the hope of causing measures of improvement to be adopted which may be favorable to his own interest; and these are motives which are wont to stir men more readily than the general interests of the country and the glory of the nation.

On the other hand, if the temper and the manners of the inhabitants especially fitted them to promote the welfare of a great republic, the Federal system smoothed the obstacles which they might have encountered. The confederation of all the American States presents none of the ordinary disadvantages resulting from great agglomerations of men. The Union is a great republic in extent, but the paucity of objects for which its Government provides assimilates it to a small State. Its acts are important, but they are rare. As the sovereignty of th Union is limited and incomplete, its exercise is not incompatible with liberty; for it does not excite those insatiable desires of fame and power which have proved so fatal to great republics. As there is no common centre to the country, vast capital cities, colossal wealth, abject poverty, and sudden revolutions are alike unknown; and political passion, instead of spreading over the land like a torrent of desolation, spends its strength against the interests and the individual passions of every State.

Nevertheless, all commodities and ideas circulate throughout the Union as freely as in a country inhabited by one people. Nothing checks the spirit of enterprise. Government avails itself of the assistance of all who have talents or knowledge to serve it. Within the frontiers of the Union the profoundest peace prevails, as within the heart of some great empire; abroad, it ranks with the most powerful nations of the earth; two thousand miles of coast are open to the commerce of the world; and as it possesses the keys of the globe, its flags is respected in the most remote seas. The Union is as happy and as free as a small people, and as glorious and as strong as a great nation.

Why The Federal System Is Not Adapted To All Peoples, And How The Anglo-Americans Were Enabled To Adopt It

Every Federal system contains defects which baffle the efforts of the legislator – The Federal system is complex – It demands a daily exercise of discretion on the part of the citizens – Practical knowledge of government common amongst the Americans – Relative weakness of the Government of the Union, another defect inherent in the Federal system – The Americans have diminished without remedying it – The sovereignty of the separate States apparently weaker, but really stronger, than that of the Union – Why? -Natural causes of union must exist between confederate peoples besides the laws – What these causes are amongst the Anglo-Americans – Maine and Georgia, separated by a distance of a thousand miles, more naturally united than Normandy and Brittany – War, the main peril of confederations – This proved even by the example of the United States – The Union has no great wars to fear – Why? – Dangers to which Europeans would be exposed if they adopted the Federal system of the Americans.

When a legislator succeeds, after persevering efforts, in exercising an indirect influence upon the destiny of nations, his genius is lauded by mankind, whilst, in point

of fact, the geographical position of the country which he is unable to change, a social condition which arose without his co-operation, manners and opinions which he cannot trace to their source, and an origin with which he is unacquainted, exercise so irresistible an influence over the courses of society that he is himself borne away by the current, after an ineffectual resistance. Like the navigator, he may direct the vessel which bears him along, but he can neither change its structure, nor raise the winds, nor lull the waters which swell beneath him.

I have shown the advantages which the Americans derive from their federal system; it remains for me to point out the circumstances which rendered that system practicable, as its benefits are not to be enjoyed by all nations. The incidental defects of the Federal system which originate in the laws may be corrected by the skill of the legislator, but there are further evils inherent in the system which cannot be counteracted by the peoples which adopt it. These nations must therefore find the strength necessary to support the natural imperfections of their Government.

The most prominent evil of all Federal systems is the very complex nature of the means they employ. Two sovereignties are necessarily in presence of each other. The legislator may simplify and equalize the action of these two sovereignties, by limiting each of them to a sphere of authority accurately defined; but he cannot combine them into one, or prevent them from coming into collision at certain points. The Federal system therefore rests upon a theory which is necessarily complicated, and which demands the daily exercise of a considerable share of discretion on the part of those it governs.

A proposition must be plain to be adopted by the understanding of a people. A false notion which is clear and precise will always meet with a greater number of adherents in the world than a true principle which is obscure or involved. Hence it arises that parties, which are

like small communities in the heart of the nation, invariably adopt some principle or some name as a symbol, which very inadequately represents the end they have in view and the means which are at their disposal, but without which they could neither act nor subsist. The governments which are founded upon a single principle or a single feeling which is easily defined are perhaps not the best, but they are unquestionably the strongest and the most durable in the world.

In examining the Constitution of the United States, which is the most perfect federal constitution that ever existed, one is startled, on the other hand, at the variety of information and the excellence of discretion which it presupposes in the people whom it is meant to govern. The government of the Union depends entirely upon legal fictions; the Union is an ideal nation which only exists in the mind, and whose limits and extent can only be discerned by the understanding.

When once the general theory is comprehended, numberless difficulties remain to be solved in its application; for the sovereignty of the Union is so involved in that of the States that it is impossible to distinguish its boundaries at the first glance. The whole structure of the Government is artificial and conventional; and it would be ill adapted to a people which has not been long accustomed to conduct its own affairs, or to one in which the science of politics has not descended to the humblest classes of society. I have never been more struck by the good sense and the practical judgment of the Americans than in the ingenious devices by which they elude the numberless difficulties resulting from their Federal Constitution. I scarcely ever met with a plain American citizen who could not distinguish, with surprising facility, the obligations created by the laws of Congress from those created by the laws of his own State; and who, after having discriminated between the matters which come under the cognizance of the Union and those which the local legislature is competent to regulate, could not point out

the exact limit of the several jurisdictions of the Federal courts and the tribunals of the State.

The Constitution of the United States is like those exquisite productions of human industry which ensure wealth and renown to their inventors, but which are profitless in any other hands. This truth is exemplified by the condition of Mexico at the present time. The Mexicans were desirous of establishing a federal system, and they took the Federal Constitution of their neighbors, the Anglo-Americans, as their model, and copied it with considerable accuracy. [12s] But although they had borrowed the letter of the law, they were unable to create or to introduce the spirit and the sense which give it life. They were involved in ceaseless embarrassments between the mechanism of their double government; the sovereignty of the States and that of the Union perpetually exceeded their respective privileges, and entered into collision; and to the present day Mexico is alternately the victim of anarchy and the slave of military despotism.

The second and the most fatal of all the defects I have alluded to, and that which I believe to be inherent in the federal system, is the relative weakness of the government of the Union. The principle upon which all confederations rest is that of a divided sovereignty. The legislator may render this partition less perceptible, he may even conceal it for a time from the public eye, but he cannot prevent it from existing, and a divided sovereignty must always be less powerful than an entire supremacy. The reader has seen in the remarks I have made on the Constitution of the United States that the Americans have displayed singular ingenuity in combining the restriction of the power of the Union within the narrow limits of a federal government with the semblance and, to a certain extent, with the force of a national government. By this means the legislators of the Union have succeeded in diminishing, though not in counteracting the natural danger of confederations.

It has been remarked that the American Government does not apply itself to the States, but that it immediately transmits its injunctions to the citizens, and compels them as isolated individuals to comply with its demands. But if the Federal law were to clash with the interests and the prejudices of a State, it might be feared that all the citizens of that State would conceive themselves to be interested in the cause of a single individual who should refuse to obey. If all the citizens of the State were aggrieved at the same time and in the same manner by the authority of the Union, the Federal Government would vainly attempt to subdue them individually; they would instinctively unite in a common defence, and they would derive a ready-prepared organization from the share of sovereignty which the institution of their State allows them to enjoy. Fiction would give way to reality, and an organized portion of the territory might then contest the central authority. [12t] The same observation holds good with regard to the Federal jurisdiction. If the courts of the Union violated an important law of a State in a private case, the real, if not the apparent, contest would arise between the aggrieved State represented by a citizen and the Union represented by its courts of justice. [12u]

He would have but a partial knowledge of the world who should imagine that it is possible, by the aid of legal fictions, to prevent men from finding out and employing those means of gratifying their passions which have been left open to them; and it may be doubted whether the American legislators, when they rendered a collision between the two sovereigns less probable, destroyed the cause of such a misfortune. But it may even be affirmed that they were unable to ensure the preponderance of the Federal element in a case of this kind. The Union is possessed of money and of troops, but the affections and the prejudices of the people are in the bosom of the States. The sovereignty of the Union is an abstract being, which is connected with but few external objects; the sovereignty of the States is hourly perceptible, easily understood, constantly active; and if the former is of recent creation,

the latter is coeval with the people itself. The sovereignty of the Union is factitious, that of the States is natural, and derives its existence from its own simple influence, like the authority of a parent. The supreme power of the nation only affects a few of the chief interests of society; it represents an immense but remote country, and claims a feeling of patriotism which is vague and ill defined; but the authority of the States controls every individual citizen at every hour and in all circumstances; it protects his property, his freedom, and his life; and when we recollect the traditions, the customs, the prejudices of local and familiar attachment with which it is connected, we cannot doubt of the superiority of a power which is interwoven with every circumstance that renders the love of one's native country instinctive in the human heart.

Since legislators are unable to obviate such dangerous collisions as occur between the two sovereignties which coexist in the federal system, their first object must be, not only to dissuade the confederate States from warfare, but to encourage such institutions as may promote the maintenance of peace. Hence it results that the Federal compact cannot be lasting unless there exists in the communities which are leagued together a certain number of inducements to union which render their common dependence agreeable, and the task of the Government light, and that system cannot succeed without the presence of favorable circumstances added to the influence of good laws. All the peoples which have ever formed a confederation have been held together by a certain number of common interests, which served as the intellectual ties of association.

But the sentiments and the principles of man must be taken into consideration as well as his immediate interests. A certain uniformity of civilization is not less necessary to the durability of a confederation than a uniformity of interests in the States which compose it. In Switzerland the difference which exists between the Canton of Uri and the Canton of Vaud is equal to that

between the fifteenth and the nineteenth centuries; and, properly speaking, Switzerland has never possessed a federal government. The union between these two cantons only subsists upon the map, and their discrepancies would soon be perceived if an attempt were made by a central authority to prescribe the same laws to the whole territory.

One of the circumstances which most powerfully contribute to support the Federal Government in America is that the States have not only similar interests, a common origin, and a common tongue, but that they are also arrived at the same stage of civilization; which almost always renders a union feasible. I do not know of any European nation, how small soever it may be, which does not present less uniformity in its different provinces than the American people, which occupies a territory as extensive as one-half of Europe. The distance from the State of Maine to that of Georgia is reckoned at about one thousand miles; but the difference between the civilization of Maine and that of Georgia is slighter than the difference between the habits of Normandy and those of Brittany. Maine and Georgia, which are placed at the opposite extremities of a great empire, are consequently in the natural possession of more real inducements to form a confederation than Normandy and Brittany, which are only separated by a bridge.

The geographical position of the country contributed to increase the facilities which the American legislators derived from the manners and customs of the inhabitants; and it is to this circumstance that the adoption and the maintenance of the Federal system are mainly attributable.

The most important occurrence which can mark the annals of a people is the breaking out of a war. In war a people struggles with the energy of a single man against foreign nations in the defence of its very existence. The skill of a government, the good sense of the community, and the natural fondness which men entertain for their

country, may suffice to maintain peace in the interior of a district, and to favor its internal prosperity; but a nation can only carry on a great war at the cost of more numerous and more painful sacrifices; and to suppose that a great number of men will of their own accord comply with these exigencies of the State is to betray an ignorance of mankind. All the peoples which have been obliged to sustain a long and serious warfare have consequently been led to augment the power of their government. Those which have not succeeded in this attempt have been subjugated. A long war almost always places nations in the wretched alternative of being abandoned to ruin by defeat or to despotism by success. War therefore renders the symptoms of the weakness of a government most palpable and most alarming; and I have shown that the inherent defeat of federal governments is that of being weak.

The Federal system is not only deficient in every kind of centralized administration, but the central government itself is imperfectly organized, which is invariably an influential cause of inferiority when the nation is opposed to other countries which are themselves governed by a single authority. In the Federal Constitution of the United States, by which the central government possesses more real force, this evil is still extremely sensible. An example will illustrate the case to the reader.

The Constitution confers upon Congress the right of calling forth militia to execute the laws of the Union, suppress insurrections, and repel invasions; and another article declares that the President of the United States is the commander-in-chief of the militia. In the war of 1812 the President ordered the militia of the Northern States to march to the frontiers; but Connecticut and Massachusetts, whose interests were impaired by the war, refused to obey the command. They argued that the Constitution authorizes the Federal Government to call forth the militia in case of insurrection or invasion, but that in the present instance there was neither invasion nor insurrection. They added, that the same Constitution

which conferred upon the Union the right of calling forth the militia reserved to the States that of naming the officers; and that consequently (as they understood the clause) no officer of the Union had any right to command the militia, even during war, except the President in person; and in this case they were ordered to join an army commanded by another individual. These absurd and pernicious doctrines received the sanction not only of the governors and the legislative bodies, but also of the courts of justice in both States; and the Federal Government was constrained to raise elsewhere the troops which it required. [12v]

The only safeguard which the American Union, with all the relative perfection of its laws, possesses against the dissolution which would be produced by a great war, lies in its probable exemption from that calamity. Placed in the centre of an immense continent, which offers a boundless field for human industry, the Union is almost as much insulated from the world as if its frontiers were girt by the ocean. Canada contains only a million of inhabitants, and its population is divided into two inimical nations. The rigor of the climate limits the extension of its territory, and shuts up its ports during the six months of winter. From Canada to the Gulf of Mexico a few savage tribes are to be met with, which retire, perishing in their retreat, before six thousand soldiers. To the South, the Union has a point of contact with the empire of Mexico; and it is thence that serious hostilities may one day be expected to arise. But for a long while to come the uncivilized state of the Mexican community, the depravity of its morals, and its extreme poverty, will prevent that country from ranking high amongst nations. [12w] As for the Powers of Europe, they are too distant to be formidable.

The great advantage of the United States does not, then, consist in a Federal Constitution which allows them to carry on great wars, but in a geographical position which renders such enterprises extremely improbable.

No one can be more inclined than I am myself to appreciate the advantages of the federal system, which I hold to be one of the combinations most favorable to the prosperity and freedom of man. I envy the lot of those nations which have been enabled to adopt it; but I cannot believe that any confederate peoples could maintain a long or an equal contest with a nation of similar strength in which the government should be centralized. A people which should divide its sovereignty into fractional powers, in the presence of the great military monarchies of Europe, would, in my opinion, by that very act, abdicate its power, and perhaps its existence and its name. But such is the admirable position of the New World that man has no other enemy than himself; and that, in order to be happy and to be free, it suffices to seek the gifts of prosperity and the knowledge of freedom.