Alexis de Tocqueville

Democracy in America

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are some constitutions that, in order to allow an unlimited responsibility to weigh on public officials, do not specify any crime.[4]

But what renders the American laws so dreadful in this matter arises, I will dare to say, from their mildness itself.

We have seen that in Europe, the removal of an official and his political interdiction is one consequence of the penalty and that in America, it is the penalty itself. This is the result: in Europe, political tribunals are vested with terrible rights that they sometimes do not know how to use; and it happens that they do not punish for fear of punishing too much. But in America, they do not recoil before a penalty that does not make humanity tremble: to condemn a political enemy to death in order to take away his power is a horrible assassination in the eyes of all; to declare one's adversary unworthy of possessing that same power and to remove it from him, leaving him his freedom and his life, can appear the honest result of a conflict.

Now, this judgment, so easy to pronounce, is not less the height of misfortune for the common sort among those to whom it applies. Great criminals will doubtless brave its futile rigors; ordinary men will see in it a decree that destroys their position, stains their honor, and condemns them to a shameful idleness worse than death.

Political judgment in the United States therefore exerts an influence on the working of society so much the greater as it seems less dreadful. It does not act directly on the governed, but it renders a majority the entire master of those who govern; it does not give to the legislature an immense power that it could exercise only on the day of a crisis; it allows it to have a moderated, regular power that it can use every day. If the force is less great, on the other hand, the use is more convenient and the abuse easier.

In preventing political tribunals from pronouncing judicial penalties, the Americans therefore seem to me to have prevented the most terrible consequences of legislative tyranny rather than the tyranny itself. And I do not know if, all in all, political judgment, as it is intended in the United States, is not the most formidable arm that has ever been put in the hands of the majority.

When the American republics begin to degenerate, I believe that one will be able to recognize it easily: it will be enough to see if the number of political judgments rises.*

*See AT's note XIII, page 694.

4. See the constitutions of Illinois, Maine, Connecticut, and Georgia.

Chapter 8 ON THE FEDERAL CONSTITUTION

Up to now I have considered each state as forming a complete whole, and I have shown the different springs that the people have to move it, as well as the means of action they make use of. But all the states that I have viewed as independent are, however, forced in certain cases to obey a superior authority, that of the Union. The time has come to examine the portion of sovereignty that has been conceded to the Union and to cast a rapid glance at the federal constitution.[1]

HISTORY OF THE FEDERAL CONSTITUTION

Origin of the first Union.—Its weakness.—Congress appeals to its constituent power.—Interval of two years that elapses between that moment and the one when the new constitution is promulgated.

The thirteen colonies that simultaneously shook off the yoke of England at the end of the last century had, as I have already said,* the same religion, the same language, the same mores, almost the same laws; they struggled against a common enemy; they should therefore have had strong reasons to unite intimately with one another and to be absorbed into one and the same nation.

But each of them, having always had a separate existence and a government within its scope, had created interests as well as particular usages for itself and repudiated a solid and complete union that might have made its individual importance disappear into a common importance. Hence, two opposed tendencies: one that brought the Anglo-Americans to unite, the other that brought them to divide.

As long as the war with the mother country lasted, necessity made the principle of union prevail. And although the laws that constituted this union were defective, the common bond subsisted despite them.[2]

* *DA* I 1,2.

1. See the text of the federal constitution.

2. See the articles of the first confederation, formed in 1778. That federal constitution was adopted by all the states only in 1781.

See also the analysis of that constitution given by *The Federalist*, from No. 15 up to and including No. 22, and Mr. Story in his *Commentaries on the Constitution of the United States*, 85–115. [AT refers to an abridged edition of Story's *Commentaries* (Boston, 1833), 84–104. Joseph

But as soon as peace was concluded, the vices of the legislation showed themselves openly: the state appeared to dissolve all at once. Each colony, having become an independent republic, took possession of its entire sovereignty. The federal government, condemned by its very constitution to weakness and no longer sustained by the sentiment of public danger, saw its flag abandoned to outrages by the great peoples of Europe, while it could not find enough resources to stand up to the Indian nations and to pay the interest on debts contracted during the War of Independence. Close to perishing, it officially declared its impotence and appealed to the constituent power.[3]

If ever America was able to elevate itself for a few instants to that height of glory to which the proud imagination of its inhabitants would constantly like to show us, it was in that supreme moment when the national power came, in a way, to abdicate its empire.

The spectacle of a people's struggling energetically to win its independence is one that every century has been able to furnish. Moreover, the efforts the Americans made to escape from the yoke of the English have been much exaggerated. Separated by 1,300 leagues of sea from their enemies, aided by a powerful ally, the United States owed victory much more to its position than to the valor of its armies or to the patriotism of its citizens. Who would dare to compare the American war to the wars of the French Revolution, and the Americans' efforts to ours, when France was up against attacks from all Europe, without money, without credit, without allies, casting a twentieth of its population before its enemies, one hand smothering the fire that was devouring its entrails and the other parading the torch around with it? But what is new in the history of societies is to see a great people, warned by its legislators that the wheels of the government are stopping, turn its regard on itself without haste and without fear, sound the depth of the ill, contain itself for two entire years in order to discover the remedy at leisure, and when the remedy is pointed out, submit voluntarily to it without its costing humanity one tear or drop of blood.

Story (1779–1845) was a Supreme Court justice and author of two works that AT consulted in writing *Democracy in America*: the *Commentaries* and *Public and General Statutes Passed by the Congress of the United States, 1789–1823*. In a letter to Francis Lieber, Story wrote: "The work of De Tocqueville has a great reputation abroad, partly founded on their ignorance that he has borrowed the greater part of his reflections from American works, and little from his own observations. The main body of his materials will be found in the Federalist, and in Story's Commentaries on the Constitution [. . .]. You know ten times as much as he does of the actual workings of our system and of its true theory." Letter of May 9, 1840; cited by G. W. Pierson, *Tocqueville in America*, 731.]

3. It was on February 21, 1787, that Congress made this declaration.

When the insufficiency of the first federal constitution was felt, the exuberance of the political passions to which the revolution had given rise was calmed in part, and all the great men that it had created were still alive. This was a double blessing for America. The assembly, few in number,[4] that was charged with drafting the second constitution included the finest minds and noblest characters that had ever appeared in the New World. George Washington presided over it.

That national commission, after long and mature deliberations, finally offered for adoption by the people the body of organic laws that still regulates the Union in our day. All the states successively adopted it.[5] The new federal government took up its office in 1789, after a two-year interregnum. So the American Revolution ended precisely at the moment when ours began.

SUMMARY PICTURE OF THE FEDERAL CONSTITUTION

Division of powers between federal sovereignty and that of the states.—State governments remain the common rule;—the federal government, the exception.

An initial difficulty must have presented itself to the minds of the Americans. It was the question of apportioning sovereignty in such a way that the different states that formed the Union might continue to govern themselves in all that concerned only their internal prosperity, without having the entire nation, represented by the Union, cease to make up a body and to provide for all its general needs. A complex question, difficult to resolve.

It was impossible to fix beforehand, in an exact and complete manner, the portion of power that would fall to each of the two governments between which sovereignty was going to be apportioned.

Who could foresee in advance all the details of the life of a people?

The duties and the rights of the federal government were simple and easy enough to define, because the Union had been formed with the goal of responding to a few great general needs. The duties and rights of the state governments were, on the contrary, multiple and complicated, because these governments entered into all the details of social life.

The prerogatives of the federal government were therefore carefully defined, and it was declared that everything that was not comprised in that

4. It was composed of only fifty-five members. Washington, Madison, Hamilton, the two Morrises [Gouverneur Morris and Robert Morris] were part of it.

5. It was not the legislators who adopted it. The people named deputies for this sole object. In each of these assemblies the new constitution was the object of profound discussions.

definition returned to the prerogatives of the state governments. Thus the state governments remained the common rule; the federal government was the exception.[6]

But as it was foreseen that, in practice, questions could arise relative to the exact limits of this exceptional government, and that it would be dangerous to abandon the solution of these questions to ordinary tribunals instituted in the different states by the states themselves, they created a high federal court,[7] a unique tribunal, one attribute of which was to maintain the division of power between the two rival governments as the Constitution had established it.[8]

PREROGATIVES OF THE FEDERAL GOVERNMENT

Power granted to the federal government to make peace, war, to establish general taxes.—Objects of internal politics with which it can occupy itself.—The government of the Union, more centralized on some points than was the royal government under the former French monarchy.

Among themselves peoples are only individuals. It is above all to appear with advantage towards foreigners that a nation has need of a unitary government.

6. See amendments to the federal constitution [particularly the tenth]. *Federalist* 32. Story, *Commentaries*, 711[–714]. *Kent's Commentaries*, vol. 1, 364.

Remark even that every time the Constitution has not reserved for Congress the *exclusive* right to regulate certain matters, the states can do it while awaiting that Congress be pleased to occupy itself with them. Example: the Congress has the right to make a general bankruptcy law, it does not do it: each state could make one in its manner. Besides, this point was established only after discussion before the courts. It exists only in jurisprudence.

7. The action of this court is indirect, as we shall see below.

8. Thus *Federalist* 45 explains the apportionment of sovereignty between the Union and the particular states: "The powers delegated by the proposed Constitution to the federal government," it says, "are few and defined. Those which are to remain in the state governments are numerous and indefinite. The former will be exercised principally on external objects, as war, peace, negotiation, and foreign commerce[; . . .] The powers reserved to the several States will extend to all the objects which, in the ordinary course of affairs, concern the lives, liberties [. . .] and prosperity of the State."

I shall often have occasion to cite the *Federalist* in this work. When the project of law that has since become the Constitution of the United States was still before the people and submitted for their adoption, three men, already celebrated, and who have since become even more so, John Jay, Hamilton, and Madison, associated for the purpose of making stand out in the eyes of the nation the advantages of the project that had been submitted to it. With this design, they published in newspaper form a series of articles the sum of which forms a complete treatise. They had given to their newspaper [series] the name *Federalist*, which was kept for the work.

The *Federalist* is a fine book that, though special to America, ought to be familiar to statesmen of every country.

The Union, therefore, was granted the exclusive right to make peace and war; to conclude commercial treaties; to raise armies, to equip fleets.[9]

The necessity of a national government does not make itself felt as imperiously in directing the internal affairs of society.

Still, there are certain general interests for which only a general authority can usefully provide.

To the Union was given over the right to regulate all that relates to the value of money; it was charged with the postal service; it was given the right to open the great [lines of] communication that would unite the various parts of the territory.[10]

In general, the governments of the different states were considered free in their sphere; they could, however, abuse that independence and by imprudent measures compromise the security of the entire Union; in those rare cases, defined in advance, the federal government is permitted to intervene in the internal affairs of the states.[11] Thus while in each of the confederated republics the power to modify and change its legislation is recognized, they are nevertheless forbidden to make retroactive laws and to create a body of nobles within themselves.[12]

Finally, as it was necessary that the federal government be able to fulfill the obligations that were imposed on it, it was given the unlimited right to levy taxes.[13]

When one pays attention to the apportionment of powers as the federal constitution established it; when one examines, on the one hand, the share of sovereignty that was reserved to the particular states, and on the other hand, the portion of power that the Union has taken, one readily discovers that the federal legislators had formed very clear and very just ideas of what I have previously named governmental centralization.*

Not only does the United States form a republic, but also a confederation. Nevertheless, its national authority was in some regards more centralized than it was in the same period in several of the absolute monarchies of Europe. I shall cite only two examples.

**DA* I 1.5.

9. See Constitution, [art. 1,] sec. 8, *Federalist* 41 and 42. *Kent's Commentaries*, vol. 1, 207ff. Story, *Commentaries*, 358–382, 409–426.

10. There are still several other rights of this kind, such as that of making a general law about bankruptcies, and of granting patents of invention . . . One senses well enough what made the intervention of the entire Union necessary in these matters.

11. Even in that case its intervention is indirect. The Union intervenes through its courts, as we shall see further on.

12. Federal constitution, art. 1, sec. 10.

13. Constitution, [art. 1,] secs. 8, 9, and 10. *Federalist* 30–36, 41, 42, 43, 44. *Kent's Commentaries*, vol. 1, 207 [222] and 381. Story, *Commentaries*, 329[–357], 514.

France had thirteen sovereign courts that, most often, had the right to interpret the law without appeal. It possessed, in addition, certain provinces called *pays d'état,** which, after the sovereign authority charged with representing the nation had ordered the levying of a tax, could refuse their cooperation.

The Union has only a single court to interpret the law, like the single legislature that makes it; the tax voted by the representatives of the nation obliges all citizens. The Union is therefore more centralized on these two essential points than was the French monarchy; nevertheless, the Union is only an assemblage of confederated republics.

In Spain, certain provinces had the power to establish a system of customs that was their own, a power that is joined, by its very essence, to national sovereignty.

In America, Congress alone has the right to regulate the commercial relations of the states among themselves. The government of the confederation is therefore more centralized on this point than that of the kingdom of Spain.

It is true that in France and in Spain, the royal power always being in a position to execute, by force if need be, what the constitution of the kingdom refused it the right to do, one arrived after all is said and done at the same point. But I am speaking here of the theory.

FEDERAL POWERS

After having enclosed the federal government within its clearly drawn circle of action, it was a question of knowing how to make it move within that.

LEGISLATIVE POWERS

Division of the legislative body into two branches.—Differences in the manner of forming the two houses.—The principle of the independence of the states triumphs in the formation of the Senate.—The dogma of national sovereignty in the composition of the House of Representatives.—Singular effects that result from the fact that constitutions are logical only when peoples are young.

In the organization of the powers of the Union, on many points they followed plans that had been drawn before by the particular constitutions of each of the states.

The federal legislative body of the Union was composed of a Senate and a House of Representatives.

* *Pays d'état* were French provinces that had traditional assemblies known as provincial estates, some of them with considerable rights and privileges.

In forming each of these assemblies the spirit of conciliation brought diverse rules to be followed.

Above I gave the sense that when they wanted to establish the federal constitution, two opposed interests were presented to each other. Those two interests had given birth to two opinions.

Some wanted to make the Union a league of independent states, a kind of congress, where the representatives of distinct peoples would come to discuss certain points of common interest.

Others wanted to unite all the inhabitants of the former colonies into one and the same people, and to give them a government that, although its sphere was limited, could nevertheless act in this sphere as the sole, unique representative of the nation. The practical consequences of these two theories were very different.

Thus, if it was a question of organizing a league and not a national government, it was for the majority of the states to make the law, and not the majority of the inhabitants of the Union. For each state, great or small, would then preserve its character as an independent power and would enter the Union on a footing of perfect equality.

In contrast, from the moment that the inhabitants of the United States were considered to form one and the same people, it would be natural that the majority of citizens of the Union alone make the law.

One understands that the small states could not consent to the application of this doctrine without completely abdicating their existence in whatever concerned federal sovereignty; for from having the power of a co-ruler they would become an insignificant fraction of a great people. The first system would have granted them unreasonable power; the second annulled them.

In this state of things, what happened was what almost always happens when interests are opposed to reasonings: they bent the rules of logic. The legislators adopted a middle term that reconciled by force two theoretically irreconcilable systems.

The principle of the independence of the states triumphed in the formation of the Senate; the dogma of national sovereignty, in the composition of the House of Representatives.

Each state would send two senators to Congress and a certain number of representatives in proportion to its population.[14]

14. Every ten years Congress fixes anew the number of deputies that each state will send to the House of Representatives. The total number was 69 in 1789; in 1833 it was 240 (*American Almanac:* 1834, 194). [*The American Almanac and Repository of Useful Knowledge* (Boston: Gray and Bowen, 1834). The correct reference is p. 124.]

The Constitution said that there would not be more than one representative for 30,000 persons; but it did not fix a limit for fewer. Congress has not believed it should increase the number

As a result of this arrangement, in our day the state of New York has forty representatives in Congress and only two senators; the state of Delaware, two senators and only one representative. The state of Delaware is, therefore, the equal of the state of New York in the Senate, whereas in the House of Representatives the latter has forty times more influence than the former. Thus it can happen that a minority of the nation, dominating the Senate, entirely paralyzes the will of the majority represented by the other house, which is contrary to the spirit of constitutional governments.

All this shows well to what degree it is rare and difficult to bind all the parts of legislation in a logical and rational manner.

In the long term, time always gives birth to different interests in the same people and consecrates diverse rights. When it is then a question of establishing a general constitution, each of those interests and rights forms just as many natural obstacles that oppose any political principle in following out all its consequences. It is therefore only at the birth of societies that one can be completely logical in the laws. When you see a people enjoying this advantage, do not hasten to conclude that it is wise; think rather that it is young.

In the period when the federal constitution was formed, there still existed among the Anglo-Americans only two interests positively opposed one to another: the interest of individuality for the particular states, the interest of union for the entire people; and it was necessary to come to a compromise between them.

Still, one ought to recognize that this part of the Constitution has, up to the present, not produced the evils that one could have feared.

All the states are young; they are close to one another; they have homogeneous mores, ideas, and needs; the difference that results from their greater or lesser size is not enough to give them very opposed interests. Therefore the small states have never been seen to join forces in the Senate against the designs of the great. Besides, there is such an irresistible force in the legal expression of the will of a whole people that when the majority comes to express itself through the organ of the House of Representatives, the Senate finds itself very weak in its presence.

In addition, one must not forget that it was not the responsibility of the American legislators to make one and the same nation of the people to whom

of representatives in proportion to the increase of the population. By the first law passed on this subject, April 14, 1792 (see *Laws of the United States* by Story, vol. 1, 235) [Joseph Story, *Public and General Statutes Passed by the Congress of the United States, 1789–1827* (Boston, 1828)], it was decided that there would be one representative for 33,000 inhabitants. The latest law, which was passed in 1832, fixed the number at one representative for 48,000 inhabitants. The population represented is composed of all free men and three-fifths of the number of slaves.

they wished to give laws. The goal of the federal constitution was not to destroy the existence of the states, but only to restrict it. Therefore from the moment when these secondary bodies were allowed real power (and it could not be taken away from them), one renounced in advance the habitual use of constraint to bend them to the will of the majority. This postulated, the introduction of their individual strength into the wheels of the federal government was nothing extraordinary. It only certified an existing fact, that of a recognized power that had to be managed and not assaulted.

ANOTHER DIFFERENCE BETWEEN THE SENATE AND THE HOUSE OF REPRESENTATIVES

The Senate named by provincial legislators.—The [House of] Representatives, by the people.—Two stages of election for the first.—A single one for the second.—Duration of the different mandates.—Prerogatives.

The Senate differs from the other house not only by the principle of representation itself, but also by the mode of election, by the duration of the mandate, and by the diversity of prerogatives.

The House of Representatives is named by the people; the Senate, by the legislators of each state.

The one is the product of direct election, the other, of election in two stages.

The mandate of the representatives lasts only two years; that of the senators, six.

The House of Representatives has only legislative functions; it participates in judicial power only in accusing public officials; the Senate concurs in the formation of laws; it judges political offenses that are referred to it by the House of Representatives; it is, in addition, the great executive council of the nation. Treaties concluded by the president must be validated by the Senate; his choices, to be definitive, need to receive the approbation of that same body.[15]

ON THE EXECUTIVE POWER[16]

Dependence of the president.—Elective and responsible.—Free in his sphere, the Senate oversees him and does not direct him.—The salary of the president fixed when he takes his office.—Suspensive veto.

15. See *Federalist* 52–66. Story, [*Commentaries,*] 199–314. Constitution, [art. 1,] secs. 2 and 3.

16. *Federalist* 67–77. Constitution, art. 2. Story, [*Commentaries,*] 315, 515–780 [317–325, 515–580]. *Kent's Commentaries,* [vol. 1,] 255 [253–271].

The American legislators had a difficult task to fulfill: they wanted to create an executive power that depended on the majority and that was nonetheless strong enough by itself to act freely in its sphere.

Maintenance of the republican form required that the representative of executive power be subject to the national will.

The president is an elective magistrate. His honor, his goods, his freedom, his life answer constantly to the people for the good use he makes of his power. In exercising that power, moreover, he is not completely independent: the Senate oversees his relations with foreign powers as well as the distribution of posts, so that he can neither be corrupted nor corrupt.

The legislators of the Union recognized that the executive power could not fulfill its task with dignity and utility if they did not succeed in giving it more stability and more force than it had been granted in the particular states.

The president was named for four years and could be reelected. With a future, he would have the courage to work for the public good and the means of effecting it.

They made the president the sole, unique representative of the executive power of the Union. They even guarded against subordinating his will to that of a council: a dangerous means that, while weakening the action of the government, diminishes the responsibility of those who govern. The Senate has the right to make some of the acts of the president fruitless; but it can neither force him to act nor share the executive power with him.

The action of the legislature on the executive power can be direct; we have just seen that Americans took care that it not be. It can also be indirect.

In depriving a public official of his salary, the houses remove a part of his independence; one must fear that they, as masters of lawmaking, will, little by little, take away from him the share of power that the Constitution wanted to preserve for him.

This dependence of the executive power is one of the vices inherent in republican constitutions. The Americans were not able to destroy the inclination that brings legislative assemblies to take hold of the government, but they rendered this inclination less irresistible.

The salary of the president is fixed, at his entry into office, for the time that his magistracy will last. In addition, the president is armed with a suspensive veto that permits him to stop laws from being passed that could destroy the share of independence that the Constitution has left him. Nonetheless, the struggle between the president and the legislature can only be unequal, since the latter, if it perseveres in its designs, can always master the resistance opposed to it; but the suspensive veto at least forces it to retrace its steps; it obliges it to consider the question anew, and this time, it can no

longer decide it except with a majority of two-thirds in agreement. The veto, moreover, is a sort of appeal to the people. The executive power, which could have been oppressed in secret without this guarantee, then pleads its cause and makes its reasons heard. But if the legislature perseveres in its designs, can it not always defeat the resistance opposed to it? To that I shall respond that in the constitution of all peoples, whatever the rest of its nature may be, there is a point at which the legislator is obliged to rely on the good sense and virtue of citizens. That point is closer and more visible in republics, more distant and more carefully hidden in monarchies; but it is always to be found somewhere. There is no country where the law can foresee everything and where institutions will take the place of reason and mores.

HOW THE POSITION OF THE PRESIDENT OF THE UNITED STATES DIFFERS FROM THAT OF A CONSTITUTIONAL KING IN FRANCE

The executive power in the United States, limited and exceptional like the sovereignty in whose name it acts.—The executive power in France extends to everything, like the sovereignty.—The king is one of the authors of the law.—The president is only the executor of the law.—Other differences that arise from the duration of the two powers.—The president hindered in the sphere of the executive power.—The king is free in it.—France, despite these differences, resembles a republic more than the Union resembles a monarchy.—Comparison of the number of officials in the two countries who depend on the executive power.

The executive power plays such a great role in the destiny of nations that I want to stop here for a moment to make the place it occupies among the Americans better understood.

In order to conceive a clear and precise idea of the position of the president of the United States, it is useful to compare it to that of a king in one of the constitutional monarchies of Europe.

In this comparison I shall not be much attached to external signs of power; they deceive the eye of the observer more than guide it.

When a monarchy is transformed little by little into a republic, the executive power in it preserves titles, honors, respect, and even money, for a long time after it has lost the reality of its power. The English, after having cut off the head of one their kings and having chased another of them from the throne,* still get on their knees to speak to the successors of those princes.

*Charles I was beheaded in 1649; James II was chased from the throne in 1688. The French, it may be noted, had likewise beheaded a king (Louis XVI in 1793) and chased one from the throne (Charles X in 1830).

On the other hand, when republics fall under the yoke of one alone, power continues to show itself simple, even, and modest in its manners, as if it were not already elevated above everyone. When the emperors disposed despotically of the fortunes and lives of their fellow citizens, in speaking to them one still called them Caesar, and they went to sup familiarly at their friends' homes.

One must therefore leave the surface and penetrate further.

Sovereignty in the United States is divided between the Union and the states, whereas among us it is one and compact; hence arises the first and the greatest difference that I perceive between the president of the United States and the king of France.

In the United States the executive power is limited and exceptional, like the very sovereignty in whose name it acts; in France it extends to everything, just like the sovereignty.

The Americans have a federal government; we have a national government.

That is a first cause of inferiority, resulting from the very nature of things; but it is not the only one. The second in importance is this: one can, properly speaking, define sovereignty as the right to make laws.

The king in France really constitutes a part of the sovereign, since laws do not exist if he refuses to sanction them; he is, in addition, the executor of the laws.

The president is equally the executor of the law, but he does not really concur in making it since, in refusing his assent, he cannot prevent it from existing. He therefore makes up no part of the sovereign; he is only its agent.

Not only does the king in France constitute one share of the sovereign, but he also participates in the formation of the legislature, which is the other share of it. He participates in it by naming the members of one house and by putting an end to the duration of the mandate of the other at his will. The president of the United States does not concur at all in the composition of the legislative body and cannot dissolve it.

The king shares with the houses the right to propose a law.

The president has no such initiative.

The king is represented, within the houses, by a certain number of agents who set forth his views, support his opinions, and make his maxims of government prevail.

The president has no entry into Congress; his ministers are excluded from it as is he, and it is only by indirect channels that he can make his influence and opinions penetrate this great body.

The king of France therefore walks as an equal with the legislature, which cannot act without him as he cannot act without it.

The president is placed beside the legislature as an inferior and dependent power.

In the exercise of the executive power properly speaking, the point at which his position seems to come closest to that of the king of France, the president still has several very great causes of inferiority.

The power of the king in France has, first, the advantage of longevity over that of the president. For longevity is one of the first elements of force. One loves and fears only what will exist for a long time.

The president of the United States is a magistrate elected for four years. The king in France is a hereditary head.

In the exercise of executive power, the president of the United States is continually subject to jealous supervision. He prepares treaties, but he does not make them; he designates [candidates] for posts, but he does not name them.[17]

The king of France is absolute master in the sphere of executive power.

The president of the United States is responsible for his actions. French law says that the person of the king of France is inviolable.

Nevertheless, above the one as above the other stands a directing power, that of public opinion. This power is less defined in France than in the United States; less recognized, less formulated in the laws; but it does in fact exist there. In America, it proceeds by elections and decrees; in France, by revolutions. France and the United States, despite the diversity of their constitutions, thus have this point in common, that public opinion is, as a result, the dominant power. The generative principle of the laws is therefore, to tell the truth, the same in the two peoples, although its development is more or less free and the consequences one draws from it are often different. This principle, in its nature, is essentially republican. Thus I think that France, with its king, resembles a republic more than the Union, with its president, resembles a monarchy.

In all that precedes, I have taken care to point out only the chief points of difference. If I had wanted to enter into details, the picture would have been still more striking. But I have too much to say not to wish to be brief.

I have remarked that the power of the president of the United States is exercised only in the sphere of a restricted sovereignty, whereas that of the king in France acts within the circle of a complete sovereignty.

I could have shown the governmental power of the king in France ex-

17. The Constitution had left doubtful the point of knowing whether the president had to take the advice of the Senate in the case of discharging as in the case of nominating a federal official. *Federalist* 77 seemed to establish the affirmative; but in 1789 Congress decided with all reason that, since the president was responsible, he could not be forced to make use of agents who did not have his confidence. See *Kent's Commentaries*, vol. 1, 289.

ceeding even its natural limits, however extended those might be, and penetrating in a thousand ways into the administration of individual interests.

To that cause of influence, I could add the one that results from the great number of public officials, who almost all owe their mandate to the executive power. Among us this number has surpassed all known bounds; it comes to 138,000.[18] Each of these 138,000 ought to be considered as an element of force. The president does not have the absolute right to name [officials] to public posts, and those posts scarcely exceed 12,000.[19]

ACCIDENTAL CAUSES THAT CAN INCREASE THE INFLUENCE OF THE EXECUTIVE POWER

External security the Union enjoys.—A waiting policy.—Army of 6,000 soldiers.—Only a few warships.—The president possesses great prerogatives that he has no occasion to make use of.—In what he does have occasion to execute, he is weak.

If the executive power is less strong in America than in France, one must attribute the cause of it perhaps more to circumstances than laws.

It is principally in relations with foreigners that the executive power of a nation finds occasion to deploy its skill and force.

If the life of the Union were constantly threatened, if its great interests were mixed every day with those of other powerful peoples, one would see the executive power grow larger in opinion, through what one would expect from it and what it would execute.

The president of the United States is, it is true, the chief of the army, but that army is composed of six thousand soldiers; he commands the fleet, but the fleet counts only a few warships; he directs the affairs of the Union towards foreign peoples, but the United States has no neighbors. Separated from the rest of the world by the ocean, still too weak to wish to dominate the sea, it has no enemies, and its interests are only rarely in contact with those of other nations of the globe.

This makes one see well that the practice of government must not be judged by the theory.

18. The sums paid by the state to these various officials amount each year to 200,000,000 francs.

19. Each year they publish an almanac in the United States called *National Calendar* [Peter Force, *The National Calendar and Annals of the United States* (Washington, 1833)]; one finds in it the names of all federal officials. It is the *National Calendar* of 1833 that furnished me the figure that I give here.

It would result from what precedes that the king of France has eleven times more places at his disposal than the president of the United States, although the population of France is only one and a half times more considerable than that of the Union.

The president of the United States possesses almost royal prerogatives, which he has no occasion to make use of, and the rights which, up to now, he can use are very circumscribed: the laws permit him to be strong, circumstances keep him weak.

It is, on the contrary, circumstances more than laws that give to the royal authority of France its greater force.

In France, the executive power struggles constantly against immense obstacles and disposes of immense resources to defeat them. It is increased by the greatness of the things that it executes and by the importance of the events that it directs, without modifying its constitution because of them.

Had the laws created it as weak and as circumscribed as that of the Union, its influence would soon become much greater.

WHY THE PRESIDENT OF THE UNITED STATES DOES NOT NEED TO HAVE A MAJORITY IN THE HOUSES IN ORDER TO DIRECT AFFAIRS

It is an established axiom in Europe that a constitutional king cannot govern when the opinion of the legislative chambers does not accord with his.

Several presidents of the United States have been seen to lose the support of the majority in the legislative body without being obliged to abandon power and without its resulting in any great evil for society.

I have heard this fact cited to prove the independence and force of the executive power in America. It suffices to reflect a few moments to see, on the contrary, the proof of his powerlessness in it.

A king in Europe needs to obtain the support of the legislative body to fulfill the task that the constitution imposes on him, because that task is immense. A constitutional king in Europe is not only the executor of the law: care for its execution has so completely devolved to him that if the law were against him, he could paralyze its force. He has need of the chambers to make the law, the chambers have need of him to execute it: these are two powers that cannot live without each other; the wheels of government stop the moment there is discord between them.

In America, the president cannot prevent the forming of laws; he cannot escape the obligation to execute them. His zealous and sincere cooperation is doubtless useful, but it is not necessary to the working of the government. In everything essential that he does, he is directly or indirectly subject to the legislature; where he is entirely independent of it, he can do almost nothing. It is therefore his weakness, and not his force, that permits him to live in opposition to the legislative power.

In Europe, there must be an accord between the king and the chambers

because there can be a serious struggle between them. In America, the accord is not obligatory because struggle is impossible.

ON THE ELECTION OF THE PRESIDENT

The danger of the system of elections increases in proportion to the extent of the prerogatives of the executive power.—Americans can adopt this system because they can do without a strong executive power.—How circumstances favor the establishment of the elective system.—Why the election of the president does not make the principles of government vary.—Influence that the election of the president exerts on the fate of secondary officials.

The system of elections, applied to the head of the executive power among a great people, presents dangers that experience and historians have sufficiently pointed out.*

Thus I want to speak of it only in relation to America.

The dangers that one fears in the system of elections are more or less great according to the place that the executive power occupies and its importance in the state, and according to the mode of election and the circumstances in which the people that elects finds itself.

What one reproaches, not without reason, in the elective system applied to the head of state is that it offers such a great lure to particular ambitions, and inflames them so much in the pursuit of power, that often, legal means no longer sufficing for them, they appeal to force when right happens to fail them.

It is clear that the more prerogatives the executive power has, the greater the lure is; the more the ambition of the pretenders is excited, the more also it finds support in a crowd of [those with] secondary ambitions who hope to share in power after their candidate has triumphed.

The dangers of the elective system therefore grow in direct proportion to the influence exerted by the executive power on affairs of state.

The revolutions of Poland ought not to be attributed solely to the elective system in general, but to the fact that the elective magistrate was the head of a great monarchy.†

Before discussing the absolute good of the elective system, there is therefore always an intervening question to decide, which is knowing whether the

*Among possible "historians" are Hume, "Essay IX: Of the Protestant Succession," in *Essays, Moral, Political, and Literary* (1777); Montesquieu, *The Spirit of the Laws*, II 2; Rousseau, *Considerations on the Government of Poland* (1772), chaps. 8, 14; *Federalist* 71. As to "experience," the question of electing the executive was debated in France in 1789 and 1830.

†See Rousseau, *Considerations on the Government of Poland* (1772), chaps. 8, 14.

geographic position, the laws, the habits, the mores, and the opinions of the people among whom one wishes to introduce it permit one to establish a weak and dependent executive power; for to wish all at once that the representative of the state remain armed with a vast power and be elected is to express, according to me, two contradictory wills. For my part, I know only a sole means of making hereditary royalty pass to the status of an elective power: one must first narrow its sphere of action, gradually diminish its prerogatives, and habituate the people little by little to living without its aid. But with that, European republicans scarcely concern themselves. Since many of them hate tyranny only because they come up against its rigors, the extent of the executive power does not offend them; they attack only its origin without perceiving the close bond that binds these two things.

No one has yet been encountered who cares to risk his honor and life to become president of the United States, because the president has only a temporary, limited, and dependent power. Fortune has to put an immense prize in play for desperate players to present themselves in the lists. No candidate up to now has been able to arouse ardent sympathies and dangerous popular passions in his favor. The reason for this is simple: having come to the head of the government, he can distribute to his friends neither much power nor much wealth nor much glory, and his influence in the state is too feeble for the factions to see their success or their ruin in his elevation to power.

Hereditary monarchies have a great advantage: as the particular interest of a family is continually bound in a strict manner to the interest of the state, not a single moment ever passes in which the latter is left abandoned to itself. I do not know if affairs are better directed in these monarchies than elsewhere; but at least there is always someone who, well or ill according to his capacity, is occupied with them.

In elective states, on the contrary, at the approach of the election and long before it arrives, the wheels of government in a way no longer function except of themselves. One can doubtless combine laws in such a manner that the election works in a single stroke and with rapidity, and the seat of executive power so to speak never remains vacant; but whatever one does, the void exists in minds despite the efforts of the legislator.

At the approach of an election, the head of the executive power thinks only of the conflict being prepared; he no longer has a future; he can undertake nothing and pursues only feebly what another is perhaps going to complete. "I am so near the moment of retiring," wrote President Jefferson on January 21, 1809 (six weeks before the election), "that I take no part in affairs beyond the expression of an opinion. I think it fair that my successor should

now originate those measures of which he will be charged with the execution and responsibility, . . ."*

For its part, the nation has its eyes turned towards but a single point: it is occupied only in watching over the work of giving birth that is being prepared.

The vaster the place that executive power occupies in the direction of affairs, the greater and more necessary its habitual action is, and the more dangerous such a state of things is. Among a people that has contracted the habit of being governed by the executive power and, even more so, of being administered by it, election could not fail to produce a profound disturbance.

In the United States the action of the executive power can be slowed with impunity because that action is weak and circumscribed.

When the head of the government is elected, a lack of stability in the internal and external politics of the state almost always results. That is one of the principal vices of the system.

But that vice is more or less felt according to the portion of power granted to the elected magistrate. In Rome, although the consuls were changed every year, the principles of government did not vary, because the Senate was the directing power, and the Senate was an hereditary body. In most of the monarchies of Europe, if one elected the king, the kingdom would change face with each new choice.

In America the president exerts a very great influence on affairs of state, but he does not conduct them; the preponderant power resides in the national representation as a whole. It is therefore the mass of people that must change, and not only the president, in order that the maxims of politics vary. So in America, the system of election applied to the head of the executive power does not impair the fixity of government in a very perceptible manner.

Yet, the lack of fixity is an evil so inherent in the elective system that it is still keenly felt in the president's sphere of action, however circumscribed it may be.

The Americans rightly thought that the head of the executive power, to fulfill his mission and to bear the weight of responsibility as a whole, ought to remain, as much as possible, free to choose his agents by himself and to dismiss them at will; the legislative body watches over the president rather than directing him. Hence it follows that at each new election, it is as if the fate of all federal employees is in doubt.

*Jefferson to James Monroe, actually on January 28, 1809, and not "before the election" but before leaving office. The letter continues: ". . . and that it is my duty to clothe them with forms of authority. Five more weeks will relieve me of a drudgery to which I am no longer equal, and restore me to a scene of tranquillity, amidst my family and friends, more congenial to my age and natural inclinations."

In the constitutional monarchies of Europe the complaint is that the destiny of obscure agents of the administration often depends on the fate of the ministers. It is much worse in states where the head of the government is elected. The reason for this is simple: in constitutional monarchies, ministers succeed each other rapidly; but the principal representative of the executive power never changes, which confines the spirit of innovation within certain limits. Their administrative systems therefore vary in details rather than in principles; they cannot substitute one for another abruptly without causing a sort of revolution. In America, that revolution is made every four years in the name of the law.

As for the individual miseries that are the natural consequence of such a law, one must avow that the lack of fixity in the fate of officials does not produce the evils in America that one could expect from it elsewhere. In the United States it is so easy to create an independent existence for oneself that to take from an official the place that he occupies is sometimes to remove the ease from his life, but never the means of sustaining it.

I said at the beginning of this chapter that the dangers of the mode of election applied to the head of the executive power were more or less great according to the circumstances in which the people that elects finds itself.

One strives in vain to lessen the role of the executive power; there is one thing on which this power exerts a great influence, whatever place the laws have made for it—that is external politics: a negotiation can scarcely be opened and followed fruitfully except by a single man.

The more a people finds itself in a precarious and perilous position, and the more the need for continuity and fixity is felt in the direction of external affairs, the more also the application of the system of election to the head of state becomes dangerous.

The policy of the Americans toward the entire world is simple; one could almost say that no one has need of them and that they have need of no one. Their independence is never threatened.

Among them the role of the executive power is therefore as restricted by circumstances as by laws. The president can change his views frequently without the state's suffering or perishing.

Whatever may be the prerogatives with which the executive power is vested, one ought always to consider the time immediately preceding the election and during it as a period of national crisis.

The more troubled the internal situation of a country and the greater its external perils, the more dangerous is this moment of crisis for it. Among the peoples of Europe, there are few indeed who would not have to fear conquest or anarchy every time they gave themselves a new head.

In America, society is so constituted that it can sustain itself without aid;

external dangers are never pressing there. The election of the president is a cause of agitation, not of ruin.

MODE OF ELECTION

Skill that the American legislators have shown in the choice of the mode of election.—Creation of a special electoral body.—Separate vote of the special electors.—In what case the House of Representatives is called on to choose the president.—What has happened in the twelve elections that have taken place since the Constitution has been in force.

Independent of the dangers inherent in the principle, there are many others that arise from the forms of election themselves and that can be avoided by the care of the legislator.

When a people gathers in arms on the public square to choose its head, it is exposed not only to the dangers that the elective system presents in itself, but also to all those of civil war arising from a mode of election like this.

When Polish laws made the choice of the king depend on the veto of a single man, they invited the murder of that man or constituted anarchy in advance.

As one studies the institutions of the United States and casts a more attentive regard on the political and social situation of that country, one notices a marvelous accord between the fortune and the efforts of man. America was a new land; nevertheless, the people who inhabited it had already made a long use of freedom elsewhere: two great causes of internal order. In addition, America did not fear conquest. American legislators, taking up these favorable circumstances, had no trouble establishing a weak and dependent executive power; having created it so, they could render it elective without danger.

Nothing more remained for them except to choose, among the different systems of election, the least dangerous; the rules that they drew up in this regard admirably completed the guarantees that the physical and political constitution of the country already furnished.

The problem to solve was to find the mode of election that, while expressing the real will of the people, hardly excited their passions and held them in the least possible suspense. First they accepted that a *simple* majority would make the law. But it was still a very difficult thing to get this majority without having to fear the delays that they wanted before all else to avoid.

It is rare, in fact, to see a man gather a majority of votes in a great people at the first stroke. The difficulty increases in a republic of confederated states, where local influences are much more developed and more powerful.

To get around this second obstacle, the means presented itself of delegating the electoral powers of the nation to a body that represented it.

This mode of election rendered a majority more probable; for the fewer

the electors, the easier it is for them to agree. It also presented more guarantee of the goodness of the choice.

But ought one to have entrusted the right to elect to the legislative body itself, usual representative of the nation, or, on the contrary, should an electoral college have been formed whose sole object was to proceed to the nomination of the president?

The Americans preferred this latter option. They thought that the men they sent to make ordinary laws would only incompletely represent the voice of the people in regard to the election of its first magistrate. Besides, being elected for more than one year, they could have represented a will that had already changed. They judged that if they charged the legislature with electing the head of the executive power, its members would become, long before the election, objects of corrupting maneuvers and playthings of intrigue, whereas special electors, like jurors, would remain unknown in the crowd until the day when they would have to act, and would appear only for an instant to pronounce their decree.

They therefore established that each state would name a certain number of electors,[20] who in their turn would elect the president. And as they had remarked that assemblies charged with choosing heads of government in elective countries inevitably became hotbeds of passion and cabal, that they sometimes took up powers that did not belong to them, and that their operations and the consequent incertitude were often prolonged long enough to put the state in peril, they ruled that the electors would all vote on one fixed day, but without being gathered together.[21]

The mode of election in two stages rendered a majority probable, but did not assure it, for it was possible that the electors would differ among themselves as those who commissioned them could have done.

This case presenting itself, they were necessarily brought to take one of these three measures: either they had to have new electors named, consult again those already named, or, finally, defer the choice to a new authority.

The first two methods, independent of the fact that they were hardly reliable, brought delays and perpetuated an always dangerous agitation.

They therefore settled on the third, and they agreed that the votes of electors would be transmitted sealed to the president of the Senate; that on a fixed day and in the presence of the two houses he would do the counting of them. If none of the candidates had gathered a majority, the House of Representatives would proceed immediately by itself to the election; but they

20. As many as they sent members to Congress. The number of electors in the election of 1833 was 288 ([Force,] *The National Calendar*).

21. Electors of the same state gathered together; but they transmitted to the seat of the central government the list of individual votes, not the product of the vote of the majority.

took care to limit its right. The representatives could only elect one of the three candidates who had obtained the most votes.[22]

As we see, it is only in a rare case, difficult to foresee in advance, that the election is entrusted to the ordinary representatives of the nation, and still they can only choose a citizen already designated by a strong minority of special electors; a happy combination that reconciles the respect that is owed to the will of the people with the rapidity of execution and the guarantees of order that the interest of the state requires. Yet by having the question decided by the House of Representatives in the case of a split, they still did not arrive at a complete solution of all difficulties; for the majority in the House of Representatives could in its turn be doubtful, and this time the Constitution offered no remedy. But in establishing obligatory candidacies, in restricting their number to three, in relying on the choice of a few enlightened men, they had ironed out all the obstacles[23] over which they could have some power; the others were inherent in the elective system itself.

During the forty-four years that the federal constitution has existed, the United States has elected its president twelve times.

Ten elections were made in a moment, by the simultaneous vote of special electors placed at different points of the land.

As yet, the House of Representatives has only twice used the exceptional right with which it is vested in case of a split. The first time was in 1801 during the election of Mr. Jefferson; and the second, in 1825, when Mr. Quincy Adams was named.

CRISIS OF THE ELECTION

One can consider the moment of the election of the president as a moment of national crisis.—Why.—Passions of the people.—Preoccupation of the president.—Calm that succeeds the agitation of the election.

I have said in what favorable circumstances the United States found itself for the adoption of its elective system, and I have made known the precautions that the legislators took to diminish its dangers. Americans are habituated to

22. In this circumstance it is the majority of states, and not the majority of members, that decides the question. In this way, New York has no more influence over the deliberation than Rhode Island. Thus one first consults the citizens of the Union as forming but one and the same people; and when they cannot agree, one revives the division by states and gives each of these a separate and independent vote.

That again is one of the peculiarities that the federal constitution presents and that only the clash of contrary interests can explain.

23. Jefferson, in 1801, was nevertheless named only on the thirty-sixth ballot.

carrying out all kinds of elections. Experience has taught them what degree of agitation they can reach and ought to stop at. The vast extent of their territory and the dispersal of inhabitants make a collision between the different parties less probable and less perilous there than anywhere else. The political circumstances in which the nation finds itself during elections have, up to now, presented no real danger.

Nevertheless, one can still consider the moment of the election of the president of the United States as a period of national crisis.

The influence that the president exerts on the course of affairs is doubtless weak and indirect, but it extends to the entire nation; the choice of the president matters only moderately to each citizen, but it matters to all citizens. Now, an interest, however small it may be, takes on great importance from the moment that it becomes a general interest.

Compared to a king in Europe, the president doubtless has few means of creating partisans for himself; still, the places at his disposal are great enough in number so that several thousand electors are directly or indirectly interested in his cause.

In addition, parties in the United States as elsewhere feel the need to group themselves around one man in order more easily to reach the intelligence of the crowd. They therefore generally make use of the name of the presidential candidate as a symbol; they personify their theories in him. So the parties have a great interest in determining the election in their favor, not so much to make their doctrines triumph with the aid of the president-elect as to show by his election that those doctrines have acquired a majority.

Long before the appointed moment arrives, the election becomes the greatest and so to speak sole business preoccupying minds. The factions at that time redouble their ardor; in that moment all the factitious passions that the imagination can create in a happy and tranquil country become agitated in broad daylight.

For his part, the president is absorbed by the care of defending himself. He no longer governs in the interest of the state, but in that of his reelection; he prostrates himself before the majority and often, instead of resisting its passions, as his duty obliges him to do, he runs to meet its caprices.

As the election approaches, intrigues become more active, agitation more lively and more widespread. Citizens divide into several camps, each of which takes the name of its candidate. The entire nation falls into a feverish state; the election is then the daily text of public papers, the subject of particular conversations, the goal of all reasoning, the object of all thoughts, the sole interest of the present.

As soon as fortune has pronounced, it is true, this ardor is dissipated,

everything becomes calm, and the river, one moment overflowed, returns peacefully to its bed. But should one not be astonished that the storm could have arisen?

ON THE REELECTION OF THE PRESIDENT

When the head of the executive power is reeligible, it is the state itself that intrigues and corrupts.—Desire to be reelected, which dominates all the thoughts of the president of the United States.—Inconvenience of reelection, special to America.—The natural vice of democracies is the gradual enslavement of all powers to the least desires of the majority.—The reelection of the president favors this vice.

Were the legislators of the United States wrong or right to permit the reelection of the president?

To prevent the head of the executive power from being able to be reelected appeared, at first, contrary to reason. We know what influence the talents or the character of a single man exerts on the destiny of a whole people, above all in difficult circumstances and in times of crisis. Laws that forbid citizens to reelect their first magistrate would take away from them the best means of making the state prosper or of saving it. One would, moreover, arrive in this way at the peculiar result that a man would be excluded from the government at the very moment when he had succeeded in proving that he was capable of governing well.

These reasons are doubtless powerful; can one nevertheless not oppose to them still stronger ones?

Intrigue and corruption are vices natural to elective governments. But when the head of state can be reelected, the vices spread indefinitely and compromise the very existence of the country. When a plain candidate can succeed by intrigue, his maneuvers can only be exercised in a limited space. When, on the contrary, the head of state puts himself in the running, he borrows the force of the government for his own use.

In the first case, it is one man, with his feeble means; in the second, it is the state itself, with its immense resources, that intrigues and corrupts.

The plain citizen who uses reprehensible maneuvers to attain power can only harm public prosperity in an indirect manner; but if the representative of the executive power descends into the lists, the care of the government becomes a secondary interest to him; his principal interest is his election. Negotiations, like laws, are no longer anything but electoral schemes for him; places become the recompense for services rendered, not to the nation, but to its head. Even though the action of the government might not always be

contrary to the interest of the country, it would, in any case, no longer serve [the country]. It is, however, for his use alone that it is taken.

It is impossible to consider the ordinary course of affairs in the United States without noticing that the desire to be reelected dominates the thoughts of the president; that the whole policy of his administration tends toward that point; that his least steps are subordinated to that object; that above all as the moment of the crisis approaches, individual interest is substituted in his mind for the general interest.

The principle of reelection therefore renders the corrupting influence of elective governments more extensive and more dangerous. It tends to degrade the political morality of the people and to replace patriotism with cleverness.

In America it attacks even more closely the sources of national existence.

Each government brings with it a natural vice that seems attached to the very principle of its life; the genius of the legislator consists in discerning it well. A state can triumph over many bad laws, and often one exaggerates the evil they cause. But every law whose effect is to develop this seed of death cannot fail in the long term to become fatal, although its bad effects may not be immediately perceived.

The principle of ruin in absolute monarchies is the unlimited and unreasonable extension of royal power. A measure that took away the counterweights to that power allowed by the constitution would therefore be radically bad, even if its effects appeared insensible for a long time.

Likewise, in countries where democracy governs and where the people constantly attract everything to themselves, laws that render their action more and more prompt and irresistible attack the existence of the government in a direct manner.

The greatest merit of the American legislators is to have clearly perceived this truth and to have had the courage to put it into practice.

They conceived that outside of the people there must be a certain number of powers that, without being completely independent of it, nonetheless enjoyed a rather large degree of freedom in their own sphere; so that, when forced to obey the permanent direction of the majority, they could nevertheless struggle against its caprices and refuse its dangerous demands.

To this effect, they concentrated all the executive power of the nation in a single hand; they gave the president extensive prerogatives and armed him with the veto in order to resist the encroachments of the legislature.

But in introducing the principle of reelection, they destroyed their work in part. They granted a great power to the president and took away from him the will to make use of it.

Not reeligible, the president would not be independent of the people, for he would not cease to be responsible to them; but the favor of the people would not be so necessary to him that he had to bend to their will in everything.

Reeligible (and this is true above all in our day, when political morality is relaxed and when great characters are disappearing), the president of the United States is only a docile instrument in the hands of the majority. He loves what it loves, hates what it hates; he flies to meet its will, anticipates its complaints, bends to its least desires: the legislators wanted him to guide it, and he follows it.

Thus, in order not to deprive the state of the talents of one man, they have rendered those talents almost useless; and in order to provide a resource for extraordinary circumstances, they have exposed the country to dangers every day.

ON THE FEDERAL COURTS[24]

Political importance of the judicial power in the United States.—Difficulty of treating this subject.—Utility of justice in confederations.—Which tribunals could the Union make use of?—Necessity of establishing courts of federal justice.—Organization of federal justice.—The Supreme Court.—How it differs from all courts of justice that we are familiar with.

I have examined the legislative power and the executive power of the Union. It still remains for me to consider the judicial power.

Here I must set forth my fears to readers.

Judicial institutions exert a great influence on the destiny of the Anglo-Americans; they hold a very important place among political institutions properly so-called. From this point of view, they particularly deserve to attract our regard.

But how make the political action of American courts understood without entering into some technical details about their constitution and their forms; and how descend to the details without having the natural dryness of such a

24. See chapter 6 [*DA* I 1.6], entitled "On the Judicial Power of the United States." That chapter makes known the general principles of the Americans in the matter of justice. See also the federal constitution, art. 3.

See the work that has for a title *The Federalist* 78–83; *Constitutional Law, being a View of the Practice and Juridiction* [sic] *of the Courts of the United States*, by Thomas Sargeant [Philadelphia, 1830].

See Story, [*Commentaries,*] 134–162, 489–511, 581, 668 [581–668]. See the organic law of September 24, 1789, in the collection entitled *Laws of the United States* [*Public and General Statutes Passed by the Congress of the United States*], by Story, vol. 1, 53[f].

subject put off the curiosity of the reader? How remain clear without ceasing to be short?

I do not flatter myself that I have escaped these different perils. Men of the world will still find that I am too long; jurists will think that I am too brief. But that is an inconvenience attached to my subject generally and to the special matter that I am treating at this moment.

The greatest difficulty was not to know how one would constitute a federal government, but how one would make its laws obeyed.

Governments generally have only two means of defeating the resistance that the governed oppose to them: the material force that they find in themselves; the moral force that the decrees of courts lend to them.

A government that had only warfare to make its laws obeyed would be very near its ruin. One of two things would probably happen to it: if it were weak and moderate, it would employ force only at the last extremity and would allow a host of [acts of] partial disobedience to pass unnoticed; then the state would fall little by little into anarchy.

If it were audacious and powerful, it would have daily recourse to the use of violence, and soon one would see it degenerate into a pure military despotism. Its inaction and its activity would be equally fatal to the governed.

The great object of justice is to substitute the idea of right for that of violence; to place intermediaries between the government and the use of material force.

The power of opinion generally accorded by men to the intervention of courts is a surprising thing. This power is so great that it still attaches to the judicial form when the substance no longer exists; it gives a body to the shadow.

The moral force with which courts are vested renders the use of material force infinitely rarer by substituting for it in most cases; and when the latter must finally act, it [material force] doubles its power by being joined to it [moral force].

A federal government ought more than any other to desire to obtain the support of justice, because in its nature it is weaker, and one can more easily organize resistance against it.[25] If it had to come always and at first to the use of force, it would not suffice for its task.

Thus the Union, to make the citizens obey its laws or to repel aggression that had the laws for its object, had particular need of courts.

But which courts ought it to have made use of? Each state already had a

25. Federal laws have most need of courts, and yet they have least allowed for them. The cause of this is that most confederations have been formed by independent states that did not have a real intention to obey the central government and that, while giving it the right to command, carefully reserved for themselves the ability to disobey it.

judicial power organized within it. Did one have to recur to its courts? [or] did one have to create federal justice? It is easy to prove that the Union could not adapt for its use the judicial power established in the states.

Without doubt, it is important for the security of each and for the freedom of all that the judicial power be separated from all others; but it is no less necessary to national existence that the different powers of the state have the same origin, follow the same principles, and act in the same sphere, in a word, that they be *correlative* and *homogeneous*. No one, I imagine, has ever thought to have offenses committed in France judged by foreign tribunals so as to be more sure of the impartiality of the magistrates.

Americans form a single people in relation to their federal government; but in the midst of this people, they have allowed political bodies to subsist that are dependent on the national government in some points, independent in all the others; that have their particular origin, their own doctrines, and their special means of acting. To entrust the execution of the laws of the Union to courts instituted by these political bodies was to deliver the nation to foreign judges.

Even more, each state is not only a foreigner in relation to the Union, it is also an everyday adversary, since the sovereignty of the Union can only lose out to the profit of that of the states.

In having the laws of the Union applied by courts of the particular states, one therefore delivered the nation not only to foreign judges, but also to partial judges.

Besides, it was not their character alone that rendered the courts of the states incapable of serving one national purpose; it was above all their number.

At the moment when the federal constitution was formed, there were already thirteen courts of justice in the United States judging without appeal. Twenty-four may be counted today. How suppose that a state can subsist when its fundamental laws can be interpreted and applied in twenty-four different manners at once! Such a system is as contrary to reason as to the lessons of experience.

The American legislators therefore agreed to create a federal judicial power to apply the laws of the Union and to decide certain questions of general interest that were carefully defined in advance.

All the judicial power of the Union was concentrated in a single tribunal, called the Supreme Court of the United States. But to expedite business they assigned inferior tribunals to it, charged with judging cases of little importance without appeal or with giving a ruling in the first instance in more serious disputes. Members of the Supreme Court were not elected by the

people or the legislature; the president of the United States was to choose them after having taken the advice of the Senate.

In order to make them independent of the other powers, they made them irremovable, and they decided that their salary, once fixed, would be outside the control of the legislature.[26]

It was very easy to proclaim the establishment of a federal justice in principle, but a host of difficulties arose when it became a question of fixing its prerogatives.

MANNER OF SETTLING THE COMPETENCE OF THE FEDERAL COURTS

Difficulty of settling the competence of the various courts in confederations.—The courts of the Union obtained the right to settle their own competence.—Why this rule attacks the share of sovereignty the particular states had reserved for themselves.—The sovereignty of those states restricted by the laws and by the interpretation of the laws.—The particular states thus risk a danger more apparent than real.

A first question presented itself: with the Constitution of the United States setting up two distinct, opposing sovereignties, represented in regard to justice by two different orders of courts, whatever care one took to establish the jurisdiction of each of these two orders of courts, one could not prevent frequent collisions between them. Now, in that case, to whom ought the right to establish competence belong?

26. They divided the Union into districts; in each of these districts they placed a federal judge in residence. The court that this judge presided over was named the district court.

In addition, each of the judges composing the Supreme Court had every year to travel a certain portion of the territory of the republic to decide certain more important cases in the places themselves: the court presided over by this magistrate was designated by the name circuit court.

Finally, the most serious affairs had to come either directly or by appeal before the Supreme Court, at whose seat all the circuit judges gathered once a year to hold a solemn session.

The jury system was introduced in the federal courts in the same manner as in the state courts and for like cases.

There is almost no analogy, as one sees, between the Supreme Court of the United States and our Court of Cassation [the highest court of appeal in the French judicial system]. The Supreme Court can be referred to in the first instance and the Court of Cassation can only be referred to second or third in order. In truth, the Supreme Court forms, as does the Court of Cassation, a unique tribunal charged with establishing a uniform jurisprudence; but the Supreme Court judges fact as well as law and pronounces *by itself* without sending [the case] back to another tribunal, two things that the Court of Cassation cannot do.

See the organic law of September 24, 1789, *Laws of the United States* [*Public and General Statutes Passed by the Congress of the United States*], by Story, vol. 1, 53[f].

In peoples who form one and the same political society, when a question of competence arises between two courts, it is generally brought before a third that serves as arbiter.

This is done without difficulty because among these peoples questions of judicial competence have no relation to questions of national sovereignty.

But above the highest court of a particular state and the highest court of the United States it was impossible to establish any tribunal whatsoever that was neither one nor the other.

They therefore had to give one of the courts the right to judge in its own cause and to take or to retain cognizance of the business that was contested in it. They could not grant this privilege to the various courts of the states; that would have been to destroy the sovereignty of the Union in fact after having established it in right; for the interpretation of the Constitution would soon have returned to the particular states the share of independence that the terms of the Constitution had taken away from them.

In creating a federal tribunal, they had wanted to withdraw from the state courts the right to decide, each in its own manner, questions of national interest, and so to form successfully a body of uniform jurisprudence for the interpretation of the laws of the Union. The goal would not have been attained if the courts of the particular states, while abstaining from judging cases as federal, had been able to judge them by claiming that they were not federal.

The Supreme Court of the United States was therefore vested with the right to decide all questions of competence.[27]

That was the most dangerous blow delivered to the sovereignty of the states. In this way it was restricted not only by the laws, but also by the interpretation of laws; by a known boundary and by another that was not known; by a settled rule and by an arbitrary rule. The Constitution, it is true, had set precise limits for federal sovereignty; but each time that sovereignty is in competition with that of the states, a federal court will pronounce.

Yet the dangers with which this manner of proceeding seemed to threaten the sovereignty of the states were not as great in reality as they appeared to be.

We shall see further on that in America real force resides more in the

27. Furthermore, to make these cases about competence less frequent, they decided that in a very great number of federal cases the courts of the particular states would have the right to pronounce concurrently with the tribunals of the Union; but then the condemned party always had the ability to form an appeal before the Supreme Court of the United States. The Supreme Court of Virginia disputed the right of the Supreme Court of the United States to judge the appeal of its judgments, but in vain. See *Kent's Commentaries*, vol. 1, 300, 370f. See *Story's Comm.*, 646, and the organic law of [September 24,] 1789; *Laws of United States* [Story, *Public and General Statutes*], vol. 1, 53[f].

provincial governments than in the federal government. Federal judges feel the relative weakness of the power in the name of which they act, and they are closer to abandoning a right of jurisdiction in cases where the law gives it to them than being inclined to claim it illegally.

DIFFERENT CASES* OF JURISDICTION

The matter and the person, bases of federal jurisdiction.—Cases having to do with ambassadors,—with the Union,—with a particular state.—Judged by whom.—Cases that arise from the laws of the Union.—Why judged by federal courts.—Cases relating to the nonperformance of contracts judged by federal justice.—Consequence of this.

After having recognized the means of fixing federal competence, the legislators of the Union determined the cases of jurisdiction in which it would be exercised.

They accepted that there were certain litigants who could only be judged by the federal courts, whatever the object of the case might be.

Next they established that there were certain cases that could only be decided by these same courts, whatever the character of the litigants might be.

The person and the matter therefore became the two bases of federal competence.

Ambassadors represent nations friendly to the Union; everything that interests ambassadors interests the entire Union in some way. When an ambassador is a party in a case, the case becomes an affair that touches the well-being of the nation; it is natural that a federal court pronounce.

The Union itself can have cases: in this instance it would be contrary to reason as well as to the usage of nations to appeal to the judgment of tribunals representing another sovereignty than its own. It is for the federal courts alone to pronounce.

When two individuals belonging to two different states have a case, one cannot without inconvenience have them judged by the courts of one of the two states. It is surer to choose a court that can excite the suspicions of none of the parties, and the court that most naturally presents itself is the Union's.

When two litigants are no longer isolated individuals, but states, a political reason of the first order is joined to the same reason of equity. Here the character of the litigants gives a national importance to all cases; the least contentious question between two states interests the peace of the Union as a whole.[28]

*In this section "case" translates both *cas* (general) and *procès* (specific).

28. The Constitution also says that cases that can arise between a state and the citizens of another state shall be within the province of the federal courts. The question was soon raised of determining whether the Constitution meant all cases that can arise between a state and the

Often the very nature of the cases was to serve to regulate competence. Thus it is that all questions connected to maritime commerce were to be decided by federal courts.[29]

The reason is easy to point out: almost all these questions fit into an assessment of the law of nations. In this relation they essentially interest the entire Union in regard to foreigners. Moreover, since the sea is not included in one judicial district rather than another, only national justice can have title to jurisdiction over cases that have a maritime origin.

The Constitution has included in a single category almost all cases that by their nature will belong under the federal courts.

The rule that it draws in this regard is simple, but it comprehends in itself a vast system of ideas and a multitude of facts.

Federal courts, it says, shall judge all cases that *arise under the laws of the United States.**

Two examples will make the thought of the legislator perfectly understood.

The Constitution forbids the states the right to make laws regarding the circulation of money; despite this prohibition, a state makes such a law. The interested parties refuse to obey it, given that it is contrary to the Constitution. [The case] must go before a federal court because the means of attack is taken from the laws of the United States.

Congress establishes an import duty. Difficulties are raised about the collection of this duty. Again, it must be presented before the federal courts because the cause of the case is the interpretation of a law of the United States.

This rule is perfectly in accord with the bases adopted for the federal constitution.

The Union, as it was constituted in 1789, has, it is true, only a restricted sovereignty, but within this sphere they wanted it to form one and the same people.[30] In this sphere, it is sovereign. When this point is set down and

*Article 3, section 2.

citizens of another state, either one or the other being the *plaintiff*. The Supreme Court pronounced for the affirmative; but that decision alarmed the particular states, who feared being brought despite themselves before federal justice at every turn. An amendment was therefore introduced into the Constitution [eleventh amendment], by virtue of which the judicial power of the Union could not be extended to judge cases that had been *brought* against one of the United States by citizens of another.

See *Story's Commentaries*, 624[–625].

29. Example: all acts of piracy.

30. Some restrictions have indeed been placed on this principle in introducing the particular states as independent powers in the Senate and in having them vote separately in the House of Representatives in the case of electing the president; but these are exceptions. The contrary principle is dominant.

accepted, all the rest becomes easy; for if you recognize that the United States, within the limits set down by its Constitution, forms only one people, it must indeed be granted rights that belong to all peoples.

Now, since the origin of societies, this point has been agreed to: each people has the right to have all questions that relate to the execution of its own laws judged by its courts. But one responds: the Union is in the singular position of forming one people only relative to certain objects; for all others it is nothing. What results from this? It is that at least for all laws that relate to those objects, it has the rights that one would grant to a complete sovereignty. The real point of the difficulty is to know which those objects are. This point decided (and we saw above, in treating competence, how it was done), there is, to tell the truth, no longer a question; for once they established that a case was federal, that is to say, came under the part of sovereignty reserved to the Union by the Constitution, it followed naturally that a federal court alone ought to pronounce.

Therefore every time one wants to attack the laws of the United States or to invoke them to defend oneself, it is the federal courts that must be addressed.

Thus the jurisdiction of the courts of the Union extends or contracts as the sovereignty of the Union itself contracts or extends.

We have seen that the principal goal of the legislators of 1789 was to divide sovereignty into two distinct parts. In one, they placed the direction of all general interests of the Union; in the other, the direction of all the interests special to some of its parts.

Their principal care was to arm the federal government with enough powers so that, in its sphere, it could defend itself against encroachments of the particular states.

As for these, they adopted as a general principle to leave them free in their sphere. The central government can neither direct them nor even inspect their conduct within it.

I pointed out in the chapter on the division of powers* that this last principle has not always been respected. There are certain laws that a particular state cannot make, however much they appear to interest it alone.

When one state of the Union makes a law of this nature, citizens who are wronged by the execution of that law can appeal to the federal courts.

So the jurisdiction of the federal courts extends not only to all cases that have their source in the laws of the Union, but also to all those that arise

**DA* I 1.8 above, "Prerogatives of the Federal Government."

from the laws that particular states have made contrary to the Constitution.

The states are forbidden to promulgate retroactive laws in criminal matters; a man who is condemned by virtue of a law of this kind can appeal to federal justice.

The Constitution has equally forbidden states to make laws that can destroy or alter rights acquired by virtue of a contract (*impairing the obligations of contracts*).[31]

From the moment that a particular person believes he sees that a law of his state infringes a right of this kind, he can refuse to obey it and appeal to federal justice.[32]

This arrangement appears to me to attack the sovereignty of the states more profoundly than anything else.

The rights granted to the federal government in its evidently national goals are defined and easy to understand. Those conceded to it indirectly by the article I have just cited do not fall easily under its meaning, and their limits are not clearly drawn. There is, in fact, a multitude of political laws that have an effect on the existence of contracts and that could thus furnish material for encroachment by the central power.

31. It is perfectly clear, says Mr. Story, [*Commentaries,*] 503, that every law that extends, narrows, or changes in any manner the intention of the parties, such as it results from stipulations contained in a contract, alters (*impairs*) the contract. In the same place, the same author carefully defines what federal jurisprudence means by a contract. The definition is very large. A concession made by the state to a particular person and accepted by him is a contract, and cannot be taken away by the effect of a new law. A charter granted by the state to a company is a contract, and is law for the state as well as for the concessionaire. The article of the Constitution we are speaking of therefore protects the existence of a great part of *acquired rights,* but not of all. I can very legitimately possess a property without its having passed into my hands as a consequence of a contract. Its possession is an acquired right for me, and that right is not guaranteed by the federal constitution.

32. Here is a remarkable example cited by Mr. Story, [*Commentaries,*] 508[–509]. Dartmouth College, in New Hampshire, had been founded by virtue of a charter granted to certain individuals before the American Revolution. Its administrators formed, by virtue of this charter, a constituted body, or, following the American expression, a *corporation.* The legislature of New Hampshire believed it should change the terms of this original charter and gave over to new administrators all the rights, privileges, and franchises resulting from that charter. The former administrators resisted and appealed to the federal court, which gave them a victory in the case; considering that the original charter was a genuine contract between the state and the concessionaires, the new law could not change the clauses of this charter without violating rights acquired by virtue of a contract, consequently without violating article 1, section 10, of the Constitution of the United States.

MANNER OF PROCEEDING OF FEDERAL COURTS

Natural weakness of justice in confederations.—Efforts that legislators should make to place, as much as possible, only isolated individuals, and not states, before federal courts.—How Americans have succeeded at this.—Direct action of federal courts on plain persons.—Indirect attack on states that violate the laws of the Union.—A decree of federal justice does not destroy provincial law, it enervates it.

I have made known what the rights of the federal courts are; it matters no less to know how they exercise them.

The irresistible force of justice in countries where sovereignty is not partitioned comes from the fact that the courts in these countries represent the nation as a whole in a conflict with the lone individual that the decree strikes. To the idea of right is added the idea of the force that supports right.

But in countries where sovereignty is divided it is not always so. There, justice most often finds before it not an isolated individual, but a fraction of the nation. Its moral power and its material force become less great.

In federal states, justice is therefore naturally weaker and the justiciable [party] stronger.

The legislator in confederations must work constantly to give the courts a place analogous to the one they hold among peoples who have not partitioned sovereignty; in other words, his most constant efforts must tend to make federal justice represent the nation and the justiciable [party] represent a particular interest.

A government, whatever its nature is, needs to act on the governed to force them to render to it what is due to it; it needs to act against them to defend itself from their attacks.

As for the direct action of the government on the governed, to force them to obey the laws, the Constitution of the United States made it (and there was its masterpiece) so that the federal courts act in the name of those laws, and never have any business except with individuals. In fact, as they declared that the confederation forms one and the same people in the sphere drawn by the Constitution, the result is that the government created by this constitution and acting within its limits was vested with all the rights of a national government, of which the principal one is to make its injunctions reach the plain citizen without an intermediary. Therefore when the Union orders the levying of a tax, for example, it does not have to address itself to the states to collect it, but to each American citizen, according to his quota. Federal justice, in its turn, charged with assuring the execution of this law of the Union, has to convict not the recalcitrant state, but the taxpayer. Like the justice of other peoples, it finds itself facing only an individual.

Remark that here the Union itself has chosen its adversary. It has chosen a weak one; it is altogether natural that he will succumb.

But when the Union, instead of attacking, is reduced to defending itself, the difficulty increases. The Constitution recognizes the power of making laws in the states. These laws can violate the rights of the Union. Here, necessarily, it is found in conflict with the sovereignty of the state that has made the law. It only remains for it to choose, among modes of action, the least dangerous. The mode was indicated in advance by the general principles that I have previously enunciated.[33]

One conceives that in the case that I have just supposed, the Union could have cited the state before a federal court that would have declared the law null; that would be to follow the most natural course of ideas. But in that manner federal justice would have found itself directly opposed to a state, which it wanted as much as possible to avoid.

The Americans thought it was almost impossible that a new law not prejudice some particular interest in its execution.

It is on that particular interest that the authors of the federal constitution rely to attack the legislative measure about which the Union can have something to complain. To it they offer a shelter.

A state sells lands to a company; one year after, a new law disposes of the same lands in another way and thus violates that part of the Constitution that prohibits changing rights acquired by a contract. When the buyer by virtue of the new law presents himself to enter into possession, the possessor who holds his rights from the former law sues him before the courts of the Union and has [the latter's] title declared null.[34] So, in reality, federal justice finds itself doing battle with the sovereignty of the state; but it attacks it only indirectly and over an application of detail. It thus strikes the law in its consequences, not in its principle; it does not destroy it, it enervates it.

Finally, a last hypothetical situation remained.

Each state formed a corporation that had an existence and civil rights separately; consequently, it could sue or be sued before the courts. A state could, for example, seek justice against another state.

In that case, it was no longer a question of the Union's attacking a provincial law, but of judging a case to which a state was a party. It was a case like any other; the character of the litigants alone was different. Here the danger indicated at the beginning of this chapter still exists, but this time one cannot avoid it; it is inherent in the very essence of federal constitutions, the result

33. See the chapter entitled "On Judicial Power in America" [*DA* I 1.6].

34. See *Kent's Commentaries*, vol. 1, 387[–396].

of which will always be to create within a nation particular [bodies] powerful enough so that justice is exercised against them only with difficulty.

ELEVATED RANK HELD BY THE SUPREME COURT AMONG THE GREAT POWERS OF THE STATE

No people has constituted as great a judicial power as the Americans.—Extent of its prerogatives.—Its political influence.—The peace and the very existence of the Union depend on the wisdom of seven federal judges.

When, after having examined in detail the organization of the Supreme Court, one comes to consider in sum the prerogatives that have been given it, one discovers without difficulty that a more immense judicial power has never been constituted in any people.

The Supreme Court is placed higher than any known tribunal both by the *nature* of its rights and by the *species* of those under its jurisdiction.

In all the ordered nations of Europe, the government has always shown a great repugnance to allow ordinary justice to decide questions that interested itself. This repugnance is naturally greater when the government is more absolute. On the contrary, as freedom increases, the sphere of prerogatives of the courts is always going to enlarge; but none of the European nations has yet thought that every judicial question, whatever its origin might be, could be left to judges of the common law.

In America, they have put this theory into practice. The Supreme Court of the United States is the sole, unique tribunal of the nation.

It is charged with the interpretation of laws and treaties; questions relative to maritime commerce and all those in general that are connected to the law of nations are within its exclusive competence. One can even say that its prerogatives are almost entirely political although its constitution is entirely judicial. Its unique purpose is to have the laws of the Union executed, and the Union regulates only the relations of the government with the governed and of the nation with foreigners; the relations of citizens among themselves are almost all ruled by the sovereignty of the states.

To this first cause of importance must be added another greater still. In the nations of Europe, tribunals have only particular persons under their jurisdiction; but one can say that the Supreme Court of the United States makes sovereigns appear before its bar. When the bailiff, advancing on the steps of the tribunal, comes to pronounce these few words, "The state of New York against the state of Ohio," one feels that there, one is not within the precincts of an ordinary court of justice. And when one considers that one of those litigants represents a million men and the other two million,

one is astonished at the responsibility that weighs on the seven judges whose decree is going to delight or sadden such a great number of their fellow citizens.

In the hands of seven federal judges rest ceaselessly the peace, the prosperity, the very existence of the Union. Without them, the Constitution is a dead letter; to them, the executive power appeals to resist the encroachments of the legislative body; the legislature, to defend itself against the undertakings of the executive power; the Union, to have itself obeyed by the states; the states, to repel the exaggerated pretensions of the Union; the public interest against private interest; the spirit of conservation against democratic instability. Their power is immense; but it is a power of opinion. They are omnipotent as long as the people consent to obey the law; they can do nothing when they scorn it. Now, the power of opinion is that which is most difficult to make use of, because it is impossible to say exactly where its limits are. It is often as dangerous to fall short of them as to exceed them.

Federal judges, therefore, must not only be good citizens, educated and upright men—qualities necessary to all magistrates—one must also find statesmen in them; they must know how to discern the spirit of their times, to confront the obstacles they can defeat, and to turn away from the current when the flood threatens to carry away with them the sovereignty of the Union and the obedience due to its laws.

The president can fail without the state's suffering because the president has only a limited duty. Congress can err without the Union's perishing because above Congress resides the electoral body that can change its mind by changing its members.

But if the Supreme Court ever came to be composed of imprudent or corrupt men, the confederation would have to fear anarchy or civil war.

Furthermore, so that one not be mistaken about it, the original cause of the danger is not in the constitution of the tribunal, but in the very nature of federal governments. We have seen that nowhere is it more necessary to constitute the judicial power strongly than in confederated peoples, because nowhere are the individual existences that can struggle against the social body greater and in a better state to resist the use of the material force of the government.

Now, the more necessary it is that a power be strong, the more one must give it [greater] extent and independence. The more extended and independent a power is, the more dangerous is the abuse that can be done by it. The origin of the evil is therefore not in the constitution of this power, but in the very constitution of the state that necessitates the existence of such a power.

HOW THE FEDERAL CONSTITUTION IS SUPERIOR TO THE CONSTITUTIONS OF THE STATES

How one can compare the constitution of the Union to those of the particular states.—In particular, one should attribute the superiority of the constitution of the Union to the wisdom of federal legislators.—The legislature of the Union less dependent on the people than those of the states.—The executive power freer in its sphere.—The judicial power less subject to the will of the majority.—Practical consequences of this.—Federal legislators have attenuated the dangers inherent in government by democracy; state legislators have increased these dangers.

The federal constitution differs essentially from the constitutions of the states by the goal that it proposes, but as to the means of attaining this goal it closely approaches them. The object of government is different, but the forms of government are the same. From this special point of view one can usefully compare them.

I think that the federal constitution is superior to all the state constitutions. This superiority is due to several causes.

The current constitution of the Union was formed only subsequent to those of most of the states; one could therefore profit from the experience acquired.

Still, one will be convinced that this cause is only secondary if one considers that, since the establishment of the federal constitution, the American confederation has increased by eleven new states and that these have almost always exaggerated rather than attenuated the faults existing in the constitutions of their precursors.

The great cause of the superiority of the federal constitution is in the very character of the legislators.

In the period when it was formed, the ruin of the confederation appeared imminent; it was so to speak present to all eyes. In that extremity the people chose not perhaps the men they liked best, but those they esteemed the most.

I have already observed above* that the legislators of the Union were almost all remarkable for their enlightenment, more remarkable still for their patriotism.

They were all reared in the midst of a social crisis, during which the spirit of freedom had to struggle continuously against a strong and dominant authority. After the struggle ended, and while the excited passions of the crowd were, according to its habit, still engaged in combating dangers that had long

*Above, *DA* I 1.8.

since ceased to exist, they stopped; they cast a more tranquil and more penetrating regard on their native country; they saw that a definitive revolution had been accomplished and that from then on the dangers that threatened the people could only arise from abuses of freedom. What they thought, they had the courage to say, because they felt at the bottom of their hearts a sincere and ardent love for that same freedom; they dared to speak of restricting it because they were sure that they did not wish to destroy it.[35]

Most of the constitutions of the states give a mandate to the House of Representatives of only one year in duration, and two for the Senate. In this way the members of the legislative body are bound constantly and in the narrowest manner to the least desires of their constituents.

The legislators of the Union thought that this extreme dependence of the legislature denatured the principal effects of the representative system by placing in the people themselves not only the origin of powers, but also the government.

They lengthened the time of the electoral mandate to allow to the deputy a greater use of his free will.

35. In this period the celebrated Alexander Hamilton, one of the most influential authors of the Constitution, did not fear to publish what follows in *The Federalist* 71:

> There are some who would be inclined to regard the servile pliancy of the executive to a prevailing current, either in the community or in the legislature, as its best recommendation. But such men entertain very crude notions, as well of the purposes for which government was instituted as of the true means by which the public happiness may be promoted.
>
> The republican principle demands that the deliberate sense of the community should govern the conduct of those to whom they entrust the management of their affairs; but it does not require an unqualified complaisance to every sudden breeze of passion, or to every transient impulse which the people may receive from the arts of men, who flatter their prejudices to betray their interests.
>
> It is a just observation that the people commonly *intend* the PUBLIC GOOD. This often applies to their very errors. But their good sense would despise the adulator who should pretend that they [always] *reason right* about the *means* of promoting it. They know from experience that they sometimes err; and the wonder is that they so seldom err as they do, beset as they continually are by the wiles of parasites and sycophants; by the snares of the ambitious, the avaricious, the desperate, by the artifices of men who possess their confidence more than they deserve it, and of those who seek to possess rather than to deserve it.
>
> When occasions present themselves in which the interests of the people are at variance with their inclinations, it is the duty of the persons whom they have appointed to be the guardians of those interests to withstand the temporary delusion in order to give them time and opportunity for more cool and sedate reflection. Instances might be cited in which a conduct of this kind has saved the people from very fatal consequences of their own mistakes, and has procured lasting monuments of their gratitude to the men who [had] courage and magnanimity enough to serve them at the peril of their displeasure.

The federal constitution, like the different state constitutions, divided the legislative body into two branches.

But in the states these two parts of the legislature were composed of the same elements, according to the same mode of election. The result was that the passions and the will of the majority came to light with the same ease and found an organ and an instrument as quickly in one chamber as in the other. This gave a violent and hasty character to the formation of the laws.

The federal constitution made the two chambers come from the votes of the people as well; but it varied the conditions of eligibility and the mode of election, so that if one of the two branches of the legislature did not represent different interests from the other, as in certain nations, it at least represented a superior wisdom.

One must have attained a mature age to be a senator, and it was an assembly itself already chosen and few in number that was charged with electing.

Democracies are naturally brought to concentrate the whole social force in the hands of the legislative body. The latter being the power that emanates most directly from the people, it is also the one that participates the most in its omnipotence.

One therefore remarks a habitual tendency in it that brings it to unite every kind of authority within it.

This concentration of powers, at the same time that it singularly hinders the good conduct of affairs, founds the despotism of the majority.

The state legislators frequently abandoned themselves to these instincts of democracy; those of the Union always struggled courageously against them.

In the states, the executive power was put into the hands of a magistrate apparently placed beside the legislature, but who in reality was only a blind agent and passive instrument of its will. Where would he draw his force? From the longevity of his functions? He is generally named only for a year. From his prerogatives? He has so to speak none. The legislature can reduce him to impotence by charging with the execution of its laws special committees taken from within itself. If it wished to, it could in a way annul him by cutting his salary.

The federal constitution concentrated all the rights of the executive power, like all its responsibility, in one man alone. It gave four years of existence to the president; it assured him the enjoyment of his salary for the duration of his magistracy; it composed a constituency for him and armed him with a suspensive veto. In a word, after having carefully traced the sphere of executive power, it sought to give it as much as possible a strong and free position within that sphere.

The judicial power is, of all the powers, the one that, in the state constitutions, has remained the least dependent on the legislative power.

Still, in all the states the legislature continued to be master in fixing the emoluments of judges, which necessarily subjects them to its immediate influence.

In certain states, judges are named only for a time, which again takes away from them a great part of their force and their freedom.

In others, one sees the legislative and judicial powers entirely confused. The senate of New York, for example, forms the highest court of the state for certain cases.

The federal constitution took care, on the contrary, to separate the judicial power from all the others. In addition, it rendered judges independent by declaring their salary fixed and their offices irrevocable.

The practical consequences of these differences are easy to perceive. It is evident to every attentive observer that the affairs of the Union are infinitely better conducted than the particular affairs of any state.

The federal government follows a more just and moderate course than the states. There is more wisdom in its views, more durability and clever combination in its projects, more skill, coherence, and firmness in the execution of its measures.

A few words suffice to summarize this chapter.

Two principal dangers threaten democracies:

Complete enslavement of the legislative power to the will of the electoral body.

Concentration in the legislative power of all the other powers of government.

The legislators of the states have favored the development of these dangers. The legislators of the Union did what they could to render them less formidable.

WHAT DISTINGUISHES THE FEDERAL CONSTITUTION OF THE UNITED STATES OF AMERICA FROM ALL OTHER FEDERAL CONSTITUTIONS

The American confederation resembles all other confederations in appearance.—Nevertheless, its effects are different.—How does this come about?—How this confederation differs from all others.—The American government is not a federal government, but an incomplete national government.

The United States of America has not provided the first and only example of a confederation. Without speaking of antiquity, modern Europe has furnished several. Switzerland, the German Empire, the Republic of the Netherlands were or still are confederations.

When one studies the constitutions of these different countries, one remarks with surprise that the powers conferred by them on the federal government are nearly the same as those granted by the American constitution to the government of the United States. Like the latter, they give the central power the right to make peace and war, the right to raise men and money, to provide for general needs and to regulate the common interests of the nation.

Nevertheless, the federal government in these different peoples has almost always remained feeble and powerless, whereas that of the Union conducts affairs with vigor and ease.

There is more: the first American Union could not subsist because of the excessive weakness of its government, and nonetheless this government, so weak, had received rights as extensive as the federal government of our day. One can even say that in certain respects its privileges were greater.

In the current constitution of the United States, therefore, are some new principles that do not strike one at first, but whose influence is felt profoundly.

This constitution, which at first sight one is tempted to confuse with the federal constitutions that preceded it, in fact rests on an entirely new theory that will be marked as a great discovery in the political science of our day.

In all confederations preceding the American confederation of 1789, peoples who were allied in a common goal consented to obey the injunctions of a federal government; but they kept the right to ordain and to oversee for themselves the execution of the laws of the union.

The American states that united in 1789 not only consented that the federal government dictate their laws, but also that it execute its laws by itself.

In the two cases the right is the same; only the exercise of the right is different. But this sole difference produces immense results.

In all the confederations that had preceded the American Union of our day, the federal government, to provide for its needs, addressed itself to the particular governments. In a case where the prescribed measure displeased one of them, the latter could always evade the necessity of obeying. If it was strong, it appealed to arms; if it was weak, it tolerated resistance to the laws of the Union that had become its own, used impotence as an excuse, and had recourse to the force of inertia.

So one constantly saw one of two things happen: the most powerful of the united peoples, taking the rights of the federal authority in hand, dominated

all the others in its name;[36] or the federal government was abandoned to its own forces, and then anarchy was established among the confederated, and the union became powerless to act.[37]

In America the Union has, not states, but plain citizens, for those governed. When it wants to levy a tax, it does not address itself to the government of Massachusetts, but to each inhabitant of Massachusetts. Past federal governments were faced with peoples, that of the Union has individuals. It does not borrow its force, but draws it from itself. It has its own administrators, its own courts, its own judicial officers, and its own army.

No doubt the national* spirit, the collective passions, the provincial prejudices of each state still singularly tend to diminish the extent of a federal power so constituted and to create centers of resistance to its will; restricted in its sovereignty, it cannot be as strong as one that possesses it wholly; but that is an evil inherent in the federal system.

In America, each state has many fewer occasions and temptations to resist; and if the thought comes to it, it can only put it into execution by openly violating the laws of the Union, interrupting the ordinary course of justice, raising the standard of revolt; it must, in a word, suddenly take an extreme position, which men hesitate for a long time to do.

In past confederations, the rights granted to the union were causes of war and not of power, since these rights multiplied its demands without increasing its means of making itself obeyed. So one almost always saw the real weakness of federal governments grow in direct proportion to their nominal power.

It is not this way in the American Union; like most ordinary governments, the federal government can do everything it has been given the right to execute.

The human mind invents things more easily than words: hence comes the use of so many improper terms and incomplete expressions.

[Suppose that] several nations form a permanent league and establish a

*Here "national" means statewide.

36. This is what one saw among the Greeks under Philip [II of Macedonia (382–336 B.C.)] when this prince was charged with executing the decree of the Amphictyons. [The Amphictyons were a league of ancient Greek tribes that could declare a "sacred war" against violators of its laws.] This was what has happened to the Republic of the Netherlands, where the province of Holland has always made the law [the United Provinces of the Netherlands, 1579–1795]. The same thing is still taking place in our day in the Germanic body. Austria and Prussia make themselves agents of the Diet and dominate the whole confederation in its name. [The Confederation of 1815 joined the thirty-nine states of Germany, of which Austria and Prussia were the largest.]

37. It has always been so for the Swiss confederation.—For centuries Switzerland would not have existed without the jealousies of their neighbors.

supreme authority that, without taking action on plain citizens as a national government could do, nevertheless takes action on each of the confederated peoples taken as a body.

That government, so different from all the others, receives the name federal.

Next, one discovers a form of society in which several peoples really meld into one only with regard to certain common interests, and remain separated and only confederated for all others.

Here the central power acts without an intermediary on the governed, administers them and judges them by itself, as national governments do, but it acts this way only in a restricted sphere. Evidently that is no longer a federal government; it is an incomplete national government. So one has found a form of government that is neither precisely national nor federal; but one stops there, and the new word that ought to express the new thing still does not exist.

It is because of not having known this new kind of confederation that all unions have come to civil war, to enslavement, or to inertia. The peoples who composed them all lacked the enlightenment to see the remedy to their ills or the courage to apply it.

The first American Union had also fallen into the same defects.

But in America, the confederated states, having arrived at independence, had long been part of the same empire; therefore they had not yet contracted the habit of governing themselves completely, and national* prejudices had not been able to sink deep roots; more enlightened than the rest of the world, they were equal in enlightenment among themselves; they felt only weakly the passions in peoples that ordinarily oppose the extension of federal power, and these passions were combated by the greatest citizens. Americans, at the same time that they felt the ill, firmly saw the remedy. They corrected their laws and saved the country.

ON THE ADVANTAGES OF THE FEDERAL SYSTEM GENERALLY, AND ITS SPECIAL UTILITY FOR AMERICA

Happiness and freedom that small nations enjoy.—Power of great nations.—Great empires favor the development of civilization.—That force is often the first element of prosperity for nations.—The federal system has for its goal to unite the advantages that peoples draw from the greatness and the smallness of their territory.—Advantages that the United States derives from this system.—Law bows to the needs of populations, and

*Here "national" refers to the states.

populations do not bow to the necessities of law.—Activity, prosperity, taste for and habit of freedom among the American peoples.—Public spirit in the Union is only the summation *of provincial patriotism.—Things and ideas circulate freely in the territory of the United States.—The Union is free and happy like a small nation, respected like a great one.*

In small nations, the eye of society penetrates everywhere; the spirit of improvement descends to the least details: the ambition of the people being much tempered by weakness, its efforts and its resources turn almost entirely toward its internal well-being and are not subject to being dissipated in the vain smoke of glory. Moreover, as the abilities of each person generally are limited, desires are equally so. The mediocrity of fortunes renders conditions nearly equal; mores have a simple and peaceful style. So, all in all, and taking account of varying degrees of morality and enlightenment, one ordinarily encounters more ease, population, and tranquillity in small nations than in great ones.

When tyranny comes to be established in the heart of a small nation, it is more inconvenient there than anywhere else because, acting in a more restricted circle, it extends to everything in that circle. Unable to take on some great object, it occupies itself with a multitude of small ones; it shows itself at once violent and troublesome. From the political world that is, properly speaking, its domain, it penetrates private life. After actions, it aspires to dictate tastes; after the state, it wants to govern families. But that happens rarely; freedom forms, to tell the truth, the natural condition of small societies. In them the government offers too little of a lure to ambition, the resources of particular persons are too limited for the sovereign power easily to become concentrated in the hands of one alone. Should the case occur, it is not difficult for the governed to unite and, by a common effort, overturn tyrant and tyranny at the same time.

In all times, therefore, small nations have been cradles of political freedom. It has happened that most of them have lost that freedom by becoming larger, which makes it very visible that [freedom] was due to the smallness of the people and not to the people itself.

The history of the world does not furnish an example of a great nation that has long remained a republic,[38] which has caused it to be said that the thing is impracticable. As for me, I think that it is imprudent indeed for man to want to limit the possible and to judge the future—he whom the real and the present elude every day and who constantly finds himself unexpectedly surprised in the things that he knows best. What one can say with certitude

38. I do not speak here of a confederation of small republics, but of a great consolidated republic.

is that the existence of a great republic will always be infinitely more exposed [to peril] than that of a small one.

All the passions fatal to republics grow with the extent of the territory, whereas the virtues that serve as their support do not increase in the same measure.

The ambition of particular persons increases with the power of the state; the force of parties, with the importance of the goal they propose; but the love of the native country that must struggle against these destructive passions is not stronger in a vast republic than in a small one. It would even be easy to prove that it is less developed and less powerful. Great wealth and profound miseries, metropolises, depravity of mores, individual selfishness, complication of interests are so many perils that almost always arise from the greatness of the state. Several of these things do not harm the existence of a monarchy, some can even contribute to its duration. Besides, in monarchies the government has a force that is its own; it makes use of the people and does not depend on them; the greater the people is, the stronger the prince is; but republican government can only oppose to these dangers the support of the majority. Now, this element of force is no more powerful, relatively speaking, in a vast republic than in a small one. So whereas the means of attack constantly increase in number and power, the force of resistance remains the same. One can even say that it diminishes, for the more numerous the people are and the more diversified the natures of minds and interests, the more difficult it is to form a compact majority as a consequence.

One could remark, moreover, that human passions acquire intensity not only through the greatness of the goal they want to attain, but also through the multitude of individuals who feel them at the same time. There is no one who has not found himself more moved in the midst of an agitated crowd that shared his emotion than if he had been alone in experiencing it. In a great republic, political passions become irresistible not only because the object that they pursue is immense, but also because millions of men feel them in the same manner and at the same moment.

It is therefore permissible to say in a general manner that nothing is so contrary to the well-being and freedom of men as great empires.

Great states nevertheless have advantages that are particular to them and that must be recognized.

Just as the desire for power among vulgar men is more ardent there than elsewhere, the love of glory is also more developed in certain souls who find in the applause of a great people an object worthy of their efforts and appropriate to elevate them in a way above themselves. Thought receives a more rapid and powerful impetus in everything, ideas circulate more freely, metropolises are like vast intellectual centers where all the rays of the human

mind come to shine and to combine: this fact explains to us why great nations make more rapid progress in enlightenment and in the general cause of civilization than small ones. One must add that important discoveries often require a development of national force of which the government of a small people is incapable; in great nations, the government has more general ideas, it is more completely disengaged from the routine of predecessors and the selfishness of localities. There is more genius in its conceptions, more boldness in its style.

Internal well-being is more complete and more widespread in small nations as long as they keep themselves at peace; but the state of war is more harmful to them than to great ones. In the latter, the remoteness of the frontiers sometimes permits the mass of people to remain remote from danger for centuries. For them, war is a cause of uneasiness rather than ruin.

Besides, a consideration that dominates all the rest presents itself in this matter as in many others: that of necessity.

If there were only small nations and no great ones, humanity would surely be freer and happier; but one cannot make it so that there are no great nations.

This introduces a new element of national prosperity into the world, which is force. What does it matter that a people presents the image of ease and freedom if it sees itself at risk daily of being ravaged or conquered? What does it matter that it is manufacturing and commercial if another dominates the seas and makes the law for all markets? Small nations are often miserable not because they are small, but because they are weak; great ones prosper not because they are great but because they are strong. Force is therefore often one of the first conditions of happiness and even of existence for nations. Hence it is that, except in particular circumstances, small peoples are always in the end violently unified with great ones or are unified with each other. I do not know of a condition more deplorable than that of a people that cannot defend itself or be self-sufficient.

It is to unite the diverse advantages resulting from the greatness and the smallness of nations that the federal system was created.

It is enough to cast a glance at the United States of America to perceive all the goods flowing to them from the adoption of this system.

In great centralized nations, the legislator is obliged to give a uniform character to the laws that does not comport with the diversity of places and of mores; never being instructed in particular cases, he can only proceed by general rules; men are then obliged to bow to the necessities of legislation, for legislation does not know how to accommodate itself to the needs and mores of men, which is a great cause of troubles and miseries.

This inconvenience does not exist in confederations: Congress regulates

the principal actions of social existence; every detail of it is abandoned to provincial legislation.

One cannot imagine to what extent this division of sovereignty serves the well-being of each of the states of which the Union is composed. In these little societies that are not preoccupied with the care of defending themselves or enlarging themselves, all public power and all individual energy turn in the direction of internal improvements. The central government of each state, placed right beside the governed, is alerted daily to the needs that are felt: so one sees new plans presented each year which, discussed in township assemblies or before the state legislature and reproduced afterwards by the press, excite the universal interest and zeal of citizens. This need to improve constantly agitates the American republics and does not trouble them; ambition for power makes way for love of well-being, a more vulgar but less dangerous passion. It is an opinion generally widespread in America that the existence and the duration of republican forms in the New World depend on the existence and the duration of the federal system. They attribute a great part of the miseries into which the new states of South America are plunged to the fact that they wished to establish great republics there instead of fragmenting sovereignty.

It is in fact incontestable that in the United States the taste for and usage of republican government are born in the townships and within the provincial assemblies. In a small nation like Connecticut, for example, where the opening of a canal and the laying out of a road are great political affairs, where the state has no army to pay or war to sustain and cannot give those who direct it either much wealth or much glory, one can imagine nothing more natural and more appropriate to the nature of things than a republic. Now, it is this same republican spirit, these mores and habits of a free people, which, after having been born and developed in the various states, are afterwards applied without difficulty to the sum of the country. The public spirit of the Union itself is in a way only a summation of provincial patriotism. Each citizen of the United States so to speak carries over the interest that his little republic inspires in him into love of the common native country. In defending the Union, he defends the growing prosperity of his district, his right to direct affairs within it, and the hope of making plans of improvement prevail that will enrich him: all things that ordinarily touch men more than the general interests of the country and the glory of the nation.

On the other hand, if the spirit and mores of the inhabitants render them more suited than others to make a great republic prosper, the federal system has rendered the task much less difficult. The confederation of all the American states does not present the ordinary inconveniences of large aggregations of men. The Union is a great republic in extent; but one could in a way

liken it to a small republic because the objects with which its government is occupied are few. Its actions are important, but they are rare. As the sovereignty of the Union is hindered and incomplete, the use of that sovereignty is not dangerous for freedom. Neither does it excite those immoderate desires for power and attention that are so fatal to great republics. As everything does not necessarily converge at a common center, neither does one see vast metropolises, or immense wealth, or great misery, or sudden revolutions there. Political passions, instead of spreading in an instant over the whole area of the country like a sheet of flames, break against the individual interests and passions of each state.

In the Union, however, as in one and the same people, things and ideas circulate freely. Nothing there stops the surge of the spirit of enterprise. Its government calls talents and enlightenment to it. Within the frontiers of the Union a profound peace reigns, as in the interior of a country subject to the same empire; outside, it takes its rank among the most powerful nations on earth; it offers to foreign commerce more than eight hundred leagues of coast; and holding in its hands the keys to a whole world, it makes its flag respected to the ends of the seas.

The Union is free and happy like a small nation, glorious and strong like a great one.

WHAT KEEPS THE FEDERAL SYSTEM FROM BEING WITHIN REACH OF ALL PEOPLES, AND WHAT HAS PERMITTED THE ANGLO-AMERICANS TO ADOPT IT

There are vices inherent in every federal system that the legislator cannot combat.—Complication of every federal system.—It requires of the governed a daily use of their intelligence.—Practical science of the Americans in matters of government.—Relative weakness of the government of the Union, another vice inherent in the federal system.—The Americans have rendered it less serious, but they have not been able to destroy it.—The sovereignty of the particular states weaker in appearance, stronger in reality than that of the Union.—Why.—There must therefore exist, independent of the laws, natural causes for union in confederated peoples.—What these causes are among the Anglo-Americans.—Maine and Georgia, four hundred leagues distant from one another, more naturally united than Normandy and Brittany.—That war is the principal shoal of confederations.—This proved by the example of the United States itself.—The Union has no great wars to fear.—Why.—Dangers that the peoples of Europe risk in adopting the federal system of the Americans.

Sometimes, after a thousand efforts, the legislator succeeds in exerting an indirect influence on the destiny of nations, and then one celebrates his genius—whereas often the geographical position of the country, about which

he can do nothing, a social state that was created without his concurrence, mores and ideas of whose origin he is ignorant, a point of departure unknown to him, impart irresistible movements to society against which he struggles in vain and which carry him along in his turn.

The legislator resembles a man who plots his course in the middle of the sea. Thus he can direct the vessel that carries him, but he cannot change its structure, create winds, or prevent the ocean from rising under his feet.

I have shown what advantages the Americans derive from the federal system. It remains for me to make it understood what permitted them to adopt this system; for it is not given to all peoples to enjoy its benefits.

One finds in the federal system accidental vices born of laws; those can be corrected by legislators. One encounters others which, being inherent in the system, cannot be destroyed by peoples who adopt it. These peoples must therefore find in themselves the necessary force to tolerate the natural imperfections of their government.

Among the vices inherent in every federal system the most visible of all is the complication of the means that it employs. This system necessarily brings two sovereignties face to face. The legislator succeeds in rendering the movements of these two sovereignties as simple and as equal as possible and can confine both in cleanly drawn spheres of action; but he cannot make it so that there is only one, or prevent them from touching each other someplace.

The federal system therefore rests, whatever one does, on a complicated theory whose application requires of the governed a daily use of the enlightenment of their reason.

In general, only simple conceptions take hold of the minds of the people. A false idea, but one clear and precise, will always have more power in the world than a true, but complex, idea. Hence it is that parties, which are like small nations in a great one, always hasten to adopt for a symbol a name or a principle that often represents only very incompletely the goal that they propose and the means they employ, but without which they could neither subsist nor move ahead. Governments that rest only on a single idea or on a single, easy-to-define sentiment are perhaps not the best, but they are surely the strongest and the most lasting.

When one examines the Constitution of the United States, the most perfect of all known federal constitutions, one is frightened, on the contrary, by the quantity of diverse knowledge and by the discernment that it supposes in those whom it must rule. The government of the Union rests almost wholly on legal fictions. The Union is an ideal nation that exists so to speak only in minds, and whose extent and bounds intelligence alone discovers.

The general theory being well understood, the difficulties of application remain; they are innumerable, for the sovereignty of the Union is so en-

meshed in that of the states that it is impossible at first glance to perceive their limits. Everything is conventional and artificial in such a government, and it can be suitable only for a people long habituated to directing its affairs by itself, and in which political science has descended to the last ranks of society. I never admired the good sense and the practical intelligence of the Americans more than in the manner by which they escape the innumerable difficulties to which their federal constitution gives rise. I almost never encountered a man of the people in America who did not discern with a surprising facility the obligations arising from laws of Congress and those whose origin is in the laws of his state, and who, after distinguishing the objects placed within the general prerogatives of the Union from those that the local legislature ought to regulate, could not indicate the point at which the competence of the federal courts begins and the limit at which that of the state tribunals stops.

The Constitution of the United States resembles those beautiful creations of human industry that lavish glory and goods on those who invent them, but that remain sterile in other hands.

This is what Mexico has made visible in our day.

The inhabitants of Mexico, wishing to establish a federal system, took as a model and copied almost entirely the federal constitution of the Anglo-Americans, their neighbors.[39] But in transporting the letter of the law to themselves, they could not at the same time transport the spirit that enlivened it. One therefore sees them constantly embarrassed amid the wheels of their double government. The sovereignty of the states and that of the union, leaving the circles that the constitution had drawn, penetrate one another daily. Mexico is still now incessantly carried along from anarchy to military despotism, and from military despotism to anarchy.

The second and most fatal of all the vices that I regard as inherent in the federal system itself is the relative weakness of the government of the Union.

The principle on which all confederations rest is the fragmentation of sovereignty. The legislators make this fragmentation little felt; they even keep it out of sight for a time, but they cannot make it not exist. And a fragmented sovereignty will always be weaker than a complete sovereignty.

We have seen in the account of the Constitution of the United States with what art the Americans, while confining the power of the Union within the restricted sphere of federal governments, nevertheless succeeded in giving it the appearance and, up to a certain point, the force of a national government.

In acting thus, the legislators of the Union diminished the natural danger of confederations; but they could not make it disappear entirely.

39. See the Mexican constitution of 1824.

The American government, one may say, does not address the states: it brings its injunctions to reach citizens immediately and bends them in isolation under the effort of the common will.

But if the federal law violently collided with the interests and prejudices of a state, should one not fear that each of the citizens of that state would believe himself interested in the cause of the man who refused to obey? All the citizens of the state thus finding themselves wronged at the same time in the same manner by the authority of the Union, the federal government would seek in vain to isolate them so as to combat them: they would feel instinctively that they ought to unite to defend themselves, and they would find in the share of sovereignty their state had been allowed to enjoy a wholly prepared organization. Then fiction would disappear to make way for reality, and one could see the organized power of a part of the territory in conflict with the central authority.

I shall say as much of federal justice. If, in a particular case, the courts of the Union violated an important law of a state, the conflict, if not apparently, at least in reality, would be between the wronged state, represented by a citizen, and the Union, represented by its courts.[40]

One must have very little experience of things of this world to imagine that after leaving to the passions of men a means of getting satisfaction, one will always prevent them with the aid of legal fictions from perceiving and making use of it.

The American legislators, while rendering conflict between the two sovereignties less probable, did not thereby destroy the causes of it.

One can go even further and say that they were unable, in case of a conflict, to assure that federal power would be preponderant.

They gave money and soldiers to the Union, but the states kept the love and prejudices of the peoples.

The sovereignty of the Union is an abstract being that is attached to only a few external objects. The sovereignty of the states comes before all the senses; one comprehends it without difficulty; one sees it act at each instant. One is new, the other was born with the people itself.

The sovereignty of the Union is the work of art. The sovereignty of the

40. Example: the Constitution has given the Union the right to have unoccupied lands sold for its account. I suppose that Ohio might claim this same right for those that are contained within its borders under the pretext that the Constitution meant only territory that was not yet subject to any state jurisdiction, and consequently it wants to sell them itself. The judicial question would be posed, it is true, between the buyers who hold their title from the Union and the buyers who hold their title from the state, and not between the Union and Ohio. But if the Court of the United States ordered the federal buyer to be put in possession, and the courts of Ohio sustained his competitor in his goods, then what would become of the legal fiction?

states is natural; it exists by itself without effort, like the authority of the father of a family.

The sovereignty of the Union only touches men through a few great interests; it represents an immense, distant native country, a vague and indefinite sentiment. The sovereignty of the states in a way envelops each citizen, and takes him over daily in detail. It takes charge of guaranteeing his property, his freedom, his life; at every moment it influences his well-being or his misery. The sovereignty of the states depends on memories, on habits, on local prejudices, on the selfishness of province and family; in a word, on all the things that render the instinct for one's native country so powerful in the heart of man. How could one doubt its advantages?

Since legislators cannot prevent dangerous collisions from cropping up between the two sovereignties that the federal system puts face to face, particular provisions that lead them to peace must be joined to their efforts to turn confederated peoples away from war.

Hence it results that the federal pact cannot have a long existence if, in the peoples to whom it applies, a certain number of conditions of union do not obtain that render this common life easy for them and facilitate the task of government.

Thus, to succeed, the federal system not only needs good laws, but circumstances must also favor it.

All peoples who have been seen to confederate had a certain number of common interests that formed the intellectual bonds of the association.

But beyond material interests man also has ideas and sentiments. In order that a confederation subsist for a long time, it is no less necessary that there be homogeneity in the civilization than in the needs of the various peoples that compose it. The difference between the civilization of the canton of Vaud and that of the canton of Uri is almost from the nineteenth century to the fifteenth: so Switzerland has never had, to tell the truth, a federal government. The union between its different cantons exists only on the map; and one would see it well if a central authority wanted to apply the same laws to the whole territory.

There is one fact that admirably facilitates federal government in the United States. The different states have not only nearly the same interests, the same origin, and the same language, but even the same degree of civilization, which almost always renders agreement between them an easy thing. I do not know if there is a small European nation that does not present an aspect less homogeneous in its different parts than the American people, whose territory is as great as half of Europe.

From the state of Maine to the state of Georgia one counts around four hundred leagues. Nevertheless, less difference exists between the civilization

of Maine and that of Georgia than between the civilization of Normandy and that of Brittany. Maine and Georgia, placed at two ends of a vast empire, therefore naturally find more real opportunities to form a confederation than Normandy and Brittany, which are separated only by a stream.

To these opportunities, which the mores and the habits of the people offered to the American legislators, were added others arising from the geographic position of the country. To the latter the adoption and maintenance of the federal system must principally be attributed.

The most important of all the actions that can inform the life of a people is war. In war, a people acts like a single individual vis-à-vis foreign peoples: it struggles for its very existence.

As long as it is only a question of maintaining the peace in the interior of a country and of favoring its prosperity, skill in the government, reason in the governed, and a certain natural attachment that men almost always have for their native country can easily suffice; but for a nation to be in a position to make a great war, citizens must impose numerous and painful sacrifices on themselves. To believe that a great number of men will be capable of submitting to such social exigencies is to know humanity very poorly.

Hence it is that all peoples who have had to make great wars have been led almost despite themselves to increase the strength of the government. Those who have not been able to succeed at this have been conquered. A long war almost always places nations in this sad alternative: that their defeat delivers them to destruction and their triumph to despotism.

It is therefore generally in war that the weakness of a government is revealed in a more visible and more dangerous manner; and I have shown that the vice inherent in federal governments is to be very weak.

In the federal system not only is there no administrative centralization or anything that approaches it, but governmental centralization itself exists only incompletely, which is always a great cause of weakness when one must defend oneself against peoples in which it is complete.

In the federal constitution of the United States, that one of all others in which the central government is vested with more real strength, this evil is still keenly felt.

A single example will permit the reader to judge.

The constitution gives to Congress the right to call the militias of the different states to active service when it is a question of stifling an insurrection or of repelling an invasion; another article says that in this case the president of the United States is the commander in chief of the militias.

At the time of the War of 1812, the president ordered the militias of the North to go to the frontiers; Connecticut and Massachusetts, whose interests the war prejudiced, refused to send their contingents.

The Constitution, they said, authorizes the federal government to make use of the militias in case of *insurrection* and *invasion;* but as for the present, there is neither insurrection nor invasion. They added that the same constitution that gives the Union the right to call the militias to active service leaves to the states the right to name the officers; it follows, according to them, that even in war no officer of the Union has the right to command the militias except the president in person. Now it was a question of serving in an army commanded by someone other than him.

These absurd and destructive doctrines received not only the sanction of the governors and of the legislatures, but even that of the courts of justice of these two states; and the federal government was constrained to seek elsewhere the troops it lacked.[41]

How, therefore, is it that the American Union, protected as it is by the relative perfection of its laws, does not dissolve in the middle of a great war? It is that it has no great wars to fear.

Placed at the center of an immense continent, where human industry can spread without bounds, the Union is almost as isolated in the world as if it found itself confined on all sides by the ocean.

Canada numbers only a million inhabitants; its population is divided into two enemy nations. The rigors of the climate limit the extent of its territory and close its ports for six months.

From Canada to the Gulf of Mexico one still finds some half-destroyed savage tribes that six thousand soldiers push before them.

To the south, the Union touches at one point on the empire of Mexico; it is from there probably that great wars will come one day. But for a long time still, the barely advanced state of civilization, the corruption of mores, and misery will prevent Mexico from taking an elevated rank among nations. As for the powers of Europe, their distance renders them not very formidable.*

The great happiness of the United States is therefore not to have found a federal constitution that permits it to sustain great wars, but to be so situated that there are none for it to fear.

No one can appreciate more than I the advantages of a federal system. I

*See AT's note XIV, page 695.

41. *Kent's Commentaries,* vol. 1, 244[f]. Remark that I have chosen the example cited above from a time subsequent to the establishment of the current constitution. If I had wanted to go back to the period of the first confederation I would have pointed out still more conclusive facts. Then a genuine enthusiasm reigned in the nation; the revolution was represented by an eminently popular man and nonetheless in this period Congress disposed, properly speaking, of nothing. It lacked men and money at every moment; the plans it best conceived failed in execution, and the Union, always at the point of perishing, was saved much more by the weakness of its enemies than by its own force.

see in it one of the most powerful combinations in favor of human prosperity and freedom. I envy the lot of the nations who have been permitted to adopt it. But I nonetheless refuse to believe that confederated peoples could struggle for long, with equal force, against a nation in which governmental power were centralized.

The people that, face to face with the great military monarchies of Europe, would fragment its sovereignty, would seem to me to abdicate by that fact alone its power and perhaps its existence and its name.

Admirable position of the New World that enables man to have no enemies but himself! To be happy and free, it is enough for him to wish it.