Readings

Unit 3

- Introduction—Federalism: U.S. v. the States
- Tocqueville, *Democracy in America:* “In What Respects the Federal Constitution Is Superior to That of the States”
- *Federalist Papers:* “Federalist No. 46”
- *McCulloch v. Maryland*
- *Dred Scott v. Sandford*

Questions

1. “In examining the Constitution of the United States, which is the most perfect constitution that ever existed,” wrote Tocqueville, “one is startled at the variety of information and the amount of discernment that it presupposes in the people whom it is meant to govern. The government of the Union depends almost entirely upon legal fictions; the Union is an ideal nation, which exists, so to speak, only in the mind, and whose limits and extent can only be discerned by the understanding.” What are some of the legal fictions that Tocqueville discussed?
2. What are the three clauses of the Fourteenth Amendment that articulate how people are to be treated by the United States government? Who shall be entitled to the various provisions?
3. Why does Congress have the power to create a bank, according to Chief Justice Marshall in *McCulloch v. Maryland?*
4. What would be the probable result of the national government sending a military force against the state?
5. Why was an act of Congress prohibiting a citizen of the United States from taking his slaves with him when he moved to a territory an unconstitutional provision?

Introduction—Federalism: U.S. v. the States

"The first question which awaited the Americans," claimed Tocqueville, "was so to divide the sovereignty that each of the different states which composed the Union should continue to govern itself in all that concerned its internal prosperity, while the entire nation, represented by the Union, should continue to form a compact body and to provide for all general exigencies." Generally, federalism refers to this primary question: the relationship between the states and the federal government. What powers belong to the national government and what powers belong to the states? This seemingly simply question organizes and sustains some of the most important political debates in American history. These relationships function from strongly separate to mutually dependent. Additionally, historical periods are marked by particular arrangements between the different layers of government as people change their perceptions of how these institutions should relate. The participants in the Constitutional Convention, particularly James Madison, worked to arrange federalism, according to the scholar Martin Diamond, so that the delegates could "have their cake and eat it too." Substantial agreement was the icing they did not quite get to taste.

Federalism scholars have often attempted to figure out exactly what kind of cake the founders baked. Layer cake has been the conclusion when the system separates areas of control very strictly between the state and national governments. Others have argued that federalism never functions that starkly and that the most separation that ever occurs is more like a marble cake in which the functions swirl around each other. Others have suggested it's more like a birthday cake or even a fruitcake.

Whatever kind of cake it was for the drafters, promoters, and signers of the Constitution, federalism was certainly one of the parts of the new Constitution that needed the most sweetening for those who feared that the Constitution was a tool for the centralization of great, possibly tyrannical, political power. This great question of the necessity or conspiracy of a more centralized government directed much of the debate between the Federalists, the supporters of the new Constitution, and the Anti-Federalists, those who, generally, found it to be an unsupported grab for power. After the ratification and adoption of the Constitution, the Democrat-Republican party would inherit some of the skepticism of the Anti-Federalists.

The earliest years of American history are typically perceived to be the most layered, that is, with the most clear distinctions between the fields of the national and state governments. This is often overstated; there was significant interaction in this early period particularly in the area of exploring, acquiring, connecting, and defending new territory. Chief Justice John Marshall, moreover, found a broad meaning for the powers assigned to Congress as "necessary and proper" in affirming the creation of a national bank, and its protection from state taxes, in *McCulloch v. Maryland*. The Court found, alternatively, important limitations on the role of the federal government, particularly in the application of the Bill of Rights, which the Supreme Court decided did not apply to states.

This ruling would eventually be rendered moot (in the middle of the twentieth century) through the application of the Fourteenth Amendment (in the Readings collected in the previous unit); even though the initial application of the Fourteenth Amendment was virtually gutted by the Slaughterhouse Cases, one of the earliest attempts by the Supreme Court to explore the meaning of the Fourteenth Amendment. While changes in federalism were certainly not the most important changes wrought by the Civil War and the emancipation of the slaves, emancipation and the war were the most significant events in the history of federalism. Not only did the war settle questions of the ability of states to leave the union but it also resulted in the passage of legislation and constitutional amendments that would allow the national government to become the protector of the civil rights and liberties of citizens against denials by the states.

In the twentieth century, regulation of business and civic rights have often been questions of the limitations and possibilities of the federal government's ability to regulate issues previously regulated by the states, particularly as new forms of corporate power generated pressing need for a powerful national government to oppose powerful international corporations. The responses of the federal government to the Great Depression, World War II, and the Civil Rights Movement all emphasized the importance of a powerful national government able to act to achieve national ends. These events produced important precedents for the federal government to act on a national scale to regulate business, enforce workplace compliance, and regulate rather private personal interaction.

At the end of the twentieth century, this national government power was criticized by those who resisted the growth of the federal government compared to states, those who resented the Civil Rights Movement's transformation of American society, and by large corporations that refused to defer to the government's regulation of their business or believed that they could perform many of the government's function in a more economical manner. These groups brought significant pressures to bear within both the Democratic and Republican parties and realized sizable achievements in shifting power from the national government to states and from the government to private corporations.

Early events of the twenty-first century (the attack on the World Trade Centers and the attack on Iraq) also changed the role of the federal government in relation to the states, through, for example, the creation of the Homeland Security Office; the national government distributed federal money through this office, and increased its power through federal policing agencies (powers historically left to the states). Federalism remains an important aspect of politics in the United States. The future of federalism remains, as it was for Tocqueville, "impossible to determine beforehand, with any degree of accuracy, the share of authority that each of the two governments was to enjoy as to foresee all the incidents in the life of a nation."

Alexis de Tocqueville, *Democracy in America:* "In What Respects the Federal Constitution Is Superior to That of the States"

In "The Federal Constitution" (Volume I, Chapter VIII)

IN WHAT RESPECTS THE FEDERAL CONSTITUTION IS SUPERIOR TO THAT OF THE STATES. How the Constitution of the Union can be compared with that of the states—Superiority of the Constitution of the Union attributable to the wisdom of the Federal legislators—Legislature of the Union less dependent on the people than that of the states—Executive power more independent in its sphere—Judicial power less subjected to the will of the majority—Practical consequence of these facts—The in a democratic government diminished by Federal legislators, and increased by the legislators of the states.

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

I am of opinion, for several reasons, that the Federal Constitution is superior to any of the state constitutions.

The present Constitution of the Union was formed at a later period than those of the majority of the states, and it may have profited by this additional experience. But we shall be convinced that this is only a secondary cause of its superiority, when we recollect that eleven new states have since been added to the Union, and that these new republics have almost always rather exaggerated than remedied the defects that existed in the former constitutions.

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

Most of the state constitutions assign one year for the duration of the House of Representatives and two years for that of the Senate, so that members of the legislative body are constantly and narrowly tied down by the slightest desires of their constituents. The legislators of the Union were of opinion that this excessive dependence of the legislature altered the nature of the main consequences of the representative system, since it vested not only the source of authority, but the government, in the people. They increased the length of the term in order to give the representatives freer scope for the exercise of their own judgment.

The Federal Constitution, as well as the state constitutions, divided the legislative body into two branches. But in the states these two branches were composed of the same elements and elected in the same manner. The consequence was that the passions and inclinations of the populace were as rapidly and easily represented in one chamber as in the other, and that laws were made with violence and precipitation. By the Federal Constitution the two houses originate in like manner in the choice of the people; but the conditions of eligibility and the mode of election were changed in order that if, as is the case in certain nations, one branch of the legislature should not represent the same interests as the other, it might at least represent more wisdom. A mature age was necessary to become a Senator, and the Senate was chosen by an elected assembly of a limited number of members.

To concentrate the whole social force in the hands of the legislative body is the natural tendency of democracies; for as this is the power that emanates the most directly from the people, it has the greater share of the people's overwhelming power, and it is naturally led to monopolize every species of influence. This concentration of power is at once very prejudicial to a well-conducted administration and favorable to the despotism of the majority. The legislators of the states frequently yielded to these democratic propensities, which were invariably and courageously resisted by the founders of the Union.

In the states the executive power is vested in the hands of a magistrate who is apparently placed upon a level with the legislature, but who is in reality only the blind agent and the passive instrument of its will. He can derive no power from the duration of his office, which terminates in one year, or from the exercise of prerogatives, for he can scarcely be said to have any. The legislature can condemn him to inaction by entrusting the execution of its laws to special committees of its own members, and can annul his temporary dignity by cutting down his salary. The Federal Constitution vests all the privileges and all the responsibility of the executive power in a single individual. The duration of the Presidency is fixed at four years; the salary cannot be altered during this term; the President is protected by a body of official dependents and armed with a suspensive veto: in short, every effort was made to confer a strong and independent position upon the executive authority, within the limits that were prescribed to it.

In the state constitutions, the judicial power is that which is the most independent of the legislative authority; nevertheless, in all the states the legislature has reserved to itself the right of regulating the emoluments of the judges, a practice that necessarily subjects them to its immediate influence. In some states the judges are appointed only temporarily, which deprives them of a great portion of their power and their freedom. In others the legislative and judicial powers are entirely confounded. The Senate of New York, for instance, constitutes in certain cases the superior court of the state. The Federal Constitution, on the other hand, carefully separates the judicial power from all the others; and it provides for the independence of the judges, by declaring that their salary shall not be diminished, and that their functions shall be inalienable.

The practical consequences of these different systems may easily be perceived. An attentive observer will soon notice that the business of the Union is incomparably better conducted than that of any individual state. The conduct of the Federal government is more fair and temperate than that of the states; it has more prudence and discretion, its projects are more durable and more skillfully combined, its measures are executed with more vigor and consistency.

I recapitulate the substance of this chapter in a few words.

The existence of democracies is threatened by two principal dangers: namely, the complete subjection of the legislature to the will of the electoral body, and the concentration of all the other powers of the government in the legislative branch.

The development of these evils has been favored by the legislators of the states; but the legislators of the Union have done all they could to render them less formidable.

CHARACTERISTICS OF THE FEDERAL CONSTITUTION OF THE UNITED STATES OF AMERICA AS COMPARED WITH ALL OTHER FEDERAL CONSTITUTIONS. The American Union appears to resemble all other confederations—Yet its effects are different—Reason for this—In what this Union differs from all other confederations —The American government not a Federal but an imperfect national government.

THE United States of America does not afford the first or the only instance of a confederation, several of which have existed in modern Europe, without referring to those of antiquity. Switzerland, the Germanic Empire, and the Republic of the Low Countries either have been or still are confederations. In studying the constitutions of these different countries one is surprised to see that the powers with which they invested the federal government are nearly the same as those awarded by the American Constitution to the government of the United States. They confer upon the central power the same rights of making peace and war, of raising money and troops, and of providing for the general exigencies and the common interests of the nation. Nevertheless, the federal government of these different states has always been as remarkable for its weakness and inefficiency as that of the American Union is for its vigor and capacity. Again, the first American Confederation perished through the excessive weakness of its government; and yet this weak government had as large rights and privileges as those of the Federal government of the present day, and in some respects even larger. But the present Constitution of the United States contains certain novel principles which exercise a most important influence, although they do not at once strike the observer.

This Constitution, which may at first sight be confused with the federal constitutions that have preceded it, rests in truth upon a wholly novel theory, which may be considered as a great discovery in modern political science. In all the confederations that preceded the American Constitution of 1789, the states allied for a common object agreed to obey the injunctions of a federal government; but they reserved to themselves the right of ordaining and enforcing the execution of the laws of the union. The American states which combined in 1789 agreed that the Federal government should not only dictate the laws, but execute its own enactments. In both cases the right is the same, but the exercise of the right is different; and this difference produced the most momentous consequences.

In all the confederations that preceded the American Union the federal government, in order to provide for its wants, had to apply to the separate governments; and if what it prescribed was disagreeable to any one of them, means were found to evade its claims. If it was powerful, it then had recourse to arms; if it was weak, it connived at the resistance which the law of the union, its sovereign, met with, and did nothing, under the plea of inability. Under these circumstances one of two results invariably followed: either the strongest of the allied states assumed the privileges of the federal authority and ruled all the others in its name; or the federal government was abandoned by its natural supporters, anarchy arose between the confederates, and the union lost all power of action.

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

In all former confederations the privileges of the union furnished more elements of discord than of power, since they multiplied the claims of the nation without augmenting the means of enforcing them; and hence the real weakness of federal governments has almost always been in the exact ratio of their nominal power. Such is not the case in the American Union, in which, as in ordinary governments, the Federal power has the means of enforcing all it is empowered to demand.

The human understanding more easily invents new things than new words, and we are hence constrained to employ many improper and inadequate expressions. When several nations form a permanent league and establish a supreme authority, which, although it cannot act upon private individuals like a national government, still acts upon each of the confederate states in a body, this government, which is so essentially different from all others is called Federal. Another form of society is afterwards discovered in which several states are fused into one with regard to certain common interests, although they remain distinct, or only confederate, with regard to all other concerns. In this case the central power acts directly upon the governed, whom it rules and judges in the same manner as a national government, but in a more limited circle. Evidently this is no longer a federal government, but an incomplete national government, which is neither exactly national nor exactly federal; but the new word which ought to express this novel thing does not yet exist.

Ignorance of this new species of confederation has been the cause that has brought all unions to civil war, to servitude, or to inertness; and the states which formed these leagues have been either too dull to discern, or too pusillanimous to apply, this great remedy. The first American Confederation perished by the same defects.

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

ADVANTAGES OF THE FEDERAL SYSTEM IN GENERAL, AND ITS SPECIAL UTILITY IN AMERICA. Happiness and freedom of small nations —Power of great nations—Great empires favorable to the growth of civilization—Strength of ten the first element of national prosperity—Aim of the federal system to unite the twofold advantages resulting from a small and from a large territory—Advantages derived by the United States from this system—The law adapts itself to the exigencies of the population; population does not conform to the exigencies of the law —Activity, progress, the love and enjoyment of freedom, in American communities—Public spirit of the Union is only the aggregate of provincial patriotism—Principles and things circulate freely over the territory of the United States—The Union is happy and free as a little nation, and respected as a great one.

IN small states, the watchfulness of society penetrates everywhere, and a desire for improvement pervades the smallest details, the ambition of the people being necessarily checked by its weakness, all the efforts and resources of the citizens are turned to the internal well-being of the community and are not likely to be wasted upon an empty pursuit of glory. The powers of every individual being generally limited, his desires are proportionally small. Mediocrity of fortune makes the various conditions of life nearly equal, and the manners of the inhabitants are orderly and simple. Thus, all things considered, and allowance being made for the various degrees of morality and enlightenment, we shall generally find more persons in easy circumstances, more contentment and tranquility, in small nations than in large ones.

When tyranny is established in the bosom of a small state, it is more galling than elsewhere, because, acting in a narrower circle, everything in that circle is affected by it. It supplies the place of those great designs which it cannot entertain, by a violent or exasperating interference in a multitude of minute details; and it leaves the political world, to which it properly belongs, to meddle with the arrangements of private life. Tastes as well as actions are to be regulated; and the families of the citizens, as well as the state, are to be governed. This invasion of rights occurs but seldom, however, freedom being in truth the natural state of small communities. The temptations that the government offers to ambition are too weak and the resources of private individuals are too slender for the sovereign power easily to fall into the grasp of a single man; and should such an event occur, the subjects of the state can easily unite and overthrow the tyrant and the tyranny at once by a common effort.

Small nations have therefore always been the cradle of political liberty; and the fact that many of them have lost their liberty by becoming larger shows that their freedom was more a consequence of their small size than of the character of the people.

The history of the world affords no instance of a great nation retaining the form of republican government for a long series of years; and this has led to the conclusion that such a thing is impracticable. For my own part, I think it imprudent for men who are every day deceived in relation to the actual and the present, and often taken by surprise in the circumstances with which they are most familiar, to attempt to limit what is possible and to judge the future. But it may be said with confidence, that a great republic will always be exposed to more perils than a small one.

All the passions that are most fatal to republican institutions increase with an increasing territory, while the virtues that favor them do not augment in the same proportion. The ambition of private citizens increases with the power of the state; the strength of parties with the importance of the ends they have in view; but the love of country, which ought to check these destructive agencies, is not stronger in a large than in a small republic. It might, indeed, be easily proved that it is less powerful and less developed. Great wealth and extreme poverty, capital cities of large size, a lax morality, selfishness, and antagonism of interests are the dangers which almost invariably arise from the magnitude of states. Several of these evils scarcely injure a monarchy, and some of them even contribute to its strength and duration. In monarchical states the government has its peculiar strength; it may use, but it does not depend on, the community; and the more numerous the people, the stronger is the prince. But the only security that a republican government possesses against these evils lies in the support of the majority. This support is not, however, proportionably greater in a large republic than in a small one; and thus, while the means of attack perpetually increase, in both number and influence, the power of resistance remains the same; or it may rather be said to diminish, since the inclinations and interests of the people are more diversified by the increase of the population, and the difficulty of forming a compact majority is constantly augmented. It has been observed, moreover, that the intensity of human passions is heightened not only by the importance of the end which they propose to attain, but by the multitude of individuals who are animated by them at the same time. Everyone has had occasion to remark that his emotions in the midst of a sympathizing crowd are far greater than those which he would have felt in solitude. In great republics, political passions become irresistible, not only because they aim at gigantic objects, but because they are felt and shared by millions of men at the same time.

It may therefore be asserted as a general proposition that nothing is more opposed to the well-being and the freedom of men than vast empires. Nevertheless, it is important to acknowledge the peculiar advantages of great states. For the very reason that the desire for power is more intense in these communities than among ordinary men, the love of glory is also more developed in the hearts of certain citizens, who regard the applause of a great people as a reward worthy of their exertions and an elevating encouragement to man. If we would learn why great nations contribute more powerfully to the increase of knowledge and the advance of civilization than small states, we shall discover an adequate cause in the more rapid and energetic circulation of ideas and in those great cities which are the intellectual centers where all the rays of human genius are reflected and combined. To this it may be added that most important discoveries demand a use of national power which the government of a small state is unable to make: in great nations the government has more enlarged ideas, and is more completely disengaged from the routine of precedent and the selfishness of local feeling; its designs are conceived with more talent and executed with more boldness.

In time of peace the well-being of small nations is undoubtedly more general and complete; but they are apt to suffer more acutely from the calamities of war than those great empires whose distant frontiers may long avert the presence of the danger from the mass of the people, who are therefore more frequently afflicted than ruined by the contest.

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

Political strength thus becomes a condition of national prosperity. It profits a state but little to be affluent and free if it is perpetually exposed to be pillaged or subjugated; its manufactures and commerce are of small advantage if another nation has the empire of the seas and gives the law in all the markets of the globe. Small nations are often miserable, not because they are small, but because they are weak; and great empires prosper less because they are great than because they are strong. Physical strength is therefore one of the first conditions of the happiness and even of the existence of nations. Hence it occurs that, unless very peculiar circumstances intervene, small nations are always united to large empires in the end, either by force or by their own consent. I do not know a more deplorable condition than that of a people unable to defend itself or to provide for its own wants.

The federal system was created with the intention of combining the different advantages which result from the magnitude and the littleness of nations; and a glance at the United States of America discovers the advantages which they have derived from its adoption

In great centralized nations the legislator is obliged to give a character of uniformity to the laws, which does not always suit the diversity of customs and of districts; as he takes no cognizance of special cases, he can only proceed upon general principles; and the population are obliged to conform to the requirements of the laws, since legislation cannot adapt itself to the exigencies and the customs of the population, which is a great cause of trouble and misery. This disadvantage does not exist in confederations; Congress regulates the principal measures of the national government, and all the details of the administration are reserved to the provincial legislatures. One can hardly imagine how much this division of sovereignty contributes to the well-being of each of the states that compose the Union. In these small communities, which are never agitated by the desire of aggrandizement or the care of self-defense, all public authority and private energy are turned toward internal improvements. The central government of each state, which is in immediate relationship with the citizens, is daily apprised of the wants that arise in society; and new projects are proposed every year, which are discussed at town meetings or by the legislature, and which are transmitted by the press to stimulate the zeal and to excite the interest of the citizens. This spirit of improvement is constantly alive in the American republics, without compromising their tranquility; the ambition of power yields to the less refined and less dangerous desire for well-being. It is generally believed in America that the existence and the permanence of the republican form of government in the New World depend upon the existence and the duration of the federal system; and it is not unusual to attribute a large share of the misfortunes that have befallen the new states of South America to the injudicious erection of great republics instead of a divided and confederate sovereignty.

It is incontestably true that the tastes and the habits of republican government in the United States were first created in the townships and the provincial assemblies. In a small state, like that of Connecticut, for instance, where cutting a canal or laying down a road is a great political question, where the state has no army to pay and no wars to carry on, and where much wealth or much honor cannot be given to the rulers, no form of government can be more natural or more appropriate than a republic. But it is this same republican spirit, it is these manners and customs of a free people, which have been created and nurtured in the different states, that must be afterwards applied to the country at large. The public spirit of the Union is, so to speak, nothing more than an aggregate or summary of the patriotic zeal of the separate provinces. Every citizen of the United States transfers, so to speak, his attachment to his little republic into the common store of American patriotism defending the Union he defends the increasing prosperity of his own state or county, the right of conducting its affairs, and the hope of causing measures of improvement to be adopted in it which may be favorable to his own interests; and these are motives that are wont to stir men more than the general interests of the country and the glory of the nation.

On the other hand, if the temper and the manners of the inhabitants especially fitted them to promote the welfare of a great republic, the federal system renders their task less difficult. The confederation of all the American states presents none of the ordinary inconveniences resulting from large associations of men. The Union is a great republic in extent, but the paucity of objects for which its government acts assimilates it to a small state. Its acts are important, but they are rare. As the sovereignty of the Union is limited and incomplete, its exercise is not dangerous to liberty; for it does not excite those insatiable desires for fame and power which have proved so fatal to great republics. As there is no common center to the country, great capital cities, colossal wealth, abject poverty, and sudden revolutions are alike unknown; and political passion, instead of spreading over the land like a fire on the prairies, spends its strength against the interests and the individual passions of every state.

Nevertheless, tangible objects and ideas circulate throughout the Union as freely as in a country inhabited by one people. Nothing checks the spirit of enterprise. The government invites the aid of all who have talents or knowledge to serve it. Inside of the frontiers of the Union profound peace prevails, as within the heart of some great empire; abroad it ranks with the most powerful nations of the earth: two thousand miles of coast are open to the commerce of the world; and as it holds the keys of a new world, its flag is respected in the most remote seas. The Union is happy and free as a small people, and glorious and strong as a great nation.

WHY THE FEDERAL SYSTEM IS NOT PRACTICABLE FOR ALL NATIONS, AND HOW THE ANGLO-AMERICANS WERE ENABLED TO ADOPT IT. Every federal system has inherent faults that baffle the efforts of the legislator—The federal system is complex—It demands a daily exercise of the intelligence of the citizens—Practical knowledge of government common among the Americans-Relative weakness of the government of the Union another defect inherent in the federal system—The Americans have diminished without remedying it—The sovereignty of the separate states apparently weaker, but really stronger, than that of the Union—Why—Natural causes of Union, then, must exist between confederate nations besides the laws—What these causes are among the Anglo-Americans—Maine and Georgia, separated by a distance of a thousand miles, more naturally united than Normandy and Brittany—War the main peril of confederations—This proved even by the example of the United States—The Union has no great wars to fear—Why —Dangers which Europeans would incur if they adopted the federal system of the Americans.

WHEN, after many efforts, a legislator succeeds in exercising an indirect influence upon the destiny of nations, his genius is lauded by mankind, while, in point of fact, the geographical position of the country, which he is unable to change, a social condition which arose without his co-operation, customs and opinions which he cannot trace to their source, and an origin with which he is unacquainted exercise so irresistible an influence over the courses of society that he is himself borne away by the current after an in effectual resistance. Like the navigator, he may direct the vessel which bears him, but he can neither change its structure, nor raise the winds, nor lull the waters that swell beneath him.

I have shown the advantages that the Americans derive from their federal system; it remains for me to point out the circumstances that enabled them to adopt it, as its benefits cannot be enjoyed by all nations. The accidental defects of the federal system which originate in the laws may be corrected by the skill of the legislator, but there are evils inherent in the system which cannot be remedied by any effort. The people must therefore find in themselves the strength necessary to bear the natural imperfections of their government.. Two sovereignties are necessarily in presence of each other. The legislator may simplify and equalize as far as possible the action of these two sovereignties, by limiting each of them to a sphere of authority accurately defined; but he cannot combine them into one or prevent them from coming into collision at certain points. The federal system, therefore, rests upon a theory which is complicated at the best, and which demands the daily exercise of a considerable share of discretion on the part of those it governs.

A proposition must be plain, to be adopted by the understanding of a people. A false notion which is clear and precise will always have more power in the world than a true principle which is obscure or involved. Thus it happens that parties, which are like small communities in the heart of the nation, invariably adopt some principle or name as a symbol, which very inadequately represents the end they have in view and the means that they employ, but without which they could neither act nor exist. The governments that are founded upon a single principle or a single feeling which is easily defined are perhaps not the best, but they are unquestionably the strongest and the most durable in the world.

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

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

The Constitution of the United States resembles those fine creations of human industry which ensure wealth and renown to their inventors, but which are profitless in other hands. This truth is exemplified by the condition of Mexico at the present time. The Mexicans were desirous of establishing a federal system, and they took the Federal Constitution of their neighbors, the Anglo-Americans, as their model and copied it almost entirely. But although they had borrowed the letter of the law, they could not carry over the spirit that gives it life. They were involved in ceaseless embarrassments by the mechanism of their dual government; the sovereignty of the states and that of the Union perpetually exceeded their respective privileges and came into collision; and to the present day Mexico is alternately the victim of anarchy and the slave of military despotism.

The second and most fatal of all defects, and that which I believe to be inherent in the federal system, is the relative weakness of the government of the Union. The principle upon which all confederations rest is that of a divided sovereignty. Legislators may render this partition less perceptible, they may even conceal it for a time from the public eye, but they cannot prevent it from existing; and a divided sovereignty must always be weaker than an entire one. The remarks made on the Constitution of the United States have shown with what skill the Americans, while restraining the power of the Union within the narrow limits of a federal government, have given it the semblance, and to a certain extent the force, of a national government. By this means the legislators of the Union have diminished the natural danger of confederations, but have not entirely obviated it.

The American government, it is said, does not address itself to the states, but transmits its injunctions directly to the citizens and compels them individually to comply with its demands. But if the Federal law were to clash with the interests and the prejudices of a state, it might be feared that all the citizens of that state would conceive themselves to be interested in the cause of a single individual who refused to obey. If all the citizens of the state were aggrieved at the same time and in the same manner by the authority of the Union, the Federal government would vainly attempt to subdue them individually; they would instinctively unite in a common defense and would find an organization already prepared for them in the sovereignty that their state is allowed to enjoy. Fiction would give way to reality, and an organized portion of the nation might then contest the central authority.

The same observation holds good with regard to the Federal jurisdiction. If the courts of the Union violated an important law of a state in a private case, the real though not the apparent contest would be between the aggrieved state represented by a citizen and the Union represented by its courts of justice.

He would have but a partial knowledge of the world who should imagine that it is possible by the aid of legal fictions to prevent men from finding out and employing those means of gratifying their passions which have been left open to them. The American legislators, though they have rendered a collision between the two sovereignties less probable, have not destroyed the causes of such a misfortune. It may even be affirmed that, in case of such a collision, they have not been able to ensure the victory of the Federal element. The Union is possessed of money and troops, but the states have kept the affections and the prejudices of the people. The sovereignty of the Union is an abstract being, which is connected with but few external objects; the sovereignty of the states is perceptible by the senses, easily understood, and constantly active. The former is of recent creation, the latter is coeval with the people itself. The sovereignty of the Union is factitious, that of the states is natural and self-existent, without effort, like the authority of a parent. The sovereignty of the nation affects a few of the chief interests of society; it represents an immense but remote country, a vague and ill-defined sentiment. The authority of the states controls every individual citizen at every hour and in all circumstances; it protects his property, his freedom, and his life; it affects at every moment his well-being or his misery. When we recollect the traditions, the customs, the prejudices of local and familiar attachment with which it is connected, we cannot doubt the superiority of a power that rests on the instinct of patriotism, so natural to the human heart.

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

But men have sentiments and principles as well as material interests. A certain uniformity of civilization is not less necessary to the durability of a confederation than a uniformity of interests in the states that compose it. In Switzerland the difference between the civilization of the Canton of Uri and that of the Canton of Vaud is like the difference between the fifteenth and the nineteenth centuries; therefore, properly speaking, Switzerland has never had a federal government. The union between these two cantons exists only on the map; and this would soon be perceived if an attempt were made by a central authority to prescribe the same laws to the whole territory.

The circumstance which makes it easy to maintain a Federal government in America is not only that the states have similar interests, a common origin, and a common language, but that they have also arrived at the same stage of civilization, which almost always renders a union feasible. I do not know of any European nation, however small, that does not present less uniformity in its different provinces than the American people, which occupy a territory as extensive as one half of Europe. The distance from Maine to Georgia is about one thousand miles; but the difference between the civilization of Maine and that of Georgia is slighter than the difference between the habits of Normandy and those of Brittany. Maine and Georgia, which are placed at the opposite extremities of a great empire, have therefore more real inducements to form a confederation than Normandy and Brittany, which are separated only by a brook.

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

The most important occurrence in the life of a nation is the breaking out of a war. In war a people act as one man against foreign nations in defense of their very existence. The skill of the government, the good sense of the community, and the natural fondness that men almost always entertain for their country may be enough as long as the only object is to maintain peace in the interior of the state and to favor its internal prosperity; but that the nation may carry on a great war the people must make more numerous and painful sacrifices; and to suppose that a great number of men will of their own accord submit to these exigencies is to betray an ignorance of human nature. All the nations that have been obliged to sustain a long and serious warfare have consequently been led to augment the power of their government. Those who have not succeeded in this attempt have been subjugated. A long war almost always reduces nations to the wretched alternative of being abandoned to ruin by defeat or to despotism by success. War therefore renders the weakness of a government most apparent and most alarming; and I have shown that the inherent defect of federal governments is that of being weak.

The federal system not only has no centralized administration, and nothing that resembles one, but the central government itself is imperfectly organized, which is always a great cause of weakness when the nation is opposed to other countries which are themselves governed by a single authority. In the Federal Constitution of the United States, where the central government has more real force than in any other confederation, this evil is still extremely evident. A single example will illustrate the case.

The Constitution confers upon Congress the right of "calling forth the militia to execute the laws of the Union, suppress insurrections, and repel invasions"; and another article declares that the President of the United States is the commander-in-chief of the militia. In the war of 1812 the President ordered the militia of the Northern states to march to the frontiers; but Connecticut and Massachusetts, whose interests were impaired by the war, refused to obey the command. They argued that the Constitution authorizes the Federal government to call forth the militia in case of insurrection or invasion; but in the present instance there was neither invasion nor insurrection. They added that the same Constitution which conferred upon the Union the right of calling the militia into active service reserved to the states that of naming the officers; and consequently (as they understood the clause) no officer of the Union had any right to command the militia, even during war, except the President in person: and in this case they were ordered to join an army commanded by another individual. These absurd and pernicious doctrines received the sanction not only of the governors and the legislative bodies, but also of the courts of justice in both states; and the Federal government was forced to raise elsewhere the troops that it required.

How does it happen, then, that the American Union, with all the relative perfection of its laws, is not dissolved by the occurrence of a great war? It is because it has no great wars to fear. Placed in the center of an immense continent, which offers a boundless field for human industry, the Union is almost as much insulated from the world as if all its frontiers were girt by the ocean. Canada contains only a million inhabitants, and its population is divided into two inimical nations. The rigor of the climate limits the extension of its territory, and shuts up its ports during the six months of winter. From Canada to the Gulf of Mexico a few savage tribes are to be met with, which retire, perishing in their retreat, before six thousand soldiers. To the south the Union has a point of contact with the empire of Mexico; and it is thence that serious hostilities may one day be expected to arise. But for a long while to come the uncivilized state of the Mexican people, the depravity of their morals, and their extreme poverty will prevent that country from ranking high among nations. As for the powers of Europe, they are too distant to be formidable.

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

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

Federalist Papers: "Federalist No. 46"

by James Madison

To the People of the State of New York:

RESUMING the subject of the last paper, I proceed to inquire whether the federal government or the State governments will have the advantage with regard to the predilection and support of the people. Notwithstanding the different modes in which they are appointed, we must consider both of them as substantially dependent on the great body of the citizens of the United States.

I assume this position here as it respects the first, reserving the proofs for another place. The federal and State governments are in fact but different agents and trustees of the people, constituted with different powers, and designed for different purposes. The adversaries of the Constitution seem to have lost sight of the people altogether in their reasonings on this subject; and to have viewed these different establishments, not only as mutual rivals and enemies, but as uncontrolled by any common superior in their efforts to usurp the authorities of each other. These gentlemen must here be reminded of their error. They must be told that the ultimate authority, wherever the derivative may be found, resides in the people alone, and that it will not depend merely on the comparative ambition or address of the different governments, whether either, or which of them, will be able to enlarge its sphere of jurisdiction at the expense of the other. Truth, no less than decency, requires that the event in every case should be supposed to depend on the sentiments and sanction of their common constituents. Many considerations, besides those suggested on a former occasion, seem to place it beyond doubt that the first and most natural attachment of the people will be to the governments of their respective States.

Into the administration of these a greater number of individuals will expect to rise. From the gift of these a greater number of offices and emoluments will flow. By the superintending care of these, all the more domestic and personal interests of the people will be regulated and provided for. With the affairs of these, the people will be more familiarly and minutely conversant. And with the members of these, will a greater proportion of the people have the ties of personal acquaintance and friendship, and of family and party attachments; on the side of these, therefore, the popular bias may well be expected most strongly to incline. Experience speaks the same language in this case. The federal administration, though hitherto very defective in comparison with what may be hoped under a better system, had, during the war, and particularly whilst the independent fund of paper emissions was in credit, an activity and importance as great as it can well have in any future circumstances whatever.

It was engaged, too, in a course of measures which had for their object the protection of everything that was dear, and the acquisition of everything that could be desirable to the people at large. It was, nevertheless, invariably found, after the transient enthusiasm for the early Congresses was over, that the attention and attachment of the people were turned anew to their own particular governments; that the federal council was at no time the idol of popular favor; and that opposition to proposed enlargements of its powers and importance was the side usually taken by the men who wished to build their political consequence on the prepossessions of their fellow-citizens. If, therefore, as has been elsewhere remarked, the people should in future become more partial to the federal than to the State governments, the change can only result from such manifest and irresistible proofs of a better administration, as will overcome all their antecedent propensities. And in that case, the people ought not surely to be precluded from giving most of their confidence where they may discover it to be most due; but even in that case the State governments could have little to apprehend, because it is only within a certain sphere that the federal power can, in the nature of things, be advantageously administered. The remaining points on which I propose to compare the federal and State governments, are the disposition and the faculty they may respectively possess, to resist and frustrate the measures of each other. It has been already proved that the members of the federal will be more dependent on the members of the State governments, than the latter will be on the former. It has appeared also, that the prepossessions of the people, on whom both will depend, will be more on the side of the State governments, than of the federal government. So far as the disposition of each towards the other may be influenced by these causes, the State governments must clearly have the advantage.

But in a distinct and very important point of view, the advantage will lie on the same side. The prepossessions, which the members themselves will carry into the federal government, will generally be favorable to the States; whilst it will rarely happen, that the members of the State governments will carry into the public councils a bias in favor of the general government. A local spirit will infallibly prevail much more in the members of Congress, than a national spirit will prevail in the legislatures of the particular States. Every one knows that a great proportion of the errors committed by the State legislatures proceeds from the disposition of the members to sacrifice the comprehensive and permanent interest of the State, to the particular and separate views of the counties or districts in which they reside. And if they do not sufficiently enlarge their policy to embrace the collective welfare of their particular State, how can it be imagined that they will make the aggregate prosperity of the Union, and the dignity and respectability of its government, the objects of their affections and consultations? For the same reason that the members of the State legislatures will be unlikely to attach themselves sufficiently to national objects, the members of the federal legislature will be likely to attach themselves too much to local objects. The States will be to the latter what counties and towns are to the former. Measures will too often be decided according to their probable effect, not on the national prosperity and happiness, but on the prejudices, interests, and pursuits of the governments and people of the individual States. What is the spirit that has in general characterized the proceedings of Congress? A perusal of their journals, as well as the candid acknowledgments of such as have had a seat in that assembly, will inform us, that the members have but too frequently displayed the character, rather of partisans of their respective States, than of impartial guardians of a common interest; that where on one occasion improper sacrifices have been made of local considerations, to the aggrandizement of the federal government, the great interests of the nation have suffered on a hundred, from an undue attention to the local prejudices, interests, and views of the particular States. I mean not by these reflections to insinuate, that the new federal government will not embrace a more enlarged plan of policy than the existing government may have pursued; much less, that its views will be as confined as those of the State legislatures; but only that it will partake sufficiently of the spirit of both, to be disinclined to invade the rights of the individual States, or the prerogatives of their governments. The motives on the part of the State governments, to augment their prerogatives by defalcations from the federal government, will be overruled by no reciprocal predispositions in the members. Were it admitted, however, that the Federal government may feel an equal disposition with the State governments to extend its power beyond the due limits, the latter would still have the advantage in the means of defeating such encroachments. If an act of a particular State, though unfriendly to the national government, be generally popular in that State and should not too grossly violate the oaths of the State officers, it is executed immediately and, of course, by means on the spot and depending on the State alone. The opposition of the federal government, or the interposition of federal officers, would but inflame the zeal of all parties on the side of the State, and the evil could not be prevented or repaired, if at all, without the employment of means which must always be resorted to with reluctance and difficulty.

On the other hand, should an unwarrantable measure of the federal government be unpopular in particular States, which would seldom fail to be the case, or even a warrantable measure be so, which may sometimes be the case, the means of opposition to it are powerful and at hand. The disquietude of the people; their repugnance and, perhaps, refusal to co-operate with the officers of the Union; the frowns of the executive magistracy of the State; the embarrassments created by legislative devices, which would often be added on such occasions, would oppose, in any State, difficulties not to be despised; would form, in a large State, very serious impediments; and where the sentiments of several adjoining States happened to be in unison, would present obstructions which the federal government would hardly be willing to encounter. But ambitious encroachments of the federal government, on the authority of the State governments, would not excite the opposition of a single State, or of a few States only. They would be signals of general alarm. Every government would espouse the common cause. A correspondence would be opened. Plans of resistance would be concerted. One spirit would animate and conduct the whole. The same combinations, in short, would result from an apprehension of the federal, as was produced by the dread of a foreign, yoke; and unless the projected innovations should be voluntarily renounced, the same appeal to a trial of force would be made in the one case as was made in the other. But what degree of madness could ever drive the federal government to such an extremity. In the contest with Great Britain, one part of the empire was employed against the other.

The more numerous part invaded the rights of the less numerous part. The attempt was unjust and unwise; but it was not in speculation absolutely chimerical. But what would be the contest in the case we are supposing? Who would be the parties? A few representatives of the people would be opposed to the people themselves; or rather one set of representatives would be contending against thirteen sets of representatives, with the whole body of their common constituents on the side of the latter. The only refuge left for those who prophesy the downfall of the State governments is the visionary supposition that the federal government may previously accumulate a military force for the projects of ambition. The reasonings contained in these papers must have been employed to little purpose indeed, if it could be necessary now to disprove the reality of this danger. That the people and the States should, for a sufficient period of time, elect an uninterrupted succession of men ready to betray both; that the traitors should, throughout this period, uniformly and systematically pursue some fixed plan for the extension of the military establishment; that the governments and the people of the States should silently and patiently behold the gathering storm, and continue to supply the materials, until it should be prepared to burst on their own heads, must appear to every one more like the incoherent dreams of a delirious jealousy, or the misjudged exaggerations of a counterfeit zeal, than like the sober apprehensions of genuine patriotism.

Extravagant as the supposition is, let it however be made. Let a regular army, fully equal to the resources of the country, be formed; and let it be entirely at the devotion of the federal government; still it would not be going too far to say, that the State governments, with the people on their side, would be able to repel the danger. The highest number to which, according to the best computation, a standing army can be carried in any country, does not exceed one hundredth part of the whole number of souls; or one twenty-fifth part of the number able to bear arms. This proportion would not yield, in the United States, an army of more than twenty-five or thirty thousand men. To these would be opposed a militia amounting to near half a million of citizens with arms in their hands, officered by men chosen from among themselves, fighting for their common liberties, and united and conducted by governments possessing their affections and confidence. It may well be doubted, whether a militia thus circumstanced could ever be conquered by such a proportion of regular troops. Those who are best acquainted with the last successful resistance of this country against the British arms, will be most inclined to deny the possibility of it. Besides the advantage of being armed, which the Americans possess over the people of almost every other nation, the existence of subordinate governments, to which the people are attached, and by which the militia officers are appointed, forms a barrier against the enterprises of ambition, more insurmountable than any which a simple government of any form can admit of. Notwithstanding the military establishments in the several kingdoms of Europe, which are carried as far as the public resources will bear, the governments are afraid to trust the people with arms. And it is not certain, that with this aid alone they would not be able to shake off their yokes. But were the people to possess the additional advantages of local governments chosen by themselves, who could collect the national will and direct the national force, and of officers appointed out of the militia, by these governments, and attached both to them and to the militia, it may be affirmed with the greatest assurance, that the throne of every tyranny in Europe would be speedily overturned in spite of the legions which surround it. Let us not insult the free and gallant citizens of America with the suspicion, that they would be less able to defend the rights of which they would be in actual possession, than the debased subjects of arbitrary power would be to rescue theirs from the hands of their oppressors. Let us rather no longer insult them with the supposition that they can ever reduce themselves to the necessity of making the experiment, by a blind and tame submission to the long train of insidious measures which must precede and produce it. The argument under the present head may be put into a very concise form, which appears altogether conclusive. Either the mode in which the federal government is to be constructed will render it sufficiently dependent on the people, or it will not. On the first supposition, it will be restrained by that dependence from forming schemes obnoxious to their constituents. On the other supposition, it will not possess the confidence of the people, and its schemes of usurpation will be easily defeated by the State governments, who will be supported by the people. On summing up the considerations stated in this and the last paper, they seem to amount to the most convincing evidence, that the powers proposed to be lodged in the federal government are as little formidable to those reserved to the individual States, as they are indispensably necessary to accomplish the purposes of the Union; and that all those alarms which have been sounded, of a meditated and consequential annihilation of the State governments, must, on the most favorable interpretation, be ascribed to the chimerical fears of the authors of them.

PUBLIUS.

McCulloch v. Maryland

"Has Congress power to incorporate a bank?" The answer to this seemingly straightforward question, as crafted by Chief Justice John Marshall in one of his most eloquent opinions, had powerful repercussions for the meaning of the Necessary and Proper Clause and furthermore for all questions of federalism. McCulloch v. Maryland *316 U.S. (1819) resulted from the federal government's claim that the state of Maryland could not tax the U.S. National Bank. The bank had always been an issue of contention between members of the Federalist party and the Democratic-Republican party. Since there was no specific constitutional delegation of power to the federal government to create a bank, the Democratic-Republicans had long complained that the bank was an unconstitutional aggrandizement of the federal government's power. The Federalists, on the other hand, maintained that Congress could create a bank, and George Washington's administration created one. The Democratic-Republicans, however, did not completely give up their resistance and by the time of the administration of Thomas Jefferson they were in a position to do something about it. Initially, the Jeffersonian Congress rescinded the bank's charter; but in response to a financial crisis they re-chartered it within five years. At the state level, however, Democratic-Republicans were not so quick to join the enemy and many states passed legislation taxing the bank.*

Marshall's opinion looked to the history and origin of the Constitution to demonstrate that the Constitution and government of the United States was established, not by states, but by the people. "The government of the Union ... is emphatically, and truly, a government of the people. In form and in substance it emanates from them." Furthermore, no one could doubt that the federal government was supreme within its "sphere of action." After establishing this claim concerning the structure and power of the Constitution and Constitutional government, Marshall focused on the question at hand—Could Maryland tax a bank established by the federal government? The state of Maryland could not tax, Marshall concluded, a federal entity such as a bank, the post office, or the mint, since the power to tax implied a superiority—"the power to tax involves the power to destroy." Supported by the Court, the bank eventually, with the election of Andrew Jackson, lost the support of the other branches of the federal government. The removal of support for a national bank did not, however, reduce the appeal of Marshall's opinion, which became, in the twentieth century, an important justification for the growth of state power.

McCulloch v. Maryland

Chief Justice Marshall delivered the opinion of the Court.

In the case now to be determined, the defendant, a sovereign State, denies the obligation of a law enacted by the legislature of the Union, and the plaintiff, on his part, contests the validity of an act which has been passed by the legislature of that State. The constitution of our country, in its most interesting and vital parts, is to be considered; the conflicting powers of the government of the Union and of its members, as marked in that constitution, are to be discussed; and an opinion given, which may essentially influence the great operations of the government. No tribunal can approach such a question without a deep sense of its importance, and of the awful responsibility involved in its decision. But it must be decided peacefully, or remain a source of hostile legislation, perhaps of hostility of a still more serious nature; and if it is to be so decided, by this tribunal alone can the decision be made. On the Supreme Court of the United States has the constitution of our country devolved this important duty.

The first question made in the cause is, has Congress power to incorporate a bank?

It has been truly said that this can scarcely be considered as an open question, entirely unprejudiced by the former proceedings of the nation respecting it. The principle now contested was introduced at a very early period of our history, has been recognized by many successive legislatures, and has been acted upon by the judicial department, in cases of peculiar delicacy, as a law of undoubted obligation....

The power now contested was exercised by the first Congress elected under the present constitution. The bill for incorporating the bank of the United States did not steal upon an unsuspecting legislature, and pass unobserved. Its principle was completely understood, and was opposed with equal zeal and ability. After being resisted, first in the fair and open field of debate, and afterwards in the executive cabinet, with as much persevering talent as any measure has ever experienced, and being supported by arguments which convinced minds as pure and as intelligent as this country can boast, it became a law. The original act was permitted to expire; but a short experience of the embarrassments to which the refusal to revive it exposed the government, convinced those who were most prejudiced against the measure of its necessity, and induced the passage of the present law. It would require no ordinary share of intrepidity to assert that a measure adopted under these circumstances was a bold and plain usurpation, to which the constitution gave no countenance.

These observations belong to the cause; but they are not made under the impression that, were the question entirely new, the law would be found irreconcilable with the constitution.

In discussing this question, the counsel for the State of Maryland have deemed it of some importance, in the construction of the constitution, to consider that instrument not as emanating from the people, but as the act of sovereign and independent States. The powers of the general government, it has been said, are delegated by the States, who alone are truly sovereign; and must be exercised in subordination to the States, who alone possess supreme dominion.

It would be difficult to sustain this proposition. The Convention which framed the constitution was indeed elected by the State legislatures. But the instrument, when it came from their hands, was a mere proposal, without obligation, or pretensions to it. It was reported to the then existing Congress of the United States, with a request that it might "be submitted to a convention of delegates, chosen in each State by the people thereof, under the recommendation of its legislature, for their assent and ratification." This mode of proceeding was adopted; and by the convention, by Congress, and by the State legislatures, the instrument was submitted to the people. They acted upon it in the only manner in which they can act safely, effectively, and wisely, on such a subject, by assembling in convention. It is true, they assembled in their several States—and where else should they have assembled? No political dreamer was ever wild enough to think of breaking down the lines which separate the States, and of compounding the American people into one common mass. Of consequence, when they act, they act in their States. But the measures they adopt do not, on that account, cease to be the measures of the people themselves, or become the measures of the State governments.

From these conventions the constitution derives its whole authority. The government proceeds directly from the people; is "ordained and established" in the name of the people; and is declared to be ordained, "in order to form a more perfect union, establish justice, ensure domestic tranquility, and secure the blessings of liberty to themselves and to their posterity." The assent of the States, in their sovereign capacity, is implied in calling a convention, and thus submitting that instrument to the people. But the people were at perfect liberty to accept or reject it; and their act was final. It required not the affirmance, and could not be negatived, by the State governments. The constitution, when thus adopted, was of complete obligation, and bound the State sovereignties ... of this fact on the case), is, emphatically, and truly, a government of the people. In form and in substance it emanates from them. Its powers are granted by them, and are to be exercised directly on them, and for their benefit.

This government is acknowledged by all to be one of enumerated powers. The principle, that it can exercise only the powers granted to it, [is] now universally admitted. But the question respecting the extent of the powers actually granted, is perpetually arising, and will probably continue to arise, as long as our system shall exist....

Among the enumerated powers, we do not find that of establishing a bank or creating a corporation. But there is no phrase in the instrument which, like the articles of confederation, excludes incidental or implied powers; and which requires that everything granted shall be expressly and minutely described. Even the Tenth Amendment, which was framed for the purpose of quieting the excessive jealousies which had been excited, omits the word "expressly," and declares only that the powers "not delegated to the United States, nor prohibited to the States, are reserved to the States or to the people"; thus leaving the question, whether the particular power which may become the subject of contest has been delegated to the one government, or prohibited to the other, to depend on a fair construction of the whole instrument. The men who drew and adopted this amendment had experienced the embarrassments resulting from the insertion of this word in the articles of confederation, and probably omitted it to avoid those embarrassments. A constitution, to contain an accurate detail of all the subdivisions of which its great powers will admit, and of all the means by which they may be carried into execution, would partake of the prolixity of a legal code, and could scarcely be embraced by the human mind. It would probably never be understood by the public. Its nature, therefore, requires, that only its great outlines should be marked, its important objects designated, and the minor ingredients which compose those objects be deduced from the nature of the objects themselves. That this idea was entertained by the framers of the American constitution, is not only to be inferred from the nature of the instrument, but from the language. Why else were some of the limitations, found in the ninth section of the 1st article, introduced? It is also, in some degree, warranted by their having omitted to use any restrictive term which might prevent its receiving a fair and just interpretation. In considering this question, then, we must never forget that it is a constitution we are expounding.

Although, among the enumerated powers of government, we do not find the word "bank," or "incorporation," we find the great powers to lay and collect taxes; to borrow money; to regulate commerce; to declare and conduct a war; and to raise and support armies and navies. The sword and the purse, all the external relations, and no inconsiderable portion of the industry of the nation, are entrusted to its government. It can never be pretended that these vast powers draw after them others of inferior importance, merely because they are inferior. Such an idea can never be advanced. But it may with great reason be contended, that a government, entrusted with such ample powers, on the due execution of which the happiness and prosperity of the nation so vitally depends, must also be entrusted with ample means for their execution. The power being given, it is the interest of the nation to facilitate its execution. It can never be their interest, and cannot be presumed to have been their intention, to clog and embarrass its execution by withholding the most appropriate means ... require it) which would impute to the framers of that instrument, when granting these powers for the public good, the intention of impeding their exercise by withholding a choice of means? If, indeed, such be the mandate of the constitution, we have only to obey; but that instrument does not profess to enumerate the means by which the powers it confers may be executed; nor does it prohibit the creation of a corporation, if the existence of such a being be essential to the beneficial exercise of those powers. It is, then, the subject of fair inquiry, how far such means may be employed.

It is not denied, that the powers given to the government imply the ordinary means of execution. That, for example, of raising revenue, and applying it to national purposes, is admitted to imply the power of conveying money from place to place, as the exigencies of the nation may require, and of employing the usual means of conveyance. But it is denied that the government has its choice of means; or, that it may employ the most convenient means, if, to employ them, it be necessary to erect a corporation....

The government which has a right to do an act, and has imposed on it the duty of performing that act, must, according to the dictates of reason, be allowed to select the means; and those who contend that it may not select any appropriate means, that one particular mode of effecting the object is excepted, take upon themselves the burden of establishing that exception.... The power of creating a corporation, though appertaining to sovereignty, is not like the power of making war, or levying taxes, or of regulating commerce, a great substantive and independent power, which cannot be implied as incidental to other powers, or used as a means of executing them. It is never the end for which other powers are exercised, but a means by which other objects are accomplished.... The power of creating a corporation is never used for its own sake, but for the purpose of effecting something else. No sufficient reason is, therefore, perceived, why it may not pass as incidental to those powers which are expressly given, if it be a direct mode of executing them.

But the constitution of the United States has not left the right of Congress to employ the necessary means, for the execution of the powers conferred on the government, to general reasoning. To its enumeration of powers is added that of making "all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this constitution, in the government of the United States, or in any department thereof."

The counsel for the State of Maryland have urged various arguments, to prove that this clause, though in terms a grant of power, is not so in effect; but is really restrictive of the general right, which might otherwise be implied, of selecting means for executing the enumerated powers....

Almost all compositions contain words, which, taken in their rigorous sense, would convey a meaning different from that which is obviously intended. It is essential to just construction, that many words which import something excessive should be understood in a more mitigated sense—in that sense which common usage justifies. The word "necessary" is of this description. It has not a fixed character peculiar to itself. It admits of all degrees of comparison; and is often connected with other words, which increase or diminish the impression the mind receives of the urgency it imports. A thing may be necessary, very necessary, absolutely or indispensably necessary. To no mind would the same idea be conveyed by these several phrases. This comment on the word is well illustrated by the passage cited at the bar, from the 20th section of the 1st article of the constitution. It is, we think, impossible to compare the sentence which prohibits a State from laying "imposts, or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws," with that which authorizes Congress "to make all laws which shall be necessary and proper for carrying into execution" the powers of the general government, without feeling a conviction that the convention understood itself to change materially the meaning of the word "necessary," by prefixing the word "absolutely." This word, then, like others, is used in various senses; and, in its construction, the subject, the context, the intention of the person using them, are all to be taken into view.

Let this be done in the case under consideration. The subject is the execution of those great powers on which the welfare of a nation essentially depends. It must have been the intention of those who gave these powers, to insure, as far as human prudence could insure, their beneficial execution. This could not be done by confiding the choice of means to such narrow limits as not to leave it in the power of Congress to adopt any which might be appropriate, and which were conducive to the end. This provision is made in a constitution intended to endure for ages to come, and, consequently, to be adapted to the various crises of human affairs. To have prescribed the means by which government should, in all future time, execute its powers, would have been to change, entirely, the character of the instrument, and give it the properties of a legal code. It would have been an unwise attempt to provide, by immutable rules, for exigencies which, if foreseen at all, must have been seen dimly, and which can be best provided for as they occur. To have declared that the best means shall not be used, but those alone without which the power given would be nugatory, would have been to deprive the legislature of the capacity to avail itself of experience, to exercise its reason, and to accommodate its legislation to circumstances. If we apply this principle of construction to any of the powers of the government, we shall find it so pernicious in its operation that we shall be compelled to discard it....

The result of the most careful and attentive consideration bestowed upon this clause is, that if it does not enlarge, it cannot be construed to restrain the powers of Congress, or to impair the rights of the legislature to exercise its best judgment in the selection of measures to carry into execution the constitutional powers of the government. If no other motive for its insertion can be suggested, a sufficient one is found in the desire to remove all doubts respecting the right to legislate on that vast mass of incidental powers which must be involved in the constitution, if that instrument be not a splendid bauble.

We admit, as all must admit, that the powers of the government are limited, and that its limits are not to be transcended. But we think the sound construction of the constitution must allow to the national legislature that discretion, with respect to the means by which the powers it confers are to be carried into execution, which will enable that body to perform the high duties assigned to it, in the manner most beneficial to the people. Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional....

Should Congress, in the execution of its powers, adopt measures which are prohibited by the constitution; or should Congress, under the pretext of executing its powers, pass laws for the accomplishment of objects not entrusted to the government; it would become the painful duty of this tribunal, should a case requiring such a decision come before it, to say that such an act was not the law of the land. But where the law is not prohibited, and is really calculated to effect any of the objects entrusted to the government, to undertake here to inquire into the degree of its necessity, would be to pass the line which circumscribes the judicial department, and to tread on legislative ground. This court disclaims all pretensions to such a power.

After the most deliberate consideration, it is the unanimous and decided opinion of this Court, that the act to incorporate the Bank of the United States is a law made in pursuance of the constitution, and is a part of the supreme law of the land....

It being the opinion of the Court, that the act incorporating the bank is constitutional; and that the power of establishing a branch in the State of Maryland might be properly exercised by the bank itself, we proceed to inquire—

2. Whether the State of Maryland may, without violating the constitution, tax that branch?

That the power of taxation is one of vital importance; that it is retained by the States; that it is not abridged by the grant of a similar power to the government of the Union; that it is to be concurrently exercised by the two governments: are truths which have never been denied. But, such is the paramount character of the constitution, that its capacity to withdraw any subject from the action of even this power, is admitted. The States are expressly forbidden to lay any duties on imports or exports, except what may be absolutely necessary for executing their inspection laws. If the obligation of this prohibition must be conceded, the same paramount character would seem to restrain, as it certainly may restrain, a State from such other exercise of this power; as is in its nature incompatible with, and repugnant to, the constitutional laws of the Union....

On this ground the counsel for the bank place its claim to be exempted from the power of a State to tax its operations. There is no express provision for the case, but the claim has been sustained on a principle which so entirely pervades the constitution, is so intermixed with the materials which compose it, so interwoven with its web, so blended with its texture, as to be incapable of being separated from it, without rending it into shreds.

This great principle is, that the constitution and the laws made in pursuance thereof are supreme; that they control the constitution and laws of the respective States, and cannot be controlled by them. From this, which may be almost termed an axiom, other propositions are deduced as corollaries, on the truth or error of which, and on their application to this case, the cause has been supposed to depend. These are, 1st. that a power to create implies a power to preserve. 2nd. That a power to destroy, if wielded by a different hand, is hostile to, and incompatible with these powers to create and to preserve. 3d. That where this repugnancy exists, that authority which is supreme must control, not yield to that over which it is supreme....

That the power of taxing by the States may be exercised so as to destroy it, is too obvious to be denied. But taxation is said to be an absolute power, which acknowledges no other limits than those expressly prescribed in the constitution, and like sovereign power of every other description, is trusted to the discretion of those who use it. But the very terms of this argument admit that the sovereignty of the State, in the article of taxation itself, is subordinate to, and may be controlled by, the constitution of the United States. How far it has been controlled by that instrument must be a question of construction. In making this construction, no principle not declared, can be admissible, which would defeat the legitimate operations of a supreme government. It is of the very essence of supremacy to remove all obstacles to its action within its own sphere, and so to modify every power vested in subordinate governments, as to exempt its own operations from their own influence. This effect need not be stated in terms. It is so involved in the declaration of supremacy, so necessarily implied in it, that the expression of it could not make it more certain. We must, therefore, keep it in view while construing the constitution.

The argument on the part of the State of Maryland is, not that the States may directly resist a law of Congress, but that they may exercise their acknowledged powers upon it, and that the constitution leaves them this right in the confidence that they will not abuse it.

Before we proceed to examine this argument, and to subject it to the test of the constitution, we must be permitted to bestow a few considerations on the nature and extent of this original right of taxation, which is acknowledged to remain with the States. It is admitted that the power of taxing the people and their property is essential to the very existence of government, and may be legitimately exercised on the objects to which it is applicable, to the utmost extent to which the government may choose to carry it. The only security against the abuse of this power, is found in the structure of the government itself. In imposing a tax the legislature acts upon its constituents....

The sovereignty of a State extends to everything which exists by its own authority, or is so introduced by its permission; but does it extend to those means which are employed by Congress to carry into execution powers conferred on that body by the people of the United States? We think it demonstrable that it does not. Those powers are not given by the people of a single State. They are given by the people of the United States, to a government whose laws, made in pursuance of the constitution, are declared to be supreme. Consequently, the people of a single State cannot confer a sovereignty which will extend over them.

If we measure the power of taxation residing in a State, by the extent of sovereignty which the people of a single State possess, and can confer on its government, we have an intelligible standard, applicable to every case to which the power may be applied. We have a principle which leaves the power of taxing the people and property of a State unimpaired; which leaves to a State the command of all its resources, and which places beyond its reach, all those powers which are conferred by the people of the United States on the government of the Union, and all those means which are given for the purpose of carrying those powers into execution. We have a principle which is safe for the States, and safe for the Union. We are relieved, as we ought to be, from clashing sovereignty; from interfering powers; from a repugnancy between a right in one government to pull down what there is an acknowledged right in another to build up; from the incompatibility of a right in one government to destroy what there is a right in another to preserve. We are not driven to the perplexing inquiry, so unfit for the judicial department, what degree of taxation is the legitimate use, and what degree may amount to the abuse of the power. The attempt to use it on the means employed by the government of the Union, in pursuance of the constitution, is itself an abuse, because it is the usurpation of a power which the people of a single State cannot give.

We find, then, on just theory, a total failure of this original right to tax the means employed by the government of the Union, for the execution of its powers. The right never existed, and the question whether it has been surrendered, cannot arise.

But, waiving this theory for the present, let us resume the inquiry, whether this power can be exercised by the respective States, consistently with a fair construction of the constitution?

That the power to tax involves the power to destroy; that the power to destroy may defeat and render useless the power to create; that there is a plain repugnance, in conferring on one government a power to control the constitutional measures of another, which other, with respect to those very measures, is declared to be supreme over that which exerts the control, are propositions not to be denied. But all inconsistencies are to be reconciled by the magic of the word CONFIDENCE. Taxation, it is said, does not necessarily and unavoidably destroy. To carry it to the excess of destruction would be an abuse, to presume which, would banish that confidence which is essential to all government.

But is this a case of confidence? Would the people of any one State trust those of another with a power to control the most insignificant operations of their State government? We know they would not. Why, then, should we suppose that the people of any one State should be willing to trust those of another with a power to control the operations of a government to which they have confided their most important and most valuable interests? In the legislature of the Union alone, are all represented. The legislature of the Union alone, therefore, can be trusted by the people with the power of controlling measures which concern all, in the confidence that it will not be abused. This, then, is not a case of confidence, and we must consider it as it really is.

If we apply the principle for which the State of Maryland contends, to the constitution generally, we shall find it capable of changing totally the character of that instrument. We shall find it capable of arresting all the measures of the government, and of prostrating it at the foot of the States. The American people have declared their constitution, and the laws made in pursuance thereof, to be supreme; but this principle would transfer the supremacy, in fact, to the States.

If the States may tax one instrument, employed by the government in the execution of its powers, they may tax any and every other instrument. They may tax the mail; they may tax the mint; they may tax patent rights; they may tax the papers of the custom-house; they may tax judicial process; they may tax all the means employed by the government, to an excess which would defeat all the ends of government. This was not intended by the American people. They did not design to make their government dependent on the States....

The Court has bestowed on this subject its most deliberate consideration. The result is a conviction that the States have no power, by taxation or otherwise, to retard, impede, burden, or in any manner control, the operations of the constitutional laws enacted by Congress to carry into execution the powers vested in the general government. This is, we think, the unavoidable consequence of that supremacy which the constitution has declared.

We are unanimously of opinion, that the law passed by the legislature of Maryland, imposing a tax on the Bank of the United States, is unconstitutional and void.

This opinion does not deprive the States of any resources which they originally possessed. It does not extend to a tax paid by the real property of the bank, in common with the other real property within the State, nor to a tax imposed on the interest which the citizens of Maryland may hold in this institution, in common with other property of the same description throughout the State. But this is a tax on the operations of the bank, and is, consequently, a tax on the operation of an instrument employed by the government of the Union to carry its powers into execution. Such a tax must be unconstitutional.

Source: 4 Wheaton 316 (1819).

Dred Scott v. Sandford

Dred Scott v. Sandford, *argued before the U.S. Supreme Court in 1856-57, involved the bitterly contested issues of the status of slaves in the Federal territories. Dred Scott was taken by his owner from Missouri, a slave state, to Illinois, a free state, and later to Fort Snelling (now Minnesota) in Wisconsin Territory where slavery was prohibited under the Missouri Compromise. Later he returned with his master, who died eight years later, to Missouri in 1838. After the owner's death Scott, now owned by the master's wife, sued her for his freedom (and for the freedom of his family—his wife and his two children) on the grounds that residence in a free state and then in a free territory had ended his bondage. He won in a St. Louis court but the decision was reversed by the Missouri Supreme Court. In 1857 the United States Supreme Court decided in conference to avoid completely the question of the constitutionality of the Missouri Compromise and to return a verdict against Scott on the grounds that, under Missouri law as now interpreted by the supreme court of that state, he remained a slave despite his previous residence in free territory. When it became known, however, that two anti-slavery justices, John McLean and Benjamin Curtis, planned to write dissenting opinions upholding the constitutionality of the Missouri Compromise (which had actually already been voided by the Kansas-Nebraska Bill of 1854), the court's Southern pro-slavery members (the majority) decided to rule on the question of the federal government's power over slavery in the territories. Chief Justice Roger Taney wrote the Court's opinion that the Missouri Compromise was unconstitutional. Further inflaming the animosity of the anti-slavery movement, three of the Justices held that a person "whose ancestors were ... sold as slaves" was not entitled to the rights of a federal citizen and therefore had no standing in court.*

DRED SCOTT, PLAINTIFF IN ERROR, v. JOHN F. A. SANDFORD

December Term, 1856

Justice Catron, Justice Wayne, Justice Nelson, Justice Grier, Justice Daniel, and Justice Campbell concurring in separate opinions.

Justice McLean and Justice Curtis dissenting in separate opinions.

I.

1. Upon a writ of error to a Circuit Court of the United States, the transcript of the record of all the proceedings in the case is brought before this court, and is open to its inspection and revision.

2. When a plea to the jurisdiction, in abatement, is overruled by the court upon demurrer, and the defendant pleads in bar, and upon these pleas the final judgment of the court is in his favor if the plaintiff brings a writ of error, the judgment of the court upon the plea in abatement is before this court, although it was in favor of the plaintiff and if the court erred in overruling it, the judgment must be reversed, and a mandate issued to the Circuit Court to dismiss the case for want of jurisdiction.

3. In the Circuit Courts of the United States, the record must show that the case is one in which, by the Constitution and laws of the United States, the court had jurisdiction and if this does not appear, and the court gives judgment either for plaintiff or defendant, it is error, and the judgment must be reversed by this court and the parties cannot by consent waive the objection to the jurisdiction of the Circuit Court.

4. A free negro of the African race, whose ancestors were brought to this country and sold as slaves, is not a "citizen" within the meaning of the Constitution of the United States.

5. When the Constitution was adopted, they were not regarded in any of the States as members of the community which constituted the State, and were not numbered among its "people or citizens." Consequently, the special rights and immunities guarantied to citizens do not apply to them. And not being "citizens" within the meaning of the Constitution, they are not entitled to sue in that character in a court of the United States, and the Circuit Court has not jurisdiction in such a suit.

6. The only two clauses in the Constitution which point to this race, treat them as persons whom it was morally lawful to deal in as articles of property and to hold as slaves.

7. Since the adoption of the Constitution of the United States, no State can by any subsequent law make a foreigner or any other description of persons citizens of the United States, nor entitle them to the rights and privileges secured to citizens by that instrument.

8. A State, by its laws passed since the adoption of the Constitution, may put a foreigner or any other description of persons upon a footing with its own citizens, as to all the rights and privileges enjoyed by them within its dominion and by its laws. But that will not make him a citizen of the United States, nor entitle him to sue in its courts, nor to any of the privileges and immunities of a citizen in another State.

9. The change in public opinion and feeling in relation to the African race, which has taken place since the adoption of the Constitution, cannot change its construction and meaning, and it must be construed and administered now according to its true meaning and intention when it was formed and adopted.

10. The plaintiff having admitted, by his demurrer to the plea in abatement, that his ancestors were imported from Africa and sold as slaves, he is not a citizen of the State of Missouri according to the Constitution of the United States, and was not entitled to sue in that character in the Circuit Court.

11. This being the case, the judgment of the court below, in favor of the plaintiff on the plea in abatement, was erroneous.

II.

1. But if the plea in abatement is not brought up by this writ of error, the objection to the citizenship of the plaintiff is still apparent on the record, as he himself, in making out his case, states that he is of African descent, was born a slave, and claims that he and his family became entitled to freedom by being taken, by their owner, to reside in a Territory where slavery is prohibited by act of Congress and that, in addition to this claim, he himself became entitled to freedom by being taken to Rock Island, in the State of Illinois and being free when he was brought back to Missouri, he was by the laws of that State a citizen.

2. If, therefore, the facts he states do not give him or his family a right to freedom, the plaintiff is still a slave, and not entitled to sue as a "citizen," and the judgment of the Circuit Court was erroneous on that ground also, without any reference to the plea in abatement.

3. The Circuit Court can give no judgment for plaintiff or defendant in a case where it has not jurisdiction, no matter whether there be a plea in abatement or not. And unless it appears upon the face of the record, when brought here by writ of error, that the Circuit Court had jurisdiction, the judgment must be reversed.

The case of Capron v. Van Noorden (2 Cranch, 126) examined, and the principles thereby decided, reaffirmed.

4. When the record, as brought here by writ of error, does not show that the Circuit Court had jurisdiction, this court has jurisdiction to revise and correct the error, like any other error in the court below. It does not and cannot dismiss the case for want of jurisdiction here; for that would leave the erroneous judgment of the court below in full force, and the party injured without remedy. But it must reverse the judgment, and, as in any other case of reversal, send a mandate to the Circuit Court to conform its judgment to the opinion of this court.

5. The difference of the jurisdiction in this court in the cases of writs of error to State courts and to Circuit Courts of the United States, pointed out; and the mistakes made as to the jurisdiction of this court in the latter case, by confounding it with its limited jurisdiction in the former.

6. If the court reverses a judgment upon the ground that it appears by a particular part of the record that the Circuit Court had not jurisdiction, it does not take away the jurisdiction of this court to examine into and correct, by a reversal of the judgment, and other errors, either as to the jurisdiction or any other matter, where it appears from other parts of the record that the Circuit Court had fallen into error. On the contrary, it is the daily and familiar practice of this court to reverse on several grounds, where more than one error appears to have been committed. And the error of a Circuit Court in its jurisdiction stands on the same ground, and is to be treated in the same manner as any other error upon which its judgment is founded.

7. The decision, therefore, that the judgment of the Circuit Court upon the plea in abatement is erroneous, is no reason why the alleged error apparent in the exception should not also be examined, and the judgment reversed on that ground also, if it discloses a want of jurisdiction in the Circuit Court.

8. It is often the duty of this court, after having decided that a particular decision of the Circuit Court was erroneous, to examine into other alleged errors, and to correct them if they are found to exist. And this has been uniformly done by this court, when the questions are in any degree connected with the controversy, and the silence of the court might create doubts which would lead to further and useless litigation.

III.

1. The facts upon which the plaintiff relies, did not give him his freedom, and make him a citizen of Missouri.

2. The clause in the Constitution authorizing Congress to make all needful rules and regulations for the government of the territory and other property of the United States, applies only to territory within the chartered limits of some one of the States when they were colonies of Great Britain, and which was surrendered by the British Government to the old Confederation of the States, in the treaty of peace. It does not apply to territory acquired by the present Federal Government, by treaty or conquest, from a foreign nation.

The case of the American and Ocean Insurance Companies v. Canter (1 Peters, 511) referred to and examined, showing that the decision in this case is not in conflict with that opinion, and that the court did not, in the case referred to, decide upon the construction of the clause of the Constitution above mentioned, because the case before them did not make it necessary to decide the question.

3. The United States, under the present Constitution, cannot acquire territory to be held as a colony, to be governed at its will and pleasure. But it may acquire territory which, at the time, has not a population that fits it to become a State, and may govern it as a Territory until it has a population which, in the judgment of Congress, entitles it to be admitted as a State of the Union.

4. During the time it remains a Territory, Congress may legislate over it within the scope of its constitutional powers in relation to citizens of the United States and may establish a Territorial Government and the form of this local Government must be regulated by the discretion of Congress but with powers not exceeding those which Congress itself, by the Constitution, is authorized to exercise over citizens of the United States, in respect to their rights of persons or rights of property.

IV.

1. The territory thus acquired, is acquired by the people of the United States for their common and equal benefit, through their agent and trustee, the Federal Government. Congress can exercise no power over the rights of persons or property of a citizen in the Territory which is prohibited by the Constitution. The Government and the citizen, whenever the Territory is open to settlement, both enter it with their respective rights defined and limited by the Constitution.

2. Congress have no right to prohibit the citizens of any particular State or States from taking up their home there, while it permits citizens of other States to do so. Nor has it a right to give privileges to one class of citizens which it refuses to another. The territory is acquired for their equal and common benefit and if open to any, it must be open to all upon equal and the same terms.

3. Every citizen has a right to take with him into the Territory any article of property which the Constitution of the United States recognizes as property.

4. The Constitution of the United States recognizes slaves as property, and pledges the Federal Government to protect it. And Congress cannot exercise any more authority over property of that description than it may constitutionally exercise over property of any other kind.

5. The act of Congress, therefore, prohibiting a citizen of the United States from taking with him his slaves when he removes to the Territory in question to reside, is an exercise of authority over private property which is not warranted by the Constitution and the removal of the plaintiff, by his owner, to that Territory, gave him no title to freedom.

V.

1. The plaintiff himself acquired no title to freedom by being taken, by his owner, to Rock Island, in Illinois, and brought back to Missouri. This court has heretofore decided that the status or condition of a person of African descent depended on the laws of the State in which he resided.

2. It has been settled by the decisions of the highest court in Missouri, that, by the laws of that State, a slave does not become entitled to his freedom, where the owner takes him to reside in a State where slavery is not permitted, and afterwards brings him back to Missouri.

Conclusion. It follows that it is apparent upon the record that the court below erred in its judgment on the plea in abatement, and also erred in giving judgment for the defendant, when the exception shows that the plaintiff was not a citizen of the United States. And as the Circuit Court had no jurisdiction, either in the case stated in the plea in abatement, or in the one stated in the exception, its judgment in favor of the defendant is erroneous, and must be reversed.

THIS case was brought up, by writ of error, from the Circuit Court of the United States for the district of Missouri.

It was an action of trespass *vi et armis* instituted in the Circuit Court by Scott against Sandford.

Prior to the institution of the present suit, an action was brought by Scott for his freedom in the Circuit Court of St. Louis county, (State court,) where there was a verdict and judgment in his favor. On a writ of error to the Supreme Court of the State, the judgment below was reversed, and the case remanded to the Circuit Court, where it was continued to await the decision of the case now in question.

The declaration of Scott contained three counts: one, that Sandford had assaulted the plaintiff; one, that he had assaulted Harriet Scott, his wife; and one, that he had assaulted Eliza Scott and Lizzie Scott, his children.

Notes