may be just; and yet, without exemplary punishment, similar disorders may be excited by other ambitious and discontented characters. Punishments however ought to light on the principals" (ibid., XXIX, 171).

<sup>2</sup>The petition of the Norfolk merchants was sent to Governor Randolph (Randolph to

Virginia Delegates, 15 Mar. 1787, n. 1).

<sup>3</sup>The word list compiled by Benjamin Hawkins and sent to Washington by JM, 18 Mar. 1787.

## Vices of the Political System of the United States

EDITORIAL NOTE

Long before the deputies assembled at Philadelphia in May 1787, JM had begun mentally "to revolve the subject" to be discussed at the Federal Convention (JM to Washington, 16 Apr. 1787). No other delegate came to that historic meeting so well prepared as JM, ready to confront the complex problems of establishing an energetic national government based on republican principles. His many years of public service on both the state and continental level had provided IM with an unrivaled knowledge of American affairs. Yet what distinguished JM from his fellow delegates, apart from his superior intellectual gifts, was not so much his firsthand experience in public life - extensive though it was - as his diligent effort to apply to that experience a scholarly study of the principles of government. Blending "together the profound politician, with the Scholar," JM took the lead on nearly every great question at the convention and consistently came forward as "the best informed Man of any point in debate" (William Pierce, "Character Sketches of Delegates to the Federal Convention." in Farrand, Records of the Federal Convention, III, 94).

JM's intellectual preparation for the Federal Convention had begun at the College of New Jersey, where he imbibed the ideas and principles of the Scottish Enlightenment under the tutelage of Dr. Witherspoon. But not until 1786 did he undertake a systematic course of reading in political history with the apparent purpose of applying his learning to the problems besetting the American Confederation. The result was JM's Notes on Ancient and Modern Confederacies, prepared in the spring of 1786, many months before he knew there would be a convention at Philadelphia. In the spring of 1787 he followed this study with another memorandum, Vices of the Political System of the United States. In addition, his letters to Jefferson (19 Mar. 1787), Randolph (8 Apr. 1787), and Washington (16 Apr. 1787) contained "the first shoot in his thoughts of a plan of Federal Government" (Adair, ed., "James Madison's Autobiography," WMQ, 3d ser., II [1945], 202). These letters were the basis of those

resolutions submitted by Governor Randolph to the convention on 29 May 1787 which became known in history as the Virginia Plan. Indeed, many of the ideas and supporting facts that JM put forward in his speeches at Philadelphia, his numbers of *The Federalist*, and his speeches at the Virginia ratifying convention were but an extension and refinement of the research and insights embodied in the memorandums and letters he wrote before the Philadelphia meeting. The period between the spring of 1786 and the spring of 1787 was perhaps the most creative and productive year of JM's career as a political thinker.

Although (according to the docket on the Ms) JM wrote Vices of the Political System in April, he probably worked on it intermittently from the time he returned to Congress in February. He apparently left his observations unfinished, for there is a blank space opposite the last vice in his list. As the title suggests, this memorandum was a logical complement to JM's previous studies of ancient and modern confederacies, to each of which (excepting the Lycian Confederacy) he had appended a section entitled "Vices of the Constitution." The two memorandums are different in style and structure, however. The earlier work is a heavily annotated series of fragmentary and incomplete notes based on a distillation of ancient and modern history. The analysis of the American federal system has more the quality of a polished essay, in which JM blended together

personal experience and theory in masterful fashion.

Among the vices of the American political system, JM included the impotence of the Confederation government: its inability to collect requisitions and to prevent the states from encroaching on its authority, violating treaties, and violating the rights of each other; its lack of control over commerce; and in general its lack of coercive power. Yet the dominant theme of Vices of the Political System was not the structural defects of the Articles of Confederation; the emphasis was rather on the deficiencies and derelictions of the state governments. More than half the work was devoted to the "multiplicity," "mutability," and "injustice" of the laws of the states. "The evils issuing from these sources," JM remarked to Jefferson after the convention, "contributed more to that uneasiness which produced the Convention, and prepared the public mind for a general reform, than those which accrued to our national character and interest from the inadequacy of the Confederation to its immediate objects" (JM to Jefferson, 24 Oct. 1787, Boyd, Papers of Jefferson, XII, 276). JM's chief concern was the unrestricted power of majorities in state legislatures to pass laws that violated the rights of individuals and minorities. Thus the great task of reform in his view was both to strengthen the national government and to provide "justice" for private individuals (see Edward S. Corwin, "The Progress of Constitutional Theory between the Declaration of Independence and the Meeting of the Philadelphia Convention," AHR, XXX [1924-25], 512-13, 533-36).

It was JM's lasting contribution to the work of the Federal Convention to

base the argument for an invigorated national government on the greater security it would afford to private rights. He arrived at this conclusion in his discussion of the "Injustice of the laws of the States," the longest and most theoretical section of Vices of the Political System. Here he brought "into question the fundamental principle of republican Government, that the majority who rule in such Governments, are the safest Guardians both of public Good and of private rights." It was the inexorable tendency of majorities, he observed, to tyrannize over minorities. Yet this oppression, he added, was more likely to occur in a small political unit, such as a town or a state. On the other hand, the rigors of majority rule could be mitigated by extending the sphere of government to include a multitude of factions and interests that would constantly check each other. In this situation "a common interest or passion" would less easily be felt, and the "requisite combinations" less easily formed, than in a constricted geographical area. Logically, then, a republican government which would effectively protect minority rights could operate only over a large territory. These ideas, so "contrary to the prevailing Theory," remained only partly developed in Vices of the Political System; a full treatment would come in IM's letter to Jefferson of 24 Oct. 1787 and in numbers 10 and 51 of The Federalist (Boyd, Papers of Jefferson, XII, 276-79; The Federalist [Cooke ed.l. pp. 63-65, 351-53).

The problem of reform was thus reduced to a single question: how could the American system of government be transformed into one extended republic? The present system did not qualify, for it was merely a league of thirteen independent republics, in which the vicious effects of majority factionalism could not be effectively controlled. In the system he proposed, sovereignty would be securely lodged in the general government, which would operate over individuals instead of through the intermediary states. The general government would have additional positive powers, including the regulation of trade and the power to tax both imports and exports. A government of expanded powers would have to be divided into separate departments: a national executive and judiciary, as well as a national legislature. Moreover, the principle of representation would have to be changed so that a vote of Delaware or Rhode Island would not have "the same effect and value" as one from Virginia or Massachusetts (JM to Washington, 16 Apr. 1787). Ratification of the new instrument of government by the people would establish an authority "clearly paramount" to that of the state legislatures (IM to Jefferson, 19 Mar. 1787).

Of all the changes JM proposed in his sketch of a new system of government none was of greater significance than the power to be given the central government to negative state laws "in all cases whatsoever," the prerogative held by the king of Great Britain over the legislation of the former colonies (JM to Washington, 16 Apr. 1787). This federal veto was to be the foundation of the new system, the means by which thirteen independent states would become one indivisible sovereignty. JM regarded

this proposition as "the least possible abridgement of the State Soveriegnties," without which all the positive powers granted on paper would be "unavailing" (JM to Randolph, 8 Apr. 1787). The absence of such a provision, he later told Jefferson, "seems to have been mortal to the antient confederacies, and to be the disease of the modern." JM's historical studies, confirmed by his own experience, had convinced him that the tendency of federal systems was "rather to anarchy among the members, than to tyranny in the head" (The Federalist No. 18 [Cooke ed.], p. 117). From his perspective in 1787 this problem far outweighed the problem of controlling the central government. Yet IM consistently maintained that the purpose of the negative was not simply to reverse the trend toward anarchy. By establishing supremacy in a general government that would operate over an extended sphere, the negative would also have the "happy effect" of providing greater security for private and minority rights. The negative power would fulfill the "great desideratum" of government by acting as a disinterested & dispassionate umpire in disputes between different passions & interests in the State" (IM to Washington, 16 Apr. 1787). Convinced that a federal power to disallow state laws would serve the end of liberty and justice, JM was a persistent but unsuccessful advocate of such a control at the Federal Convention.

[April-June]

## April. 1787

Vices of the Political system of the U. States

- 1. Failure of the States to comply with the Constitutional requisitions.
- 2. Encroachments by the States on the federal authority.

Observations by J. M. (a copy taken by permission by Danl. Carroll & sent to Chs Carroll of Carrollton)<sup>1</sup>

- 1. This evil has been so fully experienced both during the war and since the peace, results so naturally from the number and independent authority of the States and has been so uniformly examplified in every similar Confederacy, that it may be considered as not less radically and permanently inherent in, than it is fatal to the object of, the present System.
- 2. Examples of this are numerous and repetitions may be foreseen in almost every case where any favorite object of a State shall present a temptation. Among these examples are the wars and Treaties of Georgia with the Indians—The unlicensed compacts between Virginia and

3. Violations of the law of nations and of treaties.

4. Trespasses of the States on the rights of each other. Maryland, and between Pena. & N. Jersey—the troops raised and to be kept up by Massts.<sup>2</sup>

3. From the number of Legislatures, the sphere of life from which most of their members are taken, and the circumstances under which their legislative business is carried on, irregularities of this kind must frequently happen. Accordingly not a year has passed without instances of them in some one or other of the States. The Treaty of peace—the treaty with France—the treaty with Holland have each been violated. [See the complaints to Congress on these subjects]. The causes of these irregularities must necessarily produce frequent violations of the law of nations in other respects.

As yet foreign powers have not been rigorous in animadverting on us. This moderation however cannot be mistaken for a permanent partiality to our faults, or a permanent security agst. those disputes with other nations, which being among the greatest of public calamities, it ought to be least in the power of any part of the Community to bring on the whole.

4. These are alarming symptoms, and may be daily apprehended as we are admonished by daily experience. See the law of Virginia restricting foreign vessels to certain ports—of Maryland in favor of vessels belonging to her own citizens—of N. York in favor of the same.

Paper money, instalments of debts, occlusion of Courts, making property a legal tender, may likewise be deemed aggressions on the rights of other States. As the Citizens of every State aggregately taken stand more or less in the relation of Creditors or debtors, to the Citizens of every other States, Acts of the debtor State in favor of debtors, affect the Creditor State, in the same manner, as they do its own citizens who are relatively creditors towards other citizens. This remark may be extended to foreign nations. If the exclusive regulation of the value and alloy of

coin was properly delegated to the federal authority, the policy of it equally requires a controul on the States in the cases above mentioned. It must have been meant 1. to preserve uniformity in the circulating medium throughout the nation. 2. to prevent those frauds on the citizens of other States, and the subjects of foreign powers, which might disturb the tranquility at home, or involve the Union in foreign contests.

The practice of many States in restricting the commercial intercourse with other States, and putting their productions and manufactures on the same footing with those of foreign nations, though not contrary to the federal articles, is certainly adverse to the spirit of the Union, and tends to beget retaliating regulations, not less expensive & vexatious in themselves, than they are destructive of the general harmony.

5. This defect is strongly illustrated in the state of our commercial affairs. How much has the national dignity, interest, and revenue suffered from this cause? Instances of inferior moment are the want of uniformity in the laws concerning naturalization & literary property; of provision for national seminaries, for grants of incorporation for national purposes, for canals and other works of general utility, wch. may at present be defeated by the perverseness of particular States whose concurrence is necessary.

6. The confederation is silent on this point and therefore by the second article the hands of the federal authority are tied. According to Republican Theory, Right and power being both vested in the majority, are held to be synonimous. According to fact and experience a minority may in an appeal to force, be an overmatch for the majority. I. If the minority happen to include all such as possess the skill and habits of military life, & such as possess the great pecuniary resources, one third only may conquer

5. want of concert in matters where common interest requires it.

6. want of Guaranty to the States of their Constitutions & laws against internal violence. 7. want of sanction to the laws, and of coercion in the Government of the Confederacy. the remaining two thirds. 2. One third of those who participate in the choice of the rulers, may be rendered a majority by the accession of those whose poverty excludes them from a right of suffrage, and who for obvious reasons will be more likely to join the standard of sedition than that of the established Government. 3. Where slavery exists the republican Theory becomes still more fallacious.

7. A sanction is essential to the idea of law, as coercion is to that of Government. The federal system being destitute of both, wants the great vital principles of a Political Cons[ti]tution.6 Under the form of such a Constitution, it is in fact nothing more than a treaty of amity of commerce and of alliance, between so many independent and Sovereign States. From what cause could so fatal an omission have happened in the articles of Confederation? from a mistaken confidence that the justice, the good faith, the honor, the sound policy, of the several legislative assemblies would render superfluous any appeal to the ordinary motives by which the laws secure the obedience of individuals: a confidence which does honor to the enthusiastic virtue of the compilers, as much as the inexperience of the crisis apologizes for their errors. The time which has since elapsed has had the double effect, of increasing the light and tempering the warmth, with which the arduous work may be revised. It is no longer doubted that a unanimous and punctual obedience of 13 independent bodies, to the acts of the federal Government, ought not be calculated on. Even during the war, when external danger supplied in some degree the defect of legal & coercive sanctions, how imperfectly did the States fulfil their obligations to the Union? In time of peace, we see already what is to be expected. How indeed could it be otherwise? In the first place, Every general act of the Union

must necessarily bear unequally hard on some particular member or members of it. Secondly the partiality of the members to their own interests and rights, a partiality which will be fostered by the Courtiers of popularity, will naturally exaggerate the inequality where it exists, and even suspect it where it has no existence. Thirdly a distrust of the voluntary compliance of each other may prevent the compliance of any, although it should be the latent disposition of all. Here are causes & pretexts which will never fail to render federal measures abortive. If the laws of the States, were merely recommendatory to their citizens, or if they were to be rejudged by County authorities, what security, what probability would exist, that they would be carried into execution? Is the security or probability greater in favor of the acts of Congs. which depending for their execution on the will of the state legislatures, wch. are tho' nominally authoritative, in fact recommendatory only.

- 8. In some of the States the Confederation is recognized by, and forms a part of the constitution. In others however it has received no other sanction than that of the Legislative authority. From this defect two evils result: 7 1. Whenever a law of a State happens to be repugnant to an act of Congress, particularly when the latter is of posterior date to the former, it will be at least questionable whether the latter must not prevail; 8 and as the question must be decided by the Tribunals of the State, they will be most likely to lean on the side of the State.
- 2. As far as the Union of the States is to be regarded as a league of sovereign powers, and not as a political Constitution by virtue of which they are become one sovereign power, so far it seems to follow from the doctrine of compacts, that a breach of any of the articles of the con-

8. Want of ratification by the people of the articles of Confederation.

Multiplicity of laws in the several States.

10. mutability of the laws of the States.

federation by any of the parties to it, absolves the other parties from their respective obligations, and gives them a right if they chuse to exert it, of dissolving the Union altogether.

9. In developing the evils which viciate the political system of the U.S. it is proper to include those which are found within the States individually, as well as those which directly affect the States collectively, since the former class have an indirect influence on the general malady and must not be overlooked in forming a compleat remedy. Among the evils then of our situation may well be ranked the multiplicity of laws from which no State is exempt. As far as laws are necessary, to mark with precision the duties of those who are to obey them, and to take from those who are to administer them a discretion, which might be abused, their number is the price of liberty. As far as the laws exceed this limit, they are a nusance: a nusance of the most pestilent kind. Try the Codes of the several States by this test, and what a luxuriancy of legislation do they present. The short period of independency has filled as many pages as the century which preceded it. Every year, almost every session, adds a new volume. This may be the effect in part, but it can only be in part, of the situation in which the revolution has placed us. A review of the several codes will shew that every necessary and useful part of the least voluminous of them might be compressed into one tenth of the compass, and at the same time be rendered tenfold as perspicuous.

10. This evil is intimately connected with the former yet deserves a distinct notice as it emphatically denotes a vicious legislation. We daily see laws repealed or superseded, before any trial can have been made of their merits; and even before a knowledge of them can have reached the remoter districts within which they were to

 Injustice of the laws of States. operate. In the regulations of trade this instability becomes a snare not only to our citizens but to foreigners also.

11. If the multiplicity and mutability of laws prove a want of wisdom, their injustice betrays a defect still more alarming: more alarming not merely because it is a greater evil in itself, but because it brings more into question the fundamental principle of republican Government, that the majority who rule in such Governments, are the safest Guardians both of public Good and of private rights. To what causes is this evil to be ascribed?

These causes lie 1. in the Representative bodies.

2. in the people themselves. 1. Representative appointments are sought from 3 motives. 1. ambition 2. personal interest. 3. public good. Unhappily the two first are proved by experience to be most prevalent. Hence the candidates who feel them, particularly, the second, are most industrious, and most successful in pursuing their object: and forming often a majority in the legislative Councils, with interested views, contrary to the interest, and views, of their Constituents, join in a perfidious sacrifice of the latter to the former. A succeeding election it might be supposed, would displace the offenders, and repair the mischief. But how easily are base and selfish measures, masked by pretexts of public good and apparent expediency? How frequently will a repetition of the same arts and industry which succeeded in the first instance, again prevail on the unwary to misplace their confidence?

How frequently too will the honest but unenligh[t]ened representative be the dupe of a favorite leader, veiling his selfish views under the professions of public good, and varnishing his sophistical arguments with the glowing colours of popular eloquence?

2. A still more fatal if not more frequent cause lies among the people themselves. All civilized societies are divided into different interests and factions, as they happen to be creditors or debtors-Rich or poor-husbandmen. chants or manufacturers - members of different religious sects-followers of different political leaders - inhabitants of different districts - owners of different kinds of property &c &c. In republican Government the majority however composed, ultimately give the law. Whenever therefore an apparent interest or common passion unites a majority what is to restrain them from unjust violations of the rights and interests of the minority, or of individuals? Three motives only 1. a prudent regard to their own good as involved in the general and permanent good of the Community. This consideration although of decisive weight in itself, is found by experience to be too often unheeded. It is too often forgotten, by nations as well as by individuals that honesty is the best policy. 2dly, respect for character. However strong this motive may be in individuals, it is considered as very insufficient to restrain them from injustice. In a multitude its efficacy is diminished in proportion to the number which is to share the praise or the blame. Besides, as it has reference to public opinion. which within a particular Society, is the opinion of the majority, the standard is fixed by those whose conduct is to be measured by it. The public opinion without the Society, will be little respected by the people at large of any Country. Individuals of extended views, and of national pride, may bring the public proceedings to this standard, but the example will never be followed by the multitude. Is it to be imagined that an ordinary citizen or even an assembly-man of R. Island in estimating the policy of paper money, ever considered or cared in what light the measure would be viewed in France or

Holland: or even in Massts or Connect.? It was a sufficient temptation to both that it was for their interest: it was a sufficient sanction to the latter that it was popular in the State: to the former that it was so in the neighbourhood. 3dly. will Religion the only remaining motive be a sufficient restraint? It is not pretended to be such on men individually considered. Will its effect be greater on them considered in an aggregate view? quite the reverse. The conduct of every popular assembly acting on oath, the strongest of religious Ties, proves that individuals join without remorse in acts, against which their consciences would revolt if proposed to them under the like sanction, separately in their closets. When indeed Religion is kindled into enthusiasm, its force like that of other passions, is increased by the sympathy of a multitude. But enthusiasm is only a temporary state of religion, and while it lasts will hardly be seen with pleasure at the helm of Government. Besides as religion in its coolest state, is not infallible, it may become a motive to oppression as well as a restraint from injustice. Place three individuals in a situation wherein the interest of each depends on the voice of the others, and give to two of them an interest opposed to the rights of the third? Will the latter be secure? The prudence of every man would shun the danger. The rules & forms of justice suppose & guard against it. Will two thousand in a like situation be less likely to encroach on the rights of one thousand? The contrary is witnessed by the notorious factions & oppressions which take place in corporate towns limited as the opportunities are, and in little republics when uncontrouled by apprehensions of external danger. If an enlargement of the sphere is found to lessen the insecurity of private rights, it is not because the impulse of a common interest or passion is less predominant in this case

with the majority; but because a common interest or passion is less apt to be felt and the requisite combinations less easy to be formed by a great than by a small number. The Society becomes broken into a greater variety<sup>9</sup> of interests, of pursuits, of passions, which check each other, whilst those who may feel a common sentiment have less opportunity of communication and concert. It may be inferred that the inconveniences of popular States contrary to the prevailing Theory, are in proportion not to the extent, but to the narrowness of their limits.<sup>10</sup>

The great desideratum in Government is such a modification of the Sovereignty11 as will render it sufficiently neutral between the different interests and factions, to controul one part of the Society from invading the rights of another, and at the same time sufficiently controuled itself, from setting up an interest adverse to that of the whole Society. In absolute Monarchies, the prince is sufficiently, neutral towards his subjects, but frequently sacrifices their happiness to his ambition or his avarice. In small Republics, the sovereign will is sufficiently controuled from such a Sacrifice of the entire Society, but is not sufficiently neutral towards the parts composing it. As a limited Monarchy tempers the evils of an absolute one; so an extensive Republic meliorates the administration of a small Republic.

An auxiliary desideratum for the melioration of the Republican form is such a process of elections as will most certainly extract from the mass of the Society the purest and noblest characters which it contains; such as will at once feel most strongly the proper motives to pursue the end of their appointment, and be most capable to devise the proper means of attaining it.

12. Impotence of the laws of the States<sup>12</sup>

Ms (DLC): Tr (NN). Ms in JM's hand. Tr in hand of Joel Barlow, "copied at Monticello—25 Sepr. 1808." The editors have not noted JM's minor stylistic alterations, which appear to be contemporaneous with the time of writing. Several underlinings and braces in the Ms added at a later time by one or more unknown persons have not been noted here.

<sup>1</sup>JM added "by J.M." and the parenthetical note at a later time. Daniel Carroll attended the Federal Convention as a delegate from Maryland and may have made his copy at that time.

<sup>2</sup>[M placed a fistnote property in the left margin opposite this sentence.

<sup>3</sup>JM's brackets. JM placed a fistnote \* in the left margin opposite this sentence.

\*Each state under Article II of the Articles of Confederation retained "its sovereignty, freedom and independence, and every power, jurisdiction and right . . . not expressly delegated to the United States, in Congress Assembled." Alarmed by Shays's uprising and rumors of monarchy, JM and his colleagues at Philadelphia were careful to include a "guarantee" clause (Art. IV, Sec. 4) in the new Constitution. See William M. Wiecek, The Guarantee Clause of the U.S. Constitution (Ithaca, 1972), pp. 11-62.

<sup>5</sup>JM placed a fistnote in the left margin opposite this sentence. <sup>6</sup>JM placed a fistnote in the left margin opposite this sentence. <sup>7</sup>JM placed a fistnote in the left margin opposite this sentence.

\*Someone other than JM tampered with this sentence by interlining "former" where JM wrote "latter" and "latter" where JM wrote "former." Barlow's copy follows JM's wording, as does the version of Vices in Madison, *Letters* (Cong. ed.), I, 323. Hunt (Madison, *Writings*, II, 365) put the interlineations in brackets.

"JM deleted "of sections" at this point.

10 JM would expand his theory of the extended republic in his letter to Jefferson of 24 Oct. 1787 and in *The Federalist*, numbers 10 and 51 ([Cooke ed.], pp. 56-65, 347-53). For David Hume's influence on JM in formulating this theory, see Douglass Adair, "That Politics May Be Reduced to a Science': David Hume, James Madison, and the Tenth *Federalist*," *Huntington Library Quarterly*, XX (1957), 343-60. It is perhaps indicative of JM's optimism that he was able to proclaim this theory, in which he tended to minimize the dangers of "interested" majorities forming in an enlarged sphere of government, at the height of the sectional controversy over the navigation of the Mississippi River. Indeed, one of his earliest philosophical reflections on the baneful effects of strict majority rule arose precisely over this issue (see JM to Monroe, 5 Oct. 1786). To be sure, no action had been taken under Jay's revised instructions, and by April 1787 JM was hopeful that the Mississippi issue was dormant. As the debate over the Constitution would show, many of JM's fellow Southerners did not share his complacency. Nor did a later generation of Southerners, feeling themselves an oppressed minority, find much comfort in JM's theory.

11At a later time someone other than JM interlined "[governing power]" at this point.
12Barlow wrote on his copy, "That here finish Mr. Madison's observations, which I regret."
Earlier printed versions of this memorandum give a misleading impression of completeness by

excluding the last "vice" in IM's list, for which he prepared no commentary.

## To James Madison, Sr.

N. York April 1. 1787.

HOND. SIR

I have received your favor of the 17th. Feby. and have made enquiry as to the Andover Works, not indeed thro' the channel you suggested, but through one still more direct & authentic. I find that the works are not pursued with such alacrity at present as to promise the supply you wish,