

Chapter VIII: *Sovereignty and Union*

tered institutions. The implications of such state activity, in an economy in which financial transactions were increasingly crossing state lines, would be considerable. The fact that the House of Representatives debated whether Congress should repeal the Bank's charter at the same time *McCulloch* was being argued demonstrates how pressing and unsettled the issue of banking policy then was.²⁰⁴

Marshall began his discussion of both issues in *McCulloch* with general statements of sovereignty theory. In considering whether Congress could constitutionally establish a national bank he noted that Jones and Martin, for Maryland, had argued that "the constitution was formed and adopted, not by the people of the United States at large, but by the people of the respective states," and was therefore "a compact between the states" in which the states "reserved . . . all the powers [they had] not expressly relinquished."²⁰⁵ Marshall was not two pages into his opinion for the Court in *McCulloch* before he attacked that argument. "Counsel for the State of Maryland," he said,

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.²⁰⁶

Marshall devoted the next twenty pages of his opinion to refuting that proposition. The refutation involved four steps, themselves characteristic of Marshallian logic.²⁰⁷ Step one was Marshall's claim that the process by which the Constitution had been ratified, and the language in its Preamble, revealed the nature of the federal government. In the process of ratification sovereignty had not been transferred from the states to the Union, but to the people, and then to the Union. "It was deemed necessary," Marshall claimed, "to change this alliance into an effective government" that both "possess[ed] great and sovereign powers, and act[ed] directly on the people," and "deriv[ed] its powers directly from [the people]."²⁰⁸ Thus the "government of the Union" was "emphatically, and truly, a government of the people." It was also a government of "enumerated powers": it could "exercise only the powers granted to it" by the people. But though limited in its powers, the government of

²⁰⁴ For the debates see *Register of Debates*, 15th Cong., 2d Sess., Feb. 18, 22, 23, 24, 1819.

²⁰⁵ 4 Wheat. at 363, 372.

²⁰⁶ *Ibid.*, 402.

²⁰⁷ See the discussion of Marshall's rhetoric in G. White, *The American Judicial Tradition* (1976), 25-32.

²⁰⁸ 4 Wheat. at 404.