

THE MARSHALL COURT AND CULTURAL CHANGE, 1815-1835

category of cases are *McCulloch v. Maryland*,⁵ upholding congressional power to establish a federal bank and declaring that bank immune from state taxation, and *Gibbons v. Ogden*,⁶ the Court's first attempt to use the Constitution's Commerce Clause to restrict state economic regulation. Also included are two Commerce Clause cases, *Brown v. Maryland*⁷ and *Willson v. Black-bird Creek Marsh Co.*,⁸ that extended and qualified *Gibbons*; *Craig v. Missouri*,⁹ the first construction of the constitutional clause limiting the power of the states to issue bills of credit; and *Barron v. Mayor of Baltimore*,¹⁰ raising the question whether the provisions of the Bill of Rights, as interpreted by the federal judiciary, were themselves limits on state sovereignty.

These cases have conventionally been recognized as decisions that helped shape the tone and identity of the Marshall Court. But the definition of federal sovereignty collectively offered by the cases has often been loosely characterized and sometimes patently misunderstood. The cases have often been identified as decisions promoting "nationalism," but very few of them facilitated the development of national institutions or sustained regulatory policies instituted by the national government. Many of the cases did not so much promote federal sovereignty as restrict state sovereignty. They prevented the states from treating the decisions of their courts or legislatures as authoritative and incapable of federal supervision; they limited the power of the states to exclude areas of American life from the control of the federal judiciary; they restricted the power of the states to regulate various kinds of economic activity; and they curtailed the states from taxing federal institutions located within their borders. The "nationalism" inherent in those decisions was not a nationalism in the modern sense of support for affirmative plenary federal regulatory power; the Court's posture can more accurately be described as a critique of reserved state sovereignty.

But there was an affirmative dimension to the Marshall Court's sovereignty cases, although the term "nationalism" captures that dimension imperfectly. By restricting state sovereignty in areas where it clashed with the sovereignty of the federal government, the cases implicitly revived and strengthened the "political axiom," identified in *The Federalist* and in Tucker's edition of Blackstone, that federal judicial power was coterminous with federal legislative power.¹¹ Indeed, the theory of constitutional interpretation promulgated in some of the earlier cases appeared, to contemporary critics, to reinforce the boldest claims of consolidationists by combining a broad interpretation of the Article III

⁵ 4 Wheat. 316 (1819).

⁶ 9 Wheat. 1 (1824).

⁷ 12 Wheat. 419 (1827).

⁸ 2 Pet. 245 (1829).

⁹ 4 Pet. 410 (1830).

¹⁰ 7 Pet. 243 (1823).

¹¹ See the discussion in Chapter II, at pp. 122-27.