argument he reiterated that "the constitution was ordained and established by the people of the United States for themselves, for their own government, and not for the government of the individual states."[402] This was another version of the now-familiar Union theory of sovereignty he had repeatedly advanced: the crucial relationship of sovereign entities forged by the Constitution was between the Union and the people, with state sovereignty not prominent in the balance. Since a general government was being created by the Constitution, and the people were doing the creating, "the people of the United States framed such a government . . . as they supposed . . . best calculated to promote their interests." Thus those powers and limitations conferred on the general government were "naturally" and "necessarily" applicable to the government created by the instrument unless the states were expressly singled out.[403]

The focus of sovereign relationships in the Constitution thus helped explain its language. Three kinds of limitations on power appeared in the Constitution: express limitations on the federal government, express limitations on the states, and limitations framed in general terms. This last class of limitations, Marshall argued, of which the Takings Clause was one, should be read as applying only against the federal government. As an example he contrasted Article I, Section 9's statement that "No Bill of Attainder or ex post facto law shall be passed" with the statement in Article I, Section 10 that "No state shall . . . pass any Bill of Attainder [or] ex post facto law." The second clause expressly limited the states; it would have been unnecessary if the first clause, a general limitation, was intended to apply to the states.[404]

A difficulty with this argument was that all the specific limitations made in the Bill of Rights were limitations on the federal government. Congress was singled out in the First Amendment as prohibited from making laws establishing religion or abridging speech; the federal courts were prohibited by the Seventh Amendment from re-examining "fact[s] tried by a jury . . . otherwise . . . than according to the rules of the common law." This would suggest that the general limitations of the Bill of Rights applied against both the states and the federal government, and one contemporary commentator on the Constitution came to this conclusion before *Barron* was decided. "[T]he first amendment," William Rawle wrote in 1829, "expressly refers to the powers of Congress alone, but some of those which follow are to be more generally construed, and considered as applying to the state legislatures as well as that of the Union."[405]

[402] 7 Pet. at 243.
[403] Ibid., 248.
[404] Ibid.
[405] W. Rawle, *A View of the Constitution of the United States of America* (2d ed., 1829), 124.

To aid in his construction of general limitations Marshall turned to his third argument, that based on history. He noted that "had the people of the several states . . . required additional safeguards to liberty from the apprehended encroachments of their particular governments,"[406] they could have simply organized state conventions rather than resorting to the "unwieldy and cumbrous machinery" of the constitutional amendments of the Bill of Rights. Moreover, Marshall claimed, the "serious fears" that resulted in "amendments to guard against the abuse of power" recommended in almost every convention in which the Constitution was adopted were fears of "the encroachments of the general government—not against those of the local governments."[407] This focus of opposition to the Constitution was "universally understood" and "part of the history of the day."[408]

What little evidence that has survived on the origins of the Bill of Rights suggests that Marshall was correct. The debates over amending the Constitution in Congress indicate that the Bill of Rights was originally to be inserted as an additional set of limitations included in Article 1, Section 9, all of whose limitations are either general or specifically directed against Congress. Limitations on the states were also proposed, and they were to be inserted in Article I, Section 10.[409] The eventual insertion of the Bill of Rights as amendments was done as a matter of convenience and intelligibility rather than because of substantive considerations. Moreover, in the ratifying conventions of two states, Massachusetts and New Hampshire, advocates for amending the Constitution specifically expressed concern about the encroachment of the federal government on individual liberties.[410]

Finally, there is some evidence that Rawle's construction of the general language in the Bill of Rights was not widely shared, at least with respect to the Takings Clause. In *Dartmouth College,* we have seen, Webster and his co-counsel were scrambling for any additional constitutional or extraconstitutional argument they could make, and they recognized early on that the New Hampshire legislature's enforced changes in Dartmouth's governing procedures amounted to an uncompensated taking. Had they thought that the Fifth Amendment applied to the states it seems likely that they would have advanced that argument. Ultimately *Barron* presented a question of "great importance, but not of much difficulty" for the Marshall Court; even Johnson, who had intimated in *Houston* that the double jeopardy provision of the Sixth Amendment ap-

[406] 7 Pet. at 249.
[407] Ibid., 250.
[408] Ibid.
[409] See *Annals of Congress* (J. Gales, ed., 1789), I, 451–52.
[410] See *Documentary History of the Constitution of the United States of America* (5 vols., 1894), II, 93–96, 141–44.