

plied against the states,⁴¹¹ joined *Barron* and subsequently described it as having "settled" the question.⁴¹²

One might be tempted to suggest that Marshall was sacrificing a particular outcome in *Barron* for the sake of retaining the integrity of a general theory. His argument that the general limitations on governmental power found in the Constitution applied against the federal government perfectly complemented the central premise of his sovereignty theory, that the crucial relationship in the formation of the Constitution was between the people and the Union. But the *Barron* opinion bears none of the elaborate reasoning characteristic of Marshall when he conceived himself to be beset by a truly difficult question of constitutional interpretation. On the contrary, his opinion in *Barron* was short, straightforward, and apparently free from strain. He simply read sections of the Constitution, and by that reading the "plain and marked line of discrimination it imposes on the powers of the general government, and on those of the states" was revealed. He was benefited in that reading by the knowledge that state constitutions had been drafted at about the same time as the federal version, and provided a much less cumbersome method of restricting the powers of state governments; and that "it is universally understood,"⁴¹³ that the "apprehended encroachments" perceived as "dangerous to liberty" by the generation of the Framers were those "of the general government."⁴¹⁴

Barron was in this sense another of Marshall's atmospheric opinions, helping perpetuate a vivid image of the period in which the Constitution was framed. In Marshall's portrait, the time of the framing was one of chaotic economic conditions, with insecure currencies and lack of confidence; of strained relationships among the members of the league formed by the Articles of Confederation; of an ineffectual national government, lacking power to protect itself against foreign enemies or to raise revenue; and of political unrest engendered by demagogues in the state legislatures. Beset by these difficulties, the American people resolved to create a general government, representing a Union of the states, and to give it sovereign powers, once held by those states, so that it might serve as a bulwark against the evils of the times. The Constitution was the document in which that resolution was made manifest. Every effort to depart from the sovereign relationships embodied in the Constitution, or from its central purposes, or from its establishment of a Union represented cultural disintegration, a return to the chaos of the pre-framing period. An image of chaos, and the ever-present potential for decay and dissolution, were the spectres against which Marshall's theory of sover-

eignty was erected. In *Barron* those spectres reappeared, even though, for once, state sovereign powers were not adversely affected.



In light of the ongoing sovereignty debate between the Marshall Court and its critics that has been traced in this chapter, the comments from contemporaries with which the chapter began should be more intelligible. In Calhoun's toast we find the most prominent defender of compact theory nonetheless conceding that Union was next to liberty in significance; in Van Buren's toast we find a renewed sense, reflecting the political realignments of the 1820s, that sovereignty issues would increasingly represent political compromises; in Jackson's we find the symbol of those political realignments nonetheless committed to the Union's preservation. Sovereignty controversies lay ahead, most significantly those of nullification and the Jackson administration's temporary defiance of the Court in the Cherokee cases, which are reviewed in a later chapter. But the idea that the Union, whether a creation of the people or a compact among the states, needed to be preserved had become part of American political consciousness.

One would not be surprised, in light of the Court's sovereignty decisions previously reviewed, to find that Story's *Commentaries on the Constitution*, whose first volume ended with the "hope" that the Constitution "may . . . be perpetual"⁴¹⁵ and whose last volume concluded with the warning that "the national constitution is our last and our only security,"⁴¹⁶ had taken pains not only to discredit compact theory, but to link both the Union and the Constitution to a general justification for federal judicial supremacy, summoning up the coextensive power axiom in the process.⁴¹⁷ With Story's treatise the strategy of the Union theory of sovereignty, as developed by federal judges, was clearly revealed: the Union, the Constitution, coextensive power, the Court's role as the final arbiter of constitutional questions, and the will of the people were all integrated. Preserving the Union meant preserving all of those entities in their pure form, as evidenced by the "two great sources" of Story's *Commentaries*, the *Federalist* essays and "the extraordinary Judgments of Mr. Chief Justice Marshall upon constitutional law."⁴¹⁸

One can fairly call Story's strategy "nationalist": it envisaged the Supreme Court simultaneously extending its own jurisdiction and the plenary powers of Congress, constantly displacing state sovereignty with federal sovereignty. But the promulgation of Story's theory in his *Commentaries* did not mean that his vision had been put into practice. The political realignment that swept the Jackson administration into office,

⁴¹¹ See 5 Wheat. at 34.

⁴¹² *Livingston v. Moore*, 7 Pet. 469, 551-52 (1833).

⁴¹³ 7 Pet. at 150.

⁴¹⁴ *Ibid.*

⁴¹⁵ J. Story, *Constitution*, I, 494.

⁴¹⁶ *Ibid.*, III, 759.

⁴¹⁷ *Ibid.*, I, 361.

⁴¹⁸ *Ibid.*, I, v.