

ber of the community any apprehension that there are those among his countrymen who wish to deprive them of the liberty for which they valiantly fought and honorably bled."<sup>41</sup>

Throughout that summer of 1789 Madison and a congressional committee of ten others hammered out the provisions that would become the Bill of Rights. If one wonders whether Madison intended for those provisions to apply to the states, and therefore Barron's wharf, one need only look at a draft of one of his amendments: "No state shall violate the equal right of conscience, freedom of press, or trial by jury in criminal cases; because it is proper that every government should be disarmed of powers which treat upon those particular rights."<sup>42</sup> In proposing this amendment, Madison said that he realized that some of the state constitutions provided for these protections but he thought the "double security" wise because state governments were "as liable to attack these invaluable privileges as the General Government is and therefore ought to be as cautiously guarded against."<sup>43</sup> Obviously, then, Madison thought that the other proposed amendments that became the Bill of Rights did *not* apply to the states, because he spelled out a portion of their contents again in a separate amendment for the states.

Late in the day on August 17, 1789, Madison's amendment giving protections against states was put before the 11-member committee. Only one member, Representative Tucker, spoke against it, arguing that it was wiser "to leave the State Governments to themselves, and not to interfere with them more than we already do; and that is thought by many to be rather too much."<sup>44</sup> Tucker's sentiments did not convince his fellow committeemen; the amendment passed the committee and then the entire House of Representatives as well. It was in the Senate and the Conference Committee that the measure regarding the states was dropped.<sup>45</sup>

### MARSHALL'S DECISION ON BARRON'S WHARF

All this constitutional history was relevant to Barron's case, the first test of whether those amendments applied to the states. So it was with "great importance, but with not much difficulty"<sup>46</sup> that Chief Justice Marshall announced that the Fifth Amendment was not binding on the states. Barron and his wharf could get no help from the Bill of Rights. His voice often growing feeble, Marshall explained his reasoning:

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. Each state established a constitution for itself, and, in that constitution, provided such limitations and restrictions on the powers of its particular government as its judgment dictated. . . . [The Bill of Rights and the provisions of the Constitution] are limitations of power granted in the instrument itself; not of distinct governments, framed by different persons and for different purposes.

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