

CHAPTER THREE
THE THIRD AMENDMENT
BECOMES THE FIRST
ADOPTING THE FIRST AMENDMENT

It was September 1789 and Congress had just completed its work on the Bill of Rights. The first amendment dealt with the number of representatives the states could send to Congress, the second limited Congress' ability to vote on its own compensation, and the third guaranteed religious freedom. That's right. The religion clauses were in the third amendment.

So how did the third become the first?

The story begins two years earlier. The delegates to the Constitutional Convention had been meeting in Philadelphia since May, and by September 12 they had almost completed their work. The Constitution they drafted was a carefully crafted compromise that succeeded so well it is still virtually intact over two centuries later. But it had very little to say about religious freedom.¹

After a long summer spent hammering out the details of a new government, the delegates were finally getting ready to go home to their families. Then, with the Constitution almost completed, George Mason of Virginia persuaded Elbridge Gerry of Massachusetts to move to form a committee to prepare a bill of rights, and Mason seconded Gerry's motion. They could not even get the delegates from their own states to support them, and the motion was defeated.

The records do not show why the Convention defeated Gerry's motion, but Robert Sherman's response provides a clue.

Sherman, who was from Connecticut, argued that a bill of rights was unnecessary because “The State Declarations of Rights are not repealed by this Constitution; and being in force are sufficient.” Two days later, Sherman had a similar response to Gerry’s motion to add a Constitutional provision regarding the freedom of the press. According to Sherman, “It is unnecessary—The power of Congress does not extend to the Press.” That motion was also defeated.²

Based on Sherman’s comments, the delegates may have seen no need for a bill of rights. Or they may simply have been too tired and too homesick to consider matters proposed at the eleventh hour.

The delegates completed their work on September 17, 1787. Thirty of the fifty-five delegates signed the Constitution, with Mason’s and Gerry’s signatures among the missing. Then the Constitution was sent to the states for ratification without a bill of rights.

Mason left the convention angry and determined to oppose the proposed Constitution. As Madison described in an October 24, 1787 letter to Thomas Jefferson:

Col. Mason left Philada. in an exceedingly ill humour indeed. A number of little circumstances arising in part from the impatience which prevailed towards the close of the business conspired to whet his acrimony. He returned to Virginia with a fixed disposition to prevent the adoption of the plan if possible. He considers the want of a Bill of Rights as a fatal objection.³



The United States Constitution arose like a phoenix from the ashes of a failed Confederation. Although the Articles of Confederation loosely bound the states together for international

purposes, the Confederation had no power to tax, to enforce its own treaties, or to make the states comply with their obligations under the Articles. The Confederation also had no power to prevent one state from discriminating against citizens of another state, and that discouraged commerce among them.

Madison and the other Federalists wanted a central government with the powers necessary to give it clout in its international dealings and to regulate commerce between the states. The Antifederalists, on the other hand, wanted a weak central government that was unable to interfere with the states' actions. They seemed to reverse their arguments when it came to a bill of rights, however.

The Federalists claimed that a declaration of rights was unnecessary because the Constitution did not give the federal government any authority to interfere with individual rights. Some Federalists even claimed that such a declaration was dangerous because it could expand the powers of the federal government by implying that the government had that authority. The Federalists had successfully fought for a strong central government, but now they resisted a bill of rights by claiming that the new government would be too weak to need one.

The Antifederalists, on the other hand, argued that a constitution that didn't protect individual liberties was fatally flawed. Since they did not get the weak government they wanted, they opposed the Constitution because it did not contain a bill of rights.

Jefferson was in Paris as Ambassador to France when the Constitution and the Bill of Rights were adopted. While out of the country, he maintained a regular correspondence with Madison, who was the Bill of Rights' primary drafter. Those letters reveal their thoughts about the debate.

Like the Federalists, Jefferson supported a strong central government. But like the Antifederalists, he also supported a bill of rights. This position was consistent with his description of himself as a free thinker. As he put it, “if I could not go to heaven but with a party, I would not go there at all.” Still, he admitted that his thinking was much closer to that of the Federalists than the Antifederalists.⁴

After hearing about the proposed Constitution, Jefferson wrote that he did not like “the omission of a bill of rights providing clearly and without the aid of sophisms for freedom of religion, freedom of the press, protection against standing armies, restriction against monopolies, the eternal and unremitting force of the habeas corpus laws, and trials by jury in all matters of fact triable by the laws of the land.” He went on to add that “a bill of rights is what the people are entitled to against every government on earth, general or particular, and what no just government should refuse, or rest on inference.”⁵

Unlike Jefferson, Madison did not feel strongly about a bill of rights. He supported it half-heartedly because it had popular support, but he thought it was unnecessary and would be ineffective even if adopted.

My own opinion has always been in favor of a bill of rights; provided it be so framed as not to imply powers not meant to be included in the enumeration. At the same time I have never thought the omission a material defect, nor been anxious to supply it even by *subsequent* amendment, for any other reason than that it is anxiously desired by others.⁶

Madison then provided a long list of reasons why he believed a bill of rights would be ineffective, and one of those reasons was that the legislative majority would simply ignore it.

Jefferson did not agree that a bill of rights would be ineffective. He reminded Madison that part of the Supreme Court's role is to enforce it in the face of legislative tyranny. Or, as Jefferson put it:

In the arguments in favor of a declaration of rights, you omit one which has great weight with me, the legal check which it puts into the hands of the judiciary. This is a body, which if rendered independent, and kept strictly to their own department merits great confidence for their learning and integrity.⁷

It was against this political background that Congress sent the new Constitution to the states for ratification.

State Ratification of the Constitution, 1787–1788

Delaware was the first state to ratify the Constitution, with its state convention voting unanimously in favor on December 2, 1787. New Jersey and Georgia ratified the Constitution unanimously on December 18, 1787 and January 2, 1788, respectively, and Connecticut ratified it on January 9, 1788. None of these states recommended any changes or additions.

Pennsylvania was the second state to ratify the Constitution, doing so by a 46–23 vote on December 12, 1787. A vocal minority wrote a dissent that included fourteen proposed amendments to the Constitution. The first of the amendments recommended by the dissenters read:

The right of conscience shall be held inviolable; and neither the legislative, executive nor judicial powers of the United States shall have authority to alter, abrogate or infringe any part of the constitution of the several States, which provide

for the preservation of liberty in matters of religion.⁸

Maryland ratified the Constitution on April 26, 1788. Its state convention appointed a committee to consider amendments to the Constitution, and the committee prepared a report. Interestingly, the committee considered and voted **against** an amendment to safeguard religious liberty. The rejected amendment would have stated: “That there be no national religion established by law; but that all persons be equally entitled to protection in their religious liberty.”⁹ For reasons that are not explained in the convention records, the committee decided not to make its report, and Maryland’s notice of ratification did not include any recommended amendments.

New Hampshire ratified the Constitution on June 21, 1788, and it recommended twelve amendments. The eleventh of those amendments stated: “Congress shall make no Laws touching Religion, or to infringe the rights of Conscience.”¹⁰ New Hampshire was the ninth state to ratify the new Constitution, putting it into effect and binding the states that had already ratified it.

Virginia ratified the Constitution by 89–79 on June 25, 1788, after a long, hard fight. The Antifederalists, led by Patrick Henry, opposed any Constitution that did not contain specific provisions protecting individual liberties. The Federalists were better strategists, however, and they won the war of the Constitution by surrendering in the battle over the bill of rights.

Although Madison and the other Federalists continued to believe that a bill of rights was unnecessary, their first priority was to get the Constitution ratified and the new government installed. Therefore, they urged the convention to ratify the Constitution as written, and most threw their support behind

adding a bill of rights after ratification. Madison even pledged to sponsor it in the new Congress.

Along with ratification, Virginia recommended a bill of rights and twenty other amendments to the Constitution. The twentieth, and last, provision in the proposed bill of rights stated:

That religion, or the duty which we owe to our Creator, and the manner of discharging it, can be directed only by reason and conviction, not by force or violence; and therefore all men have an equal, natural, and unalienable right to the free exercise of religion, according to the dictates of conscience, and that no particular religious sect or society ought to be favored or established, by law, in preference to others.¹¹

New York ratified the Constitution on July 26, 1788 in a close vote of 30-27. Like Virginia, New York recommended both a bill of rights and other amendments to the Constitution. The fourth provision in its proposal stated: “That the People have an equal, natural and unalienable right, freely and peaceably to Exercise their Religion according to the dictates of Conscience, and that no Religious Sect or Society ought to be favoured or established by Law in preference of others.”¹²

Massachusetts and South Carolina also recommended amendments when they ratified the Constitution on February 6 and May 23, 1788, respectively. None of those amendments dealt with religion.

North Carolina forfeited representation in the first Congress and withheld ratification of the Constitution until November 21, 1789—after Congress sent the Bill of Rights to the states. This was intentional; the first North Carolina constitutional convention passed a resolution recommending amendments, but

it decided neither to ratify nor to reject the Constitution until it was amended to North Carolina's satisfaction. It did, however, suggest language for the proposed amendments. North Carolina's amendments—including the one on religious rights—were nearly identical to Virginia's.¹³

Rhode Island—which had not sent a delegate to the Constitutional Convention—was the last to ratify. Rhode Island did not even call a state ratifying convention until after Congress sent the Bill of Rights to the States.

In the end, eleven States ratified the Constitution without a bill of rights. Three of the ratifying states—New Hampshire, Virginia, and New York—recommended an amendment regarding religion. So did North Carolina, which refused to ratify the Constitution without a bill of rights, and the Pennsylvania dissenters. Although individual delegates to the other state conventions may have had concerns about religious liberty, only these five states officially voiced them.

Table 1 summarizes the actions of each state ratifying the Constitution.

The Bill of Rights in the First Congress, 1789

The Federalists had pledged to support a bill of rights they thought unnecessary. Once the states ratified the Constitution, the Antifederalists also switched sides and argued that a bill of rights was not a priority for the new government. They may have hoped the states would be so dissatisfied that they would call another constitutional convention and scrap the new government altogether. If so, they were disappointed.

James Madison, Elbridge Gerry, and Roger Sherman were all elected to serve in the new House of Representatives. It convened on March 4, 1789, but it was April 1 before enough representatives arrived to make a quorum.

Table 1
RATIFYING THE UNITED STATES CONSTITUTION

<i>State</i>	<i>Ratification Date</i>	<i>Vote</i>	<i>Proposed Amendments</i>	<i>Proposed an Amendment Regarding Religion</i>
Delaware	December 2, 1787	Unanimous	No	
Pennsylvania	December 12, 1787	46–23	Minority Report	Yes
New Jersey	December 18, 1787	Unanimous	No	
Georgia	January 2, 1788	Unanimous	No	
Connecticut	January 9, 1788	128–40	No	
Massachusetts	February 6, 1788	187–168	Yes	No
Maryland	April 26, 1788	63–11	No	
South Carolina	May 23, 1788	149–73	Yes	No
New Hampshire	June 21, 1788	57–46	Yes	Yes
Virginia	June 25, 1788	89–79	Yes	Yes
New York	July 26, 1788	30–27	Yes	Yes
North Carolina	November 21, 1789	195–77	Yes	Yes
Rhode Island	May 29, 1790	34–32	(No Action)	

Madison kept his promise, and on June 8, 1789, he proposed a bill of rights. He did not violate his own beliefs by claiming that it was necessary to protect individual liberties. Instead, he argued that Congress should keep its promise to the people who relied on it in ratifying the Constitution. He also used Jefferson's argument that the judicial branch would protect the bill of rights from becoming ineffective. The *Annals of Congress* report his statement as follows:

If [a bill of rights is] incorporated into the constitution, independent tribunals of justice will consider themselves in a peculiar manner the guardians of those rights; they will be an impenetrable bulwark against every assumption of power in the legislative or executive; they will be naturally led to resist every encroachment upon rights expressly stipulated for in the constitution by the declaration of rights.¹⁴

Unfortunately, the official *House of Representatives Journal* does not record the debates. The best source for that information is the *Annals of Congress*, which were compiled approximately fifty years after the events. They were prepared from the best records available at the time, including contemporary newspaper accounts, but there is no guarantee that they are accurate. Furthermore, speeches were often paraphrased rather than quoted verbatim. Still, the *Annals of Congress* are the most trustworthy source we have.

Although the *House of Representatives Journal* does not record the debates, it does report the matters considered by the House, the actions it took, and the vote. Proposed language was faithfully recorded, so it can be trusted. The fourth proposition in Madison's proposal covered religious rights, and it read as follows:

The civil rights of none shall be abridged on account of religious belief or worship, nor shall any national religion be established, nor shall the full and equal rights of conscience be in any manner, or on any pretext, infringed.¹⁵

The House referred the proposal to a select committee composed of one member from each of the eleven states that had ratified the Constitution and were represented in Congress. On

August 13 the select committee reported back to the whole House. The select committee made few substantive changes to Madison's proposal but did shorten the provision regarding religious rights to read: "No religion shall be established by law, nor shall the equal rights of conscience be infringed."¹⁶

Gerry's response to the select committee's report illustrates the Antifederalists' new strategy. According to the *Annals of Congress*, "Mr. Gerry thought the discussion would take up more time than the House could now spare," and he wanted to table the report until after Congress considered other matters.¹⁷

The Antifederalists were in the minority, however, and the House began debating the language in the proposal. It reached the fourth proposition on August 15, and the most significant debate about the religion clause occurred on that day. Here are some highlights.

- Peter Sylvester of New York was afraid it would abolish religious practice altogether.
- Gerry wanted it to say, "no religious doctrine shall be established by law."
- Sherman, who—unlike many of the other Federalists—had not changed his stand since the Constitutional Convention, thought the amendment was unnecessary because Congress did not have authority to establish religion.
- When asked what the clause meant, "Mr. Madison said, he apprehended the meaning of the words to be, that Congress should not establish a religion, and enforce the legal observation of it by law, nor compel men to worship God in any manner contrary to their conscience."
- Benjamin Huntington of Connecticut was concerned that the amendment would prohibit paying for ministers or

church buildings, and he did not want it to protect anyone who professed no religion at all.

The full debate is included in Appendix B.¹⁸

The House amended the language several times, reorganized the Bill of Rights so that it came at the end of the Constitution rather than changing the existing text, and passed the amendments on August 24. When the House sent the Bill of Rights to the Senate, the fourth proposition had become the third article and read as follows:

3. Congress shall make no law establishing religion, or prohibiting the free exercise thereof; nor shall the rights of conscience be infringed.¹⁹

The Senate met behind closed doors for its first few years, and its debates during that time are lost to history. The *Senate Journal* does, however, record the actions taken, including the language that was up for vote.

On September 2, 1789, the Senate began considering the Bill of Rights. It amended the third article on September 3 and again on September 9. As adopted, the third article now read:

Congress shall make no law establishing articles of faith, or a mode of worship, or prohibiting the free exercise of religion, or abridging the freedom of speech, or the press, or the right of the people peaceably to assemble, and petition to the government for the redress of grievances.²⁰

Since the Senate version was not identical to the House version, the two houses of Congress met in conference to agree on the language of the third article. The House adopted the conference language on September 24 and the Senate adopted it on September 25.

The final version of the third article, as proposed by Congress and sent to the states for ratification, read as follows:

Table 2
LANGUAGE CHANGES IN THE RELIGION CLAUSES

<i>Date</i>	<i>Text</i>
June 8, 1789 (House)	The civil rights of none shall be abridged on account of religious belief or worship, nor shall any national religion be established, nor shall the full and equal rights of conscience be in any manner, or on any pretext, infringed. [As introduced.]
August 13 (House)	No religion shall be established by law, nor shall the equal rights of conscience be infringed.
August 15 (House)	Congress shall make no laws touching religion, or infringing the rights of conscience.
August 20 (House)	Congress shall make no law establishing religion, or to prevent the free exercise thereof, or to infringe the rights of conscience.
August 24 (House)	Congress shall make no law establishing religion, or prohibiting the free exercise thereof; nor shall the rights of conscience be infringed. [Sent to the Senate.]
September 3 (Senate)	Congress shall make no law establishing religion, or prohibiting the free exercise thereof.
September 9 (Senate)	Congress shall make no law establishing articles of faith, or a mode of worship, or prohibiting the free exercise of religion, or abridging the freedom of speech, or the press, or the right of the people peaceably to assemble, and petition to the government for the redress of grievances. [Sent back to the House.]
September 24 (House)	Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances. [Final version.]
September 25 (Senate)	[Same.]

Article III. Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble, and to

petition the Government for a redress of grievances.²¹

Table 2 shows the changes in the language as the amendment went through Congress.

The Bill of Rights in the States, 1789–1791

When the Bill of Rights went to the states for ratification, it had twelve amendments.

- The first amendment dealt with the number of representatives each state could elect to Congress;
- The second amendment provided that Congress could not give itself a raise or take a pay cut unless it took effect after the next election;
- The third amendment was the current First Amendment; and
- The fourth through twelfth amendments were the current Second through Tenth Amendments.

This time the states did not call ratifying conventions. Instead, the vote took place in the state legislatures.

During 1789 and 1790, nine states ratified the current ten amendments. Maryland, North Carolina, and South Carolina ratified all twelve. New Hampshire, New Jersey, New York, and Rhode Island ratified the first and the third through twelfth but not the second. Delaware ratified all except the first, and Pennsylvania ratified the third through twelfth but not the first and second.

The sketchy reports on the states' ratification efforts come mostly from newspaper articles and letters. The most detailed accounts cover the controversy in Virginia, where what is now the First Amendment ran into trouble.

The Virginia House initially disagreed about several amendments (not including the third), but the House resolved its internal dispute and sent all twelve to the Virginia Senate. The Senate objected to the third amendment, among others, but the sources do not explain why.

The Virginia Federalists then tabled the amendments. They believed that most Virginians supported them, so they let an election intervene. Their tactic succeeded, and Virginia ratified all twelve amendments on December 15, 1791.²²

Vermont, which became a state on March 4, 1791, also ratified all twelve amendments. Massachusetts, Connecticut, and Georgia had not ratified any of them by the end of the Second Congress. As a result, the first two amendments failed, and the third became the first.²³

Table 3 summarizes the state ratification of the various amendments.

<i>State</i>	<i>All Twelve Amendments</i>	<i>All Except the First</i>	<i>All Except the Second</i>	<i>The Last Ten</i>
Connecticut	(Absent)			
Delaware		X		
Georgia	(Absent)			
Maryland	X			
Massachusetts	(Absent)			
New Hampshire			X	
New Jersey			X	
New York			X	
North Carolina	X			
Pennsylvania				X
Rhode Island			X	
South Carolina	X			
Vermont	X			
Virginia	X			



When the states ratified the Constitution, only four of them and the dissenting minority from Pennsylvania recommended adding an amendment regarding religious freedom, and only the Pennsylvania dissent placed it first on the list. It was last in the bill of rights proposed by Virginia and North Carolina.

Religious freedom was third among the amendments sent to the states for ratification. It achieved its current position only because the first two amendments were not ratified.

The one thing that is clear from the direct legislative history is that Justice Jackson got it wrong in *Everson v. Board of Education* when he said, “This freedom was first in the Bill of Rights because it was first in the forefathers’ minds.”²⁴ The amendment’s position in the Bill of Rights is purely an accident of history. While it has become first in importance to modern-day Americans, it may not have held that lofty status with the founding fathers.

Discussion Questions

- Question 1:** The founding fathers used the word “religion” in the First Amendment instead of the word “Christianity.” Does their choice of words affect the amendment’s meaning? How?
- Question 2:** Based on the First Amendment’s direct legislative history, what do you think the first Congress meant when it prohibited laws “respecting an establishment of religion”?