Congress Creates the Bill of Rights

Go Inside the First Congress
Part II A

Congress Seeks Compromise
Leaders of the House Debate
Issues and Positions
The Senate Markup
Congress Creates the Bill of Rights consists of three elements: a mobile application for tablets, an eBook, and online resources for teachers and students on the Center for Legislative Archives website (http://www.archives.gov/legislative/resources/bill-of-rights.html). Each provides a distinct way of exploring how the First Congress proposed amendments to the Constitution in 1789.

This PDF contains all the content of the app divided into four sections:

- Get the Background (Part I);
- Go Inside the First Congress (Part II A);
- Amendments in Process (Part II B); and
- Join the Debate and Appendix (Part III).

Each part is sized so that it can be easily downloaded or printed on a wide variety of devices.

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Go Inside the First Congress

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Go Inside the First Congress

Part II A
The struggle over the Bill of Rights was one of many contested issues in the First Congress. Through compromise, the House and Senate demonstrated that the Constitution could be safely amended to protect the basic rights of citizens and correct perceived defects.

A fundamental divide existed between Federalists and Anti-Federalists on the question of amendments to the Constitution. Yet, James Madison found areas of common ground to build support for a set of amendments. He displayed his political genius by focusing on proposals that could win the support of a two-thirds majority in each house of Congress, and ratification by three-quarters of the states. Madison embraced the need to change the new charter in order to keep the majority of its provisions intact, and he skillfully used the self-correcting measures in Article V of the Constitution to amend it.

Article V sets a high bar and defines a unique process to propose and ratify amendments. These requirements include congressional passage by two-thirds majorities in both houses. Yet within the House and the Senate, and between those two chambers, many of the procedures, tactics, and tools remain the same as the normal legislative process for moving bills through the chambers to enact laws. This hard work of compromise between the House and the Senate is revealed in a compelling document, the *Senate Revisions to the House Proposed Amendments to the U.S. Constitution* (referred to as the Senate Mark-up).

The Founders saw Congress as the forum where representatives of the people and of the states would reach decisions through deliberation and debate on issues of national importance. With Madison’s able guidance, the First Congress was able to reconcile differences and set in motion the ratification of the Bill of Rights.
Go Inside the First Congress

Leaders of the House Debate

The House of Representatives debated the Bill of Rights between June 8 and September 24, 1789, when the House voted on its final version of amendments. House debate was shaped by the extreme reluctance, if not the open hostility, of the members towards Madison’s version of amendments. Despite this opposition, Madison’s determination and skill guided the amendments to House approval by a two-thirds vote.

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James Madison played a critical role as instigator of the discussion on amendments, which many members wished to avoid. He put together a carefully crafted, lawyerly speech that called on the House to “expressly declare the great rights of mankind secured under this Constitution.”

James Madison (1751–1836)  
Virginia

Born in Virginia, James Madison trained as a lawyer at Princeton before settling in Orange County, Virginia. He represented the county in Virginia’s revolutionary and legislative bodies. He also represented Virginia in the Confederation Congress and at the Federal Convention. He promoted ratification of the Constitution in the press and as a delegate to the state convention. Madison was the author of the constitutional amendments considered by the House, and the floor leader who directed their passage. He believed that by passing his version of amendments, he could satisfy the public call to protect rights without endangering the Constitution and weakening the federal government.
Federalist Position on Amendments

When the first Congress convened, the Federalist-dominated House opposed amending the Constitution. Federalists generally believed that a bill of rights was unnecessary in a government of delegated powers. They were suspicious that the Anti-Federalists’ primary motive was to undo critical provisions in the Constitution before the new government could be put into effect.

As the session progressed, Federalists came to realize that Madison’s amendments neither weakened the federal government nor prevented it from fulfilling its national responsibilities. They voted for Madison’s amendments, but without much enthusiasm. Joining Madison as leaders of the debate were Federalists Roger Sherman of Connecticut, Fisher Ames of Massachusetts, and James Jackson of Georgia.
Fisher Ames (1758–1808)
Massachusetts

Ames was a Harvard-educated lawyer from Dedham, Massachusetts, who served in the Massachusetts House of Representatives before being elected as a Federalist to the First Congress. As a member of the Massachusetts convention, he ardently supported ratification. He was opposed to amending the Constitution, noting, “There would be no limits to the time necessary to discuss the subject … the session would not be long enough.”

*Fisher Ames* by James Sharples
National Portrait Gallery,
Smithsonian Institution/Art Resource, NY
Roger Sherman (1721–1793)
Connecticut

Born in Massachusetts, Sherman settled in New Haven, Connecticut, where he was a publisher, lawyer, merchant, judge, and municipal and state officeholder. Sherman served for many years in both the Continental Congress, where he signed the Declaration of Independence, and the Confederation Congress. He assumed an important role at the Federal Convention and actively supported ratification in both the press and the state convention. Sherman played a critical role in the history of the Bill of Rights when he proposed that the amendments be added to the end of the Constitution rather than written into its text, as Madison had proposed.
James Jackson (1757–1806)
Georgia

Born in England, James Jackson immigrated to Savannah, Georgia, where he became a planter and lawyer. He served in the state assembly and was elected as a Federalist to the First Congress. Jackson adamantly opposed amending the Constitution, remarking, “This is not the time for bringing forward amendments.”
Anti-Federalists wanted to add amendments to reduce the federal government’s powers. These amendments took two forms: structural amendments that would transfer powers back to the states, and rights-related amendments that would define fundamental freedoms protected from federal government interference.

The Anti-Federalists proposed amendments designed to reduce Congress’s power to tax, replace congressional control of federal elections with state control, eliminate the federal court system, limit the powers of the president, and place restrictions on a standing army. The Anti-Federalists believed that Madison had selected the least useful amendments from those proposed by the states, and they consistently voted against his version of amendments.
Aedanus Burke (1743–1802)
South Carolina

Burke was born in Ireland and settled in Charleston, South Carolina, where he served as a judge in the state. He voted against ratification in South Carolina’s convention. An advocate of imposing strict limits on federal power, Burke dismissed Madison’s amendments as, “little better than whip-syllabub, frothy and full of wind, formed only to please the palate....”
Anti-Federalist Position on Amendments

Thomas Tudor Tucker (1745–1828)
South Carolina

Born in Bermuda, Tucker settled in Charleston, South Carolina. A lawyer, doctor, and planter, he was a delegate to the state legislature and, briefly, to the Confederation Congress. Tudor was the proponent of several amendments to limit federal power, all of which were defeated in the House. He captured the Anti-Federalist view of Madison’s amendments when he complained to a political ally, “You will find our Amendments to the constitution calculated merely to amuse, or rather to deceive.”
Go Inside the First Congress

Leaders of the House Debate

Anti-Federalist Position on Amendments

Elbridge Gerry (1744–1814) Massachusetts

A merchant and office holder, Gerry was born in Marblehead, Massachusetts. A graduate of Harvard College, he later resided in Cambridge, Massachusetts. Gerry attended the Continental Congress, where he signed the Declaration of Independence, and he was also a member of the Confederation Congress. A delegate to the Constitutional Convention, he refused to sign the Constitution and actively protested its ratification at the Massachusetts state convention, which he attended as an unofficial observer. He was among the most active participants in the House debate on amendments and insisted that “all the amendments proposed by the respective states” should be considered, rather than Madison’s limited set of proposals.

*Elbridge Gerry* by James Barton Longacre
National Portrait Gallery, Smithsonian Institution/Art Resource, NY
These five questions represent the most contested issues raised in the debate over the proposed amendments, and they best show the divide between the Federalists and the Anti-Federalists. Many of the amendments proposed in Congress, especially those that touched upon due process and other traditional rights, did not inspire discussion. These five triggered the most debate, beginning with the simple question of whether the Constitution should be amended at all.

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**Should the Constitution be amended?**

**Should the House of Representatives have few or many members?**

**Should the people have the authority to instruct representatives?**

**Should the federal Bill of Rights apply to the states?**

**Should the federal taxation power be further limited?**
Go Inside the First Congress

Issues and Positions

Should the Constitution be amended?

**Federalist Position**

James Jackson
Georgia

“The more I consider the subject of amendments, the more ... I am convinced it is improper .... I am against inserting a declaration of rights in the constitution.... If such an addition is not dangerous or improper, it is at least unnecessary.... Unless you except every right from the grant of power, those omitted are inferred to be resigned to the discretion of the government.”

*June 8, 1789*

**Anti-Federalist Position**

Thomas Tudor Tucker
South Carolina

“Many citizens expected that the amendments proposed by the conventions would be attended to by the House ... and several members conceived it to be their duty to bring them forward.”

*August 18, 1789*
Federalist Position

Fisher Ames
Massachusetts

“By enlarging the representation, we lessen the chance of selecting men of the greatest wisdom and abilities; because small district elections may be conducted by intrigue; but in large districts nothing but real dignity of character can secure election.… Numerous assemblies are supposed to be less under the guidance of reason than smaller ones.”
August 14, 1789

Anti-Federalist Position

Elbridge Gerry
Massachusetts

“Will that gentleman pretend to say we have as much security in a few representatives as in many? Certainly he will not. Not that I would insist upon a burthensome representation, but upon an adequate one … [I am] in favor of extending the number to two hundred ...”
August 14, 1789
Go Inside the First Congress

Issues and Positions

Should the people have the authority to instruct representatives?

**Federalist Position**

Roger Sherman
Connecticut

“Instructions cannot be considered as a proper rule for a representative to form his conduct by.... He is to consult the good of the whole; Should instructions therefore coincide with his ideas of the common good, they would be unnecessary. If they were contrary, he would be bound by every principle of justice to disregard them.”

*August 15, 1789*

**Anti-Federalist Position**

Elbridge Gerry
Massachusetts

“The power of instruction is in my opinion essential to check an administration which should be guilty of abuses.... To deny the people this right is to arrogate to ourselves more wisdom than the whole body of the people possesses ... our constituents have not only a right to instruct, but to bind this legislature.”

*August 15, 1789*
Go Inside the First Congress

Issues and Positions

Should the federal Bill of Rights apply to the states?

Federalist Position

James Madison
Virginia

“No state shall infringe the equal rights of conscience, nor the freedom of speech, or of the press, nor of the right of trial by jury in criminal cases. [I] conceived this to be the most valuable amendment on the whole list; if there was any reason to restrain the government of the United States from infringing upon these essential rights, it was equally necessary that they should be secured against the state governments.”

August 17, 1789

Anti-Federalist Position

Thomas Tudor Tucker
South Carolina

“It will be much better, I apprehend, 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.”

August 17, 1789
Should the federal taxation power be further limited?

**Federalist Position**

James Jackson  
Georgia

“I hope, sir, that the experience we have had will be sufficient to prevent Congress ever divesting themselves of [the taxing] power ... For if this power is taken from Congress, you divest the United States of the means of protecting the Union, or providing for the existence and continuation of the government.”  
*August 26, 1789*

**Anti-Federalist Position**

Thomas Tudor Tucker  
South Carolina

“That Congress shall not exercise the power of levying direct taxes, except in cases where any of the states shall refuse, or neglect to comply with their requisitions.”  
*August 26, 1789*
These four pages recorded on two sheets illustrate the process as seventeen House-proposed amendments (referred to as “Articles”) were revised in the Senate. The brown ink markings, made by the Secretary of the Senate, include cross-outs, combined amendments, and revised language. They record the actions taken in the Senate between August 25 and September 9, 1789. After the Senate passage by a two-thirds vote, the Senate version of twelve amendments was sent to the House for its consideration on September 14. The Bill of Rights was taking shape, although final congressional passage would not occur until September 25.
CONGRESS OF THE UNITED STATES.

In the House of Representatives,

Monday, 4th August, 1789.

RESOLVED, by the Senate and House of Representa-
tives of the United States of America in Congress
assembled, two thirds of both Houses concurring, That
the following Articles be proposed to the Legislatures of the several
States, as Amendments to the Constitution of the United States, all
or any of which Articles, when ratified by three fourths of the said
Legislatures, to be valid to all intents and purposes as part of the
said Constitution—Viz.

ARTICLES in addition to, and amendment of, the Constitution of
the United States of America, proposed by Congress, and ratified
by the Legislatures of the several States, pursuant to the fifth Arti-
cle of the original Constitution.

ARTICLE THE FIRST.

After the first enumeration, required by the fifth Article of the
Constitution, there shall be one Representative for every thirty thou-
sand, until the number shall amount to one hundred, after which
the proportion shall be so regulated by Congress, that there shall
be not less than one hundred Representatives, nor less than one
Representative for every forty thousand persons, until the number of
Representatives shall amount to two hundred, after which the pro-
portion shall be so regulated by Congress, that there shall not be les-
than two hundred Representatives, nor less than one Representative
for every fifty thousand persons.

ARTICLE THE SECOND.

No law varying the compensation to the members of Congress
shall take effect, until an election of Representatives shall have in-
tervened.

ARTICLE THE THIRD.

Congress shall make no law establishing a national religion, or pro-
hibiting the free exercise thereof; nor shall Congress interfe-
rence.

ARTICLE THE FOURTH.

The right of the people peaceably to assemble for the purpose of
petitioning the Government for a redress of grievances, shall
not be infringed.
ARTICLE THE FIFTH

A well regulated militia, composed of the body of the People, being the best security of a free State, the right of the People to keep and bear arms, shall not be infringed. But no religious test shall be required as a qualification for any office or public trust under the United States.

ARTICLE THE SIXTH

No soldier shall, in time of peace, be quartered in any house without the consent of the owner, nor in time of war, but in a manner to be prescribed by law.

ARTICLE THE SEVENTH

The right of the People to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

ARTICLE THE EIGHTH

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment by a grand jury; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall property be taken for public use without just compensation.

ARTICLE THE NINTH

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, to be informed of the nature and cause of the accusation, to be confronted with the witnesses against him, to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

ARTICLE THE TENTH

The trial of all crimes except in cases of impeachment, shall be by jury; and such trial shall be public, except when the security of the State may require otherwise. A private act shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment by a Grand Jury; and no person shall be held to answer for the same crime, twice in the same, and in any other place than that wherein the infringement of the penalty of the law shall have been committed, unless the party charged shall consent, either in person or by his, or his counsel, to be taken thereunto for trial.
ARTICLE THE ELEVENTH.

No appeal to the Supreme Court of the United States, shall be allowed, where the value in controversy shall not amount to one thousand dollars: And no suit shall be entertained in any court of the United States, where the value in controversy shall not exceed one thousand dollars, unless such suit be commenced by the party aggrieved, according to the rules of the common law.

ARTICLE THE TWELFTH.

In suits at common law, the right of trial by jury shall be preserved.

ARTICLE THE THIRTEENTH.

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

ARTICLE THE FOURTEENTH.

No State shall infringe the right of trial by jury in criminal cases, nor the right of confederation, nor the freedom of speech, or of the press.

ARTICLE THE FIFTEENTH.

The enumeration in the Constitution of certain rights, shall not be construed to deny or disparage others retained by the people.

ARTICLE THE SIXTEENTH.

The powers delegated by the Constitution to the government of the United States, shall be exercised therein appropriated, so that the Legislative shall not exercise the powers vested in the Executive or Judicial, nor the Executive the powers vested in the Legislative or Judicial, nor the Judges the powers vested in the Legislative or Executive.

ARTICLE THE SEVENTEENTH.

The powers not delegated by the Constitution, nor prohibited by it, to the States, are reserved to the States respectively.

Tells,

JOHN BECKLEY, CLERK.

In Senate, August 25, 1789.

Read and ordered to be printed for the consideration of the Senate.

Attest, SAMUEL A. OTIS, SECRETARY.
Senate Revisions to the House Proposed Amendments to the U.S. Constitution, 1789.

RG 46: Records of the U.S. Senate, National Archives
The First Amendment of the Bill of Rights changed dramatically as it moved through the House and the Senate in 1789. The First Amendment rights as we know them today were originally defined in two separate House amendments: Article Three on protecting religious rights, and Article Four on the rights of speech, press, assembly, and petition.

Though Senate debates were not recorded, Senate action on the amendments between August 25 and September 9 can be seen in the handwritten notations made on the printed version of the proposed amendments passed by the House. The Senate spent a good deal of time and a quantity of ink on Articles Three and Four, revising the language considerably. The Senate decided to combine the two articles together, giving us a single amendment defining the fundamental freedoms cherished by Americans in our founding era.

When the set of twelve amendments was sent to the states, the first two, Articles One and Two, were not ratified. Article Three then rose to its preeminent place as the First Amendment in the Bill of Rights.

This is a digital and conjectural re-creation, based on descriptions in the Senate Legislative Journal and other sources, of step-by-step changes made to Articles Three and Four of the proposed amendments passed by the House.
“Article the Third. Congress shall make no law establishing religion, or prohibiting the free exercise thereof, nor shall the rights of Conscience be infringed.

Article the Fourth. The Freedom of Speech, and of the Press, and the right of the People peaceably to assemble, and consult for their common good, and to apply to the Government for redress of grievances, shall not be infringed.”

August 24, 1789
These articles were adopted by the House in this form.
“Article the Third. Congress shall make no law establishing religion, or prohibiting the free exercise thereof, nor shall the rights of Conscience be infringed.

Article the Fourth. The Freedom of Speech, and of the Press, and the right of the People peaceably to assemble, and consult for their common good, and to apply to the Government for redress of grievances, shall not be infringed.”

**Senate Legislative Journal, September 3, 1789**

The Senate’s first revision was to the wording on religious rights, changing a general ban on “making laws prohibiting the free exercise of religion” to a specific ban on “making laws establishing one religious sect or society in preference to others.”
September 3, 1789

Article the Third. Congress shall make no law establishing religion, or prohibiting the free exercise thereof, nor shall the rights of Conscience be infringed.

Article the Fourth. The Freedom of Speech, and of the Press, and the right of the People peaceably to assemble, and consult for their common good, and to apply to the Government for redress of grievances, shall not be infringed.

Senate Legislative Journal, September 3, 1789
The second motion approved by the Senate was to remove any reference to freedom of conscience at the end of Article the Third.
September 4, 1789

“Article the Third. Congress shall make no law establishing religion, or prohibiting the free exercise thereof, nor shall the rights of Conscience be infringed.

Article the Fourth. The Freedom of Speech, and of the Press, and the right of the People peaceably to assemble, and consult for their common good, and to apply to the Government for redress of grievances, shall not be infringed.”

Senate Legislative Journal, September 4, 1789

The Senate applied the opening clause of Article the Third to the Fourth, adding the prohibition on Congress in place of a general statement about rights. The Senate also replaced the phrase “apply to” with the word “petition.”
Go Inside the First Congress

Close-up on Compromise

September 9, 1789

Senate Legislative Journal, September 9, 1789

The Senate voted to amend and combine the articles into one proposed amendment. The Senate added “articles of faith or a mode of worship, or prohibiting the free exercise of religion.” The Senate then struck out “one religious sect or society in preference to others” and dropped “consult for their common good.”
“Article the Third. 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 of the press, or the right of the people peaceably to assemble, and to petition to the government for a redress of grievances.”

**Senate Legislative Journal, September 14, 1789**

Article the Third was approved by the Senate in this form by a two-thirds vote and was printed, along with the other amendments, on this date.
Article the Third. 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 of the press, or the right of the people peaceably to assemble, and to petition to the government for a redress of grievances.

Conference Committee Report, September 24, 1789
The Conference Committee changed the wording of this amendment from “establishing articles of faith, or a mode of worship,” to “respecting an establishment of Religion,” restoring it closer to the original House version. The final language appeared when the amendment was sent out for ratification.
“Art. 3. 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 petition the Government for a redress of grievances.”

October 2, 1789
The amendment was sent to the states for ratification in this form.