

Bill of Rights in Action



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JAMES MADISON AND THE BILL OF RIGHTS

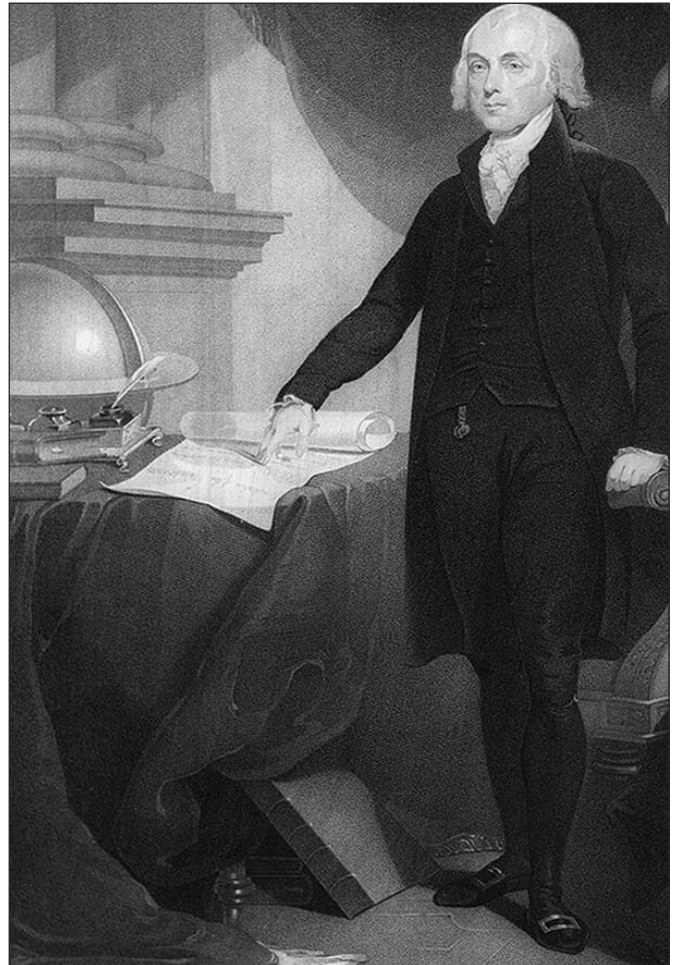
THE BILL OF RIGHTS WAS NOT A SURE THING WHEN JAMES MADISON INTRODUCED HIS AMENDMENTS TO THE CONSTITUTION AT THE FIRST CONGRESS. MANY FEDERALISTS THOUGHT HIS AMENDMENTS WERE UNNECESSARY. MOST ANTI-FEDERALISTS BELIEVED THE CONSTITUTION NEEDED MORE RADICAL AMENDMENTS TO RESTORE POWER TO THE STATES.

The Articles of Confederation, adopted in 1776, gave the state governments great power, showing that most Americans felt that lawmaking should be done mainly by the states. Despite their distrust of a strong national government, many Americans soon began to see flaws in the Articles of Confederation. For example, even during the Revolutionary War, the Confederation Congress had great difficulty raising money from the states.

In 1787, representatives from the 13 states met at Philadelphia to fix the problems of the Articles of Confederation. The delegates quickly realized that an entirely new constitution was needed to sort out which powers should go to the national government and which to the states. The meeting turned into the Constitutional Convention. Through a series of hard-fought compromises, the delegates designed the U.S. Constitution, a *federal* system of government based on shared powers.

During the convention, George Mason, a delegate from Virginia, proposed to add a bill of rights to the Constitution. He wanted specific guarantees to protect the people and states from abuses by the new federal (national) government.

The delegates briefly debated Mason's proposal for a bill of rights, but voted to turn down the idea. Most delegates thought it unnecessary, but Mason and a handful of others disagreed.



James Madison (1751-1836) is considered the main architect of both the U.S. Constitution and its Bill of Rights.

Federalists vs. Anti-Federalists

For the Constitution to go into effect, at least nine states had to ratify it at conventions where elected delegates debated the new federal form of government. Those in favor of ratification were called *Federalists* and those against, *Anti-Federalists* (or *Antis*). ▶

BREAKING NEW GROUND

This edition of *Bill of Rights in Action* explores issues related to groundbreaking moments in history. The first article looks at how James Madison, the “father” of the U.S. Constitution, who initially opposed adding a bill of rights to the Constitution, also became the “father” of the Bill of Rights. The second article examines how Hatshepsut assumed the throne and became Egypt's first woman pharaoh.

U.S. History: James Madison and the Bill of Rights • **World History:** Hatshepsut: How a Woman Took the Throne

Our longtime contributor Carlton Martz wrote about Madison and the Bill of Rights. Guest writer Lucy Eisenberg, Esq., wrote the article on Hatshepsut.

The Federalists were generally satisfied with the Constitution. They believed the powers granted to the Congress, executive (president), and courts struck the right balance between the states and a strong but limited federal government.

The Anti-Federalists argued that the powers listed in the Constitution weighed too heavily in favor of the federal government and drastically weakened the powers of the states. Many Antis began to demand a second constitutional convention to increase the power of the states and add a bill of rights.

Fearing that ratification of the Constitution was in danger, the Federalists answered the Antis with newspaper articles, pamphlets, personal letters, and speeches. Alexander Hamilton from New York organized a series of newspaper essays to defend the Constitution. Written by James Madison, John Jay, and himself, these essays are often called the *Federalist Papers*.

Patrick Henry, who had shouted ‘Give me liberty or give me death!’ at the beginning of the American Revolution, stood out as one of the most ‘Anti’ of the Anti-Federalists.

James Madison from Virginia said nothing about a bill of rights during the Constitutional Convention, but was personally skeptical. In some of his *Federalist Papers* essays, Madison pointed out that when it suited them, legislatures in states with their own bill of rights simply ignored these statements of liberties written on paper (he called them “paper barriers”). Thus, Madison believed a bill of rights added to the Constitution would be similarly ignored.

Delaware, Pennsylvania, New Jersey, Georgia, and Connecticut quickly ratified the Constitution at their state conventions. But in Massachusetts, the Antis proposed that their state convention ratify the Constitution only if it was amended to weaken the federal government and include a bill of rights.

After vigorous debate, the Massachusetts convention turned down the Antis proposal and voted for ratification. But the convention also recommended a long list of constitutional amendments for the First Congress to consider. Other states followed Massachusetts and submitted their own proposals for amendments.

Under Article V, the Constitution could be amended in two ways. Congress could adopt amendments by a two-thirds vote in the House of Representatives and the Senate. Or, two-thirds of the states could petition Congress to call a convention of the states for proposing amendments. In either case, three-fourths of the states would have to ratify any amendments.

On June 21, 1788, New Hampshire became the ninth state to ratify the Constitution. This assured the Constitution’s federal system would become the foundation of the U.S. government. But Virginia and New York had yet to vote on ratification at their state conventions. Without these important states in the Union, many predicted the experiment in federalism would fail.

Virginia’s Ratification Convention

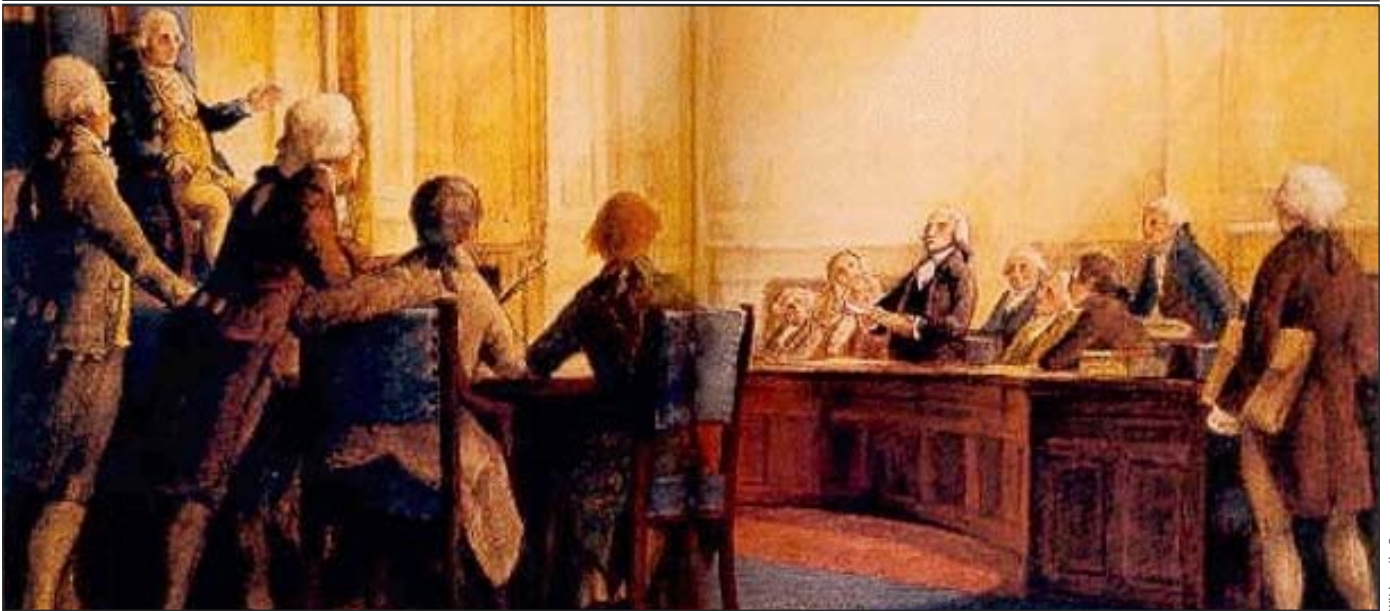
Patrick Henry, who had shouted “Give me liberty or give me death!” at the beginning of the American Revolution, stood out as one of the most “Anti” of the Anti-Federalists. The most powerful member of Virginia’s state legislature, he led that state’s strong opposition to ratifying the Constitution.

An emotional orator, Henry dominated the debates at Virginia’s ratification convention in June 1788. He predicted that the new federal government would “destroy the State governments, and swallow the liberties of the people.” Only a bill of rights and strong independent state governments, he declared, could protect individual liberty from federal government abuses. Without a bill of rights, he warned, federal tax officials could “go into your cellars and rooms, and search and measure, everything you eat, drink and wear.”

George Mason, Henry’s chief ally at the Virginia ratification convention, was more specific in his criticism of the Constitution. Mason attacked the power of Congress to tax the people directly rather than by raising revenue from the state legislatures.

Henry and Mason planned a two-part strategy. First, they wanted Virginia to reject the Constitution. Failing that, they supported ratifying it on the condition that a bill of rights and other amendments proposed by Virginia’s convention were adopted by Congress, or even better by a second constitutional convention.

James Madison answered the attacks on the Constitution by Henry, Mason, and the other Antis. Madison spoke quietly with logic and detailed arguments. He pleaded against a second constitutional convention that he feared would “mutilate” the federal system.



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A depiction of James Madison presenting the Bill of Rights to the First Congress.

In light of all the demands for a bill of rights, Madison reluctantly began to accept the idea that it might be best to debate amendments for a bill of rights in the First Congress. Madison worried what could happen to the Constitution if an uncontrollable second constitutional convention were called.

The Antis were in a bind because everybody assumed George Washington, also from Virginia, would be elected president. But if Virginia did not ratify the Constitution, it would remain outside the Union, and Washington could not run for president. The Virginia convention ratified the Constitution on June 25. It also recommended adding a bill of rights to the Constitution, but it did not condition its ratification on adding one.

Finally, Henry and Madison agreed to recommend 40 amendments for the First Congress to consider. Half included a list of rights and the rest involved making changes to the Constitution itself. Madison found many of those “highly objectionable.”

On July 26, the New York convention overcame strong Anti-Federalist opposition to ratify the Constitution. That convention proposed 30 amendments for Congress to debate.

Madison's Bill of Rights

Patrick Henry distrusted Madison, who had decided to run for a seat in the U.S. House of Representatives. Henry believed if Madison were elected, he would not back the more radical Virginia amendments that would restore more power to the states.

Using his powerful position in the Virginia state legislature, Henry redrew the boundaries of Madison's

congressional district to include more voters opposed to the new federal government. Then Henry recruited James Monroe, a Revolutionary War hero, to run against Madison.

During the campaign, Madison decided that if elected he would introduce a bill of rights to Congress. Madison believed that this was necessary to undermine the Anti-Federalist's plan to call a second constitutional convention, threatening the federal system. He also promised a group of Baptist voters, a Christian minority in Virginia, to protect freedom of religion.

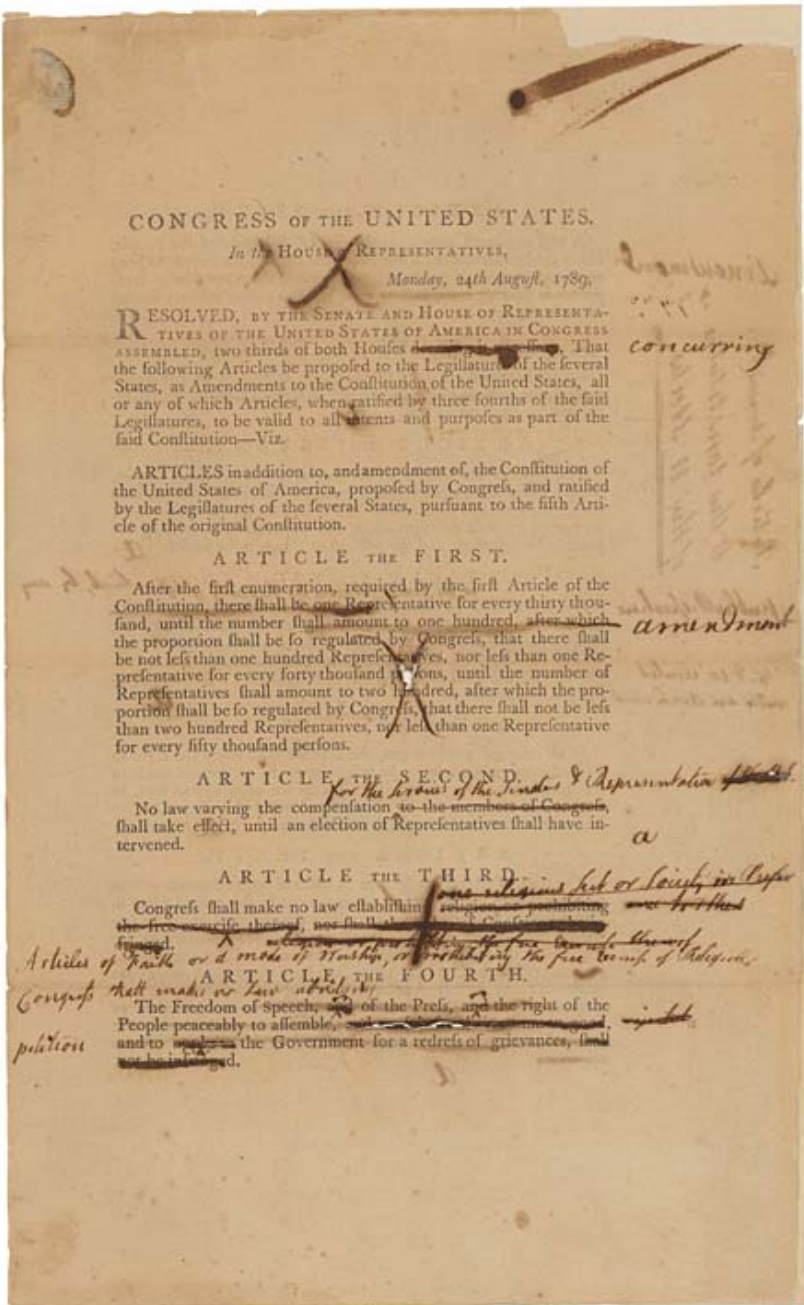
In the election of 1789, Madison easily defeated Monroe. In addition, the Federalists won solid majorities in the both the House and Senate. Washington was unanimously elected president.

The First Congress met in April 1789 in New York City, then the U.S. capital. The House of Representatives decided to conduct its sessions in public. The Senate chose to meet in secret. The primary business of this Congress was to create a new federal government based on the Constitution.

On June 8, Madison introduced 19 amendments to the House of Representatives. These amendments, with one major exception, restricted the law-making power of only the federal government.

Madison began by introducing a preamble on the natural rights of the people followed by amendments on the size of the House membership and when members could vote on increasing their pay. Then he quickly got to amendments that became the basis of the First Amendment in our Bill of Rights:

- No establishment of a “national religion.”



The Senate revised the House-passed amendments to the Constitution. Above is the first page of the Senate's revisions.

- No infringement of religious conscience.
- No abridgment of speech, writing, publication, or the press.
- No restraint of the right of assembly and petition “for redress of grievances.”

Next, Madison proposed “the right of the people to bear arms” to maintain a militia, but added no one should be forced to do military service. Neither could the government quarter any troops in homes without the owner’s consent.

Madison went on to discuss “due process of law” amendments: no searches and seizures without

specific warrants based on probable cause, no self-incrimination, no excessive bail or fines, no “cruel and unusual punishments,” no double jeopardy, and no government taking of property “without just compensation.”

Madison’s amendments relating to criminal trials guaranteed a defendant a grand jury indictment in death penalty cases, a speedy public trial by an impartial jury, notice of charges, confrontation of witnesses, subpoena of defense witnesses, assistance of an attorney, and unanimous conviction by the jury. Another amendment guaranteed trial by jury in civil cases.

Madison included an amendment that prohibited any of the three branches of the national government from infringing on the powers and duties of the others. He also added amendments that declared “other rights” that he did not name were “retained by the people” and powers not granted to the federal government were “reserved to the States.”

Madison purposely chose amendments for his bill of rights that he believed were widely accepted. Two-thirds of both houses of Congress needed to approve them and three-fourths of the states needed to ratify them.

One of Madison’s amendments proved to be very controversial. This was his only amendment that directly restricted the law-making power of the states: “No State shall violate the equal rights of [religious] conscience, or the freedom of the press, or the trial by jury in criminal cases.”

After Madison finished speaking, he was surprised that nearly all the other House members who then spoke, Federalists and Anti-Federalists alike, criticized one part or another of his bill of rights. Madison answered their objections and said his amendments “would calm the people and stabilize the government.”

Some argued that amendments should not be added to the Constitution before it even had a chance to operate. They pointed out that the priority of the House should be to complete organizing the new federal government. The House postponed the matter and later sent Madison’s amendments to a select committee, which included Madison. This committee reduced the number of his amendments to 17 and made some changes in wording.

Debating and Ratifying the Bill of Rights

The debate in the House of Representatives on Madison's bill of rights amendments began on August 1, 1789, and went on for about a dozen days. By this time, Madison was an enthusiastic advocate. He argued that a bill of rights was needed to protect unpopular religious groups and other minorities from hostile laws enacted by the majority. He predicted that the federal courts would consider themselves "the guardians of those rights."

The first question was whether the amendments should be inserted into appropriate places in the body of the Constitution or listed at the end. Madison wanted them inserted to make the Constitution "uniform and entire." The select committee agreed and after some debate so did the House. The House next debated and voted on each of the 17 amendments recommended by the select committee.

Without much debate, the House dropped Madison's preamble and accepted his first and second amendments on setting the number of House members and when they could vote to raise their pay. But controversy arose over the wording of the freedom of religion amendment. The House finally agreed on "Congress shall make no law establishing religion or prohibiting the free exercise thereof, nor shall the rights of Conscience be infringed."

House members next approved a separate amendment on freedom of speech, press, assembly, and petition. They also agreed with the right to bear arms and kept the military service exemption for religious reasons.

The debate on most of the other amendments raised little controversy. But heated debate broke out over Madison's proposal to prohibit the states from

infringing on freedom of religion, freedom of the press, the right of a trial by jury in criminal cases, and freedom of speech (added by the select committee). Madison called this the "most valuable amendment in the whole list."

The Antis called it an invasion of states' rights. Thomas Tucker of South Carolina declared, "It will be much better to have 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." Nevertheless, the strong Federalist majority in the House voted to keep this amendment.

The greatly outnumbered Anti-Federalists demanded that the House debate all the 100 or so amendments recommended by the states, not just those picked by Madison. Many of these amendments called for shifting powers of Congress back to the states. Unless these amendments were debated,

Heated debate broke out over Madison's proposal to prohibit the states from infringing on freedom of religion, freedom of the press, the right of a trial by jury in criminal cases, and freedom of speech.

the Antis threatened, they would call for a second constitutional convention. Madison and the Federalists dreaded another convention, but they voted down the Antis demand.

The House of Representatives approved the 17 amendments and sent them to the Senate. In a final act, the House voted to add them at the end of the Constitution rather than insert them into it.

We know little about the debates in the Senate because they were held in secret. The senators approved most of the House amendments, but deleted the religious exemption from military service. They also dropped Madison's amendment that prohibited

'Paper Barriers'

Between his writing in support of the Constitution in The Federalist Papers and his introduction of a bill of rights to the First Congress, James Madison changed his mind about "paper barriers." Below is his statement about them during the First Congress on June 8, 1789.

The [rights] in favor of liberty ought to be levelled against the quarter where the greatest danger lies, namely, that which possesses the highest [degree] of power. But this is not found in either the Executive or Legislative departments of Government, but in the body of the people, operating by the majority against the minority.

It may be thought that all paper barriers against the power of the community are too weak to be worthy of attention. I am sensible they are not so strong . . . ; yet, as they have a tendency to impress some degree of respect for them, to establish the public opinion in their favor, and rouse the attention of the whole community, it may be one means to control the majority from those acts to which they might otherwise be inclined.

1. What does Madison mean when he uses the term "paper barriers"?
2. Why does Madison think "paper barriers" still would help control abuse of the liberties of the minority by the majority?

RIGHTS INCORPORATED BY THE 14TH AMENDMENT

Rights	Amendment	Supreme Court Decision	Date
Just Compensation	Fifth	<i>Chicago, B, & Q RR v. Chicago</i>	1897
Freedom of Speech	First	<i>Gitlow v. New York</i>	1925
Freedom of the Press	First	<i>Near v. Minnesota</i>	1931
Counsel in Capital Cases	Sixth	<i>Powell v. Alabama</i>	1932
Freedom of Assembly & Petition	First	<i>DeJonge v. Oregon</i>	1937
Free Exercise of Religion	First	<i>Cantwell v. Connecticut</i>	1940
No Establishment of Religion	First	<i>Everson v. Board of Education</i>	1947
Public Trial	Sixth	<i>In re Oliver</i>	1948
No Unreasonable Searches & Seizures	Fourth	<i>Wolf v. Colorado</i>	1949
No Cruel & Unusual Punishments	Eighth	<i>Robinson v. California</i>	1962
Counsel for Felonies	Sixth	<i>Gideon v. Wainwright</i>	1963
Privilege Against Self-Incrimination	Fifth	<i>Malloy v. Hogan</i>	1964
Confrontation of Witnesses	Sixth	<i>Pointer v. Texas</i>	1965
Impartial Jury Trial	Sixth	<i>Parker v. Gladden</i>	1966
Speedy Trial	Sixth	<i>Klopfert v. North Carolina</i>	1967
Compulsory Process in Obtaining Witnesses	Sixth	<i>Washington v. Texas</i>	1967
Trial by Jury	Sixth	<i>Duncan v. Louisiana</i>	1968
No Double Jeopardy	Fifth	<i>Benton v. Maryland</i>	1969
Counsel for Crimes with Jail Terms	Sixth	<i>Argersinger v. Hamlin</i>	1972
Right to Bear Arms	Second	<i>McDonald v. Chicago</i>	2010

the states from infringing on freedom of religion, speech, press, and the right of a criminal jury trial.

In addition, the Senate also combined and made some amendments more concise to reduce the number to 12. After final changes in wording by the House and Senate conference committee, 12 amendments were submitted to the states for ratification on September 24, 1789.

Despite opposition from Patrick Henry, Virginia's ratification of the Bill of Rights on December 21, 1791, assured its addition to the Constitution. Three-fourths of the 14 states (Vermont was the 14th) approved all but the first two amendments (setting the number of House members and the method of voting for their pay). The remaining 10 amendments became our Bill of Rights. Massachusetts, Georgia, and Connecticut took no official action on ratification until 1939.

As Madison predicted, the addition of the Bill of Rights to the Constitution led to the collapse of the Anti-Federalists' movement for a second constitutional convention.

Ignored, Forgotten, Rediscovered

The first test of the Bill of Rights occurred during the presidency of John Adams, a Federalist. In 1798, during a war scare against revolutionary France, the heavily Federalist Congress passed the Sedition Act. This law made it a crime to write, print, say, or

publish anything "false, scandalous and malicious" about the president or members of Congress.

Under this law, a number of newspaper editors and others were arrested, tried, fined, and imprisoned. The appointed federal court judges, mostly Federalists, vigorously enforced the Sedition Act.

Madison and Thomas Jefferson charged that the Sedition Act violated the Bill of Rights, but they got nowhere. They turned to the states, calling for them to interrupt the enforcement of the law. The controversy did not end until the law expired in 1801 when Jefferson became president.

For more than a century after the Sedition Act expired, the Bill of Rights was largely forgotten. The First Amendment was not interpreted by the U.S. Supreme Court until 1919 in a wartime free speech case.

The 14th Amendment, added in 1868 stated, "nor shall any State deprive any person of life, liberty, or property, without due process of law" In the 20th century, the U.S. Supreme Court interpreted this clause to incorporate the "fundamental rights" in the Bill of Rights, thus applying them to the states, as Madison had wanted. On a case-by-case basis, the Supreme Court has ruled that most of the Bill of Rights are incorporated and hence apply to the states as well as the federal government. Those rights originally introduced to the First Congress by Madison in 1789 are at the center of

many controversial issues today from the continuing fight over federal versus state powers to legal battles over free speech and religious freedom.

DISCUSSION & WRITING

1. How did Madison and Anti-Federalists disagree over his amendment to apply part of the Bill of Rights to the states? Which side do you think was right? Use evidence from the article to support your position.
2. The Anti-Federalists demanded a bill of rights during the ratification of the Constitution. But during the ratification of the Bill of Rights, Patrick Henry and many other Antis opposed it. Why?
3. What evidence is there that the Bill of Rights was merely a “paper barrier” for more than a century?

ACTIVITY: Which Version of the First Amendment Is Best?

The First Congress considered four versions of the First Amendment before finally adopting a fifth version, which became the one in today’s Bill of Rights.

1. Divide the class into five small groups and a large one of 14 students, representing the 14 states at the time the Bill of Rights was ratified (Vermont joined the Union in 1791).
2. Each of the small groups will be assigned one version of the First Amendment and will try to persuade the large group of 14 states that its version is better than any of the others and should be in the Bill of Rights.
3. The group of 14 may ask questions of the small groups during this debate.
4. After the five groups have each presented their case for best First Amendment, the group of 14 will discuss and vote for the one it thinks is the best. The group must reach a three-fourths supermajority (at least 11 votes) as required by Article V of the Constitution.

Madison’s Original Version: 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 any pretext, infringed.

The people shall not be deprived or abridged of their right to speak, to write, or to publish their sentiments; and the freedom of the press, as one of the great bulwarks of liberty, shall be inviolable.

The people shall not be restrained from peaceably assembling and consulting for their common good; nor from applying to the Legislature by petitions, or remonstrances, for redress of their grievances. [To be inserted in Constitution Article I, Section 9, between Clauses 3 and 4]

Version Reported by the House Select Committee: No religion shall be established by law, nor shall the equal rights of conscience be infringed.

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. [To be inserted in Constitution Article I, Section 9, between clauses 2 and 3]

Version Passed by the House of Representatives: 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 the common good, and to apply to the Government for a redress of grievances, shall not be infringed.

Version Passed by the Senate: 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.

Version Sent to the States for Ratification: Article The Third. 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. [Today’s First Amendment]

Standards Addressed

Madison & Bill of Rights

National High School U.S. History Standard 8: Understands the institutions and practices of government created during the Revolution and how these elements were revised between 1787 and 1815 to create the foundation of the American political system based on the Constitution and the Bill of Rights. (2) Understands how Federalists and Anti-Federalists differed (e.g., their arguments for and against the Constitution of 1787, . . . , their backgrounds, service during the Revolution, political experience). (3) Understands the Bill of Rights and various challenges to it (e.g., arguments by Federalists and Anti-Federalists over the need for a Bill of Rights . . .).

National High School Civics Standard 8: Understands the central ideas of American constitutional government and how this form of government has shaped the character of American society. (1) Knows major historical events that led to the creation of limited government in the United States (e.g., . . . Bill of Rights (1791) . . .)

National High School Civics Standard 15: Understands how the United States Constitution grants and distributes power and responsibilities to national and state government and how it seeks to prevent the abuse of power. (1) Understands how the overall design and specific features of the Constitution prevent the abuse of power . . . to protect individual rights . . . using a system of checks and balances (e.g., . . . the Bill of Rights).

Common Core Standard RH.11B12.4: Determine the meaning of words and phrases as they are used in a text, including analyzing how an author uses and refines the meaning of a key term over the course of a text.

California History-Social Science Standard 11.1: Students analyze the significant events in the founding of the nation and its attempts to realize the philosophy of government described in the Declaration of Independence. (1) Analyze . . . the debates on the drafting and ratification of the Constitution and the addition of the Bill of Rights.

California History-Social Science Standard 12.1: Students explain the fundamental principles and moral values of American democracy as expressed in the U.S. Constitution and other essential documents of American democracy. (6) Understand that the Bill of Rights limits the powers of the federal government and state governments.

Hatshepsut

National High School World History Standard 5: Understands the political, social, and cultural consequences of population movements and militarization in Eurasia in the second millennium BCE. (2) Understands the beliefs and accomplishments of . . . Egyptian rulers . . .

Common Core Standard RH.11B12.1: Cite specific textual evidence to support analysis of primary and secondary sources, connecting insights gained from specific details to an understanding of the text as a whole.

Common Core Standard RH.11B12.3: Evaluate various explanations for actions or events and determine which explanation best accords with textual evidence, acknowledging where the text leaves matters uncertain.

California History-Social Science Standard 6.2: Students analyze the geographic, political, economic, religious, and social structures of the early civilizations of Mesopotamia, Egypt, and Kush. (7) Understand the significance of Queen Hatshepsut . . .

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About Constitutional Rights Foundation

Constitutional Rights Foundation is a non-profit, non-partisan educational organization committed to helping our nation's young people to become active citizens and to understand the rule of law, the legal process, and their constitutional heritage. Established in 1962, CRF is guided by a dedicated board of directors drawn from the worlds of law, business, government, education, and the media. CRF's program areas include the California State Mock Trial, youth internship programs, youth leadership and civic participation programs, youth conferences, teacher professional development, and publications and curriculum materials.

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