Carrying ourselves back

How a religious document contributed to religious freedom

Leah Farish[1]

Abstract

The deepest source of religious rights in the United States is the First Amendment to its Constitution, which states in two clauses that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." These two clauses are shown to derive from the American Westminster Confession of Faith, a connection that helps us recover the clauses' original intention and application. Through a Golden Rule ethic, government officials and many courts are exhibiting a new protectiveness and appreciation of religion without imposing doctrine on American citizens.

Keywords Constitution, church/state relations, U.S. Supreme Court, religious freedom, founding of America, U.S. President.

On every question of construction, let us carry ourselves back to the time when the Constitution was adopted, recollect the spirit manifested in the debates, and instead of trying what meaning may be squeezed out of the text, or invented against it, conform to the probable one in which it was passed.

– Thomas Jefferson, 12 June 1823

The First Amendment to the U.S. Constitution is one of the most venerable statements in any government document. Yet most people would be surprised to discover that part of it was derived from a religious document – the Westminster Confession of Faith. Now is a crucial time to examine this connection, because carrying ourselves back to the amendment's birthplace can shed light on our way forward.

The Religion Clauses of the First Amendment read like a promise *not* to do something: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." Some have observed that this expression is appropriate because the Bill of Rights is "a charter of negative liberties" (Diaz 2011:3). We will see that the promise is not only to avoid establishing a religion in

[1] Leah Farish, BA, MA, JD is an adjunct professor at Oklahoma Wesleyan University and an attorney on civil rights issues. She is an Honor Guard attorney with Alliance Defending Freedom and has published several scholarly articles on First Amendment issues. Ms. Farish has advocated for years concerning human rights issues in Morocco, speaking at the United Nations and college campuses around the United States. She thanks Philip A. Riegert for help with formatting. Article received: 27 January 2018; accepted: 14 October 2020. Contact: leahfarish@gmail.com.

states, but to avoid disestablishing religions in the states that had them, which were a majority at the time.

It has been widely argued that Congress had to promise Americans that the federal government would be limited, or the public would not have supported ratification of the whole Constitution. "[A] number of states … expressed a desire … that further … restrictive clauses should be added … extending the ground of public confidence in the government" (Elliot 1789). But a less recognized reason for this formulation is that it echoes the language of the Westminster Confession of Faith. This echo will be more fully explained in section 1 of this article. In section 2, I examine the phrase "respecting an establishment of religion," showing that this was an efficient and ingenious way to bring together conflicting views of church and state. Sections 3 and 4 show how the United States is currently returning to a view of the First Amendment consistent with its original meaning.

1. The Westminster Confession as it appears in the U.S. Bill of Rights

In the text below, on the left is a paragraph from the 1646 Westminster Confession of Faith on the subject of church and state. On the right is the version that American Presbyterians wrote in 1788 to reflect the fact that they no longer had a king or a national, established religion. Note, for example, that the plural "magistrates" appears in the newer, democratic version rather than the singular "magistrate."

The language in italics on the right is clearly echoed in the vocabulary and syntax of the First Amendment, as the American Presbyterian wording promises noninterference in church life by the state. (The word "let" in that era meant to hinder, just as we now call a serve in tennis that grazes the net a "let.")

This new formulation, drafted just down the street from where the Constitutional Convention was gathered, would of course bear a connection to the First Amendment. It must have been thrilling to be among the founders of that new order. John Adams exclaimed, "How few of the human race have ever enjoyed an opportunity of making an election of government … for themselves or their children!" (Miller 1976:154). Yet they were cautious too. One writer of the time warned, "Men entrusted with the formation of civil constitutions, should remember they are painting for eternity: that the smallest defect … they frame may be the destruction of millions" (Miller 1976:184). On the issue of church and state, the efforts of both bodies would be in vain if they weren't in harmony. Both were free to invent, but it would have been senseless to invent a wrench to throw in the other's works. Fortunately, some men were able to knit the two bodies' thoughts together – well-known leaders like John Witherspoon and James Madison, but also Fisher Ames and Samuel Livermore.

Original Paragraph 3	**American** Paragraph 3
[20]The civil magistrate may not assume to himself the administration of the Word and sacraments, or the power of the keys of the kingdom of heaven [1]: yet he hath authority, and it is his duty, to take order, that unity and peace be preserved in the Church, that the truth of God be kept pure and entire, that all blasphemies and heresies be suppressed, all corruptions and abuses of worship and discipline prevented or reformed, and all the ordinances of God duly settled, administered, and observed [2]. For the better effecting whereof, he hath power to call synods, to be present at them, and to provide that whatsoever is transacted in them be according to the mind of God [3].	[21]Civil magistrates may not assume to themselves the administration of the Word and sacraments [1]; or the power of the keys of the kingdom of heaven [2]; or, in the least, interfere in matters of faith [3]. Yet, as nursing fathers, it is the duty of civil magistrates to protect the church of our common Lord, without giving the preference to any denomination of Christians above the rest in such a manner, that all ecclesiastical persons whatever shall enjoy the full, free, and unquestioned liberty of discharging, every part of their sacred functions, without violence or danger [4]. And, as Jesus Christ hath appointed a regular government and discipline in his church, *no law of any commonwealth, should interfere with, let, or hinder, the due exercise thereof,* among the voluntary members of *any* denomination of Christians, according to their own profession and belief [5]. It is the duty of civil magistrates to protect the person and good name of all their people, in such an effectual manner as that no person be suffered, either upon pretence of religion or of infidelity, to offer any indignity, violence, abuse, or injury to any other person whatsoever: and to take order, that all religious and ecclesiastical assemblies be held without molestation or disturbance [6]. (emphases added)

Table 1: CONFESSION Section XXIII--Of Civil Magistrates (Irons 2002)

The main wording of the First Amendment's religion clauses was first suggested by Fisher Ames of Massachusetts, a man with a Presbyterian education (Arkin 1999:763-828; Annals of Congress, 796). A very popular orator (Dunn 2004:124), Ames would have known that the wording that had united England with Scotland in the previous century would have dramatic resonance with Americans. Once it appeared in this form, the Amendment was quickly agreed upon in final form (Dreisbach 1987:57).[2]

Would the public have really recognized or appreciated verbiage from the Westminster Confession? Without question. Presbyterians and others in colonial America

[2] For further description of the drafting and reasons why it is unlikely that James Madison had much to do with the final wording, see Farish (2010:18-26).

subscribed to the Westminster Confession; it was part of the public policy of Massachusetts and Connecticut (Davis 2000:28). American men and women studied it, and memorizing passages from it was common school assignment (Loetscher 1989:65). "The Reformed tradition was the religious heritage of three fourths of the American people in 1776 and the impact of the Confession both on the east coast and the frontier defied calculation" (Ahlstrom 1972:50). Presbyterian preaching had such attraction for the Founders that during the Constitutional Convention, the place chosen for the July 4th oration was "the Reformed Calvinistic Church" in Philadelphia (Morris 1864:254; Loetscher 1989:75). As Leopold von Ranke has said, "John Calvin was the virtual founder of America" (Carlson 1973:19).

Parallels between political history and Reformed history abound. For example, in both England and the United States, a religious document regarding civil rights was followed immediately by a similar secular one. The relevant parts of the British Westminster Confession were adopted by Parliament in 1648. In 1649, a secular document was issued, called the Agreement of the People, which scholar Bernard Schwartz (1971:22) has hailed as "a sketch of a republican Constitution, … [that] suggestively anticipated many of the fundamentals of later American Constitutions." It protected the "exercise of religion" and the support of "divines," but would treat Jews, "heathens, and dissenters … gently" (Schwartz 1971:22, 24, 28, 121-22). Thus, a year after the religious manifesto, the proclamation of civil liberties emerged. The same pattern would occur later in the United States: the Presbyterians revised their church-state allegiances, and soon afterwards the Constitutional Convention did so as well. John Witherspoon was "prominent" in both the religious and secular deliberations (Balmer and Fitzmier 1993:39), attending both assemblies in his "large Geneva collar" (Morrison 2005:28).

At their gathering, the Presbyterians drafted what they called a "constitution," which was sent around to the presbyteries (representative bodies elected by local bodies) "for consideration" (Klett 1787:628; 1788:626) and the required ratification by two-thirds of them. Then the American government founders drafted the Constitution, and the ratification process by the states began; nine approvals were needed for the nation to form as planned. The following chart summarizes the two parallel timelines.

Perhaps rebellion against European institutions was also in the DNA of the American Presbyterians. Minutes of one of the early meetings of the New York Synod contain a poignant complaint to its mother church in Scotland, much as the colonies later expressed dismay at neglect and oppression by the British king. The Synod said, "The young Daughter of the Church of Scotland, helpless, exposed, in this foreign Land cries to her tender and powerful Mother for Relief" (Klett:627). A little later they wrote, "Members being aggrieved & obtaining no Satisfying Redress,

Year	Presbyterians	U.S. Government
1787	May, Philadelphia: Drafted its Constitution and sent to churches for approval	May-September, Philadelphia: Drafted Constitution and sent to states for ratification
1788	May, Philadelphia: Last meeting of Synod adopted a Constitution, including new sections on church-state relations, ordering it printed	May, Philadelphia: Constitutional Convention is convened; no amendments yet. Ninth state ratifies in June 1788.
1789	May, Philadelphia: First General Assembly is convened.	March, New York: First Congress is convened; First Amendment is debated, mostly in August and September, and is adopted in September.

even in the highest Judicature, have a Right to protest & require the Same to be recorded" (303). They ultimately broke away from what they viewed as a corrupt and neglectful European parent institution, just as the colonies revolted from the Crown. Hence we see abundant justification for claims of "deliberate pattern[ing]" (Loetscher 1989:77) or "intentional parallels between Presbyterian polity and the federal system of government enshrined in the United States Constitution … [and of] extraordinary influence in the early national period of American history" (Balmer and Fitzmier 1993:39). And note that in the sequences above, the Presbyterian ideas are articulated first. "In sum, the Presbyterian contribution to the shaping of the intellectual culture of the new nation cannot be disputed" (Balmer and Fitzmier 1993:37).

2. "Respecting an establishment of religion"

One might wonder why the First Amendment promises not to make a congressional law "respecting" (that is, concerning) an establishment of religion rather than just saying, "Congress shall not establish a religion."

The briefest and most decisive answer to this question is that most of the states – nine of the thirteen, by one count – *had* established religions at the time they were debating the federal Bill of Rights (Balmer and Fitzmier 1993:39). In some cases, dual or multiple establishments (benefiting more than one denomination, but not all) existed in a given state (Levy 1986). Thus, the First Amendment merely promised not to touch existing state arrangements one way or the other. For example,

the opening volley on the subject, from representative Charles Pinckney of South Carolina, set the course: "The legislature of the United States shall pass no law on the subject of religion" (Pfeffer 1953:110, 145). By 1833, all states had voluntarily disestablished, but when founding a national government, the lawmakers could not take on both struggles at once. They could especially not afford to offend constituents by suggesting that they would have to surrender their state support of religion in order to launch a federal Constitution. Promising a status quo – a hands-off policy toward the states – was the best strategy to win acceptance from both ends of the spectrum (Library of Congress n.d.).

In all the states at this time – even those without established religions – the Christian Scriptures were taught and various prayers were led in public schools (in fact, this practice continued in some places until the 1960s). Oaths of office declared belief in God or Jesus Christ (Levy 1986), and public officials openly prayed and encouraged religious devotion. Criminal and civil law reflected, sometimes explicitly, moral restrictions from the Bible, including prohibitions on working on Sunday, fraud, adultery, polygamy, and sodomy. Public displays of the Ten Commandments and nativity scenes, as well as biblical mottos on coins and flags, were common from Massachusetts to Georgia. (All these things have, with various degrees of success, been attacked in later years as establishments of religion.)

Thus, we must acknowledge that the Founders did not view an establishment of religion at the state level as *inevitably* violating the First Amendment. There existed an array of state benefits and accommodations to religion that the Founders did not uniformly oppose.[3]

When it came to establishments, were the Founders concerned only to ensure that the federal government would favor no one sect over others? For most of them, the answer to this question is no (Levy 1986: ch. 1). The Appendix to this article presents the recorded debate in the recorded debate about religion in the House Committee (we have no record of the Senate's discussion), which can be summarized as expressing agreement that "No power is given to the general government

[3] Moreover, their legislative acts indicate a tolerant view of *federal* establishments. For example, the same Congress that adopted the religion clauses passed the Northwest Ordinance, which says that "Religion, morality, and knowledge, being necessary to good government and the happiness of mankind, schools and the means of education shall forever be encouraged." *The Constitutions of the United States with the Latest Amendments* (Trenton: Moore and Lake, 1813, 364, Article III). And of other "surprising" legislative acts, the Supreme Court has said, "Provision for churches and chaplains at military establishments for those in the armed services may afford one such example. … It is argued that such provisions may be assumed to contravene the Establishment Clause, yet be sustained on constitutional grounds as necessary to secure to the members of the Armed Forces and prisoners these rights." (Abington v. Schempp, 296).

to interfere with it at all. Any act of Congress on this subject would be a usurpation" (Elliot 1789:208).

3. Recollecting the spirit

By recollecting the spirit of the debates over the religion clauses, we can gain insight into how to decide controversies today. I will suggest three principles and then propose three courses of future action implied by those principles.

First, the stance of the state toward religion is protective. In the new United States, the understanding was that since the church would never again take up arms, the state would protect it. The American version of the Confession refers to government as "nursing fathers" of faith, a phrase used in the British Confession's footnotes but now elevated to the main text. John Locke, Anglicans and Congregationalists had used the phrase, as had writers in every state that had an established religion (U.S. Library of Congress 1998).

Second, both religious individuals and religious institutions are protected. "The person and good name" of all individuals, regardless of their beliefs, are to be protected under the Westminster Confession's new wording. Individual practices such as respecting (or breaking) the Sabbath, dissenting from religious views, or attending seminary were not to be interfered with by the federal government, though some were addressed in state statutes. Nor could the federal government tax church property or dictate the doctrinal or personnel decisions of religious groups.

Third, the primary ethic of the Christian Scriptures – "Do unto others as you would have them do unto you" – remains a perfectly good guide for personal tolerance, public governance, and institutional behavior, as it was for the Confessors and our Founders. The First Amendment and the new Confession were written by people who saw themselves as living in a strongly Christian-majority nation, but who deliberately granted protection to people of other faiths or no faith. Interestingly, this Golden Rule, followed here by people of faith to protect people without faith, works just fine without regard to who is religious and who is not; non-religious people can extend protection to religious adherents by the same Rule.

4. Reviving protectiveness

The last few years have seen some indications that these principles are being revived in the United States after many years of confusion. In the executive branch, a new protectiveness is apparent. President Trump has said, "Faith is deeply embedded into the history of our country, the spirit of our founding and the soul of our nation. … [This administration] will not allow people of faith to be targeted, bullied, or silenced anymore." (U.S. Dept. of Justice 2017) Appointees to federal

judgeships appear to be recognizing the paramount importance of religious liberty and of carrying themselves back to original understandings and the rule of law.

The Trump administration's Department of Justice has issued guidance on Federal Law Protections for Religious Liberty (Office of Attorney General 2017). Here are some salient passages:

1. The freedom of religion is a fundamental right of paramount importance, expressly protected by federal law. …
4. … Although the application of the relevant protections may differ in different contexts, individuals and organizations do not give up their religious-liberty protections by providing or receiving social services, education, or healthcare; by seeking to earn or earning a living; by employing others to do the same; by receiving government grants or contracts; or by otherwise interacting with federal, state, or local governments.
5. … The Free Exercise Clause of the Constitution protects against government actions that target religious conduct. Except in rare circumstances, government may not treat the same conduct as lawful when undertaken for secular reasons but unlawful when undertaken for religious reasons.

In various sections, the Department of Justice has reiterated and broadly interpreted the Religious Freedom Restoration Act, Title VII's guarantee of reasonable accommodation of religion in the workplace, and President Clinton's Guidelines on Religious Exercise and Religious Expression, all of which are generally protective of religious practice. It closes by exhorting federal agencies to "pay keen attention, in everything they do, to [these principles]" (Office of Attorney General 2017).

Other new protections include a 2017 Department of Interior reversal of a three-year obstruction of equal access to the Grand Canyon for a study requested by a Christian scholar based on his religious beliefs about the creation of the earth (*Dr. Andrew Snelling v. United States Department of Interior* 2017).

The Supreme Court also ruled in favor of a Christian school, finding it equally entitled to state funds for playground resurfacing as secular schools. Justices Thomas and Gorsuch added that in such a case, a state could deny funds to religious entities only if the state could show a justification "of the highest order" (*Trinity Lutheran Church* 2017).

4.1 Religious individuals and religious groups

"In the United States, the free exercise of religion is not a mere policy preference to be traded against other policy preferences. It is a fundamental right." In the judicial branch, the Court has now recognized the fundamental right of Hobby Lobby, an avowed Christian company, to resist federal health insurance requirements of

employers to provide contraception coverage in their healthcare plan (*Burwell v. Hobby Lobby Stores, Inc.*). It was unsuccessfully argued that only individuals had the right to free exercise of religion.

"The freedom of religion extends to persons and organizations." So says the new guidance from the Justice Department. And Chief Justice Roberts said it this way in the unanimous decision *Hosanna Tabor v. EEOC*:

> The interest of society in enforcement of employment discrimination statutes is undoubtedly important. But so too is the interest of religious groups in choosing who will preach their beliefs, teach their faith, and carry out their mission. When a minister who has been fired sues her church alleging her termination was discriminatory, the First Amendment has struck the balance for us. The church must be free to choose those who will guide it on its way. (*Hosanna Tabor*:21)

In other words, the existence of the First Amendment gives religious entities' autonomy preeminence over statutory, or even over the interests safeguarded by the Equal Protection Clause (14th Amendment of the United States Constitution).

4.2 The Golden Ethic

Finally, the U.S. government may be recovering a sense of the Golden Rule as it considers the case of *Masterpiece Cakeshop v. Colorado Civil Rights Commission*. In that case a Christian baker, Jack Phillips, refused to create an artistic "masterpiece cake" for a gay wedding, invoking his freedom from coercion to express approval for such a union. During lively oral arguments, certain justices hinted that doing unto others as one would be done by was no less than a constitutional principle.

> CHIEF JUSTICE ROBERTS: So Catholic Legal Services would be put to the choice of either not providing any pro bono legal services or providing those services in connection with the same-sex marriage? …
> JUSTICE GORSUCH: And what people are trying to do with exceptions is take … genuine, sincere religious views or whatever it is, and minimize the harm it does to the principle of the statute while making some kind of compromise for people of sincere beliefs on the other side. … And my impression of this is there wasn't much effort here in Colorado to do that. …
> JUSTICE ALITO: [This] appears to be a practice of discriminatory treatment based on viewpoint. The – the Commission had before it the example of three complaints filed by an individual whose creed includes the traditional Judeo-Christian opposition to same-sex marriage, and he requested cakes that expressed that point of view, and those – there were bakers who said no, we won't do that because it is offensive. And the Commission said: That's okay. It's okay for a baker who supports

> same-sex marriage to refuse to create a cake with a message that is opposed to same-sex marriage. But when the tables are turned and you have the baker who opposes same-sex marriage, that baker may be compelled to create a cake that expresses approval of same-sex marriage. . . .
> JUSTICE KENNEDY: Counselor, tolerance is essential in a free society. And tolerance is most meaningful when it's mutual. It seems to me that the state in its position here has been neither tolerant nor respectful of Mr. Phillips' religious beliefs.

The Court gave robust recognition to faith in *Town of Greece v. Galloway*, though in a 5-4 result. The justices said a predominantly Christian town may host religious invocations pursuant to a neutral policy, even though most of them are Christian invocations, at the openings of its board meetings and thus can "acknowledge" the value many private parties place on faith, and "in the general course, legislative bodies do not engage in impermissible coercion merely by exposing constituents to prayer they would rather not hear and in which they need not participate." Avoidance of Establishment Clause violations must not lead to "a brooding and pervasive devotion to the secular" (quoting *Abington v. Schempp*). The Court even noted the potential benefit of prayers to "lawmakers themselves, who may find that a moment of prayer or quiet reflection sets the mind to a higher purpose and thereby eases the task of governing." Implied is an invitation to those in the seat of power to grant others in their position a resource that might facilitate their work (Horwitz 2013:248-250).

These acknowledgements of religion are in keeping with the Westminster Confession's paradigm of a government that is comfortable with its cultural heritage, and with welcoming expressions of faith without seeing them as government endorsement. As founder Samuel Adams said about public prayer from diverse participants, "I am no bigot, and can hear a prayer from a gentleman of piety and virtue who is at the same time a friend of his country" (Kimball 1893: 84). Chief Justice Roberts wrote in the recent church playground case, "The exclusion of Trinity Lutheran from a public benefit for which it is otherwise qualified, solely because it is a church, is odious to our Constitution all the same, and cannot stand." (*Trinity Lutheran Church* 2017)

5. Conclusion

The words of the Westminster Confession of Faith remind us of the landscape in which the religion clauses of the U.S. Constitution were written. In that context, a government and culture informed by Christian principles declined themselves exclusive power in matters of religion, choosing instead to treat all people, regardless of their religion, fairly under the guidance of the Golden Rule.

The religion clauses allow true freedom of conscience not because they were written by people who wanted to favor their own religious institutions, but because they were based on treating others as one would like to be treated. That standard functions equally well when applied by secularists as by religious people. This generous ethic persists in 2018 in the current appointees of President Trump, who is on his way to an anticipated 300 new federal judges who are originalists, and two or three possible Supreme Court appointments in the same vein.

Readers living in increasingly secular societies may ask: what becomes of the contextualism so prevalent in other jurisprudence? The answer is simple: The Golden Rule has context built in, because it has empathy and imagination built in, thus making it durable and resilient through the centuries.

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Appendix: Record of debate on First Amendment wording

[*15 August 1789, U.S. House of Representatives*]

The fourth proposition being under consideration, as follows:

Article 1. Section 9. Between paragraphs two and three insert "no religion shall be established by law, nor shall the equal rights of conscience be infringed."

Mr. Sylvester had some doubts of the propriety of the mode of expression used in this paragraph. He apprehended that it was liable to a construction different from what had been made by the committee. He feared it might be thought to have a tendency to abolish religion altogether. …

Mr. Gerry said it would read better if it was, that no religious doctrine shall be established by law.

Mr. Sherman thought the amendment altogether unnecessary, inasmuch as Congress had no authority whatever delegated to them by the Constitution to make religious establishments; he would, therefore, move to have it struck out. …

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. Whether the words are necessary or not, he did not mean to say, but they had been required by some of the State Conventions, who seemed to entertain an opinion that under the clause of the Constitution, which gave power to Congress to make all laws necessary and proper to carry into execution the Constitution, and the laws made under it, enabled them to make laws of such a nature as might infringe the rights of conscience and establish a national religion; to prevent these effects he presumed the amendment was intended, and he thought it as well expressed as the nature of the language would admit.

Mr. Huntington said that he feared, with the gentleman first up on this subject, that the words might be taken in such latitude as to be extremely hurtful to the cause of religion. … If an action was brought before a Federal Court on any of these cases, the person who had neglected to perform his engagements could not be compelled to do it; for a support of ministers, or building of places of worship might be construed into a religious establishment.

By the charter of Rhode Island, no religion could be established by law; he could give a history of the effects of such a regulation; indeed the people were now enjoying the blessed fruits of it. He hoped, therefore, the amendment would be made in such a way as to secure the rights of conscience, and a free exercise of the rights of religion, but not to patronize those who professed no religion at all.

Mr. Madison thought, if the word national was inserted before religion, it would satisfy the minds of honorable gentlemen. He believed that the people feared one sect might obtain a pre-eminence, or two combine together, and establish a religion to which they would compel others to conform. He thought if the word national was

introduced, it would point the amendment directly to the object it was intended to prevent.

Mr. Livermore … thought it would be better if it was altered, and made to read in this manner, that Congress shall make no laws touching religion, or infringing the rights of conscience.

Mr. Gerry did not like the term national, proposed by the gentleman from Virginia, and he hoped it would not be adopted by the House. …

Mr. Madison withdrew his motion, but observed that the words "no national religion shall be established by law," did not imply that the Government was a national one; the question was then taken on Livermore's motion, and passed in the affirmative, thirty-one for, and twenty against it.

[17 August]

The committee then proceeded to the fifth proposition:

Article 1, section 10, between the first and second paragraph, insert "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."

Mr. Tucker. – This … goes only to the alteration of the constitutions of particular States. 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; … I therefore move, sir, to strike out these words.

Mr. Madison conceived this to be the most valuable amendment in 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. He thought that if they provided against the one, it was as necessary to provide against the other, and was satisfied that it would be equally grateful to the people.

Mr. Livermore … wished to make it an affirmative proposition: "the equal rights of conscience, the freedom of speech or of the press, and the right of trial by jury in criminal cases, shall not be infringed by any State."

This transposition being agreed to, and Mr. Tucker's motion being rejected, the clause was adopted.

[20 August]

On motion of Mr. Ames, the fourth amendment was altered so as to read "Congress shall make no law establishing religion, or to prevent the free exercise thereof, or to infringe the rights of conscience." This [was] adopted.