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Introduction: Rights under the Articles of Confederation

The Articles of Confederation created a unicameral Congress possessing only those powers that were “expressly enumerated” in the Articles themselves. Most importantly, the Confederation Congress could not operate directly on people, but dealt only with states. Consequently, the Articles did not contain a bill of rights. For the most part, rights were protected in state bills of rights and in the body of state constitutions, and thus the public debate over rights during the Confederation years was usually conducted on the state level. An example of this debate follows immediately with the debate over religious freedom in Virginia.

Rights, however, were periodically discussed on some national issues. When Congress proposed the Impost of 1783 as an amendment to the Articles of Confederation that would give Congress the power to levy a federal tariff to be used to pay the wartime debt, the issue of how the tariff would be collected and enforced became important debates over rights. Writing under several different pseudonyms in 1786, Abraham Yates, Jr., argued that the implementation of the Impost of 1783 would violate provisions of the New York state constitution of 1777. In ratifying the Impost, all of the states attached provisos that in essence limited the federal judiciary in prosecutions against smugglers and others who allegedly violated the Impost. No one being prosecuted could be deprived of their rights as embodied in their state bills of rights and constitutions and trials could be held only in state courts. This “reverse incorporation” occurred 140 years before *Gitlow v. New York* (1925) first incorporated the U.S. Bill of Rights onto the states through the “equal protection of the law” provision of the Fourteenth Amendment.

Rights also became an issue in adopting the Northwest Ordinance in July 1787. Because Congress appointed the governor, secretary of state, and the three judges of the judiciary, an abbreviated bill of rights was included in the ordinance. Finally, in September 1787 a small number of delegates to the Confederation Congress opposed the Constitution when considering how to submit it to the states for ratification. Richard Henry Lee of Virginia proposed that Congress should propose amendments to the Constitution including a bill of rights. In a compromise between Federalists and Antifederalists—Congress sent the Constitution to the states without its approbation, while Lee’s amendments (including his bill of rights) were stricken from the journal. Lee, however, included copies of his bill of rights in several letters to prominent Antifederalists and his letter to Governor Edmund Randolph of Virginia with Lee’s bill of rights were widely printed in newspapers throughout the country.

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