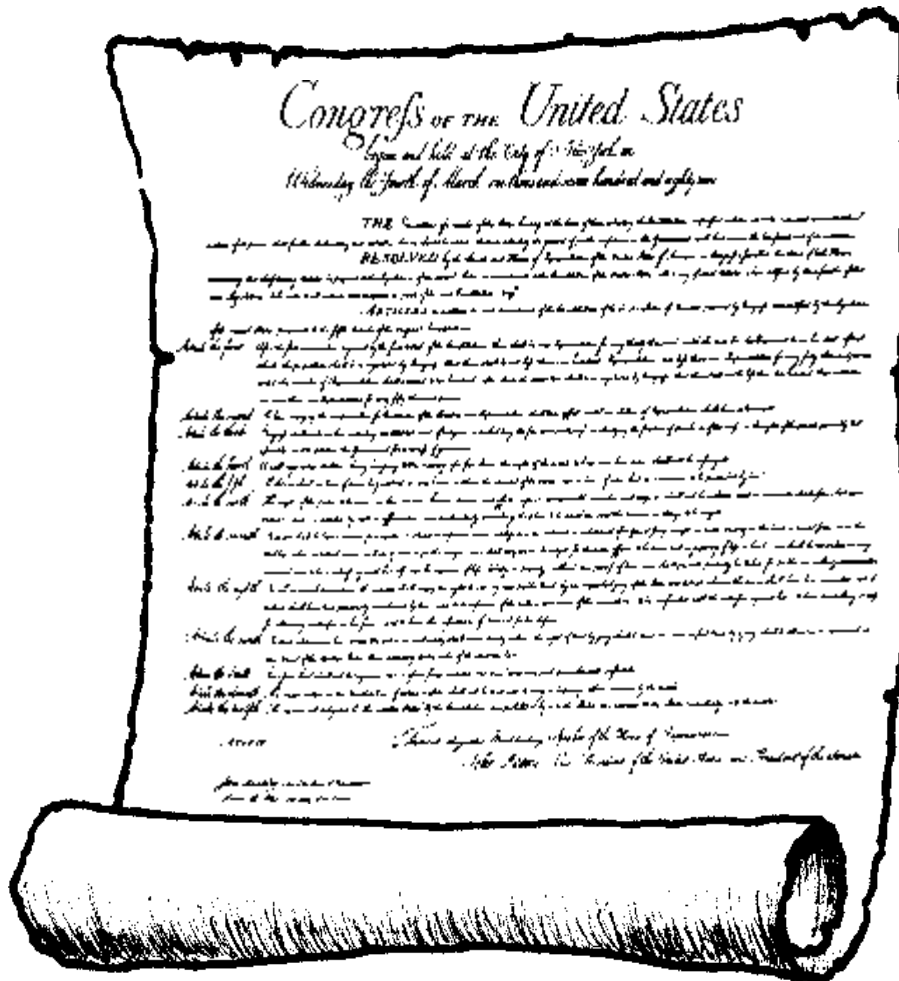

THE EVOLUTION OF THE BILL OF RIGHTS

A Unit of Study for Grades 8-12

DAVID VIGILANTE



NATIONAL CENTER FOR HISTORY IN THE SCHOOLS
University of California, Los Angeles

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The National Center for History in the Schools
History Department
University of California, Los Angeles
5262 Bunche Hall
405 Hilgard Avenue
Los Angeles, California 90095-1473
FAX: (310) 267-2103

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COVER ILLUSTRATION: Facsimile of the Bill of Rights Draft

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ACKNOWLEDGMENTS

David Vigilante, Associate Director of the National Center for History in the Schools (NCHS), has over 30 years teaching experience at both junior and senior high schools. He was a member of the teacher task force that developed the National Standards for United States History and co-edited *Bring History Alive! A Sourcebook for United States History* and the companion volume for world history. Vigilante has also developed teaching modules on the Cold War in the New York Times *Live from the Past* series, teacher's guides for video productions, and several of the other teaching units developed by the NCHS.

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TEACHER BACKGROUND MATERIALS

I. UNIT OVERVIEW

The Bill of Rights is often enshrined as a sacred document which guarantees our basic human and civil rights. Survey texts discuss the clash of ideals at the Constitutional Convention but seldom refer to conflicts over the incorporation of a Bill of Rights outside the context of the state ratification debates. The stormy history of the Bill of Rights should be included in the study of United States history and American Government. Its evolution from state declarations to final incorporation as the first ten amendments to the Constitution illustrates the clash of political ideology in a turbulent era of history.

Although today we regard the Bill of Rights with reverence, adoption was a long and arduous process which began with Virginia's Declaration of Rights in 1776 and culminated with the states' ratification of the Bill of Rights on December 15, 1791. A study of the process helps students understand the importance of vigilance in maintaining individual rights, lending credence to the Federalist arguments that "parchment barriers" in themselves are worthless.

II. UNIT CONTEXT

This unit is applicable in United States history or American Government classes where students study political ideologies during the Revolutionary and early Federal periods. The unit presents five lessons on the Bill of Rights: the Virginia and Pennsylvania Declarations of Rights; discussion regarding incorporation at the Constitutional Convention; Federalist and Antifederalist debates over ratification of the Constitution; House debates regarding inclusion of a bill of rights; and cases involving the application of principles included in the Bill of Rights. The unit also includes an extension lesson which may be used to further explore the development of state declarations of rights. The unit should be used to supplement the study of the Constitution in United States history. In American Government classes lessons are appropriate in the study of political philosophy and as an introduction to a study of contemporary issues related to the Bill of Rights.

III. CORRELATION TO NATIONAL STANDARDS FOR UNITED STATES HISTORY

The Evolution of the Bill of Rights provides teaching materials that address *National Standards for History, Basic Edition* (National Center for History in the Schools, 1996), **Era 3**, *Revolution and the New Nation (1754–1820s)*. Lessons

specifically address **Standards 3A** and **3B** on the Federalist and Anti-Federalist debates over the inclusion of a bill of rights in the federal Constitution, Madison's role in securing adoption by the First Congress, and the significance of the Bill of Rights in American history.

Lessons within this unit likewise address a number of specific Historical Thinking Standards including: Explain historical continuity and change; analyze cause-and effect relationships; support interpretations with historical evidence to construct reasoned arguments; and, analyze the interests, values, and perspectives of those involved in the debate over the Bill of Rights.

IV. UNIT OBJECTIVES

1. To understand the evolution of the Bill of Rights.
2. To clarify ideological differences over the inclusion of a Bill of Rights in the federal Constitution.
3. To appraise the impact of a Bill of Rights on the development of American democracy.

V. LESSON PLANS

1. The Virginia and Pennsylvania Declarations of Rights (an extension lesson focuses on other state declarations)
2. The Debate at the Constitutional Convention
3. Federalist and Antifederalist Perspectives on Inclusion of a Bill of Rights
4. The House Debate
5. Voices from the Past—Testing the Bill of Rights

VI. INTRODUCTION TO THE EVOLUTION OF THE BILL OF RIGHTS

By the spring of 1776 reconciliation with Britain appeared to be impossible, and on May 10 the Continental Congress called on each colony to assume sovereignty. By May 15, the Virginia Convention passed a resolution to sever all ties with the mother country and called on the Continental Congress to declare complete independence. At the same time the Virginia Convention authorized a committee to draft a Declaration of Rights and a plan of government for the colony.

George Mason was appointed as one of the twenty-seven members of the drafting committee. Mason had a reputation as a patriot and had the admiration and respect of colleagues including his Fairfax County neighbor, George Washington. Mason quickly grew impatient with parliamentary maneuvering and wrote to Richard Henry Lee that nothing would come from a committee “overcharged with useless members.” Mason, determined to meet the Convention’s charge, took it upon himself to draft a Declaration of Rights. The declaration began:

. . . All Men are born equally free and independant [sic], and have certain inherent natural Rights, of which they cannot by any Compact, deprive or divest their Posterity; among which are the Enjoyment of Life and Liberty, with the Means of acquiring and possessing Property, and pursueing [sic] and obtaining Happiness and Safety.

—Robert A. Rutland, *The Papers of George Mason*, Vol. 1, 1749–1778 (Chapel Hill: Universtiy of North Carolina Press, 1970), 276–277.

This language posed problems in a state with some 200,000 slaves. Robert Carter Nicholas led the opposition, attacking the phrase “born free and equal.” He argued that adopting this language would lead to “civil convulsion” because the ideas expressed in this statement were dangerous to a slave-holding society. Thomas Ludwell Lee complained that opponents to Mason’s proposal were obstructionists, remarking:

. . . we find such difficulty in laying the foundation stone, that I very much fear for the Temple of Liberty which was proposed to be erected. . . . A certain set of aristocrats, —for we have such monsters here,— finding that their execrable system cannot be reared on such foundations have to this time kept us at Bay on the first line, which declares all men to be born equally free and independent. . . .

—Robert A. Rutland, *The Birth of The Bill of Rights, 1776-1791* (New York: Collier Books, 1962), 37.

Mason was appalled by the debate and to avoid further haggling agreed to substitute the words “by nature” for “born” and the word “inherent” was dropped in the first sentence. Another compromise added the phrase “when they enter into a state of society.” The opening statement of the Declaration of Rights now read:

That all men are by nature equally free and independent, and have inherent rights, of which, when they enter into a state of society, they cannot, by any compact, deprive or divest their posterity; namely, the enjoyment of life and liberty, with the means of acquiring and possessing property, and pursuing and obtaining happiness and safety.

The addition of the phrase “when they enter into a state of society” was implicitly understood to remove any pretension that slaves shared in the natural rights guaranteed by this first article of the Declaration of Rights. Slaves held no property and were not considered “constituent members” of Virginia society. Other less substantive changes were approved and in June 1776, Virginia adopted the Declaration. George Mason, seldom boastful of his role in writing the Declaration, acknowledged his authorship in a letter to a friend dated October 2, 1778:

. . . I inclose you a Copy of the first Draught of the Declaration of Rights, just as it was drawn by me, & presented to the Virginia Convention, where it received few Alterations; some of them I think not for the better; this was the first thing of the kind upon the Continent, and has been closely imitated by the other States.

—Rutland, ed., *The Papers of George Mason*, 1:434.

The Virginia declaration provided a model for other states. Pennsylvania likewise adopted a Declaration of Rights on September 28, 1776, which prefaced the new state Constitution. Employing much of the language of the Virginia document, the Pennsylvania Declaration also reflected a marked Quaker influence. It expressly guaranteed liberty of conscience and prohibited coercion to bear arms against one’s religious beliefs. Although slavery existed in both states in 1776, Pennsylvania’s first article was not amended so as to reconcile it with the Virginia slave holders’ objections. It reads:

. . . all men are born equally free and independent, and have certain natural, inherent and inalienable rights, amongst which are, the enjoying and defending life and liberty, acquiring, possessing and protecting property, and pursuing and obtaining happiness and safety.

Of the thirteen original states, eight adopted separate declarations of rights; the remaining five incorporated some of the guarantees of the Virginia and Pennsylvania declarations into the body of their constitutions.

In 1787, delegates meeting in Philadelphia drafted a Constitution after bitter debate on a variety of issues. The discussion of a bill of rights was addressed on several occasions, but when George Mason called for a vote to have a committee draft a declaration of rights, it failed to carry a single state. This failure to include a bill of rights almost proved fatal during the ratification debates. Opponents of the Constitution used the omission of a guarantee of basic rights as proof of a conspiracy to subvert the principles on which the nation was founded.

Antifederalists objected to many specific features of the new political system but best articulated their objections regarding the failure of the Constitution to incorporate a bill of rights. Federalists, however, had won an important battle at the Philadelphia Convention in requiring that the Constitution be submitted to state conventions in its entirety and that ratification could not be placed on conditions or amendments.

Federalists justified the absence of a declaration of rights by arguing that the Constitution established a federal system with specific powers delegated to the national government and other powers reserved to the states. The powers held by the central government could not limit or threaten liberty. Federalists furthermore asserted that in the English tradition, bills of rights were necessary in order to limit royal prerogatives and the usurpation of power. They added that “parchment barriers” would provide no protection; only an ever-vigilant populace could safeguard basic rights. In addition, a grave risk existed in enumerating rights—those which may not be stated would be assumed denied.

The Antifederalists, on the other hand, argued that power corrupts, thus compelling written protections of basic rights which would set governmental bounds. They feared that the general welfare and the necessary and proper clauses of Article I, Section 8 along with the supremacy clause in Article VI created a powerful central government with dangerous powers. The Antifederalists believed that the Constitution placed in jeopardy guarantees which had been incorporated in state declarations of rights by giving the national government vague and unlimited powers and creating a federal judiciary to serve as a final arbiter in disputes. They countered the Federalist argument regarding specific enumeration of powers by citing prohibitions of powers in Article I, Section 9 and inquired why these and no other rights were protected in the Constitution.

Massachusetts approved the Constitution in February, 1788, with a call for “certain amendments and alterations” to lessen “the fears and quiet the apprehension of many of the good people of the commonwealth.” Ratification debates in New York and Virginia showed the degree of opposition and ultimately lead to a promise of the inclusion of a Bill of Rights.

James Madison introduced a series of amendments to the Constitution in the House of Representatives on June 8, 1789. Federalists opposed on the same grounds as they argued in the ratification debates and further argued that it was inappropriate to amend the Constitution at this time. Antifederalists likewise opposed Madison’s proposals claiming that they were “milk and water propositions.” Despite haggling, mostly over form, amendments were approved and sent to the Senate. After some alterations, the Bill of Rights was finally submitted to the states for ratification.

LESSON ONE
THE VIRGINIA AND PENNSYLVANIA
DECLARATIONS OF RIGHTS

A. OBJECTIVES

1. To analyze the impact of British colonial policy on the incorporation of declarations of rights.
2. To compare and contrast the similarities and differences in the Virginia and Pennsylvania Bills of Rights.
3. To appraise social and religious factors which influenced aspects of the Virginia and Pennsylvania Declarations of Rights.

B. LESSON ACTIVITIES (1 day)

1. Open the lesson by using the **Dramatic Moment**. Make a transparency of the three quotations and project for students to read. Ask students to react to the three different quotations. What do these short quotes illustrate regarding eighteenth-century attitudes towards the idea of a bill of rights?
2. Distribute **Documents A** and **B**
 - a. Divide the class into two groups. Inform students that they will be given a bill of rights which was written as a part of a state constitution in 1776. Give half the class **Document A**, The Virginia Declaration of Rights, and the remainder of the class **Document B**, A Declaration of the Rights of the Inhabitants of the State of Pennsylvania. Subdivide each group into smaller working groups and have each group read and discuss the document.
 - b. Have students report on the sixteen articles of each state Bill of Rights. Discuss the similarities and differences in the two state declarations. If necessary, distribute **Document C** to further assist students in comparing and contrasting the two documents.
 - c. How do these two state declarations relate to British colonial rule? To what degree were these documents a response to the particular historical experiences of Virginia and Pennsylvania in the pre-revolutionary era?

3. Have students respond to the following question as a written homework assignment: What factors contribute to the distinct differences in the two state declarations of rights? Encourage students to review the social and religious composition of the two states.

C. VOCABULARY DEVELOPMENT

Students should keep a vocabulary journal which defines these and other words which may not currently be in their vocabulary.

emoluments
remonstrance
vicinage
weal

D. EVALUATING THE LESSON

Class discussion provides an opportunity to check for understanding. The written homework assignment is an assessment of the ability of students to apply their knowledge of social factors within each state that are reflected in the respective state declarations of rights.

VIRGINIA DECLARATION OF RIGHTS

(Primary Source)

The Virginia House of Burgesses order the framing of a Declaration of Rights on May 6, 1776. The document was to be drafted by a special committee. George Mason of Fairfax County took the lead in drafting the document. The declaration, adopted on June 12, 1776, was not submitted to the people for ratification.

A declaration of rights made by the representatives of the good people of Virginia, assembled in full and free convention; which rights do pertain to them and their posterity, as the basis and foundation of government.

Sec. 1. That all men are by nature equally free and independent, and have certain inherent rights, of which, when they enter into a state of society, they cannot, by any compact, deprive or divest their posterity; namely, the enjoyment of life and liberty, with the means of acquiring and possessing property, and pursuing the obtaining of happiness and safety.

Sec. 2. That all power is vested in, and consequently derived from, the people; that magistrates are their trustees and servants, and at all times amenable to them.

Sec. 3. That government is, or ought to be instituted for the common benefits, protection, and security of the people, nation, or community; of all the various modes and forms of government, that is best which is capable of producing the greatest degree of happiness and safety, and is most effectually secured against the danger of maladministration; and that, when any government shall be found inadequate or contrary to these purposes, a majority of the community hath an indubitable, inalienable, and indefeasible right to reform, alter, or abolish it, in such manner as shall be judged most conducive to the public weal.

Sec. 4. That no man, or set of men, are entitled to exclusive or separate emoluments or privileges from the community, but in consideration of public services; which, not being descendible, neither ought the offices of magistrate, legislator, or judge to be hereditary.

Sec. 5. That the legislative and executive powers of the State should be separate and distinct from the judiciary; and that the members of the two

first may be restrained from oppression, by feeling and participating in the burdens, they should, at fixed periods be reduced to a private station, return into that body from which they were originally taken, and the vacancies be supplied by frequent, certain, and regular elections, in which all, or any part of the former members, to be again eligible, or ineligible, as the laws shall direct.

Sec. 6. That elections of members to serve as representatives of the people, in assembly, ought to be free; and that all men, having sufficient evidence of permanent common interest with, and attachment to, the community, have the right to suffrage, and cannot be taxed or deprived of their property for public uses, without their own consent, or that of their representatives so elected, nor bound by any law to which they have not, in like manner, assented, for the public good.

Sec. 7. That all power of suspending laws, or the execution of laws, by any authority, without consent of the representatives of the people, is injurious to their rights, and ought not to be exercised.

Sec. 8. That in all capital or criminal prosecutions a man hath a right to demand the causes and nature of his accusation, to be confronted with the accusers and witnesses, to call for evidence in his favor, and to a speedy trial by an impartial jury of twelve men of his vicinage, without whose unanimous consent he cannot be found guilty; nor can he be compelled to give evidence against himself; that no man be deprived of his liberty, except by the law of the land or the judgment of his peers.

Sec. 9. That excessive bail ought not to be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

Sec. 10. That general warrants, whereby an officer or messenger may be commanded to search suspected places without evidence of a fact committed, or to seize any person or persons not named, or whose offence is not particularly described and supported by evidence, are grievous and oppressive, and ought not to be granted.

Sec. 11. That in controversies respecting property, and in suits between man and man, the ancient trial by jury is preferable to any other, and ought to be held sacred.

Sec. 12. That the freedom of the press is one of the great bulwarks of liberty, and can never be restrained but by despotic governments.

Sec. 13. That a well-regulated militia, composed of the body of the people, trained to arms, is the proper, natural, and safe defence of a free State; that standing armies, in time of peace, should be avoided, as dangerous to liberty; and that in all cases the military should be under strict subordination to, and governed by, the civil power.

Sec. 14. That the people have the right to uniform government; and, therefore, that no government separated from, or independent of the government of Virginia, ought to be erected or established within the limits thereof.

Sec. 15. That no free government, or the blessings of liberty, can be preserved to any people, but by a firm adherence to justice, moderation, temperance, frugality, and virtue, and by frequent recurrence to fundamental principles.

Sec. 16. That religion, or the duty which we owe to our Creator, and the manner of discharging it, can be directed only by reason and conviction, not by force or violence; and therefore all men are equally entitled to the free exercise of religion, according to the dictates of conscience; and that it is the mutual duty of all to practise Christian forbearance, love, and charity towards each other.

Benjamin Perley Poore, comp. *The Federal and State Constitutions, Colonial Charters and other Organic Laws of the United States* (New York: Burt Franklin, 1972; first published in 1878), pt. 2, 1908–1909.

**A DECLARATION OF THE RIGHTS OF THE INHABITANTS
OF THE STATE OF PENNSYLVANIA**

(Primary Source)

The Pennsylvania Declaration of Rights and Constitution was framed by a convention which assembled in Philadelphia on July 15, 1776. The document, completed on September 28, 1776, was not submitted to the people for ratification.

I. That all men are born equally free and independent, and have certain natural, inherent and unalienable rights, amongst which are, the enjoying and defending of life and liberty, acquiring, possessing and protecting property, and pursuing and obtaining happiness and safety.

II. That all men have a natural and inalienable right to worship Almighty God according to the dictates of their own consciences and understandings: And that no man ought or of right can be compelled to attend any religious worship, or erect or support any place of worship, or maintain any ministry, contrary to, or against, his own free will and consent: Nor can any man, who acknowledges the being of a God, be justly deprived or abridged of any civil rights as a citizen, on account of his religious sentiments or peculiar mode of religious worship: And that no authority can or ought to be vested in, or assumed by any power whatever, that shall in any case interfere with, or in any manner controul [sic], the right of conscience in the free exercise of religious worship.

III. The people of this State have the sole, exclusive and inherent right of governing and regulating the internal police of the same.

IV. That all power being originally inherent in, and consequently derived from, the people; therefore all officers of government, whether legislative or executive, are their trustees and servants, and at all times accountable to them.

V. The government is, or ought to be, instituted for the common benefit, protection and security of the people, nation or community; and not for the particular emolument or advantage of any single man, family, or sett [sic] of men, who are a part only of that community; And that the community hath an indubitable, unalienable and indefeasible right to

reform, alter, or abolish government in such manner as shall be by that community judged most conducive to the public weal.

VI. That those who are employed in the legislative and executive business of the State, may be restrained from oppression, the people have a right, at such periods as they may think proper, to reduce their public officers to a private station, and supply the vacancies by certain and regular elections.

VII. That all elections ought to be free; and that all free men having a sufficient evident common interest with, and attachment to the community, have a right to elect officers, or be elected into office.

VIII. That every member of society hath a right to be protected in the enjoyment of life, liberty and property, and therefore is bound to contribute his proportion towards the expence [sic] of that protection, and yield his personal service when necessary, or an equivalent thereto: But no part of a man's property can be justly taken from him, or applied to public uses, without his own consent, or that of his legal representatives: Nor can any man who is conscientiously scrupulous of bearing arms, be justly compelled thereto, if he will pay such equivalent, nor are the people bound by any laws, but such as they have in like manner assented to, for their common good.

IX. That in all prosecutions for criminal offences, a man hath a right to be heard by himself and his council, to demand the causes and nature of his accusation, to be confronted with the witnesses, to call for evidence in his favour, and a speedy public trial, by an impartial jury of the country, without the unanimous consent of which jury he cannot be found guilty; nor can he be compelled to give evidence against himself; nor can any man be justly deprived of his liberty except by the laws of the land, or the judgment of his peers.

X. That the people have a right to hold themselves, their houses, papers, and possessions free from search or seizure, and therefore warrants without oaths or affirmations first made, affording a sufficient foundation for them, and whereby any officer or messenger may be commanded or required to search suspected places, or to seize any person or persons,

his or their property, not particularly described, are contrary to that right, and ought not to be granted.

XI. That in controversies respecting property, and in suits between man and man, the parties have a right to trial by jury, which ought to be held sacred.

XII. That the people have a right to freedom of speech, and or writing, and publishing their sentiments; therefore the freedom of the press ought not to be restrained.

XIII. That the people have a right to bear arms for the defence of themselves and the state; and as standing armies in the time of peace are dangerous to liberty, they ought not to be kept up; And that the military should be kept under strict subordination to, and governed by, the civil power.

XIV. That a frequent recurrence to fundamental principles, and a firm adherence to justice, moderation, temperance, industry, and frugality are absolutely necessary to preserve the blessings of liberty, and keep a government free: The people ought therefore to pay particular attention to these points in the choice of officers and representatives, and have a right to exact a due and constant regard to them, from their legislators and magistrates, in the making and executing such laws as are necessary for the good government of the state.

XV. That all men have a natural inherent right to emigrate from one state to another that will receive them, or to form a new state in vacant countries, or in such countries as they can purchase, whenever they think that thereby they may promote their own happiness.

XVI. That the people have a right to assemble together, to consult for their common good, to instruct their representatives, and to apply to the legislature for redress of grievances, by address, petition, or remonstrance.

Poore, *The Federal and State Constitutions*, Pt. 2, 1541–1542.

DECLARATION OF RIGHTS

The numbers below refer to the articles as listed in the *Virginia* or *Pennsylvania Declaration of Rights*. They are lined up by topic.

Virginia (29 June 1776)	Pennsylvania (28 September 1776)
Article	Article
1. All men by nature are equally free and independent when they enter into a state of society	1. All men are born equally free and independent
2. All power vested and derived from the people; magistrates are their trustees and servants, and at all times amenable to them	2-4. People have sole exclusive and inherent rights of governing—officers of government are accountable to them
3. Right of the people to reform, alter or abolish “inadequate” or “contrary” government	3. Right to “alter or abolish” nonresponsive government
4. No hereditary offices	4. All officers to be elected
5. Separation of powers	No reference
6. Suffrage—all men “having sufficient evidence [property] of permanent common interest in the community”	6. Suffrage—“all free men having a sufficient evidence of common interest with an attachment to the community”
7. No suspension of laws without legislative consent	No reference
8. Trial by jury; cannot be required to testify against oneself; speedy trial, etc.	9. Same
9. No excessive bail; no cruel and unusual punishment	Absent from the Declaration of Rights; Article 29 of the Constitution of 1776 specifies no excessive bail

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| 10. No general search warrants | 10. Same |
| 11. Jury trial in civil suits | 11. Same |
| 12. Freedom of the press | 12. Freedom of speech and press |
| 13. Standing army to be avoided in peacetime; military under strict subordination to civil power | 13. Same |
| 14. No government, separate from or independent of Virginia to be established within the state | 15. All men have the right to emigrate from one state to another; or to form a new state in vacant countries whenever they think it will promote their own happiness |
| 15. No free government can exist without popular adherence to justice, moderation, temperance, frugality, and virtue | 14. Popular adherence to justice, moderation, temperance, industry and frugality |
| 16. Free exercise of religion | 2. Liberty of conscience; no established church supported by taxpayers; no person may be denied civil rights as a citizen who acknowledges the "being of God" |
| | 8. No coercion to bear arms against one's religious beliefs |
| | 16. People have the right to assemble; to instruct their representatives; and to apply to the legislature for redress of grievances, by address, petition, or remonstrance |