

New York State's Role in the Creation and Adoption of the Bill of Rights

By BETSY L. ROSENBLATT

A college student of the 1990s ponders the great events that took place in New York and in the Union, two centuries ago. Betsy Rosenblatt of Pleasant Valley, New York, is a student at Williams College.

On the fifteenth of December, 1791, the United States of America adopted the Bill of Rights. Two hundred years have passed, and the document has endured as one of central importance to Americans. Its creation and ratification were not easy, but rested on the same tenuous strings and divided opinions that held the budding United States of America together while allowing the advent of the "more perfect union" that the writers of the Constitution envisioned.

What was New York's role in the creation and ratification of the Bill of Rights? New York did not write the document, or even propose most of its clauses. But New York's role was powerful and instrumental: it helped to convince the other states and the first Congress that a bill of rights was necessary for the future of the country. It is perhaps not too much to say that without New York's efforts, we might not have the Bill of Rights at all.

New York was, in October 1787, a relatively populous state, with a busy harbor in New York City, plenty of farmland upstate, a healthy commercial environment under Governor George Clinton, and a generally negative attitude toward the Constitution, which had just been completed in Philadelphia.¹ The New Yorkers did

1. See Sol Wachtler and Stephen L. Schechter, "Liberty and Property: New York and the Origins of American Constitutionalism," in *New York and the Union: Contributions*

not try to hide their objections: they feared that the Constitution would take money away from the state by making federal taxes mandatory, and that it would deprive them of their freedom and independence. The political leaders in New York believed that some of their objections could be corrected by a bill of rights, which would act as a check against the power of the proposed federal government. The statement they sought was finally written and adopted by all thirteen of the states, in 1791. In the four years between, however, there were countless hours of debate and creation. The Bill of Rights had to be written, presented, and ratified before the New York Antifederalists were satisfied.

Of all of the states to ratify the Constitution, New York was perhaps the most grudging.² New York was so strongly opposed to the proposed Constitution that it did not elect ratification delegates until April 1788, six months after the Constitution was completed in Philadelphia. Near the time of that election, several men met in Albany to discuss the faults of the Constitution. They resolved, in the "Albany Manifesto," that the new government needed, among other things, a bill of rights, a larger legislature, exact dates for annual elections, a ban on standing armies, and optional military duty instead of mandatory combat.³

The possible economic consequences of the instrument that was put forth by the Philadelphia convention disturbed many New Yorkers. New York Harbor and the ships that entered through New York customs were the foundation of the state's revenue system, and the control that the new federal government would have over tariffs and commerce would draw much-needed dollars away from the state. The possibility of mandatory federal and poll taxes would also hurt New York's economy.

¹ *to the American Constitutional Experience*. Edited by Stephen L. Schechter and Richard S. Bernstein (Albany: New York State Bicentennial Commission, 1990), 3-17.

² Edward Dumbauld, *The Bill of Rights and What it Means Today* (Norman, Okla.: University of Oklahoma Press, 1957), 27. Rhode Island and North Carolina may have been more hostile to the proposed Constitution, but they are often not counted as ratifying states because they waited until after the Bill of Rights was proposed and adopted by Congress before they ratified the Constitution.

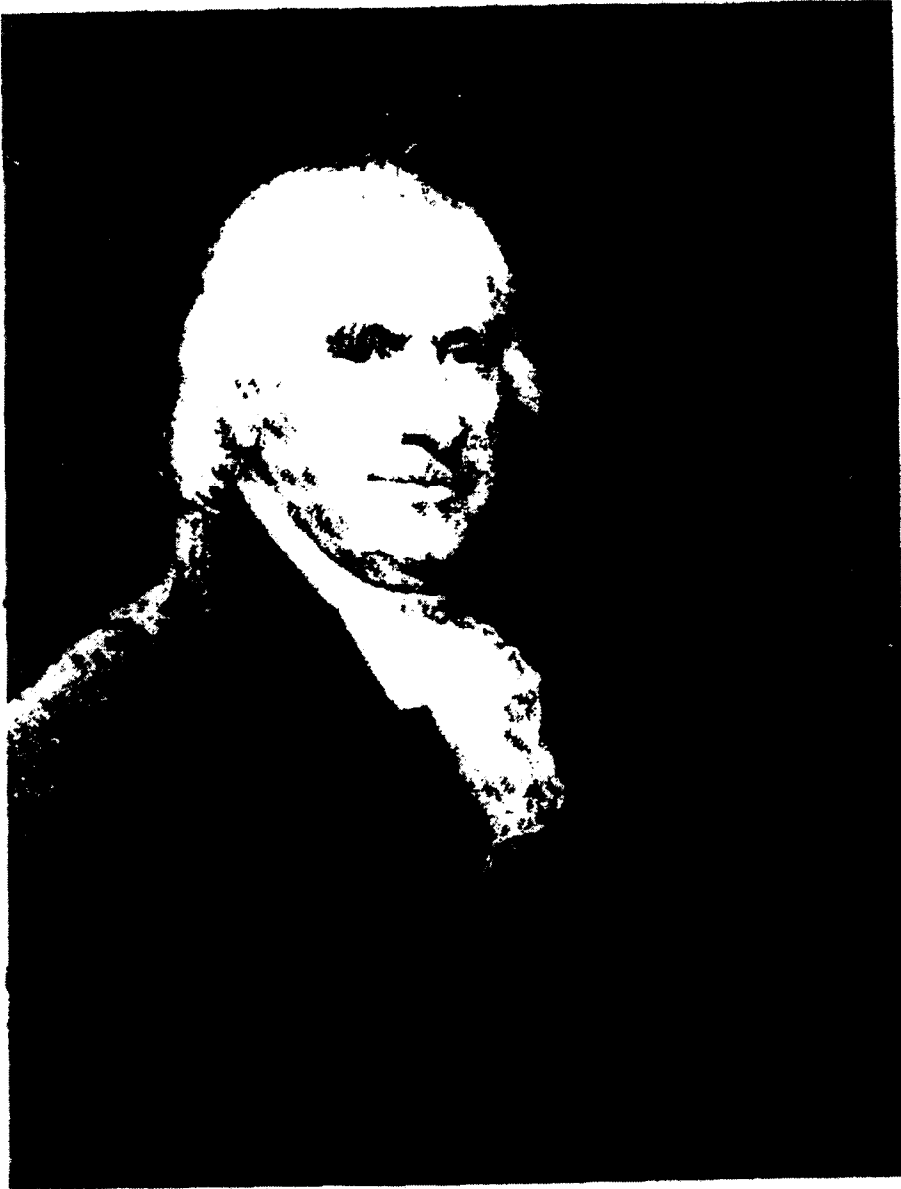
³ Cecelia M. Kanyon, *The Antifederalists* (Indianapolis: Bobbs-Merrill, 1966), 367. The men who met were Jacob TenEyck, John Bleeker, Gerrit Lansing, Cornelius Van Deusberg, Abraham Yates Jr., Gysbert Ponda, Cornelius Wendell, Volkert Douw, Abraham Cuyler, Henry TenEyck, Henry Wendell, Peter Wendell, Peter Douw, William Mancius, Robert Lansing, John Price, Arie Lagrange, Henry Lansing, Jacob Lansing, John Wendell.

New York Antifederalists were no less discomfited by the absence of a bill of rights. Would the strong central government take away the power of the individual in the process? Would the judicial system conduct unfair trials like the ones that had been made famous in Salem, Massachusetts? What about punishments for crimes? Could accused criminals be tortured? Would an accused be made to stand trial more than once for the same crime? Were the numerous civil litigants in New York entitled to jury trials? Would New Yorkers be made to quarter troops in their homes as they were required to do under British rule? Would the federal government, which was already deep into war debt, overborrow? Would the federal government create unfair monopolies? Would the President be able to declare martial law? Could the police freely search homes, as the British had done? Would the Puritans in Massachusetts or the Anglicans in South Carolina try to force their religious views on New Yorkers? Could the federal government trespass on the freedoms of the press and speech that were so dear to New Yorkers? These and many other questions remained to be answered before they would agree to the proposed Constitution.⁴

The Antifederalists presented a number of arguments in opposition to the fact and form of the proposed constitution, but they stressed the document's lack of a bill of rights that would protect the citizen from the actions of a new federal government. Through the years, in peace and war, New Yorkers had gained a number of rights that were fixed by tradition or expressed in a number of documents that dated back to New York's Charter of Liberties, created by the New York legislature in 1683. The document guaranteed New Yorkers freedom of speech and religion, trial by jury, separation of church and state. It was the first colonial document to provide for grand jury indictment and to protect the citizen against the quartering of troops in private houses in peacetime. It also stated that no one could be injured in his person or property except by "due course of law"—a precursor of "due process," which became

Abraham Bloodgood, Gysbert Marselis, Peter Yates, Dirck Van Schoonhoven, Jacob Roeboom, Richard Bush, and Peter Sharp.

4. Bernard Schwartz, *The Great Rights of Manhood: A History of the Bill of Rights* (New York: Oxford University Press, 1977), 147-150. All of these questions and more were dealt with in the proposed amendments of the New York ratification document.



George Clinton in later years. Oil on canvas, by Ezra Ames. Collections of the New York State Historical Association, Cooperstown, New York.

a central concept in American law. The Duke of York vetoed the Charter of Liberties in 1684, but various of the rights expressed in the document were restated in later documents and petitions.⁵

By mid-July, after nearly a month of vigorous debate, the positions of both sides were firmly set. The Antifederalists believed that the Constitution needed substantial changes. The Federalists were determined to endorse the Constitution as quickly as possible. Ultimately, both camps realized that a compromise would have to be reached.

As the struggle in Poughkeepsie dragged on, other states had already ratified the Constitution. Alexander Hamilton and other fervent Federalists hoped that the resolve of the Antifederalists would be weakened when they learned that nine states—the number needed to activate the new instrument of government—had ratified. At his own expense, Hamilton arranged for express riders to bring word to Poughkeepsie that New Hampshire, the ninth state to do so, had ratified the Constitution. A similar arrangement brought the news that Virginia, a large and influential state, had also ratified. The actions of New Hampshire and Virginia were extremely significant, whether the New York Antifederalists immediately acknowledged it or not, but the announcements also informed New Yorkers that New Hampshire and Virginia had attached lists of suggested amendments to their ratifying documents.⁶

It became evident that the Federalists would have to make some concessions if New York were to ratify. They would ultimately have to promise to lobby for amendments at the first Congressional session, and, even more importantly, they would have to agree to the composition and distribution of a "circular letter," asking the other states to consider a second Constitutional convention.

One of New York's leading Antifederalists, Melancton Smith, lived in Dutchess County and also owned land in Queens. In the later stages of the Poughkeepsie ratifying convention, he wrote

5. See William A. Poll, *1777: The Political Revolution and New York's First Constitution* (Albany: N.Y. State Bicentennial Commission, 1977), 34-36; Schwartz, *Bill of Rights*, 42-44, 58. For studies of New York and its role in ratification, see Stephen Schecter, *The Reluctant Pillar* (Troy, N.Y.: Russell Sage College, 1945); Linda Grant DePauw, *The Eleventh Pillar* (Ithaca: Cornell University Press, 1966), esp. pp. 214-64.

6. Gaspare J. Saladino, "The Federal Express," in Schecter and Bernstein, *New York and the Union*, 326-41; Schecter, *Reluctant Pillar*, 114-15.

After long investigation and mature deliberation, a Majority of the Convention cannot approve the system in its present form. . . Their regard for the common good impel them to preserve the Union—The Convention have the firmest confidence in the common councils of the people and well founded hopes that all the necessary amendments will be produced from their further deliberations.⁷

Just as the Federalists recognized the need to concede some ground, most Antifederalists came to realize that they would eventually have to yield. After hearing of Virginia's and New Hampshire's ratification and realizing that, since the ninth state had already ratified, the union was a certainty, Smith admitted that "Amendments could best be secured if New York joined rather than rejected the Union." Thus, in late July 1788, the convention moved toward ratification and began drafting amendments.⁸

Smith suggested that New York accept the new government "in full confidence" that amendments would be passed as soon as possible. Previously, he and his followers had agreed only to a conditional ratification, which would enable New York to secede from the union if amendments were not adopted. This change of wording was enough to muster the votes for New York to become a member of the new union of states.⁹ But it was a somewhat reluctant member. The New York delegates offered fifty-six amendments and wrote the lengthiest ratification document of any state.¹⁰ They also decided to place the proposed amendments at the beginning of their document of ratification, *before* they stated their acceptance of the Constitution, instead of after, as all of the states before them had done. This was a subtle but meaningful point.

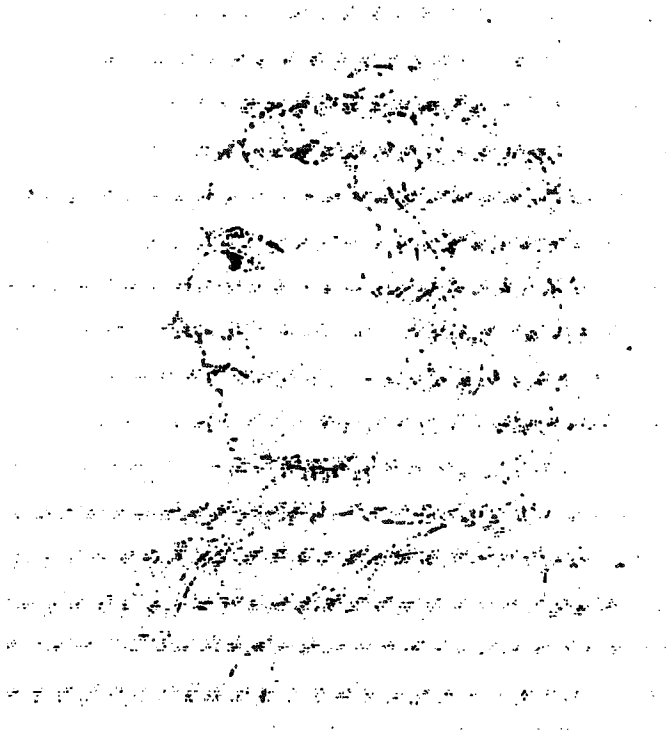
Most of the fifty-six suggestions echoed sentiments expressed earlier by other states. Only two contributions that appear in the actual language of the Bill of Rights originated with New York: the "double jeopardy" and "due process" clauses. Although New York was not the first or the only state to assure that persons accused could not be tried twice for the same crime, it was the first

7. In Melancton Smith Papers, Folio 9, pp. 2-3, New York State Archives.

8. Staughton Lynd, *Antifederalism in Dutchess County, New York* (Chicago: Loyola University Press, 1962), 83; DePue, *Eleventh Pillar*, 218.

9. Robin Brooks, "Alexander Hamilton, Melancton Smith, and the Ratification of the Constitution in N.Y.," *The William and Mary Quarterly* 24 (1967): 350.

10. Schwartz, *Bill of Rights*, 150.



A pencil sketch of Malancton Smith. From Fiske, The Critical Period in American History (1888).

state to propose the concept in its ratification document.¹¹ The phrase "due process of law," however, is specifically from New York. This wording was preferred by James Madison when he wrote what was to become the fifth amendment: "...nor shall any person... be deprived of life, liberty, or property without due process of law." This language is perhaps the most-often cited of the

11. In April of 1788, a minority in the Maryland ratifying convention wanted to attach a list of suggested amendments, including one on double jeopardy, to the state's ratification document. When the majority rejected this effort, the minority published twenty-eight proposed amendments, including one relating to double jeopardy, in pamphlet form. The Maryland instrument of ratification, passed on April 26, did not include a list of suggested amendments. See Schwartz, *Bill of Rights* 129-31, 151-53.

Constitution to date, appearing in almost every aspect of American law.

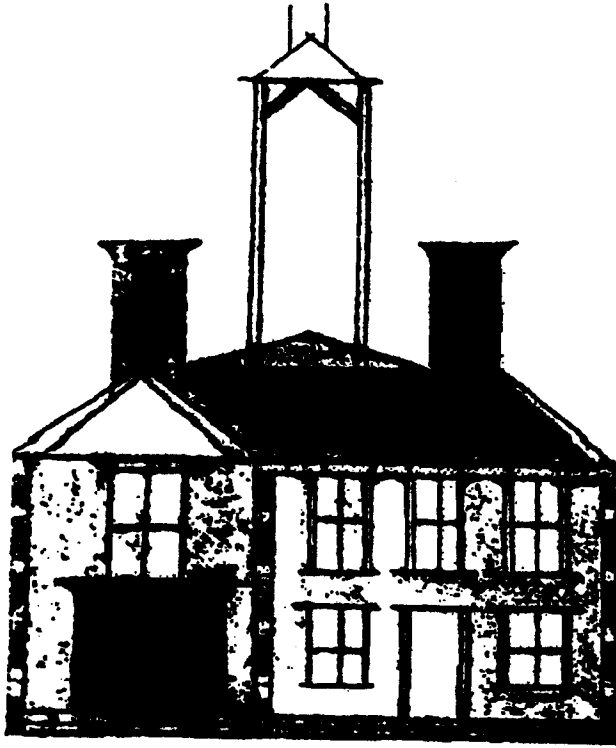
Madison probably chose these particular words because they implied more than did the phraseology of the other states' suggestions, "law of the land" and "procedure established by law." "Due process" implies a restriction on Congress that "law of the land" does not: when Congress enacts a law, it does not automatically mean that it is proper. Laws must fit within the boundaries of "due process." The judicial system can interpret whether a law or an act satisfies "due process." This adds to checks and balances. According to historian Bernard Schwartz, the first known American constitutional provision to use the term "due process of law" was New York's Bill of Rights proposal.¹²

Those two points were New York's only outward contributions to the Bill of Rights. The rest of New York's role was much less visible to the reader of the Bill of Rights, but vastly more important: New York was pivotal in creating the atmosphere of change that allowed the Bill of Rights to be created. Before New York's ratifying convention was over, Virginia, Massachusetts, South Carolina, and New Hampshire had already offered amendments. But the other six ratifying states had done so unconditionally, with no written reservations or suggested amendments. A few statesmen thought a declaration of rights could actually be injurious to the union, and even more of them simply thought it unnecessary. Even Madison, the eventual author of the Bill of Rights, was in no rush to amend the Constitution: "Let the enemies to the System wait untill [*sic*] some experience shall have taken place, and the business will be conducted with more light as well as with less heat."¹³

The New York Antifederalists, though, wanted the amendments to be instituted speedily, before the new government would have any chance to sacrifice the liberty of Americans. Before writing their ratification document and sending it to Philadelphia, New York had already composed and sent the "circular letter" to all of the other states, by courier, pressing for a second Constitutional

12. Schwartz, *Bill of Rights*, 198.

13. Robert Allen Rutland, *The Birth of the Bill of Rights, 1776-1791* (Chapel Hill, N.C.: The University of North Carolina Press, 1955), 189.



This rare likeness of the Dutchess County Court House was taken from the 1804 Map of Dutchess Turnpike. From 150th Anniversary of the Founding of the Government of New York State (Poughkeepsie, 1938).

convention. This letter, a statement of the need for amendments, was the first of its kind, and it had a great impact on the actions of all of the states. Many replied promptly, agreeing with the need for amendments. Even before they ratified the Constitution, the New Yorkers knew that they would have help in the attempt to secure amendments from Virginia, North Carolina, Massachusetts, and Rhode Island.¹⁴

Some of the Federalists who had earlier thought amendments unnecessary began to realize that the new Constitution was not a

¹⁴ Rutland, *Bill of Rights*, 188.

sacred, unchangeable compact. They started to consider amendments as a possibility. Others feared the dangers involved in a second Constitutional convention. The original Constitution had been erected on a thin thread of compromise, and new debates could deadlock the refrainers forever. For that reason, the prospect of amendments, these Federalists reasoned, was better than reconvening. Even many of the Antifederalists in New York were apprehensive that a second convention could destroy not only the Constitution but the union as well.¹⁵

Following the first federal elections, in 1789, Federalists, who had originally rejected the idea of a bill of rights, came to recognize the force of Antifederalist sentiment, and feared that this great power could force a second convention.¹⁶ Antifederalists, once a unified force against the Constitution, had begun to split within their own ranks. The most fervent Antifederalist faction, led in Virginia by Patrick Henry and in New York by George Clinton, opposed the idea of a bill of rights because it would draw attention away from the need for more substantial, structural changes to the Constitution. On the other hand, the more conciliatory, larger group of Antifederalists believed that a bill of rights was probably the biggest concession they would get from the Federalists, who had the advantage of strong leadership in James Madison and George Washington.

New York's congressional elections were held nearly four months after the scheduled date, which was set by the several states as January 4, 1789. They were postponed, mainly, because of a disagreement within New York's own legislature. The Antifederalist-controlled Assembly wanted United States Senators and Presidential Electors to be elected by a joint State Senate-Assembly vote, which would surely yield an Antifederalist-dominated outcome. The State Senate, however, which was largely Federalist, stood its ground and held up New York's federal elections until after those elections had already been completed, nationally. In so doing, the Federalists achieved their main goal of keeping George Clinton,

15. Stephen R. Boyd, *The Politics of Opposition: Antifederalists and the Acceptance of the Constitution* (Millwood, N.Y.: KTO Press, 1979), 163.

16. John F. Kazinski, "Congress Proposes the Bill of Rights," in *Well Begun: Chronicles of the Early National Period*, ed. Stephen L. Schechter and Richard B. Bernstein (Albany: N.Y. State Commission on the Bicentennial of the U.S. Constitution, 1989), 97-103.

the only serious Antifederalist contender, out of the vice-presidential seat. They also kept New York candidates out of the United States Senate until mid-July 1789, and out of the House of Representatives until late April, one month after a quorum had been reached.¹⁷

In Virginia, the Antifederalists' sentiments ran at least as high as in New York. Patrick Henry had managed to turn enough support away from James Madison that the great statesman and politician was not chosen for the United States Senate. Madison, who felt he had much to add to the new Congress, saw that his only hope for election to the House of Representatives lay in the form of campaign promises, designed to appease Antifederalists. He announced that he fully supported the idea of amendments to the Constitution and that he even planned to compile a list of amendments and propose them to Congress. On that platform, he was elected.¹⁸

When the first Congress began, New York's representatives had not yet been elected but New York's influence was still great, partly because the Congress met in the City of New York. Governor Clinton was one of the strongest Antifederalists in the union, and most New Yorkers were not entirely happy with the unamended Constitution. Also, in February 1789, three months before Congress even met, New York sent a petition to Congress, requesting a second Constitutional Convention. Madison saw that the Federalists in Congress would never gain vital public support if they did not approve a bill of rights quickly. He had another reason for haste, as well. The day after he announced his plan for amending the Constitution, Virginia made an official request for a second Constitutional Convention. New York made its second request to Congress almost simultaneously with Virginia's. On May 4, 1789, Madison proposed twelve amendments to Congress. This was not the large step that the staunchest Antifederalists had hoped for, but it did reduce the intensity of their fervor for a second convention.

By late May 1789, pressure for a bill of rights had been exerted on the Congress by Madison, and by New York, Virginia, and Pennsylvania, but the body remained apathetic. A committee met to discuss the proposals, and finally, in late August 1789, Congress

17. Gordon DeaBoer, "The First Federal Elections," in Schechter and Bernstein, *Well Regun*, 82.

18. Rutland, *Bill of Rights*, 193.

began debates on the Bill of Rights. It was not until George Washington, reacting to the pressure from Antifederalist states like New York, personally entreated the House of Representatives to pass the amendments—because some were important and others were “necessary to quiet the fears of some respectable characters and well meaning Men,”—that they accepted twelve of the seventeen ideas put forth by the committee.¹⁹ The Senate received the amendments for consideration in late August 1789, postponed debate

19. Kasinski, “Congress Proposes,” 100.



The Old Senate House at Kingston. From Magazine of American History, November 1883.



The Old State House, in Albany, where the legislature met in the winter of 1788-1789. From Albany's Tercentary: Historical Narrative Souvenir (1924).

on them for two weeks, but finally accepted the amendments with only a few stylistic changes and sent them to the states for ratification.

New Jersey, on November 20, 1789, was the first state to ratify the amendments. New York was the seventh state to ratify; it did so, after very little debate, on February 27, 1790. Ironically enough, Virginia, one of the states with the strongest Antifederalist faction in the union, was so divided on the subject of amendments that it was the last of the eleven states needed to ratify the Bill of Rights. Even Vermont, not admitted to the union until March, 1791, had

already ratified the amendments. On the other hand, Virginia, among the earliest states to express a formal regard for human rights, thus had the honor on December 15, 1791, of casting the vote that made the Bill of Rights an active part of the Constitution.²⁰

Perhaps the contributions of the particular states to the Bill of Rights are less important than the document itself, but the states were, after all, independent entities that agreed to give up much of that independence for a common good. The separate roles of the several states in the creation and adoption of the Bill of Rights is therefore important—whether they acted eagerly or with reluctance.

Some people may believe that the Antifederalists in New York were the “losers” in the fight over the Constitution, and that they were defeated by the forces that desired ratification. But this view would overlook the Antifederalist role in the creation of the Bill of Rights and would slight the instrumental influence of New York State in the total process. The New York Antifederalists were impelled by a variety of motives, but they were intent upon securing liberty to the citizens of the new nation. And through their proposals in their ratification document, their circular letter, their ratification document, their tireless political efforts, they did just that. With New York’s help, the Bill of Rights was finally ratified on the fifteenth of December 1791, putting the fears of New York’s Antifederalists to rest, and securing the personal liberties that are a cornerstone of American life.

20. *Rustand, Bill of Rights*, 217.