

HEADNOTES

LEGAL LORE

Was There Ever a Serious Debate About Whether to Approve the Constitution?

RICHARD DEAN

The author is a partner with Tucker Ellis LLP, Cleveland.

The most thought-provoking new play on Broadway last year, and on a national tour before the pandemic, was Heidi Schreck's *What the Constitution Means to Me*. Its first part is largely autobiographical. As a teenager, Ms. Schreck regularly spoke on this topic at American Legion contests to win money to pay for college. She focused especially on women's rights—or

the lack thereof—under the Constitution and in the context of her life experiences. The play ends with a brilliant scene where Ms. Schreck challenges a skilled high school debater on whether we should keep or get rid of the Constitution.

The irony of public debates about the Constitution is that the framers had very few of them in deciding whether to adopt the document in the first place. The Constitutional Convention was cloaked in secrecy. The public had no idea that it was even taking place—they thought the statesmen had gathered to make modifications to the Articles of Confederation.

In fact, even as the proposed Constitution went to the 13 states for ratification, no meaningful debate took place in most of them. Virginia was the lone exception, and there the debates were spectacular, conducted by some of the most famous men of the day.

The pro-Constitution forces were led by James Madison and the opponents by Patrick Henry. A detailed account of this debate is set forth in Albert Beveridge's *The Life of John Marshall* (Houghton Mifflin Co. 1916). Beveridge served as a Republican U.S. senator from Indiana from 1899 to 1911. He turned to history after his Senate term was over. His four-volume work on Marshall won the Pulitzer Prize for history. The account of this debate comes at the end of volume 1. At the time of the Virginia convention, Marshall, one of the delegates, was a young lawyer in Richmond.

The debates in the Virginia Convention were the only time when all parts of the Constitution were debated. The Constitution had been ratified with little or no discussion in Delaware, New Jersey, and Connecticut. Those states felt the Constitution gave them commercial advantages. Georgia thought it was necessary to defend against Native Americans. In Pennsylvania, the opponents refused to attend the convention to consider ratification.

Proponents wanted a Constitution to stem the chaos under the Articles

of Confederation, which empowered the Confederation to make treaties, but the states could and did violate them. The Confederation could not levy taxes. It could make humble requests called “requisitions” on the sovereign “Commonwealths,” which then treated the requests with contempt. The states passed tariffs against each other, trying to keep money within their borders. The Confederation was weak by design.

George Washington, John Jay, Alexander Hamilton, James Madison, and many others were angry at their weakness. Thomas Jefferson, however, did not think badly of the Articles of Confederation, but he was still in France when the Virginia debate unfolded in June 1788. The mercantile and financial interests wanted a national government with the ability to regulate trade. The debtors and agricultural interests were against such a government. Not surprisingly, Marshall was a constitutionalist from day one—his best clients were from the mercantile class.

The details of the proposed Constitution were not well known to the public, but one idea had gotten out—that the Constitution would form a strong, consolidated national government. Patrick Henry estimated that as many as nine-tenths of the Virginia population was opposed to such a strong government—Virginia's farmers and debtors, two sizable groups, were against it.

So how did Virginia approve the Constitution in the face of such numbers? The constitutionalists chose their delegate candidates well. John Marshall is an excellent example of this point. He was simply very well liked in Richmond. Edmund Pendleton and George Wythe were others elected on the same basis. After the delegate elections, it appeared that there was a slim majority favoring the Constitution. Extended debate did not change that fact.

Madison, one of the fathers of the Constitution, played a small public role in the Virginia Convention. He was not publicly popular statewide. He managed



to get elected from Orange County given the prominence of his family. He was not physically impressive. He was strong only in superb intellect. He was the coordinator of the strategy and the selection of speakers. He let others carry the main speaking parts.

The debate played out at a very elemental level. The constitutionalists argued that the decision was between a functioning government, on the one hand, and “licentiousness” and turbulence, on the other. Even Patrick Henry agreed that a national government might prevent “licentiousness,” but he believed that it would oppress and ruin the people. In the chief executive, Henry saw the powers

of a great and mighty king. He had seen that act before.

It was not until the second week of the debate that John Marshall spoke. The opponents had chosen James Monroe, a soldier in the Revolution, to speak (earning the “distinction” of being the only president to vote against the Constitution). But most soldiers during the Revolutionary War were in favor. Marshall, who served with Washington at Valley Forge, was the constitutionalists’ choice to respond to Monroe. Two-thirds of his remarks were on the necessity of providing against a future war. Henry opposed a standing army. He viewed it as a most dangerous power. He liked it even less than a strong executive.

Marshall did play a prominent role in the debate over the judiciary. Article III was generally thought to be one of the weakest points of the constitutionalists’ battle lines. Marshall had been practicing law for all of five years when he gave the major defense of the article. The anti-constitutionalists were convinced that the interests of debtors and farmers would not be served by a national court system. They advanced a laundry list of potential abuses. Marshall went through the list and showed how those imagined abuses potentially existed in the state court systems as well. His simple language yet powerful arguments were a prelude to much of what he later wrote about the Constitution. ■