IF SPENCER ROANE HAD BEEN APPOINTED CHIEF JUSTICE INSTEAD OF JOHN MARSHALL

No Event at Threshold of Our Experimental Democracy Could Have More Completely Changed Our Entire National Course—Great Influence Exerted by Roane Over Jefferson—An Original Defender of State's Rights and Ardent Supporter of the Kentucky and Virginia Resolutions—Antagonism towards the Supreme Court and Marshall—Journalistic Assault on the McCulloch vs. Maryland Decision—His Last Stand Against Marshall's Doctrines, etc.

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THE twelve years immediately following the adoption of the Constitution were years of perplexity, doubt and peril. The fabricated instrument that was presented to the States for approval was more a chart than a compass. Although the Colonies had fought a successful war of rebellion, English customs and laws had not been extinguished. Magna Charta was as much an inheritance of the Colonists as it was of their English oppressors irrespective of the form of government in which its principles found expression. The framers of the Constitution had not only been English subjects, but were pure-bred English. Besides the Colonies had not rebelled against the principles upon which the English Government was founded but the oppressive manner in which its laws were administered. It is but natural, therefore, that the delegates who proposed a written Constitution to the Colonies should have submitted an instrument that largely was declaratory of the principles embraced in the unwritten Constitution of England. King, Lords and Commons, it may be instanced, found its counterpart in President, Senate and House of Representatives. Because of this influence there was early manifested a distinct inclination to exalt the Legislative over both the Executive and Judicial.[1] Against this tendency no less authority than Jefferson vehemently protested.[2] Under the abandoned Articles of Confederation the Judiciary had been treated as incident to rather than an integral part of government. The natural consequence was an unconscious inclination of mind to regard the Legislative as not only the source but the active, controlling element in all governmental functions. A government of coordinated powers, with each coordinate, within its delegated powers, independent of the other, was not received with universal favor, and as a consequence many accepted the Constitution with extreme reluctance.

That many questions, vital to the very existence of the untried form that had been established, should have arisen, was only natural. Prominent among these was the extent to which the states had gone in surrendering their rights as independent entities to a general government. Another equally important question, both before and after acceptance, was whether one of the units of government could repudiate, at will, what it conceived to be an invasion of its undelegated rights. The real stumbling block, however, was the asserted right on the part of the Judiciary to declare void an act of Congress or an act of a State Legislature where such act, as interpreted by the Judiciary, contravened some provision of the Constitution. The members of the House of Representatives being the only participants in government chosen by direct vote of the people, there naturally arose the contention that the acts of that body registered the will of the people, and that even the Senate, representing the States, should consider with care any change in a bill which originated in the House, citing, in support of such contentions, the relation of the Lords to the Commons. That the Supreme Judiciary, and not the Congress itself, should determine the constitutionality of an act of legislation, and declare void any act it deemed unconstitutional, was more bitterly contested than any question which arose during the first three administrations, particularly the administration of Jefferson. A power so exercised, it was contended, was a direct interference by the Judiciary with the Legislative, a thing the Constitution itself prohibited, as interpreted by those in opposition.

It may well be doubted if the framers of the Constitution themselves attached to the Judiciary that importance it has subsequently attained. When the capital was permanently established at Washington no accommodations were made for the Supreme Court. The members themselves did not regard their appointment as a token of special recognition. Jay, the first Chief Justice, resigned at the end of five years to become a candidate for Governor of New York. Patrick Henry and Alexander Hamilton each declined appointment as Jay's successor. William Cushing, an Associate Justice, declined after he had been nominated and confirmed. Oliver Ellsworth, who accepted the appointment, resigned after five years' service, and Jay refused re-appointment although named and confirmed. John Rutledge, an Associate Justice, resigned to become Chief Justice of the Supreme Court of South Carolina.

The overthrow of the Federalist party in 1800 left the major questions that had arisen under the Constitution, involving the distribution and limitation of powers, in a very unsettled, even alarming,

1. The Federalist, No. XLVII.
2. Notes on the State of Virginia p 195.

condition. Control of the Supreme Court by the Republicans under Jefferson meant the ascendency of the Legislative. On the contrary, control by the Federalists meant the elevation of the Judiciary to a position of coequality if not ascendency. The portentous circumstances which, at this critical juncture, resulted in the appointment of John Marshall, are not without interest.

President Washington, who had expressed the opinion "that mankind, when left to themselves, are unfit for their own government," suffered many perplexities of mind in selecting the first Chief Justice. Prominent among the names presented to and urged upon him for appointment were those of James Wilson, a distinguished lawyer of Philadelphia; John Rutledge, of South Carolina, a senior at the Bar; Robert R. Livingston, of New York, then the most eminent Chancellor in the States, and Robert H. Harrison, Chief Justice of Maryland.[3]

On final survey John Jay, then a member of Washington's Cabinet, was selected. Jay was forty-four years of age; had been a member of the Continental Congress, 1774-1779; had moved the adoption of the Declaration of Independence; had been a member of the commission to negotiate a treaty with Great Britain; Secretary of Foreign Affairs of the Colonies. In conjunction with Madison and Hamilton he had contributed to the Federalist papers, and taken an active part in favor of the adoption of the Constitution. He had had very little experience as either a judge or lawyer, but was held in high favor by Washington and Marshall.

When Jay resigned in 1795 to become a candidate for Governor of New York, Hamilton was Washington's first choice for the vacancy, because, he said, he could "not be scared by popular clamor or warped by feeble-minded prejudices." When Hamilton declined the names of Samuel Chase, Chief Justice of the General Court of Maryland, and John Rutledge, of South Carolina, former Associate Justice, were mentioned. Rutledge was appointed but failed of confirmation.[4]

Called on a third time to name a Chief Justice Washington tendered an appointment to Patrick Henry which was promptly rejected, for the reason, asserted by some, that it should have been tendered when Jay was appointed. Henry was sixty-three years of age at the time, and died three years later.

William Cushing, an Associate Justice, and oldest member of the Court was next tendered appointment but declined, because of his advanced age, after he had been confirmed by the Senate.

Thus, for the fourth time, in the space of less than eight years, Washington was confronted with the appointment of a Chief Justice. Judge Iredell,[5] Judge Paterson,[6] of New Jersey, James Wilson,[7] was each respectively urged for the appointment. That appointment to the position of Chief Justice from the Court might not be construed as a precedent, the President decided not to appoint any of the sitting members, and selected United States Senator Oliver Ellsworth, of Connecticut,[8] who was confirmed without opposition.

Ellsworth resigned in 1800. President Adams promptly appointed former Chief Justice Jay. Although commissioned and confirmed, he declined because, he said, "the efforts repeatedly made to place the Judicial Department on a proper footing have proved fruitless." To the surprise of both political parties, and the country in general, apparently without consultation with any one, Adams appointed his Secretary of State, John Marshall, of Virginia. Neither party favored Marshall's appointment.[9] The Federalists were willing to defeat his confirmation if President Adams would agree to appoint Associate Justice Paterson, whom Marshall himself had recommended for appointment. With his accustomed obstinacy Adams refused to withdraw the name of Marshall, or to agree that he would appoint Paterson in the event Marshall failed of confirmation. Such opposition as Jefferson, the incoming President, and the Republican partisans could organize against Marshall was not sufficient to attract the attention of the opposing Federalists who favored Paterson, since the President had given no assurance he would appoint Paterson should the Senate reject Marshall. In a letter addressed to the President Marshall reluctantly accepted, and expressed the hope he would never give the President occasion to regret having made the appointment.

These recitals, it would seem, warrant the suggestion that if the hand of Fate did not intervene in the appointment of John Marshall as Chief Justice of the Supreme Court of the United States, the inquisitive mind would search in vain for an instance in the affairs of men and nations in which it could be affirmed such intervention had occurred. The sixth appointee to a life tenure position during a period of twelve years, of itself, is a circumstance

3. James Wilson was 47 years of age and the most eminent lawyer in Philadelphia. Although a Scotchman by birth he had been a member of the Continental Congress; a signer of the Declaration of Independence; member of the Constitutional Convention from Pennsylvania. In support of his appointment as Chief Justice he wrote a personal letter to President Washington in which he recited his preeminent qualifications for the position. On account of his service to the Colonies and his known ability as a lawyer Washington was favorably inclined towards his appointment, but at the last, probably on the advice of Hamilton, he declined to appoint him Chief Justice, but selected him as an Associate Justice. He died in 1798.

John Rutledge was 60 years of age; a graduate of the Middle Temple, London; at 26 was Chairman of the Committee that drafted the memorial to the House of Lords; was a member of the Continental Congress before and after the Revolution; delegate to the Constitutional Convention; Associate Justice Supreme Court, 1789-1791; resigned to become Chief Justice of South Carolina; was appointed Chief Justice of the Supreme Court, 1795, upon the resignation of Jay. Being a recess appointment he presided over one term of the Court, but failed of confirmation at the ensuing sesssion of the Senate, partly, it may be assumed, because of an intemperate speech made in Charleston in opposition to the Jay treaty, and partly because of sundry reports concerning his mental deficiencies, neither of which was known to Washington at the time his commission was issued, but the former of which was known when his name was submitted to the Senate. He died in 1800.

Chancellor Livingston had been a member of the Continental Congress during the entire period of the Revolution, and Chancellor of New York during the interval between the close of the war and the adoption of the Constitution. He had administered the oath of office to Washington, and was generally regarded as the natural selection for the first Chief Justice. He was only 43 years of age, and had won great distinction as Chancellor. He died in 1813.

Robert Hanson Harrison was 44 years of age. He had been Chief Justice of the Supreme Court of Maryland for eight years; had been the private secretary of Washington, and was his close personal friend. Five days after he had been named Associate Justice he was chosen Chancellor of Maryland, and accepted that position in preference to the Federal bench. In urging him to accept the position of Associate Justice, Hamilton wrote him a most persuasive letter in which he said: "If it is possible, my dear Harrison, give yourself to us. We want men like you. They are rare at all times."

4. Note 3, supra.

5. Judge Iredell was an Englishman by birth and a brother-in-law of Dr. Samuel Johnson. The fact he was a foreigner by birth had been urged against his appointment as Chief Justice, just as that fact had been urged against Hamilton. Iredell died in 1799.

6. William Paterson was born in Ireland, and came to the United States when only two years of age. He was a graduate of Princeton; Attorney General of New Jersey; Member of New Jersey convention that ratified the Constitution; United States Senator from New Jersey; Governor of New Jersey and resigned in 1793 to become Associate Justice of the Supreme Court. He died in 1806.

7. See note (3) supra.

8. Ellsworth was in his fiftieth year at the time of his appointment. Had been a member of the Continental Congress; Judge of the Superior Court of Connecticut; member of the Constitutional Convention; Chairman of the committee which drafted the Judiciary Act, and later Minister to France. He died in 1807.

9. "Marshall's appointment as Chief Justice was not greeted with applause from any quarter; there was even a hint of Federalist resentment because Paterson had not been chosen. The Republican politicians were utterly indifferent; and the masses of both parties neither knew nor cared about Marshall's elevation." Beveridge Vol. II, pp. 554-555.

sufficiently extraordinary to lend support to the contention of those who find in circumstance an orderly course of events that lie without the operations of chance. Whether the result of Fate or Chance, the events precedent out of which the nomination of Marshall evolved were certainly phenomenal. Jay, restless for the more active arena of politics; thoroughly dissatisfied with what he regarded as a slavish, unimportant position; more or less mistrustful of a democracy at best, resigned after five years to become a candidate for Governor of New York. While he gave an impaired state of health as one reason for declining to serve, it will be remembered that he lived to quite an age, and had he remained in office would have served for a period co-extensive in point of duration with that of Marshall, a circumstance applicable to no other person considered for appointment.

Had the Judiciary Act of 1801, relieving Supreme Court Judges of Circuit Court duties, been passed prior to the resignation of Ellsworth, the acceptance of a reappointment by Jay might fairly be assumed, as that was one of the reasons given by him for declining reappointment. Of those named and considered for Chief Justice prior to the appointment of Marshall only Jay and Livingston survived the administration of Jefferson. Again, had not the Senate been in control of the Federalists at the time of Marshall's appointment, his nomination must certainly have been rejected, and the appointment have certainly gone to Spencer Roane, of Virginia, the known choice of Jefferson for the position. No event at the threshhold of our experimental democracy could have more completely changed our entire national course than the appointment of Roane instead of Marshall.

Spencer Roane, one of the ablest of all the supporters of Jefferson and his policies, is scarcely known to the present generation. The influence which he exerted over Jefferson was probably greater than the influence which Jefferson exerted over him. Some reference to the man who would have changed our entire national course, had not the circumstances above related withheld from his coveted grasp the position that fell to his great rival, may not be devoid of interest to the student of that eventful period.

William Roane, Sr., was born in Scotland in 1713; emigrated to America in 1741, and settled in Essex County, Virginia. His son, William Roane, Jr., was the father of Spencer Roane, who was born April 2, 1762.[10]

The father of Spencer Roane was a man of unusual learning and culture, and to his son he gave every educational advantage the times afforded. Graduating at William and Mary College young Spencer had the advantage of attending the law lectures of Chancellor Wythe, admittedly the greatest law instructor of that period in America. Roane became a great favorite of Wythe because of his great mastery of Littleton, Coke, Hale and Holt. After the adoption of the Constitution, which he opposed, he devoted his studies almost exclusively to constitutional questions. At the conclusion of his law studies in 1782 he began the practice in Essex County. The year following he was elected to the House of Delegates where he served on various committees with Patrick Henry and John Marshall, the former of whom was to become his father-in-law and the latter his greatest legal antagonist in their respective interpretations of the Constitution.

In 1784, at the age of twenty-two, he was elected to the Privy Council. Two years later he was elected to the Senate from the counties of Essex, King and Queen and King William, and soon developed into an ardent Whig. In 1789, then in his twenty-seventh year, he was elected to fill a vacancy in the General Court, which was composed of the Governor and members of the Council. When Virginia later adopted a new Constitution, a new court was organized which consisted of five judges, elected by joint ballot of the two Houses of Assembly, to hold during good behavior. Like most of the Colonial courts of that period its jurisdiction was both original and appellate, and extended to all persons and all forms of action, civil and criminal. This remained the principal court in Virginia until 1788, when a system of district courts was established, the original jurisdiction of which was practically the same as the old General Courts. At the same session of the Assembly the Supreme Court of Virginia was established. Prior thereto it had consisted of three chancellors, the five judges of the General Court, and the three admiralty judges. While Roane was judge of the General Court he rendered a decision involving the right of the judiciary to declare a legislative act unconstitutional. His decision holding the judiciary had that power became in later years embarrassing to both himself and President Jefferson, although Chancellor Wythe had so declared in an earlier decision.[11] "I think the Judiciary may and ought," he held, "not only refuse to execute a law expressly repugnant to the Constitution, but also one which is by plain and natural construction in opposition to the fundamental principles thereof."[12]

At the age of thirty-three (1795) he was elected to the Court of Appeals of Virginia to fill a vacancy created by the resignation of Judge Tazewell, who had been elected to the United States Senate. Edmund Pendleton, one of the outstanding lawyers of Virginia, was then at the head of the Court.

Great as was Roane's distinction as a judge, he never ceased to be a politician. He opposed the adoption of the Constitution by the Virginia Ratification Convention, because, he said, it was "too loosely banded together," and subsequently stated that "the powers reserved to the States and to the people were not reserved with sufficient explicitness."[13] After its adoption, however, with its amendments, he became one of its strongest supporters, but never ceased to maintain "that the Federal Government was limited in its powers, that it possessed only those which were expressly

10. "The Roanes are of pure Scotch origin. Gilbert Roane, among the first of the name, was born in Scotland, on February 12, 1680. After serving with distinction under William III in the civil wars of his time, he removed to Ireland to a grant of land given by the King to him and his heirs 'as long as grass grows and water runs,' in reward for his services. He had four sons, all of whom came to America. John, the fourth son, born in 1717, came over in 1739, and was ordained a Presbyterian minister in 1745. William, the third son, came over with his other brothers in 1741. He was born in 1713, and having married Sarah Upshaw, settled in Essex County, Virginia. They lived a quiet, Country life, and many of the descendants of their six children were destined to hold high places in their country's service. The oldest, Thomas, married Mary Ann Hopkins, and one of their fourteen children marrying Sterling Ruffin, became the mother of that distinguished jurist, Chief Justice Thomas Ruffin, of North Carolina. Another son became the father of John Roane, for a number of years a member of the United States Congress. A daughter married Archibald Ritchie, and became the mother of Thomas Ritchie, the founder of the Enquirer, and father of journalism' in Virginia—a life-long friend of Spencer Roane." Spencer Roane, by Edwin J. Smith, p. 5, Branch Historical Papers.

11. Commonwealth v. Caton, 4 Call (Virginia) 5-21.
12. Kamper v. Hawkins, 1 Virginia Cases, 20 (1793).
13. Richmond Enquirer, Sept. 17, 1822.

granted by the very terms of the compact or were fairly incidental to them."[14] He never ceased to maintain that the Constitution, interpreted as he would interpret it, was one of the greatest human documents ever formulated, but that interpreted as Marshall interpreted it, it would ultimately subvert the very purposes for which it was formed.

From the outset Roane sided with Jefferson, and to some extent with Madison, against Washington, Adams and Hamilton. He, even more than Jefferson, was the original defender of States Rights. The Alien and Sedition Acts, which brought the Federalist party into general disfavor, furnished him the opportunity to indulge his intense opposition to what he denominated an arbitrary and unconstitutional usurpation of power. He ardently supported the Kentucky Resolutions of 1798, and the similar Virginia Resolutions of 1799, taking the position that each State was a sovereign power, and the Union, being voluntary, could be dissolved whenever the States so determined, and, moreover, that any State could withdraw whenever it determined its sovereign or undelegated rights had been invaded. While the repeal of the obnoxious Alien and Sedition Acts served to remove the acute resentment which their enactment had created, the Kentucky and Virginia Resolutions continued to be accepted as a cardinal policy of the Republican, or Jeffersonian party. Of the Virginia Resolutions, in which the doctrine of Nullification made its first appearance, Roane wrote: "For truth, perspicuity and moderation, it has never been surpassed. It was the *Magna Charta* on which the Republicans settled down after the great struggle in the year 1799."[15]

Roane, like Jefferson and the Republican party, accepted a position of antagonism towards the Supreme Court in general and Marshall in particular. The steady and unrelenting drive of Marshall towards nationalization made each of his great decisions an ever recurring offense. The first real clash between Roane and the Supreme Court, strangely enough, was not precipitated by an opinion of Marshall but by Justice Story, an appointee of Madison, who was later characterized by Jefferson as "unquestionably a tory." The case in question was that of Martin v. Hunter's Lessee. While the legal question involved gave not the slightest hint of a political background, it became, in its final disposition, distinctly political. The question of State Rights, asserted in the Kentucky and Virginia Resolutions, came again to the surface in a contest of jurisdiction between the Court of Appeals of Virginia and the Supreme Court.

Thomas Lord Fairfax held title to an immense grant of land in what was known as the Northern Neck of Virginia. Lord Fairfax devised these lands to his kinsman, Reverend Denny Fairfax, a resident in and subject of England, prior to December, 1783, the date of the signing of the treaty between Great Britain and the Colonies. The Marshall brothers, John and Thomas, were purchasers of a part of these lands from Denny Fairfax, prior to the appointment of the former as Chief Justice. Denny Fairfax being a British subject the question of his right, as an alien, to hold lands in Virginia, and the right of Virginia to claim title by escheat was raised in Fairfax's Devisee v. Hunter's Lessee,[16] a question in which Marshall was immediately and personally concerned. Judge Roane decided that Denny Fairfax could not pass title under Lord Fairfax's will. The case was appealed to the Supreme Court and was reversed by Justice Story on the ground that the treaty of 1783 expressly provided that lands held by alien subjects of Great Britain under titles acquired prior to the treaty, concerning which no action of confiscation was pending, could not thereafter be confiscated.

The Court of Appeals of Virginia, in an opinion written by Judge Roane, refused to obey the mandate of the Supreme Court,[17] upon the ground the Constitution did not give the Supreme Court appellate jurisdiction over a State Court, even though the question at issue involved a treaty between the United States and a foreign power. He construed the Constitutional provision giving the courts power "over all cases in law and equity arising under the Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority" as applying to the State as well as the Federal Courts. Such a construction, if adhered to, would give the courts of the forty-eight States and the National Government jurisdiction to construe any treaty negotiated by the United States, the absurdity of which is apparent.

The refusal of the Virginia Court to endorse the mandate of the Supreme Court was clearly an act of nullification. The Supreme Court took no further notice of the action of the State Court and proceeded to execute the mandate through one of its own officers.

Marshall took no part in the hearings of this case for the reason the title to the lands purchased by himself and his brother Thomas was invalid if the title to the lands involved in the Martin-Hunter case was invalid. It was believed by Roane and his associates that the opinion of the Supreme Court, while credited to Story, was in reality the opinion of Marshall. Insinuations to this effect, indiscriminately circulated, were unjust to Marshall, as subsequent events clearly proved. In this, one of the most, if not the most important of all the decisions rendered by Justice Story, was permanently established the right of the Supreme Court to review, on appeal, a decision of the State Courts involving constitutional questions.[18]

Just how impassable was the gulf between Roane and Marshall was more clearly exemplified in the controversies that followed Marshall's decision in the case of McCulloch v. Maryland than in any of the semi-political decisions of the Chief Justice. A strong, conscientious believer in State Rights as against Nationalism, never able quite to recover from his disappointment at not having attained the commanding position held by Marshall, Roane, with all the vehemence of his impetuous na-

14. Richmond Enquirer, Sept. 17, 1822.

15. Article No. 1, signed Hampden, Richmond Enquirer, June 11, 1819, in discussion of McCullough v. Maryland. In support of the Kentucky Resolution Jefferson himself, in a letter to Madison, said: "I enclose you a copy of the draught of the Kentucky resolves. I think we should distinctly affirm all the important principles they contain, so as to hold to that ground in the future."

16. 1 Munford (Va.) 218-38.

17. 4 Munford (Va.) 1.

18. The position taken by Judge Roane had the unqualified sanction of Jefferson. In a letter dated October 12, 1819, he thus expressed his approval: "I knew well that in certain Federal cases the laws of the United States had given to a foreign party, whether plaintiff or defendant, a right to carry his cause into the Federal Court; but I did not know that where he had himself elected the State judicature, he could, after an unfavorable decision there, remove his case to the Federal Courts and thus take benefit of two chances where others have but one; nor that the right of entertaining the question in this case had been exercised or claimed by the Federal judiciary after it had postponed on the party's first election." IX Ford's Jefferson, 530.

ture, dissented, through the columns of the Richmond Enquirer,[19] from the advanced position taken by Marshall in that greatest of all his decisions.

In an editorial commenting on the "Amphictyon" articles Ritchie said: "Whenever States Rights are threatened or invaded, Virginia will not be the last to sound the tocsin." (March 30, 1819). Roane was not always consistent. A severe critic of the Federalists as a party of liberal construction he acquiesced, without dissent, in the action of Jefferson in purchasing Louisiana, which Attorney General Breckenridge advised as fairly within the doctrine of implied powers under the Constitution, an assumption which John Quincy Adams said was "greater in itself and more comprehensive in its consequences than all the assumptions of implied power in the twelve years of the Washington and Adams Administrations put together." (Adams' Memoirs, Vol. V. p. 364). In his criticism of Roane's inconsistency with respect to the subject of implied powers, Adams, in his usual sarcastic manner, (Vol. V. p. 364) thus criticises Roane and the partisans of Jefferson: "The Virginian opposition to implied powers is therefore a convenient weapon to be taken up or laid aside as it suits the purposes of State turbulence and ambition; and as Virginia has no direct candidate to offer for the presidential election her aspiring demagogues are casting about them to place her again at the head of the formal opposition to the administration of the Union, that she may thus again obtain by conquest the administration itself. . . They still possess to a superior degree the art of public management. . . The tactics of the former war are again resorted to, and Roane comes forth as the champion of Virginia."

The extremity to which Roane would have carried the doctrine of States Rights, had he been Chief Justice, is thus clearly expressed in his two fundamental points of dissent from the Marshall opinion: "There are two principles advocated and decided on by the Supreme Court, which appear to me to endanger the very existence of State Rights. The first is the denial that the powers of the Federal Government were delegated by the States; and the second is, that the grant of powers to that government, and particularly the grant of powers 'necessary and proper' to carry the other powers into effect, ought to be construed in a liberal, rather than a restricted sense. Both of these principles tend directly to consolidation of the States, and to strip them of some of the most important attributes of their sovereignty. If the Congress of the United States should think proper to legislate to the full extent, upon the principles now adjudicated by the Supreme Court, it is difficult to say how small would be the remnant of power left in the hands of the State authorities."

At length, and with great force of logic, Roane argued that it was the States and not the people that adopted the Constitution; that the several States surrendered "a certain portion of specified powers to another set of servants and agents, then newly created, namely, the Federal Government." The fallacy of Roane's argument is detected when compared with the broader view of Marshall, the statesman no less than jurist, in which he clearly contrasts the difference between the *rights* which were surrendered and the *powers* which were created. Roane, in common with the early States Rights defenders, accepted the Constitution as a delegation of powers to be exercised in behalf of the several States, rather than the creation of an independent super-government of which the States were integral parts. The Nationalism towards which Marshall was constantly driving was clearly asserted in a series of decisions that in logic and clearness of diction have never been surpassed by any mind in any age. The vulnerable point in Roane's armour was never more clearly exposed than it was by Marshall in his opinion in this, the supreme effort of his life. Skillful as were the arguments of Roane, unanswerable as they were considered by the strict constructionists of that period, their fallacies, at this distance, are easily detected when compared to the decisions of Marshall which they sought to break down. It was the argument of Roane in his criticism of the McCulloch case that "the State governments have all residuary power," and this residuum, he asserted, was control over "everything necessary for the protection of the lives, liberty and property of individuals; the contracts of every class of society, agricultural, mercantile or mechanical." "This residuary power," he argued, "was left in possession of the States for wise purposes." Those purposes, he concluded, were the contentment which the people would enjoy if they were permitted to frame their own laws, whereas a concentration of power would result in "erecting a throne upon the ruins of the Republic." Jefferson, who never ceased to regret his inability to make Roane Chief Justice, unstintedly indorsed Roane's criticism of the McCullough decision. "I subscribe to every tittle of them," he said.[20]

In a series of five articles published in the Richmond Enquirer under the *nom de plume* of Algernon Sidney, Roane attacked the later decision in Cohens v. Virginia, with all the vigor he had shown in the McCulloch case. It was in this case Marshall set the capstone of Nationalism. As if in defiance of his critics, particularly Roane and Jefferson, he gave his last great thrust at States Rights, and his last assertion of the superiority of the Supreme Court "in all cases arising under the Constitution, laws, or treaties" even though a State was a party to the action.

"The United States form, for many, and for most important purposes, a single nation. . . In war, we are one people. In making peace, we are one people. In all commercial regulations, we are one and the same people. In many other respects, the American people are one; and the government which is alone capable of controlling and managing their interests in all these respects, is the government of the Union.

"It is their government, and in that character they have no other. America has chosen to be, in many respects, and to many purposes, a nation; and for all these purposes, her government is complete; to all these objects, it is competent. The people have declared, that in the exercise of all powers given for these objects it is supreme. It can, then,

19. The Richmond Enquirer was established in 1804 by Judge Roane. Thomas Ritchie, his cousin, was installed as Editor. The Enquirer, through the influence of Roane, and certain of his political associates, was long recognized as the official mouthpiece of the Republicans. John Quincy Adams in his Diary (Vol. IV, 313) refers to it as "the organ of the new Virginia faction under the auspices of Spencer Roane." Roane's assault on McCulloch vs. Maryland was made in a series of articles published in the Enquirer under the pen name of "Amphictyon."

20. Ford's Jefferson, Vol. X, 140.

in effecting these objects, legitimately control all individuals or governments within the American territory. The Constitution and laws of a state, so far as they are repugnant to the Constitution and laws of the United States, are absolutely void.

"These states are constituent parts of the United States. They are members of one great empire." 6 Wheaton, 413-14.

It was against this decision, too, that Roane made his last stand. At certain periods in his contributed articles he indulged an intemperance of speech that had found no place in his former discussions. National judges, he said, "have no interest in the government or laws of any State, but that of which they are citizens. As to every other state but that, they are completely aliens and foreigners." Virginia, he declared, was as much a foreign nation as Russia, so far as jurisdiction of the Supreme Court over the judgments of the State Courts is concerned. In Marshall's doctrine he found that "blind and absolute despotism which exists in an army, or is exercised by a tyrant over his slaves."[21]

In none of his decisions did Marshall more clearly state his antagonism to States Rights and in none did he more positively assert the supremacy of the National government.[22] Neither, it may be said, did his opponents so nearly reach a proposal in favor of secession, or go farther in their expressions of opposition to the length to which Marshall let this opportunity carry him in giving his final message in support of National supremacy. Jefferson, approaching four score years, had lost none of his bitterness or disappointment resulting from his inability to appoint Roane. Writing to Justice Johnson he said if Roane "can be answered I surrender human reason as a vain and useless faculty, given to bewilder and not to guide us."[23]

As a last attempt to circumvent the effect of the Cohen's case Roane acting in concert with Senator Richard M. Johnson, of Kentucky, prepared an amendment to the Constitution giving the Senate appellate jurisdiction in all cases where the Constitution or laws of a State were questioned, and in all cases "Where the judicial power of the United States shall be construed as to extend to any case. . . arising under" the National Constitution, laws, or treaties.[24] Roane even went to the extent of chiding Jefferson and Madison for hanging back "in this great crisis." Johnson, ably supported by Roane, argued in support of his amendment with consummate ability. "From the standpoint of an advocate of State Rights no more powerful argument was ever made in Congress than that of Johnson. He analyzed the decision of Marshall with a clearness neither Jefferson nor Madison had surpassed."[25]

This was Roane's last assault. He died at Warm Springs, Virginia, September 4, 1822, whither he had gone for relief from a malady from which he had been suffering.[26] With his death the attacks on Marshall subsided. Even Johnson abandoned his amendments. Other decisions of national importance were made by the Supreme Court, other vehement attacks were made upon the Court, but the death of Roane, and that of Jefferson, which soon followed, left Marshall supreme in his position as the undefeated advocate of Nationalism.

Reviewing the concatenating circumstances which resulted in the appointment of John Marshall, as Chief Justice of the Supreme Court, one hesitates even to contemplate the fate of the Nation if Spencer Roane had been appointed instead of him. To the student of the Constitution, no imagination can construct the fate of the Nation if there had been no Marbury v. Madison, no Cohens v. Virginia, no Dartmouth College case, no Fletcher v. Peck, no Martin v. Hunter's Lessee, no Gibbons v. Ogden, no McCulloch v. Maryland. Never lived two beings that were more the pawns of Fate. The one secure in his position as the greatest jurist of all ages; the other once the idol of half the Nation, the original seccessionist,[27] the accepted constitutional interpreter of his party for a quarter of a century, now rests in an obscure country burying ground, his name and fame seldom recognized by or known to those who chance to read the simple inscription upon the modest stone that marks his grave.

21. Branch Historical Papers, June, 1906, 119.
22. "A deep design," he writes Story, "to convert our government into a mere league of states has taken strong hold of a powerful and violent party in Virginia. The attack upon the judiciary is in fact an attack upon the union. The judicial department is well understood to be that through which the government may be attacked most successfully, because it is without patronage, & of course without power. And it is equally well understood that every subtraction from its jurisdiction is a vital wound to the government itself. The attack upon it therefore is a masked battery aimed at the government itself." Marshall to Story, July 13, 1821, Proceedings, Mass. Hist. Soc. 2d Series, XIV, 329-30.
23. Jefferson to Johnson, Ford XII, 255-56, footnote.
24. Annals, 17th Congress, 1st Sess. 68.
25. The writer, "Thirty Years War on the Constitution," Va. Law Review, May, 1931, p. 650.
26. A few years since, while tramping about the hills near Warm Springs, Virginia, the writer chanced to enter a small country graveyard, where his eye caught the name of Spencer Roane, carved on a modest stone, which recited his death at that place September 4, 1822.
27. Channing's History of the United States, Vol. V. p. 407.

The Oratorical Unforgivable Sin

(From the Manitoba Bar News, Jan. 1934)

The most inexcusable approach to an address is to inform your audience that you did not have time to prepare your remarks. That is an insult to their intelligence. Each address ought to be prepared with the greatest care, and for at least the first five years' experience in public speaking, ought to be written out verbatim. Even after that, most careful preparation should be made of the commencement, and especially the conclusion of all addresses. The knowledge that one has mastered his speech gives a quiet confidence that communicates itself also to the audience.

Adult Education for Aldermen

(From The New York Times, Jan. 16)

Education of the city fathers in the complex affairs of local government will no longer be confined to the gloomy purlieus of City Hall, according to a plan announced yesterday by Bernard S. Deutsch, President of the Board of Aldermen. Mr. Deutsch plans at his own expense, to hold a series of Saturday afternoon "seminars" for Aldermen and members of the Board of Estimate.

There will be an address by a prominent speaker, followed by round-table discussion. The atmosphere will be informal, congenial and cooperative. Mr. Deutsch has picked Feb. 17 as the date for the first session.

He has not yet decided upon the speakers, but he is eager to obtain men of the type of former Governor Smith, Dr. Nicholas Murray Butler, president of Columbia University, and Samuel Seabury.