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Roane and the Republic

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"It has been our happiness to believe, that in the partition of powers between the general and State governments, the former possessed only such as were expressly granted, or passed therewith as necessary incidents, while all the residuary powers were reserved by the latter."

— Spencer Roane

Had one-time friends John Adams and Thomas Jefferson not had such a high-profile and historic falling out, Spencer Roane would have been chief justice of the Supreme Court. He was Jefferson's pick, but Adams tapped his fellow nationalist John Marshall to occupy that powerful position.

As it was, Spencer Roane served on the highest court in his home state of Virginia, and became one of Jefferson's staunchest allies and one of the ablest defenders of federalism and the Constitution, including the concept commonly called "states' rights."

Spencer Roane was a member of the Founding Generation who preached and practiced the doctrine of a federal government whose powers were few and defined, with state governments retaining the lion's share of the authority. It is perhaps for that reason that he has been relegated to the Forgotten Founders file, and it is definitely for that reason that this article is being published.

Roane was born on April 4, 1762 in Essex County, Virginia. Roane's father was a member of the House of Burgesses until the War for Independence, at which time he joined the militia of the Old Dominion, rising to the rank of colonel.

In a way similar to most young men of his station, Spencer received his first years of formal education at home. His tutor was a Scot named Bradfute. Roane's studies focused on the heroes of Greek and Roman antiquity, endowing the young man with a patriotic passion and an appreciation of self-government that would remain with him for the rest of his life.

Studying the stories of Greece and Rome was the core of the colonial curriculum. The Founders learned very early in life to venerate the illuminating stories of ancient Greece and Rome. They learned these stories, not from secondary sources, but from the classics themselves. And from these stories they drew knowledge and inspiration that helped them found a republic far greater than anything created in antiquity.

Classical training usually began at age eight, whether in a school or at home under the guidance of a private tutor. One remarkable teacher who inculcated his students with a love of the classics was Scotsman Donald Robertson. Many future luminaries were enrolled in his school: James Madison, John Taylor of Caroline, John Tyler, and George Rogers Clark, among others. Robertson and teachers such as him nourished their charges with a healthy diet of Greek and Latin, and required that they learn to master Virgil, Horace, Justinian, Tacitus, Herodotus, Plutarch, Lucretius, and Thucydides. Further along in their education, students were required to translate Cicero's "Orations" and Virgil's *Aeneid*. They

were expected to translate Greek and Latin passages aloud, write out the translations in English, and then re-translate the passages back into the original language using a different tense.

Whether at home or in a schoolhouse, the goal of education in the early days of our nation was to instill virtue in the students. The Founders were taught that free societies were sustained by a virtuous populace, and that, if a society were to abandon a study of the classics, that same society would eventually abandon the virtues championed by the classical authors.

There was a more pragmatic side to the Founders' classical education as well. Twenty-seven of the signers of the Declaration of Independence were college-educated. Moreover, of the 55 delegates who attended the Constitutional Convention in Philadelphia in 1787, 30 were college graduates. That is an impressive feat given the challenging entrance requirements of 18th-century universities. Fortunately for the young Founding Fathers, the teachers of the day exercised their students in Greek and Latin so that their pupils could meet the rigorous entrance requirements of colonial colleges. Those colleges stipulated that entering freshmen be able to read, translate, and expound the Greco-Roman classical works.

When Roane was only 13 years old, the "Shot Heard 'Round the World" was fired on Lexington Green, and the world would change forever.

Along with his lectures on the heroes of Athens, Sparta, and Rome, Roane devoted hours to reading and pondering the proclamations and pamphlets produced in defense of American liberty and in condemnation of the crown and Parliament.

In his biographical essay on Roane published in 1896, T.R.B. Wright described the indelible effect the revolutionary writings had on young Spencer Roane:

The power of simplicity with which in these state papers the wrongs of America were described, the determined resolution which they displayed to defend the rights of the people and to resist the encroachments of Parliament and the Crown, the patriotism and magnanimity of sentiment which breathed throughout these admirable compositions, fired his young bosom with the spirit of republicanism, and fanned there the holy flame of liberty — that flame which continued to burn with undiminished lustre like the sacred fire on the vestal altar to the very day of his death.

With such ardent devotion to freedom burning brightly within the young scholar, Roane matriculated at the College of William and Mary, the choice of most of Virginia's gentry. While at William and Mary, Roane chose law as his course of study; accordingly, the inimitable George Wythe — known as the "Teacher of Liberty" — was his first professor.

Here again, Roane benefited from an exceptional education, and after reading the works of the renowned English jurist Sir Edward Coke (Coke would become his favorite legal writer), Roane was deemed ready to sit for the bar exam.

Doubting his own preparation, Roane set off for Philadelphia to spend some time studying law and attending law society meetings. These lessons and associations with the learned men of his chosen vocation convinced Roane that he was finally ready to take the bar exam in his native Virginia, to leave the study of law, and to begin the practice of it.

Spencer Roane wouldn't spend much time in the law office, though. At the age of 21, he followed in his father's footsteps, serving as the representative of Essex County to the Virginia House of Delegates.

Roane impressed his colleagues in the House of Delegates and was appointed to serve in the executive branch of Virginia's government, the Executive Council. He would serve two years in this body before being elected by his neighbors to represent them in the Senate of Virginia. His exemplary service as a senator would bring him additional accolades and advancement.

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After two years in the Senate, Roane's fellow legislators elected him to sit on the bench of the state's General Court, putting his legal training to work on behalf of his fellow citizens. T.R.B. Wright insists that Roane was promoted because "at the time he was so well known."

Twenty-seven-year-old Judge Roane spent the next five years traveling to all the districts of Virginia, making a name for himself throughout his beloved home state as an able and fair judge, one who could be counted on to dispense justice with equity and impartiality.

Here, too, Roane's skill and virtue attracted the attention of powerbrokers, who would put the young judge's name up for consideration to fill the vacancy on the Court of Appeals (Virginia's highest court) left on that court's bench when Henry Tazewell was elected to the U.S. Senate in 1794. Tazewell, similarly, was assuming the office vacated by John Taylor of Caroline.

Roane was overwhelmed by the fact that legislators unanimously elected him to the Court of Appeals bench on the first ballot. His emotion, it is said, convinced Roane to redouble his commitment to being a worthy servant of the people of Virginia.

Daniel Call, the famed reporter of Virginia cases, praised Spencer Roane's judicial preeminence, despite the fact that Call was a Federalist and Roane was a staunch Jeffersonian Republican. Speaking of Roane's time on the bench of the Court of Appeals, Call wrote:

> From that time he read law assiduously, and became very well acquainted with some of the most popular of the modern reporters, particularly Burrows and Atkyns. This, together with the natural vigor of his understanding and his other literary attainments, soon rendered him one of the most distinguished members of the bench, second only in public estimation to Mr. [Edward] Pendleton, and, upon the death of that gentleman, the ablest judge of the court. His perceptions were distinct, his judgment strong, and his powers of reasoning great.

"He abhorred oppression and the arbitrary assumption of power by courts and individuals, and never thought the end justified illegal means to obtain it," Call concluded.

Although his ability to probe matters of property law and contract law were second to none, it is in the field of constitutional law that Spencer Roane shone brighter than all of the other brilliant minds on the benches of the courts of Virginia.

In questions of constitutional construction, Roane's mind was enlightened by one lamp: liberty. The revolutionary readings of his youth placed within Roane's breast the love of equality of rights and liberty, twin poles of Roane's mind.

It was Roane's unwavering commitment to the concept of liberty that drove him to oppose the ratification by Virginia of the Constitution of 1787. Roane didn't deny that the union needed strengthening and the Articles of Confederation accordingly needed revamping, but he worried that the Constitution as written would leave too much room for the proposed general government to usurp powers that he believed were best borne by the states.

The adoption of the Bill of Rights helped assuage some of Roane's fear of a runaway federal government, but he remained apprehensive, concerned that the reservation to the states of unenumerated powers in the 10th Amendment was not explicit enough and that future federal office holders would find loopholes large enough to allow would-be tyrants to consolidate immense power, power that Roane believed should rightly reside in the states.

After the Constitution was ratified, however, Roane was a reliable and trustworthy friend to that document. His appreciation and fidelity to the Constitution, though, did not diminish his devotion to vigilance and virtue. Before long, Roane's caution was justified when he witnessed the creation and growth of political parties, a development he detested and worked tirelessly to dismantle.

Spurred by his support for principles of liberty that had always animated him, Spencer Roane allied himself with the Republicans, led by fellow Virginians Thomas Jefferson and James Madison.*

As T.R.B. Wright explained, "He [Roane] maintained that the Federal Government was limited in its power, that it possessed only those [powers] which were expressly granted by the very terms of the contract, or were fairly incidental to them."

In Roane's way of seeing things, President John Adams had committed a gross crime against the Constitution when he signed the Alien and Sedition Acts into law. He could not countenance such serious violation of the oath of office Adams took, an oath requiring the president to preserve, protect, and defend the Constitution, not to disregard it. Roane's ability to make disinterested judgments shielded him from charges of partisanship or partiality. His fellow Virginians knew Roane would never sacrifice principle in favor of party; he had demonstrated that virtue again and again throughout his many years of unsullied service to his state and his country.

It was his devotion to the timeless principles of republicanism and popular sovereignty that led Spencer Roane to champion passage by the Virginia legislature of the Virginia Resolution penned by his friend and fellow Republican, James Madison.

Unfortunately, Roane's zealous defense of the Constitution as ratified and the limited and enumerated powers granted therein to the federal government did not win the day nationally. Within a dozen years of the adoption by Virginia of Madison's Resolution, Roane would witness a crescendo of consolidation of power not only by the executive and legislative branches, but by the federal judiciary, as well.

As one would imagine, this aspect of federal usurpation was especially repugnant to Roane, the former judge and lawyer. He recoiled at the overreach of federal jurists, believing, naïvely, that judges on the federal bench would mirror his personal dedication to fairness, impartiality, and dispensing disinterested justice without regard to the potential for personal gain.

To combat the consolidation of unconstitutional authority by federal judges (and other officials of the general government), Spencer Roane took up his pen and put his impressive mental prowess to work writing articles to the *Richmond Enquirer* aimed at exposing the tyranny and alerting his fellow Virginians to the violation of their trust on the part of the federal government.

Using the pen name "Hampden" (a reference to the hero of English resistance to royal abuse of power, John Hampden), Roane denounced the despotism and promoted the principles of limited government and the role of states as creators of the Constitution and thus of the federal government itself.

After rehearsing the advantages of the federal system created by the Constitution and reminding

readers of the intent of the 10th Amendment (the preservation of state sovereignty in all but the few federal powers granted by states in the Constitution), Roane talked at length on the opinion handed down by the Supreme Court in the case of *McCulloch v. Maryland*, wherein the court stretched the Constitution's "necessary and proper" clause beyond its original meaning to unconstitutionally allow the federal government to enact laws not expressly authorized by the Constitution.

In Roane's first letter to the editor of the *Richmond Enquirer* published on June 11, 1819, he wrote words that read as if they were written in 2017:

> The warfare waged by the judicial body has been of a bolder tone and character. It was not enough for them to sanction, in former times, the detestable doctrines of Pickering & Co., as aforesaid: it was not enough for them to annihilate the freedom of the press, by incarcerating all those who dare, with a manly freedom, to canvass the conduct of their public agents; it was not enough for the predecessors of the present judges to preach political sermons from the bench of justice and bolster up the most unconstitutional measures of the most abandoned of our rulers; it did not suffice to do the business in detail, and ratify, one by one, the legislative infractions of the Constitution. That process would have been too slow, and perhaps too troublesome. It was possible, also, that some *Hampden* might make a stand against some ship-money measure of the government, and although he would lose his cause with the court, might ultimately gain it with the *people*. They resolved, therefore, to put down all discussions of the kind, in future, by a judicial *coup de main*; to give a *general* letter of attorney to the future legislator's of the Union; and to tread under foot all those parts and articles of the Constitution which had been, heretofore, deemed to set limits to the power of the federal legislature. That man must be a deplorable idiot who does not see that there is no earthly difference between an *unlimited* grant of power and a grant limited in its terms, but accompanied with *unlimited* means of carrying it into execution.
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> The Supreme Court of the United States have not only granted this *general* power of attorney to Congress, but they have gone out of the record to do it, in the case in question. It was only necessary, in that case, to decide whether or not the bank law was "necessary and proper," within the meaning of the Constitution, for carrying into effect some of the granted powers; but the court have, in effect, expunged those words from the Constitution. There is no essential difference between expunging words from an instrument, by erasure, and reading them in a sense entirely arbitrary with the reader, and which they do not naturally bear. Great as is the confidence of the nation in all its tribunals, they are not at liberty to change the meaning of our language. I might, therefore, justly contend that this opinion of the court, in so far as it outgoes the actual case depending before it, and so far as it established a *general* and *abstract* doctrine, was entirely extrajudicial and without authority. I shall not, however, press this point, as it is entirely merged in another, which I believe will be found conclusive — namely, that that court had no power to adjudicate away the *reserved* rights of a sovereign member of the confederacy, and vest them in the general government.

Roane continued:

> My opinion is, that the Supreme Court had no jurisdiction justifying the judgment which it gave, and that it decided the question wrongly. The power of the Supreme Court is indeed great, but it does not extend to everything; it is not great enough to change the *Constitution*…. These points I shall endeavor to maintain in one or more subsequent numbers. I shall also briefly touch upon the

> bank law of the United States. That law is neither justified by the Constitution, nor ratified by any acquiescence.

Could any unbiased reader fail to recognize that the very abuses of power and unconstitutional assumptions of authority witnessed by Roane in 1819 are happening in our own time and to a much greater degree of despotism, and that the tyranny careers along at a much more rapid pace?

We have witnessed a Supreme Court that presumes to rewrite legislation, from forcing Americans to purchase health insurance regardless of ability or desire (*National Federation of Independent Businesses v. Sebelius*) to disregarding the will of the people of several states, forcing them to accept the legality of homosexual "marriage" (*Obergefell v. Hodges*). These two terrible opinions of the high court would cause a constitutionally consistent man such as Spencer Roane to shout against the abuses from the rooftops. And probably on Twitter and Facebook, too!

In the final of the three Hampden letters, Roane marked the true constitutional boundaries between state and federal powers:

> The rights of the States ought not to be usurped and taken from them; for the powers delegated to the general government are few and deferred, and relate to external objects; while the States retain a residuary and inviolable sovereignty over all other subjects; over all those great subjects which immediately concern the prosperity of the people. Are these last powers of so trivial a character that it is entirely unimportant which of the governments act upon them?

Finally, Spencer Roane warned what would happen if the American people didn't enforce the enumeration of powers in the Constitution, allowing the Supreme Court to accumulate the power of all three branches of the federal government.

"If the limits imposed on the general government, by the Constitution, are stricken off, they have, literally, the power to legislate for us 'in all cases whatsoever'; and then we may bid a last adieu to the State governments," Roane, as Hampden, presciently predicted.

A couple of years after the publication of his Hampden letters, Roane wrote under the name of another English martyr to liberty, Algernon Sydney, criticizing the Missouri Compromise. Roane could not be quieted, no matter his age or the likelihood that his letters would restore the balance of federalism established by the Constitution.

After a six-month illness, Spencer Roane died on September 4, 1822 while on a visit to hot springs in Bath, Virginia, where he hoped he'd recover his health.

Of all the encomia written about Spencer Roane, perhaps none more fully encompasses all his virtue, valor, and vigilant guard of the timeless principles of liberty than that written by T.R.B. Wright in his brief biography of Roane published in the *Virginia Law Review* in November 1896.

"No reader of the history of the early days of the Republic, when its patriots, bound together by new bonds forged in the fires of the Revolution, and cemented by the blood of heroes, vied with each other for its eternal perpetuation, can doubt the exalted patriotism, inflexible integrity, and devotion to country, of Spencer Roane."

We who have inherited this legacy of liberty would be wise to learn from Spencer Roane, to courageously oppose every attempt to demolish the constitutional foundation of federalism and to unwaveringly uphold the virtue that is essential to the preservation of liberty.

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