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Wax, Wick, and Flame: Performing Daniel Webster's Peroration from the *Dartmouth College* Case

18 U.N.H. L. REV. 3 (2019)

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INTRODUCTION

Daniel Webster was a mere thirty-six years old when he argued and won the Dartmouth College Case before the United States Supreme Court.¹ It was reported that after more than four hours of comprehensive, measured, logical, and well-reasoned legal argument, Webster paused, and then delivered a closing—a “peroration”—so moving that it brought Chief Justice John Marshall to tears.² When Webster finished speaking and sat down, “there was a death-like stillness throughout the room for some moments: every one seemed to be slowly recovering

¹ Compare, Hannah Silverstein, *Arguing the Dartmouth College Case, 200 Years On*, DARTMOUTH NEWS (Feb. 13, 2019), <https://news.dartmouth.edu/news/2019/02/arguing-dartmouth-college-case-200-years> [<https://perma.cc/BM6D-MSC8>] (stating when Webster argued the case), with Richard N. Current, *Daniel Webster American Politician*, ENCYCLOPEDIA BRITANNICA (last accessed Sept. 21, 2019), <https://www.britannica.com/biography/Daniel-Webster> [<https://perma.cc/HP2Y-JL4Y>] (stating when Webster was born).

² See generally, Richard N. Current, “*It Is...A Small College...Yet, There Are Those Who Love It*” *Dartmouth College v. Woodward*, AMERICAN HERITAGE (last accessed Sept. 21, 2019) <https://www.americanheritage.com/it-small-college-yet-there-are-those-who-love-it> [<https://perma.cc/4A85-T2KE>].

himself, and coming gradually back to his ordinary range of thought and feeling.”³ And so began the legend and the mythology of Daniel Webster’s peroration in the *Dartmouth College Case*. Legend because, propelled in no small measure by this victory, over his lifetime Daniel Webster argued more than 200 cases before the U.S. Supreme Court, many of which helped to shape the new nation’s understanding of its Constitution.⁴ Mythology because there was not and is not an official transcript of this argument.⁵ One certainty, however, is that Webster had delivered a similar peroration when he unsuccessfully argued the case before the Superior Court in New Hampshire in 1817, and that his efforts to draw tears from the bench were met at that time with derision and satire by the Republican-dominated press in New Hampshire.⁶

Shortly after arguing the case in 1818 in Washington, in an era in which cases were not “briefed” in advance to the Supreme Court and contemporaneous transcripts of arguments were not made, Webster took the unprecedented step of privately printing the “minutes” of his argument “without title or name to it.”⁷ Although it was his original intention to keep the “three or four copies” under his own “lock and key” and only to lend them out a day at a time—“precautions . . . taken to avoid the indecorum of publishing the creature”—the number of copies in circulation quickly grew and, through a sympathetic Justice Joseph Story and other avenues, eventually made their way into the hands of the full court.⁸ While Webster’s printed version is quite comprehensive, it does not include the peroration. As he wrote to Jeremiah Mason, one of his co-counsel in arguing the case before New Hampshire’s highest court, “They are hastily written off, with much abbreviation, and contain little else than quotation from the cases. All the nonsense is left out.”⁹ Concluded one of Webster’s biographers, “He purposely left out his

³ Richard W. Morin, *Will to Resist: The Dartmouth College Case*, DARTMOUTH ALUMNI MAGAZINE (Apr. 1969) (quoting Chauncey A. Goodrich).

⁴ Scott Bomboy, *Daniel Webster’s Unique Supreme Court Legacy*, CONSTITUTION DAILY, (Jan. 18, 2019), <https://constitutioncenter.org/blog/daniel-websters-unique-supreme-court-legacy> [<https://webarchive.loc.gov/all/20180527181951/https://constitutioncenter.org/blog/daniel-websters-unique-supreme-court-legacy>].

⁵ Morin, *supra* note 3.

⁶ IRVING H. BARTLETT, DANIEL WEBSTER 77–79 (W.W. Norton & Company, Inc., 1978).

⁷ Morin, *supra* note 3 (citing Webster’s letter to Mason, April 22, 1818).

⁸ *Id.*

⁹ Letter from Daniel Webster to Jeremiah Mason, April 23, 1818, reprinted in WILTSE, C., ED., THE PAPERS OF DANIEL WEBSTER, CORRESPONDENCE, VOL. 1 1798–1824, 224 (University Press of New England, 1974).

peroration because it embarrassed him. It lacked legal reasoning.”¹⁰

Curiously though, ever since his death in 1852,¹¹ the words of Daniel Webster’s peroration, the words that many believe entitle him to be known as the “re-founder” of Dartmouth College, have tripped regularly from the tongues of generation after generation of Dartmouth students and graduates: “It is, Sir, as I have said . . . a small college, and yet, there are those who love it.”¹² Or at least, that’s what everyone believes that he said. Of the many people who officially eulogized Webster, one was U.S. Senator Rufus Choate of Massachusetts, a member of the Dartmouth Class of 1819, and long a friend and admirer of Webster’s.¹³ Choate had learned that Chauncey Goodrich, then a Professor of Oratory at Yale University, had attended the Supreme Court argument on that day in 1818 on behalf of his employer, which took more than a passing interest in the case and its potential implications for other private eleemosynary educational institutions. Mourning Webster’s passing, Choate wrote to Goodrich and asked if he had any materials relating to the argument that he might use in a eulogy of Webster. This inquiry prompted Goodrich to write back and share his recollections from some thirty-four years earlier of Webster’s peroration. But were Goodrich’s recollections built on actual notes that he may have taken on the day of argument in 1818 or on his memory more than three decades later of what by then had already become known as a legendary performance that had become part of the country’s folklore?¹⁴ Further complicating the picture, in the middle of his “account” that appears at first to take the form of a verbatim transcript, Goodrich included three paragraphs in which he describes Webster’s emotional state after delivering his famous line about loving a small college. Describing a Webster whose “lips quivered[,] . . . firm cheeks trembled with emotion[,] . . . eyes [] filled with tears[, and] voice choked,” Goodrich explains, “I will not attempt to give you the few broken words of tenderness in which he went on to

¹⁰ ROBERT V. REMINI, *DANIEL WEBSTER: THE MAN AND HIS TIME* 159 (W.W. Norton & Company, 1997).

¹¹ Richard N. Current, *Daniel Webster American Politician*, *ENCYCLOPEDIA BRITANNICA* (last accessed Sept. 21, 2019), <https://www.britannica.com/biography/Daniel-Webster> [<https://perma.cc/HP2Y-JL4Y>].

¹² Alex Fredman, *For the College on the Hill*, *THE DARTMOUTH* (Oct. 6, 2017, 1:55 AM), <https://www.thedartmouth.com/article/2017/10/> [<https://perma.cc/LBK3-RVRH>].

¹³ Rufus Choate, *BIOGRAPHICAL DIRECTORY OF THE UNITED STATES CONGRESS* (last accessed Oct. 25, 2019) <http://bioguide.congress.gov/scripts/biodisplay.pl?index=C000375> [<https://perma.cc/PXF9-4T6T>].

¹⁴ REMINI, *supra* note 10 at 159.

speak of his attachment to the college.”¹⁵ Is it possible that Goodrich was so moved by what he was hearing that he could not autonomously transcribe words to paper, as he, too, had to pause to put a handkerchief to his eyes? We will never know the answer to these questions and, consequently, we will never be able to fully separate fact from fiction, actual utterances from myths.

As an undergraduate at Dartmouth in the late 1970s and early 1980s, I regularly sat in Thayer Dining Hall where what seemed like a more than life-sized painting of Webster arguing the case before the Supreme Court adorned the wall and included his attestation of love for his small college. I simultaneously filled my stomach and absorbed his words. I became a storyteller during my undergraduate years, and later performed from memory Stephen Vincent Benét’s short story, “The Devil and Daniel Webster,” for audiences across New Hampshire. Evidently those performances left a lasting impression, for in about 2016 I took a call from New Hampshire Supreme Court Associate James (Jim) Bassett, Dartmouth Class of 1978, and a longtime friend.

Justice Bassett explained that he had been asked by the College’s Office of Alumni Affairs to serve as the Chair of the Planning Committee for the celebration of the 200th anniversary of the US Supreme Court’s decision in the *Dartmouth College* Case, which would coincide with the 250th anniversary celebration of the founding of the College by Eleazar Wheelock in 1769. Jim, himself a Webster admirer who keeps a portrait of Black Dan on the wall in his Chambers, recalled that he had seen me perform as Daniel Webster at a dinner meeting many years earlier of the Merrimack County Bar Association and asked if I would consider again portraying Daniel Webster by this time reenacting a portion of his argument that saved the College from becoming Dartmouth University. Jim didn’t have to make a hard sell—Webster is a fascinating and remarkable historical figure, and the opportunity to again bring his words to life was irresistible to me.

Long a Webster fan myself, years ago I purchased the complete sixteen volume collection of his papers published for Dartmouth by the University Press of New England. So, I went to the shelf, pulled down the first volume on his federal practice, and found the passage that appears below. I chose to focus on the 275 words that Goodrich put in quotation marks and to take a dramatic pause where Webster gushed out his “feelings.” Hours spent memorizing and rehearsing, whether in front of a mirror or while walking my dog, brought the words of the peroration so close that they began to feel like they were living through me. On one early morning walk, through a seemingly unstoppable torrent of words and coordinated gestures, I suddenly felt that I had broken the code, that I had a way of understanding

¹⁵ Morin, *supra* note 3 (quoting Chauncey A. Goodrich).

Webster's peroration not just as a string of sentences that reinforced reason with emotions, but as a moving picture in which the College was an actual and metaphorical candle which could be held in its holder in my right hand—a "great light of science" which could "throw its radiance over our land"¹⁶—but which, when held up close to my mouth, could be "put out" if I held my left hand behind the flame, puffed out my cheeks, and blew so as to extinguish the flame. For me, this became the central image of the peroration: a story of wax, wick, and flame, a very simple, elemental story of keeping the candle burning, even when other "sons" were turning against Webster's metaphorical Cesar as candle and trying to "put it out." Before resting his case, my Webster extends his right hand proudly before him toward the Supreme Court Justices, tenderly cradles the candle that still glows and throws its radiance across the room, and reminds the jurists that he would never turn against the College he loves, so that she could never say of him, "Et tu quoque mi fili,"¹⁷ or, in English, "And thou, too, my son."

Webster's message was not lost on the Justices, who also chose not to assassinate their mothers. When Chief Justice John Marshall announced and read the court's decision on February 2, 1819, the 6-1 majority signaled that the Court not only would not blow out the candle that was Dartmouth College, it would encourage the lighting of many, many more.¹⁸ I was honored to have had the opportunity to present Daniel Webster's words, but in many ways I felt that once I discovered Webster's candle, the peroration performed itself 200 years after it first was delivered. We'll never know what really was said or what gestures were actually used by Webster. And that's okay. Sometimes myths are just as good as and even more powerful than precise words, for myths live in hearts, while words live in books. And as myths go, few are easier to picture and understand than wax, wick, and flame.

¹⁶ Daniel Webster, Peroration, The Dartmouth College Case (Mar. 10, 1818).

¹⁷ Latin scholars would not recognize this as proper Latin; at a minimum, "fili" should be "filius," since the former is the plural and the latter is the singular. The reader is left to wonder whether the error was Webster's or Chauncey's, and what was actually said before the Court. Likewise, it's not clear whether Webster only spoke the line in Latin, or whether he also provided the translation, as I did in my rendition. Did all of the Justices know Latin so well that they understood what Webster had (ungrammatically) just said, or did they need a translation? Or, because practically everyone at that time would have known the story of Caesar's betrayal, was the message obvious, even without a translation?

¹⁸ Trustees of Dartmouth Coll. v. Woodward, 17 U.S. 518, 598 (1819) ("The case before the court is not of ordinary importance, nor of every-day occurrence. It affects not this college only, but every college, and all the literary institutions of the country.").

DARTMOUTH COLLEGE V. WOODWARD, DANIEL WEBSTER'S PERORATION, MARCH 10, 1818

"This, Sir, is my case! It is the case not merely of that humble institution, it is the case of every college in our Land! It is more! It is the case of every eleemosynary institution throughout our country—all of those great charities founded by the piety of our ancestors to alleviate human misery, and scatter blessings along the pathway of life! It is more! It is, in some sense, the case of every man among us who has property of which he may be stripped, for the question is simply this, 'Shall our State Legislatures be allowed to take *that which is not their own*, to turn it from its original use and apply it to such ends and purposes as they in their discretion shall see fit!'

Sir, you may destroy this little institution; it is weak, it is in your hands! I know it is one of the lesser lights in the literary horizon of our country. You may put it out! But if you do so, you must carry through your work! You must extinguish, one after another, all those great lights of science which for more than a century have thrown their radiance over our land! It is, Sir, as I have said, a small college. And yet *there are those who love it!*" [Here the feelings which he had thus far succeeded in keeping down, broke forth. His lips quivered; his firm cheeks trembled with emotion; his eyes were filled with tears; his voice choked; and he seemed struggling to the utmost, simply to gain that mastery over himself which might save him from an unmanly burst of feeling. I will not attempt to give the few broken words of tenderness in which he went on to speak of his attachment to the college. It seemed to be mingled throughout with the recollections of father, mother, brother, and all the trials and preventions through which he had made his way into life. Every one saw that it was wholly unpremeditated—a pressure on his heart which sought relief in words and tears. Recovering himself, after a few moments, and turning to Judge Marshall, he said,]

"Sir, I know not how others may feel, (glancing at the opponents of the college before him), but for myself, when I see my *Alma Mater* surrounded like Cesar in the senate house, by those who are reiterating stab upon stab, I would not for this right hand have her say to me, '*Et tu quoque, mi fili!*'["¹⁹

¹⁹ Retyped from THE PAPERS OF DANIEL WEBSTER, LEGAL PAPERS, VOL. 3, THE FEDERAL PRACTICE, PART I 153–154 (Andrew J. King, ed., 1989) (citing Extract. MB. Chauncey A. Goodrich to Rufus Choate, November 25, 1852).