

1991

Book Review: The Papers of Daniel Webster, Legal Papers, Volume 3: The Federal Practice. Andrew J. King Editor.

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**Recommended Citation**

Ely Jr., James W., "Book Review: The Papers of Daniel Webster, Legal Papers, Volume 3: The Federal Practice. Andrew J. King Editor." (1991). *Constitutional Commentary*. 446.  
<https://scholarship.law.umn.edu/concomm/446>

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**THE PAPERS OF DANIEL WEBSTER, LEGAL PAPERS, VOLUME 3: THE FEDERAL PRACTICE.** Andrew J. King<sup>1</sup> editor. Hanover, N.H.: University Press of New England. 1989. Pp. xxxi, 1098. \$110.00.

*James W. Ely, Jr.*<sup>2</sup>

Daniel Webster's long and distinguished legal career has been chronicled by numerous scholars.<sup>3</sup> Appearing before the Supreme Court in about two hundred cases, Webster did much to shape constitutional thought in the antebellum era. Few would dispute Webster's place among the foremost legal advocates in American history.

Ably edited by Professor Andrew J. King, *The Papers of Daniel Webster: The Federal Practice* offers a new perspective on Webster's achievements. Encompassing both private and constitutional litigation, this volume contains a wealth of material concerning Webster's participation in federal litigation between his first Supreme Court argument in an 1814 prize case and his last case shortly before his death in 1852. To illustrate Webster's career King has assembled an impressive array of judicial arguments, correspondence, pleadings, notes on the arguments of opposing counsel, opinion letters, and legislative reports. These materials are arranged topically into chapters concerning Webster's participation in major cases or discrete fields of law, and chronologically within each chapter. Insightful editorial notes help readers to understand the documents in historical context. The volume, published in two parts, includes extensive treatment of Webster's role in such landmark decisions as *Dartmouth College v. Woodward* (1819), *Gibbons v. Ogden* (1824), and *Charles River Bridge v. Warren Bridge* (1837). But the work also provides a valuable study of Webster's wide-ranging private law practice, covering maritime litigation, patent infringement cases, disputes over waterpower, and land title controversies. Helpful appendices catalogue each of Webster's appearances before the Supreme Court and lower federal courts.

Webster's constitutional advocacy surely interests the widest range of scholars today. Property rights were central to Webster's constitutionalism. Although influenced by tactical considerations

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3. E.g., M. BAXTER, *DANIEL WEBSTER & THE SUPREME COURT* (1966); F. STITES, *PRIVATE INTEREST AND PUBLIC GAIN: THE DARTMOUTH COLLEGE CASE* (1972).

in particular cases, he consistently championed the rights of property owners against legislative control. Mirroring the values of the framers, Webster linked political liberty and protection of private property. “[N]ext to life, & liberty,” he observed in his *Dartmouth College* brief, “the great end of free government is to keep hands off private property.”

Along with his high regard for property rights, Webster harbored deep suspicion of state legislatures. “If at this period there is not a general restraint on legislatures, in favour of private rights,” he argued in an 1829 land title dispute, “there is an end to private property.” As this argument suggests, Webster’s nationalism was largely instrumental: He endeavored to strengthen national power as a shield against state infringement of property rights. More specifically, Webster successfully sought to fashion the contract clause and the commerce clause into significant limits on state power over economic affairs.

Webster was especially well-attuned to the property-conscious Marshall Court. He was clearly less comfortable with the Jacksonian bent of the Court once Roger B. Taney became Chief Justice in 1836. “The present Judges, I fear,” Webster complained in 1847, “are quite too much inclined to find apologies for irregular & dangerous acts of State Legislative.” Notwithstanding this foreboding, he continued to enjoy influence before the high court. For instance, Webster successfully urged upon the Taney Court a broad view of federal admiralty jurisdiction over maritime contracts of carriage.

Aside from such weighty constitutional issues, the volume casts revealing light on the more practical aspects of Webster’s federal court practice. The documents show him formulating litigation strategy, handling clients, commenting on the arguments of opposing counsel, and offering his appraisal of various justices. Webster frequently represented commercial interests and corporations. Following his success in *McCulloch v. Maryland* (1819), he represented the second Bank of the United States during the 1820s. He served as counsel for several railroads in Massachusetts, as well as the Boston Manufacturing Company. Likewise, insurance companies turned to Webster for legal advice.

Particularly welcome is this book’s attention to Webster’s private law practice. This aspect of his career is often obscured by the more famous constitutional cases. Technology was a driving force in the transformation of American society during the 19th century. In sympathy with this technological revolution, Webster viewed patent protection as a means of inducing investment and encouraging inventions. Consequently, he frequently sought to enforce pat-

ents in the lower federal courts in New England. Webster was also active in disputes over land ownership and inheritance rights, arguing many such cases before the Supreme Court under diversity of citizenship jurisdiction.

The financial dimensions of practice were never far from Webster's mind. From his early request of a \$1000 fee in *Dartmouth College*, Webster was never modest in estimating his value. He frequently negotiated with clients concerning fees, and occasionally experienced difficulty collecting his compensation. Webster pressed vigorously in 1827 to receive payment for his services in a case to recover a lottery prize. In view of the complexity of the *Passenger Cases* (1849), Webster suggested that "an *enlarged contingency*" would be in order. Indeed, he subsequently entered into a contingency fee arrangement under which he received 25% of any tax rebates received by his clients. Little wonder that one aggravated client observed: "Webster like all the Lawyers is unreasonable in relation to Money Matters."

Despite a large measure of self-confidence, Webster did not allow his role as an advocate to distort his assessment of the likely outcome of cases. Pessimistic about the prospect of success in *Charles River Bridge*, Webster urged his client to consider a negotiated settlement. Although he attacked state liquor regulations in the *License Cases* (1847), he correctly predicted that the Supreme Court would uphold the laws.

Webster enjoyed informal access to several Supreme Court justices. He corresponded regularly with Joseph Story on matters of general legal interest as well as legislation pending in Congress. At times this correspondence touched upon national events. While Webster was Secretary of State, for instance, Story strongly recommended that Webster push President John Tyler to take steps against the Dorr Rebellion in Rhode Island. R. Kent Newmyer has characterized this close collaboration between Webster and Story "as one of the most extraordinary in American law and politics."<sup>4</sup> Even more remarkably, Webster wrote John McLean requesting information about the outcome of the *Passenger Cases*. Breaching judicial confidentiality, McLean gave private assurances that "there will be a right decision." This exchange, highly questionable to modern eyes, reflects the casual standards of a less fastidious age.

The volume also documents the close relationship between Webster's legal practice and his political career. As chairman of the House Judiciary Committee during the 1820s Webster worked to

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4. R. NEWMYER, SUPREME COURT JUSTICE JOSEPH STORY: STATESMAN OF THE OLD REPUBLIC 176 (1985).

strengthen the federal judiciary as a bulwark for property interests. He favored reorganization of the judiciary, and the creation of separate circuit courts of appeal. Although this reform failed, Webster helped defeat legislative moves to restrict the authority of the Supreme Court to invalidate state laws. More profitably, he crafted portions of the Federal Crimes Act of 1825 to close gaps in the existing law. Webster's attempts to revamp federal judicial power were fueled by his distrust of the state courts. "From the state Courts nothing can be expected," he observed in 1823. "The vacillating policy of our little petty states, leading to such frequent changes, in the organization of their Courts, & more frequent changes of the judges, forbids all hope of system, or consistency in adjudications."

Political ambitions took a toll on Webster's practice. Busy in the Senate and planning a presidential race, in the 1830s Webster began to curtail his Supreme Court work. Litigants, however, continued to seek his assistance. Indeed, Webster's professional achievements are particularly striking in view of his pressing public commitments. He appears to have been a driven man. William Wirt, a prominent contemporary at the Supreme Court bar, privately declared: "Webster is as ambitious as Caesar. He will not be outdone by any man."

I was disappointed by the absence of material on Webster's participation in *Wheaton v. Peters* (1834), the first copyright case heard by the Supreme Court. *Wheaton* was pivotal in shaping the evolution of intellectual property law in the new nation. The editor concluded that only fragmentary papers relating to this case survived. This decision seems questionable. A recent study of the *Wheaton* litigation indicates the availability of several important documents that bear on Webster's role. Of particular interest is the interplay between Webster and his client Wheaton, a noted legal scholar.<sup>5</sup>

Nonetheless, scholars will find much of interest in this work. It reveals a good deal about Webster and the development of American law during the antebellum years. It is an outstanding scholarly achievement which deserves a wide audience.

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5. For a fine treatment of *Wheaton v. Peters*, see Craig Joyce, *The Rise of the Supreme Court Reporter: An Institutional Perspective on Marshall Court Ascendancy*, 83 MICH. L. REV. 1291, 1351-86 (1985).