

THE SUPREME COURT HISTORICAL SOCIETY

Quarterly

VOLUME VI, NO. 1

WINTER 1984

Date Set For Annual Meeting

In an effort to coordinate the Society's 1984 Annual Meeting and Dinner with the activities of the American Law Institute's Washington meeting, the Board of Trustees has set Monday, May 14th as the date for the Society's Annual Meeting. The Annual Meeting Committee, chaired again this year by Chief Judge Howard T. Markey, has begun to make plans for the 1984 meeting. As in past years, the Annual Lecture, to be presented this year by the noted histor-

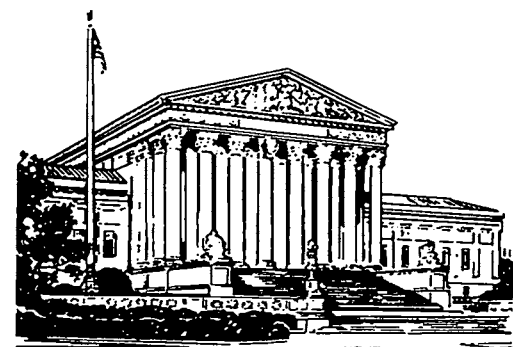
ian William Leuchtenberg, will be held in the restored Supreme Court Chamber in the U.S. Capitol at 2:00 PM, and will be followed by an open house at the headquarters building. An afternoon briefing session presented by the staff of Society's Documentary History Project will be available to those members who may already have taken the very popular afternoon tour of the Court hosted by the staff of the Curator's Office. The annual meeting of the membership will convene at 6:30 PM in the Supreme Court Chamber, followed by the now traditional black-tie reception and dinner in the Great Hall.

Members will receive additional information with their notices of the meeting which will be mailed within the next few weeks; however, those interested in attending may want to reserve the date on their calendars now. As in past years, attendance at the dinner will be by reservation only on a first-come, first-served basis. The membership is reminded that for the past several years, the Society has been unable to accommodate all those who have wanted to attend this popular Washington event; the only way to insure your reservation is to return your reservation request form with your check promptly.

Society Sponsors Panel

During the last week of December, the American Historical Association held its 1983 annual meeting in San Francisco. As part of that meeting, the Society jointly sponsored a session on December 28th entitled "Judicial Conservatism Revisited: The Supreme Court and Reform." Chaired by Dr. Maeva Marcus, editor of the Society's Documentary History Project, the panelists presented and commented on two papers. Charles W. McCurdy, associate professor of history at the University of Virginia addressed "The Roots of 'Liberty of Contract' Reconsidered: The Supreme Court and the Federal Eight-Hour Day." Melvin Urofsky, a professor and past chairman of the Department of History at Virginia Com-

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The Supreme Court of the United States—once again the site of the Society's Annual Meeting. To obtain this new full-color art poster of the Supreme Court building, send \$10.00 by check or money order to the Society at 111 Second Street, N.E., Washington, D.C. 20002.

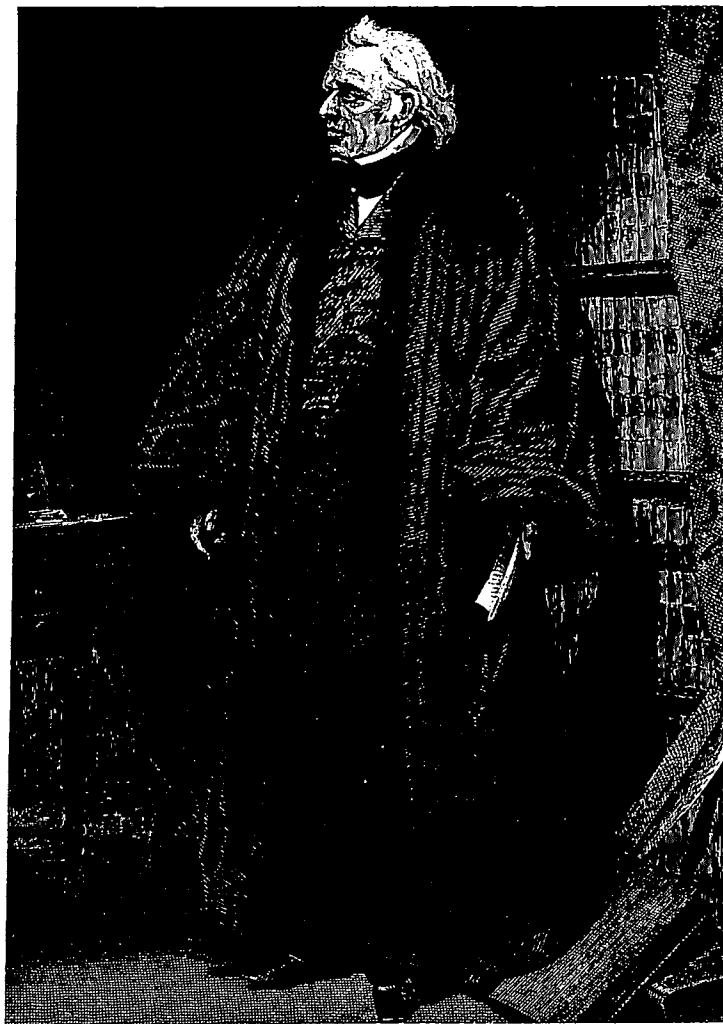
Joseph Story: Poet, Justice and Scholar

When Joseph Story joined the Supreme Court in 1811, at the age of 32, he established a record for youthful appointment to the high bench which has remained unchallenged for over 170 years. Considered one of the most distinguished legal minds of his era, he influenced the legendary arguments of his close friend Daniel Webster and helped to shape the landmark opinions of the Marshall Court. Story is perhaps equally well known for his academic contributions, having penned several important commentaries on the law while serving as a Harvard Law School professor during his last decade on the Court. This substantial legacy to American law was the product of a lifetime of intellectual industry and dedicated public service.

Joseph Story was born on September 18, 1779 in Marblehead, Massachusetts, the eighth of eighteen children born through two marriages to Elisha Story, a prominent local physician. Coming from so large a family, young Joseph learned early on that praise and recognition from his family and peers could be earned only through accomplishment. This perception was galvanized by his mother, Mehitable Pedrick Story, who challenged the future justice to aspire to the achievements of his father and grandfathers. As a boy, Story was captivated by the story of his maternal grandfather, John Pedrick's daring interception of a would-be British raid on the Salem arsenal in 1771. Joseph was also impressed with the successful career of his paternal grandfather, William Story, who served as assistant deputy of the British Vice-Admiralty Court in Boston and later as clerk of the American Navy Board.

But Joseph's greatest admiration was reserved for his own father, Elisha, who in addition to being a respected physician, had distinguished himself through his participation in the Boston Tea Party and valiant service against the British during the Revolutionary War. Dr. Elisha Story was a perfect example of the self-made man; a man of strong character, successful in his field despite having little formal education, and who was prepared to fight for his convictions. His son's admiration for this latter quality may have accounted for his youthful predisposition to settle arguments by resorting to "fisty cuffs." In Joseph's last year at Marblehead Academy, a local private school whose list of benefactors included his own father, he was severely disciplined for brawling. Feeling the punishment to have been unjust, Story left the Academy and sought early admission to Harvard, matriculating a semester ahead of his class in the Spring of 1795. Story accomplished this by passing not only the school's rigorous entrance exam, but a special examination to demonstrate that his skills were equal to those of the incumbent freshman class. In doing so, he became one of the youngest members of Harvard's class of 1798.

Story graduated second in his class in 1798 behind William Ellery Channing, later an eminent theologian, with whom he had a fierce though cordial competition for the schools' top academic honors. Story's devotion to his studies proved detrimental to his health, and the robust young freshman of 1795 emerged from Harvard a few years later a balding and sickly 19-year-old scholar. Upon graduation, he returned to Marblehead to study law—a decision probably



Associate Justice Joseph Story
(1812-1845)

influenced by his father's admonishment that he learn to support himself. His personal inclination, however, was to devote himself to reading and writing poetry. His compositions were poorly received due to their overly florid rococo style, although "the poet of Marblehead" did occasionally succeed in having a poem published in one of the local papers. His 1500 line *Power of Solitude*, published in book form, was criticized by one reviewer as a work "... neither men, gods, nor booksellers can endure." Such criticism was common, and disheartened by his poetry's limited public

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appeal, Story was soon persuaded to concentrate upon the law and to write poetry in his spare time. His decision to devote himself seriously to the law may also have been influenced by the deaths of both his wife and his father in 1805, the latter having died with his professional reputation besmirched by a grave incident. While many regions in the country had been victimized by outbreaks of smallpox, Dr. Story sought to protect the citizenry of Marblehead by inoculating them with a newly developed serum from England. Tragically, the serum sent to Story for this purpose proved to be not a vaccine, but live smallpox serum, resulting in numerous deaths and a local quarantine. Though Dr. Story was ultimately exonerated, many of those who had lost family members held him accountable for the remainder of his life. This may have influenced Story to devote himself to his profession in order to salvage his family's honor.

The passing of Story's father nearly coincided with the death of his first wife, Mary Story, the loss of whom proved equally if not more devastating to the future justice. His wife of only six months, Mary Story was not only his first and greatest love, she was his intellectual collaborator, having contributed many of the literary concepts evidenced in *Power of Solitude*. Following her death, the bereaved husband bought up all of the copies of the work he could locate and destroyed them. Critics of Story's poetry suggest that his best work came after the deaths of his father, first wife, and several of his children. As biographer Donald Clark Robbins has observed, Story's literary efforts gained maturity as a result of these tragedies, and his verse became "... touchingly eloquent in his grief."

Clearly, the Joseph Story that entered into law practice in earnest sometime after 1805 was not the brash young man and aspiring poet who had graduated from Harvard in 1798. In the interim, he had studied law under such distinguished attorneys as Samuel Sewall of Marblehead and Samuel Putnam of Salem, both of whom would shortly thereafter serve on the Massachusetts Supreme Court. Under Sewall's tutelage, Story passed the bar in 1801, and Putnam's broad working knowledge of maritime law laid the solid foundation upon which Story's later reputation as "the Father of American Admiralty Law" would be built.

Samuel Putnam's judicial appointment and departure from active practice provided Story with the opportunity to continue the practice on his own. Salem, at the turn of the century, was a large commercial port and the nation's sixth largest city, with a population of nearly 10,000 people. Nevertheless, Story attracted few initial clients. His republican leanings, his notorious conversion to Unitarianism while at Harvard, and his efforts at poetry undoubtedly raised questions in the minds of potential legal clients. Federalist newspapers openly attacked his political and religious beliefs, and on one occasion Story was assaulted and beaten. Yet, neither public animosity nor private tragedy could keep Story from achieving professional success and public recognition as one of the leading lawyers of his day.

Through his close association with Salem's fledgling Democratic-Republican Party, headed by shipping magnate Jacob Crowninshield, Story's law practice slowly began to expand. His considerable success, in both local courts and

the Massachusetts Supreme Court, served to attract additional clients and impress even his Federalist antagonists. He also published *A Selection of Pleadings in Civil Actions*, an annotated compilation of pleadings which established Story's national reputation as an author of legal texts.

After recovering from his personal setbacks in 1805, Story "crawled back" to his legal practice and was soon elected to the first of his two terms in the Massachusetts House of Representatives. His victory was a testament to the vigorous and thriving Democratic-Republican Party organization which he had helped to build. Yet, his emergence as a local party leader coincided with a growing detachment from partisan loyalties which became evident a year later. The new republican majority in the legislature was considering a bill to raise salaries for the justices of the state supreme court, a court dominated by Federalists. Although most observers thought it unlikely that the measure would pass, Story placed his political reputation on the line by coming to its defense. In an emotionally charged plea to his fellow legislators, Story commended the bill as a necessary measure to assure judicial independence, and urged its prompt passage. His advocacy joined Federalists and disaffected members of his own party into a majority favoring passage, though not without arousing the antagonism of his own party's leadership. Story would spend much of his remaining tenure in the Massachusetts legislature promoting measures for judicial reform and greater judicial independ-

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This engraving of Justice Story was taken from a crayon rendering by William Wetmore Story, the Justice's son.

Story (continued)

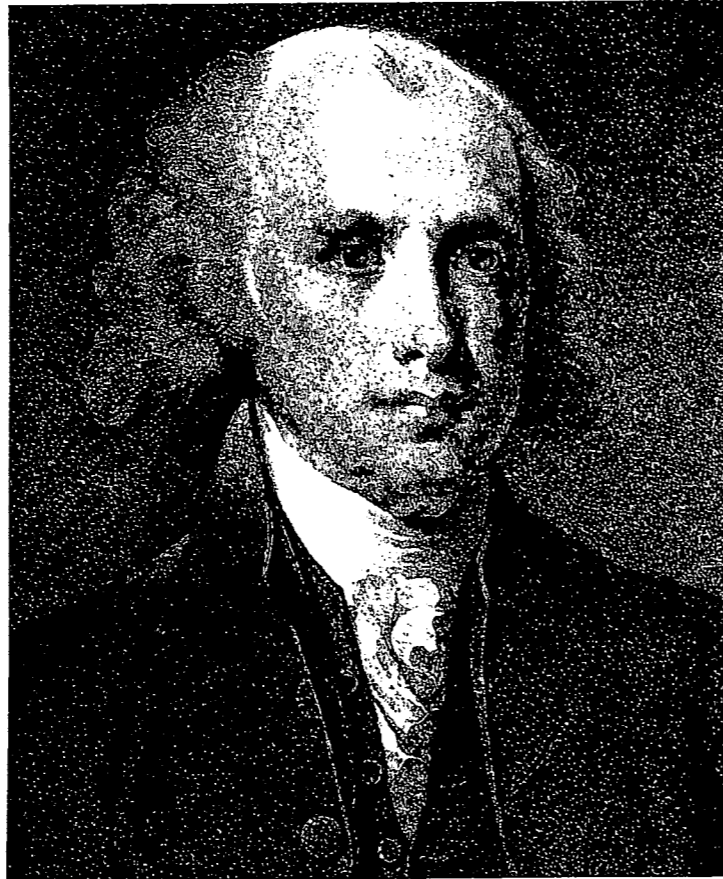
ence. His frequent absences from legislative roll calls coupled with his nearly perfect attendance on the legislature's judiciary committee suggest that Story's political ambitions had already succumbed to his growing interest in the law and in the courts.

Story was further drawn in this direction through his involvement in the Yazoo land fraud litigation. A group of New England land speculators sued the State of Georgia in federal court to set aside the Georgia legislature's rescission of a public land sale of some 35,000,000 acres. The land sale had been authorized by corrupt state legislators who sold the land to their own holding company for \$500,000, or one and a half cents per acre. The conspirators were immediately turned out of office, and their successors in the state house voted to rescind the sale and make restitution to the purchasers. Unfortunately, much of the land had already been sold for over ten cents an acre to New England speculators who were unwilling to surrender their claims for the original purchase price of one and a half cents.

Though land speculation crossed party lines in Massachusetts, it was a group of Federalists who retained Story to represent them in Washington, both as lobbyist and legal counsel. Throughout 1808, Story lobbied on his clients' behalf and even sought to address Congress on the merit of a proposed bill to settle the matter by providing a federal indemnity to the defrauded victims. It was in the course of these efforts that Story became acquainted with the political elite of Washington, including the justices of the Supreme Court. Chief Justice John Marshall left a particularly lasting impression on Story, who wrote to a friend: "His (Marshall's) genius is . . . vigorous and powerful . . . and his good temper and unwearied patience are equally agreeable on the bench and in the study." This respect foreshadowed the nature of the relationship Story and Marshall would enjoy following Story's appointment to the Court in 1811. In the interim, however, he would appear as counsel in the landmark case of *Fletcher v. Peck*, (1810), which brought the Yazoo land case before the high bench.

Story's key argument in the case was that Georgia's act of rescission was an unconstitutional impairment of contract under Article I, Section 10 of the Constitution. The Court, unanimously accepting Story's argument, struck down Georgia's rescinding act, relying for the first time upon its implied powers to overturn state laws it held contrary to the Constitution. The Court's ruling, however, did not provide for any financial redress, a matter which was ultimately resolved by an act of Congress in 1814.

For Story, the Yazoo land fraud controversy served as both a catapult to national prominence and as a political introduction to the leaders of the Federalist Party. Despite the case's importance to his legal career, *Fletcher v. Peck* did not captivate Story's undivided attention between 1808 and 1810. He was elected in 1808 to finish out the Congressional term of his old political ally, Jacob Crowninshield, who had died in office. Subsequently, Story also served briefly as Speaker of the Massachusetts House of Representatives. While in Congress, he broke with party leadership to oppose President Jefferson's maritime trade embargo. The decision



President James Madison nominated Story to the high bench in 1811 over the objections of former President Thomas Jefferson, who questioned Story's party loyalty.

was a difficult one for Story, and it earned him powerful political enemies in Washington, including the President himself.

Surprisingly, Story's hectic professional life seemed to intrude little upon his personal affairs, for on August 28, 1808 he married Sarah Waldo Wetmore. A distant relative of his first wife, and daughter of a judge of the Boston Court of Common Pleas, Sarah Wetmore Story fulfilled hopes for home and family which had been dashed three years before by the sudden death of Mary Story. Though the second marriage was a happy match and would last for 37 years, it too was not untouched by tragedy. Only two of the couple's seven children would survive childhood. Their son, William Wetmore Story, however, went on to become a prominent lawyer, and reversing his father's progression from the arts to the law, he became a distinguished artist and sculptor. His works grace the collections of museums in Europe and the United States, and his seated sculpture of Chief Justice John Marshall presides majestically over the exhibit hall in the Supreme Court building.

The death of Justice William Cushing in 1810 created a vacancy on the Supreme Court which Joseph Story would ultimately fill for 35 years. But his path to this high office was neither easy nor certain. At 32, he was considered by many to be too young and inexperienced to serve on the nation's highest bench. His political enemies argued that Story's record of party loyalty did not justify a judicial appointment. Nevertheless, after three unsuccessful attempts to fill Cushing's vacant seat, President James Madison sent

Story's nomination to the Senate in November 1811. Story was quickly confirmed and took his seat on February 3, 1812.

Story's contributions to the Court are remarkable for their blend of conservatism in defending property rights and activism in promoting legal reforms. In his circuit opinion in *United States v. La Jeune Eugenie*, (1822), Justice Story found the maritime slave trade to violate international law. The Marshall Court, however, was unprepared to challenge legislative authority in this matter and effectively overruled Story in *The Antelope*, (1825). This would not be the only time Story's brethren would rebuke his judicial activism. However, the Court—and particularly Chief Justice John Marshall—increasingly accepted and even promoted Story's expansive views on the authority of the Supreme Court as a co-equal third branch of government. It was Justice Story's opinion in *Martin v. Hunter's Lessee*, (1816), which announced the Court's jurisdiction to review all state and federal governmental actions. Story's influence can also be seen in the Court's decision in both *McCulloch v. Maryland*, (1819), and the *Dartmouth College Case*, (1819). So closely did Chief Justice Marshall's views parallel those of Story on the Supreme Court's constitutional role in government, that it is sometimes difficult to determine who actually originated some of their shared judicial philosophies.

Whether originator or simply contributor, Justice Story left a lasting mark on the nation's legal system. This might have been the case had Story never occupied the Supreme Court bench. The respected jurist was one of the nation's greatest legal scholars, and his commentaries are still cited as legal authority. This scholarship is further reflected by Harvard Law School's invitation, in 1829, to Story to join the faculty. And, for many years Story successfully blended his responsibilities on the Court with the life of a scholar and teacher.

With the election of Andrew Jackson as president, Story contemplated retirement from the Court to devote himself entirely to academic life. Jackson's victory, heralding a new era of populism, prompted Story to cynically observe that "the reign of 'King Mob' seemed triumphant."

Story's disdain for the new president appeared justified when, in 1832, Jackson refused to enforce the Supreme Court's decision recognizing the rights of the Georgia's Cherokee Indians. Georgia blatantly defied the Court by executing an accused Cherokee whose murder conviction was on appeal before the Court. Later that year, Georgia announced that it would defy the Court again by ignoring a decision limiting the state's jurisdiction over Indian lands. Jackson, who personally opposed the Court in both cases, refused to enforce either decision. At the same time Jackson was challenging the Court's authority by ignoring its decisions, it was clear he would utilize his appointment power to bring the Court more into line with his own political views. One by one, death claimed Story's colleagues, including his great friend and long time ally, John Marshall. By 1837, Jackson had appointed five replacements on the six judge bench, and Story noted sadly in a letter that he was "... the last of the old race of Judges. . . ."

Story's lament, however, was not like those of Justices

Nathan Clifford or James C. McReynolds, whose waning hours on the bench were consumed in bitter reflection on the triumph of their political foes. Despite widespread speculation, Story decided not to retire in 1837, and spent the next eight years conducting a rear guard defense of the Marshall Court's record of jurisprudence. Significantly, many of the radical reforms expected of the Jacksonian appointees did not materialize, perhaps in part as a result of Story's participation. While Story often disagreed with his new colleagues on various issues, he was not often compelled to dissent. Dissents, he felt, weakened the institution whose authority he had spent a lifetime trying to build. And even on those occasions he felt compelled to register his disagreement with his brethren, his rebuttal was generally aimed at the majority opinion rather than its authors. Story's energy, however, began to wane in the early 1840's. He was absent from the 1843 term due to illness—the first he had missed in over three decades. He struggled through 1844, but in 1845 he commenced his circuit duties with the intention of retiring as soon as a successor could be named. Before the justice could tender his resignation, he became gravely ill and died on September 10, 1845. Chief Justice Roger B. Taney, Story's occasional philosophical antagonist on the bench, lamented on Story's passing that:

It is here on this bench . . . that his loss is most severely and painfully felt. For we have not only known him as a learned and able associate in the labors of this court, but he was also endeared to us as a man, by his kindness of heart, his frankness, and his high and pure integrity.



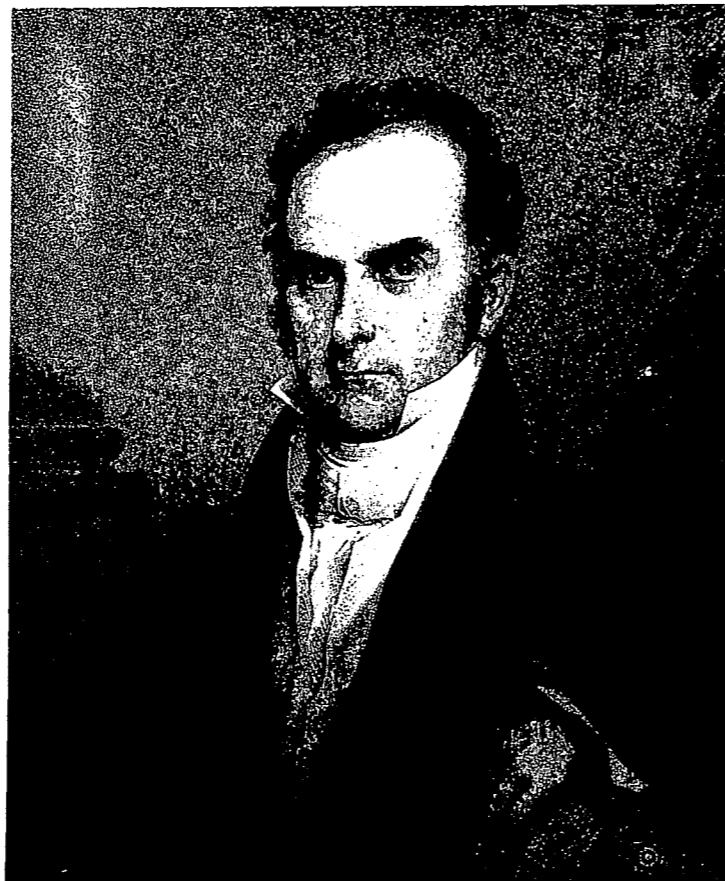
Chief Justice John Marshall's swearing-in of President-elect Andrew Jackson in 1829, depicted in this mural in the U.S. Capitol building, heralded a new era in the Court's history. By 1837, Jackson's five appointments to the six member bench left Story the only holdover from the Marshall Court.

Daniel Webster: Defender of the Constitution

For over a quarter century—from 1820 until 1852—one lawyer held a position of prominence among the Supreme Court bar unparalleled during his day and unmatched since. Daniel Webster, who first appeared before the high court in 1814 while serving as a freshman congressman from New Hampshire, argued nearly two hundred cases before the Court, winning nearly half. More impressive than his win-loss record, however, are the cases he argued, and the effect of his advocacy on the Court and the nation. Reaching full maturity as a lawyer during the golden age of the Marshall Court, Webster argued the *Dartmouth College* case, *McCulloch v. Maryland* and *Gibbons v. Ogden*—arguably three of the most important cases ever decided by the Supreme Court. After William Pinckney's death in 1822, no lawyer in the country could claim to be Webster's peer. His reputation and prestige brought him national attention and the most impressive list of clients in the land. Although he argued fewer cases of enduring consequence after 1830, his advocacy in *Wheaton v. Peters*, *Groves v. Slaughter*, *Swift v. Tyson*, the *License and Passenger Cases*, and *Luther v. Borden* preserved his status as the unchallenged leader of the Supreme Court bar.

Webster was born on January 18, 1782 on the border of colonial civilization in up-state New Hampshire. Without question, no man had greater effect upon shaping Daniel Webster for greatness than his father. Ebenezer Webster and his large family led a hard life at Salisbury, New Hampshire, about 20 miles north of Concord near the head of the Merrimac River. In 1763, a group of settlers had obtained a grant of land in the uncharted wilderness, and convinced Captain Webster, who had some knowledge of the area from his early military service in the Indian Wars, to join the expedition. The family lived at first in a log cabin surrounded by rocky hills and dense forest. Long winters and deep snows made travel difficult even among neighbors separated by only a few miles. The log cabin was replaced by a small, "rough frame house" on a slight rise overlooking the river, and with the help of five sons and five daughters, Ebenezer Webster and his wife farmed the rocky land. An officer during the Revolution, Webster was elected a lay member of the Court of Common Pleas, and served as a member of the state's conventions to ratify both the New Hampshire Constitution and the U.S. Constitution. The Constitution of 1787 "had no warmer friends anywhere than among the soldiers of the Revolution," and Ebenezer Webster was no exception. It was said by neighbors that on the night that General Washington first learned of Benedict Arnold's treachery, he called for Webster and posted his New Hampshire men to guard his headquarters through the night. Even if apocryphal, the story reflected accurately Webster's reputation as a man of solid character and unwavering loyalty.

As was the custom, young Daniel attended the village school, which frequently was held in a neighbor's home. When his parents recognized that their son had benefitted as much as he would from such humble instruction, they sent him to Phillip Academy at Exeter, New Hampshire for more serious schooling. In 1797, he was placed in the care of



Daniel Webster — one of the ablest attorneys ever to practice before the Supreme Court.

Rev. Samuel Woods, a neighbor and old familiar friend, for the purpose of preparing the boy for college the following year. Although the sons of New England's aristocracy had been going to college for years, young Webster realized that his extended education would strain his family's financial resources. In a particularly revealing passage of his autobiographical notes, Daniel Webster recalled his feelings:

The thing appeared to me so high, and the expense and sacrifice it was to cost my father so great, I could only press his hands and shed tears. Excellent, excellent parent! I cannot think of him, even now, without turning child again.

Webster entered Dartmouth College at Hanover, New Hampshire in 1797, taking his degree in 1801. Daniel's three oldest brothers were married and supporting their own families; Ezekiel, two years older than Daniel, was a strong robust man who helped their aging father make enough from the home farm to support their mother and two unmarried sisters. Daniel undoubtedly realized how unlikely it was that he, the youngest son, should be the first in the family to be sent to college. It is likely that this realization added to his determination to excel.

Following his graduation, Webster took a job in Fryeburg, Maine as a schoolmaster for \$350. In order to send his entire salary home to his father to support the family, Webster took a second job recording deeds in "a large fair hand," using the additional money thus earned to pay for his room and board.

Having stabilized the family's financial situation, Daniel returned home to read law with Thomas W. Thompson, a friend of his father who had a law office in Salisbury. A Harvard-trained lawyer, Thompson was a solid Federalist who had served as a U.S. Senator and trustee of Dartmouth College. The gentleman took great interest in his young pupil, and set about putting Daniel "to study in the old way—the hardest books first." A rather carefree boy of twenty, more disposed to hunting and fishing than reading, Webster found *Coke on Littleton* and similar tomes unpalatable. He began to dislike "the law," finding it "dull, dry, abstract and tedious," and he considered returning to Fryeburg. He wrote a Dartmouth classmate, Joseph Bingham, that he found little inspiration, beauty or intellectual stimulation to raise his task above sheer drudgery. He also remarked that he was beginning to understand why most lawyers became "careless" about their ethical principles; lawyers, it seemed to Webster, were compelled to earn their living by dealing with "the very refuse and remnant of mankind." Webster also noted that it was rarely the lawyers who got rich, but rather their clients, the prosperous businessmen who gained their fortunes by taking greater risks. Even at this early point in his fledgling career, the topics of money and business were much on the young man's mind.

In 1804, Webster moved to Boston with his brother, Ezekiel, in search of employment. Upon his arrival, it became clear that to the citizens of Boston, he was a rustic from the north with neither recommendation nor letter of introduction. Not one to be deterred, Webster made inquiries concerning the city's ablest lawyers, and learned that Christopher Gore, one of Boston's leading citizens and

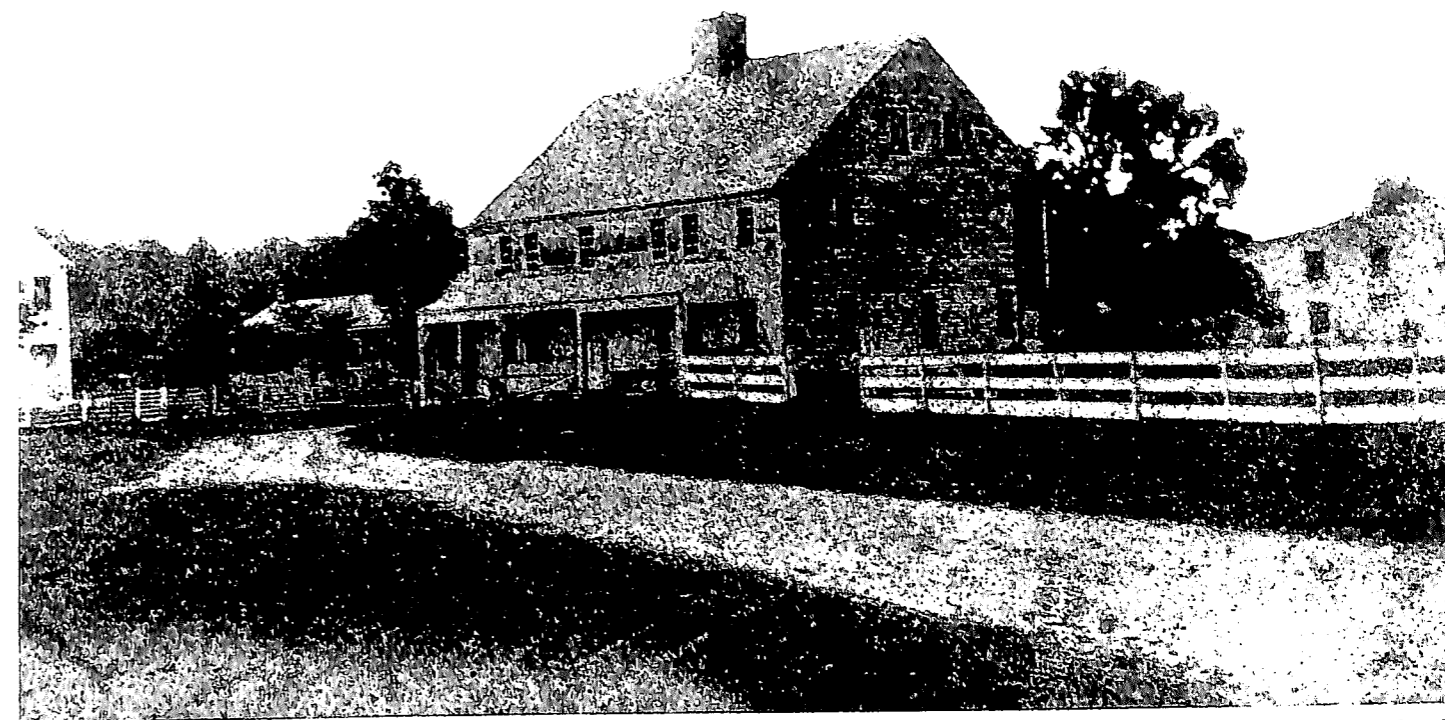
most prominent attorneys, had recently returned from London, and was looking for a clerk. A leader of the Federalists in Massachusetts, Gore had served as a member of the Jay Commission and would later be elected a U.S. Senator. An able judge of character, Gore appreciated Webster's enthusiasm and straight forward attitude, and after making a few discrete inquiries of his own, offered Webster the clerkship.

Under Gore's expert tutelage, Webster excelled. Finding his new mentor "easy, accessible and communicative," Webster concluded that he could not have wished for a better preceptor. During the better part of the next year, the apprentice read Vattel, Abott, Viner, and Bacon; he copied pleadings, researched authority, and performed various other tasks assigned to him. He also began to attend court sessions regularly, making notes of the arguments, and becoming captivated by the leading advocates of the day.

In the spring of 1805, Mr. Gore escorted his protege to court, and after introducing his 23 year old clerk, moved his admission to the bar. Although his prospects for success in Boston seemed secure, Webster headed home, opening a law office in Boscawen, a small village a few miles south of his father's farm. Portsmouth had been his planned destination, but his father's rapidly declining health urged a location closer to home.

His decision was no doubt affected by an incident that had taken place the previous winter. In January, the clerk of the Court of Common Pleas for Hillsborough County, N.H., had resigned. Though aged and in poor health, Ebenezer Webster was still a member of the Court, and through his influ-

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This tavern in Salisbury (now Franklin), New Hampshire, was owned and operated by Daniel Webster's father from 1784 to 1799, and served during that time as Webster's childhood home. Though sold in 1799, it was later purchased by Webster in 1839.

Webster (continued)

ence, Daniel was appointed to fill the vacancy. The office paid a salary of \$1,500 a year. Webster's father sent a jubilant letter informing his son of his good fortune, which the young man enthusiastically shared with his mentor. Gore's reaction was as immediate as it was unexpected.

Go on and finish your studies; you are poor enough, but there are greater evils than poverty. Live on no man's favor; what bread you do eat, let it be the bread of independence. Pursue your profession, make yourself useful to your friends, and a little formidable to your enemies, and you will have nothing to fear.

Webster found the advice sound, and made a trip home to inform his father of his decision to decline the appointment. His father listened in stunned silence as his son explained his reasons. After a long silence, he responded: "Well, my son, your mother has always said you would come to something or nothing — she was not sure which. I think you are now about to settle that doubt for her."

During the next two years, Webster's practice met with only limited success, and he soon grew weary of drafting writs and collecting debts. The young man grew increasingly dissatisfied with his chosen profession. Writing a colleague, he lamented:

We cannot study because we must pettifog. We learn the low recourse of attorneyism, when we should learn the conceptions, the reasonings, and the opinions of Cicero and Murray. The love of fame is extinguished; every ardent wish for knowledge repressed; conscience put in jeopardy, and the best feelings of the heart indurated by the mean, money-catching, abominable practices which cover with disgrace a part of the modern practice of law.

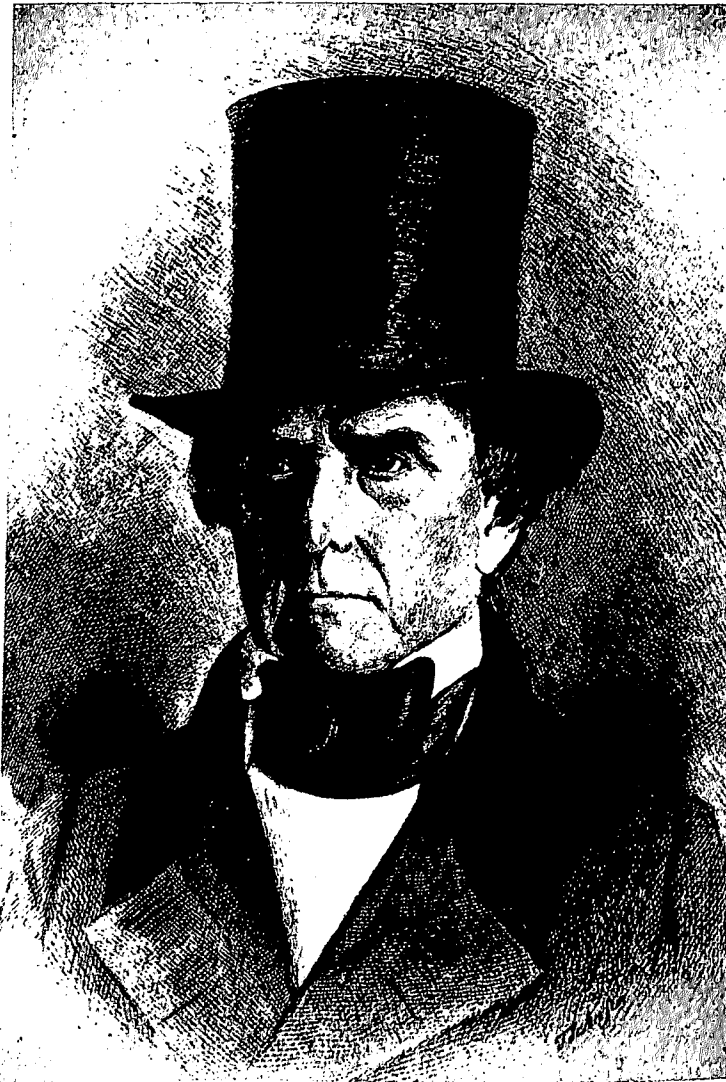
In 1806, Webster's father died, and after settling his estate, Webster turned over his practice to his brother Ezekiel, who had recently been admitted to the bar. A few months later, in September, Webster moved to Portsmouth, and married Grace Fletcher, a school teacher he had met in Salisbury.

A bustling maritime center, Portsmouth was more to the liking of an enterprising young lawyer with only thinly veiled political ambitions. His practice flourished, and his income tripled to nearly \$2,000 a year. Life was far from easy, however. Although his income exceeded that of many lawyers it provided for little extravagance. Webster's practice was very much a "circuit practice" requiring that he follow the Superior Court as it sat in the state's several counties. Webster attempted to build his practice by taking the most difficult cases, and those most likely to require extensive travel. He spent the better part of the year away from home, tending to his clients' business and sharing the company of other lawyers and travellers in rude taverns and rural inns. Although his efforts earned him a statewide reputation, Webster longed for the comfortable respectability of the prosperous Portsmouth merchants who increasingly were becoming his clients. But these yearnings went unfulfilled as the year of 1812 brought financial disaster to Webster. Portsmouth depended upon its maritime com-

merce to sustain its financial prosperity, and the outbreak of war with England threatened the port city with economic ruin, eroding a major source of Webster's income. His financial problems were magnified when his home burned to the ground in December with losses exceeding \$6,000.

As the effects of the war grew worse, Webster made what was probably the second most difficult decision of his career. Writing to Ezekiel in March, 1816, Webster observed that "our New England prosperity and importance are passing away," and informed his brother of his intention to move his practice. Webster seriously considered Albany and New York City as new homes, but remembering old friends and professional associations, finally decided to relocate his practice to Boston. Webster had been elected to the Congress from New Hampshire in 1812 and reelected in 1814; he planned to complete his term and move his family to Boston in 1816. In January of 1817, Webster was called home from Washington by news that his daughter was seriously ill; she died on January 23rd, the first great tragedy of Webster's life.

After opening his Boston law office, Webster quickly gained renown as one of the city's leading attorneys. His skill in examining witnesses and handling juries soon became legendary. Few members of the bar were more impres-



"Black Dan" — Webster's stern countenance made him appear more than "... a little formidable..." to his adversaries in court.



Exhausted from an unsuccessful bid for the Whig presidential nomination, the seventy-year-old Webster returned to "Marshfield," his summer home outside Boston, where he died on October 24, 1852.

sive in the courtroom. Broad shouldered and solidly built, his appearance suggested an underlying strength of character. His eyes, unbelievably dark and penetrating, could cut without mercy. Known to his adversaries as "Black Dan"—a school boy nickname which seemed appropriate for such a distinguished nemesis — Webster frequently wore a wide black collar above a white ruffled shirt; his blue coat and buff waistcoat reminded many of the colors of a Revolutionary war officer's uniform, an association not altogether unintended.

Undoubtedly the ablest orator of his day, it's not surprising that Webster's political career flourished after his move to Boston. His speeches sparkled with literary and historical allusions, and with his succinct and incisive style, Webster quickly became the foremost spokesman of the conservative nationalism most often associated with New England Federalists. In 1822, Webster was elected to the House from Massachusetts, and was appointed by the Speaker of the House, Henry Clay, as Chairman of the House Judiciary Committee. He proposed wide ranging reforms, including the creation of three new judicial circuits for the western states and a uniform system of bankruptcy.

In 1823, Webster argued eight cases before the Supreme Court. If his advocacy in *McCulloch* (1817) and *Dartmouth College* (1817) had established his reputation, each year saw his prestige grow. Justice Story's account of Webster's performance in the *Dartmouth College Case* provides an insight into his unusual powers of persuasion:

There was in his whole air and manner, in the fury flashings of his eye, the darkness of his contracted brow, the sudden and flying flushes of his cheek, the quivering and scarcely manageable movements of his lips, in the deep guttural tones of his voice, in the struggle to suppress his own emotions, in the almost convulsive clenchings of his hands without a seeming consciousness of the act, there was in these things what gave to his oratory an almost superhuman influence. . . . The whole audience had been wrought up to the highest excitement; many were dissolved in tears; many betrayed the most agitating mental struggles; many sinking under exhausting efforts to conceal their own emotions. When Mr. Webster ceased to speak, it was some minutes before anyone seemed inclined to break the silence.

It was reported that Chief Justice John Marshall himself was moved to tears by Webster's oration; Charles Ingersoll recorded in his diary that Webster was "Surely the most eminent practitioner before the Court," and Congressman Lowndes noted that "we in the South have not his superior and you in the North have not his equal."

The same year Webster also secured passage of an act for payment under the Florida Treaty of 1819 of claims against Spain for damage suffered by American commerce during the hostilities of 1788-89. His fees for settling these claims exceeded \$70,000; for his victories in the *Dartmouth Col-*

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Webster (continued)

lege Case and Gibbons v. Ogden, he received \$1,000 each. After prevailing in *McCulloch*, his client rewarded him with a \$1,500 bonus in addition to his retainer of \$500. Some have explained Webster's prodigious workload as the necessary consequence of his notorious difficulties with managing money. While others might have invested their earnings and slowed their pace, Webster once remarked that "after twenty-five years observation, I can give it as the condensed history of most, if not all good lawyers, that they lived well and died poor."

An explanation for Webster's extravagant style of living can perhaps be found in the series of personal tragedies which plagued him. In 1824, Webster's two-year old son, Charles, died. Webster was elected to the Senate in 1827, but within the next year, both his wife and brother Ezekiel died. Suffering from a deep depression, Webster seriously considered retiring from his practice and abandoning public life. Business took him to New York City in the autumn of 1829; there he met a young socialite, Caroline LeRoy, whom he married before the end of the year. Together they entertained lavishly, and Webster once again found himself increasingly in debt, forcing him to abandon any hope of retirement.

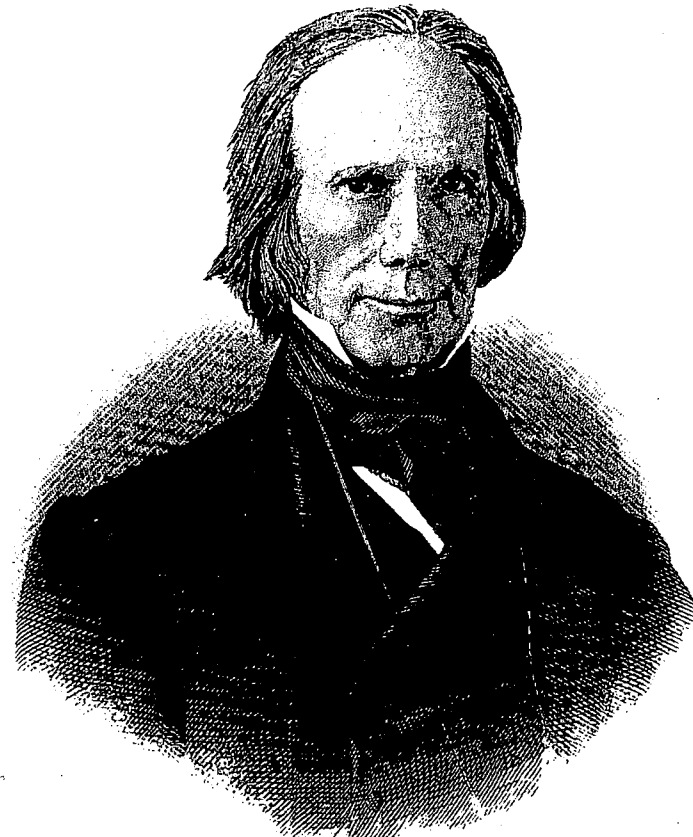
Webster had no difficulty attracting clients. In addition to his brilliant legal career, he was one of Washington's most prominent politicians. In January, 1830, he earned the epithet — "Defender of the Constitution." During a heated debate on the Senate floor over the nature of the federal union, Webster responded violently to the contention of Senator Thomas Hayne of South Carolina that the union

was a dissolvable compact between the states. In words which foreshadowed those of President Lincoln at Gettysburg a quarter century later, Webster argued that the Constitution was "the peoples' Constitution... made for the people, made by the people, and answerable to the people." In a speech that would be reprinted in newspapers throughout the country, and recited by school children for generations, Webster thundered his reply to Senator Hayne and the Southern secessionists:

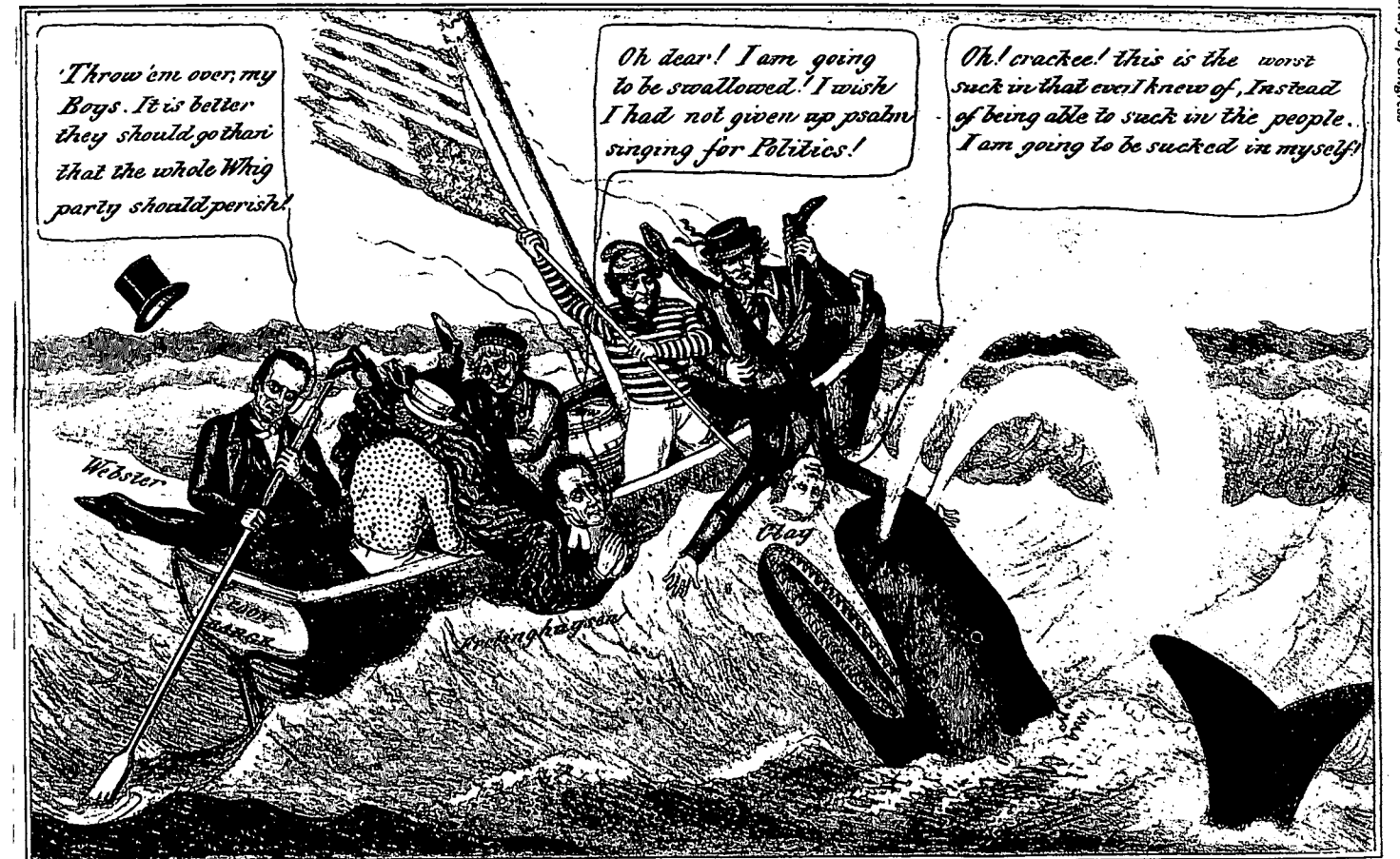
It is to that Union we owe our safety at home and our consideration and dignity abroad. It is to that Union that we are chiefly indebted for whatever makes us most proud of our country. That Union we reached only by the discipline of our virtues in the severe school of adversity. It had its origins in the necessities of disordered finance, prostrate commerce and ruined credit. Under its benign influences, those great interests immediately awoke, as from the dead, and sprang forth with newness of life. Every year of its duration has teemed with fresh proof of its utility and blessings; and although our territory has stretched out wider and wider, and our population spread further and further, they have not outrun its protection of its benefits. It has been to us all a copious fountain of national, social, and personal happiness.

Webster ended with words that would echo through distant battlefields as a call to arms: "Liberty and Union, now and forever, one and inseparable." Not since the days of Patrick Henry's oratory had words so aroused the conscience of the nation.

Webster's debate with Hayne and subsequent debates



States' rights advocate, Vice President John C. Calhoun (left) opened a constitutional breach in Congress in 1832 by supporting South Carolina's passage of the Ordinance of Nullification. Webster's staunch defense of federal authority in the ensuing Senate debates in 1833 illustrated the wide gulf between North and South which was only temporarily bridged by the compromise proposals of Henry Clay (right).



THE WHALE THAT SWALLOWED JONAH.

The ongoing debate over federal authority versus states' rights was a contributing factor to the Whig Party disunity depicted in this 1844 political satire. In the interest of preserving the party, helmsman Daniel Webster (far left) advocates feeding Henry Clay to the waiting whale.

with Calhoun were more than mere speeches. They were masterful expositions of opposing theories of the federal Constitution which laid the foundation for action on the most pressing issues of the day. Historians have speculated that but for Webster's persuasive defense of the Union, secession and war might well have come thirty years earlier, with vastly different consequences.

Webster reached the peak of his prestige in 1832, and was characterized by one observer as having "the restless grandeur of a Titan storming heaven." His reasoned moderation on the slavery issue cost him his party's nomination for President; the Whigs nominated Clay whom Jackson defeated. Many wondered that Webster should even have desired the presidency, having for many years enjoyed a status that few Presidents have attained.

Jackson's reelection and subsequent quarrel with his Vice President, John C. Calhoun, led to South Carolina's passage of the Ordinance of Nullification, an act of the state legislature which purported to declare the federal tariffs of 1829 and 1832 null and void. Jackson's reply to the South Carolina action was a presidential proclamation largely drafted by his Secretary of State, Edward Livingston, which relied heavily upon the reasoning of Webster's reply to Hayne. In January of 1833, Jackson asked Congress for the authority to use military force in executing the tariff laws. Clay introduced a compromise tariff bill, which passed, and

the crisis was averted. During Senate debate on Clay's compromise, Webster rose to oppose both Calhoun and Clay in defense of the supremacy of federal law against state attack: "The Constitution of the United States was received as a whole, and for the whole country. If it cannot stand altogether, it cannot stand in parts; and if the laws cannot be executed everywhere, they cannot long be executed anywhere." Recalling Washington's response to the Whiskey Rebellion, Webster would have preferred the use of federal force if needed to quell the threat of insurrection. Earlier than most, he understood that unless the theory of nullification was decisively driven from the field of political debate, it would lead ultimately to rebellion and civil war.

During the 1830's and 1840's, Webster continued to be one of the most successful lawyers in the land. With banks and railroads as his principal clients, he earned between \$15,000 and \$20,000 a year. In *New Orleans v. U.S.*, his fee was \$7,500, and his services in defending the Goodyear Rubber Company's patents before the Supreme Court earned him \$15,000 — the largest fee that had ever been collected for a single case in the Court's history. In 1841, Webster resigned from the Senate to accept President Harrison's appointment to his cabinet as Secretary of State, a post Webster held until 1843. During his tenure, he successfully concluded the Webster-Ashburton Treaty settling a long standing dispute over

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Webster (continued)

the nation's northeastern boundary with Canada.

Webster returned to the Senate, and on March 7, 1850, rose to reply to southern Senators who were again threatening secession unless their position on the slavery issue was adopted. In perhaps his greatest speech—either in the Senate or before the Court—Webster defended the Union, holding war at bay. While his speech achieved its purpose, Webster's frank acknowledgment that the framers of the Constitution, though excluding slavery from all territory over which the Congress had jurisdiction, otherwise "meant to leave slavery in the states as they found it, entirely under the control of the states themselves," shocked Webster's friends and admirers and outraged northern abolitionists. Webster argued that if the North expected the South to remain loyal, it would have to obey the Constitution as well by enforcing the fugitive slave laws: "No man fulfills his duty—who sets himself to find excuses, evasions, and escapes from this constitutional obligation." No lover of slavery, and a man who had spoken out against every form of human bondage for over fifty years, Webster urged sober headed and conscientious action on "men who are . . . carried away by some fanatical ideas or some false impression."

Though in some ways Webster's argument was that of an earlier era that could not see the pressing nature of the anti-slavery movement, and an argument that undoubtedly influenced the Court's *Dred Scott* opinion seven years later, Webster, like Lincoln after him, was primarily concerned with preserving the Union rather than ending slavery. In his own fashion, Webster heralded a new day for all the nation's inhabitants:

Let us come out in the light of day; let us enjoy the fresh air of liberty and Union . . . let us devote ourselves to those great objects that are fit for our consideration and our action; let us raise our conceptions to the magnitude and the importance of the duties that devolve upon us; let our comprehension be as broad as the Country for which we act; our aspirations as high as its certain destiny.

Convinced in his own mind that the "peculiar institution" would in time be abolished, Webster warned those who demanded a more immediate solution of the implicit dangers of such a settlement. "I hear with distress and anguish the word 'secession,' especially when it falls from the lips of those who are patriotic. Secession! Peaceable secession! Sir, your eyes and mine are never destined to see that miracle."

Webster was nominated for president in June, 1852 at the Whigs' National Convention in Baltimore. Once the most popular leader of his party, Webster's stand on abolition split the vote between the Senator from Massachusetts and President Fillmore, and on the 53rd ballot, General Winfield Scott received a majority and his party's endorsement. More important, the convention dramatically highlighted the impending disintegration of the Whigs as a national political party.

Despite the loss of the nomination, Webster returned in triumph to a grand reception in Boston. More a citizen of Washington than Massachusetts for over thirty years, the

"Defender of the Constitution" was still a hero in New England; the legendary giant who tangled with the Devil himself. Cheer followed cheer, garlands of flowers covered the streets, and it took over three hours for the procession to reach the Boston Commons. Following this grand reception, Webster travelled to his summer home, "Marshfield," a productive estate located some nine miles outside Boston. Weakened from the ordeal of the past year, Webster became seriously ill, and died within a few months at the age of seventy. Ten years later, in a tragic postscript, Daniel Webster's only surviving child, Colonel Daniel Fletcher Webster, died at Bull Run, leading his men into battle in a war his father had labored so valiantly to prevent.



The Society is pleased to announce that its gift shop at the Supreme Court has been relocated and expanded. Kiosk Manager Linda McElroy (above) would be happy to respond to inquiries by members concerning available gift items at (202) 252-3450.

Society Sponsors Panel (continued)

monwealth University, considered the topic of "Reform and Response: The Supreme Court and Protective Legislation in the Progressive Era."

The session, which attracted an unusually large audience, is one example of the Society's continuing commitment to making a substantive contribution to the historical understanding of the Court's unique role in public life. McCurdy's examination of the supposed "Lochnerism" of the Court's decisions during the latter part of the nineteenth century, and Urofsky's argument that with the exception of a few areas of contract law, the Court "reflected perfectly the mildly reformist mood of the country during the Progressive Era," stimulated lively responses from the panel's two commentators, Professor Aviam Soifer of the Boston University School of Law and James C. Oldham of the Georgetown University Law Center.

As a result of the success of the session, the Society plans to jointly sponsor a panel on the "Imperial Judiciary Reconsidered" at the annual meeting of the Organization of American Historians to be held in Los Angeles this month. The Society also hopes to be able to publish at least two of the papers presented at these sessions in the 1984 *Yearbook*.