

Court Speech as Political Action: Isocrates' Rhetorical Ideal and the Legal Oratory of Daniel Webster

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[B]ecause there has been implanted in us the power to persuade each other and to make clear to each other whatever we desire . . . we have come together and founded cities and made laws and invented arts For this it is which has laid down laws concerning things just and unjust, and things base and honorable It is by this also that we confute the bad and extol the good. Through this we educate the ignorant and appraise the wise; for the power to speak well is taken as the surest index of a sound understanding, and discourse which is true and lawful and just is the outward image of a good and faithful soul.¹

When public bodies are to be addressed on momentous occasions, when great interests are at stake, and strong passions excited, nothing is valuable in speech farther than as it is connected with high intellectual and moral endowments True eloquence, indeed, does not consist in speech Words and phrases may be marshalled in every way, but they cannot compass it. It must exist in the man, in the subject, and in the occasion This, this is eloquence; or rather it is something greater than and higher than all eloquence, it is action, noble, sublime, godlike action.²

Each time an American lawyer speaks before a court, that lawyer is a political agent. Advocating an interpretation of the Constitution, a statute, or judge-made common law is advocating an interpretation of the formal statement of the political will of the governed. As such, by interpreting the law or offering a translation of its meaning, the lawyer transforms the codified indicia of shared American values, altering the national identity. In this sense, American legal oratory, primarily before appellate courts, is fundamentally more than advocating the interests of private economic entities, prosecuting

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¹ Isocrates, *To Nicocles* 3.6-3.7. For this essay, the author relied on the translation of Isocrates' speeches contained in *Isocrates: Letters and Speeches* (George Norlin ed., Harv. U. Press 1980).

² Daniel Webster, *The Papers of Daniel Webster: Speeches and Formal Writings* vol. 1, 255-56 (Charles M. Wiltse & Alan R. Berolzheimer eds., U. Press N. Eng. 1986).

violations of law or protecting individual rights. American legal oratory can be statecraft: innovative speech which promotes political action, and creates or transforms the principles by which citizens are governed.

In this essay, I examine this power of legal oratory to be political speech by analyzing select court speeches of Daniel Webster as political texts. As a model for this rhetorical analysis, I use the classical standard of *logos politikos*, speech in the interest of the state, posited by Isocrates, which I refer to as Isocrates' "rhetorical ideal." Analyzing Webster's rhetoric according to this Isocratean ideal appears appropriate because of the historical and philosophical parallels between the two men. Webster was the most prominent legal orator of his time, a time when America discovered ancient Greece and was in the full grip of the Romantic embrace of antiquity.³ Webster's speeches are replete with classical allusions, his friend Edward Everett held the first chair in Hellenic Studies in America,⁴ and Webster's first famous congressional speech promoted the cause of Greek independence.⁵ Yet, the philosophical and political parallels between Webster and Isocrates are even more compelling than their comparable political roles within their respective democracies. They demonstrate how Isocrates' theory of effective political speech illuminates Webster's success and failure in speaking politically as a lawyer. Both men were conservative pragmatists. Both men would have bristled at being called a democrat. And both supported unpopular policies they believed would preserve their homeland. Moreover, both Isocrates and Webster wielded their influence and prestige in a period after a "golden age" of constitutional reform during which the governed were compelled to decide their future political direction relative to divisive issues. While Webster was often called the Demosthenes of America because of his oratorical prowess, the content of his speeches and their political effect made him the Isocrates of America.

In order to apply the analytical model of Isocrates' rhetorical ideal to Webster's court speech, I will first describe what Isocrates wrote about his ideal — gleaned from disparate sources — and state his guidelines for speech in the greater service of the *polis*. The greatest difficulty in applying a 2,500-year-old model to nineteenth century oratory is, of course, controlling for the political and legal differences of the two eras. Therefore, the second part of this essay will describe, briefly, those differences and show that even Isocrates might be surprised at how applicable his rhetorical ideal can be to speech before American appellate tribunals. With the rhetorical ideal established, and the institutional discrepancies explained, I will then turn to a consideration of three of Webster's most important Supreme Court arguments: the *Dartmouth*

³ See generally Stephen A. Larrabee, *Hellas Observed: The American Experience of Greece 1775 - 1865* (N.Y.U. Press 1957).

⁴ *Id. passim*.

⁵ *The Great Speeches and Orations of Daniel Webster* 57-76 (Edwin P. Whipple ed., Little, Brown & Co. 1879).

College case,⁶ *Gibbons v. Ogden*,⁷ and *Thurlow v. Massachusetts*.⁸ I will apply Isocrates' rhetorical ideal to that oratory, and draw some conclusions about the success and failure of Webster's *logos politikos*. This essay concludes that in satisfying a classical ideal for court speech in service to the speaker's community beyond the primary considerations of case and client, Anglo-American legal oratory can in fact be political speech in a rule of law democracy by advocating the creation and transformation of governing principles and, in the process, national identity.

I. Isocrates' Rhetorical Ideal

Isocrates proposed that rhetoric must be practiced as *logos politikos*, or political speech in the service of the speaker's political community. Principled, pragmatic, and eloquent political speech is the art which creates a collectivity, defines its purpose, and protects its interests. In order to achieve these ends, Isocrates established a "rhetorical ideal," which states that artful rhetoric fulfills its necessary role as *logos politikos* when it is artful, moral, and pragmatic. In so requiring, Isocrates established a middle ground between rhetoric as a tool only for achieving the personal interests of the speaker, and rhetoric which argues only philosophical and moral principles without regard for practical result. It is an ethico-performative ideal, where the dual obligations of art and ethical pragmatism are inseparable and feed each other. This is a break from both Platonic antagonism toward rhetoric and in contrast to Aristotle's taxonomic, institutional treatment of it.⁹ As Ekaterina Haskins has written:

Isocrates defends a program of civic education in which the traditional Greek association between speaking and acting . . . is upheld. Isocrates thereby promotes a performative view of the rhetorical training as a *mimesis* of civic excellence Whereas Isocrates gives us a vision of performance as a lifelong pursuit of political honor and recognition, Aristotle considers it but a stepping stone toward the life of leisured pursuits and contemplation unburdened by exigencies of public performance.¹⁰

By balancing the ethical and the performative, Isocrates carved a template for political speech which, laid over the works of ancient and modern political oratory, can trace a speech's power to be statecraft. Speech can be statecraft because it has rhetorical power, enduring relevance, and long-term practical

⁶ *Trustees of Dartmouth College v. Woodward*, 17 U.S. 518 (1819).

⁷ *Gibbons v. Ogden*, 22 U.S. 1 (1824).

⁸ *Thurlow v. Massachusetts*, 46 U.S. 504 (1847).

⁹ Ekaterina V. Haskins, *Logos and Power in Isocrates and Aristotle* 29 (U. of S. Carolina Press 2004).

¹⁰ *Id.* at 31.

utility. When it does, speech shapes policies and directly or indirectly incites action contributing to the creation or re-creation of the state's identity.¹¹

There is no extant speech dedicated solely to explaining Isocrates' analysis of artful rhetorical methods or how rhetoric serves the ends of discovering truth. Rather, various speeches contain, in varying amounts, evidence of his rhetorical curriculum and philosophy. These surviving speeches, including the *Antidosis*, *Panegyricus*, *Panathenaicus*, and *Against the Sophists*,¹² all address issues in addition to his educational and philosophical theories. This comports with Isocrates' ideal of rhetoric as *logos politikos*, political speech for the civic arena; any speech which had as its sole purpose the promotion of his school, or argued solely his theory of rhetoric as a political tool, would be contrary to this ideal.¹³ But in the "Hymn to Logos," contained in his speech to Nicocles, Isocrates instructed the King of Cyprus on the power and primacy of rhetoric.¹⁴ Other speeches address Isocrates' theories of how rhetoric should be employed, who should practice it, what ends it can serve, and the tension between the rhetorical influence of gifted, trained rhetors and the mass sovereignty of the Athenian democracy.¹⁵ But the "Hymn to Logos" contains Isocrates' most succinct commentary on the nature of rhetoric as ethical and political discourse. Combining traditional components of artfulness and principle with a pragmatic requirement, Isocrates' ideal is something more than Aristotle's requirements for persuasion: *logos*, *ethos*, and *pathos*. For Isocrates, the skillful, proper use of words does more than persuade; it also embodies duty and promotes action.

For the performative component of Isocrates' rhetorical ideal, *logos politikos* must be artful. Athenian audiences were demanding audiences, expecting a high degree of art and competence from speakers. If a speech was not understood, believed, and enjoyed by the audience, it was ineffective by Athenian standards. The audience will not be convinced the speaker has the authority to speak. *Logos politikos* must be principled, because only policies appealing to the ethics of the audience ultimately serve the interests of the audience; audiences will not embrace an unprincipled speaker as a leader. And *logos politikos* must be pragmatic, for a speech which only advocates an ideal policy without respect for what its audience wants and can accomplish is nothing more than a set piece with no chance to achieve the policy it advances. As will be seen, these aspects of the ideal do not stand alone; art, principles and pragmatism must exist together in a unified whole, each component begetting, creating and sustaining the other.

¹¹ See Josiah Ober, *Mass and Elite in Democratic Athens: Rhetoric, Ideology, and the Power of the People* 315 (Princeton U. Press 1989) (discussing Attic orators and their role in shaping the ideological identity of the *polis*).

¹² Takis Poulakos, *Speaking for the Polis: Isocrates' Rhetorical Education* 68 (U. of S. Carolina Press 1997).

¹³ See *id.* at 68-70, 75.

¹⁴ Isocrates, *supra* n. 1, at 3.5-3.9.

¹⁵ Josiah Ober, *Political Dissent in Democratic Athens: Intellectual Critics of Popular Rule* 265-73 (Princeton U. Press 1998).

In the "Hymn to Logos" and other speeches, Isocrates places his emphasis on the importance of morality and practicality in his rhetorical ideal, spending less time on the role of artistry. Perhaps this is because Isocrates was not a gifted speaker and disseminated his thought in written "speeches" to be read or delivered by others. Possibly, because artful speech was a bare minimum for the demanding Athenian audiences, the need for artistry was a given.¹⁶ Additionally, Isocrates' competing Sophists focused on the modes of persuasion. Concentrating more on the ethical and practical aspects of oratory was a way for Isocrates to distinguish himself from their schools.

Nevertheless, several of the speeches stress the necessity of art in effective political speech. Isocrates wrote that the "power to speak well is taken as the surest index of a sound understanding."¹⁷ This fragment reveals the dual nature of Isocrates' belief in the importance of artistry in speech. Effective political speech must engage its audience. That is the most basic requirement. A speech that fails to connect the minds of its audience members to the message of the speaker is of no use. More importantly to Isocrates, art is not only a function of effective communication, it advances the effectiveness of a political speech by convincing the audience of the speaker's authority to speak. This takes the speaker beyond his ability to project his thoughts or entertain his audience; it gives the audience a reason to believe, and ultimately, be persuaded.

In the *Antidosis*, Isocrates praises the unique artistry of political speech, and in so doing elaborates on the ethico-performative nature of his rhetorical ideal.¹⁸ He extols *logos politikos* as a form of speech more likely to serve the best interests of the *polis*, as opposed to epideictic speeches given for purely ceremonial purposes or forensic speeches made for the advancement of a personal matter through the courts. In this speech Isocrates explains the important role of artistry in a political speech. He identifies it as a subset of prose oratory which is at once more relevant to the interests of the *polis* **and** more beautiful, as if contending that the more noble the purpose of the speech, the more artful the words:

First of all, then, you should know that there are no fewer branches of composition in prose than in verse. For some men have devoted their lives to researches in the genealogies of the demi-gods; others have made studies in the poets; others have elected to compose histories of wars; while still others have occupied themselves with

¹⁶ Robert J. Bonner, *Lawyers and Litigants in Ancient Athens: The Genesis of the Legal Profession* 163 (U. Chi. Press 1927) (indicating that Athenian audiences took a keen delight in good oratory whether in the Assembly or the law courts or the lecture halls of the Sophists. The language must be suited to the subject, the delivery pleasing and the gestures appropriate. Their attitude toward oratory was much the same as our attitude toward orchestral music.).

¹⁷ Isocrates, *supra* n. 1, at 3.7.

¹⁸ Isocrates, *Antidosis*, 15.45-15.47 in *Isocrates: Letters and Speeches* (George Norlin ed., Harv. U. Press 1980).

dialogue, and are called dialecticians For there are men who, albeit they are not strangers to the branches which I have mentioned, have chosen rather to write discourses, not for private disputes, but which deal with the world of Hellas, with affairs of state, and are appropriate to be delivered at the Pan-Hellenic assemblies — discourses which, as everyone will agree, *are more akin to works composed in rhythm and set to music* than to the speeches which are made in court. For they set forth facts in style more imaginative and more ornate . . . *they use throughout figures of speech in greater number and of more striking character.* All men take as much pleasure in listening to this kind of prose as in listening to poetry¹⁹

There really is no reason to believe that the deliberative oratory of his day was any more "ornate" or artful than the forensic speeches where citizens, usually members of the elite political class, argued for their lives or property. Nevertheless, Isocrates championed political speech as a discrete art loftier in form because it is loftier in purpose. The practice of political speech must contain a component of artistry. By arguing that political speech is worthy of higher praise due to the splendor of its prose, Isocrates believed that the effective use of tropes and rhythms is critical to persuasive political speech. In fact, Isocrates distills the theory down to its basic elements by writing in the *Panathenaicus* that his political discourses are written "in a style rich in many telling points, in contrasted and balanced phrases not a few, and in the other figures of speech which give brilliance to oratory and compel the approbation and applause of the audience."²⁰ Here, Isocrates emphasizes the dual effect of artful speech: oratorical flourishes allow the speaker's message to be heard, and in Athens, artistry "forces" the audience to approve of the speaker and his message. Artistry begets authority, which leads to persuasion.

Commentators have characterized Isocrates' rhetoric as "one of the most distinctive in Greek; the diction is pure, the expression full in the extreme, rhythmical, highly antithetical, but the jingling excesses of Gorgias are avoided."²¹ In practice he availed himself of the full range of artistic conventions of speech, giving his words their power and influence, establishing him as among the greatest rhetoricians of his day. Isocrates argues for the importance of rhetorical artistry as a necessary component of effective political speech in his references to the art and in his practice of it.

But requiring artistry as a component of effective speech merely placed Isocrates in line with all of the Sophists who came before him. It was standard procedure to teach the Athenian youth the tropes and qualities of artful speech.²² Isocrates distinguished his rhetorical ideal, and attempted to

¹⁹ *Id.* (emphasis added).

²⁰ Isocrates, *Panathenaicus*, 12.2 in *Isocrates: Letters and Speeches* (George Norlin ed., Harv. U. Press 1980).

²¹ George Kennedy, *The Art of Persuasion in Greece* 174 (Princeton U. Press 1963).

²² George Kennedy, *A New History of Classical Rhetoric* 30-63 (Princeton U. Press 1994).

move his teachings away from the Sophists and toward the philosophical schools, by adding a component of morality to his conception of ideal rhetoric. For Isocrates, the morality component had two aspects: the personal ethics of the speaker and the benefit to the *polis* of the policies advanced by the speaker. This elaboration beyond artistry gives the speaker's performance credibility; his speech has a higher degree of persuasive impact when it appeals to the common values of the audience.²³ The necessity of morality and propriety in the speaker himself is set forth in the "Hymn to Logos": "and discourse which is true and lawful and just is the outward image of a good and faithful soul."²⁴

Isocrates intended the "Hymn to Logos" to be a moral or ethical instruction, a course for effective leadership. Isocrates instructed the King of Cyprus that for him to have credibility as a speaker, for his people to know that he has a "good and faithful soul," his speech to the people must be "true and lawful and just."²⁵ A speech performance has no merit, cannot be seen as worthy of political action by an audience, unless the speaker engages in ethical discourse by speaking truthfully.

For Isocrates a speaker was ethical if he was "true and lawful and just." Commentators have restated these Isocratean morals or values as *dikaiosyne kai sophrosyne* — justice and temperance.²⁶ The values of justice and temperance are conservative notions relative to the preservation of the *polis*. To be moral was to be faithful to existing norms. Tolerance, innovation, the ability to see all sides of an argument, or any liberal or reformative values leading to the progress of the collective, go unmentioned. As shown above, this is a dramatic parallel to Webster's conservatism.²⁷

Beyond personal ethics, Isocrates' rhetorical ideal requires a speaker to promote an ethical policy. An ethical policy for Isocrates meant any action which protected the political and economic well being of the *polis*. For Isocrates, what the "well being of the *polis*" meant is difficult to grasp. It appears to change as he ages. But one element is the restoration of Athens' pan-Hellenic status.²⁸ He longed to reinstate Athens as a Greek rather than Attic capital. The "Hymn to Logos" announces his elevation of pragmatism, the restoration of status to an ethical imperative through his discussion of the role of ethical speech in a society:

there is no institution devised by man which the power of speech has not helped us to establish . . . and if it were not for these ordinances we should not be able to live with one another. It is by this also that

²³ Werner Jaeger, *Paideia: The Ideals of Greek Culture* vol. 3, 91 (Gilbert Highet trans., Oxford U. Press 1971).

²⁴ Isocrates, *supra* n. 1, at 3.7.

²⁵ *Id.* at 3.6-3.7.

²⁶ Poulakos, *supra* n. 12, at 27.

²⁷ See *infra* pt. III.

²⁸ Ober, *supra* n. 15, at 254-56.

we confute the bad and extol the good. Through this we educate the ignorant and appraise the wise²⁹

Because speech has the power to create and preserve an ordered society, it must be employed to further those ends. Speech should be the champion of justice and temperance. It should conserve those values which preserve norms and stave off decay.³⁰ Preservation of the integrity and status of the *polis* are the ethical imperatives of Isocrates' *logos politikos*.

The pragmatism of an argument is the final component of his rhetorical ideal because Isocrates elevated pragmatism and the conservation of historical status to the level of ethical imperatives. But what did pragmatic or practical mean to Isocrates? Isocrates' rhetorical innovation was in carving out a middle ground for rhetoric between persuasion in the speakers' self-interest, and oratory supporting solely philosophical ends. As such, the meaning of pragmatic speech in the rhetorical ideal exists in what it is not. A speech is not practical or pragmatic if it only promotes the limited interests of the speaker. A speech is not pragmatic or practical if it only advocates ideological or philosophical objectives, without considering how the policy will actually preserve the *polis*. Isocrates has been aptly described as the rhetorician of the "politically possible."³¹ For Isocrates, then, a speech is practical if it advances policies relevant to the goals of an audience, and which the audience can achieve.

In sum, the components of Isocrates' rhetorical ideal — artistry, morality and practicality — are Isocrates' standards for effective political speech, his rhetorical ideal. A speaker must convey his authority through his artistry and command of the language. The speaker must have credibility through his expressions of widely held values. And his message must be practical in that it argues in favor of the goals of the audience while promoting the preservation of the *polis*. According to Isocrates, these attributes are the elements of effective political speech that promote action.

What, then, does "effective political speech" mean? If a speech contains these attributes, what is the result? The simple answer from a rhetorical perspective is that it persuades the audience; the audience will accept and act upon the arguments of the speaker. But because this essay discusses *logos politikos*, a larger question emerges regarding the long-term effect of a political speech on the well-being or existence of the political community. What changes occur among the audience, the polity, because of the political speech? Every political orator is a product of his time, and his motives in speaking are determined by them. If his speech is effective, it results in a desired effect: a vote, a change of opinion or policy, an agenda shift, etc. Isocrates' agenda in

²⁹ Isocrates, *supra* n. 1, at 3.6-3.7.

³⁰ Poulakos, *supra* n. 12, at 52 (discussing fourth century political discord and devastation in the aftermath of the Peloponnesian War as affecting Isocrates' conservatism).

³¹ *Id.* at 68.

speaking was for the preservation of Athens as a *polis* by recapturing its pan-Hellenic status.

II. The Athenian Democratic Assembly v. Republican Judiciary of the United States

All forms of political rhetoric can be evaluated according to the Isocratean rhetorical ideal. This, however, contradicts Isocrates himself, who excepted court speech, or forensic rhetoric, from his ideal. As fleshed out in the *Antidosis*, a speech written several years after the *Nicoles* and its "Hymn to Logos," Isocrates believed court speech of his day too amenable to the corruption of self-interest and therefore not *logos politikos*. Moreover, because Athenian law courts did not create binding precedent with the force of law, and concerned themselves with the condemnation or exoneration of individuals charged with wrongdoing by a private citizen, forensic speech lacked the formal, institutional means to affect the *polis* at large through an alteration of legal structures. That said, because of institutional differences between Athenian courts and appellate courts in the United States, Isocrates' ideal applies to analyses of American "forensic" oratory as political speech. Unlike Athenian forensic oratory, which could only address broad constitutional issues tacitly in the form of personal cases of citizen versus citizen,³² American appellate tribunals, especially courts of last resort, often certify cases and questions for review specifically because of the broader constitutional and administration of justice issues the specific cases present and can limit review to those questions. In this way, the legal speech practiced before them can, in fact, be forensic and deliberative, exceeding the bounds of case or client into the realm of pure policy.

These differences between the fourth century Athenian Assembly and modern appellate courts as forums for constitutional change create within the appellate courts more opportunity for court oratory to be political speech in the Isocratean ideal. To address major constitutional questions, fourth century Athenians relied upon the popular Assembly. Judges and magistrates heard and ruled upon disputes regarding punishment for violation of laws within their designated jurisdictions. Appeals were possible to the Assembly for a trial before the popular jury.³³ Regarding actual policy or constitutional issues (creation of laws or decrees), the general procedure was for the Council or *Boule* to recommend policies which were then voted on by the Assembly.

³² See e.g. *The Debate on the Crown From Against Ctesiphon of Aeschines and Address on the Crown of Demosthenes*, in *Greek Orations: 4th Century B.C.* 120-209 (W. Robert Connor ed., Waveland Press, Inc. 1987). In the case at issue in those orations, Aeschines brought suit against Ctesiphon who had presented a petition before the Assembly to award a crown to Demosthenes for his service to Athens. Aeschines charged Ctesiphon for unconstitutional activities because such a crown was technically improper at that stage in Demosthenes' career. This was in fact nothing more than a political attack by Aeschines against Demosthenes, his political rival.

³³ Douglas M. MacDowell, *The Law in Classical Athens* 30-32 (Cornell U. Press 1978); see also Ober, *supra* n. 11, at 55.

Until the end of the fifth century, the resulting law (*nomos*) or decree (*psaphisma*) then became binding.³⁴ Because constitutional issues were ultimately resolved by the Assembly, the development of the Athenian body of laws, or constitution, was a democratic process advanced, in theory, by all free citizens.

This process is distinguishable from the path of constitutional development in the American system. The United States, pursuant to the Constitution and subsequent Judiciary Acts and Supreme Court cases (most notably, *Marbury v. Madison*),³⁵ employs a system of constitutional transformation and interpretation which is republican in nature. A learned judiciary, without the input of a democratic or representative jury, rules on constitutional questions in the federal appellate courts and the Supreme Court. These rulings have the force of law; subsequent matters before the same tribunal are bound to the ruling.

In fourth century Athens the development and broad use of *graphe paranomon*, a form of appeal regarding the "legality" of an act of the Assembly, gave constitutional issues a more legal, rather than legislative, resolution. In a private action for *graphe paranomon*, one citizen charged that the law or decree proposed by another citizen in the *Boule* or Assembly contradicted the existing law of the *polis*.³⁶ In this type of action, the jury decided whether to punish the accused for proposing an "unconstitutional" law. This compares to the American system of judicial review of court decisions or legislation for constitutionality. Yet, despite this innovation, the fact that popular sovereignty controlled legal and constitutional change in fourth century Athens makes it very different from the American system. In Athens the will of the *demos*, as influenced by an elite, trained speaker, *was* the constitution.³⁷ While laws and decrees were codified and reduced to writing, they could change abruptly depending on the influence of a speaker and the will of the mass Assembly. This gave more influence and power to the "constitutional action" of a speaker, yet decreased the speaker's ability to promote enduring policies, to practice "statecraft," because the policies could change according to the sovereign and changeable popular will. Ober argues that the rule of law and the will of the people would not be exclusive concepts to an Athenian's mind, which could embrace the dual sovereignty of its *demos* and the *nomos*. But because the will of the *demos*, with relative ease, could reverse the existing constitutional structure, the will of the people wielded the most power.³⁸

By contrast, in the American constitutional system, a republican judiciary of appellate judges appointed by an executive with the advice and consent of the people's elected representatives wields the power to alter or interpret the

³⁴ Ober, *supra* n. 11, at 8.

³⁵ *Marbury v. Madison*, 5 U.S. 137 (1803).

³⁶ MacDowell, *supra* n. 33, at 51; Ober, *supra* n. 11, at 109.

³⁷ Ober, *supra* n. 11, at 299.

³⁸ *Id.* at 301.

constitutional rubric.³⁹ Their power to do so is constrained by two aspects of Anglo-American jurisprudence: *stare decisis* and the rule against fomenting litigation for advisory judicial opinions. In the first aspect, judges are constrained by the prior decisions of the judiciary. In this sense, because interpretation of the Constitution is bound to prior rulings, there exists in the American system judge-made law, a concept foreign to Athenian jurisprudence. Second, American appellate judges, unlike the Athenian Assembly, must wait for a constitutional issue to percolate up from a lower court's resolution of a genuine conflict between the state and a citizen or, in a private civil action, between private entities. Both the existence of *stare decisis* and the rule against fomenting litigation or seeking advisory opinions in constitutional cases limit the republican judiciary's interpretation or alteration of the constitutional rubric. This has two effects. It emphasizes the rule of law, increasing the constitutional relevance of legal oratory because such oratory influences what the law is. And it results in a static Constitution, increasing the power of legal oratory to make a significant difference when it results in an actual change in that Constitution. As such, the American judicial and jurisprudential system in which Webster practiced his legal oratory rendered that oratory more likely to be political speech according to the Isocratean ideal. Because of the institutional differences, American legal oratory is more deliberative than purely forensic, avoiding Isocrates' admonition that forensic speech cannot be *logos politikos*. American legal oratory can be statecraft in that artful, moral, and practical legal speech can result in significant and enduring constitutional change. This is especially true when practiced by an orator like Daniel Webster whose political ideology and agenda, formed from childhood, influenced his court speech.

III. Applying the Rhetorical Ideal to Webster's Legal Oratory

In his definitive treatise on Webster's career before the Supreme Court, Maurice Baxter places Webster, at the beginning of his federal practice, in the nascent period of American constitutional law, the very beginning of the American struggle to decide what the Constitution meant to the actual, day-to-day governance of a growing federal republic. He writes:

The Constitution's physiognomy was indistinct in 1814 — the Court had asserted its power to review laws but had interpreted only a few constitutional provisions — and many questions were unexplored, among them interstate commerce, corporate charters, bankruptcy, eminent domain, admiralty jurisdiction, copyright, adaptation of the common law. When Webster argued his last case in 1852, the bench and bar had examined all these issues, several exhaustively, and produced answers that would endure. Webster the lawyer was the chief crystallizing agent . . . without his illuminating wit and

³⁹ Constitutional rubric is meant to include the written constitution, its amendments, and the cases interpreting them, all of which constitute "constitutional law."

metaphors and the resounding symbolism of his oratory, without his truly great contribution at the bar, the epochal opinions of the Court might have been very different from what they were.⁴⁰

The constitutional issues Baxter catalogues appear important to the functioning of the country, but mundane and technical. Matters involving the limits on state power over corporate charters as presented in the *Dartmouth College* case, the scope of competing jurisdictional authority over the country's navigable waters at issue in *Gibbons v. Ogden*, and the regulation of interstate trade at the core of *Thurlow v. Massachusetts* seem dry, legalistic and hyper-technical. But these determinations were critical to a young country's application of its political charter to the practicalities of its growth and ultimate viability. The *Dartmouth College* case, *Gibbons v. Ogden* and *Thurlow v. Massachusetts*, three of Webster's most famous cases, dealt with practical matters, but they dealt more importantly with the primary concern of any democratic or republican government: the gulf between the preservation of liberties and the preservation of order which the Constitution was designed to bridge.⁴¹ When Webster's legal oratory in these cases was artful, principled and pragmatic according to Isocrates' rhetorical ideal (*Dartmouth* and *Gibbons*), it successfully persuaded his audience (the courts) to adopt his conservative, pragmatic vision of the Constitution. It was *logos politikos* and contributed to the shaping of constitutional and national identity for the newly united states. And when Webster's oratory failed the Isocratean ideal (*Thurlow*), the Federalist conception of the Union he tried to craft began to crumble under the weight of new political imperatives.

A. The *Dartmouth College* case

Webster's first contribution to shaping American constitutional and national identity through his legal orations came in his argument before the Supreme Court on March 10, 1818, in the *Dartmouth College* case.⁴² In 1815, the members of the Board of Trustees of Dartmouth College, predominantly Federalists, were disputing with the president of the college, John Wheelock, the founder's son. In an end game around the Board, Wheelock sought help from New Hampshire Republican Democrats who passed legislation packing the Board with members of their own party and converting the college into a university subject to state oversight.⁴³ The existing Federalist Trustees filed suit claiming that the legislative action violated their charter, deprived them of property rights, and, in so doing, violated the New Hampshire and United States constitutions. The Trustees were unsuccessful in the state courts of

⁴⁰ Maurice G. Baxter, *Daniel Webster and the Supreme Court* 1-2 (U. Mass. Press 1966).

⁴¹ Robert F. Dalzell, Jr., *Daniel Webster and the Trial of American Nationalism 1843-1852*, at xii-xiii (W.W. Norton & Co. 1973).

⁴² *Trustees of Dartmouth College v. Woodward*, 17 U.S. 518 (1819).

⁴³ Maurice G. Baxter, *Daniel Webster: The Lawyer* in *Daniel Webster, The Completest Man* 138, 143-44 (Kenneth E. Shewmaker ed., U. Press New Eng. 1990).

New Hampshire and appealed to the U.S. Supreme Court. Their alumnus, Daniel Webster, delivered the argument on behalf of the Trustees.

The dispute in this case had, as its genesis, a dispute between Federalist policies in favor of a strong, centralized national government and the Republican Democrats' efforts to enforce states' rights, the controlling struggle of Daniel Webster's political career and the defining struggle over constitutional and national identity. Was the United States going to be a unified whole controlled by a strong federal government or a less restricted union of sovereign states? In arguing that the actions of the New Hampshire legislature violated the Constitution, Webster, through his legal oratory, crafted a Federalist identity for the Constitution and the nation. His speech satisfies the Isocratean rhetorical ideal because it was artful in the weight of his legal argument and the strength of his prose; it was principled in that it extolled the mythology of the Declaration; and it was practical because it presented Webster's version of the ramifications of the legislative action in dispute as contrary to the goals and virtues of his audience (the Court) and the people it would affect.⁴⁴

The artful aspects of the *Dartmouth College* speech are manifold. Webster manipulated rhetorical tropes and provided the Court with precise legal scholarship. The audience for Webster's legal oratory was always a republican bench moved by a combination of eloquence and legal erudition. While Webster's legal speeches before the Supreme Court were all published by himself as well as by contemporary observers, thus having a political effect among the reading population, the influence of his legal oratory occurred first and foremost with the judiciary that shaped the meaning of the Constitution. Only by persuading this small audience of political actors on the bench could Webster's legal oratory be *logos politikos*. Webster's artistry in the *Dartmouth* case provoked constitutional action.

Webster argued that the legislature violated its own constitution and Bill of Rights, using strategies common to epideictic oratory. He traced the long history of corporate grants and land charters devolving from grand and historical sources. He asserted that throughout the history of the common law such charters could not be imposed, altered, or removed without the consent of the prospective or existing charter holders. Here, Webster employed antithesis, juxtaposing royal, feudal decrees with the historically "inconsequential" nature of an institution like Dartmouth, stating that the crown lacked the power to alter or abolish charters and so did the New Hampshire legislature:

If therefore, the legislature has not this power by any specific grant contained in the constitution; nor as included in any of its ordinary

⁴⁴ Analyzing Webster's court speeches is difficult because there was no system of formal, regulated, official transcription. The available texts are reports of gallery members or revised versions prepared by Webster himself for publication. We cannot hear exactly what his judicial audiences heard.

legislative powers; nor by reason of its successions to the prerogatives of the crown in this particular, on what ground would its authority to pass these acts rest . . . ?⁴⁵

Thus, through the use of comparison, analogy and juxtaposition, Webster emphasized the enormity of the legislature's transgression: if king, crown and constitution are not empowered to impose or revoke corporate charters, neither was the legislature of New Hampshire.

Webster made this point as well with his "artistic" command of legal precedent. He painted a historical and legal picture of the protected right to create the legal fiction of a corporation and the rights attendant thereto "from Magna Carta to the present moment." Webster provided all of the legal precedent from Elizabeth's Statute forward. While this legal knowledge is rightfully attributed to the preparers of the brief in the lower courts on which Webster relied, his interweaving of the precedent with his juxtaposition and metaphor is what gives the legal aspect the further weight of art.

Another example of Webster's ability to weave precedent with a compelling metaphor was in his comparison of the Dartmouth College charter with a charter for a hospital. While Eleazar Wheelock's original intention was to educate the Indian tribes and train them as missionaries, the charter moving the college from Connecticut to New Hampshire was funded by land grants and contributions premised upon the college expanding its *raison d'être* to include the education of the English-speaking citizens of the state. Nevertheless, Webster painted this institution as an eleemosynary one charged with the private betterment of the public welfare, like a hospital. In so doing, Webster created sympathy for an institution which could have been characterized as a bastion of privilege:

The government . . . lends its aid to perpetuate the beneficent intention of the donor, by granting a charter under which his private charity shall continue to be dispersed after his death. This is done either by incorporating the objects of the charity, as for instance, the scholars in a college or the poor in hospital . . .⁴⁶

Again, this attempt to metaphorically curry sympathy for the college is placed within a legal argument.

Perhaps attempting to appeal to the justices' loyalties to their alma mater, Webster employed another "big versus small" antithesis by arguing:

The numerous academies in New England have been established substantially in the same manner. They hold their property in the same tenure and no other. Nor has Harvard College any surer title

⁴⁵ Daniel Webster, *The Writings and Speeches of Daniel Webster* vol. 10, 202 (Little, Brown & Co. 1903).

⁴⁶ *Id.* at 204.

than Dartmouth College. It may to-day have more friends; but to-morrow it may have more enemies. Its legal rights are the same.⁴⁷

Through this artful weaving of rhetorical tropes among historically significant precedent, Webster created a David v. Goliath image of an institution besieged by greater powers exceeding their historical limitations. (This is, of course, ironic because the result of his argument is the strengthening of federal powers under the Constitution and to limit state action.⁴⁸) By arguing this point, Webster declared the unifying power of the Constitution and its role as protector of a national culture against the meddling states. But the weight of Webster's artistic flourishes in this speech was reserved for his epilogue. Having established, by the foregoing topics, that Dartmouth was a small, relatively powerless institution devoted to the public good, Webster expanded on this theme in the peroration by use of enthymeme, describing the pernicious long-term effects on all such defenseless yet ultimately important institutions if New Hampshire was allowed to alter its charter:

The case before the court is not of ordinary importance nor of everyday occurrence. It affects not this college only, but every college and all the literary institutions of the country. They have flourished hitherto, and have become in a high degree respectable and useful to the community It will be a dangerous, a most dangerous experiment, to hold these institutions subject to the rise and fall of popular parties, and the fluctuation of political opinion Colleges and halls will be deserted by all better spirits, and become a theatre for the contentions of politics. Party and faction will be cherished in the places consecrated to piety and learning.⁴⁹

According to Webster, this tiny David, if slain, would mark the downfall of all the protectors of knowledge. The federal government, through use of its constitutional power, must protect the institutions of the country from the ravages of the power of the states.

Webster's image of the federal constitutional government as one promoting and protecting culture from the isolating efforts of the states was conjoined with his use of the contemporary mythology of America, from both a Federalist and Republican-Democratic perspective. This mythology was found in the symbolic relevance of the Declaration of Independence. In the *Dartmouth* speech, Webster did not mention the Declaration specifically, but he structured his argument around a recitation of rights followed by a statement of grievances very much in the style of the Declaration. Moreover,

⁴⁷ *Id.* at 210.

⁴⁸ In this case, the right of the state to regulate corporations if the regulation violates the constitutional provision prohibiting state laws from interfering with contractual obligation.

⁴⁹ Webster, *supra* n. 45, at 232.

his choice of words resonated with symbolic weight for an early nineteenth century ear attuned to any declaration that the rights of man have been usurped by a "foreign" power without consent.

This is the moral or principled aspect of the *Dartmouth* speech in accordance with the second component of Isocrates' rhetorical ideal. Webster's use of stylistic allusions to the Declaration is an example of displaying his moral or political worthiness to speak, announcing himself as a man of the Revolution, an American, guided by the most sacred of American socio-political principles. It also appealed to his audience, the John Marshall-led Supreme Court dominated by Federalist jurists. Webster's word choice and framing of the issues in the *Dartmouth* case referred to the Declaration and gave his argument the credibility communicated by the common values contained in that document. Webster first evoked the Declaration in framing the issue before the Court: "[W]hether the acts of the legislature of New Hampshire . . . are valid and binding on the plaintiff, without their acceptance or assent." This phrasing harkened the invalidation argument of the Declaration which posited that Parliament had no legislative authority over the colonies because that body contained no representative from the governed; Parliament legislated without the sovereign consent of those it attempted to control.

Webster spoke of the rights of a corporation as Jefferson wrote about the natural rights of man. *Dartmouth* had "rights, powers, liberties and privileges"; the trustees had "rights, properties and power." Discussing whether or not such rights, powers and privileges could be abrogated, Webster argued that such an abrogation was wrong because it occurred:

[N]ot by the power of their legal visitors or governors, but by acts of the legislature, and to do it without forfeitures and without fault; whether all this be not in the highest degree an indefensible and arbitrary proceeding, is a question of which there would seem to be but one side fit for a lawyer or a scholar to espouse.⁵⁰

Here, Webster cloaked the New Hampshire legislature in the guise of Jefferson's parliament, accusing that body of exacting their will without the authority to do so. While Jefferson's parliament may have had authority over the colonies, it had no authority to impose taxes or control commerce when duly constituted legislatures existed in the colonies for that purpose. For Webster, the New Hampshire legislature deprived a private institution, with its own constitution and legislative body, of valuable rights while having no jurisdiction to do so. Webster's framing of the argument and choice of words evoked Jefferson's arguments and the founding document of the country.

Again, Webster evoked the style and sound of the Declaration when he stated the Trustees' catalogue of grievances against the New Hampshire legislature. Just as Jefferson announced the usurpations of the Hanoverian

⁵⁰ *Id.* at 221.

monarch in a list form with unembellished vocabulary and terse rhythm for effect, so did Webster air his clients' grievances:

They revoke corporate powers and franchises. They alienate and transfer the property of the college to others. By the charter, the trustees had a right to fill vacancies This is now taken away. They were to consist of twelve, and, by express provision, of no more. This is altered.⁵¹

These emphasize the grievances with the shortest, plainest sentences in the speech to great effect. This is more than just stylistic and good oratory. It evokes the catalogue of grievances in the Declaration in form and in content of rights trampled and property seized. By using a format borrowed from the Declaration, the most revered text of the time, Webster infused his legal oration in the *Dartmouth* case with credibility. By recalling in every listener's mind the cadences, lyrics, and rhetoric of revolution from the founding document, Webster's oration was a principled speech appealing to the highest values of his audience.

Satisfying Isocrates' third component, the *Dartmouth* speech also was pragmatic. It advocated the politically possible in furtherance of the goals of his audience, beyond party objectives. Webster achieved this by promoting the intellectual life of the nation and by protecting charitable works. These are the goals of a civilized community, and by showing how ruling in his clients' favor would promote these ends, Webster added a pragmatic argument to his legal ones. He told his audience that along with the actual legal arguments, a pragmatic rationale existed. By acting in the way he suggested, his audience would do more than comply with the law; they would act in furtherance of their better selves.

Webster's method was to elevate the importance of *Dartmouth* to that of a charitable institution and explicitly and implicitly argue that it merited the Court's sympathy and protection because of this station:

The corporation in question is . . . an eleemosynary corporation. It is a private charity "The eleemosynary sort of corporations . . . are constituted for the perpetual distribution of the free alms or bounty of the founder of them to such persons as he has directed. Of this are all hospitals for the maintenance of the poor, sick and impotent; and all colleges both in our universities and out of them" A college is a charity.⁵²

Thus, Webster gave the Court another enthymeme: if you support the college and protect its sanctity, then you protect the best among us and promote the welfare of those who cannot or are unable to protect themselves.

⁵¹ *Id.* at 199.

⁵² *Id.* at 203-04.

This theme is furthered in his exhortation to the Court that not only is the college a charity but it is the bastion of the country's intellectual life. A vote to protect it was a vote in the best interest of the nation's development of culture. Decrying the New Hampshire legislature's acts, Webster said:

Nothing could have been less expected, in this age, than that there should have been an attempt, by acts of the legislature, to take away these college livings, the inadequate but the only support of literary men who have devoted their lives to the instruction of youth No description of private property has been regarded as more sacred than college livings. They are the estates and freeholds of a most deserving class of men; of scholars who have consented to forego the advantages of professional and public employments, and to devote themselves to science and literature⁵³

A report of the concluding remarks in Webster's peroration related the emotion with which Webster conveyed this idea. Omitted from Webster's own account of the speech, Chauncey A. Goodrich wrote that Webster closed the speech, telling the Court:

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!⁵⁴

While this transcription is likely apocryphal, reported decades after the speech, scholars are convinced that it accurately reflects the tone and sentiments of Webster's closing remarks. Approaching the form of encomium in an epideictic oration, the virtues of Dartmouth are elevated to almost mythic importance. Precedents and procedure be damned. Rule against Dartmouth College and rule against science, literature and culture itself. Art, principle, and the politically possible all converged in Webster's speech. It gave the Court a mandate for action which helped create an America that not only allows the federal government to trump state action, but promotes a Frontier Athens where science and the arts are part of a national identity. The Court ruled in favor of the College.

The *Dartmouth* case is the clearest example of Webster's success in using court oratory as political speech. In the hands of another lawyer without the

⁵³ *Id.* at 221.

⁵⁴ Daniel Webster, *The Papers of Daniel Webster: Legal Papers* vol. 3, 153-54 (Alfred S. Konefsky & Andrew J. King eds., U. Press New Eng. 1989).

ability to see a legal conflict as an opportunity to promote political action, that case could have been a dry conflict over a state's right to regulate corporations; important, but limited in scope, and not the sort of dispute to provoke the Court's action limiting state power. For Webster, the legal conflict was the necessary kernel for the larger constitutional debate. The Federalist versus Republican Democrat squabble, the conflict of state and federal power under the Constitution, and the involvement of his beloved Dartmouth College, all led to artful, principled and pragmatic legal oratory in the Isocratean mold. In arguing that case, Webster appealed to the revolutionary and constitutional sensibilities of the day. Webster applied his rhetoric to arguments that were principled and pragmatic, extolling virtues and promoting goals which comported with the socio-political ideology of his audience.

B. *Gibbons v. Ogden*

The majority of Webster's most important legal arguments were statecraft not because they appealed to the socio-political ideology of his audience, but because they fashioned a socio-economic philosophy. This is a little harder to get a handle on. Instead of promoting the political agenda of the Federalists, something which can easily be seen as political action, Webster's commerce cases advanced an economic agenda expanding the federal government's control of commerce, insulating businesses from the counterproductive effect of conflicting state regulation. For Webster, creating a socio-economic identity for the United States within the constitutional framework was just as important as the socio-political identity. Webster's legal oratory advocated an American socio-economic identity which favored federal government protection of big business interests.

He advocated this conception of America's socio-economic identity in the matter of *Gibbons v. Ogden*.⁵⁵ The dispute in *Gibbons* arose from the State of New York's grant of a maritime monopoly to the Livingston–Fulton steamship company for operation of routes on the state's navigable waterways. Ogden was an assignee of the monopoly holders. Gibbons, Webster's client, held a license under the Federal Coasting Act of 1793 and operated a steamship line between New York and New Jersey. Ogden sued Gibbons, claiming that Gibbons's steamship line violated the statutory monopoly Ogden enjoyed. The lower court enforced the monopoly, enjoining Gibbons from operating his steamship line. Gibbons retained Webster and William Wirt for the appeal to the Supreme Court. In this circumstance, a conflict existed between state and federal regulation of commerce.

Webster's artistry in this case must be assessed in the context of its appeal to his intended audience, the Federalist panel of jurists sitting on the Supreme Court. Webster's greatest obstacle was the significance of what he was asking the Court to do. He was asking the Court to overturn a sovereign state's law

⁵⁵ 22 U.S. 1 (1824).

in favor of his client who held a business grant from the federal government. The Court needed encouragement to act so aggressively despite their Federalist bent. Webster opened his argument by recognizing the validity of the opposition's argument:

[I]here was a very respectable weight of authority in favour of the decision, which was sought to be reversed. The laws in question . . . had been deliberately re-enacted by the Legislature of New York; and they had also received the sanction, at different times, of all her judicial tribunals, than which there were few, if any in the country, more justly entitled to respect and deference. The disposition of the Court would be, undoubtedly, to support, if it could, laws so passed and so sanctioned.⁵⁶

Yet, while recognizing the ominous clash between federal and state powers, he reminded the Court that it was in their jurisdiction to adjudicate, peacefully, such legal and constitutional clashes, reinforcing the jurists' belief that their federal mandate superseded that of the states:

It should be remembered, however, that the whole of this branch of power, as exercised by the Court, was a power of revision [of state court decisions].⁵⁷

In this way, Webster told the Court that he respected the judiciary of New York, but that it was the Court's duty to review that judiciary's opinions when they potentially conflicted with the Constitution, especially on matters of commerce. Webster continued his construction of a framework for the Court's authority and jurisdiction by acknowledging the difficulty of their task:

It was in vain to look for a precise and exact *definition* of the power of Congress, on several subjects. The constitution did not undertake the task of making such exact definitions. In conferring power, it provided in the way of *enumeration*, stating the power conferred, one after another, in few words; . . . ⁵⁸

But, Webster advised the Court, history demanded that the Court wrangle through the constitutional brambles and resolve the commerce question:

The resolutions of Virginia, in January, 1786, which were the immediate cause of the [constitutional] convention, put forth the same great [commercial] object. Indeed, it is the *only* object stated in those resolutions. There is not another idea in the whole document.

⁵⁶ Webster, *supra* note 54, at 271.

⁵⁷ *Id.*

⁵⁸ *Id.* at 275 (emphasis added).

The entire purpose for which the delegates assembled at Annapolis, was to devise means for the uniform regulation of trade. They found no means but in a general government; and they recommended a [constitutional] convention to accomplish that purpose.⁵⁹

With this argument, Webster completed his construction of a rhetorical framework for the Court by which they could, with moral and historical support, establish the federal government as a bulwark against conflicting state regulation of commerce. Without citing a legal precedent, without referencing the conflicting licenses, Webster empowered the Court to accept this authority. The cases against the Constitution's commerce power were strong, the document itself weak. But history and the very reason the country was united under the Constitution obligated the Court to rule in favor of Webster's client. The art of this speech lies not in flourishes, not in metaphor, comparison, analogies, etc., but in its structure, in the form of *lysis*, by undoing the strength of his opponent's argument and offering another reasonable alternative. Webster did not make a lengthy legal argument grounded on cases and statutes. He appealed to a judiciary predictably reluctant to carve out such broad power by giving them a context in which the requested action was reasonable and justified. Webster persuaded the Court to have courage, act in a politically dramatic way, and adopt his client's position.

Webster's oration in *Gibbons* is also principled in the Isocratean model. Again, as an ancillary consideration to the legal arguments he offered, Webster argued from the position of moral imperative: the Court must enforce the federal government's superior power to regulate commerce if the salutary principles of national unity and harmony are to be preserved. He argued at the outset of the speech:

[T]hence it was obvious, that if the States should make regulations for the navigation of these waters, and such regulations should be repugnant and hostile, embarrassment would necessarily happen to the general intercourse of the community. Such events had actually occurred, and had created the existing state of things.⁶⁰

By making this point early on, Webster clarified that he was not merely arguing in the narrow commercial interests of his client, but was advocating a position that benefited the nation by guarding the widely held values of harmony and unity secured by the Revolution and established as a national goal by the Constitution. By arguing in favor of these broad principles, Webster gave ethical, valid support for the constitutional action he advocated. He emphasized the point, arguing that if the conflicting state mandates at issue were to stand, if his opponents' position was followed:

⁵⁹ *Id.* at 276.

⁶⁰ *Id.* at 271.

It would hardly be contended, that *all* those acts were consistent with the laws and constitution of the United States. If there were no power in the general government, to control this extreme belligerent legislation of the States, the power of the government were essentially deficient, in a most important and interesting particular.⁶¹

Because national unity and harmony are principles at the core of the Constitution, if that document did not supersede the acts in question it would not preserve its founding principles. Webster argued in favor of a strong federal commerce power to protect the unity of the nation. Unity was the object of the Revolution and the Constitution. Regulation of commerce would not only protect that hard won unity but define it:

What is it that is to be regulated? Not the commerce of the *several States*, respectively, but the commerce of the *United States*. Henceforth, the commerce of the States was to be an *unit*; and the system by which it was to exist and be governed, must necessarily be complete, entire and uniform. Its character was to be described in the flag which waved over it, E PLURIBUS UNUM.⁶²

Webster's argument for the principles of unity and harmony among the states was the enthymeme: if federal control of commerce is strengthened, then unity would follow. A national constitutional identity of United States rather than several states, flowed from his rhetorical syllogism.

While Webster argued his client's commercial position by demonstrating how it comported with purported national values, he also argued that a result in his client's favor would achieve pragmatic goals and beneficial policies. In this way, the *Gibbons* oration satisfies the third component of Isocrates' ideal: practicality or the promotion of the politically possible.

The practicality component has two features; a speech must promote the goals of the audience and by an achievable policy. In his *Gibbons* oration Webster argued in favor of economic expansion through centralized regulation. In the Isocratean model, this proposes the goal of development via the achievable policy of federal control. Webster advocated the growth of American commercial interests by justifying such growth with ends more noble than mere expansion of wealth:

To benefit and improve these [trade and commerce] was a great object in itself; and it became greater when it was regarded as the only means of enabling the country to pay the public debt, and to do justice to those who had most effectually labored for its independence.⁶³

⁶¹ *Id.* at 272.

⁶² *Id.* at 277 (emphasis added).

⁶³ *Id.* at 275-76.

Webster's premise, that commerce had to be protected by the federal government, was hollow if the reason for it was to enrich the coffers of business. Rather, Webster supported his client's position by stating it would result in repaying the debt owed to the veterans of the Revolution, a goal no one would deny was just and proper. Moreover, in establishing the goal of protecting the interests of national commerce, Webster turned the tables on his opponent's assignor, Robert Livingston. He argued that even Livingston would support Gibbons and Webster, and call for strong federal government control over commerce:

If the present state of things . . . had been all presented in the convention of New York, to the eminent person whose name is on the record, [Livingston] and who acted, on that occasion, so important a part; if he had been told, that, after all he had said in favor of the new government, and of its salutary effect on commercial regulations, the time should yet come, when the North River would be shut up by a monopoly from New York . . . does any one suppose he would have admitted all this, as compatible with the government which he was recommending?⁶⁴

And so Webster satisfies all components of Isocrates' rhetorical ideal in *Gibbons*. He showed why the expansion and protection of commerce was a worthy goal and why federal regulation was a pragmatic policy to achieve that goal by using the example offered rhetorically in his favor by an opponent. If Livingston himself championed expanded commerce and federal control, how could the Court rule against Webster's position arguing the same? The *Gibbons* oration artfully communicated a principled and pragmatic policy, adopted by the Supreme Court, which altered the socio-economic identity of the nation. As Webster said, there would no longer be real territorial boundaries for the intercourse of trade regulated by separate sovereignties in conflict with one another. Trade was forever to be a function among *united* states, not *several* states.

C. *Thurlow v. Massachusetts*

Both *Dartmouth College* and *Gibbons* are examples of how Webster's legal oratory could succeed as *logos politikos*: these artful, principled and pragmatic speeches satisfied the standards of the rhetorical ideal of Isocrates. As such, they were effective in promoting political change. The resulting political action taken by his audience, the Supreme Court, created an American identity not only by creating precedent, but by moving the trend of constitutional interpretation farther along in a Federalist, conservative direction. Deconstructing one of the cases in which Webster failed to satisfy the requirements of the Isocratean ideal further illuminates the analytical utility of the classical standard. When Webster failed the ideal, as he did in *Thurlow v.*

⁶⁴ *Id.* at 279.

Massachusetts,⁶⁵ he failed his vision of a Federalist identity for the Constitution. And he lost the case.

The issues on appeal in *Thurlow* tracked *Gibbons*; it involved a state's regulation of commerce. But the similarities end there. Webster's client, Samuel Thurlow, appealed his conviction for violating a Massachusetts law requiring a license for the sale of liquor in quantities less than twenty-eight gallons.⁶⁶ This law responded to the temperance movement in Massachusetts and met the goals of that interest group by effectively precluding the retail sale of alcoholic beverages. While the Massachusetts law impeded the sale of liquor and thus the importation of it, the law did not directly impact commercial intercourse among the states. Moreover, no statutes of the federal government were directly contradicted by it. In those ways, Webster's case in *Thurlow* was much more difficult to advocate than the argument supported by the facts and circumstances of *Gibbons*.

Many other factors were against Webster as well. *Thurlow* was argued, first, in 1845, twenty-one years after *Gibbons*. The United States was very much changed. State mercantilism was no longer a central policy concern; nativism, intemperance and abolitionism were.⁶⁷ The Supreme Court was also fundamentally altered in its composition. Justice Marshall, Webster's staunchest Federalist ally, was gone as were most members of Marshall's court, leaving a Democratic majority. Justice Story, Webster's friend and legal sounding board, died before the *Thurlow* case was ruled upon. Moreover, Roger Taney, a Jacksonian Democrat, was Chief Justice. While there could be no doubt that Webster's oration in *Thurlow* would be artful, Webster's ability to be principled and pragmatic in this new judicial and political era was greatly constrained. Webster used the same rhetorical approach in *Thurlow* as he did in *Gibbons*. Right at the outset he praised the position advocated by his opponent and the temperance objective of the state of Massachusetts by stating:

[T]he general intent of these laws is good, but there are those who believe, and I am one of them, that if Intemperance is to be put down, it must be by more powerful means than the law in question. It must be by the uses of moral, religious and persuasive means rather than by coercion It is this course, and this only, that can abate the evils of Intemperance. Religion and Morals, the Pulpit, the Lecture Room, the Press, the example of good men, well directed public opinion — these are the means which must work out this good and exterminate this evil.⁶⁸

⁶⁵ 46 U.S. 504 (1847).

⁶⁶ Baxter, *supra* n. 40, at 213.

⁶⁷ Webster, *supra* n. 54, at 682.

⁶⁸ *Id.* at 686.

This opening was a masterstroke. In two paragraphs Webster established his authority to speak on the legal issue at hand, a state's right to regulate a form of trade, by acknowledging and agreeing with the larger policy goals behind that regulation. He knew the force of public opinion was against him. Instead of saying what he truly believed, that federal power was superior to any state regulation, he argued that the policy goals could better be attained by other means. He saw that the fatal flaw of his argument was not its legal support, but the policy goals it would frustrate if accepted. By framing the issues in that way, he tried to take the steam out of a policy argument with much popular appeal.

Webster's artistry alone, however, proved insufficient. He backed it up with a weak legal argument that was premised upon the syllogism that since the federal government allowed, regulated and taxed the importation of liquor, any law ceasing the sale of liquor, and concomitantly lessening importation, was in conflict with federal laws and therefore void. This approach was unsuccessful, and its failure was a failure by Webster to satisfy the Isocratean ideal components of principled and pragmatic rhetoric.

Webster's speech in *Thurlow* was not principled because it neither reflected his true moral agenda nor the values of his audience, either among the judiciary or the public at large. In both *Dartmouth College* and *Gibbons*, Webster's legal oratory reflected his true agenda: federal power in the mold of the Founders, and federal supremacy in the regulation of commerce to maintain national unity. While he argued for those same priorities in *Thurlow*, they were not foremost in his mind. By the time of the *Thurlow* speech, he had debated on the Senate floor the issues of state nullification and the expansion of slavery. Preserving the Union in the face of the divisive slavery issue was Webster's primary policy goal. This is what was on his mind when *Thurlow* was argued. He wanted to weaken the states' rights to legislate social policy which may be contrary to whatever was the federal law. If a conflict between a state statute authorizing slavery was ever before the Supreme Court, he could use the same argument, i.e., a state statute authorizing slavery was contrary to the federal law banning the slave trade. He had the slavery issue foremost in his thoughts when he wrote to John P. Healey eighteen days after the *Thurlow* argument: "Everything may be said against them [the liquor license laws] which Massachusetts says against South Carolina."⁶⁹ Unfortunately, Webster did not say those things. He did not bolster his legal arguments with this real ethical consideration, relying instead on the old warhorse of federalism. He did not argue that Court rulings upholding state social policy legislation in conflict with federal statutes could be used as precedent to affirm state social regulations contrary to broader social goals, such as the abolition of slavery. Webster would have given his arguments a strong intra-judicial credibility if he would have made that non-legal argument he stated to Healey. It would have had more of the power of principle than merely stating the cause of temperance was better served by private initiatives.

⁶⁹ Baxter, *supra* n. 40, at 213.

Webster's speech also failed the third component of Isocrates' ideal in that it was not pragmatic; Webster's speech did not promote the goals of his audience through a politically possible policy. Webster's argument was based upon the overriding premise that protection of federal control of commerce was the ultimate concern for the court, his primary audience:

The several States should submit promptly to all laws of Congress. It is derogatory to any State to hold up her own laws in opposition to those of Congress. Even when an injury is done . . . the States should submit with alacrity to these regulations. It is by such compromise that we maintain our nationality. They are a surrender of State privilege, given in exchange for benefits accruing from our Federal compact.⁷⁰

But this Federalist dogma was the clanging of a cracked bell in the ears of the Democratic bench. The policy position advocated by Webster was not a pragmatic one to the minds of 1845. Webster was an anachronism. Factionalism was rampant, industry boomed, and nativism in light of increased immigration was a growing concern. Acts in furtherance of social goals, the states' use of their police powers to maintain order, were a priority in those changing times. Webster's promotion of the Union was not as practical a concern as the enforcement of morals and the imposition of an ordered society in a time of social flux. While artful, Webster's legal arguments in *Thurlow* lacked the power to be statecraft, to incite constitutional action and shape national identity, because they were neither principled nor practical.

IV. Conclusion

Isocrates' ethico-performative rhetorical ideal is an analytical model useful in measuring the power of rhetoric to be *logos politikos* — speech for the good of the political collective — when it is artful, moral and practical. This standard applies well to rhetorical analyses of American court oratory as political texts. Laying the Isocratean template over modern appellate court speech in the American system reveals that legal oratory is statecraft when it artfully argues in favor of moral and pragmatic policies within the context of a particular case. Such arguments promote constitutional action and the creation or re-creation of national identity through the development of law in a rule of law society. Because the law is arguably the sole unifying aspect of a heterogeneous American society, how the law is interpreted and transformed is a powerful indicator of the values and goals of the American people. In this way, constitutional change is an indication of American national identity. As such, legal oratory can be more than the Promethean fire of Isocrates' *logos*; more than the divine creator and binder of societies to which a hymn is rightfully sung. Whether practiced by Daniel Webster, Louis Brandeis, or

⁷⁰ Webster, *supra* n. 54, at 690.

Thurgood Marshall, legal oratory can and should creatively reveal and interpret the values contained in the Constitution. It should give voice, simultaneously, to historic themes and relevant improvisations on who we are. In this way appellate practitioners in the American legal system play a role beyond their legal capacity in the administration of public and private justice. They can be political actors helping to shape, even in incremental ways, the national identity of the United States.