

Horace Mann Responds to Daniel Webster, 1850

No ye, that Solomon of the law, thought it not improper to say, 'The inferior law must give place to the superior; man's laws to God's laws.' -- *Maxim's* pp.6-7.

'The law of Nature,' says Blackstone, 'being coeval with mankind, and dictated by God himself, is, of course, superior in obligation to any other. It is binding all over the globe; in all countries, at all times. No human laws any validity, if contrary to this; and such of them as are valid derive all their force and all their authority, mediately or immediately, from this original.'--1. *Com.* 41.

Fortescue, the Chancellor of Henry VI, in his *de Laudibus Legum Angliae*, cap. 42, has the following passage, the consideration of which, in requital for Mr. Webster's advice to me, I respectfully comment to him:--

'That is a hard and cruel law which increases slavery, and lessens the liberty of mankind. Every feeling which God has given to man advocates liberty. God Almighty has declared himself the God of Liberty. This is the gift of God to man in his creation; but slavery is introduced into the world through man's wickedness and folly. Wherefore liberty, torn from man, always seeks to return to him, as it were, for the purpose of restoring him to his primeval state.'

Having defended my own propositions, I shall now take the liberty to examine some of Mr. Webster's.

He says 'the Constitution declares that in all criminal prosecutions, there shall be a trial by jury;' and that 'in suits at common law, the trial by jury shall be preserved.' He then adds 'there is no other clause or sentence on the Constitution having the least bearing upon the subject.' Mark his words: 'There is no other clause or sentence in the Constitution *having the least bearing on the subject.*'

Here Mr. Webster virtually declares that, but for the above-named two provisions, the right of the trial by jury would not have been secured to us by the Constitution in any case. Of course, Congress would have been under no obligation, even if they had any power to provide by law for such trials.

Were I to say that this assertion borders on the incredible, one might well ask, which side of the line does it lie?

The provision for trial by jury, *in suits at common law*, is in the seventh article of Amendment; and neither this provision. Nor any semblance of it, is to be found, in express words, in any part of the Constitution, as it came from the hands of its framers and was adopted by the States.

According to Mr. Webster, then, Congress had no power, and were under no obligation, to make a law providing for trial by jury, *except in criminal prosecutions*, until *after* the seventh article of Amendment had been ratified. For it they had any such power, or were under any such obligation, it must be by virtue of some clause or sentence in the Constitution, *having a 'bearing upon the subject.'*

Now, the first session of Congress commenced March 4th, 1789, but this seventh Article of Amendment was not ratified, and did not become a part of the Constitution, according to Hickey (Hickey's Con., p. 36) until Dec. 15, 1791.

Until this time, therefore, according to Mr. Webster, the Constitution had secured no right to a trial by jury, except in the case of *criminal prosecutions*; because until this time, there was no clause or sentence init 'having the least bearing on the subject' of jury trials in civil cases.

Yet on the 24th of September, 1789, and *more than two years previous to the adoption of the seventh amendment* (by which alone, according to Mr. Webster, they had power to act in the premises,) Congress did pass the judiciary act, by the ninth, twelfth, and thirteenth sections of which it is provided that the trial of issues in fact, in the District Courts, in the Circuit Courts, and in the Supreme Court, shall with certain exceptions, be by jury.

The act also empowers the Courts to grant new trials 'for reasons for which new trials have usually been granted in the courts of law.' In what courts of law? Did it not mean the courts in Westminster Hall, and those in this country formed after that ancestral model? And does this not show, beyond question or cavil, that the principle of jury trial *in civil cases*, was incorporated into the Constitution of the United States, originally; and that it was universally understood to-be so by its framers, and by their contemporaries, the members of the first Congress?

From the Constitution alone, then, and not from any power above it, or outside of it, did Congress derive its power, on the 24th of September, 1789, and more than two years before the seventh amendment was adopted, to pass the Judiciary Act, and to fill it full of fact and the doctrine of jury trial in civil cases. And if Congress, at that time, had legislated on the subject of fugitive slaves, would it not have had the same power to provide the trial by jury, to determine the question, slave or free, as it had to provide for this mode of trial in other cases?

All the State Conventions for adopting the Constitution, whose debates are preserved, and all the leading men who figured in them, held, contrary to Mr. Webster, that the third article in the Constitution, providing for Courts, carried the jury trials in civil cases with it. Mr. Marshall, afterwards Chief Justice Marshall, said in the Virginia Convention, 'Does the word Court only mean the Judges? Does not the determination of a Jury necessarily lead to the judgment of the Court? Is there anything which gives the Judges exclusive jurisdiction of matters of fact? What is the object of a jury trial? To inform the Court of the facts. When a Court has cognizance of facts, does it not follow that they can make inquiry by a jury? It is impossible to be otherwise.' -- 3 *Elliot's Deb.* 506.

The third article in the Virginia Bill of Rights was as follows:

'In controversies respecting property, and in suits between man and man, trial by jury is preferable to any other, and ought to be held sacred.'

This article being reading the Convention, Judge Marshall said *the trial by jury was as well secured by the United States Constitution, as by the Virginia Bill of Rights.* - id. 524. He said this in reference to civil-cases.

In the Massachusetts Convention, it was said, without a doubt being expressed from any quarter, that 'the word *Court* does not, either by popular or technical construction, exclude the use of jury to try facts. When people in common language talk of a trial at the Court of Common Pleas, or the Supreme Judicial Court, do they not include all the branches and members of such courts, the jurors as well as the judges? They certainly do, whether they mention the jurors expressly or not. Our State Legislators have construed the word court in the same way.' - 2 *Elliott's Deb.* 127.

Such was the doctrine maintained by the leading minds in the State Conventions; by Christopher Gore, in Massachusetts; by Judge Wilson, and Chief Justice McKean, in Pennsylvania; by Chief Justice Marshall, Judge Pendleton, and Mr. Madison, in Virginia; by Judge Iredell, in North Carolina, and many other distinguished persons.

In the Virginia Conventions, objection was made to the Constitution, because it did not *expressly* secure to the accused the privileges of challenging, or excepting to jurors in criminal

cases. But Mr. Pendleton, the President of the Convention, and for so many years the highest judicial officer in the State, replied: 'When the Constitution says that the trial shall be by jury, does it not say that every incident will go along with it? -- 3 *Elliott's Deb.* 497.

So when the Constitution provided for 'Courts,' and defined their jurisdiction, it clearly contemplated the trial by jury, in regard to all such rights of the citizen as had been usually, theretofore, tried by a jury. Congress, indeed, might fail to perform its duty, but in such case, no provision in the Constitution, however express and peremptory, would secure the rights of the people.

It is perfectly well known to every student of the Constitution, that the only reason why that instrument did not make *express* provision for the trial by jury, in civil cases, was the difficulty of running the dividing line between the many cases that should be so tried, and the few that should not. All were agreed that ninety-nine per cent of all civil cases should be tried by jury; but they could not agree upon the classes of cases from which the remaining one per cent should be taken.

In this connection, it is worthwhile to notice the heading or preamble of the Joint Resolutions for submitting certain proposed amendments to the States, among which was the seventh. It is as follows:

'The Convention of a number of the States having at the time of their adopting the Constitution expressed desire, in order to prevent further misconstruction or abuse of its powers, that further declaratory and restrictive clauses should be added; and as extending the ground of public confidence in the government will best insure the beneficent ends of its institution, RESOLVED,' &c.

From this, it appears that the first Congress only proposed to submit certain '*further declaratory and restrictive clauses*,' 'to prevent misconstruction or abuse of its powers.' This heading or title, of course, does not enlarge or limit the meaning of the amendment; but it shows the view of their scope and intentment which their authors held. But what is the seventh amendment but a 'declaratory and restrictive clause,' securing the trial by jury, in cases at common law, 'where the value in controversy shall exceed twenty dollars,' and abandoning it where the value is less?

The phraseology of the amendment is full of significance: 'The right of trial by jury shall be *preserved*.' Not created, but preserved. Not instituted *de novo*, but continued. How can a right be *preserved*, which does not already *exist*?

In speaking of the trial by jury in criminal cases, Judge Story uses the same word. He says it was 'preserved.' In neither class of cases, civil or criminal, was it ever abandoned or lost through the fault of the Constitution. If not always enjoyed by the citizen, it has been through the dereliction of Congress is not passing the requisite laws. The great men who submitted the seventh amendment to the States, treated the trial by jury, in civil cases, as a then subsisting constitutional right. -- They passed a law to put the practical enjoyment of this right into the hands of the people, well knowing that there is scarcely a right which we hold under the Constitution which we can beneficially possess or use, without the intervention of some law, as its channel or medium.

Suppose this seventh amendment had never been adopted, on what ground would the trial by jury in civil cases have rested up to the present day?

In asserting, therefore, that, besides the references he has made there is not another 'clause or sentence in the Constitution, *having the least bearing on the subject*' of jury trials, Mr. Webster is contradicted by the members of the General Convention, by the State Conventions, by

the Senators and Representatives, who passed the Judiciary Act, and by President Washington who signed it.

But another of Mr. Webster's assertions is still more extraordinary. He says, 'nothing is more false than that such jury trial [a trial by jury for an alleged slave, or for a freeman claimed as a slave] is demanded by the Constitution, either in its letter or in its spirit.'

I make a preliminary remark upon the amazing untruth embodied in the form of this proposition.

'Nothing is more false;' that is, if I, or any one, had affirmed that our Constitution forbids trial by jury, in all cases, under penalty of death; or that it creates a hereditary despotism; or that it established the Catholic religion with the accompaniment of the Inquisition for each State; or that it does all these things together; it would not be more *'false'* to the *'spirit'* of the Constitution than to say that it demands the trial by jury, when a man who is seized as a slave, but who asserts that he is free, invokes its protection.

But this pertains to the form only of his assertion. I proceed to enquire whether its substance be not as indefensible as its form.

In another part of Mr. Webster's letter, he says that he sees 'no objection to the provisions of the law' of 1793. Of course, he sees no objections to Mr. Butler's bill, and its amendments; but he prefers them to Mr. Seward's. And he now says, there is nothing in the letter or in the 'spirit' of the Constitution, which demands the jury trial for an alleged slave, or for a freeman captured, and about to be carried away as a slave.

Feeble and humble as I am, great and formidable as he is, I join issue with him on this momentous question, and put myself upon the country.

Our Constitution, as the present generation has always been taught, yearns toward liberty and the rights of man. The trial by jury, in the important cases of limb, life, or liberty, is essential to these rights. The two, therefore, have such close affinity for each other, as to render it highly probable, if not morally certain, that the framers of the former would make provision for the latter; that they would lay hold of it, as by a law of instinct, to carry out their beneficent purposes. The trial by jury was necessary to the vitality of the Constitution; and it would hardly be too strong an expression to say that the Constitution, as it came from the hands of its founders, necessitated the trial by jury.

The object for which the Constitution was framed, as set forth in its preamble, -- namely, to 'establish justice,' 'promote the general welfare,' and 'secure the blessings of liberty to the people,' -- could never be accomplished without trial by jury. The preamble is not appealed to as a source of power; but it touches, as by the finger, the objects which it contemplated; it suggests the means by which its beneficent purposes were to be fulfilled, and it indicates the rules of interpretation by which all its provisions are to be expounded.

And not only the objects for which the Constitution professes to exist, but historical facts from the time of Magna Charta, and before that time; the practice of the English and our Colonial and Provincial courts before the Revolution and during the Confederacy; -- in fine, all analogies and tendencies of constitutional laws, and whatever belongs to ideas of freedom, conspire to force the expectation upon us, that in a matter of such vast concernment as the life-long liberty or bondage of a man and his offspring, it has not left us without the right of trial by jury.

The very first law 'for the general good of the Colony of New Plymouth (1623),' was, 'that all criminal acts, and also all matters of trespass and DEBTS, between man and man, should be tried by the verdict of twelve honest men.'

In that fearful array of crises which the Declaration of Independence charges home upon the king of Great Britain, that sublime indictment enumerates the following as among the most flagitious: -- 'For depriving us, in many cases, of the benefits of trial by jury,' and 'for protecting his troops by a mock trial, from punishment for any murders which they should commit on the inhabitants of these states.'

According to Blackstone, the right to a trial by jury has been held, 'time out of mind,' to be the birth-right of Englishmen. The 29th chapter of the Great Charter guaranteed this right not only in cases of liberty, life, and limb, but in cases of property, real and personal.

In England, it has become a traditional saying, and drops from the common tongue, that the great object of Kings, Lords and Commons, is to get twelve men into a jury-box.

Judge Story says, 'When our more immediate ancestors removed to America, they brought this great privilege with them, as their birth-right and inheritance, as a part of that admirable common law which had fenced round, and interposed barriers on every side against the approaches of arbitrary power. It is now incorporated into all our State Constitutions as a fundamental right: and the Constitution of the United States would have been justly obnoxious to the most conclusive objection, if it had not recognized and confirmed it in the most solemn terms.' 3 Com. 652-3.

Is it conceivable, then, that the heroes and sages of the Revolution, who rose in resistance in the most formidable power on earth, so many of whom rose against their own kindred in the mother country, because they loved liberty better than father or mother, or brother, or sister, and who endured the privations and horrors of a seven years war - is it conceivable, I say, that, when they had achieved their independence, and there was no longer any earthly power to control them, they should have framed a fundamental law, and should not have imbued that law with the 'spirit' of the trial by jury, as its breath of life? As British subjects, they were entitled to this trial. As Americans, did they renounce it? Did they wage war for seven years in order to place themselves in a worse condition than they had been placed in by their 'tyrant'? Mr. Webster says they did. He charges this infinite folly and blindness upon them, singly and collectively, one and all.

Source: *Boston Liberator*, June 14, 1850.