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## No Taxation without Representation: A British Perspective on Constitutional Arrangements

## “NO TAXATION WITHOUT REPRESENTATION”: A BRITISH PERSPECTIVE ON CONSTITUTIONAL ARRANGEMENTS

THE RT HON LORD JUDGE<sup>†</sup>

Luck plays its part in all our lives. My mother gave birth to me in the tiny island of Malta in the middle of a bombing raid in which the hospital took a direct hit. At that time, Malta was the most bombed place on earth. Not so long ago my mother pointed out to me that she gave birth to me without there being any water or electricity, and that a bomb trajectory fifteen yards nearer to where she lay would have meant “no you, no me, and no daddy,” because my father was in the Royal Air Force, serving King and country, in World War II, and had broken curfew to be with her. Luck plays its part in all our lives, sometimes for good, sometimes for bad.

My mother is Maltese, and the present Lord Chief Justice of England and Wales is only half English. I am proud of both my heritages, and proclaim them. I still have memories of childhood, when my mother, who was—and remains—a firm admirer of England, would nevertheless turn to us children, and point out that we were half Maltese, and that this was “the better half too.” Or, when my father had annoyed her, when she would tell us that “we,” meaning the Maltese, “were civilised when daddy was covered in woad”—that is war paint. My father was a lovely man, and even as a child I knew that she was exaggerating. My father had never worn woad in his life. But I venture to discuss these aspects of my background, not merely to give you a true impression of a wonderful and loving childhood, but to suggest that I have been offered the opportunity of the wider perspective that ought to follow from mixed nationality.

And that brings me to the more important points. Where I touch on the affairs of the U.S., I offer my thoughts with due humility, apologising in advance with the inevitable—but I assure you, unintended—errors or insensitivities. And, having listened to the entire conference so far, for—perhaps—picking up the wrong end of a particular discussion. No offence is intended. What follows are my personal thoughts, as an outside observer—an admiring outside observer certainly—but no expert. I am profoundly aware that the true experts on your constitutional arrangements are here, among you.

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<sup>†</sup> Lord Chief Justice of England and Wales. This Article is based on the Lord Judge’s remarks delivered to the Tenth Circuit Bench & Bar Conference in August of 2010. Publication of this Article would not have been possible without the efforts and support of Judge Neil M. Gorsuch.

I was called to the Bar of England and Wales at the Middle Temple in London. So was the man credited with coining one of the most historic and symbolic phrases ever coined: "no taxation without representation," John Dickinson. He also wrote the Liberty Song in 1768:

"Then join hand in hand, brave Americans all,  
By uniting we stand, by dividing we fall."

Five American lawyers from the Middle Temple signed the Declaration of Independence.<sup>1</sup> The Americans were publicly supported, among many others, by Edmund Burke, a Middle Templar, and all were greatly influenced by William Blackstone, another. We know that the father of the great Chief Justice Marshall, to whom I shall come, subscribed to his own edition of Blackstone, and the Chief Justice referred to it in his seminal decision in *Marbury v. Madison*. Just to be clear that men of action as well as men of thought were involved, it was a Middle Templar, John Laurens, who fought at the battle of Yorktown and negotiated, as George Washington's representative, the surrender of the British forces. And when Washington was appointing his first justices to the Supreme Court, two were Middle Templars. Two of that hugely impressive line of justices from their day to this happened to have been with us. And it is indeed a privilege that Justice Ginsburg and Justice Sotomayor have been here.

Mrs. John Adams, the wife of the second President, would have approved. Her letters show how determined she was that the founding fathers should have recognised that half the human race was female. And what a tribute to John Adams himself that such a remarkable and wonderful woman should have loved him as she did. There must have been something very special about him, and indeed in my view there was.

Dickinson's first journey to England in 1753, in what was not much more than a wooden tub, took 59 days, 2 months. And he wrote home to his mother that he had been sea sick on 35 of them. My wife, Judith, and I arrived here after 9 hours in an aeroplane. But Dickinson, and hundreds like him, braved the elements. A lot of them rather enjoyed their visit to London, although according to Charles Carroll, perhaps a rather toffee-nosed young man from Maryland, there were "few young gentlemen . . . to be found of sound morals." Well no doubt, for young men then—as for young men always—wine, women, and song did not lack their attractions. The President of the first Continental Congress, who preceded the first President of the United States as the titular head of the infant Republic, was a Middle Templar. This was Peyton Randolph. So were two of the following Presidents of the Congress. Thomas McKean and Cyrus

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1. I am indebted to Judge Eric Stockdale from England and Justice Randy Holland from Delaware whose illuminating work, the *Middle Temple Lawyers and the American Revolution*, sets out this fascinating story.

Griffin. So were four drafters of the Articles of Confederation, so were seven of those who signed the Constitution.

I am not drawing your attention to these facts for the purposes of decoration. They matter to me personally because I believe that the rule of law which we all espouse comes from deep within the roots of our national histories. That is why they merit examination. The deeper the roots go, the more entrenched they become in the unconscious as well as the conscious soul of the nation. In our communities, the citizen does not merely hope for justice based on the rule of law, but expects and demands it. We live in happier lands just because these roots go so deep, and my thesis is that your roots did not begin in 1776, and you should not assume that they did.

One of the problems with history is that when we look back at what happened, we assume that what happened would inevitably have happened. I mean no disrespect, but even if the American War of Independence was destined to succeed, those who took part in it had no particular reason to believe that it would. It took great courage to sign up to it. As a Middle Templar, I am proud of my forebears who had the courage to take their stand of principle at an uncertain time when, if they had been unsuccessful, they would undoubtedly have been hanged. That was a point, I believe, explained by John Adams at one of the early Congress meetings when the chubby, future President pointed out to one of his skinnier colleagues that it would take him longer to die because he did not weigh so much. Benjamin Franklin made the same point. If they did not hang together, they would be hanged separately. That is something we can laugh at now, but for them it was not a joke. The risks were huge.

Of course, for the reasons given by Thomas Paine in *Common Sense*—that great seminal work—independence was bound to happen: but not necessarily then, not necessarily as an outcome of their particular struggle. Moreover, this particular war divided both nations. It was in truth a civil war. That is why William Pitt, who only a few years earlier had been the Prime Minister in London when the Colonists—that was what they were called then—fought side by side with British soldiers in the Seven Years War with France, was able, during the course of the conflict, in a speech in the House of Lords, to assert that America could not be conquered, and that he would seek to invoke what he described as the “genius of the constitution.” Edmund Burke, who was responsible for one of my favourite sayings, that the rule of law demanded the hearing of disputes before the “cold neutrality of an impartial judge,” confessed in *On Conciliation with America*, that he did not know “the method of drawing up an indictment against a whole people.” These were great Englishmen, who understood and spoke out in favour of the justice of the Colonist position.

Here, as we have seen, Peyton Randolph was the first President of Congress, a Middle Templar, but his brother John took a different view

of the struggle, and he went to live and eke out his days in sad exile in England. Yet his son, Edmund, became an aide to George Washington, and his first Attorney General. But if you want to understand that this was indeed a civil war, look no further than Benjamin Franklin himself. His achievements were manifold. But in view of the discussion here this week, perhaps I should point out that he changed Jefferson's mellifluous style in the first draft of the Declaration of Independence from "we hold these truths to be sacred and undeniable," to the much briefer, but the inescapable and ultimately incontrovertible words which echo to us down the ages: "we hold these truths to be self-evident." One word, or perhaps two, are always better than three, and the one he chose put the issue beyond argument. Returning to my theme, his son took the opposite side to his father. They never fought in battle, but except on one occasion to resolve the payment of a debt, I believe that they never spoke again. His son's son, that is his grandson, took the same view as Benjamin Franklin himself. Thus are the tribulations of civil strife imposed as a burden on contemporaries who have to live through it. For you, of course, an even greater civil war was to come. And by then we had had our own civil war.

These considerations enable me to suggest to you that some of the documents of English history which matter greatly to me, continue to matter greatly to you, and should be seen as part of the foundation of your nation. They include the Magna Carta of 1215, the Petition of Right of 1626, the Grand Remonstrance of 1641, and the Bill of Rights of 1689. Your constitutional roots include a civil war which culminated in the execution in 1649 of a monarch who proclaimed the Divine Right of Kings, and the removal of another in 1688 when he sought to subvert the constitutional changes consequent on the execution of his father. All these events influenced the thinking of the Colonists, and the constitutional arrangements which they were seeking to uphold. It was part of their history, as it is of our history. And that is why I respectfully suggest that it remains part of your history. But notice for the future: our civil war was a war brought about in a struggle about the rule of law. Could it possibly be that, in the Latin, *rex est lex* or *rex est lex loquens*? It was lawyers—not exclusively lawyers, but many of the most influential members of Parliament—who challenged the concept of the Divine Right were lawyers. By the end of the Civil War, there was a public trial of a monarch for waging war on his subjects. And we have the record. The King argued that the Court had no jurisdiction to try him. In constitutional theory, it was an arguable point. In practical terms, however, it was doomed to failure. And his execution demonstrated the reality of the 17<sup>th</sup> century observation, "be ye never so high, the law is above you."

May I go back: Sir Walter Raleigh, a man who saw a great future in the potato as well as tobacco, was a Middle Templar. I am not here on behalf of the Middle Temple to receive a writ in a class action. He re-

ceived a charter which enabled him to explore the east coast of America, which is now Virginia. Less important, his nickname was "Swisser Swatter." You may wonder how that came about. We are told that he was engaging in very close social exchanges with a pretty young lady in court, who began by saying "oh sweet Sir Walter," but who, as her rapture increased found herself confined to uttering "Swisser Swatter." And to think, that we thought that the joys of sex had only been discovered in the last century.

One of the ships which explored Virginia, and settled a small number on Roanoke Island, was captained by Phillip Amadas, another Middle Templar. His efforts were met by a fine by the Benchers on the basis that he was absent for longer than he should have been without permission. They presumably failed to understand that in those days timetables across the Atlantic were not very efficient.

Another link is Sir Francis Drake, who sailed the *Golden Hind* around the world, and in his circumnavigation explored the west coast of America, now California. Our records show that his "happy return" was greeted with much joy and acclamation at the Middle Temple. Francis Drake is famous in English history for his determination, when the news of the great Spanish Armada was approaching the coast of England in 1588, to finish his game of bowls, before returning to what became the great sea battle. If the Armada of 1588 had prevailed, the history of the U.S. would have been very different. There would have been no license to the Pilgrim Fathers. The common law, and its principles, would have been extinguished before they ever left the shores of England. Francis Drake did make one observation, which I offer you as still encapsulating a principle of life: "There must be a beginning of any great matter, but the continuing unto the end until it be thoroughly finished, yields the true glory."

When you are called to the Bar at the Middle Temple you sign the book, and I did, and so many of your forebears did, on a table made from a gun hatch of the *Golden Hind* itself.

Interesting as these considerations all are, one of the great heroes for us all, and that includes you, is Sir Edwin Sandys, who drafted the first Royal Charter granted to the Virginia Company in April 1606. Sandys was no supporter of the Divine Right of Kings. He was one of those who questioned and opposed it. He found himself in the Tower for his beliefs. But in 1618 he succeeded in obtaining the "Great Charter" for Virginia. This charter established the right of settlers, and any of their children born in the new colonies and plantations, to "have and enjoy all liberties, franchises, and immunities to all intents and purposes as if they had been abiding and born within this our realm of England." This language was later to be repeated as other colonies were established, including Maryland (1632), Maine (1639), Connecticut (1662), Carolina (1663 and 1665), Rhode Island (1663), and Massachusetts Bay (1691). And

these words, hardly surprisingly, led those with trained legal minds to question the constitutionality, or the legality, of the efforts of Parliament in London in the Eighteenth Century to curtail or diminish what they believed were their now longstanding rights. And the Virginia Charter similarly provided guarantees for the Colonists of "self government, freedom of speech, equality before the law, and trial by jury." Thus, it is that 1776 was not about abstract rights. It was about the preservation of what were believed to be existing rights.

One of the major complaints against the Stamp Act of 1765 was the deprivation of those charged with contravening its provisions of trial by jury. Another Middle Templar, Robert Goldsborough of Maryland, spoke of "acts and legislative aggression by the mother country." And here was the context in which Dickenson's great phrase, "No taxation without representation" was coined. And, echoing the dictum of Sir Edward Coke—one of my great predecessors—who, in 1616, was deprived of his office and hurled into the Tower because he responded to the King's belief that judges should be lions *under* the throne, that the judges would do what it was appropriate for the judges to do, and who had suggested in *Bonham's Case* that statute was not always supreme. James Otis of Massachusetts urged that "an act against natural equity was void." And John Adams himself told a judge who was doubtful about the possible nullity of an Act of Parliament, "tell the jury the nullity of acts of Parliament . . . I am determined to die of that opinion."

Am I the only person here who is moved by the thought that as long ago as 1618, a tiny band of individuals believed that concepts like freedom of speech and trial by jury actually mattered? At a time when such concepts would have been beyond the comprehension of any other contemporary society of which I am aware. And we all still believe it. Your constitutional arrangements—and ours—seek above all to ensure equality before the law. And in particular the concept that no one is above the law or may break it with impunity was established by our civil war: self government—what is now called democracy—should always be at work in our constitutional arrangements: freedom of speech as a matter of right, what President Roosevelt identified as "the first freedom"; and trial by jury, that no one should be liable to imprisonment for a serious crime unless he or she has publicly admitted it, or sufficient evidence has been produced to enable twelve of his fellow citizens to be convinced of his guilt. As Lord Devlin once memorably put it, trial by jury is the "lamp by which we know that freedom lives." These venerable and venerated concepts are an ineradicable part of the fabric of both our societies, and our constitutional arrangements are there to preserve and uphold the rule of law. Not, of course, rule by lawyers or by judges, but the rule of law itself.

In the United States you have a written constitution. Contrary to popular myth, we in Britain also have a constitution that is written. The

main difference is this: your constitution is embodied in a single document to which—as needs must—amendments or additions have been made over the years. Our constitution is not. It is largely, but not exclusively (but that would take a lecture of its own) to be found in statute, in legislation enacted in Parliament. In our system, Parliament is sovereign. It may—and in relation to all the great nations that were once part of the British Empire, like Canada, Australia, New Zealand and India—it ceded its theoretical sovereignty to another body: to a very limited extent it ceded some of its sovereignty to the European Court of Justice in relation to affairs arising in the European Economic Community. But ultimately in the United Kingdom it is sovereign. Our recent constitutional changes were produced by the Constitutional Reform Act of 2005. It had many facets, but notice the first and most significant is that it is an Act of Parliament. That process could not have happened in the U.S. Your constitution would have forbidden it.

The process for change began with an announcement by the Prime Minister that the Lord Chancellor's office would be abolished. In other words 1300 or 800 years (whichever it was, a very very long time) of history would be wiped out. The initial proposal was met with severe opposition in the House of Lords. The fact was that you could not abolish the office. No less than 400 statutes provided for the existence of this office. In the result the office of Lord Chancellor survived, but with radically altered powers. He is no longer the Speaker of the House of Lords, nor President of the Courts of England and Wales, nor the Head of the Judiciary, nor able to sit as a judge. Many of the responsibilities of the Lord Chancellor were devolved to the Lord Chief Justice. Thus the Lord Chief Justice is the Head of the Judiciary of England and Wales and President of its courts. He is responsible for representing the views of the judiciary to Parliament, to the Lord Chancellor, and to Ministers of the Crown as, and when, necessary. He is required to maintain appropriate arrangements for discipline, welfare, training, and guidance of judges—within the resources made available by the Lord Chancellor—as well as maintaining arrangements for the deployment of judicial office holders throughout the courts of England and Wales. He must negotiate with the Lord Chancellor a budget for the efficient administration of justice. But, above all, and I speak entirely personally, he must sit as a judge. For me that remains his primary responsibility.

All that may lead you to understand why I spoke with the passion that I did the other day about the need to manage time. I asked Judith's permission to refer you to Andrew Marvell's poem *To His Coy Mistress*. When I was a teenager I knew all the naughty bits, but now I cannot remember how long he intended to adore each of her breasts. I only remember that all around him he could hear "times wingéd chariot hurrying near."

This leads me on to point about which there was much discussion at the conference. Another major change of our new constitutional arrangements was the creation of an independent Judicial Appointments Commission ("JAC"). Effectively, the Lord Chancellor and the executive is deprived of involvement in judicial appointments. The Lord Chancellor is not a member, nor is he represented among the members of the JAC. In constitutional theory, every judge at every level is appointed by the Queen. So the Commission recommends the appointment to her. Perhaps I can tell you of the system for my appointment as Lord Chief Justice. The selection was made by a Commission consisting of two senior judges, the senior Law Lord and the Master of the Rolls, together with the Chairman of the JAC and her nominee, who could not be a judge. They did not present a slate of candidates from which the Lord Chancellor or Prime Minister could choose one. They put forward one name. The Prime Minister is entitled to decline to recommend that name to the Queen, provided he gives public reasons for doing so. If he does so, that would have been a veto on my appointment. But the nuclear option could be fired once: if it had been fired, the Commission would then have met again, and the Prime Minister would then have had no option but to put that name forward to the Queen for appointment. Similar processes follow for all the senior Heads of Division and the members of the Supreme Court. Although for appointment to the Supreme Court—which is the final court for Scotland and Northern Ireland as well as England and Wales—the head of the JAC for each of those countries forms part of the selection panel.

I like to think that the selection of our judges and in particular the senior judiciary is now as immune from the political process as it is possible to be in a democratic society.

Another change related to the removal of Lords of Appeal in Ordinary from the House of Lords, and the creation of the new Supreme Court of the United Kingdom. The previous members of the Appellate Committee of the House of Lords became the first members of the Supreme Court, and the Senior Law Lord became its first President. This provision consolidated, in constitutional theory, the separation of the judiciary from the legislature at the highest level. I hasten to add that it did not turn a group of twelve lambs into lions: for years there has been government complaints about the way in which—putting it shortly—the Law Lords had failed to implement government policy, and frustrated exclamation by politicians about judges frustrating the will of Parliament. The old Law Lords were lions alright. And they did not change when they moved premises. Nevertheless the new Supreme Court has not been vested with any additional power to the jurisdiction and authority enjoyed by the Appellate Committee of the House of Lords: and there has been no diminution in its powers either.

The result is that the final court in Britain, the Supreme Court, does not enjoy the constitutional authority of the Supreme Court of the U.S. It cannot strike down, and has never yet sought to strike down, legislation properly enacted. There is a developing theory that any legislation which can properly be said to be "unconstitutional" may be open to question, but this is being tentatively explored in judgments. It has nothing to do with the Constitution Reform Act itself.

Be all that as it may, as things stand, the role of your Supreme Court in what in truth are social questions is, to British eyes, quite remarkable. Let me take one example: the question of termination of pregnancy, issues of life and death, and the dignity and autonomy of women. The attitude of the law to these questions tells us much of what sort of a country we are. For us, the issue of abortion was resolved by an Act of Parliament, the Abortion Act of 1967. For you, the issue has been resolved by the Supreme Court. Am I wrong to understand that a five to four vote of unelected judges represents the law which governs "we, the people"? This is not a criticism. I am merely identifying an important difference. And I shall offer my own theory for the difference in a moment.

This question of judicial voting in your Supreme Court led to an element of the discussion at the conference which troubled me. I hate the word "ideology" to be applied to any judge. Surely every judge applies the law as he or she conscientiously analyses it.

Any politicisation of the process is fraught with danger. Judges are not politicians. They are independent of the political process. And the appointment of judges should not give anyone the opportunity for political posturing, let alone political preference. I recognise that within your constitution the functions of the Supreme Court are fundamental, whereas if our Supreme Court reaches a decision of which Parliament does not approve, Parliament can enact whatever amending provision it likes. Nevertheless if the process of appointment to your Supreme Court were the process in England and Wales I should be immensely troubled, and for this reason. The more we allow the appointment of judges to become part of the political process, the quicker the judiciary will become subsumed in it. And what price then, judicial independence?

But how has all this come about? In my view—but I do not claim any scholarship—the differences are a consequence of the circumstances which obtained in the 1770s, and the very early days when the new republic was working out its own destiny. My thesis is that in England we granted ultimate sovereignty to Parliament because it was through Parliament that we sought to curb the divine right of kings, first in consequence of the ancient arrangements which prohibited the imposition of taxation without parliamentary consent—"no taxation without representation" indeed—and then, as the claim for privileges and protection grew when Parliament refused to endorse the King's request for additional taxation without some concession from him, and ultimately by going to

war. In other words, in our arrangements the potential for tyranny was gradually removed by insisting on the parliamentary legislative process, and victory in battle. In your situation, many years later—as we have seen from Goldsborough, and Otis, and Adams, and perhaps most important of all, from Jefferson's first draft of the Declaration, which directly attacked Parliament—Parliament was undoubtedly perceived to be integral to the problem. Central to your grievances was the Stamp Act, an Act of Parliament, not simply the diktat of a monarch, like the demand for ship money was. Your ancestors were claiming the same right not to be taxed unless they were represented which had been established, as they believed, in their constitutional affairs for years: now it was being taken away. And if that was being taken away, so could all the other immunities and privileges and principle, such as trial by jury, and so on. In the 1760s and 1770s, Parliament in London appeared to be unwilling or unable to see that the position of the Americans was entirely consistent with established constitutional principles. For you a sovereign Parliament was the problem. It could therefore not be the solution.

Consciously or unconsciously, the founders of the Constitution decided on a method of limiting or controlling not only the executive, but the legislature. For these purposes, the principle of separation of powers provided the answer—at any rate in the sense of expressed constitutional theory by John Locke at the end of the 17<sup>th</sup> century—formulated when we in England were enmeshed in the development of a constitution based on our own Bill of Rights. The celebrated French philosopher Montesquieu, who examined the English constitutional system in the 18<sup>th</sup> century in the context of contemporary France: where the king was untrammelled by the equivalent of Parliament, and enjoyed dictatorial powers, perhaps best encapsulated in the—to our eyes—repugnant *lettres de cachet*. He, like Voltaire, believed that the solution to the dangers of an absolute monarch had been achieved in England and attributed them to a concept of a separation of powers which did not, and never had—and indeed never has—existed in England. All this shows that you should never doubt the value to lawyers of a legal or political theory which perfectly appears to address what their instincts tell them is needed. But so it was, that the separation of powers assumed such crucial importance in your arrangements.

The world does not love lawyers. It never has and it never will. Sometimes the world is right, of course, but sometimes it is wrong. In his early years, William Shakespeare wrote the history of the reign of King Henry VI in three parts. These are blood infused offerings: that is what his audiences wanted. In the whole of these three plays there is but one joke. A rebellion led by Jack Cade comes into London, intent on trouble. And when the rebels are mingling among themselves and asking how they should begin, Shakespeare offers the immortal line “let's begin by killing all the lawyers.” And indeed in historical fact they did attack and

destroy much of what is now the Temple, where the lawyers were already congregating. In the theatre everyone laughs. And it is a good joke, but that rebellion is followed by the most terrible bloodshed. I shall come back to it.

But what I suggest is striking about your revolution—and ours—is this. Of course it was war. Men died and were maimed. There was much suffering and much heroism. But when it was over, it was over. After the execution of the king, I do not for a moment suggest that life was comfortable for his supporters, but when the fighting ended, they were not rounded up and killed after a series of ritual trials. After your War of Independence, those who supported the defeated king and Parliament were allowed to leave if they wished. Again there was no rounding up and series of ritual trials. Contrast that with the French Revolution which occurred less than 20 years later than your own, or the Russian Revolution and the pogroms which followed them and the slaughter of different classes of citizens. Is it too utterly fanciful to believe that these truly were wars intended to establish legal principles by which the country should be governed, and that the participants were genuinely not after power for its own sake, and certainly not after absolute power, but for power to be exercised within constitutional restraints? I think so, and both our communities are indebted to this focus on legality.

After your war was won, one critical constitutional issue and one critical social issue remained unresolved. The role of the judiciary did not require to be addressed in those very early days, when a war had to be fought and the peace properly secured. But when the issue did come to be resolved, what was at heart was the success, or otherwise, of Jefferson's campaign against the federal judiciary. In England we have a saying, "cometh the hour, cometh the man." For you that hour was 1801, and the man was Chief Justice John Marshall. In the history of the common law, his is one of the greatest and most influential of names. Probably more than any other judge—or to be fair to his brothers, any group of judges—and probably more than any other leader of a group of judges, in the decision in *Marbury v. Madison* his judgment established the constitutional arrangements and defined the role of the judiciary within an infant democracy. It was, in truth, law creation. Even for the moment ignoring the lecture to the Jefferson administration about the rule of law, he in effect returned to Sir Edward Coke in *Bonham's Case* and, as you all know, asserted, that it was for the court to interpret the Constitution. It is just worth repeating my emphasis on the distinction between interpreting the law as expressed in statute or at common law and applying it (the role of the court in England and Wales) and the authority to interpret the very constitution itself (the role of the Supreme Court). It is this that brings into stark focus such issues as the right of a woman to terminate a pregnancy, not as a matter of legal right capable of alteration or amendment through Act of Parliament, but as a matter of constitutional entitle-

ment in an arrangement in which amendments to the Constitution are—and in reality, can only be—events of extreme rarity.

Jean Edward Smith, in his biography of John Marshall, summarised the distinction between the tradition established by John Marshall and our tradition in this way:

The English tradition held that the great constitutional documents of British history were purely political statements that lay in the realm of Parliament to interpret, not the courts. Jefferson subscribed to that view: so did Jackson and even Abraham Lincoln doubted the authority of the Supreme Court to resolve fundamental constitutional issues in the course of ordinary litigation . . . Marshall took the opposite position . . . he consistently held that the Constitution was law.

But I want to highlight this remarkable feature. This was an infant republic, beset with problems, not bound to survive, fortunate that Britain was concentrating on the defeat of Napoleon who had subjugated the entire mainland of Europe. I am not perhaps wholly able disguise that I do not share the view that Jefferson should be sanctified. Personally I prefer Adams. But, I cannot withhold my admiration for Jefferson's sense of constitutional propriety, that notwithstanding the public lecture on the rule of law, and his profound disagreement with Marshall's decision, after what I regard as a show of defiance, the decision itself was allowed to stand. In the long-term that secured the rule of law in the U.S. I hope that a modern politician, elected to power in our countries, would comprehend why in similar circumstances it would be appropriate to do what Jefferson did.

There remained, of course, the social question. The issue of slavery was not resolved. It still rankles a little that in the first draft of the Declaration, a Virginian slave owner raged against slavery. It is even more ironic, given that at the very time when there were those in Parliament who were supporting the American cause, there were others who were seeking to attack the slave trade. And indeed the great case of *James Somersett* in 1772—heard before another of my predecessors, Lord Mansfield—following an earlier decision from the reign of Elizabeth I herself, finally and through a complicated process, established that the ownership of a slave in England was incompatible with the laws of England, irrespective of any legal claim which might be valid elsewhere. There could be no property in another human being. But with all that said, it is easy now for us to be critical of failure to address the slavery issue in the early constitutional arrangements. And we know, that it all culminated less than 100 years later in the ghastly catastrophe of your civil war.

May I just return to Shakespeare's early Henry VI plays. They are far from his greatest plays. We all know about his portrayal of human fallibility and frailty in its many manifestations in *Macbeth*, *King Lear*,

Othello and Hamlet and the rest. But I venture to suggest that there is nowhere in the entire canon of Shakespeare's plays where the condition of common man is better portrayed than in his description of civil war: none better than the haunting scenes where one soldier pulls a body on to the stage, and then unmasking his enemy, discovers that he has killed his father, followed by another in which another soldier pulls a dead body on to the stage, and after congratulating his opponent on his toughness in the fight discovers that he has killed his son. These are haunting scenes, filled with pity. The son remembers that he will have to tell his mother what he has done, and the father remembers that he will have to tell his wife that he has killed their boy. Although no mother or wife appears on the stage, Shakespeare is able to convey that each of these women is there—but invisible, not actually on the stage—weeping the bitter tears of the lifelong grief that lies ahead, truly part of the dreadful lamentable scene, symbols of the nameless but innumerable victims of the ghastliness of a civil war.

My respectful view is that the founding fathers had little choice. If the slavery issue had been addressed the cause about which they were united would have been paralysed: with such deep seated divisions, we might never have had a "United" States of America, but rather a continent of North America, fragmented to different states. Indeed the history of the world in the last century would almost certainly have been different, and not for the better.

With the greatest of deference I suggest that these appalling sacrifices of this civil war were not in vain, and that all who died must be honoured. Their sacrifices should be regarded as part of the price of your independence, your nationhood, your Constitution, and the greatness of your country, exactly as forecast by John Adams, now carrying the immense burden that it does, as the most powerful nation on earth.

My country once performed this role. It was known as Pax Britannica. That is no longer our role. No one loved us very much for it. Everyone can find fault with it. And of course we made mistakes, but there were a great number of plusses in the ledger too. You too will now attract criticism, even when it is not deserved. If one of your young men or women behaves in a way which all of you would find unacceptable, the pictures flash around the world: there are no pictures of the brave young man or woman who, at great personal risk, steps in to save the life of a child in some foreign country. So your mistakes will be highlighted and magnified, and the blessings you provide will largely be ignored. To be the most powerful nation on earth is indeed a thankless task. Well, you do not, and will not, lack for thanks from me.

