

May 1948

# The Judiciary in a Changing World

Fred L. Fox

*Supreme Court of Appeals of West Virginia*

Follow this and additional works at: <https://researchrepository.wvu.edu/wvlr>



Part of the [Courts Commons](#), and the [Transportation Law Commons](#)

---

## Recommended Citation

Fred L. Fox, *The Judiciary in a Changing World*, 51 W. Va. L. Rev. (1948).

Available at: <https://researchrepository.wvu.edu/wvlr/vol51/iss2/3>

This Article is brought to you for free and open access by the WVU College of Law at The Research Repository @ WVU. It has been accepted for inclusion in West Virginia Law Review by an authorized editor of The Research Repository @ WVU. For more information, please contact [ian.harmon@mail.wvu.edu](mailto:ian.harmon@mail.wvu.edu).

## THE JUDICIARY IN A CHANGING WORLD\*

FRED L. FOX\*\*

The subject of this address, the judiciary in a changing world, would seem to call for some limitations. Generally speaking, my remarks are intended to be confined to our own country and, as to time, to cover the period of our country's existence as a nation; for, in my judgment, the changes which have transformed government and life on this continent first began to move and work effectively when the Continental Congress promulgated the Declaration of Independence.

Political and individual liberty, now so firmly established in this country, and which we are determined to preserve, had its foundation in the Declaration of Independence. It is not meant that there had not been, prior to 1776, advancements in government and in individual liberty, and in respect to limitations of power, imposed by the people upon those selected to govern them. The Magna Charta, the Great Statutes of Edward I, the English Commonwealth under Cromwell, the Declaration and Bill of Rights of 1688, and the established dominance of the British Parliament had established a system in which there was deeply imbedded the ideas so eloquently and forcefully expressed in our Declaration of Independence. What we did was to build on the foundation so laid.

What of a changing world? In the world of government and ideas following the Declaration of Independence, came the Constitution of the United States, including the first ten amendments constituting our federal bill of rights. Next was the War of 1812 which, for the first time, made it certain that we would no longer be tributary to, or an adjunct of, any European power. Then followed the Louisiana Purchase, the admission of Texas as a state, the Mexican War and the annexation of California and the southwest, the settlement of the far northwest territorial dispute which rounded out our territorial boundaries, the great constitutional dispute over the rights of the states, involving slavery, the final settlement of which came with the end of the war between the states, the Spanish War, after which we first became recognized as a great power, the First World War in which for a time we departed from our policy of isolation to play a great part in world affairs, only to fall back into a greater and less excusable isolation than before, and finally the Second World War through which our people, by a practically unanimous voice, have once again taken not only an outstanding position in world affairs but by universal demand our government has

---

\* Address delivered on Alumni Day, 1947, at the College of Law.

\*\* Member of the West Virginia Supreme Court of Appeals.

been asked to assume the leadership of that portion of the world which stands for the democratic theory of government.

In the material world, the changes have been no less important. First, there was the steamship; next came the railroads, then the telegraph; later the telephone, the radio and the screen; the automobile and the airplane; the marvelous discoveries in chemistry; the production of electric power; the use and application of liquid fuel to motor-driven vehicles, through the development of the petroleum and natural gas industry, resulting in our system of highways which is far beyond the dream any Roman ever had.

With these changes in governmental and material things, there have been no less remarkable changes in the ways of our people, through improvements in education, opportunities for recreation, communication in all forms, refinements in the manner of living and, with it all, let us hope there has come an increased devotion to the ideas which have made this our present favored situation possible.

It must be understood that at the date of the adoption of our Federal Constitution, each of the thirteen independent states had a judicial system which had been transplanted from England and was based upon the English common law. The judiciary in the several states had a high standing, attracting to its service the ablest men of that day. There were disputes in the Constitutional Convention as to the exact form our government should take, mainly over the power and tenure of the executive and the election and tenure of the members of the Congress; but there seems to have been no dispute as to the necessity for a judiciary as a branch of the government. The result was that this government was established upon the theory of three separate and independent branches, the legislative, executive and judicial, and upon the theory that each should be wholly independent of the other and that each should operate as a check and balance upon the others.

It is interesting to note how few words were used in the Constitution of the United States to establish the federal judiciary. The language is contained in sections one and two of Article III of the Constitution. Section 1 provides that:

“The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish . . .”

Section 2 that:

“The judicial Power shall extend to all cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;— to all Cases affecting Ambassadors, other public

Ministers and Consuls;— to all Cases of admiralty and maritime Jurisdiction;— to Controversies to which the United States shall be a Party;— to Controversies between two or more states;— between a State and Citizens of another State;— between Citizens of different States;— between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects . . .”

The grant of judicial power was the important thing. This leads to the question: What is meant by “judicial power”? No one has ever been able to arrive at a satisfactory definition of that power, although many attempts have been made along that line. In a case recently decided by the supreme court of this state it was stated:

“It is the power which a regularly constituted court exercises in matters which are brought before it, in the manner prescribed by statute, or establish rules of practice of courts, and which matters do not come within the powers granted to the executive, or vested in the legislative department of the government.”<sup>1</sup>

To some extent, it depends upon the judges and the courts which administer the power, although courts should always and in the main do exercise their powers with due regard not only to other departments of the government but to the individual rights of citizens as well.

As stated, the courts of the several states stood high in the estimation of the public and the greatest men of the day aspired to be members thereof. Many preferred positions on state courts to membership on a federal court, even the Supreme Court of the United States. President Washington had difficulty in organizing the first Supreme Court of the United States, which was composed of six members. The first task was to select a chief justice. James Wilson of Pennsylvania, John Rutledge of South Carolina, William Cushing of Massachusetts, and John Jay of New York were all considered. Jay was finally selected. The associate justices were William Cushing, James Wilson, John Blair of Virginia, James Iredell of North Carolina, and John Rutledge. That position was offered to Robert Hanson Harrison of Maryland, who declined it because he had an opportunity to become chief justice in his own state. John Rutledge afterwards resigned to accept the position of chief justice in the state of South Carolina. John Blair soon resigned and, as is well known, the chief justice, after first being appointed to negotiate the English Treaty, was elected Governor of New York and resigned as chief justice.

The court first met in New York on February 1, 1790, and the first case of national importance was *Chisholm v. Georgia*,<sup>2</sup> a case which in-

<sup>1</sup> State v. Huber, 40 S. E. (2d) 11, 18 (W. Va. 1946).

<sup>2</sup> 2 Dall. 419 (U. S. 1793).

volved some action of the state of Georgia in respect to lands granted by it. The question involved was whether a citizen of a foreign state could maintain a suit against a state or a citizen thereof. Section 2 of Article III of the Constitution apparently sustained that right, and the Court so held; but its action was within the next few years overruled by the adoption of the Eleventh Amendment to the Constitution, which provides that:

“The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.”

This amendment became effective on January 8, 1798.

John Jay resigned June 29, 1795, and John Rutledge, named to succeed him, took office on August 12, 1795, and held one term of court before the Senate acted upon his nomination. That body rejected him, because he had criticized the Jay Treaty with England. The position was then offered to Patrick Henry, who declined it. William Cushing, an associate justice, was then appointed and declined. Oliver Ellsworth, who drafted the Judiciary Act of 1789, was finally selected and confirmed. In 1800, he resigned his office on account of ill health and the position was first tendered the first chief justice, John Jay, who declined it. The President, John Adams, as second choice, appointed John Marshall, on January 20, 1801, and after an intense battle in the Senate he was confirmed.

It is evident that John Marshall, a Revolutionary soldier, a distinguished lawyer, a one-time member of the House of Representatives, and for a short time Secretary of State, thought something could be made of the federal judiciary, and, under his leadership, it began to throw its weight around, to the consternation of many people, including Thomas Jefferson and his followers, all of whom mistrusted the courts, fearing the arbitrary use of the constitutional powers granted to the judiciary.

The first great test of judicial power came in the case of *Marbury v. Madison*,<sup>3</sup> wherein was first announced the principle that the Supreme Court of the United States had the power to declare unconstitutional an act of Congress, a doctrine which, though rarely applied, has stood the test of years, although occasionally people still grumble and complain that the exercise of this supposed right is an unwarranted assumption of power on the part of the judiciary. I shall not undertake to discuss the soundness of the decision, except to say that such a rule seems

---

<sup>3</sup> 1 Cranch 49 (U. S. 1803).

to be imperatively necessary if any restraints whatever are to be placed upon legislative power.

Another great case was *Trustees of Dartmouth College v. Woodward*,<sup>4</sup> wherein the right of a legislature to destroy contract rights under a charter issued by the Crown was denied, and the force and sanctity of contracts was once and for all upheld. In *McCulloch v. Maryland*,<sup>5</sup> the right of a state government to tax an instrumentality of the Federal Government was denied, recalling to mind the famous remark, questioned later by Justice Holmes, that in some instances "the power to tax involves the power to destroy." Another case was *Gibbons v. Ogden*,<sup>6</sup> in which the right of the federal government to prevent any state from monopolizing navigation on the waters within such state was asserted and upheld under the commerce clause of the Constitution. We who have seen the wide extension of the rights of Federal Government under the commerce and taxing clauses of the Constitution wonder why there was so much to-do over the decision in the *Gibbons* case; but it was at that time considered a landmark in judicial history. Then came the case of *Charles River Bridge v. Warren Bridge*,<sup>7</sup> a case where an effort was made to prevent the erection of a bridge near the Charles River toll bridge between Boston and Cambridge, in which, after long arguments and many years delay, it was held that the right to erect needed public improvements was not to be denied because of the existence of other improvements of like nature, the value of which might be affected by the new enterprise; thus opening the way to that era of construction of railways, bridges, and other public utilities which have done so much to develop this country. The doctrine of this case is now somewhat limited by the modern rule touching certificates of convenience. Then came the famous *Dred Scott* case,<sup>8</sup> in which the Supreme Court attempted to settle, as it thought once and for all, the slavery question as it related to the territories. This proved to be a futile effort and the political questions decided by the court in that case were overruled through the blood and sacrifices of the War between the States which soon followed.

Up to this time the judiciary of the states had advanced its power and prestige, in keeping with that of the federal judiciary, and had adjusted itself to the changing conditions of the times.

The remarkable expansion of business and developments of all kinds which followed the war created many new problems, the first of

---

<sup>4</sup> 4 Wheat. 518 (U. S. 1819).

<sup>5</sup> *Id.* at 316.

<sup>6</sup> 9 Wheat. 1 (U. S. 1824).

<sup>7</sup> 11 Pet. 420 (U. S. 1837).

<sup>8</sup> *Scott v. Sandford*, 19 How. 393 (U. S. 1857).

which was the so-called legal tender case,<sup>9</sup> involving the currency issued by the United States to finance the war; then came questions relating to the regulation of public utilities, principally the railroads; then followed the Spanish-American War, out of which arose the question of the right of the federal government to hold and govern the territories acquired by conquest and purchase from Spain; the income tax case; important cases affecting industry and labor; the control of great aggregations of wealth and monopolies developing therefrom; the emergency and war-time powers of the government; all made necessary by changing conditions which time does not permit me to outline. These problems were met as they arose and have been resolved within the framework of the constitutions and laws of the land.

With this record, marred by few errors, the high place of law and judiciary, state and national, in our system of government seems recognized by all of our people. It has met the challenge of changing conditions. Generally speaking, the judiciary is deservedly respected. Occasional disagreements with certain tendencies on the part of courts and judges are overlooked or condoned, in the hope that things will in time right themselves as they always have. No one now questions the importance of, and the imperative need for, the judiciary if our system of government is to endure permanently. We know that the existence of the judiciary is absolutely necessary to the application and enforcement of law, for, as Webster once said, "Whatever government is not a government of law, is a despotism, let it be called what it may." There cannot be a democratic form of government without a legislative, an executive, and a judiciary.

It cannot be said that during this period men have not been inclined to criticize and question the assumption of power by the courts. This criticism has not always been confined to unlearned groups but has often been indulged in by men who should have known better. It seems to be a characteristic of strong men that they resent interference with their plans, from whatever source it may come. So great a man as Thomas Jefferson distrusted and criticized the courts. Andrew Jackson was characteristically rebellious when his plans were interfered with. President Lincoln showed little respect for some of the fundamental rules of law when, in war time, he thought ignoring them was necessary to preserve his country; and in that position perhaps he was right. The first President Roosevelt toyed with the idea of the recall of judicial opinions by popular vote. President Wilson was impatient of court restraints. And the same tendency may be fairly attributed to a great

---

<sup>9</sup> Legal Tender Cases, 12 Wall. 457 (U. S. 1871).

president of more recent days. The same is true of great executives and men in all walks of life trained to exercise great power in private affairs. In fact, it is one of the faults of our people that, instead of paying proper respect to law, they too often attempt to evade and avoid its restraints and sometimes openly defy law. But, be this as it may, courts have come through all the trials, the changes, and the criticisms of the years with their powers and dignity unimpaired.

It is sometimes said that courts are affected by the changing tide of opinion, and Mr. Dooley once said, in effect, that "the Supreme Court follows the election returns." This was probably not true of the Supreme Court or of any other court; and yet, I do not doubt that courts adjust themselves, as they should, to changing conditions and even to permanent changed opinions of the people. Carried to extremes, this would be a dangerous tendency, because courts are expected to decide cases upon principle and right and not to conform to wavering public opinion, which may tend one way today and another way tomorrow. But if, as with us, the people are all-powerful and their opinions on public questions are once fully and maturely determined and applied, a court which unnecessarily places itself in their way acts unwisely and will in the end have to change its course, although the better way is to register such changes through public influence on the legislative branch of the government.

I am not one of those who believe that a weak government is the best government, although the *laissez faire* doctrine that "The less government we have, the better," or "That country is governed best which is governed least," should not be wholly cast aside. We are probably over-governed. There is too much interference with the strictly private affairs of our citizens, too much regulation in matters which have no appreciable connection with the common weal; but it is fair to say that this situation has come about through public demand for governmental control of many things which could be safely entrusted to individuals and private agencies. But, to the extent that we call upon government for the handling of our problems, the separate departments within their prescribed limits of power should be strong and firm, not weak. A weak government invites the organization of subversive movements leading to its destruction. We cannot expect a strong and efficient government where all its departments or branches are weak or uncertain of their powers. Look at France. Within their respective functions, as defined by the Constitution, we need a strong executive, a strong legislative body, and a strong, and above all a courageous and independent judiciary. Nothing involving ruthless or arbitrary power is advocated but strength and firmness in the exercise of powers legally entrusted to each of them and with



due regard to the separate powers vested in each. No branch of our government should willingly permit any other branch to encroach upon the powers entrusted to it. The division of powers cannot safely be cast aside as unimportant. The checks and balances so important in 1787 are just as important now.

The judiciary should proceed with a firm determination to exercise, in accordance with the constitution and laws enacted thereunder, all the judicial power placed in its hands by state and federal constitutions. It should guard against encroachments on that power on the part of either the legislative or executive branches while at the same time exercising the utmost care not itself to encroach upon the rights and powers of either of the other two coordinated branches of the government. A division of power and the checks and balances derived therefrom provide, in my opinion, the firmest safeguards for the future. If we cast them aside, or merely ignore them, sooner or later the legislative or executive power will become dominant, the courts will be relegated to desuetude, and some form of totalitarian government will follow, leading in the end to despotism. All history upholds this view.

Another thought is important. Montesquieu has said that "The deterioration of government begins with the decay of the principles on which it was founded." The deterioration of this government, if it occurs, will begin when we depart from the sound principle of separation of powers and destroy the checks and balances provided by our Constitution. These departures will lead to arbitrary and unrestricted power, a thing never intended by the framers of our Constitution, and against which, with every power of mind they possessed, they sought to guard.

Speaking of the future, there are dangers which confront the judiciary which must be firmly met. They are not direct attacks. If they were, they could be easily dealt with because the people realize the importance of maintaining courts in their power and dignity. Among other dangers, there has grown up in this country of necessity what is termed "administrative law." The complexity of government created through demands for its extension and expansion to the ordinary affairs of life calls for some expansion of executive and legislative power in matters which in former days had been dealt with through resort to the judiciary. I see nothing wrong with this tendency, provided administrative laws are enforced within the spirit and framework of the Constitution and the statute laws of the land. What I fear is that under administrative law there may be lost that sense of restraint which should govern every public official, and the ever-present tendency of bureaus and commissions to become ruthless and arbitrary. This tendency should be checked and, if necessary, the courts should exercise their full powers to impose

the necessary restraints, to the extent that the rights of individuals, firms, corporations, and associations alike should be given that fair and honest administration of the law which it is the purpose of our government to assure to its citizens.

We are confronted with a new day in the physical world. The average man knows little about the atom and the release of atomic power. There is a general recognition of the dangers that it involves but there is hope that, if wisely used, it may be of benefit to mankind. It may change the world for good beyond any of our present conceptions of change; but, on the other hand, if unwisely used, it may destroy our present civilization. The problem is one for the government as a whole but the government is made up of three branches, in which the judiciary is an important part, and I have no doubt that the changes brought about by this great scientific discovery will raise problems which the judiciary, in company with the other departments of government, will be called upon to solve. I apprehend that the genius of our people will in the end find a way out of any difficulties it may raise.

Another danger with which this country is confronted and which we cannot ignore is the spread of communism throughout the world. Communism is not a new thing. Men and women have attempted to practice it in all ages of the world; but not in the vicious and virulent form which it has assumed in these later days. We have established on this continent a democratic form of government in which the rights of the individual are made paramount. Communism, as presently practiced and advocated and sought to be imposed by force upon the world, is the antithesis of everything that democracy, liberty, and the moral law stand for. All of the dreams of older communists of love and assistance, one to another, are cast aside and today a communistic government is one where few people take charge of a country and impose upon it and its masses an arbitrary and despotic rule. Their purposes are accomplished by trickery and deception. They seek to reach the heart of things, the sources of power, and from that position by subtle methods of control create situations where the masses are made helpless. The association and assembling of the people is denied; the courts are made ineffective; all individual liberty is destroyed. It amounts to a conspiracy to terrorize and enslave the peoples of the world.

The first law of nature is that of self-preservation. I know of no principle of morals or justice, or any sound rule of government, which requires the courts of this country to remain neutral in a contest in which is involved the very existence of our government. I doubt whether the guarantees of our Constitution and our system of laws generally

which grant liberty of opinion should be extended to those who do not confine their efforts to effect a change in government by peaceful means but who seek to destroy it through deception, trickery, the undermining of all law, and ultimately through force. Men who practice or encourage communism in this country in this day are guilty of moral treason and are entitled to no more consideration in public esteem than if convicted of waging war against this country or giving to its enemies aid and comfort. But, even so, men charged with actual treason are entitled to their day in court and to the benefit of the laws they seek to destroy.

The place of the judiciary in a changing world is what it has always been. It derives its power from the experiences of all the centuries past and in each of them men, sometimes few in number, have sought to reason out how rules, written and unwritten, could be developed under which men could live in peace and contentment and go about their affairs with the assurance that the fruits of their labors should be theirs to enjoy, save only that part necessary to the maintenance of government. In the course of these efforts, there has been added those great written documents, such as the Magna Charta, the English Bill of Rights, the Declaration of Independence, and our Federal Constitution; and under the last named, and under the constitutions of the states, laws have been enacted by the Congress and by the legislatures sometimes extending and sometimes limiting judicial power. It may be expected that in a changing world the future will develop new conditions creating new questions, which some one must solve. Attempts at their solution will no doubt first be made through the legislative branch; but courts will be called upon, not only to interpret new laws or apply existing laws to new conditions, but to point the way for the enforcement and extension of all laws. Then the extension of government will call for the exercise of administrative laws and courts will be called upon to see that such laws are administered within the framework and spirit of the constitutions, state and federal, to the end that no man be deprived of life, liberty or property without due process of law. In my judgment, we owe these duties not only to the people but in order to preserve, in all its power and dignity, the government of the Union and of every state thereof.

I have spoken of the courts and the judiciary and their duty to the people. Nothing but an independent and courageous judiciary can properly perform the great task assigned to it by the state and federal constitutions and the laws under which we live. Only the people can select and maintain an independent judiciary. It has been said, "Eternal vigilance is the price of liberty." It can be as well said that only eternal vigilance and alertness on the part of the electorate can assure a courag-

eous and an independent judiciary. In the present, as in the years to come, I trust the people will bear this sober fact in mind.

Each of us, whatever his station in life, must play his part in the world around us. It is evident that we of this land must play an ever-increasing part in the affairs of the world. To do this we must be strong at home; strong in our ideals along with the strength of our production and our military powers. As a member of the judiciary, looking with pride on more than a century and a half of distinguished service on the part of that branch of the government, in the states and in the nation, I am persuaded that in the critical days ahead the need for the judiciary will continue, and that in response to that need it will play its part, with devotion to right and justice and strict adherence to the principles upon which our government was founded which has actuated it from the beginning of the republic to this hour.