

THE CONSTITUTION AND THE "OPEN DOOR."

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IS THE "open door" in the Philippines a "political myth"? Has the Government of the United States exceeded its powers and promised what it cannot perform in announcing to the nations through its Peace Commissioners at Paris its policy "to maintain in the Philippines an open door to the world's commerce"? With the near prospect of the restoration of normal conditions in the islands these become practical questions. On the answer to them will depend our power to make our Asiatic possessions an aid to the liberal trade policy which we in common with Great Britain are trying to uphold in China, instead of having our presence in the Orient a stumbling-block in our own commercial path and an irritation to the rest of the world.

Those who hold that no separate tariff for the Philippines is possible base their opinion on the Constitutional provision :

"The congress shall have power :

"To lay and collect taxes, duties, imposts and excises ; to pay the debts, and provide for the common defence and general welfare of the United States ; but all duties, imposts and excises shall be uniform throughout the United States."

The interpretation of this rule as applying to our new possessions requires the assumption, first, that all territories of the United States under all conditions are within the United States in the meaning of the Constitution, and, secondly, that in the view of the organic law the Philippines cannot possibly be differentiated from continental territory. Two cases in the Supreme Court are relied upon to uphold the first contention. One is the dictum of Chief Justice Marshall¹ in 1820. Arguing that Congress had power to extend a general direct tax to the District of Columbia, the Chief Justice remarked :

¹Loughborough vs. Blake, 5 Wheaton 319.

"The power, then, to lay and collect duties, imposts and excises may be exercised, and must be exercised, throughout the United States. Does this term designate the whole or any particular portion of the American empire? Certainly this question can admit of but one answer. It is the name given to our great Republic which is composed of States and Territories."

More directly touching the Philippine tariff question is the decision of the Supreme Court¹ upholding the collection of duties under the United States tariff, without action of Congress or the establishment of a collection district, in California in 1849. Justice Wayne in his opinion said :

"By the ratifications of the treaty California became a part of the United States. And as there is nothing differently stipulated in the treaty with respect to commerce, it became instantly bound and privileged by the laws which Congress had passed to raise a revenue from duties on imports and tonnage. . . .

"The right claimed to land foreign goods within the United States at any place out of a collection district, if allowed, would be a violation of that provision in the Constitution which enjoins that all duties, imposts and excises shall be uniform throughout the United States."

Change "California" to "the Philippines," it is said, and the open door is closed. True, it might be, if the Supreme Court, on the case being presented to it, were to decide that with the transposition that decision was still good law. There are many reasons to believe, however, that on review the Court might hold that even our continental territories were outside the United States of the Constitution, and that its tariff applied to them from convenience and not from necessity. And, even if it did not, it is still a far cry from American California to the Asiatic Philippines.

From the first organisation of the Government Congress has been treating territory as in one way or another outside the Constitution, governing it in violation of general provisions of the Constitution which are more fundamental and less limited as to time and place than the tariff rule, and the Supreme Court itself has repeatedly upheld such practices.

The original charter of the United States Bank, approved on February 25, 1791, authorised the directors to establish offices of discount and deposit "wheresoever they shall think fit within the United States." On the annexation of Louisiana they desired to establish a branch in New Orleans, but nobody considered that they had the power to do so. By order of the House of Representatives the Committee of Ways and Means of that body drafted a bill extending the bank's privileges, and on March 23, 1804, the President signed the law authorising the directors to establish branches

¹Cross vs. Harrison, 16 Howard 164.

on the terms of the original act "in any part of the territories or dependencies of the United States." Possibly that was an unnecessary law, but it clearly reveals the views of the men who had a hand in making the Constitution about its territorial application. It shows, too, that the idea of "dependencies" could not have been so foreign to "the Fathers" as their descendants sometimes suppose, since they, who were always splitting constitutional hairs and living in daily fear of opening the door to tyranny, were willing to contemplate "dependencies" in their laws.

The internal revenue laws under the Constitution are as universal and uniform in their application as the tariff laws, but it was not until 1868 that they were by act of Congress¹ extended to apply to all places "within the exterior boundaries of the United States." A curious phrase that, suggesting an interior boundary beyond which the enforcement of the revenue law is a matter of discretion. The territories thus embraced by that act were the Indian reservations and the lands of the Civilised Tribes which the revenue collector had not before invaded. But long before that an internal boundary had been marked out for him. The first internal tax on spirits distilled in the United States was levied by the act of March 3, 1791, which, for the purpose of collection, ordered "that the United States shall be divided into fourteen districts, each consisting of one State." The Territories of the United States were entirely neglected, though they had growing towns, and it was not until 1798 that "The Annals of Congress" showed the existence of a supervisor of internal revenue in Ohio.

The constitutional rule for direct taxes, instead of requiring uniformity, orders that they shall be "apportioned among the several States which may be included within this Union according to their respective numbers." This provision is apparently co-extensive with that concerning duties. If the makers of the Constitution were so deeply concerned that the burden of indirect taxes should be laid fairly on all, they must have been equally anxious that the direct tax burden should be borne by all, after the method of apportionment, which was considered equitable in that case. The two clauses must be taken together, and the fact that the one in providing uniformity mentions the United States as a whole, and the other in prescribing rules of proportion among the parts refers to the area of taxation distributively, cannot be taken to mean that the tax limits in the two cases are different. In the first quarter century of the Government's operation several direct taxes were

¹ Section 3, 448.

laid, and solely in the States. Finally one was extended to territory, and in upholding it Chief Justice Marshall delivered his dictum, already referred to, defining "the American Empire." He himself felt embarrassed by his own rule, and confessed difficulty in reconciling a tariff necessarily operative in the Territories with a direct tax operative there or not, at the discretion of Congress. He contented himself with deciding that at any rate, even if Congress was not obliged to tax the Territories, it had the power to do so, and that was the point at issue before the Court. It would seem a good deal more natural to suppose that if Congress had discretion in the one case it had in the other.

The original law for the collection of customs, passed July 31, 1789, divided the States into collection districts, but entirely neglected the Territories. The only collector in the Western country was at Louisville, then in the State of Virginia, and his jurisdiction extended from the Falls of the Ohio to the mouth on the Southern side. The territorial bank of that river was free for the landing of goods without duty. Vermont was left without a custom house until its admission as a State, and so was Tennessee, but as soon as either was admitted a port was established in it, evidently out of scrupulous regard for the Constitution, which forbade preference to ports of one State over those of another. It was not until 1799 that the customs laws were put in force in any part of the Northwest Territory.

When the Louisiana treaty came up for debate the preference for French and Spanish vessels was attacked as unconstitutional. Of course it was defensible as a reservation or "burden upon the fee." But having doubts of the power of the Government, even as a condition of acquirement, to give a privilege which did not harmonise with the Constitution, the supporters of the treaty preferred to defend the grant as concerning things outside the Constitution. Congressman Nicholson, one of the leaders of the House whose word carried weight, thus stated the Administration's position :¹

"Whatever may be the future destiny of Louisiana, it is certain that it is not now a State. It is a territory purchased by the United States in their confederate capacity, and may be disposed of by them at pleasure. It is in the nature of a colony whose commerce may be regulated without reference to the Constitution. Had it been the Island of Cuba, which was ceded to us under a similar condition of admitting French and Spanish vessels for a limited time into the Havannah, could it possibly have been contended that this would be giving a preference to the ports of one State over those of another, or that the uniformity of duties, imposts and excises throughout the United States would have been destroyed? . . .

¹Annals of Congress, 1803-'04, p. 471.

"The restrictions in the Constitution are to be strictly construed, and I doubt whether under a strict construction the very same indulgence might not be granted to the port of Natchez, which does not lie within any State, but in the territory of the United States."

The judicial power of the United States is explicitly defined by the Constitution, yet the courts in the Territories are and for nearly a century have been organised without regard to the Constitution and clearly in violation of it—if they are under its control. All the judicial power of the United States of the Constitution is vested in courts whose judges hold office during good behavior, and to them are committed certain functions which are exclusively their own. They cannot be alienated by Congress. Wherever the Constitution runs no other courts are capable of receiving those judicial powers which are reserved to the Federal courts, and which they are commanded to assume. As early as 1816 Justice Story declared, with the concurrence of the whole Court¹: "No part of the criminal jurisdiction of the United States can consistently with the Constitution be delegated to State tribunals. The admiralty and maritime jurisdiction is of the same exclusive cognisance; and it can only be in those cases where previous to the Constitution State tribunals possessed jurisdiction independent of National authority that they can now constitutionally exercise a concurrent jurisdiction." Nevertheless in the Territories courts which were not Federal courts, which were incapable of receiving Federal jurisdiction, exercised jurisdiction of that "exclusive cognisance." In 1828 the exercise of maritime jurisdiction by a Territorial court of Florida was questioned, and in his argument to the Supreme Court in defence of Territorial authority Daniel Webster said:

"What is Florida? It is no part of the United States. How can it be? How is it represented? Do the laws of the United States reach Florida? Not unless by particular provisions. The Territory and all within it are to be governed by the acquiring power, except where there are reservations by the treaty. . . . Florida was to be governed by Congress as she thought proper. What has Congress done? She might have done anything—she might have refused trial by jury and refused a Legislature."

Mr. Webster won his case. Chief Justice Marshall, writing the opinion, said²:

"It has been contended that, by the Constitution, the judicial power of the United States extends to all cases of admiralty and maritime jurisdiction, and that the whole of this judicial power must be vested in 'one Supreme Court, and in such inferior courts as Congress shall from time to time ordain and establish.

¹ *Martin vs. Hunter's Lessee*, 1 Wheaton 304.

² *American Insurance Company vs. Canter*, 1 Peters 542.

Hence it has been argued that Congress cannot vest admiralty jurisdiction in courts created by the Territorial Legislature.

"We have only to pursue this subject one step further to perceive that this provision of the Constitution does not apply to it. The next sentence declares that 'the judges both of the Supreme and inferior courts shall hold their offices during good behavior.' The judges of the superior courts of Florida hold their offices for four years. These courts then are not constitutional courts, in which the judicial power conferred by the Constitution on the general government can be deposited. They are incapable of receiving it. They are legislative courts, created in virtue of the general right of sovereignty, which exists in the Government, or in virtue of that clause which enables Congress to make all needful rules and regulations respecting the territory belonging to the United States. The jurisdiction with which they are invested is not a part of that judicial power which is defined in the third article of the Constitution, but is conferred by Congress in the execution of those general powers which that body possesses over the Territories of the United States. Although admiralty jurisdiction can be exercised in the States in those courts only which are established in pursuance of the third article of the Constitution, the same limitation does not extend to the Territories. In legislating for them Congress exercises the combined powers of the general and of a State government."

In 1849 the Supreme Court reaffirmed this doctrine even more explicitly, and Justice Nelson made this broad statement about Territories¹:

"They are not organised under the Constitution, nor subject to its complex distribution of the powers of government, as the organic law; but are the creations exclusively of the legislative department and subject to its supervision and control. Whether or not there are provisions in that instrument which extend to and act upon these Territorial governments it is not now material to examine."

This last suggestion of an open question as to some shadowy constitutional authority over the Territories is particularly interesting in view of Chief Justice Taney's persistent tendency to subject the government of the Territories to the checks of the Constitution for the protection of slavery. The California tariff opinion, which was almost contemporary with Justice Nelson's, was written by Justice Wayne, of Georgia. He was the man who persuaded the court in the Dred Scott case of the expediency of declaring that Congress had no power to interfere with slavery in the Territories, and he was the only member of it who fully concurred with Chief Justice Taney's opinion. His pleading of the Constitution to justify the California tariff, when it might equally well have been justified as a general exercise of sovereignty, and probably would have been by some other judge, is to be considered in the light of the pro-slavery policy of restricting the powers of the general government. This culminated in the Dred Scott decision, denying that the power "to make all needful rules and regulations" for the Territories ap-

¹ Benner vs. Porter. 9 Howard 235.

plied to more than the old Northwest Territory, and holding that other territory was impressed with a trust for Statehood and already in anticipation subject to the constitutional checks on administrative discretion. Such a contention makes the Government's whole course in dealing with the Louisiana Purchase, and even the Louisiana treaty itself, unconstitutional. A theory of the Constitution which inevitably reaches the conclusion that ever since 1804 the country has treated that document as "blank paper," to recall the strict constructionist Justice Campbell's sneer at Jefferson, is certainly open to question and suspicion.

In many details of government the Constitution as a fundamental law for a United States larger than the States composing it has been made blank paper by events. It is well settled that the constitutional guarantee of jury trial does not extend to actions in the State courts. It is equally well settled that it does extend to all exercise of judicial power by the Federal Government of the Constitution. The first bill for the government of the Territory of Orleans, however, which was drawn by Madison in co-operation with Jefferson and passed in 1804, restricted trial by jury to capital cases in criminal prosecutions, entirely in violation of the Constitution—if it applied. It also vested the appointment of the Legislative Council in the President, without confirmation by the Senate, though the Constitution requires the advice and consent of the Senate to the appointment of specified functionaries "and all other officers of the United States whose appointments are not herein otherwise provided for, and which shall be established by law." No pretence was made in the debates that these legislators were "inferior officers" such as Congress could authorise the President or heads of departments to appoint.

The establishment of this despotism did not pass unchallenged. The bill was denounced as conferring "royal" powers. It was said it did "not evince a single trait of liberty." In the House of Representatives G. W. Campbell, of Tennessee, made an earnest contest for the jury trials and the courts of the Constitution, arguing that "in legislating for the people of Louisiana" Congress was "bound by the Constitution of the United States." A similar attempt at amendment was made in the Senate, but was voted down. Among the majority were such men as John Breckenridge, of Kentucky, a champion of strict construction and the supposed author of the famous Kentucky Resolutions; Timothy Pickering, of Massachusetts; Jonathan Dayton, of New Jersey; Uriah Tracy, of Connecticut, and that stanch Jeffersonian, Wilson Carey Nicholas, of

Virginia—a strange medley of Federalists and State Rights men, who seemed to agree on nothing about the Constitution except that it did not apply to the Territories. Indeed, the prevailing opinion through the whole course of Louisiana legislation was strongly in that direction.

Many more scruples were entertained about the right of Congress to bring new peoples within the operation of the Constitution, and not rule them as colonists, than about any obligation arising from the Constitution itself to govern territory, regardless of expediency, according to its specific provisions. Much was said in both houses of the treaty guarantees of constitutional privileges, and the Louisiana bill was attacked as not keeping the promise to France to incorporate the Territory into the Union as soon as might be consistent with the principles of the Constitution. The Jeffersonian philosophers of liberty anxiously debated among themselves the duty of the United States to live up to its own ideals of freedom. But the suggestion that it must live up to them by a rule of thumb application of a compact made for a union of States found little credit even among those who construed that instrument most strictly in its relation to States. Cæsar A. Rodney's declaration¹ that the Constitution "does not limit or restrain the authority of Congress with respect to Territories, but vests them with full and complete power to exercise a sound discretion generally on the subject," was echoed by many other debaters.

This same question came up with reference to Florida in 1822. The bill was modelled on that of Orleans in its administrative features, and contained a section forbidding the Territorial government to transgress the personal rights guaranteed to the people of the States by the Constitution. Mr. Montgomery, of Kentucky, tried to substitute a clause that all the principles of the Constitution and all the prohibitions to legislation, as well with respect to Congress as the Legislatures of the States, be "declared to be applicable to the said Territory, as paramount acts." This was voted down, and the following is Benton's comment on the incident²:

"This prompt rejection of Mr. Montgomery's proposition shows what the Congress of 1822 thought of the right of Territories to the enjoyment of any part of the Constitution of the United States. . . . The only question between Mr. Montgomery's proposition and the clause already in the bill was as to the tenure by which these rights should be held—whether under the Constitution of the United

¹ Annals of Congress. 1803-'04, p. 513.

² Benton's Abridgement, Vol. VII, p. 295, note.

States or under a law of Congress and the treaty of cession. And the decision was that they should be held under the law and the treaty. Thus a direct issue was made between constitutional rights on one hand and the discretion of Congress on the other in the government of this Territory, and decided promptly and without debate (for there was no speech after that of Mr. Rea on either side) against the Constitution. It was tantamount to the express declaration: 'You shall have these principles which are in the Constitution, but not as a constitutional right; nor even as a grant under the Constitution, but as a justice flowing from our discretion, and as an obligation imposed by the treaty which transferred you to our sovereignty.'

Justice Story, in his commentaries,¹ has thus stated this doctrine:

"The power of Congress over the public territory is clearly exclusive and universal, and their legislation is subject to no control, but is absolute and unlimited, unless so far as it is affected by stipulations in the cessions or by the ordinance of 1787, under which any part of it has been settled."

A host of Supreme Court decisions laying down this law with some reservations might be cited. When those reservations are quoted in support of constitutional restraint on Territorial lawmaking it is to be remembered that the Constitution, as well as the general laws of the United States, are in force by legislation in the Territories. It is indeed curious that Congress should have made the Constitution into a law for the Territories, if that Constitution of itself governed them, but it has done so time and time again in particular cases, and finally summed up these enactments generally in Section 1,891 of the Revised Statutes, which declares:

"The Constitution and all laws of the United States which are not locally inapplicable shall have the same force and effect within all the organised Territories and in every Territory hereafter organised as elsewhere within the United States."

Thus the open question of Justice Nelson's time has been practically closed, and the Supreme Court has for years been declaring as a fact that the fundamental personal rights guaranteed by the Constitution belong to the inhabitants of the Territories. In some cases undoubtedly the opinions tend to uphold the view that the so-called Bill of Rights and the general limitations of the Constitution by their own force extend to the Territories. But even while conceding these rights the Supreme Court often shows a tendency to do so merely on the theory that the old Anglo-Saxon "law of the land" protects all within the range of government from tyranny and injustice.

Thus Justice Bradley² says:

"Doubtless Congress in legislating for the Territories would be subject to those fundamental limitations in favor of personal rights which are formulated in

¹ Section, 1328.

² *Mormon Church vs. United States*, 136, U. S. 1.

the Constitution and its amendments; but these limitations would exist, rather by inference and the general spirit of the Constitution from which Congress derives all its powers, than by any other express and direct application of its provisions.'

It may be conceded that every officer of our Government, owing to its very nature, must exercise his functions in harmony with the spirit of our institutions, with what Justice Matthews¹ called "the principles of constitutional liberty which restrain all the agencies of government, State and National." But that does not compel the application to Territories of particular rules of administration made by States for the government of States in their united capacity. And it should be remembered in construing these rules that, however much the country may have grown and the idea of a broader nationality developed, the framers of the Constitution formed a government for States and committed the territory or other property which might fall to the general government to its complete discretion, with a general grant of power. So those who first added new territory understood and acted, though they were strict constructionists and theoretical democrats.

Perhaps the Louisiana legislation ought to have been declared unconstitutional. But if so, what is to be said of the condemnation to death or imprisonment without jury trial of American citizens by Ministers and Consuls for crimes committed at places constructively made American territory for that purpose by treaty with foreign governments? There is no constitutional warrant for it. If trial by jury is a right of all men subjected to the authority of the United States, is it not as much their right in a consulate at Yokohama as in a courthouse at Santa Fe? The Supreme Court has frankly cut this Gordian knot since it could not untie it. It has said² that though a private American vessel is constructively American territory, yet an offence on it can be punished by a consul without jury trial, for "By the Constitution, a Government is ordained and established for the 'United States of America' and not for countries outside their limits. . . . The Constitution can have no operation in another country."

The rule of uniformity in taxation of what is essentially one people is so manifestly advisable that nobody would wish to change it or even open the door to change. But in view of all the exceptions made in practice to the necessary application of the Constitution to the home Territories, and the political purpose, which about 1850 demanded limitation of the power over them, it is a violent

¹ Murphy vs. Ramsey, 114 U. S. 15.

² In re Ross, 140 U. S. 453.

assumption to assert that a rule laid down in one particular case then would be literally and slavishly applied to overturn a deliberate policy of the Government formed to meet utterly different conditions which the Court did not and could not foresee.

The Supreme Court itself in the California tariff decision intimated as much. It noted that California was part of the United States by treaty, and it found nothing in the treaty to differentiate it from the rest of the United States. The California treaty did promise to incorporate the Territory into the Federal Union, and naturally judges with the "trust for Statehood" idea in mind would give that promise immediate effect so far as they were concerned with government under it. The fact that they consulted the treaty to learn the Territory's status with reference to the Constitution implies that even this State Rights Court would have regarded a treaty for acquiring a dependency as giving the acquisition quite a different character.

In that respect the Philippines hold an entirely distinct relation to the general government. They are not by treaty taken actually or prospectively into the Union. The United States has simply assumed possession of the Philippines. It holds them, just as all the Federalists, and, indeed, many of the Republicans, believed in 1803 it could alone hold Louisiana. The narrow construction which denied the power of expansion for assimilation has been outgrown. Certainly, it is too late to bind the country in a similar bond of narrow construction carried to an opposite extreme. Nor is there anything new or startling in the idea of dependencies outside the United States. Neither Congress nor the Supreme Court has ever hesitated to recognise and provide for territorial and administrative anomalies. The Louisiana and Florida governments were, as has been seen, utterly inconsistent with the Constitution. The Indians, with their separate laws in States and Territories, have ever been anomalies, and offer a precedent for dealing quite unhampered with Orientals as their needs may require.

Our extraterritorial jurisdiction exercised by Federal officers since 1848 has no warrant in the Constitution for any United States of the Constitution.

Congress did not hesitate to use the word "dependencies" in legislating for the United States Bank.

Later, in 1856, it made laws for the government of the Guano Islands, which at the discretion of the President might "be considered as appertaining to the United States." In other words, they were territory of the United States which was not within it.

Finally, the XIIIth Amendment to the Constitution declares that neither slavery nor involuntary servitude "shall exist within the United States or any place subject to their jurisdiction." The men who drew this had been through the slavery contest, knew the doctrine of limited power in the Territories, and had repudiated it, and won their case in war. They passed the Amendment in the light of their own contention to assure the exclusion of slavery from any territory which Congress ruled or might rule outside the United States of the Constitution.

The supposition that the term United States in that instrument means more than the government over the States united requires the assumption of its use in two utterly different meanings without any indication of the difference. Thus it must be said that the "people of the United States" who make and amend the Constitution are people of States, but the United States for which the preamble says they make the Constitution is the whole "American Empire;" that the United States of the Judiciary Article means only States, but of the Tariff Article all the territories or dependencies over which the Government may extend its rule. And that in face of the final use and implied definition in the XIIIth Amendment of that term in the narrower significance.

Such a restricted meaning is fully in accord with common sense. Who thinks of the Philippines as being in the United States? They are manifestly no part of the system for which our Constitution was made. The belief that the Constitution must of necessity apply to the home Territories, in spite of evidence that the founders and early rulers had no such thing in mind, is due in its present form largely to the feeling of continental interest and common American nationality. The interpretation of the Constitution as a fundamental law for Asiatic islands simply because this country is called upon to rule them is no proper development of that idea of the American Nation. "The Constitution can have no operation in another country," and the Philippines, even though we control them, are another country, physically, morally, socially and commercially.

The reversal of the California tariff decision is not essential to the "open door." The reasons for questioning the law it laid down for this continent are cited only to show clearly how little ground there is in the circumstances of its delivery, and in our history, for stretching its meaning to forbid a Government policy in an emergency which its authors never contemplated. Courts do not thus tie the hands of Government with reference to particular situations

which cannot be foreseen. In a constitution, as Story says, "there ought to be a capacity to provide for future contingencies as they may happen, and as these are . . . illimitable in their nature, so it is impossible safely to limit that capacity."

It has not been limited in this country. The Constitution, in spite of being written, is mobile. It never would have been adopted if its meaning to the present generation had been known to those who drew it, if, for instance, it had been understood as an indissoluble compact instead of a voidable association. Those who thought it made blank paper by the changed interpretations circumstances forced were merely victims of the tendency to limit by one day's conceptions the power of meeting another's needs. Some American trader may follow the example of the plaintiff in the California case, and strive to avoid duties at Manila, or some Spanish interest may seek, regardless of this country's welfare, to close the door to the world's commerce in the Philippines. But it is scarcely conceivable that either could overturn in those distant islands, which have nothing in common with this country and are not a part of its industrial system, a considered policy of the United States with reference to international relations, by invoking a disputed constitutional doctrine, which, even if true, is true only for "the United States of America."