

OUR NEW DEPARTURE

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Our New Departure by Moorfield Storey

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1. LETTER TO A FRIEND

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BY

MOORFIELD STOREY

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LETTER TO A FRIEND.

BOSTON, MASS., Oct. 21, 1899.

My dear A,— I read Mr. Thayer's article in the *Harvard Law Review*, with which you tell me you agree, when it first appeared, and gathered from it that we differed because, like some others, he had ceased to believe in the Declaration of Independence. I have now read it again carefully; but I am still unable to see how you can think that you uphold the Declaration and the doctrines of Lincoln, while you approve the war now waged upon the Filipinos. I think Mr. Thayer has lost sight of some vital distinctions, and I will state my position briefly. To answer his article fully would require more than a letter.

Let me say at the outset that I cordially agree with him in thinking that America's duty was "to illustrate how nations may be governed *without wars* and without waste, and how the great mass of men's earnings may be applied, not to the machinery of government, or the rewarding of office-holders, or the wasteful activities of war, but to the comforts and charities of life, and to all the nobler ends of human existence." I am not willing, however, to admit that the Spanish War must result in the abandonment of this great mission.

He begins his article by apparently assuming that the rulers of our choice have so far committed us to a reversal of our "whole traditional policy" that we must accept the result. His conclusion is that "we no longer have before us the question of whether we will take in extra-continental colonies or not." That in his judgment is settled.

I agree that our rulers can embark us in war, and that we cannot wipe out some of their acts; but I do not think they can commit us irrevocably to any policy. I believe with Charles Sumner that "nothing is settled that is not settled right." Had you entertained in your youth such views as you now express, you would hardly have hoped to save Kansas for freedom, to keep slavery out of the territories, or to abolish it altogether. Certainly our rulers for

years committed us to slavery as fully as possible, and buttressed it with vested rights of every kind. We did not consider their acts as "spilled milk," to use your illustration.

We doubtless agree that Congress alone can determine what shall be done with territories of the United States, and that Congress has not taken any action respecting the territories lately governed by Spain. To quote Mr. Thayer's words, "We may, subject to the agreements of the treaty, sell them if we wish or abandon them, or set up native governments in them with or without a protectorate, or govern them ourselves."

This being so, the whole question is open; and we all are bound to see that, of the possible courses thus suggested, the right one is chosen. When he says, "We are no longer considering the expediency of entering upon a foreign colonial policy: we have already begun upon it," he seems to deny what he has admitted, that we may abandon the new territories and resume our great mission if we will. What is our duty in the premises?

Before discussing the real issue between us, there are some general observations which I should like to make. The first is that our practice in the past is no argument for a new departure from the true path. Precedents may make law, but not morals. You cannot argue that, because this free nation, professing to believe in the principles laid down in the Declaration of Independence, has done certain acts, therefore such acts are consistent with these principles. As well argue that the practices of "His Most Christian Majesty," of ecclesiastical potentates, or of the popes themselves, are to be taken as proving what Christ meant by his teachings. Our whole treatment of the colored race for years was in violation of our principles, and we paid bitterly for our sin. The Declaration sets up the standard to which we should conform. Our failures in the past are to be regretted, not repeated.

The second is that the practices and theories of other nations are no guide for us in this case. They one and all recognize the law of might, the right of conquest, which under our system is regarded as "criminal aggression." They all claim the right to govern men without their consent, and to sell territories without consulting their inhabitants. Our government was founded upon a denial of that right.

The third is that there is a distinction, which you seem sometimes

to forget, between the rights which we have under international law and those which we have under our own theories of popular liberty. Our title to the territories taken from Spain must be recognized by any foreign nation. The question for us is our title against the inhabitants of these territories.

Now I believe that "governments derive their just powers from the consent of the governed," that "taxation without representation is tyranny," that all men are created with equal political rights. I think these are statements of ultimate political truth, resting upon the ethical principles taught by Christ, and that you cannot depart from them without paving the way for disastrous consequences. I believe exactly in the statement of Lincoln:—

"The authors of the Declaration of Independence meant to set up a standard maxim for free society, which should be familiar to all and revered by all, constantly looked to, constantly labored for, and, even though never perfectly attained, constantly approximated, and thereby constantly spreading and deepening its influence and augmenting the happiness and value of life to *all people of all colors everywhere.*"

You speak of the "large utterances" of the Declaration, and you said, when we met, that, if we desired to annex an island with a population of savages, we should have the right to govern them as we saw fit, because they would obviously be incompetent to govern themselves. This means that you would decide for your fellow-man without consulting him, *first*, that he is savage, and, *second*, what sort of government is best for him; and then you would force him to accept it. You would decide for yourself that you are wiser and better than he, and by superior strength compel him to obey you. This may be a tenable position, but it is not consistent with the Declaration of Independence. Lincoln stated and answered your views thus:—

"They said, *Some men are too ignorant and vicious to share in government.* Possibly so, said we, and by your system you would always keep them ignorant and vicious."

"No man is good enough to govern another without that other's consent. I say this is the leading principle, the sheet anchor of American republicanism.

"When the white man governs himself, that is self-government; but, when he governs himself and also governs another man, that is more than self-government,—that is despotism."

I think that, upon comparing your position with Lincoln's, you must admit that you do not believe in the Declaration as Lincoln interpreted it. I do, and here is one main difference between us.

Mr. Thayer's contention, as I understand it, is that Congress has the power to acquire foreign territory and govern it as it sees fit, that the inhabitants of territory so held have no rights under our Constitution, and that Congress in the case before us should never under any circumstances give these inhabitants the rights of American citizens.

I think I state his conclusion correctly. His words are: "Let me at once, and shortly, say that, in my judgment, there is no lack of power in our nation, of legal, constitutional power, to govern these islands as colonies, substantially as England might govern them. . . . The conclusion seems, as I am inclined to believe it, a just one that the Constitution generally was not meant for the territories, except as it may in any place expressly or plainly indicate otherwise." He concludes by saying, "Never should we admit any extra-continental State into the Union: it is an intolerable suggestion," and by recommending an amendment to the Constitution which would prevent their admission.

In a word, to deal only with the Philippine Islands, ten millions or more of men without their consent are to become for all time subject to the absolute control of our Congress, with no constitutional rights and no possibility of acquiring them. They may be taxed under a tariff or otherwise by a legislature in which they are not represented. They may be denied the writ of habeas corpus, the right of trial by jury. Their property may be taken without due process of law, their dwellings and their persons searched without a warrant,—in a word, they become our vassals, to be dealt with as Congress may at any time see fit. Does it not seem to you that this is a strange conclusion for a man to reach who professes to believe in the Declaration of Independence? Is it not a remarkable interpretation to place upon language used by men who had helped to frame that Declaration, who had jeopardized in its defence "their lives, their fortunes, and their sacred honor," and who at the close of the Revolution through their Congress said,—

"Let it be remembered that it has ever been the pride and boast of America that the rights for which we contended were the *rights of human nature?*"

A result so astonishing should lead you to reconsider the argu-

ments on which it rests. It is no answer to say that our purposes are benevolent, and that we shall use this power wisely. It is a question of right. As our fathers said, "The right to take ten pounds implies the right to take a thousand"; and human history shows that absolute power over an alien people can never safely be intrusted to any man or any legislature.

In my judgment, no such power exists. The purpose of the Constitution is expressed in its preamble; and this shows that we framed a government in order to secure certain benefits to the people of this country, and especially to insure for them and their children the blessings of liberty, not to engage in the business of administering despotically the affairs of foreign nations. It is a government of limited powers; and I cannot accept the proposition that a Congress and a President who derive all their power from the Constitution can hold under their sway vast regions over which the Constitution does not extend, and deny to the inhabitants of these regions the blessings of constitutional liberty. Our legislative and executive officers are trustees who hold their powers in strict trust, defined by a written instrument. I cannot find among these carefully enumerated powers any which authorize the President and Congress of the moment to undertake the conquest and government of foreign nations, because they believe or pretend to believe that they can govern such nations better than their existing rulers. Not for any such loose benevolence were they given control of our lives and our property. Nor is there in our history any precedent for such action. Till now we have made no war except in the real or pretended interest of this country.

Let me now examine the steps in Mr. Thayer's argument. He begins by pointing out that we have done many things which at the time were denounced as unconstitutional. Very likely; but can any inference be drawn from this? Certainly not that leading statesmen and lawyers are always wrong when they insist that proposed action is unconstitutional. Men who preceded them may have been wrong or right. The country may have acquiesced in action clearly unwarranted by the Constitution, but such acquiescence does not make it constitutional. Some opponents may have been wrong, but it does not follow that all opponents are wrong. This part of the argument does not help us now.

He then makes a general statement as to the powers of the general government, saying, "It may do what other sovereign nations

may do." In this statement he seems to confuse two essentially different things. As against other nations, the federal government is sovereign. None of them can question its absolute power. As against its own citizens and subjects, its powers are limited. The United States can in war do whatever Russia can do against a foreign enemy. The Czar can send any subject to Siberia without trial. The government of the United States cannot deprive its meanest subject of liberty or property without due process of law, nor can its officers enter the humblest cottage without the warrant of a court. The question which we are considering is what rights our agents, the President and Congress, have as against the persons whom they govern,— what position we as a nation must take toward *our* citizens or subjects.

Mr. Thayer says that "the power of acquiring colonies is an incident to the functions of representing the whole country in dealing with other nations and States, whether in peace or war. The power of holding and governing them follows necessarily from that of gaining them." These statements confuse the distinction which I have pointed out. No other nation can deny our right to conquer a foreign country. We ourselves, however, are bound by our own principles *not* to conquer, but to govern by consent, and, wherever we govern, to recognize that all other men have the political rights which we claim for ourselves.

He undertakes to find a warrant for the rights which he claims over the Philippines, in our dealings with the Indians, and in our government of the territories and the District of Columbia, and asks: "Has it been un-American to govern the territories and the District of Columbia as we have? Has it been contrary to the fundamental principles of free government or the Declaration of Independence? Has it tended to the degradation of our national character?" It is singular to me that he should find any parallel between the government of the District of Columbia and the conquest of the Philippines; but, as he does, let me point out the distinctions which he overlooks.

Take the Indians first. We found these tribes occupying vast regions of territory, upon certain parts of which they dwelt and over most of which they occasionally travelled. There were large tracts entirely unoccupied or in dispute between different claimants. There were no clear boundaries, no unquestioned sovereignty. Into these vast regions were pouring emigrants from every