THE RIGHT TO TRAVEL AS COMPREHENDING THE "RIGHT" TO TROUBLE

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Perspective

Constitutionalists read the fundamental rights of citizens as *in esse* even absent the assurance that their exercise will bring good to the community. Rights are fundamental or "preferred" when they are "implicit in the concept of ordered liberty,"[1] that "to abolish them is to violate a principle of justice so rooted in the traditions and conscience of our people."[2] Equally true, they add, is that the likelihood of bad resulting from the exercise of a fundamental right does not *ipso jure* justify a ban against the right; the alternative of reasonable regulation is set in place for the governance of all within the rule of law. Not even the invocation of state security and stability would automatically or conclusively foreclose a citizen's demand for recognition and enforcement of his fundamental rights. Justice Tuason, in *Nava v. Gatmaitan*,[3] said,

> To the plea that the security of the State would be jeopardized by the release of the defendants on bail, the answer is that the existence of danger is never a justification for courts to tamper with the fundamental rights expressly granted by the Constitution. These rights are immutable, inflexible, yielding to no pressure of convenience, expediency, or the so-called 'judicial statesmanship'. The legislature itself cannot infringe them, and no court conscious of its responsibilities and limitations would do so. If the Bill of Rights are incompatible with stable government and a menace to the nation, let the Constitution be amended, or abolished. It is trite to say that, while the Constitution stands, the courts of justice as the repository of civil liberty are bound to protect and maintain undiluted individual rights.

Respect for, more than the disregard of, the citizen's fundamental rights, even in crisis situations, can better preserve the existence and enhance the integrity of a republican society, so qualitative case law declares,

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[1]Palko v. Connecticut, Cardozo, J., 302 U.S. 319, 325.

[2]Snyder v. Massachusetts, 291 U.S. 97, 105 (1934).

[3]90 Phil., 172, 206 (1951). Italics ours.

> [O]ne of the surest means to ease the uprising is a sincere demonstration of this Government's adherence to the principles of the Constitution together with an impartial application thereof to all citizens, whether dissidents or not. Give them the assurance that the judiciary, ever mindful of its sacred mission, will not, thru faulty cogitation or misplaced devotion, uphold any doubtful claims of Governmental power in diminution of individual rights, but will always cling to the principle uttered long ago by Chief Justice Marshall that *when in doubt as to the construction of the Constitution*, the Courts will favor personal liberty.[4]

A citizen's probable abuse of his fundamental rights is accepted as a small price to pay in the ultimate good of preserving a free society, so Justice Douglas says,

> Those with the right of free movement use it at times for mischievous purposes. But that is true of many liberties we enjoy. We nevertheless place our faith in them, and against restraint, knowing that the risk of abusing liberty so as to give rise to punishable conduct is part of the price we pay for this free society.[5]

Caveat

Society should ever be on guard against the slow erosion of the potency of these fundamental rights, or the citizens, as in the recent past, will lose all through apathy and default,

> It may be that it is the obnoxious thing in the mildest and least repulsive form; but illegitimate and unconstitutional practices get their first footing in that way, namely: by silent approaches and slight deviations from legal modes of procedure. This can only be obviated by adhering to the rule that *constitutional provisions for the security of person and property should be liberally construed. A close and literal construction deprives them of half their efficacy and leads to gradual depreciation of the right, as if it consisted more in sound than in substance. It is the duty of courts to be watchful of the constitutional rights of the citizen, and against any stealthy encroachments thereon. Their motto should be absta principiis.*[6]

The Right to Travel, Meaning and Nature

The right to travel means "the right of locomotion, the right to move from one place to another according to inclination,"[7] "freedom of movement, at home and abroad,"[8] or "freedom of movement across

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[4]Justice Bengzon in Nava et al. v. Gatmaitan, *id.*, at 194-195, Italics ours.
[5]Aptheker v. Secretary of State, 378 U.S.500, 520, concurring opinion, (1964).
[6]Boyd v. US, 116 U.S. 615,635 (1886). Italics ours.
[7]Chief Justice Fuller in Williams v. Fears, 179 U.S. 270, 274 (1900).
[8]Justice Douglas in Aptheker v. Secretary of State, *supra* note 5, at 519.

frontiers in either direction, and inside frontiers as well,"[9] and "includes the right to enter and live in any [island, province, city, town or barangay] and in [one's country]".[10]

The right to travel is a matter of express constitutional declaration under our 1987 Constitution,

> The liberty of abode and of changing the same within the limits prescribed by law shall not be impaired except upon lawful order of the court. Neither shall the right to travel be impaired except in the interest of national security, public safety, or public health, as may be provided by law.[11]

But even without express articulation, the right had been recognized at the start of this century as an "attribute of personal liberty"[12] secured by the due process clause, and this *dictum* through the years evolved into settled decisional doctrine.[13]

American decisions regard the right as part of a free society's "heritage", "basic in a [free society's] scheme of values,"[14] which has been "emerging at least as early as the Magna Carta."[15]

There is no doubt that settled case law esteems the right to travel as a "fundamental right".[16] And the *Aptheker* decision equates freedom of travel to the right of free speech and the right of association -- all under the decisional command that "precision must be the touchstone of legislation so affecting basic freedoms,"[17] or the interference will be struck down as "overbreadth."[18]

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[9]Kent v. Dulles, 357 U.S. 116 (1958).

[10]Construction Ind. Ass'n of Somona City v. City of Petaluma, 377 F. Supp. 574, 581 (1974).

[11]CONST., art. III, sec. 6.

[12]Williams v. Fears, *supra* note 7, at 274.

[13]Kent v. Dulles, *supra* note 9, at 125; Aptheker v. Secretary of State, *supra* note 5, at 505-506.

[14]Kent v. Dulles, *id.*, at 126.

[15]*Id.* citing I Blackstone Commentaries, at 134-135.

[16]Memorial Hospital v. Maricopa Country, 415 U.S. 250 (1974); Dunn v. Blumenstein, 405 U.S. 330 (1972); Shapiro v. Thompson, 399 U.S. 618 (1969); United States v. Guest, 383 U.S. 745 ((1966); Edwards v. California, 314 U.S. 160 (1941); Kent v. Dulles, *supra* note 5; Oregon v. Mitchell, 400 U.S. 122 (1970).

[17]National Association for the Advancement of Colored People (NAACP), etc. v. Button, 371 U.S. 415, 438 (1963).

[18]Broadrick v. Oklahoma, 413 U.S. 601,615 (1973).

Sociological Rationale of the Right to Travel

Justice Douglas, speaking for the U.S. Supreme Court in *Kent v. Dulles,* expounded on the "large social values" that a free society reaps in protecting the freedom to travel,

> Foreign correspondents and lecturers on public affairs need firsthand information. Scientists and scholars gain greatly from consultations with colleagues in other countries. Students equip themselves for more fruitful careers in [their native country] by instruction in foreign universities. Then there are reasons close to the core of personal life -- marriage, reuniting families, spending hours with old friends. Finally, travel abroad enables [native] citizens to understand that people like themselves live in Europe and [other lands and] helps them to be well-informed on public issues. [A citizen] who has crossed the ocean is not obliged to form his opinion about our foreign policy merely from what he is told by officials of our government or by a few correspondents of [national] newspapers. Moreover, his views on domestic questions are enriched by seeing how foreigners are trying to solve similar problems. In many different ways direct contact with other countries contributes to sounder decisions at home.[19]

At the risk of including "loafers or loiterers" in the protection that the right to travel affords to all citizens, again, Justice Douglas says for a unanimous Supreme Court in *Papachristou v. City of Jacksonville,*[20]

> The difficulty is that these activities are historically part of the amenities of life as we have known them. They are not mentioned in the Constitution or in the Bill of Rights. These unwritten amenities have been in part responsible for giving our people the feeling of independence and self-confidence, the feeling of creativity. These amenities have dignified the right of dissent and have honored the right to defy submissiveness. They have encouraged lives of high spirits rather than hushed, suffocating silence. They are embedded in Walt Whitman's writings, especially in his "Song of the Open Road." They are reflected, too, in the spirit of Vachel Lindsay's "I Want to Go Wandering", and by Henry D. Thoreau.

The Natural Revulsion in a Free Society of Intruding into the Freedom of Travel

Restrictions on the freedom of travel is *de riqueur* in totalitarian states. This explains the normal hesitancy of free societies, naturally rejecting identification with the former, to yield to the temptation -- totalitarians rush in where republics fear to tread,

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[19]Kent v. Dulles, *supra* note 9, at 126-127, quoting Chafee, "Three Human Rights in the Constitution of 1787" (1956).

[20]405 U.S. 156, 164 (1972).

> Free movement by the citizen is of course as dangerous to a tyrant as free expression of ideas or the right of assembly and it is therefore controlled in most countries in the interest of security. That is why riding boxcars carries extreme penalties in Communist lands. That is why the ticketing of people and the use of identification papers are routine matters under totalitarian regimes, yet abhorrent in the United States. Freedom of movement, at home and abroad, is important for job and business opportunities, for cultural, political, and social activities, for all the commingling which gregarious man enjoys.[21]

National Security and the Right to Travel

Governments have so often used the national security argument like some talisman to override constitutionally guaranteed freedoms. In case situations arising in the course of grave national emergency, the tendency is for congruence between the legislative and executive departments in resorting to the national security argument to justify evident constitutional overreaching and, for the most part, the judiciary in truly free societies kept faith with their oath to serve the rule of law in the admirable tradition of *Ex parte* Milligan,

> The Constitution is a law for rulers and people, equally in war and in peace, and covers with the shield of its protection all classes of men at all times and under all circumstances..[22]

Time was when our Supreme Court was firm and undaunted of this voice.[23] But martial rule for about nine years -- 1972 to 1981 -- crushed the independence of our courts and their facial and real capacity for justice were unhinged.[24] The catharsis is on but the syndrome abides, from which we will not be entirely free of any time soon.[25]

The *Aptheker* and *Kent* decisions, are exemplars, in these nuclear missile-charged times, of the desirable "cold neutrality" of judges, fittingly endowed by reason and tradition to be the final arbiters in troubled times "when rulers and people would become restive under restraint that the principles of constitutional liberty would be in peril.[26]

Under a statute enacted to control subversives, at the height of the Communist movement in the United States, members of the Communist Party and similar organizations who believe in the forcible

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[21]Aptheker v. Secretary of State, *supra* note 5, at 519-520.
[22]*Ex parte* Milligan, 71 U.S. 108, 120 (1866).
[23]*E.g.*, Nava, et al. v. Gatmaitan, *supra* note 3.
[24]*E.g.*, Javellana v. Executive Secretary, et al. 50 SCRA 30 (1973).
[25]*E.g.*, Valmonte, et al. v. De Villa, et al. G.R. No. 83933, September 15, 1989.
[26]*Ex parte* Milligan, *supra* note 22.

overthrow of duly constituted government were disqualified from applying for passports to travel abroad. The legislative finding under the Subversive Activities Control Act was that the world communist movement is a threat to national security. The U.S. Secretary of State thus revoked the issued passports to top-ranking leaders of the U.S. Communist Party. The joint legislative-executive action was challenged in court as trenching on a citizen's liberty to travel under protection of the due process clause. The U.S. Supreme Court, in *Aptheker v. Secretary of State,* while affirming that the U.S. Constitution "is not a suicide pact," struck down the U.S. government's action in very emphatic language,

> The right to travel is a part of the 'liberty' of which the citizen cannot be deprived without due process of law under the Fifth Amendment. Freedom of movement across frontiers in either direction, and inside frontiers as well, was a part of our heritage. Travel abroad, like travel within the country may be as close to the heart of the individual as the choice of what he eats, or wears, or reads. Freedom of movement is basic in our scheme of values.
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> The substantiality of the restrictions cannot be doubted. The denial of passport, given existing domestic and foreign laws, is a severe restriction upon, and in effect a prohibition against, world-wide foreign travel. Present laws and regulations make it a crime for a United States citizen to travel outside the Western Hemisphere or to Cuba without a passport. By its plain import Section 6 of the Control Act effectively prohibits travel anywhere in the world outside the Western Hemisphere by members of any 'Communist organization' -- including 'Communist action' and 'Communist-front' organizations. The restrictive effect of the legislation cannot be gainsaid by emphasizing, as the Government seems to do, that a member of a registering organization could recapture his freedom to travel by simply abandoning in good faith his membership in the organization. Since freedom of association is itself guaranteed in the First Amendment, restrictions imposed upon the right to travel cannot be dismissed by asserting that the right to travel could be fully exercised if the individual would first yield up his membership in a given association.[27]

The U.S. State Department, having determined that it is in the "national interest" to require passport applicants the execution of an "affidavit of loyalty," declined to issue passports to U.S. citizens who refused to submit the required "affidavit as to whether he was then or ever had been a Communist." Responding to the challenge of unconstitutional infringement of the citizen's right to travel, the State Department invoked that a "large body of precedents grew up which repeat over and again that the issuance of passports is 'a discretionary act' on the part of the Secretary of State."[28] The U.S. Supreme Court, in

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[27]Aptheher, *supra* note 5, at 505-506, citing Kent v. Dulles, *supra* note 9, at 507.
[28]Kent v. Dulles, *id.*, at 125.

Kent v. Dulles, cut down the assertion with the ruling that the constitutionally protected right to travel prohibits Congress from enacting the law giving the State Department Secretary unbridled discretion to grant or withhold a passport from a citizen for any substantive reason he may choose."[29]

But the U.S. Supreme Court, however, intimated a different rule in times of global war, but always on the assumption of an enabling statute at the back of the executive regulatory act, and then always coupled with a restrictive interpretation thereof,

> More restrictive regulations were applied in 1918 and in 1941 as war measures. We are not compelled to equate this present problem of statutory construction with problems that may arise under the war power.
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> In a case of comparable magnitude *[Korematsu v. United States,*323 US 214, 218 (1944)], *we allowed the Government in time of war to exclude citizens from their homes and restrict their freedom of movement only on a showing of "the gravest imminent danger to the public safety."* There the Congress and the Chief Executive moved in coordinated action; and, as we said, *the Nation was then at war.* No such condition presently exists. No such showing of extremity, no such showing of joint action by the Chief Executive and the Congress to curtail a constitutional right of the citizen has been made here.
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> Since we start with an exercise by an American Citizen of an activity included in constitutional protection, we will not readily infer that Congress gave the Secretary of State unbridled discretion to grant or withhold it, the issuance of the passport carries some implication of intention to extend the bearer diplomatic protection, though it does no more than "request all whom it may concern to permit safely and freely to pass, and in case of need to give all lawful aid and protection" to this citizen of the United States. But that function of the passport is subordinate. Its crucial function today is control over exit. And, as we have seen, the right of exit is a personal right included within the word 'liberty' as used in the Fifth Amendment.
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> If that 'liberty' is to be regulated, it must be pursuant to the lawmaking functions of the Congress. And if that power is delegated, the standard must be adequate to pass scrutiny by the accepted tests. Where activities or enjoyment, natural and often necessary to the well-being of an American citizen, such as travel, are involved, we will construe narrowly all delegated powers that curtail or dilute them.[30]

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[29] *Id.,* at 128.

[30] *Id.,*at 128-129. Italics ours.

But in *Regan v. Wald*,[31] following *Zemel v. Rusk*,[32] the American Supreme Court was less inclined to accord full potency to the right to travel. In that case the U.S. Congress authorized, under the Trading With the Enemy Act, the promulgation of the Cuban Assets Control Regulations through which the President, by proclamation, regulated all property transactions with Cuba, including travel-related transactions. The statutory authorization was premised on the executive department's findings that "relations between Cuba and the United States have not been 'normal' for the last quarter of a century, and that those relations have deteriorated further in recent years, due to increased Cuban efforts to destabilize governments throughout the Western Hemisphere." The passport application of plaintiffs were denied as prohibited by the property-travel regulations on Cuba. The applicants invoked their right to travel as construed in *Kent* and *Aptheker*. The U.S. Supreme Court wiggled out of the *Kent* and *Aptheker* bind through the magic of the so-called "classical deference to the political branches in matters of foreign policy" argument. This not too persuasive rationalization of judicial backtracking in the area of fundamental freedoms is interesting reading,

> Both *Kent* and *Aptheker* were qualified the following Term in *Zemel v. Rusk*. In that case, the Court sustained against constitutional attack a refusal by the Secretary of State to validate the passports of United States citizens for travel to Cuba. The Secretary of State in *Zemel*, as here, made no effort selectively to deny passports on the basis of political belief or affiliation, but simply imposed a general ban on travel to Cuba following the break in diplomatic and consular relations with that country in 1961. The Court in *Zemel* distinguished *Kent* on grounds equally applicable to *Aptheker*.
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> It must be remembered that the issue involved in *Kent* was whether a citizen could be denied a passport because of his political beliefs or associations. In this case, however, the Secretary has refused to validate appellant's passport not because of any characteristic peculiar to appellant, but rather because of foreign policy considerations affecting all citizens.

The Court went on to note that, although the ban in question effectively prevented travel to Cuba, and thus diminished the right tc gather information about foreign countries, no First Amendment rig!:.: ol the sort that controlled in *Kent* and *Aptheker* were implicated by the across-the-board restriction in *Zemel*. And the Court found the Fifth Amendment right to travel, standing by itself, insufficient to overcome the foreign policy justifications supporting the restriction.[33]

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[31]468 U.S. 222 (1984).
[32]381 U.S. 1 (1965).
[33]*Id.*, at 241-242.

That the restriction which is challenged in this case is supported by the *weightiest considerations of national security* is perhaps best manifested by recalling that *the Cuban missile crisis of October, 1962 preceded the filing of appellant's complaint by less than two months.*

> Respondents apparently feel that only a Cuban missile crisis in the offing will make area restrictions on international travel constitutional. They argue that there is no "emergency" at the present time and that the relations between Cuba and the United States are subject to "only the 'normal' tensions inherent in contemporary international affairs." The holding in *Zemel*, however, was not tied to the Court's independent foreign policy analysis. *Matters relating to the conduct of foreign relations are so exclusively entrusted to the political branches of government as to be largely immune from judicial inquiry or interference.*[34]

In *Haig v. Agee,*[35] the question at issue was whether the President, acting through the Secretary of State, over a citizen's protestations of infringement of his right to travel, has authority to revoke the citizen's passport on the ground that the holder's activities in foreign countries are causing or likely to cause serious damage to the national security or foreign policy of his country. Agee, the citizen whose passport was revoked, used to be a CIA agent who subsequently engaged in activities to carry out his campaign to fight the United States CIA wherever it is operating and to expose CIA officers and agents and to take the measures necessary to drive them out of the countries where they are operating.[36] Invoking the *Aptheker* and *Kent* decisions, Agee argued that the cancellation of his passport impermissibly burdens his freedom to travel. Chief Justice Burger, speaking for a divided Supreme Court, ruled for the government,

> Revocation of a passport undeniably curtails travel, but the freedom to travel abroad with a 'letter of introduction' in the form of a passport issued by the sovereign is subordinate to national security and foreign policy considerations; as such, it is subject to reasonable governmental regulation. It is 'obvious and unarguable' that no governmental interest is more compelling than the security of the Nation. Protection of the foreign policy of the United States is a governmental interest of great importance, since foreign policy and national security considerations can not be neatly compartmentalized.
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> Measures to protect the secrecy of our Government's foreign intelligence operations plainly serve these interests. Thus, we [have] held that "[t]he Government has a compelling interest in protecting

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[34] *Id.* Italics ours.
[35] 453 U.S. 280 (1981).
[36] *Id.*, at 283.

> both the secrecy of information important to our national security and the appearance of confidentiality so essential to the effective operation of our foreign intelligence service.[37]

In another case, an alien professing himself to be a "revolutionary Marxist" was banned from entering the United States, though his purpose was to participate in various "colloquia, debates, and discussions" arranged for him by his American host universities and professors. The latter challenged the ban issued under authority of the immigration statute, which excludes aliens who advocate or are members of associations advocating violent overthrow of government, as a violation of the alien's right to travel and the American hosts' right to free speech and in this regard, the right to receive information. The exclusion was upheld as a valid exercise by Congress of its plenary authority, not subject to judicial authority, to legislate the substantive rules on the entry of aliens into the country. It is a power "inherent in sovereignty, necessary for maintaining normal international relations and defending the country against foreign encroachments and dangers -- a power to be exercised exclusively by the political branches of government"; but at all times the enforcing executive authorities must "respect the procedural safeguards of due process."[38] The court justified this positively by relying mainly on *The Chinese Exclusion case,*[39] and *Galvan v. Press.*[40]

But the decision's main reliance on the cases dealing with the exclusion of Chinese entrants would seem to narrow the "plenary power on the admission of aliens" only to "foreigners of a *different race* who will not assimilate with us," because their very presence within the United States was perceived *prima facie* "dangerous to its peace and security, [though] at the time there are no actual hostilities with the nation of which the foreigners are subjects."[41] Nonetheless, the *Kleindienst* decision seems persuaded by the argument on the irrelevance of the free speech issue, because the exclusion "restricted only one action -- the action of the alien in coming into this country,"[42] and because the information that the barred alien may convey to his American hosts could be accessed "through his books and speeches", and because "technological developments' such as tapes or telephone hook-ups, readily supplant his physical presence."[43]

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[37] *Id.*, at 306-307.

[38] Kleindienst v. Mandel, 408 U.S. 753, 765, 767 (1972).

[39] 130 U.S. 58 (1889) and Fong Fue Ting v. U.S.149 U.S. 698 (1893).

[40] 347 U.S. 522 (1954).

[41] Justice Field, speaking for the U.S. Supreme Court, in The Chinese Exclusion Case, *supra.* note 39, at 606.

[42] *Id.*, at 764.

[43] *Id.*, at 765.

Safeguarding Economic Interests and the Right to Travel

Upon the community determination that "paupers", "vagabonds" and those "without employment and without funds" constitute a "moral pestilence" that threatens the general well-being of the residents of a particular State, the State of California,[44] excluded such persons from entry into its boundaries under pain of criminal indictment. The U.S. Supreme Court, in *Edwards v. California,* declared the State law an improper use of police power, for it "imposes an unconstitutional burden upon interstate commerce." Justices Douglas and Black concurred, excepting to the equation of the case of "persons to move freely from State to State" with the "movement of cattle, fruit, steel and coal across state lines."[45] The two justices premised their invalidation of the State law on the infringement of the right to travel and the "privileges or immunities" clause.[46] Justice Black's emphasis was on the inalienable protection arising from the "privileges or immunities" clause, according to which, "federal citizenship implies rights to enter and abide in any state of the Union", and that "a man's mere property status, without more, cannot be used by a state to test, qualify or limit his rights as a citizen."[47] In Justice Douglas' view "[t]he right to move freely from State to State is an incident of national citizenship protected by the privileges and immunities clause of the Fourteenth Amendment against state interference."[48] He underscored that "free transit from or through the territory of any State is an attribute of personal liberty."[49] Furthermore, he declared that to accept citizenship classification based on economic/property grounds "would be to contravene every conception of national unity."[50]

Crime Control and the Right to Travel

The classic clash between state authority and individual right, as an ordinary citizen goes through the routine of day to day living, is the litigated situation in *Kolender v. Lawson.*[51] Failure to provide "credible and reliable" identification when asked by a police officer who has "reasonable suspicion of criminal activity" is made a just cause for detention by statute. The law addresses "the need for strengthened law enforcement tools to combat the epidemic of crime that plagues the

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[44]Edwards v. California 314 U.S. 160 (1941).
[45]*Id.*, at 177.
[46]*Id.*, at 178.
[47]*Id.*, at 184.
[48]*Id.*, at 178.
[49]*Id.*, at 179.
[50]*Id.*, at 181.
[51]461 U.S. 353, 357, 360 (1983).

Nation." A citizen detained under the statute instituted a suit for damages against the detaining police officers, attacking the facial validity of the law as overbroad, because the standard of "credible and reliable" identification is not of "sufficient definiteness that ordinary people can understand what conduct is prohibited" and as such "confers on police officers a virtually unrestrained power to arrest and charge persons with a violation." The Supreme Court upheld the citizen's suit under the "void-for-vagueness doctrine," saying that the statute as thus loosely worded provides an easy vehicle for mischief *vis-a-vis* the citizen's freedom of movement.

> The statute vests virtually complete discretion in the hands of the police to determine whether the suspect was permitted to go on his way in the absence of probable cause to arrest. An individual, whom police may think is suspicious but do not have probable cause to believe has committed a crime, is entitled to continue to walk the public streets only at the whim of any police officer who happens to stop that individual. Our concern here is based upon the potential for arbitrarily suppressing First Amendment liberties.[52]

In *Papachristou v. Jacksonville,* the petitioners were arrested under a vagrancy statute for "prowling by auto," for "loitering on street" and on their "reputation as common thief;" all petitioners were caught while walking about on public streets and sidewalks; some of the petitioners were arrested "near a used-car lot which had been broken into several times." The U.S. Supreme Court upheld the challenge of unconstitutionality on these sociological findings based on the history of the enforcement of vagrancy statutes in diverse countries and through the centuries,

> A presumption that people who might walk or loaf or loiter or stroll or frequent houses where liquor is sold, or who are supported by their wives or who look suspicious to the police are to become future criminals is too precarious for a rule of law. The implicit presumption in these generalized vagrancy standard -- that crime is being nipped in the bud -- is too extravagant to deserve extended treatment. Of course, vagrancy statutes are useful to the police. Of course, they are nets making easy the roundup of so-called undesirables. But the rule of law implies equality and justice in its application. Vagrancy laws of the Jacksonville type teach that the scales of justice are so tipped that evenhanded administration of the law is not possible. The rule of law, evenly applied to minorities as well as majorities, to the poor as well as the rich, is the great mucilage that holds society together.[53]

Making the statute pass through the test of constitutional propriety, the decision ruled,

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[52]*Id.*, at 358.

[53]Papachristou v. Jacksonville, *supra* note 20, at 171.

> Walkers and strollers and wanderers may be going to or coming from a burglary. Loafers or loiterers may be 'casing' a place for a holdup.
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> The difficulty is that these activities are historically part of the amenities of life as we have known them. They are not mentioned in the Constitution or in the Bill of Rights. These unwritten amenities have been in part responsible for giving our people the feeling of independence and self-confidence, the feeling of creativity. These amenities have dignified the right of dissent and have honored the right to be non-conformists and the right to defy submissiveness. They have encouraged lives of high spirits rather than hushed, suffocating silence.
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> They are embedded in Walt Whitman's writings, especially in his 'Song of the Open Road'. They are reflected, too, in the spirit of Vachel Lindsay's 'I Want to Go Wandering', and by Henry D. Thoreau.[54]

U.S. v. Chalk[55] presented this type of a fact situation: the City Mayor, under an existing statute, proclaimed a state of emergency and banned the possession of dangerous weapons in one's residence, marches, parades, and assemblies; prohibited the sale of alcoholic beverages in one's premises; and imposed a 9 P.M. to 6 A.M. curfew. Petitioners were stopped and searched by police authorities, then arrested for curfew violations. Appellants challenged the proclamation as "overbroad" and the restrictions as unlawful under the unreasonable search and seizure clause and the liberty (right to travel) clause; the argument is that "constitutionally protected activity" is thus oppressed by the vague proclamation which overbroadly invades protected freedoms. The Federal Circuit Court brushed aside the constitutional challenge on findings of actual and widespread violence and mayhem and the presumably superior competence and facilities of the executive branch for "maintaining public peace on a day-to-day basis."

Demographic Considerations and the Right to Travel

Invoking police powers based on hands-on and committee studies approved by the citizenry, a city government enacted ordinances setting ceilings for the construction of new housing units and admission of new residents into the city. The city government and residents had determined that excessive and uncontrolled population growth would spawn serious social and economic problems, would be disruptive of the city's ecology, existing peace and order conditions and would likewise overload and strain community facilities and services, *e.g.*, water supply, sewage and drainage systems. The ordinances were assailed as violative of a U.S. citizen's right to travel from state to state. In

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[54]*Id.*, at 164.
[55]441 F. 2d 1277 (1971).

Construction Ind. Ass'n, etc., v. City of Petaluma, the Court ruled that the question of where a person should live is "one within the exclusive realm of that individual's prerogative, not within the decision-making power of any governmental unit." The decision rejected the policy consideration of the ordinances,which were posited as equivalent to "compelling state interests" as to justify interference with the fundamental right to travel.

> There is no doubt that many of the residents of this area are highly desirous of keeping it the way it is, preferring, quite naturally, to look out upon the land in its natural state rather than on other homes. These desires, however, do not rise to the level of public welfare. This is purely a matter of private desire which zoning regulations may not be employed to effectuate.
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> [T]he Court summarized the actual rationale which supported the zoning regulation as representing the township's position that it does not desire to accommodate those who are pressing for admittance to the township unless such admittance will not create any additional burdens upon governmental functions and services. The question posed is whether the township can stand in the way of the natural forces which send out growing population into hitherto undeveloped areas in search of a comfortable place to live. We have concluded not. A zoning ordinance whose primary purpose is to prevent the entrance of newcomers in order to avoid future burdens, economic or otherwise, upon the administration of public services and facilities cannot be held valid. It is clear that the general welfare is not fostered or promoted by a zoning ordinance designed to be exclusive or exclusionary.[56]

Durational Residency as Basis of State Benefits and the Right to Travel

The right to travel precludes state authority from imposing durational residency as a pre-condition to the enjoyment of social security/welfare benefits in a State, as the U.S. Supreme Court held in *Shapiro v. Thompson.*[57] In this case the right to travel throughout and within the territorial boundaries of one's country was declared a virtually unconditional right.

> The constitutional *right to travel* from one State to another has been firmly established and repeatedly recognized. This constitutional right, which, of course, includes the right of entering and abiding in any State in the Union, *is not a mere conditional liberty subject to regulation and control under conventional due process or equal protection standards. [T]he right to travel freely from State to State finds constitutional protection that is quite independent of the Fourteenth Amendment.* As we made clear in *Guest,* it is *a right broadly*

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[56]*Supra* note 10, at 585-586.
[57]394 U.S. 618 (1969).

> *assertable against private interference as well as governmental action. Like the right of association* it is a virtually unconditional personal right, guaranteed by the Constitution to us all.[58]

But in the *Shapiro* decision the *dictum* distinguishing intrastate *vis-a-vis* interstate travel came forth: "By contrast, the right of international travel has been considered to be no less than *an aspect of the "liberty protected by the Due Process Clause* of the Fifth Amendment."[59]

Addressing itself to the situation, the *Shapiro* decision declared that "the purpose of deterring the immigration of indigents cannot serve as justification for the classification created by the one-year waiting period, since that purpose is constitutionally impermissible," and "a law that so clearly impinges upon the constitutional right of interstate travel must be shown to reflect a *compelling* governmental interest."[60]

A prior five-year residency requirement fixed by statute before being entitled to public housing in a new state to which a citizen had moved into was ruled not to be a'compelling governmental interest' in *King v. New Rochelle Municipal Housing Authority,*[61] as to justify trenching the right to intra-state travel. This decision reasons, as follows,

> [W]e do find that the residency requirement penalizes respondents by adding an additional period of as much as five years to the time that they must wait for public housing and that this penalty is imposed solely because they have recently exercised their right to travel. Hence, unless shown to be necessary to promote a compelling governmental interest, [the classification] is unconstitutional.

The international-intrastate travel dichotomy was applied in *Califano v. Aznavorian.*[62] A U.S. citizen and resident, due to illness, had to prolong her trip to Mexico for over three (3) months. She was denied on her return to claim benefits under the law purposely enacted to aid the aged, blind, disabled and poor. The law disqualifies from benefits those otherwise qualified who had stayed abroad for over a month. Claimant invoked the constitutionally guaranteed freedom of travel. The Supreme Court ruled against a violation because the

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[58]*Id.*, at 642-643.

[59]*Id.*, at 643, citing Zemel v. Rusk, *supra* note 32, in rel. Kent v. Dulles, *supra* note 19, and Aptheker v. Secretary of State, *supra* note 5.

[60]*Id.*, at 643-644.

[61]442 F. 2d 646, 648 (1971).

[62]439 U.S. 170 (1978).

regulation was "reasonable" and merely indirectly relates to international as distinguished from intra-state travel.

But the *Califano* opinion intimates the core basis of its ruling, in an attempt to square with the *Kent* and *Aptheker* decisions,

> The statutory provision in issue here does not have nearly so direct an impact on the freedom to travel internationally as occurred in the *Kent*, *Aptheker*, or *Zemel* cases. It does not limit the availability or validity of passports. It does not limit the right to travel on grounds that may be in tension with the First Amendment. It merely withdraws a governmental benefit during and shortly after an extended absence from this country. Unless the limitation imposed by Congress is wholly irrational, it is constitutional in spite of its incidental effect on international travel.[63]

The Power to Tax and The Right to Travel

Taxation imposed on persons engaged in hiring workers for employment outside the boundaries of the taxing state was declared a constitutionally permissible burden on the freedom of travel. The U.S. Supreme Court deemed it a legitimate interest for one state to keep its manpower resources within its boundaries, such that a tax on citizens hiring foreign employment is a reasonable exercise of police power[64] - such a tax leaves the individual laborers "free to come and go at pleasure,"[65] in exercise of their "right of locomotion, the right to move from one place to another according to inclination, the right of free transit from or through the territory of any state a right secured by the Fourteenth Amendment and by other provisions of the Constitution."[66]

But if the tax is imposed on the mere act of a citizen in leaving his home state for another then the tax becomes an unconstitutional obstruction of the right to travel.[67]

The Right to Travel, an Incident of National Citizenship

Justice Douglas, concurring in *Edwards v. California*, discussed the right to travel as "an incident of national citizenship" in a manner which makes the two one and indivisible. The right to travel is "fundamental to the national character of our Federal government," and comprehends "the right to move freely throughout the nation" or "the

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[63]*Id.*, at 177.
[64]Williams v. Fears, *supra* note 7.
[65]*Id.*, at 275.
[66]*Id.*, at 274.
[67]Crandal v. Nevada, 6 Wall 35 (1868).

right of free transit from or through the territory of any State," or "the right of a citizen to travel to the seat of his national government or its offices throughout the country."[68]

Chief Justice Taney maintains the right to travel as an incident of national citizenship,

> We are all citizens of the United States; and, as members of the same community, must have the right to pass and repass through every part of it without interruption, as freely as in our own States.[69]

A Free Society's Rules on the Right to Travel

The thrust of case law on the limits of governmental power to intrude into the right to travel, is to regard with suspicion and strike down or narrowly confine any interference, unless necessitated by a compellingly justified interest of the State. This result proceeds from the recognized category of the right to travel as among the "preferred" or fundamental constitutional rights like the freedoms of speech, press and assembly, with which it shares essential and complementing relation. All these "preferred" or fundamental rights touch more deeply and permanently than the other rights on a citizen's personhood that they are esteemed as the "constituents of freedom" to assure the fullest realization of the human personality. Harvard constitutionalist, Laurence H. Tribe, writes that "preferred" rights, as "constituents of freedom," function "to set new boundaries on majority rule through law."[70]

The case-law-ordained-pre-condition to any intrusion into the right to travel, as well as any "preferred" rights, is founded on the State's proper exercise of police power - in fine, as a consequence of legislative action, and never on the sole initiative of the executive branch. The 1987 Constitution, by express provision, authorizes interference on the right to travel only on the basis of congressional legislation founded on case law- sanctioned police power purposes.[71] And any such congressional interference will be construed under the rule of *strictissimi juris* as to confine the regulation only to what is reasonably necessary to achieve the permissible constitutional objective.

Case law has sanctioned but limited instances of governmental intrusion into the right to travel:

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[68]Edwards v. California, *supra* note 44, at 178.
[69]Passenger Cases, 7 How 283, 492 (1849).
[70]L. TRIBE, AMERICAN CONSTITUTIONAL LAW, 770 (2nd ed., 1978).
[71]CONST., art. III, sec. 6.

> - when a State is actually at war the movement of its citizens whose ancestry runs to the belligerent State may be placed under restriction on joint legislative and executive action;[72]
>
> - when a State had broken off diplomatic relations with another state, of a perceived hostile ideology and actively engaged in 'exporting' revolutions into other countries, a State may forbid its citizens from travelling to the other State for the duration of the explosive emergency situation between the States;[73]
>
> - when a former intelligence officer of a State leaves service and engages in 'treasonable acts' against his home State, his right to travel may be cut off;[74]
>
> - when an alien admittedly subscribed to an ideology that believes in the overthrow of a government by force, a State may ban such an alien from entry.[75]

In each of the instances when the citizen's right to travel was curtailed or diluted, the courts relied on findings of fact showing "the weightiest considerations of national security,"[76] or "the gravest imminent danger to the public safety."[77] The courts never allowed themselves to be stampeded or bound by executive determinations of threat to national security pressed on them, demonstrating functional and exemplary fidelity to the time-revered decisional doctrine that "the existence of danger is never a justification for courts to tamper with fundamental rights,"[78] for the "Constitution is a law for rulers and people, equally in war and in peace."[79]

Due to the fact that the right to travel is not merely a "preferred" right, but is likewise one which is an "incident of national citizenship,"[80] qualitative case law denies the government the power to expel or exclude a citizen perceived as a source of unrest or upheaval, in

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[72]*E.g.*, Korematsu v. U.S. 323 U.S. 214 (1944); *but see* strong dissents of Justices Jackson, Murphy and Roberts; *see* also suggestion of racists bias by L. Tribe, *id.*, at 354-355, W. Lockhart, Y. Kamisar, M. Choper and J. Sheffrin, Constitutional Law, ed., 1154.

[73]*E.g.*, Zemel v. Rusk, *supra* note 32; *but see* strong dissent of Douglas, J., *id*, at 25.

[74]*E.g.*, Haig v. Agee, 453 U.S. 280 (1981); *but see* strong dissent of Brennan, J., joined in by Marshall, J.

[75]*E.g.* Kleindienst v. Mandel, 408 U.S. 753 (1972); *but see* strong dissent of Douglas, J.

[76]Zemel v. Rusk, *supra* note 32.

[77]Korematsu v. U.S., *supra* note 72.

[78]Tuason, J., Nava et al. v. Gatmaitan, *see supra* note 3, at 1.

[79]*Ex-parte* Milligan, *supra* note 22.

[80]Douglas, J., Edwards v. California, *supra* note 44.

the same way that a citizen may not be imprisoned in his own country when he wants to be out for political or economic reasons.[81]

The polestar to illuminate and guide us on our constitutional path has been set in this solemn policy statement of the 1987 Constitution: "The State values the dignity of every human person and guarantees full respect for human rights."[82] Tribe's inimitable prose as he expounds on the sanctity of the human person in the constitutional scheme of a free society is instructive,

> *Human beings are of course the intended beneficiaries of our constitutional scheme. The Constitution was consecrated to the blessings of liberty for ourselves and our posterity* - yet it contains no discussion of the right to be a human being; no definition of a person; and, indeed, no express provisions guaranteeing to persons the right to carry on their lives protected from the 'vicissitudes of the political process' by a zone of privacy or a right of personhood. Nor, apart from the obviously incomplete listing in the Bill of Rights, does the document enumerate those aspects of self which must be preserved and allowed to flourish if we are to promote the fullest development of human faculties and ensure the greatest breadth to personal liberty and community life. *But the Constitution is not a totalitarian design, depending for its success upon the homogenization or depersonalization of humanity.* The judiciary has thus reached into the Constitution's spirit and structure, and has elaborated from the spare text an idea of the 'human' and a conception of 'being' not merely contemplated but required.[83]

Epilogue - *O Temporal O Mores!*

By an eight to seven vote, the Supreme Court in *Ferdinand Marcos et al. v. Raul Manglapus, et al.*,[84] proclaimed a "no case law" decision denying to Ferdinand Marcos, his wife Imelda, son Ferdinand Jr., daughters Imee and Irene, and sons-in-law Tomas Manotoc and Gregorio Araneta -- all Filipino citizens -- their right to return to their country of birth and citizenship. For this kind of decision thus written, the majority opinion apologized with evident discomfort,

> This case is unique. It should not create a precedent, for the case of a dictator forced out of office and into exile after causing twenty years of political, economic and social havoc in the country and who within the short space of three years seeks to return, is in a class by itself.[85]

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[81]*Cf.*, Trop v. Dulles, 356 U.S. 86, 92, 102-103 (1958).
[82]CONST, art II, sec. 11.
[83]TRIBE, *supra* note 70, at 1308. Italics ours.
[84]G.R. No. 88211, 177 SCRA 668 (1989).
[85]*Id.*, at 682.

The arguments posited by the majority opinion - to deny the fundamental/preferred right to travel/abode - facially reveal the causes for mortification:

> - the capacity of the Marcoses to stir trouble even from afar;[86]
>
> - the fanaticism and blind loyalty of their followers in the country;[87]
>
> - the armed threats to the government were not only found in misguided elements in the military establishment, but also in the communist insurgency and in the secessionist movement in Mindanao;[88]
>
> - the woes of the Republic, accummulated foreign debt and the plunder of the nation which is attributed to Mr. Marcos and his cronies leaving the economy devastated;[89]
>
> - three years after Mrs. Aquino assumed office, the Government has yet to show concrete results in alleviating the poverty of the masses;[90]
>
> - the recovery of the ill-gotten wealth of the Marcoses has remained elusive;[91] and
>
> - Mrs. Aquino has stood firmly on the decision to bar the return of Mr. Marcos and his family considering the dire consequences to the nation of Marcos' return at a time when the stability of the government is threatened from various directions and the economy is just beginning to rise and move forward.[92]

The above arguments are consequent to the postulate on which the opinion had chosen to rule on the Marcos petition:

> The issue is basically one of power: whether or not in the exercise of the powers granted by the Constitution, the President may prohibit the Marcoses from returning to the Philippines.[93]

Taking off from the "power" postulate, the majority decision burst into a litany of presidential powers under the Constitution -- the executive power clause, the plenary power on foreign affairs, the power of appointment, the power to grant reprieves, the loan and guarantee powers, the budgetary power and the power to address Congress.

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[86] *Id.*, at 697.
[87] *Id.*, at 681, 697.
[88] *Id.*, at 681.
[89] *Id.*, at 698.
[90] *Id.*
[91] *Id.*, at 697.
[92] *Id.*, at 698.
[93] *Id.*, at 683.

The litany came embellished with selected quotes from Corwin: "What the presidency is at any particular moment, depends in important measure on who is President"; from Schlesinger: "The American Presidency was a peculiarly personal institution;" and from Clinton Rossiter: "The power of the President calls for the exercise of the President's powers as protector of the peace."[94]

A decision of the U.S. Supreme Court[95] over a then colonial Philippine Supreme Court, naturally upholding the American Governor-General's power over that of the Philippine-elected legislature, was also thrown in to support the ramification of the "power" postulate of the majority opinion: "Whatever power in the government that is neither legislative nor judicial has to be executive."

Thus was set the majority opinion's bizarre embrace of what is dogma in totalitarian societies, but anathema in republican systems, *i.e.*, that police power resides in the presidency:

> The Constitution declares among the guiding principles that"[t]he prime duty of the Government is to serve and protect the people" and that" [t]he maintenance of peace and order, the protection of life, liberty and property, and the promotion of the general welfare are essential for the enjoyment by all the people of the blessings of democracy.
>
> Faced with the problem of whether or not the time is right to allow the Marcoses to return to the Philippines, the President is, under the Constitution, constrained to consider these basic principles in arriving at a decision. More than that, having sworn to defend and uphold the Constitution, the President has the obligation under the Constitution to protect the people, promote their welfare and advance the national interest.
>
> To the President, the problem is one of balancing the general welfare and the common good against the exercise of rights of certain individuals. The power involved is the President's residual power to protect the general welfare of the people. It is founded on the duty of the President, as steward of the people.[96]

The tautology that for the most part underpins the majority opinion arguments was seen and firmly exposed by three of seven dissenting justices.

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[94]*Id.*, at 690.
[95]Springer v. Government of the Philippines Islands, 277 U.S. 189 (1928).
[96]Marcos v. Manglapus, *supra* note 84, at 693 - 694.

Justice Cruz disagrees with the majority argument that the "totality of executive power" by itself is a conferment of hidden presidential powers; he cites Justice Black in the *Steel Seizure Case*,[97]

> It is difficult to see why our forefathers bothered to add several specific items, including some trifling ones. I cannot accept the view that this clause is a grant in bulk of all conceivable executive power, but regard it as an allocation to the presidential office of the generic powers thereafter stated.

But for its vehemence, nay venom, the angry dissent of Justice Sarmiento faithfully expresses the republican temper of the 1987 Constitution,

> The power of the president, so my brethren declaim, "calls for the exercise of the President's power as protector of peace."
>
> This is the self-same falsehood Marcos foisted on the Filipino people to justify his authoritarian rule. It also means that we are no better than he was.
>
> That,"[t]he power of the President to keep the peace is not limited merely to exercising the commander-in-chief powers in times of emergency or to leading the State against external and internal threats to its existence," is a bigger fantasy.[98]

The dubious invocation of inherent power, when the result is the erosion of fundamental guarantees of the Bill of Rights, is rejected by a simple textual and unglossed reading of the Bill of Rights in Justice Gutierrez's dissent:

> Section 6 of the Bill of Rights states categorically that the liberty of abode and of changing the same within the limits prescribed by law may be impaired only upon a *lawful order of a court*. Not by an executive officer. Not even by the President. Section 6 further provides that the right to travel, and this obviously includes the right to travel *out of or back into* the Philippines, cannot be impaired except in the interest of national security, public safety, or public health, *as may be provided by law*.[99]

Justice Gutierrez is also unhappy with the no-precedent *caveat* of the majority opinion. The awesomely sweeping societal consequences of the majority opinion underlie his fears:

> The 'confluence theory' of the Solicitor General or what the majority calls 'catalytic effect' which alone sustains the claim of danger to

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[97]Youngstown Sheet and Tube Co., et al. v. Sawyer, 343 U.S. 579 (1952).
[98]Sarmiento, dissenting, at 727.
[99]Gutierrez, dissenting, at 707.

> national security is fraught with perilous implications. Any difficult problem or any troublesome person can be substituted for the Marcos threat as the catalysing factor. The alleged confluence of NPA's, secessionists, radical elements, renegade soldiers, etc., would still be present. Challenged by any critic or any serious problem, the Government can state that the situation threatens a confluence of rebel forces and proceed to ride roughshod over civil liberties. In the name of tomorrow, a newspaper may be closed. Public assemblies may be prohibited. Human rights may be violated. Yesterday, the right to travel of Senators Benigno Aquino, Jr. and Jovito Salonga was curtailed. Today, it is the right of Mr. Marcos and family. Who will be tomorrow's pariahs? I deeply regret that the Court's decision to use the political question doctrine in a situation where it does not apply raises all kinds of disturbing possibilities.[100]

The republican tone of Justice Gutierrez's dissent was set when he parted ways with the majority opinion on what the litigation hinges on, declaring that, "the issue before us is one of rights and not power."

The lessons from our martial rule experience, not too long ago, as a people are two:

> - if there is anything we need to burn in our system it is the assumption of power by the executive arm of government, through stealth or audacity, and not the Bill of Rights;
>
> - if we had a Marcos hegemony the acquiescence, decided cases, starting with the *Javellana* decision, by our Supreme Court then, had a lot to do with the abusive presidency that was our lot during the Marcos years.

The Bill of Rights guarantees the individual's personhood. The affirmations therein of a person's substantive rights in the same breath limit the powers of government, even as the great ordinances of the fundamental law structurally define and confine governmental powers by firm apportionment and actual division into three. As early as the 1935 Constitution, the framers, in this manner, articulated their fears against usurpations of power by the three departments of government *inter se*, and invasions of individual rights from any of the three branches. And the U.S. Constitution, with its then century and a half of decisional gloss, was the instant model hopefully adopted to countervail against these fears. Early on, in our constitutional law history, we had Justice Jose P. Laurel in *Angara v. Electoral Commission*[101] emulating Chief Justice John Marshall in *Marbury v. Madison*,[102] as he expounded on "judicial supremacy."

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[100] *Id.*, at 712.
[101] 63 Phil. 139, 157-159 (1936).
[102] 5 U.S. 137 (1803).

The annointment process was on – even before the country became independent in 1946 – and the Supreme Court was "it" among the three in the matter of who arbitrates what rules and what acts of government conform or not to the fundamental law.

Of the three departments, therefore, the Philippine Supreme Court, by tradition and evolution, was chosen to assume ascendancy as the "last bulwark" to maintain the integrity of our republican rights and institutions. It is no accident, therefore, that when the Supreme Court failed to hold the fort in *Javellana*, at the inception of the Marcos onslaught, the Republic was unraveled and republican values crumbled with the disintegration of the constitutional order. Political hemophilia is self-inflicted in the sense that when the judicial organ fails, by will or mind, to staunch the hemorrhaging, the republican *corpus* withers and dies. The ready acceptance of the "political question" doctrine until it became an institutionalized gimmick in the Marcos years is the attribution pointed to by Justice Gutierrez in his dissent to explain the death of republicanism during the Marcos presidency. The rationalization now in the decision penned by Justice Cortes adopting the Solicitor General's glib argument of "primacy of the right of the State to national security over individual rights" for endowment of powers in bulk upon the presidency is the fantastic notion that executive power comprehends unilateral exercise of the police power of the State.

Whether by stretch of the "political question" doctrine, or by "police power" rationalization, when the effect is to dump powers in bulk unto the presidential lap, invariably the process spells disaster to the constitutional order and consequent death to a republic, as the limits of legitimate power are erased from constant blurring.

The slow but potent assaults against constitutional guarantees first come in insidious little encroachments. Not infrequently the inroads begin under cover of respectability from men in government taken facially as good-intentioned. And when contemporaneous with an emotion-charged litigation, leave is allowed as a deviation from the constitutionally permissible, an opening is therefore cut for further erosions to insinuate themselves under color of respectability into the republican order. Such "challenge to our liberties" is no winking matter, says Justice Douglas,

> A suppression of liberty has the same effect whether the suppressor be a reformer or an outlaw. The only protection against misguided zeal is constant alertness to infractions of the guarantees of liberty contained in our Constitution. Each surrender of liberty to the demands of the

> moment makes easier another, larger surrender. The battle over the Bill of Rights is a never ending one.[103]

In language that should recall how we lost our liberties, from 1972 to 1986, on unchecked initiative of the executive arm of government, we quote from Marjorie G. Fribourg's "The Bill of Rights,"[104]

> [T]ime has taught its age-old lesson. Well-meaning people burnt witches. Well-meaning prosecutors have convicted the innocent. Well-meaning objectives espoused by those not grounded in history can lure us from protecting our heritage of equal justice under the law. They can entice us, faster than we like to believe, into endangering our liberties.

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[103]W. DOUGLAS, A LIVING BILL OF RIGHTS, 61-62 (1961).
[104]M. FRIBOURG, THE BILL OF RIGHTS, 233 (1961).