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G.R. No. 221697 — MARY GRACE NATIVIDAD S. POE-LLAMANZARES, *Petitioner* vs. COMMISSION ON ELECTIONS and ESTRELLA C. ELAMPARO, *Respondents.*

G.R. Nos. 221698-700 — MARY GRACE NATIVIDAD S. POE-LLAMANZARES, *Petitioner* vs. COMMISSION ON ELECTIONS, FRANCISCO S. TATAD, ANTONIO P. CONTRERAS, and AMADO C. VALDEZ, *Respondents.*

Promulgated:

March 8, 2016

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CONCURRING OPINION

JARDELEZA, *J.*:

The Philippine Constitution requires that a person aspiring for the presidency must be a natural-born Filipino citizen and a resident of the Philippines for at least ten years immediately preceding the election.[1] The question is whether the petitioner, as a foundling and former resident citizen of the United States (US), satisfies these requirements.

I

I first consider the issue of jurisdiction raised by the parties.

A

Petitioner Mary Grace Natividad S. Poe-Llamanzares (Poe) contends that in the absence of any material misrepresentation in her certificate of candidacy (COC), the public respondent Commission on Elections (COMELEC) had no jurisdiction to rule on her eligibility. She posits that the COMELEC can only rule on whether she intended to deceive the electorate when she indicated that she was a natural-born Filipino and that she has been a resident for 10 years and 11 months. For the petitioner, absent such intent, all other attacks on her citizenship and residency are premature since her qualifications can only be challenged through the post-election remedy of a petition for *quo warranto*. On the other hand, the COMELEC argues that since citizenship and residency are material representations in the COC affecting the qualifications for the office of President, it necessarily had to

[1] CONSTITUTION, Art. VII, Sec. 2. No person may be elected President unless he is a natural-born citizen of the Philippines, a registered voter, able to read and write, at least forty years of age on the day of the election, and a resident of the Philippines for at least ten years immediately preceding such election.

rule on whether Poe's statements were true. I agree with the COMELEC that it has jurisdiction over the petitions to cancel or deny due course to a COC. As a consequence, it has the authority to determine therein the truth or falsity of the questioned representations in Poe's COC.

Section 78[2] of the Omnibus Election Code (OEC) allows a person to file a verified petition seeking to deny due course to or cancel a COC exclusively on the ground that any of the material representations it contains, as required under Section 74,[3] is false. The representations contemplated by Section 78 generally refer to qualifications for elective office,[4] such as age, residence and citizenship, or possession of natural-born Filipino status.[5] It is beyond question that the issues affecting the citizenship and residence of Poe are within the purview of Section 78. There is also no dispute that the COMELEC has jurisdiction over Section 78 petitions. Where the parties disagree is on whether intent to deceive is a constitutive element for the cancellation of a COC on the ground of false material representation.

The divide may be attributed to the two tracks of cases interpreting Section 78. On the one hand, there is the line originating from *Salcedo II v. COMELEC*, decided in 1999, where it was held that "[a]side from the requirement of materiality, a false representation under section 78 must consist of a deliberate attempt to mislead, misinform, or hide a fact which would otherwise render a candidate ineligible."[6] On the other hand, in the more recent case of *Tagolino v. House of Representatives Electoral Tribunal*, we stated that "the deliberateness of the misrepresentation, much less one's intent to defraud, is of bare significance in a Section 78 petition as it is enough that the person's declaration of a material qualification in the COC be false."[7]

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[2] OMNIBUS ELECTION CODE, Sec. 78. *Petition to deny due course to or cancel a certificate of candidacy.* - A verified petition seeking to deny due course or to cancel a certificate of candidacy may be filed by the person exclusively on the ground that any material representation contained therein as required under Section 74 hereof is false. The petition may be filed at any time not later than twenty-five days from the time of the filing of the certificate of candidacy and shall be decided, after due notice and hearing, not later than fifteen days before the election.

[3] OMNIBUS ELECTION CODE, Sec. 74 par. 1. *Contents of certificate of candidacy.* - The certificate of candidacy shall state that the person filing it is announcing his candidacy for the office stated therein and that he is eligible for said office; if for Member of the Batasang Pambansa, the province, including its component cities, highly urbanized city or district or sector which he seeks to represent; the political party to which he belongs; civil status; his date of birth; residence; his post office address for all election purposes; his profession or occupation; that he will support and defend the Constitution of the Philippines and will maintain true faith and allegiance thereto; that he will obey the laws, legal orders, and decrees promulgated by the duly constituted authorities; that he is not a permanent resident or immigrant to a foreign country; that the obligation imposed by his oath is assumed voluntarily, without mental reservation or purpose of evasion; and that the facts stated in the certificate of candidacy are true to the best of his knowledge.

[4] *Salcedo II v. COMELEC*, G.R. No. 135886, August 16, 1999, 312 SCRA 447, 458; *Ugdoracion, Jr. v. COMELEC*, G.R. No. 179851, April 18, 2008, 552 SCRA 231, 239; *Lluz v. COMELEC*, G.R. No. 172840, June 7, 2007, 523 SCRA 456, 471; *Talaga v. COMELEC*, G.R. Nos. 196804 & 197015, October 9, 2012, 683 SCRA 197, 234.

[5] *Tagolino v. House of Representatives Electoral Tribunal*, G.R. No. 202202, March 19, 2013, 693 SCRA 574, 596; *Gonzalez v. COMELEC*, G.R. No. 192856, March 8, 2011, 644 SCRA 761, 781; *Salcedo II v. COMELEC*, *supra* at 457-459.

[6] *Supra* at 459.

[7] *Supra* at 592.

To reconcile these two cases, it is important to first understand the coverage of Section 78. The provision refers to material representations required by Section 74 to appear in the COC. In turn, Section 74 provides for the contents of the COC, which includes not only eligibility requirements such as citizenship, residence, and age, but also other information such as the candidate's name, civil status, profession, and political party affiliation. Section 78 has typically been applied to representations involving eligibility requirements, which we have likened to a *quo warranto* petition under Section 253 of the OEC.[8]

Understated in our jurisprudence, however, are representations mentioned in Section 74 that do not involve a candidate's eligibility. In this regard, there appears to be a prevailing misconception that the "material representations" under Section 78 are limited only to statements in the COC affecting eligibility.[9] Such interpretation, however, runs counter to the clear language of Section 78, which covers "any material representation contained therein *as required under Section 74*." A plain reading of this phrase reveals no decipherable intent to categorize the information required by Section 74 between material and nonmaterial, much less to exclude certain items explicitly enumerated therein from the coverage of Section 78. *Ubi lex non distinguit, nec nos distinguere debemus*. When the law does not distinguish, neither should the court.[10] The more accurate interpretation, one that is faithful to the text, is that the word "material" describes—not qualifies—the representations required by Section 74. Therefore, the declarations required of the candidate by Section 74 are all material.[11] In enumerating the contents of the COC, Section 74 uses the word "shall" in reference to non-eligibility-related matters, including "the political party to which he belongs," "civil status," "his post office address for all election purposes," "his profession or occupation," and "the name by which he has been baptized, or ... registered in the office of the local civil registrar or any other name allowed under the provisions of existing law or ... his Hadji name after performing the prescribed religious pilgrimage." The presumption is that the word "shall" in a statute is used in an imperative, and not in a directory, sense.[12] The mandatory character of the provision, coupled with the requirement that the

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[8] *Fermin v. COMELEC*, G.R. Nos. 179695 & 182369, December 18, 2008, 574 SCRA 782, 792-794 ;

[9] This can also be traced to *Salcedo, supra* at 458: "the material misrepresentation contemplated by section 78 of the Code refer to qualifications for elective office." Yet, *Salcedo* left open the possibility that a candidate's stated name in the COC may fall within the coverage of Section 78, *supra* at 459: "The use of a surname, **when not intended to mislead or deceive the public** as to one's identity, is not within the scope of the provision." (Emphasis added)

[10] *Ejercito v. COMELEC*, G.R. No. 212398, November 25, 2014, 742 SCRA 210, 299; *Yu v. Samson-Tatad*, G.R. No. 170979, February 9, 2011, 642 SCRA 421, 428; *People v. Sandiganbayan*, G.R. No. 164185, July 23, 2008, 559 SCRA 449, 459.

[11] The form of the COC prescribed by the COMELEC contains items not enumerated in Section 74, such as "nickname or stage name," "name to appear in the ballot," and "gender." It is with respect to these items that a distinction between material and nonmaterial is proper.

[12] *Codoy v. Calugay*, G.R. No. 123486, August 12, 1999, 312 SCRA 333, 342; *Gonzales v. Chavez*, G.R. No. 97351, February 4, 1992, 205 SCRA 816, 837; *Lacson v. San Jose-Lacson*, G.R. Nos. L-23482, L-23767 & L-24259, August 30, 1968, 24 SCRA 837, 848.

COC be executed under oath,[13] strongly suggests that the law itself considers certain non-eligibility-related information as material—otherwise, the law could have simply done away with them. What this means relative to Section 78 is that there are material representations which may pertain to matters not involving a candidate's eligibility.[14]

It is apparent that the interests sought to be advanced by Section 78 are twofold. The first is to protect the sanctity of the electorate's votes by ensuring that the candidates whose names appear in the ballots are qualified and thus mitigate the risk of votes being squandered on an ineligible candidate. The second is to penalize candidates who commit a perjurious act by preventing them from running for public office. This is a policy judgment by the legislature that those willing to perjure themselves are not fit to hold an elective office, presumably with the ultimate aim of protecting the constituents from a candidate who committed an act involving moral turpitude.[15] In a way, this protectionist policy is not dissimilar to the underlying principle for allowing a petition for disqualification based on the commission of prohibited acts and election offenses under Section 68. These two considerations, seemingly overlooked in *Salcedo*, are precisely why the "consequences imposed upon a candidate guilty of having made a false representation in his certificate of candidacy are grave to prevent the candidate from running or, if elected, from serving, or to prosecute him for violation of the election laws."[16]

Therefore, there are two classes of material representations contemplated by Section 78: (1) those that concern eligibility for public office; and (2) those erstwhile enumerated in Section 74 which do not affect eligibility. *Tagolino* applies to the former; *Salcedo* to the latter. This is a logical distinction once we connect the factual settings of the two cases with the aforementioned state interests. Ironically, *Salcedo*, oft-cited in Section 78 cases as authority for requiring intent in cases *involving eligibility-related representations*, actually did not concern a representation in the COC affecting the candidate's eligibility. *Salcedo* involved a candidate who used the surname of her husband of a void marriage. Her COC was challenged on the ground that she had no right to use such surname because the person she married had a subsisting marriage with another person. We held that petitioner therein failed to discharge the burden of proving that the alleged

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[13] OMNIBUS ELECTION CODE, Sec. 73 par. (1). *Certificate of candidacy.* — No person shall be eligible for any elective public office unless he files a **sworn** certificate of candidacy within the period fixed herein. (Emphasis added)

[14] The statement of the law in *Fermin v. COMELEC*, *supra* at 792, is thus more accurate:

> [T]he denial of due course to or the cancellation of the COC is not based on the lack of qualifications but on a finding that the candidate made a material representation that is false, which ***may*** [or may not] relate to the qualifications required of the public office he/she is running for.

[15] "The crime of perjury undisputedly involves moral turpitude." *Republic v. Guy*, G.R. No. L-41399, July 20, 1982, 115 SCRA 244, 254.

[16] *Salcedo II v. COMELEC*, *supra* at 458.

misrepresentation regarding the candidate's surname pertains to a material matter, and that it must equally be proved that there was an intention to deceive the electorate as to the would-be candidate's qualifications for public office to justify the cancellation of the COC.[17] The rationale is that the penalty of removal from the list of candidates is not commensurate to an honest mistake in respect of a matter not affecting one's eligibility to run for public office. "It could not have been the intention of the law to deprive a person of such a basic and substantive political right to be voted for a public office upon just any innocuous mistake."[18] Notably, a finding in *Salcedo* that the candidate had no intention to deceive the electorate when she used her married name, notwithstanding the apparent invalidity of the marriage, would have been sufficient to arrive at the same conclusion (that is, allowing her to run) without making a sweeping rule that only matters pertaining to eligibility are material.

By contrast, *Tagolino* involved a false representation with respect to a candidate's residence and its subsequent effect on the substitution by a replacement candidate. The false representation affected the one-year residency requirement imposed by the Constitution on members of the House of Representatives[19]—in other words, it went into the eligibility of the candidate. "[A]n express finding that the person committed any deliberate misrepresentation is of little consequence in the determination of whether one's COC should be deemed cancelled or not."[20] It is the fact of eligibility, not the intent to deceive, that should be decisive in determining compliance with constitutional and statutory provisions on qualifications for public office. This reading is more in accord with the text of Section 78, which does not specify intent as an element for a petition to prosper. In this context, the term "material misrepresentation" is a misnomer because it implies that the candidate consciously misrepresented himself. But all Section 78 textually provides is that "any material representation ... is false." Thus, in resolving a Section 78 petition, truth or falsity ought to be the definitive test. The COMELEC's duty, then, is to make findings of fact with respect to the material representations claimed to be false.

The need to apply *Tagolino* to the first class is highlighted by an inherent gap in *Salcedo*'s analysis, which failed to take into account a situation where a candidate indicated in good faith that he is eligible when he is in fact not. It is not inconceivable that a child, for example, born in 1977, but whose parents simulated the birth certificate to make it appear that he was born in 1976, would believe himself to be qualified to run for president in the 2016 elections. However, if the simulation of birth is proved, and hospital records and family history show that he was indeed born in 1977, then he would fall short of the minimum age requirement prescribed

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[17] *Id.* at 458-460.
[18] *Id.* at 458.
[19] CONSTITUTION, Art. VI, Sec. 6.
[20] *Tagolino v. House of Representatives Electoral Tribunal*, G.R. No. 202202, March 19, 2013, 693 SCRA 574, 592.

by the Constitution. If *Salcedo* is to be followed to a tee, the COMELEC cannot cancel his COC because he acted in good faith. This would lead to a situation where the portion of the electorate who voted for the ineligible candidate would face the threat of disenfranchisement should the latter win the elections and face a *quo warranto* challenge. In the latter proceeding, not even good faith can cure the inherent defect in his qualifications. *Tagolino* is therefore preferable in instances involving eligibility-related representations because it fills this gap. Indeed, the law should not be interpreted to allow for such disastrous consequences.

In fact, in cases involving eligibility-related representations, the Court has never considered intent to deceive as the decisive element, even in those that relied on *Salcedo*. In *Tecson v. COMELEC*,[21] which involved a question on the eligibility of Fernando Poe, Jr. for the 2004 presidential elections by way of a Section 78 petition, the Court determined whether he was a natural-born citizen of the Philippines. Intent to deceive the electorate was never discussed. In *Ugdoracion v. COMELEC*,[22] which involved residency, the Court determined that the candidate lost his residency when he became a US green card holder despite his mistaken belief that he retained his domicile in the Philippines. The candidate, invoking the legal definition of domicile, claimed that even if he was physically in the US, he always intended to return the Philippines. The Court, placing emphasis on his permanent resident status in the US, merely *inferred* his intent to deceive when he failed to declare that he was a green card holder. Then in *Jalosjos v. COMELEC*,[23] also involving residency, the Court found that the claim of domicile was contradicted by the temporary nature of the candidate's stay. This time, the Court simply *deemed* that "[w]hen the candidate's claim of eligibility is proven false, as when the candidate failed to substantiate meeting the required residency in the locality, the representation of eligibility in the COC constitutes a 'deliberate attempt to mislead, misinform, or hide the fact' of ineligibility."[24]

The Court owes candor to the public. Inferring or deeming intent to deceive from the fact of falsity is, to me, just a pretense to get around the gap left by *Salcedo*, *i.e.*, an ineligible candidate who acted in good faith. I believe the more principled approach is to adopt *Tagolino* as the controlling rule. The decision in *Agustin v. COMELEC*[25] is a step towards that direction: "[e]ven if [the COMELEC] made no finding that the petitioner had deliberately attempted to mislead or to misinform as to warrant the cancellation of his COC, the COMELEC could still declare him disqualified for not meeting the requisite eligibility...." Of course, *Salcedo* remains applicable to cases where the material representation required by Section 74

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[21] G.R. Nos. 161434, 161634, 161824, March 3, 2004, 424 SCRA 277.
[22] G.R. No. 179851, April 18, 2008, 552 SCRA 231.
[23] G.R. No. 193314, June 25, 2013, 699 SCRA 507.
[24] *Id.* at 516-517.
[25] G.R. No. 207105, November 10, 2015.

does not relate to eligibility, such as in *Villafuerte v. COMELEC*,[26] which, similar to *Salcedo*, involved a candidate's name.[27]

B

The 1987 Constitution designated the Supreme Court *en banc*, acting as the Presidential Electoral Tribunal (PET), as the "sole judge of all contests relating to the election, returns, and qualifications of the President or Vice-President."[28] Poe argues that allowing the COMELEC to rule on the eligibility of the candidate regardless of intent would be tantamount to the usurpation of the PET's authority (and that of the electoral tribunals of both the Senate and the House of Representatives) as the sole judge of qualifications. This, however, is an incorrect reading of the provision. The phrase "contests relating to the election, returns, and qualifications" is a legal term of art that is synonymous to "election contests." "As used in constitutional provisions, election contest relates only to statutory contests in which the contestant seeks not only to oust the intruder, but also to have himself inducted into the office."[29] Thus, an election contest can only contemplate a post-election,[30] post-proclamation situation.[31] While the power of electoral tribunals is exclusive,[32] full, clear, and complete,[33] it is nonetheless subject to a temporal limitation—their jurisdiction may only be invoked after the election is held and the winning candidate is proclaimed.[34]

Notably, the Constitution neither allocates jurisdiction over pre-election controversies involving the eligibility of candidates nor forecloses legislative provision for such remedy. Absent such constitutional proscription, it is well within the plenary powers of the legislature to enact a

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[26] G.R. No. 206698, February 25, 2014, 717 SCRA 312.

[27] The foregoing analysis is limited to the interpretation of Section 78 in relation to Section 74. It is not intended to affect the existing doctrine involving the penal provisions of the OEC, specifically Section 262 vis-à-vis Section 74, as enunciated in *Lluz v. COMELEC*, G.R. No. 172840, June 7, 2007, 523 SCRA 456.

[28] CONSTITUTION, Art. VII, Sec. 4 par. (7).

[29] *Vera v. Avelino*, G.R. No. L-543, August 31, 1946, 77 Phil. 192, 209.

[30] *Tecson v. COMELEC*, *supra* at 325.

[31] *Limkaichong v. COMELEC*, G.R. Nos. 178831-32, 179120, 179132-33, April 1, 2009, 583 SCRA 1, 33.

[32] *Gonzalez v. COMELEC*, G.R. No. 192856, March 8, 2011, 644 SCRA 761, 790-791.

[33] *Veloso v. Board of Canvassers*, G.R. No. 15620, July 10, 1919, 39 Phil. 886, 888.

[34] The word "sole" was originally used to bar either House of Congress (and the courts) from interfering with the judgment of the other House (*Angara v. Electoral Commission*, G.R. No. 45081 , July 15, 1936, 63 Phil. 139, 162):

> The original provision regarding this subject in the Act of Congress of July 1, 1902 (sec. 7, par. 5) laying down the rule that "the assembly shall be the judge of the elections, returns, and qualifications of its members", was taken from clause 1 of section 5, Article I of the Constitution of the United States providing that "Each House shall be the Judge of the Elections, Returns, and Qualifications of its own Members, ..." The Act of Congress of August 29, 1916 (sec. 18, par. 1) modified this provision by the insertion of the word "sole" as follows: "That the Senate and House of Representatives, respectively, shall be the sole judges of the elections, returns, and qualifications of their elective members, ..." apparently in order to emphasize the exclusive character of the jurisdiction conferred upon each House of the Legislature over the particular cases therein specified.

law providing for this type of pre-election remedy, as it did through Section 78.[35] In this regard, Poe's statement that the COMELEC essentially arrogated unto itself the jurisdiction to decide upon the qualifications of candidates is inaccurate. It is Congress that granted the COMELEC such jurisdiction; the COMELEC only exercised the jurisdiction so conferred. When the COMELEC takes cognizance of a Section 78 petition, its actions are not repugnant to, but are actually in accord with, its constitutional mandate to enforce and administer all laws relative to the conduct of an election.[36] To be clear, the proceeding under Section 78 is not an election contest and therefore does not encroach upon PET's jurisdiction over election contests involving the President and Vice-President.

We have already recognized that a Section 78 petition is one instance—the only instance—where the qualifications of a candidate for elective office can be challenged before an election.[37] Although the denial of due course to or the cancellation of the COC is ostensibly based on a finding that the candidate made a material representation that is false,[38] the determination of the factual correctness of the representation necessarily affects eligibility. Essentially, the ground is lack of eligibility under the pertinent constitutional and statutory provisions on qualifications or eligibility for public office,[39] similar to a petition for *quo warranto* which is a species of election contest. "The only difference between the two proceedings is that, under Section 78, the qualifications for elective office are misrepresented in the COC and the proceedings must be initiated before the elections, whereas a petition for *quo warranto* under Section 253 may be brought on the basis of two grounds—(1) ineligibility or (2) disloyalty to the Republic of the Philippines, and must be initiated within ten days after the proclamation of the election results."[40] Put simply, the main distinction is the time the action is filed.[41] If a person fails to file a Section 78 petition within the 25-day period prescribed in the OEC, the election laws afford him another chance to raise the ineligibility of the candidate by filing a petition for *quo warranto*.[42]

The reason why the COMELEC, pursuant to a valid law, is allowed to determine a candidate's constitutional and statutory eligibility prior to the election is not difficult to fathom. As earlier alluded to, there is legitimate value in shielding the electorate from an ineligible candidate. In addition, there are sound fiscal considerations supporting this remedy. These include the more efficient allocation of COMELEC's resources, ultimately funded

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[35] CONSTITUTION, Art. VI, Sec. 1. *See also Cecеña v. COMELEC*, G.R. No. L-52265, January 28, 1980, 95 SCRA 755.
[36] CONSTITUTION, Art. IX(C), Sec. 2(1).
[37] *Gonzalez v. COMELEC*, *supra* at 777; *Aznar v. COMELEC*, G.R. No. 83820, May 25, 1990, 185 SCRA 703, 708.
[38] *Fermin v. COMELEC*, G.R. Nos. 179695 & 182369, December 18, 2008, 574 SCRA 782, 792.
[39] *Jalosjos, Jr. v. COMELEC*, G.R. Nos. 193237, 193536, October 9, 2012, 683 SCRA 1, 45 (Brion, *J., dissenting) citing Fermin v. COMELEC*, *supra*.
[40] *Salcedo II v. COMELEC*, G.R. No. 135886, August 16, 1999, 312 SCRA 447,457.
[41] *Fermin v. COMELEC*, *supra* at 794.
[42] *Loong v. COMELEC*, G.R. No. 93986, December 22, 1992, 216 SCRA 760, 768-769.

by taxpayers' money, and a check on unnecessary campaign spending, an activity with minimal economic utility. A contrary ruling could lead to the *de facto* disenfranchisement of those who voted for a popular but ineligible candidate. The possibility of a constitutional and political crisis arising from such a result is one we dare not risk.

II

Article VII, Section 2 of the 1987 Constitution lays down the eligibility requirements for the office of President:

> No person may be elected President unless he is a natural-born citizen of the Philippines, a registered voter, able to read and write, at least forty years of age on the day of the election, and a resident of the Philippines for at least ten years immediately preceding such election.

Citizenship is determined by the organic law in force at the time of birth.[43] When Poe was found in 1968, the 1935 Constitution was still in effect. It enumerated the following as citizens of the Philippines: (1) those who are citizens of the Philippines at the time of the adoption of the 1935 Constitution; (2) those born in the Philippines of foreign parents who, before the adoption of the 1935 Constitution, had been elected to public office; (3) those whose fathers are citizens of the Philippines; (4) those whose mothers are citizens of the Philippines and, upon reaching the age of majority, elect Philippine citizenship; and (5) those who are naturalized in accordance with law.[44] For obvious reasons, the first two classes are not applicable to the present controversy. I therefore limit my discussion to the remaining three classes.

The 1987 Constitution defines "natural-born citizens" as those who are Filipino citizens "from birth without having to perform any act to acquire or perfect their Philippine citizenship."[45] Children born of Filipino fathers under the 1935 Constitution fall under this category. By express declaration, the 1987 Constitution also considered those born of Filipino mothers who elect Philippine citizenship by age of majority as natural-born citizens.[46] On the other hand, those who become Filipino citizens through the naturalization process are evidently excluded from the constitutional definition. Therefore, there are two kinds of Filipino citizens recognized under the Constitution: natural-born citizens and naturalized citizens.[47] Only the former are eligible to be President of the Philippines.

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[43] *Tan Chong v. Secretary of Labor*, G.R. Nos. 47616 & 47623, September 16, 1947, 79 Phil. 249, 258.
[44] 1935 CONSTITUTION, Art. IV, Sec. 1.
[45] CONSTITUTION, Art. IV, Sec. 2.
[46] *Id.*
[47] *Bengson III v. HRET*, G.R. No. 142840, May 7, 2001, 357 SCRA 545 557-558

Poe contends that she is a natural-born citizen because there is a presumption under international law that a foundling is a citizen of the place where he was born. She further argues that the deliberations of the 1934 Constitutional Convention reveal an intent by the framers to consider foundlings as Filipino citizens from birth. In any case, she believes that she has proved, by substantial evidence, that she is a natural-born citizen. The Solicitor General supports the second and third arguments of Poe.

On the other hand, the COMELEC and private respondents maintain that because she is a foundling whose parentage is unknown, she could not definitively prove that either her father or mother is a Filipino. They dispute the applicability of international conventions which the Philippines is not a party to, while those which have been ratified require implementing legislation. Assuming *arguendo* that she was a natural-born citizen, respondents are unanimous that she lost such status when she became a naturalized American citizen. Her subsequent repatriation under RA 9225 only conferred upon her Filipino citizenship but not natural-born status.

I take their arguments in turn.

A

The power of a state to confer its citizenship is derived from its sovereignty. It is an attribute of its territorial supremacy.[48] As a sovereign nation, the Philippines has the inherent right to determine for itself, and according to its own Constitution and laws, who its citizens are.[49] International law, as a matter of principle, respects such sovereign determination and recognizes that the acquisition and loss of citizenship fall within the domestic jurisdiction of each state.[50] Domestic rules on citizenship vary greatly from sovereign to sovereign,[51] a necessary consequence of divergent demography, geography, history, and culture among the many states. As explained in the *Nottebohm Case*:

> [T]he diversity of demographic conditions has thus far made it impossible for any general agreement to be reached on the rules relating to nationality, although the latter by its very nature affects international relations. It has been considered that the best way of making such rules accord with the varying demographic conditions in different countries is to leave the fixing of such rules to the competence of each State.[52]

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[48] PAUL WEIS, NATIONALITY AND STATELESSNESS IN INTERNATIONAL LAW,101 (1979).

[49] *Roa v. Collector of Customs*, G.R. No. 7011, October 30, 1912, 23 Phil., 315, 320-321, *citing US v. Wong Kim Ark*, 169 US 649 (1898).

[50] HANS KELSEN, PRINCIPLES OF INTERNATIONAL LAW 374-375 (2nd ed. 1979, Tucker rev. ed. 1967); IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 385 (5th ed. 1998).

[51] GERHARD VON GLAHN, LAW AMONG NATIONS: INTRODUCTION TO PUBLIC INTERNATIONAL LAW 177 (1965).

[52] *Nottebohm Case (Second Phase) (Liechtenstein v. Guatemala)*, Judgment, 1955 I.C.J., 4, 23 (April 6).

Thus, "[t]here is no rule of international law, whether customary or written, which might be regarded as constituting any restriction of, or exception to, the jurisdiction of [individual states to determine questions of citizenship]."[53] The foregoing considerations militate against the formation of customary law in matters concerning citizenship, at least not one directly enforceable on particular states as advocated by Poe. Accordingly, the provisions of the 1930 Hague Convention and 1961 Convention on the Reduction of Statelessness purportedly conferring birth citizenship upon foundlings, or creating a presumption thereof, cannot be considered customary.

At this juncture, it may not be amiss to explain that another reason why we judiciously scrutinize an invocation of customary international law based on treaties the Philippines has not acceded to is out of deference to the President's treaty-ratification power[54] and the Senate's treaty-concurring power.[55] The doctrine of separation of powers dictates that, unless the existence of customary international law is convincingly shown, courts of law should not preempt the executive and legislative branches' authority over the country's foreign relations policy, including the negotiation, ratification, and approval of treaties.[56]

In respect of international covenants that the Philippines is a party to, Poe invokes the following which allegedly recognize her right to natural-born citizenship: the Convention on the Rights of the Child (CRC), the International Covenant on Civil and Political Rights (ICCPR), and the Universal Declaration of Human Rights (UDHR). The CRC and the ICCPR both speak of a child's "right to acquire a nationality." A plain reading indicates that the right simply means that a child shall be given the opportunity to become a Filipino citizen.[57] It does not by itself create an enforceable right to birth citizenship. The obligation imposed upon states parties is for them to either enact citizenship statutes specifically for children or to equally extend to children the benefits of existing citizenship laws. In the Philippines' case, the Constitution grants birth citizenship to those born of Filipino parents and our naturalization statutes provide for derivative citizenship of children born of non-Filipino parents.[58] The Philippines is,

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[53] League of Nations Committee of Experts for the Progressive Codification of International Law, Nationality, 20 AJIL 21, 23 (1926).

[54] *Bayan (Bagong Alyansang Makabayan) v. Zamora*, G.R. No. 138570, October 10, 2000, 342 SCRA 449, 494-495.

[55] CONSTITUTION, Art. VI, Sec. 21.

[56] For an incisive analysis on the constitutional status of international law principles as interpreted by the Supreme Court, *see* MERLIN M. MAGALLONA, THE SUPREME COURT AND INTERNATIONAL LAW (2010). Dean Magallona argues that "... in cases where State sovereignty is at stake, the Court could have been a decisive factor in reshaping it along the contours of integrity of the Filipino nation." *Id.* at iii. "The heavy burden of judicial interpretation in problems of international law lies in the involvement of the sovereign integrity of the Philippine Republic and in the modality by which the will of the national community finds juridical expression." *Id.* at 119.

[57] Notably, both the CRC and ICCPR speak of children in general, not just foundlings; they apply to Filipino children, foreign children domiciled in the Philippines, and foundlings alike. This only highlights that the conventions could not have contemplated an automatic grant of citizenship without imposing the *jus soli* principle on all state-parties.

[58] *See* Commonwealth Act No. 473, Sec. 15; Republic Act No. 9225, Sec. 4.

therefore, compliant with this specific obligation under the CRC and the ICCPR.

The same can be said about the UDHR, even though it uses a slightly different wording.[59] Preliminarily, it must be clarified that the UDHR is technically not a treaty and therefore, it has no obligatory character. Nonetheless, over time, it has become an international normative standard with binding character as part of the law of nations. In other words, it has acquired the force of customary international law.[60] The "right to a nationality" under the UDHR must be interpreted as being subject to the conditions imposed by domestic law, given the broad scope of the declaration, *i.e.*, it covers "everyone." A contrary interpretation would effectively amount to an unqualified adoption of the *jus soli* principle, which would be repugnant to our constitutional structure. Such interpretation would, in fact, be contrary to the intent of the UDHR itself. The correlative state obligation under the UDHR is for a state not to withdraw or withhold the benefits of citizenship from whole sections of the population who can demonstrate a genuine and effective link with the country.[61] It does not purport to indiscriminately grant citizenship to any person. Taking into consideration the historical context of the UDHR,[62] it may be said that the right, really, is one against statelessness; and the obligation is a negative duty not to create or perpetuate statelessness.[63] It proscribes an arbitrary deprivation of citizenship and an unreasonable discrimination in the operation of naturalization laws against stateless persons.

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[59] UDHR, Art. 15(1). Everyone has the right to a nationality.

[60] MERLIN M. MAGALLONA, FUNDAMENTALS OF PUBLIC INTERNATIONAL LAW 255-258 (2005).

[61] United Nations High Commissioner for Refugees, THE STATE OF THE WORLD'S REFUGEES: A HUMANITARIAN AGENDA, *available at* http://www.unhcr.org/3eb7ba7d4.pdf.

[62] *Id.* The UDHR was precipitated by citizenship issues arising from large-scale population movements and formation of new states after World War I. It is in this context that the "right to a nationality" should be understood. Notable events include the disintegration of the Austro-Hungarian, German, and Ottoman empires leading to the establishment of new states, such as Czechoslovakia, Hungary, and Yugoslavia, the restoration of the former state of Poland, and the simultaneous adjustment of many international borders in the area directly or indirectly affected by the conflict. "Some five million people were moved, ... which evidently required the states concerned and the international community as a whole to address some complex citizenship questions." Then in the 1940s, there was the decolonization and partition of India in 1947 and the subsequent movement of Hindus and Muslims between India and Pakistan; the conflict over Palestine and the creation of Israel in 1948, creating a Palestinian diaspora in the Middle East and beyond; and the Chinese revolution of 1949, which led to the establishment of a communist government on the mainland and a nationalist government on the island of Taiwan.

[63] Commission on Human Rights, Memorandum (As *Amicus Curiae* Submission), p. 10, *citing Reports of Special Rapporteurs and Other Documents Considered During the 48th Session*, [1996] 2 Y.B. Int'l L. Comm'n 126, UN Doc. A/CN.4/SER.A/1996/Add.1 (Part 1).

> The right to a nationality, as a human right, is conceivable as a right of an individual vis-à-vis a certain State, deriving, under certain conditions, from international law. As the case may be, it is the right to be *granted the nationality of the successor State* or *not to be deprived of the nationality of the predecessor State*. The obligation not to create statelessness, however, is a State-to-State *erga omnes* obligation, conceivable either as a corollary of the above right to a nationality or as an autonomous obligation existing in the sphere of inter-State relations only and having *no direct legal consequences in the relationship between States and individuals*. (Emphasis added)

Finally, the CRC, ICCPR, and UDHR all refrained from imposing a direct obligation to confer citizenship at birth. This must be understood as a deliberate recognition of sovereign supremacy over matters relating to citizenship. It bears emphasis that none of the instruments concern themselves with natural-born and naturalized classifications. This is because this distinction finds application only in domestic legal regimes. Ergo, it is one for each sovereign to make.

B

The 1935 Constitution did not explicitly address the citizenship of foundlings. For the COMELEC and private respondents, the silence means exclusion, following the maxim *expressio unius est exclusio alterius*. They point to the *jus sanguinis* principle adopted by the Constitution to conclude that a foundling who cannot establish a definite blood relation to a Filipino parent is not natural-born. For Poe and the Solicitor General, the deliberations of the 1934 Constitutional Convention indicate the intention to categorize foundlings as citizens and the textual silence "does not indicate any discriminatory *animus* against them." They argue that the Constitution does not preclude the possibility that the parents of a foundling are in fact Filipinos.

In interpreting the silence of the Constitution, the best guide is none other than the Constitution itself.[64] As Prof. Laurence Tribe suggests, giving meaning to constitutional silence involves the twin tasks of articulating the relevant constitutional norms that determine how the silence ought to be interpreted and propounding principles of statutory construction consistent with these norms.[65] There is no question that since 1935, the Philippines has adhered to the *jus sanguinis* principle as the primary basis for determining citizenship. Under the 1935 Constitution, a child follows the citizenship of the parents regardless of the place of birth, although there was a caveat that if only the mother is Filipino, the child has to elect Philippine citizenship by age of majority. Determining a person's parentage, of course, requires a determination of facts in an appropriate proceeding. Consequently, to arrive at a correct judgment, the fundamental principles of due process and equal protection[66] demand that the parties be allowed to adduce evidence in support of their contentions, and for the decision-maker to make a ruling based on the applicable quantum of evidence.

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The appropriate due process standards that apply to the COMELEC, as a quasi-judicial tribunal, are those outlined in the seminal case of *Ang*

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[64] *Optima statuti interpretatrix est ipsum statutum* (The best interpreter of a statute is the statute itself). *Serana v. Sandiganbayan*, G.R. No. 162059, January 22, 2008, 542 SCRA 224, 245.

[65] Laurence Tribe, *Toward a Syntax of the Unsaid: Construing the Sounds of Congressional and Constitutional Silence*, 57 IND. L.J. 515, 531 (1982).

[66] CONSTITUTION, Art. III, Sec. 1.

Tibay v. Court of Industrial Relations.[67] Commonly referred to as the "cardinal primary rights" in administrative proceedings, these include: (1) the right to a hearing, which includes the right of the party interested or affected to present his own case and submit evidence in support thereof; (2) not only must the party be given an opportunity to present his case and to adduce evidence tending to establish the rights which he asserts, but the tribunal must consider the evidence presented; (3) while the duty to deliberate does not impose the obligation to decide right, it does imply a necessity which cannot be disregarded, namely, that of having something to support its decision; (4) not only must there be some evidence to support a finding or conclusion, but the evidence must be "substantial;" (5) the decision must be rendered on the evidence presented at the hearing, or at least contained in the record and disclosed to the parties affected; (6) the tribunal must act on its or his own independent consideration of the law and facts of the controversy; and (7) the tribunal should render its decision in such a manner that the parties to the proceeding can know the various issues involved, and the reasons for the decision rendered.[68] The COMELEC failed to comply with the third and fourth requirements when it *first*, decided the question of foundlings on a pure question of law, *i.e.*, whether foundlings are natural-born, without making a determination based on the evidence on record and admissions of the parties of the probability or improbability that Poe was born of Filipino parents; and *second*, by concluding that Poe can only prove her parentage through DNA or other definitive evidence, set a higher evidentiary hurdle than mere substantial evidence.

The COMELEC's starting position is that foundlings are not natural-born citizens[69] unless they prove by DNA or some other definitive evidence[70] that either of their biological parents are Filipino citizens. Thus, it

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[67] G.R. No. 46496, February 27, 1940, 69 Phil. 635.
[68] *Id.* at 642-644.
[69] COMELEC En Banc Resolution, SPA Nos. 15-002, 15-007 & 15-139, p. 17:

> The fact that Respondent was a foundling with no known parentage or blood relative effectively excluded her from the coverage of the definition of a natural-born citizen" (at p. 15). "To reiterate, natural-born citizenship is founded on the principle of *jus sanguinis*. Respondent is a foundling. Her parentage is unknown. There is thus no basis to hold that respondent has blood relationship with a Filipino parent. This Commission therefore cannot rule or presume that Respondent possesses blood relationship with a Filipino citizen when it is certain that such relationship is indemonstrable.

[70] COMELEC First Division Resolution, SPA Nos. 15-002, 15-007 & 15-139, p. 25:

> To be a natural-born citizen of the Philippines, however, Respondent must be able to definitively show her direct blood relationship with a Filipino parent and—consistent with Section 2, Article IV of the 1987 Constitution—demonstrate that no other act was necessary for her to complete or perfect her Filipino citizenship.

TSN, February 9, 2016, pp. 64-65:

> J. JARDELEZA: Now, [] when you say that the petitioner has only one type of evidence that can prove her parentage and that's only DNA[?]

limited its inquiry to the question of whether the 1935 Constitution considered foundlings as natural-born citizens. In effect, the COMELEC has created a conclusive or irrebuttable presumption against foundlings, *i.e.*, they are not natural-born citizens. This is true notwithstanding the apparently benign but empty opening allowed by the COMELEC. By definition, foundlings are either "deserted or abandoned ... whose parents, guardian or relatives are unknown," or "committed to an orphanage or charitable or similar institution with unknown facts of birth and parentage."[71] Considering these unusual circumstances common to all foundlings, DNA or other definitive evidence would, more often than not, not be available. A presumption disputable only by an impossible, even cruel, condition is, in reality, a conclusive presumption.

In this jurisdiction, conclusive presumptions are looked upon with disfavor on due process grounds. In *Dycaico v. Social Security System*, the Court struck down a provision in Republic Act No. 8282 or the Social Security Law "because it presumes a fact which is not necessarily or universally true. In the United States, this kind of presumption is characterized as an irrebuttable presumption and statutes creating permanent and irrebutable presumptions have long been disfavored under the due process clause."[72] The case involved a proviso in the Social Security Law which disqualified the surviving spouses whose respective marriages to SSS members were contracted after the latter's retirement. The Court found that this created the presumption that marriages contracted after the retirement

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> COMM. LIM: Seemingly for now...
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> J. JARDELEZA: And what is the meaning of "seemingly for now"?
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> COMM. LIM: That is what a reasonable mind could possibly approximate, because we have a situation where a child is of unknown biological parents. From the premise that the parents are biologically unknown it cannot admit of proof that parentage exists, identity wise that is otherwise the parents would be known. So in a situation such as this, Your Honor, it is our respectful submission that some other modality other than the surfacing of the parents, other than evidence of family relations, one plausible evidence would be what Justice Carpio suggested, DNA. And although we did not discuss that in our decisions not being necessary anymore to a disposition of the issues before us, this humble representation accepts that suggestion to be very sound. Because in all fairness, a foundling status need not be attached to a person forever.

[71] Rule on Adoption, A.M. No. 02-6-02-SC (2002), Sec. 3(e).

[72] *Dycaico v. SSS*, G.R. No. 161357, November 30, 2005, 476 SCRA 538, 558-559 *citing Jimenez v. Weinberger*, 417 US 628 (1974); *U.S. Department of Agriculture v. Murry*, 413 US 508, 37 (1973); *Vlandis v. Kline*, 412 US 441 (1973). *See Cleveland Board of Education v. Lafleur*, 414 U.S. 632 (1974) which involved school board rules that mandated maternity leaves for teachers beginning their fifth or sixth month of pregnancy and prohibited reemployment prior to a semester at least 3 months after delivery. The US Supreme Court found that the mandatory leave requirement conclusively presumed "that every pregnant teacher who reaches the fifth or sixth month of pregnancy is incapable of continuing," while the 3-month delay conclusively presumed the teacher's unfitness to work during that period. This conclusive presumption is "neither 'necessarily [nor] universally true,' and is violative of the Due Process Clause." In his concurring opinion, Justice Powell applied an equal protection analysis and found the school board rules "either counterproductive or irrationally overinclusive" and therefore violative of equal protection. *See also* GERALD GUNTHER, CONSTITUTIONAL LAW: CASES AND MATERIALS 888-897 (1975).

date of SSS members were sham and therefore entered into for the sole purpose of securing the benefits under the Social Security Law. This conclusive presumption violated the due process clause because it deprived the surviving spouses of the opportunity to disprove the presence of the illicit purpose.

In the earlier case of *Government Service Insurance System v. Montesclaros*, the Court similarly found as unconstitutional a proviso in Presidential Decree No. 1146 or the Revised Government Service Insurance Act of 1977 that prohibits the dependent spouse from receiving survivorship pension if such dependent spouse married the pensioner within three years before the pensioner qualified for the pension. In finding that the proviso violated the due process and equal protection guarantees, the Court stated that "[t]he proviso is unduly oppressive in outrightly denying a dependent spouses claim for survivorship pension if the dependent spouse contracted marriage to the pensioner within the three-year prohibited period," and "[t]here is outright confiscation of benefits due the surviving spouse without giving the surviving spouse an opportunity to be heard."[73]

The same considerations obtain here. The COMELEC's approach presumes a fact which is not necessarily or universally true. Although the possibility that the parents of a foundling are foreigners can never be discounted, this is not always the case. It appears that because of its inordinate focus on trying to interpret the Constitution, the COMELEC disregarded the incontrovertible fact that Poe, like any other human being, has biological parents. Logic tells us that there are four possibilities with respect to the biological parentage of Poe: (1) both her parents are Filipinos; (2) her father is a Filipino and her mother is a foreigner; (3) her mother is a Filipino and her father is a foreigner; and (4) both her parents are foreigners. In three of the four possibilities, Poe would be considered as a natural-born citizen.[74] In fact, data from the Philippine Statistics Authority (PSA) suggest that, in 1968, there was a 99.86% statistical probability that her parents were Filipinos.[75] That Poe's parents are unknown does not automatically discount the possibility that either her father or mother is a citizen of the Philippines. Indeed, the *verba legis* interpretation of the constitutional provision on citizenship as applied to foundlings is that they *may* be born of a Filipino father or mother. There is no presumption for or against them. The COMELEC's duty under a Section 78 petition questioning a candidate's citizenship qualification is to determine the probability that her father or mother is a Filipino citizen using substantial evidence. And there lies the second fault of the COMELEC: regardless of who had the burden of proof,

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[73] *GSIS v. Montesclaros*, G.R. No. 146494, July 14, 2004, 434 SCRA 441, 449.

[74] If she falls under the third category, her acts of obtaining a Philippine passport and registering as a voter may be considered as election of Filipino citizenship. (*In re FlorencioMallare*, A.C. No. 533, September 12, 1974, 59 SCRA 45, 52. Art IV, Sec. 2 of the 1987 Constitution provides that those who elect Filipino citizenship are deemed natural-born.)

[75] OSG Memorandum, Exhibits C & D.

by requiring DNA or other definitive evidence, it imposed a quantum of evidence higher than substantial evidence.

In proceedings before the COMELEC, the evidentiary bar against which the evidence presented is measured is substantial evidence, which is defined as such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.[76] This is the least demanding in the hierarchy of evidence, as compared to the highest, proof beyond reasonable doubt applicable to criminal cases, and the intermediate, preponderance of evidence applicable to civil cases.[77] When the COMELEC insisted that Poe must present DNA or other definitive evidence, it effectively subjected her to a higher standard of proof, that of absolute certainty. This is even higher than proof beyond reasonable doubt, which requires only moral certainty; in criminal cases, neither DNA evidence[78] nor direct evidence[79] are always necessary to sustain a conviction. The COMELEC's primary justification is the literal meaning of *jus sanguinis*, *i.e.*, right of blood. This, however, is an erroneous understanding because *jus sanguinis* is a principle of nationality law, not a rule of evidence. Neither is it to be understood in a scientific sense. Certainly, the 1935 Constitution could not have intended that citizenship must be proved by DNA evidence for the simple reason that DNA profiling was not introduced until 1985.

Since the COMELEC created a presumption against Poe that she was not a natural-born citizen and then set an unreasonably high burden to overcome such presumption, it unduly deprived her of citizenship, which has been described as "the right to have rights,"[80] from which the enjoyment of all other rights emanates. The Commission on Human Rights (CHR), in its *amicus* submission, accurately described the bundle of rights that flow from the possession of citizenship: "[it is] oftentimes the precursor to other human rights, such as the freedom of movement, right to work, right to vote and be voted for, access to civil service, right to education, right to social security, freedom from discrimination, and recognition as a person before the law."[81]

The purpose of evidence is to ascertain the truth respecting a matter of fact.[82] Evidence is relevant when it induces belief in the existence or non-existence of a fact in issue or tends in any reasonable degree to establish its probability or improbability.[83] It is a fundamental requirement in our legal system that questions of fact must be resolved according to the proof.[84] Under the due process clause, as expounded in *Ang Tibay*, the COMELEC was duty-bound to consider all relevant evidence before arriving at a

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[76] *Sabili v. COMELEC*, G.R. No. 193261, April 24, 2012, 670 SCRA 664, 683.
[77] *Salvador v. Philippine Mining Service Corp.*, G.R. No. 148766, January 22, 2003, 395 SCRA 729, 738.
[78] *People v. Cabigquez*, G.R. No. 185708, September 29, 2010, 631 SCRA 653, 671.
[79] *Zabala v. People*, G.R. No. 210760, January 26, 2015, 748 SCRA 246, 253.
[80] *Go v. Bureau of Immigration*, G.R. No. 191810, June 22, 2015, (Velasco, *J.*, *dissenting*) *citing* CJ Warren's dissenting opinion in *Perez v. Brownell*, 356 U.S. 44, 64 (1958).
[81] Commission on Human Rights, Memorandum (As *Amicus Curiae* Submission), p. 12.
[82] RULES OF COURT, Rule 128, Sec. 1.
[83] RULES OF COURT, Rule 128, Sec. 4.
[84] *U.S. v. Provident Trust Co.*, 291 U.S. 272 (1934).

conclusion. In the proceedings before the COMELEC, Poe presented evidence that she is 5 feet 2 inches tall, has brown eyes, low nasal bridge, black hair and an oval-shaped face, and that she was found abandoned in the Parish Church of Jaro, Iloilo. There are also admissions by the parties that she was abandoned as an infant, that the population of Iloilo in 1968 was Filipino, and that there were no international airports in Iloilo at that time. Poe's physical features, which are consistent with those of an ordinary Filipino, together with the circumstances of when and where she was found are all relevant evidence tending to establish the probability that her parents are Filipinos. Thus, the COMELEC gravely abused its discretion when it failed or refused to consider these. On the other hand, the private respondents presented absolutely no evidence before the COMELEC that would tend to establish the improbability that both of Poe's parents are Filipino citizens, and instead chose to rely solely on the undisputed fact that Poe is a foundling. The COMELEC's stance that "the probability that [Poe] might be born of a Filipino parent is not sufficient to prove her case"[85] is a blatant misunderstanding of the purpose of evidence. Tribunals, whether judicial or quasi-judicial, do not deal in absolutes, which is why we lay down rules of evidence. The determination of facts in legal proceedings is but a weighing of probabilities.[86] "[A judge] must reason according to probabilities, drawing an inference that the main fact in issue existed from collateral facts not directly proving, but strongly tending to prove, its existence. The vital question in such cases is the cogency of the proof afforded by the secondary facts. How likely, according to experience, is the existence of the primary fact if certain secondary facts exist?"[87] This is different from a mere "possibility" that is borne out of pure conjecture without proof.

To my mind, the foregoing evidence, admissions on record, data from the PSA, which we may take judicial notice of,[88] showing that 99.55% of the population of Iloilo province in 1970 were Filipinos[89] and that 99.82% of

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[85] *Rollo*, p. 180.

[86] *See* RULES OF COURT, Rule 128, Sec. 4; Rule 130, Sec. 51, par. (a)(3); Rule 133, Sec. 1.

In filiation cases, Sec. 3(f) of the Rule on DNA Evidence (A.M. No. 06-11-5-SC) refers to the "Probability of Parentage". It is "the numerical estimate for the likelihood of parentage of a putative parent compared with the probability of a random match of two unrelated individuals in a given population."

"Preponderance of evidence is a phrase which, in the last analysis, means **probability of the truth**." *Sevilla v. Court of Appeals*, G.R. No. 150284, November 22, 2010, 635 SCRA 508, 515-516. (Emphasis added)

"Probability, and not mere possibility, is required; otherwise, the resulting conclusion would proceed from deficient proofs." *Sea Power Shipping Enterprises, Inc. v. Salazar*, G.R. No. 188595, August 28, 2013, 704 SCRA 233, 251.

[87] *Joaquin v. Navarro*, G.R. Nos. L-5426-28, May 29, 1953, 93 Phil. 257, 269 *citing* 1 Moore on Facts, Sec. 596.

[88] RULES OF COURT, Rule 129, Section 2. *Judicial notice, when discretionary.* — A court may take judicial notice of matters which are of public knowledge, or are capable of unquestionable demonstration, or ought to be known to judges because of their judicial functions. *See Bagabuyo v. COMELEC*, G.R. No. 176970, December 8, 2008, 573 SCRA 290, 309.

[89] Poe Memorandum, p. 205.

children born in the Philippines in 1968 are natural-born Filipinos,[90] and absence of contrary evidence adequately support the conclusion that Poe's parents are Filipinos and, consequently, that she is a natural-born citizen. If circumstantial evidence is sufficient to establish proof beyond reasonable doubt,[91] then it should also be sufficient to hurdle the lower threshold of substantial evidence, particularly in the present case where there are a number of circumstances in favor of Poe.

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The COMELEC's unwarranted presumption against Poe, and foundlings in general, likewise violates the equal protection clause. In *Dycaico*, the Court ruled that the proviso in the Social Security Law disqualifying spouses who contracted marriage after the SSS members' retirement were unduly discriminated against, and found that the "nexus of the classification to the policy objective is vague and flimsy."[92] In *Montesclaros*, the Court considered as "discriminatory and arbitrary" the questioned proviso of the GSIS Act that created a category for spouses who contracted marriage to GSIS members within three years before they qualified for the pension.[93]

The COMELEC's *de facto* conclusive presumption that foundlings are not natural-born suffers from the same vice. In placing foundlings at a disadvantaged evidentiary position at the start of the hearing then imposing a higher quantum of evidence upon them, the COMELEC effectively created two classes of children: (1) those who know their biological parents; and (2) those whose biological parents are unknown. As the COMELEC would have it, those belonging to the first class face no presumption that they are not natural-born and, if their citizenship is challenged, they may prove their citizenship by substantial evidence. On the other hand, those belonging to the second class, such as Poe, are presumed not natural-born at the outset and must prove their citizenship with near absolute certainty. To illustrate how the two classes are treated differently, in *Tecson*,[94] which involved Poe's adoptive father, the COMELEC did not make a presumption that Fernando Poe was not a natural-born citizen. Instead, it considered the evidence presented by both parties and ruled that the petition before it failed to prove by substantial evidence that Fernando Poe was not natural-born. On *certiorari*, the Court sustained the COMELEC. In this case, the COMELEC presumed that Poe was not natural-born and failed or refused to consider relevant pieces of evidence presented by Poe. Evidently, the COMELEC's only justification for the different treatment is that Fernando Poe knew his biological parents, while herein petitioner does not.

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[90] OSG Memorandum, Exh. C
[91] RULES OF COURT, Rule 133, Sec. 4.
[92] *Dycaico v. SSS*, G.R. No. 161357, November 30, 2005, 476 SCRA 538, 553.
[93] *GSIS v. Montesclaros*, G.R. No. 146494, July 14, 2004, 434 SCRA 441, 453.
[94] G.R. Nos. 161434, 161634 & 161824, March 3, 2004, 424 SCRA 277.

I find the COMELEC's classification objectionable on equal protection grounds because, in the first place, it is not warranted by the text of the Constitution. The maxim *expressio unius est exclusio alterius* is just one of the various rules of interpretation that courts use to construe the Constitution; it is not the be-all and end-all of constitutional interpretation. We have already held that this maxim should not be applied if it would result in incongruities and in a violation of the equal protection guarantee.[95] The more appropriate interpretive rule to apply is the doctrine of necessary implication, which holds that

> No statute can be enacted that can provide all the details involved in its application. There is always an omission that may not meet a particular situation. What is thought, at the time of enactment, to be an all-embracing legislation may be inadequate to provide for the unfolding events of the future. So-called gaps in the law develop as the law is enforced. One of the rules of statutory construction used to fill in the gap is the doctrine of necessary implication. The doctrine states that what is implied in a statute is as much a part thereof as that which is expressed.[96]

When the 1935 Constitution referred to "those whose fathers [or mothers] are citizens of the Philippines," it necessarily included foundlings whose fathers or mothers are Filipino citizens. As previously discussed, the parentage of foundlings may be proved by substantial evidence. Conversely, foundlings whose parents are both foreigners are excluded from the constitutional provision. This would be the case if in an appropriate proceeding there is deficient relevant evidence to adequately establish that either of the parents is a Filipino citizen.

Another useful interpretive rule in cases with equal protection implications is the one embodied in Article 10 of the Civil Code: "In case of doubt in the interpretation or application of laws, it is presumed that the lawmaking body intended right and justice to prevail." "When the statute is silent or ambiguous, this is one of those fundamental solutions that would respond to the vehement urge of conscience."[97] Indeed, it would be most unkind to the delegates of the 1934 Constitutional Convention to ascribe upon them any discriminatory *animus* against foundlings in the absence of any positive showing of such intent. It is conceded that the *exact reason* why the Convention voted down Sr. Rafols' proposal to explicitly include "children of unknown parents" may never fully be settled. Srs. Montinola, Bulson, and Roxas all had their respective views on why the amendment was not necessary. [98] The parties herein have diametrically opposed

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[95] *Chua v. Civil Service Commission*, G.R. No. 88979, February 7, 1992, 206 SCRA 65, 77.

[96] *Id.*; *Department of Environment and Natural Resources v. United Planners Consultants, Inc.*, G.R. No. 212081, February 23, 2015.

[97] *Padilla v. Padilla*, G.R. No. 48137, October 3, 1947, 74 Phil. 377, 387.

[98] Sr. Montinola saw no need for the amendment because he believed that this was already covered by the Spanish Code. Sr. Bulson thought that it would be best to leave the matter to the hands of the legislature.

interpretations on the proposal: the respondents argue that the fact that the amendment is defeated should be conclusive—after all, not all delegates expressed their views—and that the deliberations were not submitted to the people for ratification; Poe contends that the deliberations reveal that rules of international law already considers foundlings as citizens of the place where they are found, thus making the inclusion unnecessary; and finally, the Solicitor General maintains that the silence may be fully explained in terms of linguistic efficiency and the avoidance of redundancy. These are all valid points, but I believe the only thing we can unquestionably take away from the deliberations is that there was at least *no intent to consider foundlings as stateless,* and consequently deprive them of the concomitant civil and political rights associated with citizenship.

My second objection is that—as the Solicitor General points out—foundlings are a "discrete and insular"[99] minority who are entitled to utmost protection against unreasonable discrimination applying the strict scrutiny standard. According to this standard, government action that impermissibly interferes with the exercise of a "fundamental right" or operates to the peculiar class disadvantage of a "suspect class" is presumed unconstitutional. The burden is on the government to prove that the classification is necessary to achieve a compelling state interest and that it is the least restrictive means to protect such interest.[100] The underlying rationale for the heightened judicial scrutiny is that the political processes ordinarily relied upon to protect minorities may have broken down.[101] Thus,

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Sr. Roxas believed that foundlings are rare cases and that it would be superfluous to include them in the Constitution because, in his view, this was already covered by international law.

[99] First coined by Justice Stone in the famous "Footnote Four" in *U.S. v. Carolene Products Co.*, 304 U.S. 144 (1938), where the US Supreme Court established that state-sanctioned discriminatory practices against discrete and insular minorities are entitled to a diminished presumption of constitutionality. *Cited in Central Bank Employees Ass'n, Inc. v. Bangko Sentral ng Pilipinas*, G.R. No. 148208, December 15, 2004, 446 SCRA 299, 488 (Carprio-Morales, *J., dissenting*); *White Light Corp. v. City of Manila*, G.R. No. 122846, January 20, 2009, 576 SCRA 416, 436 ; *Ang Ladlad LGBT Party v. COMELEC*, G.R. No. 190582, April 8, 2010, 618 SCRA 32, 87-99 (Puno, *C.J., concurring*); *Garcia v. Drilon*, G.R. No. 179267, June 25, 2013, 699 SCRA 352, 447-451 (Leonardo-De Castro, *J., concurring*).

[100] *Disini, Jr. v. Secretary of Justice*, G.R. No. 203335, February 18, 2014, 716 SCRA 237, 301.

[101] *Johnson v. Robison*, 415 U.S. 361 (1974); In one article, Justice Powell, although not in entire agreement with the theory of Footnote Four, summarized many scholars' formulation of the theory as follows:

> The fundamental character of our government is democratic. Our constitution assumes that majorities should rule and that the government should be able to govern. Therefore, for the most part, Congress and the state legislatures should be allowed to do as they choose. But there are certain groups that cannot participate effectively in the political process. And the political process therefore cannot be trusted to protect these groups in the way it protects most of us. Consistent with these premises, the theory continues, the Supreme Court has two special missions in our scheme of government:
>
> First, to clear away impediments to participation, and ensure that all groups can engage equally in the process; and
>
> Second, to review with heightened scrutiny legislation inimical to discrete and insular minorities who are unable to protect themselves in the legislative process.

one aspect of the judiciary's role under the equal protection clause is to protect discrete and insular minorities from majoritarian prejudice or indifference.[102]

The fundamental right warranting the application of the strict scrutiny standard is the right to a nationality embodied in the UDHR—properly understood in the context of preventing statelessness and arbitrary denial of citizenship. Citizenship has been described as "man's basic right for it is nothing less than the right to have rights," and the effects of its loss justly have been called "more serious than a taking of one's property, or the imposition of a fine or other penalty."[103] It is the individual's "legal bond [with the state] having as its basis a social fact of attachment, a genuine connection of existence, interests and sentiments, together with the existence of reciprocal rights and duties."[104] Although the COMELEC primarily argues that Poe is not natural-born, its rigid exclusionary approach,[105] taken to its logical conclusion, would actually have deprived Poe of her Filipino citizenship—natural-born or otherwise. This is an infringement of a fundamental right that threatens to deprive foundlings not only of their civil and political rights under domestic law but also deny them of the state's protection on an international level.

Foundlings also comprise a suspect class under the strict scrutiny analysis. The traditional indicia of "suspectness" are (1) if the class possesses an "immutable characteristic determined solely by the accident of birth,"[106] or (2) when the class is "saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process."[107] Thus, in the US, suspect classes for equal protection purposes include classifications based on race, religion, alienage, national origin, and ancestry.[108] In the Philippines, the Court has extended the scope to include distinctions based on economic class and status,[109] and period of employment contract.[110] Here, the COMELEC's classification is based solely on the happenstance that foundlings were abandoned by their biological parents at birth and who, as a class, possess practically no political power.[111] The classification is therefore suspect and odious to a nation committed to a regime of equality.[112]

Lewis F. Powell, Jr., *"Carolene Products" Revisited,* 82 COLUM. L. REV. 1087, 1088-1089.

[102] *Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989).
[103] *Fedorenko v. U.S.*, 449 U.S. 490, 522-523 (1981),
[104] *Nottebohm Case (Second Phase) (Liechtenstein v. Guatemala),* Judgment, 1955 I.C.J., 4, 23 (April 6).
[105] "Neither will petitioner (Poe) fall under Section 1, paragraphs 3, 4, and 5." COMELEC Memorandum, p. 56.
[106] *Frontiero v. Richardson*, 411 U.S. 677, 686 (1973).
[107] *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1, 28 (1973)
[108] *Ang Ladlad LGBT Party v. COMELEC, supra* at 93, (Puno, *C.J., concurring*).
[109] *Central Bank Employees Association, Inc. v. Bangko Sentral ng Pilipinas, supra* at 391.
[110] *Serrano v. Gallant Maritime Services, Inc.*, G.R. No. 167614, March 24, 2009, 582 SCRA 255, 282.
[111] Only 4,483 individuals were registered since 1950. Poe Memorandum, Annex B.
[112] CONSTITUTION, Preamble; Art. II, Sec. 26; Art. XIII, Sec. 1.

Applying the strict scrutiny standard, the COMELEC failed to identify a compelling state interest to justify the suspect classification and infringement of the foundlings' fundamental right.[113] Indeed, the Solicitor General, appearing as Tribune of the People,[114] disagrees with the COMELEC's position. When the Solicitor General acts as the People's Tribune, it is incumbent upon him to present to the court what he considers would legally uphold the best interest of the government although it may run counter to the position of the affected government office.[115] In such instances, the Court has considered his opinion and recommendations "invaluable aid[s] in the disposition of the case."[116] His opinion that there is no compelling state interest to justify discrimination against foundlings, while in no way conclusive upon the Court, must be afforded weight.

It may nonetheless be deduced that the interest sought to be protected by the COMELEC is the same as the concern of John Jay, the future first US Chief Justice, when he suggested to George Washington that it would be wise "to provide a ... strong check into the admission of Foreigners into the administration of our national Government; and to declare expressly that the Command in chief of the american (sic) army shall not be given to, nor devolve on, any but a natural born Citizen."[117] The rationale behind requiring that only natural-born citizens may hold certain high public offices is to insure that the holders of these high public offices grew up knowing they were at birth citizens of the Philippines. It flows from the presumption that, in their formative years, they knew they owed from birth their allegiance to the Philippines and that in case any other country claims their allegiance, they would be faithful and loyal to the Philippines. This is particularly true to the President who is the commander-in-chief of the

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[113] TSN, February 16, 2016, p. 29:

> J. JARDELEZA: x x x Under strict scrutiny analysis, the government has to meet a compelling interest test. Meaning, the government has to articulate a compelling State interest why you are discriminating against the foundling. ... So, state for me in your memo what is the compelling State interest to make a discrimination against the foundling." COMELEC did not address this in its memorandum.

[114] The Solicitor General's discretion to appear as Tribune of the People is one undoubtedly recognized in Philippine jurisprudence. *See Orbos v. Civil Service Commission*, G.R. No. 92561, September 12, 1990, 189 SCRA 459; *Gonzales v. Chavez*, G.R. No. 97351, February 4, 1992, 205 SCRA 816; *Martinez v. Court of Appeals*, G.R. No. L-112387, October 13, 1994, 237 SCRA 575 ; *Pimentel, Jr. v. COMELEC*, G.R. No. 126394, April 24, 1998, 289 SCRA 586; *City Warden of Manila v. Estrella*, G.R. No. 141211, August 31, 2001; *Constantino-David v. Pangandaman-Gania*, G.R. No. 156039, August 14, 2003, 409 SCRA 80 ; *Salenga v. Court of Appeals*, G.R. No. 174941, February 1, 2012, 664 SCRA 635.

[115] *Orbos v. Civil Service Commission*, *supra* at 466. Indeed, the OSG is expected to look beyond the narrow interest of the government in a particular case and take the long view of what will best benefit the Filipino people in the long run. As we explained in *Gonzales v. Chavez*, "it is the Filipino people as a collectivity that constitutes the Republic of the Philippines. Thus, the distinguished client of the OSG is the people themselves x x x." This is but an affirmation that the privilege, and at times, even the duty, to appear as Tribune of the People springs from the constitutional precept that sovereignty resides in the people and all government authority, including that of the Solicitor General, emanates from them.

[116] *Id.*

[117] Neal Katyal & Paul Clement, *On the Meaning of "Natural Born Citizen,"* 128 HARV. L. REV. F. 161, *available at* http://harvardlawreview.org/2015/03/on-the-meaning-of-natural-born-citizen/ .

armed forces.[118] To be sure, this interest is compelling because the Constitution itself demands it. Nonetheless, it can only be used where the issue involves the bright-line between natural-born and naturalized citizens. It cannot be used as justification in a case where no clear constitutional line has been drawn, *i.e.*, between foundlings and persons who know their parents. It finds no application in this case where there was absolutely no evidence, not even an allegation, that Poe's parents were foreign nationals. I simply find the risk that a Manchurian candidate[119] was planted by a foreign sovereign in the form of a foundling too remote to justify an *en masse* discrimination against all foundlings. If the underlying premise for the natural-born requirement is that natural-born citizens consider themselves as Filipino citizens since birth, then foundlings surely fit into this category as well.

In any case, the COMELEC failed to adopt the least restrictive means to protect such interest.[120] By imposing a heavy burden upon Poe just because she was abandoned as an infant with unknown facts of birth and parentage, the COMELEC haphazardly acted without regard to the far-reaching consequences to a discrete and insular minority. Needless to say, a more narrowly tailored approach would avoid making a sweeping presumption. The COMELEC's fixation with a scientific application of the *jus sanguinis* principle, as opposed to a legal one guided by rules of evidence, led to its discriminatory interpretation of the Constitution. It acted with "an evil eye and unequal hand,"[121] denying foundlings equal justice guaranteed by the same fundamental law. This is grave abuse of discretion.

C

The COMELEC and private respondent Amado Valdez both argue that even assuming that Poe was a natural-born citizen, she forever lost such status when she became a naturalized American in 2001. Her repatriation in 2006 only restored her Filipino citizenship, but not her natural-born status. They cite as legal basis the constitutional definition of natural-born citizens, *i.e.*, those who are citizens from birth without having to perform any act to acquire or perfect their Philippine citizenship.[122] Poe and the Solicitor General refute this by invoking the Court's ruling in *Bengson III v. HRET*,[123] where it was held that the act of repatriation allows a former natural-born citizen to recover, or return to, his original status before he lost his Philippine citizenship.

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[118] *Tecson v. COMELEC*, G.R. Nos. 161434, 161634, 161824, March 3, 2004, 424 SCRA 277, 422 (Carpio, *J.*, *dissenting*).

[119] RICHARD CONDON, THE MANCHURIAN CANDIDATE (1959). A political thriller novel about the son of a prominent US political family, who was brainwashed as part of a Communist conspiracy. It was twice adapted into a feature film (1962 and 2004).

[120] *Serrano v. Gallant Maritime Services, Inc.*, *supra* at 278.

[121] *Yick Wo v. Hopkins*, 118 US 356 (1886) *cited in People v. Dela Piedra*, G.R. No. 121777, January 24, 2001, 350 SCRA 163, 181.

[122] CONSTITUTION, Art. IV, Sec. 2.

[123] G.R. No. 142840, May 7, 2001, 357 SCRA 545.

The COMELEC and Valdez, without stating it directly, are asking for a reexamination of *Bengson*. Valdez, on the one hand, frames his argument by differentiating RA 9225 from Republic Act No. 2630 (RA 2630), the old repatriation law in effect at the time *Bengson* was decided. He argues that RA 9225 had a more tedious process than RA 2630. On the other hand, the COMELEC points to the text of RA 9225 noting that it only mentioned reacquisition of citizenship, not reacquisition of natural-born status. These are, of course, thin attempts to differentiate this case from *Bengson*. But the problem is that they never directly question the legal soundness of *Bengson*. And, to me, this half-hearted challenge is insufficient justification to depart from *stare decisis*.

Time and again, the Court has held that it is a very desirable and necessary judicial practice that when a court has laid down a principle of law as applicable to a certain state of facts, it will adhere to that principle and apply it to all future cases in which the facts are substantially the same. Absent any **powerful countervailing considerations**, like cases ought to be decided alike.[124] The reason why we adhere to judicial precedents is not only for certainty and predictability in our legal order but equally to have an institutional safeguard for the judicial branch. As articulated by the US Supreme Court in *Planned Parenthood v. Casey*,

> There is a limit to the amount of error that can plausibly be imputed to prior Courts. If that limit should be exceeded, disturbance of prior rulings would be taken as evidence that justifiable reexamination of principle had given way to drives for particular results in the short term. The legitimacy of the Court would fade with the frequency of its vacillation.[125]

In the Philippines, using as reference the cited US case, we have adopted a four-point test to justify deviation from precedent, which include the determination of: (1) whether the older doctrine retained the requirements of "practical workability;" (2) whether the older doctrine had attracted the kind of reliance that would add a special hardship to the consequences of overruling it and "add inequity to the cost of repudiation;" (3) whether the related principles of law have developed in a different direction so as to render the older rule "no more than the remnant of an abandoned doctrine;" and, (4) whether the contextual facts of the older doctrine have so changed as to deprive the old rule of "significant application or justification."[126] Thus, before we could venture into a full-blown reexamination of *Bengson*, it was necessary for respondents to have shown, at the first instance, that their case hurdled the foregoing test.

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[124] *Ty v. Banco Filipino Savings & Mortgage Bank*, G.R. No. 144705, November 15, 2005, 475 SCRA 65, 75-76.
[125] 505 U.S. 833 (1992).
[126] *Ting v. Velez-Ting*, G.R. No. 166562, March 31, 2009, 582 SCRA 694, 707-708.

III

It is well settled in election law that residence is synonymous with domicile.[127] Domicile denotes a fixed permanent residence where, when absent for business or pleasure, or for like reasons, one intends to return.[128] To establish domicile, three elements must concur: (1) residence or bodily presence in the new locality; (2) an intention to remain there (*animus manendi*); and (3) an intention to abandon the old domicile (*animus non revertendi*).[129]

There is no question that Poe has complied with the first requirement. She has been residing in the Philippines together with her children since May 24, 2005, save for brief travels abroad. The point of contention between the parties is whether Poe satisfied the concurrent requisites of *animus manendi et non revertendi*. In the proceedings before the COMELEC, Poe presented evidence that: she and her husband enrolled their US-based children in Philippine schools in June 2005; they purchased a condominium in the second half 2005 which was intended to be used as the family abode; they made inquiries with property movers as early as March 2005 and actually relocated household goods, furniture, cars, and other personal properties to the Philippines during the first half of 2006; she secured a Tax Identification Number from the Bureau of Internal Revenue in July 2005; her husband notified the US Postal Service that they will no longer be using their former US address in March 2006; they sold their family home in the US in April 2006; her husband resigned from his work in the US to join the family in May 2006; and her application for reacquisition of Filipino citizenship and her application for derivative citizenship of her minor children, which were subsequently approved on July 18, 2006. The COMELEC, however, relied on the declaration in her 2013 COC for Senator, where she stated that she was a resident for 6 years and 6 months, which would peg her residency in November 2006. Even if the previous COC was not controlling, the COMELEC determined that the earliest Poe could have established domicile here was when the BI approved her application to reacquire her Filipino citizenship on July 18, 2006. It emphasized that when Poe entered the Philippines in May 2005, she did so as a foreign national availing of a *balikbayan* visa-free entrty privilege valid for one year. In other words, she was a temporary visitor. Citing *Coquilla v. COMELEC*,[130] the COMELEC ruled that Poe should have either secured an Immigrant Certificate of Residence or reacquired Filipino citizenship to be able to waive her non-resident status.

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[127] *Caballero v. COMELEC*, G.R. No. 209835, September 22, 2015; *Limbona v. COMELEC*, G.R. No. 186006, October 16, 2009, 604 SCRA 240, 246; *Romualdez-Marcos v. COMELEC*, G.R. No. 119976, September 18, 1995, 248 SCRA 300, 323.

[128] *Asistio v. Aguirre*, G.R. No. 191124, April 27, 2010, 619 SCRA 518, 529-530.

[129] *Caballero v. COMELEC*, supra.

[130] G.R. No. 151914, July 31, 2002, 385 SCRA 607.

Unlike residence which may be proved by mere physical presence, *animus manendi et non revertendi* refers to a state of mind. Thus, there is no hard and fast rule to determine a candidate's compliance with the residency requirement.[131] Its determination is essentially dependent on evidence of contemporary and subsequent acts that would tend to establish the fact of intention. Although the appreciation of evidence is made on a case-to-case basis, there are three basic postulates to consider: *first*, that a man must have a residence or domicile somewhere; *second*, that where once established it remains until a new one is acquired; and *third*, a man can have but one domicile at a time.[132] In addition, the Court has devised reasonable standards to guide tribunals in evaluating the evidence.

In *Mitra v. COMELEC*,[133] the Court recognized that the establishment of domicile may be **incremental**. The Court considered the following "incremental moves" undertaken by Mitra as sufficient to establish his domicile: (1) his expressed intent to transfer to a residence outside of Puerto Princesa City to make him eligible for a provincial position; (2) *his preparatory moves*; (3) the transfer of registration as a voter; (4) his initial transfer through a leased dwelling; (5) *the purchase of a lot for his permanent home*; and (6) the construction of a house on the said lot which is adjacent to the premises he was leasing pending the completion of his house.

In *Fernandez v. HRET*,[134] the Court held that the transfer of domicile must be *bona fide*. In ruling in favor of the petitioner whose residency was challenged in a *quo warranto* proceeding, the Court found that there are **real and substantial reasons** for Fernandez to establish a new domicile in Sta. Rosa, Laguna for purposes of qualifying for the May 2007 elections. The ruling was based on a finding that: (a) Fernandez and his wife owned and operated businesses in Sta. Rosa since 2003; (b) *their children attended schools in Sta. Rosa* at least since 2005; (c) although ownership of property should never be considered a requirement for any candidacy, *Fernandez purchased residential properties* in that city even prior to the May 2007 election; and (d) *Fernandez and his spouse subsequently purchased another lot* in April 2007, about a month before election day, where they have constructed a home for their family's use as a residence.

In *Japzon v. COMELEC*,[135] also involving residency, the Court ruled that **residence is independent of citizenship**. The Court found that although respondent Ty did not automatically reestablish domicile in the Philippines upon reacquisition of citizenship under RA 9225, his **subsequent acts** proved his intent to establish a new domicile in the Philippines. The Court based its finding on the following circumstances: (a) he applied for a Philippine passport indicating in his application that his residence in the

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[131] *Jalosjos v. COMELEC*, G.R. No. 191970, April 24, 2012, 670 SCRA 572, 576.
[132] *Id.*
[133] G.R. No. 191938, July 2, 2010, 622 SCRA 744.
[134] G.R. No. 187478, December 21, 2009, 608 SCRA 733.
[135] G.R. No. 180088, January 19, 2009, 576 SCRA 331.

Philippines was in General Macarthur, Eastern Samar; (b) for the years 2006 and 2007, Ty voluntarily submitted himself to the local tax jurisdiction of General Macarthur by paying community tax and securing CTCs from the said municipality stating therein his local address; (c) thereafter, Ty applied for and was registered as a voter in the same municipality; and (d) *Ty had also been bodily present in General Macarthur except for short trips abroad.*

In *Romualdez-Marcos v. COMELEC*,[136] one of the issues presented was an apparent mistake with regard to the period of residency stated in the COC of Imelda Marcos, which would have made her ineligible. In finding that Marcos was eligible, the Court held that "[i]t is the **fact of residence**, not a statement in a certificate of candidacy which ought to be decisive in determining whether or not an individual has satisfied the [C]onstitution's residency qualification requirement."[137]

Guided by the foregoing, it is clear to me that Poe has adequately established her *animus manendi et non revertendi* by substantial evidence. There are real and substantial reasons for her establishment of domicile in the Philippines. Her father died on December 2004, which Poe claims, was crucial in her decision to resettle in the Philippines for good. She and her family then began the incremental process of relocating by making preparatory inquiries with property movers as early as March 2005. She then entered the Philippines in May 2005 and enrolled her children in Philippine schools for the academic year starting in June 2005. It cannot be overemphasized that it defies logic that one would uproot her children from US schools and transfer them to schools in a different country if the intent was only to stay here temporarily. The intent to stay in the Philippines permanently is further reinforced by the purchase of real property to serve as the family abode and relocation of household goods, furniture, cars, and other personal properties from the US. The sale of their family residence in the US and her husband's arrival in the Philippines to join the family all but confirmed her abandonment of her US domicile and a definitive intent to remain in the Philippines. Poe has also been physically present in the Philippines since May 2005, and the fact that she returned after short trips abroad is strongly indicative that she considers the Philippines as her domicile. Her subsequent acts of acquiring Filipino citizenship for herself and her minor children, renouncing her US citizenship, and holding public office are all consistent with the intent formed as early as 2005. Although these acts are subsequent to May 2005, they are relevant because they tend to prove a specific intent formed at an earlier time.[138] Taken together, these facts trump an innocuous statement in her 2013 COC.

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[136] *Romualdez-Marcos v. COMELEC*, G.R. No. 119976, September 18, 1995, 248 SCRA 300.

[137] *Id.* at 326.

[138] RULES OF COURT, Rule 130, Sec. 34. *Similar acts as evidence.* — Evidence that one did or did not do a certain thing at one time is not admissible to prove that he did or did not do the same or similar thing at another time; but it may be received to **prove a specific intent** or knowledge; identity, plan, system, scheme, habit, custom or usage, and the like. (Emphasis added)

The facts that Poe did not renounce her US citizenship until 2010 and used her US passport between 2006 and 2010 do not affect her establishment of domicile in the Philippines. The circumstance that Poe, after leaving the US and fixing her residence in the Philippines, may have had what is called a "floating intention" to return to her former domicile upon some indefinite occasion, does not give her the right to claim such former domicile as her residence. It is her establishment of domicile in the Philippines with the intention of remaining here for an indefinite time that severed the respondent's domiciliary relation with her former home. [139] This is consistent with the basic rule that she could have only one domicile at a time.

I now discuss the effect of the fact that Poe entered the country in May 2005 as an American citizen under the *balikbayan* visa-free program. There is no dispute among the parties that citizenship and residence are distinct concepts. A foreign national can establish domicile here without undergoing naturalization. Where there is disagreement is whether Poe could have established her domicile in the Philippines in May 2005 considering that her entry was through the *balikbayan* program, which is valid for one year. Respondents, on the one hand, believe it was not possible because of the temporary nature of her stay. For them, Poe should have first secured an Immigrant Certificate of Residence or repatriated earlier than July 2006. On the other hand, Poe contends that to require either would be to add a fourth requisite to the establishment of domicile.

In principle, I agree with the COMELEC's proposition that "a foreigner's capacity to establish her domicile in the Philippines is ... limited by and subject to regulations and prior authorization by the BID."[140] This appears to be based on rulings of US federal courts, which distinguish "lawful" from "unlawful" domicile.[141] The requisites for domicile remain the same, *i.e.*, physical presence, *animus manendi*, and *animus non revertendi*. But "[i]n order to have a 'lawful domicile,' then, an alien must have the ability, under the immigration laws, to form the intent to remain in the [country] indefinitely. [142] The basis for this is the sovereign's inherent power to regulate the entry of immigrants seeking to establish domicile within its territory. It is not an additional requisite for the establishment of domicile; rather, it is a precondition that capacitates a foreigner to lawfully establish domicile. This is the import of the statement in *Coquilla* that "an alien [is] without any right to reside in the Philippines save as our immigration laws may have allowed him to stay."[143]

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[139] *Tanseco v. Arteche*, G.R. No. 36300, September 13, 1932, 57 Phil. 227, 235.
[140] COMELEC Resolution dated December 23, 2015, p. 23
[141] *Castellon-Contreras v. Immigration and Naturalization Service*, 45 F.3d 149 (7th Cir. 1995); *Melian v. Immigration and Naturalization Service*, 987 F.2d 1521 (11th Cir. 1993); *Lok v. Immigration and Naturalization Service*, 681 F.2d 107, 109 (2nd Cir. 1982).
[142] *Castellon-Contreras v. Immigration and Naturalization Service, supra.*
[143] G.R. No. 151914, July 31, 2002, 385 SCRA 607, 616.

The point of inquiry, therefore, is if, under our immigration laws, Poe has the ability to form the intent to establish domicile. In resolving this issue, the analysis in the US case of *Elkins v. Moreno*[144] is instructive. In *Elkins*, the US Supreme Court resolved the question of whether a holder of a "G-4 visa" (a nonimmigrant visa granted to officers or employees of international treaty organizations and members of their immediate families) cannot acquire Maryland domicile because such a visa holder is incapable of demonstrating an essential element of domicile—the intent to live permanently or indefinitely in Maryland (a "legal disability"). In resolving the issue, the US Court analyzed federal immigration laws and found that where the US Congress intended to restrict a nonimmigrant's capacity to establish domicile, it did so expressly. Since there was no similar restriction imposed on G-4 aliens, the US Court considered the legislature's silence as pregnant, and concluded that the US Congress, while anticipating that permanent immigration would normally occur through immigrant channels, was willing to allow non-restricted nonimmigrant aliens to adopt the US as their domicile.[145]

In the Philippines, the primary immigration law is Commonwealth Act No. 613 (CA 613) or the Philippine Immigration Act of 1940. In defining certain nonimmigrant classes, Congress explicitly limited the purpose for entry into the Philippines. For example, a nonimmigrant student's entry is "solely for the purpose of study."[146] In other instances, it uses language that identifies a specific purpose and the transient nature of the nonimmigrant's entry.[147] By including such restrictions on intent, it may be deduced that Congress aimed to exclude aliens belonging to these restricted classes if their real purpose in coming to the Philippines was to immigrate permanently. This is further supported by Section 37(d) of the Act which provides as ground for deportation the nonimmigrant's violation of any limitation or condition under which he was admitted.

But Congress made no such clear restrictions in Republic Act No. 9174 (RA 9174), which amended Republic Act No. 6768 (RA 6768).[148] The law allows *balikbayans* who hold foreign passports to enter the Philippines visa-free for a period of one year, except for those considered as restricted nationals.[149] It defines a *balikbayan* as "a Filipino citizen who has been continuously out of the Philippines for a period of at least one (1) year, a

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[144] 435 U.S. 647 (1978).
[145] *Id.*
[146] CA 613, Sec. 9(f). *See also* 9(c) "A seaman serving as such on a vessel arriving at a port of the Philippines and seeking to enter **temporarily and solely in the pursuit of his calling as a seaman**"; and 9(d) "A person seeking to enter the Philippines **solely to carry on trade between the Philippines and the foreign state** of which he is a national, his wife, and his unmarried children under twenty-one years of age, if accompanying or following to join him, subject to the condition that citizen of the Philippines under similar conditions are accorded like privileges in the foreign state of which such person is a national." (Emphasis added)
[147] *Id.*, Sec. 9(a) "A **temporary** visitor coming **for business or for pleasure or for reasons of health**"; (b) "A person **in transit to a destination outside the Philippines.**" (Emphasis added)
[148] An Act Instituting a Balikbayan Program (1989).
[149] RA 6768, as amended by RA 9174, Sec. 3(c).

Filipino overseas worker, or former Filipino citizen and his or her family, as this term is defined hereunder, who had been naturalized in a foreign country and comes or returns to the Philippines."[150] Unlike the restricted classes of nonimmigrants under the Immigration Act, there was no definite restriction on intent or purpose imposed upon *balikbayans*, although there was a temporal restriction on the validity of the visa-free entry. Taken alone, the one-year limit may be interpreted as an implied limitation. However, RA 9174 expressly declared that one of the purposes of establishing a *balikbayan* program is to "to enable the *balikbayan* to become economically self-reliant members of society upon their return to the country."[151] To this end, the law instructs government agencies to "provide the necessary entrepreneurial training and livelihood skills programs and marketing assistance to a *balikbayan*, including his or her immediate family members, who shall avail of the *kabuhayan* program in accordance with the existing rules on the government's reintegration program." [152] This is a clear acknowledgement by Congress that it is possible for a *balikbayan* to form the intent needed to establish his domicile in the Philippines. Notably, there are no qualifications, such as acquisition of permanent resident status or reacquisition of Filipino citizenship, before a *balikbayan* may avail of the *kabuhayan* program. Applying the well-established interpretive rule that a statute must be so construed as to harmonize and give effect to all its provisions whenever possible,[153] the one-year visa-free entry does not create a legal disability which would prevent *balikbayans* from developing *animus manendi*.

The amendments introduced by RA 9174 to RA 6768 differentiate the present case from *Coquilla*. In that case, decided prior to the enactment of RA 9174, the Court concluded that a visa-free *balikbayan* visitor could not have established domicile in the Philippines prior to a waiver of his non-resident status. This is because under RA 6768, the only declared purpose was "to attract and encourage overseas Filipinos to come and visit their motherland." Coupled with the one-year visa-free limit, this most likely led to the Court's interpretation that a *balikbayan*'s entry was merely temporary. However, with the amendments introducing the reintegration provisions, a *balikbayan* is no longer precluded from developing an intent to stay permanently in the Philippines. Therefore, Poe, who entered the Philippines after the effectivity of RA 9174, had the ability to establish a lawful domicile in the Philippines even prior to her reacquisition of Filipino citizenship.

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[150] *Id*, Sec. 2(a).
[151] *Id.*, Sec. 1.
[152] *Id.*, Sec. 6.
[153] *Uy v. Sandiganbayan*, G.R. Nos. 105965-70, March 20, 2001, 354 SCRA 651, 672-673.

For the foregoing reasons, I vote to **GRANT** the petitions.

FRANCIS H. JARDELEZA
Associate Justice