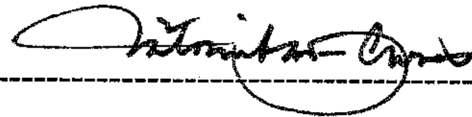
EN BANC

G.R. No. 263590 (***Atty. Romulo B. Macalintal,*** *petitioner vs.* ***Commission on Elections and The Office of the President through Executive Secretary Lucas P. Bersamin,*** *respondents*).

G.R. No. 263673 (***Atty. Alberto N. Hidalgo, Atty. Aluino O. Ala, Atty. Agerico A. Avila, Atty. Ted Cassey B. Castello, Atty. Joyce Ivy C. Macasa, and Atty. Frances May C. Realino,*** *petitioners vs.* ***Executive Secretary Lucas Bersamin, The Senate of the Philippines, duly represented by its Senate President, Juan Miguel Zubiri, The House of Representatives, duly represented by its Speaker of the House, Ferdinand Martin Romualdez, and the Commission on Elections, duly represented by its Chairman, George Erwin M. Garcia,*** *respondents*).

Promulgated: June 27, 2023



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SEPARATE CONCURRING OPINION

GESMUNDO, *C.J.*:

The instant consolidated petitions assail the constitutionality of Republic Act (*R.A.*) No. 11935, otherwise known as "An Act Postponing the December 2022 *Barangay* and *Sangguniang Kabataan* Elections, Amending for the Purpose Republic Act No. 9164, as Amended, Appropriating Funds Therefor, and for Other Purposes." Principally, both petitions argue that the Congress has no power to postpone or cancel a scheduled election as this power belongs solely to the Commission on Elections (*COMELEC*) pursuant to Section 5 of the Omnibus Election Code of the Philippines (*OEC*).[1]

I concur in the result, particularly as to the declaration of R.A. No. 11935 as unconstitutional. I write to respectfully share my views on the proper standard to test the validity of laws postponing *barangay* elections. I also put into perspective Sec. 5 of the OEC and its applicability to postponements of elections by the Congress.

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1 Batas Pambansa Blg. 881; approved on December 3, 1985.

I. The Legislative Power to Postpone Elections vis-à-vis the COMELEC's Power under Sec. 5 of the OEC

The consolidated petitions posit, among others, that the power to postpone elections belongs exclusively to the COMELEC.[2] Petitioners based this proposition on the powers granted to the COMELEC under paragraphs 1 to 3, Sec. 2, Article IX-C of the 1987 Constitution:

> SECTION 2. The Commission on Elections shall exercise the following powers and functions:
>
> (1) Enforce and administer all laws and regulations relative to the conduct of an election, plebiscite, initiative, referendum, and recall.
>
> (2) Exercise exclusive original jurisdiction over all contests relating to the elections, returns, and qualifications of all elective regional, provincial, and city officials, and appellate jurisdiction over all contests involving elective municipal officials decided by trial courts of general jurisdiction, or involving elective barangay officials decided by trial courts of limited jurisdiction.
>
> Decisions, final orders, or rulings of the Commission on election contests involving elective municipal and barangay offices shall be final, executory, and not appealable.
>
> (3) Decide, except those involving the right to vote, all questions affecting elections, including determination of the number and location of polling places, appointment of election officials and inspectors, and registration of voters.

To buttress their position that the power to postpone elections belongs exclusively to the COMELEC, <u>both petitioners also cite Sec. 5 of the OEC</u>.

Addressing these points, the *ponencia* declared as follows:

> On plainer perspective, matters that solely and distinctly pertain to election administration can be said to fall primarily within the power of the COMELEC. On the other hand, matters that intersect and transcend numerous constitutional interests and rights — beyond the strict confines

[2] Petitioner's Memorandum in G.R. No. 263590, pp. 16-21; and petitioner's Memorandum in G.R. No. 263673, pp. 7-10.

> of election matters and the right of suffrage — must generally be viewed as falling primarily within the broad and plenary power of the Congress.[3]
>
> x x x x
>
> Given the broad and plenary power of the Congress that encompasses, as well, matters affecting the elections and the exercise of the right of suffrage, it logically follows that its power extends to the postponement of elections, including at the barangay level.[4]

The *ponencia* explained that any power deemed legislative by usage and tradition is necessarily possessed by Congress. Thus, the Congress' broad and plenary power to legislate inherently includes the power to postpone *barangay* elections. It, thus, rejected petitioners' claim that the powers granted to COMELEC under pars. 1 to 3, Sec. 2, Art. IX-C of the 1987 Constitution limits the power to postpone elections to the COMELEC alone.[5]

I agree with the clear explanation offered by the esteemed *ponente.* I also concur with the *ponencia*'s characterization of the powers granted to the COMELEC under pars. 1 and 3, Sec. 2, Art. IX-C of the 1987 Constitution as being administrative in nature while the power vested in it under par. 2 thereof is quasi-judicial.[6]

I find petitioners' argument that the power of the COMELEC under pars. 1 to 3 constitutes an exclusive grant to postpone elections to be misplaced. The power under par. 1 is merely administrative in nature; it speaks of the enforcement and administration of laws and regulations in relation to the conduct of an election, plebiscite, initiative, referendum, and recall. It does not contemplate the COMELEC postponing an election. Similarly, the power granted under par. 3 is administrative in nature since it refers to decisions as to logistical details in the facilitation of the electoral process.[7] The postponement of an election does not fall within this category. Meanwhile, par. 2 contemplates the COMELEC's quasi-judicial power to decide contests, whether in the exercise of its original or appellate jurisdiction. To my mind, none of these powers squarely allow for the postponement of elections by the COMELEC.

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[3] *Ponencia*, p. 24.
[4] Id.
[5] Id. at 28.
[6] Id. at 29.
[7] Id.

Indeed, the power of the COMELEC to postpone elections is not based on the Constitution; but rather, such power is merely statutory, based on Secs. 5 and 45 of the OEC:

> SECTION 5. *Postponement of election.* — When for any **serious cause** such as **violence, terrorism, loss or destruction of election paraphernalia or records,** ***force majeure*****, and other analogous causes of such a nature that the holding of a free, orderly and honest election should become impossible** in any **political subdivision**, the **Commission,** *motu proprio* or upon a verified petition by any interested party, and after due notice and hearing, whereby all interested parties are afforded equal opportunity to be heard, **shall postpone the election therein to a date which should be reasonably close to the date of the election not held, suspended or which resulted in a failure to elect but not later than thirty days after the cessation of the cause for such postponement or suspension of the election or failure to elect.** (Emphases supplied)
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> x x x x
>
> SECTION 45. *Postponement or failure of election.* — When for any **serious cause** such as **violence, terrorism, loss or destruction of election paraphernalia or records,** ***force majeure*****, and other analogous causes of such nature that the holding of a free, orderly and honest election should become impossible** in any **barangay**, the Commission, upon a verified petition of an interested party and after due notice and hearing at which the interested parties are given equal opportunity to be heard, shall postpone the election therein for such time as it may deem necessary.
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> If, on account of *force majeure*, violence, terrorism, fraud or other analogous causes, the election in any barangay has not been held on the date herein fixed or has been suspended before the hour fixed by law for the closing of the voting therein and such failure or suspension of election would affect the result of the election, the Commission, on the basis of a verified petition of an interested party, and after due notice and hearing, at which the interested parties are given equal opportunity to be heard shall call for the holding or continuation of the election within thirty days after it shall have verified and found that the cause or causes for which the election has been postponed or suspended have ceased to exist or upon petition of at least thirty percent of the registered voters in the barangay concerned.
>
> When the conditions in these areas warrant, upon verification by the Commission, or upon petition of at least thirty percent of the registered voters in the barangay concerned, it shall order the holding of the barangay election which was postponed or suspended. (Emphases supplied)

On this score, Atty. Ruben E. Agpalo, in his Comments on the Omnibus Election Code (2004 Revised Edition), stated the following in relation to Sec. 5:

> Section 5 of the Omnibus Election Code enumerates the grounds which may justify the COMELEC to postpone the election. Where after hearing, the Commission finds that there is extreme difficulty in conducting a free, orderly, honesty, peaceful, and credible election on the date set by law and there is need for close supervision by the Commission and effective military presence, which neither can definitely provide if elections were not postponed, the Commission may postpone the election **in the province or locality concerned.**
>
> The setting of the special elections not later than thirty days after the cessation of the cause of the postponement of election or suspension of the election or failure to elect is directory depending upon the exigencies and peculiar circumstances attendant as determined by the Commission and its determination, in the absence of abuse of discretion, is binding.[8] (Emphasis supplied)

A plain reading of Secs. 5 and 45 reveals that the power of the COMELEC to postpone is limited to the specific instances or circumstances mentioned therein. Congress, in legislating these provisions, set out adequate guidelines or limitations[9] on the authority of the COMELEC to postpone an election.

It may be surmised that the COMELEC may only postpone elections in any political subdivision, including a *barangay*, when there is serious cause in the nature of violence, terrorism, loss, or destruction of election paraphernalia or records, *force majeure*, and other analogous cases of such nature that would make it impossible to hold a free, orderly, and honest election.

As noted by Senior Associate Justice Josue N. Bellosillo, Associate Justice Jose Midas P. Marquez, and Atty. Emmanuel L.J. Mapili in their book entitled "2007 *Omnibus Election Code with Rules of Procedure and*

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[8] Agpalo, R.E., *Comments on the Omnibus Election Code* (Revised Edition 2004), Quezon City: Rex Printing Company, Inc., pp. 27-28.

[9] In *ABAKADA GURO Party List v. Purisima*, 584 Phil. 246, 272 (2008), the Court held:

Two tests determine the validity of delegation of legislative power: (1) the completeness test and (2) the sufficient standard test. A law is complete when it sets forth therein the policy to be executed, carried out or implemented by the delegate. It lays down a sufficient standard when it provides adequate guidelines or limitations in the law to map out the boundaries of the delegate's authority and prevent the delegation from running riot. To be sufficient, the standard must specify the limits of the delegate's authority, announce the legislative policy and identify the conditions under which it is to be implemented.

Jurisprudence in Election Law," this power of COMELEC to postpone is limited to the enumerated causes in Sec. 5 of the OEC:

> ***Causes of Postponement.*** For a postponement to happen, there must be either one of the enumerated causes: *force majeure*, violence, terrorism, loss or destruction of election paraphernalia, and analogous causes. The cause would have to be serious and would make it *impossible* to have free and orderly elections. Comelec *en banc*, by a majority of its members, shall have the authority to declare the postponement of elections. It must be noted that the grounds must exist before voting. The postponement may be done *motu proprio* or upon verified petition. There is also a rule on notice and due process in Section 5 that must also be observed.[10]

The fact that Congress gave the COMELEC this power does not mean that it has given up its own power to postpone elections. The COMELEC, the constitutional body tasked with the enforcement and administration of all election laws and regulations, itself acknowledged that its power to postpone elections was delegated to it by the Congress, subject to Congress' review, and only for the causes mentioned therein. This is evidenced by the following exchange with COMELEC Chairperson George Garcia during the Oral Arguments held on October 21, 2022:

> **CHIEF JUSTICE GESMUNDO:**
> Thank you.
> The petitioner harps on Section 5 of the Omnibus Election Code saying that the power to postpone election is exclusively lodged with the COMELEC. Did you hear his arguments?
>
> **CHAIRPERSON GARCIA:**
> Yes, Your Honor.
>
> **CHIEF JUSTICE GESMUNDO:**
> Do you agree with that...
>
> **CHAIRPERSON GARCIA:**
> I strongly disagree, Your Honor.
>
> **CHIEF JUSTICE GESMUNDO:**
> Why do you disagree?
>
> **CHAIRPERSON GARCIA:**
> **Because the provision of Section 5 *Batas Pambansa Bilang* 881 is a delegated authority coming from Congress. Being a delegated authority, it can be taken, [modified] or even [reviewed] by Congress. Meaning to say that when Congress deemed it necessary to give us the**

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[10] Agpalo, R.E., *Comments on the Omnibus Election Code* (Revised Edition 2004), Quezon City: Rex Printing Company, Inc., p. 29, citing *Sumbing v. Davide*, G.R. Nos. 86850-51, July 20, 1989.

> **power to postpone the election, the Congress limited such exercise of power to the causes mentioned therein.** Meaning, there is an urgency for the Commission to act on these matters. And that's why the limitation as given in Section 5 pertains to the causes mentioned therein and likewise pertaining to the sub-divisions as mentioned likewise in the last part of *Batas Pambansa Bilang* 881. And so therefore, Your Honor, when Congress said COMELEC can postpone the election based on these causes, Congress can likewise postpone the election based on any other cause other than those mentioned.[11] (Emphasis supplied)

It is well-established that "[t]he legislative power of the Philippine Congress is plenary, subject only to such limitations, as are found in the Republic's Constitution. So that any power, deemed to be legislative by usage and tradition, is necessarily possessed by the Philippine Congress, unless the Organic Act has lodged it elsewhere."[12]

As explained above, the 1987 Constitution has not lodged this power to postpone elections elsewhere. It is, in fact, Congress which delegated some measure of this power to the COMELEC through Secs. 5 and 45 of the OEC.

The Court is also aware of the following statement in Atty. Agpalo's Comments on the Omnibus Election Code (2004 Revised Edition):

> No other body or officer has the power to postpone or rest an election date except the Commission *en banc* itself. Hence, the postponement or resetting of the election date by the COMELEC Assistant Director or the COMELEC Special Action Team, not having any authority to do so, is invalid.[13]

It may be surmised from the foregoing statement that it was made in connection with a postponement or resetting of the election date by the COMELEC Assistant Director or the COMELEC Special Action Team. Said statement was made in relation to a different set of facts, which does not prevail in the instant case. Further, it must be emphasized that the power of the COMELEC to postpone is limited to the serious causes provided in Sec. 5, such as violence, terrorism, loss or destruction of election paraphernalia or records, *force majeure*, and other analogous causes of such nature that the holding of a free, orderly, and honest election should become impossible in any political subdivision. In this case, the postponement of the *barangay* elections was done by the Congress in the exercise of its plenary power to legislate, which is not restricted to the grounds provided by Sec. 5.

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[11] Transcript of Stenographic Notes of the Oral Arguments held on October 21, 2022, pp. 145-146.
[12] *Vera v. Avelino*, 77 Phil. 192, 212 (1946).
[13] Bellosillo, J.N., Marquez, J.M.P., and Mapili, E.L.J., *Omnibus Election Code with Rules of Procedure and Jurisprudence in Election Law*. Quezon City: Central Book Supply, Inc., p. 12.

Nonetheless, it must be emphasized that the plenary power of Congress to legislate is not unbridled. The same is subject to review by the Court pursuant to a standard by which to measure its validity.

II. The Proper Standard to Test the Validity of Postponement of Elections

It is my humble opinion that, as a **general rule,** the proper standard to test the validity of laws postponing *barangay* elections should be the **rational basis test.** In presenting this position, I am guided foremost by the duty of this Court to balance the people's fundamental right to vote with the State's responsibility to maintain the sanctity and integrity of the electoral process.

To support my position, I undertake a review of jurisprudence in the Philippines and in the United States (*U.S.*) on the use of the three tests of judicial scrutiny in cases involving the right to vote or the electoral process.

The Three Tests of Judicial Scrutiny

A review of relevant Philippine case law demonstrates that the Court considers the application of three tests of judicial scrutiny when assessing the validity of laws and regulations on the basis of either substantive due process or the equal protection clause.[14] These are the **strict scrutiny test, intermediate scrutiny test**, and **rational basis test.**[15]

These three tests were adopted by our courts from jurisprudence developed in the U.S. As to their development in the U.S., it has been said that "[t]he origins of this formula and its proliferation... are neither well known nor easily traced."[16] It would appear that the tests evolved gradually via a number of different doctrinal cases throughout the 19th and 20th centuries.[17] With the rise of the industrial age in the U.S. and a concomitant

[14] *White Light Corp. v. City of Manila*, 596 Phil. 444, 462-463 (2009).
[15] Id. at 462.
[16] Strict Judicial Scrutiny, 54 UCLA L. Rev. 1267, 1274.
[17] Id. at 1275.
The rational basis test, with its presumption of constitutionality, is perhaps the oldest and default test, in use by U.S. courts in one form or another since the 19th century (Tears of Scrutiny, 57 Tulsa L. Rev. 341, 347). The strict scrutiny test has its foundations in footnote four of the 1938 case of *United States v. Carolene Products*, although it was not expressed as the formula that we know it today until the 1960s (Tears of Scrutiny, 57 Tulsa L. Rev. 341, 346-347 and Strict Judicial Scrutiny, 54 UCLA L. Rev. 1267, 1274). Finally, the intermediate scrutiny test – as well as the practice of choosing between the three tests – began in 1976, in the equal protection case of *Craig v. Boren* (Tears of Scrutiny, 57 Tulsa L. Rev. 341, 347-348).

growth in the scope of governmental power, U.S. courts were more frequently faced with the need to ascertain the balance between governmental power and individual rights.[18] The tests of judicial scrutiny became effective tools by which courts could structure their analyses.[19]

As adopted by Philippine courts in due process and equal protection cases, the three tests can be summarized in the following manner:

The strictest test, aptly called the **strict scrutiny test**, is used when the law or regulation in question interferes with the exercise of a fundamental right, or operates to the peculiar disadvantage of a suspect class or persons accorded special protection by the Constitution.[20] Under this test, the law is presumed unconstitutional, and the government carries the burden to prove that the law is (1) necessary to achieve a **compelling** state interest and (2) the **least restrictive means** to protect such interest.[21]

Heightened review or the **intermediate scrutiny test** is used when the assailed law or regulation does not burden fundamental rights or suspect classes, but where some circumstance nevertheless exists which requires heightened scrutiny.[22] For example, the test is applied in freedom of speech cases, when the assailed regulation is content-neutral in that it regulates the time, place, or manner of speech, without restricting the subject matter of speech.[23] Under intermediate scrutiny, the government must show that the law or regulation (1) serves an **important** state interest and (2) is **substantially related** to serving that interest.[24]

Lastly, the **rational basis test** applies in all other cases not covered by the first two tests.[25] Under this test, the law or regulation will be upheld if it is (1) **rationally** related (2) to a **legitimate** state interest.[26]

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[18] The New Formalism: Requiem for Tiered Scrutiny? U. Pa. J. Const. L. 945, 948.
[19] Strict Judicial Scrutiny, 54 UCLA L. Rev. 1267, 1336.
[20] *Serrano v. Gallant Maritime Services, Inc.*, 601 Phil. 245, 282 (2009).
[21] Id.
[22] *Samahan ng mga Progresibong Kabataan v. Quezon City*, 815 Phil. 1067, 1113-1114 (2017).
[23] *Chavez v. Gonzales*, 569 Phil. 155, 238 (2008).
[24] *Serrano v. Gallant Maritime Services, Inc.*, supra at 282.
[25] *Samahan ng mga Progresibong Kabataan v. Quezon City*, supra at 1114.
[26] *Serrano v. Gallant Maritime Services, Inc.*, supra at 282.

A. The Three Tests of Judicial Scrutiny in Cases Involving the Right to Vote in Philippine Jurisprudence

The application of the three tests of judicial scrutiny in cases involving laws and regulations affecting the right to vote or the electoral process varies. A review of select cases in order to gain insight into the Court's treatment of election-related cases, as well as the Court's reasoning behind the choice of test in each case, shows:

i. Strict Scrutiny Test

The Court applied the strict scrutiny test in *GMA Network v. COMELEC*[27] (*GMA Network*), *1-United Transport Koalisyon v. COMELEC*[28] (*1-UTAK*), and *Kabataan Party-List v. COMELEC*[29] (*Kabataan Party-List*).

GMA Network and *1-UTAK* both involved COMELEC resolutions on political campaigning. The use of strict scrutiny in these cases reflects the Court's stance, elucidated in the earlier case of *Mutuc v. COMELEC*, that "this preferred freedom [free speech] calls all the more for the utmost respect when what may be curtailed is the dissemination of information to make more meaningful the equally vital right of suffrage."[30]

In *GMA Network*, the Supreme Court applied the strict scrutiny test to review the COMELEC's imposition of aggregate-based airtime limits on political advertisements.[31] The Court reasoned there that:

> Political speech is one of the most important expressions protected by the Fundamental Law. "[F]reedom of speech, of expression, and of the press are at the core of civil liberties and have to be protected at all costs for the sake of democracy." Accordingly, the same must remain unfettered **unless otherwise justified by a compelling state interest**.[32] (Emphasis supplied; citation omitted)

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[27] 742 Phil. 174 (2014).

[28] 758 Phil. 67 (2015).

[29] 775 Phil. 523 (2015).

[30] *Mutuc v. Commission on Elections*, 146 Phil. 798, 805-806 (1970).

[31] *GMA Network, Inc. v. Commission on Elections*, supra at 230-238.

[32] Id. at 228.

Moreover, in striking down the affected COMELEC resolution, the Court had occasion to expound on the importance of the right to suffrage and the free communication of ideas. The Court said:

> The assailed rule on "aggregate-based" airtime limits is unreasonable and arbitrary as it unduly restricts and constrains the ability of candidates and political parties to reach out and communicate with the people. Here, the adverted reason for imposing the "aggregate-based" airtime limits – leveling the playing field – does not constitute a compelling state interest which would justify such a substantial restriction on the freedom of candidates and political parties to communicate their ideas, philosophies, platforms and programs of government.
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> x x x x
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> Fundamental to the idea of a democratic and republican state is the right of the people to determine their own destiny through the choice of leaders they may have in government. Thus, the primordial importance of suffrage and the concomitant right of the people to be adequately informed for the intelligent exercise of such birthright.[33]

In *1-UTAK*, the Court declared void several provisions in a COMELEC resolution prohibiting the posting of election campaign materials on public utility vehicles (*PUVs*) and in transport terminals.[34] The Court held that the assailed provisions "forcefully and effectively inhibited [owners of PUVs and transport terminals] from expressing their preferences" and unduly infringed on the fundamental right of the people to freedom of speech.[35] The Court's use of strict scrutiny was explained thus:

> The right to participate in electoral processes is a basic and fundamental right in any democracy. It includes not only the right to vote, but also the right to urge others to vote for a particular candidate. The right to express one's preference for a candidate is likewise part of the fundamental right to free speech. Thus, **any governmental restriction on the right to convince others to vote for a candidate carries with it a heavy presumption of invalidity**.[36] (Emphasis supplied)

On the other hand, at issue in *Kabataan Party-List* was the mandatory voters' biometrics registration introduced by R.A. No. 10367.[37] The Court proceeded to apply the strict scrutiny test after due recognition that U.S. jurisprudence has expanded the scope of strict scrutiny to protect the right to

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[33] Id. at 230-232.
[34] *1-United Transport Koalisyon v. Commission on Elections*, supra at 104.
[35] Id. at 85-86.
[36] Id. at 78.
[37] *Kabataan Party-List v. Commission on Elections*, supra at 539.

suffrage.[38] That said, in upholding the validity of the law, the Court also reasoned that biometrics registration is a mere aspect of the registration procedure which the State has the right to regulate.[39] In fact, as the Court noted, biometrics registration was "precisely designed to facilitate the conduct of orderly, honest, and credible elections by containing — if not eliminating, the perennial problem of having flying voters, as well as dead and multiple registrants,"[40] thereby ensuring that "the results of the elections were truly reflective of the genuine will of the people."[41]

ii. Intermediate Scrutiny Test

The Court employed the intermediate scrutiny test in *Osmeña v. COMELEC*[42] (*Osmeña*), *Nicolas-Lewis v. COMELEC*[43] (*Nicolas-Lewis*), and *The Diocese of Bacolod v. COMELEC*[44] (*Diocese of Bacolod*). Notably, at issue in all these cases were regulations on political campaigning and political messages. In *Osmeña* and *Nicolas-Lewis*, these regulations were judged by the Court to be content-neutral in nature.

Osmeña involved a question relating to the validity of a provision in R.A. No. 6646 prohibiting mass media from giving print space or air time for campaigns or other political purposes, except to the COMELEC.[45] The Court held that the assailed provision simply regulated the place and time for the conduct of political campaigning, without interfering with the content of political campaigns.[46] As such, and in contrast to content-based regulations which must be supported by a compelling state interest, the subject regulation need only be supported by a "substantial government interest," and a "deferential standard of review" will suffice to test its validity.[47]

In addition, the Court emphasized in *Osmeña* that "the validity of regulations of time, place and manner, under well-defined standards, is well-nigh beyond question" and that the allocation of print space and air time was for the purpose of ensuring free, orderly, honest, peaceful, and credible elections.[48]

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[38] Id. at 551.
[39] Id. at 550.
[40] Id. at 552.
[41] Id.
[42] 351 Phil. 692 (1998).
[43] 859 Phil. 560 (2019).
[44] 751 Phil. 301 (2015).
[45] *Osmeña v. COMELEC*, supra at 702.
[46] Id. at 705-706.
[47] Id. at 717-718.
[48] Id. at 709.

In *Nicolas-Lewis*, R.A. No. 9189 was assailed for prohibiting the engagement of any person in partisan political activities abroad during the 30-day overseas voting period.[49]

The Court began its discussion of the merits in this case by stressing the nature of freedom of expression as a preferred right and a fundamental principle of every democratic government.[50] Moreover, the Court affirmed that the right to participate in electoral processes, including the right to vote, is "[a] fundamental part of this cherished freedom."[51]

That said, the Court viewed its task in the case as one of balancing the freedom of expression with the State's duty to preserve the sanctity and integrity of the electoral process. We discussed:

> The Court is once again confronted with the task of harmonizing fundamental interests in our constitutional and democratic society. On one hand are the constitutionally-guaranteed rights, specifically, the rights to free speech, expression, assembly, suffrage, due process and equal protection of laws, which this Court is mandated to protect. On the other is the State action or its constitutionally-bounden duty to preserve the sanctity and the integrity of the electoral process, which the Court is mandated to uphold. It is imperative, thus, to cast a legally-sound and pragmatic balance between these paramount interests.[52]

The Court proceeded to rule that the prohibition in R.A. No. 9189 partook of a content-neutral regulation, merely regulating the time and place of political campaigning without affecting the actual content of campaign messages.[53] As such, the same should be tested using intermediate scrutiny.[54]

Finally, *Diocese of Bacolod* involved COMELEC's Notice to Remove Campaign Material issued on February 22, 2013, and the letter issued on February 27, 2013 regulating the size of election propaganda material.[55] While the Court ultimately found that the regulation involved was content-based, it subjected the same to intermediate scrutiny to showcase that it would not pass such lower standard.[56]

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[49] *Nicolas-Lewis v. COMELEC*, supra at 578.
[50] Id. at 586.
[51] Id.
[52] Id. at 581.
[53] Id. at 592-593.
[54] Id. at 594.
[55] *The Diocese of Bacolod v. Commission on Elections*, supra at 315-316.
[56] Id. at 377-382.

***iii.* Rational Basis Test**

The Court appears to have applied the rational basis test in at least one election-related case.

In *Ang Ladlad LGBT Party v. COMELEC*,[57] the Court applied the rational basis test to review the COMELEC's refusal to accredit Ang Ladlad LGBT Party (*Ang Ladlad*) as a party-list organization.[58] Nevertheless, while the case discussed the freedom of expression and of association in relation to the organization of Ang Ladlad as a political group,[59] the Court did not enter into an extensive discussion as to why rational basis was the appropriate test to apply. Instead, the Court simply stated that "[r]ecent jurisprudence has affirmed that if a law neither burdens a fundamental right nor targets a suspect class, we will uphold the classification as long as it bears a rational relationship to some legitimate government end."[60]

The foregoing review of jurisprudence leads me to make three observations regarding the use of the three tests of judicial scrutiny in Philippine cases involving elections or the right to vote.

First, the invocation of the right to vote or the right to freedom of expression does not by itself trigger the application of strict scrutiny. Instead, as in other due process or equal protection cases, **the Court chooses the appropriate test on a case-to-case basis, carefully assessing the impact of the assailed regulation on the rights invoked.**

Second, in cases involving elections or the right to vote, the Court gives due consideration to **two distinct interests** – that is, on the one hand, **the right of the people to vote and to participate in political affairs** and, on the other, **the duty of the State to preserve the sanctity and integrity of the electoral process**. The two are not opposed. Rather, the State's duty to regulate elections exists for the very purpose of protecting and upholding the right of the people to vote. Therefore, in every case involving election regulations, the Court must be mindful of its duty to balance both these interests.

Third, Philippine jurisprudence applying the three tests of judicial scrutiny appears to be rich in cases involving laws or rules regulating political campaigns and political advertisements. As such, there is much to

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[57] 632 Phil. 32 (2010).
[58] Id. at 77-78.
[59] Id. at 79-86.
[60] Id. at 77.

draw from with regard to the application of the three tests when the law in question affects political speech. It is my humble submission, however, that **a law changing the schedule of elections is a whole different animal, and it must be reviewed on parameters different from what the Court usually applies** in cases which directly affect the exercise of free speech.

I now turn to election-related cases in U.S. jurisprudence applying the three tests of judicial scrutiny.

B. The Three Tests of Judicial Scrutiny in Cases Involving the Right to Vote in U.S. Jurisprudence

i. 20th Century Landmark Cases

Early landmark cases in the U.S. involving the review of election-related laws and regulations are notable for their recognition of the right to vote as a fundamental right, as well as their consequent application of the strict scrutiny test. Indeed, these are the cases that the Court invokes when it applies the strict scrutiny test to review election regulations.

These cases follow the tone of *Yick Wo v. Hopkins*[61] (*Yick Wo*), an 1886 case where the U.S. Supreme Court expressed its view on the importance of the right to vote.[62] *Yick Wo* set forth:

> Sovereignty itself is, of course, not subject to law, for it is the author and source of law; but, in our system, while sovereign powers are delegated to the agencies of government, sovereignty itself remains with the people, by whom and for whom all government exists and acts. And the law is the definition and limitation of power. It is, indeed, quite true that there must always be lodged somewhere, and in some person or body, the authority of final decision, and in many cases of mere administration the responsibility is purely political, no appeal lying except to the ultimate tribunal of the public judgment, exercised either in the pressure of opinion or by means of the suffrage. But the fundamental rights to life, liberty, and the pursuit of happiness, considered as individual possessions, are secured by those maxims of constitutional law which are the monuments showing the victorious progress of the race in securing to men the blessings of civilization under the reign of just and equal laws, so that, in the famous language of the Massachusetts Bill of Rights, the government of the commonwealth "may be a government of laws, and not of men." For the

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[61] 118 U.S. 356 (1886).
[62] Id. at 369-370.

> very idea that one man may be compelled to hold his life, or the means of living, or any material right essential to the enjoyment of life at the mere will of another seems to be intolerable in any country where freedom prevails, as being the essence of slavery itself.
>
> There are many illustrations that might be given of this truth, which would make manifest that it was self-evident in the light of our system of jurisprudence. The case of the political franchise of voting is one. Though not regarded strictly as a natural right, but as a privilege merely conceded by society according to its will under certain conditions, nevertheless **it is regarded as a fundamental political right, because preservative of all rights.**[63] (Emphasis supplied)

In *Reynolds v. Sims*,[64] the U.S. Supreme Court held that "any alleged infringement of the right of citizens to vote must be **carefully and meticulously scrutinized.**"[65] Suit was brought in this case challenging the apportionment of the Alabama Legislature.[66] The Court considered apportionment as a matter affecting the right to vote, declaring that "the right of suffrage can be denied by a debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise."[67]

In *Harper v. Virginia Board of Elections*,[68] petitioners asked the U.S. Supreme Court to declare Virginia's poll tax unconstitutional.[69] The Court again held that "where fundamental rights and liberties are asserted... classifications which might invade or restrain them must be **closely scrutinized and carefully confined.**"[70] (Emphasis supplied)

In *Kramer v. Union Free School Dist. No. 15*,[71] a New York law provided that residents could vote in the school district election only if they owned or leased taxable real property within the district, or if they were parents of children enrolled in local public schools.[72] Again, the U.S. Supreme Court held that the law must be given a "close and exacting examination" given the fundamental nature of the right to vote.[73] The U.S. Supreme Court went on to discuss:

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63 Id. at 370.
64 377 U.S. 533 (1964).
65 Id. at 562.
66 Id. at 537.
67 Id. at 555.
68 383 U.S. 663 (1966).
69 Id. at 664.
70 Id. at 670.
71 395 U.S. 621 (1969).
72 Id. at 622.
73 Id. at 626.

> This careful examination is necessary because statutes distributing the franchise constitute the foundation of our representative society. Any unjustified discrimination in determining who may participate in political affairs or in the selection of public officials undermines the legitimacy of representative government.
>
> Thus, state apportionment statutes, which may dilute the effectiveness of some citizens' votes, receive close scrutiny from this Court. No less rigid an examination is applicable to statutes denying the franchise to citizens who are otherwise qualified by residence and age. Statutes granting the franchise to residents on a selective basis always pose the danger of denying some citizens any effective voice in the governmental affairs which substantially affect their lives. Therefore, if a challenged state statute grants the right to vote to some *bona fide* residents of requisite age and citizenship and denies the franchise to others, **the Court must determine whether the exclusions are necessary to promote a compelling state interest.**
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> x x x x
>
> Accordingly, when we are reviewing statutes which deny some residents the right to vote, **the general presumption of constitutionality afforded state statutes and the traditional approval given state classifications if the Court can conceive of a "rational basis" for the distinctions made are not applicable**. The presumption of constitutionality and the approval given "rational" classifications in other types of enactments are based on an assumption that the institutions of state government are structured so as to represent fairly all the people. However, **when the challenge to the statute is, in effect, a challenge of this basic assumption, the assumption can no longer serve as the basis for presuming constitutionality**.[74] (Emphases supplied; citations omitted)

Further, in *Dunn v. Blumstein*,[75] the U.S. Supreme Court employed strict scrutiny to assess the validity of a Tennessee law imposing a residency requirement on voters.[76] *Dunn* declared that "if it was not clear then, it is certainly clear now that **a more exacting test is required for any statute that 'places a condition on the exercise of the right to vote'**."[77] (Emphasis supplied)

That said, U.S. jurisprudence also emphasizes that "not every limitation or incidental burden on the exercise of voting rights is subject to a stringent standard of review."[78] In fact, the U.S. Supreme Court applied the rational basis test to assess the validity of candidate filing fees in *Bullock v. Carter*,[79] despite the recognition in that case that impositions on candidates

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[74] Id. at 626-628.
[75] 405 U.S. 330 (1972).
[76] Id. at 342-343.
[77] Id. at 337.
[78] *Bullock v. Carter*, 405 U.S. 134, 143 (1972).
[79] Id. at 149.

also affect voters' rights.[80] The rational basis test was also applied in *McDonald v. Board of Election Commissioners*[81] after detainees in a county jail questioned their non-inclusion in Illinois' system of absentee voting.[82]

In the case of *Storer v. Brown*[83] (*Storer*), the U.S. Supreme Court recognized that the right to vote must accept substantial regulation in order for the electoral process to be properly safeguarded.[84] Further, precisely because the right to vote should be balanced with the duty of the State to regulate elections, the process of arriving at the outcome in each case is highly sensitive to the attendant facts and circumstances. The U.S. Supreme Court discussed:

> In challenging § 6830 (d) (Supp. 1974), appellants rely on Williams v. Rhodes and assert that under that case and subsequent cases dealing with exclusionary voting and candidate qualifications, e.g., Dunn v. Blumstein x x x; Bullock v. Carter x x x; Kramer v. Union Free School District, x x x substantial burdens on the right to vote or to associate for political purposes are constitutionally suspect and invalid under the First and Fourteenth Amendments and under the Equal Protection Clause unless essential to serve a compelling state interest. These cases, however, do not necessarily condemn § 6830 (d) (Supp. 1974). It has never been suggested that the Williams-Kramer-Dunn rule automatically invalidates every substantial restriction on the right to vote or to associate. x x x [The Constitution] authorizes the States to prescribe "the Times, Places and Manner of holding Elections for Senators and Representatives." Moreover, as a practical matter, **there must be a substantial regulation of elections if they are to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic processes**. In any event, the States have evolved comprehensive, and in many respects complex, election codes regulating in most substantial ways, with respect to both federal and state elections, the time, place, and manner of holding primary and general elections, the registration and qualifications of voters, and the selection and qualification of candidates.
>
> It is very unlikely that all or even a large portion of the state election laws would fail to pass muster under our cases; and the rule fashioned by the Court to pass on constitutional challenges to specific provisions of election laws provides no litmus-paper test for separating those restrictions that are valid from those that are invidious under the Equal Protection Clause. **The rule is not self-executing and is no substitute for the hard judgments that must be made. Decision in this context, as in others, is very much a "matter of degree", very much a matter of "consider[ing] the facts and circumstances behind the law, the interests which the State claims to be protecting, and the interests of those who are disadvantaged by**

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80 Id. at 143.
81 394 U.S. 802 (1969).
82 Id. at 809.
83 415 U.S. 724 (1974).
84 Id. at 730.

the classification." What the result of this process will be in any specific case may be very difficult to predict with great assurance.[85] (Emphases supplied; citations omitted)

Since *Storer*, U.S. jurisprudence on the review of election laws appears to have progressed along at least two distinct lines.

The first line of cases deal specifically with laws affecting core political speech.[86] In these cases, courts apply what has come to be known as the "Meyer-Buckley Standard," whereby the courts resort directly to the strict scrutiny test.[87] In other words, following the Meyer-Buckley Standard, when a court finds that a law affects core political speech, that court will automatically apply the strict scrutiny test, regardless of the severity of the burden imposed by the law in question.[88]

The second line of cases apply the so-called "Anderson-Burdick Balancing Framework," whereby the appropriate test of judicial scrutiny depends to a large extent on the severity of the burden imposed by the election law, and will vary on a case-to-case basis.[89] The Anderson-Burdick Test applies when the law or regulation in question has the following two characteristics: (1) the law must burden a relevant constitutional right, such as the right to vote; and (2) the law must primarily regulate the mechanics of the electoral process, as opposed to core political speech.[90]

ii. The Meyer-Buckley Standard

As mentioned, in cases involving core political speech, U.S. courts typically opt for the more traditional approach of resorting directly to the strict scrutiny test. I will no longer discuss the history or nuances of the Meyer-Buckley Standard in detail. Instead, it will suffice to touch upon the illustrative cases of *McIntyre v. Ohio Elections Commission*[91] (*McIntyre*) and *Meyer v. Grant*[92] (*Meyer*).

In *McIntyre*, petitioners questioned an Ohio law requiring campaign literature to contain the name and address of the issuing person or campaign

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85 Id. at 729-730.
86 *Lichtenstein v. Hargett*, 489 F. Supp. 3d 742 (M.D. Tenn. 2020).
87 Id.
88 Id.
89 *Mazo v. New Jersey Secretary of State*, 54 F.4th 124 (3d Cir. 2022).
90 Id.
91 514 U.S. 334 (1995).
92 486 U.S. 414 (1988).

official, effectively prohibiting anonymous campaign literature.[93] The U.S. Supreme Court held that the subject Ohio law was "a regulation of pure speech" as opposed to a regulation controlling "the mechanics of the electoral process."[94] As such, the Court proceeded directly to an application of "exacting scrutiny."[95] The Court pronounced that "[w]hen a law burdens core political speech, we apply 'exacting scrutiny,' and we uphold the restriction only if it is narrowly tailored to serve an overriding state interest."[96]

In *Meyer*, the Court considered a law prohibiting the use of paid petition circulators (paid to circulate initiative petitions for the purpose of proposing constitutional amendments) as a direct imposition on political speech which, as in *McIntyre*, required "exacting scrutiny."[97] Notably, the Court defined "core political speech" in *Meyer*, subsequently reiterated in the case of *Buckley v. American Constitutional Law Foundation, Inc.*,[98] as "interactive communication concerning political change."[99]

iii. The Anderson-Burdick Balancing Framework

The Anderson-Burdick Balancing Framework, applicable in every case involving an election law not primarily directed at regulating political speech, has seen wide and varied application.[100] It has been used by the U.S. Supreme Court to review all manner of laws and rules regulating the time, place, and manner of elections, including "notices, registration, supervision of voting, protection of voters, prevention of fraud and corrupt practices, counting of votes, duties of inspectors and canvassers, and making and publication of election returns"[101] as well as "ballot access rules, regulation of party primaries, voter identification laws, and the content of ballots."[102]

The leading case of *Anderson v. Celebrezze*[103] (*Anderson*) consolidates and lays down the guidelines for the judicial review of election regulations not primarily directed at core political speech. In said case, petitioners challenged the constitutionality of an Ohio rule imposing an

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93 *McIntyre v. Ohio Elections Commission*, supra at 334.
94 Id. at 345.
95 Id. at 334-335.
96 Id. at 347.
97 *Meyer v. Grant*, supra at 420.
98 525 U.S. 182, 186 (1999).
99 *Meyer v. Grant*, supra at 421-422; *Buckley v. American Constitutional Law Foundation, Inc.*, id. at 186.
100 *Mazo v. New Jersey Secretary of State*, supra.
101 Id., citing *Smiley v. Holm*, 285 U.S. 355, 366 (1932).
102 Id.
103 460 U.S. 780 (1983).

earlier deadline for independent candidates to file their statement of candidacy, as compared to major-party candidates.[104]

Anderson echoed the U.S. Supreme Court's statement in *Storer* that "as a practical matter, there must be a substantial regulation of elections if they are to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic processes."[105] The U.S. Supreme Court went on to say:

> To achieve these necessary objectives, States have enacted comprehensive and sometimes complex election codes. **Each provision of these schemes**, whether it governs the registration and qualifications of voters, the selection and eligibility of candidates, or the voting process itself, **inevitably affects – at least to some degree – the individual's right to vote** and his right to associate with others for political ends. **Nevertheless, the State's important regulatory interests are generally sufficient to justify reasonable, nondiscriminatory restrictions.**[106] (Emphases supplied)

Further, as in *Storer*, the U.S. Supreme Court in *Anderson* recognized the absence of a "litmus paper test" by which courts could automatically or quickly determine the validity of election regulations.[107] Instead, *Anderson* advised that courts must meet each challenge "by an analytical process that parallels its work in ordinary litigation."[108] Thus, *Anderson* laid down the following guidelines:

> [A court] must **first consider the character and magnitude of the asserted injury to the rights** protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate. It then must **identify and evaluate the precise interests put forward by the State** as justifications for the burden imposed by its rule. In passing judgment, the Court must not only determine the legitimacy and strength of each of those interests, it also must **consider the extent to which those interests make it necessary to burden the plaintiff's rights**. Only after weighing all these factors is the reviewing court in a position to decide whether the challenged provision is unconstitutional. The results of this evaluation will not be automatic; as we have recognized, there is "no substitute for the hard judgments that must be made."[109] (Emphases supplied; citations omitted)

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[104] Id. at 782-783.
[105] Id. at 789, citing *Storer v. Brown*, supra note 83, at 730.
[106] Id.
[107] Id.
[108] Id.
[109] Id.

Expanding on *Anderson*, the case of *Burdick v. Takushi*[110] (*Burdick*), emphasized that the determination of the applicable standard of review in election-related cases depends, in part, on the **severity of the restriction** on the right to suffrage. The Court in *Burdick* discussed:

> [T]o subject every voting regulation to strict scrutiny and to require that the regulation be narrowly tailored to advance a compelling state interest, as petitioner suggests, would tie the hands of States seeking to assure that elections are operated equitably and efficiently. x x x
>
> Instead, as the full Court agreed in Anderson, **a more flexible standard applies**. A court considering a challenge to a state election law must weigh "the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate" against "the precise interests put forward by the State as justifications for the burden imposed by its rule," taking into consideration "the extent to which those interests make it necessary to burden the plaintiff's rights."
>
> Under this standard, **the rigorousness of our inquiry** into the propriety of a state election law **depends upon the extent to which a challenged regulation burdens First and Fourteenth Amendment rights**. Thus, as we have recognized **when those rights are subjected to "severe" restrictions, the regulation must be "narrowly drawn to advance a state interest of compelling importance." But when a state election law provision imposes only "reasonable, nondiscriminatory restrictions" upon the First and Fourteenth Amendment rights of voters, "the State's important regulatory interests are generally sufficient to justify" the restrictions.**[111] (Emphases supplied; citations omitted)

U.S. courts have come to describe the Anderson-Burdick Balancing Framework as a "sliding scale" approach.[112] For example, the U.S. Court of Appeals for the Ninth Circuit in *Ariz. Libertarian Party v. Hobbs*[113] explained:

> There is an inevitable tension between a state's authority and need to regulate its elections and the First and Fourteenth Amendment rights of voters, candidates, and political parties. To harmonize these competing demands, we look to Anderson v. Celebrezze and Burdick v. Takushi which provide a "flexible standard" for reviewing constitutional challenges to state election regulations:
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> x x x x

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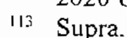
110 504 U.S. 428 (1992).

111 Id. at 433-434.

112 See *e.g. Ariz. Libertarian Party v. Hobbs*, 925 F.3d 1085 (9th Cir. 2019); *Libertarian Party v. Sununu*, 2020 U.S. Dist. LEXIS 133437 (D.N.H. 2020); *Fish v. Schwab*, 957 F.3d 1105 (10th Cir. 2020).



113 Supra.

> We have described this approach as **a "sliding scale" — the more severe the burden imposed, the more exacting our scrutiny; the less severe, the more relaxed our scrutiny.** To pass constitutional muster, a state law imposing a severe burden must be narrowly tailored to advance "compelling" interests. On the other hand, a law imposing a minimal burden need only reasonably advance "important" interests.[114] (Emphasis supplied; citations omitted)

Similarly, in *Fish v. Schwab*,[115] the U.S. Court of Appeals for the Tenth Circuit summarized the sliding scale nature of the Anderson-Burdick framework in this way:

> Thus, **the scrutiny we apply will wax and wane with the severity of the burden imposed** on the right to vote in any given case; heavier burdens will require closer scrutiny, lighter burdens will be approved more easily.[116] (Emphasis supplied)

The Supreme Court of Missouri in *Peters v. Johns*[117] stressed the significance of the severity of the restriction as a factor in deciding which test to apply, to wit:

> It is tempting to assume the application of strict scrutiny due to the implication of voting rights, regarded as "among our most precious freedoms." The Supreme Court has been clear, however, that "to subject every voting regulation to strict scrutiny . . . would tie the hands of States seeking to assure that elections are operated equitably and efficiently." "Accordingly, the mere fact that a State's system creates barriers tending to limit the field of candidates from which voters might choose does not of itself compel close scrutiny."
>
> **Rather, it is the severity of the burden on the asserted constitutional rights that produces the level of scrutiny, and not the nature of the burdened right itself, as is often the case in traditional fundamental rights analysis. If the burden is severe, strict scrutiny applies. If the burden is *de minimis*, rational basis review applies.**[118] (Emphasis supplied; citations omitted)

Lastly, in *Chelsea Collaborative, Inc. v. Secretary of the Commonwealth*,[119] the Supreme Court of Massachusetts restated the rule as follows:

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[114] Id. at 1090.
[115] Supra.
[116] Id.
[117] 489 S.W.3d 262 (Mo. 2016).
[118] Id.
[119] 480 Mass. 27 (Mass. 2018).

> Because the right to vote is a fundamental one protected by the Massachusetts Constitution, a statute that **significantly interferes with that right is subject to strict judicial scrutiny**. x x x
>
> By contrast, statutes that do not significantly interfere with the right to vote but **merely regulate and affect the exercise of that right to a lesser degree are subject to rational basis review** to assure their reasonableness.[120] (Emphases supplied; citations omitted)

C. Application and Recommendations

Drawing from the review of both Philippine and U.S. jurisprudence, I respectfully submit the following:

First, **as a general rule**, in choosing the appropriate standard of review to test the validity of **regulations affecting the right to vote and the electoral process**, the Court should adopt a **flexible, case-to-case basis approach** akin to that espoused in *Anderson* and *Burdick*. I believe this approach accords the greatest respect to both the people's right to vote and the State's duty to regulate elections.

Some of my esteemed colleagues opined that when a law involves the right to suffrage, resort to the strict scrutiny test is necessary.[121] That being said, I respectfully submit that not every law or regulation involving a fundamental right automatically warrants the application of either intermediate or strict scrutiny.

Indeed, as to the sweeping application of the intermediate scrutiny test, it must be stated that the range of what constitutes an "indirect" effect is too vague and too broad; it does not operate as an effective limitation on the scope of the intermediate scrutiny test. One can stretch the point and argue, in fact, that even the lightest rules regulating the smallest details of the electoral process indirectly affect the right to vote. Similarly, one can argue that every election-related law not directly controlling the content of political speech is a content-neutral regulation. To apply the intermediate scrutiny test in every case involving an "indirect effect" on the right to vote would unduly impair the ability of the State to regulate the conduct of elections.

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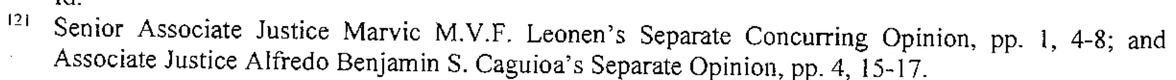
[120] Id.



[121] Senior Associate Justice Marvic M.V.F. Leonen's Separate Concurring Opinion, pp. 1, 4-8; and Associate Justice Alfredo Benjamin S. Caguioa's Separate Opinion, pp. 4, 15-17.

On the other hand, as to the sweeping use of the strict scrutiny test, it must be pointed out that the extent of statutes which the legislature may enact involving the right to suffrage are near limitless. The potential expanse of such enactments covers a whole gamut of subject matters, ranging from the lightest of regulations to the most burdensome. Thus, to rule, without exception, that any law involving the right to suffrage must be subjected to strict scrutiny is to unduly burden the capacity of the State to legislate and, in effect, regulate the conduct of elections. Such declaration is an unwarranted and unjustifiable restriction; it fails to balance the duty of the State to regulate elections with the right to vote. It must be stressed that "not every limitation or incidental burden on the exercise of voting rights is subject to a stringent standard of review."[122]

It is well-recognized that the impact of any law or rule regulating elections varies widely in nature and severity. In fact, this is true even if we restrict our attention to laws postponing elections. The effect, for example, of a single postponement of several months is vastly different from the effect of several consecutive postponements serving to delay the elections by 10 years or 15 years. The Court would not be according full respect to either the right to vote or the State's duty to regulate elections if these two vastly different situations were judged according to the same standard. **With every unique factor attendant in each case, the balance between the right to vote and the State's duty to regulate elections shifts, and the court must adjust accordingly.**

Following the example of U.S. jurisprudence, I humbly propose that regulations affecting elections or the right to vote may be subject to the appropriate level of scrutiny after a consideration, among others, of the severity of the restriction imposed by the regulation on the right to vote.

Second, with respect in particular to the review of **laws postponing *barangay* elections**, I am of the modest view that the application of the **rational basis test** as a **general rule** is proper.

While the cases of *Osmeña and Nicolas-Lewis* applied the intermediate scrutiny test, it should be noted that these cases all deal with regulations relative to political campaigning and advertisements.[123] Furthermore, the "content-based" versus "content-neutral" analysis in *Osmeña* and *Nicolas-Lewis* draws directly from doctrine laid down in the

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[122] *Bullock v. Carter*, 405 U.S. 134, 143 (1972); *Rogers v. Corbett*, 468 F.3d 188 (3d Cir. 2006); *Barnesville Educ. Assoc. OEA/NEA v. Barnesville Exempted Vill. Sch. Dist. Bd. of Educ.*, 2007 WL 745095 (Ohio 2007).

[123] *Osmeña v. Commission on Elections*, supra note 42; *Nicolas-Lewis v. Commission on Elections*, supra note 43.

U.S. cases of *United States v. O'Brien*[124] and *Turner Broad. Sys. v. FCC,*[125] which dealt with the regulation of speech.[126] Again, I respectfully submit that a law changing the schedule of elections is far too different from laws regulating political speech, such that the doctrine developed for the latter cannot squarely apply to the former.

In general, unlike laws and rules regulating political campaigns and advertisements, laws postponing elections are not intended to affect, control, limit, restrict, or regulate either the content or the incidents of political communication. Despite the postponement of elections, political aspirants and voters are free to engage in debates on the merits or demerits of incumbent or prospective elective officials, to enter into discussions of history or current events, and to voice their critique of governmental acts. Voters can continue to discuss the relevant issues and express their opinion on prospective candidates involved in the delayed elections. In short, political discourse continues unimpeded despite the change in the schedule of elections.

It should also be remembered that incumbent *barangay* officials whose tenures are extended as a result of laws postponing *barangay* elections are, presumably, validly elected, and the delay in the conduct of the elections does not affect their continuing duty to serve and be accountable to the citizenry. The citizenry may, thus, continue to exercise their right to protest and to petition the government for the redress of grievances, although elections have been postponed for some limited measure of time. They may continue to resort to measures granted by law to complain or to express dissent against the actions of their *barangay* officials.

In addition to these observations, I note that laws postponing *barangay* elections, as a general rule and as we have so far encountered them in our jurisdiction, do not attempt to discriminate against any particular class of people, but apply in a uniform manner across the whole country. Last but not least, I stress the fact that the Constitution has left the determination of the term of *barangay* officials to the discretion of Congress.[127] Thus, in my opinion, this Court should accord full respect to this constitutionally granted prerogative by adopting a deferential mode of review to assess postponements of *barangay* elections.

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[124] 391 U.S. 367 (1968).

[125] 512 U.S. 622 (1994).

[126] In *United States v. O'Brien* (supra), petitioner O'Brien argued that a 1965 law penalizing the destruction of military registration certificates was unconstitutional as applied to him, because his act of burning his registration certificate was an act of protest and therefore protected speech. *Turner Broad. Sys. v. FCC* (supra) dealt with the validity of a law requiring "cable television systems to devote a portion of their channels to the transmission of local broadcast television stations."

[127] 1987 CONSTITUTION, Art. X, Sec. 8.

Taking all these into consideration, I am of the view that the temporary delay (by postponement of less than a year or so) in the conduct of *barangay* elections constitutes a minor burden on the right to suffrage, such that it can be justified for so long as it bears a rational relation to a legitimate state interest.

Of course, and to emphasize, my position on the use of the rational basis test for postponements of *barangay* elections is without prejudice to the possibility that factors may exist in future cases which would warrant the application of stricter standards.

WHEREFORE, I vote to **GRANT** the petition.

ALEXANDER G. GESMUNDO
Chief Justice