Tempering Dominance in the Marketplace of Ideas: The Application of the Philippine Competition Act in the Mass Media Industry

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I. THE MASS MEDIA AND THE MARKETPLACE OF IDEAS

Freedom of the press belongs to those who own one.

— Abbott Joseph "A.J." Liebling[1]

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This Article is a synthesis of ideas that were cultivated by the Authors in connection with their engagement in the Philippine Competition Commission. Much credit is

Every time a Filipino turns on the television, tunes into the radio, or flips through the pages of a newspaper, he or she opens up his or her mind to the reception of different ideas — ideas which can enrich or pollute, sharpen or dull, or even emancipate or shackle the mind. The Filipino must be wary, therefore, of who manufactures these ideas.

Filipinos should be assured that the marketplace of ideas will function smoothly, weeding out the bad ideas and cultivating the good ones, particularly the "truth."[2] But in reality, the marketplace is a captive market. It is guided not by Adam Smith's invisible hand but by the invisible hand of the "powerful societal interests that control and finance" mass media.[3] As such, these interests "have important agendas and principles that they want to advance, and they are well positioned to shape and constrain media policy."[4]

This Article seeks to revisit the doctrine that "the ultimate good desired is better reached by free trade in ideas — that the best test of truth is the power of the thought to get itself accepted in the competition of the market[.]"[5] It reexamines the proposition that falsehood and fallacies are best remedied by more speech.[6]

The marketplace metaphor has been invoked numerous times to maintain the State's *laissez-faire* or hands-off approach in the treatment of free speech issues. Closely mirroring the freely competitive market model in economics, the prevailing understanding is that state intervention is unnecessary in order for the marketplace to function properly since an invisible hand will weed out untruth and allow the truth to emerge. When United States (U.S.) Supreme Court Justice Oliver Wendell Holmes initially

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extended to former Commissioner Butuyan, whose ideas contributed to the fruition of this Article. The views expressed as well as any inaccuracies reflected herein are solely the Authors' own and are not attributable to the institutions to which they belong.

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1. ABBOT JOSEPH LIEBLING, THE WAYWARD PRESSMAN 265 (1947).
2. Abrams v. United States, 250 U.S. 616, 630 (1919).
3. EDWARD S. HERMAN & NOAH CHOMSKY, MANUFACTURING CONSENT: THE POLITICAL ECONOMY OF THE MASS MEDIA xi (2002).
4. *Id.*
5. *Abrams*, 250 U.S. at 630.
6. Whitney v. California, 274 U.S. 357, 376 (1927).

formulated the doctrine, the free competition of ideas might have reigned in the marketplace, closely mirroring the ancient Greek concept of *agora* and evoking the image of an open public space in which members of society freely participate and exchange ideas.[7] But eventually, this public space was warped out of shape by the rise of mass media. No longer is the public space conceived of as a flat dimension, ensuring equal participation and uniform capacity to transmit or receive ideas. Mass media has instead created spheres of dominance, within which the true invisible hand is able to capture public opinion, maintain its grip on the Filipino mind, and deflect ideas subversive to its agenda.

Hence, democratizing the marketplace becomes imperative since it is the "modern forum"[8] where attitudes are formed and where new cultures are shaped. Mass media, being very influential in the marketplace, serve as the arbiters of public opinion, which in turn influences the nation in the pursuit of its goals.[9] It is an industry imbued with public interest considering that it "plays a vital role in the realization, enhancement and strengthening of the democratic process, in the shaping of public opinion, in the expression of the people's will[,] in the free expression of the people's thoughts and opinions and the upholding of their right to be informed."[10]

Beyond these observations, this Article goes on further to advocate the application of the Philippine Competition Act (PCA)[11] in the mass media industry with a view to creating level playing field in the marketplace of ideas. Insofar as other jurisdictions are concerned, this argument is by no means a novel one. But in the Philippines, where it was only in 2015 that the PCA was enacted, it will be worthwhile to consider whether and in

7. *See Abrams*, 250 U.S. at 630 (J. Holmes, dissenting opinion).

8. LUIS TEODORO, MASS MEDIA LAWS AND REGULATIONS IN THE PHILIPPINES: ANNOTATED COMPILATION WITH COMMENTARIES AND OTHER BACKGROUND MATERIAL 148 (2006) (citing Message *by* Holy Father Pope John Paul II for the 30th World Communications Day, The Media: Modern Forum for Promoting the Role of Women in Society (May 19, 1996)).

9. TEODORO, *supra* note 8, at 9.

10. *Id.*

11. An Act Providing for a National Competition Policy Prohibiting Anti-Competitive Agreements, Abuse of Dominant Position and Anti-Competitive Mergers and Acquisitions, Establishing the Philippine Competition Commission and Appropriating Funds Therefor [Philippine Competition Act], Republic Act No. 10667 (2015).

what manner the current constitutional and statutory framework can support the application of competition law in the mass media industry.

A. Conceptual Framework

The marketplace, as a theoretical construct, pertains to the entire universe of ideas that are transmitted and received by a community of participants consisting of individuals, broadcast stations, publishers, organizations, propagandists, academics, so on and so forth. This universe is understood as the relevant playing field — to use the parlance of antitrust — where the mass media operates as a dominant transmitter of ideas. This Article considers how concentration of ownership in the mass media industry affects the exchange of ideas in the broader marketplace.

"Mass media" encompasses

> print [m]edia and [b]roadcast [m]edia. 'Print [m]edia' includes all newspapers, periodicals, magazines, journals, and publications and all advertising therein, and billboards, neon signs[,] and the like. 'Broadcast [m]edia' includes radio and television broadcasting in all their aspects, including all forms of audio, visual or audio-visual communications such as video tapes, citizens band, and other similar electronic devices, and cinematography, to the extent that these forms are utilized as mass media through radio or television broadcasting transmission.[12]

Thus defined, mass media is bifurcated into the print medium and the broadcast medium.[13] Statistics disclose that broadcast and print are still the most prevalent means by which the public consumes information.

Television remains king.[14] As of 2013, 81% of Filipinos are glued to their television and 71.6% tune in at least once a week.[15] Furthermore, television

12. Further Amending Presidential Decree No. 576, Entitled "Abolishing The Media Advisory Council and the Bureau Of Standards for Mass Media, and authorizing the Organization of Regulatory Councils for Print Media and for Broadcast Media, Presidential Decree No. 1776, § 1 (1981).

13. There is an ongoing debate regarding whether or not "New Media" such as Rappler and other internet platforms should be considered mass media. Admittedly, the available legal definitions are rather outmoded. *See* Rappler, Inc. v. Bautista, 788 SCRA 442 (2016) & Rigoberto Tiglao, *Media Firm Rappler scorns Constitution by getting foreign money*, MANILA TIMES, Oct. 28, 2016, *available at* http://www.manilatimes.net/media-firm-rappler-scorns-constitution-getting-foreign-money/293543/ (last accessed Oct. 31, 2017).

14. *See* CHAY HOFILEÑA, NEWS FOR SALE: THE CORRUPTION AND COMMERCIALIZATION OF THE PHILIPPINE MEDIA (2004).

is the most heavily relied upon source of political news, garnering a trust rating of 58%.[16] Significantly, the four biggest television companies capture the attention of 88% of the Philippine audience.[17]

The radio platform is the second most used and most trusted source of political information.[18] Considering that its reach extends to remote areas, 67% of Filipinos tune in to the radio, with 41.4% tuning in at least once a week.[19] As of 2016, the number of AM stations — predominantly relied upon for the transmittal of news, public affairs, talk shows, and public services — tallied at 416.[20] The sheer number of stations gives the illusion of pluralism in viewpoints, though in reality there are actually only two dominant media conglomerates that own these stations.[21] Together with the government-owned radio station and another private station, these two major conglomerates capture an audience of 83% of Filipinos.[22]

On the subject of print media, one out of ten Filipinos read the newspapers each day, as of 2013.[23] For the online media, 46.5% of Filipinos use the internet, but do not depend on this platform — much less trust it — for news and political information.[24] Notably, internet usage is only

15. The Vera Files, Media Ownership Monitor — Television, *available at* http://philippines.mom-rsf.org/en/media/tv/ (last accessed Oct. 31, 2017) [hereinafter Media Ownership Monitor — Television] (citing Philippine Statistics Authority, FLEMMS 2013: Functional Literacy, Education and Mass Media Survey, *available at* https://psa.gov.ph/sites/default/files/2013%20FLEMMS%20Final%20Report.pdf (last accessed Oct. 31, 2017)).

16. Media Ownership Monitor — Television, *supra* note 15 (citing EON, Philippine Trust Index 2015 Executive Summary (A Nationwide Survey on Examining Filipino's Levels and Drivers of Trust in Philippine Institutions), *available at* http://www.eon.com.ph/report2015/2015%20PTI%20Executive%20Summary.pdf (last accessed Oct. 31, 2017)).

17. Media Ownership Monitor — Television, *supra* note 15.

18. The Vera Files, Media Ownership Monitor — Radio, *available at* http://philippines.mom-rsf.org/en/media/radio (last accessed Oct. 31, 2017).

19. *Id.*

20. *Id.*

21. *Id.*

22. *Id.*

23. The Vera Files, Media Ownership Monitor — Print, *available at* http://philippines.mom-rsf.org/en/media/print (last accessed Oct. 31, 2017).

24. The Vera Files, Media Ownership Monitor — Online, *available at* http://philippines.mom-rsf.org/en/media/online (last accessed Oct. 31, 2017).

concentrated in the urban areas, while rural areas still heavily depend on traditional mass media for information.[25] The internet belongs to the category of "new media," of which the dynamics and interactions with traditional mass media are still being understood and deserve a separate treatment altogether.[26]

The rest of the Article proceeds as follows: Part II discusses the development of the marketplace doctrine in Philippine free speech jurisprudence. As treated by jurisprudence, the underlying notion of the marketplace is a free market where government intervention must be obviated; but jurisprudence has recognized a narrow area where the market is distorted — that is, in the area of election campaign. Part III argues that it is not only in the area of election campaign that the marketplace is distorted. A distorted market, where mass media dominates the interchange of ideas, is actually the norm rather than the exception. Part IV proposes that a viable solution to the market distortions is the application of the PCA in the mass media industry. This portion points to the various foundations which could support, as well as the weaknesses that could impede, the application of the PCA in mass media. Part V, before concluding, provides a brief chronicle on the rise of mass media throughout Philippine history.

II. PHILIPPINE JURISPRUDENCE ON THE MARKETPLACE OF IDEAS

Surveying Philippine jurisprudence on the marketplace doctrine, it becomes apparent that the universe of ideas is generally conceived of as mirroring the freely competitive market model in economics, facilitating the unhampered exchange of ideas among various actors. But the Supreme Court, drawing from the Constitution, concedes that, for a limited duration during election campaign, speaking power is unequal among various participants. The disparate resources being spent by some candidates on mass media propaganda produce a distortion in the free interchange of ideas, allowing some ideas to come across more domineeringly, to the prejudice of other ideas. This situation necessitates the resort to affirmative action, through the intervention of the Commission on Elections (COMELEC), to equalize the opportunity to influence votes.

25. Iremae D. Labucay, *Patterns of Internet usage in the Philippines*, *in* THE INTERNET AND THE GOOGLE AGE: PROSPECTS AND PERILS 31 (Jonathan D. James ed., 2014).

26. *See, e.g.*, Ngugi Peter Kibe & Charles Kinyua Kamunyu, *New Media in Interpersonal Communication*, 4 J. MASS COMM. & JOURNALISM 226 (2014).

A. Free Market Paradigm

By way of a dissenting opinion in *Abrams v. United States*,[27] Justice Holmes formulated the marketplace doctrine in the following manner — "the best test of truth is the power of the thought to get itself accepted in the competition of the market[.]"[28] This theory assumes that a process of robust debate, if uninhibited by governmental interference, will lead to the discovery of truth, or at least the best perspectives or solutions for societal problems. A properly functioning marketplace, in Justice Holmes' perspective, ultimately assures the proper evolution of society, wherever that evolution might lead.[29]

The doctrine assumes that there is a plurality of voices, where all distributors of speech have an equal chance to persuade,[30] and from which the market mechanisms will ensure that the truth will eventually emerge. The image conjured up by the marketplace doctrine is that of an adversarial system of discourse where parties representing all sides of a dispute are able to engage in critical debate and mutual cross-examination,[31] thus providing a foolproof method for extracting the truth.

Such forms the premise for the supposed "truth-validating function"[32] of the marketplace doctrine. Distinguished law professor Frederick Schauer best

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27. *Abrams*, 250 U.S. at 624-31 (1919) (J. Holmes, dissenting opinion).

28. *Id.* at 630.

29. Edward Corwin, *Bowing Out "Clear and Present Danger"*, 27 NOTRE DAME L. REV. 325, 332-34 (1952).

30. M. Neil Browne, et al., *The Potential Tension Between a 'Free Marketplace of Ideas' and the Fundamental Purpose of Free Speech*, 3 AKRON J. CONST. K. & POL'Y 55, 60 (2012).

31. *See* Alvin Goldman & James Cox, *Speech, Truth, and the Free Market for Ideas*, 2 LEG. THEORY 1 (1996).

32. Notably, it is doubtful whether an objective and universal truth even exists. Furthermore, society does not always place such a high premium on truth and could ably function even without the discovery thereof. *See* Goldman & Cox, *supra* note 31, at 8-9.

> [T]here may be statements in some domains that lack objective truth values, but a global denial of objective truth is unwarranted. Among the many plausible candidates for objective truth and falsehood are statements of criminal or historical fact (e.g., who fired a gun on a certain occasion, who was the 12th President), statements concerning chemical or nutritional properties of commercial products, and causal statements to the effect that certain consequences would follow from

expressed this when he said that, "[j]ust as Adam Smith's 'invisible hand' will ensure that the best products emerge from free competition, so too will an invisible hand ensure that the best ideas emerge when all opinions are permitted freely to compete."[33] The U.S. Supreme Court validated this idea in the case of *Red Lion Broadcasting v. FCC*,[34] where it held that, "[i]t is the purpose of the First Amendment to preserve an uninhibited marketplace in which truth will ultimately prevail[.]"[35]

The very first Supreme Court decision — more accurately and quite uncannily also a dissenting opinion therein — that alluded to the marketplace metaphor is *Taruc v. Ericta*.[36] The case involved a challenge to the constitutionality of the Anti-Subversion Act[37] for being violative of freedom of expression.[38] The Court, citing *People v. Ferrer*,[39] upheld the constitutionality of the Act.[40]

Justice Abraham Sarmiento, Sr. in his dissenting opinion, commented that "[c]ommunism is an ideology fundamentally at war with our cherished values and traditions ... but let the matter be, in any event, tested in the

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> the adoption of this or that policy. The general legitimacy of objective truth cannot be argued here at length, but we find the anti-truth contentions of the foregoing critics unpersuasive. Particularly unpersuasive is the suggestion that the mutability of beliefs undercuts objective truth. The mere fact that there was extended controversy over continental drift, and many geologists changed their opinions over time, hardly proves, or even suggests, that there is no objective, belief-independent truth about continental drift. No doubt, it is difficult to get 'conclusive' evidence for the truth in any complex and difficult subject, but that does not prove that there is no objective truth. Our own arguments against the marketplace theory will not rest on any skepticism or nihilism about truth.

Id.

33. FREDRICK SCHAUER, FREE SPEECH: A PHILOSOPHICAL ENQUIRY 9 (1982).
34. Red Lion Broadcasting Co. v. FCC, 395 U.S. 367 (1969).
35. *Id.* at 390.
36. Taruc v. Ericta, 168 SCRA 63 (1989).
37. An Act to Outlaw the Communist Party of the Philippines and Similar Associations, Penalizing Membership Therein, and for Other Purposes [Anti-Subversion Act], Republic Act No. 1700 (1957).
38. *Id.* at 64.
39. People v. Ferrer, 48 SCRA 382 (1972).
40. *Taruc*, 168 SCRA at 66.

democratic *marketplace of ideas*, and may the better debater win."[41] Since *Taruc*, the marketplace of ideas has served as a useful theoretical framework whenever the Court is confronted with free speech issues.

In *Iglesia ni Cristo v. Court of Appeals*,[42] the Board of Review for Motion Pictures disallowed the airing of an Iglesia ni Cristo television episode on the ground that the content of the program constituted an attack on other religions.[43]

In ruling for the Iglesia, Chief Justice Reynato S. Puno noted that the Board's censorship of the television episode constituted a prior restraint on free speech and must be set aside. Chief Justice Puno wrote that "freedom of thought ... is best served by encouraging the marketplace of dueling ideas. When the luxury of time permits, the marketplace of ideas demands that speech should be met by more speech for it is the spark of opposite speech, the heat of colliding ideas that can fan the embers of truth."[44]

Further still, in *Chavez v. Gonzales*,[45] Justice Antonio T. Carpio wrote a concurring opinion and explained the value of free expression in relation to the marketplace, in this wise —

> Freedom of expression allows the competition of ideas, the clash of claims and counterclaims, from which the truth will likely emerge ... Freedom of expression provides a civilized way of engagement among political, ideological, religious[,] or ethnic opponents for if one cannot use his tongue to argue, he might use his fist instead.
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> Freedom of expression is the freedom to disseminate ideas and beliefs, whether competing, conforming[,] or otherwise. It is the freedom to express to others what one likes or dislikes, as it is the freedom of others to express to one and all what they favor or disfavor. It is the free expression for the ideas we love, as well as the free expression for the ideas we hate.[46]

The *Chavez* case involved the "Hello Garci" Scandal — arguably the Philippine analog of the Watergate Scandal, with some even going so far as

41. *Id.* at 70 (J. Sarmiento, dissenting opinion) (emphasis supplied).

42. Iglesia Ni Cristo v. Court of Appeals, 259 SCRA 529 (1996).

43. *Id.* at 534.

44. *Id.* at 547.

45. Chavez v. Gonzales, 545 SCRA 441 (2008).

46. *Id.* at 528 (J. Carpio, concurring opinion).

to dub it the "Gloriagate."[47] The tapes contained recorded phone conversations of former President Gloria Macapagal-Arroyo with former COMELEC Commissioner Virgilio O. Garcillano, where spoke of how they rigged the 2004 national elections, ultimately securing the victory for the former.[48] Such a scandal would have precipitated the impeachment of the former President, had it not been blocked by her coalition in Congress.[49]

Following the public release of the controversial "Hello Garci" phone conversation, the National Telecommunications Commission (NTC) issued a press release warning that the airing or broadcasting of the "Hello Garci" Tapes by radio and television stations would be a cause for the suspension, revocation, and/or cancellation of their licenses or authorizations.[50] Justice Carpio voted to nullify the NTC press release as unconstitutional because it constituted a prior restraint on the speech of journalists.[51]

B. Deviation During Election Campaign

Philippine jurisprudence has, however, acknowledged in the limited area of election campaign that the marketplace is not a perfectly competitive one. Beginning with *Sanidad v. Commission on Elections*[52] until an exhaustive treatment of the issue in *The Diocese of Bacolod v. Commission on Elections*,[53] the Court has identified some distortions that impede the free interchange of ideas; in turn, these allow some actors to dominate the public discourse and ultimately produce inequalities in speaking power among different participants in the marketplace.

In *Sanidad*, the Organic Act of the Cordillera Administrative Region[54] had been enacted and different provinces were to partake in a plebiscite for

47. Rolly Espina, *There's life beyond Gloriagate*, PHIL. STAR., July 6, 2005, *available at* http://www.philstar.com/nation/286608/there%C2%92s-life-beyond-gloriagate (last accessed Oct. 31, 2017).

48. *Id.* at 473-74.

49. *See* GMANews Online, 'Hello, Garci' Timeline, *available at* http://www.gmanetwork.com/news/news/content/59406/hello-garci-timeline/story (last accessed Oct. 31, 2017).

50. *Chavez*, 441 SCRA at 474.

51. *Id.* at 521 (J. Carpio, concurring opinion).

52. Sanidad v. Commission on Elections, 181 SCRA 529 (1990).

53. The Diocese of Bacolod v. Commission on Elections, 747 SCRA 1 (2015).

54. An Act Providing for an Organic Act for the Cordillera Autonomous Region, Republic Act No. 6766 (1989).

the ratification of said Act.[55] Purportedly for the purpose of supervising and regulating media during the conduct of elections and plebiscites, the COMELEC issued a Resolution with the following contentious provision —

> Section 19. Prohibition on columnist, commentators[,] or announcers. — During the plebiscite campaign period, on the day before[,] and on plebiscite day, no mass media columnist, commentator, announcer, or personality shall use his column or radio or television times to campaign for or against the plebiscite issues.[56]

Petitioner Pablito V. Sanidad, a lawyer and columnist based in Baguio, assailed the regulation for being violative of his freedom of speech.[57] Siding with Sanidad, the Court struck down the provision. In so doing, the Court interpreted Article IX-C of the 1987 Constitution,[58] which the COMELEC heavily relied upon for justifying the assailed regulation —

> [I]t is clear from [Article] IX-C of the 1987 Constitution that what was granted to the COMELEC was the power to supervise and regulate the use and enjoyment of franchises, permits[,] or other grants issued for the operation of transportation or other public utilities, media of communication or information to the end that equal opportunity, time and space, and the right to reply, including reasonable, equal rates therefor, for public information campaigns and forums among candidates are ensured. *The evil sought to be prevented by this provision is the possibility that a franchise*

55. *Sanidad*, 181 SCRA at 531 (citing Republic Act No. 6766, § 19).

56. *Id.*

57. *Id.*

58. PHIL. CONST. art. IX-C. The Article reads —

> The Commission may, during the election period, supervise or regulate the enjoyment or utilization of all franchises or permits for the operation of transportation and other public utilities, media of communication or information, all grants, special privileges, or concessions granted by the Government or any subdivision, agency or instrumentality thereof, including any government-owned or controlled corporation or its subsidiary. Such supervision or regulation shall aim to ensure equal opportunity, time, and space, and the right to reply, including reasonable, equal rates therefor, for public information campaigns and forums among candidates in connection with the objective of holding free, orderly, honest, peaceful[,] and credible elections.

Id.

> *holder may favor or give any undue advantage to a candidate in terms of advertising space or radio or television time.*[59]

The Court, in striking down the provision, sought to ensure that all channels of information exchange were kept open.

> While the limitation does not absolutely bar petitioner's freedom of expression, it is still a restriction on his choice of the forum where he may express his view. No reason was advanced by respondent to justify such abridgement. We hold that this form of regulation is tantamount to a restriction of petitioner's freedom of expression for no justifiable reason.[60]

Sanidad was subsequently cited in *National Press Club v. Commission on Elections*.[61] At issue before the Court in *National Press Club* were statutory provisions, which (1) prohibited mass media from selling or donating print space or air time for political purposes, except to the COMELEC and (2) required the COMELEC to purchase "COMELEC space" in the newspaper and "COMELEC time" in radio and television.[62] With the objective of

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59. *Sanidad*, 181 SCRA at 533 (emphasis supplied).

60. *Id.*

61. National Press Club v. Commission on Elections, 207 SCRA 1 (1992).

62. *Id.* at 7. The pertinent provisions were Section 11 (b) of Republic Act No. 6646, or the Electoral Reforms Law of 1987 and Sections 90 and 92 of Batas Pambansa Blg. 881, or the Omnibus Elections Code.

Section 11 (b) of Republic Act No. 6646 reads —

> Prohibited Forms of Election Propaganda. — In addition to the forms of election propaganda prohibited under Section 85 of Batas Pambansa Blg. 881, it shall be unlawful:
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> ...
>
> b) for any newspapers, radio broadcasting or television station, other mass media, or any person making use of the mass media to sell or to give free of charge print space or air time for campaign or other political purposes except to the Commission as provided under Section 90 and 92 of Batas Pambansa Blg. 881. Any mass media columnist, commentator, announcer[,] or personality who is a candidate for any elective public office shall take a leave of absence from his work as such during the campaign period.

An Act Introducing Additional Reforms In The Electoral System And For Other Purposes [The Electoral Reforms Law of 1987], Republic Act No. 6646, § 11 (b) (1998).

Sections 90 and 92 of Batas Pambansa Blg. 881, or the Omnibus Elections Code, states —

preventing rich candidates from exploiting their war chests and fully exerting their influence through mass media, the COMELEC would have a monopoly over print space and air time and take charge in allocating these to the candidates of the 1992 elections.[63]

The majority opinion, penned by Justice Florentino P. Feliciano, argued that the incidental restriction to free speech was justified by the State interest involved.[64] The majority attempted to draw a distinction from *Sanidad*. While in the previous case, the Court was justified in striking down the COMELEC Resolution for infringing on reports and commentaries by responsible media that is not paid for by political candidates, in *National Press Club*, the statutory provisions were upheld for being limited in scope since it only applied to political advertisements sponsored by candidates themselves.

The majority opinion was met with three strong dissents by Justices Isagani A. Cruz, Hugo Gutierrez, Jr., and Edgardo L. Paras. While acknowledging the laudable intention behind the assailed provisions, the dissenters argued that the State interest did not justify the restriction on free speech.

> [Section] 90. COMELEC space. — The Commission shall procure space in at least one newspaper of general circulation in every province or city: Provided, however. That in the absence of said newspaper, publication shall be done in any other magazine or periodical in said province or city, which shall be known as 'COMELEC Space' wherein candidates can announce their candidacy. Said space shall be allocated, free of charge, equally, and impartially by the Commission among all candidates within the area in which the newspaper is circulated.
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> ...
>
> [Section] 92. COMELEC time. — The Commission shall procure radio and television time to be known as 'COMELEC Time' which shall be allocated equally and impartially among the candidates within the area of coverage of all radio and television stations. For this purpose, the franchises of all radio broadcasting and television stations are hereby amended so as to provide radio or television time, free of charge, during the period of the campaign.
>
> Omnibus Election Code of the Philippines [OMN. ELECTION CODE], Batas Pambansa Blg. 881, §§ 90 & 92 (1985).

63. *See National Press Club*, 207 SCRA at 7.

64. Again, the COMELEC relied heavily on Article IX-C of the 1987 Constitution.

Justice Cruz conceded that

> [t]he announced purpose of the law is to prevent disparity between the rich and the poor candidates by denying both of them access to the mass media and thus preventing the former from enjoying an undue advantage over the latter ... Equality among the candidates in this regard should be assiduously pursued by the government if the aspirant with limited resources is to have any chance at all against an opulent opponent who will not hesitate to use his wealth to make up for his lack of competence.[65]

He argued, however, that

> [t]he financial disparity among the candidates is a fact of life that cannot be corrected by legislation[,] except only by the limitation of their respective expenses to a common maximum. The flaw in the prohibition under challenge is that while the rich candidate is barred from buying mass media coverage, it nevertheless allows him to spend his funds on other campaign activities also inaccessible to his straitened rival.[66]

Thus, in the opinion of Justice Cruz, the assailed provisions effectively deprived the candidates, rich and poor alike, of a crucial medium of communication and forced them to compete in other media where inequalities in speaking power still persist.

On his side was Justice Gutierrez, who minced no words, commenting that the "[t]he implementation of Section 11 (b) will result in gross inequality. A cabinet member, an incumbent official, a movie star, a basketball player, or a conspicuous clown enjoys an unfair advantage over a candidate many times better qualified but lesser known."[67] Even within the limited avenue of the COMELEC space and time, he was skeptical that the candidates would receive equal treatment, to wit —

> A candidate to whom columnists and radio-television commentators owe past favors or who share their personal biases and convictions will get an undue amount of publicity. Those who incur the ire of opinion makers cannot counteract negative reporting by buying his own newspaper space or airtime for the airing of his refutations.[68]

Finally, Justice Paras expressed his worries over the plight of the weaker, less financially capable, and obscure candidates, thus —

65. *National Press Club*, 207 SCRA at 31 (J. Cruz, dissenting opinion).

66. *Id.*

67. *Id.* at 29 (J. Gutierrez, dissenting opinion).

68. *Id.*

> [T]he 'unknown' or 'lesser known' candidates would be at a distinct disadvantage. They will have to hold numerous rallies (spending oodles and oodles of money). And only those who had previously received public exposure by dint of government service or by prominence in the movies, in music, in sports, etc. will be the ones 'recalled' by the voters.[69]

In 1998, Emilio M. R. Osmeña, Jr., then a candidate for President, and Pablo P. Garcia, then a candidate for Governor of Cebu, sought to vindicate the petitioners and dissenters of *National Press Club*.[70] They lodged a petition asking the Supreme Court to revisit its previous ruling. Unfortunately, Osmeña and Garcia failed to convince the Court to reverse itself.[71] This time, there were four dissenters, among them Justices Artemio V. Panganiban and Flerida Ruth Pineda-Romero.

Justice Panganiban cited figures to the effect that mass media would have been the least-cost and most effective way for weaker candidates to make themselves known.[72] He lamented, however, that

> to say that the prohibition levels the playing field for the rich and the poor is to indulge in a theoretical assumption totally devoid of factual basis. On the contrary, media advertising may be [—] depending on a contender's propaganda strategy [—] the cheapest, most practical[,] and most effective campaign medium, especially for national candidates. By completely denying this medium to both the rich and the poor, this Court has not leveled the playing field. It has effectively abolished it! Far from equalizing campaign opportunities, the ban on media advertising actually favors the rich (and the popular) who can afford the more expensive and burdensome forms of propaganda, against the poor (and the unknown) who cannot.[73]

Justice Romero, on the other hand, drew from hindsight and pointed out that the experience during the 1992 and 1995 elections demonstrated the flaws of the statutory provisions —

> Instead of 'equalizing' the position of candidates who offer themselves for public office, the prohibition actually gives an unfair advantage to those who have wide media exposure prior to the campaign period. Instead of promoting the interest of the public in general, the ban promotes the interest of a particular class of candidates, the prominent and popular candidates for public office. What is in store for the relatively obscure

69. *Id.* at 43 (J. Romero, dissenting opinion).

70. Osmeña v. Commission on Elections, 288 SCRA 447 (1998).

71. *Id.*

72. *Id.* at 539 (J. Panganiban, dissenting opinion).

73. *Id.*

> candidate who wants to pursue his candidacy? Eager to trumpet his credentials and program of government, he finds himself barred from using the facilities of mass media on his own. While incumbent government officials, show business personalities, athletes[,] and prominent media men enjoy the advantage of name recall due to past public exposure, the unknown political neophyte has to content himself with other fora, which given the limited campaign period, cannot reach the electorate as effectively as it would through the mass media. To be sure, the candidate may avail himself of 'COMELEC Space' and 'COMELEC Time,' but the sheer number of candidates does not make the same an effective vehicle of communication.[74]

Blo Umpar Adiong v. COMELEC[75] is a kindred case. Blo Umpar Adiong, a senatorial candidate in the 1992 elections, assailed a COMELEC Resolution that prohibited the posting of political decals and stickers on mobile vehicles.[76] His concern was that "with the ban on radio, television[,] and print political advertisements, he, being a neophyte in the field of politics [stood] to suffer grave and irreparable injury with this prohibition."[77] He further contended that "[t]he posting of decals and stickers on cars and other moving vehicles would be his last medium to inform the electorate that he is a senatorial candidate in the [11 May] 1992 elections."[78]

True enough, the Court observed the quandary whereby "[t]he big number of candidates and elective positions involved has resulted in the peculiar situation where almost all voters cannot name half or even two-thirds of the candidates running for Senator. The public does not know who are aspiring to be elected to public office."[79]

But the Court was assiduous enough to point out that the true evil in the Resolution was its infringement of private citizens' freedom of expression, to wit —

> Significantly, the freedom of expression curtailed by the questioned prohibition is not so much that of the candidate or the political party. The regulation strikes at the freedom of an individual to express his preference and, by displaying it on his car, to convince others to agree with him. A sticker may be furnished by a candidate but once the car owner agrees to

74. *Id.* at 499-500 (J. Panganiban, dissenting opinion).

75. Blo Umpar Adiong v. Commission on Elections, 207 SCRA 712 (1992).

76. *Id.* at 713.

77. *Id.* at 715.

78. *Id.*

79. *Id.*

> have it placed on his private vehicle, the expression becomes a statement by the owner, primarily his own and not of anybody else.[80]

Recent cases have remained faithful to the principles laid down in the preceding cases. In the 2014 case of *GMA v. COMELEC*,[81] petitioners consisted of various broadcast companies with one senatorial candidate as an intervenor. They assailed a COMELEC Resolution which implemented the provisions on Equal Access to Media Time and Space found in the Fair Election Act. [82] Under the law, candidates are allocated a given number of minutes to use for television or radio advertisement. The assailed Resolution departed from the previously "per station" basis of the media time allotment. It now required that the total air time be allocated on an "aggregate" basis.[83] Whereas before, a certain candidate could max out 120 minutes worth of television advertisement on both GMA and ABS-CBN, that candidate now had to apportion the 120 minutes between GMA and ABS-CBN.

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80. *Id.* at 719.

81. GMA Network, Inc. v. Commission on Elections, 734 SCRA 88 (2014).

82. An Act to Enhance the Holding of Free, Orderly, Honest, Peaceful and Credible Elections Through Fair Election Practices [Fair Elections Act], Republic Act No. 9006, § 6 (2001). The provision states —

> Equal Access to Media Time and Space. — All registered parties and bona fide candidates shall have equal access to media time and space. The following guidelines may be amplified on by the COMELEC:
>
> ...
>
> a. Each bona fide candidate or registered political party for a nationally elective office shall be entitled to not more than one hundred twenty (120) minutes of television advertisement and one hundred eighty (180) minutes of radio advertisement whether by purchase or donation.
>
> b. Each bona fide candidate or registered political party for a locally elective office shall be entitled to not more than sixty (60) minutes of television advertisement and ninety (90) minutes of radio advertisement whether by purchase or donation.
>
> For this purpose, the COMELEC shall require any broadcast station or entity to submit to the COMELEC a copy of its broadcast logs and certificates of performance for the review and verification of the frequency, date, time[,] and duration of advertisements broadcast for any candidate or political party.

Id.

83. *GMA Network, Inc.*, 734 SCRA at 108.

The Court held that the "aggregate" interpretation unduly restricted the candidates' capacity to disseminate political speech.[84] Aggravated by the fact that the Philippines is composed of numerous fragmented islands, the regulation significantly reduced the opportunity for the electorate to receive such political messages that were vital in the formation of voting preferences.

Concurring in the majority opinion, Justice Marvic Mario Victor F. Leonen went out of his way to point out the inequalities of speaking power that persist within the mass media structure, providing —

> What Resolution No. 9615 does not take into consideration is that television and radio networks are not similarly situated. The industry structure consists of network giants with tremendous bargaining powers that dwarf local community networks. Thus, a candidate with only a total aggregate of 120/180 minutes of airtime allocation will choose a national network with greater audience coverage to reach more members of the electorate. Consequently, the big networks can dictate the price, which it can logically set at a higher price to translate to more profits. This is true in any setting especially in industries with high barriers to entry and where there are few participants with a high degree of market dominance. Reducing the airtime simply results in a reduction of speech[.][85]

Rappler v. COMELEC[86] concerned the grant by former COMELEC Chairman Juan Andres D. Bautista to the nation's biggest television networks of exclusive rights to broadcast the Presidential and Vice-Presidential debates. This was undertaken through a Memorandum of Agreement between the COMELEC and the major television networks[87] which, when taken as a whole, had the effect of limiting Rappler's ability to live stream the debates. Rappler argued that

> [r]espondent through the [Memorandum of Agreement] granted exclusive rights to the Lead Networks over the Debates but had no legal basis to do so. Indeed, the [Intellectual Property] Code provides free and full access to the Debate content. Ironically, this illegal grant of exclusive rights have placed barriers to the flow of information contrary to the [r]espondent's mandate to educate the voters.[88]

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84. *Id.* at 168.

85. *Id.* at 222 (J. Leonen, concurring opinion).

86. Rappler, Inc. v. Bautista, 788 SCRA 442 (2016).

87. *Rappler, Inc.*, 788 SCRA at 450.

88. This quote was taken directly from the petition filed by Rappler in *Rappler, Inc.*, 788 SCRA. The petition was previously available online. Rappler, Rappler sues Comelec chief over debates, public interest issues, *available a*

Concurring with the majority, Justice Leonen wrote a separate opinion where he propounded the notion of an "indirect prior restraint" —

> The effect of government's mandate empowering lead networks from excluding other media is a prior restraint, albeit indirectly. The evil of prior restraint is not made less effective when a private corporation exercises it on behalf of government.[89]

Allowing major television networks, considering their sheer size and audience coverage, to deprive other media outlets the opportunity to stream the debates would amount to a state-sanctioned repression of freedom of expression.[90] Corollarily, it would allow the dominant industry players to capture the marketplace and influence public opinion at a time when the free interchange of ideas should be upheld.

The foregoing doctrinal developments are best summarized in the *ponencia* of Justice Leonen in *The Diocese of Bacolod v. COMELEC.*[91] Providing an exhaustive treatment on the issue, he introduced the notion of an "equality-based approach" in free speech issues —

> 'Politically disadvantaged speech prevails over regulation[,] but regulation promoting political equality prevails over speech.' *This view allows the government leeway to redistribute or equalize 'speaking power,' such as protecting, even implicitly subsidizing, unpopular or dissenting voices often systematically subdued within society's ideological ladder. This view acknowledges that there are dominant political actors who, through authority, power, resources, identity, or status, have capabilities that may drown out the messages of others.* This is especially true in a developing or emerging economy that is part of the majoritarian world like ours.
>
> This balance between equality and the ability to express so as to find one's authentic self or to participate in the self-determination of one's communities is not new only to law. It has always been a philosophical problematique.
>
> In his seminal work, Repressive Tolerance, philosopher and social theorist Herbert Marcuse recognized how *institutionalized inequality exists as a background limitation, rendering freedoms exercised within such limitation as merely '[protecting] the already established machinery of discrimination.' In his view, any*

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http://www.rappler.com/views/123020-rappler-sues-comelec-chief-sc-debates (last accessed Oct. 31, 2017). However, the pleading has since been taken down.

89. *Rappler, Inc.*, 788 SCRA at 471 (J. Leonen, separate opinion).

90 *Id.*

91. The Diocese of Bacolod v. Commission on Elections, 747 SCRA 1 (2015).

> *improvement 'in the normal course of events' within an unequal society, without subversion, only strengthens existing interests of those in power and control.*
>
> ...
>
> '[D]ifferent opinions and 'philosophies' can no longer compete peacefully for adherence and persuasion on rational grounds — *the 'marketplace of ideas' is organized and delimited by those who determine the national and the individual interest.*'
>
> ...
>
> Considerations such as 'expressive, deliberative, and informational interests,' costs or the price of expression, and background facts, when taken together, produce bases for a system of stringent protections for expressive liberties.
>
> ...
>
> Fair access to opportunity is suggested to mean substantive equality and not mere formal equality since *'favorable conditions for realizing the expressive interest will include some assurance of the resources required for expression and some guarantee that efforts to express views on matters of common concern will not be drowned out by the speech of better-endowed citizens.'*
>
> ...
>
> *Thus, more speech can only mean more speech from the few who are dominant rather than those who are not.*[92]

The foregoing survey of jurisprudence underscores two important points. First, mass media has been and still is a potent tool for influencing the interchange of ideas in the marketplace, so much so that candidates expend copious resources in order to seize not only the communication apparatus but more so the public opinion, and such that mass media regulation during election campaign is sanctioned by no less than the Constitution. Jurisprudence, however, has failed to keep up with the developments in mass communication theory. The marketplace has evolved, such that even in everyday life, it is doubtful whether the interchange of ideas is freely competitive and whether it will truly allow the best ideas to emerge. Mass media, by its very industry structure, is a dominant force in the marketplace, allowing the influential invisible hand to extend towards all realms of public issues and reach the minds of a very wide audience. Second, the legal system has recognized that the freely competitive conception of the marketplace does not hold, at least in a limited scenario. However, as the succeeding

92. *Id.* at 105-07 (citing ROBERT PAUL WOLFF, ET. AL., A CRITIQUE OF PURE TOLERANCE 85 (1970)) (emphases supplied).

sections will demonstrate, deviations from the freely competitive paradigm are actually the rule rather than the exception.

III. A PARADIGM SHIFT IN THE MARKETPLACE OF IDEAS

A. Underlying Economic Theory

Economists view the free market model to be the best choice among alternative conflict resolution mechanisms because markets allocate and distribute resources efficiently, achieving society's goals while using as few resources as possible.[93] A freely competitive market assumes that: (1) there are a large number of firms; (2) individual firms produce a small percentage of the products; (3) there are no barriers to entry; and (4) there is product homogeneity.[94]

It appears that when the U.S. ratified the First Amendment, up to the time that Justice Holmes crafted the marketplace metaphor, the marketplace closely resembled that of a free market —

> [T]he press was broadly representative of the people it was serving. While many of the newspapers were intensely partisan and narrow in their views, the press collectively presented a broad range of opinions to readers. Entry into publishing was inexpensive; pamphlets and books provided meaningful alternatives to the organized press for the expression of unpopular ideas, and often treated events and expressed views not covered by conventional newspapers. A true marketplace of ideas existed in which there was relatively easy access to the channels of communication.[95]

But the actual marketplace no longer reflects the perfectly competitive ideal; it now derives features from oligopolistic and monopolistic market models. With the emergence of the corporate vehicle, economic reality, as well as the marketplace, started to deviate from the competitive market model. Philosopher Aldous Huxley points out that mass communication is, by itself, a neutral force but can be used for good or ill depending on who wields it.[96] But as the machinery for mass media becomes more efficient, it tends to become more complex, expensive, and less accessible to the smaller players, who eventually drop out from the competition against the dominant players, allowing the latter to wield more and more economic power.[97] An

93. M. Neil Browne, et al., *supra* note 30, at 61.

94. *Id.* at 61-62.

95. Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241, 248 (1974).

96. ALDOUS HUXLEY, BRAVE NEW WORLD REVISITED 34 (1958).

97. *Id.* at 18 & 34.

oligopolistic market structure features significant entry barriers and consequently, a small number of firms, each with lion's share of the market.[98] On the other hand, firms engaged in monopolistic competition attempt to "differentiate" their product and set it apart from those of its competitors when in fact, they are substitutable for one another.[99]

An example of a Philippine industry exhibiting oligopolistic market behavior is telecommunications. There is little to no market contestability whereby potential entrants can enter the market and reasonably expect to survive against the two telecom giants, Globe Telecom and PLDT, Inc. The industry is also subject to numerous regulatory barriers such as securing a Congressional franchise and a spectrum allocation license from the NTC.[100] Additionally, entry and survival in the market depend on vast amounts of capital expenditure which serve as effective financial barriers to entry.[101]

On the other hand, monopolistic competition is demonstrated when mass media firms package their content in a way that suits a particular audience, effectively differentiating their product. For a given set of facts, different news outlets may strategically present unique angles in order to elicit calculated responses from their viewers. In employing such strategy, mass media operates "as if they were monopolies on the subset of readers to which they tailor their news[.]"[102]

Mass media faces numerous regulatory barriers. To begin with, the ownership and management of mass media is limited to citizens of the Philippines, or to corporations, cooperatives, or associations, wholly-owned and managed by such citizens.[103] Specifically for advertising, only Filipino citizens or corporations or associations at least 70% of the capital of which is

98. M. Neil Browne, et al., *supra* note 30, at 66.

99. *Id.* at 66-67.

100. *See* Mary Grace Mirandilla-Santos, Philippine Broadband: A Policy Brief (A Policy Brief on Philippine Broadband Service) at 7, *available at* http://www.investphilippines.info/arangkada/wp-content/uploads/2016/02/BROADBAND-POLICY-BRIEF-as-printed.pdf (last accessed Oct. 31, 2017).

101. *Id.*

102. Maksymilian Kwiek, Competition Among Mass Media (A Discussion Paper No. 1013 on Economics and Econometrics for the University of Southampton) at 1, *available at* https://eprints.soton.ac.uk/161637/1/1013_with_cover.pdf (last accessed Oct. 31, 2017). *See also* JOHN FORTUNATO, MAKING MEDIA CONTENT: THE INFLUENCE OF CONSTITUENCY GROUPS ON MASS MEDIA 79 (2005).

103. PHIL. CONST. art. XVI, § 11 (1).

owned by such citizens are allowed to engage in the advertising industry.[104] Nationalistic and patrimonial considerations aside, these rules alone already provide substantial barriers that automatically foreclose the possibility of entry by foreign mass media firms.

In broadcast media, radio, broadcast, and television stations that wish to operate must first secure a legislative franchise from Congress.[105] A franchise is merely a privilege emanating from the sovereign power of the State and owing its existence to a grant. It is, therefore, subject to regulation by the State by virtue of its police power.[106] Additionally, these stations must obtain a certificate of public convenience and necessity from the NTC.[107]

By virtue of Presidential Decree No. 1986,[108] the Movie and Television Review and Classification Board (MTRCB) was created. The MTRCB has the power to

> approve or disapprove, delete objectionable portions from and/or prohibit the importation, exportation, production, copying, distribution, sale, lease, exhibition and/or television broadcast of motion pictures, television

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104. PHIL. CONST. art. XVI, § 11 (2), para. 2.

105. PHIL. CONST. art. XII, § 11. The Section provides —

> No franchise, certificate, or any other form of authorization for the operation of a public utility shall be granted except to citizens of the Philippines or to corporations or associations organized under the laws of the Philippines, at least sixty per centum of whose capital is owned by such citizens; nor shall such franchise, certificate, or authorization be exclusive in character or for a longer period than fifty years. Neither shall any such franchise or right be granted except under the condition that it shall be subject to amendment, alteration, or repeal by the Congress when the common good so requires. The State shall encourage equity participation in public utilities by the general public. The participation of foreign investors in the governing body of any public utility enterprise shall be limited to their proportionate share in its capital, and all the executive and managing officers of such corporation or association must be citizens of the Philippines.

PHIL. CONST. art. XII, § 11.

106. *See* Radio Communications of the Philippines, Inc. v. National Telecommunications Commission, 150 SCRA 450 (1987).

107. Creating a Ministry of Public Works and a Ministry of Transportation and Communications, Executive Order No. 546 [E.O. No. 546], § 15 (a) (July 23, 1979).

108. Creating The Movie And Television Review And Classification Board, Presidential Decree No. 1986 (1985).

> programs[,] and publicity materials ... which in the judgment of the Board applying contemporary Filipino cultural values as standard are objectionable for being immoral, indecent, contrary to law and/or good customs, injurious to the prestige of the Philippines or its people, or with a dangerous tendency to encourage the commission of violence or of a wrong or crime.[109]

Properly contextualized, the MTRCB's function is in the nature of the State's regulatory power to promote the public good, specifically Filipino values. But in the manner of exercising its mandate, it is essentially operating as an additional hurdle for whatever content media firms would like to introduce to the public audience. Either the MTRCB completely censors the content or, at best, acts as another bureaucratic layer that creates friction in the otherwise free flow of ideas.

Another significant barrier to entry in the mass media industry is obviously the constraint to financial resources. Steep capital expenditures need to be sunk without any assurance of return on investment. The huge gap between the capital expenditure required in broadcast media and print media partly explains why in the latter, the market is still rather competitive while in the former, the industry is highly concentrated. Financial constraints serve as a "first filter"[110] that segregates which news is fit to print.[111] As a testament to this "filter" function, the print medium evolved into industrialization, exhibiting an increase in capital costs and a rise in the scale of operations, in order to reach wider audiences.[112]

Notably, just like oligopolistic market structures, mass media firms also engage in a form of product differentiation. While there is no single universally-accepted truth, different mass media outlets will present in differing tenors essentially the same set of facts depending on which segment of the public they wish to reach out to. More often than not, mass media would select a dominant frame, to the exclusion of alternative models, within which to present a particular event and select facts which would fit this frame.[113]

> [P]rivate media are major corporations selling a product (readers and audiences) to other businesses (advertisers). The national media typically target and serve elite opinion, groups that, on the one hand, provide an

109. TEODORO, *supra* note 8, at 86.

110. HERMAN & CHOMSKY, *supra* note 3, at 4.

111. *Id.* at 2.

112. *Id.*

113. *Id.* at 143.

> optimal 'profile' for advertising purposes, and, on the other hand, play a role in decision-making in the private and public spheres. The national media would be failing to meet their elite audience's needs if they did not present a tolerably realistic portrayal of the world. But their 'societal purpose' also requires that the media's interpretation of the world reflect the interests and concerns of the sellers, the buyers, and the governmental and private institutions dominated by these groups.[114]

Another factor which contributes to the imperfection of the marketplace is the vast concentration of media firms undertaken via mergers and acquisitions. Among the strongest incentives for mass media to vertically integrate is the potential to better streamline their processes at every stage of production.[115]

> Large vertical mergers allow some companies to internalize all or nearly all of their operations. In the case of media organizations, vertical integration allows one company to own or control the stages of the production and distribution of a particular program. The same company can then use its various properties to promote the project. From an economic perspective, self-dealing has several distinct advantages. First, self-dealing often reduces the overall cost of program production. Second, common ownership often reduces the risk that a competing network will pick up a particular program. Finally, ideas for programs are more effectively circulated between network executives and program producers and vice versa.[116]

Other motivations for media combinations include effective exploitation of copyright holdings, repackaging and cross-promotion,[117] digitization, and compression technology.[118] The latter two motivations facilitate the faster transmittal of content between two points making it much easier for different units of a vertically integrated media firm to share content.

In sum, the stringent assumptions under which a perfectly competitive market operates does not hold for the mass media industry — instead of a large number of firms, only a few dominant ones are present; these concentrated firms each produce a lion's share of the content being consumed by the public; the industry is laden with substantial barriers to

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114. *Id.* at 303.

115. *Id.*

116. Donald Simon, *Big Media: Its Effects on the Marketplace of Ideas and How to Slow the Urge to Merge*, 20 J. COMP. & INFO. L. 247, 253-54 (2002).

117. *Id.* at 255.

118. *See* Euisun Yoo, *Media Convergence and its Policy Implications*, 33 KOR. J. INT'L & COMP. L. 29 (2005).

entry, both regulatory and financial; and the output produced, in the form of news material, is being differentiated depending on the target audience.

B. Concentrated Marketplace

Instead of free competition, the current landscape depicts a marketplace where there is a highly concentrated mass media industry. Chief Justice Warren Earl Burger went out of his way to paint such a picture through a concurring opinion in the case of *First National Bank v. Bellotti*,[119] in this wise —

> Making traditional use of the corporate form, some media enterprises have amassed vast wealth and power and conduct many activities, some directly related — and some not — to their publishing and broadcasting activities ... Today, a corporation might own the dominant newspaper in one or more large metropolitan centers, television[,] and radio stations in those same centers and others, a newspaper chain, news magazines with nationwide circulation, national or world-wide wire news services, and substantial interests in book publishing and distribution enterprises. Corporate ownership may extend, vertically, to pulp mills and pulp timber lands to insure an adequate, continuing supply of newsprint and to trucking and steamship lines for the purpose of transporting the newsprint to the presses. Such activities would be logical economic auxiliaries to a publishing conglomerate.[120]

Eerily, Chief Justice Burger's opinion reads as if it was written with the Philippines in mind. With ABS-CBN and GMA Network commanding a majority of the industry in terms of revenue share, mass media is effectively controlled by a duopoly.[121] Combined, they reach almost 81% of the Filipino television audience and 47% of the FM radio listeners.[122] The situation is made more alarming considering that ABS-CBN manages a total of 12 print publications, not limited to newspapers, catering to audiences of different income strata, educational background, and having diverse interests;[123] 80 television channels, spanning across all geographical areas in

119. First National Bank v. Bellotti, 435 U.S. 765 (1978).

120. *Id.*

121. The Vera Files, A Tale of Two Conglomerates, *available at* https://philippines.mom-rsf.org/en/owners/companies/abs-cbn-and-gma7/ (last accessed Oct. 31, 2017).

122. *Id.*

123. These publications consist of Metro Magazine, Metro Home & Entertaining, Metro Weddings, Metro Society, Vault, Working Mom, Food Magazine,

the Philippines;[124] and 20 AM and FM stations with nationwide coverage.[125] On the other hand, GMA Network controls 88 television outlets and 23 radio stations, inclusive of both AM and FM, with both platforms covering the entire nation.[126]

Table 1. Market Shares and Platforms Operated by Top 8 Media Companies[127]

Firm	Market Share (%)	Platform Covered		
		TV	Radio	Print
ABS-CBN	58.47	✓	✓	✓
GMA Network	20.97	✓	✓	
Manila Bulletin	4.29		✓	✓
The Philippine Star	3.21		✓	✓
Philippine Daily Inquirer	3.07		✓	✓
TV5	2.74	✓	✓	
Solar News Channel	2.10	✓		
Manila Broadcasting Company	1.65		✓	
TOTAL	96.49%			

The controlling interests behind the mass media industry, like most other big businesses in the Philippines, consist of a narrow and well-entrenched elite. Corporate records disclose big names such as the Lopezes, Gozons, Prietos, Elizaldes, and so on. However, the concern lies less in the fact of their controlling stake in the mass media firms, but more in the fact that these families are also dominant players in other businesses, such as

StarStudio, Chalk, Barbie, Star Magic Catalogue, and UAAP Magazine. *See* The Vera Files, Media Ownership Monitor — ABS-CBN Corporation, *available at* https://philippines.mom-rsf.org/en/owners/companies/detail/company/company/show/abs-cbn-corporation (last accessed Oct. 31, 2017).

124. *Id.*

125. *Id.*

126. The Vera Files, Media Ownership Monitor, GMA Network, Inc., *available at* https://philippines.mom-rsf.org/en/owners/companies/detail/company//gma-network-inc (last accessed Oct. 31, 2017).

127. Media Ownership Monitor — Television, *supra* note 15.

power, manufacturing, real estate, and food. This raises issues concerning conflict of interest in reporting as well as the manipulation of media to promote their other businesses.[128]

Table 2. Top Media Conglomerates and Ownership[129]

Company	Ownership
ABS-CBN	Lopez Incorporated (55%); PCD Nominee Corporation (43%); Ching Tiong Keng (1%)
GMA Network	Group Management Development, Incorporated (23%); GMA Holdings, Incorporated (22%); FLG Management & Development Corporation (20%)
Manila Bulletin	US Automotive Co., Inc. (54%); USAutoco, Inc. (23%); Menzi Trust Fund Incorporated (8%)
The Philippine Star	Armson Corporation (30%); White Gold, Inc. (27%); Francisco Dizon (8%)
Philippine Daily Inquirer	Pinnacle Printers Corporation (69%); Excel Pacific Holding Corp. (25%); Mercedes Prieto (6%)[130]
TV5	Mediaquest Holding, Incorporated (29%); Upbeam Investments, Incorporated (29); Telemedia Business Ventures, Incorporated (25%)

128. *See* The Vera Files, Media Ownership Matters, *available a* http://philippines.mom-rsf.org/en (last accessed Oct. 31, 2017) & Sheila S. Coronel, *The Media, the Market and Democracy: The Case of the Philippines*, 8 JAVNOST — THE PUBLIC 109 (2001).

129. *See* The Vera Files, Media Ownership, *available at* http://philippines.mom-rsf.org/en/owners (last accessed Oct. 31, 2017)

130. As of this writing, Entrepreneur Ramon S. Ang has bought out the Prietos' share in the Philippine Daily Inquirer, but the details of the transaction have yet to be fully appreciated. *See* James Loyola, *Ramon Ang buys out Prietos from PDI*, MANILA BULL., Jul. 18, 2017, *available at* http://news.mb.com.ph/2017/07/18/ramon-ang-buys-out-prietos-from-pdi (last accessed Oct. 31, 2017).

Solar News Channel	Solar Films, Incorporated (38%); Wilson Y. Tieng (21%); William Y. Tieng (15%)
Manila Broadcasting Company	Elizalde Holdings Corporation (35%); Elizalde Land, Incorporated (35%); Romulo, Mabanta, Buenaventura, Sayoc and Delos Angeles Law Offices (17%)

The industry structure provides incentives that promote perverse practices, which in turn leads to a loss of plurality of voices in the marketplace. Concentration endangers the voice of the press, leading to biased and homogenous reportage and editorial judgment. More specifically, cross-ownership of newspaper and television reporting restricts the variety of news available to the public and dampens editorial vigor.[131]

> Contrary to the image of an 'adversary press' boldly attacking a pitiful executive giant, the media's lack of interest, investigative zeal, and basic news reporting on the accumulating illegalities of the executive branch have regularly permitted and even *encouraged* ever larger violations of law, whose ultimate exposure when elite interests were threatened is offered as a demonstration of media service 'on behalf of the polity.'[132]

Media concentration results in a conflict of interest at the media company level. Information of possibly vital importance to the public, relating to a media conglomerate's other financial interest, will be given minimum coverage or suppressed altogether. News gathering, reporting, and commenting would merely be one of the many corporate activities and could be subordinated or manipulated to safeguard the profit-making potential of subsidiaries and affiliates. Furthermore, journalists could mask the underlying economic incentives to their news reporting under the pretense of integrity, thereby misleading an unaware public.[133] Some voices in the industry become biased sources, immune to the rules of evidence, and in fact, serve as agents of misinformation.[134]

In turn, the independence of the individuals working for the media company is also compromised. Purportedly, some journalists, during certain points of their career, have had to abandon the pursuit of a newsworthy

131. Catherine Roach, *Media Conglomerate, Antitrust Law, and the Marketplace of Ideas*, 9 MEM. ST. U.L. REV. 257, 264 (1979).

132. HERMAN & CHOMSKY, *supra* note 3, at 301.

133. Roach, *supra* note 131, at 265-66.

134. HERMAN & CHOMSKY, *supra* note 3, at 159.

story; were ignored because of potential financial conflicts with advertisers of their news operations; or lamented their inability to publish a story that was critical of their parent company.[135]

> Given the imperatives of corporate organization and the workings of the various filters, conformity to the needs and interests of privileged sectors is essential to success. In the media, as in other major institutions, those who do not display the requisite values and perspectives will be regarded as 'irresponsible,' 'ideological,' or otherwise aberrant, and will tend to fall by the wayside.[136]

Self-censorship, news coverage reduction, and content manipulation are just some examples of the ways by which journalists "serve two masters." They serve the interests of their principals, while at the same time, substantially complying with their duties to the public. But as is often the case, the two masters are not on the same side of the fence.

Most pernicious of all, the very credibility of the press is itself threatened. The preferred status of the mass media as a shaper of views depends upon public opinion and the general spirit of the people. However, perceptions of loss in diversity and conflict of interest could ultimately undermine the public's reliance on the mass media. Consequently, there runs the risk of a dislocation in the relationship between the public and the private media,[137] leading to a loss of credibility.

> The mass media are indeed free [—] for those who adopt the principles required for their 'societal purpose[.'] There may be some who are simply corrupt, and who serve as 'errand boys' for state and other authority, but this is not the norm. We know from personal experience that many journalists are quite aware of the way the system operates, and utilize the occasional openings it affords to provide information and analysis that departs in some measure from the elite consensus, carefully shaping it so as to accommodate to required norms in a general way. But this degree of insight is surely not common. Rather, the norm is a belief that freedom prevails, which is true for those who have internalized the required values and perspectives.[138]

Journalists, specifically the editorial staff, perform a vital "gatekeeper" function because they get to determine which news gets published. However, independent editors make painful decisions to kill stories or not

135. Simon, *supra* note 116, at 266-67.

136. HERMAN & CHOMSKY, *supra* note 3, at 304.

137. Roach, *supra* note 131, at 267.

138. HERMAN & CHOMSKY, *supra* note 3, at 304.

discuss certain issues because they may not coincide with corporate interests. Instead of introducing the stories or issues into the marketplace and letting the public determine their importance, the media gatekeepers filter them out.[139]

> In contrast to the standard conception of media as cantankerous, obstinate, and ubiquitous in their search for truth and their independence of authority, we have spelled out and applied a propaganda model that indeed sees the media as serving a 'societal purpose,' but not that of enabling the public to assert meaningful control over the political processes by providing them with the information needed for the intelligent discharge of political responsibilities. On the contrary, a propaganda model suggests that the 'societal purpose' of the media is to inculcate and defend the economic, social, and political agenda of privileged groups that dominate the domestic society and state. The media serve[s] this purpose in many ways: through selection of topics, distribution of concerns, framing of issues, filtering of information, emphasis and tone, and by keeping debate within the bounds of acceptable premises.[140]

The implications of a concentrated mass media industry cause even more alarm when examined from the broader context of the marketplace. Now a warped public space, the marketplace no longer mirrors the *agora* where participants of a community are able to freely participate and exchange their ideas with equal chances of persuading others. Rather, as succinctly expressed in the parlance of physics —

> [S]pace is not only warped by the action of a social agent; there is spatial curvature *ab initio* because of the mere presence of different entities with varying semantic powers ... space is warped by virtue of the operations of inclusion and exclusion that meet every utterance and the one who utters. The transmission and positing of meaning may, like light travel, be bended by the space itself; it may be amplified or rarefied, or simply consumed by a black hole.
>
> Preexisting and powerful semantic beings are like bodies with huge mass energy in the universe — like heavy bowling balls placed on a mattress, they warp the space around them and thereby influence the behavior of smaller bodies[,] those entities with lesser semantic powers.
>
> This is an uneven playing field [—] a convoluted distribution of the densities of semantic power [—] where some entities have more capacity to speak than others. Some emerge empowered, others are marginalized. This

139. Simon, *supra* note 116, at 270-71.

140. HERMAN & CHOMSKY, *supra* note 3, at 298.

> is the kind of curvature that is obviously problematic, not only as a democratic issue, but as a question of reason.[141]

Truly, mass media entities possess significant clout. Their manufactured content reaches more eyes and ears and influences more minds compared to a Facebook post or a pamphlet circulated in the streets. With their vast reach and near-unlimited access to a wide audience, the invisible hands of the interests behind mass media are capable of creeping into the public's consciousness and molding its beliefs. The current system creates the illusion that the marketplace is working — dissent and inconvenient information are kept within bounds and at the margins, so that while their presence shows that the system is not monolithic, they are not large enough to interfere unduly with the domination of the official agenda.[142] Such artificial limits to discourse pose serious implications when considering the truthfulness or falsity of particular ideas. As English poet John Milton once posed, "[l]et [truth] and falsehood grapple; whoever knew truth put to the worse in a free and open encounter?"[143] However, this begs the question — if the utterer of falsehood carries more influence than that of truth, then what chance is there that the truth will eventually prevail?

As was shown in the aforementioned 2016 Media Ownership Monitor, mass media outlets are heavily commercialized and often integrated into broader conglomerates that are held by a few families. Vested interests utilize mass media as a mere mouthpiece, no different from the blaring monotonous propaganda of repressive regimes, to instill in the public an ideology of consumerism. This cheapens the mass media's public interest function. On another aspect, the commercialization of the mass media has also led to the production of a multitude of opiate entertainment shows that keep their audiences glued to the screens, evoking emotional responses and allowing the tally of viewer statistics that can be processed by market researchers to be churned out for further business. Yet, such audiences remain sedated and insulated from the social ills that plague society. As aptly expressed by Huxley —

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141. Maximo Paulino T. Sison, III, *Legal Reason and Illegal Fictions*, 82 PHIL. L.J. 42, 45-46 (2008) (emphasis supplied). Sison's work discusses constitutional space and the production of meaning therein, but his theories and principles may be applied analogously to the marketplace of ideas.

142. HERMAN & CHOMSKY, *supra* note 3, at xii.

143. JOHN MILTON, AREOPAGITICA: A SPEECH OF MR. JOHN MILTON FOR LIBERTY OF UNLICENSED PRINTING 35 (1644).

> [T]he early advocates of universal literacy and a free press envisaged only two possibilities: the propaganda might be true, or it might be false. They did not foresee what in fact has happened, above all in our Western capitalist democracies [—] *the development of a vast mass communications industry, concerned in the main neither with the true nor the false, but with the unreal, the more or less totally irrelevant. In a word, they failed to take into account man's almost infinite appetite for distractions.*[144]

The current structure of the marketplace even serves as a vice to democracy. Article II, Section 1 of the 1987 Constitution provides that "[s]overeignty resides in the people and all government authority emanates from them."[145] Safeguarding this principle may well have been among the primary motivations of the framers when they vested the COMELEC with the power to equalize speaking power during election campaign. Indeed, "substantial, open, and ethical dialogue is a critical, and indeed defining, feature of a good polity ... it definitely includes a collective decision making with the participation of all who will be affected by the decision."[146] But even before campaign season commences, various interests are already insidiously capturing the minds, hearts, and ultimately the votes of the electorate. In this sense, elections are rigged long before the votes are cast.

IV. COMPETITION IN THE MASS MEDIA INDUSTRY

A. Constitutional Considerations

The free speech and free press clause rest on the assumption that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public.[147] As stated by Justice Romero in *Osmeña v. Commission on Elections*,

> [t]he primacy accorded the freedom of expression is a fundamental postulate of our constitutional system. The trend as reflected in Philippine and American decisions is to recognize the broadest scope and assure the widest latitude to this guaranty. It represents a profound commitment to the principle that debate of public issue should be uninhibited, robust[,] and wide open and may best serve its high purpose when it induces a condition

144. HUXLEY, *supra* note 96, at 35-36 (emphasis supplied).

145. PHIL. CONST. art. II, § 1.

146. *The Diocese of Bacolod*, 747 SCRA at 77.

147. Associated Press v. United States, 326 U.S. 1, 20 (1945).

> of unrest, creates dissatisfaction with conditions as they are[,] or even stirs people to anger.[148]

But the free speech and free press clause alone may be insufficient to attain such lofty ideals.

Article III, Section 4 of the Bill of Rights reads, "*No law shall be passed abridging the freedom of speech, of expression, or of the press*, or the right of the people peaceably to assemble and petition the government for redress of grievances."[149]

Notably, the Philippine Constitution's free speech and free press clause is couched in the negative, only serving at most as a restraint to any governmental act that abridges speech and press freedoms. It does not serve as a positive command for the government to level the playing field in the public space so that each participant will have an equally persuasive voice.

Furthermore, the clause only enjoins governmental acts that restrain speech.[150] It does not account for the possibility that even private agents have the capacity to subdue the speech of other individuals. But as was laid down in *Associated Press v. United States*,[151] "a command that the government itself shall not impede the free flow of ideas does not afford nongovernmental combinations a refuge if they impose restraints upon that constitutionally guaranteed freedom."[152] After all, "[f]reedom to publish is guaranteed by the Constitution, but freedom to combine to keep others from publishing is not. Freedom of the press from governmental interference under the First Amendment does not sanction repression of that freedom by private interests."[153]

Finally, Justice Leonen observes how the free speech clause protects only "speech" and not "speakers."[154] The problem sometimes is that "the effectivity of communication sometimes relies on the emphasis put by the speakers and on the credibility of the speakers themselves. Certainly, larger segments of the public may tend to be more convinced of the point made by

148. Osmeña v. Commission on Elections, 288 SCRA 447, 513 (1998) (J. Romero, dissenting opinion).

149. PHIL. CONST. art. III, § 4 (emphasis supplied).

150. *See* People v. Marti, 193 SCRA 57, 64 (1991).

151. *Associated Press*, 326 U.S. 1.

152. *Id.* at 20.

153. *Id.*

154. *The Diocese of Bacolod*, 747 SCRA at 75.

authoritative figures when they make the effort to emphasize their messages."[155] Hence, the audience is left to ascertain and assess the relative influence of different speakers, and the latter are constrained to make themselves more noticeable.

Freedom of speech means little if no one can hear such, either because one lacks the money to make oneself heard effectively or because one's opponents have drowned out the message by means of the latter's superior resources.[156] The only effective way to ensure fairness and accuracy and to provide for some accountability is for government to take affirmative action.[157]

The 1987 Constitution is replete with provisions to justify and support the application of competition law in the mass media industry.

The bedrock of the State's competition mandate is embodied in Article XII, Section 19 of the Constitution. It states that "[t]he State shall regulate or prohibit monopolies when the public interest so requires. No combinations in restraint of trade or unfair competition shall be allowed."[158]

In *Tatad v. Secretary of Energy*,[159] the Court ruled —

> [W]e underline in scarlet that the fundamental principle espoused by [S]ection 19, Article XII of the Constitution is competition for it alone can release the creative forces of the market. But the competition that can unleash these creative forces is competition that is fighting yet is fair. Ideally, this kind of competition requires the presence of not one, not just a few but several players. A market controlled by one player (monopoly) or dominated by a handful of players (oligopoly) is hardly the market where honest-to-goodness competition will prevail. Monopolistic or oligopolistic markets deserve our careful scrutiny and laws which barricade the entry points of new players in the market should be viewed with suspicion.[160]

Recognizing that the spirit of competition must also pervade the mass media industry, the framers explicitly restated the competition provision in the second paragraph of Article XVI, Section 11 that "[t]he Congress shall regulate or prohibit monopolies in commercial mass media when the public

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155. *Id.*

156. Jack Balkin, *The Footnote*, 83 NW. U.L. REV. 275, 310 (1989).

157. *Miami Herald Publishing Co.*, 418 U.S. at 251.

158. PHIL. CONST. art. XII, § 19.

159. Tatad v. Secretary of the Department of Energy, 281 SCRA 330 (1997).

160. *Id.* at 358-59.

interest so requires. No combinations in restraint of trade or unfair competition therein shall be allowed."[161]

Indeed, the State recognizes the vital role of communication and information in nation-building.[162] Furthermore, the State is mandated to provide the policy environment for the full development of Filipino capability and the emergence of communication structures suitable to the needs and aspirations of the nation and the balanced flow of information into, out of, and across the country, in accordance with a policy that respects the freedom of speech and of the press.[163] The right to information is viewed as a means of ensuring that all channels of communication remain open, smoothening out whatever frictions there are in the free flow of information. Jurisprudence and an executive issuance has, however, limited the application of the right to information to matters of public concern, often serving as a means of obtaining information from the government.[164]

During the deliberations of the 1986 Constitutional Commission, Commissioner Florangel Rosario Braid explained the *raison d'être* of the provisions governing communication and information —

> We cannot talk of the functions of communications unless we have a philosophy of communication, unless we have a vision of society. Here, we have a preferred vision where opportunities are provided for participation

161. PHIL CONST. art. XVI, § 11.

162. PHIL. CONST. art. II, § 24.

163. PHIL. CONST. art. XVI, § 10.

164. *See, e.g.*, Office of the President, Operationalizing in the Executive Branch the People's Constitutional Right to Information and the State Policies to Full Public Disclosure and Transparency in the Public Service and Providing Guidelines Therefor, Executive Order No. 2 [E.O. No. 2, s. 2016], pmbl. (July 2, 2016) & Legaspi v. Civil Service Commission, 150 SCRA 530 (1987).

See also PHIL. CONST. art. III, § 7. The Article states —

> The right of the people to information on matters of public concern shall be recognized. Access to official records, and to documents, and papers pertaining to official acts, transactions, or decisions, as well as to government research data used as basis for policy development, shall be afforded the citizen, subject to such limitations as may be provided by law.

PHIL. CONST. art. III, § 7.

While the first sentence appears sufficient to support the right of information insofar as private and civil affairs are concerned, this right to information has been confined to a limited role in matters concerning government information.

> by as many people, where there is unity even in cultural diversity, for there is freedom to have options in a pluralistic society. Communication and information provide the leverage for power. They enable the people to act, to make decisions, [and] to share consciousness in the mobilization of the nation.[165]

Hence, even if Justice Holmes' marketplace doctrine fails to guarantee the emergence of the best ideas through an unhampered exchange of ideas, the constitutional provisions synthesized herein provide strong impetus for the State to regulate the mass media industry and level the playing field in the marketplace. The free speech clause guarantees that the government will not interfere with what agents have to say, but without regard to the relative influence that each one possesses. The constitutional directive to regulate or prohibit monopolies, as well as proscribe combinations in restraint of trade and unfair competition in mass media, complements the free speech clause by giving a voice to the mute or amplifying those who are little heard, all towards ensuring a more democratic interchange of ideas. In fact, the Court has already imbued government intervention, albeit only in the particular case of licensing in broadcast media, with such a purpose, in this manner —

> [T]he scarcity of radio frequencies made it necessary for the government to step in and allocate frequencies to competing broadcasters. In undertaking that function, the government is impelled to adjudge which of the competing applicants are worthy of frequency allocation. *It is through that role that it becomes legally viable for the government to impose its own values and goals through a regulatory regime that extends beyond the assignation of frequencies, notwithstanding the free expression guarantees enjoyed by broadcasters. As the government is put in a position to determine who should be worthy to be accorded the privilege to broadcast from a finite and limited spectrum, it may impose regulations to see to it that broadcasters promote the public good deemed important by the State,* and to withdraw that privilege from those who fall short of the standards set in favor of other worthy applicants.[166]

B. Application of Competition Law

The PCA was enacted in order to prevent economic concentration,[167] penalize all forms of anti-competitive agreements,[168] and, most importantly, to carry out the constitutional mandate to regulate or prohibit monopolies

165. TEODORO, *supra* note 8, at 202.

166. Divinagracia v. Consolidated Broadcasting System, 584 SCRA 213, 227 (2009) (emphasis supplied).

167. Philippine Competition Act, § 2 (b).

168. *Id.* § 2 (c).

when the public interest so requires and to prohibit combinations in restraint of trade as well as unfair competition.[169]

In other jurisdictions, such as the U.S., regulators have made use of competition as a tool in order to democratize mass media ownership and promote viewpoint diversity.[170] The United Kingdom's (U.K.) Office of Fair Trading (OFT) employs a supply-driven analysis, consisting of indicators such as investment and advertisers, among others, to determine if a questioned transaction will promote media pluralism or media bias.[171] Motivated by the principle that the flow of information should not be bottlenecked, Japan views competition law as a means to eliminate private restraints to media pluralism.[172]

1. Prosecution

The PCA prohibits one or more entities from abusing their dominant position by engaging in conduct that would substantially prevent, restrict or lessen competition.[173] It vests the Philippine Competition Commission (PCC) with sufficient power to prosecute subject entities that have engaged in anti-competitive behavior.[174] The U.S. has relied on similarly phrased provisions in order to prosecute mass media companies.

It was made clear as early as 1945 that the Sherman Antitrust Act[175] covered mass media entities. In *Associated Press v. United States*, the Associated Press was a cooperative association engaged in gathering and distributing news in interstate and foreign commerce.[176] The association adopted by-laws which prohibited members from furnishing news to non-members and granted members the prerogative to deny membership to other

169. *Id.* § 2, para. 2.

170. *See* Howard Shelanski, *Antitrust Laws as Mass Media Regulation: Can Merger Standards Protect the Public Interest*, 94 CAL. L. REV. 372 (2006).

171. Yoshiharu Ichikawa, Law and Economics of Media Policy: Europe and Japan Compared, at 23 (Mar. 2013) (unpublished Ph.D. thesis, Graduate School of Applied Informatics, University of Hyogo) (on file with Authors).

172. *Id.* at 56-58.

173. Philippine Competition Act, § 15.

174. *Id.* § 12.

175. Monopolies and Combinations in Restraint of Trade [The Sherman Antitrust Act], 15 U.S.C. §§ 1-7 (1890).

176. *Associated Press*, 326 U.S. at 3-4.

competitors.[177] The Associated Press attempted to argue that the application of the Sherman Act to the news industry would abridge their freedom of the press.[178] Brushing aside this argument, the U.S. Supreme Court considered trade in news as interstate commerce and found that the by-laws constitute restraint of trade.[179] Justice Hugo Lafayette Black pointed out that

> [m]ember publishers of [the Associated Press] are engaged in business for profit exactly as are other business men who sell food, steel, aluminum, or anything else people need or want. *All are alike covered by the Sherman Act.* The fact that the publisher handles news, while others handle food, does not, as we shall later point out, afford the publisher a peculiar constitutional sanctuary in which he can with impunity violate laws regulating his business practices.[180]

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177. *Id.* at 4.

178. *Id.* at 19.

179. *Id.* at 14.

180. *Id.* at 7 (emphasis supplied). In another case, *Associated Press v. Labor Board*, the Associated Press contested the Labor Board's directive to reinstate one of its editorial staff. It was alleged that the directive violated their First Amendment rights by interfering with their prerogative as to who to employ, which would consequently influence the content that such employee would produce for the press. Associated Press v. Labor Board, 301 U.S. 103, 125-27 (1937). Later in the decision, the Court opined, "The business of the Associated Press is not immune from regulation because it is an agency of the press. The publisher of a newspaper has no special immunity from the application of general laws. He has no special privilege ... He is subject to the antitrust laws." *Id.* at 132-33. A contrary view, however was expressed in the dissenting opinion of Justice George Alexander Sutherland —

> [I]f [Associated Press] concluded, as it well could have done, that its policy to preserve its news service free from color, bias, or distortion was likely to be subverted by [Morris] Watson's retention [(the dismissed Associated Press employee)], what power has Congress to interfere in the face of the First Amendment? ... Due regard for the constitutional guaranty requires that the publisher or agency of the publisher of news shall be free from restraint in respect of employment in the editorial force. And we are dealing here not with guild members employed in the mechanical or purely clerical work of the press, but with those engaged, as Watson was, in its editorial work, and having the power thereby to affect the execution of its policies.

Id. at 140 (J. Sutherland, dissenting opinion).

More importantly, the U.S. government successfully obtained an injunction to proscribe the questioned practice.[181]

In the landmark case of *United States v. Paramount Pictures*,[182] otherwise known as the "Hollywood Antitrust Case of 1948", the U.S. government was able to secure the film companies' breakup from their vertical links to other economic activities. Featured in the case were big names like Paramount Pictures, Warner Brothers Pictures, Universal Studios, and Columbia Pictures, among others.[183] The industry at that time was structured as a vertically-integrated oligopoly; big film production companies also owned distribution arms as well as theatres for exhibition.[184] The anti-competitive arrangements were as follows:

(1) Clearances, whereby movies were scheduled at particular theatres so as to prevent them from competing with other theatres;

(2) Pooling arrangements, where a single theatre may be owned by two or more nominally competitive film studies;

(3) Block booking, whereby theatres were required to purchase films without even getting the chance to view them; and

(4) Discrimination against smaller theatres by refusing them the opportunity to screen the films of the big studios.[185]

Litigation by the U.S. Department of Justice (U.S. DOJ) actually commenced in 1938 and the parties came to a compromise in 1940, requiring the film studios to desist from their anti-competitive arrangements.[186] The failure of the compromise agreement prompted the U.S. DOJ to recommence litigation, which ultimately ended up to the Supreme Court.[187] Siding with the government, the Court remanded the

181. *Associated Press*, 326 U.S. at 21-22.

182. United States v. Paramount Pictures, 334 U.S. 131 (1948).

183. *Id.* at 140.

184. *Id.* at 140-42.

185. *Id.*

186. *See* The Society of Independent Motion Picture Producers Research Database, The Hollywood Antitrust Case aka The Paramount Antitrust Case, *available at* http://www.cobbles.com/simpp_archive/1film_antitrust.htm (last accessed Oct. 31, 2017) (for archives outlining the litigation history of the *Paramount Pictures* case and the events following the Supreme Court decision).

187. *Id.*

case to the lower courts for determination of the appropriate remedy.[188] Thereafter, some of the companies voluntarily divested their theatre assets.[189] Those who maintained a hardline stance ended up facing stiffer sanctions, on top of divestiture, compared to those who voluntarily divested.[190]

While litigation proves a useful tool in competition enforcement, it is not without its share of difficulties. Oftentimes, in the context of the press, the decision to avoid a story or issue is almost never reduced into a memo form; these decisions are made at editorial meetings, staff assignment boards, and by the journalists themselves. Hence, "smoking guns" are seldom discovered. [191] Furthermore, litigation can be very costly and time-consuming, often allowing big industry players to hold out longer than their smaller competitors who bring cases to court. Lastly, in other industries, measuring the extent of economic harm is simple because the goods and services exchanged therein can be numerically estimated. In contrast, how exactly does one appraise the value of ideas, much less measure the extent of damage to consumers?

2. Merger Review

The PCC is also empowered to review proposed mergers and acquisitions, determine thresholds for notification thereof, and determine the requirements and procedures for notification.[192] Upon the exercise of its powers to review, it can prohibit mergers and acquisitions that will substantially prevent, restrict, or lessen competition in the relevant market.[193]

The agglomeration of mass media into a few corporate hands started in America during the 1960s.[194] Trusted newspapers such as the New York Times, The Washington Post, and Los Angeles Times, had already gained a reputable status in their respective communities, but their profitability was little known. [195] They were mostly held by closely-knit families. [196]

188. *Id.*

189. *Id.*

190. *Id.*

191. Simon, *supra* note 116, at 266.

192. Philippine Competition Act, § 12 (b).

193. *Id.*

194. *See* Ben Bagdikian, The Empire Strikes: Mergers in the Media World, Center for Media Literacy, *available at* http://www.medialit.org/reading-room/empire-strikes-mergers-media-world (last accessed Oct. 31, 2017).

195. *Id.*

Curiously, one of the primary motivations that induced newspapers to sell to corporations was the avoidance of inheritance taxes. Owners looked for a way to skirt the hefty inheritance taxes and found a solution by either trading shares in the stock market or by selling their papers to corporations outright.[197]

Television then was already concentrated but became even more so when the Federal Communications Commission (FCC) decided to deregulate the industry and allow broadcast companies to increase their holdings of radio and television stations.[198] Thereafter, media companies sought to further diversify their portfolio by assimilating magazine companies, book publishers, and studios.[199]

The FCC wields a strong mandate to limit concentration in the broadcasting industry.[200] The FCC's merger oversight covers only the holders of FCC licenses.[201] When the FCC reviews merger transactions, the parties must demonstrate that the grant of their applications is in the public interest.[202] While the impact on competition is a major element in the FCC's application of this public interest standard, the FCC also considers other factors that go far beyond what the antitrust laws would cover, most notably localism and diversity.[203] This allows the FCC to consider the impact of a transaction on important First Amendment values.[204]

One notable feature of the FCC's merger review mandate is its promulgation of rules regulating ownership or control of mass media units.[205] One iteration of such regulations was criticized as going too far in

196. *Id.*

197. *Id.*

198. *Id.*

199. *Id.*

200. Roach, *supra* note 131, at 257 & 268.

201. Andy Schwartzman, How the Department of Justice, Federal Trade Commission and Federal Communications Commission Regulate Media Company Acquisitions, Benton Foundation (Part One of a Discussion of the Regulation of Media Ownership), *available at* https://www.benton.org/blog/how-department-justice-federal-trade-commission-and-federal-communications-commission-regulate (last accessed Oct. 31, 2017).

202. *Id.*

203. *Id.*

204. *Id.*

205. *Id.*

restricting cross-ownership of newspapers and broadcast stations. This challenge led to the case of *Federal Communications Commission v. National Citizens Committee.* [206] The U.S. Supreme Court brushed aside the petitioners' contentions, acknowledged the FCC's wide discretion in promulgating the contested rules, and ultimately upheld the FCC regulations.[207] The U.S. Supreme Court noted that

> the First Amendment and antitrust values underlying the Commission's diversification policy may properly be considered by the Commission in determining where the public interest lies. *'[T]he public interest[ ] standard necessarily invites reference to First Amendment principles, and, in particular, to the First Amendment goal of achieving 'the widest possible dissemination of information from diverse and antagonistic sources.' And, while the Commission does not have power to enforce the antitrust laws as such, it is permitted to take antitrust policies into account in making licensing decisions pursuant to the public interest standard.*[208]

Responding to the argument that the regulations violated the First Amendment by restricting speech, the Court stated that, "since the prospective ban was designed to '[increase] the number of media voices in the community,' and not to restrict or control the content of free speech, the ban would not violate the First Amendment rights of newspaper owners."[209]

Since the *National Citizens Committee* case, the FCC has regularly updated such rules and regulations in order to adapt to changing times. Just in 2016, the FCC concluded its analysis of the pre-existing rules and gave its proposals to update the same.[210] The report is comprehensive and contains technical and specific rules covering Local TV Ownership, Local Radio Ownership, and Cross-Ownership in Radio/Television or Broadcast/Newspaper, among others.[211]

In connection with the FCC's rule-making and merger review powers, it employs a "Diversity Index" in order to measure the variety of

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206. Federal Communications Commission v. National Citizens Committee, 436 U.S. 775 (1978).

207. *Id.* at 815.

208. *Id.* at 795 (citing Columbia Broadcasting System, Inc. v. Democratic National Committee, 412 U.S. 94, 122 (1973) & *Associated Press*, 326 U.S. at 20)).

209. *Federal Communications Commission*, 436 U.S. at 790.

210. Dana Scherer, The FCC's Rules and Policies Regarding Media Ownership, Attribution, and Ownership Diversity (A Report Commissioned by the Congressional Research Service), *available at* https://fas.org/sgp/crs/misc/R43936.pdf (last accessed Oct. 31, 2017).

211. *Id.*

viewpoints.[212] In much the same way that general competition analysis employs the Herfindahl-Hirschman Index to measure concentration in the market and appraise the results thereof against pre-determined thresholds,[213] the Diversity Index measures the share of each firm in the mass media industry.[214] It asks whether, in a given geographic setting, there are a sufficient number of diverse media outlets that deliver mass communication to their covered audience.[215] As applied, in small markets where there are only few providers of mass communication, any proposed merger or acquisition threatens the diversity of viewpoints post-transaction. Conversely, in markets where there are numerous media outlets, there would still be a sufficient number of competing viewpoints despite a merger or acquisition between existing firms.

In 2010, British company News Corporation (NewsCorp), a minority shareholder in the British Sky Broadcasting Group, sought to acquire the remainder of shares it still did not own in the latter.[216] Complaints were filed by the BBC, Channel Four, the Daily Telegraph, the Daily Mail, the Guardian, and the Daily Mirror claiming that the transaction should be blocked because it would reduce media diversity and plurality.[217] The overriding concern was that the industry's ownership structure must provide for a sufficient number of persons that own mass media enterprises serving a particular audience.

The OFT and the Office of Communications (Ofcom), the U.K. communications regulator, assessed the transaction's public interest considerations on the basis of "static" and "dynamic" effects.[218] The former

212. Federal Communication Commission, FCC Sets Limits on Media Concentration at 2, *available at* https://apps.fcc.gov/edocs_public/attachmatch/DOC-235047A1.pdf (last accessed Oct. 31, 2017).

213 FRASER, The Herfindahl-Hirschman Index, *available at* https://fraser.stlouisfed.org/files/docs/publications/FRB/pages/1990-1994/33101_1990-1994.pdf (last accessed Oct. 31, 2017).

214. Adam Marcus, *Media Diversity and Substitutability: Problems with the FCC's Diversity Index*, 3 J.L. & POL. INFO. SOCIETY 83, 94 (2007).

215. *Id.*

216. *Id.*

217. *See* The Democratic Audit of the United Kingdom, The Media in a Democratic Society, *available at* http://democracy-uk-2012.democratic auditarchive.com/media-freedom-and-pluralism (last accessed Oct. 31, 2017).

218. Office of the Communications, Report On Public Interest Test On The Proposed Acquisition Of British Sky Broadcasting Group Plc By News

entailed a projection of immediate post-transaction effects such as range, number of persons controlling the enterprise, and the ability to influence opinions.[219] The latter required a more forward-looking approach, considering factors such as: (1) development and launch of integrated news products for convergent devices and media, (2) cross promotion between NewsCorp news titles and channels, (3) bundling of news products with other media services, and (4) winning new wholesale news contracts.[220]

After coming to the conclusion that the transaction posed a potential threat to media plurality, the OFT and Ofcom referred the matter to the U.K. Competition Commission for a full-scale review of the transaction. However, no ruling was ever reached since the deal fell through after a NewsCorp scandal broke out.[221]

While very useful, the exercise of merger review in the Philippine mass media industry may be possibly met by some hindrances.

First, the current industry structure appears to have achieved a steady state. Considering the asset-holdings and far-reaching scope of the current industry players, it becomes doubtful whether any new player will enter the mass media industry, especially considering the huge capital expenditures required in the industry. While the legislature slept on the enactment of a comprehensive competition law, mass media companies accumulated the economic power leading up to the current industry shares. Having missed the opportunity to review the past mergers through a competition lens, it would be difficult to undo such concentration unless prosecution can be utilized heavily and effectively. For instance, the PCA vests the PCC with the power to penalize anti-competitive agreements[222] and abuse of dominance[223] — essentially private conduct that substantially prevents, restricts, or lessens competition. Such violations can merit hefty administrative and criminal penalties,[224] as well as trigger the imposition of structural remedies, such as divestiture of certain assets and holdings and

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Corporation, at 4-14, *available at* https://www.ofcom.org.uk/__data/assets/pdf_file/0017/81413/public-interest-test-report.pdf (last accessed Oct. 31, 2017).

219. *Id.*

220. *Id.*

221. *See* The Democratic Audit of the United Kingdom, *supra* note 217.

222. Philippine Competition Act, § 14.

223. *Id.* § 15.

224. *Id.* §§ 29 & 30.

behavioral remedies that enjoin an entity from employing certain business practices.[225] When utilized properly, such functions can dismantle the consolidated dominance that has accrued to mass media empires over the years.

Second, the PCC might encounter regulatory friction considering that the scope of regulatory jurisdiction of the PCC, in relation to other specific sector regulators, is not yet clearly delineated. For example, the PCC has had a brush with the NTC due to the previous telecommunications asset acquisition between PLDT and Globe, on the one hand, and San Miguel, on the other. As it currently stands, the NTC still has the primary jurisdiction to issuing licenses to broadcast firms.

3. Advocacy

In addition to its prosecutorial and merger review powers, the PCC is also mandated to advocate pro-competitive policies of the government by reviewing economic and administrative regulations; as well as to conduct, publish, and disseminate studies and reports on anti-competitive conduct and agreements to inform and guide the industry.[226]

A note by the United Nations Conference on Trade and Development highlights the importance of having a communications strategy in order to "establish, maintain, and promote competition culture."[227] Advocacy raises public awareness, influences the behavior of business communities, and even influences other policy-makers.

In using these powers, the PCC might engage in tie-ups with the NTC, albeit in an advisory capacity, with respect to the licensing of mass media firms. In Japan, for instance, the Ministry of Internal Affairs and Communications (MIC) allocates broadcast licenses in such a way as to regulate the number of players as well as concentration in the market.[228] By strategically defining the geographical scope in operating a license, the MIC is able to promote media localism.[229] With the view to maximizing the ability of citizens to effectively participate in decision-making about the

225. *Id.* § 12 (h).

226. *Id.* § 12.

227. United Nations Conference on Trade and Development Secretariat, *Communication Strategies of Competition Authorities as a Tool for Agency Effectiveness*, ¶ 2, U.N. Doc. TD/B/C.I/CLP/28 (Apr. 28, 2014).

228. Ichikawa, *supra* note 171, at 58-59.

229. *Id.*

conditions of their own lives, media localism requires that mass media be demographically responsive to the diverse needs of disparate communities.[230] Note, however, that the Japanese MIC allocates licenses with the directive of promoting viewpoint diversity. Such is not so in the Philippine regulatory scheme, and as the regulatory metes and bounds between different agencies have yet to be clearly delineated, the PCC might end up participating in NTC proceedings through advocacy channels.

The first item on the Journalists' Code of Ethics reads, "I shall scrupulously report and interpret the news, taking care not to suppress essential facts nor to distort the truth by omission or improper emphasis. I recognize the duty to air the other side and the duty to correct substantive errors promptly."[231] Considering that this tenet converges with the purpose of promoting a meaningful exchange of information in the marketplace, the PCC could partner with media interest groups, such as the Philippine Press Institute, Union of Journalists of the Philippines, or the Center for Media Freedom and Responsibility, that exercise a certain degree of influence over their members. While these organizations have long been fighting for a pluralistic and credible mass media, these organizations can garner additional impetus to shape journalistic ethics and media practices if the PCC supports and advises their efforts. In this regard, anti-competitive conduct in the marketplace can be nipped in the bud.

230. Sandra Braman, *The Ideal v. the Real in Media Localism: Regulatory Implications*, 12 COMM. L. & POL'Y 231, 234-36 (2007).

231. Philippine Press Institute, Journalists' Code of Ethics, *available at* http://www.philpressinstitute.net/journalists-code-of-ethics-2 (last accessed Oct. 31, 2017).

4. Special Considerations

Clearly, the standards to be applied in regulating mass media go beyond mere economic considerations. The business of mass media is one that is imbued with public interest for it concerns the promotion of truth regarding public matters by furnishing the basis for an understanding of them. Truth and understanding are not wares like peanuts or potatoes.[232]

Thus, the regulation of mass media by means of competition law calls for a "multivalued approach" that does not limit the analysis to prices, cost, and product innovation, but also accounts for strong socio-political considerations.[233] The problem, however, lies in the absence of a clear cut standard for a "multivalued approach."

American authorities and their courts craft and apply different doctrines that apply to specific cases, but all with the view to devoting special scrutiny to mass media actions that come under the purview of competition laws. For instance, during the proposed merger between cable operators Time Warner and Turner Broadcasting Systems, the FTC Chairman declared that he would be applying special standards in scrutinizing the deal.[234] Beyond economic considerations, the analysis would factor in non-economic aspects such as diminished broadcast quality, reduced consumer choice, the potential for self-censorship, journalism independence, and the availability of alternative sources for news and public affairs programming.[235]

As earlier discussed, the FCC applies an extensive array of rules governing mass media ownership. While not exactly instituted as a competition body, the FCC possesses a mandate to promote diversity of viewpoints in broadcasting. This concept of diversity is further broken down into four aspects: (a) diversity of viewpoints, as reflected in the availability of media content reflecting a variety of perspectives; (b) diversity of programming, as indicated by a variety of formats and content, including programming aimed at various minority and ethnic groups; (c) outlet

232. *Associated Press*, 326 U.S. at 28 (J. Frankfurter, concurring opinion).

233. Keith Conrad, *Media Mergers: First Step in a New Shift of Antitrust Analysis?*, 49 FED. COMM. L.J. 687 (1997).

234. Press Release *by* the United States Federal Trade Commission, *FTC Requires Restructuring of Time Warner/Turner Deal: Settlement Resolves Charges that Deal Would Reduce Cable Industry Competition* (Sep. 12, 1996) *available at* https://www.ftc.gov/news-events/press-releases/1996/09/ftc-requires-restructuring-time-warnerturner-deal-settlement.

235. *Id.*

diversity, to ensure the presence of multiple independently owned media outlets within a geographic market; and (d) minority and female ownership of broadcast media outlets.[236] Furthermore, the FCC also limits the number of media outlets possessed by a single entity in order to promote "localism" whereby broadcast stations are responsive to the needs of their communities.[237]

In the *National Citizens Committee* case, the FCC sought to apply its standards to "the most egregious cases which it identified as those in which a newspaper-broadcast combination has an effective monopoly in the local marketplace, as well as economically. The FCC recognized that any standards for defining which combinations fell within that category would necessarily be arbitrary to some degree, but a choice had to be made."[238]

Finally, almost all competition analysis commences with the definition of the relevant market. In order to determine market dominance, monopoly, or anti-competitive conduct, competition authorities must first define the market within which the subject entity is operating. For instance, a relevant market may be defined narrowly, as one for rice, or broadly, as one for grains. One the one hand, the former increases the likelihood that the subject entity is engaging in anti-competitive conduct since there is a smaller market. On the other hand, the broader definition would dilute the market power possessed by a subject entity. Consequently, competition authorities would necessarily look into the characteristics of the subject products, determining whether they are substitutable to other similar goods.

This becomes tricky in the marketplace since ideas cannot be precisely characterized by their features, attributes, and corresponding audience. For instance, is it proper to state that the ideas propounded by movies do not compete with the news? Or that a subject entity competes only for an adult audience but not a teenage audience? Just to demonstrate such difficulties in the market for newspapers, the U.S. DOJ noted that

> [w]hen faced with a proposed merger of two or more newspapers, the Division collects and examines the facts to determine whether local daily newspapers, national daily newspapers, community newspapers, radio stations, television stations, or [i]nternet sources belong in the same market on either side. In past investigations, the Division has concluded that non-newspaper media do not sufficiently constrain the pricing of newspaper advertisements, the pricing of newspaper subscriptions, or newspapers'

236. Scherer, *supra* note 210.

237. *Id.*

238. *Federal Communications Commission*, 436 U.S. at 787.

> investments in news and editorial content, and thus are not in the same market. That conclusion is perfectly consistent with the observation that newspapers have been losing subscription and advertising revenues to other media, as some degree of competition across market boundaries is the norm. Whether changes in technology and consumer preferences may lead to the conclusion that a relevant market should include sales of advertisements (or content) by both newspapers and other media remains something that should be analyzed on a case-by-case basis.[239]

Notwithstanding these technical — but not insurmountable — difficulties, the task at hand for competition law is by all means imperative. The values of competition law and the media pluralism essentially mirror each other. Whereas competition laws seek to benefit society by dispersing economic power, providing economic opportunity for diverse businesses, and maximizing the efficient use of resources, media pluralism aims to maximize the number and diversity of voices in the marketplace.[240] Where competition law seeks to broaden the array of consumer choices, free speech aims to increase the audience's exposure to a wide spectrum of ideas.

Consumers should be free to make choices by any criteria they choose: quality, price, or as in the case of media organizations, by viewpoint diversity.[241] Exposure to a vast diversity of ideas becomes crucial because a reader or viewer who never learns about news events or particular editorial perspectives might not look to other sources for them. The readers or viewers often would have no reason to suspect that they have been deprived of a diversity of choices.[242]

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239. Christine A. Varney, Assistant Attorney General, Antitrust Division, U.S. Department of Justice, *Dynamic Competition in the Newspaper Industry*, Remarks as Prepared for The Newspaper Association of America (Mar. 21, 2011) (transcript *available at* https://www.justice.gov/atr/speech/dynamic-competition-newspaper-industry (last accessed Oct. 31, 2017)).

240. Brad A. Greenberg, *The News Deal: How Price-Fixing and Collusion Can Save the Newspaper Industry — and Why Congress Should Promote It*, 59 UCLA L. REV. 414, 440 (2011).

241. Robert H. Lande, *Consumer Choice as the Ultimate Goal of Antitrust*, 62 U. PITT. L. REV. 503, 504 (2001).

242. Simon, *supra* note 116, at 249 (citing Robert H. Lande, Secretary, American Antitrust Board Institute, Statement at the Hearing on the America Online/Time-Warner Merger Before the Committee on Commerce, Science, and Transportation at the United States Senate (Mar. 2, 2000) (transcript *available at* http://www.antitrustinstitute.org/node/10164 (last accessed Oct. 31, 2017)).

The pressing issue for the Philippine jurisdiction, therefore, is whether or not its premiere competition agency possesses the mandate to adopt a multivalued approach. Such question must be resolved in favor of imbuing the PCC with such flexibility.

First, directly referencing the country's Charter, the PCA bestows the PCC with a crucial mission pursuant to "the constitutional mandate that the State shall regulate or prohibit monopolies when the public interest so requires and that no combinations in restraint of trade or unfair competition shall be allowed[.]"[243] The statutory policy derives its force from the constitutional directive on competition which, by extension, should also encompass the analogous provision specifically targeting commercial mass media.[244] These provisions serve as major thoroughfares, leading to other constitutional provisions relating to the right to information[245] and the free flow of information across the nation.[246] Hence, no less than the Constitution and the PCA textually integrate such policy objectives into the PCC's mandate.

Second, the PCA's declaration of policy is malleable enough to accommodate a multivalued approach. The PCA emphasizes the "constitutional goals for the national economy to attain a *more equitable distribution of opportunities*, income, and wealth ... and an expanding productivity as the *key to raising the quality of life for all, especially the underprivileged*[.]"[247] As a measure that seeks to "safeguard competitive conditions[,]" the State aspires for the "*provision of equal opportunities to all.*"[248] Again, echoing the constitutional mandate, monopolies should be regulated or prohibited "when the *public interest* so requires."[249] If such objectives are to be taken seriously, the language of the law ought not be read so narrowly as to accommodate only purely economic considerations — for in the marketplace of ideas, speech is imbued with immense social worth, over and beyond basic wares and commodities that can easily be ascribed a pecuniary value.

243. Philippine Competition Act, § 2.

244. *See* PHIL. CONST. art. XVI, § 11 (1).

245. *See* PHIL. CONST. art. III, § 7.

246. *See* PHIL. CONST. art. XVI, § 10.

247. Philippine Competition Act, § 2 (emphasis supplied).

248. *Id.* (emphasis supplied).

249. *Id.* (emphasis supplied).

Finally, that the PCC exercises the discretion to incorporate non-economic considerations in the exercise of its functions can be gleaned from two key provisions. Section 14 of the PCA on Anti-Competitive Agreements contains a catch-all clause — "Agreements other than those specified in (a) and (b) of this [S]ection which have the object or effect of substantially preventing, restricting[,] or lessening competition shall also be prohibited[.]"[250] Notably, the paragraphs being referenced pertain to purely economic considerations such as prices, output, innovation, and the like. So, by exclusion, the catch-all clause should open the door to the integration of non-economic factors as well. Section 15 on Abuse of Dominance prohibits dominant players from "[l]imiting production" and such limitation can be construed liberally to cover situations where mass media firms withhold vital information from the public. At any rate, the same Section provides that the PCC shall not be constrained from pursuing measures that would promote or increase fair competition.[251]

5. Caveat

For all its potential in promoting social values — such as leveling the playing field in the marketplace of ideas — some authorities have argued against the utilization of competition law to achieve non-economic goals. Their concerns can be divided into the philosophical and the political, both being often intertwined.

Since the 1970s, Judge Heron Robert Bork persuasively delimited the underlying philosophy of antitrust law to purely economic considerations.[252] Under his school of thought, antitrust was to be wielded only "to avoid the allocative inefficiencies of monopoly power, encourage efficiency and progressiveness in the use of resources, and perhaps, on fairness grounds, to maintain price close to cost in order to minimize unnecessary and undesirable accumulations of private wealth[.]"[253] To conservative scholars like Judge Bork, antitrust regulators and judges during that time were reading into the antitrust laws certain goals that were too broad, arbitrary, or devoid of any objective standard. Limiting its purpose served as an additional institutional check on the use of antitrust.

250. *Id.* § 14 (c).

251. *Id.* § 15.

252. *See* ROBERT BORK, THE ANTITRUST PARADOX (1978).

253. Robert Pitofsky, *Political Content of Antitrust*, 127 U. PA. L. REV. 1051, 1051 (1979).

History may have validated, if not aggravated, Judge Bork's worries, as the philosophy of antitrust often interfaces with the politics of antitrust. At the height of the Watergate Scandal, then U.S. President Richard Milhous Nixon was alleged to have instructed the U.S. DOJ's antitrust chief to threaten the investigation of three major television networks in order to obtain favorable coverage.[254] Just recently, U.S. President Donald J. Trump publicly threatened Amazon with an antitrust suit, owing primarily to the negative press coverage he received from The Washington Post. Both the Washington Post and Amazon are owned by billionaire Jeff Preston Bezos.[255]

The foregoing instances show that "[p]eople who want to see more aggressive antitrust enforcement that is not solely motivated by efficiency and evidence of price increases ... should remember that without clear criteria, antitrust enforcement can serve as a powerful political tool."[256]

Nevertheless, these concerns should not be taken as providing a compelling argument for using competition law solely to achieve the limited goal of economic efficiency. Notably, the U.S. Constitution does not possess the same hortatory provisions under the Philippine Constitution, the latter explicitly upholding competition in the mass media and promoting a robust exchange of information. The nation would have lost a potent tool that can promote the free exchange of ideas — among other democratic and social goals — if the PCA were to be construed so narrowly. The aim, therefore, is not to kill the beast, but rather to learn how to tame it. The fear that a multi-valued approach might be manipulated to achieve illegitimate objectives can be addressed through institutional checks such as judicial review of agency action and the appointment of credible and competent regulators, among others.

V. CONCLUSION

Mass media did not always enjoy the freedom that it does today. To varying degrees of an Orwellian tenor, from the Spanish colonialism to the Martial Law era, the overarching struggle was that of the media against a repressive government.

254. Guy Rolnik, Netanyahu, Trump, Nixon and the Use of Antitrust to Tame the Media, *available at* https://promarket.org/netanyahu-trump-nixon-use-antitrust-tame-media (last accessed Oct. 31, 2017).

255. *Id.*

256. *Id.*

During the Spanish colonial period, the ruling paradigm was censorship of the press, so much so that newspaper content was more literary and satiric — intended to please and to humor the elite — rather than critical and informative.[257] But such repressive conditions incited the organization of a free press and in the spirit of nationalism, there sprouted independent newspapers such as *La Solidaridad*, *Kalayaan*, and *La Independencia*.[258] Thus began the political and ideological war for an independent Philippines.

Notwithstanding the incorporation of a proviso on press freedom in the Philippine Organic Act of 1902,[259] the improvement of press freedom was at best superficial during American rule. In order to insulate government rule from the tirades of critics, the courts, in reviewing the suppression of press freedoms, applied the dangerous tendency rule.[260] This judicial standard, lower than the presently used clear and present danger test, allowed the courts sufficient leeway to justify the repression of speech in order to support the colonial government.[261]

Post-war print publication was in the hands of big business people who pushed for legislative policies, put down their rivals, and uplifted their allies.[262] Because of the newly-attained independence of the Philippines, many opportunists who wanted a hand in steering the course of the national agenda sought out the journalists for their influence.[263]

Then came Martial Law. For mass media, this era marked a regime of systemic corruption from among their own ranks coupled with the repressive practices of the dictatorship of former President Ferdinand E. Marcos.[264]

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257. Florangel Rosario-Braid & Ramon R. Tuazon, *Communication Media in the Philippines: 1521-1986*, 47 PHIL. STUD. 291, 294-95 (1999).

258. *Id.*

259 An Act Temporarily to Provide for the Administration of the Affairs Of Civil Government in the Philippine Islands, and for Other Purposes, 32 Stat. 691, § 5 (1902) (also known as The Philippine Organic Act of 1902). The law states "That no law shall be passed abridging the freedom of speech or of the press, or the right of the people peaceably to assemble and petition the Government for redress of grievances." *Id.*

260. JOAQUIN G. BERNAS, S.J., THE 1987 CONSTITUTION OF THE PHILIPPINES: A COMMENTARY 249 (2009 ed.).

261. TEODORO, *supra* note 8, at 5.

262. *See* ROSALINDA PINEDA-OFRENEO, THE MANIPULATED PRESS (1986).

263. HOFILEÑA, *supra* note 14, at 8.

264. *Id.*

Newspapers were occasionally being shut down or taken over by government only to be placed under the control of a Marcos crony.[265] The offshoot of this highly repressive regime was the emergence of an underground "mosquito press" consisting of the likes of Veritas, The Philippine Collegian, and the We Forum tabloid.[266] Ultimately, Marcos could neither contain the spirit of independent journalism nor tame the craving of the masses for independent news. The huge democratic breathing space opened up by the 1987 EDSA Revolution facilitated the entry of "many papers catering to a news-hungry public."[267]

But while the repressive practices of martial rule were discontinued, corruption and influence-peddling within the mass media industry intensified. It is argued that post-Marcos media corruption had become "costlier, more pervasive, and even more systemic."[268] Because of the vast number of newspapers and mass media outlets, there was a need for corrupters to capture the media in a more organized and institutionalized manner.[269] In the 2004 national elections, the television — considering the broad reach of its news reporting, talk shows, sitcoms, and advertisements — was the primary arena where the votes were fought for. Hence, candidates exerted unprecedented pressure on journalists and business executives behind the television outlets.[270]

Now, the marketplace of ideas in the Philippines is characterized by a paradox — while the regime is democratic, the voices are far from pluralistic.

Concededly, Philippine mass media does not function in the exact same manner as a totalitarian state's mouthpiece. The industry, on one hand, does not spurt out "euphemism, question-begging[,] and sheer cloudy vagueness"[271] that is characteristic of political speech in a repressive regime.

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265. *Id.*

266. *Id.* & Ellen T. Tordesillas, The potent bite of the 'Mosquito Press', *available at* http://news.abs-cbn.com/blogs/opinions/03/03/15/potent-bite-mosquito-press (last accessed Oct. 31, 2017).

267. Coronel, *supra* note 118, at 115.

268. HOFILEÑA, *supra* note 14, at 9.

269. *Id.* at 17.

270. *Id.* at 26.

271. George Orwell, *Politics and the English Language*, *in* 4 THE COLLECTED ESSAYS, JOURNALISM AND LETTERS OF GEORGE ORWELL 136 (Sonia Orwell & Ian Angos eds., 1968).

But neither does it boast of a truly robust, independent, and critical exchange of ideas, perhaps only a semblance thereof. The current state of affairs permits, indeed even encourages, spirited debate, criticism, and dissent, as long as these remain faithfully within the system of presuppositions and principles that constitute an elite consensus — a system so powerful as to be internalized largely without awareness.[272]

All told,

> [w]hat the Philippine experience has so painfully demonstrated is that a free press is not achieved simply through the absence of official regulation, and that a free press even when achieved does not necessarily lead to a society of justice, freedom[,] and democracy. Theoretically, private ownership is the guarantee of a free press, and with it responsible and accountable practice. But in practice press freedom is often compromised by the interference of owners with interests to protect, and who compel their editors and reporters to report events from the perspective of those interests.[273]

For far too long, vested interests have lorded over the public space, delineating its metes and bounds, setting the terms for exchanges therein, inducing pervading sentiments, and implanting ideas into the Filipino mind, as though these were as easy as pulling levers in a machine. The State ought not to be constricted by Justice Holmes' marketplace doctrine, adopting only a *laissez-faire* approach in the treatment of free speech issues. Such a passive stance will only allow mass media empires to further entrench themselves as dominant manufacturers of ideas. Instead, the State, through the PCC and in consonance with the constitutional and statutory framework proposed herein, should waste no time in carrying out the "creative destruction" [274] of mass media dominance in the universe of ideas.

The constitutional foundations and statutory policies of the PCA provide the framework by which the PCC can incorporate non-economic considerations in the exercise of its functions. Examined in light of the impact on Philippine democracy of a mass media that is not freely competitive, the PCC's competition mandate becomes all the more imperative. In hurdling the technical and political obstacles to adopting a multivalued approach in merger analysis, the PCC should be able to draw from the best practices of other jurisdictions.

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272. HERMAN & CHOMSKY, *supra* note 3, at 302.

273. TEODORO, *supra* note 8, at 402.

274. JOSEPH SCHUMPETER, CAPITALISM, SOCIALISM AND DEMOCRACY 83 (2003).

The next installment in the Philippine mass media narrative might just be a battle between the PCC and a concentrated mass media industry, in which case, a win by the PCC will likely translate to a more level playing field in the marketplace of ideas and hopefully, in the long run, a stronger democracy in the country.