WHO WALKS THE WATCHDOG?: *RAPPLER V. SEC*, BALANCING FREEDOM OF THE PRESS AND CONSTITUTIONAL OWNERSHIP REQUIREMENTS, AND THE USES AND GRATIFICATIONS OF A POSTCOLONIAL CONSTITUTION*[*]

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ABSTRACT

This Note aims to highlight a major gap in Philippine media law: the incongruence between the Constitutional right to the freedom of the press and the Constitutional equity restriction on mass media. It aims to tackle three distinct but related legal issues. Its first goal is to argue, using the lenses of both textual analysis and the framework of postcolonial constitutionalism, that in a conflict between the right to freedom of speech and the Constitution's 100% Filipino-owned equity restriction on mass media, the latter should prevail. Its second goal is to render an analysis of the ongoing case of *Rappler v. SEC* and assess the case both on its own merits and based on the postcolonial framework. Its third goal is, using the uses and gratifications theory of the press, to stimulate a discussion for future legal scholars as to the continued relevance of the mass media equity restriction in today's age.

KEYWORDS: Rappler, SEC, mass media, postcolonial constitutionalism

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[*] *Cite as* Andrew Holandez-Mencias, *Who Walks the Watchdog?: Rappler v. SEC, Balancing Freedom of the Press and Constitutional Ownership Requirements, and the Uses and Gratifications of a Postcolonial Constitution*, 99 PHIL. L.J. 333, [page cited] (2026).

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In addition to paper adviser ICC Ret. Judge Raul C. Pangalangan, of whom I am of perpetual gratitude and admiration, I would like to acknowledge the indispensable contributions of various scholars and individuals who have helped me along the way. Of foremost consideration, Atty. Robert M. Sanders, Jr., Atty. Oliver Xavier Reyes, Atty. Cesar Tomas Solis, Atty. Iñaqui Angelo Mangahas, Eleni Tanriosa, and Blanch Marie Ancla, none of whom this paper would have been possible without. I'd also like to thank my best friends Ar. Reinhardt Rey and Atty. Angeline de Vera; my family members Marianne Holandez Mencias, Danilo Holandez, Patrocinio Holandez; and the love of my life Leigh Lim in helping me draft this paper. I'd also like to dedicate this paper to shortstop Francisco Lindor of the New York Mets baseball club for being the shining example of courage, resilience, and leadership that got me through my last year of law school.

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I. INTRODUCTION

"It is true, and I am proud of it, that I once said, 'I would rather have a government run like hell by Filipinos than a government run like heaven by Americans.'"
—President Manuel L. Quezon[1]

"Sabi ni Manuel Quezon noon, 'I would rather have a country run like hell by Filipinos, than run like heaven by Americans.' 'Yan yung be careful what you wish for, e 'no?"
—Victor Anastacio[2]

In 2018, the Securities and Exchange Commission (SEC) rendered a decision ("2018 Decision") against multimedia news website Rappler, revoking the latter's Certificate of Incorporation.[3] The decision immediately sent shockwaves across the landscape of Philippine media, and for good reason. The news outlet and its founder, Maria Ressa, had—at the time of the decision—been subject to direct verbal attacks by the administration of then-President Rodrigo Duterte, with Duterte himself alleging that Rappler is "fully owned" by Americans.[4] Through the 2018 Decision, Rappler—one of the most prominent news agencies in the country, and decidedly the most critical of the Duterte administration—was swiftly disarmed. By operation of law, the revocation of Rappler's license meant that its juridical personality ceased to exist.[5]

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[1] Manuel L. Quezon, Speech on Civil Liberties delivered on the occasion of the interuniversity oratorical contest held under the auspices of the Civil Liberties Union at the Ateneo auditorium, Manila (Dec. 9, 1939). It is amusing that not even Quezon himself could give an original citation for when he first said the quote.

[2] Victor Anastacio (@victoranastacio), TIKTOK (June 12, 2023), *at* https://www.tik tok.com/@victoranastacio/video/7243800085295877381.

[3] *In re* Rappler, Inc. and Rappler Holdings Corp., SP Case No. 08-17-001 (Sec. Exch. Comm'n. Jan. 11, 2018).

[4] Rodrigo Duterte, Speech delivered at the 2017 State of the Nation Address, Batasang Pambansa Complex, Quezon City (July 24, 2017), *at* https://mirror.pco.gov.ph/wp -content/uploads/2018/07/2017-State-of-the-Nation-Address-of-Duterte.pdf.

[5] REV. CORP. CODE, § 18.

The move of the SEC was largely derided by scholars,[6] media practitioners,[7] and public figures[8] alike as a direct attack on the constitutional right to freedom of speech, expression, and the press.[9] After Duterte's endless targeting of Rappler,[10] many viewed the 2018 Decision as the SEC's feeble submission to the Duterte regime and the Commission being turned into a weapon of authoritarianism. Regardless of any truth to these assertions, however, the 2018 Decision was not explicitly anchored on Rappler committing any form of *lèse-majesté*. Rather, the SEC revoked Rappler's license due to allegations of foreign ownership, just as Duterte had claimed in his State Address only six months prior.

Under the 1987 Constitution, mass media must be 100% Filipino-owned. Specifically, the Constitution requires that "[t]he ownership and management of mass media shall be limited to citizens of the Philippines, or to corporations, cooperatives or associations, wholly-owned and managed by such citizens."[11] It is upon this constitutional principle which the 2018 Decision was anchored,[12] as the SEC ruled that Rappler and Rappler Holdings Corp.[13] (hereinafter, "RHC") violated the foreign equity

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[6] *See Philippines: SEC order to shut down Rappler violates freedom of expression*, INT'L COMM'N JURISTS WEBSITE, July 8, 2022, *at* https://www.icj.org/philippines-sec-order-to-shut-down-rappler-violates-freedom-of-expression/.

[7] *See* Randy David, *Public Lives: Rappler and press freedom,* INQUIRER.NET, Jan. 21, 2018, *at* https://opinion.inquirer.net/110428/rappler-press-freedom.

[8] *See* Howard Johnson, *Why Rappler is raising Philippine press freedom fears,* BBC, Jan. 17, 2018, *at* https://www.bbc.com/news/world-asia-42713897.

[9] CONST. art. III, § 4. "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."

[10] Maria Ressa herself alleges that the 2018 Decision was partly a result of orchestrated attacks by Duterte in retaliation for what Ressa calls, "Rappler's hard-hitting investigative piece exposing corruption around naval purchases linked to Duterte's assistant Bong Go." Ressa further alleges that Duterte banned her from Malacañang Palace, and that the *modus operandi* of the 2018 Decision had been devised since as early as 2016. MARIA RESSA, HOW TO STAND UP TO A DICTATOR: THE FIGHT FOR OUR FUTURE 121–24 (2022).

[11] CONST. art. XVI, § 11(1). The provision will hereinafter be referred to as "the foreign equity restriction," "the media ownership requirement," or "the Constitutional ownership requirement." Any other foreign equity restrictions in the Constitution governing industries that are not mass media will be specifically identified.

[12] *In re* Rappler, Inc. and Rappler Holdings Corp., SP Case No. 08-17-001, 7 (Sec. Exch. Comm'n. Jan. 11, 2018).

[13] At this point, it would be useful to make the distinction between Rappler, Inc. and Rappler Holdings Corp. In short, Rappler Inc. is the media company, while Rappler Holdings Corp. is the holdings company with primary ownership over Rappler, Inc. Thus, Rappler, Inc. is a domestic stock corporation registered on July 25, 2011. Its primary purpose is "to design, develop, establish, market, sell, maintain, support, distribute, customize, sell, re-sell, and/or operate news, information, and social network services including but not

requirement through the issuance of Philippine Depositary Receipts ("PDRs") to foreign juridical entity Omidyar Network Fund LLC.[14]

In reversing this Decision in 2024, however, the Court of Appeals ruled that not only were the PDRs not evidence of foreign ownership, but also that any decision resulting in the corporate death of a mass media entity ought to take into consideration such a decision's draconian implications.[15] In her *ponencia,* Justice Emily San Gaspar-Gito writes: "indiscriminately striking down mass media entities, despite their intent to fully comply with the Constitution […] would limit the number of journalists and mass media entities who serve as an inherent check and balance to the powers that be."[16] The Court of Appeals subsequently denied the Motion for Reconsideration filed by the Securities and Exchange Commission.[17]

Regardless of one's opinion on the merits of the case, what is certain is that the entire fiasco between Rappler and the SEC brings to light an interesting constitutional question: is there an incongruence between the media ownership requirement and the right to the freedom of the press? And if so, how are we to bridge the gap?

This Note seeks to answer both questions in the following manner. *Firstly*, the Note will lay out its theoretical framework by discussing the theory of postcolonial constitutionalism and thereby characterizing the 1987

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limited to contents, platforms, systems and/or applications via web, internet, mobile, and other delivery formats; communications, advertising, corporate social responsibility, marketing, PR, events, brand affinity, and other related services and packages provided it will not act as an internet service provider."

Rappler Holdings Corporation is a domestic stock corporation registered on December 12, 2014. It presently owns 98.84% of Rappler, Inc.

In re Rappler, Inc. and Rappler Holdings Corp., SP Case No. 08-17-001, 1–2 (Sec. Exch. Comm'n Jan. 11, 2018).

[14] The Omidyar Network Fund Inc., founded by French-Iranian-American billion--aire and eBay founder Pierre Omidyar, describes itself as practicing a balance of venture philanthropy and impact investing to deliver social change. *See The Omidyar way of giving,* THE ECONOMIST, Oct. 26, 2013, *at* https://www.economist.com/business/2013/10 /26/the-omidyar-way-of-giving; Rappler, Inc. v. Sec. Exch. Comm'n [hereinafter, "*Rappler v. SEC*"], C.A.-G.R. SP No. 174288, 3 (Ct. of Appeals July 23, 2024).

[15] *Rappler v. SEC*, C.A.-G.R. SP No. 174288, 26–27, 41.

[16] *Id.* at 44.

[17] Rappler, Inc. v. Sec. Exch. Comm'n, C.A.-G.R. SP No. 174288 (Ct. of Appeals July 11, 2025). This is a Court of Appeals Resolution denying the Motion for Reconsideration filed by the SEC.

Constitution as a postcolonial constitution. *Secondly*, it will discuss the history of the constitutional ownership requirement, as well as the operational definition of ownership and perspectives on the same. This part will also include the history of the constitutional right to freedom of the press, as well as an assessment of both rights as postcolonial imperatives. *Thirdly*, the Note will introduce its methodological framework for the balancing of rights, applying the same to balance the right to freedom of the press with the constitutional equity requirement. *Fourthly*, it will pass on *Rappler v. SEC*, based both on the merits of the arguments of both parties and on the postcolonial character of the Constitution. *Finally*, the Note will discuss, through the uses and gratifications theory of communication, the current relevance of the foreign equity restriction in the light of the digitalization of mass media.

II. THEORETICAL FRAMEWORK: THE 1987 CONSTITUTION AS A POSTCOLONIAL CONSTITUTION

Before proceeding to any in-depth discussion as to the precise constitutional provisions subject of the piece, it is first important to establish how this Note believes the Constitution ought to be read.

This portion will seek to characterize the 1987 Constitution as a postcolonial constitution, one developed in direct response to the dual nature of Ferdinand Marcos, Sr.'s[18] regime as both an oppressive regime in and of itself, and one that is heavily influenced by foreign control. It is worth emphasizing that the approach of the succeeding section is not a mere *reading* of the Constitution through a postcolonial lens; rather, it will be to *characterize* the Constitution as one where postcolonial principles were central to its development. In doing so, this section lays the foundation for succeeding sections to determine which rights ought to be prioritized given the Constitution's postcolonial character.

A. The Tenets of Postcolonial Constitutionalism

A precise definition of the theory of postcolonial constitutionalism is amorphous. The framework's name alone is a conjunction of two terms—

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[18] Hereinafter, Ferdinand Marcos, Sr. will be referred to as "President Marcos." For our purposes, there will be no need to distinguish him from his son, President Ferdinand Marcos, Jr.

"postcolonial" and "constitutionalism"—which, by themselves, are amorphous.

Postcolonial theory developed in the mid-20th century as a direct result of scholarly attempts to describe and critique the wave of independence movements across the globe. Unfortunately, scholars themselves are of little agreement as to the proper scope of postcolonial theory. For our purposes, the work of Leela Gandhi provides a sufficient synthesis as to the "overarching preoccupations and obligations" of postcolonial studies.[19] For Gandhi, the impetus of postcolonialism is understanding the colonial aftermath, which in turn is done by resisting cultural amnesia. To decolonize, according to Gandhi, is not to simply forget a colonial past, but to make sense out of it. Gandhi says that it is the constant interrogation of the colonial past that allows the subjects of colonialism to uncouple themselves from its burdens.[20]

As for the second half of the term "*postcolonial constitutionalism*," "constitutionalism" has a bit more of a stable definition. Wil Waluchaw and Dimitrios Kyritsis defines constitutionalism as "the idea […] that government can and should be legally limited in its powers, and that its authority or legitimacy depends on [the government's] observing these limitations."[21] Essentially, it is through adopting and accepting entrenchments and constraints through a written constitution that a government sources its powers.[22]

Taking these two rough definitions together, perhaps the simplest way to describe postcolonial constitutionalism is that it is an attempt to use the limits of written constitutions to decolonize. For postcolonial constitutions, the limitations on government power inherent in constitutions must, as Gandhi says, "successfully imagine and execute a decisive departure from the colonial past."[23] Through the use of the uniquely self-inhibiting character of constitutions, postcolonial governments can carefully consider the lingering effects of a colonial past and impose self-limitations that prevent a return to colonial oppression.

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[19] Leela Gandhi, Postcolonial Theory: A Critical Introduction 23 (1998).

[20] *Id.* at 3–9.

[21] Wil Waluchow & Dimitrios Kyritsis, *Constitutionalism*, STAN. ENCYCLOPEDIA PHILO. WEBSITE, *available at* https://plato.stanford.edu/entries/constitutionalism/ (last modified May 18, 2023).

[22] *Id.*

[23] GANDHI, *supra* note 19, at 6.

This understanding of postcolonial constitutionalism is congruent with the understanding provided by Peggy Cooper Davis in her seminal work on the subject. Though Davis does not explicitly define postcolonial constitutionalism as a theoretical undertaking, she does define what a postcolonial *constitution* is. That is, according to Davis, one with "constitutional principles adopted in reaction to supremacist arrogance and atrocity."[24]

Postcolonial constitutionalism should therefore be understood as a theoretical framework that exists not merely to create an identity, but *to respond* to a previous, hegemonic one. For this reason, postcolonial constitutionalism, or the assertion of a constitution's postcolonial character, is often seen as a form of transformative constitutionalism.[25] That is, it is a constitution adopted against the background of an existing constitution, which seeks to adopt entirely new theories of governance.[26] As described by Mark Tushnet, under the transformative theory, it is the society itself which is transformed, and not merely the constitution.[27] In the case of postcolonial constitutions, this transformation happens through an emphasis on eradicating supremacist thought,[28] resisting colonial norms and power structures, and providing inclusive praxes.[29]

B. Viability of the Framework in the Philippine Context

On its face, there seems to be an immediate problem when it comes to the applicability of postcolonial constitutionalism as a theory by which we can describe the 1987 Constitution: How can the 1987 Constitution be deemed postcolonial if its creation does not immediately succeed a colonizer?

To this end, there are two assertions which lay down the viability of the framework.

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[24] Peggy Cooper Davis, *Post-Colonial Constitutionalism,* 44 N.Y.U. REV. L. & SOC. CHANGE 1, 2 (2019).

[25] *Id.* at 8.

[26] Mark Tushnet, *Varieties of Constitutionalism* 25–26 (Harv. Pub. L., Working Paper No. 23–31, 2023).

[27] *Id.* at 26.

[28] Davis, *supra* note 24, at 8.

[29] Vrinda Narain, *Postcolonial Constitutionalism in India: Complexities and Contradictions*, 25 S. CAL. INTERDISC. L.J. 107, 123–24 (2016).

Firstly, Davis emphasizes that though the term "postcolonial" might seem to necessitate that the constitution in question be a direct response to the ousting of a colonial power, this is not always the case. As noted by many scholars, postcolonialism may also broadly include every culture affected by "political oppressive systems."[30] Often, this results in constitutions with a deep emphasis on human rights[31] and conversely, the rejection of forms of oppression such as racism and discrimination.[32] Davis cites, for instance, the constitutions of post-Apartheid South Africa and post-Nazism Germany as examples of postcolonial constitutions despite not being responses to colonial powers in the traditional sense. For Davis, it is more useful to treat postcolonial constitutionalism as a broader, global trend, whereby nation-states in the mid-20th century sought to assert and codify stances reactive to supremacist and imperial thought.[33]

The Marcos era was decidedly not a supremacist regime in the vein of Apartheid South Africa or Nazi Germany, which had inherent segregationist policies analogous to colonial systems. Still, following the words of Davis in quoting former South Africa Chief Justice Ismail Mahomed, postcolonial constitutions are manifestations of deliberate rejections of not only racist and insular regimes, but authoritarian and repressive regimes; as well as deliberate and articulated commitments to egalitarian aspirations.[34]

Secondly, although the Marcos regime was a domestic affair, it was nevertheless a period heavily afflicted by the presence of foreign control. A more thorough discussion of this will be laid out in the next subsection. For now, the point that must be immediately asserted is that, although the 1987 Constitution is a response to a domestic oppressor, that character does not preclude it from also being a response to foreign colonial and neo-colonial powers. This can be seen in the fact that the interests of the Marcos regime were heavily entangled with foreign interests.

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[30] Davis, *supra* note 24, at 3, *citing* Erika Lemmer & Michele Olivier, *The South African Constitution as a Post-Colonial Document: A Long Walk to Freedom*, 33 DE JURE 138, 140 (2000).

[31] Davis, *supra* note 24, at 3.

[32] José María Monzón, *The Constitution as a Post-Colonial Discourse: An Insight Into the Constitution of Bolivia*, 12 SEATTLE J. SOC. JUST. 821, 842 (2014).

[33] Davis, *supra* note 24, at 2–3.

[34] *Id.* at 3.

C. Application to the 1987 Constitution

Having asserted the viability of using postcolonial theory as our theoretical framework, we must now proceed to directly applying the same to the 1987 Constitution. In assessing the postcolonial character of a constitution, the work of Heinz Klug proves useful. Klug identifies five elements common in the process of postcolonial constitution-making.[35] These elements allow us to frame constitution-making from a broader perspective while also understanding the unique situations of different states, as each element provides a source of variance between different countries' constitution-making processes.[36]

The five elements identified by Klug are as follows.

1. Klug's First Element: The Temporal Dimension; and the 1987 Constitution as a Late Cold War Document

First is the temporal dimension, which is further divided into the macro and the micro. The macro-temporal dimension refers to the characteristic of a constitution where the transition took place against the larger context of a shift in international political culture. Meanwhile, the micro-temporal dimension refers to the specific timeframe of the constitution-making and the domestic circumstances surrounding it.[37] The 1987 Constitution, as an instrument developed during a period of mass democratization at the tail end of the Cold War, checks this box. The Philippines was just one of many countries that deposed their authoritarian regimes in favor of a more liberal democracy.[38]

Note, however, that despite the fall of the Soviet Union and the global shift towards liberal democracy, the overarching sentiment for many of the countries undergoing this change was one of nationalism and the

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[35] Heinz Klug, *Constituting the State in Postcolonial Africa: Fifty Years of Constitution-Making Toward an African Constitutionalism*, *in* MODERN CONSTITUTIONS 272–90 (Rogers Smith & Richard Beeman eds., 2020).

[36] At this point, it should be noted that this Paper will only briefly pass upon the reading of the 1987 Constitution as a postcolonial constitution. While the paper will establish the same, deeper theorizing on the subject is best reserved for a separate paper by future researchers. *See also* Dante Gatmaytan, *Legal Transfers as Colonization: Initial Thoughts on Decoloniality and the Constitution,* 93 PHIL. L.J. 276 (2020).

[37] Klug, *supra* note 35, at 272–76.

[38] *See* Anna Brigevich, The Post-Cold War Wave of Democratization: Regime Transitions in Sub-Saharan Africa and Postcommunist States Compared (2008) (unpublished thesis for M.A. Political Science, University of North Carolina at Chapel Hill).

ability to establish an identity free from the control of superpowers. In his sponsorship speech in the 1986 Constitutional Commission on a provision prohibiting the American bases, Atty. Jose Nolledo noted the similarities of the Philippine context to the growing desire of countries to free themselves from the shackles of superpowers, calling neutralism a policy necessary to preserve national independence and serve national interests. Nolledo notably and incisively called the policy of neutralism a feature which enables the Philippines to avoid dependence on global superpowers.[39]

More interesting than the macro-temporal dimension, however, is the micro-temporal dimension. The said dimension likewise applies to the 1987 Constitution because of how it directly responded to the Marcos regime both as an oppressive political system and also as a response to the growing perception of Marcos as a sycophant to the Americans.

It cannot be understated how much the Cold War between the United States and the Soviet Union affected Philippine political thought. Through the continued matching of domestic interests with those of the United States, the development of American military bases in the Philippines, and the formulation of economic policies favorable to Americans, American ideology was heavily embedded into Philippine presidents prior to Marcos, leading to a sense of dependence on the United States amid the growing fear of escalating nuclear warfare.[40]

With Marcos entering the fold, another administration was added to the line of administrations subservient to the United States.[41] Marcos initially campaigned heavily on nationalistic sentiments and, upon assuming the Presidency, sought to establish closer relations with fellow Southeast Asian nations and the People's Republic of China. Still, this did not end Philippine dependence on Washington, as Marcos maintained the necessity of keeping strong ties with the Americans.[42] Hence, throughout the duration of the

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[39] 4 RECORD CONST. COMM'N 81, 583 (Sept. 12, 1986). Nolledo specifically cites India, Kenya, Myanmar (then-Burma), and the then-country of Yugoslavia.

[40] This primarily refers to Presidents Roxas, Quirino, and Magsaysay. *See* Ricardo Jose, *The Philippines' search for security in the first years of the Cold War, 1946–51*, *in* SOUTHEAST ASIA AND THE COLD WAR, 29–40 (Albert Lau ed., 2012).

[41] Richard Kessler, *Marcos and the Americans*, 63 FOREIGN POL'Y 40, 44–45 (1986).

[42] Robert Youngblood, Philippine-American Relations Under the "New Society", 50 PAC. AFF. 45, 48–50 (1977).

Marcos administration, the presence of American military bases remained, partly as a mechanism for the Americans to funnel aid to the regime.[43]

This dependence on the United States—coupled with low approval ratings due to the Philippines' participation in the Vietnam War, along with the growing cult of personality of China's cultural revolution—strengthened the resurgent communist movement in the country.[44] Marcos would later use this movement as a primary scapegoat in his declaration of Martial Law in 1972.[45] Throughout all of this, the United States welcomed martial law, with Marcos receiving strong bipartisan support in the American Congress and among the American public.[46] Marcos used the threat of insurgency and its concomitant security concerns to, as mentioned, further receive aid from the Americans, whose interests lay in the military bases.[47]

The late-to-post Cold War period represented a tonal shift in global political thought toward liberal democracy.[48] The Marcos administration saw a rejection of both principles, instead leaning towards a more corporatist-authoritarian administration. Still, this did not necessarily affect Marcos' standing with the Americans. Until the very end, Marcos fashioned himself both to Americans and Filipinos alike as America's chosen Filipino. To the Americans, Marcos portrayed himself as the only leader who could successfully champion the interests of the Americans; and to the Filipinos, the only leader who could ensure American protection.[49]

Towards the end of the Marcos regime, however, popular opinion towards the Americans dwindled, with distaste for the American military bases becoming the majority opinion. The Americans were seen as complicit in the abuses of the Marcos regime. This is reflected in the discussion of the 1986 Constitutional Commission on the Declaration on State Principles, which would later result in the Transitory Provision prohibiting military bases:[50]

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[43] Patricio Abinales & Donna Amoroso, State and Society in the Philippines 209 (2017); *See also* Linda Robinson, Patrick Johnston, & Gillian Oak, U.S. Special Operations Forces in the Philippines, 2001–2014, at 10 (2016).

[44] ABINALES & AMOROSO, *supra* note 43, at 195–99.

[45] Proc. No. 1081 (1972). Proclaiming a State of Martial Law in the Philippines.

[46] ABINALES & AMOROSO, *supra* note 43, at 205.

[47] *Id.*; *see also* Gary Hawes, *United States Support for the Marcos Administration and the Pressures that made Change*, 8 CONTEMP. SE. ASIA 18, 19–24 (1986).

[48] Klug, *supra* note 35, at 262, 273.

[49] Kessler, *supra* note 41, at 45.

[50] CONST. art. XVIII, § 25. "After the expiration in 1991 of the Agreement between the Republic of the Philippines and the United States of America concerning Military Bases,

MR. NOLLEDO: […] The existence of the American bases, Madam President, is a continuing threat to and constitutes an undue influence upon the leaders of our country. It has been a truism that a Filipino political leader, to enjoy support whether openly or clandestinely by the United States of America, must agree with the maintenance of American bases in our country.

Only a leader willing to be an American tool in this respect will get aid from the U.S. including the U.S.-dominated World Bank, as well as the International Monetary Fund. It is a well-known fact that the United States supported the repressive and most corrupt regime of Ferdinand Marcos. It is said that President Nixon cooperated and facilitated the declaration of martial law in our country. President Ford continued to support the pro-Marcos policy. President Carter tolerated the Marcos dictatorship and Henry Kissinger openly supported the deposed dictator. President Reagan affectionately, intimately and closely supported the Marcos administration. All these were possible because Mr. Marcos, a close American ally and who allegedly fought side by side with the Americans in fighting the Japanese enemies during World War II, was an ardent supporter of the American bases. The cosmetic moves of Mr. Marcos to have Filipino commanders in American bases and to require these bases to fly the Filipino flag do not, in any way, lessen the validity of the arguments against the American bases.

The Marcos regime has wrought great havoc to our country. It has intensified insurgency and is guilty of rampant violations of human rights and injustices that it has committed. It has brought about economic turmoil. It has institutionalized widespread graft and corruption in all levels of government and it has bled the National Treasury, resulting in great financial hemorrhage of our country. Therefore, the United States, because of the American bases, has become *particeps criminis* in the grand design of Mr. Marcos to devastate our country.[51]

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foreign military bases, troops, or facilities shall not be allowed in the Philippines except under a treaty duly concurred in by the Senate and, when the Congress so requires, ratified by a majority of the votes cast by the people in a national referendum held for that purpose, and recognized as a treaty by the other contracting State."

[51] 4 RECORD CONST. COMM'N 81, 583 (Sept. 12, 1986). This section of the Records contains a much longer, deeper discussion on the American military bases, reflective of the postcolonial interests of the framers. The entire discussion is not included in this Paper for brevity.

2. Klug's Second, Third, and Fourth Elements

Secondly, there is the element of process. This refers to the existence of mechanisms for political transition outside of merely the negotiation and drafting of a new constitution. According to Klug, different processes have varying impacts on the degree of legitimacy and durability of the resulting constitution, especially when the expression of democratic will may exclude vulnerable groups. As described by Klug, this often takes the form of an election.[52] The case of the 1987 Constitution was not a matter of mere amendments to the existing 1973 Constitution. Instead, it was a direct product of the political transition resulting from the EDSA Revolution, by which President Corazon Aquino[53] seized power through the support of a defecting military.

Thirdly, there is the element of active participation. This element of postcolonial constitutions allows for the legitimacy of the resulting document as an expression of popular will.[54] In relation to Klug's previous element, this occurred in the 1987 Constitution through the active selection of representatives from various sectoral stakeholders as members of the drafting Commission.[55] Though the members of the Constitutional Commission were appointed by President Aquino, this was not done without first conducting massive stakeholder consultation, as provided for in the interim "Freedom Constitution," leading to the public presenting an estimated 1,500 to 2,000 nominees.[56] Notably, 30 of the 48 delegates to the Commission represented marginalized sectors,[57] and over 100 public hearings across the country were enacted to solicit suggestions and concerns from as many citizens as possible, with the Constitutional Commission even providing for direct submissions for proposals via postage from far-flung areas.[58]

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[52] Klug, *supra* note 35, at 276–80.

[53] Hereinafter, Corazon Aquino will be referred to as "President Aquino." For our purposes, there will be no need to distinguish her from her son, President Benigno Aquino III.

[54] Klug, *supra* note 35, at 273, 280–82.

[55] Maria Ela Atienza, *The 1986 Constitutional Commission and the 1987 Constitution: Background, Processes, and Outputs*, *in* CHRONOLOGY OF THE 1987 PHILIPPINE CONSTITUTION 4–5 (Maria Ela Atienza ed., 2019).

[56] Bryan Dennis Tiojanco, *The Making of the 1987 Philippine Constitution*, *in* 1 ASIAN COMPARATIVE CONSTITUTIONAL LAW 223, 231 (Ngoc Son Bui & Mara Malagodi eds., 2023).

[57] *Id.* at 231, *citing* Atienza, *supra* note 55, at 5.

[58] Tiojanco, *supra* note 56, at 231, 233.

Fourthly, there is the element of constitutional principles. Postcolonial constitutions must contain the political transition within a set of principles.[59] These principles are not meant to be future-proof insofar as resolving all potential disputes; rather, they are meant to circumscribe future conflicts into struggles which can be constantly negotiated and renegotiated.[60]

We can see the Constitution's postcolonial character this way through its Statement of Principles in Article II. While many of these provisions are not self-executing by themselves,[61] they do, at least, lay the foundation for the Constitution's postcolonial character. A key example is Section 7, which declares that the State pursues an independent foreign policy and that in the country's relations with other states, national sovereignty, territorial integrity, national interest, and the right to self-determination are the foremost considerations.[62] Similarly, the same Article provides that patriotism and nationalism are inseparable from the State's policies on youth development[63] and the development of education, science and technology, arts, culture, and sports.[64] Moreover, as will be discussed later, this same Statement of Principles includes denuclearization as a clear reflection of postcolonial intentions.

Finally, there is the element of institutional design and substantive choices. Through this element, constitution builders select out of many alternatives mechanisms which concretize the guidelines of the chosen constitutional principles.[65] This element reflects the importance of using postcolonial constitutionalism as a framework for which to analyze the 1987 Constitution and the place of the equity restriction in it.

D. Klug's Fifth Element: the 1987 Constitution's Postcolonial Imperatives

The existence of the fifth element is crucial as it illustrates a nexus of importance between a postcolonial constitution's principles and its operations. Without postcolonial principles, there is nothing to

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[59] Klug, *supra* note 35, at 273, 282–88.
[60] *Id.* at 282.
[61] Manila Prince Hotel v. GSIS, G.R. No. 122156, 267 SCRA 408, 431, Feb. 3, 1997.
[62] CONST. art. II, § 7.
[63] Art. II, § 13.
[64] § 17.
[65] Klug, *supra* note 35, at 288.

operationalize. Conversely, without substantive choices and institutional designs, the constitution's principles are flimsy. The effect of this is that the substantive choices ought to be read with great reverence, as it is their presence by which the constitution can assert its principles, and by extension, its independence from the tyranny it sought to dismantle. Phrased differently, a constitution can be characterized as postcolonial if, more than just postcolonial principles, *there are postcolonial mechanisms as well.*

A part of this Paper's assertions is that the mass media equity restriction is one such mechanism by which the postcolonial character of the 1987 Constitution is affirmed; and conversely, that the right to freedom of the press is either not a postcolonial imperative, or at the very least, a less important one. However, more than just the mass media equity restriction, the Constitution's postcolonial imperatives are littered throughout its text.

One of the most obvious examples of a postcolonial imperative in the Constitution is the Filipino First Policy, which is essentially a form of equity restriction in and of itself. Although the entirety of Article XII of the Constitution outlines the country's policies on National Economy and Patrimony, the "Filipino First" provision typically refers specifically to Sections 10 and 12 of the Article, which contain a two-fold instruction on the preferential use of Filipino products and industries.[66]

Crucially, these provisions—which echoed the nationalist policies of former President Carlos P. Garcia[67]—were a completely new addition to the 1987 Constitution. Although the 1973 Constitution contains an article on the "National Economy and Patrimony," there is no specific provision mandating preferential economic treatment towards Filipinos. This leads to

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[66] CONST. art. XII, §§ 10, 12. "Section 10. The Congress shall, upon recommendation of the economic and planning agency, when the national interest dictates, reserve to citizens of the Philippines or to corporations or associations at least sixty per centum of whose capital is owned by such citizens, or such higher percentage as Congress may prescribe, certain areas of investments. The Congress shall enact measures that will encourage the formation and operation of enterprises whose capital is wholly owned by Filipinos.

"In the grant of rights, privileges, and concessions covering the national economy and patrimony, the State shall give preference to qualified Filipinos.

"The States shall regulate and exercise authority over foreign investments within its national jurisdiction and in accordance with its national goals and priorities."

"Section 12. The State shall promote the preferential use of Filipino labor, domestic materials and locally produced goods, and adopt measures that help make them competitive."

[67] See Yusuke Takagi, *The "Filipino First" Policy and the Central Bank, 1958–1961: Island of State Strength and Economic Decolonization*, 62 PHIL. STUD: HIST. & ETHNOGRAPHIC VIEWPOINTS 233 (2014).

the conclusion that these provisions were designed to reflect the economic ideology of the country moving forward as a protectionist one. In his sponsorship of the Filipino First Policy, Commissioner Crispino de Castro described the provision as one which "give[s] impetus to the production and use of Philippine products."[68]

It is not just the Filipino First provision that reflects the institutional design of the 1987 Constitution as a postcolonial constitution. A number of other provisions in the 1987 Constitution that were absent in the 1973 Constitution operationalize its postcolonial character.

Another clear postcolonial provision is the State Policy on the prohibition of nuclear weapons within the country's territory.[69] Considering again the temporal dimension in Klug's first element, the Cold War was just as much about the dangers of nuclear warfare as it was about any stark ideological differences between the United States and Soviet Union. This is what makes the Constitution's prohibition on nuclear weapons a clear postcolonial imperative—in the wake of the Cold War, the Constitution sought to actively resist the nuclear stockpiling of superpowers. In his sponsorship speech, Commissioner (later Justice) Adolfo Azcuna characterized the prohibition against nuclear weapons as a provision reflective of the Constitution's function in representing the ideals of the State, and not merely something that can or should be a matter left to the discretion of any of the branches of government.[70]

Another such postcolonial provision is the one which provides safeguards on the President's ability to contract loans.[71] Under the 1973 Constitution, the President was given free rein to contract foreign loans on

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[68] 3 RECORD CONST. COMM'N 65, 671 (Aug. 25, 1986).

[69] CONST. art. II, § 8. "The Philippines, consistent with the national interest, adopts and pursues a policy of freedom from nuclear weapons in its territory."

[70] THE LAW LIBRARY OF CONGRESS, PHILIPPINES: NUCLEAR WEAPONS AND THE CONSTITUTION 4–5 (1989).

[71] CONST. art. VII, § 20. "The President may contract or guarantee foreign loans on behalf of the Republic of the Philippines with the prior concurrence of the Monetary Board, and subject to such limitations as may be provided by law. The Monetary Board shall, within thirty days from the end of every quarter of the calendar year, submit to the Congress a complete report of its decisions on applications for loans to be contracted or guaranteed by the Government or government-owned and controlled corporations which would have the effect of increasing the foreign debt, and containing other matters as may be provided by law."

behalf of the Republic, subject to limitations provided by law.[72] Given Congress' subjugation and acquiescence to the Executive during the Martial Law period, this "safeguard" under the Constitution became a mere formality. As evidence of this provision's abuse, one need only to look at the excessive debt accumulation under the Marcos regime, where the country's debt rose from 360 million dollars in 1962 to 2.3 billion dollars in 1970, and to 26.25 billion dollars in 1985, during Marcos' final year in office.[73] The dictator's mishandling of the country's debt and its resulting imbalance of power between the country and foreign creditors were primary considerations in the development of the new provision—Article VII, Section 20—which mandates unique preemptive checks on the power of the President to contract foreign loans.[74]

The point of this entire discussion is simple: there are substantive choices throughout the 1987 Constitution that are part of its very design, which, not only reflect the Constitution's postcolonial character, but also operationalize it. This, together with the other elements, is what makes the postcolonial framework the ideal framework for assessing the balance between the mass media equity restriction and the right to freedom of the press. As will be discussed in the succeeding section, both provisions have explicitly postcolonial ideas rooted in them.

This is how we ought to understand the mass media equity restriction, as well as all other equity restrictions in the 1987 Constitution. Despite the mass equity restriction's placement in the back end of the 1987 Constitution, it is not a mere throwaway provision. Rather, like all other equity restrictions, it is a provision by which the 1987 Constitution asserts its character. As a tangible means of operationalizing the Constitution's principles, the mass media equity restriction holds an imperative importance to the Constitution, around which other provisions ought to work.

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[72] CONST. (1973), art. VII, § 12. "The President may contract and guarantee foreign and domestic loans on behalf of the Republic of the Philippines, subject to such limitations as may be provided by law."

[73] JC PUNONGBAYAN, FALSE NOSTALGIA: THE MARCOS "GOLDEN AGE" MYTHS AND HOW TO DEBUNK THEM 174–75 (2023), *citing* James Boyce & Lyuba Zarsky, *Capital Flight from the Philippines, 1962–1986,* 15 PHIL. J. DEV'T. 191, 214 (1988).

[74] *See* 2 RECORD CONST. COMM'N 42, 387–411 (July 29, 1986). The framers' discussion spanned pages on different possible checks on the President's power to contract foreign loans. Different topics were considered, such as the independence of the Central Bank, the check that the Congress may offer, and even mechanisms for popular consultation.

III. THE CONSTITUTIONAL OWNERSHIP REQUIREMENT, PERSPECTIVES ON OWNERSHIP, AND THE CONSTITUTIONAL RIGHT TO FREEDOM OF THE PRESS

To achieve any of the Note's goals, it is important to first contextualize the mass media ownership requirement with respect to its history and the way it's been supplemented by subsequent legislation. Doing this will allow us to establish the framework by which we are to construe the equity restriction, which will then allow us to critique how the *Rappler v. SEC* decision fits within that framework.

A. The Constitutional Ownership Requirement

1. The 1973 Constitution

Absent in the 1935 Constitution, the equity restriction on mass media first found its way into the Philippines' supreme law during the Marcos dictatorship. The 1973 Constitution limits the ownership and management of mass media to "citizens of the Philippines or corporations or associations wholly owned and managed by such citizens."[75] This provision is further codified through Presidential Decree No. 1018, which—apart from essentially providing for the same—particularly lays out the liability of publishers who fail to observe the Constitutional requirement.[76]

The origin of this provision is Resolution No. 1157, which was titled "Filipinizing Mass Media in the Philippines," and was presented by Augusto Espiritu, the delegate from the First District of Rizal. In the Resolution's preamble, Espiritu explained the two rationales behind the proposal—the first being that "mass media is the most effective vehicle in the [molding] of public opinion in the Philippines today;" and the second being that "foreigners [cannot] be expected to adopt policies based mostly on our ideals, culture, social demands, and national goals as Filipinos."[77]

Curiously, a look through the Journal of the 1971 Constitutional Commission shows that the Commission did not further deliberate on this Resolution when it was presented, nor was there any interpellation nor

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[75] CONST. (1973, amend.), art. XV, § 7(1).

[76] Pres. Dec. No. 1018 (1976), pmbl. ¶ 2, §§ 3–5.

[77] Const. Comm'n Res. No. 1157 (1971). Resolution Proposing Filipinizing Mass Media in the Philippines.

sponsorship statement by the Resolution's author.[78] It is unclear to what extent the Committee deliberated on Resolution No. 1157, and a look into other sources written by Delegate Espiritu likewise proved unhelpful.[79] Yet, unfortunate as the lack of records may be, Resolution No. 1157 nonetheless provides us with a useful lens from which to look at the mass media equity restriction—that the media, as a tool of shaping public opinion, is *a tool for nation-building at large*. This perspective was further expounded on in the 1973 Constitution's successor, to be discussed in the subsequent subsection.

Given the absence of any evidence of the intentions of the framers, it is up to the reports of historians to fill in the gaps as to the possible intentions behind the mass media equity restriction. I believe an assessment of the place both foreign media and mass media at large had in the Marcos regime can provide reasonable assumptions as to the reasoning behind the equity restriction.

Firstly, it is common knowledge that the Philippine press was heavily regulated under the Marcos regime. Marcos' first mandate upon the declaration of Martial Law authorized the sequestering of the country's major media outlets.[80] In the preamble of Letter of Instruction No. 1, Marcos specifically detailed that the seizing of media outlets was to prevent the use of privately owned newspapers, magazines, radio and television facilities, and all forms of media of communications, *for propaganda purposes against the government* and its duly constituted authorities or for any purpose that tends to undermine the faith and confidence of the people in our Government and aggravate the present national emergency.[81]

Only the "crony press"—that is, media outlets owned or ran by Marcos allies, such as the Bulletin Today owned by aide-camp Hans Menzi, the Times Journal owned by brother-in-law Benjamin Romualdez, and Banahaw Broadcasting Corp. and Radio Philippines Network owned by Roberto Benedicto[82]—were allowed to operate.

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[78] 3 RECORD CONST. COMM'N (1971) 46, 1149–75 (Aug. 4, 1971).

[79] *See, generally* Augusto Caesar Espiritu, How Democracy Was Lost: a Political Diary of the 1971–1972 Constitutional Convention (1993).

[80] Ltr. of Inst. No. 1 (1973); *See also* Ltr. of Inst. No. 1-A (1973), whereby the Marcos administration explicitly seized, via the Department of National Defense, the communication facilities of ABS-CBN and ABC.

[81] Ltr. of Inst. No. 1 (1973). (Emphasis supplied.)

[82] *Martial law @ 50: Media repression then and now*, CTR. FOR MEDIA FREEDOM & RESPONSIBILITY WEBSITE, Sept. 23, 2022, *at* https://cmfr-phil.org/in-context/for-the-record-in-context/martial-law-50-media-repression-then-and-now/.

The language of the foregoing is clear—Marcos shut down media in order to control its messaging.[83] Various executive decrees prior to the enactment of the 1973 Constitution were direct exercises of this, including Department of Public Information (DPI) Order No. 1 and 2, which required clearance from media publications in order to both function and to produce and disseminate news.[84] Notable in DPI Order No. 1 was the instruction for news to provide "positive national value," echoing Marcos' hyper-nationalistic agenda.[85] Similarly, Presidential Decree No. 36 canceled the franchises, permits, and authorizations for all radio, television, and telecommunications facilities that allegedly conspired against the Marcos regime through the "subversion of our established traditions and values."[86]

Secondly, however, is that Marcos could not control foreign media the same way. As mentioned, Marcos—despite promoting a seemingly nationalistic paradigm—constantly and paradoxically fashioned himself as a pro-American leader. Given this and the inherent impossibilities of actually exercising direct control on foreign reportage, he often attempted to appear cordial to foreign media. Still, he made various efforts to silence foreign media as much as he could, or at the very least, setting various obstacles for foreign media.[87] Famous examples, though occurring after the 1973 Constitution, included the harassment and expulsion of journalist Arnold Zeitlin of the Associated Press for reportage of fighting between Marcos' military and Moro insurgents;[88] as well as the denial of the visa application of Washington Post correspondent Bernard Wideman due to his writing "scurrilous" articles about the Philippines.[89]

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[83] *See* PRIMITIVO MIJARES, THE CONJUGAL DICTATORSHIP 118–19, 144 (1976).

[84] *See Back to the Past: A timeline of press freedom,* CTR. FOR MEDIA FREEDOM & RESPONSIBILITY WEBSITE, Sept. 1, 2007, *at* https://cmfr-phil.org/media-ethics-responsibility/ethics/back-to-the-past-a-timeline-of-press-freedom/.

[85] Dep't of Pub. Info. (DPI) Dep't Order No. 1 (1972); E. San Juan, Jr., *Marcos and the media*, 7 INDEX ON CENSORSHIP 39, 40 (1978).

[86] Pres. Dec. No. 36 (1972), ¶ 1.

[87] *See* David Rosenberg, *Civil Liberties and the Mass Media under Martial Law in the Philippines*, 47 PAC. AFF. 472, 477–78 (1974).

[88] *Id.* at 477; *see also Manila Accuses a U.S. Newsman*, THE NEW YORK TIMES, Mar. 1, 1974, at https://www.nytimes.com/1974/03/01/archives/manila-accuses-a-us-newsman-says-he-showed-malice-in-reporting-on.html.

[89] *Charges Against American Writer Aired in Manila,* WASH. POST, Feb. 18, 1977, *at* https://www.washingtonpost.com/archive/national/1977/02/19/charges-against-american-writer-aired-in-manila/4c2dafb1-c52b-4c17-a969-7e5034d6700c/.

Outside of these particular examples, Marcos' attempts to control foreign media as a whole manifested in the placement of bureaucratic obstacles. For instance, Presidential Decree No. 1018, which codified the mass media equity restriction, provided for the general process by which foreigners could print or publish, *to wit*:

> Section 3. Any foreigner or alien residing in the Philippines and any foreign corporation doing business in the Philippines who prints or publishes, or causes to be printed or published, abroad any newspaper, magazine, periodical or other publication but circulates or causes the circulation of the same in the Philippines *shall be covered by or be subject to the provisions of this Decree.*
>
> Section 4. Any person who publishes a newspaper, magazine, periodical or other publication abroad and desires to circulate it in the Philippines shall do so *through a Filipino citizen or a firm or association wholly owned or controlled by citizens of the Philippines*, and the said distributor shall be responsible for compliance with any requirements of Philippine law, rules or regulations and be liable for any criminal or civil action against the publication.[90]

From the pattern of the foregoing and in the absence of any reports from the 1973 Constitutional Convention, we can reach a reasonable conclusion about the true nature of the mass media equity restriction. It is fairly clear that given Marcos' desire and successful attempts to control the media, and given his inability to fully do the same towards foreign media, the mass media equity restriction was implemented as a way to restrict the dissemination of dissenting views by foreign publications; and, in turn, increase the concentration of lame duck media outlets under the crony press. It can likewise be reasonably concluded that the equity restriction was not an exercise of any postcolonial thought at all, as it was really a way for an authoritarian government to limit reportage by media it could not control. However, this changed with the equity restriction's inclusion in the 1987 Constitution.

2. The 1987 Constitution

In the wake of the Marcos dictatorship, the 1986 Constitutional Commission was in the unique position to wipe out all vestiges of the Marcos era, including the mass media equity restriction. Evidently, and perhaps surprisingly, the Commission instead decided to double down on the equity

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[90] Pres. Dec. No. 1018 (1976), §§ 3–4. (Emphases supplied.)

restriction and almost entirely reproduce the provision, with the slight modification that the provision now allows Filipino-owned cooperatives to engage in the ownership and management of mass media.

This reproduction reflects the overarching philosophy towards communication as a tool for national development, as described by Commissioner Florangel Rosario-Braid in her sponsorship speech for Article XVI, where the equity restriction is found:

> MS. ROSARIO-BRAID: [...] We cannot talk of the functions of communication 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 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, to share consciousness in the mobilization of the nation. We are not so much concerned, therefore, with the media or the channels or the messages as we are about the functions of communication resources in a given society — in education, in mobilization of rural communities in the integration of ethnic groups, improving capability of decision making and in forging peace and brotherhood with the entire community of nations.
>
> The media have such a powerful socializing effect that they could tell audiences how to think and behave. They have a tremendous influence in shaping opinions and attitudes and could lead to cultural alienation and social uniformity.[91]

The actual discussion of the provision in the Records of the Constitutional Commission is fairly thin,[92] primarily centering on the aspect of monopolies in mass media and the State's right to regulate or prohibit them as the public interest requires. Still, I believe the discussion in the Records on monopolies is still a useful tool when it comes to ascertaining the rationale and theoretical underpinnings behind the mass media equity restriction. This is because not only are the foreign equity restriction and the policy on the monopolization of mass media contained in the same subsection of the same section, but also because of the overarching philosophy of communication as described by Rosario-Braid.

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[91] 5 RECORD CONST. COMM'N 92, 83 (Sept. 25, 1986).
[92] *See id.*

Take, for instance, the discussion by Commissioner Vicente Foz with respect to the role of media monopolies. Foz begins by addressing the rationale of "the first paragraph about putting limitations on media ownership." Though, as stated, he mostly discusses the limitation with respect to monopolies, the principles outlined by Foz evidently apply to Section 11 of Article XV of the 1987 Constitution in its entirety.

> MR. FOZ: Thank you, Madam President.
>
> I just would like to explain the rationale behind these provisions. With regard to the first paragraph about putting limitations on media ownership, the *twin overriding objectives of the provision are to prevent media monopolies and to democratize media in this country.*
>
> * * *
>
> *If the basic role of the press is to invigorate the so-called marketplace of ideas*, a concept enunciated by Justice Holmes for which many have a fixation, a concept which claims that the people will discover the truth from the welter of ideas, information and events aired or reported in the media, if such is the role of the press, then *limitations must really be put on mass media ownership so that no single individual, family or corporation shall be allowed to own mass media establishments that will result in a kind of a monopolization or a situation that will place at his or its command a propaganda machine to control the minds of men for ulterior motives.* For a media monopolist will aim to dominate the marketplace and so induce the buying public with neither the inclination nor the discernment needed to discriminate and make proper conclusions out of the confusion, to accept a given slant, a sensationalized account or a reduction of the truth for the truth itself and thus be misled with costly societal consequences. Granting without accepting the validity of the marketplace theory as making for a democratic choice by the people, concentration of ownership in mass media defeats the objectives of the theory. In media monopolies there is diminution of the marketplace of the views aired or reported to the people. Instead of being exposed, let us say, to as many as 25 different views, assuming that each newspaper in town presents, airs or pontificates different views, the reading public is subjected to a barrage of fewer views or shades of opinions.[93]

[93] 5 RECORD CONST. COMM'N 95, 191–92 (Sept. 29, 1986). (Emphases supplied.)

An interesting point of discussion with respect to the equity restriction comes with respect to its placement in the Constitution. Despite being an equity restriction, the mass media equity restriction is not located in Article XII on National Economy and Patrimony, where equity restrictions on land[94] and public utilities[95] are located. This design, according to Commissioner Rosario-Braid, was to recognize the distinct cultural role played by telecommunications as opposed to other public utilities.

MS. ROSARIO-BRAID: To give a little background, during the committee meetings of the Committee on National Economy, I was asked to be present. They then decided that anything that has to do with communication technology will be taken out of National Economy and transferred to General Provisions. Then, while we agree that telecommunications traditionally belonged to public utilities, the developments during the past decade has made present telecommunication facilities not only as carriers of telex, cable and commercial messages, but are, in fact, carriers of culture and economic and political information now […] *[T]elecommunications has become very powerful political forces. What we are trying to say, Madam President, is that while we are not insisting on the separation of telecommunications from public utilities, we would like to have this issue surface, so that in the future, Congress perhaps could organize a study of telecommunications so that subsequently, it would be understood in terms of its function as a technology for education and culture* […]We are not insisting, Madam President, for a special consideration. I just want the issue to surface in view of the significant impact of communications technology, a "double-edged sword." *In previous*

[94] CONST. art. XII, §§ 7–8. "Section 7. Save in cases of hereditary succession, no private lands shall be transferred or conveyed except to individuals, corporations, or associations qualified to acquire or hold lands of the public domain."

"Section 8. Notwithstanding the provisions of Section 7 of this Article, a natural-born citizen of the Philippines who has lost his Philippine citizenship may be a transferee of private lands, subject to limitations provided by law."

[95] Art. XII, § 11. "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."

> *studies, it has been shown that those who own the facilities had access to power, most of it economic and political power.*[96]

At the risk of redundancy, the value of this interpellation by Rosario-Braid is the demonstration that mass media, more than other equity restrictions, is wholly unique in that the risks of violating it entail consequences of national cultural identity as opposed to merely economic or industrial consequences. This showcases how the mass media equity restriction has a distinct significance in our legal system which, as will be further expounded upon later, ought to be protected even above other constitutional considerations.

Despite, however, the separation of mass media from other equity restrictions, it is actually the deliberations on National Economy and Patrimony which provide us with the first debates on operational understanding of "ownership" and "management" for the purposes of the equity restriction. One development in these debates was the proposal of an amendment to the Constitution which describes "broader-based management." Of interest to us is that in distinguishing "broader-based management" from "management," Commissioner Edmundo Garcia cited the management of newspapers as a hypothetical example.

> MR. OPLE: To reassure the Committee because I have already accepted it and we are now negotiating with the Committee, will the Gentleman give an example of a broader-based management in addition to the ownership of economic enterprises?
>
> MR. GARCIA: One very concrete example right now—we actually have it in our own experience—is the people's economic councils in particular areas which help chart the course of economic development in a particular zone. I think that is part of the thrust of the Ministry of Trade.
>
> MR. OPLE: That is different from management of an economic enterprise.
>
> MR. GARCIA: The other area, for example, is a newspaper business. As I mentioned in our caucus, a newspaper, rather than being in the hands of one family or one owner, should be in the hands of the people who produce that *newspaper. Therefore, they*

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[96] 5 RECORD CONST. COMM'N 95, 200 (Sept. 29, 1986). (Emphases supplied.)

> *should participate in the management and in charting the direction and the policies.*
>
> THE PRESIDENT: Commissioner Aquino seeks recog- -nition.
>
> MS. AQUINO: I would only like clarification on the concept of management. Does that take the nature of codetermination in corporate management, corporate planning and corporate acquisition of property, for example?
>
> MR. GARCIA: Not necessarily. The point I want to establish is that we leave flexibility; we leave room for development so that when the organized associations of the different social sectors are more ready, they can be more willing participants in this effort. Then they could be incorporated. I feel that this provides room for that form of development.[97]

This Note will later discuss, in the backdrop of the cases of *Narra Nickel v. Redmont Consolidated Mines Corp.*[98] and *Gamboa v. Teves*,[99] the way the framers explored the concepts of ownership with respect to constitutional equity restrictions. However, it is quite interesting to point out the statement of Commissioner Garcia when it comes to ascertaining the definition of "management" specifically for the purposes of the mass media equity restriction. This definition of management is certainly not binding, as not only are Records of the Constitutional commission treated as a "last resort" for interpretation,[100] but also because the contemplation of broader-based management also ultimately did not find its way in the Constitution.[101]

B. Court Rulings on Foreign Ownership Requirements

As of writing, the Supreme Court has yet to make a ruling on the mass media equity restriction. The closest that the Court has ruled on mass

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97 3 RECORD CONST. COMM'N 57, 343 (Aug. 15, 1986). (Emphases supplied.)

98 [Hereinafter, "*Narra Nickel*"] G.R. No. 195580, 748 SCRA 455, Jan. 28, 2015.

99 [Hereinafter, "*Gamboa*"] G.R. No. 176579, 652 SCRA 690, June 28, 2011.

100 John Glenn Agbayani & Paolo Tamase, *Assessing Compliance with Foreign Ownership Restrictions Under Narra Nickel,* 89 PHIL. L.J. 297, 318 (2015); *see* Civ. Liberties Union v. Exec. Sec'y, G.R. No. 83896, 194 SCRA 317, 337, Feb. 22, 1991.

101 There really is not much weight to the deliberations on the concept of broader-based management, given that it is a provision which ultimately failed. However, I do find it interesting that there is at least some conception of the management of mass media to refer to more than just corporate control, but management over policy decisions and potentially editorial decisions. A deeper discussion on this topic could be reserved for future researchers.

media equity restrictions were the two cases of *GMA Network, Inc. v. ABC Development Corp.*[102] and *Ridon v. AXN Networks Philippines.*[103] Notably, both cases turned on administrative law principles,[104] allowing the Court to refuse to rule on allegations of violations of the mass media equity restriction. The Court likewise avoided ruling on the mass media equity restriction in the case of *Liberty Broadcasting Network v. NTC*,[105] holding that the violation of the mass media equity restriction alleged in the case was neither properly raised nor the *lis mota* of the case, and thus a ruling on the same would not be a proper exercise of judicial review.[106]

Be that as it may, the Court has already made a few instructive rulings when it comes to interpreting equity restrictions on the whole.

In the case of *Gamboa v. Teves*,[107] the Court was asked to rule on the validity of a sale by the Philippine government in favor of Bermuda-registered and Hong Kong-based investment firm First Pacific Co. The subject matter of the sale was of shares of stock of the Philippine Telecommunications Investment Corporation ("PTIC") to First Pacific Co., thereby allowing the latter to control 46.125% of the former. Since, however, PTIC was a stockholder of telecommunications giant Philippine Long Distance Telephone Company ("PLDT"), it was argued by petitioner Gamboa that the sale would in effect allow First Pacific to own 81.47% of PLDT, in violation of the Constitution's foreign equity restriction on public utilities of 40% maximum ownership.

The Court did not explicitly rule on the validity of the sale, as they found it necessary to first put to rest the definition of "capital" for the purposes of foreign ownership restrictions in the Constitution before such a definition could be applied to the case. As such, the Court opted to finally define the term "capital" for the purposes of the equity restriction, citing the previously cited Records of the Constitutional Commission to define

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[102] [Hereinafter, "*GMA Network*"], G.R. No. 205986, 933 SCRA 43, Jan. 11, 2023.

[103] [Hereinafter, "*Ridon*"], G.R. No. 210885, Aug. 26, 2014, slip op.

[104] The Court found, in *GMA Network*, that the filing of the action was premature due to predicate factual issues demanding the NTC's competence, owing to the doctrine of primary jurisdiction. *GMA Network*, 933 SCRA 43, 72. Meanwhile, the Court dismissed the petition primarily because the petitioners failed to exhaust administrative remedies. Further, the Court stressed that the issue sought to be resolved—the revocation of corporation franchise—was a matter within the competence of the SEC. *Ridon*, slip op.

[105] Liberty Broad. Network Inc. v. Altocom Wireless System, Inc., 762 Phil. 210 (2015).

[106] *Id.* at 231–32.

[107] *Gamboa,* 652 SCRA 690.

"capital" as referring only to shares of stock allowed to vote in the election of directors. The Court emphasized that it is *control by foreigners* that the equity restrictions seek to prevent, a control that is exercisable through the ability to vote.[108]

On reconsideration, however, the Court would clarify this holding by defining "capital" as not being strictly limited to voting shares, but extending also to beneficial ownership across *all classes of shares*, including non-voting shares.[109]

In *Roy v. Herbosa*,[110] the Court would once again revert to the original *Gamboa* ruling with a modification—a nationalized corporation must pass the test of equity restrictions with respect to both voting shares as well as the outstanding capital stock, that is, both voting and non-voting shares. Phrased differently, in addition to voting shares, the entire outstanding capital stock including non-voting shares must fit the equity restriction; however, the smaller classes of non-voting shares do not need to fit the equity restriction so long as the entire outstanding capital stock does. As of writing, the *Roy* ruling continues to be the prevailing interpretation.

Another crucial piece of jurisprudence is the case of *Narra Nickel*.[111] Here, the Court outlined the two tests to determine foreign ownership in a domestic corporation by corporate shareholders with foreign shareholdings: the control test and the grandfather test. It is not particularly useful to discuss the development of either test in great detail. It is likewise not particularly important to address any of the criticisms towards this decision.[112] What is of primary importance for the purpose of the Note is what those tests entail.

The control test is simple—the nationality of a private corporation is determined by its controlling stockholders' citizenships. As held in the case, the control test is the first resort when it comes to ascertaining a private corporation's nationality. Passing the control test is all that is necessary to determine a corporation's nationality when there is no doubt as to the corporation's control and beneficial ownership falling within the required

[108] *Id.* at 723–28.

[109] *Gamboa*, 696 Phil. 276, 339.

[110] [Hereinafter "*Roy*"], G.R. No. 207246, 810 SCRA 1, 55, Nov. 22, 2016.

[111] *Narra Nickel*, 722 SCRA 382. This is a petition for Review on Certiorari under Rule 45 initiated by Narra Nickel. The earlier cited case of *Narra Nickel* pertains to the Motion for Reconsideration challenging the decision of the Supreme Court.

[112] *See* Agbayani & Tamase, *supra* note 100.

equity restriction. However, when doubts do exist as to beneficial ownership and control, the grandfather test should be applied.[113]

Under the grandfather test, the second tier of corporate ownership is assessed to determine a corporation's nationality. In other words, when a corporation has a corporate shareholder (a "father"), that corporate shareholder's own shareholders (the "grandfathers") determine the actual percentage of Filipino or foreign ownership and control in the original corporation.[114] As previously mentioned, this is used when doubt exists as to the locus of control for a corporation in a nationalized industry.

C. Right to Freedom of the Press

Given that this Note seeks to balance two competing constitutional interests, we should also look at the history and development of the second interest: the right to freedom of the press.

The right to press freedom was an original inclusion under the Philippine Republic's very first constitution, the 1935 Constitution, where it was the eighth listed under the Bill of Rights.[115] The precise wording of the provision—"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"—is directly adopted in the succeeding constitutions of 1973 and 1987. Furthermore, it noticeably takes after the First Amendment of the US Constitution, which similarly separates the rights to freedom of speech, the press, and peaceable assembly.[116]

Notably, American jurisprudence[117] has often conflated the rights under the First Amendment under one umbrella right of freedom of speech. This, according to Chief Justice Fernando in *Reyes v. Bagatsing*,[118] is the same treatment afforded to the rights in the Philippine Constitution—"not identical, but inseparable."[119] Still, there are a few notable things that give the right to press freedom a character unique from its fellow speech rights. As

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[113] *Narra Nickel*, 722 SCRA at 417–18, 439.

[114] *Id.* at 417–18.

[115] CONST. (1935, amend.), art. III, § 1(8).

[116] U.S. Const. amend. I.

[117] *See* Thomas v. Collins, 323 U.S. 516, 530 (1945). "It was not by accident or coincidence that the rights to freedom in speech and press were coupled in a single guaranty with the rights of the people peaceably to assemble and to petition for redress of grievances."

[118] G.R. No. 65366, 125 SCRA 553, Nov. 9, 1983.

[119] *Id.* at 561–62, *citing id.*

outlined in *Chavez v. Gonzalez*,[120] there are four aspects to the freedom of the press: (1) freedom from prior restraint; (2) freedom from punishment subsequent to publication; (3) freedom of access to information; and (4) freedom of circulation.[121]

The direct lifting of the provision was addressed early by the 1986 Constitutional Commission in a discussion between Commissioners Vicente Foz and Fr. Joaquin Bernas, S.J., where it was ultimately decided that the provision would retain its power by retaining its character, *to wit*:

> MR. FOZ: Mr. Presiding Officer, in the explanation of Section 9 of the draft about freedom of speech and of the press, there is the statement that the provision preserves the consecrated language of the old version, and this is only very true, because even our 1973 Constitution speaks in the following manner: "No law shall be passed abridging the freedom of speech, or of the press, etc.," and the same language is found in our 1935 Constitution. Now, this provision is traceable to the First Amendment of the US Constitution which has words to the same effect.
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> FR. BERNAS: Yes.
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> MR. FOZ: […] As presently worded in our Constitution and even in the American Constitution, the impression is that it is absolute freedom of speech and of the press that is being granted or stressed, but we know very well that this is not so. As a matter of fact, in our Revised Penal Code, we know there are provisions, particularly on libel and inciting to rebellion, which are, in fact, legal provisions which abridge freedom of expression and of the press. The question is: Has the Committee ever tried defining freedom of expression, freedom of speech and of the press?
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> FR. BERNAS: The Committee did not think it necessary or advisable to try to define these freedoms; rather, it would prefer to keep the original language which has been enriched by a large body of jurisprudence. *It is a dynamic right which is very difficult to put into simple formulas, and we prefer to leave the formula this way.*[122]

Despite the right's direct lifting from constitutions past, one way we can see the unique nature of the right of freedom of the press in the 1987

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[120] [Hereinafter, "*Chavez*"], G.R. No. 168338, 545 SCRA 441, Feb. 15, 2008.
[121] *Id.* at 489–90.
[122] 1 RECORD CONST. COMM'N 32, 708 (July 17, 1986). (Emphasis supplied.)

Constitution is by considering the ways it could have changed. One proposal in the Constitutional Commission by former COMELEC Chairperson Christian Monsod was the inclusion of a provision ensuring the responsibility of media practitioners to upholding truth. Monsod suggested a provision along the lines of "[t]he State has the duty *and media the social responsibility* to respect the right of the people to accurate and truthful information."[123]

For Commissioner Monsod, the inclusion was meant to be a safeguard for the media against government control. Phrased differently, in order to prevent another submission of the media to the whims of government, as was the case during Marcos' control of the crony press, the media could rely on its proposed constitutional duty to provide accurate and truthful information. Ultimately, however, this provision failed because—as identified by Commissioner Bernas—it would only seek to curtail the press. In concurring with Commissioner Bernas, Commissioner Blas Ople recognized the frailties of over-regulating the media, given the lessons of the Marcos regime.

> MR OPLE: It is the latter part which causes some concern for me and, apparently, other Commissioners because when social responsibility by the press and by media is stipulated here, they are, of course, not exempt from accountability.
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> But I think the question of Commissioner Bernas is very important. In exercising the social responsibility of the press, should Congress have a hand in establishing the standards of social responsibility and accountability?
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> For example, press freedom is generally defined in British jurisdiction. I said, "British jurisdiction," because this includes not only the United Kingdom, but also former colonies of Great Britain, such as Malaysia and Singapore. Press freedom is defined as the freedom from licensing by the government. However, in Malaysia and Singapore, we know that the press is licensed. One cannot publish without a government permit.
>
> And in our country, fortunately, anybody can publish without registering even with the government, except as a business in which capacity, a newspaper company ought to register only with the SEC or with, let us say, the Bureau of Domestic Trade. But the minute it is required to register with a government institution,

[123] 4 RECORD CONST. COMM'N 90, 924 (Sept. 23, 1986). (Emphasis supplied.)

> like the Office of Media Affairs—and this happened during martial law so that even textile companies with printing facilities for fabric were required by the Media Advisory Council at that time headed by Primitivo Mijares to register with the Office of Media Affairs—I would like to know whether in saying that Congress will take care of this and that, it will be authorized under this section to prescribe registration without which they may not be able to impose the social responsibility of the press and media.[124]

The major takeaway from the adoption of the lifted provision in the 1987 Constitution, without any further amendments, was that it was a deliberate choice—at least to some Commissioners—to protect press freedom following its curtailment by the Marcos regime.

IV. METHODOLOGICAL FRAMEWORK: BALANCING FREEDOM OF THE PRESS AND FOREIGN OWNERSHIP REQUIREMENTS

A. The Viability of Balancing

As a quick refresher, the following provides us with an outline for our blended theoretical and methodological framework.

1. There are decolonizing mechanisms in the Constitution (Klug's fifth element);
2. Therefore, the Constitution is a postcolonial Constitution (Klug; Cooper Davis);
3. Therefore, postcolonial principles ought to be prioritized in the Constitution; and
4. Therefore, in potential conflicts between provisions, the Constitution must be read in such a way as to allow postcolonial principles to prevail (Moller; Alexy, *infra*).

While the first three steps refer to elements of our theoretical framework that have already been discussed, the final step is where this succeeding section comes into play.

1. Determination of the Conflict

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[124] *Id.* at 932.

Before we proceed to the methodological framework of balancing, we must first determine if there even exists a conflict to begin with as to compel us to choose one right over the other.

In fine, the conflict results from both being explicit constitutional pronouncements governing the conduct of the press. On one hand, one provision provides for the press being afforded great reverence in the preservation of democracy; on the other hand, one provides for a limit. Evidently, there is a need to figure out a way to reconcile the differing values.

The case of *Rappler v. SEC*, on which this Note is anchored, is a prime example of a potential conflict. As will be elaborated on later, there may be situations in which ownership concerns directly conflict with the mobility of the press in its watchdog role. Moreover, as will be discussed, the flimsiness of the decision itself compels the development of a framework by which these kinds of conflicts can be understood and properly appraised.

2. Both Rights as Postcolonial Imperatives

Balancing, however, only really works if both competing rights are on an equal footing. This is where the theoretical framework comes into play. We have to identify how these rights work within the context of the Constitution's character. From determining that both rights reflect the Constitution's character, we can begin to measure which right reflects that character more than the other.

In the case of the mass media equity restriction, the postcolonial character of the same should be clear. The provision displays a clear intention to free Philippine media from the hegemonic control of foreign control. This is despite the fact that, as discussed, the provision's placement in the 1973 Constitution seemed to have more insidious motives behind it. Yet, as likewise discussed, there is also a clear intention in the 1987 Constitution to use the provision to cleanse it of its malicious intentions and to instead earnestly divorce Philippine media from foreign influence.

This is particularly evidenced by Commissioner Rosario-Braid's sponsorship speech for the Constitution's Article on General Provisions, specifically referring to Section 12, which would result in the equity restrictions. Here, Rosario-Braid clarifies that the restriction is a response to *both* the Marcos regime *and* the transnational and foreign powers which supported it, as well as the larger context of developing a uniquely Filipino form of communication:

> MS. ROSARIO-BRAID: […] The lessons from the Marcos regime in the use of communication for bolstering its legitimacy, in depriving millions of Filipinos the freedom to shape their personal needs and demands due to the continuing assault by messages of indoctrination either from advertising that sells foreign goods or favorable images about the new society *should alert us on the consequences of an interlapping relationship between a political regime with transnational corporations, communication enterprises and the elite groups of society who have access to power.*
>
> As someone said, "no other technology, but no other technology has prescribed itself so penetratively and yet so imperceptibly on human consciousness as mass communications." We cannot measure the real losses in terms of people participation, development of indigenous technical skills, personal and national identity and self-worth and self-esteem owing to the pervasive influence of communication in our society. The importance of small and noncommercial forms of communication, particularly community media, small media, that support the philosophy of "small is beautiful" in enhancing people power is recognized in one provision. This refers to the opportunity presented by the media as delivery systems for nonformal education, health, agriculture and other development areas. *The role of communication may be regarded as that of a major carrier of culture. It fosters adoption of behavior patterns to bring about social integration. Development is a cooperative venture requiring communication and deep understanding between people. All people must, therefore, share a common code of meaning. It is difficult for people to cooperate with each other politically when they are divided socially and culturally. This is a recognition of the primacy of communication as a tool of government, particularly in communicating the national ideology or philosophy.*[125]

Here, Rosario-Braid clarifies that the equity restriction is equal parts a response to the Marcos regime as it is to the wounds of colonialism. There is, as mentioned above, interest in protecting the public against an "interlapping relationship" between political regimes and transnational corporations. Thus, it is not simply the use of mass media by foreign powers, but also the use of mass media by domestic oppressors with foreign interests.

This ties into treating the right to press freedom as a postcolonial imperative, which this Note argues that—as with the media equity

[125] 5 RECORD CONST. COMM'N 92, 83 (Sept. 25, 1986). (Emphases supplied.)

restriction—it is. The Records of the Constitutional Commission show that the construction of the right to press freedom, without any amendments or changes, was an explicit response to the way the Marcos regime, as an oppressive regime, weaponized the press.

As a final point, before we proceed to actually balance these rights, one crucial thing to point out is that the right to the freedom of the press is characterized in our legal system as a right that, though deemed a primary right, may be balanced.

In the aforementioned case of *Chavez*,[126] the Supreme Court held a few basic premises about the right to freedom of speech. Of consideration now, as previously mentioned, is that the right to freedom of speech necessarily includes the right to freedom of the press. Jurisprudence provides that the right to freedom of the press, as an extension of the right to freedom of speech, is a "preferred right," or one which "stands on a higher level than substantive economic freedom or other liberties."[127] In simpler terms, this means that freedom of speech is considered one of the most powerful and important rights, indispensable to the exercise of the freedom given to us by democracy.[128]

However, one basic premise set by *Chavez* regarding the right to freedom of speech is that, despite being a preferred right, it is not an absolute right.[129] The right to freedom of speech, and by extension, its adjunct rights, can be regulated. The Supreme Court has outlined in *Chavez* a number of instances in which the State may regulate speech using its police power despite its status as a preferred right. Speech such as defamation[130] and obscenities[131] have long been held by the Supreme Court as speech not subject to constitutional protection.

These rulings demonstrate that despite the freedom of the press' importance in our litany of rights, it is ultimately the prevention of greater evils which weighs more. This much is also clear when looking towards the

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[126] *Chavez*, 545 SCRA 441.

[127] *Id.* at 481.

[128] *See also* Nicolas-Lewis v. COMELEC, G.R. No. 223705, 913 SCRA 515, 547, 562, Aug. 14, 2019; Mutuc v. COMELEC, G.R. No. 32717, 36 SCRA 228, 233–34, Nov. 26, 1970.

[129] *Chavez*, 545 SCRA at 486, *citing* Gonzales v. COMELEC, G.R. No. 27833, 27 SCRA 835, 858, Apr. 18, 1969.

[130] *See* Alonzo v. Ct. of Appeals, G.R. No. 110088, 241 SCRA 51, 52, Feb. 1, 1995.

[131] *See* Pita v. Ct. of Appeals, G.R. No. 80806, 178 SCRA 362, Oct. 5, 1989.

intent of the framers. In the aforementioned interpellation by Commissioner Foz, it is clear that the framers always intended this to be the case.

B. Möller and Alexy's Balancing of Rights as a Methodological Framework

Having already determined that the 1987 Constitution is a postcolonial constitution, and that the competing interests are expressions of its postcolonial character, we now reach our methodological framework in balancing the equity restriction and the right to freedom of the press. For this, we can look towards literature theorizing the balancing of rights.

Perhaps the most influential proposal when it comes to balancing rights is that of Robert Alexy, who posits that constitutional principles must be realized to their "greatest possible extent."[132] Thus, competing constitutional interests must balance each other such that they may both be fully optimized. Phrased differently, competing interests serve as *limits* against each other.

At first glance, Alexy's theory is instructive for this Note. The assertion in the previous subsection—that in postcolonial constitutions, substantive choices must be balanced against principles—seems to reflect Alexy's theory to a tee. Indeed, this Note could simply cite this theoretical perspective and be on its way.

Still, scholars like Kai Möller have criticized Alexy's theory for focusing solely on balancing of rights and principles as an end which ought to be reached. Möller argues that one major problem with Alexy's theory is that it necessitates that rights must always be optimized to fulfill each other's greatest possible extent.[133] This, according to Möller, does not take into account instances wherein a right, for it to be properly optimized, must completely trump another right.[134] As such, Möller argues that there must first be a *moral* dimension to the balancing; instead of viewing optimization as an ends whenever there are competing rights, the central moral argument must be identified, which will then determine how the balancing proceeds.

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[132] Kai Möller, *Balancing and the structure of constitutional rights*, 5 INT'L J. CONST. L. 453, 459 (2007), *citing* ROBERT ALEXY, THEORIE DER GRUNDRECHTE 47, 66 (1986).

[133] *Id.* at 459–60.

[134] *Id.* at 460. *See* Ronald Dworkin, *Rights as Trumps, in* THEORIES OF RIGHTS (Jeremy Waldron ed., 1984).

This is a much more convincing method of balancing rights, and one which provides another perspective as to the function of the mass media equity restriction in the context of a postcolonial constitution. We can use Möller's build on Alexy's theory this way—before rights can be balanced, there must first be a moral argument to determine which right takes priority. Using the established theoretical framework of Cooper Davis, the moral argument for a postcolonial constitution is a constitution's freedom from prior political oppression. This Note posits that in the event of conflicting interests within a postcolonial constitution, rights and principles must always be balanced in favor of a reading that strengthens the unique identity of post-colonies.

Let us now apply this framework to the mass media equity restriction against the right to the freedom of the press. Evidently, there is a conflict between these two considerations, as one provides for the independence of the press, while the other provides a direct limitation on who can exercise that right. Now that the conflict has been established, the moral argument comes into view—that the Constitution's postcolonial character requires that rights and principles must be balanced in favor of a postcolonial identity—to determine which right to prioritize. In the unique situation of the 1987 Constitution and the competing rights, this, as summarized from the sentiments of Commissioner Rosario-Braid, manifests by ensuring that *undue foreign influence is avoided in the formation of national consciousness*. For this, the next section provides the balancing proper.[135]

C. The Mass Media Equity Restriction is a Greater Postcolonial Imperative than the Right to Freedom of the Press

Again, the key to balancing under a postcolonial constitution is to prioritize the postcolonial principles. As such, it must be determined which of the two rights better reflects the unique postcolonial identity of the 1987

[135] The typical tests of content neutrality in order to assess the validity of prior restraint of speech would not apply to the case of the mass media equity restriction, for the simple reason that the mass media equity restriction is a *constitutional provision*. Since the Constitution itself cannot be unconstitutional, tests of prior restraint are inapplicable. *See also* TikTok v. Garland, 604 U.S. 56 (2025). Here, the US Supreme Court essentially concluded that laws which aim to protect sovereignty through restraining foreign speech are *not* content-based. Rather, they are content-neutral, and therefore, justifiable exercises of prior restraint. The ratio in *TikTok* lines up quite nicely with the interests of this Note, but because the subject of said case is a *law* and not a constitutional provision or amendment, it would not be wholly applicable here. I find it to be an interesting and useful case nonetheless, worthy of further research.

Constitution. But how does one even measure whether one right is more reflective of postcolonial identity than the other?

For this, we turn to Klug's fifth element—a postcolonial constitution's character emerges from the substantial choices which operationalize it. In this case, the mass media equity restriction is evidently the right of choice.

Firstly, the right of freedom of the press is a significantly broader right than the mass media equity restriction, the latter of which is a feature unique to the Philippine Constitution[136] and to the temporal context in which it was conceived.

Further, it is a provision that *operationalizes* the Constitution and sets its postcolonial character into motion, unlike the right to freedom of the press which—though also established to be a postcolonial provision—is merely foundational. Phrased differently, while it is true that the right to freedom of the press tells us that there is a postcolonial interest in keeping the press free and independent, the equity restriction tells us *how* that postcolonial interest is executed—i.e., executed without foreign influence.

This is likewise clear from the development of the provisions themselves. True, the right to freedom of the press was re-adopted with the scars of the Marcos era in mind. However, as discussed, its original form in the 1935 Constitution was deemed sufficient to reflect the overarching interests of the Filipino people. This is in stark contrast to the mass media equity restriction which, although also directly lifted from a previous constitution, had to be heavily reconsidered in the Constitutional Commission's deliberations as to its intentions and importance. The explicit recognition of foreign influence in the development of national identity in developing the mass media equity restriction, as opposed to the implicit inherent postcolonial character of the right of freedom of the press, is what makes the equity restriction more reflective of the Constitution's postcolonial character.

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[136] Whether other constitutional rights of this nature exist is beyond the scope of my research. By unique to the Constitution, I am merely pertaining to the fact that it is a provision which developed organically in the Philippine context. Any similar provisions in other constitutions that I am not aware of I will, in the interim, chalk up to convergent evolution.

Approaching it slightly differently, it can be said that the equity restriction can be viewed as a *feature* of the right of the freedom of the press. In some ways, in fact, it may even be argued that the equity restriction, having been carefully considered by the framers as an exercise of national identity, actually gives the right to freedom of the press its postcolonial character. Arguably, the additional restriction on who can or cannot own mass media actually distinguishes the right to freedom of the press from its imported concept in the US Constitution.

All this said, it may be concluded that the equity restriction better embodies the postcolonial character of the Constitution than the right to freedom of the press. Its development's explicit recognition of multiple, entangled sources of oppression, as well as its unique nature of operationalizing the right to freedom of the press and the Constitution itself mean that, following the Möller framework of determining a moral argument with which rights can be balanced, the equity restriction has a greater priority in terms of its optimization.

V. *RAPPLER V. SEC*

Having established our theoretical framework for understanding the role of postcolonial constitutionalism as it relates to the balancing of rights, and in particular, the right of freedom of the press against the mass media equity restriction, let us finally circle back to where this Note began—the case of *Rappler v. SEC.*

A. On PDRs

The Philippine Stock Exchange (PSE) defines PDRs as securities which "[grant] the holder the right to the delivery or sale of the underlying share. A PDR consists of a deposit price and an option price, which is considered as payment when the buyer opts to convert said PDRs to a corporation's share."[137] The PSE goes on to assert that PDRs are not evidence of ownership, as they are merely a profit mechanism granting the owner of the PDR the right to all the dividends due the underlying shares.[138]

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[137] *Products,* PSE ACADEMY WEBSITE, *at* https://www.pseacademy.com.ph/products/#:~:text=A%20Philippine%20Depositary%20Receipt%20or,PDRs%20to%20a%20corporation's%20share.

[138] *Id.*

Rappler has firmly echoed this position, propounding that PDRs are commonplace in other media companies, including ABS-CBN and GMA, as a mere way of obtaining capital without needing to sacrifice ownership.[139] Maria Ressa herself has likened the nature of PDRs to a bettor placing money on a horse, where the bettor—despite being a beneficiary if the horse wins—has no stake in the way the jockey or owner cares for the horse.[140] This position, Rappler emphasizes, is shared by the Court of Tax Appeals (CTA) in its 2023 acquittal of Ressa and Rappler of tax evasion.[141]

On the other end, the SEC held in its 2018 Decision that the Omidyar PDRs in particular were violations of the mass media[142] equity restriction because of the unique terms found therein. The provisions in question read:

> 12.2 *The Issuer* […] *undertakes to cause* [*Rappler, Inc.*] from the date hereof and while the PDRs are outstanding:
>
> * * *
>
> 12.2.2 not to alter, modify or otherwise change its Article of Incorporation or By-laws or take any other action so as to materially prejudice the rights in relation to the PDRs.[143]

According to the SEC, these provisions were tantamount to the Omidyar Network being able to exercise control over a mass media entity, as amendments to a corporation's Articles of Incorporation or By-laws are matters which can only be undertaken by stockholders.[144] The SEC elaborated on this rather incisively, holding that "it does not matter what capacity or device gives the foreigner control, as stockholder or holder or

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[139] Lian Buan, *PDRs: The innovative tool that attacked media, created a chilling effect on businesses,* RAPPLER, Jan. 28, 2023, *at* https://www.rappler.com/philippines/pdrs-innovative-tool-attacked-media-chilling-effect-businesses/.

[140] RESSA, *supra* note 10, at 122.

[141] People v. Rappler Holdings Corp., CTA Crim. Case No. O-679 (Ct. of Tax Appeals May 18, 2023).

[142] As it is outside the scope of this Note, it is not worth belaboring on whether or not an online news outlet such as Rappler falls under the purposes of the mass media equity restriction in the first place. In any case, Rappler itself, throughout these proceedings, has conceded the same.

[143] Rappler v. SEC, C.A.-G.R. SP No. 174288, at 23.

[144] REV. CORP. CODE, §§ 6, 12, 35.

otherwise, there must be none. It does not matter if control is only available in certain occasions, there must be no occasion."[145]

The Court of Appeals was not persuaded. In its decision, the Court of Appeals held that there was no transfer of ownership given to the Omidyar Network through the PDRs when taking into account the other provisions of the PDRs. In particular, Clause 5.4 and its cross-referenced condition, Condition 2.4, provide:

> 5.4. The PDR Exercise Right is exercisable on any Business Day upon payment of the Exercise Price and compliance with Condition 6 and entitles the Holder to delivery by the Issuer to the Holder of the corresponding number of Underlying Shares (subject to Condition 6 and the issuance of additional PDRs or adjustment in accordance with Condition 10). *Where the Holder is not a person permitted under Philippine law to own the Shares, the Holder may transfer the PDRs in accordance with and subject to Condition 2.4.* The Issuer's obligations in respect to a PDR Exercise Right are discharged upon delivery of the Shares to the Holder.
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> 2.4. Unless otherwise agreed by the Issuer and the PDR Holder in writing, the PDRs shall be transferable only with prior written consent of the Issuer (which consent shall not be unreasonably withheld) and by completing the endorsement at the back of the PDR Certificate, surrendering the same to the Issuer, and submitting to the Issuer a copy of the deed of sale, assignment or transfer in respect (sic) of the PDRs subject of the transfer. For this purpose, the Issuer shall maintain a PDR Registry Book which shall contain a record of all transfers of the PDRs. Unless recorded in the PDR Registry Book, any transfer of certified PDRs shall pay all applicable taxes, including documentary stamp taxes, capital gains taxes and other transfer taxes due on the transfer of the PDRs, and shall present proof of such payment (including but not limited to, an electronic certificate authorizing registration) to the Issuer before such transfer may be recorded in the PDR Registry Book.[146]

Put simply, the Court of Appeals phrased its reasoning this way—the Exercise Right allows the holder to buy shares only if it is permitted by

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[145] *In re* Rappler, Inc. and Rappler Holdings Corp., SP Case No. 08-17-001, 13 (Sec. Exch. Comm'n. Jan. 11, 2018).

[146] Rappler v. SEC, C.A.-G.R. SP No. 174288, at 26–27. (Emphasis supplied.)

Philippine laws to hold shares. If not, it must sell or transfer the PDRs to another holder. Thus, since the Omidyar Network is not allowed to hold shares of Rappler Holdings, the Exercise Right does not trigger, and the Omidyar Network can not own any of Rappler's underlying shares.

Further, the Court of Appeals also held that the PDRs never gave the Omidyar Network beneficial ownership over the underlying shares. Citing the previously cited case of *Roy v. Herbosa*, the Court of Appeals held that beneficial ownership of a specific stock only occurs if the shareholder can vote, sell, and earn dividends from the specific stock. Thus, since RHC was able to retain its voting rights, right to dividends, and right to sell the underlying shares of Rappler Inc., it cannot be said that the Omidyar Network ever held beneficial ownership over RHC's shares of Rappler Inc.

B. Applying the Balancing Test to the 2024 Decision

As this Note has asserted thus far, in the event of a conflict between the right to freedom of speech and the mass media equity restriction, the latter must necessarily prevail. In the 2024 Decision, the Court of Appeals explicitly ruled in the contrary, holding that the equity restriction was meant to serve greater purposes than the "narrow view" of equity held by the SEC, *to wit*:

> Finally, while it is true that the Constitution fully intended to eliminate all foreign influence in mass media, this Court does not agree with the SEC *En Banc's* draconian interpretation that mere violation of the same, at any point in time, and even if such violation was cured, should warrant the obliteration of a mass media entity.
>
> [T]he only question to be answered is whether the Constitution seeks the dissolution of all violators of this provision regardless of subsequent compliance, like a predator lying in wait for any stray agreement or contract, dealing death at the exact moment of violation.[147]

Evidently, then, the Court of Appeals seems to agree with one of the foundational premises of this Note—there is indeed a conflict between these constitutional imperatives, and it is a conflict that must be resolved through balancing. With great respect to the Court, however, there are two major

[147] *Id.* at 41.

ways through which a more thorough engagement with the balancing of said imperatives could have been done.

Firstly, the Court of Appeals' engagement with the history and nature of both the freedom of the press and the mass media equity restriction could have benefited from a closer inspection of the latter, particularly through the postcolonial reading this Note has thus far posited. Without a closer reading, the consequence of the Decision is that the mass media equity restriction is, perhaps inadvertently, rendered neutered.

Now, to the Court of Appeals' point, there is indeed merit in its assertion that the SEC's imposition of a total shutdown was too harsh and too swift. [148] The Court of Appeals particularly addresses the failure of the SEC *en banc*, upon order of the Court, to conduct hearings and receive evidence from Rappler. To the degree that the SEC failed to do this, there is little argument. However, insofar as the propriety of the shutdown itself as a proper penalty for failing to abide by the equity restriction is concerned, this Note diverges from the Court's opinion.

As this Note has forwarded, the 1987 Constitution may be characterized a postcolonial constitution. Its interpretation should always be in favor of independence from the influence of oppressors. Certainly, this considers authoritarian attempts to defang the press, but all the same, it contemplates the more insidious possibilities of foreign influence seeping into an industry as crucial to the national identity as mass media. However, without this proper theoretical grounding, the 2024 Decision has somewhat "hand-waved" its importance, with the potential danger of doing away with the provision entirely.

In its theorizing of the mass media equity restriction, the Court of Appeals cites the same sections of the Records of the Constitutional Commission this Paper had previously cited regarding Rosario-Braid's philosophy of communication, as well as Foz's rationale behind the provision's inclusion of a prohibition on media monopolies.[149] The Court of

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[148] *Id.* at 47.

[149] In addition to what has been said in the main, I posit that this may be an incomplete understanding of the interpellation on monopolies. As Commissioner Foz identified, the prohibition against media monopolies seeks to avoid the situation where single individuals, families, or corporations are allowed to command propaganda machines for ulterior motives. The Court of Appeals fails to consider the possible relationship between foreign influence and the power that leads to monopolies. This is just one demonstration of

Appeals attempts to marry this by concluding that because the framers intended for a multitude of mass media entities to function, doubts should necessarily be resolved against the silencing of media, *to wit*:

> It is manifest in the above speech that foreign influence is not the framers' only concern in enacting the provisions concerning mass media. It is readily apparent that the role of mass media in educating and equipping Filipinos with accurate information was given equal weight in crafting these provisions.
>
> Indeed, mass media's role in informing Filipinos of the truth is even more vital in an age of misinformation, social media, and fake news. Even then, the framers of the Constitution foresaw that lies would be peddled to Filipinos and recognized mass media's privilege and responsibility to stand as bastions of truth and sentinels of neutrality in an ever-increasingly dichotomized society. It is for this very reason that the framers sought to prevent foreign influence, to allow Filipinos to tread their own path and shape their own values.[150]

To the Court's credit, this is certainly a creative attempt at a solution of the conflict. After all, if any selection of the Constitution must be read in coordination with the mass media equity restriction, there is a lot of sense in it being the paragraph attached to the mass media equity restriction. However, the question remains—when should the mass media equity restriction apply?

Following the 2024 Decision, it would seem as though the Court's answer is never. The Court is clear: "the restriction on foreign ownership was designed for a much grander purpose than to simply strike down anyone who violates it, whether intentionally or unintentionally."[151] This ruling seems to imply that the foreign equity restriction must not be applied if it would result in the reduction of voices in the country's mass media space.

What this ruling fails to account for, however, is that this is functionally impossible. By its very nature, an equity restriction on mass media *is* a limit on the number of people who may participate. There does not appear to be a situation in which an equity restriction may be enforced without limiting the participants in its industry; and if there is, the 2024

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the way the Constitution reconciles these ideas of freedom of the press and restrictions on media ownership: in its limitations, the truth finds its strength.

[150] Rappler v. SEC, C.A.-G.R. SP No. 174288, at 44.

[151] *Id.*

Decision would have been enriched by laying these standards out, something that the Court of Appeals unfortunately did not undertake to do.

In the case of mass media, the 100% ownership requirement is not ambiguous. All means all, and none means none, and this, to reiterate, is by design. As this Note has demonstrated, the mass media equity restriction does not exist in a vacuum. It is an imperative informed by the framers' perspective on nationalism—one that is decidedly protectionist and decidedly postcolonial.

This ties into the second major way that the 2024 Decision falls shy of a true test of balancing, which is the way its holding applies to the case of Rappler itself.

Following the 2024 Decision's softening of the mass media equity restriction, there is no reason to further examine the questions regarding Rappler's ownership, as presented by the SEC in its 2018 Decision. A closer inspection of the same, however, shows that these unanswered questions are major points for consideration in determining the true ownership of Rappler.

One point of contention with the Court of Appeals Decision is with the Court's position on beneficial ownership. Despite citing *Roy v. Herbosa*, its conclusion actually runs *counter* to the ruling in the case. The selection in *Roy v. Herbosa* cited in the Court of Appeals Decision states, *to wit*:

> Given that beneficial ownership of the outstanding capital stock of the public utility corporation has to be determined for purposes of compliance with the 60% Filipino ownership requirement, the definition in the SRC-IRR can now be applied to resolve only the question of who is the beneficial owner or who has beneficial ownership of each "specific stock" of the said corporation. *Thus, if a "specific stock" is owned by a Filipino in the books of the corporation, but the stock's voting power or disposing power belongs to a foreigner, then that "specific stock" will not be deemed as "beneficially owned" by a Filipino.*[152]

Thus, if one of the marks of beneficial ownership—voting, earning, dividends, or the ability to sell the underlying shares—belongs or is exercised by a foreigner, the foreigner has beneficial ownership over that stock. Hence, the Court of Appeals correctly asserts that for a share of stock to be considered "Filipino," the rights given to its owner must be complete.

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[152] *Id.* at 31, *citing Roy*, 810 SCRA 1, 55.

Yet, the matters of amending a corporation's Articles of Incorporation and By-laws are *voting powers* even given to *non-voting shares*. Now, to reiterate, PDRs are not considered shares of stock, as they do not result in foreigners owning any equity. Thus, it can be conceded that rights granted in a PDR do not reflect the same rights as those of stockholders. In theory, and as appreciated by the Court of Appeals, this should logically apply as well to the case of a right granted in an RHC-issued PDR that allows a foreign corporation to veto any changes in Rappler's Articles of Incorporation.

However, this raises the question of whether there is, in the case of Rappler, a material difference when it comes to the Omidyar PDRs.

True enough, the Omidyar PDRs were not *ipso facto* converted into shares with voting rights just because of the right granted in the PDR. In fact, the PDRs themselves expressly provide that the PDR does not grant Omidyar voting rights over the shares held by RHC over Rappler.[153] Be that as it may, the PDRs grant Omidyar *veto power* over RHC's ability to exercise its voting rights. When looking at the provision of the SRC-IRR in *Roy v. Herbosa,* as cited in the Court of Appeals Decision, it is clear that beneficial ownership also extends to *indirect* exercises of voting rights, with the explicit inclusion of *directing* the voting of such security.[154]

Notably, the Court of Appeals does not make any mention of the same. Its determination of the beneficial ownership of Omidyar is strictly limited to whether or not RHC retained its voting rights.[155] The limits of

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[153] *Rappler v. SEC*, C.A.-G.R. SP No. 174288, at 25–26, 32, 33.

[154] SEC. REG. CODE, Rules & Regs. (2015), Rule 3, ¶ 3.1.2.

[155] It must be noted that since the completion of this Note, the SEC has since released new Rules on Beneficial Ownership in Mem. Circ. No. 15 s. 2025 (hereinafter "2026 BOD Rules"). Under these Rules, the definition of beneficial ownership was broadened, thus leading to tighter regulations. Notably, the beneficial ownership category of "Direction of Board" no longer necessitates that for a natural person to be deemed a beneficial owner that the directors of the corporation were accustomed to acting according to that natural person's wishes. It is sufficient that a natural person's directions, instructions, or wishes in conducting the affairs of the entity are carried out by the board.

Further, it is now explicitly clear that a natural person exercising effective control may do so through "exclusive use of the reporting entity's assets, receipt of profits and liquidating dividends, among others." Thus, it is not necessary that the recipient receive profits through dividends to be declared a beneficial owner.

those retained voting rights, however, are left unexplored. This is despite the established rule that the presence of just one of the marks of beneficial ownership is enough to assert that a share of stock is foreign owned. And although there is not necessarily a hierarchy between the different marks of ownership, the supreme importance of voting rights cannot be ignored, particularly with reference to the Articles of Incorporation of a corporation. Articles of Incorporation, after all, lay out matters absolutely pivotal to the very existence of the corporation, such as its purposes, capital structure, and corporate term, among others.

Authors like Oscar Franklin Tan note that the inclusion of veto power was unique to the Rappler PDRs. Although PDRs are a common instrument used primarily for corporations with equity restrictions to raise capital, veto rights are, to the knowledge of the public, not a feature present in PDRs issued by other mass media corporations.[156] Following the Court of Appeals Decision, the question of why this provision was there in the first place remains unanswered.

In addition, there is little discussion as to whether or not the amounts received by Omidyar due to the PDRs fall under the classification of dividends. Again, the cited provision of the SRC-IRR refers to both direct and indirect exercises of ownership, which then include *investment returns*. The argument used by Rappler, as appreciated by the Court of Appeals, is essentially that the dividends of Rappler do not go to the PDR holders but

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None of this is particularly relevant for the *Rappler* case, as it was decided under the previous rules on beneficial ownership that did not have the same heightened restrictions. However, future researchers may look into the relationship between this Note's framework against the 2026 BOD Rules. As a matter of opinion, the Author opines that the set-up between Omidyar and Rappler would not have passed the heightened scrutiny of the 2026 BOD Rules.

[156] Oscar Franklin Tan, *Rappler should stop misleading everyone,* INQUIRER.NET, Jan. 29, 2018, *at* https://opinion.inquirer.net/110628/rappler-stop-misleading-everyone. One other difference which Tan points out between Rappler's PDRs and those of ABS-CBN and GMA is that Rappler's PDRs, unlike ABS-CBN and GMA, were unregistered prior to being offered by investors; *See also* ABS-CBN News, *ABS-CBN's Philippine Depositary Receipts different from Rappler's, legal counsel says,* ABS-CBN, June 8, 2020, *at* https://www.abs-cbn.com/business/06/08/20/abs-cbns-philippine-depositary-receipts-different-from-rapplers-legal-counsel-says. Here, ABS-CBN legal counsel Herminio Ozaeta says, "[t]he main distinction is that any change in the Rappler PDR required consultation with the PDR holders, and the original version required approval before such changes can be made. In the ABS-CBN model, there was no requirement. From the very beginning, there was an understanding that when the PDR issuer issued, they made a promise that they would not change the document." Ozaeta would later repeat the same at a Congressional hearing a few days later on June 11, 2020.

to RHC. These dividends are then divided by RHC for distribution to the PDR holders. This begs the question however, of whether these *second* dividends fall under the category of *equity derivatives*, and by extension, indirect exercises of ownership.

Outside of dividends, another unaddressed question rests on whether the "Exercise Right" in the Omidyar PDRs is an exercise of beneficial ownership through the selling of underlying shares. The Exercise Right refers to the right of Omidyar as a PDR holder to purchase the underlying shares of RHC. Now, as the Court of Appeals discussed, Omidyar could have never exercised the Exercise Right, as the right was only explicitly limited to PDR holders qualified to own the underlying shares. For those *unqualified*, such as, ostensibly, those limited by equity restrictions, they have the option to sell their PDRs.

On its face, all of this appears to be functionally sound. When a PDR holder cannot exercise the Exercise Right and is instead forced to sell the PDR, they are not selling the underlying stock itself. Rather, they are selling the PDR. Still, what the Court of Appeals failed to address is the fact that the ability of the PDR holder to sell the PDR includes the ability to sell the underlying shares. Again, the SRC-IRR considers even indirect exercises of marks of ownership to fall under the ambit of beneficial ownership.

Not only that, but the SRC-IRR notes that beneficial ownership is not only limited to *actual* disposal of the shares, but the ability to *direct* the disposal of shares. A reasonable argument could be made that in the scenario where Omidyar, due to the limitation on the Exercise Right, exercises the option to sell the PDR due to their restriction on owning shares of RHC, there is a direction of the disposition of shares.

Herein lies another interesting exclusion with respect to the Court of Appeals Decision—the absence of an examination based on the grandfather rule. As held in the previously cited case of *Narra Nickel*, while the control test is always the first step in determining the amount of foreign equity, the grandfather rule applies in cases where there is doubt as to the beneficial ownership of a corporation with an equity restriction. However, the implication of this is that in cases where an equity restriction requires 100% Filipino ownership, the grandfather test must always be resorted to, as the absolute nature of the ownership restriction means there will always be doubt.

Phrased differently, in cases where the equity restriction is 100% ownership, the control test can never apply because a corporation under a 100% equity restriction could theoretically always pass the 60% rule in the control test, while still failing to meet the 100% equity restriction. Thus, a 100% equity restriction being absolute means that there will always be doubt in the case of corporate stockholders, since the ownership must be wholly spotless. Thus, if there ever is any doubt as to the beneficial ownership, the grandfather test should immediately be triggered. The 2024 Decision could have been made fuller through the making of such a survey.

One other consideration noticeably absent from the Court of Appeals' discussion is the dual aspect of the mass media equity restriction. In addition to ownership, the Constitutional provision likewise lists the aspect of *management*, whereby the management of mass media shall be limited to citizens of the Philippines. While the Court of Appeals solely focused on whether or not Omidyar owned underlying shares of Rappler, Inc., the exercise of Omidyar of any management prerogatives was left unresolved.

As a general rule, a corporation's management functions are exercised by its board of directors. As pointed out by the Court of Appeals itself in the 2024 Decision, the exercise of RHC's voting rights over the shares of Rappler, when it comes to amending the latter's Articles of Incorporation, is an exercise of management functions. This is clear even from the letter of the Revised Corporation Code in that, in addition to approval of 2/3 of the outstanding capital stock, a majority vote of the board of the directors is likewise required in order to change the Articles of Incorporation.[157]

To the Court's credit, there is much merit in the argument that the issuance of a Waiver by Omidyar foregoing its right under Clause 12.2.2. ought to have been taken into account by the SEC, or at least been reason to offer Rappler a degree of clemency, especially considering the SEC's knowledge about the Waiver prior to the release of the 2018 Decision. This is a compelling argument by the Court, but there is nevertheless a sense of unfulfillment in its application without first addressing the other questions regarding Rappler's ownership.

Now, none of this is to say that Rappler indeed violated the equity restriction. What these things do say, however, is that there remain

[157] REV. CORP. CODE, § 15.

unanswered questions which should have warranted a closer inspection by the Court.

Ultimately, this is where the Decision could have achieved its potential. Certainly, the context by which Rappler was investigated by the Duterte regime was an affront on the freedom of the press. Yet, this consideration is not mutually exclusive from the necessity of a full examination of Rappler's ownership. Both things can be necessary, and in the event of both being true, this is where balancing both rights could have proven to be a useful framework. Unfortunately, the 2024 Decision does not allow us to reach a full conclusion.

Not only that, but this Decision also has the potential to set a dangerous precedent where the right to freedom of the press is a panacea to all concerns regarding media outlets who willingly relinquish their role in the national development by yielding to foreign influence. In these kinds of situations, what is lost is the basic assumption that makes the freedom of the press work—there must be an assurance that it is free. This Decision could have been an opportunity to do that, and yet, it remains wanting.

VI. CONTINUED RELEVANCE OF THE MASS MEDIA EQUITY RESTRICTION

Regardless of what one thinks about the legal correctness of the Decision itself, it goes without saying that the timing of Rappler's closure and the specificity of targeting Rappler—the publication most vocally critical of the Duterte administration—was suspect, to say the least.[158] The imagination need not wander far to produce suspicions as to why the SEC chose to render its Decision, and at the time it did.

Given everything that has been analyzed so far, one might read this Note and think that it has arrived at quite a somber conclusion. If the mass media equity restriction is so pervasive, it would seem as though the press would have no space to function at all. Legally sound or not, to agree with the SEC Decision now gives any aspiring dictator a playbook through which they can swiftly silence media outlets unwilling to kneel.

[158] This might even be too charitable. A *blatant, politically motivated silencing of press freedom* is—although not the most academic turn of phrase—perhaps a more accurate assessment of the events.

Although this Note remains firm in its position that the Court of Appeals Decision erred in its appraisal of the equity restriction, the practical considerations are valid concerns. As such, placating them requires an analysis of the continued relevance of the mass media equity restriction in today's age. After all, if the mass media equity restriction is still relevant, then maybe a more optimistic outlook on it is in order. Maybe, as the framers of the Constitution seem to have intended, the equity restriction is meant to liberate and be an expression of an independent, postcolonial identity. On the opposite end, if the equity restriction is no longer relevant, then it might just be time for a change, which, as with any Constitutional amendment, would have sweeping legal and historical implications.

To be clear, this section of the Note differs from the rest of the it in that, where the previous sections were concerned with the question of whether or not the Court of Appeals Decision was correct in its understanding of the equity restriction and the theoretical underpinnings to support a conclusion, this section deals primarily with the prospective and practical. Phrased differently, given the conclusion that the equity restriction prevails over the right to freedom of the press, this section now discusses whether or not the equity restriction has outlived its usefulness, and the possible solutions to reconcile the Note's conclusion with the reality that such conclusion may be weaponized against press institutions.

As a disclaimer, it must be conceded that determining the relevance of the equity restriction is clearly not an easy task. Further research and deeper theorizing are necessary to come up with a fully satisfying conclusion, if even possible.

Nevertheless, this final stretch is meant merely to propose a starting point. For this starting point, the Note now argues that the relevance of the equity restriction is just as much of a communication question as it is a legal question. Though the implications and theoretical framework may be legal, the determination of relevance is a matter of communication studies and all that they entail.

A. Threats to and Arguments for the Relevance of the Mass Media Equity Restriction

1. Does the restriction actually protect nationalism?

One compelling argument for the mass media equity restriction's loss of relevance comes from its perceived failure to actually protect the spirit

of nationalism. Diane Desierto, in her scathing criticism of the mass media equity restriction, argues that the provision is merely an ideological cover that reinforces the hegemony of oligarchic interests.[159] Using the social conflict theories of political economy, Desierto claims that the equity restriction, by design, keeps oligarchs in positions where they can control the flow of information—precisely what the framers ostensibly sought to prevent.[160]

Desierto's data shows that these fears are not unfounded. Media organization and fact-checking hub VERA Files, through their Media Ownership Monitor ("MOM") Project, shows just how alarming the state of media pluralism currently is in the country. The MOM Project shows high levels of risk in many key areas, such as media audience concentration, media ownership concentration, and cross-media ownership concentration, among others. [161]

VERA Files' data, for instance, shows that with respect to audience concentration, the four major network owners have a shared audience concentration of 88.57%, with GMA Network having 62.02%, MediaQuest Holdings Inc. holding 15.01%, and ABS-CBN Corp. having 11.54% of audience concentration, respectively. The data is similarly in the high 80s for the radio, broadsheet, and internet readership bases.[162]

The data on cross-media ownership concentration is similarly disconcerting, with the three leading companies—GMA Network, ABS-CBN Corporation, and MediaQuest—having control of 90% of the market. Essentially, the entire landscape of media ownership is only owned by a select few families and individuals, namely the Gozon, Duavit, and Jimenez families; the Lopez family; Manny V. Pangilinan; the Elizalde family; the Yap family; Maria Nicolas-Suchianco; Bro. Eddie Villanueva; and the Rufino-Prieto family.[163]

Desierto's analysis seems to reflect the actual state of media in the country, and it is perhaps the biggest argument for the decreased relevance

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[159] Diane Desierto, *Restriction and Rhetoric: A Critique of the Constitutional Prohibition Against Foreign Ownership in Philippine Mass Media*, 5 J. APPLIED ECON. 77 (2010).

[160] *Id.*

[161] Media Ownership Monitor Philippines 2023, VERA FILES, at https://philippines.momgmr.org/en/findings/findings/#!9fed61067e34232006ff7dcd0ed479d0.

[162] *Id.*

[163] *Id.*

of the mass media equity restriction. An amendment of the Constitution to reduce the equity restriction could have the potential to introduce foreign perspectives, and by extension, more perspectives. Alternatively, a reduction in the equity restriction could have the potential to induce wider, more diverse reportage as an effect of increased competition in the media space.

2. Economic implications

Desierto also argues that there is no real reason to believe protectionism towards mass media has increased domestic economic growth. For this, Desierto cites statistical trends with respect to the opening up of the telecommunications industry and the increased growth rate of that sector.[164]

The author defers in this regard, as this is a matter best discussed by economists. However, it is worth bringing up the counterargument, which is that there is no consistent empirical evidence of the positive relationship between foreign direct investments and economic growth. In fact, some economists even argue that opening up the Philippine economy to foreign investments too much has the potential to backfire by increasing investment uncertainty.[165]

3. Relevance in a digital world

The most obvious major threat to the equity restriction's relevance is the existence of the internet. It can be argued that the wide and unbridled access Filipinos have to the internet renders the equity restriction moot, because now, Filipinos have immediate access to an unlimited amount of information that may or may not be Filipinized. Nowadays, with a few simple clicks and swipes, the Filipino public is able to consume large amounts of content that may shape its opinion outside of those with the ideals, culture, and national goals of the Philippines in mind, as desired by Resolution No. 1157. Thus, it may seem that because of the equity restriction's inability to prevent the free flow of foreign mass media, the equity restriction has lost its relevance.

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[164] Desierto, *supra* note 159.

[165] Toby Monsod et al., How to change a constitution by hand-waving (Or, the unbearable lightness of evidence in support of foreign ownership restrictions), 1, 28–31 (UP Sch. Econ., Discussion, Paper No. 2024-01, Apr. 2024).

At the same time, the unregulated exposure to foreign mass media due to the internet may be the biggest argument against reducing the equity restriction and for strengthening it and tightening regulations even further. Amid the Philippines' ongoing tensions against China in the West Philippine Sea, various reports have shown the presence of extensive disinformation networks in the country, many of which tend to favor China's position in the dispute by echoing the claim that it is the United States that is destabilizing the Asia-Pacific region[166] and applauding and exaggerating China's military strength.[167] Evidence of China's meddling in the Philippine information system have been observed since at least 2020, with Facebook announcing that it had taken down Chinese disinformation campaigns that targeted the Philippines and promoted Chinese-friendly politicians such as President Duterte.[168]

Though social media campaigns are outside the scope of mass media, they are nonetheless testament to the pervasiveness of foreign presence in our country's information system.

All these things considered, does the pervasiveness of the internet support the growing relevance of the mass media equity restriction? Or does it show its growing obsolescence? How about any of the other identified factors? While there is no clear-cut answer, this perhaps is where the uses and gratifications ("U&G") theory could prove to be useful and important.

B. Uses and Gratifications Theory

The U&G theory, as with other theories under the sociopsychological tradition of communication, was developed as a response to the dominant models of communication, which focused primarily on the sources of communication and their messages. Under the classical theories of communication, audiences were viewed as mostly passive actors easily

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[166] Ara Eugenio, Jan Cuyco, Lucille Sodipe, & Nattakorn Ploddee, *Philippines, China clashes trigger money-making disinformation,* PHILSTAR, Nov. 26, 2024, *at* https://www.philstar.com/headlines/2024/11/26/2403070/philippines-china-clashes-trigger-money-making-disinformation.

[167] Julia Voo, *Driving Wedges: China's Disinformation Campaigns in the Asia-Pacific*, *in* ASIA-PACIFIC REGIONAL SECURITY ASSESSMENT 2024 108, 114 (Int'l. Inst. Strategic Stud., 2024).

[168] Gregory Winger, *China's Disinformation Campaign in the Philippines,* THE DIPLOMAT, Oct. 6, 2020, *at* https://thediplomat.com/2020/10/chinas-disinformation-campaign-in-the-philippines/.

influenced by messages transmitted by a source. U&G upends these traditional models by putting the focus more on the audience.[169]

Under the U&G model, audiences are treated as active participants who are just as involved in shaping communication as the transmitters of messages. The theory follows this basic premise—audiences are aware of their consumption needs (uses) and thus only seek media which gratifies those needs (gratifications).[170]

This framework appears to be a useful way for us to assess the continued relevance of the mass media equity restriction as it provides us with triggers and responses with which we can identify the public's response to foreign media. The U&G theory could provide us with answers to the following questions: (1) Why do audiences consume local news? (2) To what degree are audiences concerned about the possibility of their news being laced with foreign propaganda? (3) To what degree are foreign news sources more trustworthy than local news sources, or vice-versa? (4) What responses can be elicited from political loyalists of pro-foreign politicians with respect to news that promotes foreign policies, and to what degree does this affect their consumption of news? (5) How do different forms of media achieve different gratifications, and to what extent do these different forms of media insulate audiences from their awareness of foreign propaganda?[171] (6) To what degree do audiences view our media as a keeper of national identity, and to what degree do audiences resonate with the postcolonial identity of the Constitution at all?

These questions and many more can be identified through the U&G theory and can provide us with a deeper understanding as to how audiences consume media and what the legal implications of that consumption are or should be. The ultimate conclusion of all of this is this—if the theory can accurately determine the uses and gratifications behind local mass media, foreign mass media, and mixed-origin media, it can be determined if the media is still able to fulfill the nation-building function that the 1987 Constitution envisioned for it. From there, it can determine if the mass media

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[169] STEPHEN LITTLEJOHN ET AL., THEORIES OF COMMUNICATION 174–76 (11th ed., 2011).

[170] *Id.*

[171] *See also* Anabel Quan-Haase, Is the Uses and Gratifications Approach Still Relevant in a Digital Society? Theoretical and Methodological Applications to Social Media, 2 J. MASS COMMC'N JOURNALISM 1, 1 (2012), *at* https://www.hilarispublisher.com/open-access/is-the-uses-and-gratifications-approach-still-relevant-in-a-digital-society-theoretical-and-methodological-applications-to-social-media-2165-7912.1000e124.pdf.

equity restriction ought to be repealed, reworked, strengthened, or any other option in between.

Unfortunately, there is not much in the way of research with regard to these questions, but there are different studies that could be useful as foundations on which future research can build upon with respect to the context of the mass media equity restriction. A 2024 study by Chao Wei et al.[172] showed that, generally, those who share disinformation seek the combined gratification of passing time and seeking information. Studies like this could be useful in assessing the susceptibility of Filipinos to disinformation vis-á-vis its prevalence and, by extension, the relevance of mass media in curbing disinformation even with the equity restriction in place. Another study from 2018[173] assessed the relationship between South Korean journalists' motivations in using social media and their relational satisfaction with the public. Studies like this could prove useful in analyzing the shared relationship between the mass media themselves and their platforms which, for the purposes of the mass media equity restriction, could tell us the degree to which a chosen medium affects the relevance of its message. These are but some examples of ways the field of communications and law can grow and provide us with a deep insight as to the continued relevance or irrelevance of the mass media ownership restriction.

C. Moving forward

Should future research find that the mass media equity restriction is no longer relevant, proposals for how to view the provision are bridges to be crossed once reached. Still, this Note would be remiss if it were not closed with a bit of speculation as to what the future of the mass media equity restriction could look like, if we find that it is no longer relevant.

The first proposal is for either the SEC or Congress to set precise standards for (a) how to ascertain ownership of mass media; (b) how to resolve irregularities in the equity of mass media; and (c) appraising when State forces abuse the equity restriction. This proposal would not require the amendment of the Constitution and would likewise maintain the holding of

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[172] Chao Wei, Hafizah Mat Nawi, & Salman Bin Naeem, *The uses and gratifications (U&G) for understanding fake news sharing behavior on social media*, 50 J. ACAD. LIB. 1, 7 (2024), *at* https://doi.org/10.1016/j.acalib.2024.102938.

[173] Yonghwan Kim, Youngju Kim, Yuan Wang, & Na Yeon Lee, *Uses and Gratifications, Journalists' Twitter Use and Relational Satisfaction with the Public*, 60 J. BROAD. & ELEC. MEDIA 503 (2016).

the Note as to the postcolonial character of the Constitution and the mass media equity restriction, along with the importance thereof.

Again, one major issue this Note has identified with the 2024 Decision is the absence of more thorough investigations for whether or not Rappler really did violate the equity restriction. Conversely, one major point of agreement this Note has with the 2024 Decision is the condemnation of the recklessness with which the SEC imposed the penalty of revocation. Specific standards, such as codifying the implementation of the grandfather test in cases of mass media equity questions and more exhaustive processes allowing media institutions time and lenience to correct any irregularities in their equity could bring a fuller and fairer process to any similar proceedings in the future.

The second proposal is similar to the previously cited interpellation by Commissioner Garcia, who proposed that the mass media equity restriction should contemplate future flexibility and allow for a definition of ownership which is audience-centric. Perhaps the mass media equity restriction could be updated in such a way where, instead of doing without the provision entirely, we simply view ownership from the lens with which the audience may access it. We could reinterpret the provision "mass media owned and managed by Filipino citizens" to refer instead to measuring whether or not Filipino audiences have full, unrestrained access to news media and information and have open avenues for public engagement regarding current events.

On the flip side, a third proposal is to do away with the mass media equity restriction entirely, or at the very least, reduce the percentage of equity. If we find that the mass media equity restriction no longer serves its purpose, then perhaps the call is to decolonize our understanding of media,[174] as opposed to decolonizing the media itself. Perhaps we could and should evolve the meaning of ownership and management of media into a collective responsibility towards media literacy with an emphasis on its role in nation-building. This way, we can view ourselves as audiences with an active role in shaping media and communication because, as the framers intended, media is a tool for nation-building, and nation-building is an active exercise.

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[174] *See* Raka Shome, *When postcolonial studies meets media studies,* 33 CRITICAL STUD. MEDIA COMMC'N 245, 247 (2016). There is an interesting point in this article about how "internationalizing" is an outdated post-Cold War ethos where nations express their identity by viewing nations as discreet units. The goal, instead, Shome says, is to decolonize. This entails deeper cultural critiques and foundations outside of just simply doing away with Western sensibilities and philosophical frameworks.

VII. CONCLUSION

> *"Digital witnesses, what's the point of even sleeping? If I can't show you, you can't see me."*
>
> —St. Vincent, Digital Witness[175]

In conclusion, the relationship between the right to freedom of the press and the mass media ownership restriction is a contentious one, but strangely one which has yet to be resolved. However, when looking at the postcolonial character of the 1987 Constitution through the lens of the mass media equity restriction, it becomes increasingly clear that said restriction is meant to be an inherent limitation on the right to freedom of the press. This unfortunately could have dire consequences, such as in the case of *Rappler v. SEC*, where the Court of Appeals fell short of a thorough examination of Rappler's ownership, all while seemingly neutering the mass media equity restriction. The Court not only left many questions as to Rappler's ownership unanswered, but also resolved the case in a way that stripped the mass media equity restriction of function, as the Court prioritized maintaining as many voices of the media as possible.

Finally, although the Note argues that a proper reading of the mass media equity restriction is to recognize its importance in preserving the postcolonial character of the Constitution, its continued relevance is worth ascertaining. Through the use of communication theories, the Note takes a look at contentions against the restriction's relevance and ultimately proposes ways by which the equity restriction's relevance can be determined and accounted for.

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[175] ST. VINCENT, *Digital Witness*, *on* ST. VINCENT (Loma Vista Recordings 2014).