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Words on the Market: Consent Theory and the Public Interest

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Content regulation of U.S. electronic media–both broadcast and online forms of that media–has historically centered on notions of a public discourse determined by external forces and that such discourse must be governed in the interest of the consuming public. Such an ethic fails to account for the nature of discourse in hegemonic cultures, the manner in which such communication evolves. Hegemonic discourse, even electronic forms of that discourse, originates organically, not deterministically, rooted in the organization of consent. Thus the overarching claim justifying such content regulation–to serve the public interest–must finally be questioned as a presumption, controls potentially not coincident with that interest.

In interviews leading up to his election, then-U.S. presidential candidate, Barack Obama, noted that he would like to see more "public interest" in broadcasting.[1] Mr. Obama's comments came only a few short years after Rep. Joe Barton (R-Texas) promoted the idea of better defined, more regulated "public interest" requirements on the part of broadcasters in exchange for valuable "must carry" rules on cable systems for their digital signals.[2] This renewed emphasis also comes amid talk among some congressional leaders of reviving the Fairness Doctrine, possibly reconstituting that doctrine as law.[3]

Amid such intimations, broadcasters and observers of that industry envision the return to a more expansive regulatory philosophy centered heavily on notions of stewardship and protecting the public's best interests. That regulatory modality centered primarily on public discourse: what was said over the radiowaves. Yet such a return also seems squarely at odds with U.S. conceptions of both commercialism and discourse, that broadcasting and speech exist within the market, and that heavy regulation of either is principally a construct foreclosing upon organic transactions. Aside from purely commercial/market considerations, however, the notion of discourse regulation most often ignores the nature of discursive development in societies. This paper seeks an understanding aligned with the latter. By examining the current state of broadcasting through the eyes of Antonio Gramsci and his notion of consent development, it is hoped that this writing will yield a new perspective on the nature of broadcast discourse in hegemonic cultures, the manner in which such communication evolves. Hegemonic discourse, even electronic forms of that discourse, originates organically, not deterministically, rooted in the organization of consent. Thus the overarching claim justifying broadcast content regulation must finally be questioned as more likely presumption than certitude, controls which, despite aims to safeguard public interest, may potentially not coincide with that interest.

In discussing the notion of Gramsci's consent doctrine, this paper will first indicate how valuations of virtue have historically informed U.S. conceptions of discourse, then briefly outline the publicly discursive nature of broadcasting. It will then address how considerations of stewardship and scarcity have contributed as well to constructed expectations upon broadcast media communication, even extending into the online arena. Finally, the paper details Gramsci's formulation of consent theory and how those formulations conflict with traditional discursive ideologies.

PUBLIC DISCOURSE AND THE MARKET

U.S. preoccupation with discourse regulation always formulates a curious juxtaposition with its antithesis: freedoms of speech guaranteed in the U.S. Constitution. Historically, an Enlightenment context informs the framework for discourse perceptions in the U.S., though interestingly not exclusively as a domain in need of supervision. That's because public discourse in the original republican sphere drew upon an idealistic context of a free and open market and equal participation

from both good ideas and bad. Citizens could extrapolate from that theoretical marketplace of ideas truth and virtue submitted in the writings of others, the rational audience consequently separating such idealized discourse from less noble submissions. In other words, early speech would participate in an uninhibited exchange, unprotected in the open market from competition on the one hand while protected, on the other, from the silence of censorship, the constitutional guarantees of the First Amendment. It was an idea first put forth by John Milton in seventeenth century England. "Who ever knew Truth put to the worse," Milton wrote in his *Areopagitica*, "in a free and open encounter??[4] In that same document, Milton idealizes further:

> ...when truth and falsehood collide, truth emerges triumphant...And though all the winds of doctrine were let loose to play upon the earth, so truth be in the field, we do injuriously by licensing and prohibiting to misdoubt her strength.[5]

Sir William Blackstone in the next century wrote in his *Commentaries* that "every freeman has an undoubted right to lay what sentiments he pleases before the public..."[6] Likewise John Locke, writing eighty years later in *An Essay Concerning Human Understanding* stated, "It is one thing to show a man that he is in an error, and another to put him in possession of truth."[7] And in the new republic, individual states recognized the value of an open forum of unrestrained communication, and wrote specific laws into their constitutions to provide for these. One such example is the state of New York which, in 1805, articulated the rights each citizen of that state would enjoy to "freely speak, write and publish his sentiments on all subjects," and that no other law would be able to usurp that right.[8]

Discourse in the new republic was viewed as a chief mechanism of cultural, political and ideological identity. Those early audiences, as Noah Webster would suggest, struggling for their own cultural independence from the old world to accompany a new political independence, needed an independent literature as well, and looked to writers who would specifically shape a set of "distinctive fashions, manners, language, and political and social attitudes" for the republic. Early philosophical beginnings such as these led eventually in the United States to explicit constitutional protections and a judicial ethos for uninhibited speech. Specific court cases such as Holmes' famous 1919 dissent in *Abrams v. U.S.*, in clear analogic terms, located public speech in the market suggesting that good "is better reached by free trade in ideas - that the best test of truth is the power of the thought to get itself accepted in the competition of the market."[9]

VIRTUE AND THE WRITTEN WORD

Nevertheless, an historic tension centers squarely on the naked idealism of the open marketplace of ideas and has always circumscribed unfettered, unencumbered exchange. That specific tension arises precisely from the implicit responsibility in all forms of speech toward virtuous discourse. This is echoed early in the new republic in public printings like Thomas Paine's *Common Sense* and Benjamin Franklin's *Poor Richard's Almanacks*.[10] Ideas and thoughts were most virtuous, it was held, when disclosed to, and ratified by, a public audience. Writing would thus be held to a loftier standard than pure aesthetics. Through publication it would strive to "raise the mind and [hurry] it to sublimity."[11] And the responsibility to the republic was well understood. "Americans," according to Michael Warner, "to a surprising degree, understood their engagements with print as activities in the republican sphere subject to its norms."[12]

On the market, ideas, thoughts and beliefs contained in printed discourse were thus held to high didactic ideals. Paine, for example, proposes in *Common Sense* a course of action for the new republic that would unite subsequent generations of citizens to a common cause. "No nation ought to be without a debt," Paine writes. "A national debt is a national bond…."[13] Paine's pamphlet is thick with this kind of didacticism, exhorting the colonials to awareness of the justifications for

their own independence while offering as well clear guidelines, like a national debt, to ensure the new nation's perpetuity. Paine even goes so far as to publish in his text a ledger of how at least some of the funds acquired from a national debt may be specifically spent.

Franklin's published advice, equally didactic, centers more, however, upon the personal, dispensing words for living that are intended to lead the reader to a practical virtue. In his *Poor Richard's Almanacks*, the collected published wisdom of twenty-five years of writing, Franklin provides practical comments on everything from the secret of marital bliss—"Keep your eyes wide open before marriage, half shut afterwards"[14]—to the wisdom of patience—"Time is an herb that cures all Diseases" (sic)[15]—practical ideas and wisdom that lead, hopefully, to a virtuous, exemplary life.

Warner suggests that so pervasive was the new Americans' sense of public obligation to virtuous discourse that even aesthetic forms of writing subscribed to the ideal.[16] Fictive works, like Charles Brockden Brown's *Arthur Mervyn*, conveyed in narrative the same kind of advice and exhortation as Paine's *Common Sense* and Franklin's *Poor Richard's Almanacks*. Brown's protagonist, according to Michael Warner, "never spots a book or paper without taking it up to read,"[17] discovering a corresponding elevation in virtue. Pointing to his protagonist's own observations, Warner cites Mervyn's admission that "rustic manners... have a 'tendency to quench the spirit of liberal curiosity; to habituate the person to bodily, rather than intellectual, exertions...'"[18] Warner indicates that Mervyn's life is meant to be a paradigm to the citizens of the new republic for virtuous living; the character's "pursuit of knowledge [appears] identical with virtuous action."[19] The wisdom portrayed is contained within a narrative plot Warner describes as "unintelligible,"[20] though illustrative through Mervyn's personal development throughout the novel from ignorance to benevolence, thus representing itself as an "exemplary public instrument."[21]

ELECTRONIC DISCOURSE

This was, simply, an abiding faith that individual publication could exert itself, for better or worse, upon the collective group–fellow citizens, the politics of the republic and, eventually, upon the world at large–and corresponded with a nascent sense of American mission. It was an early manifestation, as well, of the ideal to which discourse would be held in America. But the twentieth century offered up a very distinct and unique form of discourse Warner, Franklin and others could surely have never imagined. The advent of radio in the early years of that century managed to focus this tension between absolute freedom of communication on the marketplace and the need for virtuous discourse perhaps like no other form of discourse. This was truly mass communication, and it was specifically mass consumption of that communication—the reach of this new discursive form–which magnified that tension.

Moreover, radio communication arose so suddenly in the public sphere that it failed to materialize its own unique philosophical framework coincident with its early development. Instead, radio was comparably and reactively[22] subjected to the same framework of public obligation and virtuous disclosure as earlier forms of the printed word. Initially appealing to the experimental and novelistic, then evolving early into a humanitarian context by ensuring greater passenger safety on ocean-going vessels, by the early 1920's radio communication manifested itself as a new and fundamentally important form of not only information, but entertainment and advertising as well. At a congressional hearing in 1924, Herbert Hoover, then Secretary of Commerce, remarked that radio communication was not to be considered as conventional business. Despite a

market structure rapidly orienting toward profit, according to Hoover, radio should be a "public concern impressed with the public trust and to be considered primarily from the standpoint of public interest."[23] While that specific language was not an entirely novel notion (public interest was long firmly connected to public utilities/public domain philosophy in the United States), Hoover's insistence, nevertheless, introduced a novel obligatory framework for radio regulation centered on the notion of public discourse, what was said over radio waves. This newest form of communication was at its core a form of speech, and even mass communication thus articulated, enlarged considerations of what had been viewed, until then, a technological novelty.

Yet aside from this nascent awareness, and declarations such as Hoover's, social obligations upon the infant wireless medium had already manifested, and not exclusively from the political sphere. Embedded within the medium's expanse were also harbingers of its future expectations. This was certainly the case with ascending acknowledgment of wireless' humanitarian maritime value, the glaring optimism arising from radiotelegraphy's performance in the *Republic* episode in 1909 and the equally glaring deficiencies arising from the sinking of the *Titanic* in 1912. However, equally significant were developments like the timing and content of KDKA's first terrestrial radio newscast–November 2, 1920—a general election day, and KDKA led off with the results of the Harding-Cox presidential election returns. Thus, social and political expectations upon radio can hardly be viewed as spontaneous in light of the medium's early manifestations in the United States.

As a result, public interest obligations were quickly codified into early regulatory documents. For example, with the Radio Act of 1927 Congress manifested its intent to regulate more than simply technological aspects of the radio medium. As Hoover declared, something more, it appeared, was at stake. That act's single reference to radio's public obligation—"public convenience, interest, or necessity"[24]—staged what the U.S. Supreme Court would eventually term the "touchstone" of the Federal Communication Commission's authority to regulate.[25] Consequently, "the overarching goal of communications regulation,"[26] safeguarding the content of radio discourse, emerges very early and arguably as the federal government's most apparent responsibility in the arena of electronic media regulation.

STEWARDSHIP

In 1961, Louis Jaffe, a specialist in administrative law and at the time a faculty member of Harvard University Law School, in outlining his perception of the government's responsibility for what he termed "the end product of TV," posited to the Conference on Freedom and Responsibility in Broadcasting at Northwestern University that given the fundamental content of television—education, entertainment, news and public affairs—"is there anything more important to government than the good husbandry of its people's culture?"[27] The problem, however, with the call to regulate which has seemingly always accompanied radio wave communication, is that discursive contexts alone don't adequately justify and rationalize those expectations. To codify philosophical expectation, one needs as well some kind of judicial rationale, and for radio wave communication that rationale found its confirmation in pre-existing expositions centered on the essence of stewardship, conceptualizations which dictated the use and economy of a public resource.

In states such as Illinois, Massachusetts, Pennsylvania and Kentucky, various versions of the language of public interest pre-existed the Radio Act of 1927. New York, for example, included in its public utility statutes reference to "public

convenience and necessity," while other states codified utility regulations that would ostensibly ensure use that is "necessary or proper for the service accommodation, convenience or safety of the public."[28] Broadcasters, like public utilities, were early held to these clear notions of public trusteeship. Like the utilities, they were given stewardship of a public property—radio waves—and would thus be held accountable to broad ideas of public benefit, in other words, virtuous discourse in broadcasting content.

Here, radio communication marks its departure from those earlier forms of written discourse. With the appearance of broadcasting, earlier confidence in truth's ability to prevail in the market gave way to an apparent lack of confidence. Jaffe's echoes of stewardship expectations for television first found regulatory confirmation in the Radio Act of 1927. That act's borrowing of public interest, convenience, and necessity language from pre-existing public utility models, was originally designed to cement technological standards, ensure public access (clear reception) and preserve domains (individual broadcaster spectrum space) from intrusion. Yet it also installed sweeping changes such as discretionary licensing power, viewed as a necessary insurance toward publicly responsible broadcasting. Discretionary licensing endowed the then-Federal Radio Commission with the power to foreclose on a licensee's ability to broadcast should he or she not demonstrate appropriate dedication to public interest ideals.

Broadcast performance expectations would be further elaborated in the FRC's 1928 statement,[29] and evidenced in a rapid succession of court cases, such as *Brinkley*[30] and *Trinity*,[31] directed solely on broadcast content. In the former, just a few short years after passage of the Radio Act of 1927 the U.S. Federal Court of Appeals upheld the FRC's earlier decision not to renew the Doc Brinkley's radio license for peddling his goat gland operations over the air, suggesting that the distinctly pervasive and extensive nature of radio broadcasting constituted a particularly public form of communication, "reaching out, as they do, from one corner of the country to the other." Likewise, in *Trinity* the FRC's decision denying license renewal to "Battling Bob" Schuler on the basis of his on-air ramblings against Jews, the Catholic Church, and the Los Angeles government's infrastructure[32] demonstrated the Commission's intent to preserve broadcasting for the public's, not individual, interests.

Other early court decisions involving radio communication extend and justify the rationale of interventionism. The Federal Court of Appeals in the United Church of Christ case stated it rather bluntly. The fundamental difference, the Court suggested, between the broadcaster's privilege to speak and a newspaper's privilege to publish is that newspapers "can be operated at the whim or caprice of its owners" while broadcasters are "granted the free and exclusive use of a limited and valuable part of the public domain; when he accepts that franchise, it is burdened by enforceable obligations."[33]

SCARCITY, COMMERCIALISM AND INTERVENTIONISM

By 1934[34] and the appearance eleven times of public interest language, public obligation was clearly institutionalized as the primary evaluative standard for broadcasters, the FCC and the courts. The message to broadcasters was clear: electronic discourse needs management through intervention. Yet justification for intervention in broadcast discourse is equally the product of scarcity rationales. The new electronic discourse depended on a scarce resource—the electromagnetic spectrum—for publication. In *NBC v. U.S.* (1941),[35] the U.S. Supreme Court, for example, contrasted radio with other media, stating that the privilege of expressing oneself via radio communication is available to only a limited number of persons which

finally justifies government intervention.[36] Consequently, broadcasting has historically been viewed as essentially undemocratic; access depends on the absolute necessity of an available frequency for transmission, even as the limited availability of those frequencies circumscribes the number of potential participants, despite attempts to *expand* the spectrum as the 1991 AM Rules proposed.

In other words, aside from broadcasting's concrete differences with printed and spoken forms of communication, it also departs from these by virtue of its in-egalitarianism, and this equally lays the groundwork for close supervision by the federal government, a burden largely absent from printed discourse. As Ross points out in her observations on positive liberty theory, the scarcity of available frequencies and subsequent inaccessibility to ownership for the largest portions of the American population gives way in broadcasting to lurking suspicions of abuse, directed mostly, according to Ross, at the absence of one particular component of the public interest: diversity. Positive liberty theory, Ross indicates, holds that "all ideas are not equal or equally represented in the unregulated marketplace."[37] Thus certain voices, according to the argument, will enjoy greater access to broadcast publication than others; likely frustrating the fair exchange idealized in marketplace theory. Under such circumstances, positive libertarians advocate regulatory intervention to compensate for the access limitations scarcity imposes.

This is only magnified as well in U.S. broadcasting's dependence on commercialism. Like printed discourse, its unique dependence on an economic model rather than governmental such as other countries adopted early in radio wave communication, meant broadcasting in the United States would forever be dependent on advertising revenue. Yet this dependence also signaled a likely conflict between virtuous discourse in the public's best interest and discourse more prone to serving advertiser interests, a concern continuously pervading broadcast and not print media because of the former's necessary dependence on a public resource. Sakolsky and Dunifer cite early radio's rapidly evolving commercialism as a focal point for early pressure on governmental entities to intervene. Proponents, they suggest, came from organizations as diverse as "education, religion, labor, civic organizations, women's groups, religion, journalism, farmer's groups, civil libertarians and intellectuals,"[38] reformers who tapped into the public dislike for radio commercialism, thereby managing to convince Congress and its administrative agencies of the need for, among other things, commercial restrictions. That concern registers clearly in the FCC's *Blue Book*[39] which once again reminded broadcasters that the public's interest was more important than advertisers' requiring them to eliminate advertising excess.

ONLINE DISCOURSE

More contemporary forms of discourse must likewise be addressed in any reference to notions of positive liberty, broadcast discourse and federal intervention since these newer forms of mass communication have also fallen under a similar regulatory framework as broadcasting, most specifically the Internet. In regulatory terms, online communication has conventionally been viewed in the U.S. as extended electronic communication, similar to broadcasting though not resorting to the latter's reliance on radio waves in the public domain. This would seem to suggest the absence of a regulatory foundation, yet since 1996 the United States has attempted in several incarnations, and with limited success, to regulate online content. One of the first of these was the *Communication Decency Act* (CDA), part of the *Telecommunications Act of 1996.*[40] While some have argued that the Act itself was more oriented toward a free market approach from the Clinton

Administration[41], the courts quickly struck down the CDA because of its vagueness and broad-reaching scope toward online communication.[42]

The Children's Online Protection Act (COPA) was likewise an effort to more clearly define what might be considered indecent or obscene online content, mostly by defining children as a unique audience requiring protection from the free, unfettered nature of information on the Internet.[43] It was also struck down by the courts as being overly vague. Of chief concern with COPA and its successor, CIPA (Children's Internet Protection Act), was the constraints these placed on libraries and librarians. The same filters that public libraries were required to provide to keep people from accessing potentially "obscene" content were also screening out legitimate research searches on topics such as "breast cancer" or national crime statistics on rape.[44] Miltner contends that CIPA was unconstitutional because not only did it require an adult to ask a library staff member to turn off the filter, but that the staff member must make the judgment whether to comply with the request.[45] While the Supreme Court upheld CIPA in 2003, Justices Kennedy and Breyer did hint that its application was open to challenges.[46]

These latest attempts to regulate the online communication arena only further demonstrate the presumptions that discourse 1) must be virtuous and 2) may be determined and, therefore, in need of intervention.

DISCOURSE AND CONSENT

The conflict here can be, and often is, reduced to a convenient antagonism between market-driven and interventionist regulatory approaches, the rationales of stewardship and scarcity, pitting broadcasters and commercialism on the one hand against Congress, the FCC and public interest on the other. Confusion within such a polarity is unavoidable, based as that polarity is on the duality between organic and determined discourse. By invoking a positive liberty context to support and justify regulation on electronic forms of discourse, the courts, the FCC and Congress assume the possibility that given forces indeed control discourse, thus potentially and unfairly dictating it in a dominant manner.

There is an alternative, however, to such prevailing ideological positions. In matters of discourse, the notion of consent organization outlined by cultural theorists, most particularly Antonio Gramsci, ostensibly argues against an exclusively interventionist regulatory ethic. Gramsci's position on consent and the collective ideology, also called his theory of hegemony, the result of laborious note-taking as a political prisoner from 1926 until his death ten years later, liberates public and electronic discourse from the limitations of top-down interventionist rationale. In close to two-and-a-half thousand pages of notes, essays and ideas on the formation, structure and operation of cultures, Gramsci conveys his overarching intent to account for consent as a cultural dynamic.

Gramsci supposes preliminarily that no act of history may occur—no cultural or social endeavor or development—without construction of what he calls "a single cultural 'climate,'"[47] later identified as consent to a common world view shared by all segments of a given society. Consent signals mutual acceptance from those segments of a unified perception of existence, "an intellectual unity and an ethic in conformity with a conception of reality that has gone beyond common sense and has become, if only within narrow limits, a critical conception."[48] For Gramsci, the prospect of overt control over social groups by controlling discourse is not only flawed, but represents in its appeal a "primitive infantilism."[49] "Culture," he states elsewhere, "is something quite different,"[50] a form of *leadership* exercised by one class or social group over, or more

appropriately in concert with, others thus enlisting rather than ordering consent. Far from a collective will that may be deliberately shaped via media exclusivity or protected via government intervention consent is, according to Gramsci, the result of complex and silent negotiation between the ideas of multiple factions within a given cultural climate, in other words, a discourse of multiplicity. "Cultural-social unity," Gramsci maintains, "arises through a multiplicity of dispersed wills, with heterogeneous aims...welded together with a single aim," producing a "common conception of the world."[51] Gramsci's discourse of multiplicity in which many views are articulated into one dynamic, always fluid, common world view, envisions instead an intricate web of discursive relations, voices of varying power that continuously give and take. In the hegemonic model, collective acceptance of given points of view is the organic result of one group's ability to somehow articulate other points of view in varying degrees into a unified whole, thus structuring a kind of polyvocalism, as opposed to the univocalism characteristic of the interventionist ethic, a universality of viewpoints and acceptance of those viewpoints.[52] Thus social groups, according to Gramsci, rather than exert their dominance over other groups, effect a "compromise equilibrium" in which the "interests and tendencies" of those other groups are accounted for, to one degree or another, in the collective world view.[53]

Referring to this common worldview, Althusser resorts to the inclusive term *ideology* and expresses, like Gramsci, its ubiquitous infiltration of all cultural and social sectors. "Human societies," Althusser claims, "secrete ideology as the very element and atmosphere indispensable to their historical respiration and life."[54] This is Gramsci's contention as well when he describes the common worldview as "a conception of the world that is implicitly manifest in art, in law, in economic activity and in all manifestations of individual and collective life."[55]

Nowhere is the Gramscian account more evident in broadcasting than in its commercial economic structure. More than simply a means for economic subsistence in U.S. broadcasting, commercialism situates itself as an ideal hegemonic exchange, at its heart a circular system of negotiation between advertisers, media owners, and the receiving public. Broadcasters depend on advertising revenue, yet the rate at which advertisers are charged for their commercial spots is based on a given program venue's ratings, the sum expression of how many people either listen or watch broadcast content. Thus in a circular fashion listenership/viewership drives content decisions as broadcasters struggle to air that content of most appeal to the public, consequently enhancing the revenue stream, but simultaneously reinforcing hegemonic consent as well by virtue of the implicit feedback ratings services provide them. Dynamic, complex and silent, this is the kind of exchange Gramsci describes in *The Prison Notebooks*.

The rationale of interventionism would thus appear an inadequate account of discourse in non-authoritarian cultures. One needn't look further for evidence of that inadequacy than indecency regulation—the "description or depiction of sexual or excretory activities or organs in a manner patently offensive by contemporary community standards"[56]—perhaps the most overt attempt to control broadcast content. Despite fairly non-existent early regulation arising from its origin in the *Communications Act of 1934*,[57] the significance of indecency prohibitions has risen progressively, most notably in the *Pacifica* case[58] and currently the extension in 2006 of indecency definitions to include both fleeting profanity and fleeting nudity, as well as the elevation of imposed fines from $35,000 per instance to $325,000. The justification for this kind of attention to broadcast indecency was clearly laid out in the U.S. Supreme Court's decision in *Pacifica*. Justice John Paul Stevens cited

broadcasting's "uniquely pervasive presence... in the lives of our people. Broadcasts," Stevens explained, "extend into the privacy of the home, and it is impossible completely to avoid those that are patently offensive."[59]

Yet U.S. federal regulation of indecent content, far from addressing organic discursive formulations in broadcasting, is instead reactive. Indecency enforcement occurs only in reaction to those complaints the FCC receives regarding a particular broadcast or licensee, and there is abundant evidence that the scale and number of those complaints fails to demonstrate the viewing/listening public's position with respect to indecent content. For example, in the third quarter 2005 (July, August, September), the FCC received 17,524 more indecency complaints about broadcast content than it did in the previous quarter (April, May, June), up from 6,161 complaints in *Q2* to 23,685 in *Q3*, yet of those 23,685 complaints received, the overwhelming majority, 23,542, came from a single entity: the Parent Television Council.[60] According to their Internet website, the Parent Television Council is a "non-partisan education organization advocating responsible entertainment... founded in 1995 to ensure that children are not constantly assaulted by sex, violence and profanity on television and in other media."[61] The preponderance of complaints, in this instance, merely indicates the potential error contained in justifications for broadcast content regulation, which presuppose a universality of concern and the need to protect the receiving public from undesirable discourse.

CONCLUSION

The long history of interventionism in broadcast discourse suggests not only a philosophical position—positive liberty approaches—with respect to content aired, but an implicit assumption that such approached are justified by broadcasting's scarcity and use of material—the electromagnetic spectrum—in the public domain. However, even in light of the reigning ethics of scarcity and public domain that are used to justify such intervention, it's clear that tensions may be located within. Some of those tensions are philosophical and reach back to early Enlightenment notions in the new republic of discourse, ideas, human reason and the speech marketplace. Yet, it's equally evident that U.S. regulatory philosophy with respect to broadcasting has at times been divided, at once interventionist as in the case of indecency provisions, the Fairness Doctrine or public interest obligations generally, but at the same time more reliant on the dispositional economies of the market, a duality finding expression even in specific regulation, the idea that public interest is principally organically organized.

Moments of the latter are rare, but have, at times, found regulatory expression. For instance, the FCC's *1960 Programming Policy Statement* which came to be known as *Ascertainment*, later clarified by the FCC in1971, was a requirement upon licensees to discover the "tastes, needs and desires" of the community within its signal contour by interviewing both the general public and leading representatives from that public as well.[62] This seems clearly an acknowledgment that determination of the public interest must be ascertained from the public itself and not determined from the outside by a regulatory body. Still, it's important to note that the doctrine of *Ascertainment* was relinquished in 1984 as part of the reigning deregulatory philosophy of the Reagan administration.

Despite what has in the past appeared dualistic, broadcasting nevertheless has historically been regulated with the broad stroke of positive liberty, a regulatory course, which within the Gramscian theoretical framework, must finally be questioned. Gramsci's theories of consent organization more closely invoke the ideals of the theoretical marketplace and the

exchange on which it depends, obviating intervention that is intended to protect the multiplicity its discourse naturally exhibits.

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