

Deliberative Democracy on the Air: Reinvigorate Localism—Resuscitate Radio’s Subversive Past

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Radio today seems so trapped in the amber of corporate control that it is easy to forget how much of radio technology and programming came from the bottom up, pioneered by outsiders or rebels who wanted something more, or something different, from the box than corporate America was providing. And what they wanted from radio was more direct, less top-down communication between Americans. . . . At times they turned . . . listening, and programming into a subversive activity.¹

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1. SUSAN J. DOUGLAS, LISTENING IN: RADIO AND THE AMERICAN IMAGINATION 15 (1999).

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I. INTRODUCTION

Radio is dead.² Dead, that is, to realizing those, at first, noble ideals of being a communicative medium created by the people, for the people, and representative of the people. At radio's mass emergence, many perceived it as the vehicle through which America's locally, regionally, ethnically, and/or socioeconomically marginalized populations could be included in America's democracy by being given an expressive and deliberative space on this newly accessible and fairly inexpensive medium. Today, however, scholars and activists³ have argued that deregulation of the media industry,

2. Radio, here, and throughout this Article, unless otherwise specified, is referring to conglomerate-controlled, full-power commercial radio, and not to nonconglomerate, locally owned commercial radio or to low-power, noncommercial, public, or college/educational radio.

3. See Michael A. McGregor, *When the "Public Interest" Is Not What Interests the Public*, 11 COMM. L. & POL'Y 207, 207-08 (2006); see also, e.g., Paul Cowling, *An Earthy Enigma: The Role of Localism in the Political, Cultural and Economic Dimensions of Media Ownership Regulation*, 27 HASTINGS COMM. & ENT. L.J. 257, 266-67 (2005); Robert W. McChesney, *The U.S. Media Reform Movement: Going Forward*, MONTHLY REV., Sept. 15, 2008, at 51-55; ROBERT W. MCCHESENEY, RICH MEDIA, POOR DEMOCRACY: COMMUNICATION POLITICS IN DUBIOUS TIMES 74-75 (1999); FREEPRESS, <http://www.freepress.net> (last visited Oct. 24, 2010); MEDIA ACCESS PROJECT, <http://www.mediaaccess.org> (last visited Oct. 24, 2010). In addition, the public responded visibly and quite vocally in protest to the FCC's 2003 *Order*. See *In the Matter of 2002 Biennial Regulatory Review—Review of the Commission's Broadcast Ownership Rules & Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996, Report and Order and Notice of Proposed Rulemaking*, 18 F.C.C.R. 13620 (2003) [hereinafter *2003 Report and Order*], which permitted a further deregulation of the media industry. Such deregulation has been found by many to be the leading cause of consolidation in ownership

which began in the early 1980s and was solidified by the Telecommunications Act of 1996,⁴ facilitated unprecedented consolidation in radio station ownership. As a result, radio has become a commodified and commercialized wasteland—a corporatized plaything—littered with fragmented, yet overlapping, music formats that play the same homogenized corporate-produced music playlists and are devoid of meaningful local public- and cultural-affairs programming.

These same scholars and activists also contend that radio's fate was sealed with the shift in meaning of the public interest requirement imposed on broadcasters by the FCC,⁵ which required licensees to serve as “public trustees” of the nation's airwaves for the listening and deliberating public.⁶ However, with the ideological shift in meaning of the public interest standard from the public trustee model—aimed at informing the listening public and at facilitating the discourse that occurs within it⁷—to the market model, the FCC's ultimate approach toward radio has effectively resulted in turning the listening audience over to advertisers as a pre-packaged and consuming demographic, a saleable commodity in and of itself.⁸ As a result, and to the dismay of many, radio today focuses little on cultural diversity, norms, tastes, and interests of the local—the historically favored and distinctive quality of radio.

Is radio really dead, though? While some commentators may not have gone so far as to assert radio's death, they have suggested that radio has

of the nation's radio stations. Several congressional leaders, including Senator Russell Feingold from Wisconsin, called for the entire 2003 *Report and Order* to be set aside, while the Prometheus Radio Project, a public advocacy group, challenged it in court. *Prometheus Radio Project v. FCC*, 373 F.3d 372, 386 (3d Cir. 2004). The Third Circuit stayed the 2003 *Report and Order* and required the FCC to sufficiently justify its continued media ownership deregulation. *Id.* at 435. In the five hearings held by the FCC across the nation, including one in which the Author of this Article testified, there was considerable testimony regarding the effect of deregulation on local musicians' decreased access to the airwaves, decreased coverage of local news and public affairs programs, and the overall lack of diverse content heard on the radio. *Public Hearings on Media Ownership Issues*, FCC, <http://www.fcc.gov/ownership/hearings.html> (last visited Nov. 14, 2010).

4. Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (codified at scattered sections of 47 U.S.C.).

5. The public interest requirement was imposed on broadcasters initially via the Radio Act of 1927, Pub. L. No. 69-632, ch. 169, sec. 11, 44 Stat. 1162, and maintained in the Communications Act of 1934, ch. 652, 48 Stat. 1064 (codified as amended at scattered sections of 47 U.S.C.), which remains, in addition to several amendments, the governing framework for the regulation of telecommunications.

6. Victoria F. Phillips, *On Media Consolidation, the Public Interest, and Angels Earning Wings*, 53 AM. U. L. REV. 613, 618 (2004).

7. *See, e.g., id.* at 628.

8. *See* Catherine J.K. Sandoval, *Antitrust Language Barriers: First Amendment Constraints on Defining an Antitrust Market By a Broadcast's Language, and Its Implications for Audiences, Competition, and Democracy*, 60 FED. COMM. L.J. 407, 415 (2008).

struggled to adapt to today's rapidly evolving technological landscape.⁹ With broadcast, cable, and satellite television; the Internet; satellite and Internet radio; MP3 players; and the like, the media outlet cup runneth over, providing many different choices for listeners to retrieve the programming content they desire. Despite these doomsday predictions of radio's relevance or deliberative future given corporate control of the medium and the content provided on it, there is reason for pause. Radio's history provides evidence of a rich account of resistance from the bottom up, with once-marginalized groups finding voice and expression on the nation's radio airwaves, even *within* the commercialized setting of terrestrial radio.

In spite of claims of radio's extinction and irrelevance, such history makes radio's current relevance all the more evident. History reveals that now is not the first time radio or radio programming has been slave to corporate control. For example, during the network era, the commercial broadcast networks controlled most radio programming via their affiliate agreements, which bound local affiliate stations to play content provided to them by the corporate networks.¹⁰ Such content was provided remotely and from the top down, with little reflection of local interest or norms. Still again, during the format era which followed the network era and facilitated the rise and development of the Top 40 music format, music playlists were (and still are) selected based primarily on aggregated national surveys, which became further and further removed from the listening preferences of local community members.¹¹

For deliberative purpose, it is important to note that the format era followed what some have referred to as the first "death" of radio¹² due in part to the emergence of television;¹³ others, however, including cultural studies scholars, consider it to be more like a transition period in radio between the network and format eras.¹⁴ This transition period opened up

9. See MARC FISHER, *SOMETHING IN THE AIR: RADIO, ROCK, AND THE REVOLUTION THAT SHAPED A GENERATION* 306–09 (2007).

10. See DOUGLAS, *supra* note 1, at 63. Similarly, broadcast television would face the same challenges due to increasing commercial network control. Cecilia Rothenberger, *The UHF Discount: Shortchanging the Public Interest*, Note, 53 AM. U. L. REV. 689, 721 (2004) (discussing commercial networks' control and consolidation of broadcast television); see also Akilah N. Folami, *Freeing the Press from Editorial Discretion and Hegemony in Bona Fide News: Why the Revolution Must Be Televised*, 33 COLUM. J.L. & ARTS, (forthcoming Spring 2011).

11. Robert J. Delchin, *Musical Copyright Law: Past, Present and Future of Online Music Distribution*, 22 CARDOZO ARTS & ENT. L.J. 343, 361 (2004).

12. Derek W. Vaillant, *Sounds of Whiteness: Local Radio, Racial Formation, and Public Culture in Chicago, 1921-1935*, 54 AM. Q. 25, 50–52 (2002) (discussing the first death of local voices and the turning over of radio to commercial corporate interests).

13. See *infra* Part II.B.

14. See *id.*

access in the mid-1940s to the early 1950s to the nation's radio airwaves to White¹⁵ American youth and Black American musicians and, as a result, gave birth to voices of resistance on the nation's radio airwaves to mainstream American ideologies. These voices were from the marginalized segments of America's population. They challenged the dominant ideological norms and values that permeated mainstream society and that were reflected in the content provided from the top down by the then-existing, corporate-controlled radio network affiliate outlets and the new and emerging media outlet at the time—television.¹⁶

This Article zeroes in on this history to show the unique and influential role radio has played in fostering communication in what some public sphere and deliberative democracy theorists call counterpublics,¹⁷ which Habermas has historically dismissed as less effective than his idealized formal political public sphere in mounting challenge to authority to effectuate meaningful change.¹⁸ This Article contends that these publics, found most often in the everyday lives, conversations, and interactions of ordinary people can, despite their disorganization, still challenge the hegemonic authority of the majority. For example, by playing on radio the musical tastes of the formerly unacknowledged youth of mainstream American society, the disc jockey,¹⁹ through his guest appearances at high schools, teen “call-in” shows, and announcements regarding local events, tapped into and came to represent this segment of the local community. He gave voice to their concerns and interests that were otherwise rendered invisible by mainstream media outlets, and that were, at times, at odds with

15. The word “White” (as well as the word “Black”) is capitalized in this Article when it is used to refer to a racial group because it refers to a “specific cultural group and, as such, require[s] denotation as a proper noun.” Kimberlé Williams Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331, 1332 n.2 (1988).

16. See *infra* Part III.B.

17. See Houston A. Baker, Jr., *Critical Memory and the Black Public Sphere* (1994), in THE BLACK PUBLIC SPHERE: A PUBLIC CULTURE BOOK 5 (The Black Public Sphere Collective eds., Univ. of Chi. Press 1995); Mary P. Ryan, *Gender and Public Access: Women's Politics in Nineteenth-Century America*, in HABERMAS AND THE PUBLIC SPHERE 259, 284 (Craig Calhoun ed., MIT Press 1992).

18. Public sphere theorist, Michael Gardiner, contends that while counterpublics may fall far short of organizing formally into the overtly political reasoning and consensus building political publics endorsed, they nevertheless are “as much sites of impassioned and embodied contestation as arenas of impartial, reasoned debate, . . . and . . . ‘consensus and sharing may not always be the goal, but the recognition and appreciation of differences, in the context of confrontation with power.’” Michael E. Gardiner, *Wild Publics and Grotesque Symposiums: Habermas and Bakhtin on Dialogue, Everyday Life and the Public Sphere*, in AFTER HABERMAS: NEW PERSPECTIVES ON THE PUBLIC SPHERE 28, 44 (2004) (citations omitted).

19. References to “disc jockey,” “DJ,” and “deejay” throughout this Article refer to White radio disc jockeys, unless otherwise specified.

the larger dominant ideals.

More specifically, in the mid-1940s to early 1950s, the playing of rock and roll—infused with the “rhythm and blues” sentiments of Black America through its Black musicians—on the nation’s segregated airwaves in a racially segregated America, and its consumption by mainstream America’s youth, signaled a challenge to the dominant and legally sanctioned ideology strictly prohibiting intermingling between the races, especially on such a socially and culturally pervasive medium as radio. Radio became the stage upon which the contest over social identity and meaning was fought, and it altered, via its heavy influence on popular culture, the way American youth (both Black and White) physically interacted both on and off the dance floor in a racially integrative way that was diametrically opposed to the segregated norms established and endorsed by mainstream America.

By exploring this history as support for the proposal to include music into the calls to reinvigorate localism and resuscitate democratic deliberation (even if subverted) on radio, this Article poses a challenge to deliberative democracy theorists who suggest that challenges to ruling norms can only come via the overtly political public sphere and reasoned debate.²⁰ Moreover, this Article also calls into question the distinctions made between high and low culture among cultural studies scholars²¹ and between high and low value speech among First Amendment scholars,²² where high value, overtly political speech is deemed worthier of greater First Amendment protections than nonovert political speech that is often inclusive of everyday popular cultural expression.

Finally, this Article ultimately encourages media scholars to include in their calls to reform radio not only local news and information, but also local music and popular cultural expression to reverse the tide of the homogenized, corporately produced content that currently stifles the potentiality of subversion. The early rock-and-roll era DJ—who once played bottom-up music and who was, as a result, instrumental in facilitating the contestation over identity meaning and making—has become more distanced from his local listening audience and its preferences due to syndicated programming, corporatized payola, and the new-market based, public interest interpretive standard promoting consumption. He now provides a more top-down, corporate-driven music

20. *See infra* Part III.B.

21. *Id.*

22. *See* Adam Candeb, *Media Ownership Regulation, the First Amendment, and Democracy’s Future*, 41 U.C. DAVIS L. REV. 1547, 1586–87 (distinguishing Meiklejohn and Holmesian notions of First Amendment protections, noting the former’s elevation of political news and civic information as worthy of the highest level of protection over “unregulated talkativeness”).

programming platform that is increasingly sensationalized and homogenously geared toward promoting consumption, rather than discursive exchange. Moreover, despite today's current media-rich environment, radio remains relevant, not only because it continues as a mass disperser of music that can and does shape cultural norms,²³ but also because it is still a relatively inexpensive medium through which one can obtain and share information. Comparatively, the content from other media sources comes at a premium that a portion of America's population—already marginalized by socioeconomic limitations and America's widening digital divide²⁴—may be unable to afford.

Part II of this Article briefly explores the history of radio and its regulation, as well as the original deliberative ideals accompanying its mass emergence and the underlying localism concept. Part III of this Article considers radio through a cultural-studies and deliberative-discourse theory framework and provides, as an example of radio's past as a "subaltern counterpublic,"²⁵ the emergence of rock and roll and the creation of the disc jockey persona in popular culture. Finally, Part IV advocates for a broader conceptualization of localism, one that includes music as an "arbiter of *cultural recognition*"²⁶ and of constructions of identity which like the formal public sphere, can also, although in different ways, serve as a significant tool in furthering deliberative democracy. In addition, this Article argues that constructions of localism should also aim to be more inclusive of the interests of those on the bottom rung of America's socioeconomic ladder, whose financial position may preclude them from

23. For example, this Author has explored the manner in which the passage of the Telecommunications Act of 1996 contributed to the creation of the gangsta rapper through the continuous radio airplay of gangsta rap to the exclusion of a diversified representation of rap music that might include lyrical content with more social commentary and varied Black cultural expressivity. Akilah N. Folami, *From Habermas to "Get Rich or Die Tryin": Hip Hop, the Telecommunications Act of 1996 and the Black Public Sphere*, 12 MICH. J. RACE & L. 235 (2007).

24. See generally Ronald J. Krotoszynski, Jr. & A. Richard M. Blaiklock, *Enhancing the Spectrum: Media Power, Democracy, and the Marketplace of Ideas*, 2000 U. ILL. L. REV. 813 (2000).

25. Nancy Fraser, *Politics, Culture, and the Public Sphere: Toward a Postmodern Conception*, in SOCIAL POSTMODERNISM: BEYOND IDENTITY POLITICS 287, 291 (Linda Nicholson & Steven Seidman eds., Cambridge Univ. Press 1995) (defining subaltern counterpublics as "parallel discursive arenas where members of subordinated social groups invent and circulate counterdiscourses. Subaltern counterpublics permit them to formulate oppositional interpretations of their identities, interests, and needs").

26. Henrik Örnebring & Anna Maria Jönsson, *Tabloid Journalism and the Public Sphere: A Historical Perspective on Tabloid Journalism*, 5 JOURNALISM STUDIES 283, 285 (2004) (distinguishing Habermas's construction of the public sphere as the site of political power from Fraser's construction of the public sphere as the space for asserting equality in cultural and identity recognition, but acknowledging the power of both to serve as participatory tools of democracy).

taking advantage of today's rich media landscape.

II. RADIO HISTORY AND FOUNDATIONAL REGULATORY PRINCIPLES

A. *From Safety to Scarcity*

Several years after the introduction of the telegraph in 1840, radio had its debut in America, when Guglielmo Marconi introduced wireless telegraphy by using radio waves to transmit Morse code.²⁷ The federal government was not originally interested in it or in regulating its use, beyond promoting safety on ships and more efficient transmission of information by segments of the government.²⁸ Although the government's interest in the medium was slow and radio's broad-based mass appeal did not develop for several decades following its debut, a segment of America's population—the amateur operators—found this new technology enticing almost immediately, and in the process of its exploratory use, it drew the ire of the government.²⁹ Within a decade of radio's debut, many amateur stations popped up all over the country, causing interference with government and business use of radio and crowding out naval and business transmissions.³⁰ Some operators even engaged in practical jokes, posing as Navy personnel sending out false orders to naval ships and leading them on wild goose chases.³¹ With the *Titanic* disaster in 1912 and the loss of so many lives with its sinking, the public and the government, outraged over the ceaseless interference and chatter on the airwaves that occurred during the ordeal, and especially in its aftermath, directed their anger at the amateur operators.³² Just four months after the *Titanic*'s sinking, the Radio

27. DOUGLAS, *supra* note 1, at 41.

28. Gregory M. Prindle, Note, *No Competition: How Radio Consolidation Has Diminished Diversity and Sacrificed Localism*, 14 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 279, 284 (2003). For example, in 1910, Congress passed a law requiring certain ocean-going vessels to be equipped with radio equipment in the event of an emergency. Wireless Ship Act, Pub. L. No. 61-262, 36 Stat. 629 (1910) (repealed 1934); *see also* ANN E. WEISS, TUNE IN, TUNE OUT: BROADCASTING REGULATION IN THE UNITED STATES 12 (1981) (discussing how the U.S. Navy was the first major military user of wireless because “[i]t did not take navy officers long to see how useful it would be to have ships linked to each other, and to shore, by wireless”).

29. DOUGLAS, *supra* note 1, at 59 (noting that amateur operators were “primarily [W]hite and middle-class, located predominantly in urban areas . . . and they built their own stations in their bedrooms, attics, or garages”).

30. *Id.* (“By 1910 the amateurs outnumbered everyone else—private wireless companies and the military—on the air.”).

31. Prindle, *supra* note 28, at 284.

32. *See* Michael Ortner, *Serving a Different Master—The Decline of Diversity and the Public Interest in American Radio in the Wake of the Telecommunications Act of 1996*, 22 HAMLIN J. PUB. L. & POL’Y 139, 141 (2001).

Act of 1912 was passed.³³ It prohibited radio broadcasting without a license and gave the Secretary of Commerce the power to determine who had the right to broadcast on specific wavelengths and at what times.³⁴

Despite the passage of the Act and despite increased restrictions placed on broadcasters due to the onset of World War I, radio stations grew exponentially, both among the licensed broadcasters and the outlaws—unlicensed amateur operators.³⁵ By 1923, there were several hundred stations broadcasting across America, and within a year, radio and radio sets acquired broad-based mass appeal with Americans.³⁶ Indeed, one magazine of the time declared, “[n]ever in the history of electricity has an invention so gripped the popular fancy,”³⁷ while another proclaimed that radio’s “rapid growth has no parallel in industrial history.”³⁸ With several stations beginning to broadcast voice, live music, and scheduled programming,³⁹ the radio listening craze that gripped Americans and “swept through America in the 1920s and ’30s . . . disrupted the cognitive and cultural practices of a visual culture and a literate culture in a way that neither the telephone nor the phonograph did.”⁴⁰ And, as recent studies have shown, radio’s uniqueness then (and arguably continued uniqueness today) was due to “[t]he deeply personal nature of radio communication—the way its sole reliance on sound produces individualized images and reactions; its extension of a precommercial, oral tradition; its cultivation of the imagination”⁴¹ Local broadcast radio stations, insulated within White ethnic communities, capitalized on the uniquely intimate nature of radio “to empower many community groups and to strengthen ethnic institutions in a display of broadcast Americanism”⁴²

Growing public demand for radio and overlapping and interfering

33. Radio Act of 1912, Pub. L. No. 62-264, 37 Stat. 302 (repealed 1927).

34. See Mike Harrington, Note, *A-B-C, See You Real Soon: Broadcast Media Mergers and Ensuring a “Diversity of Voices,”* 38 B.C. L. REV. 497, 504 (1997).

35. See *id.* By 1920, there were “fifteen times as many amateur stations in America as there were other types of stations combined.” DOUGLAS, *supra* note 1, at 60.

36. Prindle, *supra* note 28, at 285.

37. DOUGLAS, *supra* note 1, at 61 (internal quotations omitted).

38. *Id.* (internal quotations omitted).

39. Eric Rothenbuhler & Tom McCourt, *Radio Redefines Itself, 1947-1962*, in RADIO READER: ESSAYS IN THE CULTURAL HISTORY OF RADIO 367, 369 (Michele Hilmes & Jason Liviglio eds., Routledge 2002) (noting that “[t]he commercial radio system also melded advertisements, music, drama, and news together into a flow of programming unprecedented in scope”).

40. DOUGLAS, *supra* note 1, at 29.

41. *Id.* at 17.

42. Vaillant, *supra* note 12, at 26; see also *id.* at 29 (noting how, as radio’s appeal spread, local and community-based radio was used to celebrate and strengthen local, ethnic, religious and class-based communities).

radio station operators led to utter chaos on the nation's radio airwaves,⁴³ which eventually prompted Herbert Hoover, then-Secretary of Commerce, to reallocate radio frequencies to facilitate a more efficient operation of the radio industry.⁴⁴ Opponents of Secretary Hoover's allocation plan argued that he acted outside of the scope of the authority granted his office under the Radio Act.⁴⁵ Others maintained that his plan more heavily favored large commercial stations.⁴⁶ In a federal case challenging Secretary Hoover's authority and reallocation plan, the court interpreted the Radio Act of 1912 narrowly as only giving the Secretary of Commerce ministerial authority and no power to allocate radio frequencies, to refuse to grant licenses, or to otherwise regulate broadcasting.⁴⁷

The day after the court's decision, pandemonium broke out, with over 700 stations boosting their frequencies, jumping frequencies, broadcasting at whatever time they wanted, and battling over the significantly smaller number of available channels.⁴⁸ In the midst of the pandemonium, radio stations continued to expand, both among the outlaw, amateur stations and the emerging network stations. National Broadcasting Company (NBC) emerged in 1926, and Columbia Broadcasting System (CBS) in 1927.⁴⁹ With continued calls for regulation now from all sides, Congress enacted the Radio Act of 1927, which divested the Secretary of Commerce of the ability to grant radio licenses and gave such power to a newly formed five-member Federal Radio Commission (FRC).⁵⁰ It also explicitly granted the FRC the authority to do what Secretary Hoover had attempted to do, which was to assign and distribute frequencies and to regulate broadcasting hours, time sharing, and overall use of the airwaves.⁵¹ Moreover, the FRC

43. See Kristine Martens, Note, *Restoring Localism to Broadcast Communications*, 14 DEPAUL-LCA J. ART & ENT. L. & POL'Y 285, 293 (2004).

44. Prindle, *supra* note 28, at 285-86.

45. *Id.* at 287.

46. See DOUGLAS, *supra* note 1, at 63; see also Prindle, *supra* note 28, at 286 ("Hoover divided the frequencies into three classes and assigned them to particular stations. The third class of frequencies included stations that served small local areas, were on the same spot on the dial, and had to share time. The second class included stations that were a little larger and had to share time and frequencies as necessary. The first class of frequencies carried little interference, broadcast over wide areas, and had almost no time-sharing. This most powerful class of radio stations was called 'clear channels.'").

47. *United States v. Zenith Radio Corp.*, 12 F.2d 614 (N.D. Ill. 1926).

48. DOUGLAS, *supra* note 1, at 63.

49. *Rothenbuhler & McCourt*, *supra* note 39, at 367, 369. These large radio broadcast stations were referred to as networks because they sought to link local radio stations to their enterprises by telephone lines in an effort to synchronize the broadcasting of shows and content. FISHER, *supra* note 9, at xv.

50. Radio Act of 1927, Pub. L. No. 69-632, 44 Stat. 1162 (1927) (repealed 1934).

51. See Cindy Rainbow, Comment, *Radio Deregulation and the Public Interest*: Office of Communication of the United Church of Christ v. FCC, 4 CARDOZO ARTS & ENT. L.J. 169, 172 (1985) (citing the Radio Act of 1927 sec. 4(a)).

regulatory power under the 1927 Act was now based, less on facilitating government or business use of radio as in the very early days of its development, but more on “the idea that the broadcast spectrum is a scarce resource. Government intervention was required in order to ensure efficient use of a finite number of frequencies.”⁵²

B. The Public Interest Standard, Localism, and the Market Beyond

Due in part to the scarcity rationale for regulating radio airwaves, the 1927 Act required the FRC to allocate licenses with the goal of serving the “public interest, convenience, or necessity” of the people in the local broadcast market,⁵³ and not “the interest, convenience, or necessity of the individual broadcaster.”⁵⁴ While the 1927 Act did not specifically define the public interest, convenience, and necessity standard, the FRC, early on, and pursuant to such mandate, endorsed laws and policies that were sanctioned by the courts and Congress, and that strongly encouraged a decentralized broadcast industry accessible to, and reflective of, the interests of the local listening audience.⁵⁵

For example, as evidenced by the distributional authority assigned to the FRC by the 1927 Act, Congress did not cede control over broadcast to a national- or state-funded entity or to a private entity, despite the utter turmoil that had systemically plagued the radio industry in the previous decades, and despite the rapidly growing entrepreneurial and corporate interests in radio’s development.⁵⁶ Pursuant to such mandate, the FRC, in structuring the overall American broadcast system, rejected the approach eventually adopted by some European countries where large frequencies were allotted to one station to reach the entire country.⁵⁷ Instead, and

52. Martens, *supra* note 43, at 291–92 (internal citations omitted).

53. Prindle, *supra* note 28, at 288 (quoting the Radio Act of 1927 sec. 4).

54. Martens, *supra* note 43, at 293 (internal quotation marks omitted).

55. Vaillant, *supra* note 12, at 51–53. While the laws and policies implemented to facilitate broadcaster public interest obligations have varied over time, they have centered on either a regulatory or deregulatory approach. The paramount goals, however, underlying the public interest obligation of promoting localism, competition, and diversity, have not changed. These goals have often been conflated, and used interchangeably by the FRC and later the FCC as the stated basis of a regulatory or deregulatory effort. Rainbow, *supra* note 51, at 173–75. To the extent the goals can be teased apart, an analysis of FCC diversity regulations, aimed at promoting minority ownership, minority hiring, etc., is beyond the scope of this Article. This Article focuses specifically on localism (as a means of promoting diversity and competition) and briefly highlights the various programs enacted pursuant to this goal. It calls for the reinstatement of some of those programs that the Author believes would necessarily increase diversity among various ethnic and minority groups and competition in the industry.

56. See, e.g., Cowling, *supra* note 3, at 286.

57. See *id.* at 286–87. Consistent with the regulatory public interest goals contained within the 1927 Act, the FRC, in implementing the Act, specifically rejected a “nationally

similar to Hoover's reallocation plan years before, the FRC divided the United States into five listening zones.⁵⁸ Each zone granted eight clear stations with maximum broadcast wattage and better slots on the AM dial, due to their more expensive and sophisticated equipment.⁵⁹ Not all listeners were happy with the practical effect of the reallocation, which led to a decrease in noncommercial and local stations.⁶⁰

Stated congressional and FRC localism goals were undermined even more with the growth of the networks, which were expanding their control over the nation's radio airwaves by linking local stations to their centralized headquarters.⁶¹ As a result, "national cosmopolitanism [began] to eclipse FCC-favored local particularism"⁶² With decreased distribution costs, streamlined operations, and uniform scheduling, the affiliates began to attract a significant number of local independent commercial and even noncommercial stations that, in turn, became network affiliates, despite the overarching localism goals of the 1927 Act.⁶³ By 1930, the networks had a "near-absolute monarchy of the air"⁶⁴ because they controlled nearly all of the high-powered stations across the country, accounting for more than eighty-five percent of the nation's transmitting power.⁶⁵ While historians agree that the networks played a key role in

oriented, centralized source of supply that had clear-channel stations Instead, the FRC allocated spectrum to only 40 clear-channel stations, which freed up spectrum for more local stations." *Id.* at 287. As referenced in the 2003 FCC report, the FRC, after setting up the initial broadcasting structure, informed Congress that it was able to allocate frequencies in a way that "would serve as many communities as possible to ensure those communities had at least one station that would serve as a basis for the development of good broadcasting to all sections of the country." 2003 *Report and Order*, *supra* note 3, at para. 74 (quoting SECOND ANNUAL REPORT OF THE FEDERAL RADIO COMMISSION TO THE CONGRESS OF THE UNITED STATES FOR THE YEAR ENDED JUNE 30, at 8–9 (1928)).

58. DOUGLAS, *supra* note 1, at 39.

59. *Id.*

60. *See id.* at 63.

61. Cowling, *supra* note 3, at 288.

62. *Id.*

63. Rothenbuhler & McCourt, *supra* note 39, at 367, 369. Indeed, "only 7% of radio stations in the United States were commercial operations in 1925. This number rose to 11% in 1926 and 59% in 1930, representing a thousandfold increase (from 21 to 223)." *Id.* In addition, seven years after the passage of the Radio Act of 1927, a fourth national network, the Mutual Broadcasting Systems (MBS), was created and joined the ranks of CBS's network and NBC's two networks (the Red and Blue). *See* PAUL STARR, THE CREATION OF THE MEDIA: POLITICAL ORIGINS OF MODERN COMMUNICATIONS 367 (2004). The FCC's Chain Broadcasting rules forced NBC to sell its blue network. *See* Kofi Asiedu Ofori & Mark Lloyd, *The Value of the Tax Certificate*, 51 FED. COMM. L.J. 693, 695–96 (1999). Nevertheless, MBS grew to include a significant number of low-power station affiliates that were "lagging far behind the [network affiliates] in total wattage and audience share." STARR, *supra* note 63, at 367.

64. *See* Bruce Lenthall, *Critical Reception: Public Intellectuals Decry Depression-Era Radio, Mass Culture, and Modern America*, in RADIO READER, *supra* note 39, at 41, 53.

65. Cowling, *supra* note 3, at 288 (quoting STARR, *supra* note 66, at 367–68).

developing a national culture in the 1930s and 1940s, it came at the expense of local content, in that “[l]ocal programming would be eclipsed . . . by shows produced in New York City,”⁶⁶ which was not necessarily where all listeners, who yearned for more regional identity and local community pride, wanted to be transported.⁶⁷ Indeed,

Network programming originating from New York City dominated local station schedules; this programming, financed by national advertisers, featured dramas, quiz shows, adventure series, and comedies, interspersed with news and informational programs. Music (almost exclusively live, rather than recorded) was secondary, largely a means of filling time during evenings, on weekends, and between programs. The industry’s cultural and aesthetic standards were nationalist and middlebrow, reflected in the genteel reserve of its announcers.⁶⁸

The major intent behind the Communications Act of 1934⁶⁹ was to unify regulation of all electronic communications (i.e., radio, television, and telephone) within a single independent agency, namely, the seven-member FCC, which replaced the FRC.⁷⁰ However, some media scholars have argued forcefully that the developing commercial hegemony over the airwaves—initiated with the original spectrum allocations dating back to Secretary Hoover and the Radio Act of 1927—was institutionalized for certain with the passage of the 1934 Act.⁷¹ While the Communications Act of 1934 retained the 1927 Act’s requirement that regulation of broadcast be in the public’s interest, convenience, and necessity, some have asserted that by not directly addressing the networks’ consolidation and control over content, Congress undermined the public interest standard and its own purported goal of ensuring a decentralized, unconsolidated media

66. DOUGLAS, *supra* note 1, at 63.

67. *Id.* at 79 (“One listener warned in 1930 that ‘unless we watch our step, the chain stations will be the Czars of the Air.’ Added another, ‘The chains . . . have nearly complete control of the air. We feel sorry for the future of Radio if this chain business gets any worse.’”).

68. Rothenbuhler & McCourt, *supra* note 39, at 367, 367. Prior to the passage of the 1934 Act, local and independent nonaffiliate broadcasters continuously attempted to save their local stations from further network control and encroachment by rallying listener support over the airwaves and organizing letter writing campaigns to the FRC. The hope was to show to the FRC the value of such stations in “producing an electronic public culture of pluralism in which ethnic, local, and ‘American’ themes coexisted. Network representatives [however] dismissed this ideal-type and argued for a market-driven model in which heavily capitalized, centralized producers should supply a national market with programs created for mass appeal.” Vaillant, *supra* note 12, at 28.

69. Communications Act of 1934, ch. 652, 48 Stat. 1064 (codified as amended at scattered sections 47 U.S.C.).

70. *Id.* at §§ 4, 303.

71. See, e.g., Judith E. Smith, *Radio’s “Cultural Front,” 1938-1948*, in RADIO READER, *supra* note 39, at 209, 213.

industry.⁷² In fact,

By 1935, when the regulatory dust had settled, 20 percent of previously operating stations across the country were off of the air, and commercial networks dominated the airwaves. The independent era model of many producers constituting the “American” sound of broadcasting had been replaced by a commercial network determination of that sound and the parties able to constitute it.⁷³

Many radio stations continued to become affiliates of the networks and to enter into network agreements that restricted the affiliates from airing programming content of the other networks, and the networks from selling content to nonaffiliate stations.⁷⁴

The FCC attempted to regulate network control indirectly and to breathe force into its localism ideals with its *Report on Chain Broadcasting (Chain Broadcasting Order)*,⁷⁵ issued in 1941, and its *Report on Public Service Responsibility of Broadcast Licensees* (also commonly known as the “Blue Book”), issued in 1946.⁷⁶ Since the FCC’s jurisdiction under the Communications Act of 1934 was limited to the licensee and not the networks, the FCC sought, through the *Chain Broadcasting Order*, to increase competition among the networks.⁷⁷ The FCC also sought to give local stations some independence by denying the networks the complete dominion over radio they enjoyed.⁷⁸ Generally, the *Chain Broadcasting Order* attempted to contain the network control over the content aired on radio by increasing a network affiliate’s ability to air programming of another network and by limiting the network’s ability to preempt prime time programming.⁷⁹ The *Order* also limited the vertical integration of networks with local stations by preventing such networks from owning more than one station in a particular market or from owning stations in areas with so few local stations that competition could potentially be stifled.⁸⁰

72. See, e.g., Anthony E. Varona, *Out of Thin Air: Using First Amendment Public Forum Analysis to Redeem American Broadcasting Regulation*, 39 U. MICH. J.L. REFORM 149, 149 (2006).

73. Vaillant, *supra* note 12, at 28.

74. See Rainbow, *supra* note 51, at 175–76.

75. Order Instituting Chain Brdcast. Investigation, *Order No. 37*, 3 Fed. Reg. 637 1938 (Mar. 25, 1938), in FCC, REPORT ON CHAIN BROADCASTING 95 (1941) [hereinafter CHAIN BROADCASTING ORDER]; see also Investigation of Chain Brdcast., *Order*, 6 Fed. Reg. 2282 (May 2, 1941), in CHAIN BROADCASTING ORDER, *supra* note 75, at 91.

76. FCC, PUBLIC SERVICE RESPONSIBILITY OF BROADCAST LICENSEES (Arno Press 1974) (1946) [hereinafter BLUE BOOK].

77. Cowling, *supra* note 3, at 289–90.

78. *Id.* at 289.

79. CHARLES H. TILLINGHAST, AMERICAN BROADCAST REGULATION AND THE FIRST AMENDMENT: ANOTHER LOOK 61 (2000).

80. CHAIN BROADCASTING ORDER, *supra* note 75, at 68–69 (1941); see also Christopher

Although the networks, namely NBC, challenged the *Chain Broadcasting Order* as beyond the scope of FCC authority, the Supreme Court affirmed the policies of the FCC, which encouraged localism.⁸¹ The FCC followed up with the Blue Book to provide guidance to broadcasters in selecting programming content that would meet FCC expectations.⁸² Specifically, the Blue Book endorsed the broadcasting of content that reflected the interests of the local listening community of the broadcaster.⁸³ In addition, the FCC continued the FRC's goal of limiting national and centralized media ownership in broadcast to prevent undue consolidation.⁸⁴ In the late 1940s and early 1950s, the FCC adopted rules limiting the number of broadcast stations any station owner could own.⁸⁵ During this same period, the FCC adopted the Main Studio rule, which related to local program origination and a local community's geographic accessibility to the station broadcasting within its community.⁸⁶ For nearly four decades following these localism rules, and up until the first wave of deregulation in the 1980s, the FCC continued to implement laws and policies encouraging localism, which included requiring broadcasters to keep detailed radio programming logs for inspection by local community members and to interview local community leaders and activists to determine the everyday

S. Yoo, *Vertical Integration and Media Regulation in the New Economy*, 19 YALE J. ON REG. 171, 184 (2002).

81. See generally *Nat'l Brdcast. Co. v. Columbia Brdcast. Sys.*, 319 U.S. 190 (1943). Although the Communications Act of 1934 did not specifically define the public interest standard, the Supreme Court determined (1) that the FCC had the power to enact regulations that would have a direct effect on program content, *id.* at 226–27; (2) that the principles of competition and localism, in particular, fell within the scope of the public interest, *id.* at 223–24, 200–01; (3) that the network affiliate agreements often led to the provision of program content that was not in the public's interest, *id.* at 198–99; and (4) therefore, that, the FCC acted within its authority when it decided not to grant licenses to applicants who were parties to these agreements, *id.* at 224.

82. Martens, *supra* note 43, at 294.

83. *Id.* at 295.

84. See *id.*

85. Martens, *supra* note 43, at 307 (citing Amendment of Sections 3.35, 3.240, and 3.636 of the Rules and Regs. Relating to Multiple Ownership of AM, FM and TV Brdcast. Stations, *Report and Order*, 18 F.C.C. 288 (1953)) (“In 1946, the FCC set a defacto limit of seven stations when it denied CBS’ application for an eighth station. This rule was later formally adopted by the FCC as the ‘Seven Station Rule’ or the ‘Rule of Seven’ in which a common owner could have ownership interest in seven FM, seven AM and seven TV stations The Rule of Seven remained intact without modification for nearly thirty years.”). The FCC also adopted audience caps with the goal of limiting the control a national broadcaster had on residents in a particular community. See Amendment of Section 73.3555 of the Comm’n’s Rules Relating to Multiple Ownership of AM, FM, and TV Brdcast. Stations, *Memorandum, Opinion, and Order*, 100 F.C.C.2d 74, 76 (1985); see also Amendment of Sections 3.35, 3.240 and 3.636 of the Rules and Regs. Relating to Multiple Ownership of AM, FM and TV Brdcast. Stations, *Report and Order*, 18 F.C.C. 288, 294–295 (1953) (implementing ownership limits of AM stations).

86. Martens, *supra* note 43, at 299.

interests of the local community it served.⁸⁷

With regard to localism rules and policies adopted up until the 1950s, critics have contended that many of these laws, while arguably well intentioned, “either had little effect on the industry, or reinforced the power of the major broadcast players and the services they provided.”⁸⁸ To them, these localism rules served as a smoke screen for “the actual practices and consequences of a commercially organized, national system of network broadcasting.”⁸⁹ Indeed, four years after the adoption of the *Chain Broadcasting Order*, network affiliations rose to ninety-five percent.⁹⁰ Moreover, critics of that period who despised the mounting capitalist and commercial nature of radio contended that the “commercial nature of radio forced broadcasters to appeal to broad audiences. . . . [R]adio transformed diverse groups of humanity into a collective audience that denied the distinctive and had no use for creative or intellectual advance.”⁹¹

Radio was believed to have become “a vehicle, perhaps the leading vehicle, of mass culture,”⁹² that

at best, neglected those individuals and groups who did not conform to a bland, standardized, and artificial common taste. At worst, mass culture eroded the foundations of democracy [and] conceived of people not as individuals or thinkers . . . but only as undifferentiated consumers.⁹³

Moreover, to the anticapitalist media critic at that time, “programming and popularity [of content] were easily manipulated by those who paid for the air time”⁹⁴ In the end, the critics claimed, local and network broadcasters alike abdicated their public trustee programming responsibilities to commercial sponsors given the price tag advertisers were willing to pay for air time on radio.⁹⁵ For such critics, the possibility of radio and radio content enhancing democracy, and what they deemed high

87. *See id.* at 30205.

88. ROBERT BRITT HORWITZ, *THE IRONY OF REGULATORY REFORM: THE DEREGULATION OF AMERICAN TELECOMMUNICATIONS* 194 (1989). An in-depth analysis of the programming log and ascertainment rule requirements are beyond the scope of this Article as these laws were implemented after the period, namely the mid-1940s to early 1950s, that is the subject of this Article.

89. *Id.*

90. STARR, *supra* note 63, at 381.

91. Lenthall, *supra* note 64, at 41, 44.

92. *Id.*

93. *Id.* at 47 (citing William Orton, *The Level of Thirteen-Year-Olds*, *ATLANTIC MONTHLY*, Jan. 1931, at 1,7).

94. *Id.* at 54.

95. *See* Jennifer Hyland Wang, *The Case of the Radio-Active Housewife*, in *RADIO READER*, *supra* note 39, at 343, 346 (noting that “in 1943 over 97% of radio programming was controlled by advertisers and over 60% of network billings for NBC and CBS came from just ten advertising agencies”) (citations omitted).

cultural values, had long gone.⁹⁶

III. COUNTERPUBLICS, CULTURAL STUDIES, AND RADIO'S SUBVERSIVE PAST

A. *Habermas's Theorized Public Sphere and the Efficacy of Counterpublics on Deliberative Democracy*

For Habermas, mass media (including radio) helped lead to the disintegration of his theorized formal public sphere, and to the creation of the mass audience and the manipulated and manufactured consent of such audience by mass media.⁹⁷ Habermas's vision of the "formal" public sphere was introduced in his seminal book, *The Structural Transformation of the Public Sphere*,⁹⁸ where he examined the rise and decline of a specific form of the public sphere—the liberal model of the bourgeois public sphere—that developed in Britain, France, and Germany in the eighteenth and early nineteenth centuries. For Habermas, the bourgeois public sphere was a domain where private individuals sought out information for the purpose of self-education and of cultivating a collective public voice that could hold the ruling feudal authority accountable on issues important to this newly formed public.⁹⁹ The formal public sphere was not premised on a specific physical space per se, but was envisioned more as a "domain of social life in which such a thing as public opinion could be formed."¹⁰⁰ The public sphere represented a considerable shift in power and was "defined as a forum in which people without official power 'readied themselves to compel public authority to legitimate itself before public opinion'—a public opinion whose authority depended on its mode of open

96. *See id.* at 345–46.

97. Lisa McLaughlin, *Feminism and the Political Economy of Transnational Public Space*, in AFTER HABERMAS, *supra* note 18, at 156, 158.

98. *See generally* JÜRGEN HABERMAS, THE STRUCTURAL TRANSFORMATION OF THE PUBLIC SPHERE: AN INQUIRY INTO A CATEGORY OF BOURGEOIS SOCIETY (Thomas Burger & Frederick Lawrence, trans., 1991). References to the formal or political public sphere are to the overtly political and organizationally structured public sphere discussed in detail in this Section, and do not refer, unless otherwise noted, to the less overtly political and informal spheres that Habermas considers to be ineffectual in directly contesting ruling authority and normative understandings.

99. *See* Ken Hirschkop, *Justice and Drama: On Bakhtin as a Complement to Habermas*, in AFTER HABERMAS, *supra* note 18, at 49, 49–50. *See generally* THE STRUCTURAL TRANSFORMATION, *supra* note 98.

100. Maria Simone & Jan Fernback, *Invisible Hands or Public Spheres? Theoretical Foundations for U.S. Broadcast Policy*, 11 COMM. L. & POL'Y 287, 291 (2006) (citing JÜRGEN HABERMAS, JÜRGEN HABERMAS ON SOCIETY AND POLITICS: A READER 231 (Steven Seidman ed., 1989)) (quotation marks omitted). "For a society founded on a principle of self-government, the development of public opinion is vital to its health. Said differently, self-government is only an illusion if the powerful are not held accountable to public opinion." *Id.*

argument.”¹⁰¹

As Habermas pointed out, the formal, bourgeois, public sphere did not spontaneously appear with organized and consciously articulated demands for reform and accountability, but was instead the result of a long, sociocultural transformation that reshaped the manner and place of social communications and topics of discussion.¹⁰² Conversations emerged in bourgeois coffeehouses, taverns, and literary clubs and evolved into voluntary associations and civic societies of enlightenment.¹⁰³ Within these social networks, alternative means of expressing and forming tastes, beyond that prescribed by the ruling authority, were created. They were to become “a future society’s norms of political equality.”¹⁰⁴ The formal public sphere was to operate separate and apart from the state and the market, where inequities abounded due to ethnic and socioeconomic differences.¹⁰⁵ In operating separately and independently from the market and state, it was housed in the “lifeworld”—which was situated in civil society—and was to be protected at all costs from being colonized by the systems world that housed both the market and the state—two mutually exclusive spheres in their own right.¹⁰⁶

Indeed, in this theoretically egalitarian space, all had access, with participants bracketing differences, social inequalities, and even private interests for the sake of the common good. The common good was to be determined by consensus of the participants, reached by reasoned, truthful, and enlightened debate, a process Habermas considered to be representative of the ideal speech scenario.¹⁰⁷ Through this process, participants, who started out with views based on their individual experiences and self-interest, experienced a “self-revelation”, whereby private needs are brought to consciousness and adjudicated through rational dialogue Ideal speech must bracket off potentially distorting material forces and inequities”¹⁰⁸ To Habermas’s dismay, private interests undermined those of the common good and cut short the maturation of the

101. Hirschkop, *supra* note 99, at 49, 50 (citing THE STRUCTURAL TRANSFORMATION, *supra* note 98, at 25).

102. See Jürgen Habermas, *Further Reflections on the Public Sphere* (Thomas Burger trans.), in HABERMAS AND THE PUBLIC SPHERE, *supra* note 17, at 421, 423.

103. *Id.*

104. *Id.* at 424.

105. See Nancy Fraser, *Rethinking the Public Sphere: A Contribution to the Critique of Actually Existing Democracy*, in HABERMAS AND THE PUBLIC SPHERE, *supra* note 17, at 109, 113.

106. See *id.* at 111; see also Gardiner, *supra* note 18, at 28, 35.

107. Gardiner, *supra* note 18, at 28, 29.

108. *Id.* at 35 (citing JÜRGEN HABERMAS, 2 THE THEORY OF COMMUNICATIVE ACTION 330 (Beacon Press 1987)).

formal public sphere and the independence of public opinion.¹⁰⁹ “[C]ritical scrutiny of the state gave way to . . . mass-mediated staged displays and the manufacture and manipulation of public opinion.”¹¹⁰

Like the radio critics and reformists of the 1930s and 1940s who opposed the increasing commercial nature of radio during that period, Habermas, a disciple of the Frankfurt School, viewed mass media (including radio) with disdain.¹¹¹ He, like other disciples of the Frankfurt School, regarded mass media as a highly suspect vehicle through which deliberative goals could be achieved.¹¹² Mass media was a tool used by private interests for dispersing information primarily for manipulation and coercion rather than for enlightenment and empowerment.¹¹³ It was perceived then as “part of the baggage of ruling class ideology, a sophisticated barrage of loaded imagery which seduced people into a life of mindless consumption and diverted them from an authentic confrontation”¹¹⁴ with life conditions as they were. As a result, “public communication, by this means at least, [became] moderated by the demands of big business and . . . led to a regressive ‘dumbing down’ of the level of public debate”¹¹⁵

B. *The Connection: Cultural Studies, Deliberative Democracy, Counterpublics, Radio, and Music*

While many scholars find Habermas’s public sphere theory appealing, some have, however, found his historical reading and use of the liberal bourgeois public sphere as the ideal model of his theorized public sphere to be problematic due to its inherently ideological contradictions.¹¹⁶ A more expansive reading of eighteenth-century European history reveals that the liberal bourgeois model was anything but accessible to all, and that participants certainly did not bracket social inequalities when cultivating

109. Fraser, *supra* note 105, at 109, 113.

110. *Id.*

111. See Michele Hilmes, *Rethinking Radio*, in RADIO READER, *supra* note 39, at 1, 7 (discussing the Frankfurt School’s position on mass media).

112. *Id.*

113. Folami, *supra* note 23, at 265 (“The market’s infiltration of communication led to the demise of the public sphere because information was no longer disseminated to foster critical communication and scrutiny but for manipulating and coercing public opinion for the benefit of private interests.”).

114. Anthony Chase, *Toward a Legal Theory of Popular Culture*, 1986 WIS. L. REV. 527, 540 (1986); see also John Michael Roberts & Nick Crossley, *Introduction* to AFTER HABERMAS, *supra* note 18, at 1, 6 (“As the mass media began to establish itself as a viable economic market, [Habermas] argues, it was both hijacked for the purpose of selling goods, via advertising, and became a considerable saleable commodity in its own right.”).

115. Roberts & Crossley, *supra* note 114, at 1, 6.

116. Fraser, *supra* note 105, at 109, 115.

public opinion through reasoned debate.¹¹⁷ Instead, women, people of color, and unpropertied men were excluded from Habermas's theoretically egalitarian public sphere, which ultimately represented the interests of White, propertied males only.¹¹⁸ Moreover, while the participants' goal may have been to resist the absolutist rule of their geographically distant feudal lords, it was also to establish and sustain their control of the lower classes—not through physical force but through hegemonic domination instead.¹¹⁹

By idealizing the bourgeois public sphere and its definition of civic participation via reasoned debate and the ideal speech scenario, Habermas did not acknowledge the truly repressive nature of his idealized bourgeois public sphere but instead exalted it as *the* public.¹²⁰ In doing so, he ignored the presence of other nonbourgeois public spheres and their means of political engagement and discourse.¹²¹ To the contrary, other scholars have argued that the public sphere in European history never did conform to the realm of sober and virtuous debate of the sort that Habermas claims to have identified, but instead was “witness to a tumultuous intermingling of diverse social groups and widely divergent styles and idioms of language, ranging from the serious to the ironic and the playful.”¹²² In the real public sphere, “existing social hierarchies were often questioned and subverted through carnivalesque strategies of remarkable variety and invention, including the use of parodic and satirical language, grotesque humour, and symbolic degradations and inversions.”¹²³

Indeed, Habermas has not only conceded that the lifeworld—the “realm of personal relationships and . . . communicative action”¹²⁴—can contain several formal political public spheres, but has also agreed that the lifeworld contains various informal, organizationally fluid, and spontaneous nonformal publics (or networks) that are not expressly

117. *See id.* at 114.

118. *See* Folami, *supra* note 23, at 246.

119. Hegemonic domination required the bourgeois class to convince subjugated groups that they were meant to be the next moral and intellectual leaders of society by completely permeating society and the societal order, including normative values, morals, beliefs, and customs, with such messages of domination and subjugation. *See* Geoff Eley, *Nations, Publics, and Political Cultures: Placing Habermas in the Nineteenth Century*, in *HABERMAS AND THE PUBLIC SPHERE*, *supra* note 17, at 289, 322.

120. Folami, *supra* note 23, at 247.

121. *Id.*

122. Gardiner, *supra* note 18, at 28, 38 (asserting that “[t]here never was a ‘golden age of the communicative utopia’: the *real* public sphere was always marked by a pluralistic and conflictual heteroglossia”).

123. *Id.*

124. Craig Calhoun, *Introduction* to *HABERMAS AND THE PUBLIC SPHERE*, *supra* note 17, at 1, 30.

political in objective.¹²⁵ As such, public sphere theorists have maintained that to Habermas, these disorganized publics would more than likely not sufficiently challenge ruling authority due to the lack of organizational structure necessary to support and sustain the reasoned and formal debate Habermas felt was essential to forming public opinion.¹²⁶ They are instrumental, nonetheless, because they often represent a diverse range of identities in the civil society and can and should influence the dialogue that occurs within the formal political public sphere.¹²⁷ For example, to highlight the influence of these informal public spheres on the development of the formal political one, Habermas referenced the rise of identity politics in the 1960s¹²⁸ (which incidentally had their roots in the cultural transformations and challenges posed in the preceding decades with the emergence of rock and roll and other countercultural expressivity on radio). He referenced these post-1960s movements to show that they provided the “raw materials of the public sphere.”¹²⁹

Moreover, Habermas’s acknowledgement of these informal publics signaled his shift in views regarding who could serve as “key agents of social change”¹³⁰ Habermas deemed them now as “crucial for generating [but not engaging in directly themselves] a public sphere of debate[, which] are not those asking about *what we should get* but those asking about *who we are, how we live, and who is accountable.*”¹³¹ They seek to “defend traditional lifestyles or institute new ones on their own terms”¹³² and to resist the continued colonialization of the lifeworld where “everyday realms of action are increasingly organized, not on the basis of the norms we have mutually agreed . . . but on the basis of the money and power that already drive our political and economic system”¹³³ Indeed, Habermas included theatrical performances, and even rock concerts, as more modern examples of the informal publics¹³⁴ (to the surprise of some

125. *See id.*; *see also* Folami, *supra* note 23, at 248 (citing Habermas, *supra* note 102, at 421, 423).

126. *See id.* at 248–49.

127. *See* Roberts & Crossley, *supra* note 114, at 1, 18–20 (discussing various scholars’ interpretations of the role of the public sphere).

128. *See* JÜRGEN HABERMAS, BETWEEN FACTS AND NORMS: CONTRIBUTIONS TO A DISCOURSE THEORY OF LAW AND DEMOCRACY 373–74 (William Rehg trans., 1996) (1992).

129. Gemma Edwards, *Habermas and Social Movements: What’s ‘New’?*, in AFTER HABERMAS, *supra* note 18, at 113, 113.

130. *Id.* at 114.

131. *Id.* at 115.

132. *Id.* at 116 (citing Jürgen Habermas, *New Social Movements*, TELOS, Fall 1981, at 33 (1981)).

133. *Id.* (citing JÜRGEN HABERMAS, 2 THE THEORY OF COMMUNICATIVE ACTION (Beacon Press 1987)).

134. *See* BETWEEN FACTS AND NORMS, *supra* note 128, at 374.

deliberative theorists), because such examples ironically seem to be more “aimed at a symbolic intervention in public space rather than at a rational-critical debate on policy.”¹³⁵

While, to Habermas, these informal publics compliment, and are intertwined with, the political public sphere in that they provide raw material for dialogic discourse in the political public sphere,¹³⁶ they are not as influential as the formal sphere, especially since “[o]ne can discover public spheres in every nook and cranny of popular culture”¹³⁷ Although Habermas believes that space must be provided for such informal spheres for purposes of self-exploration and understanding, he stops short of conceding that they too can, by themselves, impact ruling hegemonic control.¹³⁸ To go that far is to sacrifice the larger vision of holding the state accountable through the force of public opinion, which, to him, can only be cultivated in the political public sphere through rational debate.¹³⁹ The formal public sphere remained the place and space where public opinion was vetted by reasoned debate and dialogue.¹⁴⁰

Many deliberative theorists, however, have envisioned a wider understanding of deliberative democracy that extends beyond dialogic exchange.¹⁴¹ Such understandings therefore encompass the many subverted ways in which individuals, who are marginalized by societal inequalities, might express their contestation to the status quo—an oversight that has led Habermas to misread the contestatory impact of these informal publics.¹⁴² Part of this ideological shift in conceptualizing wider exchanges comes from “locating culture and its role in the formation of identities centre-stage,”¹⁴³ rather than seeing culture and its articulation as a “pure and corrupting epiphenomenon imposed on a pristine realm of rational

135. Hirschkop, *supra* note 99, at 49, 51 (citing Jürgen Habermas, *Right and Violence—A German Trauma*, CULTURAL CRITIQUE, 1985, at 125–39).

136. *See* Hirschkop, *supra* note 99, at 62.

137. *Id.* at 50. As Habermas understands it, the analysis undertaken in the informal public sphere evidences no “attempt to link such an analysis with any remnants of a normative political theory,” Habermas, *supra* note 102, at 421, 465, even though it may be “part of a social psychological approach to some sort of an analysis of an expressivist, somehow aesthetic, need for self-representation in public space. . . . [T]his [cannot] lead back to a theory of democracy” *Id.* at 466.

138. Gardiner, *supra* note 18, at 28, 29.

139. Hirschkop, *supra* note 99, at 49, 52.

140. *See id.*

141. *See* Gardiner, *supra* note 18, at 28, 44.

142. *See id.* at 43 (arguing that Habermas’s public sphere theory still contains a level of elitist idealism “because it supposes that material conflicts of a socio-economic nature can be effectively transcended or at least effectively sublimated into a rational discourse that can suspend ingrained power differentials”).

143. *Id.* at 44.

openness in which citizens once communicated transparently”¹⁴⁴ These alternative publics, which public sphere theorist Nancy Fraser has called “subaltern counterpublics,” are participatory spaces where participants create counterdiscourses to ruling authority, the formal political public sphere, and even other subaltern counterpublics.¹⁴⁵ They often contain sociocultural challenges to the established order that are “entirely legitimate on their own terms, but which do not conform to Habermas’ model of rational dialogue”¹⁴⁶ In fact, marginalized groups, excluded from mainstream society or formal discourses, “are often motivated to pursue quite different strategies of action and representation than their more privileged counterparts.”¹⁴⁷ Their strategies are often “rooted in the particularistic concerns of everyday life, are formulated at some distance from the official public sphere and aim to celebrate difference through diverse expressions of identity and community.”¹⁴⁸

Such alternate forms of expression and communications in these informal publics that might differ substantially from that required in Habermas’s formal public sphere can serve as “a crucial resource through which the popular masses can retain a degree of autonomy from the forces of sociocultural homogenization and centralization.”¹⁴⁹ For Bakhtin and others, who reject deliberative democracy theorists that consider formal dialogic debate as the only forum through which meaningful or effective challenges to ruling ideological constructions can be fought, what matters most are the discourses, interactions, and expressive exchanges that occur

144. *Id.* (internal quotation marks and citations omitted); *see also id.* at 35 (explaining Habermas’s view that other forms of language used in everyday life and culture, including humor, irony, or parody, in comparison to reasoned debate and the ideal speech scenario, are “secondary and ‘parasitic’, presumably because they compromise the lucidity and openness that ideally marks the communicative process”).

145. *See* Nancy Fraser, *Politics, Culture, and the Public Sphere: Toward a Postmodern Conception*, in *SOCIAL POSTMODERNISM: BEYOND IDENTITY POLITICS* 291 (Linda Nicholson & Steven Seidman eds., 1995); *see also* Roberts & Crossley, *supra* note 114, at 1, 14–15.

146. *See* Gardiner, *supra* note 18, at 28, 44.

147. *Id.* (discussing the work of Alberto Melucci). Moreover, Habermas calls for no hidden agendas in dialogue, *id.* at 37, a call that would leave the relatively powerless in society vulnerable and at a considerable disadvantage if they accepted without reservation the type of transparency that Habermas endorses. In contrast, Bakhtin argues that, despite Habermas’s suggestion that rational actors can set aside and bracket societal inequalities and differences, such inequalities play out in the public sphere and everyday communication in a way that often leads marginalized participants to engage in a form of strategic “double-voicedness,” “indirect speech,” or “words with a sideways glance” to evince a multiplicity of actual and potential contested meanings that might fall far short of Habermas’s ideal speech expectations. *Id.* at 36–37 (citing MIKHAIL BAKHTIN, *PROBLEMS OF DOSTOEVSKY’S POETICS* 233 (Caryl Emerson ed., 1984)); *see also* Folami, *supra* note 23, at 271 (discussing subversive discourse by gangsta rappers as a form of “contradictory consciousness”) (internal citations omitted).

148. Gardiner, *supra* note 18, at 28, 44.

149. *Id.* at 39.

in everyday life and that in and of themselves can serve as challenges (even if subverted) to ruling authority. For example, by focusing on everyday dialogue and cultural expression in civil society where ordinary people live their lives daily, Bakhtin's desire is to show that "power relations can be inverted through popular, 'earthly', 'grotesque' and wildly funny culture."¹⁵⁰ Furthermore, in highlighting the fluidity, multiplicity, spontaneity, and informality of everyday human communication, public sphere theorists contend that Bakhtin both draws attention to the "underlying sociocultural forces that continually subvert our received commonsensical notions and habitualized viewpoints, and . . . encourage[s] a renewed awareness of the hidden and all-too-often suppressed potentialities that lie within 'the dregs of an everyday gross reality.'"¹⁵¹ By tuning into everyday conversations of ordinary citizens, such attention exposes the participatory constraints of the ideal speech scenario preferred in Habermas's idealized public sphere.¹⁵² Such attention also shines light on the "crevices in discourse which allow one to 'open up' the discussion of life experiences . . . [and to] connect problems experienced in individual life histories to wider social structures."¹⁵³

One such discourse through which the lived experiences and interests of formerly marginalized American citizens, namely White American youth and Black Americans, found expression was in and through the nation's radio airwaves during the rise of rock and roll. Black and White youth found expression through such music at a time when Congress and the FCC struggled, through the enactment of a number of localism orders and policies, to contain the networks' increasing hegemony over media content—content, which, this Article contends did little to foster intergenerational discourse between mainstream America and its youth, or interracial discourse between mainstream America and its Black American counterpart.¹⁵⁴ By framing public sphere contestation to the ruling authority too narrowly—with a vision of a formal, structured, reasoned debate that is perhaps overtly political—Habermas, as discussed above, overlooks and thereby deemphasizes the importance and efficacy of such politically disorganized and informal spheres in challenging the mainstream social order themselves.

Finally, some theorists contend that the role of the law in society is to protect the discourse that occurs within the public sphere and to facilitate

150. Roberts & Crossley, *supra* note 114, at 1, 19.

151. Gardiner, *supra* note 18, at 28, 42 (citing MIKHAIL BAKHTIN, *THE DIALOGIC IMAGINATION: FOUR ESSAYS BY M. M. BAKHTIN* 385 (Michael Holquist ed., 1981)).

152. *See id.* at 45.

153. Hirschkop, *supra* note 99, at 60.

154. *See infra* Part III.B.2.

the transmission of interests and concerns to the state or ruling authority, such that the ruling authority may in turn be held accountable.¹⁵⁵ However, because such informal publics may not be acknowledged as discursive, contestatory, or of direct deliberative value in and of themselves, the need for laws to protect them and their various means of expression, including music or other popular forms, may be overlooked or not given their due weight in shaping a robust deliberative democracy. Similarly, by failing to frame music within the call for reinvigorating localism, especially given that history has shown that music can be a valuable deliberative tool just as much as local news and public affairs programming,¹⁵⁶ scholars and reformists that focus solely on a call for more local public affairs programming also run the risk of overlooking music's relevance in the real lives of everyday citizens, most especially by those excluded or rendered invisible by the mainstream American discourse.

Fortunately, a theoretical paradigm developed in the early 1980s by students of the Birmingham School—a discipline that came to be known as cultural studies¹⁵⁷—served as a direct challenge to Habermas's and other Frankfurt disciples' pessimistic view of mass media and culture.¹⁵⁸ Such scholars turned to media studies with a different critical eye, one that rejected the more established proposition in media scholarship that created a favorable distinction between “high culture” (represented by film and television) and “low culture” (represented by radio), with the latter being critically dismissed along with its related cultural byproduct—popular culture.¹⁵⁹ They approached media with an eye toward “[d]eliberately calling into question assumed hierarchies of high and low, of seriousness and triviality, of ‘quality’ and ‘trash,’ . . . [and] turned their attention to formerly disparaged media forms such as girls' magazines, working-class style, popular music, romance novels, television, and eventually even radio.”¹⁶⁰ The focus was broadened then beyond the sphere of the producers and artists of mass media and culture, who, to Habermas and other Frankfurt School disciples, used mass media and culture as a tool to

155. See generally Naomi Mezey & Mark C. Niles, *Screening the Law: Ideology and Law in American Popular Culture*, 28 COLUM. J.L. & ARTS 91 (2005); William E. Forbath, *Short-Circuit: A Critique of Habermas's Understanding of Law, Politics, and Economic Life*, 17 CARDOZO L. REV. 1441, 1444–45 (1996).

156. See, e.g., DOUGLAS, *supra* note 1, at 222–23.

157. Hilmes, *supra* note 111, at 1, 8.

158. See *id.*

159. *Id.* at 8 (discussing some scholars' dismissal of radio, and the transition period explored in this Article, as a “local medium playing rock and roll to racial minorities and unruly youth [that] hardly represented the kind of high culture that film and television advocates—industrial or academic, left-wing or conservative—were anxious to endorse”).

160. *Id.* (citations omitted).

solidify hegemonic domination.¹⁶¹ Attention was turned to the audience and the audience's use and reception of dominant images and messages in popular culture, countercultural expression, and constructions of identity that in itself could serve as a challenge to dominant social understandings.¹⁶² As a result of this reconfiguration and focus, radio's cultural significance came to the fore, especially in light of its earlier expulsion from the acceptable realms of academic and scholarly endeavors.¹⁶³

With the advent of television in 1939 and resulting scholarly focus on television and America's newly emerging visual culture, radio's unique aural culture was virtually erased from America's memory banks.¹⁶⁴ As a result, for decades, little scholarly attention was given to its role in making music preeminent in everyday American life and on everyday perceptions and understandings, most especially in the 1950s with the emergence of rhythm and blues and rock and roll.¹⁶⁵ As an aural medium, radio, from the onset, activated people's imaginations, especially as it related to listening to music.¹⁶⁶ Dating back to at least the 1920s when music became a regular part of radio programming, radio revolutionized and transformed Americans' relationship with music and helped make it "one of the most significant, meaningful, sought after, and defining elements of day-to-day life, of generational identity, and of personal and public memory."¹⁶⁷ Moreover, radio's influence on a song's popularity and success soon became readily apparent, as did its ability to spread and diffuse cultural understandings.

For example, in the 1920s, with the advent of jazz—a musical art form through which a segment of Black Americans found expression—and with its subsequent radio airplay, the controversial nature of music's airplay on radio became quite visible.¹⁶⁸ Jazz's radio airplay soon increased the consumption and exposure of it to White listeners and, in so doing,

161. See Mezey & Niles, *supra* note 155, at 96–97; see also Hilmes, *supra* note 111, at 1, 9.

162. Accord Hilmes, *supra* note 111, at 1, 9.

163. See *id.*

164. See DOUGLAS, *supra* note 1, at 220.

165. *Id.* at 253.

166. As some research has shown in comparing listening to visual stimulation, "listening often imparts a sense of emotion stronger than that imparted by looking." *Id.* at 30. Moreover, listening to music in particular solicits even more of an emotional response because "the brain's musical networks and emotional circuits are connected." *Id.* at 32. Indeed, "[m]usic so effectively taps our emotions . . . that we develop deep, associative memories between particular songs and our own personal narratives." *Id.* at 11–12 (internal citation omitted).

167. *Id.* at 83.

168. See *id.* at 88.

“opened a small crack between [W]hite and [B]lack culture”¹⁶⁹ in an impermissible way, given America’s legally sanctioned system of segregation of the races.¹⁷⁰ This specific crack was quickly closed, however, with the rise of the networks and with their increasing control over who was granted access to the nation’s radio airwaves and over the content played on the air, which reflected their homogenized and noncontroversial approach to radio programming.¹⁷¹ Indeed, while a few Black musicians (jazz and otherwise) had broken through the color line on the air by the mid-1920s, with the spreading control of the networks, “the homogenization of radio fare by the early 1930s—and the persistent racism of the industry—meant that rigid and ridiculous conventions circumscribed the representations of [B]lacks on radio.”¹⁷² Jazz, as a result, was co-opted and stifled by the White jazz bands that were granted access to the nation’s radio airwaves to the exclusion of jazz’s originators.

C. The Emergence of Rock and Roll on White Radio as an Example of Radio’s Subversive Past

1. Radio and Rock and Roll’s Subversive Challenge to the Then-Existing Economic Order

Although jazz created a small crack through which Black music crept indelibly into White culture and imagination, the rise of rock and roll almost two decades later widened into a culturally explosive crevice that many in the media industry and society at large in no way could have anticipated. The infusion of rhythm and blues—a musical byproduct of Black America’s post-World War II frustration with the nation’s segregationist and exclusionary policies toward it—into what was renamed, repackaged, and aired as rock and roll across the nation’s radio airwaves represented much more than a generation’s or ethnic minority’s entertainment preference.¹⁷³ Indeed, by the 1950s, at rock and roll’s heyday, “[r]adio listening became highly politicized” because “[r]adio—more than films, television, advertising, or magazines in the 1950s—was *the* media outlet where cultural and industrial battles over how much influence [B]lack culture was going to have on [W]hite culture were

169. *Id.* at 85.

170. *Id.* at 84–85.

171. See Cowling, *supra* note 3, at 290–91; see also DOUGLAS, *supra* note at 1, at 228, 234.

172. DOUGLAS, *supra* note at 1, at 234.

173. See Reebee Garofalo & Steve Chapple, *From ASCAP to Alan Freed: The Pre-History of Rock 'N' Roll*, in 2 AMERICAN POPULAR MUSIC: THE AGE OF ROCK 63, 68–69 (Timothy Scheurer ed., 1989); DOUGLAS, *supra* note 1, at 228.

staged and fought.”¹⁷⁴

Despite Habermasian notions of the efficacy of weak publics at challenging state or ruling authority, the playing and consuming of such music served as a direct challenge to racial segregation both on the nation’s radio airwaves and in society at large.¹⁷⁵ At the time, many did not see this cultural revolution coming—a change that was initially fought out on radio and was arguably instrumental in fueling the momentum for the long journey toward desegregation, the civil rights movement, and the ideological generational divide within White America.¹⁷⁶ Also unforeseen was the manner in which the emergence of rock and roll challenged the economic hierarchy in the music industry.¹⁷⁷ Its emergence and popular reception on radio not only posed a threat to America’s broader racial and socioeconomic racial order, but also “posed a financial threat to established [W]hite music interests in the industry.”¹⁷⁸

For example, by the late 1940s, to many listeners and media critics, radio was a mass medium through which low culture was disseminated.¹⁷⁹ It had lost its potential for generating any type of civic discourse and was thought of as all but dead due to its commercial exploitation by the networks and their affiliates, the top-down homogenization of radio content, and the ultimate unveiling of television.¹⁸⁰ The networks essentially relegated radio to secondary, and, in some ways, insignificant status, and came to view radio’s purpose as generating revenue via advertising exploits to fund their growing commercial interests in developing the emerging technology at the time—television.¹⁸¹ Once their commercial interests regarding television were sufficiently funded and financially viable, the networks reallocated their popular and successful radio programs and personalities to television, and to a welcoming and growing television audience.¹⁸² As a result, with television’s debut,

174. DOUGLAS, *supra* note 1, at 222.

175. See Timothy J. Dowd & Maureen Blyler, *Charting Race: The Success of Black Performers in the Mainstream Recording Market, 1940 to 1990*, 30 *POETICS* 87, 97 (2002); see also DOUGLAS, *supra* note 1, at 253 (“Whites gained access to [B]lack music and language, which invigorated their own sense of America and of the possibilities for opposing mainstream culture.”).

176. See Barbara Savage, *Radio and the Political Discourse of Racial Equality*, in *RADIO READER*, *supra* note 39, at 231, 231.

177. DOUGLAS, *supra* note 1, at 250.

178. *Id.*

179. See Lenthall, *supra* note 64, at 41, 44–45.

180. See Rothenbuhler & McCourt, *supra* note 39, at 367, 376.

181. See PETER FORNATALE & JOSHUA E. MILLS, *RADIO IN THE TELEVISION AGE* 6 (1980).

182. Rothenbuhler & McCourt, *supra* note 39, at 367, 376 (“Television clearly eclipsed radio as the dominant broadcast medium for advertising, audiences, and investments. Throughout the early 1950s the networks virtually abandoned their radio operations to focus on television, and radio network programming became less valuable to local radio

network affiliate stations were left to fend for themselves for content and advertising revenue.¹⁸³

Affiliates were not only left to scramble for revenue and content but were also left to compete with the independent nonaffiliate stations for an audience that was fast becoming fascinated with television. Moreover, at the same time of the networks' decreasing interest in radio, the number of local independent radio stations grew considerably due to the *Chain Broadcasting Order* that, among other things, reduced the regional bandwidth requirement between stations, thereby making space for more stations in a particular community.¹⁸⁴ While the *Chain Broadcasting Order* may have opened up space for more local radio stations pursuant presumably to the FCC's localism goals at the time, it was not until the networks abandoned their affiliates, however, that the networks' hegemonic control over radio content was released. Therefore, the networks' abandonment left all local stations, including their former affiliates, in the collective position not only of competing among themselves for a listening audience and for advertising revenue,¹⁸⁵ but also of filling the radio programming day and evening with content.

In search of demand (e.g., an audience) and even for supply (e.g., content and funding via advertisers),¹⁸⁶ radio station owners eventually turned to the local market¹⁸⁷ and found value in the localism that Congress and the FCC had endorsed for years, albeit for different reasons—one arguably market-based and the latter based on deliberative principles.

stations.") (citation omitted); see also Garofalo & Chapple, *supra* note 173, at 63, 70; DOUGLAS, *supra* note 1, at 220 ("The famous 'talent raids' of 1948–49 lured stars like Jack Benny, Bing Crosby, and Ozzie and Harriet away from radio to television . . .").

183. See, e.g., Rothenbuhler & McCourt, *supra* note 39, at 367, 376.

184. DOUGLAS, *supra* note 1, at 224–25; see also FORNATALE & MILLS, *supra* note 181, at 7 (noting that the number of AM radio stations increased from 1,000 at the end of the War to 2,391 stations by 1953). Indeed, although small independent AM stations eventually tripled in number, the increase was overshadowed, however, by the sixty-fold increase in television during this same period. See Rothenbuhler & McCourt, *supra* note 39, at 367, 371; DOUGLAS, *supra* note 1, at 223.

185. See DOUGLAS, *supra* note 1, at 225; see also Kristen Lee Repyneck, Note, *The Ghost of Alan Freed: An Analysis of the Merit and Purpose of Anti-Payola Laws in Today's Music Industry*, 51 VILL. L. REV. 695, 699 n.21 (2006).

186. With the post-World War II proliferation of low-power stations, radio's audience "dropped from 60,000 to 30,000, and thus there were more stations vying to sell smaller audiences to local advertisers." DOUGLAS, *supra* note 1, at 233.

187. See Richard Kielbowicz & Linda Lawson, *Unmasking Hidden Commercials in Broadcasting: Origins of the Sponsorship Identification Regulations, 1927-1963*, 56 FED. COMM. L.J. 329, 350 (2004) ("Competition from network television forced radio to reinvent itself . . ."); DOUGLAS, *supra* note 1, at 225 ("[A]fter the rise of television [was] the devolution of radio, a reversal of the centralization that gripped the industry in the 1930s and '40s. Hundreds of stations disaffiliated from the networks, finding their audiences and their advertising revenues in local markets.").

Unforeseen at the time was the real benefit of radio's loss in status due to larger corporate broadcast interests in television. With the network abandonment, "[t]he veneer of network paternalism was stripped off . . .," and "[a]s radio sought to redefine itself, traditional business models were discarded in favor of new opportunities for entrepreneurial innovation and cultural expression."¹⁸⁸ Such innovation inadvertently subverted existing business models in the media industry at the time and was instrumental in the development and flourishing on the radio of rhythm and blues and its musical cousin, rock and roll.¹⁸⁹

Rock and roll was played predominantly on independent nonaffiliate radio stations, which was a result of subverted entrepreneurial maneuvering.¹⁹⁰ For example, from the beginning of music's regular radio airplay, musicians demanded a fee from radio station owners for the radio airplay of their songs. In the early 1920s, the American Society of Composers, Authors, and Publishers (ASCAP), a music publishing firm, required networks and their affiliate stations to pay a set royalty fee to its members in exchange for the right to play their members' music on air.¹⁹¹ The networks and, by extension, their affiliates also subsequently agreed to play only live music (which was preferred anyway over playing low culture and *déclassé* recorded music).¹⁹² Independent, nonaffiliate stations, ignored and overlooked by ASCAP, were excluded from these agreements and were, as a result, free to showcase new, upcoming, and local music talent, produced by ASCAP's competitor, Broadcast Music, Inc. (BMI).¹⁹³ These stations relied heavily on recorded music produced by BMI because it was cheaper than showcasing live bands on the air.¹⁹⁴

Moreover, many new and younger artists were attracted to BMI over ASCAP because of ASCAP's fee structure, which paid more to older, more established musicians while the newly formed BMI paid all musicians equally.¹⁹⁵ "By the 1950s BMI controlled the majority of R&B, blues, and rock 'n' roll music,"¹⁹⁶ with the independent radio stations serving to

188. Rothenbuhler & McCourt, *supra* note 39, at 367, 368.

189. *See* DOUGLAS, *supra* note 1, at 222.

190. *See id.* at 222–28.

191. *Id.* at 250.

192. *Id.* at 86, 229.

193. DOUGLAS, *supra* note 1, at 250.

194. *See id.*; *see also* Rothenbuhler & McCourt, *supra* note 39, at 367, 369. The networks were the cofounders of BMI and established it to counter ASCAP's control over music content and to retaliate against ASCAP's demand of an increase in royalty fees to its members. DOUGLAS, *supra* note 1, at 250. BMI provided the majority of the recorded music to these independent stations that were in a position, unlike the network affiliates, to take advantage of BMI's recorded musical selections. *Id.*

195. DOUGLAS, *supra* note 1, at 250.

196. *Id.*

provide exposure for musicians in these genres. Exempt from major music publishing deals, these stations were free to take advantage of BMI's music selections and were ultimately successful in attracting two segments of the much needed local listening audience—White American youth and Black Americans—due to radio airplay of such music. As the popular demand of such music content increased dramatically, hundreds of new recording companies developed in the late 1940s to meet such demand and to provide programming content to the growing number of independent stations (and soon-to-be disaffiliated network stations) willing to play such music.¹⁹⁷

2. Radio and Rock and Roll's Subversive Challenge to the Then-Existing Mainstream Discourse on Identity and Race Relations in America

In addition to using recorded music to cut operating costs, independent stations implemented another entrepreneurial initiative early on to compete more effectively with the networks and to raise additional capital. Such stations not only gave air time to Black disc jockeys, but also allowed them to air their own programming content.¹⁹⁸ At the time, Whites were the primary owners of the nation's radio stations,¹⁹⁹ and to the extent Blacks were permitted on the air, it was within the context of maintaining the normalization of "Whiteness" as superior to Blackness via racial stereotypes.²⁰⁰ Indeed, the airwaves, like society at large, were racially

197. See *id.* at 224–25. Some have argued that this shift in music production, distribution, and airplay was the underlying reason for the 1950s congressional payola investigations, instigated by ASCAP, that targeted these rising musicians, their music, and the rock-and-roll disc jockeys who were perceived as the main culprits in orchestrating this shift. *Id.* at 251.

198. Jack Cooper's *The All-Negro Hour*, on Chicago's WSBC, was the first Black-oriented show in Chicago and was the first on that station to switch "from live music and guests to a deejay-and-records format in 1932." Rothenbuhler & McCourt, *supra* note 39, at 367, 370.

199. Although there is no explicit data to support the contention that the FCC engaged in discriminatory practices at that time in distributing licenses, the fact remains that radio stations were owned by Whites. Following the civil unrest in Black urban America that followed Martin Luther King, Jr.'s assassination and the release of the Kerner Commission's report on the effect on Blacks of the limited and disparaging images of Blacks in media, the FCC affirmatively adopted diversity-based regulations and policies aimed at increasing minority ownership in broadcast, such as tax incentives, the distress policy, etc. For a more detailed discussion, see generally Leonard M. Baynes, *Making the Case for a Compelling Governmental Interest and Re-Establishing FCC Affirmative Action Programs for Broadcast Licensing*, 57 RUTGERS L. REV. 235 (2005).

200. See Smith, *supra* note 71, at 209, 211 ("The [W]hiteness of radio broadcasting grew out of unspoken, widely accepted, and long-standing conventions, but it was carefully monitored and enforced."). Since radio stations generally only hired White employees for permanent staffing, Black personnel had temporary positions as programming consultants for shows that reinforced mainstream society's or the entertainment industry's racially stereotypical norms of Blackness. Indeed, "[a]s a medium, radio was nearly impenetrable

segregated.²⁰¹ These Black disc jockey pioneers were given the late-night graveyard shift because it was at a time when most advertisers were disinterested in purchasing airtime.²⁰² It was also at a time when station owners assumed that their White listening audience was least likely to be listening and, hence, offended by Black-oriented programming.²⁰³

With the increasing competition in the local market, and especially after several studies indicated the growing social and economic status of Black Americans after World War II, independent station owners began to view the Black community as less of an afterthought and more of an under-tapped market.²⁰⁴ In seeking to attract the Black audience, station owners, rather than hiring more Black disc jockeys, instead hired White disc jockeys who sounded Black and played Black music; such DJs were ultimately given free rein of programming content.²⁰⁵ Following the television talent raids of the late 1950s, radio station owners turned to the disc jockey “to get the first television generation to [still] want to” tune into radio.²⁰⁶ By doing so, station owners soon realized that they had also inadvertently tapped into the White teenage market. White disc jockeys were charged with appealing to both Black and White audiences, and they

for nonwhite performers, who could only find work in broadcasting by playing parts as servants or minstrels if they approximated the accents [W]hite actors, directors, and producers had popularized as “[B]lack.” *Id.* In 1945, famed Black poet Langston Hughes wrote of radio,

[c]onsidering the seriousness of the race problem in our country . . . I do not feel that radio is serving the public interest in that regard very well. And it continues to keep alive the stereotype of the dialect-speaking amiably-moronic Negro servant as the chief representative of our racial group on the air.

Savage, *supra* note 176, at 231, 235 (citing a letter from Hughes to historian Erik Barnouw, Mar. 27, 1945) (internal quotation marks omitted).

201. Some have argued that the FCC historically and implicitly endorsed the racism that permeated radio almost from its inception, but particularly in the 1930s when “the expanding dominion of the national networks and their commercial sponsors *increased* the power of southern segregationists to demand radio representations reinforcing customary racial separation, and to keep anything else off of the air.” Smith, *supra* note 71, at 209, 211.

202. Rothenbuhler & McCourt, *supra* note 39, at 367, 374; FISHER, *supra* note 9, at 37.

203. See FISHER, *supra* note 9, at 37.

204. DOUGLAS, *supra* note 1, at 234 (“In the postwar period, with the increased availability of radio licenses for small local stations, the networks’ gradual abandonment of radio in favor of television, and the discovery that African Americans were an important new niche market . . . certain independent stations began courting the [B]lack audience.”). A New York radio station owner “commissioned a study, . . . which found that one million [B]lacks spent \$1 billion a year and that the city’s [B]lack population had tripled in the previous decade. Those families were going to buy cars, clothing, and furniture” FISHER, *supra* note 9, at 51. In the years “between 1940 and 1953 [B]lack median income rose 192 percent, and [B]lack home ownership increased by 129 percent. In most regions of the country, especially in cities, 90 percent of African Americans now owned radios.” DOUGLAS, *supra* note 1, at 234.

205. See DOUGLAS, *supra* note 1, at 230, 243; see also FISHER, *supra* note 9, at 51.

206. DOUGLAS, *supra* note 1, at 222.

often accomplished such a daunting task in a racially segregated America, at least as it related to America's developing youth and the Black American audience, by engaging in "racial ventriloquy."²⁰⁷ While radio station owners, at the time, were "focused on the bottom line, [they] unwittingly reshaped the cultural landscape of the United States."²⁰⁸

Indeed, their appointed disc jockeys, through their on-air personas and vernacular, helped to redefine radio and its relevance in the then-existing media landscape,²⁰⁹ where corporate interests focused more on television, and to create a popular culture that challenged mainstream authority's socially constructed identities. The disc jockey came to be known around town as the DJ, and was essential to the survival of local radio.²¹⁰ "By 1958 [a popular broadcast journal] admitted that the disc jockey 'has emerged as the big business factor in today's new concept of radio.'"²¹¹ Each DJ's job was predicated on the need to attract the listening audience and advertising sponsorships, which, in radio—a largely aural medium—turned on developing a memorable and distinct voice, style, and personality.²¹² On air, these local DJs, through their voice, personality, and radio content alone, had to create an intimacy with their audience such that its members felt like part of the particular DJ's community. While off air, the DJ attended lodge meetings, emceed social events, was the guest speaker at local functions, sat in on meetings with record label executives, staged live shows, and, in some cases, managed upcoming talent,²¹³ all in an attempt to "be seen . . . as an intrinsic part of the community, an enviable celebrity and a respected altruist."²¹⁴

Eventually, many listeners came to bond personally with the disc jockey, who, to them, personified postwar sentiments and interests. In essence, he symbolized the voice, interests, and understandings of the everyday lives and exchanges of his listening audience. For White

207. *Id.* at 243. There was a segment of the White listening audience, White youth, that was not offended by Black-oriented programming, but was drawn to it. As a result, eventually radio station owners hired Black personnel to serve as voice coaches for White disc jockeys who engaged in racial ventriloquy (i.e., attempts to sound Black), to attract that audience. WILLIAM BARLOW, *VOICE OVER: THE MAKING OF BLACK RADIO 165–66* (1999).

208. Rothenbuhler & McCourt, *supra* note 39, at 367, 372.

209. DOUGLAS, *supra* note 1, at 230 (explaining that "through language and music," the DJ had to be "invented and had to serve—and mediate between—very particular cultural and corporate interests"). See generally ARNOLD PASSMAN, *THE DEEJAYS* (1971).

210. DOUGLAS, *supra* note 1, at 229.

211. *Id.* (citation omitted); see also ROY SHUKER, *UNDERSTANDING POPULAR MUSIC* 42–43 (2nd ed. 2001) (1994).

212. See PHILIP H. ENNIS, *THE SEVENTH STREAM: THE EMERGENCE OF ROCKNROLL IN AMERICAN POPULAR MUSIC* 136 (1992) (discussing the DJ as an on-air salesman); DOUGLAS, *supra* note 1, at 232.

213. DOUGLAS, *supra* note 1, at 233.

214. *Id.*

teenagers in particular, “DJs around the country became switchboards on the air for their young listeners, making themselves privileged conduits within their listeners’ imagined communities.”²¹⁵ Moreover, for White teenagers, these DJs who embraced and played Black music—namely rhythm and blues (and eventually rock and roll)—engaged in racial ventriloquy,²¹⁶ and in doing so, symbolized a generation’s rebellion against the normative status quo.²¹⁷ Although the Black DJs, during the late 1940s and early 1950s, were the originators who brought jive, hipster talk, and rhyming and rapping games to their shows and on-air personalities,²¹⁸ it was the rock-and-roll disc jockeys’ adaptation of such style that led to the music’s broader racial crossover appeal to White youth.²¹⁹

Through its rock-and-roll disc jockeys, radio became a trading zone and facilitator of discourse between Black and White Americans, and White adults and rebelling White youth. When radio, the disc jockey, and the airing of rhythm and blues (and, subsequently, rock and roll) are viewed through the lens of theorists who adopt an understanding of participatory democracy that embraces popular cultural expression,²²⁰ they reveal much generally “about the emptiness and forced conformity of [W]hite culture”²²¹ Moreover, and perhaps more importantly for discourse theory, also revealed is their individual and collective subversive resistance to such conformity.

For example, as some cultural historians have pointed out, for a generation of White middle class youth (boys in particular), America at the time demanded homogeneity, obedience, and a “phony[] surface conformity that threatened to suck all the spirit and individuality”²²² out of

215. *Id.* at 231.

216. *See* BARLOW, *supra* note 207, at 157; *see also* DOUGLAS, *supra* note 1, at 236 (explaining how DJs’ imitation of their Black counterparts “represented a conscious turning away from the official ‘announcer speak’ that had been institutionalized since the early 1930s: deep-voiced, bell-shaped tones in homogenized English that policed the boundaries of acceptable public address by men”).

217. *See* RAY PRATT, RHYTHM AND RESISTANCE: EXPLORATIONS IN THE POLITICAL USES OF POPULAR MUSIC 140 (1990).

218. DOUGLAS, *supra* note 1, at 236. BARLOW, *supra* note 207, at 157 (discussing “racial masquerading”).

219. *Cf.* ENNIS, *supra* note 212, at 31. Indeed, it was through the White disc jockey that the teenage audience was discovered, since what was played on radio came to be determined by what was bought in the record stores. *See* DOUGLAS, *supra* note 1, at 227–29. At the time, teenage consumption of records was more voluminous than his or her adult counterpart. *Id.* at 227. With a smaller targeted audience, local radio stations, through their disc jockeys, turned what was once a problem (a shrinking listening audience), into an advertising advantage.

220. *See supra* Part II.A.

221. DOUGLAS, *supra* note 1, at 223.

222. *Id.* at 241.

a generation “[r]aised on independent, brave pop culture heroes like the Shadow, [and] the Lone Ranger”²²³ American boys were influenced early on by popular television images touting aggression and independence; however, by adolescence they were expected by societal norms to submit to authority figures.²²⁴ By the late 1940s, juvenile delinquency became a national obsession, with middle class parents moving out of cities in hope of helping their children to avoid the lure of punks and motorcycles, and to adopt the more acceptable and restrained bourgeois norms.²²⁵

As America became more repressive in the 1950s, with the grip of conformity and McCarthyism tightening, [B]lack music became especially attractive to the young “because it could generate emotional release” and because it promised a kind of commentary about life ignored or frowned upon in the schools, in the family, and on television.²²⁶

During this time, network television not only continued to perpetuate the dominantly inscribed racial stereotypes of Black Americans, but also, through its programming, replicated the phony innocence, conformity, and forced homogeneity that American youth sought to escape.²²⁷

In that way, radio filled the cultural vacuum left by television and the larger dominant discourse.²²⁸ First, the Black slang expropriated by the White DJ “signaled membership in a special, outcast community that seemed to laugh at and be above [the] clueless, cookie-cutter, tightassed [W]hite folks.”²²⁹ Additionally, like jazz music two decades earlier, Black American music of the early 1940s and late 1950s, in particular, symbolized to White youth “the cultural alienation, rebellion, and sexual energy of the younger generation,”²³⁰ and widened the crack between Black and White American cultures, first “in the form of rhythm and blues and then rock ‘n’ roll”²³¹

So what was it in particular about rhythm and blues that White youth found so subversively appealing? Rhythm and blues was “[B]lack artists’

223. *Id.*

224. *See id.* at 241–42. *See generally* STEPHEN TROPIANO, *REBELS & CHICKS: A HISTORY OF THE HOLLYWOOD TEEN MOVIE* (2006).

225. DOUGLAS, *supra* note 1, at 242; *see also* ERIC AVILA, *POPULAR CULTURE IN THE AGE OF WHITE FLIGHT: FEAR AND FANTASY IN SUBURBAN LOS ANGELES* 17 (2004).

226. DOUGLAS, *supra* note 1, at 243.

227. *See id.* at 241. *Cf.* Brian W. Ludeke, *Malibu Locals Only: “Boys Will Be Boys,” or Dangerous Street Gang? Why the Criminal Justice System’s Failure to Properly Identify Suburban Gangs Hurts Efforts to Fight Gangs*, 43 CAL. W. L. REV. 309, 329 n.96 (2007) (discussing how one rock-and-roll band’s lyrics appealed to youth and increased a “militant and disenchanting counterculture as the decade wore on”) (internal quotation omitted).

228. Rothenbuhler & McCourt, *supra* note 39, at 367, 375.

229. DOUGLAS, *supra* note 1, at 244.

230. *Id.* at 228.

231. *Id.*

pop-tinged tunes with a heavy beat and lyrics packed with sexual innuendo.”²³² It displaced jazz as the musical passion of Black Americans and represented a blending and evolution of various Black musical forms, including blues, gospel, and jazz.²³³ Underlying each of these musical traditions was soul—distinct from “[f]eeling” [which] was something everybody had”²³⁴—which captured the “emotional center of [B]lack cultural experience,”²³⁵ and served as a subversive “challenge to the technocratic rationalism threatening to enslave” White youth, especially by the 1950s.²³⁶ By the 1950s then, Black America’s musical “soul” was in rhythm and blues which symbolized “negation of Western analytic process . . . that posited a near mystical naturalness, reaffirming biological priorities and denying the Puritan ethic of middle America.”²³⁷ As one historian noted with respect to the crossover appeal of Black musical culture, “White Americans may have turned to [B]lack culture for guidance because [B]lack culture contains the most sophisticated strategies of signification and the richest grammars of opposition available to aggrieved populations.”²³⁸

Veiled in the soul of rhythm and blues was the collective and communal frustration of being Black in segregated post-World War II America. During World War II, job opportunities, mostly in factories, prompted a significant number of Black Americans to leave the rural south and move to larger cities like Los Angeles and Detroit, ultimately settling in to form large urban ghettos.²³⁹ Despite the considerable ideological differences in Black American discourse prior to the war regarding the best way of achieving liberation, the dominant discourse of postwar Black Americans included a call and struggle for full rights of American citizenship.²⁴⁰ Rhythm and blues arose out of these new postwar urban

232. FISHER, *supra* note 9, at 31.

233. *Id.* at 31–32.

234. DOUGLAS, *supra* note 1, at 243.

235. *Id.* (quoting BEN SIDRAN, *BLACK TALK* 126–29 (New York: Da Capo Press 1971)) (quotation marks omitted).

236. DOUGLAS, *supra* note 1, at 243.

237. *Id.* (quoting SIDRAN, *BLACK TALK* 129) (quotation marks omitted).

238. DOUGLAS, *supra* note 1, at 242 (quoting GEORGE LIPSITZ, *A RAINBOW AT MIDNIGHT: LABOR AND CULTURE IN THE 1940S* 305 (1994)) (quotation marks omitted).

239. Garofalo & Chapple, *supra* note 173, at 63, 66.

240. Indeed, after the war, membership in the National Association for the Advancement of Colored People (NAACP) (an organization founded on the premise of facilitating full civic and citizenship rights for Black Americans) soared from 50,000 to 450,000. DOUGLAS, *supra* note 1, at 223. Prior to the war, however, various organizations were aimed at attaining equality for Black America, and were organized around different ideologies that ranged from Black nationalist claims for a separate political and economic state to anti-imperialist or anti-colonialist calls for a physical revolution. Savage, *supra* note 176, at 231, 250.

localities and found its way onto independent radio stations willing to sell air time to Black disc jockeys.²⁴¹ Through their late-night broadcasts, these Black DJs connected with the sentiments of a community alienated, due to socially constructed racial identities, from the larger society. Young White Americans—who also felt alienated—listened in as well.²⁴²

Through cultural and musically coded songs, Blacks “waged a mind war against the shameful paradox of a segregated democracy . . . although it would take two decades of mass protests, litigation, and deaths to overcome virulent [W]hite resistance to dismantling its edifice.”²⁴³ In addition to enjoying the entertainment value of rhythm and blues, White teenagers “grasped the veiled yet complex codes of self-discovery and liberation that often threaded their way through rhythm and blues, codes that became overt with the development of rock and roll.”²⁴⁴ Moreover, as this Article contends, rock and roll served as a counterpublic, which *in and of itself* served to subvert and challenge established segregationist norms—a challenge that occurred alongside the developing civil rights movements.²⁴⁵ Disc jockeys were given free rein over programming content and implicitly stomped all over the color line by playing Black music on White radio, which was avowedly about much more than the fun and entertainment value of the music alone.²⁴⁶ Not only did their shows foster an intermixing between Black and White cultures on air, but they also set the stage for direct physical intermingling between the youth of both races.

For example, even the self-proclaimed Father of Rock and Roll, Alan

241. See Rothenbuhler & McCourt, *supra* note 39, at 367, 370.

242. See DOUGLAS, *supra* note 1, at 249. See generally *id.* at 372–74. Soon, White youths’ favorite artists were Black Americans and their favorite disc jockeys were White ventriloquists, who both sounded Black and interacted with Blacks. See *id.* at 243, 249. Before Elvis Presley, virtually all R&B artists that White teens heard on the radio were Black artists. *Id.* at 249. See generally Rothenbuhler & McCourt, *supra* note 39, at 367, 372–74.

243. Savage, *supra* note 176, at 231, 231.

244. Rothenbuhler & McCourt, *supra* note 39, at 367, 374.

245. DOUGLAS, *supra* note 1, at 228. Here, Habermas is partially correct in asserting that informal publics can be influential to form more organized movements that overtly challenge the ruling authority or state apparatus. See *supra* Part III.A. He underestimates, however, the power of these informal publics to challenge the ruling ideologies in and of themselves.

246. See DOUGLAS, *supra* note 1, at 244–45. Black disc jockeys were much more explicit about the racial issues of the day that affected the Black community. Many radio stations, by observing Black DJs and their connection with the Black community, would see the value in attracting and connecting with a local listening audience. See FISHER, *supra* note 9, at 52; see also DOUGLAS, *supra* note 1, at 239 (“Linguistically and musically, these stations acknowledged that much of the community’s identity derived from a distance from mainstream, [W]hite, bourgeois culture, a distance that [W]hite DJs would mimic and cultivate to great profit.”).

Freed, avoided talking directly or overtly about Blacks or race on air, despite his use of racial ventriloquy.²⁴⁷ He was, however, known to publicly embrace Black male and female musicians at shows or events he hosted.²⁴⁸ And, while these disc jockeys, their station owners, and eventually White rock-and-roll artists, like Elvis Presley, expropriated and exploited Black music without directly addressing the conditions of Black Americans in America, they flung the door open wider for Black disc jockeys, Black musicians,²⁴⁹ and the listening Black audience. This audience found pleasure in the visibility and attention given to Black musical and cultural expression (even if coded and subverted) since, for so long, they had been completely ignored and objectified on radio, and were continuing to be ignored on television.²⁵⁰

Moreover, these disc jockeys hosted shows and concerts, which led to racial intermingling and were, in themselves—like the formal civil rights movement that was soon to come—challenges to the mainstream prohibitions against social interactions between the races.²⁵¹ At the time, rock and roll was seen as an overnight shift in popular culture, but was instead actually a manifestation of sentiments that had been festering for decades. With rhythm-and-blues-infused rock and roll music played on the air symbolizing an “imagined” racial interaction on air, and with the literal and spontaneous everyday interactions on the dance floor between Black and White youth, mainstream racial segregationist norms “were starting to buckle, and a huge new generation of young people was beginning to flex its demographic muscle.”²⁵² In fact, as disc jockeys spoke at record stores, emceed, and coordinated dances and events, they saw the crowds growing more racially mixed and the physical divide meant to partition the Black and White youth soon disappeared.²⁵³ By surveying local record stores and

247. FISHER, *supra* note 9, at 53–54 (“Indeed, [Freed] never called the music he played ‘rhythm and blues,’ instead using the term ‘rock and roll’—the old blues metaphor for sexual intercourse—as a euphemism.”).

248. DOUGLAS, *supra* note 1, at 249. Alan Freed was known to kiss Black female performers, share the stage with and embrace Black male performers, and “was even seen sharing a cigarette or a drink with these performers after the show.” *Id.*

249. DOUGLAS, *supra* note 1, at 240 (“[B]lack musicians like B. B. King, James Brown, and Aaron Neville felt grateful to such DJs because they gave [B]lack music a much wider audience; exposed [B]lacks and [W]hites to gospel, rhythm and blues, boogie-woogie, and jazz; and often gave these same musicians their first break.”).

250. *See id.*; *see also* FISHER, *supra* note 9, at 47 (“The illicit sound of the new music drove radio further and further from the innocence of TV America and the pretense of racial separation.”).

251. *See* DOUGLAS, *supra* note 1, at 249.

252. FISHER, *supra* note 9, at 28; *see also* ENNIS, *supra* note 212, at 140.

253. DOUGLAS, *supra* note 1, at 249.

Many DJs sought to boost their ratings with teenagers by hosting dance parties, which often resulted in integrated crowds. Whites’ embrace first of R&B and then

interacting directly with his local audience, the DJ played what he thought his audience wanted to hear, an observation that ultimately led to the development of the Top 40 format.²⁵⁴ “Top 40 radio was [originally] designed to reflect what had been widely accepted, not to showcase anything avant-garde.”²⁵⁵

Therefore, the disc jockey helped to make visible the musical tastes and preferences of two formerly ignored segments of mainstream America. He also helped to make radio a center of business in the entertainment industry, at least as it related to rock and roll—the music genre that most influenced popular culture at the time and exemplified the intergenerational and interracial battle over identity and identity formation. With the growing connection between radio, disc jockeys, the small up-and-coming grassroots record labels, and the effect of radio airplay on a song’s sales, radio became a serious site of contestation to self-appointed guardians of both old-guard segregationist ideology²⁵⁶ and established business practices in radio.

3. Commercializing White Youth Culture

In response, a campaign against rock and roll developed with the goal of beating back the wave of sociocultural change underlying the music’s popularity. Rock-and-roll disc jockeys were targeted as the culprits for instigating and fueling the desires for such transformative cultural understandings, which, within a decade, advanced to a demand for change

of [B]lack rock and pop stars disrupted the old patterns of segregated shows, and this was especially revolutionary in the South, where segregated facilities were commonplace. Now [B]lacks and [W]hites would enter the same building to hear the same R&B group they had heard on the radio, but they were separated from each other by ropes or other dividers. Once everyone started dancing, however, these barricades often fell, and there they would be, dancing together.

Id. Popular movies such as *Hairspray*, *The Frankie Avalon Story*, *Ray*, and *Cadillac Records* touch on this American cultural phenomenon that was fueled by the radio airplay of such music.

254. Rothenbuhler & McCourt, *supra* note 39, at 367, 370–71 (“[S]tations surveyed record stores for their most popular songs, and local interest, rather than national popularity, determined airplay . . .”). Top 40, at the time, was not as scientific as it has come to be in terms of being based on national surveys and market research. The number forty originally represented “the approximate number of songs a deejay could play in a three-hour shift.” FISHER, *supra* note 9, at 16. It reflected the music tastes and preferences of the local listening audiences as determined by the disc jockey, who surveyed what music and records were being bought in the local community record store, which, during this time, were primarily rhythm and blues and rock and roll records purchased by teenagers. *See* DOUGLAS, *supra* note 1, at 227–28.

255. FISHER, *supra* note 9, at 28.

256. *Id.* at 50–51. “When [W]hite deejays put [B]lack acts onstage in front of [W]hite audiences, and [W]hite deejays were buddies with [B]lack musicians, and [W]hite deejays went out of their way to talk and walk like [B]lack men, the reaction ranged from queasy discomfort to unchecked rage.” *Id.* at 50.

by Black Americans via the civil rights movement and the 1960s protest movements.²⁵⁷ In the 1950s, though, “[t]he enemy was not . . . the handful of . . . stations that appealed to [B]lack America, but rather the rebel deejays who breached the color line, bringing [B]lack music to [W]hite teens.”²⁵⁸ Local and city governments banned rock-and-roll concerts within their jurisdiction in an effort to prevent further racial intermixing, while churches and several civic organizations issued anti-rock statements on behalf of parents, and civic and religious leaders.²⁵⁹

The main assault, however, came in the early 1950s and ultimately led to the dethroning of the disc jockey and a dismantling of the threats to the then-established economic and racial hegemonies in the industry and society at large. Payola, “gifts and payments to deejays made as inducement for playing records[,]” while not illegal in the 1950s,²⁶⁰ was the subject of a federal investigation into corruption in radio, due in large part to the lobbying efforts of ASCAP.²⁶¹ ASCAP’s objective was to bring down the rock-and-roll DJ, who played primarily rock-and-roll and rhythm-and-blues music—both published by its competitor, BMI.²⁶² Due to the payola investigations, disc jockeys quit in droves, and stations fired many others.²⁶³ To communications scholar Susan Douglas, the payola surge was the apex of

a massive fight over listening, over the barely articulated understanding that radio listening was playing a central role in shaping the identities of millions of young people. This was a recognition that despite the highly visual nature of American culture, especially with the ubiquity of television, radio was addressing and cultivating young people in a way that television didn’t dare.²⁶⁴

257. *Id.* at 50–51.

258. *Id.* at 50.

259. See DOUGLAS, *supra* note 1, at 249; FISHER, *supra* note 9, at 52.

260. FISHER, *supra* note 9, at 79. *Accord* 47 U.S.C.A. § 508 (2006). In fact, payola dated back to the 1930s in one form or another to when songwriters offered band leaders certain incentives to play one of their songs in a set or performance on radio. Devin Kosar, Note, *Payola—Can Pay-for-Play Be Practically Enforced?*, 23 ST. JOHN’S J. LEGAL COMMENT 211, 217 (2008). As disc jockeys gained in popularity and control over the content that was aired on the radio, they began to receive paid incentives from an endorsing record company to play a particular record. *Id.*

261. See DOUGLAS, *supra* note 1, at 251.

262. *Id.* The stage was set for a national inquiry determined to bring Top 40 radio back within the control of corporate leaders.

263. FISHER, *supra* note 9, at 91.

264. DOUGLAS, *supra* note 1, at 251; see also FISHER, *supra* note 9, at 89.

Those who lived through the payola scandal came to see the purging of rock radio as the older generation’s desperate effort to hold on to what they knew, to their ideas of how parents and children should relate to one another, to their concept of race in America, to their sense of respect and propriety.

Id.

In the end, after the payola surge, the disc jockey's autonomy was eroded.²⁶⁵ Stations turned to national surveys to give an appearance of a scientific methodology of choosing playlists, which ultimately served as “the first big step away from the localism of the 1950s,” and led to the resurfacing of the “blandness” and homogeneity of the network era.²⁶⁶ Developing AM programming formats soon favored management selections over the DJs and often “gave DJs even less time to talk and made them hew to a thirty-record playlist. . . . [with] rotations emphasize[ing] the top six to eight records, playing the hits over and over and over.”²⁶⁷ While rock and roll on the air continued and the disc jockey personality remained, racial ventriloquy and music with overt identifications with Black culture did not. They were replaced instead with “more generic youth slang like ‘sockin’ it to you’ and ‘groovy,’”²⁶⁸ and “crossover music that was clearly [B]lack, but not threatening, and very danceable.”²⁶⁹ AM radio became highly “predictable and routinized,” and filled with “so many jingles, ads, and promos to tune out.”²⁷⁰

In essence, the youth rebellion was commercialized and harnessed by a controlled and predictable playlist. Youth began to turn away and tune out of AM radio, especially as the youth rebellion became overtly politicized in the years to come.²⁷¹ But even prior to Congress' payola

265. Kielbowicz & Lawson, *supra* note 187, at 352 (“Station managers reined in deejays by imposing more centralized control over programming, which led, according to some observers, to the rise of formula play lists such as Top 40 formats.”). Indeed, “payola would never really go away; it merely changed direction. Now it was music directors and station managers, rather than deejays, who made deals with record companies and their distributors.” FISHER, *supra* note 9, at 91.

266. FISHER, *supra* note 9, at 91.

267. DOUGLAS, *supra* note 1, at 252; *see also* BILL BREWSTER & FRANK BROUGHTON, *LAST NIGHT A DJ SAVED MY LIFE: THE HISTORY OF THE DISC JOCKEY 40* (2000). Moreover, smaller independent record labels would be hurt considerably with fewer opportunities for their songs to get airplay due to the subsequent development of Top 40 music play lists—which were based on national surveys, including music listings in *Billboard* magazine—and to a reduction in the number of songs played on the radio airwaves, an increase in advertising jingles, and rapid-fire disc jockey talk. DOUGLAS, *supra* note 1, at 251–52.

268. DOUGLAS, *supra* note 1, at 252.

269. *Id.* (internal quotation marks omitted).

270. *Id.* at 254; *see also* FORNATALE & MILLS, *supra* note 181, at 26 (stating that Top 40 has come to mean the playing of the best selling records over and over in what industry calls rotation).

271. They would turn to FM radio, *see* DOUGLAS, *supra* note 1, at 256–59, a phenomenon, which while fascinating in its own right and which provides yet another example of radio's subversive capabilities, is beyond the scope of this Article. This exodus played out repeatedly on broadcast radio as different subversive voices on radio found their way onto the airwaves only to be eventually commercialized or co-opted—a situation not too different from the current status of radio. Interestingly enough, when FM stations, too, became restricted by tight Top 40 playlists, those excluded or marginalized from the nation's radio airwaves turned to college radio and community radio. *See id.* at 282–83.

surge that dethroned the DJ and initiated the move away from localism, FCC localism rules and policies up until the 1950s fell far short of facilitating the discursive struggle against mainstream norms related to identity and race that were occurring at the time.²⁷² Early on, the FCC did little to further the contesting voices of those in the Black community and, furthermore, was indifferent to those voices being given access to the radio airwaves.²⁷³ Indeed, the FCC failed to effectively adopt and enforce localism rules or policies that called for the inclusion of Black interests, local or otherwise, which were notoriously absent or objectified on radio pursuant to the firmly entrenched industry norm regarding the Whiteness of radio.

One could argue that what this trip down America's historic sociocultural legal lane shows is that the market, and not the law, was instrumental in the subversion and diversity that appeared on radio during the transition period. Despite all the FCC's calls for localism, this Article contends that the law implicitly endorsed the Whiteness ethos on radio, and it did little, if anything, to facilitate the discourse that ultimately surfaced, despite the law's indifference to the limited access to Blacks on radio or even to the mainstream American youth.²⁷⁴ Both segments of the population remained invisible and did not gain access to the nation's radio airwaves until after their buying power increased and the market demanded their entry.²⁷⁵ But as this history has also shown, demographics and market demand were not the only factors, but two of many that led to the inclusion of these voices. These other factors are no longer present in the deregulated and ownership-consolidated radio (and music) industry in which radio now exists. Therefore, government intervention is clearly necessary. The government needs to reinvigorate a localism policy that ensures that radio, in particular, given its unique qualities, is more representative and inclusive of contesting voices, especially those of the underserved. Continued adherence to the predominant market-based analysis of the public interest obligations imposed on broadcasters, where buying power of a particular demographic is the dispositive force, will not lead to such inclusion, as evidenced by the current state of radio.

272. See *supra* Part II.B.

273. See generally LaVonda N. Reed-Huff, *Radio Regulation: The Effect of a Pro-Localism Agenda on Black Radio*, 12 WASH. & LEE J. CIVIL RTS. & SOC. JUST. 97 (2006).

274. See BLUE BOOK, *supra* note 76, at 15, 36; see also Lenthall, *supra* note 64, at 41, 53–54.

275. See FISHER, *supra* note 9, at 45–47.

IV. REINVIGORATING LOCALISM

A. *Deregulation and Its Effect on Music Content on Radio*

The deregulatory efforts that began in the 1980s, and were cemented with the passage of the Telecommunications Act of 1996, have virtually eliminated many of the factors that were once present and relevant to the rise of rock and roll on radio. Specifically, as previously discussed in this Article, the countercultural sound of rock and roll made its way onto the airwaves, despite premature predictions of radio's demise, since fierce competition existed between local radio station owners and because radio stations were connected and responsive to local communities through their local DJs, musicians, and independent record labels. These factors considerably influenced the emergence of the local and contesting voices heard on radio in the 1940s and 1950s, which have been undermined due to the exclusive market-based deregulatory approach ultimately adopted by the FCC.²⁷⁶ For nearly four decades, and up until the early 1980s, communications regulatory policies incorporated localism ideals and aimed "to restrict [media] ownership concentration."²⁷⁷ During that time, the "presumption was relentlessly against concentration and toward maximizing the number of independent media voices."²⁷⁸ Although the FRC and FCC struggled to effectuate localism early on in light of the rising dominion of the networks, the FCC, through the *Chain Broadcasting Order*, encouraged the development of more nonnetwork, independent stations. In addition, the increased competition among these independent radio stations for content and a listening audience gave rise to a number of smaller, independent record labels that provided such content and to the rise of the local disc jockey, who was intimately connected with his listening audience.²⁷⁹

Now, radio has essentially become centralized in the hands of very few conglomerates that control the majority of what the nation hears.²⁸⁰

276. See, e.g., Amendment of Section 7.3555, [formerly Sections 73.35, 73.240, & 73.636] of the Commission's Rules Relating to Multiple Ownership of AM, FM, and TV Broadcast Stations, *Report and Order*, 100 F.C.C.2d 17, paras. 8–10 (1984).

277. C. Edwin Baker, *Media Concentration: Giving Up on Democracy*, 54 FLA. L. REV. 839, 869 (2002).

278. *Id.*

279. See generally DOUGLAS, *supra* note 1, at 227.

280. Mark Anthony Neal, *Rhythm and Bullshit?: The Slow Decline of R&B, Part Three: Media Conglomeration, Label Consolidation and Payola*, POPMATTERS (June 30, 2005), <http://popmatters.com/music/features/050630-randb3.shtml>.

In the aftermath of the Telecommunications Reform [sic] Act, the massive consolidation in radio has left fewer people making the decisions about what music will be played. The ten largest radio conglomerates in the U.S. control more than two thirds of the national radio audience, with Clear Channel and Viacom . . .

Moreover, the public trusteeship interpretive standard applied to the public interest obligations imposed on broadcasters, from the outset, incorporated localism concepts. It, however, has been replaced with the marketplace interpretive standard, premised on the belief that the public interest requirement could best be met by market forces.²⁸¹ Marketplace ideology rejected the scarce-airwaves theory underlying the trusteeship standard because, in principle, all resources, including the airwaves, were scarce. Therefore, according to the marketplace model, the belief was that the efficient use of the airwaves (like other scarce resources) could best be determined by the market and the laws of supply and demand.²⁸² Such demand turned primarily on buying demographics and consumption habits and in treating radio content as a consumer good. Gone by the wayside was the concern for local access to, and content on, the airwaves.

Moreover, pursuant to this market-based ideology, the Telecommunications Act of 1996 was ultimately enacted, removing ownership caps on local and, to some extent, national station ownership.²⁸³ Immediately following its passage, media conglomerates bought and consolidated most local stations in order to decrease competition among them and thereby maximize profits.²⁸⁴ “With media conglomerates having no commitment to the idea of the local interest, they ‘laid off hundreds, decimated community programming and all but standardized play lists across the country’”²⁸⁵ To increase profits, many stations soon

controlling more than 40 percent of that.

Id.

281. Mark S. Fowler & Daniel L. Brenner, *A Marketplace Approach to Broadcast Regulation*, 60 TEX. L. REV. 207, 233 (1982) (written by a former FCC Chairman, who was the first in history to advocate for abandonment of the public trustee model of broadcast regulation for the market-based approach).

282. See R. Randall Rainey & William Rehg, *The Marketplace of Ideas, The Public Interest, and Federal Regulation of the Electronic Media: Implications of Habermas’ Theory of Democracy*, 69 S. CAL. L. REV. 1923, 1937 (1996).

283. Telecommunications Act of 1996 § 202, Pub. L. No. 104-104, 110 Stat. 56 (codified at scattered sections of 47 U.S.C.).

284. See Prindle, *supra* note 28, at 306. Originally, proponents of deregulating ownership in media opined that multiple ownership of radio would foster more diversity in content, given that an owner of multiple stations would seek to provide a more diverse array of content options on its differing sister stations to attract a differing listening demographic. Krotoszynski & Blaiklock, *supra* note 24, at 831–32. In that way, perhaps even niche markets could be served. *Id.* However, with common ownership, radio conglomerates found economies of scale much more appealing. Martens, *supra* note 43, at 311. This, in turn, cut short the goal of catering to niche or even local tastes. Today, conglomerates generate more advertising profits by marketing and selling to advertisers a well-studied and known commodity—a particular listening and buying demographic. Rather than appealing to the intricacies and nuances of a particular local listening audience, the content provided, then, is more national and mainstream in appeal. *Id.* at 311–12 (stating that radio has become more like a “McRadio” than the intimate connection to the local that it once was).

285. Folami, *supra* note 23, at 296 (quoting JEFF CHANG, CAN’T STOP WON’T STOP: A

replaced live disc jockeys, both Black and White, who “understood local tastes and intricacies”²⁸⁶ with prerecorded announcers. In addition, with the adoption of software that permitted disc jockeys to “voice track” or “cyberjock” their shows,²⁸⁷ disc jockeys became further removed from their local audience.

Shows were prerecorded with voice-tracking technology, which allowed disc jockeys to tape their shows with sound bites; other technological developments made it possible to patch in listener calls, songs, promos, and other commercials. Such shows were subsequently sent out to other conglomerate-owned stations in other local and regional areas.²⁸⁸ With cyberjocking and voice tracking, radio conglomerates “cut down the total number of disc jockeys and spotlight[ed] its top talents.”²⁸⁹ As a result, many DJ positions were eliminated “by simply having one company jock send out his or her show to dozens of sister stations. Thanks to clever digital editing, the shows still often sound[ed] local.”²⁹⁰ The nationally syndicated radio personality was soon to follow and was, by definition, further removed from the many communities that received the syndicated broadcast.²⁹¹ Although syndication of programming has benefits in that it can give national exposure to information or talent that might have otherwise remained local, syndicated programming is, however, a huge problem to the extent that it only (or primarily) recycles top-down, national content and contributes to erasing local access and expressivity on the airwaves.²⁹² There also exists a concern that calls for the recognition of local and particularized interests and tastes may lead to further fragmentation of the public sphere. However, attention to localized viewpoints, especially as they relate to radio access, is necessary to capture the concerns of those rendered voiceless in the mainstream discourse and to facilitate a more robust and inclusive democracy.

With consolidated radio and radio’s continued ability to influence

HISTORY OF THE HIP-HOP GENERATION 441–42 (2005)).

286. Adam J. van Alstyne, Note, *Clear Control: An Antitrust Analysis of Clear Channel’s Radio and Concert Empire*, 88 MINN. L. REV. 627, 660 (2004).

287. Randy Dotinga, ‘Good Mornin’ (Your Town Here),’ WIRED NEWS (Aug. 6, 2002), <http://www.wired.com/news/business/1,54037-0.html>.

288. *Id.*

289. *Id.*

290. Eric Boehlert, *Radio’s Big Bully*, SALON.COM (Apr. 30, 2001), http://archive.salon.com/ent/feature/2001/04/30/clear_channel/.

291. See Dotinga, *supra* note 287.

292. See Martens, *supra* note 43, at 315 (stating that post-consolidation, voice-tracking technology of the syndicated DJs on radio is not locally responsive). See generally Ortner, *supra* note 32 (arguing that, while syndicated programming allows some local issues to be heard nationally, it has generally led to a loss of radio’s historically unique connection to the local community).

consumer preferences, media conglomerates were soon positioned to generate more advertising fees and to ultimately enhance their control over what the public hears on the radio. For example, given their growing market power via station ownership, station owners knew that they could “leverage their access to the airwaves to coerce labels and artists in the form of pay-for-play . . . because [the labels and artists] ha[d] no comparable means to promote their material.”²⁹³ Playlists were no longer determined by the local disc jockey, but by distant radio stations’ regional managers and directors, and were played by the distant nationally syndicated disc jockey. Presumably, radio stations were also hesitant to introduce new talent or to vary from such nationally generated playlists for fear of offending advertisers concerned about upsetting the core listening demographic.²⁹⁴ Therefore, “[w]ith few open spots for new music on tightly controlled play lists, it [became] increasingly difficult for new artists to enter the airwaves.”²⁹⁵ Moreover, independent labels fared no better in the post-Telecommunications Act consolidated radio industry environment because “they simply were unable to compete with the expensive advertising costs for radio air play of their talent.”²⁹⁶ Radio programming, in the end, not only has become further removed from the local listening audience, but also has become devoid of social commentary and is filled with jingles, advertising, and feel-good music meant to entice listeners into buying and consuming.²⁹⁷

Because radio continues to influence the popularity of a particular song, it is still very relevant in shaping mass and popular culture²⁹⁸ and, by extension, societal perceptions, understandings, and constructions of identity. It is therefore imperative for a thriving and deliberating participatory democracy that such perceptions are not merely shaped or passed down from the top. Space must be provided to musicians (and their

293. Van Alstyne, *supra* note 286, at 653.

294. Rachel M. Stillwell, *Which Public? Whose Interest? How the FCC's Deregulation of Radio Station Ownership Has Harmed the Public Interest, and How We Can Escape From the Swamp*, 26 LOY. L.A. ENT. L. REV. 369, 406 (2006) (“Programmers’ decisions about music are driven by financial considerations, aimed at particular demographics for purposes of selling advertising.”).

295. Van Alstyne, *supra* note 286, at 659.

296. Folami, *supra* note 23, at 300. The intense consolidation in radio, coupled with the subsequent consolidation in the record industry—where approximately four major record labels came to be responsible for more than eighty percent of what makes it on to commercial radio—practically squeezed out new artists that were not backed by one of the major labels. Neal, *supra* note 280.

297. See DOUGLAS, *supra* note 1, at 356–57; see also Neal, *supra* note 280 (claiming that, on urban radio, in particular, the overarching message is buy, buy, buy).

298. See generally Mezey & Niles, *supra* note 155. “Popular culture makes use of the mass cultural resources that capitalism provides, and mass culture often co-opts and markets pop cultural practices.” *Id.* at 99.

listening audiences) who might contest the current cookie-cutter lyrical messages of consumption and frivolity that currently pervade the corporately controlled, market-driven radio airwaves. Given what seems like the exclusive application of the market-model approach to current media policies, and the disappearance now of most of the factors that were present during the period in which rock and roll emerged, it is difficult to see how contestatory voices would or could now find their way onto the conglomerate-controlled airwaves. Radio ownership consolidation by the major conglomerates of small and local radio stations has swallowed up competition such that there is no longer a competition for advertising dollars, an audience, or even content.²⁹⁹

Without government intervention, it is difficult to see how or why radio conglomerates would not continue with business as usual, maximizing advertising profits by maintaining predictable buying demographics. Indeed, the Third Circuit, in staying the 2003 *Report and Order* further deregulating the media industry, seemingly acknowledged as much by ordering the FCC to listen to the everyday concerns and conversations of the local public through a series of public hearings across the nation.³⁰⁰

B. *Opening Up Access: Suggested Approaches*

Radio ownership consolidation is more than likely here to stay, despite concerns raised by the current presidential administration.³⁰¹ Moreover, while concerned with the effects of consolidation on localism generally, the Third Circuit neither raised the issue of dissolving the current consolidation in broadcast to remedy its current status, nor required conglomerates to divest some of their consolidated holdings.³⁰² Such divesting would more than likely only occur if media conglomerates, like the networks in the 1950s, decided to release some of their ownership holdings voluntarily. While the law, through localism rules and policies,

299. See Prindle, *supra* note 28, at 299; see also DOUGLAS, *supra* note 1, at 350.

300. Prometheus Radio Project v. FCC, 373 F.3d 372, 435 (3d Cir. 2004).

301. President Barack Obama, while Senator and during his presidential campaign, stated his displeasure with the current consolidated and hyper-commercialized status of the media and has suggested possible remedies, including reinstating a meaningful localism standard and adopting policies to pave the way for more low-power FM stations across the country. See John Eggerton, *Obama, Bush at Odds over Media-Ownership Vote*, BROADCASTING & CABLE (May 16, 2008), http://www.broadcastingcable.com/article/113739Obama_Bush_at_Odds_Over_Media_Ownership_Vote.php; see also Associated Press, *Changed Media Landscape Awaits FCC Move*, CBS NEWS (June 20, 2010), <http://www.cbsnews.com/stories/2010/06/20/ap/tech/main6600896.shtml> (discussing FCC stance on issues confronting broadcast, including concentrated conglomerate ownership).

302. See *Prometheus Radio Project*, 373 F.3d 372.

was not particularly helpful historically in destabilizing the racial and economic status quo on the nation's airwaves during the transition period of the mid-1940s to early 1950s, there were a number of other factors at the time beyond market demand that contributed to bringing marginalized voices to the forefront. Now, however, many of those factors, such as the intense competition between local radio station owners and their intimate connections with their local listening audiences via the DJs, have disappeared, due to ownership consolidation in the industry.

Therefore, this Article proposes a few possible remedies for opening up access on the nation's radio airwaves *within* the context of ownership consolidation, which are informed by radio's subversive past explored herein. First, this Article calls for the continued imposition of public interest obligations on broadcasters, a return to the public-trusteeship interpretive standard, and a reinvigoration of localism as part of such obligations.³⁰³ This Article also argues for a more expansive understanding of localism that would incorporate music and popular culture expressions, especially as expressed by those most marginalized in society. It also proposes that broadcasters be required to allot a specific amount of time to the airing of local music and that a more meaningful review process for broadcast license renewals be imposed to consider the extent to which broadcasters provide radio access to local musicians and content.³⁰⁴

With regard to the first suggestion on the continued imposition of public interest obligations on broadcasters and a return to the public-trusteeship interpretive model, such obligations should remain in force because, despite the motley of other media outlets available—Internet radio, satellite radio, cable and digital television, and the like—the reason underlying such obligations in the first place is still present: electromagnetic spectrum is still scarce. Despite the high demand for its use, spectrum is still finite and regulation of its use remains justified.³⁰⁵

303. See also Folami, *supra* note 10 (discussing potential remedies—that do not include increased FCC regulatory oversight—for increasing public affairs and political news, rather than music and other cultural programming explored herein, on broadcast television within the context of its commercialization and consolidated control).

304. Currently, pursuant to the deregulatory policies adopted via the passage of the Telecommunications Act of 1996, broadcaster licenses are, for the most part, presumptively renewed with nonrenewal relegated to the last punitive option should a licensee fail to meet renewal requirements. See Telecommunications Act of 1996 § 309, Pub. L. No. 104-104, 110 Stat. 56 (codified at scattered sections of 47 U.S.C.).

305. Krotoszynski & Blaiklock, *supra* note 24, at 817–18 (“Because physical constraints limit the number of broadcast licenses that the Commission may issue, government regulation of the airwaves . . . [is] necessary to ensure that those granted the privilege of broadcasting do not abuse that privilege by failing to operate their stations in the public interest.”); see Varona, *supra* note 72, at 153 (asserting that the scarcity doctrine is still applicable and justifiable despite the increase in other media outlets). See generally FCC, SPECTRUM POLICY TASK FORCE: REPORT OF THE SPECTRUM RIGHTS AND RESPONSIBILITIES

Moreover, unlike many other scarce resources, radio is still a pervasive medium, and its uniqueness continues to rest in its ability to facilitate deliberative discourse. The Supreme Court, nearly forty years ago, acknowledged the unique status of broadcast as a deliberative tool and established as its primary goal exposing listeners to a marketplace of ideas and diversified viewpoints.³⁰⁶ With such deliberative goals of radio still firmly in place, the governing public-trusteeship interpretive standard and localism policies (and related localism dictates), which were in place for well over three decades, should be resurrected. Relying solely on the market model and on demand in the market to determine the public's interest (especially when public demand turns narrowly on a particular buying demographic) is the equivalent of turning a public resource over to private interests for their own self-regulation. Such self-regulation diametrically conflicts with the foundational principles underlying radio's regulation, with the interests of the listening audience significantly sacrificed as a result. Therefore, not only should the public trusteeship standard be reapplied to the public interest standard as a part of FCC policy and regulatory authority, but localism requirements must also be read back into the public-trusteeship model of the public interest standard.

Indeed, almost from the inception of radio's regulation, localism requirements have been part of such public interest obligations, with due weight given to them in facilitating the articulation of community norms and interests. These regulations and policies, like the Blue Book and *Chain Broadcasting Order*, implemented during the network era, were aimed at ensuring that radio was a medium representative of the interests of those in the local listening audience of a radio broadcast station. Most attempts at increasing localism were abandoned, however, by the FCC during the deregulatory process, which began in the 1980s. The market-model approach to broadcasting has, for the sake of efficiency, not only set aside local interests generally, but has also reinforced demographic inequalities that tend to further marginalize and render invisible the socioeconomically vulnerable.³⁰⁷ Therefore, some type of regulation, requiring a broadcaster to consider and address the preferences of its local community, may be necessary to reverse the tide of the mass-produced and rarely local, top-

WORKING GROUP (2002), *available at* <http://www.fcc.gov/sptf/files/SRRWGFinalReport.doc> (discussing potential methods of allocating spectrum and the typical rights and responsibilities the FCC assigns to licensees).

306. *Red Lion Brdcast. Co. v. FCC*, 395 U.S. 367, 390 (1969).

307. Randall Rainey and William Rehg argue that, while an unregulated media grounded in market-based ideology may be more economically efficient (via costs and economies of scale), deliberation on radio is sacrificed. Rainey & Rehg, *supra* note 282, at 1937. Moreover, radio and the facilitation of such public discourse cannot be reduced to a consumer good. *Id.* The net result of such approach is the elevation of the interests of those with more wealth and buying power above those with less. *Id.* at 1943.

down basis upon which radio content is currently provided.

Specifically, in reinvigorating localism, the FCC should do so with a particular eye toward ensuring that members of the local listening audience in the lower economic order are granted access to the nation's radio airwaves and are provided with culturally expressive content, including music, which reflects their particular interests—and perhaps subversive discourse.³⁰⁸ As has been discussed, cultural expression has proved to be essential in helping an individual process, accept, challenge, or reformulate community norms and related constructions of identity and social order: localism principles have been built on culture's processing function.³⁰⁹ Radio's importance on this front cannot be underestimated despite the availability of other outlets in the media landscape because radio—unlike the other media outlets that might also have the ability to encourage discourse—is still relatively inexpensive, without a premium attached for access. As a result of such costs, a significant portion of America's population, constrained by socioeconomic limitations, cannot perhaps afford the price tag of these other media options. There is growing and continued digital divide between America's poorer communities and mainstream America.³¹⁰ Moreover, continuing to follow primarily a market-based approach to media policy has led, and will continue to lead, to the creation of technology “‘haves’ and ‘have nots,’” resulting in an increased marginalization of the socioeconomically vulnerable.³¹¹

In order to fulfill localism objectives and, thereby, radio's deliberative aspirations, radio stations, at a minimum, must be required to reach out and reconnect to the local community by hiring local personnel that could, in turn, directly affect the representation of local voices.³¹² Since this Article

308. This Article contends that, by directly targeting an increase in the representation on radio, in particular, of those on the lower socioeconomic ladder, the FCC may diversify the airwaves with minority voices in a way that more than likely will not face as many constitutional challenges, given *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995). See *Miller v. Johnson*, 515 U.S. 900, 916 (1995) (decided a few weeks after *Adarand* and establishing that targeting of a socioeconomic community is not an impermissible racial distinction, provided that race was not the predominate factor motivating the government's decision).

309. Cowling, *supra* note 3, at 312.

310. See, e.g., Krotoszynski & Blaiklock, *supra* note 24, at 864 (discussing how government intervention in media access allocation is needed due to imperfect market conditions).

311. *Id.*

312. While a return to the programming logs and ascertainment rules are not specifically being proposed here, as there does seem to have been some value to the arguments that such requirements were unduly burdensome on smaller to mid-sized radio stations, something akin to it is in order. See, e.g., Martens, *supra* note 43, at 304–05. The FCC has recently announced that radio stations must establish an advisory council that consults with local community and civic leaders to determine what local, news, and public affairs issues and programming would be of interest to their community; but many critics have found such

argues for a more expansive reading of localism that includes music and popular culture as reflective of local discursive interests and concerns, hiring local Black or White disc jockeys (or of other diverse ethnic backgrounds) might prove, as history has shown, quite beneficial to representing on the airwaves the cultural discourses, which necessarily might include music of the local community.³¹³

With regard to the second suggestion on opening up access, this Article also calls for broadcasters to provide a specific portion of airtime to local musicians,³¹⁴ to provide space for voices that, by their very nature, might contest the top-down corporate-selected and -endorsed music that currently pervades the nation's airwaves. Admittedly, there are a few challenges to this time allotment requirement. One such challenge is that the allotment requirement assumes that local music will be different than that provided on a corporate-driven national level or that local music will contain social commentary or contestatory messages that challenge the status quo. Such replication is certainly a possibility given the effect radio has on consumer preferences, especially as it relates to music and popular cultural expression.³¹⁵ However, the main point here is to ensure that access is provided. While some of the music may simply be about frivolity and pure entertainment, the belief is that, even within the realm of

promulgation too vague to be effectual. *See id.* at 286 (citing Press Release, FCC, FCC Chairman Powell Launches "Localism in Broadcasting" Initiative (Aug. 20, 2003)). Moreover, the announcement for advisory council consultations also seems to focus primarily on local news and public affairs to the exclusion of local music.

313. Such a policy would not run afoul of the ruling in *Bechtel v. Federal Communications Commission*, 10 F.3d 875 (D.C. Cir. 1993). The court in *Bechtel* struck down the FCC's owner-manager integration rule, which gave a preference to a prospective licensee applicant who committed to hire managers from the local community, on the grounds that the causal connection that the FCC drew between hiring local employees and granting licenses was arbitrary and capricious and without factual support. *Id.* at 887. As has been discussed in this Article, in terms of increasing local, culturally expressive content on radio, the local disc jockey has had, up until the massive industry consolidation and the implementation of economies of scale measures, a historically proven and far from arbitrary role in increasing local and diverse viewpoints on radio.

314. This proposition has found support with other scholars albeit for different reasons related to general programming entertainment enhancement and not necessarily for deliberative purposes as this Article specifically endorses. *See, e.g.,* Krotoszynski & Blaiklock, *supra* note 24, at 857 n.310; *see also* Martens, *supra* note 43, at 313–14.

315. *See* Cowling, *supra* note 3, at 349 ("Consumer choice is also constrained by "'gatekeepers,' 'chokepoints' and 'tastemakers'" deciding 'which products get shelf space and which will be excluded from audience consideration.' Consumers get what gatekeepers approve[,] . . . positing the pure consumer sovereignty/marketplace model as an illusory ideal.") (citing PETER S. GRANT & CHRIS WOOD, BLOCKBUSTERS AND TRADE WARS, POPULAR CULTURE IN A GLOBALIZED WORLD 51 (2004)). In the context of radio and music airplay, the gatekeepers are the record industry that pays a premium, often in the form of payola, to regional and corporate managers that then require DJs to play the paid-for song on air. *See* Folami, *supra* note 23, at 291–92; *see also* Kosar, *supra* note 260, at 214–15.

entertainment, commercialization, and what some might call manufactured consent, voices of contestation (even if coded) can and will surface. For example, in his book, *Happy Slaves*, Don Herzog explored slave songs and other culturally expressive conduct in slave communities that, on the surface seemed to be solely entertaining and established that subversive messages of resistance were also often found in such expressivity.³¹⁶

A different but related challenge to requiring an allocation of time to local musicians in hopes that subversive music might surface is that such exposure might, in the end, lead to the commercialization or co-optation of it, as was the case with jazz, rhythm and blues, rock and roll, and, even more recently, gangsta rap.³¹⁷ The answer to that challenge again is that only access is being called for here. The goal here is not to ensure that subversive music maintains its authenticity, but that continued spheres of musical contestation are given space to flourish continually and find expressive release in hopes of facilitating a discursive exchange or a “nudge”³¹⁸ toward such dialogue.

The question remains, however, as to why space for such contestation must be made on commercial radio when there are other broadcast options available, like low power stations, national public radio stations, and college radio. Part of the answer lies in the belief that such fights must occur within the very commercially saturated realm of entertainment and mass media. Indeed, in a highly commercialized and commodified society, contestation must, at least on some level and at some point, be staged right where the battle lines are being drawn—within the very site of commercialization where identities are being reinforced, constructed, and, in some ways, manufactured.³¹⁹ Moreover, even noncommercial, public, and college stations are beginning to feel the weight and pressure of commercialization due to their underfunded budgets.³²⁰ In the end, there is evidence that even their radio programming is beginning to buckle under the commercial pressure, resulting to the solicitation of commercial advertisements on their websites and to tying of financial incentives to donation (e.g., offering consumer products at a discount with a donation).³²¹

316. DON HERZOG, *HAPPY SLAVES: A CRITIQUE OF CONSENT THEORY* (1989).

317. See generally Folami, *supra* note 23, at 264, 274–75.

318. See generally RICHARD H. THALER & CASS R. SUNSTEIN, *NUDGE* (2008) (discussing the ways in which regulation can encourage individuals to make certain choices relevant to their everyday lives).

319. See generally David M. Skover & Kellye Y. Testy, *LesBiGay Identity as Commodity*, 90 CAL. L. REV. 223 (2002).

320. See David Weir, *NPR, Newsweek Announce Layoffs*, BNET (Dec. 11, 2008), <http://industry.bnet.com/media/1000490/npr-newsweek-announce-layoffs/> (discussing NPR layoffs and programming cuts to meet a \$23 million deficit, including axing shows targeted to attract youth and Blacks).

321. See, e.g., Reuters, *‘Radio Bookmarks’ a Hit with NPR Listeners*, PCMAG.COM (Jan. 29, 2009), <http://www.pcmag.com/article2/0,2817,2339805,00.asp> (“It is important for

And the final challenge to the required time allotment might come from broadcasters asserting First Amendment rights to control the radio content they wish to air on their own licensed stations. The Supreme Court, however, has established that the First Amendment rights of broadcasters are not absolute and take a back seat to the higher governmental interest in ensuring that the radio remains a medium through which a wide variety of ideas, perspectives, and viewpoints are presented.³²² In doing so, the Court recognized a right of the listening audience to have access to a multiplicity of ideas over the airwaves, which as history has shown can include music.³²³ Moreover, the First Amendment rights of broadcasters to provide the content they want has been and still continues to be limited pursuant to other FCC orders requiring broadcasters to provide (or not to provide) content the FCC deems valuable (or of lesser value) to the listening audience. For example, the FCC has prevented broadcasters from airing an unlimited amount of advertisements during children's viewing hours and has required broadcasters to provide children's educational programming.³²⁴ In addition, Congress has established that cultural expression does have societal value by creating the National Endowment for the Arts and Humanities and the Corporation for Public Broadcasting, and by subsidizing the airing of such content.³²⁵

Finally, with regard to the third suggestion, this Article contends that, in order to provide incentives for broadcasters to consider and internalize the needs of their local listening communities, the FCC must reestablish a meaningful review process of each broadcaster's license renewal application. In determining whether a license should be renewed completely or partially, the FCC should consider the extent to which a licensee has provided, or plans to provide, content that is reflective of the needs, interests, and preferences of the local community, which are not

public radio stations to offer enticing premiums because they would not have enough money to keep broadcasting without support from their listeners.”).

322. See *Nat'l. Brdest. Co. v. Columbia Brdest. Sys.*, 319 U.S. 190, 226–27 (1943).

323. Despite its entertaining nature, music has been accorded First Amendment protections, even for lyrics deemed as not overtly political in nature. See e.g., Jason Talerman, Note, *The Death of Tupac: Will Gangsta Rap Kill the First Amendment?*, 14 B.C. THIRD WORLD L.J. 117 (1994) (discussing how rap lyrics were challenged as unprotected speech that encouraged the murder of a police officer); Jeffrey B. Kahan, Note, *Bach, Beethoven and the (Home)boys: Censoring Violent Rap Music in America*, 66 S. CAL. L. REV. 2583 (1993) (discussing how rap lyrics were challenged as obscene and violent).

324. See, e.g., *Children's TV Programming & Advertising Practices, Report and Order*, 96 F.C.C.2d 634 (1984); see also Martens, *supra* note 43, at 314.

325. See Rainey & Rehg, *supra* note 282, at 1984; see also 47 U.S.C.A. § 396 (2006); Daniel Reid, Note, *An American Vision of Federal Arts Subsidies: Why and How the U.S. Government Should Support Artistic Expression*, 21 Yale J.L. & Human. 361, 367–370 (2009).

otherwise serviced by other radio stations in the community.³²⁶ Such review will also ensure that broadcasters are not attempting to satisfy the time allotment obligations proposed herein by relegating such programming to graveyard shifts to avoid airing them during prime times that generate considerable advertising revenue.³²⁷

V. CONCLUSION

History has shown that now is not the first time radio has been controlled by corporate, market-driven commercial interests, which have threatened radio as a medium through which societal understanding and participatory democracy can be achieved. Radio has survived through the commercial hegemony over content in the network era and the format era, and it can do the same in the conglomerate era. During the transition period between the network and format eras, ruling hegemonies were shaken by the voices that made it onto the airwaves in the form of rhythm and blues and rock and roll, thereby validating the contestatory power of music, popular culture, and culturally expressive conduct.

The net effect of consolidation in radio ownership (and the record industry) has been the near extinguishing of even the potentiality of voices of contestation making it to the airwaves. By breathing life back into the localism standard and by reading in a broader understanding of localism—one that incorporates music and popular cultural expression—the FCC can adopt localism rules and policies that acknowledge fully the deliberative capacity of music that can (and does) influence popular constructions of identity and societal understandings. As history has shown, because those most marginalized and excluded from mainstream society may adopt nonovertly political means of expressing their concerns, including via subversive and coded music, due regard must be given to such possibilities in any reexamination of media and localism policy. Local music must be included in the call for more responsive local programming and in promoting a more participatory and deliberative democracy, using radio as a tool. And with that, radio will live on, with its deliberative ideals still intact.

326. See Krotoszynski & Blaiklock, *supra* note 24, at 857.

327. To provide additional incentives to broadcasters, the government could subsidize the time allotted for local music and cultural expression as it does with other government-mandated programming, or could generate funds by imposing certain structural fees on broadcasters. See Rainey & Rehg, *supra* note 282, at 1975–76 (discussing the ways in which funds could be raised by imposing a federal surcharge or excise tax on broadcasters to subsidize the creation of a new nonprofit corporation established with the specific task of collecting content representative of the formal public sphere of civic associations, etc., in the local community).