March 6, 2009

Deliberative Democracy on Air: Reinvigorate Localism-Resuscitate Radio's Subversive Past

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DELIBERATIVE DEMOCRACY ON THE AIR:
REINVIGORATE LOCALISM--RESCUITE RADIO’S SUBVERSIVE PAST

AKILAH N. FOLAMI†

ABSTRACT

Radio, once the vibrant center of deliberative democracy, is now widely regarded as a commercialized wasteland. As the FCC, Congress, and the courts reconsider current media policy in light of the public outcry over the lack of diverse content on the nation’s radio airwaves, many scholars and media reformists attribute the commercial marginalization of radio to deregulation, and the resulting consolidation in radio ownership and homogenization of radio content. They argue for more local news and public affairs programming as a remedy to this problem. This article builds on such arguments but further posits that local music and popular cultural expression are as critical to radio’s role in deliberative democracy as are localized news and other public affairs content, given that the rumblings of the marginalized can often be found in their coded modes of

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† Associate Professor of Law at Hofstra University School of Law. I wish to thank the organizers of the 2008 Northeast People of Color Legal Scholarship Conference and of the 2009 Association for Law, Culture, and Humanities, for allowing me to present a preliminary version of this article. A special thanks to Professors Deborah Post, Lavonda Reed-Knuff and Maria Simone, and to my colleagues Alafair Burke, Julian Ku, and the commentators at the Hofstra Junior Faculty Forum, for their helpful thoughts and comments. Finally, I would especially like to thank Josh Winefesky, Renada King, and James Lewis for their invaluable research assistance.
entertainment and culturally expressive conduct. These culturally expressive sites are essential to will formation and the deliberative process and must not be overlooked as mere entertainment or extinguished due to the top down homogenized content currently heard on the nation’s radio air waves. This article is the first to specifically endorse the inclusion of music into the call to reinvigorate the localism concept on radio not simply for entertainment purposes but also for deliberative purposes. In doing so, this article calls into question the distinctions made in First Amendment scholarship between high and low speech, and in cultural studies between high and low culture. It also poses a challenge to deliberative democracy theorists who argue that overt political discourse via reasoned debate is the only means upon which the public sphere can challenge hegemonic rule.

In support of this proposition, this article examines a period in America’s history--the mid-1940s to early 1950s--during the rise of rock and roll, as an example of radio’s discursive and, at times, subversive past. In a segregated America, radio and the White DJs, who played rock and roll and its predecessor Black rhythm and blues, were instrumental in forging discussion and deliberation in America, at a time of intense inter-racial and inter-generational unrest between White and Black America and between White America and its younger generation. In addition, because radio continues to be considerably influential in dispersing music and in shaping and reinforcing cultural norms and understandings, its relevance remains today. Moreover, given the growing digital divide based largely on socio-economic status, radio remains all the more relevant because it is still a relatively inexpensive medium to access, and because those on the bottom of the socio-economic ladder may be unable to afford the premiums associated with the motley of other media outlets available today. Given radio’s historically unique ability in facilitating marginalized group’s coded subversion through music, it is imperative to ensure that music played on the radio reflects the interests of the people from the bottom up, with a particular focus on the interests of those rendered invisible by the dominant mainstream discourse.
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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

INTRODUCTION

Radio² is dead. Dead, that is, to realizing those, at first, noble ideals of it 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 socio-economically 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, many scholars and activists³ have argued that deregulation of the media industry, which began in the early 1980’s and

² The reference here, and for the most part throughout this article, unless otherwise specified, is to conglomerate controlled full power commercial radio, and not to non-conglomerate locally owned commercial radio, or low power, non-commercial, public, or college/educational radio.
³ Michael A. McGregor, When The “Public Interest” Is Not What Interests the Public, 11 COMM. L. & POL’Y 207, 207-08 (2006). The public responded visibly and quite vocally in protest to the FCC’s 2003 Report and Order [hereinafter, “2003 Order”] permitting further deregulation of the media industry which many found as the leading cause of consolidation in ownership of the nation’s radio stations. Several Congressional leaders, including Senator Feingold, called for the entire 2003 Order to be set aside, while the Prometheus Radio Project, a public advocacy group, challenged it in court. On appeal to the Third Circuit, the court stayed the 2003 Order and required the FCC to conduct numerous hearings across the nation to ascertain the public sentiments on the effects of deregulation on the media industry. 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 viewpoints heard of the radio.
was solidified by the Telecommunications Act of 1996, facilitiated 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 play lists, and devoid of meaningful local public and cultural affairs programming.

They contend, in addition, that radio’s fate was sealed with the shift in meaning of the public interest requirement imposed on broadcasters, which for over 50 years and prior to the deregulatory efforts began in the early 1980s, required licensees to serve as public trustees of the nation’s airwaves for the listening and deliberating public. 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 discourse that occurs within it to the market model approach, the ultimate focus has become one of turning the listening audience over to advertisers, as a pre-packaged and consuming demographic, a saleable commodity in itself. As a result, and to the dismay of many, there is little focus today on radio of the cultural diversity, norms, tastes, and interests of the local, which has historically been the 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 it has become irrelevant to furthering lofty deliberative goals, given its hyper-commercialization and the motley of media options available today. With

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5 The public interest requirement was imposed on broadcasters initially via the Radio Act of 1927, Ch. 169 Secs. 1-41, 44 Stat. 1162 (repealed 1934), and maintained in the Communications Act of 1934, ch. 652, 48 Stat. 1064 (1934) (codified as amended at 47 U.S.C. Secs. 151-615 (2000)), which remains, in addition to several amendments, the governing framework for the regulation of telecommunications.
7 Id. at 628.
broadcast television, cable, satellite television, the internet, internet radio, satellite radio, iPods and the like, the media outlet cup runneth over, providing many different choices for listeners to retrieve the programming content they desire. But 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 history 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.

Despite 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 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.9 Such content was provided remotely and from the top down, with little reflection of local interest or norms. And still again, during the format era which followed the network era and facilitated the rise and development of the Top 40 music format, music play lists 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.10

For deliberative purpose, it is important to note that the format era followed what some have referred to as the first “death” of radio due in part to the emergence of television,11 but what others, however, including cultural studies scholars, consider to be more like a transition period in radio between the network and format eras. This transition period opened up access in the mid-1940s to early 1950s to the nation’s radio airwaves to White12 American youth and Black American musicians, and as a result,

12 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
gave birth to voices of resistance on the nations’ radio airwaves to mainstream American ideologies. These voices were from the marginalized segments of America’s population challenging 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.

This article zeroes in on this history to show the unique and influential role radio plays in fostering communication and will formation in what public sphere and deliberative democracy theorist, Jurgen Habermas, considers, weak publics—deemed as such, because they are not formal and organized political publics that through their organization and reasoned debate challenge the state apparatus. 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 tapping into and playing on radio the musical tastes of the formerly unacknowledged youth of mainstream American society, the disc jockey, through his guest appearances at high schools, teen “call-in” shows, and announcements regarding local events, 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 the larger dominant ideals.

More specifically, the playing of rock and roll, which was infused with the “rhythm and blues” sentiments of Black America through its Black musicians, on what was deemed White radio on the nation’s segregated airwaves in a racially segregated America, and the consumption of rock and roll by mainstream America’s youth, signaled a challenge to the dominant and legally sanctioned ideology that strictly prohibited intermingling between the races, especially on such a socially and culturally pervasive medium as radio. Radio became the stage upon which the contestation over social identity and meaning was fought, and it altered, via its heavy influence on popular culture, the way American group and, as such, require[s] denotation as a proper noun.” Kimberléé Williams Crenshaw, Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law, 101 Harv. L. Rev. 1331, 1332 n.2 (1988).

References to disc jockey, DJ, and deejay throughout this article refer to White radio disc jockeys unless otherwise specified.
youth (both Black and White) mentally and physically located themselves in an inter-racially interactive 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, like Habermas, contend that challenges to ruling norms can only come via the overtly political public sphere and reasoned debate. Moreover, it also has the effect of calling into question the distinctions made between high and low culture among cultural studies scholars, and between high and low value speech among First Amendment scholars, where high value, overtly political, speech is deemed worthier of greater First Amendment protections than non-overt political speech, which is often inclusive of everyday popular cultural expression.

Finally, this article therefore 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. Today, the DJ, who once played bottom up music most especially during the early rock and roll era and, who, as a result, was instrumental in facilitating the contestation over identity meaning and making, has become, through syndicated programming, corporatized payola, and the new market based public interest interpretive standard promoting consumption, more distanced from his local listening audience and their preferences. He now provides a more top down, corporate driven music programming platform that is increasingly sensationalized and homogenously geared towards 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 but also because it is still a relatively inexpensive medium through

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14 In From Habermas to ‘Get Rich or Die Trying:’ Hip Hop, the Telecommunications Act of 1996 and the Black Public Sphere, 12 Mich. J. Race & L. 235 (2007), this author 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 air play of gangsta rap to the exclusion of a more
which one can obtain and share information. Comparatively, the content from other media sources comes at a premium, a premium that a portion of America’s population, already marginalized by socio-economic limitations and America’s widening digital divide,\(^\text{15}\) may be unable to afford.

Part I 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 II of this article considers radio through a cultural studies and deliberative discourse theory framework and provides, as an example of radio’s subaltern past, the emergence of rock and roll and the creation of the disc jockey persona in popular culture. Finally, Part III advocates for a broader conceptualization of localism, one that includes music as a significant tool in will formation and 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 socio-economic ladder, whose financial position may preclude them from taking advantage of today’s rich media landscape.

I. Radio History and Foundational Regulatory Principles

A. From Safety to Scarcity

Several years after the introduction of the telegraph in 1840, radio had its debt in America in 1899, when Gugliemo Marconi introduced the wireless telegraphy by using radio waves to transmit Morse code.\(^\text{16}\) 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.\(^\text{17}\) Although the government’s


\(^{16}\) Douglas, *supra* note 1, at 41.

interest in the medium was slow and radio’s broad-based mass appeal did
not develop for several more decades following its debut, a segment of
America’s population, the amateur operator, found this new technology
enticing, and in the process of their exploratory use, they drew the ire of
the government. 18 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. 19 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. 20 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. 21 Just four months after the Titanic’s
sinking, the Radio Act of 1912 was passed. 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. 22

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 outlaw
unlicensed amateur operators. 23 By 1923, there were several hundred
stations broadcasting across America and within a year, radio and radio

18 Douglas, supra note 1, at 59 (Amateur operators were “primarily white and
middle-class, located predominantly in urban areas…and they built their own
stations in their bedrooms, attics, or garages.”).
19 Id. at 59 (“By 1910 the amateurs outnumbered everyone else—private wireless
companies and the military on the air.”).
20 Prindle, supra note 17, at 284.
21 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
22 Mike Harrington, A-B-C, See You Real Soon: Broadcast Media Mergers and
23 Indeed, by the 1920’s, there were “fifteen times as many amateur stations in
America.” Douglas, supra note 1, at 60.
sets acquired broad-based mass appeal with Americans. Indeed, magazines, at the time, declared “[n]ever in the history of electricity has an invention so gripped the popular fancy….Its rapid growth has no parallel in industrial history.” With several stations beginning to broadcast voice, live music, and scheduled programming, the radio listening craze that gripped Americans and “swept through America in the 1920s and 1930s, 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.” And as recent studies have shown, radio’s uniqueness then (and arguably continued uniqueness today) was due to “the deeply personal nature of radio communication—the way its sole reliance on sound produces individualized images and reactions; its extension of a pre-commercial, oral tradition; its cultivation of the imagination.” Local broadcast radio stations, insulated within White ethnic communities, would capitalize on the unique intimate nature of radio “to empower many community groups and to strengthen ethnic institutions in a display of broadcast Americanism.”

Growing public demand for radio and overlapping and interfering radio station operators led to utter chaos on the nation’s radio airwaves which eventually prompted Secretary of Commerce, Herbert Hoover, to reallocate radio frequencies to facilitate a more efficient operation of the radio industry. Opponents of Hoover’s allocation plan argued that Hoover acted outside of the scope of the authority granted his office under the Radio Act. Others maintained that his plan slanted towards large

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24 Prindle, supra note 17, at 285.
25 Douglas, supra note 1, at 61.
27 Douglas, supra note 1, at 29.
28 Id. at 17.
29 Vaillant, supra note 11 (as radio’s appeal spread, local and community based radio would be used to “celebrate and strengthen local, ethnic, religious and class-based communities.”).
commercial stations.\textsuperscript{31} In a federal court case challenging 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.\textsuperscript{32}

The day after the federal court decision, pandemonium broke out with over seven hundred stations boosting their frequencies, jumping frequencies, broadcasting whatever time they wanted, and battling over roughly ninety-six available channels.\textsuperscript{33} In the midst of the pandemonium, radio stations continued to expand, both among the outlaw amateur stations and with the emerging network stations. National Broadcasting Company (“NBC”) emerged in 1926 and Columbia Broadcasting System (“CBS”) in 1927.\textsuperscript{34} 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”). It also explicitly granted the FRC the authority to do what 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.\textsuperscript{35} Moreover, FRC regulatory power under the 1927 Act was now based less on facilitating government or businesses use of radio as in the very early days of its development but more on “the idea that the broadcast spectrum

\textsuperscript{31} Hoover’s reallocation plan included dividing radio frequencies into three classes. Prindle, \textit{supra} note 17, at 286. The third and lowest class of frequencies included stations that serviced small local areas that had to share the same frequency location and to divide up equitably a certain allotted time. \textit{Id.} The second class of stations were slightly larger and shared frequencies and time as necessary, while the first class of frequencies, called clear channels, had little interference, broadcasted over wide areas and had barely any time-sharing requirements. \textit{Id.}


\textsuperscript{33} Douglas, \textit{supra} note 1, at 63.

\textsuperscript{34} Rothenbuhler & McCourt, \textit{supra} note 26, at 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. MARC FISHER, SOMETHING IN THE AIR: RADIO, ROCK, AND THE REVOLUTION THAT SHAPED A GENERATION xv (2007).

is a scarce source. Government intervention was required in order to ensure efficiency use of a finite number of frequencies.\textsuperscript{36}

\textbf{B. The Public Interest Standard, Localism, and the Market Beyond.}

Due in part to the scarcity rationale for regulating radio air waves, 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 broadcasting market,”\textsuperscript{37} and not “the interest, convenience, or necessity of the individual broadcasters.”\textsuperscript{38} 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\textsuperscript{39} 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, an approach sanctioned by the courts and Congress.\textsuperscript{40}

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

\textsuperscript{36} Martens, supra note 30, at 291-92.
\textsuperscript{37} Prindle, supra note 17, at 288.
\textsuperscript{38} Martens, supra note 30, at 293.
\textsuperscript{39} HARRY ZUCKERMAN ET AL, MODERN COMMUNICATIONS LAW 768-74 (1999) (discussing generally the rule making and adjudicatory authority of the FCC, as a federal administrative agency).
\textsuperscript{40} Rainbow, supra note 35, at 172. While the means of facilitating broadcaster public interest obligations have varied over time, the means have centered on either a regulatory or deregulatory approach. The paramount goals however underlying 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 the FCC as the stated basis of a regulatory or deregulatory effort. To the extent the goals can be teased a part, an analysis of FCC diversity regulations, aimed at promoting minority ownership, minority hiring, etc., are 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 which the author believes would necessarily increase diversity among various ethnic and minority groups and competition in the industry.
decades and despite the rapidly growing entrepreneurial and corporate interests in radio’s development. 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. Instead, and similar to Hoover’s reallocation plan years before, the FRC would divide the United States into five listening zones, with 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. Opponents of the FRC structure opined that while the plan decreased interference, it again (like Hoover’s earlier plan) favored larger stations. Not all listeners were happy with the practical effect of the reallocation, which led to a decrease in non-commercial and local stations from 98 in 1927 to 43 by 1933.

Stated Congressional and FRC localism goals were undermined even more with the growth of the networks, who were expanding their control over the nation’s radio airwaves by linking local stations to their centralized centers. As a result, “national cosmopolitanism…began to eclipse FCC-favored local particularism.”

41 Consistent with the regulatory public interest goals contained within the 1927 Act, the FRC, in implementing the Act, specifically rejected a “nationally 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.” 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, 287 (2005). As referenced in a 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.” FCC, Report and Order and Notice of Proposed Rulemaking on Broadcast Ownership Rules Cross-Ownership of Broadcast Stations and Newspapers, Multiple Ownership of Radio Broadcast Stations in Local Markets, and Definition of Radio Markets, Rules and Regulations, 47 C.F.R. Part 73 (MB Docket 02-277, and MM Dockets 01-235, 01-317, and 00-244; FCC 03-127) (Aug. 5, 2003) Sec. 74.

42 The allocation led practically to favoring “rich and powerful broadcasters – the networks – over smaller, community-based stations with deeply loyal listenerships but inadequate resources or clout.” Douglas, supra note 1, at 63.

43 Cowling, supra note 41, at 288.
costs, streamlined operations, and uniform scheduling, the affiliates began
to attract a significant number of local independent commercial and even
non-commercial stations that, in turn, became network affiliates, despite
the overarching localism goals of the 1927 Act. By 1930, the networks
had a near-absolute “monarchy of the air” because they controlled nearly
all of the high-powered stations across the country, thereby, accounting for
more than 85% of the nations transmitting power. While historians agree
that the networks played a key role in developing a national culture in the
1930s and 1940s, it came at the expense of local content, in that “local
programming would be eclipsed…by shows produced in New York
City,” which was not necessarily where all listeners, who yearned for
more regional identity and local community pride, wanted to be
transported.

Network programming originating in 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 program.
Music (almost exclusively live, rather than recorded) was

44 Indeed, in 1925, only 7% of radio stations in the United States were commercial
operations but by 1926 and given network growth and profitability, the number of
commercial stations rose to 11%, and to 59% by 1930, “representing a
thousandfold increase (from 21 to 223).” Rothenbuhler, supra note 26, at 369. 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’ network, and NBC’s two networks (the Red and Blue). Although
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), MBS grew to include a significant number of low-power
station affiliates that were lagging far behind the network affiliates in wattage and
audience share. See Paul Starr, The Creation of the Media: Political Origins
45 Bruce Lenthall, Critical Reception: Public Intellectuals Decry Depression-Era
Radio, Mass Culture, and Modern America, reprinted in Radio Reader: Essays
in the Cultural History of Radio 53 (Michele Hilmes & Jason Liviglio eds.
46 Cowling, supra note 41, at 288.
47 Douglas, supra note 1, at 63.
48 Id. at 79 (quoting one listener, at the time, as saying, “unless we watch our step,
the chain stations will be the Czars of the Air,” and another as saying, “The
chains…have nearly complete control of the air. We feel sorry for the future of
Radio if this chain business gets any worse.”).
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 [disc jockey] announcers.\textsuperscript{49}

The major intent behind the Communications Act of 1934 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. However, some media scholars have argued forcefully that the developing commercial hegemony over the airwaves--initiated with the original spectrum allocations dating back to Hoover and the Radio Act of 1927--was institutionalized for certain with the passage of the 1934 Act. 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 it undermined the public interest standard and Congress’ own purported goal of ensuring a decentralized unconsolidated media industry by not directly addressing the networks’ consolidating control over content. In fact, “by 1935, when the regulatory dust had settled, 20 percent of previously operating stations across the country were off the air, and commercial networks dominated the airwaves…. The ‘American’ sound of broadcasting had been replaced by a commercial network determination of that sound and the parties able to constitute it.”\textsuperscript{50} Many radio stations continued to become affiliates of the networks and to enter into network agreements restricting the affiliates from airing programming content of the other networks, and the networks from selling content to non-affiliate stations.\textsuperscript{51}

\textsuperscript{49} Rothenbuhler & McCourt, supra note 26, at 367. Prior to the passage of the 1934 Act, local and independent non-affiliate 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 11, at 28.

\textsuperscript{50} Vaillant, supra note 11, at 28.

\textsuperscript{51} See Rainbow, supra note 35, at 175.
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"), issued in 1941, and its Report on Public Service Responsibility of Broadcast Licensees (also known as the "Blue Book"), issued in 1946. 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 between the networks. They also sought to give local stations some independence by denying the networks, the complete dominion over radio they presently enjoyed. Generally, the Chain Broadcasting Order scaled back network control over radio programming by limiting the networks’ ability to preempt prime time content and to restrict an affiliate’s rights to accept and air programming content from other networks. The rules 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.

Although the networks, namely NBC, challenged the Chain Broadcasting Order as beyond the scope of FCC authority, the Supreme Court affirmed the FCC’s actions which encouraged localism. The FCC

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52 Chain Broadcasting Commission Order No. 37, Docket No. 5060 (May 1941).
53 See Nat’l Broad. Co. v. U. S., 319 U.S. 190, 199 (1943) (court discusses how the public interest was not served when residents of communities serviced only by NBC and CBS were unable to hear the 1939 World Series, a program the court deemed to be “of outstanding national interest” because MBS had acquired the rights to broadcast the Series and only granted broadcast permission to its own affiliate stations); See also, CHARLES H. TILLINGHAST, AMERICAN BROADCAST REGULATION AND THE FIRST AMENDMENT - ANOTHER LOOK 61 (2000).
54 Chain Broadcasting Order, supra note, at 68-69; See also, Christopher Yoo, Vertical Integration and Media Regulation in the New Economy, 19 YALE J. ON REG. 171, 184 (2002).
55 319 U.S. 190. 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, (2) that the principles of competition and localism, in particular, fell within the scope of the public interest, (3) that the network affiliate agreements often led to the provision of program content that was not in the publics interest, 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.
followed up with the Blue Book to provide guidance to broadcasters in selecting programming content that would meet FCC expectations. Specifically, the Blue Book endorsed the broadcasting of content that reflected the interests of the local listening community of the broadcaster. In addition, the FCC continued the FRC’s goal of limiting national and centralized media ownership in broadcast to prevent undue consolidation. In the late 1940s and early 1950s, the FCC adopted rules limiting the number of broadcast stations any station owner could own. 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. For almost three to 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 interests of the local community it served.

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.” To them, these localism rules served then as a smoke screen for “the actual practices and consequences of a commercially organized, national system

56 In 1946, the FCC set the de facto limit of broadcast ownership to seven when it denied CBS’ application for a license to an eighth station, and formerly adopted the Seven Rule a few years later which stayed in place for almost thirty years until the number was increased during the first round of deregulation in the 1980s. Martens, supra note 30, at 307. 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 Commission’s Rules Relating to Multiple Ownership of AM, FM, and Television Broadcast Stations, 100 F.C.C.2d 17, 21 (1984) (citing Federal Communications Commission, Seventh Annual Report, 34 (FY 1941) (1941) (limiting T.V. ownership to three); See also Amendment of Sections 3.35, 3.240 and 3.636 of the Rules and Regulations Relating to the Multiple Ownership of Am, Fm and Television Broadcasting Stations, 18 F.C.C. 288 (1953) (implementing ownership limits of AM stations).
57 See Martens, supra note 30, at 299. 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 that is the subject of this article.
of network broadcasting." Indeed, four years after the adoption of the Chain Broadcast Order, network affiliations rose to 95 percent. 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.”

Radio was believed to have become “a vehicle, perhaps the leading vehicle, of mass culture,” and the very concept of mass culture was based on the premise of:

… a mass-minded devalued cultural diversity, [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 individual thinkers...but only as undifferentiated consumers.

Moreover, to the anti-capitalist media critic at that time, “programming and popularity [of content] were easily manipulated by those who paid for the air time.” In the end, the critics claimed, local and network broadcasters alike, abdicated their programming responsibilities to commercial sponsors given the price tag advertisers were willing to pay for air time on radio. For them, the possibility of radio enhancing democracy and, what they deemed, high cultural values through programming content, had long gone. Similarly, for Habermas, mass media (including radio)

59 Id. at 294. Similarly today, in the 2003 Order endorsing further deregulation of media that sparked the national public outcry, the FCC purports to commit to reinvigorating localism to promote more diversity on radio but does not address the current consolidation in ownership that led to its decrease in the first place. Additionally, the Third Circuit also did not address the current state of ownership consolidation but raised concerns as to continued deregulation only.

60 Starr, supra note 44, at 381.
61 Lenthall, supra note 45, at 44.
62 Id.
63 Id. at 47.
64 Lenthall, supra note 45, at 54.
65 See Rothenbuhler & McCourt, supra note 26, at 346 (By 1943, “over 97% of radio programming was controlled by advertisers and over 60% of network billings came from just ten advertising agencies.”).
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.

II. Habermasian “Weak Publics,” Cultural Studies, and
Radio’s Subversive Past

A. Habermas’ Theorized Public Sphere and the Efficacy of
Weak Publics on Deliberative Democracy

Habermas’ vision of the “formal” public sphere\textsuperscript{66} was introduced
in his seminal book, \textit{Structural Transformations of the Public Sphere},
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 18\textsuperscript{th} and early 19\textsuperscript{th}
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 positioned to hold the ruling feudalist
authority accountable on issues important to this newly formed public.\textsuperscript{67}
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.”\textsuperscript{68} 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 argument.”\textsuperscript{69}

\textsuperscript{66} 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.

\textsuperscript{67} Ken Hirschkop, \textit{Justice and Drama: On Bakhtin as a Complement to Habermas},
\textit{reprinted in After Habermas: New Perspectives on the Public Sphere} 50 (2004).

\textsuperscript{68} Maria Simone and Jan Fernback, \textit{Invisible Hand or Public Spheres? Theoretical
(“For a society founded on a principle of self-government, the development of
public opinion is vital to its health.” Self-government is only an illusion if the
powerful are not held accountable to public opinion.”)

\textsuperscript{69} Hirschkop, \textit{supra} note 68, at 50.
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 socio-cultural transformation that reshaped the manner and place of social communications and topics of discussion. Conversations emerged in bourgeois coffee houses, taverns, and literary clubs and evolved into voluntary associations and civic societies of enlightenment. 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.”

For Habermas, the formal public sphere was to operate separate and apart from the state and the market, where inequities abounded due to ethnic and socio-economic differences. In operating separately and independently from the market and state, it was housed in the “life world”—which was situated in civil society—and was to be protected at all costs from being colonialized by the systems world that housed both the market and the state—two mutually exclusive spheres in their own right.

Indeed, in this theoretically egalitarian space, all would have 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. 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.” To Habermas’ dismay, private interests undermined those of the common good and cut short the maturation of the formal public sphere and the independence of public opinion. Critical

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72 Id.
74 Id. at 35.
scrutiny of the state gave way to mass mediated staged displays and the manufacture and manipulation of public opinion.\footnote{Fraser, supra note 72 at 113.}

Like the radio critics and reformists of the 1930s and 40s who opposed the increasing commercial nature of radio during that period, Habermas, an enlightenment thinker and disciple of the Frankfurt School,\footnote{Michele Helmes, Rethinking Radio, reprinted in RADIO READER: ESSAYS IN THE CULTURAL HISTORY OF RADIO 7 (Michele Hilmes & Jason Liviglio eds. Routledge 2001).} viewed mass media, including radio, with disdain. He regarded it, like other disciples of the Frankfurt School, as a highly suspect vehicle through which deliberative goals could be achieved. It was a tool used by private interests for dispersing information primarily for manipulation and coercion rather than for enlightenment and empowerment.\footnote{From Habermas, supra note 14, at 265 (“[t]he 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.”)} It was perceived then as “a part of the ruling class of ideology, a sophisticated barrage of loaded imagery which seduced people into a life of mindless consumption and diverted them from an authentic confrontation”\footnote{Anthony Chase, Toward a Legal Theory of Popular Culture, 1986 Wis. L. REV. 527, 539-40 (1986); See also John Michael Roberts & Nick Crossley, Introduction, reprinted in AFTER HABERMAS: NEW PERSPECTIVES ON THE PUBLIC SPHERE 6 (2004) (“as the mass media began to establish itself as a viable economic market… it was both hijacked for the purpose of selling goods, via advertising, and became a considerable saleable commodity in its own right.”).} 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.”\footnote{Roberts & Crossley, supra note 79, at 6.}

\section*{B. The Connection: Cultural Studies, Deliberative Democracy, Weak Publics, Radio and Music}

While many scholars find Habermas’ public sphere theory appealing, they have however also found Habermas’ historical reading and use of the liberal bourgeois public sphere as a model problematic due to its inherently ideological contradictions. A more expansive reading of 18th 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 public opinion through
reasoned debate. Instead, women, people of color, and unpropertied men
were excluded from Habermas’ theoretically egalitarian public sphere,
which ultimately represented then the interests of White propertied males
only. 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 class and remaining
populis—not through physical force but hegemonic domination instead.

By idealizing the bourgeois public sphere, and its definition of
civic participation via reasoned debate and the ideal speech scenario,
Habermas failed “to appreciate the true repressive nature of the bourgeois
public sphere, and incorrectly situated it as the public—ignoring the
existence of alternative non bourgeois public spheres and their means of
political expression and discourse.” 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 “were 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.” 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 humor, and
symbolic degradations and inversions.” Although Habermas would
eventually acknowledge that such counter-publics existed alongside his
liberal bourgeois public sphere, he maintains that, to the extent they were
informal and disorganized, they were (and are) a far cry from the

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80 See From Habermas, supra note 14, at 246.
81 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. Geoff Eley, Nations, Publics and Political Cultures: Placing
Habermas in the Nineteenth Century, reprinted in HABERMAS AND THE PUBLIC
82 From Habermas, supra note 14, at 247.
83 Gardiner, supra note 74, at 38 (asserting that there never really was a “golden
age of the communication utopia: the real public sphere was always marked by a
pluralistic and conflictual heteroglossia.”).
84 Id.
organizational and expressive style necessary to truly serve as a challenge to ruling authority.\footnote{Further Reflections, supra note 71 at 423.}

Indeed, Habermas has not only conceded that the life world can contain several formal political public spheres but has also agreed that the life world contains various informal, organizationally fluid, and spontaneous non-formal publics (or networks) that are not expressly political in objective. As such, to Habermas, these disorganized publics do not sufficiently challenge ruling authority due to their spontaneity and fluidity. They are instrumental nonetheless, however, because they often represent a diverse range of identities in the civil society and can and should influence the dialogic exchange that occurs within the formal political public sphere.\footnote{The formal public sphere was charged then with the task of processing the concerns generated in the informal publics, which could be expressed in an unlimited variety of ways. Roberts & Crossley, supra note 79, at 20.} 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 1960s\footnote{Jurgen Habermas, \textit{Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy} 374 (William Rehg trans., MIT Press 1996) (1992).} (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 counter-cultural expressivity on radio). He referenced these post-1960s movements to show that they provided the “raw materials of the public sphere.”\footnote{Hirschkop, supra note 68, at 52.}

Moreover, Habermas’ acknowledgement of these informal publics signaled the “shift in the key agents of social change and the key battles of modern society in which they engage.”\footnote{Gemma Edwards, \textit{Habermas and Social Movements: What’s ‘New’?}, reprinted in \textit{After Habermas: New Perspectives on the Public Sphere} 113 (2004).} To Habermas, these key agents were now “crucial \textit{for generating} [but not engaging in directly themselves] a public sphere of debate...[and] are not those asking about what we should get but those asking about who we are, how we live, and who is accountable.”\footnote{Id. at 115.} They seek to “defend traditional lifestyles or institute new ones on their own terms”\footnote{Id. at 116.} and to resist the continued colonization of
the life world where “everyday realms of action are increasingly organized, not on the basis of norms we have mutually agreed…but on the basis of the money and power that already drive our political and economic system.”

Indeed, Habermas would include theatrical performances, and even rock concerts, as more modern examples of the informal publics, to the surprise of some 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.”

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, they are not as influential as the formal sphere, especially since “one can discover public spheres in every nook and cranny of popular culture.” 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. 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 rationale debate. The formal public sphere remained the place and space through which public opinion was vetted by reasoned debate and dialogue.

Many deliberative theorists however have envisioned a wider understanding of deliberative democracy that extends beyond dialogic exchange. It therefore encompasses 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, as a result, misread the contestatory impact of these informal publics.

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92 Id.
93 See BETWEEN ACTS, supra note 88, at 370.
94 Hirschkop, supra note 68, at 51.
95 Id. at 62.
96 Id. at 51. As Habermas understands it, the analysis engaged in in the informal public sphere 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… There is no longer an attempt to link such an analysis with any remnants of a normative political theory,” Further Reflections, supra note 71, at 465-66.
97 See Gardiner, supra note 74, at 43 (arguing that Habermas’ public sphere theory still contains a level of elitist idealism “because it supposes that material conflicts
Part of this ideological shift in conceptualizing wider exchanges comes from “locating culture and its role in the formation of identities centre-stage”\textsuperscript{98} rather than seeing culture and its articulation as a “pure and corrupting epiphenomenon imposed on a pristine realm of rational openness in which citizens once communicated transparently.”\textsuperscript{99} These alternative publics, which public sphere theorist, Nancy Fraser, has called subaltern publics, are participatory spaces where participants create counter-discourses to ruling authority, the formal political public sphere, and even other subaltern publics.\textsuperscript{100} They often contain socio-cultural challenges to the established order that are entirely legitimate on their own terms, but which do not conform to Habermas’ model of rational dialogue.\textsuperscript{101} 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.”\textsuperscript{102} Their strategies are often rooted “in the particularistic concerns of everyday concerns of everyday life”\textsuperscript{103} which are often created of a socio-economic nature can be effectively transcended or at least effectively sublimated into a rational discourse that can suspend ingrained power differentials.”).\textsuperscript{98} Id. at 44.
\textsuperscript{99} Id. (elaborating on Habermas’ view of other forms of language use in everyday life and culture, including humor, irony or parody, as they relate to reasoned debate and the ideal speech scenario, as “secondary or parasitic, presumably because they compromise the lucidity and openness that ideally marks the communicative process.”).
\textsuperscript{100} See Roberts & Crossley, supra note 79, at 15.
\textsuperscript{101} See Gardiner, supra note 74, at 44.
\textsuperscript{102} Id. Moreover, Habermas calls for no hidden agendas in dialogue, 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 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 at a sideways glance” to evince a multiplicity of actual and potential contested meanings that might fall far short of Habermas’ ideal speech expectations. Id. at 37; See also, From Habermas, supra note 14, at 271 (discussing subversive discourse by gangsta rappers as a form of “contradictory consciousness”).
\textsuperscript{103} Gardiner, supra note 74, at 44.
at some distance from the official public sphere and aim to celebrate difference through diverse expressions of identity and community.”

In that way, these informal publics serve as a “crucial resource through which the popular masses can retain a degree of autonomy from the forces of sociocultural homogenization and centralization.” For Bakhtin, de Certeau, and others, who reject deliberative democratic theorists that consider formal dialogic debate as the only stage through which meaningful or effective challenges to ruling ideological constructions can be fought, what matters most is the discourses, interactions, and expressive exchanges that occur 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.” Furthermore, to Bakhtin, to look beyond Habermas’ ideal public sphere and speech scenario to the informal, disorganized, weaker publics, is to draw attention to the “underlying sociocultural forces that continually subvert commonsensical notions and habitualized viewpoints, and to encourage a renewed awareness of the hidden and all-too-often suppressed potentialities that lie with ‘the dregs of an everyday gross reality.’” To look beyond Habermas’ ideal public sphere and speech scenario is to look “through 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.”

One such crevice 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 on roll. These segments 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

104 Id.
105 Id. at 39.
106 Roberts & Crossley, supra note 79, at 19.
107 Gardiner, supra note 42 (citing THE DIALOGIC IMAGINATION: FOUR ESSAYS BY M. M. BAKHTIN 385 (M. Holquist, ed., Austin: Texas University Press 1981)).
108 Hirschkop, supra note 68, at 60.
media content, but, in practice, did little to foster intergenerational discourse between mainstream America and its youth, or between mainstream America and its Black American counterpart. 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 and other ideologically similar dialogic theorists overlook and thereby de-emphasize the importance and efficacy of such politically disorganized and informal spheres to the social order.

Finally, many theorists contend that the role of the law in society is to protect the discourse that occurs within the public sphere and to facilitate the transmission of the public sphere’s interest and concerns to the state or ruling authority such that the ruling authority may in turn be held accountable. However, because Habermas does not acknowledge informal publics, as discursive and contestatory in and of themselves, the need for the law to protect such informal publics and their various means of expression, including music or other popular forms, for the specific purpose of furthering deliberative goals may be overlooked, or deemed less than what it should be if such expressions were 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, 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 would come to be known as cultural studies, served as a direct challenge to Habermas’ and other Frankfurt disciples’ pessimistic view of mass media and culture. 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” (radio), with the latter being critically

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dismissed along with its related cultural by-product, popular culture.\textsuperscript{111} 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 girl’s magazines, working-class style, popular music, romance novels, television, and eventually even radio.”\textsuperscript{112} 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 solidify hegemonic domination. Attention was turned to the audience and the audience’s use and reception of dominant images and messages in popular culture, counter-cultural expression and meaning making that in itself could serve as a challenge to dominant social understandings.\textsuperscript{113} With this new framing, radio’s very exclusion from the academically acceptable then became a “signal of its underground cultural importance.”\textsuperscript{114}

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.\textsuperscript{115} As a result, for decades, little scholarly attention was given to its role in making music pre-eminent in everyday American life and on everyday perceptions and understandings, most especially in the 1940s with the emergence of rhythm and blues and rock and roll. As an aural medium, radio, from the onset, activated people’s imagination, especially as it related to listening to music.\textsuperscript{116} Dating back to at least the 1920s when music became a regular

\textsuperscript{111} Id. at 8 (discussing the dismissal by some scholars 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.”).

\textsuperscript{112} Id.

\textsuperscript{113} Id. at 9.

\textsuperscript{114} Id.

\textsuperscript{115} See Douglas, supra note 1, at 33.

\textsuperscript{116} 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, music “so effectively taps our emotions…that we develop deep, associative memories between particular songs and our own personal narratives.” Id. at 11-12.
part of radio programming, radio would revolutionize and transform American’s relationship with music and would help 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.”\textsuperscript{117} 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, which is 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.\textsuperscript{118} Jazz’s radio airplay soon increased the consumption and exposure of it to White listeners and in so doing opened a small crack between White and Black cultures in an impermissible way, given American’s legally sanctioned system of segregation of the races. This specific crack would be quickly fused closed however with the rise of the networks, their increasing control of radio content and of who was granted access to the nation’s radio airwaves, and with their homogenized and non-controversial approach to radio programming.\textsuperscript{119} 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 representation of [B]lacks on radio.”\textsuperscript{120} Jazz, as a result, would be 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.

\textbf{C. The Emergence of Rock and Roll on White Radio as Example of Radio’s Subversive Past.}

\textbf{i. Radio and Rock and Roll’s Subversive Challenge to the Then Existing Economic Order}

Although jazz would create a small crack through which Black music crept indelibly into White culture and imagination, the rise of rock

\textsuperscript{117} Id. at 83.
\textsuperscript{118} Id. at 234.
\textsuperscript{119} See Cowling, supra note 41, at 290.
\textsuperscript{120} Douglas, supra note at 1, at 234.
and roll almost two decades later would widen into a culturally explosive crevice that many in the media industry and society at large in no way anticipated. With the infusion of rhythm and blues, a musical by product of Black America’s post World War II frustration with the nation’s segregationist and exclusionary policies towards them, into what would be renamed, repackaged, and aired as rock and roll across the nation’s radio air waves, such music represented much more than a generation’s or ethnic minority’s entertainment preference. Indeed, by the 1950s, at rock and roll’s heyday, radio listening became highly politicized because radio “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 was staged and fought.”

Despite Habermasian notions of the efficacy of weak publics at challenging state or ruling authority, the playing and consumption of such music served as a direct challenge to racial segregation both on the nation’s radio airwaves and society at large. At the time, many, did not see this Cultural Revolution, which was initially fought out on radio, coming, and which, some scholars have argued, was instrumental in fueling the momentum for the long journey toward desegregation, the Civil Rights Movement, and the ideological generational divide between White America and its youth. Also unforeseen was the manner in which the emergence of rock and roll would challenge the economic hierarchy in the music industry. Its emergence and popular reception on radio not only posed a threat to America’s broader racial and socio-economic racial order but also “posed a financial threat to established [W]hite music interests in the industry.”

For example, by the late 1940s, to many listeners and media critics, radio was a mass medium through which low culture was

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122 Douglas, supra note 1, at 222.
123 T. Dowd & M. Blyler, Charting Race: The Success of Black Performers in the Mainstream Recording Market, 1940 to 1990, 30 Poetics 87 (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.”).
124 Douglas, supra note 1, at 250.
disseminated. 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. The networks would essentially regulate radio to secondary, and, in some ways, insignificant status, and would come 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. Once their commercial interests regarding television were sufficiently funded and financially viable, the networks would reallocate to television and to a welcoming and growing television audience, popular and successful radio programs and personalities. As a result, with television’s debut, network affiliate stations were left to fend for themselves for content and advertising revenue.

Affiliates were not only left to scramble for revenue and content but were also left to compete with the independent non-affiliate 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 between stations thereby making space for more stations in a particular community. 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

125 Rothenbuhler & McCourt, supra note 26, at 346.
126 PETER FORNATALE & JOSHUA E. MILLS, RADIO IN THE TELEVISION AGE 6 (1980).
127 See Scheurer, supra note 122, at 70; Rothenbuhler & McCourt, supra note 24, at 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.”); Douglas, supra note 1, at 220 (the “famous ‘talent raids’ of 1948-49 lured stars like Jack Benny, Bing Cosby, and Ozzie and Harriet away from radio to television.”).
128 See Fornatale & Mills, supra note 127, at 3 (from 1,000 stations at the end of the War to 2, 391 stations by 1953). Indeed, although small independent AM stations eventually tripled in number, that fact was obscured by the six-fold increase in television during this same period. See Rothenbuhler & McCourt, supra note 124, at 371.
control over radio content was released. The networks abandonment therefore 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 but also of filling the radio programming day and evening with content.  

In search of a demand (e.g., an audience) and even for supply (e.g., content and funding via advertisers), radio station owners eventually turned to the local market and found value in the localism Congress and the FCC had endorsed for years, albeit for different reasons, one arguably market based and the latter based on deliberative principles. 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 abandon, the “veneer of network paternalism was stripped,” and radio sought to redefine itself, traditional business models were discarded in favor of new opportunities for entrepreneurial innovation and cultural expression.” Such innovation inadvertently subverted existing business models in the media industry at the time and was instrumental in the development and flourishing on radio of rhythm and blues and its musical cousin, rock and roll.

Rock and roll was played predominantly on independent non-affiliate radio stations, which was itself a result of subverted entrepreneurial maneuvering. For example, from the beginning of music’s regular radio air play, musicians demanded a fee from radio stations owners for the radio air play of their songs. In the early 1920s, the

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130 With the post World War II proliferation in low power stations, a radio’s audience dropped “from 60,000 to 30,000, and thus there were more stations vying for smaller audiences to local advertisers.” Douglas, supra note 1, at 233.

131 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.”)

132 Rothenbuhler & McCourt, supra note 26, at 368.

133 Id.
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. 134 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). 135 Independent non-affiliate 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"). These stations would rely heavily on recorded music produced by BMI because it was cheaper than showcasing live bands on the air. 136

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. 137 By the 1950s, BMI controlled “the majority of R&B, blues, and rock n’ roll music,” 138 with the independent radio stations serving as exposure for these musicians. Exempt from major music publishing deals, these stations were free to take advantage of BMI’s music selections and were ultimately successfully in attracting two segments of the much needed local listening audience--White American youth and Black Americans, due to radio air play 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 disaffiliate network stations) willing to play such music. 139

134 Douglas, supra note 1, at 250.
135 Id. at 227, 229.
136 Rothenbuhler & McCourt, supra note 26, at 369. The networks were the co-founders of BMI and would establish it to counter ASCAP’s control over music content and to retaliate against ASCAP’s demand of a 70% increase in royalty fees to its members. Helmes, supra note 77, at 13. Ironically, BMI provided the majority of the recorded music to these independent stations that were in a position to take advantage of BMI’s recorded musical selections.
137 Douglas, supra note 1, at 250.
138 Id.
139 Id. at 224. Some have argued that this shift alone in music production, distribution, and airplay were the underlying reasons for the 1950s Congressional payola investigations, instigated by ASCAP, that targeted these rising musicians,
ii. Radio and Rock 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 more effectively compete 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. At the time, Whites were the primary owners of the nation’s radio stations, and to the extent Blacks were permitted on the air, it was within the context of maintaining the unspoken, yet widely accepted and endorsed, long standing conventions of radio’s “Whiteness.” Indeed, the airwaves, like their music, and the rock and roll disc jockey who were perceived as the main culprits in orchestrating this shift.

140 Jack Cooper’s, All Negro Hour, was the first black oriented show on Chicago’s “WSBC [that] switched from live music and guests to a deejay-and-records format in 1932.” Rothenbuhler & McCourt, supra note 26, at 371. There would be other Black disc jockeys with Black oriented programming, but with the increase of network power and homogeneity and the persistent racism in the industry, many, including Cooper’s show, would fall along the waste side.

141 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 however that radio stations were owned by Whites. Following the civil unrest in Black urban America that followed King’s assassination and the release of the Kerner Commission’s report on the effect limited and disparaging images of Black’s in media had on Blacks, the FCC affirmatively adopted diversity based regulations and policies aimed at increasing minority ownership in broadcast, such as tax incentive, the distress policy, etc. See generally Leonard Baynes, Making the Case for a Compelling Governmental Interest and Re-Establishing FCC Affirmative Action Programs for Broadcast Licensing, 57 Rutgers L. Rev. 235 (2004).

142 Judith E. Smith, Radio’s “Cultural Front” 1938-1948, Radio Reader: Essays in the Cultural History of Radio, reprinted in Radio Reader: Essays in the Cultural History of Radio 211 (Michele Hilmes & Jason Liviglio eds. Routledge 2001). 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 for nonwhite performers, who could only find work in broadcasting by playing parts as servants or minstrels if they approximated the
society at large, were racially segregated. These Black disc jockey pioneers were given the late night grave yard shift because it was at a time when most advertisers were disinterested in purchasing airtime. It was also at a time when station owners assumed their White listening audience were least likely to be listening and, hence, offended by Black oriented programming.

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 after-thought and more of an under-tapped market. 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 accents white actors, directors, and producers had popularized as ‘[B]lack.’ 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.” Barbara Savage, Radio and the Political Discourse of Racial Equality, reprinted in Radio Reader: Essays in the Cultural History of Radio 235 (Micheal Hilmes and Jason Liviglion eds. Routledge 2001).

Some have argued that in this way, 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 143, at 211.

See Smith, supra note 143, at 211.

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.”). When a New York radio station owner commissioned a report on the “New York’s Negro Market…[the report] 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.” Lenthall, supra note 45, at 51. In the years between 1940 and 1953, the Black median income increased 192 percent and home ownership increased by 129 percent and by the early 1950s, 90 percent of [B]lack families, especially those living in the cities, owned radios. Douglas, supra note 1, at 234.
ultimately given free reign of programming content. 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. 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 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. While radio station owners, at the time, were “focused on the bottom line, [they]…unwittingly reshaped the cultural landscape of the United States.” Indeed, their appointed disc jockeys helped to redefine radio and its relevance in the then existing media landscape where corporate interest’s focused more on television, and to create a popular culture that challenged 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. By 1958, the DJ was quoted in a popular broadcast journal of the time as “the big business factor in today’s new concept of radio.” 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. On air, these local DJs, through their voice, personality, and radio content alone, had to create an intimacy

146 See Fisher, supra note 34, at 13.
147 There was a segment of the White listening audience, White youth, that would not be offended by Black oriented programming, but be drawn to it. As a result, eventually radio station owners would hire Black personnel to serve as voice coaches for White disc jockeys who engaged in racial ventriloquy (e.g., attempts to sound Black), to attract that audience. Douglas, supra note 1, at 222. (“Increasingly, teenagers’ music was written or performed by African Americans, and many of the announcers they loved, who were [W]hite, tried to sound [B]lack. (A few others, of course, actually were [B]lack.”). Id.
148 Rothenbuhler & McCourt, supra note 26, at 372.
149 See ARNOLD PASSMAN, THE DEEJAYS 19 (1971); Douglas, supra note 1, at 230 (the DJ had to be “invented and had to serve—and mediate between—very particular cultural and corporate interests.”).
150 Douglas, supra note 1, at 229; See also ROY SHUKER, UNDERSTANDING POPULAR MUSIC 43 (2001).
with their audience such that the listening audience felt like members 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, all in an attempt to “be seen as an intrinsic part of the community, an enviable celebrity and a respected altruist.”

Eventually, many listeners came to personally bond with the disc jockey, who, to them, personified post-war sentiments and interests. He in essence symbolized the voice, interest, and understandings of the everyday lives and exchanges of his listening audience. For White 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.” Moreover, for White teenagers, these DJs who embraced and played Black music, namely rhythm and blues (and eventually rock and roll), and engaged in racial ventriloquy, symbolized a generation’s rebellion against the normative status quo. Although the Black DJs, during the late 1940s and early 1950s, were the originators in bringing jive, hipster talk and rhyming and rapping games to their show and on air personalities, the rock and roll disc jockeys’ adaptation of such style, however, led to the music’s broader racial cross-over appeal to White youth.

\begin{footnotes}
\item[152] Douglas, supra note 1, at 233.
\item[153] Id. at 231.
\item[154] William Barlow, Voice Over: The Making of Black Radio (1999) (Discussing White DJs imitation of their Black counterparts, which “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.”)
\item[156] Barlow, supra note 155, at 157 (discussing racial masquerading).
\item[157] Ennis, supra note 152 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. At the time, teenage consumption of records were more voluminous than his or her generational counterpart. 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.
\end{footnotes}
Radio became a trading zone, and facilitator, through its rock and roll disc jockeys, of discourse between Black and White Americans and White Americans and their rebelling youth. When radio, the disc jockey, and the airing of rhythm and blues (and subsequently rock and roll) are viewed through the lens of cultural studies theories and of public sphere theorists who adopt an understateing of participatory democracy that embraces popular cultural expression, they reveal much about the “emptiness and forced conformity of [W]hite culture,”\(^{158}\) at the time, on White youth and the Black community. 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” out of a generation raised on “independent, brave pop culture heroes like the Shadow, the Lone Ranger.”\(^{159}\) American boys were torn then by popular mainstream images on television of aggression and independence at a young age but, by adolescence, were required by societal norms to submit and obey authority figures.\(^ {160}\) Moreover, teenagers as a whole were generally encouraged to not become juvenile delinquents, which became a national obsession in the late 1940s. Middle class parents moved their children out of the cities and into the suburbs away from punks on motorcycles, hoods, and lower class aversions to more restrained middle class bourgeois norms.\(^ {161}\) By the 1950s, with America becoming more repressive and with “the grip of conformity and McCarthyism tightening, [B]lack music became especially attractive to White middle class youth ‘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.”\(^ {162}\) During this time, network television not only continued to

\(^{158}\) Douglas, supra note 1, at 223.
\(^{159}\) Id.
\(^{160}\) See Stephen Troiano, Rebels and Chicks (2005); See also Douglas, supra note 1, at 241.
\(^{162}\) See also Neela Kartha, Digital Sampling and Copyright Law in a Social Context: No More Colorblindness, 14 U. MIAMI ENT. & SPORTS L. REV. 218, 222 (1997)
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.\textsuperscript{163}

Everything about radio then represented to White youth and, to some extent, the Black community, contested resistance to dominant ideology. In that way, radio filled the cultural vacuum left by TV and the larger dominant discourse.\textsuperscript{164} First, the White DJ and his expropriated Black slang, “signaled membership in a special, outcast community that seemed to laugh at and be above [the] clueless, cookie-cutter.”\textsuperscript{165} 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,”\textsuperscript{166} and widened the crack integrating Black and White American cultures first in the form of rhythm and blues and then rock and roll.

So what was it in particular about rhythm and blues that White youth found so subversively appealing? Rhythm and Blues was “[B]lack artists pop-tinged tunes with a heavy beat and lyrics packed with sexual innuendo.”\textsuperscript{167} 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 combined.\textsuperscript{168} Underlying each of these musical traditions was soul—distinct from “feelings” (which most
everybody had), which captured the “emotional center of [B]lack cultural expression,” and served as a subversive “challenge to the technocratic rationalist threatening to enslave” White youth especially by the 1950s.\footnote{Douglas, supra note 1, at 243.} By the 1950s then, Black America’s musical “soul” was in rhythm and blues which symbolized “the negation of Western analytic process…that posited a near mystical naturalness, reaffirming biological priorities and denying the Puritan ethic of middle America.”\footnote{Id.} As one historian would note with respect to the cross over 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 the aggrieved.”\footnote{Douglas, supra note 1, at 242.}

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, Detroit, and Alabama, ultimately settling in to form large urban ghettos.\footnote{Scheurer, supra note 122, at 66.} Despite the considerable ideological differences in Black American discourse prior to the War regarding the best way of achieving liberation, the dominant discourse of post War Black Americans included a call and struggle for full rights of American citizenship.\footnote{Indeed, after the war, membership in the NAACP (an organization organized on the premise of facilitating full civic and citizenship rights for Black Americans) soared from 50,000 to 450,000. Prior to the war, however, various organizations were organized around different ideologies all aimed at attaining equality for Black America that ranged from Black Nationalist claims for a separate political and economic state to anti-imperialist or anti-colonialists calls for a physical revolution.} Rhythm and Blues arose out of these new post War urban localities and found its way on independent radio stations willing to sell air time to Black disc jockeys. 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—would be listening in as well.\footnote{Lacey, supra note 168, at 37.} Soon, white youths’ favorite artists were Black Americans and their favorite disc jockeys were White ventriloquists, who both
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 the edifice.” 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.” Moreover, because the popularity and spread of rock and roll coincided with the a developing civil rights movements in the 1950s, the music itself served as a serious threat to established race relations. Although disc jockeys were given free reign of programming content, they were generally prohibited by their station managers from engaging in any explicit or overt discussion about race or race relations on air. They would however essentially stomp all over the color line nevertheless by playing Black music on White radio which was avowedly about much more than the fun and entertainment value of the music alone. Not only did their shows foster an inter-mixing between Black and White sounded Black and interacted with Blacks. Before Elvis Presley, virtually all R&B artists that White teens heard on the radio were Black artists.

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175 Id. at 23.
176 Rothenbuhler & McCourt, supra note 26, at 374; See also Russell Pearce, Revitalizing the Lawyer-Poet: What Lawyers Can Learn From Rock and Roll, 14 Widener L.J. 907 (2005) (discussing how rock n roll lyrics about sex, booze, etc., were a challenge to the establishment).
177 Douglas, supra note 1, at 228. Here, Habermas is partially correct in asserting that informal publics can be influential to formal more organized movements that overtly challenge the ruling authority or state apparatus. He underestimates however the power of these informal publics to challenge the ruling ideologies in and of themselves.
178 Lacey, supra note 168, at 35. Black disc jockeys were however expected to be involved in community building in the Black community and to speak specifically about racial issues of the day. Many radio stations by observing Black DJs and their connection with Black community would see the value in creating a local listening audience, connection, and bond. Fisher, supra note 34, 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, white, bourgeois culture, a distance that white DJs would mimic and cultivate at great profit.”).
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 Freed avoided talking directly or overtly about Blacks or race on air despite his use of racial ventriloquy. He was however also known to publicly embrace Black male and female musicians at shows or events he hosted. And while these disc jockeys, their station owners, and eventually White rock and roll artists, like Elvis Presley, would expropriate and exploit Black music without directly addressing the conditions of Black Americans in America, they ironically flung the door open wider for Black disc jockeys, Black musicians, and the listening Black audience. Such 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 on television.

Moreover, these disc jockeys would host shows and concerts, that led to racial intermingling, that were in themselves, like the formal Civil Rights Movement that was to soon come, a challenge to the mainstream prohibitions against social interactions between the races. While the rock revolution was at the time seen as an overnight shift in popular culture, it reflected a brewing revolution that spread across the country for more than a decade. It buckled racial lines, through music and everyday interactions, on the dance floor or in “imagined” interactions over the airwaves, as a “huge new generation of young people was beginning to flex its demographic muscle.” In fact, as disc jockeys spoke at record stores,

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179 Fisher, supra note 34, at 54. Indeed, some historians have credited Freed with developing the term rock and roll as a subverted substitute of the term rhythm and blues, which was clearly associated with Black culture.
180 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.” Douglas, supra note 1, at 249.
181 Black artists like B.B King, James Brown, and others agreed that these DJs exposed their music to wider audiences and, in doing so, exposed blues, gospel, and jazz, to white audience, and often gave upcoming musicians their first break. Douglas, supra note 1, at 240.
182 Id.; See also Fisher, supra note 34, at 47 (“[t]he illicit sound of the new music drove radio further and further from the innocence of TV America and the pretence of racial separation.”).
183 Fisher, supra note 34, at 28; See also Ennis, supra note 152 at 140.
emceed and/or 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 disappear.\footnote{Douglas, \textit{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 of black 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.")}. By surveying local record stores and interacting directly with his local audience, the DJ played what they thought their audience wanted to hear, an observation that would ultimately lead to the development of the Top 40 format.\footnote{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. Rothenbuhler & McCourt, \textit{supra} note 26, at 371 ("stations surveyed record stores for their most popular songs, and local interest, rather than national popularity determined airplay"). Top 40 originally represented the number of songs a disc jockey could play in a three hour shift. 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 White teenagers. Douglas, \textit{supra} note 1, at 16.} Top 40 radio then "was [originally] designed to reflect what had been widely accepted, not to showcase anything avant guarde."\footnote{Fisher, \textit{supra} note 34, at 28.}

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, at the time, that most influenced popular culture and exemplified the intergenerational and inter-racial battle over identity and identity formation. With the growing connection between radio, disc jockeys, the small up and coming grass roots 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 ideology\textsuperscript{187} and established business practices in radio.

In response, a campaign against rock and roll developed with the goal of beating back the wave of socio-cultural change underlying the music’s popularity. Rock and roll disc jockeys were targeted as the culprits for instigating and fueling the desires for such change, which would, within a decade, advance to a demand for change by Black Americans via the Civil Rights Movement and the 1960s protest movements. In the 1950s though, “the 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.”\textsuperscript{188} 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 would issue anti-rock statements on behalf of parents, civic, and religious leaders.\textsuperscript{189}

The main assault however that ultimately led to the dethroning of the disc jockey, and as a result, the disruption in the contestation to the then established economic and racial hegemonies in the industry and society at large, came in the early 1950s. In the 1950s, payola, while not illegal at the time,\textsuperscript{190} was the subject of a federal investigation investigating corruption in radio, due in large part to the lobbying efforts of ASCAP. ASCAP’s objective was to bring down the rock and roll DJ who played primarily rock and roll and rhythm and blues music, both

\textsuperscript{187} 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 of the…[s]elf appointed guardians of the old ([W]hite) ways…ranged from queasy discomfort to unchecked rage.”).

\textsuperscript{188} Id. at 50.

\textsuperscript{189} Id. at 52

\textsuperscript{190} In fact, payola dated back in one form or another to when songwriters offered band leaders of live bands certain incentives to play one of their songs in a set or performance on radio. Lauren Katunich, \textit{Time to Quit Paying the Payola Piper: Why Music Industry Abuse Demands a Complete System Overhaul}, 22 LOY. L.A. ENT. L. REV. 643, 644 (2002). As disc jockeys gained in popularity and control over the content that was aired on the radio, their ability to make or break a record’s sales via access to, and airplay on, the radio, they, including Alan Freed, began to receive paid incentives from an endorsing record company to play a particular record. \textit{Id.}
published by its competitor, BMI. Disc jockeys quit in droves, and stations fired many others. To cultural studies scholars, 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.”

In the end, after the payola surge, the disc jockey’s autonomy was eroded. Stations turned to national surveys to give an appearance of a scientific methodology of choosing play lists, 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. Known as the format era of Top 40 AM radio, it favored management and “gave DJs even less time to talk and made them hew to a thirty-record playlist...[with] rotations emphasis[ing] the top six to eight records, playing the hits over and over and over. While rock and roll on the air continued and the disc jockey personality remained, racial ventriloquy and

191 FORNATALE & MILLS, supra note 127, at 49. The stage was set for a national inquiry determined to bring Top 40 radio back within the control of corporate leaders. Douglas, supra note 1, at 250.
192 Douglas, supra note 1, at 251; Fisher, supra note 34, 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.”).
193 Kielbowicz & Lawson, supra note 132, 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). Payola never really would go away however but it instead changed directions because “[n]ow it was music directors and station managers, rather than deejays, who made deals with record companies and their distributors.” Fisher, supra note 34, at 91.
194 Fisher, supra note 34, at 91.
195 BILL BREWSTER & FRANK BROUGHTON, LAST NIGHT A DJ SAVED MY LIFE: THE HISTORY OF THE DISC JOCKERY 40 (2000). Moreover, with Top 40 music play lists based on national surveys, including music listings in Billboard magazine, and with a reduction in the number of songs played on the radio air waves, an increase in advertising jingles, and rapid fire disc jockey talk, smaller independent record labels would be hurt considerably due to fewer opportunities for their songs to get air play. Id. at 251.
music with overt identifications with Black culture did not and were replaced instead with “more generic youth slang like ‘sockin it to you’ and ‘groovin’…. [and] crossover music that was ‘clearly [B]lack but not threatening, and very danceable.” AM radio became highly “predictable and routinized,” and filled with “so many jingles, ads, and promos [that had to be] tune[d] out.”

In essence, the youth rebellion would become commercialized and harnessed by a controlled and predictable play list to such a degree that they would begin to turn away and tune out, especially, as the youth rebellion overtly politicized in the years to come. But even prior to Congress’ payola 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. Early on, the FCC did little to further the contesting voices of those in the Black community but was instead indifferent to their being given access to the radio airwaves. Indeed, the FCC failed, in its calls for localism, to directly adopt and/or 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.

Some could argue that what this trip down America’s historic socio-cultural legal lane shows is that the market and not the law was instrumental in the subversion, and/or diversity that appeared on radio during the transition period. For all the FCC calls for localism, the law

196 Douglas, supra note 1, at 252.
197 Id. at 254; See also FORNATALE & MILLS, supra note 127, at 26 (Top 40 has come to mean the playing of the best selling records over and over in what industry calls rotation).
198 They would turn to FM radio, 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 would play out repeatedly on broadcast radio as different subversive voices on radio would find their way onto the airwaves only to be eventually commercialized or co-opted—a situation not too unfamiliar to the current status of radio. Interestingly enough, when FM station too became restricted by tight Top 40 play lists, those excluded or marginalized from the nation’s radio air waves would turn to college radio, and community radio.
implicitly endorsed the “Whiteness” ethos on radio and did little, if anything, to facilitate discourse that would ultimately surface despite the laws’ indifference to the limited access to Blacks on radio, or even to the mainstream American youth. 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 until after the market demanded their entry. But as this history has also shown, demographics and market demand was not the only factor but one of many that led to the inclusion of these voices. Because these other factors are no longer present in the deregulatory and ownership consolidated radio (and music) industry in which radio now exists, government intervention is necessary via the re-invigoration of a localism policy that ensures that radio in particular, given its unique qualities, is more representative and inclusive of contesting voices, especially 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.

IV. Reinvigorating Localism

A. Deregulation and Its Effect on Music Content on Radio

The deregulatory efforts that began in the 1980s and 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, the counter-cultural sound of rock and roll made its way on radio, despite the radio’s doomsday and irrelevant predictions, because fierce competition existed between local radio owners, and because radio stations were connected and responsive to local communities through their local DJs, musicians, and independent record labels. These factors influenced considerably the emergence of the local and contesting voices heard on radio in the 1940s and 1950s and that have been undermined due to the exclusive market based deregulatory approach ultimately adopted by the FCC. For over three decades and up until the early 1980s, communications regulatory policies, incorporated localism ideals and aimed “to restrict media ownership…to relentlessly [guard] against concentration and toward maximizing the number of
independent media voices.**200 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 non-network 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.

Now, radio has essentially become centralized in the hands of a very few conglomerates that control the majority of what the nation hears. 201 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. 202 Marketplace ideology rejected the scarce air waves’ theory underlying the trusteeship standard because, in principle, all resources, including the air waves, were scarce. Therefore, according to the marketplace model, the belief was that the efficient use of the air waves (like other scarce resources) could best be determined by the market and the laws of supply and demand. 203 Such demand turned primarily on buying demographics and consumption habits and in treating radio content as a consumer good. Gone by the way side was the concern for local access to, and content on, the airwaves.

201 Mark Anthony Neal, *Rhythm And Bullshit?: The Slow Decline Of R&B, Part Three: Media Conglomeration, Label Consolidation And Payola*, June 30, 2005, http://popmatters.com/music/features/050630-randb3.shtml (“[i]n the aftermath of the Telecommunications...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..controlling more than 40 percent of that.”).
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. Immediately following its passage, media conglomerates bought up most local stations and consolidated the stations in order to maximize profits, thereby decreasing competition among them. Furthermore, with media conglomerates having no commitment to local interest, they fired hundreds of local radio employees, cut community programs, and ultimately standardized play lists nationally. To increase profits, many stations soon replaced live disc jockeys, who “understood local tastes and intricacies” with pre-recorded announcers. In addition, with the adoption of software that allowed disc jockeys to “voice track” or “cyberjock” their shows, disc jockeys became further removed from their local audience.

Shows were pre-recorded with voice tracking technology which allowed disk jockeys to tape their shows with sound bites, and other computer developments that made it possible for listener calls, songs, promos, and with other commercials to be patched in. Such shows were subsequently sent out to other conglomerate owned stations in other local and regional areas. With cyber-jocking and voice tracking, radio conglomerates would “cut down the total number of disc jockeys and to

204 Prindle, supra note 17, at 299.
205 Id. 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, supra note 15, 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 which in turn cut short the goal of catering to niche or even local tastes. Martens, supra note 30, at 311. 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 and usually with record industry backing. Id (radio has become more like a “McRadio” than the intimate connection to the local that it once was).
206 From Habermas, supra note 14, at 296.
209 Id.
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spotlight its top talents.”210 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.”211 The nationally syndicated radio personality was soon to follow and was by definition further removed (geographically) from the many communities that received the syndicated broadcast.212

With consolidated radio and radio’s continued ability to influence 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 they [the labels and artists] ha[d] no comparable means to promote their material.”213 Play lists were no longer determined by the local disc jockey but by distant radio station regional managers and directors, and were played by the distant nationally syndicated disc jockey. Radio stations were also hesitant to introduce new talent or to vary from such nationally generated play lists for fear of offending advertisers concerned about upsetting the core listening demographic. Therefore, “[w]ith few open slots for new music on tightly controlled play lists, it [became] increasingly difficult for new artists to enter the airwaves.”214 Moreover, independent labels would fare no better in the post-Telecommunications Act consolidated radio industry environment because “they simply were unable to compete with the expensive advertising costs charged by conglomerate radio stations for

210 Id.
212 This article does not oppose syndicated programming but indeed acknowledges its benefit in making “national” information or talent that might have otherwise remained local. Syndicating program is however a huge problem to the extent it recycles top-down, national content and contributes to erasing local access and expressivity on the airwaves. See Martens, supra note 30, at 315 (post consolidation voice tracking technology of the syndicated DJs on radio is not locally responsive); Ortner, supra note 21, at 139 (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).
213 Van Alystyne, supra note 208, at 653.
214 Id. at 659.
radio air play of their artists."\textsuperscript{215} Many scholars have therefore argued that radio music programming not only has become further removed from the local listening audience but also has become devoid of social commentary and filled with jingles, advertising, and “feel good” music meant to entice listeners into buying and consuming.\textsuperscript{216}

Because radio continues to influence the popularity of a particular song, radio is still very relevant in shaping mass and popular culture,\textsuperscript{217} and by extension, societal perceptions, understandings, and will formation. It is therefore imperative, for a thriving deliberating and participatory democracy, that such perceptions are not merely shaped or passed down from the top. Space must be provided to musicians (and their listening audiences) who might contest the current cookie-cutter lyrical messages of consumption and frivolity that currently pervade the corporately controlled, market driven, radio air waves. Given what seems like the exclusive application of the market model approach to current media policies and given 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 contestatatory voices would or could now find their way onto the conglomerate controlled air waves. 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.\textsuperscript{218} Without government intervention, it is difficult to see how or why radio conglomerates would not continue on with business as usual, maximizing advertising profits by maintaining predictable buying demographics. Indeed, the Third Circuit, in staying the 2003 Order further deregulating the media industry, seemingly

\textsuperscript{215} From Habermas, supra note 14, at 300. The intense consolidation in radio, coupled with the subsequent consolidation in the record label industry, where approximately four major record labels came to be responsible for more than 80 percent of what makes it on to commercial radio practically squeezed out new artists that were not backed by one of the major record labels. Neal, supra note 202.
\textsuperscript{216} Id (claiming on urban radio in particular the overarching message is buy, buy, buy).
\textsuperscript{217} See Naomi Mezey and Mark Niles, Screening the Law: Ideology and Law in American Popular Culture, 28 COLUM. J.L. & ARTS 91, 99 (2005) (distinguishing popular culture as making “use of the mass cultural resources that capitalism provides,” and mass culture as usually co-opting and marketing popular cultural practices).
\textsuperscript{218} See Prindle, supra note 17, at 299.
acknowledged as much by ordering the FCC to listen in on the “everyday” concerns and conversations of the local public through a series of public hearings across the nation.

B. Opening Up Access: Suggested Approaches

Radio ownership consolidation is more than likely here to stay, the new presidential administration and incoming FCC chairman notwithstanding.\textsuperscript{219} 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 the current status of broadcast, nor required conglomerates to divest some of their consolidated holdings.\textsuperscript{220} 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 were not particularly helpful historically in destabilizing the racial and economic status quo on the nation’s air waves during the transition period of the mid 1940s to early 1950s, there were a number of other factors beyond market demand in place at the time that contributed to bringing marginalized voices to the fore. Now, however, many of those factors have disappeared.

Therefore, this article proposes a few possible remedies for opening up access on the nation’s radio airwaves \textit{within} the context of ownership consolidation, which are informed by the glimpse of 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. 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

\textsuperscript{219} President Obama has stated his displeasure with the current status with current 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. He, nor his administration, however have directly advocated for divestiture by current media conglomerates of some of their consolidated holdings.

\textsuperscript{220} Prometheus Radio Project v. FCC, 373 F.3d 372 (3rd Cir. 2004).
review process for broadcast license renewals be imposed to consider the extent to which broadcasters provide radio access to local musicians and content.221

With regard to 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 via the internet, 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, electromagnetic spectrum is still finite and regulation of its use remains justified.222 Moreover, unlike many other scarce resources, radio’s uniqueness continues to rest in its ability to facilitate deliberative discourse. The Supreme Court, over almost 40 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.”223 With such deliberative goals of radio still firmly in place, the public trusteeship interpretive standard (and related localism dictates), that was the governing standard of broadcaster public interest obligations for over three decades, should be resurrected. Continuing to follow the market model and relying solely on demand in the market to determine the public’s interest, when “the public” is construed narrowly to focus on a particular buying demographics, is the equivalent of turning the market over to private interests for their own self-regulation. Doing so is (and continuous to be), the diametric opposite of 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

221 Currently, pursuant to the deregulatory policies adopted via passage of the Telecommunications Act of 1996, broadcaster licenses are for the most part presumptively renewed with non-renewal relegated to the last punitive option should a licensee fail to meet renewal requirements.
222 Krotoszynski, supra note 15, at 817-18 (“Because physical constraints limit the number of broadcast licenses that the Commission may issue, government regulation of the airwaves… are 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 also Anthony Verona, Out of Thin Air: Using First Amendment Public Forum Analysis to Redeem American Broadcasting Regulation, 39 U. Mich. J.L. Reform 149 (2006) (asserting that scarcity doctrine is still applicable and justifiable despite the increase in other media outlets).
trusteeship standard be reapplied to the public interest standard, localism requirements must also be read back into the public trusteeship model of the public interest standard.

Indeed, almost from the inception or radio’s regulation, localism requirements have been part of such public interest obligations, with due weight given to it in facilitating the articulation of community norms and interests. Indeed, these regulations and policies, like the Blue Book and Chain Broadcasting Order, implemented during the network era, 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 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 socio-economically vulnerable. Therefore, some type of regulation requiring a broadcaster to consider and address the preferences of its local community needs to be reestablished to reverse the tide of the mass produced and nationalist top down basis upon which radio content is currently provided.

Specifically, in reinvigorating localism, the FCC should do so with a particular eye towards 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 reflect their particular interests (and perhaps subverted discourse). As has been discussed, cultural expression is

224 Randall Rainey and William Rehg argue that while an unregulated media grounded in market based ideology may lead to more (economic) efficiencies via costs and economies of scale, deliberation on radio is sacrificed. 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). Moreover, radio and the facilitation of such public discourse cannot be reduced to a consumer good, with the net result of such approach being the elevation of the interests of those with more wealth and buying power elevated above those with less. Id. at 1943.

225 There is currently considerable debate as to whether the casual link, accepted by the Supreme Court in Metro Broadcasting v. FCC, 497 U.S. 547 (1990), between minority ownership of media and the provision of diverse content on such minority owned outlets is sound, especially if “national” minority owners adopt the same market model approach as the conglomerates. Krotoszynski, supra note 15, at
fundamental to how one establishes, and comes to understand, community and his or her place in that community, and localism norms in turn build on this function of culture. 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 a relatively inexpensive without a premium attached for access. As a result of such costs, a significant portion of America’s population, constrained by socio-economic limitations, cannot perhaps afford the price tag of these other media options. Scholars continue to highlight the growing digital divide between America’s poorer communities and mainstream America. They have further pointed out that the effect of a primarily market based approach to media policy, has been a creation of technology have and have nots with increased marginalization of the socio-economically vulnerable, and the effect of a market based approach alone to media policy and the creation of technology and information haves and have nots, resulting increased marginalization of the socio-economically vulnerable.

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.

852. Radio One, currently the only Black owned radio station with a national presence, played more local based content when it was run by founder Cathy Hughes, who at Radio One’s beginning catered to, and was more connected with, the Washington, D.C. local listening community. Since Hughes’ son’s took over the station and its management, it has expanded nationally, and has begun to select music in the same top down manner as other non-minority national chain radio stations, thereby, limiting access to local talent. While an analysis of such issue is beyond the scope of this article, this article contends that by directly targeting to increase the representation on radio in particular of those on the lower socio-economic ladder, the FCC can diversify the airwaves with minority voices in a way that more than likely not face serious constitutional challenges, given Adarand Constructions v. Pena, 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 socioeconomic community is not an impermissible distinction based on race).

226 Cowling, supra note 41, at 312.
227 Krotoszynski, supra note 15, at 864 (government intervention in media access allocation needed due to imperfect market condition).
228 Id.
that could in turn directly affect the representation of local voices.\textsuperscript{229} Since this article argues for a more expansive reading of localism that includes music and popular culture as reflective of local discursive interests and concerns, hiring local disc jockeys might prove, as history has shown, quite beneficial to achieving the goals of determining the music preferences and interests of the local community.\textsuperscript{230} Moreover, this article also calls for broadcasters to provide a specific portion of airtime to local musicians,\textsuperscript{231} to hopefully provide space for voices that by their very nature might be in contest to the nationalist top down music that currently pervades the nation’s air waves.

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, 

\textsuperscript{229} 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. Martens, supra note 30, 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 promulgation too vague to be effectual. Moreover, such announcement for advisory council consultations also seems to focuses primarily on local news and public affairs to the exclusion of local music.

\textsuperscript{230} Such a policy would not run afoul of the ruling in \textit{Bechtel}, 10 F.3d 875 (D.C. Cir. 1993). The court in \textit{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 was arbitrary and capricious, and without factual support. As has been discussed, in terms of increasing locally culturally expressive content on radio, the local disc jockey, up until the massive industry consolidation and the implementation of economies of scale measures, had a historically proven and established role as the gateway of local community interests and tastes on radio.

\textsuperscript{231} This proposition has found support with other scholars albeit for different reasons related to entertainment enhancement and not necessarily for deliberative purposes as this article specifically endorses. \textit{See} Krotoszynski \textit{supra} note 15, at 857 n. 310; \textit{See also}, Martens, \textit{supra} note 30, at 313.
especially as it relates to music, and popular cultural expression. However, the main point here is to ensure that access is provided. While some of the music may simply be about frivolity and entertainment, the belief is that even within the realm of entertainment, commercialization, and what some might call manufactured consent, voices of contestation (even if coded and subverted) 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 subverted messages of resistance were also often found in such expressivity as well.

A different but related challenge to requiring an allocation of time to local musicians in hopes that subverted 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 in gangsta rap. The answer to that challenge again is that only access is being called for here. The goal here is not to ensure that subverted music maintains its authenticity but that continued spheres of musical contestation are given space to continually flourish and find expressive release in hopes of facilitating a discursive exchange or a nudge towards such dialogue.

Finally, in answer to the question as to why space for such contestation must be made on commercial radio when there are other broadcast options like low power stations, national public radio stations,

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232 See Cowling, supra note 41, 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...posing 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 278 (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 pay the paid for song on air. See From Habermas, supra note 14, at 292; See also Devin Kosar, Payola: Can Pay for Play Be Practically Enforced?, 23 ST. JOHN’S J. LEGAL COMMENT, 211 (2008).

233 See generally DON HERZOG, HAPPY SLAVES (1989).

234 From Habermas, supra note 14, at 264, 274-75.

235 RICHARD THALER & CASS SUNSTEIN, NUDGE (2008) (discussing the ways in which regulation can encourage individuals to make certain choices relevant to their everyday lives).
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 reinforced, constructed and, in some ways, manufactured. Moreover, even with non-commercial, public and college stations, they too are beginning to feel the weight and pressure of commercialization due to their under-funded budgets. In the end, there is evidence that even their radio programming is beginning to buckle under the commercial pressure and to resort to market based tactics such as soliciting advertisements on its website and tying financial incentives to donation (i.e., offering consumer products at a discount with a donation).

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. In doing so, the Court recognized a right in the listening audience to have access to a multiplicity of ideas over the airwaves, which as history has shown can include music. Moreover, the First Amendment rights of

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236 *From Habermas, supra* note 14, at 277-81.
239 PCMag.com, *PC Magazine, Radio Bookmarks a Hit with NPR Listeners*, http://www.pcmag.com/article2/0,2817,2339805,00.asp (last visited Mar. 4, 2009) (It is important for public radio stations to offer enticing premiums because they would not have enough money to keep broadcasting without support from their listeners.).
240 Despite its entertaining nature, music has been accorded First Amendment protections even for lyrics deemed as not overtly political in nature. *See generally* Jason Talerman, *The Death Of Tupac: Will Gangsta Rap Kill The First Amendment?*, 14 B.C. THIRD WORLD L.J. 117 (1994) (rap lyrics challenged as
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 provide) content the FCC deems valuable (or of lesser valuable) 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. 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.

Finally, to provide incentives for broadcasters to consider and internalize the needs of their local listening community, the FCC must re-establish a meaningful review process of each broadcaster’s license renewal application. In determining whether a license should be renewed, the FCC should consider the extent to which a licensee has or plans to provide content that is reflective of, the needs, interests, and preferences of the local community, who are not otherwise serviced by other radio stations in the community. Such review will also ensure that broadcasters are not attempting to satisfy the time allotment obligations proposed herein by regulating such program to graveyard shifts to avoid airing them during prime-times that generate considerable advertising revenue.


Krotoszynski, supra note 15, at 857.

To provide additional incentives to broadcasters, the government could subsidize this time allotted for local music and cultural expression as it does with other government mandated programming or by funds generated from imposing certain structural fees on broadcasters. Rainey & Rehg, supra note 224, at 1976 (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 non-profit corporation established with the specific task of collecting content representative of the formal public sphere of civic associations, etc., in the local community).
CONCLUSION

History has shown that now is not the first time radio has been controlled by corporate market driven commercial interests that have threatened radio as a medium through which will formation and participatory democracy can be achieved. Radio has survived through the commercial hegemony over content in the network era, and the format era, and can do the same in the conglomerate era. During the transition period between the network and format era, ruling hegemonies were shook by the voices that made it on the airwaves in the form of rhythm and blues and rock and roll, thereby, evidencing the contesting 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 airwaves. By breathing life back into the localism standard and by reading in a broader understanding of localism, one that incorporates music and popular counter-cultural expression, the FCC can adopt localism rules and policies that acknowledge fully the deliberative capacity of music that can (and does) influence popular will formation and societal understandings. As history has shown, because those most marginalized and excluded from mainstream society, may adopt non overtly political means of expressing their concerns, including via subverted and coded music, due regard must be given to such possibilities in any re-examination of media and localism policy. Local music must be included within the counters of the call for more responsive local programming, in promoting a more participatory and deliberative democracy using radio in particular as a tool. And with that, radio will live on, with its deliberative ideals still intact and remaining to be seen.