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Back to the Drawing Board! Legislating Hollywood

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BACK TO THE DRAWING BOARD! LEGISLATING HOLLYWOOD

A REGULATION THAT RESOLVES THE FILM INDUSTRY’S CONFLICT BETWEEN THE FIRST AND FOURTEENTH AMENDMENTS.

Christina Shu Jien Chong¹

INTRODUCTION

The United States Department of Justice “contended that equal employment opportunity in the broadcast industry could ‘contribute significantly toward reducing . . . discrimination in other industries’ because of the ‘enormous impact . . . television . . . [has] upon American life.’”² Courts have also recognized that “communities . . . [must] take an active interest in the . . . quality of [television programming because television] has a vast impact on their lives and the lives of their children.”³ Unfortunately, Hollywood continues to promote an insular culture that excludes minorities from influential behind-the-camera and on-screen positions.⁴

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2. *Metro Broad., Inc. v. FCC*, 497 U.S. 547, 555 (1990) (citing *Nondiscrimination Emp’t Practices of Broad. Licensees*, 23 F.C.C.2d 430, 771 (1970)), *overruled by* *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200 (1995).

3. *Office of Comm’n of United Church of Christ v. FCC*, 359 F.2d 994, 1003 (D.C. Cir. 1966).

4. Christina Shu Jien Chong, *Where Are the Asians in Hollywood? Can § 1981, Title VII, Colorblind Pitches, and Understanding Biases Break the Bamboo Ceiling?*, 21 UCLA ASIAN PAC. AM. L. J. 29, 49–50 (2016).

Although the government established agencies, such as the Federal Communications Commission (FCC), to ensure that networks and stations operate in the public's interest, my research revealed that minorities are still vastly underrepresented in the film industry.⁵ My research study confirmed that minority representation remained nearly stagnant between 2010 and 2014 and that the white majority continued to dominate as directors, casting directors, screenwriters, actors, and actresses.⁶ These results suggest that America's existing regulatory schemes are unable to break the cycle of bias among film creators and that the lack of diverse perspectives in Hollywood minimizes the number of casting calls seeking non-white talent and perpetuates the inaccurate, stereotypical portrayal of minorities.⁷ As a result, society's members develop negative implicit biases about minorities that strengthen the bamboo ceiling in the film industry and prevented people of color from succeeding as professional artists.⁸

The courts believe that "communities throughout the . . . country . . . must bear [the] final responsibility for the quality and adequacy of television service" and that members of the "public [should not] feel . . . [that] they are unduly interfering in the private business affairs of others" because the public has a direct interest in television programming.⁹ However, recent decisions, such as *Claybrooks v. ABC* and *Adarand Constructors, Inc. v. Pena*, suggest that courts sometimes fail to recognize the public's desire to promote antidiscrimination in employment and diversity, especially when these interests conflict with an individual's freedom of expression.¹⁰

This article urges the public to hold Congress and the judiciary responsible for ensuring children are exposed to a diverse portrayal of minority experiences on screen and providing minorities with the equal opportunity to earn a reasonable living in entertainment—

5. *Office of Comm'n of United Church of Christ*, 359 F.2d at 1003. See generally Chong, *supra* note 3.

6. Chong, *supra* note 3, at 31–33, 70.

7. *Id.* at 38.

8. *Id.* at 69.

9. *Office of Comm'n of United Church of Christ*, 359 F.2d at 1003.

10. *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 240–41 (1995) (Thomas, J., concurring); *Claybrooks v. Am. Broad. Co.*, 898 F. Supp. 2d 986, 999–1000 (M.D. Tenn. 2012).

America's most influential industry. Our judges need more direction from Congress to establish a precedent that properly balances our country's First Amendment and antidiscrimination values because, currently, the courts are failing to stop discrimination in Hollywood despite Congress's passage of Title VII and § 1981.¹¹ Entertainment leaders also need congressional guidance because the industry has not eliminated its improper practices through self-regulation.¹² Thus, this article presents a legislative solution that can reduce the film industry's prejudicial actions without interfering with artists' right to express their views.

Part I reviews the regulatory history of the broadcast, cable, and film industries.¹³ This section also uses statistics to explain why legislative action is necessary to promote nonstereotypical appearances of minorities in films and employment of minorities in front of and behind the camera.¹⁴ Part II examines the constitutionality of a content-based regulation that requires casting calls to be race neutral.¹⁵ This section argues that casting calls with a preference for actors or actresses of a particular race constitute unlawful speech under Title VII, and similar to obscene and commercial speech, these discriminatory employment advertisements deserve minimal or no protection under the First Amendment.¹⁶ Thus, even if no legislation is passed, Hollywood's current hiring practices are illegal. Part III argues that even if the Supreme Court of the United States applies strict scrutiny, the regulation is constitutional because eliminating discriminatory casting calls serves the compelling government interests of (1) protecting a minority's right to earn a living in Hollywood and (2) shielding America's children from developing implicit biases after constant exposure to the discriminatory portrayals of minorities on screen.¹⁷

11. Chong, *supra* note 3, at 53, 56.

12. *Id.* at 66–67.

13. *See infra* Part I.

14. *See infra* Part I.

15. *See infra* Part II.

16. *See infra* Part II.

17. *See infra* Part III.

I. *The Broadcast, Cable, and Film Industries*

Although free speech absolutists claim that regulating the entertainment industry violates the First Amendment, past regulatory actions by the legislative and judicial branches suggest otherwise.¹⁸ This section provides a brief overview and history of the regulations in the broadcast and cable industries that are relevant to this article and explains why legislative action is necessary.

A. *An Overview of the Broadcast and Cable Industries*

Broadcast television (TV), also known as over-the-air broadcasting or terrestrial TV, began in 1927 and is an industry where networks deliver programs to the public for free.¹⁹ The networks transmit TV signals by radio waves to a receiver, such as an antenna.²⁰ Because the radio frequency spectrum is limited, most governments require a station license to prevent networks from broadcasting over each other's airwaves.²¹ Broadcast TV was the only method of TV delivery until cable TV was popularized in the 1950s.²² The major networks in the United States are ABC, CBS, Fox, and NBC.²³

Unlike broadcast TV, cable TV is a system where programs are delivered through coaxial cables to individual receivers of paying subscribers.²⁴ Cable operators, such as AT&T and Comcast, deliver programming from four sources: (1) retransmission of broadcast

18. Chong, *supra* note 3, at 56.

19. David E. Fisher et al., *Television*, ENCYC. BRITANNICA, <https://www.britannica.com/technology/television-technology> [perma.cc/8J28-SJJ2] (last visited Nov. 1, 2018).

20. *Id.*; *What Is the Difference Between Broadcast and Cable Television?*, I AGREE TO SEE, <http://www.iagreeetosee.com/faq/what-is-the-difference-between-broadcast-and-cable-television/> [https://perma.cc/GM8R-FB9R] (last visited Mar. 22, 2017).

21. STEVEN WALDMAN, *THE INFORMATION NEEDS OF COMMUNITIES* 276 (2011), <https://www.fcc.gov/sites/default/files/the-information-needs-of-communities-report-july-2011.pdf> [https://perma.cc/2PNK-7USW].

22. Lydia Boyd, *Brief History of the Television History*, AD*ACCESS, <https://library.duke.edu/specialcollections/scriptorium/adaccess/tv-history.html> [https://perma.cc/JM9J-ZR3X] (last visited Nov. 1, 2018).

23. *TV Broadcast & Cable Networks Industry Insights From D&B Hoovers*, D&B HOOVERS, <http://www.hoovers.com/industry-facts.tv-broadcast-cable-networks.1470.html> (last visited Mar. 22, 2017).

24. *What Is the Difference Between Broadcast and Cable Television?*, *supra* note 19.

stations; (2) programs purchased from cable networks, such as ESPN, Fox News, USA, TBS, and Disney; (3) programs created by the cable operator itself; and (4) programs on third-party and government-owned access channels.²⁵ The program sources for each network vary but are usually produced by independent companies, such as Viacom, CBS, NBCUniversal, Time Warner, Twenty-First Century Fox, Disney, and British Broadcasting Corporation Worldwide.²⁶

B. Regulation of the Broadcast Industry

Early regulation of the entertainment industry suggests that Congress did not view the freedom of speech as an unlimited right.²⁷ Instead, Congress feared that without governmental control “the public interest might be subordinated to monopolistic domination in the broadcasting field.”²⁸ Similarly, the Supreme Court believes that the medium of broadcast has the “special characteristic” of scarcity, which “calls for more exacting regulation.”²⁹ In recent years, over-the-air broadcasting has transitioned to delivering TV signals via cable or satellite, but the government still regulates the broadcast industry to ensure efficiency and diversity.³⁰ This section discusses the powers of the FCC and how its history suggests that the entertainment industry is subject to regulation.

1. The Radio Act of 1927 and the Communications Act of 1934

To prevent chaos over radio frequencies, the Radio Act of 1927 created a unified and comprehensive regulatory system for the broadcast industry and the Federal Radio Commission (FRC).³¹ The Radio Act of 1927 gave the FRC the power to deny licenses to

25. Denver Area Educ. Telecomms. Consortium, Inc. v. FCC, 518 U.S. 727, 787–88 (1996).

26. *Who Owns What on Television?*, NEATORAMA (July 7, 2008, 3:13 AM), <https://www.neatorama.com/2008/07/07/who-owns-what-on-television/> [<https://perma.cc/G2KZ-28NE>].

27. *Nat'l Broad. Co. v. United States*, 319 U.S. 190, 227 (1943).

28. *Id.* at 219.

29. *FCC v. League of Women Voters of Cal.*, 468 U.S. 364, 375 (1984).

30. Bethany M. Burns, *Reforming the Newspaper Industry: Achieving First Amendment Goals of Diversity Through Structural Regulation*, 5 *COMMLAW CONSPPECTUS* 61, 62–63 (1997).

31. *Nat'l Broad. Co.*, 319 U.S. at 212–13.

stations that made exclusivity agreements with networks, which is an example of Congress approving indirect regulation of private dealings.³²

TV became available in the late 1920s,³³ but Congress did not replace the FRC with the FCC until the Communications Act of 1934.³⁴ The Communications Act authorizes the FCC to regulate the radio and TV industries and requires the FCC to grant broadcasting licenses that are in the “public convenience, interest, or necessity.”³⁵

Although the FCC cannot edit broadcasts that it deems inappropriate, it can review the content of past and future broadcasts through the license-renewal³⁶ and license-granting processes.³⁷ When granting initial licenses, the FCC can forecast the station’s performance, but when analyzing renewals, the FCC must focus on the broadcaster’s past actions.³⁸ If a broadcaster failed to promote operations and programs that furthered the public interest of its listeners then the FCC can deny the broadcaster’s renewal application.³⁹

Currently, the FCC’s licensing power is broad and applies to both noncommercial and commercial broadcasters⁴⁰; its powers are not limited to the engineering and technical aspects of regulating frequencies, hours, and licensees.⁴¹ For example, the FCC does not have unfettered censorship power over broadcast communications,⁴² but it can regulate the broadcast of obscene, indecent, or profane language.⁴³ Congress’s decision to provide vast powers to the FCC

32. *Id.* at 200–01.

33. Fisher, *supra* note 18.

34. *Nat’l Broad. Co.*, 319 U.S. at 217.

35. 47 U.S.C. § 303 (2018); *Federal Communications Commission*, WIKIPEDIA, https://en.wikipedia.org/wiki/Federal_Communications_Commission [https://perma.cc/SE7A-DZ54] (last visited Mar. 23, 2017).

36. *FCC v. Pacifica Found.*, 438 U.S. 726, 737 (1978).

37. *Office of Commc’n of United Church of Christ v. FCC*, 359 F.2d 994, 1007 (D.C. Cir. 1966).

38. *Id.*

39. *Nat’l Broad. Co.*, 319 U.S. at 216; *Office of Commc’n of United Church of Christ*, 359 F.2d at 1003, 1007.

40. *FCC v. League of Women Voters of Cal.*, 468 U.S. 364, 367 (1984).

41. 47 U.S.C. § 303 (2018); *Nat’l Broad. Co.*, 319 U.S. at 215.

42. 47 U.S.C. § 326 (2018).

43. *FCC v. Pacifica Found.*, 438 U.S. 726, 737 (1978).

suggests an effort to regulate an industry that was dominated by the majority and excluded minority viewpoints.

2. *The FCC's Employment and Diversity Goals*

In addition to using its licensing powers to further the public's interest, the FCC promotes three basic concepts in its regulatory decisions to encourage diversity: (1) nondiscrimination in employment, (2) affirmative action, and (3) proper discovery of community problems.⁴⁴ Despite the FCC's explicit efforts to encourage diversity, Hollywood still remains dominated by the majority,⁴⁵ which further supports the idea that legislative attention is necessary. This section discusses the three FCC diversity goals and explains how the FCC's efforts, although valiant, have not been enough to change Hollywood.

a) *Nondiscrimination in Employment*

"[F]rom the outset, . . . the [FCC] has recognized that the public interest is not served by licensees who engage in intentional employment discrimination."⁴⁶ The FCC requires that no person be denied employment or related benefits on the grounds of his or her race, color, religion, national origin, or sex.⁴⁷

The FCC also analyzes employment practices of licensees "to the extent those practices affect the obligation of the licensee to provide programming that 'fairly reflects the tastes and the viewpoints of minority groups.'"⁴⁸ A licensee's disproportionate employment of minorities, "standing alone, does not necessarily present an issue warranting exploration in an evidentiary hearing."⁴⁹ But, a "highly

44. *La. Television Broad. Corp.*, 53 F.C.C.2d 561, 562–63 (1975).

45. Chong, *supra* note 4, at 28.

46. *Bilingual Bicultural Coal. on Mass Media, Inc. v. FCC*, 595 F.2d 621, 628 (D.C. Cir. 1978).

47. *La. Television Broad. Corp.*, 53 F.C.C.2d at 563. The FCC examines the broadcaster's past employment practices to determine if there is (1) a pattern of intentional discrimination that would seriously put into question the licensee's character qualifications to remain a licensee and (2) intentional discrimination, which would almost invariably disqualify a broadcast from a position of public trusteeship. *Bilingual Bicultural Coal.*, 595 F.2d at 629.

48. *Bilingual Bicultural Coal.*, 595 F.2d at 628.

49. *La. Television Broad. Corp.*, 53 F.C.C.2d at 563.

disproportionate representation of minorities and women employed by a licensee in relation to their presence in the population or workforce may constitute evidence of discriminatory practices.”⁵⁰ At first glance, the FCC’s current scheme appears to protect minorities and promote equal opportunity in employment, but my study of Hollywood, which is discussed in Section D, indicates that unfair hiring procedures still exist in the industry.⁵¹

b) Affirmative Action

The FCC “requires licensees to make additional efforts to recruit, employ[,] and promote qualified members of minority and women groups.”⁵² If a licensee’s “employment profile falls below a zone of reasonableness, the licensee must modify or supplement its recruitment practices and policies by vigorous and systematic efforts to locate and encourage the candidacy of qualified minorities and women.”⁵³ For example, the licensee must eliminate recruitment activities that perpetuate hiring schemes that rely upon personal contacts and friendships, a hiring practice that often benefits nonminority males and often excludes minorities and women.⁵⁴ Many companies have diversity initiatives to promote inclusivity, but these diversity hiring programs have become more of a marketing scheme than a legitimate pipeline program to leadership positions in Hollywood,⁵⁵ which means there is minimal movement of minorities into top positions in the film industry.

c) Primer on Ascertainment of Community Problems by Broadcast Applicants

A broadcast licensee’s response to the conflicting needs of the groups in its service area remains largely within its discretion, but it

50. *Id.*

51. *See infra* Part I.D.

52. *La. Television Broad. Corp.*, 53 F.C.C.2d at 563.

53. *Id.*

54. *Id.*

55. Chong, *supra* note 3, at 66.

cannot “flatly ignore a strongly expressed need.”⁵⁶ Although there is no requirement that the station devote 20% of its airtime to needs expressed by 20% of its viewing public, the licensee must act reasonably.⁵⁷ If a licensee is unable to adequately serve the needs of both the majority and minorities in its service area, then its renewal application will be denied unless the licensee can prove it made “reasonable efforts” to broadcast programs of particular interest to minorities.⁵⁸

The FCC’s Ascertainment Policy recognizes that “[g]roups with the greatest problems may be the least organized and have [the] fewest recognized spokesmen.”⁵⁹ Thus, additional efforts are necessary to identify their leaders and establish a dialogue to ascertain their problems and interests.⁶⁰ Broadcasters can satisfy this requirement by conducting a random sample of the general public or meeting with community leaders, but questionnaires and preprinted forms cannot be used in lieu of personal connections.⁶¹

The FCC has never held that the needs of a minority group may only be satisfied by programs designed specifically for that group.⁶² A wider range of appeal can suffice to satisfy the licensee’s obligation of service to demographic minorities, but the broadcast industry cannot accept that appeal to general tastes, intellects, problems, needs, and interests is the only way programing decisions should be made.⁶³ The FCC encourages broadcasters to consider the needs of minorities⁶⁴ by expressly including “minority and ethnic groups” as segments of the community that licensees are expected to consult.⁶⁵ However, despite this explicit, regulated, and recognized

56. *Stone v. FCC*, 466 F.2d 316, 328 (D.C. Cir. 1972).

57. *Id.* For example, “[a] station should be ready, able, and willing to serve the needs of the local community by broadcasting such outstanding local events as community concerts, civic meetings, [and] local sports events” *Nat’l Broad. Co. v. United States*, 319 U.S. 190, 203 (1943).

58. *Ala. Educ. Television Comm’n*, 50 F.C.C.2d 461, 473 (1974).

59. *WGN of Colo., Inc.*, 31 F.C.C.2d 413, 420 (1971).

60. *Id.*

61. *Stone*, 466 F.2d at 326.

62. *Ala. Educ. Television Comm’n*, 50 F.C.C.2d at 473.

63. *Id.*

64. *Id.*

65. *Metro Broad., Inc. v. FCC*, 497 U.S. 547, 587 (1990), *overruled by Adarand Constructors, Inc. v. Pena*, 515 U.S. 200 (1995); *Ala. Educ. Television Comm’n*, 50 F.C.C.2d at 473.

ascertainment program run by the FCC, decision-making positions still lack minority representation, minorities are often placed in menial jobs, and stations have low minority employment statistics.⁶⁶

To increase the number of minorities on screen, Hollywood needs more representation behind-the-scenes. The FCC is trying to make the industry diverse through its three explicit policies, but it has been unsuccessful,⁶⁷ which is why this article argues for more concrete regulation of the entertainment industry.

C. Regulation of the Cable and Film Industries

Some people might argue that allowing regulation of the broadcast industry does not mean that the cable and film industries can also be regulated, but this argument fails because local governments currently regulate cable operators' rights and obligations through franchise authorities that control access to public rights-of-way and easements related to the laying of cable lines.⁶⁸ Local franchising agreements were the first form of cable regulation and began in the 1960s,⁶⁹ and today, the federal government still requires these franchise agreements.⁷⁰ In 1972, Congress explicitly required cable operators to reserve 10%–15% of their channels for commercial lease to unaffiliated third parties.⁷¹ The leased access channels created another avenue for programmers, who would otherwise be excluded from cable, to express their views.⁷² Congress also required operators to set aside channels for public, educational, and government programming (PEG channels).⁷³ Local governments often hired an access channel manager—usually a nonprofit organization—that prescreened programming, promulgated rules for use of the PEG channels, and dealt with any issues arising from programming; this locally accountable body, not the cable operators, had editorial

66. WGN of Colo., Inc., 31 F.C.C.2d 413, 415 (1971).

67. Chong, *supra* note 3, at 30.

68. Denver Area Educ. Telecomms. Consortium, Inc. v. FCC, 518 U.S. 727, 788 (1996).

69. *Id.*

70. *Id.*

71. *Id.* at 789.

72. *Id.* at 743.

73. *Id.* at 760.

control.⁷⁴ On leased and PEG channels, federal law prohibited the cable operator from exercising any control over program content until 1992, when Congress allowed operators to prohibit the broadcasting of indecent programs.⁷⁵ These are all examples of Congress allowing regulation of the cable industry to promote diversity. Unfortunately, this minimal regulation has not been enough to garner any significant change.

As for the film industry, its leaders must still abide by general tort, contract, intellectual property, and employment regulations, such as Title VII and copyright laws.⁷⁶ Similar to the broadcast industry, Congress has suggested that cable and film companies do not have unfettered discretion to operate their businesses and must consider diversity and excluded groups in their programming.⁷⁷ The question is whether current regulation is enough. This article argues, “No.”

D. Studies that Prove a Lack of Diversity in the Film Industry Still Exists

Congress has regulated entertainment via the broadcast and cable industry for almost 100 years,⁷⁸ but more regulation is necessary because our TV and movie casts still lack diversity. The disparity in representation suggests that current regulation of the cable, broadcast, and film industries is not enough because representation has not reached parity. This section provides two examples of underrepresentation of minorities despite the existence of current regulations: (1) ownership of broadcast stations and (2) representation in movies and broadcast television behind the camera and on screen.

74. *Denver Area Educ. Telecomms.*, 518 U.S. at 761.

75. *Id.* at 760.

76. *Ferrill v. Parker Grp., Inc.*, 168 F.3d 468, 474 (11th Cir. 1999); Paige Zandri, *Lights, Camera . . . Litigation?: Film Industry Law*, PRIORI LEGAL (June 13, 2014), <https://www.priorilegal.com/blog/film-industry-law> [<https://perma.cc/KZ7M-NRZ3>].

77. *Congress Members Weigh in on Diversity in Hollywood*, MULTICULTURAL MEDIA CAUCUS (June 7, 2017), <https://multiculturalmediacaucus-clarke.house.gov/congress-members-weigh-in-on-diversity-in-hollywood/> [<https://perma.cc/2RVY-A2EA>].

78. Anne P. Jones & Harry W. Quillan, *Broadcasting Regulation: A Very Brief History*, 37 FED. COMM. L.J. 107, 107 (1985).

1. *Ownership of Broadcast Stations*

In 1968, Congress recognized that “the most valuable broadcast licenses were assigned many years ago” and determined that the comparative hearings at the renewal stages were “an important opportunity for excluded groups . . . to gain entry into the industry.”⁷⁹ However, despite Congress’s push for diversity and its creation of the FRC in 1927 and the FCC in 1934, by 1971—almost forty years later—minorities still only owned ten of the approximately 7,500 radio stations in the country and none of the 1,000+ television stations.⁸⁰ In an effort to increase minority representation, the FCC promulgated equal-employment-opportunity regulations through “formal ‘ascertainment’ rules.”⁸¹

In 1978, eight years after the FCC enacted its ascertainment policy, the views of racial minorities continued to be inadequately represented in the broadcast media.⁸² Minorities still owned less than 1% of the nation’s radio and television stations.⁸³ The FCC determined that additional measures were needed to include more minority voices.⁸⁴ In May 1978, the FCC adopted the Statement of Policy on Minority Ownership of Broadcasting Facilities (Statement).⁸⁵ The FCC historically maintained a race-neutral policy when assigning licenses because minority ownership did not necessarily mean that the owner would broadcast minority programs,⁸⁶ but Congress acknowledged that the FCC’s race-neutral alternatives had failed to achieve necessary programming and approved the Statement.⁸⁷ Prior to passing the Statement, Congress

79. *Metro Broad., Inc. v. FCC*, 497 U.S. 547, 573 (1990), *overruled by* *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995).

80. *Id.* at 553.

81. *Id.* at 586. The regulations required broadcasters “to ascertain the problems, needs[,] and interests of the residents of his community of license . . . and to specify ‘what broadcast matter he proposes to meet those problems, needs and interests.’” *Id.* (quoting *Primer on Ascertainment of Cmty. Problems by Broad. Applicants*, 27 F.C.C.2d 650, 682 (1971)).

82. *Id.* at 588.

83. *Id.* at 553.

84. *Metro Broad.*, 497 U.S. at 588.

85. *Id.* at 556.

86. *Id.* at 555.

87. *Id.* at 589–90.

conducted a study that revealed that “the effects of past inequities stemming from racial and ethnic discrimination have resulted in a severe underrepresentation of minorities in the media of mass communications.”⁸⁸ Congress justified the minority ownership policies of the FCC not as “remedies for victims of this discrimination” but “primarily to promote programming diversity” and urged that “diversity is an important governmental objective that can serve as a constitutional basis for the [FCC’s] preference policies.”⁸⁹ The Supreme Court agreed.⁹⁰ Representative Van Deerlin explained that “the most effective way to reach the inadequacies of the broadcast industry in employment and programming would be by doing something at the top, that is, increasing minority ownership and management and control in broadcast stations.”⁹¹

The Statement (1) pledged to consider minority ownership in the proceedings for new licenses as a plus and (2) created a distress-sale policy that allowed licensees under review by the FCC to assign their licenses to an FCC-approved minority enterprise.⁹² Under the distress-sale policy, the assignee must be comprised of at least 50% minority ownership, the sale price for the licensee must not exceed more than 75% of the fair-market value, and the assignee must purchase the licensee before the hearing.⁹³ This “congressional [support] showed [a] clear recognition of the extreme underrepresentation of minorities and their perspectives in the broadcast mass media.”⁹⁴

In addition to the Statement, in 1981, Congress authorized a lottery procedure that randomly selected an application from a pool of qualified applicants in the selection process for an initial license and construction permit.⁹⁵ The procedure gave “significant” preferences in the lottery process to groups that were underrepresented in the

88. *Id.* at 566.

89. *Id.*

90. *Metro Broad.*, 497 U.S. at 566.

91. *Id.* at 574.

92. *Id.* at 556–58.

93. *Id.* at 557–58.

94. *Id.* at 560–61.

95. *Id.* at 575–76.

ownership of telecommunications facilities and whose selection would increase the diversification of mass media ownership and programming offered to the public.⁹⁶ Unfortunately, in 1986, minorities owned only 2.1% of the more than 11,000 radio and television stations in the United States—a mere 1% increase since 1978.⁹⁷ Congress explicitly endorsed the FCC’s diversity policies, but progress was still slow.⁹⁸ Moreover, the 2.1% statistic failed to reflect that, as late entrants to the industry, minorities often obtained less valuable stations and only served geographically limited markets with relatively small audiences.⁹⁹

By 1990, the Court recognized that for the past two decades, minorities constituted at least one-fifth of the United States population, but very few members of the minority groups held broadcasting licenses.¹⁰⁰ It is now 2018—almost sixty years after our nation began its efforts to produce sufficient diversity in programming.¹⁰¹ Representation has improved but not significantly enough.¹⁰² This article argues that our country has focused its efforts on increasing ownership statistics of the distributors without realizing that the majority also dominates the leadership positions responsible for creating a film’s content. As a result, the films available to broadcast owners are mostly created by writers, directors, and producers with a majority perspective using mainly white actors and actresses, which leads to a small selection of diverse films for broadcast stations and cable networks.

2. *Underrepresentation Behind the Camera and On Screen*

In 2014, my research study recorded the race of 2,394 actors and actresses cast in 500 popular films over a span of five years (2010 to 2014).¹⁰³ The annual sample of films included the top twenty-five

96. *Metro Broad.*, 497 U.S. at 575–76.

97. *Id.* at 553.

98. *Id.* at 578.

99. *Id.* at 553–54.

100. *Id.* at 553.

101. *Id.* at 585.

102. Chong, *supra* note 3, at 44.

103. *Id.* at 32.

movies grossing over \$40 million during opening weekend, the top twenty-five movies grossing under \$40 million during opening weekend, the top twenty-five television shows with over 2 million viewers, and the top twenty-five television shows with under 2 million viewers.¹⁰⁴ The rankings for the movies and television shows were collected from boxofficemojo.com,¹⁰⁵ deadline.com,¹⁰⁶ and tvbythenumbers.zap2it.com.¹⁰⁷

104. *Id.*

105. 2010 Domestic Grosses, BOX OFFICE MOJO, <http://www.boxofficemojo.com/yearly/chart/?view=releasedate&view2=domestic&yr=2010&sort=open&gross&order=DESC&p=.htm> [<https://perma.cc/XM6H-M25N>] (last visited Feb. 20, 2016); 2011 Domestic Grosses, BOX OFFICE MOJO, <http://www.boxofficemojo.com/yearly/chart/?view=releasedate&view2=domestic&yr=2011&sort=opengross&order=DESC&p=.htm> [<https://perma.cc/Q6KC-ZYPF>] (last visited Feb. 20, 2016); 2012 Domestic Grosses, BOX OFFICE MOJO, <http://www.boxofficemojo.com/yearly/chart/?view=releasedate&view2=domestic&yr=2012&sort=opengross&order=DESC&p=.htm> [<https://perma.cc/CY6S-B4LX>] (last visited Feb. 20, 2016); 2013 Domestic Grosses, BOX OFFICE MOJO, <http://www.boxofficemojo.com/yearly/chart/?view=releasedate&view2=domestic&yr=2013&sort=opengross&order=DESC&p=.htm> [<https://perma.cc/WL5Y-G3YC>] (last visited Feb. 20, 2016); 2014 Domestic Grosses, BOX OFFICE MOJO, <http://www.boxofficemojo.com/yearly/chart/?view=releasedate&view2=domestic&yr=2014&sort=opengross&order=DESC&p=.htm> [<https://perma.cc/59VF-A4CN>] (last visited Feb. 20, 2016).

106. Nellie Andreeva, *Full Series Rankings for the 2009–10 Broadcast Season*, DEADLINE (May 27, 2010, 11:49 PM), <http://deadline.com/2010/05/full-series-rankings-for-the-2009-10-broadcast-season-44277/> [<https://perma.cc/9SUJ-X62Y>]; Nellie Andreeva, *Full 2010–2011 TV Season Series Rankings*, DEADLINE (May 27, 2011, 10:56 AM), <http://deadline.com/2011/05/full-2010-11-season-series-rankings-135917/> [<https://perma.cc/E26N-BQE8>]; Nellie Andreeva, *Full 2011–2012 TV Season Series Rankings*, DEADLINE (May 24, 2012, 11:10 PM), <http://deadline.com/2012/05/full-2011-2012-tv-season-series-rankings-277941/> [<https://perma.cc/VV8S-AL3S>]; *Full 2013–2014 TV Season Series Rankings*, DEADLINE (May 22, 2014, 4:40 PM), <https://deadline.com/2014/05/tv-season-series-rankings-2013-full-list-2-733762/> [<https://perma.cc/JYX3-MSUS>].

107. 2010–11 Season Broadcast Primetime Show Viewership Averages, TV BY NUMBERS (June 1, 2011), <http://tvbythenumbers.zap2it.com/2011/06/01/2010-11-season-broadcast-primetime-show-viewership-averages/94407/> [<https://perma.cc/6WH-22PU>]; *Complete List of 2011–12 Season TV Show Ratings: ‘Sunday Night Football’ Tops, Followed by ‘American Idol,’ ‘The Voice’ & ‘Modern Family,’* TV BY NUMBERS (May 24, 2012), <http://tvbythenumbers.zap2it.com/2012/05/24/final-list-of-2011-12-season-tv-show-ratings-sunday-night-football-tops-followed-by-american-idol-the-voice-modern-family/135747/> [<https://perma.cc/377A-M5KL>]; *Complete List of 2012–13 Season TV Show Viewership: ‘Sunday Night Football’ Tops, Followed by ‘NCIS,’ ‘The Big Bang Theory’ & ‘NCIS: Los Angeles,’* TV BY NUMBERS (May 29, 2013), <http://tvbythenumbers.zap2it.com/2013/05/29/complete-list-of-2012-13-season-tv-show-viewership-sunday-night-football-tops-followed-by-ncis-the-big-bang-theory-ncis-los-angeles/184781/> [<https://perma.cc/VT24-LDHC>].

The research study used the following parameters. Lead roles in movies included actors and actresses whose pictures appeared on the published movie poster. Supporting roles in movies included actors and actresses who were listed in the Wikipedia starring section, but did not appear on the movie poster. Lead roles in broadcast television included actors and actresses who appeared in 90% of the episodes over the lifetime of the series. Supporting roles included actors or actresses who appeared in 75–90% of the episodes over the lifetime of the series. The race data for lead and supporting roles for movies and television

The overall results revealed that whites occupied 83.5% of lead roles while minorities occupied 16.5%—9.5% black, 2% Latino, 2.5% Asian, 0.5% Native American, and 2% Mixed/Other.¹⁰⁸ For supporting roles, whites were 85% and minorities were 15%—7% black, 2.5% Latino, 3.5% Asian, 0% Native American, and 2% Mixed/Other.¹⁰⁹ In both categories, the minority representation was extremely low compared to the U.S. population.¹¹⁰

OVERALL RESULTS					
<i>On-Screen Representation</i>					
Movies and TV	U.S. Population in 2014	Lead Roles	Difference (Lead Roles)	Supporting Roles	Difference (Supporting Roles)
White	77.36%	83.5%	+6.14	85%	+7.64
Black	13.22%	9.5%	-3.72	7%	-6.22
Latino	17.37%	2%	-15.37	2.5%	-14.87
Asian	5.62%	2.5%	-3.12	3.5%	-2.12
Native American	1.24%	0.5%	-0.74	0%	-1.24
Mixed/Other	N/A	2%	N/A	2%	N/A
Unknown	N/A	0%	N/A	0%	N/A
Total Minorities	23%	16.5%	-6.5	15%	-8.00

In the movies category for on-screen roles, whites occupied 84% of lead roles while minorities occupied 16%—9% black, 2% Latino, 2% Asian, 0% Native American, and 3% Mixed/Other.¹¹¹ For supporting roles, whites were 83% and minorities were 17%—8%

shows were collected through various online resources, such as IMDb, Wikipedia, movie and TV webpages, news articles, and the network's webpages.

Chong, *supra* note 3, at 32–33.

108. Chong, *supra* note 3, at 33.

109. *Id.*

110. *Annual Estimates of the Resident Population by Sex, Race, and Hispanic Origin for the United States, States, and Counties: April 1, 2010 to July 1, 2014*, U.S. CENSUS BUREAU, POPULATION DIV., (June 2015), <https://factfinder.census.gov/bkmk/table/1.0/en/PEP/2014/PEPSR6H> [<https://perma.cc/8GBC-YZHT>] [hereinafter *Annual Estimates of the Resident Population*].

111. Chong, *supra* note 3, at 33.

2019]

LEGISLATING HOLLYWOOD

621

black, 3% Latino, 3% Asian, 0% Native American, and 3% Mixed/Other.¹¹²

MOVIES RESULTS					
<i>On-Screen Representation</i>					
Movies	<i>U.S. Population in 2014</i>	Lead Roles	<i>Difference (Lead Roles)</i>	Supporting Roles	<i>Difference (Supporting Roles)</i>
White	77.36%	84%	+6.64	83%	+5.64
Black	13.22%	9%	-4.22	8%	-5.22
Latino	17.37%	2%	-15.37	3%	-14.37
Asian	5.62%	2%	-3.62	3%	-2.62
Native American	1.24%	0%	-1.24	0%	-1.24
Mixed/Other	<i>N/A</i>	3%	<i>N/A</i>	3%	<i>N/A</i>
Unknown	<i>N/A</i>	0%	<i>N/A</i>	0%	<i>N/A</i>
Total Minorities	23%	16%	-7.00	17%	-6.00

In the television category, minorities fared slightly better. Whites occupied 81% of lead roles while minorities occupied 19%—10% black, 2% Latino, 3% Asian, 1% Native American, and 3% Mixed/Other.¹¹³ For supporting roles, whites were 83% and minorities were 17%—6% black, 2% Latino, 4% Asian, 0% Native American, and 5% Mixed/Other.¹¹⁴

112. *Id.*

113. *Id.*

114. *Id.*

TV SHOWS RESULTS					
<i>On-Screen Representation</i>					
TV Shows	<i>U.S. Population in 2014</i>	Lead Roles	<i>Difference (Lead Roles)</i>	Supporting Roles	<i>Difference (Supporting Roles)</i>
White	77.36%	81%	+3.64	83%	+5.64
Black	13.22%	10%	-3.22	6%	-7.22
Latino	17.37%	2%	-15.37	2%	-15.37
Asian	5.62%	3%	-2.62	4%	-1.62
Native American	1.24%	1%	-0.24	0%	-1.24
Mixed/Other	<i>N/A</i>	3%	<i>N/A</i>	5%	<i>N/A</i>
Unknown	<i>N/A</i>	0%	<i>N/A</i>	0%	<i>N/A</i>
Total Minorities	23%	19%	-4.00	17%	-6.00

My research study also recorded the race of 417 directors, 580 casting directors, and 691 screenwriters from 2010 to 2014 using the same 500 films mentioned above.¹¹⁵ The results revealed 94.5% of directors were white and 15.5% were minorities—2.5% black, 1.5% Latino, 1% Asian, and 0% Native American.¹¹⁶ For casting directors, the results revealed 92.5% were white, 5.5% were Unknown, and 2% were minorities—1% black, 0.5% Latino, 0.5% Asian, and 0% Native American.¹¹⁷ For screenwriters, 95% were white and 5% were minorities—1.5% black, 2.5% Latino, 1% Asian, 0% Native American, and 0.5% Mixed/Other.¹¹⁸ Similar to on-screen roles, the minority representation was extremely low compared to the U.S. population.¹¹⁹

115. *Id.* at 33–34.

116. *Id.* at 34.

117. Chong, *supra* note 3, at 34.

118. *Id.*

119. *Annual Estimates of the Resident Population*, *supra* note 109.

OVERALL RESULTS				
<i>Behind-the-Camera Representation</i>				
Movies and TV	Directors	Casting Directors	Screenwriters	U.S. Population in 2014
White	94.5% <i>(+17.14)</i>	92.5% <i>(+15.14)</i>	95% <i>(+17.64)</i>	77.36%
Black	2.5% <i>(-10.72)</i>	1% <i>(-12.22)</i>	1.5% <i>(-11.72)</i>	13.22%
Latino	1.5% <i>(-15.87)</i>	0.5% <i>(-16.87)</i>	2.5% <i>(-14.87)</i>	17.37%
Asian	1% <i>(-4.62)</i>	0.5% <i>(-5.12)</i>	1% <i>(-4.62)</i>	5.62%
Native American	0% <i>(-1.24)</i>	0% <i>(-1.24)</i>	0% <i>(-1.24)</i>	1.24%
Mixed/Other	0% <i>(N/A)</i>	0% <i>(N/A)</i>	0% <i>(N/A)</i>	N/A
Unknown	0% <i>(N/A)</i>	5.5% <i>(N/A)</i>	0% <i>(N/A)</i>	N/A
Total Minorities	5% <i>(-18.00)</i>	2% <i>(-21.00)</i>	5% <i>(-18.00)</i>	23%

In the movies category for behind-the-scenes positions, 92% of directors were white and 8% were minorities—4% black, 1% Latino, 2% Asian, 0% Native American, and 0% Mixed/Other.¹²⁰ For casting directors, the results revealed 85% were white, 11% were Unknown, and 4% were minorities—2% black, 1% Latino, 1% Asian, 0% Native American, and 0% Mixed/Other.¹²¹ For screenwriters, 95%

120. Chong, *supra* note 3, at 34.

121. *Id.*

were white and 5% were minorities—2% black, 2% Latino, 1% Asian, 0% Native American, and 0% Mixed/Other.¹²²

MOVIES RESULTS				
<i>Behind-the-Camera Representation</i>				
Movies	Directors	Casting Directors	Screenwriters	U.S. Population in 2014
White	92% <i>(+14.64)</i>	85% <i>(+7.64)</i>	95% <i>(+17.64)</i>	77.36%
Black	4% <i>(-9.22)</i>	2% <i>(-11.22)</i>	2% <i>(-11.22)</i>	13.22%
Latino	1% <i>(-16.37)</i>	1% <i>(-16.37)</i>	2% <i>(-15.37)</i>	17.37%
Asian	2% <i>(-3.62)</i>	1% <i>(-4.62)</i>	1% <i>(-4.62)</i>	5.62%
Native American	0% <i>(-1.24)</i>	0% <i>(-1.24)</i>	0% <i>(-1.24)</i>	1.24%
Mixed/Other	0% <i>(N/A)</i>	0% <i>(N/A)</i>	0% <i>(N/A)</i>	N/A
Unknown	0% <i>(N/A)</i>	11% <i>(N/A)</i>	0% <i>(N/A)</i>	N/A
Total Minorities	8% <i>(-15.00)</i>	4% <i>(-19.00)</i>	5% <i>(-18.00)</i>	23%

In the television shows category for behind-the-scenes positions, 97% of directors were white and 3% were minorities—1% black, 2% Latino, 0% Asian, 0% Native American, and 0% Mixed/Other.¹²³ For casting directors, the results revealed 100% were white and 0% were

122. *Id.*

123. *Id.*

minorities.¹²⁴ For screenwriters, 95% were white and 5% were minorities—1% black, 3% Latino, 1% Asian, 0% Native American, and 0% Mixed/Other.¹²⁵

TV SHOWS RESULTS				
<i>Behind-the-Camera Representation</i>				
TV Shows	Directors	Casting Directors	Screenwriters	U.S. Population in 2014
White	97% <i>(+19.64)</i>	100% <i>(+22.64)</i>	95% <i>(+17.64)</i>	77.36%
Black	1% <i>(-12.22)</i>	0% <i>(-13.22)</i>	1% <i>(-12.22)</i>	13.22%
Latino	2% <i>(-15.37)</i>	0% <i>(-17.37)</i>	3% <i>(-14.37)</i>	17.37%
Asian	0% <i>(-5.62)</i>	0% <i>(-5.62)</i>	1% <i>(-4.62)</i>	5.62%
Native American	0% <i>(-1.24)</i>	0% <i>(-1.24)</i>	0% <i>(-1.24)</i>	1.24%
Mixed/Other	0% <i>(N/A)</i>	0% <i>(N/A)</i>	0% <i>(N/A)</i>	N/A
Unknown	0% <i>(N/A)</i>	0% <i>(N/A)</i>	0% <i>(N/A)</i>	N/A
Total Minorities	3% <i>(-20.00)</i>	0% <i>(-23.00)</i>	5% <i>(-18.00)</i>	23%

Finally, my research updated Russell Robinson's 2007 casting-call numbers by analyzing the specific race of 488 casting calls on backstage.com from January 2015 to May 2015.¹²⁶ The results were

124. *Id.*

125. *Id.*

126. Chong, *supra* note 3, at 43.

similar to Robinson's 2007 statistics on IMDb with 39% white, 10% black, 11% Latino, 4% Asian, 2% Native American or Middle Eastern, 8% multiple races specified, and 26% race not specified.¹²⁷ According to industry standards, race not specified means "white."¹²⁸ Thus, the final statistics were 65% white.¹²⁹ Although the industry improved since 2007, whites still received sixteen times more employment opportunities than minorities in film.¹³⁰

CASTING CALLS					
White	Black	Latinos	Asians	Native American and Middle Eastern	Multiple Races
65%	10%	11%	4%	2%	8%

Where Are the Asians in Hollywood? revealed that after more than fifty years of attempting to resolve the underrepresentation and misrepresentation of minorities, the problem is still prevalent in society.¹³¹ This article acknowledges that the FCC supports ownership, equal employment, and ascertainment policies, but the data from my study proves the FCC's methods are not working.

E. Legislation is Necessary to Improve the Representation of Minorities in Films

My research study recognizes that Hollywood has improved because the film industry originally had no minorities as owners of TV stations and radio stations, no minorities cast for on-screen roles, and no minorities in leadership positions behind the camera.¹³² However, the increase is not significant enough. As a nation that promotes itself as a melting pot of cultures, we do not want to be

127. *Id.* at 43–44.

128. Leonard M. Baynes, *WHITE OUT: The Absence and Stereotyping of People of Color by the Broadcast Networks in Prime Time Entertainment Programming*, 45 ARIZ. L. REV. 293, 311 (2003).

129. Chong, *supra* note 3, at 44.

130. *Id.*

131. *Id.* at 33.

132. *Id.* at 44.

subpar in our diversity standards. This article argues that the entertainment industry's current failure to reach parity is likely due to three reasons: (1) existing regulations are not aggressively enforced and create loopholes for employers, (2) government policies focus on regulating the wrong area of Hollywood, and (3) courts believe that First Amendment rights are more significant than promoting diversity or equal employment.

1. Existing Regulations Are Not Aggressively Enforced and Create Loopholes

Hollywood often flies under the Title VII and § 1981 radar because whether directors, casting directors, screenwriters, actors, and actresses are employees or independent contractors is a common topic of debate.¹³³ In the movie category, it is more likely that the film industry employs people as independent contractors because the creation of the film is a temporary project.¹³⁴ However, in the television category, many series are ongoing, and the relationship with the cast and crew is not a one-time interaction.¹³⁵ The gray area in determining whether someone is an employee or independent contractor makes it difficult for courts to determine if minorities attempting to break into film are protected under existing labor laws.¹³⁶

Moreover, Title VII and § 1981 address employment discrimination generally and do not target one industry.¹³⁷ As a result, many injured parties are unaware that the entertainment industry's practices are illegal because no specific law refers to Hollywood's practices. In addition, most individuals searching for stable careers in Hollywood are unlikely to enforce their rights; struggling actors and actresses who fall victim to casting-call

133. Kurtis Anton, *The Debate of Independent Contractor or Employee in Filmmaking*, LINKEDIN (Oct. 23, 2016), <https://www.linkedin.com/pulse/debate-independent-contractor-employee-filmmaking-kurtis-anton> [<https://perma.cc/4YR6-3VEJ>].

134. *Id.*

135. *See* Chong, *supra* note 3, at 54.

136. *See id.*

137. *See generally* Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e; 42 U.S.C. § 1981 (2018).

discrimination normally do not have the financial means to fight the large film companies.¹³⁸ Hollywood is also an insular network, and creating enemies through lawsuits almost guarantees that the actor or actress will be blacklisted. The ambiguity and lack of litigation have allowed our governing bodies to avoid having to harshly enforce the laws against film leaders who violate discrimination laws, leaving this area of law underdeveloped.¹³⁹

2. *Congressional Action Should Focus on Creation of Films and Not Only Ownership*

A true change in our media requires Congress to diversify the artists in the field, not only the owners of broadcast stations and cable networks. The FCC focuses on regulating the ownership of stations through licensees, but this only addresses the distribution of films.¹⁴⁰ The FCC does not regulate the parties that actually create the film content submitted to the stations.¹⁴¹ If the FCC manages to increase minority ownership of stations but the selection of films available to the distributed stations remains limited, then it will be difficult to provide more diverse films to the public.

Congress must focus its regulatory energy on the individuals creating and starring in the films to provide owners with more minority-created films and nonstereotypical portrayals of minorities on screen. This article proposes legislation that will help Congress better regulate the artists in the film industry without violating the First Amendment.

138. See Marie Tae McDermott, *'I Was Blacklisted from Employment': Speaking Up in the Workplace*, N.Y. TIMES (Oct. 11, 2017), <https://www.nytimes.com/2017/10/11/business/i-was-blacklisted-from-employment-speaking-up-in-the-workplace.html> [<https://perma.cc/7ARY-BNZV>].

139. Henna Choi, *White Men Still Dominate Reality Television: Discriminatory Casting and the Need for Regulation*, 37 HASTINGS COMM. & ENT. J. 163, 169 (2015).

140. See *What We Do*, FCC, <https://www.fcc.gov/about-fcc/what-we-do> [<https://perma.cc/N7UV-YE7M>] (last visited Nov. 1, 2018).

141. See *id.*

3. *Freedom of Speech Often Trumps Diversity*

In 2012, the Middle District of Tennessee, in *Claybrooks v. ABC*, held that casting decisions are protected by the First Amendment.¹⁴² The *Claybrooks* decision is a prime example of a court ruling that the First Amendment is more important than diversity without Congressional support or guidance for the decision.¹⁴³ In fact, as discussed above, Congress has indicated that diversity is equally important through its regulation of the broadcast, cable, and film industries.¹⁴⁴ Congress explicitly recognized that “the effects of past inequities stemming from racial and ethnic discrimination have resulted in a severe underrepresentation of minorities in the media of mass communications” and justified the minority ownership policies of the FCC as “primarily to promote programming diversity.”¹⁴⁵ Congress and the Supreme Court have agreed that “diversity is an important governmental objective” that justifies preferential treatment on the basis of race.¹⁴⁶ Nevertheless, the court in *Claybrooks* determined that diversity was not a priority.¹⁴⁷ To remedy the *Claybrooks* decision and ensure other courts do not make similar mistakes, Congress should actively make its viewpoint understood by the judiciary through legislative action.

Some scholars believe that the market will naturally correct the lack of diversity in Hollywood¹⁴⁸ but, as shown in the data from my research study, it has taken minorities over 100 years to simply gain a foothold in the American film industry.¹⁴⁹ Without help from our country’s leaders, reaching parity is not in the near future. Legislative action or harsher enforcement of employment advertisement policies is necessary to help us reach an acceptable standard of minority representation within our lifetimes.

142. *Claybrooks v. Am. Broad. Co.*, 898 F. Supp. 2d 986, 999 (M.D. Tenn. 2012).

143. *See* Chong, *supra* note 3, at 42–53.

144. *See* discussion *supra* Part I.D.

145. *Metro Broad., Inc. v. FCC*, 497 U.S. 547, 566 (1990), *overruled by* *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995).

146. *Id.*

147. Chong, *supra* note 3, at 52.

148. *Id.* at 52–53.

149. *Id.* at 52.

II. Content-Based Regulation: Casting Calls Must Be Race Neutral

First, this section argues that race-specific casting calls are illegal speech under Title VII and should receive no protection under the First Amendment.¹⁵⁰ Second, this section explains pertinent freedom of speech doctrines and presents a regulation that will pass the First Amendment's strict scrutiny standard even though it requires casting calls to be race neutral.¹⁵¹

A. Under Title VII 2000e-3(b), Race Specific Casting Calls Are Illegal, Unprotected Speech

Title VII explicitly states that “[i]t shall be an unlawful employment practice for an employer . . . [or] employment agency . . . to print . . . or cause to be printed or published any notice or advertisement relating to employment . . . indicating any preference . . . based on race, color, religion, sex, or national origin.”¹⁵² Although a casting call is a published notice related to employment that indicates a preference based on race, sex, color, or national origin, casting calls have not been ruled as an illegal hiring practice.¹⁵³ On the contrary, casting calls have been and still are a common practice in the movie and television industry for finding actors and actresses.¹⁵⁴

Leaders in Hollywood have openly admitted that casting is not always about talent but rather about finding the person who best fits the casting call.¹⁵⁵ A casting call is a synopsis that includes the script and character descriptions that often state the character's desired race.¹⁵⁶ Some casting calls do not specify a race, but others

150. See *infra* Part II.A.

151. See *infra* Part II.B.

152. 42 U.S.C. § 2000e-3(b) (2018).

153. See Russell K. Robinson, *Casting and Caste-ing: Reconciling Artistic Freedom and Antidiscrimination Norms*, 95 CALIF. L. REV. 1, 2 (2007).

154. *Id.*

155. Baynes, *supra* note 127, at 311; see also Debbie Sikkema, *What Is a Breakdown? (Showbiz Term of the Day)*, YOUR YOUNG ACTOR (Dec. 7, 2015), <http://www.youryoungactor.com/2009/12/07/what-is-a-breakdown-showbiz-term-of-the-day/#sthash.WdrKnqjk.dpuf> [https://perma.cc/VMZ7-Z9H8] (defining breakdown as a synopsis of the project that includes the script with character descriptions).

156. See Baynes, *supra* note 127, at 311.

specifically ask for a white actor or actress.¹⁵⁷ Nine out of ten times, if the race is unspecified, the role goes to a white person because casting directors eliminate people of color by default.¹⁵⁸ Although courts have acknowledged that television broadcasters can be subject to labor-relations law, such as discriminatory employment practices,¹⁵⁹ studios and other power players in the film industry have not been reprimanded for violating these laws and continue to use discriminatory job postings.¹⁶⁰

Hollywood argues that it is exempt from the Court's strong policy against discriminatory advertising because the First Amendment protects its actions.¹⁶¹ However, this assertion has limited merit because courts have prohibited discriminatory advertising in other industries despite defendants' First Amendment concerns, such as the housing industry and printed press.¹⁶² For example, in *Ragin v. New York Times Co.*, the Second Circuit held that the New York Times Company (the Times) violated the Fair Housing Act of 1968 because it published an advertisement for the sale and rental of a dwelling that indicated a preference based on race.¹⁶³

In *Ragin*, during the twenty-year period after the Fair Housing Act was passed, the Times featured thousands of human models, but virtually none were black.¹⁶⁴ The few blacks depicted were maintenance employees and doormen, but blacks were never portrayed as potential homeowners.¹⁶⁵ The court confirmed that liability for racial discrimination could be viewed in the aggregate and deemed the Times's twenty-year pattern of only depicting white homeowners a powerful engine for housing segregation.¹⁶⁶ The court also stated that allowing the Times to discriminate based on effects

157. *But see id.*

158. *See id.*

159. *Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations*, 413 U.S. 376, 397 (1973).

160. *Claybrooks v. Am. Broad. Co.*, 898 F. Supp. 2d 986, 993 (M.D. Tenn. 2012).

161. *See Chong, supra* note 3, at 52–53, 56.

162. *Robinson, supra* note 152, at 43–44.

163. *Ragin v. N.Y. Times Co.*, 923 F.2d 995, 998. (2d Cir. 1991).

164. *Id.*

165. *Id.*

166. *Id.* at 1002.

would undermine civil rights laws such as Title VII, which prohibits discrimination on the basis of race in employment.¹⁶⁷

The Times tried to argue that allowing racially conscious decisions would make racial quotas in advertising a reality, but the court rejected the argument.¹⁶⁸ The court stated that, unlike college admissions, where the quota argument was entertained, “advertising is a make-up-your-own world in which one builds an image from scratch, selecting those portrayals that will attract targeted consumers and discarding those that will put them off.”¹⁶⁹ Academia deals with real-life, competitive situations where individual skills and academic criteria should govern decisions.¹⁷⁰ Although racial decisions are inevitable in advertising, the law still requests advertisers to make choices that will not create a suggestion of racial preference.¹⁷¹

In today’s society, Hollywood’s race-specific casting procedures resemble the same “make-up-your-own-world” practice discussed in *Ragin* and have contributed to nondiverse casts and segregated programming.¹⁷² Similar to the Times, Hollywood has made First Amendment arguments to protect the industry’s practice of employment advertising for only white actors or actresses.¹⁷³ Unlike the Times, however, Hollywood has been allowed to post discriminatory, race-specific casting calls for more than twenty years because courts and legislators have entertained Hollywood’s claims that prohibiting certain casting decisions will negatively impact the content of films.¹⁷⁴ To remedy this problem, courts and Congress must realize that requiring race-neutral casting calls will not impact the artist’s final casting decisions; requiring race-neutral casting calls

167. *Id.* at 1004.

168. *Id.* at 1000–01.

169. *Ragin*, 923 F.2d at 1001.

170. *Id.*

171. *Id.* at 1000. The Times also argued that the government should not be able to regulate advertising decisions based on race because racially discriminatory advertising would lead to a multitude of plaintiffs suing for damage awards that would impair the press’s role in society. *Id.* at 1004. The court rejected this argument and reasoned that no device exists to determine if this possibility is credible or baseless and that the speculative nature of the assertion was not a reason to immunize publishers from discriminatory behavior. *Id.* at 1005.

172. *Id.* at 1001.

173. Chong, *supra* note 3, at 52, 57.

174. *Id.* at 56.

merely creates opportunities for more people of color to appear in front of the casting director, screenwriter, and director to prove that they are qualified for the role.

Another example is *Pittsburgh Press Co. v. Pittsburgh Commission on Human Relations*, where the Court held that the newspaper's advertisements in sex-specific columns were unprotected commercial speech because they expressed no social policy or expression of ideas.¹⁷⁵ The newspaper had allowed employers to place help-wanted advertisements in sex-designated columns, such as "Male Help Wanted" or "Jobs—Female Interest," even though the jobs advertised obviously had no sex-based bona fide occupational qualifications.¹⁷⁶ The Court ordered Pittsburgh Press to revamp its employment advertisement section because the current advertisements did not discuss why certain positions ought to be filled by members of one sex over another.¹⁷⁷ The newspaper's advertisements were considered a "classic example[] of [illegal] commercial speech" because they advocated for discrimination in employment; the editorial judgment of whether to accept an advertisement and place it in the correct column did not strip the commercial advertising of its commercial character.¹⁷⁸

The Supreme Court rejected Pittsburgh Press's First Amendment argument and ordered the newspaper to use a classification system with no reference to sex.¹⁷⁹ Although the ordinance did impact the newspaper's editing of the help-wanted section and could be viewed as impacting the newspaper's content, the Court analogized the sex-based discrimination advertisements to defamatory speech.¹⁸⁰ The Court held that the First Amendment did not protect the newspaper's discriminatory editorial decisions because the First Amendment would not shield a newspaper from punishment for libel when actual malice and falsity existed.¹⁸¹ The Court further analogized Pittsburgh

175. *Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations*, 413 U.S. 376, 385 (1973).

176. *Id.* at 378–79.

177. *Id.* at 385.

178. *Id.* at 385, 388.

179. *Id.* at 388.

180. *Id.* at 386.

181. *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 279–80 (1964).

Press's actions to ads proposing the sale of narcotics or soliciting prostitutes, which could also be constitutionally forbidden.¹⁸² Based on the reasoning above, the Court held that the Constitution prohibited Pittsburgh Press's commercial practice of allowing employers to post employment ads with a sex preference.¹⁸³

Hollywood's casting calls are identical to the illegal job postings in *Pittsburgh Press*¹⁸⁴ and should not be treated any differently. Title VII states that employment advertisements specifying a race are illegal.¹⁸⁵ If Pittsburgh Press was not allowed to post jobs that specified a preference based on gender—a quasi-suspect class—then Hollywood should not be allowed to advertise for actors and actresses of a specific race, a suspect class. *Pittsburgh Press* also confirmed that the First Amendment is not a complete shield for any discriminatory action involving creative discretion.¹⁸⁶ The Court regulated the content of the Pittsburgh newspaper, which indirectly affected who would advertise in the newspaper.¹⁸⁷ Similarly, courts should be able to regulate the content of casting calls, even if regulation indirectly impacts who will audition and be cast in the film. Free speech proponents who believe casting regulation would impact a film's tone and message are incorrect because whether a doctor is black, Asian, white, or Native American does not impact a storyline focused on a doctor saving people, two people falling in love, or everyday life scenarios.

In conclusion, in both *Ragin* and *Pittsburgh Press*, the courts required the newspapers to monitor the ads that they received and avoid indicating a racial or gender preference.¹⁸⁸ The courts held that requiring the advertisements to be race and gender neutral did not impose an unconstitutional burden on the press and would not disrupt

182. *Id.* at 388.

183. *Id.*

184. "Just Mercy" Starring Jamie Foxx—Kids & Teens, AUDITIONSFINDER (Oct. 24, 2018), <https://www.auditionsfinder.com/new/just-mercy-starring-jamie-foxx-kids-teens/> [https://perma.cc/83ML-AVXT].

185. 42 U.S.C. § 2000e-3(b) (2018).

186. *Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations*, 413 U.S. 376, 386 (1973).

187. *Id.* at 389.

188. *Ragin v. N.Y. Times Co.*, 923 F.2d 995, 1003 (2d Cir. 1991).

the press's traditional role of editorial control and free expression of views.¹⁸⁹ Title VII is identical.¹⁹⁰ There is no specific reason why an Asian person cannot be cast as a superhero or an FBI agent over a white person. The U.S. has an established precedent of ruling against discriminatory advertising,¹⁹¹ and regulators should recognize that the current practice of casting calls in Hollywood is illegal under Title VII.

However, this article recognizes that advocating for enforcement of a law that has existed for more than fifty years and has been consistently neglected is unlikely to fix Hollywood's illegal casting process in a timely manner. Thus, to speed up the process, this article advocates for creating a specific law related to casting calls to provide a concrete cause of action for artists who suffer discrimination. A new law would send a strong message of deterrence to entertainment industry leaders who have continued discriminatory hiring practices.

This article proposes the following language:

To promote equal employment opportunities for minorities, all casting calls must be race neutral unless the race of the character is essential (1) to the storyline, (2) to preserve historical or regional accuracy, or (3) to maintain the network's identity-themed programming. If none of the three exceptions apply, then the race of the actor or actress is likely insignificant and does not need to be specified on the employment advertisement.

To stop the practice of race-specific casting calls, Congress must specify that race-specific casting calls are illegal. If our government fears that including casting calls as an employment advertisement could violate the First Amendment, there is no merit in that fear. The First Amendment provides no protection for illegal commercial

189. *Id.*

190. 42 U.S.C. § 2000e-3(b).

191. *Pittsburgh Press Co.*, 413 U.S. at 388; *Ragin*, 923 F.2d at 1003.

speech or activity that shows a preference on the basis of race, such as deceptive advertising or commercial speech related to any illegal activity.¹⁹² As shown in *Ragin* and *Pittsburgh Press*, any type of racial discrimination in advertising is likely considered an illegal activity.¹⁹³ Thus, the freedom of speech will not protect employers who only want a white actor, actress, director, casting director, or screenwriter. The next section discusses this issue in detail.¹⁹⁴

B. Requiring Race-Neutral Casting Calls Does Not Violate the First Amendment

The First Amendment provides that “Congress shall make no law . . . abridging the freedom of speech.”¹⁹⁵ The Supreme Court acknowledged that the First Amendment protects “entertainment, as well as political and ideological speech” and that a “‘particularized message’ is not required for speech to be constitutionally protected.”¹⁹⁶ Entertainment work includes scripts, storyboards, storylines, character development, dialogue, sounds, graphic design, concept art, sounds, music, narratives, video games, motion pictures, editorial opinions of newspapers, and broadcasts on controversial issues of public importance.¹⁹⁷ However, the reality is that “[t]otally unlimited free will . . . is not allowed in our or any other society.”¹⁹⁸ “The First Amendment’s guaranty is not absolute”¹⁹⁹ and has varying standards of review depending on the speech involved.²⁰⁰

192. *Ragin*, 923 F.2d at 999.

193. *See, e.g., id.* at 1003.

194. *See infra* Part II.B.

195. *Skywalker Records, Inc. v. Navarro*, 739 F. Supp. 578, 584 (S.D. Fla. 1990).

196. *Interactive Dig. Software Ass’n v. St. Louis Cty.*, 329 F.3d 954, 957 (8th Cir. 2003); *see also* *Schad v. Borough of Mount Ephraim*, 452 U.S. 61, 65 (1981).

197. *Interactive Dig. Software Ass’n*, 329 F.3d at 957; *see also* *FCC v. League of Women Voters of Cal.*, 468 U.S. 364, 381–82 (1984); *Zacchini v. Scripps-Howard Broad. Co.*, 433 U.S. 562, 563 (1977); *Young v. Am. Mini Theatres, Inc.*, 427 U.S. 50, 76–77 (1976).

198. *Skywalker Records, Inc.*, 739 F. Supp. at 586.

199. *Id.* at 584; *see also* *Smith v. United States*, 431 U.S. 291, 318 (1977) (“Although offensive or misleading statements in a political oration cannot be censored, offensive language in a courtroom or misleading representations in a securities prospectus may surely be regulated. Nuisances such as sound trucks and erotic displays in a residential area may be abated under appropriately flexible civil standards even though the First Amendment provides a shield against criminal prosecution.”) (footnotes omitted).

200. *Interactive Dig. Software Ass’n*, 329 F.3d at 958.

To determine if a regulation requiring casting calls to be race-neutral would violate the First Amendment, the courts must categorize the type of speech limited by the regulation and then apply the appropriate scrutiny.²⁰¹ If the regulation requires parties to examine the content of the message to determine if the views expressed violate it, then the regulation is content based,²⁰² which means which means that the regulation is presumptively invalid²⁰³ and must pass strict scrutiny.²⁰⁴ The government bears the burden of demonstrating that the regulation is necessary to serve a compelling state interest and that it is narrowly tailored to achieve that end by putting the least possible burden on expression.²⁰⁵

Hollywood would likely argue that requiring race-neutral casting calls is a content-based regulation because the regulation impacts the text of the casting breakdown, which can indirectly impact the message of some films. Many directors claim that the race of an actor or actress can play a vital role in the film's overall composition,²⁰⁶ but this argument has limited merit. Storylines can be developed without a racial component. For example, whether two teenagers attending high school are black, white, or Asian does not matter if there is no interracial component to the message conveyed by the film. Thus, although casting calls likely deserve some protection, as discussed in Section II-A, Hollywood's admission that it purposefully posts racially discriminatory employment advertisements justifies reviewing the race-neutral regulation under a lower standard because the discriminatory ads are illegal speech.

This section makes two arguments. First, if race-specific casting calls are protected under the First Amendment, courts should apply a lower standard of review, similar to obscene speech and commercial speech.²⁰⁷ Second, if courts determine that race-specific casting calls

201. *Riley v. Nat'l Fed'n of the Blind of N.C., Inc.*, 487 U.S. 781, 788 (1988).

202. *League of Women Voters of Cal.*, 468 U.S. at 383.

203. *Denver Area Educ. Telecomms. Consortium, Inc. v. FCC*, 518 U.S. 727, 782 (1996).

204. *Interactive Dig. Software Ass'n*, 329 F.3d at 958.

205. *Id.*; *U.S. Sound & Serv., Inc. v. Township of Brick*, 126 F.3d 555, 558 (3d Cir. 1997).

206. *Robinson*, *supra* note 152, at 11–12.

207. *Id.* at 44.

deserve the highest protection afforded by the U.S. Constitution, then requiring race-neutral casting calls passes strict scrutiny.²⁰⁸

1. *Similar to Obscene and Commercial Speech, Discriminatory Casting Calls that Perpetuate Discriminatory Messages in Films Deserve Less First Amendment Protection*

Films with a nondiverse cast or minorities cast in stereotypical roles deserve limited protection because they can create implicit biases in children that negatively impact the children's development. This policy of protecting children can be easily analogized to America's current regulation of (a) obscene speech and (b) commercial speech.

a) *Obscene Speech: No First Amendment Protection*

The First Amendment will not tolerate the total suppression of erotic materials that have some arguably artistic value.²⁰⁹ However, when the speech is so obscene that it is of such slight social value that it is outweighed by the compelling interest of society, then the obscene speech has no protection under the First Amendment²¹⁰ and can be regulated by the federal and state governments by virtue of the Fourteenth Amendment's police power.²¹¹ The government's interest in the "well-being of its youth" and in supporting parents' claims to authority in their own households justifies the regulation of obscene speech.²¹² If a statute regulates unprotected obscenity, mere rationality is sufficient to satisfy due process.²¹³

Courts reason that the lower standard of review is appropriate because obscene materials can distort or reduce the quality of "human existence."²¹⁴ There is a universal belief that good art can lift the spirit, improve the mind, enrich the human personality, and

208. *Id.* at 41–42.

209. *Young v. Am. Mini Theatres, Inc.*, 427 U.S. 50, 70 (1976).

210. *Skyywalker Records, Inc. v. Navarro*, 739 F. Supp. 578, 584 (S.D. Fla. 1990).

211. *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 54 (1973).

212. *FCC v. Pacifica Found.*, 438 U.S. 726, 749 (1978).

213. *Skyywalker Records, Inc.*, 739 F. Supp. at 586.

214. *Paris*, 413 U.S. at 63.

develop character.²¹⁵ Thus, state legislatures can assume that obscene art can similarly lead to corruptive or antisocial behavior and encourage extreme, promiscuous behavior among children, which would result in the children receiving disapproval from most people in society.²¹⁶ Legislatures have concluded that a “sensitive, key relationship of human existence” that is “central to family life, community welfare, and the development of human personality, can be . . . distorted by [the] crass commercial exploitation of sex.”²¹⁷

The government’s reasoning for analyzing obscene speech under a lower standard of rational basis can easily be applied to discriminatory art that portrays minorities in stereotypical roles or race-specific casting calls that indicate people of color are not a desirable commodity in Hollywood. For example, in *Skyywalker Records, Inc. v. Navarro*, the Southern District of Florida held that material lacking serious literary, artistic, political, or scientific value, is not something that the law calls art; on the contrary, works that include discrimination and obscenity are works that the law calls a crime.²¹⁸ *Skyywalker* looked at an artist’s recording that included riffs, rhythm, and explicit sexual lyrics.²¹⁹ After the court examined the piece as a whole to determine its social value it ruled that once the riffs were removed, the remaining rhythm and lyrics had no redeeming social value.²²⁰ The court confirmed that regulation of obscene speech is allowed because both the federal and state governments “banned prostitution, incest, rape, and other sexually related conduct.”²²¹

If legislatures applied the same logic used in *Skyywalker*, discriminatory art and casting calls would have no “redeeming social value” after common ideas, such as the basic storyline or character arch, are removed and the racial classification would be all that

215. *Skyywalker Records, Inc.*, 739 F. Supp. at 585.

216. *Id.*

217. *Paris*, 413 U.S. at 63.

218. *Skyywalker Records, Inc.*, 739 F. Supp. at 596.

219. *Id.* at 582–83.

220. *Id.* at 596.

221. *Id.* at 584.

remains.²²² The remaining racially discriminatory casting call could be regulated because the federal government has made race-specific employment advertisements and discriminatory hiring practices illegal under Title VII.²²³ Governments have regulated obscene speech because it is linked to illegal conduct, such as sexual assault and rape;²²⁴ governments should regulate discriminatory speech because it is linked to discriminatory conduct, such as employment discrimination and racism.²²⁵

Courts have even ruled that “the use of the F-word [can be] indecent” because it is “one of the most vulgar, graphic and explicit descriptions of sexual activity in the English language,” and exposure to it “could [enlarge] a child’s vocabulary in an instant.”²²⁶ Courts allow the FCC to regulate broadcasts of the F-word if children might be in the audience, even if used as a fleeting expletive and not in a sustained or repeated manner.²²⁷ Similarly, brief exposure to a stereotypical portrayal of a minority or no exposure to minorities on television can impact a child’s psyche and cause the child to develop a skewed view of minorities that can lead to intolerance in the form of racism, fear, or implicit biases.

Another example is *Paris Adult Theatre I v. Slaton*.²²⁸ In *Paris*, the Court permitted the regulation of obscene material in local commerce to promote the public’s interests in maintaining a high quality of life, a comfortable community environment, and the public’s safety.²²⁹ The Supreme Court upheld a law that allowed states to regulate the commerce of pornographic films, even in public places of accommodation like “‘adult’ theatres” that excluded minors²³⁰ and displayed warning signs, such as, “You must be 21 and able to prove

222. *Id.* at 596.

223. 42 U.S.C. § 2000e-3(b) (2018).

224. *Skywalker Records, Inc.*, 739 F. Supp. at 586.

225. Choi, *supra* note 138, at 165.

226. *FCC v. Fox Television Stations, Inc.*, 567 U.S. 239, 248 (2012); *Complaints Against Various Broad. Licensees Regarding Their Airing of the “Golden Globe Awards” Program*, 19 FCC Rcd. 4975, 4976–79 (2004).

227. *FCC v. Pacifica Found.*, 438 U.S. 726, 732 (1978).

228. *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 49 (1973).

229. *Id.* at 57–58.

230. *Id.* at 69.

it. If viewing the nude body offends you, Please Do Not Enter.”²³¹ The Court rejected the defendant’s argument that pornographic films had constitutional immunity under the First Amendment²³² because the state’s interest to regulate exposure of obscene materials to juveniles and nonconsenting adults was of high importance.²³³ The Court was not swayed by the argument that the government must protect a consenting person’s privacy interest to view obscene films in places of public accommodation.²³⁴

Similar to *Paris*, our state and federal legislatures should be able to regulate discriminatory speech because the public exhibition or commerce of offensive material can injure the community as a whole and jeopardize the state’s right to maintain a decent society.²³⁵ As seen during the recent election of President Donald Trump, the careless use of offensive speech can cause unrest and tension in the community.²³⁶ To eliminate the promotion of hate and intolerance, our government must look at the root of the problem, which likely lies in the media and films shown to society—especially to children and teenagers.

Unfortunately, the ideas that stereotypical portrayals are offensive speech or that race-specific casting calls discourage minorities to

231. *Id.* at 52.

232. *Id.* at 57.

233. *Id.*

234. *Paris*, 413 U.S. at 68. Another example appeared in *Denver Area Educational Telecommunications Consortium, Inc. v. FCC*, where the Court upheld a provision that allowed cable operators to prohibit programming that the “operator reasonably believes describes or depicts sexual or excretory activities or organs in a patently offensive manner as measured by contemporary community standards.” *Denver Area Educ. Telecomms. Consortium, Inc. v. FCC*, 518 U.S. 727, 733, 734 (1996) (quoting 1992 Act, § 10(a)(2), 106 Stat. 1486). The Court needed to balance the competing interest of protecting children from exposure to patently offensive sex-related materials and a cable operator’s right to editorial freedom in the selection of what programs to offer its subscribers. *Id.* at 743. Ultimately, the Court determined that a regulation that allowed cable operators to exclude obscene material on leased channels did not violate the First Amendment because it was permissive and restored the editorial control that operators normally possessed before Congress required access channels and the regulation was viewpoint neutral. *Id.* at 747.

235. *Paris*, 413 U.S. at 69.

236. Colby Itkowitz, *An Expert on ‘Dangerous Speech’ Explains How Trump’s Rhetoric and the Recent Spate of Violence Are and Aren’t Linked*, WASH. POST (Oct. 29, 2018), https://www.washingtonpost.com/politics/2018/10/29/professor-who-defined-dangerous-speech-how-trumps-rhetoric-pittsburgh-are-linked/?noredirect=on&utm_term=.ecc28c3235dd [<https://perma.cc/VJQ4-2JUX>].

audition are less likely to be accepted by the majority. In 2014, minorities were 38% of the population and held limited positions of power in our government.²³⁷ This means that the majority of our nation's leaders and the remaining 62% of the U.S. population includes individuals who are less likely to be offended by Asians portrayed as nerds with

“slanty” eyes, blacks and Hispanics in gangs, or Native Americans with feathers on their heads.²³⁸ To the majority, stereotypical portrayals or discriminatory hiring might even be considered normal or a common strategic business practice. As a result, they are more likely to direct their energy towards initiatives that relate to their personal experiences.

Where are the Asians in Hollywood? discussed why the First Amendment was viewed as more important than the Fourteenth Amendment; the majority can more easily relate to the ideas of free speech than to ideas of diversity.²³⁹ When comparing the majority's relatability to the impact of obscene art versus discrimination, the results are the same; it is likely that the majority can relate to the idea of protecting their children from obscenity more easily than the idea of protecting minorities from discrimination.²⁴⁰ This relatability-to-issues phenomenon is why U.S. governments have regulated obscene speech but not Hollywood's discriminatory casting or stereotypical portrayals of minorities.²⁴¹ Almost everyone can identify with protecting children because the color of a person's skin does not impact a person's parental desires to protect their child.²⁴²

237. *Minority Representation*, FAIR VOTE, https://www.fairvote.org/minority_representation [<https://perma.cc/4KSZ-LV4L>] (last visited Nov. 2, 2018); Kendra Yoshinaga, *Babies of Color Are Now the Majority*, CENSUS SAYS, NAT'L PUB. RADIO (July 1, 2016, 12:49 PM), <https://www.npr.org/sections/ed/2016/07/01/484325664/babies-of-color-are-now-the-majority-census-says> [<https://perma.cc/NZ7L-TFKJ>].

238. Hannah Fingerhut, *In 'Political Correctness' Debate, Most Americans Think Too Many People Are Easily Offended*, PEW RES. CTR. (July 20, 2016), <http://www.pewresearch.org/fact-tank/2016/07/20/in-political-correctness-debate-most-americans-think-too-many-people-are-easily-offended/> [<https://perma.cc/SSS5-5XPW>].

239. See Chong, *supra* note 3, at 56.

240. See *Paris*, 413 U.S. at 69.

241. See *id.*

242. See *Protecting Children's Rights*, UNICEF (May 19, 2014), https://www.unicef.org/crc/index_protecting.html [<https://perma.cc/7QCV-FFJ7>].

However, the white majority, which controls our government,²⁴³ is less able to understand how discriminatory employment advertisements and films can create negative environments for minorities and limit the appearance of minorities on screen, which creates antisocial behavior among our youth in the form of explicit and implicit biases against minorities.²⁴⁴ Courts allow the government to regulate expressive conduct, such as nude dancing.²⁴⁵ Thus, expressive films should not be treated differently, especially if further regulation can eliminate discriminatory speech and protect society's morality.²⁴⁶ Society must push the government to recognize that Hollywood's race-specific casting calls and stereotypical films are a form of discriminatory expression that should be discouraged.

b) Commercial Speech: Rational Basis Review

Similar to obscene speech, the Constitution accords less protection to commercial speech than to other constitutionally guaranteed expression, such as the news.²⁴⁷ To determine if speech is commercial, the courts must look to more than just the aspects of sales, solicitation, payment, financial motivation of the advertiser, and the relationship of speech to the activity;²⁴⁸ the courts must balance the value of the speech against the public interest served by the regulation.²⁴⁹ For example, if an advertisement focuses only on an exchange of services, then it is likely considered pure commercial advertising that is unprotected,²⁵⁰ such as paid commercial advertisements that are driven by the solicitor's desire for gainful sales or occupation.²⁵¹

243. Anna Brown & Sara Atske, *blacks Have Made Gains in U.S. Political Leadership, but Gaps Remain*, PEW RES. CTR. (June 28, 2016), <http://www.pewresearch.org/fact-tank/2016/06/28/blacks-have-made-gains-in-u-s-political-leadership-but-gaps-remain/> [https://perma.cc/S42Y-JCNY].

244. See Chong, *supra* note 3, at 30, 77.

245. *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 567 (1991).

246. See *id.*

247. *Ragin v. N.Y. Times Co.*, 923 F.2d 995, 1002 (2d Cir. 1991).

248. *Bigelow v. Virginia*, 421 U.S. 809, 818 (1975).

249. *Id.* at 822.

250. *Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations*, 413 U.S. 376, 385 (1973).

251. *Vill. of Schaumburg v. Citizens for a Better Env't*, 444 U.S. 620, 630 (1980).

However, if an advertisement mainly focuses on the exchanging of ideas, then its mere advertisement characteristic will not be determinative of whether it deserves First Amendment protection.²⁵² Courts have clarified that legal commercial speech, such as charitable solicitations,²⁵³ is afforded some degree of protection—even paid advertisements—because some advertisements might convey information of potential interest and value to a diverse audience.²⁵⁴

The First Amendment provides no protection for illegal commercial speech, such as deceptive advertising, activities showing a racial preference, and commercial speech related to any illegal activity.²⁵⁵ However, legal commercial speech is subject to reasonable regulation that serves a legitimate public interest.²⁵⁶

Race-specific casting calls are likely illegal speech under Title VII because the main purpose of a casting call is to obtain potential talent for the film and not to communicate any specific ideals or messages.²⁵⁷ Artists often argue that casting calls can impact the underlying messages of the film itself because casting decisions can change the feeling and tone of the film.²⁵⁸ In *Riley v. National Federation of the Blind of North Carolina, Inc.*, the Court entertained an intertwined argument when it held that a charitable solicitation was not pure commercial speech because the solicitation was characteristically intertwined with informative and persuasive speech; without the solicitation, the flow of information and advocacy from the charity would likely have ceased.²⁵⁹

The Court held that charitable solicitation deserved First Amendment protection because it would be artificial and impractical to parcel out the speech by “applying one test to one phrase and

252. *Bigelow*, 421 U.S. at 831.

253. *Riley v. Nat’l Fed’n of the Blind of N.C., Inc.*, 487 U.S. 781, 788 (1988).

254. *Bigelow*, 421 U.S. at 822.

255. *Ragin v. N.Y. Times Co.*, 923 F.2d 995, 1003 (2d Cir. 1991).

256. *Bigelow*, 421 U.S. at 826.

257. *Robinson*, *supra* note 152, at 4.

258. Noam Kroll, *90% of Directing Is Casting! Here’s Why You Need to Prioritize Your Talent*, NOAM KROLL FILMMAKING RESOURCE & COMMUNITY (June 26, 2014), <http://noamkroll.com/90-of-directing-is-casting-heres-why-you-need-to-prioritize-your-talent/> [<https://perma.cc/Q8NW-H6F4>].

259. *Riley v. Nat’l Fed’n of the Blind of N.C., Inc.*, 487 U.S. 781, 796 (1988).

another test to another phrase.”²⁶⁰ Even if the Court determined that casting calls deserve protection because, similar to charitable solutions, the ads are intertwined with the film’s message, this article argues that Congress can still impose regulations using a rational-basis review because films are commercial speech rather than mere expressive speech.

A large part of the entertainment industry is driven by the need to make money.²⁶¹ Hollywood defines the success of a film by the amount of sales during its opening weekend or the number of viewers.²⁶² Although there are several films created as pure expressions without regard to making a profit, such as independent films, Hollywood does not define success by the strength of its message.²⁶³ As a result, Hollywood’s films and casting calls are more likely commercial speech and should be reviewed with a lower level of scrutiny.

In *Associated Press v. NLRB*, the Court recognized that the commercial aspects of newsgathering and publishing were different from the editorial function and upheld that the newsgathering organization must follow the National Labor Relations Act despite its First Amendment objections.²⁶⁴ The Court also subjected the newspaper to antitrust laws²⁶⁵ and provisions of the Fair Labor Standards Act.²⁶⁶ This suggests that regulation of organizations that have aspects of commercial speech and artistic speech are not necessarily subject to a heightened scrutiny and that casting calls that

260. *Id.*

261. Adam Davidson, *How Does the Film Industry Actually Make Money?*, N.Y. TIMES (June 26, 2012), <https://www.nytimes.com/2012/07/01/magazine/how-does-the-film-industry-actually-make-money.html> [https://perma.cc/73ZG-YX8K].

262. Colin Moreshead, *Hollywood Is Now Making Films for Foreign Markets, and Their Taste in Movies Is Awful*, BUS. INSIDER (Sept. 18, 2012, 10:08 AM), <https://www.businessinsider.com/hollywood-is-making-films-for-foreign-markets-2012-9> [https://perma.cc/6GSC-YFPM].

263. Sean Fennessey, *The End of Independent Film as We Know It*, RINGER (Apr. 10, 2017, 11:49 AM), <https://www.theringer.com/2017/4/10/16044256/netflix-amazon-studios-independent-film-sundance-5def390a69ef> [https://perma.cc/XMF2-6ZHN].

264. *Associated Press v. NLRB*, 301 U.S. 103, 128–29 (1937).

265. *Ind. Farmer’s Guide Publ’g Co. v. Prairie Farmer Publ’g Co.*, 293 U.S. 268, 271 (1934).

266. *Smith v. Evening News Ass’n*, 371 U.S. 195, 196 (1962).

possess artistic and commercial value should not automatically receive heightened scrutiny.

2. If Courts Apply Strict Scrutiny, the Regulation is Narrowly Tailored to Serve Multiple Compelling Government Interests

The purpose of the First Amendment is to foreclose public authority from assuming guardianship of the public mind through regulating press, speech, and religion.²⁶⁷ The First Amendment mandates that the government “not interfere [with expressions of First Amendment freedoms] on the ground that [it] view[s] a particular expression as unwise or irrational.”²⁶⁸ Even with the purest motives, the government cannot substitute its judgment as to how best to speak for the public,²⁶⁹ especially in areas where the Constitution leaves matters of taste and style largely to the individual.²⁷⁰

However, the Court has stated that the government’s interest “in protecting societal order and morality” is a substantial interest.²⁷¹ Courts have reasoned that society’s moral views are enough to justify a statute that reaches a significant amount of protective expressive activity.²⁷² Past prohibitions that have been upheld in American society on the basis of protecting order and morality include “sodomasochism, cockfighting, bestiality, suicide, drug use, prostitution, and sodomy.”²⁷³ Similarly, discriminatory casting calls are expressive activities that violate society’s morality because the race-specific casting calls promote unequal employment opportunities.²⁷⁴ But if the courts determine that commercial, race-

267. *Riley v. Nat’l Fed’n of the Blind of N.C., Inc.*, 487 U.S. 781, 791 (1988).

268. *Id.* at 790–91 (quoting *Democratic Party of U.S. v. Wisconsin ex rel. La Follette*, 450 U.S. 107, 124 (1981)); see also *Democratic Party of U.S.*, 450 U.S. at 124 (criticizing the state’s paternalistic interest in protecting the political process by restricting speech by corporations); *Linmark Assocs., Inc. v. Willingboro*, 431 U.S. 85, 96–97 (1977) (criticizing, in the commercial speech context, the state’s paternalistic interest in maintaining the quality of neighborhoods by restricting speech to residents).

269. *Riley*, 487 U.S. at 791.

270. *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 593–94 (1991).

271. *Id.* at 560.

272. *Id.*

273. *Id.* at 575.

274. See *id.* at 569.

specific casting calls are fully protected because they can impact the underlying message of a film, this section argues that requiring race-neutral casting calls still survives strict scrutiny because the proposed statute focuses on casting advertisements, which are a small portion of the film, and not casting decisions. Moreover, the statute requiring race-neutral casting calls furthers the compelling government interests of protecting (a) a minority's right to earn a living and (b) America's children from discriminatory, stereotypical portrayals of minorities.²⁷⁵

a) Right to Earn a Living

A minority's right to practice his or her profession as an artist in Hollywood is a fundamental right,²⁷⁶ and race-neutral casting calls are necessary to protect a minority's right to earn a living. The Fourteenth Amendment of the U.S. Constitution states:

No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.²⁷⁷

Courts have explained that “[l]iberty means more than freedom from servitude, and the constitutional guarantee is an assurance that the citizen shall be protected in the right to use his powers of mind and body in any lawful calling.”²⁷⁸ If a man is deprived of the right to labor, his liberty is restricted because his capacity to earn wages and acquire property is lessened.²⁷⁹ Thus, the right to earn a living is an

275. See Robinson, *supra* note 152, at 1. To promote equal employment opportunities for minorities, all casting calls must be race neutral unless the race of the character is essential (1) to the storyline, (b) to preserve historical or regional accuracy, or (3) to maintain the network's identity-themed programming. If the three exceptions do not apply, then the race of the actor or actress is likely insignificant and does not need to be specified on the employment advertisement. *Id.*

276. See Lone Star Sec. & Video, Inc. v. Bureau of Sec. and Investigative Servs., 147 Cal. Rptr. 3d 173, 178 (Cal. Ct. App. 2012) (“The right to practice one’s profession is a fundamental vested right . . .”).

277. U.S. CONST. amend. XIV, § 1.

278. Mass. Bd. of Ret. v. Murgia, 427 U.S. 307, 322 (1976).

279. *Id.*

important interest and requires the courts to look at reasons for depriving people of their jobs carefully.²⁸⁰

The Supreme Court has held that “the right of the individual . . . to engage in any of the common occupations of life” is the “very essence of the personal freedom and opportunity that it was the purpose of the [Fourteenth] Amendment to secure.”²⁸¹ Justice Douglas explicitly stated:

Employment is one of the greatest, if not the greatest, benefits that governments offer in modern-day life. When something as valuable as the opportunity to work is at stake, the government may not reward some citizens and not others without demonstrating that its actions are fair and equitable. And it is procedural due process that is our fundamental guarantee of fairness, our protection against arbitrary, capricious, and unreasonable government action.²⁸²

Unfortunately, courts have also admitted that private employers are free to act capriciously and unreasonably with respect to employment practices unless statutory or contractual laws govern their actions.²⁸³ Thus, even though the Supreme Court established that the government may only act fairly and reasonably with respect to employment opportunities,²⁸⁴ the Court provides a free pass for private employers, which Hollywood currently uses to its advantage. Thus, because Congress has the power to enforce, by appropriate legislation, the Fourteenth Amendment,²⁸⁵ Congress should require race-neutral casting calls to promote a minority’s fundamental right to work in Hollywood.

The major obstacle is that the freedom of expression is also a fundamental right,²⁸⁶ which often creates a conflict between equal protection and the freedom of speech.²⁸⁷ However, case precedent

280. *Id.* at 323.

281. *Bd. of Regents of State Colls. v. Roth*, 408 U.S. 564, 572, 588 (1972) (quoting *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923)).

282. *Id.* at 589.

283. *Id.* at 588.

284. *Id.*

285. U.S. CONST. amend. XIV, § 5.

286. *KGB, Inc. v. Giannoulas*, 164 Cal. Rptr. 571, 581 (Cal. Ct. App. 1980).

287. *See id.*

and past regulation shows that courts have held that the right to earn a living is more compelling than the right to express one's views.²⁸⁸ For example, the FCC requires broadcasters to ensure that their policies promote equal employment opportunities.²⁸⁹ The FCC's equal employment rules are designed to open the door to minority employment and participation in broadcasting in jobs that involve more than minimal responsibility.²⁹⁰

In *In Re Application of New Mexico Broadcasting Co.*, the station's figures showed that employment of Mexican Americans was stagnant because in 1971 there were no minority persons employed in the categories of officials, managers, and professionals; in 1972 there were three; and in 1973 there were five.²⁹¹ The FCC stated that it is a problem when there is little variation in the numbers of full-time, Mexican-American employees at the station, especially when the total number of full-time employees increased from forty-seven to fifty-two between 1973 and 1974 but the total number of Mexican-American employees remained the same at eight people.²⁹² This meant that there was a decrease from 17% to 15.4% in the number of Mexican Americans working at the station.²⁹³ The FCC confirmed that the percentage of minority employees at broadcast stations, generally or in specific job categories, did not need to match the percentage of minorities in the station's service area but recognized that statistical evidence of a substantial failure to accord equal employment opportunities is enough to suggest that a problem exists and warrants a hearing.²⁹⁴

As for employment, the station employed sixty-one persons and only seven were Spanish surnamed, which constituted 18.6% of the station's total employees even though the population of Mexican

288. *Id.*

289. *WGN of Colo., Inc.*, 31 F.C.C.2d 413, 422 (1971); *see also* Equal Employment Opportunities, 47 C.F.R § 73.2080 (2018).

290. 47 C.F.R § 73.2080.

291. *N.M. Broad. Co., Inc.*, 54 F.C.C.2d 126, 138 (1975).

292. *Id.*

293. *Id.*

294. *Id.*

Americans in the service area was 34%.²⁹⁵ The station had no black or Native-American employees even though they made up 1% and 2% of the population, respectively.²⁹⁶ The minority employees were also limited to lower positions at the station and not employed in the newsroom or management level positions; they were receptionists, traffic clerks, and assistant bookkeepers.²⁹⁷ There were no Mexican-American newscasters in a community where more than one-third were Mexican Americans.²⁹⁸

In *Black Broadcasting Coalition of Richmond v. FCC*, the D.C. Circuit reversed the FCC's renewal of WTVR's license without a hearing because the station's actions during its license term showed overt discrimination.²⁹⁹ The petitioners presented evidence that: (1) WTVR employed only one part-time black employee out of sixty-two full-time and six part-time employees at its television station and no blacks out of the twenty-six employees at its radio stations, (2) qualified blacks had been available for employment but were rejected, and (3) WTVR engaged in two specific instances of discriminatory hiring and firing of blacks.³⁰⁰ The court found that WTVR's history of 1.5% or less black employment during a license period in an area where blacks constituted about one-fourth of the local workforce suggested discriminatory actions that were outside the zone of reasonableness.³⁰¹ The court also found that passive affirmative-action programs, such as simply accepting referrals from state employment offers or using equal-opportunity employment agencies or lists of community contacts that had little to do with outreach, recruitment, and on the job training, were not enough to fulfill WTVR's obligation to recruit minority employees.³⁰² The

295. *Id.* at 135.

296. *Id.*

297. *N.M. Broad. Co., Inc.*, 54 F.C.C.2d at 135–36.

298. *Id.* at 136.

299. *Black Broad. Coal. of Richmond v. FCC*, 556 F.2d 59, 64–65 (D.C. Cir. 1977).

300. *Id.* at 60–61.

301. *Id.* at 61–62.

302. *Id.* at 62.

court ordered the FCC to hold a full hearing to determine if the licensee's performance met its affirmative action obligations.³⁰³

In both *Black Broadcasting* and *New Mexico Broadcasting*, the courts allowed the FCC to regulate the employment practices of a broadcast company that was responsible for selecting and editing programs that are distributed to the public.³⁰⁴ The court and FCC's decisions to make the company's editorial function secondary to promoting nondiscriminatory employment practices supports the regulation requiring race-neutral casting calls in Hollywood, especially because the employment statistics for minorities in Hollywood are as low as in *Black Broadcasting* and *New Mexico Broadcasting*.³⁰⁵ Although statistics alone do not provide ideal evidence of discrimination, if there are specific instances of discrimination or conscious policies of exclusion, the FCC must grant a hearing to review the renewal of the broadcaster's license.³⁰⁶ Congress must similarly review the practices in Hollywood and enact laws that will help the industry correct its discriminatory hiring of talent.

The right to earn a living also trumps the First Amendment in intellectual property law.³⁰⁷ In *Carson v. Here's Johnny Portable Toilets, Inc.*, the Sixth Circuit determined that the right to publicity is essential to a person's right to earn a living and is more important than society's First Amendment rights.³⁰⁸ The court explained that the commercial interest of celebrities in their identities can be valuable in the promotion of products, which meant that the famous had an exclusive legal right during their lives to control and profit from the commercial use of their names and personalities.³⁰⁹ Although the First Amendment protects the freedom to use intellectual property, words, and ideas that are in general circulation and not protected by valid copyright, patent, or trademark, the right

303. *Id.* at 65.

304. *See generally id.*; *N.M. Broad. Co., Inc.*, 54 F.C.C.2d 126, 135–36 (1975).

305. *Black Broad. Coal. of Richmond*, 556 F.2d at 60–61; *N.M. Broad. Co., Inc.*, 54 F.C.C.2d at 135.

306. *Bilingual Bicultural Coal. on Mass Media, Inc. v. FCC*, 595 F.2d 621, 624, 630 (D.C. Cir. 1978).

307. *See Carson v. Here's Johnny Portable Toilets, Inc.*, 698 F.2d 831, 837, 841 (6th Cir. 1983).

308. *See id.*

309. *Id.* at 835, 838.

of publicity exists to promote production of works that benefit the public but are a product of an individual's own talents and energy.³¹⁰

Another example is *San Francisco Arts & Athletics, Inc. v. U.S. Olympic Committee*, where the Court held that Congress did not prohibit San Francisco Arts and Athletics (SFAA) from conveying its message when it passed a law that prohibited SFAA or any other entity from using the word "Olympic" in certain contexts.³¹¹ The petitioners successfully executed their athletic event under the names "Gay Games I" and "Gay Games II" without the need for the Olympic trademark.³¹² The Court clarified that Congress had a greater interest in promoting the participation of athletes from the U.S. in the "great four-year[] sport festival, the Olympic games," educating young people about the "spirit of better understanding between each other," and building "a better and more peaceful world" with "international goodwill."³¹³ The Court held that the incidental restrictions on expressive speech were necessary to further this substantial government interest³¹⁴ because the U.S. Olympic Committee's (USOC) right to use the word "Olympic" was essential to supplying the USOC with the means to raise money to support the Olympics; it ensured that the USOC received benefits for its efforts and was not confused with other organizations.³¹⁵ Thus, the regulation of allowing the USOC to have exclusive control of the word "Olympic" was not broader than necessary to protect the legitimate government interest and did not violate the First Amendment.³¹⁶

Similarly, copyright law protects tangible expressions of an idea and does not violate the First Amendment because copyright laws do not restrain the use of ideas³¹⁷ but instead protect an entertainer's incentive to produce this type of work by granting valuable,

310. *Id.* at 839, 841.

311. *S.F. Arts & Athletics, Inc. v. U.S. Olympic Comm.*, 483 U.S. 522, 527–28, 536 (1987).

312. *Id.* at 536.

313. *Id.* at 537.

314. *Id.* at 561.

315. *Id.* at 538–41.

316. *Id.* at 537, 540.

317. *Carson v. Here's Johnny Portable Toilets, Inc.*, 698 F.2d 831, 841 (6th Cir. 1983).

enforceable rights.³¹⁸ The government believes that the “best way to advance public welfare through the talents of authors and investors in ‘[s]cience and useful [a]rts’” is by protecting the personal gain obtained by personal effort.³¹⁹ In fact, an entire body of intellectual property law exists to protect a person’s right to earn a living,³²⁰ which suggests that providing equal employment opportunities is a compelling government interest and likely more compelling than a person’s right to expression, especially if the expression is plagued with discriminatory stereotypes. Thus, casting calls requesting a specific race should not be protected by the First Amendment, especially when they violate a compelling government interest to a minority’s right to work in the entertainment industry.

b) Protecting America’s Children from Discriminatory Portrayals by Promoting Diversity

Nondiscriminatory, minority characters are necessary to promote diversity and break the cycle of biases because children spend ample time watching television, and the images, storylines, and messages sent through television programming likely influence their personalities and development into adults.³²¹ The Kerner Commission warned that “the various elements of the media ‘have not communicated to whites a feeling for the difficulties and frustrations of being a Negro in the United States The world that television and newspapers offer to their black audience is almost totally white.’”³²²

The Supreme Court has explicitly recognized that “motion pictures possess a greater capacity for evil, particularly among the youth of a community, than other modes of expression,” and that “because of its strong and abiding interest in youth, a State may regulate the dissemination . . . of . . . material objectionable [to juveniles that] a

318. *Zacchini v. Scripps-Howard Broad. Co.*, 433 U.S. 562, 576–77 (1977).

319. *Id.* at 576 (quoting *Mazer v. Stein*, 347 U.S. 201, 219 (1954)).

320. *See generally id.*

321. *See Denver Area Educ. Telecomms. Consortium, Inc. v. FCC*, 518 U.S. 727, 744–45 (1996).

322. *Metro Broad., Inc. v. FCC*, 497 U.S. 547, 586 (1990), *overruled by Adarand Constructors, Inc. v. Pena*, 515 U.S. 200 (1995).

State clearly could not regulate as to adults.”³²³ The Court has also recognized that society has the right to “adopt more stringent controls on communicative materials [and general dissemination of speech] available to youths than those available to adults” because children do not have the full capacity for individual choice that is a presupposition of First Amendment guarantees.³²⁴ Courts have upheld several regulations that limit radio, broadcast television, and cable television to protect children—who are likely listeners or viewers—from indecent and offensive material.³²⁵ Courts should expand the regulations to cover material that promotes discrimination against minorities.

For example, in *Interactive Digital Software Ass’n v. St. Louis County*, the Eight Circuit agreed that the state had a compelling interest in protecting the “psychological well-being of minors” by reducing the harm that children suffered when playing violent video games.³²⁶ But, the court clarified that the government must defend its restrictions on speech with more than abstract arguments or the possibility of the existence of a “disease sought to be cured.”³²⁷ The government must “demonstrate that the recited harms are real, not merely conjectural, and that the regulation will in fact alleviate the harms in a direct and material way.”³²⁸ The government cannot suppress ideas and images that the legislative body thinks are unsuitable for children without showing “substantial supporting evidence” that the harm will justify a law that threatens speech.³²⁹ The court found that a single psychologist referencing his study, which indicated that playing violent video games “does in fact lead to aggressive behavior . . . [and] more aggressive thoughts,” is a vague generality that does not prove that the violent video games are psychologically deleterious.³³⁰

323. *Interstate Circuit, Inc. v. City of Dall.*, 390 U.S. 676, 690 (1968).

324. *FCC v. Pacifica Found.*, 438 U.S. 726, 757 (1978).

325. *See Denver Area Educ. Telecomm. Consortium, Inc.*, 518 U.S. at 744.

326. *Interactive Dig. Software Ass’n v. St. Louis Cty.*, 329 F.3d 954, 958 (8th Cir. 2003).

327. *Id.*

328. *Id.* (quoting *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 664 (1994)).

329. *Id.* at 959–60.

330. *Id.* at 958–59.

In order to achieve diverse programming, race-neutral casting calls must be required to provide minorities an opportunity to influence the entertainment industry. But unlike the *Interactive Digital Software* court, the FCC has already recognized that the viewing and listening public suffers when minorities are underrepresented among owners of television and radio stations:

Acute underrepresentation of minorities among the owners of broadcast properties is troublesome because it is the licensee who is ultimately responsible for identifying and serving the needs and interests of his or her audience. Unless minorities are encouraged to enter the mainstream of the commercial broadcasting business, a substantial portion of our citizenry will remain underserved and the larger, [nonminority] audience will be deprived of the views of minorities.³³¹

The Supreme Court has also stated that it is widely believed that a diverse student body promotes educational excellence “even though it is hard to know how, and when, and even if, this informal ‘learning through diversity’ actually occurs.”³³² The concept of a diverse student body can be applied to diverse television because minority viewpoints in programming serve not only the needs and interests of the minority community but also enriches and educates the nonminority audience, which is a key objective of the Communications Act of 1934 and the First Amendment.³³³

Thus, a regulation requiring race-neutral casting calls supports the government’s compelling interest to protect children who “may not be able to protect themselves” from indecent speech or discriminatory speech, which is likely to have a much “deeper and more lasting negative effect on a child than on an adult.”³³⁴ Although *Interactive Digital Software* did not uphold the regulation, it provided a standard of review that can be applied to discriminatory films.³³⁵

331. *Metro Broad., Inc. v. FCC*, 497 U.S. 547, 554 (1990), *overruled by Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995).

332. *Id.* at 580.

333. *Id.* at 556.

334. *FCC v. Pacifica Found.*, 438 U.S. 726, 758 (1978).

335. *Interactive Dig. Software Ass’n*, 329 F.3d at 959–60.

Section I has already proven that representation is low,³³⁶ and the number of examples of racism in the world are easily available through a Google search.³³⁷

Broadcast television is uniquely accessible to children—even those too young to read³³⁸—and must be regulated responsibly by the government. Other forms of offensive expression may be withheld from the young without restricting the expression at its source, such as bookstores and motion-picture theaters where the owners can prohibit children from accessing indecent material or physically separate the indecent material from unwilling audiences.³³⁹ But the ease with which children can obtain access to discriminatory images on television justifies requiring the entertainment industry to give people of color a chance to audition for films to provide a diverse cast. Moreover, many actors and actresses become writers and directors in the future,³⁴⁰ and the more opportunity provided to minorities to enter the field, the more likely that television will include a variety of perspectives.

In fact, evidence presented by Congress and the FCC has determined that an owner's minority status (a) “influences the selection of topics for news coverage and the presentation of editorial viewpoint, especially on matters of particular concern to minorities”; (b) has a special impact on the way in which images of minorities are presented; and (c) makes it more likely that minorities will be employed in managerial and other important roles where they can have an impact on station policies.³⁴¹ The policies adopted by the FCC to promote diversity in programming and equal employment

336. *See supra* Part I.

337. *See Examples of Racist Material on the Internet*, AUSTRALIAN HUM. RTS. COMMISSION (Oct. 2002), <https://www.humanrights.gov.au/publications/examples-racist-material-internet> [<https://perma.cc/FS44-UW4F>].

338. *Pacifica Found.*, 438 U.S. at 749.

339. *Id.*

340. Ross Bonaime, *The 15 Greatest Actors-Turned-Directors*, PASTE MAG. (Nov. 14, 2011, 8:07 AM), <https://www.pastemagazine.com/blogs/lists/2011/11/15-greatest-actors-turned-directors.html> [<https://perma.cc/GA73-UULZ>].

341. *Metro Broad., Inc. v. FCC*, 497 U.S. 547, 580–82 (1990), *overruled by Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995).

opportunity through minority ownership policies are “a product of analysis rather than a stereotyped reaction.”³⁴²

Moreover, “[t]he type of reasoning employed by the FCC and Congress is not novel[] but is utilized in many areas of the law, including the selection of jury venires on the basis of a fair cross section[] and the reapportionment of electoral districts to preserve minority voting strength.”³⁴³ It is a small, logical step to conclude that including more minorities in the electromagnetic spectrum would likely produce a “fair cross section” of diverse content.³⁴⁴ The FCC’s logic should also be applied more widely to the entertainment industry to support race-neutral casting calls, which might be a key component to opening the door to more minorities in leadership positions and breaking the cycle of discrimination.

Some free speech absolutists might argue that promoting diversity as a value among our children is not a compelling government interest, but past regulation and cases suggest otherwise.³⁴⁵ The Court has held that “the right of the public to receive suitable access to social, political, esthetic, moral, and other ideas and experiences [through the medium of broadcasting] is crucial, . . . and [the First Amendment commands that it] may not constitutionally be abridged either by Congress or by the FCC.”³⁴⁶ Broadcasters engage in a vital and independent form of communicative activity and should have wide journalistic freedom to exercise it, consistent with their public duties, to ensure that there is a balanced presentation of views on diverse matters of public concern.³⁴⁷

In *In Re Applications of Alabama Educational Television Commission*, the FCC confirmed that promoting diversity on screen is a high priority in America.³⁴⁸ In *Alabama Educational Television Commission*, the court held that a company’s discriminatory policies

342. *Id.* at 582–83.

343. *Id.* at 549.

344. *Id.* at 583.

345. *Id.* at 616.

346. *FCC v. League of Women Voters of Cal.*, 468 U.S. 364, 377 (1984) (quoting *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 390 (1969)).

347. *Id.* at 377–80.

348. *See generally* Ala. Educ. Television Comm’n, 50 F.C.C.2d 461 (1975).

can be inferred from conduct that displays a pattern of underrepresentation or systematic exclusion of minorities from the broadcast licensee's overall programming, such as refusing to present members of an ethnic group or their views on the air or excluding minorities from the production and planning levels of programming.³⁴⁹ The FCC clarified that "the appearance of a black person on a program does not necessarily mean that the program is 'integrated' in any meaningful sense or that integrated programming is the sole test of discrimination."³⁵⁰ Ultimately, AETC's renewal application was denied because there was no black representation on the various boards and committees responsible for the production, which the FCC held was a violation of its duty to serve the public interest.³⁵¹

When the FCC does not promote diversity, the court intervenes, as in *Office of Communications of United Church of Christ v. FCC*.³⁵² In *United Church of Christ*, WLBT's renewal application for a license to operate a television station was granted with conditions despite WLBT's proven racial and religious discrimination.³⁵³ In its petition, the Commission claimed that WLBT had failed to properly serve the community by failing to present a fair and balanced presentation of controversial issues, especially those concerning blacks, who comprised 45% of the total population within its prime service area.³⁵⁴ Nevertheless, the FCC made the political decision to allow WLBT to continue its operations based on its hope that WLBT would improve and on the community's need for a properly run station.³⁵⁵ The Commission was willing to risk WLBT's continuation of improper conduct for efficiency purposes despite WLBT's failure to engage in the nondiscriminatory running of its

349. *Id.* at 465–66, 468.

350. *Id.* at 466.

351. *Id.* at 470.

352. *See generally* *Office of Comm'n of United Church of Christ v. FCC*, 359 F.2d 994 (D.C. Cir. 1966).

353. *Id.* at 999.

354. *Id.* at 998.

355. *Id.* at 1000, 1007.

television station.³⁵⁶ The Commission's policy decision revealed that ad hoc determinations exist in the government, and the results are highly dependent on the value placed on the interests by those in power.³⁵⁷ Fortunately, the D.C. Circuit overturned the Commission's conditional renewal of WLBT's license and required a hearing.³⁵⁸

In *United Church of Christ*, the FCC failed to equally weigh the interests of minorities receiving discriminatory programming or no programming against the interests of others in the community.³⁵⁹ The FCC seemed to not understand that the lack of diverse programming could negatively impact community members as a whole, and its actions would never have been reversed if members of the public did not take an active interest and spend the time, money, and energy to litigate the renewal of the license.³⁶⁰ The FCC's actions showed two problems: (1) discrimination at the station and programming level is not being corrected despite the requirement that licenses be granted in the public's interest; and (2) these safeguards are being applied in a biased manner because eliminating racial discrimination is still viewed as less important than other efficiency or access reasons.³⁶¹ Thus, a regulation that requires race-neutral casting calls is necessary to ensure that diversity is promoted on television so the youth of America can learn about other cultures from a less stereotypical or discriminatory point of view.

Another example is in a dissent written by Justice Brennan where he quoted a study that stated "[words] generally considered obscene like 'bullshit' and 'fuck' are considered neither obscene nor derogatory in the [black] vernacular except in particular contextual situations and when used with certain intonations."³⁶² This generalization of black culture to justify the country's inability to appreciate cultural pluralism is somewhat ironic because it imposes a stereotypical view on a particular racial group that suggests bias and

356. *Id.* at 1007.

357. *Id.* at 1008.

358. *Office of Comm'n of United Church of Christ*, 359 F.2d at 1009.

359. *Id.* at 1004.

360. *Id.* at 1005.

361. *Id.* at 1000.

362. *FCC v. Pacifica Found.*, 438 U.S. 726, 776 (1978) (Brennan, J., dissenting).

not actual cultural understanding. In fact, there are likely many black people who find the words “bullshit” and “fuck” offensive. To correct this stereotypical belief, it starts with how children perceive certain races, which is socialized through television.

As the late President Kennedy stated, the civil rights legislation was created:

to promote the general welfare by eliminating discrimination based on race, color, religion, or national origin in . . . public accommodations through the exercise by Congress of the powers conferred upon it . . . to enforce the provisions of the [F]ourteenth and [F]ifteenth [A]mendments, to regulate commerce among the several [s]tates, and to make laws necessary and proper to execute the powers conferred upon it by the Constitution.³⁶³

A regulation requiring race-neutral casting calls supports President Kennedy’s ideas but also considers the argument for freedom of speech and expression by creating the three exceptions where the casting call can include race if character is essential: (1) to the storyline, (2) to preserve historical or regional accuracy, or (3) to maintain the network’s identity-themed programming. It is a reasonable solution that will nudge Hollywood in the right direction.

CONCLUSION

In conclusion, the Supreme Court stated, “Standards are the means by which we state in advance how to test a law’s validity, rather than letting the height of the bar be determined by the apparent exigencies of the day.”³⁶⁴ Although the proposal might not be perfect as drafted, we need to start somewhere. Laws are not created in a day or in one law review article. It will take time for a final method of review to be established. For example, it took sixteen years for the modern

363. *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 245 (1964).

364. *Denver Area Educ. Telecomms. Consortium, Inc. v. FCC*, 518 U.S. 727, 785 (1996).

obscenity standard to settle and forty years for the definition of a public forum to solidify.³⁶⁵ However, we know for certain that Congress, through statutes and regulations, has the power to respond to “an unfortunate reality.”³⁶⁶ As Justice Ginsburg stated in her dissent in *Adarand*, the unfortunate reality is:

[T]he unhappy persistence of both the practice and the lingering effects of racial discrimination against minority groups in this country. The United States suffers from those lingering effects because, for most of our Nation’s history, the idea that “we are just one race[.]” was not embraced. For generations, our lawmakers and judges were unprepared to say that there is in this land no superior race, no race inferior to any other. In *Plessy v. Ferguson*, not only did this Court endorse the oppressive practice of race segregation, but even Justice Harlan, the advocate of a “color-blind” Constitution, stated: “The white race deems itself to be the dominant race in this country. And so it is, in prestige, in achievements, in education, in wealth[,] and in power. So, I doubt not, it will continue to be for all time, if it remains true to its great heritage and holds fast to the principles of constitutional liberty.”³⁶⁷

We see the effects of a system of racial caste that only recently ended in our workplaces, markets, and neighborhoods. As Justice Ginsburg explained in her *Adarand* dissent:

Job applicants with identical resumés, qualifications, and interview styles still experience different receptions, depending on their race. White and African-American consumers still encounter different deals. People of color looking for housing still face discriminatory treatment by landlords, real estate agents, and mortgage lenders. Minority entrepreneurs sometimes fail to gain contracts though they are the low bidders, and they are sometimes refused work even after winning contracts. Bias both conscious and unconscious, reflecting traditional and unexamined habits of thought, keeps up barriers that

365. *Id.* at 777–78.

366. *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 272 (1995) (Ginsburg, J., dissenting).

367. *Id.*

must come down if equal opportunity and nondiscrimination are ever genuinely to become this country's law and practice.³⁶⁸

Thus, race-neutral casting calls are a small step in the right direction because it attempts to address the root of the problem, which is that the extremely influential film industry is priming the youth of our country with discriminatory, stereotypical portrayals. The regulation will hopefully increase diversity in Hollywood's leadership and lead to more on-screen appearances of minorities on television and in the movies. But to achieve this, Congress must act first.

368. *Id.* at 273–74.