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An Immovable Object and an Unstoppable Force: Reconciling the First Amendment and Antidiscrimination Laws in the Claybrooks Court

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ABSTRACT

This Note broadly addresses the problem of racial stereotyping and racial roles in the media. It is viewed through the lens of Claybrooks v. ABC, Inc., *a recent federal district court decision of first impression. In* Claybrooks, *the court dismissed the plaintiff's discrimination claims, ruling that casting decisions were protected under the First Amendment. This Note will address the problem of racial discrimination by focusing on racial misrepresentations in the media and the role of reality television programs in that landscape. Specifically, this Note will propose a new solution for the* Claybrooks *court. This analysis will assert that cast members should be considered employees, thus subjecting television networks to the legal liabilities under employment and labor laws. Furthermore, a special caveat should be created for casting decisions in race- and gender neutral reality television programming that should not be subject to protection under the First Amendment.*

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Over the years, Hollywood has become notorious for glitz, glamor, legendary icons, cinematic masterpieces, and making dreams of aspiring actors and actresses come true.[1] But not all that glitters in Tinseltown[2] is gold.[3] Hollywood possesses a less glamorous trait—stereotyping and misrepresenting racial minorities.[4] When a casting director seeks out a bright young actress to fill the leading role in his latest screenplay, that role, despite being written as race-neutral, is typically filled by a Caucasian actress.[5] Despite being a race-neutral role, James Bond, international man of mystery and British Spy, has been cast and played by eleven Caucasian actors.[6]

Hollywood has historically cast people of color in roles only when a person of color is specifically called for.[7] Actors of color have

1. *See* Hollywood, California, LAtourist.com, http://www.latourist.com/?page=hollywood (last visited Feb. 9, 2015).

2. Tinseltown is a nickname for Hollywood, California, named for the glitz and glamour associated with the movie industry.

3. *See generally* Parthenia (Ruthie) O. Grant, *Cultural Racism in Hollywood and the Media,* RUTHIEOGRANT.ORG, http://ruthieogrant.org/articles/Cultural%20Racism%20in%20Hollywood%20and%20the%20Media.htm (last visited Feb. 9, 2015).

4. *See id.*

5. *See* Eva Hattie L. Schueler, *'Hunger Games' Casting: Why Jennifer Lawrence Shouldn't Play Katniss,* HUFFINGTON POST (Mar. 1, 2012, 3:25 PM), http://www.huffingtonpost.com/2012/03/01/hunger-games-movie_n_1314053.html (discussing casting Jennifer Lawrence in the lead role in the Hunger Games, despite the character being described as having a darker complexion and hair).

6. *See generally* Breeanna Hare, *Idris Elba: I'd Consider Playing James Bond,* CNN (Sept. 29, 2011, 12:31 PM), http://www.cnn.com/2011/09/28/showbiz/celebrity-news-gossip/idris-elba-james-bond/ (discussing rumors that Idris Elba is set to be the first black actor to portray James Bond).

7. *See* Grant, *supra* note 3.

historically been typecast, shut out of leading roles, and grossly underrepresented in films and television shows.[8] As a result, the public's perception of racial minorities and race relations in the United States has been greatly skewed.[9]

In recent years, there has been an explosion in the number of reality-based programs featured on network and cable television.[10] Like Hollywood and the mass media, these reality television programs have perpetuated racial stereotypes, limited roles for people of color, subjected people of color to discriminatory practices, and excluded racial minorities altogether.[11] But unlike Hollywood, which is a platform of artistic development and the creation of art, reality television is supposed to be just that—reality.[12] If reality television programming aims to stay true to reality, then something must be done to combat the skewed public perception of what our society looks like and to portray racial minorities for what they truly are—contributing members of society who add value and diversity to our collective community.[13]

This Note investigates the problem of racial stereotyping in the media. It analyzes and criticizes *Claybrooks v. American Broadcasting Companies*, a recent decision from the US District Court for the Middle District of Tennessee.[14] Dismissing the plaintiff's Section 1981 discrimination claims, the court in *Claybrooks* found that network executives of *The Bachelor* were free to make casting decisions designed to prevent the likelihood of interracial dating because casting decisions were protected under the First Amendment.[15]

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8. *See* DARNELL HUNT ET AL., RALPH J. BUNCHE CTR. FOR AFRICAN AM. STUDIES AT UCLA, 2014 HOLLYWOOD DIVERSITY REPORT 6–8 (Feb. 2014), *available at* http://www.bunchecenter.ucla.edu/wp-content/uploads/2014/02/2014-Hollywood-Diversity-Report-2-12-14.pdf (showing that in 2011, 89.5 percent of male leading roles were played by white actors, and that in broadcast comedies and dramas, 94.9 percent lead actors were white).

9. Grant, *supra* note 3 ("[T]he unsettling reality today remains that when Asian, Chicano, Native American or African American children turn on the television set and see their race depicted very little, if at all on mainstream television; or, alternatively, portrayed a stereotype, or a criminal on network news, a subliminal message is sent and received.").

10. *See* Bill Carter, *Tired of Reality TV, but Still Tuning In*, N.Y. TIMES (Sept. 13, 2010), http://www.nytimes.com/2010/09/13/business/media/13reality.html?_r=0.

11. *See* Kate Lyons, *Why Hollywood is Frozen in the 1950s: White Men are Still King of the Silver Screen with Lead Roles Going to Just 26% of Women and 11% of Minorities*, DAILY MAIL (Feb. 20, 2014, 5:03 PM), http://www.dailymail.co.uk/news/article-2563561/Hollywood-place-white-men-New-study-finds-women-minorities-dramatically-underrepresented-films-television.html.

12. *But see* L. Brent Bozell III, *'Reality Shows' Distort the Real World*, CNS NEWS (Oct. 21, 2011, 4:34 AM), http://cnsnews.com/blog/l-brent-bozell-iii/reality-shows-distort-real-world.

13. *See* Lyons, *supra* note 11.

14. Claybrooks v. Am. Broad. Cos., 898 F. Supp. 2d 986, 998 (M.D. Tenn. 2012).

15. *Id.* at 988.

This Note addresses the problem of racial discrimination within the media by focusing on the *Claybrooks* decision and reality television programming.[16] Specifically, this Note proposes a new solution for courts addressing similar *Claybrooks* questions. The analysis will assert that cast members of reality-based network television shows should be considered employees, thus subjecting television networks and network executives to the legal liabilities under employment and labor laws. Furthermore, a special caveat should be carved out of the First Amendment for casting decisions in race- and gender-neutral reality television programming that would allow certain regulations on the casting process that would otherwise be protected under the First Amendment.

Part I of this Note focuses on an exploration of race and the media, an overview of anti-discrimination laws and the First Amendment, and the *Claybrooks* decision. Part II analyzes how courts have navigated the First Amendment as it relates to anti-discrimination laws by examining possible solutions and the past regulatory schemes leading up to the *Claybrooks* decision. Part III proposes that a special exception to the First Amendment's broad protection should be created for casting decisions in race- and gender-neutral roles in reality television programs. Furthermore, cast members of reality television shows should be considered employees, placing them and their employer networks under the umbrella of Title VII's anti-discrimination laws. Finally, Part IV concludes with a discussion of the implications in the media regarding the shifting attitudes toward classically stereotyped groups and the effect of this solution on racial misperceptions going forward.

I. BACKGROUND

A. Race and the Media

Cultural racism comes into play when a racial majority uses its power and influence to impose their "cultural heritage . . . upon others, while at the same time destroying the culture of ethnic minorities."[17] This statement holds the most truth when examining race relations and the media.[18] Television and other forms of media serve as "powerful priming agents, activating constructs that

16. *See generally id.* at 989 (discussing the plaintiff's experience with reality television producers of *The Bachelor*).

17. Grant, *supra* note 3 (quoting Geneva Gay, *Racism in America, Imperatives for Teaching Ethnic Studies, in* NAT'L COUNCIL FOR THE SOC. STUDIES, TEACHING ETHNIC STUDIES: CONCEPTS AND STRATEGIES 27, 33 (James A. Banks, ed., 43d Y.B. 1973)).

18. *See id.*

subsequently influence social judgment."[19] Throughout history, racial minorities have been subject to discriminatory depictions, stereotypes, and racism as they are portrayed in the media as well as their status in the entertainment industry.[20] Moreover, television depictions of minorities "have been shown to influence whites' perceptions of those groups."[21] As a consequence, these visual misrepresentations by the media convey the message that whites and people of color exist within separate moral universes, giving the impression that people of color are different than whites.[22]

1. Racial Typecasting and Whitewashing

Historically, Hollywood has perpetuated many racially and culturally insensitive stereotypes by typecasting actors and actresses of color, by only rewarding actors and actresses of color for playing stereotypical roles, and for ignoring artistic endeavors that cast minorities in a positive light.[23] When Steven Spielberg, who has won Oscars for war epics, *Saving Private Ryan* and *Schindler's List*, directed the critically acclaimed movie, *The Color Purple*, it did not win an Oscar, despite being nominated for eleven Academy Awards.[24] Moreover, despite great box office success and many industry insiders' belief that Spielberg would win the Oscar for Best Director, he failed to be nominated.[25] Another classic example is Spike Lee's *Malcolm X*, starring Denzel Washington as the title role.[26] Despite being regarded by critics as one of Washington's most iconic roles, both the movie and Washington failed to be rewarded by the Academy.[27] More recent examples include director Ava DuVernay and actor David Oyelowo in 2014's critically acclaimed *Selma*.[28]

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19. Thomas E. Ford, *Effects of Stereotypical Television Portrayals of African-Americans on Person Perception*, 60 SOC. PSYCHOL. Q. 266 (1997).

20. *See* Grant, *supra* note 3.

21. Ford, *supra* note 19, at 271 ("The results of this experiment support the hypothesis that when whites are exposed to negative stereotypical television portrayals of African-Americans, they are more likely to make negative judgments of an African-American target person.").

22. *See* ROBERT S. LICHTER & DANIEL R. AMUNDSON, DISTORTED REALITY: HISPANIC CHARACTERS IN TV ENTERTAINMENT (1994).

23. *See* Grant, *supra* note 3.

24. *See* Andre Soares, *Steven Spielberg—The Color Purple: Biggest Oscar Snubs #2*, ALT FILM GUIDE (Jan. 29, 2011, 7:45 PM), http://www.altfg.com/blog/awards/steven-spielberg-the-color-purple-oscar-snubs-44881/.

25. *See id.*

26. MALCOLM X (40 Acres & A Mule Filmworks 1992).

27. Denzel Washington was nominated for his role by the Academy.

28. SELMA (Cloud Eight Films, Celador Films, Harpo Films, Pathé, Plan B Entertainment 2014).

These slights are anecdotal examples of a consistent diversity gap in Hollywood.[29] Of the nearly 6,000 Academy Awards voters, 94 percent are white, with the remaining 6 percent being comprised of 2 percent black, less than 2 percent of Hispanic origin, and less than 1 percent Asian or Native American descent.[30] Moreover, in eighty-seven years, 9 percent of Best Actor winners have been men of color, 1 percent of Best Actress winners have been women of color, and in the last twelve years, no Best Actress or Best Actor winner has been of Latino, Asian, or Native American descent.[31] As a result, many racial minorities have felt that Hollywood is sending them a resounding message—movies and roles depicting African Americans and other racial minorities in a non-stereotypical or positive light are of little importance.[32]

In 2001 and 2002, two historical events occurred in Hollywood: in 2001, Denzel Washington became the first African American male to win the Best Actor Academy Award in thirty-eight years for his role in *Training Day*;[33] and in 2002, Halle Berry became the first African American woman[34] to win the Best Actress Academy Award for her role in the movie, *Monster's Ball*.[35] Prior to Berry's win, the only African American female to win an Oscar for an acting role was Hattie McDaniel for her role as "Mammy" in *Gone with the Wind*.[36]

Washington's and Berry's Oscars, while met with mostly praise and joy, were not universally well received by the African American

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29. *See Oscar Academy Demographics*, CRITICAL MEDIA PROJECT, http://www.criticalmediaproject.org/cml/media/oscar-academy-demographics/ (last visited Feb. 10, 2014).

30. *Id.*; Paula Bernstein, *The Diversity Gap in the Academy Awards in Infographic Form*, INDIEWIRE (Feb. 25, 2014, 12:42 PM), http://www.indiewire.com/article/the-diversity-gap-in-the-academy-awards-in-infographic-form.

31. *Oscar Academy Demographics*, *supra* note 29. *See generally* Amy Goodman, *Selma Director Ava DuVernay on Hollywood's Lack of Diversity, Oscar Snub and #OscarsSoWhite Hashtag*, DEMOCRACY NOW (Jan. 27, 2015), http://www.democracynow.org/2015/1/27/selma_director_ava_duvernay_on_hollywoods ("I think . . . folks see films, see history, see art, see life through their own lens. And when there's a consensus that has to be made by a certain group . . . the consensus is most likely going to be through a specific lens. And unless there's diversity amongst the people that are trying to come to a consensus, then . . . there will be a lack of diversity in what the consensus is . . . .").

32. *See* Goodman, *supra* note 31; Grant, *supra* note 3.

33. TRAINING DAY (Warner Bros. Pictures 2001).

34. The first African American woman to win an Academy Award was Hattie McDaniel in 1940 for her depiction of "Mammy" in *Gone With the Wind*. GONE WITH THE WIND (Metro-Goldwyn-Mayer Studios 1939). Hattie McDaniel's win, like Berry's was met with much criticism for portraying the stereotypical role of a house slave. *Id.*

35. MONSTER'S BALL (Lions Gate Films 2002).

36. GONE WITH THE WIND, *supra* note 34.

population.[37] This was due to the nature of the roles played by Berry and Washington.[38] Denzel Washington's character was a crooked police officer and gangster head of a criminal ring.[39] Similarly, Halle Berry portrayed a poor African American woman, saved from a life of poverty by the white corrections officer who oversaw the execution of her late husband, a convicted murderer.[40] Many members of the African American community saw these awards as Hollywood perpetuating and rewarding the depiction of stereotypical roles that too often frame the African American community—that of gangster, criminal, destitute, and sexual object.[41] As a result, many of these stereotypes have become universally accepted by members of the white community, fostering false notions of the African American's role in society.[42]

African Americans are not the only racial minority group subjected to misrepresentations by the media. Asian Americans are stereotypically depicted as the hard working and successful minority group, martial arts warriors, submissive geishas, fortune tellers, and Chinese mafia bosses.[43] Moreover, misrepresentations in the media lead to overgeneralizations, like the Asian American population being categorically mislabeled as Chinese and Latinos being referred to as Mexicans.[44]

Latinos are also subjected to a host of racial stereotypes in the media.[45] As a group, Latinos are restricted to roles depicting them as comedians, criminals, sexual objects, and police officers.[46] Moreover, Latinos are often depicted as inarticulate, lacking intelligence and education, and portraying characters with traits such as laziness and verbal aggression.[47] These negative depictions have drastic

37. *See* Grant, *supra* note 3 (explaining that Denzel Washington "was denied awards for playing non-stereotypical, positive and compelling roles such as Malcolm X and Hurricane Carter, while rewarded for portraying a crooked cop").

38. *See id.*

39. *See* TRAINING DAY, *supra* note 33.

40. *See* MONSTER'S BALL, *supra* note 35.

41. *See* Grant, *supra* note 3 (explaining that members of the African American community did not hesitate to speak out against Washington's and Berry's awards).

42. *See id.*

43. *See* Russell K. Robinson, *Casting and Caste-ing: Reconciling Artistic Freedom and Antidiscrimination Norms*, 95 CALIF. L. REV. 1, 25 (2007).

44. Emily Drew, *Pretending to Be "Postracial": The Spectacularization of Race in Reality TV's Survivor*, 12 TELEVISION NEWS MEDIA 326, 330–31 (2011).

45. *See id.*

46. Dana E. Maestro, Elizabeth Behm-Morawitz & Maria A. Kopacz, *Exposure to Television Portrayals of Latinos: The Implications of Aversive Racism and Social Identity Theory*, 34 HUM. COMM. RES. 1 (2008).

47. *Id.*

consequences, considering many white Americans get a "bulk of information about Latinos" from the media.[48]

Similarly, Arab Americans are categorically cast in a negative light in the media as villains and terrorists.[49] Native Americans are depicted as exotic others within society, often "wearing tribal gear or performing rituals."[50] Consequently, white perception of minority groups are shaped and influenced by these narrow and negative representations.

Additionally, minorities also deal with a systematically whitewashed society in which their roles within society are subject to further marginalization.[51] Despite the box office success and high ratings that television shows and films with more diverse casts experience, the media continues to engage in whitewashing minority characters on the big screen.[52] In 2014's *Exodus: Gods and Kings*, director Ridley Scott cast three white actors—Christian Bale, Joel Edgerton, and Sigourney Weaver—to play the leading roles of the prophet Moses, and Egyptian royalty Ramses and Queen Tuya.[53] Scott described wanting to cast Bale at the onset, describing him as "the definition of Moses."[54] These casting decisions stood in stark contrast to the roles of the slaves, servants, and low class civilians, all of which were played by actors of color.[55] The lack of positive roles for people of color in movies and network programming, combined with the media's systematic whitewashing in popular culture, has created a distorted public perception of people of color.[56]

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48. *Id.*

49. Alex Abad-Santos, *Hollywood Likes to Pretend that Ancient Egypt was Full of White People*, VOX (Aug. 4, 2014, 12:30 PM), http://www.vox.com/2014/8/4/5955253/Hollywood-egypt-white-people-exodus-gods-and-kings.

50. Robinson, *supra* note 43.

51. *See* Abad-Santos, *supra* note 49.

52. *See* HUNT ET AL., *supra* note 8, at 27 ("[In 2011] the 25 films that were from 21 percent to 30 percent minority posted a median global box office of $160.1 million—a figure considerably higher than the medians for all other diversity intervals . . . median household ratings peaked for broadcast comedies and dramas that were from 41 percent to 50 percent minority.").

53. Kaitlin Reilly, *'Exodus: Gods and Kings' Trailer Proves Hollywood Hasn't Learned Much About Diverse Casting*, BUSTLE (July 9, 2014), http://www.bustle.com/articles/30956-exodus-gods-and-kings-trailer-proves-hollywood-hasnt-learned-much-about-diverse-casting.

54. *Exclusive: Ridley Scott Q & A for 'Exodus: Gods and Kings,'* YAHOO ENT. (Aug. 27, 2014, 9:00 AM), https://au.movies.yahoo.com/on-show/article/-/24819148/exclusive-ridley-scott-q-and-a-for-exodus-gods-and-kings/.

55. *See id.*

56. *See id.*; *see also* Tanya Ghahremani, *25 Minority Characters That Hollywood Whitewashed*, COMPLEX (Apr. 1, 2013), http://www.complex.com/pop-culture/2013/04/25-minority-characters-that-hollywood-whitewashed/the-good-earth (identifying other recent examples of whitewashing as Jake Gyllenhaal being cast as the lead in *Prince of Persia: The Sands of Time*; two white actors being cast in *The Last Airbender* in roles written for Asian actors; Johnny

2. Race and Reality Television

While racial misrepresentations in the media have been a prevalent concern, reality television presents an even greater problem.[57] In 2002, the number of people who cast votes to select a winner for the first season of *American Idol* surpassed the number of people who voted in the 2000 US presidential election.[58] This mass appeal has moved reality television programming to the forefront of popular culture, with nearly 70 percent of cable programming comprised of reality television shows.[59] Moreover, despite the fact that reality television contributes to an increase in minority representation on television, and despite its potential to serve as a forum for misrepresented groups to dispel historically inaccurate depictions, the roles occupied by minorities in reality shows often serve to perpetuate minority stereotypes.[60] One example is that of the angry black female on the show *Flavor of Love*, where the majority of cast members were black females who were depicted as angry black women, possessing "characteristics of ghetto behavior."[61] Moreover, nicknames ascribed to contestants like "Red Oyster" for an Asian American, "Miss Latin" for a Hispanic woman, and "Deelishis" for an African American woman with a curvy figure and pronounced

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Depp's casting and depiction of Tonto, the Native American sidekick, in *The Lone Ranger*; Jennifer Connelly's depiction of John Nash's Salvadoran wife, Alicia, in *A Beautiful Mind*; Jennifer Lawrence's depiction of Katniss Everdeen in *The Hunger Games*, despite the character's description being "nonwhite" and "olive-skinned" in the novel; and Ben Affleck's depiction of Tony Mendez, a C.I.A. agent of Hispanic decent, in *Argo*).

57. Drew, *supra* note 44, at 330.

58. Rachel E. Dubrofsky, *The Bachelor: Whiteness in the Harem*, 23 CRITICAL STUD. MEDIA COMM. 39, 39 (2006).

59. *See id.*; *see also* HUNT ET AL., *supra* note 8, at 4 (noting that, in the 2011–2012 season, 68.8 percent of shows on cable were comprised of reality television programming).

60. *See generally* Rachel E. Dubrofsky & Antoine Hardy, *Performing Race in Flavor of Love and The Bachelor*, 25 CRITICAL STUD. MEDIA COMM. 373, 374 (2008) ("A remarkable aspect of the genre is the fostering of an unprecedented racial diversity on the small screen . . . . Discussions of race look at how the television industry governs representations of black bodies and constructs race in a particular way.").

61. *Id.* at 385; *see also* Nadra Kareen Nittle, *Five Common Black Stereotypes in TV and Film*, ABOUT NEWS, http://racerelations.about.com/od/hollywood/a/Five-Common-Black-Stereotypes-In-Tv-And-Film.htm (last visited Oct. 11, 2014) ("When Bravo debuted the reality show 'Married to Medicine' in Spring 2013, black female physicians unsuccessfully petitioned the network to pull the plug on the program. 'For the sake of integrity and character of black female physicians, we must ask that *Bravo* immediately remove and cancel 'Married to Medicine' from its channel . . . . Black female physicians only compose one percent of the American workforce of physicians. Due to our small numbers, the depiction of black female doctors in media, on any scale, highly affects the public's view on the character of all future and current African-American female doctors.'").

posterior, reduce them to representations of their race and existing stereotypes.[62]

On *The Apprentice*, a black male character was described as having "street smarts" and was the owner of a shoe shining company.[63] Moreover, a study of ten different reality television programs revealed that African Americans were often portrayed as physical aggressors and inciters of altercations among cast members.[64] In addition, viewers who watch reality-based programming tend to view these programs as a depiction of real life.[65] Thus, reality programming has an increasingly larger impact precisely because of the hegemonic power associated with describing something as "reality," and because it is generally accepted as more real or authentic by viewing audiences.[66]

B. Legal Background

1. Antidiscrimination Laws: Title VII and Section 1981

Title VII of the Civil Rights Act of 1964[67] prohibits discriminatory practices in the context of employment. Specifically, Section 703 of Title VII specifies that adverse employment practices, i.e., failing to hire, fire, or treat disparately, by employers based on the "race, color, religion, sex, or national origin" of an employee or job applicant is an unlawful employment practice.[68]

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62. Dubrofsky & Hardy, *supra* note 60, at 381, 383; *see also* Jennifer Pozner, *Reality TV Exploits Women, Minorities, and Children*, N.Y. TIMES (May 21, 2014, 10:40 AM), http://www.nytimes.com/roomfordebate/2012/10/21/are-reality-shows-worse-than-other-tv/reality-tv-exploits-women-minorities-and-children (describing *Flavor of Love* as a "modern day minstrel show" that portrays "black and Latina women as ignorant 'ghetto' 'hos,' and men of color as clowns, thugs and criminals").

63. Tia Tyree, *African American Stereotypes in Reality Television*, 22 HOW. J. COMM. 394, 407 (2011).

64. *Id.* at 408.

65. *See id.*

66. Drew, *supra* note 44, at 330 ("Viewers are more likely to accept the 'bad black' stereotype, as embodied by Omarosa, because she was a 'real person' in 'real situations' than they are to accept the same stereotype in film, television, and other media not purporting to be reality.").

67. 42 U.S.C. § 2000e-2 (2012); *see Legal Highlight: The Civil Rights Act of 1964*, U.S. Dep't of Labor, http://www.dol.gov/oasam/programs/crc/civil-rights-act-1964.htm (last visited Mar. 31, 2015) ("The Civil Rights Act of 1964 prohibits discrimination on the basis of race, color, religion, sex, or national origin. Passage of the Act ended the application of 'Jim Crow' laws, which had been upheld by the Supreme Court in the 1896 case *Plessy v. Ferguson*, in which the Court held that racial segregation purported to be 'separate but equal' was constitutional.").

68. 42 U.S.C. § 2000e-2 (2012).

The main theories of discrimination under Title VII fall under one of two categories—disparate treatment or disparate impact.[69] The disparate treatment theory of discrimination prevents employers from "treating applicants . . . differently because of their membership in a protected class."[70] In contrast, the disparate impact theory prohibits the use of facially neutral employment practices that have a disproportionately adverse impact on a protected group.[71] Over 98 percent of employment discrimination litigation involves disparate treatment claims; with only 4 percent involving disparate impact claims.[72] Under Title VII, the employer can be subject to personal liability as well as vicarious liability as a result of discrimination of an employee at the hands of a co-worker, supervisor, or independent contractor.[73]

Title VII prohibits employers from printing or publishing any posts or advertisements associated with employment that indicate a "preference, limitation, specification, or discrimination, based on race, sex, or color."[74] In the context of casting decisions, an actor who proves that sex or race played a role in the denial of an employment opportunity could obtain an injunction against the further use of discriminatory practices.[75]

The Bona Fide Occupational Qualification (BFOQ) is a narrowly defined statutory defense to sex discrimination, which allows the applicant's sex to be a consideration in hiring when "reasonably necessary to the normal operation of that particular business or enterprise."[76] In the case of a BFOQ, Title VII grants an exception, allowing employers to publicly post advertisements indicating a sexual

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69. *See* J. CUNYON GORDON, CHI. LAWYERS' COMM. FOR CIVIL RIGHTS UNDER LAW, TITLE VII AND SECTION 1981: A GUIDE FOR APPOINTED ATTORNEYS IN THE NORTHERN DISTRICT OF ILLINOIS 6 (2012), *available at* http://www.ilnd.uscourts.gov/ATTORNEY/2009Title7manual.pdf (noting under the disparate treatment theory of discrimination "Title VII prohibits employers from treating applicants or employees differently because of their membership in a protected class. The central issue is whether the employer's action was motivated by discriminatory intent, which may be proved by either direct or circumstantial evidence").

70. *Id.*

71. *Id.* at 22 ("Even where an employer is not motivated by discriminatory intent, Title VII prohibits an employer from using a facially neutral employment practice that has an unjustified adverse impact on members of a protected class." (quoting Int'l Bhd. of Teamsters v. United States, 431 U.S. 324, 325 n.15 (1977))).

72. LAURA BETH NIELSEN ET AL., AM. BAR FOUND., CONTESTING WORKPLACE DISCRIMINATION IN COURT: CHARACTERISTICS AND OUTCOMES OF FEDERAL EMPLOYMENT DISCRIMINATION LITIGATION 1987–2003, at 11 (2008), *available at* http://www.americanbarfoundation.org/uploads/cms/documents/nielsen_abf_edl_report_08_final.pdf.

73. *Id.*

74. 42 U.S.C. § 2000e-3(b) (2012); Desert Palace, Inc. v. Costa, 539 U.S. 90 (2003).

75. Robinson, *supra* note 43, at 29.

76. *Id.* at 31.

preference only in situations where "the essence of the business operation would be undermined by not hiring members of one sex exclusively."[77] Within the context of casting decisions, the Equal Employment Opportunity Commission (EEOC) guidelines provides for a BFOQ for actors and actresses where it is vital in order to maintain authenticity.[78] But while there is a BFOQ for sex, there is no BFOQ for race.

Section 1981 of the Civil Rights Act of 1866 provides protectionist measures for racial minorities from discriminatory practices by both public and private sector players.[79] Section 1981 specifies that all racial groups within the United States are afforded the same opportunities as white Americans "to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings."[80] While Section 1981 does not expressly authorize a private cause of action, "the [Supreme] Court has held that § 1981 creates an independent private action for racially discriminatory employment practices."[81]

Courts analyze both types of employment discrimination claims under Title VII and Section 1981 identically—by direct or indirect evidence assessed under the *McDonnell Douglas* burden-shifting formulation.[82] Under this burden-shifting approach, the plaintiff must: "(1) establish a prima facie case of discrimination; (2) the employer must then articulate, through admissible evidence, a legitimate, nondiscriminatory reason for its actions; and (3) in order to prevail, the plaintiff must prove that the employer's stated reason is a pretext to hide discrimination."[83] A plaintiff's claim that passes this three-part analysis will survive a defendant employer's summary judgment motion.[84]

2. First Amendment and Wide Latitude for Artistic Creation

The First Amendment of the US Constitution provides a safeguard for two of the most fundamental notions of liberty—freedom of religion and freedom of expression[85] from government

77. *Id.*

78. *Id.*

79. 42 U.S.C. § 1981 (2012).

80. *Id.*

81. *See* STEVEN H. STEINGLASS, 1 SECTION 1983 LITIGATION IN STATE COURTS § 4:5 (2014).

82. *See* McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973).

83. *Id.*

84. *Id.*

85. There are five freedoms of expression: freedom of the press, assembly, petition, religion, and speech. *See* United States v. O'Brien, 391 U.S. 367 (1968).

interference.[86] It states, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press . . . ."[87] Protectionist measures under the First Amendment are founded on the rationale that in a democratic and free society, individuals must be afforded the right to express themselves without fear of governmental interference.[88] Among the types of speech protected under the Free Speech Clause of the First Amendment is the artistic freedom of expression, which is founded on the rationale that artistic freedom in the creation of art is in the interest of society's cultural and political awareness.[89] Among the protections afforded by the freedom of artistic expression is the artist's right to "create, display, perform, and sell their artwork."[90]

The Supreme Court requires a strong justification before the government may interfere with or regulate the content of artistic expression.[91] Historically, the right to freedom of speech and artistic expression has been given wide latitude by the courts and has been interpreted quite broadly, with a few choice exceptions.[92] Two principles come into play when courts deal with a challenge to the right of artistic expression—content neutrality and direct and imminent harm.[93]

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86. *See id.*

87. U.S. CONST. amend. I.

88. *Freedom of Expression in the Arts and Entertainment*, AM. CIVIL LIBERTIES UNION (Feb. 27, 2002), https://www.aclu.org/free-speech/freedom-expression-arts-and-entertainment.

89. *See id.*; *see also* JOHN ADAMS, A DISSERTATION ON THE CANON AND FEUDAL LAW, para. 15 (1765) ("[T]he jaws of power are always open to devour, and her arm is always stretched out, if possible, to destroy the freedom of thinking, speaking, and writing."), *available at* http://www.digitalhistory.uh.edu/disp_textbook.cfm?smtID=3&psid=4118; Benjamin Franklin, On Freedom of Speech in the Press, *in* 2 THE WORKS OF BENJAMIN FRANKLIN: CONTAINING SEVERAL POLITICAL AND HISTORICAL TRACTS NOT INCLUDED IN ANY FORMER EDITION, AND MANY LETTERS, OFFICIAL AND PRIVATE, NOT HITHERTO PUBLISHED; WITH NOTES AND A LIFE OF THE AUTHOR 285 (Univ. Chicago Press 2014) (1840) ("Freedom of speech is a principal pillar of a free government; when this support is taken away, the constitution of a free society is dissolved . . . .").

90. *Introduction*, NAT'L CAMPAIGN FOR FREEDOM OF EXPRESSION, http://www.thefirstamendment.org/ncfeintro.htm (last visited Jan. 15, 2014); *see also* Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546 (1975); Kingsley Int'l Picture Corp. v. Regents of the Univ. of the State of N.Y., 360 U.S. 684 (1959); Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495 (1952) (all finding motion pictures as a form of artistic expression protected by the First Amendment).

91. *See First Amendment: An Overview*, LEGAL INFO. INST., http://www.law.cornell.edu/wex/first_amendment (last visited Jan. 15, 2014) ("The Supreme Court requires the government to provide substantial justification for the interference with the right of free speech where it attempts to regulate the content of the speech. A less stringent test is applied for content-neutral legislation.").

92. *See* AM. CIVIL LIBERTIES UNION, *supra* note 88.

93. *Id.*

A content-neutral restriction imposes limits on communication without regard to the message conveyed.[94] In terms of artistic expression, the government cannot interfere with the freedom of artistic expression simply because someone is offended by the content of the art.[95] The second principle provides that the government can interfere with the artistic freedom of expression only in instances where there is a direct and imminent harm to a social interest.[96] Thus, when a regulation furthers an important governmental interest and is narrowly tailored so that it impedes on the First Amendment no more than necessary to further that interest, the regulation may pass constitutional muster.[97]

C. Claybrooks v. ABC

In 2012, Nathaniel Claybrooks and Christopher Johnson, two African American males, filed a class action lawsuit against ABC, Inc. and affiliates,[98] as well as the producers of *The Bachelor*[99] and *The Bachelorette*.[100] After being turned down as potential contestants for *The Bachelor*,[101] Claybrooks and Johnson claimed that ABC, Inc. and

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94. *See* Erwin Chemerinsky, *Content Neutrality as a Central Problem of Freedom of Speech: Problems in the Supreme Court's Application*, 74 S. CAL. L. REV. 49, 51 (2000) ("[T]he requirement that the government be content neutral in its regulation of speech means that the government must be both viewpoint neutral and subject-matter neutral. The viewpoint-neutral requirement means that the government cannot regulate speech based on the ideology of the message. . . . The subject-matter-neutral requirement means that the government cannot regulate speech based on the topic of the speech).

95. *Id.*

96. *Id.*; *see also* United States v. O'Brien, 391 U.S. 367, 376–77 (1968) ("[W]hen 'speech' and 'nonspeech' elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms. . . . [T]he Court has employed a variety of descriptive terms: compelling; substantial; subordinating; paramount; cogent; strong. Whatever imprecision inheres in these terms, we think it is clear that a governmental regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.").

97. *O'Brien*, 391 U.S. at 376–77.

98. Claybrooks v. Am. Broad. Cos., 898 F. Supp. 2d 986, 998 (M.D. Tenn. 2012) (noting that affiliates were ABC, Warner Horizon Television, Inc., Next Entertainment, Inc., NZK Productions, Inc., and Michael Fleiss).

99. *The Bachelor* (Next Entertainment, ABC television broadcast) is a reality-based dating show featuring one single bachelor and many bachelorettes competing to be in a relationship with the bachelor.

100. *The Bachelorette* (Next Entertainment, ABC television broadcast) is a reality-based dating show featuring one single bachelorette and many bachelors competing to be in a relationship with the bachelorette.

101. *Claybrooks*, 898 F. Supp. 2d at 990–91 ("In 2011, plaintiff Johnson appeared for a casting call at a hotel in Nashville, Tennessee. In the hotel lobby, a white employee of the

affiliates violated Section 1981 prohibiting racial discrimination in the formation of contracts, alleging that the defendants purposefully avoid casting people of color[102] in the leading roles in *The Bachelor* and *The Bachelorette*, engaging in "purposeful segregation in the media," and denying "persons of color opportunities in the entertainment industry."[103]

The defendants successfully argued a motion to dismiss based on the theory that the First Amendment prohibits the plaintiff's claims because regulating casting decisions imposes prohibited restraints on the content of network programming.[104] In dismissing the case, the court explained that the First Amendment protected the defendants from having to implement race neutral criteria in their casting process.[105] Relying on a principle[106] set forth in *Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston*,[107] the court found that in "appropriate circumstances, anti-discrimination statutes of general applicability must yield to the First Amendment."[108]

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defendants stopped Johnson, took his materials, and promised to 'pass them on' to the casting directors. Johnson observed that the white employee did not stop any of the white Bachelor applicants who were entering the hotel for the casting call at the same time. Johnson never heard back from the Defendants about his application. In 2011, plaintiff Claybrooks appeared for a casting call at a different hotel. In the lobby, all of the other applicants appeared to be white. Although interview of these white applicants took 45 minutes, Claybrooks's interview lasted only 20 minutes, making him feel that he had been rushed through the interview process without being given the same opportunity as the white applicants. Like Johnson, Claybrooks never heard back from the defendants concerning his application. The defendants ultimately selected a white Bachelor for its 2012 season.").

102. *See* Dubrofsky, *supra* note 58, at 39 ("In the first season, all four women of color in the initial pool were eliminated by the third week. . . . [T]he only woman of color on the third season was eliminated in the first week. . . . [T]he only woman of color on the seventh season was eliminated at the first rose ceremony. The three women of color on the eighth season were eliminated in the first episode.").

103. *Claybrooks*, 898 F. Supp. 2d at 989–90.

104. *Id.*

105. *Id.* at 1000.

106. *Id.* at 995–96 ("The factual circumstances in *Hurley* are not precisely analogous to those presented in this case—the plaintiffs here are not an advocacy group, for example. Nevertheless, the Court . . . articulated a general principle that governs the court's analysis in this case: under appropriate circumstances, anti-discrimination statutes of general applicability must yield to the First Amendment.").

107. 515 U.S. 557 (1995).

108. *Claybrooks*, 898 F. Supp. 2d at 996, 1000 ("The plaintiffs' goals here are laudable: they seek to support the social acceptance of interracial relationships, to eradicate outdated social taboos, and to encourage television networks not to perpetuate outdated racial stereotypes. Nevertheless, the First Amendment prevents the plaintiffs from effectuating these goals by forcing the defendants to employ race-neutral criteria in their casting decisions in order to 'showcase' a more progressive message.").

II. ANALYSIS

This Note suggests that, in certain contexts, ensuring equal protection for cast members of reality programs is a significant state interest, which outweighs the television station's First Amendment rights to free speech.[109] While television shows have historically enjoyed strong freedom of speech protections, the core robust values behind the First Amendment protections—the freedom of political and religious speech—are not in danger of being impeded in this context.[110] While free speech is an inalienable right founded in the Constitution, "it is well understood that the right of free speech is not absolute at all times and under all circumstances."[111] While most forms of speech are protected, at the heart of the First Amendment was the vital importance of the Founding Fathers to ensure notions of liberty and to grant citizens of the nation an open forum for the free expression of political beliefs.[112]

In the context of casting decisions, notions of liberty are not in danger of impediment.[113] Moreover, although television shows enjoy high protections under the First Amendment, they are not afforded the highest freedom of speech protections, and thus, are not completely insulated from governmental interference.[114] When casting decisions are viewed through the frame of hiring decisions, the First Amendment implications are significantly lowered.[115] It is not the content of the television program that is being regulated, but rather, the regulation of conduct—that conduct being employment.[116] This is relevant because the regulation of speech or content of the television program would be regarded as a constitutionally prohibited

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109. *See generally* KATHLEEN ANN RUANE, CONG. RESEARCH SERV., 7-5700, FREEDOM OF SPEECH AND PRESS: EXCEPTIONS TO THE FIRST AMENDMENT 9 (2014), *available at* http://fas.org/sgp/crs/misc/95-815.pdf ("With respect to non-content based restrictions, the Court requires that the governmental interest be 'significant' or 'substantial' or 'important' . . . .").

110. Neel Sukhatme, *Making Sense of Hybrid Speech: A New Model for Commercial Speech and Expressive Conduct*, 118 HARV. L. REV. 2836 (2005) ("[S]ome categories of speech such as political speech, are viewed as being at the core of the First Amendment.").

111. Chaplinsky v. New Hampshire, 315 U.S. 568, 71 (1942).

112. Sukhatme, *supra* note 110, at 2836.

113. *Id.*

114. Eugene Volokh, *Permissible Restrictions on Expression*, ENCYCLOPEDIA BRITANNICA, http://www.britannica.com/EBchecked/topic/208044/First-Amendment/296554/Permissible-restrictions-on-expression (last updated Jan. 7, 2014).

115. *See* Sukhatme, *supra* note 110, at 2836; *see also* James Madison, Virginia Resolution of 1798, H.D. Doc. No. 42 (1798), *available at* http://dtylercade.eprci.com/virginia_resolution_of_1798 ("[T]he right of freely examining public characters and measures, and of free communication thereon, is the only effectual guardian of every other right.").

116. Sukhatme, *supra* note 110, at 2840. ("For most expressive conduct, the purpose of expression is protected but the method of expression is regulable.").

state intrusion, whereas the regulation of conduct would be permissible.[117]

In other words, at its core, casting for a reality television show is a hiring decision that should be treated differently than casting decisions in scripted shows tied to an artistic narrative, where such a regulation would seek to regulate content.[118] Thus, since there is already a federal regime for hiring practices in the workplace, regulating casting decisions in reality television programs would merely be a means of extending that regulatory regime to the aspect of the television industry that deals directly with employment practices, within a forum where those decisions are tangentially connected to the artistic process.[119]

The *Claybrooks* decision was the first time a federal court examined how to resolve the First Amendment and antidiscrimination laws in the context of casting decisions.[120] Despite the novel question addressed by the court, the First Amendment and antidiscrimination laws have butted heads in many different contexts.[121] These contexts will be explored by examining how courts have navigated the First Amendment as it relates to antidiscrimination laws and casting decisions by examining possible solutions, the shortcomings of past and current regulatory schemes both inside and outside the context of the media, and the rationale behind the *Claybrooks* decision.

A. Antidiscrimination Laws and the Media—The Bona Fide Occupational Qualification

One possible solution is for courts to create a BFOQ for race. While there is currently no BFOQ for race, the drafters of Title VII acknowledged the need within the entertainment industry to cast actors who possess certain physical attributes, where race was a necessary element of the project.[122] A casting director who wants to

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117. *See generally* Chemerinsky, *supra* note 94, at 51.

118. *See id.*; *see also* United States v. O'Brien, 391 U.S. 367, 377 (1968) (explaining that restraints on conduct are content-neutral restrictions and subject to intermediate scrutiny, and that restraints on content are content-based and subject to strict scrutiny).

119. *See generally* 42 U.S.C. § 2000e-2 (explaining that discriminating against someone because of race, religion, color, national origin, or sex is an illegal hiring practice).

120. *See* Claybrooks v. Am. Broad. Cos., 898 F. Supp. 2d 986, 996 (M.D. Tenn. 2012).

121. *See generally* Hajir Ardebili & Kenneth D. Kronstadt, *All's Fair in Love and Reality Television: First Amendment Protection of Casting in Entertainment Programming*, 29 COMM. LAW. 3 ("Numerous courts have held that . . . the application of antidiscrimination laws may violate the First Amendment.").

122. Angela OnWuachi-Willig, *There's Just One Hitch, Will Smith: Examining Title VII, Race, and Casting Discrimination on the Fortieth Anniversary of* Loving v. Virginia, 319 WIS. L. REV. 319, 336 (2007).

cast a black actor to portray a slave, or a Native American actor to portray Tonto in *The Lone Ranger*, while prevented from specifying a racial preference, can specify their desire to cast someone with "the physical appearance" of a black person or Native American in roles where the portrayal of that race is crucial to the project.[123]

While the First Amendment shielded casting decisions from anti-discrimination laws in *Claybrooks*, the BFOQ and the idea of casting based on physical attributes raises a host of implications.[124] Were an exception to the First Amendment carved out, the recognition of a BFOQ for race would arm networks with a tool allowing intentional casting discrimination, couched in terms of necessity to the project.[125] Moreover, using race as a qualification for a job is the very type of employment practice Title VII seeks to prevent.[126] Thus, a BFOQ for race as a solution to casting discrimination would likely prove more harm than good.[127]

Conversely, carving an exception to casting decisions without recognizing a new BFOQ for race could subject shows like *Jersey Shore* and *Shahs of Sunset*, and networks like Lifetime and BET, which aim to represent certain cultural and ethnic groups, to antidiscrimination laws that threaten their content.[128] Thus, in the realm of casting decisions and subjecting them to antidiscrimination laws, finding the proper balance between the exception and the rule is of vital importance.[129]

B. Fairness Doctrine, Grutter, *and the Goals of Diversity*

The broad protections under the First Amendment are subject to scrutiny in areas where the government finds a compelling reason to regulate. During the 1960s, the Federal Communications Commission (FCC) implemented a regulatory solution aimed at

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123. *See* 110 CONG. REC. 2550 (1964) (statement of Sen. Clark) ("Although there is no exemption in Title VII for occupations in which race might be deemed a bona fide job qualification, a director of a play or movie who wished to cast an actor in the role of a Negro, could specify that he wished to hire someone with the physical appearance of a Negro . . . .").

124. *See generally* OnWuachi-Willig, *supra* note 122, at 336 (explaining that drafters, when considering the BFOQ, considered hiring and acting and appearances).

125. *See generally id.* at 340 ("[W]here race improperly creeps into those decisions, illegal discrimination has occurred.").

126. *See* Michael Frank, *Justifiable Discrimination in the News and Entertainment Industries: Does Title VII Need a Race or Color BFOQ?*, 35 U.S.F. L. REV. 474, 508 (2001).

127. *See generally id.* ("Congress made an intentional decision not to include race or color in the BFOQ provision.").

128. *See* Claybrooks v. Am. Broad. Cos., 898 F. Supp. 2d 986, 998 (M.D. Tenn. 2012).

129. *See generally id.* ("Applying antidiscrimination laws to casting decisions in this manner would threaten the content of various television programs . . . .").

addressing misrepresentations in the media—the Fairness Doctrine. The doctrine, which was first instituted in the late 1940s, required broadcasters to include public issues in their programming, allowing all sides to be heard on such issues, due to their operation of public license and publically owned airwaves.[130] During that time, President Johnson appointed a commission to investigate the environmental factors that contributed to the 1967 race riots.[131] The commission found that print and broadcast media's futile efforts in accurately depicting to the American majority the trials and tribulations of the African American citizen had ultimately failed.[132] Consequently, the majority of white Americans were relatively uninformed as to the social perspectives of the black community.[133]

The FCC sought to improve the media's depiction of minorities by encouraging broadcasters to hire minorities and implement diverse programming.[134] However, under the Reagan Administration, the FCC voted to revoke the Fairness Doctrine in 1987, removing the language that created the doctrine from their regulations.[135] Despite this, the Fairness Doctrine stood as an example of a compelling governmental interest in diversity in the context of broadcast media.[136]

In the realm of judicial measures, in *Grutter v. Bolinger*, the Supreme Court carved out a narrow rule with arguably broader implications when it found diversity to be a compelling governmental interest sufficient to survive constitutional scrutiny after Grutter—a white Michigan resident—was denied admittance to University of Michigan Law School. She claimed the university's policies discriminated against her on the basis of race, contrary to her rights under the Fourteenth Amendment.[137] In its holding, the Court established a bright-line rule limiting diversity as a compelling interest explicitly in the educational setting.[138]

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130. Sarah Honeycutt, *The Unbearable Whiteness of ABC: The First Amendment, Diversity, and Reality Television in the Wake of* Claybrooks v. ABC, 66 SMU L. REV. 431, 436 (2013).

131. *Id.*

132. *Id.*

133. *Id.*

134. *See id.*

135. *Id.*

136. *See generally id.* at 437 (the Fairness Doctrine was revoked for not being narrowly tailored to a substantial governmental interest).

137. Grutter v. Bollinger, 539 U.S. 306, 317 (2003).

138. *Id.*at 331–32 ("We have repeatedly acknowledged the overriding importance of preparing students for work and citizenship, describing education as pivotal to 'sustaining our political and cultural heritage' with a fundamental role in maintaining the fabric of society. This Court has long recognized that 'education . . . is the very foundation of good citizenship.' For this

While the Fairness Doctrine was wrought with noble considerations, it ultimately fell short of its goal of increased media representation for minorities and the majority.[139] The Fairness Doctrine failed, in large part, because its application had a chilling effect on the disbursement of information and speech in light of the increase in informational outlets.[140] However, the doctrine's considerations for the public good are overwhelmingly present in *Grutter*.[141]

Despite the Court's limited holding in *Grutter*, confining diversity as a compelling state interest to the higher educational realm, the *Grutter* Court concerned itself with "the civic life of our Nation," echoing concern for the meaningful participation of all groups.[142] This broad language suggests that the rationale behind *Grutter* "may counsel other institutions" to seek recognition from the Court.[143] Thus, while the Fairness Doctrine has been laid to rest, the broad themes of civic involvement and concern for the public discussed in *Grutter* set the stage for diversity as a compelling governmental interest to be recognized outside the educational frame set by the *Grutter* Court.[144] Moreover, broadcast media and cable television forums, under the correct set of legal rules, are well situated to establish regulatory parameters on the basis of diversity as a compelling governmental interest.[145]

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reason, the diffusion of knowledge and opportunity through public institutions of higher education must be accessible to all individuals regardless of race or ethnicity. . . . '[E]nsuring that public institutions are open and available to all segments of American society, including people of all races and ethnicities, represents a paramount government objective.' . . . And, 'nowhere is the importance of such openness more acute than in the context of higher education.' Effective participation by members of all racial and ethnic groups in the civic life of our Nation is essential if the dream of one Nation, indivisible, is to be realized.").

139. *See* Donna Schoaff, Meredith Corp. v. FCC*; 77 The Demise of the Fairness Doctrine*, 77 KY. L.J. 227, 229 (1989).

140. *Id.* at 239.

141. *See generally* Michelle Adams, *Stifling the Potential of* Grutter v. Bollinger*: Parents involved in* Community Schools v. Seattle School District No. 1, 88 B.U. L. REV. 937, 951 (2008) (quoting Justice O'Connor, explaining that "education must be accessible to all individuals regardless of race or ethnicity").

142. *Id.*

143. *See generally id.* at 948 ("Grutter may counsel other institutions—religious institutions, media institutions, libraries . . . to seek from the court . . . recognition . . . that they have special roles to play in the firmament . . . .").

144. *See generally* Robert A. Caplen, *When* Batson *Met* Grutter*: Exploring the Ramifications of the Supreme Court's Diversity Pronouncements Within the Computerized Jury Selection Paradigm*, 10 U. PA. J. CONST. L. 66, 117 (2007) ("[C]itizenship is an evolving, individualized process that encompasses 'a characteristic of personhood' rather than requiring an institutionalized setting.").

145. *See generally* Adams, *supra* note 141, at 948.

C. Content v. Conduct in Past Regulatory Schemes

First Amendment protections are not only afforded to artistic works, but also to any conduct "sufficiently imbued with elements of communication to fall within the scope of [the First Amendment]."[146] Moreover, as mentioned earlier, whether a regulation seeks to regulate content or conduct determines the level of protections afforded under the First Amendment.[147] The courts have treated expressive conduct[148] as warranting First Amendment protection in certain situations.[149] The Supreme Court explained the justification for extending First Amendment protectionist measures to conduct by clarifying that some conduct, while not inherently speech, that is done in order to convey a message or express an idea, can contain "elements of communication" that sufficiently fall within First Amendment protection.[150]

The test set forth by the Court in determining expressive conduct considers whether "[a]n intent to convey a particularized message was present, and [whether] . . . the likelihood was great that the message would be understood by those who viewed it."[151] Courts treat expressive conduct that satisfies this criterion with the upmost protection under the First Amendment, warranting review under a strict scrutiny standard.[152] Conversely, courts subject regulations relating to plain conduct to the less rigorous intermediate scrutiny standard.[153] Courts analyze the constitutionality of a regulation on plain conduct to the less rigorous intermediate scrutiny standard.

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146. Spence v. Washington, 418 U.S. 405, 411 (1974).

147. *Id.*

148. *See* Texas v. Johnson, 491 U.S. 397, 404 (1989) ("[W]e have recognized the expressive nature of students' wearing of black arm bands to protest American military involvement in Vietnam; of a sit-in by blacks in a 'whites only' area to protest segregation; of the wearing of American military uniforms in a dramatic presentation criticizing American involvement in Vietnam; and of picketing about a wide variety of causes.").

149. Frank, *supra* note 126, at 516.

150. *Spence*, 418 U.S. at 409.

151. *Id.* at 411.

152. *Johnson*, 491 U.S. at 404; *see also Strict Scrutiny*, LEGAL INFORMATION INST. CORNELL U. LAW SCH., http://www.law.cornell.edu/wex/strict_scrutiny ("Strict scrutiny is a form of judicial review that courts use to determine the constitutionality of certain laws. To pass strict scrutiny, the legislature must have passed the law to further a 'compelling governmental interest,' and must have narrowly tailored the law to achieve that interest.").

153. *Intermediate Scrutiny*, LEGAL INFORMATION INST. CORNELL U. LAW SCH., http://www.law.cornell.edu/wex/intermediate_scrutiny ("Intermediate scrutiny is a test used in some contexts to determine a law's constitutionality. To pass intermediate scrutiny, the challenged law must further an important government interest by means that are substantially related to that interest.").

Many of the regulatory solutions that have sought to remedy discriminatory practices have proven unsuccessful because they have attempted to regulate content instead of conduct.[154] In *R.A.V. v. City of St. Paul*, the Court found a hate speech ordinance to be an unconstitutional content-based restriction on free speech.[155] The Court distinguished content-based restrictions from conduct, explaining that Title VII targets speech that violates laws not because of its expressive content, but because it is tied to a specific prohibited conduct.[156] In contrast, the Supreme Court in *Wisconsin v. Mitchell* upheld the constitutionality of a hate crime statute that provided an enhanced penalty for hate motivated crimes.[157] The Court distinguished the content-based restriction in *R.A.V.* from the hate crime statute that sought to regulate the conduct of intentional discrimination in selecting a victim.[158]

In *Metro Broadcasting v. FCC*, the Supreme Court upheld the constitutionality of two minority preference policies implemented by the FCC.[159] Though partially overruled several years later, *Metro Broadcasting* stands among a line of cases that suggests a governmental interest in the increasing need for diversity in the media.[160]

In *Metro Broadcasting*, the FCC's fatal error was in the regulatory scheme it chose to implement.[161] By utilizing non-remedial racial preferences in an effort to increase minority representation, the FCC's regulatory efforts were aimed at controlling the output or content of the programming.[162] This regulation of content subjected the regulatory scheme to the highest standard of review—strict scrutiny, which ultimately proved too high a bar to meet.[163]

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154. *See* Ardebili & Kronstadt, *supra* note 121.

155. *See* R.A.V. v. City of St. Paul, 505 U.S. 377, 391 (1992).

156. *See id.* at 409; *see also* Robinson, *supra* note 43, at 46 ("Title VII does not single out expressive industries; it regulates employment decisions by virtually all employers, including studios, and applies regardless of a film's content.").

157. *See* Wisconsin v. Mitchell, 508 U.S. 476, 476 (1993).

158. Frederick M. Lawrence, Wisconsin v. Mitchell, 508 U.S. 476 (1993), AM. CIV. LIBERTIES, http://uscivilliberties.org/cases/4711-wisconsin-v-mitchell-508-us-476-1993.html (last visited Feb. 20, 2015).

159. *See* 497 U.S. 547, 552 (1990).

160. *See generally id.*

161. *See* Ronald J. Krotoszynski, Jr. et al., *Enhancing the Spectrum: Media Power, Democracy, and the Marketplace of Ideas*, 2000 U. ILL. L. REV. 813, 841–42 (2000) ("[I]t is probable that the FCC's primary objective of promoting diversity . . . would not qualify as a compelling governmental interest for equal protection purposes . . . failing the first prong of strict scrutiny.") (internal quotation marks omitted).

162. *See generally* Neal E. Devins, Metro Broad., Inc. v. FCC*: Requiem for a Heavyweight*, 69 TEX. L. REV. 125, 127 (1990).

163. *See* Krotoszynski, *supra* note 161, at 841.

Any future attempts at a regulatory scheme that will pass constitutional muster should consider an approach that focuses on what can be considered "input": hiring norms and decisions involved in the front end of a show's development, rather than on "output," or what is actually broadcast.[164] Thus, a regulatory solution that attempts to regulate conduct instead of content.[165]

D. First Amendment and Antidiscrimination Laws

In the context of antidiscrimination suits, courts have historically found that the application of antidiscrimination laws is a violation of the First Amendment.[166] In *Hurley*,[167] the Irish-American Gay, Lesbian, and Bisexual Group of Boston (GLIB) sought to be included in Boston's annual Saint Patrick's Day parade.[168] The Supreme Court considered whether, under Massachusetts law, private citizens[169] organizing a parade could be forced to include marchers depicting a message the organizers did not want to convey.[170] Holding for the parade organizers, the Court said parades are a form of expressive conduct warranting protection under the First Amendment.[171]

Conversely, in *Pittsburgh Press Co. v. Pittsburgh Commission on Human Relations*, the Court upheld an ordinance prohibiting newspapers from publishing sex classifications[172] in job postings.[173] The Court stressed that there was no category of "special immunity" for the press regarding laws of general applicability like employment regulations.[174] Furthermore, advertisements are considered commercial speech and are thus not constitutionally protected.[175] Drawing a distinction between protected speech and commercial

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164. *See generally* Robinson, *supra* note 43, at 47 (explaining that the weight of legal authority suggests that Title VII and other regulations addressing discrimination seek to regulate conduct and not content).

165. *See id.*

166. *See* Ardebili & Kronstadt, *supra* note 121.

167. Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos., 515 U.S. 557, 561 (1995).

168. *Id.*

169. *See id.* at 557 (organizing the parade was a group composed of private citizens, known as "South Boston Allied War Veterans Council, an unincorporated association of individuals.").

170. *See id.*

171. *See id.*

172. The Pittsburgh Press newspaper in question included a "Help Wanted" section with sex-specific headers like "JOBS—Female Interest." Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations, 413 U.S. 376, 379 (1973).

173. *See id.* at 376.

174. *Id.* at 382 (quoting Associated Press v. NLRB, 301 U.S. 103, 132 (1937)).

175. *See id.* at 384.

speech lacking First Amendment protection, the Court said, "discrimination in employment is not only commercial activity, [but] illegal commercial activity."[176]

In *Redgrave v. Boston Symphony Orchestra*, the First Amendment prevented actress Vanessa Redgrave from recovering under the Massachusetts Civil Rights Act (MCRA) after defendants cancelled her employment contract in response to Redgrave's political commentary.[177] On dissent, Judge Bownes expressed concern for the broad discretion given artistic expression under the First Amendment.[178]

Notwithstanding the concerns raised by Judge Bownes regarding the broad application and absolute defense offered by the First Amendment, courts have universally treated the application of antidiscrimination laws as an unconstitutional ban to the freedom of artistic expression.[179] Despite the government's attempts to remedy racial misrepresentations and discriminatory practices, these regulatory schemes have been proven to be overly intrusive restrictions on the First Amendment; have presented problematic implications; or have been expressly narrowed to a defined frame, rendering them incapable of becoming viable solutions.[180] In 2012, the US District Court for the Middle District of Tennessee dealt with an issue of first impression: does the First Amendment of the US Constitution protect casting decisions for entertainment works?

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176. *Id.* at 388.

177. *See* Redgrave v. Bos. Symphony Orchestra, Inc., 855 F.2d 888, 890 (1st Cir. 1988).

178. *See id.* at 925–26 (Bownes, J., dissenting) ("But perhaps the strongest illustration of the weakness of the BSO's asserted absolute first amendment defense lies in examining the potentially nightmarish consequences of recognizing it. If the first amendment extends absolute protection to the BSO when it fired Redgrave in response to public outcry over her political views, why would it not also protect the BSO in caving in to public views about her sex, her race, or her religion? If, in another case, the BSO refused to hire a Black performer because it felt that protests by bigots would be so intense as to compromise the BSO's 'artistic integrity,' then the Black performer should have a cause of action under the MCRA against the BSO for infringing her rights under the equal protection clause and any analogous state constitutional provisions banning race discrimination. But the 'artistic integrity' defense would impose a fatal barrier to the application of the MCRA. And there is no reason to assume that the same defense would not also extend to other institutions, such as newspapers and universities, that engage generally in first amendment activity. In order to qualify for protection, these institutions would only need to characterize their discriminatory acts as based on artistic or intellectual choices and thus effectively foreclose legislative or judicial scrutiny.").

179. *See id.* at 910.

180. *See generally* Grutter v. Bollinger, 539 U.S. 306, 324 (2003); Metro Broad., Inc. v. FCC, 497 U.S. 547, 601 (1990) (Stevens, J., concurring); Schoaff, *supra* note 139, at 229.

E. The Claybrooks *Analysis*

While the *Claybrooks* Court was constrained by the judicial tools available in making its assessment,[181] there are considerable problems with the analysis adopted by the court that warrant a review of the applicable First Amendment and antidiscrimination jurisprudence.[182] Those problems include the court's strict reliance on *Hurley* and the application of the strict scrutiny standard of review.[183]

While the court concedes that the "factual circumstances in *Hurley* are not precisely analogous to those presented in this case," it nevertheless relies entirely on the *Hurley* analysis.[184] In striking down the antidiscrimination statute, the *Hurley* Court pointed out that, like the great protection for editorial discretion, a parade was a form of expressive conduct entitled to the utmost protection.[185] Moreover, the Court explained the definition of parade used in its analysis as "marchers who are making some sort of collective point, not just to each other but to bystanders along the way."[186]

In defining the parade as expressive conduct, the *Hurley* Court analogized to other forms of expressive conduct shielded by the First Amendment, like wearing an armband in protest of war, saluting the American Flag, marching in a Nazi uniform, or displaying a flag.[187]

However, in contrast to political expressive conduct, casting decisions are arguably tangentially connected to the artistic content of a show and thus are not analogous to the forms of expression set forth in *Hurley*.[188] Moreover, the regulation of casting decisions in *Claybrooks* is closely analogous to Supreme Court precedent establishing antidiscrimination laws, like Section 1981 or Title VII, as

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181. *See* Claybrooks v. Am. Broad. Cos., 898 F. Supp. 2d 986, 996 (M.D. Tenn. 2012) ("Accordingly, the court must analyze this issue of first impression in light of relevant First Amendment principles.").

182. *See id.* ("The parties fault each other for failing to identify any federal case law, specifically addressing this issue . . . .").

183. But see Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations, 413 U.S. 376, 379 (1973), for a case in which the Court held that First Amendment rights were not implicated.

184. *Claybrooks*, 898 F. Supp. 2d. at 995–96.

185. *See* Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos., 515 U.S. 557, 581 (1995).

186. *Id.* at 558.

187. *See id.* at 569.

188. *See generally Claybrooks*, 898 F. Supp. 2d at 993 ("The parties agree that the Shows are expressive works that constitute speech protected by the First Amendment. However, they disagree as to whether the casting decisions behind those Shows are also protected by the first Amendment.").

laws that seek to regulate conduct.[189] Accordingly, in relying heavily on *Hurley*'s analysis and a strict scrutiny level of review,[190] the court neglected to adopt an analysis that could have survived constitutional scrutiny.[191]

In addition to the flawed logic used by the court, the plaintiff's focus on the racially divisive message conveyed by the defendant's and the plaintiff's proposed exception for "identity-themed shows" not only encouraged the court's unwillingness to discern casting decisions from the artistic content of the shows final product, but provided an "inherently unwieldy" test that threatened to "chill protected speech" and involve the courts in questioning the creative process behind the production of any television program.[192]

III. SOLUTION

A. Carving an Exception out of the First Amendment

In examining the problems faced by the *Claybrooks* court, this Note proposes an exception to the First Amendment's broad protection under the freedom of artistic expression for casting decisions in race- and gender-neutral roles in reality television programs.[193] To determine which shows fall within the purview of the rule, this Note proposes the following test: (1) cast members or contestants are chosen from a screening process or open casting call, (2) the show is a reality-based program, and (3) the show's programming is not wed to a central script. To deter networks from escaping the scope of the rule, this three-prong factor test would stress function over form. This function over form test would thus prevent reality-based shows that

189. *See* Rumsfeld v. Forum for Academic & Institutional Rights, Inc., 547 U.S. 47, 47 (2006); Pittsburgh Press Co. v. Pittsburg Comm'n on Human Relations, 413 U.S. 376, 376 (1973).

190. *See Claybrooks*, 898 F. Supp. 2d at n.11 ("In *Hurley*, the Court did not state whether it was analyzing the application of the state statute under a strict scrutiny analysis or under the *O'Brien* intermediate scrutiny analysis. However, the Court's analysis suggests that it was undertaking a strict scrutiny approach to determine whether applying the Massachusetts anti-discrimination statute amounted to a content-based restriction on the parade organizer's fundamental free speech rights in any respect.").

191. *See id.* at n.8 (explaining under the intermediate scrutiny analysis set forth in *O'Brien*, "a content-neutral statute that incidentally impact speech survives a First Amendment challenge if (1) the statute is within the constitutional power of the government, (2) the statute furthers an important or substantial governmental interest, (3) the interest is unrelated to the suppression of free expression, and (4) the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.").

192. *Id.* at 898 ("The plaintiff's proposed test is inherently unwieldy, threatens to chill otherwise protected speech, and, if implemented, would embroil courts in questioning the creative process behind any television program or other dramatic work.").

193. *See generally* Robinson, *supra* note 43, at 47 (discussing content neutrality and the standards under which First Amendment claims are addressed).

fall within the purview of the rule from escaping inclusion by creating an ad hoc script or ad hoc modification to their casting process, merely in order to avoid inclusion. Moreover, shows that purport to convey a particular cultural or ethnic group or social phenomenon would be outside the exception.[194]

This functional test would apply to casting decisions involving race- and gender-neutral roles in reality television programming for three reasons. First, reality television cast members should be considered more akin to network employees, placing them under the umbrella of Title VII's antidiscrimination protectionist measures.[195] Second, unlike casting decisions for scripted shows and movies, casting for race- and gender-neutral roles in reality television programs should not be considered expressive conduct inextricably tied to the artistic process.[196] Third, the government should consider diversity in reality-based programming to be a compelling state interest due to the historical regulations imposed on broadcast media and the purported aim of reality television to be a representative sampling of reality.[197] In asserting this compelling state interest, this solution proposes an extension of the Supreme Court's rule in *Grutter* beyond the educational setting and would apply it in the context of broadcast and cable television.[198]

B. Cast Members as Employees

The first prong of the test deals with shows that are cast in a way that most closely resembles standard employment hiring norms. In assessing whether or not a reality show participant is an employee of a television network, courts look to three elements.[199] First, an individual must act "at least in part to serve the interests of the employer."[200] Second, the employer consents to the services of the employee.[201] Third, "the individual must not render his services as an

194. Shows, like *Jersey Shore* or *Shahs of Sunset*, that purport to represent a particular ethnic group or culture would be outside the rule. Also, networks like BET or Lifetime, which purport to represent an intended group, would not be subject to the rule.

195. *See* Melody Hsiou, *Harsh Reality: When Producers and Networks Should be Liable for Negligence and Intentional Infliction of Emotional Distress*, 23 SETON HALL J. SPORTS & ENT. L. 187, 196–97 (2013).

196. *See* Texas v. Johnson, 491 U.S. 397, 404 (1989); Frank, *supra* note 126, at 520.

197. *See generally* Honeycutt, *supra* note 130, at 453.

198. *See id.*

199. *See* RESTATEMENT (THIRD) OF EMPLOYMENT LAW § 1.01 (Tentative Draft No. 2, 2009).

200. *Id.*

201. *Id.*

independent business person because the employer controls the manner and means by which the services are performed."[202]

Contestants on *The Bachelor* and similar shows should be considered employees of ABC because they satisfy all three elements. The first element is satisfied because show producers select cast members of *The Bachelor* because they serve the interests of network producers—high ratings.[203] The second element is satisfied because network producers conduct a rigorous selection process in choosing cast members.[204] The very act of conducting an extensive application process for the purpose of choosing cast members suggests implicit consent to the services of cast members who are selected.[205] Furthermore, producers and cast members enter into a contractual agreement, an action that further suggests the producer's consent to cast members' services.[206]

Finally, producers of reality shows like *The Bachelor* exercise a significant level of control over the lives of cast members.[207] Reality television producers control the travel and housing arrangements, meals, date schedules, and daily schedules of cast members.[208] Furthermore, producers have ultimate authority over editing the show and control how cast members' personalities are portrayed.[209] In addition, show producers exercise a degree of control over when cast members depart from the show and contractually bind them to refrain from certain actions for an extended time period before and after the show airs.[210]

By serving the producer's interest in high ratings,[211] being selected for participation through the show producers' audition process,[212] and subjecting their lives to an extensive degree of control,[213] cast members of reality programs satisfy the elements necessary to establish employee status. Thus, cast members should be considered employees of *The Bachelor* and ABC, Inc.[214]

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202. *Id.*
203. Hsiou, *supra* note 195, at 197.
204. *See id.*
205. *Id.*
206. *Id.*
207. *See generally* Honeycutt, *supra* note 130, at 451.
208. *Id.*
209. *Id.*
210. *Id.*
211. *See* Hsiou, *supra* note 195, at 197.
212. *Id.*
213. *See* Honeycutt, *supra* note 130, at 451.
214. *See id.* ("It is conceivable that reality show cast members could convince a court that they are employees of the network.").

C. Separating Conduct from Content

The third prong of the factor test, addressing whether a show is tied to a central script, intends to separate casting decisions that are inextricably tied to content from casting decisions that are not. Under the test established in *Texas v. Johnson* for expressive conduct, casting decisions in reality television shows are arguably not inextricably linked to artistic expression and could thus be entitled to a lower standard of protection under the First Amendment.[215] Thus, casting decisions should be considered to shape content only when artistic narratives or scripts apply.[216] Unlike films and television shows, in which the casting decisions are heavily tied to scripted narratives and the artistic creation of a particularized message, the casting decisions in reality television shows do not meet this standard of artistic expression.[217] In scripted television shows and movies, such casting decisions are tied to the artistic process because the casting is done within the context of conveying the intended message of the creative process—the writer's narrative.[218]

Conversely, casting decisions in reality television programming, like *The Bachelor*, are not linked to an artistic narrative and thus are not sufficiently tied to content or a proffered message.[219] Unlike a scripted show in which there is an intended message tied to a scripted artistic narrative, reality television shows do not seek to hire contestants to convey a particular message.[220] Rather, they seek to hire for an intended purpose—depicting "real life" in a reality-based setting.[221]

While the distinction between casting decisions that regulate content and those that regulate conduct may be seemingly narrow, it is an important distinction to make in regards to the First Amendment. Justice Rehnquist clarified the importance of the narrow distinction between the two types of conduct:

> "[F]reedom of speech" means more than simply the right to talk and to write. It is possible to find some kernel of expression in almost every activity a person undertakes—for example, walking down the street or meeting one's friends at a

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215. *See* Texas v. Johnson, 491 U.S. 397, 404 (1989).

216. *See generally* Honeycutt, *supra* note 130, at 434.

217. *Id.*

218. *Id.* (clarifying that scripted programming is distinct from reality television programming in the context of the *Johnson* test, in that the existence of the script ties the casting decisions inextricably up in the artistic process and the ultimate message reaching the audience).

219. *Id.*

220. *Id.*

221. *Id.*

> shopping mall—but such a kernel is not sufficient to bring the activity within the protection of the First Amendment.[222]

Thus, if casting decisions shape content only when artistic narratives apply, then laws regulating casting decisions for race- and gender-neutral reality television programming is a regulation of conduct.[223] Under this analysis, the court in *Claybrooks* would have to draw a distinction because the government is not interfering with artistic means or forcing the means of an artistic process.[224] Rather, the government is regulating a type of conduct tied to employment—hiring norms.[225] Moreover, because content-neutral laws regulating conduct are subject to intermediate scrutiny, in order to justifiably regulate conduct tied to the First Amendment, the court in *Claybrooks* would have to establish that there is a compelling governmental interest in such a regulation.[226]

D. Compelling Interests: Policy Rationales and Extending Grutter

The second prong of the test narrows the exception to reality-based programming. Extending *Grutter* beyond the context of the educational setting would lay the groundwork for the *Claybrooks* court to find a compelling governmental interest in regulating the conduct of casting decisions in reality television programming.[227] The analysis set forth in *Grutter* not only placed great emphasis on the notion of diversity being at the heart of an institution of higher learning's mission, but it also suggests that a compelling interest in diversity should not be limited to the educational setting.[228] In extending *Grutter*, the *Claybrooks* court should look to the reasoning set forth in the analysis.[229] Just as the court highlighted that diversity was a paramount governmental objective within the context

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222. City of Dallas v. Stanglin, 490 U.S. 19, 25 (1989).

223. *See generally* Chemerinsky, *supra* note 94, at 51 (drawing a distinction between conduct tied to expression and conduct).

224. *Id.*

225. *Id.* (explaining that regulating conduct sufficiently tied to speech does not necessarily warrant an unconstitutional burden under the First Amendment).

226. *Id.*

227. *See generally* Grutter v. Bollinger, 539 U.S. 306, 332 (2003) ("Effective participation by members of all racial and ethnic groups in the civic life of our Nation is essential if the dream of one Nation, indivisible, is to be realized.").

228. *Id.*; *see also* Jessica Bulman-Pozen, Grutter *at Work: A Title VII Critique of Constitutional Affirmative Action*, 115 YALE L.J. 1408, 1410 (2006) ("Because *Grutter*'s conception of diversity has remedial resonances and, even more so, because the opinion focuses on society's need for meaningful integration, the implications of *Grutter*'s holding cannot be contained by university walls.").

229. *See Grutter*, 539 U.S. at 328.

of educational institutions, diversity in broadcast programming should be a compelling interest because of what it purports to do.[230]

Furthermore, the implications of the Fairness Doctrine and other diversity regulations applied historically to broadcasting supports an extension of *Grutter* to reality-based programming.[231] The Fairness Doctrine and diversity regulations set forth by the FCC were in response to the government's growing concern for the need to properly inform members of the white American majority of the plight faced by people of color and to paint an accurate portrait of our national community.[232] Similarly, by regulating hiring norms in race- and gender-neutral reality programs, the government is regulating a realm of broadcasting that, by name, purports to capture real life and thus gives rise to a compelling reason to regulate—to ensure diversity and contribute to efforts aimed at presenting an accurate depiction of society.[233]

Casting decisions are protected by the First Amendment as expressive conduct when there is "intent to convey a particularized message"[234] and a strong likelihood that those who viewed it would understand the message.[235] Conduct like burning a flag, protesting by wearing armbands, and the creation of a script can be considered conduct that conveys a political message.[236] Casting for films and scripted television programs is inherently tied to the artistic process as expressive conduct because it involves conveying a particular message—the central storyline or plot presented in the script.[237] Casting decisions in the above-mentioned programs are entitled to strong First Amendment claims because they are inherently tied to a mode of artistic expression—scriptwriting.[238]

Conversely, by regulating hiring norms, this regulatory scheme would be subject to intermediate scrutiny. Unlike the regulatory scheme in *Metro Broadcasting*, which aimed to increase the diversity on television by implementing non-remedial racial preferences, the main goal of antidiscrimination laws is to remove barriers within the

230. *See generally id.* (elucidating that just as higher learning institutions are concerned with the social implications and benefits of diversity within its student body, so too is the government concerned with the greater implications of diversity within society).

231. *See* Honeycutt, *supra* note 130, at 436.

232. *Id.*

233. *See id.*

234. Texas v. Johnson, 491 U.S. 397, 409 (1989).

235. *See id.* at 404.

236. *See generally id.* (explaining the difference between conduct sufficiently tied to expression and conduct that is only tangentially tied to expression).

237. *See* Honeycutt, *supra* note 130 (explaining that the court could have determined the regulation sought to control conduct and not content on the facts).

238. *Id.*

hiring process. Instead of regulating the output of shows, regulating the hiring process would, in turn, create a ripple effect and an eventual shift in representation.

Thus, by drawing a distinction between regulating casting decisions for race- and gender-neutral reality-based shows, like *The Bachelor*, and casting decisions for scripted television shows and films, the *Claybrooks* court could justifiably find that the plaintiffs stated a viable claim for relief under Section 1981 and deny the defendant's Rule 12(b)(6) motion to dismiss without impermissibly interfering with the defendant's freedom of artistic expression under the First Amendment.[239] In reality programs lacking a narrative script, casting decisions are not inherently tied to the artistic process as expressive conduct because by their nature, they do not claim to involve the conveyance of a particular message.[240] Here, casting decisions are considered conduct—regulation of which controls employment hiring and firing procedures.[241] Thus, without being tied to an artistic message, casting decisions in race- and gender-neutral reality programs are not subject to broad First Amendment treatment.[242]

Shows that purport to represent certain cultural and ethnic groups are outside the scope of the rule because these shows are not considered race-neutral and deal with cultural nuances that aim to portray an intended message. Moreover, these shows are outside the scope of the policy rationales behind the exception because they help to foster diversity in programming. Thus, while the reality show exception appears to be overly broad, it only applies to a narrow sect of reality programs. In doing so, the rule avoids an overly broad regulation that, admittedly, places an imposition on the First Amendment rights of reality television network executives that is outweighed by the social harms the rule seeks to address.

E. Implications of the Claybrooks *Solution*

By subjecting networks and network executives to the duties that fall under discrimination and employment laws—particularly Title VII and Section 1981—and by applying an exception to First Amendment protections for race- and gender-neutral roles, reality

239. *See generally* Robinson, *supra* note 43, at 47 (explaining that the weight of legal authority suggests that Title VII and other regulations addressing discrimination seek to regulate conduct and not content).

240. *See id.*

241. *See generally id.*

242. *Cf.* Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations, 413 U.S. 376, 391 (1973).

television programming will begin to reflect the same diversity found in today's workforce.[243]

The media has the power to depict reality "in ways that can produce or transform social inequality."[244] Because "representational tools" like reality television programming have the power to enforce cultural norms, they in turn have the power to "reorganize people's sense of self, build alternative conceptions of realizable futures, and . . . function as agents of social transformation."[245] Thus, television's depiction of racial minority groups has the power to achieve far-reaching social consequences that "can serve to create, reinforce, or change disparaging stereotypes."[246]

By being exposed to more diversity in reality television programming—the most widely viewed form of television programming today—racial stereotyping and discrimination can begin to dismantle and society's collective perception of who and what types of people make up our society will begin to transform.[247]

It is through this collective change in perception that societal pressures will begin to "trickle-down" and influence other forms of media—sitcoms, talk shows, news programming, and films.[248] Once members of society are able to see a realistic depiction of the various types of people who make up our collective society, public perception will change and media will begin to mimic life.[249] When casting directors feel the need to fill roles with an actress without regard to her racial status or give equal consideration to a black actor and a white actor when attempting to fill the role of a man without the pressure to adhere to a social norm that no longer exists—only then will the problems of race in the media and society as a whole begin to deconstruct.[250]

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243. Robinson, *supra* note 43, at 47.

244. Drew, *supra* note 44, at 341.

245. *Id.*

246. Ford, *supra* note 19, at 266.

247. *See generally id.* (explaining the importance of challenging suits like *Claybrooks* in order to encourage more diversity and because of the possibility of a future successful suit).

248. *Id.* at 460 ("Should this happen, the benefits will far exceed the merely pragmatic, and in their small way, strike a blow for equality of representation in the American media.").

249. *Id.*

250. *Id.*

IV. CONCLUSION: AN IMMOVABLE OBJECT AND AN UNSTOPPABLE FORCE

"I've learned over a period of years there are setbacks when you come up against the immovable object; sometimes the object doesn't move."—Coleman Young[251]

In examining the *Claybrooks* decision, this Note attempts to reconcile two foundational pillars upon which this country rests: the freedom of speech and artistic expression without unreasonable governmental interference under the First Amendment; and the right to equal access and opportunity for every citizen, regardless of race, sex, religion, color, or national origin under the Civil Rights Act of 1964. So what happens when two vitally important doctrines collide? Is one obliterated for the sake of the other? Do both crumble to the ground?

When an immovable object meets an unstoppable force, they inevitably collide. But when the dust settles, perhaps something new is created—a nook, a small space where the two come together perfectly. That new space is what this Note attempts to create. An exception to the First Amendment's freedom of artistic expression that impedes minimally, if not insignificantly, on liberties protected under that right in order to serve a socially relevant goal: the breakdown in racial stereotyping and outgroup marginalization perpetuated by an industry and society desperately in need of a reality check.

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251. 94th Leg., Reg. Sess., No. 29 (Mich. 2007) (statement of Senator Scott (quoting Coleman Young, the first African American mayor of Detroit)).

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