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The Journal of Gender, Race & Justice

Fall, 2000

4 J. Gender Race & Just. 99

LENGTH: 18435 words

ARTICLE: "Don't Try to Adjust Your Television--I'm Black" n1: Ruminations on the Recurrent Controversy over the Whiteness of TV

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SUMMARY:

... ... Today these advocates point to the continued absence of major roles for actors of color--particularly among the shows on CBS, NBC, and ABC--as "Exhibit 1" of their case documenting the exclusion of people of color from television. ... The FCC regulations forbid discrimination by licensees "because of race, color, religion, national origin or sex," and required licensees to adopt affirmative action plans targeted to attract people of color and women. ... The regulations provide for FCC review of each licensee's employment practices, and require licensees to keep extensive records documenting its recruitment and outreach practices, or a statistical record of the ethnicity and gender of applicants for each full-time job vacancy filled by the licensee. ...

TEXT:

[*100]

We seldom appear in media as who we say we are, but as whites say we are. n2

I. Introduction

When the television networks announced their lineups for the fall 1999 season, the print media noted a striking phenomenon: of the twenty-six new shows announced by the networks, not one featured a lead character who was African American, Asian American, Native American, or Latino. n3 Moreover, the new series sported virtually no supporting characters of color. n4 Reacting to this news, one studio executive commented, "It's an awfully white world on television." n5

Several organizations of color reacted vociferously to the new lineups. n6 The groups formed coalitions and attacked the problem using a variety of legal and nonlegal approaches. They demanded meetings with network television executives, announced plans to boycott the fall lineup and its sponsors, and sought congressional investigations and legislation. n7 In addition, Kweisi Mfume, President of the National Association for the Advancement of Colored People (NAACP), stated that his organization was considering filing legal challenges to the networks' broadcasting licenses based on the belief that the networks might be in violation of the 1934 Communications Act. n8

This Article explores the controversy surrounding the portrayal, or lack thereof, of people of color on television. The Article briefly documents the history of protests concerning the entertainment industry's portrayal, or lack thereof, of people of color, focusing on network television. It considers whether [*101] these protests are important because of the sociological and political influence of television, or are much ado about nothing. The Article examines the potential legal and political remedies for the situation, and assesses the chances for each remedy's success. Finally, the Article asks this critical question: What should be the objective(s) of getting more faces of color in front of, and behind, the camera?

II. The History of the Controversy

A. Prologue: Past Struggles over the Absence of Actors of Color on Television

The paucity of faces of color on the small and big screens, and the problems with the way those faces are portrayed when they are presented, have been issues since at least 1915, the year the film *Birth of A Nation* made its debut. n9 Since that time, there have been continued difficulties and struggles around the issue of people of color on television. In 1951, the NAACP began a successful campaign to halt the television broadcast of *Amos and Andy*, a show which portrayed African Americans as lazy, scheming, and stupid. n10

In 1977, the United States Commission on Civil Rights issued a report entitled *Window Dressing on the Set: Women and Minorities in Television*, noting that the portrayals of women and people of color on television was a continuing problem. n11 In the introduction to its report, the Commission stated that "throughout the early history of television programming, minorities were excluded from the screen except for certain stereotyped roles in programs of a particular type." n12 In 1996, almost twenty years after that report, Reverend Jesse Jackson led a protest during the Academy Awards program, decrying the "historic practices of the motion picture and television industries which have limited the inclusion of people of color." n13 Ironically, a few short months after Jackson led this protest, those same networks announced fall television lineups [*102] with Bill Cosby and Phylicia Rashad as the only African American actors on any major network show. n14

B. Is There Any Truth to the Accusation of Network "Whitewashing"? n15

1. The Arguments

This lengthy history has led advocates of color to allege that network television systematically excludes or misrepresents people of color. n16 Today these advocates point to the continued absence of major roles for actors of color--particularly among the shows on CBS, NBC, and ABC--as "Exhibit 1" of their case documenting the exclusion of people of color from television. n17 Particularly notable, say these critics, are the host of network shows set in the major metropolitan areas of the United States such as New York, Los Angeles, Chicago, and San Francisco, where characters work and play in cities that are, if you believe television, all white. n18 These critics point out that, outside of a few ensemble casts, very few faces of color appear on television dramas. n19 And dramas featuring casts comprised predominantly of actors of color were, before January of 2000, nonexistent. n20

[*103] These critics note that the pattern documented by the United States Commission on Civil Rights in 1977 persists in the year 2000--that when faces of color do appear on network television series, they are primarily on comedies where, more often than not, those faces play stereotypical, and at times buffoonish, roles. n21 Even one of the most successful African Americans in television history, Bill Cosby, makes that argument:

At the level the networks support African-American, Latino and Asian shows, we've wound up with buffoonery that always hits the same note ... It's overly sexual, obsessed with bodily functions and orifices below the belt. There's no sign of education or decision-making beyond sexual encounters, no cares past an apartment and a car. n22

Some entertainment industry figures assert that the attacks on network television programming are unfair and unjustified. n23 They argue television has made great strides in reflecting the racial and ethnic diversity of this nation. n24 In support of this position they cite shows such as *Law and Order*, *Chicago Hope*, *NYPD Blue*, and *Homicide*, where people of color play major roles. n25

Other entertainment industry figures grumble that people of color seek to have it both ways. n26 They argue that on one hand racial minorities complain and threaten to boycott, because there are not enough people of color on televi-

sion. n27 On the other hand, those same groups complain and threaten to boycott any show featuring performers of color that does not fit a certain [*104] mold. n28 These critics point to the short, loud and unlamented history of the show *The Secret Diary of Desmond Pfeiffer* as their first exhibit. n29

The protests that at times greet such shows were lamented by actor Damon Standifer:

Time and again, TV shows that feature black leads are targeted for protests by these black activists...

...

Every type of "black" show has been protested: If a show portrays wealthy black people, it's criticized for ignoring the plight of poor ones. If a show features poor black people (as in "*South Central*"), it's criticized for stereotyping black people as poor. The lack of interracial love stories is protested, but so, too, are interracial love stories (as in the recent controversies over "*Ally McBeal*" and "*ER*"). Black sitcoms are protested (as in "*The Wayans Bros.*"), and protests against the lack of black voice-actors in animation are followed by protests against black-voice actors (as in "*The PJs*" and the Jar Jar Binks character in "*The Phantom Menace*"). n30

Still other critics are beginning to suggest that people of color are overreacting to portrayals on entertainment shows, suggesting that groups representing the interests of people of color are the only ones not to "get it" that network television is only entertainment. n31 Executives in the television industry defend programs that portray minority ethnic groups in unfavorable ways as [*105] progress in integrating faces of color into television casting. n32 People who defend television programs that find humor in sensitive racial issues, such as *The PJs*, say that these programs are harmless. n33 The defenders of these comedies ask, "are some black skins really that thin?" n34

2. The Statistics

The 1977 Commission report documented the underrepresentation of women and people of color in the television industry. n35 Statistics revealed that, out of a total of 5624 characters, 89.1% were Caucasian, with 10.9% characterized as nonwhite. n36 As of 1970, the population breakdown of the United States was estimated as 83% Caucasian and 17% nonwhite. n37

While the composition of the population has changed significantly in the intervening decades, the ratio of white actors to actors of color on television has not changed. In 1998, the United States Census Bureau estimated that African Americans comprised 12.7% of the populace; Latinos (designated "Hispanic origin" in Census data) comprised 11.2%; Asian and Pacific Islanders comprised 3.9%. n38 The Screen Actors Guild (SAG), using casting data for 1998 covering 43,686 roles on television, found a continued lack of people of color on television. n39 African Americans were best represented numerically, [*106] obtaining 13.4% of all roles on television. n40 Asian American and Pacific Island actors garnered only 2.1% of all roles cast, while Latinos accounted for 3.5% of the acting roles for that year. n41 The SAG report was prescient regarding the controversy over the 1999-2000 network television schedules, noting that "every ethnic minority except Asian/Pacific Americans saw a slight decline in the number of roles they captured." n42

There are a number of factors that may contribute to the continuing dearth of television characters of color, and the often stereotypical image of those characters that do appear. For instance, there is a lack of people of color behind the camera, particularly among television writers, directors, and owners. n43 The United States Commission on Civil Rights examined the composition of the management workforce at eight television stations. n44 The statistics revealed that there were 101 Caucasian producers versus 22 producers of color. n45 Of the directors, 50 were Caucasians and 2 were nonwhites. n46 There were only 5 nonwhite writers, compared with 41 Caucasian writers. n47

In 1997, the figures for people of color working as producers, directors, and writers remained dismal. The Writers Guild of America reported that people of color were awarded approximately 4% of the writing jobs available in Hollywood that year. n48 The Director's Guild reported that employment of people of color had dropped to 4%. n49 In 1999, the NAACP conducted a survey of television writers, finding that out of 839 writers employed on prime time [*107] network shows, only 55 were African American. n50 Moreover, 83% of these writers were employed on black-themed shows. n51

The numbers were even more dismal for Asian and Latino writers. The NAACP survey found only 11 Latino writers and 3 Asian American writers employed on prime time television series. n52 Julie Friedgen, President of the Lati-

no Writers Committee of the Writers Guild, explains: "Once these executives see a Latino name on a script, they just automatically assume that they can only write Latino." n53

The absence of color is even more pronounced in the executive suites of the companies that produce and broadcast television fare. Adonis Hoffman, Director of the Corporate Policy Institute, described the executive ranks of the entertainment industry this way: "Out of 1,000 top executives in the industry--including writers, directors, producers and agents--a handful are black. This virtually homogeneous group of white males exerts control over a more than \$ 20-billion industry that influences the culture, commerce and values of virtually every nation in the world." n54 This is not surprising, given that writing jobs have traditionally served as the track to becoming producers. n55

Another factor contributing to the problem is the lack of minority ownership of broadcasting licenses. In 1997, the United States Department of Commerce reported that while African Americans and Latinos comprised approximately 27% of the U.S. population, members of these groups owned only 2.7% of the nation's 1342 commercial television stations. n56 This underrepresentation led U.S. Senators John McCain and Conrad Burns to propose legislation allowing media companies to defer the capital gains tax on [*108] the sale of a media company to an entity owned by people underrepresented in the entertainment industry. n57 The proposal is similar to an FCC tax credit program that was eliminated by Congress. n58 CBS has also taken up the challenge of increasing ownership of the media by people of color, announcing the creation of an equity investment fund that will invest exclusively in minority-owned media enterprises. n59

3. How the Power Behind the Camera Determines Which Faces Appear in Front of the Camera

The absence of faces of color behind the camera creates barriers for people of color who make their living in front of the camera. This is inevitable, given the nature of the creative and casting processes. Because people of color are not part of the creative process for most shows, writers tend not to create roles for actors of color. n60 This deficit is difficult to overcome during casting calls.

Following the initial uproar over the 1999 fall television schedule, a story was reported that illustrated the source of the casting problem. Reporters questioned Kevin Williamson, the creator of the new 1999 fall show *Wasteland*, about the absence of black people in his vision of New York City. He responded that New York looked that way on his show because that was "his experience of it." n61

Famed filmmaker Woody Allen exhibited an unrepentant attitude when asked how he could make so many movies about Manhattan without African American characters:

I write about what it is that I know. I don't set out to be an equal-opportunity writer. My goal in film is not to represent all strains of New York City... But the inattention to minorities has no other significance. It's something I never give a moment's thought to. n62

Leslie Moonves, President and Chief Executive of CBS television, inadvertently identified the attitudes that lead to the lack of diversity in [*109] television casting. n63 In describing his efforts to improve the diversity of entertainment programs broadcast on CBS, he stated that whenever the people at CBS consider a potential show, "we discuss the options for adding minority characters to that show, if a role, by necessity can be color-blind." n64

Warren Littlefield, former Entertainment Division Chief of NBC, was more cognizant of the casting problem. He instituted a mandate that all shows produced for NBC include at least one person of color in the cast. n65 Littlefield described this mandate as "really a Band-Aid. What you have to do is go deeper in the process, when the shows are being conceptualized." n66 Such "Band-Aid" measures are necessary because the creators of television series do not think about including actors of color in new series. They must be reminded to consider whether a person of color might fit the role. n67

One clear cause of the continuing lack of television roles for actors of color is casting decisions. The problem begins very early in the process. "Breakdowns" are the entry point for most actors who are attempting to secure a role. n68 Breakdowns are, essentially, calls for actors based upon an initial reading of a script. n69 As described in one article, the breakdowns summarize the roles in a screenplay and describe the type of actor or actress desired for each part. n70

In discussing the breakdowns, agents and casting directors agree that each character is assumed to be white unless there is a specific indication to the [*110] contrary. n71 Of 160 listings for one day, 12 roles called for African American actors, 5 called for Latino actors, and 4 called for Asian actors. n72 While actors of color can and do try out for roles designated for Caucasians, the hurdles they must overcome to get those roles are overwhelming. "Latinos must over-prepare for auditions so they can make the casting director 'forget' a character was written with a white actor in mind... Many casting directors feel committed to the race agreed upon by the writers and studio executives, almost all of whom are white." n73

Actors of color must force casting directors to forget television roles were not created "for them." Because the world experiences of writers and producers often exclude people of color, it is inevitable that the casting decisions for their shows reflect a monochromatic view of the world. If actors of color can break the barrier between "white" roles and roles for people of color, these actors could reshape society's view of America.

4. The Sociology of Television's "Neighborhoods"

Perhaps television shows are predominantly white because much of American society still envisions America that way. Certainly, some commentators suggest that television's lack of diversity is a reflection of American reality. Attorney James K. Autrey, in commenting on the television diversity controversy, argues that while Americans interact with people of different races in the work environment, they seldom interact on a social level. n74 He notes that most television comedies are based in the characters' homes, while most dramas are set in working environments. n75 From Autrey's vantage point, "television is accurately mimicking the segregated social nature of our country. Although we may work together in integrated environments, blacks and whites seldom spend leisure or social time together." n76

[*111] Others argue that the American viewing audience should not expect to see shows where white professionals have friends and neighbors who are African American, Latino, Asian American, or Native American. Mary Mitchell, a Chicago Sun-Times journalist, expressed this view:

It is interesting, however, how much heat the networks are catching for simply projecting the segregated way many of us truly live... Most of us are friendly to people of different races on our jobs, but we go home to our whitewashed, or blackwashed, or brownwashed lives. While America is legally desegregated, it is not yet socially integrated ... So I can't see how programs about close friends in an urban city that exclude a black character in a leading role are flawed. Unless we are advocating that TV reflect life as it ought to be and not as it is, such shows looks [sic] pretty realistic to me. n77

5. The Economics of Television's "Neighborhoods"

To paraphrase President Clinton's campaign mantra, perhaps the whiteness of television is due to "the economy, stupid." n78 Several commentators have asserted that the color of the faces we see on any screen, and the way those faces are portrayed, are simply matters of economics. For these observers, the whiteness of television is a product of the law of supply and demand, and nothing more. n79 They argue that if the American public wants to see more faces of color on the small screen acting in serious dramas and high-minded comedies, people will watch *City of Angels*, *Cosby*, *The Practice*, and other shows that presently feature actors of color performing in a dignified manner. n80 Once the demand for these shows becomes manifest, critics argue, advertisers and network executives will request, and producers will produce, more of those shows. n81 According to this line of thinking, the African American audience, [*112] which is allegedly starved for positive images, would allow more scatological fare to languish in the ratings. n82

One anonymous studio executive put the proposition bluntly: "Studio executives will lend half an ear to a social case, but the bottom line is that the corporate suits are running a business, and business is about potential profits ... Develop a business case and you will bring about change." n83 Television producer Steven Bochco articulated this economic analysis in discussing the diversity problem: "I don't think racism is an issue. I think economics is an issue ... When things that you try don't succeed, there's a reluctance to try them again. When they do succeed, you try them over and over again." n84

One flaw in this economic argument concerns the "one try and out" phenomenon that afflicts programs featuring actors of color. n85 If a show with a minority-oriented theme fails on network television, television executives and producers cite that experience as proof such shows can never succeed. n86 Consequently, the theme is not tried again for long periods of time, if ever. n87

One can see the "one try and out" phenomenon at work in discussion surrounding the ratings "struggle" of *City of Angels*. While it ranks second among African American viewers, *City of Angels* ranks eighty-sixth among [*113] white viewers. n88 This translates into an overall ranking of seventy-fourth, a result defined as struggling, because a show on the three major networks is not successful unless it appeals to the "crossover audience." n89

One should note the "one try and out" tenor of the argument. Prior to the premiere of *City of Angels*, there was speculation that if the show did not attract a "mainstream" audience, future attempts to create minority-centered dramas would be met with resistance from network executives. n90 Indeed, there is speculation that CBS' recent decision not to broadcast *American Family*, a drama about a Latino family, is directly related to the ratings struggle of *City of Angels*. n91

Contrast these experiences with the case of the show *Grapevine*, which first aired in 1992. n92 This show starred white characters and featured "the sexual shenanigans of 20-somethings on South Beach." n93 In its initial outing, *Grapevine* was canceled after six episodes. n94 In the spring of 2000, the show was brought back despite that failure, on the theory it was "ahead of its time." n95 Shows featuring actors of color, or with strong minority group themes, are never given the benefit of speculation that they were "ahead of the curve." Shows that feature people of color do not receive multiple chances if the show fails the first time. If more people of color had power in television, perhaps quality shows featuring them would receive the same opportunities to succeed.

[*114]

III. The Lack of Faces of Color on Television and in Television: Does It Really Matter?

The statistical underrepresentation of people of color in front of and behind the camera is indisputable. The question protestors of all colors must answer at this point is, "So what?" Given that people of color are underrepresented, and at times misrepresented, on television comedies and dramas, why should we care? Do the dramas and comedies we see on television really make any difference in issues of social justice? Can the paucity of color in the entertainment lineups of network television be linked, in any persuasive way, to the problems of racial harmony we face today? Is it plausible that California voters' willingness to pass Proposition 187 was, in part, attributable to the way Spanish-speaking people are portrayed on the small screen? n96 Can we plausibly link the widespread societal acceptance of racial profiling to the constant portrayal of black males as hustlers, drug dealers, and criminals?

The United States Commission on Civil Rights began to explore these questions with its 1977 report, n97 acknowledging that "relatively little is known about the ways in which the stereotyped images of men and women and of whites and nonwhites affect viewers' beliefs, attitudes, and behavior." n98 The Commission did note one study that concluded white children who had little or no contact with African Americans were most likely to believe that portrayals of black people on television were realistic. n99 The Commission revisited the question of the impact of racial stereotypes in television in 1979, when it published *Window Dressing on the Set: An Update*. n100 In a section entitled "The Effect of the Portrayal of Minorities and Women on Children," the Commission [*115] discussed children's perceptions of people of color on television. n101 The Commission noted a study which found that children's perceptions of the appropriateness of certain occupations for minorities may be influenced by television, and that the portrayal of people of color in comic roles may have a deleterious effect on children's attitudes. n102

More recently, the federal government again manifested its belief that television shows are a major influence on people's behavior. In 1997, Congress approved a one-billion-dollar anti-drug advertising campaign. n103 Under this campaign, the networks had to agree to sell advertising time to the government at half price, essentially granting the government advertising time worth two billion dollars. n104 The White House Office of National Drug Policy subsequently created a program whereby the government gave up some of the advertising time it had purchased in exchange for getting anti-drug messages included in specific shows. n105

While the federal government has used the power of television in an attempt to alter behavior, other observers are not convinced that television affects people in such a way. Author Paul Monaco questions the proposition that television images influence how people behave:

The claims about media effects are based upon a specious model of human intelligence, reasoning, and development. In essence, claims about media effects have to endorse assumptions about learning that are tenuous and fallacious. After all, even when people are consciously trying to learn material the rate of their retention is strikingly low: measured at 10

percent for what normal subjects read, 20 percent for what is heard, and barely 30 percent for what is seen. The notion that humans are slavishly imitating behaviors that they see in the movies or on television is laughable, except that it is taken so seriously. n106

[*116] Monaco questions the assumptions, techniques, and conclusions of social science researchers who have concluded that television has a profound influence on behavior and beliefs. n107

Despite Mr. Monaco's skepticism, many social scientists agree with the government that television exerts a substantial influence on our society. n108 Because the prevailing view is that a large amount of power to shape society resides in the hands of television executives, directors, and writers, it is imperative that remedies are found to remake the composition of television shows and the executive suites that produce them. Organizations that represent people of color have an obligation to seek out possible remedies in order to reshape society's perception of them.

IV. Is There an Effective Remedy Available?

If we accept that television programs shape racial attitudes, the question facing advocacy organizations for people of color is whether they have effective tools available to ensure that television's neighborhoods, whether they appear in comedies or dramas, are never again whitewashed. There are at least five potential tools that might fit that job description. Four of those tools are legal, while the fifth is political.

Legally, advocates of color can resort to the Communications Act of 1934, which authorizes the licensing of television broadcasters. n109 Pursuant to the Act, two tools may provide specific relief. The first tool was created by the Federal Communications Commission (FCC), the agency charged with enforcing the mandates of the Communications Act. n110 The FCC requires that licensees pursue diversity in their hiring practices, distributing new licenses with an eye toward increasing diversity of ownership. n111 These mandates directly address [*117] the absence of diversity in the executive suites and production studios of television broadcasters. n112

The second tool would directly attack licenses held by broadcasters. Organizations of color would focus on network programming, arguing that such programming, to the extent it does not fairly represent the diversity of American society, is contrary to the public interest. Thus, people of color would have an avenue by which gain footing in the television industry.

Another pair of tools is available under Title VII of the Civil Rights Act of 1964 (Title VII). n113 The avenues of attack would be straightforward: persons of color in the television industry could bring a claim of disparate impact, using as support the statistics that document the racial disparities in hiring that exist in the industry. n114 In addition, some persons of color may have situations that lend themselves to a disparate treatment claim. This approach may be especially appropriate for redressing the problems of breakdowns. n115

Finally, advocates of color have a nonlegal tool--public pressureBwielded primarily by the threat of boycotts. This remedy has three advantages. First, it is not tied to any legal argument. Second, it can be directed toward problems in front of and behind the camera. Third, it can more easily be used to improve the quality of programming that does feature performers of color. Therefore, advocates of color may flex their political strength through boycotts while pursuing legal options to increase diversity in television programming.

A. Communications Act of 1934 n116

1. Enhancing Diversity Behind the Camera

Perhaps the most promising and least problematic remedy for correcting the whiteness of television is to address the lack of faces of color behind the camera. Indeed, the Supreme Court concluded in *Metro Broadcasting, Inc. v. FCC* n117 that the FCC is empowered to correct that situation. n118 In *Metro* [*118] Broadcasting, two FCC policies were under attack. n119 The first policy awarded an enhancement for minority ownership in comparative proceedings for new broadcasting licenses. n120 The second policy declared that a class of minority-owned radio and television broadcast stations could only be transferred to other minority-controlled firms. n121 The FCC defended these policies by arguing that there is a legitimate nexus between race and expression. n122 Based upon that conclusion, the FCC argued the licensing scheme was consistent with its duty "to achieve the public interest in programming content without direct content regulation." n123

In a 5-4 decision, the Supreme Court upheld the FCC's right to enforce both policies. n124 The majority opinion concluded that the FCC's policies advanced important First Amendment interests. n125 "The interest in enhancing

broadcast diversity is, at the very least, an important governmental objective ... The diversity of views and information on the airwaves serves important First Amendment values... The benefits redound to all members of the viewing and listening audience." n126

The Metro Broadcasting opinion is encouraging, because the majority's reasoning agrees with a criticism leveled by people of color within the entertainment industry. n127 They argue that the racial composition of the power structure behind the camera is a major cause of problems in front of the camera. For example, Paris Barclay, an African American director and co-producer of the new, predominantly African American television drama *City of Angels*, notes that "most of the people who develop and oversee network television shows are white males who live in Malibu, Brentwood or Bel Air. They don't [*119] know a lot of black people, and they're not interested in really writing those kinds of characters." n128

Kevin Williamson, whose "experience of New York City" is devoid of people of color, agrees with Barclay. n129 When questioned about the absence of diversity on his and other shows slated for the 1999 season, n130 Williamson stated, "If we're not seeing enough diversity on television, I would encourage us to get some more diverse storytellers so that they can create these stories." n131 If people of color filled more positions both in front of and behind the camera, perhaps the power structure in Hollywood would change.

The supposition that broadening the color spectrum of the people working behind the camera will increase the number of faces of color appearing on the small screen is supported by the experience of gays on television. Just three years ago, Ellen DeGeneres acknowledged that she was a lesbian and was able to incorporate that dynamic into her show, generating tremendous publicity. n132 Now, news stories comment on the expanding number of shows on television featuring gay characters. n133 The result of the growing presence of gay people in positions of power at the networks and production studios is the increasing casting of gays in prominent roles on television shows. n134 As the Media Director of the Gay & Lesbian Alliance Against Defamation put it, "People in [*120] the industry are realizing: As a gay person in a position to put a character on the air, if I don't do it, no one will." n135

The facts support the FCC's conclusion that improving diversity behind the camera will enhance the diversity of the performers appearing in front of the camera. n136 Unfortunately, the current drive against affirmative action in politics and the courts does not bode well for the continued vitality of Metro Broadcasting. n137 In a case fraught with ominous implications for any attempt to enhance diversity through the FCC's regulatory power, one federal circuit court has held that Metro Broadcasting is no longer good law. Leading up to the D.C. Circuit's decision in *Lutheran Church-Missouri Synod v. FCC*, n138 the FCC had ruled that the church violated the Commission's equal employment opportunity regulations because it used religious hiring preferences and because its recruitment of minority employees was inadequate. n139 The FCC regulations forbid discrimination by licensees "because of race, color, religion, national origin or sex," n140 and required licensees to adopt affirmative action plans targeted to attract people of color and women. n141 The church argued the affirmative action component of the regulations was a violation of the Equal Protection Clause of the Fifth Amendment. n142 The FCC concluded that its regulations were valid as against the constitutional challenge, because they [*121] were necessary to achieve its objective of fostering diverse programming content. n143

The D.C. Circuit agreed with the church. n144 Because the Commission did not define precisely how the regulations would promote broadcast diversity, the court did not hesitate to supply its own definition of the Commission's objective. The court stated, "The more appropriate articulation would seem the more particular: the fostering of programming that reflects minority viewpoints or appeals to minority tastes." n145 Having defined the FCC's diversity objective, the court held that this objective could not satisfy the strict scrutiny standard of review:

We do not think diversity can be elevated to the "compelling" level, particularly when the Court has given every indication of wanting to cut back Metro Broadcasting... We doubt, however, that the Constitution permits the government to take account of racially based differences, much less encourage them. One might well think such an approach antithetical to our democracy. n146

The FCC has, however, continued to fight for diversity behind the camera. Responding to the *Lutheran Church-Missouri Synod* ruling, the FCC promulgated new rules reiterating its insistence that licensees must aggressively pursue diversity. n147 Acknowledging the difficulties presented by the ruling, the new FCC regulations do not mandate affirmative action. n148 They do, however, require licensees to provide equal employment opportunities, and

mandate outreach programs and management training to enhance compliance with the equal opportunity in employment mandate. n149 The regulations provide for FCC review of each licensee's employment practices, and require licensees to keep extensive records documenting its recruitment and outreach practices, or a statistical record of the ethnicity and gender of applicants for each full-time job [*122] vacancy filled by the licensee. n150 The regulations allow the public to file complaints with the FCC based upon a licensee's failure to comply and to base opposition to the renewal of a license on such failure. n151

2. Enhancing Diversity in Front of the Camera

In articulating the NAACP response to the lack of faces of color in the fall 1999 television lineup, NAACP President Kweisi Mfume stated that he and other leaders of the NAACP were considering filing a claim against one or more of the networks under the Communications Act of 1934. n152 The legal basis for the proposed challenge was that broadcasting licenses are held under a public trust. n153 Mfume reasoned that the public trust is violated when television does not fairly represent people of color, either numerically or thematically. n154

In theory, this proposed legal attack on network television licenses looks promising. Each network owns several television stations. n155 Those broadcasting licenses are incredibly valuable, because there is a limited number of over-the-air channels available to broadcast television images. n156 The licenses are granted by the FCC and held by television stations and networks, pursuant to the Communications Act. n157 The Act declares that the FCC's [*123] licensing power is to be exercised to safeguard the "public convenience, interest, or necessity." n158

Mfume's argument fits comfortably within this statutory language. One can argue persuasively that television programming portraying multicultural cities as exclusive bastions of young white professionals does not fairly represent how the races regularly interact with each other, or fairly represent life in the United States today. Even if television's writers, directors, and producers have visions of an all-white world, their failure to address issues such as diversity, race relations, and racism is problematic. To borrow from the language of the Communications Act, the networks' failure to fairly portray people of color does not serve the public interest. n159 Hence, their television station licenses should be revoked or suspended.

This argument was effectively articulated by Guy Aoki, President of the Media Action Network for Asian Americans:

Television should reflect not only the diversity of people in everyday life, but the diversity of the jobs and positions they hold as well. When they [television executives] realize the different story-line possibilities this opens up, they'll understand that including people of color in their casts is not a creative imposition--it's a creative opportunity. n160

Based upon the public interest language of the Communications Act, the FCC for many years enforced the fairness doctrine, n161 which held that broadcasters were required to meet minimum standards of "fairness" in order to retain their licenses. n162 Among its standards was an obligation that broadcast stations provide fair coverage of differing views. n163 This doctrine would, of [*124] course, lend strength to the attack on the exclusion and misrepresentation of people of color in television.

The fairness doctrine was repealed by the FCC in 1987 in its Syracuse Peace Council decision, n164 when the agency concluded that "the fairness doctrine contravenes the First Amendment and thereby disserves the public interest." n165 Despite the FCC's abandonment of the fairness doctrine, one could, as Kweisi Mfume suggested, mount an attack by filing complaints with the FCC seeking to revoke the networks' station licenses. These complaints would state that the networks' failure to fairly present and portray people of color is not in the public interest. However, the FCC's repeal of the fairness doctrine poses a virtually impregnable barrier to that attack.

A case recently decided by the Eighth Circuit illustrates the difficulty of successfully making this argument. In *Arkansas AFL-CIO v. FCC*, n166 a coalition of groups filed a complaint with the FCC alleging that a television station violated the fairness doctrine in its coverage of a ballot issue in Arkansas. n167 The FCC dismissed the complaint, reaffirming its decision to repeal the fairness doctrine. n168 The Eighth Circuit upheld the FCC decision, n169 explicitly holding that any attempt to argue the fairness doctrine in court must fail because of the agency's determination that the fairness doctrine is no longer required:

Under the 1934 Communications Act, the FCC is charged with interpreting the statutory mandate that stations operate in the public interest. For years, the FCC interpreted "operate in the public interest" as requiring the fairness doctrine. However, it is within the FCC's discretion to alter its interpretation of "operate in the public interest" in light of changed circumstances...

...

... In *Syracuse Peace Council*, the D.C. Circuit credited the FCC's testimony that the dramatic increase in media outlets since 1959 eliminated the need for the fairness doctrine. In addition, the FCC presented testimony that the fairness doctrine actually chilled speech. [*125] We think this kind of judgment about the way the world of broadcasting works is precisely the type of determination that the FCC is better equipped to make than are the courts... Therefore, while *Syracuse Peace Council* does not bind this court, we agree with that well-reasoned decision. n170

An additional barrier to using the public interest language of the Communications Act is the principle that federal courts should defer to the FCC's expertise, since it is the administrative agency charged with enforcing the Act. n171 Even before the repeal of the fairness doctrine, one federal court held that because there are "difficult problems with how and when [the fairness doctrine] should be applied[,] ... there is particular reason to defer to the agency established to exercise supervision." n172 Given the FCC's rejection of the fairness doctrine, the presence of potential First Amendment issues, and the federal courts' willingness to defer to the FCC, it is improbable filing challenges to network broadcasting licenses will be successful.

B. Title VII n173

Title VII of the Civil Rights Act of 1964 prohibits discrimination in employment based on race, color, religion, sex, or national origin. n174 The lack of diversity both behind and in front of the camera may be addressed through the provisions of Title VII. The purpose of this section is to briefly explore some of the possible applications of Title VII to the problem of television diversity, as well as the limitations of this approach.

Title VII prohibits both intentional and unintentional discrimination. n175 Intentional discrimination under Title VII can be proven with either direct or indirect evidence. n176 The method for proving cases of intentional discrimination where direct evidence is present is fairly straightforward. However, the [*126] incidence of this kind of case has decreased over time and most cases are now brought under Title VII using circumstantial evidence. n177

In *McDonnell-Douglas Corp. v. Green*, n178 the Supreme Court developed a burden-shifting analysis to deal with the complexities of circumstantial evidence. The basic outline of the burden-shifting framework is a three-step analysis. First, the plaintiff is required to make a prima facie showing of discrimination. n179 Once the plaintiff has done so, the burden of production shifts to the defendant to articulate a legitimate nondiscriminatory reason for the action. n180 The plaintiff is then free to argue that the reason articulated by the defendant was pretext. n181

To make a prima facie showing under Title VII of race-based discrimination in hiring, the plaintiff must prove the following: that the plaintiff is a member of a racial minority; that the plaintiff applied for the job and was qualified for the job for which the employer was seeking to hire an employee; that despite the plaintiff's qualifications, the employer did not hire the plaintiff; and, after the rejection, the employer continued to seek applicants with the plaintiff's qualifications. n182

In addition to finding liability where the defendant was involved in intentional discrimination, Title VII has been expanded to provide liability when the discrimination is not intentional, but where some activity has a disproportionate impact on members of a protected class. n183 This is known as a disparate impact claim, and the standard method of proving such a case is through the use of statistics demonstrating that the employer's practices had a disproportionate impact on a protected class. n184

[*127]

1. Enhancing Diversity Behind the Camera

As previously discussed, the statistics documenting underrepresentation of people of color in the ranks of writers, directors, producers, and executives are very strong. n185 This kind of statistical evidence could be used to support a prima facie showing of discrimination under the disparate treatment branch of employment discrimination law. n186

In *International Brotherhood of Teamsters v. United States*,¹⁸⁷ the Supreme Court stated that statistics can prove strong enough to support a prima facie showing of discrimination:

Our cases make it unmistakably clear that "statistical analyses have served and will continue to serve an important role" in cases in which the existence of discrimination is a disputed issue... We have repeatedly approved the use of statistical proof, where it reached proportions comparable to those in this case, to establish a prima facie case of racial discrimination in jury selection cases ... Statistics are equally competent in proving employment discrimination.¹⁸⁸

Similarly, the statistics documenting the racial disparity in the television industry may be strong enough to prove prima facie case. However, once a prima facie case is made, the burden shifts to the employer to articulate a legitimate, non-discriminatory business reason for the disparity.¹⁸⁹ Even if the employer is not successful in doing so, they may still escape liability based on the "business necessity" defense.¹⁹⁰

2. Enhancing Diversity in Front of the Camera by Attacking Racial Disparities in Casting

By and large, the courts and the Equal Employment Opportunity Commission (EEOC) have not directly addressed the legal questions raised by [*128] racial disparities in casting.¹⁹¹ However, on its face, Title VII seems to provide an available remedy for actors of color who are unfairly excluded from television roles.¹⁹² Plaintiffs could potentially rely on either the disparate treatment or disparate impact theories of discrimination under Title VII. Given the nature of casting calls,¹⁹³ the easiest approach may be the disparate treatment route. The major problem with this approach is not the prima facie case, which should be fairly easy to establish, but the possibility that the employer could argue a bona fide occupational qualification (BFOQ).¹⁹⁴

The BFOQ defense to disparate treatment is narrow, and notably does not include an exception for race.¹⁹⁵ Despite the fact that there is no such exception, there is controversy in the entertainment community over race-specific casting.¹⁹⁶ In addition, there is evidence that the legislature and the EEOC might support a race-based BFOQ in limited situations, including acting.¹⁹⁷ This kind of argument would raise some serious questions about the nature of the entertainment industry, raising complicated questions about the rights of writers, producers, and directors to express themselves, and the rights of actors to find employment. Currently, however, no such defense exists.

In addition to the possible disparate treatment claims actor-plaintiffs may bring, actor-plaintiffs could rely upon the statistical disparities in the entertainment industry to show that the hiring practices of the television industry have a disparate impact on actors of color.¹⁹⁸ The employer could, [*129] however, respond by stating that casting a certain race in a certain role is a business necessity and thus escape liability.¹⁹⁹ The business necessity defense raises some of the same issues present in the BFOQ defense. The business necessity defense has the added benefit for plaintiffs of not being a complete defense to liability. However, it has the additional burden of being legitimately influenced by customer preferences.²⁰⁰

Part of the reason there are no clear answers on this issue is that no cases squarely address the topic. Writers who have examined the issue of racial casting have advanced two plausible explanations for the absence of legal challenges to the disparities that have been documented. One argument is that people who are excluded from television and other entertainment industry jobs do not bring discrimination claims because they believe television, movies, and the arts in general are immune from discrimination law.²⁰¹ A second view asserts that affected artists view casting decisions as matters of artistic freedom that are protected by the First Amendment and therefore immune to legal scrutiny for discrimination.²⁰²

C. Of Boycotts and "Brownouts"

In response to the lack of characters of color in fall television lineups, several organizations of color called for boycotts or "brownouts."²⁰³ [*130] Historically, the boycott has occasionally been an effective weapon against racism, discrimination and social injustice.²⁰⁴ The D.W. Griffith movie, *Birth of A Nation*, glorifies the Ku Klux Klan and demonizes African Americans.²⁰⁵ In 1915, when its racist content became known, W.E.B. DuBois and the fledgling NAACP mounted protests, calling for boycotts and censorship of the film across the United States.²⁰⁶ Those efforts enjoyed immediate success in Pasadena, California and Wilmington, Delaware, where showing of the film was blocked.²⁰⁷ In Chicago, the board of censors temporarily banned the film.²⁰⁸ In New York, the NAACP successfully lobbied the censorship board into ordering the removal of some scenes.²⁰⁹ Later, when the film was reissued with a

soundtrack, the NAACP convinced the governor of Massachusetts to ban its showing. n210 During the 1960s, boycotts were effectively used in combating segregation in the South. n211 In the 1970s and 1980s, Cesar Chavez and the United Farmworkers Union used boycotts to educate the public about the deplorable working conditions for farm workers, and to promote the workers' right to organize. n212 This movement initially succeeded in California, which in [*131] 1975 enacted the Agricultural Labor Relations Act. n213 That victory was later duplicated in Arizona, Idaho and Kansas. n214

More recently, consumer boycotts by people of color helped convince the Disney Company to first apologize, and then settle litigation involving a promotion by one of its radio stations giving away "Black Hoes," a double entendre intended to evoke images of Black whores. n215 Similarly, in 1999, two African American radio show hosts organized a successful boycott and write-in campaign against CompUSA, which allegedly refused to advertise on radio stations owned by or aimed at African Americans. n216

D. The Protests and Brownouts over the Fall 1999 Lineup

In this era of media mega-corporations and rampant consumerism, will boycotts and brownouts influence the major networks to diversify? It is questionable whether a well-organized boycott would have a significant impact on these multinational corporations. n217 Another question is whether people who want networks to change their programming would heed a call to turn off their televisions.

After the controversy over the fall 1999 lineup erupted, a coalition of groups representing people of color called for a "brownout" during the week of September 12. n218 When the brownout was announced, Texas state [*132] representative Ciro Rodriguez expressed fear it would be ineffective. n219 One student at Howard University, a historically black institution, was skeptical of the impact the brownout would have: "I don't think the boycott will make that big a difference, as long as there are enough white people watching." n220 Another student, while expressing optimism that the boycott would be successful in bringing attention to the issue, stated he would not actively participate in the boycott. n221

It appears Representative Rodriguez's fears were well founded. The call for a brownout was widely reported in the press n222 and publicized on the Internet. n223 The press reported that the campaign provoked little concern among industry executives, n224 and Nielsen Media Research reported no significant decline in ratings during the targeted week. n225

In terms of lending credibility to the idea of a boycott or brownout of television, part of the problem is the level of penetration television has made, at least in the African American community. n226 While the average American household watches television approximately fifty hours per week, African American households average seventy hours per week. n227 Also, by some measures, African Americans are, per capita, America's biggest consumers. n228

[*133] Happily, television network executives reacted favorably to public and private pressure. n229 After several rounds of discussion with a coalition of advocacy groups, each major network agreed to a wide range of reforms aimed at improving diversity at both ends of the camera. n230 NBC, for example, agreed to place at least one writer of color on each of its second-year series, to initiate a minority hiring program, and to seek out and hire qualified directors of color. n231 ABC agreed "to foster minority representation at all levels ... through grants, existing internship programs and by more aggressively identifying whether minority candidates have been considered in the job interview process," and by tying management bonuses to management's performance in these areas. n232 Thus it appears that, despite the daunting economic power of the networks and the seeming apathy of population segments toward boycotts and brownouts, these tools do retain the power to persuade and cajole the networks into at least paying lip service to the principle of diversity.

V. Conclusion

The protests and negotiations over the past year have resulted in some tangible gains. There was an increase in the number of roles for African American actors in the fall 2000 television series lineup. Asian Americans and Latinos, however, remained largely invisible. n233 The networks have also promised to address the absence of people of color in the creative process by training more writers and producers, and by actively seeking to employ writers and producers of color already established in the business. n234

These mixed results are encouraging. Certainly, the consciousness of the entertainment industry has been raised regarding the importance of diversity on both sides of the camera. The question now is, AWhere should people of color go from here?

First, monitoring and constant vigilance over the agreements with networks are an absolute necessity. Turnover in the management suites of television [*134] networks means that promises made by today's executives can quickly be forgotten by tomorrow's replacements. n235 The emphasis on profit makes vigilance even more important. The statements of some within the industry make clear that while the goal of diversity is "socially desirable," networks will pursue it only in the context of programs that are successful in generating revenue for the networks. n236 If today's City of Angels struggles in the ratings or tomorrow's new program, featuring an actor of color in a prominent and serious role, fails, the networks may abandon the pursuit of diversity. So advocacy groups must insist that producers and writers of color and shows with minority themes be given the same chance to fail and "try again" that networks extend to others shows and artists. n237

Second, groups should explore the options of filing litigation under Title VII and pursuing administrative action before the FCC, should networks fail to live up to the promises made in those agreements. The employment statistics for actors, writers and producers of color in the television industry present a ready-made prima facie showing of employment discrimination under Title VII. n238 Statistics on the hiring practices of broadcast licensees should become more complete and readily available in light of the FCC regulations requiring extensive record-keeping. The explanations offered publicly by television's present executives, writers, and directors for their failure to create more roles for people of color would not provide satisfactory defenses to charges of unlawful employment discrimination. n239 The threat of action under Title VII, if the networks do not correct current conditions, should create adequate leverage for securing more diversity.

[*135] The FCC insists that diversity of viewpoint is a valid objective of its broadcast licensing regulation. n240 This allows advocates of color to threaten to challenge network licenses in order to ensure compliance with the promises made in fall 2000. Resorting to the FCC for relief by relying upon its equal opportunity regulations has two benefits. First, the FCC is unquestionably a more receptive audience for claims of racial discrimination than the federal judiciary, given the latter's current makeup. n241 Second, pursuit of administrative remedies will likely require fewer financial and legal resources on the part of advocacy organizations.

Finally, public pressure on the networks must be maintained. Because of concerns over reputation, television networks seem especially responsive to public criticism on issues of diversity. n242 As this past year's episode has demonstrated, a concerted public campaign demanding greater diversity does yield positive results. To ensure the effectiveness of public campaigns for diversity on and in television, advocates of color must formulate and clearly articulate persuasive objectives. The limited objective of securing more employment for actors, writers, directors, and producers of color is certainly legitimate and laudable. That goal is not, however, the kind of incentive necessary to convince people to turn off their television sets and limit their spending.

The campaign for diversity must focus on the societal impact of television's portrayal of people of color, or its lack thereof. Advocates must emphasize how ubiquitous television is, and how the images it projects shape the attitudes of all members of society. Advocates must never lose sight of the importance of a presence behind the camera and in all facets of the creative process, for these form the foundations upon which the images and concepts that flicker across the small screen are formed. When people of color gain access to the board rooms and studios where television's images are dreamed up and produced, those images and concepts are bound to become more diverse, and the messages transmitted about people of color will be, as a whole, more positive.

To have maximum effectiveness, a grassroots campaign for diversity in television must secure commitments from substantial majorities of the affected [*136] communities. If advocates of color can convince half of their constituents to turn off WB programs until they become less stereotypical, or to refuse to visit Disneyland or Disney World until ABC lives up to its promise to diversify its programs and creative management staffs, people of color will transmit a powerful message to network executives. Unless that message is communicated to television's decision makers, the saga of 1999 is destined to repeat itself. n243

Legal Topics:

For related research and practice materials, see the following legal topics:

Communications Law Related Legal Issues Taxation Labor & Employment Law Discrimination Racial Discrimination-Coverage & Definitions Tax Law State & Local Taxes Sales Tax General Overview

FOOTNOTES:

n1. Ghost (Paramount Pictures 1990) (depicting a monologue by Arsenio Hall on The Arsenio Hall Show).

n2. My Soul Looks Back, "Less I Forget: A Collection of Quotations by People of Color 401 (Dorothy Winbush Riley ed., 3d ed. 1993) (quoting Ellen Holly).

n3. Greg Braxton, A White, White World on TV' s Fall Schedule, L.A. Times, May 28, 1999, at A1.

n4. See id.; Minority Groups Uniting to Protest Lack of Roles, Star Trib. (Minneapolis-St. Paul), June 29, 1999, at 1E; Brian Lowry et al., Networks Decide Diversity Doesn't Pay, L.A. Times, July 20, 1999, at A1.

n5. Braxton, supra note 3.

n6. See Greg Braxton, Groups Join to Protest Exclusion Television: Coalition Forms in Response to the Absence of Minorities on New Shows in Prime Time this Fall, L.A. Times, June 25, 1999, at F1 (stating that "an interracial cross-section of entertainment industry organizations and advocacy groups" protested the absence of faces of color in the fall 1999 lineup).

n7. Id.; Faye Fiore, California and the West: Latinos Urge Congress to Pressure Hollywood, L.A. Times, Sept. 14, 1999, at A3.

n8. Greg Braxton, NAACP Will Fight Network TV Lineups, L.A. Times, July 12, 1999, at A1; see discussion infra Part IV.A.2.

n9. David Levering Lewis, W.E.B. DuBois: Biography of a Race 506-07 (1993); see discussion infra Part IV.C.

n10. That campaign was finally successful in 1966. Braxton, supra note 6; see discussion infra Part IV.C.

n11. U.S. Comm'n on Civil Rights, Window Dressing on the Set: Women and Minorities in Television 4 (1977).

n12. Id.

n13. Donna Mungen, Oscar Time Exposes Lack of Racial Diversity, USA Today, Mar. 21, 1997, at 15A.

n14. Tom Feran, Trend in TV Fall Schedules is Lack of Ethnic Diversity, Star Trib. (Minneapolis-St. Paul), June 6, 1996, at 11E.

n15. The NAACP charged that there was a "virtual whitewash" in the fall 1999 television lineup. Brooks Boliek, Minority Tax Credits Resurface: GOP Senators Propose Capital-Gains Breaks for Media Sales, Hollywood Rep., July 30, 1999, available in LEXIS, News Library, Hollywood Rep. File.

n16. Claudia Kolker, Latino Groups Urge Boycott of Network TV, L.A. Times, July 28, 1999, at A12. While Latinos compose 11% of the population, they only represent 2% of the characters on television. *Id.* Latino groups have talked to networks repeatedly about increasing the number of Latinos on television without any success. Latino groups, therefore, organized a "brownout" of network shows during the first week of the 1999 fall season. *Id.*; see U.S. Comm'n on Civil Rights, *supra* note 11, at 11. In 1967, Frito-Lay began an advertising campaign to sell corn chips based on a Hollywood stereotype of Mexican people. *Id.* The "Frito Bandito" had a Spanish accent, a handlebar mustache, an oversized sombrero, and a white suit squeezed over his big belly. The "Frito Bandito" satisfied his craving for Fritos by stealing the corn chips from unsuspecting victims with a pair of six-shooters. *Id.*

n17. Kevin D. Thompson, The New Fall TV Shows: What's Missing?: Minorities, Palm Beach Post, Aug. 25, 1996, at 1J.

n18. *Id.*

n19. Jacqueline Trescott, "Roots," Wrapped Around the American Psyche: Twenty Years Later, the Minise-ries's Influence is Still Felt, Wash. Post, Feb. 16, 1997, at G05.

n20. See Tom Feran, Hopes are High that Angels' Will Fly, Plain Dealer (Cleveland), Jan. 19, 2000, at 1E (stating that 71% of the crew of City of Angels is minority and female).

n21. See Braxton, *supra* note 6.

n22. Gail Pennington, Bill Cosby Gets Better with Age, Stuart News/Port St. Lucie News (Fla.), July 28, 1996, at P5.

n23. See Thompson, *supra* note 17 (according to Les Moonves, CBS Entertainment President, the focus in creating new television programs should be on developing quality shows, not "creating an all-minority" show); Mary A. Mitchell, Disregard for Minorities is No Network News Flash, Chi. Sun-Times, Sept. 19, 1999, at 22 (arguing that television reflects the segregated lives that most people live).

n24. See Thompson, *supra* note 17 (stating that NBC made great strides between the mid-1950s and the 1980s, in creating programs featuring minority actors).

n25. *Id.*

n26. Greg Braxton, Protesters Say Fox's "The PJs" is "a Slap in the Face" to Blacks, L.A. Times, Jan. 6, 1999, at F2. Groups protested The PJs, a comedy based in the inner city that featured an African American cast. *Id.* According to Najee Ali, who leads Project Islamic H.O.P.E., a religious advocacy organization, the show "makes a joke out of people's suffering and poverty." *Id.*

n27. See Braxton, *supra* note 3. On television, there are few roles for African Americans and even fewer roles for other ethnic groups such as Latinos, Asian Americans, and Native Americans. *Id.*

n28. See Don Aucoin, An Uncivil War over "Desmond," Boston Globe, Oct. 3, 1998, at C1 (stating that minority groups criticized The Secret Diary of Desmond Pfeiffer, a comedy starring an African American, because the show incorporated slavery into its comedic scenes).

n29. The comedy, set in the Civil War era, featured as its lead character Desmond Pfeiffer, a black British nobleman who worked in the Lincoln White House. Pfeiffer was portrayed as the smartest person in the White House. *Id.* African American groups and politicians protested the airing of the show because in their view, "it desecrates the bones of our ancestors who died to get us to this point." *Id.* (quoting Danny Bakewell, President of the Brotherhood Crusade).

n30. Damon Standifer, *Activists Harm Black Actors' Aspirations*, L.A. Times, June 28, 1999, at F3. Standifer has played roles in the film *Ace Ventura: When Nature Calls* and the television series *Martin*, *The Wayans Bros.*, *Becker*, and *Mad About You*. *Id.*

n31. See, e.g., Brian Lowry, *Pushing an Already Torn Envelope*, L.A. Times, Oct. 5, 1999, at F1 (stating that minority activists have "cried wolf a few times too many" in the area of television broadcasting and that this "constant nagging" has caused the public to stop listening to these groups).

n32. Keith Marder, *The Irony (and Unknown Fate) of "Desmond Pfeiffer"*, Daily News L.A., Oct. 4, 1998, at L2. Dan Valentine, President and Chief Executive Officer of United Paramount Network (UPN), believed that *The Secret Diary of Desmond Pfeiffer* was the result of a concerted effort to integrate programs on UPN. *Id.* In reaction to the criticism over the television show, Valentine asked, "What was all the fuss about?" *Id.*

n33. See Howard Rosenberg, *"The PJs": Equal Opportunity Satire*, L.A. Times, Jan. 9, 1999, at F1 (arguing that *The PJs* is funny, not insulting).

n34. *Id.*

n35. The exhaustive statistics relied upon by the Commission were compiled by the Annenberg School of Communications at the University of Pennsylvania over a six-year period. U.S. Comm'n on Civil Rights, *supra* note 11, at 158.

n36. *Id.* at 28 tbl.2.1. The data used by the Commission are not broken down into individual ethnic groupings. *Id.*

n37. *Id.* at 32.

n38. U.S. Census Bureau, *Resident Population Estimates of the United States by Sex, Race, and Hispanic Origin: April 1, 1990 to July 1, 1999, with Short-Term Projection to July 1, 2000* (Aug. 25, 2000) <<http://www.census.gov/population/estimates/nation/intfile3-1.txt>>.

n39. Screen Actors Guild, *New Screen Actors Guild Employment Figures Reveal Decline in Roles for Latinos, African Americans and Native American Indian Performers* (May 3, 1999) <<http://www.sag.com/pressreleases/pr-la990503.html>>.

n40. *Id.*

n41. *Id.* The report notes these data are potentially misleading because they do not examine the quality of or compensation for the roles reported. *Id.*

n42. *Id.*

n43. Adonis Hoffman, Race: Through an Accurate Prism, L.A. Times, Aug. 8, 1999, at M1 (stating that among the top one thousand executives, which includes writers, directors, producers, and agents in the entertainment industry, "a handful are black").

n44. U.S. Comm'n on Civil Rights, *supra* note 11, at 88.

n45. *Id.* at 111-12 tbl.6.6.

n46. *Id.*

n47. *Id.*

n48. Mungen, *supra* note 13.

n49. *Id.*

n50. Greg Braxton, Survey Cites Low Number of Minority Writers on Series, L.A. Times, Oct. 9, 1999, at F2.

n51. *Id.* The survey went further, examining the composition of the writing staffs for the major networks. It found that CBS had a total of 144 writers working on series, only 2 of whom were African American (and both worked on *Cosby*). *Id.* NBC had a total of 198 writers, but only 1 African American. *Id.*

n52. *Id.*

n53. Greg Braxton, Faced with Reality of Exclusion: Minority Writers, Actors Say Emphasis on Young Whites has Put Their Livelihood at Risk, L.A. Times, July 24, 1999, at F1 (quoting Julie Friedgen, President of the Latino Writers Committee).

n54. Hoffman, *supra* note 43.

n55. Braxton, *supra* note 50.

n56. Larry Luxner, A High Price to Pay: Small Carriers Tell FCC of the Hardships of Competitiveness, Telephony (Chicago), Oct. 7, 1996, at 96. Similarly, the National Association of Black Broadcasters estimated in 1999 that less than two percent of all television and radio stations in America are owned by people of color. Bradley Spurrison, CBS and Clear Channel Eye Minority Fund, Private Equity Wk., Aug. 23, 1999, available in LEXIS, News Library, Private Equity Wk. File.

n57. Boliek, *supra* note 15.

n58. *Id.*

n59. Spurrison, *supra* note 56.

n60. Gloria Goodale, What's Missing from this Picture?: TV Networks Scramble to Make Changes After Lineups are Denounced for Lack of Racial Diversity, *Christian Sci. Monitor*, Aug. 6, 1999, at 13.

n61. *Id.*

n62. Jan Stuart, The Story of His Life: Woody Allen Knows Viewers Will Think Film is Based on Him, No Matter What He Says, *L.A. Times*, Dec. 23, 1999, at F22 (emphasis added).

n63. Jay Handelman, Color Television?: You Won't See Many Black or Hispanic Faces on New Shows this Fall, *Sarasota Herald Trib.*, Aug. 31, 1999, at 1E.

n64. *Id.* (emphasis added).

n65. Greg Braxton & Brian Lowry, Small Screen, Big Picture, *L.A. Times*, July 23, 1999, at F1.

n66. *Id.*

n67. More than one observer described the networks' response of adding actors of color to shows previously announced with all-white casts as Band-Aids. See, e.g., Joanne L. Pert, Prime-Time "Tokens"? Spare Us, *Orlando Sentinel*, Aug. 6, 1999, at A22 (stating that too often, television executives cast a character of color among a cast of white actors "for the sake of political correctness"); Greg Braxton, A Mad Dash for Diversity, *L.A. Times*, Aug. 9, 1999, at F1 (stating that after the networks announced they would work to increase diversity, television executives have been scrambling to get actors of color on television programs); Greg Braxton, NAACP Presses on After Talks With Networks, *L.A. Times*, Aug. 21, 1999, at F1 [hereinafter Braxton, NAACP Presses On] (stating that NAACP President Kweisi Mfume met with the major network executives to discuss expanding the roles of faces of color in television, but seemed doubtful that the networks would work to change the status quo).

n68. Dana Calvo, Applying the First Light Coat, *L.A. Times*, Nov. 20, 1999, at F1.

n69. *Id.*

n70. See *id.*

n71. *Id.*

n72. *Id.*

n73. *Id.*

n74. James K. Autrey, Work or Play Setting Dictates Integration, *L.A. Times*, June 14, 1999, at F3. Autrey is an attorney who specializes in employment and labor law and is based in Manhattan Beach, California. *Id.*

n75. *Id.* Autrey has stated, Unlike family-oriented sitcoms, which tend to be more ethnically homogeneous, these producers [who have regularly cast actors of color in their shows] generally base series in work settings, from the hospital corridors of "ER" to the precinct houses of "NYPD Blue" and "Homicide." Braxton & Lowry, *supra* note 65.

n76. Autrey, *supra* note 74.

n77. Mitchell, *supra* note 23.

n78. Guy Molyneux, *Fooling None of the People: Just How Much Influence does the Campaign Have on the Electorate?*, L.A. Times, Sept. 13, 1992, at M1. During Clinton's first presidential campaign, a sign hung in his headquarters that read, "It's the economy, stupid." *Id.*

n79. One former network executive expressed this economic imperative succinctly: "If the advertisers said tomorrow 'I want all ethnically skewed programming, I don't care who's working at the networks,' they're going to provide it." Lowry et al., *supra* note 4; see also Fiore, *supra* note 7 (finding that many entertainment executives believe that diversity does not appeal to white audiences).

n80. See Feran, *supra* note 20. According to executive producer Steven Bochco, if *City of Angels* succeeds, the show could be a "template for success" for other shows featuring faces of color. *Id.*

n81. *Id.*

n82. Several writers have noted the African American viewing public seems satisfied with the arguably lowbrow programming offered by the Warner Brothers Network (WB) and UPN. Tony Norman, *A Ridiculous Controversy*, Pittsburgh Post-Gazette, Oct. 6, 1998, at B1. They argue that the African American images we see on television are what we deserve. *Id.* Tony Norman expressed this viewpoint acerbically in ridiculing the protests over Desmond Pfeiffer: "And why this goofy lie about black folks 'deserving' quality black television? Blacks are no more inclined to watch quality shows like 'Homicide' with its brilliant multiracial cast than white folks are. If they were, gems like 'Frank's Place' and 'I'll Fly Away' would still be on the air." *Id.*

n83. Valerie Kuklenski, *Latino Actors' Battle: Finding a Job* (May 25, 2000) <<http://www.dailynews.com/archives/2000/05/25/new05.asp>>.

n84. Douglas Durden, *TV Networks Tackle Diversity: NAACP's Formal Complaint Spurs Talk, Action*, Richmond Times-Dispatch, July 31, 1999, at A1. Bochco was co-creator of *City of Angels* and a television producer whose shows regularly feature protagonists of color in major roles. *Id.*

n85. According to John Thompson, former basketball coach at Georgetown University, "There's a lot of whites failing ... All we want is the opportunity to get out there and to try, and a right to fail also. I'm sick of us having to be perfect to get the job." J.A. Adande, *A Padre Who is Heaven Sent?*, L.A. Times, Sept. 9, 1999, at D1.

n86. Durden, *supra* note 84.

n87. See *id.* (stating that television executives mimic successful shows). Consider the experience of Margaret Cho. In 1994, she was the star of a new ABC series *All American Girl*, the first series on network television to feature an Asian American family. Braxton, *supra* note 53. Since that show's cancellation, no other Asian-themed show has aired on television. *Id.*

n88. Greg Braxton, *"City of Angels" Tries a New Treatment: CBS' Hospital Drama Changes Look and Adopts More Complex Plots in Effort to Attract Viewers*, L.A. Times, Mar. 8, 2000, at F1.

n89. *Id.*; see also Lowry et al., *supra* note 4 (documenting the decrease in numbers of minorities on television and describing some of the economic reasons for the trend).

n90. Feran, *supra* note 20. According to Les Moonves, President of CBS Television, "There's a dearth of black shows on the networks[,] ... and that's why this one is becoming more symbolic than it should." *Id.*

n91. Howard Rosenberg, CBS Makes its Fall Picks ... But Omits One "Family," *L.A. Times*, May 17, 2000, at F1.

n92. Paul Brownfield, Will "Grapevine" Bear Fruit This Time?, *L.A. Times*, Feb. 28, 2000, at F12.

n93. *Id.*

n94. *Id.*

n95. See *id.* Once again, the series was quickly canceled. Michael Speier, M.Y.O.B., *Daily Variety* (L.A.), June 6, 2000, at 18.

n96. See *League of United Latin American Citizens v. Pete Wilson*, 908 F. Supp 755 (C.D. Cal. 1995). Proposition 187 was an initiative measure, approved by 59% of the voters in 1994, that denied a host of benefits and services to undocumented immigrants. *Id.* at 763. Its preamble declared, "The People of California ... have suffered and are suffering economic hardship caused by the presence of illegal aliens in this state." 1994 Cal. Legis. Serv. 187 (West). It goes on to state that Californians "have suffered and are suffering personal injury and damage caused by the criminal conduct of illegal aliens in this state." *Id.* Proposition 187 was declared unconstitutional by a federal district court. *League of United Latin American Citizens*, 908 F. Supp. at 755. Subsequently, the State of California agreed through mediation not to enforce the bulk of the measure. Ed Mendel, Governor, Prop. 187 Foes Agree to Spike Most of Measure: Settlement Stops Suit Against Embattled Immigration Law, *San Diego Union-Trib.*, July 30, 1999, at A1.

n97. See *supra* note 11 and accompanying text.

n98. U.S. Comm'n on Civil Rights, *supra* note 11, at 43.

n99. *Id.* at 46.

n100. U.S. Comm'n on Civil Rights, *Window Dressing on the Set: An Update* (1979).

n101. See *id.* at 49.

n102. *Id.* at 49-50.

n103. Daniel Forbes, Prime-Time Propaganda (Jan. 13, 2000) <<http://www.salon.com/news/feature/2000/01/13/drugs>>.

n104. *Id.*

n105. *Id.* Scripts were reviewed by the Office of National Drug Policy, and in some instances major changes were made as result of those reviews. *Id.*

n106. Paul Monaco, *Understanding Society, Culture, and Television* 64 (1998).

n107. See *id.* at 59-73.

n108. See U.S. Comm'n on Civil Rights, *supra* note 11, at 147 (noting that the "impact of television on the Nation's viewers, while not precisely measurable, is nevertheless immense," based on the average amount of time viewers spend watching television); Frank Coppa, *The Explosion of the Eye: An Introduction to the Promise and Problems of Television*, in *Screen and Society: The Impact of Television Upon Aspects of Contemporary Civilization* x-xxiii (Frank Coppa ed., 1979) (discussing various studies of television's impact on society including its impact on art, culture, marketing, politics, children, and morality); see also Jake Harwood, *Age Identification, Social Identity Gratifications, and Television Viewing*, 43 *J. Broadcasting & Electronic Media* 123, 123 (1999) (studying the "relationship between individuals' identifications with large social groups and their [television] media consumption").

n109. 47 U.S.C. 151-161 (1994).

n110. See *id.* " 151.

n111. *Id.*

n112. *Id.*

n113. 42 U.S.C. " 2000e (1994).

n114. See discussion *infra* Part II.B.2.

n115. See discussion *infra* Part II.B.3.

n116. U.S.C. 151-161 (1994).

n117. 497 U.S. 547 (1990) (holding that programs encouraging minority ownership of broadcast licenses is a permissible means to achieve the legitimate government interest of remedying past discrimination and diversifying programs).

n118. *Id.* at 584.

n119. *Id.* at 552.

n120. *Id.* at 556-57.

n121. *Id.* at 557.

n122. Oral Argument on Behalf of the Federal Respondent at 31, No. 89-453, 1990 U.S. Trans Lexis 190, Metro Broad., Inc. v. FCC, 497 U.S. 547 (1990).

n123. Id. at 30-31.

n124. Metro Broad., Inc. v. FCC, 497 U.S. 547, 589-97 (1990).

n125. Id. at 567.

n126. Id. at 567-68.

n127. See id. at 567-68, 579-82 (stating that minorities in broadcast leadership positions will create more diverse programs).

n128. Durden, supra note 84. Steve Harris, a successful African American actor who has been nominated for an Emmy for his role in *The Practice*, echoed this conclusion when he stated, "If you have more people other than white being producers, writers and (so on), ... you would definitely have a better and more balanced group of people on television." Allan Johnson, "Practice" Makes Perfect: Steve Harris' Emmy Nomination Proves his Tenacity On, Off Screen, *Chi. Trib.*, Aug. 15, 1999, " 7, at 4.

n129. Durden, supra note 84. Kevin Williamson wrote the movie *Scream* and created the television show *Dawson's Creek*. Id.

n130. See supra note 61 and accompanying text.

n131. Durden, supra note 84.

n132. Paul Brownfield, As Minorities' TV Presence Dims, Gay Roles Proliferate, *L.A. Times*, July 21, 1999, at A1.

n133. See, e.g., id. (finding that networks have integrated gay characters into prime-time programs, while excluding minority characters). Gay characters comprised approximately 2% of the overall fall 1999 lineup, while estimates find that gays make up about 10% of the population and about 50% of "Hollywood's creative community." Gail Shister, *Gay Alliance Seeks More Characters on Television*, *Milwaukee J. Sentinel*, Aug. 25, 1999, at 7.

n134. Brownfield, supra note 132; see also Martha Lauzen & David Dozier, *Making a Difference in Prime Time: Women On Screen and Behind the Scenes in the 1995-96 Television Season*, 43 *J. Broadcasting & Electronic Media* 1 (1999) (describing the impact of women working behind the screen on the portrayal of women on the screen).

n135. Brownfield, supra note 132.

n136. Metro Broad., Inc. v. FCC, 497 U.S. 547, 567-68 (1990).

n137. A key vote in the five member majority was Thurgood Marshall, a tireless champion of civil rights. See A. Leon Higginbotham Jr., *50 Years of Civil Rights*, *Ebony*, Nov. 1995, at 148. He has been replaced by

Clarence Thomas, a tireless opponent of civil rights. *Id.* There is no doubt Justice Thomas would, given the opportunity, overrule *Metro Broadcasting*, rejecting its reasoning and contextualization. Justice Thomas once announced that his opposition to affirmative action is based upon "God's Law." *Id.* In *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995), a Supreme Court case striking down a federal affirmative action program, Justice Thomas voiced his approval of the decision, declaring that in my mind, government-sponsored racial discrimination based on benign prejudice is just as noxious as discrimination inspired by malicious prejudice. *A Id.* at 241. And in 1998, Thomas informed the National Bar Association, a group composed primarily of African American attorneys, that he intends to continue to oppose affirmative action. Clarence Thomas Tells Black Lawyers, He'll Still Oppose Affirmative Action, *Jet*, Aug. 17, 1998, at 4, 4.

n138. 141 F.3d 344 (D.C. Cir. 1998).

n139. *Id.* at 347.

n140. 47 C.F.R. " 73.2080(a) (2000).

n141. See *id.* " 73.2080(b)(3)-(4), (c)(2)(iii), (c)(4)(i)-(vii).

n142. *Lutheran Church-Missouri Synod*, 141 F.3d at 349.

n143. *Id.* at 350 ("The Commission has defended its affirmative action recruiting policy by arguing that all employees affect programming diversity.").

n144. See *id.* at 356 (stating that the FCC failed to establish a link between low-level employees and the content of programming).

n145. *Id.* at 354.

n146. *Id.* at 354-55 (citations omitted).

n147. See 47 C.F.R. " 73.2080 (2000) (listing equal employment opportunity (EEO) requirements for radio and television stations).

n148. *Id.*

n149. *Id.*

n150. *Id.*

n151. *Id.*

n152. Greg Braxton, TV Networks Deny Program "Whitewashing," *L.A. Times*, July 13, 1999, at A14.

n153. *Id.*

n154. *Id.*; see also Greg Braxton, NAACP Chief Buys Stock in 4 TV Networks, L.A. Times, July 22, 1999, at C5 (stating that Mfume purchased one hundred shares of stock in each of the four major networks in an effort to diversify the television industry).

n155. Norman Horowitz, Concentration of Media Ownership is Bad News for the Rest of Us, Star Trib. (Minneapolis-St. Paul), Jan. 8, 2000, at 14A. ABC presently owns 10 television stations and Fox owns 15. *Id.* NBC owned stations in 13 markets as of 1999. *Id.*; see also NBC Buys 32% of Paxson for \$ 415 Million, L.A. Times, Sept. 17, 1999, at C8 (noting that Fox Network owner, Rupert Murdoch, owns 15 television stations).

n156. See *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 367-77 (1969) (holding that under the fairness doctrine, a station must furnish a person who was attacked in a prior broadcast aired by the station time on the air for a rebuttal). In 1995, Walt Disney Company bought ABC Network for \$ 19 billion. Mike Harrington, Note, A-B-C, See You Real Soon: Broadcast Media Mergers and Ensuring a Diversity of Voices, 38 B.C. L. Rev. 497, 497 (1997). That same year, Westinghouse Corporation acquired CBS for \$ 5.4 billion. John Carmody, The TV Column, Wash. Post, Oct. 29, 1992, at C4. NBC was purchased by General Electric Corporation in 1986 for \$ 6 billion. *Id.*

n157. See 47 U.S.C. 151-161 (1994).

n158. *Id.* " 303.

n159. *Id.* " 151 (stating that the FCC will attempt to give people of color opportunities in broadcasting).

n160. Guy Aoki, TV's Definition of "Minority" Too Narrow, L.A. Times, Sept. 6, 1999, at F3. An intriguing rebuttal to this argument was expressed by James Autry. He begins by posing a question: "Why do the casts of comedies such as 'Seinfeld,' 'Living Single' and 'Friends' remain racially segregated, while dramatic series such as 'Homicide,' 'ER' and 'NYPD Blue' feature integrated casts?" Autry, *supra* note 74. His answer is that television accurately mimics the segregated nature of our social interactions. *Id.* In Autry's words, "Although we may work together in integrated environments, blacks and whites seldom spend leisure or social time together." *Id.* However, even if one accepts Autry's premise, the constant characterization of New York without African American or Latino professionals, or of San Francisco without Asian doctors and executives, trivializes their importance to the lives of those cities, and invites viewer stereotyping.

n161. See *Red Lion Broad.*, 395 U.S. at 369-70. The fairness doctrine requires that broadcasters give fair coverage of public issues by allowing people on both sides of an issue to speak. *Id.* at 369.

n162. *Id.* at 369.

n163. *Id.* at 377.

n164. Syracuse Peace Council, 2 F.C.C.R. 5043 (1987).

n165. *Id.* at para. 98.

n166. 11 F.3d 1430 (8th Cir. 1993).

n167. *Id.* at 1434.

N168. Id.

n169. Id. at 1442.

n170. Id. (citations omitted).

n171. See *Public Interest Research Group v. FCC*, 522 F.2d 1060, 1067 (1st Cir. 1975) (holding that the fairness doctrine applies to commercial advertisements that address public issues in a meaningful way).

n172. Id.

n173. 42 U.S.C. " 2000e (1994).

n174. Id. " 2000e-2(e).

n175. Jennifer L. Sheppard, *Theatrical CastingBDiscrimination or Artistic Freedom?*, 15 *Colum.-VLA J.L. & Arts* 267, 272 (1991).

n176. *EEOC v. MCI Int'l, Inc.*, 829 F. Supp. 1438, 1446 (D.N.J. 1993).

n177. Ronald Turner, *Thirty Years of Title VII's Regulatory Regime: Rights, Theories, and Realities* 46 *Ala. L. Rev.* 375, 434-35 (1995) (describing the difficulty of finding direct evidence of intentional discrimination).

n178. 421 U.S. 792 (1973) (finding that a person who argued that his employer refused to rehire him because of his race and his involvement in the civil rights movement established a prima facie case of racial discrimination).

n179. Id. at 802.

n180. Id. at 802-03.

n181. Id. at 804.

n182. Id. at 802.

n183. See *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971) (holding that company's employment tests had a disproportionate impact on African American employees).

n184. See Turner *supra* note 177, at 448B49 (discussing the quantitative nature of proof in disparate impact cases where intent is not a prerequisite for liability).

n185. See discussion *supra* Part II.B.2.

n186. Heekyung Kim, Race as a Hiring/Casting Criterion: If Laurence Olivier was Rejected for the Role of Othello in Othello, Would He Have a Valid Title VII Claim?, 20 Hastings Comm. & Ent. L.J. 397, 406-08 (1998).

n187. 431 U.S. 324 (1977).

n188. Id. at 339 (citations omitted).

n189. See McDonnell-Douglas Corp. v. Green., 421 U.S. 792, 802 (1973).

N190. See Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971) (allowing employers to use employment tests which create racial disparities only if the test is "shown to bear a demonstrable relationship to successful performance of the jobs for which it was used").

n191. See Sheppard, supra note 175, at 279 (suggesting that claims of discrimination in theatrical casting may not be viable under the Civil Rights Act or the First Amendment and therefore minorities involved in theater should pursue nonlegal means for improving diversity); Bonnie Chen, Mixing Law and Art: The Role of Anti-Discrimination Law and Color-Blind Casting in Broadway Theater, 16 Hofstra Lab. & Emp. L.J. 515, 530 (1999) (stating that it may be difficult for an actor of color to establish a prima facie case of discrimination under Title VII if the actor believes her race was the only reason she did not get the acting job).

n192. See 42 U.S.C. " 2000e (1994).

n193. See discussion supra Part II.C.1.

n194. See 42 U.S.C. " 2000e-2(e); Dothard v. Rawlinson, 433 U.S. 321, 334 (1997) (stating that a BFOQ will be construed narrowly).

n195. Sheppard, supra note 175, at 276.

n196. See Chen, supra note 191, at 534-43.

n197. Id. at 529 (discussing dicta from the Fifth Circuit indicating tolerance for some race-specific casting); Sheppard supra note 175, at 276-77 (citing EEOC guidelines explaining the sex BFOQ by using actors and actresses as examples, and Senators discussing a possible race requirement).

n198. See Griggs v. Duke Power, 401 U.S. 424, 431 (1971) (holding that a test for evaluating a job applicant's qualification does not violate Title VII as long as it is not a pretext for racial discrimination), overruled by Wards Cove Packing Co. v. Atonio, 490 U.S. 642, 656 (1989) (holding that employees making a Title VII claim must identify the practice that is the reason for the statistical disparity between the races, prove that it exists, and make a prima facie case of discrimination). The Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071 (1991), reinstated the type and sufficiency of evidence required in Griggs. See H.R. Rep. No. 102-40(I), at 24-45 (1991), reprinted in U.S.C.C.A.N. 549, 562-83 (discussing Griggs).

n199. See Chen, supra note 191, at 527-29.

n200. See Lois L. Krieger, Note, "Miss Saigon" and Missed Opportunity: Artistic Freedom, Employment Discrimination, and Casting for Cultural Identity in the Theater, 43 Syracuse L. Rev. 839, 856-57 (1992).

n201. See Chen, *supra* note 191, at 515.

n202. See Patti Hartigan, *Curtain Opens on Casting Debate*, *Boston Globe*, Dec. 11, 1990, at 61; see also Sheppard, *supra* note 175, at 279-82 (discussing First Amendment issues invoked in challenging employment discrimination in casting).

n203. See Elizabeth Jensen, *Groups Band Together to Press for Diversity Campaign*, *L.A. Times*, Sept. 11, 1999, at F2. A coalition of Latino groups coined the term "brownouts" to describe the act of people turning off their television sets to protest the lack of faces of color. *Id.*; see also David Robb, *NAACP "United" on TV Watch*, *Hollywood Rep.*, Sept. 10, 1999, available in LEXIS, News Library, *Hollywood Rep. File* (stating that several Latino groups planned to boycott the major networks for excluding people of color from leading roles in the 1999 fall lineup); Greg Braxton, *Minority Coalition Assails the Networks on Casting*, *L.A. Times*, July 21, 1999, at F3 (stating that groups representing people of color believed that the major networks were guilty of "ethnic purification" of television); Claudia Kolker, *supra* note 16 (stating that boycotts by minority organizations could make network executives think about giving opportunities to people of color in television).

n204. See Susan Ferris & Ricardo Sandoval, *The Fight in the Fields: Cesar Chavez and the Farmworkers Movement* 113-14, 161 (1997) (describing the 1965 Delano, California grape strike and subsequent agricultural boycotts spearheaded by Cesar Chavez which caused "some of the world's agribusiness chiefs ... [to call] on Chavez personally and appeal[] to him not to boycott their products").

n205. See Lewis, *supra* note 9, at 507.

n206. *Id.*

n207. *Id.*

n208. *Id.*

n209. *Id.* at 507-08.

n210. *Id.* at 508.

n211. See, e.g., *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 907-08 (1982) (holding that nonviolent protests are protected by the First Amendment). One successful civil rights boycott was the famous Montgomery, Alabama bus boycott, which catapulted Martin Luther King into national prominence and made a hero of Rosa Parks. See David Halberstam, *The Children* 27 (1998). Another civil rights boycott of downtown merchants in Nashville, Tennessee was also successful, estimated to be 98% effective. *Id.*

n212. See Ferris & Sandoval, *supra* note 204, at 113-14.

n213. *Cal. Lab. Code* 1140-1140.6 (West 2000).

n214. See *Ariz. Rev. Stat. Ann. sect; 23-1381 to 23-1385* (West 2000) (limiting an agricultural employer's ability to interfere with the activities of labor unions); *Idaho Code* 22-4101 to 22-4108 (2000) (granting labor unions rights to picket their employer); *Kan. Stat. Ann.* 44-818 to 44-823 (1999) (recognizing that the unique situation of agricultural workers requires that the workers have delineated rights to picket their employers).

n215. Chuck Philips, *Disney Issues Apology for Radio Promo Controversy*, L.A. Times, Aug. 25, 1999, at C1; see also Chuck Philips, *Disney to Settle Racial Bias Suit over Radio Gag*, L.A. Times, Aug. 22, 2000, at A1 ("The dispute is seen as a public relations blunder for Disney... Only after its initial resistance was met by community protests did the family entertainment conglomerate negotiate a resolution.").

n216. *Complaints of Blacks Spur CompUSA to Act*, L.A. Times, Oct. 20, 1999, at C5.

n217. Presently, the major networks are all owned by multinational corporate giants. See Horowitz, *supra* note 155. Disney owns ABC and General Electric owns NBC. Viacom, which already owned one-half of UPN, recently merged with CBS. Rupert Murdoch's News Corporation, a multinational conglomerate, is the power behind Fox Network. Time Warner, which recently announced a merger with America Online, owns the WB. *Id.*

n218. See Robb, *supra* note 203 (stating that the brownout would address the underrepresentation of people of color on network television programs); Braxton, *supra* note 203 (stating that when the networks announced their 1999 fall lineups, minority groups were outraged by the exclusion of people of color); Kolker, *supra* note 16 (stating that Latino groups scheduled the brownout because none of the twenty-six new shows for the fall 1999 season featured an actor of color).

n219. Ted Monoson, *States News Service*, July 30, 1999, available in LEXIS, News Library, States News Service File.

n220. Kelli D. Esters, *Coalition Turns Off "Whitewashed" TV*, U. Wire, Sept. 17, 1999, available in LEXIS, News Library, U. Wire File.

n221. *Id.*

n222. See, e.g., Kolker, *supra* note 16 (stating that advocacy groups had scheduled the brownout to begin on September 12); David Robb, *3 Asian Groups Join "Brownout" Against TV Nets*, Hollywood Rep., Sept. 14, 1999, available in LEXIS, News Library, Hollywood Rep. File (calling for people to join the brownout for two weeks during September of 1999); Monoson, *supra* note 219 (stating that the brownout coincides with Hispanic Heritage Week).

n223. See, e.g., e-mail message from Antonette Cordero to Gary Williams (Sept. 14, 1999) (on file with author); e-mail message from Margery Melvin to Gary Williams (Sept. 13, 1999) (on file with author).

n224. See, e.g., Shauna Snow, *Morning Report*, L.A. Times, Sept. 21, 1999, at F2 (reporting that television executives did not react to the brownout because the week of the protest historically has low ratings, the new season having not yet begun).

n225. See *id.*

n226. See Mitchell, *supra* note 23 (finding that African Americans watch 40% more television than other groups of viewers).

n227. Lowry et al., *supra* note 4.

n228. Mitchell, *supra* note 23.

n229. See Alan Frutkin, *Bochco Series Reflects a Rare Hue*, Wash. Post, Jan. 16, 2000, at Y06.

n230. See Elizabeth Jensen et al., *NBC, NAACP in Pact to Boost Minorities in TV*, L.A. Times, Jan. 6, 2000, at A1.

n231. *Id.*

n232. Paul Brownfield, *ABC Announces Plans for More Diversity at All Levels*, L.A. Times, Jan. 8, 2000, at F31.

n233. See Lisa Boone, *Morning Report*, L.A. Times, July 5, 2000, at F2. "Latino advocates say they are happy that black actors ... appear to be getting juicier roles in the fall network television season, but they lament the lack of roles for them, American Indians and Asian Americans." *Id.*

n234. See Jensen et al., *supra* note 230.

n235. For example, in 1997, Warren Littlefield, then President of NBC Entertainment, ordered all producers of new NBC shows to include one character of color in the regular cast. Braxton, *supra* note 3. He further trumpeted NBC's commitment to diversity, announcing that while NBC had "a great history[,] ... we need[] to improve." Bob Longino, *The Changing Face of Television: Viewers Will See More Minority Stars as Broadcast Executives Compete for Audiences with the Likes of the WB and UPN*, Orlando Sentinel, Aug. 28, 1997, at E1. As illustrated by the controversy over NBC's fall 1999 lineup, that initiative seems to have expired when Littlefield left NBC. See Phil Rosenthal, *Say Good Night Gracie: 1998: Television's Year of Goodbyes*, Chi. Sun-Times, Dec. 20, 1998, at 18.

n236. See Lowry et al., *supra* note 4 (arguing that diversity in television does not generate enough revenue, and therefore it is not a priority to television executives).

n237. Paul Brownfield, *supra* note 92 (discussing the re-emergence of a television show featuring an all-white cast).

n238. See discussion *supra* Part IV.B.

n239. Those defenses, that "we are not thinking in terms of color," or that we simply hired the best actor or executive available, simply will not withstand scrutiny under the standards of Title VII in view of the measurable underrepresentation of people in the television industry. See Kim, *supra* note 186, at 408-13.

n240. See 47 C.F.R. " 73.2080 (2000) (requiring that broadcast stations have equal opportunity in programming).

n241. Commenting on the Lutheran Church-Missouri Synod ruling, which held that the FCC may not require broadcast licensees to practice affirmative action, one columnist wrote, "Credit [former President Reagan] with the judicial retreat from affirmative action. He reshaped the federal judiciary in his image, which includes a record of hostility toward people of color." Gregory Stanford, *Media Failures Exemplify Retreat of Affirmative Action*, Milwaukee J. Sentinel, Apr. 19, 1998, at 3.

n242. Braxton, NAACP Presses On, *supra* note 67 (stating that NAACP President Kweisi Mfume had successful meetings with top executives at the four major networks in August of 1999).

n243. This Article is a rudimentary exploration of an incredibly complex topic. The research on television's societal impact, for example, is far more extensive than my meager citations indicate. It is a topic worthy of much deeper investigation and discussion. I plan to be a participant in that discussion.