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COMMENTS

UNMASKING TONTO: CAN TITLE VII “MAKE IT” IN HOLLYWOOD?

*Megan Basham**

The promotional trailer for Disney’s 2013 summer blockbuster *The Lone Ranger*¹ adequately encapsulates the impetus for the film’s controversy within the Native American community: striped with face paint, a colossal stuffed raven perched prominently atop his head, Johnny Depp rides up to Armie Hammer as his voiceover declares in broken, pidgin English, “There come a time, Kemosabe, when good man must wear mask.”² *The Lone Ranger* is the latest redux Western in Hollywood’s nearly century-long tradition of misappropriating and misrepresenting Native American identity on the silver screen. Historically in theatrical, film, and television productions, the roles of Native American characters have been cast with non-Native actors in “redface,” the practice wherein non-Native actors don face paint to portray Native Americans, often as stereotypically brutal and ill-spoken.³ Whether portrayed as violent savages bent solely on war or as nobly ignorant spiritualists, Native American characters on screen have been portrayed as inferior and (literally or narratively) subservient to the robust, authoritative American cowboy.

The latest data from The Screen Actors Guild-American Federation of Television and Radio Artists (“SAG-AFTRA”), a labor union representing film, television, and other performing artists, reveals that Native American actors continue to be underrepresented and misrepresented, receiving the lowest percentage of representation by race in Hollywood⁴ and losing even

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1. THE LONE RANGER (Walt Disney Studios 2013); Adam Chitwood, *First Trailer for the Lone Ranger Starring Johnny Depp and Armie Hammer*, COLLIDER.COM (Oct. 3, 2012), <http://collider.com/the-lone-ranger-movie-trailer/199483/>.

2. *Id.*

3. Eric Brightwell, *November Is Native American Heritage Month*, AMOEBA MUSIC (Nov. 5, 2008, 7:19 PM), <http://www.amoeba.com/blog/2008/11/eric-s-blog/november-is-native-american-heritage-month.html>; *see also infra* Part I.

4. *Latest Casting Data Follows Historical Trends and Continues to Exclude People with Disabilities*, SAG-AFTRA (Oct. 23, 2009), <http://www.sagaftra.org/press-releases/october-23-2009/latest-casting-data-follows-historical-trends-and-continues-exclude-p> [hereinafter *Latest Casting Data*].

Native American character roles to non-Native actors like Depp.⁵ The most recent casting data compiled by the SAG-AFTRA reveals that Caucasians dominated 72.5% of all acting roles, while Native Americans were hired for only 0.3% of all roles, in 2007 and 2008.⁶ Though Native Americans make up a small percentage of the overall population, they are still proportionately underrepresented.⁷ According to the United States Census Bureau, the group characterized as “American Indians,” makes up approximately 2% of the population.⁸ Caucasians compose approximately

5. Depp claims that his great-grandmother was partially of Native American ancestry, though he is not positive of her tribe of origin. See Ben Child, *Johnny Depp Made Honorary Member of Comanche Nation*, GUARDIAN (May 23, 2012), <http://www.guardian.co.uk/film/2012/may/23/johnny-depp-member-comanche-nation>. The Comanche Nation adopted Depp this year, but adoption does not confer legal Indian status or even membership rights, and many Native Americans view Depp’s decision skeptically, as culturally insensitive and/or a public relations strategy. See, e.g., Jessica Metcalfe, *The Tonto Files: Behind the Facepaint*, INDIAN COUNTRY TODAY MEDIA NETWORK (June 26, 2012), <http://indiancountrytodaymedianetwork.com/article/the-tonto-files%3A-behind-the-facepaint-120550>.

Legally defining who is a Native American is a complicated undertaking and currently a source of contention within the Native community; indeed, “[t]here is no one definition of ‘Indian’ that serves all federal purposes.” Margo S. Brownell, *Who Is an Indian? Searching for an Answer to the Question at the Core of Federal Indian Law*, 34 U. MICH. J.L. REFORM 275, 278 (2001). Federal Indian law employs scores of different definitions depending upon the context, such as criminal jurisdiction, federal employment, and wealth distribution; however, “[w]hile there are numerous combinations of criteria used to define the term ‘Indian,’ legislation and regulations dealing with ‘Indians’ generally fall into one of three categories: (1) those that use definitions based on blood quantum; (2) those that use definitions based on tribal status; and (3) those lacking any definition at all” but who self-identify as Native. *Id.* While the United States Supreme Court has deemed that the power to afford tribal status belongs to each tribe, “[i]t is impossible to avoid the fact that racial ancestry is critical to tribal membership criteria.” Matthew L.M. Fletcher, *Tribal Membership and Indian Nationhood*, 37 AM. INDIAN L. REV. 1, 1 (2013) (citing *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 72 n.32 (1978)). From a sociological standpoint, scholarly opinion regarding the difference between race and identity is still unsettled. See, e.g., Luis Angel Toro, *“A People Distinct from Others”: Race and Identity in Federal Indian Law and the Hispanic Classification in OMB Directive No. 15*, 26 TEX. TECH L. REV. 1219, 1219-20 (1995) (decrying the “untenability of biological or anthropological definitions” of race under the traditional view that “race is a biological trait, susceptible of classification into four general types”; acknowledging, however, that “race reflects a social construct that affects people’s lives.”).

6. *Latest Casting Data*, *supra* note 4.

7. *2010 Census Shows America’s Diversity*, U.S. CENSUS BUREAU (Mar. 24, 2011) http://www.census.gov/newsroom/releases/archives/2010_census/cb11-cn125.html.

8. *Id.*

72% of the population, and thus receive fully proportionate representation in acting roles.⁹

Currently, there is uncertainty within the academic community as to whether any legal remedy is available for Native American actors or other minorities¹⁰ who have lost job opportunities in the billion-dollar film industry to non-Native actors.¹¹ Hollywood decision makers continue to cast non-Native stars — even when the role calls for a character with a Native American identity, like Tonto. Yet these discriminatory casting practices have been virtually unchallenged in the courts since the inception of Hollywood.

This comment will explore legal scholars' recent attempts to fit an actor's discrimination claim within the pre-existing framework of Title VII of the Civil Rights Act of 1964 ("Title VII").¹² This statute prohibits employers from depriving "any individual of employment opportunities or otherwise adversely affect[ing] his status as an employee, because of such individual's race . . . or national origin."¹³ Despite Congress's mandate, the entire filmmaking industry continues to engage in discriminatory casting practices with a heretofore unchallenged disregard for Title VII.¹⁴

Although several proponents insist that Title VII provides an appropriate mechanism for Native American actors' redress for employment discrimination,¹⁵ the courts are nearly silent — no discernible claims have

9. See Appendix B (results calculated with data gathered from *Latest Casting Data*, *supra* note 4); *2010 Census Shows America's Diversity*, *supra* note 7. Population percentages by race exceed 100% because the Census Bureau included mixed-race population in calculation of white population. *Id.*

10. An in-depth history of discrimination against actors of Asian or African American ancestry is outside the scope of this comment, but has been addressed by several scholars. See, e.g., SUSAN GUBAR, RACECHANGES: WHITE SKIN, BLACK FACE IN AMERICAN CULTURE 56, 86-91 (1997); Tisa Chang, *Race Is Crucial in Some Stage Roles*, USA TODAY, Aug. 17, 1990, at A12.

11. See, e.g., *Latest Casting Data*, *supra* note 4; Russell K. Robinson, *Casting and Caste-ing: Reconciling Artistic Freedom and Antidiscrimination Norms*, 95 CAL. L. REV. 1, 5 (2007); Angela Onwuachi-Willig, *There's Just One Hitch, Will Smith: Examining Title VII, Race, and Casting Discrimination on the Fortieth Anniversary of Loving v. Virginia*, 2007 WIS. L. REV. 319, 321.

12. 42 U.S.C. §§ 2000a to 2000h-6 (2006).

13. *Id.* § 2000e-2(a).

14. Robinson, *supra* note 11, at 5.

15. See, e.g., *id.*; Onwuachi-Willig, *supra* note 11; Bonnie Chen, Note, *Mixing Law and Art: The Role of Anti-Discrimination Law and Color-Blind Casting in Broadway Theater*, 16 HOFSTRA LAB. & EMP. L.J. 515 (1999); Heekyung Esther Kim, Note, *Race as a Hiring/Casting Criterion: If Laurence Olivier Was Rejected for the Role of Othello in*

been brought since this idea was introduced to the legal discourse in the early 1990s. This comment will explain why a Title VII approach to redress underrepresentation in the film industry inadequately addresses Native American concerns and fails to provide a suitable solution in light of those concerns.

Part I provides a brief sojourn into the humanities to gain insight on Hollywood's nearly century-long, continuing history of misappropriation and misrepresentation of Native Americans on film, and identifies the prevailing calls for redress within the Native American community. Part II explores recent legal scholarship advocating the use of Title VII's existing framework to counteract such discriminatory underrepresentation in the future, utilizing Disney's decision to cast Depp as Tonto in *The Lone Ranger* as the impetus for a model cause of action. Part III advances the position that this approach neither provides an adequate fit for Native American concerns nor stands up against First Amendment guarantees of artistic license.¹⁶ Native American artists and scholars consistently call for redress in the form of more resources to create their own speech from their own point of view, rather than participating in what many view as the continuing process of stereotyping and subjugation in centrally non-Native stories such as *The Lone Ranger*. Furthermore, the art of filmmaking has been expressly included by the Supreme Court in the category of speech that falls within the protection of the First Amendment, and government regulators are severely limited in the manner in which they may interfere with its content. Part IV proposes non-legal options as more impactful solutions. The proposed solutions include as follows: first, encouraging self-regulation, using the National Football League's ("NFL") efforts with the "Rooney Rule" as a model, and second, granting financial support to Native American filmmakers, which would support a platform for Native American voices. Providing more opportunity for Native American speech balances competing constitutional interests, addressing Native American

Othello, *Would He Have a Valid VII Claim?*, 20 HASTINGS COMM. & ENT. L.J. 397 (1998); 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 (1992).

16. The reader should consider the potential implications of *Employment Division, Department of Human Resources v. Smith*, 494 U.S. 872 (1990). This case holds that a Native American's use of peyote for religious purposes did not fall under the purview of First Amendment protections because such drug use violated state law. Thus, if a state has a compelling interest in preventing drug use, a religiously neutral law, petitioners should seek relief through the state legislature, not the courts.

requests for redress without raising First Amendment concerns.¹⁷ The proposed non-legal remedies fail to provide authoritative remedy, but permanent change must come from encouraging discourse within society rather than limiting it. This comment concludes in Part V.

*I. The History of Native American Portrayal in Hollywood Films:
Misappropriation, Misrepresentation – The Savage and the Spiritualist*

At least women in Westerns are not played by men. At least horses are not played by dogs, or cattle by goats. Faked scenery is more convincing than fake Indians are . . . when there are thousands of Native Americans alive, why should Jeff Chandler play Cochise?¹⁸

For nearly a century in over 4000 films, Hollywood has misappropriated Native American identity, defining for the movie-going public what it means to be Native American.¹⁹ As a genre, the Western film provided the benchmark in establishing images of racial minorities in film and television, with savage Indians standing as the paradigm.²⁰ Such widespread portrayals were largely negative and inaccurate, and for many Native Americans, damaged not only their image to the world, but their own self-image as a people.²¹ Native Americans have been represented on film since

17. It is important to note that because Native American tribes are sovereign, they might be treated differently under the First Amendment than minorities (such as African Americans and Hispanics). See Paige E. Hoster, *Understanding the Value of Judicial Diversity Through the Native American Lens*, 36 AM. INDIAN L. REV. 457, 485-86 (2011-2012) (discussing how the pro-tribal movement's goal of sovereign rights is different than the pro-minority movement's goal of inclusion and recognition under the U.S. Constitution).

18. Eric Gary Anderson, *Driving the Red Road: Powwow Highway*, in HOLLYWOOD'S INDIAN: THE PORTRAYAL OF NATIVE AMERICANS IN FILM 137, 141 (John O'Connor & Peter Rollins eds., 1998) (quoting JANE TOMPKINS, WEST OF EVERYTHING: THE INNER LIFE OF WESTERNS 5-9 (1992)).

19. REEL INJUN (Rezolution Pictures 2009); see also Michael Omi, *In Living Color: Race and American Cultures*, in CULTURAL POLITICS IN CONTEMPORARY AMERICA 111 (Ian Angus & Sut Jhally eds., 1989); Beverly R. Singer, *Wiping the Warpaint Off the Lens: Native American Film and Video*, in NATIVE AMERICAN VOICES 224, 226 (Susan Lobo et al. eds., 3d ed. 2009) (maintaining that Hollywood has advanced a negative and inaccurate image of Indians that "contribute[s] to the commodification and dehumanization of Native people").

20. Omi, *supra* note 19, at 114.

21. REEL INJUN, *supra* note 19; see also MICHELLE H. RAHEJA, RESERVATION REELISM: REDFACING, VISUAL SOVEREIGNTY, AND REPRESENTATIONS OF NATIVE AMERICANS IN FILM x,

the inception of the technology. Indeed, during the free-for-all of the silent film era, Native Americans were able to bring their own viewpoints to the medium via directing and acting in their own productions.²² During the Great Depression of the 1930s, however, these authentic films failed at the box office, and as a result, Native Americans were no longer portrayed as complex human beings but rather one-dimensional, brutal savages. Non-Native moviemakers misappropriated the Native image to serve as a backdrop to the new American hero: the cowboy.²³

Creating films in the Western style, a genre borrowed from the literary formula which emerged in the 1860s, framed the West in mythical terms and reduced the Native American image from that of a human being to a symbol of threat to the dominant class.²⁴ Native Americans were cut down to a simplistic “other” in film, serving as a bloodthirsty stumbling block to settlers, who represented the valiant, legitimate force of civilization, ordained by God to overcome barbarism.²⁵

Part of reducing the Native American image from complex and diverse groups of human beings to a mythical “other” involved boiling all the disparate, unique tribes into one image; thus, the “Plains Indian” was born on screen.²⁶ Costumers from the golden age of Westerns describe how all Native Americans were dressed in the style of the “Plains Indian,” with elaborate headdresses, buckskin, and beaded jewelry.²⁷ This image was a fictional construct, an amalgamation of several different regions of tribes that did not accurately reflect the variations of custom and culture among Native American tribes.²⁸

Another tool in the filmmakers’ dehumanization arsenal was to remove the Native American’s voice. These characters were often portrayed as

11 (2011) (stating that film has contributed to Native Americans’ construction of their own identity).

22. REEL INJUN, *supra* note 19.

23. *Id.* Scholars have offered several theories explaining Western filmmakers’ motivation for casting Native Americans as the “Other.” See Michael Lewis Goldberg, *Hegemony*, UNIVERSITY OF WASHINGTON, <http://faculty.washington.edu/mlg/courses/definitions/hegemony.html> (last visited Dec. 29, 2012).

24. Susan Lobo, Steve Talbot & Traci L. Morris, Introduction to *Native Representations: Media and the Arts*, in NATIVE AMERICAN VOICES, *supra* note 19, at 202, 202.

25. Omi, *supra* note 19.

26. REEL INJUN, *supra* note 19.

27. *Id.*

28. *Id.*

unintelligent and unable to coherently communicate.²⁹ When a Native American character did have a speaking role, he was only able to speak in broken, pidgin English. For example, in the original 1949 television series *The Lone Ranger*,³⁰ the cowboy's sidekick Tonto, played by real-life Mohawk Jay Silverheels,³¹ is famous for his short, pidgin phrases.³² Contributing to the image of the simple-minded savage is Tonto's moniker itself, which is Spanish for "dumb" or "stupid."³³ Although Lone Ranger fans promote Tonto's role in the show as a positive presentation, many Native Americans insist that Tonto's subservience, simplicity, and lack of any character development outside his devotion to the cowboy contributed to dehumanization and degradation of the Native American image onscreen.³⁴

Coupled with their uniformity and mental simplicity was the brutality of the onscreen Native American. In countless Westerns up until the 1960s, Hollywood filmmakers took General Sheridan's popular misquote, "The only good Indian is a dead Indian"³⁵ to heart, as the hero emerged victorious from a battlefield of slain Indians.³⁶ Advancing the stereotype of the one-dimensional, brutal, uncivilized savage served to justify the near genocide that settlers had caused, legitimating the settler as the dominant culture and the cowboy as the hero.³⁷

29. See, e.g., REEL INJUN, *supra* note 19 (citing A DISTANT TRUMPET (Warner Bros. Pictures 1964)).

30. B.R. Smith, *The Lone Ranger*, MUSEUM OF BROADCAST COMM., <http://www.museum.tv/eotvsection.php?entrycode=loneranger> (last visited Dec. 27, 2012).

31. *Jay Silverheels*, INTERNET MOVIE DATABASE, <http://www.imdb.com/name/nm0798855/> (last visited Dec. 27, 2012).

32. Manuel Valdes, *New Tonto, Familiar Feelings for Native Americans*, ASSOCIATED PRESS (July 29, 2012, 7:23 PM), <http://movies.yahoo.com/news/tonto-familiar-feelings-native-americans-072010319.html>. For instance, in one of Tonto's first scenes with *The Lone Ranger*, Tonto says in severely broken English, "Here hat. Me wash in stream. Dry in sun. Make whiter." *Id.*

33. *Id.*

34. Valdes, *supra* note 32; see also Ungelbah Daniel-Davila, *Regarding Johnny Depp's Portrayal of Tonto*, INDIAN COUNTRY TODAY MEDIA NETWORK (May 19, 2012), <http://indiancountrytodaymedianetwork.com/mobile/opinion/regarding-johnny-depps-portrayal-of-tonto-113815>; Dodai Stewart, *Johnny Depp Takes Tonto Character from Racist to Merely Culturally Insensitive*, JEZEBEL (Mar. 9, 2012), <http://jezebel.com/5891904/johnny-depp-takes-tonto-character-from-racist-to-merely-culturally-insensitive>.

35. Wolfgang Mieder, *The Only Good Indian Is a Dead Indian: History and Meaning of a Proverbial Stereotype*, 106 J. AMERICAN FOLKLORE 419, 38 (1993).

36. REEL INJUN, *supra* note 19.

37. Theresa Harlan, *Creating a Visual History: A Question of Ownership*, in NATIVE AMERICAN VOICES, *supra* note 19, at 206, 210; REEL INJUN, *supra* note 19.

When a role for a Native American character called for greater prominence on screen, Hollywood decision makers only hired non-Native actors; leading the trend, iconic Western director John Ford cast Navajo actors as extras but chose non-Native actors for roles involving any kind of emotional complexity.³⁸ For instance, in Ford's 1956 John Wayne classic *The Searchers*,³⁹ Native Americans worked as extras in the backdrop,⁴⁰ but Ford chose German-born Henry Brandon — famous for his villainous character roles — for the role of Comanche Chief “Scar” Cicatriz.⁴¹ Indeed, with almost uniform consistency up until the 1970s, a Native American character with any character depth — or, as some critics have described it, any character that is a “real person” — was always cast with a non-Native actor.⁴²

Many Native American writers, artists, and scholars use the term “redface” to criticize filmmakers’ practice of casting a Native American character with a non-Native actor, often utilizing paint, prosthetics, and other makeup techniques.⁴³ Scores of prominent non-Native actors have engaged in the practice of redfacing, literally donning face-paint and black wigs to portray Native Americans on screen — including Burt Lancaster, Charles Bronson, Burt Reynolds, Dustin Hoffman, and even Elvis Presley.⁴⁴ The practice of non-Native actors painting their faces and/or using prosthetic eyes, noses, or lips in order to resemble or portray a different race is a long-standing and controversial practice in film, theater, and television.⁴⁵ Often face painting was used mockingly, with overtly stereotypical and exaggerated prosthetic noses, lips, or eyes, and actors would perform with stereotypically exaggerated, ill-spoken behavior.⁴⁶

38. Anderson, *supra* note 18, at 141 (stating that Ford “turned to a white actor . . . to play the more visible and complex role of the Comanche war chief Scar . . .”) (quoting JANE TOMPKINS, *WEST OF EVERYTHING: THE INNER LIFE OF WESTERNS* 5 (1992)).

39. (Warner Bros. Pictures 1956).

40. Anderson, *supra* note 18, at 141.

41. *Henry Brandon*, INTERNET MOVIE DATABASE, <http://www.imdb.com/name/nm0104770/> (last visited Dec. 27, 2012).

42. Anderson, *supra* note 18, at 141.

43. See Brightwell, *supra* note 3; RAHEJA, *supra* note 21, at xii, 11.

44. REEL INJUN, *supra* note 19.

45. GUBAR, *supra* note 10, at 53; Brightwell, *supra* note 3; KRISTYN R. MOON, *YELLOWFACE: CREATING THE CHINESE IN AMERICAN POPULAR MUSIC AND PERFORMANCE, 1850S-1920S*, at 164 (2004).

46. GUBAR, *supra* note 10, at 10-11; Gil Asakawa, *Yellowface Redux*, NIKKEI VIEW: THE ASIAN AMERICAN BLOG (Sept. 11, 2012), <http://www.nikkeiview.com/blog/2012/09/yellowface-redux-why-is-it-ok-for-hollywood-to-do-this-to-asians/>.

This practice has not been limited to portraying Native Americans. Dozens of prominent actors, such as Bing Crosby and Shirley MacLaine, have altered their facial appearance to portray characters of other minorities; in Crosby and MacLaine's cases, an African American and Asian, respectively.⁴⁷ Minority critics have labeled these practices "blackface" and "yellowface."⁴⁸ Although redface, blackface, and yellowface occurred more frequently in the early twentieth century, stars continue to don face paint and portray other races today.⁴⁹ Like redface, the term yellowface derives from blackface.⁵⁰ Blackface was the racist practice of white performers painting their faces black to portray African-Americans.⁵¹ This degrading form of entertainment was popularized by minstrel shows in Vaudeville and finally Hollywood.⁵² Like blackface, yellowface is the practice of using white actors to portray characters of Asian descent, but also refers to the situations where non-Asian people have artistic control over the portrayal of Asian culture and themes in theater, film, and television.⁵³ With a few notable exceptions,⁵⁴ the practice of blackface has been widely discouraged. However, yellowfacing and redfacing remain commonly accepted practices in Hollywood today.⁵⁵ Whether used mockingly, as a vehicle for big stars, or even to rewrite race relations, some critics find such practices fundamentally racist and offensive.⁵⁶

Several theories have been posited as the motivation for blackface and its progeny. For some, this practice is a method of cultural hegemony —

47. GUBAR, *supra* note 10, at 53; GINA MARCHETTI, ROMANCE AND THE "YELLOW PERIL" 178 (1993).

48. MOON, *supra* note 45, at 164 (defining yellowface as a term "to describe the continuation in film of having white actors playing major Asian and Asian American roles and the grouping together of all makeup technologies used to make one look 'Asian'").

49. See, e.g., Mike Le, *The Cloud Atlas Conversation: Yellowface, Prejudice, and Artistic License*, RACEBENDING.COM (Aug. 17, 2012), <http://www.racebending.com/v4/blog/cloud-atlas-conversation-yellowface-prejudice-artistic-license/> (discussing controversy over Wachowskis's decision to cast non-Asian actors in Asian roles — complete with prosthetic eyes — in the 2012 film, CLOUD ATLAS).

50. THE SLANTED SCREEN (Asian American Media Mafia 2006).

51. *Id.*

52. *Id.*

53. *Id.*

54. See GUBAR, *supra* note 10, at 48 (discussing Ted Danson's public appearance in blackface).

55. THE SLANTED SCREEN, *supra* note 50.

56. See, e.g., Stewart, *supra* note 34; Le, *supra* note 49; GUBAR, *supra* note 10, at 56-57.

where the ruling class defines stereotypes as “common sense” truths, asserting and reinforcing what it means to be a minority in the United States.⁵⁷ Cultural hegemony is a symbolic continuation of imperialism: the success of the dominant class in presenting its definition of reality, in such a way that it is adopted by the mainstream consciousness as the only sensible worldview. As a result, minority groups presenting an alternative view are marginalized by the mainstream.⁵⁸

Another theory is that the motivation for such practices was a multifaceted way of psychologically processing the history of subjugation in the United States; some may have used the practice to justify past treatment, others to attempt a kind of apologetic catharsis.⁵⁹ Critic Susan Gubar maintains that impersonation

serves a unique function for white people, not so much mimetic as punitive or purgative . . . blackface illuminates the long-term effects of slavery and in particular white people’s efforts to repeat, rationalize, camouflage, confess, or repair the grievous injury inflicted on blacks by international and national forms of subjugation.⁶⁰

While scholars do not have a firm consensus on the reason for such practices, a great number agree on the effects: damage to minority perception and self-image; loss of minority control to define what it means to be a member of the minority race;⁶¹ and relegation of true minority actors to background or stereotypical roles.⁶²

In the later decades of the twentieth century, beginning with the turmoil of the 1960s, filmmakers began portraying Native American characters in a more sympathetic light.⁶³ These seemingly positive portrayals, however, did not eliminate the objectionable hegemonic practices, misappropriations, and misrepresentations of the Native American identity. The new

57. See, e.g., RAHEJA, *supra* note 21, at 11-12; MARCHETTI, *supra* note 47, at 190; Goldberg, *supra* note 23.

58. Goldberg, *supra* note 23.

59. GUBAR, *supra* note 10, at 54-55.

60. *Id.*

61. See, e.g., Michelle I, *Yellowface: A Story in Pictures*, RACEBENDING.COM (Dec. 9, 2009), <http://www.racebending.com/v3/background/history-of-yellowface/>.

62. MOON, *supra* note 45, at 164 (asserting that due “to the power of film executives in casting, Asian and Asian Americans who had decades of theatrical experience . . . were unable to find work or were relegated to stereotypical roles – laundrymen, prostitutes, or servants”).

63. REEL INJUN, *supra* note 19.

“positive” roles misrepresented Native Americans by perpetuating stereotypes and misappropriated the Native American image to express social dissatisfaction of youth during the “hippie” movement in the 1960s.⁶⁴ This practice resumed later in the 1990s, where the Native American image continued to be misappropriated as a backdrop to tell non-Native-centered stories.⁶⁵ Furthermore, more often than not, non-Native actors continued to be hired to portray these new Native American characters.

Arguably, Native American characters began to be portrayed in a more positive light beginning in the 1960s. In practice, however, most films continued to perpetuate negative stereotypes. The image of Native Americans in the popular, “common sense” view, was relegated to the Western and, as a result, became frozen in the past.⁶⁶ The popular image of a “real Indian” perpetually bore the mark of the stereotypical Plains Indian construct, with beads, headdresses, and moccasins, and a Native American character was seldom viewed in the context of modern, everyday life.⁶⁷ Rather than portrayed as complex human beings, Native Americans were presented as noble savages with mythic spiritual qualities. The famous “crying Indian” embodies this stereotype — the wooden, stoic, spiritual Indian in tune with nature.⁶⁸ The advent of the new century has seen a decrease in the popularity of Westerns, but stereotypes remain. When Native American actors are hired for roles in contemporary films, these characters commonly equate the Native American image with social problems such as alcoholism and domestic violence.⁶⁹

Next, filmmakers channeled the hippie movement of the 1960s and misappropriated the Native American image to express social

64. *Id.*

65. *Id.*

66. *Id.*; Harlan, *supra* note 37, at 206, 208 (echoing the hegemonic theory that Native Americans are relics of the past who failed to survive to modernity).

67. Harlan, *supra* note 37, at 207-08. For example, not every modern-day Native American adorns moccasins and headdresses during his/her everyday life. Specifically, not every Native American looks or dresses in the traditional garb of a Plains Indian.

68. Anderson, *supra* note 18, at 143-44.

69. See Omi, *supra* note 19, at 119 (maintaining that while non-Native actors are able to play nearly any character from any genre, Native Americans are relegated to roles where they “cope with alcoholism and tribal conflicts. Rarely do we see racial minorities ‘out of character,’ in situations removed from the stereotypic arenas in which scriptwriters have traditionally embedded them.”); see also, e.g., REEL INJUN, *supra* note 19 (citing FLAGS OF OUR FATHERS (Paramount Pictures 2006)) (portraying Adam Beach’s Native American character struggling with alcoholism).

dissatisfaction.⁷⁰ Hippies began to “play Indian” — dressing in the stereotypical image of the Plains Indian, wearing braids, feathers, and moccasins — and called for a return to a cultural communion with nature.⁷¹ Scholars and leaders within the Native American community objected to their people being used — and inaccurately portrayed in the amalgamated Plains Indian image — as a symbol of protest.⁷²

With the revival of the Western in the 1990s, filmmakers continued to misappropriate the Native American image. While mainstream critics celebrated the new positive portrayal of Native Americans in films such as *The Last of the Mohicans*⁷³ and *Dances with Wolves*,⁷⁴ this practice, though facially positive, constituted a subtler form of redface in the minds of many Native peoples. Native Americans may have been presented in these films in a more positive light, but the same objections remained. Non-native actors were still misappropriating Native American identity to tell a centrally non-Native story. Furthermore, this practice continued to provide to the world a cultural definition, albeit an ill-defined one, of what it means to be a Native American.⁷⁵ Just as the hippie movement appropriated Native American images to make a statement about political dissatisfaction, these newly formulated Westerns used Native American actors and imagery as the central message of the story.⁷⁶ This new formulation still centered on the non-Native character, and many Native American critics viewed such practices as another form of colonialism. Along with Kevin Costner, many popular non-Native actors appropriated this Native American identity in the 1990s, including Pierce Brosnan, Brad Pitt, and Daniel Day Lewis.⁷⁷

The same “common sense” stereotypes were often perpetuated in the following way: the non-Native characters improved conditions for or introduced groundbreaking ideas to the stereotypically portrayed Native Americans.⁷⁸ Meanwhile, the “real” Native American characters and actors were relegated to the background, existing in the shadows to underscore the

70. REEL INJUN, *supra* note 19.

71. *Id.*; see also Katie J.M. Baker, *A Much-Needed Primer on Cultural Appropriation*, JEZEBEL (Nov. 13, 2012, 5:00 PM), <http://jezebel.com/5959698/a-much+needed-primer-on-cultural-appropriation> (objecting to modern white misappropriation of stereotypical images in fashion).

72. *Id.*

73. (Morgan Creek Prods. 1992).

74. (Tig Productions 1990).

75. REEL INJUN, *supra* note 19.

76. Anderson, *supra* note 18, at 142.

77. REEL INJUN, *supra* note 19.

78. *Id.*

strength, courage, and intelligence of the lead actor.⁷⁹ Oglala Sioux activist Russell Means expressed frustration with Kevin Costner's role in 1990s *Dances with Wolves*.⁸⁰ Costner's character fights alongside Native Americans and teaches them to use firearms — underscoring the stereotypes of Native American ignorance and permanent relegation to Stone Age technology — when in reality, the Lakota people were experienced warriors.⁸¹ While mainstream critics point to the humanized character of Kicking Bird, played by Oneida Graham Greene, Lakota activist John Trudell maintains that the story of Costner's character remains the film's main focus, and any notion that the film centered on Native American people is largely illusory.⁸² Thus, these “positive” roles in the revival Westerns remain a form of racism that Native scholars continue to insist perpetuates negative stereotypes.

The history of discrimination against the Native American community in the film industry has damaged the perception of the Native American identity. Whether Native American citizens are portrayed as bloodthirsty warriors, nobly ignorant spiritualists, or merely a backdrop to an overarching non-Native focus, the effect is to dehumanize Native Americans and place their voices and perspectives at the periphery. Community leaders are actively seeking a remedy for these practices. A prevailing call for remedy within the community of Native American scholars, artists, and activists is a platform in the industry for Native Americans to present their own self-image in film, speaking in their own voices, in order to proclaim — and ultimately reclaim — their humanity.⁸³ Once empowered with a platform to speak with their own voices, Native

79. See Omi, *supra* note 19, at 555.

80. *DANCES WITH WOLVES*, *supra* note 74.

81. REEL INJUN, *supra* note 19 (objecting to the film's treatment of the Lakota, Means states, “[L]ike we don't know how to fight? We, the Lakota, the first nation to ever militarily defeat the United States of America on the field of battle and ‘Lawrence of the Plains’ has to teach us how to fight?”).

82. *Id.* (maintaining that *Dances with Wolves* “gets promoted as being about Native American people or Indians, but . . . it's a story about a white guy”).

83. Lobo, Talbot & Morris, *supra* note 24, at 202 (stating that Native peoples have been misrepresented throughout history, and calling for a revision of this history “to include Native voices”); REEL INJUN, *supra* note 19 (featuring Lakota activist John Trudell's plea “to be treated as human beings, to be looked upon and respected as equals”); Harlan, *supra* note 37, at 206 (maintaining a need to “claim rights to, and ownership of, strategic and intellectual space for our works”); Singer, *supra* note 19, at 227 (urging that storytelling through film is key to “wiping the warpaint off the lens”; indeed, “it is *only* through our participation in filmmaking that we can help to create mutual understanding and respect.”).

American artists are able to correctly portray the Native American image — as human beings. Rather than the one-dimensional amalgamated Plains Indians presented onscreen, Native Americans should be viewed in all of their complexities. This viewpoint would expose the diverse cultural practices and traditions inherent within each individual Native American tribe. There is a consensus within the community that “Native Americans are starved for positive and accurate depictions of themselves” as people, with all the multifaceted dimensions of humanity, where the character’s ethnicity does not form the sole basis of his identity.⁸⁴

Despite calls for redress from the Native American community, Hollywood’s practices appear to continue into the new century with 2013’s *The Lone Ranger*.⁸⁵ Rather than create an authentic image, Disney’s modern take on the Western appears to reinforce more inaccurate stereotypes and traditional hegemonic narrative structures. The film gets off to a poor start, introducing Tonto’s character as an old relic, frozen in the past — he is literally portrayed as an old man relegated to a museum exhibit, with a traditional southwest setting and the label “the noble savage in his natural habitat.”⁸⁶ While “[t]he old man, presumably, is intended to be a prankster, or sort of spirit guide to the past . . . the idea is barely developed as more than a framing device” which acts more to emphasize the hegemonic theory that Native Americans are relics of the past who failed to survive to modernity.⁸⁷ The old Comanche chief, another Native character, later reinforces to the Lone Ranger that “Our time is past” and that “we are already ghosts.”⁸⁸

Moreover, though Tonto’s costume in the film was interpreted from a painting of Crow artist Kirby Sattler, the painting is not a historically accurate depiction of a Crow Indian from the period.⁸⁹ Furthermore, in the

84. Matthew Fleischer, *Gone with the Wind: A Decade After Smoke Signals, Success Remains Elusive for Native American Filmmakers*, in NATIVE AMERICAN VOICES, *supra* note 19, at 229, 229.

85. THE LONE RANGER, *supra* note 1.

86. *Id.*

87. Harlan, *supra* note 37, at 206; Liam Lacey, *The Lone Ranger: Cowboy Kitsch Meets Major Studio Spectacle*, GLOBE & MAIL, July 3, 2013, <http://www.theglobeandmail.com/arts/summer-entertainment/the-lone-ranger-cowboy-kitsch-meets-major-studio-spectacle/article12925938/>.

88. THE LONE RANGER, *supra* note 1.

89. Anthony Breznican, *Johnny Depp Reveals Origins of Tonto Makeup from ‘The Lone Ranger’*, ENT. WKLY. (Apr. 22, 2012), <http://insidemovies.ew.com/2012/04/22/johnny-depp-reveals-origins-of-tonto-makeup-from-lone-ranger-exclusive/>.

film Tonto's character hails from the Comanche Nation.⁹⁰ Though a backstory in the film explains Tonto's appearance, the Crow-Comanche mix-up continues in Hollywood's tradition of amalgamating tribal identity into the generic Plains Indian. Tonto's younger character, in flashback, reinforces more inaccurate stereotypes. In addition to his pidgin speech and historically inaccurate Plains Indian costume, his ability as a "spirit warrior" to talk with spirit animals and see visions from the spirit world recalls the hippie movement's identification of the Native as the embodiment of nature.⁹¹ Though perhaps less willingly, Tonto's guidance of the Lone Ranger on his journey for justice mirrors older narratives; though there is more character development of the Native character, the central focus remains on the non-Native lead and his family.⁹²

Commenting to the press on his decision to accept the role of Tonto in the film, Depp has acknowledged the history of negative stereotyping against Native Americans in Hollywood, and expressed intent to "[mess] around" with them in his portrayal.⁹³ In execution, Depp's performance fails to do more than simply "mess around" – his "notion that exaggerating the stereotype somehow subverts it doesn't really wash. Tonto is, in a freshly idiosyncratic way, still a squirm-worthy character."⁹⁴ Just as with blackface, critics could view the franchise's reboot as another form of misappropriation — this time to engage in a cathartic revision of non-Native/Native relations, while still reinforcing more of the same.⁹⁵ Some critics mourn that even though well intentioned, once again, it is a non-Native actor with a painted face that will define the modern image of Native Americans to the public.⁹⁶

II. Academic Discussion Has Centered on Utilization of the Existing Legal Mechanism of the Title VII Anti-Discrimination Claim in Seeking Redress for Hollywood's Discriminatory Casting Practices

Native Americans continue to be underrepresented and misrepresented on film today. As of 2008, fewer Native American actors were cast in film

90. THE LONE RANGER, *supra* note 1.

91. *Id.*; Roscoe Pond, 'Tonto' Prominent in New 'Lone Ranger' Movie Trailer with Johnny Depp, EXAMINER.COM (Dec. 12, 2012), <http://www.examiner.com/article/tonto-prominent-new-lone-ranger-movie-trailer-with-johnny-depp>.

92. THE LONE RANGER, *supra* note 1.

93. Breznican, *supra* note 89.

94. Lacey, *supra* note 87.

95. See GUBAR, *supra* note 10, at 54-55.

96. Breznican, *supra* note 89.

and television roles in proportion to their population than any other race.⁹⁷ This section explores the legal options and remedies Native American actors have, if any, in challenging the discriminatory results of the casting process within the film industry. The chief legal option through which a minority actor exposed to employment discrimination could seek judicial relief is found in Title VII of the Civil Rights Act of 1964.⁹⁸

Courts have yet to be presented with an actor's challenge to discriminatory employment practices in the casting of films. A possible reason for this dearth of jurisprudence is the lack of a clear legal mechanism to address the balance between artistic freedom and employment rights.⁹⁹ However, a recent trend within the community of legal scholars advocates the use of Title VII's existing framework to counteract racially discriminatory casting practices in Hollywood. A Title VII claim provides the most plausible existing mechanism through which a Native American actor may seek relief for discriminatory casting practices within the film industry. A plaintiff could also bring a cause of action under 42 U.S.C. § 1981, an alternative but, for the purposes of this discussion, pragmatically equivalent claim for racial discrimination under the Civil Rights Act of 1964.¹⁰⁰ Using this existing framework presents challenges, and requires drawing analogies to a body of case law that is untouched by the subjective and artistic endeavors of the film industry.¹⁰¹ Nonetheless, film studios are employers engaged in employment contracts much like any other industry, and many scholars insist that a heretofore-unchecked industry should be responsible for observing the same basic civil rights requirements under Title VII as other employers.

Title VII was passed as part of the Civil Rights Act of 1964, which was sweeping legislation proposed by President John F. Kennedy and signed into law by Lyndon B. Johnson.¹⁰² Passed in response to the turmoil of the civil rights movement, the Act was meant to fulfill the Fourteenth Amendment's promise of equal protection by counteracting Jim Crow era

97. *Latest Casting Data*, *supra* note 4.

98. *See, e.g.*, *supra* note 15.

99. Krieger, *supra* note 15, at 840.

100. *See* Robinson, *supra* note 11, at 73 (comparing § 1981's prohibition of racial discrimination in contracting to a Title VII claim); *see also* Ferrill v. Parker Group, Inc., 168 F.3d 468, 473 (11th Cir. 1999) (acknowledging that the § 1981 test is equivalent to a Title VII claim for intentional discrimination).

101. Krieger, *supra* note 15, at 840.

102. *The Civil Rights Act of 1964*, U.S. SENATE COMMITTEE ON THE JUDICIARY, <http://www.judiciary.senate.gov/about/history/CivilRightsAct.cfm> (last visited Dec. 31, 2012).

racial criteria that, in the wake of *Plessy v. Ferguson*,¹⁰³ had provided a bar to minority voting rights and imposed cultural, social, and economic segregation, among other harms.¹⁰⁴ As a component of this overarching regulatory scheme, Title VII targeted discriminatory employment practices Congress had found to be pervasive and systematic in the American workplace.¹⁰⁵ Its purpose was to remove societal barriers to historically disadvantaged groups, insisting on equality of employment opportunities and proscribing employment decisions based on racial or gender-based qualifications.¹⁰⁶ This was to be achieved by identifying and combating false or arbitrary employment criteria.¹⁰⁷

Title VII prohibits employers from engaging in discriminatory hiring practices on the basis of race.¹⁰⁸ The language of the statute provides:

It shall be an unlawful employment practice for an employer:

(1) to fail or refuse to hire . . . any individual . . . because of such individual's race, color . . . or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise

103. 163 U.S. 537 (1896).

104. *The Civil Rights Act of 1964*, *supra* note 102; *Teaching with Documents: The Civil Rights Act of 1964 and the Equal Employment Opportunity Commission*, NAT'L ARCHIVES & RECS. ADMIN., <http://www.archives.gov/education/lessons/civil-rights-act/> (last visited Dec. 31, 2012) [hereinafter *Teaching with Documents*].

105. *The Civil Rights Act of 1964*, *supra* note 102; *see also* H.R. REP. NO. 88-914 (1963); 110 CONG. REC. 1511, 1516-2805 (1964); *Civil Rights: Hearings on H.R. 7152 Before the House Comm. on Rules*, 88th Cong., 2d Sess., pt. 1, 1-2 (1964); *Katzenbach v. McClung*, 379 U.S. 294, 301 (1964) (addressing the enactment of the Civil Rights Act of 1964 in response to the "nationwide scope" of discrimination); MICHAEL J. ZIMMER ET AL., *CASES AND MATERIALS ON EMPLOYMENT DISCRIMINATION* 91 (3d ed. 1994).

106. *The Civil Rights Act of 1964*, *supra* note 102; *see also* *Griggs v. Duke Power Co.*, 401 U.S. 424, 429-30 (1971) (asserting that Congress's purpose in enacting Title VII is plain from its language — that "[i]t was to achieve equality of employment opportunities and remove barriers that have operated in the past to favor an identifiable group of white employees over other employees.").

107. *Griggs*, 401 U.S. at 431; *see also generally* H.R. REP. NO. 88-914; 110 CONG. REC. 1511, 1516-2805; *Civil Rights: Hearings on H.R. 7152 Before the House Comm. on Rules*, 88th Cong., 2d Sess., pt. 1, 1-2.

108. 42 U.S.C. § 2000e-2(a) (2006). This provision also prohibits discrimination on the basis of sex and religion, but these topics are beyond the scope of this comment.

adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.¹⁰⁹

The statute's application covers most employers having at least fifteen employees across a broad spectrum of employment practices, including hiring, termination, promotions, training, and wages.¹¹⁰

This statute is administered through the Equal Employment Opportunity Commission ("EEOC"), an independent federal commission created by Title VII and appointed by the President.¹¹¹ Subsequent legislation extended the EEOC's power to enforce Title VII, and the EEOC now has the authority to enact regulatory guidelines, along with extensive investigative power.¹¹² In order to pursue a Title VII claim in court, potential claimants must first file a charge with the EEOC, allowing it to conduct an investigation.¹¹³ The EEOC may pursue a suit against the offending employer, attempt to settle the claim, or provide the claimant with a Notice of Right to Sue.¹¹⁴ Such practices afford the EEOC with a considerable deal of discretion and authority in enforcing Title VII, as well as providing claimants the means to seek redress in court. Courts construe Title VII with a significant level of deference to EEOC interpretation and with a liberal construction of the Act in general.¹¹⁵

Parties seeking relief for employment discrimination under Title VII may bring a claim asserting either disparate treatment or disparate impact.¹¹⁶ A disparate treatment claim focuses on an employer's discriminatory motive in treating an employee differently as a result of his or her protected characteristic, while a disparate impact claim examines a facially neutral employment practice that disproportionately impacts a protected group, often with a focus on statistical data.¹¹⁷

109. *Id.*

110. *About EEOC*, EQUAL EMP'T OPPORTUNITY COMM'N, <http://www.eeoc.gov/eeoc/index.cfm> (last visited Dec. 31, 2012).

111. *Teaching with Documents*, *supra* note 104; 1 RODNEY A. SMOLLA, FEDERAL CIVIL RIGHTS ACTS § 9.2 (3d ed. 2012).

112. SMOLLA, *supra* note 111.

113. *Filing a Lawsuit*, EQUAL EMP'T OPPORTUNITY COMM'N, <http://www.eeoc.gov/employees/lawsuit.cfm> (last visited Dec. 31, 2012).

114. *Id.* Legislation requires a different approach for federal employers. *Id.*

115. SMOLLA, *supra* note 111.

116. Katie Manley, *The BFOQ Defense: Title VII's Concession to Gender Discrimination*, 16 DUKE J. GENDER L. & POL'Y 169, 173 (2009).

117. *Id.*

A. Disparate Treatment Analysis

The disparate treatment track essentially requires a plaintiff to prove that the employer purposefully treated him differently as a result of his protected status.¹¹⁸ The United States Supreme Court established a scheme outlining the elements of a disparate treatment claim in *McDonnell Douglas Corp. v. Green*.¹¹⁹ Under the *McDonnell Douglas* scheme, the Title VII plaintiff carries the initial burden of establishing a prima facie case of racial discrimination.¹²⁰ To establish a prima facie case, the plaintiff must establish: first, that he/she was a qualified applicant belonging to a racial minority; second, that he/she was rejected from a job for which the employer was seeking applicants; and third, after this rejection, the employer continued to seek applicants with the same qualifications.¹²¹ For example, the plaintiff in *McDonnell Douglas*, an African American lab technician, established a prima facie case of racial discrimination by proving that the manufacturer refused to hire him for an open position because of his race,¹²² even when the corporation conceded that the plaintiff was qualified.¹²³

Next under the *McDonnell Douglas* scheme, the burden shifts to the employer to rebut the presumption of unlawful employment discrimination established by the plaintiff's prima facie case.¹²⁴ In order to rebut the presumption, the defendant must provide evidence clearly setting forth a "legitimate, non-discriminatory reason" for refusing to hire a qualified member of a racial minority.¹²⁵ For instance, the eponymous employer in *McDonnell Douglas* countered that the reason for refusing to hire the plaintiff was motivated by plaintiff's unlawful behavior that had occurred when the plaintiff engaged in a form of civil disobedience directed at the corporation during a civil rights protest.¹²⁶

Finally, the trier of fact decides whether the employer's motivation was based on prohibited racial discrimination.¹²⁷ The plaintiff carries the

118. *Id.* For analysis of disparate impact track, see discussion *infra* Part II.B.

119. 411 U.S. 792 (1973).

120. *Id.* at 802.

121. *Id.* (noting that the requirements for a prima facie case may differ in various factual contexts).

122. *Id.* at 792.

123. *Id.* at 802.

124. *Id.*

125. *Id.* at 802-03.

126. *Id.* at 796.

127. *Id.* at 807.

conclusive burden of persuasion, and even if the fact finder discredits the defendant's explanation, judgment for the plaintiff does not necessarily become the automatic result.¹²⁸ The Court in *McDonnell Douglas*, for instance, remanded to the trier of fact the ultimate question of the corporation's reason for refusal to hire the plaintiff, asserting that while the proffered explanation could have been pretext, issues of credibility did not determine whether the defendant's explanation rebutted the initial presumption.¹²⁹

Under limited circumstances, an employer may engage in purposeful employment discrimination without garnering disparate treatment liability. The plain language of the statute clearly prohibits employers from taking race into account when interviewing — or, in a logical parallel, auditioning — potential hires. The same statutory provision, however, provides an exception, allowing certain employee characteristics to be taken into account when there exists a bona fide occupational qualification (“BFOQ”).¹³⁰ The language of the statute provides:

Notwithstanding any other provision of this subchapter, (1) it shall not be an unlawful employment practice for an employer to hire and employ employees . . . on the basis of his religion, sex, or national origin in those certain instances where religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise.¹³¹

An employer must meet three elements to establish a BFOQ defense: first, there must be a direct relationship between the trait and the ability to perform the job; second, the BFOQ relates to the “essence” of the employer's business; and third, there is no less-restrictive or reasonable alternative.¹³²

The statute intentionally omits race as a factor in establishing a BFOQ exception; subsequent administrative guidelines and case law confirm that

128. Ann K. Wooster, Annotation, *Title VII Race or National Origin Discrimination in Employment*, 182 A.L.R. FED. 61 (2011).

129. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 807 (1973).

130. 42 U.S.C. § 2000e-2(e) (2006).

131. *Id.*

132. See *Int'l Union, United Auto., Aerospace & Agric. Implement Workers of Am. v. Johnson Controls, Inc.*, 499 U.S. 187 (1991); see also 1 BARBARA T. LINDEMANN & PAUL GROSSMAN, *EMPLOYMENT DISCRIMINATION LAW* 404 (Barbara T. Lindeman et al. eds. 4th ed. 2007).

race can never be a permissible BFOQ.¹³³ In interpreting the exception, the EEOC¹³⁴ limited its scope.¹³⁵ The Supreme Court confirmed that even permissible BFOQ exceptions such as gender should be given an “extremely narrow” construction.¹³⁶

The EEOC guidelines do address the BFOQ exception in the context of casting decisions, allowing an exception for hiring an actor according to gender if such a distinction is key to the integrity of a motion picture. Federal rules allow for the BFOQ exception: “Where it is necessary for the purpose of authenticity or genuineness, the [EEOC] will consider sex to be a [BFOQ], e.g., an actor or actress.”¹³⁷ This discussion, however, is pointedly limited to considerations of an actor’s gender, not race. A discussion of the intersection of casting, race, and the BFOQ exception can be found in Title VII’s legislative history.¹³⁸ Senators Joseph Clark and Clifford Case, in discussing the bill in the House of Representatives, extended the authenticity or genuineness component of the BFOQ exception to appearance, which they differentiated from race as a permissible qualification:

[a] director of a play or movie who wished to cast an actor in the role of a Negro could specify that he wished to hire someone with the physical appearance of a Negro — but such a person might actually be non-Negro. Therefore, the act would not limit the director’s freedom of choice.¹³⁹

Though courts have not addressed this issue, under this approach filmmakers conceivably could raise a successful defense on the BFOQ exception to a racial classification, citing the EEOC guideline on authenticity.¹⁴⁰ Though narrowly interpreted, the BFOQ exception’s

133. See, e.g., *King v. Bd. of Regents of the Univ. of Wis. Sys.*, 898 F.2d 533, 537 (7th Cir. 1990); *Malhotra v. Cotter & Co.*, 885 F.2d 1305, 1308 (7th Cir. 1989); *Miller v. Tex. State Bd. of Barber Exam’rs*, 615 F.2d 650, 652 (5th Cir. 1980); 29 C.F.R. § 1604.2(a)(2) (2013); 110 CONG. REC. 2550 (1964).

134. Krieger, *supra* note 15, at 850-51 (citing MACK A. PLAYER, EMPLOYMENT DISCRIMINATION LAW 2000 (1988)) (describing the EEOC as “an independent agency that administers Title VII . . . [and] interprets the act through its official guidelines”).

135. 29 C.F.R. § 1604.2.

136. *Dothard v. Rawlinson*, 433 U.S. 321, 334 (1977).

137. 29 C.F.R. § 1604.2(a)(2).

138. 110 CONG. REC. 7213, 7216 (1964); Krieger, *supra* note 15, at 855.

139. 110 CONG. REC. 7213, 7216 (reporting comments by Senators Joseph Clark and Clifford Case regarding the BFOQ exception).

140. Krieger, *supra* note 15, at 856.

inclusion of appearance works to counteract Title VII's goal of encouraging hiring practices based on an applicant's qualifications, not his or her race, color, or national origin.¹⁴¹ In allowing such an interpretation, the exception would swallow the rule and effectively contravene Title VII.

Recent jurisprudence reveals that film studios may be limited in using the appearance exception as a BFOQ defense to the Title VII model claim. For example, retailer Abercrombie & Fitch settled a claim with the EEOC in 2004, paying a \$50 million settlement for alleged Title VII violations for its discriminatory hiring and advertising practices.¹⁴² The EEOC censure rose in response to an advertising campaign that centered on an "Aryan" appearance or aesthetic "look."¹⁴³ Although the art of fashion often involves selling an aesthetic standard, the EEOC warned that even aesthetic industries cannot use appearance as a pretext for discriminatory practices or to promote a specific racial preference.¹⁴⁴ It can be argued that this small exception is limited to requirements for authenticity or genuineness related to the gender of a role. The case may shed light on the extent the EEOC would be willing to construe a film studio's BFOQ defense in a model Title VII claim; but the *Abercrombie* case does not provide binding precedent, and any predictions merely provide inconclusive conjecture.

Employers may argue that customer preference is a justification for overt discrimination in a BFOQ defense.¹⁴⁵ Where racism exists in customers' minds, often discrimination can be profitable to a business, and this is no less true with cinema. Doubtless, Johnny Depp was cast as Tonto not due to Disney's racial prejudices, but, as is often the case with casting, because of his box-office draw.¹⁴⁶ Even advocates of the Title VII approach admit

141. *Griggs v. Duke Power Co.*, 401 U.S. 424, 434 (1971) (quoting 110 CONG. REC. 7247 (1964)).

142. Robinson, *supra* note 11, at 73; *EEOC Agrees to Landmark Resolution of Discrimination Case Against Abercrombie & Fitch*, U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION (Nov. 18, 2004), <http://www.eeoc.gov/eeoc/newsroom/release/11-18-04.cfm> [hereinafter *EEOC Agrees to Landmark Resolution*]. The lawsuit, entitled *EEOC v. Abercrombie & Fitch Stores, Inc.*, Case No. CV-04-4731 SI, was filed on Nov. 10, 2004, in the Northern District of California. *Id.*

143. Steven Greenhouse, *Abercrombie & Fitch Bias Case Is Settled*, N.Y. TIMES, Nov. 17, 2004, at A16, available at http://www.nytimes.com/2004/11/17/national/17settle.html?_r=0.

144. *EEOC Agrees to Landmark Resolution*, *supra* note 142 (quoting EEOC General Counsel Eric Dreiband that "businesses cannot discriminate against individuals under the auspice of a marketing strategy or a particular 'look'").

145. Manley, *supra* note 116, at 172.

146. In the past decade, in over eighteen non-independent films, a Depp vehicle has only lost money twice. Calculated from data gathered in *Johnny Depp*, INTERNET MOVIE

that a movie with a budget of over \$200 million would not have been made without a “super star” like Depp.¹⁴⁷ Typically, decisions, even discriminatory ones, are strictly business. Studios continue in the same static casting process, as one scholar admits, “not out of animus but out of a genuine belief that such casting maximizes box office potential.”¹⁴⁸

EEOC guidelines and case law show, however, that customer (or audience) preference is not a permissible motivation for discriminatory employment practices. The EEOC states that an employer’s refusal to hire a person because of the racial preferences of other employees or customers does not fall within the BFOQ exception.¹⁴⁹ Case law among various circuit courts confirms such an interpretation. The Fifth Circuit, for example, held that allowing Pan American World Airways (“Pan Am”) to cater to airplane passengers’ preference for only attractive female stewardesses would be unacceptable and defeat the purpose of the act.¹⁵⁰ Rather, employers may only consider a customer’s predilections when the employer would be unable to perform its primary function without such a distinction.¹⁵¹ The Seventh Circuit agreed in *Rucker v. Higher Education Aids Board*,¹⁵² refusing to allow an employer to consider the racial preference of its clients.¹⁵³ Despite the protective legal language, often in practice, entertainment executives use the consumer choice argument to justify underrepresentation of minorities in the film industry.¹⁵⁴

DATABASE, <http://www.imdb.com/name/nm0000136/> (last visited Oct. 30, 2012); *see also* *The Numbers: Johnny Depp*, NASH INFO. SERVS., <http://www.the-numbers.com/person/580401-Johnny-Depp> (last visited May 25, 2013). Records show Depp’s box office draw to be over \$6 billion worldwide; in one movie, he brought studios almost as much as the gross domestic product of the country of Bhutan in 2011. *Id.*; *The World Factbook*, CENT. INTELLIGENCE AGENCY, <https://www.cia.gov/library/publications/the-world-factbook/fields/2195.html> (last visited Dec. 27, 2012).

147. Metcalfe, *supra* note 5 (citing remarks by Native American filmmaker Chris Eyre).

148. Robinson, *supra* note 11, at 56.

149. 29 C.F.R. § 1604.2 (a)(1)(iii) (2013) (“The Commission will find that the following situations do not warrant the application of the [BFOQ] exception: The refusal to hire an individual because of the preferences of coworkers, the employer, clients or customers.”).

150. *Diaz v. Pan Am. World Airways, Inc.*, 442 F.2d 385, 389 (5th Cir. 1971) (stating that “[i]t was, to a large extent, these very prejudices the Act was meant to overcome.”).

151. *Id.*; *see also* *Hooters of Am. v. Phillips*, 173 F.3d 933 (4th Cir. 1999).

152. 669 F.2d 1179 (7th Cir. 1982).

153. *Id.* at 1181 (holding that Title VII forbids employers “to refuse on racial grounds to hire someone because your customers or clientele do not like his race.”).

154. Michael J. Frank, *Justifiable Discrimination in the News and Entertainment Industries: Does Title VII Need a Race or Color BFOQ?*, 35 U.S.F. L. REV. 473, 521 (2001).

A Native American actor wishing to bring a Title VII claim under the disparate treatment track would have a heavy burden. The first roadblock to a Native American actor wishing to bring a Title VII claim is the difficulty in establishing the initial prima facie presumption that the employer's actions were motivated by discriminatory racial¹⁵⁵ criteria.

Purposeful racial discrimination in the form of the disparate treatment track of the Title VII claim remains unlawful under the statute except in the very narrow, uncertain category of films requiring genuineness or authenticity. This category is uncertain because the genuineness or authenticity in film exception has only been addressed in legislative history, not statute or case law. Additionally, it would be difficult to find a consensus in the subjective domain of film and the arts as to which films require absolute historical accuracy regarding the characters' race. For example, several stage and film adaptations of Shakespearean works have featured minority actors in traditionally Caucasian roles, the most prominent of which stars Denzel Washington in the critically acclaimed box office hit *Much Ado About Nothing*.¹⁵⁶ More troublesome is the notion that bringing such an issue to court would place judges in the seat of making such artistic determinations.

Despite such uncertainty, however, an actor would face a difficult challenge meeting the burden of proof in such a case, not only because of the subjective nature of art, but because the industry is sophisticated — most modern discrimination is more covert than overt.¹⁵⁷ A modern Title VII plaintiff has the difficult burden of proving the employer discriminated intentionally because of the plaintiff's race — a difficulty compounded when the employer need only assert a non-discriminatory explanation that is reasonable in light of the circumstances.¹⁵⁸

Harking back to a time of more overt discrimination, kung fu legend Bruce Lee likely would have had a valid claim under the disparate treatment approach against Warner Brothers in the early 1970s. Lee pitched an idea to the studio for a television show featuring a Chinese monk practicing martial arts in an American “old West” setting. In the talks

155. See discussion *supra* note 5.

156. MUCH ADO ABOUT NOTHING (Renaissance Films 1993); *Much Ado About Nothing*, FESTIVAL DE CANNES, <http://www.festival-cannes.com/en/archives/ficheFilm/id/2566/year/1993.html> (last visited Dec. 27, 2012).

157. Omi, *supra* note 19, at 113 (positing that discrimination in modernity occurs in “implicit, and at times invisible, ways”); Robinson, *supra* note 11, at 6-8.

158. *Morgan v. Fed. Home Loan Mortg. Corp.*, 328 F.3d 647, 654 (D.C. Cir. 2003); 2 FAIR EMPLOYMENT PRACTICES § 13:31 (2013).

between Lee and the studio, it was understood that Lee would portray the lead character.¹⁵⁹ The studio approved the television show *Kung Fu* – but cast the role with a non-Chinese actor, the son of a famous actor, David Carradine.¹⁶⁰ The studio chose to cast David Carradine in the role of Chinese character Kwai Chang Caine, even though Carradine had little martial arts experience in comparison to Bruce Lee.¹⁶¹ Carradine also engaged in the practice of yellowface in portraying the role, wearing makeup to appear more Chinese.¹⁶²

Under the *McDonnell Douglas* scheme, Lee could have likely established a prima facie case. First, Lee was a member of a protected minority race; and second, he was objectively qualified for the role. While the job requirements of an actor are subjective and hardly fungible, Lee's superior martial arts talent and success in the Hong Kong film industry indicate more than sufficient qualifications. This fact is especially apparent when his replacement was a relatively unknown non-Chinese actor with no martial arts skills. Finally, after he was turned down for the role, the studio continued to seek applicants. Because the studio admitted that its decision to cast Carradine instead of Lee was based on race, Warner Brothers would have had difficulty rebutting this presumption. Remarkably, studio executives famously told Lee that a Chinese man would not be a bankable star, and that America was not ready for “a yellow man on the tube.”¹⁶³

It is difficult to imagine a similar scene today — with such a frank manifestation of discriminatory motive by the defendant — due to the disappearance of widespread overt discrimination, the subjective nature of the performing arts, and the closed nature of Hollywood's decision-making process. Modern filmmakers frequently hire a cast without holding auditions or issuing any discoverable data points. Whether these decisions are based primarily on a star's box-office draw, talent, or racially discriminatory reasons are often impossible to determine.¹⁶⁴ A number of subjective factors contribute to a studio's decision to cast an actor beyond

159. Frederick Dennis Greene, *Cultural Colonization in the Hollywood Film: The Harlem Debates-Part 2*, 5 *ASIAN L.J.* 63, 94-95 (1998); Marissa Lee, “*Kung Fu*” *Remake in the Works Again*, RACEBENDING.COM (Nov. 1, 2011) <http://www.racebending.com/v4/history/kung-fu-remake-in-the-works-again/>.

160. Lee, *supra* note 159.

161. *Id.*; THE SLANTED SCREEN, *supra* note 50.

162. THE SLANTED SCREEN, *supra* note 50.

163. Lee, *supra* note 159.

164. Robinson, *supra* note 11, at 8 (noting that due to casting practices, decisions are “largely hidden from public view and protected from Title VII scrutiny because of the difficulty in pinpointing the discriminatory motive”).

appearance, including acting ability, charisma, and a director's "vision" of a character.¹⁶⁵ The subjective nature of these qualities would make the plaintiff's burden in a disparate treatment claim nearly insurmountable to show purposeful discrimination. Many actors possess all of these qualities but are never even considered for a part because studios often cast films around certain actors and their ability to draw audiences, without even holding auditions.¹⁶⁶

Depp, for instance, was chosen at the outset of production on *The Lone Ranger* as part of a continued working relationship with director Gore Verbinski.¹⁶⁷ Depp has already successfully collaborated with Verbinski, namely, in Disney's highly lucrative *Pirates of the Caribbean*¹⁶⁸ and its three sequels.¹⁶⁹ Many speculate that Disney also chose to hire Depp for the part of Tonto because of his economic box-office draw. In the past decade, Depp has been billed in over eighteen films; from these films he has given studios an average of 168% return on their investment — one film, over 400% return.¹⁷⁰ In the past decade in approximately eighteen films (non-independent), Depp drew in gross box office earnings of over \$6 billion for Hollywood studios.¹⁷¹ Verbinski and Disney studios could effectively rebut the presumption established by a model Title VII prima facie case by asserting that Depp was chosen for non-discriminatory reasons, such as his past success in collaborative films. The level of success is concrete; a movie starring Depp has only lost money twice in the last ten years.¹⁷²

165. See, for example, Native American filmmaker Chris Eyre's acknowledgement that Depp was chosen for *The Lone Ranger* because of his "super star" quality. Metcalfe, *supra* note 5.

166. Robinson, *supra* note 11, at 8.

167. Steve Persall, *Gore Verbinski, Johnny Depp Forge Animated Partnership*, TAMPA BAY TIMES (Mar. 3, 2011), <http://www.tampabay.com/features/movies/gore-verbinski-johnny-depp-forge-animated-partnership/1154703>.

168. (Walt Disney Pictures 2003).

169. Sandy Schaefer, *Gore Verbinski Promises an Unconventional 'Lone Ranger'*, SCREEN RANT (Jan. 1, 2012), <http://screenrant.com/lone-ranger-johnny-depp-gore-verbinski-sandy-101993/>.

170. See Appendix A (calculated from data gathered in *Johnny Depp*, INTERNET MOVIE DATABASE, <http://www.imdb.com/name/nm0000136/> (last visited Oct. 30, 2012)); see also *The Numbers: Johnny Depp*, NASH INFO. SERVS., <http://www.the-numbers.com/person/580401-Johnny-Depp> (last visited May 25, 2013).

171. See Appendix A.

172. Calculated from data gathered in *Johnny Depp*, INTERNET MOVIE DATABASE, <http://www.imdb.com/name/nm0000136/> (last visited Oct. 30, 2012); see also Appendix A. This does not take independent film proceeds into consideration.

The next roadblock to a Native American actor wishing to bring a model Title VII claim is the BFOQ defense. As a result of the appearance exception, it is plausible that a filmmaker could raise the BFOQ defense for his decision to cast an actor with a European appearance for a Shakespearean role, which, almost certainly, would be a Caucasian performer. The BFOQ exception, however, is a defense and not a mandate. Filmmakers are not required to cast for authenticity; instead, they are given an amount of creative freedom to do so if desired. A Native American actor turned down for the role of Tonto could not use the BFOQ appearance exception as an offensive tool to demand a racially appropriate representation of the Native American character. As a result of this construction, Title VII seems to garner the perverse result of protecting a casting director's decision to cast a non-Native actor in a Native American role while providing no statutory incentive to cast a Native American actor in a Native American role.¹⁷³

B. Disparate Impact Analysis

Title VII contemplates the difficulty of proving discriminatory purpose and provides relief for employers' acts that, though facially neutral, have a discriminatory impact.¹⁷⁴ The Supreme Court developed the analysis for the disparate impact track in a series of two cases, beginning with *Griggs v. Duke Power Co.*,¹⁷⁵ and ending with *Wards Cove Packing Co. v. Atonio*.¹⁷⁶ The disparate impact track does not require proof of any discriminatory intent on the part of the employer. Rather, it requires that facially neutral hiring methods have an adverse impact on a minority group.¹⁷⁷ As a result, the BFOQ defense is not available to employers under the disparate treatment track because it is utilized only to justify an employer's admittedly discriminatory practices, not facially neutral methods.¹⁷⁸

Under the disparate treatment analysis, a plaintiff must first establish a specific policy or practice of the employer has had an adverse impact on a

173. In response, several minority activists have called for a firmer BFOQ race exception or statutory incentive to encourage minority employment in roles featuring minority characters. See, e.g., Chen, *supra* note 15, at 535-37.

174. *Griggs v. Duke Power Co.*, 401 U.S. 424, 431 (1971) (holding that the Civil Rights Act of 1964 "proscribes not only overt discrimination but also practices that are fair in form, but discriminatory in operation").

175. *Id.*

176. 490 U.S. 642 (1989).

177. Manley, *supra* note 116, at 173 (citing *Connecticut v. Teal*, 457 U.S. 440, 446 (1982)).

178. *Id.*

segment of the workforce or job applicant pool, e.g., African Americans or women.¹⁷⁹ The fact that one group may be impacted differently by a hiring practice, however, does not provide dispositive proof of discrimination; disparate impact alone does not establish a Title VII claim.¹⁸⁰ After the plaintiff establishes the adverse impact, employers may raise a “business necessity” defense by proving that the practice is significantly related to successful job performance of a specific employment task.¹⁸¹ The plaintiff prevails if the defendant cannot raise a successful business necessity defense.¹⁸² For example, in *Griggs*, the employer was held liable for racial discrimination under a disparate impact theory when it could not justify a business necessity, or any economic benefit, derived from its policy of requiring its unskilled laborers to have a high school diploma or to pass a written test.¹⁸³ The plaintiff may also prevail by demonstrating that although the employer's policy or practice at issue is justified by “business necessity,” the employer refused to implement alternative policies or practices through which it could have accomplished its business objectives without having an adverse impact on a specific segment of the workforce.¹⁸⁴

Much like the customer preference argument for choosing a lucrative actor like Johnny Depp over an arguably more qualified Native American actor, many courts have imposed a categorical rejection of profit-based discriminatory hiring practices. In *Wilson v. Southwest Airlines Co.*,¹⁸⁵ for example, the district court noted that allowing employers to engage in employment discrimination on the justification of mere profit would cripple Title VII's utility.¹⁸⁶ The Fifth Circuit in dicta addressed the business necessity defense for race-specific casting. Justifying a narrow necessity exception when the character's race formed an integral part of the role, the court acknowledged that hiring an actor of a certain race based on desired

179. *Griggs*, 401 U.S. at 431.

180. Manley, *supra* note 116, at 173.

181. 42 U.S.C. § 2000e-2(k)(1)(A)(i) (2006); *Griggs*, 401 U.S. at 426 (holding that employer's hiring practice of requiring intelligence tests did not relate to job performance, the requirements disqualified a disproportionate number of minority applicants, and only whites had been hired in the past “as part of a longstanding practice of giving preference to whites”).

182. *Griggs*, 401 U.S. at 431.

183. *See id.* at 433.

184. 42 U.S.C. § 2000e-2(k)(1)(A)(ii).

185. 517 F. Supp. 292 (N.D. Tex. 1981).

186. *Id.* at 302 n.25.

authenticity for a historical figure would be appropriate.¹⁸⁷ However, even while recognizing the possible validity of such an approach, like the BFOQ appearance exception, the court's language limited the concept to historical accuracy. Specifically, the court looked narrowly at historical figures primarily famous for their race.¹⁸⁸

Like the BFOQ defense under the disparate treatment approach, the disparate impact approach presents similar problems for plaintiffs attempting to overcome a defendant's non-discriminatory explanation under the business necessity defense. Asserting similar non-discriminatory justifications for its actions, an employer may raise the business necessity defense by showing that the hiring practice is significantly related to successful job performance of a specific employment task. The studio would assert that an established actor with proven talent and ability to carry a movie in the lead role was a necessity in the business of producing films.

III. Insufficiencies of the Title VII Approach: A Clash with the First Amendment and an Inadequate Fit for Native American Concerns

Utilizing a Title VII approach to combat Hollywood's discriminatory casting practices against Native Americans neither stands up against First Amendment guarantees of artistic license nor provides an adequate remedy for Native Americans. The First Amendment prohibits state and federal governments from restricting the content of protected speech, even if the speech counteracts government initiatives.¹⁸⁹ In addition, because members of the Native American community seek access to the film industry in order to present their own artistic perspective in their own voice, judicially forcing production companies to integrate Native American actors into the preexisting power structure would not serve this goal.

187. *Miller v. Tex. State Bd. of Barber Exam'rs*, 615 F.2d 650, 654 (5th Cir. 1980) (acknowledging that "it is likely that a black actor could not appropriately portray George Wallace, and a white actor could not appropriately portray Martin Luther King, Jr.").

188. Onwuachi-Willig, *supra* note 11, at 339 (maintaining that such discrimination only complies with Title VII when "the appearance of race is central to the authenticity of a role").

189. See William J. Brennan, Jr., *The Supreme Court and the Meiklejohn Interpretation of the First Amendment*, 79 HARV. L. REV. 1, 13 (1965) (asserting that "the arts . . . fall within the subjects of 'governing importance' that the first amendment absolutely protects from abridgment").

A. Title VII Does Not Provide an Adequate Remedy Because the First Amendment Protects Filmmakers' Artistic Freedom in Making Casting Decisions

In addition to non-litigated questions of interpretation, splicing the rigid, preexisting framework of Title VII into the context of filmmaking collides with potential constitutional questions. Does Title VII's application to the film industry's casting process violate filmmakers' artistic freedom in making casting decisions under the First Amendment? The question of an actor's Title VII claim is especially complex because of the unique nature of the film industry as both a business and an artistic member of the marketplace of ideas. The Supreme Court's First Amendment jurisprudence serves as a pragmatic roadblock to civil rights initiatives such as applying Title VII in the context of private artistic expression, weighing more heavily in the protection of speech. Being a constitutional provision, the First Amendment garners more weight than antidiscrimination statutes such as Title VII.¹⁹⁰

One of the First Amendment's core values lies in protecting a person's right to express his or her chosen views in a free society without government interference, even if the government finds such expression objectionable in its topic or underlying ideology.¹⁹¹ The Supreme Court has explicitly stated that the motion picture industry, though conducted for profit, produces artistic expressions that are included within the protected "free speech" and "free press" guaranties of the First Amendment — even if the purpose of the film is merely to provide entertainment.¹⁹²

Filmmaking is undoubtedly artistic expression; thus, actors are not only employees but artistic subjects as well. The free speech values outlined by the Supreme Court over the last half-century clearly shows that the Constitution prevents the federal government from regulating what an artist can paint on his canvas. For instance, it would be unconstitutional to

190. Robinson, *supra* note 11, at 17.

191. See, e.g., *Cohen v. California*, 403 U.S. 15, 24 (1971); *Police Dep't of Chi. v. Mosley*, 408 U.S. 92, 95 (1972) ("[A]bove all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content."). The only exception is for unprotected speech such as obscenity, incitement, or libel. See *Miller v. California*, 413 U.S. 15 (1973); *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942); *New York Times v. Sullivan*, 376 U.S. 254 (1964).

192. *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 501-02 (1952); see also Brennan, *supra* note 189.

mandate Grant Wood to diversify the racial identity of the pitchforked couple in his famous painting, *American Gothic*.¹⁹³ Filmmakers could argue that a court's application of Title VII to the casting process would achieve an analogous result. Many in the industry, even actors, resent judicial interference with the arts. These critics maintain that if courts mandate a racially blind casting process, the law would be imposing artistic deference in contravention of the First Amendment.¹⁹⁴

A few Title VII proponents have suggested minimizing First Amendment conflict by narrowing the scope of the proposed lawsuit so that a petitioner would challenge only the casting calls issued in written form to agents and actors.¹⁹⁵ This proposed model, proposed by Professor Russell Robinson, calls for a qualified minority actor to bring suit when a casting call states a racial preference, such as a call for white actors.¹⁹⁶ Such a casting call would constitute a direct racial classification and likely satisfy the disparate treatment elements.¹⁹⁷ Additionally, proponents maintain that casting calls for a minority that relegate the actor to a stereotypical role could satisfy the disparate impact elements.¹⁹⁸ Such suits would have more of a narrow reach, focusing on direct harms rather than industry-wide relief.¹⁹⁹

The limited casting call approach, however, calls for judges to carve out an exception, balancing First Amendment rights against Title VII.²⁰⁰ It remains unclear whether limiting the scope of judicial review to casting

193. (Art Institute of Chicago 1930); *see, e.g.*, *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos.*, 515 U.S. 557, 569-70 (1995) (illustrating a Jackson Pollock painting as a form of protected expressive speech within First Amendment protection from content regulation).

194. Chen, *supra* note 15, at 543.

195. Robinson, *supra* note 11, at 3-4 (asserting that "current law would support a finding that at least some race and sex classifications in breakdowns violate Title VII and do not receive First Amendment protection").

196. *Id.* at 29.

197. *Id.*

198. *See id.* at 27-28 (discussing the harms associated with adopting a gender/racial stereotype, and more specifically, the employment harms suffered by females who end up in certain stereotypical roles throughout their acting careers).

199. *Id.* at 17 ("Although the proposed Title VII lawsuit pragmatically focuses on the direct harms suffered by actors, the ramifications of such a lawsuit could ultimately help erode the social stratification exacerbated by much casting in contemporary film.").

200. *Id.* at 46-47 (acknowledging that without any contextual precedent, an actor bringing this novel claim would shoulder the burden to "convince the court that the case should be understood principally as a dispute concerning employment rather than an attempt to change the content of a film").

calls would be sufficiently narrow to survive First Amendment attacks. Moreover, the Supreme Court has consistently applied a strict level of scrutiny to content-based restrictions on protected speech.²⁰¹ Content based restrictions are subject to “the most exacting scrutiny.”²⁰² As with flag burning or Ku Klux Klan demonstrations, under the First Amendment, the government may not prohibit expressive conduct merely because society finds the expressed idea offensive or disagreeable.²⁰³

In light of recent Supreme Court decisions, it seems unlikely that the Court would carve out an exception and allow greater latitude of First Amendment regulation. This decade, the Supreme Court has engaged in deregulating speech in the greatest amount since the Warren Court.²⁰⁴ In *Citizens United v. Federal Election Commission*,²⁰⁵ the Court upheld the extension of First Amendment protection to corporate speech and deregulated corporate funding of political campaigns. Valuing speech as “indispensable to decision-making in a democracy,”²⁰⁶ the Court included corporate expression within its view of the mythical “marketplace of ideas,” which provides a carefully guarded platform for social discourse.

The following year in *Brown v. Entertainment Merchants Ass’n*,²⁰⁷ the Court underscored its commitment to content deregulation, holding that books, movies, and video games are all forms of expression protected by the First Amendment — even if their purpose is purely for entertainment.²⁰⁸ Consistent with the growing trend of deregulation, the Roberts Court in *Brown* further limited government intervention in the marketplace of ideas, holding that whether the artistic subject was Dante’s *Divine Comedy* or the violent video game *Mortal Kombat*, courts may not impose value judgments, “even if we can see in them nothing of any possible value to society.”²⁰⁹ To the Court, the First Amendment declares, “esthetic and moral judgments about art and literature ... are for the individual to make,

201. *Texas v. Johnson*, 491 U.S. 397, 412 (1989) (citing *Boos v. Barry*, 485 U.S. 312, 321 (1987)).

202. *Id.*

203. *Id.*

204. *See, e.g.*, William Freivogel, *Analysis: Roberts Court Displays Robust Support of Free Speech, Especially for Monied Interests*, ST. LOUIS BEACON (June 29, 2011, 12:12 PM), https://www.stlbeacon.org/#!/content/15812/analysis_roberts_court_displays_robust_support_of_free_speech (comparing pro-speech holdings of Roberts Court to 1960s Warren Court).

205. 130 S. Ct. 876, 883 (2010).

206. *Id.*

207. 131 S. Ct. 2729 (2011).

208. *Id.* at 2733.

209. *Id.* at 2737.

not for the [g]overnment to decree, even with the mandate or approval of a majority.”²¹⁰ A Title VII plaintiff’s attempts to persuade the Court that the harm occurring from casting decisions justifies imposing limits on casting will not likely succeed in light of *Brown*. Even though Title VII supports the judgment that racial discrimination has utterly no value in our society, the posture of the Roberts Court and history of consistent speech deregulation since the 1960s do not present a great possibility for change.

Finally, pragmatically speaking, actors are not motivated to pursue relief in court under this approach. The industry’s casting process is highly competitive. The image of small-town actors coming to Hollywood in droves to catch their “big break” is iconic in the American psyche. The majority of roles are centralized in the Los Angeles area, and a large number of applicants vie for a much smaller number of jobs within a small community of major studios.²¹¹ Employment as a film actor is short-lived; most movies wrap filming in less than a year.²¹² As a result, stars with staying power must be connected within the industry. Many stars are notorious for being “black-balled” after meeting disfavor with a studio, amid the well-known phrase, “You’ll never work in this town again!” Unless Congress steps in and definitively addresses the impact of racial discrimination in the performing arts industry, actors are likely unwilling to risk their careers on an untested legal theory.

One notable attempt to sue a studio for discriminatory casting practices arises from a pair of reality television shows: *The Bachelor* and *The Bachelorette*. In *Claybrooks v. American Broadcasting Cos.*,²¹³ two African American men who were turned down for the role of bachelor contestants on the American Broadcasting Company (“ABC”) television program *The Bachelor* brought suit against ABC and other producers, alleging that the show’s producers intentionally refused to cast minority contestants in the “central role.”²¹⁴ The plaintiffs alleged that the defendants’ motive for refusing to cast a racial minority in the lead role was

210. *Id.* at 2733 (quoting *United States v. Playboy Entm’t Grp., Inc.*, 529 U.S. 803, 818 (2000)).

211. *See generally* Robinson, *supra* note 11.

212. *Id.*

213. No. 3:12-cv-00388, 2012 WL 4890686, at *1 (M.D. Tenn. Oct. 15, 2012).

214. Greg Braxton, *Racial Discrimination Lawsuit Against ‘The Bachelor’ Is Dismissed*, L.A. TIMES (Oct. 15, 2012), <http://articles.latimes.com/2012/oct/15/entertainment/la-et-st-racial-discrimination-bachelor-20121015>. Plaintiffs brought suit under the equivalent, contract-based 42 U.S.C. § 1981; the outcome would be the same under a Title VII claim. *See* discussion *supra* note 100.

to guarantee viewership and avoid the controversy of an interracial couple.²¹⁵

As predicted, the district court in *Claybrooks* dismissed the plaintiffs' complaint on First Amendment grounds.²¹⁶ The *Claybrooks* court echoed the Supreme Court's principle — articulated in *Burstyn*²¹⁷ and *Brown*²¹⁸ — that motion pictures and other forms of entertainment constitute expressive speech included within the scope of First Amendment protection.²¹⁹ Despite the statute's clear prohibition of race-based criteria, the Court nonetheless held that such a statutory requirement was superseded by the constitutional weight of the First Amendment.²²⁰ Under the First Amendment, statutes regulating content, even offensive, unorthodox, or discriminatory content, are subject to strict scrutiny when they interfere with private, expressive speech.²²¹

Acknowledging the dearth of analogous precedent, the *Claybrooks* court nonetheless underscored the continued tradition of deregulation in First Amendment jurisprudence, even in the context of antidiscrimination statutes, noting that a speaker's freedom of choice to refrain from expressing a particular point of view lies beyond the government's constitutionally permissible regulatory limits.²²² For example, in *Hosanna-Tabor Evangelical Lutheran Church & School v. Equal Employment Opportunity Commission*,²²³ the First Amendment shielded from employment discrimination statutes a religious institution's discriminatory criteria in hiring its ministers.²²⁴ Likewise, in *Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston*,²²⁵ the First Amendment shielded parade organizers from state antidiscrimination statutes in

215. *Claybrooks*, 2012 WL 4890686, at *2.

216. *Id.* at *5.

217. *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495 (1952).

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

219. *Burstyn*, 343 U.S. at 502; *Claybrooks*, 2012 WL 4890686, at *5.

220. *Claybrooks*, 2012 WL 4890686, at *5 (citing *Hurley*, 515 U.S. at 568) (holding that the First Amendment can trump the application of antidiscrimination laws to protected speech).

221. See Gerald Gunther, *Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 8 (1972) (stating that strict scrutiny is "strict in theory, fatal in fact").

222. *Claybrooks*, 2012 WL 4890686, at *5 (citing *Hurley*, 515 U.S. at 575).

223. 132 S. Ct. 694 (2012).

224. *Id.* (prioritizing First Amendment protections above the statutory antidiscrimination standards of the Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12101-12213).

225. 515 U.S. 557 (1995).

choosing parade participants.²²⁶ Because organizing and holding a parade constitutes expressive conduct, a statute compelling the private actors to include a Lesbian Gay Bisexual and Transgender (“LGBT”) group in the expression would impermissibly violate the speakers’ autonomy in choosing the content of the expressive message, including the choice to omit a message the council did not like.²²⁷ The protection remains even when the speakers’ message contains undesirable, discriminatory ideas.²²⁸

Like the court in *Hurley*, which included the “casting” process of the parade in the overarching expression of the parade, the *Claybrooks* court approached ABC’s casting process with a broad scope, refusing to carve out a narrow exception as separate from the ultimate casting decision expressed on the air.²²⁹ Instead, the court held that casting decisions are incorporated into the overarching creative process within the protected scope of expressive speech.²³⁰ As a result, applying the antidiscrimination statute to the act of casting a television program would interfere with the defendants’ right to control the expressive content of their constitutionally protected speech.²³¹

ABC’s casting decisions may, as the *Claybrooks* plaintiffs allege, send the message that only non-minority relationships are desirable, resulting in deleterious effects on society such as the perpetuation of racial taboos.²³² In light of First Amendment protections consistently upheld by the judiciary, however, ABC remains free to select the expressive content of its television programming. In the court’s view, using antidiscrimination law to reform casting practices and include a more progressive message — while admirable — impermissibly affects the content of the television program in a manner precluded by the First Amendment.²³³

226. *Id.* at 573.

227. *Id.*

228. *Id.*

229. *Claybrooks*, 2012 WL 4890686, at *10 (M.D. Tenn. Oct. 15, 2012) (holding that “regulating the casting process necessarily regulates the end product” with the result that “casting and the resulting work of entertainment are inseparable and must *both* be protected to ensure that the producers’ freedom of speech is not abridged.”).

230. *Id.*

231. *Id.*

232. *Id.*

233. *See id.* (applauding plaintiff’s “[I]audable [goals which] seek to support the social acceptance of interracial relationships, to eradicate outdated racial taboos, and to encourage television networks not to perpetuate outdated racial stereotypes. Nevertheless, the First Amendment prevents the plaintiffs from effectuating these goals by forcing the defendants to

B. Even Assuming the Viability of a Title VII Claim in a Filmmaking Context, This Method Does Not Speak to the Unique Needs of the Native American Community

Assuming the viability of a Title VII claim, such a suit would not provide the desired remedy that Native American leaders have clearly articulated. If Congress acted, or a trend of cases emerged in the lower courts, to award minorities relief under the Title VII approach, the industry would likely make changes in order to avoid litigation. If these decision-makers consulted with the academic community to determine what changes to make, it is likely that color-blind casting would be implemented. This practice is much like its moniker sounds — actors are hired with disregard to ethnicity. This practice, though controversial, has been implemented with some small success in the United States theater community. One famous example even occurred in film: Kenneth Branagh's 1993 adaptation of Shakespeare's *Much Ado About Nothing*,²³⁴ where African-American actor Denzel Washington was cast in the role of Don Pedro of Aragon.²³⁵ Grossing over \$22 million in the United States, the film was one of the most lucrative Shakespearean film adaptations to date.²³⁶ Color-blind casting is designed to advance underrepresentation by minority actors; however, it has the potential to cut both ways.²³⁷ Color-blind casting promotes cross-racial portrayals; therefore a Caucasian actor could theoretically be cast in a role that according to the script, or to tradition, went to a minority. This could have the undesirable result of both protecting and perpetuating "redface."

Even when implemented successfully in the aid of minorities, color-blind casting only provides a solution for larger minority groups such as African-Americans, where a chief complaint is underrepresentation. A survey of the Native American artistic and academic community, however, reveals Native Americans' biggest complaint — the misappropriation and misrepresentation of Native American images on film. Native peoples would like to fight against the practice of redfacing and portraying their

employ race-neutral criteria in their casting decisions in order to 'showcase' a more progressive message.")

234. (Renaissance Films 1993).

235. *Denzel Washington*, INTERNET MOVIE DATABASE, <http://www.imdb.com/name/nm0000243/bio> (last visited Dec. 27, 2012).

236. *Much Ado About Nothing*, INTERNET MOVIE DATABASE, <http://www.imdb.com/title/tt0107616/> (last visited Dec. 27, 2012).

237. See generally Chen, *supra* note 15.

people as frozen in the past by gaining a chance to speak for themselves.²³⁸ Native American filmmakers such as Chris Eyre desire the opportunity to present the perspective of the modern Native American, who wears jeans and participates in the modern world.²³⁹ Native American actors and audiences communicate a hunger for a role that focuses on the actor's humanity rather than his ethnicity.²⁴⁰

Any workable Title VII approach would only seek to obtain more equal representation within the workforce. In order to avoid First Amendment barriers, the content of films would remain completely unaltered. It is the content, however, that Native Americans find so damaging: the history of racist imagery and stereotypical messages that continue to exist on the modern screen.²⁴¹ Forcing Disney and other production companies to hire Native American actors in roles like Tonto would not satisfy Native American writers' hunger for a realistic, human depiction²⁴² because the problem runs much deeper. In *The Lone Ranger*, written by non-Native authors, Tonto tells the story from a non-Native perspective, while in redface, and as such demonstrates the negative stereotype promulgated by media.²⁴³

These continued practices form the basis of controversy in Disney's *The Lone Ranger*, released more than fifty-seven years after John Wayne led a raid against a group of Comanches in Ford's iconic film, *The Searchers*. During the course of those fifty-seven years, we have seen both the rise of the Civil Rights movement and our first minority president. Yet, from the initial trailer of this modern film, it is apparent that little has changed. Tonto still sports the generic apparel of the homogenized Plains Indian, still speaks the same pidgin English, and is still cast with a non-Native man. Implementing a Title VII approach may serve progressive antidiscrimination goals, but would not serve to redress specific discrimination claims within the Native American community. In order for the Native American community to prevail over Hollywood, the community

238. REEL INJUN, *supra* note 19.

239. *Id.*

240. *Id.*

241. *Id.*

242. See Daniel-Davila, *supra* note 34 (maintaining that “[f]or a Native actor to play the role of Tonto would have been the most damaging decision, because instead of rejecting that type of Native portrayal, he would have validated the character’s original intended message, that Native men are all Tontos . . . Instead of furthering the stereotype and lending credibility to it, we should be putting our energy into creating real roles for ourselves, in every form of media . . .”).

243. *Id.*

as a whole must address the issue of discrimination. Native Americans must convey the differences and similarities among various tribes in order to strive against cultural hegemony. Without a thoughtful discussion about this core issue, Native people may continue to be perceived as relics of the past, rather than human beings. A modern movement toward cultural understanding would serve to put a fresh face on the issue.

IV. Proposal: Providing Greater Opportunity for Minority Counter-Speech Reaches Native American Concerns and Protects First Amendment Freedoms

Providing more opportunity for minority speech would address Native American calls for cultural ownership without raising First Amendment concerns for artistic freedom. This compromise finds common ground between the two competing interests, which both strive to encourage discourse within society rather than to limit it. The proposed solutions include as follows: first, encouraging self-imposed changes within the industry, using the NFL's efforts with the "Rooney Rule" as a model; and second, granting government subsidies, grants, and self-imposed industry support to Native American filmmakers, which addresses Native American concerns more directly. It also provides more immediate and impactful solutions to the community by supporting a platform for Native American voices to produce counter-speech, defining their own self-image to the world.

A. Self-Imposed Union Regulations Within the SAG-AFTRA Analogous to the Rooney Rule Have a Greater Potential for Effective Change

First, the entertainment industry can find pseudo-legal, voluntary solutions from analogous industries; namely, the sports industry. Much like the film industry, American sports leagues have historically discriminated against racial groups, with severe underrepresentation in leadership and coaching positions.²⁴⁴ Especially within Major League Baseball ("MLB") and NFL organizations, the sports industry has engaged in analogous discriminatory hiring practices, particularly regarding "star" leadership positions.²⁴⁵ The employment process for baseball and football coaches

244. Timothy Davis, *The Myth of the Superspade: The Persistence of Racism in College Athletics*, 22 *FORDHAM URB. L.J.* 615, 645 (1995) (discussing stereotype that African American athletes lack the intellectual rigor to excel at team leadership).

245. See, e.g., *Impact of the Rooney Rule*, FRITZ POLLARD ALLIANCE FOUND., http://fritzpollard.org/?page_id=167 (last visited Dec. 27, 2012) (stating that before the 2003 implementation of the Rooney Rule, the NFL hired only two minority managers out of

shares a similar historical atmosphere, lacking spoken, objective employment qualifications and favoring an “old boy network,” where hires come from within existing circles of the “wealthy white elite,” often without even announcing an open position.²⁴⁶

Innovators within the sports community began to pressure owners to implement a system of self-regulation aimed at breaking down racial barriers within these positions.²⁴⁷ The owners listened, and steps toward integrating management began first with MLB in 1999, when commissioners “instituted a policy requiring” teams to “submit a list of minority candidates” to consider for top decision-making positions among team management.²⁴⁸ The NFL answered in 2003, when Pittsburgh Steelers owner, Dan Rooney, chaired the newly formed Committee on Workplace Diversity (“Committee”) to study the lack of minority coaches in the league.²⁴⁹ The Committee was formed in response to pressure from civil rights attorneys such as Johnnie Cochran, Jr., who threatened to bring suit against the league if leaders refused to implement a system promoting fair criteria in hiring decisions.²⁵⁰

The outcome of the study, dubbed “The Rooney Rule” in honor of chairman Dan Rooney, is an internal requirement, voluntarily adopted and implemented by the league. The rule instructs the league’s teams to “interview at least one minority candidate” when filling a senior coaching position.²⁵¹ Teams were issued a set of guidelines to follow during the interviewing process; most notably, the elimination of telephone interviews and requiring the owners to be personally involved.²⁵² These measures are

thirty-two teams); Aaron T. Walker, Comment, *Title VII & MLB Minority Hiring: Alternatives to Litigation*, 10 U. PA. J. BUS. & EMP. L. 245, 255 (2007) (comparing similarly low percentages of minority managers in baseball, with less than ten minority team managers and general managers in over fifty years).

246. Walker, *supra* note 245, at 249.

247. See *Impact of the Rooney Rule*, *supra* note 245 (characterizing implementation of the Rooney Rule as the result of “four-year push by people inside and outside the sport to open doors to minority coaches that have been closed for most of the NFL’s history”).

248. Walker, *supra* note 245, at 249.

249. Greg Garber, *Thanks to Rooney Rule, Doors Opened*, ESPN (Feb. 9, 2007, 3:03 PM), <http://sports.espn.go.com/nfl/playoffs06/news/story?id=2750645>.

250. Patrick K. Thornton, *The Increased Opportunity for Minorities in the National Football League Coaching Ranks: The Initial Success of the NFL’s Rooney Rule*, 6 WILLAMETTE SPORTS L.J. 45, 50 (2009).

251. Garber, *supra* note 249.

252. *NFL Issues Guidelines for Hiring Minority Coaches*, JACKSONVILLE FREE PRESS, <http://jacksonvillefreepress.com/nfl-issues-guidelines-for-hiring-minority-coaches-p132-71.htm> (last visited Dec. 27, 2012).

aimed to ensure legitimate, not sham, interviews.²⁵³ Among other requirements, teams must also prepare a job description setting forth specific, objective qualifications of the position, and communicate clear deadlines for decision making.²⁵⁴ The guidelines are meant to give qualified minority candidates increased exposure and serious consideration for the position.²⁵⁵

The rule is enforced with relatively mild consequences. While facing fines for refusing to extend an interview, ultimate hiring decisions remain with the team.²⁵⁶ In July of 2003, however, the NFL revealed that the rule does have a relative level of bite. The NFL imposed a \$200,000 fine against the Detroit Lions for failing to interview a minority candidate before hiring a new head coach; taking the fine a step further, the NFL warned that any team incurring the next violation would be fined \$500,000.²⁵⁷

Detractors alleged the rule went too far; proponents, however, underscored the voluntary nature of the rule, serving as a recommendation rather than a requirement or “rigid quota” system.²⁵⁸ Critics, speaking from the other side of their mouths, also pointed out that because the rule is process-oriented rather than a conclusive mandate, evasive teams could subvert the rule by conducting sham interviews, then hiring the non-minority candidate that team leadership had in mind from the beginning.²⁵⁹ The numbers, however, speak for themselves; the rule markedly increased diversity.²⁶⁰ Some posit that face-to-face interviews with leadership made the difference in combating subconscious prejudices.²⁶¹ Finally, even when the interview does not result in immediate employment, the Rooney Rule still has the potential to benefit minority interviewees. Experiencing the

253. *Id.*

254. Thornton, *supra* note 250, at 51.

255. *Impact of the Rooney Rule*, *supra* note 245.

256. Garber, *supra* note 249.

257. Sean O’Connell, Book Review, *Advancing the Ball: Race, Reformation, and the Quest for Equal Coaching Opportunity in the NFL*, 8 DEPAUL J. SPORTS L. & CONTEMP. PROBS. 117, 120 (2011).

258. Kim Van Der Zon, *Bring the NFL ‘Rooney Rule’ into Corporate Boardrooms*, FORBES (May 9, 2012, 2:35 PM), <http://www.forbes.com/sites/forbeswomanfiles/2012/05/09/bring-the-nfl-rooney-rule-into-corporate-boardrooms/>.

259. *Id.*

260. *Id.*

261. N. Jeremi Duru, *The Fritz Pollard Alliance, the Rooney Rule, and the Quest to “Level the Playing Field” in the National Football League*, 7 VA. SPORTS & ENT. L.J. 179, 195 (2008) (noting the few instances of sham interviews, alleging that “more often than one might initially intuit, a face-to-face, in-person, interview with an organization’s primary decision-makers begets meaningful consideration”).

interview process can better prepare candidates when faced with similar interactions in the future. It also affords interviewees a level of exposure to leadership that can lead to a position in the future.²⁶²

Many were surprised to discover that the NFL's implementation of the Rooney Rule had been successful in leading to concrete jobs for minority applicants. Since 2003, an increasing number of minority coaches have been hired and succeeded.²⁶³ As of 2011, 22% of the league's current coaches are minorities, up from 6% when the Rooney Rule was implemented.²⁶⁴ The NFL's decision draws criticism from some, who describe the Rooney Rule as a sort of nouveau-racism, objecting to its paternal appearance,²⁶⁵ however, it has been received positively in most minority circles. Supporters of the rule underscore the limited imposition of the rule, pointing out that all minorities require is an opportunity to be heard. The Fritz Pollard Alliance, an organization formed to increase minority hiring in the NFL and one of the initial forces in bringing about the NFL's implementation of the rule, stresses that the proponents' intent was not to dictate which coaches to hire, but merely to create interviewing opportunities.²⁶⁶ Rooney himself echoes the Fritz Pollard Alliance's stated purpose, illustrated with the decision to hire African American Mike Tomlin as the Vikings defensive coordinator. Tomlin's opportunity to exhibit his qualifications formed the basis for the team's decision to hire him, not motivations artificially imposed by the rule.²⁶⁷ In 2008, Tomlin became the second African American head coach in history to win the Super Bowl.²⁶⁸ In statements to reporters, Tomlin stated that he would not have had the same opportunities without the implementation of the rule.²⁶⁹

Borrowing such a system is not a novel concept. Variations of the rule have been implemented in sports besides football, and many have proposed

262. Van Der Zon, *supra* note 258.

263. *Impact of the Rooney Rule*, *supra* note 245; Thornton, *supra* note 250.

264. O'Connell, *supra* note 257.

265. See Mike Reiter, *Rooney Rule: Why the Rule Is Racist and Needs to Be Removed*, BLEACHER REPORT (Jan. 3, 2011), <http://bleacherreport.com/articles/560734-rooney-rule-why-the-rule-is-racist-and-needs-to-be-removed> (characterizing Rooney Rule, affirmative action as another form of racism because "as long as people differentiate others based on their race, this country will not move forward").

266. *Impact of the Rooney Rule*, *supra* note 245.

267. Garber, *supra* note 249 (quoting Rooney's statement that the rule "wasn't the most important thing because he was the most important thing. Mike got the job because he showed us his ability and showed us what he could do, and we believed in him.").

268. Thornton, *supra* note 250, at 46.

269. Garber, *supra* note 249.

implementing the rule at the college level.²⁷⁰ Other minorities and disfavored groups have advocated the implementation of an analogous rule into other settings outside the sports industry as well.²⁷¹ Groups advocating equal employment opportunities for women in the corporate boardroom, for example, have pressured boards to implement policies requiring nominating committees to interview a diverse slate of candidates for leadership positions, including a minimum of one woman.²⁷²

The most plausible method to implement a Rooney Rule analogue into the filmmaking industry is through action by the performers' unions, namely SAG-AFTRA. The SAG and the AFTRA merged in 2012 into one performers' union.²⁷³ Along with other entertainment unions such as the Writers Guild of America,²⁷⁴ these organizations are in the best position to change minority-hiring practices because of their strong bargaining power.²⁷⁵ SAG-AFTRA protects a large scope of media professionals, including news writers, recording artists, and of course, actors.²⁷⁶ Both organizations are strong labor unions, which could negotiate terms into collective bargaining agreements in order to achieve increased minorities in leadership positions. The union is tasked with negotiating and enforcing collective bargaining agreements which form contracts between producers and performers, outlining their rights and responsibilities, including levels of compensation and benefits, working conditions, and compensation for exploitation.²⁷⁷

SAG-AFTRA has a wide latitude of discretion in setting forth the terms of these agreements, even terms regarding discriminatory employment

270. Thornton, *supra* note 250, at 53-54.

271. Duru, *supra* note 261, at 197.

272. Van Der Zon, *supra* note 258.

273. *History*, SAG-AFTRA, <http://www.sagaftra.org/history> (last visited Dec. 27, 2012).

274. The discrimination among industry writers is pervasive but outside the scope of this comment. See Adam Freed, *TV Writers and Proskauer Client CAA Reach Preliminary Agreement to Settle*, PROSKAUER (Mar. 19, 2012), <http://calemploymentlawupdate.proskauer.com/2012/03/articles/discrimination/tv-writers-and-proskauer-client-caa-reach-preliminary-agreement-to-settle/>; *Samuels v. William Morris Agency*, No. 10 Civ. 7805(DAB), 2011 WL 2946708 (S.D.N.Y. July 19, 2011).

275. See Walker, *supra* note 245, at 261, 266. Walker advocates the introduction of such a method in baseball through the MLB Players Association ("MLBPA"). SAG-AFTRA is in an even stronger bargaining position because the MLBPA only protects players, rather than the wider range of performing arts protected under SAG-AFTRA. *Id.* at 263; *Mission Statement*, SAG-AFTRA, <http://www.sagaftra.org/about-us/mission-statement> (last visited Dec. 27, 2012).

276. *Mission Statement*, *supra* note 275.

277. *Id.*

practices in casting. Acknowledging its power for influence, the union has expressed a commitment to achieving optimal member employment regardless of race, and working to achieve opportunities for diversity.²⁷⁸ It claims to work toward this goal through non-discrimination provisions in collective bargaining agreements and policies, programs, and initiatives to diversify the entertainment industry.²⁷⁹ Already “a vocal advocate challenging discrimination in the industry,” the SAG-AFTRA is in a prime position to bring about change from within.²⁸⁰ The union has already incorporated some of these progressive ideas into its contracts. The 2005 Basic Agreement, for example, provides a master agreement for theatrical motion pictures, setting forth producers’ responsibilities in casting actors for a film. This contract contains several clauses reaffirming Title VII values.²⁸¹ The union requires producers to reaffirm that “every effort shall be made to include minorities in the casting of each motion picture, thereby creating fair and equal employment opportunity and eliminating stereotyping in casting.”²⁸² The agreement also requires producers to include a statement in the casting calls circulated to agents that “submissions for *non-descript* roles will be accepted for all performers, regardless of race.”²⁸³

The union already has a policy in place in its standard agreement consistent with Title VII objectives and Rooney Rule methods.²⁸⁴ This policy, however, remains ultimately limited and contradicted by the language in the latter clause.²⁸⁵ The clause, affecting the permissible language producers may use in its casting calls, sends the message to agents that all races have a chance to make a submission — but only regarding non-descript roles. Much like the minority NFL employees, these performers have been relegated to the sideline rather than given an opportunity to seek center stage.

The union, in order to carry out its stated goals, needs to expand this opportunity to include all roles. Like the sports industry, which self-imposed the Rooney Rule in response to criticism that its minority talent

278. *EEO & Diversity*, SAG-AFTRA, <http://www.sagaftra.org/EEODiversity> (last visited Dec. 27, 2012).

279. *Mission Statement*, *supra* note 275; *EEO & Diversity*, *supra* note 278.

280. *EEO & Diversity*, *supra* note 278.

281. *2005 Basic SAG Agreement*, SAG-AFTRA, <http://www.sagaftra.org/production-center/documents> (last visited Dec. 27, 2012).

282. *Id.*

283. *Id.* (emphasis added).

284. *Id.*

285. *Id.*

was also relegated to “non-descript roles,” the entertainment industry has the opportunity to impose self-regulatory measures that overcome racially preconceived notions about who Main Street will pay to see on the screen. Just as Mike Tomlin, when given the chance, led his team to the Super Bowl, at least five minority actors, when given the chance, have delivered Oscar-worthy performances, namely: Forest Whitaker,²⁸⁶ Jamie Foxx,²⁸⁷ Denzel Washington,²⁸⁸ Sidney Poitier,²⁸⁹ and Halle Berry.²⁹⁰

The union’s contract also needs to expand the contractual language beyond just the agents’ opportunity to make diverse submissions. Just as the percentage of minority coaches hired into the NFL increased once the Rooney Rule was imposed, even though the rule did not impose mandatory hiring, the number of minority actors cast into lead roles will likely increase if these actors are given face-to-face auditions with decision makers. While submissions can be tossed aside by assistants, such face-to-face interaction gives actors an opportunity for counter-speech. Such interaction breaks down preconceived notions and allows the interviewer to learn about the human within the actor.

B. Funding Native American Artists Calls for Redress Within the Community and Provides a Platform for Counter-Speech and Cultural Ownership

Finally, the interests of the Native American community would be best served by providing a platform for Native Americans to establish their own expression of identity without raising First Amendment concerns. The general consensus within the community is a call for Native American voices to speak for themselves in order to counteract negative portrayals. As Native American artist Barbara Singer writes, “it is only through our participation in filmmaking that we can help to create mutual understanding and respect.”²⁹¹

Native American filmmakers have already gained notoriety for taking steps to improve the Native image to the world. Chris Eyre, director of

286. *Forest Whitaker*, INTERNET MOVIE DATABASE, <http://www.imdb.com/name/nm0001845/bio> (last visited Dec. 27, 2012).

287. *Jamie Foxx*, INTERNET MOVIE DATABASE, <http://www.imdb.com/name/nm0004937/bio> (last visited Dec. 27, 2012).

288. *Denzel Washington*, *supra* note 235.

289. *Sidney Poitier*, INTERNET MOVIE DATABASE, <http://www.imdb.com/name/nm0001627/bio> (last visited Dec. 27, 2012).

290. *Halle Berry*, INTERNET MOVIE DATABASE, <http://www.imdb.com/name/nm0000932/> (last visited Dec. 27, 2012).

291. Singer, *supra* note 19, at 227.

highly acclaimed feature film *Smoke Signals*,²⁹² has used his fame as a preeminent Native American filmmaker to create films that serve as counter-speech to television and motion pictures with roles he characterized as one-dimensional or romanticized, such as *Walker, Texas Ranger*.²⁹³ In his filmmaking projects, Eyre strives not only to hire Native American actors, but also to cast according to the appropriate tribe, and to portray characters speaking Native languages.²⁹⁴ By engaging in these practices, he feels he is achieving progress.²⁹⁵

Despite the positive strides made by Native artists, there remains a strong call within the community for more resources in order to foster growth. This can be achieved in several ways; first, Congress can be pressured to grant government subsidies to Native American filmmakers. In addition, like the NFL's decision to fine the Detroit Lions for violating the Rooney Rule, the powerful performers' unions could impose fines on producers for discriminatory casting practices, with the proceeds going to Native filmmaking projects. With this method, the remedy would answer the harms directly.

Additionally, just as the NFL began a pilot program in order to prepare members of minorities to become coaches,²⁹⁶ funding equivalent pilot programs such as the Sundance Initiative ("Initiative") ensures that Native voices will be heard. The Initiative is a division of the Sundance Institute, a program aimed at developing new talent within the industry.²⁹⁷ A unique feature of the Initiative is the placement of Natives in leadership positions.²⁹⁸ Bird Runningwater, Associate Director of the Native American and Indigenous Initiatives for the Sundance Film Festival, is free to scout for talent among indigenous filmmakers, serving as the decision maker regarding which projects to assist in development.²⁹⁹

One of the Initiative's films, "Miss Navajo," provides an example of Native filmmakers' use of film to combat cultural hegemony and to

292. SMOKE SIGNALS (ShadowCatcher Entertainment 1998).

293. Alexis Fitts, *Interview: Chris Eyre, Native American Director, and Ric Burns, Documentary Filmmaker*, MOTHER JONES (May 29, 2012, 1:50 AM), <http://www.motherjones.com/media/2009/05/interview-chris-eyre-native-american-director-and-ric-burns-documentary-filmmaker>.

294. *Id.*

295. *Id.*

296. Thornton, *supra* note 250, at 51.

297. Farai Chideya, *Native American Filmmakers Arrive at Sundance*, NAT'L PUB. RADIO (Jan. 17, 2007, 12:00 PM), <http://www.npr.org/templates/story/story.php?storyId=6883548>.

298. *Id.*

299. *Id.*

supplant it with their own cultural values.³⁰⁰ The film, a documentary, focused on members of the Navajo Nation speaking to each other in their native language — showing that despite past U.S. policy, the language remains alive.³⁰¹ The Initiative also stresses the importance of screening these films for Natives on reservations, in order to encourage and inspire a new generation of talent and keep the language alive.³⁰² The film also shows women's roles within Navajo society, portraying Navajo women not just in a positive light, but also with all the complexities of human beings.³⁰³

V. Conclusion

For nearly a century, Hollywood has engaged in casting procedures that perpetuate racial stereotypes and reinforce entrenched employment discrimination against Native Americans. While legal scholars have suggested that minority actors who have been wrongfully denied employment seek redress under Title VII, no system of case law supports such an interpretation. Additionally, the Title VII approach would not adequately address constitutional concerns regarding a filmmaker's First Amendment freedom of expression. Instead, non-legal solutions should be self-imposed within this industry, with results that encourage more speech, rather than restricting filmmakers. Without a doubt, however, significant strides must be made to reclaim the Native American image on the silver screen. Theresa Harlan, a Pueblo art critic and curator, concludes, "Native American image-makers understand that the images they create may either subvert or support existing representations of Native American people . . . [t]he contest remains over who will image — and own — this history."³⁰⁴

300. *Id.*

301. *Id.*

302. *Id.*

303. *Id.*

304. Harlan, *supra* note 37, at 210.

Appendix A: Return on Investment, Johnny Depp Movies (Non-Independent)

Year	Title	Investment	Gross	Profit	ROI
2003	Pirates of the Caribbean: Black Pearl	140,000,000.00	654,264,015.00	514,264,015.00	367%
2003	Once Upon a Time in Mexico	29,000,000.00	55,845,943	26,845,943.00	93%
2004	Secret Window	40,000,000.00	47,781,388	7,781,388.00	19%
2004	Finding Neverland	25,000,000.00	51,676,606	26,676,606.00	107%
2005	Charlie and the Chocolate Factory	150,000,000.00	474,968,763	324,968,763.00	217%
2005	Corpse Bride	40,000,000.00	53,337,608	13,337,608.00	33%
2006	Pirates of the Caribbean: Dead Man's Chest	225,000,000.00	1,066,179,725.00	841,179,725.00	374%
2007	Pirates of the Caribbean: At World's End	300,000,000.00	963,420,425.00	663,420,425.00	221%
2007	Sweeney Todd	50,000,000.00	152,523,073	102,523,073.00	205%
2009	The Imaginarium of Doctor Parnassus	30,000,000.00	7,689,607	(22,310,393.00)	74%
2009	Public Enemies	100,000,000.00	214,104,620	114,104,620.00	114%
2010	Alice in Wonderland	200,000,000.00	1,024,299,904.00	824,299,904.00	412%
2010	The Tourist	100,000,000.00	278,346,189	178,346,189.00	178%
2011	Rango	135,000,000.00	245,375,374	110,375,374.00	82%
2011	Pirates of the Caribbean: On Stranger Tides	250,000,000.00	1,043,871,802	793,871,802.00	318%
2011	The Rum Diary	45,000,000.00	13,100,042	(31,899,958.00)	- 71%
2012	21 Jump Street	42,000,000.00	201,585,328	159,585,328.00	380%
2012	Dark Shadows	150,000,000.00	234,211,160	84,211,160.00	56%
TOTAL		2,051,000,000.00	6,782,581,572.00	4,731,581,572.00	168%

Appendix B: Racial Representation in Proportion to Population

Race	% Population	% Acting Roles	% Representation in Proportion to % Population
White	72	72.5	100.6
Black	13	13.3	102
Asian	5	3.8	76
Hispanic	16	3.4	21
American Indian/Alaska Native, alone or in combination with some other race	2	0.3	15