

# WHO TELLS YOUR STORY: THE LEGALITY OF AND SHIFT IN RACIAL PREFERENCES WITHIN CASTING PRACTICES

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## INTRODUCTION

When a 2016 casting call<sup>1</sup> for the Broadway and touring musical productions of *Hamilton* specifically sought “non-white men and women ages 20s to 30s,”<sup>2</sup> concerns arose regarding its legality. Shortly after the posting went live, human rights attorney and professor Randolph McLaughlin took to the media and griped, “You cannot advertise showing that you have a preference for one racial group over

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1. For the purposes of this Article, casting “call” and “advertisement” will be used interchangeably.

2. See David Quinn, *‘Hamilton’ Seeks New Talent With Open Auditions*, NBC NEW YORK (Mar. 24, 2016, 3:53 PM), <https://www.nbcnewyork.com/entertainment/the-scene/Hamilton-Seeks-New-Talent-with-Open-Auditions--373398681.html> [https://perma.cc/W55L-68PX].

another.”<sup>3</sup> By doing so, he reportedly claimed that *Hamilton*’s posting violated § 8-107 of New York City’s Human Rights Law Administrative Code (the “Code”).<sup>4</sup> Then again, in March 2019, a petition for writ of certiorari filed before the U.S. Supreme Court in a case concerning cable programming raised a similar question in the context of an analogy, asking: Could “[a] refusal to contract with a white actor to play George Washington [in *Hamilton*] . . . be made an antidiscrimination violation”?<sup>5</sup>

While no formal lawsuit has been brought adjudicating this issue,<sup>6</sup> controlling constitutional and statutory texts clearly address the questions at hand. To explain why McLaughlin’s contention and Charter’s analogized concerns are misplaced, this Article turns to and relies on First Amendment principles and statutory carveouts. Modeled after Title VII, Section 8-107(3)(b) of the Code provides that it is not unlawful to advertise or make hiring decisions based on race or other protected characteristic if that characteristic is deemed a “bona fide occupational qualification” (BFOQ).<sup>7</sup> And it is this exception, coupled with strong First Amendment protections, that shields *Hamilton* from incurring any legal liability for signifying racial preference in its casting advertisements and hiring decisions.

In discussing the intersection between the First Amendment and human rights laws, this Article will explain why *Hamilton*’s casting call, and numerous other race-based casting calls, are exempt from antidiscrimination laws like § 8-107 of the Code and Title VII under the BFOQ exception. This Article will also explain why *Hamilton*’s practice of hiring mostly nonwhite cast members is a lawful practice in light of the First Amendment, focusing on the scriptwriter’s intended message when creating the show. Next, it will consider whether casting practices that grant preference to white actors should be treated differently under the law than those that, like *Hamilton*, advantage nonwhite actors. It will examine two justifications for permitting differential treatment under the law, but ultimately conclude that legal reform focused on casting in this context would be ineffectual and impracticable. Finding the law an ineffective way to remedy

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3. Tony Aiello, *Broadway Union Takes Issue With ‘Hamilton’ Casting Call for ‘Non-White’ Performers*, CBS NEW YORK (Mar. 29, 2016, 11:18 PM), <http://newyork.cbslocal.com/2016/03/29/hamilton-casting-call-non-white> [<https://perma.cc/6Y85-XQY2>].

4. *Id.*

5. Petition for Writ of Certiorari at 26, *Charter Commc’ns, Inc. v. Nat’l Ass’n of Afr. Am.-Owned Media & Entm’t Studio Networks, Inc.*, No. 18-1185 (*petition for cert. filed* Mar. 8, 2019).

6. The *Charter Communications* case concerns whether a cable network can take race into account when deciding which television stations to carry; it does not actually concern race-based casting. *See id.* at 1.

7. N.Y. EXEC. LAW § 296(1)(d) (Consol. 2015).

inequitable casting opportunities, this Article will propose several alternative channels for redressing the economic and financial harms that minority actors with limited employment opportunities currently endure. These proposals will also seek to combat the additional harms that flow from limited representation of diverse communities in the entertainment industry. Finally, this Article will conclude that even if none of these alternative channels are employed to counter today's racially inequitable casting opportunities and their accompanying harms, evolving business necessity will eventually result in more diverse and equitable hiring opportunities in the coming decades.

### I. BACKGROUND OF *HAMILTON*

Lin-Manuel Miranda's acclaimed musical *Hamilton* opened on Broadway in July 2015 at the Richard Rodgers Theatre.<sup>8</sup> Inspired by Ron Chernow's book "Alexander Hamilton," the musical incorporates historical figures like "George Washington, Aaron Burr, James Madison and Thomas Jefferson" into a narrative told entirely through rap verse.<sup>9</sup> Act I lightheartedly portrays aspects of Alexander Hamilton's biographical story from roughly 1776 until the end of the American Revolution, focusing largely on his loving relationships with his wife Eliza Schuyler and her sister Angelica as well as John Laurens and George Washington.<sup>10</sup> The more plot-heavy Act II, on the other hand, highlights the later, darker years and conflicts therein that plagued Hamilton's life; it documents the Reynolds affair, Washington's retirement, Jefferson's ascension, the death of Hamilton's eldest son, and Hamilton's fatal duel with Aaron Burr.<sup>11</sup> Throughout the show, the subplot also fleshes out "the very real ways that the era's gender ideologies constrained [women's and minorities'] lives."<sup>12</sup> The show's final number, entitled "Who Lives, Who Dies, Who Tells Your Story?", leaves the audience with the lingering question of who should, and will, tell Hamilton's story (some variation of this question appears seventeen times throughout the three minute and thirty second song).<sup>13</sup> By intentionally making nonwhite persons the

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8. Michael Gioia, *History in the Making—Revolutionary Musical Hamilton Opens on Broadway Tonight*, PLAYBILL (Aug. 6, 2015), <http://www.playbill.com/article/history-in-the-making-revolutionary-musical-hamilton-opens-on-broadway-tonight-com-356214> [<https://perma.cc/4V57-2RJJ>].

9. *Id.*

10. Christopher F. Minty, *Historians Attend Lin-Manuel Miranda's Hamilton: An American Musical*, THE JUNTO (Aug. 7, 2015), [https://earlyamericanists.com/2015/08/07/hamilton\\_review-2](https://earlyamericanists.com/2015/08/07/hamilton_review-2) [<https://perma.cc/J4CX-VB76>].

11. *Id.*

12. Ellen Noonan, *Who Tells Your Story?*, NAT'L COUNCIL ON PUB. HIST. (Feb. 24, 2016), <https://ncph.org/history-at-work/who-tells-your-story> [<https://perma.cc/7W33-B8A8>].

13. *Who Lives, Who Dies, Who Tells Your Story?*, ATLANTIC RECORDS, <http://atlantic>

lead narrators of the story, Miranda seemingly answers the question, at least as it applies to his show.<sup>14</sup> But in doing so, he sparked controversy over whether *Hamilton*'s audition advertising and casting policies are actually lawful, particularly in light of existing antidiscrimination statutes.<sup>15</sup>

## II. TITLE VII AND BFOQ AS APPLIED TO CASTING CALLS

The underlying purpose of the Civil Rights Act of 1964 (CRA) is to counteract racial discrimination.<sup>16</sup> Title VII of the CRA makes it unlawful to deny someone employment based on their "race, color, religion, sex, or national origin."<sup>17</sup> In so doing, Title VII has improved employment opportunities for minorities by opening up fields that they had been "previously and routinely turned away from . . . [even though] they met the requirements necessary for the job."<sup>18</sup>

While Congress passed Title VII to respond to preexisting employment discrimination, it never intended to "guarantee the employment of minorities" or anyone else.<sup>19</sup> In fact, when drafting this legislation, Congress realized that it might be necessary to consider facially discriminatory characteristics when deciding whom to hire for certain positions.<sup>20</sup> To account for this, Congress created an exception to Title VII.<sup>21</sup> The exception provides that where a characteristic is "reasonably necessary to the normal operation of that particular business or enterprise," then that characteristic constitutes a BFOQ and may lawfully be factored into employment decisions.<sup>22</sup>

In the entertainment industry, race and other protected characteristics that are taken into account for casting purposes are traditionally considered BFOQs so long as they are integral to the storyline or the work's intended message.<sup>23</sup> The legislative history of Title VII

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records.com/HamiltonMusic/callembed.php?embedid=2315101&track=3A7EsSVPxaYoAZjQwhspJBs2 [https://perma.cc/48J3-8KN2] (last visited Nov. 4, 2019).

14. Noonan, *supra* note 12.

15. Aiello, *supra* note 3.

16. Francis J. Vaas, *Title VII: Legislative History*, 7 B.C. L. REV. 431, 433 (1966).

17. The Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a)(1)–(b) (2006).

18. Latonja Sinckler, *And the Oscar Goes to . . . Well, It Can't Be You, Can It?: A Look at Race-Based Casting and How It Legalizes Racism, Despite Title VII Laws*, 22 AM. U. J. GENDER SOC. POL'Y & L. 857, 861 (2014).

19. *Id.* at 878.

20. See H.R. Doc. No. 7152, 7213, 7217 (1964).

21. See 42 U.S.C.S. § 2000e-2(e) (LexisNexis 2019).

22. *Id.*

23. See Stefanie M. Renaud, *Are Casting Calls for Actors of Certain Races or National Origins Illegal?*, SKOLERABBOT (Sept. 28, 2016), https://www.skoler-abbott.com/2016/09/28/are-casting-calls-for-actors-of-certain-races-or-national-origins-illegal [https://perma.cc/V2AF-YNGX].

is consistent with this interpretation.<sup>24</sup> During the legislative debates over Title VII, Senator Joseph Clark, a floor manager for the statute, noted that a “movie company making an extravaganza on Africa may well decide to have hundreds of extras of a particular race or color to make the movie as authentic as possible.”<sup>25</sup> Thus, while determining how “necessary” race is to achieve authenticity for a storyline or message requires a subjective analysis, Senator Clark’s comment suggests that such subjectivity by casting directors is lawful and may be acted upon.<sup>26</sup>

In light of how the BFOQ exception has historically applied to casting, it is clear that *Hamilton*’s controversial advertisement was not unlawful merely because it expressed a racial preference.<sup>27</sup> As previously mentioned, to lawfully express a preference for race in a casting call, casting directors must truly think that an actor’s race could impact the show’s storyline or message.<sup>28</sup> The below statement from the show’s press representative indicates that *Hamilton*’s casting directors possess such a belief:

It is *essential to the storytelling* of HAMILTON that the principal roles—which were written for non-white characters (excepting King George)—be performed by non-white actors. This adheres to the accepted practice that certain characteristics in certain roles constitute a ‘bona fide occupational qualification’ that is legal. This also follows in the tradition of many shows that call for race, ethnicity or age specific casting, whether it’s THE COLOR PURPLE or PORGY & BESS, or MATILDA.<sup>29</sup>

According to the creators of *Hamilton*, the race of the cast is integral to telling the underlying story because of the “singular way” in which the writer, actor, and director Lin-Manuel Miranda seeks to “depict[] the birth of our nation.”<sup>30</sup> Miranda intentionally wrote the script to convey the message that “America *is* a nation of immigrants,” built and expanded in significant part by immigrants and racial

24. See H.R. Doc. No. 7152, *supra* note 20, at 7213, 7217.

25. *Id.* at 7217 (comments of Senators Joseph Clark and Clifford Case).

26. See *id.*

27. Afeef Nessouli & Ray Sanchez, *Broadway’s ‘Hamilton’ Under Fire for Controversial Casting Call*, CNN (Mar. 31, 2016, 8:03 AM), <https://www.cnn.com/2016/03/30/entertainment/hamilton-broadway-casting-call> [<https://perma.cc/LSN6-95AS>].

28. See H.R. Doc. No. 7152, *supra* note 20, at 7213 and accompanying text.

29. David Matthews, *Lawyer Alleges that a ‘Hamilton’ Casting Call for ‘Nonwhite’ Actors is Illegal*, FUSION (Mar. 30, 2016, 4:56 PM), [https://fusion.tv/story/286231/hamilton-casting-call-non-white-civil-rights-law-violation/?utm\\_source=facebook&utm\\_medium=social&utm\\_campaign=blackvoices](https://fusion.tv/story/286231/hamilton-casting-call-non-white-civil-rights-law-violation/?utm_source=facebook&utm_medium=social&utm_campaign=blackvoices) [<https://perma.cc/T22V-M22V>] (emphasis added).

30. Nessouli & Sanchez, *supra* note 27.



minorities.<sup>31</sup> This message<sup>32</sup> resonates throughout the show, illustrated in lines like “we all know who’s really doing the planting”<sup>33</sup> and “Immigrants: we get the job done.”<sup>34</sup> Having a nonwhite cast enables Americans of color to actually claim America as theirs onstage (“I’m just like my country/I’m young, scrappy and hungry/and I’m not throwing away my shot.”).<sup>35</sup> In other words, Miranda’s script was written in part as a protest (“Rise up/when you’re living on your knees/you rise up/tell your brother that he’s gotta/rise up/tell your sister that she’s gotta/rise up”) against today’s history curricula.<sup>36</sup> Thus, to authenticate this message and portray Miranda’s visionary story of American history in accordance with authorial intent, he believed it “essential . . . that the principal roles, which were written for nonwhite characters . . . be performed by nonwhite actors.”<sup>37</sup> Since this belief enables use of a BFOQ for casting calls so long as the show does not outright prohibit any race from auditioning (which it did not), the choice to express a racial preference here is legally permissible.<sup>38</sup>

### III. THE FIRST AMENDMENT AS APPLIED TO HIRING DECISIONS

The First Amendment’s strong protections for the freedom of expression are at the core of the American identity and integral to

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31. Kendra James, *Race, Immigration, and Hamilton: The Relevance of Lin-Manuel Miranda’s New Musical*, THE TOAST (Oct. 1, 2015), <https://the-toast.net/2015/10/01/race-immigration-and-hamilton> [<https://perma.cc/DW9N-MXQD>] (emphasis in original).

32. This message has been clearly understood by audience members of the performance, including former President Barack Obama. See Michael Paulson, *‘Hamilton’ Producers Will Change Job Posting, but Not Commitment to Diverse Casting*, N.Y. TIMES (Mar. 30, 2016), <http://www.nytimes.com/2016/03/31/arts/union-criticizes-hamilton-casting-call-seeking-nonwhite-actors.html> [<https://perma.cc/VY9C-NUBR>] (“Just a few weeks ago, President Obama also called attention to the symbolic import of the show’s casting choices, saying, ‘With a cast as diverse as America itself, including the outstandingly talented women, the show reminds us that this nation was built by more than just a few great men—and that it is an inheritance that belongs to all of us.’”); see also *id.*

33. ORIGINAL BROADWAY CAST OF HAMILTON, *Cabinet Battle #1*, on HAMILTON (Atlantic Records 2015).

34. ORIGINAL BROADWAY CAST OF HAMILTON, *Yorktown (The World Turned Upside Down)*, on HAMILTON (Atlantic Records 2015).

35. ORIGINAL BROADWAY CAST OF HAMILTON, *My Shot*, on HAMILTON (Atlantic Records 2015).

36. *Id.*

37. Matthews, *supra* note 29; Paulson, *supra* note 32 (Hamilton’s press representative noting: “The casting will be amended to also include language we neglected to add, that is, we welcome people of all ethnicities to audition for HAMILTON”).

38. See, e.g., *Ferrill v. Parker Grp., Inc.*, 168 F.3d 468, 477 n.10 (11th Cir. 1999) (“A film director casting a movie about African-American slaves *may not exclude Caucasians from the auditions*, but the director may limit certain roles to persons having the physical characteristics of African-Americans.”) (emphasis added); see also Paulson, *supra* note 32.

American society.<sup>39</sup> As a result, the First Amendment often trumps other legislative rights to the extent they come into conflict, including with regard to aspects of Title VII.<sup>40</sup> As scholars have noted, “[t]he 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.”<sup>41</sup> As “a constitutional provision, the First Amendment garners more weight than antidiscrimination statutes such as Title VII” and § 8-107 of New York’s Code.<sup>42</sup> And it is well-settled that in addition to “motion pictures [and] programs broadcast by radio and television, . . . live entertainment, such as musical and dramatic works fall within the First Amendment guarantee.”<sup>43</sup> “[T]hat casting decisions ‘are part and parcel of the creative process’” for a given show, “thereby meriting First Amendment protection against the application of anti-discrimination statutes to that process,” has been widely accepted by courts in recent years.<sup>44</sup> This is because “the production of a play is a medium of expression for its director.”<sup>45</sup> Accordingly, show creators have the right to decide how to present their productions to an audience in accordance with his or her personal vision. “This personal vision [has been understood to] includ[e] interpretation of the script, the play’s . . . costumes, [its] scenery,” and, importantly, its “characters,” brought to life by its casting.<sup>46</sup> Thus, it appears that “all the components of the production of the play, including its casting, should be afforded the same First Amendment protection enjoyed by the oral and written word, and by expressive conduct, such as the burning of the American flag” or writing of a script in the “primarily black musical [form]” of rap verse, as was done here.<sup>47</sup>

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39. See Megan Basham, *Unmasking Tonto: Can Title VII “Make It” in Hollywood?*, 37 AM. INDIAN L. REV. 549, 578 (2012).

40. *Id.*

41. *Id.*

42. *Id.*

43. *Schad v. Borough of Mount Ephraim*, 452 U.S. 61, 65 (1981).

44. See THOMAS D. SELZ ET AL., ENTERTAINMENT LAW 3D: LEGAL CONCEPTS AND BUSINESS PRACTICES § 8:53.50 (2018) (listing cases).

45. Jennifer L. Sheppard, *Theatrical Casting-Discrimination or Artistic Freedom?*, 15 COLUM. VLA J.L. & ARTS 267, 279–80 (1991). There is some disagreement as to whether the director or writer’s artistic expression and vision should be protected. For the purpose of *Hamilton*, the distinction is insignificant since the scriptwriter and director are one and the same. The discussion about whose expression warrants protection is beyond the scope of this Article. The important thing to note, however, is that it has been accepted that artistic expression should not be hindered by antidiscrimination laws or other government regulation. *Id.* at 280–81.

46. *Id.* at 280.

47. *Id.*; Noonan, *supra* note 12 (“Miranda may have connected with an artifact of

The First Amendment affords individuals and businesses alike the “[r]ight to express [their] chosen views in a free society without government interference.”<sup>48</sup> That producing a show like *Hamilton* clearly constitutes artistic expression, and that “[m]any [people] in the [entertainment] industry, even actors, resent judicial interference with the arts,”<sup>49</sup> helps explain why recent court decisions have repeatedly extended protection to casting decisions.<sup>50</sup> Indeed, this reluctance to place restraints on artistic freedoms reflects American society’s deep commitment to First Amendment values; that societal commitment reverberates throughout American jurisprudence.

For example, in *Claybrooks v. American Broadcasting Companies*, a Tennessee district court held that “casting decisions are incorporated into the overarching creative process within the protected scope of expressive speech.”<sup>51</sup> In *Claybrooks*, two African American men who had attended a casting call for *The Bachelor* alleged that producers of the reality show violated federal antidiscrimination laws by refusing to fairly consider the men for spots as contestants on the show due to their race.<sup>52</sup> The plaintiffs claimed that the show had a

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‘founders chic,’ but he uses the ingredients of his art—primarily black musical forms and his choice of performers—to bring people of color into the center of a story from which they have traditionally been excluded. Miranda chose hip hop to tell Hamilton’s story because the form’s density of words gave him the ability to pack more information into the show to encompass Hamilton’s eventful life. Miranda also chose hip hop because that very density mirrored Hamilton’s own prodigious level of writing.”).

48. Basham, *supra* note 39, at 578.

49. *Id.* at 579.

50. In addition to *Claybrooks v. Am. Broad. Cos., Inc.*, 898 F. Supp. 2d 986 (Md. Tenn. 2012), discussed subsequently, another significant First Amendment freedom of casting case, *Redgrave v. Boston Symphony Orchestra*, opined in dicta that it did “not think . . . that liability should attach if a performing group replaces a black performer with a white performer (or vice versa) in order to further its expressive interests.” 855 F.2d 888, 904 n.17 (1st Cir. 1988). See also *Tamkin v. CBS Broad., Inc.*, 122 Cal. Rptr. 3d 264, 271 (Cal. Ct. App. 2011) (“the creation, casting, and broadcasting of an episode of a popular television show” is an “an exercise of free speech”).

51. Basham, *supra* note 39, at 583.

52. Whether *The Bachelor* amounts to “artistic expression” in the same sense as *Hamilton* is a controversial question from a qualitative perspective. However, the First Amendment does not permit the government to act on such qualitative judgments within its very broad limits. *United States v. Playboy Entm’t Grp., Inc.*, 529 U.S. 803, 818 (2000) (“The Constitution exists precisely so that opinions and judgments, including esthetic and moral judgments about art and literature, can be formed, tested, and expressed. What the Constitution says is that these judgments are for the individual to make, not for the Government to decree, even with the mandate or approval of a majority.”). Indeed, where, as here, the relevant expression is purposefully created for the entertainment of viewers—see Chelsea Duff, *The New ‘Bachelor Nation’ Book Reveals How Low Producers Will Go for Drama*, LIFE & STYLE MAG. (Mar. 7, 2018), <https://www.lifeandstylemag.com/posts/bachelor-nation-book155540> [<https://perma.cc/6LRT-7G9L>] (explaining that the producers create the show by playing a large part in determining and bringing forth its content, bearing in mind the type of stories they think would be entertaining for their viewers)—the question is no longer “what is art?” but rather “what is ‘good’ art?” See Adam Manuel, *Is Reality Television A Legitimate Art Form?*, HUFFPOST (June 7, 2017), <https://www.huffpost.com>



discriminatory reason for casting primarily white bachelors and bachelorettes: it wanted to prevent the final couple from being interracial because that could spark controversy and alienate the show's mostly white viewership.<sup>53</sup> The defendant-producers, in turn, argued that the First Amendment protects the show's casting decisions and storyline, including whether or not the show should send particular political or social messages with regard to interracial dating.<sup>54</sup> The defendant-producers further argued that "in reality programming, like the series at issue, casting is especially critical because the participants and their interaction *are* the story."<sup>55</sup> In rejecting the plaintiffs' racial discrimination claim, the court held that "the First Amendment protects the producers' right to unilaterally craft and control their creative content and prevents the plaintiffs from forcing the defendants to employ race-neutral criteria in their casting decisions."<sup>56</sup> In other words, the *Claybrooks* court essentially found that forcing a producer to change casting criteria to avoid violating the Civil Rights Act risks altering the producer's message altogether—a result inconsistent with First Amendment protections and, therefore, constitutionally unsound.<sup>57</sup>

Lin-Manuel Miranda's reasoning for why he believes his casting decisions should be protected likewise echoes this mainstream view. According to Miranda:

[A]uthorial intent wins. . . . Katori Hall never intended for a Caucasian Martin Luther King. That's the end of the discussion.

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ingtonpost.co.uk/adam-manuel/reality-television-art-form\_b\_17392196.html?guccounter=1&guce\_referrer=aHR0cHM6Ly93d3cuZ29vZ2xlLmNvbS8&guce\_referrer\_sig=AQAALkITuVD6mpXYdAQiZ3-0skwPajT7vLgmx\_7joVUqC0kVfVGSg87zhatWVShb6djr-IhvmCswzRqRPNg54L4DesC0JfsGrb1pzAZiXmZfy1M5\_wO19SZ-M3S3SzkFeqxNeYxJgp1gRIW3-zRYphRkrSRvQHYSSRzFF61-iBkQt9e [https://perma.cc/2L47-K6CL]. To borrow from a separate but canonical First Amendment opinion: "[O]ne man's vulgarity is another's lyric." *Cohen v. California*, 403 U.S. 15, 25 (1971) (Harlan, J.). In other words, even accepting the debatable viewpoint that reality television makes for low quality artistic entertainment, casting decisions for such shows are still covered by the First Amendment's broad protections for free expression. Sheppard, *supra* note 45; *see also Claybrooks*, 898 F. Supp. 2d at 989–90. The plaintiffs here brought a 42 U.S.C. § 1981 claim, which is similar to a Title VII claim. *Id.* The distinctions are not significant for purposes of this Article, as both are antidiscrimination statutes, but unlike Title VII, § 1981 covers all private employers regardless of their size; plaintiffs need not first file a charge of discrimination with an administrative agency prior to filing a § 1981 claim; the time period to bring a discriminatory § 1981 claim is four years (which is longer than for Title VII); and the plaintiff's burden of proof is higher for a § 1981 claim than it is under Title VII. *See Fisher & Phillips LLP*, EMPLOYMENT DISCRIMINATION 11, [https://www.fisherphilips.com/media/publication/5345\\_32199\\_FP%20EmployDiscrim%20Updated%20CVR.pdf](https://www.fisherphilips.com/media/publication/5345_32199_FP%20EmployDiscrim%20Updated%20CVR.pdf).

53. *Claybrooks*, 898 F. Supp. 2d at 989.

54. Def.'s Mem. Supp. Mot. Dismiss at 3–4, *Claybrooks v. Am. Broad. Cos., Inc.* 2012 WL 2863992 (M.D. Tenn. June 28, 2012).

55. *Id.* at 6 (emphasis added).

56. SELZ ET AL., *supra* note 44.

57. *Claybrooks v. Am. Broad. Cos., Inc.*, 898 F. Supp. 2d 986, 995 (Md. Tenn. 2012).

In every case, the intent of the author always wins. If the author has specified the ethnicity of the part, that wins [because that signifies his or her artistic expression].<sup>58</sup>

Miranda also agrees with the mainstream belief that an author's artistic expression is particularly worthy of protection because, despite editorial changes to a script, an author's name is still attached to it and the show's ultimate message: "You go to Hollywood, you sell a script, they do whatever and your name is still on it. What we protect . . . is the author's power over their words and what happens with them."<sup>59</sup> Said differently, the First Amendment protects the author's expressive voice, and "the selection of [cast] members is the definition of that voice."<sup>60</sup> Likewise, scholars have noted that "[s]ince [a] performance may be considered a statement in which the actors are the 'words' cast by the director/[writer] to express that statement, the [actual] casting decision should be protected as other words and types of expressive conduct are protected."<sup>61</sup> This position holds especially true for a production like *Hamilton* where the show's creator sought to convey a specific, singular message/story that hinged in large part on the actors' races.<sup>62</sup>

In light of this, it is clear that *Hamilton* has acted lawfully in deciding to cast primarily nonwhite actors and express a racial preference in its casting calls.<sup>63</sup> The choice to feature "Hispanic and black actors as the founding fathers, and [include] Asian-American and white actors in other roles" constitutes artistic expression protected from government interference under the First Amendment.<sup>64</sup>

#### IV. HOW DO PROTECTIONS FOR RACE-BASED CASTING APPLY WHERE CASTING GRANTS PREFERENCE TO WHITE ACTORS AND DISFAVORS MINORITIES?

While *Hamilton* is unique in that its casting calls and employment decisions benefit minorities who have historically been discriminated against in the entertainment industry, the same protective logic and reasoning also applies to casting calls and actual casting

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58. Howard Sherman, *What Does "Hamilton" Tell us About Race In Casting?* (Dec. 3, 2015), <http://www.hesherman.com/2015/12/03/what-does-hamilton-tell-us-about-race-in-casting> [<https://perma.cc/RQ5W-G2QV>] (quoting Lin-Manuel Miranda).

59. *Id.*

60. *Roberts v. U.S. Jaycees*, 468 U.S. 609, 633 (1984) (O'Connor, J., concurring).

61. Heekyung Esther Kim, *Race As a Hiring / Casting Criterion: If Laurence Olivier was Rejected for the Role of Othello in Othello, Would He Have a Valid Title VII Claim?*, 20 HASTINGS COMM. ENT. L.J. 397, 413–14 (1998).

62. See *supra* note 30 and accompanying text.

63. See Kim, *supra* note 61, at 413–14.

64. Paulson, *supra* note 32.

decisions that demonstrate a preference for white actors over non-white actors, making the casting process nearly always immune from discrimination claims.<sup>65</sup> This was seen in the *Claybrooks* case, concerning casting of *The Bachelor*, and has been a factual scenario confronted in much greater frequency given that most roles are designed with white actors in mind and are filled accordingly.<sup>66</sup> Indeed, historically on Broadway and in the entertainment industry generally, “it is extremely rare to cast a show that is not about an African American, Latino, or Asian American with performers of color playing every leading role” like *Hamilton* does.<sup>67</sup>

According to the Screen Actors Guild (SAG)’s 2007 and 2008 Casting Data Reports, “Caucasians made up 72.5% of all roles in 2008, accounting for 74% of roles in feature films and 71.9% of roles in episodic television.”<sup>68</sup> Of all television and theatrical roles examined by SAG in 2008, over seventy percent went to white actors.<sup>69</sup> And while there has been some improvement in diversity representation in the last decade, the 2019 Hollywood Diversity Report published by UCLA explained that minorities “[remain] underrepresented on every [entertainment] industry employment front” in Hollywood, including being underrepresented by 2 to 1 among film leads during the 2016–2017 season.<sup>70</sup> Consistent with this, a June 2019 search on Backstage.com for casting calls at all possible locations, for any gender, age, performance type (i.e., theater, film, television and video, commercials, modeling, performing arts generally, and voiceovers), role type (i.e., leads and background roles), compensation level, and union status revealed a significant racial disparity in audition opportunities. Including positions that did not specify racial preference, white people had 6,831 possible audition opportunities; black people had 6,642, Hispanics had 5,521, persons of Middle Eastern descent had 6,128, Asians had 5,728, and Indigenous people had 5,472.<sup>71</sup> The disparity between roles available increased even more so when the search was altered to look specifically for lead roles, as the results demonstrated a clear preference for white actors.<sup>72</sup>

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65. *Claybrooks v. Am. Broad. Cos., Inc.*, 898 F. Supp. 2d 986, 998 (Md. Tenn. 2012).

66. See *Casting Calls*, BACKSTAGE, <http://www.backstage.com/casting> [<http://perma.cc/BC6H-CCVP>] (last visited Nov. 4, 2019) (comparing number of positions available based on race/ethnicity of the performer).

67. Noonan, *supra* note 12.

68. Kathleen A. Tarr, *Bias and the Business of Show: Employment Discrimination in the ‘Entertainment’ Industry*, 51 U.S.F. L. REV. 3 n.10 (2016) (internal citations omitted).

69. *Id.*

70. This was the most recent season examined in the report. DARNELL HUNT ET AL., UCLA, HOLLYWOOD DIVERSITY REPORT 2019 3 (2019), <https://socialsciences.ucla.edu/wp-content/uploads/2019/02/UCLA-Hollywood-Diversity-Report-2019-2-21-2019.pdf>.

71. See *Casting Calls*, *supra* note 66 (this search omitted results for staff/crew).

72. *Id.*

While *Claybrooks* concerned merely casting decisions, there are many other examples of productions that indicated a racial preference for white actors in both their casting calls and their ultimate casting decision, as one might expect based on Backstage.com's listings.<sup>73</sup> For example, according to *The Wall Street Journal*, when casting Katniss Everdeen, the lead role of *The Hunger Games* movie who was written as a racially ambiguous character in the book series, the casting call stated that auditioning actresses "should be Caucasian, between ages 15 and 20, who could portray someone 'underfed but strong,' and 'naturally pretty underneath her tomboyishness.'" <sup>74</sup> The movie went on to cast the "naturally blonde-haired and blue-eyed" white actress Jennifer Lawrence in the part.<sup>75</sup>

Similarly, the July 2015 casting call for Steve Martin's new Broadway show *Bright Star*, which tells a love story set in the early 1900s American South, read: "Seeking Equity actors who sing for various principal roles. All characters are Caucasian."<sup>76</sup> And, indeed, the show employed an entirely white cast.<sup>77</sup> But, just as with many of the other "endless amounts of shows that call for Caucasian actors to play the leading characters, . . . [t]here was no big stir about this."<sup>78</sup>

Still other productions limit the kinds of roles available to certain races by differentiating casting call language and casting decisions not by quantity, but by quality and type.<sup>79</sup> For example, HBO's television show *Girls*—a comedy-drama that follows the lives of four young

73. *Id.*

74. Marissa Lee, *Rue Won't Be Whitewashed in "The Hunger Games,"* RACEBENDING (Apr. 7, 2011), <http://www.racebending.com/v4/blog/rue-wont-be-whitewashed-in-the-hunger-games> [<https://perma.cc/MU2U-ZF9J>] (noting that Katniss was described as having "olive skin" and "straight black hair," which are "physical traits that could be possessed by someone of any ethnicity"); see John Jurgensen, *The Newcomers*, WALL ST. J. (Feb. 25, 2011), <https://www.wsj.com/articles/SB10001424052748703529004576160782323146532> [<https://perma.cc/J6NV-ACFM>].

75. Eva Hattie L. Schueler, *'Hunger Games' Casting: Why Jennifer Lawrence Shouldn't Play Katniss*, HUFFPOST (Mar. 1, 2012), [https://www.huffpost.com/entry/hunger-games-movie\\_n\\_1314053](https://www.huffpost.com/entry/hunger-games-movie_n_1314053) [<https://perma.cc/RBW8-ENPN>]. Lawrence ultimately had to dye her hair for the role so she would fit the director's artistic vision for the character (the director called hair-dyeing an "easy" way to "deal with Jennifer's [natural] hair color."). Karen Valby, *'Hunger Games' Director Gary Ross Talks Casting Jennifer Lawrence*, ENTMT WEEKLY (Mar. 17, 2011, 12:00 PM), <http://www.ew.com/article/2011/03/17/hunger-games-gary-ross-jennifer-lawrence> [<https://perma.cc/Hy5V-S3SL>].

76. *Bright Star*, BACKSTAGE, <http://www.backstage.com/casting/bright-star-7619> [<https://perma.cc/RP5X-CTG3>].

77. *Bright Star—Cast*, PLAYBILL (Sept. 1, 2019), <http://www.playbill.com/personlist/page/person-list?production=00000151-b783-d86d-a375-ffc7794b0000&type=op#oc> [<https://perma.cc/W3RJ-C2TD>].

78. Montana Schultz, *The Casting Call: Racial Diversity In Musical Theater*, ODYSSEY (Apr. 4, 2016), <http://theodysseyonline.com/adelphi/the-casting-call/390584> [<https://perma.cc/9NMT-N7XP>].

79. Sarah Eschholz et al., *Symbolic Reality Bites: Women and Racial/Ethnic Minorities in Modern Film*, 22 SOC. SPECTRUM 299–300 (2002).

women living in Brooklyn as they deal with seemingly real-life struggles and events—received some media criticism for employing a cast of white female leads when it premiered in 2012.<sup>80</sup> The show’s first season was criticized for its “stereotypical casting of minority actors” and an examination of the *Girls*’ casting calls demonstrates why.<sup>81</sup> While writer, producer, and director of *Girls*, Lena Dunham, decided to cast the four leads with white women (including herself), *Girls* also posted other casting calls that expressly endorsed stereotyping.<sup>82</sup> For example, one casting call for the show’s first season sought a “male, Asian, 20s–40s, [who] delivers sake that [the girls] did not order” for a one-line sake bar waiter role.<sup>83</sup> Another *Girls* casting call sought an African American woman to play a recurring character named “Tako” that, as a defining attribute, likes “bar fights.”<sup>84</sup>

These examples of stereotyped casting calls are not unique. Indeed, even despite being a successful standup comedian with his own self-created television series, Aziz Ansari has stated that “when [his] phone rings, the roles [he’s] offered are often defined by ethnicity and often require accents.”<sup>85</sup> In fact, Ansari made fun of his very real-life experience with this in his show *Master of None* on an episode entitled “Indians on TV.”<sup>86</sup> In the episode, Ansari’s character, Dev, “is asked to do a stereotypical Indian accent during an audition,” but he refuses and walks out of the audition (something Ansari has reportedly done in real life).<sup>87</sup> During a separate audition, Dev is told that the sitcom for which he was auditioning would only be able to cast one Indian because “no network executive wants to see more than one Indian person on TV at a time.”<sup>88</sup> As a way to air his very real-life frustration with racially stereotyped casting, Ansari wrote Dev’s

80. Jenna Wortham, *Where (My) Girls At?*, THE HAIRPIN (Apr. 16, 2012), <http://thehairpin.com/2012/04/where-my-girls-at> [<https://perma.cc/F3UF-8CFV>].

81. Karen J. Francis, *Caution: Characters in HBO’s “Girls” May Be Closer Than They Appear*, WEEN ONLINE (Jan. 11, 2013), <https://www.weenonline.org/caution-characters-in-hbos-girls-may-be-closer-than-they-appear> [<https://perma.cc/SPH6-V8B5>] (“In the pilot, the only black person with a speaking line is a homeless person . . .”).

82. Cassie Murdoch, *It Looks Like Girls Is Going to Have a Black Character After All*, JEZEBEL (Apr. 26, 2012, 11:55 PM), <http://jezebel.com/5905583/it-looks-like-girls-is-going-to-have-a-black-character-after-all> [<https://perma.cc/R7ES-KRM3>].

83. *Id.*

84. *Id.*

85. Aziz Ansari, *Aziz Ansari on Acting, Race and Hollywood*, N.Y. TIMES (Nov. 10, 2015), [https://www.nytimes.com/2015/11/15/arts/television/aziz-ansari-on-acting-race-and-hollywood.html?\\_r=0](https://www.nytimes.com/2015/11/15/arts/television/aziz-ansari-on-acting-race-and-hollywood.html?_r=0) [<https://perma.cc/2VPR-MS77>].

86. Kristen Griffin & Ian Phillips, *Aziz Ansari Nails Hollywood’s Race Problem*, BUS. INSIDER (Nov. 12, 2015, 3:53 PM), <http://www.businessinsider.com/aziz-ansari-addresses-hollywoods-race-problem-in-master-of-none-2015-11> [<https://perma.cc/5BBZ-NKS8>].

87. *Id.*

88. *Id.*



response: “Yeah, but you’d never say that about a show with two white people. Every show has two white people.”<sup>89</sup>

While race-based casting calls and casting decisions almost certainly have more harmful impacts when they disadvantage minorities due to their already fewer employment opportunities in the entertainment industry and their regular battles against racial stereotypes, the same BFOQ and First Amendment protections that shield *Hamilton* from discrimination claims apply to productions favoring white casts as well.<sup>90</sup> This raises the controversial question: should it?

#### V. ARGUMENTS IN FAVOR OF SUBJECTING CASTING CALLS AND CASTING DECISIONS THAT DISCRIMINATE AGAINST MINORITIES TO LEGAL LIABILITY

There are two foundational principles that, at first glance, cut in favor of the idea that casting calls and casting decisions disadvantaging minorities warrant legal redress: equity and meritocracy. This section will examine these two principles and their historical importance to casting practices. In so doing, this section will consider whether either or both of these principles justify broadening the scope of antidiscrimination statutes to cover discriminatory casting practices. Ultimately, this section will conclude that nonregulatory measures can more effectively steer the industry toward these ideals within constitutional bounds and, thus, that legislative reform is not the right mode for addressing the discriminatory impact of race-based casting practices that disfavor minorities.

##### A. *Equity*

The notion that “casting should be fair” originated in early twentieth century America.<sup>91</sup> In the early 1910s, actors—faced with little job security, abysmally minute wages, and lacking enforceable contractual protections—decided to unionize.<sup>92</sup> In 1913, the Actors’ Equity Association (AEA) was formed to represent live theater performers (as opposed to film or live television, which were over a decade away from technological development).<sup>93</sup> Shortly thereafter, in 1919, the AEA organized a successful and historic strike that resulted in overtime pay and better wages for actors, a cap on the amount of

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89. *Id.*

90. *See supra* Parts II–III.

91. Brian Eugenio Herrera, *The Best Actor for the Role, or the Mythos of Casting in American Popular Performance*, 27 J. AM. DRAMA & THEATRE 1, 3 (2015).

92. *History*, ACTORS’ EQUITY ASS’N, <https://www.actorsequity.org/aboutequity/history> [https://perma.cc/B6PT-3HPH] (last visited Nov. 4, 2019).

93. *Id.*

weekly performances permitted, and established Saturday as the official payday.<sup>94</sup> The results of the strike were lasting and kept protest-oriented union activities to a minimum for much of the immediately subsequent decades.<sup>95</sup> Following World War II, however, “growing national concerns about civil rights and desegregation” prompted actors unions to “reassert[] their inceptive investment in equitable access to employment.”<sup>96</sup> Indeed, “[d]uring the 1940s and 1950s, subcommittees within all the major actor unions began to advocate for fair and equitable access to employment opportunities for minority union members, especially actors of African descent.”<sup>97</sup> In addition to the AEA, which had initiated its own Committee on Negro Integration in the Theatre, unions for film and television performers, such as the Screen Actors Guild (SAG), began facing pressure from their members to push for greater equity of casting opportunities for minority actors.<sup>98</sup> While these union members often faced great opposition by their controlling boards, who were generally reluctant to pursue such initiatives, eventually even SAG’s Board “endorsed a statement on ‘Integration and Employment of Negro Performers,’ which called upon writers, directors, producers, and casting agents to recognize [black] artist[s] primarily as . . . artist[s] and give such performers parts reflecting their position in society which then extended ‘from the kitchen to the United Nations.’”<sup>99</sup> In other words, the real pressure that actors placed on their unions to vocalize support for helping black performers expand their reach and casting opportunities, both in terms of quantity and quality, helped bring greater recognition to the need to redress inequity in the industry.<sup>100</sup>

Despite this historical praise for equity, however, it is quite clear that even today, the vocalization of support for minority performers has often rung hollow.<sup>101</sup> People of different races still do not all have equitable employment opportunities within the entertainment industry.<sup>102</sup> Current casting practices threaten to cause substantial economic and identity harms for actors of color, which

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94. See, e.g., SEAN P. HOLMES, *WEAVERS OF DREAMS, UNITE!: ACTORS’ UNIONISM IN EARLY TWENTIETH-CENTURY AMERICA* 82–83 (2013).

95. Herrera, *supra* note 91, at 3.

96. *Id.*

97. *Id.*

98. *Id.*

99. Stephen Vaughn, *Ronald Reagan and the Struggle for Black Dignity in Cinema, 1937–1953*, 77 *J. NEGRO HIST.* 1, 10 (1992) (noting that SAG rejected a request to contribute membership in the NAACP in 1953).

100. *Id.*

101. Russell K. Robinson, *Casting and Caste-ing: Reconciling Artistic Freedom and Antidiscrimination Norms*, 95 *CALIF. L. REV.* 1, 11–12 (2007).

102. See HUNT ET AL., *supra* note 70.

may warrant rectification.<sup>103</sup> On the economic harms aspect, disparate casting opportunities<sup>104</sup> result in “people of color receiv[ing] less work than white actors, especially in leading, more lucrative roles.”<sup>105</sup> Furthermore, many of the opportunities available to minority actors require them to assume a stereotyped identity.<sup>106</sup> This creates additional, perpetuating economic problems, as it is common practice in the entertainment industry to only consider actors “for jobs that replicate his or her prior roles.”<sup>107</sup> Thus, minority actors often face an unfortunate choice: either they must be willing to “play[] a few stereotypical roles,” which “will lead to more stereotypical work and hinder the actor in obtaining future non-stereotypical roles” or they must “[h]old[] out for non-stereotypical work,” which “will likely mean that the actor works less.”<sup>108</sup> For most actors, however, the latter is not a realistic option, as they “simply do not have the economic luxury of passing up parts, even stereotypical roles they would prefer not to play.”<sup>109</sup> In fact, even when minorities somehow get cast in the same kinds of roles as white actors, evidence suggests that “people of color . . . may be paid less for their work.”<sup>110</sup>

As for identity harms, because many of the already limited employment opportunities for minority actors involve playing stereotypical roles, nonwhite actors reportedly regularly endure a greater amount of psychological discomfort to pursue their careers.<sup>111</sup> This discomfort stems from the fact that oftentimes a minority actor “must shed her normal identity and embody a racial . . . prototype . . . that she struggles against and tries to distance herself from in most other contexts.”<sup>112</sup> Because most of these stereotyped roles—which “manifest[] . . . othering” by requiring actors to adopt “exaggerated” mannerisms that usually “misrepresent[] the [racial] group”—are written by white people, minority actors also must frequently confront the reality that accepting one of these available roles means they will help perpetuate a potentially harmful racial stereotype.<sup>113</sup> Thus, actors of color are often placed in a catch-22 where they need to make an unfair choice between whether to accept playing an

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103. Robinson, *supra* note 101, at 18.

104. *Id.* (“Casting director Jane Jenkins explains that ‘there’s definitely less work statistically and it’s definitely harder for minority actors to get good [agent] representation and to get work.’”).

105. *Id.* at 18.

106. *Id.*

107. Robinson, *supra* note 101, at 23.

108. *Id.* at 27.

109. *Id.* at 27–28.

110. *Id.* at 19.

111. *Id.* at 27–28.

112. *Id.* at 27.

113. Robinson, *supra* note 101, at 25, 27.

exaggerated, racially stereotyped role or else risk facing no employment at all.<sup>114</sup>

For all these reasons, a respect for equity theoretically provides a compelling reason to consider legal reform concerning casting practices.<sup>115</sup> But, from a practical standpoint, committing to such a principle would involve such a great deal of imprecise line-drawing that any casting equity statute would almost certainly fail a First Amendment challenge.<sup>116</sup> For example, would a regulation seeking to ensure equal casting be focused on the casting call (i.e., ensuring that the audition is open to everyone regardless of race and expresses no racial preference), the final casting decisions (i.e., who actually is casted), or both? While the former approach might be more plausible (though query whether there is any real benefit to blanketly requiring open casting calls where a director is not willing to budge on his or her preset notions of what the cast must look like—is it wasting the valuable time of actors who do not fit that description?), certainly requirements on the latter would impose a substantial burden on the free expression of the creator of the artistic work.<sup>117</sup> In other words, requiring that a given cast be racially diverse could impact the storyline or way in which a role is portrayed or viewed, implicating First Amendment concerns.<sup>118</sup> Beyond this, though, defining equity in such a statute would be an imperfect and nearly impossible task that would almost certainly fall short of satisfying the First Amendment's narrow tailoring requirement.<sup>119</sup> If, for instance, a cast consisted of ten performers, what would be considered an equitable breakdown in terms of race? Could five actors be white, five non-white? Could all of the nonwhite actors be black, or would you need to break it down more evenly: two white, two black, two Hispanic, two Asian, two Native American? Would the representation need reflect the population's racial composition (and thereby potentially be in constant flux)? What about works that only have one or two people

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114. *See id.* at 27–28.

115. *See supra* Part V.

116. *Cf. Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 329 (2010). It is also worth noting that the First Amendment has no “reasonableness” requirement and does not mandate that diverse perspectives be given equal voice; it mandates merely that no perspective or viewpoint be banned from being heard. In that sense, a statute requiring equal opportunities for actors of color to be viewed or cast in certain roles is anathema to the concept of free expression itself. The First Amendment does not permit regulating speech to the extent that the purpose of that regulation is to ensure that all individuals can equally influence an industry or its products. *See id.* at 340–41.

117. Robinson, *supra* note 101, at 50–53. Of course, there is always the possibility that a producer or director might be more willing to cast actors they had not previously considered right for a role upon seeing them audition for the part in person, but I have not been able to locate any reliable studies testing this theory either way. *See id.*

118. *See id.*

119. *See id.* at 41–42.

in their cast, or uneven numbers? To what extent would these requirements impact lead roles versus supporting roles? Ultimately, it seems unlikely that any such statute would be able to sufficiently further a compelling or substantial interest in equity in such a manner that restricts no more speech than necessary.<sup>120</sup> Accordingly, drafting such a restriction that could survive constitutional scrutiny under the First Amendment is ultimately a fantastical feat and an unrealistic solution to addressing inequities caused by race-based casting.

### *B. Meritocracy*

Meritocracy is a well-understood ideal valued by most Americans.<sup>121</sup> Applied to casting, meritocracy would ensure that “the casting process permits the best performers to be seen, thereby presumptively enabling directors, producers and others to identify those performers best equipped to execute their artistic vision.”<sup>122</sup> Underlying this promise is the ideal that “if the flow of supply and demand could be effectively marshaled, the best actor would certainly get the role.”<sup>123</sup> Existing default casting practices undermine the ideal of meritocracy in part because they condone the fact that some actors have less access to auditions or parts for various roles, especially leading roles.<sup>124</sup> *Hamilton*’s casting practices are also inconsistent with any sense of meritocracy; under this principle, casting and awarding people, even in part, because they are a minority is just as problematic as casting and awarding them, in part, because they are white.<sup>125</sup> In other words, in a meritocratic industry, it would not matter if a cast was all one race or otherwise nonreflective of the population so long as it was comprised of the best and most talented actors for the given roles.

There are many proponents of reforming casting practices to reflect meritocratic ideals, including *Boys Don’t Cry* actress Hilary Swank.<sup>126</sup> In a 2015 interview, Swank expressed, “Everyone should

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120. See *United States v. O’Brien*, 391 U.S. 367, 382 (1968).

121. See Herrera, *supra* note 91, at 6–7.

122. *Id.* at 6.

123. *Id.* at 6–7.

124. J. Reese, *The Problem of Diversity in Seattle Theatre Stems from Implicit Assumptions and White Fragility*, JREESE (July 16, 2014), <http://cast.jreese.net/the-problem-of-diversity-in-seattle-theatre-stems-from-implicit-assumptions-and-white-fragility> [<https://perma.cc/Z79P-HJW8>].

125. Cecilia Kang, *Beyond the Oscars: A Look at Racial Diversity in Hollywood*, DIANE REHM (Feb. 18, 2016, 11:00 AM), <https://dianerehm.org/shows/2016-02-18/beyond-the-oscars-a-look-at-racial-diversity-in-hollywood> [<https://perma.cc/RA4T-UQTB>].

126. See Daniel Reynolds, *Is ‘Transface’ a Problem in Hollywood?*, ADVOCATE (Feb. 25, 2015, 6:00 AM), <http://www.advocate.com/arts-entertainment/2015/02/25/transface-problem-hollywood> [<https://perma.cc/VKB7-8YCE>].



have an opportunity to audition and have the chance to act and to be a part of a film. But in the end, I don't think they should get it because they actually live that [identity] day in and day out. . . . [T]he part should ultimately go to the best actor."<sup>127</sup> *Orange is the New Black* actress Natasha Lyonne agrees, opining that casting practices should operate under the notion "[m]ay the best actor win."<sup>128</sup> And though *Hamilton*'s past casting calls and decisions veered away from meritocracy on the basis of race, its casting calls for the show's regional productions exemplified more meritocratic ideals by "looking for men *and women*" to play the lead roles of George Washington and Aaron Burr.<sup>129</sup>

While proponents of legal reform aimed at ensuring casting meritocracy are likely well-intentioned, their means of countering inequity in casting opportunities is unrealistic. To engage in legal reform to change casting practices so that they promote a system of meritocracy would raise too many unanswered questions, creating absolute chaos in the industry and serving to disincentivize the creation of future works because of fear of liability.<sup>130</sup> A regulation ensuring that a part will go to the best actor for the role simply cannot be drafted because there is no singular agreed-upon way to define "best."<sup>131</sup> Is "best" the person the casting director has the best gut feeling about?<sup>132</sup> Or is it "[b]est as in most qualified? The person with the most credits? That's not a great measurement."<sup>133</sup> The law is just not an effective tool for ensuring meritocracy in an industry where there is no objective measure of excellence.<sup>134</sup>

127. *Id.* (internal quotations omitted).

128. *Id.*

129. Andrea Towers, *Hamilton Casting Calls Wants Women to Play Washington and Burr*, ENTERTAINMENT WEEKLY (Mar. 20, 2016, 8:26 PM), <http://www.ew.com/article/2016/03/03/hamilton-casting-women-washington-burr> [<https://perma.cc/4S2U-BWVF>] (emphasis added).

130. See Nelson T. Eusebio, *On the Merits of Yellowface*, HOWLROUND THEATRE COMMONS (Oct. 9, 2015), <https://howlround.com/merits-yellowface> [<https://perma.cc/W2N4-FnJN>].

131. *Id.*

132. See Dennis Hevesi, *Marion Dougherty, Hollywood Star-Maker, Dies at 88*, N.Y. TIMES (Dec. 7, 2011), <https://www.nytimes.com/2011/12/08/movies/marion-dougherty-hollywood-star-maker-dies-at-88.html> [<https://perma.cc/HUE2-WG85>] (reporting that legendary American casting director Marion Dougherty had said: "Casting is a game of gut instinct. You feel their talent and potential in the pit of your stomach. It's about guts and luck").

133. Eusebio, *supra* note 130.

134. See Robinson, *supra* note 101, at 50. It is also important to note that, under the First Amendment, a director or producer is free to disregard whether the actor selected to play a role is less talented than others who auditioned for the same part. The government cannot, pursuant to the First Amendment, require that artistic creators choose expression that is meritocratic in its execution. *Id.* at 45–47.

## VI. TACTICS OUTSIDE THE SCOPE OF LAW REFORM CAN BE MORE EFFECTIVE IN INFLUENCING CASTING PRACTICES

While the law may be an ineffective channel for addressing economic and financial harms arising from current inequitable casting opportunities and practices, there are several other, more effective ways to bring about change in the casting process.<sup>135</sup> This section will discuss three tactics outside the scope of law reform that could serve to foster a greater universal celebration of diversity in casting decisions, including the creative community adopting “professional consciousness” when writing and casting a script; audience activism; and spreading public recognition of nonwhite actors.

### *A. The Creative Community, Especially Screenwriters, Has the Power to Change Casting Practices*

In the words of American film director and producer Tom Donahue, “every character begins life as just words on a page.”<sup>136</sup> In other words, each production begins with scripts, not actors; the script defines which types of people can play a role.<sup>137</sup> Indeed, a large part of why Hollywood is not “an actor’s utopian meritocracy” is due to “the people making the stories.”<sup>138</sup> In a piece written by Charles Ramírez Berg, screenwriter and Professor of Media Studies at the University of Texas at Austin’s Moody College of Communication, Berg notes that while the entertainment industry’s practices are often discriminatory, it is very possible for scriptwriters “to alter its pervasive stereotyping.”<sup>139</sup>

For example, Berg warns fellow screenwriters not to reserve nonwhite characters for “ethnic stories,” as doing so risks “ghettoizing [minorities] talents,” nor to attempt to “force ethnic/racial content into every story telling crevice, whether it belongs there or not,” because doing so “run[s] the risk of becoming doctrinaire” and could limit viewership.<sup>140</sup> He believes that if screenwriters abide by a “professional conscience” when they write, they can catalyze the

135. *Id.* at 2–3.

136. *HBO Airs Documentary on the Lives of Casting Directors Tonight*, BROADWAY WORLD (Aug. 5, 2013), <https://www.broadwayworld.com/bwwtv/article/HBO-to-Air-Documentary-on-the-Lives-of-Casting-Directors-Today-20130804> [<https://perma.cc/7YG9-RDPJ>].

137. See Robinson, *supra* note 101, at 7–8.

138. Vincent Milburn, *Hollywood and Diversity*, WHAT IS GREAT CINEMA (Feb. 6, 2015), <http://www.whatisgreatcinema.com/2015/02/hollywood-and-diversity.html> [<https://perma.cc/AM6E-6DT2>].

139. Charles Ramírez Berg, *Strategies for Latino Screenwriters*, JUMP CUT (June 1993), <http://www.ejumpcut.org/archive/onlinesays/JC38folder/forLatinoScreenwtrs.html> [<https://perma.cc/KE5C-84ET>].

140. *Id.*

industry's endorsement of "equal treatment for all and the tolerance of difference."<sup>141</sup> According to Berg, abiding by a "professional conscience" means taking into account the following while writing a script when able:

1. Race of the characters (steering clear of stereotypes), especially for the protagonist(s);
2. Incorporating nonwhite characters into relatable, everyday activities (e.g., "leisurely conversations around kitchen tables," which, while potentially doing little to advance the central plotline, can "add immeasurably to the film's thick cultural texture");
3. Accurately portraying and setting the production in a culturally specific location that "Hollywood always gets wrong" or that "is seldom seen in mainstream" production (e.g., instead of setting a movie in "the 'mean streets' of the barrio," setting it in a church hall dance or at a quinceañera);
4. Possibilities for reclaiming history within a story's narrative, especially when minorities have been excluded from a related historical dialogue (e.g., how *Hamilton* shows that minorities and immigrants also contributed significantly to early American history);<sup>142</sup> and
5. Dialect (meaning that to the extent possible, "broken English spoken with a heavy accent" should be avoided and, where necessary, replaced with language spoken in the character's native tongue with English subtitles (e.g., like in *The Godfather*)).<sup>143</sup>

And Berg is not alone in believing that industry change can be effectively driven by the writers and other players within the creative community.<sup>144</sup> When screenwriter and filmmaker Alex Proyas and production studio Lionsgate Movies were confronted about their choice to employ a near-exclusively white cast in the film *Gods of Egypt*, they acknowledged the power and discretion the creative community has over casting as well as its social responsibility.<sup>145</sup>

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141. *Id.*

142. *See supra* Part II.

143. Berg, *supra* note 139.

144. *See, e.g.,* Melena Ryzik, *What It's Really Like to Work in Hollywood\* (\*If You're Not a Straight White Man.)\**, N.Y. TIMES (Feb. 24, 2016), <http://www.nytimes.com/interactive/2016/02/24/arts/hollywood-diversity-inclusion.html> [<https://perma.cc/S3NF-J6U5>].

145. Greg Evans, 'Gods of Egypt': 'Selma' Director Ava DuVernay Responds to Alex Proyas & Lionsgate Apology for Lack of Diversity, DEADLINE (Nov. 28, 2015, 3:01 PM),

Apologizing for their casting decisions, a Lionsgate representative stated:

We recognize that it is our responsibility to help ensure that casting decisions reflect the diversity and culture of the time periods portrayed. In this instance we failed to live up to our own standards of sensitivity and diversity, for which we sincerely apologize. Lionsgate is deeply committed to making films that reflect the diversity of our audiences. We have, can and will continue to do better.<sup>146</sup>

Experience has shown that when writers do embrace the concept of “professional consciousness” and internalize social responsibility while engaged in their craft, they can change the way in which roles get casted and evolve.<sup>147</sup> For example, Indian-American actress Mindy Kaling noted that her casting in *The Office* as Kelly, a generally relatable character for American women whose various forays tend to be race-neutral, directly reflected the fact that the show “hired a group of the most feminist writers” who cared about her experience and ensured that her “voice was heard” to prevent forcing her into a stereotype.<sup>148</sup> Thus, there is strong reason to believe that one of the most effective ways to change the casting process is for writers in the creative community to take an active role in writing their scripts with an underlying sense of “professional consciousness.”

### *B. Audiences Can Help Influence Casting Practices*

Audiences can play an influential role in shifting discriminatory casting practices to create more equitable opportunities. In light of the growing nonwhite population and an increasingly progressive mindset for at least some white heteronormative populations, this has become a potent tactic.<sup>149</sup> Audience members can encourage the industry to shoulder greater social responsibility in its casting choices by “demand[ing] that movies or television programs [and other

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<https://deadline.com/2015/11/gods-of-egypt-diversity-lionsgate-alex-proyas-apologize-1201642246> [<https://perma.cc/PN7F-B9VY>].

146. *Id.* Similarly, Proyas stated: “The process of casting a movie has many complicated variables, but it is clear that our casting choices should have been more diverse. I sincerely apologize to those who are offended by the decisions we made.” *Id.*

147. Berg, *supra* note 139.

148. Ryzik, *supra* note 144.

149. HUNT ET AL., *supra* note 70, at 4. “The minority share of the U.S. population is growing by about a half a percent each year. Constituting nearly 40 percent of the U. S. population in 2017, minorities will become the majority within a couple of decades.” *Id.* at 2. That said, however, this Article is not suggesting that minorities should have to shoulder the burden of audience activism to ensure more racially unbiased casting opportunities alone or at all.

productions] cast people of color and refus[ing] to watch or frequent the showing if the director fails to do so.”<sup>150</sup>

Employing this tactic has been successful in the past.<sup>151</sup> For example, in August 1992, playwright and director Luis Valdez put his film *Frida and Diego* “on hold indefinitely.”<sup>152</sup> “His decision [to do so was] a reaction to recent protests by some Latino actors in Hollywood who objected to his casting of a non-Latina actress, Laura San Giacomo, in the role of famed Mexican painter Frida Kahlo.”<sup>153</sup> More recently, the theater production company New York Gilbert & Sullivan Players, canceled its Broadway production of *The Mikado*, which was planned for December 26, 2015–January 2, 2016.<sup>154</sup> The reason? Vocal “members of the Asian community took offense” to the fact that the production featured “four Caucasian actors portraying Japanese characters,” that “out of the approximately forty members of the company, only two actors [were] of Asian descent,” and that the show was “full of stereotypes.”<sup>155</sup> This resulted in bad publicity that the company wished to ameliorate.<sup>156</sup>

150. Kim, *supra* note 61, at 417.

151. In addition to the below examples, numerous other accounts of recent and impactful audience activism abound. See, e.g., Isha Aran, *Twitter Is Dragging Netflix’s Latest Whitewashed Show Back to Hell*, SPLINTER (Mar. 22, 2017, 4:31 PM), [https://splinternews.com/twitter-is-dragging-netflix-s-latest-whitewashed-show-b-1793859335#\\_ga=2.184057958.1149526257.1503322374-880228213.1465229634](https://splinternews.com/twitter-is-dragging-netflix-s-latest-whitewashed-show-b-1793859335#_ga=2.184057958.1149526257.1503322374-880228213.1465229634) [<https://perma.cc/5AKT-C53R>] (discussing backlash for *Ghost in the Shell* and *Iron Fist*); Kristy Puchko, *Are We Finally at the Precipice of the Whitewashing Tipping Point?*, PAJIBA (Feb. 23, 2016), [https://www.pajiba.com/think\\_pieces/are-we-finally-at-the-precipice-of-the-whitewashing-tipping-point.php](https://www.pajiba.com/think_pieces/are-we-finally-at-the-precipice-of-the-whitewashing-tipping-point.php) [<https://perma.cc/XV8D-P6HT>]; India Sturgis, *Rooney Mara: ‘I’ve Been on the Wrong Side of the Whitewashing Debate’*, THE TELEGRAPH (Feb. 22, 2016, 7:00 AM), <https://www.telegraph.co.uk/film/carol/rooney-mara-interview> [<https://perma.cc/L5SR-3G6C>] (discussing backlash for *Pan*, the live action remake of *Peter Pan*); Katie Van Syckle, *Death Note Director Adam Wingard Is Ready to Talk About Whitewashing*, VULTURE (Aug. 18, 2017), <https://www.vulture.com/2017/08/death-note-director-adam-wingard-on-whitewashing-criticisms.htm> [<https://perma.cc/TYF2-27XR>] (discussing backlash for *Death Note* and noting similar backlash for *Iron Fist*, *The Great Wall*, *Kubo and the Two Strings*, *Ghost in the Shell*, and *The Martian*); Jeff Yang, *Whitewashing Hollywood Movies Isn’t Just Offensive—It’s Also Bad Business*, QUARTZ (Apr. 18, 2017), <https://qz.com/960600/whitewashing-ghost-in-the-shell-and-other-hollywood-movies-isnt-just-offensive-its-also-bad-business> [<https://perma.cc/J39E-X5CV>] (discussing backlash for remake of anime movie *Ghost in the Shell*).

152. David J. Fox, *Valdez’s ‘Frida’ on Hold: Movies: Criticism from Latino Community Causes the Writer-Director to Halt the Project.*, L.A. TIMES (Aug. 18, 1992), <https://www.latimes.com/archives/la-xpm-1992-08-18-ca-5985-story.html> [<https://perma.cc/QZ7D-QMB2>].

153. *Id.*

154. Michael Gioia, *Actors’ Equity ‘Commends’ Cancellation of The Mikado with Caucasian Actors, Issuing Statement*, PLAYBILL (Sept. 18, 2015), <http://www.playbill.com/article/actors-equity-commends-cancellation-of-the-mikado-with-caucasian-actors-issuing-statement-com-363199> [<https://perma.cc/TBV3-XAB9>].

155. Michael Gioia, *Casting and Advertising for The Mikado in NYC Stirs Controversy Amongst Asian Community*, PLAYBILL (Sept. 16, 2015), <http://www.playbill.com/article/casting-and-advertisement-for-the-mikado-in-nyc-stirs-controversy-amongst-asian-community-com-362609> [<https://perma.cc/R4Q6-T5PF>].

156. Brian Wise, *NYC Gilbert & Sullivan Troupe Cancels ‘The Mikado’ Over ‘Yellowface’*



Similarly, when screenwriter and director Cameron Crowe's movie *Aloha*, which was heavily criticized by the public for its casting choices prior to opening,<sup>157</sup> “performed poorly in its first weekend in theaters, collecting just \$10.5 million despite a shiny pedigree and a star-studded cast” in summer 2015, Crowe conceded that his decision to cast Emma Stone as the part-Chinese, part-Hawaiian leading female role may have been “misguided.”<sup>158</sup> Following an organized boycott by Hawaiian natives and the Media Action Network for Asian Americans,<sup>159</sup> *Aloha* only grossed “\$26 million against a budget of \$37 million, making the film a box office bomb.”<sup>160</sup> Shouldering the blame for the movie's poor reception, Crowe assured future moviegoers that his “future casts” would “include more people of color.”<sup>161</sup> Thus, while Crowe's movie did play in theaters,<sup>162</sup> audience activism and collective disapproval toward the film's casting appear to have impacted the legendary screenwriter and director such that he will likely be more willing to cast talented actors of color in his future projects.<sup>163</sup>

While these examples show that organized collective action can be a powerful tool in shaping casting decisions, individual voices of showgoers or activist groups can be potent and effective tools as well, especially when collective action is difficult to undertake. Even just mere expressions of disapproval of casting choices can influence

*Criticisms*, WQXR (Sept. 18, 2015), <https://www.wqxr.org/story/nyc-gilbert-sullivan-troupe-cancels-mikado-over-yellowface> [<https://perma.cc/V2SC-MABE>].

157. See, e.g., Scott Edward, *John Oliver Asks Why the Hell Whitewashing is Still Happening*, BUZZFEED (Feb. 23, 2016, 8:52 PM), <http://www.buzzfeed.com/scottedward/hollywood-whitewashing-with-john-oliver#ffr3WvwMK6> [<https://perma.cc/G4N2-9DXK>]; Claire Fallon, *Emma Stone Plays a Part-Asian Character in 'Aloha' and That's Not Okay*, HUFFPOST (June 4, 2015), [http://www.huffingtonpost.com/2015/05/29/emma-stone-aloha\\_n\\_7465730.html](http://www.huffingtonpost.com/2015/05/29/emma-stone-aloha_n_7465730.html) [<https://perma.cc/M7F3-R4NY>]; Chris Lee, *I'm Not Buying Emma Stone as an Asian-American in Aloha*, EW (May 29, 2015, 12:00 PM), <http://www.ew.com/article/2015/05/29/im-not-buying-emma-stone-asian-american> [<https://perma.cc/X5CG-VSVQ>].

158. Brandon Griggs, *'Aloha' Director Apologizes for Casting Emma Stone as Asian-American*, CNN (June 4, 2015, 12:42 PM), <http://www.cnn.com/2015/06/03/entertainment/cameron-crowe-emma-stone-aloha-apology-feat> [<https://perma.cc/8WMW-7GQR>].

159. Marissa Martinelli, *Cameron Crowe Apologized for Casting Emma Stone as a Half-Asian Character. Sort Of.*, SLATE (June 3, 2015, 3:29 PM), <https://slate.com/culture/2015/06/cameron-crowe-apology-for-white-washed-casting-in-aloha.html> [<https://perma.cc/E9C2-BPK4>]; MANAA *Condemns Sony Pictures And Cameron Crowe For Continuing To Erase Asian/Pacific Islanders In "Aloha" Film*, MANAA (May 28, 2015), <http://manaa.org/?p=1544> [<https://perma.cc/M9CR-BKS7>].

160. *Aloha (2015 Film)*, WIKIPEDIA, [https://en.wikipedia.org/wiki/Aloha\\_\(2015\\_film\)](https://en.wikipedia.org/wiki/Aloha_(2015_film)) [<http://perma.cc/9QNX-NV5A>] (last visited Nov. 4, 2019).

161. Griggs, *supra* note 158.

162. *Id.*

163. Ben Child, *Cameron Crowe Apologizes for casting Emma Stone as 'Part-Asian' in Aloha*, THE GUARDIAN (June 3, 2015, 3:40 PM), <https://www.theguardian.com/film/2015/jun/03/cameron-crowe-apologises-for-casting-emma-stone-as-part-asian-in-aloha> [<https://perma.cc/2GC9-ARPA>].

casting within the industry.<sup>164</sup> Indeed, trails of public discontentment over certain casting choices have certainly helped impact future casting decisions.<sup>165</sup> For instance, when the 1989 Broadway production of *The King and I* had white actors in “yellowface” play Asian characters, Beulah Ku, the Director of Advocacy of the Association of Asian/Pacific American Artists in Los Angeles, wrote a well-received response article to the *Los Angeles Times*.<sup>166</sup> Speaking for Asian Americans in her advocacy group, she wrote to “voice our dissent and concern over the casting choices for the show.”<sup>167</sup> She opined that, “[t]o use no Asians as principals is unjust and anachronistic, especially when *The King and I* is a musical so obviously based on Asian themes.”<sup>168</sup> While the 1989 production continued to play, it is likely that the outcries from people like Ku influenced the subsequent decision to actively seek actors of “Asian, South Asian, Southeast Asian/Pacific Islander” descent when casting the show’s Broadway revival in 2014.<sup>169</sup>

### *C. Public Recognition May Help Encourage More Equitable Casting Opportunities*

Some scholars argue that mainstream public recognition of non-white actors’ achievements may help encourage fairer casting opportunities.<sup>170</sup> While these scholars applaud minority representation at award ceremonies like the NAACP Image Awards (which honor “individuals and organizations which have contributed to the positive portrayal of African Americans in motion pictures, television, literature and recording”);<sup>171</sup> the Golden Eagle Awards (which “celebrate the talent and culture of Latino artists”);<sup>172</sup> and the Golden Ring Awards (which “highlight the achievements of Asian American and Pacific Islander members of the arts and entertainment community”),<sup>173</sup>

164. Kim, *supra* note 61, at 417–18.

165. Jessica Gelt, *Authenticity in Casting: From ‘Colorblind’ to ‘Color Conscious,’ New Rules Are Anything But Black and White*, L.A. TIMES (July 13, 2017, 6:00 AM), <https://www.latimes.com/entertainment/arts/la-ca-cm-authenticity-in-casting-20170713-htmlstory.html> [<https://perma.cc/8YVQ-8LF6>].

166. Beulah Ku, *Casting of Asians*, L.A. TIMES (Dec. 31, 1990, 12:00 AM), <https://www.latimes.com/archives/la-xpm-1989-12-31-me-218-story.html> [<https://perma.cc/D33Y-HU4P>] (reposting Ku’s *L.A. Times* article).

167. *Id.*

168. *Id.*

169. *The King And I, Lincoln Center*, BACKSTAGE, [http://www.backstage.com/casting/the-king-and-i-lincoln-center-43570/?role\\_id=165896](http://www.backstage.com/casting/the-king-and-i-lincoln-center-43570/?role_id=165896) [<https://perma.cc/7UQG-EAXS>] (last visited Nov. 4, 2019).

170. See Kim, *supra* note 61, at 418.

171. *Id.*

172. *Id.*

173. *Id.*

they believe that if nonwhite artists were better represented among the nominees and recipients for more mainstream entertainment awards (e.g., the Academy Awards), “it may encourage decision makers in the entertainment industry to realize the abundance of non-white artists and the demand for their talent.”<sup>174</sup>

Responding to public criticism and “calls for an Oscar boycott” over the lack of nonwhite nominees at the Academy Awards in 2015 and 2016,<sup>175</sup> the 2016 governing board of the Academy Awards approved a “sweeping series of substantive changes” aimed at “doubling the number of women and diverse members of the Academy by 2020” in an effort to encourage more diverse nominees.<sup>176</sup> The adopted changes include a ten-year cap on each new member’s voting status, making it possible for the new member to renew their voting privileges only if they have been “active in motion pictures during that decade” or have won or been nominated for an Academy Award.<sup>177</sup> Members falling into the latter “receive lifetime voting rights.”<sup>178</sup> Those not falling into any of these categories will be “moved to emeritus status” and lose their voting privileges.<sup>179</sup> Additionally, the Academy said it would “supplement the traditional process in which current members sponsor new members by launching an ambitious, global campaign to identify and recruit qualified new members who represent greater diversity.”<sup>180</sup> Echoing the sentiment that it could

174. *Id.*

175. Tim Gray, *Academy Nominates All White Actors for Second Year in Row*, VARIETY (Jan. 14, 2016, 7:16 AM), <http://variety.com/2016/biz/news/oscar-nominations-2016-diversity-white-1201674903> [https://perma.cc/WMR7-9PBF] (“Last year’s Oscar nominations drew howls of protests for their lack of diversity. This year, it’s even worse.”); see also Jefferson Grubbs, *The 2016 Oscar Nominations Lack Diversity, But There Is Some Good News As Well*, BUSTLE (Jan. 14, 2016), <http://www.bustle.com/articles/135565-the-2016-oscar-nominations-lack-diversity-but-there-is-some-good-news-as-well> [https://perma.cc/PTN6-UE2K]; Nicky Woolf, *Oscars Diversity: Academy to Double Female and Minority Members by 2020*, THE GUARDIAN (Jan. 22, 2016, 6:10 PM), <http://www.theguardian.com/film/2016/jan/22/oscars-diversity-race-minority-members-academy-awards> [https://perma.cc/7KLG-M42R] (“Actors Jada Pinkett-Smith and Will Smith, as well as director Spike Lee and documentary film-maker Michael Moore, said they would not be attending the awards in light of the lack of recognition of black artists.”).

176. Woolf, *supra* note 175 (“The announcement followed criticism and calls for an Oscar boycott after members nominated all-white slate of actors for the second year in a row.”); see also *Academy Takes Historic Action to Increase Diversity*, OSCARS (Jan. 22, 2016), <http://www.oscars.org/news/academy-takes-historic-action-increase-diversity> [https://perma.cc/ZH3S-9GHW].

177. *Academy Takes Historic Action to Increase Diversity*, *supra* note 176.

178. *Id.*

179. *Id.*

180. *Id.* Other approved changes include “adding new members who are not Governors to its executive and board committees where key decisions about membership and governance are made” and “establish[ing] three new governor seats that will be nominated by the President for three-year terms and confirmed by the Board.” *Id.*

be a change force in the industry, Academy President Cheryl Boone Isaacs said of the new voting and governance measures: “The Academy is going to lead and not wait for the industry to catch up.”<sup>181</sup> And, indeed, there has been a noticeably positive impact on the increased diversity of Academy Award winners since these changes were adopted.<sup>182</sup>

But if public recognition via awards can be used to promote diversity with industries, a question arises as to why we should promote diversity for artistically inclined entertainment (e.g., theater, movies, television, etc.) when different entertainment fields, like sports, are not making akin efforts to promote diversity.<sup>183</sup> In other words, does the lack of diversity in, for example, sports undermine efforts to diversify artistically inclined entertainment? Indeed, many people have compared art to sports and, in so doing, noted “the disproportionate amount of black people in the NBA.”<sup>184</sup> So why is the public more upset when the Oscar nominees do not resemble America’s population than when the basketball players on the All-Star team are equally homogenous? Why was there no public uproar when the National Basketball Association (NBA) announced that the 2016 starting lineups for the All-Star game included “no Europeans, no Latin Americans, no white Americans and no Asians, American or otherwise?”<sup>185</sup> Is it that people are applying different standards to artistically inclined entertainment than to sports based on social outcomes? And if so, are they justified in encouraging and prompting organizations like the Oscars to institute policies aimed at increasing diversity while not doing so for other organizations like the NBA?

While this line of questioning may seem fair on the surface, it rests on a shaky analogy. Unlike basketball, art does not have a literal scoreboard.<sup>186</sup> Awards and honors bestowed upon artists in the entertainment industry are based on more subjectivity because, as previously discussed, there is no singular agreed-upon way to define

181. *Academy Takes Historic Action to Increase Diversity*, *supra* note 176.

182. Nichola Groom & Alex Dobuzinskis, *Oscars Not So White? Academy Awards Winners See Big Shift*, REUTERS (Feb. 25, 2019, 1:53 AM), <https://www.reuters.com/article/us-awards-oscars-diversity/oscars-not-so-white-academy-awards-winners-see-big-shift-idUSKCN1QE0N4> [<https://perma.cc/64VV-XRLP>].

183. Chris Bodenner, *Debating Diversity in the Entertainment Industry*, THE ATLANTIC (Feb. 28, 2016, 6:22 PM), <https://www.theatlantic.com/notes/2016/02/what-about-the0disproportionate-diversity-in-pro-sports/471360> [<https://perma.cc/VW42-TS2K>]. In other words, people have questioned whether strides toward diversity in the casting context could be undermined by a lack of diversity in other entertainment fields. *Id.*

184. Milburn, *supra* note 138.

185. Jack Cashill, *NBA All-Stars: So-Non-White*, WND (Jan. 28, 2016, 7:54 PM), <http://www.wnd.com/2016/01/nba-all-stars-so-non-white> [<https://perma.cc/P9YF-HZFA>].

186. Bodenner, *supra* note 183.

“best” in this context.<sup>187</sup> Conversely, there is an objective way to measure who is, for example, good at basketball.<sup>188</sup> So while meritocratic casting decisions are simply not feasible, professional sports are inherently and almost invariably meritocratic.<sup>189</sup> Furthermore, even if different standards are being applied to artistically inclined entertainment than sports, qualitative differences between the industries justify the different standards.<sup>190</sup> Unlike sports, in artistically inclined entertainment, diversity makes a significant difference because it changes the type of stories you can tell; conversely a basketball game is still a basketball game regardless of who is on the court.<sup>191</sup> Stories, and the characters used within them (e.g., racially stereotyped characters) can have a greater societal impact on race relations.<sup>192</sup> Consequently, promoting diversity within artistically inclined entertainment via encouraging public recognition of nonwhite actors through channels like the Academy Awards is possible and will not be undermined just because sports organizations do not advocate for greater diversity in their own awards programs.

#### CONCLUDING THOUGHTS

Employing the above tactics promises to help bring about change in casting practices in an efficient and effective manner. Indeed, audience activism can make or break productions before they have even been released, prompting creators to think twice before casting their works in homogenous and disconcerting ways.<sup>193</sup> Likewise, screenwriters and voting members that bestow prestigious achievement recognitions upon actors both have the ability to shape the direction of the industry through straightforwardly increasing the number of serious roles available to minority actors and by providing greater public recognition to talented performers of color.<sup>194</sup> While legal reform

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187. See *supra* Section V.B.

188. See Bodenner, *supra* note 183.

189. See *supra* Section V.B. Additionally, as discussed in Robinson, *supra* note 101, in accordance with the First Amendment, the government cannot mandate that artistic creators cast only the most objectively talented actors even if such an objective measurement could be made. The First Amendment allows producers and directors to create art that cannot be served by placing meritocracy above all other concerns.

190. See Bodenner, *supra* note 183.

191. Gelt, *supra* note 165.

192. See JAMES A. MICHENER, *SPORTS IN AMERICA* 162 (Random House 1976). Even if one does not buy into the argument above, harmful stereotyping toward nonwhite players still exists in the realm of sports. For example, in football, “thinking position,” like quarterback and center, are typically filled by white players. *Id.*

193. Gelt, *supra* note 165.

194. Darrell D. Miller, *Hollywood’s Diversity Problem: Change Needs to be Both Top-Down and Bottom-Up*, *VARIETY* (Aug. 7, 2018, 12:18 PM), <https://variety.com/2018/film>



of casting practices may not be realistic or effective at this juncture, these tactics can help to bring about immediate change in the casting industry.

Even if these tactics are not employed, however, changes to casting practices are likely and perhaps inevitable over time in light of changing demographics shifting market demand.<sup>195</sup> In other words, in light of growing minority populations in the United States, it is likely that current casting practices may soon be unsustainable; evidence “shows clearly that America’s increasingly diverse audiences prefer diverse content created with the input of diverse talent.”<sup>196</sup> Recent studies have concluded that “the nation is projected to be majority minority by 2043.”<sup>197</sup> If this is true, the entertainment industry will eventually need to adapt to these changing demographics. Harry M. Benshoff, a professor of Film Studies at the University of North Texas, has explained that “[t]he way Hollywood sees it, the more people who identify with a character, the more tickets a movie might sell.”<sup>198</sup> From this it follows that as minority populations continue to grow and more people find themselves identifying with nonwhite characters, casting opportunities for nonwhite actors will grow as well.

We have already begun to see the start of this shift in a number of recent Broadway casting decisions,<sup>199</sup> resulting in successful runs for recent shows like *Mean Girls* (casting Asian-American actress Ashley Park as Gretchen Weiners and, subsequently, Mexican and Lebanese actress Krystina Alabado in the same role);<sup>200</sup> *Romeo and Juliet* (casting black actress Condola Rashad as Juliet);<sup>201</sup> *Les*

/news/hollywood-diversity-2-1202898210 [https://perma.cc/WUV6-V9MV].

195. *Id.*

196. DARNELL HUNT & ANA-CHRISTINA RAMÓN, UCLA, 2015 HOLLYWOOD DIVERSITY REPORT: FLIPPING THE SCRIPT 53 (2015), <http://docplayer.net/13547450-2015-hollywood-diversity-report-flipping-the-script.html> [https://perma.cc/3WBQ-4P3G]; HUNT ET AL., *supra* note 70, at 3 (“New evidence from 2016–17 supports findings from previous reports in this series suggesting that America’s increasingly diverse audiences preference diverse film and television content.”).

197. HUNT & RAMÓN, *supra* note 196, at 5.

198. Stephanie Goldberg, ‘Hunger Games’ and Hollywood’s Racial Casting Issue, CNN (March 28, 2012, 7:45 PM), <https://www.cnn.com/2012/03/28/showbiz/movies/hunger-games-black-actors/index.html> [https://perma.cc/EL3H-BW6Y].

199. Andrew R. Chow, *Study Finds Increasing Diversity on Broadway*, N.Y. TIMES (Jan. 15, 2018), <https://www.nytimes.com/2018/01/15/theater/study-finds-increasing-diversity-on-broadway.html> [https://perma.cc/2KWY-6FFC]; cf. Patrick Pacheco, *In Like a Lion*, L.A. TIMES (Jan. 25, 1998, 12:00 AM), <http://articles.latimes.com/1998/jan/25/entertainment/ca-11780> [https://perma.cc/F9NM-94YP].

200. Matthew Blank, *Catching Up With Krystina Alabado, the Fetch AF New Star of Mean Girls*, ONSTAGE BLOG (May 10, 2019), <https://www.onstageblog.com/profiles/2019/5/10/catching-up-with-krystina-alabado-the-fetch-af-new-star-of-mean-girls> [https://perma.cc/P5WS-H5AJ]; Casey Mink, *How Ashley Park Made Fetch Happen and Got Cast in ‘Mean Girls,’* BACKSTAGE (Apr. 18, 2018), <https://www.backstage.com/magazine/article/ashley-park-made-fetch-happen-got-cast-mean-girls-1379> [https://perma.cc/44MB-9MCG].

201. Philippa Hawker, *Condola Rashad is Juliet Opposite Orlando Bloom as Romeo*

*Miserables* (casting black actor Kyle Jean-Baptise to play Jean Valjean); and, of course, *Hamilton* (casting nonwhite actors as Alexander Hamilton, Aaron Burr, and George Washington, among others).<sup>202</sup> The success of these shows also signals white people's increasing willingness to support and see shows that include more diverse casts.<sup>203</sup> In fact, *Hamilton* ticket prices run upwards of around \$300<sup>204</sup> and the show has been sold out since opening despite the fact that Broadway's theatergoers tend to be overwhelmingly white.<sup>205</sup> Indeed, *Hamilton's* success suggests that the former justification behind white-preferred casting—that doing so was necessary to ensure a production's commercial success<sup>206</sup>—is no longer as tenable. Rather, we seem to be approaching a market shift where diversity is beginning to help increase interest and sales in mainstream society, not detract from them.

Until this market shift has fully materialized,<sup>207</sup> however, employing tactics like the ones described above will likely remain the

on Broadway, N.Y. TIMES (May 9, 2014, 6:30 PM), <http://www.smh.com.au/entertainment/condola-rashad-is-juliet-opposite-orlando-bloom-as-romeo-on-broadway-20140509-zr8e2.html> [<https://perma.cc/GU5H-W6FB>].

202. Sally Henry, *Les Miserables Welcomes Youngest and First African American Jean Valjean in Broadway History*, BROADWAY WORLD (July 26, 2015), <https://www.broadwayworld.com/article/LES-MISERABLES-Welcomes-Youngest-and-First-African-American-Jean-Valjean-in-Broadway-History-20150726> [<https://perma.cc/73XR-WRR8>].

203. Marina Fang, *Audiences Want Diversity In Hollywood. Hollywood's Been Slow To Get The Message.*, HUFFPOST (Feb. 27, 2018, 11:20 AM), [https://www.huffpost.com/entry/hollywood-diversity-study-black-panther\\_n\\_5a954898e4b0699553cc3cc8](https://www.huffpost.com/entry/hollywood-diversity-study-black-panther_n_5a954898e4b0699553cc3cc8) [<https://perma.cc/J366-8545>].

204. Kendra James, *Race, Immigration, and Hamilton: The Relevance of Lin-Manuel Miranda's New Musical*, THE TOAST (Oct. 1, 2015), <http://the-toast.net/2015/10/01/race-immigration-and-hamilton> [<https://perma.cc/GLV7-CEQJ>]; Charles Passy, *A 'Hamilton' Ticket for \$849? Experts Call That a Bargain*, WALL ST. J. (June 6, 2019, 6:34 PM), <https://www.wsj.com/articles/a-hamilton-ticket-for-849-experts-call-that-a-bargain-11559860459> [<https://perma.cc/2XLA-7NPY>].

205. *The Demographics of a Broadway Audience: 2017–2018 Season*, THE BROADWAY LEAGUE, [https://www.broadwayleague.com/index.php?url\\_identifier=the-demographics-of-the-broadway-audience](https://www.broadwayleague.com/index.php?url_identifier=the-demographics-of-the-broadway-audience) [<http://perma.cc/4YAW-WKQ5>] (last visited Nov. 4, 2019) (in 2017–2018, only “[o]ne quarter of all tickets were purchased by non-Caucasian theatregoers”).

206. James, *supra* note 204.

207. See Dino-Ray Ramos, *Emmy Nominations See Major Decline In Diversity And Inclusion*, DEADLINE (July 16, 2019, 9:51 AM), <https://deadline.com/2019/07/emmys-diversity-acting-when-they-see-us-black-monday-rupauls-drag-race-pose-lgbtq-people-of-color-1202646769> [<https://perma.cc/PW9A-MX3P>]. If the 2019 Emmy nominations are any indication, diverse recognition and representation in artistically inclined entertainment still has a way to go before the industry fully embraces equitable and meritocratic treatment of talent independent of race. *Id.* (noting that “actors of color were completely shut out of numerous categories including Lead Actress in a Comedy, Supporting Actress in a Drama, Supporting Actor in a Comedy, Supporting Actress in a Comedy as well as Guest Actor in a Comedy Series” and that “[t]his year, there were only 24 [total] acting nominations for people of color”).

most effective ways to promote more equal and fair casting practices in the entertainment industry.<sup>208</sup> The creative community and its audiences have tremendous power and influence over the shape of mainstream entertainment.<sup>209</sup> Through collective action and independent efforts, it is possible to change the landscape of casting practices even without the unlikely and impracticable support of legal reform in this context. Such action is necessary to ensure more equitable casting opportunities for and greater portrayal of diverse actors in the entertainment industry in the immediate future.

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208. Fang, *supra* note 203.

209. *Id.*