The Unbearable Whiteness of ABC: The First Amendment, Diversity, and Reality Television in the Wake of Claybrooks v. ABC

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I. INTRODUCTION

A rose by any other name would smell just as sweet to the contestants on ABC's reality dating drama "The Bachelor." Unfortunately, a freedom of expression case by any other name is also just as vexed, as was made clear by the recent controversial verdict in Claybrooks v. ABC, in which a Tennessee federal district court ruled that the ABC network did not violate federal anti-discrimination laws when it denied African-American hopefuls an equal chance to compete for casting.\(^1\) The court ruled that, whether or not the plaintiffs' allegations were true, ABC's casting decisions were part of the creative process and therefore protected by the First Amendment.\(^2\) However, both ABC and the judge claimed to be sympathetic to the plaintiffs' desire for greater racial integration on network television.\(^3\)

This Comment examines unresolved and sometimes uncomfortable questions about to what extent television networks, and reality television shows in particular, may skirt issues of fairness in the name of the First Amendment. Part II of the Comment traces the development of First Amendment jurisprudence and the development of anti-discrimination law, two areas of law that have rarely intersected. Part III of the Comment details the Claybrooks lawsuit—the facts of the case, the publicity surrounding the case, and the reasoning and outcome of the case. Part IV of the paper explores the tactics available to discrimination plaintiffs in the wake of the Claybrooks ruling. First, given the unsettled state of the law, more casting discrimination lawsuits should be filed to challenge the Claybrooks court's application and extension of Hurley v. Irish-American Gay, Lesbian, and Bisexual Group of Boston.\(^4\) Second, discrimination plaintiffs should explore filing suit under Title VII, with the caveat that such suits will be fraught with challenges. Third, activists should lay the groundwork for diversity in television to be considered a compelling state interest, so that diversity regulations will be upheld in court notwithstanding any small infringement of First Amendment rights. Finally, because the current legal landscape is unsettled and even unfriendly to such action for diversity, activists should petition the networks themselves to self-regulate, following the admirable model set by the NFL in the so-called "Rooney Rule," aimed at diversifying professional football coaches.\(^5\) This self-imposed rule was created in response to anticipated legal challenges,

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2. Id.
3. See id. at 996, 1000.
and so ultimately, I argue for continued legal action against discriminating networks in the hope that either new precedent will be set or the networks will themselves initiate self-regulation in the interest of the common good.

II. HISTORICAL INTERSECTIONS BETWEEN THE FIRST AMENDMENT AND DIVERSITY

A. First Amendment Freedom of Speech

The First Amendment to the United States Constitution provides that "Congress shall make no law . . . abridging the freedom of speech, or of the press." The purpose of the First Amendment is to prevent the government from silencing speech simply because it finds the speech to be distasteful or against its own policy. Indeed, "it is a central tenet of the First Amendment that the government remain neutral in the marketplace of ideas." Expressions of ideas are thus immune from government regulation. In particular, printed material "enjoys virtually absolute protection from government regulation." Regulations that interfere with a publisher's "editorial control and judgment" have been found unconstitutional. For example, Florida's "right to reply statute," guaranteeing political candidates newspaper space to respond to criticism violated the First Amendment because it forced publishers to devote finite space to material they may prefer not to associate with, in effect prohibiting the publishers from printing other material in that space.

However, the government may regulate some speech, notwithstanding the First Amendment. First, the government may regulate obscenity, which is entitled to less protection than speech about ideas because of its minimal social importance. For a similar reason, libel is not protected under the First Amendment; the U.S. Supreme Court concluded that "social interest in order and morality" outweighs the "slight social value" of libel, which plays "no essential part of any exposition of ideas." Third, fighting words may be regulated. "[P]ersonal abuse is not in any proper sense communication of information or opinion," and as such, regulation of such speech "would raise no question" under the First Amendment. Commercial speech is protected speech, but still may be regulated when the government shows substantial interest. Similarly, child pornography

6. U.S. Const. amend. I.
11. Id. at 256-57.
12. Roth, 354 U.S. at 479-80, 483-84.
may be regulated due to the government’s compelling interest in the well-being of children.\textsuperscript{17} Significantly, broadcast media—more so than print media—is also subject to regulation, in part because of the recognized impact that television viewing has on children and the substantial interest that the government has in protecting children.\textsuperscript{18}

B. FIRST AMENDMENT FREEDOM OF CONDUCT

At the same time, even conduct not involving literal speech may be protected from regulation. In \textit{Spence v. State of Washington}, the Court reversed the conviction of a college student who had affixed a peace symbol to a United States flag and hung it upside down in the window of his private residence.\textsuperscript{19} During his trial for flag desecration, the student testified that he displayed the flag to publicly protest the invasion of Cambodia and the recent killings at Kent State University: “I felt there had been so much killing and that this was not what America stood for. I felt that the flag stood for America and I wanted people to know that I thought America stood for peace.”\textsuperscript{20} The Court reasoned that the display was protected speech under the First Amendment:

To be sure, appellant did not choose to articulate his views through printed or spoken words. It is therefore necessary to determine whether his activity was sufficiently imbued with elements of communication to fall within the scope of the First and Fourteenth Amendments . . . [T]he nature of appellant’s activity, combined with the factual context and environment in which it was undertaken, lead to the conclusion that he engaged in a form of protected expression.\textsuperscript{21}

In other words, conduct that is meant to communicate is protected speech for purposes of First Amendment analysis.\textsuperscript{22}

However, the Court has also rejected the idea that “an apparently limitless variety of conduct can be labeled ‘speech.’”\textsuperscript{23} In 1989, Chief Justice Rehnquist explained, “It is possible to find some kernel of expression in almost every activity a person undertakes—for example, walking down the street or meeting one’s friends at a shopping mall—but such a kernel is not sufficient to bring the activity within the protection of the First Amendment.”\textsuperscript{24} For example, teenagers and adults gathering together at a dance hall is not speech, and a regulation limiting use of a dance hall to teenagers does not violate the First Amendment’s free association or free

\begin{itemize}
\item \textsuperscript{17} New York v. Ferber, 458 U.S. 747, 747 (1982).
\item \textsuperscript{18} FCC v. Pacifica Found., Inc., 438 U.S. 726, 748–51 (1978).
\item \textsuperscript{19} 418 U.S. 405, 415 (1974).
\item \textsuperscript{20} \textit{Id.} at 408.
\item \textsuperscript{21} \textit{Id.} at 409–10.
\item \textsuperscript{23} United States v. O’Brien, 391 U.S. 367, 376 (1968).
\item \textsuperscript{24} City of Dallas v. Stanglin, 490 U.S. 19, 25 (1989).
\end{itemize}
C. BALANCING FREE SPEECH AND DIVERSITY

1. Free Speech over Diversity

The interest in protecting speech may sometimes clash with diversity goals. In such cases, the Court has indicated that the First Amendment trumps anti-discrimination law. One such conflict arose when parade organizers refused to allow the Irish-American Gay, Lesbian, and Bisexual Group of Boston (GLIB) to march in Boston’s annual St. Patrick’s Day parade. GLIB sued under a Massachusetts law that banned discrimination in public accommodations based on sexual orientation. Both the Massachusetts trial court and the Massachusetts Supreme Judicial Court found that the parade was not expressive and therefore not protected speech. The U.S. Supreme Court reversed, observing that parades consist of creative content: “Rather like a composer, the Council selects the expressive units of the parade from potential participants, and though the score may not produce a particularized message, each contingent’s expression in the Council’s eyes comports with what merits celebration on that day.” Thus, the Court concluded, “whatever the reason, it boils down to the choice of a speaker not to propound a particular point of view, and that choice is presumed to lie beyond the government’s power to control.”

2. Diversity over Free Speech

On the other hand, the Court has, at times, regulated speech in order to achieve diversity. The First Amendment, in addition to guaranteeing free speech, also enshrines the public’s right to receive information. To preserve the latter right, the government has intervened through antitrust or diversity regulations. For example, when the Associated Press challenged the application of the Sherman Antitrust Act to the press, the Court explained:

[The First Amendment] rests on the assumption that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public, that a free press is a

25. Id.
27. Id. at 561.
28. Id.
29. Id. at 563–64.
30. Id. at 574.
31. Id. at 575.
32. N.Y. Times Co. v. Sullivan, 376 U.S. 254, 269 (1954) (stating that the First Amendment “was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people”); Red Lion Broad. Co. v. FCC, 395 U.S. 367, 390 (1969) (“It is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail . . . ”).
condition of a free society. Surely a command that the government itself shall not impede the free flow of ideas does not afford non-governmental combinations a refuge if they impose restraints upon that constitutionally guaranteed freedom. Freedom to publish means freedom for all and not for some. Freedom to publish is guaranteed by the Constitution, but freedom to combine to keep others from publishing is not.\textsuperscript{34}

In other words, it is inconsistent with the First Amendment to immunize speakers from regulation when those speakers use speech, publishing, or any other means to exclude others from public discourse. On the contrary, allowing speakers to exclude others with impunity is against the First Amendment's guarantee that the public will hear all points of view and that every citizen has the freedom to speak.

In particular, broadcasts have been subject to significant regulation, including diversity regulations, based in part on the fact that the public owns the airwaves and that broadcasters operate under public permits and licenses.\textsuperscript{35} In 1967, the FCC formally codified the so-called “Fairness Doctrine,” which requires broadcasters to cover public issues and to sufficiently cover all sides of each issue.\textsuperscript{36} The Supreme Court upheld the doctrine against a First Amendment challenge, holding that the Fairness Doctrine's regulations “enhance rather than abridge the freedoms of speech and press protected by the First Amendment.”\textsuperscript{37}

That same year, in response to nationwide race riots, President Lyndon Johnson appointed the Kerner Commission to investigate the reasons for the riots.\textsuperscript{38} In part of the Commission's report, it concluded that television and print media had failed to communicate “to whites a feeling for the difficulties and frustrations of being a Negro in the United States... [and had] not shown understanding or appreciation of... culture, thought or history.”\textsuperscript{39} The report warned that stereotypes and unrest would persist unless the media improved its depiction of minorities.\textsuperscript{40} In response to these findings, the FCC promulgated regulations encouraging broadcasters to employ minorities, attempting to achieve diversity in programming through diversity amongst the programmers.\textsuperscript{41}

In 1978, the Supreme Court found that this tactic was a judicially sustainable means to promote a compelling interest.\textsuperscript{42} Noting that “there is no ‘unabridgeable First Amendment right to broadcast comparable to the right of every individual to speak, write, or publish,’”\textsuperscript{43} the Court held

\begin{itemize}
\item \textsuperscript{34} Id.
\item \textsuperscript{35} See 47 U.S.C. § 151 (2006).
\item \textsuperscript{36} 9 F.C.C.2d 921, 931–32, 941 (1967); 48 F.C.C.2d 1, 8–9 (1974).
\item \textsuperscript{37} Red Lion, 395 U.S. at 375.
\item \textsuperscript{38} Petition for Rule Making to Require Broadcast Licenses to Show Nondiscrimination in Their Employment Practices, 13 F.C.C.2d 766, 774 (1968).
\item \textsuperscript{39} Id. at 774–76.
\item \textsuperscript{40} Id.
\item \textsuperscript{41} Id.
\item \textsuperscript{42} FCC v. Nat'l Citizens Comm. for Broad., 436 U.S. 775, 779 (1978).
\item \textsuperscript{43} Id. (quoting Red Lion Broad. Co. v. FCC, 395 U.S. 367, 388 (1969)).
\end{itemize}
that the FCC acted rationally in allocating ownership amongst diverse broadcasters, even though the link between diverse ownership and diverse content was not empirically proven, and even though the regulations would prevent owners from obtaining some broadcast stations.\footnote{44} 

However, diversity initiatives faced increased skepticism and scrutiny in the subsequent decades. In 1985, FCC Chairman Mark S. Fowler released a report stating that the Fairness Doctrine “as a matter of policy, disserves the public interest.”\footnote{45} Citing growth in the number of broadcast outlets and the difficulty of evaluating program content, the report suggested that the Doctrine was outdated and possibly even unconstitutional.\footnote{46} In 1987, relying on the findings within the 1985 report, the Commission revoked the Fairness Doctrine.\footnote{47} The FCC found that “the fairness doctrine chills speech and is not narrowly tailored to achieve a substantial government interest. . . . [T]he fairness doctrine contravenes the First Amendment.”\footnote{48} A federal appeals court affirmed the revocation.\footnote{49} Members of Congress attempted to preempt the FCC by codifying the Fairness Doctrine, but then-President Ronald Reagan vetoed the legislation.\footnote{50} Again in 1991, legislators sought to revive the doctrine, but then-President George H.W. Bush threatened veto.\footnote{51}

At the same time that old diversity doctrines are being retired, increased scrutiny standards make new diversity initiatives unlikely. In \textit{Adarand Constructors, Inc. v. Pena}, the Court replaced the intermediate scrutiny standard with a strict scrutiny standard for any program that uses race as a foundation, even if the program is designed to benefit groups that have suffered discrimination in the past.\footnote{52} The dispute involved a federal program designed to provide highway contracts to disadvantaged business enterprises.\footnote{53} Disadvantaged groups included “Black Americans, Hispanic Americans, Native Americans, Asian Pacific Americans, and other minorities, or any other individual found to be disadvantaged.”\footnote{54} When a non-disadvantaged business lost a subcontracting award despite submitting the lowest bid, the business claimed violation of Equal Protection.\footnote{55} Writing for the majority, Justice O’Connor stated that “a free people whose institutions are founded upon the doctrine of equality’ should tolerate no retreat from the principle that government may treat

\begin{footnotesize}
\begin{itemize}
\item\footnote{44}{Id.}
\item\footnote{45}{102 F.C.C.2d 142, 148.}
\item\footnote{46}{Id. at 148–49.}
\item\footnote{47}{2 F.C.C.R. 5043, 5057 (1987).}
\item\footnote{48}{Id.}
\item\footnote{49}{Syracuse Peace Council v. FCC, 867 F.2d 654, 656 (1989).}
\item\footnote{50}{Steve Randall, \textit{The Fairness Doctrine: How We Lost It, and Why We Need It Back}, \textit{FAIR: FAIRNESS & ACCURACY IN REPORTING} (Jan. 1, 2005), http://fair.org/extra-online-articles/the-fairness-doctrine.}
\item\footnote{51}{Id.}
\item\footnote{52}{515 U.S. 200, 201 (1995) (overruling \textit{Metro Broad., Inc. v. FCC}, 497 U.S. 547 (1990)).}
\item\footnote{53}{Id. at 205.}
\item\footnote{54}{Id.}
\item\footnote{55}{Id. at 210.}
\end{itemize}
\end{footnotesize}
people differently because of their race only for the most compelling reasons.”

Dissenting, Justice Stevens lamented that the new standards would “equate remedial preferences with invidious discrimination,” ignore the difference between “an engine of oppression” and an effort “to foster equality in society,” and equate “a ‘No Trespassing’ sign and a welcome mat.” The Court responded that a strict scrutiny standard would be able to differentiate well-intentioned programs from programs designed to maintain white dominance. It is true, O'Connor explained, that “whenever the government treats any person unequally because of his or her race, that person has suffered an injury that falls squarely within the language and spirit of the Constitution’s guarantee of equal protection,” even if the person claiming the injury is a member of a privileged group. However, if a “compelling governmental interest justifies the infliction of that injury,” the unequal treatment is constitutionally valid. This two-step process, O'Connor wrote, would guarantee consistency and ensure that important welcome mats were protected, while the “No Trespassing” signs were not.

Thus, any diversity initiative must further a compelling governmental interest to survive constitutional scrutiny. Skeptics of the new standards worried that the court would never find diversity to be a compelling interest, thus killing all diversity initiatives. Indeed, only once since Adarand has the Court found that diversity is a compelling state interest. In Grutter v. Bolinger, the Court upheld “holistic” college admissions criteria that considered race as part of the total admissions evaluation. In some respects, Grutter closes more doors than it opens. Although Grutter held that diversity was a compelling interest in the educational context, Justice O'Connor explicitly noted that this finding was confined to education. This raises doubts that diversity will ever be found a compelling interest in any other context, such as broadcasting or media. In addition, Grutter's emphasis on a “holistic” review precludes quota-based regulations, which had been promulgated before. The trend away from diversity regulations seems to be continuing. In Fisher v. University of Texas, a white

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56. Id. at 227 (quoting Hirabayashi v. United States, 320 U.S. 81, 100 (1943)).
58. Id. at 243.
59. Id. at 245 (Stevens, J., dissenting).
60. Id. at 201.
61. Id. at 229–30.
62. Id. at 230.
63. Id.
66. Id. at 334–37.
67. Id. at 329.
68. See Morant, supra note 64 at 974.
University of Texas applicant's lawsuit alleging racial discrimination reached the Supreme Court, even though the university had carefully followed *Grutter* in making its admissions decisions. The Supreme Court did not overrule *Grutter*, but it did remand the case to the Fifth Circuit, instructing stricter scrutiny and less deference to the university. This decision has the potential to erode *Grutter* and endanger holistic affirmative action programs at schools. Broadcast and media diversity regulations would then be even less likely to resurface.

D. OTHER DISCRIMINATION SAFEGUARDS

1. Title VII

Besides the few affirmative regulations that are designed to foster diversity, it is important to note laws that forbid discrimination. Two of these are Title VII and section 1981 of the United States Code.

As part of the Civil Rights Act of 1964, Congress passed Title VII to eliminate employment discrimination based on race, color, or national origin. In *Griggs v. Duke Power Co.*, the Supreme Court clarified that Title VII was not designed to guarantee employment for minorities; rather, the goal of Title VII is to remove "artificial, arbitrary, and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of racial or other impermissible classification." The text of Title VII states:

> It shall be an unlawful employment practice for an employer (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin.

The common law *McDonnell Douglas* formula provides the elements of a prima facie Title VII case. First, the plaintiff must belong to a racial minority. Second, the plaintiff must have applied for, and be qualified for, the position for which the employer was seeking applicants. Third, the plaintiff must have been rejected, despite being qualified. Fourth, the employer must have continued to seek applicants after the plaintiff's rejection.

After a plaintiff establishes a prima facie case, the burden shifts to the employer to give a non-discriminatory reason for rejecting the plaintiff's
application.\textsuperscript{80} Then, the burden shifts back to the plaintiff, who must prove by preponderance of the evidence that the employer did in fact reject the applicant with discriminatory intent.\textsuperscript{81} Alternatively, the plaintiff may claim disparate impact, showing that a facially neutral employment practice affects a minority group more harshly than others.\textsuperscript{82} The employer may then assert one of two narrow defenses. The business necessity defense applies when an employment practice with disparate impact is related to job performance.\textsuperscript{83} The Bona Fide Occupational Qualification (BFOQ) exception is found within Title VII and states that:

It shall not be an unlawful employment practice for an employer to hire and employ employees . . . on the basis of his religion, sex, or national origin in those certain instances where religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise.\textsuperscript{84}

The BFOQ exception is narrow and only applies when the "essence of the business operation would be undermined" by non-discrimination.\textsuperscript{85}

2. \textit{Section 1981}

Minority groups may also claim the protection of 42 U.S.C. § 1981, which prohibits both public and private actors from discriminating based on race. In particular, Section 1981(a) guarantees that:

All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.\textsuperscript{86}

Section 1981 prohibits racial discrimination in forming contracts, including employment contracts.\textsuperscript{87} Thus, though distinct from one another, Title VII and section 1981 could both apply to a discrimination case involving the formation of an employment contract.

\textbf{III. CURRENT LAW: THE BACHELOR CONTROVERSY}

Ultimately, it was a reality dating show that brought together the issues of casting, the First Amendment, discrimination, and the value of diver-

\begin{footnotesize}
\begin{enumerate}
\item \textit{Id.}
\item \textit{Id.} at 253–54, 260 nn.5–6.
\end{enumerate}
\end{footnotesize}
sity. Reality television presents various novel legal issues. For example, in 2002, Castaway cast member Ron Copsey sued the BBC for libel, alleging that "the broadcasting corporation . . . libeled him by editing scenes in the shows so that he would appear to be ‘aggressive and temperamental,’" characterizing him "as a villain to boost ratings." Shows such as "Fear Factor" raise the issue of strict liability for abnormally dangerous activities. Other shows may raise privacy issues. For example, in Shulman v. Group W Productions, Inc., a mother and son sued "On Scene: Emergency Response" for filming and broadcasting their rescue from a severe car accident. The latest of these reality television suits arose in 2012 when two African-American plaintiffs challenged casting in ABC's "The Bachelor."

A. What is "The Bachelor"?

ABC's "The Bachelor" premiered in 2002 and is executively produced by Mike Fleiss. Producers select one bachelor and twenty-five bachelorettes as cast members, who will reside in "Villa De La Vina," an 8,000 square foot mansion in California during filming. Each episode features dates between the bachelor and a group of bachelorettes, or between the bachelor and one bachelorette. The episode then culminates in an elimination ceremony called a "rose ceremony," in which a limited number of bachelorettes are offered a rose by the bachelor. Bachelorettes who are not offered a rose leave the mansion and no longer appear on the show. At the end of each season, the bachelor may propose marriage to the one remaining bachelorette. "The Bachelor" is currently in its seventeenth season. A spin-off called "The Bachelorette" features the same structure, but gender-reversed, and another spin-off called "The Bachelor Pad" features former contestants who live together and

90. Ugolini, supra note 88, at 76-77.
91. 955 P.2d 469, 475 (Cal. 1998).
96. id.
97. id.
98. id.
compete for a final cash prize.101

B. WHO ARE NATHANIEL CLAYBROOKS AND CHRISTOPHER JOHNSON?

ABC holds nationwide searches for new cast members by means of mail-in applications and casting calls.102 In 2011, Christopher Johnson, an African American, attended a Nashville casting call for that season’s bachelor.103 Johnson claims that he was singled out and stopped by a white employee of ABC who took Johnson’s application materials and “promised to ‘pass them on’” to casting directors, while other white applicants continued into the hotel.104 The same year, Nathaniel Claybrooks, also an African American, attended a casting call at a different hotel.105 Claybrooks was interviewed, but his interview lasted only twenty minutes, while the interviews of the white candidates lasted forty-five minutes.106 Neither Claybrooks nor Johnson was selected as that season’s Bachelor.107 Instead, as in all twenty-three previous seasons of “The Bachelor” and “The Bachelorette,” ABC selected a white lead.108 Minorities have fared a little better when auditioning to be one of the twenty-five competitors. A few non-white contestants have been chosen, but all were eliminated early in the season and enjoyed little screen time.109

C. THE LAWSUIT

On behalf of all similarly situated applicants, Johnson and Claybrooks filed suit under section 1981, alleging that they were denied the equal opportunity to contract.110 As support, Claybrooks and Johnson cited a Los Angeles Times article that reported, “ABC executives maintained two years ago that the show was ‘exploring’ the possibilities of casting a person of color in the pivotal role, [but] insiders said producers had little interest in pursuing a more diverse cast, and were unwilling to vary the chemistry of a hugely popular series and wary of a potential controversy stemming from an interracial romance.”111 This report, the plaintiffs argued, was evidence that ABC intentionally denied minorities an opportunity to be part of the show, an opportunity that came with benefits such as a stipend, housing, food, travel expenses, and fame.112 The plaintiffs

103. Id.
104. Id.
105. Id. at 991.
106. Id.
107. Id.
108. Id. at 989.
109. Id.
110. Id. at 990.
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further alleged that producer Mike Fleiss had fabricated a pretext for the discrimination.\(^{113}\) As support, they cited an *Entertainment Weekly* article in which Fleiss stated, “We always want to cast for ethnic diversity. It’s just that for whatever reason, they don’t come forward. I wish they would.”\(^{114}\)

Certainly, the lack of diversity in “The Bachelor” had garnered media attention. News outlets such as *The Los Angeles Times*,\(^{115}\) *The Daily Beast*,\(^{116}\) and *The Grio*\(^{117}\) have had sharp words for the show’s lack of diversity. For instance, *The Grio* writer Zerlina Maxwell observed, America is a melting pot of different cultures and nationalities. The country’s demographics are constantly changing and popular culture slowly but surely evolves to keep pace with the real world. That is unless you are a hit reality series on ABC where 25 women and men compete for the affections of a *Bachelor* or *Bachelorette* . . . Minority contestants are fine for dancing, singing, and racing around the globe but when it comes to matters of the heart only white is right.\(^{118}\)

Blogger Joshua Alston mused, “Is it ridiculous that there’s a black president before a black Bachelor? Sure, but I wanted the former a lot more anyway.”\(^{119}\) In addition, one individual, Lamar Hurd, launched a public campaign to become “the first Black Bachelor” in March of 2012.\(^{120}\) Hurd is a twenty-eight year old Portland sportscaster who also volunteers as a youth basketball coach.\(^{121}\) In his audition video, which has been viewed over 37,000 times on YouTube, Hurd described his ideal date as a romantic day in Paris visiting castles, touring museums, and sampling restaurants.\(^{122}\) His efforts have been featured in *The Huffington Post*,\(^{123}\) *Entertainment Weekly*,\(^{116}\) *The Daily Beast*,\(^{116}\) and *The Grio*.\(^{117}\)  

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118. Id.
ertainment Weekly, BET.com, and Essence.com, as well as on television. Hurd got as far as meeting with ABC casting directors, but ultimately did not appear on the show. Finally, creator Michael Fleiss has publicly responded to the diversity controversy in a way that some might characterize as callous: "I think Ashley [a Bachelorette] is 1/16th Cherokee Indian, but I cannot confirm. But that is my suspicion! We really tried, but sometimes we feel guilty of tokenism. Oh, we have to wedge African-American chicks in there!" Armed with this evidence, the plaintiffs charged that they had been denied an equal opportunity to contract.

In its Motion to Dismiss, ABC denied the charge of intentional discrimination and insisted that it "share[d] Plaintiffs' goals of reducing racial bias and prejudice and fostering diversity, tolerance and inclusion." Its basis for arguing for dismissal, however, was the First Amendment. Casting decisions, the network argued, shape the content of television programs and are thus insulated from anti-discrimination laws. The network speculated that a ruling for the plaintiffs would "call into question the legality of a host of networks targeting a specific demographic or audience" and prohibit those network's freedom of speech.

For example, ABC argued, Lifetime, a network geared towards a female audience, could be sued for not airing male-themed programs. BET, Telemundo, The Jewish Channel, and LOGO (geared toward a gay and lesbian audience) would also face challenges to their lineup.

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132. Defendants’ Memorandum of Law in Support of Motion to Dismiss at 1, Claybrooks, 898 F. Supp. 2d 986 (M.D. Tenn. 2012).
133. Id. at 5.
134. Id. at 6.
135. Id. at 11.
136. Id.
137. Id.
shows would additionally be at risk. ABC asked, “Would MTV have to cast African Americans or Latinos on The Jersey Shore, its show about Italian-Americans living in New Jersey? Would the producers of The Shahs of Beverly Hills have to cast African Americans, Latinos, or Caucasians on its show about Persian Americans living in Los Angeles?”

In response, the plaintiffs proposed a distinction between “identity-themed” and “non-identity themed” programming. Under this scheme, programs like “The Shahs of Sunset” would be classified as “identity themed” since the concept of the show is to portray life as a person with Persian identity. However, a show like “The Bachelor” is different; its content is purportedly not about, or geared towards, a specific racial demographic. Identity-themed programs, the plaintiffs proposed, would be safe from anti-discrimination laws, while other programs would be subject to anti-discrimination laws.

Though characterizing the plaintiffs’ goals as “laudable,” the court ruled for ABC. All casting, the court reasoned, was part of a network’s creative process because the cast, especially in a reality television show, affects the content of the end product. There is no “wedge” between casting and the end product; if the end product is protected by the First Amendment, as it unquestionably is, so too must be the casting. Casting may be a form of “conduct,” but as conduct that leads so directly to an expressive end, it is conduct that is sufficiently imbued with communication to be protected. Citing Hurley, the court concluded that, even assuming ABC did act discriminatorily, “the First Amendment can trump the application of anti-discrimination laws to protected speech.” The proposed exception for “identity-themed” programs was supported by “no legal authority,” noted the court. More importantly,

The plaintiffs’ proposed test is inherently unwieldy, threatens to chill otherwise protected speech, and, if implemented, would embroil courts in questioning the creative process behind any television program or other dramatic work. How would a court determine the point at which a television program, movie, or play is sufficiently “identity-themed,” “specifically geared” to, or “about” a particular racial, religious, or gender group to construe the demographics of its

138. Id. at 12.
139. Plaintiffs’ Memorandum of Law in Opposition to Defendants’ Motion to Dismiss and Alternative Motion to Strike at 11 n.1, Claybrooks, 898 F. Supp. 2d 986 (M.D. Tenn. 2012).
140. Id.
141. Id. at 11.
142. Id. at 11–12.
143. Claybrooks, 898 F. Supp. 2d at 1000.
144. Id. at 993.
145. Id. at 999.
146. Id. at 997.
148. Claybrooks, 898 F. supp. 2d at 993.
149. Id. at 998.
cast as to constitute the show’s “content”?  

Warner Horizon, one of the defendants that had been joined by ABC, told the Los Angeles Times that it was “pleased the Court found in our favor.” 151 Meanwhile, the plaintiffs’ lawyer, Cyrus Mehri, said he was “disappointed,” but “hopeful that there will ultimately be a positive outcome.” 152 Tahajah Samuels, a blogger at Everything Girls Love, argued that diversity “still is” an “important issue to tackle,” even though the case was dismissed. 153 She wrote that the case opened up a needed discussion about diversity in media and invited readers to “sound off” in online comments with their reactions and ideas. 154

IV. WHERE DO WE GO FROM HERE?

In light of this verdict, how can activists who care about discrimination and fair representation in entertainment proceed? First, there ought to be more challenges in different districts in order to get a full and fair hearing in court, more publicity, and perhaps even a favorable verdict. Second, plaintiffs should argue that casting is a branch of employment and hiring, falling under applicable law, rather than a pure expression of creative control, especially in a content-neutral setting such as “The Bachelor.” Third, diversity activists can use research to lay the groundwork for diversity in television to be considered a compelling state interest, so that any eventual diversity programs are upheld under strict scrutiny. Finally, outside of the courts, networks like ABC should be held accountable to their ostensible support for racial equality. Networks and related entertainment industries should take their cue from the world of professional sports, which, while far from perfectly integrated, has seen efforts to break up “old boy networks” through voluntary mechanisms like the NFL’s “Rooney Rule” that requires job searches for coaches to interview at least one minority candidate per position. 155

150. Id.


154. Id.

A. More Lawsuits: Challenging the Claybrooks Court's Application of Hurley and Gaining Publicity

Activists should continue to challenge ABC's casting in the courts and in public for two reasons. First, the legal issue is a new and unsettled one, and a suit in a different district may very well end differently. Second, even when the plaintiffs lose these suits, the cause still gets publicity, and this publicity exerts pressure on the network to correct the issue on its own.

The ruling in Claybrooks\textsuperscript{156} should not be seen as the final word on this issue. In the dismissal opinion, Judge Aleta Trauger headed an entire section "Absence of Precedent Applying First Amendment to Casting Decisions."\textsuperscript{157} Judge Trauger noted that the parties "vigorously disagree as to whether the First Amendment protects the casting decisions for programs. With respect to casting decisions for an entertainment program of any kind, it appears that no federal court has addressed the relationship between anti-discrimination laws and the First Amendment."\textsuperscript{158} This "absence of precedent" meant that Judge Trauger must analyze the issue as a matter of "first impression in light of relevant First Amendment principles."\textsuperscript{159} Without clear, binding precedent, judges are free to apply their discretion and reasoning in different ways.

While Judge Trauger analogized Claybrooks to Hurley,\textsuperscript{160} other courts may choose to distinguish the two cases rather than compare them. Hurley involved plaintiffs who were all from an activist group, the Irish-American Gay, Lesbian, and Bisexual Group of Boston.\textsuperscript{161} The group members "joined together" for a specific purpose: "to march in the parade as a way to express pride in their Irish heritage as openly gay, lesbian, and bisexual individuals, to demonstrate that there are such men and women among those so descended, and to express their solidarity with like individuals."\textsuperscript{162} In other words, each member of the group is a representative of an ideology, and each member's presence is calculated to express and to demonstrate this ideology. For that reason, the Hurley court concluded that forcing the group's presence in a St. Patrick's Day parade would impermissibly control the expressive content of the parade.\textsuperscript{163} In contrast, the Claybrooks plaintiffs are not activists with a specific, unified message to promote. Being African-American is not an ideology; one's race is not a club that one joins to advocate for a political message. The plaintiffs in Hurley formed an association based in part on ethnic and sexual identity; the operative term is "form an association." It

\begin{itemize}
  \item \textsuperscript{156} Claybrooks v. ABC, Inc., 898 F. Supp. 2d 986, 1000 (M.D. Tenn. 2012).
  \item \textsuperscript{157} Id. at 996.
  \item \textsuperscript{158} Id.
  \item \textsuperscript{159} Id.
  \item \textsuperscript{160} Id. at 993–96.
  \item \textsuperscript{162} Id.
  \item \textsuperscript{163} Id. at 574.
\end{itemize}
is unlikely, perhaps even inconceivable, that the court would have ruled that the *Hurley* plaintiffs could be excluded simply for sharing an Irish-American heritage. Rather, it is their association's political goals and activities that bestowed upon it an expressive content, and it is this content that conflicted with the First Amendment rights of the parade organizers.

In *Claybrooks*, there is manifestly no such association or political content. The plaintiffs are unified by no expressive agenda at all, but solely by the color of their skin. In light of this distinction between *Hurley* and *Claybrooks*, it becomes clear that the expressive content of "The Bachelor" is not at risk in the same way as that of the St. Patrick's Day parade in *Hurley*. What is at issue in *Claybrooks* is who can participate, not what messages can participate. Thus, some courts may not agree with Judge Trauger that excluding minorities from casting implicates the First Amendment the same way that excluding a pro-LGBT message from a parade does. With a broad reading of section 1981 and a narrow view of the First Amendment interests of ABC, a court could easily reach a decision in favor of a minority plaintiff.

Indeed, though no other courts have yet addressed this issue, there are indications that other circuits may read section 1981 in this manner. For example, in *Ferril v. Parker Group, Inc.*, an Alabama District Court held that section 1981 "broadly prohibits intentional discriminatory conduct which interferes with the terms and conditions of an employment, or other, contract." The case challenged an election firm's race-matched system for "get out the vote" calls, in which black workers phoned black voters and white workers phoned white voters. The court held that the system was impermissible under section 1981. In dicta, the court further stated that section 1981 would bar employers from casting actors based on race: "[Section 1981] might even go so far as preventing the exclusive hiring of black actors to play such roles as Othello. Nevertheless, this is the state of the law and this court has found no authority to the contrary." This dictum suggests that other courts may read section 1981 more broadly than Judge Trauger, and these courts may include casting contracts within section 1981. The holding in *Claybrooks* was far from a foregone conclusion, and future lawsuits should challenge its analysis.

In addition, because of the popularity of "The Bachelor," these cases garner significant media attention, and this attention itself can act as a catalyst for change, regardless of the outcome of the case. Several media

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165. Id. at 473.
166. Id. at 475.
167. Id.
outlets, including *Entertainment Weekly*, *The Grio*, *BET.com*, and *The Hollywood Reporter*, reported on the Claybrooks suit. This is significant because, as scholars have noted, sometimes the best check on the media is the media itself. The coverage seems to have had some impact. The 2013 season, which premiered just a few months after ABC prevailed in *Claybrooks*, features more minority contestants than ever before. Though bachelor Sean Lowe is blonde-haired and blue-eyed, four of the twenty-six bachelorettes are African-American. In addition, one bachelorette, Selma, is Persian, and another, Catherine, is half-Filipino. Another, Sarah, has amniotic band syndrome and is the first disabled cast member ever to appear on the show. Catherine ultimately wins the season, becoming the first non-white bachelorette to do so.

In addition to casting more diversely, ABC also used the season to address the diversity issue directly. In episode two, African-American competitor Robyn pulled bachelor Sean aside during the traditional pre-rose ceremony cocktail party. Robyn warned Sean that she was about to pose an “uncomfortable” question. She proceeded to tell him that she had noticed the increased diversity in the show and then asked him how he felt about dating diverse women. Sean told Robyn that when “The Bachelor” producers asked him what he was looking for in a mate, he had responded that he wants a “sweet, intelligent, and funny woman.” As for physical characteristics, Sean insisted that “it didn’t matter,” that he

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172. Morant, * supra* note 64, at 954.


178. Id.

179. Id.

180. Id.
had dated Persian, Hispanic, and African-American women, and that in fact, his last girlfriend was African-American.\textsuperscript{181} After the episode’s rose ceremony, two African-American candidates, Robyn and Leslie, remained on the show.\textsuperscript{182} Selma, Catherine, and Sarah also remained.\textsuperscript{183} For the first time, diversity was directly discussed on the show. In addition, more diverse competitors were cast this season than ever before. Several media outlets reported this development.\textsuperscript{184} Though Claybrooks and Johnson did not prevail in court, diversity activists clearly shaped the 2013 season.

**B. Title VII: A Problematic Tool**

*Claybrooks* focused on the freedom to contract under section 1981, but diverse plaintiffs have another tool: Title VII of the Civil Rights Act.\textsuperscript{185} One option for the future is to place reality television cast members under the protection of Title VII. This may be possible given the broad definition of “employee” under the Act.\textsuperscript{186} However, even if plaintiffs pass the initial hurdle of being considered “employees,” they still face the network’s defenses such as the First Amendment privilege that doomed the *Claybrooks* suit.

1. *Are Reality Television Cast Members “Employees”?*

To be covered by Title VII, any prospective reality television plaintiffs must show that they are “employees” of the network they are suing.\textsuperscript{187} Title VII provides a notoriously unhelpful definition: “The term ‘employee’ means an individual employed by an employer.”\textsuperscript{188} To determine whether a complainant is an employee, courts have applied the common law “economic realities/common control” test.\textsuperscript{189} Under this test, courts consider both the economic realities of the work relationship and the extent to which the alleged employer has the right to control the work of the alleged employee.\textsuperscript{190} Different circuits consider different sets of factors to make these determinations. For example, the Fifth Circuit examines eleven factors:

(1) the kind of occupation, with reference to whether the work usually is done under the direction of a supervisor or is done by a specialist without supervision; (2) the skill required in the particular occupation; (3) whether the “employer” or the individual in question furnishes the equip-

\begin{itemize}
  \item\textsuperscript{181} Id.
  \item\textsuperscript{182} Id.
  \item\textsuperscript{183} Id.
  \item\textsuperscript{186} See id. § 2000e(f).
  \item\textsuperscript{187} Broussard v. L.H. Bossier, Inc., 789 F.2d 1158, 1159-60 (5th Cir. 1986).
  \item\textsuperscript{188} 42 U.S.C. § 2000e(f).
  \item\textsuperscript{189} Diggs v. Harris Hosp.-Methodist, Inc., 847 F.2d 270, 272 (5th Cir. 1988).
  \item\textsuperscript{190} Id.
ment used and the place of work; (4) the length of time during which the work relationship is terminated; i.e., by one or both parties, with or without notice and explanation; (7) whether annual leave is afforded; (8) whether the work is an integral part of the business of the "employer"; (9) whether the worker accumulates retirement benefits; (10) whether the "employer" pays social security taxes; and (11) the intention of the parties.191

A reality television show plaintiff would never be able to satisfy all eleven factors. For example, networks do not pay social security taxes, retirement benefits, or grant annual leave. However, reality television show plaintiffs may be able to make a compelling showing for the other factors. For example, the level of control that producers have over the plot and participants of so-called "reality" shows is significant.192 In "The Bachelor," the housing, dates, meals, travel, and daily schedule of the cast members are controlled by ABC producers.193 Cast members may also be able to prove the second factor, as they arguably possess important skills such as affability, physical attractiveness, communication skills, and interesting life experiences, which are specifically sought by the casting network.194 In addition, although cast members are not paid with traditional paychecks, they receive stipends, travel opportunities, publicity, and fame.195 Furthermore, a cast member's length of time on the show may be determined by producers, and even after leaving the show, cast members are bound by contracts which they cannot terminate.196 Cast members also agree to grant the producers complete editing authority so that their very personalities are controlled and shaped by the network.197 Thus, it is conceivable that reality show cast members could convince a court that they are employees of the network.

Networks have already fought against such characterizations. Reality television cast members are not represented by either of the two Hollywood performers' unions, the Screen Actors Guild or the American Federation of Television and Radio Artists, and they are prevented from

191. Id. at 272–73 (internal citations omitted).
192. William Booth, Reality Is Only an Illusion, Writers Say, WASH. POST, Aug. 10, 2004, at C1 (quoting a reality television show writer as saying, "[S]ometimes we just tell the contestant you're mad, you're happy, whatever. Act that way. And if they're not getting it, we feed them a line.").
194. See id.
joining these unions by clauses in their participation contracts.\textsuperscript{198} In addition, contracts to participate in the shows often contain clauses denying the participants' employee status.\textsuperscript{199} Contracts may also threaten liquidated damages if participants reveal any information about their experience on the show.\textsuperscript{200} Due to these clauses, most participants are afraid of suing in the first place.\textsuperscript{201} If any participant does sue, a network would have high incentive to settle rather than risk a court ruling that reality show participants are employees.\textsuperscript{202} Thus, even establishing coverage under Title VII will be a difficult and uncertain road.

2. \textit{Title VII: Claims and Defenses}

Assuming reality television cast members or potential cast members persuaded a court that they were covered under Title VII as employees," they would still have to establish their prima facie case and rebut any defenses offered by the network. While the prima facie case is easily established, networks will likely be able to defend against any claims by asserting that "appearance," not race, is the reason behind casting decisions.

A prima facie case is established in four steps. First, the plaintiff must belong to a racial minority.\textsuperscript{203} Second, the plaintiff must have applied for and be qualified for the position for which the employer was seeking applicants.\textsuperscript{204} Third, the plaintiff must have been rejected, despite being qualified.\textsuperscript{205} Fourth, the employer must have continued to seek applicants after the plaintiff's rejection.\textsuperscript{206} Claybrooks and Johnson could have easily shown these four elements.\textsuperscript{207} They are African-Americans, a racial minority.\textsuperscript{208} Both applied to be cast members.\textsuperscript{209} Both were not selected.\textsuperscript{210} Finally, ABC continued interviews and casting calls after meeting Claybrooks and Johnson.\textsuperscript{211}

The burden would then shift to ABC to offer non-discriminatory motives and defenses.\textsuperscript{212} ABC may first claim that it rejected Claybrooks and Johnson not because of their race, but because of their appearance. The court would likely accept this as a legal reason for rejecting the appli-

\begin{itemize}
  \item \textsuperscript{199} \textit{Id.} at 624.
  \item \textsuperscript{200} \textit{Id.}
  \item \textsuperscript{201} \textit{Id.}
  \item \textsuperscript{202} \textit{Id.}
  \item \textsuperscript{204} \textit{Id.}
  \item \textsuperscript{205} \textit{Id.}
  \item \textsuperscript{206} \textit{Id.}
  \item \textsuperscript{207} See Claybrooks v. ABC, 898 F. Supp. 2d 986, 989–91 (M.D. Tenn. 2012).
  \item \textsuperscript{208} \textit{Id.} at 989.
  \item \textsuperscript{209} \textit{Id.}
  \item \textsuperscript{210} \textit{Id.}
  \item \textsuperscript{211} \textit{Id.}
  \item \textsuperscript{212} Chen, supra note 203, at 531.
\end{itemize}
ants, in light of the show’s emphasis on physique and sex appeal.\textsuperscript{213} Alternatively, ABC might assert the business necessity defense and claim that Claybrooks’s and Johnson’s race would affect their performance on the show’s dates, outings, and interactions with other cast members. Although no court has applied Title VII to casting, the Fifth Circuit has speculated in dicta that the business necessity defense may be available to a director engaging in race-specific casting: “For example, it is likely that a black actor could not appropriately portray George Wallace, and a white actor could not appropriately portray Martin Luther King, Jr.”\textsuperscript{214} Thus, even if a plaintiff could establish coverage as an employee and a prima facie case, the case would be vulnerable to defenses.

3. \textit{The First Amendment Issue Remains}

A final hurdle for any Title VII plaintiff lucky enough to prevail on the coverage issue and against the network’s defenses is the same First Amendment issue that Claybrooks and Johnson faced. A Title VII plaintiff would have to argue that casting was not speech, just as Claybrooks and Johnson unsuccessfully asserted.

C. \textbf{Diversity in Television as a Compelling State Interest}

In addition to filing suit before all available courts, diversity activists should continue to lobby for legislation and regulation that promotes diversity. One way to address the First Amendment issue, especially in the event that a government body eventually passes a diversity regulation, is to invoke \textit{Adarand}\textsuperscript{215} and argue that diversity in casting is a compelling state interest and that slight infringement of the network’s creativity is justified to address that compelling interest.\textsuperscript{216} Future diversity legislation or regulation could pass the strict scrutiny mandated by \textit{Adarand}, despite courts’ reluctance to hold that diversity is a compelling interest outside of education. One might easily question why integration of reality television matters so much to anyone other than the very small pool of cast members and devotees. However, the facts attest otherwise: television actually does exert a strong influence upon cultural norms, especially among children, and experts suspect it can control stereotypes about people groups in insidious and powerful ways that should cause all networks to reevaluate their policies about the justice and optics of race in casting and decision-making.\textsuperscript{217}

For example, studies have shown that black children watch nearly twice as much television as white children, which means that “television . . . has been identified as an important factor in the socialization of minority chil-

\begin{enumerate}
  \item See \textit{id}.
  \item Miller v. Tex. State Bd. of Barber Exam’rs, 615 F.2d 650, 654 (1980).
  \item See \textit{Worthy, supra} note 9, at 557–60.
  \item See \textit{id} at 535.
\end{enumerate}
Black children use television to acquire values, beliefs, concepts, attitudes, and basic socialization patterns,” which means that negative stereotypes about racial minorities or the simple exclusion of said minorities from depictions of “normal” life on television can harm “minorities’ self-concept.” The situation is so bad across most televised media that an Advisory Report to the U.S. Commission on Civil Rights recently warned that “continuous biased presentations foment unrest and contribute to racial polarization.” Similarly, “prime time television remains overwhelmingly [w]hite,” and even when underrepresented minorities appear on television, “they are often in minor roles” and are “more likely to hold low-status jobs, be aggressive, or engage in criminal activity.” This can leave frequent television watchers with the impression that “racial groups are meant to be segregated” and ensure that they do not have “appropriate role models for interracial interactions.”

At the same time, the research is just as clear that integrated television programming can have a positive influence on real-world race relations, especially when “these examples are portrayed as normative.” While ABC’s “The Bachelor” is not targeted at children in the manner of more heavily-studied shows like “Sesame Street,” there is no question that children will be exposed to it and other reality TV, particularly in less-monitored household or daycare environments. Therefore, it is impossible to discount the fact that “The Bachelor” and other dating-based reality shows, through their “unbearable whiteness,” could introduce as normative the idea that dating, love, and marriage are properly monoracial or that “desirable” bachelors and bachelorettes are always Caucasian. The tendency for racial minority characters to disappear from contestant pools early on reinforces the idea that dating should be segregated and that underrepresented minorities should not even attempt to socialize or pursue romance with “normal” Euro-American individuals.

Thus, although most FCC diversity regulations are relics of the past, discrimination plaintiffs can arm themselves now with research demonstrating the ever-increasing role television plays in shaping future generations’ conceptions of race, and then deploy this research to defend any future diversity regulations as necessary to achieve a compelling state interest. In light of Grutter, there is hope for success. Like the educational setting in Grutter, television influences the young and transmits ideas. If the Grutter court was willing to find diversity in education a compelling interest, it may very well find diversity in television to be a compelling interest as well.

218. Id. at 533.
219. Id. at 534.
220. Id. at 537 (internal citations omitted).
222. Id.
223. Id. at 85–86.
D. Voluntary Initiatives: From the Rooney Rule to the “Claybrooks Rule”

Activists should continue to sue networks, as well as offer new legal theories based on Title VII and Adarand. However, even continuous legal action is a slow and uncertain process, and there are options that could help solve the underrepresentation problem and all of its appurtenant negative social impact without necessarily waiting on the courts. A particularly successful example can be found in NFL’s “Rooney Rule,” enacted in 2002 to combat the underrepresentation of African Americans and other minorities in NFL leadership positions.224 Not only has this rule achieved real-world success, but it has also inspired discussion in other fields plagued by racial disparity, calling for imitation of the rule across society as a whole. A “Claybrooks Rule,” modeled after the Rooney Rule, could work in harmony with the legal system to desegregate reality television before the courts catch up or finish settling the question on a purely judicial basis.

The Rooney Rule was implemented by the NFL in response to the increasingly obvious racial inequality in hiring—even though 65% of the league’s players were African-American, “they made up only 6% of the league’s head coaches.”225 This disparity—which can be analogized to the way in which ABC diversifies the ethnic and racial makeup of “Bachelor” competitors without ever modifying the makeup of the lead cast—came under fire from the general public and from lawyers affiliated with the NAACP, Johnnie Cochran and Cyrus Mehri,226 who published a report on the situation and threatened to sue.227 In a move calculated to improve diversity privately, before the league was forced by external pressure or a court ruling to integrate, Dan Rooney, majority owner of the Pittsburgh Steelers and chair of the NFL’s diversity committee, proposed a rule stipulating that at least one under-represented minority candidate be considered for every vacancy in a NFL head coaching position.228 The rule was endorsed by more than a two-thirds majority of the NFL’s governing structure and went into effect in 2002.229

The advantages of a diversity rubric like the Rooney Rule are significant and obvious. Since the rule was voluntary, it reduced the chances for acrimony that would undoubtedly arise in the case of compelled legal integration. It also guaranteed that the NFL would save face and even

225. Id.
226. Interestingly, Cyrus Mehri is also the lawyer for Nathaniel Claybrooks and Christopher Johnson.
228. Butler et al., supra note 224, at 257; Fennell & Miller, supra note 226, at 80.
229. Butler et al., supra note 224, at 257.
appear relatively progressive as public opinion shifted increasingly away from de facto discrimination. Best of all, it saved the league from the embarrassment of a de jure forced integration, which could have done irreparable damage to the league's reputation. Overall, the Rule de-politicized the issue to perhaps the greatest extent that was possible. Clifton Brown wrote in 2008, only six years after the rule's inception, that it "has become a touchy subject for various reasons," including charges of tokenism or simply the belief that the rule has outlived its necessity. However, even this critical quotation comes from an article that largely documents the success of the rule, and when compared with any imagined court-mandated or legislated solution to the problem, it becomes clear how smoothly this voluntary action has gone into place.

Indeed, the success of the Rooney Rule has been surprising, perhaps even to those who proposed and voted on it. It took only four years for the "percentage of African-American head football coaches" to rise from 6% to 22%. All three finalists for Coach of the Year in 2006 were African American, and in 2007, only teams coached by African-Americans "advanced to Super Bowl XLI." According to Fennell and Miller, the Rooney Rule "has been so successful that even those who had initially opposed the rule later advocated for it to be extended to front office slots as well." Even more impressively, the rule has shown an influence far beyond its specific requirements—although "there is no mention of any regulations regarding the hiring practice of assistant coaches" in the Rooney Rule, there has still been "a precipitous increase in the number of African-American NFL assistant coaches" since the rule was implemented.

In other words, there is no question that the direct goals of the rule have been fulfilled by an almost immediate increase in under-represented minority NFL coaches. In addition, though more difficult to prove, there is reason to believe that the Rooney Rule changed NFL culture to the point that minority coaches are no longer seen as a liability, and even roles unaffected by the rule have seen an increase in diversity. Similarly, NCAA football later adopted an analogue to the Rooney Rule, and before its enactment in 2008, only six of its 120 coaches were minorities. Within a single year of implementation, the number of minority coaches had doubled from six to twelve, even though the NCAA imposes no penalty for violations of the rule. If these policies continue to cause chain-reactions as they have so far, spreading from professional to college sports and from head coaches to assistant coaching positions without

231. Butler et al., supra note 224, at 258.
232. Id. at 258–59.
233. Fennell & Miller, supra note 227.
234. Butler et al., supra note 224, at 259.
compulsion, they will likely become the gold standard for voluntary inte-
gration in the world of entertainment.

Indeed, analogues to the Rooney Rule have already been proposed by
scholars for other fields of work and hiring. For instance, Fennell and
Miller argue that a Rooney-like rule should govern the selection of col-
lege presidents. The “unacceptable” lack of minorities in university ad-
ministration is “not a matter of conscious discrimination” but rather “one
of supply and demand, a lack of exposure as well as the opportunity to
become familiar with the application and interview process.” This
means not only enacting a top-down system of quotas, but also going “be-
yond the Rooney Rule” to identify and mentor qualified candidates from
among “faculty and mid-level administrators.”

Perhaps an even closer analogy comes from the world of advertising, where in 2010 Cyrus Mehri,
one of the initial instigators of the Rooney Rule, published an NAACP-
affiliated report finding that of the advertisements created for the 2010
Super Bowl, “92% of the creative executives were white men, and 7%
were white women.” In an editorial for Advertising Age, Ken Wheaton
argues that while it is time for the advertising world to enact “its own
version of the Rooney Rule,” such a move “would have likely have to be
enacted from the bottom up” because the industry is not currently “brim-
mimg with candidates” as the NFL is via its “player ranks.”

While it is easy to take shots at industries like professional sports and
advertising as trivial and far from the forefront of struggles for civil rights
in America, there is clear evidence that a monochromatic racial situation
can have genuinely disastrous consequences for under-represented mi-
norities in the general population. Butler et al., for example, writing in
the American Journal of Surgery, noted that “[e]very specialty within the
field of surgery has documented evidence of racial disparities,” with the
result that “underrepresented minorities . . . in the United States are not
receiving equal treatment for various conditions.” This urgent situation
is what caused them to advocate for a Rooney-style rule in medical
schools that train surgeons; not doing so could perpetuate a system with
negative consequences that far outstrip a lawsuit or a poor reputation.

“The Bachelor” and reality television in general certainly seem to exist on
the opposite end of the spectrum from surgery departments in medical
schools. However, as discussed above, there is a real possibility for televi-
sion programming to engender and reinforce socially destructive racial
attitudes.

Such facts, especially when combined with the manifest de facto injusti-
tice of a workplace or television cast that is overwhelmingly segregated,

237. Fennell & Miller, supra note 227, at 80.
238. Id.
239. Id.
240. wheaton, supra note 227, at 28.
241. Id.
242. Butler et al., supra note 224, at 255.
243. See supra Part III.C.
make it clear that the optimal response of ABC and “The Bachelor” to Claybrooks’s and Johnson’s lawsuit (and the successive lawsuits that are sure to ensue following the failure of this one) would be the public adoption of a Rooney-modeled rule—perhaps it could even be named the “Claybrooks Rule” in honor of the plaintiff in this first lawsuit. But how would such a rule work? Would it run aground, as some have speculated for other industries, without a large pool of qualified and interested individuals like NFL players? Should it work as a top-down or bottom-up process? Should the rule concern itself primarily with behind-the-scenes personnel or with the actual cast members in front of the screen? Should there be some punitive element to the rule, and if so, who would enforce its application? These are not easy questions, and they would of course have to be worked out by the network itself. However, lessons and ideas from other fields could help set forth a basic framework for how ABC could police its own image, avoid further legal challenges, and distinguish itself from its competitor networks as a progressive force for change and a very public face of equality in America today.

First, it would be necessary to find the correct analogue to “head coach” in the NFL; the obvious choice might be the executive producers of television shows. However, coaching in professional sports is a profession with a high turnover rate, subject to the vagaries of team performance on a year-by-year basis. Executive producers and show runners tend to stay around as long as their shows do, so to demand that Mike Fleiss be replaced with an underrepresented minority would do little to improve “The Bachelor,” as the show may cease to exist without its producer. Therefore, it seems logical that the individuals presented on the show itself must be the ones subject to the proposed “Claybrooks Rule”: the man chosen as the Bachelor and the various competitors who seek to become engaged to him. ABC executives have already, rather flippantly, dismissed this option: when Fleiss was asked why ABC was not exerting more effort to diversify the show, he replied that there simply were no candidates coming forward to seek to be on the show, and since Bachelors and Bachelorettes are now regularly chosen from previous show-members, the loop is virtually closed. 244

This answer is very common in discussions of diversity and racial quotas, but it has been shown by the experience of the NFL to be untrue or, at best, tautological: there are no qualified minority candidates because authorities have not qualified them. In fact, not only were candidates for head coach positions found, but they excelled, quickly rising to candidacy for Coach of the Year and leading teams to the Super Bowl. Indeed, the lawsuit of Claybrooks and Johnson itself is sufficient proof that willingness is not the issue here: plenty of minorities are willing to participate in the show, and it is the show’s structure that preserves the “unbearable whiteness” of the contestants. To solve this, ABC might implement something along these lines: first, each time a Bachelor or Bachelorette is to be

244. See Rice, supra note 130.
chosen, at least one finalist must be from an underrepresented racial minority, regardless of whether he or she has appeared on the show before. While this would break with recent precedent, clearly Bachelors were once chosen from the community, as there were no older shows from whose casts to choose new Bachelors. Second, each time a candidate pool is selected to audition for “The Bachelor” or “The Bachelorette,” a fixed percentage of the candidates must be drawn from underrepresented minorities as well. This two-pronged “Claybrooks Rule” could potentially outgrow itself in just a few seasons, as long as the percentage were fixed at a sufficiently high number during the lifespan of the rule. Once a critical mass of minority faces had appeared on the show, the statistical probability of future Bachelors and Bachelorettes being minorities would rise commensurately, as would (presumably) the desire of minorities in the community to audition for the show. The rule could begin as a self-enforced and entirely voluntary practice, but if it was not followed, independent observers could be assigned by ABC executives to intervene and, in the case of a violation, to fine the producers or overrule their casting decisions.

The proposed “Claybrooks Rule” solves many problems at once: first of all, it would be very likely to forestall further lawsuits of the sort that have already been brought against the network. As Ken Wheaton argued in the case of the advertising industry, “we haven’t seen many viable alternatives [to Rooney-like rules] other than class-action lawsuits and the increasingly tiresome ‘dialogue.’” Even if it is possible that ABC would win every single legal challenge to the racial makeup of “The Bachelor,” avoiding the lawsuits in the first place would save money, trouble, and bad publicity. By contrast, the “Claybrooks Rule” would cost virtually nothing. Second, the network would achieve a competitive advantage in the world of publicity, as a voluntary attempt to integrate a television network would be received well by the press and the general public, and would likely spur a renewed interest in the next seasons of “The Bachelor,” “The Bachelorette,” and “Bachelor Pad.” ABC could even capture a share of the reality TV market that currently goes to minority-focused networks like BET or Telemundo. Finally, and perhaps most importantly of all, a “Claybrooks Rule,” if expanded to the remainder of the network, could do a tremendous amount of good in combating negative stereotypes in the media, turning the vicious circle of stereotyping and poor self-image among minorities into a virtuous circle of positive portrayal and, one hopes, imitation in the real world.

V. CONCLUSION

It is rare to find a solution to a problem that yields both moral and economic rewards, but it would appear that the Rooney Rule is just such a solution; for this reason, it is clearly in ABC’s best interest to apply

245. Wheaton, supra note 227, at 28.
something like a "Claybrooks Rule" to "The Bachelor" and similar reality television shows. However, as of now, despite claiming to seek diversity, the network has shown only recalcitrance, and the legal system has (in one isolated instance) abetted this attitude. Rather than simply hoping this situation will change, it would be best for as many interested groups as possible to file actions against ABC, refusing to be deterred by the unfavorable verdict in this path-breaking case. Even if the suits are unsuccessful, a greater critical mass and a higher media profile will place pressure on ABC of the sort already placed on the NFL and the advertising industry, and possibly induce the network to self-regulate for pragmatic reasons. Should this happen, the benefits will far exceed the merely pragmatic, and in their small way, strike a blow for equality of representation in the American media.