Race, Markets, and Hollywood's Perpetual Antitrust Dilemma

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This Article focuses on the oft-neglected intersection of racially skewed outcomes and anti-competitive markets. Through historical, contextual, and empirical analysis, the Article describes the state of Hollywood motion-picture distribution from its anti-competitive beginnings through the industry's role in creating an anti-competitive, racially divided market at the end of the last century. The Article's evidence suggests that race-based inefficiencies have plagued the film distribution process and such inefficiencies might likely be caused by the anti-competitive structure of the market itself, and not merely by overt or intentional racial discrimination. After explaining why traditional anti-discrimination laws are ineffective remedies for such inefficiencies, the Article asks whether antitrust remedies and market mechanisms might provide more robust solutions.

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INTRODUCTION

This Article examines racially skewed outcomes in an unfamiliar context—outside of the familiar rubric of traditional anti-discrimination regimes. Law scholars have not given adequate attention to a fairly significant problem: the fact that non-competitive markets fuel inefficient and racially-skewed outcomes beyond labor market distortions. Economic outcomes relating to production, creation, and distribution of goods and services are also affected. In these markets, where we see a form of anti-competitive racial impasse, how can we more easily determine whether racial inequities remain, what causes them, and how the law can reduce or eliminate them? The typical framework for analyzing such problems might rest in antitrust law, but typical antitrust frameworks rarely view market inefficiencies primarily through the lens of racial equality.

The difficulty in connecting antitrust law with the goal of remedying racially skewed market outcomes is underscored by a frank scholarly admission: “[T]here seems to be a widespread, implicit belief (at least among [W]hite males) that race and gender discrimination is not a serious problem” in markets defined by products and not workers. Accordingly, scholars have engaged in just a few studies of the role that race plays in structuring modern marketplace interactions between seller and buyer and the overall racially polarized structure of market movements within industries. The lack of credible information, particularly regarding the role of race in structuring decisions about what to sell and to whom, is troubling if one cares about remedying these market problems. The Article’s empirical analysis and supporting contextual research regarding the market for Hollywood feature films suggests that racial differentials in marketplace outcomes, primarily in film distribution differentials, are

1. Studying the real-life consequences of racial bias in these markets is not an entirely new phenomenon, but it is still a largely undeveloped field. Ian Ayres is among leaders in the field and has made many important contributions. Prior to his widely cited car audit experiment, few legal scholars had broached the subject. See, e.g., Ian Ayres & Peter Siegelman, Race and Gender Discrimination in Bargaining for a New Car, 85 AM. ECON. REV. 304 (1995); see also Ian Ayres, Pervasive Prejudice? Unconventional Evidence of Race and Gender Discrimination (2001) [hereinafter Pervasive Prejudice].

2. Pervasive Prejudice, supra note 1, at 3.

3. See, e.g., id. Ayres notes that “almost no one has tested whether consumers’ taste for discrimination might be directed at a seller’s race itself (or the race of a seller’s employees). This failure to test is unjustified.” But see Daria Roithmayr, Barriers to Entry: a Market Lock-in Model of Discrimination, 86 VA. L. REV. 727 (2000) (applying antitrust principles to theories of discrimination in law school markets).
caused in part by the anticompetitive nature of the market itself. Therefore, the goals of this Article are twofold: (1) to move further toward engaging antitrust scholarship with the empirical analysis of market-based racial inequities, and (2) to highlight an underdeveloped area of legal study—solving the harms resulting from markets where race plays an important, but difficult, to identify role in shaping market outcomes.

A brief few words on what this Article does not do. In any attempt to frame questions of racial bias within existing legal regimes, it is common to wrestle with core frameworks. For instance, one might explore the role of constitutional law or Title VII in providing a “solution.” This Article does not attempt this for a number of reasons detailed later, but which bear mention here. First, as the racial skewing studied here is related to a product, not a person, the Title VII regime is simply not a useful framework. Second, as the article is not (directly) concerned with employment or labor practices, it makes little sense to retread familiar ground. Finally, with respect to issues of casting and hiring and remedies that might result from racial discrimination, definitive and innovative solutions have been framed; the question has been much more thoroughly explored than is appropriate for the top-down analysis presented here.4

When studying racial bias at the market-wide level, divorced from the framework of employment discrimination and related laws, the legal harm is a vexing question that must be addressed. In a traditional employer/employee dispute, a racially-biased outcome might occur when an individual suffers some sort of adverse job or labor action connected to his or her race. That action is a race-based harm that can be easily identified, but perhaps less easily proven. However, when studying racially-biased markets and industries, how might one assess who is harmed by racially biased or stratified outcomes? For this Article’s purposes, if we imagine a “film” as a product, the “owners” of that product are primarily financiers, producers, and (often) production houses and studios. Thus, when that product suffers from some sort of racial bias in the marketplace, those owners suffer a legal harm that antitrust law might be used to remedy.5

This Article proceeds as follows: First, I sketch an approach to studying the nexus between antitrust law, racially skewed outcomes, and market-wide inefficiencies. Next, I trace the historical development of the Hollywood production and distribution system, with an eye toward the

4. See, e.g., Russell Robinson, Casting and Caste-ing: Reconciling Artistic Freedom and Antidiscrimination Norms, 95 CAL. L. REV 1 (2007). Robinson focuses on race-bias in the casting process, whereas this Article’s focus is on the film distribution market as a whole. Consequently, though I do not dispute that such a hiring bias may exist, it shall not be discussed at length here.

5. Though it is true, secondarily, that actors and others who helped to create the product also suffer a harm, this Article focuses on the direct harm to those who own the product.
role that a lack of competition might play in structuring racially stratified outcomes. Then, I turn toward the modern pre-video-on-demand (pre-VOD) era; specifically, I explore the contextual role that race played in feature film distribution during the 1990s prior to the national rollout of services like Netflix. To complement this contextual analysis, I gathered a dataset of demographic information pertaining to a wide variety of films distributed for general release during the 1990s. Through econometric modeling of race, distribution, and outcomes data, I attempt to determine whether a racially skewed outcome is being caused by non-competitive market forces. The data shows that race is indeed a driving force of distribution decisions and likely rooted primarily in a lack of competition. However, such skewed outcomes must also be contextualized within a prior history of explicit racial preferences and/or racial animus. How might we solve this problem? I conclude by attempting to answer that question; a comparison of traditional anti-discrimination remedies to market and antitrust law solutions in this market suggests the latter are more useful tools in the antidiscrimination toolbox.

The contextual and empirical analysis that follows reflects on a market that, given its emphasis on publicly reported data-driven outcomes, we may have previously assumed to be efficient. This assumption is false. Therefore, as the Article moves from history through data analysis and then to legal regimes designed to promote market competition, it ends retrospectively asking whether antitrust-based legal solutions could have been utilized to minimize racially skewed market outcomes. To fully understand the scope of the market problem, its impact over time, and the failure of law as a solution, we now turn to contextual analysis of the industry's competitive morass over the last century.

I. FAUX-COMPETITION: A BRIEF HISTORY OF HOLLYWOOD

Movie studios and their distribution arms are ideal candidates for an empirical analysis of market-wide racial inefficiencies. In addition to their freedom from most race and gender discrimination regulations, there is no federal or state agency with direct regulatory oversight over the sale

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6. The data gathered herein includes a series of gender-related variables. Gender (standing alone) is not fully discussed here except in contrast to race; the discussion of how gender differs from race in this framework is the subject of future work.

7. My concerns in this Article focus on identifying harms in a market that is not operating at maximum efficiency. In a different article, one might solve for problems in markets where such skewed outcomes are indeed efficient—at least with respect to revenue or profit maximization.

8. But see, e.g., Robinson, supra note 4, at 29 (describing how traditional race-related claims might be viable in certain contexts).
and distribution of feature films. The only “regulator” that governs what happens during the film distribution process is a voluntary and private industry-created group: the Motion Picture Association of America (MPAA). The MPAA, among other things, provides the ratings structure for virtually all studio films released to theaters in the United States. Further, because of the relatively open reporting of film box-office results, one can test theoretical and observational findings with a quantitative analysis of measurable economic output. When market outputs are tested in this fashion, one can determine, with some limitations, the extent to which they are tainted by racial bias. But data analysis, absent contextual analysis, is meaningless. Therefore, we shall first turn to the connection between market history and racial inefficiency in Hollywood.

A. Anti-Competitive Beginnings

In contrast to recent times, the motion picture industry originally developed and thrived amidst immense government regulation. Thomas Edison developed the first motion picture camera and player, and others followed in pursuit. After a significant period of development, he and his competitors agreed to pool their patents for cameras and projectors; they formed the Motion Picture Patents Company (the MPPC). In 1910, the MPPC created the General Film Company (GFC) in order to control the distribution pipeline of films and to ensure that exhibitors who sought popular films also used MPPC products. Fearing the growing


10. Major studio films are defined here as films produced or distributed by Hollywood based major studios that were released to a minimum of 500 theater screens. This 500-theater minimum accounts for the large majority of studio-produced films in a given year. Major studios during the time period studied here, for distribution purposes, are defined as: Disney/Miramax, MGM/Universal, 20th Century Fox, Warner Brothers/New Line, Paramount, and Sony/Columbia. The study is limited to the United States because only a small percentage of the films released to U.S. theaters are distributed to theaters abroad, and only a small handful of those feature majority-minority casts. See Frequently Asked Questions, MOTION PICTURE ASSOCIATION OF AMERICA, http://www.mpaa.org/faq (last visited Oct. 23, 2012).

11. This approach is an underutilized, but highly effective, method of examining discrimination. See PERVERSIVE PREJUDICE, supra note 1, at 404 (“[O]utcome tests can provide powerful evidence of when a particular kind of decisionmaking bias has an unjustified disparate impact.”).


14. Id.
dominance of the MPPC and the GFC, the lone remaining independent
distributor sued the MPPC and GFC, arguing that their growing domi-
nance violated federal antitrust law. The courts agreed, and ruled that the
MPPC had to dissolve.\textsuperscript{15} At this early stage, the anticompetitive nature of
the industry quickly caused government intervention. That intervention
in part, caused more robust competition in the market.\textsuperscript{16}

However, after the dissolution of the MPPC, studios that produced
movies sought to create another system of monopolistic control.\textsuperscript{17} When
audience demand for films stabilized, a three-branch industry developed
to supply the demand.\textsuperscript{18} First, film producers, primarily studios, supplied
and manufactured films.\textsuperscript{19} Second, wholesale distributors brought those
films to theaters around the country.\textsuperscript{20} Finally, exhibitors served as the re-
tail outlet for those films.\textsuperscript{21} Rather than focus on controlling the movie
making equipment, studios vertically integrated production, distribution,
and exhibition of films.\textsuperscript{22} Studios developed films with well-recognized
stars.\textsuperscript{23} Then, they developed distribution chains to help distribute their
stars' films. Finally, by merging with existing regional theater chains, they
then bought out the retail space where those films were exhibited.\textsuperscript{24} By
forming these vertically integrated corporations, studios could easily exer-
cise market dominance and prevent outside producers from successfully
entering the marketplace. By the end of the silent movie era in the late
1920s, five studios had control over each branch of the movie making
industry; Paramount, 20th Century Fox, Loew's-MGM, Warner Brothers,
and RKO dominated production, distribution, and exhibition.\textsuperscript{25} This sec-
ond act of anti-competitive behavior led to a number of marketplace
inefficiencies and helped to facilitate other cartel-like behaviors, such as a
mandatory decency code.

Government intervention again proved critical to breaking up this
oligopoly. For much of the pre-war period, government regulators turned
a deaf ear to the tight coupling of production, distribution, and exhibi-
tion. As one account of the period reminds us, "when MGM released
\textit{Gone with the Wind} in 1939, it was shown in MGM's theaters, staffed by

\begin{itemize}
  \item \textsuperscript{15} See United States v. Motion Picture Patents Co., 225 F. 800 (E.D. Pa. 1915).
  \item \textsuperscript{16} See Wu, supra note 12, at 61–73.
  \item \textsuperscript{17} See Michael Conant, Antitrust in the Motion Picture Industry 1 (1960).
  \item \textsuperscript{18} Id.
  \item \textsuperscript{19} Id. at 2.
  \item \textsuperscript{20} Id.
  \item \textsuperscript{21} Id. at 21.
  \item \textsuperscript{22} Id. at 2.
  \item \textsuperscript{23} Id. at 7–8.
  \item \textsuperscript{24} Id. at 23–27.
  \item \textsuperscript{25} Three additional minor studios brought the market total to eight players. These
three were Columbia and Universal, who produced and distributed films, and United Art-
ists, who distributed and exhibited films. See Id. at 23.
\end{itemize}
MGM employees showing the public to their MGM-owned seats.\footnote{26} Finally, after growing public resentment of the studios’ monopolization of content, distribution, and exhibition, the United States Department of Justice ("DOJ") filed a complaint against all eight studio/producer distributors, alleging that their practices unreasonably restrained trade in violation of the Sherman Antitrust Act and constituted a vertically integrated system of production, distribution, and exhibition.\footnote{27} However, after heavy lobbying, the studios negotiated a settlement and consent decree in November 1940 that effectively maintained the status quo.\footnote{28} After a number of years, government antitrust regulators found that the settlement terms were not effective.\footnote{29} In response, the federal government again sought aggressive remedies by seeking the full relief requested in its original complaint.\footnote{30}

The government’s case and the lengthy trial that followed unfolded through most of the 1940s ending (substantively, if not procedurally) in United States v. Paramount Pictures, Inc.\footnote{31} The Supreme Court's seven to one decision in Paramount upheld much of the prior consent decree requiring major changes to the ways movies were distributed to the public.\footnote{32} The Court found that antitrust remedies could include barring movie studios from fixing prices when they licensed their films\footnote{33} and dissolution of various “pooling” agreements in which theaters owned by different parties were managed together.\footnote{34} And while the district court previously found that the five major movie studios at the time did not collectively have a monopoly because they owned only about one-sixth of the country’s theaters, the Supreme Court held that the other restraints of trade engendered by the studios’ conduct could still “effect a monopoly.”\footnote{35} Following the Supreme Court’s decision, the protracted court battle ended with an aggressive plan of studio dis-integration. This forced the production, distribution, and exhibition arms of each studio to compete with

\footnotesize{\begin{itemize}
\item\footnote{26} Tom Shone, Blockbuster: How Hollywood Learned to Stop Worrying and Love the Summer 104–05 (2004).
\item\footnote{28} See, e.g., SHOW BUSINESS: Consent Decree, Time, Nov. 11, 1940, at 70–71.
\item\footnote{29} United States v. Paramount Pictures, Inc., 334 U.S. 131, 141 (1948).
\item\footnote{30} Id.
\item\footnote{31} Id. at 140.
\item\footnote{32} Id. at 131.
\item\footnote{33} Id. at 143–44.
\item\footnote{34} Id. at 149.
\item\footnote{35} Id. at 167–71.
\end{itemize}}
one another.36 The case record, settlements, and subsequent court orders became popularly known as the "Paramount Decrees."37

Less than ten years later, each studio had separate production, exhibition, and distribution channels. This ostensibly opened the market and provided for vigorous free enterprise without the concomitant concerns about excess corporate consolidation and power.38 Therefore, by the late 1950s, government intervention, regulation, and antitrust pressures had already completely transformed the entire motion picture industry twice.39 It is not clear that these antitrust actions had any beneficial effect on consumers, and these actions did not have any race-specific component. There were simply no major movies with the need for multiple minority roles and very few speaking roles for ethnic minorities in general.40 This lack of racial impact can certainly be attributed to many factors, but it initially may suggest that for antitrust remedies to have a positive impact on remedying market-wide discrimination or bias, there must be members of race-minority groups ready and able to capitalize on marketplace inefficiencies.

The gradual re-consolidation of the motion picture industry is beyond the scope of this Article. In short, as the marketplace shifted in the period beginning after the late 1950s, studios slowly re-integrated distribution of their products, while encouraging the development of large chains of independent exhibitors. By the 1980s, the Reagan administration’s strategic decision to step further back from antitrust enforcement with respect to key Hollywood players allowed for the robust re-emergence of studio-owned distribution arms and even a new era of studio-owned theaters.41 Perhaps because of this hands-off approach to market expansion and industry consolidation, studios and their distribution divisions maximized profits amidst a period of large-scale growth within the film industry. However, this growth was not without its costs. Despite the expansion of studios and their distribution networks, movies featuring women, minorities, and themes associated with their experiences simply were not frequently made or distributed widely.42 Although a host of factors may have impacted this inefficiency, the high-level of sunk costs required in such a fairly closed marketplace may be a significant

38. See, e.g., Wu, supra note 12, at 162–67.
39. See id.
40. See generally Jesse Algernon Rhines, Black Film/White Money 7-13 (1996).
42. See, e.g., Rhines, supra note 40.
contributor. In short, this history of anti-competitive forces operating during the formation of the modern Hollywood era may have created a path dependent model toward perpetually anticompetitive and racially disparate market outcomes.\textsuperscript{43}

B. Modern Distribution Regimes

By the 1990s, the major Hollywood studios were releasing record numbers of films while distributing them to the widest number of theaters possible. This shift in distribution and marketing strategies led to a market where movies would be opened in 2,000–3,000 theaters to “become commonplace.”\textsuperscript{44}

This Article’s focus thus begins with the fully consolidated, modern version of the industry, specifically the period between 1991 and 2000 (“the 1990s”). The average movie during the 1990s was financed with roughly $53.4 million, and films with big-name stars easily required $100 million with an additional $40 million in marketing expenses.\textsuperscript{45} Veterans in the film industry estimated that major studio movies only earned a profit of 5 percent after expenses, even including profits derived from home video, international, and other markets.\textsuperscript{46} As the costs of developing, promoting, and distributing films grew during the 1990s, studio executives likely sought to maximize profits and minimize costs—the prototypical, neoclassic model of the firm. As major studios adopted free-market, choice-oriented models of behavior, they began to—like a political candidate—seek the “one-time vote” (the ticket bought by the moviegoer).\textsuperscript{47} The rise in production and distribution of majority-minority movies and the concomitant desire to match these majority-minority wide-release films with the audience most likely to “vote for” them would test whether this distribution model was actually efficient and effective.\textsuperscript{48}

\begin{itemize}
\item \textsuperscript{43} See generally Paul A. David, Clio and the Economics of QWERTY, 77 AM. ECON. REV. 332 (1985).
\item \textsuperscript{44} Peter Passell, \textit{As Cost of Movie-Making Rises, Hollywood Bets it All on Openings}, \textit{Star-Tribune} (Minneapolis-St.Paul), December 29, 1997, at D4.
\item \textsuperscript{45} Josh Chetwynd, \textit{Lights, Camera, Money?}, \textit{USA Today}, March 8, 1999.
\item \textsuperscript{48} Hereinafter, I use the phrase “majority-minority” to indicate only those movies that had a majority of the speaking cast as members of ethnic minority groups. Therefore, the all-minority mainstream comedy \textit{Boomerang} (Paramount Pictures 1992) is majority-minority, but the Denzel Washington thriller \textit{Pelican Brief} (Warner Bros. Pictures 1993) is not considered majority-minority. When I say “woman-led,” I mean that the movie stars a woman in a leading role. Thus, the comedy \textit{There’s Something About Mary} (20th
\end{itemize}
In order to best study this model, it makes the most sense to examine the process of a feature-film's first-run theater distribution. The initial distribution of a film is uniquely tied to studio profit since most revenues early in a film's box-office performance revert to studios and/or distributors, not theaters. As one analyst demonstrates, "under that arrangement it is clearly in the studios' interest to earn as much of the gross in the opening weekend as possible." If films are distributed in an economically inefficient manner by race, the unique effect of first-week consumer demand further artificially depresses a film's actual earning potential. As it stands, distributors and studios solicit individual theaters and chains with target proposals for exhibition contracts for all movies. These proposals emphasize the studios' or distributors' insider knowledge about a film's potential success in each theater's market. Then, within a highly constrained choice set, distributors arrange exhibition contracts to maximize their expected return on their products. Despite this rational calculus, the system's major players failed to take advantage of economically efficient opportunities to serve hungry audiences consistently throughout the 1990s.

Lack of healthy competition and a one-size-fits-all model might be expected to lead to this sort of racial impasse, as distribution calculations historically focused exclusively on non-minority films. For films to produce the most profit, "the economics of marketing powerfully favor nationwide openings in thousands of theaters over the traditional 'platforming' approach." Having a film open on the widest number of screens has always been perceived as critical for a film's long-term revenues because the opening weekend box-office figures have become "the fulcrum for selling everything from videos to foreign distribution to toys and popcorn." Even large theater chains recognize that when a movie

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49. Rick Lyman, Even Blockbusters Find Fame Fleeting In a Multiplex Age, N.Y. TIMES, Aug. 13, 2001, at A12.
51. See id.
52. See id.
53. As shall be explained, the distribution of films may be characterized by an irrational racial bias based upon whether the movie partially or predominantly features minority actors. In a fully competitive market, racial bias would have no logical effect on market strategy. After all, according to free market theorists, if the studios were indeed discriminating in film distribution practices, they would be punished by the market—and then perish.
54. Passell, supra note 44, at D4. Platforming is a strategy where a film is opened in a smaller number of markets, generates positive buzz/acclaim, and then is gradually rolled out to an increasing number of theaters/markets.
55. Id.
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secures a first place finish during its opening weekend it “pays dividends long after the movie leaves the theaters.” This formula has historically appeared to be true for all films, regardless of the race and gender of the cast. In the period studied here, a massive build-out in multiplexes led to greater screen capacity—for all types of films—creating what some termed a “glut in theater capacity.” This glut led some theaters to “strain to fill auditoriums” with many Hollywood releases, except those with minority casts.

As shall be discussed in Part II below, theaters showing movies with predominantly minority actors were much more likely to be filled to capacity. The problem is not really in the supply of movies, as independent filmmakers produced almost 54 percent of the total yearly amount of films by the end of the 1990s. Instead, the distribution problem is one of access, control, and overall market domination by the largest firms; in antitrust matters, this can be measured by the market-concentration number created using the Herfindahl-Hirschman Index (HHI). As one antitrust challenge describes, “sufficiently large HHI figures establish the FTC’s prima facie case that a merger is anti-competitive.” In the 1990s, studio produced and distributed films were 98 percent of the content and 90 percent of the box-office revenues, and the HHI of the top eight distributors during this period was between 1200 and 1550, which could by some measurements be seen as just slightly moderately concentrated under DOJ’s traditional HHI analysis (assuming a nationwide market for distribution). However, if distribution markets are regionally concentrated

56. Id.
59. Id.
60. See, e.g., James Surowiecki, Media Circus: If it’s Wednesday, A Black Film Must Be Opening, SALON.COM (Aug. 13, 1997, 3:00 PM), http://www.salon.com/1997/08/13/media_219/ (discussing the trend of opening “Black” movies on Wednesdays to relieve overcrowding at the limited number of theaters).
61. See, e.g., FTC v. Heinz, 246 F.3d 708, 716 (D.C. Cir. 2001). DOJ uses the Herfindahl-Hirschman Index (HHI) when evaluating the change in market shares on the competitive effects of a merger. The HHI is calculated by summing the squares of individual firms’ market shares, and thus gives proportionately greater weight to larger market shares. For example a market with 5 large firms with market shares of 25%, 25%, 25%, 15%, and 10% would have an HHI of 2200. Under DOJ Guidelines during this period, an unconcentrated market had an HHI below 1500, moderately concentrated markets had an HHI between 1500 and 2500, and highly concentrated markets had an HHI above 2500.
instead of perfectly nationally distributed, the HHI for that market could be substantially higher.\textsuperscript{62}

Finally, given the measurement inefficiencies and uncertainty regarding products with no revenue/demand precedent during this period, if demand was inaccurately advance-gauged, the effect of such inaccuracy would be most strongly felt for those products that were coming from outside the traditional studio system or those products for which demand measurements were particularly inaccurate (such as majority-minority films).

C. The “Business” and “Science” of Efficient Distribution\textsuperscript{63}

The process of distributing a film consists of essentially three players: the studio/group that produced the movie, the distribution company, and movie theaters.\textsuperscript{64} When a film is complete, studios typically send copies of the film to distributors for their consideration.\textsuperscript{65} Distributors analyze known variables like cast, director, script, target demographic, rating, and running time to determine a potential profit margin and consider whether to bid on distribution rights.\textsuperscript{66} Once all distributors have responded to the studio’s request, they will then offer to either rent the rights outright or share the film profits with the studio.\textsuperscript{67}

The balance between renting and buying also relies on rough estimates, gut instinct, and the search for comparable “metrics” of movies that seem similar.\textsuperscript{68} In a rental agreement, distributors obtain licenses to distribute after paying a flat fee negotiated with the studio.\textsuperscript{69} The risk/reward scenario in rental arrangements is squarely on the distributor, since the studio is fully paid for the product and the secondary profit/returns are all left in the distributor’s hands.\textsuperscript{70} In contrast, a sharing arrangement essentially creates a partnership between studio and distributor: the distributors get to keep a portion of the returns in exchange for distribution rights.\textsuperscript{71} This method of distribution is “safer” for both sides, but it is potentially less lucrative for studios.\textsuperscript{72} Over time, studios have also created their own


\textsuperscript{63.} The discussion in this section relies generally on the insights of industry insiders and Harold Vogel. \textit{Vogel, supra} note 50, at 72–82.

\textsuperscript{64.} \textit{Id.}

\textsuperscript{65.} \textit{Id.} at 75.

\textsuperscript{66.} \textit{Id.} at 76–82.

\textsuperscript{67.} \textit{Id.} at 77.

\textsuperscript{68.} \textit{Id.} at 76–80.

\textsuperscript{69.} \textit{Id.} at 77.

\textsuperscript{70.} \textit{Id.}

\textsuperscript{71.} \textit{Id.}

\textsuperscript{72.} \textit{Id.}
distribution arms, but keeping films entirely in-house shifts the financial risk back to the company itself.\textsuperscript{73}

The next phases of distribution also involve rough data estimates by distributors and risk analysis by theaters. Distributors have to determine how many prints to make, and where the movie will be most successful. Because each print's cost was roughly $1,500–$2,000 during the 1990s, a wide-release movie could cost $6 million—at a minimum—just for distribution.\textsuperscript{74} After gauging metrics of their own, distributors then negotiate with theaters, and again the model becomes one of risk versus reward.\textsuperscript{75} Theaters can either pay a distributor a flat fee in exchange for the free rights to exhibit a film for a minimum period, or they can enter into a cost-sharing agreement where they agree to give the distributor a portion of the movie's box-office revenue.\textsuperscript{76} In this latter model, distributors have the upper-hand on theaters: the terms of their “percentage” arrangements typically allow for distributors to set tight percentage retentions and to get the higher of net or gross box-office returns.\textsuperscript{77} During the 1990s, consistent with a model of minimal competition, theater exhibitors in given regions often agreed not to competitively bid-up prices on certain films. Instead, they chose to divide up those limited sure-fire hits equally among themselves to ensure that pure-market forces would be minimized.\textsuperscript{78}

Although it is reasonable to expect that the business of distribution is mechanized and routinized by a dizzying array of statistical data and advance formal modeling, this is not the case. It would also be wrong if one might have thought that distribution decisions were initially linked to audience demand. The lack of ex-ante demand measurements has long hampered forecasting and pre-release models of major studios, academics, and industry analysts.\textsuperscript{79} The Economist, when surveying the history of studio efforts to predict box-office hits, concluded that despite decades of tinkering with models and measurements, “[n]one has worked well.”\textsuperscript{80} During the 1990s, a few companies attempted to fill this void but with mixed results. Predicting audience response to consumer products is certainly difficult, especially for a unique good like a feature film. In the 1990s, interested parties attempted to find demand-based solutions but were not particularly successful. These inaccurate metrics caused a certain amount of mis-prediction with respect to demand (and thus the scope of distribution).

\textsuperscript{73} Id. at 38–39.
\textsuperscript{74} See id. at 123.
\textsuperscript{75} Id. at 77.
\textsuperscript{76} Id.
\textsuperscript{77} Id.
\textsuperscript{78} See Fox, supra note 41, at 533.
\textsuperscript{80} Id.
During the 1990s, the National Research Group (NRG), a division of A.C. Nielsen, conducted small-scale consumer surveys to create a “tracking score.” The score is essentially a percentage of survey respondents who indicate that a particular movie identified by the survey taker is the one they most want to see. Given this relatively simple measurement, it is not surprising that virtually all pre-release movies scored within the same rough proximity on the NRG’s typical survey. Even movies with the highest consumer recognition registered with less than 25 percent of the sampled public. Despite this level of imperfect information, the NRG survey was typically used to gauge the hypothetical performance of a small group of wide-releases that received copious amounts of advance release exposure. The weakness of this model even extended to blockbuster films. For example, NRG predicted an opening of $28–31 million for X-Men, which was quite different from its $54.5 million opening weekend. Whether for lofty or awkward reasons, NRG did not release or discuss its models, surveys, or methodologies. This prevented both industry and academic scrutiny of particular results.

Alternative methods of tracking viewer interest were typically derived from week-of-release sources. In other words, studios gauged demand from post-distribution sales or search data. For example, during the 1990s, Moviefone, the telephone/internet service that enables consumers to find which movies are playing in their neighborhood, had an extensive database that tracked each consumer-initiated search. By mining the data during the first week of a film’s release, Moviefone’s corporate subscribers (primarily industry analysts) could fairly accurately gauge consumer interest and demand—often organized in relatively discrete community-level data. Alternatively, during this period, Cinemascore conducted exit polling during a movie’s first week of release. In short, Cinemascore asked audiences to rate movies on a familiar letter grade scale. Those responses were then popularly distributed to industry insiders and publications. Cinemascore also collected key demographic information that is used to further analyze individual level responses. Nonetheless, it is widely known that despite the use of occasional test screenings and polls, movie studios have never used anything “as intense

82. See John Lippman & Bruce Orwall, Box Office Befuddlement: How Will Films Fare From Week to Week?—Accuracy of Tracking Surveys Gets A Few Thumbs Down; Misjudging ‘Chicken Run,’ WALL ST.J., July 21, 2000, at B1.
83. Id.
85. Id.
86. Fred Zufryden, New Film Website Promotion and Box-Office Performance, 40 J. ADVERTISING RES. 55, 57 (2000).
or precisely calibrated as the sampling devices some toothpaste and cereal companies employ." And the industry never rallied behind a key standard or set of parameters for predicting a movie’s profitability despite large pre-release investments.

Given the absence of robust pre-release demand information (then and now), the impact of market inefficiencies is clearer. There has simply never been an accepted industry standard to determine the scope of a film’s distribution beyond the relatively simplistic metrics described above and simple comparisons to a previous movie of its type (e.g., Star Trek to Star Wars or Batman to Superman). Academics and economists have aggressively pursued a pre-release standard metric but have found that “attempts to predict revenue patterns without any sales data meet with limited success.” In other words, prior to the release of most films (and certainly during the 1990s), the film industry and its distributors often do not know how well a film will do at the box office or what its optimal level of distribution might be. In the weeks preceding a tent-pole general release, studios use marketing research from limited test screenings to develop awareness of the public’s response to “advertising themes, trailers, posters, and other promotional materials, [which] helps devise effective campaigns geared toward a film’s potential audience.” However, without clear standards or objective data-driven models until very late in the production/distribution equation, studios are more vulnerable to unreliable information—particularly in film projects that are tied to race or minority actors. So what of the role of racial equality in such an uncertain market environment? Might this lack of standard lead to race-based market inefficiencies if such efficiencies are exacerbated in markets that lack strong competition?

Seizing on the absence of real data and the temptation to fill the void with racial conjecture, critics of the studios’ demand-side arguments argued that distributors and studios themselves were substituting their own theories of demand and telling filmmakers “to make hood movies or nothing.” If demand could not be accurately measured and caused inefficiencies in distribution, then such inefficiencies would also tighten production markets. At least anecdotally, this seems to be true. For much of the 1990s, African-American actors and filmmakers found themselves “frustrated by studio executives who seem reluctant to embrace films that

explore other facets of the black experience outside of life on the streets. 92 These failures to achieve sustained growth of the market for diverse films led by African-American actors prompted one well-known magazine to charge that “when African-Americans [actors and actresses] come knocking on Hollywood’s door, the response is still ‘Whites only.’” 93 There is no reliable market-wide data to back up the quiet idea that Whites simply avoid certain movies because the actors are predominantly racial minorities. 94 Market research indicates that African-Americans are only 13 percent of the population but 25 percent of the market for commercial films. 95 Yet, throughout the 1990s, films that feature African-American actors were underdistributed to all audiences, regardless of the audience’s color or the movie’s topic. The data-analysis presented later suggests that this history of excluding or limiting African-American opportunity in the industry stems from its lack of competition.

D. Majority-Minority Films

From its early beginnings as a tightly controlled oligopoly, the Hollywood studio system did not produce enough films to satisfy diverse tastes. 96 Indeed, these historically market-inefficient, production-side inequalities may be a significant contributor to the level of disparate participation by women and ethnic minorities in the filmmaking present. 97 Pure efficiency cannot be expected in any market. And by their very structure, oligopolistic industries are, to some degree, inefficient. 98 In Hollywood, that inefficiency is particularly intransient with respect to race.


93. Pam Lambert et. al., What’s Wrong With This Picture? Exclusion of Minorities Has Become a Way of Life In Hollywood, PEOPLE MAG., Mar. 18, 1996, at 44 (discussing the exclusion of minorities from all but one category of the 1996 Academy awards).

94. It is frequently true that when I refer to majority-minority movies or minority actors, they are African-American. Regrettably, studio films led by Latino or Asian-American actors are so rare that they cannot be analyzed as separate subgroups within the dataset developed for this Article. With respect to consumer surveys and experiments, they have been few and far between. The most promising studies substantially post-date the period of this study.


96. An early influential analysis of this type of marketplace discrimination can be found in Peter O. Steiner, Program Patterns and Preferences, and the Workability of Competition in Radio Broadcasting, 66 Q. J. OF ECONOMICS 194 (1952).

97. Although his work focuses more generally on a comprehensive historical approach to participation and inclusion in all aspects of Hollywood filmmaking, Jesse A. Rhines offers an interesting critique of the discriminatory effects of flawed distribution practices. See Rhines, supra note 40, at 7–13.

98. See, e.g., Roithmayr, supra note 3.
This race inefficiency was, at least initially, caused in part by old-fashioned racism. This racism was typified by Jack Warner who once said, “I don’t want no niggers on this lot.” Although Hollywood studios have long lacked market ingenuity in areas of diversity, the distribution problem did not play nearly as large a negative net-economic role in previous generations. This is simply because throughout much of the twentieth century, Hollywood studios failed to produce one general release film featuring a majority of minorities in starring roles. Through formal segregation and with some creative ingenuity, Black filmmakers, such as Spencer Williams and Oscar Michaux, independently developed and distributed all-Black movies to receptive audiences in all-Black theaters. However, after the break-through of Sidney Portier and the “black exploitation” (later “blaxploitation”) fad that swept through American theaters in the early 1970s, Blacks in Hollywood had little hope that filmmaking opportunities would advance beyond roles in stories filled with hyperbolic sex and violence, and usually directed by Whites. Although a well-developed film like Supercly actually led the box-office rankings and grossed $11 million in its first two months of release, studios’ reliance on recycling slightly different versions of that movie's central premise eventually led to a decline in popularity and box-office performance. Further, while the 1970s and 1980s led to an opening of opportunities for African-Americans in political and corporate sectors, industry insiders seemed to agree that the movement for inclusion failed to reach Hollywood until the middle of the 1990s. Thus, during the period of study in this Article (1990–2000), it was not initially clear that any forces—external or internal—would cause both the production and distribution channel inefficiencies to change.

Despite such pessimism, an assessment of opportunities for African-Americans in Hollywood early in the 1990s argued in favor of the rational firm approach. Most industry insiders agreed that “the problem is more a question of money than racism. In other words, as long as films made by and for Blacks earn money, Hollywood will continue to finance

99. As quoted in James Sallis, Chester Himes: A Life 56 (2001). Himes was an African-American writer (of crime novels, primarily) whose attempts to break into Hollywood were resoundingly unsuccessful.
102. See id. Further, although Black filmmakers such as Michael Schultz and Gordon Parks Sr. and Jr. did reach wider audiences in mainstream films, they were “eventually squeezed out of major status by White-dominated market and studio forces.”
104. V. Dion Haynes, Call To Empowerment: Many Think It's Time to Get Serious About a Black Film Industry, Chi. Trib., Oct. 20, 1996.
Moreover, the optimism fueled by the 1980s success of Eddie Murphy and successful (yet budget-conscious) releases by Spike Lee, Robert Townsend, and Keenan Ivory Wayans, suggested that, as one article noted, "a new wave of films may at last win wider acceptance for minority themes." The promised opportunities and developments did not exactly come to pass as the 1990s unfolded.

Developments throughout the 1990s are far too numerous—and predictable—to be discussed at length here. Simply put, as individual movies with majority-minority casts (such as New Jack City, Boyz N the Hood, Menace II Society, Malcolm X, Poetic Justice, Waiting to Exhale, and countless others) entered the distribution channel, they did so at rates that were seemingly uncorrelated with their market demand. For example, Boyz N the Hood debuted with a box-office average per-theater higher than Terminator 2. Ironically, studio failure to adequately predict demand and a strong miscalculation in distribution led to violence at a Los Angeles venue where the over-capacity theater was forced to turn away opening-night ticket holders, along with those who sought to buy tickets to the sold out showings of New Jack City. The melee occurred only after the theater sold out for the evening but failed to tell the patrons who were still waiting in line for several hours. Studio executives noticed that the crush of demand for new release “Black” movies, particularly on Friday, resulted in sold-out shows, moviegoers being turned away, and the potential for violence as a result of this overcrowding. A rational response to this crush of demand might have been to more widely distribute such pictures. However, this would have been particularly hard to do during the 1990s given the narrow number of distributors and their reliance on the same potentially inefficient distribution models.

105. Likewise, Morgan Freeman echoed this assessment by noting that Hollywood was not “locked anymore on color . . . they’re looking for the bucks.” Joe DeChick, Black Actors Want to Build on Recent Gains in Hollywood, CINCINNATI INQUIRER, Feb. 16, 1990, at E1, E6.

106. The successful, low-budget HOLLYWOOD SHUFFLE (Conquering Unicorn 1987) (by Townsend) and I’M GONNA GET YOU SUCKA! (Front Films 1988) (by Wayans) performed profitably on a small scale in 1989. The summer of 1989 brought Lee’s memorable DO THE RIGHT THING (40 Acres & A Mule Filmworks 1989). And, though not dealing with a predominantly minority cast or theme, Denzel Washington’s turn in GLORY (Tristar Pictures 1989) and Morgan Freeman’s role in DRIVING MISS DAISY (The Zanuck Company 1989) suggested that Hollywood studios were warming to the idea of rethinking their traditional reticence to think creatively with regard to African-American actors and directors. See, e.g., Sterritt, supra note 100.


E. Preference Externalities, Demand Metrics, and Distribution

The distribution problem for films with predominantly minority casts is unique, in part, because a wide distribution of films is dependent upon perceived market demand and potential revenues from theater exhibition. If it is perceived that the potential film audience will be narrow and/or small, distribution decisions will result in an initial narrowing of the marketplace to maximize yield in targeted markets. Marketing then helps to maintain and create demand. Yet studios create market demand through marketing efforts that often bungle movies with predominantly minority actors. Therefore, for these “minority” films, marketing and public perception matter a great deal in explaining why these movies’ performance is not maximized at the box office. Analysts have also suggested that while mainstream films with popular stars can survive negative reviews, films by and about African-Americans are said to be especially sensitive to negative reviews. This might be attributed to a number of factors. First, some critics cite the low marketing budgets of majority-minority films, suggesting that audiences who are not incentivized to become familiar with a new movie (product) simply won’t buy a ticket if a well-known box-office leading actor is not involved. Others target the non-minority executives who decide how to market or distribute films. They criticize that such executives do not understand how to translate “minority issues” into broader themes accessible to a wide variety of audiences. As one such example, the filmmakers who created the 1993 hit Menace II Society strongly objected to the distributor’s active efforts to change marketing materials during the film’s release. The distributor’s response was that it wanted to “broaden the film’s appeal . . . and attract crossover business.” However, New Line Cinema’s first audience study of Menace II Society suggested that the movie’s opening audience was a highly skewed demographic—98 percent African-American teenagers.

111. One executive survey indicated that Disney, Universal, Fox, MGM, Paramount, and Warner Brothers had no African-Americans in vice president or higher positions. MGM, Paramount, Universal, and Warner Brothers had no minority vice presidents at all. At the time, only Sony Pictures (through Columbia) had African-American leadership. Perhaps not coincidentally, Columbia’s vice president helped to develop the commercially successful Boyz N the Hood (Columbia Pictures 1991). See Robert Welkos, Against the Odds, L.A. TIMES, Sept. 6, 1992.


113. Pristin, supra note 112.

114. Id.

Studio executives promoting the admittedly gritty movie struggled to broaden the movie's audience until finally generating an audience that was 25 percent White, suggesting that wider distribution and a larger audience were attainable with a thoughtful and more universal marketing approach.\textsuperscript{116} As typified by the problems with \textit{Menace II Society}, marketing and distribution problems can also partially be explained if one believes that movie audiences have very little overlap in their preference for movies and that such preferences are highly tied to race (specifically, the race of characters in a movie). In other words, if African-Americans and Whites have no movie preferences in common, these “preference externalities” might make some of the decisions discussed in this Article seem more efficient.\textsuperscript{117} There is little solid data that this is the case.

Further, marketing the same film to multiple target audiences in this era wasn’t terribly difficult, due to the 1990s expansion of cable and television network television shows. Yet, it was apparently no secret that Hollywood studios would “frequently hamstring [majority-minority] projects by failing to allot them the funds necessary to reach beyond traditional African-American markets.”\textsuperscript{118} When they did make such an effort, often the biggest problem for studios was making the lead actors appear less violent.\textsuperscript{119} Hollywood studios also apparently ignored Nielsen ratings data that indicated strong, similar tastes for both Blacks and Whites in the highly coveted young adult audience. Indeed, of their top twenty favorite television shows during the middle of the 1990s, Black and White Americans aged twelve to seventeen had eleven identical picks.\textsuperscript{120} Despite these commonalities, New Line Cinemas, Disney, and MGM relied on a consulting agency whose president argued that young, urban Black teens want their humor “raw and R-rated” and will go to see a movie if “they

\begin{itemize}
\item \textsuperscript{116} \textit{Id.}
\item \textsuperscript{117} For example, see Joel Waldfogel \& Peter Siegelman, \textit{Race and Radio: Preference Externalities, Minority Ownership, and the Provision of Programming to Minorities}, 10 Advances in Applied Microeconomics 73 (2001), which argues that in the market for radio, the different programming preferences of audiences can be differentiated by race. As such, these “preference externalities” tend to make race-free decision making difficult. This approach might succeed in radio, which relies on advertiser differences for its revenues. Advertisers can pay less for minority listeners, because these listeners listen more and tend to buy less. However, these preference externalities should not be expected in film, where studio revenues are not derived from an audience intermediary that values audience dollars differently.
\item \textsuperscript{118} Nurse, supra note 95.
\item \textsuperscript{119} During 1991 and 1992, there were a number of fascinating incidents in which studios removed firearms from the movie posters for the majority-minority \textsc{Juice} (Island World 1992), while leaving them prominently featured in ads for the Christian Slater vehicle, \textsc{Kuffs} (Dino de Laurentis Communications 1992). See, e.g., Jim Emerson, \textit{Violence Strikes a Nerve in Black Action Films}, Orange County Reg. (California), Jan. 26, 1992.
\item \textsuperscript{120} The data were analyzed by BBDO New York and reported in Christy Fisher, \textit{Black, Hip, and Primed (to Shop)}, Am. Demographics, Sept. 1, 1996, at 58.
\end{itemize}
think the soundtrack is good and the beat is there.”121 With marketing experts like these, it's no wonder that marketing and distribution problems plagued Hollywood studios.

Thus, even with the success of films starring both popular and not-yet-discovered minority actors, the production and distribution of majority-minority films still seemed to underserve market demands and dampen industry profit potential. The successes of movies like Waiting to Exhale and Soul Food were rebutted by industry comments regarding the barely profitable vehicles The Preacher’s Wife and How Stella Got Her Groove Back. Even the aforementioned executive at Fox, which distributed the $70 million grossing Waiting to Exhale, argued that they “spent weeks and weeks trying to get middle White America to buy into this film. We never succeeded.”122 Interestingly, this marketing executive was also in charge of the universally panned marketing strategy for the critically praised but box-office underperforming Warren Beatty movie, Bulworth.123 Yet, even movie experiments like Bulworth do not entail significant financial risks for studios. Bulworth and the slightly profitable How Stella Got Her Groove Back were both produced for “well below the industry average.”124

Based upon these observations, it certainly might appear that no matter what the content of the movie, major Hollywood studio films with a majority of minority actors were consistently marketed and deployed on very few screens nationwide due to a perceived lack of demand. Likewise, it appears at first glance that no matter what the subject, rating, or critical review, major studio movies not featuring a majority of minority actors were consistently distributed to a wider array of theaters. To more aggressively test these observations, we turn to empirical analysis.

122. Kim Masters & Jacqueline Trescott, Why Hollywood Keeps Blacks Waiting, WASH. POST, Mar. 24, 1996, at C6 (quoting Tom Sherak, Senior Vice President of 20th Century Fox and lead marketer for WAITING To EXHALE (20th Century Fox 1995)).
123. Bulworth (20th Century Fox 1998) was a sophisticated political satire, but it also featured a popular rap music soundtrack and was set in Los Angeles, and one reviewer suggested that the film’s audience would be “young, urban males, specifically the young African-American audience.” However, the executive who led the WAITING To EXHALE (20th Century Fox 1995) campaign was also in charge of Bulworth, and he argued that Bulworth would be most successful with “guys” and “older females.” It wasn’t successful, apparently, with either group. But, the movie received a 1999 Academy Award nomination for Best Original Screenplay, which suggests that its content had wide and original appeal. See, e.g., Richard Natale, The Competition Is Only on the Surface, L.A. TIMES, Apr. 20, 1998, at F1.
II. THE EMPIRICAL FOUNDATIONS OF FILM DISTRIBUTION

The contextual evidence that I have described thus far suggests that race played a strong and independent role in influencing film distributors’ behavior during the 1990s. However, when one gathers data to explore the science of distribution, the question remains: is any evidence of racial skewing nonetheless efficient? This Article cannot definitively answer that question, but it sets out a model of distribution, with the best available evidence, which broadly challenges assumptions about marketplace efficiency and its connection to racially disparate outcomes.

A. Previous Studies and Industry Models

Because the process has historically been characterized by a dearth of rigorous information modeling, a few academics and others attempted to develop something of a post-hoc science for predicting distribution and—more often—box-office success. Those models and the ones in this Article are influenced by traditional studies of product sales, consumer preferences, and product quality; they have been designed to reflect familiar studies that focus on aggregate consumer marketplace demand and “take the form of [OLS] multivariate regression models in which demand for a vector of products is related to marketing variables such as prices, displays, and various forms of advertising.” That approach is taken here, though with the uncertainty of demand reflected by the lack of a direct measurement. Box-office forecasting models take this basic marketing study approach, but studios and academics adapt that model of choice to reflect the peculiarities of Hollywood filmmaking and distribution. The most notable difference between general consumer product models and those for film is a reliance on product and environmental factors of films to predict sales and profits, as opposed to demand—which is widely used in traditional consumer products research. This is so, in part, because the pattern and life-cycle of a film’s release and box-office results is the exact opposite of the typical “bell-shaped life-cycle diffusion curve pattern that has been described for durable products.” Further, pricing considerations, a central variable in much consumer research, appear to

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126. Demand, when needed here as a variable, is measured by using overall box-office performance. This is, of course, a post hoc gauge of demand, which is precisely what works best to determine whether demand is being accurately predicted at the outset.
128. Id.
129. Id. at 16 (using OLS for some questions, and a logged dependent variable ridge regression procedure when analyzing a bounded “intent to see” measure).
play no role in movie attendance since prices at various theaters do not substantially vary within a geographic region.

A variety of econometric models of various aspects of film business outcomes provide a useful starting framework for the models that I create and test here. In “Predicting Movie Grosses,” Simonoff and Sparrow outline their preferred method for predicting a movie’s net theater gate receipts. They use a database of three hundred films from 1999 to calculate potential grosses. Using only ten independent variables, Simonoff and Sparrow employ an OLS model to derive their predictive model of a film’s total gross. Similarly, Fred Zufryden’s work connects advertising and the level of a film’s distribution to gauge their impact on a film’s overall box-office performance. Zufryden’s model for total box-office performance for new releases relies on a standard regression analysis as well as log-linear regression techniques.

Two other representative works use a simplified set of variables to predict box-office performance and/or profitability. Sogit Sochay, using a multivariate OLS regression model, modeled a film’s performance as determined by three broad categories: creativity, scheduling/distribution pattern, and marketing. Sochay’s results suggest that the film’s genre, a proven box-office star, the date of the film’s release, and the total screens/theaters allocated to the film drive the film’s overall box-office performance. Likewise, Abraham Ravid, in varied studies, focused on determinants of a film’s profitability by using a series of OLS regressions. Ravid’s work expanded the field by factoring in video-revenues and international revenues to gauge overall film profitability. Significant variables in his work include film budgets, reviewer ratings (after the first week of release), film ratings, and sequel status. Notable results include Ravid’s rejection of conventional wisdom that box-office stars matter for a film’s ultimate profitability. Of course, though OLS regression is the most common technique used in industry-analyses of this kind, other approaches

130. See Jeffrey Siminoff & Ilana Sparrow, Predicting Movie Grosses: Winners and Lasers, Blockbusters and Sleepers, 13 CHANCE 15 (2000). Their model uses two logged variables to adjust for a skewed variable tail, a problem that my dataset does not have.

131. Id. at 16–17 (ten independent variables are: genre; rating; country of movie’s origin; two “star power” variables; production budget; sequel; holiday opening weekend; number of screens; critic Roger Ebert’s rating; and Academy Award nominations and wins).

132. Zufryden, supra note 86.

133. See generally Scott Sochay, Predicting the Performance of Motion Pictures, 7 J. MEDIA ECON. 1 (1994).

have been tested in experimental consumer analysis studies of film-going behavior.\textsuperscript{135}

The set of regression models in this section is designed to test two things: the validity of the profit-maximizing, race-neutral approach to distribution and the likelihood that inefficiency can be corrected by market forces. I expect the data will demonstrate that holding independent variables constant, including actual revenue per theater (in the United States), studios limit distribution of minority actor and majority-minority movies solely on the basis of race. If true, this would bolster the argument of a number of African-American actors and film-makers that majority-minority led films are “given stiffer litmus tests” and that decisions are never made “on an equal opportunity basis.”\textsuperscript{136} The null hypothesis of a non-biased market is that the distribution of a movie is primarily influenced by its perceived national popularity, audience appeal, and ability to generate significant amounts of money per theater. To test this hypothesis, three successive sets of models follow.

The source for the statistical analyses in this dataset is the Diversity Film Index (DFI), a large-scale dataset I created specifically for this Article. The dataset includes roughly three hundred films, with an array of independent variables associated with each film.\textsuperscript{137} The economic data for each film include (amongst other things): box-office performance, length of release, per-screen average, per-screen totals, week-to-week performance, and overall budget.\textsuperscript{138} The demographic information for each film includes: each film’s distributor, length, rating, and category. The sociological data includes: the race and gender of the featured actors, as well as select actors’ previous box-office history.\textsuperscript{139} The dataset is an attempt to create some order in a universe of high uncertainty. Therefore, it, like the market, is imperfect. Because film production data is closely held, there was no way to capture precise film cost (or marketing budget) during the period analyzed here. Likewise, most films lack a pre-demand metric, and thus, such a metric could not be included in this Article.

Further, few studies of the film marketplace focus on the ultimate question at issue here: distribution. Instead, most models of studio and consumer behavior focus on predicting box-office results. Since these


\textsuperscript{136} King, supra note 92, at R.6.

\textsuperscript{137} The regressions in this Article were run with a finalized set of 274 films primarily from the latter half of the 1990s.

\textsuperscript{138} Detailed descriptions of the variables used in the regressions can be found in the Appendix.

\textsuperscript{139} Inter-coder reliability is not an issue since the data were coded by the author. Any questions about the small amount of films with subjective interpretation (such as, is \textit{Jerry Maguire} a romantic comedy?) are entirely fair game.
questions are somewhat similar, it is useful to consider common sets of independent variables used in the varied models. The previously mentioned studies of the film industry agree on some common predictive elements. For example, Sharda, Amoto, and Meany gathered data for date of release, rating, intensity of competition, star power, genre, technical effects, sequel, screens at opening, and final gross. Rather than just the five to ten variables typically gathered by these and other researchers, I include race-related variables and other first-time-gathered data in an attempt to shed new light on the distribution question. The dataset contains more than one hundred films featuring minority actors in leading roles. To ensure a wide range of distribution in key variables within the dataset, almost all movies with available demographic information that were released on more than five hundred screens during one portion of the latter half of this period were included in the dataset.

This gathering of data highlights a fact mentioned at the outset of this Article: race, though at the core of our political and sociological landscape, has often been given short shrift in legal, political science, economic, and business-school studies of marketplace outcomes in non-competitive markets. Therefore, notwithstanding the above-mentioned studies of film studio profitability, box-office forecasting, and studio distribution efforts, this Article is the first to directly apply race-related research and economic data as variables to be considered in discussing industry economic outcomes in Hollywood.

B. Applied Models and Analysis

The following three models each focus on a different explanation for race-gaps in movie distribution. The first model, examining factors influencing per-theater grosses, is primarily designed to test whether a film’s Black-ness depresses moviegoer turnout, causing a lower per-screen average. If this were true, studios could argue that the scope of distribution was restricted due to a sub-average level of interest in these types of movies. If the assumption that the film’s Black-ness depresses turnout turns out to be false, one would expect that, holding other factors constant, per-theater grosses of these films would be equal to other films.

141. Additional movies from earlier in the period were added to provide for greater inclusion of diverse films and casts.
142. At the outset, I address a few peculiar statistical problems. Some have suggested that showcasing a movie in fewer theaters would actually drive revenue per theater up. Given that such a suggestion would undermine some of these models, the theory was tested independently and the relationship actually moves in the opposite direction. As available theaters increase, generally, so do per-theater, per-screen revenues.
The second and third models build from a similar logic. The second examines factors influencing overall box-office gross and challenges a familiar industry argument that majority-minority movies make less money overall. For example, using a nationwide audience as the standard, if one finds that, all things being equal, majority-minority movies do worse than others in total box-office revenues, this result would suggest that studios would be right to distribute these movies less widely and produce less of them. On the other hand, if the model shows no independent negative effect for race, then one can conclude that the average moviegoer does not discriminate as much as industry experts predict. Finally, the third model takes insights learned from the results of the first two and applies them directly to the distribution question. Taking into account various factors from the first two models, I test whether such factors, especially race, suppress a film’s distribution.

Model I: Per-Theater Gross

To begin, I examined a number of factors that were expected to influence per-theater film grosses and constructed a model to those specifications.

The results proved more confounding than one might expect. First, the model shows that the presence of a “White star” significantly impacts per-theater revenues more so than any other associated variable. This finding, in part, confirms conventional wisdom that star-driven vehicles tend to produce bigger results per theater. However, the results also showed no significant relationship between the presence of a majority-minority cast and per-theater revenues for general release movies. Therefore, there would be no statistical reason to expect that of any two random releases (both without “stars”), one featuring a majority-minority cast would underperform compared to another movie without such a cast. This has significant implications for theaters who underbooked majority-minority movies and for distributors who steered these movies to a limited number of theaters. By demonstrating that a majority-minority cast did not predictably drive down per-theater gross, this Article’s data suggests that the marketplace for majority-minority movies during the 1990s was underserved given the potential for increased revenues. In other words, when holding other factors constant, seats were filled for majority-minority movies at the same rates for movies without such casts.

Finally, the model produced a number of helpful, but unexpected results. While it has been argued that “R” ratings negatively impact total box-office revenues, it appears that an “R” rating does not drive down the per-theater revenues of movies in this study. Further, as movies became longer in running time, their per-theater/-screen revenue did not decrease as expected. In addition, comedies were positively associated with

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143. See infra Table 1.
per-screen revenue, but romances did not have a clear effect on box-office revenue. However, casting a proven box-office African-American star did not have an apparent effect on per-theater success. While the inclusion of data for movies like *Independence Day* and *Men in Black* would have changed this result, their outlier status compromised the data as a whole. Finally, the data suggest that the inclusion of a minority or woman lead, or a minority supporting character, has no significant effect on the per-theater revenues of movies in general release. Therefore, an assumption that such movies would underperform at any given theater might not be reliable as a market-making variable.

**Model II: Total Box-Office Revenue (U.S. totals only)**

The working hypothesis following the first model was that total box-office revenues could be predicted by the same factors that predict per-theater revenues but with significant exceptions. Because total box-office revenues as a variable were moderately correlated with the “Top-15” variable, that variable was excluded from the model. Likewise, general observation of the data indicated that blockbuster releases tended to generate large movements in the relationship between box-office revenues and maximum theaters. As was true with respect to per-theater revenues, running time and the inclusion of White male stars significantly increased a film’s financial bottom line. The effects of African-American stars washed out in the final analysis, as did the effects of comedy on the box-office gross. There were differences in the per-theater versus total U.S. gross models as to the significant effects of a movie’s rating and whether it was classified as a comedy. The effects of a movie’s “R” rating accord with conventional wisdom that movies with such ratings cannot generate the long-term and repeat audience traffic necessary to achieve a sufficiently high gross. The

144. Because African-American actor Will Smith starred in both movies (and both performed phenomenally at the box office), the inclusion of them in the analysis dramatically amplified the beta values for several variables and also increased their significance. It “proved” that black stars mattered, in part because the per-theater grosses rose substantially when such films were included. To ensure normality, these films were removed from this analysis. The effects for white stars were not skewed in this fashion.

145. The line between causation and correlation in this model and the others is a tight one, and reasonable people can differ.

146. The “Monthly Top 15” variable is a variable designed to control for the popularity of the time period of a film’s release. It is the average gross of the top fifteen movies playing during that film’s release. This variable helps to control for seasonal variations in attendance and overall gross.

147. This connection will be explored in a later set of analyses that directly address the distribution question. See infra Table 2.

negative impact of the "R" rating can also explain, in part, the smaller box-office returns from majority-minority films. Extrapolating from the data in this Article, while 54 percent of the movies in this dataset were rated "R," 74 percent of majority-minority movies had "R" ratings. Some filmmakers have suggested that the MPAA's ratings system discriminates against African-American films by using heightened standards of language, violence, or sexual decency for films with largely minority casts. If this is true, it also negatively impacts the box-office draw for majority-minority films and actively contributes to further market inefficiencies, although this form of inefficiency is not caused by studios or distributors themselves.

Model III: The Racial Impasse—Modeling Film Distribution

Based upon these observations regarding per-theater revenues and overall box-office revenues, one can predict a number of factors that should determine the scope of a film's distribution. The null hypothesis of a "race-neutral" market was that the distribution of a movie would be primarily influenced by its perceived national popularity, audience appeal, and ability to generate significant amounts of money per theater. Researchers agree that other factors driving distribution (besides any individual theater booking preferences) include whether the film is rated "R," whether it features actors who have recently been in popular films, whether it faces strong competition during its time of release, and the movie's genre. However, unlike this Article's previous tests, one might expect that if studios or distributors are discriminating against movies featuring minorities, then significant, independent, and negative results will be shown for the variables that involve minorities. In order to test this marketplace skewing, it is necessary to use an outcome measure in this model. In this case, final box-office gross was used as an independent measure of a movie's overall pre-release popularity (i.e., pre-release demand). In general, box-office grosses for majority-minority movies were also significantly lower than the average film during the 1990s. Therefore, if the dependent variable is total number of theaters and the key driving variable is a post-distribution measure of demand, we can expect that no other "demographic" variable should impact distribution. Therefore, if we see significant effects in this equation, they would represent the degree to which the objective demand calculus is consistently poorly estimated (by

149. The commercially successful director of JASON'S LYRIC (The Jackson/McHenry Company 1994) argued that the lengthy MPAA ratings approval process for some sexual scenes in his majority-minority movie demonstrated that "if you have two Black people making love, somehow, that's steamier than other people." Bernard Weinraub, Ratings Board Blasted: Critics Say System Discriminatory, THE PLAIN DEALER (Cleveland), Oct. 2, 1994. For a more detailed examination of the ratings process, see Jacob Septimus, The MPAA Ratings System: A Regime of Private Censorship and Cultural Manipulation, 21 COLUM.-VLA J.L. & ARTS 69 (1996).
leading studios, distributors, and theaters causing an over or under supply of a given film to the national market).

The third model confirmed and disproved initial hypotheses about factors that are either highly correlated with or actually influence distribution. First, a number of variables that one might expect to achieve significance (based on earlier models) did so here. The third model confirmed the non-significance of box-office leading women in distribution decisions for films, as well as the minor significance of the box-office grosses for competing films during the month of release. However, the model also confirmed several relationships that independently drive a film's distribution and serve as potential indicators of marketplace inefficiencies that cannot be explained by neutral economic factors. To analyze the significance of these results, each set of explanatory independent variables is explored in turn.

First, the third model's results do suggest a negative-impacting role for race notwithstanding actual demand. These race-related effects shown by the third model suggest that the historical evidence discussed earlier in this Article matches the relationships shown in the data. Not only are there independent effects for the presence of a majority-minority cast, but there are additional significant effects when a lead actor is also an ethnic minority. The overwhelming significance and beta value for majority-minority demonstrates that even holding factors such as film popularity (i.e., audience demand) constant, majority-minority movies are substantially underdistributed for reasons that race-neutral market variables cannot entirely explain.

There are bound to be multiple and competing explanations of this phenomenon. Why can the market players be consistently wrong? In the context of this industry and with the data and examples deployed in this analysis, one must—at a minimum—consider that the oligopolistic nature of the market leads to the race-based inefficiencies identified here. If this were the cause of such inefficiency, it would represent a profound failure of both studio distributors and, to a lesser degree, theaters to exploit a captive and demand-heavy market. Further, the independent significance of the presence of an ethnic lead character also has irrational market distribution consequences. This demonstrates, in part, that the conventional

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150. See infra Table 3.

151. Because this Article is limited to a discussion of race, I shall leave for future work a discussion of the distribution regressions for variables that involve gender considerations.

152. See Daniel Kahneman, Jack L. Knetsch, & Richard Thaler, *Fairness as a Constraint on Profit Seeking: Entitlements in the Market*, 76 AM. ECON. REV. 728, 729–30 (1986) (describing the concept of a “reference transaction”—a benchmark that parties without equal information can draw from to form rational expectations about the fairness of a contractual bargain). Here, where reference transactions involving the distribution of movies are themselves false benchmarks, they undermine the bargaining power of racial minorities involved in the production of those movies.
wisdom of casting a few non-minority actors in majority-minority films might have some bearing on the film's distribution; as shown earlier, it does not, however, have any bearing on the ultimate per-theater or total grosses. This observation, standing alone, is also evidence of some degree of market inefficiency.153

Confirming industry myth and previous practices, film attributes including running time, movie rating, and movie type have significant and independent effects on a movie's market distribution. Movies that are longer tend to be distributed to fewer theaters. In addition, movies that are rated “R” also tend to be distributed less widely. Finally, comedies tend to be distributed less widely than other types of movies. These factors are particularly significant for their independent effects on movies that feature ethnic minorities and adult themes. As movies become sophisticated in storytelling, they become longer. As movies grapple with mature subjects or adult comedy, they are more likely to be rated “R.” Additionally, movies with less sophisticated themes and less mature subjects can easily lend themselves to comedy. The profound, independent impact that each of these qualities has serves as another independent negative market characteristic that will more heavily impact mature, adult-oriented majority-minority films that may be produced by Hollywood studios. However, because the market for distribution reacts to these film qualities in race-neutral ways, their impact will be felt above and beyond the negative distribution impact for majority-minority films generally. Therefore, one historical lesson derived from this data is that the heavy concentration of “R” ratings and comedy in majority-minority movies created independently negative distribution effects that were in addition to the already substantial distribution biases against majority-minority films.

C. Distributors' Defenses

When faced with anecdotal and empirical evidence of the type described above, distributors might offer a number of arguments for why they might distribute films starring racial minorities to fewer theaters than non-minority films. First, distributors contend with a perception by theater chains and movie critics that stories featuring love themes or non-violent plots fail to bring a large and diverse audience to the theater for majority-minority films. In short, the studios and distributors are

153. As other quantitative analyses have demonstrated, this phenomenon also extends, in part, to television network programming. See Robert Schmidt, Airing Race, BRILL'S CONTENT, Oct. 2000, at 112.

154. While a string of movies in 1991 led many chains to embrace the profit making potential of movies with mostly African-American casts, the under-performance of Director John Singleton's non-violent 1993 movie Poetic Justice (Columbia Pictures 1993) dampened enthusiasm for majority-minority films. See, Pristin, supra note 112.
simply creating and providing movies for audiences with distinct tastes and preferences. As such, studio advocates argue that these consumer preference externalities (industry jargon for consumer demand) drive production and distribution decisions, not some vague irrational market prejudice by studios. Because the issue of demand is a compelling justification for industry behavior, one must ask to what extent demand or consumer preferences are relied upon or are reliable. Studios do not, however, discuss another quiet possibility: that White consumers consistently reject movies with minority actors for racial reasons. It is also possible that studios aggressively market movies for distribution but that individual theater owners reject the movies.

The other significant set of distributor arguments actually seem to focus on production, not distribution. Some studios argue that because the international market for films now accounts for roughly 50 percent of total revenues, movies without international appeal are less likely to be distributed and marketed widely in the United States. During the period studied here, films produced in the United States comprised 85 percent of the international film market and 90 percent of the market in Europe. As the international market for Hollywood films expands, some defenders of these racial inequities argue that non-action films just do not fare well in the lucrative overseas market. Duncan Clark, the head of the international theatrical department at Sony, once argued, “Black baseball movies, period dramas about football, rap, inner-city films—most countries can’t relate to that.” The chairman of Universal Pictures added that “history has said that African American movies don’t translate” overseas.

Despite some efforts to address these discrepancies, these “international market” arguments seem disingenuous for many reasons. First, two-thirds of all movies produced during a representative year of this study failed to earn a profit overseas. Thus, restricting production or distribution based on that metric might not be a reliable market-making device. Second, if the distribution and marketing of these films in the United States is based upon a faulty race-based logic, it might seem odd that the American distributor “usually provides the worldwide marketing

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156. Masters & Trescott, supra note 122.
158. Id. (quoting Casey Silver).
plan and material for a film’s marketing campaign."¹⁶⁰ For, if the American campaign were based on flawed assumptions and an inaccurate market demand, then this would surely be replicated if the same market-makers crafted the plan for marketing and distribution overseas. Third, it will be difficult to establish a strong overseas market for talented women and minorities when distributors for action movies like *Drop Zone* change the overseas posters to remove the lead Black actor’s face and reduce the prominence of his name.¹⁶¹ Fourth, while some majority-minority movies may fare poorly abroad, this logic still fails to address why these movies are underdistributed in the *United States*. Fifth, some well-known movies featuring prominent African-Americans have been foreign box-office profit leaders.¹⁶² Studios that have failed to recognize the value of their majority-minority domestic hits have suffered financial peril when others stepped in to take over international distribution efforts.¹⁶³ Further, majority-minority films made for moderate budgets have consistently turned profits even prior to foreign or video release.¹⁶⁴ Throughout the 1990s, despite some successes and an eight year record in the United States alone ranging from 100 percent returns on investment to a break-even recovery, the studio system continued to underdevelop and market films with minority casts.¹⁶⁵ Some suggest that the concomitant failure to seriously address contentious issues on film was a product of Hollywood studios’ desires to

¹⁶⁰. Even where foreign market analysts suggest changes, they still must be approved by the U.S. studio parent. See Danan, *supra* note 90, at 137.

¹⁶¹. The U.S. version of *Drop Zone* (Paramount Pictures 1994) featured a large photo of box-office talent Wesley Snipes and his name in big letters. The French posters for the movie did not feature a picture of Snipes and reduced the prominence of his name. The change was recommended because Snipes was less well known in France. He has become more well-known since, but more for his advocacy involving the tax code than his acting. During the data-period discussed here, Snipes was a large draw.

¹⁶². The Martin Lawrence and Will Smith feature *Bad Boys* (Don Simpson/Jerry Bruckheimer Films 1995) and the Eddie Murphy vehicle *Dr. Dolittle* (20th Century Fox Film Corp. 1998) both generated foreign box office results larger than their already impressive U.S. grosses. Significantly, both movies featured only minority characters in the leading roles. While certainly an exception, the virtually all-minority Eddie Murphy movie *Coming to America* (Paramount Pictures 1988) grossed $350 million on the international market. See, e.g., Lambert, *supra* note 93, at 46.

¹⁶³. One notable example was the domestic hit *Sister Act* (Touchstone Pictures 1992), featuring Whoopi Goldberg. Disney aggressively promoted it overseas and made $143 million. See Waxman, *supra* note 157, at 3.

¹⁶⁴. Even lesser known movies like *Jason’s Lyric* (The Jackson/McHenry Co. 1994) produced strong profits—both by its film and soundtrack. Made for under $7 million, the movie grossed $6.3 million in only its first twelve days of release. See Louis B. Parks, *‘Lyric’ Director Takes Different Look at City*, *Houston Chron.*., Oct. 7, 1994.

¹⁶⁵. No studio that released a majority-minority movie to a minimum of five hundred theaters during the 1990s reported a negative return in expenditures.
make their fortunes by "purveying comfortable notions about American culture."\textsuperscript{166}

In addition, producers and distributors might argue that since films with no racial diversity sell well, there is no reason to change their behavior. Since films with no diversity can sell, there seems to be no benefit in adding significant numbers of minority actors into the mix of films scheduled for production and no need to think deeply about racial assumptions in the distribution calculus. Indeed, one studio's vice president of development notes that "[t]here's no [B]lacks in \textit{Saving Private Ryan} or \textit{There's Something About Mary}, and they sold at the box office. So there's not a lot of incentive to make changes. It's wrong, but that's the reality."\textsuperscript{167} Further, this same-race approach to marketing reinforces the dominant view (which I suggest is the result of lack of competition) that studios do not even consider the possibility of a White audience attending a majority-minority movie. Likewise, in television production, the success of the all-White \textit{Seinfeld} reinforced the idea that both networks and advertisers can create hits without regard for the inclusion of racial minorities—even when the show is based in a diverse city like New York.\textsuperscript{168}

Next, distributors would remind critics that they have already captured the minority audience—whether for majority-minority films or non-Black wide-release films. In short, studios know the following: market research has long demonstrated that African-Americans consume entertainment at rates exceeding the non-minority population. As described earlier, African-Americans watch 40 percent more television than non-Blacks;\textsuperscript{169} additionally, as mentioned earlier, though they comprise 12 percent of the population, they are 25 percent of the market for commercial films.\textsuperscript{170} This has led to an unusual problem of supply and demand. Social science literature indicates that African-Americans accept, desire, and maintain a significantly higher percentage of Black-White integration in their social (and political) lives than the average White-American.\textsuperscript{171}

\textsuperscript{166} See Nurse, supra note 95. (providing a rich contrast of the commercial success of the love story \textit{Titanic} (20th Century Fox 1997) and the per-theater success, but overall box-office stale, performance of \textit{Amistad} (DreamWorks SKG 1997)).

\textsuperscript{167} An anonymous studio executive quoted in Allison Samuels & John Leland, \textit{They've Got Next}, \textit{NEWSWEEK}, Apr. 5, 1999. The executive was also wrong; \textit{There's Something About Mary} (20th Century Fox Film Corp.) featured well-respected African-American actor Keith David in the part of Mary's stepfather.


\textsuperscript{169} Jacqueline Trescott, \textit{For Blacks, 50 Years on the TV Fringes}, \textit{WASH. POST}, Apr. 25, 1999.

\textsuperscript{170} Nurse, supra note 95.

\textsuperscript{171} Professor Ely argues that in the context of political representation, White voters consider Blacks a threat when Blacks reach a certain percentage of the voting population. In contrast, Black voters "are probably so accustomed to [W]hite people being a majority
Given that this is so, the average African-American consumer has little difficulty choosing integrated or predominantly White cultural options for entertainment; the experience of sharing cross-cultural interactions is familiar and does not produce negative reactions. Since African-Americans, therefore, can comfortably embrace existing entertainment options at much higher rates than their White counterparts, the economic incentive to diversify entertainment options to add more African-American or minority characters to "White" films (or television shows), for example, is extremely low.

One might wonder about two clear empirical results from the three models that this Article presents that seem contrary to a theory of market inefficiency: (a) that White-male stars impact a film's final revenue substantially, and (b) that (on average) majority-minority films make less than other films. How can these results be reconciled with claims that those distribution decisions are irrational? In short, why can't it be that race-skewing in the marketplace is simply a market exemplar of statistical discrimination?

With respect to the independent effect of White-male stars on a movie's revenue, this effect is nonetheless consistent with a market that also exhibits racially skewed outcomes that are inefficient. When the presence of White-male stars is held constant, the presence of a majority-minority cast does not negatively impact revenue. In other words, for pure box-office revenue, it is theoretically more efficient to make movies only with proven White—or Black—box-office stars. It is the other universe—the majority of all films without a guaranteed star—where the racial-skewing lacks a rational market purpose. Put differently, the data suggest there is no box-office expected difference between the returns of two movies if neither has box-office stars and if the only thing distinguishing them is the race of the actors.

It is true, however, that majority-minority films earn less money on average, but this misses the anticompetitive point. If distribution of majority-minority films is substantially less than other films on average, we would expect to see, on average, a similar shifting of box-office performance downwards for such films. In fact, there is such a downward performance (since additional screens are tied to additional revenue), but the downward performance is much less than the data would predict in a non-racially skewed world. In other words, when the relationship be-

that experiencing them as even a sizeable majority is likely to seem more relief than threat.” See John Hart Ely, Standing to Challenge Pro-Minority Gerrymanders, 111 Harv. L. Rev. 576, 593 (1997) (exploring legal issues related to white voters who challenge their redistricting from a majority-white to a majority-minority district).

172. Some prominent research programs suggest that members of “low-status” ingroups manifest in-group bias less than members of “high-status” groups. See, e.g., Marilyn B. Brewer & Rupert J. Brown, Intergroup Relations in 2 Handbook of Social Psychology 570 (Daniel T. Gilbert, Susan T. Fiske & Gardner Lindzey eds., 4th ed. 1998).
between box-office revenue and distribution is held constant, the negative
effects of race as an independently acting variable further drag distribu-
tion downward to a lower point than it should be if distribution is tied
solely to expected demand and projected box-office performance.

The foregoing analysis rests on certain assumptions about the con-
nection between budgets, profits, risk, and race. Because budgets and
advertising expenses are closely held for many films, it is difficult to pre-
cisely estimate the overall return on investment for most of the films in
the 1990s. However, none of the evidence gathered for this Article sug-
gested that a majority-minority movie was not “profitable.” The question,
then, becomes one of profit scope and maximization. If majority-minority
movies are only expected to have a finite tail of profit distribution and
other movies have a potentially unlimited profit distribution tail (e.g., The
Dark Knight, which earned more than $500 million in the United States
alone), it could be a rational strategy to focus exclusively on producing
and distributing movies that carried both a higher degree of risk and the
potential for a higher return. However, in a purely competitive market,
one might expect that the majority-minority films, with a no-loss history
and at least a mild-rate of return, would attract an equal amount of in-
vestment and attention from investors willing to make their spread over
ten movies and not one. However, there is no evidence that this market-
shifting took place.

In a marketplace with five dominant players during the 1990s, there
were few incentives to make such an investment. Hollywood studios ar-
gued that the limited distribution of majority-minority films was rational
following the moderate profits (in raw dollars generated) of many majori-
ty-minority films during the 1990s. Unfortunately, for those who
sought to expand the marketplace for majority-minority films, even the
successful producers or directors of earlier works such as New Jack City,
Boyz N the Hood, Hollywood Shuffle, and Malcolm X did not consistently
produce box-office rates of return equivalent to those movies. Further,
because the market’s demand metrics were so crude, there was no availa-
ble research throughout the 1990s that would indicate what types of films
the African-American consumer consistently supported or what types of

173. See The Dark Night, Box Office Mojo (Sep. 26, 2012, 8:23 PM),
174. See Gary S. Becker, A Note on Restaurant Pricing and Other Examples of Social
Influences on Price, 99 J. POL. ECON. 1109 (1991) (discussing economics of “quality-
certification” process).
175. Mario Van Peebles followed NEW JACK CITY (Warner Bros. Pictures 1991) with
the low-grossing POSSE (PolyGram Films Entertainment 1993). John Singleton’s Poetic
JUSTICE performed poorly compared to BOYZ N THE HOOD. The studio-backed THE FIVE
HEARTBEATS (20th Century Fox 1991) and THE METEOR MAN (Metro-Goldwyn-Mayer
1993) underperformed Robert Townsend’s privately funded first movie. And, following
MALCOLM X (Largo Int’l N.V. 1992), Spike Lee’s movies during the 1990’s were profitable
but on a smaller scale.
majority-minority films would generate sufficient non-minority audiences. As a result, even John Singleton, director of the highly profitable *Boyz N the Hood*, noted that he had to "press" Warner Brothers for more money to complete his fourth film, which eventually cost $28 million.\(^{177}\)

D. Revisiting "Faux-Competition": Why Inequities Might Persist

None of these proffered excuses or defenses for skewing directly rebuts evidence gathered for this Article. If one accepts the empirical results—whether as causal proof or mere correlations—they nonetheless demonstrate that rational firm behavior deviates significantly from commercial optimality in the real world.\(^{178}\) During the 1990s, films featuring minorities were not, as was commonly believed, economically inefficient engines of studio and theater profit. Instead, one might expect that if the market for these films was underserved, theaters showing these films would actually have higher average revenue than for most other types of motion pictures.\(^{179}\) As a result of the limited screen space, however, these films often did not generate a large overall box-office intake. If the films were featured on screens in proportion to their actual demand, they would have generated even more income for studios/distributors and for women and minorities in the entertainment marketplace. Something about this market inefficiency during the 1990s seems particularly striking given that the failure to find the most profitable movies to book also hit theater chains in their pocketbooks. Between 1999 and 2001, America's four biggest theater chains, Loews, Regal, Carmike and AMC lost more than $340 million. While acknowledging its losses, Carmike blamed the studios' aggressive financial terms for booking and keeping Hollywood big-budget movies as the reason for theaters' large financial losses.\(^{180}\) Perhaps an investment in majority-minority films might have proven more successful.


179. This has been true since at least the per-theater dominance of *New Jack City* (Warner Bros. 1991) and *Boyz N the Hood* (Columbia Pictures Corp. 1991). In 1994, the majority-minority *Jason's Lyric* (The Jackson/McHenry Co. 1994) was ranked third overall during its first weeks of release, despite playing at only 40 percent of the total theaters of the box office leader. Similarly, the movie *Amistad* (DreamWorks SKG 1997) came close to dominating the weekly charts, despite playing in roughly only 25 percent of the theaters of the box office leader.

180. For a more detailed explanation, see Shone, *supra* note 26, at 290–91.
When summarizing the profit maximization model employed throughout Hollywood's first century, all available evidence suggests a model of imprecision, guess work, and instinct, and a lack of rigorous models and demand analysis. Therefore, it would not be entirely surprising that studios, distributors, and theaters could not accurately match distribution with eventual grosses and profit. Given the presumptions surrounding majority-minority films in this concentrated market, it is only somewhat surprising that these films were generally given an overly-pessimistic distribution base. But, there are a number of reasons why this might occur, and not all of these reasons have to be rooted in racial animus, racial discrimination, or subtle corporate racial bias. Risk aversion may play a role, and the status-quo/path-dependency inherent in a non-competitive system might also be factors. How might these factors be interrelated?

Many explanations might account for market inefficiency, but evidence gathered for this Article suggests that one plausible explanation of the inefficient behavior of Hollywood studios might be that market-skewing by race is plausibly induced by lack of competition in both production and distribution. The scarcity of wide-release producers and the concentration of distribution and production amongst roughly a dozen producers, suppliers, and distributors of such content make the race-based input and output problem a fairly entrenched one. As one assessment notes, "Hollywood's creations are the mirror in which Americans see themselves—and the current racially skewed reflection is dangerously distorted."

How can this be? Professor Ian Ayres offers one solution—"beliefs that are based on erroneous stereotypes may not be tested by the market equilibrium. If market experience does not teach sellers that their preconceptions are false, disparate treatment that is both inequitable and inefficient will persist." Ayres points out that it is possible for firms to maintain false beliefs in a growing and profitable market or in a weakly competitive one. These beliefs become self-perpetuating because consumers will respond to a stereotypical approach in a predictable way and reinforce the stereotype. Put differently by Cooter, increased competition intrinsically allows for "[p]eople with different perspectives [who]…"
tend to notice things that would be missed by people with the same perspective.”

Since oligopolies and cartelistic industries may be more likely to implement discriminatory practices, one benefit of increased competition, new actors, and new perspectives should be a reduction in market-wide racial bias.

In other words, highly consolidated industries can produce racially disparate impacts or remain subtly racially biased because they lack the economic pressure, knowledge, or robust market mechanisms to create pressure to change. These antitrust problems are indeed part of the underlying issue here: since the five major studios and their distributors supplied 90 percent or more of all film content to the nation’s theater screens during the 1990s, it would have been difficult for outside firms to penetrate the market to change this discriminatory calculus. The data gathered for this Article, while establishing a correlative effect between consolidation and race-based inefficiency, cannot decisively prove that one causes the other. Nonetheless, the combination of historical and empirical evidence suggests that as firms become more dominant in the marketplace, these race-based inefficiencies increased over time.

During the 1990s, the racial impasse in the distribution market was enhanced by yet another powerful reason why market actors did not modify their behavior. Between 1990 and 2000, total box-office grosses increased from $5.0218 billion to $7.661 billion; in most years, the rate of growth far outpaced inflation. In other words, more than ten years of (more or less) increasing revenue gave studios and distributors little incentive to dislodge their folk beliefs regarding production and distribution strategies of movies predominated by minority actors.

Ayres’s reflections are also consistent with the insights of social psychologists. Floyd Allport’s widely discussed analysis of pluralistic ignorance bears some similarity to the inefficiencies of markets discussed here. For Allport, pluralistic ignorance exists when, within a group of individuals, each person quietly believes that his or her own perception, behavior, and understanding of the relevant world are different than those of his or her colleagues. Rather than risking taking an unorthodox position or revealing a departure from expectations, the group member instead chooses to go along with the

189. This behavior suggests that, at some level, corporations and distributors believed that their actions were both efficient and revenue maximizing, but if such actions were not (as the data suggests), they would have made more money with a more strategic (and less race-centered) approach.
group's perceived norm out of a desire to fit into the group and exemplify the group's philosophy.\textsuperscript{191} Applying these insights to the results in this Article suggests that it is possible that the disparities identified here could be apparent to some or many within the system, but without a systemic change in the higher levels of decision making (e.g., the studio focus on “blockbusters”), such insights might be more quietly held out of respect for the group's dominant position.

Toward the end of the 1990s, some promising trends emerged. In the summer of 2000, for example, over the course of four successive weekends, four different films with African-American leads opened with significant distribution and with the week's top grosses.\textsuperscript{192} This development, coming on the heels of an explosion of teenage interest in hip-hop culture, found one critic applauding the developments and concluding that "Black-themed movies [are] no longer just for a niche market."\textsuperscript{193} Yet, given the cyclical nature of distribution trends throughout that decade, it would be hasty to suggest that the period between 2000 and 2010 would prove, for that reason, to be substantially different. Further work on more recent trends will be left to future study.

Given the overall historical posture of the industry, coupled with the context and data presented in this Article, the question is not "do the race-based distribution inequities need to be fixed?" but "how might we do so?" For a variety of complicated reasons, the solutions to this market-wide failure do not lie in traditional anti-discrimination law; instead, the solution lies in market-driven initiatives and the potential for antitrust action. To explain why those remedies work best in this market, it is useful to review the full arsenal of tools in the anti-discrimination toolbox and how they might be applied to the market bias described above.

III. The Anti-Discrimination Toolbox

When contemplating solutions for market-wide inefficiencies that may lead to racial bias, solutions can range from aggressive civil rights actions to a hands-off approach and market-force corrections. In this market, however, neither of these familiar paradigms may solve for the diffuse nature of the market harm or the difficulty in measuring how the harm is manifested. If these familiar arguments are unavailing, then we should not expect traditional civil rights remedies to be particularly

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\textsuperscript{192} The films were Martin Lawrence's \textit{Big Momma's House} (20th Century Fox 2000), Eddie Murphy's \textit{ Nutty Professor II: The Klumps} (Universal Pictures 2000), Samuel L. Jackson's \textit{Shaft} (Paramount Pictures 2000), and the Wayans Brothers' \textit{Scary Movie} (Dimension Films 2000).

successful in their current form or in an evolved state. Instead, for a market-wide problem like this, one might pivot toward market-wide solutions that are either voluntary industry-led efforts or government-driven efforts based on antitrust law. To determine whether the familiar anti-discrimination categorizations might work better as market resolving forces, it is useful to outline their strategic logic, apply the most commonly used frameworks, and then compare them to market-based solutions, antitrust law, and other alternatives.

A. Familiar Paradigms

When proposing remedies for the type of racially-skewed decision-making and outcomes described here, one must consider the concerns that are commonly raised when advancing methods designed to eliminate new or subtle forms of bias. As Professor Rhode sets out in her recent work on expanding certain coercive anti-bias regimes, "In considering these questions, it often makes sense to consider both the nature of the characteristic and the context of discrimination." Asking whether inequities in film distribution markets warrant the expansion of existing legal frameworks implicates the broader theoretical question of whether any intervention to eliminate such bias would be warranted in the first place. Both free-market and anti-discrimination regime perspectives have strong advocates and an internal logic supported by theoretical models.

The debate about remedying racial-bias begins with those who insist that a government enforcement regime is neither necessary nor appropriate. The free marketplace, dependent upon maximizing profits from a diverse array of workers and consumers, will not discriminate by race. Government race-based regulations that seek to monitor, control,

194. Some may argue that this skewing is proof of bias; others will claim that it is proof merely of flawed judgment. Regardless, it is a form of inefficient behavior that is practiced by corporations and which appears to be against the corporations' self interest.


198. Following such logic, corporations who harbor racial biases or false perceptions about individuals will falsely judge the marketplace, imposing a cost for their bias. Recognizing this cost will cause the holder of the false beliefs to eliminate them. See, e.g., David A. Strauss, The Law and Economics of Racial Discrimination in Employment: The Case for Numerical Standards, 79 Geo. L.J. 1619, 1640 (1991).
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and specifically outlaw racial discrimination in employment are inefficient and unnecessary because they interfere with the natural Darwinian consequences of inefficient economic choices. They further exacerbate economic inefficiency. In short, firms that continue to discriminate in employment will suffer from the ultimate punishment—they will lose business, lose profit, and perish, so government intervention is superfluous.199

Therefore, rather than constraining the market, some might argue that the law should let the natural economic order run its course. However, based on the status quo of extensive regulations, free market theorists suggest that market bias will never be eliminated. This is so because the existing government race-based regulations promote market inefficiency and exacerbate market bias by thwarting the market’s natural methods of uprooting irrational race-based behavior. However, few adherents to the free market view within the political system are willing to extend that argument to its logical legislative conclusions.200 Even free-market arguments can allow for some anti-discrimination legal remedies “to the extent that there is monopoly or restricted entry” into various markets.201 How these principles might directly apply to non-competitive markets like those discussed here remains unclear; most scholarship in this tradition focuses on laws affecting labor and employment in the hiring/employment market and not transactional markets for products.202

Others argue that most or all forms of racial bias can be eliminated by government intervention. Discrimination and the types of bias identified here, at their core, are not rational. Therefore, individuals and organizations can (and do) discriminate in a variety of ways, despite the fact that such discrimination is profit-limiting, illegal, or both. Advocates for anti-bias laws argue that individual and organization behavior is not nearly as ordered and efficient as free-market theorists would have us

200. One reason may be that scholars who advocate the use of markets as the answer to eliminating discrimination acknowledge that even perfect competition will not eliminate the more subtle manifestations of discrimination that exist in today’s complicated marketplace. See, e.g., Richard A. Epstein, Standing Firm, on Forbidden Grounds, 31 SAN DIEGO L. REV. 1, 1–2 (1994).
believe. Government regulation can serve to change and define the preferences of firms and individual actors. However, some anti-discrimination law advocates would take this argument further by expanding legal remedies for multiple forms of bias, eliminating distinctions between willful and accidental discrimination, expanding tort regimes to punish racially insulting language, and considering unique ways of addressing past discrimination—like reparations. Rejecting the claims of the free-marketers, these theorists have also relied on traditional econometrics to bolster their positions.

Despite the normative appeal of arguing that federal law should be further expanded to enforce compliance with anti-discrimination ideals, the evidence gathered for this Article suggests that at least with respect to film distribution markets, such efforts might be counterproductive. Why might such efforts be ineffective or counter-productive? The roots of such answers are in the limitations of traditional civil rights frameworks, which have not been easily applied to entertainment industry matters and have been construed with a particular emphasis on employer actions in a traditional employer/employee relationship.

B. Traditional Anti-Discrimination Law: Not an Option

Title VII has been the cornerstone of anti-discrimination law for almost sixty years, and the full history of that Act will not be recounted
The most frequently used provisions of Title VII forbid most employers from intentionally discriminating against an employee because of that employee’s “race, color, religion, sex, or national origin.” Most individual cases under Title VII rely on either direct or circumstantial evidence of discrimination. The Supreme Court set out the standard for analyzing these claims in *McDonnell Douglas Corp. v. Green.* But several market barriers prevent Title VII anti-discrimination actions from working in a non-competitive market such as the one discussed in this Article. This is not to suggest that such barriers are insurmountable; instead, it is to recognize that in a marketplace such as the one described here, such regimes are more difficult to apply.

The first barrier to applying traditional anti-discrimination regimes to market-wide bias is rooted in the structure of certain non-competitive industries like Hollywood’s film market. If a film producer or financier were to sue in such a non-competitive environment, a comparable business opportunity in the immediate geographic area—or even nationwide—would likely not be available. As such, even if discrimination occurs, the pressure to remain successfully engaged in a professional endeavor within a consolidated or non-competitive market likely outweighs the value of filing a traditional claim of racial discrimination.

The second barrier to a successful market-wide discrimination claim by an affected participant is a network effect. In a public professional network such as film production or distribution (along with law professors, doctors, and so on), accusing one’s business colleagues of biased or racist behavior or market dealings often means that said colleagues will be the

211. For a detailed view of the history surrounding the Act’s enactment, see PHILIP A. KLINKNER WITH ROGERS M. SMITH, THE UNSTEADY MARCH: THE RISE AND DECLINE OF RACIAL EQUALITY IN AMERICA (1999).


213. See, e.g., Luciano v. Olsten Corp., 110 F.3d 210, 215–16 (2d Cir. 1997).


216. As Donohue and Siegelman demonstrate, most plaintiffs in employment discrimination cases are not working for the alleged discriminator at the time they file the lawsuit—suggesting a great impediment remains to filing when one intends to continue working for the same employer. See John J. Donohue III & Peter Siegelman, *The Changing Nature of Employment Discrimination Litigation,* 43 STAN. L. REV. 983, 1025–27 (1991).
subject of a highly publicized dispute within that profession. Thus, even if other professional avenues are available as options, a typical plaintiff might avoid a discrimination lawsuit that would cause other potential business partners to view him or her as tainted goods. For example: Producer Litigation Larry sues Distributor X and Theater Chain Y, claiming racial bias in distribution patterns and practices. It is highly likely that Distributor Z in the same city and Theater Chain A will learn of this dispute through trade magazines and other networks, and this could affect their willingness to engage in a nationwide distribution plan for Producer Larry’s additional films.

The third major barrier to filing a traditional anti-discrimination claim in non-competitive markets is the lack of direct proof of bias, such as objective criteria for evaluating a product’s inherent worth or a comparable reference group for the product. Large bureaucratic firms, ranging from the government to large corporations, claim to use evaluation criteria that naturally “leave less room for subjective and potentially discriminatory judgments.” However, in markets like film distribution, much of the work product and placement is subjectively evaluated according to taste, skill, results, aesthetic, and other intangible factors, which are quite vulnerable to an infusion of racial bias. Against these various subjective categories, an individual challenging distribution practices would somehow have the very difficult task of showing that the original distribution plan was objectively wrong. In short, when so much about a service’s or product’s value is subjectively evaluated, applying a modern


219. Krieger demonstrates that inter-group bias and discrimination often occur when organizations fail to provide a detailed and precise set of performance evaluation guidelines that allow for each individual to be evaluated according to the same criteria. See Linda H. Krieger, The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity, 47 Stan. L. Rev. 1161, 1246 (1995). Because these evaluations are subjective, they are difficult to evaluate across different employees in a typical employment discrimination case.

220. Harry J. Holzer, Why Do Small Establishments Hire Fewer Blacks Than Larger Ones? 33 J. Hum. Resources 896, 907 (1988). However, though subjective judgments might be harder, other forms of discrimination (such as patronage or nepotism) can remain even more difficult to detect in positions where formal entry-level criteria are low.


222. See Watson v. Fort Worth Bank & Trust, 487 U.S. 977 (1988) (holding that subjective employment decision-making criteria can be challenged under a theory of disparate impact).
anti-discrimination regime to analyze a subjective decision or practice is "neither empirically nor economically feasible."  

Title VII is the most commonly used method of litigating federal discrimination claims, but it is not the only option. Here, focusing on federal law, a few alternatives are left to remedy nuanced cases of racial bias and § 1981 is chief among them. To prove a claim under § 1981, an individual needs to show (a) membership in a racial minority group, (b) an act of discrimination concerning the making or enforcing of a contract, and (c) the discriminating person or company intended to discriminate on the basis of race. The key difference between enforcement of Title VII and § 1981 is that claims under § 1981 must show that the offending party engaged in purposeful discrimination. The test for intentional discrimination in § 1981 lawsuits is the same as the Title VII test for discriminatory treatment. First, the plaintiff must bring forth direct evidence of disparate treatment and make a prima facie case of intentional discrimination. Then, the burden of persuasion shifts, and the defendant must rebut the direct evidence of discrimination by proving that it would have made the same choice even if it had not taken race into account. Although discrimination must be intentional, it need not be based on racial animus; racial categorization and discrimination will suffice. The problem with § 1981 lawsuits in non-competitive markets like film distribution is essentially the same as with Title VII: individual litigants have evidentiary barriers and risks to future business prospects. Further, it is not clear that § 1981 claims for market buyers can be applied to market sellers. If § 1981's scope does not include marketplace sellers, then producers and owners of films would not be able to rely on its provisions. Therefore, like Title VII, § 1981 lawsuits would not be the most

224. At state and local levels, of course, additional legal remedies exist but will not be discussed extensively here.
225. PERVERSIVE PREJUDICE, supra note 1, at 125–36 (describing use of §§ 1981–82 as remedies in cases of patron discrimination, as in Ayres's car audit study described earlier).
227. See General Bldg. Contractors Ass'n v. Pennsylvania, 458 U.S. 375, 389 (1982). Ayres suggests that amending § 1981 to allow for disparate impact claims would help to further combat market-wide racial bias. See PERVERSIVE PREJUDICE, supra note 1, at 136. While Ayres is correct, the likelihood of amending § 1981 at this point is too slim to allow for vigorous discussion of its merits as a plausible or immediate remedy.
230. See, e.g., Goodman v. Lukens Steel Co., 482 U.S. 656, 668 (1987) (finding § 1981 liability even though "there was no [sic] suggestion ... that the [defendant] held any racial animus").
231. See generally PERVERSIVE PREJUDICE, supra note 1 (focusing on buyer remedies against discriminating sellers).
efficient options for individuals experiencing market-wide discrimination in film distribution markets.²³²

Amending anti-discrimination laws, so as to make them more applicable to the market problems described in this Article, is also not ideal. As Professor Rhode explained when summarizing the prevailing view of those opposed to expanding bias law in this way, there are two primary concerns.²³³ The first concern, articulated by both progressive and classical theorists, is that the law should not deal with such murky waters because some cultural tastes and styles are simply not mutable or worth legal attention.²³⁴ Others worry that expanding the law to include unfamiliar forms of bias risks trivializing existing bias claims in familiar categories by essentially watering down the overall potency of the total amount of discrimination cases.²³⁵ So why should a market participant rely on traditional enforcement mechanisms or expanding them to include new and novel theories of discrimination? Instead, as a useful alternative, market initiatives and antitrust theories may provide easier solutions to the market problems identified in this Article.

C. Market-Based Solutions and Antitrust Remedies

Given the above reasons that traditional anti-discrimination regimes are difficult to apply to this market, market-driven solutions and the heavy hand of antitrust law remain as the most viable law-based solutions to racially biased market outcomes.²³⁶ For example, interested corporations could create additional sub-companies for creating alternative production and distribution patterns in non-competitive markets. Corporations experiencing discrepancies between lack of minority supply and a strong demand for certain products could, of course, expand the network of distribution of those products. Further, outside corporations and individual actors could, in theory, respond to corporate intransigence by entering into the marketplace and creating and/or distributing new supply to fill the needs of the existing market base. Similar to the National Football League’s approach to coaching vacancies, corporations could contractually agree to hear a minimum number of “diversity” proposals per year or to implement market diversification strategies in markets that have been

²³². Consumers in a non-competitive market also cannot easily challenge a race-biased market structure, but that is not my focus here.
²³⁴. Id.
²³⁵. Id.
²³⁶. For a broader discussion of the benefits of using “market-like instruments” because of the inapplicability and failure of “command and control” regulations like Title VII, see Cooter, supra note 186, at 133–35.
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identified as underserved.\textsuperscript{237} And, as discussed later, it may very well be that advanced technology—developed after the 1990s—may prove to be a silver bullet for racial skewing in film distribution.

Each of these market-driven strategies requires no government oversight or even substantive additional expenditures. Instead, by negotiating and contractually assigning new responsibilities and options, entrepreneurs who recognize discrimination in non-competitive markets stand both to reap impressive profits and drive larger economic growth.\textsuperscript{238} Within previously non-competitive markets, for example, financial services and banking, the wave of post-deregulation competition substantially increased racial equity across a variety of metrics while the markets experienced rapid growth and record profits.\textsuperscript{239}

The direct nexus between antitrust law and discriminatory practices remains relatively unexplored as a viable remedy. However, there are some scholars—Professors Ian Ayres and Robert Cooter among them—who have presciently invited a discussion of the connection between racially disparate market impacts, highly consolidated industries, and antitrust remedies. Although these academics have touched upon the relationship between competition and inequality, their works remain solicitations for further inquiries into the practical application of antitrust law to issues of discrimination.

Professor Ayres characterizes the perceived opposition between civil rights laws and the free market as a historical misunderstanding, arguing instead that “disparate impact law can complement antitrust and consumer protection law to make markets more competitive and more equitable.”\textsuperscript{240} Perfect competition, according to Professor Ayres, forces decision-makers in a given industry to adopt policies based on substantive factors because rival firms create the need for efficiency, not speculation.\textsuperscript{241} However, the problem facing industries where inefficiency has lead to

\textsuperscript{237} The NFL's approach is rare, but it is a notable example of using the threat of a lawsuit (and the potential discovery that would inevitably ensue) to achieve a contractual remedy in a non-competitive market. Thus, though the lawsuit might itself have failed, the public relations implications of the lawsuit forced the NFL to seek a more market-based solution to the problem and created the "Rooney Rule." See N. JEREMI DURU, ADVANCING THE BALL 61-86 (2011).

\textsuperscript{238} In a larger context, this discrimination extends to the economic development of a variety of markets and is not limited to non-competitive markets. See, e.g., Keith Hylton & Vincent D. Rougeau, Lending Discrimination: Economic Theory, Econometric Evidence and the Community Reinvestment Act, 85 Geo. L.J. 237 (1996).


\textsuperscript{240} Ian Ayres, Market Power and Inequality: A Competitive Conduct Standard For Assessing When Disparate Impacts Are Unjustified, 95 Cal. L. Rev. 669, 674 (2007).

\textsuperscript{241} Id. at 676–77.
racial disproportionate outcomes is that the benchmark for competition is either extremely low or unenforced by the government.\textsuperscript{242}

As Professor Ayres explains, the risk associated with relaxed competitive standards in insulated industries is the unequal treatment of racial minorities.\textsuperscript{243} While this disparity should concern advocates for equality, the absence of “the same equal protection norm[s that] undergird[] the social concern with both civil rights and antitrust discrimination” offers an opportunity to import the arm of antitrust law into the arena of racial discrimination.\textsuperscript{244} Currently, meeting competition means doing as little as the market requires. This affords monopolies and oligopolies the defense of claiming that their minimalist practices were consistent with what was economically required given the level of competition. As Professor Suggs explains, these minimalist practices often manifest themselves in the use of racial stereotypes to skirt rising costs associated with the acquisition of information.\textsuperscript{245} In markets where the façade of competition glosses over the absence of meaningful engagement, and where firms can implement market stereotypes without fear of reliability and efficiency, antitrust law can “restrict disparate impacts that are caused by anti-competitive conduct” without overstepping its bounds.\textsuperscript{246}

Professor Ayres does not therein intend to fully detail the practical implementation of antitrust law for the purpose of negotiating obstacles posed by racial bias; however, his insights regarding the relationship between anti-discrimination and antitrust law invite a discussion of how competition laws can have a pragmatic effect on discriminatory practices in the marketplace.\textsuperscript{247} Simply put, the potential union of antitrust and anti-discrimination is not “a mere marriage of convenience.”\textsuperscript{248} Contemporary research of these intersections suggests that one of the “evils” common to the destruction of competition is racial bias.\textsuperscript{249} So how might one have used antitrust law to achieve a less racially biased market?

D. Legal Challenges: Likelihood of Success

Thinking back, if one agrees that racial skewing may be present in this market, that the market was highly consolidated, that the racial skewing may have been caused by the antitrust problems, and that antitrust law

\begin{itemize}
\item \textsuperscript{242} Id. at 677.
\item \textsuperscript{243} Id. at 678.
\item \textsuperscript{244} Id. at 679.
\item \textsuperscript{245} Robert E. Suggs, Poisoning The Well: Law & Economics And Racial Inequality, 57 Hastings L.J. 255, 287 (2005).
\item \textsuperscript{246} Ayres, supra note 240, at 719.
\item \textsuperscript{247} Id.
\item \textsuperscript{248} Id. at 674.
\end{itemize}
could (in theory) be used to address this racial skewing, the final question might be, how could individuals and corporations harmed by these actions have mounted such a challenge?

We can imagine such a challenge would have begun with an assessment of core antitrust doctrine and its direct applicability to this market. Section 1 of the Sherman Act bans collaborations—contractual or conspiratorial—that restrain commerce.\textsuperscript{250} Section 2 bans monopolies and attempts to monopolize “any part of the trade or commerce among the several States, or with foreign nations.”\textsuperscript{225} The Sherman Act subjects offending corporations to maximum fines of up to $100 million.\textsuperscript{252} In addition, Section 4 of the Clayton Act allows a plaintiff to recover treble damages if he can prove he has been “injured in his business or property by reason of anything forbidden in the antitrust laws,” including Sherman Act violations.\textsuperscript{253} Antitrust lawsuits can be brought by the U.S. Department of Justice, the Federal Trade Commission, states, and private litigants.\textsuperscript{254} Given the context of Paramount and other cases, those challenging the industry’s market-wide racial disparities in distribution would likely focus their efforts on establishing the nexus between the injuries described earlier and Section 1 of the Sherman Act.

During the period studied here, to prove violations of Section 1 of the Sherman Act, a plaintiff would have to show “(1) a contract, combination, or conspiracy; (2) in restraint of trade; (3) affecting interstate commerce.”\textsuperscript{255} The key consideration in a Section 1 claim is whether the defendants’ “conduct toward [would-be competitors] stemmed from independent decision or from an agreement, tacit or express” with allied companies to control a market.\textsuperscript{256} Such an agreement can be inferred by “parallel business behavior”—if companies alleged to be conspiring with one another make the same types of business decisions—but such parallel behavior does not definitively show such an agreement.\textsuperscript{257}

Because Section 1 violations do not apply to unilateral conduct, the essential element is the establishment of an agreement between the accused.\textsuperscript{258} Although the agreement is vital to the entire action, courts have historically been willing to accept indirect proof of such an unlawful arrangement provided there was evidence that eliminated the possibility

\textsuperscript{251} Id. § 2.
\textsuperscript{252} Id.
\textsuperscript{253} Id. § 15(a).
\textsuperscript{254} See, e.g., PHILLIP A. PROGER, ANTITRUST PRIMER MATERIALS, at L.C (2010).
\textsuperscript{255} Maric v. St. Agnes Hosp. Corp., 65 E3d 310, 313 (2d Cir. 1995).
\textsuperscript{256} Theatre Enter., Inc. v. Paramount Film Distrib. Corp., 346 U.S. 537, 540 (1954).
\textsuperscript{257} Id. at 541.
that each defendant acted individually. To this end, courts recognized certain “plus factors” that are symptomatic of a collusive agreement, and among these was a pattern of parallel conduct between the defendants.

It might be possible that studios and distributors were engaged in parallel distribution strategies. The evidence discussed earlier in this article suggests that studios and distributors in Hollywood regularly undersupplied the market with majority-minority films capable of generating the same overall revenues as “White” movies. Despite the lack of evidence demonstrating a concrete agreement by the “Big 5” to distribute these majority-minority films according to a predetermined scheme, the amount of revenue foregone by the inefficient distribution of these films might suggest collusion by major players in order for big-budget high-potential investments to crowd the market. It is counterintuitive that over a ten-year period, complex and sophisticated corporations specializing in the production and distribution of films would not recognize the lost potential for profits and remedy market inefficiency.

Yet, approaching the Section 1 violation through parallel conduct is challenging when the alleged conduct is judged by a subjective view of the accused’s business practice. More specifically, alleging that the continuous underdistribution of majority-minority films throughout the 1990s is evidence of a conspiracy to maintain an insulated system rests on the assumption that the distribution regime is itself inefficient, independent, and alterable. Further, parallel conduct may not have been sufficient to explain away the possibility that industry leaders were actually operating similarly because the industry was subject to certain informal assumptions that led to the demonstrated inefficiencies.

The more likely antitrust action during the 1990s would have relied on Section 1 and shifted the focus away from racial inefficiencies to concrete actions taken by the studios and distributors that tended to suggest a desire to secure a monopoly. One such action could have been challenging the de facto union of Universal, Paramount, and MGM under the umbrella of United International Pictures. Although joint ventures are not per se violations of antitrust law, the creation of a confederacy that unduly restrains trade without adding pro-competitive benefits may have been found unlawful under the Rule of Reason analysis. If further evi-

260. See, e.g., Toys “R” Us, Inc. v. FTC, 221 F.3d 928, 934–36 (7th Cir. 2000).
261. Id.
262. No industry operates completely efficiently. Invariably there are some factors that cause industry wide, inefficient practices.
263. See Bd. of Trade of Chi., v. United States, 246 U.S. 231, 238 (1918) (finding that under the Rule of Reason analysis, “[t]he true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition.”)
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dence were to be gathered indicating that the United International Pictures conglomerate was designed to drive out competitors and share profits, it is more likely that this "plus factor" might have withstood initial judicial skepticism. And, finally, even if individual plaintiffs' antitrust evidence lacked persuasive power, it is possible that sufficient complaint about these practices and a reinvigorated DOJ under President Clinton might have used such complaints to conduct a wide-ranging fact finding mission that could have led to government intervention. However, there was no such plaintiff complaint and no such government action, and with a strong shift in the DOJ shortly after the 1990s concluded, aggressive government intervention would prove unlikely.264

Another strategy for a minimally plausible antitrust action by affected market participants would have been demonstrating the power of the dominant player's market share and the concomitant antitrust injuries. While complaints centered on monopolization under the Sherman Act generally look at "predominant market share," courts during this period intervened even in matters where companies control less of the market in separate, but related, antitrust contexts. For example, in FTC v. H.J. Heinz Co., the D.C. Circuit ordered a preliminary injunction to prevent the merger of the second and third largest baby food companies in the United States.265 The largest baby food company, Gerber, controlled 65 percent of the market.266 The Federal Trade Commission was concerned, however, that the merger of Heinz (17.4 percent market share) and Beech-Nut (15.4 percent market share) would reduce competition in the market under another federal antitrust law, the Clayton Act.267

The D.C. Circuit agreed to grant the injunction and compel further review based on calculations under HHI, which, as described earlier, is a commonly used measure of market concentration in merger cases. Though HHI is not as commonly used in cases that hinge on whether companies already monopolize a market under the Sherman Act, the fact that a proposed merger that would create a company that controlled only about one-third of a distinct market indicates that companies that have less than a "predominant market share" may raise some antitrust concerns.

Ultimately, if the purpose of the Sherman Act is "to secure equality of opportunity and to protect the public against evils commonly incident to destruction of competition," antitrust enforcement could be seen as

264. And, to be fair, certain indicators of concentration diminished later in the 1990s as niche players like DreamWorks SKG and others became distributors, temporarily pushing the HHI below 1,500 under some calculations.
265. 246 F.3d 711, 727 (D.C. Cir. 2001).
266. Id. at 711.
clearly applicable to discrimination claims or as an integrated component of anti-discrimination law.\textsuperscript{268} However, though evidence of the type described in this Article may have been useful to confront anti-competitive behavior in the 1990s, certainly the mere presence of an anti-competitive atmosphere in the Hollywood film market would not have been sufficient to establish an antitrust action against major studios and distributors. Instead, an actual antitrust violation must be demonstrated: that is, affirmative conduct on the part of the accused tending towards the acquisition or attempted acquisition of monopoly power needs to be shown.\textsuperscript{269} While indicators such as inordinately high market shares or the extraction of supra-competitive profits might have allowed for the inference of an antitrust violation,\textsuperscript{270} certainly plaintiffs in such an action would have needed more to survive summary judgment.

More recently, subsequent to the period studied here, such opportunities for antitrust actions may have been further diminished because of the Supreme Court's decision in \textit{Bell Atlantic Corp. v. Twombly.}\textsuperscript{271} In \textit{Twombly}, the Court affirmed a lower court's decision to dismiss a claim that various telecommunications companies were violating Section 1 of the Sherman Act.\textsuperscript{272} The Court held that "absent some factual context suggesting agreement" among the defendants to restrain trade, approval of a motion to dismiss was appropriate.\textsuperscript{273} In their claim, the plaintiffs alleged that Bell Atlantic and other defendants engaged in "parallel conduct unfavorable to competition."\textsuperscript{274} The Court found there could have been "an obvious alternative explanation" aside from unlawful agreement between the defendants to explain why they were engaging in the same types of business decisions.\textsuperscript{275}

\begin{itemize}
\item \textsuperscript{268} Ramsay Co. v. Associated Bill Posters of U.S. & Canada, 260 U.S. 501, 512 (1922).
\item \textsuperscript{269} \textsc{William C. Holmes, Antitrust Law Handbook 2009–2010 Edition} 423 (2009).
\item \textsuperscript{270} See, e.g., United States v. Microsoft Corp., 253 F.3d 34 (D.C. Cir. 2001). The D.C. Circuit rejected Microsoft's defense that it could not have monopoly power because although short-term prices were lower, the long-term price of its products was monopolistic. Moreover, the court noted that Microsoft's popularity was indicative of inordinate market power.
\item \textsuperscript{271} Prior to \textit{Twombly}, harmed market participants could have initially relied on a more lenient pleading standard for their antitrust claims. See, e.g., Conley v. Gibson, 335 U.S. 41, 47 (1957) (pleadings are sufficient enough to withstand a motion to dismiss if they "give the defendant fair notice of what the plaintiff’s claim is and the grounds upon which it rests").
\item \textsuperscript{272} 550 U.S. 544, 548–49 (2007).
\item \textsuperscript{273} \textit{id.} at 549.
\item \textsuperscript{274} \textit{id.} at 548–49.
\item \textsuperscript{275} \textit{id.} at 567.
\end{itemize}
Twombly was, at least in part, motivated by the Court’s concerns about the high costs of modern-day discovery in complex civil cases. The Court seemed to be establishing a heightened standard for pleading to ensure defendants are not subjected to the “potentially enormous expense of discovery” based on allegations that may not even pass a simple laugh test. Therefore, the Court held that pleadings require “more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do.” While the Court stopped short of forcing plaintiffs to show their claims were probably true, it did say their pleadings must include “enough fact to raise a reasonable expectation that discovery will reveal evidence of illegal agreement.”

In Ashcroft v. Iqbal, the Court expanded its reasoning from Twombly's antitrust context to pleadings more broadly defined. In Iqbal, the Court had to decide whether a Pakistani Muslim detained after the September 11 terrorist attacks had filed pleadings with enough factual heft to survive a motion to dismiss. The Court also laid out a two-step framework for courts to use when deciding whether a claim pleads enough sufficient facts to survive a motion to dismiss:

Two working principles underlie our decision in Twombly. First, the tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions. Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice. . . . Second, only a complaint that states a plausible claim for relief survives a motion to dismiss. Determining whether a complaint states a plausible claim for relief will, as the Court of Appeals observed, be a context-specific task that requires the reviewing court to draw on its judicial experience and common sense.

This two-step process has guided decisions on dismissal requests in recent antitrust cases, but none of these cases definitively foreclose an effort to challenge the Hollywood market practices described earlier.

276. Id. at 559 (“[T]he threat of discovery expense will push cost-conscious defendants to settle even anemic cases before reaching those proceedings.”).
277. Id.
278. Id. at 555.
279. Id. at 556.
281. See, e.g., Gregory G. Wrobel et al., Judicial Application of the Twombly/Iqbal Plausibility Standard in Antitrust Cases, 26 ANTITRUST 8 (2011); see also In re Text Messaging Antitrust Litig., 630 F.3d 622, 626 (7th Cir. 2010) (noting that Twombly’s scope is still “unsettled,” but that plaintiffs’ circumstantial evidence of illegal collusion and price fixing could survive an initial Twombly inquiry); Richard A. Epstein, Of Pleading and Discovery: Reflections on Twombly and Iqbal with Special Reference to Antitrust, 2011 U. ILL. L. REV. 187,
In short, though the path to eliminating market-wide racial bias through antitrust law has remained open for quite some time, no significant efforts have been undertaken to mount such a challenge. So what remedies might be left?

E. Alternative Solutions

To that end, there are some scholars who suggest that since markets have failed to correct for this problem in the past, the market-based solutions or antitrust remedies proposed herein are unlikely to be implemented. Therefore, they suggest, non-market based legal remedies will provide for swifter justice. Alternatively, others suggest that "cognitive bias" may play a role in the decision-making process. But, this problem need not be so rigidly formulated. It may be that markets have in fact not been fully aware of these racial inequities and their causes; better data, marketing, and research alone can propel markets forward. Another reason may be that large organizations, insulated from pure competition, may have no reason to question their assumptions about their core consumers. If film distributors and (to a lesser extent) theater chains have historically believed that customers harbor racial bias, they may be particularly resistant to change even in the face of contradictory evidence. In any case, it seems imperative that major distributors and chains should determine just why biased outcomes continue to exist and whether they are now indeed most efficiently maximizing the profit that each side so desperately wants.

Further, if it is true that industry-wide phenomena and racial-bias in market outcomes are not easily susceptible to mass litigation, then the best way to solve intractable race bias problems is through industry-level

197 (2011) ("Indeed, the impact of the Twombly/Iqbal rule could vary across different classes of cases. But the reported cases in antitrust, however, do not indicate any undue shift in favor of defendants.").

282. Although cognitive bias is not explored at length here, it may be the case that cognitive bias of decision-makers interacts (in the statistical sense) with the relatively anti-competitive market structure, thus exacerbating the problem. More work must be done to engage this interaction and explore the intersection of these two areas.

283. See, e.g., Ian Ayres, Super Crunchers 112 (2007). Ayres briefly describes cognitive deficiencies of decision makers and explains that "once we form a mistaken belief about something, we tend to cling to it. As new evidence arrives, we’re likely to discount disconfirming evidence and focus instead on evidence that supports our preexisting beliefs."

284. See, e.g., Susan Sturm, Remediying Organizational Discrimination at 242 in Legality and Community: On the Intellectual Legacy of Philip Selznick (Robert Kagan, Martin Krygier, & Kenneth Wilson, eds., 2002) (describing how some large organizations have responded to marketplace inequity or perceptions of internal decision-making bias by adopting "a process of data gathering and analysis to identify the patterns of decision making that risk producing bias").
analysis and market-based solutions derived either from within or by gentle prodding from antitrust authorities. There are not many markets that are highly visible, highly consolidated, and left untouched by traditional anti-discrimination laws; however, the Hollywood production and distribution system is one of them—for now.

CONCLUSION

Rethinking the nexus between industry consolidation and racially skewed market discrimination may prove more rewarding as a method to reducing racial inequality and disparities in commercial outcomes. As a first step in that direction, this Article presents initial evidence that competition in Hollywood, if it could be classified as such, has been limited and that limited level of competition results in both racially-skewed and inefficient outcomes. The net harm as a result of that lack of competition has been a persistent and unique form of racial inequity in market outcomes that has not been adequately remedied and shows (at least during the period studied here) little signs of abating. The long arm of antitrust law did force a small amount of industry change some seventy-odd years ago, but results since then suggest that the initial pro-competitive legal remedies failed to accomplish their objectives or simply caused a shift in industry organization leading to market domination by the major studios repackaged in slightly different forms. Evidence gathered for this Article makes clear that during the 1990s and earlier the industry was characterized by racial impasse in the film distribution process.

To test how the rapid change in technology and demand in recent years could change distribution outcomes, more study is needed. Therefore, having established a baseline from which one might begin to question marketplace efficiency and consider the role of market consolidation and antitrust law in promoting racial equality, future work building on this evidence might trace developments in the period 2001–10 that particularly focus on whether radical changes to the industry brought by technology and refined modeling reversed the trend of racially-biased outcomes shown here. In addition, such work might further explore, using consumer-level data, the role that individual racial preferences might play in structuring product markets and the extent to which corporations might steer products in an attempt to match or mimic consumer preferences. Finally, with the perspective of recent events (e.g., conditions imposed on the Comcast/NBC Universal merger), one might ask whether antitrust law has indeed finally begun to be recognized as an additional tool in the arsenal for achieving racial equality in commerce and across
markets. But reflecting on Hollywood’s first century and the lessons of the recent past might still lead one to conclude that the racial market skewing and inefficiencies identified in this Article might persist notwithstanding technological developments. If such skewing is to be remedied, history suggests that traditional anti-discrimination regimes are not the answer. Antitrust is an option. Perhaps advocates for equality in Hollywood may want to consider sharpening some new tools in their anti-discrimination toolbox.

**Appendix**

### Table 1

**Model: Per-Theater Gross (in $ per Theater)**  
*(Range of Years 1991-2000)*

**OLS Regression Where Dependent Variable Is Revenue per Theater**  
**and Independent Variables Are as follows:**

<table>
<thead>
<tr>
<th>Variable</th>
<th>Coefficient</th>
<th>Std. Error</th>
<th>T Ratio</th>
<th>P Value</th>
</tr>
</thead>
<tbody>
<tr>
<td>Monthly 15</td>
<td>.11455</td>
<td>.011455</td>
<td>-2.88</td>
<td>.004**</td>
</tr>
<tr>
<td>Running Time</td>
<td>.2799</td>
<td>.05985</td>
<td>4.68</td>
<td>.000**</td>
</tr>
<tr>
<td>R Rating</td>
<td>-.758</td>
<td>2.104</td>
<td>-3.6</td>
<td>.019</td>
</tr>
<tr>
<td>Min. Lead</td>
<td>.104</td>
<td>2.659</td>
<td>.04</td>
<td>.969</td>
</tr>
<tr>
<td>Woman Lead</td>
<td>.048</td>
<td>2.219</td>
<td>.02</td>
<td>.983</td>
</tr>
<tr>
<td>Min. Co-Star</td>
<td>2.186</td>
<td>2.468</td>
<td>.89</td>
<td>.377</td>
</tr>
<tr>
<td>Comedy</td>
<td>4.758</td>
<td>2.246</td>
<td>2.12</td>
<td>.035</td>
</tr>
<tr>
<td>Majority Minority</td>
<td>2.191</td>
<td>2.958</td>
<td>.74</td>
<td>.460</td>
</tr>
<tr>
<td>Romance</td>
<td>1.639</td>
<td>3.045</td>
<td>.54</td>
<td>.591</td>
</tr>
<tr>
<td>White Male Star</td>
<td>10.427</td>
<td>2.332</td>
<td>4.47</td>
<td>.000**</td>
</tr>
<tr>
<td>African-American Star</td>
<td>2.477</td>
<td>2.791</td>
<td>.89</td>
<td>.376</td>
</tr>
</tbody>
</table>

* = significant at .05, ** = significant at .01  
N=250 s = 14.29 R-sq = 25.3% R-sq(adj) = 21.5% constant= -22.696.

### Table 2

**Model: Total U.S. Box-Office Revenue**  
*(Range of Years 1991-2000)*

**OLS Regression Where Dependent Variable Is Revenue**  
**and Independent Variables Are as follows:**

<table>
<thead>
<tr>
<th>Variable</th>
<th>Coefficient</th>
<th>Std. Error</th>
<th>T Ratio</th>
<th>P Value</th>
</tr>
</thead>
<tbody>
<tr>
<td>Running Time</td>
<td>.5808</td>
<td>.1524</td>
<td>3.81</td>
<td>.000**</td>
</tr>
<tr>
<td>R Rating</td>
<td>-10.713</td>
<td>5.363</td>
<td>-2.00</td>
<td>.047*</td>
</tr>
<tr>
<td>Min. Lead</td>
<td>-9.125</td>
<td>6.516</td>
<td>-1.40</td>
<td>.163</td>
</tr>
<tr>
<td>Woman Lead</td>
<td>.027</td>
<td>5.663</td>
<td>.00</td>
<td>.996</td>
</tr>
<tr>
<td>Min. Co-Star</td>
<td>3.624</td>
<td>6.280</td>
<td>.58</td>
<td>.564</td>
</tr>
<tr>
<td>Comedy</td>
<td>9.786</td>
<td>5.725</td>
<td>1.71</td>
<td>.089</td>
</tr>
<tr>
<td>Majority Minority</td>
<td>-11.171</td>
<td>7.532</td>
<td>-1.48</td>
<td>.139</td>
</tr>
<tr>
<td>Romance</td>
<td>2.438</td>
<td>7.969</td>
<td>.31</td>
<td>.760</td>
</tr>
<tr>
<td>White Male Star</td>
<td>35.031</td>
<td>5.901</td>
<td>5.94</td>
<td>.000**</td>
</tr>
<tr>
<td>African-American Star</td>
<td>13.868</td>
<td>7.054</td>
<td>1.97</td>
<td>.050</td>
</tr>
<tr>
<td>Woman Star</td>
<td>14.728</td>
<td>8.900</td>
<td>1.65</td>
<td>.099</td>
</tr>
</tbody>
</table>

* = significant at .05, ** = significant at .01  
N=250 s = 36.19 R-sq = 31.3% R-sq(adj) = 28.1%


Table 3

Model: Film Distribution To Theaters (In # of Theaters)
(Range of Years 1991–2000)
OLS Regression Where Dependent Variable Is Number of Theaters
and Independent Variables Are as Follows:

<table>
<thead>
<tr>
<th>Variable (N=250)</th>
<th>Coefficient</th>
<th>Std. Error</th>
<th>T Ratio</th>
<th>P Value</th>
</tr>
</thead>
<tbody>
<tr>
<td>Constant</td>
<td>2301.4</td>
<td>241.5</td>
<td>9.53</td>
<td>.000**</td>
</tr>
<tr>
<td>Monthly 15</td>
<td>3.114</td>
<td>1.888</td>
<td>1.688</td>
<td>.066</td>
</tr>
<tr>
<td>Running Time</td>
<td>-5.935</td>
<td>1.845</td>
<td>-3.22</td>
<td>.001**</td>
</tr>
<tr>
<td>R Rating</td>
<td>-202.06</td>
<td>63.62</td>
<td>-3.18</td>
<td>.002</td>
</tr>
<tr>
<td>Min. Lead</td>
<td>-169.76</td>
<td>79.76</td>
<td>-2.13</td>
<td>.034</td>
</tr>
<tr>
<td>Woman Lead</td>
<td>20.03</td>
<td>66.67</td>
<td>.30</td>
<td>.764</td>
</tr>
<tr>
<td>Woman Star</td>
<td>-8.6</td>
<td>105.4</td>
<td>-0.08</td>
<td>.935</td>
</tr>
<tr>
<td>Min. Co-Star</td>
<td>56.7</td>
<td>148.0</td>
<td>.38</td>
<td>.702</td>
</tr>
<tr>
<td>Comedy</td>
<td>-138.67</td>
<td>67.84</td>
<td>-2.05</td>
<td>.042</td>
</tr>
<tr>
<td>Majority Minority</td>
<td>-486.45</td>
<td>89.93</td>
<td>-5.41</td>
<td>.000**</td>
</tr>
<tr>
<td>Romance</td>
<td>-139.54</td>
<td>94.16</td>
<td>-1.48</td>
<td>.140</td>
</tr>
<tr>
<td>White Male Star</td>
<td>198.35</td>
<td>74.62</td>
<td>2.66</td>
<td>.008</td>
</tr>
<tr>
<td>African-American Star</td>
<td>229.31</td>
<td>83.71</td>
<td>2.74</td>
<td>.007</td>
</tr>
<tr>
<td>African-American Co-Star</td>
<td>-64.8</td>
<td>145.2</td>
<td>-0.45</td>
<td>.656</td>
</tr>
<tr>
<td>Box-Office Gross (Demand)</td>
<td>7.1734</td>
<td>.8071</td>
<td>8.89</td>
<td>.000**</td>
</tr>
</tbody>
</table>

* = significant at .05, ** = significant at .01
N=250 s = 424.9 R-sq = 61.1% R-sq(adj) = 58.8%
Examination of computer-generated normality graphs and residual plots demonstrated that the data, when appropriate, supported the application of a general linear regression model. The residuals seem evenly distributed yielding an expected value of zero, thus they are unbiased. They are also uncorrelated, meaning that no discernable pattern is observed in the plots. The residuals also satisfy concerns about homoscedasticity.²⁸⁶

Movies: demographic information for a total of 274 movies spanning the years 1991–2000 ("the 1990s") was collected. The 274 movie dataset contains more than one hundred films featuring minority actors in leading roles. To ensure a wide range of distribution in key variables within the dataset, all movies with available full demographic information and released on more than five hundred screens between May 1997 and August 1998 were included in the dataset as controls.

Monthly (Top) 15: Continuous data (in millions) for the total box office collected during the month of the film’s release.

Running Time: Continuous variable measuring length of time that the movie plays on each screen. A longer running time means that the movie can be shown on less screens per day; therefore, less per-theater revenue would be expected for longer movies.

Maximum Theaters: A continuous variable measuring the maximum amount of theaters to which a film was distributed. A large number here indicates a studio’s prediction that the movie will be a “blockbuster.”

Rated R: Whether the movie was given an “R” rating by the Motion Picture Association of America (MPAA). Movies with “R” ratings are expected to generate less box office revenues.

Box Office Star Variables

To qualify as a box office star, an actor had to have appeared in a previous movie which met the following criteria: (a) released during the period between 1988 and 2000, (b) qualified by its U.S. gross to be in the Top 20 percent of all movies released during this time frame, and (c) which generated more than $60 million in total U.S. box office revenues. When the previous movie contained an ensemble cast without a primary solo performance, the actor was not included.

²⁸⁶. The inclusion of three box-office large release flops and four mega-hits would have called these distributions into question. Therefore, to ensure that the glr model’s assumptions regarding distribution tail normality were met, when appropriate and prior to the regressions, key attributes for the movies TITANIC (20th Century Fox 1997), MEN IN BLACK (Columbia Pictures Corp. 1997), INDEPENDENCE DAY (20th Century Fox 1995), MAJOR LEAGUE: BACK TO THE MINORS (Warner Bros. Pictures 1998), and THE LOST WORLD: JURASSIC PARK (Universal Pictures 1997) were removed to ensure a reliable analysis.
White Male Star: Whether the movie includes a White male box office star in a lead (starring role). This list contained: Bruce Willis, Michael Douglas, Harrison Ford, Anthony Hopkins, Jack Nicholson, Kevin Costner, Daniel Stern, Keanu Reeves, Nicholas Cage, Mel Gibson, Sylvester Stallone, Dustin Hoffman, Brad Pitt, Arnold Schwarzenegger, Robert DeNiro, John Travolta, Robin Williams, Joe Pesci, Stephen Segal, Tommy Lee Jones, Sean Connery, Tom Cruise, Jeff Goldblum, Leonardo DiCaprio, Woody Harrelson, George Clooney, Tom Hanks, Pierce Brosnan, and Jim Carrey.

Black Star: Whether a box office star who is also Black or African-American starred in the movie. The list contained: Morgan Freeman, Will Smith, Eddie Murphy, Martin Lawrence, Samuel L. Jackson, Wesley Snipes, Whitney Houston, Denzel Washington, Whoopi Goldberg, Danny Glover, and Michael Jordan.

Woman Star: Whether a box office star who is also a woman starred in the movie. The list contained: Julia Roberts, Whitney Houston, Cameron Diaz, Whoopi Goldberg, Meg Ryan, Jodie Foster, Drew Barrymore, Rene Russo, Michelle Pfeiffer, Sharon Stone, Vanessa Williams, and Sandra Bullock.

Minority Lead: Whether a lead character (by screen time as approximated by billing) is self-identified or press-identified as Black/Latino/Asian-American. This category includes any ethnic minority in a leading role, whether a box office star or otherwise.

Woman Lead: Whether a lead character (by screen time as approximated by billing) is a woman. This variable included women box office stars, as well as those without previously successful movies.

Minority Co-star: Whether a co-starring character (by screen time as approximated by billing) is self-identified or press-identified as Black/Latino/Asian-American.

African-American Co-Star: Whether a co-starring character (by screen time as approximated by billing) is self-identified or press-identified as Black or African-American.

Comedy: Whether the movie was advertised or reviewed as a “comedy” in popular press. Press accounts and reviews were generated from Entertainment Weekly and Videohound. The author then coded the movie when one or more sources characterized the movie as a “comedy.”

Majority-Minority: Whether the movie’s main characters were primarily members of ethnic minority groups. For this variable, two measurements were compared. The primary metric was whether the first ten billed characters, as listed on IMDB.com and secondary websites, were members of ethnic minority groups. When this metric yielded a result that was within a discrete band (40–60 percent), measurement was recalculated by determining whether the top ten characters (by screen time)
were members of ethnic minority groups. For example, Denzel Washington's performance in *Philadelphia* would not qualify but *Malcolm X* would.

Romance: Whether the movie was advertised or reviewed as a "love story," "romance story," or "romantic comedy" in popular press. Press accounts and reviews were generated from Entertainment Weekly and Videohound and coded by the author when one or more sources characterized the movie using the phrases above.

Box-Office Gross: Total U.S. gross revenues reported as of February 2001 for all tickets sold at all showings of the movie.

Per-Theater Gross: The total U.S. gross revenue divided by the maximum number of screens the movie was shown on, which was based upon a count of total theaters.