

NOTES

TACKLING UNCONSCIOUS BIAS IN HIRING PRACTICES: THE PLIGHT OF THE ROONEY RULE

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This Note analyzes the National Football League's (NFL) 2002 decision to implement an innovative—and controversial—policy aimed at increasing the League's number of minority head coaches. Designated the "Rooney Rule," the policy mandates that every NFL team interview at least one minority candidate upon the vacancy of a head coaching position or be subjected to a significant monetary fine. Despite ongoing allegations that it promotes tokenism and is a form of reverse discrimination, the Rule has reached uncharted success. While other professional sports with large minority populations (e.g., the National Basketball Association) have succeeded in integrating their head coaching positions over the past twenty years without analogous action, this Note argues that the pre-Rooney Rule NFL hiring process remained relatively static because decisionmakers unwittingly held (and often still hold) archaic biases regarding the intellectual ability of minority candidates to handle the high degree of organizational complexity in football. By deftly traversing the line between "soft" and "hard" variants of affirmative action, the Rule has proven effective because it forces decisionmakers harboring this unconscious bias to expand previously restricted coaching networks and come face-to-face with a candidate they would never have considered otherwise.

INTRODUCTION

Hierarchical business organizations have long faced the predicament of racial imbalance in their higher ranks. While minority employees are often well represented in lower-tier jobs, they are almost completely absent in upper-tier positions.¹ Since the United States Supreme Court's seminal decision in *Griggs v. Duke Power*

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¹ Robert E. Thomas & Bruce Louis Rich, *Under the Radar: The Resistance of Promotion Biases to Market Economic Forces*, 55 SYRACUSE L. REV. 301, 303 (2005).

*Company*²—holding that even establishments with neutral hiring practices could be liable for legal claims of discrimination³—a number of these organizations have attempted to correct the imbalance by voluntarily implementing affirmative action policies in accordance with Title VII of the Civil Rights Act of 1964 (Title VII).⁴

In 2002, the National Football League (NFL) responded to years of criticism and the threat of legal action over the low percentage of African American⁵ head coaches employed in its professional league. In union with its thirty-two franchise owners, the NFL voluntarily implemented a unique policy, designated the “Rooney Rule,” mandating that every NFL team interview at least one minority candidate upon the vacancy of a head coaching position. Any inconsistent behavior would be treated as detrimental conduct under the NFL constitution and bylaws, subjecting the violating franchise to league discipline.

Though there was mild concern regarding the scope of the policy at the Rooney Rule’s inception, the first actual violation provoked considerable criticism.⁶ Not only did the Rule appear ambiguous and inefficient,⁷ but the once-private whispers decrying the policy as a

² 401 U.S. 424 (1971).

³ *Id.* at 430.

⁴ 42 U.S.C. §§ 2000e–2000e-17 (2000).

⁵ This paper focuses on decisionmaker bias directed at African American head coaching candidates in particular—as opposed to all minorities—because African Americans account for the vast majority of participants in the National Football League (NFL). See RICHARD E. LAPCHICK, 2004 RACIAL AND GENDER REPORT CARD 26 tbl.18 (2004), available at http://www.bus.ucf.edu/sport/public/downloads/2004_Racial_Gender_Report_Card.pdf (providing racial breakdown of NFL). Moreover, the overwhelming African American presence on the field influences decisionmakers’ assessment of coaching qualifications. See *infra* Part I.B.1. Ideally, I would avoid the black-white dichotomy that often dominates racial discussion at the expense of other ethnicities. But in a league where approximately ninety-eight percent of players and ninety-seven percent of the coaching staffs are either African American or Caucasian, LAPCHICK, *supra*, at 26 tbl.18, 27 tbl.21, 28 tbl.23, a broader brush is infeasible. See Jay Nordlinger, *Color in Coaching*, NAT’L REV., Sept. 1, 2003, at 25 (asserting that when NFL implemented Rooney Rule, “minority” was “merely a euphemism for black”).

⁶ See Nordlinger, *supra* note 5, at 26 (opining that Rooney Rule appears to mandate tokenism); Hub Arkush, *Honorable Intentions Aside, ‘Rooney Rule’ Is Unfair*, PRO FOOTBALL WEEKLY.COM, Dec. 20, 2004, <http://www.profootballweekly.com/PFW/Commentary/Columns/2004/harkush1924.htm> (arguing that Rooney Rule is “seriously flawed”); Eric Edholm, *Lions’ President Was Made Example of for NFL’s Flawed ‘Rooney Rule’*, PRO FOOTBALL WEEKLY.COM, Aug. 1, 2003, <http://www.edit.profootballweekly.com/PFW/Commentary/Columns/2003/edholm080103.htm> (expressing “pure disgust” for NFL in essentially making Detroit Lions President Matt Millen scapegoat of League’s poor hiring practices).

⁷ The Rooney Rule’s only semblance of guidelines was the NFL’s announcement that teams must take “sufficient steps” and make “good faith” efforts in pursuance of minority candidates. Nordlinger, *supra* note 5, at 26; *Lions’ Millen Fined \$200K for Not*

form of reverse discrimination became public discontent.⁸ The reaction underscored an irony common to most voluntary affirmative action plans: The NFL instituted the policy largely in response to legal threats concerning discriminatory hiring practices excluding minority candidates, but its subsequent implementation elicited criticism that the plan infringes the rights of Caucasian candidates. Lost in the backdrop of this legal dilemma is the true purpose of the Rooney Rule—addressing the objectionable history of NFL hiring practices—and whether it is effective in meeting this purpose.

This Note contends that the Rooney Rule is a legally viable policy that effectively counters the principal reason for the significantly low percentage of minority head coaches in the NFL: unconscious bias.⁹ The NFL's longstanding hiring practices and networking systems have consistently allowed front-office decisionmakers to avoid interacting with qualified African American candidates. Without any substantive exposure to such candidates, decisionmakers commonly—and often unconsciously—rely on racial stereotypes depicting African Americans as natural born, instinctive athletes whose success is attributable to their innate physical gifts rather than their hard work and intellect.¹⁰ At a bare minimum, the Rooney Rule forces these decisionmakers to come face-to-face with candidates whom they previously may have shunned. While not a perfect cure, recent statistics suggest that the Rooney Rule has succeeded in diversifying the NFL's head coaching ranks.

Part I of this Note reviews the historical and contemporary racial inequities in professional sports management. Part II analyzes why professional basketball—another major sport predominantly composed of African American athletes—has had a notable increase in the number of African American head coaches while professional

Interviewing Minority Candidates, CBS SPORTSLINE.COM, July 25, 2003, <http://cbs.sportslines.com/nfl/story/6498949> [hereinafter *Millen Fined*].

⁸ See Edholm, *supra* note 6 (asserting that NFL implemented Rooney Rule to establish quota system and improve image with general public); see also Posting of Miamirw to <http://www.finheaven.com/boardvb2/showthread.php?t=59040> (Dec. 17, 2004, 1:52 PM) (declaring that Rooney Rule must be replaced by system “where race, heritage, etc. is not considered”); Posting of Sec19Row53 to <http://the-w.com/thread.php?id=9494> (July 2, 2003, 12:19:36 PM) (contending that unless people criticize Indianapolis Colts—who hired African American head coach Tony Dungy without interviewing any other candidates—then policy is inconsistent and form of reverse discrimination).

⁹ This phenomenon describes a widely established belief system characterized by racist or biased feelings or judgments of which people are typically unaware, despite their motivation to experience themselves as nonprejudicial. See Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 322–23 (1987) (explaining underpinnings of unconscious bias).

¹⁰ See *infra* Part I.B.1 (describing stereotypes of African American athletes).

football's pre-Rooney Rule hiring numbers remained static. Part III highlights the initial threat of Title VII suits by African American candidates and the League's subsequent effort to reform their hiring process. Part IV evaluates the Rule relative to past affirmative action measures and considers whether the policy is susceptible to a Title VII attack on grounds of reverse discrimination. Finally, Part V analyzes whether the Rule actually accomplishes its purpose and surveys the results of its implementation.

I

RACIAL INEQUITY IN SPORTS HEAD COACHING AND MANAGEMENT

The history of sports is littered with the expression of racism. Since many forms of prejudice are often unconsciously maintained, in certain instances someone or something outside of the establishment must propose innovative policies that promote exposure-based methods in order to dismantle deeply-rooted ideological beliefs.

A. *The History of Overt Racism*

From the day Jackie Robinson broke the color barrier in Major League Baseball (MLB), sports have represented the laboratory for integration and the struggle for equality in America.¹¹ The sporting world's past, besieged by formal rules of exclusion¹² and informal discrimination,¹³ appears far behind us. Today the sporting world is often thought to be a paradigm of an integrated society.¹⁴ However, a more determined investigation undermines this idyllic depiction. Camouflaged by the racial composition of its athletes, significant barriers persist in the industry's upper-management positions.¹⁵ Most of these barriers are based on longstanding, negative perceptions of race—both explicit and unconscious.

¹¹ ARNOLD RAMPERSAD, *JACKIE ROBINSON: A BIOGRAPHY* 186–87 (1997).

¹² See MATTHEW J. MITTEN ET AL., *SPORTS LAW AND REGULATION: CASES, MATERIALS, AND PROBLEMS* 737–38 (2005) (describing late nineteenth-century and early twentieth-century rules and customs limiting African American sports participation to historically African American colleges and to few predominantly Caucasian colleges in northern United States).

¹³ See *id.* at 740 (citing example of early twentieth-century “gentlemen’s agreements” prohibiting African Americans and dark-skinned Latino athletes from participating in Major League Baseball).

¹⁴ Paul M. Anderson, *Racism in Sports: A Question of Ethics*, 6 MARO. SPORTS L.J. 357, 357 (1996).

¹⁵ See KENNETH L. SHROPSHIRE, IN *BLACK AND WHITE: RACE AND SPORTS IN AMERICA* 3–4 (1996) (commenting on low percentage of minority head coaches in professional sports programs).

Examples of overtly racist assertions regarding the management abilities of African Americans have been recorded as recently as fifteen to twenty years ago. In 1987, for instance, Los Angeles Dodgers executive Al Campanis stated that there were few African American baseball managers because “[African Americans] may not have some of the necessities to be, let’s say, a field manager or perhaps a general manager.”¹⁶ While the Dodgers and MLB executives distanced themselves from Campanis’s remarks, neither entity offered a better explanation for the lack of African American managers.¹⁷ In 1992, Cincinnati Reds owner Marge Schott bluntly stated, “I once had a n—— work for me . . . I would never hire another n——. I’d rather have a trained monkey working for me than a n——.”¹⁸

B. Current Perspective: The Pervasiveness of Unconscious Bias

The racial disparities in sports management are particularly evident in professional basketball and football, where African Americans constitute a vast majority of the participating athletes. This underrepresentation in management positions is caused, in part, by racism—both in its institutionalized form and through the maintenance of automatic or implicit stereotypes. The latter form, coined “unconscious bias,”¹⁹ is the likely culprit for the continuing disparity.²⁰ As Charles Lawrence observed, this strain of racism persists despite the decline of overt demonstration:

[M]ost of us . . . do not recognize the ways in which our cultural experience has influenced our beliefs about race or the occasions on which those beliefs affect our actions. In other words, a large part of the behavior that produces racial discrimination is influenced by unconscious racial motivation.²¹

¹⁶ *Id.* at 21. Given a chance to correct himself, Campanis instead added peculiar statements such as, “[W]hy are black men or black people not good swimmers? Because they don’t have the buoyancy.” *Id.* at 22.

¹⁷ Paul Finkelman, *Baseball and the Rule of Law*, 46 CLEV. ST. L. REV. 239, 254 (1998). Perhaps this was because, as Frank Robinson—professional baseball’s first African American team manager—noted, “Someone from the inner circle had let out what we had known all along” about the attitudes of baseball’s highest echelon of power. *Id.*

¹⁸ *Id.* Schott, a Nazi paraphernalia collector who had before referred to players as “million-dollar n——” and to some agents and lawyers as “money-grubbing Jews,” was suspended for a year following her comments. *Id.* at 254–55.

¹⁹ David A. Strauss, *Discriminatory Intent and the Taming of Brown*, 56 U. CHI. L. REV. 935, 960 (1989). Professor Strauss notes that “unconscious bias,” including unconscious race and gender bias, may be even more common today than conscious bias. *Id.*

²⁰ See Kenneth L. Shropshire, *Merit, Ol’ Boy Networks, and the Black-Bottomed Pyramid*, 47 HASTINGS L.J. 455, 461 (1996) (opining that unconscious bias is “certainly part of the answer”).

²¹ Lawrence, *supra* note 9, at 322.

Since it is unconscious, this bias is neither cognitive nor intentional; however, it could be considered “more insidious because it is for the most part less straightforward, outspoken, and ‘honest.’”²² Accordingly, society’s longstanding focus on discriminatory intent inevitably fails to address some of the actions and behaviors that sustain patterns of discrimination.²³ In order to counter unconscious bias effectively, a new approach is necessary. Rather than implicating every decision as racist, acknowledging that unconscious bias exists reveals that American culture has engendered and transmitted certain stereotypes that perpetuate discrimination.²⁴ Understanding the psychological underpinnings of unconscious bias involves redefining and, ultimately, widening our perspective of the decisionmaking processes to include the socio-cultural context in which decisions are made.

In professional sports, unconscious bias influences head coaching selections through the internalization of stereotypes regarding African Americans’ intellectual inferiority and the establishment and maintenance of “old boy” networks.

1. *Unconscious Stereotypes of Intellectual Inferiority*

Although explicit assertions of African Americans’ intellectual inferiority, such as the statements of Campanis and Schott, appear to have waned, many of those in the position to hire head coaches continue to harbor similar stereotypes unconsciously.²⁵ These decisionmakers function in a largely nondiverse atmosphere, where most of their exposure to African Americans consists of interactions with athletes stigmatized by the image of the so-called “African American Athlete.”²⁶

²² DREW A. HYLAND, *PHILOSOPHY OF SPORT* 10 (1990).

²³ See Lawrence, *supra* note 9, at 343–44 (asserting that existing search for discriminatory intent may fail even though actor himself holds racial animus because he may “be unaware that his actions, or . . . feelings and ideas that accompany them, have racist origins”).

²⁴ *Id.* at 343; see also *id.* at 321 (claiming that “[a]cknowledging and understanding the malignancy [of unconscious bias] are prerequisites to the discovery of an appropriate cure”).

²⁵ See Shropshire, *supra* note 20, at 461 (arguing that unconscious stereotypes associated with African Americans’ intellectual inferiority factor in their exclusion from upper-management positions today); see also Gary A. Sailes, *The African American Athlete: Social Myths and Stereotypes*, in *AFRICAN AMERICANS IN SPORT* 183, 188 (Gary Sailes ed., 1998) (“Whites are reluctant . . . because they do not have confidence in the intellectual capabilities of African Americans to manage or coach professional or major college ball clubs.”).

²⁶ *Cf.* Anderson, *supra* note 14, at 362 (contending that racism remains prevalent in society and sports through descriptions of attributes and performance of African American athletes).

People commonly attribute the success of African American athletes solely to natural ability, whereas Caucasian athletes are often depicted as intelligent and hardworking.²⁷ Early 1990s media reports about four top college basketball players (two African American, two Caucasian) described the African American players as “having the tools” but possessing “questionable” intellect and reserved “[t]he real praise . . . for white players because they have managed to prevail despite . . . their modest athletic endowment.”²⁸ Further, in a *USA Today* poll of their readers, both Caucasian and African American respondents ranked Caucasian athletes highest for leadership, then thinking, instincts, strength, and speed; African Americans were ranked in the exact opposite order.²⁹

These descriptions imply that African Americans are “unthinking, natural performers—born with an advantage.”³⁰ The perception that African American players lack work ethic and that athletics comes naturally makes them seem less deserving of their success. Moreover, the descriptions imply that these athletes, unlike their Caucasian counterparts, do not exhibit the virtues—e.g., determination and commitment³¹—deemed essential to management.³²

2. Persistence of “Old Boy” Networks

The term “old boy” networks describes social networking systems and perceptions allegedly prevalent among certain American communities.³³ Due in large part to unconscious bias, these networks tend to reinforce traditional power structures by limiting hiring practices and/or business transactions to other elites or acquaintances within the network. African Americans and other minorities are often blocked

²⁷ James A. Rada & K. Tim Wulfemeyer, *Color Coded: Racial Descriptors in Television Coverage of Intercollegiate Sports*, 49 J. BROADCASTING & ELECTRONIC MEDIA 65, 80 (2005), available at http://www.leaonline.com/doi/pdf/10.1207/s15506878jobem4901_5?cookieSet=1 (finding that sports announcers “continue to paint a picture wherein African American athletes are portrayed as physical specimens using their God-given, natural ability, whereas White athletes are hard working and intellectually endowed”).

²⁸ Anderson, *supra* note 14, at 362–63.

²⁹ Jim Myers, *Race Still a Player: Stereotypes Pit Ability vs. Intellect*, USA TODAY, Dec. 16, 1991, at A1.

³⁰ PHILLIP M. HOOSE, NECESSITIES: RACIAL BARRIERS IN AMERICAN SPORTS 19 (1989).

³¹ HYLAND, *supra* note 22, at 10–11.

³² When asked to describe an NFL head coach, African American head coach Tony Dungy said the key traits are a “[c]erebral guy” and “disciplinarian,” two characteristics that “for eons . . . [made] you think of a somewhat older, white man.” SHROPSHIRE, *supra* note 15, at 7.

³³ See Charles R. Lawrence III, *Minority Hiring in AALS Law Schools: The Need for Voluntary Quotas*, 20 U.S.F. L. REV. 429, 435–36 (1986) (discussing “old boy” networks in context of legal academia).

from these predominantly Caucasian networks not as a result of conscious animus but because there is a “tendency to recognize intellectual power and unusual capacity for [creativity] more easily in persons of one’s own sex and race.”³⁴ While it seems eminently reasonable for a decisionmaker to seek the evaluation of those he or she knows and trusts when making choices from among a number of outstanding candidates, this extensive reliance on mutual friends and colleagues—i.e., other network members—operates “to exclude even those few minorities [who] have managed to surmount the more easily quantifiable barriers to access.”³⁵

In sports, the “old boy” hiring system excludes African Americans from authoritative positions.³⁶ A head coaching vacancy begins with an already short list of candidates, many of whom are acknowledged because of connections the decisionmaker has with others in the sports world.³⁷

II

EXPLORING THE DIVIDE BETWEEN THE NBA AND THE NFL

At the start of the new millennium, before the Rooney Rule’s adoption, the NFL and the National Basketball Association (NBA) were heading in different directions. As the number of African American head coaches in the NBA substantially increased, the NFL numbers remained stagnant. Statistics from 2001–02 reveal a dearth of African American head coaches in sports with a substantial African American presence among the players.³⁸ While African Americans comprised the majority of players in the NBA and the NFL in

³⁴ *Id.* at 435 (quoting Herma Hill Kay, Commentary, *The Need for Self-Imposed Quotas in Academic Employment*, 1979 WASH. U.L.Q. 137, 140 (1979)).

³⁵ *Id.*

³⁶ Timothy Davis, *Racism in Athletics: Subtle Yet Persistent*, 21 U. ARK. LITTLE ROCK L. REV. 881, 884–85 (1999) (citing SHROPSHIRE, *supra* note 15, at 83). According to Hall of Fame football coach Bill Walsh, coaching positions in football are “a very fraternal thing. . . . You end up calling friends, and the typical coach hasn’t been exposed to many black coaches.” Claire Smith, *Too Few Changes Since Campanis*, N.Y. TIMES, Aug. 16, 1992, § 8, at 1 (internal quotation marks omitted).

³⁷ Jim Moye, Comment, *Punt or Go for the Touchdown? A Title VII Analysis of the National Football League’s Hiring Practices for Head Coaches*, 6 UCLA ENT. L. REV. 105, 130–32 (1998).

³⁸ RICHARD E. LAPCHICK, 2003 RACIAL AND GENDER REPORT CARD 14 tbl.1, 24 tbl.17 (2003), available at http://www.bus.ucf.edu/sport/public/downloads/media/ides/release_05.pdf. While MLB and Major League Soccer (MLS) are relatively balanced in terms of their African American athlete-to-head coach percentage, these are still low absolute numbers due to the small representation of African American athletes in both leagues. See *id.* at 14 tbl.1 (illustrating that African American players in MLB and MLS accounted for ten percent and sixteen percent, respectively, of total athlete population in those sports).

2001–02, access to head coaching positions remained either imbalanced (NBA) or inert (NFL).

During the 2001–02 NBA season, African Americans made up seventy-eight percent of all players and held forty-eight percent of the head coaching positions.³⁹ The NBA has made significant strides: Just a decade earlier, only two of the League's then twenty-seven teams (seven percent) employed African American head coaches, despite the fact that seventy-five percent of players were African American.⁴⁰

In the 2001–02 NFL season, sixty-five percent of the League's players were African American compared to only six percent of the coaches (two of thirty-two positions).⁴¹ In spite of the several vacancies arising each year,⁴² the NFL's hiring statistics remained static for twelve seasons.⁴³ In fact, including the two coaches employed in 2001–02, there had only been five full-time African American head coaches in the modern history of the NFL.⁴⁴

The following analysis contends that the structural and cultural makeup of the NBA made African American acumen visible to the front office, reducing NBA decisionmakers' unconscious bias and increasing the number of African American head coaching hires. In contrast, the prevalence of unconscious bias in football remained constant due to two factors: (1) the high degree of organizational complexity in football requires a decisionmaker to consider candidates' intellect more so than in basketball; and (2) while entrance into and approval from the "old boy" networks function as a prerequisite for

³⁹ *Id.* at 14 tbl.1 (player statistics), 24 tbl.17 (coaching statistics).

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² In the past decade, there have usually been anywhere from seven to ten head coaching vacancies shortly after the conclusion of each NFL season. For example, there were nine openings in 1999, seven in 2000, and eight in both 2001 and 2002. Tom Barnidge, *How to Hire a Coach: Finding Mr. Right*, NFL.COM, Nov. 22, 2002, <http://www.nfl.com/insider/story/5917206>.

⁴³ From 1989–2001, the percentage of NFL African American head coaches were as follows: four percent from 1989–91, seven percent from 1992–95, ten percent from 1996–99, six percent in 2000, and ten percent in 2001. LAPCHICK, *supra* note 38, at 24 tbl.17.

⁴⁴ The NFL's "Modern Era" refers to the 1946 reopening of the NFL to African American players and coaches after the League's fateful decision to segregate in 1926. See Lloyd Vance, *The Complete History of African American Quarterbacks in the NFL*, BLACK ATHLETE SPORTS NETWORK, Aug. 29, 2005, http://www.blackathlete.net/artman/publish/article_01018.shtml (noting that by 1946, after MLB signed Jackie Robinson, NFL decided to reintegrate). Technically, African American Terry Robiskie could be regarded as a sixth head coach—if you count the three-game interim stint he was given late in the 2000 NFL season after the then head coach was fired. Michael Silver, *Next in Line: Which NFL Assistant Can Duplicate Payton's Success?*, SPORTS ILLUSTRATED.COM, Jan. 4, 2007, http://sportsillustrated.cnn.com/2007/writers/michael_silver/01/04/coaches/index.html.

NFL head coaching candidates, NBA head coaches appear to be evaluated more objectively.

A. *Bias Based on “Organizational Complexity”*

The organizational structure of football programs is substantially more complex than their basketball counterparts.⁴⁵ This complexity interacts with team decisionmakers’ entrenched bias: While an African American is trusted to lead in basketball, the complexity of managing a football program functions as a proverbial glass ceiling.⁴⁶

The typical NFL team is comprised of several separate groups, including offense, defense, and special teams. These sets contain even more specialized subgroups, and football’s stop-and-go style of play requires the various subgroups to function as a unit. The meticulous craftsmanship of team play requires delicate managerial planning by the head coach. In contrast, basketball involves spontaneous teamwork, and the speed of the game precludes most managerial coordination. Instead, the players self-manage and adjust their play to the flow of the game. The free-form, “just-in-time” decisionmaking in basketball is a stark contrast to the “enormously complex” strategy inherent in football.⁴⁷

The difference in complexity is also a function of team size. NFL teams have an active unit of fifty-three players, while each NBA active roster has only twelve players. Far fewer basketball players are in the game at a given time and, unlike football, a change in possession does not result in a complete substitution of all players.⁴⁸

The NFL also has more complex coaching tiers. Like a corporation, football is strongly hierarchical. The head coach must supervise numerous subordinates and each of the offensive, defensive, and spe-

⁴⁵ See Thomas & Rich, *supra* note 1, at 343–44 (contending that complexity in professional football along with synchronization of several more players stands in stark contrast to off-the-cuff style of professional basketball).

⁴⁶ *Id.* at 345–46 (stating NFL’s organizational complexity has led to lower minority representation at head coach level than in NBA); see also Frank Deford, *Black Coaches Still Can’t Make Headway in Football*, SPORTS ILLUSTRATED.COM, Jan. 31, 2002, http://si.com/inside_game/frank_deford/news/2002/01/31/deford/ (“[T]here is almost surely some kind of submerged racism, which presumes that, sure, a black man can handle a little basketball club, but a heavy-duty football operation is really too complicated to trust to a minority.”).

⁴⁷ Thomas & Rich, *supra* note 1, at 344.

⁴⁸ Only ten players play basketball at a time (with each five-person team shifting automatically from offense to defense), while twenty-two players are on a football field for each play (eleven per side). Moreover, each change of possession in football results in eleven new players entering into the game. Including substitutions, there may be over forty football players per team who play significant roles in the game, in contrast with nine or ten basketball players per team. *Id.*

cial teams units has its own coordinator and assistant coaches.⁴⁹ By comparison, a basketball coaching staff rarely has more than six assistant coaches,⁵⁰ most of whom are general assistants with no formal specialization.

During the hiring process in both sports, decisionmakers must determine whether a candidate can manage and motivate players as well as select winning strategies. Given the number of additional variables for judging NFL candidates, decisionmakers are more likely to unconsciously assume that African American candidates are less capable of handling such complexities. In contrast, the NBA has virtually no sophisticated communication schemes or technology—coaches effortlessly communicate directly with the players from the sideline. To decisionmakers, the traits used to evaluate head coaching qualifications in basketball are not appropriate in a more complex setting, i.e., football.⁵¹

Moreover, NBA decisionmakers are more likely to subvert their unconscious bias. As discussed in Part I, decisionmakers of both leagues are largely nondiverse, so their core exposure to African Americans occurs during their interaction with the so-called “African American Athlete.”⁵² In basketball, many believe that the “point guard” is the most intellectual on-court position.⁵³ The point guard handles the ball most often, coordinates the offensive sets, and simultaneously defends the opposing team’s point guard in a metaphorical chess match. Given this amount of responsibility, point guards are considered on-court coaches.⁵⁴ Since the vast majority of NBA point

⁴⁹ NFL teams often have several specific position coaches. For example, the 2006–07 NFL Champion Indianapolis Colts’ team website lists fifteen assistant coaches holding fifteen different positions. Indianapolis Colts Coaches, <http://www.colts.com/sub.cfm?page=coaches> (last visited Apr. 6, 2007).

⁵⁰ The roster of the 2006–07 NBA Champion Miami Heat franchise lists six assistant coaches and two trainers. Other than the team’s “conditioning coach,” none of the assistant coaches have individual titles like those in football. Miami Heat Roster, <http://www.nba.com/heat/roster/> (last visited Apr. 6, 2007).

⁵¹ Thomas & Rich, *supra* note 1, at 351.

⁵² See *supra* notes 23–28 and accompanying text.

⁵³ See Michael Bradley, *Making a Point*, SPORTING NEWS, Feb. 8, 1999, at 66, 67 (remarking that point guard is basketball’s “most important position,” and that “[n]o other position . . . has as many responsibilities”).

⁵⁴ See Bill Harris, *Parker Loses Superhero Status*, SLAM! SPORTS, June 13, 2003, http://www.canoe.ca/Slam030613/col_harris-sun.html (emphasizing that San Antonio Spur Tony Parker, as point guard, is “the so-called on-court coach”); Chris Mannix, *Change of Plans: McNamara Back in U.S. After Sour Greek Experience*, SPORTS ILLUSTRATED.COM, Jan. 23, 2007, http://sportsillustrated.cnn.com/2007/writers/chris_mannix/01/23/mcnamara/index.html (asserting that Syracuse point guard Gerry McNamara served as head coach Jim Boeheim’s “coach on the floor”).

guards are African American,⁵⁵ NBA decisionmakers seem to be more aware of African Americans' intellectual capabilities and less likely to rely on negative stereotypes.⁵⁶ In football, the corollary leadership and intellectual position is the quarterback, termed "the thinking position."⁵⁷ Historically, most NFL quarterbacks have been Caucasian.⁵⁸ In fact, African American athletes who played quarterback in high school and college are commonly converted to so-called "skill positions" in order to exploit their "athletic superiority" and mask their "intellectual inferiority."⁵⁹ In recent years, African American quarterbacks have become more common,⁶⁰ but they are still criticized for their supposed inability "to effectively play the position due to the 'sophistication' of defensive sets or the 'complexity' of NFL offensive playbooks."⁶¹ The successful African American quarterbacks in the NFL are notoriously depicted as "running quarterbacks," a label that undermines their playmaking capacity and facilitates decisionmakers' reliance on biases.⁶²

⁵⁵ During the 2006–07 NBA season, 112 of the 127 point guards on active rosters were African American. ESPN.com, Players, <http://sports.espn.go.com/nba/players?league=nba&position=PG> (last visited Apr. 6, 2007).

⁵⁶ See Ian O'Connor, *Knicks Too Quick in Hiring Wilkens*, USA TODAY, Jan. 15, 2004, http://www.usatoday.com/sports/columnist/oconnor/2004-01-15-2004-01-15-oconnor-wilkens2_x.htm (noting that NBA team cited new head coach Lenny Wilkens's intellectual knowledge as former point guard as key asset in hiring decision).

⁵⁷ See J.R. Woodward, *An Examination of a National Football League College Draft Publication: Do Racial Stereotypes Still Exist in Football?*, SOC. SPORT ONLINE, Oct. 13, 2002, http://physhed.otago.ac.nz/sosol/v5i2/v5i2_1.html (asserting that quarterback position is widely recognized as "thinking' position").

⁵⁸ J.B. Cash, *Hostile Work Environment*, CASTE FOOTBALL, Mar. 15, 2005, <http://www.castefootball.us/viewarticle.asp?sportID=14&teamID=0&ID=22550>.

⁵⁹ JON ENTINE, TABOO: WHY BLACK ATHLETES DOMINATE SPORTS AND WHY WE ARE AFRAID TO TALK ABOUT IT 5 (2000); see also Douglas C. Lyons, *College Football's Bumper Crop of Black Quarterbacks*, EBONY, Nov. 1989, at 60, 66 (asserting that many African American college quarterbacks are drafted by NFL teams and converted to wide receivers and defensive backs); C. Keith Harrison, *Black Athletes at the Millennium*, http://www.umich.edu/~paulball/webpage%20papers/Black_Athletes%20_Millennium.htm (last visited Apr. 6, 2007) (noting how hard African Americans must work to become "thinking positions such as quarterback").

⁶⁰ In the 2005–06 season, six teams had African American quarterbacks start their opening-day game, and a total of nineteen African American quarterbacks were listed as backups for various teams. See Vance, *supra* note 44 (providing numerical breakdown of NFL's African American quarterbacks during 2005–06 season).

⁶¹ Morris O'Kelly, *The Mo'Kelly Report: Vince Young Is a Great Quarterback . . . Period*, EURWEB, Jan. 3, 2006, <http://www.eurweb.com/story/eur24158.cfm>.

⁶² African American All-American Quarterback Vince Young was labeled a "running quarterback" by NFL scouts—despite having the highest *passing* efficiency rating in all of college football during the 2005–06 season. *Id.*

B. Importance of Acceptance in the NFL's Old Boy Networks

In the fraternal world of professional sports, there is a strong tendency to create candidate pools from “old boy” networks. Like many other social networks,⁶³ the NFL’s “old boy” system often leaves out African Americans.⁶⁴

One way to enter the “old boy” network is by creating relationships with already established members. For example, the increase of African American head coaches in the NBA is largely attributable to the working environment. The small staff size allows an NBA head coach to develop close relationships with assistants. Basketball head coaches are thus likely to have direct information about an assistant’s coaching capabilities.⁶⁵

In contrast, football’s considerable managerial demands minimize the opportunities for head coaches to work closely with assistants.⁶⁶ An NFL head coach will likely interact primarily with assistants at the top of his staff hierarchy. But even these top assistants are specialists, so uncertainty remains about their ability to manage an *entire* team.⁶⁷ Thus, an NFL head coach’s recommendation of an African American assistant might receive far less weight than a similar referral in the NBA.

“Old boy” networks also dominate institutions such as team alumni and financial constituents. In professional sports, the approval of the public and the paying fan base is crucial. While the overall fan base of both sports may be diverse, the actual paying attendees are overwhelmingly Caucasian.⁶⁸ A number of studies suggest that sports entertainment customers reveal their discrimination through metrics like attendance and television ratings.⁶⁹ Aware of this fact, teams with

⁶³ Jason Wright, an African American vice president at RJR Nabisco, said about the business world in general: “The reality of life in America is that if you’re white, most of the people you know are white. If someone says to you, ‘Do you know anyone for this job?’ the people you recommend will probably be white.” Howard Gleckman et al., *Race in the Workplace: Is Affirmative Action Working?*, Bus. Wk., July 8, 1991, at 50, 52.

⁶⁴ See Shropshire, *supra* note 20, at 462 (noting tendency to create candidate pools through networking often leaves out African American candidates).

⁶⁵ Thomas & Rich, *supra* note 1, at 357.

⁶⁶ *Id.*

⁶⁷ *Id.* at 358.

⁶⁸ See DAVID SHIELDS, *BLACK PLANET: FACING RACE DURING AN NBA SEASON* 11 (1999) (discussing fan base at NBA game); Derrick Z. Jackson, *NFL Athletes Let Down* *Rev. King*, BOSTON GLOBE, Jan. 14, 2005, at A17 (noting that “predominantly white fans” attend NFL games).

⁶⁹ See Eric M. Aldrich et al., *Do People Value Racial Diversity? Evidence from Nielsen Ratings*, 5 TOPICS ECON. ANALYSIS & POL’Y 1, 1–3 (2005), available at <http://www.bepress.com/cgi/viewcontent.cgi?article=1396&context=bejeap> (highlighting studies supporting viewer bias, which authors later attempt to refute); see also Brant T. Lee, *The Network Economic Effects of Whiteness*, 53 AM. U. L. REV. 1259, 1283 (2004) (explaining that

Caucasian clientele may be less likely to hire African Americans as head coaches.⁷⁰

Given that both the NBA and NFL have a predominantly Caucasian attendance rate, why does the NBA's diversity in head coaching flourish while the NFL's languishes? One explanation—the “face of the franchise” phenomenon—is that a team's top player or head coach is expected to maintain a commercial identity appealing to team investors and fans.⁷¹ In the NBA, employment decisionmakers and financial supporters have adjusted to the idea of an African American as the face of a team, and thus NBA teams are more willing to consider an African American candidate. In contrast, in the NFL, the “face of the franchise” is often the team's starting quarterback or head coach.⁷² As previously noted, a substantial majority of NFL quarterbacks are Caucasian.⁷³ Therefore, NFL decisionmakers, fans, and financial supporters are less familiar with African American leadership. In his 2005 assessment of head coaching, Tulane University Law School Professor Gary Roberts commented:

A head football coach . . . is much more than a football coach. He is somebody who is expected to raise a lot of money, to move gently among the alumni and be one of the good old boys. . . . There was unbelievable alumni pressure put on our president not to hire [a

majority of Caucasians “simply feel[] more affinity with White celebrities, politicians, and historical figures”).

⁷⁰ In a similar vein, television and film executives recognize that since most Americans are Caucasian and tend to watch entertainment featuring Caucasians, there is a greater probability of producing significant income when Caucasian actors or actresses are cast. See Michael J. Frank, *Justifiable Discrimination in the News and Entertainment Industries: Does Title VII Need a Race or Color BFOQ?*, 35 U.S.F. L. REV. 473, 521–22 (2001) (“[W]hen given a choice, whites tend to watch movies and television programs containing white actors.”). Therefore, because the production companies—like NFL franchises—are businesses and must make money to survive and compete, “these businesses seek to provide the majority of consumers with the goods they most want.” *Id.*

⁷¹ Cf. Jose De Jesus Ortiz, *Beltran Says Adios to Astros*, HOUS. CHRON., Jan. 9, 2005, at A1 (defining “face of the franchise” in terms of role as team and community ambassador).

⁷² See Jim Armstrong, *Weis Gives Big Guys Plenty of Hope*, AOL SPORTS NEWS, Oct. 13, 2005, <http://aolsvc.news.aol.com/sports/article.adp?id=20051020223609990002&cid=1202> (“The head coach [in football] is the face of the franchise or the patriarch of the program, and history suggests in no uncertain terms that owners and university presidents don't want [undesirables] in that role.”).

⁷³ See *supra* note 58 and accompanying text. Quarterbacks also appear to be the most marketable players in the league. See Warner, *Favre Are Most Marketable*, NFL.COM, Jan. 18, 2002, <http://www.nfl.com/news/story/4860474> (reporting that top four “most marketable players” in NFL are quarterbacks); Matt Drudge, *Bush, Kerry Battle Over ‘Super Bowl’ Brady After Appearance at State of Union*, DRUDGE REPORT, Jan. 21, 2004, <http://www.drudgereport.com/matttb.htm> (“New England Patriot quarterback Tom Brady has become one of the most sought after political endorsements this [2004] election cycle after he agreed to be a guest of President Bush and Laura Bush in her VIP box during the State of the Union speech.”).

head coach of color], simply because they didn't want him going to the men's clubs in downtown New Orleans and mingling in a milieu where they just aren't used to black faces. . . . [T]here are so many older alumni who harken back to earlier days, who have a lot of money to give, who [teams] don't want to alienate. . . . [In] basketball it has broken down, because . . . pressures on the basketball coach are not quite the same as they are on the football coach⁷⁴

Thus, decisionmakers tend to rationalize their preference for safe, familiar coaching options by highlighting the unique pressures and responsibilities inherent in an NFL head coaching position. Since so few African American head coaches currently exist in the NFL, hiring an African American candidate is presumably neither safe nor familiar. But if African American candidates are rarely hired, then how are African American head coaches supposed to materialize and subsequently break down this unfamiliarity? The result is a frustrating catch-22 that effectively excludes African American head coaching hopefuls.

III

PATH TO THE ROONEY RULE

The NFL's embarrassing hiring record of African American head coaches has not gone unnoticed. Although former NFL commissioner Paul Tagliabue had informally lobbied within the League for greater minority hiring, some deemed these efforts inadequate.⁷⁵ In fact, for a number of years preceding the Rooney Rule, there were threats of employment discrimination lawsuits⁷⁶ against the NFL under Title VII.⁷⁷ No action was ever filed, and theories vary as to the legal viability of this charge.⁷⁸

⁷⁴ Symposium, *Is the System Flawed? Legal Ramifications of the Bowl Championship Series and Conference Alignment*, 7 VAND. J. ENT. L. & PRAC. 461, 479–80 (2005).

⁷⁵ JOHNNIE L. COCHRAN, JR. & CYRUS MEHRI, BLACK COACHES IN THE NATIONAL FOOTBALL LEAGUE: SUPERIOR PERFORMANCE, INFERIOR OPPORTUNITIES iii (2002), available at http://www.findjustice.com/files/Report_-_Superior_Performance_Inferior_Opportunities.pdf.

⁷⁶ For example, the fact that NFL assistant coach Sherman Lewis, offensive coordinator of the 1995 Super Bowl Champion Green Bay Packers, had difficulty getting an interview for a head coaching position was so disconcerting that perhaps for this reason a group of African American assistant coaches discussed, but never pursued, filing a class action suit against the NFL for its hiring practices. See Jim Reeves, Op-Ed., *Lewis Merits a Chance at Cowboys Job*, FORT WORTH STAR-TELEGRAM, Jan. 22, 1998, at D1 (describing Lewis's frustrating attempt to obtain head coaching position and hypothesizing that "[m]aybe that's why some of the league's black coaches are contemplating a class-action lawsuit against the NFL").

⁷⁷ 42 U.S.C. §§ 2000e–2000e-17 (2000).

⁷⁸ For comments on possible outcomes of a Title VII suit against NFL team hiring practices, compare Neil Forester, Comment, *The Elephant in the Locker Room: Does the*

A. *The Cochran-Mehri Analysis and “Fair Competition Resolution”*

In September 2002 the release of a report detailing the League’s “dismal record of minority hiring” renewed the threat of a Title VII suit.⁷⁹ Authored by attorneys Johnnie Cochran and Cyrus Mehri, the report compiled fifteen years’ worth of statistical data showing that African American head coaches often performed better than Caucasian head coaches, yet they were quickly terminated.⁸⁰ Moreover, Caucasian assistant coaches with minimal experience were continually hired over exceedingly qualified African American assistants or former head coaches.⁸¹

Upon release of the report, Cochran announced that he and Mehri would pursue class action lawsuits against NFL franchises⁸² unless “substantial progress [was] made by the NFL in the hiring of African Americans for head coaching positions.”⁸³ The report ended

National Football League Discriminate in the Hiring of Head Coaches?, 34 McGEORGE L. REV. 877, 902 (2003), finding that the plaintiff willing to sacrifice his future career as head coach and who comes forward with a cognizable claim *might* prevail, with Moye, *supra* note 37, at 135, who alleges that an African American plaintiff would *likely* have a successful Title VII claim against the NFL.

⁷⁹ COCHRAN & MEHRI, *supra* note 75, at iii.

⁸⁰ *Id.* at ii. The report’s statistical data was furnished by the University of Pennsylvania’s Dr. Janice Fanning Madden, who analyzed data between 1986 and 2001. Key findings include: African American head coaches averaged 9.1 wins per year while Caucasian head coaches averaged only eight; two-thirds of African American coaches led their teams to the playoffs while only thirty-nine percent of Caucasian coaches did so; and terminated African American head coaches had won more games and reached the playoffs at a higher rate in their final seasons than Caucasians who were similarly forced out. *Id.* at Exhibit B. However, Dr. Madden acknowledges that the small sample size of African American coaches in the NFL makes it difficult to conduct a more formal statistical analysis. *Id.*

⁸¹ See Tom Silverstein, *Closed Door: Lewis Snub Illustrates Plight of Black Coaches*, MILWAUKEE J. SENTINEL, Mar. 30, 1997, at C1 (noting that African American candidate Sherman Lewis—who won four Super Bowls and had no losing seasons in his fourteen years as assistant coach—received no head coaching interviews); Michael Smith, *Race an Issue, but Networking Is Still the Key*, ESPN.COM, Feb. 10, 2006, http://sports.espn.go.com/nfl/columns/story?columnist=smith_michael&id=2304091 (observing that former African American head coach Art Shell “took the Raiders to the playoffs three times and won almost 60 percent of his games and yet he can’t get so much as a serious sniff of a second chance”) (subscription required) (on file with the *New York University Law Review*).

⁸² Note that in a particular suit, an individual franchise—rather than the NFL itself—would be the proper defendant. The League (franchiser) establishes policies; it does not supervise individual teams (franchisees). Though the NFL sets the basic rule structure, the League does not make the ultimate hiring decisions, nor can it compel a team owner to hire a candidate not of his own choice. It stands to reason that those actually implementing those principles in their employment practices, or allegedly not implementing them, should ultimately bear the responsibility. See Forester, *supra* note 78, at 891–93 (arguing team owners and general managers are more appropriate defendants than NFL).

⁸³ Corey M. Turner, *Inherent Conflicts of Interest in the National Football League Management Structure May Render the Rooney Rule Meaningless*, SPORTS J., Fall 2003, <http://www.thesportjournal.org/2003Journal/Vol6-No4/nfl.asp>.

with a proposal called the “Fair Competition Resolution,” which would create a system of incentives and penalties to motivate NFL franchises toward a more diversified selection process.⁸⁴

B. Enacting the Rooney Rule

The NFL could not simply disregard the report: Even if the League escaped a class action suit brought by two renowned civil rights attorneys,⁸⁵ it could still face a public relations nightmare.⁸⁶ In response, the League hastily formed the NFL Committee on Workplace Diversity, chaired by Pittsburgh Steelers owner Dan Rooney. The Committee sought to implement a comprehensive program to promote diversity in coaching and management.⁸⁷ By December 2002 the Committee drafted a series of recommendations endorsed by every NFL franchise owner⁸⁸—including a mandate termed the “Rooney Rule.”⁸⁹ The new policy, inspired by Cochran and Mehri’s “Fair Competition Resolution,”⁹⁰ required each team to interview at least one minority candidate when filling a head coaching vacancy.⁹¹

⁸⁴ COCHRAN & MEHRI, *supra* note 75, at Exhibit F. The “Fair Competition Resolution” would award teams that hired qualified minorities and females extra draft picks; teams that opt out by refusing to consider qualified minority candidates would be penalized by forceful forfeiture of a draft pick. *Id.*

⁸⁵ The late Mr. Cochran became well recognized after representing O.J. Simpson in his 1995 murder trial. Mr. Mehri is responsible for landmark discrimination settlements against Coca-Cola and Texaco. See Curtis R. Simmons, *Cochran and Mehri Take Aim at NFL*, BLACK ENTERPRISE.COM, Nov. 5, 2002, <http://www.blackenterprise.com/cms/exclusivesopen.aspx?id=53&p=0>.

⁸⁶ Cochran was a media darling, regularly appearing on Court TV and Larry King Live. See Jesse Londin, *Johnnie Cochran*, LAW CROSSING, Feb. 16, 2004, <http://www.lawcrossing.com/article/index.php?id=335> (detailing Cochran’s path to legal and media stardom). In addition, Mehri’s own website notes that he has been labeled with the moniker “Corporate America’s Scariest Opponent.” Mehri & Skalet, PLLC, Cyrus Mehri, <http://www.findjustice.com/about/attorneys/mehri/> (last visited Apr. 6, 2007); see also John Leo, Op-Ed., *Called for an NFL Diversity Penalty*, SAN DIEGO UNION-TRIB., Aug. 4, 2003, at B6 (“The prospect of long and expensive litigation, accompanied by a steady drumbeat of ‘racism’ charges, startled the football league.”).

⁸⁷ *NFL Clubs to Promote Diversity Program*, NFL.COM, Dec. 20, 2002, <http://www.nfl.com/news/story/6046016> [hereinafter *Diversity Program*].

⁸⁸ In addition to the Rooney Rule, the other accepted recommendations included: establishment of minority coordinator/assistant head coach career data bank; expanded minority training and development programs; and expanded minority internship opportunities. *Id.*

⁸⁹ Named after Committee Chairman Dan Rooney. *Millen Fined*, *supra* note 7.

⁹⁰ Kenneth L. Shropshire, *Minority Issues in Contemporary Sports*, 15 STAN. L. & POL’Y REV. 189, 204 (2004) (noting that NFL’s Committee on Workplace Diversity was “inspired by Cochran and Mehri’s Fair Competition Resolution proposal” and “transformed [the] proposal into the ‘Rooney Rule’”).

⁹¹ See *Diversity Program*, *supra* note 87 (discussing owners’ agreement that clubs seeking to hire head coach will interview at least one minority applicant for position). The

In order to hold the NFL to its word, Cochran and Mehri immediately created the Fritz Pollard Alliance (FPA), an affinity group of former African American athletes intent on promoting diversity and equal job opportunities in NFL coaching, front office, and scouting staffs.⁹² This group, according to Mehri, could be the plaintiff in a Title VII action.⁹³

IV

THE LEGALITY OF THE ROONEY RULE

As will be discussed in Part V, the Rooney Rule has proved highly effective in deconstructing unconscious bias,⁹⁴ leading some commentators to suggest that it should be adopted in other hiring contexts.⁹⁵ However, since the Rooney Rule's design is relatively unprecedented, it is important to explore whether or not it is even legal—a subject of particular contention.⁹⁶

A. *The Rooney Rule as an Affirmative Action Policy*

The Rooney Rule was a preemptive measure. Prior to the 1970s, very few organizations acted voluntarily to correct racial disparities. However, in the landmark 1971 decision, *Griggs v. Duke Power Company*,⁹⁷ the Supreme Court held that “practices, procedures, or tests neutral on their face, and even neutral in terms of intent, cannot be maintained if they operate to ‘freeze’ the status quo of prior discriminatory employment practices.”⁹⁸ Employers realized that they

only exception to the Rooney Rule interview requirement is where a team has a preexisting contractual commitment with a member of its coaching staff to make him head coach and this agreement was on file with the League at the time the contract was entered into. *Id.*

⁹² Fritz Pollard Alliance (FPA), *NFL Minority Affinity Group Launches Website for Minority Coaches*, URBANMECCA.COM, Jan. 6, 2006, http://www.urbanmecca.com/artman/publish/article_577.shtml. The Alliance was named in honor of Frederick Douglas “Fritz” Pollard, the NFL’s first African American coach. *Id.*

⁹³ Shropshire, *supra* note 90, at 200.

⁹⁴ *See infra* Part V.

⁹⁵ *Cf.* Kenneth A. Cole, *Super Bowl Showcases Success of Affirmative Action*, DETROIT NEWS, Feb. 2, 2007, <http://www.detroitnews.com/apps/pbcs.dll/article?AID=/20070202/OPINION01/702020311/1008> (asserting that “society at large” can learn from NFL’s handling of affirmative action).

⁹⁶ *See supra* note 8 and accompanying text (acknowledging public discontent regarding Rooney Rule’s legality).

⁹⁷ 401 U.S. 424 (1971).

⁹⁸ *Id.* at 430. The plaintiff in *Griggs* claimed the employer violated Title VII by engaging in neutral employment practices that disproportionately affected minorities. *Id.* at 425–26. Claims of employment discrimination brought under Title VII usually fit into two broad and overlapping categories—“disparate treatment” and “disparate impact.” Generally, “disparate treatment” claims arise from overt discriminatory action by employers, while “disparate impact” claims arise from the discriminatory effect of a facially

could be held liable under Title VII without *intentionally* discriminating against minorities. As a result, “many private employers implemented affirmative action programs to avoid [future Title VII] liability.”⁹⁹

Rooney Rule proponents are reluctant to brand the policy with an “affirmative action” label¹⁰⁰—an apprehension undoubtedly linked to mainstream Caucasians’ “generally negative reaction” toward the controversial doctrine.¹⁰¹ Nonetheless, the Rooney Rule—a diversity initiative aimed at correcting racial disparities—is undoubtedly embedded in any faithful conception of affirmative action.¹⁰² Thus, the question is not whether the Rooney Rule is affirmative action, but rather what variety of affirmative action it represents.

neutral employment hiring practice—such as the practice employed in *Griggs*. See Christine Jolls, Comment, *Antidiscrimination and Accommodation*, 115 HARV. L. REV. 642, 647 (2001) (distinguishing between Title VII’s two categories of antidiscrimination liability).

⁹⁹ Michael K. Braswell et al., *Affirmative Action: An Assessment of Its Continuing Role in Employment Discrimination Policy*, 57 ALB. L. REV. 365, 371 (1993). See, e.g., *United Steelworkers v. Weber*, 443 U.S. 193, 209 n.9 (1979) (noting employer’s claim that “plan was justified because [the employer] feared that black employees would bring suit under Title VII if they did not adopt an affirmative action plan”).

Among the most enthusiastic supporters of voluntary affirmative action initiatives are members of the professional sports community. Given the NFL’s low African American head coaching statistics, it may be surprising to learn that the Rooney Rule was not the NFL’s first attempt to increase representation in coaching. The NFL established the NFL Minority Coaching Fellowship Program in 1987. *Minority Fellowship Attracts 79 Coaches*, NFL.COM, Aug. 31, 2005, <http://www.nfl.com/news/story/8790093> [hereinafter *Fellowship Program*]. This annual program provides minority coaches with NFL training camp positions, through which they become working members of a team’s staff for the summer. *Id.* Although this attempt mirrored successful plans in other professional leagues, it did not yield the turnout in the NFL that many had envisioned. See LAPCHICK, *supra* note 5, at 78–79 (describing “diversity management training” programs of NBA and MLB). Of the nearly 1100 fellowship “graduates,” only thirty-four held coaching positions during the 2004 season. *Fellowship Program, supra*.

¹⁰⁰ Cyrus Mehri has said that he does not “view the [Rooney] rule as affirmative action because it focuses on process, best practices, fair competition, leveling the playing field, and letting the best rise to the top.” Bram A. Maravent, *Is the Rooney Rule Affirmative Action? Analyzing the NFL’s Mandate to Its Clubs Regarding Coaching and Front Office Hires*, 13 SPORTS LAW. J. 233, 263 (2006). FPA Chairman John Wooten similarly stated that the Rooney Rule “was never intended to be affirmative action.” *Id.*

¹⁰¹ Stephen F. Befort & Tracey Holmes Donesky, *Reassignment Under the Americans with Disabilities Act: Reasonable Accommodation, Affirmative Action, or Both?*, 57 WASH. & LEE L. REV. 1045, 1081 (2000); see Anthony D. Taibi, *Banking, Finance, and Community Economic Empowerment: Structural Economic Theory, Procedural Civil Rights, and Substantive Racial Justice*, 107 HARV. L. REV. 1463, 1515 n.222 (1994) (noting impossibility of ignoring Caucasians’ “remarkably negative reaction to affirmative action”).

¹⁰² See, e.g., Jed Rubenfeld, *Affirmative Action*, 107 YALE L.J. 427, 448 (1997) (“A standard affirmative action plan [is defined] as one that offers preferential treatment to minorities in the allocation of desirable opportunities.”).

B. *The Rooney Rule: Both “Soft” and “Hard” Variants*

Diversity initiatives are often defined by their position on the affirmative action continuum, where so-called “soft” and “hard” variants reside at opposite ends. While “soft” affirmative action programs encompass outreach attempts like minority recruitment and counseling, “hard” affirmative action programs usually include explicit preferences or quotas that reserve a specific number of openings exclusively for members of the preferred group.¹⁰³ An overwhelming majority of Americans support “soft” affirmative action.¹⁰⁴ Therefore, professional sports leagues—whose revenue streams force them to be extremely conscious of public opinion¹⁰⁵—have focused on “soft” programs characterized by minority outreach initiatives.¹⁰⁶ But in the face of a major discrimination lawsuit, the NFL was forced to venture across the continuum. Thus, the Rooney Rule has both “soft” and “hard” characteristics: While it includes soft-style minority recruitment efforts (e.g., creating databases of available minority head coaching candidates), mandating NFL teams to reserve at least one minority interview slot is more typical of “hard” affirmative action.¹⁰⁷ The Rooney Rule’s ambiguous status on the affirmative action con-

¹⁰³ Michelle Adams, *The Last Wave of Affirmative Action*, 1998 WIS. L. REV. 1395, 1402 (1998). Note, however, that “[i]n between these two ends of the continuum are varying degrees of preferential treatment that can be used in the hiring process, but not to the exclusion of merit-based qualifications.” Jason C. Nelson, *Affirmative Action—Its Got a Bad Reputation*, http://www.msi.ms/MSJ/affirmative_action.htm (last visited Apr. 6, 2007); see also Adams, *supra*, at 1402 (stating that while so-called “hard” forms of affirmative action draw vast amount of examination in legal scholarship, “[r]elatively little attention has been paid to so-called ‘soft’ forms of affirmative action”).

¹⁰⁴ Support dramatically dissipates—and hostility toward minorities increases—when explicit preferences and quotas along the lines of “hard” affirmative action enter the picture. See Carol M. Swain et al., *Life after Bakke Where Whites and Blacks Agree: Public Support for Fairness in Educational Opportunities*, 16 HARV. BLACKLETTER L.J. 147, 163 (2000) (noting that while outreach programs are “widely supported by an overwhelming majority of Americans,” quotas and set-asides “garner much less support”).

¹⁰⁵ See Edholm, *supra* note 6 (stating that NFL is concerned “about putting up fronts and about looking good to the general public”). See, e.g., Daniel P. Fox, *Structural Barriers in Antidoping Measures*, 8 SPORTS LAW. J. 271, 277 (2001) (stating that “the NFL’s motive for its antidoping efforts is to fight . . . public perception”); Carol Slezak, *Tagliabue Fumbles Lewis Decision*, CHI. SUN-TIMES, Aug. 20, 2000, at 138 (quoting then NFL commissioner Paul Tagliabue, who fined Baltimore Ravens’ player Ray Lewis \$250,000 despite his acquittal on non-football related murder charges, as stating: “[Lewis] misconduct no doubt fueled a public perception that he had something to hide. . . . That negative perception, in turn, negatively affected other NFL players and the [L]eague itself.”).

¹⁰⁶ See LAPCHICK, *supra* note 5, at 78–79 (describing diversity training programs and outreach initiatives of NBA and MLB).

¹⁰⁷ See Adams, *supra* note 103, at 1403 (specifying that “soft” affirmative action attempts to “level the playing field and provide much needed information,” but does not “‘prefer’ minorities or ‘set-aside’ slots solely for minorities”).

tinuum may help temper public scrutiny,¹⁰⁸ but it does not shield the policy from a legal challenge by a Caucasian candidate.

C. Bringing Suit: The Makings of a Reverse Discrimination Claim

Title VII was aimed specifically at ending severe workplace discrimination against African Americans,¹⁰⁹ but by the 1980s and 1990s many people—especially Caucasians—believed that the need for affirmative action had subsided.¹¹⁰ Private employers suddenly faced Title VII threats from the opposite direction. Pursuant to a 1976 Supreme Court holding that Title VII's prohibition of racial discrimination applies equally to Caucasians and minorities,¹¹¹ Caucasians began claiming that employers violated Title VII by considering race when making employment decisions—i.e., abiding by “invalid” affirmative action plans.¹¹²

But what constitutes an invalid (or valid) plan? Since Congress has never spoken directly on affirmative action, the judiciary has created most of the law governing the area.¹¹³ In *United Steelworkers v. Weber*¹¹⁴ and *Johnson v. Transportation Agency*,¹¹⁵ the Court crafted

¹⁰⁸ See Edholm, *supra* note 6 (suggesting that Rule's minority hiring practices are simply “public-relations damage control for the NFL”).

¹⁰⁹ See 110 CONG. REC. 2556 (1964) (statement of Rep. Celler) (“[T]he basic purpose of [T]itle VII is to prohibit discrimination in employment on the basis of race or color.”); 110 CONG. REC. 2581 (1964) (statement of Rep. Green) (“[L]et us not add any amendment that would place in jeopardy in any way our primary objective of ending that discrimination that is most serious, most urgent, most tragic, and most widespread against the Negroes of our country.”).

¹¹⁰ See, e.g., Braswell et al., *supra* note 99, at 438 (noting that affirmative action policies may be increasingly unnecessary).

¹¹¹ See *McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273, 295–96 (1976) (holding that Title VII clearly protects Caucasian individuals from unfair racial discrimination).

¹¹² See, e.g., *Martin v. Wilks*, 490 U.S. 755, 758 (1989) (detailing Caucasian firefighters' claim that employers were making illegal promotion decisions on basis of race in reliance on affirmative action plan enacted via consent decree with African American firefighters); *Schurr v. Resorts Int'l. Hotel, Inc.*, 196 F.3d 486, 488 (3d Cir. 1999) (summarizing reverse discrimination claim brought by Caucasian job applicant who was denied position in favor of minority candidate); *Marcantel v. Dep't of Transp. & Dev.*, 37 F.3d 197, 198 (5th Cir. 1994) (relating to Caucasian employee's claim of discriminatory employment practices after employer promoted African American employee as part of settlement agreement in prior civil service complaint); *Lehman v. Yellow Freight Sys., Inc.*, 651 F.2d 520, 521–22 (7th Cir. 1981) (describing Caucasian applicant's claim that employer's affirmative action plan violated applicant's rights by filling position with African American who had fewer qualifications); *Patterson v. Newspaper & Mail Deliverers' Union*, 514 F.2d 767, 771 (2d Cir. 1975) (regarding challenge by Caucasian employee who sought to set aside settlement agreement—between his employer and minority persons seeking employment—as unlawful on ground that it afforded opportunities and benefits to minority workers not given to similarly situated Caucasian workers).

¹¹³ Lara Hudgins, Comment, *Rethinking Affirmative Action in the 1990s: Tailoring the Cure to Remedy the Disease*, 47 BAYLOR L. REV. 815, 830 (1995).

¹¹⁴ 443 U.S. 193 (1979).

a guide to analyze affirmative action plans challenged under Title VII.¹¹⁶

Weber was the first Title VII reverse discrimination case to reach the Supreme Court. The 1974 case involved a plan that reserved fifty percent of openings in a training program for African Americans until the percentage of African American craftworkers in the plant matched their percentage in the local labor force.¹¹⁷ Brian Weber, a Caucasian, sued under Title VII after he was denied admission to the program while African Americans with less seniority had been accepted.¹¹⁸ Weber argued successfully in the lower courts that the plan was illegal because Title VII banned any race-based preference, including those used as part of affirmative action plans.¹¹⁹

Acknowledging that Title VII protects Caucasians as well as African Americans from certain forms of racial discrimination, the Supreme Court reversed the lower court's judgment and held that the Act must be read against its legislative history and historical context.¹²⁰ The Court concluded that Congress intended Title VII to serve as a broad remedial tool to tear down social and economic barriers that kept many African Americans poor and unemployed.¹²¹ The legislative history further revealed that Congress aimed to encourage voluntary private efforts "to eliminate, so far as possible, the last vestiges of an unfortunate and ignominious page in this country's history."¹²² Given these goals, the Court reasoned that Title VII cannot be interpreted as an absolute prohibition against "all private, voluntary, race-conscious affirmative action plans."¹²³

¹¹⁵ 480 U.S. 616 (1987).

¹¹⁶ See *Johnson*, 480 U.S. at 641–42 (following decision in *Weber* and determining that plan at issue was permissible because it was justified by imbalance in workplace, was temporary, and did not authorize blind hiring on basis of sex or overburden interests of male employees); *Weber*, 443 U.S. at 208–09 (determining that plan at issue was permissible because it reflected purposes of Title VII, did not overburden interests of white employees, and was temporary).

¹¹⁷ *Weber*, 443 U.S. at 197. Prior to implementation of the plan, African Americans comprised thirty-nine percent of the relevant labor market, but only a mere 1.83% of the skilled craftworkers at the Kaiser plant. *Id.* at 198–99. African Americans accounted for less than fifteen percent of the total work force at the plant. *Id.* at 210 (Blackmun, J., concurring).

¹¹⁸ *Id.* at 199.

¹¹⁹ *Id.* at 200.

¹²⁰ *Id.* at 200–02.

¹²¹ *Id.* at 202–03.

¹²² *United States v. N.L. Indus., Inc.*, 479 F.2d 354, 379 (8th Cir. 1973).

¹²³ *Weber*, 443 U.S. at 208. The Court's conclusion was further reinforced by the language and legislative history surrounding § 703(j) of Title VII, codified at 42 U.S.C. § 2000e-2(j), which provides that nothing contained in the Act "shall be interpreted to require any employer . . . to grant preferential treatment . . . to any group because of the race . . . of such . . . group on account of a *de facto* racial imbalance in the employer's

The *Weber* Court did not “define . . . the line of demarcation between permissible and impermissible affirmative action plans.”¹²⁴ The Court found the plan acceptable, focusing on three characteristics: (1) the plan was designed to eliminate conspicuous racial imbalance in traditionally segregated job categories,¹²⁵ (2) it did not “unnecessarily trammel” the interests of Caucasian employees,¹²⁶ and (3) it was a temporary measure.¹²⁷

Eight years later, the Supreme Court announced the current standard for Title VII analysis.¹²⁸ In *Johnson*, the Court upheld a plan voluntarily adopted by a county government against a challenge by a Caucasian male employee. Paul Johnson alleged that the Transportation Agency denied him a promotion and instead promoted a female employee based on her gender.¹²⁹ Both employees had similar work experience, but Johnson scored slightly higher on a qualification exam that both passed. According to the Court, the Agency’s plan correctly calculated imbalances and directed hiring to be governed solely by those figures, did not displace current Caucasian employees or establish a bar to their advancement, and was sufficiently temporary in its efforts to attain a balanced workforce (rather than maintain one).¹³⁰

In upholding the Agency’s plan, the Court reaffirmed the *Weber* test and announced a two-track inquiry for evaluating “manifest imbalance” under the first prong. If an affirmative action plan applies to unskilled jobs or entry-level training programs, courts must compare “the percentage of minorities or women in the employer’s workforce with the percentage in the area labor market or general population.”¹³¹ If, however, the program applies to skilled jobs, courts must

workforce.” *Id.* at 205–06 (quoting 42 U.S.C. § 2000e-2(j) (2000)). Had Congress meant to prohibit all affirmative action, it could have provided that Title VII would not require or permit racially preferential integration efforts. *Id.* at 205–07.

¹²⁴ *Id.* at 208.

¹²⁵ *Id.*

¹²⁶ The plan required neither the discharge of Caucasian workers nor their replacement with African Americans, nor did it create an absolute bar to the advancement of Caucasian employees, since half of those trained would be Caucasian. *Id.*

¹²⁷ The Court noted that the preferential selection would end as soon as the percentage of African American skilled craftworkers approximated the percentage of African Americans in the local labor force. *Id.* at 208–09.

¹²⁸ See *Johnson v. Transp. Agency*, 480 U.S. 616, 627 (1987) (“The assessment of the legality of the [affirmative action plan in question] must be guided by our decision in *Weber*.”).

¹²⁹ *Id.* at 619.

¹³⁰ *Id.* at 631, 634–35, 637–40.

¹³¹ *Id.* at 631–32. In *International Brotherhood of Teamsters v. United States*, the Court determined that “the comparison between the percentage of [African Americans] on the employer’s workforce and the percentage in the general areawide population was highly

compare the employer's work force to the smaller pool of persons in the area labor market with the special skills or "relevant qualifications" required for the job.¹³²

D. Title VII Assessment of the Validity of the Rooney Rule

A Caucasian head coaching candidate denied the position would likely challenge the Rooney Rule by bringing a reverse discrimination suit to contest the hiring of a minority candidate,¹³³ alleging that the NFL franchise¹³⁴ impermissibly considered race when making its decision. The analytical framework used in reverse discrimination claims mirrors the standard discrimination claim format, which is governed by the burden-shifting model set forth in *McDonnell Douglas Corp. v. Green*.¹³⁵ In the initial phase, the Caucasian candidate must establish a prima facie case under Title VII by showing that: (1) he belongs to a protected class;¹³⁶ (2) he applied and was qualified for a job for which the employer was seeking applicants; (3) despite his qualifications, he was rejected; and (4) the position continued to be held open after his rejection.¹³⁷ The first and third prongs are self-evident as prerequisites to a Title VII reverse discrimination claim. The fourth prong is fulfilled without difficulty in cases where candidates were seriously considered but not selected as a finalist for a vacancy, as NFL teams

probative, because the job skill there involved—the ability to drive a truck—is one that many persons possess or can fairly readily acquire." *Hazelwood Sch. Dist. v. United States*, 433 U.S. 299, 308 n.13 (1977) (citing *Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324, 342 n.23 (1977)).

¹³² *Johnson*, 480 U.S. at 632. In *Hazelwood School District v. United States*, the Court held that to infer whether the defendant school district had discriminated in the hiring of teachers, the "proper comparison was between the racial composition of Hazelwood's teaching staff and the racial composition of the qualified public school teacher population in the relevant labor market." *Hazelwood*, 433 U.S. at 308.

¹³³ Alternatively, the lawsuit could be structured as a class action suit on behalf of Caucasian head coaching candidates. This particular hypothetical challenge, however, will be based on a single candidate's claim because a class action suit would be evaluated under the same analytical framework.

¹³⁴ Like the employment discrimination suits threatened by Cochran and Mehri, discussed *supra* Part III.A, the individual franchise, rather than the NFL itself, is likely the proper defendant. See *supra* note 82.

¹³⁵ 411 U.S. 792, 802–03 (1973) (detailing burden-shifting structure applicable to Title VII employment discrimination claims).

¹³⁶ Rather than applying the first element, "most courts . . . have instead required the plaintiff to show that 'background circumstances support the suspicion that the defendant is that unusual employer who discriminates against the majority,' finding this to be the 'functional equivalent' of membership in a racial minority." Donald T. Kramer, Annotation, *What Constitutes Reverse or Majority Race or National Origin Discrimination Violative of Federal Constitution or Statutes—Private Employment Cases*, 150 A.L.R. FED. 1, 29 (1998) (citing *Parker v. Balt. & Ohio R.R. Co.*, 652 F.2d 1012, 1017 (D.C. Cir. 1981)).

¹³⁷ *McDonnell Douglas*, 411 U.S. at 802.

commonly drop a significant number of candidates as they narrow their search.¹³⁸ The only potentially challenging burden is establishing the candidate's preliminary qualifications. However, assuming that the candidate has either acquired relevant experience from previous assistant coaching positions or otherwise demonstrates the requisite knowledge of the game, this *prima facie* burden is not a heavy one.

Once a *prima facie* case is made, the burden shifts to the employer to articulate a nondiscriminatory rationale for its decision.¹³⁹ Again, this is not a particularly demanding showing—the existence of an affirmative action rationale will suffice.¹⁴⁰ Articulation of the Rooney Rule as the basis for the team's hiring practice shifts the burden back to the Caucasian candidate, who must then demonstrate that the Rule is invalid for being deficient in at least one of the three criteria derived from *Weber* and *Johnson*. In other words, the Caucasian candidate must disprove at least one of the following: (1) the plan is designed to eliminate manifest racial imbalance in traditionally segregated job categories; (2) it does not unnecessarily trammel the interests of Caucasian candidates; and (3) it is a temporary measure.¹⁴¹

1. *Designed to Eliminate a Manifest Racial Imbalance*

The first inquiry seeks to establish whether a manifest racial imbalance in a traditionally segregated job category—here, NFL head coaches—justified the introduction of race consideration in hiring at the time the Rooney Rule was adopted (i.e., in 2002).¹⁴² When Cochran and Mehri announced their intent to sue if the NFL's pre-Rooney Rule status quo persisted, some observers characterized the NFL's player/head coach racial disparity as highly indicative of the

¹³⁸ See, e.g., *Niners Narrow Coaching Search*, NFL.COM, Feb. 4, 2003, <http://www.nfl.com/teams/story/SF/6168920> (“Romeo Crennel was dropped from the list of candidates for the San Francisco 49ers’ head-coaching vacancy.”).

¹³⁹ *McDonnell Douglas*, 411 U.S. at 802.

¹⁴⁰ *Johnson v. Transp. Agency*, 480 U.S. 616, 626 (1987).

¹⁴¹ See *Johnson*, 480 U.S. at 631–32 (noting that manifest imbalance for jobs requiring expertise must be derived from comparison with those in labor force with relevant qualifications); *United Steelworkers v. Weber*, 443 U.S. 193, 208–09 (1979) (explaining why challenged affirmative action plan was permissible).

¹⁴² Proponents of the Rule often argue that its policy is necessary to correct the disparity between African American players and head coaches. See Shropshire, *supra* note 90, at 194 (noting common comparison between percentage of African American players and percentage of African American coaches, general managers, or owners in sports league); Dave Zirin, *Crossroads: Race and Coaching in the NFL*, TENN. TRIB., Jan. 12, 2006, at B1 (“Progress will be when 65% of coaches are African-American.”); Max Welles, *Detroit Lions Not Fine with \$200,000 Fine*, DAILY COUGAR ONLINE, July 28, 2003, <http://www.stp.uh.edu/vol68/160/sports/sports1.html> (finding three African American head coaches in sport with over sixty percent black players to be “pitiful”).

need for more diverse coaches.¹⁴³ However, as discussed in Part II.A, an NFL head coach's job is extremely complex;¹⁴⁴ thus, the job qualifies as a highly skilled position under *Johnson*.¹⁴⁵ Consequently, NFL head coaches must be compared to the relevant section of the labor market that possesses the requisite skills to determine if a "manifest racial imbalance" is actually present.¹⁴⁶ A comparison of African American head coaches with African American NFL players looks at two distinct labor markets and is therefore an insufficient basis for adoption of the Rooney Rule.¹⁴⁷ Instead, the percentage of African American NFL assistant coaches—who likely possess many of the special skills required for head coaching—is a more appropriate basis for comparison.¹⁴⁸ Though promising, there are two flaws in this approach.

First, assuming that all assistant coaches do indeed constitute a suitably comparable labor market, it is uncertain whether the resulting disparity among head coaches constitutes a "manifest imbalance." Though it remains unclear how large an imbalance must be before an employer may voluntarily adopt racial or gender preferences,¹⁴⁹ the *Johnson* Court stated that the required "manifest imbalance need *not* be such that it would support a prima facie [discrimination] case

¹⁴³ See Leo, *supra* note 86 (finding case for more African American coaches to be strong since between sixty and seventy percent of NFL players are African American).

¹⁴⁴ See *supra* notes 47–61 and accompanying text (describing organizational complexity facing NFL head coaches).

¹⁴⁵ See *Johnson*, 480 U.S. at 631–32 (explaining dichotomy between jobs that "require no special expertise" and those that call for "special training").

¹⁴⁶ *Id.* at 632.

¹⁴⁷ While a history of professional play may be a valid criterion for eventual coaching success, standing alone it is not considered a valid indicator of potential head coaching success in the NFL. Thomas & Rich, *supra* note 1, at 351. Moreover, many professional athletes have little interest in coaching for practical reasons. See Edholm, *supra* note 6 ("When you are rich, you certainly don't need to work after your playing days are over. NFL players have families they barely see six months of the year while they play, and most of them decide to spend their time at home once they stop playing.").

¹⁴⁸ NFL teams occasionally hire head coaches straight from the head coaching ranks of Division IA college football. See, e.g., Mark Maske, *LSU's Saban Accepts Offer to Coach Dolphins*, WASH. POST, Dec. 26, 2004, at E1 (reporting that Nick Saban, fresh off his stint as head coach of Louisiana State University, was hired by NFL's Miami Dolphins franchise). However, extending the hypothetical pool of candidates to include Division IA head coaches would be ineffectual: Only four Division IA football teams (2.1%) employed African American head coaches in 2002. LAPCHICK, *supra* note 38, at 27. Notably, by 2007 this number had risen to only seven, prompting some to call for an extension of the Rooney Rule to the college football ranks. Morgan Campbell, *Black Coaches Owe It All to Rooney Rule: Interviewing Minority Candidates for NFL Coaching Jobs Mandatory Since '03*, TORONTO STAR, Jan. 23, 2007, at B1.

¹⁴⁹ See Harry T. Edwards, *The Future of Affirmative Action in Employment*, 44 WASH. & LEE L. REV. 763, 782–83 (1987) (noting that Supreme Court has not distinctly defined floor beneath which imbalance will not be considered sufficiently "manifest").

against the employer.”¹⁵⁰ Title VII’s “general rule” is that illegal discrimination can only be inferred by the existence of a disparity “greater than two or three standard deviations.”¹⁵¹ Therefore, the NFL may be able to show a sufficient imbalance to adopt an affirmative action plan even if the imbalance is less than two or three standard deviations.

African Americans made up twenty-eight percent of NFL assistant coaches in 2002.¹⁵² While lower than the percentage of African American players in the NFL (sixty-seven percent), the figure is still significantly higher than the percentage of African American head coaches (six percent) that year.¹⁵³ The resulting statistical imbalance appears to satisfy the *Castaneda* “general rule,” and therefore a defendant NFL franchise could plausibly prove the sufficient “manifest imbalance” needed for adoption of the Rooney Rule.

The second problem relates to whether *all* NFL assistant coaches possess the requisite special skills to warrant their inclusion in the head coaching labor market. Part II.A highlighted the specialized nature of assistant coaches in the NFL.¹⁵⁴ Each team has approximately sixteen of these categorically hierarchical coaches, with the majority of responsibility falling on the offensive and defensive coordinators. These coordinators are regularly groomed to be head

¹⁵⁰ *Johnson v. Transp. Agency*, 480 U.S. 616, 632 (1987) (emphasis added).

¹⁵¹ *Castaneda v. Partida*, 430 U.S. 482, 497 n.17 (1977), cited with approval in *Hazelwood Sch. Dist. v. United States*, 433 U.S. 299, 309 n.14 (1977) (evaluating statistical evidence in Title VII case). Admittedly, the Court’s “general rule” applies to “large samples,” *id.*, and precedent remains unclear as to how the “general rule” would apply to a sample size similar to that of NFL head coaches (thirty-two). However, the Fourth Circuit has found that the “rule in *Castaneda* of course can be adjusted for small sample sizes” by using a statistical method known as the “student’s t distribution.” *Moultrie v. Martin*, 690 F.2d 1078, 1084 n.10 (4th Cir. 1982). However, the adjustment for a sample size of NFL head coaches via the student’s t distribution would be rather minimal. When dealing with a sample size of eighteen in *Moultrie*, the court calculated that racial disparities must be greater than “2.1 to 3.6 standard deviations” (in comparison to the 2.0 and 3.0 suggested for large samples in *Castaneda*). *Id.* at 1084 n.11. Moreover, the Office of Federal Contract Compliance Programs and the Equal Employment Opportunity Commission have promulgated rules that presume discrimination when the percentage representation of a group is less than eighty percent of its percentage representation in the selection pool (the “four-fifths rule”). 29 C.F.R. § 1607.4 (2006); 41 C.F.R. § 60-3.4 (2006). Tellingly, both of the aforementioned agencies “have maintained these rules despite statistical criticism that the rule should differ for sample sizes with smaller samples.” Thomas J. Campbell, *Regression Analysis in Title VII Cases: Minimum Standards, Comparable Worth, and Other Issues Where Law and Statistics Meet*, 36 STAN. L. REV. 1299, 1311 n.39 (1984).

¹⁵² LAPCHICK, *supra* note 38, at 29 tbl.22.

¹⁵³ *Id.* at 14 tbl.1 (player statistics), 24 tbl.17 (coaching statistics).

¹⁵⁴ See *supra* Part II.A.

coaches¹⁵⁵ and typically comprise the candidate pools for head coaching vacancies.¹⁵⁶ Meanwhile, it remains uncertain whether lower-tier assistants can manage an entire NFL team.¹⁵⁷ Accordingly, assistant coaches in general could be a skill-deficient labor market for head coaching positions, in contrast to assistant coaches with coordinator experience. In 2002, African Americans held only nineteen percent of all coordinator positions in the NFL.¹⁵⁸ This is significantly less than the twenty-eight percent of total assistant coach positions held by African Americans, and therefore substantially weakens—but does not rule out—the opportunity to prove the requisite “manifest imbalance.” Overall, this demonstrates that a great deal depends on how the labor market is defined.

2. *Cannot Unnecessarily Trammel the Interests of Caucasians*

The next consideration is whether the Rooney Rule “unnecessarily trammels” the rights of Caucasian candidates. A head coach search is an enormous endeavor involving candidate visits to team facilities, interviews with the front office, extravagant dinners, and general showmanship.¹⁵⁹ Given financial and time constraints, the ability to duplicate this “dog and pony show” is limited. Therefore, the reservation of at least one interview slot for a minority candidate is significant. A Caucasian denied an in-person interview could argue that the Rooney Rule’s mandate is an arbitrarily fixed quota that unnecessarily trammels his rights.¹⁶⁰

¹⁵⁵ See Michael Wilbon, *To Unearth a Coaching Gem, You Have to Know Where to Dig*, WASH. POST, Dec. 23, 2000, at D1 (providing examples of offensive and defensive coordinators who became NFL head coaches).

¹⁵⁶ See LAPCHICK, *supra* note 38, at 30 (“Coordinator positions are considered to be the pipeline to the head coaching position.”); Wilbon, *supra* note 155 (claiming that almost all great NFL head coaches first served as coordinators).

¹⁵⁷ Thomas & Rich, *supra* note 1, at 358.

¹⁵⁸ LAPCHICK, *supra* note 38, at 30.

¹⁵⁹ See, e.g., Brandt Williams, *Vikings Hire Brad Childress as New Head Coach*, MINN. PUB. RADIO, Jan. 6, 2006, http://news.minnesota.publicradio.org/features/2006/01/06_williamsb_childress (detailing Minnesota Vikings’ wooing of head coach candidate Brad Childress, who within hours of end of NFL season was flown to Minnesota for meetings with legendary Vikings players and dinner with Vikings owners).

¹⁶⁰ See Roger Clegg, *Cochran and the Coaches: Johnnie’s Next Lawsuit?*, NAT’L REV. ONLINE, Oct. 10, 2002, <http://www.nationalreview.com/clegg/clegg101002.asp> (emphasizing that forcing NFL teams to interview minority candidates “means that sometimes a better-qualified white candidate, and one who might have gotten the job, is going to be bumped off the list to make way for a less qualified nonwhite candidate”); Edholm, *supra* note 6 (“[T]he NFL is not worried about teams missing out on ‘their guy.’ It is worried about filling quotas . . .”). Note that the possibility exists that teams will treat the Rooney Rule as a lump-sum tax and interview the exact same number of Caucasian candidates as before (simply adding an additional interview for a minority candidate). Thus the Caucasian candidate that may have originally been bumped could still get interviewed regardless of the

This “quota” argument, however, is flawed. First, quotas are not per se illegal. Indeed, in *Weber* the Court approved an affirmative action plan that reserved fifty percent of training openings for African Americans.¹⁶¹ A quota system is usually deemed illegal only when there is no legitimate basis for the figure chosen, such as when there is no showing of the requisite “manifest imbalance.”¹⁶² Therefore, a quota based purely on speculative or amorphous data is arbitrarily fixed and will fail under Title VII. Accordingly, assuming that the proper “manifest imbalance” is present, the Rooney Rule is not illegal simply for employing a nonarbitrary quota.

That said, it is inaccurate to even call the Rooney Rule a “quota system.” Quotas generally refer to explicit hiring preferences characteristic of the “hard” end of the affirmative action continuum,¹⁶³ but the interview “set-aside” provision is not a quota for the number of minorities who must actually be *hired*.¹⁶⁴ Instead, the provision is more like a “quasi quota”¹⁶⁵ or consideration-forcing mechanism lying at some point between the “soft” and “hard” polar extremes. Since he gains no entitlement to the head coaching position, a Rooney Rule beneficiary must still compete with all other qualified applicants, none of whom are automatically excluded from consideration.¹⁶⁶ There-

tax. However, this analysis only identifies that the Rule will not *necessarily* reduce the opportunities for Caucasian candidates; it still leaves open the real possibility that teams (which are largely at the mercy of finite budgets and time constraints) will bump qualified candidates off their interview list because of the Rooney Rule, thereby creating an alleged prima facie injury.

¹⁶¹ *United Steelworkers v. Weber*, 443 U.S. 193, 199 (1979).

¹⁶² *See City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 499 (1989) (“While there is no doubt that the sorry history of both private and public discrimination in this country has contributed to a lack of opportunities for black entrepreneurs, this observation, standing alone, cannot justify a rigid racial quota”); *Bennett v. Arrington (In re Birmingham Reverse Discrimination Employment Litig.)*, 20 F.3d 1525, 1542 (11th Cir. 1994) (finding affirmative action plan impermissible under Title VII because its arbitrary fifty percent quota was not linked to workforce racial balance and unnecessarily trammelled non-African Americans’ rights).

¹⁶³ For a discussion contrasting “soft” and “hard” forms of affirmative action, see *supra* notes 103–07 and accompanying text.

¹⁶⁴ *See Leonard Shapiro & Mark Maske, NFL Improves in Minority Hiring*, WASH. POST, Jan. 29, 2005, at D3 (quoting head coach Tony Dungy as stating “[t]he rule was never intended to get a quota of minority coaches”); *see also Nordlinger, supra* note 5, at 26 (sarcastically suggesting that “the brave new social engineers should stop pussyfootin’ around with this interviewing stuff” and simply set aside “a certain percentage of the [head coaching positions] in the league” for African Americans).

¹⁶⁵ *See Ian Ayres, Narrow Tailoring*, 43 UCLA L. REV. 1781, 1812 (1996) (discussing “quasi-quotas that would at least to a small degree tailor the level of participation to the strength of minority applicants”).

¹⁶⁶ Steve Wilstein, *High Marks for NFL in Minority Hiring*, SPORTINGNEWS.COM, Feb. 10, 2005, <http://fantasy.sportingnews.com/nfl/articles/20050127/596532.html> (noting that Rooney Rule “is all about opportunities, not quotas[,] . . . opening doors, not shutting

fore, if a minority candidate prevails, the use of a mandatory consideration rule—as opposed to an absolute hiring quota—provides some assurance that he is substantially qualified for the position.¹⁶⁷ Because the Rooney Rule neither requires replacement of Caucasian head coaches with African Americans nor creates an absolute bar to the advancement of Caucasian candidates, it should not be construed to unnecessarily trammel Caucasians' interests.

3. *Must be a Temporary Measure*

In contrast to the plan approved in *Weber*, the NFL has yet to set an end date for the Rooney Rule. Dan Rooney explicitly refused to set any numerical goals, saying only that the Rule was intended to “‘accomplish diversity and make it so that everyone interested in these jobs gets an opportunity and a fair chance at them.’”¹⁶⁸ Without a discernable end, the Rule seriously flirts with impermissibility. Precedent regarding the validity of indefinite affirmative action plans is inconsistent, especially in the lower courts.¹⁶⁹ In *Johnson*, however, the Supreme Court upheld a plan that lacked a termination date, noting that an express assurance of duration may be necessary only if a program actually sets aside positions according to specific numbers or quotas (as in *Weber*).¹⁷⁰ Overall, it was clear to the *Johnson* Court that the plan in question was designed “to attain a balanced work force, not to maintain one.”¹⁷¹

Similar to the plan in *Johnson*, the Rooney Rule takes a moderate, gradual approach to eliminating the racial imbalance in the

people out[.] . . . [and] giving qualified candidates a chance to succeed or fail on their own merits”). Such a structure is likely to be viewed positively by courts. *See Johnson v. Transp. Agency*, 480 U.S. 616, 638 (1987) (noting with approval that plan in question did not insulate individual women applicants from comparison with all other candidates).

¹⁶⁷ *See Ayres, supra* note 165, at 1812 (explaining quasi quotas as “provid[ing] some assurance that prevailing minorities must have minimal qualifications”).

¹⁶⁸ Leonard Shapiro, *Rooney Decries Tying Draft Picks to Hirings*, WASH. POST, Nov. 12, 2002, at D3 (quoting Dan Rooney).

¹⁶⁹ *Compare Taxman v. Bd. of Educ.*, 91 F.3d 1547, 1564 (3d Cir. 1996) (en banc) (holding affirmative action plan invalid partly because of its unlimited duration), and *Lehman v. Yellow Freight Sys., Inc.*, 651 F.2d 520, 528 (7th Cir. 1981) (finding plan invalid partly because its lack of time limit threatened rights of non-minority applicants), with *Kromnick v. Sch. Dist. of Phila.*, 739 F.2d 894, 911–12 (3d Cir. 1984) (approving plan despite lack of termination date because it was meant to “meet a continuing need” and would “undoubtedly [be] periodically reappraise[d]”), and *Cohen v. Cmty. Coll. of Phila.*, 484 F. Supp. 411, 435 (E.D. Pa. 1980) (finding plan’s lack of termination date “not nearly so serious as to warrant intervention”).

¹⁷⁰ *Johnson*, 480 U.S. at 639–40.

¹⁷¹ *Id.* at 639 (second emphasis added). Among the key factors persuading the Court to accept the plan was the fact that the plan itself contained ten references to “attain[ing]” racial and sexual balance but no references to “maintain[ing]” this balance. *Id.*

NFL's head coaching ranks. Absolute hiring quotas or demanding timetables are notably absent. Therefore, despite its lack of an explicit statement of duration, the Rule should qualify as a "temporary" measure.

The above analysis exposes notable weaknesses within the Rooney Rule's structure—particularly relating to its "manifest balance" calculation and amorphous quasi quota. On the whole, however, Supreme Court precedent suggests that the Rooney Rule would withstand a Title VII challenge—a conclusion important to the image-conscious NFL.¹⁷²

V

BUT DOES IT WORK? THE EFFECT OF THE ROONEY RULE

Upon its inception, the Rooney Rule appeared to insulate the NFL from legal threats and media scrutiny. However, after the Rule's first violation, the NFL again found itself under the microscope when the Rule's initial supporters and detractors both questioned its policy implications. In the background of this frenzied condemnation, however, the Rooney Rule continued to evolve and methodically influence the antiquated hiring process.

A. *The First Violation of the Rooney Rule*

In 2003, Detroit Lions president Matt Millen candidly declared his intention to hire head coach Steve Mariucci¹⁷³—and why not? After all, the Michigan native had put together a 60–43 record with four playoff appearances in his previous six seasons as head coach of the San Francisco 49ers,¹⁷⁴ where he was known for his charisma and outstanding operation of the franchise.¹⁷⁵ The Lions could not dream of a better "face of the franchise" than a local kid with a golden résumé like Mariucci.

Cognizant of the Rooney Rule, Millen contacted five minority prospects regarding the Lions vacancy, but all five refused his interview invitation because they knew that the decision to hire Mariucci

¹⁷² See *supra* note 105 and accompanying text (describing NFL's perception-conscious nature).

¹⁷³ See Nordlinger, *supra* note 5, at 25 (noting that Millen was too honest in letting others know that he "had long wanted Mariucci at the head of his team").

¹⁷⁴ Edholm, *supra* note 6.

¹⁷⁵ See Larry Lage, *Mooch Brings Hope to Lions*, TRVERSE CITY RECORD-EAGLE, Aug. 28, 2003, Football Preview, at 32, available at <http://www.record-eagle.com/sections/2003football/32football.pdf> (declaring that Mariucci's coaching track record in San Francisco converted many doubters).

had already been made.¹⁷⁶ As Millen hastily continued his search to conduct an obligatory minority interview, he worried that Mariucci would receive other offers.¹⁷⁷ Fearful that he would lose a hot commodity, Millen decided to forego the Rule and signed Mariucci. Subsequently, the NFL fined Millen \$200,000, informing him of the penalty in a letter from then commissioner Tagliabue. The correspondence stated that “[w]hile certain of the difficulties that [Millen] encountered in seeking to schedule interviews with minority candidates were beyond [his] control, [he] did not take sufficient steps to satisfy the commitment that [he] had made.”¹⁷⁸

B. *The Sound Off: Criticisms of the Policy*

Following the fine, the NFL took advantage of the opportunity to maximize the attention given to the Rooney Rule.¹⁷⁹ The fine was initially supported by progressive groups, who condemned Millen,¹⁸⁰ and the media, which proclaimed that “[t]he NFL served notice . . . that it is taking its commitment to diversity seriously.”¹⁸¹ However, the applause quickly ebbed as commentators began to question the reprehensibility of Millen’s actions.¹⁸² Technically, Millen did break a League rule. But when a franchise targets a specific coach, who then reciprocates the interest, what is accomplished by forcing the franchise to interview a minority “candidate” with no intention of hiring him?

1. *What Legitimacy Results from Perfunctory Interviews?*

The Rooney Rule appears to be helpful only when a franchise is conducting a wide-open search that includes first-time or relatively unknown candidates. In that scenario, the minority candidate may actually receive legitimate consideration. But if an accomplished coach like Mariucci is under consideration, the Rule merely results in an elaborate public charade, in which a team must contact candidates

¹⁷⁶ Nordlinger, *supra* note 5, at 25.

¹⁷⁷ See Shropshire, *supra* note 90, at 206 (“Millen wanted to move rapidly before some other team could lure Mariucci.”).

¹⁷⁸ *Millen Fined*, *supra* note 7.

¹⁷⁹ See Edholm, *supra* note 6 (mocking NFL’s decision to announce fine on eve of new season, six months after Mariucci’s hiring).

¹⁸⁰ See Nordlinger, *supra* note 5, at 26 (noting criticism of Millen’s actions by Cyrus Mehri and Detroit City Council). Kellen Winslow, executive director of the Fritz Pollard Alliance, commented that “[w]ith today’s announcement, the ‘Rooney Rule’ has finally arrived,” and “[w]e are pleased that the rule now has teeth and . . . sends a strong message to owners to embrace inclusive hiring practices.” *Millen Fined*, *supra* note 7.

¹⁸¹ *Millen Fined*, *supra* note 7.

¹⁸² See *supra* note 6 and accompanying text (highlighting criticism of Rule).

it has no interest in hiring.¹⁸³ Likewise, the Rule asks minority “candidates” to play along by agreeing to be interviewed for an opening that they know does not really exist.

In this sense, the Rooney Rule may result in a series of sham interviews scheduled solely to satisfy its requirements.¹⁸⁴ These interviews not only commit team resources inefficiently but, more importantly, they demean the candidates themselves.¹⁸⁵ In forcing teams that have essentially already selected their new head coaches to conduct these interviews, the NFL seems to support—and perhaps mandate—the demeaning phenomenon of tokenism.¹⁸⁶ Instead of being taken seriously, these token candidates are “likely to become future pawns, cast out in front of the media as legitimate possibilities” when in reality they are merely “compliance candidates.”¹⁸⁷

For example, the same year that Millen was fined for violating the Rooney Rule, the Dallas Cowboys were in hot pursuit of head coach Bill Parcells, a Caucasian with a legendary track record of success.¹⁸⁸ Cowboys owner Jerry Jones, well aware of the Rule, apparently complied by interviewing African American candidate Dennis Green over the phone for a half hour.¹⁸⁹ And in 2004, the Miami Dolphins delayed hiring Nick Saban, a Caucasian, as head coach when someone in the organization recognized that the team would be fined if it did not first interview a minority candidate.¹⁹⁰

¹⁸³ See Shelly Anderson, *The NFL's Woeful Track Record on Diversity and Head Coaching Jobs*, POST-GAZETTE.COM, Feb. 7, 2003, <http://www.post-gazette.com/sports/columnists/20030206shelly0207p2.asp> (finding it “obvious” that minority candidates for Lions’ opening would have received “token interviews” so that team could conform to Rooney Rule).

¹⁸⁴ Cf. Nordlinger, *supra* note 5, at 26 (explaining “sham interviews” as inevitable consequence of Rooney Rule’s “tokenism”).

¹⁸⁵ See Leo, *supra* note 86 (noting that Detroit offensive coordinator and minority Sherman Lewis found invitation to interview for head coach position to be “demeaning” in light of team’s known interest in Mariucci).

¹⁸⁶ Cf. Alice K. Ma, Comment, *Campus Hate Speech Codes: Affirmative Action in the Allocation of Speech Rights*, 83 CAL. L. REV. 693, 719 (1995) (opining that minority presence at schools without participation in campus life is “perilously akin to tokenism” when in context of affirmative action plan).

¹⁸⁷ Edholm, *supra* note 6.

¹⁸⁸ See Jaime Aron, *Cowboys Still Waiting on Parcells Decision*, PITT. POST-GAZETTE, Jan. 1, 2003, at C-6 (reporting Dallas Cowboys’ interest in hiring Super Bowl-winning coach Bill Parcells).

¹⁸⁹ See Jay Nordlinger, *Of the Rooney Rule, Classically Black, and Other Distinctively American Outrages*, NAT’L REV. ONLINE, Sept. 2, 2003, <http://www.nationalreview.com/impromptus/impromptus090203.asp> (quoting Jimmy Raye, an African American assistant coach: “[Cowboys owner Jerry Jones] wanted Bill Parcells, and, oh, by the way, he made a call to Denny Green and spent half an hour on the phone with him to act like he was in compliance”—which is ‘ludicrous’”).

¹⁹⁰ Arkush, *supra* note 6. University of Miami defensive coordinator Randy Shannon, an African American, rejected the chance to interview for the position before it was even

Ironically, NFL Players Association Executive Director Gene Upshaw—who called the 2003 Mariucci hiring “indefensible” when the Lions protested their fine¹⁹¹—may have foreseen this weakness. In 2002, Upshaw, an African American, criticized the idea of a “mandated diversified list of candidates” as “inviting . . . sham interviews and a sham list.”¹⁹² Indeed, according to sports sociologist Dr. Harry Edwards, the Rule “essentially ask[s] a minority coaching candidate to play the clown in this situation.”¹⁹³

2. What Qualifies as “Sufficient Steps”?

Millen’s error, it appears, was his candor. He publicly identified his top choice with the hope that Mariucci would not sign with another team while waiting on the Lions. In turn, he also made minority candidates aware of the unlikelihood of obtaining the position if they accepted an interview. Former commissioner Tagliabue admitted that some of the team’s difficulties were beyond its control, but he insisted that it was still required to take sufficient steps to satisfy its commitment to the Rooney Rule. Did this mean that for the sake of appearances, the Lions should have found someone willing to sit down for a “sham” interview?¹⁹⁴ And what number of interview rejections by minority candidates would have justified the Mariucci hiring in the League’s eyes?

3. What Determines a Good Faith Effort at Inclusion?

NFL franchises are directed to interview minority candidates “in good faith” and “with an open mind.”¹⁹⁵ But how are we to evaluate this? If any organization among the thirty-two NFL franchises exemplified good faith and open-mindedness, it was likely the Detroit Lions. In 2003, the team had twelve African Americans in high-level

offered, saying, “Do you think they’re going to hire me? Let’s be honest. Why should I waste my time?” Michael Smith, *System’s Flawed, but Better Than Before*, ESPN.COM, Dec.21, 2004, http://proxy.espn.go.com/nfl/columns/story?columnist=smith_michael&id=1950744 (subscription required) (on file with the *New York University Law Review*).

¹⁹¹ *Millen Fined*, *supra* note 7.

¹⁹² Gary Myers, *Upshaw Rips Cochran’s Plan*, N.Y. DAILY NEWS, Oct. 31, 2002, at 79.

¹⁹³ *Live From . . .* (CNN television broadcast Feb. 1, 2005) (transcript available at <http://cnstudentnews.cnn.com/TRANSCRIPTS/0502/01/1ol.05.html>).

¹⁹⁴ In a 2003 scheme illustrating the folly of the system, John Hackney, an African American with an MBA from Cornell, offered to come and interview with any NFL team for \$100,000. While he had no interest in being an NFL head coach, Hackney reasoned that he could pocket \$100,000, and the NFL team would have a net savings of \$100,000 by complying with the Rule and thereby avoiding a \$200,000 fine such as the one issued against Millen. Marianne M. Jennings, *Rush Limbaugh: Part I*, JEWISH WORLD REV., Oct. 5, 2003, <http://www.jewishworldreview.com/cols/jennings1011503.asp>.

¹⁹⁵ Nordlinger, *supra* note 5, at 26.

positions, including two of their top three executives.¹⁹⁶ In addition, all three of its last four offensive coordinators prior to the fine were African American.¹⁹⁷ Millen and Lions owner William Clay Ford, Sr.—a former NAACP Man of the Year—are active proponents of minority hiring, yet ironically they were the ones stung by the Rooney Rule.

The preceding section summarizes the dilemma of the Rooney Rule. If a franchise hires a head coach without interviewing a minority candidate, it faces a substantial fine and public condemnation. But if it hires a Caucasian head coach—even while satisfying the Rule—it may cause harm by perpetrating sham interviews. In contrast, if it hires an African American head coach, it will win applause—until it decides to fire him, “in which event they’d better have a passel of black candidates at the ready.”¹⁹⁸ As a result, every head coach hirer is now under a microscope.¹⁹⁹

C. Accentuate the Positive: The Strengths of the Rooney Rule

Whether by vilifying the Matt Millens of the NFL for making a mockery of affirmative action, or by condemning the NFL itself for implementing an ambiguous and precarious policy, commentators of the Rooney Rule have lost sight of the primary reason for the low percentage of African Americans in the NFL’s head coaching ranks: the persistence of unconscious bias.²⁰⁰ For all of its admitted weaknesses, the Rooney Rule’s effectiveness lies in its potential to deconstruct the hidden biases inherent in NFL social networks. Because these network affiliations and unconscious biases have muted the voices of African American candidates and perpetuated the status quo, a unique policy designed to promote occupational integration should not be cast aside so abruptly.

While consistent with the traits of traditional “old boy” networks, in some ways the exclusive networks used to hire head coaches are distinctive to professional sports.²⁰¹ The world of sports, unlike that

¹⁹⁶ Edholm, *supra* note 6.

¹⁹⁷ *Id.*

¹⁹⁸ Nordlinger, *supra* note 5, at 26.

¹⁹⁹ The same year that Millen was fined, three other teams obeyed the Rule but hired Caucasians, yet all three came under heavy suspicion. *Id.*

²⁰⁰ See *supra* notes 20–24 and accompanying text (delineating phenomenon of “unconscious bias”).

²⁰¹ See Shropshire, *supra* note 90, at 206–07 (noting that most commentators conclude that hiring and promotion problems in sports—beyond overt discrimination—are due to use of networks at various levels of hiring process).

of traditional business, is not one where jobs are posted and people apply. It is one dependent on the existence of prior teammate and coaching relationships, and a potential candidate must usually be close to an existing network member to obtain an interview.²⁰² The NFL's head coaching network remains exclusive because football's organizational complexity causes decisionmakers to rely on unconscious biases when evaluating candidates' intellectual ability.²⁰³ Though the NFL decisionmaker is no more likely to be consciously racist than an NBA decisionmaker, he is more apt to unconsciously discount an African American candidate's intellectual ability,²⁰⁴ and the candidacy is therefore likely to end well before the interview phase. Thus, the NFL head coaching network has remained virtually impenetrable.

Acknowledging the potency of this pervasive bias, the Rooney Rule aims to integrate minorities into the NFL head coaching network and thereby expand it. Mandating diverse candidate slates ensures that every team is exposed to minority candidates who might not otherwise receive an interview. The policy slows down the selection process and induces teams to act prudently before making a decision, limiting the instances where teams preselect a head coach without acknowledging other qualified candidates.²⁰⁵

Notably, the NFL has also worked to diminish the incidence of sham interviews by adopting guidelines that create a protocol for taking "substantial steps" towards ensuring the legitimacy of minority interviews.²⁰⁶ In a job market that is primarily about who you know and who knows you,²⁰⁷ forcing social interaction between previously

²⁰² *Id.*; see Smith, *supra* note 81 (asserting that in NFL head coaching ranks "[t]here's a network in place that, unfortunately, most minorities aren't plugged into").

²⁰³ See *supra* Part II.A.

²⁰⁴ See *supra* notes 51–62 and accompanying text. African American NBA head coach Avery Johnson reinforced the distinction between the two professional leagues' hiring practices: "I don't think [the NBA] needed a rule to give a guy an opportunity [T]he NBA has done a good job of giving coaches an opportunity [without a Rooney Rule equivalent]." Dwain Price, *NBA Insider: NFL Feat Old News in the NBA*, FORT WORTH STAR-TELEGRAM, Feb. 7, 2007, at D2.

²⁰⁵ See Scott Brown, *Steelers' Rooney Praised for 'Rule'*, KNIGHT RIDDER TRIB. BUS. NEWS (Washington), Feb. 3, 2007, at 1 (quoting African American head coach Tony Dungy as stating: "'The thing [the Rooney Rule] has done is it's really slowed the hiring process down and made people investigate a lot of different candidates, and I think that's key.'").

²⁰⁶ See *NFL Issues Interviewing Guidelines*, NFL.COM, Dec. 9, 2003, <http://www.nfl.com/news/story/6908387> (listing guidelines including ban on telephone interviews and involvement of principal team owner in minority interviews).

²⁰⁷ As former New Orleans Saints general manager Bill Kuharich stated: "[T]he way [NFL head coaching candidates] get jobs is probably determined more by who you know than by talent and ability [Y]ou've got to go back to the individual and trace the connection—who influenced the decision—and you can target why a guy got a job." Greg Logan, *Just Out of Reach: Black Coaches, Shut Out of 11 Head-Coaching Spots, Ask 'Why?'*, NEWSDAY, June 1, 1997, at B4; see also Simmons, *supra* note 85 (quoting Cyrus

excluded African American candidates and those inside the NFL's "old boy" network is crucial. Essentially, a decisionmaker harboring unconscious bias is forced to confront his own partiality by meeting face-to-face with a candidate he might never have previously considered.²⁰⁸ Even a candidate interviewed on what some consider sham terms²⁰⁹ receives the chance to at least make a good impression in front of actual decisionmakers.²¹⁰ This candidate could benefit not only by being available should things not work out with the franchise's eventual choice but also by garnering a reputation as a quality interviewee.²¹¹ Moreover, there may be instances where a candidate—previously a specialist assistant coach (i.e., linebackers coach)—interviews for a head coaching position and winds up instead with an offer for a lower, but still highly coveted, coordinator position (i.e., defensive coordinator).²¹² Accepting the offer not only results in a

Mehri as stating that “[b]ecoming a head coach is not based on merit—it is based on who you know”).

²⁰⁸ See *NFL Coaching Searches Become More Inclusive*, CBS SPORTSLINE.COM, Jan. 12, 2006, <http://cbs.sportslines.com/nfl/story/9161398/1> [hereinafter *NFL Coaching Searches*] (asserting that Rooney Rule has opened doors for minority candidates who were previously unable to obtain interviews). Reacting to his interview for the Houston Texans' head coaching vacancy, current assistant coach Kippy Brown stated: “There was a time when guys that looked like me didn't get those opportunities . . . [but with the Rooney Rule] it's happening, so it's positive.” *Id.*

²⁰⁹ When asked about the possibility that NFL teams may continue to conduct sham interviews, FPA Chairman John Wooten, quoting Steelers chairman Dan Rooney, responded, “[L]et [those teams] suffer for not using the complete resources this league offers.” Sean Jensen, *Call Waiting: The Success of Tony Dungy, Lovie Smith, Herman Edwards and Others Has Opened the Door for Additional Minority Coaches to Get Chances to Lead NFL Teams*, NFLFANS.COM, Jan. 8, 2006, <http://www.nflfans.com/x/archive/index.php/t-6557.html>.

²¹⁰ The impact of an opportunity to interview cannot be overstated. See Scott Brown, *Rooney Rule Helping Minority Coaching Candidates*, KNIGHT RIDDER TRIB. BUS. NEWS (Washington), Jan. 11, 2007, at 1 (quoting FPA chairman John Wooten as stating: “The most important part of this process is the interview. Get [the minority candidate] in the door, and it works.”). Cyrus Mehri noted that Marvin Lewis, who is African American, interviewed with the Cincinnati Bengals prior to the 2003 NFL season in what appeared to be the team's attempt to satisfy the Rooney Rule and ended up with the position after “knock[ing the Bengals] socks off” during his meeting with the team's management. *Id.*; see also James Joyner, *NFL's Rooney Rule*, OUTSIDE THE BELTWAY, Dec. 21, 2004, <http://www.outsidethebeltway.com/archives/8517> (noting need for minority candidates “to get their names out there by meeting with those doing the hiring—team owners”).

²¹¹ See Shapiro & Maske, *supra* note 164 (quoting Tony Dungy as noting that “when you interview, you may not get that job this time, but if you impress the owner, he might tell another owner who has a vacancy, and he might call, too”); cf. Anderson, *supra* note 183 (noting that “if [the minority candidates are] dynamite in the interview, maybe word will spread and they will be attractive to other teams looking for a head coach”).

²¹² Jason Garrett, whose previous coaching experience amounted to two years as quarterbacks coach for the Miami Dolphins, interviewed for—but did not receive—the Dallas Cowboys head coaching position. *NFL/Cowboys Finalize Garrett's Promotion to Coordinator/Babich Replaces Rivera as Head of Bears' Defense*, HOUS. CHRON., Feb. 21,

promotion, but it significantly increases his chances of becoming a head coach in the future.²¹³

D. *The Rooney Rule in Action: Recent Statistics*

By the start of the 2006 football season, the number of African American head coaches in the NFL had jumped to seven. This record number put the overall percentage of African American head coaches at twenty-two percent, a considerable increase from the pre-Rooney Rule level of six percent. In fact, prior to 2004, the highest number of African American head coaches in the NFL at any one time had been three. While other factors may well have contributed to the increase, the Rooney Rule has undoubtedly played an integral role and criticism of it has correspondingly diminished.²¹⁴

By the end of the 2005 season, the success in the interview room had extended to the field, as three of the six division titles went to teams led by African American head coaches.²¹⁵ Further, all three coaches were finalists for the NFL's "Coach of the Year" honors, and one of them, Lovie Smith, was the eventual winner.²¹⁶

The progress reached another pinnacle the following season, when Smith's Chicago Bears met the Indianapolis Colts—led by fellow African American head coach Tony Dungy—in the NFL's championship game, Super Bowl XLI. Remarkably, the NFL had waited over forty years for an African American head coach to patrol the sidelines at a Super Bowl, and suddenly there were two.²¹⁷ Both

2007, at 9. Nonetheless, the Cowboys—thoroughly impressed by his interview—offered Garrett the position of offensive coordinator, which he accepted. *Id.*

²¹³ See *supra* note 156 and accompanying text (discussing importance of coordinator experience in head coaching candidates).

²¹⁴ FPA chairman John Wooten noted that the Rooney Rule "has been outstanding. The thing we set out to accomplish with it, we think we're doing it . . ." Shapiro & Maske, *supra* note 164; see also Jensen, *supra* note 209 (affirming that by making NFL teams stop and investigate more candidates than they would have, Rule remains driving force behind recent increase of African American head coaches); *NFL Coaching Searches*, *supra* note 208 (quoting Cyrus Mehri as stating: "'When the rule came out three years ago, there was a little bit of a pushback on it [but now] people see the results.'").

²¹⁵ The coaches were Tony Dungy (Indianapolis Colts), Marvin Lewis (Cincinnati Bengals), and Lovie Smith (Chicago Bears). Tim Kawakami, *Another Shame for NFL on Race*, KNIGHT RIDDER TRIB. BUS. NEWS (Washington), Jan. 16, 2006, at 1.

²¹⁶ Cf. Ralph Vacchiano, *Rooney Sees Doors Open & Close on Rule*, N.Y. DAILY NEWS, Feb. 1, 2006, at 70 (remarking that "despite a season in which Tony Dungy's Indianapolis Colts made a run at an undefeated record, Marvin Lewis revived a dead franchise in Cincinnati and Chicago's Lovie Smith was named the NFL Coach of the Year," hiring process is still at early stage).

²¹⁷ Eleanor Pollard Towns, daughter of the late African American coach Fritz Pollard, see *supra* note 92, described her elation upon hearing about Dungy and Smith: "It's like a miracle. I can see dad now, shaking his head that it's finally happened. I can just see . . . the smile on his face." Gene Wojciechowski, *Pollard's Legacy Follows Coaches to Super*

coaches' stories are noteworthy, albeit for different reasons. Originally hired by the Tampa Bay Buccaneers in 1996, Dungy is a pre-Rooney Rule relic—one of the few African American candidates to secure a head coaching position prior to the public cajoling of the League by Cochran and Mehri in 2002.²¹⁸ In contrast, the Bears hired Smith in 2004, a move seen by many, including Smith himself, as a byproduct of the Rooney Rule.²¹⁹ Together, both Dungy and Smith represent the historic message that an African American coach can lead a team to the top of the NFL.²²⁰ This time around, however, the peak was claimed by Dungy. The Colts prevailed in the game, and their venerated coach added to his legacy by becoming the first African American head coach to win a Super Bowl.²²¹

Facilitated by the success of Dungy and Smith, the Rooney Rule officially reached celebrity status in the weeks surrounding Super Bowl XLI. The media and players alike widely applauded the Rule's role in diversifying the NFL's coaching ranks.²²² Nonetheless, recent

Bowl, ESPN.COM, Jan. 23, 2007, http://sports.espn.go.com/espn/columns/story?columnist=wojciechowski_gene&id=2740677.

²¹⁸ See Chip Mundy, *Quiet Dungy Tackles a Big Job in Tampa Bay*, GRAND RAPIDS PRESS, Sept. 8, 1996, at B3 (reporting 1996 hiring of Tony Dungy). Dungy's significance goes beyond his own coaching accomplishments: Known as "the godfather of African-American football coaches," Dungy has played an integral role in the development of several African American coaching candidates. Jesse Jackson, *Super Bowl Equality Still Eludes Many*, CHI. SUN-TIMES, Jan. 30, 2007, at 23. Heading into the 2007 season, three of the NFL's six African American head coaches—Herman Edwards, Mike Tomlin, and Dungy's Super Bowl counterpart Lovie Smith—were former assistant coaches on Dungy's Tampa Bay team. *Id.*

²¹⁹ See Campbell, *supra* note 148 (quoting FPA chairman John Wooten as declaring: "I know Lovie benefitted [sic] from the rule in getting his job. I can't tell you the details, but trust me."); Phil Taylor, *Milestone in Miami: Don't Discount Impact of African-American Coaches*, SPORTS ILLUSTRATED.COM, Jan. 31, 2007, http://sportsillustrated.cnn.com/2007/writers/phil_taylor/01/31/coaches/index.html ("Smith has said that he would not have been hired by the Bears if not for the Rooney Rule.").

²²⁰ Tony Dungy recently shared his reflections on the enormity of the occasion: Watching all those [Super Bowls] when I was a young person, you dream about playing—"Maybe I can be in the game."—but you never seemed to dream about being the coach. It never seemed possible. And now, some young people will be able to dream down the road, "I might be able to coach that team one day. I might coach in the Super Bowl." And I think that is really progress.

Greg Garber, *Williams' Super Bowl Start Opened Door to Dreams*, ESPN.COM, Jan. 31, 2007, <http://sports.espn.go.com/espn/print?id=2749659&type=story>; see *id.* (quoting former African American NFL quarterback Doug Williams as saying: "I think what [Dungy and Smith] have accomplished lets everybody know it can be done.").

²²¹ On February 4, 2007, the Colts beat the Bears, 29–17, in a Super Bowl that was, appropriately, played during Black History Month. *Dungy Bests Protégé Smith*, ESPN.COM, Feb. 4, 2007, <http://sports.espn.go.com/espn/wire?section=NFL&id=2754470>.

²²² See Campbell, *supra* note 148 (stressing FPA chairman John Wooten's view that "a Dungy-Smith Super Bowl is the Rooney Rule in action"); *id.* (quoting University of

events demonstrate that the Rule remains a lightning rod for controversy,²²³ and whispers of racial bias continue to surface.²²⁴ In early 2007, national media reports stated that the Pittsburgh Steelers were set to introduce Caucasian candidate Russ Grimm as their next head coach.²²⁵ To seemingly everyone's surprise, the Steelers hired Mike Tomlin, who is African American, the very next day. Rumors immediately emerged that Steelers owner Dan Rooney, the Rule's creator and namesake,²²⁶ had bent under the pressure to hire a minority candidate in order to validate his commitment to diversity.²²⁷ The

Central Florida Sports Business Professor Richard Lapchick as saying that “[t]he Rooney rule has been one of the most important rules in professional sports”); Howard Bloom, *Countdown to Kickoff—a Date with Destiny*, SPORTS BUS. NEWS, Feb. 1, 2007, http://sportsbiznews.blogspot.com/2007_01_28_archive.html (quoting Cyrus Mehri stating that Rooney Rule “has exceeded our best expectations”).

²²³ Following a miserable 2006 season, the Oakland Raiders attempted to contact African American Dennis Green—in hopes of arranging what would appear to be a perfunctory interview—despite being smitten with candidate Steve Sarkisian. Phil Barber, *Sarkisian Looks Like Top Choice: But by NFL Rules, Oakland Must Interview a Minority Before a New Head Coach Hire*, PRESS DEMOCRAT (Santa Rosa), Jan. 16, 2007, at C1. Interestingly, Sarkisian himself is Armenian American. However, the Raiders were told by Greg Aiello, the NFL's Vice President of Public Relations, that this would not satisfy the Rooney Rule. Aiello explained that:

When [the Rooney Rule] began, the issue involved African-American coaches It was expanded to include Hispanic-Americans and Asian-Americans—but not nationalities. The focus is on groups that have been historically underrepresented as coaches in our league, to ensure that all coaches, minorities included, have a fair opportunity to achieve success.

Id. The Raiders eventually satisfied the Rooney Rule by interviewing San Diego Chargers receivers coach James Lofton, an African American, immediately after which they offered the job to Sarkisian, who promptly turned it down. Steve Corkran, *Sarkisian Turns Down Raiders Offer*, OAKLAND TRIB., Jan. 19, 2007, at 1.

²²⁴ See Kevin B. Blackstone, *Black Coaches Shortchanged Again in NFL*, PITT. POST-GAZETTE, Jan. 21, 2006, at D-2 (noting that while African American Romeo Crennel served as NFL assistant for thirty-four years before receiving his first opportunity to be head coach in 2004, newly anointed New York Jets head coach—Caucasian Eric Mangini—received his first opportunity after just eleven years serving as NFL assistant, including only one year as offensive coordinator); Kawakami, *supra* note 215 (contending that Green Bay Packers' 2005 hiring of Caucasian Mike McCarthy as head coach, coming off stint as offensive coordinator of last place team, “makes no sense on a straight-up evaluation of qualifications, except for the one with which the Packers were apparently most concerned”).

²²⁵ See Scott Brown, *Grimm Never Got Offer, Rooney Says*, KNIGHT RIDDER TRIB. BUS. NEWS (Washington), Jan. 24, 2007, at 1 (citing media reports that Grimm “was told [by the Steelers that] he could inform those close to him he would be the Steelers' next head coach and a contract was in place”).

²²⁶ See *supra* note 89 and accompanying text.

²²⁷ See Posting of Mike Florio to <http://www.profootballtalk.com/1-16-07through1-31-07.htm> (Jan. 30, 2007, 21:13 EST) (discussing media-released rumor that Rooney was urged by NFL commissioner Roger Goodell to hire either Tomlin or Chicago Bears defensive coordinator Ron Rivera, both minority candidates per League's definition). Both Rooney and Tomlin deny the reports. See *Were Others 'Ruled' Out by Rooney?; Did the Rooney Rule Play a Part in Tomlin's Hiring as Steelers Coach?*, PITT. POST-GAZETTE, Jan. 23, 2007, at

Steelers' dilemma came on the heels of the equally curious results of the 2006 coaching market, when ten head coaching positions opened at the conclusion of the 2005 season, creating an opportunity to add to the already burgeoning number of African American head coaches. Not only were just two positions filled by African Americans, but one of the two hirings—the Kansas City Chiefs' signing of Herman Edwards directly from the New York Jets' head coaching position—did not add to the total number of African American head coaches.

Nonetheless, there remains a prominent silver lining: The total number of African American candidates recently interviewed has been unprecedented,²²⁸ with a number of candidates receiving multiple interviews and further entrenching themselves in the Caucasian-dominated head coaching network.²²⁹ Perhaps the ultimate irony is that Edwards landed the Chiefs position for the very reason that Caucasian coaches usually have an edge over African Americans: his place in the network.²³⁰ In this case, the “who he knew” was Chiefs president Carl Peterson, Edwards's close friend. In effect, Kansas City's interview process was the reverse of what had transpired in other cities—including Detroit in 2003: The Chiefs had pre-selected a candidate and any interviews were just for show. This time, however, the candidate of choice was African American.²³¹

D-1 (confirming that while Tomlin acknowledges that Rooney Rule probably opened Steelers' door to him, it “had [no] part in his hiring once candidates started competing for the job”).

²²⁸ See Smith, *supra* note 81 (“[Y]ou can see significant progress, like a dozen minorities receiving some 25 interviews among them.”).

²²⁹ FPA chairman Wooten recognized the growth since the Rule's implementation: “The difference between 2000 and ‘05 or ‘06 is that in 2000 there may have been one or two interviews Today, some of our guys had multiple interviews with various teams, and that's a significant difference in itself.” Bob DiCesare, *This Round, NFL All About Exclusion*, BUFF. NEWS, Jan. 25, 2006, at D1; see also *NFL Coaching Searches*, *supra* note 208 (quoting Atlanta Falcons Executive Vice President Ray Anderson as stating: “It is progress when [African Americans] are getting multiple shots The rule was not intended to guarantee minorities a job. The rule was intended to give opportunity.”).

²³⁰ See Mark Maske & Leonard Shapiro, *Lack of Minority Hiring Called a Disappointment; NFL's New Coaches Are Mostly White and Mostly Young*, WASH. POST, Jan. 20, 2006, at E9 (quoting Dan Rooney as saying that “if [critics] say [owners] got the old-boy network going, . . . Herm Edwards, I guess, is part of it”).

²³¹ See Smith, *supra* note 81 (asserting that it is definitely progress when you begin to hear of “a retread African-American coach”).

Despite the 2003 Millen controversy²³² and the persistent specter of sham interviews,²³³ the current NFL head coaching demographics illustrate the significant effect of the Rooney Rule. As decisionmaker bias decreases and network doors are pried open, one can expect that the hiring numbers will continue to improve.

CONCLUSION

A core argument against affirmative action policies like the Rooney Rule is that classification and preferential treatment solely on the basis of race inherently leads to stigmatization and racial hostility by promoting notions of racial inferiority and stimulating latent race consciousness.²³⁴ However, rejecting an affirmative action policy on these grounds implies that the existing types of stigmatization and hostility in society are more tolerable.²³⁵ The unconscious bias that

²³² Millen's rush to hire Mariucci backfired on several levels, the defiance of the Rooney Rule being just one. After compiling a dismal 15–28 record over his three seasons in Detroit, the Lions fired Mariucci in 2005. *Mariucci Fired by Frustrated Lions*, AUGUSTA CHRON., Nov. 29, 2005, at C4. The move prompted Cyrus Mehri to state that “[o]ne could only imagine where Detroit would be with Marvin Lewis as their head coach over these last five years.” Leonard Shapiro, *Diverse Results; with Rooney Rule in Place, Black Coaches Making Most of the Opportunity*, WASH. POST, Dec. 17, 2005, at E1.

²³³ This inevitable backlash necessitates a reconsideration of the details of the policy. The League could consider the following changes: (1) It could implement an incentive-based system rather than the current penalty-based rule, which substantially interferes with teams' organizational autonomy. See Thomas & Rich, *supra* note 1, at 370 (suggesting that incentive measures “minimize attribution and racial biases without substantial interference” with franchises). An incentive program could provide an effective means of countering hiring biases with a minimum of unintended collateral consequences while also eliminating the threatening, commandeering nature inherent in a penalty-based system. (2) Alternatively, if the NFL maintains a penalty-based system, it would be wise to explicitly extend culpability to the team itself. To this end, the League could fine both the responsible individual *and* the organization for violations of the Rule. When Detroit bypassed the Rule in 2003, the NFL fined only Millen in his capacity as team president. See Shropshire, *supra* note 90, at 206 (noting that team punishment could emphasize that “organizations [themselves] need to have more of an institutional memory regarding how business should be conducted and how far an enterprise needs to go to meet that extra-mile criteria”). (3) The inherent conflict of interest in the structure of the NFL, which undermines compliance with the Rooney Rule, can be addressed. Currently, owners hire the commissioner, who is thus beholden to them and reduced to figurehead status when enforcing League policies. Collectively, the owners must place the best interests of the League ahead of their own by not only embracing the Rule in theory but also in practice, so that compliance with the Rule becomes an institutional norm. Turner, *supra* note 83.

²³⁴ See *Shaw v. Reno*, 509 U.S. 630, 643 (1993) (finding that racial classifications “threaten to stigmatize individuals by reason of their membership in a racial group and to incite racial hostility”); Elizabeth S. Anderson, *Integration, Affirmative Action, and Strict Scrutiny*, 77 N.Y.U. L. REV. 1195, 1232 (2002) (recognizing argument that racial preferences “carry a danger of stigmatic harm” that “encourages others to engage in invidious discrimination”).

²³⁵ See *Civil Rights—Section 1981—Ninth Circuit Holds that Private School's Remedial Admissions Policy Violates § 1981*. – *Doe v. Kamehameha Schools*, 416 F.3d 1025 (9th Cir.

permeated the NFL before the Rooney Rule excluded highly qualified candidates based on race, hardly a tolerable status quo.

But skeptics still wonder why the Rooney Rule was necessary: If unconscious bias caused the hiring discrepancies, one may argue that the mere publishing of the Cochran-Mehri report should have led decisionmakers to self-correct this problem.²³⁶ However, acknowledging that a problem exists is merely symptom recognition; it does not guarantee a solution.²³⁷ Because unconscious bias is unintentional and not easily recognizable, it will not disappear unless specifically addressed.²³⁸ Exhortation, education, and protest all modify our conscious beliefs while leaving the unconscious foundation largely untouched.²³⁹

The Rooney Rule forces decisionmakers to actively confront their own unconscious bias by mandating face-to-face contact and social interaction with African American candidates. While its method is imperfect and its societal impact debatable,²⁴⁰ without the Rooney Rule NFL team decisionmakers would likely continue to rely upon unconscious bias in identifying head coaching prospects. In its success, the Rooney Rule is both a recognition of how unjust the NFL once was and a celebration of how far it has come.

2005), 119 HARV. L. REV. 661, 667 (2005) (“[R]acial identification inherently leads to stigmatization and racial hostility.”); *see also* Anderson, *supra* note 234, at 1269 (“The mere fact that efforts to undo injustice arouse hostility toward the victims of that injustice cannot justify giving up on the attempt.”).

²³⁶ *See* Clegg, *supra* note 160 (opining that Cochran-Mehri report sufficiently warns owners that “they have to be on guard about some very bad decision-making that is costing them dearly”).

²³⁷ *See* Thomas & Rich, *supra* note 1, at 364 (asserting that decisionmakers will continue to rely on unconscious biases “unless the *source* of the problem is identified”) (emphasis added).

²³⁸ *See supra* notes 20–24 and accompanying text (delineating insidious nature of unconscious racism).

²³⁹ *See* Annie Murphy Paul, *Where Bias Begins: The Truth About Stereotypes*, 31 PSYCHOL. TODAY 52, 82 (1998) (asserting that strategies that are effective in reducing overt prejudice will not work on unconscious beliefs).

²⁴⁰ *See* Taylor, *supra* note 219 (“For every story on the racial significance of [Super Bowl XLI], there has been another one suggesting that we’re making too much of it.”). Dr. Harry Edwards ultimately summed up the societal impact of the Rooney Rule when he noted that the presence of Dungy and Smith in the Super Bowl “is not perhaps on the level of the White House or the first black secretary of state or the first black head of the Joint Chiefs of Staff, [but] it is one more river that [African Americans] really needed to cross” Garber, *supra* note 220.