*233 IS THE ROONEY RULE AFFIRMATIVE ACTION? ANALYZING THE NFL’S MANDATE TO ITS CLUBS REGARDING COACHING AND FRONT OFFICE HIRES*

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Rooney Rule Forward and Backward

*I. Introduction*

Nick Saban was the guy the Miami Dolphins wanted all along. [FN1] It was in all the newspapers, and mentioned all over talk radio. [FN2] Dolphins' officials were tight-lipped about filling their head coaching vacancy. The team had the worst season since its inception back in 1966, winning just four times in sixteen contests. [FN3] Saban had all the pedigree the team wanted: Defensive Coordinator for Bill Belichick, winner of three Super Bowls with the New England Patriots, a successful run as Head Coach of the Michigan State Spartans, and a National Championship with the Louisiana State University (LSU) Tigers in the 2002-2003 season. [FN4] The Dolphins wanted a proven winner and after initial clandestine discussions with Saban seemed to have a match. [FN5] But there was one catch; Miami still had more interviewing to do.

The Dolphins had to comply with the National Football League's (NFL) Rooney Rule, which mandates that any team with a head coaching vacancy must interview at least one minority candidate before making a hire. [FN6] Saban informed club officials that because he was trying to also prepare LSU for the Capitol Bowl game against the University of Iowa, any contract negotiations needed to be completed before the game. [FN7] This threw a monkey wrench into the preliminary negotiations because the Dolphins had to get the interview process done rather quickly. Bringing in any other head coach could be considered an insult (to any candidate, let alone a minority candidate), for that candidate might be able to see the writing on the wall and not wish to be part of an alleged “shamockery.” [FN8]

*235 In order to adhere to the Rooney Rule, the Dolphins brought in Art Shell, a former head coach of the Oakland Raiders and Hall of Famer, for an interview. [FN9] Miami also attempted to bring in Randy Shannon, Defensive Coordinator for the University of Miami, but he called the process a sham. [FN10] Art Shell said he wanted a chance to prove himself as a legitimate head coaching candidate, and took the interview for just that reason. [FN11] However, when the process played out, Miami made its hire. [FN12] On Christmas Day of 2004, Dolphins owner Wayne Huizenga introduced Nick Saban as the team's head coach. Miami complied with the Rooney Rule and still got the head coach it wanted.

However, what if the story ended another way? Here is an alternative ending.

The Miami Dolphins wanted to comply with the Rooney Rule while having its eye on keeping Saban interested in its vacancy. Without making an offer, the Dolphins made it clear to Saban that he was their top choice. Nonetheless, the team went into its “extra” interviews, hoping to complete them as quickly as possible so to get Saban introduced to the South Florida media. The team brings in one minority candidate out of its five interviews, as per league policy. Art Shell appears for his mandated interview and wows team officials with a scheme that opens up the offense in a way called “imaginative and innovative.” In a move that shocks the entire media community, Miami hires Shell as its head coach. Saban, who expected an official offer either immediately after, or closely following, the Shell interview, condemned the Dolphins for their hiring practices and promised action against the franchise and the NFL for its hiring policies.

This Article will summarize the history of affirmative action law, and analyze the Rooney Rule as an affirmative action policy. This analysis will include a scenario proposing an alternative NFL mandate analyzed against the criterion of affirmative action, discuss how litigation against the Rooney Rule might be based, and provide several recommendations on introducing the rule to other leagues or organizations whose hiring practices have come into question by minority activist groups.
II. A History of the NFL's Rooney Rule

Until 1989, only one African-American, Fritz Pollard, who coached the Hammond (Akron) Pros from 1923 to 1925, had been a head coach in the NFL. [FN13] Art Shell was the second man to join this very exclusive fraternity, by becoming the first African-American head coach of the modern era when he was named head coach of the Oakland Raiders. [FN14] Shell led the Raiders to a 56-41 mark from 1989-1994, but has not coached since 2000. [FN15] As of 2002, this number had swelled to five African-American head coaches, one of whom was hired on an interim basis for three games. [FN16] At the conclusion of the 2005-2006 NFL season, this number had increased to six African-American head coaches. [FN17]

Three people decided to note the differences in winning percentage amongst African-American head coaches compared to those of white head coaches: famed defense attorney Johnnie Cochran, Jr. [FN18], attorney Cyrus Mehri, [FN19] and Dr. Janice Madden. [FN20] Mehri, a famed civil rights attorney and fan of professional football, told me that he “watched the league struggle in going backwards instead of forward concerning its hiring practices, and felt [Mehri’s] expertise might be useful in putting some policy together.” [FN21] Mr. Mehri asked Mr. Cochran if he was interested in collaborating on this effort, and together, with the help of Dr. Madden’s report, the three compiled Black Coaches in the NFL: Superior Performance, Inferior Opportunities. [FN22]

Included in the Cochran-Mehri Report was what came to be known as “The Madden Report.” Dr. Madden’s report scrutinized the disparity between the percentage of African-American football players and assistant coaches to head coaching opportunities during the fifteen-year span of 1986 to 2001:

86 whites, but only 5 African Americans coached an NFL team for at least a full season. African Americans accounted for a little more than 5% of these coaches, a percentage that is less than half their share of the U.S. population, but that is a far smaller share of their percentage of participants in professional football. For example Northeastern University’s Center for the Study of Sport in Society 2001 Racial and Gender Report Card [FN23] indicates that 28% of NFL assistant coaches and 67% of NFL players are African-American. [FN24]

Dr. Madden’s research combined season records for all head coaches, first year records, seasons of termination records, and the win-loss records of teams coached by African-American coaches. [FN25] The number of African-American head coaches was far surpassed by the number of white head coaches, [FN26] but the winning percentage of those African-American head coaches that took their teams to the playoffs measured at 67%, compared to 39% for white head coaches. [FN27] Another key statistic was the record of black and white coaches who coached the same team. White coaches before the arrival of an African-American head coach averaged 7.4 wins per season; once an African-American coach took over the average number of wins per season was 9.1. [FN28] Additionally, white coaches taking over for those African-American head coaches saw their average win total slip to 8.9. [FN29] In conclusion, Dr. Madden found that

[N]o matter how we look at success, black coaches are performing better. [FN30] . . . The small number of black coaches is likely not to be just a “pipeline” problem. The black coaching candidates in the pipeline seem to be held to a higher standard by the teams in the NFL. [FN31]

Dr. Madden’s report was compiled to be the substantive analytical backbone of the Cochran-Mehri Report. The Cochran-Mehri Report was a response to the ever-decreasing number of African-American head coaches, which dropped to two after the Minnesota Vikings’ Dennis Green and the Tampa Bay Buccaneers’ Tony Dungy were fired. [FN32] The Cochran-Mehri Report included a listing of all head coaches hired in the years 1986-2001, their regular season records, playoff records, and race. [FN33] Also included were profiles of seventeen African-American head coaching candidates. [FN34]
The Cochran-Mehri Report called for “increased hiring opportunities for minority coaching candidates,” [FN35] which required “diversity among the key decision-makers (i.e., in the front office) and among the final slate of coaching candidates for each open position.” [FN36] Proposed was a “Fair Competition Resolution,” [FN37] which would reward teams an additional draft pick for “engaging in noteworthy hiring practices that encourage diversity among management decision-makers.” [FN38] Those practices included minority and female hires for all “positions of real power.” [FN39] Team owners had the opportunity to “opt out” of the resolution, but would suffer the loss of a first round draft pick. [FN40]

*239 The Report also cited some key reasons for the lack of minority hires. The NFL clubs adhere to an antitampering policy which forbids teams from interviewing candidates who are still coaching in postseason play. [FN41] For example, until recent hires this off-season by the Chicago Bears and the Cleveland Browns, Lovie Smith and Romeo Crennel served as the Defensive Coordinator of the St. Louis Rams and New England Patriots, respectively. Both the Rams and Patriots were playoff teams in recent years. The thought behind the antitampering policy explanation is that teams do not wish to wait for a coaching candidate to finish a season if it might extend all the way to the Super Bowl, which is played in late January or early February. Waiting that long might affect the ability of those teams to hire assistant coaches to fill a particular coach’s staff, or more importantly, may affect a team’s capability to prepare adequately for the NFL Draft in April. Therefore, “[b]ecause black head coaches have a demonstrated record of success, they will more often be involved in postseason play, and will hence be unavailable to interview with teams looking to make a quick change from an unsuccessful head coach.” [FN42] Moreover, the consequence from being “passed over” might become a stigma that carries its own negative effect, compounding the discrimination. A black coach who did extraordinary work and helped lead his [or her] team to the playoffs, but who is repeatedly passed over for the top coaching spots, quickly begins to lose his credibility among owners, fans and the press. [FN43] Such coaches may be seen as damaged goods and are forgotten as fresher candidates enter the spotlight. [FN44]

Internationally recognized scholar, author and human rights activist Dr. Richard Lapchick at the Institute for Diversity and Ethics in Sport hailed the report. In a statement provided for the Cochran-Mehri Report, Dr. Lapchick noted the potential far-reaching implications of the findings.

*240 When it comes to head coaches, most often the teams do not even interview highly qualified minority candidates. If the Resolution is adopted by the NFL, the Commissioner will have the tools to do more than encourage the hiring of Black head coaches. He will be able to replicate the records achieved by MLB (Major League Baseball) and the NBA [FN40] (National Basketball Association) and break new ground for the NFL. This represents a step forward in making the debate about minority coaches more than just a debate. [FN45] After its publication and release in September 2002, the Cochran-Mehri Report struck a chord first with the media, but shortly thereafter, with the NFL’s leadership and owners. [FN46] NFL Commissioner Paul Tagliabue appointed a Diversity Committee, and that committee proposed the hiring policy that all thirty-two teams now follow. [FN47] In a December news release, the NFL’s Committee on Workplace Diversity [FN48] issued its recommendations to promote diversity in the league’s head coaching and front office positions: “any club seeking to hire a head coach will interview one or more minority applicants for the position. The one exception occurs when a club has made a prior contractual commitment to promote a member of its own staff and no additional interviewing takes place.” [FN49] This policy is known as the “Rooney Rule,” after the chair of the league’s Diversity Committee, Pittsburgh Steelers’ owner Dan Rooney. Mehri described the rule as “a best practices policy, in that a better decision [as to the hiring of an NFL head coach] will be made with a more inclusive process. You [an owner] wouldn’t go to the Senior Bowl and only look at certain players from certain conferences, would you?” [FN50]

The actual nickname “Rooney Rule” was dubbed by the Fritz Pollard Alliance, the organization known for promoting diversity practice in the NFL workplace. [FN51] Fritz Pollard Alliance Chairman John Wooten [FN52] *241 helped start
the organization, along with Mehri, Cochran, and Kellen Winslow. [FN53] This group of four held impromptu meetings with NFL teams in 2002 to gather interest and to discuss then-current league hiring policies. [FN54] After some 150-200 discussions with various personnel, the plan for a corporate structure was sketched out and soon thereafter the organization took the name of the first African-American head coach in NFL history. [FN55]

With the backing of the Cochran-Mehri Report, the Madden Report, the Fritz Pollard Alliance, and the recommendation of the NFL’s Committee on Workplace Diversity, the “Rooney Rule” was implemented. The league now had a list of qualified African-American assistants, coordinators, and former head coaches qualified for head coaching positions in the league. But the committee did more than just provide a rule with some lists. Running concurrently with the interview policy in 2003 was a pilot program for coaching preparation, with the thought of possibly including this program for front office and business operations positions as well. [FN56] As of August 4, 2003, thirty-four coaches were graduates of the NFL’s Minority Coaching Fellowship Program. [FN57] In its official memo to club owners, the committee stated:

Our initial focus has been on the head coaching position. We have had numerous meetings and held discussions with a wide range of people, including club owners and executives, current and former players and coaches, and knowledgeable people outside the NFL. Overall our goal has been to assist clubs in approaching the hiring process in ways that will lead to better decisions and enhance opportunities for well-qualified coaches. [FN58]

On December 9, 2003, the Committee on Workplace Diversity issued a set of interviewing guidelines for all clubs hiring a head coach. [FN59] In short, the guidelines described the processes to be followed by all teams in their search for a new head coach:

First, prior to beginning the interview process, a club should prepare a job description that clearly and fully defines the role of its head coach and the qualities it is looking for in its head coach.

Second, prior to beginning the interview process, clubs should prepare a ‘search timeline’ that sets forth key decisions and dates leading up to the hiring of a head coach.

Third, as part of the search process, clubs should make certain that they identify a deep and diverse--by many different criteria--pool of head coaching candidates.

Fourth, the Committee strongly believes that direct involvement in the interviewing and selection process by a club’s principal owner is very important. . . . [W]e strongly urge owners to personally contact candidates and extend invitations to interview for a club’s head coaching position.

Fifth, requests for permission to interview must be made and documented in accordance with the [NFL’s] Anti-Tampering Policy.

Sixth, invitations to interview--whether accepted or declined--should be documents directly by the club in a letter to the candidate.

Seventh, telephone interviews are never preferable and seldom adequate.

Eighth, it is not necessary that the same person interview each applicant.

Ninth, candidates who are invited to interview for open positions should do so. Any widespread refusal . . . should be brought to the attention of the [NFL] Commissioner or his senior staff.

Finally, for a range of reasons, we strongly question the value of head coaching changes during the season. However, if a coaching change is made during the season, the club may name an interim coach from its existing
staff for the remainder of the season without going through a formal interviewing process. However, the club must follow the mandatory interviewing process in choosing a new permanent head coach. [FN60]

In addition, Commissioner Tagliabue made sure to note that “conduct inconsistent with procedural or substantive initiatives relating to equal employment opportunity may be treated as conduct detrimental” to the NFL’s Constitution and Bylaws, and therefore subject to punishment. [FN61] Moreover, not just the club, but the violating executive(s) *243 could be held accountable, provided those parties received reasonable notice and a quasi-judicial proceeding before such a finding was made. [FN62]

This new policy came too late, however, for the Detroit Lions. As per the statement issued by Tagliabue in the December press release, he fined Lions' President Matt Millen $200,000 for not interviewing any minority candidates before the team hired head coach Steve Mariucci in February of 2003. [FN63] The Lions fired Marty Mornhinweg in January, and in its search for a new head coach interviewed one person: Mariucci. [FN64] Millen's defense was that five minority candidates turned down interviews because those candidates thought that the Lions had their sights set on Mariucci. [FN65] Tagliabue responded to those remarks in a memo to the Lions noting, “While certain of the difficulties that you [the Lions] encountered in seeking to schedule interviews with minority candidates were beyond your control. You did not take sufficient steps to satisfy the commitment that you had made.” [FN66] At the time, there were just three African-American head coaches in the NFL: Tony Dungy of the Indianapolis Colts, Herman Edwards of the New York Jets, and Marvin Lewis of the Cincinnati Bengals. [FN67] Then Executive Director of the Fritz Pollard Alliance Kellen Winslow said, “With today's [June 25, 2003] announcement, the ‘Rooney Rule’ has finally arrived. I am happy to applaud the league for making the [rule] enforceable, which is a major step toward leveling the playing field in the NFL.” [FN68] Gene Upshaw, the league's executive director of the Players Association, added that, “[t]he Detroit Lions gave mere lip service to the agreed-upon minority hiring process, treating it almost as if a nuisance to their hiring of Steve Mariucci. The minority candidates were never given a fair chance to interview. In this case, the Lions' position is indefensible.” [FN69]

*244 Critics praised the league and criticized the Lions' front office. [FN70] Cyrus Mehri noted, “[i]mplicit in that [rule] is to give one minority candidate a fair shot. He [Millen] broke his word. The issue for us has never been about Matt Millen. It's never been about Steve Mariucci. The issue has been: give us a fair process and give us a rule that's enforceable.” [FN71] Rhoden himself said that the policy is not about quotas but about a promise that the league's thirty-two owners made to the Fritz Pollard Alliance and the potential minority candidates. [FN72] Even the Detroit City Council passed a unanimous resolution condemning Lions owner William Clay Ford and General Manager Matt Millen for its violation. [FN73]

The Lions' story is a stark contrast to the manner in which the Cincinnati Bengals hired Marvin Lewis as its head coach in January of 2003. Mehri notes that the Bengals did not have a history of interviewing minority candidates, but after the implementation of the rule, not only interviewed minority candidates, but hired then-Washington Redskins and former Baltimore Ravens Defensive Coordinator Marvin Lewis. [FN74] Lewis had been a candidate, or mentioned as a candidate, in just about every year after Baltimore won the Super Bowl in 2000 over the New York Giants. Lewis was part of a Bengals' interviewing process that whittled down an initial group of five candidates to two and then to one. [FN75] This type of process is what Mehri and Wooten both called “best practice.” [FN76]

After three years, the “Rooney Rule” has settled into the NFL culture. With that, discussion about the rule has shifted away from the procedural guidelines, and shifted to substantive matters. Some of that discussion centers on the tangible results that the rule has created in coaching circles, which has led to dialogue with NFL leadership about the possibility of expanding the rule to front office personnel. *245 Simultaneously, some people in NFL circles debate the manner in
which the rule might be circumvented.

A. Expanding the Rooney Rule to the Front Office from the Sideline

“The Rooney Rule has had a phenomenal impact on African-American coaches in the NFL. The number has jumped from two to six (as of 2005). [FN77] The culture of team front offices and the league has changed.” [FN78] Mr. Mehri had the information to support that statement, and others agreed. Dr. Richard E. Lapchick, Chairman of the Institute for Diversity and Ethics in Sport at the University of Central Florida, noted that the NFL led all leagues in assistant coaches for race (33%, or 173 in the 2004 season). [FN79] Following the initial implementation of the rule, noting the penalty that a team could suffer, and the announcement of the hiring guidelines, a system for broadening the search for head coaches in the NFL was a reality. Based on the success of the rule, the Fritz Pollard Alliance pushed for an extension of the rule into the front office. General Managers, Player Personnel Directors, Chairmen, Salary Capologists, and Scouting Directors were just some of the positions included in this push.

After the 2004 season, there were three African-American general managers (also called principal-in-charge in the Lapchick Report) in the league, which garnered a grade of “D” in the 2004 Lapchick Report. [FN80] Similarly, just 10% of team vice presidents were African-American (fourteen total), which resulted in a 3% increase; this earned a “B-“ in the Lapchick Report. [FN81] Senior administration had also seen a small decrease from 16% to 13% (18% of all Senior Administrators were not white in 2001 and 16% were not white in 2003). [FN82] This earned a grade of B/B+ in the report. [FN83] These statistics showed an emerging trend in that teams were taking the league's guidelines to heart. However, those advances in the NFL would be a stark contrast from those of the league's Players Association. “In 2003, African-Americans held 64 percent of the positions on the board . . . while whites held 34 percent.” [FN84]

The increases were good news for groups like the Fritz Pollard general managers. A policy akin to the Rooney Rule might pave the way for continued increases, or at least prevent any decreases. The Fritz Pollard Alliance began lobbying Commissioner Tagliabue for the league to extend the rule to include top front-office positions. [FN85] or, as it was termed in the Cochran-Mehri Report, “positions that have significant decision-making authority.” [FN86] In April of 2004, Fritz Pollard Alliance Chairman John Wooten and others asked the NFL’s Committee on Workplace Diversity to vote to recommend extending the Rooney Rule to front office positions, and were summarily denied. [FN87] Instead, the league wanted to try promoting better minority hiring practices in the front office without an enforcement mechanism. [FN88] Committee Chairman Dan Rooney told Washington Post writer Mark Maske by telephone:

We discussed it, but we didn't do it. It's a completely different thing than coaches. With coaches, you can make lists and discuss people from all around the league. The front office is different. We tend to hire Pittsburgh people (Rooney is the owner of the Steelers). That doesn't mean they can't be minorities, but we hire people from within our own organization or people from the Pittsburgh business community. What we have done is, when there is an opening, we call the team and let them know about the [minority] candidates. [FN89]

Wooten, disappointed, still admitted that the process was working more in favor of minority candidates than against them. [FN90] He also mentioned that in discussions with NFL Executive Vice President Jeff Pash that if the league did not continue to make progress that the consideration of expanding the rule would be brought back into committee discussion. [FN91] It should be noted that during the same off-*247 season, both the Miami Dolphins and Tampa Bay Buccaneers considered minority candidates for vacant GM-level positions before eventually hiring a white male; Wooten noted those processes and commended those franchises. [FN92]

Recently, “the NFL circulated a memo league-wide late in 2005, urging all its teams to interview at least one person of color for any front-office vacancy.” [FN93] Lapchick cited that this memo differed from the Rooney Rule because
“the latter attaches a penalty when a team fails to include a person of color in its candidate pool for head coaching vacancies.” [FN94] In a telephone interview, Lapchick elaborated on the logistics of expanding the rule. “It would be cumbersome for all positions but it would be better for certain positions [like] vice presidents, general managers, department directors, but someone smarter than me is better to set that line.” [FN95] Moreover, the Diversity Committee met during the week of November 14-18, 2005, with members of the Fritz Pollard Alliance. [FN96] During that meeting, Alliance officials again requested that the league consider putting “some teeth in the rule” [FN97] to discourage any attempts to make a sham out of the rule. One suggestion made for teams that violate the league memo is to take one week of off-season training camp away from them. [FN98] The Alliance did not ask for teams to follow the Rooney Rule, just to follow the guidelines set forth in the Pash memo. [FN99] Additionally, the Alliance sent the Diversity Committee a long list of potential candidates for front office positions. [FN100]

B. Preventing the “Shamockery” [FN101]: Interviews with Minority Candidates by NFL Teams with No Intention of Hiring Them

As noted above, the Miami Dolphins and Tampa Bay Buccaneers hired general managers while at the same time abiding by the terms of the Pash memo. [FN102] But, that same off-season, the Atlanta Falcons (in its hiring of Rich McKay), and more recently the Green Bay Packers *248 (bringing in Ted Thompson as its general manager) raised eyebrows of both supporters and critics of the Rooney Rule because each hired their respective general managers, without interviewing a minority candidate. [FN103] Those in support of the rule insist that the league’s continued failure to expand it to front office positions or to elaborate on the rules of coaching guidelines will continue to create situations where teams can conduct interviews that might not be sincere. [FN104] That reasoning carried out means that there could be an unwritten loophole to which teams can resort if a particular club has its sights set on a particular person, but does not want to draw the ire of the league or other organizations. [FN105]

When the Miami Dolphins wanted to hire Saban as its head coach, it is impossible for anyone, other than those on the inside, to know what team officials were thinking. It is possible, as some argue, that the team just wanted to interview any minority to satisfy the Rooney Rule. [FN106] Others even suggest that some within the NFL hierarchy urged Art Shell, an African-American candidate, to ignore the pleadings of groups like the Fritz Pollard Alliance and not participate in such a dog and pony show. [FN107] The rule does not force a team to hire one minority head coach, or interview ten minority coaches; the rule requires one interview. [FN108] The questions are not about violating the letter of the rule, but the spirit of the rule. [FN109] The same questions arise regarding the Dallas Cowboys hiring of Bill Parcells (the team interviewed Dennis Green), the Jacksonville Jaguars’ bringing in Jack Del Rio as their head coach (after interviewing Dennis Green as well), San Francisco’s hire of Dennis Erickson (after claiming interest in both Ted Cottrell and Greg Blache). [FN110]

Therein lies the problem. The rule does have some wiggle room. There is no denying it. When a team has its sights set on a particular candidate, and, if it does comply with the specifics of either the Rooney Rule or the Pash memo, then there is no way to hold that team accountable. The media and other activist groups can write and speak about the alleged injustice, but the fact remains that there is no clear *249 violation of either rule. Nick Saban had set a deadline with the Dolphins to finish their interview process and tie up any loose ends in regard to a contract by LSU’s Capitol One Bowl game. This gave him the option of either moving on to prepare his team and then move on to college football’s recruiting season, or to give LSU enough time to move on after he left to hire a head coach. [FN111] That deadline forced the Dolphins to act quickly and diligently in their search process. The issue remains whether Miami should have to suffer the ire of the media, activist groups, and the NFL front office for trying to complete a hiring process in a shorter-than-usual period of time. This begs the question: are teams forced to interview candidates for the sake of fulfilling a league-
mandated rule? [FN112] Was Art Shell brought in as NFLPA Executive Director Gene Upshaw puts it, as “window dressing?” [FN113] Upshaw suggested otherwise and admitted he convinced his longtime friend to take the interview: [FN114] 

He met with [Dolphins owner Wayne] Huizenga, and he believed it was a serious interview. I told him he had to go do it, and he said afterward he was glad he did. You never know what might happen down the line, and that's how everyone has to approach these things. [FN115] 

Some argue that the rule forces teams who might not be interested in a particular candidate, to at least interview them, which means that another worthy candidate becomes part of the field. [FN116] As Dolphins defensive end Jason Taylor said, “You have to give the rule a chance to work. Otherwise, what good does it do? How long were Tony Dungy [of the Colts, but then of the Buccaneers] and Herman Edwards [of the Jets] and Marvin Lewis [of the Bengals] qualified?” [FN117] 

Another criticism of the Rooney Rule is directed at its chief officer, NFL Commissioner Paul Tagliabue. It is argued that even though a commissioner's responsibilities include business management and judicial administration, the commissioner must still bow to the interests of the league's thirty-two owners. [FN118] It is true that Tagliabue enforced the rule when he fined the Lions’ front office (for violating the Rooney *250* Rule) and promised larger fines for future violators, [FN119] but no team has yet to cross that line. What might happen if several teams voiced concerns over the policy? Would Commissioner Tagliabue be under such scrutiny that he could be fired for acting adverse to the owners' interests? [FN120] If such a situation were indeed true, then Tagliabue would be rendered nothing more than a “figure head.” [FN121] As such, “the commissioner is empowered to levy penalties against teams that violate league policy, but such disciplinary action is discretionary with the interpretation of the letter and spirit of the rule left to the devices of the commissioner on a case-by-case basis.” [FN122] 

The NFL’s thirty-two owners created the Rooney Rule, so it is argued that the rule they created was one they could collectively swallow as well. [FN123] Thus, it follows that if the owners created the rule, they must be willing to follow it, or suffer the consequences should one or more of them break the rule. [FN124] The rule must be followed to such an extent that it becomes customary business practice. [FN125] 

Can the rule be made stronger, or could more exceptions be written into the rule? The answer from those associated with the Rooney Rule is a resounding no. [FN126] Wooten evaluated the rule as follows:

The rule is fine the way it is. When Jerry Jones (owner of the Cowboys) interviewed Denn[is] Green by phone for its head coaching position, it was okay. [Art] Shell was fine with the interview. You can't say that a person's been harmed if they say they are fine. Owners are now moving closer to the middle. Before, there were no interviews in the playoffs. Now, teams set aside one or two days for interviews, because they realized the old rule was not fair. When Buffalo needed a head coach in 2000, it could not interview Marvin Lewis because the Ravens were in the Super Bowl. Now the process might be different. You have to look at the rule as “law versus life.” It boils down to what people consider as fair. The league can't write enough laws to make the rule fairer. Owners and head coaching candidates have to ask and answer if the process is fair. [FN127] 

Fritz Pollard Alliance General Counsel Cyrus Mehri agreed with Wooten's assessment to the point that the rule does not need to be *251* strengthened. He feels that the rule could be made clearer in certain areas to give guidance to teams in their interview process. [FN128] Dr. Richard Lapchick agreed that “[t]here are certainly possibilities of it [the Rooney Rule] being abused, but for every one of those there is the possibility where a team meets someone whom they never thought of by bringing them in (for an interview).” [FN129]
Some teams have on the surface violated the Pash memo, but in some of those instances there were reasons involved other than the fact no penalty attached to violating the memo’s directives. When the Packers hired Ted Thompson, formerly Seattle’s Director of Football Operations, to be their new general manager, Team President Bob Harlan called Steelers owner Dan Rooney to ask his opinion of the situation. [FN130] Green Bay did have a minority candidate in house (Director of Player Personnel Reggie McKenzie), but he had been working under Head Coach Mike Sherman because Sherman held both the head coach and general manager titles until the Thompson hire. [FN131] Therefore, if Harlan had promoted McKenzie to the GM post instead of Thompson, it could be potentially awkward—the new boss would be the old boss’s former subordinate. [FN132]

Here is another take on the same above scenario: what if the Packers would like to keep McKenzie as an ace-in-the-hole candidate in case both Sherman and Thompson do not work out? Is there a penalty for wanting to retain talented personnel? Dan Rooney said earlier this year that owners might be concerned about losing talented minority candidates if the rule were extended to front office candidates because, “they just don’t want to lose their good young people.” [FN133]

The bottom line is that there are proponents who make very good points. Making the rule stronger would just be an extension of a policy which has helped raise the total of African-American coaches in the NFL to six. On the flip side, some would like to see nothing done with the rule and play a sort of waiting game to attach penalties to any violation of the Pash memo. Some also suggest the Rooney Rule should be erased entirely from the NFL landscape because it forces teams into precarious situations in its interview process and it makes a mockery of a well-intentioned policy. Although there is no answer as to which side is right, *252 the league will wait to see if its policy regarding minority interviews and minority hires results in better grades in diversity, or if even more questions need to be answered.

III. A History of Affirmative Action

At first blush, the analysis of affirmative action policies implemented by public and private actors might take different paths. However, careful consideration of the case law which follows sheds light on the Supreme Court’s similar mode of analysis with either public or private actors. The biggest difference between public and private actors lies in the framework of their analyses. Public actors are held to the Equal Protection Clause, while private actors are scrutinized under the parameters of Title VII.

One of the very first references to the term “affirmative action” came on March 6, 1961. President John F. Kennedy issued Executive Order Number 10,925, which established the President’s Committee on Equal Employment Opportunity, and in doing so, provided:

In connection with the performance of work under this [government] contract, the contractor agrees as follows:

(1) The contractor will take affirmative action (emphasis added) to ensure that applicants are employed, and that employees are treated during employment, without regard to their race, creed, color, or national origin. Such action shall include, but not be limited to, the following: employment, upgrading, demotion or transfer; recruitment or recruitment advertising; layoff or termination; rates of pay or other forms of compensation; and selection for training, including apprenticeship. [FN134]

Just over four and one-half years later, President Lyndon Johnson issued Executive Order 11,246 which, following the unprecedented Civil Rights Act of 1964 (including Title VI and Title VII), further resolved Kennedy’s order by requiring that government contractors place conspicuous notices of the provisions of the Order, that statements be made in
“all solicitations for advertisements for employees,” with the penalty for failing to abide by the Order cancellation of the contract. [FN135] The Order was later amended in 1967 to include affirmative action for women. [FN136] Several bits of remedial legislation were passed over the next eleven years, focusing on employer-employee relations in the realm of federal contractors, as well as within state and local government. [FN137]

However, in 1978, the United States Supreme Court issued one of its most important decisions involving affirmative action: Regents of the University of California v. Bakke. [FN138] In the case, the University of California-Davis’ (UC-Davis) Medical School admission plan was challenged by a student who was rejected twice through a special admissions process (separate from the general admissions program) that evaluated students either as “an economically and/or educationally disadvantaged applicant” or as member of a “minority group.” [FN139] Justice Powell, writing the Court's judgment, noted that “[t]he guarantee of equal protection cannot mean one thing when applied to one individual and something else when applied to a person of another color. If both are not accorded the same protection, then it is not equal.” [FN140] Carrying that analysis further, Powell wrote that if a school’s purpose in its admissions program was to provide an advantage for minority candidates by reserving a percentage of seats solely on the basis of their race, that is was facially invalid. [FN141] Although diversity was seen as an admirable and compelling reason for instituting its policy, the Court ruled it was still unconstitutional because it reserved seats for minorities as a quota instead of, for example, deeming race or ethnic background as a “plus.” [FN142] Suggested elements included under the heading of diversity are “exceptional personal talents, unique work or service experience, leadership potential, maturity, demonstrated compassion, a history of overcoming disadvantage, ability to communicate with the poor, or other qualifications deemed important.” [FN143]

In summary, the Court held unconstitutional the special admissions program at UC-Davis because it “involves the use of an explicit racial classification,” and also “[i]t tells applicants who are not . . . [a minority] that they are totally excluded from a specific percentage of the seats in an entering class.” [FN144] The special admissions program was deemed a violation of the Fourteenth Amendment because although the diversity was a compelling state interest, the end result (certain nonminority students with similar or better credentials were shut out of a seat at UC-Davis’ medical school) did not justify the means (a percentage of seats reserved for minority students). [FN145] The petitioning student, Allan Bakke, was unable to persuade the Court to grant him entrance into UC-Davis. [FN146] In other words, the policy increased the “plus factor” so much, that it gave the appearance that it was the only factor, and not part of a host of factors.

One of the most illustrative cases to this discussion is United Steelworkers of America, AFL-CIO-CLC v. Weber. [FN147] An affirmative action plan instituted by the Steelworkers Union with an aluminum company was challenged by a white employee who claimed the program, sought to “eliminate conspicuous racial imbalances,” in the “almost exclusively white craft-work (read: skilled worker) forces.” [FN148] The goal of the plan was to level the playing field, raising the level of skilled black workers to that of white skilled workers. [FN149] In an effort to remedy quickly past racial imbalances in the work force, the company instituted an “on-the-job training program.” [FN150] The program, however, was open to both white and black workers. [FN151] The plan reserved 50% of the openings in these newly created in-plant training programs for black employees. [FN152] In particular, a plant in one city had a severely disproportionate number of black skilled workers to white skilled workers, more specifically 1.83% of 273 workers (5 workers) were black, when the work force in that city was 39% black. [FN153]

Slowly but surely, the plan resulted in a greater percentage of African-American skilled workers; however most of them had less seniority than the white workers in the pool of applicants. [FN154] As a result, one white applicant, the complainant Weber, filed a reverse discrimination suit against the company. [FN155] After the lower courts ruled in favor of the white employee, the Supreme Court reversed. [FN156]
Justice Brennan, writing for the majority, [FN157] stated that because the actions of Kaiser [the company] were private, there was no state action and thus no implication of the Equal Protection Clause of the Fourteenth Amendment. [FN158] Moreover, Kaiser's plan was a voluntary effort, so the only question before the Court was whether a private sector employee could institute such a program under Title VII. [FN159] The employee alleged that if the Court were to read the statute literally, that the lower courts would be correct. [FN160] However, Justice Brennan and the majority did not see it that way. Justice Brennan, citing to legislative intent, found that if the Court were to agree with the lower courts' decisions, the actual purpose of the statute (Title VII) would be undermined. [FN161] In fact, the purpose of the statute, Justice Brennan wrote, was to help African-American workers excel in the skilled work force, in part because of the implementation of automation in industrial factories. [FN162] These were the jobs which African-Americans were traditionally left on the outside looking in. [FN163] As a matter of fact, Justice Brennan noted that the statutory language actually urged private actors to implement these types of programs as well. [FN164] In addition, section 703(j) of Title VII specifically states that a minority should be afforded an opportunity over a white worker simply because of their minority status. [FN165] The section also showed that Congress did not want to disallow voluntary “race-conscious affirmative action.” [FN166] Finally, Justice Brennan, after refuting the challenges to the affirmative action plan, laid down the rule for which all affirmative action programs would be measured:

The purposes of the plan mirror those of the statute [Title VII]. Both were designed to break down old patterns of racial segregation and hierarchy. Both were structured to “open employment opportunities for Negroes in occupations which have been traditionally closed to them.”

At the same time, the plan does not unnecessarily trammel the interests of the white employees. The plan does not require the discharge of white workers and their replacement with new black hires. . . . Nor does the plan create absolute bar to advancement of white employees. . . . Moreover, the plan is a temporary measure. [FN167]

United Steelworkers set the framework from which affirmative actions were to be implemented. An affirmative action program must be remedial, or designed to correct past wrongs. It cannot fire white employees at the expense of minority employees. The plan must not be a deterrent to a white employee seeking advancement. Finally, a plan must be temporary. Temporary did not refer to a specific amount of time until the Court addressed this factor in the Grutter v. Bollinger decision. [FN168]

Women were also involved in Title VII-based affirmative action cases. In Johnson v. Transportation Agency, a male employee challenged an affirmative action program that passed him over for a female. [FN169] The Supreme Court, with Justice Brennan writing for the majority, affirmed the United States Court of Appeals for the Ninth Circuit’s decision that the plan was not offensive to any notions of affirmative action. [FN170] The fact that “36.4% of the area labor market [consisted of women, while] they composed only 22.4% of the Agency employees” suggested that the program was trying to right a past wrong. [FN171] The numbers were even worse in skilled positions--no woman held such a position. [FN172] The plan furthermore contained “short term goals” which helped classify it as a temporary measure. [FN173] Additionally “[t]he Agency's plan . . . set aside no specific number of positions for minorities or women, but authorized the consideration of ethnicity or sex as a factor (emphasis provided) when evaluating qualified candidates for jobs in which members of such groups were poorly represented.” [FN174] Further, the woman qualified for the job to which she was hired, as she had the attached qualifying interview score (fourth in the group, when Johnson was tied for second). [FN175] The woman was chosen not solely based on her gender, but a combination of factors, including test scores, interview scores, qualifications for the job, and her background; affirmative action was a part of the basis for hire, but not the sole reason. [FN176] The Court stressed that the plan ensured that the interviewers knew that quotas were not at issue. [FN177] In the holding, Justice Brennan reasoned the Agency's plan was proper because

[T]he decision to do so was made pursuant to an affirmative action plan that represents a moderate, flexible,
case-by-case approach to effecting a gradual improvement in the representation of minorities and women in the
Agency's work force. Such a plan is fully consistent with Title VII, for it embodies the contribution that voluntary
employer action can make in eliminating the vestiges of discrimination in the workplace. [FN178]

Six years later, another challenge to affirmative action arose, also in the form of a reverse discrimination claim. In
Northeastern Florida Chapter of the Associated General Contractors of America v. City of Jacksonville, the petitioners
challenged a city ordinance on the basis that the “ordinance accords preferential treatment to certain minority-owned
businesses in the award of city contracts.” [FN179] The ordinance required that 10% of all money spent on city contracts
was to be awarded to these businesses whose majority owners (more than 51%) were either a minority or female. [FN180]
Minority also included disabled individuals. [FN181] Because the City of Jacksonville qualified as a State actor,
this challenge was based on the Fourteenth Amendment's Equal Protection Clause (facially and as applied). [FN182] The
contractors argued that they were ready *258 and able to bid on contracts, but because of the ordinance in the City of
Jacksonville, they were unable. [FN183]

After the district court granted the contractors' injunction, the court of appeals reversed, holding that the contractors
did not have standing because they failed to point to one specific contract from which they were injured. [FN184] This
decision conflicted with two other circuits, so the Court granted certiorari. [FN185]

Twenty-two days following the Court's grant of certiorari, Jacksonville repealed its ordinance and enacted a new one.
[FN186] This ordinance applied to “only women and blacks.” [FN187] It also removed the 10% quota, and replaced it
with a more flexible range to be set, “depending upon the type of contract, the ownership of the contractor, and the fiscal
year in which the contract is awarded.” [FN188] A decision to dismiss the case as moot was denied by the Court, so it
could resolve the conflict. [FN189]

The Court held that the contractors had standing because the plan had disallowed them from applying for certain con-
tracts. [FN190] This was much like the Court's holding in Bakke, where the petitioner could claim that his denial of ad-
mission but for the policy constituted injury in fact. [FN191] The Court concluded:

   When the government erects a barrier that makes it more difficult for members of one group to obtain a ben-
   efit that it is for members of another group, a member of the former group seeking to challenge the barrier need not
   allege that he would have obtained the benefit but for the barrier in order to establish standing. The “injury in
   fact” in an equal protection case of this variety is the denial of equal treatment resulting from the imposition of the
   barrier, not the ultimate inability to obtain the benefit. [FN192] Justice Thomas, writing for the Court, continued
   that “the ‘injury in fact’ is the inability to compete on an equal footing in the bidding process, not the loss of a
   contract.” [FN193] Standing was granted. [FN194]

*259 Ten years later, public universities came under scrutiny for their adoption of affirmative action plans in Gratz v.
Bollinger. [FN195] At the University of Michigan (UM), the undergraduate program adopted a policy by which minority
applicants received an additional score on their application review solely on the basis of minority. [FN196] This point
award significantly increased the chances of minority students' receiving admission to Michigan. [FN197] After address-
ing standing, the Court moved to the alleged equal protection violation by the University. In asserting that its admissions
process was not discriminatory, UM reasoned that it was trying to promote diversity. [FN198] Although this reasoning
was clear enough for a compelling state interest (and one of a remedial nature) in undergraduate admissions, the Court
had trouble with the means used to that end. [FN199]

   “[T]he University's policy, which automatically distributes 20 points, or one-fifth of the points needed to guarantee
   admission, to every single 'underrepresented minority' applicant solely because of race, is not narrowly tailored to
   achieve the interest in educational diversity. . . .” [FN200]

The Court pointed to Justice Powell's decision in Bakke, that each candidate should be considered as an individual, and not just as a race needed to fulfill a diversity policy. [FN201] The only qualification is that the applicants be a minority. [FN202] Not only did an applicant's race guarantee points in the admissions process, but because it was a twenty-point addition, the bump virtually clinched their admission. [FN203] Therefore, the process was not narrowly tailored to justify the compelling need for diversity. [FN204]

At the same time Gratz was decided, the University of Michigan Law School was defending its admissions policy. [FN205] Grutter v. Bollinger also cited diversity as its compelling reason for the admissions assessment that came under fire. [FN206] The petitioner, Barbara Grutter, was a white applicant who was initially placed on the school's wait list, then *260 denied admission. [FN207] She claimed the school's admissions policy violated the Equal Protection Clause of the Fourteenth Amendment and Title VI. [FN208] She alleged that race was a “‘predominant’ factor” [FN209] that gave minority applicants an edge over white applicants. The law school's response was that race was taken as a factor on a case-by-case basis, and that there was no specific quota that it adhered to, nor recommended. [FN210]

The district court agreed with Grutter, and held that diversity was not a compelling reason to pass strict scrutiny muster, and even if it were, the school's means to that end were not narrowly tailored. [FN211] After the court of appeals reversed citing to Bakke that diversity was a compelling interest, the Supreme Court granted certiorari. [FN212]

Justice O'Connor returned the Court to its decision in Bakke, by agreeing with the court of appeals that diversity is a compelling interest. [FN213] She also reiterated that an admissions policy must not take solely into account race or origin or gender as a factor for admittance, but that it could be a “plus factor” if for remedial purposes. [FN214] In this case, the benefits cited by the law school were seen by the Court as viable, including “enabl[ing students] to better understand persons of different races.” [FN215] Justice O'Connor, writing for the majority, said these were important qualities for lawyers, who would be working with all kinds of people. [FN216] Moreover, the admissions plan itself was not harmful to those interests of white students, as there was no quota set in place, just one that allows race to be considered as a “plus” factor in any given case while still ensuring that each candidate “compete[s] with all other qualified applicants.” [FN217] With minimal goals in mind for law students, the policy did not impinge on admissions officials any more than it did on applicants. [FN218] The University's system was the least intrusive means for obtaining diversity, contrary to the district court's suggested “use of a lottery system” or “decreasing the emphasis” of graduate entrance exams and grade point average. [FN219]

*261 Perhaps one of the more intriguing statements made by Justice O'Connor regarded the temporary requirement, as first cited in United Steelworkers. [FN220] Justice O'Connor aligned the majority in Grutter with Justice Powell's opinion in Bakke by concluding:

It has been 25 years since Justice Powell first approved the use of race to further an interest in student body diversity in the context of public higher education. Since that time, the number of minority applications with high grades and test scores has indeed increased. We expect that 25 years from now (emphasis added), the use of radical preferences will no longer be necessary to further the interest approved today. [FN221]

Another recent challenge to an affirmative action program was brought in the United States Court of Appeals for the Seventh Circuit, in Petit v. City of Chicago, where white police officers challenged their department's criteria and process in its sergeant promotion program. [FN222] The City defended the program by noting its remedial action, effectiveness through diversity, temporary time period, and failure to impede on the rights of nonminority officer applicants. [FN223] Some Petitioners were summarily dismissed early in the litigation for lack of standing as they were rejected during the application process but still sued on the equal protection theory. [FN224] The Court reasoned that these Petitioners did not have standing because their initial rejection under the plan meant that they were not up against any minority
in being passed over. They simply did not pass muster through the initial exam process, and thus there was no injury-in-fact. [FN225]

As to the system itself, the Seventh Circuit upheld the City’s reasoning for diversity, especially when the diverse makeup of the City of Chicago was considered. [FN226] Judge Terrence T. Evans wrote that the means (the application process) to the end (diverse police department) employed by the City of Chicago was an effective policy to remedy the skewed results from the examination process, because the actual data used comprised interviews from a group of officers that was 70% white. [FN227] As a result of the skewed answers in the survey, the scores of the exams were standardized and ranked. [FN228] Of the 2000 candidates that passed the exam, *262 and the 500 that were at the top of that list, more than 60% were white, while just more than 25% of the candidates were black, and 17% were Hispanic. [FN229] Of those candidates, 402 were promoted, and of those promotions, 56 were out-of-rank, but Judge Evans said “they were within the margin of error [of the standardized scores].” [FN230] The standardization was a means to eliminate “an advantage the white officers had on the test.” [FN231] Last, the court agreed with the City that the tests were within a short enough time frame to be deemed temporary. [FN232] The process was upheld.

IV. The Rooney Rule Evaluated as an Affirmative Action Policy

To classify any policy as affirmative action does not mean, as established in United Steelworkers, Petit, City of Jacksonville, and to a certain extent Grutter, that the actual initiative is unconstitutional or void. In plain words, the term “affirmative action” means that “a business or governmental agency . . . gives special rights of hiring or advancement to ethnic minorities to make up for past discrimination against that minority.” [FN233] So technically, the Rooney Rule may be analyzed as an affirmative action policy, yet also not considered an affirmative action policy at all.

The NFL is a private actor, but that does not mean the courts would alter its analysis of the Rooney Rule as an affirmative action policy. The Supreme Court, in Weber has indicated similar treatment for private actors under the Title VII framework as for public actors under the Equal Protection Clause in Johnson.

The Rooney Rule may be classified as an affirmative action policy because the purpose of the rule is to give more minority members a chance to advance into coaching, front office, and management positions. It serves this purpose by theoretically forcing a team to interview a minority candidate, even when the team might have its eyes set on another particular candidate. Before the rule was instituted, no such interview or hiring practice existed. In this sense, the rule is an example of a business (the NFL) giving special rights (mandating one minority interview per team with a coaching vacancy) to ethnic *263 minorities (as the interviews arguably do) to correct past discrimination (the alleged lack of minority hires in the NFL’s head coaching ranks).

However, this perception of the rule might be too strict. As Fritz Pollard Alliance General Counsel Cyrus Mehri put it, “I don't 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, [not quotas].” [FN234] John Wooten of the Alliance similarly stated:

[I]t was never intended to be affirmative action. Pure affirmative action is firm timetables and quotas, but that is not the way to go because it is not effective. The inclusive process is the right way to thread the needle. Corporations are requiring a diversity slate. [We are] not trying to get quotas based on player ratios in the NFL. All we are saying is that we believe in the interview process--just let them (minority candidates) in the door to show their skills in an open process and they will have a great chance to get a [head coaching] job. [FN235] Dr. Lapchick agreed, but in a more limited sense. “It is pretty close but [the Rooney rule] is limited in its application. But it is
for a purpose, although that purpose is to ring in the best person for the job. This is not results oriented, it is for one position only, and it is not across the board.” [FN236]

It is conceivable that the rule may be a “best practices” policy, but does that connote desired standards, like those in codes of professional conduct, or does a monetary penalty suggest something more? A best practice is “[a] business management term for optimal tactics and strategies. Best practices do not guarantee success; rather, they describe those tactics and strategies used in successful companies.” [FN237] It is not outside the realm of the term to penalize those who do not conform to the suggested practices. The legal ethics rules, while suggesting that every lawyer should work fifty hours of pro bono public service per year, [FN238] also suggest penalties for violations like fraud, failure to communicate with clients, and breach of fiduciary duty. [FN239] So, while it is possible to consider the Rooney Rule a best practices policy with a penalty, it should also at least be measured as an affirmative action policy, if the definition were applied in a strict manner.

*264 As described in United Steelworkers, an affirmative action policy is not challengeable if it is remedial in nature, does not harm white workers or bar them from the same jobs, and if it is temporary in nature. [FN240] In this case, the Cochran-Mehri Report, the Madden Report, and the Lapchick Report all have shown through statistical analysis that African-American assistants were previously almost en masse shut out of head coaching opportunities. The front office statistics denoted an even greater disparity. A rule requiring each team with a head coaching vacancy, unless certain factors applied, to interview at least one minority candidate could help remedy the egregious disparity between black players and black coaches in the NFL.

As to harming white workers, or in this case, white coaching candidates, the rule seems to do nothing more than at minimum add one candidate to the interview pool per team. In the case of the Cincinnati Bengals, [FN241] the process resulted in the hiring of Marvin Lewis. Similar situations followed in Cleveland, Arizona, and with the Chicago Bears. The Rooney Rule’s mandate does not require a team to hire at least one minority head coach; it simply calls for interviewing a minority candidate. If a team had its sights set on a particular white candidate, it could still satisfy the rule by bringing in at least one African-American interviewee. No white candidates are barred from participating in the interview process, and therefore none are harmed if a coaching vacancy was filled with a minority candidate. As long as the interview process remains fundamentally fair to all candidates, minority and majority, there is no trammeling of interests.

The temporary factor is perhaps the weakest of the criteria in analyzing the Rooney Rule as an affirmative action policy. When the NFL’s Committee for Diversity in the Workplace recommended the Rooney Rule, there was no mention as to how long the policy was to be enforced. Furthermore, there is no mention of any of the NFL’s thirty-two owners recommending the addition of the word “temporary” or any other set amount of time. Is a “best practices” policy, as Mr. Mehri put it, one that lasts in perpetuity? Justice O’Connor certainly thought not; she said that in twenty-five years from their 2003 decision in Grutter, that affirmative action plans would not be necessary. [FN242]

This is troubling language for the Rooney Rule. Mr. Mehri admitted there was no mention of a time frame in the Rooney Rule, but if an owner was interested in applying a cap to it, that would be the owners’ decision. [FN243] He added, “I hope twenty-five years from now there won’t be a need for the Rooney Rule because it’s a solution to a current problem.” [FN244] If this is the case, perhaps the NFL’s Rooney Rule would pass muster under the criteria of United Steelworkers.

However, will the above analysis result in a different set of facts? What if this 2005 season proved to be the high watermark for minority head coaches? What if following the 2006 Super Bowl in Detroit, African-American head coaches were fired in Arizona, Cleveland, and New York (Dennis Green, Romeo Crennel, and Herman Edwards respectively), due to poor performance or disagreements with ownership or general managers? Further, what if Marvin Lewis in Cin-
cincinnati, Tony Dungy in Indianapolis, and Lovie Smith in Chicago left the NFL, one by one, for various reasons, so that by the end of the decade, there were no minority head coaches? Would the NFL have to rethink the Rooney Rule, or perhaps strengthen it?

V. A Brave New World and a Brand New Rooney Rule [FN245]

At the end of the 2010 season, there are no minority head coaches in the NFL. The media is clamoring for Commissioner Tagliabue to do something about it. Finally, the NFL’s Committee for Workplace Diversity meets and slaps together what they deem “the answer to all our troubles.” The “Rooney Rule II,” as it is penned by one writer, requires that “[b]y the year 2015, the NFL must have five minority head coaches walking the sidelines.” There is no clause allowing a team to get around the rule if they have promised a job to an in-house candidate. [FN246] Now, 15.625% of all NFL head coaches must be a minority by the beginning of the 2015 season.

Nick Saban, whose first stint with Miami culminated in three straight playoff berths, but no trip to the Super Bowl, was out of work for two years after being fired by the Dolphins following the 2012 season. Miami replaced Saban with Art Shell, who was brought in to coach the offensive line prior to Saban's last season in Miami. [FN247] Teams were reluctant to fire their head coaches because they might be forced by the Diversity Committee to hire a minority head coach. By the end of the 2014 season, there were four minority head coaches in the NFL. Saban, after working as an analyst for CBS Sports for two years, wanted to return to the NFL. The 2014 season saw three teams fire their head coaches: Tampa Bay, Houston, and New Orleans. New Orleans hired a white head coach, even though Saban was in consideration for the job based on his previous coaching stint at LSU. Houston also went with a white coach; Saban was also one of two finalists for the Texans job. Now all eyes were on Tampa Bay; with four minority head coaches, the team was in the center of a huge controversy. Pundits everywhere were curious who the next head coach of the Buccaneers would be.

Finally, Tampa hired, in an odd twist of irony, Tony Dungy, who decided that he was ready to return to the franchise which had previously fired him unceremoniously. Saban was never even called for an interview. Furious, Saban filed a reverse discrimination suit against the NFL and the Tampa Bay Buccaneers. He argued that but for the Rooney Rule II, he would have had a job in one of those three cities. He further alleged that he would have at least been considered by Tampa.

A. The Rules of Law for Saban and the NFL

The aforementioned hypothetical describes not only perhaps the NFL's worst legal nightmare, but a method to analyze this type of rule under the United Steelworkers criteria. Once again, the policy must be remedial in nature; it cannot unnecessarily trammel on the rights of white coaches or create an absolute bar to an opportunity for advancement, and it must be temporary in nature. [FN248]

Before a court could even hear Saban's argument, he must prove that he has standing. Standing in this set of facts is a more difficult question, because unlike in City of Jacksonville, the NFL is a private actor. Proving that a private employer caused a potential employee injury-in-fact would be groundbreaking. In City of Jacksonville, the Court reasoned that standing would be granted to the petitioners not because their injury was losing a contract, but because the contractors were unable to compete for a contract due to the policy set forth in the ordinance. [FN249] Again, City of Jacksonville deals with the public sector and government contracts. Saban would have to argue that if the rule from City of Jacksonville applied only to public sector cases, then many private employers would effectively be given a green light to allow *267 similar private actors to promulgate similar types of rules. Perhaps Saban could liken his readiness and willing-
ness to perform in Tampa Bay to the contractors in City of Jacksonville, [FN250] as well as to the applicant's denial to a (public) medical school in Bakke to satisfy the injury-in-fact criteria for standing. [FN251] Without the labels “public” and “private” on a case, the situations are similar and might pass muster.

As to the Rooney Rule II, Mr. Mehri called this type of a policy “results based,” because of the language requiring the “NFL to have five minority head coaches by the year 2015.” This is why Mr. Mehri insisted on finding some middle ground in the original Rooney Rule.

B. Analysis of the Rooney Rule II

Applying the United Steelworkers framework, the NFL would have to justify its rule as remedial. The league's lack of minority head coaches before and during the first Rooney Rule brings notice to the past history, and the original rule even exemplifies the first attempt to level the playing field. The NFL, with six black head coaches in 2005, decreased dramatically to zero in 2010. With no minority head coaches to show for their rule just eight years after voting in the policy, the league could argue that there was a weakness in its rule [FN252] and hoped this would not only remedy the weakness, but also the disparity between black players in the NFL and black head coaches. The NFL's well-intentioned motive to right a wrong it sought to fix more than ten years ago but failed to do so might be persuasive enough to pass the first prong.

Skipping to the fourth prong, there is no question here the temporary requirement is met. At five years, and before 2028, when O'Connor said the need for these initiatives would no longer be necessary, the program is temporary enough to sustain judicial scrutiny. Five years should be found consistent with the short term goals mentioned in Johnson. [FN253]

If the Rooney Rule II is measured against the second and third prongs of the United Steelworkers test, Mr. Mehri's quest for a middle road process-based “best practices” rule instead of the current rule might come back to haunt the NFL. Saban would argue that but for the new rule, his readiness and willingness to interview would not have been ignored. Ultimately, Saban might have a valid argument. Although it is true the quota (five minority head coaches by the start of the 2015 *268 season) did not trammel on his rights to interview for the jobs in New Orleans and Houston, the rule did limit Tampa Bay's ability to hire Saban, even if it were interested, for fear of violating the rule.

The NFL could argue that Saban, like many head coaches black or white, will have many opportunities for interviews, as the Tampa Bay position was one of three that off season. The league would point to his consideration for the job in New Orleans and Houston. But, this argument could be flawed. The “unnecessary trammeling” language means that a policy should not impinge on any right that a ready and willing worker or interviewee/applicant would have. The NFL could refute partially that being a head coach is not a right; it is a privilege. However, when the right is not of being a head coach, but of being recognized as a potential head coach (the purpose of an interview), the rule's language inadvertently placed the Buccaneers in the unenviable position of complying with the rule, since Tampa Bay was the last franchise to make a coaching hire. This is not to say that Coach Dungy is not deserving of the job; it just means that Saban should have had his chance to impress as well.

Similarly, Saban's failure to receive a phone call from Tampa Bay barred him from an opportunity for employment. Saban's track record at LSU, Michigan State, as an NFL assistant, and as head coach of the Miami Dolphins proves a history of winning that any franchise would welcome. Nevertheless, Tampa was essentially forbidden from hiring Saban without the repercussions the league office might issue for violating the Rooney Rule II. It is safe to say that but for the rule, Saban would have at least been a candidate for an interview, but because of the rule, he was not even

considered a candidate. Because Saban was denied a potential interview, and thus a potential job, his rights were barred.

C. Conclusion: Game over for the NFL’s (Hypothetical) Rooney Rule II

The failure to satisfy two of the four components of the United Steelworkers criteria would render little argument, if any at all, that Saban was denied an opportunity to coach in the league when he was more than qualified, not to mention ready and willing to perform the same duties he carried out several times before. Saban's claim might be upheld and the NFL might have to rethink its policy.

Again, as noted by Mr. Mehri and Mr. Wooten, the Rooney Rule is process based. The rule is not contingent upon a quota or the percentage of coaching candidates hired, trained, or considered. Instead, the means to get minority candidates in the door for the opportunity to shine in an interview is what the Fritz Pollard Alliance is trying to accomplish. The rule itself, even with the potential monetary penalties, is more practice and process based, and because of this, a challenge to the rule as it currently stands (in 2005, not the above-mentioned 2015 scenario) would most likely fail.

VI. Final Thoughts: Carrying the Rooney Rule Forward and Backward

If the NFL is applying a rule with a goal of increasing awareness in qualified minority coaching candidates, then why not consider applying the same rule to the front office ranks? The Rooney Rule allows for situations in which “a prior contractual commitment to promote a member of its own staff and no additional interviewing takes place.” [FN254] The same rule can apply here. Perhaps it can even be written so teams do not have to contract with their in-house candidates in order to qualify for the exception. A policy like this would cure Mr. Rooney's fear that teams might lose good in-house talent that they have groomed. As a result of the Rooney Rule, during the last NFL season 173 assistant coaches and 14 coordinators were of minority descent. [FN255]

Yet Commissioner Tagliabue has come out on the record and insinuated that the Rooney Rule is not the reason for the expansion of minority opportunities in head coaching. In February 2005, in Jacksonville, at his annual “State of the NFL” address, he took a question from a reporter about the Rooney Rule.

[Reporter] Question: The Rooney Rule seems to have an obvious effect. You'll have a record number of black head coaches next year. The Rooney Rule has no enforcement penalty in hiring of front office personnel. Why is that? For example, the Green Bay Packers hired a [white] general manager without [there] being a minority candidate. Is that something you want changed?

Commissioner Tagliabue: Not at this time, no. I think the Rooney Rule has been important, but--I know Dan would be the first one to say it's not the Rooney Rule. I don't think it's the most important thing. I think the most important thing is the outstanding coaches are demonstrating that they have the talent and the vision and the understanding of what it takes to win to be head coaches. . . . The [coaches] are there because they are outstanding head coaches. And one of the reasons we made the interviewing mandatory is that we knew that the coaches were there. . . . *270 So what I think what you're seeing is more of a natural process of development than one that's driven by threats or penalties. It didn't take a Rooney Rule to get Donovan McNabb into this game. He's a great quarterback, following earlier decades. We don't have penalty or mandatory interview requirement[s] because we haven't satisfied ourselves that we've done enough to recruit people and to really have a deep pool of talent within our league. And I've said before some of the talent in the front office comes from outside the league. It comes from corporate America. But the clubs are doing a better and better job of doing that on a voluntary basis. And it's about talent and not about penalties, primarily. We will have penalties where we think they make sense, but mostly about talent. [FN256]
Taking this statement apart is interesting. The Rooney Rule was not the basis for the increase in minority head coaches at all, not even partially, Mr. Tagliabue insists. In Part II, the history of the Rooney Rule described the process of the three reports which led to the creation of the Diversity in the Workplace Committee and the subsequent introduction and unanimous passage of the Rooney Rule. These three reports described the lack of diversity in head coaches in the NFL, especially when compared to the overwhelming majority of minority football players in the league. Thus far, one team (Detroit) has been fined for failure to comply with the rule. In 2005, six black head coaches walked the sideline in the NFL. Is it 100% true to solely credit the skill of the coaches when there were arguably several skilled minority assistant coaches for so many years in the league, as the three reports noted? [FN257]

Commissioner Tagliabue's statement suggesting that there is not a deep enough pool of qualified front office candidates, neither within the league nor in corporate America, is shocking. [FN258] First, as USA Today columnist Ian O'Connor writes, “[t]here's nothing more important in sports, in business, in society, than positions of power. Head coaches are almost never the true power brokers inside an NFL franchise. They are hired and fired by general managers, team presidents and owners.” [FN259] Dr. Lapchick agrees with that assessment. “The Rooney Rule is the cause of more African-Americans being hired, but it is also because they were the *271 best candidates for the job when they walked into the room for their interview and they might not have been interviewed in the first place.” [FN260]

Additionally, corporate America's minority workforce is quite capable these days. At a 2003 presentation for the Academy of Management Meeting in Seattle, Professors Myrtle P. Bell, K. Matthew Gilley, and Joseph E. Coombs, wrote that “[t]hough comprising about 27 percent of all U.S. workers, people of color occupy three percent of all executive level positions, about four percent of Fortune 500 directorships, and four CEO positions.” [FN261] Although the percentage is small, surely that would be enough for at least a kiddie's pool worth of candidates, and enough to justify expansion of the Rooney Rule to the front office. If the pool of coaching candidates grew from a smaller number when the rule was first introduced, the same logic follows that even a small base of executive talent would grow exponentially with a Rooney Rule expansion.

Further, President Myles Brand and the National Collegiate Athletic Association (NCAA) should seriously consider implementing the Rooney Rule in college athletics, especially in football. Dennis Green was a head coach at Stanford; Tony Dungy, Marvin Lewis, and Romeo Crennel all have assistant coaching experience at the Division I level. Currently, there are only three African-American head coaches in Division I college football: Karl Dorrell (UCLA), Tyrone Willingham (Washington), and Sylvester Croom (Mississippi State). [FN262] That works out to 2.5% of all Division I Football head coaching positions. [FN263]

Creating a policy where colleges must interview at least one minority coaching candidate would at least expand the applicable field. After the 2003-04 season, there were 417 minority assistant coaches out of 1572 (26.52%). [FN264] Expanding the pool of coaching candidates by at least one minority at the collegiate level is a good start to increasing the amount of minority head coaches in Division I. [FN265] An increase in the *272 number of Division I coaches could increase the number of qualified minority coaching candidates at the NFL level. As Mr. Mehri explained:

Have this (the Rooney Rule) in the college ranks because they are struggling coming up with a solution to the issue. What are the alternatives? Report cards are not enough. The position of Myles Brand might make it more challenging but the NCAA can't keep its head in the sand. The tools are right there from the NFL; it's tried, true and tested. [FN266]

Dr. Lapchick has spoken with Mr. Brand about implementing a similar rule in college sports. “The numbers are dramatically changing in Major League Baseball (MLB) and the NFL from similar policy and practice, so this is a good idea for college football.” [FN267]
There is another potential reason for increasing minority coaching opportunities at the Division I level. “A lot of problems with African-American kids might be alleviated with an African-American head coach as a mentor/role model because it’s the head coaches that do a lot of the recruiting. Some kids do go to schools because there are coaches of a like background are coming to recruit them.” [FN268]

An obvious concern is boosters. Those contributors of largesse to athletic programs are part of the reason stadiums get expanded seats. Schools also get new facilities and modern equipment, and exorbitant coaching salaries and staffs. Grambling Head Coach Doug Williams even noted that “[w]e may say it’s about black and white, but in the end it’s green. The big-time boosters and alumni are out there, and the [college] presidents and athletic directors are afraid to make decisions that might irk some of their big-time boosters.” [FN269]

The NCAA’s senior vice president for governance and membership recently said that it may be too early to declare that the Rooney Rule is the policy college sports governing body must adopt. [FN270] But Dr. Lapchick, of the aforementioned Lapchick Reports, says otherwise:

I think something like that would help enormously inside college sports. The NFL, which had an even worse record at the time, implemented the Rooney Rule, and went from three black coaches to six. [Major League *273 Baseball Commissioner] Bud Selig had a similar rule in baseball and went from three to nine. So we know the potential is there. [FN271]

“It’s easier to be Colin Powell than it is to be a head coach, a commissioner or an administrator anywhere in college sports [as a minority]. So something is systematically wrong. . . . Social injustice is what it is, and it isn’t right,” said Black Coaches Association Executive Director Floyd Keith. [FN272]

The NCAA is trying to move forward with increased minority hiring and awareness, recently creating a position of vice president for diversity and inclusion. [FN273] Perhaps someone like Norm Chow might have benefited from this recent proactive policy. An Asian assistant at both Brigham Young University and Southern California, he worked with Heisman Trophy winning quarterbacks Ty Detmer, Carson Palmer, and Matt Leinart for more than thirty-two years in the college ranks. [FN274] Yet Chow never broke the “glass ceiling” at the NCAA level. [FN275] Instead, he left to take a job with the Tennessee Titans to serve as the team’s offensive coordinator. [FN276] Thus, Chow left a league that had no diversity policy for a league that did. If Chow becomes an NFL head coach because of the Rooney Rule, perhaps it is further proof that the NCAA should rethink implementing some version of the Rooney Rule within its ranks. As former Maryland All-American, Harvard law graduate and ESPN basketball analyst Len Elmore so eloquently puts it, “[i]f sport is a way of American life, then race is also a way of American life, and will remain that way until, as a nation, we reach that lofty perch where color doesn’t matter.” [FN277]

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[FN1]. Greg Stoda, Facing Facts, Palm Beach Post, Dec. 17, 2004, at 1C.

[FN2]. Id.


[FN7]. Schad, supra note 6.

[FN8]. 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 (“To [the Fritz Pollard Alliance] and critics of the ‘search’ process agree, the sit-down with Shell was a sham and a mockery. Call it a ‘shamockery.’ They believe that Shell is nothing but a token interview for a franchise that already has a new coach in place but does not want to incur a hefty fine....”).

[FN9]. Schad, supra note 6.

[FN10]. Id. Shannon told Schad, “You guys tell me. I’m an assistant coach at [the University of] Miami and they’re going to pass over [Patriots] defensive coordinator Romeo Crennel and all those other guys to talk to me? Do you see it happening?” Id.

[FN11]. Id.; see also Smith, supra note 8. But see Maske & Shapiro, supra note 6.

[FN12]. Miami Dolphins Coaching Staff, supra note 4.


[FN14]. Id.

[FN15]. Smith, supra note 8.

[FN16]. Cochran & Mehri, supra note 13, at 1 n.2.

[FN17]. Since the beginning of the offseason, this number has climbed to seven with the Oakland Raiders hiring of Art

Shell. With the exception of Herman Edwards, who moved from the New York Jets to the Kansas City Chiefs, all other minority head coaches have remained with their previous organizations. Mark Maske, Alliance ‘Disappointed’ Despite Shell Hiring, Wash. Post, Feb. 13, 2006, at E03.


[FN19]. For a more comprehensive background on Mr. Mehri, see Mehri & Skalet, PLLC Attorneys, http://www.findjustice.com/attorneys/cyrus.htm. Here is a brief background from that Web site:

[Cyrus Mehri] is a founding partner of the law firm Mehri & Skalet, PLLC. Mr. Mehri served as Class Counsel in the two largest race discrimination class actions in history: Roberts v. Texaco Inc. which settled in 1997 for $176 million and Ingram v. The Coca-Cola Company, which settled in 2001 for $192.5 million. Both settlements include historic programmatic relief, featuring independent Task Forces with sweeping powers to reform key human resources practices such as pay, promotions and evaluations.

[FN20]. Dr. Madden is a professor at the University of Pennsylvania and serves as an expert in labor economy in litigation claims involving suspect classes (race, gender, age, alienage). Dr. Madden also serves as Vice Provost for Graduate Education at the University. She is also a former president of the Association of Graduate Schools (1997-98). Cochran & Mehri, supra note 13, exhibit B-4.

[FN21]. Telephone Interview with Cyrus Mehri, Partner at Mehri & Skalet, PLLC (Nov. 18, 2005).

[FN22]. Id.


[FN24]. Cochran & Mehri, supra note 13, exhibit B-1.

[FN25]. Id. exhibit B-2.

[FN26]. Id. Over the 15-year span, the 5 African-American head coaches coached 27 full seasons combined, while the 86 white head coaches over the same period coached 426 full seasons.

[FN27]. Id.

[FN28]. Id. exhibit B-3.

[FN29]. Id.

[FN30]. Id. Dr. Madden admits in her report that “[t]he small number of black head coaches hired by NFL teams makes it difficult to conduct more formal statistical analyses of racial differences.... [T]here are simply too few black coaches for more formal statistical analyses to be appropriate.” Id. exhibit B-3, note 2.

[FN31]. Id. exhibit B-3.

[FN32]. Id. exhibits A-6, A-10. Green compiled a 97-62 record (.610 winning percentage) in nearly ten seasons with the
Vikings (he did not coach the last game of the 2001 season), and Dungy had a 54-42 record (.5625 winning percentage).

[FN33]. Cochran & Mehri, supra note 13, exhibit A.

[FN34]. Id. exhibit D-1.

[FN35]. Id. at iii.

[FN36]. Id.

[FN37]. Id.

[FN38]. Id. at iv (explaining that the example the Report used would have awarded the Baltimore Ravens an extra draft pick for hiring Ozzie Newsome, an African-American, as its General Manager).

[FN39]. Id. at 15. “Real power” likely refers to high-level front office jobs like assistant general manager, general manager, vice president, president, and directorships.

[FN40]. Id.

[FN41]. Id. at 13.


[FN46]. Telephone Interview with Cyrus Mehri, supra note 21. Mr. Mehri also serves as In-house Council to the Fritz Pollard Alliance.


[FN48]. The committee was chaired by Pittsburgh Steelers' owner Dan Rooney (hence the rule's name) and included Atlanta Falcons' owner Arthur Blank, the Denver Broncos' Pat Bowlen, the St. Louis Rams' Stan Kroenke, and the Philadelphia Eagles' Jeff Lurie. Support for the committee came from a working group of team executives, including the Atlanta Falcons' Ray Anderson, the New York Jets' Terry Bradway, Tampa Bay's Rich McKay, the Baltimore Ravens' Ozzie Newsome, and the Indianapolis Colts' Bill Polian.

[FN49]. NFL Release 1, supra note 47 (emphasis added). Please note also that the rule still included an antitampering provision, in which teams were not allowed to interview anyone whose season was still underway. This means that if a team was in the Super Bowl (the NFL's Championship game), a team with a vacancy could not interview a candidate from that team until the conclusion of their season, which would be after the Super Bowl (or in practice, at least the day
after the game).

[FN50]. Telephone Interview with Cyrus Mehri, supra note 21.

[FN51]. Telephone Interview with John Wooten, Chairman of the Fritz Pollard Alliance (Nov. 17, 2005).

[FN52]. Wooten played eleven years in the NFL with the Cleveland Browns, served as a scout for an additional sixteen years with the Dallas Cowboys and Philadelphia Eagles, and then was employed as an executive with the player personnel departments of the Eagles, Cowboys, and Baltimore Ravens (originally the Cleveland Browns) franchises.

[FN53]. Telephone Interview with John Wooten, supra note 51.

[FN54]. Id.

[FN55]. Id.

[FN56]. NFL Release 1, supra note 47.

[FN57]. Press Release, NFL, NFL Minority Coaching Fellowship Attracts 81 Participants; Bengals' Lewis Joins Jets' Edwards as Head Coach Grads of Program (Aug. 4, 2003) (on file with author). Note also that both the New York Jets Head Coach and Cincinnati’s Marvin Lewis were graduates of this program as well. Current UCLA Bruins Head Coach Karl Dorrell is also a graduate of the program. He interned with the Denver Broncos in 1993 and 1999.

[FN58]. Id.


[FN60]. Id. Please note that the guidelines noted in this Article were not in full as listed in the actual release.

[FN61]. Id.

[FN62]. Id.


[FN64]. Id.

[FN65]. Id.

[FN66]. Id.

[FN67]. Id.

[FN68]. Id.

[FN69]. Id.
[FN70]. As a result of the Mariucci firing, USA Today’s Jarret Bell reports that Lions President Matt Millen has “called NFL attorney Jeff Pash, seeking permission to talk with the [Fritz] Pollard Alliance about [coaching] candidates. He said the Lions have indicated they will at least consult with the group during their search process.” For more information about this development, see Jarrett Bell, Coaches’ Abilities Can Be Seen in Black and White, USA Today, Dec. 22, 2005, at 6C.


[FN72]. Id.


[FN74]. Telephone Interview with Cyrus Mehri, supra note 21. Lewis won a Super Bowl with the Ravens in the 2000 season.

[FN75]. Id.; Telephone Interview with John Wooten, supra note 51.

[FN76]. Id. After the 2003 season, Chicago hired Lovie Smith (formerly a defensive coordinator with the St. Louis Rams) as its head coach. Following the Super Bowl in 2005, the Arizona Cardinals named Dennis Green their head coach (Green had previously coached the Minnesota Vikings), and the Cleveland Browns lured Romeo Crennel away from the World Champion New England Patriots (where he served as defensive coordinator).

[FN77]. Telephone Interview with Cyrus Mehri, supra note 21.

[FN79]. Richard E. Lapchick, 2004 Racial and Gender Report Card 29 (2005), available at www.bus.ucf.edu/sport/public/downloads/2004_Racial_Gender_Report_card.pdf [hereinafter Lapchick Report]. For thirteen years, the Lapchick Report has noted the gains and declines in the gender and racial make-up in major professional sport as well as collegiate athletics (NBA, NFL, MLB, MLS, WNBA, and NCAA). Grades are based on the composition of the total pool of players and teams and measured against the actual diversity ratio in those sports. Thus, grades range like a standard report card, from “A+” to “F”.

[FN80]. Id. at 29-30.

[FN81]. Id. at 30.

[FN82]. Id. at 30-31.

[FN83]. Id.

[FN84]. Id. at 34.

[FN85]. Mark Maske, Diversity Committee Rejects Rule Change, Wash. Post, Apr. 9, 2004, at D03.

[FN86]. Cochran & Mehri, supra note 13, at 15.

[FN87]. Maske, supra note 85.
[FN88]. Id.
[FN89]. Id.
[FN90]. Id.
[FN91]. Id.
[FN92]. Id.

[FN93]. Lapchick Report, supra note 79, at 26. The memo was written by league counsel Jeff Pash.

[FN94]. Id.

[FN95]. Telephone Interview with Dr. Richard Lapchick, Dir. of the Inst. for Diversity & Ethics in Sport at the Univ. of Cent. Fla. (Dec. 17, 2005).

[FN96]. Telephone Interview with John Wooten, supra note 51.

[FN97]. Id.

[FN98]. Id.

[FN99]. Id.

[FN100]. Id.

[FN101]. Smith, supra note 8.

[FN102]. Maske, supra note 85.

[FN103]. Id.; Stoda, supra note 1; Cole, supra note 5.

[FN104]. Stoda, supra note 1.

[FN105]. Cole, supra note 5.

[FN106]. Smith, supra note 8.

[FN107]. Id.; see also Wilbon, supra note 73.


[FN109]. Id.

[FN110]. Id. Cottrell was with the Jets; Blache was with the Bears when they were interviewed.

[FN111]. Stoda, supra note 1.

[FN112]. Id.
[FN113]. Maske & Shapiro, supra note 6.

[FN114]. Id.

[FN115]. Id.

[FN116]. Slezak, supra note 108; see also Stoda, supra note 1.

[FN117]. Stoda, supra note 1.


[FN119]. Slezak, supra note 108.

[FN120]. Turner, supra note 118.

[FN121]. Id.

[FN122]. Id.

[FN123]. Id.

[FN124]. Id.

[FN125]. Id.

[FN126]. Telephone Interview with John Wooten, supra note 51; Telephone Interview with Cyrus Mehri, supra note 21; Smith, supra note 8.

[FN127]. Telephone Interview with John Wooten, supra note 51.

[FN128]. Id.

[FN129]. Telephone Interview with Dr. Lapchick, supra note 95.

[FN130]. Maske & Shapiro, supra note 6.

[FN131]. Id.

[FN132]. Id.

[FN133]. Id.


[FN137]. Id.


[FN139]. Id. at 273.

[FN140]. Id. at 289-90.

[FN141]. Id. at 307.

[FN142]. Id. at 317.

[FN143]. Id.

[FN144]. Id. at 319.

[FN145]. Id. at 320.

[FN146]. Id.


[FN148]. Id. at 198.

[FN149]. Id.

[FN150]. Id.

[FN151]. Id.

[FN152]. Id.

[FN153]. Id. at 198-99.

[FN154]. Id. at 199.

[FN155]. Id. at 199-200.

[FN156]. Id. at 209.

[FN157]. Here is the final tally from the United Steelworkers opinion: three Justices sided with Brennan, Blackmun concurred separately, Chief Justice Burger dissented, as did Justice Rehnquist, who wrote separately, while Justices Powell and Stevens did not take part in the decision. This makes for a final vote tally of four votes wholly reversing, one vote concurring with the decision but not necessarily with the process, two votes against, and two abstentions. 443 U.S. at 209, 219.

[FN158]. Id. at 200.

[FN159]. Id. at 199-200. The provisions of Title VII in question were § 703(a), (d). They read as follows:

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

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

....

d. It shall be an unlawful employment practice for any employer, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs to discriminate against any individual because of his race, color, religion, sex, or national origin in admission to, or employment in, any program established to provide apprenticeship or other training.


[FN161]. Id. at 202.

[FN162]. Id.

[FN163]. Id. at 203.

[FN164]. Id. at 204.

[FN165]. Id. at 207.

[FN166]. Id. at 206.

[FN167]. Id. at 208 (quoting Sen. Humphrey, 110 Cong. Rec. 6548 (1964)).


[FN170]. Id. at 620.

[FN171]. Id. at 621.

[FN172]. Id.

[FN173]. Id. at 622.

[FN174]. Id.

[FN175]. Id. at 623.

[FN176]. Id. at 625.

[FN177]. Id. at 638.

[FN178]. Id. at 642.

[FN180]. Id.

[FN181]. Id.

[FN182]. Id. at 659.

[FN183]. Id.

[FN184]. Id.

[FN185]. Id. at 660.

[FN186]. Id.

[FN187]. Id. at 661.

[FN188]. Id.

[FN189]. Id. at 663.

[FN190]. Id. at 665.

[FN191]. Id.

[FN192]. Id. at 666.

[FN193]. Id.

[FN194]. Id. at 669.


[FN196]. Id. at 254-56.

[FN197]. Id. at 256.

[FN198]. Id. at 263.

[FN199]. Id. at 270.

[FN200]. Id.

[FN201]. Id. at 271.

[FN202]. Id. at 271-72.

[FN203]. Id. at 272.

[FN204]. Id. at 275.

[FN206]. Id. at 314-15.

[FN207]. Id. at 316.

[FN208]. Id. at 317.

[FN209]. Id.

[FN210]. Id. at 319.

[FN211]. Id. at 321.

[FN212]. Id. at 321-22.

[FN213]. Id. at 322-23.

[FN214]. Id. at 334.

[FN215]. Id. at 330.

[FN216]. Id. at 331-32.

[FN217]. Id. at 335 (citing Johnson v. Transp. Agency Santa Clara, 480 U.S. 616, 638 (1987)).

[FN218]. Id. at 336-38.

[FN219]. Id. at 340.


[FN221]. Grutter, 539 U.S. at 343.

[FN222]. 352 F.3d 1111 (7th Cir. 2003).

[FN223]. Id. at 1112.

[FN224]. Id. at 1113.

[FN225]. Id.

[FN226]. Id. at 1114-15.

[FN227]. Id. at 1117.

[FN228]. Id.

[FN229]. Id.

[FN230]. Id.
[FN231]. Id.
[FN232]. Id. at 1117-18.
[FN234]. Telephone Interview with Cyrus Mehri, supra note 21.
[FN235]. Telephone Interview with John Wooten, supra note 51.
[FN236]. Telephone Interview with Dr. Lapchick, supra note 95.
[FN239]. See ABA Model Rules of Prof'l Conduct, R. 1.2(d), 1.3, 1.4(a), 1.5. (2004).
[FN241]. Telephone Interview with Cyrus Mehri, supra note 21.
[FN243]. Telephone Interview with Cyrus Mehri, supra note 21.
[FN244]. Id.
[FN245]. The following story is fictional. None of the facts are true, nor does the author wish that they come true. The story is written to illustrate a point, and to analyze another form of the Rooney Rule.
[FN246]. NFL Release 1, supra note 47.
[FN247]. Schad, supra note 6.
[FN250]. Id.
[FN252]. See discussion supra Part II.B.
[FN254]. NFL Release 1, supra note 47.

[FN257]. See generally Cochran & Mehri, supra note 13.


[FN259]. Id.

[FN260]. Telephone Interview with Dr. Lapchick, supra note 95.


[FN263]. Id. at 12 (resulting in a rating of “F” in the Lapchick Report).

[FN264]. Id. at 36.

[FN265]. On December 16, 2005, the University of Buffalo became the first Division I school with a Black Athletic Director (Warde Manuel), football coach (Turner Gill), and men’s basketball coach (Reggie Witherspoon). See Rodney McKissic, UB Looks to Gill To Get over Hill, Buffalo News, Dec. 16, 2005, at B1.

[FN266]. Telephone Interview with Cyrus Mehri, supra note 21.

[FN267]. Telephone Interview with Dr. Lapchick, supra note 95.

[FN268]. Telephone Interview with John Wooten, supra note 51.


[FN271]. Id.

[FN272]. Id.

[FN273]. Id. Charlotte Westerhaus will report directly to NCAA President Miles Brand.


[FN275]. Id.

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