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## Call in the Feds: Title VI as a Diversifying Force in the Collegiate Head Football Coaching Ranks

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# CALL IN THE FEDS: TITLE VI AS A DIVERSIFYING FORCE IN THE COLLEGIATE HEAD FOOTBALL COACHING RANKS

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## INTRODUCTION

Over the course of the past decade, the racial complexion of the National Football League's ("NFL's") head coaching ranks has dramatically changed. For the bulk of the NFL's existence, it was virtually impossible for an African American to land a head coaching position. Whether as a result of "old boy" networking or stereotypical suppositions that African Americans lacked the intellectual capacity required to lead, manage, and teach a team of professional football players, African Americans toiled in assistant coaching positions for their entire careers with virtually no hope of ascending to the top spot.<sup>1</sup> Beginning in December of 2002, however, the NFL's leadership convinced team owners to bind themselves to a diverse candidate-slate interviewing process—a process under which every team seeking to hire a new head coach would be required to grant a meaningful interview to at least one candidate of color before filling the position.<sup>2</sup> In short order, under what came to be dubbed the "Rooney Rule" process, coaches of color began receiving and thriving in head coaching positions, long-held myopic visions of what an NFL head coach

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1. See N. JEREMI DURU, *ADVANCING THE BALL: RACE, REFORMATION, AND THE QUEST FOR EQUAL COACHING OPPORTUNITY IN THE NFL* 4 (2011).

2. Press Release, NFL, *NFL Clubs to Promote Diversity in Hiring* (Dec. 20, 2002), <http://www.nfl.info/nflmedia/News/2002News/NFLDiversityProgram.htm>.

should look like began to dissipate, and the NFL enjoyed renown as an equal opportunity torchbearer.<sup>3</sup>

The National Collegiate Athletic Association (“NCAA”) has historically struggled even more mightily than the NFL with respect to ensuring equal opportunity for its head football coaches. As the NFL’s head coaching ranks began to grow more diverse under the Rooney Rule, the NCAA’s head football coaching ranks grew increasingly conspicuous in their virtual homogeneity.<sup>4</sup> Although individuals and advocacy groups of all sorts have called on the NCAA’s leadership to lobby its member institutions (just as the NFL’s leadership lobbied its teams) to bind themselves to a diverse candidate-slate interviewing process, the NCAA’s leadership has refused.<sup>5</sup> The law- and policy-oriented bases for their refusal have sparked tremendous interest and disagreement, which has given rise to substantial debate in law reviews and other publications,<sup>6</sup> as well as discussion during a congressional hearing called to explore the lack of diversity among collegiate head football coaches.<sup>7</sup> Still, the NCAA has not budged.

Given the NCAA’s refusal to advocate that its member institutions commit themselves to a diverse candidate-slate interviewing process, it is imperative to explore other approaches to requiring that our nation’s colleges and universities utilize diverse candidate slates in searching for head football coaches. This Article raises the possibility that Title VI of the Civil Rights Act of 1964<sup>8</sup> could provide the basis for such an approach. Part I

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3. See Scott Brown, *Rooney Rule Helping Minority Coaching Candidates*, PITTSBURGH TRIB. REV. (Jan. 11, 2007), [http://www.pittsburghlive.com/x/pittsburghtrib/sports/steelers/s\\_488048.html](http://www.pittsburghlive.com/x/pittsburghtrib/sports/steelers/s_488048.html).

4. See Michael Marot, *College Sports Slip in Racial Diversity Compared to Pros*, ESPN (June 2, 2005), <http://sports.espn.go.com/ncaa/news/story?id=2074484>.

5. Michael Marot, *BCA Considers Court Challenge to Change Football Hiring Process*, USA TODAY (Oct. 9, 2007), [http://www.usatoday.com/sports/college/football/2007-10-09-637533307\\_x.htm](http://www.usatoday.com/sports/college/football/2007-10-09-637533307_x.htm).

6. See, e.g., Hannah Gordon, *The Robinson Rule: Models for Addressing Race Discrimination in the Hiring of NCAA Head Football Coaches*, 15 SPORTS LAW. J. 1, 2–3 (2008); Michael J. Nichols, *Time for a Hail Mary? With Bleak Prospects of Being Aided by a College Version of the NFL’s Rooney Rule, Should Minority College Football Coaches Turn Their Attention to Title VII Litigation?*, 8 VA. SPORTS & ENT. L.J. 147, 156 (2008).

7. *The Lack of Diversity in Leadership Positions in NCAA Collegiate Sports: Hearing Before the Subcomm. on Commerce, Trade, and Consumer Prot. of the H. Comm. on Energy and Commerce*, 110th Cong. 14 (2007) [hereinafter *Lack of Diversity*] (statement of Jesse Jackson, President, Rainbow/PUSH Coalition).

8. 42 U.S.C. § 2000d–7 (2006).

of this Article examines the NFL's discriminatory history, the Rooney Rule's origins, and the Rule's impact in transforming the NFL's hiring culture. Part II explores the racial complexion of the NCAA's head coaching ranks as well as the NCAA's opposition to enacting a Rooney Rule analog in the collegiate football context. Part III explores the Rooney Rule's federal roots as well as the traction diverse candidate slates have in private industry and among state legislators. And Part IV explores whether Title VI might provide a basis for incentivizing institutions of higher education to implement diverse candidate-slate interviewing for head football coaching positions.

### I. THE NATIONAL FOOTBALL LEAGUE AND THE ROONEY RULE

The NFL entered the twenty-first century as the least racially progressive major sports league in America.<sup>9</sup> The league was full of African American players, but relatively few African Americans occupied the one position on the field universally viewed as requiring more intelligence and leadership ability than the others—the quarterback position. Although nearly 65 percent of the league's players were African American, only 22 percent of the league's quarterbacks were African American,<sup>10</sup> that 22 percent representing a high-water mark. Historically, the numbers had been worse and for the bulk of the league's history they had been far worse. After the NFL teams' owners expelled the league's few African Americans in the mid-1930s, the league desegregated in 1946.<sup>11</sup> During the two decades following desegregation, however, and despite a consistently increasing African American population of players in the league, the league's only African American quarterbacking presence was Willie Thrower, who played for a short portion of one game in 1953 and then never played again.<sup>12</sup>

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9. See DURU, *supra* note 1, at 2–3.

10. *Id.* at 86.

11. *Senate Marks 60th Anniversary of NFL's Integration*, ESPN NFL (July 18, 2006, 8:15 PM), <http://sports.espn.go.com/nfl/news/story?id=2523315>; see also Alexander Wolff, *The NFL's Jackie Robinson*, SPORTS ILLUSTRATED, Oct. 12, 2009, at 60, 62, available at <http://sportsillustrated.cnn.com/vault/article/magazine/MAG1161017/index.htm>.

12. Lloyd Vance, *The Complete History of the African American Quarterbacks in the National Football League (NFL)—Part 1*, 27 COFFIN CORNER, no. 6, 2005 at 2, [http://profootballresearchers.org/Coffin\\_Corner/27-06-1102.pdf](http://profootballresearchers.org/Coffin_Corner/27-06-1102.pdf).

When an African American did finally enter the league as a starting quarterback in 1969,<sup>13</sup> he had to overcome presumptions of intellectual inferiority to do so. Even in light of James Harris's substantial accomplishments as a collegiate quarterback,<sup>14</sup> teams were reluctant to draft him at that position. Teams coveted his athleticism and many expressed an interest in making him a high draft selection if he changed positions, but even at the risk of going undrafted, Harris refused to abandon quarterbacking.<sup>15</sup> One hundred ninety-one players were chosen before Harris in the 1969 draft, but in the draft's eighth round, the Buffalo Bills finally picked him, and he went on to have a successful twelve-year NFL quarterbacking career.<sup>16</sup> Despite Harris's success, generations of African American quarterbacking aspirants-to-follow endured the same obstacles he did. African American high school quarterbacks were routinely asked or pressured to switch positions at the collegiate level and African American collegiate quarterbacks were routinely asked or pressured to switch positions at the professional level.<sup>17</sup> While a few, like Harris, refused to switch, the majority did, and the African American NFL quarterback remained a rarity through the great bulk of the twentieth century.<sup>18</sup>

Indeed, in the history of the NFL draft up through 1998, only three African American quarterbacks had been drafted in the first round.<sup>19</sup> And while the 1999 draft, in which three teams selected African American quarterbacks in the first round, sparked cautious optimism at the turn of the century that African Americans would enjoy increased opportunities to play

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13. DURU, *supra* note 1, at 85.

14. WILLIAM C. RHODEN, *THIRD AND A MILE: FROM FRITZ POLLARD TO MICHAEL VICK—AN ORAL HISTORY OF THE TRIALS, TEARS AND TRIUMPHS OF THE BLACK QUARTERBACK* 115 (2007), *reprinted in* <http://sports.espn.go.com/espn/blackhistory/2007/news/story?id=2762569>.

15. See Michael Wilbon, *The Revolutionaries*, ESPN MAG., Nov. 21, 2002, *available at* <http://espn.go.com/magazine/vol2no08qbs.html>.

16. See *James Harris Biography*, DETROITLIONS.COM, <http://www.detroitlions.com/team/staff/james-harris/e6461d6e-6fff-4716-b1e9-ab2dcfc71c92> (last visited June 29, 2011).

17. See, e.g., Vance, *supra* note 12, at 3–4. It bears noting that due to the limited number of NFL teams and therefore the limited number of NFL quarterback slots, some white college quarterbacks are forced to switch positions in the NFL as well. See Rick Gosselin, *Mobile Passers Scramble for a Sport in NFL but Are Often Left Out of Pocket*, DALLAS MORNING NEWS, Apr. 23, 2011, *available at* 2011 WLNR 7972709.

18. DURU, *supra* note 1, at 85–86.

19. RICHARD E. LAPCHICK, *SMASHING BARRIERS: RACE AND SPORT IN THE NEW MILLENNIUM* 228 (2d ed. 2001).

quarterback in the NFL,<sup>20</sup> their numbers remained disproportionately low.

With respect to diversifying the virtually colorless head coaching ranks in the NFL, there was no cause for even cautious optimism. In the league's eighty-plus year history, there had been only six African American head coaches, and January 2002, during which the Tampa Bay Buccaneers fired head coach Tony Dungy, represented a low-point.<sup>21</sup> Dungy took the Buccaneers' head coaching job in 1996, when the Buccaneers were by any estimate the worst team in the league. They had recorded only three winning seasons in franchise history and had not made the playoffs in over a decade.<sup>22</sup> In Dungy's second season as head coach, he took the Buccaneers to the playoffs.<sup>23</sup> Two years later, he took them to the NFC championship game and nearly to the Super Bowl.<sup>24</sup> Two years after that, despite two additional playoff appearances, Dungy was fired.<sup>25</sup> The firing, in light of Dungy's success, seemed absurd, but even more absurd was that a thirty-two-team league in which 70 percent of the players were of color was down to one head coach of color.<sup>26</sup>

Dungy's termination sparked an outcry in the NFL community of color and, ultimately, an idea in the minds of two civil rights lawyers. Cyrus Mehri and Johnnie L. Cochran Jr. believed that race played a role in Dungy's termination and that a white coach in Dungy's position would have been granted more time at the helm.<sup>27</sup> Dungy's termination reinforced their view that African American coaches in the NFL were discriminatorily treated and they set out to support their view with statistics.<sup>28</sup>

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20. *Id.* at 228–29.

21. See generally Paul Kenyon, *Pats' Cox Blasts Lack of Blacks Hired for NFL Coaching Posts*, PROVIDENCE J., Jan. 16, 2002 (Patriot's Journal), at D07, available at 2002 WLNR 5080590 (noting that the recent termination of two African American head coaches left only one minority coach in the league).

22. DURU, *supra* note 1, at 11–12.

23. *Id.* at 12.

24. *Id.*

25. *Id.*

26. See Kenyon, *supra* note 21.

27. See JOHNNIE L. COCHRAN, JR. & CYRUS MEHRI, BLACK COACHES IN THE NATIONAL FOOTBALL LEAGUE: SUPERIOR PERFORMANCE, INFERIOR OPPORTUNITIES 12 (www.findjustice.com 2002), <http://www.findjustice.com/special-projects/minority-coaches-in-the-nfl/> (follow hyperlink titled "based on Mehri and Cochran's findings"); DURU, *supra* note 1, at 18.

28. See DURU, *supra* note 1, at 19–20.

With the help of a University of Pennsylvania economics professor, they compared the NFL win to loss ratios of African American head coaches with those of white head coaches over the course of a fifteen-year period.<sup>29</sup> Their results revealed that African American head coaches won more games per season than their white counterparts, but were the proverbial “last hired” and “first fired.” Armed with those results, Mehri and Cochran threatened the NFL with litigation.<sup>30</sup> Negotiations ensued and after several months of tense and at times frustrating discussions, the league’s owners agreed to enact a diverse candidate-slate interviewing procedure for all head coach searches.<sup>31</sup> Named after Pittsburgh Steelers’ owner Dan Rooney, who was a driving force behind its implementation, the Rooney Rule required teams to expand their head coaching candidate pools and, over the course of the following years, altered the league’s head coaching landscape.<sup>32</sup> By 2005, the NFL featured six head coaches of color.<sup>33</sup> Two years later, in 2007, there were seven head coaches of color in the NFL, and two of those seven—Tony Dungy, who became the Indianapolis Colts’ head coach after his Tampa termination, and Lovie Smith, who was in his third year as the Chicago Bears’ head coach—met in that year’s Super Bowl.<sup>34</sup> In the ensuing years, opportunities continued to expand and coaches of color, given opportunities, continued to succeed. As of the spring of 2011, an all-time high of eight NFL head coaches were of color, and the previous five Super Bowls had featured five head coaches of color.<sup>35</sup>

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29. *Id.* at 31–32.

30. *Id.* at 6, 46–47.

31. *Id.* at 86–87.

32. Jarrett Bell, ‘Still a Need’ for Rooney Rule, USA TODAY, Feb. 8, 2007, [http://www.usatoday.com/sports/football/nfl/2007-02-08-rooney-rule-update\\_x.htm](http://www.usatoday.com/sports/football/nfl/2007-02-08-rooney-rule-update_x.htm).

33. Study Gives NFL B+ for Diversity, Incomplete Grade on Gender Equity, USA TODAY, Aug. 27, 2008, [http://www.usatoday.com/sports/football/nfl/2008-08-27-study\\_N.htm](http://www.usatoday.com/sports/football/nfl/2008-08-27-study_N.htm).

34. Sam Farmer, *Historic Achievement Is Just Super for Smith, Dungy*, L.A. TIMES, Jan. 22, 2007, <http://articles.latimes.com/2007/jan/22/sports/sp-coaches22>.

35. See Jason Reid, *Adding Transparency to the Rooney Rule*, WASH. POST, Feb. 20, 2011, at D2; *Jim Caldwell Biography*, COLTS.COM, <http://www.colts.com/team/coaches/jim-caldwell/600c24a0-92dc-478b-8c39-e8a59ba43b68> (last visited Sept. 4, 2011); *Super Bowl 45 Recap*, NFL.COM (Feb. 4, 2006), <http://www.nfl.com/superbowl/history/recap/sbxli>; *Super Bowl History*, NFL.COM, <http://www.nfl.com/superbowl/history> (last visited Sept. 4, 2011); *Mike Tomlin*, STEELERS.COM, <http://news.steelers.com/team/coach/49255/> (last visited Sept. 4, 2011).

The Rooney Rule has clearly worked, but it is certainly not perfect. Although the rule requires that the mandated interviews be meaningful, team decision makers can skirt the spirit of the rule by conducting an ostensibly meaningful interview with no intent of ever truly considering the candidate of color.<sup>36</sup> Still, the rule has been more effective in expanding NFL head coaching opportunities than any other equal opportunity initiative in league history.<sup>37</sup>

## II. THE NEED FOR A ROONEY RULE ANALOG IN COLLEGIATE FOOTBALL

The NCAA's track record with respect to equal opportunity for head football coaches has been no better than the NFL's.<sup>38</sup> Indeed, by most estimates, it has been worse.<sup>39</sup> The NCAA's leadership has long been well aware of the problem and its scope. Indeed, in 2007, former NCAA President Myles Brand publicly stated that "the proportion of ethnic minority head football coaches is inexcusably low."<sup>40</sup> It seems sensible, then, that in light of the NFL's diversity gains, the NCAA might consider enacting its own Rooney Rule-like head football coach interviewing procedure. The NCAA, however, has steadfastly refused, despite calls from various entities and individuals to do so.<sup>41</sup>

Brand explained his refusal in a February 28, 2007, appearance before the United States Congress during which Congress was exploring the woeful underrepresentation of people of color among the nation's collegiate head football coaches.<sup>42</sup> Brand noted that the NCAA is a membership institution of colleges and universities and argued that the NCAA was powerless

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36. See Reid, *supra* note 35 (noting that both the Seattle Seahawks and the Washington Redskins were accused of abusing the Rooney Rule in this way as they searched for new coaches after the 2009 NFL season).

37. *Id.*

38. See *Lack of Diversity*, *supra* note 7, at 28 (statement of Fitzgerald Hill, President, Ark. Baptist Coll.).

39. *Id.*

40. Ron. S. Hochbaum, Comment, "And It Only Took Them 307 Years": *Ruminations on Legal and Non-Legal Approaches to Diversifying Head Coaching in College Football*, 17 VILL. SPORTS & ENT. L.J. 161, 161-62 (2010).

41. *Id.* at 162.

42. *Lack of Diversity*, *supra* note 7, at 15-16 (statement of Myles Brand, President, NCAA).



to impose a Rooney Rule analog on its members if they did not want it imposed.<sup>43</sup> The NCAA's powerlessness in this regard is debatable. The NCAA, despite being a voluntary membership institution, is a "major power in formulating rule changes and in setting and policing the procedures under which members operate their football programs."<sup>44</sup> It regulates a wide swath of conduct, from scholarship allocation to the use of team logos to the propriety of telephonic communication with recruits.<sup>45</sup> While it may be true that the NCAA regulates these areas only because the member institutions have invited the NCAA's regulation, the NCAA has clearly imposed its rules on member institutions in other respects against their will.<sup>46</sup>

Most notably, the NCAA precludes schools with racially "hostile or abusive mascots, nicknames or imagery" from hosting NCAA championship competitions.<sup>47</sup> This policy, designed to disincentivize the use of offensive Native American mascots, is highly controversial and was not invited by the NCAA's member institutions.<sup>48</sup> In fact, the NCAA essentially bypassed the member institutions altogether when enacting it. The policy originated as a proposal at the June 2005 meeting of the NCAA Minority Opportunities and Interest Committee.<sup>49</sup> The proposal was then forwarded to the Executive Committee Subcommittee on Gender and Diversity Issues and was subsequently forwarded on to the full Executive Committee, which enacted it later that year.<sup>50</sup> Upon enactment, the policy was wildly unpopular among many member institutions and spurred numerous lawsuits.<sup>51</sup> Still, the policy

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43. *Id.*

44. Nichols, *supra* note 6, at 149.

45. See Hochbaum, *supra* note 40, at 180.

46. *Id.*; see also Spencer D. Kelly, *What's in a Name: The Controversy Surrounding the NCAA's Ban on College Nicknames and Mascots*, 5 WILLAMETTE SPORTS L.J. 17, 17-18 (2008) (noting that the NCAA made certain member institutions change their nicknames and mascots against their will).

47. Press Release, NCAA, NCAA Exec. Comm. Issues Guidelines for Use of Native Am. Mascots at Championship Events (Aug. 5, 2005), <http://fs.ncaa.org/Docs/PressArchive/2005/Announcements/NCAA%2bExecutive%2bCommittee%2bIssues%2bGuidelines%2bfor%2bUse%2bof%2bNative%2bAmerican%2bMascots%2bat%2bChampionship%2bEvents.html>.

48. See Kelly, *supra* note 46, at 17-18.

49. NCAA, *supra* note 47.

50. *Id.*

51. Kelly, *supra* note 46, at 24-32.

stands.<sup>52</sup> While enacting a Rooney Rule analog might be politically challenging for the NCAA's leadership, it is certainly possible, and the Native American mascot policy's enactment provides a procedural template. The NCAA's leadership mustered the moral courage to enact the Native American mascot policy in 2005. With that same courage, it has the power to enact a Rooney Rule analog now.

Apart from the issue of institutional prerogative, the NCAA leadership has marshaled several arguments against the feasibility of an NCAA Rooney Rule analog, and legal scholars have responded with counterarguments. The debate and various arguments animating it have been well documented in the literature,<sup>53</sup> and they do not merit further exploration here. However, no argument thus far has convinced the NCAA to move toward establishing a Rooney Rule analog.

With the NCAA having opted against taking leadership in establishing a diverse candidate-slate interviewing process for collegiate head football coaches, the Division I-A Athletic Directors' Association stepped forward in 2008 and created a "best practice" that strongly urged its members to interview diverse candidate slates for all head football coaching positions in the Football Bowl Subdivision ("FBS"), which comprises all football programs formerly referred to as Division I-A football programs.<sup>54</sup> Only 120 of the nation's 582 collegiate football teams are in the FBS,<sup>55</sup> so the scope of the "best practice" is limited, but because it

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52. See *id.* at 32–33.

53. Compare Gene Collier, *Brand: BCA Tops Rooney Rule*, PITTSBURGH POST-GAZETTE, Mar. 30, 2007, at D7, available at 2007 WLNR 6013741 (discussing the belief of Myles Brand, President of the NCAA, that the Black Coaches Association's report card is a better mechanism for ensuring head coaching opportunities than a college-football Rooney Rule), with Marot, *supra* note 5 (quoting Richard Lapchick, Director of the Institute for Diversity and Ethics in Sports at the University of Central Florida) ("We have called on the NCAA and president Myles Brand to adopt an 'Eddie Robinson Rule,' a college version of the NFL's Rooney Rule."), and Kenneth L. Shropshire, *Increase Diversity Among College Football Coaches*, DIVERSITY EDUC., (May 10, 2011), <http://diverseeducation.com/article/15533> (discussing the success of the Rooney Rule and how it could translate to college athletics).

54. See *Minority Head Football Coaches*, NCAA, <http://www.ncaa.org/wps/wcm/connect/public/NCAA/Issues/Diversity+and+Inclusion/Minority+Head+Football+Coaches> (last visited Aug. 25, 2011).

55. NCAA *Head Football Coach Race/Ethnicity Demographics*, NCAA (Mar. 15, 2010), <http://www.ncaa.org/wps/wcm/connect/2a8b098041ed7a2080e1f80136064c64/NCAA+Head%20+Football+Coach+Demo.pdf?MOD=AJPERES&CACHEID=2a8b098041ed7a2080e1f80136064c64> [hereinafter *Demographics*].

is limited, the Division I-A Athletic Directors' Association's initiative provides a convenient case study. In 2010, two years after the "best practice" took hold, the percentage of FBS collegiate head football coaches of color had increased from 6.7 percent<sup>56</sup> to 12.6 percent,<sup>57</sup> by far the most substantial increase among college football's four divisions. The percentage of FCS (formerly Division I-AA) collegiate head football coaches of color increased by only one percentage point during that time, from 5.9 percent<sup>58</sup> to 6.9 percent.<sup>59</sup> And the percentage of head football coaches of color in Divisions II and III actually dropped during that time from 4.5 percent to 3 percent<sup>60</sup> and 3.7 percent to 2.9 percent,<sup>61</sup> respectively.

While this, of course, does not constitute irrefutable proof that diverse candidate slates have, in their limited application in the collegiate football realm thus far, expanded opportunities for coaching candidates of color, it certainly suggests as much. And the Division I-A Athletic Director's Association's Executive Director, Dutch Baughman, has strengthened that suggestion, publicly attributing the increase in FBS head football coaches of color to the diverse candidate slate interviewing process.<sup>62</sup>

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56. Floyd A. Keith, *Executive Director Statement*, in C. KEITH HARRISON, WHO YOU KNOW & WHO KNOWS YOU: THE HIRING PROCESS & PRACTICE OF NCAA FBS & FCS HEAD COACHING POSITIONS, BCA HRC #5, at 11 (2008), available at [http://grfx.cstv.com/photos/schools/bca/genrel/auto\\_pdf/08-hiring-report-card.pdf](http://grfx.cstv.com/photos/schools/bca/genrel/auto_pdf/08-hiring-report-card.pdf) (Black Coaches & Administrators' hiring report card from the 2007–2008 year in college football).

57. *Demographics*, *supra* note 55 (illustrating that, as of March of 2010, fifteen of 119 FBS head coaches, or 12.6 percent, were of color).

58. Richard Lapchick, *Foreword* to C. KEITH HARRISON, WHO YOU KNOW & WHO KNOWS YOU: THE HIRING PROCESS & PRACTICE OF NCAA FBS & FCS HEAD COACHING POSITIONS, BCA HRC #5, at 11 (2008), available at [http://grfx.cstv.com/photos/schools/bca/genrel/auto\\_pdf/08-hiring-report-card.pdf](http://grfx.cstv.com/photos/schools/bca/genrel/auto_pdf/08-hiring-report-card.pdf) (Black Coaches & Administrators' hiring report card from the 2007–2008 year in college football).

59. *Demographics*, *supra* note 55 (illustrating that as of March 2010, seven out of 101, or 6.9 percent, of college football championship head coaches were of color).

60. NICOLE M. BRACKEN & DENISE DEHASS, NCAA, RACE AND GENDER DEMOGRAPHICS 2007–2008, 115 (2009), available at <http://www.ncaapublications.com/p-4128-race-and-gender-demographics-2007-08-ncaa-member-institutions-personnel-report.aspx> (illustrating that in 2008, six of 133, or 4.5 percent, of Division II head football coaches were of color, and only three of six were African American); ERIN IRICK, NCAA, RACE AND GENDER DEMOGRAPHICS 2009–2010, 108 (2009) available at <http://midwest.conference.org/custompages/Forms%20and%20Information/Diversity%20and%20Well%20Being/2010RaceGenderMember.pdf> (finding that in 2010, four of 133, or 3 percent, of Division II head football coaches were of color, and that three of those four were African American).

61. BRACKEN & DEHASS, *supra* note 60, at 121; IRICK, *supra* note 60, at 120.

62. See Gary Brown, *Leaders Push to Diversify College Football Sidelines*, NCAA (Apr. 20,

### III. THE ROONEY RULE'S FEDERAL ROOTS AND EVER-EXPANDING INFLUENCE

While the federal government has not heretofore issued a generally applicable diverse candidate slate mandate for collegiate head football coach searches, diverse candidate-slate interviewing processes are certainly not foreign to the federal government.<sup>63</sup> Indeed, the NFL's Rooney Rule drew inspiration from equal opportunity efforts spearheaded by former Secretary of the Army Clifford Alexander decades ago.<sup>64</sup> Alexander was once presented for consideration a list of general officer candidates, and upon reviewing the list he realized that none of the candidates were of color.<sup>65</sup> Alexander viewed the list as insufficiently inclusive and, convinced that some candidates of color who deserved to be on the list were left off, refused to move forward with his assessments until he received a more inclusive list.<sup>66</sup> The new list included some candidates of color and Alexander made his assessments. One of the newly listed candidates was Colin Powell, who went on to become the Chairman of the Joint Chiefs of Staff and one of the most respected individuals in American public life.<sup>67</sup> But for the diverse candidate slate that Alexander demanded, Powell may have gone unnoticed. Powell's inclusion among those considered, however, gave him an opportunity, and with the opportunity, Powell flourished.<sup>68</sup>

Cyrus Mehri, a Washington, DC, employment discrimination lawyer litigating class action suits against large corporations in the late 1990s and early 2000s, learned of and admired Alexander's approach to considering candidates for promotion. When settling suits he began to insist that the

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2011), <http://ncaa.org/wps/wcm/connect/public/ncaa/resources/latest+news/2011/april/leaders+push+to+diversify+college+football+sidelines>.

63. See DURU, *supra* note 1, at 79.

64. *Id.*

65. *Id.*

66. *Id.*

67. *Id.*; see also *Colin L. Powell*, N.Y. TIMES, [http://topics.nytimes.com/topics/reference/timestopics/people/p/colin\\_l\\_powell/index.html](http://topics.nytimes.com/topics/reference/timestopics/people/p/colin_l_powell/index.html) (last visited Oct. 2, 2011) ("Over the course of his career Mr. Powell became one of America's most popular figures, representing to millions of people around the world the possibilities of the American dream.").

68. DURU, *supra* note 1, at 79.

corporations with which he was settling use diverse candidate slates when making hiring and promotion decisions.<sup>69</sup> In 2002, when Mehri challenged the NFL's head coaching hiring practices, he proposed that they use diverse candidate slates, a proposal that spawned the Rooney Rule.<sup>70</sup>

The Rooney Rule's simplicity and efficacy, in turn, has prompted scores of organizations—some within the sporting community and others entirely unrelated to sport—to consider and, in some cases, implement their own diverse candidate-slate interviewing processes. For instance, shortly after the Rooney Rule began to expand equal opportunity in the NFL's coaching ranks, the Association of Art Museum Directors contacted one of the Rule's architects to inquire as to how a Rooney Rule-like process might be helpful in diversifying the upper echelons of the nation's art museum staffs.<sup>71</sup> Not long after that, the National Urban League approached NFL Commissioner Roger Goodell directly to learn more about the Rule and then, noting the lack of diversity among corporate America's chief executive officers, issued a statement calling on companies across the nation to utilize diverse candidate slates when considering candidates for high-level executive positions.<sup>72</sup> More recently, in early 2011, high level soccer officials in the United Kingdom ("UK")—where soccer is wildly popular—noted that only one of ninety-two soccer clubs in the nation's top four professional soccer leagues had a black coach, and officials began to argue that soccer in the UK would benefit from something like the NFL's Rooney Rule.<sup>73</sup>

Notably, enthusiasm for diverse candidate slates in recent years has not been limited to the private sector. On the contrary, state governments have been active in exploring the benefits of

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69. *Id.*

70. See generally N. Jeremi Duru, *The Fritz Pollard Alliance, the Rooney Rule, and the Quest to "Level the Playing Field" in the National Football League*, 7 VA. SPORTS & ENT. L.J. 179, 186–89 (2008) (discussing a report commissioned by Cyrus Mehri and Johnnie L. Cochran Jr. on head coach diversity in the National Football League and its evolution into the Rooney Rule).

71. DURU, *supra* note 1, at 168.

72. *Id.*; see also Marc. H. Morial, *To Be Equal #40: NFL's Rooney Rule Could Be Good for Business*, NAT'L URBAN LEAGUE (Oct. 7, 2009), [http://www.nul.org/sites/default/files/TBE\\_2009\\_40.pdf](http://www.nul.org/sites/default/files/TBE_2009_40.pdf).

73. See N. Jeremi Duru, *Could Rooney Rule Soon Apply to Wayne Rooney's Team?*, POSTGAME, YAHOO! SPORTS (Apr. 3, 2011), <http://www.thepostgame.com/commentary/201104/could-rooney-rule-soon-apply-wayne-rooneys-team>.

diverse candidate slates, particularly with respect to collegiate football. In January 2009, New Jersey State Senator Richard Codey, citing the Rooney Rule as his inspiration, introduced a resolution in the New Jersey Senate calling for the NCAA to implement diverse candidate-slate interviewing processes for head football coaching positions.<sup>74</sup> Nothing ultimately came of Senator Codey's resolution, but several months later, Oregon state legislators—unwilling to rely on the NCAA to act—took action of their own and enacted a law requiring that Oregon's seven public universities implement diverse candidate slates when searching for head coaches for not just football, but for all of their athletic programs.<sup>75</sup>

Within a year of the Oregon enactment, Alabama state legislator John Rogers proposed legislation requiring at least one of every three interview slots for all athletic department positions at Alabama's public colleges and universities go to a candidate of color.<sup>76</sup> Whether the proposed legislation will become law is unclear, but the prospect of diverse candidate-slate interviewing in Alabama—known both for its tremendous football tradition and its racially oppressive history—is an exciting one for civil rights activists across the nation.<sup>77</sup>

Inspired by the movements in Oregon and Alabama, Florida State Senator Richard Steinberg, together with University of Central Florida Professor Richard Lapchick, lobbied the Florida Board of Governors to require that all eleven public universities in Florida utilize diverse candidate slates when searching for head coaches and athletic directors.<sup>78</sup> The Board of Governors, which

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74. See Anne M. Peterson, *Proposed Legislation Would Bring NFL's Rooney Rule to Oregon*, BLEACHER REPORT, May 18, 2009 (quoting the Codey resolution) (internal quotation marks omitted), available at <http://bleacherreport.com/articles/178413-legislation-would-bring-rooney-rule-to-oregon> ("Adopting the 'Rooney Rule' will greatly benefit college football programs by providing teams with a pool of talented, dedicated, and competitive head coach applicants that has gone virtually untapped, and will result in a leadership of college football programs that more adequately reflects the diversity of the student-athletes in those programs.").

75. DURU, *supra* note 1, at 169; Rachel Bachman, *Diversity Bill's Impact May Be Broader*, OREGONIAN, June 20, 2009, available at 2009 WLNR 11865386.

76. Jon Solomon, *Rogers Eyes 'Rooney Rule' for State Schools*, BIRMINGHAM NEWS, Jan. 12, 2010, available at 2010 WLNR 778546; see DURU, *supra* note 1, at 169.

77. DURU, *supra* note 1, at 169.

78. Andrea Adelson, *Florida Could Require More Minority Candidates for Head Coach*, AD Jobs, ORLANDO SENTINEL, June 25, 2010, [http://articles.orlandosentinel.com/2010-06-25/sports/os-adelson-college-hiring-0626-20100625\\_1\\_head-coaches-coaches-and-athletic-](http://articles.orlandosentinel.com/2010-06-25/sports/os-adelson-college-hiring-0626-20100625_1_head-coaches-coaches-and-athletic-)

oversees the state's public universities and has the power to implement Steinberg and Lapchick's proposal, has begun researching the possibility of implementation.<sup>79</sup>

According to Sam Sachs, a Portland-based activist who assisted in getting the Oregon bill passed, this state-level Rooney Rule-related activity is only the beginning.<sup>80</sup> He asserts that legislatures in Tennessee, Arkansas, Mississippi, Georgia, New York, and Oklahoma may soon discuss legislation of their own.<sup>81</sup>

As state legislators grow increasingly bullish about diverse candidate slates, another top-level federal official, following in Secretary Alexander's footsteps, seems to have embraced their power. In numerous speeches during the spring of 2011, Luis Aguilar, one of the five commissioners on the United States Securities and Exchange Commission, has lauded the NFL's equal opportunity progress and has stated that America's corporate boards would similarly benefit from the use of diverse candidate slates.<sup>82</sup>

Secretary Alexander insisted upon the use of diverse candidate slates decades ago and, in doing so, ultimately inspired a movement for equal coaching opportunities in the NFL. This in turn sparked diverse candidate slate enthusiasm in the American private sector, among state legislators, and overseas.<sup>83</sup> Now, with Commissioner Aguilar—another of our nation's highest-ranking federal officials—lauding the benefits of diverse candidate slates, it seems sensible to explore ways in which the federal government might be able to urge America's colleges and universities toward implementing diverse candidate-slate interviewing processes to diversify one of the most racially homogeneous job categories in our nation's history.

Even in light of the aforementioned state legislative activity in support of diverse candidate slates, it is difficult to imagine there being sufficient congressional buy-in to pass any sort of

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administrators-governors.

79. *Id.*

80. Solomon, *supra* note 76.

81. *Id.*

82. *See, e.g.*, Luis A. Aguilar, Comm'r, U.S. Sec. and Exch. Comm'n, Keynote Speech at Annual Compañeros Award Luncheon (Apr. 22, 2011), *available at* <http://www.mondovisione.com/media-and-resources/news/keynote-speech-by-sec-commissioner-luis-a-aguilar-still-fighting-for-inclusio>.

83. *See* DURU, *supra* note 1, at 79.

federal Rooney Rule legislation. However, Title VI of the Civil Rights Act of 1964,<sup>84</sup> a half-century-old congressional enactment and one of our nation's most robust anti-discrimination statutes, may provide the basis for incentivizing diverse candidate-slate interviewing processes for head football coaches at our nation's colleges and universities.

#### IV. TITLE VI AS A BASIS FOR A ROONEY RULE ANALOG IN COLLEGIATE FOOTBALL

[Title VI] declares it to be the policy of the United States that discrimination on the ground of race, color, or national origin shall not occur in connection with programs and activities receiving Federal financial assistance and authorizes and directs the appropriate Federal departments and agencies to take action to carry out this policy.<sup>85</sup>

For decades, Title VI has protected individuals of all races from discrimination of all types.<sup>86</sup> Indeed, the statute's power is in its breadth.<sup>87</sup> Rather than restricting Title VI's protections to a certain realm of activities, Congress chose to craft a statute that applies with as much force to summer youth programs as it does to multimillion dollar construction projects.<sup>88</sup> In 1987, nearly twenty-five years after enacting Title VI, Congress reemphasized its commitment to the provision's breadth by passing additional legislation to ensure that the "programs and activities" covered by Title VI are covered in full.<sup>89</sup> Until then, Title VI was sometimes interpreted as governing only the portions of "programs and activities" that directly received federal financial assistance, rather than all portions of "programs and activities," any part of which

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84. 42 U.S.C. § 2000d-7 (2006).

85. H.R. REP. NO. 88-914, at 10 (1963), *reprinted in* 1964 U.S.C.C.A.N. 2391, 2400.

86. *See id.* (noting that the Civil Rights Act of 1964 was enacted on July 2, 1964).

87. *See* Memorandum from Thomas E. Perez, Assistant Att'y Gen., U.S. Dep't of Justice, to the Fed. Funding Agency Civil Rights Dirs. (Aug. 19, 2010), *available at* [http://www.justice.gov/crt/about/cor/titlevi\\_memo\\_tp.pdf](http://www.justice.gov/crt/about/cor/titlevi_memo_tp.pdf) (referring to Title VI as the "sleeping giant" of civil rights law).

88. *See* 42 U.S.C. § 2000d-4a.

89. *See id.* (amending Title VI on March 22, 1988, to more thoroughly define "program or activity").



received federal financial assistance.<sup>90</sup> The amendment solidified the latter interpretation as accurate.<sup>91</sup>

Just as the term “programs and activities” is construed broadly under the statute, so too is the term “federal financial assistance.” Federal financial assistance is not restricted to monetary grants, but instead encompasses employee training, tax incentives, technical assistance, and other forms of federal aid.<sup>92</sup> Title VI has a truly expansive reach and, as such, is a powerful weapon in our society’s battle against racial discrimination.

Numerous “federal departments and agencies” have taken up Congress’s call under Title VI and implemented regulations to thwart discrimination among recipients of federal financial assistance. Indeed, all fifteen of the federal executive departments—from the Department of Agriculture to the Department of Veterans Affairs—have done so.<sup>93</sup>

Among these federal executive departments is the Department of Education, which has been extremely active under Title VI. The Department of Education’s Title VI-inspired regulations are housed at 34 C.F.R. § 100 and titled

90. *Grove City Coll. v. Bell*, 465 U.S. 555, 566, 570–71 (1984), *superseded by statute*, Civil Rights Restoration Act of 1987, Pub. L. No. 100–259, 102 Stat. 28, *as recognized in* *Franklin v. Gwinnett Cnty. Pub. Sch.*, 503 U.S. 60 (1992) (holding that the receipt of federal aid by one portion of an entity does not necessarily require the other parts of the entity to comply with Title IX, which was patterned after Title VI).

91. 42 U.S.C. § 2000d-4a (2006) (redefining the term “program” to include an entire entity that received federal financial assistance).

92. *See Title VI What Does It Say? What Does It Do? And How Do You Enforce It?*, U.S. DEP’T OF JUST., <http://www.justice.gov/crt/about/cor/Pubs/vioutline.php> (last visited July, 6, 2011); Cynthia Howard, *Civil Rights Office—Title VI Program*, TENN. DEP’T. OF TRANSP., <http://www.tdot.state.tn.us/civil-rights/titlevi/> (last visited Sept. 5, 2011).

93. *See generally* 7 C.F.R. § 15.3 (2011) (prohibiting discrimination in the Department of Agriculture); 15 C.F.R. § 8.4 (2011) (prohibiting discrimination in the Department of Commerce); 32 C.F.R. § 195.4 (2010) (prohibiting discrimination in the Department of Defense); 34 C.F.R. § 100.3 (2010) (prohibiting discrimination in the Department of Education); 10 C.F.R. § 1040.13 (2011) (prohibiting discrimination in the Department of Energy); 45 C.F.R. § 80.3 (2010) (prohibiting discrimination in the Department of Health and Human Services); 6 C.F.R. § 21.5 (2011) (prohibiting discrimination in the Department of Homeland Security); 24 C.F.R. § 1.4 (2011) (prohibiting discrimination in the Department of Housing and Urban Development); 28 C.F.R. § 42.104 (2010) (prohibiting discrimination in the Department of Justice); 29 C.F.R. § 31.1 (2011) (prohibiting discrimination in the Department of Labor); 22 C.F.R. § 141.3 (2011) (prohibiting discrimination in the Department of State); 43 C.F.R. § 17.3 (2010) (prohibiting discrimination in the Department of Interior); 49 C.F.R. § 21.5 (2010) (prohibiting discrimination in the Department of Transportation); 12 C.F.R. § 528.7 (2011) (prohibiting discrimination in the Department of Treasury); 38 C.F.R. § 18.3 (2011) (prohibiting discrimination in the Department of Veterans Affairs).

“Nondiscrimination Under Programs Receiving Federal Assistance Through the Department of Education Effectuation of Title VI of the Civil Rights Act of 1964.”<sup>94</sup> The regulations demand generally that “[n]o person in the United States shall, on the ground of race, color, or national origin be excluded from participation in, be denied the benefits of, or be otherwise subjected to discrimination under any [covered] program . . . .”<sup>95</sup> In that virtually every college and university in the nation has at least one program that receives federal financial assistance, nearly every American institution of higher education is bound.<sup>96</sup> And while the regulations prohibit discrimination with respect to a laundry list of particular institutional actions, they also explicate that “[t]he enumeration of specific forms of prohibited discrimination . . . does not limit the generality of the prohibition . . . .”<sup>97</sup>

The regulations, however, go beyond even this sweeping prohibition of discrimination. They further require that recipients of federal financial assistance “take affirmative action to overcome the effects of [the recipients’] prior discrimination” and, even in such discrimination’s absence, they permit recipients to “take affirmative action to overcome the effects of conditions which resulted in limiting participation by persons of a particular race . . . .”<sup>98</sup>

Considering Title VI’s mandate, the Department of Education’s regulations enforcing that mandate, and, in particular, the Department of Education’s choice to authorize—and, in some cases, require—recipients to implement proactive measures to thwart discrimination and its effects, diverse candidate slates would seem a reasonable tool for the Department of Education to use in ensuring equal opportunity in football coaching positions at our nation’s colleges and universities.

Nonetheless, to this point the Department of Education’s regulations enforcing Title VI have not been read to require that college and university athletic programs utilize diverse candidate-

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94. 34 C.F.R. § 100.3 (2010).

95. *Id.* § 100.3(a).

96. Frank Fitzpatrick, *Grove City Stays Out of the Fray*, PHILA. INQUIRER, July 2, 2002, at A10 (stating that Grove City College and Hillsdale College are the only two universities in the United States that do not accept federal money).

97. 34 C.F.R. § 100.3(b)(5).

98. *Id.* § 100.3(b)(6)(i)–(ii).

slate interviewing processes when conducting searches for head football coaches. One reason for this stems from the text of the regulations themselves, which largely exclude employment-related matters from coverage. Indeed, 34 C.F.R. § 100.2, states that, with two exceptions, 34 C.F.R. § 100 does not apply to “any employer, employment agency, or labor organization . . . .”<sup>99</sup>

The first exception arises from 34 C.F.R. § 100.3(c)(1), which reads, in relevant part, “[w]here a primary objective of the Federal financial assistance to a program to which this regulation applies is to provide employment, a recipient may not (directly or through contractual or other arrangements) subject an individual to discrimination on the ground of race . . . .”<sup>100</sup>

This provision provides substantial protection under circumstances in which federal financial assistance is directed primarily to “provide employment,” but since the bulk of federal financial assistance to colleges and universities is not earmarked as such, 34 C.F.R. § 100.3(c)(1) does little to ensure equal employment opportunity in those institutions.<sup>101</sup>

The second exception arises from 34 C.F.R. § 100.3(c)(3), which reads, in relevant part:

Where a primary objective of the Federal financial assistance is *not* to provide employment, but discrimination on the ground of race, color, or national origin in the employment practices of the recipient . . . tends, on the ground of race, color, or national origin, to exclude individuals from participation in, to deny them the benefits of, or to subject them to discrimination under any program to which this regulation applies, the foregoing provisions . . . shall apply to the employment practices of the recipient . . . to the extent necessary

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99. *Id.* § 100.2 (2010).

100. *Id.* § 100.3(c)(1).

101. *See* *Grove City Coll. v. Bell*, 465 U.S. 555, 563 (1984) (“[Basic Educational Opportunity Grants] were aptly characterized as a ‘centerpiece of the [Education Amendments of 1972].’”); *see also id.* at 603 (Brennan, J., concurring in part and dissenting in part) (“Indeed, it would be more accurate to say that financial aid for students is the prototypical method for funneling federal aid to institutions of higher education.”).

to assure equality of opportunity to, and nondiscriminatory treatment of, beneficiaries.<sup>102</sup>

In short, 34 C.F.R. § 100(c)(3) establishes that, unless a recipient's employment practices can be shown to deny benefits to or result in discrimination against program beneficiaries (who, in the case of student athletics, are the student athletes), 34 C.F.R. § 100 does not apply.<sup>103</sup>

Taken together, these limitations leave very little room for the application of 34 C.F.R. § 100 in the employment realm. However, just because the Department of Education's regulations implementing Title VI do not yet apply broadly in the employment realm does not mean they *must not* apply broadly in the employment realm.

The Department of Education's exclusion of employment matters in 34 C.F.R. § 100 is almost surgical, exempting from coverage "any employer, employment agency, or labor organization"<sup>104</sup>—the precise entities, in the precise order, in which Title VII of the Civil Rights Act of 1964 includes them—signaling a belief that those entities are adequately regulated under Title VII and do not require further regulation under the Department of Education's Title VI-inspired regulations. Title VII, however, is a largely reactive statute, providing a private cause of action to individuals alleging unlawful employment discrimination.<sup>105</sup> It is an important statute that has its place, but as employer bias has become increasingly subtle over the past few decades, and at times, perhaps subconscious, Title VII's protections have become decreasingly effective.<sup>106</sup> This "second

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102. 34 C.F.R. § 100.3(c)(3) (emphasis added).

103. *Id.*

104. *Id.* § 100.2.

105. See 42 U.S.C. § 2000e-2(a) (2006).

106. See generally Aida M. Alaka, *Corporate Reorganizations, Job Layoffs, and Age Discrimination: Has Smith v. City of Jackson Substantially Expanded the Rights of Older Workers Under the ADEA?*, 70 ALB. L. REV. 143, 148 (2006) ("Few employees have the proverbial smoking gun that would directly demonstrate an employer's discriminatory intent."); Linda Hamilton Krieger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 STAN. L. REV. 1161, 1164 (1995) (discussing the courts' failure to develop appropriate standards for subtle, non-overt discrimination); George O. Luce, *Why Disparate Impact Claims Should Not Be Allowed Under the Federal Employer Provisions of the ADEA*, 99 NW. U. L. REV. 437, 439 (2004) ("Most Title VII cases, like most ADEA cases, fall into the circumstantial evidence category because defendants rarely leave 'smoking gun' evidence of discrimination."); Toni J. Querry, Note,

generation”<sup>107</sup> bias is often more appropriately targeted with proactive (rather than reactive) measures—measures designed to broaden employers’ perspectives before an employment decision is made—so as to expand opportunities for candidates from underrepresented racial groups who might otherwise be overlooked.<sup>108</sup> Title VII is simply not crafted to incentivize proactive anti-discriminatory measures.

Title VI, on the other hand, declares that discrimination should not occur in programs receiving federal financial assistance *and directs federal agencies to take action necessary to prevent it*.<sup>109</sup> Although the Department of Education has taken action to prevent discrimination in educational institutions receiving federal financial assistance by enacting 34 C.F.R. § 100, that regulation should not be the extent of the Department of Education’s implementation of Title VI. Indeed, considering the stark racial disproportionality in collegiate head football coaching, the success of diverse candidate slates in expanding employment opportunity in the NFL, and the expanding influence of diverse candidate slates in other realms—including the NCAA FBS—a new Department of Education regulation requiring diverse candidate-slate interviewing processes for collegiate head football coaches may be in order.<sup>110</sup>

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*A Rose by Any Other Name No Longer Smells As Sweet: Disparate Treatment Discrimination and the Age Proxy Doctrine After Hazen Paper Co. v. Biggins*, 81 CORNELL L. REV. 530, 558 (1996) (“However, in today’s litigious environment ‘smoking gun’ evidence of an employer’s discriminatory intent is rarely present.”).

107. See Susan Sturm, *Second Generation Employment Discrimination: A Structural Approach*, 101 COLUM. L. REV. 458, 460 (2001) (explaining that “second generation” bias results from social practices that are not overt and can be difficult to see on the surface); see also Richard A. Nagareda, *Class Certification in the Age of Aggregate Proof*, 84 N.Y.U. L. REV. 97, 152–53 (2009) (“Still, regimes of public law that seek to change private behavior often tend to move from a first to a second generation, with the latter tending to involve less of the flagrant, in-your-face kinds of violations as compared to the former.”).

108. See Sturm, *supra* note 107, at 483 (discussing a “structural approach” that encourages proactive measures to stop “second generation” discrimination).

109. See 42 U.S.C. § 2000d–1 (2006).

110. To issue a new regulation, which the Department of Education routinely does, the department would first have to provide notice of the proposed regulation. To do so, the department would publish a Notice of Proposed Rulemaking (“NPRM”) in a daily publication titled the Federal Register. 5 U.S.C. § 553(b)(2006). To be effective, the NPRM would require: “(1) a statement of the time, place, and nature of public rule making proceedings; (2) reference to the legal authority under which the rule is proposed; and (3) either the terms or substance of the proposed rule or a description of the subjects and issues involved.” *Id.* Members of the public would then have the right to provide written comments on the proposed regulation, after which the Department would

At first blush it would seem that such a regulation would most appropriately target the NCAA, the institution of which virtually all of our nation's colleges and universities are members.<sup>111</sup> Courts, however, seem to agree that the NCAA does not receive federal financial assistance and is therefore not regulated under Title VI.<sup>112</sup> But because nearly every institution of higher education in this nation receives some federal financial assistance, nearly every institution of higher education in this nation is individually subject to regulation under Title VI.<sup>113</sup>

The Department of Education has the power to do what the NCAA has not yet done—require that our nation's colleges and universities utilize diverse candidate slates in interviewing for head football coaching positions. In doing so, the Department of Education would be carrying out its charge under Title VI and expanding employment opportunities for collegiate head coaching aspirants-of-color across the country.

### CONCLUSION

A Department of Education regulation mandating the use of diverse candidate slates for head football coaching searches would be sure to cause controversy, but such a regulation would also be likely to do for collegiate football head coaching what the Rooney Rule has done for NFL head coaching: expand opportunity. As such, the idea should be explored and the time has come for Secretary of Education Arne Duncan—who, as a former collegiate athlete,<sup>114</sup> would bring tremendous credibility to

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be able to alter the proposed regulation as necessary and then enact it. *Id.* § 553(c).

111. See *NCAA v. Smith*, 525 U.S. 459, 462 (1999).

112. *Cureton v. NCAA*, 198 F.3d 107, 116–17 (3d Cir. 1999) (holding that the NCAA does not directly receive federal aid in the college athletics programs); *Smith*, 525 U.S. at 465–66 (noting that Title IX is based directly on Title VI and holding that the NCAA's receipt of dues does not subject it to Title IX litigation); see also Phillip C. Blackman, *The NCAA's Academic Performance Program: Academic Reform or Academic Racism?*, 15 UCLA ENT. L. REV. 225, 246–47 (2008) (citations omitted) (“The Supreme Court . . . held that only entities that receive FFA, whether directly or through an intermediary, are recipients. Programs or organizations that merely ‘benefit’ economically from FFA were not considered recipients. Although member institutions clearly receive FFA, the NCAA appears to be sheltered from this Title VI element. Most likely, the NCAA does not currently receive FFA directly or through an intermediary.”).

113. Fitzpatrick, *supra* note 96.

114. Arne Duncan, *U.S. Secretary of Education—Biography*, U.S. DEP'T OF EDUC., <http://www.ed.gov/print/news/staff/bios/duncan.html> (last modified Aug. 25, 2011).

a call for diverse candidate-slate interviewing processes in the collegiate athletics context—to lead his Department in exploring it.

The collegiate head football coaching ranks have been overwhelmingly and disproportionately white for as long as college football has existed, and the most substantial diversification of those ranks in recent years has been largely attributable to an informal, diverse candidate slate movement among Division I-A athletic directors. Perhaps other approaches to expanding opportunity for collegiate head football coaching candidates of color would be more effective, but until such approaches are proposed and explored, those who take issue with diverse candidate slates in college football must be faced with the question that the NFL's outside counsel used to convince the NFL's owners to seriously study, and ultimately enact, the Rooney Rule—"what better idea do you have?"<sup>115</sup>

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115. DURU, *supra* note 1, at 79.