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ARTICLES

BIAS IN THE COLLEGE FOOTBALL PLAYOFF SELECTION PROCESS: IF THE DEVIL IS IN THE DETAILS, THAT'S WHERE SALVATION MAY BE FOUND

M. MARK HEEKIN*
BRUCE W. BURTON**

“In all of sports, at least in the United States, at every level, whether it’s professional or amateur, there is some sort of a merit-based, competition-based, winner-take-all playoff or meet except in the Football Bowl Subdivision.” Joe Barton, U.S. Representative (R-TX), as he introduced the College Football Playoff Act of 2009 to the US House of Representatives Commerce, Trade and Consumer Protection Subcommittee, December 9, 2009.¹

I. INTRODUCTION

At its core, the new College Football Playoff (CFP) system is seeking to formulate a new system of governance for the vastly popular college football in twenty-first century America. Those who regard modern, big college athletics with disdain as bloated, corrosive, or anti-intellectual enterprises in conflict with the purposes of higher education² will scoff at the notion of creating the CFP as a futile exercise in creating a system of governance.³ However, the CFP

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1. Press Release, House Energy & Commerce Comm., Barton: BCS is an Economic Cartel (Dec. 9, 2009), *available at* <http://collegefootball.procon.org/sourcefiles/BartonPressRelease.pdf>.

2. *See, e.g., Our Mission and Goals*, DRAKE GROUP, <http://thedrakegroup.org/2012/12/04/hutchins-award-2/> (last visited Apr. 5, 2014).

3. *See* Mike Knobler, *Tougher Academic Requirements Proposed*, ATLANTA J.-CONST. (June 24, 2007), <http://blogs.comm.psu.edu/thecoia/wp-content/uploads/Tougher-academic-requirements-proposed-Mike-Knobler-Atlanta-Journal-Constitution-24-June-07.pdf> (“Imagine what would happen if your

structure seeks to create a choice-making mechanism, which will be accepted, even enthusiastically supported, by millions of people made up of big-time college football's constituent groups. These constituent groups include fans, coaches, student bodies, television networks, sports reporters, and players. This is a classic exercise in establishing a structure for governance of any venture consisting of such a broad diversity of interest groups.⁴

The first premise of this Article is that numerous flaws exist in the CFP enterprise. This Article will identify and explore these significant problems. Next, this Article will propose solutions which follow the famous advice of James Madison, first expressed during the birth of America's experiment, that in devising a governing structure to be run, not by angels but by flawed humans over other flawed humans, we must recognize the "necessity of auxiliary precautions."⁵ Accordingly, this Article will identify the CFP's problems and propose a series of "auxiliary precautions" to address each of the identified problem areas.

Beginning with its 2014 season, collegiate athletics enters a new era when the CFP system kicks off. This system courageously seeks to replace the much-maligned Bowl Championship Series (BCS), which was established in 1998. In the new CFP, there will be two semifinal games played in participating postseason bowls that will match up the top four teams in the nation, as determined by a selection committee. These two semifinal bowl games will be played during the regular bowl season's array of New Year's Day games.

university's football players not only had to meet NCAA academic requirements but had to mirror the academic qualifications of your university's student body as a whole. Imagine what would happen if they had to maintain a 2.0 grade-point average to stay eligible to play. Those are two of 28 proposals put forward recently by a group of professors from 55 major college football schools. 'If these proposals were implemented at most schools, most of the problems currently associated with intercollegiate athletics would disappear,' said Nathan Tublitz, co-chair of the Coalition on Intercollegiate Athletics and a biologist at the University of Oregon." See generally Matthew J. Mitten, James L. Musselman & Bruce W. Burton, *Targeted Reform of Commercialized Intercollegiate Athletics*, 47 SAN DIEGO L. REV. 779, 786-91 (2010); SPORTS AND THE LAW: A MODERN ANTHOLOGY 215-59 (Timothy Davis et al. eds., 1999) (describing the history of various college athletic scandals and reform movements).

4. See Allan C. Hutchinson, *'In the Public Interest': The Responsibilities and Rights of Government Lawyers*, 46 OSGOODE HALL L.J. 105, 108 (2008) ("[D]emocracy seems to involve a recognition that power should be devolved and shared, and when that is not practicable, that power be exercised by those democratically authorized to do so with responsibility and accountability. Consequently, modern democratic governance effects a practical compromise by establishing a system of governance that is at least for the people if it is not always by the people. It does this by ensuring a division of powers and responsibilities among institutions and actors so that the allocation and exercise of power is diffuse, disciplined, conditional, temporary, and accountable. The basic gamble is that although a gap between the rulers and the ruled and between the powerful and the powerless will persist, the smaller the gap and the better its means of scrutiny, the more democratic the society will be.").

5. THE FEDERALIST NO. 51, at 349 (James Madison) (Jacob E. Cooke ed., 1961) ("If angels were to govern men, neither external nor internal controuls [sic] . . . would be necessary . . . but experience has taught mankind the necessity of auxiliary precautions.").

The CFP selection committee not only selects the four teams to face off in the semifinal bowl games but is also charged with the task of determining the seeds for the four playoff teams. Determining the seeding of the teams can have a profound impact on the teams' success in the initial rounds of a tournament.⁶ Seeding the four selected teams may be as controversial as the initial selection of the teams. The winners of the two semifinal bowl games will advance to a national championship game. The CFP national championship game will be played approximately a week later.⁷

The BCS, predecessor to the new CFP system,⁸ was intended to provide certainty to college football, but in its fifteen years of existence, it might have been an improvement in this respect, but the BCS also generated more controversy than clarity. The BCS was plagued by criticism that its formula for determining participating teams was convoluted, and fans invariably criticized the teams selected.⁹

As noted, the teams that will play in the CFP will be chosen by a selection committee. This selection committee will be composed of thirteen people.¹⁰

6. Sheldon H. Jacobson, Alexander G. Nikolaev, Douglas M. King & Adrian J. Lee, *Seed Distributions for the NCAA Men's Basketball Tournament*, OMEGA 1, 2 (2011), available at <http://bracketodds.cs.illinois.edu/2011%20Omega.pdf>. For each of the four tournament regions,

the selection committee seeds the 16 teams from one (the highest seeded team in a region) to sixteen (the lowest seeded team in a region). Therefore, there are a total of four teams seeded No. 1, four teams seeded No. 2, and so forth, with four teams seeded No. 16. These seeds also determine the structure of each region's bracket; for example, seed No. n plays seed No. $17-n$, $n = 1, 2, \dots, 8$, in the first round of the tournament. Assuming that the selection committee has done a good job in seeding the teams, then each team's seed provides a simple metric for comparing the relative strength of teams, and hence, provides a quantitative measure to predict which team will win. It is reasonable to expect that the performance of each seed is monotonically non-increasing with the seed value, where performance is measured as the probability of seeds winning in each round.

Id.

7. See C. FOOTBALL PLAYOFF, <http://www.collegefootballplayoff.com> (last visited Apr. 24, 2014).

8. The organizers of the College Football Playoff have specified, "The name 'College Football Playoff' will not be abbreviated and 'playoff' is singular not plural." "*College Football Playoff*" Will Be Name of New Event, C. FOOTBALL PLAYOFF (April 23, 2013), <http://www.collegefootballplayoff.com/story?id=9202762>.

9. See generally Walter Bingham, *Bingham: BCS Is Still All About the Money*, CAPECODONLINE.COM (Nov. 13, 2010), <http://www.capecodonline.com/apps/pbcs.dll/article?AID=/20101113/SPORTS/11130333/-1/rss06> (alleging that the BCS was created to bring money to athletic programs, but it only brings money to those in charge of the BCS); Daniel Libit, *Rep. Joe Barton Likens BCS Football to 'Communism'*, POLITICO.COM (May 1, 2009), http://www.politico.com/news/stories/0509/21989_Page2.html (comparing the advantage that the BCS awards some schools to providing the smallest of states with an inordinate amount of votes in the House of Representatives); Jeremy, *The BCS: Breaking Down the Facts*, BLEACHER REP. (July 9, 2009), <http://bleacherreport.com/articles/215003-breaking-down-the-facts-of-the-bcs> (demonstrating holes in the voting methods of the BCS).

10. *College Football Playoff Announces Selection Committee*, COLLEGE FOOTBALL PLAYOFF (Oct. 14, 2013), <http://www.collegefootballplayoff.com/story?id=9825420>.

Ostensibly, the CFP selection committee will not rely on external polls and computer rankings, as the BCS has done, but rather on the judgment of the selection committee members. This attempt to divorce external polls and computerized ranking purports to be an improvement over the BCS selection system. Replacing such elements with CFP's thirteen-member selection committee assumes that the selection committee will be seen to produce more objective results. However, among some constituents of big-time college football there has been considerable consternation over the makeup of the CFPs committee itself.¹¹

It is difficult to imagine the decision of the selection committee in naming the four semi-final teams and their respective seeds will be any less controversial than the two-team selection results under the discarded BCS formula. The gist of the controversy about the selection committee revolves around how natural human characteristics will impact the selection of the four teams for the playoff. Early calls by college football fans and journalists to enlarge the CFPs bracket to include more teams than four would appear to show an implicit mistrust of the selection committee to accurately select the top teams. Rather than leave this decision to a human selection committee, the preference is to include more teams and allow the deserving teams to prove their worth by

The members of the selection committee are:

- Jeff Long, vice chancellor and director of athletics, University of Arkansas-Fayetteville, Chair
- Barry Alvarez, director of athletics, University of Wisconsin-Madison
- Lieutenant General Mike Gould, former superintendent of the United States Air Force Academy
- Pat Haden, director of athletics, University of Southern California
- Tom Jernstedt, former NCAA executive vice president
- Oliver Luck, director of athletics, West Virginia University
- Archie Manning, former University of Mississippi quarterback and all-pro NFL quarterback
- Tom Osborne, former head coach and director of athletics, University of Nebraska-Lincoln
- Dan Radakovich, director of athletics, Clemson University
- Condoleezza Rice, Stanford University professor, former Stanford provost and former United States Secretary of State
- Mike Tranchese, former commissioner of the Big East Conference
- Steve Wieberg, former college football reporter, USA Today
- Tyrone Willingham, former head coach of three FBS institutions.

Id.

11. Nick Schwartz, *Erin Andrews Responds to David Pollack's Controversial Comments*, FOR THE WIN (Oct. 6, 2013), <http://ftw.usatoday.com/2013/10/erin-andrews-responds-to-david-pollacks-controversial-comments/> ("ESPN analyst David Pollack's controversial comments on ESPN's College GameDay Saturday morning caused a small firestorm on Twitter, and female journalists are responding in force. While discussing the College Football Playoff selection committee, Pollack intimated that he did not think women should be allowed on the panel (he later clarified his stance, and said he simply wants people who 'eat, sleep and breathe college football.')"); see also Kevin Duffey, *Condi Rice? Let the Selection Committee Circus Begin!*, SATURDAY DOWN S. (Oct. 4, 2013), <http://www.saturdaydownsouth.com/2013/condi-rice-selection-committee/>.

advancing on the field of competition. Expanding the field of the playoff is essentially a movement to expand the field beyond the power of the thirteen-member selection committee to allow biases and internal committee politics to control the ultimate outcome. As Madison observed, human bias is inevitable, but minimizing its effect is critical to achieving an acceptable aura of fairness among the groups subject to a governance structure.¹²

Since ancient times, we humans have accepted Aristotle's truism that "man is by nature a political animal."¹³ In modern times, this truism has been explored in a myriad of jury studies in the law, in group dynamics research, and in advanced courses in the psychology, business, political science, and history departments of our colleges and universities.¹⁴ Because of the human vicissitudes of group decision-making by political animals, transparency of process has become a vital axiom of acceptable governance in a democracy. "If the broad light of day could be let in upon men's actions, it would purify them as the sun disinfects."¹⁵ Based upon these longstanding truisms concerning human dynamics, this Article proposes several reforms.

The only sound pathway to neutralizing widespread skepticism and mistrust in the process of selecting the four-team finalists for the CFP structure lies in openly recognizing and minimizing these human problems, not in touting the splendid personal qualifications of Condoleezza Rice, Archie Manning, Tyrone Willingham, and the other members of the selection committee. We should remove the final four-team selection process from sole control by a committee of distinguished personages and introduce well-defined selection criteria designed by the selection committee. Then, CFP Executive Director Bill Hancock could carefully program these criteria into a computer model and task

12. See THE FEDERALIST NO. 51, *supra* note 5, at 349.

13. ARISTOTLE, POLITICS bk. I, at 9 (Jeffrey Henderson ed., H. Rackham, trans., Harvard Univ. Press rev. ed. 1944).

14. See, e.g., *Social*, DEP'T OF PSYCHOL., <http://www.isites.harvard.edu/icb/icb.do?keyword=k3007&pageid=icb.page19736> (last visited Apr. 5, 2014) (The division of Social Psychology in Harvard's Department of Psychology seeks to understand "human experiences and behaviors in social settings." Harvard has designed this program to intersect "with other departments such as Economics and Sociology; and with Harvard professional schools, such as the Law School, the Business School, the Medical School, and the Kennedy School of Government."); see also DORIS KEARNS GOODWIN, TEAM OF RIVALS: THE POLITICAL GENIUS OF ABRAHAM LINCOLN xv-xix (2005) (analyzing the group dynamics of decision-making by Lincoln's War Cabinet); John F. Nash, Jr., *Equilibrium Points in n-Person Games*, 36 PROC. NAT'L ACAD. SCI. U.S. AM. 48, 48-49 (1949).

15. Andrew Berger, *Brandeis and the History of Transparency*, SUNLIGHT FOUND. BLOG (May 26, 2009, 10:47 AM), <http://sunlightfoundation.com/blog/2009/05/26/brandeis-and-the-history-of-transparency/> (quoting Letter from U.S. Supreme Court Justice Louis Brandeis to his fiancée (Feb. 26, 1891), reprinted in Letters of Louis D. Brandeis: Volume I (1870-1907): *Urban Reformers* 100 (Melvin I. Urofsky & David W. Levy eds., 1971); see also JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 5-6, 109 (1980).

the committee of thirteen to refine that computer model as experience requires. Continually shining the sunlight of publicity on each of these steps would fulfill James Madison's demand for auxiliary precautions in conducting the affairs of men, thus minimizing the current level of mistrust and suspicion.

II. COLLEGE FOOTBALL PLAYOFF SYSTEM PROBLEM AREAS

If those who do not learn from the past are condemned to repeat it, then the new CFP structure demands reform. The paramount lesson of the BCS experiment is not that a championship playoff system is popular and desirable, though that is one apparent lesson. Nor is the paramount lesson that any playoff system be based inside the major bowl game structure, though that also appears sensible. Nor that the playoff system must involve the top tier of each season's college teams, though that too, is evident. The paramount BCS lesson is that the process of selecting the teams to play for the national championship must be seen to contain maximum transparency, purity, and objectivity in order to gain a lasting public consensus. For all its flaws, the BCS employed a transparent method of ranking college football teams—it used two human polls and one computer-generated poll. The CFP selection process has no formula for selection of the four teams for the playoff. It simply has its thirteen-member human selection committee who will select the teams without any quantifiable method of selecting the teams. The CFP process lacks any pretense of transparency. Already, college football fans are expressing concern that there may be a bias in favor of the Southeastern Conference (SEC), that the members of the selection committee with SEC ties (Jeff Long, Arkansas AD and Archie Manning) will have a bias against the SEC's Eastern Division schools, and that Condaleezza Rice and Tyrone Willingham will attempt to get Stanford into the playoff at all costs.¹⁶ Even if the CFP system selection process does prove to be impartial, a lack of transparency will certainly fuel speculation to the contrary. Transparency that allows the sunlight to shine on the selection process would help remove conjecture of improper motives or actions by the CFP selection committee.

Tragically, the CFP system to be initiated in 2014 not only repeats the structural flaws in the BCS selection process but also magnifies those flaws. The underlying source of the flaw is human bias, as recognized in political

16. Dennis Dodd, *Eight-Team Playoff Makes More Sense; Is It Worth the Complications?*, CBSSPORTS.COM (Jan. 5, 2014), <http://www.cbssports.com/collegefootball/writer/dennis-dodd/24399700/eightteam-playoff-makes-more-sense-but-is-it-worth-the-complications> (explaining some of the problems with the new College Football Playoff system); see also Tony Barnhart, *Before BCS Ends, the Whens, Wheres, Whys of College Football Playoff*, CBSSPORTS.COM (Jan. 6, 2014), <http://www.cbsports.com/collegefootball/writer/tony-barnhart/24400200/before-bcs-ends-the-whens-where-and-whys-of-college-football-playoff> (explaining the new College Football Playoff).

science, jury studies, and other analyses when any panel or jury engages in a process relying on subjective, individual judgments. Even when the panel is merely deciding whether Alabama has a better football team than, say, Auburn, Michigan State, Florida State, South Carolina, Missouri, Oklahoma, or Oregon, bias may play a role in the outcome. Before examining the general impact of bias on CFP decision making, we must first assess the certain problems, which in the CFP context, will amplify human bias. These issues arise from preseason and early season polls and also from the historic influence of big-time football schools that engage in lobbying upon the decision makers. Both have the potential to amplify bias.

A. Preseason & Early Season Polls

For any system of ranking, rating, or judgment to be both defensible and sustainable, it must have reliable information on which to base its evaluation.¹⁷ A very real problem lies in the popularity of preseason rankings, which can create bias for or against certain football teams. The old computer programming adage “garbage in, garbage out” is applicable to a wide variety of decision-making endeavors, including jury deliberations.¹⁸ It is also applicable to selection of top football teams. Preseason football poll rankings are, at the very best, entertaining guesswork by popular media outlets.

Principles of psychology indicate that such polls may alter perception with regard to football programs. There are a variety of publications that issue preseason college football rankings including Associated Press, USA Today, ESPN, Athlons, Street & Smith and many more. It seems rather self-evident, and as demonstrated by the historical gap between preseason polls and final season results,¹⁹ preseason and early season polls are notoriously informed by little more than factors such as the reputation of the schools’ football programs, the coaching staffs and athletes, the teams’ success during the previous season, and the preseason poll voters’ personal biases.

In reality, preseason college football polls are an entertaining oasis in an otherwise barren college football summertime desert. They provide much

17. See Libit, *supra* note 9.

18. See, e.g., L. Timothy Perrin, *The Perplexing Problem of Client Perjury*, 76 *FORDHAM L. REV.* 1707, 1712 (2007) (“This inability to monitor the jury’s deliberative process places additional emphasis on the need to regulate what evidence is presented to the jury in the first instance. In many ways, the Rules of Evidence manifest a significant mistrust of the ability of jurors to effectively evaluate certain kinds of evidence, and the Rules seek to enhance their decision making in those areas by regulating the range of information presented to them. It is a specific application of the old “garbage in, garbage out” principle: if jurors receive reliable evidence during the course of the trial, they are more likely to reach an accurate verdict.” (citations omitted)).

19. See Libit, *supra* note 9.

needed talk of college football during the dog days of summer. The historical gap between preseason and postseason polls, however, shows the preseason college football polls are not reliable indicators of how teams will perform during the upcoming season. Yet, these preseason polls have the effect of creating or affirming significant bias in the minds of journalists, coaches, players, fans, spectators, and anyone else who may happen to read them. As colorfully expressed in *Dunn v. United States*, “one ‘cannot unring a bell’; ‘after the thrust of the saber it is difficult to say forget the wound’; and finally, ‘if you throw a skunk into the jury box, you can’t instruct the jury not to smell it.’”²⁰

Over the past ten NCAA football seasons, from 2003–2012, the average difference between a team’s preseason consensus and the final AP standing was 8.12 positions. In other words, each team that was represented in either the preseason consensus or the final AP poll standing moved an average of more than eight positions. With only twenty-five coveted positions up for grabs, this is a significant difference.²¹

Once the preseason rankings are published and have created an impression on the minds of the poll voters, the CFP selection committee, journalists, fans and all others with an interest in college football, it is difficult to overcome the psychological impact of the “primacy effect.” Perhaps the most significant harm to the bowl team selection process caused by the publication of preseason polls is the so-called “primacy effect.”²² By their very nature, preseason polls are one of the first sources of information presented to sports fans, players, journalists, and, of course, the selection committee members for the upcoming football season. Long before anyone, particularly CFP selection committee members, have a chance to form judgments based on a team’s actual performance, their perception is influenced by these statistically unreliable polls. The psychological impact of such polls will be to color the way selection committee members interpret, perceive and process subsequent evidence of teams’ strengths made available to them during the actual season. Early exposure to these preseason polls magnifies bias. We should not blink at the reality flowing from preseason polls, which can have a profound and meaningful

20. 307 F.2d 883, 886 (5th Cir. 1962).

21. For each team, the difference between preseason consensus and final AP poll standing was computed by simple subtraction. The number of teams that made the cut for at least one of the rankings ranged from thirty-two–thirty-seven over the ten seasons. Teams that were unranked in either (or both) the preseason consensus or the final AP poll standings were counted as twenty-sixth. Had these unranked teams actually been given a ranking (beyond the top twenty-five), the average difference between the preseason and final polls would likely reflect an even more ominous reality.

22. In a phenomenon known as the primacy effect, information presented first usually has the most influence. In studies, information presented to subjects first seemed to color the subjects’ interpretations of the later information, producing the primacy effect. DAVID G. MYERS, *SOCIAL PSYCHOLOGY* 239 (9th ed. 2008).

influence on the selection committee members.

B. Lobbying

While the risk of human bias in the selection committee is substantial, the potential for undue influence by college coaches, athletic programs, and their boosters must be examined, as well. Human selection of four teams out of a competitive field will certainly be vulnerable to lobbying. There are recent examples of lobbying in the BCS selection process. In 2006, University of Florida's then-head coach Urban Meyer and SEC Commissioner Mike Slive engaged in some politicking in front of a national audience to enhance the Gators' chances of earning a BCS Championship game berth.²³ In 2007, Les Miles and members of the Louisiana State University (LSU) athletic department, inspired by Miles' wife's observation that LSU was undefeated in regulation play, despite having lost in triple overtime to Arkansas late in the college football season, took politicking a step further and engaged in an organized campaign for their Bengal Tigers to play in the BCS Championship game.²⁴

Lobbying and similar politicking efforts to influence legislation or lobbying to influence administrative agency rulemaking is deeply woven into American life.²⁵ However, lobbying a court or jury is a very different matter. The

23. DAN WETZEL, JOSH PETER & JEFF PASSAN, DEATH TO THE BCS: THE DEFINITIVE CASE AGAINST THE BOWL CHAMPIONSHIP SERIES 124 (2010) ("At halftime of the 2006 SEC championship game, with Florida ahead of Arkansas 17-7, SEC commissioner Mike Slive held a press conference and claimed that if the Gators won, they deserved the BCS title-game bid. 'I'd be disappointed' if it didn't happen, he said. At the time, Slive was also serving as the BCS coordinator, which meant that the official head of the official postseason system officially admitted he might not agree with the official result.").

24. *Id.* at 122-23. ("If LSU wanted back into the national title picture, all Miles had to do was convince voters it deserved a spot there. And so began the ingenious campaign that would change the way BCS titles are won in college football: through the power of marketing brains as much as on-field brawn. The Tigers weren't trying to jockey the system and deny a small school its chance for glory. LSU would hopscotch its big-conference brethren with the first intensive spin-doctoring of the BCS era. . . . LSU understood it had no control over the computer formulas, which comprise one-third of the BCS formula that determines the title game. Miles and [LSU associate athletic director in charge of media relations] Bonnette targeted another Cartel weakness: the human polls, which make up the remaining two-thirds. The coaches' poll had sixty-one voters that year. The Harris Poll, a group of former college administrators, players, coaches, and media, had 114. And LSU was banking on the collective gullibility of those 173 men and two women to write its ticket to the championship game.").

25. See, e.g., C.M.A. Mc Cauliff, *Didn't Your Mother Teach You to Share?: Wealth, Lobbying and Distributive Justice in the Wake of the Economic Crisis*, 62 RUTGERS L. REV. 383, 424-25 (2010) ("Lobbying gives advantages only to those groups with enough pooled money to be able to afford the services of lobbyists Whatever good lobbyists do, the moneyed interests present their side and the information relevant to their position. Those without money, however, do not get the opportunity to present the information about their lives to legislators nor do they get the chance to explain the impact

difference between politicking and lobbying can be a fuzzy line. Lobbying allows those with resources to gain access, for good or bad, to lawmakers largely in the legislative branch of government and have their voice heard above the common citizen.²⁶ There are an abundance of laws, regulations and other safety checks to try to ensure lobbyists are not able to exert undue influence on the legislative process.²⁷ The notion of those who can afford gifts in the form of trips, dinners and other perks will receive special treatment and access to lawmakers is at the very least contrary to the American way and repugnant.²⁸

By contrast, there are strong policy reasons for prohibiting lobbyists from attempting to sway the decisions of members of the judiciary.²⁹ It is submitted

that proposed legislation will have on their lives.”); see also Alan B. Morrison, *Lobbyists—Saints or Sinners?*, 19 STAN. L. & POL’Y REV. 1, 1 (2008) (“[T]he source of everything wrong in Washington, D.C. is lobbyists.”).

26. Marion McLane Read, Student Article, *Between a Rock and a Hard Place: Looking Beyond Statutes and the First Amendment to Address Ethical Concerns in Federal Lobbying*, 24 GEO. J. LEGAL ETHICS 783, 788 (2011) (“Lobbying threatens the democratic process when different interest groups have unequal access to lawmakers and only one side of an issue is presented and reflected in public policy. Unequal access thereby takes the positive side of lobbying—increased information and focused constituent petitions—and distorts it by giving undue weight to one side of an issue, concentrating an interest’s power over legislation at the expense of those without that access. Unfortunately, legislative reform has so far focused mainly on direct influence buying, not the corrosive power of unequal access.”(footnote omitted)).

27. Lloyd Hitoshi Mayer, *What Is This “Lobbying” That We Are So Worried About?*, 26 YALE L. & POL’Y REV. 485, 507 (2008) (“[L]obbyists have become subject to special scrutiny and to tighter restrictions. A 1994 Senate committee report in support of special gift rules for lobbyists stated the reasons for this special treatment: [I]t seems appropriate to single out registered lobbyists . . . for special treatment, because this category includes people who are, by definition, in the business of seeking to influence the outcome of public policy decisions. Because registered lobbyists . . . are paid to influence the actions of public officials, including legislative branch officials, their gifts are uniquely susceptible to the appearance that they are intended to purchase access and influence. Similar concerns motivated the adoption by the House of Representatives of its special rules for gifts from lobbyists and the 2007 revisions to both the LDA and various lobbyist-related House and Senate Rules. Furthermore, the limitations on post-government service lobbying by former government officials and employees also have their origins in concerns about improper influence.”).

28. See *id.* at 506–07 (“The reasons for the rules governing financial transactions with government officials and employees, including the House and Senate rules governing gifts, are not difficult to fathom. Such transactions raise the risk of both improper interference with official duties and responsibilities—corruption—and the appearance of such interference—the appearance of corruption. It is, therefore, perhaps inevitable that highly publicized influence-peddling accusations involving government officials often result in revisiting and extending these rules, with the Jack Abramoff scandal being only the latest example.” (alteration in original) (footnote omitted)).

29. *United States v. Grace*, 461 U.S. 171, 182–83 (D.C. Cir. 1983) (“It is said that the federal courts represent an independent branch of the Government and that their decision-making processes are different from those of the other branches. Court decisions are made on the record before them and in accordance with the applicable law. The views of the parties and of others are to be presented by briefs and oral argument. Courts are not subject to lobbying, judges do not entertain visitors in their chambers for the purpose of urging that cases be resolved one way or another, and they do not and should not respond to parades, picketing, or pressure groups. Neither, the Government urges, should it *appear* to

that the members of a CFP selection committee are closely akin to a court or jury rendering a judgment, not a legislative body or a rulemaking agency. Lobbying directed at influencing the CFP selection committee in its judicial role should be prohibited. When Urban Meyer and the University of Florida lobbied in favor of the Gators playing in the 2006 BCS championship instead of the University of Michigan, the impropriety of such attempt to sway the voters was noted.³⁰ Similarly, the Les Miles situation in 2007 was directed at those humans who would determine LSU's fate in its pursuit of a national championship, but interestingly they acknowledged they could not influence the computers.

One hopes we would have learned from the past in structuring the CFP system. Yet, at the time of this writing no prohibitions are in effect with regard to the CFP which would restrict institutions from lobbying, whether directly or indirectly, the selection committee. Without such prohibitions the CFP system runs the risk of a destructive public perception of unseemliness in the CFP selection process. The perception of a repeat of the Meyer-Miles lobbying efforts in which the larger schools with larger budgets appear to buy influence, or worse yet a cynical public perception that big schools may begin a covert lobbying campaign to win influence with those judging the fate of their football season would belie claims the CFP is an improvement in determining the best team in college football.

C. Confirmation Bias

Another related concern regarding bias is that humans have a tendency to search out information that will confirm their initial hunch, hypothesis, or existing belief while overlooking, ignoring, or marginalizing any other information. In the psychological communities, this phenomenon is known as confirmation bias.³¹

The ability to reason, which leads to fair-minded judgment, is one characteristic that sets humans apart from virtually every other animal on

the public that the Supreme Court is subject to outside influence or that picketing or marching, singly or in groups, is an acceptable or proper way of appealing to or influencing the Supreme Court.”).

30. WETZEL, PETER & PASSAN, *supra* note 23, at 124–25 (“In the press conference following Florida’s [2006 SEC championship game] 38–28 victory, its coach, Urban Meyer, not only pumped up the Gators but compared them to the Wolverines. Michigan coach Lloyd Carr, whose idle team entered the week ahead of Florida in the two polls but had lost its regular-season finale to Ohio State, called that ‘inappropriate.’ Perhaps, but it was effective. Florida surpassed Michigan in both polls and the BCS standings, went to Glendale, Arizona, and trounced Ohio State for the national title. Michigan watched, in part, because it wasn’t as committed to the P.R. fight.”).

31. Raymond S. Nickerson, *Confirmation Bias: A Ubiquitous Phenomenon in Many Guises*, 2 REV. GEN. PSYCHOL. 175, 175 (1998) (“Confirmation bias, as the term is typically used in the psychological literature, connotes the seeking or interpreting of evidence in ways that are partial to existing beliefs, expectations, or a hypothesis in hand.”).

Earth.³² Along with humans' ability to use reason to form judgments on a myriad of things comes human bias. Human judgment is always colored by a person's beliefs, memories, perceptions, and expectations.³³ The implications this has on utilizing a human selection committee to determine the teams that play in the CFP championship are endless.

Each selection committee member will bring his or her own biases, views, and beliefs to the table. It is inevitable that all of the members will have preconceived notions about which teams are strong and which are not. During the course of the season, some preconceived notions will be expelled, and preseason beliefs may be discredited. At first glance, this appears promising. However, humans have a tendency to cling to their initial beliefs. This holds true even once the belief has been discredited. This phenomenon is known as belief perseverance.³⁴ As the season plays out and preseason incorrect beliefs are discredited, this natural human tendency may prevail. The judgments of the committee members will be clouded by their initial beliefs rather than guided by reality.

Influenced by belief perseverance—probably unavoidable in human nature—CFP selection committee members could unintentionally, even unconsciously, seek evidence in support of their initial position rather than seek out all evidence that would allow them to make an objective decision. At the beginning of each season, selection committee members will bring their initial beliefs as to which teams will be most successful and which teams will not. As the season progresses, the selection committee members affected by confirmation bias may seek out and naturally be more attentive to information that supports their initial beliefs, regardless of actual strength of each team.³⁵

32. HOLLY L. WILSON, *KANT'S PRAGMATIC ANTHROPOLOGY: ITS ORIGIN, MEANING, AND CRITICAL SIGNIFICANCE* 72 (2006).

33. Justin S. Teff, *Analytical Tools – Distinguishing Intended Deception from Unconscious Inaccuracy*, 76 N.Y. ST. B. ASS'N J. 42, 43 (2004) (“To repeat a popular analogy, when one perceives a stimulus the sensory input is not recorded perfectly or even objectively, as might a video camera, but rather neutral stimuli are broken apart and reorganized, or interpreted, in light of numerous factors including all existing knowledge and experience. Two internal factors dominantly influencing perception are a subject's cognitive affect, mood and mindset at the moment of perception, and the previously formed psychic constructs and schema, the background against which all incoming stimulation is interpreted.”).

34. Craig A. Anderson, Mark R. Lepper & Lee Ross, *Perseverance of Social Theories: The Role of Explanation in the Persistence of Discredited Information*, 39 J. PERSONALITY & SOC. PSYCHOL. 1037, 1045 (1980) (“[I]nitial beliefs may persevere in the face of a subsequent invalidation of the evidence on which they are based, even when this initial evidence is itself weak and inconclusive . . .”).

35. See Nickerson, *supra* note 31, at 178. (“Closely related to the restriction of attention to a favored hypothesis is the tendency to give greater weight to information that is supportive of existing beliefs or opinions than to information that runs counter to them. This does not necessarily mean completely ignoring the counter-indicative information but means being less receptive to it than to

Teams that were not favored initially may be overlooked, while teams that were initially favored will continue to be viewed in favorable light, regardless of performance. Confirmation bias suggests the possibility of a surprising win for a lower ranked team over a higher ranked team will have little effect just as the loss by the more highly ranked team. In both cases, the confirmation bias of the members could cause these important events to be discounted, at least to an extent. The committee members' initial beliefs as to which teams will be most successful will be a significant force throughout the season and could potentially culminate in a biased, misguided, and unfair selection process.

D. Jury Bias

Arguably, the CFP selection committee process for selecting and seeding teams will be very similar to juror deliberations. Features from the many published jury studies become worthy of consideration with respect to the CFPs selection committee.³⁶

Implicit bias resulting from deeply held but unrecognized stereotypes in human beings is a grave concern when seeking an impartial tribunal.³⁷ Clearly, implicit bias is recognized to exist not only in potential jurors, but in judges, attorneys, and other court officials, as well.³⁸ Thoughtful observation of human

supportive information—more likely, for example, to seek to discredit it or to explain it away.”)

36. See, e.g., Jim Accardi, *Personality Typing and Jury Selection*, 33 PROSECUTOR 26, 27–29 (1999) (differences in personality types lead to varied approaches in deliberations, causing issues such as over-analysis and doubt); Lucy Fowler, *Gender and Jury Deliberations: The Contributions of Social Science*, 12 WM. & MARY J. WOMEN & L. 1, 24 (2005) (comparing the difference between men and women in jury deliberations and how gender affects participation in the process); Jenia Iontcheva, *Jury Sentencing as Democratic Practice*, 89 VA. L. REV. 311, 360–61 (2003) (demonstrating that often juries, as a group, produce harsher sentences than an individual judge because of community sentiments); Geoffrey P. Kramer, Norbert L. Kerr & John S. Carroll, *Pretrial Publicity, Judicial Remedies, and Jury Bias*, 14 L. & HUM. BEHAV. 409, 412–13 (1990) (juror instructions designed to remove bias strengthen a juror's bias, exposure to news reports affects juror guilt, and while groups allow for less error, they also inhibit individual sentiment).

37. Anna Roberts, *(Re)forming the Jury: Detection and Disinfection of Implicit Juror Bias*, 44 CONN. L. REV. 827, 833 (2012) (“‘Implicit biases’ are discriminatory biases based on either implicit attitudes—feelings that one has about a particular group—or implicit stereotypes—traits that one associates with a particular group. They are so subtle that those who hold them may not realize that they do.” (footnote omitted)).

38. *Id.* at 835–37 (“Implicit bias is no less prevalent in the courtroom than in the street. Judges harbor implicit bias, as do death penalty attorneys, despite very different self-characterizations by both groups. So, too, do prosecutors. So, too, does the jury, despite its characterization by the Supreme Court as the criminal defendant's fundamental ‘protection of life and liberty against race or color prejudice.’ Judges, as well as scholars, have recognized the existence of implicit bias in the courtroom. Supreme Court opinions have acknowledged its presence in jurors, its potential to affect their assessments of evidence, and its potential to affect their verdicts. Some state and lower federal courts have followed suit, noting that implicit bias among jurors extends beyond evaluations of a criminal defendant, to other juror tasks such as evaluation of witnesses. Supreme Court Justices, and other

nature confirms the inevitability of this condition and the critical need to minimize it in every tribunal. The basic principles on which our country was founded demand a judicial system that incorporates unbiased jurors to ensure the fairness of trials. The United States' judicial system has sought to eradicate implicit juror bias through the use of peremptory strikes in voir dire. Of course, there is considerable debate as to whether conscientious effort to eliminate implicit bias can be effective when it is so pervasive in human nature.³⁹ The CFP is as much a tribunal as courts and juries. However, because the CFPs selection committee will not be subject to even the most fundamental examination of potential implicit bias by which potential jurors are scrutinized in voir dire, the potential for implicit bias to impact the four-team selection is a material danger.

Another concern is the issue of dominant personalities on the selection committee. Former University of Oregon Head Football Coach and Athletic Director (AD) Mike Bellotti recently stated that the strongest personalities on the selection committee will dominate on the controlling criteria for selection, and therefore, the criteria may shift from year-to-year as the result of changes in committee membership. Without referring to jury studies, he pointed out this feature of uncertainty built into the current CFP system. Bellotti said such a process is far too subjective.⁴⁰

judges, have also acknowledged the possibility of implicit bias in attorneys and in judges.”).

39. *Id.* at 839–41 (“In the case of jurors, impartiality is a constitutional requirement, and bias in even one juror violates a criminal defendant's right to a fair trial. However, procedures for removing biased jurors were established long before the existence and significance of implicit bias were widely known. Motions by attorneys to remove jurors ‘for cause’—in other words, on the basis that they cannot be fair—have been viewed as the primary opportunity for removing biased jurors. Such motions, however, are granted only on the basis of a narrow set of rather obvious biases, and not on grounds of implicit bias. Indeed, despite the Supreme Court's acknowledgement of the phenomenon, courts have typically been hostile to considerations of the possible impact of implicit bias in the courtroom, as elsewhere. The process of voir dire, the dialog with jurors during jury selection, has proven largely unable to detect or correct implicit bias in jurors. The types of judicial exhortations that are typically issued, including that jurors ‘remove bias from their deliberations,’ are likely to be rejected as irrelevant and may be counterproductive. The types of perfunctory questions that are commonly asked—whether the jurors can be fair and impartial, for example—are unlikely to succeed if the jurors have no idea. Indeed, because of the prevalence of implicit bias, commentators, such as the late Derrick Bell, have despaired that ‘even the most extensive and penetrating voir dire will not screen the vast majority of bigoted jurors.’ The peremptory strike, a way for attorneys to remove jurors without having to give a reason, allows attorneys to strike jurors whom they believe may harbor implicit bias. However, the peremptory strike has been criticized as an augmentor of, rather than a protector against, bias. Naturally, potential jurors are unlikely to give voice to their implicit bias and, during a voir dire process that can be short, attorneys may learn little about the jurors and about their implicit biases. Thus, attorneys often rely on stereotypes in their peremptory strikes, including unconscious stereotypes.” (footnotes omitted)).

40. Mike Bellotti, *CFB Daily: The Experts* (ESPN U television broadcast Oct. 29, 2013) (transcript on file with authors).

In addition to the dominant personalities feature pointed out by Mike Bellotti, juries are groups, and they are swayed by the same influences that bear upon other types of groups. “For example, the most vocal members of a jury tend to do most of the talking,” and the least vocal members speak later in deliberations after the group has already heard the arguments of the group leaders.⁴¹ Additional problems and signals involved in jury group dynamics would include consideration of such matters as: instructions designed to limit attention to a subject, in turn draw attention to the subject; internal guilt; individual sentiment; group or community sentiment; over-analysis leading to doubt; and gender differences in jury deliberations.⁴²

III. AUXILIARY PRECAUTIONS

A. *Prohibiting Preseason Polls*

If the CFP officials want to truly make the selection committee’s job as meaningful as possible, and thus the committee’s selections as accurate as possible, they need to make certain adjustments to the CFP model and to college football in general. By the public clamor for a football playoff system, America has seen the sweeping power and our era’s historical changes to college football.

In order for football CFP rankings to be as accurate as possible, selectors need to be free from the bias produced by preseason polls. The same publishers who provide mainstream polls during the football season also release their preseason polls. Since preseason polls are not statistically accurate predictors of success in the upcoming season, their purpose is largely to generate interest in the upcoming season and sell copies of their off-season summertime publications. Preseason poll publications generate significant revenue during the summer by releasing their preseason polls to college football starved fans in mid-summer.

CFP officials have the power to do something that should have been done years ago to remedy the garbage in, garbage out spiral. They need to focus their attention on reducing the bias to the football season from preseason polls. It would require the CFP to play hardball. They should condition press credentials for all of the CFP games on publishers refraining from publishing preseason polls. Any publisher who refuses to comply would not be allowed to cover the CFP games. This would likely lead many to claim the CFP officials were engaging in some sort of coercion, extortion, bribery, or worse. However, established law supports this proposal. Case law does not grant constitutionally

41. MYERS, *supra* note 22, at 572.

42. Iontcheva, *supra* note 36, at 360–61; Kramer, *supra* note 36, at 412–13.

protected news-gathering rights to broadcasters when a sports event is being staged—such as a national championship playoff bowl game—even when the stadium is publicly financed and owned. Accordingly the CFP can legally prohibit by contract any participating stadium to allow credentials and entry to media sources that violate the poll-taking policy of the CFP.⁴³

B. Prohibition of Lobbying the CFP Selection Members

The lesson from the 2006–2007 BCS experience is not yet learned. Permitting big-name coaches, ADs, or other school administrators who run big-time programs at big-money colleges and universities to lobby or seek to influence—in any way, directly or indirectly the CFP decision makers—should be forbidden. Since membership in the CFP playoffs is a matter of contract and private association, the CFP can prohibit, by contract or regulation, such activities. CFP should establish a rule excluding from any CFP event any team representing any university whose leaders have engaged in lobbying.

If Les Miles in 2007 or Urban Meyer in 2006 knew they risked their teams' eligibilities in the bowl playoffs by lobbying, lobbying would not have taken place.

C. Reintroduce Computerized Rankings

CFP's total reliance on judgments among members of the selection committee exposes the process to all the pitfalls of human bias enumerated above.⁴⁴ Similarly, full reliance on individual committee members raises Mike Bellotti's observation of the dominance by the committee shifting from year-to-year and with it the controlling criteria.

Instead of total removal of the computerized rankings, the computerized-programmed rankings should be made primary. As to the selection committee, there are four necessary and proper roles for the selection committee. The first responsibility could be to adopt the criteria to be used by the computer program. Next, determine the weight to be assigned to each criteria in the computer program. Also, to monitor the computer program's application, tweak the criteria and the program as needed year-to-year. Finally, in the event that any scandal, upcry, or dispute arises involving the CFP program, the selection committee could act as the magistrate to resolve such problem.

This change would substantially mitigate all the worries noted above regarding published preseason polls, lobbying, human bias, and jury dynamics.

43. *Post Newsweek Stations-Conn., Inc. v. Travelers Ins. Co.*, 510 F. Supp. 81, 83–86 (D. Conn. 1981).

44. Teff, *supra* note 33, at 43.

IV. CONCLUSION

It needs to be noted that the intensity of popular opinions regarding college sports rivalries, and the rigor with which rivalries are sustained, is part of a constant feature of human nature. Apart from the wagering and rewards known to have begun in the athletics of the ancient world, if we look merely to the early roots of American college sport competitions we can see all forms of intensity. Since 1869 when students, alumni, and fans first pumped money into team sports, including the earliest reports of crowds, brawls, and use of mercenaries all the way to the thriving Las Vegas odds-making industry and other wagering in the twenty-first century we see a history of hotly intense interest.⁴⁵

Thus, any system seeking to govern big-time, college football—whether BCS, CFP, NCAA, or some future confederation of the five largest conferences—will find itself under intense scrutiny and criticism. No perfection exists. The key, as it was for Madison and the others, will be to devise a process susceptible to reform. The best we can hope for is to devise a process with maximum: (1) transparency, (2) objectivity, and (3) adaptability to changing conditions.

Winston Churchill notoriously said “democracy is the worst form of government except all those other forms that have ever been tried.”⁴⁶ The pending CFP structure may represent Churchill’s assessment applied to structuring an intercollegiate big time football championship. That is not to say, however, that the initial structure should be immune to amendment or revision. After all, democracy’s greatest virtue is its corrective process whereby flaws are identified and addressed.

Upon the conclusion of the 2014 college football season, the CFP should analyze the entire playoff system to identify and address areas that need improvement. If human bias is believed to have affected the selection of teams, the selection process should be reformed. The CFP system should maintain the playoff structure but return to a BCS-style poll with the top-ranked teams taking the corresponding seed slots in the playoff. This would eliminate the need for seeding the teams, since the poll would have them ranked, thereby assigning each team its seed. Instead of four teams, the CFP should be expanded to eight teams. The eight teams would play in four New Year’s Day bowl games after which the winner of each of those games would advance to two semifinal games

45. See SPORTS AND THE LAW: A MODERN ANTHOLOGY, *supra* note 3, at 218–23, 224–25.

46. See Sir Winston Churchill, *Quotation #24926 From Classic Quotes*, QUOTATIONS PAGE, <http://quotationspage.com/quote/24926.html> (last visited Apr. 24, 2014) (“Many forms of Government have been tried, and will be tried in this world of sin and woe. No one pretends that democracy is perfect or all-wise. Indeed, it has been said that democracy is the worst form of government except all those other forms that have been tried from time to time.”).

to be played on the next Saturday that is at least seven days after the New Year's Day games. The winners of the semifinals would advance to the championship game the following Saturday. This arrangement would add the two semifinal games to the current CFP structure, but given the current passion for the game, fans, teams, schools, host cities, advertisers, and media would welcome an extra week of college football. College football would welcome a system worthy of trust to determine a clear-cut, unequivocal champion.