For the Love of the Frame: How Behavioral Economics Helps Explain the NCAA Grant-in-Aid Cap's Perplexing Antitrust Vitality

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* © 2017 W. Fritz Metzinger. J.D. candidate 2017, Tulane University Law School; B.A. 2013, University of Virginia. I would like to thank the peerless staff of the *Tulane Law Review*—in particular Sheridan DuPont, Jennifer Leaphart, Sarah Smith-Clevenger, Collin Buisson, and William Anderson—for undertaking the daunting task of rendering this Comment presentable. I am also indebted to Professor Gabe Feldman and Andy Schwarz for their invaluable comments and inspiration. This Comment is dedicated to Dr. Ann "MeMe" Metzinger, a perfect grandma, a longtime Tulane athletics supporter, and the finest scholar the Metzinger family will ever know.

I. INTRODUCTION

"Yes, they paid very well," Shaquille O'Neal told reporters regarding his time as a men's basketball player at Louisiana State University (LSU).[1] O'Neal later clarified that he was kidding and had never pocketed illicit payments as a star for LSU in the early 1990s.[2] Even with this clarification taken at face value, O'Neal's comment provides an apt entry point into the complex and often polemic debate surrounding the compensation cap imposed on National Collegiate Athletic Association (NCAA) Division I athletes. A transcendent talent at LSU,[3] O'Neal received scholarship assistance in the form of tuition, books, and lodging that enabled him to attend class at a prestigious four-year university and compete at the highest intercollegiate level.[4] Proponents of the NCAA model would argue that by supplying him with enough money to receive a top-flight education and enjoy the spotlight afforded prominent college athletes, LSU paid O'Neal well *enough* without paying him an amount that would violate the spirit of amateurism vital to the survival of college athletics.[5] To the NCAA's supporters, the recent ruling in *O'Bannon v. NCAA* ordering the NCAA to raise the award limit to the full cost of attendance[6]—a directive the NCAA institutionalized in 2015[7]—

1. Sam Vecenie, *Shaquille O'Neal Says LSU 'Paid Very Well' at Lakers Fan Event*, CBS SPORTS (Jan. 26, 2016), http://www.cbssports.com/college-basketball/news/shaquille-oneal-says-lsu-paid-very-well-at-lakers-fan-event/.

2. *Id.*

3. *See* Jim Kleinpeter, *Superstar Shaquille O'Neal Highlights 2013 La. Sports Hall of Fame Induction Class*, NOLA.COM (Jan. 26, 2013, 11:43 PM), http://www.nola.com/lsu/index.ssf/2013/01/superstar_shaquille_oneal_high.html; Row27 Studios, *LSU Great Shaquille O'Neal*, YOUTUBE, https://www.youtube.com/watch?v=MTQD3C8Muco (last updated Sept. 6, 2011).

4. *See* NCAA, 2014-2015 NCAA Division I Manual, art. 15.02.4.5, at 189 [hereinafter 2014-2015 NCAA Manual].

5. *See, e.g.*, Robert L. Kehoe III, *Hunger Games*, POINT, https://thepointmag.com/2015/politics/hunger-games (last visited Oct. 17, 2016) (refuting claims that Division I athletes are "scandalously underpaid" and arguing that raising scholarship limits would "encourage a Romanized spectacle with little connection to the presumed goals and values of institutions of higher learning").

6. 802 F.3d 1049, 1075-76 (9th Cir. 2015).

reinforced the legal validity of restricting scholarship amounts to a level that rewards student-athletes without permitting college sports to devolve into some watered down facsimile of a professional league.[8]

The NCAA's swelling contingent of critics, meanwhile, decry NCAA Division I schools as an illegal price-fixing cartel.[9] Because member schools share none of the considerable revenue college sports generate with the players themselves, many players are not paid *well* relative to the value they generate for their schools.[10]

A consolidated class action lawsuit currently pending in the United States District Court for the Northern District of California promises to bring to a head the question of whether college athletes are paid well enough for the NCAA to comport with federal antitrust law.[11] Current and former competitors in the Football Bowl Subdivision (FBS) and Division I men's and women's basketball are mounting a direct threat to the restraint on student-athletes' scholarships, alleging that the grant-in-aid cap stymies price-driven competition for their services in violation of Section 1 of the Sherman Act.[12] Meanwhile, now that the Supreme Court of the United States has declined to review a United States Court of Appeals for the Ninth Circuit decision forbidding players from receiving name, image or likeness (NIL) compensation in excess of the cost of attendance,[13] "amateurism" has been reensconced as a valid procompetitive benefit

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7. Steve Berkowitz, *NCAA Increases Value of Scholarships in Historic Vote*, USA TODAY (Jan. 17, 2015, 11:05 PM), http://www.usatoday.com/story/sports/college/2015/01/17/ncaa-convention-cost-of-attendance-student-athletes-scholarships/21921073/.

8. *See* Reply Memorandum of Points and Authorities in Support of Defendants' Motion To Dismiss the Complaints at 2-5, Jenkins v. NCAA (*In re* NCAA Athletic Grant-in-Aid Cap Antitrust Litig.), 311 F.R.D. 532 (N.D. Cal. 2015) (No. 4:14-md-02541-CW/No. 4:14-cv-02758-CW).

9. *See, e.g.*, Andy Schwarz & Colin Weaver, *Net Gains*, POINT, https://thepointmag.com/2015/politics/net-gains (last visited Oct. 17, 2016) (decrying the "monolith of 351 Division I schools that have colluded to fix wages through their cap on athletic scholarships").

10. *See* Consolidated Amended Complaint at 47-49, *In re* NCAA Athletic Grant-in-Aid Cap Antitrust Litig., 311 F.R.D. 532 (N.D. Cal. 2015) (No. 4:14-md-02541-CW / No. 4:14-cv-02758-CW); Jonathan Mahler, *College Athletes Should Be Paid Exactly This Much*, BLOOMBERG (Jan. 2, 2014, 1:12 PM), http://www.bloomberg.com/news/articles/2014-01-02/how-much-should-college-athletes-get-paid.

11. *See* Jenkins v. NCAA (*In re* NCAA Athletic Grant-in-Aid Cap Antitrust Litig.), 311 F.R.D. 532 (N.D. Cal. 2015). The class-certification order applied to both the *Alston v. NCAA* lawsuit, brought on behalf of former players attempting to earn the difference between what they received during their college careers and the full cost of attendance, and the *Jenkins v. NCAA* suit seeking to eradicate the cap in perpetuity. *Id.*

12. Consolidated Amended Complaint, *supra* note 10, at 1-4.

13. NCAA v. O'Bannon, 137 S. Ct. 277 (2016).

under antitrust law. A price ceiling that in other contexts may have long ago succumbed to the Sherman Act guillotine could survive thanks to two dubious principles, undergirded by the biases studied in behavioral economics, which have long pervaded the way people view big-time college athletics as a product. First, federal courts and large swaths of the public have accepted as gospel the notion that "amateurism" is necessary to the survival of college athletics in the face of substantial historical evidence to the contrary.[14] Second, most people still refuse to regard scholarship awards as "compensation" in the traditional commercial sense, despite their incontrovertibly commercial nature.[15]

With an infusion of behavioral economic theory and close scrutiny of existing NCAA-related antitrust case law, this Comment examines how the framing of the issue of whether college athletes should be paid has warped the legal analysis of the NCAA's limit on athletics-based compensation. Moreover, it proposes that properly framing the student-athlete compensation dilemma exposes the illegality of the NCAA's current grant-in-aid apparatus for Division I athletes under section 1 of the Sherman Antitrust Act. Part II describes the relevant antitrust law.[16] Part III explains how NCAA Division I schools operate as a price-fixing monopsony in the market for athletes' services.[17] Part IV details the relevant behavioral economic theory and how the NCAA's historical reliance on the nebulous concept of "amateurism" helped lead to the two fallacies elucidated above, framing the grant-in-aid debate in a way that biases observers in favor of the NCAA's price-fixing conduct.[18] Part V traces how, from *Board of Regents of Oklahoma v. NCAA* to *O'Bannon v. NCAA*, courts have injected these biases into NCAA-related antitrust law.[19] Finally, Part VI argues that a proper framing of the issue confirms that the NCAA's current grant-in-aid apparatus violates the Sherman Act.[20]

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14. *See infra* subpart IV.C.1.
15. *See infra* subpart IV.C.2.
16. *See* discussion *infra* Part II.
17. *See* discussion *infra* Part III.
18. *See* discussion *infra* Part IV.
19. *See* discussion *infra* Part V.
20. *See* discussion *infra* Part VI.

II. SHERMAN ACT SECTION 1

According to section 1 of the Sherman Act, "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal."[21] The Supreme Court clarified that, since any contract or combination necessitates some sort of restraint, section 1 prohibits "unreasonable" restraints on trade.[22] The Supreme Court has characterized many conspiracies by more than one competitor in a market to fix prices in that market as per se illegal.[23]

In 1979, the Court carved out a notable exception to per se illegality in *Broadcast Music, Inc. v. Columbia Broadcasting System, Inc.* (*BMI*).[24] By offering "blanket licenses" to swaths of copyrighted works at a time for a set fee, music licensers such as Broadcast Music and the American Society of Composers, Authors and Publishers (ASCAP) had essentially foreclosed price competition for individual compositions of music.[25] Nevertheless, Justice White refused to apply the per se rule, characterizing the blanket license apparatus as a necessary trade-restraining "evil" in a market that would otherwise devolve into a miasma of unwieldy and impractical individual negotiations.[26] Because the blanket license apparatus enabled composers to market a product they could not have peddled themselves, Justice White asserted that the price-fixing scheme could be reasonable under section 1.[27]

The Rule of Reason eventually emerged as the test on which courts depended to assess restraints adjudged less egregious than a naked price restraint.[28] When applying Rule of Reason analysis, courts must determine (1) whether the plaintiff has demonstrated an anticompetitive impact in a relevant market;[29] (2) whether the defendant has carried its "heavy" burden of proving that a

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21. 15 U.S.C. § 1 (2012).

22. *See* NCAA v. Bd. of Regents of Univ. of Okla., 468 U.S. 85, 98 (1984); Bd. of Trade of City of Chi. v. United States, 246 U.S. 231, 241 (1918).

23. *See, e.g.*, United States v. Socony-Vacuum Oil Co., 310 U.S. 150 (1940) (deeming per se illegal a conspiracy by oil companies to directly fix fuel prices).

24. 441 U.S. 1 (1979).

25. *Id.* at 4-7.

26. *Id.* at 20-23.

27. *Id.* at 23-24.

28. *See* NCAA v. Bd. Of Regents of Univ. of Okla., 468 U.S. 85, 103, 113.

29. *See id.* at 86, 103-04, 110-13.

procompetitive effect justified the challenged restraint;[30] and (3) whether the plaintiff has presented less restrictive and "virtually as effective" alternatives for achieving the defendant's procompetitive goal, provided it exists.[31]

III. THE NCAA AS A PRICE-FIXING MONOPSONY

For the 2015-2016 academic year, Division I consisted of 351 colleges and universities.[32] These institutions function as "buyers" in the market for college athletes' services.[33] Driven by the influx of television contract money—particularly into football and men's basketball programs—over the past several decades, many of the athletic programs at these schools are generating staggering amounts of revenue.[34] Across all sports in 2014-2015, NCAA Division I schools hauled in more than $8.5 billion in revenue,[35] with a whopping twenty-eight different athletic programs pulling in more than $100 million individually.[36]

FBS football and men's basketball programs in the "Power 5" conferences—the Atlantic Coast Conference, the Big Ten Conference,

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30. Professor Maurice E. Stucke proclaimed four separate criteria that jurisdictions in the United States and worldwide have relied upon, to varying degrees, in discerning whether a benefit is procompetitive: "ensuring an effective competitive process, promoting consumer welfare, maximizing efficiency, and ensuring economic freedom." Maurice E. Stucke, The Implications of Behavioral Antitrust 35 (Feb. 2013) (unpublished manuscript) (on file with the University of Tennessee College of Law), http://trace.tennessee.edu/cgi/viewcontent.cgi?article=1061&context=utk_lawpubl.

31. *See Bd. of Regents of Univ. of Okla.*, 468 U.S. at 104-20; Cty. of Tuolumne v. Sonora Cmty. Hosp., 236 F.3d 1148, 1159 (9th Cir. 2001).

32. *2015-16 School Ratings*, SR/COLLEGE BASKETBALL, http://www.sports-reference.com/cbb/seasons/2016-ratings.html (last visited Oct. 12, 2016).

33. *See* O'Bannon v. NCAA, 7 F. Supp. 3d 955, 991 (N.D. Cal. 2014), *aff'd in part, rev'd in part*, 802 F.3d 1049 (9th Cir. 2015); *see also* Jeffrey L. Harrison & Casey C. Harrison, *The Law and Economics of the NCAA's Claim to Monopsony Rights*, 54 ANTITRUST BULL. 923, 930-34 (2009) (assessing the NCAA schools as the "buying side" under antitrust law).

34. *See generally* WALTER BYERS, UNSPORTSMANLIKE CONDUCT: EXPLOITING COLLEGE ATHLETES 79-94 (1995) (chronicling an onslaught of television rights contracts beginning in the 1950s); Schwarz & Weaver, *supra* note 9 ("Since 1985, revenue across FBS football has grown at a steady eight percent a year, through boom and bust.").

35. *What Is the Total Amount of Revenues Reported?*, U.S. DEP'T EDUC., http://ope.ed.gov/athletics/Trend/public/#/answer/6/601/main?row=-1&column=-1&limit=5&limitValues=1,2,3 (select "Athletic Sanctioning Body" under "Filter By"; select NCAA Division I-A, I-AA, and I-AAA; and select "Submit") (last visited Oct. 12, 2016).

36. Jon Solomon, *Inside College Sports: SEC, Big Ten Dominate $100M Revenue Club*, CBS SPORTS (Dec. 17, 2015), http://www.cbssports.com/collegefootball/writer/jon-solomon/25417211/inside-college-sports-sec-big-ten-dominate-100m-revenue-club.

the Big 12 conference, the Pac-12 Conference and the Southeastern Conference—generate most of this revenue.[37] The Power Five conferences themselves amassed more than $2.1 billion, much of which was then divvied up among member schools.[38] In particular, FBS football revenues have soared since 2012, when ESPN agreed to pay $470 million annually for twelve years merely to broadcast the College Football Playoff's six bowl games.[39] For the 2014 season, FBS program revenues eclipsed $3.7 billion.[40] Division I men's basketball supplies another reliable annual windfall for the NCAA. The fourteen-year contract struck between the NCAA, CBS, and Turner Sports in 2010 for the broadcast rights to the men's basketball tournament is worth $10.8 billion, or $770 million annually.[41] Division I men's basketball accounted for more than $1.5 billion in revenue in 2014-2015.[42] Meanwhile, Division I women's basketball programs raked in nearly $500 million, rendering women's basketball the third-highest earning athletic program by a comfortable margin.[43] All other NCAA Division I sports programs grossed nearly $2.4 billion in revenue.[44]

While these billions pour into Division I coffers, the assumptive stars of the show are limited to receiving "tuition and fees, room and board, books, and other expenses related to attendance at the

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37. *Id.*

38. Jon Solomon, *Power Five Conferences See Revenue Grow by 33 Percent in One Year*, CBS SPORTS (May 27, 2016), http://www.cbssports.com/college-football/news/power-five-conferences-see-revenue-grow-by-33-percent-in-one-year/.

39. Jerry Hinnen, *ESPN Reaches 12-Year Deal To Air College Football Playoffs*, CBS SPORTS (Nov. 21, 2012, 2:03 PM), http://www.cbssports.com/collegefootball/eye-on-college-football/21083689/espn-reaches-12year-deal-to-air-college-football-playoffs.

40. *What Is the Total Amount of Revenues Reported?*, U.S. DEP'T EDUC., http://ope.ed.gov/athletics/Trend/public/#/answer/6/601/main?row=-1&column=-1&limit=5&limitValues=1,2,3 (select "Athletic Sanctioning Body" under "Filter By"; select NCAA Division I-A; select "Search"; create table with "Football" selected as Row Variable and "Men's Teams" selected as Column Variable) (last visited Oct. 12, 2016).

41. *CBS Sports, Turner Broadcasting, NCAA Reach 14-Year Agreement*, NCAA (Apr. 22, 2010), http://www.ncaa.com/news/basketball-men/2010-04-21/cbs-sports-turner-broadcasting-ncaa-reach-14-year-agreement.

42. *What Is the Total Amount of Revenues Reported?*, U.S. DEP'T EDUC., http://ope.ed.gov/athletics/Trend/public/#/answer/6/601/main?row=-1&column=-1&limit=5&limitValues=1,2,3 (select "Athletic Sanctioning Body" under "Filter By"; select NCAA Division I-A, NCAA Division I-AA and NCAA Division I-AAA; select "Search"; create table with "All Varsity Team Sports" selected as Row Variables and "All Team Types" selected as Column Variables) (last visited Oct. 12, 2016).

43. *Id.*

44. *Id.*

institution up to the cost of attendance."[45] Anchored by the value of school-related costs, the maximum compensation players receive for the "sale" of their services bears no relation to the marginal revenue their athletic participation creates.[46] According to many economists and legal scholars, the grant-in-aid figure falls woefully short of the amount athletes in football and basketball would command if Division I schools had to bargain for their services in a free market.[47] In addition, no intercollegiate divisions or minor leagues can replicate Division I's unique hybrid of esteemed academic programming and high-level, nationally-ballyhooed athletic competition.[48] As a result, the NCAA's grant-in-aid cap represents a ceiling on the prices the student-athlete "sellers" can acquire for their services.[49] In other words, the cap renders the NCAA Division I institutions a monopsony, or a collective entity by which, as *buyers*, the member schools preclude sellers (the players) from reaping the benefits of open competition.[50] Although antitrust law's interest in shielding consumers from the pratfalls of imperfect competition have largely subjected monopolistic sellers to jurisprudential Sherman Act scrutiny, courts have held that "monopsonistic practices that harm

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45. NCAA, 2016-2017 NCAA Division I Manual, art. 15.02.5, at 181 [hereinafter 2016-2017 NCAA Manual]. Before the district court decision in *O'Bannon v. NCAA* ordered the NCAA to raise the cap to cover cost of attendance and the organization's members complied months later, NCAA bylaws defined a full grant-in-aid as "tuition and fees, room and board, and required course-related books." 2014-2015 NCAA Manual, *supra* note 4; *see* O'Bannon v. NCAA, 7 F. Supp. 3d 955, 1007 (N.D. Cal. 2014), *aff'd in part, rev'd in part*, 802 F.3d 1049 (9th Cir. 2015); Berkowitz, *supra* note 7.

46. Banks v. NCAA, 977 F.2d 1081, 1091 (7th Cir. 1992) ("[T]he value of the scholarship is based upon the school's tuition and room and board, not by the supply and demand for players.").

47. *See, e.g.*, RAMOGI HUMA & ELLEN J. STAUROWSKY, THE $6 BILLION HEIST: ROBBING COLLEGE ATHLETES UNDER THE GUISE OF AMATEURISM 12 (2012) ("[T]he average FBS football and basketball player is denied approximately $114,153 and $265,827 of their fair market value, respectively."); Gary R. Roberts, *The NCAA, Antitrust, and Consumer Welfare*, 70 TUL. L. REV. 2631, 2643-44, 2650 (1996) ("[F]or many star athletes, there is no question that the value of this fixed maximum compensation is well below their free-market value."); Richard Posner, *Monopsony in College Athletics*, U. CHI. L. SCH.: BECKER-POSNER BLOG (Apr. 3, 2011), http://www.becker-posner-blog.com/2011/04/monopsony-in-college-athleticsposner.html (speculating that college athletes would earn scholarships that "yield more than the full cost of tuition and living expenses"); Andy Schwarz, *An Economist Explains Why Darren Rovell Is Wrong About Paying College Athletes*, VICE SPORTS (Mar. 30, 2015), https://sports.vice.com/en_us/article/an-economist-explains-why-darren-rovell-is-wrong-about-paying-college-athletes (referring to the "incontrovertible evidence" that many scholarship athletes are likely worth more than their scholarships).

48. *See O'Bannon*, 7 F. Supp. 3d at 965-66.

49. *See* Harrison & Harrison, *supra* note 33, at 939; Posner, *supra* note 47.

50. *See* Posner, *supra* note 47.

suppliers may violate antitrust law even if they do not ultimately harm consumers."[51]

IV. BEHAVIORAL ECONOMICS AND THE NCAA

Of course, Division I college athletics do not exist in a vacuum, but in a society that has long venerated them.[52] As persisting public unease with the idea of college athletes earning anything more than the cost of attendance confirms, this reverence stems at least in part from the NCAA's association with the concept of amateurism.[53] Some form of the ideal of athletes toiling on the athletic field for nothing more than school glory and the supplementing of their postsecondary education has long fueled college sports' reputation as the "purer" alternative to professional leagues.[54] At no point in college athletics' century and a half of existence, however, has the ideal of amateurism in college athletics ever been fully realized.[55] Rather, the aspiration and accompanying failure to uphold the tenets of amateurism defines the NCAA's history, as the organization has stretched and contorted the definition of the concept itself to halt commercialism's unceasing encroachment.[56] When the NCAA, its fans, and the judges hearing its antitrust cases insist that amateurism is worth preserving, they advocate for the survival of something that never fully existed as a component of big-time collegiate sports.

Nevertheless, because many persist in touting the need for some form of amateurism,[57] the NCAA's grant-in-aid price-fixing apparatus may endure. An application of behavioral economic theory to the NCAA's history may help illuminate why. The entrenched idea that the preservation of amateurism represents an essential cog in college

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51. *O'Bannon*, 7 F. Supp. 3d at 992 (citing Mandeville Island Farms, Inc. v. Am. Crystal Sugar Co., 334 U.S. 219 (1948)). The Division I student athletes agreeing to provide their talents in exchange for scholarship compensation represent the "suppliers" harmed by the NCAA's purported monopsony. *See* Posner, *supra* note 47.

52. *See* Schwarz & Weaver, *supra* note 9.

53. *See, e.g.*, Peter Moore, *Poll Results: Paying College Athletes*, YOUGOV (Oct. 28, 2015, 10:43 AM), https://today.yougov.com/news/2015/10/28/poll-results-paying-college-athletes/ (reporting that 56% of respondents believed college athletes were "already being compensated by getting a scholarship and a chance to earn a college degree"); Ekow N. Yankah, *Why N.C.A.A. Athletes Shouldn't Be Paid*, NEW YORKER (Oct. 14, 2015), http://www.newyorker.com/news/sporting-scene/why-ncaa-athletes-shouldnt-be-paid (warning that increased commercialization will "erode" allegiance to school teams).

54. *See infra* subparts IV.B, VI.A.

55. *See infra* subparts IV.B, VI.A.

56. *See infra* subpart IV.B.

57. *E.g.*, Yankah, *supra* note 53.

athletics' machinery has blinded observers to the true economic character of a grant-in-aid scholarship. It is a price NCAA colleges pay to induce young men and women into offering their athletic services.[58]

A. The Relevant Behavioral Economic Theory

If traditional economics is the study of making marketplace choices, behavioral economic theory spotlights our inability to recognize choices for what they really are.[59] Devised by Richard Thaler, Daniel Kahneman, and Amos Tversky, behavioral economics distinguishes "Econs"—the rational decision-making firms and individuals relied upon in abstract economic models—from actual human beings, whose dependence on easily accessible rules of thumb known as "heuristics" often delimit the capacity for rational decision-making.[60]

Because antitrust law has long relied on treating corporations and consumers as Econs, many scholars remain wary of infusing behavioral economic principles into antitrust analysis.[61] In this context, however, behavioral economic concepts provide immense value by illuminating how biases underlying popular perceptions of scholarship awards may be facilitating NCAA Division I schools' illegal cartel activity.[62] Namely, heuristics proven to influence how humans evaluate certain transactions may help elucidate why what Econs would regard as a scholarship price ceiling strikes real humans as a fair—and even necessary—aspect of prestigious college athletics.[63]

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58. *See infra* subpart IV.C.

59. *See* RICHARD H. THALER, MISBEHAVING: THE MAKING OF BEHAVIORAL ECONOMICS 4-9 (2015).

60. *See* DANIEL KAHNEMAN, THINKING, FAST AND SLOW 292-94 (2011); THALER, *supra* note 59; Maurice E. Stucke, *Behavioral Economists at the Gate: Antitrust in the Twenty-First Century*, 38 LOY. U. CHI. L.J. 513, 527-28 (2007).

61. *See, e.g.*, Joshua D. Wright & Judd E. Stone II, *Misbehavioral Economics: The Case Against Behavioral Antitrust*, 33 CARDOZO L. REV. 1517, 1548 (2012) (concluding that behavioral economics "does not add significant explanatory power concerning the behavior of firms over and above existing theories").

62. *See* Stucke, *supra* note 30, at 2; *see also* Allan L. Shampine, *The Role of Behavioral Economics in Antitrust Analysis*, 27 ANTITRUST 65, 68 (2013) ("If firms can obtain higher prices from consumers by exploiting behavioral economics, then a collective agreement to exploit that fact may constitute price maintenance or price fixing . . . .").

63. *See* THALER, *supra* note 59, at 23 (explaining that behavioral economics' value lies in the *predictability* of certain psychological factors influencing decision-making).

Understanding how heuristics shape the NCAA grant-in-aid debate begins with the acceptance of a central precept of behavioral economic theory: that people perceive choices in terms of *changes* from a "reference point" of wealth or happiness rather than in terms of *levels* of wealth or happiness.[64] This matters, Kahneman and Tversky discovered, because humans are loss averse: losses loom larger than gains in our psyches.[65] For instance, in order to accept a coin flip bet for which a tails landing results in a $100 loss, most people will need a heads landing to promise much more than a $100 gain.[66] As a consequence, humans engage differently with decisions that would produce identical outcomes under traditional economic reasoning, depending on whether potential outcomes represent losses or gains relative to a reference point.[67] Kahneman and Tversky denoted this phenomenon "Prospect Theory."[68]

In observing this dissonance in the behavior of Richard Rosett, a fellow economics professor and wine connoisseur, Thaler augmented Prospect Theory with a concept he called the endowment effect.[69] Despite owning—and occasionally drinking—several bottles of wine approximating $100 in value, Rosett refused to spend more than $35 on a new bottle.[70] These preferences defied rational economic utility-maximization. Given his willingness to consume a bottle worth $100, Rosett should have pounced on the opportunity to purchase a bottle for any price up to $100.[71] That Rosett resisted this economic reality revealed that Rosett valued owning his "endowment" of wine—and the avoidance of losing it—more than the opportunity to purchase new wine.[72] The level of our endowment, then, demarcates the reference point from which we base the utility of gains and losses.[73] Although we like adding to our endowment, we dislike chipping away at it even more.

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64. *See* KAHNEMAN, *supra* note 60, at 280-82; THALER, *supra* note 59, at 31.
65. *See* KAHNEMAN, *supra* note 60, at 283-86.
66. *Id.* at 284.
67. *See id.* at 280-84, 363-65; THALER, *supra* note 59, at 31.
68. KAHNEMAN, *supra* note 60, at 280-82.
69. *See id.* at 292-94; THALER, *supra* note 59, at 17-18.
70. KAHNEMAN, *supra* note 60, at 292-94; THALER, *supra* note 59, at 17-18.
71. *See* KAHNEMAN, *supra* note 60, at 292-94; THALER, *supra* note 59, at 17-18.
72. *See* KAHNEMAN, *supra* note 60, at 292-94; THALER, *supra* note 59, at 17-18. The inverse is equally true, as Thaler articulated: "Giving up the opportunity to sell something does not hurt as much as taking the money out of your wallet to pay for it." THALER, *supra* note 59, at 17.
73. *See* KAHNEMAN, *supra* note 60, at 292-94; THALER, *supra* note 59, at 17.

Defining Rosett's endowment as the bottles of wine he already owned represented a relatively facile task.[74] In other situations, however, what a person believes she owns or is entitled to depends on the framing—or the context of the presentation—of a question or decision.[75] One experiment described by Kahneman aptly demonstrates the potential for a framing effect to skew perceptions of economic reality.[76] The experimenters awarded their subjects £50.[77] The subjects were then offered the option of either (1) retaining £20 or (2) spinning a wheel of chance, with one outcome awarding the full £50 and the other awarding nothing.[78] However, the testers presented the "sure thing" option as "keeping £20" to one group and "losing £30" to another.[79] Even though unbounded rationality would dictate that both groups demonstrate the same preferences, the "keep £20" group opted for the sure thing far more often than the "lose £30" group.[80] The divergence in responses resulted from the differing reference points. Whereas the former group tended to approach the choice as if they had no endowment, members of the latter group dwelled on the £50 endowment newly nestled in their pockets.[81] Though *economically* equivalent, the "keep £20" and "lose £30" options were not *emotionally* equivalent.[82]

Another hypothetical conceived by Thaler demonstrated how framing and the endowment effect conspire to inform our broader conceptions of economic fairness. Thaler asked two separate groups of MBA students to imagine they were languishing away on a sultry day at the beach.[83] Members of the first group related the maximum price at which they would purchase cold beers from a beachside resort hotel; the second group, meanwhile, reported how much they would be willing to pay for the same beer from a nearby dilapidated grocery store.[84] Even though both groups were paying to drink the same beer at the same beach, the median price which members of the luxury

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74. *See* KAHNEMAN, *supra* note 60, at 292-94; THALER, *supra* note 59, at 17.
75. *See* KAHNEMAN, *supra* note 60, at 363-65; THALER, *supra* note 59, at 17-18.
76. *See* KAHNEMAN, *supra* note 60, at 364-65.
77. *Id.* at 364.
78. *Id.* at 364-65.
79. *Id.*
80. *Id.*
81. *See id.*; *see also* Stucke, *supra* note 30, at 12-13 (describing how framing determines the reference point from which a consumer determines a deal's value).
82. *See* KAHNEMAN, *supra* note 60, at 364.
83. THALER, *supra* note 59, at 60.
84. *Id.*

hotel group were willing to pay exceeded the median price of the grocery group by more than three dollars per beer.[85] The discrepancy, Thaler posited, stemmed from the disparate expectations associated with alcohol purchases at luxury hotels and run-down markets.[86] Because of hotels' long-running and well-known practice of upcharging alcohol, consumers capitulate to hotel prices that would incite them to mutiny if charged at a grocery.[87] In other words, hotel consumers felt entitled to less bang for their buck.[88] "[P]erceptions of fairness," Thaler explains, "are related to the endowment effect. Both buyers and sellers feel entitled to the terms of trade to which they have become accustomed, and treat any deterioration of those terms as a loss."[89]

Finally, and critically for the purposes of this comment, the concept of mental accounting provides an additional way of confronting how perceived reference points dominate our evaluation of choices.[90] In processing economic decisions, humans tend to create separate "accounts" for different aspects of life that skew the perceptions of gains, losses, and current assets.[91] When someone holds a $40 ticket to a concert, for instance, she is more likely to refuse paying for another ticket if she loses the ticket itself than if she loses $40 in cash.[92] The lost ticket is internally framed as a debit to the "concert" account and discourages the purchase of another, whereas the lost $40 drains a more general "cash" account.[93] Therefore, even though the lost ticket and lost cash qualify as equivalent sunk costs, they affect our behavior differently because of the internal reference point from which we evaluate their utility.[94] According to Thaler, mental accounting also induces us into

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85. *Id.*

86. *Id.*

87. *Id.*; *see also* Amanda Bell, *Just How Big Is the Markup on Movie Theater Food?*, YAHOO! (May 29, 2014), https://www.yahoo.com/movies/just-how-big-is-the-markup-on-movie-food-87128526582.html (describing movie theater mark-ups for food and drink concessions reaching as high as 806%).

88. *See* THALER, *supra* note 59, at 60.

89. *Id.* at 131.

90. *See* KAHNEMAN, *supra* note 60, at 342-44; THALER, *supra* note 59, at 57-62.

91. *See* KAHNEMAN, *supra* note 60, at 342-44; THALER, *supra* note 59, at 57-62; Richard H. Thaler, *Mental Accounting Matters*, 12 J. BEHAV. DECISION MAKING 183, 193-97 (1999).

92. *See* KAHNEMAN, *supra* note 60, at 371.

93. *Id.*

94. *Id.*

"labeling" wealth into different, nonfungible categories.[95] For instance, people separate their housing cost budgets from their monthly food budget, law firms separate their Westlaw and printing budgets, and Division I member institutions separate their scholarship budgets from the remainder of their athletic input expenditures.[96]

B. The Long Frame Job

To understand the influence of these heuristics on the college amateurism debate is to understand the sordid and self-contradictory early history that culminated in the NCAA adopting its grant-in-aid system. From the beginning, commercial interests have shaped college athletics. Organizers of the first ever intercollegiate athletic event, an 1852 crew regatta between Harvard and Yale, promised "lavish prizes" to the winners and "unlimited alcohol" to spectators.[97] As other sports, particularly football, exploded in popularity over the ensuing decades, schools began to reap the economic benefits of intercollegiate competition, from gate revenues to increased exposure.[98] To ensure the gravy train kept rolling, universities began to invest heavily in their athletic programs. From maintaining "slush funds" for athletes to enlisting graduate and nonstudents in competition, purportedly well-esteemed educational institutions engaged in profiteering conduct that appalled faculty members and administrators.[99] Many fretted that intercollegiate athletics were rapidly transforming into quasi-professional competition.[100]

Safety concerns drove President Theodore Roosevelt to convene two conferences on intercollegiate athletics in 1905.[101] In a broader sense, however, Roosevelt and others sought to dissolve the unholy matrimony that had formed between "play" and "business."[102] For

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95. Thaler, *supra* note 91, at 193-97.

96. *Id.* at 194.

97. ANDREW ZIMBALIST, UNPAID PROFESSIONALS: COMMERCIALISM AND CONFLICT IN BIG-TIME COLLEGE SPORTS 6-7 (1999).

98. *Id.* at 7-8; *see* BYERS, *supra* note 34, at 38-39.

99. ZIMBALIST, *supra* note 97, at 7-8.

100. *See* BYERS, *supra* note 34, at 39-40; W. Burlette Carter, *The Age of Innocence: The First 25 Years of the National Collegiate Athletic Association, 1906 to 1931*, 8 VAND. J. ENT. & TECH. L. 211, 218-19 (2006).

101. *See History*, NCAA, https://web.archive.org/web/20110807060521/http://www.ncaa.org:80/wps/wcm/connect/public/ncaa/about+the+ncaa/who+we+are/about+the+ncaa+history (last visited Jan. 18, 2017). During the 1905 season alone, eighteen players died and 149 sustained serious injuries. BYERS, *supra* note 34, at 38.

102. BYERS, *supra* note 34, at 39.

Roosevelt, college sports' value lay in their ennobling, not their enriching, qualities.[103] Administrators from nearly seventy colleges and universities ingrained this ethos into the nascent Intercollegiate Athletic Association of the United States (IAAUS),[104] rechristened as the NCAA in 1910.[105] In addition to a bevy of safety regulations, the organization's 1906 constitution prohibited from competition any athlete receiving "any money or financial concession or emolument as past or present compensation [to] enter any athletic contest."[106] In behavioral terms, then, the NCAA's forerunner formally set the reference point of an athlete's worth at zero—the "fair" deal to athletes was the one insulating them from the debasing influence of compensation.[107] In a 1907 address, IAAUS President Palmer Pierce explained:

> This organization wages no war against the professional athlete, but it does object to such a one posing and playing as an amateur. It smiles on the . . . contestant, imbued with love of the contest he wages; it frowns on the more skillful professional who, parading under college colors, is receiving pay in some form or other for his athletic prowess.[108]

However, because Pierce and other members of the IAAUS's executive committee allowed each school to retain its own enforcement autonomy, the organization's highfalutin aspirations struggled to stanch the flow of cash-fueled corruption spreading through the sports' veins.[109] In the NCAA's first four decades, colleges and universities eager for their programs' commercial success circumvented the NCAA's bylaws, with under-the-table payments, recruiting violations and point-shaving scandals reaching ubiquity.[110]

Still, even while commercialization seeped into and consumed college athletics, NCAA and university administrators recoiled at the

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103. *Id.*

104. *See* Carter, *supra* note 100, at 217-24.

105. *History*, *supra* note 101.

106. Carter, *supra* note 100, at 223 (quoting THE INTERCOLLEGIATE ATHLETIC ASSOCIATION OF THE UNITED STATES: PROCEEDINGS OF THE FIRST ANNUAL MEETING 34 (1906)).

107. *See id.*; *supra* text accompanying notes 60-68.

108. BYERS, *supra* note 34, at 40.

109. *See* Neil Gibson, Note, *NCAA Scholarship Restrictions as Anticompetitive Measures: The One-Year Rule and Scholarship Caps as Avenues for Antitrust Scrutiny*, 3 WM. & MARY BUS. L. REV. 203, 211-12 (2012).

110. *See* ZIMBALIST, *supra* note 97, at 8-9. Other, less pejorative but nevertheless illicit practices, such as alumni paying for local high school athletes' tuition, also prevailed. BYERS, *supra* note 34, at 65.

notion of institutionalizing any sort of "pay-for-play" apparatus for competitions they envisioned as intrinsically nonprofessional.[111] In other words, the fight to "restore" the NCAA to a state of innocence raged on. In 1948, the NCAA implemented what became known as the Sanity Code in a desperate attempt to detoxify college athletics.[112] Intended to eradicate the surreptitious payments that dominated the college football financial aid system most universities had adopted, the Sanity Code prohibited coaches from enticing recruits with the promise of financial inducements and tethered a limited amount of financial aid to academic, rather than athletic, performance.[113] Three years later, however, seven schools—dubbed the "Seven Sinners"—self-reported gross violations of the Code.[114] The Sinners complained that players, overburdened by their academic and athletic obligations, could not adhere to the Sanity Code's draconian academic standards.[115] When NCAA member schools failed to muster the requisite majority to expel the Sinners, the Sanity Code collapsed.[116]

Nevertheless, in framing a form of player payment as a measure to prevent "pay for play," the Sanity Code laid the framework that enabled the NCAA to justify the grant-in-aid system.[117] In 1953, NCAA member schools voted at their annual convention to vest the NCAA's Executive Council with the power to impose penalties on schools other than expulsion.[118] Finally equipped with the bite to accompany its bark, the NCAA created the national, uniform grant-in-aid cap in 1956, with compensation hinging on athletic participation.[119] As Walter Byers, the NCAA's Executive Director from 1951 to 1988, later acknowledged, the cap functioned as a compromise between college sports' economic realities and the lingering desire to conform to the amateurism ideal.[120] By tethering aid to expenses rather than revenue, Byers and the NCAA convinced themselves that they were offering athletes "an arbitrary but uniquely lucrative allowance . . . dedicated to amateurism" and that athletes

111. *See* Gibson, *supra* note 109, at 213-14.
112. BYERS, *supra* note 34, at 67.
113. *See* Gibson, *supra* note 109, at 213-14.
114. BYERS, *supra* note 34, at 53-54.
115. *Id.*
116. *See id.* at 54-55.
117. *See id.* at 67-72; Gibson, *supra* note 109, at 213-14.
118. Gibson, *supra* note 109, at 215.
119. BYERS, *supra* note 34, at 72.
120. *Id.*

were still "not being paid to perform."[121] The cap, then, effectively moved the reference point from zero to an amount still low enough for the NCAA to pretend it was rewarding athletes while protecting them from the perfidy of making real money.[122] Schools were and remain entitled to withhold scholarship compensation as a bulwark against the NCAA's demise, despite commercialization having long since woven its way into the organization's DNA.

C. The Two Fallacies

An Econ unsullied by NCAA fandom would identify the grant-in-aid system as a horizontal conspiracy to stifle price competition among Division I athletes.[123] Still, as the NCAA's history helps illustrate, limits on Division I player compensation have endured because many of the humans with a financial or emotional investment—including the judges who have helped craft NCAA-related antitrust law[124]—believe that some form of the current model must endure. Two economic fallacies, explained in part by the presence of the heuristics discussed above, fuel this belief and the resultant misapprehension of the antitrust legality of the NCAA's practices.[125]

1. Fallacy 1: Allowing Unfettered Player Compensation Would Fundamentally Destroy College Athletics

The fear that allowing "outside" payments to players would commercialize college sports to the point of collapse has long framed discussion of NCAA amateurism.[126] Instead of evaluating an athlete's compensation level relative to his or her worth, we ask how much colleges should be able to give an athlete without desecrating an

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121. *Id.*

122. *See id.*; *supra* text accompanying notes 60-68.

123. *See* discussion *supra* Parts II-IV.A.

124. *See* discussion *infra* Part V.

125. *See* discussion *infra* Part VI.

126. *See, e.g.*, BYERS, *supra* note 34, at 40, 68-69 (highlighting Palmer Price's virulent opposition to the idea of a paid professional "posing and playing as an amateur" and describing worries in the early 1950s that the erumpent grant-in-aid format represented a corrosive form of "pay-for-play"); Kehoe, *supra* note 5 (warning in 2015 that lifting restrictions on player compensation would beget "unbridled compensation" ruinous to college athletics' academic underpinnings); *Amateurism*, NCAA, http://www.ncaa.org/amateurism (last visited Oct. 12, 2016) ("Maintaining amateurism is crucial to preserving an academic environment in which acquiring a quality education is the first priority.").

amateurism principle we can barely define in the first place.[127] From this perspective, the transformative loss that would befall college athletics as a hallowed American institution—or, put in Thaler's terms, "[the] deterioration of [the] terms" that have always governed the school-to-player transaction—looms far larger than any potential financial gain to the athletes.[128]

2. Fallacy 2: Scholarship Athletes Are Not Being Paid

Scholarship awards constitute commercial transactions in which student-athletes offer their services to schools of their choosing in exchange for payment.[129] Like any high school student who manages to entice a school into awarding a merit-based scholarship, many Division I athletes decide to attend certain schools as a direct result of that particular school offering one of these compensation packages.[130] Nevertheless, people steadfastly refuse to place scholarship aid to students in the same context as an input price or salary.[131] The NCAA itself declares that a grant-in-aid award "is not considered to be pay or the promise of pay for athletics skill"[132] as a means of reconciling the system with its express prohibition on athletes receiving pay "in any form" for their athletic participation.[133] In essence, the NCAA's bylaws have institutionalized mental accounting. People assign a University of Oregon scholarship awarded to a five-star recruit; an illicit payment from a booster; a coaching salary worth millions per annum; and a $68 million expenditure on a grandiose new football facility to distinct mental accounts, despite each investment serving the same underlying economic purpose: boosting the Ducks' chances

127. THALER, *supra* note 59, at 131.

128. *Id.*; *see* Kehoe, *supra* note 5; Yankah, *supra* note 53.

129. O'Bannon v. NCAA, 802 F.3d 1049, 1065 (9th Cir. 2015); Andy Schwarz, *The NCAA's Economic Exploitation of Athletes Won't Be Solved by More of the Same*, VICE SPORTS (Oct. 20, 2015), https://sports.vice.com/en_us/article/the-ncaas-economic-exploitation-of-athletes-wont-be-solved-by-more-of-the-same.

130. *See* Andy Schwarz, *Myth 10: What They Get Is Very Valuable, It Should Be Enough. How Can You Say What They Get Is Unfair? I Wish My Kid Got That Deal!*, TUMBLR: SPORTSGEEKONOMICS, http://sportsgeekonomics.tumblr.com/post/13848652399/myth-10-what-they-get-is-very-valuable-it-should (last visited Nov. 2, 2016).

131. *See, e.g.*, Banks v. NCAA, 977 F.2d 1081, 1091 (7th Cir. 1992) ("We fail to understand how . . . NCAA colleges purchase labor through the grant-in-aid athletic scholarships . . . ."); BYERS, *supra* note 34, at 72 (relaying the description of the grant-in-aid program as a "compensation package" that nevertheless ensured that players were "not being paid to perform"); Yankah, *supra* note 53 (admonishing against "paying student athletes").

132. 2016-2017 NCAA Manual, *supra* note 45, art. 12.01.04, at 53.

133. *Id.*, art. 12.1.2, at 55-59.

in "college football's arms race."[134] Unmoored from comparison to a player's economic value or their function as an input cost, the grant-in-aid represents not just a fair deal but a benevolent one.[135]

V. BIAS IN NCAA ANTITRUST LAW

An analysis of the relevant case law confirms the potency of these fallacies in informing how federal courts have interpreted the NCAA's antitrust standing. From *Board of Regents* to *O'Bannon*, even cases unfavorable to the NCAA feature reasoning emblematic of how many federal judges have come to accept both the necessity of amateurism and the characterization of scholarship limits as beneficial rather than exploitative.[136] This Part explores how framing effects have shaped, and will continue to shape, the antitrust law applicable to big-revenue college athletics.

A. Board of Regents of the University of Oklahoma v. NCAA[137]

Arriving a few years after the Supreme Court's *BMI* decision,[138] *Board of Regents* centered on the NCAA's exclusive football television contracts with ABC.[139] These contracts limited the number of times each individual team could appear on a broadcast, drawing the ire of University of Oklahoma and other traditionally successful Division I programs who contended that the contracts illegally prohibited them from price-competing for television appearances.[140] Justice Stevens cited *BMI* in explaining that the case "involves an

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134. Greg Bishop, *Oregon Embraces 'University of Nike' Image*, N.Y. TIMES (Aug. 2, 2013), http://www.nytimes.com/2013/08/03/sports/ncaafootball/oregon-football-complex-is-glittering-monument-to-ducks-ambitions.html?_r=0; Andrew Greif, *Mark Helfrich's Big Pay Raise Earns Ducks Coach a Big Bump in Coaches' Salary Ranking*, OREGON LIVE (Oct. 8, 2015, 6:34 PM), http://www.oregonlive.com/ducks/index.ssf/2015/10/mark_helfrichs_big_pay_raise_e.html; *see* Schwarz, *supra* note 129; *supra* text accompanying notes 90-96.

135. *See* BYERS, *supra* note 34, at 72; Thaler, *supra* note 91. *But see* Schwarz, *supra* note 47 (refuting this rationale).

136. *See, e.g.*, O'Bannon v. NCAA, 802 F.3d 1049, 1076-79 (9th Cir. 2015) (stressing the need to protect college athletics from "professionalism" and equating a cost-of-attendance scholarship award with "not paying" amateur athletes).

137. Although the U.S. Court of Appeals for the Fifth Circuit upheld a restriction on the number of assistant coaches a school could employ in *Hennessey v. NCAA*, 564 F.2d 1136 (5th Cir. 1977), recent decisions have largely ignored it and begun their analysis of the NCAA's antitrust standing with *Board of Regents*. *See, e.g.*, *O'Bannon*, 802 F.3d 1049 (containing no citations to *Hennessey*).

138. *See supra* text accompanying notes 24-27.

139. NCAA v. Bd. of Regents of Univ. of Okla., 468 U.S. 85, 90-95 (1984).

140. *Id.* at 91-94.

industry in which horizontal restraints on competition are essential if the product is to be available at all."[141] He first alluded to the rules and regulations imperative to any sports league's existence, such as the size of the field and the number of players allowed on each team.[142] Stevens then expounded upon the procompetitive benefits conferred by college sports' adherence to amateurism:

> The identification of this "product" with an academic tradition differentiates college football from and makes it more popular than professional sports to which it might otherwise be comparable, such as, for example, minor league baseball. *In order to preserve the character and quality of the "product," athletes must not be paid,* must be required to attend class, and the like. And the integrity of the "product" cannot be preserved except by mutual agreement; if an institution adopted such restrictions unilaterally, its effectiveness as a competitor on the playing field might soon be destroyed. Thus, the NCAA plays a vital role in enabling college football to preserve its character, and as a result enables a product to be marketed which might otherwise be unavailable.[143]

Later in the opinion, Stevens declared that it was "reasonable to assume" that most of the NCAA's regulations furthered its goals of fostering competitive balance and amateur competition.[144] He concluded by acknowledging the NCAA's duty to preserve "a revered tradition of amateurism."[145]

Although the Court struck down the television contract at issue in *Board of Regents*, the opinion's language ensconced the "revered tradition" of amateurism as an essential procompetitive benefit in NCAA antitrust law cases.[146] In particular, Justice Stevens' declaration that athletes who had received NCAA-sanctioned grants-in-aid since 1956 "must not be paid" for the sport's survival preserved and augmented the impact of the two fallacies within a single phrase.[147] The opinion presupposes both (1) that college athletics' survival depends on player compensation limits, entitling the NCAA to set them, and (2) that scholarship compensation does not constitute

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141. *Id.* at 101.
142. *Id.*
143. *Id.* at 101-02 (emphasis added).
144. *Id.* at 117.
145. *Id.* at 120.
146. *See* discussion *infra* subparts V.B-C.
147. *See Bd. of Regents of Univ. of Okla.*, 468 U.S. at 102; *cf.* discussion *supra* subpart IV.C.

payment.[148] Because the Court accepted amateurism as a necessity and the grant-in-aid payment as a form of nonpayment, the NCAA was equipped to parry antitrust challenges by alluding to a tenet its universities had always violated.[149]

B. The Post-Board of Regents *Years*

Thanks to the Court's "long encomium to amateurism" in *Board of Regents*, the NCAA has escaped per se liability for the amateurism-related restraints it imposes on its members.[150] Stevens' opinion also helped embed a view of the grant-in-aid system dominated by the two fallacies into more than three decades of ensuing case law.

In *McCormack v. NCAA*, former players, alumni, and cheerleaders from Southern Methodist University directly challenged the grant-in-aid cap's legality after the NCAA levied the "death penalty" against SMU's football program.[151] The United States Court of Appeals for the Fifth Circuit found "little trouble" in concluding that the compensation limit boosted competition.[152] For the Fifth Circuit, Stevens' language concerning the necessity of amateurism for the "character and quality" of the product—itself lacking in empirical support[153]—sufficed to establish the reasonability of the NCAA's compensation restraint.[154] The court even acknowledged that the NCAA permitted "some compensation" through scholarship aid but opined that the organization's failure to "distill[] amateurism to its purest form [did] not mean its attempts to maintain a mixture containing some amateur elements are unreasonable."[155] In the

148. *See Bd. of Regents of Univ. of Okla.*, 468 U.S. at 102.

149. *See id.* at 101-02; *see also* Harrison & Harrison, *supra* note 33, at 929 ("[T]he Court did not assess the value of amateurism or rely on any evidence on the matter of whether amateurism was necessary to assure the popularity of the college game.").

150. *See* O'Bannon v. NCAA, 802 F.3d 1049, 1063-64 (9th Cir. 2015) (interpreting *Bd. of Regents* as protecting any NCAA regulation from invalidation "without a Rule of Reason analysis").

151. 845 F.2d 1338, 1340 (5th Cir. 1988). The NCAA suspended SMU's program from competition for the entire 1987 season after finding that the school had been paying its players in excess of the grant-in-aid limitation. *See* PONY EXCESS (ESPN Films 2010). Once ascendant, the program has staggered in the decades since. *See id.*; Eric Dodds, *The 'Death Penalty' and How the College Sports Conversation Has Changed*, TIME (Feb. 25, 2015), http://time.com/3720498/ncaa-smu-death-penalty/.

152. *McCormack*, 845 F.2d at 1344.

153. *See* Harrison & Harrison, *supra* note 33, at 928-29.

154. *McCormack*, 845 F.2d at 1344-45.

155. *Id.* at 1345.

McCormack Court's Rule of Reason analysis, a restriction on athletes earning too much was equivalent to a restriction on their earning anything at all.[156]

Perhaps no other NCAA antitrust opinion signifies the pernicious combination of historical ignorance and economic illogic that has maligned NCAA-focused antitrust jurisprudence more than *Banks v. NCAA*.[157] The United States Court of Appeals for the Seventh Circuit's primary holding thwarted an attack on the NCAA's draft and professional agent contact restrictions.[158] Mired in that opinion's dicta is the court's flabbergasting explanation that Division I schools did not participate in a market for athletes' services at all.[159] Rather, the court insisted, schools did not pay players because they topped scholarship payouts at a value "based upon the school's tuition and room and board, not by the supply and demand for players."[160] Put otherwise, the court's merry-go-round reasoning posited that the restraint on the market eliminated the market itself, which in turn justified the restraint.[161] In addition, the court speculated that allowing athletes to cavort with professional agents would "turn amateur intercollegiate athletics into a sham because the focus of college football would shift from educating the student-athlete to creating a 'minor-league' farm system."[162] In both denying the commercial character of scholarship payments altogether and disavowing the presence of any professional influence in high-revenue college sports, the court stretched the two fallacies to their conceptual limit.[163]

In *Law v. NCAA*, a group of assistant coaches actually toppled a horizontal price-fixing scheme analogous to the grant-in-aid cap.[164] *Law* rejected the NCAA's audacious argument that *Board of Regents*

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156. *See id.* at 1344-45. In *O'Bannon*, the United States Court of Appeals for the Ninth Circuit overturned as unreasonable a district court decision which equated a restriction on excessive compensation with a restriction on any compensation. O'Bannon v. NCAA, 802 F.3d 1049, 1076-77 (9th Cir. 2015). Despite reasoning that explicitly contradicted the *McCormack* decision, the Ninth Circuit's decision also defended the NCAA's limits on excess compensation. *See id.*; discussion *infra* subpart V.C.2.

157. *See* 977 F.2d 1081 (7th Cir. 1992).

158. *Id.* at 1093-94.

159. *Id.* at 1091.

160. *Id.*

161. *See id.*

162. *Id.*

163. *See id.*

164. *See* 902 F. Supp. 1394, 1405-10 (D. Kan. 1995), *aff'd*, 134 F.3d 1010 (10th Cir. 1998).

exempted all of its regulations from antitrust scrutiny.[165] The court then found the "Restricted Earnings Rule" limiting assistant coach salaries unreasonable, unmoved by the NCAA's appeals to competitive balance and higher costs.[166] However, the United States District Court for the District of Kansas reiterated that "amateurism . . . should be maintained" and emphasized that the "Restricted Earnings Rule" would have survived had the NCAA demonstrated a link between suppression of assistant coach salaries and the preservation of amateurism.[167] On appeal, the United States Court of Appeals for the Tenth Circuit characterized the rules "forbidding payments to athletes" as requisite for the NCAA's survival.[168]

Even in recent years, as a groundswell of public rancor toward the NCAA has developed,[169] courts have embraced the frame-biased underpinnings of the grant-in-aid system. In *Agnew v. NCAA*, the Seventh Circuit held that the plaintiffs' failure to identify the market in which the NCAA functioned as a monopsony in three separate instances warranted the dismissal of their challenge to the NCAA's limitations on the number and duration of scholarships.[170] In the process, the court heralded the eligibility rules prohibiting nonscholarship payments to players as presumptively procompetitive and "clearly protect[ing] amateurism."[171]

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165. *Id.* at 1405-06.

166. *Id.* at 1410.

167. *See id.* at 1408-10.

168. *Law*, 134 F.3d at 1018. For other appellate decisions toeing the fallacy-ridden amateurism line, see also Bassett v. NCAA, 528 F.3d 426, 433 (6th Cir. 2008) (holding that an assistant coach "violate[d] the spirit of amateur athletics" by paying recruits), and Smith v. NCAA, 139 F.3d 180, 187 (3d Cir. 1998), *vacated on other grounds*, 525 U.S. 459 (1999) (finding that the amateurism restrictions "allow for the survival of the product").

169. *See, e.g.*, Taylor Branch, *The Shame of College Sports*, ATLANTIC (Oct. 2011), http://www.theatlantic.com/magazine/archive/2011/10/the-shame-of-college-sports/308643/ (decrying the NCAA model).

170. 683 F.3d 328, 347-48 (7th Cir. 2012).

171. *Id.* at 343; *see also* Rock v. NCAA, 928 F. Supp. 2d 1010, 1026 (S.D. Ind. 2013) (holding that Division III's ban on all forms of financial aid "distills amateurism to an even purer form" than the Division I grant-in-aid limit). One pre-*O'Bannon* case, *White v. NCAA*, did threaten to disrupt the compensation limit's longstanding inoculation from antitrust violation. *See* White v. NCAA, No. CV 06-0999-RGK (MANx), 2006 WL 8066803 (C.D. Cal. Oct. 19, 2006). After Judge R. Gary Klausner of the United States District Court for the Central District of California certified the class, however, the parties settled for $10 million before a substantive legal assessment of the grant-in-aid limit could occur. *See id.*; Jon Solomon, *Lawsuit Challenges NCAA Rules Capping the Value of Athletic Scholarships*, AL.COM, http://www.al.com/sports/index.ssf/2014/03/lawsuit_challenges_ncaa_rules.html (last updated Mar. 6, 2014).

C. O'Bannon v. NCAA

The NCAA's framing of the grant-in-aid cap as a necessary salve against professionalization and a noneconomic "bargain" for student-athletes, rather than a deprivation of worth, undergirded the case law for nearly three decades without close scrutiny. But when Ed O'Bannon saw a familiar, pixelated face staring back at him from a friend's TV screen, the intersection between the NCAA and antitrust law changed forever.[172] Rankled that the Electronic Arts (EA) Sports NCAA Basketball videogame featured an avatar purporting to represent him during his UCLA playing days without his permission, O'Bannon filed a suit challenging the NCAA's prohibition on student-athletes profiting from their NILs in association with their athletic performance.[173] The suit dovetailed perfectly with a flurry of illegal benefits scandals[174] and a burgeoning distrust of the NCAA's amateur model[175] to pose the most potent threat to the NCAA's amateurism model yet seen.

Observers initially hailed Judge Claudia Wilken's 2014 decision striking down the NIL restriction and raising the grant-in-aid limit to the full cost of attendance[176] as the death knell for amateurism in the NCAA.[177] However, despite her articulation of several strong reasons for eradicating amateurism as a valid antitrust defense, her acknowledgment that amateurism held "some" procompetitive benefit revealed a lingering belief in its necessity and in the fundamental incompatibility of grant-in-aid compensation with "professional"

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172. O'Bannon v. NCAA, 802 F.3d 1049, 1055 (9th Cir. 2015).

173. *Id.* at 1055-56. Sam Keller, a former quarterback for Arizona State and Nebraska, formed a nearly identical class action that settled for $20 million in 2014. *Id.*

174. *E.g.*, *Ohio State Football Players Sanctioned*, ESPN (Dec. 26, 2010), http://espn.go.com/college-football/news/story?id=5950873 (reporting the suspension of five Ohio State players for receiving improper benefits from a tattoo parlor and selling memorabilia); Steve Eder, *After Long N.C.A.A. Inquiry, Miami Loses 12 Scholarships*, N.Y. TIMES (Oct. 22, 2013), http://www.nytimes.com/2013/10/23/sports/miami-avoids-further-bowl-ban-in-ncaa-penalties.html?_r=0 (chronicling the investigation into illegal booster payments at the University of Miami).

175. *See* Branch, *supra* note 169.

176. O'Bannon v. NCAA, 7 F. Supp. 3d 955 (N.D. Cal. 2014), *aff'd in part, rev'd in part*, 802 F.3d 1049 (9th Cir. 2015).

177. *See, e.g.*, Stewart Mandel, O'Bannon *Ruling Deals Crushing End to Amateurism in NCAA Athletics*, FOX SPORTS (Aug. 9, 2014, 12:08 AM), http://www.foxsports.com/college-football/story/o-bannon-decision-deals-decisive-end-to-amateurism-in-ncaa-athletics-080814 (calling the decision "a decisive and crushing end to the era of amateurism in college athletics").

compensation.[178] When the United States Court of Appeals for the Ninth Circuit reversed her in a two-to-one decision to allow $5000 in deferred NIL compensation, it reaffirmed the power of the existing biases.[179]

1. District Court Decision

Although the plaintiffs characterized the college education market as an NCAA school monopoly before trial, Judge Wilken also evaluated the case under an alternative monopsony theory in which the schools acted as the buyers of the student-athletes' services.[180] She then subjected the restraint to a Rule of Reason analysis, finding that NCAA schools conspired to fix prices and therefore restrain competition in each market.[181] Turning to the NCAA's procompetitive justifications, she rejected the argument that the restraints protected competitive balance, concluding that the Division I schools' heavy investment in recruiting efforts, facilities, coaching salaries, and other benefits created an "arms race" that "likely negated whatever equalizing effect the NCAA's restraints on student-athlete compensation might have once had on competitive balance."[182] Wilken also spurned the NCAA's arguments that more NCAA schools competed in Division I because of a "philosophical commitment to amateurism" and that lifting the restrictions would prohibit schools from affording programs.[183] After all, the *O'Bannon* plaintiffs sought only to allow schools to offer NIL compensation, not to require it.[184]

Wilken devoted most of her analysis to evaluating the NCAA's claim that amateurism "contribute[s] to the popularity of college sports and help[s] distinguish them from professional sports and other forms of entertainment in the marketplace."[185] Her opinion cast aspersions on the NCAA's supposed historical adherence to amateurism, spotlighting its often schizophrenic approach to the

178. *See O'Bannon*, 7 F. Supp. 3d at 984-1008.

179. *See O'Bannon*, 802 F.3d at 1076-79.

180. *O'Bannon*, 7 F. Supp. 3d at 991. *See generally* Harrison & Harrison, *supra* note 33, at 923 (describing NCAA schools' significant "monopsony power" over the input market for athletes' services); *supra* text accompanying note 50 (same).

181. *See O'Bannon*, 7 F. Supp. 3d at 988-99.

182. *Id.* at 1002.

183. *Id.* at 1004.

184. *Id.* at 1003-04.

185. *Id.* at 999-1001.

concept[186] and alluding to an NCAA lawyer's downplaying amateurism's value as a procompetitive benefit during arguments in *Board of Regents*.[187] Wilken also found dubious the NCAA's portrayal of player compensation restraints as the driving force in consumer demand.[188] She found that "school loyalty and geography" drove consumer demand, not amateurism.[189]

Despite the apparent vitriol towards these core amateurism arguments, Wilken's opinion nevertheless conceded that amateurism might justify a restriction on "large payments" to student-athletes still enrolled at their colleges and universities.[190] The only discernible basis for distinguishing between restrictions on small payments and large payments lies in the findings of Dr. J. Michael Dennis, who conducted a survey aimed at discerning consumer attitudes toward college sports in 2013.[191] After attacking the survey's methodology and minimizing its value in establishing amateurism as a procompetitive benefit, Judge Wilken cited its findings to push the NCAA through to the less restrictive alternatives stage of the Rule of Reason.[192] In addition, although Wilken surmised that players could achieve their academic goals "regardless of whether or not the NCAA permitted them to receive compensation for the use of their names, images, and likenesses," she speculated that "limited restrictions on compensation" might help promote this procompetitive goal by "preventing student-athletes from being cut off from the broader campus community."[193] Her reasoning failed to present a foundation for assuming that any sort of restriction on player compensation would impact the quality of the educational product.[194]

Guided by her "current understanding of amateurism," Wilken proceeded to raise the grant-in-aid limit to the level of cost of

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186. Wilken highlighted college sports' ever-shifting eligibility rules and noted, for instance, that a tennis player could accept $10,000 in prize money and remain eligible, while cross country runners forfeit eligibility if they accept prize money. *Id.* at 1000; *see also* discussion *supra* subpart IV.B (outlining this history).

187. *O'Bannon*, 7 F. Supp. 3d at 999-1000.

188. *See id.* at 1000-01.

189. *Id.* at 1001.

190. *Id.*

191. *See id.* at 975, 1000-01.

192. *See id.*; *see also* Alex Moyer, Note, *Throwing Out the Playbook: Replacing the NCAA's Anticompetitive Amateurism Regime with the Olympic Model*, 83 GEO. WASH. L. REV. 761, 811-12 (2015) (slamming the opinion for simultaneously disparaging and relying on the Dennis Survey).

193. *O'Bannon*, 7 F. Supp. 3d at 1003.

194. *Id.*

attendance and to require Division I schools to offer at least $5000[195] in deferred compensation as less restrictive alternatives.[196] For all Wilken's contempt for the NCAA's arguments, her opinion was tinged by the same biases that have steered the amateurism discussion for more than a century.[197] Like Walter Byers and the NCAA in 1956, Wilken oriented the problem as one of somehow reconciling the players' need for some compensation with the ironclad rule that student-athletes must not be paid.[198]

2. Ninth Circuit Decision

Circuit Judge Jay Bybee's appellate court majority decision tacks closely to Wilken's reasoning at first.[199] Although Bybee faulted Wilken for underplaying the NCAA's historical commitment to amateurism, he nevertheless recognized that the historical commitment neither mitigated the compensation limit's anticompetitive effect nor rendered amateurism any more procompetitive.[200] Bybee even declared that the old grant-in-aid cap "has no relation whatsoever to the procompetitive purposes of the NCAA."[201]

In overturning Wilken's deferred compensation order, however, Bybee demonstrated a paradoxical and fundamental misunderstanding of the district court opinion—and a deeply ingrained bias toward amateurism's necessity.[202] Bybee repeatedly alluded to and overstated the importance of the district court's finding that amateurism "played a role" in consumer demand[203] and "promoting [the] current understanding of amateurism."[204] The opinion then skewers Wilken's reasoning for "ignor[ing] that not paying student-athletes is *precisely what makes them amateurs,*"

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195. Stated differently, Wilken permitted NCAA Division I member schools to cap NIL compensation at $5000 or any higher level. NCAA witness Neal Pilson cited $5000 as the threshold at which consumers would still view college athletes as amateurs. *Id.* at 984.

196. *Id.* at 1008.

197. *See id.* at 988-1008; discussion *supra* Part IV.

198. *See O'Bannon*, 7 F. Supp. 3d at 988-1008; *cf.* BYERS, *supra* note 34, at 67-72.

199. *See* O'Bannon v. NCAA, 802 F.3d 1049, 1070-76 (9th Cir. 2015).

200. *Id.* at 1073.

201. *Id.* at 1075.

202. *See id.* at 1076-79.

203. This is a distortion of Wilken's statement that amateurism plays a *limited* role in consumer demand compared to school loyalty and geography. *Cf. O'Bannon*, 7 F. Supp. 3d at 1001.

204. *O'Bannon*, 802 F.3d at 1076.

averring that a $5000 deferred compensation stipend would not prove "virtually as effective" in preserving the NCAA's procompetitive interest.[205] Essentially, Bybee substituted his understanding of amateurism (any amount surpassing the grant-in-aid limit) with Wilken's (any *substantial* amount over the grant-in-aid limit) under a clear error standard.[206] Standard of review issues notwithstanding, the idea that scholarships belong in a noncommercial "scholarship" account rather than a commercial "compensation account" prompted Bybee to characterize amateurism as a procompetitive necessity mere sentences after denying compensation limits had any relation to the NCAA's procompetitive interests whatsoever.[207] At the arbitrary inflection point where fair scholarship "gifts" become ruinous professional "payments," grant-in-aid awards veer from benevolent to austere.[208] The opinion finishes with the unsupported postulate that extra payment would "transform" college sports more than it did the Olympics after 1960.[209] Once again, fear for the loss of college athletics' amateur soul trumped a rational economic appraisal of the NCAA player payment apparatus in a judicial setting.[210]

VI. SHEDDING THE BIAS

For limitations on compensation beyond the cost of attendance to survive the consolidated grant-in-aid lawsuit,[211] the NCAA should have to show that some adherence to amateurism is necessary to the market survival of its products.[212] To anyone combatting the biases perpetrated by the two fallacies, however, the Sherman Act foundation on which the NCAA has built its arguments turns to quicksand. The

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205. *Id.* at 1076-77.

206. *See id.*

207. *See id.* at 1075, 1076-77.

208. *See id.*; discussion *supra* subpart IV.C.2.

209. *O'Bannon*, 802 F.3d at 1077. *But cf.* Bob Greene, *What Changed the Olympics Forever*, CNN (July 23, 2012, 11:43 AM), http://www.cnn.com/2012/07/22/opinion/greene-olympics-amateurs/ (explaining that the relaxing of athlete compensation limits, rather than maintaining the status quo, actually enhanced the Olympics' popularity).

210. *See O'Bannon*, 802 F.3d at 1077. In dissent, Chief Judge Sidney R. Thomas correctly took the majority to task for speculating about the "professionalization" of college sports vis-à-vis baseball. He also pointed out what Bybee's opinion neglected: that the concept of amateurism matters in a Sherman Act section 1 analysis "only insofar as it relates to consumer interest." *See id.* at 1079-93 (Thomas, C.J., dissenting).

211. Jenkins v. NCAA (*In re* NCAA Athletic Grant-in-Aid Cap Antitrust Litig.), 311 F.R.D. 532 (N.D. Cal. 2015).

212. *See O'Bannon*, 802 F.3d at 1081 (Thomas, C.J., dissenting); Broad. Music, Inc. v. Columbia Broad. System, Inc., 441 U.S. 1, 23-24 (1979).

NCAA's grant-in-aid bylaws equip Division I schools with cartel power in the market for athletes' services, power the procompetitive justification of amateurism cannot justify.[213] Their continued legality imbues antitrust law, the purported marriage of rational economic theory and public welfare at the altar of the judiciary, with irrational, indefensible biases.[214] An attack on the assumptions undergirding the biases that have governed amateurism-related thought for a century leads to the ineluctable conclusion that the NCAA Division I system, as currently constituted, should be deemed illegal.

A. Allowing Unfettered Player Compensation Would Not Fundamentally Destroy College Athletics

The fallacy inhering in the notion that athletes must be insulated from commercialization for college sports to endure is that college sports have never survived *without* commercialization. From the boozy 1852 Harvard-Yale regatta to the billion-dollar 2016 men's March Madness tournament, money and the promise of money have always informed college athletics' "character and quality" for better and worse.[215] College athletics, meanwhile, have survived and thrived as a distinct, beloved alternative to their professional counterparts even though the NCAA has, time and again, moved the amateurism goalposts.[216] The fear of some drastic loss to college sports' identity, therefore, lacks validity because it is premised on a reference point of nonpayment ungrounded in reality.[217] To protect Division I athletes from commercialization is akin to protecting a fish from water.

B. Scholarships Are a Form of Payment

As economists Andy Schwarz and Colin Weaver point out, "The question in the amateurism debate is not whether athletes should or should not be paid, but whether colleges should or should not collude

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213. *See* sources cited *supra* note 10.

214. *See* Stucke, *supra* note 30, at 36 ("Antitrust law is at its strongest when it focuses on preserving an effective competitive process and enforcing norms of free, fair, and open competition.").

215. *See* BYERS, *supra* note 34, at 65-95; ZIMBALIST, *supra* note 97, at 7-8; Branch, *supra* note 169; Schwarz & Weaver, *supra* note 9.

216. *See* O'Bannon v. NCAA, 7 F. Supp. 3d 955, 1000 (N.D. Cal. 2014), *aff'd in part, rev'd in part*, 802 F.3d 1049 (9th Cir. 2015); Schwarz & Weaver, *supra* note 9; *see also* BYERS, *supra* note 34, at 74 (admitting that the NCAA was "forswearing old amateur principles" when it adopted the grant-in-aid system).

217. *See* discussion *supra* Part IV.

to prevent athletes from being paid *more*."[218] Although people and courts have recognized that scholarships represent a type of compensation, the framing of grant-in-aid as a cost-anchored gift rather than a price for labor has caused many to consider athletic scholarships in a different vein from direct cash payments, salaries, or endorsement deals.[219] As a result, the grant-in-aid award is distinguishable from the "pay-for-play" account and other athletic input accounts in people's heads. This enables them to exalt an athletic scholarship as a generous endowment, disparage any further player compensation as unwholesome, and accept as necessary multimillion-dollar coaching salaries and lavish facilities.[220] Like Thaler's beer-swilling beachgoers, the grant-in-aid cap's adherents regard transactions with equivalent economic functions through disparate lenses.[221] This dissonance prevents many people from properly recognizing the grant-in-aid award's role in the economic framework of NCAA sports.[222]

C. An Unbiased Evaluation Dooms the NCAA's Antitrust Case

Without the pervading influence of our own biases, the NCAA's antitrust arguments fall like dominos. First, although projecting the precise effect of grant-in-aid limits on consumer demand is impossible, the chances of demand plummeting are too low to necessitate price-fixing.[223] School loyalty, regional ties, preferences in style of play, the frequency of games, affinity for school marching bands, gambling opportunities, tailgating culture, the fact that athletes are pursuing high-level degrees in the course of their athletic

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218. Schwarz & Weaver, *supra* note 9 (emphasis added).

219. *See O'Bannon*, 802 F.3d at 1076-77; Banks v. NCAA, 977 F.2d 1081, 1091 (7th Cir. 1992); Kehoe, *supra* note 5.

220. *See* Thaler, *supra* note 91, at 193-97; Kehoe, *supra* note 5; *supra* note 134 and accompanying text; *see also* Moore, *supra* note 53 (stating that 56% of poll respondents believe athletes are compensated enough with scholarships). *But see* Schwarz, *supra* note 129 (identifying and criticizing the mental accounting error). The 2016 Summer Olympic Games provide another prime example of the different ways the NCAA treats different forms of player compensation, with current and incoming NCAA students netting $2.1 million in prize money while retaining their eligibility. Steve Berkowitz, *Ohio State's Kyle Snyder Due $250,000 Bonus After Wrestling Gold in Rio*, USA TODAY (Aug. 21, 2016, 4:02 PM), http://www.usatoday.com/story/sports/olympics/rio-2016/2016/08/21/kyle-snyder-gold-medal-bonus-ncaa/89078436/.

221. *See* THALER, *supra* note 59, at 60.

222. *See, e.g.*, *Banks*, 977 F.2d at 1091 (failing to even identify the market for athletic services).

223. See *O'Bannon*, 802 F.3d at 1081-82 (Thomas, C.J., dissenting).

participation—each and every single one of these factors, along with countless more, differentiate major college sports from their market competitors.[224] In addition, as antitrust scholar Maurice Stucke observes, "If heuristics and biases systematically affect consumer decision-making, then consumer choices do not necessarily reflect actual preferences."[225] The prevalence of consumers' "preference" for limited scholarship awards therefore should delimit the persuasiveness of survey and anecdotal data which evinces widespread public aversion to athletes earning more than the grant-in-aid cap, as their actual decision as to whether to consume prestige college athletics may diverge from that stated preference.[226] Given the myriad potential impacts on demand and the rose-colored glasses with which consumers regard the importance of scholarship limits, the faint possibility that amateurism may influence college sports' market competitiveness does not justify a restraint as onerous as a horizontal price-fixing scheme.[227]

Second, amateurism is not "necessary" for the existence of college sports as a product under the rule articulated in *BMI*.[228] As discussed above, the NCAA has grown into a commercial behemoth over the past century even while incessantly tweaking its

224. *See* O'Bannon v. NCAA, 7 F. Supp. 3d 955, 1000-01 (N.D. Cal. 2014), *aff'd in part, rev'd in part*, 802 F.3d 1049 (9th Cir. 2015).

225. Stucke, *supra* note 30, at 31.

226. *See id.* That the Olympics only increased in popularity after the International Olympic Committee relaxed compensation restrictions further countervails the idea that lifting the grant-in-aid cap would irrevocably hamper fan interest. *See* Branch, *supra* note 169; Greene, *supra* note 209.

227. *See* Roberts, *supra* note 47, at 2645 ("[I]t is very questionable whether antitrust or public policy is served by, in effect, giving substantially greater economic 'free market' protection to sports fans who watch NCAA sports and to coaches than to the young (and relatively politically powerless) athletes who produce these sports products."); Andy Schwarz & Richard J. Volante, *The Ninth Circuit Decision in* O'Bannon *and the Fallacy of Fragile Demand*, 26 MARQ. SPORTS L. REV. 391, 398-403 (2016) (explaining that the potential for consumer demand for college athletics to taper off as player compensation increases does not entitle NCAA schools to arbitrarily select a "magical threshold" at which they can declare that the product would collapse in the absence of a restraint); Branch, *supra* note 169; *see also* Harrison & Harrison, *supra* note 33, at 941 ("[Whether] a possible consumer preference for the appearance of amateurism leads to a conclusion that buyers may collude to force workers to be amateurs . . . is a decision that should not be made without an empirical basis for believing amateurism is the key factor.").

228. *See* Broad. Music, Inc. v. Columbia Broad. System, Inc., 441 U.S. 1, 23-24 (1979); discussion *supra* subpart VI.A.

compensation restrictions.[229] That NCAA Division I schools *feel* entitled to withhold player compensation as a manner of assuring college sports' survival, thanks to long-standing norms and misconceptions, does not actually entitle them to do so.[230]

Third, the NCAA's contention that increases in compensation may somehow derail the educational mission of an athletic scholarship lacks merit. The plaintiffs in the pending consolidated grant-in-aid litigation argued correctly in their consolidated complaint that no basis exists for finding mutual exclusivity between academic prowess and students earning more than the grant-in-aid cap currently permits.[231]

Fourth, and finally, the contention that some athletes would be "overpaid" if the grant-in-aid cap were lifted should hold no water in an antitrust setting.[232] In certifying the class for the grant-in-aid litigation, Judge Wilken credited the economic tenet of "revealed preference," holding that the NCAA failed to explain why schools currently "provide full GIAs to purportedly overvalued class members without being required to do so and would stop doing so absent the GIA cap."[233] Further, in *United States v. Socony-Vacuum Oil*, the Supreme Court held that the level at which prices were set was immaterial, as the Sherman Act violation inheres in the restriction of price competition.[234] Even those athletes currently earning close to their marginal revenue should be able to price-compete—and revealed preference suggests most will earn at least the value of their scholarships.[235]

VII. CONCLUSION

Ultimately, the man helming the NCAA when it ushered in the grant-in-aid system best captured the odd, biased way in which we came to perceive its antitrust legality. Describing the NCAA in his

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229. *See* Schwarz & Weaver, *supra* note 9; discussion *supra* subpart VI.A.; *see also* Harrison & Harrison, *supra* note 33, at 928 ("[A]ny factor that makes one product different from another is necessary to preserve its 'character and quality.'").

230. *See* discussion *supra* Part IV.

231. Consolidated Amended Complaint, *supra* note 10, at 152; *see also* Schwarz, *supra* note 129 (arguing that an influx of money to student-athletes will inhibit academic values no more than would an influx of money to other students or faculty).

232. *See* Schwarz, *supra* note 47 (citing proponents of this argument).

233. Jenkins v. NCAA (*In re* NCAA Athletic Grant-in-Aid Cap Antitrust Litig.), 311 F.R.D. 532, 544 (N.D. Cal. 2015).

234. 310 U.S. 150, 222-23 (1940).

235. *See* Schwarz & Weaver, *supra* note 9.

1995 book *Unsportsmanlike Conduct: Exploiting College Athletes*, former Executive Director Walter Byers sardonically claimed that the organization "shielded [players] from exploitation and the taint of commercial gold . . . and it then confirmed that the gold belonged to the coaches and the colleges."[236] Amateurism, Byers declared, represented "an economic camouflage for monopoly practice."[237] That these words came from Byers, who once led the vanguard of reformers striving to retain amateurism in college sports, is telling. The comments reveal how the two interlocking frames—how drifting too far from amateurism would mean the death of college sports and scholarship aid came to mean nonpayment—have governed popular and judicial thought about the NCAA Division I model. An assessment of the NCAA grant-in-aid system appropriately divorced from these framing biases demonstrates the flaws in the antitrust defenses that have helped preserve it.

236. BYERS, *supra* note 34, at 13.
237. *Id.* at 376.