



1-9-2015

The Potential Unintended Consequences of the *O'Bannon* Decision

Matthew J. Parlow
Marquette University Law School

Follow this and additional works at: <https://scholarlycommons.law.wlu.edu/wlulr-online>



Part of the [Law Commons](#)

Recommended Citation

Matthew J. Parlow, *The Potential Unintended Consequences of the O'Bannon Decision*, 71 WASH. & LEE L. REV. ONLINE 203 (2015), <https://scholarlycommons.law.wlu.edu/wlulr-online/vol71/iss4/1>

This Response is brought to you for free and open access by the Law School Journals at Washington and Lee University School of Law Scholarly Commons. It has been accepted for inclusion in Washington and Lee Law Review Online by an authorized editor of Washington and Lee University School of Law Scholarly Commons. For more information, please contact christensena@wlu.edu.

The Potential Unintended Consequences of the *O'Bannon* Decision

Matthew J. Parlow*

Abstract

The O'Bannon decision made a significant change to one of the philosophical pillars of intercollegiate athletics in allowing for greater compensation for student athletes. At the same time, the court took only an incremental step in the direction of pay for college athletes: The decision was limited to football and men's basketball players—as opposed to non-revenue-generating sports—and it set a yearly cap of \$5,000 for each of these athletes. However, the court left open the possibility for—indeed, it almost seemed to invite—future challenges to the National Collegiate Athletic Association's restrictions on student-athlete compensation. In this regard, the court's incremental step in college athlete pay may be a harbinger of more dramatic and structural changes to come in the college athletic system. While this Essay does not take a normative position on the legal or economic justifications for such a possible change in intercollegiate athletics, it does seek to describe some of the potential unintended consequences of a free(r) marketplace for student-athlete services. In particular, this Essay analyzes the possible implications and impact on Title IX, as well as college athletic opportunities and values more generally. In doing so, this Essay attempts to explain why the court's more cautious approach may be needed going forward to balance the varied interest in the college athletic system.

* Associate Dean for Academic Affairs and Professor of Law, Marquette University Law School.

Table of Contents

I. Introduction	204
II. The <i>O'Bannon</i> Decision and Its Potential Impacts.....	206
A. The District Court's Incremental Approach.....	206
B. The Impact of Collegiate Athletic Opportunities.....	208
C. Title IX Implications.....	212
III. Conclusion.....	214

I. Introduction

The *O'Bannon v. National Collegiate Athletic Association*¹ case sent shockwaves through the sports law world. The case was particularly notable because it advanced the ability of certain college athletes to receive greater compensation than under the restrictive rules of the National Collegiate Athletic Association (NCAA). At the same time, the \$5,000 cap that the district court set for athlete pay made the decision somewhat more limited in its immediate impact.² However, the district court's decision left open future challenges to the NCAA's anticompetitive restrictions on college athlete compensation that may well overcome the procompetitive justifications. In fact, the district court almost seemed to invite future plaintiffs to bring lawsuits that sought even greater levels of compensation. Such challenges could raise—or even eliminate entirely—this \$5,000 cap and thus dramatically alter the system of college athletics. Indeed, subsequent challenges to the NCAA could well bring about the

1. 7 F. Supp. 3d 955 (N.D. Cal. 2014).

2. See Permanent Injunction, *O'Bannon v. Nat'l Collegiate Athletic Ass'n*, No. C-09-3329-CW, at *2 (N.D. Cal. Aug. 8, 2014) (limiting NCAA college athlete pay to \$5,000).

“[f]ar [g]rander [c]hange” that Professor Marc Edelman hopes will flow from the *O’Bannon* decision.³

This Essay does not seek to normatively assess the merits of further compensating student athletes for competing in collegiate athletics.⁴ Nor does it strive to analyze the legal bases for the district court’s decision in *O’Bannon*. Instead, this Essay endeavors to provide insight into why the district court may have taken a more tempered approach in its decision—perhaps to avoid destabilizing the entire intercollegiate athletic system. In addition, this Essay hopes to foreshadow some of the potential unintended consequences for college athletics: specifically with regard to Title IX advances and the robust number of sports currently played competitively at many of the NCAA’s member schools.⁵ These potential pitfalls are particularly relevant in light of the looming National Labor Relations Board’s (NLRB) decision regarding the ability for college athletes to unionize.⁶ In

3. See generally Marc Edelman, *The District Court Decision in O’Bannon v. National Collegiate Athletic Association: A Small Step Forward for College Athlete Rights, and a Gateway for Far Grander Change*, 71 *WASH. & LEE L. REV.* 2319 (2014). The currently pending *Jenkins v. National Collegiate Athletic Association* case—also referred to by many in the sports law industry as the Kessler case—could bring even greater change than the *O’Bannon* decision. No. 14-cv-2758 (N.D. Cal. 2014). While some have described the *O’Bannon* case as a set-back—if not a bar—to the *Jenkins* plaintiffs, the district court’s decision in *O’Bannon* strongly suggests that further challenges to the NCAA’s anticompetitive restraints could well overcome the procompetitive justifications.

4. There is certainly merit to the position of compensating student athletes to better reflect the value they bring. Many student athletes come from modest backgrounds. We allow teenagers to work and get paid. And we have seen many young adults in their late-teens and early-twenties become incredibly wealthy as musicians, actors/actresses, and even as entrepreneurs. Thus, it is not such a stretch to consider changing a college athletic system that may have been originally built on a foundation of amateurism but that has certainly morphed into an extremely profitable enterprise for many colleges and universities. Nevertheless, it is outside of the scope of this Essay to fully address the arguments on both sides of this debate.

5. This Essay presumes for purposes of the following analysis that the Ninth Circuit Court of Appeals does not reverse the district court’s decision.

6. See Lewis Lazare, *NLRB Gets the Case of the Northwestern Football Player Union and the Wait Begins*, *CHICAGO BUS. J.* (Aug. 1, 2014, 2:50 PM), <http://www.bizjournals.com/chicago/news/2014/08/01/nlr-gets-the-case-of-the-northwestern-football.html> (last visited Dec. 30, 2014) (describing the matter pending before the NLRB regarding whether the Northwestern University football players can unionize) (on file with the Washington and Lee Law

highlighting some of the potential unintended consequences of even greater change in college athlete compensation, this Essay provides a cautionary context for the judiciary, the NCAA, and colleges and universities as they navigate the post-*O'Bannon* landscape.

II. *The O'Bannon Decision and Its Potential Impacts*

A. *The District Court's Incremental Approach*

In its *O'Bannon* decision, the district court allowed colleges and universities—beginning in 2016—to pay their college athletes in football and men's basketball up to \$5,000 cap per year (to be held in trust for the athletes until their eligibility expires).⁷ The court, however, did not provide much explanation or transparency regarding why the amount was capped at \$5,000. There are some potential explanations as to why the district court—in setting this cap—took an incremental approach in advancing this change in college athletics. Indeed, there may be much merit to this prudent approach of beginning a gradual process that may well lead to student athletes receiving compensation more commensurate with their value to their respective colleges and universities.

The district court could have taken a more ambitious approach, but instead it punted. The court could have potentially found that there were even fewer and/or less restrictive means for the NCAA to achieve its goals than the \$5,000 amount. The court could have taken the position that student athletes should be able to earn remuneration greater than that cap—amounts more commensurate with the value of their athletic services and personae. The court could have accomplished this, for example, by going as far as creating a purely free market for collegiate athletes. Instead, the court seemed to recognize that to do so

Review).

7. See Permanent Injunction, *O'Bannon v. Nat'l Collegiate Athletic Assoc.*, No. C-09-3329-CW, at *2 (N.D. Cal. Aug. 8, 2014) (limiting NCAA college athlete pay to \$5,000). The district court's decision does not apply to non-revenue athletes. See *id.*

would have been to unsettle a long-established college athletic system that had been designed and constructed on certain fundamental assumptions—such as limited student-athlete compensation. In this regard, the district court echoes themes from the *Flood v. Kuhn*⁸ case, where the United States Supreme Court seemed unwilling—despite a clearly inaccurate precedent of granting an antitrust exemption to Major League Baseball because it had been previously found not to be engaged in interstate commerce—to change baseball’s reserve clause (and thus bring about a more robust form of free agency).⁹ As its decision demonstrated, the Supreme Court was simply unwilling to unsettle a well-established (and deliberately designed) player-retention structure for baseball. The Court did not foreclose a legislative solution, but it refused to change judicially the status quo.¹⁰

Similarly, the *O’Bannon* court may have realized that a sudden change to student-athlete compensation could well have posed significant economic and budgetary challenges for colleges and universities that are already facing difficult financial circumstances. In this regard, the district court may have correctly deduced that while more robust student-athlete compensation was likely inevitable, an incremental approach would help ensure a more stable transition. Such an approach would allow colleges and universities to adapt and adjust to the changes on the horizon. At \$5,000 per student-athlete in football and men’s basketball, the system that is scheduled to become effective in 2016 would likely not be cost prohibitive for most, if not all, colleges and universities. Moreover, a slower transition to a free(r) marketplace for college athletes would also have a greater likelihood of success and acceptance than if a sudden change had occurred—one that could have led to significant disruptions and problems in college athletics.

8. *Flood v. Kuhn*, 407 U.S. 258 (1972).

9. *See generally id.* (finding that professional baseball’s reserve system was exempt from federal antitrust laws and therefore did not violate a player’s right to contract).

10. *See id.* at 285 (affirming the New York Court of Appeals’s decision and holding that “the remedy, if any is indicated, is for congressional, and not judicial, action”).

B. The Impact of Collegiate Athletic Opportunities

It is this eventual free(r) marketplace for college athletes and their services and personae that Professor Edelman excitedly anticipates.¹¹ To be sure, there is much merit to Professor Edelman's goal—both legally and economically. But this grander change—whether achieved in the immediate or in the more distant future—may have unintended consequences that unsettle college athletics in unanticipated ways. For example, a dramatic increase in college athlete compensation could create a tale of two universities—that is, a small group of well-funded colleges and universities that would be able to pay the elite high school athletes to matriculate on the one hand and the vast majority of other schools that would be unable to compete for elite talent on the other hand. Some might even argue that this trend towards a wider gap in college athletic parity was already occurring through the formation and/or bolstering of the five NCAA mega-conferences.¹²

It is, ironically, this competitive imbalance that professional sports leagues seek to protect against with their various policies. Professional sports leagues attempt to avoid the consolidation of the most talented or “star” players into the largest media markets (such as New York, Los Angeles, and the like).¹³ Given a completely free marketplace, the elite athletes in professional sports leagues might well choose teams in these larger media markets because those teams would have greater resources to pay

11. See Edelman, *supra* note 3, at 2355–56.

12. See Matt Hinton, *Division Zero: What the NCAA's "Power Five" Autonomy Decision Means for the Future of College Sports*, GRANTLAND.COM (Aug. 8, 2014), <http://grantland.com/the-triangle/division-zero-what-the-ncaas-power-five-autonomy-decision-means-for-the-future-of-college-sports/> (last visited Dec. 30, 2014) (discussing the NCAA's decision regarding mega-conference autonomy and its effect on college sports generally) (on file with the Washington and Lee Law Review).

13. See, e.g., Andrew Larsen et al., *The Impact of Free Agency and the Salary Cap on Competitive Balance in the National Football League*, 7 J. SPORTS ECON. 376 (2006) (“[F]ree agency and salary cap restrictions tend to promote competitive balance, whereas a concentration of player talent reduces competitiveness among teams.”).

higher salaries.¹⁴ In addition, the size of such media markets would help these players garner more lucrative endorsement deals and gain greater international exposure. In the absence of greater restraints on player movement or structural incentives and disincentives affecting the marketplace for elite athletes, professional sports leagues would likely face a situation of a lack of parity among teams based on their market size and revenue streams. Professional sports leagues worry about this potential phenomenon for they fear that it would hurt the long-term viability of smaller-market franchises and thus the overall stability of their respective leagues.¹⁵ In fact, competitive balance is sufficiently important to the strength and longevity of professional sports leagues that courts have even recognized this value as a procompetitive justification for leagues to pursue when imposing player restraints.¹⁶

Given the importance of competitive balance, professional sports leagues have implemented a variety of restraints on players through collective bargaining agreements (CBA) to avoid competitive imbalance through such a consolidation of player talent in a handful of larger media markets. Such restraints include delays or limitations to free agency such as an amateur player draft and corresponding rookie contracts that enable a team to keep the players that they drafted for a certain number of years before the players reach free agency.¹⁷ Professional sports

14. See, e.g., Moke Hamilton, *How NBA's Luxury Tax Penalties Will Impact Elite Teams*, BLEACHERREPORT.COM (Dec. 26, 2012), <http://bleacherreport.com/articles/1457745-how-nbas-luxury-tax-penalties-will-impact-elite-teams> (last visited Dec. 30, 2014) (describing the NBA's concern, during the renegotiation of the NBA's collective bargaining agreement in 2011 that the ability for large-market teams to significantly outspend the smaller-market teams threatened competitive balance and the long-term health of the league) (on file with the Washington and Lee Law Review).

15. See *id.* (noting concern that a large-market team may significantly outspend a smaller-market team).

16. See *Am. Needle, Inc. v. Nat'l Football League*, 560 U.S. 183, 203 (2010) ("We have recognized . . . that the interest in maintaining a competitive balance among athletic teams is legitimate and important." (internal quotations omitted)).

17. See Nathaniel Grow, *Decertifying Players Unions: Lessons from the NFL and NBA Lockouts of 2011*, 15 VAND. J. ENT. & TECH. L. 473, 482–83 (2013) (describing historical methods to impose labor restraints on players).

league CBAs also impose more indirect forms of restraints on player movement such as salary caps and maximum salary amounts and contract lengths.¹⁸ For example, if teams are limited in how much they can spend on player salaries—both individually and in the aggregate—it makes it almost impossible for a handful of teams to attract and pay all of the elite players in the league. The CBAs in professional sports leagues also provide for more favorable contractual terms for players to sign with their current teams before or when they become free agents to create incentives for players to re-sign with their teams (often the teams that drafted them).¹⁹ In addition, these leagues—through their CBAs as well as other means—attempt to provide for robust revenue sharing and shared revenue to minimize disparities in revenue between large-market and small-market teams.²⁰ In doing so, these leagues attempt to create a more level playing field among teams for paying for a competitive roster of players. In all of these different manners, professional sports leagues seek to maintain and nurture competitive balance.

The historical development of these various tools for seeking competitive balance in professional sports is a long, complex, and litigious tale—one that is outside the scope of this Essay. However, even the overview of the many avenues for achieving competitive balance in professional sports should provide a warning to those involved in college athletics. The creation of two unequal tiers of college athletic programs could end relative parity in college athletics and potentially lead to a dramatically

18. See Russell T. Gorkin, *Sports-League Player Restraints, Section 1 of the Sherman Act, and Federal Labor Law in the Context of the National Football League*, 5 HARV. J. SPORTS & ENT. L. 1, 11–13 (2014) (describing salary caps in the context of the NFL); Matthew J. Parlow, *Lessons from the NBA Lockout: Union Democracy, Public Support, and the Folly of the National Basketball Players Association*, 67 OKLA. L. REV. 1, 7–8 (2014) (detailing maximum contract lengths and salary amounts in the NBA).

19. See Parlow, *supra* note 18, at 7–8 (explaining how the Larry Bird exception to the NBA's salary cap provides players longer contract lengths and more lucrative salaries for re-signing with their current team).

20. See generally Justin R. Hunt, Note, *To Share or Not to Share: Revenue Sharing Structures in Professional Sports*, 13 TEX. REV. ENT. & SPORTS L. 139 (2012) (noting the importance of balance between large- and small-market teams).

different system that provides far fewer opportunities for amateur athletes to compete at the collegiate level. It is not hard to imagine those colleges and universities in the non-elite tier of schools struggling for sponsorships, lucrative television contracts, alumni and booster support, and the like. One only need look to the disparity in attendance and revenue between professional teams in Major League Baseball and their minor league affiliates—or teams in the National Basketball Association and their National Basketball Development league affiliates—to get a sense for the decline of interest and revenue that a more polarized collegiate athletic system could spur. In short, these non-elite schools might struggle to maintain pre-*O'Bannon* revenue streams and amounts because they are no longer as competitive under a free(r) market for college athletes.

Whether their revenues shrank or their costs rose under the new system, many colleges and universities might consider cutting athletic programs, particularly those that did not produce much, if any, revenue. Very few, if any, college athletic programs are self-funded or revenue-neutral (or better) in their entirety.²¹ Given the economic challenges facing higher education today, one could foresee colleges and universities cutting costs in non-revenue-generating athletic programs as their teams became less competitive, their costs for athletic programs increased, and/or their revenue derived from athletics declined. Absent offsetting cuts from elsewhere within the school's overall budget, the only other option for these colleges and universities to maintain their athletic programs at their pre-*O'Bannon* levels would be to increase tuition for its other students. This result seems unlikely given the growing awareness of the challenges of student debt. Therefore, there is a reasonable possibility that many colleges and universities may cut some sports that run budgetary deficits. Such a reduction in athletic programs and opportunities would undercut one of the NCAA's core values: "[t]he supporting role

21. See Steve Berkowitz, Jodi Upton & Erik Brady, *Most NCAA Division I Athletic Departments Take Subsidies*, USA TODAY (July 1, 2013, 12:48 PM), <http://www.usatoday.com/story/sports/college/2013/05/07/ncaa-finances-subsidies/2142443/> (last visited Dec. 30, 2014) (noting that most of the subsidies come from student fees and state funding) (on file with the Washington and Lee Law Review).

that intercollegiate athletics plays in the higher education mission and in enhancing the sense of community and strengthening the identity of member institutions.”²²

C. Title IX Implications

Just as importantly, there will almost certainly be Title IX implications and effects based on the *O'Bannon* decision and potential changes in the collegiate athletic system. For example, while Title IX does not require precise equal treatment between male and female athletes—rather, it requires proportionality²³—there is no doubt that compensating male college football and basketball players will draw scrutiny from a gender equity perspective.²⁴ Some have already speculated that if colleges and universities that pay their male football and basketball players up to the \$5,000 stipend and fail to compensate some of their female athletes, these schools may well face Title IX lawsuits from their female athletes.²⁵ One way to ensure Title IX compliance would be for schools that paid their ninety-eight football and men's basketball players the stipend—eighty-five scholarship athletes on the football team and thirteen on the men's basketball team—to also pay a matching number of athletes from women's sports.²⁶ Some schools are even

22. *NCAA Core Values*, NCAA.COM, <http://www.ncaa.org/about/ncaa-core-purpose-and-values> (last visited Dec. 2, 2014) (on file with the Washington and Lee Law Review).

23. See 20 U.S.C. §§ 1681–87 (2012) (describing treatment to which both sexes are entitled); 34 C.F.R. § 106.41(a) (2013) (stating that discrimination in athletics is not allowed).

24. See Michael McCann, *What Ed O'Bannon's Antitrust Victory Over the NCAA Means Going Forward*, SPORTS ILLUSTRATED (Aug. 9, 2014), <http://www.si.com/college-basketball/2014/08/09/ed-obannon-ncaa-claudia-wilken-appeal-name-image-likeness-rights> (last visited Dec. 30, 2014) (explaining that the *O'Bannon* decision might lead colleges to violate Title IX) (on file with the Washington and Lee Law Review).

25. See Jon Soloman, *Q&A: What the O'Bannon Ruling Means for NCAA, Schools and Athletes*, CBS SPORTS (Aug. 9, 2014, 6:30 PM), <http://www.cbssports.com/collegefootball/writer/jon-solomon/24654805/qa-what-the-obannon-ruling-means-for-the-ncaa-schools-and-athletes> (last visited Dec. 30, 2014) (noting that Title IX issues will arise in the wake of the *O'Bannon* decision) (on file with the Washington and Lee Law Review).

26. See Ben Strauss, *After Ruling in O'Bannon Case, Determining the*

considering paying the \$5,000 stipend to all of their scholarship athletes.²⁷ As these proposals demonstrate, colleges and universities will be carefully considering Title IX implications of their reactions to *O'Bannon* decision.

However, there is an even greater threat to Title IX than a potential shift in the collegiate athletic system that the response to *O'Bannon* may bring. As mentioned above, if the costs of football and men's basketball—or perhaps even all college sports—increase dramatically, many colleges and universities may well reduce a number of non-revenue-producing sports. Schools will be mindful of Title IX in this process. In this regard, colleges and universities will not make such reduction only at the expense of women's sports. Rather, to remain in compliance with Title IX, they are more likely to reduce men's and women's sports in a roughly proportional manner. Nevertheless, the overall reduction in athletic opportunities—particularly those in women's sports—would be a regression in the advances made by Title IX. Indeed, one of the great legacies of Title IX is the proliferation of women's sports at the collegiate level and the various opportunities that this presents for these athletes—both in college and beyond.²⁸

Finally, these potential pitfalls may be acutely compounded by the looming NLRB's decision regarding the ability for college athletes to unionize.²⁹ The unionization of college athletes could further drive up costs for colleges and universities and create even more difficult budgetary decisions for schools with competitive athletic programs. Depending on the costs that the

Future of Amateur Athletics, NY TIMES (Oct. 21, 2014), <http://www.nytimes.com/2014/10/22/sports/after-obannon-ruling-figuring-out-whats-next.html> (last visited Dec. 2, 2014) (describing four potential options that universities may follow) (on file with the Washington and Lee Law Review).

27. See *id.* (noting stipends as one of the options).

28. See Jane McManus, *NCAA Reforms: Good for Female Athletes?*, ESPN (Aug. 13, 2014), <http://espn.go.com/espnw/news-commentary/article/11347170/espnw-why-ncaa-reforms-really-good-really-bad-women-sports> (last visited Dec. 30, 2014) (explaining that women's sports have always been valued as an educational tool) (on file with the Washington and Lee Law Review).

29. See *supra* note 6 and accompanying text (discussing the pending NLRB case).

O'Bannon decision and unionization bring to collegiate athletics, it is not too far a stretch to foresee many colleges and universities scaling their athletic programs back to a very limited number of men's and women's sports if the costs—without corresponding new revenues and/or cost savings—increase significantly.

III. Conclusion

A free(r) marketplace for college athlete compensation is not necessarily bad or unwarranted. And Professor Edelman's views may be correct both legally and economically. Indeed, one only need look at the proliferation of websites and news articles that document the business of college athletics to understand how a change to student-athlete compensation may well be justifiable and appropriate.³⁰ Moreover, none of the scenarios above are certain to occur. The college athletic marketplace may shake out in a very different manner that does not unsettle the values of amateurism that some worry may decline under a pure, or at least more robust, market for student-athlete services.

But as the various interests push to get to the far grander things that Professor Edelman wistfully ponders, there is likely a need for a cautious and judicious approach that tries to avoid the kind of potential unintended consequences detailed above. Without such a deliberate approach that balances the varied interests inherent in the college athletic system, we could experience a regression in important areas of college athletics that may well be valued more than the public polls regarding paying college athletes demonstrate.

30. See, e.g., *The Business of College Sports*, BUS. OF C. SPORTS, www.businessofcollegesports.com (last visited Dec. 30, 2014) (providing information on college athlete marketing) (on file with the Washington and Lee Law Review).