

THE POTENTIAL REACH OF *O'BANNON V. NCAA*

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INTRODUCTION

In August 2014, a Stanford University graduate made a remarkable play in college athletics. Although fans may not know her by name, this northern California woman may have profoundly and forever changed the relationship between student-athletes and their respective schools.¹ As the deciding judge in the antitrust-based lawsuit of *O'Bannon v. NCAA*, Judge Claudia Wilken bucked longstanding legal precedent to set aside National

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¹ See generally *O'Bannon v. Nat'l Collegiate Athletic Ass'n*, 7 F. Supp. 3d 955, 962, 963, 971-73 (N.D. Cal. 2014).

Collegiate Athletic Association (“NCAA”) rules that limited student-athlete scholarships and prohibited student-athletes from receiving compensation for the use of their names, images, and likenesses. The Ninth Circuit, which decided the *O'Bannon* appeal, declared the case “momentous.”²

The narrow issue decided by Judge Wilken was that NCAA rules restrain price competition in violation of Section 1 of the Sherman Act. As the Ninth Circuit noted, as great may be the import of the final ruling³, the mere fact that the court found the NCAA restrictions subject to antitrust review was remarkable.⁴ Indeed, for some time courts have struggled with Supreme Court precedent to decide if (i) all NCAA restraints are commercial but some restraints are carved out as almost per se procompetitive, or (ii) some NCAA restraints are carved out as noncommercial and are entirely outside of antitrust review. *O'Bannon* adds to the current circuit split by determining that antitrust scrutiny is appropriate and can be applied with vigor. Given the importance of the district court’s analyses, and the Ninth Circuit’s affirmation,⁵ on the central legal issues of *O'Bannon*, the question presented in this essay is: What is the potential reach of *O'Bannon* in the student-athlete labor market and to the applicability of antitrust law?⁶

² See *O'Bannon v. Nat'l Collegiate Athletic Ass'n*, 802 F.3d 1049 (9th Cir. 2015) (affirming in part, vacating in part).

³ The Ninth Circuit noted that “[a]s far as we are aware, the district court’s decision is the first by any federal court to hold that any aspect of the NCAA’s amateurism rules violate the antitrust laws” *Id.* at 1053. The Ninth Circuit is correct in its intuition: see *infra* Part II for the full breakdown.

⁴ “The question presented in this momentous case is whether the NCAA’s rules are subject to the antitrust laws and, if so, whether they are an unlawful restraint of trade.” *O'Bannon v. Nat'l Collegiate Athletic Ass'n*, 802 F.3d 1049, 1052 (9th Cir. 2015).

⁵ The Ninth Circuit affirmed in part and vacated in part the district court’s decision. Part of what was affirmed is the central focus of this essay: that NCAA “rules are not exempt from antitrust scrutiny; rather, they must be analyzed under the Rule of Reason.” *Id.* at 1053. The part that was vacated, the remedy devised by the district court that would allow “students to be paid cash compensation of up to \$5,000 per year, was [found] erroneous,” is irrelevant to the analyses presented here. *Id.*

⁶ Of course, the short-term corollary to the question is the impact that the decision will have on the student-athlete labor market.

Prognosticating on the future impact of such a newly decided case is largely a guessing game.⁷ There is sufficient importance to the case, however, both as to the narrow impact on college sports and its broader impact on antitrust jurisprudence that it is worthy of attention, even if it is ultimately overruled. First, in Part I, this essay lays out basic facts and legal issues of the *O'Bannon* case. Second, in Part II, this essay explains why the *O'Bannon* court's holdings may affect future cases against the NCAA and to what extent they may also impact similar, but unrelated, antitrust cases.

I. O'BANNON: A BRIEF PRIMER OF THE CASE

Edward O'Bannon, lead plaintiff in the class action lawsuit *O'Bannon v. NCAA*, was a star basketball player for the UCLA Bruins.⁸ Although he went on to play professionally, he is perhaps best remembered for his stellar performance in the 1995 NCAA Men's Division I Basketball Championship, during which he was named the NCAA Tournament's Most Outstanding Player.⁹ Despite his perennial popularity, O'Bannon received no royalties from the many airings of his 1995 championship game nor from the videogames that use his image.¹⁰ Frustrated by the current state of affairs, O'Bannon agreed to represent a class of current and former student-athletes to challenge the NCAA restrictions that prevented their opportunity to receive scholarship and other licensing compensation.¹¹

⁷ As noted philosopher and wordsmith Yogi Berra observed, "It's tough to make predictions, especially about the future." *Yogi Berra Quotes*, GOODREADS, http://www.goodreads.com/author/quotes/79014.Yogi_Berra (last visited Feb. 10, 2016).

⁸ See *The NCAA Lawsuit*, PBS FRONTLINE (Mar. 29, 2011), <http://www.pbs.org/wgbh/pages/frontline/money-and-march-madness/ncaa-lawsuit> (last visited Aug. 31, 2015).

⁹ See *NCAA Basketball Tournament*, INSIDEHOOPS (Apr. 5, 2006), <http://www.insidehoops.com/ncaa/tournament.shtml>.

¹⁰ See Rachael Marcus, *Former College Sports Stars Say the NCAA Owes Them for Using Their Images*, ABA JOURNAL (July 1, 2013, 8:40 AM), http://www.abajournal.com/magazine/article/former_college_sports_stars_say_the_ncaa_owes_them_for_using_their_images.

¹¹ See Steve Fainaru & Tom Farrey, *Game Changer*, ESPN (July 27, 2014), http://espn.go.com/espn/otl/story/_/id/11255945/washington-attorney-michael-hausfeld-most-powerful-man-sports.

Specifically, the *O'Bannon* class filed an antitrust suit against the NCAA alleging that three specific restrictions unreasonably restrained trade in the college education market and the live telecast, videogame, and archival footage submarkets were in violation of Section 1 of the Sherman Act.¹² The three challenged NCAA restrictions are: (1) the student-athletes may not receive any of the revenue that the NCAA earns by selling the athlete's name, image, or likeness; (2) the scholarship that the student-athlete may receive is limited by two defined price caps;¹³ (3) student-athletes may not receive third-party compensation based on their athletic ability or endorse products while they are in school, even if they are not compensated for the endorsement.¹⁴

In order to win on their claim, the athletes needed to prove that (i) the Division I elite men's basketball and football college education market and licensing submarkets were valid markets, (ii) participants in those markets collectively came to an anticompetitive agreement, (iii) the agreement unreasonably restrained trade, and (iv) such a restraint affected interstate commerce.¹⁵ It was undisputed that there was a collective agreement amongst NCAA members and that it affected interstate commerce, so the only elements at issue were the market's validity and the unreasonableness of the agreement.¹⁶

As discussed further in Part II, the determination of a cognizable, relevant market was a key legal triumph for *O'Bannon*. Indeed, Judge Wilken wasted little time to find that not one, but two relevant markets existed—the college education market and the licensing market. She then applied a rule of reason analysis to determine whether those markets were

¹² See generally *supra* note 1.

¹³ More precisely, the athletic scholarship is capped at the institution's full grant-in-aid, a term defined in the NCAA bylaws as "financial aid that consists of tuition and fees, room and board, and required course-related books." *Id.* at 971. In addition, the student's total scholarship (athletic and other scholarship types) is capped at the institution's full cost of attendance—another term defined in the NCAA bylaws as the grant-in-aid amount plus incidental expenses. *See id.*

¹⁴ *See id.* at 972.

¹⁵ *See id.* at 984-86.

¹⁶ *See id.* at 985.

unreasonably restrained by the NCAA's limitations.¹⁷ Ultimately, she found the NCAA restrictions analogous to price fixing—the grant-in-aid and cost of attendance definitions provided a price ceiling beyond which colleges could not compete, and the ban on name, image, and likeness compensation also forbade an entire avenue of potential compensation for athletes and competition for colleges.¹⁸ The result of these restrictions was that the best offer an athlete could hope for was uniform across NCAA member institutions: an athletic (or athletic combination) scholarship equal to the full grant-in-aid.¹⁹

The court's more general findings, however, are of great interest: (1) there are cognizable, legal markets for student-athlete college education and name, image, and likeness licensing that are subject to antitrust review; and (2) under a rule of reason analysis, the NCAA restraints placed on the student-athlete college education market violate the Sherman Act.

¹⁷ See *O'Bannon v. Nat'l Collegiate Athletic Ass'n*, 7 F. Supp. 3d 955, 985 (N.D. Cal. 2014).

¹⁸ These holdings were major victories for the student-athletes in the college education market, but they did not have the same success with respect to the three submarkets. See generally *id.*; see also *infra* Section II Part B. While Judge Wilken recognized the validity of the live telecast, videogame, and archival footage markets as submarkets within the broader group licensing market, and acknowledged the restraint that the NCAA's rules placed on the athletes' participation in these submarkets, she declined to validate any commercial injury in any of the submarkets. See *supra* note 1 at 994. Without an injury, she could not engage in the same rule of reason analysis that she used for the college education market. In any event, these holdings do not condemn future group licensing arguments. Instead, they provide future litigants and judges valuable insight into executing and evaluating antitrust claims against the NCAA.

¹⁹ That is not to say that the full grant at a higher-priced school is not greater in dollar value than at a lower-priced school. It demonstrates, rather, that one is purchasing a discrete opportunity—to earn a degree. That opportunity is unitary regardless of the relative price—*i.e.* you want a refrigerator, the best the school can offer is a “free” refrigerator.

II. O'BANNON: IMMEDIATE AND FUTURE IMPACT

A. *A Break in NCAA Restrictions on Student-Athlete Compensation*

In the wake of the appeal, certain narrow, potential impacts on the student-athlete market are fairly straightforward—colleges will be permitted to compete in scholarship money for potential student-athletes. The appeal also makes clear that the “amateurism” justification for NCAA rules sufficiently justifies its prohibition on cash payments to athletes that are not related to the costs of their education.²⁰ Although narrow, this is a stunning victory for student-athletes. Overwhelmingly, antitrust cases brought by student-athletes have either been dismissed outright or have failed to prevail on the merits. Any court siding with the athletes on substance is notable.

A quick breakdown of the numbers shows the uphill battle faced by student-athletes against the NCAA. Collecting data from 1973 to 2015, there were thirty-seven (*O'Bannon* inclusive) antitrust challenges to NCAA restrictions.²¹ Of those thirty-seven, eighteen—or 48.6%—were brought by student-athletes. Breaking down the student-athlete cases, in six the plaintiffs “won” to the extent they at least survived motions to dismiss or won other pre-trial motions.²² Of those six, only one, *O'Bannon*, succeeded on at least part of the merits. That results in a substantive victory in one out of eighteen player cases (or 5.6%) and only one out of a total of thirty-seven antitrust cases (or 2.7%). Any break at all in

²⁰ “The difference between offering student-athletes education-related compensation and offering them cash sums untethered to educational expenses is not minor; it is a quantum leap. . . . [W]e must afford the NCAA ‘ample latitude’ to superintend college athletics” *O'Bannon v. Nat'l Collegiate Athletic Ass'n*, 802 F.3d 1049, 1078-1079 (9th Cir. 2015) (quoting *Nat'l Collegiate Athletic Ass'n v. Bd. of Regents of Univ. of Okla.*, 468 U.S. 85, 120 (1984)).

²¹ List of cases on file with author.

²² See *O'Bannon v. Nat'l Collegiate Athletic Ass'n*, 7 F. Supp. 3d 955, 1009 (N.D. Cal. 2014); see also *Russell v. Nat'l Collegiate Athletic Ass'n*, 2012 WL 1747496 at *6 (N.D. Cal. 2012); see also *In re NCAA Student-Athlete Name & Likeness Litigation*, 2011 WL 1642256 at *8 (N.D. Cal. 2011); *White v. Nat'l Collegiate Athletic Ass'n*, 2006 WL 8066803 at *7 (C.D. Cal. 2006); *Buckton v. Nat'l Collegiate Athletic Ass'n*, 366 F. Supp. 1152, 1160 (D. Mass. 1973); *In re NCAA I-A Walk-On Football Players Litigation*, 398 F. Supp. 2d 1144, 1152 (W.D. Wash. 2005).

the NCAA dyke might have a large impact for future student-athlete cases.

B. A Break in NCAA Antitrust Scrutiny

The broader impact for college sports is that the NCAA's control on permissible payments to student-athletes is no longer absolute—antitrust challenges can not only be brought; they can be won.²³ To paraphrase Ron Burgundy, “[It’s] kind of a big deal.”²⁴ As previously stated, in over one hundred years of the NCAA’s existence and many antitrust challenges²⁵ to its restrictions on personnel or player markets, courts have overwhelmingly sided with the NCAA.²⁶

If there is a common thread for the collective failure of student-athlete antitrust challenges, it is plaintiffs’ failure to define a cognizable, relevant market—the threshold element of any section 1 Sherman Act claim.²⁷ Section 1 prohibits any contract or agreement that unreasonably restrains trade.²⁸ Before any restraint can be analyzed, however, a cognizable market for trade must be established.²⁹

Some courts historically have struggled with whether the antitrust laws could even reach NCAA restrictions because (i) the NCAA was protecting amateurism, and (ii) the restrictions were noncommercial in nature.³⁰ If the activities or restraints are

²³ It does appear that the NCAA can cap payments to the extent that such payments must have some relation to the student-athletes’ educational expenses.

²⁴ ANCHORMAN: THE LEGEND OF RON BURGUNDY (DreamWorks Pictures July 9, 2004).

²⁵ The reference to “antitrust laws” in this context is limited to Sherman Act sections 1 and 2.

²⁶ See *supra* note 20 and accompanying text.

²⁷ See *O’Bannon v. Nat’l Collegiate Athletic Ass’n*, 7 F. Supp. 3d 955, 985 (N.D. Cal. 2014).

²⁸ Sherman Act, 15 U.S.C. § 1 (2012).

²⁹ See *O’Bannon*, 7 F. Supp. 3d at 985.

³⁰ See, e.g., *Smith v. Nat’l Collegiate Athletic Ass’n*, 139 F.3d 180, 185-86 (3rd Cir. 1998), *vacated on other grounds*, 525 U.S. 459 (1999) (holding that eligibility rules are noncommercial in nature and are beyond Sherman Act scrutiny); see also *Gaines v. Nat’l Collegiate Athletic Ass’n*, 746 F. Supp. 738, 743-44 (M.D. Tenn. 1990) (finding that eligibility rules are noncommercial and not subject to the Sherman Act); *Ass’n for Intercollegiate Athletics for Women v. Nat’l Collegiate Athletic Ass’n*, 558 F. Supp. 487, 494-95 (D.D.C. 1983) (holding that NCAA rules would only be subject to antitrust

noncommercial, then how could a statute that protects commerce apply? The Supreme Court seemed to answer that question in *National Collegiate Athletic Ass'n v. Board of Regents* when it not only applied Sherman Act scrutiny, but also condemned certain NCAA restrictions on college broadcast rights.³¹

But in the same case, however, the Supreme Court created a large safety net for the NCAA by warning potential plaintiffs that, although subject to antitrust review, most NCAA regulations are a “justifiable means of fostering competition among amateur athletic teams,” and are therefore procompetitive.³² In fact, the Supreme Court went so far as to arguably create a presumption in favor of certain NCAA player-related restrictions when it stated:

It is reasonable to assume that most of the regulatory controls of the NCAA are . . . procompetitive because they enhance public interest in intercollegiate athletics. The specific restraints . . . that are challenged in this case do not, however, fit into the same mold as do rules defining the conditions of the contest, the eligibility of participants, or the manner in which members of a joint enterprise shall share the responsibilities and the benefits of the total venture.³³

Cases challenging the NCAA’s eligibility requirements confirm a judicial safe harbor for such restrictions.³⁴ The

scrutiny if they were promulgated with an anticompetitive motive); *Jones v. Nat'l Collegiate Athletic Ass'n*, 392 F. Supp. 295, 303–04 (D. Mass. 1975) (holding that eligibility standards are not subject to antitrust analysis because “antitrust regulation is aimed primarily at combinations with commercial objections, and is applied only to a very limited degree of other types of organizations” and the eligibility standards were noncommercial).

³¹ See *Nat'l Collegiate Athletic Ass'n v. Bd. of Regents of Univ. of Okla.*, 468 U.S. 85, 119 (1984).

³² *Id.* at 117.

³³ *Id.*

³⁴ See, e.g., *Smith v. Nat'l Collegiate Athletic Ass'n*, 139 F.3d 180, 185-86 (3rd Cir. 1998), *vacated on other grounds*, 525 U.S. 459 (1999); see also *Banks v. Nat'l Collegiate Athletic Ass'n*, 977 F.2d 1081, 1099 (7th Cir. 1992); *Bowers v. Nat'l Collegiate Athletic Ass'n*, 9 F. Supp. 2d 460, 497-98 (D.N.J. 1998); *Gaines v. Nat'l Collegiate Athletic Ass'n*, 746 F. Supp. 738, 749 (M.D. Tenn. 1990); *Jones v. Nat'l Collegiate Athletic Ass'n*, 392 F. Supp. 295, 303 (D. Mass. 1975); *Bowers v. Nat'l Collegiate Athletic Ass'n* 9 F.

interpretation of the Supreme Court dicta in *Board of Regents* has been mixed. It is clear that some NCAA restraints are commercial and subject to antitrust review. But how to address the carve-out set forth by the Supreme Court has vexed the courts. The two possible views are either (i) all NCAA restraints are commercial but, under some version of rule of reason analysis, some restraints are carved out as almost per se procompetitive; or (ii) some NCAA restraints are carved out as noncommercial and are entirely outside of antitrust review. The Ninth Circuit is new to the issue, but the Third, Sixth, and Fifth Circuits have already addressed it in some way.

The Third Circuit decided the latter, that antitrust laws simply *did not* apply to certain NCAA restrictions. The court definitively decided the issue but limited it to the NCAA's eligibility rules, leaving the question open as to other types of restraints.³⁵ The Third Circuit did seem to hedge its bets on the issue a little in a later decision. In dicta, the Third Circuit hypothesized that, even if the NCAA eligibility rules were subject to Sherman Act rule of reason analysis, they would survive because of their procompetitive protection of an "amateur" market.³⁶

For its part, the Sixth Circuit decided, in *Bassett v. Nat'l Collegiate Athletic Ass'n*, that the NCAA's rules against recruits receiving "improper inducements" were "explicitly non-commercial." In contrast to the Third Circuit, the Fifth Circuit assumed the former—without deciding—that the Sherman Act *did* apply to all NCAA restrictions, including the NCAA's eligibility rules.³⁷ The Fifth Circuit, however, did find that the eligibility requirement at issue—a restriction on benefits awarded student-athletes—easily survived rule of reason analysis.³⁸

Supp. 2d 460, 497-98 (D.N.J. 1998); *Coll. Athletic Placement Serv., Inc. v. Nat'l Collegiate Athletic Ass'n, Inc.*, No. 74-1144, 1974 WL 998, at *5 (D.N.J. 1974).

³⁵ See *supra* note 30.

³⁶ See *Smith v. Nat'l Collegiate Athletic Ass'n*, 139 F.3d 180, 186 (3d Cir. 1998).

³⁷ See *Bassett v. Nat'l Collegiate Athletic Ass'n*, 528 F.3d 426, 430-33 (6th Cir. 2008); see also *McCormack v. Nat'l Collegiate Athletic Ass'n*, 845 F.2d 1338, 1343-43 (5th Cir. 1988).

³⁸ *Id.*

The Ninth Circuit, squarely facing the issue of whether NCAA eligibility rules were outside the scope of the Sherman Act, answered, in strong and unequivocal language: no.³⁹ The Ninth Circuit held that the NCAA rules “are not exempt from antitrust scrutiny; rather, they must be analyzed under the Rule of Reason.”⁴⁰ Further, the Ninth Circuit noted that the NCAA was asking the court not merely to find “that its amateurism rules are procompetitive; rather, it asks [the court] to hold that those rules are essentially exempt from antitrust scrutiny. Nothing in *Board of Regents* supports such an exemption.”⁴¹ Given the split in the Circuits as to whether these particular NCAA restrictions are even susceptible to antitrust review, the importance of Judge Wilken’s threshold determination that they are—and the Ninth Circuit’s forceful affirmation of that holding—is of no small moment.

C. A Break in Defining a Cognizable Student-Athlete Education Market

1. A Break with Precedent

Given the discussion in Part II, how is it that Judge Wilken’s analysis, in large part, survived appeal since it is indeed a break with prior case law?⁴² Of course, part of the answer is the straightforward legal analysis of the Ninth Circuit that distinguished and interpreted prior law in much the same way as did the district court. But again, in looking at prior cases, I cannot help but think that a key, if not dispositive, failure of prior plaintiffs was not poor legal arguments but rather undeveloped economic analysis. Specifically, plaintiffs have historically failed to effectively define a relevant market. Proper definition of the

³⁹ See *O'Bannon v. Nat'l Collegiate Athletic Ass'n*, 802 F.3d 1049, 1053 (9th Cir. 2015).

⁴⁰ *Id.*

⁴¹ *Id.* at 1063.

⁴² See, e.g., *Rick-Milk Enters., Inc. v. Equilon Enter., L.L.C.*, 532 F.3d 963, 971 (9th Cir. 2008) and accompanying text (acknowledging that analogous issues with analogous facts can yield different results under antitrust jurisprudence due to evolving market perceptions).

market is of such core importance to many antitrust case outcomes, that a competitive restraint found to violate the Sherman Act in one market may be found not to violate the Sherman Act in a different economic market, *or* may be found not to violate the Sherman Act in the *same* market at a different point in time.

This arguably makes antitrust precedent different than legal precedent created in other areas of law. As a general matter, courts follow precedent under the general doctrine of *stare decisis*, which means “let the decision stand.” This doctrine has much to recommend itself, not the least of which is creating knowable and certain commercial, legal outcomes—even if those outcomes are the spawn of a legal mistake.⁴³ As Supreme Court Justice Kagan recently remarked,

[The] Court has viewed *stare decisis* as having a less-than-usual force in cases involving the Sherman Act [In those cases, the Court has] felt relatively free to revise [their] legal analysis as economic understanding evolves and . . . to reverse antitrust precedents that misperceived a practice’s competitive consequences.”⁴⁴

The take-away from the Court’s decision is that antitrust jurisprudence is different—more open to finding that, as time progresses, similar legal issues that arise under similar circumstances (facts, markets) may merit different conclusions of law.⁴⁵ More pointedly, corrections in antitrust precedent will be

⁴³ The Supreme Court described the rationale of *stare decisis*, as “the ‘preferred course because it promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process.’” *Kimble v. Marvel Entm’t, L.L.C.*, 135 S. Ct. 2401, 2409 (2015) (quoting *Payne v. Tennessee*, 501 U.S. 808, 827-28 (1991)). The most succinct encapsulation of the doctrine may be Justice Brandeis’s observation that *stare decisis* springs from the idea that it is “more important that the applicable rule of law be settled than that it be settled right.” *Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393, 406 (1932) (Brandeis, J., dissenting).

⁴⁴ *Kimble v. Marvel Entm’t, L.L.C.*, 135 S. Ct. 2401, 2412-13 (2015).

⁴⁵ When the Court overruled the per se standard of review for retail price maintenance set by precedent, Justice Kennedy remarked that the Court was free to overrule past precedent “when subsequent cases have undermined their doctrinal underpinnings.” *Leegin Creative Leather Prods. v. PSKS, Inc.*, 551 U.S. 877, 900

guided by economic “understanding.” In prior cases, we see that the type of change in economic “understanding” sufficient to change prior antitrust precedent comes in two broad categories: (1) a change in economic theory, or (2) a drastic change in the economic realities of the market(s) under review.⁴⁶

Arguably, it is the latter, the change in the economic realities of the college athlete market, that Judge Wilkin found persuasive in *O'Bannon*.⁴⁷ In past cases, the courts have determined that the NCAA restrictions on student-athletes were permitted because the market for student-athletes was either non-commercial or undefined as a cognizable market.⁴⁸ The *O'Bannon* plaintiffs successfully argued that a narrow product market definition was not only appropriate, but clearly subject to antitrust scrutiny.⁴⁹ Even if nothing more than the market classification of Division I basketball and Football Bowl Subdivision (“FBS”) football survives review, the *O'Bannon* case could have a far-reaching impact on the college athletic market.⁵⁰ The acceptance that at least a part of the student-athlete education market is commercial is an erosion of what has effectively been a grant of judicial immunity for a large category of NCAA restrictions—namely those that pertain to player compensation and, perhaps, even those that pertain to eligibility.⁵¹

(2007) (quoting *Dickerson v. United States*, 530 U.S. 428, 443 (2000) (overruling *Dr. Miles Med. Co. v. John D. Park & Sons Co.*, 220 U.S. 373 (1911)).

⁴⁶ See *supra* note 44.

⁴⁷ *O'Bannon v. Nat'l Collegiate Athletic Ass'n*, 7 F. Supp. 3d 955, 973 (N.D. Cal. 2014).

⁴⁸ See, e.g., *Agnew v. Nat'l Collegiate Athletic Ass'n*, 683 F.3d 328, 345-46 (7th Cir. 2012); see also *Rock v. Nat'l Collegiate Athletic Ass'n*, 928 F. Supp. 2d 1010, 1022 (S.D. Ind. 2013).

⁴⁹ See *O'Bannon*, 802 F. 3d 1049, 1070, 1072 (9th Cir. 2015) (affirming the District Court's finding that the relevant market was the college education market and then proceeding to conduct an antitrust rule of reason analysis).

⁵⁰ The *O'Bannon* court was not the first to reach the conclusion that the student-athlete market was indeed a relevant antitrust market. In 2012, the Seventh Circuit observed that “transactions between NCAA schools and student-athletes are, to some degree, commercial in nature, and therefore take place in a relevant market with respect to the Sherman Act.” *Agnew*, 683 F.3d at 341.

⁵¹ See *Fainaru & Farrey*, *supra* note 11.

2. The Relevant Market Definitions

Indeed, the *O'Bannon* district court recognized two similarly situated product markets: the “college education market” (scholarships and services offered athletes) and the “group licensing market” for student-athletes’ names, images, and likenesses.⁵² The college education market was narrowly defined as those colleges and universities offering men’s Division I basketball and FBS athletic programs.⁵³ The licensing market is also defined within the same college education market of Division I basketball and FBS.⁵⁴ The court also defined three subgroups within the group licensing market: licenses for live telecasts, videogames, and archival footage.⁵⁵

The *O'Bannon* plaintiff class has also laid out a game plan for future cases. Again, a key frustration of courts faced with the issue of NCAA athlete restraints is plaintiffs’ inability to articulate a market.⁵⁶ But *O'Bannon* succeeded where other plaintiffs failed. In finding a cognizable, relevant market, Judge Wilken set forth the economic analysis. The market is best characterized as one where the colleges are the “sellers” of education and they

⁵² See *O'Bannon*, 7 F. Supp. 3d at 986, 993.

⁵³ *Id.* at 987.

⁵⁴ *Id.* at 994.

⁵⁵ *Id.* at 993-99. The court’s decision relied exclusively on Professor Roger Noll’s filing for plaintiffs that examined the ranking of student-athletes on Rivals.com and analyzed how that correlated to the athlete’s ultimate school of attendance. *Id.* at 966. Professor Noll determined from the data that “if the top athletes are offered a D–I scholarship, they take it. They do not go anywhere else.” *Id.* (quoting Trial Tr. 114:6-7). Although defendants contested that the market definition should be broader, that Division II, III and even European schools are legitimate substitutes, they did not present any contrary evidence to dispute Professor Noll’s data. *O'Bannon* at 966-67. The court held that there are no professional football or basketball leagues capable of supplying a substitute for the bundle of goods and services that FBS football and Division I basketball schools provide. *Id.* at 967-68. These schools comprise a relevant college education market, as described above. *Id.* at 968.

⁵⁶ As discussed in *Agnew v. Nat’l Collegiate Athletic Ass’n*, 683 F.3d 328, 339-41 (7th Cir. 2012), and *Banks v. Nat’l Collegiate Athletic Ass’n*, 977 F.2d 1081, 1099 (7th Cir. 1992), the court was sympathetic that there existed a commercial market between NCAA member institutions and their prospective student-athletes, but defining that cognizable market eluded student-athlete plaintiffs until *O'Bannon*.

compete to sell unique bundles of goods and services to elite football and basketball recruits. The bundles include scholarships to cover the cost of tuition, fees, room and board, books, certain school supplies, tutoring, and academic support services. They also include access to high-quality coaching, medical treatment, state-of-the-art athletic facilities, and opportunities to compete at the highest level of college sports, often in front of large crowds and television audiences.⁵⁷

This bundle of educational services was declared unique because the testimony showed no real substitutes for players looking to “buy” educational services with their athletic talent.⁵⁸ The data presented showed that Division II and III schools or high-caliber foreign opportunities were simply not close substitutes to the Division I schools, as star athletes chose FBS football or Division I basketball schools even when given greater compensation in an alternative education market.⁵⁹

Having found a cognizable market, and also determining that scholarships and compensation are not within the *Board of Regents* carve-out for NCAA eligibility restrictions, the next step is more straightforward. As stated above, the court applies the rule of reason analysis to review the restraints and finds them (in part) unreasonable restraints on trade. It is the threshold finding of a cognizable, relevant education, however, that might have the biggest impact on the future of college sports. If that door stays open, many future plaintiffs are sure to successfully walk through and ebb away at the NCAA’s control of the market.

CONCLUSION

The *O'Bannon* contribution to both the student athletic market and to antitrust jurisprudence is worthy of note. The immediate impact, now more certain, could create a bit of a scholarship frenzy in the labor market for student-athletes.⁶⁰ But

⁵⁷ *O'Bannon* 7 F. Supp. 3d at 966-67 (internal citations to court documents omitted).

⁵⁸ *Id.* at 965.

⁵⁹ *Id.* at 966-67.

⁶⁰ To put it in perspective, the year after the *Board of Regents* court invalidated the NCAA restraint on broadcast, the number of televised college football games

the case may also have a lasting effect on the level of antitrust scrutiny the NCAA will receive in the future. Indeed, with the strong language of the Ninth Circuit, based on careful analysis of the district court, the writing seems to be on the wall—the commercial nature of college sports will not go unnoticed for long.