Remembering the Lessons of the Baseball Exemption in NCAA v. Alston

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Introduction

It is somewhat ironic that the recently-granted Supreme Court appeal in National Collegiate Athletic Association (NCAA) v. Alston **[1** falls so near the 100-year anniversary of Federal Baseball v. National League,[2 a well-debated opinion by the Supreme Court that gave a particular sports league?and, for decades only that sports league?broad immunity from the antitrust laws. In doing so, the Court set up the field of sports antitrust law in a way that would position professional baseball apart from the other leagues to a degree that the Court would later remark is ?unrealistic, inconsistent, or illogical.?[3 Indeed, even a sitting member of the Court has remarked on the baseball exemption's controversial nature, noting that Federal Baseball has been ?pilloried pretty consistently in the legal literature since at least the 1940s.?[4

That sitting member of the Court, Justice Alito, did agree with commentary that Federal Baseball was mostly correct for its time; indeed he deemed a scholarly assessment of Federal Baseball's criticism as ?principally for things that were not in the opinion, but later added by Toolson and Flood,? to be ?accurate.?[5 As Justice Alito mentioned, the Supreme Court had ?at least two opportunities to overrule the Federal Baseball case? and did so both times ?over withering dissents.?[6 Thus while Federal Baseball may not deserve its notorious reputation, decisions by the Court to continue to affirm the baseball exemption?especially while completely undercutting Federal Baseball's legal underpinnings in Flood?are certainly fair game for questioning.[7

While the Alston Petitioners (the NCAA and member conferences) have strategically refused to frame it this way, this Supreme Court now?99 years after Federal Baseball?once again faces a question about whether to grant a request by a sports league for an antitrust exemption.[8 But unlike in Toolson and Flood, the doctrinal history underpinning this case presents little basis for an argument of binding stare decisis based on past court decisions, as the language Petitioners continuously point to as what compels the courts to grant them ?ample latitude? under the antitrust laws is merely dicta.[9 After all?as the Ninth Circuit found?while the Supreme Court ?certainly discussed the NCAA's amateurism rules at great length? in Board of Regents, ?it did not do so in order to pass upon the rules' merits, given that they were not before the Court.?[10

The Court should hold firm to its decades of precedent strongly disfavoring implicit, court-made antitrust exemptions. The Supreme Court has repeatedly noted a ?heavy presumption against implicit exemptions? to the Sherman Act.[11 Such powers should be reserved to Congress, who has thus far declined to grant the Petitioners that deference despite repeated opportunities to do so. In fact, such opportunities have only increased in recent years?with at least three separate public Senate hearings since July 1, 2020?with no signed bill or reported consensus.[12

At the heart of the Court's justification for affirming the baseball exemption in Toolson was that ?Congress . . . had [Federal Baseball]under consideration but has not seen fit to bring such business under these laws by legislation having prospective effect.? [13 If that statement is true, its corollary must also be true: that since Congress has had plenty of opportunities to consider the Petitioners' requests for antitrust immunity but ?has not seen fit? to grant that request through legislation, this Court should cede to Congress's inaction.[14

This Essay takes no position on whether the Ninth Circuit decision should be affirmed or overruled. Instead, the position argued herein is that regardless of the Court's conclusion in this case, the NCAA's underlying assertions that they are entitled to antitrust immunity for amateurism-related activities based on the precedent of Board of Regents should be rejected. As argued, Board of Regents provides no stare decisis on this point, and any approach by this Court that grants such antitrust immunity fails to consider the powerful lessons of the Court-enacted baseball antitrust exemption.

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[1] No. 20-512 (2021). This litigation has been combined with a separate appeal by the NCAA's member conferences. See Am. Athletic Assoc. v. Alston, 20-520 (2021). Both cases appeal In re NCAA Grant-in-Aid Cap Antitrust Litigation (Alston v. NCAA), 958 F.3d 1239 (9th Cir. 2020).

[2 Federal Baseball Club v. Nat'l League, 259 U.S. 200 (1922).

[3 Radovich v. Nat'l Football League, 352 U.S. 445, 452 (1957).

[4 Samuel A. Alito, Jr., The Origin of the Baseball Antitrust Exemption: Federal Baseball Club of Baltimore, Inc. v. National League of Professional Baseball Clubs, 34 J. Sup. Ct. Hist. 183, 192 (2009).

[5 Id. at 193 (quoting Kevin McDonald, Antitrust and Baseball: Stealing Holmes, 1998 J. Sup. Ct. Hist. 89, 122 (1998)); see also Toolson v. New York Yankees, 346 U.S. 356 (1953); see also Flood v. Kuhn, 407 U.S. 258 (1972) (affirming baseball's antitrust exemption on the basis of stare decisis).

[6 Alito, supra note 4, at 192.

[7 See Flood, 407 U.S. at 282-84 (overruling Federal Baseball's finding that professional baseball is not interstate commerce but keeping in place baseball's corresponding antitrust exemption on the grounds of stare decisis and ?a recognition and an acceptance of baseball's unique characteristics and needs?).

[8 Alston, 958 F.3d 1239.

[9 See NCAA v. Board of Regents, 468 U.S. 85, 120A (1984). See also O'Bannon v. NCAA, 802 F.3d 1049, 1063 (9th Cir. 2015) (finding that ?[t]he Court's long encomium to amateurism [in Board of Regents], though impressive-sounding, was therefore dicta?).

[10 O'Bannon, 802 F.3d at 1063.

[11 Goldfarb v. Va. State Bar, 421 U.S. 773, 777 (1975). See also California v. FPC, 369 U.S. 482, 485 (1962) (?Immunity from the antitrust laws is not lightly implied?); Group Life & Health Ins. v. Royal Drug, 440 U.S. 205, 231 (1979) (?It is well settled that exemptions from the antitrust laws are to be narrowly construed?); So. Motor Carriers Rate Conf. v. United States, 471 U.S. 48, 67 (1985) (?Implied antitrust immunities, however, are disfavored . . .?).

[12 See Exploring a Compensation Framework for Intercollegiate Athletics Before the S. Comm. on Com., Sci., and Transp., 116th Cong. (2020); Protecting the Integrity of College Athletics Before the S. Comm. on the Judiciary, 116th Cong. (2020); Compensating College Athletes: Examining the Potential Impact on Athletes and Institutions Before the S. Comm. on Health, Ed., Labor, and Pensions, 116th Cong. (2020).

[13 Toolson, 346 U.S. at 357.

[14 Id.

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