"Mixed Metaphors," Revisionist History and Post-Hypnotic Suggestions on the Interpretation of Sports Antitrust Exemptions: The Second Circuit's Use in *Clarett* of a *Piazza*-like "Innovative Reinterpretation of Supreme Court Dogma"

Walter T. Champion, Jr.
“MIXED METAPHORS,” REVISIONIST HISTORY AND POST-HYPNOTIC SUGGESTIONS ON THE INTERPRETATION OF SPORTS ANTITRUST EXEMPTIONS: THE SECOND CIRCUIT’S USE IN CLARETT OF A PIAZZA-LIKE “INNOVATIVE REINTERPRETATION OF SUPREME COURT DOGMA”

BY WALTER T. CHAMPION, JR.*

I. INTRODUCTION

The United States Supreme Court has a history of misinterpreting cases that involve sports antitrust exemptions. The most infamous antitrust exemption case of this sort is Flood v. Kuhn.¹ This case “was an antitrust action based on baseball’s failure to allow St. Louis Cardinals’ outfielder Curt Flood to negotiate his own contract with another team on the basis that ‘free agency’ in any form, was not permitted under the reserve system.”² As Curt Flood said, “I should be able to negotiate for myself in an open market and see just how much money this little body is worth. I shouldn’t be confronted with an either-or proposition like the one now facing me. Somebody needs to go up against the system. I’m ready.”³ Flood affirmed the earlier cases of Federal Baseball Club of Baltimore v. National League of Professional Baseball Clubs⁴ and Toolson v. New York Yankees, Inc.,⁵ on a strict stare decisis basis, and continued baseball’s anomalous antitrust exemption.⁶ The rationale was

* Walter T. Champion, Jr. is Professor of Law at Texas Southern University Thurgood Marshall School of Law in Houston, Texas. He is also the author of many sports law treatises and has published numerous law review articles concerning a variety of sports issues.

6. Flood, 407 U.S. at 283-84; see also Champion, Baseball, supra note 2, at 577-78.
that the exemption was an established aberration that must be continued, and if change was to occur, then legislative action was the appropriate vehicle.7 Judge Friendly declined to overrule Federal Baseball Club of Baltimore8 in Salerno v. American League of Professional Baseball Clubs, but freely acknowledged that it “was not one of Mr. Justice Holmes’ happiest days, [and] that the rationale of Toolson [was] extremely dubious . . . .”9 The Supreme Court, in Radovich v. National Football League,10 noted that the distinction between baseball and other sports11 that have not earned an exemption was “unrealistic,” “inconsistent,” and “illogical.”12 Because Flood was an apparently irrational decision,13 other lower courts were forced to develop an “innovative reinterpretation” of its dogma.14 In Piazza v. Major League Baseball, which involved the purchase and sale of a baseball franchise,15 Judge Padova of the Eastern District of Pennsylvania reviewed Flood through a revisionist reinterpretation16 so that its exemption would appear to cover only the now moribund reserve clause.17 Through skillful opinion crafting, “Judge Padova reinterpreted some 70 years of Supreme Court precedence”18—“Federal Baseball held [that] the business of baseball [was] outside the scope of the Act,”19 but Toolson and Flood essentially limited Federal Baseball’s exemption to include only the reserve clause.20

The second most important sports exemption case is Brown v. Pro Football, Inc.,21 which concerned the so-called nonstatutory labor exemption.22 To digress, the Sherman Antitrust Act23 makes every

7. Flood, 407 U.S. at 282-85; Champion, Baseball, supra note 2, at 577.
8. Id. “If there is any inconsistency or illogic in all this, it is an inconsistency and illogic of long standing that is to be remedied by the Congress and not by this Court.” Id at 284.
11. Id. at 450.
12. Id. at 452.
13. See e.g., Flood v. Kuhn, 407 U.S. 258, 286 (1972) (Douglas, J., dissenting). “This Court’s decision in Federal Baseball . . . is a derelict in the stream of law that we, its creator, should remove. Only a romantic view of a rather dismal business account over the last 50 years would keep that derelict in midstream.” Id.
15. Id. at 422-23.
16. Id. at 438.
17. Champion, Baseball, supra note 2, at 583.
18. Id. at 583.
20. Piazza, 831 F. Supp. at 436-38; Champion, Baseball, supra note 2, at 583.
22. Id. at 243-50.
combination in the form of a conspiracy that involves interstate commerce illegal.\textsuperscript{24} This exemption emanates from the statutory labor exemption,\textsuperscript{25} which protects certain union activities from antitrust scrutiny.\textsuperscript{26} The nonstatutory exemption was developed by the Supreme Court in nonsports cases.\textsuperscript{27} Under this exemption, any union-management agreement that is a product of good faith negotiation will be protected from the scope of antitrust laws.\textsuperscript{28}

"[I]n Brown . . . the Court [held] that the exemption is limited to mandatory subjects . . . and covers only conduct that arises from the collective bargaining process."\textsuperscript{29} "[However,] the Court in Brown . . . left the precise contours of the exemption undefined."\textsuperscript{30}

Maurice Clarett was the star tailback in Ohio State University's undefeated 2002 football season.\textsuperscript{31} Because of reports of criminal behavior, Ohio State and the National Collegiate Athletic Association (NCAA) suspended him from the 2003-04 season, with the distinct possibility that the NCAA would not permit him to play in the 2004-05 season.\textsuperscript{32} He sought to be included in the pool of players eligible for the 2004 National Football League (NFL) draft to be held on April 24-25, 2004.\textsuperscript{33} However, he was unable to enter the draft class because of an NFL rule that allowed only those athletes who were three years out of high school to be eligible for the draft.\textsuperscript{34}

Judge Scheindlin of the Southern District of New York granted plaintiff's

---

24. Id. WALTER T. CHAMPION, JR., SPORTS LAW IN A NUTSHELL 58 (2005) [hereinafter CHAMPION, NUTSHELL].
26. Id. at 350.
motion for summary judgment on February 5, 2004. Judge Scheindlin also
denied the NFL’s motion to stay pending appeal on February 11, 2004. However, the Second Circuit Court of Appeals reversed and remanded Judge
Scheindlin’s summary judgment decision on May 24, 2004. The Second
Circuit found that this rule represented a condition for initial employment
because it affected the job security of veteran players, and therefore had
tangible effects on mandatory collective bargaining subjects, for example,
wages, hours, and conditions of employment, of current NFL Players.

The Second Circuit in Clarett v. National Football League (Clarett III),
was forced to deal with the Supreme Court’s precedent in Brown. However,
Justice Breyer—writing for the majority in Brown—indicated that “[o]ur
holding is not intended to insulate from antitrust review every joint imposition
of terms by employers . . . .” It was imperative that the Second Circuit in
held that the . . . exemption protected the NFL’s unilateral implementation of
new salary caps for developmental squad players after its . . . agreement with
the . . . union had expired and negotiations . . . over [the] proposal reached an
impasse.”

The Second Circuit’s main connective argument asserts in the negative
that Clarett III did “not argue . . . that the Supreme Court’s treatment of the
non-statutory exemption . . . [gave] reason to doubt the authority of our prior
decisions . . . . Because . . . our prior decisions in this area fully
comport[ed]—in approach and result—with the Supreme Court’s decision in
Brown, we regard them as controlling authority.” In sum, the Second
Circuit in Brown “is guilty of mixing metaphors in its attempt to connect
Brown” to its own basketball nonstatutory exemptions cases, National

35. Clarett I, 306 F. Supp. 2d at 410-411. “Clarett’s motion for summary judgment is granted . . . . Because the Rule violates the antitrust laws, it cannot preclude Clarett’s eligibility for the 2004 NFL draft.” Id.

36. Clarett II, 306 F. Supp. 2d at 414. “If a stay is granted, Clarett will miss the 2004 draft. He will not be eligible to play in the NFL until the 2005 draft . . . . If the stay is granted, Clarett will have effectively lost his lawsuit.” Id. (emphasis in original).

37. Clarett III, 369 F. 3d at 143.

38. Id. at 139-140.

39. Id. at 135.


41. Clarett III, 369 F.3d at 135 (internal citations omitted).

42. Id. at 138.

43. Champion, Clarett, supra note 28, at 612.
Basketball Association v. Williams (Williams), Wood v. National Basketball Association, and Caldwell v. American Basketball Association. Maurice Clarett was a football player "and the whole universe or collective bargaining in football is different than . . . basketball. Brown does not broadly embrace the exemption; there is nothing in Brown which . . . segue[s] their tacit and limited approval of the exemption to include [the] rule . . . in Clarett, that was never directly bargained over."

My theory is that the Supreme Court has trouble with sports antitrust exemption cases. But Piazza initiated a respectful "innovative reinterpretation" of anomalous Supreme Court cases by using judicial legerdemain, including mixed metaphors, revisionist history, and post-hypnotic suggestions—whatever it takes. This judicial surgery was emulated by the Second Circuit in Clarett III with less glorious results. Clarett III reinterpretated Brown, which was less idiosyncratic than Flood. In Piazza, the court worked with the relevant jurisprudence; however, the Second Circuit in Clarett III incorrectly reinterpretated Brown by inventing precedent.

II. SPORTS ANTITRUST EXEMPTIONS, GENERALLY

Baseball's exemption is an anomalous "derelict in the stream of law . . ." "If there is any inconsistency or illogic in all this, it is an inconsistency and illogic of long standing that is to be remedied by the Congress and not by this Court." The exemption was reaffirmed again by the Supreme Court in Flood, and exempts baseball from the antitrust laws. There is no chance that it will be extended to others sports. Radovich, for example, is controlling in football and specifically denies immunity despite the obvious similarities between the sports. Baseball is just "a narrow application of . . . stare decisis." However, the Curt Flood Act of 1998 established a partial repeal of baseball's common law exemption from the

44. See generally Nat'l Basketball Ass'n v. Williams, 45 F.3d 684 (2d Cir. 1995).
45. See generally Wood v. Nat'l Basketball Ass'n, 809 F.2d 954 (2d Cir. 1987).
46. See generally Caldwell v. Am. Basketball Ass'n, 66 F.3d 523 (2d Cir. 1995); Champion, Clarett, supra note 28, at 612.
47. Champion, Clarett, supra note 28, at 612-13 (emphasis added).
49. Id. at 284.
50. See CHAMPION, FUNDAMENTALS, supra note 25, at 529.
antitrust laws.\textsuperscript{54} The partial repeal specifically does not apply to minor leagues and minor league reserve clauses, the amateur draft, the “Professional Baseball Agreement,” franchise relocation, club ownership rules, ownership transfers, the relationship between commissioners and owners, baseball marketing, the Sports Broadcasting Act of 1961,\textsuperscript{55} the league’s relationship with umpires, and “persons [not] in the business of organized professional major league baseball...”\textsuperscript{56} “Nothing in this section shall be construed to affect the application to organized professional baseball of the nonstatutory labor exemption from the antitrust laws.”\textsuperscript{57}

Two other exemptions are particular to professional football. One authorizes agreements between the NFL and television networks to pool and sell a unitary video package.\textsuperscript{58} The second exemption allows blackouts of outside game telecasts into home territories when the home team is playing, and permits the blackout of home games in the home territory.\textsuperscript{59} The “statutory” labor exemption is derived from the Clayton Act\textsuperscript{60} and the Norris-LaGuardia Act.\textsuperscript{61} The purpose of this exemption is to allow unions to eliminate competition from the other unions; but this privilege cannot be claimed by businesses.\textsuperscript{62} The nonstatutory labor exemption emanates from the statutory labor exemption and protects certain union activities from antitrust scrutiny.\textsuperscript{63}

The “nonstatutory labor exemption is at the heart of nearly every antitrust suit in professional sports.”\textsuperscript{64} This exemption was developed by the United States Supreme Court in nonsports cases.\textsuperscript{65} Under this exemption, any union-management agreement that is a product of good faith negotiation will be protected from the scope of antitrust laws.\textsuperscript{66} This exemption is applicable where alleged player restraint mechanisms primarily affect only those parties

\textsuperscript{54} See generally \textit{Champion, Fundamentals}, supra note 25, at 539-41.


\textsuperscript{60} 15 U.S.C. §§ 12-27.


\textsuperscript{63} \textit{See id.; see also Champion, Fundamentals}, supra note 25, at 530.

\textsuperscript{64} \textit{Champion, Fundamentals}, supra note 25, at 530.

\textsuperscript{65} \textit{See, e.g., Connell Constr. Co. v. Plumbers & Steamfitters Local Union No. 100, 421 U.S. 616, 622-23 (1975); Local Union No. 189 v. Jewel Tea Co. 381 U.S. 676, 689-91 (1965).}

\textsuperscript{66} \textit{Champion, Fundamentals supra note} 25, at 530.
to the collective bargaining agreement, where the restraint concerns a mandatory subject of collective bargaining, and where the provision that is sought to be exempted is a product of bona fide, arms-length bargaining. The preeminent sports nonstatutory exemption case is Mackey v. National Football League. The plaintiff sued to determine whether the NFL’s “Rozelle Rule” violated antitrust laws. This rule allowed the NFL Commissioner, one Alvin “Pete” Rozelle, to require the club acquiring a free agent to compensate the former team with money, players, draft picks, or all three. Although this rule did not deal with a mandatory subject of collective bargaining, it operated to restrict a player’s mobility to move freely from team to team; therefore, depressing salaries. The court also held that there was no bona fide arm’s length bargaining over the rule on the basis that the rule remained unchanged because it was unilaterally promulgated by management.

However, other courts found that the nonstatutory exemption could apply to players restriction mechanisms in professional sports. In McCourt v. California Sports, Inc., the court found the exemption applicable to protect the National Hockey League’s version of a reserve system. The court found that there was sufficient bona fide bargaining to trigger the exemption even though management did not yield from its initial position. Powell v. National Football League continued the exemption even after the parties reached impasse. In Wood, the exemption protected the salary cap. Because “Wood challenged agreements concerning mandatory subjects of bargaining, to which labor law attaches a host of rights and obligations, [the court] saw no place for the application of the antitrust laws and found the non-statutory exemption applicable.” In Brown, the Supreme Court held that the NFL’s

67. Id.
69. Mackey, 543 F. 2d at 609-10; Champion, Clarett, supra note 28, at 592.
70. Mackey, 543 F. 2d at 610-11.
71. Id. at 615; see also Champion, Clarett, supra note 28, at 592.
72. Id. at 616.
73. McCourt v. California Sports, Inc., 600 F.2d 1193, 1203 (6th Cir. 1979); Champion, Clarett, supra note 34 at 593.
74. McCourt, 600 F.2d at 1193.
76. Wood v. Nat’l Basketball Ass’n, 809 F.2d 954, 956-57 (2d Cir. 1987).
unilateral imposition of a fixed salary for developmental squad players was protected by the nonstatutory exemption.\textsuperscript{78}

III. THE SUPREME COURT MISSES THE MARK IN FEDERAL BASEBALL CLUB OF BALTIMORE, TOOLSON, FLOOD, AND BROWN

Baseball’s exemption was created in 1922 by Justice Oliver Wendell Holmes in a unanimous Supreme Court decision in Federal Baseball Club of Baltimore.\textsuperscript{79} In Holmes’s defense, it could be argued that the clubs were organized for profit but that the league was not.\textsuperscript{80} Although Holmes did see it as a business, he thought that the travel was mere incident, and not the essential thing; therefore, the interstate commerce requirements were not met.\textsuperscript{81} It was “freely acknowledge[d] . . . that \textit{Federal Baseball} was not one of Mr. Justice Holmes’ happiest days . . . .”\textsuperscript{82} “Baseball was a mess, and the key to its nightmarish existence was the infamous reserve clause.”\textsuperscript{83} This clause was not a “clause” per se, but a “system” of interrelated player contract provisions and league rules.\textsuperscript{84} It can be defined as a stipulation in an athlete’s contract that attempts to bind the player perpetually to the client. It provides that if the player does not sign his contract for the succeeding season, all of the provisions of the old contract are automatically renewed, except for the amount of compensation.\textsuperscript{85} Thus, the reserve clause is also renewed and the player is bound to his club for life, unless his contract is traded, sold, assigned, or terminated.\textsuperscript{86} Under the reserve system, a ball player was the property of his team for life. A dissatisfied player’s only alternatives would be to request his contract be traded, to retire, or to die; on the other side, management could release a player or assign his contract to any team without the player’s consent.\textsuperscript{87}

Judge Frank, in \textit{Gardella v. Chandler}, opined that even though the “[d]efendants suggest that ‘organized baseball,’ which supplies millions of

\begin{itemize}
\item \textsuperscript{79} Fed. Baseball Club v. Nat’l League of Prof’l Baseball Clubs, 259 U.S. 200, 207-09 (1922); Champion, \textit{Baseball, supra} note 2, at 574.
\item \textsuperscript{81} \textit{Id.} at 209.
\item \textsuperscript{82} Salerno v. Am. League of Prof’l Baseball Clubs, 429 F.2d 1003, 1005 (2d Cir. 1970).
\item \textsuperscript{83} Champion, \textit{Baseball, supra} note 2, at 575.
\item \textsuperscript{84} Flood v. Kuhn, 409 U.S. 258, 259-60 (1978).
\item \textsuperscript{85} \textit{Id}; Champion, \textit{Baseball, supra} note 2, at 575.
\item \textsuperscript{86} CHAMPION, FUNDAMENTALS, \textit{supra} note 25, at 511.
\item \textsuperscript{87} \textit{See generally} Walter Champion, \textit{Baseball’s Third Strike: Labor Law and the National Pastime} (pt.2), 4 PENN. L. J-REP. (1991).
\end{itemize}
Americans with desirable diversion, will be unable to exist without the ‘reserve clause.”’\textsuperscript{88} Regardless, “the answer is that the public’s pleasure does not authorize the courts to condone illegality, and that no court should strive ingeniously to legalize a private (even if benevolent) dictatorship.”\textsuperscript{89} To Judge Frank, the reserve clause was “shockingly repugnant to moral principles, . . . condemning ‘involuntarily servitude’ . . . [f]or the ‘reserve clause’ . . . results in something resembling peonage of the baseball player.”\textsuperscript{90} The Second Circuit in \textit{Gardella} in 1949 almost ended the reserve clause, but the parties settled the case before the Supreme Court could review the question of baseball’s exemption.\textsuperscript{91} Danny Gardella of the New York Giants left New York for the Mexican League but later changed his mind.\textsuperscript{92} Upon his return, he was blacklisted by Commissioner “Happy” Chandler.\textsuperscript{93} Although the \textit{Gardella} court saw baseball as engaged in interstate commerce and subject to the antitrust laws, it felt that the Supreme Court would eventually decline to uphold \textit{stare decisis} and \textit{Federal Baseball Club of Baltimore—it was wrong.}\textsuperscript{94}

However, in 1953 the Supreme Court, in the case of \textit{Toolson}, ignored \textit{Gardella} and merely affirmed \textit{Federal Baseball Club of Baltimore} in a per curiam opinion.\textsuperscript{95} This etched the \textit{Federal Baseball} anomaly in stone.\textsuperscript{96} \textit{Toolson} cited \textit{Federal Baseball Club of Baltimore} as holding “that the business of providing public baseball games for profit between clubs of professional baseball players was not within the scope of the federal antitrust laws.”\textsuperscript{97} The \textit{Toolson} Court based its holding on the fact that [t]he business has . . . been left for thirty years to develop, on the understanding that it was not subject to existing antitrust legislation. . . . We think that if there are evils in this field which now warrant application . . . of the antitrust laws it should be by legislation.\textsuperscript{98}

\textsuperscript{88} Gardella v. Chandler, 172 F.2d 402, 415 (2d Cir. 1949).
\textsuperscript{89} Id.
\textsuperscript{90} Id. at 409.
\textsuperscript{92} See \textit{Gardella}, 172 F.2d at 403.
\textsuperscript{93} See \textit{id.} at 403, 410.
\textsuperscript{94} \textit{Id.} at 409; \textit{Champion, Baseball, supra} note 2, at 576.
\textsuperscript{95} \textit{See generally Toolson v. New York Yankees}, 346 U.S. 356 (1953). The dissent of Justices Burton and Reed was much more interesting in that they realized that baseball was now a very big industry that included large revenues from radio and television and that baseball was certainly deeply involved in interstate commerce. \textit{Id.} at 358 (Burton, J., dissenting).
\textsuperscript{96} Flood v. Kuhn, 407 U.S. 258, 273 (1972); \textit{Champion, Baseball, supra} note 2, at 576.
\textsuperscript{97} \textit{Toolson}, 346 U.S. at 357.
\textsuperscript{98} \textit{Id.}
The Toolson Court based its decision "on the authority of Federal Baseball... so far as that decision determined[d] that Congress had no intention of including the business of baseball within the scope of the federal antitrust laws." However, in his dissent, Justice Burton, with Justice Reed concurring, realized that "the present popularity of organized baseball increases... the importance of its compliance with standards of reasonableness comparable with those now required by law of interstate trade or commerce." Justice Reed would remand "for a consideration of the merits of the alleged violations of the Sherman Act.

The contract of Curt Flood, star of the St. Louis Cardinals, and its subsequent assignment to the Philadelphia Phillies, was the basis for the Flood decision. Flood stated, "I can go to Philadelphia or I can quit baseball altogether. I will not go to Philadelphia." Flood reasoned that "the issue was not me alone but the reserve system. Like thousands of players before me, I had been caught in its machinery. Before being ground to bits, I'd get out." Flood "want[ed] to give the courts a chance to outlaw the reserve system. [He] want[ed] to go out like a man instead of disappearing like a bottle cap."

Flood affirmed Federal Baseball Club of Baltimore and Toolson on a strict stare decisis basis. The Court reasoned that "if there is any inconsistency or illogic in all this, it is an inconsistency and illogic of long standing that is to be remedied by the Congress and not by this court.

While ostensibly researching the abortion case, Roe v. Wade, he was actually "playing with baseball cards" in his search for statistics to compile the requisite minimum numbers and qualifications so as to appear on his list of "celebrated names" of the game. Justice Marshall protested that the list did not contain any African-
Justice Blackmun defended his selections by pointing out that most of the list predated World War II and that African-American ball players were excluded from the major leagues until 1947, which was precisely Justice Marshall’s point. Justice Blackmun, who still hoped to secure Justice Marshall’s vote, capitulated and added Jackie Robinson, Roy Campanella, and Satchel Paige. However, Justice Marshall remained faithful to Curt Flood and wrote his own dissent.

In Justice Douglas’s dissent, he indicated that Federal Baseball Club of Baltimore was “a derelict in the stream of the law that we, its creator, should remove.” Justice Marshall, in his dissent, reminded his brethren that “[t]he importance of the antitrust laws to every citizen must not be minimized. They are as important to baseball players as they are to football players, lawyers, doctors, or members of any other class of workers.” The end of the reserve clause appeared to be imminent and was hastened by the newly reinvigorated Major League Baseball Players Association, which under collective bargaining eventually produced an agreement that allowed for neutral arbitration of grievances.

In the decision of In re Arbitration of Messersmith, arbitrator Peter Seitz released pitchers Andy Messersmith and David McNally from their reserve clauses, thus making them free agents and allowing them to bargain for the highest bidder. This arbitration decision was affirmed in Kansas City Royals Baseball Club v. Major League Baseball Players Ass’n. Management and labor eventually arrived at a formula that gave players the opportunity to become free agents in a “reentry draft,” which began in 1976. In Flood, the court added that “[t]he conclusion we have reached makes it unnecessary for us to consider the respondents’ additional argument that the reserve system is a mandatory subject of collective bargaining and that federal labor policy therefore exempts the reserve system from the operation of the antitrust laws.”

110. Woodward & Armstrong, supra note 107, at 191.
111. Id.
112. Id.
113. Id. It was queried of Blackmun, after the opinion was published, as to why he omitted Mel Ott, the great right fielder for the New York Yankees. Blackmun insisted that he had included Ott. Id. at 192. The clerk said that the name was not in the printed opinion. Id. Blackmun said he would never forgive himself. Id.
115. Id. at 292.
116. See generally Champion, Baseball, supra note 2, at 579.
118. See generally Kansas City Royals Baseball Club v. Major League Baseball Players Ass’n, 409 F. Supp. 233 (W.D. Mo.) aff’d, 532 F. 2d 615 (8th Cir. 1976).
119. See generally Walter Champion, Take It Out on the Ballgame: Why the Phillies are for the Safe, 4 Penn. L.J.-Rep. 2 (1981); see also Champion, Baseball, supra note 2, at 579.
of federal antitrust laws." Justice Marshall, in dissent continues that:

Lurking in the background is a hurdle of recent vintage . . . . In 1966, the . . . Players Association was formed. It is the collective-bargaining representative for all major league baseball players. Respondents argue that the reserve system is now part and parcel of the . . . agreement and that because it is a mandatory subject . . . , the federal labor statutes are applicable, not federal antitrust laws. [But, t]he lower courts [in Flood] did not rule on this argument, having decided the case solely on the basis of [baseball’s] antitrust exemption.

Although the Court in Brown held that the nonstatutory exemption applied, it left the precise contours of the exemption undefined. “[I]n Brown, . . . the Court reiterated that the exemption is limited to mandatory subjects . . . and covers only conduct that arises from the bargaining process.” Mackey envisioned some situations where “non-labor parties may potentially avail themselves of the nonstatutory labor exemption where they are parties to . . . agreements pertaining to mandatory subjects . . . .” “[T]he Supreme Court in Brown . . . h[e]ld that the non-statutory exemption protected the NFL’s unilateral implementation of new salary caps for developmental squad players after its . . . agreement with the . . . union had expired and negotiations . . . over that proposal reached an impasse.” Brown, held that the exemption protects what would otherwise be an illegal restraint of trade under section one of the Sherman Act.

The Supreme Court noted in Brown that although they affirmed the decision of the appeals court, “we do not interpret the exemption as broadly . . . .” The Brown Court declined to apply the exemption simply because of the existence of a collective bargaining agreement. By implication, the Brown Court intimated its approval of a similar approach utilized in Mackey. The Court intimated that the exemption should only be

120. Flood, 407 U.S. at 285 (footnote omitted).
121. Id.
127. Id.
128. Id.
129. Id.; Champion, Mackey, supra note 68, at 96.
applied properly where certain other criteria were also met. These other conditions were similar to the Mackey test, which stipulated that, in addition to the existence of a collective bargaining relationship, the provision must only affect the parties to the agreement, concern a mandatory subject, and the parties must have bargained in good faith. The key to both opinions is that the questioned rule must concern a mandatory subject of collective bargaining.

The Second Circuit in Clarett III went to great lengths to synthesize its “decisions in this area—Caldwell, Williams, and Woods—, [to the alleged] “similar reasoning . . . in Brown.” But, Justice Breyer who wrote for the majority in Brown, indicated that “[o]ur holding is not intended to insulate from antitrust review every joint imposition of terms by employers.”

Justice Breyer continually referred to mandatory subjects within the collective bargaining agreement. His reasons for finding the exemption in Brown were specific, precise, and particular:

That conduct took place during and immediately after a collective-bargaining negotiation. It grew out of, and was directly related to, the lawful operation of the bargaining process. It involved a matter that the parties were required to negotiate collectively. And it concerned only the parties to the collective bargaining relationship.

Our holding is not intended to insulate from antitrust review every joint imposition of terms by employers, for an agreement among employers could be sufficiently distant in time and in circumstances from the collective-bargaining process that a rule permitting antitrust intervention would not significantly interfere with that process. We need not decide in this case whether or where, within these extreme outer boundaries to draw that line. Nor would it be appropriate for us to do so without the detailed views of the Board . . . .

In his dissent in Brown, Justice Stevens noted that the “limited judicial exemption complements its statutory counterpart by ensuring that unions which engage in collective bargaining to enhance employees’ wages may enjoy the benefits of the resulting agreements.” Justice Stevens also warned

---

131. Id.; see also Mackey v. Nat’l Football League, 543 F.2d 606, 614 (8th Cir. 1976); Champion, Mackey, supra note 68, at 95-96.
133. Brown, 518 U.S. at 250.
134. Champion, Clarett, supra note 28, at 609.
135. Brown, 518 U.S. at 250, at 250 (internal citations omitted).
136. Id. at 254.
that “exemptions should be construed narrowly, and judicially crafted exemptions more narrowly still . . . .”137 However, even the Second Circuit in Clarett III was forced to admit that “the Court in Brown . . . left the precise contours of the exemption undefined.”138

“Brown does not broadly embrace the exemption; there is nothing in Brown which would segue their tacit and limited approval of the exemption to include [a] rule, such as the one in Clarett, that was never directly bargained over.”139 Judge Scheindlin reiterated that Brown’s analysis, by emphasizing that the exemption, established a “labor policy favoring . . . collective bargaining, which require good-faith bargaining over wages, hours, and working conditions.”140 Judge Scheindlin also noted that Brown “recognized the primacy of collective bargaining in the workplace . . . .”141 Judge Scheindlin’s interpretation of Brown is summarized as follows: the exemption should be limited to those mandatory subjects that were fairly negotiated.142

IV. THE DISTRICT COURT IN PIAZZA “REINTERPRETS” FLOOD

Piazza, is a 1993 Eastern District of Pennsylvania case that involved two leading investors in one of the groups that sought to purchase the San Francisco Giants and relocate the team to Tampa.143 These investors alleged that the National League rules that required approval by the other club owner before the team could be either moved or purchased, was an illegal conspiracy in restraint of trade in violation of the antitrust laws.144

Although Piazza does not involve the reserve clause, it does involve structure;145 however, the purchasing and selling of a business enterprise is certainly not unique to baseball even in those cases where some form of group approval is necessary to buy into a franchise. The job of Federal District Judge Padova, in Piazza, was to review Flood through a revisionist microscope and re-interpret it so that the exemption would appear to cover

137. Id. at 258.
138. Clarett III, 369 F.3d at 138; see also Brown, 518 U.S. at 250.
139. Champion, Clarett, supra note 28, at 613; see also, Brown, 518 U.S. at 248-50.
141. Id.
142. Id. at 393; see also, Brown, 518 U.S. at 239.
144. Id. at 421-22; Champion, Baseball, supra note 2, at 581.
only the reserve clause." At best, this was a very difficult bit of judicial word twisting, but here the sanctity of a Holmes unanimous decision needed to be maintained. 

Judge Padova’s journey was a reinterpretation that revisited Flood and saw it as viewing Federal Baseball Club of Baltimore and Toolson as limited to the reserve system. Piazza also went so far as to counting the number of times that Flood mentioned the reserve clause: “Flood refers to the reserve clause at least four times.” The Piazza court continued, “[i]n Flood, the Supreme Court exercised its discretion to invalidate the rule of Federal Baseball and Toolson. Thus no rule from those cases binds the lower courts as a matter of stare decisis.” From there, Judge Padova concluded that baseball’s antitrust exemption, which was created in Federal Baseball Club of Baltimore, was limited to baseball’s reserve system; and because both the parties in Piazza agreed that the reserve system was not an issue, Judge Padova rejected Major League Baseball’s argument that its decision to deny the plaintiff the opportunity to purchase and relocate an existing baseball franchise was exempt from antitrust liability. 

Piazza, of course, could not overrule Flood. Judge Padova then was forced to reread Flood so that it could be restricted to pertaining to the reserve clause only. Flood admitted that the exemption was illogical, but an “inconsistency and illogic of long standing that is to be remedied by Congress and not by this Court.” By carefully crafting his opinion, Judge Padova “reinterpreted some 70 years of Supreme Court precedence.” Although Federal Baseball held that the business of baseball was outside the scope of the Sherman Act, Toolson and Flood essentially limited Federal Baseball Club of Baltimore’s exemption to include only the reserve clause. Because the exemption was merely a blind application of stare decisis anyway, Piazza implied that Toolson and Flood taken together, created their own branch of

146. See generally id. at 435-40; Champion, Baseball, supra note 2, at 581.
148. Id. at 420.
149. Id. at 437 (emphasis in original).
150. Id. at 438.
151. Id. at 441.
152. Id. at 436.
154. See Piazza, 831 F.Supp. at 433; Champion, Baseball, supra note 2, at 583.
precedent, different from *Federal Baseball Club of Baltimore*,¹⁵⁷ which restricts the exemption to the reserve clause only.¹⁵⁸

All of the *Flood* authors wanted to terminate the exemption. Most hoped that it would be by congressional fiat.¹⁵⁹ Although *Piazza* is only an interlocutory decision, it is an honorable alternative. *Piazza* is a thoughtfully written attempt to solve the *Flood* conundrum. It reinterprets *Flood*; however, it has limited influence because it is only a federal district court case. In short, *Piazza* carefully, patiently, and intelligently explained why the proposed sale and relocation of a baseball team was not protected by baseball's antitrust exemption.¹⁶⁰

V. THE SECOND CIRCUIT IN *CLARETT III* ATTEMPTS TO CIRCUMVENT BROWN

Although the Supreme Court has successfully defined the scope and purpose of the nonstatutory antitrust exemption in professional sports, it has been less clear defining its terms and application.¹⁶¹ However, Justice Breyer, for the majority in *Brown*, set sufficient guidelines when he admonished that "[o]ur holding is not intended to insulate from antitrust review every joint imposition of terms by employers..."¹⁶² It is impossible to "require groups of employers and employees to bargain together, but [also] forbid them to make among themselves... competition-restricting agreements potentially necessary [that] make the process work... Thus, the... exemption recognizes that, to [have] federal labor laws... and meaningful collective bargaining..., some restraints on competition... must be shielded from antitrust sanctions."¹⁶³ In *Brown*, Justice Breyer indicated that

petitioners and their supporters [, the union,] concede... the legal existence of the exemption... [and] its application... to make the statutorily authorized collective-bargaining process work... [and if so] the exemption must apply both to employers and to employees... Consequently, the question before us is one of determining the exemption's scope: Does it apply to an agreement among several employers bargaining together to implement

---

¹⁶⁰. *Id.*
¹⁶³. *Id.* at 237.
after impasse on the terms of their last best good-faith wage offer?

Labor law itself regulates directly, and considerably, the kind of behavior here at issue—the post-impasse imposition of a proposed employment term concerning a mandatory subject of bargaining.\textsuperscript{164}

Note that Justice Breyer continually referred to mandatory terms within the collective bargaining agreement.\textsuperscript{165} Justice Breyer’s reasons for finding the exemption applicable in \textit{Brown} were specific and particular: “conduct took place during and immediately after a collective-bargaining negotiation. It grew out of, and was directly related to, the lawful operation of the bargaining process. It involved a matter that the parties were required to negotiate collectively. And, it concerned only the parties to the collective-bargaining relationship.”\textsuperscript{166} Justice Breyer erred, however, in his inability to “find a satisfactory basis for distinguishing football players from other organized workers.”\textsuperscript{167}

In Justice Stevens’s dissent in \textit{Brown}, he noted that the “limited judicial exemption complements its statutory counterpart by ensuring that unions which engage in collective bargaining to enhance employees’ wages may enjoy the benefits of the resulting agreements.”\textsuperscript{168} In \textit{Connell Construction Co. v. Plumbers & Steamfitters Local Union No. 100}, the Supreme Court, in a nonsports case, found that “a proper accommodation between the congressional policy favoring collective bargaining under the NLRA and the congressional policy favoring free competition in business markets requires that some union-employer agreements be accorded a limited nonstatutory exemption from antitrust sanctions.”\textsuperscript{169} Justice Stevens agreed with the majority that “the judicially crafted labor exemption must also cover some collective action that employers take in response to a collective-bargaining agent’s demands for higher wages. Immunizing such action from antitrust scrutiny may facilitate collective bargaining over labor demands.”\textsuperscript{170} Justice Stevens further declares:

In my view, however, neither the policies underlying the two separate statutory schemes, nor the narrower focus on the purpose of the nonstatutory exemption, provides a justification for exempting from antitrust scrutiny

\textsuperscript{164}. \textit{Id.} at 237-38.
\textsuperscript{165}. See \textit{id.} at 236-49.
\textsuperscript{166}. \textit{Id.} at 250.
\textsuperscript{167}. \textit{Id.} at 249-50.
\textsuperscript{168}. \textit{Id.} at 254 (Stevens, J., dissenting).
\textsuperscript{169}. \textit{Id.} (quoting \textit{Connell Constr. Co. v. Plumbers & Steamfitters Local Union No. 100}, 421 U.S. 616, 622 (1975)).
\textsuperscript{170}. \textit{Id.}
collective action initiated by employers to depress wages below the level that would be produced in a free market. Nor do those policies support a rule that would allow employers to suppress wages by implementing noncompetitive agreements among themselves on matters that have not previously been the subject of either agreement with labor or even a demand by labor for inclusion in the bargaining process. That, however, is what is at stake in this litigation.

In light of the accommodation that has been struck between antitrust and labor law policy, it would be most ironic to extend an exemption crafted to protect collective action by employees to protect employers acting jointly to deny employees the opportunity to negotiate their salaries individually in a competitive market. Perhaps aware of the irony, the Court chooses to analyze this case as though it represented a typical impasse in an unexceptional multiemployer bargaining process.171

Both the majority and the dissent in Brown give little real ammunition for the Second Circuit in Clarett III to misuse the reasoning of Brown. However, the Second Circuit went to great lengths in its attempt to synthesize its decisions in this area, (Caldwell, Williams, and Wood) to the alleged “similar reasoning” in Brown v. Pro Football, Inc.”172

In shoring up its own basketball cases (e.g. Caldwell) the Second Circuit quoted Brown with approval, but out of context: “The inception of a collective bargaining relationship between employees and employers irrevocably alters the governing legal regime.”173 The Second Circuit continued with its courting of the Brown imprimatur:

The following year, in Brown, the Supreme Court was presented with facts similar to Williams, and eight Justices agreed that the non-statutory exemption precludes antitrust claims against a professional sports league for unilaterally setting policy with respect to mandatory bargaining subjects after negotiations with the players union over those subjects reach impasse. There, a class of professional football players challenged the NFL’s unilateral institution of a policy that permitted each team to establish a new squad of developmental players and capped those players’ weekly salaries after negotiations with the players union over that proposal became deadlocked. Approaching the issue largely as a “matter of logic,” the Court found that to permit antitrust liability in such a case would call into question a great deal of conduct, such as multi-employer bargaining, that federal labor policy promotes and for which labor

171. Id. at 254-255.
173. Id. at 137 (quoting Brown v. Pro Football, Inc., 50 F.3d 1041, 1054 (D.C. Cir. 1995), aff’d, 518 U.S. 231 (1996)).
law provides an array of rules and remedies. The Court held that the non-
statutory labor exemption necessarily applied not only to protect such labor
policies but also to prevent "antitrust courts" from usurping the NLRB's
responsibility for policing the collective bargaining process.\textsuperscript{174}

Although, the Second Circuit in \textit{Clarett III} all but kowtowed to \textit{Brown}, it
never connected the Supreme Court's rationale to the particulars of \textit{Clarett III}:
The [\textit{Brown}] Court also rejected a number of potential limits on the
exemption that were raised by the players and their supporters. First, the Court
held that the exemption was not so narrow as to protect only agreements
between the parties that are embodied in an existing collective bargaining
agreement. Second, in finding that the League's post-impasse action was
protected by the exemption, the court dismissed the suggestion that the
exemption should insulate the concerted action of employers only up to the
point at which negotiations reach impasse or a "reasonable time" thereafter.
Third, the court rejected the notion that courts in applying the exemption could
distinguish between bargaining "tactics," which the players argued should be
exempt, and unilaterally imposed "terms." Finally, the Court refused the
players' contention that the labor of professional sports players was unique
and that the market for players' services therefore should be treated differently
than other organized labor markets for purposes of the non-statutory
exemption.\textsuperscript{175}

But still there is no connection to \textit{Brown}, other than a list of weak
similarities. But even the Second Circuit must admit that "the Court in
\textit{Brown} . . . left the precise contours of the exemption undefined."\textsuperscript{176}

\textit{Clarett} argues that his case differs in material respects from \textit{Brown}, but he
does not argue, nor do we find, that the Supreme Court's treatment of the non-
statutory exemption in that case gives reason to doubt the authority of our
prior decisions in \textit{Caldwell}, \textit{Williams}, and \textit{Wood}. Because we find that our
prior decisions in this area fully comport—in approach and result—with the
Supreme Court's decision in \textit{Brown}, we regard them as controlling
authority.\textsuperscript{177}

The Second Circuit is guilty of mixing metaphors in its attempt to connect
\textit{Brown} to its own sports exemption cases—\textit{Williams}, \textit{Caldwell}, \textit{Woods}—all
professional basketball cases.\textsuperscript{178} Maurice Clarett, though, is a football player,
and the whole universe of collective bargaining in professional football is

\textsuperscript{174} \textit{Id.} (citations omitted).
\textsuperscript{175} \textit{Id.} at 137-38 (citations omitted).
\textsuperscript{176} \textit{Id.} at 138; see also \textit{Brown}, 518 U.S. at 250.
\textsuperscript{177} \textit{Clarett III}, 369 F.3d at 138.
\textsuperscript{178} See \textit{id.} at 136-38.
different than in professional basketball. Brown does not broadly embrace the exemption; there is nothing in Brown that would segue their tacit and limited approval of the exemption to include a rule, such as the one in Clarett III, that was never directly bargained over. 179

Judge Scheindlin’s take on Brown was more precise. 180 Brown reiterated the fact that the exemption which emanated from federal labor statutes, set forth “a national labor policy favoring free and private collective bargaining, which require good faith bargaining over wages, hours, and working conditions...” 181 Judge Scheindlin stated that the Brown Court also “recognized the primacy of collective bargaining in the workplace, even when the agreements reached through that bargaining would otherwise violate the antitrust laws’ prohibition on combinations in restraint of trade.” 182 Judge Scheindlin quotes from Brown with approval:

As a matter of logic, it would be difficult, if not impossible, to require groups of employers and employees to bargain together, but at the same time to forbid them to make among themselves or with each other any of the competition-restricting agreements potentially necessary to make the process work or its results mutually acceptable. Thus, the implicit exemption recognizes that, to give effect to federal labor laws and policies and to allow meaningful collective bargaining to take place, some restraints on competition imposed through the bargaining process must be shielded from antitrust sanctions. 183

The emphasis in the quote from Brown was supplied by Judge Scheindlin: “[S]ome restraints on competition imposed through the bargaining process must be shielded from antitrust sanctions.” 184

Judge Scheindlin notes that in Brown the Supreme Court “reiterated that the exemption is limited to mandatory subjects of collective bargaining and covers only conduct that arises from collective bargaining process.” 185 Although this is not quoted from Brown per se, the emphasis on the word “process” was again supplied by Scheindlin. And, of course, in Clarett, there was not even a scintilla of “process.” 186

179. See Brown, 518 U.S. at 248-50.
181. Id. (quoting Brown, 518 U.S. at 236).
182. Id.
183. Id.
184. Id.
185. Id. at 393; see also Brown, 518 U.S. at 239.
"In Brown, the question was whether a unilateral decision to impose a salary cap on NFL practice squad players violated antitrust laws when that cap was imposed by team owners after reaching a bargaining impasse with the NFLPA." 187 "In holding that the nonstatutory labor exemption applied . . . , the Court noted that ‘impasse and an accompanying implementation of proposals constitute an integral part of the bargaining process.’ The Court repeatedly stated that the purpose behind the exemption was to support the collective bargaining process and ensure that it worked in the manner intended by Congress." 188

The emphases were supplied by Judge Scheindlin. Because Brown does not elucidate the exemption’s contours in every sports situation, Judge Scheindlin counted the number of times that “process” was emphasized; in fact, the policy must constitute “an integral part of the bargaining process.” 189 Without a thorough and complete process, (e.g. a bona fide, arm’s-length negotiation), the application of the nonstatutory exemption would refute the very labor policies that it was developed to protect. 190

VI. THE REINTERPRETATION IN PIAZZA WAS INNOVATIVE, WHEREAS IN CLARETT III IT WAS MISGUIDED

The Court in Piazza was faced with the daunting task of accepting a similar situation from recent Supreme Court precedence. However, the precedence that had to be avoided in Piazza, was Flood, a notoriously unpopular case. 191 The task was to reevaluate baseball’s exemption in a manner that would make it less broad so as to immunize baseball from all of its various types of relationships. 192 "In 1992, Pamela Postema, baseball’s token female umpire, sued under a gender-based employment discrimination claim, exploring Federal Baseball Club of Baltimore, Toolson, and Flood and concluded that the exemption was limited to baseball’s reserve clause and to its league structure." 193 "The court has not specifically determined whether

187. Id. at 393.
190. See id.
192. Id.
the exemption applies to baseball’s conduct outside the domain of league structure and player rotation.”

Flood, however, offered some suggestions on how to revise itself on the basis that the exemption was based on the “recognition and acceptance of baseball’s unique characteristics and needs.” Therefore, the exemption might not extend to conduct that fails to include these particular characteristics or needs.

Postema v. National League of Professional Baseball Clubs and Flood itself therefore created the possibility that it was “at least theoretically possible that baseball would be subject to antitrust liability for any conduct that was unrelated to the reserve system or to league structure.” In 1982, for example, “a court explicitly found that the exemption did not protect professional baseball from a suit by a radio station against a team owner, because broadcasting is not central enough to the sport to be covered by the exemption.”

Postema, of course, did indeed limit the exemption to the reserve system and league structure; specifically, it excluded the exemption from encompassing umpire employment relations. “Anti-competitive conduct toward umpires is not an essential part of baseball and in no way enhances its vitality or viability.” “Unlike the league structure or [the structure of] the reserve system, baseball’s relations with non-players are not a unique characteristic or need of the game.” The next logical step of this progression would be the further limiting of the exemption’s coverage from “league structure and reserve system” to the reserve system only—enter Piazza. Piazza could not overrule Flood per se, but it did reinterpret it so that it could be restricted to pertaining only to the reserve clause. Remember, Flood itself admitted that the exemption was illogical, and that it was an “inconsistency and illogic of long standing that is to be remedied by Congress and not by this Court.” Even Chief Justice Burger in his concurrence noted that, “it is time the Congress acted to solve this problem.”

196. Id.; Champion, Baseball, supra note 2, at 580.
197. Postema, 799 F.Supp. at 1488; Champion, Baseball, supra note 2, at 580.
200. Id.
201. Id.
204. Id. at 286.
doubt "that 'were we considering the question of baseball for the first time upon a clean slate' we would hold it to be subject to federal antitrust regulation. The unbroken silence of Congress should not prevent us from correcting our own mistakes."205

The Second Circuit Court of Appeals in Clarett III held that the NFL's three year "sent from high school" eligibility rule was protected from antitrust scrutiny based on the applicability of the nonstatutory labor exemption.206 Although the Court admitted that there was no bargaining between the union and management over the rule, that alone did not exclude the rule from the scope of the nonstatutory labor exemption.207 The Second Circuit had to cobble together an argument that would somehow side step the fact that there was no bargaining over the rule.208 The Circuit Court in Clarett III combined Wood, Caldwell, and Williams, along with the United States Supreme Court's opinion in Brown, which applied the nonstatutory labor exemption to management's unilaterally setting of wages for developmental squad players.209

"Clarett [III] contends that the NFL clubs invited antitrust liability when they agreed amongst themselves to impose the same criteria on every prospective player..." Federal labor policy permits NFL teams to act collectively as a multiemployer bargaining unit in structuring the rules of play and setting criteria for player employment."210 The Clarett III appeals court averred that the fact that the rule excluded some potential employees from consideration "does not render the NFL's adherence to its eligibility rules as a multi-employer bargaining unit suspect."211

The Second Circuit noted that "the eligibility rules... were well known to the union."212 The "union [also] agreed to waive any challenge to the Constitution and Bylaws and thereby acquiesced in the continuing operation of the eligibility rules contained therein—at least for the duration of the agreement."213 This clause gives the NFL "control over any changes to the

205. Id. at 288. (Douglas, J., dissenting) (quoting Radovich v. Nat'l Football League, 352 U.S. 445, 452 (1957)).
207. Id. at 142.
208. Id. at 142-43.
210. Clarett III, 369 F.3d at 141.
211. Id.
212. Id. at 142.
213. Id.
eligibility rules . . . ” The Second Circuit summarized Maurice Clarett’s suit as “simply a prospective employee’s disagreement with the criteria, established by the employer and the labor union, that he must meet in order to be considered for employment.” The Second Circuit in *Clarett III*, like the United States Supreme Court in *Brown*, declined to “fashion an antitrust exemption [giving] additional advantages to professional football players . . . that transport workers, coal miners, or meat packers would not enjoy.”

**VII. CONCLUSION**

The court of appeals in *Clarett III* did not deal with *Brown*, as much as it sidestepped it. *Clarett I* changed the rules of discussion by elevating the labor laws to a point that essentially eliminated the use of antitrust as a viable means to effectuate change in professional sports. The *Clarett III* appeals decision ignored *Brown* by using smoke and mirrors. *Brown* did not eliminate antitrust litigation in professional sports, but the *Clarett III* appeals decision effectively did just that; that is, it went against the tenor and philosophy of *Brown*. *Piazza*, on the other hand, takes its cues from *Flood* itself, and is symmetrical, respectful, and obedient to Supreme Court precedence, even if its precedence, in the case of *Flood*, is dubious at best.

---

214. *Id.*
215. *Id.* at 143.