CHAPTER EIGHT
ANTITRUST AND SPORTS:
THE BASEBALL EXEMPTION

This is the first antitrust Chapter following the antitrust primer, and it starts with the earliest cases involving both sports and antitrust. The introductory discussion between Casey Stengel and various United States Senators in 1958 is intended for the amusement of the reader. In addition, it should take the reader back to what it was like to be involved with professional baseball and the major and minor leagues in the first half of the twentieth century.

The first four cases -- Federal Baseball, Toolson, Salerno, and Flood -- chronicle the history and development of the baseball exemption. The final three cases all post-date the Supreme Court's decision in Flood, and concern the scope of the exemption.

The following text addresses Chapter 8 and the Baseball Exemption in two ways. The first part of the text is a hornbook description of the historical development of the baseball exemption, which discusses the cases in the Chapter as part of that development. The second part of the text goes case-by-case through the Chapter, discussing the significance of each case and the notes and questions that follow those cases.

I. THE HISTORICAL DEVELOPMENT OF THE BASEBALL EXEMPTION

The following is a hornbook description/analysis of the baseball exemption:

In a series of cases, the Supreme Court has considered the application of the antitrust laws to professional sports. In Federal Base Ball Club of Baltimore, Inc. v. National League of Professional Base Ball Clubs, the Supreme Court first considered the issue and held that the "business [of] giving exhibitions of base ball" did not constitute interstate commerce, even though the competitions were "arranged between clubs from different cities and States" and the League had to induce and pay for players and other personnel to cross state lines.\(^1\) Accordingly, the Court did not reach the merits of the case, but affirmed the lower court's dismissal of the case.\(^2\) The Court expressed the view that "personal effort, not related to production, is not a subject of commerce," and the exhibitions were not interstate, so neither commerce nor interstate commerce were at issue.\(^3\)

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\(^1\) 259 U.S. 200, 208-09 (1922).

\(^2\) The plaintiff, the only remaining team in baseball's Federal League, had secured an $240,000 verdict after trebling against the National and American Leagues for buying up Federal League teams and inducing teams to leave the Federal League in other ways. On appeal, the Court of Appeals in the District of Columbia had held the antitrust laws inapplicable and entered judgment for the defendants. See 259 U.S. at 208; National League of Professional Baseball Clubs v. Federal Baseball Club of Baltimore, 269 Fed. 681, 688, 50 App. D.C. 165 (D.C. Cir. 1921).

\(^3\) 259 U.S. at 208-09.
Over the next thirty years, the analysis of the *Federal Base Ball* decision was undermined by holdings that the provision of personal services constituted commerce and that the required interstate nexus was much less than was present in baseball's professional leagues. The Supreme Court next considered the application of the antitrust laws to baseball in *Toolson v. New York Yankees, Inc.*, and dismissed several appeals that involved challenges by players against baseball's reserve system. Despite the express holding of *Federal Base Ball* having been that baseball exhibitions did not involve interstate commerce, the *Toolson* majority held that it was affirming based on the authority of the *Federal Base Ball* decision, "so far as that decision determines that Congress had no intention of including the business of baseball within the scope of the federal antitrust laws." The *Toolson* majority also stated that Congress had been aware that the *Federal Base Ball* decision by the Supreme Court had left professional baseball to develop "on the understanding that it was not subject to existing antitrust legislation," and Congress had considered possible responses to that decision; therefore, "if there are evils in this field which now warrant application to it of the antitrust laws it should be by legislation."

The Supreme Court followed the *Toolson* decision with a series of rulings that the antitrust laws did apply to the production of theatrical attractions, championship boxing exhibitions, professional football, and professional basketball. The lower federal courts held that other professional sports were not exempt. Questions were raised about the continued vitality of baseball's exemption and the *Federal Base Ball* and *Toolson* decisions in light of the

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5 346 U.S. at 357.

6 *Id.*


decisions consistently holding that other sports and exhibition businesses were not exempt from antitrust scrutiny.\textsuperscript{12}

The Supreme Court considered the baseball exemption for the third time in 1972, when a major league player, Curt Flood, challenged baseball's reserve system, in particular the requirement that he move from the St. Louis Cardinals to play for the Philadelphia Phillies as a result of an inter-team trade, without any opportunity to review or approve the transfer and assignment of his contract. In \textit{Flood v. Kuhn}, Justice Blackmun authored the majority opinion, which held that the two lower courts that had considered Flood's case had correctly determined that the baseball exemption precluded judicial application of the antitrust laws, both state and federal, to assess the merits of Flood's claims.\textsuperscript{13}

The \textit{Flood} decision made it clear that "professional baseball is a business and it is engaged in interstate commerce" and acknowledged that the affording of an antitrust exemption only to baseball and not to other professional sports is "an anomaly."\textsuperscript{14} Nevertheless, the Court held that the exemption remains confined to baseball.\textsuperscript{15}

The \textit{Flood} majority held that even though baseball's exemption from the antitrust laws might be regarded by some as an aberration, "[i]t is an aberration that has been with us now for half a century, one heretofore deemed fully entitled to the benefit of \textit{stare decisis}, and one that has survived the Court's expanding concept of interstate commerce. It rests on a recognition and an acceptance of baseball's unique characteristics and needs."\textsuperscript{16}

\textsuperscript{12} See, e.g., \textit{Salerno v. American League of Professional Baseball Clubs}, 429 F.2d 1003, 1005 (2d Cir. 1970), cert. denied, 400 U.S. 1001 (1971) (Friendly, J.) ("We freely acknowledge our belief that \textit{Federal Baseball} was not one of Justice Holmes' happiest days, that the rationale of \textit{Toolson} is extremely dubious and that, to use the Supreme Court's own adjectives, the distinction between baseball and other professional sports is 'unrealistic,' 'inconsistent' and 'illogical.' . . . While we should not fall out of our chairs with surprise at the news that \textit{Federal Baseball} and \textit{Toolson} had been overruled, we are not at all certain the Court is ready to give them a happy d[i]spatch.")


\textsuperscript{14} 407 U.S. at 282.

\textsuperscript{15} \textit{Id.}

\textsuperscript{16} \textit{Id.}
The Court held that the baseball exemption remains viable for several reasons. First, for fifty years Congress has allowed professional baseball to develop and expand, and although "[r]emedial legislation has been introduced repeatedly in Congress, . . . none has ever been enacted," thereby evidencing, by "positive inaction," a Congressional intent that the exemption should continue. Second, the majority expressed concern that a "judicial overturning of Federal Baseball" could cause confusion and retroactivity problems. The Court stated that if the exemption is to be changed, it should be by legislative action that "by its nature, is only prospective in operation."

The lower courts in Flood had held that Flood's state antitrust laws were preempted by the federal policy embodied in the baseball exemption and were barred by the dormant Commerce Clause as an undue interference with interstate commerce. The majority cited those portions of the lower court opinions and, on the basis of those statements, affirmed the dismissal of the state antitrust claims.

Since Flood, the reported decisions focusing on the baseball exemption have all confirmed the existence of an exemption, but have focused on defining its scope. In Charles O. Finley & Co., Inc. v. Kuhn, the court interpreted the Supreme Court trilogy (Federal Base Ball, 17 407 U.S. at 283. 18 Id. at 284; 443 F.2d at 268; 316 F. Supp. at 280.
19 407 U.S. at 284-85.
20 569 F.2d 527, 541 (7th Cir. 1978).
(Toolson, and Flood) as three holdings "that 'the business of baseball' is exempt from the federal antitrust laws." The dispute at issue in the case concerned the Commissioner's disapproval of the assignment of three player contracts, and the Finley court held that the Commissioner's conduct was part of the business of baseball and exempt. Other courts held that the scope of the exemption was "the business of baseball" or applied a similar broad formulation in dismissing an antitrust challenge.

In Henderson Broadcasting Corp. v. Houston Sports Ass'n, Inc., Judge McDonald stated that the baseball exemption has a "narrow scope," does not apply to radio broadcasting of baseball, and does not apply to agreements between baseball teams and non-baseball business enterprises. Judge McDonald's opinion suggests the exemption is limited to conduct or agreements that are "central enough to the 'unique characteristics and needs' of baseball," or are a "part of the sport in the way in which players, umpires, the league structure and the reserve system are." 23, 24

23 The only other guidance from the Finley court was that "the business of baseball, not any particular facet of that business," is exempt, but the "exemption does not apply wholesale to all cases which may have some attenuated relation to the business of baseball." 569 F.2d at 541 & n.51.

24 In Professional Baseball Schools and Clubs, Inc. v. Kuhn, 693 F.2d 1085, 1086 (11th Cir. 1982) (per curiam), the United States Court of Appeals for the Eleventh Circuit affirmed the district court's dismissal of an antitrust challenge to the minor league player assignment and franchise location systems and other minor league rules, on the basis that "the exclusion of the business of baseball from the antitrust laws is well established." Similarly, two years before the Supreme Court's decision in Flood, Judge Friendly stated that Federal Baseball and Toolson hold that "professional baseball is not subject to the antitrust laws." Salerno v. American League of Professional Baseball Clubs, 429 F.2d 1003, 1005 (2d Cir. 1970), cert. denied, 400 U.S. 1001 (1971) (Friendly, J.). On that basis, the Second Circuit affirmed the dismissal of antitrust claims filed by two discharged major league umpires. Id.

25 In Portland Baseball Club, Inc. v. Kuhn, 368 F. Supp. 1004, 1007 (D.Or. 1971), aff'd per curiam, 491 F.2d 1101, 1103 (9th Cir. 1974), the district judge and the Ninth Circuit both held that major league baseball's agreement with the minor leagues and the rules about territorial allocation and compensation for territorial infringement were protected by the baseball exemption from federal antitrust challenge.


27 541 F. Supp. at 268-69. In Wisconsin v. Milwaukee Braves, Inc., 31 Wis. 2d 699, 144 N.W.2d 1, 15 (1966), a decision issued prior to the Supreme Court's opinion in Flood, the
The scope of the exemption was also at issue in Postema v. National League of Professional Baseball Clubs, in which the court held that the baseball exemption did not apply to antitrust claims about baseball's employment relations with its umpires. The court followed the Henderson court's analysis, seeking to assess whether the challenged conduct was "central enough to baseball to be encompassed in the baseball exemption." The Postema opinion treated Flood as an opinion limiting the scope of the exemption to baseball's "unique characteristics and needs" and applied that narrow scope to Postema's claims:

Unlike the league structure or the reserve system, baseball's relations with non-players are not a unique characteristic or need of the game. Anti-competitive conduct toward umpires is not an essential part of baseball and in no way enhances its vitality or viability.

799 F. Supp. at 1489.

More recently, the baseball exemption battleground has concerned whether the scope of the exemption is limited to antitrust claims concerning baseball's reserve clause and other issues concerning professional baseball's agreements restricting players' compensation and ability to negotiate freely with a number of professional baseball teams. The conventional wisdom about the scope of the exemption was rejected by Judge Padova in Piazza v. Major League Baseball. In Piazza, Judge Padova first acknowledged that prior to the Supreme Court's opinion in Flood, the scope of the exemption may have been expansive, applying "to the

Supreme Court of Wisconsin held that "the exemption at least covers the agreements and rules which provide for the structure of the organization and the decisions which are necessary steps in maintaining it." The Court held that league and team decisions about relocation of teams and league expansion are exempt. 144 N.W. 2d at 18.


See also Amateur Softball Ass'n of Am. v. United States, 467 F.2d 312, 314 (10th Cir. 1972) ("amateur softball is not entitled to rely on the same unique exemption that organized professional baseball has claimed and achieved for so many years").

'business of baseball' generally, not to one particular facet of the game." However, Judge Padova concluded that the Supreme Court's opinion in *Flood* stripped all prior cases of any precedential value except with respect to the reserve clause -- the conduct at issue in *Flood*.

Judge Padova's opinion did not stop there -- he went on to assess the scope of the exemption if he were wrong and the exemption were not limited to the reserve clause. In making the latter alternative assessment, he reviewed the prior precedents concerning the exemption and generated a list of activities within the exemption if it were more broadly construed:

1. the reserve system, and
2. matters of league structure and a list of non-exempt activities:
   3. the movement of players and their equipment from game to game,
   4. the broadcast of baseball games, and
   5. perhaps, employment relations between organized professional baseball and non-players.

831 F. Supp. at 440. Judge Padova then stated that determining which aspects of league structure are "central. . . to the unique characteristics of baseball exhibitions" or which types of league and team decisions or agreements are part of baseball's league structure are factual questions that could only be decided on the basis of a factual record.

Since *Piazza*, some courts have come to contrary interpretations of the scope of the exemption. For example, in *New Orleans Pelicans Baseball, Inc. v. National Ass'n of Professional Baseball Leagues, Inc.*, the United States District Court for the Eastern District of Louisiana agreed with the Seventh Circuit's interpretation of the scope of the exemption in the

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32 Id. at 435.
33 831 F. Supp. at 435-36.
34 831 F. Supp. at 441. Judge Padova reiterated these latter points in his opinion denying the defendants' request that he certify his decision about the baseball exemption for immediate appeal. *See Piazza v. Major League Baseball*, 836 F. Supp. 269, 271-73 (E.D.Pa. 1993). In his opinion denying certification, Judge Padova conceded that "there is substantial ground for difference of opinion" about the scope of the baseball exemption and whether it is limited to baseball's reserve system. 836 F. Supp. at 271.
Finley case, concluding that the exemption applied generally to the business of baseball, and thereby granted summary judgment dismissing antitrust challenges to territorial allocation rules of the minor leagues.\textsuperscript{35}

One year after Piazza, in \textit{Butterworth v. National League of Professional Baseball Clubs},\textsuperscript{36} the Supreme Court of Florida reversed a lower court and came to the same narrow view of the exemption as Judge Padova did in Piazza,\textsuperscript{37} with only a single judge dissenting. The state trial court had stated, among other things, that "[o]ne area of business activity which has clearly and consistently been considered exempt is the matter of the structure of the league. . . . Decisions concerning ownership and location of baseball franchises clearly fall within the ambit of baseball's antitrust exemption."\textsuperscript{38} The Florida Supreme Court rejected the trial judge's analysis. The Florida Supreme Court acknowledged that "[t]here is no question that \textit{Piazza} is against the great weight of federal cases regarding the scope of the exemption" and even noted the very recent \textit{New Orleans Pelicans} opinion\textsuperscript{39} rejecting \textit{Piazza}.\textsuperscript{40} However, the \textit{Butterworth} court concluded that no other case has engaged in the comprehensive analysis of \textit{Flood} set out in \textit{Piazza}.\textsuperscript{41} \textit{Butterworth} "come[s] to the same conclusion as the \textit{Piazza} court: baseball's antitrust exemption extends only to the reserve system."\textsuperscript{42}

\textsuperscript{35} Civil Action No. 93-253, 1994 WL 631144 at *9 (E.D.La. 1994). The court expressly rejected the "cramped view" of \textit{Piazza}, but described Judge Padova's reasoning as "impressive." \textit{Id. See also McCoy v. Major League Baseball}, 911 F. Supp. 454, 456-57 (W.D. Wash. 1995) ("This Court rejects the reasoning and results of \textit{Piazza} and \textit{Butterworth}. As \textit{Butterworth} recognized, the great weight of authority recognizes that the scope of the antitrust exemption covers the business of baseball") (citations omitted).

\textsuperscript{36} 644 So.2d 1021, 1022, 1025 (Fla. 1994).

\textsuperscript{37} \textit{See also Morsani v. Major League Baseball}, 663 So.2d 653, 655 (Fla.App. 2 Dist. 1995) ("the antitrust exemption for baseball is limited to the reserve clause").

\textsuperscript{38} \textit{Butterworth}, 644 So.2d at 1026 (McDonald, S.J., dissenting), quoting trial judge's order.

\textsuperscript{39} Civil Action No. 93-253, 1994 WL 631144 at *9 (E.D.La. 1994).

\textsuperscript{40} 644 So.2d at 1025.

\textsuperscript{41} \textit{Id.}

\textsuperscript{42} \textit{Id.}
II. CASE-BY-CASE ANALYSIS OF CHAPTER EIGHT

We now turn to an abbreviated case-by-case analysis of the seven main cases and the notes and questions that follow them.

FEDERAL BASE BALL CLUB OF BALTIMORE, INC. V. NATIONAL LEAGUE OF PROFESSIONAL BASE BALL CLUBS

Primary Reason for Inclusion: This is the first Supreme Court decision that dismissed an antitrust challenge directed at professional baseball.

Points to Emphasize:

The opinion is very short. It is of historical interest only, except to the extent that it may inform the subsequent discussion of whether Judge Padova is correct in Piazza.

To start the students thinking about the underlying antitrust claims (not just the exemption issues), N&Q 1 focuses on the theory of the case, which is that the National League and the American League purchased teams in the Federal League and induced other Federal League teams to jump to the American and National Leagues. As a result, the complaint alleged, the Baltimore Team was left without opponents or a league. You might conduct a discussion about what claims the plaintiff could bring -- Section 1 claims, both per se (e.g., group boycott, perhaps horizontal market division) and Rule of Reason (e.g., exclusive dealing), to get the students thinking about and applying what they learned in Chapter 7. In addition, when Judge Padova in Piazza says the Supreme Court in its trilogy of baseball exemption cases was always focusing on the reserve clause, was that true? The reserve clause would have been at issue in Federal Base Ball, but was it the central focus?

Notes and Questions:

The key to the analysis of the Court is also sought in N&Q 1 -- what was the basis of the holding? If the students read carefully, it becomes clear that the Court considered arguments that the plaintiff could not satisfy the interstate commerce requirement of the federal antitrust laws, both because the plaintiff had not challenged activity that was sufficiently interstate in character and because the activity was not commerce, being personal effort. The Court seemed to accept both of these arguments, but certainly accepted at least one of them, holding that the activity was not interstate commerce. N&Q 5 asks whether there is a significant difference between the two theories about why baseball did not constitute interstate commerce.
N&Q 4 focuses on something that is often said, in error, about the Supreme Court's decision in *Federal Base Ball* -- that the Court held that baseball was a sport, not a business. In fact, the Court of Appeals in *Federal Base Ball* said something very similar -- that baseball games "are still sport, not trade." The Supreme Court does speak positively about specific parts of the decision of the Court of Appeals ("we are of the opinion that the Court of Appeals was right"), and does note the defendants' argument that "personal effort, not related to production, is not a subject of commerce." However, its holding technically concerns the interstate commerce requirement and does not include the statement oftentimes attributed to it.

N&Q 3 quotes from the plaintiff’s brief, which makes a point that is even more true today – major professional sports leagues are more fundamentally interstate businesses than just about any other business. It is perhaps ironic that baseball’s antitrust exemption originated with the idea that baseball did not involve interstate commerce.

N&Q 6 foreshadows the subsequent decisions, all of which held other sports subject to the antitrust laws, asking whether there is any basis for reaching a different result in those cases.

**TOOLSON V. NEW YORK YANKEES, INC.** (pages 303-306)

**Primary Reason for Inclusion:** This is the Second Supreme Court decision considering whether the federal antitrust laws apply to professional baseball and it reaches the same outcome as *Federal Base Ball*, but with different reasoning.

**Points to Emphasize:**

The Court’s opinion is extremely short -- six sentences in a single paragraph. The key discussion point is raised in N&Q 1 -- the *per curiam* majority affirmed *Federal Base Ball* "so far as that decision determines that Congress had no intention of including the business of baseball within the scope of the federal antitrust laws," but of course the *Federal Base Ball* opinion said no such thing. You could discuss with your students the meaning of a *per curiam* decision (*per curiam* means "by the court," and is used to distinguish an opinion issued by the whole court or all of the judges who join in the opinion, rather than by a specific judge), which are used in a variety of circumstances, and some say are used when no judge wants his or her name associated with the decision.

If one wants to work hard to say the majority is correct, one could say that Holmes in *Federal Base Ball*, when he said that baseball was not interstate commerce, was saying that under the terms of the federal antitrust statutes issued by Congress, they did not mean...
to address anticompetitive practices in baseball, because they did not consider baseball to be commerce or to be interstate in nature. In that way, you could say that *Federal Base Ball* was about congressional intent, and could thereby defend what the majority said in *Toolson*. However, when Congress passed the Sherman Act in 1890 and the Clayton Act in 1914, they did not consider the question of whether baseball exhibitions might become interstate commerce, they could not anticipate the development of a great many products and services, and courts have generally not hesitated to conclude that competitive activity concerning new products and services is subject to antitrust review. Basically, the Supreme Court majority knew that it could no longer say, consistent with its other decisions, that professional baseball was not interstate commerce, and for that reason, when it decided to hold baseball exempt, it "re-construed" the Court's previous decision in *Federal Base Ball*.

**Notes and Questions:**

N&Q 1 considers the significance of congressional inaction and whether that is a basis for attributing to Congress and intent to continue the exemption acted in *Federal Base Ball* and *Toolson*.

N&Q 2 is intended to draw attention to the fact that the dissent does not really attack the majority opinion, but restates the majority opinion to say what it does not say (that baseball is still not interstate commerce) and then knocks that straw man down. We have included portions of the dissent to give the students some understanding of the state of the business of baseball as of 1953.

N&Q 3 asks students to consider how *Salerno*, the case that follows *Toolson*, can be reconciled with the prior Supreme Court decisions. This lead-in may cause students to consider the role of lower federal courts. Should a lower court rule contrary to Supreme Court precedent in anticipation of a change in the Supreme Court’s views, or follow prior precedent and wait patiently for Supreme Court direction?

**SALERNO v. AMERICAN LEAGUE OF PROFESSIONAL BASEBALL CLUBS**

*pages 306-307*

**Primary Reason for Inclusion:** This case is also quite short, and is included to set the stage for *Flood* -- to give the students the idea that a very learned judge, Judge Henry Friendly of the Second Circuit, had considered the issue and said both (1) that the creation of the baseball exemption was not a great moment in Supreme Court history and (2) that he was not certain the Supreme Court was ready to terminate the exemption.
Points to Emphasize:

It is an opinion that expresses the view that lower courts should wait for the Supreme Court to overrule its decisions except in exceptional cases. That portion of the opinion can be the basis for a discussion about the question of whether lower courts should follow the Supreme Court, try to anticipate what the Supreme Court is likely to do, or lead the way for the Supreme Court to review later. That topic can be revisited, as you discuss whether Judge McDonald (Henderson Broadcasting) and Judge Padova (Piazza) did what Judge Friendly says they should do.

Notes and Questions:

The notes and questions that follow Salerno start to cultivate parallels and cross-references between ideas from antitrust law and ideas from labor law. N&Q 2 explores the decision by the NLRB to refuse to exercise jurisdiction over employees in the horse racing industry, for a number of policy reasons that are alluded to in the note.

N&Q 3 is intended to foreshadow the analysis of Flood v. Kuhn. Was Justice Blackmun writing a scholarly legal precedent or an ode to baseball?

FLOOD V. KUHN (pages 307-326)

Primary Reason for Inclusion: This is the most recent pronouncement of the Supreme Court concerning the existence and scope of the baseball antitrust exemption.

Points to Emphasize:

The text above explains the analysis and holding of Flood v. Kuhn. Some of the primary issues in the decision are:

A. The decision clears up the issue of what the Court says are and are not the current theoretical underpinnings of the exemption.

1. The interstate commerce requirement is no longer a basis for the baseball exemption. The majority makes it clear that "professional baseball is a business and it is engaged in interstate commerce."

2. The exemption for baseball alone is difficult to defend. The majority opinion acknowledges that the affording of an antitrust exemption only to baseball and not to other professional sports is "an anomaly."
Nevertheless, the Court held that the exemption remains confined to baseball because even though baseball's exemption from the antitrust laws might be regarded by some as an aberration, "[i]t is an aberration that has been with us now for half a century, one heretofore deemed fully entitled to the benefit of stare decisis, and one that has survived the Court's expanding concept of interstate commerce. It rests on a recognition and an acceptance of baseball's unique characteristics and needs." The Court's analysis of stare decisis is arguably directly contrary to its 1970 decision in Boys Market, which is discussed in N&Q 2. How does this concept of stare decisis relate to the concept in Salerno about lower courts waiting for the Supreme Court to correct its own erroneous prior decisions?

The decision states that the baseball exemption remains viable for several reasons.

a. For fifty years Congress has allowed professional baseball to develop and expand, and although "[r]emedial legislation has been introduced repeatedly in Congress, . . . none has ever been enacted," thereby evidencing, by "positive inaction," a Congressional intent that the exemption should continue. This issue is explored in N&Q 1.

b. The majority expressed concern that a "judicial overturning of Federal Baseball" could cause confusion and retroactivity problems.

c. The Court stated that if the exemption is to be changed, it should be by legislative action that "by its nature, is only prospective in operation."

B. The Court holds that the baseball exemption bars state antitrust claims, as well as federal antitrust claims. The lower courts in Flood had held that Flood's state antitrust laws were preempted by the federal policy embodied in the baseball exemption and were barred by the dormant Commerce Clause as an undue interference with interstate commerce. The majority cited those portions of the lower court opinions and, on the basis of those statements, affirmed the dismissal of the state antitrust claims. This issue is explored in N&Q 3.

Notes and Questions:

N&Q 1 alludes to one reason the anomalous baseball exemption has survived over more than sixty years. Major League Baseball players (not much of a lobbying force) are about the only ones likely to benefit from elimination of the exemption. Therefore, this is a particularly inappropriate circumstance to infer much of anything from congressional inaction.
N&Q 2 simply provides information about the Boys Market case, discussed in Flood, which was decided only two years before Flood.

N&Q 3 is intended to highlight the bizarre holding in Flood concerning state antitrust law. Contrary to ordinary antitrust law, congressional inaction is interpreted as preempting state antitrust law! Usually preemption requires a congressional legislative scheme that “occupies the field” and leave no room for state involvement. Can that be said about Congress’s failure to take any action concerning baseball?

The introductory portions of the opinion, which discuss the history of baseball and list famous former players, raise questions about the attitude or preconceptions that the justices brought to the case, and the way the case was handled by the justices. Those questions have been fueled by the description of the deliberative process of the Supreme Court in the case, which appears in The Brethren by Bob Woodward & Scott Armstrong and is excerpted in N&Q 4.

N&Q 3 that follows the Salerno case and N&Q 4 after Flood can be the basis for a discussion about the influence of jurists' views about sports on litigation involving those sports. This issue is similar to the concern that jurists will be unable to perceive how to apply antitrust analysis that is usually applied to more traditional businesses to the business of a professional sport. The latter issue is the subject of N&Q 1 on page 467 that follows the Volvo case in Chapter 10. The class discussion of this issue that follows Flood can be revisited when you reach page 467.

HENDERSON BROADCASTING CORP. v. HOUSTON SPORTS ASS'N, INC.  
(pages 326-333)

Primary Reason for Inclusion: Post-Flood case that addresses the scope of the baseball exemption.

Points to Emphasize:

Henderson was decided ten years after the Supreme Court's decision in Flood. The district judge in Henderson was faced with the task of deciding not whether there is a baseball exemption, but the scope of the baseball exemption.

One issue to discuss about the case is the underlying allegation of an antitrust violation. The team decided to cancel its radio station contract and to only contract with station KENR, not the plaintiff, to broadcast Houston Astros games on the radio. How would you argue
that the defendants' conduct violates the antitrust laws if it is not exempt? HINT: The plaintiff alleged the conduct constituted horizontal market division, but it appears to be exclusive dealing. What is the relevant market? What are the anticompetitive effects on a relevant market of the challenged conduct? It is difficult to see any likely substantial anticompetitive effects in any relevant market of having one, instead of two, stations broadcast Astro games on the radio.

Some of the primary points to focus upon are the three-pronged basis for the court's holding: (1) broadcasting is not a central aspect of the business of baseball, and is therefore not exempt, (2) to the extent that the exemption is based on congressional inaction, there has been congressional action with respect to sports broadcasting -- the Sports Broadcasting Act of 1961 and 1966 discussed in Chapter 7, and that statute fails to exempt the conduct at issue in Henderson, and (3) the baseball exemption has not been applied by lower federal courts in cases involving contracts with non-exempt entities, such as a radio station. With respect to the last prong, footnote 8 of the opinion, found on page 332 of the text, states that the Court accepted the plaintiff's argument that exempt baseball businesses lose the exemption when they combine with entities that are not exempt.

In Henderson, Judge McDonald, foreshadowing the Piazza decision, stated that "[t]he baseball exemption arose and has been applied by the courts solely in disputes between players and team owners or a league." N&Q 1 asks whether that is true. Consider Federal Baseball -- wasn't that a claim by a team against other teams and leagues? In addition, Toolson was an affirmance of several decisions, and the substance of some of those cases is referenced in the opinion. Toolson includes the following statement:

"Similarly, in No. 25, the plaintiffs allege that because of illegal and inequitable agreements of interstate scope between organized baseball and the Mexican League binding each to respect the other's 'reserve clauses' they have lost the services of and contract rights to certain baseball players."

That certainly sounds by a claim by competing teams. "[T]he plaintiffs . . . have lost the services of . . . certain baseball players." The plaintiffs must be employers of players and the defendants are not the players, but rather are teams and leagues.

Judge McDonald seems to consider it important that in response to an antitrust counterclaim by a baseball team against its concessionaire, the defendant concessionaire did not raise the baseball exemption as a defense. Similarly, in an antitrust case involving the Major League Baseball Players Association ("MLBPA") and baseball cards, the defendant MLBPA did not raise the baseball exemption as a defense. N&Q 2 asks about the limited precedential significance of the failure by a party to raise a defense that might have been available.
particular, how likely would it be that the MLBPA would support an affirmance and possible extension of the baseball exemption?

N&Q 3 and 4 ask about the implications of the analysis as applied to other aspects of the businesses of baseball, broadcasting, and softball. N&Q 5 asks whether is consistent with or is a district judge working hard to undermine or limit the Supreme Court's decision.

**PIAZZA v. MAJOR LEAGUE BASEBALL** (pages 333-344)

**Primary reason for Inclusion:** Most important post-baseball exemption decision; major effort to limit scope of the exemption.

**Points to Emphasize:**

The analysis of *Piazza* is described in detail above.

*Piazza* is a very important decision. The primary antitrust concerns of baseball are, not necessarily in this order, (1) player issues (restrictions on free agency, amateur player draft, etc.), (2) minor league-major league agreement and overall minor league system, (3) league restrictions on franchise relocation, and (4) other intra-league rules, such as restrictions on ownership, revenue sharing, exclusive local television territories, etc. If the primary holding of *Piazza* is correct, all except player issues will be subject to antitrust challenge. As Chapter 9 explains, given the Supreme Court's decision in *Brown v. Pro-Football, Inc.*, as long as the MLBPA remains the collective bargaining representative of major league players and does not de-certify as a labor union, legal challenges involving player issues will be resolved under the labor laws, not the antitrust laws. See, e.g., N&Q 5 following the *Butterworth* case (page 347) and N&Q 7 following the D.C. Circuit's decision in *Brown* (page 399). Therefore, the continuing significance of the baseball exemption would be extremely limited.

If *Piazza*’s primary holding is rejected, its secondary holding would require a case-by-case assessment, after factual development, of whether the minor leagues, franchise relocation, revenue sharing, and restrictions on ownership are matters of "league structure" or whether the markets they affect are "central to the unique characteristics and needs of baseball exhibitions." The alternative would be for judges to decide whether challenged conduct is part of the "business of baseball" to a sufficiently significant extent to be exempt from antitrust scrutiny.

**Notes and Questions:**

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N&Q 1 asks whether Judge Padova was trying to apply the letter and the spirit of *Flood* or whether he was working very hard to construe the exemption as narrowly as possible. N&Q 2 asks whether *Piazza* and its analysis of *stare decisis* is correct.

The strangest portion of the *Piazza* analysis is the attempt to tie the scope of the exemption to analysis of relevant markets. It is very unusual for an antitrust exemption to be defined with reference to the market that would be at issue if there were no exemption. The idea of an exemption generally is that the industry or activity is exempt, and for that reason there is no need to focus on the market at issue. This issue is explored in N&Q 3 and 4.

In the minds of some, the baseball exemption is linked to the idea that Major League Baseball has an independent Commissioner who will safeguard the sport. In all fairness, the idea that an independent Commissioner, if there ever was one, would be a substitute for application of the antitrust laws, is a very strange concept. Similarly, the idea that a sport should lose its antitrust exemption if it fails to appoint an independent Commissioner is, at best, unusual. What does it mean that the Commissioner is independent? Nevertheless, those views have been expressed by members of Congress and they are the focus of N&Q 7. The exploration of the issues related to the independence of the Commissioner can be revisited at this point.

**BUTTERWORTH v. NATIONAL LEAGUE OF PROFESSIONAL BASEBALL CLUBS**

(pages 344-348)

**Primary Reason for Inclusion:** This case and the notes and questions explore the world of the baseball exemption post-*Flood*. Points to Emphasize: The majority, concurrence, and dissent all explore the questions of whether *Piazza* is correct, and if so, what remains exempt after *Piazza*. The notes and questions also identify some of the other post-*Flood* decisions that applied or refused to apply the baseball exemption to various aspects of baseball or related sports.

**Notes and Questions:**

Some students may wonder how MLB's liability for "collusion" relates to the antitrust laws. The answer is that it does not, except to the extent that the players, unable to pursue antitrust claims, negotiated for antitrust-like remedies in their collective bargaining agreement with the teams. N&Q 4 explains that there is no cause of action for "collusion," but that the players had a right to pursue a claim, in arbitration, based on their allegation that the owners had violated the anti-collusion provisions in the collective bargaining agreement ("CBA") that were negotiated by the MLBPA and Major League Baseball. The CBA provided for treble damages (modeled after the antitrust laws) to the players if they could prove that the owners had colluded to keep salaries low or to restrict movement.
N&Q 7 asks the students to apply what they know about the baseball exemption to the lawsuit filed by George Steinbrenner and the New York Yankees against Major League Baseball. The Yankees lawsuit certainly does not concern player restraints, and if the primary holding of *Piazza* is accepted, the baseball exemption would not be a hurdle. If either the alternative *Piazza* holding or the "business of baseball" standard is applied, the analysis must focus on whether sponsorship agreements are sufficiently central to the business of baseball to render them exempt. Is sponsorship similar to broadcasting or concessions, as peripheral economic activities that are associated with baseball but are not central to league structure or baseball operations? In addition, under *Henderson*, does the agreement between MLB and non-exempt sponsors eliminate any claim to an exemption?