Can Congress Squeeze the "Juice" Out of Professional Sports? The Constitutionality of Congressional Intervention into Professional Sports' Steroid Controversy

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I. INTRODUCTION

In June of 2003, a Pandora's Box of controversy was opened which has yet to be closed.[1] The U.S. Anti-Doping Agency received a package from an anonymous track and field coach containing a used syringe.[2] After testing, the syringe was found to contain a hybrid steroid cocktail that was previously not detectable by drug-testing procedures.[3] The anonymous coach claimed the steroid[4] was being supplied to athletes by Victor Conte, president of the Bay Area Laboratory Cooperative ("BALCO").[5] This information prompted an investigation into BALCO by the Department of Justice and the Internal Revenue Service,[6] which, coupled with the release of former professional baseball player Jose Conseco's book *Juiced*,[7] exposed several high-profile

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[1] Though the use of steroids has a long history in many different sports, see Maxwell J. Mehlman, Elizabeth Banger, & Matthew M. Wright, *Doping in Sports and the Use of State Power*, 50 ST. LOUIS U. L.J. 15, 17–21 (2005), this Note will deal exclusively with the recent steroids scandal plaguing MLB and the NFL.

[2] *See* Mark Zeigler, *Anatomy of a Drug Investigation*, SAN DIEGO UNION-TRIB., Nov. 2, 2003, at C7.

[3] *See id.*

[4] For purposes of this Note and unless otherwise specified, the term steroid is meant to include anabolic-androgenic steroids and nutritional supplements that have or may have the same effect as steroids.

[5] *See* Zeigler, *supra* note 2; *see also* Jeffrey Kluger, *The Steroid Detective*, TIME, Mar. 1, 2004, at 60.

[6] *See* David K. Osei, Note, *Doping, Juicing, and Executive Bypass Oversight: A Case Study of Major League Baseball's Steroid Scandal*, 4 VA. SPORTS & ENT. L.J. 155, 156–57 (2004).

[7] *See Countdown* (MSNBC television broadcast Feb. 14, 2005) (stating that Conseco pegged Mark McGwire, Jason Giambi, Juan Gonzalez, Rafael Palmeiro, and Ivan

athletes to public scrutiny and criminal and congressional questioning regarding possible steroid use.[8] Major League Baseball ("MLB") has seen former heroes such as Jason Giambi, Jeremy Giambi, and Gary Sheffield haled before grand juries,[9] while Congress has taken testimony from Rafael Palmeiro, Jose Conseco, and home-run king Mark McGwire.[10] Potential Hall of Famer Barry Bonds has been in the middle of the controversy as well, serving as a link between many other players and BALCO.[11] The National Football League ("NFL") also saw players brought before grand juries to testify about steroid use, including four former Oakland Raiders: Bill Romanowski, Barret Robbins, Chris Copper, and Dana Stubblefield.[12]

In 2006, both MLB and the NFL garnered more press coverage, bringing steroid usage back to the forefront. MLB Hall of Fame ballots baring the name of McGwire prompted a serious debate as to whether or not possible steroid use should bar induction of an otherwise likely Hall of Famer.[13]

The NFL saw two steroids stories break, confirming that the problem with steroids is not only an MLB problem.[14] San Diego Chargers linebacker

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Rodriguez, as well as others, as steroid users); *see also* Baird Helgeson, *Committee Passes Statewide Testing for Use of Steroids*, TAMPA TRIB., Mar. 31, 2005, Metro, at 1 (noting that, in *Juiced*, Conseco claimed to have used steroids and injected Mark McGwire with steroids).

[8] *See* Ian Bishop & Bill Sanderson, *Home-Run Hero Bats a Big Zero: McGwire Refuses to Come Clean*, N.Y. POST, Mar. 18, 2005, at 6; Helgeson, *supra* note 7.

[9] *See* John Crumpacker & Mark Fainaru-Wada, *Sports and Drugs: Star-Studded Day for the Grand Jury*, S.F. CHRON., Dec. 12, 2003, at C1.

[10] *See* Bishop & Sanderson, *supra* note 8.

[11] *See* Crumpacker & Fainaru-Wada, *supra* note 9.

[12] *Id.*

[13] *See* Rick Hummel, *Lost in the Shadow*, ST. LOUIS POST-DISPATCH, Jan. 4, 2007, at D1 (observing that there was "more buzz" about McGwire not getting into the Hall of Fame than about Tony Gwynn and Cal Ripken, Jr. being voted in); Michael Hunt, *A Certain Hall of Fame Ballot Won't Have McGwire's Name Checked*, MILWAUKEE J. SENTINEL, Dec. 3, 2006, at C1 (noting that, though McGwire has outstanding statistics, seventy-five percent of Hall of Fame voters have stated they will not vote for McGwire); Tony Massarotti, *Covering All Bases; Goin' Out with a Bang*, BOSTON HERALD, Dec. 31, 2006, at B33 (stating that, due to steroid use, McGwire is "not getting in this time and he may not get in ever").

Though he has not tested positive for steroids, Barry Bonds was reported to have failed a test for amphetamines, a performance-enhancing drug prohibited by MLB's "Program," explained *infra* Part II.B. *See* T.J. Quinn with Bill Madden, *Failure Leaves a Testy Barry, Passes Blame to Teammate*, DAILY NEWS (N.Y.), Jan. 11, 2007, at 57. Though not the focus of this Note, there are many substances besides steroids that are prohibited by both MLB and the NFL. *See infra* notes 44, 76 (providing sources for complete lists of prohibited substances).

[14] *See generally* Phil Taylor, *Seeing is Believing: There's Cheating in All Pro Sports—If You Look Closely*, SI.COM, Oct. 25, 2006, http://sportsillustrated.cnn.com/

sensation Shawne Merriman, former Rookie Defensive Player of the Year and candidate for Defensive Player of the Year in 2006, tested positive in October for steroids.[15] Perhaps more shocking was the news coverage over the non-detected steroid use by the 2003 National Football Conference Champion Carolina Panthers. James Shortt, a South Carolina doctor, pleaded guilty to conspiracy to distribute steroids and human growth hormone ("HGH") to Panthers players.[16] Evidence was produced showing that five players extensively used steroids during the 2002 season,[17] but the NFL did not detect the use.[18] This egregious mistake by the NFL may lead to a new round of congressional investigations into doping in professional sports now that Democrats have retaken control of the House of Representatives.[19]

The summer of 2007 saw more steroid stories break. HGH took center stage, as MLB Commissioner Bud Selig admitted that his sport could not control use of the illegal drug.[20] The NFL suspended player Rodney Harrison of the New England Patriots, a fourteen-year veteran, for four games after he admitted to using HGH to prosecutors who linked him to a clinic supplying HGH.[21] That same investigation led to a five-game suspension for Dallas Cowboy quarterbacks coach Wade Wilson when an order he placed with the clinic was discovered.[22] The same investigation has also linked MLB player Rick Ankiel to HGH use.[23] It appears this investigation will uncover more MLB and NFL player use.[24]

The release of the Mitchell Report in December 2007 illustrated just how widespread steroid use, specifically HGH use, is in major league baseball and

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2006/writers/phil_taylor/10/25/merriman/index.html (noting that steroids are likely as big a problem in the NFL as in the MLB, though the NFL receives less media coverage on the matter).

[15] *See id.*

[16] *See* Evan Weiner, *Incoming Congress May Tackle Several Sports Issues*, N.Y. SUN, Jan. 4, 2007, at 18.

[17] *See* Taylor, *supra* note 14.

[18] *See* Weiner, *supra* note 16.

[19] *See id.* (noting that Rep. Henry Waxman, a Democrat from California and new chair of the House Committee on Government Reform, indicated in late summer 2006 that he was interested in beginning a new round of congressional hearings).

[20] *See* Mike Berardino, *Selig's Struggling in his Quest to Corral HGH*, S. FLA. SUN-SENTINEL, July 14, 2007, at Sports.

[21] *See* Brendan J. Lyons, *Steroids Raid Still Reverberating: Six Months After Florida Arrests, Probe Snares Pro Athletes, Nets Cash Seizures*, TIMES UNION (Albany, N.Y.), Sept. 17, 2007, at A1.

[22] *Id.*

[23] *See* T.J. Quinn, *Baseball Wants Names; Offers to Help Drug Probe if it Can Get Names Before Media*, TIMES UNION (Albany, N.Y.), Sept. 11, 2007 at B1.

[24] *See id.*

how detrimental public knowledge of such use is to a player's career. The Report, commissioned by Commissioner Selig, stated that Andy Pettitte and future Hall-of-Famer Roger Clemens both used HGH during their careers.[25] Both players are pitchers,[26] demonstrating that steroid use is not limited to power hitters. After the report was released, Pettitte admitted using HGH in both 2002 and 2004.[27] Clemens denied the allegation, leading to a Congressional hearing and a perjury investigation by the FBI.[28] Clemens is quickly becoming "baseball's scarlet letter"[29]—his "personal services contract" with the Houston Astros[30] and his future hall-of-fame status may be in danger.[31]

Both the NFL and MLB have offered to help identify players who have ordered illegal steroids from the Florida clinic,[32] but this willingness to ferret-out HGH use may be only a façade. Though both organizations stated publicly that they are interested in preventing HGH use, prevention will only be possible only with an HGH test.[33] Previously, there was no test for HGH; however, a new blood test should be ready to be used by the end of 2007.[34]

One would think that such a test would be warmly embraced by organizations that are committed to cleaning up their sports. That does not

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[25] *See* Bob Hohler, *A Long, Star-Studded Drug Roster: Enhancement Use Tainted All Teams, Sweeping Report Says 'Steroids era' Blamed on a Collective Failure*, BOSTON GLOBE, Dec. 14, 2007, at A1.

[26] *See id.*

[27] *See* Mark Feinsand, *Andy Situation is a No-Win*, DAILY NEWS (N.Y.), Feb. 29, 2008, at 74.

[28] *See id.* The evidence of Clemens' steroid use in the Mitchell Report comes from the testimony of Clemens' former trainer, Brian McNamee. *See* Hohler, *supra* note 25. McNamee claimed to have injected Clemens with HGH himself. *See Substance Abuse and Perjury; Dark Cloud over Roger Clemens Reminds That Perjury Is a Serious Charge*, MORNING CALL, Mar. 4, 2008, at A12. After Clemens denied use, Andy Pettitte, a good friend of Clemens, stated in a deposition that Clemens admitted to Pettitte that he used HGH. *See* Feinsand, supra note 27. Clemens claims that Pettitte "misremembered" the event. *Id.* Pettitte will likely be "dragged into" the pending FBI investigation in Clemens. *Id.*

[29] *See* Christian Red, *Suddenly, Rocket Launches Self Home*, DAILY NEWS (N.Y.), Mar. 1, 2008, at 46.

[30] *See id.* (reporting that, though Astros owner Drayton McLane currently states he will "honor the [personal services] contract," Clemens' absence from the Astros' minor-league complex suggests that the Astros are "distancing themselves" from Clemens).

[31] *See* Hohler, *supra* note 25 (stressing that Mark McGuire was not admitted to the Hall of Fame "amid suspicion of steroid use" and that Clemens may face a similar fate).

[32] *See* Quinn *supra*, note 23.

[33] *See* Mike Reiss, *HGH Isn't Put to the Test: WADA Official Takes Issue with NFL Stance*, BOSTON GLOBE, Sept. 9, 2007, at C6.

[34] *Id.*

appear to be the case. The NFL and the NFL Players' Association have already stated that they will not use a blood test.[35] Commissioner Roger Goodell has stated that "players don't feel strongly enough about" HGH to submit to blood testing.[36] It appears that the new great steroid threat will not be willingly combated by professional sports organizations. The use of steroids by professional athletes not only raises issues regarding the integrity of sports or the health of athletes, it also has ramifications for the youth of America. Congressional findings have shown that the use of steroids is escalating in high school as well, with the role-model status of professional athletes influencing use among America's children.[37] Even President Bush, in his 2004 State of the Union Address, spoke to the effect of professional athlete use of steroids on children:

> To help children make right choices, they need good examples. Athletics play such an important role in our society, but, unfortunately, some in professional sports are not setting much of an example. The use of performance-enhancing drugs like steroids in baseball, football, and other sports is dangerous, and it sends the wrong message—that there are shortcuts to accomplishment, and that performance is more important than character.[38]

The issue has made professional steroid use relevant not only to sports fans and supporters, but also to those looking out for the well being of children.

The possibility of new congressional action[39] on this matter is the central focus of this Note. Should Congress be involved in the steroid controversy? If Congress does indeed attempt to help stem the tide of drug use in professional sports, what can Congress constitutionally do? More specifically, can Congress mandate a drug-testing scheme that would be more successful than the steroid-testing policies already in place in MLB and the NFL and, if so, would such a policy violate the Fourth Amendment's protection against unreasonable searches and seizures? Part II of this Note

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[35] *Id.*

[36] *Id.* As explained in Part III, *infra*, players have incentives to keep drug testing to a minimum. The lack of satisfactory drug-testing policies in MLB and the NFL can be partially attributed to player opposition to specific types of testing. *See infra* Part II.

[37] *See* Clean Sports Act of 2005, S. 1114, 109th Cong. § 2 (2005); *see also infra* notes 269–70 and accompanying text.

[38] President George W. Bush, State of the Union Address (Jan. 20, 2004), *available at* http://www.whitehouse.gov/news/releases/2004/01/20040120-7.html.

[39] Congress's ability to intervene in this matter and mandate testing requirements stems from its power under the Interstate Commerce Clause of the Constitution. *See* Matthew J. Mitten, *Drug Testing of Athletes—An Internal, Not External, Matter*, 40 NEW ENG. L. REV. 797, 805 (2006).

provides an overview of the current drug-testing policies of MLB and the NFL. Part III explores incentives on both sides of the collective bargaining table[40] that lead to weak steroid-testing policies Part III also addresses whether Congress is in a better position to mandate tough policies, and concludes that Congress should intervene. Part IV tackles the complex question of the constitutionality of such congressional intervention by reviewing the jurisprudence of the "special needs" doctrine of the Fourth Amendment and applying it to the current steroid issue, using the Clean Sports Act of 2005 and the Drug Free Sports Act as examples. Part IV concludes that congressionally-mandated steroid testing would be unconstitutional. Part V then recommends a possible strategy for Congress to reduce doping in professional sports and among the youth of America, concluding that Congress should focus its efforts on increased testing and education of middle and high school students—something that can be done constitutionally—while offering tax incentives to professional sports organizations and owners in order to incentivize this side of the bargaining table to fight for tougher policies.

II. CURRENT DRUG-TESTING POLICIES OF MLB AND THE NFL

A. *NFL Steroid Testing Policies*

In 1987, the NFL was the first professional sports organization to initiate a drug-testing program.[41] Actual testing began in 1989, with the current program beginning in 1993.[42] This program is regarded as the most extensive and comprehensive in major American professional sports.[43] The NFL instituted the program for three reasons: 1) steroids and other substances threaten the integrity and fairness of professional football; 2) steroids have adverse health effects; and 3) the use of steroids by professional athletes sends a negative message to the youth of America.[44] No NFL player is

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[40] Both MLB and the NFL are unionized organizations that follow collective bargaining agreements. *See* Lisa Pike Masteralexis, *Drug Testing Provisions: An Examination of Disparities in Rules and Collective Bargaining Agreement Provisions*, 40 NEW ENG. L. REV. 775, 775–76 (2006).

[41] *See id.* at 780.

[42] *See Interview with General Counsel Adolpho Birch on the NFL's Drug Policy*, 5 VAND. J. ENT. L. & PRAC., Winter 2002, at 6.

[43] *See* Allan H. "Bud" Selig & Robert D. Manfred, Jr., *The Regulation of Nutritional Supplements in Professional Sports*, 15 STAN. L. & POL'Y REV. 35, 54 (2004) ("The NFL has the most comprehensive drug-testing policy of the four major sports.").

[44] NAT'L FOOTBALL LEAGUE, POLICY ON ANABOLIC STEROIDS AND RELATED SUBSTANCES 1–2 (2007) (hereinafter NFL POLICY), *available at* http://www.nflpa.org/pdfs/RulesAndRegs/BannedSubstances.pdf.

allowed to use any anabolic-androgenic steroid,[45] human or animal growth hormone, listed stimulant, or other similar substance.[46] The text below outlines the process by which players are tested for such substances.

1. *Administration of Testing*

The NFL steroid-testing program is directed by the NFL Advisor on Anabolic Steroids and Related Substances ("Advisor") who has "sole discretion to make determinations regarding steroid-related matters, including . . . testing."[47] The Advisor also has the duty of making himself available to players and team doctors for consultations and to ensure that education on steroid issues is being developed.[48] All testing is done by urine analysis.[49] The sample is given under observation, and players are not informed until the day of the test that they will be tested.[50]

2. *Circumstances That Permit Testing*

The NFL has six types of steroid testing: "pre-employment," "annual/preseason," "regular season," "postseason," "off-season," and "reasonable cause testing for players with prior positive tests or under other circumstances" ("reasonable cause").[51] "Pre-employment" testing may be done on free agents, both rookies and veterans, and any player who is eligible for the NFL draft.[52] "Annual/preseason" testing is done on all players at least once a season, during training camp, or when the player reports to his

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[45] An anabolic steroid is defined as: "any of a group of usually synthetic hormones that are derivatives of testosterone, are used medically especially to promote tissue growth, and are sometimes abused by athletes to increase the size and strength of their muscles and improve endurance." MERRIAM-WEBSTER'S ONLINE DICTIONARY, http://www.webster.com/dictionary/anabolicsteroid (last visited Apr. 20, 2008).

[46] Paul A. Fortenberry & Brian E. Hoffman, *Illegal Muscle: A Comparative Analysis of Proposed Steroid Legislation and the Policies in Professional Sports' CBAs that Led to the Steroid Controversy*, 5 VA. SPORTS & ENT. L.J. 121, 123 (2006). For a complete list all of all substances banned by the NFL, see NFL POLICY, *supra* note 44, at 13–16.

[47] NFL POLICY, *supra* note 44, at 2.

[48] *Id.* The Advisor is also required to "participate in research on steroids; confer with the Consulting Toxicologist; and serve on the League's Advisory Committee on Anabolic Steroids and Related Substances." *Id.* at 2–3.

[49] *Id.* at 3.

[50] *Id.* at 4 (referring to the collecting of urine samples for analysis).

[51] *Id.* at 3–4.

[52] *Id.* at 3 ("Pre-employment tests may be administered to free agent players (whether rookies or veterans). In addition, the League will conduct tests at its annual timing and testing sessions for draft-eligible football players.").

respective team.[53] Random testing of players during the weeks of preseason games also falls under this type of testing.[54] "Regular season" tests include testing players from each team randomly selected by the Advisor using a computer program.[55] There is no cap on the number of times the same player may be randomly selected for this testing and no guarantee that all players will at some point be randomly tested.[56] "Postseason" tests are an extension of the random testing system used in the regular season, but it only applies to teams that are participating in the postseason and only until a team is eliminated from the postseason.[57] Under "off-season" testing, the Advisor can choose to test up to six times from a pool of all players who are currently under contract.[58] Players are chosen for testing in the same random way test subjects are chosen for "regular season" testing.[59]

"Reasonable cause" testing, the most extensive form of testing in the NFL, allows the Advisor to test a player who has a history of steroid use in college or the pros as often as the Advisor sees fit, both during the season and the off-season.[60] It also allows for the testing of players when the Advisor has information that causes him to reasonably suspect a player of steroid use.[61] A team may require a player to undergo "reasonable cause" testing if both the team physician and the Advisor agree that the course of action is appropriate.[62]

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[53] NFL POLICY, *supra* note 44, at 3.

[54] *Id.* ("[R]andom testing will be conducted during the weeks in which preseason games are played.").

[55] *See id.*

[56] *See id.* at 3–4 (stressing that players can be tested an unlimited amount of times, but not requiring that all players be tested in this manner a minimum number of times during a season). Note that players who are subject to the reasonable cause testing are not subject to random testing of "regular season," "postseason," or "off-season" testing. *Id.* at 4.

[57] *Id.* at 4.

[58] *Id.*

[59] NFL POLICY, *supra* note 44, at 4.

[60] *Id.* This includes players who have ever tested positive during college, combines, or their pro careers. *Id.*

[61] *Id.*

[62] *Id.* at 11.

3. *Procedures and Penalties for Positive Test Results*[63]

After a player tests positive,[64] the player and the League Office are notified and a second test, or "B" test, is performed on the remaining urine.[65] If this sample tests positive, the player is said to have a confirmed positive steroid test.[66] All confirmed positive test results are subject to penalties by the NFL[67] that vary depending on how many times a player has tested positive.[68]

The first positive test leads to a minimum four-game suspension, without pay, starting from a date designated by the NFL.[69] A second positive test warrants a minimum eight-game suspension without pay.[70] A third positive result lands a player a minimum twelve-month suspension without pay.[71] In order to play after a third suspension, a player must petition the Commissioner of the NFL for reinstatement.[72] The Commissioner has the sole discretion to reinstate a player and determine the conditions under which that player can return to the NFL.[73] During all suspensions, a player cannot use team facilities, have contact with team officials, or participate in team activities.[74] At the end of any suspension period, a player must test negative

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[63] Included in the NFL plan are procedures and conditions for reinstatement dealing with medical treatment for players in certain situations. *See generally id.* at 6–9. This aspect of the policy is not covered in this Note.

[64] Penalties can also be instituted for missing a test date unexcused, attempting to manipulate a test sample, or diluting or substituting a sample, all of which may merit harsher penalties than a simple positive test result. *Id.* at 5.

[65] *See* NFL POLICY, *supra* note 44, at 6. A player has a right to waive this "B" sample test. *Id.*

[66] *See id.* at 5–6.

[67] *See id.* at 5, 7 (explaining that, even if a player is unaware that an illegal substance is in his system, a positive test result will still be punished). Even if a product is approved by a team's trainer or medical staff, a positive result is still punishable. *Id.* at 6. Players with questions must contact the NFL Advisor in order to ensure compliance. *See id.* at 5.

[68] *See id.* at 7–9.

[69] *Id.* All suspensions are subject to appeal by the player; such appeals can change the start date of any suspension. *Id.* at 10. When there are fewer games remaining in a season than the suspension mandates, including postseason games the player's team has qualified for, the suspension will continue into the next season until the entire suspension period has been served. *Id.* at 7.

[70] NFL POLICY, *supra* note 44, at 8.

[71] *Id.*

[72] *Id.*

[73] *Id.*

[74] *Id.*

for all substances and pass a physical conducted by the team physician before returning to the team.[75]

B. *MLB Steroid Testing Policy*

In early 2005, MLB's Commissioner and the Major League Baseball Players Association agreed on a drug-testing policy. This policy, entitled "Major League Baseball's Joint Drug Prevention and Treatment Program" (the "Program"), stated a three-fold purpose: 1) "to educate Players . . . on the risks associated with using" steroids; 2) "to deter and end the use by Players of" steroids; and 3) "to provide for . . . an orderly, systematic, and cooperative resolution of any disputes that may arise concerning . . . the agreement."[76] It stated that no Major League player shall use any "anabolic androgenic steroid[] covered by Schedule III of the Code of Federal Regulations' Schedule of Controlled Substances" or any steroids that are illegal to obtain.[77]

In November of 2005, the "Program" was substantially revamped.[78] With the signing of a new collective bargaining agreement in 2006, this revamped "Program" was extended through the 2011 season.[79] Below, the specifics of the original "Program" and the changes that can be found in the revamped "Program" are outlined.

1. *Administration of Testing*

a. *The Original "Program"*

The original "Program" was overseen by the Health Policy Advisory Committee (HPAC), composed of two licensed physicians who are experts in

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[75] *See id.* at 6, 8.

[76] MAJOR LEAGUE BASEBALL'S JOINT DRUG PREVENTION AND TREATMENT PROGRAM 1 (2005) (hereinafter MLB PROGRAM), *available at* http://mlb.mlb.com/mlb/downloads/joint_drug_prevention_and_treatment_program_2005.pdf. In November 2005, amphetamines were added to the list of banned substances. Press Release, MLB Players Association, MLB, MLBPA Announce New Drug Agreement (Nov. 15, 2005), *available at* http://mlbplayers.mlb.com/NASApp/mlb/pa/releases/releases.jsp?content=111505#summary. For a complete list of all prohibited substances, see MLB PROGRAM, *supra*, at 3–4.

[77] MLB PROGRAM, *supra* note 76, at 3.

[78] *See* Michael Silverman, *Baseball; MLB Beefs up its Steroid Policy*, BOSTON HERALD, Nov. 16, 2005, at 88 (highlighting aspects of the new MLB Program).

[79] *See* Hal Bodley, *Deal Brings Labor Peace Through '11*, USA TODAY, Oct. 25, 2006, at 6C.

drug and steroid use and abuse and two licensed attorneys.[80] One of each is chosen by the MLB Players Association, and the others are chosen by the Commissioner.[81] HPAC would attempt to make all decisions unanimously, but a majority vote would carry.[82] If a majority vote could not be reached, the physician members would jointly choose another expert, a licensed physician, to be the fifth member of the committee and cast the decisive vote.[83] HPAC, among other things, was charged with overseeing the testing of players for steroid use following the procedures laid out in the "Program."[84] All testing was urine analysis[85] conducted under direct observation.[86]

b. *Changes in the Revamped "Program"*

Under the revamped "Program" much of HPAC's responsibilities have been substantially reduced.[87] An Independent Program Administrator, who has no ties to either MLB or the MLB Players Association, will now oversee: "1. The scheduling of tests"; "2. Supervision of the collection process"; and "[3.] Reporting of positives."[88]

2. *Circumstances that Permit Testing*

a. *The Original "Program"*

The "Program" allowed for three different types of testing: "in-season" testing, "additional in-season and off-season" testing,[89] and "reasonable cause" testing.[90] "In-season" testing dictated that each player would be randomly selected for testing once during the season, which began when players reported to spring training and ended with the last regular season

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[80] MLB PROGRAM, *supra* note 76, at 1.

[81] *Id.*

[82] *Id.*

[83] *Id.* The fifth member would be appointed within forty-eight hours of a failed majority decision. *Id.*

[84] *Id.* at 2.

[85] MLB PROGRAM, *supra* note 76, at 5.

[86] *Id.* at 18. For a complete review of the urine collection and testing procedure, see *id.* at 18–28.

[87] *See* Press Release, *supra* note 76.

[88] *Id.*

[89] MLB PROGRAM, *supra* note 76, at 5.

[90] *Id.* at 6.

game.[91] "Additional in-season and off-season" testing allowed the Office of the Commissioner to do additional random testing of players with the number and times of these tests to be determined by HPAC.[92] Players could be randomly selected for this type of testing an unlimited number of times.[93] "Reasonable cause" testing happened when any HPAC member had information that caused a reasonable belief that a player had used or otherwise been involved with steroids in the last twelve months.[94] At such times, HPAC would have a meeting, and, if a majority of members agreed, the player would be tested for steroid use within forty-eight hours.[95]

b. *Changes in the Revamped "Program"*

The revamped "Program" increases the frequency of testing of each player, with each player being tested a minimum of twice a year.[96] The first test occurs during spring training physicals.[97] The second test happens on a randomly selected date in the regular season and is unannounced.[98] In addition to these tests, there will also be year-round random testing of players.[99] There is no limit to how many times a player may be subjected to this random testing.[100] It is now the responsibility of the Independent Administrator to schedule testing.[101]

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[91] *Id.* at 5.

[92] *Id.*

[93] *See id.* ("Each Player shall remain subject to such additional tests regardless of the number of tests taken by the Player during any calendar year.").

[94] *Id.* at 6.

[95] MLB PROGRAM, *supra* note 76, at 6.

[96] *See* Press Release, *supra* note 76.

[97] *Id.* ("Every player will have: 1. A pre-season test in connection with spring training physicals.").

[98] *Id.* ("Every player will have: . . . . 2. An unannounced test during the season on a randomly selected date.").

[99] *Id.* ("There will be additional, year-round random testing.").

[100] *Id.* ("No matter how many times a player is tested, he remains subject to an additional random test.").

[101] *Id.*

3. *Procedures and Penalties for a Positive Test Result*

a. *The Original "Program"*

Whether a player had a positive test result[102] was determined by HPAC.[103] HPAC would notify a player immediately if such a result was found.[104] After notification, a player who had been found to have steroids present in his urine could challenge the finding within two business days, but he had to give a reason for the challenge.[105] If no appeal was sought, the Office of the Commissioner would, within twenty-four hours, inform the player and his team of the disciplinary action imposed.[106] The following penalties were imposed for positive steroid results:

1. First positive test result: a 10-day suspension or up to a $10,000 fine;
2. Second positive test result: a 30-day suspension or up to a $25,000 fine;
3. Third positive test result: a 60-day suspension or up to a $50,000 fine;
4. Fourth positive test result: a one-year suspension or up to a $100,000 fine;
5. Any subsequent positive test result by a Player shall result in the Commissioner imposing further discipline on the Player. The level of discipline will be determined consistent with the concept of progressive discipline.

All suspensions shall be without pay.[107]

b. *Changes in the Revamped "Program"*

Under the revamped "Program," the Independent Administrator is now responsible for reporting positive test results.[108] The penalties that can be applied are as follows: "1. First positive: 50 games"; "2. Second positive: 100 games"; "3. Third positive: Lifetime ban, subject to right to seek

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[102] Positive test results included the finding of steroids in a urine sample; refusal to take a test; unexcused absence from a required test; an attempt to mask, dilute, or substitute a sample; or any attempt to alter a test result. MLB PROGRAM, *supra* note 76, at 6.

[103] *Id.*

[104] *Id.* at 7.

[105] *Id.* at 12.

[106] *Id.*

[107] *Id.* at 11–12.

[108] *See* Press Release, *supra* note 76.

reinstatement after two years of suspension, with arbitral review of reinstatement decision."[109]

Part III discusses how collective bargaining hinders the implementation of tough steroid-testing policies because of the lack of incentives on either side of the table to push for tough policies, concluding that Congress should intervene.

III. THE HURDLES OF COLLECTIVE BARGAINING AND THE NEED FOR CONGRESSIONAL INTERVENTION

Both MLB and the NFL are unionized organizations.[110] This means that collective bargaining is used to dictate many aspects of how the organization is run, including steroid-testing policies.[111] Because "juiced" players generate higher revenues for owners by bringing in more fans, there is no incentive for owners and professional organizations as a whole to push for policies that would lead to a steroid-free environment in sports.[112] There are some who still argue that collective bargaining agreements are the best way to deal with the steroid problems in professional sports because collective bargaining equalizes the bargaining power of players and owners, allowing players to protect their rights.[113] One such right that players would want to protect is the right not to use steroids.[114] Congressional intervention is seen as nothing more than a moral "witch hunt" to make steroid-using players out to be "bad human beings," not an attempt to help players.[115] This ignores the fact that many players may not want to be protected from using steroids for various reasons, including: 1) a desire to reap the benefits of steroid use; 2) a desire for increased physical abilities; 3) a desire to avoid the financial burdens of positive steroid use; and 4) a desire to keep steroid use out of the eyes of the public. Each of these issues is discussed below.

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[109] *Id.* Though these punishments are substantially harsher than the punishments in the original "Program," many are still claiming that they are not harsh enough to deal with the steroid controversy. *See infra* note 129 and accompanying text.

[110] *See* Masteralexis, *supra* note 40, at 776 n.1.

[111] *See id.* (explaining that the National Labor Relations Board has held that drug testing of employees must be subject to bargaining).

[112] *See* Eric Gold, *Around the Majors*, SPORTS NETWORK, Mar. 16, 2005, http://www.sportsnetwork.com/default.asp?c=sportsnetwork&page=mlb/misc/gold_archive/mlbweekly_031605.htm (noting that MLB team owners turned a blind eye to steroid use because the play of "juiced" players increased revenues).

[113] *See* Masteralexis, *supra* note 40, at 776–78.

[114] *See id.*

[115] *See id.* at 777.

A. *Benefits of Steroid Use*

In an environment where money is tied to outstanding performance, there is little incentive to discourage players from using steroids and much to ignore steroid use.[116] "Juiced" players typically perform better, generating more revenue for owners, which in turn generates higher salaries for players.[117] Fan admiration and media attention for their improved performance are also benefits received from steroid use.[118] In this environment, it is not surprising that the current steroid-testing policies are inadequate to solve the "juicing" problem; both sides of the bargaining table stand to win by the continued use of steroids.

B. *Increased Physical Ability*

A desire for increased physical abilities can be two-fold: players may need steroids in order to be at the needed physical level to play in the pros, or players may seek to increase their abilities in order to reach the upper echelons of the profession.[119] Though there are players that do wish to stamp out the use of steroids in professional sports,[120] as Department Head and Associate Professor in the Department of Sport Management at the University of Massachusetts-Amherst Lisa Pike Masteralexis points out, players will do anything to reach their goal of being professional athletes.[121] Thus, a player who knows that he physically cannot make the leap into the Majors without steroid help would not want a strong steroid policy. Even if a player can make it into the pros without steroids, steroids often allow players

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[116] *See id.* at 776–77; *see also* Shaun Assael & Peter Keating, *Who Knew?*, ESPN THE MAG., Nov. 21, 2005, at 69, *available at* http://sports.espn.go.com/espn/eticket/story?page=steroids (detailing the way baseball management, trainers, and owners turned a "blind eye" to steroid use). Some players have reported that trainers, scouts, and other management personnel more than ignored steroid use; they in fact promoted it, though indirectly. *See* Masteralexis, *supra* note 40, at 777 (noting that telling players they are "too slow" or "too small" may have encouraged steroid use). Jose Conseco, in his book, *Juiced*, claims that owners sent word to players, managers, and trainers to keep players doing whatever they were doing to be "superhuman" in order to generate excitement and homeruns. *New in Paperback*, WASH. POST, Apr. 2, 2006, at T11. For a complete history of steroid use in MLB from the 1970s to present, see Assael & Keating, *supra* note 116.

[117] *See* Masteralexis, *supra* note 40, at 777 (noting that "substantial financial benefits," as well as other rewards garnered from fans, media, and management can be obtained by "juicing"); *see also supra* note 112 and accompanying text.

[118] *See id.*

[119] *See id.*

[120] *See Sports*, *supra* note 42, at 6, 7 (explaining that the current NFL policy on drug testing was promoted by players who wanted to end steroid use for various reasons).

[121] *See* Masteralexis, *supra* note 40, at 778.

to reach the pinnacle of their chosen profession.[122] These pressures can cause players to rely on the aid of steroids. If many players feel this pressure, there is no desire on that side of the table to argue for strong steroid policies.

C. *Avoidance of Financial Penalties*

The desire of players to avoid financial penalties because of steroid use is another disincentive to bargain for tougher steroid policies. Positive drug-test results, as explained in Part I, often have consequences such as fines and suspensions without pay.[123] Players have the extra financial incentive of avoiding lost wages if they do currently take, or in the future decide to take, steroids.[124] Even players who are not purposely taking steroids can still be issued these fines and suspensions.[125] There are substances that can cause a player to test positive even though the player did not mean to break a steroid policy.[126] This extends the financial incentive against strong testing policies to any player who may have a fear of an unintentional positive, which could be a substantial number of players.

D. *Keeping Drug Use from the Public*

Keeping face in the public eye is also a factor motivating players against strong steroid-testing policies. As has been seen with the Mark McGwire and Barry Bonds stories, being convicted in the court of public opinion can severely damage the integrity of a player's career, even keeping players out

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[122] *See id.* Current examples of these types of players can be seen throughout sports today. Mark McGwire is known as a home-run king, whose 583 career home runs have been drawn into question amid allegations of steroid use. *See* Hunt, *supra* note 13. Barry Bonds, another home-run giant who, on August 7, 2007, broke Hank Aaron's all-time home-run record, has been suspected of steroid use since the beginning of the steroids controversy,. *See* Crumpacker & Fainaru-Wada, *supra* note 9.

[123] *See* NFL POLICY, *supra* note 44, at 6; MLB PROGRAM, *supra* note 76, at 11–12; Press Release, *supra* note 76.

[124] *See* Selig & Manfred, Jr., *supra* note 43, at 35.

[125] *See* NFL POLICY, *supra* note 44, at 4, 7 (explaining that players are responsible for what is in their bodies and their lack of knowledge that they are taking a forbidden substance is immaterial); *see also supra* note 67 and accompanying text.

[126] *See Biomedical Engineering: New Biological Engineering Study Results from German Sport University, Institute of Biochemistry Described*, OBESITY, FITNESS & WELLNESS WEEK, Mar. 17, 2007, at 536 (stating that several over-the-counter nutritional supplements contain steroids but do not label these steroids as ingredients); Kevin Acee, *Merriman Speaks with Goodell, Upshaw*, SAN DIEGO UNION-TRIB., Feb. 10, 2007, at D-4 (stating that San Diego linebacker Shawn Merriman contends that his positive drug test was the result of the use of nutritional supplements that did not mark steroids as an ingredient); *see also* NFL POLICY, *supra* note 44, at 4, 7.

of the Hall of Fame.[127] The quickness with which the public can turn against a player is evident in the current Roger Clemens situation—Clemens has gone from beloved, seven-time Cy-Young Award winner to "baseball's scarlet letter" in a matter of months.[128] With mere allegations keeping McGwire from the Hall of Fame and turning the public sentiment against Bonds[129] and Clemens,[130] an actual positive steroid test would be even more devastating to a player in the public's eye, something that can severely harm a player.[131] For example, players with confirmed steroid use, such as MLB greats Jose Conseco and Ken Caminiti, may never be inducted into the Hall of Fame;[132] the public will never view them in the same light as it did before the rumors about steroid use were confirmed.[133]

Confidentiality is typically put into testing policies to avoid this issue, but a recent case involving MLB has shown that even a confidentiality agreement does not guarantee that the public will not learn of a positive test result. The Ninth Circuit Court of Appeals ruled in late December, 2006, that federal investigators had a right to the names of one hundred MLB players who tested positive for steroid use in 2003.[134] This decision overrode the confidentiality agreement that was part of the testing policy.[135] Though the order only gives the names over to the Justice Department, there is great

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[127] *See* Jody Vance, *Guilty Until Proven Innocent*, 24 HOURS, Jan. 11, 2007, at 30 (noting that Mark McGwire was not inducted into the Hall of Fame in 2006 because of his alleged steroid use, and that a similar fate may await Barry Bonds); Harry Stein, *Writers Scrutinize Big Mac and Themselves*, N.Y. TIMES, Jan. 13, 2007, at 2 (explaining that McGwire was "emphatically rejected" for admission into the Hall of Fame because of alleged steroid use).

[128] *See* Red, *supra* note 29.

[129] *See* Ann Killion, *Once Loyal Bonds Fans Starting to Turn*, SAN JOSE MERCURY NEWS, Jan. 11, 2007 (noting that San Francisco Giants fans are "fed up" with "Bonds and his sordid, overwrought story" and his "chase for the sour, tainted record").

[130] *See, e.g.*, Red, *supra* note 29.

[131] *See* Vance, *supra* note 127 ("Public opinion is extremely powerful . . . . It can destroy reputations, cancel endorsements and . . . lessen the value of your autobiography.").

[132] Bob Hertzel, *Hall Voters Have Set New Guidelines*, DOMINION POST, Jan. 10, 2007.

[133] *See* Jorge L. Ortiz, *Ruling Could Expose 100-Plus Tests; Future Programs Might See Effect*, USA TODAY, Dec. 28, 2006, at 6C (quoting Bob Lanza, partner with Sonnensschein Nath and Rosenthal "a positive drug test . . . can stain an athlete's reputation for years and negatively impact his . . . endorsement opportunities").

[134] United States v. Comprehensive Drug Testing, Inc., 473 F.3d 915 (9th Cir. 2006), *withdrawn and superseded by* United States v. Comprehensive Drug Testing, Inc. 513 F.3d 1085 (9th Cir. 2008).

[135] *Id.*

speculation that the results will become public.[136] This ruling will likely have a chilling effect on collective bargaining for testing policies,[137] making minimal or non-existent testing more attractive to players wanting to avoid losing face in the public eye.

E. *Why Should Congress Get in the Game?*

With all these factors, the inability to fight the steroid problem is not surprising. The policies of both MLB[138] and the NFL[139] have come under scrutiny. MLB substantially increased its testing policies in November of 2005 under the threat of congressional intervention, but even this "juiced" up policy has critics calling for more.[140] The Mitchell Report recommended 19 changes to improve MLB's testing program, but to implement some of these recommendations, the Players Association must cooperate with MLB.[141] The Player's Association has refused to consent to such changes, claiming that the current testing policy is "working fine."[142] It is important to emphasize that the November 2005 upgrading of the "Program" came into being

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[136] *See* Peter Schmuck, *Confidence is Low that Steroid Test Results Will Stay Confidential; Commentary*, BALT. SUN, Dec. 29, 2006, at 2E.

[137] *See* Ortiz, *supra* note 133 ("The inability of player unions to keep drug-test results confidential will only complicate collective bargaining with leagues.").

[138] *See* Fortenberry & Hoffman, *supra* note 48, at 141 (noting that MLB has been condemned for its weak policy on steroids); *see also* Keith Dobkowski, *New Steroid Policy in Effect*, LEGALBALL.COM, http://legalball.com/MLB_News_2005_Steroids_Policy (last visited Jan. 24, 2008) ("[M]any are calling the new [MLB steroid] policy soft.").

[139] *See* Taylor, *supra* note 14 (detailing the NFL's inability to detect some forms of steroid use).

[140] *See* Sally Jenkins, *Baseball Takes Its Best Swing, but the Game Continues*, WASH. POST, Nov. 17, 2005, at E1 (noting that the new policy will do nothing more than punish players "dumb enough to get caught," not end the steroid problem); Stephen A. Smith, *Loopholes Undercut Steroids Agreement*, PITTSBURGH POST-GAZETTE, Nov. 18, 2005, at D2 (calling for even harsher penalties for first- and second-time positive results, much more in line with what Congress proposed in legislation); Editorial, *MLB Steroids Policy Misses the Plate*, CINCINNATI ENQUIRER, Nov. 17, 2005, at 12C (stating that the new baseball penalties, though an improvement, did not send the correct message because they were not harsh enough).

[141] *See* Ken Davidoff, *The Mitchell Report; All-Star Shame*, NEWSDAY, Dec. 14, 2007, at A02. MLB Commissioner Bud Selig has instituted all the improvements recommended by the Mitchell Report that MLB could institute unilaterally. *Id.*

[142] *Union Lawyer Says Drug Program Fine*, CHATTANOOGA TIMES FREE PRESS, Feb. 26, 2008, at D2.

because of pressure put on the MLB Players Association from Congress[143] and, specifically, Senator John McCain.[144] Bud Selig, Commissioner of Baseball, tried to pass the same steroid program in 2002, but the Players Association would not sign off and continued to rebuff his attempts until Congress threatened action,[145] just as the Players Association is doing now with the Mitchell recommendations. This shows that, if left to collective bargaining alone, steroid testing policies will not meet a standard needed to stop usage.

Even the NFL program, pegged as the "model" program,[146] has major flaws. These flaws are most clearly seen in the complete failure to catch even one of several players "juicing" on the 2003 Carolina Panthers Team.[147] Again, when left to the devices of collective bargaining alone, steroid testing programs, even the oldest and most comprehensive programs, are not sufficient to fight the steroid problem.[148] The only way to fight the problem is to have a party intervene whose sole objective is to end steroid abuse. Congress would qualify as such a party.

Part IV will discuss whether Congress can constitutionally mandate a steroid testing policy.

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[143] *See* Evan Grant, *MLB Steroid Rules: 3 Strikes, You're Out: U.S. Pressure Spurs Longer Suspensions; Amphetamines Targeted*, DALLAS MORNING NEWS, Nov. 16, 2005, at 1A (noting that pressure from Congress led to tougher penalties for steroid use).

[144] *See* Phil Rogers, *Baseball to Steroid Users: 1, 2, 3 Strikes, You're Out*, CHI. TRIB., Nov. 16, 2005, at 1 (noting that, until McCain "turned up the heat" on MLB Player Association leader Donald Fehr, the Association refused to sign off on the testing policy).

[145] *See id.*; Michael O'Keeffe & T.J. Quinn, *It's 3 Strikes and Yer Out! Strict Doping Rules Now Include Speed*, N.Y. DAILY NEWS, Nov. 16, 2005, at 60 ("Union officials fought [Selig] from the [beginning of his attempt to pass tougher testing policies], arguing that players had the same privacy rights as any other citizens, but began to acquiesce when it was clear that . . . Congress [was] behind the commissioner.").

[146] *See* Fortenberry & Hoffman, *supra* note 46, at 141 ("[T]he NFL triumphs in all categories for its denunciation, condemnation and punishment of its professional athletes' use of steroids. The NFL and the NFLPA have crafted a policy that has both the league's and the players' best interests in mind."); *see also* Selig & Manfred, Jr., *supra* note 43, at 54 (noting that the NFL has the most comprehensive testing program).

[147] *See* Taylor, *supra* note 14; Weiner, *supra* note 16.

[148] *See* Taylor, *supra* note 14 (stating that former NFL lineman Dana Stubblefield believes that thirty percent of NFL players are using human growth hormone, while Jon Jansen, an offensive lineman for the Washington Redskins, believes fifteen to twenty percent of players use some form of performance-enhancing drug).

IV. CAN CONGRESS CONSTITUTIONALLY DRAIN THE "JUICE" OUT OF PROFESSIONAL SPORTS?

Even though congressional intervention is appropriate and necessary in the case of steroid use in sports, the type of intervention that can and should take place is much less clear. In 2005, at the height of the original steroid controversy, Congress threatened to mandate drug-testing protocols[149] for all four of the major professional sports organizations in America: the NFL, the NBA, the NHL, and MLB. But this approach may have serious constitutional implications. By forcing sports organizations to test their athletes under specific protocols, a congressional steroid-testing policy would compel an action by a private group.[150] This would render the policy subject to the Constitution[151] and, most importantly, the Fourth Amendment.[152] In this Part, this Note explores whether or not the Supreme Court would likely find that a congressionally-mandated steroid-testing policy could withstand a Fourth Amendment challenge by exploring the Court's approach to both drug testing in public high schools and drug testing of government employees.

A. *What Does it Take to Pass Constitutional Muster Under the Fourth Amendment?*

The Fourth Amendment protects individuals from unreasonable searches and seizures.[153] Following current Supreme Court precedent, it seems clear

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[149] *See* Mitten, *supra* note 39, at 804 (noting that Congress proposed legislating in 2005 to unify drug-testing policies for professional sports organizations).

[150] *See* Lewis Kurlantzick, *Symposium: From Grand Slams to Grand Juries: Performance-Enhancing Drug Use in Sports: Symposium Contribution: Is There a Steroids Problem? The Problematic Character of the Case for Regulation*, 40 NEW ENG. L. REV. 789, 792 n.11 (2006) (citing Skinner v. Ry. Labor Executives' Ass'n, 489 U.S. 602, 614–16 (1989)).

[151] *See id.*

[152] *See id.* This policy would also raise issues with the Fourteenth Amendment Equal Protection Clause because professional athletes, as a group, would be treated differently than other private employees not subject to drug testing. *See* Mitten, *supra* note 39, at 805. This would be a very difficult claim to win due to the nature of Fourteenth Amendment analysis. Professional athletes are not a protected group, thus the testing policy would only have to meet a rational basis test. *See id.* This would likely be satisfied fairly easily, especially with Congress's findings of the impact that steroids have on the youth of America. See *infra* notes 279–80 and accompanying text. *See also* Clean Sports Act of 2005, S. 1114, 109th Cong. §2(a)(4). Because of the weak nature of this claim, this Note does not focus on Fourteenth Amendment issues.

[153] Bd. of Educ. v. Earls, 536 U.S. 822, 828 (2002).

that the collection of urine samples for testing would constitute a search,[154] and accordingly Congress would have to show the reasonableness of its action in order for drug-testing policies to pass constitutional muster. Reasonableness usually implies probable cause,[155] but the Court has made some exceptions when the reason for the search is not criminal in nature.[156] One set of exceptions flowing from a lack of criminal objectives has come to be known as "special needs"[157] searches and seizures.[158] This applies when "special needs, beyond the normal need for law enforcement, make the . . . probable-cause requirement impracticable."[159] Assuming that Congress would not use test results for criminal purposes,[160] fitting a mandatory policy into this area of Fourth Amendment jurisprudence would be the best way to develop a constitutional policy. In order to determine whether or not the Court is likely to find a special need with steroid use, the history and development of the "special needs" doctrine must be evaluated, in its early context and in the context of drug and alcohol testing, and then applied to the steroid situation.

1. *The Early Development of the "Special Needs" Doctrine*

The "special needs" doctrine began with the case of *New Jersey v. T.L.O.*,[161] a case involving a student who, after denying that she had been smoking in violation of school rules, was forced to open her purse by the assistant vice principal to see if there were cigarettes present.[162] While looking at the pack of cigarettes, the assistant vice principal also noticed

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[154] *See, e.g.*, Vernonia Sch. Dist. v. Acton, 515 U.S. 646, 652 (1989) (stating that the collection of urine constituted a search by public school officials).

[155] *See, e.g.*, Skinner v. Ry. Labor Executives' Ass'n, 489 U.S. 602, 619 (1989).

[156] *See* JOSHUA DRESSLER, UNDERSTANDING CRIMINAL PROCEDURE §19.01, at 323–25 (3d ed. 2002) (noting the Court's attempt to draw a line between the requirements of the Fourth Amendment for criminal and non-criminal matters).

[157] This is also known as the "special governmental needs" doctrine. *Id.* at 338.

[158] *See id.* at 338–39.

[159] Griffin v. Wisconsin, 483 U.S. 868, 873 (1987) (quoting New Jersey v. T.L.O., 469 U.S. 325, 351 (1985) (Blackmun, J., concurring in judgment)).

[160] If Congress did want to use test results for criminal purposes, then random drug testing would be out of the question. The Court has been very firm in stating that, if the primary purpose of a suspicionless search is to "detect evidence of ordinary criminal wrongdoing," then such searches are not constitutional. *See* City of Indianapolis v. Edmond, 531 U.S. 32, 41 (2000); *see also* DRESSLER, *supra* note 156, at 336–38 (outlining the jurisprudence regarding government drug-interdiction checkpoints).

[161] 469 U.S. 325 (1985). *See also* DRESSLER, *supra* note 156, at 339.

[162] *T.L.O.*, 469 U.S. at 328–29.

cigarette rolling papers commonly associated with marijuana.[163] The assistant vice principal then completely searched the purse and found marijuana and other drug paraphernalia.[164] The Supreme Court held the search constitutional,[165] even while holding that students had a right to privacy.[166]

In finding the search constitutional, the Court held that school officials did not have to have a warrant to search students so long as the search is reasonable.[167] The reasonableness of a search does not have to reach the level of probable cause when the Court determines, as it did in this case, that the balancing of the governmental interest and the private interest "suggests that the public interest is best served by a Fourth Amendment standard of reasonableness that stops short of probable cause."[168] To determine the reasonableness of a search, the Court held that a two-part test applied: 1) the action must be reasonably related to the end objective of the search, and 2) the search must "not [be] excessively intrusive in light of the age and sex of the student and the nature of the infraction."[169]

O'Connor v. Ortega[170] presented the next development in the doctrine.[171] This case involved the search of a state doctor's office without a warrant.[172] A plurality of the Court held that, though merely being a government employee did not destroy one's privacy interest, some employees may not have a reasonable expectation of privacy from certain other individuals, such as supervisors.[173] The plurality held that a warrantless search could be conducted of such employees' offices and the like,[174] but that the reasonableness test set down in *T.L.O.* had to be followed.[175] The plurality reinforced the idea that special exceptions could be made when a

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[163] *Id.*

[164] *Id.*

[165] *Id.* at 341–43.

[166] *Id.* at 339 ("[S]choolchildren may find it necessary to carry with them a variety of legitimate, noncontraband items, and there is no reason to conclude that they have necessarily waived all rights to privacy in such items merely by bringing them onto school grounds.").

[167] *Id.* at 341.

[168] *T.L.O.*, 469 U.S. at 341.

[169] *Id.* at 342.

[170] 480 U.S. 709 (1987).

[171] *See* DRESSLER, *supra* note 156, at 341.

[172] *O'Connor*, 480 U.S. at 713.

[173] *Id.* at 717–18 (plurality).

[174] *Id.* at 722 (plurality) (holding that the requirement of a warrant would be unworkable in the government office environment).

[175] *Id.* at 726.

warrant requirement is "not suitable . . . because such a requirement would unduly interfere with the maintenance of the swift and informal disciplinary procedures needed" in a given situation,[176] and that the need to show probable cause did not lie when the reason for the search was not criminal in nature.[177]

2. *Special Needs and Drug and Alcohol Testing*

The Supreme Court has spoken on the issue of random drug and alcohol testing in a series of decisions dating back to 1989.[178] In most cases, the Court has allowed random testing, but it has placed limits on such testing.[179] There have also been circumstances where testing was completely barred by the Court.[180] Most notably, testing is not constitutional when it is used for a symbolic purpose.[181] This section will outline the case history of both allowed and banned testing, then summarize the factors the Court looks to when deciding if a program is constitutional.

a. *Circumstances Where the Supreme Court has Allowed Drug and Alcohol Testing*

The Court began tackling the realm of drug testing in public employment with the tandem cases of *Skinner v. Railway Labor Executives' Association*[182] and *National Treasury Employees Union v. Von Raab*.[183] *Skinner* involved drug and alcohol testing by blood and urine analysis of covered employees in the railroad industry after a series of major accidents had occurred.[184] In response to a well-documented drug and alcohol abuse and detection problem in the railroad industry, the Federal Railroad Association ("FRA"), a government entity, promulgated a drug and alcohol testing program.[185] Testing was implemented, pursuant to the regulations, by

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[176] *Id.* at 720–22.

[177] *Id.* at 724.

[178] *See Skinner*, 489 U.S. at 619.

[179] *See Vernonia*, 515 U.S. at 665 (stating that the Court will not readily allow testing in circumstances outside of a public school setting).

[180] *See* Chandler v. Miller, 520 U.S. 305, 309 (1997) (striking down a policy that required testing of Georgia's political candidates).

[181] *Id.* at 322.

[182] 489 U.S. 602 (1989).

[183] 489 U.S. 656 (1989).

[184] *Skinner*, 489 U.S. at 609–10.

[185] *Id.* at 606–08. It is important to note that the FRA compiled and presented extensive evidence regarding the drug and alcohol problems in the railroad industry. The

private railway companies.[186] The Court held that, even though the testing was done by a private entity, it was done under "compulsion of sovereign authority," and thus must adhere to the demands of the Fourth Amendment.[187] The Court stressed that concerns about personal autonomy were important, due to the invasive nature of blood collection and the observation of urine collection, and ultimately held that both activities qualified as "searches" under the Fourth Amendment,[188] and thus had to be reasonable.[189]

In order to evaluate the reasonableness of the search, the Court determined that a special need faced the FRA and private railroads,[190] and, after dispensing with the question of whether or not a warrant was needed,[191] addressed the issue of probable cause through a balancing of the interests involved.[192]

The Court stated three reasons why a warrant was unnecessary in this context: 1) there was no need for a neutral magistrate to evaluate the facts because there was a standardized protocol in place dictating who would be

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problem was so obvious to the Court that the *Skinner* opinion begins by opining that "[t]he problem of alcohol use on American railroads is as old as the industry itself," and listing statistics that showcase this problem. *Id.* at 606. This is something that Justice Scalia, who signed onto the majority in *Skinner*, takes great pains to point out in his dissent in *Von Raab*, discussed *infra*, where the majority upheld a testing scheme for the U.S. Customs Services without this showing of a drug abuse problem. *See Von Raab*, 489 U.S. at 681.

[186] *Skinner*, 489 U.S. at 609.

[187] *Id.* at 614.

[188] *Id.* at 616–18. The Court had previously held blood collection to be a search, *see* Schmerber v. California, 384 U.S. 757, 767–68 (1966), but the issue of urine had never before been broached. The holding in *Skinner* that urine collection was a "search" centered intently on the private nature of urination and the intrusion that forcing someone to have his or her urination observed caused:

> There are few activities in our society more personal or private than the passing of urine. Most people describe it by euphemisms if they talk about it at all. It is a function traditionally performed without public observation; indeed, its performance in public is generally prohibited by law as well as social custom.

Skinner, 489 U.S. at 617 (quoting Nat'l Treasury Employees Union v. Von Raab, 816 F.2d 170, 175 (5th Cir. 1987)).

[189] *Skinner*, 489 U.S. at 619.

[190] *Id.* at 620 ("The Government's interest in regulating the conduct of railroad employees to ensure safety . . . 'likewise presents "special needs" beyond normal law enforcement that may justify departures from the usual warrant and probable-cause requirements.'") (quoting Griffin v. Wisconsin, 483 U.S. 868, 873–74 (1987) (allowing for warrantless searches of probationers)).

[191] *Id.* at 621–24.

[192] *Id.* at 624.

tested, which minimized discretion;[193] 2) a warrant requirement would hinder the testing because drugs and alcohol leave the body quickly, and the delay of waiting on the warrant could "result in the destruction of valuable evidence;"[194] and 3) railroad personnel implementing the tests had limited familiarities with the warrant requirements, and it would be unreasonable to force them to learn the particulars.[195]

The Court next dealt with the issue of probable cause, stating that, though the Fourth Amendment typically required some individualized suspicion for a search to be reasonable, "[i]n limited circumstances, where the privacy interests implicated by the search are minimal, and where an important governmental interest furthered by the intrusion would be placed in jeopardy by a requirement of individualized suspicion, a search may be reasonable despite the absence of such suspicion."[196] The Court found this to be such a case.[197]

When determining the privacy interest of employees, the Court noted that the taking of blood is "not significant" because such tests are now "commonplace."[198] Though the Court reiterated its issues with urine collection, it held that the current program, which allowed collection in a medical environment and without observation of the actual act of urination, minimized the privacy issues at hand.[199] Importantly, the Court emphasized that railroad workers have a reduced privacy interest because they work in a heavily regulated industry, which helped to minimize the intrusiveness of the testing that might not be so minimal in other settings.[200]

The Court balanced this minimal privacy interest with the interest of the government to regulate drug use, categorizing that interest as compelling.[201] Most notably, the Court, relying on the FRA evidence, emphasized that the employees being tested could cause "great human loss before any signs of impairment become noticeable to supervisors or others."[202] Also, the Court

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193 *Id.* at 622.

194 *Id.* at 623.

195 *Skinner*, 489 U.S. at 623–24. For a concise summary of *Skinner*'s holding on warrants, see DRESSLER, *supra* note 156, at 344–45.

196 *Skinner*, 489 U.S. at 624.

197 *Id.*

198 *Id.* at 625.

199 *Id.* at 626.

200 *Id.* at 628 ("Though some of the privacy interests implicated by the . . . testing at issue reasonably might be viewed as significant in other contexts, . . . a diminished expectation of privacy attaches to information relating to the physical condition of covered employees and to this reasonable means of procuring such information.").

201 *Id.*

202 *Skinner*, 489 U.S. at 628.

noted that there was a deterrent effect of the testing because an employee could not know when he would ever be involved in an accident that would trigger testing, thus employees would generally avoid drug and alcohol use.[203] In the end, the Court held that the compelling interest of the government far outweighed the minimal privacy interest of the employees and upheld the program.[204]

Tracking its logic from *Skinner*, the Court in *Von Raab* upheld the drug testing of U.S. Customs Service employees seeking certain promotions.[205] Again, the Court held there was a special need that did not require a warrant or probable cause[206] and, after balancing privacy interests and government interests, held in favor of the government.[207] The two cases are not completely analogous, however, as Justices Scalia and Stevens, who both voted to uphold testing in *Skinner*, dissented in *Von Raab*.[208] The dissent, authored by Scalia, notes that the majority's opinion will be "searched in vain for real evidence of a real problem that will be solved by urine testing of Customs Service employees," and that this lack of evidence of use or a connection to a real harm was the reason he could not join the majority.[209] The majority focused on the possible harms of drug use because of the exposure that Customs employees have to controlled substances and drug smugglers, stating that employees are often the target of bribery[210] and that the "Government has a compelling interest in ensuring that the front-line interdiction personnel are physically fit, and have unimpeachable integrity and judgment,"[211] something drug testing could help ensure. But, as Scalia points out:

> What is . . . notably absent, revealingly absent, and as far as I am concerned dispositively absent—is the recitation of even a single instance in which any of the speculated horribles actually occurred: an instance, that is,

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[203] *Id.* at 629–30 ("By ensuring that employees . . . know they will be tested upon the occurrence of a triggering event, the timing of which no employee can predict with certainty, the regulations significantly increase the deterrent effect of the administrative penalties associated with the prohibited conduct.").

[204] *Id.* at 633.

[205] Nat'l Treasury Employees Union v. Von Raab, 489 U.S. 656, 679 (1989).

[206] *Id.* at 665–66.

[207] *Id.* at 679.

[208] *See* DRESSLER, *supra* note 156, at 345.

[209] *Von Raab*, 489 U.S. at 681 (Scalia, J., dissenting).

[210] *Id.* at 668–69.

[211] *Id.* at 670.

> in which the cause of bribe-taking, or of poor aim, or of unsympathetic law enforcement, or of compromise of classified information, was drug use.[212]

Scalia, joined by Stevens, stressed that the only plausible reason to have the drug-testing policy was to prove a point and make government employees an example of the Government's commitment to the war on drugs, something that is constitutionally unacceptable.[213]

As Professor Joshua Dressler points out, these two cases read together seem to suggest that a warrantless, suspicionless drug-testing policy aimed at public employees is reasonable under the Fourth Amendment when: 1) "the employee is working in a job already pervasively regulated"; 2) "there is a close relationship between the employee's job responsibilities and the employer's concern about drug or alcohol use"; 3) "the regulations authorizing the testing remove most or all of the employer's discretion in determining which employees will be tested and under what circumstances it will occur"; 4) "there is evidence presented that a system based on an individualized system is impracticable or would frustrate the non-law-enforcement purpose of the testing"; and 5) "care is taken to protect the dignitary interest of employees in the specimen collection process."[214]

The Court expanded the realm of warrantless, suspicionless drug testing outside of public employees with the holding[215] in *Vernonia School District 47J v. Acton*.[216] The case involved the urine testing of high school students involved in athletics, both before the season began and randomly during the season.[217] Though students were observed providing the urine sample, males were allowed to remain clothed with their back to an observer twelve to fifteen feet behind them, while females provided the sample while in an enclosed stall.[218] Observers were of the same sex.[219]

When addressing the Fourth Amendment issue, the Court found that a special governmental need applied, and that neither a warrant nor individual

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[212] *Id.* at 683. Even the Commissioner of Customs admitted that he felt that the department was largely drug-free and that drug use was not the reason the program was put into place. *Id.*

[213] *Id.* at 686–87 ("I think it obvious that this justification is unacceptable; that the impairment of individual liberties cannot be the means of making a point; that symbolism, even symbolism for so worthy a cause as the abolition of unlawful drugs, cannot validate an otherwise unreasonable search.").

[214] DRESSLER, *supra* note 156, at 346.

[215] *Id.* at 348.

[216] 515 U.S. 646 (1995).

[217] *Id.* at 650.

[218] *Id.*

[219] *Id.*

suspicion was needed for the search to be reasonable.[220] The Court then evaluated the privacy interest of the students, holding that because this case dealt with "children, who . . . have been committed to the temporary custody of the State as schoolmaster," the students involved had a diminished expectation of privacy compared to adults.[221] The Court also held that, in regards to medical examinations and procedures, the privacy interest for students was even lower because students are often required to undergo certain medical examinations "[f]or their own good and that of their classmates."[222] The Court further held that student athletes, by voluntarily "choosing to 'go out for the team,'" further diminish their claims to privacy because athletes must undergo extra physical examination, as well as change in front of other students with minimal privacy.[223] The Court analogized athletes to adults in "closely regulated industries," stating that, "students who voluntarily participate in school athletics have reason to expect intrusions upon normal rights and privileges, including privacy."[224] The fact that the conditions under which the samples were collected were "nearly identical to those typically encountered in public restrooms, which . . . schoolchildren use daily," further helped to alleviate any concerns the Court had in regards to privacy interests.[225]

Next, the Court evaluated the government interest, further defining what was meant in earlier cases by the need for a compelling government interest: "the phrase describes an interest that appears important enough to justify the particular search at hand, in light of other factors that show the search to be relatively intrusive upon a genuine expectation of privacy."[226] In the Court's opinion, deterring student drug use was "at least as important as enhancing efficient enforcement of the Nation's laws against the importation of drugs," the interest found compelling in *Von Raab*.[227] Though the Respondents argued that there were less restrictive ways to deal with the problem, the Court noted that it has "repeatedly refused to declare that only the 'least intrusive' search practicable can be reasonable under the Fourth

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[220] *Id.* at 653.

[221] *Id.* at 654–56 ("*T.L.O.* . . . emphasized, that the nature of [the] power [of the State over school children] is custodial and tutelary, *permitting a degree of supervision and control that could not be exercised over free adults*.") (emphasis added).

[222] *Vernonia*, 515 U.S. at 656.

[223] *Id.* at 657.

[224] *Id.*

[225] *Id.* at 658.

[226] *Id.* at 661.

[227] *Id.* The Court's emphasis on the desire to stop student drug use may weigh heavily on any attempt by Congress to regulate professional athletes; the constitutionality may hinge on whether or not a connection between professional use of steroids and child and teenage use of steroids can be made. *See infra* Part IV.B.5.

Amendment."[228] Relying on the district court findings of a drug problem that disrupted the educational process and was centered around athletes,[229] the Court concluded "a drug problem largely fueled by the 'role model' effect of athletes' drug use, and of particular danger to athletes, is effectively addressed by making sure that athletes do not use drugs;"[230] thus, the testing program was reasonable under the Fourth Amendment.[231] Though this opinion seems to vastly increase the sweep of the special needs doctrine,[232] the Court set a limit on how far it intended the opinion to reach:

> We caution against the assumption that suspicionless drug testing will readily pass constitutional muster in other contexts. The most significant element in this case is the first we discussed: that the [drug testing p]olicy was undertaken in furtherance of the government's responsibilities, under a public school system, as guardian and tutor of children entrusted to its care.[233]

As this statement emphasizes, the decision of the Court was centered on the nature of the reduced privacy interests of those being tested; the reduction of privacy was key to the Court's holding.[234]

Though the Court has imposed some limits, an expansion of the doctrine has occurred. In *Board of Education of Independent School District No. 92 of Pottawatomie County v. Earls*,[235] the Court upheld a testing policy that tested

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[228] *Vernonia*, 515 U.S. at 663.

[229] The District Court made substantial findings about the drug problem in *Vernonia*:

> Drugs had not been a major problem in Vernonia schools. In the mid-to-late 1980's, however, teachers and administrators observed a sharp increase in drug use. Students began to speak out about their attraction to the drug culture, and to boast that there was nothing the school could do about it. Along with more drugs came more disciplinary problems . . . . [D]isciplinary referrals . . . [more than doubled] . . . . [A]s the District Court found, athletes were the leaders of the drug culture.

Id. at 648–49. This type of connection between athlete use and student use was a central focus of the Court's evaluation.

[230] *Id.* at 663.

[231] *Id.* at 664–65.

[232] *See* DRESSLER, *supra* note 156, at 348 ("*Vernonia School District* is an important expansion of the "special needs" doctrine. It authorizes random suspicionless drug-testing outside the public-employment sphere to which some commentators hoped the doctrine would be limited.").

[233] *Vernonia*, 515 U.S. at 665 (emphasis added).

[234] For a synopsis of all the limiting factors of *Vernonia*, see DRESSLER, *supra* note 156, at 348–49.

[235] 536 U.S. 822 (2002).

all students participating in any extracurricular activity, whether or not it was athletic in nature.[236] The Court stated that, although in *Vernonia* it had focused on athletes having an even more diminished privacy interest due to the nature of medical exams and the changing of clothes prevalent in that context, *Vernonia* was not dependent on that finding.[237] The Court emphasized the "nationwide drug epidemic,"[238] along with the finding that a drug problem existed in the school district at issue.[239] This, coupled with the safety concerns that drug use poses to all students,[240] led the Court to hold that this more expansive drug-testing program was constitutional.[241]

b. *Circumstances Where the Supreme Court Did Not Allow Drug Testing*

The limitations provided in *Vernonia* are not the only ones the Court has placed on drug testing. In *Chandler v. Miller*, the Court struck down a drug-testing policy that required candidates for state office in Georgia to pass a drug test.[242] The Court failed to find a special need in the testing program because there was a lack of "any indication of a concrete danger demanding departure from the Fourth Amendment's main rule,"[243] something present in other special needs cases:

> Nothing in the record hints that the hazards respondents broadly describe[d], [having drug users as state officials] are real and not simply hypothetical for Georgia's polity. The statue was not enacted, as counsel for respondents readily acknowledged at oral argument, in response to any fear or suspicion of drug use by state officials.[244]

The Court also pointed out that the "demonstrated problem of drug abuse, while not in all cases necessary to the validity of a testing

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[236] *Id.* at 838.

[237] *Id.* at 831.

[238] *Id.* at 834. The Court puts great emphasis on the national drug problem in this country, going so far as to quote statistics for drug use in 12th graders throughout the country. *Id.* at 834 n.5. The desire to reduce drug use could be a factor that could help Congress argue for a compelling interest in testing sports professionals. *See infra* Part IV.B.5.

[239] *Earls*, 536 U.S. at 834–35.

[240] *Id.* at 836 (finding that "the safety interest furthered by drug testing is undoubtedly substantial for all children, athletes and nonathletes alike").

[241] *Id.* at 838.

[242] 520 U.S. 305, 309 (1997).

[243] *Id.* at 319.

[244] *Id.*

regime, . . . would shore up an assertion of special need for a suspicionless general search program."[245] The Court found that Georgia was simply testing candidates for "symbol's sake," and that the "Fourth Amendment shields society against that state action,"[246] reiterating Justice Scalia's point in his *Von Raab* dissent.[247]

c. *What it Takes to Pass Constitutional Muster Under the Fourth Amendment*

It would appear that the Court is most likely to allow warrantless, suspicionless drug testing when: 1) the immediate objective of the test is not for law enforcement purposes; 2) there is a reduced expectation of privacy either because there is substantial regulation of the industry or because students, who have diminished privacy rights, are being tested; 3) there is evidence of an established drug problem that is affecting the public safety either by causing harm to innocents or to users and those who may imitate them; and 4) random testing is likely to help solve the drug problem through deterrence. The next subpart will apply these factors to the circumstances surrounding congressionally mandated drug testing in professional sports.

B. *Can Congress Fit a Mandatory Steroid Testing Policy into the Realm of the Special Needs Doctrine?*

In order to determine whether the U.S. Supreme Court would find a congressionally mandated drug testing program constitutional in the context of professional sports, an examination of the four criteria identified above is required: 1) non-criminal objective, 2) reduced expectation of privacy, 3)

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[245] *Id.*

[246] *Id.* at 322. The Court summarized the issues with the testing:

> Georgia asserts no evidence of a drug problem among the State's elected officials, those officials typically do not perform high-risk, safety-sensitive tasks, and the required certification immediately aids no interdiction effort. The need revealed, in short, is symbolic, not "special," as that term draws meaning from our case law.

Id. at 321–22.

[247] The Court further limited the special needs doctrine in *Ferguson v. City of Charleston*, 532 U.S. 67 (2001). The case involved the testing of maternity patients suspected of cocaine use. *Id.* at 71–72. The Court held that the program was unconstitutional, centering on the fact that the immediate goal of the searches was to "generate evidence *for law enforcement purposes*." *Id.* at 83. Because this Note assumes that Congress will not use steroid testing for criminal prosecutions, this case is largely inapplicable to the topic at hand. For a summary of all the issues raised in *Ferguson*, see DRESSLER, *supra* note 156, at 350–53.

substantial evidence of a drug problem and its harms, and 4) testing will help solve the problem. Even if these criteria are met, a program must still pass the special needs balancing between the privacy interests at stake and the governmental interest asserted. This subpart explores the realm of the special needs doctrine as it applies to professional athletes and Congress, stressing what the parameters of any statute Congress would attempt to enact should be and the types of evidence that Congress would need to compile in order to pass constitutional muster. This subpart also outlines the arguments that would surround the balancing test the Supreme Court would undertake. To make these observations, this subpart focuses on the findings Congress made in 2005, embodied in two bills presented to the House and Senate, the Clean Sports Act of 2005[248] and the Drug Free Sports Act.[249] Ultimately, this subpart concludes that Congress is likely unable to constitutionally mandate testing due to a lack of diminished privacy interests for professional athletes.

1. *Non-Criminal Objective*

For the Court to uphold any suspicionless, warrantless, drug-testing policy as constitutional, the immediate objective of such a program cannot be to file criminal charges.[250] It is clear that Congress cannot put a drug-testing policy in place that has criminal sanctions as a part of the testing system.[251] As such, the statute must have only fines, suspensions, and bans as punishment for a positive result. The Clean Sports Act and the Drug Free Sports Act both represent good models of a punishment system that would not violate this prong. Both programs provided mandatory suspension for violations, with no criminal punishment present in the scheme.[252] Such a system will allow the Court to easily dismiss the warrant requirement, a requirement to fit in the special needs doctrine.

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[248] S. 1114, 109th Cong. (2005).

[249] H.R 3084, 109th Cong. (2005).

[250] *See* DRESSLER, *supra* note 156, at § 19.

[251] *See id.* at 336–38.

[252] *See* Clean Sports Act of 2005, S. 1114, 109th Cong. § 4(b)(7) (2005); Drug Free Sports Act, H.R. 3084, 109th Cong. § 3(a)(5)(A) (2005). It is important to note, however, that both bills required that the names of athletes who tested positive be made public. *See* S. 1114, § 4(b)(9); H.R. 3084, § 3(a)(5)(B). The Clean Sports Act also required the name of the substance that the athlete tested positive for to be disclosed. *See* S. 1114, § 4(b)(9). This public disclosure could raise issues if law enforcement used the information to launch criminal investigations, but how the Court would deal with such an abuse of the system is unknown. To avoid any issues that may arise from such disclosure, Congress should avoid public disclosure of test results.

2. *Reduced Expectation of Privacy*

One key to all the situations in which the Court has upheld drug testing is a finding of some sort of reduced privacy interest, either because an industry is already highly regulated[253] or because the persons being tested have some reduced privacy expectation because they are, for a temporary time, in the custody and responsibility of the State.[254] This factor will be the hardest for Congress to show. Neither the NFL nor MLB[255] are highly regulated by Congress currently, nor are professional athletes in any way in the custody of the State. However, the Court has stated that athletes, by the very nature of required medical exams and changing in front of others, are often like employees in closely regulated industries and have "reason to expect intrusions upon . . . privacy."[256] Standing alone, this blanket statement may appear to give Congress hope, but this was made in the context of public school children who already have a diminished expectation of privacy compared to adults.[257] Thus, in analyzing the privacy rights of student athletes, the Court was already in the framework of people with diminished rights; adults in non-heavily regulated industries are different. The Court underscored this point in *Vernonia* by stating that the most important finding for constitutionality was that the program was instituted "in furtherance of the government's responsibilities, under a public school system, as guardian and tutor of children entrusted to its care."[258] This point was further emphasized by the Court in *Earls*, which stated that the medical exams and changing in front of others were not dispositive in *Vernonia*[259]—what was really important was that students, in general, have a diminished right of privacy. Without the framework of a school, the Court will be hard-pressed to find a diminished privacy interest.

It has been argued that language in *Chandler v. Miller* can be used to find that there is a diminished right of privacy when an adult, by means of his or her occupation, is subject to intense public scrutiny.[260] In *Chandler*,

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253 *See* Skinner v. Ry. Labor Executives' Ass'n, 489 U.S. 602, 628 (1989).

254 *See, e.g.*, Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646, 654–56 (1995).

255 In fact, MLB has even less regulation than most industries because courts have repeatedly held that MLB is exempt from all anti-trust laws. *See* Marc Chalpin, Comment, *It Ain't Over 'Til it's Over: The Century Long Conflict Between the Owners and the Players in Major League Baseball*, 60 ALB. L. REV. 205, 213 (1996).

256 *Vernonia*, 515 U.S. at 657.

257 *See id.* at 653.

258 *Id.* at 665 (emphasis added).

259 *See* Bd. of Educ. v. Earls, 536 U.S. 822, 831 (2002).

260 *See* Joshua Peck, Note, *Last Resort: The Threat of Federal Steroid Legislation—Is the Proposed Legislation Constitutional?*, 75 FORDHAM L. REV. 1777, 1820–23 (2006).

Justice Ginsberg states that "[c]andidates for public office . . . are subject to relentless scrutiny—by their peers, the public, and the press. Their day-to-day conduct attracts attention notably beyond the norm in ordinary work environments."[261] Chief Justice Rehnquist, in his dissent, latches on to this language to insinuate that the majority found a diminished right of privacy for public officials because of their place in the spotlight.[262]

Taken out of context, this language may appear to support such an argument, but, within the confines of the opinion, the phrase is used to distinguish *Chandler* from *Von Raab* and thus strike down testing.[263] There is no mention in the opinion about a diminished privacy right for candidates, let alone a statement of why such a diminished right would exist. Also, such a reading of *Chandler* does not align with the explicit statements made by the Court in *Vernonia* as to who has diminished privacy interests.[264]

Such a reading would also open the door for diminished privacy rights for anyone in the public eye, such as celebrities and musicians. It is well documented that persons in those professions are role models for the youth of America[265] and have publicized substance abuse problems.[266] In fact, the drugs abused by these professionals (alcohol, prescription drugs, and marijuana, to name a few) arguably affect more students than steroid abuse.[267] As explained in Part IV.B.5, Congress's best argument for a

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[261] Chandler v. Miller, 520 U.S. 305, 321 (1997).

[262] *Id.* at 325–26 (Rehnquist, C.J., dissenting).

[263] *Id.* at 321–22.

[264] *See* Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646, 657 (1995).

[265] Part of the reason to stop steroid use in professional sports is to stop the use of steroids in children and teenagers under a "role model" effect theory. *See* Clean Sports Act of 2005, S. 1114, 109th Cong. § 2(a)(4) (2005). *See also* Bush, *supra* note 38 (noting that professional athletes are role models for young people).

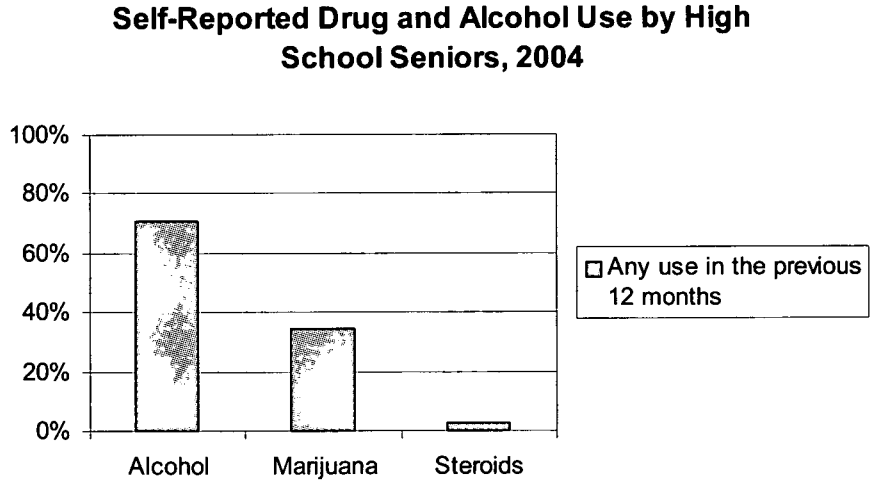
[266] *See, e.g.*, Bill Hutchinson, *The Snorting Life for Brit*, N.Y. DAILY NEWS, Feb. 26, 2007, at 19 (reporting on Britney Spears' alleged cocaine and ecstasy abuse and admission into rehab); Kathleen Deveny with Raina Kelley, *Girls Gone Bad: Paris, Britney, Lindsay & Nicole: They Seem to Be Everywhere and They May Not Be Wearing Underwear*, NEWSWEEK, Feb. 12, 2007, at 40 (exploring the images that celebrities portray to teens and how teens look to celebrities as role models).

[267] *See Strengthening Communities: An Overview of Service and Volunteering in America Before the Subcomm. on Healthy Families and Communities of the H. Comm. on Education and Labor* 9 (Feb. 27, 2007) (testimony of David Eisner, Chief Executive Officer, Corporation for National and Community Service, reporting that 15% of high school students use "illicit drugs and the abuse of prescription drugs is on the rise"), *available at* http://www.gpoaccess.gov/chearings/110hcat1.html; *Teens Turn Away From Street Drugs, Move to Prescription Drugs, New Report Reveals*, HEALTH BUS. WEEK, Mar. 9, 2007, at 625 (reporting that marijuana and prescription drugs are the two leading drugs abused by teenagers); Jo Anne Grunbaum et al., *Youth Risk Behavior Surveillance—United States, 2003*, MORBIDITY & MORTALITY WEEKLY REPORT, May 21,

compelling governmental interest to regulate professional athletes is to argue that, under a role model theory, professional use of steroids influences the use of steroids in young people.[268] Under a reading of the case law that renders all people in the public eye subject to diminished privacy rights, Congress could foreseeably mandate drug testing for musicians and celebrities under a similar theory: celebrity and musician use affects child use. This slippery slope cannot be what the Court mandated in *Chandler* by rejecting a drug-testing policy for politicians. For these reasons, such an argument does not have firm grounding in the case law.

Without meeting this prong, Congress will have a much harder time tipping the balance between the privacy interest of the athletes and the compelling interest it asserts. If the governmental interest is profound enough, the Court may still uphold a statute even without a diminished privacy interest. This approach is discussed in Part IV.B.5, *infra*.

2004, at 61 (finding that only 6.1% of high school students reported using illegal steroids in 2003). *See also Drugs & Alcohol,* TEENSHEALTH, http://kidshealth.org/teen/drug_alcohol/ (last visited Apr. 20, 2007) (providing information on drug and alcohol use in teenagers and the dangers associated with such use). The U.S. Department of Justice offers a self-reported study of twelfth-grade students that shows an even greater difference between steroid use and other illegal drugs and alcohol:



U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS DRUGS AND CRIME FACTS: DRUG USE IN THE GENERAL POPULATION (on file with author). For 2006 statistics, *see* filettp://www.ojp.usdoj.gov/bjs/dcf/du.htm (last visited May 4, 2008). No matter which study is viewed, it is clear that abuse of steroids does not come close to matching abuse of other drugs and alcohol by high school students.

[268] Stopping child drug use has already been held to be a compelling governmental interest, even under a role model theory of use. *See* Vernonia, 515 U.S. at 663.

3. *Substantial Evidence of a Drug Problem and Its Harms*

No matter how Congress structures a potential statute, it must be prepared to submit substantial evidence that there is both a drug problem in professional sports and that some harm is caused by that problem that Congress is attempting to stop. In the findings reported in the Clean Sports Act of 2005, Congress focuses on the use of steroids, not in professional athletes, but in teenagers.[269] Though the lynchpin of Congress's compelling governmental interest argument will need to be the effect that professional drug use has on the youth of America, explained *infra*, Congress will likely also need to show that there is a pressing problem of drug use by professional athletes.[270] Mere speculation of drug use will not be enough.[271] Congress should compile a detailed account of both the steroid problem in professional sports and how that affects the well-documented steroid problem with teenage athletes.

4. *Testing Will Solve the Drug Problem*

As the Supreme Court pointed out in *Skinner*, testing must have a deterrent effect on drug use in order to be reasonable.[272] Similar to the protocol found constitutional in *Skinner*, random testing mandated by Congress would have a deterrent effect on players because players would not know when they were going to be tested. The effect of a positive test result would be suspension and loss of pay with the possibility of being banned from the sport for life.[273] With these heavy penalties, avoiding a positive test would be valuable to an athlete; thus, they would need to avoid steroid use at all times to ensure they do not test positive.

The bigger question is whether Congress could show that this deterrent effect on players would have a deterrent effect on steroid use in young adults. If Congress states its compelling interest in testing professionals as a desire to stop young people from using steroids, the Court will likely demand a showing that deterring professionals will deter young people. Congress has stated that professional athletes have a role model effect on children and

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[269] S. 1114, § 2(a). Congress found that over 500,000 teenagers have used steroids or other performance enhancing drugs. *Id.* § 2(a)(2).

[270] *See* Chandler v. Miller, 520 U.S. 305, 319 (1997) (stressing that, although in all cases the government may not need to show documented drug abuse problems, such a showing will "shore up an assertion of special need").

[271] *See id.*

[272] *See* Skinner v. Ry. Labor Executives' Ass'n, 489 U.S. 602, 629–30 (1989).

[273] This is assuming Congress imposes the same types of penalties that have been proposed in previous legislation. *See* Clean Sports Act of 2005, S. 1114, 109th Cong. § 4(b)(7) (2005); Drug Free Sports Act, H.R. 3084, 109th Cong. § 3(a)(5)(A) (2005).

young adults,[274] which was the theory of deterrence used by the school in *Vernonia*.[275] However, in *Vernonia*, the district court found, and the Supreme Court accepted, that the athletes were the leaders of the drug culture in the school, and drug use among others in the school was dependent on athlete use.[276] Congress will need to compile evidence to show that the use of steroids by children and young adults is dependent on professional use and, thus, will be lessened if steroid use is deterred in professional sports.[277]

5. *Balancing the Interest: Can Congress Tip the Scale?*

Should Congress construct a statute and compile the evidence stated above, the Court will still balance the privacy interests of the professional athletes with the government's asserted compelling interest. The privacy interests of the players, as stated *supra*, will be the hardest selling point for Congress. The Court has upheld urine testing as not excessively invasive when done in private ways (such as in stalls or when an observer does not actually watch the urination),[278] which would be the manner in which the congressional plan would likely operate. But, unlike athletes in a school environment, professional athletes are not subject to the diminished expectation of privacy associated with students. To the contrary, professional athletes are adults working in an industry that is not heavily regulated; thus, they have the same privacy interests as every other adult in the private sector.

Even if the Court found a diminished privacy interest, Congress would need to show that it has a governmental interest that is compelling. In its findings for the Clean Sports Act of 2005, Congress stated its purpose as "protect[ing] the integrity of professional sports and the health and safety of athletes generally."[279] Included in protecting the health and safety of athletes in general is the idea of protecting student athletes from steroid use. This is evidenced by Congress's extensive findings regarding teen steroid use and the impact that professional athletes' use has on teens.[280] Congress should

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[274] *See* Clean Sports Act of 2005, S. 1114, 109th Cong. § 2(a)(4) (2005) ("Professional athletes are role models for young athletes and influence the behavior of children and teenagers.").

[275] *See* Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646, 649 (1995).

[276] *Id.*

[277] This theory of steroid use in young people is not accepted by everyone. *See infra* notes 286–89 and accompanying text.

[278] *See Vernonia*, 515 U.S. at 658 (stressing that environments for urine collection that mirrored the common conditions of public restroom use were minimally invasive).

[279] S. 1114 § 2(b).

[280] *See id.* § 2(a)(2)–(4). Congress also found in 2005 that 56% of high school students in 2004 felt that steroids were dangerous, a decrease from 71% in 1992. *See Restoring Faith in America's Pastime: Evaluating Major League Baseball's Efforts to*

approach the testing policy as a way to decrease steroid use in children by emphasizing that professionals use steroids and that these professionals act as "role models for young athletes and influence the behavior of children and teenagers."[281] Congress will then have presented a governmental interest that the Court has already held as compelling: stopping the drug epidemic among teenagers.[282] Approached in this way, and provided that Congress can present evidence to support its role-model effect findings, it seems likely the Court would find the governmental interest compelling.

Without a diminished interest, Congress would have to show that its governmental interest is "important enough to justify . . . intrusi[on] upon a genuine expectation of" full privacy.[283] Even with the emphasis the Court has placed on stopping drug use by students, all attempts to stop such use have been in the setting of a school, a place where persons being tested do have a diminished privacy right.[284] With the stress the Court has placed on diminished rights of privacy, this type of showing seems unlikely.

In applying the case law and facts available, Congress's attempt to mandate testing in professional sports seems to hinge on whether Congress can convince the Court that professional athletes have a diminished privacy right. Analyzing the current case law, it appears that such an argument would be very hard to win; the Court has not yet found a diminished privacy right outside the public school or heavily regulated industry settings. Because the Court has never upheld testing in the absence of a diminished privacy right, it is unlikely that mandated steroid testing would pass constitutional muster.

Part V will discusses what Congress should do to remedy the steroid problem without the ability to mandate testing in professional sports, concluding that Congress should focus on increased testing of high school and middle school students.

V. WHAT SHOULD CONGRESS DO?

Faced with the pressing problem of steroid abuse that current policies have been ineffective in combating, coupled with a seemingly insurmountable constitutional hurdle to mandating tougher laws, what should Congress do to stop the "juicing"? Congress is currently attempting to stop steroid use in children and young adults by indirectly targeting them.

Eradicate Steroid Use, Hearing Before the H. Comm. on Government Reform, 109th Cong. 2 (2005) (statement of Tom Davis, Chairman, House Comm. On Government Reform).

[281] S. 1114 § 2(a)(4).

[282] *See Vernonia*, 515 U.S. at 661.

[283] *Id.*

[284] *See id.*; *see also* Bd. of Educ. v. Earls, 536 U.S. 822, 832 (2002).

Congress wants to stop professional athletes from "juicing," hoping the effect will trickle down to the youth of America. This strategy completely ignores a solution that could be more effective and would not have to contend with the constitutional issues raised by mandatory testing for professional athletes: Congress could directly target steroid use in children. Though Congress may not want to completely ignore professional use, its focus, and its resources, should be directly on children. This Part explores ways Congress can directly target child use of steroids and recommends a way that Congress can still be involved in the steroid issues facing professional sports organizations.

A. *Stopping the "Juicing" in the Youth of America*

The actual problem that Congress is attempting to remedy by testing professional athletes is the use of steroids by children and young athletes. Congress's ultimate concern, and the central reason it claims to be involved in the steroid controversy, is the alarming rate of steroid use by the youth of America.[285] However, the current attempts to remedy the situation are indirect, and thus not effective.[286] The logic Congress is using is that children use steroids to "be like" their favorite athletes; thus, if the athletes are clean, then the children will be clean. This ignores the fact that children take steroids not to "be like" professional athletes, but because they believe that the success that a professional athlete enjoys is based on steroid use.[287] It is the "skill, power, money, fun and or fame" that causes children to start "juicing," not a desire to be just like Barry Bonds.[288] Congress must disentangle from the minds of children the idea that steroids are needed to achieve this success, and simply eliminating steroid use in professional sports alone will not achieve this. Children must be shown that success can come without steroid use.[289] The best way to disentangle this belief in children and teenagers is to directly target these groups with the objective of creating an anti-steroid environment. Congress can do this through increased testing of

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[285] *See* Grunbaum et al., *supra* note 267. *See also supra* note 267 and accompanying text.

[286] *See generally* Colin Latiner, *Steroids and Drug Enhancements in Sports: The Real Problem and the Real Solution*, 3 DEPAUL J. SPORTS L. & COMTEMP. PROBS. 192 (2006) (critiquing the ineffective approach Congress has taken to dealing with the steroid problem).

[287] *See id.* at 214.

[288] *Id.*

[289] *Id.* ("If what . . . kids want is to play at the professional level or dominate at their current level, and taking steroids seems to them like the only route, then it will not matter that their favorite sport star is clean of enhancements thanks to a rigorous testing policy.").

student athletes in middle school and high school and through educational programs.

Testing imposed by public school districts has already been held to be constitutional.[290] Congress should financially support school districts in their testing efforts. To induce compliance in districts that do not want to test their athletes, Congress, by using the power of the Spending Clause,[291] could tie federal educational funding to the implementation of a steroid-testing protocol, similar to the tying of federal funding to the implementation of educational testing guidelines described in the No Child Left Behind Act of 2001.[292]

Congress could go so far as to legislate mandated testing in all middle school and high schools in the country.[293] As explained in Part IV.B.5, the only Fourth Amendment hurdle standing between Congress and mandating testing of professional athletes is the lack of a diminished privacy interest for professional athletes. Mandating testing for middle school and high school students does not have this problem; the Court has repeatedly held that public school students have a diminished privacy interest.[294] With this diminished right already in place, and the statistics that Congress has already compiled about the steroid abuse problem in schools, the Court would likely find such a congressional program constitutional.

No matter which route Congress takes, supporting districts in their own plans, tying funding to the implementation of a plan, or legislating its own policy, the policy aimed at teenagers needs to have real consequences. As explained in Part III.B.4, the deterrent effect of a policy is tied to the penalties associated with a positive test result. Such penalties should include suspension from competing in athletics for a significant part of a season, if not for an entire season, as well as counseling and educational programs about the dangers of steroids. Students must see a positive test result as

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[290] *See, e.g.*, Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646, 664–65 (1995).

[291] U.S. CONST. art. I, § 8, cl. 1.

[292] The No Child Left Behind Act of 2001 requires states to implement a testing scheme for elementary schools and to post the results in order to receive federal funding. *See generally* OFFICE OF THE UNDER SEC'Y, U.S. DEP'T OF EDUC., NO CHILD LEFT BEHIND: A DESKTOP REFERENCE 13–14 (2002), *available at* http://www.ed.gov/admins/lead/account/nclbreference/reference.pdf. There are those that claim Congress exceeded its power in passing the act, and its constitutionality has been challenged. *See generally, e.g.*, Note, *Leaving No Child Behind (Except in States that Don't Do as We Say): Connecticut's Challenge to the Federal Government's Power to Control State Education Policy Through the Spending Clause*, 47 B.C. L. REV. 1033 (2006).

[293] Whether Congress has the constitutional ability to pass such legislation under its Interstate Commerce Clause power is beyond the scope of this Note. For a discussion of these matters, see Mitten, *supra* note 39.

[294] *See supra* notes 221–41 and accompanying text.

detracting from their ability to be successful and achieve the skill, power, money, fun, and/or fame that they desire. Missing a significant amount of time from a sport can damage a player's chance to move on to the next level of her desired sport.[295] Once the disentanglement of steroids with success occurs, the incentive to use steroids will disappear.

This testing program should be coupled with educational programs informing young people not only of the dangers of steroid use, but that steroid use is decreasing and steroid-positive tests have consequences. The latter two will help to show students that steroids are not needed for success and will actually hamper a student's ability to be successful. If no one in their generation is using steroids, then the need for steroids to take the next step will diminish; the students that they are competing with will also be steroid-free. When students are armed with this information, the belief that steroids are needed for success will begin to diminish.

If Congress places its efforts in this arena, by supplying financial backing for testing programs and educational programs in schools, the use of steroids by professionals can be counter-balanced. With enough time, education, and testing, child use of steroids can hopefully be extinguished. The success of these steroid-free children will follow them into the ranks of professional sports, and the use of steroids in that arena will likewise decrease and ultimately disappear. In this way, professional sports will slowly be purged of the current addiction to steroid use, while protecting those that Congress is particularly worried about: children.

B. *Stopping "Juicing" at the Professional Level*

Though professional sports can be purged of steroids over time with direct efforts to stop steroid use amongst middle school and high school students, Congress still has an option to attack steroid use in professional sports today. Congress can place in the tax code incentives for professional sports organizations and owners of teams to meet minimum steroid-testing and punishment standards. In this way, Congress is not mandating drug testing, nor causing testing by compulsion.[296] The professional organizations

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[295] When looking at students for college or the professional ranks, scouts often look to the total statistics athletes have compiled during their careers as well as the character of the student. *See Athletes, Coaches, Umpires, and Related Workers*, U.S. DEPARTMENT OF LABOR, BUREAU OF LABOR STATISTICS, http://www.bls.gov/oco/pdf/ocos251.pdf (last visited Apr. 20, 2008). These statistics will take a hit if a student misses a significant amount of time from a sport, and the character of a student would be called into question if his or her record shows a positive steroid test. Both of these elements would decrease the chance of success for a student with a positive steroid test.

[296] Testing done by compulsion of sovereign authority is state action, even if done by a private party, and invokes Fourth Amendment protection. *See* Skinner v. Ry. Labor

and owners can choose whether to take advantage of the tax break, keeping the decision to test purely a private one.[297] There would be no state action involved, and the policy would satisfy the demands of the Fourth Amendment.[298]

A tax incentive scheme would likely appeal to organizations that have allowed steroid use to proliferate because it increases revenues.[299] If it becomes more profitable to have stricter testing policies than to allow steroid use to continue at the current rate, a push for stricter testing will occur. Though players' unions will likely still lobby against strict policies,[300] there will now be an incentive for the owners/organization side of the bargaining table to push back, something that has been lacking in the past.[301] This extra push may be enough to bring these policies up to the level that Congress is seeking.

VI. CONCLUSION

Steroid use is a pressing problem—not just in professional sports, but, more importantly, in the arena of children and teenagers. In order to solve the problem of "juicing," Congress has looked exclusively at stopping "juicing" among professional athletes,[302] hoping that this will stop the "juicing" of children, the purported real concern. However, mandating steroid testing for professional athletes poses a constitutional hurdle: the Fourth Amendment.[303] This is a hurdle that, given current Supreme Court jurisprudence, Congress is unlikely to clear.[304]

Executives' Ass'n, 489 U.S. 602, 614 (1989). The Court held that the private party, a railroad company, had to comply with the regulations set down by a government entity; it was compelled to test in order to comply with the regulation. *See id.* In the case of a tax incentive, there is no compulsion. A private party does not have to take advantage of the tax benefit, but rather, the party chooses to take advantage of it by implementing the testing protocol. In this way Congress is not compelling any action by the private party, and any action taken remains purely private.

[297] Testing done purely by a private party, "on his own initiative," does not have to meet the demands of the Constitution. *See id.*

[298] *See id.*

[299] *See supra* Part III.A.

[300] The incentives for players to want weak testing policies, explained *supra* Part III, would still be in place under this system.

[301] *Id.*

[302] *See, e.g.*, Clean Sports Act of 2005, S. 1114, 109th Cong. (2005) (only regulating professional athletes).

[303] *See supra* Part IV.

[304] *See supra* Part IV.B.5.

This inability to mandate testing in professional sports may actually be a positive for solving the overall problem. Because Congress can do less in the professional arena, it should shift the focus to an area it can more easily regulate—the behavior of our children.[305] By supporting or mandating testing of young people, coupled with educational programs and strict penalties, Congress can begin fighting the problem directly instead of hewing to the indirect method it is currently pursuing. This direct assault will have much quicker and long-lasting results than just targeting professionals, and can ensure that the next generation of athletes plays the game steroid-free.

[305] *See supra* Part V; *see also* Latiner, *supra* note 286, at 214.