Clean Sports & Dirty Politics: Proposed Steroid-Testing Legislation Violates the Fourth Amendment

Christopher S Storm, *University of Houston*
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I. **Introduction**

The federal government has declared war on steroids. President Bush, in his State of the Union Address, “call[ed] on team owners, union representatives, coaches, and players to take the lead, to send the right signal, to get tough, and to get rid of steroids.”\(^1\) The Senate warned Major League Baseball (“MLB”) that it would take legislative action if the league did not increase steroid testing.\(^2\) Lawmakers used the full power and influence of their offices to force MLB into adopting stricter steroid-testing policies.\(^3\) However, Congress overlooked the Fourth Amendment in its zeal to eliminate steroid use.\(^4\)

Like many government drug-testing programs, the proposed legislation raises serious Fourth Amendment concerns.\(^5\) Rather than address these concerns, Congress chose to

\(^{1}\) Address Before a Joint Session of the Congress on the State of the Union, 40 WEEKLY COMP. PRES. DOC. 94, 100 (Jan. 20, 2004).


\(^{5}\) “[T]he most substantial claim [against government-mandated drug testing] is that drug testing constitutes a violation of the Fourth Amendment’s prohibition against unreasonable searches and seizures.” MARK A. ROTHSTEIN ET AL., EMPLOYMENT LAW § 1.26 (3d ed. 2005).
completely ignore the athletes’ privacy rights.\textsuperscript{6} Lawmakers pushed for steroid-testing legislation without fully considering the constitutional consequences of their actions.\textsuperscript{7} Even some scholars have dismissed the players’ Fourth Amendment objections.\textsuperscript{8}


\textsuperscript{7} For example, after Congress asked the American Law Division of the Congressional Research Service to research the potential constitutional barriers presented by the proposed steroid-testing legislation, the American Law Division report failed to reach any sort of answer or recommendation. \textit{See generally CHARLES V. DALE, CONG. RES. SERV., FEDERALLY MANDATED RANDOM DRUG TESTING IN PROFESSIONAL ATHLETICS: CONSTITUTIONAL ISSUES} (2005), \textit{reprinted in} \textit{DOPING IN SPORTS,} at 37-46 (Christopher N. Burns ed., 2006).

\textsuperscript{8} \textit{See} Joshua Peck, Comment, \textit{Last Resort: The Threat of Federal Steroid Legislation—Is the Proposed Legislation Constitutional?}, 75 \textit{FORDHAM L. REV.} 1777, 1828 (2006) (concluding that “[w]hether or not [MLB’s increased steroid testing] was induced by the threat of potentially unconstitutional legislation does not affect the fact that Congress accomplished its goal and MLB and other professional sports will be the better for Congress’s effort”); Erik Brady et al., \textit{Politicians weighing in heavily on steroid testing}, \textit{USA TODAY,} June 22, 2005, http://www.usatoday.com/sports/2005-06-22-steroid-testing-congress_x.htm (reporting Tulane
Congress is continuing to threaten legislative action in spite of the players’ Fourth Amendment concerns. After MLB caved to congressional pressure, members of Congress immediately turned their attention to other professional sports. Congressmen warned that they

professor Gary Roberts’ belief that “Congress can pass such a law” over any Fourth Amendment objections); see also Matthew J. Mitten, Drug Testing of Athletes—An Internal, Not External, Matter, 40 NEW ENG. L. REV. 797, 805-06 (2006) (commenting that judicial precedent, which holds that suspicionless drug tests of high school and college students are legal, likely also applies to professional sports).

See Katy Kiely, MLB, Players Agree to Update Drug Policy, USA TODAY, Nov. 16, 2005, http://www.usatoday.com/sports/baseball/2005-11-15-steroids-agreement_x.htm (reporting that MLB and the players agreed to a new steroid policy only hours before the Senate was about to pass the proposed legislation).

“I think it’s safe to say that most members of Congress will now view MLB as the minimum standard, so they’ll be watching any leagues that don’t meet that standard currently.” See MLB Steroid Law ‘Minimum’ Standard, CBS NEWS, Nov. 17, 2005, http://www.cbsnews.com/stories/2005/11/17/sportsline/main1054280.shtml (quoting a spokesman for Representative Tom Davis). Davis commented that lawmakers are “still in discussions with some of the other sports.” Id. Senator Jim Bunning pointed out basketball and hockey as two sports that still need to strengthen their steroids policy. Kiely, supra note Error!

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“reserve[d] the right to push the button” on the proposed legislation.11 Some lawmakers continued to call for a uniform, federal steroid policy for all professional sports.12

Furthermore, the government has intensified reform efforts with each steroid-related scandal. For example, lawmakers pursued steroid-testing legislation, in part, because MLB player Rafael Palmiero tested positive for steroids after denying steroid use in a Congressional hearing.13 Likewise, some members of Congress called for blood-testing legislation after MLB player Jason Grimsley admitted using Human Growth Hormone.14 Congress will likely revisit the proposed legislation again if the media reports another steroid scandal.

This Comment analyzes the proposed steroid-testing legislation under the Fourth Amendment. Part II reviews the different types of performance-enhancing drugs used by some athletes, including many popular substances that are not detected by modern steroid-testing

11 See MLB Steroid Law ‘Minimum’ Standard, supra note 10 (asserting that lawmakers have “made clear the threat of congressional intervention isn’t disappearing”).

12 See id. (reporting Representative Cliff Stearns’ belief that “steroid rules should be standardized across sports”); see also Brady et al., supra note 8 (reporting that Stearns will push for legislative action “no matter what the leagues do”).


14 See Howard Bryant, Congress Might Seek Blood Tests for Baseball, WASH. POST, Jun. 9, 2006, at E01 (reporting Congressional reaction to the federal investigation of Jason Grimsley). Representative Stephen Lynch of Massachusetts quipped, “they’ve put us to the sword again.”

Id.
II. PERFORMANCE-ENHANCING DRUGS

Performance-enhancing drugs ("PEDs") are substances that provide athletes with a competitive advantage.\textsuperscript{15} Prohibited PEDs fall into three major categories: (1) anabolic steroids, (2) stimulants and relaxants, and (3) masking agents.\textsuperscript{16} This section describes these three substances, as well as a fourth method of performance enhancement in which athletes “take drugs and engage in practices that increase the amount of oxygen in tissues.”\textsuperscript{17} These four categories include a wide variety of performance-enhancement methods, many of which are not detected by modern steroid-testing programs.


\textsuperscript{17} See Craig Freudenrich, Performance-Enhancing Drugs: An Overview, in PERFORMANCE-ENHANCING DRUGS 15 (James Haley ed., 2003) (explaining how athletes can increase oxygen in their tissues).
A. Anabolic Steroids

Anabolic-androgenic steroids are synthetic derivatives of the male sex hormone testosterone.18 Testosterone “build[s] muscle and bone mass primarily by stimulating the muscle and bone cells to make new protein.”19 Commentators refer to anabolic steroids as “training drugs” because athletes often use them over an extended period of time to achieve long-term performance enhancement.20

Testing officials detect anabolic steroids in an athlete’s urine sample by analyzing the ratio of testosterone to epitestosterone (“T/E ratio”) and then looking for specific synthetic steroids.21 However, testing facilities cannot accurately detect many PEDs, such as Human

18 Freudenrich, supra note 17, at 13. Scientists create synthetic testosterone because natural testosterone breaks down in the liver breaks without having the desired effects. L. ELAINE HALCHIN, CONG. RES. SERV., ANTI-DOPING POLICIES: THE OLYMPICS AND SELECTED PROFESSIONAL SPORTS 23 (2005), reprinted in DOPING IN SPORTS, at 26 (Christopher N. Burns ed., 2006).

19 Freudenrich, supra note 17, at 13.

20 See Anonymous, supra note 16, at 80 (explaining that training drugs are more difficult to detect because cheaters can discontinue use in time to pass a steroid test).

21 See Carroll, supra note 15, at 99 (interviewing the president of a steroid-testing laboratory).
Growth Hormone (“HGH”)\textsuperscript{22} and Insulin-like Growth Factor (“IGF-1”),\textsuperscript{23} although scientists are still attempting to develop such tests.\textsuperscript{24} Furthermore, testing officials have yet to identify many anabolic steroids.\textsuperscript{25} Testing facilities would never have discovered Tetrahydrogestrinone (“THG”), for example, if not for the help of an unknown informant.\textsuperscript{26} These “designer” steroids are increasingly popular because they are unknown to testing facilities and thus undetectable.\textsuperscript{27}

\textsuperscript{22} Excessive levels of HGH, a natural hormone, can “increase muscle mass by stimulating protein synthesis, strengthen bones by stimulating bone growth[,] and reduce body fat by stimulating the breakdown of fat cells.” Freudenrich, \textit{supra} note 17, at 15.

\textsuperscript{23} IGF-1, a natural protein, helps in the action of HGH. \textit{Id}.

\textsuperscript{24} Scientists have developed blood tests for detecting high levels of HGH, but the current tests are “not forensically acceptable at this stage.” Carroll, \textit{supra} note 15, at 106.

\textsuperscript{25} The standard testing procedure identifies discovered substances by matching them with the unique molecular fingerprints of known substances. \textit{Id}.

\textsuperscript{26} \textsc{John McCloskey \& Julian Bailes}, \textit{When Winning Costs Too Much} 105 (2005). THG, better known as “the clear,” is the designer steroid linked to several high-profile Olympic athletes and prominent baseball players. \textit{Id}.

\textsuperscript{27} \textit{See id.} at 95-96 (describing how substances such as THG are “attractive for [their] undetectable state and its potency”).
B. Stimulants and Relaxants

In addition to “training” drugs, some athletes also take stimulants and relaxants immediately before a competition to improve performance. Stimulants help athletes “stay aggressive, reduce fatigue, and increase alertness.” Relaxants, on the other hand, help athletes “relax and cope with the pressures of competition.” Although stimulants and relaxants are a major part of professional sports, officials have ignored relaxant and stimulant usage, choosing instead to focus other types of PEDs. For example, MLB began testing for amphetamines only after Congress threatened legislative action.

28 See Anonymous, supra note 16, at 80 (noting that stimulants and relaxants are only effective if taken before the event).

29 See Freudenrich, supra note 17, at 17 (explaining how stimulants “make the heart beat faster, the lungs breath faster, and the brain work faster’”).

30 See id (describing the various forms of relaxants).

31 See Carroll, supra note 15, at 78-79 (arguing that most leagues recognize that stimulant usage is an important problem but avoid the issue for public relations purposes).

C. Masking Agents and Blocking Drugs

Athletes sometimes attempt to beat steroid tests by reducing the presence of steroids in their blood and urine samples. Some testing procedures for anabolic steroids also include tests for known masking agents, which dilute the concentration of drugs in the sample, as well as blocking drugs, which block the release of the drug through the urine. However, athletes have successfully used many masking agents, such as epitestosterone (which alters the T/E ratio), dextran (which increases the fluid component of blood), and diuretics (which increases the amount of urine produced). Masking agents may become an even more important part of PED testing in the future because chemists will likely discover more effective ways of masking steroid use.

33 See Carroll, supra note 15, at 100 (explaining that decreasing the concentration of a substance increases the chance that the test will not detect the substance).

34 See id. (asking the president of a steroid-testing laboratory to describe current test procedures).

35 See id. at 234-35 (asserting that some masking agents allow athletes to mislead testing officials by producing confusing results); see also Pass Steroid Drug Test, Anabolic Steroid Drug Testing, http://www.ipassedmydrugtest.com/steroid_drug_test.asp (last visited Jan. 2, 2007) (“Steroid Cleaning Solutions are certified with a full 100% MONEY BACK GUARANTEE!!!”).

36 See Freudenrich, supra note 17, at 17-18 (defining the common types of masking agents).

D. Methods of Increasing Oxygen Production

Endurance athletes can extend athletic performance by engaging in practices that increase oxygen delivery to their body tissues. For instance, athletes can inject recombinant erythropoietin (“EPO”) to increase the production of oxygen-producing red blood cells. Although both the Olympics and the NFL test for EPO, many argue that current testing methods do not conclusively prove EPO use.

38 See Freudenrich, supra note 17, at 15 (describing the available methods that can achieve this result).

39 See Carroll, supra note 15, at 71-72 (commenting that some Tour de France cyclists use rEPO to boost performance).

40 See Christopher Clarey, EPO Tests are Approved for Sydney, N.Y. TIMES, Aug. 29, 2000, at ___ (announcing the first Olympic test for EPO); but see Ryan Connolly, Note, Balancing the Justices in Anti-Doping Law: The Need to Ensure Fair Athletic Competition Through Effective Anti-Doping Programs vs. The Protection of Rights of Accused Athletes, 5 VA. SPORTS & ENT. L.J. 161, 168 (2006) (describing the troubles the WADA has had with the recently developed rEPO testing procedures).

41 See Judy Battista, N.F.L. and Union to Strengthen Steroid Testing, N.Y. TIMES, Jan. 25, 2007, at D1 (announcing that the NFL is the first American sports league to test for EPO).

42 See Carroll, supra note 15, at 71-72 (“[T]here is no accepted and definitive test for rEPO doping.”). “Now the only true way of testing for rEPO doping is by measuring the hematocrit [level] of the athlete. If that hematocrit is elevated, it is suspicion of blood doping—but not
III. THE CURRENT APPROACH TO THE STEROIDS EPIDEMIC

The undetectable PEDs discussed in the previous section present tremendous obstacles for those who want to eliminate PED use in athletic competition.43 This section explores different approaches to eliminating steroids, including the federal criminalization of steroid possession, the proposed steroid-testing legislation, and the professional sports leagues’ steroid-testing programs.

A. Steroids as a Controlled Substance

The use of PEDs may have originated with the dawn of man,44 but the war on steroids began in the 1980s when increasing reports of steroid use forced Congress into action.45

medically reliable evidence because of the variation in hematocrit levels among individuals naturally.” Id. at 71.

43 See supra Part II (describing how modern steroid-testing procedures cannot detect all PEDs).

44 “Dr. Augustin Mendoza, a sports medicine expert, believes that the use of performance-enhancing substances probably began when some caveman found a mysterious root and, after chewing it, had a very successful day of hunting, was named leader of his clan, and was rewarded with the sleeping area in the cave closest to the fire. Soon other cavemen were searching for similar roots to chew on to make them better hunters.” Carroll, supra note 15, at 29.

45 See Rick Collins, Changing the Game: The Congressional Response to Sports Doping Via the Anabolic Steroid Control Act, 40 NEW ENG. L. REV. 753, 754 (2006) (asserting that Congress chose to address steroid use because of the purported “silent epidemic” of high school
Congress held a series of hearings on whether to prohibit possession of certain anabolic steroids.\textsuperscript{46} Legislators were primarily concerned with the impact of steroids on athletics and the “cheating” problem in professional sports.\textsuperscript{47} Congress eventually passed the Anabolic Steroid Act of 1990.\textsuperscript{48}

steroid use and because of Canadian sprinter Ben Johnson’s positive test for the steroid stanozol).


Unfortunately, the 1990 Act failed to eliminate steroid use by professional athletes.\(^{49}\)

Those arrested under the statute were “almost exclusively non-competing, purely cosmetic users.”\(^{50}\) Also, prosecution of black-market steroid smugglers was “hampered by insufficiencies in the existing statute.”\(^{51}\) In an effort to cure these deficiencies and to respond to frenzied media coverage,\(^{52}\) Congress added a new list of steroid compounds and created penalties for steroid possession and distribution.\(^{53}\)

**B. Proposed Federal Steroid-Testing Legislation**

Despite passing the Anabolic Steroid Control Act of 2004, Congress was still concerned with steroid use in professional sports. Senator McCain threatened the leagues, “Your failure to commit to addressing this issue straight on and immediately will motivate this committee to


\(^{50}\) *See* Collins, *supra* note 45, at 761 (describing how the 1990 Act did not effectively target professional athletes).

\(^{51}\) *See id.* at 755 (explaining how the original act did not include many of the PEDs that were sold during the decade).

\(^{52}\) *See id.* at 756 (noting how Congress passed the legislation “[a]mid an atmosphere of searing media attention”).

search for legislative remedies.” Just as “drug testing leapt out as an answer” to the question of how to eliminate recreational drug use during the 1980s, Congress again turned to drug-testing programs as a means of eliminating steroid use in professional sports.

In 2005, legislators introduced a myriad of steroid-testing bills in the Senate and in the House. The proposed bills subject professional athletes in specified American sports leagues

54 Heath, supra note 2, at A01.


57 All of the proposals target baseball, basketball, football, and hockey. S. 1960 § 4(7); S. 1334 § 3(5); H.R. 3084 § 2(2); S. 1114 § 3(4); H.R. 2565 sec. 201(a)(2), § 723(4); H.R. 2516 § 3(2); H.R. 1862 § 2(2). Other proposed bills include the Arena Football League, H.R. 3084 §
to randomized steroid tests. The bills provide for a two-year suspension on the first offense and a lifetime ban on the second offense, as well as public disclosure of all positive test results.

The proposed legislation also requires the leagues to test for substances prohibited by the World Anti-Doping Agency ("WADA") and the United States Anti-Doping Agency ("USADA"). Such prohibited substances include most stimulants and relaxants, all known

2(2), Major League Soccer, id., boxing, S. 1960 § 8, S. 1114 § 8, H.R. 2565 sec. 201(a)(2), § 728, and the Women’s National Basketball Association ("WNBA"). S. 1334 § 3(5). Finally, several bills allow the Secretary of Commerce to later add leagues to the enumerated list. H.R. 3084 § 2(2); S. 1114 § 5(c); H.R. 2565 sec. 201(a)(2), § 725(c).

The original Stearns bill only requires one test each year. H.R. 1862 § 3(1). The other proposed bills each required either three, four, or five tests per year. S. 1960 § 6(c)(1)(A); S. 1334 § 5(d)(1)(A); H.R. 3084 § 3(a)(1); S. 1114 § 4(b)(1)(A); H.R. 2565 sec. 201(a)(2), § 724(b)(1)(A); H.R. 2516 § 4(b)(1).

S. 1960 § 6(d)(1); S. 1334 § 5(e)(1); S. 1114 § 4(b)(7)(A); H.R. 2565 sec. 201(a)(2), § 724(b)(7)(A); H.R. 2516 § 4(b)(6); H.R. 1862 § 3(4)(A). The Revised Stearns Bill promulgates lighter penalties, requiring a one-half year suspension for the first offense, a one-year suspension for the second offense, and a lifetime ban for the third offense. H.R. 3084 § 3(a)(5)(A).

S. 1960 § 6(d)(3); S. 1334 § 5(e)(2)(A); H.R. 3084 § 3(a)(5)(B); S. 1114 § 4(b)(9); H.R. 2565 sec. 201(a)(2), § 724(b)(9); H.R. 2516 § 4(b)(7); H.R. 1862 § 3(4)(B).

S. 1960 § 4(11); S. 1334 § 3(7); H.R. 3084 § 3(a)(2)(A); S. 1114 § 3(8); H.R. 2565 sec. 201(a)(2), § 723(8); H.R. 2516 § 4(b)(3); H.R. 1862 § 3(2)(A). The Stearns bills also allow the
anabolic agents, hormones such as EPO, hGH, and IGF-1, and masking agents. Two bills also require that the testing methods “be consistent with and as stringent as the doping control standard established by the USADA.” This USADA requirement means that the leagues must conduct both urine and blood testing. Additionally, they must store the collected samples and later test the samples for newly discovered designer steroids.

Secretary of Commerce to add new PEDs to the list of tested substances. H.R. 3084 § 3(a)(2)(B); H.R. 1862 § 3(2)(B).


S. 1114 § 4(b); H.R. 2565 sec. 201(a)(2), § 724(b); H.R. 2516 § 4(b)(2) (requiring leagues to “consult” with the USADA).


C. Current Testing Regimes in Professional Sports

Unlike the Congressional approach, which defers to the wisdom of the WADA/USADA,\(^6^6\) the professional leagues negotiated the terms of their testing policies with the players.\(^6^7\) Thus, rather than adopt the Olympics’ two-year suspension standard,\(^6^8\) the professional sports leagues suspend players for only part of a season on their first offense.\(^6^9\)

\(^6^6\) See supra note 63 (citing the proposed bills that rely on testing procedures created by the WADA/USADA).

\(^6^7\) See Mitten, supra note 8, at 803 (noting that drug testing is a mandatory subject of the collective bargaining agreements).

\(^6^8\) See WORLD ANTI-DOPING AGENCY, WORLD ANTI-DOPING CODE § 10.4.3 (2003), http://www.wada-ama.org/rtecontent/document/code_v3.pdf (suspending athletes two years for an anti-doping violation).

Also, none of the covered leagues require blood testing.70 Furthermore, the NBA, NHL, and MLB prohibit the public disclosure of a player’s test results.71

IV. ANALYSIS UNDER THE FOURTH AMENDMENT’S “SPECIAL NEEDS” TEST

The remainder of this Article analyzes the proposed steroid-testing legislation under the Fourth Amendment. Of course, Congress believes that the proposed legislation is not subject to Fourth Amendment scrutiny because the government does not conduct the steroid tests. The

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Bargaining Agreement, Article XXXIII: Anti-Drug Program, 

70 See A Look at Steroid Policies by Sport, ESPN.COM NEWS SERVICES, Jun. 7, 2006,  
story?id=2474104 (comparing different steroid testing policies).

71 Major League Baseball’s Joint Drug Prevention and Treatment Program 9,  
Fourth Amendment only applies to “state actors.” Congress asserts that the professional sports leagues are not state actors.

However, the Fourth Amendment does apply to the proposed steroid-testing legislation because the legislation requires professional sports leagues to conduct steroid testing in compliance with federal guidelines. The proposed legislation expressly requires the professional sports leagues to execute the suspicionless searches. The Constitution protects against “unreasonable searches and seizures” executed by private parties acting under


73 See Integrity in Professional Sports Act, S. 1960 § 9(a), 109th Cong. (2005) (“Nothing in this Act shall be construed to deem . . . any professional sports league an agent of or an actor on behalf of the United States Government.”).

74 See, e.g., Clean Sports Act of 2005, S. 1114 § 6, 109th Cong. (2005) (providing that non-compliant leagues are subject to a $1,000,000 fine per day); see also Peck, supra note 8, at 1819-20 (concluding that the Fourth Amendment does apply to the proposed steroid-testing legislation).

75 See, e.g., S. 1114 § 6 (penalizing sports leagues for not complying with the proposed legislation).

76 U.S. CONST. amend. IV.
“compulsion of sovereign authority.” Therefore, the proposed legislation will violate the Fourth Amendment if the search program is deemed “unreasonable.”

Generally speaking, a search is unreasonable unless supported with evidence of individualized suspicion. However, when a “special need” exists, courts determine reasonableness by conducting a balancing test. Specifically, courts “balance the individual’s privacy expectations against the Government’s interests to determine whether it is impracticable to require a warrant or some level of individualized suspicion.”

Part A of this section discusses the privacy interests at risk under the proposed steroid-testing legislation. Part B analyzes the different government interests in steroid testing under the “special needs” test. This section concludes that the proposed legislation violates the Fourth Amendment because the proffered government interests do not justify violating the athletes’ Fourth Amendment privacy rights.

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77 Skinner, 489 U.S. at 614.
78 See id. at 614-16 (explaining that the Fourth Amendment requires government searches to be reasonable).
79 Id. at 619 (citing Payton v. New York, 445 U.S. 573, 586 (1980); Mincey v. Arizona, 437 U.S. 385, 390 (1978)).
81 Id.
A. The Athlete’s Expectation of Privacy

The Fourth Amendment protects expectations of privacy that society recognizes as “legitimate.”\(^82\) A court analyzes the legitimacy of an individual’s privacy rights in the “context within which a search takes place.”\(^83\) For example, the Supreme Court has held that “[l]egitimate privacy expectations are even less with regard to student athletes” because of the locker room’s reputation for communal undress,\(^84\) a rationale that could also apply to professional sports.\(^85\) Likewise, “the expectations of privacy of covered employees are diminished by reason of their participation in an industry regulated pervasively to ensure safety.”\(^86\) However, this reasoning does not apply to professional athletes because the government has left most sports to self-regulation.\(^87\)

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\(^83\) Id. at 337.


\(^85\) Cf. Peck, supra note 8, at 1807 (arguing that professional athletes “voluntarily” subject themselves to many violations of privacy that occur in the locker-room).

\(^86\) Skinner, 489 U.S. at 627.

\(^87\) See, e.g., Restoring Faith in America’s Pastime: Evaluating Major League Baseball’s Efforts to Eradicate Steroid Use: Hearing Before the H. Comm. on Gov’t Reform, 109th Cong. 9
This section explains how the proposed steroid-testing legislation infringes on the players’ privacy interests by requiring blood testing, storing test samples for extended periods, disclosing all positive test results, and restraining the athletes’ freedom of movement.88

1. Privacy under a Collective Bargaining Agreement (“CBA”)

As an initial matter, most athletes covered by the proposed legislation have consented to some form of steroid testing.89 However, athletes do not necessarily waive all expectations of privacy by consenting to a search under a CBA. Consent under a CBA is very limited: players can contractually define the search’s scope and revoke their consent through a subsequent

(2005) [hereinafter House MLB Hearing] (statement of Rep. Henry A. Waxman, Ranking Minority Member, Comm. on Gov’t Reform) (commenting on how Congress left baseball to self-regulation). But see Integrity in Professional Sports, S. 1960 §2(a)(10)(C), 109th Cong. (2005) (claiming that, “[f]or several years, Congress has . . . regulated both professional and amateur sports”). An actual example of a heavily regulated sport is horse racing, a sport governed by existing state agencies because it is (1) highly dangerous; (2) the subject of state-sponsored gambling laws; and (3) known for its long history of corrupt practices. Dimeo v. Griffin, 943 F.2d 679, 681 (1991).

88 See infra Parts IV.A.2-5 (describing the different types of privacy violations that the proposed legislation requires).

89 For example, the NFL, NBA, NHL, and MLB have steroid-testing programs. A Look at Steroid Policies by Sport, supra note 70.
agreement. However, the proposed legislation permanently requires searches that extend beyond the terms of the CBAs.

Also, some athletes agreed to CBA searches because Congress threatened to pass steroid-testing legislation. The government cannot coerce a search by threat. When the players were negotiating their CBAs, they could either choose the CBA search program or a more intrusive government search program. The players did not waive their privacy rights simply by choosing the less-intrusive testing programs available under the CBAs.


 See Parts IV.A.2-5 (discussing how the terms of the proposed legislation further encroach on privacy rights).

 MLB’s updatesd their steroid-testing program because of congressional pressure. Kiely, * supra* note Error! Bookmark not defined. Likewise, the NHL did not test for steroids until Congress got involved. *See Clean Sports Act Hearings, supra* note 6, at 2 (2005) (statement of Ted Saskin, Executive Director, National Hockey League Players’ Association) (announcing the NHL’s first attempt to eliminate PEDs through a system of testing and discipline”).


 See Heath, * supra* note 2, at A01 (reporting Senator McCain’s belief that Congress would pass steroid-testing legislation if the players did not agree to stricter steroid testing).
2. Blood Testing

Although the CBAs do not necessarily diminish the professional athletes’ expectations of privacy, the agreements do help determine whether certain violations of privacy are reasonable. For example, under many CBAs, urine testing is acceptable, but blood testing is not. The proposed legislation, however, requires both blood and urine testing.

According to the Supreme Court, blood testing is actually less intrusive than urine testing. "Skinner v. Railway v. Labor Executives’ Association" confirmed ‘society’s judgment that blood tests do not constitute an unduly extensive imposition on an individual’s privacy and

Presumably, players would never agree to unreasonable privacy violations unless they were paid millions of dollars.

See A Look at Steroid Policies by Sport, supra note 70 (reporting that the four major sports test urine but not blood).

See supra note 64 (explaining that some proposed bills either adopt the Olympics’ blood testing procedure or expressly require blood testing). One author, who argued that the proposed legislation is constitutional, mistakenly believed that the legislation does not require blood testing. See Peck, supra note 8, at 1791 (claiming that “the proposed bills do not state the method of testing—i.e., blood or urine testing. . .”).

See Skinner v. Railway Labor Executives’ Association, 489 U.S. 602, 624-26 (1989) (asserting that urine tests present more difficult privacy questions because of the collection process, but concluding that blood, breath, and urine tests result in “minimal” interference with an individual’s privacy interest).
bodily integrity.’”99 From this perspective, the proposed legislation’s blood testing requirement seems reasonable. After all, professional athletes constantly subject themselves to physical examinations and other medical procedures that tend to involve poking and prodding.100

However, the government cannot assume that the Court’s prior approach to blood testing in *Skinner* is still good law.101 *Skinner* relied on the theory that blood tests are not intrusive,102 a rationale that scholars have since rejected.103 Justice Marshall argued in his *Skinner* dissent that

99  *Id.* at 625 (quoting Winston v. Lee, 470 U.S. 753, 762 (1985)); *see also* Schmerber v. California, 384 U.S. 757, 771 (1966) (“tests are a commonplace in these days of periodic physical examinations and experience with them teaches that the quantity of blood extracted is minimal, and that for most people the procedure involves virtually no risk, trauma, or pain”); South Dakota v. Neville, 459 U.S. 553, 563 (1983) (“The simple blood-alcohol test is . . . safe, painless, and commonplace”); Breithaupt v. Abram, 352 U.S. 432, 436 (1957) (“The blood test procedure has become routine in our everyday life.”).


101  *See* Skinner, 489 U.S. at 624-26 (holding that blood testing is less intrusive than urine testing).

102  *See id.* at 625 (characterizing blood testing as a minimal violation of privacy).

103  *See, e.g.*, Phillipa M. Guthrie, *Note, Drug Testing and Welfare: Taking the Drug War to the Constitutional Limits*, 66 IND. L. J. 579, 580 n.19 (1991) (“No one could seriously argue that a procedure to withdraw bodily fluids with a needle is not intrusive.”).
“[c]ompelling a person to submit to the piercing of his skin by a hypodermic needle so that his blood may be extracted significantly intrudes on the ‘personal privacy and dignity against unwarranted intrusion by the State’ against which the Fourth Amendment protects.”  

Furthermore, although players’ unions have agreed to an increase in steroid testing, the athletes have consistently refused to take blood tests. Players’ unions believe that drawing blood samples is a much more intrusive method of testing than taking urine samples. Some athletes may also refuse to take any drug tests that involve needles. In short, the proposed legislation infringes on legitimate privacy interests by requiring blood testing.

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Skinner, 489 U.S. at 644 (Marshall, J., dissenting) (quoting Schmerber, 384 U.S. at 767). According to Justice Marshall, a blood test may not be required without a showing of individualized suspicion. Id. at 644-45.

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See A Look at Steroid Policies by Sport, supra note 70 (noting that most athletes have not consented to blood tests).

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At least ten percent of all Americans suffer from trypanophobia, commonly referred to as “needle phobia,” the extreme and irrational fear of medical procedures involving injections or hypodermic needles. James G. Hamilton, Needle Phobia: A Neglected Diagnosis, J. FAM. PRAC., Aug. 1995, at 169.
3. Sample Storage

In addition to blood testing, some proposed bills also require the leagues to store test samples for future testing.108 “Storing samples would be an effective deterrent and would make players think twice about using HGH.”109 Congress argues that players will stop using HGH if they believe scientists will develop an HGH test in the future.110

However, MLB is against the long-term storage of test samples, in part, because it doubts that the test results “would still be reliable” after long-term storage.111 Likewise, when the NFL has stored and retested samples, it did not retain them for extended periods subject to a retesting program.112 The Supreme Court has only approved of short-term sample storage, designed for the purpose of obtaining a warrant, that storage does not threaten the accuracy of the test results.113

108 See Bill Comparison, supra note 65, at 2 (noting that some proposed bills require leagues to preserve test samples).


110 Id.

111 Id.

112 See Clean Sports Act Hearings, supra note 6, at 6 (2005) (statement of Paul Tagliabue, Commissioner, National Football League) (testifying that the NFL tested all samples that had not been destroyed when the league learned about a new steroid).

Storing test samples also increases the chance that samples will fall into the wrong hands. Of course, the Supreme Court has approved of a testing program that did not adequately protect medical data because the plaintiff failed to prove a confidentiality breach. The federal investigation of the Bay Area Lab Cooperative (“BALCO”), however, illustrates an actual confidentiality breach that can occur when the government requires storage of test samples.

In 2003, MLB implemented a provisionary steroid-testing program. The CBA required MLB to keep test results confidential and destroy the samples after testing. However, the federal government seized the test results as part of the BALCO investigation. The Ninth Circuit allowed investigators to keep the testing data of about 100 MLB players, including many athletes never accused of a crime. Some commentators believe that the Ninth Circuit’s

115 BALCO is a sports nutrition center in California currently under investigation for distributing illegal steroids to athletes. United States v. Comprehensive Drug Testing, Inc., No. 05-10067, slip op. at 19790 (9th Cir. Dec. 27, 2006).
116 See Phil Rogers, Judicial Brushback Stuns MLB Union, CHI. TRIB., Dec. 28, 2006, at ___ (describing the BALCO investigation).
117 Id.
118 Id.
119 Comprehensive Drug Testing, No. 05-10067, slip op. at 19826. The government could keep the irrelevant test results because it was intermingled with relevant data. Id. at 19822.
decision violates the Fourth Amendment. Regardless, the innocent players can only sit and wait for the testing data to be leaked to the media.

Requiring the leagues to store samples is simply another way the proposed legislation infringes on privacy rights. “Peeing in a cup is one thing; getting stuck with needles and having the samples frozen for future testing delves into the deep and moralistic issues of civil liberties. . . .”

4. Public Disclosure of Test Results

In addition to requiring sample storage, the proposed legislation also jeopardizes confidentiality by requiring public disclosure of testing results. Many CBAs contain confidentiality clauses, although most athletes never receive full confidentiality due to their popularity. For example, the media regularly leaks confidential drug test results.

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123 See supra note 60 (citing the full disclosure provisions).

124 See supra note 71 (citing various CBA requirements).

125 See Peck, supra note 8, at 1821-22 (describing how athletes face relentless public scrutiny).
Some scholars argue that professional athletes also have a diminished expectation of privacy based on the Court’s treatment of political candidates.\textsuperscript{127} The Supreme Court has held that political candidates have a diminished expectation of privacy because they are subject to “relentless scrutiny.”\textsuperscript{128} However, unlike politicians, professional athletes have the ability to keep certain information confidential by creating privacy rights by contract.\textsuperscript{129} The players created an expectation of privacy in their CBAs that the Fourth Amendment should recognize.

5. Freedom of Movement

Ted Saskin, Executive Director of the NHL Players’ Association, raises another interesting Fourth Amendment issue: freedom of movement.\textsuperscript{130} Saskin argues that the proposed legislation, requiring both year-round and post-game testing, impairs the players’ ability to...

\textsuperscript{126} See, e.g., Caught Speeding: News Learns Bonds Failed Amphetamine Test in '06, N.Y. DAILY NEWS, Jan. 11, 2007, at 84 (reporting the confidential results of Barry Bonds’ amphetamine test).

\textsuperscript{127} See Peck, supra note 8, at 1821-22 (comparing professional athletes with political candidates).

\textsuperscript{128} Chandler v. Miller, 520 U.S. 305, 321 (1997).

\textsuperscript{129} See, e.g., supra note 71 (citing the confidentiality provisions used in baseball, basketball, and hockey CBAs).

\textsuperscript{130} See Clean Sports Act Hearings, supra note 6, at 6 (2005) (statement of Ted Saskin, Executive Director, National Hockey League Players’ Association) (arguing that the proposed legislation is not properly tailored to the NHL).
travel. Off-season steroid testing in America would keep many hockey players from playing in Europe during the summer. Likewise, players do not have time to take steroid tests after games because they must leave to travel to the next city on their schedule.

The Supreme Court has stated that “any limitation on an employee’s freedom of movement that is necessary to obtain the blood, urine or breath samples contemplated by the regulations must be considered in assessing the intrusiveness of the searches effected by the Government’s testing program.” Based on this language, the constitutionality of the proposed legislation is in jeopardy because the legislation severely limits the players’ freedom of movement.

6. A Brief Summary of the Players’ Privacy Interests

Professional athletes can argue that the proposed legislation would result in numerous privacy violations. Blood testing, sample storage, confidentiality, and freedom of movement concerns implicate serious Fourth Amendment privacy interests. Unfortunately for the players, the proposed legislation provides a perfect illustration of the most popular complaint about the “special needs” test: the test does not give proper weight to individual privacy interests.

131 Id.
132 Id.
133 Id.
135 See, e.g., Irene Merker Rosenberg, The Public Schools Have a “Special Need” for their Student’s Urine, 31 Hofstra L. Rev. 303, 304 (2002) (concluding that the Court’s analysis in the “special needs” cases erodes Fourth Amendment privacy rights by subjecting government decisions to a special needs analysis that is too narrow).
intrusions to a “toothless” level of scrutiny); Robert D. Dodson, *Ten Years of Randomized Jurisprudence: Amending the Special Needs Doctrine*, 51 S.C. L. REV. 258, 283-84 (2000) (arguing that the Supreme Court has unfairly diminished privacy rights because it “never considered the adverse effects on society from mass invasions of privacy”); George M. Dery, III, *Are Politicians More Deserving of Privacy than Schoolchildren? How Chandler v. Miller Exposed the Absurdities of Fourth Amendment “Special Needs” Balancing*, 40 ARIZ. L. REV. 73, 102 (1998) (“The sanctity of individual dignity has deteriorated from where the Court considered the search of a student’s purse to constitute a ‘severe violation of subjective expectations of privacy,’ to where a schoolchild being forced to urinate in front of faculty implicated only ‘negligible’ privacy interests.”) (internal quotations and footnotes omitted); Jennifer Y. Buffaloe, *Note, “Special Needs” and the Fourth Amendment: An Exception Poised to Swallow the Warrant Preference Rule*, 32 HARV. C.R.-C.L. L. REV. 529, 532 (1997) (arguing that the Supreme Court has erred in diminishing privacy rights in civil searches as compared to criminal searches); Robert L. Misner, *Justifying Searches on the Basis of Equality of Treatment*, 82 J. CRIM. L. & CRIMINOLOGY 547, 547 (1992) (“The Supreme Court has become so concerned with the equal treatment of searched persons that the Court has often abandoned its role in providing protection for individual privacy.”); Phoebe Weaver Williams, *Governmental Drug Testing: Critique and Analysis of Fourth Amendment Jurisprudence*, 8 HOFSTRA LAB. L.J. 1, 72-73 (1990) (arguing that the Supreme Court’s “diminished expectation” approach penalizes workers who willingly sacrificed some privacy interests for the sake of employment by creating an even greater privacy violation).
The Supreme Court has considered the privacy interests of petitioning individuals to be minimal in every “special needs” case.136 Even in Chandler v. Miller,137 the only Supreme Court case to strike down a civil search under the “special needs” test, the Court summarily described the search procedure as “relatively noninvasive” before proceeding to analyze whether a “special need” was present.138

The Supreme Court’s analysis is painfully simple: all drug tests are relatively noninvasive,139 regardless of search method.140 The Court diminishes the privacy violations that occur when the government searches an individual’s body even though such a search should receive the strongest presumption of invalidity.141 Thus, despite the legitimate privacy concerns

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136 See, e.g., Earls, 536 U.S. at 833 (concluding that the search method is “even less problematic” than “a negligible intrusion”); Vernonia School District v. Acton, 515 U.S. 646, 658 (1995) (describing the method of collection as a “negligible” intrusion); Skinner, 489 U.S. at 624 (holding that blood, breath, and urine tests result in “minimal interference” with an employee’s privacy rights).

137 520 U.S. 305 (1997).

138 Id. at 318.

139 See, e.g., id. (asserting that the search procedure was “relatively noninvasive” before analyzing whether a “special need” was present).


141 See Erik G. Luna, Sovereignty and Suspicion, 48 DUKE L.J. 787, 818 (proposing the “Individual Rights Model” approach to Fourth Amendment searches, which is based on the
discussed in this section, the constitutionality of the legislation under the “special needs” test turns solely on the legitimacy of the government’s interest in the search program.

B. Special Needs and the Government’s Interest

America has a serious steroid problem. Former professional athletes estimate that as many as 40% of players use PEDs.\textsuperscript{142} Seventy-nine percent of baseball players believe that

\begin{itemize}
\item assumption that individual sovereignty “is the ultimate concern and must be protected from oppression by the state”).
\end{itemize}

\textsuperscript{142} See House MLB Hearing, supra note 87, at 10 (statement of Rep. Henry A. Waxman, Ranking Minority Member, Comm. on Gov’t Reform) (citing a 2002 issue of Sports Illustrated that reported a player’s belief that forty to fifty percent of Major League baseball players used steroids); Steroid Use in Sports, Part II: Examining the National Football League’s Policy on Anabolic Steroids and Related Substances: Hearing Before the H. Comm. on Gov’t Reform, 109th Cong. 86 (2005) [hereinafter House NFL Hearing] (statement of Rep. Mark Souder, Chairman, S. Comm. on Criminal Justice, Drug Policy, and Human Resources) (referring to the comments of Larry Brown, Super Bowl XXX MVP, who believes that forty percent of today’s NFL players are using steroids). Jose Canseco believes that as many as 85% of baseball players took steroids when he was playing. Congress to Launch Steroid Query, CBSNEWS.COM, June 11, 2002, http://www.cbsnews.com/stories/2002/06/11/national/main511828.shtml.

Unfortunately, these estimates are unverifiable and represent, at best, off-the-cuff commentary, and at worst, an effort to sell a few more books.
steroids played some role in athletes accomplishing record-breaking achievements. Some former players have admitted to using PEDs even though they never failed a league steroid test. Because testing programs never catch all cheaters, we may never know the true extent of PED use.

Unfortunately, America’s steroid problem also affects our Nation’s youth. Teen steroid abuse can cause “early cardiovascular disease, liver damage, infection from contaminated injection equipment, changes to sexual characteristics and serious psychiatric side effects, including severe depression leading to suicide.” Shockingly, only 56% of high school students believe that steroid use is harmful. More than 500,000 high school students have


144 Admitted steroid users such as Jose Canseco, Ken Caminiti, Bill Romanowski, and Steve Courson were never caught by league testing programs. Mitten, *supra* note 8, at 798.

145 For example, six former Charlotte Panther football players used testosterone cypionate and stanozol during their careers. Charles Chandler, *On File: Steroids’ Risks, Ravages*, CHARLOTTE OBSERVER, Aug. 27, 2006, at __. These two performance-enhancing substances had been subject to NFL steroid testing for years. *Id.* Normally, “[i]f you put testosterone cypionate and stanozol in [your] body, you’re hoping around like a bunny with a big sign saying, ‘Test me, test me, catch me, catch me.’” *Id.* Yet, somehow the NFL failed to catch the cheating athletes.

146 *House MLB Hearing, supra* note 87, at 46.

147 *Id.*
tried steroids—nearly triple the number from just 10 years ago.\textsuperscript{148} 3.4 percent of 12th graders and 1.9 percent of 8th graders have used PEDs.\textsuperscript{149}

However, Congress’s interest in solving this “public health crisis”\textsuperscript{150} is not sufficient to justify infringing individual privacy rights. Even if Congress can legislate public health,\textsuperscript{151} suspicionless government searches require “special needs, beyond the normal need for law enforcement.”\textsuperscript{152} The Supreme Court in \textit{Chandler} breathed new life into the “special needs” test, stating that “the proffered special need for drug testing must be substantial—important enough to override the individual’s acknowledged privacy interest, [and] sufficiently vital to suppress the Fourth Amendment’s normal requirement of individualized suspicion.”\textsuperscript{153} This section analyzes

\begin{flushleft}
\textsuperscript{148} \textit{Id.} at 2.
\textsuperscript{149} \textit{Id.} at 137.
\textsuperscript{150} \textit{See} Brady, supra note 8 (quoting Representative Tom Davis).
\textsuperscript{151} “National health,” according to Professor Susan Herman, “is not a constitutionally authorized basis for Congressional action. Congress has only limited enumerated powers under the Constitution, and public health is not one of them.” Chass, supra note 4, at __. One Member of Congress commented, “I’m not sure that it’s our role to get into taking on the regulation of every sport in America.” \textit{House MLB Hearing}, supra note 87, at 345 (statement of Rep. Paul E. Kanjorski, Member, Comm. on Gov’t Reform).
\textsuperscript{153} Chandler v. Miller, 520 U.S. 305, 318 (1997).
\end{flushleft}
the government justifications for the proposed legislation and concludes that they do not satisfy the “special needs” test.

As an initial matter, supporters of the proposed legislation recognize that steroid testing helps enforce the Anabolic Steroid Control Act.\textsuperscript{154} For example, Representative Henry Waxman justified the Congressional investigation of steroids use in professional sports by relying on the power of his committee to investigate the enforcement of federal law.\textsuperscript{155} The legislative record is also littered with comments about how athletes are not “above the law.”\textsuperscript{156}

The proffered government “special need” must be “beyond the need for law enforcement.”\textsuperscript{157} Any government search executed for law enforcement purposes requires individualized suspicion under the Fourth Amendment.\textsuperscript{158} If the immediate purpose of the

\begin{footnotesize}
\textsuperscript{155} “[A]thletes [are] violating the Controlled Substances Act, which Congress passed in 1991, [and] they’re violating baseball’s own rules against using steroids. And yet, steroid use is increasing. We ought to find out at a minimum why federal laws aren’t being enforced adequately or what changes in the law ought to be made.” \textit{Meet the Press: Steroids in Baseball} (NBC television broadcast Mar. 13, 2005) (transcript available at http://www.msnbc.msn.com/id/7173024/).
\textsuperscript{157} \textit{Skinner}, 489 U.S. at 619.
\textsuperscript{158} See Ferguson v. City of Charleston, 532 U.S. 67, 84 (2001) (holding that law enforcement purposes is not a “special need”).
\end{footnotesize}
legislation is to enforce criminal law, then the ultimate purpose of protecting public health is not relevant in a “special needs” inquiry.\textsuperscript{159} However, the Supreme Court has narrowly defined a search for “law enforcement purposes” to mean a search intended to gather evidence for a criminal prosecution.\textsuperscript{160} The proposed legislation is not for “law enforcement purposes” because the proposed legislation does not threaten criminal prosecution against the athletes.\textsuperscript{161}

Therefore, the proposed legislation will not be unconstitutional despite helping to enforce the principles of the Anabolic Steroids Control Act. Rather, the proposed legislation will be constitutional if the government proves that a “special need” justifies the searches. The government believes that the legislation will (1) protect children from steroids, (2) restore the integrity of professional sports, and (3) protect the health of professional athletes.

1. Protecting the Health of America’s Youth

Congress’s primary reason for passing steroid-testing legislation is to stop children from using steroids.\textsuperscript{162} However, the athletes subject to the legislation are not directly related to the potential public danger—children taking steroids. In previous “special needs” cases, the

\textsuperscript{159} See id. (“A search cannot be justified by “its ultimate, rather than immediate, purpose.”).

\textsuperscript{160} Id. at 82-84.


individual subject to the search is directly linked to the potential public danger. But supporters of the proposed legislation believe that the legislation can stop students’ steroid use by eliminating steroid use by their role models.

The Supreme Court agrees that protecting children from the dangerous effects of drugs is a “special need” in some settings. However, the Court has specifically rejected the need to set a good example as a sufficient government interest. In Chandler, the State of Georgia argued that the testing of political candidates was necessary to establish “public confidence and trust in elected officials.” Georgia insisted that the law must be upheld because elected officials are

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165 See Acton, 515 U.S. at 664-65 (holding that a school district has a legitimate interest in drug-testing students).

166 Chandler, 520 U.S. at 318.
role models for Georgia’s youth.\textsuperscript{167} The Court determined that the government only passed the law to preserve “the image the State seeks to project” and concluded that Georgia could not “diminish[] personal privacy for a symbol’s sake.”\textsuperscript{168} According to the Supreme Court, “need[s] of the ‘set a good example’ genre [are in] sufficient to overwhelm a Fourth Amendment objection.”\textsuperscript{169}

Joshua Peck provides several reasons why the proposed steroid-testing legislation is “anything but symbolic.”\textsuperscript{170} Peck argues that the government need is “special” because “the problem of steroids in professional sports, particularly in baseball, was substantial enough to be addressed by the President and then by Congress.”\textsuperscript{171} However, this reasoning fails because it treats every federal search law as constitutional, which is not much of a test at all.\textsuperscript{172}

\textsuperscript{167} Brief for the Respondents at 16, Chandler v. Miller, 520 U.S. 305 (1997) (No. 96-126).
\textsuperscript{168} \textit{Chandler}, 520 U.S. at 321-22.
\textsuperscript{169} \textit{Id.} at 322 (emphasis added). The Supreme Court later echoed this sentiment in \textit{Earls}. Bd. of Educ. v. Earls, 536 U.S. 822, 834 (2002) (explaining that the holding in \textit{Acton} did not rely on the “role model” effect that high school athletes had on other students at the school) (citing Vernonia School District v. Acton, 515 U.S. 646, 663 (1995)).
\textsuperscript{170} Peck, \textit{supra} note 8, at 1823-24.
\textsuperscript{171} \textit{Id.} at 1824.
\textsuperscript{172} \textit{Cf.} Rosenberg, \textit{supra} note 135, at 314 (warning against deference to majoritarian determinations of reasonableness).
Peck also argues that the government need is “special” because America has a steroids problem.\textsuperscript{173} According to Peck, the proposed legislation is necessary because professional sports have failed to eliminate steroid use.\textsuperscript{174} However, proof of America’s steroid problem does not transport a government interest from “symbolic” to “special.”\textsuperscript{175} Congress must prove that drug testing professional athletes is a “special need,” not just that eliminating steroids generally is a “special need.”\textsuperscript{176}

Congress has the legislative power to eliminate steroid use.\textsuperscript{177} However, Congress cannot try to “set a good example” for America’s youth while dispensing with the Fourth Amendment.\textsuperscript{178} Congress failed to prove a direct nexus between teen steroid use and professional athletes, who are merely “distant societal role models.”\textsuperscript{179} Rather, Congress made a

\textsuperscript{173} Peck, \textit{supra} note 8, at 1824.

\textsuperscript{174} \textit{See id.} (calling Congressional action a “last resort”).

\textsuperscript{175} Rather, such evidence only “help[s] to clarify—and to substantiate—the precise hazards posed by such use.” \textit{Chandler}, 520 U.S. at 319.

\textsuperscript{176} For example, in \textit{Chandler}, the Court asked whether the search program is a “special need,” not whether eliminating public drug use is a “special need.” \textit{See id.} at 318 (“[W]e concentrate on the core issue: Is the certification requirement warranted by a special need?”).

\textsuperscript{177} \textit{See supra} Part III.A (describing Congress’s previous efforts to eliminate steroid use).

\textit{But see supra} note 151 (questioning Congressional power to legislate “public health”).

\textsuperscript{178} \textit{See Chandler}, 520 U.S. at 322 (prohibiting all needs “of the set a good example genre”).

\textsuperscript{179} See Knox County Educ. Ass’n v. Knox County Bd. Of Educ., 158 F.3d 361, 375 (6th Cir. 1998) (explaining how school teachers, unlike political candidates, “influence and mold the
symbolic statement against steroids without regard for individual privacy rights. The government wants to solve a serious steroid problem in a “symbolic” and unconstitutional way.

2. Restoring the Integrity of Professional Sports

Just as the need to protect the health of children is not sufficient, Congress cannot rely on its second major justification for the proposed legislation—steroid testing will protect the integrity of the game. Congress fears that professional sports “[are] about to become a fraud.” Supporters believe that the public nature of sports overrides any privacy concerns.

perceptions, [thoughts,] and values of children . . . [t]hrough their own conduct and daily interaction with [them]”). For a discussion on how testing professional athletes will not deter teen steroid use, see supra notes 210–214 and accompanying text.

See supra Part IV.A (discussing the different ways the proposed legislation infringes on individual privacy rights).

Congress expressed two justifications for the legislation: “to protect the health and safety of all athletes and [to] promote the integrity of professional sports. . . .” Integrity in Professional Sports Act, S. 1960 § 2(b), 109th Cong. (2005). See also Chass, supra note 4, at __ (quoting Kieth Ausbrook, Chief Counsel for the House Government Reform Committee, who believes that “the record shows there’s compelling interest in doing it to protect the integrity of the game and protect the health of players and children who look up to them”).

Heath, supra note 2, at A01 (quoting Senator John McCain).

As Baltimore Orioles owner Peter Angelos explained, “the senators made their positions very clear that this is a public matter. The public needs reassurance. This testing is calculated to accomplish that purpose. And it is owed to the public. It is owed to the game.” Id.
However, even supporters of the proposed legislation recognize that restoring the integrity of professional sports is not really a “special need” under the Fourth Amendment.184 Congress is not responsible for policing American professional sports.185 “[P]ublic safety is not genuinely in jeopardy”186 simply because athletes may be ruining the image of professional sports and cheating to achieve major sports records.187

Furthermore, the need to establish “public confidence and trust in elected officials” was not sufficient in Chandler.188 Likewise, legislation intended to give America “a reason . . . to have faith in [professional] sport[s] again”189 is not a “special need” under the Fourth Amendment. Restoring the integrity of professional sports is merely a symbol of our Nation’s

184 See Peck, supra note 8, at 1824 (discussing “the ‘less special’ purpose of the Act”).


186 Chandler, 520 U.S. at 323.

187 Oddly enough, Congress wants to regulate the legitimacy of statistical records in professional sports. See S. 1960 § 3(1), 109th Cong. (2005) (“[T]he individual records of professional athletes achieved as a result of the use of performance-enhancing substances or methods should be invalidated.”).

188 Chandler, 520 U.S. at 318.

189 House MLB Hearing, supra note 87, at 11 (statement of Rep. Henry A. Waxman, Ranking Minority Member, Comm. on Gov’t Reform).
fight against steroid abuse and is not a sufficient government interest under the “special needs” test.

3. Protecting the Health of Professional Athletes

The government’s third major justification for the proposed legislation is that Congressional intervention is necessary to protect the health of professional athletes. Professional athletes jeopardize their health by taking steroids. However, players feel pressured to take PEDs because (1) today’s athletes must “win at all costs;” (2) athletes must

190 See S. 1960 § 2(b), 109th Cong. (2005) (expressing the purpose of protecting “the health and safety of all athletes”).


192 See, e.g., House MLB Hearing, supra note 87, at 258 (statement of Rep. Dennis J. Kucinich, Member, Comm. on Gov’t Reform) (discussing “the larger questions of pressures to succeed, pressures to win, pressures to make money, pressures to be bigger, [and] pressures to be better, at the cost of life”).
cheat to keep up with the other players who cheat;\textsuperscript{193} (3) players recognize that the success and popularity of the sport may depend on PEDs;\textsuperscript{194} and (4) teams and leagues benefit from doping

\textsuperscript{193} \textit{See}, e.g., William Saletan, \textit{Let Them Eat Steak}, SLATE, May 2, 2005, http://www.slate.com/id/2117568/ (discussing players’ general concern about coercion: “If the hulk opposite you on the line of scrimmage uses steroids, you have to do the same just to keep your job”). Teammates even ostracize nonusers as “slackers.” \textit{See} Carroll, \textit{supra} note 15, at 79 (reporting the experience of former MLB outfielder Chad Curtis).

\textsuperscript{194} For example, Mark McGwire and Sammy Sosa felt the pressure to increase the popularity of baseball during the 1998 home-run chase. Carroll, \textit{supra} note 15, at 231. Sports columnists who once praised McGwire and Sosa for saving baseball now blame them for ruining baseball. \textit{Compare}, e.g., Ann Killion, \textit{Pure Gold: Baseball in 1998 Offers Record Breaking Feats}, SPORTING NEWS, Sept. 21, 1998, at ___ (commenting that the heroics of players like McGwire and Sosa will be a “treat” for kids in the future who are learning about baseball history), \textit{with} Ann Killion, \textit{Why McGwire Won’t be Getting my Hall Vote}, MERCURY NEWS, Dec. 19, 2006, at ___ (arguing that Mark McGwire’s cannot become a member of the Hall of Fame because it sends the wrong message to children).
because it increases revenues.\footnote{195} External force may be necessary to eliminate the internal pressures to take steroids.\footnote{196}

However, the Supreme Court has never upheld a violation of an adult’s privacy rights so that the government could protect that individual from himself.\footnote{197} Rather, the Court requires the government to show a “public” danger.\footnote{198} The government’s only alleged public danger is the need to “set a good example” for America’s youth.\footnote{199} Steroid testing a small class of citizens, some of whom subject themselves to serious health risks, is not a “special need” under the Fourth Amendment.\footnote{200}

\footnote{195} \textit{See}, e.g., Daniel P. Fox, Comment, \textit{Structural Barriers in Antidoping Measures}, 8 \textit{Sports L.J.} 271, 277-78 (2001) (arguing that the NFL conducts “sloppy” testing because the league is dependent on the revenues earned from doping and only tests athletes for public relations purposes).

\footnote{196} Cf. Carroll, supra note 15, at 17 (discussing how the pressure to take steroids can come from inside the sport).


\footnote{198} Chandler v. Miller, 520 U.S. 305, 323 (1997).

\footnote{199} \textit{See supra} Part IV.B.2 (concluding that the proposed legislation’s method of deterring teen steroid use is not a “special need” under the Fourth Amendment).

4. **Effectiveness of the Government’s Search Program**

The preceding sections analyzed the insufficiency of the government’s interest in requiring suspicionless steroid tests. However, the “special needs” test requires the Court to address both “the nature and immediacy of the government’s concerns and the efficacy of the Policy in meeting them.”201 Of course, the Supreme Court often either ignores the efficacy of the drug testing policy202 or addresses the efficacy requirement only in passing.203 The Supreme Court has analyzed efficacy before, but the Court can easily ignore the effectiveness of a search program again in the future.204 Also, according to the Court, any drug testing policy is effective if it can deter drug use, even if it will not actually decrease drug use.205

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202 *Cf.* Williams, *supra* note 135, at 77 (describing *Von Raab’s* “untenable” assumption that “drug dependent customs professionals [would] naively apply for promotions risking exposure and detection”).

203 *See, e.g.*, *Earls*, 536 U.S. at 837-38 (concluding that drug testing is effective by quickly stating that drug tests do not have to target the group of students most likely to use drugs).

204 *See Chandler*, 520 U.S. at 319-20 (holding that Georgia’s drug testing policy could not effectively identify or deter drug users with only one test). Because *Chandler* is the only “special needs” case to address efficacy, there is no way of knowing whether *Chandler* is an incongruity or a sign of things to come. *See Dery*, III, *supra* note 135, at 97-98 (commenting on
Furthermore, under the “special needs” test, a drug testing program can be constitutional even if the program is not effective. The “special needs” test requires a court to balance the nature of the individual’s privacy interest and the character of the privacy intrusion against “the nature and immediacy of the government’s concerns and the efficacy of the Policy in meeting them.”\footnote{206} Recall that the Supreme Court is likely to dismiss concerns regarding the nature of the individual’s privacy interest and the character of the privacy intrusion.\footnote{207} If privacy interests are diminished, and the government has a legitimate interest in the particular social epidemic the

\footnote{205} See id. at 837 (holding that “preventing, deterring, and detecting drug use” are all legitimate government interests).


\footnote{207} See supra note 136 (listing the Supreme Court’s civil “special needs” cases, all of which concluded that the violation of the individual’s privacy interest was minimal).
search targets, then efficacy is irrelevant because the other factors weigh in favor of the government.

However, if the Supreme Court were to investigate the efficacy of the proposed legislation, the Court would find that the legislation is ineffective for two reasons. First, the government has failed to prove the validity of the “role model” effect. Although student athletes may feel somewhat justified in taking steroids because some professional athletes also use PEDs, students will not stop taking steroids simply because athletes are now subject to stricter testing.

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208 See, e.g., Earls, 536 U.S. at 835-36 (justifying drug testing because “drug abuse is one of the most serious problems confronting our society today”); see also Thomas Procter, Comment, Constitutionality of Testing High School Male Athletes for Steroids Under Vernonia School District v. Acton and Board of Education v. Earls, 2005 B.Y.U. L. REV. 1335, 1358 (criticizing the Court for “ratif[y]ing ineffectual testing regimes based solely on a perceived national drug problem”).

209 See Procter, supra note 208, at 1358 (explaining how an ineffective search program can still be reasonable).

210 Cf. Carroll, supra note 15, at 138-45 (interviewing a high school baseball players who believes that taking HGH is just a necessary step towards reaching the majors).

211 It is too simple an analysis to say that youths in sports emulate professionals, and [that] if professionals are not using steroids then neither will the younger generation. Youths do seek to imitate their favorite sports stars, but it is not because they use steroids that kids want to mimic them. Instead, it is the skill,
The proposed steroid-testing legislation relies on the “role model” effect instead of addressing the major influences on a student athlete’s decision to take steroids. For example, the bills fail to account for the influence of an adolescent’s peer group and the perception of how harmful PEDs are.\textsuperscript{212} The legislation also ignores the roles that parents, teachers, and coaches power, money, fun, and or fame that motivates middle school and high school athletes. If what these driven 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 sports star is clean of enhancements thanks to a rigorous testing policy.


\textsuperscript{212} See *House MLB Hearing*, supra note 87, at 146 (statement of Dr. Kirk J. Brower) (commenting that Congress has failed to investigate “[h]ow teenagers and student athletes regard the use of steroids by professional athletes”). Dr. Brower recognized that the legislation does address the “perception” reason because steroid use by professional athletes contributes to the perception that steroids are not harmful. *Id.* However, an education program would be a more effective method of addressing the students’ perceptions of steroids. *See infra* Part IV.8.
have in teaching adolescents the difference between right and wrong.\textsuperscript{213} Instead, Congress chose to place the blame for teen steroid use squarely on professional athletes.\textsuperscript{214}

Second, the proposed legislation will be ineffective because scientists cannot detect many popular PEDs.\textsuperscript{215} Most athletes only take undetectable PEDs.\textsuperscript{216} Some players also hire

\textsuperscript{213} Cf. Ron Cook, \textit{Some Parents Drop the Ball as Role Models}, PITTSBURG POST-GAZETTE, March 22, 2005, at __ (complaining that turning athletes into villains does little more than take parents, teachers, and coaches off the hook for their failure to take responsibility); JOHN MCCLOSKEY & JULIAN BAILES, WHEN WINNING COSTS TOO MUCH 21 (2005) (explaining how Charles Barkley’s “I am not a role model” advertisements “awaken[ed] a nation filled with parents who failed to be role models for their children”).

\textsuperscript{214} For example, Congress asked Donald Hooton, the father of an athlete who committed suicide after taking steroids, to speak at a Congressional hearing on how professional athletes are responsible for teen steroid use. \textit{See House MLB Hearing, supra} note 87, at 118-19 (statement of Donald M. Hooton). Mr. Hooton attacked the professional athletes sitting in the room for encouraging teens to take steroids, even though only one player, Jose Canseco, was an admitted steroid user. \textit{Id.} Mr. Hooton considered these athletes guilty until proven innocent and implied that the athletes were responsible for his son’s death.

\textsuperscript{215} \textit{See supra} Part II (discussing the different types of PEDs).

\textsuperscript{216} For example, according to a federal investigator, “[Jason] Grimsley stated that since Major League Baseball began its drug testing for steroids and amphetamines, the only drug he has used is human growth hormone.” Passan, \textit{supra} note 122.
How can steroid tests effectively restore the “integrity of professional sports” when the athletes can simply avoid detection? The proposed legislation does not send the message that all steroids are bad; rather, Congress is telling athletes that only detectable steroids are bad. The proposed legislation should fail the “special needs” test because it is will not effectively reduce steroid use or restore integrity to professional sports.

5. Steroid Testing is the Only Way to Eliminate Steroid Use

Congress may believe it is running out of effective means of eliminating steroid use after its previous attempts were unsuccessful. Keith Ausbrook, Chief Counsel for the House Government Reform Committee, argues that, “if [testing is] the only way to deter the use, [the

\[217\] See Luke Cyphers, Mandatory Drug Fest in Sports: The War Against Drugs is Failing on All Fronts, in DRUGS AND SPORTS 56 (William Dudley ed., 2001) (commenting on how “the cheaters will always find a better chemist than the urine police”).


\[219\] The ease at which players can cheat the drug test distinguishes one Supreme Court case, which held that a search program was effective even though employees could sometimes take drugs and still pass the test. Nat’l Treasury Employees Union v. Von Raab, 489 U.S. 656, 676 (1989) (noting that attempts to cheat the drug test probably would not be successful).

\[220\] See supra Part III.A (describing the series of failed attempts to eliminate steroid use by professional athletes).
government’s interest] might not have to be so compelling.” However, Supreme Court precedent does not support Ausbrook’s assertion.

“In limited circumstances, where the privacy interests implicated by the search are minimal, and where an important government 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.” Contrary to Mr. Ausbrook’s assertion, the government must prove both the “important government interest” element and the requirement that the interest “be placed in jeopardy by a requirement of individualized suspicion.”

Furthermore, the government cannot prove either element. As previously discussed, the government does not have a substantial interest in steroid-testing under the “special needs” test. Also, suspicionless steroid testing is not the only means of eliminating steroid use, and the proposed legislation will not deter steroid use. The proposed legislation violates the Fourth Amendment despite Ausbrook’s attempt to rewrite the “special needs” test.

221 Chass, supra note 4, at __.
223 Id.
224 See supra Parts IV.B.2-4 (analyzing the proffered government interests under Supreme Court precedent).
225 See infra Part IV.B.7 (proposing a more effective and less intrusive means of eliminating steroid use).
226 See supra Part IV.B.5 (showing how the legislation will be ineffective in deterring steroid use by all athletes).
Keith Ausbrook’s belief that Congress might not have to prove a compelling government interest may be based on the Supreme Court’s history of deference to government search programs. “The analysis in special needs has evolved into a simplistic schema: a once over lightly, special needs inquiry—balancing with a thumb on the government’s side.”\textsuperscript{227} Although the Court has scrutinized government interests on occasion,\textsuperscript{228} the Court has yet to “enter the uncomfortable terrain of labeling government actions a ‘ruse’ or a ‘pretext.’”\textsuperscript{229}

However, the Supreme Court should not defer to legislative determinations of reasonableness. Deference would give lawmakers “the power to define the Fourth Amendment, a fundamental right purportedly not subject to majoritarian manipulation.”\textsuperscript{230} Furthermore, unlike previous Court cases that upheld publicly approved search programs,\textsuperscript{231} most Americans

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\item \textsuperscript{227} Rosenberg, \textit{supra} note 135, at 308.
\item \textsuperscript{228} \textit{See} Dery, III, \textit{supra} note 135, at 91 (commenting on how “\textit{Chandler} broke the pattern” of consistent Court deference).
\item \textsuperscript{229} \textit{See} Scott E. Sundby, \textit{Protecting the Citizen “Whilst He is Quiet”: Suspicionless Searches, “Special Needs” and General Warrants}, 74 Miss. L.J. 501, 551 (2004) (arguing that the Court still defers to government determinations of reasonableness).
\item \textsuperscript{230} Rosenberg, \textit{supra} note 135, at 314.
\item \textsuperscript{231} \textit{See} Bd. of Educ. v. Earls, 536 U.S. 822, 841 (2002) (Breyer, J., concurring) (noting that few parents objected to the testing program at public meetings); Vernonia v. Acton, 515 U.S. 646, 665 (1995) (explaining that parents did not object to the districtwide program when given the opportunity).
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are opposed to federally-mandated steroid testing.\(^{232}\) The Court must not delegate its duty to protect individual privacy rights.

6. A Fourth Amendment-Friendly Proposal

Although Congress prefers suspicionless drug testing as a means of deterring steroid use by America’s youth, many scholars believe that the proper solution to the steroid epidemic is education.\(^{233}\) Congress has instead chosen to leave any education efforts to the professional leagues.\(^{234}\) Education programs, however, can effectively target the two major influences on a

\(^{232}\) See PETER HART & WILLIAM D. MCINTRUFF, NBC NEWS/WALL STREET JOURNAL SURVEY 7 (2005), http://online.wsj.com/public/resources/media/poll20050406.pdf (reporting that only 37% of Americans are in favor of congressional involvement while 58% believe that Congress should not be investigating steroid use in professional sports); Brady, supra note 8 (reporting a Rasmussen poll stating that only 22% of Americans support steroid-testing legislation).

\(^{233}\) See, e.g., Will Carroll, The Real Story of Baseball’s Drug Problems, 40 NEW ENG. L. REV. 711, 714 (2006) (urging Congress to abstain from “scare tactics” and to focus its efforts on education); Latiner, supra note 211, at 214 (arguing that “the legislation should focus on kids, education, and even testing younger athletes in schools and related competitions”); Tim Walker, Missing the Target: How Performance-Enhancing Drugs Go Unnoticed and Endanger the Lives of Athletes, 10 VILL. SPORTS & ENT. L.J. 181, 205 (2003) (explaining how education is the proper deterrence method because steroid testing is inaccurate).

\(^{234}\) See Integrity in Professional Sports Act, S. 1960 § 3(3), 109th Cong. (2005) (“It is the sense of Congress that . . . each professional sports league should produce and publicize public
student athlete’s decision to take steroids: (1) the influence of an adolescent’s peer group and (2) public perception of the real effects of PEDs.235

Education will also be more effective than steroid testing because athletes continue to “maintain a few paces ahead of drug-testing efforts.”236 Plus, education programs can effectively attack America’s steroid problem without forcing athletes to surrender their Fourth Amendment rights. In short, the government should stop threatening to pass steroid-testing legislation and focus on education programs that are more effective and less intrusive.

VI. CONCLUSION

The proposed steroid-testing legislation violates the Fourth Amendment. The government has failed to establish a substantial government interest in federally-mandated steroid testing. The government’s main justification for the proposed legislation—protecting the health of America’s youth—is of the “‘set a good example’ genre,” a category which the

service announcements and invest in grassroots efforts regarding the health and safety consequences of steroids and other similar performance-enhancing substances on children and teenagers, particularly on high school athletes.”); see also Chip Dempsey, Steroids: The Media Effect and High School Athletes, 40 NEW ENG. L. REV. 731, 734 (2006) (reporting that Congress has provided steroid education initiatives but failed to fund the programs).

235 See House MLB Hearing, supra note Error! Bookmark not defined., at 146 (statement of Dr. Kirk Brower) (testifying to the real reasons teens take steroids).

236 Anonymous, supra note 16, at 84; see also Carroll, supra note 233, at 714 (predicting that gene doping will soon be so prevalent that steroid testing will be useless).
Supreme Court has already rejected.237 The other major justifications for passing the legislation—restoring the integrity of professional sports and protecting the health of professional athletes—are not substantial government interests under the “special needs” test.238 Furthermore, the government has not shown how the legislation will be effective in deterring steroid use by students and professional athletes.239

Congress is concerned with the message that athletes send to teenagers who are inclined to use steroids. However, these members of Congress, in their rush to rid the country of steroids, should recognize that they too send a message to America’s youth. “Our government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example.”240 Rather than setting a positive example, the proposed legislation sets “frightening precedents” for our society and teaches our Nation that suspending Fourth Amendment protections is acceptable.241 “Drug testing in sports has become a trojan horse eradicating privacy rights.”242

238 See supra Part IV.B (describing the insufficient government interests in the proposed steroid-testing legislation).
239 See supra part IV.B.5 (detailing how the legislation will not be effective in deterring steroid use).
240 Olmstead v. United States, 277 U.S. 438, 485 (Brandeis, J., dissenting).
242 Id.
“The Constitution of the United States is a law for rulers and people, equally in war and in peace, and covers with the shield of its protection all classes of men, at all times, and under all circumstances.”\textsuperscript{243} The Fourth Amendment makes no exception for the war on steroids.

\textsuperscript{243} Ex Parte Milligan, 71 U.S. 2, 121-22 (1866).