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The Baseball Hall of Fame Selection Process in an Age of Performance Enhancing Drugs: An Application of the Contractual and Statutory Rules of Interpretation

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By Joseph A. Kohm, Jr.*

“Greatness and littleness are terms merely comparative; and we err in our estimation of things, because we measure them by some wrong standard.”

Samuel Johnson

Each November, the Baseball Writers’ Association of America (BBWAA) mails out ballots to every eligible voter for Baseball’s Hall of Fame. For only the third time since 1971, the Baseball Writers failed to elect a candidate for the Hall of Fame Class of 2013. The plasticity of the standard employed by the BBWAA has given rise to endless debates, discussions, arguments, analysis, and discord because it is missing what those involved with the law desire in all things contentious - “the bright line” test.

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4 Gary Kicinski, Survey: Bonds, Clemens, Sosa, don’t deserve Hall of Fame this year, SILICON VALLEY MERCURY NEWS.COM http://www.mercurynews.com/breaking-news/ci_22330716/baseball-hall-fame-bonds-clemens-sosa-voting-steroids (last accessed Feb. 27, 2013) “Want to pick a fight? Just walk into any bar and proclaim that Barry Bond’s deserves to be in baseball’s Hall of Fame.”

5 See BBWAA Election Rules, NATIONAL BASEBALL HALL OF FAME AND MUSEUM, available at http://baseballhall.org/hall-famers/rules-election/bbwaa (last accessed Feb. 24, 2013). Rule 5 states: “Voting: Voting shall be based upon the player’s record, playing ability, integrity, sportsmanship, character, and contributions to the team(s) on which the player played.” The concision of these rules, limited to one small page in the internet, is evidence that no lawyers were involved in the drafting of these rules.
Compounding the debate over the Hall of Fame selection process is a specter which has been hovering over the game these last twenty years. Whether players were using performance enhancing drugs (PEDs) during this period is no longer in dispute. The mystery is how to interpret the statistical output of those who were either implicated or admitted as using steroids during this period, and place them in the proper context of their peers.

For the individual fan, this determination will be made on a personal level based on a combination of the particular, combined with both rationalism and empiricism. But for those charged with deciding which players enter Baseball’s hallowed Hall of Fame, the “steroid era” is a pestiferous curse, adding an additional metric for consideration into an equation that is already a controversial and highly illusory benchmark. This purpose of this article is to examine the BBWAA voting standard by using statutory and contractual rules of interpretation to see whether the application of these rules may lend some clarity to the elector’s decision making process. Section I covers the Hall of Fame balloting process. Section II discusses baseballs home run problem in light of PEDs. Sections III and IV apply the statutory and contractual rules of interpretation to the Baseball Hall of Fame voting rules. Finally, Section V

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7 For purposes of this article, performance enhancing drugs include but are not limited to steroids or other drugs used by players with the intent of improving off-field output. For a thorough review of PEDs available to professional baseball players see Jay Jaffe, *What Really Happened in the Juiced Era?*, in EXTRA INNNINGS, STEVEN GOLDMAN, ED. 56-67, 69-70(Baseball Prospectus, Basic Books 2012)(specifically covering steroids at 56-67, and human growth hormone (HGH) at 69-70).


9 Jay Jaffe, *How Should the Hall of Fame Respond to the Steroids Era?* in EXTRA INNNINGS, supra note 6, at 98.

10 Verducci, supra note 6.

concludes with the view that the statutory and contractual rules of interpretation do not favorably dispose BBWAA writers to vote for players who have been associated with performance enhancing drugs.

Before doing so, a cursory review of the voting process, recent results, and a statistical overview of the steroid era is appropriate in order to understand the magnitude of the problem.  

I. Hall of Fame Balloting

Those eligible to vote for members of Baseball’s Hall of Fame are members of the Baseball Writers Association of America, (BBWAA), who have been active baseball writers for ten years. Upon receiving their ballots, each voter must make their selection(s), if any, and sign their ballot and return it by December 31. It has always been considered a privilege to vote for those players seeking immortality via the Hall of Fame. In fact, many members of the BBWAA see themselves as gatekeepers, charged with guarding and maintaining the Hall of Fame’s effulgence.

Eligible candidates for election to the Hall of Fame must have at least played for parts of ten seasons and have ceased to be an active player in the Major Leagues for at least five years preceding their election. The current standard for election that voters are charged with applying when casting their votes is, “Voting shall be based upon the player’s record, playing

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12 Verducci, supra note 6, stating that “[t]hat the postmodern hitting era unofficially began in 1993…”.
13 See BBWAA Election Rules, supra note 5, at Rule 2, which states:  
2. Electors: Only active and honorary members of the Baseball Writers’ Association of America, who have been active baseball writers for at least ten (10) years, shall be eligible to vote. They must have been active as baseball writers and members of the Association for a period beginning at least ten (10) years prior to the date of election in which they are voting.
14 See Voting FAQ, supra note 2, noting that in 2010, 581 ballots were turned in.
16 BBWAA Election Rules, supra note 5, at Rule 3B & C.
ability, integrity, sportsmanship, character, and contributions to the teams(s) on which the player
played.”  

Many observers were paying particularly close attention to the results of the 2013 Hall of
Fame voting as the list of players eligible for the first time included baseball’s all-time home run
leader, Barry Bonds,18 seven-time Cy Young award winner Roger Clemens,19 and Sammy
Sosa,20 who is one of only eight players with more than 600 career home runs and the only
player with three seasons of 60 or more home runs. All three have been linked to performance
enhancing drugs during their careers.21 Voters appeared to send a resounding message to those
three as Bonds received 36.2% of the votes necessary for election while Clemens and Sosa
received 37.6% and 12.5% of the vote respectfully.22

What is not certain is how voters will treat these three and others who have been linked to
steroids in future voting. If history is any indication, Bonds, Clemens and Sosa should not be
optimistic. Mark McGwire,23 who at one time held the single season home run record and retired
with 583 career home runs, and Rafael Palmeiro, one of only four players to have 3000 hits and
500 home runs24 have both been eligible for election into the Hall of Fame.25 Both have been

17 Id. at Rule 5.
(last accessed Feb. 24, 2013).
(last accessed Feb. 24, 2013).
(last accessed Feb. 24, 2013).
21 Ronald Blum, Drug-tainted or not, no one elected, VIRGINIAN PILOT, Jan. 10, 2013, at 2. The top 10 vote-getters
of the 2013 Hall of Fame Balloting by percentage, with 75% necessary for enshrinement, were Craig Biggio
(68.2%), Jack Morris (67.7%), Jeff Bagwell (59.6%), Mike Piazza (57.8%), Tim Raines (52.0%), Lee Smith
(47.80%), Curt Schilling (38.8%), Roger Clemens (37.6%), Barry Bonds (36.2%), and Edgar Martinez (35.9%). See
2013 Hall of Fame Vote, supra note 15.
23 See Mark McGwire, BASEBALL-REFERENCE.COM, http://www.baseball-
24 The others are Hall of Famers Henry Aaron, Willie Mays, and Eddie Murray. See generally Baseball-
Reference.com, supra note 18.
25 See Blum, supra note 21.
linked to steroids. McGwire has been eligible for seven years and Palmeiro has been eligible for three, yet in the most recent Hall of Fame balloting, McGwire was named on just 16.9% of the ballots, and Palmeiro was named on 8.8%, both far short of the necessary 75% needed for election. Their respective support has dwindled each year they have been eligible.

As more and more players associated with PEDs use become eligible for the Hall of Fame, some sort of syncretism regarding their status will become necessary.

II. Major League Baseball’s Home Run Problem

To begin looking at the impact of PEDs on Major League Baseball, a good starting point would be the 1994 season. For the first time since 1904, no World Series was played to conclude the season. On September 14th of that year, Commissioner Bud Selig cancelled the remainder of the season in response to the players going on strike one month earlier. Attendance fell the following season over 20 percent as many people were disgusted with millionaire players fighting over money with billionaire owners. But in 1995, Cal Ripken’s indefatigable consecutive games played streak provided the kindling that would eventually become a raging fire for baseball’s resurgence in popularity. Then, in 1998, Mark McGwire and Sammy Sosa captured the attention of not only the sports world, but the nation as well with their thrilling assault on Roger Maris’ single season home run record of 61 set in 1961.

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27 See 2013 Hall of Fame Vote a Shut Out, supra note 15.
29 Andrew Zimbalist, MAY THE BEST TEAM WIN, BASEBALL ECONOMICS AND PUBLIC POLICY, 89 (The Brookings Institution 2003).
30 Id. at 93.
In July of that year, Associated Press reporter Steve Wilstein, began to follow Mark McGwire as he approached Maris’ record.\(^{33}\) While waiting for McGwire after a home game in St. Louis, Wilstein began to catalogue the contents of McGwire’s locker that were in plain view.\(^{34}\) Near the picture of McGwire’s son (who was serving as a bat boy that season) and a pack of sugarless gum, Wilstein saw a brown bottle with the word “androstenedione” on it.\(^{35}\) Wilstein contacted a physician to inquire what androstenedione was and was informed that it is a steroid with anabolic qualities.\(^{36}\) He subsequently asked McGwire about the contents of the bottle and McGwire confirmed that he had been using the drug for over a year.\(^{37}\) On Friday, August 21, the Associated Press published Wilstein’s piece, “Drug OK in Baseball, Not Olympics.”\(^{38}\) A firestorm ensued. The St. Louis Cardinals initially issued a statement which condoned McGwire’s use of androstenedione.\(^{39}\) Stating that since androstenedione had no significant side effects, “the Cardinals medical staff cannot object to Mark’s choice” to use the drug.\(^{40}\)

Both Sammy Sosa and Mark McGwire broke Roger Maris’ single season home run record that year. Sosa finished with 66 home runs while McGwire hit a seemingly


\(^{34}\) *Id.*


\(^{36}\) Assael and Keating, *supra* note 33.

\(^{37}\) Wilstein, *supra* note 35.

\(^{38}\) *Id.*


\(^{40}\) *Id.*
insurmountable 70. McGwire and Sosa were named Sportsmen of the Year by Sports Illustrated in 1998. 41

As the ebullience from this record breaking season began to subside, many began asking questions about the effects of steroids on not only the statistical output of players, but on the health of players as well. Almost immediately after the McGwire story broke, Commissioner Selig announced that he was commencing a study along with Major League Baseball Players Association head Don Fehr on the effects of steroids and supplements.42 While Mark McGwire’s use of androstenedione was legal for Major League baseball players, it would have been prohibited in the National Football League, the National Basketball League, and the NCAA.43 Over the next several seasons, Major League Baseball Commissioner Bud Selig began recognize the depth and breadth of the problem of steroids in baseball.44 Implementing any changes to Major League Baseball’s drug policies could only be accomplished through collective bargaining and the existing collective bargaining agreement was not set to expire until the conclusion of the 2001 season.45 Commissioner Selig did unilaterally implement a drug testing program for minor league players in 2001.46 He was able to accomplish this because minor league players were not (and are currently not) members of the Major League Baseball Players Association, which constitutes the player’s union.47

42 Assael and Keating, supra note 33.
43 Wilstein, supra note 35.
44 MITCHELL REPORT, supra note 8, at 44.
45 Commissioner Selig could not just unilaterally implement drug testing. Drug testing is a mandatory subject of collective bargaining as it encompasses terms and conditions of employment. See Ethan Lock, The Legality Under the National Labor Relations Act of Attempts by National Football League Owners to Unilaterally Implement Drug Testing Programs, 39 U. of Florida L. Rev. 1 (1987)
46 MITCHELL REPORT, supra note 8, at 44.
47 Id. at 45.
An agreement on a new collective bargaining agreement was finally reached on August 30, 2002, the same date the players had set to go on strike.\(^{48}\) As part of the new agreement, steroid use was prohibited and random drug testing would begin in 2004 only if a threshold of 5% of players tested positive after a series of random testing in 2003.\(^{49}\) During 2003, 1,369 tests were conducted with 96 players testing positive.\(^{50}\) Though the names of the players who tested positive were supposed to have remained anonymous, the names of several individuals have subsequently been leaked as being included on the list, including Manny Ramirez, David Ortiz, Barry Bonds, Alex Rodriguez, and Sammy Sosa.\(^{51}\)

This list was eventually seized by the federal government as part of its investigation of a supplement company, Bay Area Laboratory Cooperative (BALCO), located in Burlingame, California, for illegally supplying professional athletes with anabolic steroids.\(^{52}\) As part of this federal investigation into BALCO, Barry Bonds, who finished his career in 2007 as Major League baseball’s all-time career home run leader with 762, was indicted on three counts of perjury and one count of obstruction of justice for his grand testimony.\(^{53}\) After a seven year saga, Bonds was convicted of only one count of obstruction of justice.\(^{54}\)

On the field, the home run had become a profligacy. In the seventy seasons before Mark McGwire hit his 70 home runs and Sammy Sosa hit his 66, only one player had hit more than

\(^{48}\) ZIMBALIST, supra note 29, at 99.

\(^{49}\) MITCHELL REPORT, supra note 8, at 54.

\(^{50}\) Id. at 55, footnote 36.


\(^{52}\) MITCHELL REPORT, supra note 8, at 112.


sixty – and that was Roger Maris with 61 in 1961.\(^{55}\) Including 1998, and the three following seasons, the sixty home run mark was surpassed six times. Mark McGwire did it twice with 70 in 1998 and 65 in 1999. Sammy Sosa did it three times – 66 in 1998, 63 in 1999, and 64 in 2004. Finally, Barry Bonds hit 73 home runs in 2001.

And while no player has crested the 60 home run mark since the 2001 season (Ryan Howard of the Philadelphia Phillies came the closest, hitting 58 in 2006\(^ {56}\)), a look at the metric of the 50 home run season reveals that during the chronological period known as the steroid era, offensive levels were elevated. Starting with the decade of the 1920’s, there have been 42 players that have hit at least 50 home runs in a season. Twenty-five of those instances have happened in the last twenty years.\(^ {57}\)

These inflated numbers make it difficult for Hall of Fame voters as they contemplate filling out their Hall of Fame ballots each January. Veteran ESPN baseball writer Jayson Stark foreshadowed the issue when he received the first ballot with the name of a player identified with the steroid era appearing it.

I used to look forward to the day the Hall of Fame ballot arrived every November. Not this year. It’s not just because the already-ugly Mark McGwire Debate is going to crash what is supposed to be Tony Gwynn and Cal Ripken’s party, either. It’s because this is only the beginning…With every new name that appears on these ballots now,


\(^{57}\) “Consider that from 1988 to 1992, a very stable period of time for home run hitting, 2.7 percent of batted balls were home runs. In 1993, that number jumped to 3.1 percent, and then to 3.6 percent (36 percent above that five-year baseline) the following year. It peaked at 4.2 percent (56 percent above the baseline) in 2000, and even in 2010 it was at 3.52 percent (31 percent above the baseline); in 2011, it fell to 3.47 percent, 29 percent above the baseline. In every year between 1994 and 2010, the rate of homers per batted ball ranged from 31 to 56 percent above that five-year baseline, a range that fits neatly in the estimates of steroid-related gain…” Jay Jaffe, What Really Happened in the Juiced Era? in Extra Innings, supra note 7, at 69.

Interestingly, there may be anecdotal evidence that the pendulum is swinging back toward pitchers having the advantage over hitters. Of the twenty-one perfect games thrown in Major League history, five have come in the last three seasons. Albert Chen, The Problem with Perfection, SPORTS ILLUSTRATED, Dec. 31, 2012, at 46.
we’re not just going to have to ask ourselves, “Was this guy a Hall of Famer?” We’re going to have to ask ourselves, “What are the chances that this guy used steroids?” 58

The task of trying to evaluate players from the steroid era is similar to looking through a dirty window. It’s difficult to determine, how much, if any, of the player’s accomplishments are a direct result of the player’s use of performance enhancing drugs. When considering whether those players linked to steroids deserve admittance to the Hall of Fame, it is interesting to posit whether the application of either statutory or contractual terms of interpretation will bring clarity the selector’s decision making process.

III. Application of Statutory Rules of Interpretation of Hall to Fame Voting

Initially, there is the recognition that a distinction exists, (with some similarities which will be discussed later), between the interpretation of statutes and the interpretation of contracts. Contracts involve a reciprocal relationship between two parties comprised of corresponding rights and responsibilities with the intent of governing future behavior. A statute “is ultimately enacted as embodying the statement of one unit…rather than the words of two units.”59 This description of a statute most nearly reflects the voting standard enacted by the BBWAA election rules as there is obviously no express or implied contractual relationship between the BBWAA and the fans who enjoy attending the Hall of Fame.

The primary rule regarding statutory interpretation is that, “intent controls.”60 To determine intent, it is necessary to review the language of the text to determine whether the language is clear enough to make this determination. Courts will use the Plain Meaning Rule and give the words contained within the four corners of the document, “their ordinary dictionary

58 Jay Jaffe, How Should the Hall of Fame Respond to the Steroids Era? in Extra Innings, supra note 9, at 98.
If the language of a statute is dispositive on the issue, the court should not venture further. As discussed earlier, the language from the BBWAA election rules that voters are to apply states, “Voting shall be based upon the player’s record, playing ability, integrity, sportsmanship, character, and contributions to the team(s) on which the player played.” This language is not clear with respect to whether players who have been implicated with steroids deserve to be enshrined in baseball’s Hall of Fame. When confronted with unclear statutory language, courts ask, “Did the legislature intend this particular statutory provision to cover this particular fact pattern?” Or, as applied to this issue, did the BBWAA intend for this standard for election to apply to those who benefited from or were associated with the use of steroids?

By invoking legislative intent, courts and judges often review the legislative history of a statute. Bills that become laws have paper trails reflecting the trajectory of the life of a bill from introduction to enactment which sometimes assists judges in determining legislative intent. The history of the provision outlining the qualifications for election into the Hall of Fame unfortunately does not share the depth and volume of traditional legislation.

The first class elected to baseball’s Hall of Fame was announced in 1936 with the only prerequisite being that a player had to be named on 75 percent of the ballots. The earliest mention of the qualifications to be considered for players being elected is found in a

61 Id.
63 BBWAA Election Rules, supra note 5.
64 MIKVA & LANE, supra note 62, at 7.
65 Id. at 27. “In Congress, ideas for legislation are introduced as bills or as amendments to bill; committee hearings, debates, and markup (committee meetings at which bills are read line by line for review and amendment) are transcribed; committee actions are set forth and explained in committee reports; legislative debate is transcribed; and votes are recorded.”
Memorandum from then Hall of Fame treasurer Paul Kerr, to Hall of Fame President Stephen Clark, regarding Kerr’s conversation with National League President Ford Frick, dated August 16, 1944. Kerr inquired of Frick whether any written rules existed concerning selecting players for membership, and was reporting in the memo that Frick responded that while “there was nothing in writing,” players were, “to be selected for ability, character and their general contribution to base ball in general.” According to this memo, the only requirement at the time was that players had to receive 75 percent approval by the BBWAA.

Later that year, a set of by-laws was approved containing the first documented rules for election to the Baseball Hall of Fame. It included the provision that players “shall be chosen on the basis of playing ability, sportsmanship, character, their contribution to the teams on which they played and to baseball in general.” This original standard is very similar to the current standard, which reads, “Voting shall be based upon the player’s record, playing ability, integrity, sportsmanship, character, and contributions to the teams(s) on which the player played.”

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67 Paul S. Kerr, Memorandum Re: Base Ball Hall of Fame Committee, Aug. 16, 1944, provided by the National Baseball Hall of Fame Library (copy on file with author).
68 Id.
69 Id. Kerr writes:

I asked Mr. Frick whether or not there was any written set of rules or policy in connection with the selection of members of the Hall of Fame. He told me there was nothing in writing, and that he and Cleland had sat down in his office and outlined some general rules which were principally to the effect that members were to be selected from the ranks of players of the period from 1900 down to the present. They were to be selected for ability, character, and their general contribution to base ball in all respects. Approval of 75% of the members of the Base Ball Writers Association of America was necessary for election to the Hall of Fame. There are apparently no further rules, although the foregoing were probably described more fully in the publicity put out at that time.

70 Exhibit B, By-laws, Dec. 10, 1944 (copy on file with author).
71 Id. Other rules included in the by-laws were that voting would take place every three years, players were to have completed their active playing careers, and that individual voters could not place more than ten names on their ballots.
72 BBWAA Election Rules, supra note 5.
current provision subtracts contributions “to baseball in general,” from consideration and adds the “player’s record” and “integrity.”

An argument could be made that with the addition of the word “integrity” to the other existing qualitative terms of “sportsmanship” and “character,” it was the voter’s intent that those selected would meet or exceed some higher moral ideal. When reflecting on the outcome of the most recent Hall of Fame election results and whether character was a factor in the outcome, current secretary/treasurer of the Baseball Writers Association Jack O’Connell agreed that considering character, “has been there since the very first election of 1936, and it is something that was emphasized by the hall of Fame itself.”73 But as discussed below, it appears that the criterion of character has been selectively applied by the Writers in their past voting patterns.

If reviewing the legislative history is not dispositive, courts often utilize certain canons of construction to resolve statutes that are unclear.74 Some traditional canons of construction include the narrow reading of both statutes in derogation of the common law and criminal statutes.75

One such canon which may be useful for Hall of Fame voters is commonly known as the Mischief Rule, which contemplates that, “a thing may be within the letter of a statute and yet not within the statute, because not within its spirit.”76 The Mischief Rule comes from Church of the Holy Trinity v. United States, a 1892 Supreme Court case where a New York Church hired an individual who was residing in England to come to New York and be the church’s rector.77 This was apparently in violation of an existing federal law which made it, “unlawful for any person, company, partnership, or corporation, in any manner whatsoever, to prepay the transportation, or

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73 Kepner, supra note 3, at B12.
74 MIKVA & LANE, supra note 62, at 23.
75 Id. at 24.
76 HOLY TRINITY CHURCH V. UNITED STATES, 143 U.S. 457 459 (1892)
77 Id.458.
in any way assist or encourage the importation or migration of any alien or aliens, any foreigner or foreigners, the United States….” 78 While the Court agreed that the prohibition against hiring a pastor was, “within the letter of this section,”79“the construction invoked cannot be accepted as correct,”80 as the law was designed to stem the tide of unskilled labor entering the United States.81 The outcome of following the statute was not contemplated by the legislature who passed it.82

Similarly, while it can be easily argued that players such as Mark McGwire, Barry Bonds, and Roger Clemens have the requisite cumulative statistics for admission into the Hall of Fame, the application of the Mischief Rule to their candidacy might lead to a different outcome. An argument could be made that with the addition of the word “integrity” to the other existing qualitative terms of “sportsmanship” and “character,” that currently exist in the selection rule, it was the voter’s intent that those selected would meet or exceed some higher moral ideal. And while it is true that the Hall of Fame has admitted nefarious and base individuals,83 the admission of players associated with steroids would seemingly violate the spirit of the qualification of “character” and “integrity.”

Another cannon of construction used to interpret statutes states that, “Words are to be given their common meaning unless they are technical terms or words of art.”84 To give a word its common meaning, it must be understood in its proper context.85 In this case, the words, “integrity, sportsmanship” and “character” tend to be more evaluative than specifically

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78 Id.
79 Id.
80 Id. 472.
81 Id. 465.
82 Id. 472.
83 See infra notes 102-106, and notes 109-111.
84 MIKVA & LANE, supra note 62, at 25.
85 “One understands a word much better if one has met it alive, in its native habitat. So far as is possible our knowledge should be checked and supplemented, not derived, from the dictionary.” C.S. LEWIS, STUDIES IN WORDS 2 (Cambridge University Press 2002).
descriptive. But in each instance, these words are most commonly understood to mean behavior reflecting ethical behaviors.\textsuperscript{86} What may be problematic for words like “integrity,” and “character” is the inflation of their meaning to a status of irreproachable probity\textsuperscript{87} which would have the effect of limiting the pool of eligible Hall of Fame members to Billy Sunday.\textsuperscript{88}

**IV. Application of Contractual Rules of Interpretation to Hall of Fame Voting**

Contractual rules of interpretation have applications that are similar to statutory rules of interpretation in aiding Hall of Fame voters in their decision-making process. Contract drafters are charged with being forward-looking problem avoiders. Litigators are backward-looking problem-solvers. Drafters and litigators both orbit around the issue of ambiguity as it is the primary cause of litigation.\textsuperscript{89} A contract, or a provision within contract, is ambiguous if it is “capable of having two or more distinct and mutually inconsistent meanings.”\textsuperscript{90} Once an ambiguity is identified, interpretation involves the ascertainment of its meaning.\textsuperscript{91}

Terms like “playing ability,” “sportsmanship,” “character,” and “contributions to the teams” are not ambiguous terms capable of having two distinct and mutually inconsistent meanings. Instead, they are vague terms that that could be characterized as having imprecise meanings within theoretical bookends. Common examples of familiar legal verbiage which fall into the category of vague includes terms such as “reasonable efforts,” or “material adverse

\textsuperscript{86} The American Dictionary of the English Language defines Integrity as, “The entire, unimpaired state of anything, particularly of the mind; moral soundness or purity; incorruptness; uprightness; honesty.” Character is defined as, “By way of eminence, distinguished or good qualities; those which are esteemed and respected;” NOAH WEBSTER, AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE, (Foundation For American Christian Education 1999)
\textsuperscript{87} Lewis, supra note 85, at 7.
\textsuperscript{88} William Ashley Sunday played eight years of professional baseball before become one of America’s most prominent evangelists. See ROBERT ALLEN, BILLY SUNDAY, HOME RUN TO HEAVEN, (Mott Media 1985)
\textsuperscript{89} HAGGARD AND KUNEY, supra note 60, at 196.
\textsuperscript{90} Id.
\textsuperscript{91} RESTATEMENT OF CONTRACTS 2\textsuperscript{nd} §200.
A player’s record could be one game played, or it could be 3,562 games played. A player could have no ability, or his ability could make baseball scouts swoon. These terms are bracketed by calculable and qualitative extremes that are subject to the subjective influences of electors, thereby making them vague.

One way of eliminating the possibility of having either ambiguous terms or the outliers of vague terms in a contract is with a “Definitions” section. A Definitions Section contains a list of specifically drafted terms that can either give meaning to a word with no lexical (dictionary) definition, or supplement or contract from a lexical meaning. Definition sections are usually found earlier in the body of a contract after the recitals and before any substantive provisions or boilerplate language. One possibility that may assist voters in future elections is to employ definitions of baseline qualification for more quantifiable metrics such as games played, home runs, runs batted in, etc., setting a statistical baseline for election to the Hall of Fame.

Much more problematic is defining the more subjective terms such as “integrity,” “sportsmanship” or “character.” Philosophers, moralists, and theologians have been attempting to define these terms for centuries. Contract drafters can alleviate the problem of potentially subjective terms using a contractual provision commonly known as a “Morals Clause.”

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92 KENNETH A. ADAMS, A MANUAL OF STYLE FOR CONTRACT DRAFTING, 2 ND ED. 130 (ABA Publishing 2008) The term “reasonable efforts” is vague because one point on the reasonable efforts spectrum would be “best efforts” while the opposite point on the spectrum would be unreasonable effort.
94 Adams, supra note 92, at 121.
95 THOMAS R. HAGGARD AND GEORGE W. KUNEY, LEGAL DRAFTING IN A NUTSHELL 351 (Thomson West 2007)
96 HAGGARD AND KUNEY, supra note 60, at 31-2.
97 Some have argued that it would be beneficial to define what constitutes a Hall of Fame caliber player. One suggested definition is, “A Hall of Famer is any player who could reasonably be argued to be the greatest player ever at the position he played.” Another suggested definition is, “A Hall of Famer is a player who is one of the greatest ever at the position he played.” A third proposed definition is, “A Hall of Famer is a player who rises above the level of the average player…” See BILL JAMES, HISTORICAL BASEBALL ABSTRACT 177-178 (Villard Books 1988).
98 Bertrand Russell once said, “The theory which I advocate is a form of the doctrine which is called the subjectivity of values, which consists in maintaining that, if two men differ about values, there is not a disagreement as to any kind of truth, but a difference in taste.” THE MAGICIAN’S TWIN C.S. LEWIS ON SCIENCE, SCIENTISM, AND SOCIETY, JOHN G. WEST, ED. 303 (Discovery Institute Press 2012).
Clause can attempt to crystallize some of these more opaque terms by governing future behavior though prohibited acts. Morals provisions attempt to incorporate a list of specified behavior which will constitute a breech if engaged in by a party. Unfortunately, no Morals Provision exists in the election rules. In the high improbability that the BBWAA could uniformly agree on the substance and content of a Morals Clause, it would be highly unfair to apply it retroactively.

Another potential source of uncertainty in the provision regarding the method of election for the Hall of Fame is the use of the word “shall.” Use of the word shall is often times associated with language of obligation, as opposed to language of discretion, prohibition, or policy. When correctly used in a contractual provision, the word “shall” and the phrase “has a duty to” should be interchangeable while still having the sentence make sense grammatically. If the word “shall” is treated as language of obligation in the voting rules for the Hall of Fame, then each elector is obligated to consider each of the six characteristics mentioned – player’s record, playing ability, integrity, sportsmanship, character, and contributions to the teams the player played on. As discussed above, this could prove to be problematic for players associated with steroids such as Barry Bonds as his conviction for obstruction of justice would seem to run afoul of the integrity and character qualifications.

But a review of the names enshrined in the Hall of Fame shows that most electors have not applied each of the qualifications for election. Hall of Fame members Tris Speaker and Rogers Hornsby were both members of the Ku Klux Klan. Orlando Cepeda spent ten months

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100 Id.

101 Id., supra note 92, at 32.

102 Id.

in prison for possession of marijuana. Ty Cobb was “mean, vindictive, selfish, vain, a bully, a racist, paranoid, cruel, and hot-tempered.” Cobb notoriously went into the stands and beat a fan with no hands while stomping him with his cleats for shouting verbal insults at him. More recently, 2001 inductee Kirby Puckett was known to have put a gun to his ex-wife’s head and attempted to strangle her with an electric cord. Shortly before his election to the Hall of Fame, he was working for the Minnesota Twins. The Twins settled a sexual harassment claim with another employee in which Puckett was complicit. Serious baseball historians know that Baseball’s Hall of Fame is filled with womanizers, drunkards, racists, and cheaters. Pitcher Gaylord Perry is the Hall of Fame inductee most associated with cheating. Perry was elected to the Hall of Fame in 1991 after having won 314 games. He was best known for his attempts at altering the surface of the baseball before he released it by means of adding foreign substances to the ball, such as Vaseline, or by defacing the ball with an emery board. Perry once earned a 10 day suspension for altering the surface of the ball.

105 Id.
106 Id.
108 Id.
109 Id.
110 Hall, supra note 106, at 440. Babe Ruth was known for his prodigious home runs and prodigious appetites. “Ruth set new standards for eating, drinking, and whoring off the field.”
111 Jules Tygiel, BASEBALL’S GREAT EXPERIMENT; JACKIE ROBINSON AND HIS LEGACY, 14. (Oxford University Press 1983). Cap Anson, the player/coach for the Chicago White Stockings, threatened to pull his team from the game in 1887 if the Newark team used African-American pitcher George Stovey.
113 Id.
115 Holway, supra note 104, at 378.
116 Id.
the surface of the ball causes an unnatural trajectory when thrown and is strictly prohibited by Major League Baseball’s Official Rules. Offenders are subject to suspensions and fines.

How is Gaylord Perry’s cheating different from the use of performance enhancing drugs? It appears that there are some actions that occur on the field that certainly violate the “integrity” and “sportsmanship” ideals, such as when the recently inducted Roberto Alomar spit on umpire John Hirschbeck over a disputed called third strike. Yet, in the minds of Hall of Fame electors, it appears that doctoring baseballs and spitting on umpires are measured in degrees, not magnitude.

V. Conclusion

Employing the statutory and contractual rules of interpretation to the requirements for election to the Hall of Fame point to an unfavorable outcome for players associated with performing enhancing drugs. Those drafting BBWAA Election Rule 5 at its inception could not have foretold from within the Rule’s plain meaning of circumstances in which pharmaceutical enhancements altered and influenced the qualitative and quantitative outcome on the playing field. What can only be ascertained from the genesis of the Rule was that some level of rectitude was to be associated with being selected to the Baseball Hall of Fame with the insertion of the words “integrity,” “character,” and “sportsmanship.” These concepts are not binary. Rather, they are measured on a spectrum. However, as long as the use performance enhancing drugs is associated with public disgrace and infamy, the door to Baseball’s Hall of Fame in Cooperstown is likely to remain locked for all those connected with their use.

118 Official Baseball Rules 73, Rule 8.02 (2011), available at http://mlb.mlb.com/mlb/downloads/y2011/Official_Baseball_Rules.pdf. The pitcher shall not- (2) expectorate on the ball, either hand or his glove; (4) apply a foreign substance of any kind to the ball; (5) deface the ball in any manner; or (6) deliver a ball altered in a manner prescribed by Rule 8.02(a)(2) through (5) or what is called the “shine” ball, “spit” ball, “mud” ball or “emery” ball.
119 Official Baseball Rule, supra note 119, 8.02 (a)(1) and 8.02(a)(6)(a).
Chronologically, Hall of Fame electors are now voting just at the apex of the Bell Curve with regard to the number of players who will become eligible for selection and have been implicated with performance enhancing drugs. This does not include the backlog of players who are currently eligible, such as Mark McGwire and Rafael Palmeiro. With so many of the BBWAA electors being antipodean in their beliefs regarding whether those associated with performance enhancing drugs belong in the Hall of Fame, the problem is far from over.


122 Respected baseball writer and BBWAA voter Buster Olney has said, “I’m in a very small minority of writers who are going to vote for Barry Bonds and Roger Clemens just as I’ve always voted for Mark McGwire.” Sports Illustrated baseball writer and BBWAA voter Tom Verducci has said, “When I vote for a player I am upholding him for the highest individual honor possible. My vote is an endorsement of a career, not part of it, and how it was achieved. Voting for a known steroids user is endorsing steroid use. Having spent too much of the past two decades or so covering baseball on the subject of steroids-what they do, how the game was subverted by them, and how those who stayed away from them were disadvantaged- I cannot endorse it.” AP, Baseball Hall of Fame Vote 2013: BBWAA Shuts Out Barry Bonds, Roger Clemens and Elects No One, HUFF POST SPORTS Jan. 9, 2013 http://www.huffingtonpost.com/2013/01/09/baseball-hall-of-fame-bbwaa-vote-2013-bonds_n_2441379.html (last accessed Feb. 27, 2013)