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COMMENT: END OF THE “STEROIDS ERA”

THE CONGRESS, THE PRESIDENT,

AND THE LONG BALL

I. INTRODUCTION

“Back, back, back… that ball is GONE!” Baseball announcers everywhere have been calling more and more home runs in the past few years. Baseballs have been flying out of stadiums at undeniably high rates since the beginning of what has come to be known as the “Steroids Era.”¹ This Era, which began in 1994, has bore witness to the greatest outpouring of home runs in baseball history: in 1998 Mark McGwire and Sammy Sosa chased the single season home run record of Roger Maris, and when all was said and done, McGwire had smashed 70 to Sosa’s 66, each enough to top Maris’ 61.² However, McGwire’s record would not stand the test of time—Barry Bonds belted 73 home runs during the course of the 2001 season.³ Beyond the broken single season records, the Steroids Era has seen twenty players eclipse the fifty home run mark; a feat accomplished only nineteen times between 1846 to 1994.⁴ The proof seems to be in

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³ *Id.*

the proverbial pudding, either something is in the clubhouse water or baseball players are “juiced.”

Home runs are sexy; they bring fans to the stadium and create excitement in their game.

In 1994, the Baseball Players Union and the Owners Association could not reach an agreement over a salary cap and revenue sharing agreement, the result was a strike and the cancellation of the first World Series since 1904. The players stayed away from the stadiums for over a season, but the fans remained absent for much longer. It wasn’t until the aforementioned home run race of 1998 that fans returned to the seats of Wrigley Field, Busch Stadium, and other iconic playing grounds. But over the past couple seasons, a strange thing has happened—there have been too

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6 See generally YouTube.com, *Chicks Dig the Long Ball*, ESPN, http://www.youtube.com/watch?v=MRs60GZ1q1o (illustrating the popularity of home runs over good pitching).

7 BaseballLibrary.com, World Series, http://www.baseballlibrary.com/ballplayers/player.php?name=World_Series (last visited Mar. 2, 2007). In 1904, the American and National Leagues were not considered to be under the blanket umbrella of MLB as they are today; rather, they existed as two separate professional leagues. Id. In 1903, the two leagues decided that the champion of each would play each other. Id. The first World Series was wildly popular as the American League’s Boston Pilgrims too the best of nine game series five games to three. Id. The sad story behind the cancellation of the would-be second World Series arose out of a feud between American League president Ban Johnson and the Giant’s National League champion manager, John McGraw. Id. The National League considered itself to be superior to the “minor” league teams participating in the American League (even though an American League team had surprisingly won the Series just a year prior). Id. The Giant’s manager refused to recognize an American League champion and felt that even a sound beating would not justify playing the Series; accordingly McGraw declared his team World Champions without playing the World Series. Id.

8 Eric Fisher, *New Ball Parks Help Boost MLB Attendance*, INSIGHT ON THE NEWS, July 3, 2000, http://www.findarticles.com/p/articles/mi_m1571/is_25_16/ai_63323548. The baseball strike in 1994 lasted 232 days and ended in April of 1995, but fans did not come back to the ball park until much later as numbers show that attendance took a 20% hit. Id.

9 Baseball-Almanac.com, Ballparks, Baseball Stadiums, and Fields of Dreams, http://www.baseball-almanac.com/stadium.shtml (last visited Mar. 2, 2007). Wrigley Field is the home of the Chicago Cubs, the team to which Sammy Sosa belonged when he was in the home run race of 1998. Id. Busch Stadium is the home of the St. Louis Cardinals, the team on which Mark McGwire belonged when he broke Roger Maris’ record in 1998. Id. The home field is particularly important in baseball and a good measure of how many fans comes to see their team play as a minimum of eighty-one games (half) of the home team are played at their home ball parks. Id.
many home runs hit.\textsuperscript{10} A few plausible theories have been posited as to why baseballs were flying so far, so frequently, namely the “juiced” ball and more hitter-friendly stadiums, but most believe that the players are injecting themselves with steroids to enhance their performance.\textsuperscript{11} The sports world began suspecting steroids in 2002 when Ken Caminiti told \textit{Sports Illustrated} that he had achieved his success in baseball, at least in part, with the help of steroids. \textsuperscript{12} The BALCO scandal caught the public eye in 2003 when the United States Anti-Doping Agency (USADA) received an anonymous tip and a syringe sample from a man described as a high profile track and field coach—the subsequent investigation implicated Barry Bonds.\textsuperscript{13} The President took note of the situation and announced it to the American people in his 2004 State of

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\item Joel Stein, \textit{Mark of Excellence}, \textit{TIME}, Dec. 28, 1998, http://www.time.com/time/magazine/article/0,9171,989919-1,00.html. This article, written a couple months after McGwire shattered Roger Maris’ record mentioned McGwire’s use of andro, but went out of its way to discredit the idea that McGwire may have enhanced his performance with illegal steroids. \textit{Id.} Apparently, seventy home runs in one season wasn’t enough to get the steroid rumor mills flying, but the seventy-three by Bonds got people talking. \textit{Id.}
\item Peter Schmuck, \textit{Juiced-Ball Conspiracy Backed by Powerful Evidence}, \textit{Baltimore Sun}, Apr. 17, 2006, http://www.baltimoresun.com/sports/baseball/bal-sp.schmuck17apr17,1,7179353.column?coll=bal-sports-headlines&ctrack=1&cset=true. A juiced-ball is one that critics claim is wound tighter than they historically have been. \textit{Id.} This causes the compression of the ball to increase, thereby allowing the ball to travel further when impacted at high speeds. \textit{Id.} Hitter-friendly stadiums are designed so that the airflow of the ballpark streams out, making home runs easier to hit. \textit{Id.}
\item SI.com, \textit{Caminiti Comes Clean}, \textit{Sports Illustrated}, May 28, 2002, http://sportsillustrated.cnn.com/si_online/special_report/steroids/. In this article, Caminiti told the magazine that he had so heavily used steroids to increase his performance during his 1996 MVP run that by the end of that season, “[his] testicles shrank and retracted; doctors found that [his] body have virtually stopped producing its own testosterone and that [his] level of the hormone had fallen to [twenty percent] of normal.” \textit{Id.}
\item Mark Fainaru-Wada and Lance Williams, \textit{Barry Bonds: Anatomy of a Scandal}, S.F. Chronicle, Dec. 25, 2003. The scandal unfolded like a law school hypothetical; Barry Bonds was training with childhood friend Greg Anderson. \textit{Id.} Anderson introduced Bonds to Victor Conte, a scientist who claimed that he could increase Bonds’ performance with a unique blend of blood analysis and nutritional supplements. \textit{Id.} In fact, Conte had been marketing a unique product called ZMA which consisted of a zinc and magnesium blend to other Bay Area athletes through his Burlingame Bay Area Laboratory Co-Operative (BALCO). \textit{Id.} The actual scandal began to build when Olympic cyclist Tammy Thomas was banned from her sport after testing positive for norbolethone in August of 2002. \textit{Id.} The subsequent federal investigation reached BALCO after a track and field coach sent the United States Anti-Doping Agency a syringe filled with an undetectable steroid allegedly retrieved from BALCO. \textit{Id.} After a UCLA chemist reverse-engineered the drug, it was found to be an anabolic steroid called tetrahydrogestrinone (THG). \textit{Id.} Barry Bonds has been implicated in the scandal based on his close relationship with BALCO, a federal investigation is ongoing. \textit{Id.}
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the Union Address.14 The public really started to be persuaded by the steroids idea when Jose Canseco published his best-seller, *Juiced*, in 2005 which claimed that baseball in the post-Canseco era has evolved with a little boost from steroids.15 Eventually, word reached Capitol Hill that steroids may have infiltrated the Major League Baseball record books.16

When the ground swell to clean up baseball finally reached Washington, it seemed as though the nation had lost confidence in the national pastime.17 The scandal was so prevalent that the Congressional hearings leaped from standard C-SPAN programming and onto the midday schedule of ESPN.18 People watched Rafael Palmiero defiantly wag his finger at the

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14 President George W. Bush, State of the Union Address (Jan. 20, 2004). "To help children make the right choices, they need good examples. Athletics play such an important role in our society, but, unfortunately, some in professional sports are not setting much of an example. The use of performance-enhancing drugs like steroids in baseball, football, and other sports is dangerous, and that performance is more important than character. So tonight I call 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 now." Id.

15 JOSE CANSECO, JUICED: WILD TIMES, RAMPANT 'ROIDS, SMASH HITS, AND HOW BASEBALL GOT BIG, (Regan Books 2005). In 2005, Jose Canseco published his “tell all” book about how he became the godfather of steroids in baseball. Id. The book speaks of his humble beginnings and his mediocre athletic ability as a child. Id. Canseco candidly credits all of his success, a Most Valuable Player award and attaining the feat of hitting forty home runs and stealing forty bases in one seasons, to steroids. Id. In Canseco’s eyes, not only did steroids allow him to achieve the success he did, but he believes that they should be used in the game of baseball so long as they are used with correct supervision. Id. All in all, the book reads as though it was written by an athlete who has been taking steroids for a bit too long but does call out some very high profile players for alleged steroid use. Id.


17 Mel Antonin, Poll: Fans Back Tougher Drug Policy, USA TODAY, Dec. 10, 2004, http://www.usatoday.com/sports/2004-12-10-steroid-gallup-poll_x.htm. A national Gallup Poll done in 2004 reflected that eighty-six percent of baseball fans agree that MLB should institute a tough steroid testing program. Id. Furthermore, another poll showed that sixty-one percent of baseball fans reported that they were less enthusiastic about the sport. Id.

18 Well, the hearings didn’t exactly “leap” from C-SPAN because even they knew that these hearings were not going to make for stellar television. Tim Goodman, Bad TV: ESPN Swings and Misses with Airing of Congressional Steroid Hearings, S.F. GATE, Mar. 18, 2005, http://www.sfgate.com/cgi-
Congresspersons and Major League Baseball (MLB) Commissioner Allan “Bud” Selig promised to reform the sport’s steroids policies. By the time the hearings were over, it was clear the game that had survived WWI and WWII was being torn apart by steroids. The use of anabolic, performance enhancing substances had apparently become common place among the ranks of the world’s most elite athletes. Professional baseball player David Wells claimed that twenty-five to forty percent of MLB players were juicing, while Jose Canseco pushed that estimate to eighty percent. And whether or not players were actually using steroids, the perception of steroid use was causing substantial damage to the nation’s youth. The Center for Disease Control and bin/article.cgi?f=/c/a/2005/03/18/MNGJHBRLD1.DTL. In fact, programming was not picked up by C-SPAN or C-SPAN2, rather, ESPN had to go get the licensing rights and synced their video feed to that of C-SPAN3. Id.

Steroid Hearings, supra note 16. During the hearings, Rafael Palmiero, a professional baseball player called to testify, is now famous for shaking his finger at the panel in defiance of their allegations that he had used steroids. Id. “I have never used steroids, period,” he told the congressional panel with the indignation of a man wrongfully accused. Associated Press, Steroid Shocker, Palmeiro Suspended, MSNBC, Aug. 2, 2005, http://www.msnbc.msn.com/id/8788193/. Less than five months later, Palmeiro tested positive for steroids. Id.

Although MLB has always been sensitive to the pulse of the nation, with the exception of short strikes in 1972 and 1981, and a long strike in 1994, the game had always gone on. Scot Mondroe, 1942, When Baseball Went to War, http://www.baseballhalloffame.org/history/2003/030918.htm. When America needed time to mourn, MLB responded—cancelling games in recognition of the deaths of Presidents Warren Harding in 1923 and Franklin Delano Roosevelt in 1945. Id. MLB cut the 1918 short by a month because of WWI, and on D-Day in 1944, all games were cancelled. Id. In fact, when most baseball players were drafted to fight WWII, the All-American Girls Professional Baseball League was formed to keep professional baseball alive in America. Id. It is sad to think that a game that has seen so much be torn apart one injection of steroids at a time.

Baseball has not been the only sport plagued with this new epidemic. In the professional football ranks, superstars Chris Cooper, Dana Stubblefield, and Bill Romanowski have all admitted to steroid use. Beau Dure, BALCO Investigation: Key Players, USA TODAY, Apr. 27, 2006, http://www.usatoday.com/sports/balco-players.htm. Track and field has seen several of its star athletes go down for testing positive including Regina Jacobs and Kevin Toth. Id. And most recently, cyclist and would-be 2006 Tour de France winner, Floyd Landis was stripped of his title upon testing positive for doping. Associated Press, Landis’ Backup Doping Test Also Positive, MSNBC, Aug. 5, 2006, http://www.msnbc.msn.com/id/14059185/.


Steroid Hearings, supra note 16. See also, Drug Enforcement Agency, Steroids and Our Youth, http://www.dea.gov/pubs/pressrel/hooton_interview.html. The DEA published an interview conducted with Don Hooten who lost his son due to steroid misuse. Id. It is Mr. Hooten’s belief that his son began using steroids because he felt that they were necessary to get his performance to be of professional caliber. Id.
Prevention has determined that more than 500,000 high school students have tried steroids, nearly triple the number in 1995.\textsuperscript{24} There is a direct link between the use of steroids at the professional level and their use in the youth leagues: “College athletes believe they have to consider steroids if they’re going to make it to the pros; high school athletes, in turn, think steroids are the key to getting a scholarship.”\textsuperscript{25} Though it was unmistakable that steroid use in professional baseball was a national issue, it was not entirely clear why Congress, at a time when the country was fighting a war in Iraq, and attempting to solve Social Security, medical care and education issues, devoted so much of its time to a game.\textsuperscript{26} It was even less clear how Congress could step into the fray and threaten a “takeover” of baseball steroid testing policies.\textsuperscript{27}

This Comment does not intend to determine whether Mark McGwire, Sammy Sosa, or Barry Bonds actually used steroids to break the age-old home run record.\textsuperscript{28} Rather, the focus of this Comment will target how Congress was able to grab a hold of the steroid controversy, drag it onto the floor of the Capitol building, and tell baseball to change its policies or have the legislature change them. These actions illuminate two intriguing constitutional issues: the first issue involves the doctrine of federalism and the dual sovereignty structure of the United States.

\textsuperscript{24} Steroid Hearings, supra note 16.


\textsuperscript{26} On the record, Congress cited: “The use of anabolic steroids and other performance-enhancing substances by minors is a public health problem of national significance;” adding, “Professional athletes are role models for young athletes and influence the behavior of children and teenagers.” Clean Sports Act, supra note 16.

\textsuperscript{27} The term “takeover” here will be used throughout the Comment to refer to Congress’ attempt to rewrite MLB’s steroid policy.

\textsuperscript{28} Similarly, I do not intend to delve into the effects of steroids on players, or argue that: an asterisk should not be placed in the record books; the pitchers are just as much to blame as the hitters; or no amount of steroids can replace hand-eye coordination.
At its core, professional baseball is an exhibition—a sport—involving the personal efforts of players unrelated to the production of goods. Travel between states is the “incident” not the “essential thing” of the game; thus, the issue becomes whether control of the game should be held by the federal government or by the states.  

The second legal issue presented implicates the separation of powers doctrine between the legislature and the executive. It was Montesquieu’s teaching and the Constitution’s promise that the legislature shall create rules and the executive shall enforce such rules. Here, the legislature had spoken to the issue of steroid use through the Anabolic Steroid Act of 2004 and through the Federal Trade Commission Act. Constitutionally speaking, it is the job of the executive to enforce these laws via agencies such as the Drug Enforcement Agency and the Federal Trade Commission; it is not the role of Congress.  

At the end of the day, Congress was not required to amend the steroid policy of MLB because baseball, upon the strong urging of Congress, made changes from within. But what if the MLB Players Union and the Owner’s Association would have stood its ground and challenged Congress to act on its threat? Would congressional action have been unconstitutional?


30 Id.


32 See infra notes 175-94 and accompanying text.

33 See infra notes 213-14 and accompanying text.
Part II of this Comment describes the historical background of steroid testing in baseball and the role the federal government has played in shaping the MLB testing policies. Part III looks into the propriety of federal action in the MLB steroid controversy to determine whether the current state of the federalism doctrine allows the federal government to regulate steroids in MLB. Part IV delves into a discussion of which branch of the federal government is best situated, practically and constitutionally, to regulate MLB steroid testing programs. Part V evaluates the actions actually taken by the federal government and by MLB, and offers a prediction of how the future of steroid testing may look. Part VI will conclude the Comment.

II. STEROIDS GO FROM THE LOCKER ROOMS TO THE CAPITOL

Long before steroids were injected into political conversation, the substance was being used to enhance player performance between the white lines. Jose Canseco claims to have begun experimenting with various steroids and growth hormones for years before entering the professional ranks in 1985. Even as performance enhancing drugs began permeating the sport, the use of these substances went virtually undetected by sports reporters and commentators. Even when McGwire and Sosa broke the home run record in 1998, “steroids” was not the first

34 See infra note 38-82 and accompanying text.
35 See infra note 83-172 and accompanying text.
36 See infra note 173-211 and accompanying text.
37 See infra note 211-14 and accompanying text.
38 CANSECO, supra note 15, at 70.
39 This was not necessarily the fault of the sports media. Since no formal testing methods were put into place in MLB until the 2003 season, and even then, the results were anonymous. It would have been arguably speculative and irresponsible for sports reporters to begin pointing fingers at players who had not even been subjected to a drug test. The bottom line is that steroids were off the radar in MLB until the results of the survey testing of the 2003 season came back. See infra notes 43-51 and accompanying text.
word out of everyone’s mouth.\textsuperscript{40} Even if steroids were suspected, MLB was not in a position at the time McGwire swatted 70 home runs to fine, suspend or otherwise discipline steroid users.\textsuperscript{41} Had McGwire come clean about his use of androstenedione during the 2006 season, he would have been subject to a fifty game suspension.\textsuperscript{42}

A. History of Steroid Regulation in Baseball

Though the unauthorized use of human growth hormone and other similar substances were formally outlawed by the Controlled Substances Act,\textsuperscript{43} baseball possessed no mechanism to test for or weed out the substances from the league.\textsuperscript{44} In fact, MLB did not formally implement a drug testing policy until after the 2002 season.\textsuperscript{45} When the MLB Players’ Association and the owners sought to restructure its collective bargaining agreement in 2002, the parties agreed to hold survey testing in 2003 with the understanding if greater than five percent of the results from the anonymous testing were returned positive, a formal program would be implemented for the 2004 season.\textsuperscript{46} When five to seven percent of the anonymous tests came back positive for

\textsuperscript{40} During the 1998 home run chase, controversy spread over how Mark McGwire was accomplishing his feat at such an advanced age. \textit{Id.} at 201. It was disclosed that McGwire has used a supplement called androstenedione, “andro,” to help boost his testosterone levels during workouts. \textit{Id.} at 203. Aside from the chemical difference between andro and steroids, andro was a legal substance that could be purchased at any store that sells protein power (such as GNC). \textit{Id.} at 204. Furthermore, andro was not a banned substance in MLB. \textit{Id.} Canseco claims that McGwire fabricated the andro story to explain his performance without breaking any rules, when, in reality, steroids were to be credited for his power. \textit{Id.} In the end, the buzz over performance enhancing substances began to swirl over andro and it could be argued that this buzz lead to the press screaming of steroids.

\textsuperscript{41} \textit{See infra} note 45. In 1998, baseball did not have a drug testing policy in place. \textit{Id.}

\textsuperscript{42} \textit{See infra} note 50. Since androstenedione has been added to the list of banned substances by MLB, a positive test by McGwire would have demanded punishment for a first time offender—under the new rules, this would have been a fifty game suspension. \textit{Id.}


\textsuperscript{45} \textit{Id.}

\textsuperscript{46} \textit{Id.}
steroids, the new testing policy was triggered.\textsuperscript{47} In 2004 players were to be randomly tested once a season; suffering penalties that ranged from drug treatment to a one year suspension for a fifth positive test.\textsuperscript{48} The result of the 2004 plan was zero suspensions due to steroid testing, flagging a weakness in the policy.\textsuperscript{49} At the urging of Congress, MLB adopted a new policy which banned more than garden-variety steroids and tested for steroids, steroid precursors, designer steroids, masking agents and diuretics.\textsuperscript{50} Additionally, players would be tested in the off-season and penalties were increased; new penalties ranged from a ten day suspension for a first positive test, to a one year suspension for a fourth positive.\textsuperscript{51} This testing scheme was the state of affairs at the time the Congressional hearings began.

B. History of Steroid Regulation in Washington

Although MLB slowly began to get on the steroid bandwagon beginning in 2002, Congress had been hard at work protecting the general population from the misuse of these substances. Congress has directly and indirectly regulated the use of steroids: directly through the Anabolic Steroids Act of 2004\textsuperscript{52} and indirectly through § 45 of the Federal Trade Commission Act.\textsuperscript{53}

\textsuperscript{47} Id.

\textsuperscript{48} Id.

\textsuperscript{49} Id.

\textsuperscript{50} Id.

\textsuperscript{51} Id.


The Anabolic Steroids Act of 2004 was the latest amendment to a long line of legislation that began with the Controlled Substances Act (CSA).\textsuperscript{54} The original purpose of the CSA was to make illegal the “importation, manufacture, distribution, and possession and improper use of controlled substances” because such substances have “a substantial and detrimental effect on the health and general welfare of the American people.”\textsuperscript{55} However, the benefits and problems associated with steroid use in athletes had been a mystery during the infancy of the CSA and anabolic steroids were omitted from the original list of controlled substances.\textsuperscript{56} It was assumed that steroids had no effect, positive or negative, on the human body until an article was published in the \textit{New England Journal of Medicine}, which concluded that steroids can have a substantial impact when injected in larger doses.\textsuperscript{57} On the coat-tails of this study, Congress enacted the Anabolic Steroid Control Act of 1990 (ASCA), which placed anabolic steroids and steroid precursors on the list of “Schedule III” drugs.\textsuperscript{58} Most recently, Congress has enacted the


\textsuperscript{55} 21 U.S.C. § 801(2).

\textsuperscript{56} See Gideon B. Ariel, \textit{Anabolic steroids: The physiological effects of placebos}, 4 Med. & Sci. 124, 124-26 (1972). This study, conducted in the 1970’s tested the effects of steroids by injecting a control group with placebo and another with steroids, telling both that they were participating in a steroid study. \textit{Id.} The placebo group attained the same results as the group injected with steroids, leading the author to believe that steroids did not have any effect other than psychological. \textit{Id.}

\textsuperscript{57} Shalender Bhasin, et. al., \textit{The effects of supraphysiologic doses of testosterone on muscle size and strength in normal men}, 335 New Eng. J. Med. 1, 1-7 (1996). This study targeted the shortcomings of the Ariel study. \textit{Id.} Bhasin and his colleagues recognized that steroids in small doses, as had been administered by Ariel, were useless. \textit{Id.} However, when injected with a substantially greater amount of steroids over a period of time, results were conclusive that steroids had a substantial impact on the strength of the study participant. \textit{Id.}

\textsuperscript{58} 21 U.S.C. § 812(b). The ASCA defined an anabolic steroid as: “any drug or hormonal substance, chemically and pharmacologically related to testosterone (other than estrogens, progestins, and corticosteroids) that promotes muscle growth...”. 21 U.S.C. § 802(41). A “steroid precursor” is defined as a substance which the Attorney General has found to be a compound used in the manufacture of a controlled substance, a chemical intermediary of a controlled substance, and the control of which is necessary to limit the manufacture of such controlled substance. 21 U.S.C. § 802(23). The consequence of being classified as a Schedule III drug, anabolic steroids may not be dispensed without a “written or oral prescription” nor may they be refilled “more than five times after the date of the prescription unless renewed by the practitioner.” 21 U.S.C. § 829(b).
Anabolic Steroids Act of 2004 (ASA). This Act was a direct response to the BALCO scandal and had the effect of amending the ASCA to include tetrahydrogestrinone, androstenedione and other related chemicals to the list of anabolic steroids prescribed under the CSA.

The Federal Trade Commission Act (FTCA) was signed into law in 1914 and had the effect of creating the Federal Trade Commission (FTC). The FTC was created for the purposes of promoting consumer protection and also to eliminate and prevent anticompetitive business practices. This Commission has a tradition of “maintaining a competitive marketplace for both consumers and businesses.” Specifically applicable to the matter of steroid use in MLB is § 45 of the FTCA, which unequivocally prohibits the use of “unfair” and “deceptive” practices in professions which affect interstate commerce. The Court has established a case-by-case, totality of the circumstances analysis to determine whether a method of competition has become “unfair” within the meaning of the statute. Whether the use of steroids in baseball is an “unfair” and “deceptive” practice for the purposes of the FTCA is a discussion reserved for another article; for the purposes of this Comment, it is sufficient to simply recognize that if MLB impacts interstate commerce, the regulation of its practices arguably fall within the power

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64 15 U.S.C. § 45(1) (“Unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are hereby declared unlawful.”).

65 FTC v. Motion Picture Advertising Service Co., 344 U.S. 392, 396 (1953) (“The point where a method of competition becomes ‘unfair’ within the meaning of the Act will often turn on the exigencies of a particular situation, trade practices, or the practical requirements of the business in question.”).
delegated to the FTC under the FTCA.66 Furthermore, if push came to shove, the FTC would have a colorable argument that the use of steroids in the profession of baseball actually is an “unfair” and “deceptive” practice.67

C. Congress Threatens a Takeover

It was only a matter of time before Congress became actively involved in the steroids controversy that originated in baseball and began to leak into other sports such as track and field, cycling, and football.68 Recognizing that the issue of steroid use had already been addressed by prior legislative acts, the matter of steroid use by professional athletes was referred to the Committee on Government Reform (CGR).69 The Committee held a hearing to investigate the

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67 FTC v. Beech-Nut Packing Co., 257 U.S. 441 (1922) (interpreting section 45 of the FTCA). The Court faced an antitrust price fixing agreement whereby the defendant refused to sell to distributors who would not comply with defendant’s pricing structure. Id. at 442. Ultimately remanding the issue, the Court held that the words “unfair method of competition” are aimed at practices characterized by “deception, bad faith, fraud or oppression, or as against public policy because of their dangerous tendency unduly to hinder competition or create monopoly.” Id. at 453. The Court felt that the appellate court’s cease and desist order was too broad, but clearly recognized the FTC’s authority to regulate defendant and enforce a cease and desist order to compel defendant to stop doing business in an “unfair” manner. Id. at 455. Applying the facts of this case and other similar issues, it would not stretch the bounds of reason to determine that baseball players who used steroids in the business of baseball exhibitions would be engaging in deception, bad faith and fraud with the dangerous tendency to unduly hinder competition. Furthermore, the use of steroids in a business where the participants are the role models of youth athletes worldwide is against public policy. Id. Ergo, the FTCA enables the use of steroids in MLB to be regulated by the FTC.

68 See supra note 21.

69 The Committee of Government Reform was renamed the “Committee of Oversight and Government Reform” in 2007. Committee on Oversight and Government Reform, About the Committee, http://oversight.house.gov (last visited Jan. 28, 2007). This Committee, now known as the Committee on Oversight and Government Reform, has been in existence in one form or another since 1816. Id. The principle purpose of the CGR is to study the “operations of the Government activities at all levels with a view to determining their economy and efficiency.” Committee on Oversight and Government Reform, Committee Rules and Jurisdiction, http://oversight.house.gov/rules (last visited Jan. 28, 2007). More specifically, House Rule X, clause 1 lists the specific areas of the government which the CGR may appropriately investigate; most notably included in Committee’s jurisdiction is the capacity to investigate the “overall economy, efficiency, and management of government operations and activities…” Id. Once jurisdiction is established, it is the duty of the CGR, under House Rule X, Clause 1 and 2, “[t]o determine whether laws and programs addressing subjects within the Committee’s jurisdiction are being implemented and carried out in accordance with the intent of Congress.” Id. Once a matter is delegated to the CGR, the Committee, at its discretion, may decide to call a hearing with the purpose of investigating the scope and magnitude of the issue and better understand the issue facing Congress before recommending the passage of new legislation to remedy the problem. Id.
use of steroids in MLB, which was entitled, “Restoring Faith in America’s Pastime: Evaluating Major League Baseball’s Efforts to Eradicate Steroid Use,” on March 17, 2005. Among those called to testify were parents of youth-athletes who used steroids, retired and active MLB players, medical doctors, Congresspersons, and MLB officials and representatives, including the Commissioner, Allan “Bud” Selig. After this hearing, three pieces of legislation were drafted and introduced into Congress: Congressman Tom Davis and Congressman John Sweeney introduced separate bills to the House of Representatives and Senator McCain introduced similar legislation to the Senate.

The “Clean Sports Act of 2005” (CSA), sponsored by Representative Davis and Senator McCain, and “The Professional Sports Integrity Act of 2005” (PSIA), sponsored by Representative Sweeney, all contained provisions that would tighten the minimum testing standards of MLB (as well as professional basketball, football and hockey). These bills

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70 Steroid Hearings, supra note 16.

71 Parents who testified included Denise and Raymond Garibaldi and Donald Hooten. Steroid Hearings, supra note 16. Mr. and Mrs. Garibaldi spoke of their son, Rob, who harbored life-long aspirations to become a professional baseball player like his heroes, Jose Canseco and Mark McGwire. Id., at 113. Rob, his parents say, was encouraged to use steroids by several baseball coaches and professional scouts if he wanted to move the next level and play in the Major Leagues. Id. Soon after receiving these recommendations, Rob began using steroids and ballooned from 5’9”, 130 pounds, to 5’11”, 185 pounds. Id. at 114. As a side effect of using these substances, Rob spiraled into an insurmountable depression and before playing a game at the professional level, he committed suicide. Id.

72 Jose Canseco, Mark McGwire, Rafael Palmiero, Curt Shilling, Sammy Sosa, and Frank Thomas all testified. Steroid Hearings, supra note 16, at 208-40.

73 Those who testified were: Allan “Bud” Selig, Commissioner; Sandy Alderson, Executive Vice President Baseball Operations; Donald Fehr, Executive Director Major League Baseball Players Association; and Robert Manfred, Executive Vice President Major League Baseball. Steroid Hearings, supra note 16, at 267-328.

74 Clean Sports Act, supra note 16; Professional Sports Integrity Act, supra note 16.

75 Clean Sports Act, supra note 16.

76 Professional Sports Integrity Act, supra note 16 (“The purpose of this act is to protect the integrity of professional sports and strengthen the health and safety standards for Major League Baseball, the National Basketball Association, the National Football League, and the National Hockey League, through the establishment of minimum standards and procedures for testing for prohibited substances and methods.”).
formally constituted the “threat” that if baseball did not reform its own steroid testing policies and punishment schedule, Congress would. The provisions written into the bills represented a substantial departure to the steroid policies that the players and owners had agreed upon months earlier.\textsuperscript{77} Both Acts sought MLB to be compliant with the standards established by the United States Anti-Doping Agency.\textsuperscript{78} The bills varied slightly regarding the frequency of testing as the CSA required testing three times during the season and twice during the off-season, while the PSIA required testing only twice during the season.\textsuperscript{79} However, the bills agreed that the consequences for positive tests should be severe, extremely severe: first positive test would result in a minimum suspension of two years and a second positive would result in a permanent bar from participation in the activity of that professional league.\textsuperscript{80} When these Acts were formally introduced to the Congress floor, the gauntlet was set and MLB went back to their collective bargaining table.\textsuperscript{81}

Constitutionally speaking, the legal issues in play here have become moot. At the end of the day, the MLB players and owners were able to hammer out a plan that all parties, including

\textsuperscript{77} As a general rule, the interests of the players and the owners are at odds with one another. However, the steroid policy is one where each side had the same interest in mind—money. The formula was simple: hitters + steroids = home runs; home runs = fans; fans = money. Therefore, steroids = money for all.

\textsuperscript{78} Clean Sports Act, \textit{supra} note 16; Professional Sports Integrity Act, \textit{supra} note 16.

\textsuperscript{79} Clean Sports Act, \textit{supra} note 16; Professional Sports Integrity Act, \textit{supra} note 16.

\textsuperscript{80} Clean Sports Act, \textit{supra} note 16; Professional Sports Integrity Act, \textit{supra} note 16.

\textsuperscript{81} MLB is known for having one of the most powerful player’s union in all of professional sports. MLBPlayers.com, \textit{Frequently Asked Questions}, http://mlbplayers.mlb.com/pa/info/faq.jsp. Generally, a collective bargaining agreement is a labor contract between an employer and a union. \textit{Id.} This arrangement is facilitated in MLB by negotiations between representatives of the players’ union and the owners. \textit{Id.} The subject of negotiation refers to the terms and conditions of employment, including the standards of drug testing that all players of the union would be subject. \textit{Id.} Thus, before any change in the steroid policy could happen from within (instead of from Congress), it would need to be approved by both the owners and the players’ union. \textit{Id.}
Congress could agree upon. But this dispute did not have to work out as cleanly as it did. Had the players, owners and Congress not mutually agreed on a plan negotiated by the three parties, Congress would have been forced to follow through on its threat to re-write the rules of baseball as they pertain to MLB’s steroid testing policy. Which ultimately begs the question, would affirmative Congressional action have been unconstitutional?

III. INTERSTATE HOME RUNS

When the words “United States” are spoken, they are modernly referred to in the context of a singular noun—as one nation. This is a modern development; the words “United States” were, before the end of the Civil War, regarded as a plural, referring to the States individually. This distinction reflects the transformation of the nation’s concept of “federalism” throughout the life of the country. The power of the central, federal government in relation to the autonomy of the several States played a key role in the drafting and ratification of the Constitution. Such dispute is understandable when looking toward the historical roots of the country and its struggle to allocate control of governmental powers. The Constitution promised to enumerate specific

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84 Id.

85 Federalism is technically defined as: “The relationship and distribution of power between the national and regional governments within a federal system of government.” BLACK’S LAW DICTIONARY 277 (2d pocket ed. 2001). This relationship between the federal and regional governments works in inverse proportions. Stanford University, Federalism, STANFORD ENCYCLOPEDIA OF PHILOSOPHY, http://plato.stanford.edu/entries/federalism/. This impact of this relationship is that, practically speaking, as the federal government is granted greater power, it necessarily reduces the power of the regional government, and visa versa. Id.

86 See generally THE FEDERALIST NO. 33 (Alexander Hamilton).

87 Encyclopedia Britannica Online, Articles of Confederation, http://www.britannica.com/ebi/article-9272967. In the beginning, there were thirteen colonies united only by their ties to England. Id. After the revolution, the government of the colonies remained essentially independent from one another until the Articles of Confederation
powers to the federal government, while reserving all others to the States.\textsuperscript{88} In short, before legislating or executing legislation, the federal government must point to a specific place in the Constitution where it derives its power.

No where in the Constitution is it said that Congress may enact laws that prohibit MLB players to use steroids.\textsuperscript{89} More broadly speaking, the Constitution never specifically authorizes the Congress to enact legislation that would allow Congress to curb steroid use by anyone.\textsuperscript{90} Nevertheless, it was Congress’ intent to pass legislation that would radically transform the testing program of MLB and weed out the juicers.\textsuperscript{91} This brings the constitutionality of Congress’ threat directly into question—how can Congress exercise authority over MLB if the Constitution does not enumerate that power? If Congress cannot point to a place in the Constitution where it would derive its authority to regulate the use of steroids in baseball, then such action would be unconstitutional. The first subsection will address the origins of federalism doctrine through the lens of judicial action. The second subsection will look to how the doctrine of federalism has morphed by way of the Commerce Clause. The third subsection will look to the role the Commerce Clause has played in the regulation of MLB. Finally, the fourth subsection will apply the modern conception of federalism to the dispute between the federal government and MLB to decipher if congressional action would be constitutional.

A. Setting the Stage—\textit{McCulloch v. Maryland}

\textsuperscript{88} See U.S. CONST., amend. X.

\textsuperscript{89} See generally, US Const.

\textsuperscript{90} Id.

\textsuperscript{91} Professional Sports Integrity Act, \textit{supra} note 16; Clean Sports Act, \textit{supra} note 16.
Even before the Constitution was ratified, it was understood that the enumerated powers of the federal government were not necessarily limited to those examples specifically enumerated within the four corners of the document. Practically speaking, this means that in order for Congress to regulate steroid use in MLB, it does not need to point to a provision in specifically granting Congress the ability to regulate steroid use in MLB. The issue that logically arises is how far does the scope of the federal government extend if subject matter within the purview of federal power need not be expressly written in the Constitution. More fundamentally, how much power did the founders grant to the federal government, and reciprocally, how much was reserved to the states?

The compromise of federalism embodied in the Constitution found center stage in the landmark case of *McCulloch v. Maryland*. At the heart of the factual dispute was the question of where the power of the federal government ends and the power of the several States begins.

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92 The Federalist No. 33 (Alexander Hamilton). Hamilton went to great lengths to explain that the Necessary and Proper Clause could be invoked by the government to expand its power beyond the plain meaning of the words of the Constitution. *Id.*

93 *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819). The factual dispute underlying the legal issues in *McCulloch* was the enforcement of Maryland’s state law, which imposed an annual tax on non-state chartered banks, on a federally established bank doing business in Maryland. *Id.* at 425-37. The legal issue is one which implicates the “conflicting power of the general and State governments… and the supremacy of their respective laws, when they are in opposition…” *Id.* at 405. In holding the State tax on the federal bank unconstitutional, the Court recognized that the federal government is one of “enumerated powers” and that those powers not expressly vested in the federal government are reserved to the States by way of the Tenth Amendment. *Id.* at 405-06. However, the Court also recognized that the Supremacy Clause required the interpretation that the federal government is “supreme within its sphere of action.” *Id.* at 405. Additionally, the Court determined that the Necessary and Proper clause was included within the grants of federal power and thus, should be accorded a broad reading. *Id.* at 420-22. Interpreting the Necessary and Proper Clause in conjunction with the Supremacy Clause, the Court adopted the reasonable means test, whereby the federal government could exercise power where it was reasonable to exercise an enumerated power. *Id.* at 421-25. The Court ultimately held the establishment of a federal bank to be within the federal government’s sphere of action by way of the necessary and proper clause because it was a necessary and proper means of effecting its power of taxation. *Id.*

94 *Id.* at 400. The importance of this opinion did not escape the Court. In the opening paragraph of his opinion, Chief Justice Marshall writes:

The constitution of our country, in its most interesting and vital parts, is to be considered; the conflicting powers of the government of the Union and of its members, as marked in that constitution, are to be discussed; and an opinion given, which may essentially influence the great operations of the government. *Id.*
Chief Justice Marshall’s opinion in *McCulloch* is stands for the premise that the federal government is supreme within its “sphere of action.” But perhaps of even greater significance is how the Marshall Court expanded the federal government’s sphere of action beyond the words and examples specifically enumerated in the Constitution by use of the Necessary and Proper Clause.

Interpreting the meaning of the Necessary and Proper Clause, the Court opined that the Constitution was not a document intended to include all of the “subdivisions of which its great powers will admit and of all the means by which they may be carried into execution” as such inclusion would “partake the prolixity of a legal code and could scarcely be embraced by the human mind.” The nature of the Constitution requires “that only its great outlines should be marked, its important objects designated, and the minor ingredients which compose those objects be deduced from the nature of the objects themselves.” It was the idea of the framers that the scope of federal and state power be defined by the Constitution read as a whole and not by pointing to a particular provision. Thus, a specific enumeration of power, such as the power of tax, should be read in conjunction with other grants of federal power to measure the appropriate breadth of the federal power.

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95 *Id.* at 405 (“If any one proposition could command the universal assent of mankind, we might expect it would be this—that the government of the Union, though limited in its powers, is supreme within its sphere of action.”).

96 *Id.* at 421-25.

97 *Id.* at 407.

98 *Id.*

99 *Id.* at 407-08.

100 *Id.* at 425-28. The Court read the Necessary and Proper clause to be an expansion of federal power by way of its placement within the Constitution. *Id.* By placing the clause within a section granting power, the Court interpreted the purpose of the clause to be an expansion of power rather than a limitation. *Id.* at 425. By this rationale, the Court found that the word “necessary” was to be construed liberally. *Id.* at 427-29. Consequently, the Court merely
It is important to note that the Necessary and Proper Clause served as a means by which the federal government could expand the use of its enumerated powers, but was not an affirmative grant of power in and of itself. The Necessary and Proper Clause served as a means by which the federal government could expand the use of its enumerated powers, but was not an affirmative grant of power in and of itself. This means that Congress could not simply point to the Necessary and Proper Clause in order to exercise control over MLB. Even though the McCulloch opinion could not be cited to justify Congress’ power to regulate MLB, it was this interpretation of the Constitution that set the stage for future expansions of the federal government. Those subsequent expansions provide the principles by which Congress would attempt to reconcile its threatened legislation to restructure drug testing in MLB with the Constitution.

B. The Commerce Clause

Modernly, the doctrine of federalism not been shaped by the Necessary and Proper Clause, but rather by the Commerce Clause. It may seem unlikely that this clause, which grants the federal government authority to regulate those activities which are defined as “commerce” and are conducted “among the several States,” would be the vehicle by which Congress would gain control over MLB’s drug testing provisions. It is hard to imagine that the founders (living without radio, television, and the internet) would have envisioned that the commerce clause would permit the central government to reach into the MLB rulebook. The

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102 Id. at 1176.

103 Professional Sports Integrity Act, supra note 16; Clean Sports Act, supra note 16.

104 U.S. CONST. art. I, § 8, cl. 3.

105 Id.
application of the commerce clause did not always have such wide-reaching ramifications and
the federal government did not carry such wide-reaching authority.\textsuperscript{106}

When the Constitution was written, the balance between federal and state power was
black and white; there was the Commerce Clause and there was the Tenth Amendment. These
provisions provided that the federal government could regulate that which was determined to be
commerce between the several states, and the Tenth Amendment reserved all else to the
States.\textsuperscript{107} However, the same Marshall Court that laid the foundation by which the federal
government would be expanded also opined on the seminal Commerce Clause case of \textit{Gibbons v.
Ogden}.\textsuperscript{108} The case of \textit{Gibbons} is most famous for giving the Court the analytical framework by
which it determines whether an activity is “commerce” for constitutional purposes.\textsuperscript{109} It was
stipulated that the activity to be regulated was interstate; however, the Court was faced with the
task of determining whether steamboat operation is “commerce” for constitutional purposes.\textsuperscript{110}
In holding that the activity at bar was commerce, the Court engaged in a four step analysis,
giving the most weight to the first and least to the last: (1) plain meaning of commerce; (2)
purpose of the commerce clause; (3) structural and intra-textual analysis; and (4) historical

\begin{footnotesize}
\begin{enumerate}
\item[\textsuperscript{106}] See \textit{infra} notes 107-17.
\item[\textsuperscript{107}] See U.S. CONST. art. I, § 8, cl. 3 (commerce clause); U.S. CONST. amend. X.
\item[\textsuperscript{108}] \textit{Gibbons v. Ogden}, 22 U.S. 1 (1824).
\item[\textsuperscript{109}] \textit{Id.} at 189. The famous dispute arises out of a conflict that developed when Gibbons obtained an operating
license by way of a 1793 Act of Congress. \textit{Id.} at 186-88. Gibbons operated a steamboat which provided a ferry
service within the state of New York where Fulton and Livingston were granted a monopoly over steamboat
operation between New York and New Jersey by the government of New York.\textsuperscript{109} \textit{Id.}
\item[\textsuperscript{110}] \textit{Id.} at 189 (“The subject to be regulated is commerce; and our constitution being, as was aptly said at the bar, one
of enumeration, and not of definition, to ascertain the extent of the power, it becomes necessary to settle the
meaning of the word.”).
\end{enumerate}
\end{footnotesize}
perspective. It was through this analysis that the Court is famous for broadly defining the term “commerce,” opening the door for further liberal construction of the clause.

The States took back some degree of power from the federal government in the seminal “dormant commerce clause” case of Cooley v. Board of Wardens. It was held in Cooley that States could regulate interstate commerce in the absence of federal action. This small state victory was followed by the 1895 decision of United States v. E.C. Knight, Co. where the Court took on the challenge of defining “between the several States.” Gaining momentum, the States successfully argued that the manufacture of goods was a wholly in-state activity even though those same goods would eventually be shipped across state lines. This victory for state sovereignty was quickly followed in 1902 by Champion v. Ames, a decision which eroded

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111 Id. 189-223. Though it is not of utmost importance to dissect the analysis of the Court in holding that “navigation” fell within the scope of federal power, its analysis should be noted. Satisfying the first prong, the Court held that the plain meaning of commerce clearly included the navigation of waters. Id. The purpose of the commerce clause was to enable the federal government to govern when the several States were incompetent or the Union required uniformity. Here, the regulation of navigation was one which required uniformity so as a steamboat operator would not face the dilemma of being compelled to face contradictory laws when crossing over state lines. Id. Regarding the intra-structural analysis, the commerce power falls within a section of the Constitution granting powers to the federal government, which implies a broad interpretation of the grant of power. Id. Lastly, history revealed that the federal government had the power to impose embargoes. Embargos implicate navigation of waters and are commercial in nature. Using this analogy, the Court determined that the navigation of interstate waters was within the scope of federal authority. Id.

112 Cooley v. Bd. of Wardens, 53 U.S. 299 (1851). After the Court gave a broad interpretation of commerce, it was feared that the federal government held exclusive jurisdiction over the regulation of interstate commerce. These fears were dispelled by Justice Curtis in holding that in the absence of federal regulation, the several States had the authority to regulate that which was considered interstate commerce. Id. at 320. It is of note that the Court limited its decision to instances where the federal government had not spoken in a way which expressly or impliedly preempted State regulation. Id. at 320-21.

113 Id.


115 Id. at 14. The legal issue presented to the Court was whether the operation of sugar refineries in Pennsylvania could be determined “interstate” because the sugar was produced with the purpose of shipping it out of state. Id. at 11. Answering the question in the negative, the Court distinguished between goods which were actually shipped and traded between the States and goods which were manufactured with the intent of being shipped and traded across state lines. Id. at 14.
traditional state police power in favor of the federal authority to regulate interstate commerce. In a dispute over whether the shipment of lottery tickets over state lines was more appropriately regulated by the federal government by way of the commerce clause or the state government by way of their police powers.

The States’ victory in *E.C. Knight* was destroyed by the Court’s holding in the 1942 case of *Wickard v. Filburn*. Eliminating the “manufacturing” distinction, the Court favored an approach that significantly broadened the scope of federal power. In the process of concluding that an individual who grew wheat on his personal property predominately for personal consumption was subject to federal regulations by way of the commerce clause, the Court outlined the following rule:

The commerce power is not confined in its exercise to the regulation of commerce among the states. It extends to those activities intrastate which so affect interstate commerce, or the exertion of the power of Congress over it, as to make regulation of them appropriate means to the attainment of a legitimate end, the effective execution of the granted power to regulate interstate commerce. The power of Congress over interstate commerce is plenary and complete in itself, may be exercised to its utmost extent, and acknowledges no limitations other than are prescribed in the Constitution. It follows that no form of state activity can constitutionally thwart the regulatory power granted by the commerce clause to Congress. Hence the reach of that power extends to those intrastate activities which in a substantial way interfere with or obstruct the exercise of the granted power.

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117 *Id.* at 363-64. This case saw a conflict between two competing powers—the State’s right to regulate the health, safety, welfare and morality of its citizens and the federal government’s right to control the transactions of lottery tickets between state lines. *Id.* Holding for the propriety of federal regulation, the Court interpreted that the Constitution provided the federal government “plenary authority” over the carriage of commercial goods “from State to State.” *Id.* at 364.


119 *Id.* at 124.
The Court’s decision in *Wickard* made clear the federal government may exercise authority over private activities that, in the aggregate, have substantial economic effect. This is notwithstanding the fact that the actual activity in question is not interstate or commercial. Furthermore, the courts will defer largely to the judgment of Congress in its commerce clause analysis.\(^\text{120}\) In the aftermath of *Wickard*, it seemed as though no activity was safe from the commerce clause. This, in effect, destroyed the role of the State to regulate in-state activities except where the federal government was silent.

In 1995, the Court momentarily curbed the use of the commerce clause in *United States v. Lopez*.\(^\text{121}\) The Court declared the Gun-Free School Zones Act of 1990 unconstitutional on the grounds that it did not regulate the channels of interstate commerce, the instrumentalities of interstate commerce, nor did the activity governed have a substantial relation to interstate commerce.\(^\text{122}\) Ten year later, the impact of *Lopez* was substantially narrowed by the Court’s decision in *Gonzales v. Raich*.\(^\text{123}\) In *Raich*, state and federal law clashed over the propriety of

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\(^{120}\) This concept is counter-intuitive in the scheme of the separation of powers. The courts are supposed to check the power of the Congress; it should be assumed that the Congress will continually attempt to expand the scope of its authority until limited by the courts. For the courts to defer to the Congress is to allow one branch of the government to determine the scope of its own power.

\(^{121}\) *United States v. Lopez*, 514 U.S. 549 (1995). Defendant in *Lopez* was a twelfth grade student who arrived at Edison High School in San Antonio, Texas, carrying a concealed .38 caliber handgun and five bullets. *Id.* at 551. Defendant was arrested and charged under Texas law, but the next day state charges were dropped to give way to a federal charge under the Gun-Free School Zones Act of 1990 (“GFSZA”). *Id.* A grand jury indicted defendant on one count of knowingly possessing a firearm in a school zone pursuant § 922(q) of the GFSZA. *Id.* Defendant motioned to dismiss the indictment on the grounds that the GFSZA was unconstitutional because it is beyond the power of Congress to “legislate control over our public schools.” *Id.* The District Court denied the motion, only to be reversed by the Fifth Circuit Court of Appeals. *Id.*

\(^{122}\) *Id.* at 620-31. The Court affirmed that the GFSZA was outside of the scope of federal authority. *Id.* at 631. The Court reasoned that the precedent has upheld a variety of congressional Acts that had the purpose of regulating interstate economic activity that affected interstate commerce. *Id.* at 625-27. However, the possession of a gun in a school zone could hardly be argued to have a substantial impact on interstate commerce. *Id.* at 627-29. Section 922(q) is a criminal statute that does not address commerce or economic activity of any kind, no matter how loosely those terms may be construed. *Id.*

\(^{123}\) *Gonzales v. Raich*, 545 U.S. 1 (2005). The facts underlying *Raich* involved two California residents, Raich and Monson, with serious medical conditions which caused them extreme pain. *Id.* at 5-7. As a result of their
allowing citizens to cultivate and use marijuana for medicinal purposes. This dispute also illustrated the intersection of two conflicting pieces of precedent—Wickard and Lopez. Looking to both cases, the Court found the similarities between the present facts and Wickard to be “striking,” while application of Lopez in this case would overlook the larger context of modern Commerce Clause jurisprudence. Distinguishing Lopez, the Court emphasized that the target of the Gun Free School Zones Act was wholly non-economic with no relation to commerce or any sort of economic enterprise. In contrast, the Controlled Substances Act regulates “quintessentially economic” activities. Thus, looking to the facts of the case and the language of the Controlled Substances Act, the Court determined that Congress was acting within a larger regulatory scheme to stop the trafficking of illicit drugs. Ergo, the control of a locally cultivated product for personal use falls within the larger plan surrounding the Controlled Substances Act, bringing those seemingly local actions to a place of national magnitude and

conditions, their physicians prescribed medical marijuana to relieve the symptoms of their medical conditions. Id. California permitted residents to possess and use marijuana so long as it was recommended to patients for medical purposes under California’s Compassionate Use Act. Id. Federal officials from the Drug Enforcement Agency arrested both for the cultivation and possession of marijuana as prescribed by the Controlled Substances Act. Id. at 7.

124 Id.

125 The parties in Raich used these two cases to support their powerful arguments. The federal government argued that the facts of Raich were strikingly similar to those of Wickard. Id. at 17. Each represented a case where individuals were cultivating small amounts of a product in violation of federal regulations. Id. In Wickard, the Court found that, in the aggregate, this type of behavior significantly impacted the national commerce, allowing the federal government to control the issue. Wickard v. Filburn, 317 U.S. 111, 124 (1942). Defendants posited that the facts at bar were analogous to the case of Lopez where the Court held that the link to interstate commerce could only be found by “piling inferences upon inferences.” Lopez, 514 U.S. 627-29.

126 Id. at 15-25.

127 Id. at 25-26.

128 Id. at 25.

129 Id. at 15-19.
federal control. Practically speaking, the Raich Court limited the limitations of Lopez to single-subject, non-economic regulations.

The current state of commerce clause jurisprudence is one which permits expansive federal regulation at the expense of State sovereignty. Although the accepted categories of federal regulation as outlined in Lopez form the basis of evaluating a commerce clause issue, the expansive principles of Wickard and Raich are used to evaluate what activities involve a “substantial relation to interstate commerce.”

C. The Commerce Clause in Baseball

The profession of baseball has not eluded the attention of the Congress or the Supreme Court. Three decades after Congress passed the Sherman Antitrust Act in 1890, the Court was left to determine whether the National League of Professional Baseball Clubs was engaging in unlawful monopolistic behavior. However, before reaching the merits of the Sherman Act claim, the case was decided in favor of the National League on the grounds that baseball did not fall within the purview of federal authority because it did not implicate interstate commerce. This decision laid the groundwork for what would become known as baseball’s antitrust exemption. In a trilogy of cases, the Court would balance the evolution of the commerce clause with the doctrine of stare decisis in deciding whether MLB’s antitrust exemption would

130 Id. at 32-33.
131 Id. at 17-20.
132 Lopez, 514 U.S. at 557. The accepted categories of federal regulation outlined in Lopez are: (1) channels of interstate commerce; (2) instrumentalities of interstate commerce; and (3) activities that are substantially related to interstate commerce. Id.
134 Id. at 209.
survive. The Court’s analysis in these cases follows the colorful history of the commerce clause eventually deciding that the profession of baseball is interstate commerce for constitutional purposes, but is nevertheless exempt from federal antitrust law.

The first of the trilogy is *Federal Baseball Club of Baltimore v. National League of Professional Baseball Clubs*. Arising out of a dispute over what was essentially an acquisition of a failing professional baseball league by a prospering league; a team from the soon to be extinct league filed an antitrust action. The case eventually reached the Supreme Court where Justice Holmes, writing for a unanimous Court, never reached the antitrust issues claimed. Rather, the Court found that professional baseball does not fall within the purview of federal control. The Court reasoned that although teams’ schedules required them to frequently travel between state lines, professional baseball was not interstate for constitutional purposes. Citing to *E.C. Knight*, the court held that the exhibition of baseball games was not interstate because it was such display was the “essential thing,” and the travel was merely incident to this essential thing. Furthermore, the profession of baseball was not commerce because the athletes were

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136 259 U.S. 200 (1922).

137 The facts behind the dispute illuminate the early history of professional baseball. Thomas J. Ostertag, *Baseball’s Antitrust Exemption: It’s History and Continuing Importance*, 4 VA. SPORTS & ENT. L.J. 54, 55 (2004). In 1913, the Federal Baseball League was created to compete with the already established American and National Leagues. *Id.* After over-extending its resources by paying players above-market salaries, the Federal League planned to dissolve. *Id.* However, before doing so, the Federal League entered into a settlement agreement by which the Federal League would assign player and stadium contracts to the American and National Leagues in exchange for cash. *Id.* The problem arose when the team from Baltimore objected to the settlement agreement and filed an antitrust action in federal court. *Id.*


139 *Id.*

140 *Id.*

141 *Id.* at 210.
merely playing a sport and were not being traded in a market—indeed, their personal effort as not the subject of commerce. Therefore, since professional baseball did not fall within the definition of interstate commerce for constitutional purposes, it was outside the scope of federal control and the antitrust claim was dismissed. This rationale went unchallenged by the Supreme Court or Congress until 1953.

By the time Toolson v. New York Yankees, Inc. reached the Court, the interstate commerce doctrine had been substantially expanded by Wickard. But while the interstate commerce doctrine had expanded federal power, professional baseball had been allowed to develop without the burden of federal antitrust compliance. Before reaching the issues of whether professional baseball implicated the new concepts of interstate commerce, the Court ruled in favor of the New York Yankees based on the doctrine of stare decisis. The Court explicitly found that it was not appropriate for the courts to alter precedent that has been left untouched for over three decades, determining that such change was more appropriately made by Congress. The Court’s six sentence opinion was not without vigorous dissent. Justice Burton blasted the Court for allowing such flawed precedent to stand. Pointing to baseball’s capital

142 Id. at 209
143 Id.
145 Toolson, 346 U.S. at 357 (recognizing that thirty years have passed since Federal Baseball Club of Baltimore was handed down, and since that time, Congress has refrained from legislating upon the subject of baseball and the federal antitrust laws).
146 Id.
147 Id. (“The business has been left for thirty years to develop, on the understanding that it was not subject to existing antitrust legislation. […] We think that if there are evils in this field which now warrant application to it of the antitrust laws it should be by legislation.”).
148 See id. (“I am not able to join today’s decision which, in effect, announces that organized baseball, in 1953, still is not engaged in interstate trade or commerce.”) (Burton, J., dissenting).
investments, radio and television revenues and the minor league “farm system,” the dissent argues that this profession fits clearly within the current conceptions of interstate commerce and as such the Court should overturn precedent which was decided in a matter inconsistent with modernly applicable law.\footnote{Id. at 357-58 ("In the light of organized baseball's well-known and widely distributed capital investments used in conducting competitions between teams constantly traveling between states, its receipts and expenditures of large sums transmitted between states, its numerous purchases of materials in interstate commerce, the attendance at its local exhibitions of large audiences often traveling across state lines, its radio and television activities which expand its audiences beyond state lines, its sponsorship of interstate advertising, and its highly organized "farm system" of minor league baseball clubs, coupled with restrictive contracts and understandings between individuals and among clubs or leagues playing for profit throughout the United States, and even in Canada, Mexico and Cuba, it is a contradiction in terms to say that the defendants in the cases before us are not now engaged in interstate trade or commerce as those terms are used in the Constitution of the United States and in the Sherman Act.").}

The final case of baseball’s antitrust trilogy is \textit{Flood v. Kuhn}, decided in 1972.\footnote{Flood v. Kuhn, 407 U.S. 258 (1972).} In a case that implicated Major League Baseball’s reserve system, plaintiff, Curtis Flood filed an antitrust suit against the then MLB Commissioner, Bowie Kuhn.\footnote{Id. at 259.} Thirteen years after signing a contract with the Cincinnati Reds in 1956 for a salary of $4000 per year, Flood was traded without his notice or consent to the Philadelphia Phillies.\footnote{Id. at 265.} After a failed appeal to the Commissioner to rescind the trade, Flood filed suit in federal court.\footnote{Id. at 268.} The Supreme Court granted certiorari and this time offered more than six lines to justify its decision to continue to enforce baseball’s antitrust exemption. Justice Blackmun first acknowledged that “[p]rofessional baseball is a business and it is engaged in interstate commerce.”\footnote{Id. at 282.} However, it had now been fifty years since the Court in \textit{Federal Baseball Club of Baltimore} exempted the profession from
federal antitrust regulation and thereby allowed the sport to develop under the exemption.\textsuperscript{155} Such absence of remedial legislation demonstrates “something other than mere Congressional silence and passivity,” but “positive inaction.”\textsuperscript{156} Thus, once more, in spite of the expanded power afforded to the federal government through the commerce clause, the Court upheld MLB’s federal antitrust exemption on the basis of \textit{stare decisis}.	extsuperscript{157} This line of cases illustrate how the commerce clause has expanded over time to allow Congress to reach activity in 1972 that it was not able to touch in 1922. Specifically, the commerce clause has been at the forefront of analysis is determining whether the profession of baseball may be included within the sphere of federal power.

D. The Infield Fly Rule\textsuperscript{158}

Baseball’s antitrust exemption survived despite the expanding conception of the commerce clause.\textsuperscript{159} Thus, until legislation is passed to the contrary, MLB does not need to comply with the Sherman Act and may engage in otherwise illegal monopolistic practices.

\textsuperscript{155} \textit{Id.} at 282 n.17 (“Since \textit{Toolson} more than 50 bills have been introduced in Congress relative to the applicability or nonapplicability of the antitrust laws to baseball. A few of these passed one house or the other. Those that did would have expanded, not restricted, the reserve system’s exemption to other professional league sports.”).

\textsuperscript{156} \textit{Id.} at 283.

\textsuperscript{157} \textit{Id.} at 282 (“It is an aberration that has been with us now for half a century, one heretofore deemed fully entitled to the benefit of \textit{stare decisis}, and one that has survived the Court’s expanding conception of interstate commerce.”).

\textsuperscript{158} The infield fly rule is a type of anomaly in baseball; it is a rule no one quite understands and stands as a euphemism for an irregular rule that no one quite understands. The rule appears in two places in the official MLB rule book, and is defined by section 2.00. \textit{Official Rules of Major League Baseball} § 2.00 (2006). As simply as possible, the rule only pertains to a specific situation when there are less than two outs and runners are on first and second or bases are loaded (runners on first, second, and third). \textit{Id.} In this situation, if a fair fly ball is hit and an infielder could easily catch it, an infield fly rule is called by the umpire. \textit{Id.} This means that the batter is automatically out (regardless of whether the ball is actually caught). \textit{Id.} Furthermore, the runners do not have to leave the base they are at. \textit{Id.} The purpose for the rule is that the runners on base are caught between a rock and a hard place without the rule because if the ball is dropped, they could be forced out at the next base. However, if they attempt to advance to the next base to avoid being force out and the ball is caught, they will be forced out at the base they came from. The analogy here is that the infield fly rule is a bit of an anomaly as far as baseball rules go; similarly, baseball’s antitrust exemption has also been held to be an anomaly as far as constitutional rules go. Sorry if that didn’t make any sense, but if you actually read this far, you’d have to admit it’s kind of clever.

\textsuperscript{159} \textit{See supra} notes 134-58 and accompanying text.
However, the question still remains whether MLB must comply with legislation that would be directed at its drug testing policies. To put it lightly, the MLB players and owners would like to find any available means to escape the control of Congress so that players can remain juiced and baseballs continue to fly out of ballparks. The best argument to be made by MLB would be to make a claim that the power to regulate baseball is appropriately reserved the several States and not the federal government because its activities do not implicate the interstate commerce clause.

Although the dissent in Toolson and the majority in Flood concluded that MLB is subject to federal regulation via the commerce clause, it has been over forty years since the Supreme Court has been asked to apply Commerce Clause jurisprudence to the game. During that time, the commerce clause has undergone some tweaks and it would behoove the players and owners to posit that those changes have limited the scope of federal power to exclude professional baseball. Using the Court’s rationale from Lopez, MLB could attempt to argue that steroid regulation in baseball does not involve a “channel” of interstate commerce, an “instrumentality” of interstate commerce, nor was it “substantially related” to interstate commerce.\(^\text{160}\) Certainly, the regulation of steroids could not be considered to be regulating a channel or instrumentality of interstate commerce; therefore, the appropriate analysis lay in determining whether such regulation is “substantially related” to interstate commerce. After the Court’s decisions in Lopez and Raich, courts will look primarily to two factors in determining whether a Congressional action is constitutional: (1) whether the act being regulated is an economic activity; and (2) whether there is a logical stopping point of the power of Congress so as not expand the power

granted to the federal government by the Commerce Clause to a point where it unduly infringes upon State power.\textsuperscript{161}

It would be hard to claim that the act being regulated is not an economic activity. The threatened legislation deals directly with the use of steroids by baseball players within the scope of their profession as MLB players. Not only do the players need to pay for the steroids that are shipped between states to arrive in their posterior muscles, but the players are using such substances to benefit them in a profession where steroids may be directly tied to salary. However, where MLB could attempt to slip through the cracks of the modern application of the commerce clause is to argue that too many inferences are being piled atop each other in order to grant Congress authority to regulate. In \textit{Lopez}, the Court found that the arguments connecting its legislation to interstate commerce were too attenuated and upholding such legislation would be to “convert Congressional authority under the Commerce Clause to a general police power of the sort retained by the States.”\textsuperscript{162} During the time between \textit{Lopez} and \textit{Raich}, MLB may have had at least a chance in claiming that the regulation steroids in baseball is off-limits to Congress because the connection between the Clean Sports Act and interstate commerce is just too attenuated.\textsuperscript{163} But ten years after \textit{Lopez}, there was \textit{Raich}.

\textsuperscript{161} Id. at 563-68; \textit{see also} Gonzales v. Raich, 545 U.S. 1, 17-19 (2005).

\textsuperscript{162} \textit{Lopez}, 514 U.S. at 564-65 (“The Government argues that possession of a firearm in a school zone may result in violent crime and that violent crime can be expected to affect the functioning of the national economy in two ways. First, the costs of violent crime are substantial, and, through the mechanism of insurance, those costs are spread throughout the population. Second, violent crime reduces the willingness of individuals to travel to areas within the country that are perceived to be unsafe. The Government also argues that the presence of guns in schools poses a substantial threat to the educational process by threatening the learning environment. A handicapped educational process, in turn, will result in a less productive citizenry. That, in turn, would have an adverse effect on the Nation’s economic well-being. As a result, the Government argues that Congress could rationally have concluded that § 922(q) substantially affects interstate commerce.”).

\textsuperscript{163} I, by no means, claim this to be a winning argument, but MLB could have at least attempted to analogize the winning arguments in \textit{Lopez} to the facts surrounding the Clean Sports Act.
The facts of *Raich* are to those presently at issue, particularly since each involve the enforcement of controlled substances by way of the CSA. MLB could attempt to construct an argument analogizing the fact that the defendants in *Raich* were growing and not merely using controlled substances. The Court in *Raich* analogized to the facts of *Wickard* by pointing out that federal control was appropriate considering the larger regulatory scheme in attempting to slow drug traffic. 164 Since MLB players were not growing or manufacturing steroids, MLB would claim that, in the aggregate, the market of steroids was not impacted and the larger regulatory scheme was not injured. However, this argument would be likely to fail although the players are not impacting the supply side of the market analysis, they are providing the demand for steroids. Although the *Raich* Court was not forced to grapple with this issue, it seems that based on the expansionist trend of the Commerce Clause, the Court would have no problem opining that the significant impact on the market demand for steroids would push the regulation of the use of steroids in baseball into the federal sphere of power.

Down by five runs in the bottom of the ninth inning with none out, MLB could attempt to make a few more arguments before succumbing to federal legislation. First, MLB could attempt to claim that the regulation of safety and morality, both of which are implicated by the use of steroids, are appropriately reserved to the States through their police powers. 165 MLB owners may attempt to point to precedent to support the proposition that the regulation of health, safety, welfare, and morality are left to the exclusive control of the States. 166 However, aside from the

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164 *Gonzales v. Raich*, 545 U.S. 1, 17 (2005).

165 *See* Lochner v. New York, 198 U.S. 45, 56-59 (1905) (recognizing the ability of the states to regulate the health, welfare, safety and morality of its citizens).

166 *Id.*
fact that the police powers doctrine has been whittled away over the course of time, the Supreme Court established the supremacy of the commerce clause over the police powers of the States in *Champion v. Ames*.

After facing defeat of the out number one, the individual teams that comprise MLB could attempt to lobby their state legislatures to pass favorable legislation addressing the use of steroids in baseball. Though it was determined that the use of steroids in baseball did implicate interstate commerce, MLB could attempt to cite *Cooley v. Board of Wardens* in order to support the idea that the dormant commerce clause permits States to legislate matters within the purview of the commerce clause, but are not yet regulated by Congress. However, it is probable that the States would be impliedly preempted from regulating on the subject of steroids since Congress had spoken on the subject by way of the Controlled Substances Act and the Anabolic Steroids Act. Even if the States were not preempted, since the matter is within the scope of the federal government, Congress would simply need to approve the Clean Sports Act and the States would be expressly preempted by such law.

With two outs, the MLB owners and players would be left with only one option—to beg. As a last resort, MLB could request that the antitrust exemption be expanded and applied to federal drug regulation. However, this pinch-hitter would not likely be as successful as Kirk

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170 *See State v. Milwaukee Braves, Inc.*, 31 Wis. 2d 699 (1966) (addressing the issue whether state antitrust law may be applied in the present case, the court began by asserting that organized baseball is clearly interstate commerce, therefore subject to Congressional regulation, that the defendants are engaged in interstate commerce involving activity within Wisconsin, and that enforcement of the antitrust policy of Wisconsin would directly affect defendants' operations outside the state as well); *see also* Crosby v. National Foreign Trade Council, 530 U.S. 363 (2000) (holding that a Massachusetts law was impliedly preempted by a broader federal law regulating the trade of United States companies with Burma).
Gibson in the 1988 World Series.\textsuperscript{171} In \textit{Flood}, the court made clear that MLB’s antitrust exemption was an “exception and an anomaly” of the law and was upheld on the grounds that the profession, “with full and continuing Congressional awareness has been allowed to develop and expand unhindered by federal action.”\textsuperscript{172} The rationale for the baseball’s federal antitrust exemption does not support an exemption from steroid legislation. First, and most important, there has not been a Supreme Court decision allowing the use of steroids in baseball. Without that precedent, the Congress could not have exercised the “positive inaction” that led the Court to affirm baseball’s antitrust exemption. Secondly, even if a precedent had been set, the Clean Sports Act represents the remedial legislation—the type called for to remedy the antitrust exemption in \textit{Toolson} and \textit{Flood}. Lastly, in this situation, Congress is attempting to pass legislation that baseball would be attempting to block; thus, it is unlikely that Congress would agree to extend a common law exemption. For these reasons, the plea to extend baseball’s antitrust exemption to steroid enforcement fails.

Much to the chagrin of MLB owners and players, the commerce clause enumerated in the Article I of the United State Constitution would provide the basis for the federal government to regulate steroid use in baseball. Therefore, were Congress to have followed through on its threat to rewrite baseball’s steroid testing policy, such act would not have been invalidated by a federalism argument. However, now that it is clear that the issue of steroid regulation in baseball is within the purview of federal powers, it is essential to determine whether Congress would be

\textsuperscript{171} Kirk Gibson was called on to pinch-hit for the Los Angeles Dodgers in game one of the 1988 World Series played at Dodger Stadium. MLB.com, Baseball’s Best—1988 World Series, Game 1, http://mlb.mlb.com/mlb/baseballs_best/mlb_bb_gamepage.jsp?story_page=bb_88ws_gm1_oakla. The result of this interesting coaching decision was a game winning home run hit into the right field bleachers by an injured Gibson. \textit{Id.} (see link on right side of webpage to watch video of this moment in baseball history).

\textsuperscript{172} Flood v. Kuhn, 407 U.S. 258, 282-83 (1972).
in violation of the separation of powers doctrine within the federal government by passing legislation on the issue.

IV. SEPARATION OF STEROID-ENHANCED POWER

It has been established that the federal government may appropriately exercise control over MLB. Now that the federal government possesses the ability to govern MLB, which branch, within the central government, should be permitted to act? More narrowly, as between the Congress and the Executive, who should be assigned the task of addressing the concern of steroid use in MLB? At its most fundamental level, Congress makes laws and the President executes them; the President shall have no role in making law and the Congress shall have no role in executing the laws it makes. In the case of Congress and MLB, Congress had spoken in the form of passing the Anabolic Steroids Act of 2004 and the Federal Trade Commission Act. The execution of these pieces of legislation was now in the hands of the executive to carry out. So what was Congress doing meddling in the affairs of what seems to be a purely executive matter? And even if such interference was appropriate, to what extent can the legislature intervene in the execution of its laws? These questions are addressed and answered in this discussion. The first subsection will address the historical origins of the separation of powers doctrine, how it was originated, how it is embodied in the Constitution and the language of the Constitution has been interpreted. The second subsection will deal with the issues presented when Congress threatened to rewrite baseball’s steroid testing policy; specifically the division of power between the executive and legislative branches. The final subsection will use historical

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173 See supra notes 159-73 and accompanying text.

and common law precedent to decipher whether Congress had any business fussing with the rules of baseball.

A. The Separation of Powers Doctrine

One of the fundamental principles of the United States is that each branch of the federal government—executive, legislature, and judiciary—possess separate functions, inalienable by the other branches of the government. A study of this “separation of powers” doctrine would lead scholars back to the twelfth century and the law gathering efforts of King Henry II.175 However, the doctrine was not memorialized until 1748 when Charles de Montesquieu published, *The Spirit of the Laws.*176 Modernly, this classic philosophy is embodied in the

175 It was during this period that Henry II sent judges into the country side in order to familiarize themselves with the formalities and rules that the separate regions of England used to settle disputes. *Douglas W. Kmiec et al., The History, Philosophy, and Structure of the American Constitution* 20 (2d ed. 2004). The purpose of these expeditions were to “bring royal justice to the provinces and to centralize and regularize the content of the law.” *Id.* It was only a matter of time before the King had amassed a team of professional lawyers and the study of law became recognized as a specialty at Oxford and Cambridge. *Id.* at 20-21. King Henry then created what was known as the “Court of the King’s Bench,” and with such establishment, the King implicitly divested a portion of his absolute reign to a panel of professional trained judges appointed by the King. *Id.*

This divestiture of power was one of ambiguous scope and future monarchs acquiesced to this divestiture with varying levels of conformity. *Id.* One of the more colorful conflicts that arose between the court and the King was instigated by Sir Edward Coke in 1609 with his *Prohibitions del Rey.* *Sir Edward Coke, Prohibitions del Rey, reproduced in Douglas W. Kmiec et al., The History, Philosophy, and Structure of the American Constitution* 27-29 (2d ed. 2004). Coke expressed concern over the King’s role within the courts; essentially admonishing King James I to stay out of the business of the courts. *Id.* at 29. The separation of powers doctrine did not exist at the time and neither did the concept of judicial review, so the King did what any monarch would do and fired Coke. *Id.* at 29-30. So was the way of the monarch during the late middle ages—in what has become known as the *Five Knights Case,* King Charles I ordered five Knights imprisoned without charge. The *Five Knights Case,* reprinted in *Douglas W. Kmiec et al., The History, Philosophy, and Structure of the American Constitution* 34-35 (2d ed. 2004). The Knights demanded that they be charged or released; the matter was referred to the Kings Bench in 1627 where Lord Chief Justice Hyde recognized that the Court was “sworn to maintain all prerogatives of the King.” *Id.* at 35. Accordingly, the Court upheld the King’s order to hold the Knights without charge, irrespective of the patent injustice that was being done. *Id.*

176 *Charles de Montesquieu, The Spirit of the Laws, reprinted in Douglas W. Kmiec et al., The History, Philosophy, and Structure of the American Constitution* 105-109 (2d ed. 2004). The idea of a structurally divided government was first theorized by Charles de Montesquieu who wrote:

In every government there are three sorts f power: the legislative; the executive in respect to things dependent on the law of nations; and the executive in regard to matters that depend on the civil law. By virtue of the first, the prince or magistrate enacts temporary or perpetual laws, and amends or abrogates those that have been already enacted. By the second, he makes peace or war, sends or receives embassies, establishes the public security, and provides against invasions. By the third, he punishes criminals, or determines the disputes that arise between individuals. The
Constitution, which vests all legislative power in the Congress,\textsuperscript{177} all executive power in the President,\textsuperscript{178} and all judicial power in one Supreme Court.\textsuperscript{179} In theory, one branch could not exercise any power vested in another; a literal reading of the Constitution would imply a hermetic sealing off of the three branches. In practice, these apparently clear dividing lines more resemble lines drawn in the sand than black ink laid on paper. There are areas in the administration of government affairs which would seem to be vested in one branch, but most easily exercised by another.\textsuperscript{180} It is in this gray area of constitutionality where the Congressional hearings and subsequent threats to take over of baseball lay.

The legislature, for example, may not definitively know when the scope of their power has been shrunk at the expense of the executive. This interplay was addressed by Court in

\begin{quote}
\textit{latter we shall call the judiciary power, and the other simply the executive power of the state. Id. at 105-06.}
\end{quote}

It was Montesquieu’s vision that “[w]hen legislative and executive powers are united in the same person, or in the same body of magistrates, there can be no liberty; because apprehensions may arise, lest the same monarch or senate should enact tyrannical laws, to execute them in a tyrannical manner.” Id. at 106. Warning of the dangers of joining powers which should be separate in one body, Montesquieu illustrates the tyranny of allowing the executing body to create the rules it wishes to impose. Id. Montesquieu goes on to outline the tenets of each branch of government, how each shall be formed and the necessity of overlap so that one branch may check another. Id. at 106-08.

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{177} U.S. CONST. art. I, \S\ 1 (“All legislative powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.”).
\item \textsuperscript{178} U.S. CONST. art. II, \S\ 1 (“The executive power shall be vested in a President of the United States of America.”).
\item \textsuperscript{179} U.S. CONST. art. III, \S\ 1 (“The judicial power of the United States, shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish.”).
\item \textsuperscript{180} Writing in an attempt to gain support for the newly drafted Constitution, James Madison adopted Montesquieu’s idea in his Federalist Papers. Specifically, Madison cites extensively to the ideas espoused by Montesquieu in the Federalist number 47. \textit{The Federalist No. 47} (James Madison). Madison does fine tune Montesquieu’s theory by identifying the necessity of a certain amount of overlap between the branches. Citing to \textit{The Spirit of the Laws}, Madison clarified that the coordinate branches of the government were not to be strictly divided, but that one branch could not overcome the other. Id. Madison left the scope of this overlap to his discussion in the Federalist number 51. \textit{The Federalist No. 51} (James Madison). In the second sentence of his writing, Madison summarized his solution: “By so contriving the interior structure of the government as that its several constituent parts may, by their mutual relations, be the means of keeping each other in their proper places.” Id. It was the idea of Madison that it was the duty of each branch to maintain the integrity of its constitutional functions, as Madison wrote: “Ambition must be made to counteract ambition.” Id. The idea of a self-executing government where each branch would, by means of its own self-interest, protect itself from attack by the other branches is one that works in the world of academia, but as a practical matter one branch may not always be capable of protecting against a breach. Id.
\end{enumerate}
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Buckley v. Valeo where the Court expressly recognized that a “hermetic sealing off” of the branches of federal government would prevent it from “governing itself effectively.” ¹⁸¹ Buckley was not the first time that the Court was called upon to settle a separation of powers dispute. In 1928, Chief Justice Taft wrote for the majority in Hampton & Co. v. United States, a case which, in part, examined the division of power allocated the branches of government in the Constitution. ¹⁸² After giving due attention to the bright lines that seemed to divide the government into three branches, the Court acknowledged the reality of commingling power, and held that the different branches of the government may properly overlap where such action is made “according to common sense and the inherent necessities of governmental co-ordination.” ¹⁸³ The “common sense” test was later refined by Justice Jackson. ¹⁸⁴ In his Youngstown dissent, he wrote: “While the Constitution diffuses power the better to secure liberty, it also contemplates that practice will integrate the dispersed powers into a workable government. It enjoins upon its branches separateness but interdependence, autonomy but reciprocity.” ¹⁸⁵ Finally, Chief Justice Burger wrote for the Court in United States v. Nixon that the proper framework by which to determine if the legislature eroded so much of the executive

¹⁸¹ Buckley v. Valeo, 424 U.S. 1 (1976). In Buckley, political candidates, contributors, political parties and various others filed suit against government officials in their official capacity and as members of the Federal Election Commission. Id. at 7. One of the sub-issues presented in the case was whether the members of the Federal Election Commission intruded on powers reserved to the Congress via Article I of the Constitution. Id. at 12. In deciding that defendant’s exercise of power did not improperly encroach on legislative power, the Court made reference to Montesquieu’s maxim that the legislature, executive and judiciary should be kept separate. Id. Acknowledging that a literal reading would be impractical, the Court cited Madison’s Federalist Papers 47 and 51 before determining that the founders “saw that a hermetic sealing off of the three branches of Government from one another would preclude the establishment of a Nation capable of governing itself effectively.” Id.

¹⁸² Hampton & Co. v. United States, 276 U.S. 394 (1928).

¹⁸³ Id. at 406.


¹⁸⁵ Id.
power as to cause a separation of powers violation is whether the Congressional act “prevents the Executive Branch from accomplishing its constitutional assigned functions.”

These opinions make apparent that although a clear division is made in the strict meaning of the Constitution, the separate branches of the government are to cooperate with each other in situations where it would make common sense to do so considering the inherent necessities of government action so long as it does not prevent the infringed upon branch from accomplishing its constitutionally assigned functions. And although many opinions expressed the propriety of inter-branch sharing of power, few limited this practice. This leaves the Court with little guidance to determine whether Congress would be encroaching too far into the power of the Executive by attempting to control steroid use in MLB when it has already passed legislation that would, in theory, have the same effect. Absent common law, the Court may attempt to direct


187 History has illuminated that the law making power and executive power of government should not be vested in one person or body. This principle was adopted by Montesquieu and is reflected in the United States Constitution. That part is easy. But the rigidity of division has caused the founders and the courts a bit of trouble. In garnering the support needed to ratify the Constitution, Madison warned that although the power of the federal government was vested in three separate branches, a certain degree of overlap would be necessary. The Supreme Court was forced to grapple with these distinctions in Hampton and in Youngstown creating the analytical framework by which the courts would determine whether one branch had overstepped its constitutional power. See Hampton, 276 U.S. at 406. The question of how far one branch may intrude upon another is another question. King James I and King Charles I would determine that all branches of the government fell under the power of the executive; thus, by definition, no other branch could exercise executive power. See supra, note 175. The Constitution recites that all executive power is vested in the President of the United States, implying there is no executive power for the Congress to exercise. U.S. CONST. art. II, § 1. Common law of the Supreme Court grants the coordinate branches some degree of latitude to exercise power outside of that which was granted by the Constitution. See Buckley v. Valeo, 424 U.S. 1 (1976); Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 635 (1952); Hampton & Co. v. United States, 276 U.S. 394 (1928). Specifically, the Court in Hampton would permit the overlap of power on all occasions where it made “common sense” and was appropriate considering the “inherent necessities of governmental co-ordination.” Hampton, 276 U.S. at 406.

188 When Congress stepped in and addressed the issue of steroids in baseball, it, in theory, had the purpose of refining how the Anabolic Steroid Act of 2004 and the Federal Trade Commission Act was being executed. The Congress felt as though these laws were not being executed in a manner consistent with the purpose of the statutes and accordingly held hearings to change the specifics of how these Acts were to apply to professional baseball players. This exercise of power seems to lie within the constitutional twilight zone: a strict reading of the Constitution would give Congress no power to oversee the execution of the laws that it spent so much time approving. However, a strict reading has not been adopted by the Court, and the applicable analysis would be whether Congress’ actions make “common sense” so long as they do not prevent “the Executive Branch from
its attention to the text of the Constitution where it would a defined scope of Executive power into the Legislature, but no reciprocal provisions.\textsuperscript{189} Fortunately the Court finally spoke on the issue in the case of \textit{INS v. Chadha}.\textsuperscript{190}

\textit{Chadha} was a case where the Congress attempted to invoke a legislative veto provision it had written into the Immigration and Nationality Act.\textsuperscript{191} In the process of invalidating Congress’ use of the legislative veto, the Court laid down two bright-line rules: (1) when the Congress

\textsuperscript{189} In approving legislation, both the Congress and the executive have a place in the process. Under Article I, section 7, clause 2, the President has the authority to veto legislation passed by the Congress. \textit{U.S. Const.} art. I, \S 7, cl. 2. However, Congress can override the President’s veto with a two-thirds vote of approval pursuant clause 3 of that same section. \textit{U.S. Const.} art. I, \S 7, cl. 3. The Constitution enumerates a clear provision giving the President some degree of law making power, but the Constitution is silent to Congress’ execution power. Under \textit{Hampton}, it certainly would make “common sense” that Congress is given some degree of control over the execution of their legislation. \textit{Hampton}, 276 U.S. at 406. After all, such legislation is meaningless if it is misinterpreted, misapplied, or just plain ignored. The issue then becomes how much control may Congress be given before that control exceeds the bounds of “common sense”?

\textsuperscript{190} \textit{I.N.S. v. Chadha}, 462 U.S. 919, 968 (1983). The conflict in \textit{Chadha} began when Congress passed the Immigration and Nationality Act (INA) in 1952, which, among other things delegated power to the executive branch to make quasi-legislative and quasi-judicial decisions and also authorized either house of Congress to overrule the decision of the executive. 8 U.S.C. \S 244(c)(2). This case begins when Chadha, an alien who was legally admitted to the United States by way of a nonimmigrant student visa, illegally remained in the United States without renewing his visa or obtaining citizenship. \textit{Chadha}, 462 U.S. at 923. Chadha sought suspension of his deportation by way of a hearing and requested that the Attorney General act under his capacity pursuant section 244(a)(1) of the INA to order the suspension of his deportation. \textit{Id.} at 924. The Attorney General, an executive officer, granted the suspension and reported this decision to Congress pursuant \S 244(c)(1) of the INA. \textit{Id.} Things really began getting juicy when the House of Representatives, acting pursuant to \S 244(c)(2), and passed a resolution which vetoed the suspension causing the Immigration Judge to reopen the deportation hearings. \textit{Id.} at 943. The House exercised the legislative veto that had been written into the INA under \S 244(c)(2) to overrule an executive officer’s execution of the INA. Recognizing this constitutional problem, Chadha moved to terminate the new hearings on the grounds that \S 244(c)(2) is unconstitutional on the grounds that it is facially violative of the separation of powers doctrine. \textit{Id.} at 946-59.

\textsuperscript{191} The legislative veto finds its origin in the years following the Depression. During this time, President Hoover requested the authority to reorganize the government to respond to the failing economy. \textit{Chadha}, 462 U.S. at 968. In order to accomplish such a grandiose plan, the President asked the Congress to delegate legislative power to the executive, subject to the defined principles of delegation. \textit{Id.} Cognizant of Congress’ divestiture of power, the President coupled his request with a proposal that the executive “should act upon approval of a joint committee of Congress or with the reservation of power of revision by Congress within some limited period adequate for its reconsideration.” \textit{Id.} at 969. With this language, President Hoover exchanged a portion of his executive power in order to receive a delegation of legislative authority. The principles of the delegation principle are irrelevant to this Comment, but the other end of that same bargain provides the focal point for this analysis. It is the legislature’s receipt of executive power that became known as the “legislative veto.” \textit{Id.} at 968.
legislates, it must satisfy the bicameralism and presentment requirements required by the Constitution; and (2) Congress shall hold no legislative veto power.\(^{192}\) In a vigorous dissent, Justice White saw the Court’s decision to condemn the legislative veto as one which violated the principles expressed by the Court in *Buckley*, *Hampton*, and *Nixon*.\(^{193}\) In the eyes of Justice White, the legislative veto makes common sense in the way that it affords accommodation and practicality to meet the necessities of government coordination. To understand this principle, one must simply look to the dismal alternatives to a legislative veto: (1) “write certain statutes

\(^{192}\) *Id.*. The rule of bicameralism and presentment is found in the Constitution under Article I; however the rule regarding the legislative veto finds no explicit place in the Constitution, but rather in its structure and history. The Court recognized that the use of a legislative veto may be more convenient, but the Court also recognized that “cumbersome and delays often encountered in complying with explicit constitutional standards may [not] be avoided, either by Congress or by the President.” *Id.* at 959, quoting *Youngstown Sheet & Tube v. Sawyer*, 343 U.S. 579 (1952). The Court identifies the “hydraulic pressure inherent within each of the separate Branches to exceed the outer limits of its power.” *Chadha*, 462 U.S. at 951. Cognizant of this pressure, the Court heedsthat even if the breach into another’s capacity is for the purpose of accomplishing “desirable objectives,” such desire to commingle the powers of the separate branches, “must be resisted.” *Id.* In the conclusory paragraph of the Court’s opinion, Justice Burger noted: “The choices we discern as having been made in the Constitutional Convention impose burdens on governmental processes that often seem clumsy, inefficient, even unworkable, but those hard choices were consciously made by men who had lived under a form of government that permitted arbitrary governmental acts to go unchecked.” *Id.* at 959. Ultimately, the Court found that granting the Congress a one-house veto power would allow legislative power to go essentially unchecked. This power would allow the Congress to write laws which would be enacted pursuant bicameralism and presentment measures, these laws would go to the President to execute, but if the legislature did not like the way the President handled their legislation, the Congress could overrule the executive’s decisions. Allowing this power to be placed in the hands of the Congress would not only upset the separation of powers, but would also violate Montesquieu’s maxim that legislative and executive power should not be held in the same person or body.

\(^{193}\) *Id.* at 967-1003. Justice White was highlighting the function of a legislative veto provision; such provision allowed the Congress to delegate a degree of power to executive and independent agencies to work out the details of laws that would cause the legislature to venture into areas outside of its expertise and reduce the amount of legislation coming out of Congress. The legislative veto allowed Congress to delegate power without losing control of the legislation. In the event the executive did not implement an Act in a manner consistent with the intent of Congress, the legislative branch could always overrule a certain decision of the executive. Without the veto, the Congress would need to choose either to take on the task of writing all legislative that would be executed to the letter or delegate legislative power to a body not elected by the citizens. *Id.* at 983 After identifying the purpose of the legislative veto and the problems inherent in abolishing such power, Justice White pointed to separation of powers doctrine to support the legislative veto used in *Chadha*. *Id.* at 985-89. This argument finds its roots in reciprocity—if the Congress has the ability to delegate legislative power to the executive, then it escapes reason why the Congress would not be able to reserve a check on legislative power for itself. *Id.* at 986. Justice White observes: “Absent the veto, the agencies receiving delegations of legislative or quasi-legislative power may issue regulations having the force of law without bicameral approval and without the President’s signature.” *Id.* at 986-87. Historically, the concepts of “common sense,” “accommodation and practicality” to meet the “inherent necessities of governmental co-ordination” drove the courts to adopt both the delegation doctrine and the legislative veto. *Hampton*, 276 U.S. at 406; *Chadha*, 462 U.S. at 999.
with greater specificity”; (2) conduct “oversight hearings and Congressional investigations”; (3) pass “corrective legislation after agency regulations take effect or Executive branch officials have acted entail the drawbacks endemic to a retroactive response; or (4) use the courts to remedy the situation through the power of judicial review.\textsuperscript{194}

C. Fair or Foul Veto?

After \textit{Chadha}, one principle was clear—the legislative veto was a thing of the past. No matter how persuasive the dissenting opinion, the Congress may not include a legislative veto in any future legislation nor utilize one in any past legislation. If a legislative veto has been unequivocally held unconstitutional, then how exactly did Congress think it was going to rewrite the rules of baseball? Two facts, which have been established in previous sections, are applicable here: first, Congress, via the commerce clause, could regulate steroids in the game of baseball;\textsuperscript{195} second, Congress has regulated both steroids and baseball before.\textsuperscript{196} If the executive and independent agencies chose not to enforce the Anabolic Steroids Act of 2004 or the Federal Trade Commission Act as it applied to baseball players’ use of steroids, then the legislature could not force these non-legislative agencies to do so. Thus, it seems as though the players and owners of baseball should not have “caved” and restructured their steroid testing programs at the

\textsuperscript{194} \textit{Chadha}, 462 U.S. at 973 n.10; see also DOUGLAS W. KMIEC ET AL., THE HISTORY, PHILOSOPHY, AND STRUCTURE OF THE AMERICAN CONSTITUTION 162-63 (2d ed. 2004). Option one is simply impractical; it is not possible for a group of elected representatives to hold specialties in all the various inter-working of the subject-matter which it is legislating. To require the legislature to write certain statutes with greater specificity would require the Congress to call in the organizations who are the would-be recipients of a Congressional delegation (with a veto provision), to advise the Congress. Option two and three seem to work together; if Congress chose not to write statutes with increased specificity, then it would be required to delegate to the executive without veto. This would require Congress to constantly assess the current state of the law and pass remedial “patch work” legislation. Lastly, the fourth option is not responsive to either public opinion nor is it practical. The wrongful execution of legislation would need to do substantial detrimental harm to a citizen in order for the Supreme Court to exercise its power of judicial review. Furthermore, the Justices are not elected as the Congresspersons are and as such, the Justices are not as responsive to public opinion.

\textsuperscript{195} See supra notes 104-172 and accompanying text.

\textsuperscript{196} See supra notes 133-57 and accompanying text.
expense of their home-run loving fans. But as it turns out, MLB did the right thing. Congress did have the constitutional authority to erase MLB’s steroid policy and insert its own.

The strongest argument supporting Congress’ threatened use of power is that the manner of its regulation is distinguishable from that used in Chadha. It is necessary to understand that the Court in Chadha confined its decision to the exercise of a provision by which Congress delegated, to itself—the authority to overturn the decision made by an executive or independent agency. The Court did not strip Congress of its oversight function and ability to pass “corrective legislation.” In fact, Justice White, in his dissent, made clear that although the legislature is left with undesirable alternatives, it is left with alternatives. The second alternative was to oversee the functioning of the applicable laws and the third was for the Congress to pass corrective legislation. The two alternatives are essentially one in the same: Congress must have the power to conduct oversight to determine whether a deficiency in the law exists before filling that hole with actual legislation. This oversight function has been protected through a series of Supreme Court opinions and legislative action. It is in this fine distinction between Congress exercising a legislative veto provision and exercising its constitutionally protected right to conduct oversight hearings and pass corrective legislation where Congress found the authority to rewrite MLB’s drug policy.

197 Chadha, 462 U.S. at 973 n.10.
198 Id.
199 See McGrain v. Daugherty, 273 U.S. 135, 175 (1927) (holding “the power of inquiry -- with process to enforce it -- is an essential and appropriate auxiliary to the legislative function”); see also Watkins v. United States, 354 U.S. 178, 187 (1957) (explaining “a legislative body cannot legislate wisely or effectively in the absence of information respecting the conditions which the legislation is intended to affect or change”); Legislative Reorganization Act of 1946 (mandating that the House and Senate committees maintain “continuous watchfulness” over the administration of laws and programs within the United States); Legislative Reorganization Act of 1970 (enabling House standing committees to “review and study, on a continuing basis, the application, administration and execution of laws” within the United States).
In *Chadha*, the Attorney General exercised its delegated authority under the Immigration and Nationality Act of 1952 to suspend the deportation of an immigrant who had illegally overstayed his visa.\(^{200}\) The Congress pointed to a provision in the INA that permitted it to overturn a decision made by the executive.\(^{201}\) It was that exercise of power that led the Court to strike down Congress’ action and the legislative veto. Contrast those facts with those surrounding the steroid controversy. Here, the talk of steroids in the media had so tainted the game of baseball, that Congress conducted oversight hearings to determine whether or not: (a) baseball was compliant with the Anabolic Steroids Act of 2004 (ASA); (b) whether the use of steroids in baseball qualified as “unfair” and “deceptive” practices under the Federal Trade Commission Act (FTCA); and (c) if MLB was not compliant with the ASA and players were violating the FTCA, what internal checkpoints had MLB implemented to weed out steroids in the game.\(^{202}\) The information exposed in that oversight hearing made clear that the epidemic that surrounded MLB and sports in general was beyond the practical scope of the ASA and FTCA as enforced by the DEA and FTC and required specific legislation that targeted MLB.\(^{203}\)

\(^{200}\) *Chadha*, 462 U.S. at 920.

\(^{201}\) *Id.*

\(^{202}\) *Steroid Hearings*, supra note 16 (“Our specific purpose today is to consider Major League Baseball’s recently negotiated drug policy, how the testing policy will be implemented, how it will effectively address the use of prohibitive drugs by players and most importantly, the larger societal and public health ramifications of steroid use. Yesterday, USA Today reported that 79 percent of Major League players surveyed believed steroids played a role in record-breaking performances by some high profile players.”) (statement of Rep. Davis, Member, House Comm. on Government Reform).

\(^{203}\) *Steroid Hearings*, supra note 16 (“1995, the first of a series of detailed investigative reports appeared. The L.A. Times quoted one Major League manager who said ‘we all know there is steroid use and it has definitely become more prevalent, I think, 10 to 20 percent.’ Another general manager estimated that steroid use was closer to 30 percent. In June 2002, Sports Illustrated put steroids on its cover and it reported that baseball had become a pharmacological trade show. One Major League player estimated that 40 to 50 percent of Major League players use steroids.”) (statement of Rep. Waxman, Member Comm. on Government Reform); *Steroid Hearings*, supra note 16 (emphasizing the impact that the perceived acquiescence to steroid use at the professional level was having on youth athletes who aspired to play professionally: “Steroids are a drug problem that affects not only elite athletes, but also the neighborhood kids who idolize them. And this issue is challenging not just for baseball, but for our whole
The reaction to the Congressional hearings was the introduction of three pieces of legislation; the Clean Sports Act of 2005 as introduced into both the House and Senate, and the Sports Integrity Act of 2005, introduced solely to the House. In drafting this legislation, the sponsors believed that the result of strong testing standards in baseball and other professional sports not only restore faith in the national pastime, but also prevent the nation’s youth from supplementing their work with steroids. Representative Tom Davis made his clear in the purpose statement of the Clean Sports Act: “The purpose of this subtitle is to protect the integrity of professional sports and the health and safety of athletes generally by establishing minimum standards for the testing of steroids and other performance-enhancing substances by professional sports leagues.” Based on the findings made by the House and the language of the threatened legislation, Congress makes it clear that it is not exercising a legislative veto, but rather using its oversight and law-making functions to fill a gap left in the Anabolic Steroids Act and ultimately the Controlled Substances Act.

Congress’ threat of using legislation to reconstruct the drug testing policies of MLB not only avoids condemnation on legislative veto grounds, but is actually supported by the history society. More than 500,000 teenagers across the country have taken illegal steroids, risking serious and sometimes deadly consequences.” (statement of Rep. Waxman, Member Comm. on Government Reform).

Clean Sports Act, supra note 16; Professional Sports Integrity Act, supra note 16.

Clean Sports Act, supra note 16. Among the findings named in section 722(a) of the Act, of note are: (4) Professional athletes are role models for young athletes and influence the behavior of children and teenagers; (6) Surveys and studies suggest a connection between the actual or perceived use of performance-enhancing substances by college and professional athletes and the increased use of these substances by children and teenagers; (7) The real or perceived tolerance of the use of performance-enhancing substances by professional athletes has resulted in both increased pressure on children and teenagers to use performance-enhancing drugs in order to advance their athletic careers and to profession sports loss of integrity; (8) The adoption by professional sports leagues of strong policies to eliminate the use of performance-enhancing substances would result in the reduced use of these substances by children and teenagers; (9) Minimum drug testing standards for professional sports established by Federal law would ensure the adoption of strong policies to eliminate the use of performance-enhancing substances in professional sports; (10) Minimum drug testing standards for professional sports established by Federal law would help return integrity to professional sports. Id.

The purpose of the Clean Sports Act further clarifies Congress’ vision: “The purpose of this subtitle [Clean Sports Act] is to protect the integrity of professional sports and the health
and common law of the separation of powers doctrine. It is through the teachings of King James I, King Charles I, and Montesquieu that not all legislative or executive power be held by one person or body.\textsuperscript{206} The players and owners of MLB could attempt to base an argument for rule-making autonomy on these historical teachings. It would be the claim of MLB that each branch should be kept wholly separate and that the oversight and remedial legislation of Congress was a way of giving the Congress executive authority in the sense that the legislature could use these tactics to control the executive, rendering the President’s constitutional function meaningless. MLB’s arguments ultimately fail when looking to the modern, common law application of the separation of powers doctrine. The Court has not only explicitly upheld Congress’ oversight function and accepted its authority to pass remedial legislation, but has also provided the analytical framework by which such questions are to be answered.\textsuperscript{207}

The Court in \textit{Buckley v. Valeo} made perfectly clear that the three branches of government are not “hermetically” sealed off from one another.\textsuperscript{208} Rather the branches work in coordination, exchanging power when it makes “common sense” based on the “inherent necessities of government co-ordination.”\textsuperscript{209} Ultimately, the essential inquiry to determine if a separation of powers violation has occurred is whether the legislature has interfered with the executive’s performance of its constitutionally assigned function.\textsuperscript{210} By looking at the enforcement of

\textsuperscript{206} Clean Sports Act, \textit{supra} note 16.


\textsuperscript{208} \textit{Buckley}, 424 U.S. at 121.

\textsuperscript{209} \textit{Hampton}, 276 U.S. at 406.

\textsuperscript{210} \textit{Nixon}, 433 U.S. at 433.
legislation it has already passed, the legislature has stepped beyond a mere law-making function and into the realm of execution. Thus, the legislature in this situation has entered into the executive sphere of constitutional power, but as we have seen, this is not a per se separation of powers violation. Using the framework dictated by *Hampton* it makes “common sense” that the Congress be permitted to conduct oversight hearings to determine if there is an actual or perceived prevalence of steroid use in MLB. The House also has the ability to make findings of that actual or perceived prevalence outside of MLB and the impact that such actual or perceived use is having on the youth of the nation. Furthermore, the issue of steroid use in MLB baseball is such a refined and narrow application of the Anabolic Steroids Act that it may not have received due attention from a Drug Enforcement Agency that also has the responsibility of ensuring truck-loads of cocaine are not entering the blood-stream of our youth. It is perfectly reasonable that the strict regulation of Schedule III drug is not receiving the utmost attention of executive and independent agencies. Founded in this rationale, it seems clear that Congressional action in MLB would be based on a necessity of government coordination. Lastly, this exercise of Congressional power in no way is trampling on the executive’s ability to execute the laws of the United States. In fact, had the threatened legislation had been adopted, the power to enforce the provisions provided was to be delegated under section 726 of the Clean Sports Act to the Federal Trade Commission under section 57a of the Federal Trade Commission Act.211 Through this delegation, the Congress ensured that it remained within is textually and historically defined role as the legislative branch.

In summary, Congress avoided the problems which plagued the Court in *Chadha* by controlling prior legislation through oversight and remedial legislation rather than by utilizing a

211 *Clean Sports Act, supra* note 16, at § 726.
legislative veto provision. Furthermore, the Congressional use of power is supported by a long line of history beginning in the sixteenth century and ending in modern Supreme Court jurisprudence. For the aforementioned reasons, had the Congress been forced to follow through on its threat to rewrite the drug policies of MLB, it would have been constitutionally justified in doing so.

V. LOSE THE GAME, SAVE THE SEASON

In the end, MLB complied with the demands of Congress. MLB agreed to expand the list of banned substances, engage in more frequent testing and, and establish greater penalties for steroid users. Though, MLB did succumb to the demands of Congress, it was right in doing so. Had MLB refused to amend its steroid testing policy, Congress would have been within its constitutional authority to follow through on its threat of enacting legislation to make MLB and other professional sports leagues compliant with United States Anti-Doping Agency standards. By successfully negotiating with Congress, MLB was able to escape with a more lenient plan. Where the Professional Sports Integrity Act called for baseball players to be tested five times yearly, the new MLB testing policy requires only one random test during the season.212

Furthermore, both proposed Acts of Congress mandated a two-year ban for the first positive test, and a lifetime ban for a second; the current MLB scheme penalizes players as follows: first positive results in a fifty game suspension, the second a one-hundred game suspension and a lifetime ban for a third positive test.213

Perhaps more important than achieving a more lenient steroid policy than those submitted to Congress, MLB was able to maintain autonomy over the rules of its profession. It is important

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212 Drug Prevention and Treatment Program, supra note 82.

213 Drug Prevention and Treatment Program, supra note 82.
to note that MLB players, without legislation, are technically held to no higher standard than average United States citizens. This means that just like Jane Doe walking down the street, federal officials cannot, without cause, force a drug test on any player. MLB also saved other professional sports leagues from becoming USADA compliant since the Clean Sports Act and the Professional Sports Integrity Act would have also addressed the steroid policies of the National Football League (NFL), National Basketball Association (NBA), and the National Hockey League (NHL). Autonomy is a valid concern for those involved in the management of professional sports: once the federal government acts on its ability to engage in the regulation of professional sports, the first step down a slippery slope would be taken. A judicial challenge would, by the reasoning of this Comment, create common law that would expressly permit the Congress to regulate the sport of baseball and other professional sports. Sporting events have long been viewed by the American public as an escape from stress, work and politics. A reasonable fear of the MLB, NFL, NBA, and NHL is that increased government involvement in professional sports would ruin the care-free environment of sports arenas and decrease popularity. Such fear plausibly inspired MLB compliance; after all, Congress did cite a loss of professional integrity as a rationale for changing the rules of the game.\textsuperscript{214} MLB could believe that Congress would be less hesitant to act in the future when it believed the “professional integrity” of the game was at stake. However, I do not believe that professional sports will forever enjoy the autonomy they currently possess, nor do I believe that the hands of the federal government will intrude into places in professional sports it does not belong.

\textsuperscript{214} See Clean Sports Act, \textit{supra} note 16 (“Congress finds… The real or perceived tolerance of the use of performance-enhancing substances by professional athletes has resulted in both increased pressure on children and teenagers to use performance-enhancing drugs in order to advance their athletic careers and to professional sports loss of integrity.”).
Although a slippery slope may be feared by professional sports and their enthusiasts, the specific issue that Congress threatened to address in this instance was steroids. As reflected in the hearings and proposed legislation, the purpose of Congressional action was not to decrease the number of home runs being hit, but rather it was to decrease the use of steroids in youth sports; a phenomena linked to the rampant drug use, or the perception thereof, by professional athletes.\(^{215}\) Congress was clear in linking the logical steps to establish the purpose of intruding into the sphere of professional sports: professional athletes are role models to youth athletes; youth athletes are currently operating under the assumption that their role models are using steroids to achieve their fame and success; youth athletes are therefore using steroids to mimic their role models and enhance their own performance; as a result of steroid use, youth athletes are suffering from severe health problems and even dying.\(^{216}\)

Based on the stated findings and purpose of Congress in the Clean Sports Act and the Professional Sports Integrity Act, I predict that it will not be long before all professional sports are held to USADA drug standards. Currently, the NFL imposes only a one year penalty for a third positive drug test; the NBA does not impose a lifetime ban until a fourth positive; and the NHL still does not have a drug testing and enforcement plan officially in place.\(^{217}\) The same findings made in the MLB hearings could be made in a Congressional investigation of any of these sports. The likenesses of Payton Manning, Kobe Bryant and Joe Thorton can be found on the walls of youth athletes all over the nation. My point is not that these players are using steroids, but rather that role models exist in sports other than baseball. Furthermore, even the

\(^{215}\) See Clean Sports Act, supra note 16; see also, Steroid Hearings, supra note 16.

\(^{216}\) See Clean Sports Act, supra note 16.

most cursory study would reveal significant steroid use by professional football, basketball and
hockey players. And most importantly, youth football, basketball and hockey players are also
injecting themselves in an effort to achieve the successes of their heroes.

By tacitly approving of the laughable testing policies of professional sports, Congress is
encouraging the youth of the nation to use steroids. Recognizing this implication, I foresee that
Congress will implement the zero-tolerance policies of the USADA in all professional sports. In
enacting such legislation with the purpose of protecting the nation’s youth athletes, Congress
would be acting constitutionally and consistent with its appropriate societal role.

VI. CONCLUSION

The game of baseball has played an important role in maintaining the morale of the
Union and the history and significance of the game has not escaped the attention of the Court. Recognizing the sport’s place of prominence, the Congress acted in an informed, thoughtful, and,
most importantly, constitutional manner. By stepping onto the field in the midst of a scandal,
Congress preserved the integrity of the national pastime. This Comment has provided an
explanation of how Congress could have taken over baseball; but some may still be left
wondering why Congress bothered addressing the issue of steroids in baseball. Skeptics may
claim that the steroid controversy was actually hurting the financial outlook of MLB owners and
the hearings were merely a charade in order to pressure the MLP Player’s Union to acquiesce to
strict testing standards. Parents may argue that the youth of the country is being tainted by

218 “It is a century and a quarter since the New York Nine defeated the Knickerbockers 23 to 1 on Hoboken’s Elysian
Fields June 19, 1846, with Alexander Jay Cartwright as the instigator and the umpire. The teams were amateur, but
the contest marked a significant date in baseball’s beginnings. That early game led ultimately to the development of
professional baseball and its tightly organized structure.
"The Cincinnati Red Stockings came into existence in 1869 upon an outpouring of local pride. With only one
Cincinnatian on the payroll, this professional team traveled over 11,000 miles that summer, winning 56 games and
tying one. Shortly thereafter, on St. Patrick’s Day in 1871, the national Association of Professional of Professional
Baseball Players was founded and the professional league was born.” Flood v. Kuhn, 407 U.S. 258, 262 (1972).
super-sized sluggers and Congress aimed to ease the pressure children’s heroes are placing on them to inject themselves with performance enhancing drugs at a young age. Personally, I believe that Congress acted in order preserved the exalted stature of MLB in modern American society—in the words of Judge Cooper: “The game is on a higher ground; it behooves everyone to keep it there.”

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Baseball has been the national pastime for over one hundred years and enjoys a unique place in our American heritage. Major league professional baseball is avidly followed by millions of fans, looked upon with fervor and pride and provides a special source of inspiration and competitive team spirit especially for the young. Baseball’s status in the life of the nation is so pervasive that it would not strain credulity to say the Court can take judicial notice that baseball is everybody’s business. To put it mildly and with restraint, it would be unfortunate indeed if a fine sport and profession, which brings suercease from daily travail and an escape from the ordinary to most inhabitants of this land, were to suffer in the least because of undue concentration by any one or any group on commercial and profit considerations. The game is on a higher ground; it behooves everyone to keep it there. Id.
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