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# Collective Bargaining Agreements in Professional Sports: The Proper Forum for Establishing Performance-Enhancing Drug Testing Policies

David M. Wachutka<sup>1</sup>

## I. INTRODUCTION

The effort to uphold the integrity of professional sports has brought the issue of drug testing of professional athletes into the public spotlight. Many professional sports leagues<sup>2</sup> have drug testing systems in place whose policies are negotiated and agreed upon through the collective bargaining process.<sup>3</sup> Professional athletes, through their membership in players associations, are unionized employees.<sup>4</sup> The respective players association negotiates on behalf of the players, with representatives of league management or league owners, to establish the terms and conditions of the players' employment. The process is called collective bargaining, and the

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1. The author of this article is a law student at Pepperdine University School of Law and is a 2008 juris doctorate candidate. The author is an avid sports fan who participated in competitive sports at the high school level and has continued to follow collegiate and professional sports throughout his life. Before coming to law school, the author completed his undergraduate studies at the University of Minnesota's Carlson School of Management in Minneapolis, Minnesota.

2. The professional sports leagues which are considered for the purposes of this article include: Major League Baseball (MLB), the National Basketball Association (NBA), the National Football League (NFL), and the National Hockey League (NHL).

3. See National Basketball Players Association, NBPA Collective Bargaining Agreement, 236, [hereinafter NBPA Collective Bargaining Agreement] <http://www.nbpa.com/downloads/CBA.pdf> (last visited Nov. 23, 2007). See also National Football League, Policy on Anabolic Steroids and Related Substances 2006, <http://www.nflpa.com/pdfs/RulesAndRegs/BannedSubstances.pdf> (last visited Nov. 23, 2007).

4. Lisa Pike Masteralexis, *Drug Testing Provisions: An Examination of Disparities in Rules and Collective Bargaining Agreement Provisions*, 40 NEW ENG L. REV. 775, 776 (Spring 2006) (stating that players in the National Basketball Association, the National Football League, the National Hockey League, and Major League Baseball are all members of players associations).

result is a collective bargaining agreement.<sup>5</sup> In recent years, public suspicions of athletes using performance-enhancing drugs have put pressure on the professional sports leagues to tighten up their drug testing policies.<sup>6</sup> Collective bargaining, which allows both sides to negotiate the terms of an agreement, is the proper forum for implementing drug testing policies.

The intrusive nature of drug testing implicates the concern over a person's right to privacy. Currently, Congress has proposed legislation which would establish minimum drug testing requirements in professional sports.<sup>7</sup> This legislation is a reaction to suspicions and investigations surrounding Major League Baseball players and the use of performance-enhancing drugs.<sup>8</sup> Federally mandated drug testing would raise constitutional issues regarding the players' rights against mandatory drug testing.<sup>9</sup> These concerns could be avoided if drug testing policies are implemented through a collective bargaining agreement, negotiated and agreed upon between the leagues and their players associations.<sup>10</sup> Thus, as previously asserted, collective bargaining provides the ideal forum for

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5. See *E. Associated Coal Corp. v. United Mine Workers of Am.*, 531 U.S. 57, 60 (2000) (involving a dispute between parties to a collective bargaining agreement); *Holmes v. NFL*, 939 F. Supp. 517, 520 (N.D. Tex. 1996) (involving a dispute as to the terms of the NFL collective bargaining agreement); See, e.g., Major League Baseball Player's Association, 2003-2006 Basic Agreement, [http://mlbplayers.mlb.com/pa/pdf/cba\\_english.pdf](http://mlbplayers.mlb.com/pa/pdf/cba_english.pdf) (last visited Nov. 23, 2007).

6. See Amy Shipley, *Baseball Players Say Steroid Use is Heavy*, WASH POST, May 29, 2002, at D01 available at <http://www.washingtonpost.com/ac2/wp-dyn?pagename=article&node=&contentId=A24530-2002May28> (last visited Nov. 23, 2007); see also Erik Brady, Dick Patrick, and Andrea Stone, *Politicians Weighing in Heavily on Steroid Testing*, USATODAY.COM, June 22, 2005, [http://www.usatoday.com/sports/2005-06-22-steroid-testing-congress\\_x.htm](http://www.usatoday.com/sports/2005-06-22-steroid-testing-congress_x.htm) (last visited Nov. 23, 2007).

7. Charles V. Dale, CRS Report for Congress, *Federally Mandated Random Drug Testing in Professional Athletics: Constitutional Issues*, CRS-1, June 27, 2005, available at [http://www.opencrs.com/rpts/RL32911\\_20050627.pdf](http://www.opencrs.com/rpts/RL32911_20050627.pdf) (last visited Nov. 23, 2007). The McCain/Davis proposal would require professional sports leagues to implement independently administered drug-testing programs mirroring the standards of the United States Anti-Doping Agency (USADA). *Id.* "At a minimum, each professional athlete would have to be tested no less than five times each calendar year, including at least two off-season tests." *Id.* Athletes who test positive for any of the USADA prohibited substances, or refuse to take a test would face a minimum two year suspension and a lifetime ban for a second failed test. *Id.*

8. See Brady et. al., *supra* note 6 (stating that Congress issued the message to Major League Baseball to clean up their act on steroid testing).

9. Dale, *supra* note 7, at CRS-2. Federal courts have recognized limits on congressionally mandated drug testing requirements based largely on issues of constitutional privacy. *Id.* "Drug testing programs have also been challenged under the First, Fifth, and Fourteenth Amendments, based on arguments that the testing procedures or some other aspect of the program violated rights to due process, equal protection, privacy, and freedom of religion." *Id.* at CRS-2 n.2.

10. See Masteralexis, *supra* note 4, at 776 (stating that when the policies are established through collective bargaining the parties are able to negotiate the deal and essentially give their consent to the policy which is adopted).

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implementing performance-enhancing drug testing policies in professional sports.

Part II of this article explores the evolution and nature of professional sports in America and analyzes why the public is demanding that professional athletes be submitted to performance-enhancing drug testing.<sup>11</sup> Part III of the article scrutinizes the nature of drug testing, examines the associated constitutional concerns, and recognizes current drug testing policies in professional sports.<sup>12</sup> Part IV of the article provides an overview of collective bargaining agreements and the use of arbitration.<sup>13</sup> Then, Part V explains why collective bargaining is the appropriate forum for implementing performance-enhancing drug testing policies in professional sports.<sup>14</sup> Finally, this article concludes by acknowledging the advantages of using collective bargaining instead of federal legislation to establish drug testing policies.<sup>15</sup>

## II. NATURE OF THE GAME

Professional sports provide entertainment for millions of people around the world. The human attraction to athletic competition has been apparent throughout the existence of man. Sport has been a centerpiece in the culture of the people since the establishment of the Coliseum in ancient Rome. Today, people still flock to stadiums around the world to view various sports competitions.<sup>16</sup> The appeal of a professional sports league is largely based on having the best players in the world competing at the highest level. However, if the integrity of the players or the competition is questioned, the league becomes less appealing to spectators. If players appear to be using steroids to become bigger, stronger, or faster than they otherwise would be,

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11. See *infra* pp. 3-5.

12. See *infra* pp. 5-15.

13. See *infra* pp. 15-24.

14. See *infra* pp. 24-26.

15. See *infra* pp. 26-27.

16. See Press Release, Major League Baseball, Major League Baseball's Record Attendance Tops 76 Million (Oct. 2, 2006) available at [http://mlb.mlb.com/news/press\\_releases/press\\_release.jsp?ymd=20061002&content\\_id=1695261&vkey=pr\\_mlb&fext=.jsp&c\\_id=mlb](http://mlb.mlb.com/news/press_releases/press_release.jsp?ymd=20061002&content_id=1695261&vkey=pr_mlb&fext=.jsp&c_id=mlb) (last visited Nov. 23, 2007) (over 76 million fans attended a major league baseball game in 2006.); see also ESPNsoccer.net, Premiership Attendance 2005/06, <http://soccer.net.espn.go.com/stats/attendance?league=eng.1&year=2005&cc=5901> (last visited Nov. 23, 2007) (Twelve million people attended premiership soccer matches in England during the 2005-2006 season.).

the display of natural talent and ability is lost. This concern calls for drug testing of professional athletes.

Modern professional sports leagues have a wealth of history, but none more than baseball. Known as the national pastime of America, baseball has been popular in America since the beginning of the twentieth century.<sup>17</sup> A baseball player hitting a home run is one of the most impressive acts in all of sport, and one of the greatest shows of strength. Major League Baseball's records for the most home runs hit in a single season, and for the most home runs hit in a career, are arguably the most cherished records in sports. In 1961, Roger Maris set the single season record when he hit sixty-one home runs.<sup>18</sup> No player defeated that record for thirty-seven years.<sup>19</sup> In 1998, both Sammy Sosa and Mark McGwire made history as they hit sixty-six and seventy home runs, respectively.<sup>20</sup> Since 1998, the mark set by Maris has been surpassed four more times, with Barry Bonds holding the current record for the seventy-three home runs he hit in 2001.<sup>21</sup> The breaking of this historic record brought the issue of performance-enhancing drugs into the public spotlight. Baseball fans rejected the idea of unnatural players breaking historic records and tarnishing the integrity of America's pastime.<sup>22</sup> During the 2007 season, Bonds again put his name in the record books, this time by breaking the record for most *career* home runs, previously held by Hank Aaron.<sup>23</sup> More controversy surrounds Bonds and Major League Baseball amid the speculation of Bonds' steroids use and his imprint in the baseball record books.<sup>24</sup> Consequently, performance-enhancing drugs present a problem in Major League Baseball, where several players have admitted to using, and the integrity of the game is being questioned by the

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17. See, e.g., Baseball Almanac, <http://www.baseball-almanac.com/yearmenu.shtml> (last visited Nov. 23, 2007) (contains records since 1901 in the American League and since 1876 in the National League).

18. *Id.*

19. *Id.*

20. *Id.*

21. *Id.* After breaking Maris' mark in 1998, McGwire and Sosa hit sixty-three and sixty-five home runs, respectively, in 1999. *Id.* In 2001, Bonds hit seventy-three home runs and Sosa hit sixty-four. *Id.*

22. See Shipley, *supra* note 6 (stating that players acknowledge that steroids have led to tainted records).

23. See Tim Brown, *Bonds is the All-time Home Run King*, Yahoo! Sports, Aug. 8, 2007 [http://sports.yahoo.com/mlb/news;\\_ylt=AoK8mQT0B6FtMB7GibPseM5nYcB?slug=tibondsdoesit080807&prov=yahoo&type=lgns](http://sports.yahoo.com/mlb/news;_ylt=AoK8mQT0B6FtMB7GibPseM5nYcB?slug=tibondsdoesit080807&prov=yahoo&type=lgns) (last visited Nov. 23, 2007).

24. See Dan Wetsel, *Hollow, not Hallowed*, Yahoo! Sports, Aug. 7, 2007, [http://sports.yahoo.com/mlb/news;\\_ylt=AihJhMmAn3CY4p0yS1ehh.A8R9MF?slug=dw-756bonds080707&prov=yahoo&type=lgns](http://sports.yahoo.com/mlb/news;_ylt=AihJhMmAn3CY4p0yS1ehh.A8R9MF?slug=dw-756bonds080707&prov=yahoo&type=lgns) (last visited Nov. 23, 2007) (Speculation continues regarding the records being set in Major League Baseball during the "steroid era.").

public.<sup>25</sup> The sharp increase of home runs in the late 1990's and into the twenty-first century has raised the suspicions of many and prompted the grand jury investigations and proposed legislation currently pending in Congress.<sup>26</sup>

### III. DRUG TESTING

Drug abuse is one of the most serious and tragic social problems affecting the American people.<sup>27</sup> Not only are Americans abusing illicit drugs, such as marijuana, cocaine, and heroin, but they are also increasingly misusing prescription drugs.<sup>28</sup> Drug abuse takes its toll on the American medical system, the court system, and the personal lives of drug abusers and their families.<sup>29</sup> Drug abuse also contributes to higher costs for employers in a number of different ways.<sup>30</sup> Not surprisingly, many employers are testing their employees for drug use.<sup>31</sup> Drug testing programs are instituted in various ways and can include any or all of the following: pre-employment testing, random testing, reasonable suspicion/cause testing, post-accident

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25. See Shipley, *supra* note 6 (Major League Baseball commissioner, Bud Selig, acknowledges that steroids present a problem that must be dealt with.).

26. See Dale, *supra* note 7 ("Problems of usage of steroids and other performance enhancing drugs in professional and amateur athletics have been the focus of a series of investigative hearings before the House Government Reform Committee.").

27. National Institute on Drug Abuse, *Drug Abuse and Addiction: One of America's Most Challenging Public Health Problems*, <http://www.drugabuse.gov/about/welcome/aboutdrugabuse/magnitude> (last visited Nov. 23, 2007) (Substance abuse contributes to drugged driving, violence, stress, and child abuse.).

28. National Institute on Drug Abuse: Research Report Series, *Prescription Drugs: Abuse and Addiction*, <http://www.drugabuse.gov/PDF/RRPrescription.pdf> (last visited on Nov. 23, 2007). "The nonmedical [sic] use or abuse of prescription drugs is a serious and growing public health problem." *Id.* An estimated forty-eight million people (approximately 20% of the United States population) have used prescription drugs for non-medical use.) *Id.*

29. See National Institute on Drug Abuse, *supra* note 27 (stating that substance abuse costs our nation more than \$484 billion per year in health care expenditures, lost earnings, and costs associated with crime and accidents).

30. Mark A. Rothstein, *Drug Testing in the Workplace: The Challenge to Employment Relations and Employment Law*, 63 CHI.-KENT. L. REV. 683, 688 (1987) ("The costs of employee drug abuse borne by employers can be divided into six categories: (1) lost productivity; (2) accidents and injuries; (3) insurance; (4) theft and other crimes; (5) employee relations; and (6) legal liability.").

31. See Rothstein, *supra* note 30, at 703 (stating that drug testing in the private sector has become widespread).

testing, return to duty testing, and follow-up testing.<sup>32</sup> Drug testing programs for federal employees are mandatory and have been for the past twenty years.<sup>33</sup> Drug testing in the private sector has also become increasingly prevalent, although not mandated by federal law.<sup>34</sup>

### A. *Constitutional Aspects of Drug Testing*

The legality of employee drug testing has raised challenges on a number of constitutional grounds.<sup>35</sup> Much of the controversy and concern surrounding drug testing is due to the intrusiveness required to properly test.<sup>36</sup> Privacy concerns are immediately raised when someone is forced to supply a sample from his or her body to test for drugs. The most common

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32. Substance Abuse and Mental Health Services Administration: Division of Workplace Programs, *Reasons for Drug Testing*, Feb. 2005, [http://workplace.samhsa.gov/DrugTesting/Files\\_Drug\\_Testing/Federal/Reasons%20for%20Drug%20Testing%20-%20February%202005.pdf](http://workplace.samhsa.gov/DrugTesting/Files_Drug_Testing/Federal/Reasons%20for%20Drug%20Testing%20-%20February%202005.pdf) (click “drug testing,” then click “Reasons for Drug Testing [pdf]”) (last visited Nov. 23, 2007). “Pre-employment testing requires an individual to provide a specimen during the job application process.” *Id.* “Generally, a negative drug result is required before employment is offered to the individual.” *Id.* Random drug testing involves an employer selecting one or more individuals included in the drug testing program to be tested using a “truly random selection process”. *Id.* An employer using a random selection process is “precluded from pre-selecting a particular individual to be tested.” *Id.* Under a reasonable suspicion testing program, “an employee is tested when there is sufficient evidence to indicate that the employee may have used an illicit substance.” *Id.* “[E]vidence is typically based on direct observations by supervisors or co-workers that an ‘employee has used or possess an illicit substance, exhibits physical symptoms of being under the influence, and has patterns of abnormal or erratic behavior.’” *Id.* Post-accident testing is done “when an employee has been involved in an accident or incident on the job.” *Id.* Results of post-accident testing “may provide evidence as to the cause of the accident or incident.” *Id.* Return to duty testing requires an employee to “provide a specimen to ensure that the employee is drug-free before being allowed to return to work.” *Id.* Follow-up testing is done to ensure an employee remains drug-free after returning to work. *Id.*

33. Substance Abuse and Mental Health Services Administration: Division of Workplace Programs, *Model Plan for a Comprehensive Drug Free Workplace*, [http://dwp.samhsa.gov/FedPgms/Pages/Model\\_Plan/Intro.aspx](http://dwp.samhsa.gov/FedPgms/Pages/Model_Plan/Intro.aspx) (then click “Federal Programs,” then click “HHS Mandatory Guidelines”) (last visited Nov. 23, 2007).

34. See Rothstein, *supra* note 30, at 703 n.122 (“Ironically, government testing programs have been justified because of testing in the private sector. Then, governmental testing programs and advocacy of testing have been cited as the basis for increased testing in the private sector.”).

35. See Rothstein, *supra* note 30, at 704. Fourth Amendment concerns regarding unreasonable search and seizure are the most common bases for constitutional challenge to employee drug testing. *Id.* Arguments that testing procedures violate due process concerns of the Fifth and Fourteenth Amendments have also been raised. Dale, *supra* note 7, at CRS-2 n.2.

36. See *Skinner v. Railway Labor Executives Ass’n*, 489 U.S. 602, 617 (1989) (stating that “the collection and testing of urine intrudes upon expectations of privacy that society has long recognized as reasonable,” and that “these intrusions must be deemed searches under the Fourth Amendment”).

source of a sample is urine, although blood, saliva, hair, and other specimens are also used.<sup>37</sup>

### 1. Fourth Amendment Concerns

The most frequently raised challenge to the constitutionality of drug testing is that it is an unreasonable search and seizure in violation of the Fourth Amendment.<sup>38</sup> The Fourth Amendment of the United States Constitution guarantees an individual's right to be free from unreasonable searches.<sup>39</sup> In *Schmerber v. California*, the Supreme Court held that taking a blood sample from a criminal defendant was a search within the meaning of the Fourth Amendment.<sup>40</sup> Likewise, taking a bodily sample from an employee for drug testing is deemed a search.<sup>41</sup>

An individual can waive his or her Fourth Amendment protection from unreasonable searches when he or she voluntarily consents to a search.<sup>42</sup> The issue becomes less clear, however, with third-party consent to a drug test. This is the case when a union negotiates with an employer the terms of a collective bargaining agreement which provides for drug testing of the employees. There have been several cases where the Court has upheld third-

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37. Rothstein, *supra* note 30, at 691 (“[B]lood, breath, saliva, hair and other specimens have been used in settings other than the workplace. Blood testing by employers is mostly limited to retrospective testing after the occurrence of an accident.”).

38. Rothstein, *supra* note 30, at 704. See also *Skinner*, 489 U.S. at 660; *Schmerber v. California*, 384 U.S. 757 (1966) (questioning whether a blood sample drawn from a criminal defendant despite his refusal was an unreasonable search and seizure in violation of the Fourth Amendment).

39. U.S. CONST. amend. IV. The Fourth Amendment states:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized. *Id.*

40. *Schmerber*, 384 U.S. at 767 (stating that taking a blood sample to determine if the defendant is intoxicated plainly operates as a search under the Fourth Amendment).

41. See *Skinner*, 489 U.S. at 617 (“Because it is clear that the collection and testing of urine intrudes upon expectations of privacy that society has long recognized as reasonable, the Federal Courts of Appeals have concluded unanimously, and we agree, that these intrusions must be deemed searches under the Fourth Amendment.”).

42. See *Schneekloth v. Bustamonte*, 412 U.S. 218, 219 (1973) (“[O]ne of the specifically established exceptions to the requirements of both a warrant and probable cause is a search that is conducted pursuant to consent.”).



party consent to the search of another individual.<sup>43</sup> However, none of these cases have involved drug testing, which raises increased privacy concerns as a search of the body itself, and it is not clear that this scenario was imagined by the courts in these prior third-party consent to search cases.

## 2. Government Interest vs. Individual Rights

The Fourth Amendment, however, only bars “unreasonable searches.”<sup>44</sup> In general, the Court has considered a search without a warrant or consent to be unreasonable.<sup>45</sup> However, there is a recognized exception to this rule where the importance of the government interest in conducting the search outweighs the intrusion upon the individual’s rights.<sup>46</sup>

The manner in which drug testing must be done is a great intrusion on personal privacy, so the government interest in performing the drug test would have to be significant.<sup>47</sup> However, this issue would not apply to a drug testing policy implemented through the collective bargaining process. In that scenario, we are not concerned with government action, and the employees are considered to have consented to the search.<sup>48</sup> On the other hand, federally mandated drug testing constitutes government action, which is subject to Due Process concerns under the Fifth and Fourteenth

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43. See, e.g., *Stoner v. California*, 376 U.S. 483, 489 (1964) (recognizing ability of agent to consent on behalf of principal); *United States v. Matlock*, 415 U.S. 164, 170 (1974) (“The consent of one who possesses common authority over premises or effects is valid as against the absent, non-consenting person with whom that authority is shared.”); *Frazier v. Cupp*, 394 U.S. 731, 740 (1969) (holding that cousin who shared duffel bag with defendant could consent to a search of the bag).

44. U.S. CONST. amend. IV (emphasis added).

45. See *O’Connor v. Ortega*, 480 U.S. 709, 720 (1987) (“[E]xcept in certain carefully defined classes of cases, a search of private property without proper consent is ‘unreasonable’ unless authorized by a valid search warrant.” (quoting *Camara v. Mun. Court*, 387 U.S. 523, 528-29 (1967))).

46. See *O’Connor*, 480 U.S. at 719-20 (“A determination of [an appropriate] standard of reasonableness applicable to a particular class of searches requires ‘balanc[ing] the nature and quality of the intrusion on the individual’s Fourth Amendment interests against the importance of the governmental interests alleged to justify the intrusion.’” (quoting *United States v. Place*, 462 U.S. 696, 703 (1983))).

47. Charles Neil Floyd, *Searches in the Absence of Individualized Suspicion: The Case of Vernonia School District 47J v. Acton*, 50 ARK. L. REV. 335, 340 (1997) (“The [Acton] Court balanced the compelling need for the search against the intrusiveness of the search.” (citing *Acton v. Vernonia Sch. Dist.* 47J, 496 F. Supp. 1354, 1364-65 (D. Or. 1992))).

48. See *Masteralexis*, *supra* note 4, at 776 (stating that when policies are established through collective bargaining the parties are able to negotiate the deal and essentially give their consent to the policy which is adopted).

Amendments.<sup>49</sup> To determine what level of judicial review should be given to federal laws that mandate drug testing, we first need to determine whether such a drug testing policy would threaten the individual's fundamental right of privacy.<sup>50</sup>

If the courts decided a federal drug testing program did not implicate an individual's fundamental right of privacy, a relatively lenient standard of judicial review would be applied to the legislation, and the court would merely look for a rational basis behind the law.<sup>51</sup> However, if the courts determined that the fundamental right to privacy was abridged, then the level of review would be much stricter, and the court would have to find a compelling state interest behind the law, which could not be achieved using less drastic measures.<sup>52</sup> In order for federally mandated drug testing to be considered unconstitutional, the reviewing court must find that there is not a sufficient government interest to justify intrusion into the individual's rights.<sup>53</sup> Ultimately, if the court finds that the fundamental right to privacy is at issue, the legislation is likely to be found unconstitutional.<sup>54</sup>

### 3. Government Interest in Drug Testing for Professional Athletes

If a court determines that there is a sufficient compelling state interest in drug testing professional athletes that outweighs intrusion on privacy, the

49. The Fifth Amendment states in part: "No person shall... be deprived of life, liberty or property, without due process of law..." U.S. CONST. amend. V. The Fourteenth Amendment makes this same principle applicable to the States. See U.S. CONST. amend. XIV.

50. See *Griswold v. Connecticut*, 381 U.S. 479, 484 (1968) (stating the need to elevate the right of privacy due to the penumbra relationship with other provisions in the Constitution (Fourth Amendment) and the relationship between past precedents of the Court and the right to privacy).

51. Laws limiting substantive rights are given permissive review by the courts. See *Carolene Products Co. v. United States*, 323 U.S. 18, 31-32 (stating that congressional laws or regulations will normally be beyond attack without a "showing that there is no rational basis for the legislation").

52. See *Griswold*, 381 U.S. at 504 (White, J., concurring) (identifying that statutes regulating the fundamental right of privacy must be given strict scrutiny and "viewed in the light of less drastic means for achieving the same basic purpose" (quoting *Shelton v. Tucker*, 364 U.S. 479, 488 (1960))).

53. See *id.* (stating the elevated right of privacy and the need for a compelling state interest in order to encroach upon that right).

54. See *id.* Where the Court applies the compelling state interest test – such as in cases involving the fundamental right of privacy – the Court will find the legislation unconstitutional if there is any less drastic means of advancing the particular state interest. See *id.* This "strict scrutiny" level of review is much more likely to find the law is unconstitutional. See *id.*

legislation may be upheld.<sup>55</sup> In *Shoemaker v. Handel*,<sup>56</sup> the Third Circuit upheld state-mandated drug and alcohol tests administered to thoroughbred racehorse jockeys as constitutional.<sup>57</sup> The *Shoemaker* court found that the integrity of the sport outweighed the jockeys' individual reduced privacy interests.<sup>58</sup> The state of New Jersey had a strong interest regarding the public perception of the horseracing industry because "public confidence forms the foundation for the success of an industry based on wagering."<sup>59</sup> The drug testing policy provided an "effective means" of upholding the public perception that the racing was free of "outside influences."<sup>60</sup> The *Shoemaker* court recognized that horseracing is a closely regulated state-run industry.<sup>61</sup> In contrast, professional sports leagues such as Major League Baseball, the National Football League, and the National Basketball Association are private entities, not under control of the state, and would not be subject to the reasoning in *Shoemaker* supporting state mandated drug testing.<sup>62</sup>

#### 4. Athletes' Diminished Expectation of Privacy

In *Vernonia School District v. Acton*,<sup>63</sup> the Supreme Court upheld a random drug-testing program for high school students engaged in interscholastic athletic competition.<sup>64</sup> The *Vernonia School District* Court found that high school students' privacy interest was diminished by the

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55. See *Griswold*, 381 U.S. at 504 (White, J., concurring) ("Where there is a significant encroachment upon personal liberty, the State may prevail only upon showing a subordinating interest which is compelling." (quoting *Bates v. Little Rock*, 361 U.S. 516, 524 (1960))).

56. *Shoemaker v. Handel*, 795 F.2d 1136 (3d Cir. 1986).

57. *Id.* The Third Circuit emphasized the pervasiveness of New Jersey state regulation and the state's "strong" interest in preserving the "integrity" of the horseracing industry. *Id.* (quoting Dale, *supra* note 7, at CRS-4).

58. *Shoemaker*, 795 F.2d at 1142 ("[W]hen jockeys chose to become involved in this pervasively-regulated business and accepted a state license, they did so with the knowledge that the Commission would exercise its authority to assure public confidence in the integrity of the industry.").

59. *Id.*

60. *Id.* at 1142-43.

61. *Id.* at 1141-42 (noting that the case involved voluntary participants in a highly-regulated industry and the same analysis would not apply to drug-testing in other contexts).

62. See *id.* at 1142 (reasoning that the justifiable expectation of privacy for the jockeys was diminished because of the pervasive state regulation of the industry).

63. *Vernonia Sch. Dist. v. Acton*, 515 U.S. 646 (1995).

64. *Id.* at 666. The Student Athlete Drug Policy required mandatory and random suspicionless urinalysis of all student athletes within the district. *Id.* (quoting Dale, *supra* note 7, at CRS-4). All students wanting to participate in a school-sponsored sports team had to provide a consent form, signed both by the student and his or her parents, acquiescing in the tests. *Id.*

communal aspect of high school athletic competition.<sup>65</sup> Significantly, the Court emphasized that the expectation of privacy within the school environment is less than that for the public generally.<sup>66</sup>

*Vernonia School District* involved drug testing of high-school athletes with a diminished expectation of privacy, and is distinguishable from a scenario involving federally-mandated drug testing in *professional* sports.<sup>67</sup> Professional athletes do not share this diminished expectation of privacy, at least, not for the same reasons.<sup>68</sup>

One could argue that professional athletes *do* have a diminished expectation of privacy because league or association rules already require routine physical examinations.<sup>69</sup> Additionally, one could argue that the “safety and health concerns” of the athletes, the “importance of professional athletes as role models,” or the protection of the integrity of the game itself are all compelling interests that justify drug testing of the players.<sup>70</sup>

Although the law regarding drug testing is somewhat unclear, there are two scenarios where federally mandated drug testing is constitutional: (1) Where a compelling state interest in conducting the drug test overrides privacy concerns; (2) where the individual consents to the drug test.<sup>71</sup> The analysis required to balance state interests and privacy concerns would not be required in the realm of professional sports if the drug testing policies were allowed to continue to be implemented through collective bargaining.<sup>72</sup>

65. *Vernonia Sch. Dist.*, 515 U.S. at 657. Every person in the general population is entitled to a legitimate expectation of privacy. These privacy expectations are less for student athletes. *Id.* The environment of high school athletics has an “element of communal undress [that] is inherent.” *Id.*

66. Dale, *supra* note 7, at CRS-5 (“The [*Vernonia Sch. Dist.* Court] emphasized that ‘students within the school environment have a lesser expectation of privacy than members of the public generally.’” (quoting *Vernonia Sch. Dist.*, 515 U.S. at 657))).

67. *Vernonia Sch. Dist.*, 515 U.S. at 648.

68. *See id.* at 654 (noting that “unemancipated minors lack some of the most fundamental rights of self-determination. . .”).

69. Dale, *supra* note 7, at CRS-6 (“It could be countered that professional players have a diminished expectation of privacy as the consequence of league or association rules that already require routine physical examinations and testing for drugs in certain circumstances.”).

70. *Id.*

71. *See* Floyd, *supra* note 47, at 343 (“The key consideration in determining the government’s interest has been whether the interest was “compelling.”); *see also* *Schnecko v. Bustamonte*, 412 U.S. 218, 219 (1973) (stating that consent is a well-established exception to conducting a search without a warrant).

72. *See* Masteralexis, *supra* note 4, at 779 (stating that when policies are established through collective bargaining, the parties are able to negotiate the deal and essentially give their consent to the adopted policy).

## B. Drug Testing in Professional Sports

In the context of professional sports, drug testing has become a heated issue with recent suspicions regarding the use of performance-enhancing drugs among professional athletes.<sup>73</sup> Historically, the leagues have implemented drug testing policies through the leagues' respective collective bargaining agreement.<sup>74</sup> There is a growing and continuing importance of performance-enhancing drug testing policies in professional sports in order to secure the integrity of the sport and to assure that players are the product of natural talent and training. This is evidenced by the ongoing discussions and ever-increasing drug testing policies being implemented by different professional leagues.<sup>75</sup>

### 1. Recent Agreements Strengthening Performance-enhancing Drug Testing

The National Football League (NFL) and the National Football League Players Association reached a new agreement regarding testing for steroids and other performance-enhancing drugs in January of 2007.<sup>76</sup> The new policy will see forty-percent more players randomly tested each week during the pre-season, regular season and post-season.<sup>77</sup> The NFL also tests its players in the off-season, with each player subject to a maximum of six random tests.<sup>78</sup> With its new policy the NFL will become the first North American professional sports league to test for the drug erythropoietin (EPO).<sup>79</sup> The deal added a new feature to the league's collective bargaining agreement which provides for an automatic forfeiture of a prorated portion

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73. See Dale, *supra* note 7, at CRS-1 (noting that there are currently four bills regarding drug testing for professional athletes in Congress); see Brady, et al. *supra* note 6.

74. See Masteralexis, *supra* note 4, at 780-786 (noting that the NFL, NBA, NHL and MLB all have performance-enhancing drug testing policies implemented through the leagues' respective collective bargaining agreements).

75. See Dave Goldberg, *NFL and Players Union Reach Agreement on Tougher Drug Testing*, THE BAYLOR LARIAT, Jan. 24, 2007, at 4, available at <http://www.baylor.edu/content/services/document.php?id=40353>; Shipley, *supra* note 6, at D01; see also Brady et al., *supra* note 6.

76. See National Football League Players Association, *NFL, NFLPA Reach Agreement on Additional Improvements to Steroids Program*, [http://www.nflpa.com/newsandevents/Steroids\\_Improvement\\_Agrmnt.aspx](http://www.nflpa.com/newsandevents/Steroids_Improvement_Agrmnt.aspx) (last visited Nov. 23, 2007) [hereinafter *NFL Additions to Steroids Program*].

77. *Id.*

78. *Id.*

79. Goldberg, *supra* note 75, at 4 (stating that EPO provides users more stamina by increasing their number of red blood cells, and the drug is primarily used by endurance sport athletes, such as long distance runners and cyclists).

of a player's signing bonus if suspended for a steroid or other substance abuse violation.<sup>80</sup>

## 2. Benefits of Drug Testing Implemented Through Legislation

With recent proposed federal legislation calling for mandated drug testing, individual constitutional rights are of primary concern.<sup>81</sup> An argument in support of federally-mandated drug testing is that it provides a sure way to see that the players are being properly tested, and minimizes the concern that a particular league has a weak stance on drug testing. If a particular league and its players never agree to a sufficient drug testing policy, then collective bargaining is not getting the job done.

Furthermore, by passing legislation that establishes only *minimum* drug testing requirements, the collective bargaining process will still ultimately decide the specific terms of the policy in place. Legislation that only provides a guaranteed minimum threshold without disturbing the collective bargaining process appears to be a valid alternative.

Although implementing drug testing policies through legislation has its benefits, an ongoing policy negotiated through collective bargaining is more efficient in the long run. As discussed below, collective bargaining has a built-in check and balance system, as defined by public policy, which could render a league's drug testing policy unenforceable if it fails to meet a minimum standard.<sup>82</sup>

## IV. COLLECTIVE BARGAINING AGREEMENTS

Collective bargaining is the process of negotiation that occurs between representatives of a labor union and the employer or some representative of management.<sup>83</sup> The resulting agreement is a contract containing the terms

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80. *NFL Additions to Steroids Program*, *supra* note 76.

81. Dale, *supra* note 7, at CRS-1 (stating that there are four professional athletic drug testing bills before Congress).

82. *See E. Associated Coal Corp. v. United Mine Workers of Am.*, 531 U.S. 57, 62 (2000) (stating that a collective bargaining agreement that is contrary to public policy may be held unenforceable).

83. *See id.* at 60 (regarding dispute over the terms of a collective bargaining agreement between Eastern Associated Coal Corp. and the United Mine Workers of America labor union.); *Holmes v. NFL*, 939 F. Supp. 517, 520 (N.D. Tex. 1996) (regarding dispute over the terms of the collective bargaining agreement agreed to between the National Football League Players Association, on behalf of the players, and the National Football League Management Council, on

and conditions of employment; including wages, hours worked, benefits, working conditions, and grievance procedures.<sup>84</sup>

#### A. *Collective Bargaining Agreements in Professional Sports*

Collective bargaining agreements are commonly used by professional sports leagues in America.<sup>85</sup> All the major professional sports leagues<sup>86</sup> have implemented collective bargaining agreements to determine the conditions of employment for the players.<sup>87</sup> Collective bargaining agreements in professional sports commonly involve issues such as players' salaries, a reserve system (or free agency), and grievance procedures.<sup>88</sup> In the twenty-first century, a league's policy on testing for performance-enhancing drugs has become a key topic in collective bargaining negotiation.<sup>89</sup> The perceived failures of drug testing policies implemented through collective bargaining has prompted proposal of federal legislation and threatens to take the issue out of the control of the collective bargaining process.<sup>90</sup>

#### B. *Arbitration's Role in Collective Bargaining Agreements*

When an issue arises regarding some term or condition of a collective bargaining agreement, often the contract will specify the grievance

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behalf of all NFL clubs.); *see, e.g.*, Major League Baseballs Player's Association, 2003-2006 Basic Agreement [hereinafter MLBPA Basic Agreement], available at [http://mlbplayers.mlb.com/pa/pdf/cba\\_english.pdf](http://mlbplayers.mlb.com/pa/pdf/cba_english.pdf) (last visited Nov. 23, 2007).

84. *See, e.g.*, MLBPA Basic Agreement, *supra* note 83; NBPA Collective Bargaining Agreement, *supra* note 3; National Football League Players Association & National Football League Management Council, Collective Bargaining Agreement Amended 2006 [hereinafter Collective Bargaining Agreement Amended 2006], [http://www.nflpa.org/pdfs/Agents/CBA\\_Amended\\_2006.pdf](http://www.nflpa.org/pdfs/Agents/CBA_Amended_2006.pdf) (last visited Nov. 23, 2007).

85. *See id.*; NBPA Collective Bargaining Agreement, *supra* note 3; Collective Bargaining Agreement Amended 2006, *supra* note 84.

86. This includes MLB, the NFL, the NBA, and the NHL.

87. *See* MLBPA Basic Agreement, *supra* note 83; NBPA Collective Bargaining Agreement, *supra* note 3; Collective Bargaining Agreement Amended 2006, *supra* note 84.

88. *See id.*

89. *See* Masteralexis, *supra* note 4, at 776 (stating that each of the four major professional sports leagues now has a drug testing policy implemented through collective bargaining).

90. *See* Dale, *supra* note 7, at CRS-1 (using performance-enhancing drugs in professional athletics has been the focus of a series of investigative hearings before the House Government Reform Committee.); *see also* Shipley, *supra* note 6, at D01; Brady, et al., *supra* note 6.

procedures to be used in resolving the dispute.<sup>91</sup> Commonly, the collective bargaining agreements will specify that grievances are submitted to an arbitrator to make a fair determination of the parties' rights under the contract.<sup>92</sup> Arbitration involves a neutral third-party, known as the arbitrator, who interprets the agreement and determines the proper resolution.<sup>93</sup> This process provides an alternative to the often slow, and higher cost, option of using the court system to resolve a dispute.<sup>94</sup> However, the courts may still become involved when a party challenges the decision of an arbitrator.<sup>95</sup>

### 1. Standard of Review for an Arbitration Decision

In some cases, one of the parties subject to an arbitration decision may feel the arbitration award was unjust and an appeal to the court may be necessary. However, where a collective bargaining agreement provides for a matter to be submitted to arbitration, the courts are hesitant to overturn an arbitrator's decision.<sup>96</sup>

91. See Masteralexis, *supra* note 4, at 780 (“[T]he drug testing policies [in all of the major professional sports leagues] are also linked to league disciplinary and grievance arbitration provisions in their collective bargaining agreements.”).

92. See, e.g., MLBPA Basic Agreement, *supra* note 83 (Article XI of the contract specifies the grievance procedures to be used); NBPA Collective Bargaining Agreement, *supra* note 3 (Article XXXI of the contract provides that any dispute under the contract will be resolved under the authority of the grievance arbitrator); Collective Bargaining Agreement Amended 2006, *supra* note 84 (Articles IX and X specify the procedures to be used in the case of non-injury and injury grievances, respectively.).

93. See Seth H. Lieberman, *Something's Rotten in the State of Party-Appointed Arbitration: Healing ADR's Black Eye that is "Nonneutral Neutrals"* 5 CARDOZO J. CONFLICT RESOL. 215, 218 (Spring 2004) (defining an arbitrator “as a neutral person who resolves disputes between parties. . .”).

94. Henry C. Strickland, *Allied-Bruce Terminix, Inc. v. Dobson: Widespread Enforcement of Arbitration Agreements Arrives in Alabama*, 56 ALA. LAW. 238, 241 (July 1995) (stating that arbitration is usually “faster and less expensive than a judicial trial”).

95. See, e.g., E. Associated Coal Corp. v. United Mine Workers of Am., 531 U.S. 57, 61 (2000) (“Eastern brought suit in federal court seeking to have an arbitrator's award vacated.”); United Mine Workers of Am. Local Union 1323 v. Peabody Coal Co., No. 84-3880, 1985 WL 13816, at \*1 (6th Cir. Oct. 29, 1985) (United Mine Workers union filed a complaint seeking to vacate an arbitration award arguing that the arbitrator failed to follow the decisions of the Arbitration Review Board, to which the Union and Peabody were parties.).

96. See Way Bakery v. Truck Drivers Local No. 164, 363 F.3d 590, 593 (6th Cir. 2004) (“A court's review of an arbitration award ‘is one of the narrowest standards of judicial review in all of American jurisprudence.’” (quoting *Tenn. Valley Auth. v. Tenn. Valley Trades & Labor Council*, 184 F.3d 510, 515 (6th Cir. 1999))).



In *Way Bakery v. Truck Drivers Local No. 164*,<sup>97</sup> the Sixth Circuit clearly defined the court's very limited role in reviewing an arbitrator's award. In determining whether an arbitration award "draws its essence" from the collective bargaining agreement, which is the main concern of a reviewing court, the court is essentially making sure the arbitrator's award is consistent, within with the express terms of the collective bargaining agreement, and not "based on general considerations of fairness and equity" which depart from the express terms of the agreement.<sup>98</sup>

The limited role of the judiciary, in the context of arbitration resulting from a collective bargaining agreement, was established by the Supreme Court prior to *Way Bakery*.<sup>99</sup> As long as the arbitrator is a neutral third party and makes his decision based on the conditions of the contract, a reviewing court is unlikely to reverse a decision even if it disagrees with the outcome.<sup>100</sup> The Supreme Court has stated that "[t]he refusal of courts to review the merits of an arbitration award is the proper approach to arbitration under collective bargaining agreements."<sup>101</sup> The difficulty in ignoring the merits while reviewing an arbitration decision has led district courts to improperly vacate arbitration awards, only to have them reinstated by the reviewing court of appeal.<sup>102</sup>

The Sixth Circuit in *United Mine Workers of America v. Peabody Coal Co.*,<sup>103</sup> reversed a district court decision to vacate an arbitrator's award.<sup>104</sup> In reversing, and reinstating the award, the Sixth Circuit stated that "it is the decision of the arbitrator, and not of this court, for which the parties have

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97. *Id.* at 590.

98. *Id.* at 593 ("An award fails where: (1) it conflicts with the express terms of the agreement; (2) it imposes additional requirements not expressly provided for in the agreement; (3) it is not rationally supported by or derived from the agreement; or (4) it is based on general considerations of fairness and equity instead of the express terms of the agreement.").

99. *See* *United Steelworkers of Am. v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 581-82 (1960) (noting that the considerations used by a labor arbitrator are a product of the unique functions he performs, and may well be foreign to the competence of the courts).

100. *See* *E. Associated Coal Corp.*, 531 U.S. at 62 ("[A]s long as [an honest] arbitrator is even arguably construing or applying the contract and acting within the scope of his authority, [the fact that] a court is convinced he committed serious error does not suffice to overturn his decision." (quoting *Paperworkers v. Misco, Inc.*, 484 U.S. 29, 38 (1987))).

101. *United Steelworkers of Am. v. Enter. Wheel & Car Corp.*, 363 U.S. 593, 596 (1960).

102. *See id.*

103. *See* *United Mine Workers of Am., Local Union 1323 v. Peabody Coal Co.*, 1985 WL 13816 (6th Cir. Oct. 29, 1985).

104. *Id.* at \*3 (stating that "neither the irrationality nor manifest infidelity to the collective bargaining agreement" which is required to support vacation of the arbitrator's award was present in the case).

bargained.”<sup>105</sup> Despite the narrow standard of review, there are circumstances that can render a collective bargaining agreement unenforceable, taking the decision away from an arbitrator.

## 2. Public Policy Exception to Arbitration Review

The Court has identified a legal exception that makes a collective bargaining agreement which is contrary to public policy unenforceable.<sup>106</sup> In a 2000 decision, *Eastern Associated Coal Corporation v. United Mine Workers of America*, the Court upheld an arbitrator’s decision to reinstate a mine worker, who was a member of the appellee union, after the worker had failed two random drug tests and was fired by the appellant.<sup>107</sup> The collective bargaining agreement at issue specified that in order to discharge an employee, Eastern Associated Coal Corporation, the appellant, needed to prove it had “just cause.”<sup>108</sup> Based on the specific circumstances in that case, the arbitrator determined that Eastern had not proven “just cause” for the discharge of the employee and he was reinstated.<sup>109</sup> On appeal, Eastern argued that the arbitrator’s award should be overturned because the reinstatement of the employee violated public policy.<sup>110</sup> The Court reasoned that it was not a question of whether the employee’s drug use violated public policy, but whether the collective bargaining agreement itself constituted a violation of public policy.<sup>111</sup>

In determining if a collective bargaining agreement runs afoul of public policy, and can thereby be considered unenforceable, the ultimate question is whether the specified conditions of the collective bargaining agreement “run contrary to an explicit, well-defined, and dominant public policy, as ascertained by reference to positive law and not from general considerations of supposed public interests.”<sup>112</sup> The Court in *Eastern Coal* recognized that

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105. *Id.* at \*3 (“[A]n arbitrator’s decision is entitled to great deference and generally should be upheld absent irrationality or disregard of plain and unambiguous language in the agreement.”).

106. *E. Associated Coal Corp.*, 531 U.S. at 62.

107. *Id.* at 59–60.

108. *Id.* at 60.

109. *Id.*

110. *Id.* at 61 (“Eastern brought suit in federal court seeking to have the arbitrator’s award vacated, arguing that the award contravened a public policy against the operation of dangerous machinery by workers who tested positive for drugs.”).

111. *Id.* at 62–63.

112. *Id.* at 63. (citing *United Paperworkers Int’l Union, AFL-CIO v. Misco*, 484 U.S. 29, 43 (1987)).

“reasonable people can differ” in determining whether termination or suspension was the proper punishment for the failed drug test, but ultimately did not see any contravention of public policy as defined by *W. R. Grace & Co. v. Local Union 759*,<sup>113</sup> and upheld the award.<sup>114</sup> The Court is highly deferential to both the arbitrator’s decision and the collective bargaining agreement, which calls for arbitration as a grievance resolution process.

A collective bargaining agreement established between a players union and a professional sports league which does not test its players for performance-enhancing drugs may be unenforceable on public policy grounds. There is a strong public policy interest in knowing the performance of professional athletes is a product of natural talent and training.<sup>115</sup> If the public perceives the athletes of a particular sport as unnatural or the product of performance-enhancing drugs, the image of the league and of the sport would suffer.<sup>116</sup> Additionally, the illegality of steroids and performance-enhancing drugs furthers the argument, and references a “positive law.”<sup>117</sup> Therefore, one could argue that a professional sports league’s collective bargaining agreement that does not call for sufficient testing for performance-enhancing drugs would be contrary to an “explicit, well-defined, and dominant” public policy and would be legally unenforceable.<sup>118</sup>

If the public policy supporting testing professional athletes for performance-enhancing drugs is strong enough, the parties to collective bargaining in professional sports must agree on a sufficient testing plan; otherwise, the collective bargaining agreement itself could be unenforceable.<sup>119</sup> The public policy exception is a check on the nature of collective bargaining agreements. This mechanism serves the same function as federal legislation which would require minimum drug testing requirements. Thus, the currently proposed federal legislation is an

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113. See *W. R. Grace & Co. v. Rubberworkers Local Union 759*, 461 U.S. 757 (1983).

114. *E. Associated Coal Corp.*, 531 U.S. at 67.

115. See Dale, *supra* note 7, at CRS-1 (stating that steroid use among professional athletes has “been the focus of a series of investigative hearings before the House Government Reform Committee”).

116. See Shipley, *supra* note 6, at D01 (stating that Major League Baseball players are fed up with the steroid speculation surrounding their sport and the inflated numbers being attributed to steroid use).

117. National Institute on Drug Abuse: Research Report Series, *Anabolic Steroid Abuse*, <http://www.drugabuse.gov/PDF/RRSteroids.pdf> 6 (last visited Nov. 23, 2007) (acknowledging that professional athletes are suspected of abusing *illegal* anabolic steroids).

118. See *E. Associated Coal Corp.*, 531 U.S. at 62 (stating that a collective bargaining agreement which is contrary to public policy can be deemed unenforceable).

119. See *id.* at 63 (stating that a contract agreement which is contrary to public policy can be held unenforceable).

overreaction and unnecessary. Furthermore, establishing minimum requirements through public policy, rather than legislation, provides a more flexible system which will adapt to societal changes.

### C. Drug Testing Policies under Collective Bargaining Agreements

Collective bargaining negotiations provide the proper forum for establishing drug testing policies in professional sports for two main reasons.<sup>120</sup> First, it allows the parties to negotiate their own rights.<sup>121</sup> Second, it eliminates certain constitutional issues that may arise if the policy is implemented through other means.<sup>122</sup>

Unlike the proposed legislation, drug testing policies established through collective bargaining allow the parties that are going to be affected to have a hand in creating the policy.<sup>123</sup> Professional team sport athletes, as unionized employees, are subject to labor laws which “require union and management to bargain in good faith over mandatory subjects.”<sup>124</sup> The National Labor Relations Board, the federal authority regarding collective bargaining, “has held that drug and alcohol testing of employees is a mandatory subject of bargaining.”<sup>125</sup> Despite federal labor policy, there are currently numerous congressional bills relating to testing for performance-

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120. See *Masterallexis*, *supra* note 4, at 778 (stating that collective bargaining negotiations create an ideal forum for a number of reasons, including: parties’ opportunity to review their rights before negotiating, parties’ knowledge about the customary policies within a particular industry, and parties’ knowledge of what the particular needs of the industry require).

121. See *Masterallexis*, *supra* note 4, at 779.

122. See Andrew M. Souder, *Bargaining Away Fourth Amendment Rights in Labor Dispute Resolution: Bolden v. SEPTA* (1991), 38 VILL. L. REV. 1133, 1138 (1993) (stating that an individual can waive his or her Fourth Amendment protections from unreasonable searches by consenting to the search).

123. *Masterallexis*, *supra* note 4, at 776.

While Congressional hearings may in fact spur changes in professional leagues’ drug testing policies, Congress should not substitute its judgment for the bargaining process which can take into account the business environment, past practice, culture, history, and relationships between the parties involved. The bargaining environment is one that will likely lead to a more effective drug policy because both sides will have ownership in it.

*Id.*

124. *Id.* (stating that mandatory subjects are those that are plainly germane to the working environment).

125. *Id.* (citing *Johnson-Bateman Co.*, 295 N.L.R.B. 180, 182-84 (1989)).

enhancing drugs in professional sports.<sup>126</sup> If passed, this legislation would take the issue of establishing drug testing policies in professional sports away from collective bargaining.

Additionally, when constitutional issues are considered, the collective bargaining process is clearly a superior means of implementing drug testing. If the government passed legislation establishing drug testing policies, the resulting regulations would be subject to strict constitutional scrutiny regarding Fourth Amendment and due process concerns.<sup>127</sup> Constitutional concerns would be far less where a drug testing policy is established through collective bargaining in which the players consent to be tested as negotiated between the union representatives and owners. By implementing a drug testing plan through the collective bargaining process, Fourth Amendment concerns regarding unreasonable search and seizure would no longer be an issue because the players would have consented to the search.<sup>128</sup> Specifically, a union that negotiates a drug testing policy for its members is consents on behalf of all its members who are subject to the drug testing policy. Some circuits have already suggested that the union's consent through collective bargaining may eliminate potential Fourth Amendment concerns for unreasonable search.<sup>129</sup>

In sum, although legislation may provide short-term relief, a policy negotiated through collective bargaining would be the most fair to the parties involved and be far less likely to raise constitutional concerns.<sup>130</sup>

## V. COLLECTIVE BARGAINING PROVIDES THE PROPER FORUM FOR ESTABLISHING DRUG TESTING POLICIES

It is not a matter of if, but a matter of how performance-enhancing drug testing policies should be implemented in professional sports leagues. As mentioned previously, the advantages of collective bargaining outweigh the use of legislation to enforce the testing for performance-enhancing drugs which the public demands and the integrity of the sports require.

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126. *Masteralexis*, *supra* note 4, at 776 (stating that federal labor policy dictates that disputes between employers and employees regarding mandatory subjects be handled in the private sector rather than through government intervention).

127. *See* *Floyd*, *supra* note 47, at 341.

128. *See* *Schneckloth v. Bustamonte*, 412 U.S. 218, 219 (1973) (“[O]ne of the specifically established exceptions to the requirements of both a warrant and probable cause is a search that is conducted pursuant to consent.” (citing *Davis v. United States*, 328 U.S. 582, 593-94 (1946))).

129. *Souder*, *supra* note 123, at 1140.

130. *See* *Masteralexis*, *supra* note 4, at 778 (stating that collective bargaining is likely to develop a fairer system because the parties involved will have the opportunity to consider their rights prior to negotiating a plan).

### A. *Handling of Individual Grievances*

The intrusiveness of drug testing raises concerns over the privacy rights of the individuals being tested, and therefore challenges to failed tests, or to the process itself, are likely to occur. The collective bargaining agreements provide for grievance procedures which establish a more efficient process than the process of challenging federally mandated drug testing.<sup>131</sup> Grievances with the drug testing policies would be handled as directed in the collective bargaining agreement and would be subject to arbitration.<sup>132</sup> An arbitrator would interpret the drug testing policy in the contract and resolve any issues accordingly.<sup>133</sup> In the case of federally mandated drug testing, individuals who were negatively impacted by the testing would be likely to raise constitutional arguments over the invasion of privacy, and the federal court system would be the forum for handling grievances.<sup>134</sup> The arbitration process would be able to handle the cases more quickly and less expensively.<sup>135</sup>

### B. *Consent to Drug Testing Alleviates Concerns*

Not only does arbitration through collective bargaining provide a more efficient and cost effective means of resolving these issues, but the people being tested would be less likely to attack drug testing policies implemented through collective bargaining.<sup>136</sup> A federally mandated drug testing program is governmental action which is subject to constitutional due process

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131. Strickland, *supra* note 94, at 241 (stating that arbitration is usually faster and less expensive than a judicial trial).

132. See *Masterallexis*, *supra* note 4, at 780 (stating that drug testing policies in all of the four major professional sports leagues are linked to league disciplinary and arbitration provisions within the collective bargaining agreement).

133. See *E. Associated Coal Corp.*, 531 U.S. at 61 (stating that under a collective bargaining agreement that provides for arbitration, “both employer and union grant to the arbitrator the authority to interpret the meaning of their contract’s language. . .”).

134. See 28 U.S.C. § 1331 (“The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.”). *Id.*

135. Strickland, *supra* note 94, at 241 (stating that arbitration is usually faster and less expensive than a judicial trial).

136. See *Schneekloth*, 412 U.S. at 219 (stating that consent is one of the specifically established exceptions to the requirement for a search warrant); see also *Masterallexis*, *supra* note 4, at 776 (noting that through collective bargaining agreements, players are essentially giving their consent to the performance enhancing drug testing policies adopted in the agreement).

concerns, as well as constitutional concerns over individual privacy.<sup>137</sup> Conversely, player representatives are private actors who negotiate a collective bargaining agreement that implements a drug testing policy that the players consent to, through the representatives.<sup>138</sup> Because of the consent, constitutional concerns over due process and privacy would no longer be an issue.<sup>139</sup> The players would be making a contractual agreement to submit to the testing and any challenge would be decided by the terms of the agreement.<sup>140</sup>

### *C. Collective Bargaining Provides A Fair Solution*

In addition to being a more efficient policy, the negotiation aspect of a collective bargaining agreement assures a fair policy, or at least one that the players have agreed to.<sup>141</sup> Despite the strong public desire to see comprehensive drug testing and the assurance of natural athletes, the players are still individuals and entitled to privacy rights.<sup>142</sup> A policy negotiated through collective bargaining allows the players to establish an acceptable policy which still accomplishes the purpose of guaranteeing the integrity of the athletes who compete.<sup>143</sup>

## VI. CONCLUSION

Collective bargaining agreements provide a superior forum for implementing performance-enhancing drug testing policies over federal legislation. Professional team sport athletes in America are unionized employees, and national labor policy instructs that drug and alcohol testing is a mandatory subject for bargaining.<sup>144</sup> Drug testing policies implemented through collective bargaining allow player representatives to be involved in

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137. See U.S. CONST. amend. V (“No person shall . . . be deprived of life, liberty, or property, without due process of law. . .”).

138. See *Masteralexis*, *supra* note 4, at 776 (stating that players would be consenting to drug testing policies established through collective bargaining).

139. See *Schnecko*, 412 U.S. at 228 (stating that a search conducted pursuant to consent is constitutionally permissible).

140. See *E. Associated Coal Corp.*, 531 U.S. at 61 (stating that the parties to a collective bargaining agreement grant the arbitrator authority to interpret the contract’s meaning).

141. See *Masteralexis*, *supra* note 4, at 779 (stating that collective bargaining allows the players to review their rights before negotiating and agreeing to a policy).

142. See U.S. CONST. amend. IV.

143. See *Masteralexis*, *supra* note 4, at 779 (“A collective bargaining agreement can be renewed, reviewed, and renegotiated when the parties find that conditions have evolved in such a way as to require the two sides to come back to the bargaining table to re-open the agreement.”).

144. *Masteralexis*, *supra* note 4, at 775.

the negotiation and approval of the policies. The players are consenting and agreeing to the implemented policies. Due to the intrusive nature of drug testing, federally mandated policies are likely to be challenged on constitutional grounds, increasing the strain on the court system. Although federal legislation provides a “quick fix” to the problem of athletes using performance-enhancing drugs, allowing the policies to be negotiated and agreed upon through collective bargaining will be more efficient, fair, and more adaptable to changes in technology and public concern. Furthermore, collective bargaining agreements are subject to public policy, and therefore, they must sufficiently address performance-enhancing drug use among athletes or risk being held unenforceable. The public policy exception to collective bargaining agreements achieves the same purpose that federally mandated minimum drug testing standards propose to address without the added stress on the court system.



