

January 2007

Who Decides: Institutional Choice in Determining a Performance Enhancing Drug Policy for the NFL

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Shapiro, Scott B. (2007) "Who Decides: Institutional Choice in Determining a Performance Enhancing Drug Policy for the NFL," *Wyoming Law Review*: Vol. 7: No. 1, Article 6.
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COMMENT

Who Decides: Institutional Choice in Determining a Performance Enhancing Drug Policy for the NFL

*Scott B. Shapiro**

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I. INTRODUCTION

In this, the era of the juiced athlete, asterisks, fallen heroes, and tell all books, it seems all too familiar that the lead news story in the sporting section always seems to be a new athlete involved in a new steroid scandal.¹ So here's to you Justin Gatlin, Floyd Landis, Jose Canseco, Barry Bonds, Bill Romanowski, Shawne Merriman, and of course, the greatest funk-bass-player-turned-alleged-steroid-

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¹ See Rob Sinclair, *Barry Bonds Lacks Star Power*, CBC SPORTS, April 1, 2005, at <http://www.cbc.ca/sports/columns/analysis/sinclair>; Micheal Wilbon, *Tarnished Records Deserve an Asterisk*, WASHINGTON POST, Dec. 4, 2004, at D10. See also Lance Williams, Mark Fainaru-Wada, *What Bonds Told the Grand Jury*, SAN FRANCISCO CHRONICLE, Dec. 3, 2004,

mogul of all time, Victor Conte, Jr.² He and his San Francisco-area BALCO (Bay Area Laboratory Co-operative) laboratories not only diagnosed what was missing from the nutritional end of athletic training, but would also allegedly supply professional athletes that extra edge in the form of undetectable steroids opening up the proverbial “can of worms” that Congress has tried to reseal. The arrest of Conte signaled the end of America’s blind eye.

In the summer of 2003, a then unnamed source delivered a syringe filled with a substance, that was described as a designer steroid, to the United States Anti-Doping Agency (USADA).³ This designer steroid was tetrahydrogestrinone (THG).⁴ THG was undetectable by current testing methods.⁵ This same source, later named as Trevor Graham, also said that many top athletes were using the substance.⁶ Now that the USADA had the syringe, the THG could be analyzed and a test developed to detect it.⁷ Dr. Don Catlin, of the Olympic Analytical Laboratory at the University of California-Los Angeles (UCLA), developed a test for the previously undetectable substance.⁸ THG was eventually tracked back to BALCO, a company based in Burlingame, California. According to its website, the company provides “Scientific analysis of essential and toxic elements impacting the quality of life.”⁹ Victor Conte, Jr. is the President and CEO of BALCO. SNAC System, Inc., a nutritional supplement company operated out of BALCO’s office space.¹⁰ After the link to BALCO was made, the Internal Revenue Service

at A1; JOSE CANSECO, *JUICED: WILD TIMES, RAMPANT ‘ROID, SMASH HITS, AND HOW BASEBALL GOT BIG* (2005); MARK FAINARU-WADA, *LANCE WILLIAMS, GAME OF SHADOWS: BARRY BONDS, BALCO AND THE STEROID SCANDAL THAT ROCKED PROFESSIONAL SPORTS* (2005).

² U.S. v. Conte, No. CR04-004 SI, 2004 U.S. Dist. LEXIS 25896 (N.D.Cal. 2004). All of these athletes have been linked to steroids. *Id.* Conte was a central figure in the production and distribution of the designer steroid THG. *Id.* He was also the bass player for the 1970’s funk band, Tower of Power. *Id.*

³ See *infra* note 8. See also Beau Dure, *BALCO Investigation Timeline*, USATODAY.com (June 22, 2006), available at <http://www.usatoday.com/sports/balco-timeline.htm>.

⁴ MedicineNet.com (2006) available at <http://www.medterms.com/script/main/art.asp?articlekey=24863> (defining THG: Tetrahydrogestrinone. A “designer steroid.” THG first surfaced in October 2003 with reports of its illicit use by athletes due to the fact that it was undetectable at the time).

⁵ Reuters, *I Was THG Whistleblower, Admits Gatlin Coach*, ABC NEWS ONLINE (Aug. 23, 2004), available at <http://www.abc.net.au/sport/content/200408/s1182730.htm>.

⁶ *Id.*

⁷ U.S. ANTI-DOPING AGENCY, *Mission Statement* (2006), available at <http://www.usanti-doping.org/who/mission.html>. The USADA is dedicated to preserving the well being of Olympic Sport, the integrity of competition, and ensuring the health of athletes by focusing on research, education testing and results management. *Id.*

⁸ John T. Wendt, *The Year of the Steroid: Are New Testing Regimens Enough?*, ENTERTAINMENT AND SPORTS LAWYER, 8 (Winter 2005).

⁹ *Id.* at 8.

¹⁰ *Id.*

criminal investigation unit and the San Mateo County Narcotics Task Force raided the Burlingame lab.¹¹ Conte, James Valente, Vice President of BALCO, Greg Anderson, a well known personal trainer, and Remi Kochemny, a track and field coach, were all charged with (1) conspiracy to distribute and possess with intent to distribute anabolic steroids, (2) conspiracy to defraud the United States through the introduction and delivery of misbranded drugs, and (3) possession with intent to distribute human growth hormone; and conspiracy to launder monetary instruments.¹² In September 2004, the NFL fined only three players with respect to the BALCO/THG scandal.¹³ Chris Cooper, Barret Robbins, and Dana Stubblefield were fined three game checks each after the three current and former Oakland Raiders tested positive for THG.¹⁴ A fourth player, Bill Romanowski, was reported to have tested positive but retired.¹⁵ The four are the only positive tests in the league for THG. The three active players were also warned that any subsequent positive test would result in an eight-game suspension.¹⁶

Until 2004, the NFL and all professional sports leagues were responsible for policing their own players.¹⁷ These policies were bargained for as part of the league's collective bargaining agreements with their player's unions.¹⁸ With the proverbial cat out of the bag and the seemingly endless litany of allegations of steroid abuse, Congress decided to conduct hearings as to the prevalence of steroid use in sports. Being that Major League Baseball (MLB) and Barry Bonds were at the center of the BALCO allegations, Commissioner Bud Selig and Bonds took center stage at hearings. Because of Selig's unwillingness to work with Congress to uncover the truth, or to create any kind of performance enhancing drug testing program, Congress began to threaten the autonomy of the leagues to police themselves.¹⁹

In 2005, in the wake of the MLB hearings and allegations of rampant steroid use in professional sports, the U.S. government decided that governmental action was appropriate. Congressman Tom Davis of Virginia linked a Centers for Disease Control and Prevention study to the steroid problem in professional sports.²⁰ The study stated that more than 500,000 high school students have tried

¹¹ *Id.*

¹² U.S. v. Conte, No. CR04-004 SI, 2004 U.S. Dist. LEXIS 25896 (N.D. Cal. 2004).

¹³ Wendt, *supra* note 8, at 10.

¹⁴ *See* Dure, *supra* note 3.

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ NATIONAL FOOTBALL LEAGUE, *Collective Bargaining Agreement* (2006), available at http://nflpa.org/CBA/CBA_Complete.aspx. The NFL as well as all other non-Olympic professional team sports have policed themselves from performance enhancing drugs. *Id.*

¹⁸ *Id.*

¹⁹ Associated Press, *McCain: Law for All Sports Should be Considered*, ESPN.com (March 20, 2005), available at <http://sports.espn.go.com/espn>.

²⁰ *Steroid Use in Sports: Hearing on H.R. 1862 Before the H.R. Gov't. Reform Comm.*, 109th Cong. (2005) (statement of Rep. Tom Davis).

steroids, nearly triple the number from ten years prior.²¹ He also quoted a second study, conducted by the National Institute on Drug Abuse and the University of Michigan in 2004, that “found over 40% of twelfth graders describe steroids as ‘fairly easy’ or ‘very easy’ to get, and the perception among high school students that steroids are harmful has dropped from 71% in 1992 to 56% in 2004.”²²

In an effort to take action, Congress summoned all professional sports league representatives to Washington for congressional hearings on the subject of steroid use in sport.²³ After the confrontational stance taken by MLB commissioner Bud Selig, Senator John McCain said, “it seems to me that we ought to seriously consider . . . a law that says all professional sports have a minimum level of performance enhancing drug testing.”²⁴ On April 26, 2005, the Drug Free Sports Act was introduced in Congress.²⁵ Essentially, this act takes the testing program

²¹ *Id.*

²² *Id.*

²³ Dave Sheinin, *Pro Sports Leagues Pitch Steroid Proposal on Hill*, WASHINGTON POST, May 19, 2005, at D01.

²⁴ Associated Press, *supra* note 19.

²⁵ 109 H.R. 1862 (2005).

[T]he Secretary [of State] shall issue regulations requiring professional sports associations operating in interstate commerce adopt and enforce policies and procedures for testing athletes who participate in their respective associations for the use of performance-enhancing substances. Such policies and procedures shall, at minimum, include the following:

- (1) Timing and frequency of random testing. Each athlete shall be tested a minimum of once each year that such athlete is participating in the activities organized by the professional sport association. Tests shall be conducted at random throughout the entire year and the athlete shall not be notified in advance of the test.
- (2) Applicable substances. The Secretary shall, by rule, issue a list of substances for which each athlete shall be tested. Such substances shall be those that are—
 - (A) determined by the World Anti-Doping Agency to be prohibited substances; and
 - (B) determined by the Secretary to be performance-enhancing substances for which testing is reasonable and practicable.
 - (A) Suspension.
 - (i) An athlete who tests positive shall be suspended from participation in the professional sports association for a minimum of 2 years.
 - (ii) An athlete who tests positive, having once previously tested positive shall be permanently suspended from participation in the professional sports association.
 - (B) Disclosure. The name of any athlete having a positive test result shall be disclosed to the public.

out of league hands and places it into the hands of the Secretary of Commerce and the World Anti-Doping Agency.²⁶ The policy stance taken by Congress is that the youth of America look to athletes like Bonds, McGuire, and even Romanowski as heroes and will act in a similar manner as these athletes.²⁷ In allowing steroids to be used by the best athletes in the world, American youth only see the advantages of having a long career in professional sports and do not acknowledge the harmful physical and emotional effects of these powerful drugs.²⁸

In trying to resolve the problem of performance enhancing drugs in sports, consideration must be given to what institution is in the best position to create policy. The NFL has been dealing with drug testing issues for close to twenty years. Congress has been addressing the issue for approximately two years. So who should decide how to address this issue? This article will focus on the NFL's drug testing policy because of the NFL's effort to eliminate performance enhancing drugs over a prolonged period of time, and also because the NFL policy is the most widely acclaimed to be the most complete program for team sports in the United States.²⁹ By using the NFL as the benchmark to compare policy, it will become clear that a professional sports league can create a policy that works.³⁰

This article will apply the institutional choice analysis developed by Neil Komesar in his book *Imperfect Alternatives: Choosing Institutions in Law, Economics, and Public Policy*, in order to determine which institution, Congress, the National Football League, the market, or the courts, can best address the issue of performance enhancing drug testing programs for the NFL. The labor and employment ramifications of this determination will affect employee and employer rights in relation to performance enhancing drug testing programs that were bargained for under the current Collective Bargaining Agreement. This article will analyze the different institutions that could affect these rights and how to best resolve the issue of which institution can best decide policy in the workplace of professional athletics. Institutional choice is paramount in determining how institutions will enact public policy.

²⁶ *Id.* See also Shaun Assael, *Dick Pound's Fight Against Drugs Has Claimed a Surprising Victim: Himself*, ESPN MAGAZINE, 10 (July 31, 2006). The World Anti-Doping Agency has been publicly scrutinized for its handling of the Lance Armstrong doping allegations, and its chairman Dick Pound was likened to Captain Ahab "with his bearings lost, chasing his great white whale." *Id.*

²⁷ *Steroid Use in Sports: Hearing on H.R. 1862 Before the H.R. Gov't. Reform Comm.*, 109th Cong. (2005).

²⁸ *Id.*

²⁹ See U.S. ANTI-DOPING AGENCY, *supra* note 7. The USADA oversees international sports doping policy and works in concert with WADA policy. *Id.*

³⁰ Wendt, *supra* note 8, at 8. Due to the fact the other leagues have only recently implemented policy, there would be little doubt that any policy created outside the vacuum of the league, would likely be better than the untested policy recently created. *Id.*

This article contains five sections that will outline and then apply Komesar's institutional choice framework. Part II of this article will examine the evolution of institutional choice as an evaluation tool. Then it will demonstrate what to look for in an institutional choice analysis. In order to understand how this theory applies to a real world situation, Part III will apply the institutional choice framework to a similar factual situation, the banning of ephedrine, in order to illustrate how the framework applies to the relevant institutions. The ephedrine case study is particularly relevant because each of the possible institutions, the NFL, Congress, and the courts made a decision in that case regarding the banning of a performance enhancing drug.³¹ In Part IV, the article will use the information gathered in the ephedrine case study to apply Komesar's institutional choice framework, to the NFL's performance enhancing drug testing policy. Through this examination it becomes clear that the NFL is the best institution to decide performance enhancing drug testing policy for its players/employees.

II. INSTITUTIONAL CHOICE FRAMEWORK

A. Background

Institutional choice or comparative institutional analysis refers to a mode of public policy analysis that examines institutional choice as a central and necessary component of public policy decision making.³² This type of economic analysis is useful because the majority of economic analyses rely on economic efficiency to guide the analyst to the best institutional choice for addressing a particular issue.³³

Komesar's theory of institutional choice is rather groundbreaking, and has called attention to defects in the market based efficiency analysis of other studied economists.³⁴ Komesar attacks well-known legal scholars as suffering

³¹ The lawmaking body involved in the ephedrine case study is actually the FDA, but since regulatory agencies have the same effect as the legislative body, the results would mirror each other.

³² NEIL KOMESAR, *IMPERFECT ALTERNATIVES: CHOOSING INSTITUTIONS IN LAW, ECONOMICS, AND PUBLIC POLICY* (1994).

³³ *Id.*

³⁴ *Id.* at 34-44 (discussing JOHN RAWLES, *A THEORY OF JUSTICE* (1971)). See also *id.* at 17-22, 157-61 (discussing RICHARD POSNER, *ECONOMIC ANALYSIS OF LAW* (4th ed. 1992)); *Id.* at 198-215 (discussing JOHN HART ELY, *DEMOCRACY AND DISTRUST* (1980)); *Id.* at 235-44 (discussing RICHARD EPSTEIN, *TAKINGS* (1985)); *Id.* at 217-21 (discussing Cass Sunstein, *Interest Groups in American Public Law*, 38 *STAN. L. REV.* 29 (1985)); *Id.* at 221-30 (discussing Bruce Ackerman, *Beyond Carolene Products*, 989 *HARV. L. REV.* 713 (1985)); *Id.* at 22 n.17 (discussing Guido Calabresi & Douglas Melamed, *Property Rules, Liability Rules and Inalienability: One View of the Cathedral*, 85 *HARV. L. REV.* 1098 (1972)); *Id.* at 137 n.13 (discussing GUIDO CALABRESI, *A COMMON LAW FOR THE AGE OF STATUTES* (1982)); *Id.* At 215 N.37 (Discussing Laurence Tribe, *The Puzzling Persistence Of Process-based*

from the defect he calls "single institutionalism."³⁵ As he explains, most institutional choice frameworks up to this point have only concentrated on single institutions, ignoring other institutions that may or may not be more effective in policy implementation.³⁶ For example, Richard Posner, a renowned law and economics scholar, opined that "where the market works, the courts allocate the . . . balancing of costs and benefits[] to the market; where the market does not work, the courts make the efficiency determination themselves."³⁷ According to Komesar, this analysis is incomplete.³⁸ If the issue involves two institutions, the market and the courts, then why does Posner only ask about variations in the ability of the market? The question is not whether market performance improves or deteriorates with larger numbers of parties, but rather whether the market works better or worse than the courts.³⁹ Komesar observes that the same factors that cause market performance to deteriorate may also impede the functioning of courts, making our choice between the two institutions much more difficult than Posner recognizes.⁴⁰ These gaps in Posner's framework are filled in by Komesar through identifying the actions of the significant players within each institution, and then comparing those actions across all relevant institutions.⁴¹ This is the crux of Komesar's participation-centered approach to institutional choice.

In developing his theory, Komesar based his participation-centered research on the work of two well known economists, Mancur Olson and Ronald Coase.⁴² He stated,

Nothing is new or startling about the participation-centered approach. Ronald Coase's transaction cost approach . . . emphasized the cost of information in understanding institutional activity The emphasis on the distribution of stakes can be traced to Mancur Olson's work on collective action. That this

Constitutional Theories, 89 YALE L.J. 1063 (1980)); *Id.* at 179-80 (discussing Patricia Danzon, *Tort Reform and the Role of Government in Private Markets*, 13 J. LEGAL STUD. 517 (1984)); *Id.* at 180-81 (discussing Alan Schwartz, *Proposals for Products Liability Reform: A Theoretical Synthesis*, 97 YALE L.J. 353, 371-84 (1988)); *Id.* at 80 n.49 (discussing W. KIP VISCUSI, REFORMING PRODUCTS LIABILITY 128 (1991)).

³⁵ *Id.* at 6.

³⁶ KOMESAR, *supra* note 32, at 3.

³⁷ *Id.* at 22.

³⁸ *Id.*

³⁹ David A. Luigs, *Administrative Law and Regulation: Imperfect Alternatives: Choosing Institutions in Law, Economics, and Public Policy*, 93 MICH. L. REV. 1559, 1566 (1995) (reviewing NEIL KOMESAR, IMPERFECT ALTERNATIVES: CHOOSING INSTITUTIONS IN LAW, ECONOMICS, AND PUBLIC POLICY, (1994)).

⁴⁰ *Id.* (citing KOMESAR, *supra* note 32, at 21-28).

⁴¹ KOMESAR, *supra* note 32, at 4.

⁴² *Id.* at 8.

analysis is simple and its components well known are major advantages . . . for my purposes. An analytical framework meant to serve so vast a range of possible investigations . . . must be as simple, accessible, and intuitively sensible as possible.⁴³

Olson's work on collective action describes the importance of the distribution of stakes as the average per capita benefit derived from institutional participation and the variance of this benefit across the population of beneficiaries.⁴⁴ Coase's work on the other hand, describes the costs of institutional participation, including transaction costs, litigation costs, and political participation costs, as the costs of information and organization.⁴⁵ Both of these ideas are central to Komesar's framework and are virtually ignored in Posner's work.⁴⁶

Komesar's research sheds light on the gaps that can form when economic efficiency is the only factor being considered.⁴⁷ Economic efficiency analysis assists in determining the best policy making institution by weighing the costs against the benefits that affect each individual actor within each institution.⁴⁸ It also helps flush out the potential problems that each institution faces in trying to determine the efficiency, reach, and effectiveness of the final policy as implemented by each of the potential participating institutions.⁴⁹

As this synopsis shows, Komesar accounts for more variables when analyzing institutions than many of his predecessors. Because the central issue regarding the NFL performance enhancing drug policy regards institutional choice in policy implementation, Komesar's framework is beneficial because it can be used across institutions. For that reason his framework will be the lens that this article will use to determine the best institution for deciding drug testing policy for the NFL.

B. The Framework

Institutional choice analysis starts with the premise that one must decide who decides. In 1960, Ronald Coase stated:

There is no reason to suppose that government regulation is called for simply because the problem is not well handled by [the politics] of the market or the firm. Satisfactory views on

⁴³ *Id.*

⁴⁴ *Id.* (citing MANCUR OLSON, *THE LOGIC OF COLLECTIVE ACTION* (1965)).

⁴⁵ *Id.* (citing Ronald H. Coase, *The Nature of the Firm*, 4 *ECONOMICA* 386 (1937); Ronald H. Coase, *The Problem of Social Cost*, 3 *J.L. & ECON.* 1 (1960)).

⁴⁶ *Id.* See also RICHARD POSNER, *ECONOMIC ANALYSIS OF LAW* (4th ed. 1992).

⁴⁷ Luigs, *supra* note 39, at 1562.

⁴⁸ KOMESAR, *supra* note 32, at 10-11.

⁴⁹ *Id.* at 16.

policy can only come from a patient study of how, in practice, the market, firms and governments handle the problem of harmful effects.⁵⁰

In *Imperfect Alternatives*, Neil Komesar focuses on assessing the relative capacities of three alternative institutions available to address social needs: the market, the political process, and the courts.⁵¹ It should be noted that this analysis does not have to apply to only these three institutions, but in fact can be applied to any institution that is in the position to set policy.⁵² Institutional choice analysis begins with an assumption prevalent in law and economics.⁵³ Specifically, both individuals and institutions are assumed to be rational actors making choices that maximize their self-interest.⁵⁴ However, comparative institutional analysis also provides both a positive and a normative structural approach to considerations of legal change.⁵⁵ As a positive matter, the analysis predicts the different outcomes that will arise in various institutional settings based on the actors' incentives in each setting.⁵⁶ As a normative matter, comparative institutional analysis chooses the best institution by determining the outcome that best furthers a particular social policy goal.⁵⁷

Komesar's analysis consists of five steps. First, a policy goal must be chosen.⁵⁸ Since the value of the Komesar framework is to analyze institutions' ability to implement a policy, it is not important where the policy comes from so long as it is not altered when comparing across institutions. Thus, virtually any policy goal

⁵⁰ Ronald H. Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1 (1960).

⁵¹ See KOMESAR, *supra* note 32, at 3.

⁵² See David Arsen & Courtney Bell, *David Plank, Who Will Turn Around "Failing" Schools? A Framework for Institutional Choice*, Michigan State University Education Policy Center (Aug. 2003), available at <http://www.epc.msu.edu/publications/workpapers/failingschools.pdf> (referring to intermediary institutions as decision makers and thus qualifying them for this analysis); David Klooster, *Institutional Choice, or a Process of Struggle?*, Crossing Boundaries Conference, June 10-14, 1998. The 7th Conference of the International Association for the Study of Common Property, Vancouver (citing land resource management agencies as decision makers in forest preservation issues in Mexico and thus qualifying for the framework). See KOMESAR, *supra* note 32, at 10. The NFL as an institution is relevant and should be included in the Komesar framework. *Id.*

⁵³ William W. Buzbee, *Sprawl's Dynamics: A Comparative Institutional Analysis Critique*, 35 WAKE FOREST L. REV. 3 (2000).

⁵⁴ KOMESAR, *supra* note 32, at 270-73.

⁵⁵ See generally KOMESAR, *supra* note 32.

⁵⁶ NICHOLUS MERCURO, STEVEN G. MEDEMA, ECONOMICS AND THE LAW: FROM POSNER TO POST MODERNISM, 122-23 (1997).

⁵⁷ KOMESAR, *supra* note 32, at 28 (claiming that both positive and normative legal analysis requires comparative institutional analysis).

⁵⁸ Susan Freiwald, *Comparative Institutional Analysis in Cyberspace: The Case of Intermediary Liability for Defamation*, 14 HARV. J. LAW & TECH. 569, 575-76 (2001).

can be chosen. The second step is to identify the relevant institutions that could implement that policy.⁵⁹ Third, the relevant actors within each institution must be identified.⁶⁰ Fourth, costs and benefits are weighed for each actor taking into account forces that act upon those actors.⁶¹ Fifth, the likely outcomes of each institution are compared.⁶²

The central premise of Komesar's framework is that it is participation-centered. This approach relies on actions likely to be taken by relevant actors in an institution. The participation-centered approach requires interested parties to act in order to facilitate legal change.⁶³ Susan Freiwald sums up the participation-centered approach as follows:

The participation-centered approach involves positive analysis: identification of the different groups interested in a particular legal rule and of the costs and benefits to each group of participation in any of the three institutions. In order to focus on comparative institutional analysis, the approach assumes a social policy goal and then evaluates the comparative abilities of each institution to achieve that social policy goal given the likely participation level of each group. The approach also embodies normative visions of what it means for each institution to function properly.⁶⁴

In other words, in applying institutional choice theory, the analyst must first assume the social policy goal at the outset in order to use it to assess comparative institutional performance.⁶⁵ The policy goal must remain constant so that a proper analysis of the institutional competence of each institution involved can be made. The reason why a policy goal must be determined at the onset of the analysis is because it would be indeterminable which institutions could be involved and relevant to the discussion. Once a goal is in place, the relevant institutions can be identified followed by the relevant actors within that institution.

The relevant actors in an institution are people who generate legal change through their activities in each institution, whether as litigants, voters and lobbyists, or consumers and producers.⁶⁶ In order to compare institutions consistently,

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ *Id.*; see also KOMESAR, *supra* note 32, at 8.

⁶² *Id.*

⁶³ Freiwald, *supra* note 58, at 579.

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ KOMESAR, *supra* note 32, at 7.

the participation-centered model focuses on the actions of those people.⁶⁷ There are several ways that an actor can facilitate change within an institution. For example, “concerned parties can put pressure on the legislature to make changes by voting for politicians who share their views or by lobbying and attempting to educate legislators and other voters with propaganda.”⁶⁸ Also, people can create change through the court system by bringing cases.⁶⁹ Finally, change can be made in the marketplace by transacting in ways that achieve it.⁷⁰

The differences in those actors’ distribution of stakes in the outcome, costs of information, and costs of organizing, leads to consistent differences in institutional performance.⁷¹ Participation will not occur unless the benefits of participation outweigh the costs.⁷² Friewald stated “[t]he benefits from participating directly relate to a party’s stake in the outcome.”⁷³ In other words, the more the party has at stake, the more that party is likely to facilitate change in a direction that will benefit that party. Friewald also notes that “[o]n the other hand, the costs of participation stem from the costs of acquiring information about the current legal rule and the path towards change, as well as the costs of organization.”⁷⁴ Friewald continues by saying:

Some characteristics of participation costs and benefits are true across all institutions. In general, the more diffusely an interest is spread over a group of people, the lower each person’s stake in the outcome and the more likely that small increases in the costs of participation will inhibit any call for change to promote that interest.⁷⁵

Costs of participation increase when the interest is complex because it takes organization, time, and energy to understand the relevant information.⁷⁶

⁶⁷ Friewald, *supra* note 58, at 577 (stating that the actors’ collective willingness to participate in a given institution determines the institution’s competence).

⁶⁸ *Id.* at 575-76 (citing KOMESAR, *supra* note 32, at 63-64).

⁶⁹ *Id.* at 576.

⁷⁰ *Id.* (citing KOMESAR, *supra* note 32, at 98).

⁷¹ *Id.*

⁷² *Id.* at 577 (citing KOMESAR, *supra* note 32, at 125-28).

⁷³ Friewald, *supra* note 58, at 576 n.24. (Friewald uses “stake” as a shorthand for what Komesar discusses as either an impact from an injury or a stake in its prevention. Komesar uses stakes and impacts interchangeably). *See also* KOMESAR, *supra* note 32, at 161.

⁷⁴ *See* Friewald, *supra* note 58, at 576 (citing KOMESAR, *supra* note 32, at 8, 71). Komesar breaks down participation costs more finely into “the complexity or difficulty of understanding the issue in question, the numbers of people on one side or the other of the interest in question, and the formal barriers to access associated with institutional rules and procedures”). KOMESAR, *supra* note 32, at 8, 71.

⁷⁵ Friewald, *supra* note 58, at 576.

⁷⁶ Friewald, *supra* note 58, at 577 (citing KOMESAR, *supra* note 32 at 68-75). Komesar’s analysis is dependant on interest group theory of public choice scholarship. *See, e.g.,*

Institutions also create their own costs that affect whether the particular institution will take account of all interests. For example, the adjudicative process, with its formal rules and its limited scale, likely poses the highest cost to participation for a diffusely spread interest.⁷⁷ The costs of access to the political process can also be significant if lobbyists are required to achieve the desired results.⁷⁸ Other methods of participation in the political process are not as expensive, such as informing the general public, including legislators, and voting for legislators with sympathetic views.⁷⁹ However, the cost of acquiring the information to make an informed decision may prevent those who want change from acting.⁸⁰ Applying these concepts to the real world, Freiwald states:

To apply the model in real world settings, the comparative institutional analyst first chooses the social policy goal to be promoted. Then, the analyst determines which groups would be most affected by a legal change and considers how the costs of participation inherent in each institution compare with the expected benefits of using the institution. Under the participation-centered approach, actors' collective willingness to participate in a given institution determines that institution's competence.⁸¹

In addition to weighing the costs and benefits to the individual actors within an institution, other dynamics threaten to skew outcomes in the market, the political process, as well as the courts in many instances.⁸² Freiwald stated that "[The political process] represents a poor institutional choice when it is subject to the over-representation of one group and the under-representation of another. When one group has concentrated and high-stakes interests as compared to its opponents, Congress will be subject to a distorting minoritarian bias."⁸³ Generally,

FABER & FRICKEY, *LAW AND PUBLIC CHOICE*, at 12-37 (1991) (reviewing literature and insights of interest group theory); Einer R. Elhauge, *Does Interest Group Theory Justify More Intrusive Judicial Review?*, 101 *YALE L.J.* 31, 35-43 (1991); MANCUR OLSEN, *THE LOGIC OF COLLECTIVE ACTION: PUBLIC GOODS AND THE THEORY OF GOODS*, (1971) (laying out the foundation for the approach).

⁷⁷ KOMESAR, *supra* note 32, at 125-28.

⁷⁸ *Id.*

⁷⁹ Freiwald, *supra* note 58, at 577.

⁸⁰ KOMESAR, *supra* note 32, at 91.

⁸¹ Freiwald, *supra* note 58, at 577.

⁸² KOMESAR, *supra* note 32, at 153-52 (comparing dynamics affecting choice and likely outcomes in court, market, and political processes).

⁸³ Freiwald, *supra* note 58, at 578 (citing KOMESAR, *supra* note 32, at 56, 76, 173, 192). Under Komesar's model, minoritarian bias does not always lead to distorted legislation. It depends on whether there is a countervailing majoritarian bias. *Id.* See also KOMESAR, *supra* note 32, at 65-67. Komesar refines the interest group theory by devising a "two-force" model, in which both minorities and majorities can exercise improper sway. *Id.*

a minoritarian bias occurs when a group with small numbers has a high stake in the outcome of the policy decision and also has the financing to get the attention of the policy makers.⁸⁴ Policy makers will hear more from the minority and will likely not hear as much concerning the needs of the group with the diffuse interests, which may in fact be the majority of those affected by the policy decision.⁸⁵ According to the participation-centered approach, one must evaluate whether one group has disproportionate influence with reference to the social policy goal.⁸⁶ This is conducted by evaluating whether a group's influence leads to a law that grants it more benefits than are efficient for society.⁸⁷

The participation-centered approach assesses court performance in a similar manner, weighing the costs with the benefits conferred. The courts operate well for the purposes of creating legal change only if parties actually bring suit. If courts are selected as the institution to decide the question, the legal rule may fail to change as needed, or it may be decided on the basis of the one case that are brought.⁸⁸ It is difficult for a court to create policy in a vacuum and the parties to the suit must present the question to the court in a way that can affect policy. For instance, if a party elects for a bench trial instead of a jury trial it is possible that the most relevant actor would be the judge in determining policy.⁸⁹ If a determination hinges on particular facts, then the jury may be the most relevant actor in determining policy.⁹⁰ Therefore, the parties that bring the case have the most at stake and are the most likely to affect how the policy is implemented due to the decisions that they make when presenting the case. If one of the parties is a government agency of the government itself, then all the forces that affect the political process are also at work in the courts.

Finally, when assessing market performance, transaction costs are the determinative factor.⁹¹ When transaction costs take away the gains from contracting, the market will not be well suited to make a legal change.⁹² As Friewald stated, "Instead, transactions that are favorable in terms of their ability to further the

⁸⁴ KOMESAR, *supra* note 32, at 91.

⁸⁵ *Id.* at 65-67.

⁸⁶ *Id.*

⁸⁷ *See id.* A hypothetical example of this kind of evaluation would be if the assumed policy goal was to stop minors from using tobacco products and the federal regulation was to incarcerate all minors found using tobacco products. Although this is an extreme example, it is obvious that the costs to society for incarceration and the burden on the courts and police, is too high for this to be an acceptable solution. Therefore society would have to bear the burden of the minority view, which in this case would be tobacco sellers who would be in favor of more lenient sanctions. *Id.*

⁸⁸ Friewald, *supra* note 58, at 579.

⁸⁹ KOMESAR, *supra* note 32, at 124.

⁹⁰ *Id.*

⁹¹ KOMESAR, *supra* note 32, at 121.

⁹² *Id.* at 111-12, 171.

social policy goal will be avoided. Under the participation-centered approach, market competence requires transactions to take place, and it seems to require also that contracts reflect real bargaining by informed parties."⁹³

The Komesar framework can be a valuable tool in comparing institutional choices for a given policy goal. However, the framework analysis is specific to a given situation. The next section will apply Komesar's participation-centered approach of institutional choice to the ephedrine case study. This case study illustrates how the Komesar framework actually can predict outcomes since each of the relevant institutions made decisions to implement policy in regards to banning ephedrine. The institutions implicated in the ephedrine situation, the NFL, the political processes, and the courts engaged in efforts to implement performance enhancing drug policy for the NFL. This case study gives credence to Komesar's work as an indicator of institutional action, as it describes the acts of the relevant institutions and the decisions they made in regard to ephedrine and shows that the institution which would theoretically be best under Komesar's framework was in fact the best in real life.

III. EPHEDRINE CASE STUDY

Before conducting an institutional choice analysis regarding performance enhancing drug programs in the NFL, this article will first examine a similar scenario that has already played itself out in the NFL, the political process, the market, and the courts. The application of the participation-centered approach to the facts of this particular case will assist in forecasting how each institution might react to the question of how to best implement policy for performance enhancing drugs. It will also provide evidence that the Komesar framework is a tool that could be used to determine who is in fact the best decision maker in this particular scenario. By comparing the theoretical and actual outcomes for each institution, one can see that institutional choice theory is a good indicator of how these institutions actually function to affect social change. Thus, an accurate forecast can be made of how these institutions, under similar circumstances, would respond to the policy of drug testing for professional athletes, in particularly changes in policy for the NFL.

As stated, the first step in Komesar's institutional choice analysis is to define the public policy goal.⁹⁴ After the goal is identified, an analyst can then identify the institution.⁹⁵ Third, the analyst must identify the actors within that institution and perform a cost/benefit analysis in order to determine the forces that will affect that

⁹³ Freiwald, *supra* note 35, at 578 (citing KOMESAR, *supra* note 32, at 116-21) (describing misled consumers with relatively low stakes as victims of market rent-seeking).

⁹⁴ Freiwald, *supra* note 58, at 577.

⁹⁵ *Id.*

actor's decision.⁹⁶ Finally, those forces acting upon the actor within a given institution that will affect the ultimate decision of the institution regarding the policy at issue must be illustrated.⁹⁷ In this section the institutional choice framework will be applied to each institution—the political process, the courts, the market, and the NFL—and will provide insight into how these institutions have approached the issue of banning ephedrine.

A. Introduction

Ephedrine is defined as:

A common ingredient in herbal dietary supplements used for weight loss. Ephedrine can slightly suppress your appetite, but no studies have shown it to be effective in weight loss. Ephedrine is the main active ingredient of ephedra. Ephedra is also known as Ma Huang, not ephedrine. High doses of ephedra can cause very fast heartbeat, high blood pressure, irregular heart beats, stroke, vomiting, psychoses and even death.⁹⁸

In the summer of 2001, Minnesota Vikings offensive lineman, Kory Stringer, died of heatstroke during training camp.⁹⁹ It was later discovered that Stringer had taken the supplement Ripped Fuel, which is an ephedrine product.¹⁰⁰ Ephedrine was not a banned substance at the time of Stringer's death. Former NFL Commissioner, Paul Tagliabue, stated at that time that ephedrine would be added to the NFL's banned substances list:

Manufacturers can market so-called "dietary supplements" without any prior governmental review for safety, efficacy or purity. In other words, there is no way to be certain that these types of products are safe and effective or that they contain the exact ingredients listed on their label One example is the proliferation of products containing ephedrine Last December, players and clubs were alerted to the risks of ephedrine in a notice from Dr. John Lombardo-NFL Advisor on Anabolic Steroids. He advised that, particularly with regard

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ WebMD.com (Nov. 22, 2006), *available at* http://my.webmd.com/content/article/46/2731_1672.

⁹⁹ MEALY'S LITIGATION REPORT, 2-12 Mealey's Litig. Rep. Ephedra & PPA 5 (2003).

¹⁰⁰ MEALY'S LITIGATION REPORT, 1-8 Mealey's Litig. Rep. Ephedra & PPA 11 (2001).

to athletes, there is growing evidence linking ephedrine to fatal heart rhythm difficulties, strokes, thermo-regulatory problem . . . and other serious conditions.¹⁰¹

The relevant institutions here are the NFL, the market, the political process, and the courts. Since the first step in the analysis is to assume a policy goal, it will be assumed that the social policy goal is to eliminate ephedrine from the market due to its adverse health effects. Accordingly, assume that the public policy is consumer safety.

B. NFL Analysis

In a matter where death is a possible side effect, institutional efficiency is of utmost concern. In order to begin an institutional choice analysis, one must first consider the assumed social policy goal and actors in the market.¹⁰²

The second step is to identify the actors within the institution.¹⁰³ The actors that will facilitate legal change are the labor union representatives of the NFL Players Association (NFLPA), the players themselves, and the NFL Management Council.¹⁰⁴ Komesar referred to labor/management relations as a “little government” in that labor and management have the delegated responsibility to represent the best interests of either the ownership groups or the players.¹⁰⁵ For the purposes of this discussion it can be assumed that biases are not relevant in the negotiation process between owners and players because the groups are too small to be influenced by factors outside the scope of representation for both the owners and players and are therefore the only relevant actors.¹⁰⁶ The result that would come from negotiating impacts the league as a whole as well as public perception. The goals of labor and management can be looked at like interest groups in the decision making process.¹⁰⁷ Consumers could choose not to watch the NFL if they do not change the status of ephedrine. It could be argued that the league is really only protecting players and the idea of the league policing itself is akin to the fox

¹⁰¹ *NFL General Counsel Adolpho Birch Speaks on the NFL's Drug Policy*, 5 VAND. J. ENT. L. & PRAC. 6, 10 (Winter 2002)(interview with Adolpho Birch, Counsel for NFL Labor Relations).

¹⁰² Freiwald, *supra* note 58, at 597. “To consider Institutional choice in depth, one must simplify the public policy goal discussion by assuming the goal rather than providing detailed proof.” *Id.*

¹⁰³ *Id.* at 577.

¹⁰⁴ Telephone Interview with Neil Komesar, (Aug. 25, 2005). *See also* KOMESAR, *supra* note 32, at 10.

¹⁰⁵ Telephone Interview with Neil Komesar, (Aug. 25, 2005).

¹⁰⁶ *Id.* The NFLPA and the Owners are in agreement on the banning of ephedrine because it protects the integrity of the game. According to Komesar, since both the union and management are in agreement, bias does not come into play. *Id.*

¹⁰⁷ *Id.*

guarding the hen house. NFL General Counsel Adolpho Birch scoffs at this by pointing out the fact that generally where there are criminal violations involved, the player will face league discipline as well as whatever discipline he receives from the court.¹⁰⁸ He argues that the testing program is in the best interest of the game which is the reason for the policy to begin with. According to Birch, the integrity of the game is more important than protecting the league and its players from scrutiny.¹⁰⁹ Therefore the only relevant actors within the NFL are the union and the Management Council.

In the third step, the evaluator must examine the costs versus the benefits with the assumption that all actors will act in a way that is most beneficial to the particular actor.¹¹⁰ In assessing costs for the NFL, the evaluator must examine transactional costs and the cost of information.¹¹¹ Information costs for the NFL in this situation are comparatively low considering that several transactions have already occurred.¹¹² Basically, the evaluation of different substances is ongoing. Drug evaluation is not intended simply to identify ephedrine as a possible unsafe substance. The transactions that have occurred in an ongoing basis have led to the conclusion that ephedrine was dangerous without that exact intent. The fact that the NFL consistently keeps track of research and continues to actively endeavor to examine performance enhancing drugs, demonstrates the efficiency with which the NFL can disseminate the information since they already have it on hand.¹¹³ Since drug evaluation is an ongoing process, the information is received and examined quickly because all actors who could participate in legal change for the NFL (NFLPA and the Management Council) have a background and understanding of the potential ramifications of performance enhancing drugs. Therefore, they can make concise, educated decisions on actions that would be required to produce the desired social goal. In this case study, the NFL, through its normal process of research and education, already had the information necessary to make a decision at the time of Stringer's death.¹¹⁴ Accordingly, the cost of information in this particular case study was built-in to the cost of doing business. Therefore, the cost of research for this particular purpose was very low because no

¹⁰⁸ *NFL General Counsel Adolpho Birch Speaks on the NFL's Drug Policy*, 5 VAND. J. ENT. L. & PRAC. 6, 7 (Winter 2002). Use of illegal steroids, or, for example, driving while intoxicated can have criminal sanctions, as well as league sanctions. *Id.*

¹⁰⁹ *Id.*

¹¹⁰ Freiwald, *supra* note 58, at 577.

¹¹¹ *Id.* See also KOMESAR, *supra* note 32, at 10.

¹¹² KOMESAR, *supra* note 32, at 98-100.

¹¹³ Paul Tagliabue, *What the N.F.L. Is Doing to Stamp Out Steroid Abuse*, NEW YORK TIMES Feb. 29, 2004, at 10. See also *Steroid Use in Sports: Hearing on H.R. 1862 Before the H.R. Gov't. Reform Comm.*, 109th Cong. (2005) (testimony of Gene Upshaw, President of the NFL Players Association).

¹¹⁴ *Id.*

new expenditures needed to be made in order to find out the adverse health risks involved with ephedrine use.¹¹⁵

The transactional cost of this decision could potentially be much higher. The legal costs of labor negotiations between the NFLPA and the NFL Management Council to agree on the status of ephedrine as a banned substance under the collectively bargained performance enhancing drug program, and the drafting of the amended policy could be expensive, but in this instance, not cost prohibitive because protecting players' lives is in the best interest of both parties. The benefit to the players, whom the union represents, of not dying greatly outweighs the associated costs. Additionally, since the policy goal is one of consumer safety, the fact that a well-known entity such as the NFL would ban the substance because of the adverse health risk may help to regulate the consumer market for this product. The consumers of professional sports, who may have been inclined to use this product, will see that a respected organization such as the NFL banned the supplement, it may cause the consumer to conclude the substance is not safe and to subsequently stop buying the product.

Last, the examiner would need to evaluate who has the greatest stakes in the outcome of the decision and what the benefits would be.¹¹⁶ The actors most affected by the decision would be the players through the actions of the NFLPA. Management will also be affected because if another player dies at practice, or for that matter on Monday Night Football, the public relations backlash could potentially cost more than it would to simply add this product to the banned substance list.¹¹⁷ There are several benefits to the players and the owners. The players get a level playing field where one does not have to worry about competing with chemically altered athletes, and the risks that accompany the use of these substances. The owners receive the benefit of reduced risk of injury to players, and the negative attention that goes along with "roid rage." It could be argued that the players do indeed receive benefits from the use of performance enhancing drugs in the form of lucrative contracts and longer playing careers. If an analyst were to apply the Nash equilibrium in the form of the famous "Prisoner's Dilemma" example to this problem, it would become obvious that the player has a great incentive to cheat by using performance enhancing drugs and a minimal chance of being caught.¹¹⁸ What this doesn't take into account is the concept of repeated

¹¹⁵ Freiwald, *supra* note 58, at 576-77. *See also* KOMESAR, *supra* note 32, at 68-75 (stating that technical issues are difficult to deal with because of research costs).

¹¹⁶ Freiwald, *supra* note 58, at 577.

¹¹⁷ KOMESAR, *supra* note 32, at 98-100 (stating potential losses could come from public relations transactional costs since they are costs associated with doing business.).

¹¹⁸ Roger A. McCain, *Game Theory: An Introductory Sketch*, THE DR. WILLIAM KING SERVER, available at <http://william-king.www.drexel.edu/top/eco/game/nash.html>. The Nash Equilibrium Defined: If there is a set of strategies with the property that no player can benefit by changing her strategy while the other players keep their strategies unchanged,

play.¹¹⁹ If testing is ongoing, then players will likely not cheat because it is in their best interest.¹²⁰ In this case, testing is ongoing.

The NFL appears to be an efficient institution that will act in the best interests of the players and the owners. It is clear that the relevant actors, the NFLPA and the Management Council, would incur more benefits than costs associated with the banning of ephedrine from the league. It is good for the business of both parties to protect the players from taking this substance and it also protects the owners from liability concerning ephedrine. Although the policy may not be far reaching, it could have an effect on the market by affecting consumers of this product in furtherance of the goal to ban ephedrine. Next, the discussion turns to how the market generally could affect the status of ephedrine as a nutritional supplement for the purpose of consumer safety.

then that set of strategies and the corresponding payoffs constitute the Nash Equilibrium. This was created by Nobel Laureate (in economics) and mathematician John Nash. Nash contributed several key concepts to game theory around 1950. *Id.* See also ANDREW GAVIL ET AL, ANTITRUST LAW IN PERSPECTIVE: CASES, CONCEPTS AND PROBLEMS IN COMPETITION POLICY, at 241-42 (2002). See Bruce Schneier, *Doping in Professional Sports*, Schneier.com (Aug. 10, 2006), available at http://www.schneier.com/blog/archives/2006/08/doping_in_profe.html.

The doping arms race will continue because of the incentives. It's a classic Prisoner's Dilemma.

Consider two competing athletes: Alice and Bob. Both Alice and Bob have to individually decide if they are going to take drugs or not. Imagine Alice evaluating her two options:

"If Bob doesn't take any drugs," she thinks, "then it will be in my best interest to take them. They will give me a performance edge against Bob. I have a better chance of winning."

"Similarly, if Bob takes drugs, it's also in my interest to agree to take them. At least that way Bob won't have an advantage over me."

"So even though I have no control over what Bob chooses to do, taking drugs gives me the better outcome, regardless of what his action."

Unfortunately, Bob goes through exactly the same analysis. As a result, they both take performance-enhancing drugs and neither has the advantage over the other. If they could just trust each other, they could refrain from taking the drugs and maintain the same non-advantage status—without any legal or physical danger. But competing athletes can't trust each other, and everyone feels he has to dope—and continues to search out newer and more undetectable drugs—in order to compete. And the arms race continues.

Id.

¹¹⁹ GAVIL, *supra* note 129, at 241-42.

¹²⁰ *Id.*

C. Market Analysis

In the case of the market, the relevant actors involved would be the producers, sellers, and consumers of ephedrine products. The actors who will benefit from this legal change would be the consumers. The problem with the consumer is that there are many diffused actors who may or may not want to take action to precipitate change.¹²¹

The costs associated with the production of ephedrine include the costs of advertising since producers advertise to create a market.¹²² As long as the costs of advertising create sales and profits, the benefits to the producers and sellers will obviously outweigh the costs. This advertising could create a bias among consumers.¹²³ The advertising for ephedrine products depicts it as a weight loss wonder and not as a high risk supplement.¹²⁴ Thus, advertising may lead consumers within the market to think that the product is a safe, weight-loss drug; without emphasizing the potential hazards of use. This is a form of minoritarian bias.¹²⁵ The benefit to the consumer, as discussed earlier, is not facing adverse health risks such as death, heart attack, or stroke.¹²⁶ Even though the benefit of possible weight loss seems to pale in comparison to possible death, the misinformation distributed by the ephedrine producers creates a failure in the market.

Skewed market perception due to advertising to a diffused consumer base has prevented the market from making progress in eliminating this substance. Although the stakes that the consumer has may be high, and the benefits may also be high, the consumer may not be aware of the potential for harm due to the advertising practices of ephedrine producers. In this situation, initially the market seems like an efficient, cost effective institution to facilitate the implementation of public policy because if consumers become aware of the risks involved in use, it would be in their best interest to stop using the product. Thus, the product

¹²¹ Freiwald, *supra* note 58, at 577. See also KOMESAR, *supra* note 32, at 105.

¹²² Press Release, Federal Trade Commission, FTC Releases Report on Weight-Loss Advertising (Sept. 17, 2002), available at <http://www.ftc.gov/opa/2002/09/weightlossrpt.htm>. *Id.* The U.S. Federal Trade Commission has published a forty-eight-page staff report on current trends in weight-loss advertising. *Id.* FTC releases report on weight-loss advertising, FTC news release, Sept 17, 2002. *Id.* The report noted that nearly 40 percent of the ads made at least one representation that is almost certainly false and 55 percent made at least one representation that is very likely to be false. *Id.*

¹²³ KOMESAR, *supra* note 32, at 100-105.

¹²⁴ METABOLIFE, *Me Looking Pretty* (July 1, 2006), available at Metabolife.com (2005). An advertisement for Metabolife, an ephedrine product, claimed it was “[a] breakthrough appetite suppressant, Metabolife Ultra is formulated for sustained energy, Metabolife Ultra helps you stay on track so you can meet your weight-loss goals.” *Id.*

¹²⁵ See KOMESAR, *supra* note 32, at 115-16.

¹²⁶ *NFL General Counsel Adolpho Birch Speaks on the NFL's Drug Policy*, 5 VAND. J. ENT. L. & PRAC. 6 (Winter 2002).

no longer produces profits for the producers and is no longer a viable product. However, because of advertising affecting the dissemination of information concerning the health risks involved with use, the market may not have optimal ability to facilitate public policy change on a large scale. In fact the market did not facilitate any change in the production of ephedrine products.

D. Political Process Analysis

Taking the same institutional choice analytical framework and applying it to the political process, an evaluator would find that the actors in this case study would be legislators; lobbyists for the sports supplement industry, consumers, and voters. Assuming that the public policy goal is consumer safety, the evaluator would next need to examine the costs of information, efficiency in the decision making process, the stakes each actor has in the decision, and possible skewed reasoning resulting from a minoritarian bias, if it is not countered with a majoritarian bias.¹²⁷

The cost of information, the amount of time and energy it would take to understand the information, considering it is of a technical nature, and the number of legislators involved who would need to be informed before they could make an educated decision, would result in a very high cost of information.¹²⁸ Similarly, the amount of time it would take to inform and draft a bill affecting public policy was in reality also not efficient.¹²⁹ The legislature and FDA worked to ban the substance for several years before having success.

The actors with the highest stakes in the decision are the lobbyists who work for the producers and are therefore dependent on the continued sales of ephedrine for their livelihood, the legislators who need to answer to the voters for the decisions that are made, and the consumer who is at risk for using the product.¹³⁰ Skewed information is again where this process, like the market process has the potential to break down.¹³¹ If the consumers are unaware of the potential for adverse health risks, and do not make their elected officials aware of the desire for social policy change, then the legislators may not have an accurate portrayal of public sentiment. Similarly, the lobbyists who are highly paid to influence decision-makers, may be in the minority against public sentiment, but as the old saying goes "the squeaky wheel gets the grease."

¹²⁷ See KOMESAR, *supra* note 32, at 53-97.

¹²⁸ Freiwald, *supra* note 58, at 577. See also KOMESAR, *supra* note 32, at 105-15.

¹²⁹ See generally *Nutraceutical Corp. v. Crawford*, 364 F. Supp. 2d 1310 (D.Utah 2005). The FDA invested 3 years in drafting and defending their final rule from the ephedrine producer's attacks just to have the rule overturned by the courts. *Id.*

¹³⁰ See KOMESAR, *supra* note 32, at 125-28 (referring to the roles and stakes within the political system). See also Freiwald, *supra* note 58, at 577.

¹³¹ See KOMESAR, *supra* note 32, at 53-97.

To illustrate how public sentiment and the goals of the lobbyists for the sports supplement industry are at odds, the following three example of public sentiment are included. The University of California-Berkeley Wellness Letter recently made this statement:

In 1994 federal legislation—the Dietary Supplement Health and Education Act, passed after intensive lobbying by the supplements industry—essentially removed so-called “dietary supplements” from FDA control. Manufacturers can now suggest almost anything on their packages and in ads, without any proof of safety or efficacy, but in theory at least, cannot make medical claims. Flawed studies are vigorously cited in support of dubious or even dangerous products. Studies that show a negative effect are never mentioned, and indeed may never be published.¹³²

At the recent International Symposium of Supplements in Sports held in Montreal, Canada, the official conclusion was that:

The use of nutritional supplements in sport is a matter of great concern. It represents a significant doping risk with all too often devastating consequences for athletes. In addition to the possibility of inadvertent doping from the consumption of a contaminated or mislabelled [sic] supplement, athletes face problems including risks to health and safety.¹³³

The NCAA also informed its student athletes that “[d]ietary supplements are not strictly regulated and may contain substances banned by the NCAA. What’s in the bottle is not always on the label. If you don’t know what you’re taking, you are risking both your health and your eligibility.”¹³⁴

The skewed perception created by lobbyists creates a minoritarian bias that may greatly influence the decision of governmental actors.¹³⁵ If the diffused consumer/voter base does not organize, there is a substantial chance that legislators will not make the decision that the majority of stakeholders actually desire. The cost of creating a majoritarian bias with a diffused stakeholder base is very high due to the number of people and amount of energy it would take to organize.¹³⁶ If the minoritarian view prevails, voters have the option to vote for new policy

¹³² Rick Collins, *Insider’s Update on the Regulatory Issues Surrounding Sports Supplements*, Anabolic-Pharma.com (June 18, 2004), available at <http://www.mesomorphosis.com/articles/collins/sports-supplements.htm>.

¹³³ *Id.*

¹³⁴ *Id.*

¹³⁵ See KOMESAR, *supra* note 32, at 53-97.

¹³⁶ See *id.*

makers, but then the process would need to begin all over again and time and resources would have been wasted.

The one positive for the political process in this case study is that their decision could be far-reaching and legally binding. The rest of the evaluation shows that it is an inefficient institution to make this decision, the costs are extremely high, and there is a greater chance of minoritarian bias offsetting the majority goal. In sum, the political process does not seem like the best choice of institution to achieve the desired social policy goal of consumer safety and in this case study, this institution failed to facilitate any change in policy for quite some time.

Komesar's theory seems to have predicted the behavior of the political process quite accurately. To contrast the NFL action concerning ephedrine with the federal government's actions concerning the same substance, the NFL took initial action in December 2000 to inform players of the dangers of ephedrine products.¹³⁷ Within two months of Stringer's death, the league and player's association were able to agree to ban all ephedrine products.¹³⁸ Although this may seem too late, and the government may argue that if the NFL had banned the substance earlier Stringer may still be alive, the FDA was not able to ban ephedrine products for over three years.¹³⁹ One year and one day after the FDA implemented its final rule banning the sale of all ephedrine dietary supplements, a United States District Court determined that the final rule was invalid.¹⁴⁰ Finally, on August 17, 2006, the United States Court of Appeals for the Tenth Circuit in Denver upheld the FDA's final rule declaring all dietary supplements containing ephedrine illegal for marketing in the United States, reversing a decision by the District Court of Utah.¹⁴¹ Subsequently on August 21, 2006, the FDA in a press release stated in no uncertain terms, "[n]o dosage of dietary supplements containing ephedrine alkaloids is safe and the sale of these products in the United States is illegal and subject to FDA enforcement action."¹⁴² Clearly, the political process has worked for the policy at issue, but it is also clearly not the most efficient institution to facilitate the desired change. As Sidney Wolfe, M.D., Director of Public Citizen's Health Research Group stated,

All the scientific evidence and legal authority to ban ephedra was in place at the time of our petition, which we filed in September 2001. One reason major manufacturers have stopped selling

¹³⁷ See Birch interview, *supra* note 126 at 8.

¹³⁸ *Id.*

¹³⁹ *Nutraceutical Corp. v. Crawford*, 364 F. Supp. 2d 1310 (D.Utah 2005).

¹⁴⁰ *Id.*

¹⁴¹ *Nutraceutical Corp. v. Von Eschenbach*, 459 F.3d 1033 (10th Cir. 2006).

¹⁴² Press Release, Food and Drug Administration, FDA Statement on Tenth Circuit's Ruling to Uphold FDA Decision Banning Dietary Supplements Containing Ephedrine Alkaloids (Aug. 21, 2006), available at <http://www.fda.gov/bbs/topics/NEWS/2006/NEW01434.html>.

ephedra is that the companies have become uninsurable because of massive losses in product liability cases. When we filed our petition, there were reports of 81 ephedra-related deaths. Now . . . that number has nearly doubled.¹⁴³

With that number of fatalities, the ultimate success of the FDA ban cannot be called a success.

E. Judiciary Analysis

The central purpose of the participation-centered approach is that legal change will not take place without interested parties acting to generate the desired change.¹⁴⁴ This is no more evident than in the court system. The actors in this case are the litigants; a supplement company that manufactures ephedrine products and the FDA. Other relevant actors include the judge, the lawyers who represented the litigants, and other court employees.

The interests of the relevant actors are varied. The supplement producer in this case was forced to bring an action against the FDA in order to continue to produce and sell ephedrine products.¹⁴⁵ The FDA's interest is in preventing the adverse affects that ephedrine products can inflict on the consumer. Federal judges are appointed for life and generally cannot be swayed by opinion, but rather by how the law applies to the facts in a given circumstance.¹⁴⁶ Finally, lawyers are interested in representing their clients interests.

Institutions create their own costs that affect whether they will take account of all interests. The adjudicative process, with its formal rules and its limited scale, likely poses the highest cost to participation for a diffusely spread interest.¹⁴⁷ The structure and evenhandedness that the courts possess come at a cost.¹⁴⁸ The interested parties must take action in order to affect change because the courts cannot create social change without interested parties bringing suit. The costs of litigation are generally assumed to be very high.¹⁴⁹ These costs not only includes lawyers, but also expert witnesses, researchers, writers, and the time it takes the litigants away from their own profession which limits their earning potential.¹⁵⁰ What

¹⁴³ Mark Moran, Did Delay of Ephedra Ban Cause Unnecessary Deaths?, *PSYCHIATRIC NEWS* (Feb. 6, 2004), available at <http://pn.psychiatryonline.org/cgi/content/full/39/3/24>.

¹⁴⁴ Freiwald, *supra* note 58, at 556.

¹⁴⁵ *Nutraceutical Corp. v. Crawford*, 364 F. Supp. 2d 1310-12 (2005).

¹⁴⁶ Justice Thurgood Marshall, Address at the Second Circuit Judicial Conference (May 8, 1981), (transcript available at http://www.thurgoodmarshall.com/speeches/sword_article.htm).

¹⁴⁷ See KOMESAR, *supra* note 32, at 123-25.

¹⁴⁸ *Id.*

¹⁴⁹ *Id.*

¹⁵⁰ See KOMESAR, *supra* note 32, at 127.

the courts do potentially offer is a lack of minority bias which, as demonstrated, is present in the political process through lobbyists, and in the market through advertising. However, if one set of stakeholders is the diffused consumer base, and the other is a wealthy corporation and the costs of organization for the diffused party may be cost prohibitive. Additionally, the opportunity for the corporation to hire legal counsel and possibly drag out litigation long enough to bankrupt its less organized and diffused opponent is present. The courts' approach to the ephedrine issue was illustrated in *Nutraceutical Corp. v. Crawford*.¹⁵¹

In *Nutraceutical Corp. v. Crawford*, *Nutraceutical* sued the Food and Drug Administration (FDA) claiming that the FDA's application of the final rule as applied to ephedrine federal law.¹⁵² Plaintiffs, ephedrine-alkaloid dietary supplements (EDS) manufacturers sued Defendants, the Commissioner of the United States FDA and other officials, challenging the validity of the FDA's regulation which banned all EDS. They claim the rule was in violation of the Dietary Supplement Health and Education Act (DSHEA).¹⁵³ After extensive review, the FDA concluded that all EDS, regardless of the dose suggested in labeling, presented an unreasonable risk of illness or injury, and banned the distribution of all such products on the basis that they were adulterated within the meaning of the DSHEA.¹⁵⁴ The court determined that the FDA's imposition of a risk-benefit analysis placed a burden on the producers of EDS to demonstrate a benefit as a precondition to sale, which was contrary to Congress' intent.¹⁵⁵ Congress unequivocally stated that the United States had to bear the burden of proof on each element to show that a dietary supplement was adulterated.¹⁵⁶ Thus, the FDA's requirement that the manufacturers demonstrate a benefit was contrary to the clear intent of Congress.¹⁵⁷ For those same reasons, the FDA's definition of "unreasonable", which entailed a risk-benefit analysis, was also improper.¹⁵⁸ Additionally, there was insufficient evidence in the administrative record to establish that the risks identified by the FDA were associated with the intake of low-dose EDS.¹⁵⁹ The statement by the FDA that a safe level of ephedrine could not be determined, was simply not sufficient to meet the Government's burden.¹⁶⁰

¹⁵¹ *Nutraceutical Corp. v. Crawford*, 364 F. Supp. 2d 1310 (D.Utah 2005).

¹⁵² *Id.* at 1321. Safety of dietary supplements and burden of proof on FDA; the FDA concluded that when the minimal benefits of ephedrine are weighed against the substantial risks, ephedrine presents an unreasonable risk of illness under ordinary conditions of use. *Id.* See also 69 FR 6788-01.

¹⁵³ *Nutraceutical*, 364 F. Supp. 2d at 1319.

¹⁵⁴ *Id.* at 1312.

¹⁵⁵ *Id.* at 1318-19.

¹⁵⁶ *Id.* at 1319.

¹⁵⁷ *Id.*

¹⁵⁸ *Id.*

¹⁵⁹ *Id.* at 1321.

¹⁶⁰ *Id.*

Being bound by precedent, statutory construction, and legislative intent, the court eventually granted summary judgment in favor of the Plaintiffs and stated that, “[t]he statute reads that the government’s burden is met only if it has demonstrated the presence of a risk under the conditions of use recommended or suggested in labeling.”¹⁶¹ The court also noted that the plain language of the statute requires a dose specific analysis.¹⁶² Legislative history also confirms Congress’ “intent to require . . . that the finding be dose-specific.”¹⁶³

Finally, as stated in the previous section, in August 2006, the United States Court of Appeals for the Tenth Circuit in Denver upheld the Food and Drug Administration’s (FDA) final rule, declaring all dietary supplements containing ephedrine alkaloids adulterated, and therefore illegal for marketing in the United States, reversing a decision by the District Court of Utah.¹⁶⁴ The FDA explained the decision in the following press release excerpt:

The Tenth Circuit Court of Appeal’s ruling demonstrates the soundness of FDA’s decision to ban dietary supplements containing ephedrine alkaloids, consistent with the Dietary Supplement Health and Education Act (DSHEA) of 1994. The Tenth Circuit Court of Appeals also found that Congress clearly required FDA to conduct a risk-benefit analysis under DSHEA.

FDA conducted an exhaustive and highly resource-intensive evaluation of the relevant scientific data evidence on ephedrine alkaloids before issuing its final rule, which became effective in 2004. The court found that the 133,000-page administrative record compiled by FDA supports the agency’s findings that dietary supplements containing ephedrine alkaloids pose an unreasonable risk of illness or injury to users, especially those suffering from heart disease and high blood pressure.¹⁶⁵

The inherent problem when the court considers public policy, is the institution’s inability to change anything but the issue before the courts, and that decision may not best serve public policy. The Utah court clearly did not affect change in the social policy of consumer safety in this instance. Although the decision was efficient and far-reaching, the underlying goal was not achieved. Finally, the court of appeals did effect the appropriate change by upholding the ephedrine ban, however, several more ephedrine related deaths occurred during the interim.¹⁶⁶

¹⁶¹ *Id.* See also 21 U.S.C. § 342(f)(1)(A)(1) (2005).

¹⁶² *Id.* at 1320 (interpreting the language of 21 U.S.C. § 342(f)(1)(A)(1) (2005)).

¹⁶³ *Nutraceutical Corp. v. Crawford*, 364 F. Supp. 2d 1310, 1319-20 (D.Utah 2005).

¹⁶⁴ *Nutraceutical Corp. v. Von Eschenbach*, 459 F.3d 1033 (10th Cir. 2006).

¹⁶⁵ FDA Press Release, *supra* note 142.

¹⁶⁶ Moran, *supra* note 143.

Finally, Nutraceutical can still appeal this decision to the Supreme Court and have it overturned again, negating the tenth circuit decision. This case study shows that the courts are high cost because of the time and man hours associated with litigation, and achieving the desired policy implementation through the court is difficult. The courts are not likely to be the best choice of institutions for the purposes of this goal of implementing the policy of consumer safety.

F. Conclusions of Study

The overall outcome of the case study demonstrates that even though these institutions were all able to facilitate the desired policy change and protect the public from the adverse affects of ephedrine, the political process and the courts had far-reaching and permanent implications while operating inefficiently. The market facilitated almost no change. The NFL facilitated an efficient change that did not affect the general public. It could be argued that the NFL's actions and subsequent press releases concerning ephedrine may have prompted the governmental action and subsequent court cases, and then those institutions facilitated the desired public policy change. The purpose of this case study was to test the theory and demonstrate how the institutions acted in real life. By changing the assumed policy goal from consumer safety to the elimination of ephedrine in sports, it can be seen that the NFL would be the most efficient institution in facilitating that goal.

Now that the framework has been applied to a situation that involves the same institutions and actors, utilizing a very similar policy goal, we can apply the framework to the question of who decides drug testing policy for the NFL. The actors in each institution will be the same. Because the ephedrine case study demonstrated how these actors reacted to the job of implementing policy, it is assumed that the institutions will react in a similar manner given a similar public policy to implement. Therefore, the next section bases its conclusions on the actual actions taken by each institution in the ephedrine case study.

IV. INSTITUTIONAL ANALYSIS FOR PERFORMANCE ENHANCING DRUG POLICY

The NFL has dealt with the problem of performance enhancing drugs for more than twenty years.¹⁶⁷ Over time the league has developed a program of testing and deterrence that is commonly regarded as the "most comprehensive in professional sports today."¹⁶⁸ Since the congressional hearings and the grand jury investigations in the BALCO scandal erupted, Congress has expressed its opinion, that as an institution, it is better able to determine how best to deter professional and student athletes from using steroids and other performance enhancing

¹⁶⁷ Tagliabue, *supra* note 113.

¹⁶⁸ *Steroid Use in Sports: Hearing on H.R. 1862 Before the H.R. Gov't. Reform Comm.*, 109th Cong. (2005) (testimony of Gene Upshaw, President of the NFL Players Association).

drugs.¹⁶⁹ This next section begins by reviewing the current NFL performance enhancing drug testing policy. Then it will illustrate the history of each institution in regards to drug testing programs, how the decisions have been made in the past, and how using the institutional choice framework will predict the institution best able to make the decision to achieve the desired policy in the future.

A. History of the NFL's Performance Enhancing Drug Testing Program

The NFL began testing for steroids in 1987.¹⁷⁰ The Policy and Program on Anabolic Steroids and Related Substances began suspensions for violators in 1989, and in 1990 instituted a year-round random testing program including off-season testing that is backed by suspensions without pay for violations.¹⁷¹ The program also has strong features to deter evasion including suspension for players testing positive for masking agents.¹⁷² Players who test positive are subject to up to 24 unannounced tests per year, including off-season testing.¹⁷³ They will also be subject to frequent, year-round testing for the remainder of their professional football careers.¹⁷⁴

The NFL policy apparently does have its flaws, as pointed out by Rep. Elijah Cummings (D-MD).¹⁷⁵ In the April 27, 2005, Hearing of the House Government Reform Committee he stated,

In the past five years, only 0.5% of the 15,000 NFL players have tested positive. However, while the NFL's drug testing policy is strong, it needs to be one of zero tolerance and it needs to be airtight. [The] NFL's policy fails to meet the Olympic standard in several key areas, from insufficiently prohibiting the testing [of] stimulants to inadequately penalizing players who test positive. Allegations that the NFL steroid testing policy may be underestimating the scope of the problem must be considered in light of a recent *60 Minutes* report that . . . three Carolina Panthers obtained steroids before the 2004 Super Bowl and evaded detection.¹⁷⁶

¹⁶⁹ *Id.*

¹⁷⁰ Birch interview, *supra* note 126, at 6.

¹⁷¹ *Id.*

¹⁷² *Id.* A masking agent is a substance that covers or "masks" a performance enhancing drug present in the body. It is used to avoid detection of the performance enhancing drug in a test sample. *Id.*

¹⁷³ *Id.*

¹⁷⁴ *Id.*

¹⁷⁵ *Steroid Use in Sports: Hearing on H.R. 1862 Before the H.R. Gov't. Reform Comm.*, 109th Cong. (2005).

¹⁷⁶ *Id.*

There are many obstacles that need to be addressed by both labor and management. Besides, the basic issues raised by drug testing, like test reliability, and privacy rights of players, there is also the potential conflict between employer and employee rights under federal labor laws. The following will discuss the current program bargained for by the NFL and the NFLPA.

Paul Tagliabue, former Commissioner of the NFL, addressed the steroid issue in an appearance in Washington to testify before Congress. Although Tagliabue commended the congressional involvement, he also stated that he does not believe that there is rampant cheating in professional football.¹⁷⁷ Tagliabue also released a statement to NFL.com outlining the goals of the program as well as an outline as to what the current parameters are. Tagliabue's statement outlining the current policy stated that the program consists of:

- (1) An annual test for all players plus unannounced random testing in and out of season. We test players on all teams each week of the season, conducting more than 8,000 tests per year for steroids and related substances.
- (2) A list of more than 70 prohibited substances, including anabolic steroids, steroid precursors, growth hormone, stimulants, and masking agents. This list is revised and expanded on an ongoing basis.
- (3) A mandatory four-game suspension (25 percent of the season) without pay upon a first violation. A second violation would result in a six-game suspension and a third would ban a player for a minimum of one year. Players cannot return to the field until they test clean and are cleared for play.
- (4) Strict liability for players who test positive. Violations are not excused because a player says he was unaware that a product contained a banned substance.
- (5) Education of players and teams about the program through literature, videos, a toll-free hotline, and mandatory meetings.¹⁷⁸

As Representative Cummings noted, there are very few positive tests in the NFL.¹⁷⁹ The league maintains its research and testing facilities at the UCLA Olympic

¹⁷⁷ Associated Press, *NFL Against Uniform Drug Tests*, NFL.com (April 27, 2005), available at <http://www.nfl.com/news/story/8423675>.

¹⁷⁸ Tagliabue, *supra* note 113.

¹⁷⁹ *Id.*

Analytical Laboratory in Los Angeles, which is the same institution responsible for upholding the Olympic standard of which Cummings spoke.¹⁸⁰

As an example of how the NFL's policy can adapt, Tagliabue stated that as soon as the lab informed them of the designer steroid THG, it was banned and a test was developed and implemented into the current program seamlessly.¹⁸¹ Tagliabue pointed out in his statement, and later to Congress, that through the collective bargaining process, the NFL addressed the issue of performance enhancing drugs over a decade and \$100 million ago.¹⁸²

B. NFL Analysis

In order to consider institutional choice in depth, the analyst must simplify the public policy goal discussion and assume the goal rather than providing detailed proof.¹⁸³ In this case, Congress has stated that the high visibility of the steroid problem in professional sports has caused a marked increase in performance enhancing drug use by high school students.¹⁸⁴ Adolpho Birch, Counsel for Labor Relations for the National Football League, stated that the performance enhancing drug testing program was created to attain three main goals,

. . . the first goal is to ensure the competitive integrity of the game; the second goal is to prevent the adverse health effects related to use of those types of substances; and the third would be to protect the league in terms of its role model obligations with respect to the youth who are particularly vulnerable to things that they see NFL players doing.¹⁸⁵

Based on these statements, the analyst could assume that the underlying public policy goal is to eliminate the use of performance enhancing drugs at all levels of athletic competition for the purpose of public safety.

¹⁸⁰ *Id.* See also *Steroid Use in Sports Hearing on H.R. 1862 Before the H.R. Gov't Reform Comm.*, 109th Cong. (2005).

¹⁸¹ See Tagliabue, *supra* note 113 (citing that the UCLA lab informed the league in 2002 of the new designer steroid called THG. The league immediately added it to the banned substance list and started officially testing for it on a uniform basis on October 6, 2003. Since then, the league has randomly tested more than 3,000 player urine samples and there have been no THG positives).

¹⁸² *Id.*

¹⁸³ Freiwald, *supra* note 58, at 597.

¹⁸⁴ *Steroid Use in Sports, Hearing on H.R. 1862 Before the H.R. Gov't Reform Comm.*, 109th Cong. (2005).

¹⁸⁵ Birch interview, *supra* note 126, at 6.

As in the ephedrine study, the relevant actors are the NFLPA, the NFL Management Council, and the players.¹⁸⁶ The evaluator must also look at the NFL not only as solitary institution, but also as a market force within football as a whole.¹⁸⁷

The information that is applicable to making this decision is already available to the actors in this situation due to the nature of the collectively bargained for policy currently in place.¹⁸⁸ Although the cost of gathering this information is well over the \$100 million range, it would generally be the same information that any other institution planning on making the same decision would need to acquire and utilize at its own expense.¹⁸⁹ This cost has been accumulating over a considerable period of time for the NFL. The cost of inflation and time pressure to analyze the technical data could potentially be more expensive for other institutions that are not well-versed in performance enhancing drugs. The aggregate transactions that have led to this accumulation of costs over time have also influenced the current testing model used by the NFL, and while not perfect, it is the contention of the NFL and the NFLPA that the process is constantly evolving and changing.¹⁹⁰ Since the program is a product of transactions, it is flexible enough that it can change as conditions dictate more readily than a prescribed program from outside the league. This mirrors the actual outcome that was illustrated in the ephedrine case study.¹⁹¹ The NFL in both situations has already assessed the costs of their program and can ban a substance quickly and effectively. Thus, the NFL as an institution can effectively implement an efficient plan to further the public policy goal of eliminating performance enhancing drugs from professional football. However, there needs to be further inquiry into whether it can eliminate these substances in all levels of athletic competition.

C. Market Analysis

As mentioned at the beginning of this section, the NFL acts as an institution in and of itself and it also acts like a market for professional athletes. The next part of this analysis will draw on the fact that the NFL is the market for professional football players and as such, has the capacity to determine the behaviors of the athletes it seeks to employ.

¹⁸⁶ See discussion *supra* Part III.B.

¹⁸⁷ See discussion *infra* Part IV.C.

¹⁸⁸ Johnson-Bateman Co. 295 NLRB 180, 187 (1989) (holding that the National Labor Relations Board under the National Labor Relations Act, has already ruled that drug testing is a mandatory subject of collective bargaining.).

¹⁸⁹ See Tagliabue, *supra* note 113.

¹⁹⁰ Birch interview, *supra* note 126, at 8.

¹⁹¹ See discussion *supra* Part III.B.

The actors in the market are the same as the NFL since the NFL is the market for professional football players. Therefore, the actions of the players, the NFL Management Council, need to be examined, as well as the producers and consumers of performance enhancing drugs. The consumers within the world of professional football are football players who aspire to play in the NFL, and the producers of performance enhancing drugs. The consumers/athletes are affected because the market for professional athletes (NFL) denies the ability of consumers of performance enhancing drugs (consumers/athletes) to have an opportunity to play at the elite level.

The costs and benefits to the players are balanced between having the speed and strength to play at the elite level and whether or not to use performance enhancing drugs to achieve that goal. There is a possibility that the consumers/athletes who have aspirations to play football professionally, may stop their use of the banned substances during their amateur career in order to play for the NFL. The NFPLA and the Management Council have agreed that performance enhancing drugs do not belong in pro football. If the players improve their skills through these substances there is a substantial likelihood they will be caught and prevented from competing at the highest level of play.¹⁹² Therefore it would be in the best interest of the player who aspires to play professionally not to use performance enhancing drugs. This does further the public policy goal of eliminating performance enhancing drugs from all levels of athletic competition.

There is of course the influence of producers of these drugs on the players. Producers like Conte and BALCO allegedly convinced several high profile professionals to use substances that could not be detected. Though the majority of banned substances are also illegal, some are not. Therefore advertising can be tricky. In Conte's case, he advertised a service. That service included the use of performance enhancing drugs. Some substances which are banned by the league can be advertised as supplements.¹⁹³ Other substances, like anabolic steroids, could be endorsed through high profile athletes, as Jose Canseco claimed.¹⁹⁴ The league does not allow NFL players to publicly endorse any banned substance or companies that produce any known banned substance.¹⁹⁵

The ultimate choice to use these products belongs to the player. Therefore, the bias that could affect the players comes from the league's collective bargaining agreement in the form of limits on participation based banned substance use, and through the advertising of these same substances. As the ephedrine study

¹⁹² See *supra* text accompanying note 118.

¹⁹³ See *supra* text accompanying notes 133, 135.

¹⁹⁴ See generally CANSECO, *supra* note 1.

¹⁹⁵ Associated Press, *Hasselbeck Embraces Supplements Endorsement*, July 28, 2006, available at <http://www.nfl.com/teams/story/SEA/9576231>.

illustrated, the NFLPA, as representatives for the players, made it clear that performance enhancing substances that adversely affect a player's health should not be part of the game.¹⁹⁶

Due to the fact that the NFL does not allow performance enhancing drugs as an institution, and the NFL is the most influential market force in professional football, the league would be able to efficiently implement a performance enhancing drug testing program for its current players as it creates a market force that helps eliminate these drugs in all levels of the game. The NFL demonstrated, through development of its performance enhancing drug program and the ephedrine case study, it is able to make efficient, cost effective, decisions in regards to drug testing policy for the desired public policy goal of eliminating performance-enhancing drugs from all levels of competition. This makes the NFL, and more accurately, all professional sports leagues unique. The leagues have a tremendous market share of the professional sport, and are also in position to set policy for that market. The caveat is that since all sports do not have similar testing regimens, the data is inconclusive in regards to how the all the professional sports leagues, as markets for professional athletes, would be able to handle elimination of performance enhancing drugs in all sports.

D. Political Process Analysis—The Drug Free Sports Act

Taking the same analytical framework and applying it to the political process, an evaluator would find that that the actors in this case study would be legislators, lobbyists for the sports leagues, and the voters.¹⁹⁷ Assuming that the public policy goal is the elimination of performance enhancing drugs from all levels of athletic competition, the evaluator would next need to examine the costs of information, efficiency in the decision making process, the stakes each actor has in the decision, and possible skewed reasoning resulting from a minoritarian bias, if it is not countered with a majoritarian bias.¹⁹⁸

The cost of information, the amount of time and energy it would take to understand the information, considering it is of a technical nature, and the number of legislators involved who would need to be informed before they could make an educated decision, would result in a very high cost of information.¹⁹⁹ Similarly, the amount of time it would take to inform and draft a bill affecting public policy would also not be efficient. The bill that Congress introduced on April 26, 2005, is being called the Drug Free Sports Act.²⁰⁰ The bill explains generally

¹⁹⁶ See discussion *supra* Part III.B.

¹⁹⁷ This article will concentrate on the NFL, although it should be noted that all leagues with collective bargaining agreements would be a consolidated high stakes actor in this process.

¹⁹⁸ See KOMESAR, *supra* note 32, at 53-97.

¹⁹⁹ Freiwald, *supra* note 58, at 576.

²⁰⁰ Drug Free Sports Act, H.R. 1862, 109th Cong. (2005).

that the list of banned substances will be determined by the World Anti-Doping Agency [WADA], and the program would be administered by the Secretary of Commerce.²⁰¹ It also contains a very strict suspension provision that states:

- (A) Suspension.
 - (i) An athlete who tests positive shall be suspended from participation in the professional sports association for a minimum of 2 years.
 - (ii) An athlete who tests positive, having once previously tested positive shall be permanently suspended from participation in the professional sports association.²⁰²

This universally adaptable program was created to further the public policy goal of eliminating performance enhancing drugs from all levels of athletic competition.²⁰³ This bill, if voted into law, would likely be able to achieve the desired public policy goal, but at what cost? Since this framework is based on economic theory, the costs to the applicable actors in the political process, as well as the benefits, must be considered in determining their actions.²⁰⁴

The lobbyists for the NFL, and for that matter, lobbyists for the entirety of professional sports and the leagues they represent, have a high stake in how the public policy goal is implemented. The implementation decision, if not favorable to the leagues, would drastically reduce the amount of control that they have enjoyed in policing their own rules. It would also diminish the amount of capital already invested over the last twenty years by the NFL. All the research and development that the NFL has invested in their program would be assimilated by the federal government's new plan of discipline for professional athletes. The leagues are a consolidated high stakes actor in this process and will expend their legal resources to prevent government control of their market. To date, the NFL has appeared before Congress and has offered legal documents in support of its position.²⁰⁵

Since the policy of keeping performance enhancing drugs out of all levels of athletic competition affects public safety, voters with children who are involved in athletic competition, have a high stake in the outcome of the decision. The voters are a diffused group with high stakes, so according to Komesar's participation-

²⁰¹ *Id.*, § 3(2).

²⁰² *Id.*, § 3(A)(iii).

²⁰³ *Steroid Use in Sports: Hearing on H.R. 1862 Before the H.R. Gov't. Reform Comm.*, 109th Cong. (2005).

²⁰⁴ Freiwald, *supra* note 58, at 577. See also KOMESAR, *supra* note 32, at 105-15.

²⁰⁵ *Steroid Use in Sports: Hearing on H.R. 1862 Before the H.R. Gov't. Reform Comm.*, 109th Cong. (2005) (testimony of Paul Tagliabue).

centered approach, it would be very costly to organize this group into any kind of politically effective organization.²⁰⁶ It would also cost money to be represented in the decision-making process for any interested party through lobbyist groups. A problem also arises when the information that concerns the general public is of a technical nature.²⁰⁷ The diffused power base of voters may not be aware that drug testing at the professional level could have an impact on their children's health and may not agree that changing policy at the professional level will in fact lead to the awareness that the policy goal is aimed to achieve.

As in the ephedrine case study, the time and costs associated with governmental intervention will not likely be efficient.²⁰⁸ Political action may end up costing the taxpayers millions of dollars to administer a program that was previously financed privately by the leagues. Accordingly, the voters would be reluctant to finance this program. If the Drug Free Sports Act becomes law without the voters backing, the only recourse voters have is to vote for different representation. Unfortunately, there is no guarantee that the issue will be properly addressed by the new representation. This wastes time and resources. This is inefficient and mirrors the political process' shortcomings illustrated by the ephedrine case study.²⁰⁹

Assuming that actors will act in their best interest, it would seem that the legislators would only try to address this issue if they believe that the majority of their constituents would like them to do so. Assuming the majority of voters polled approve of government action, it becomes the legislator's job to hear the majority and the minority views. The majority of voters may not have the resources to properly be heard by the legislators and that may lead to a minoritarian dominant view. In this particular case, it would seem that the cost of this proposed legislation would be high since the research is of a technical nature and specific to the sports industry. The scientific research required to administer the program outlined in the Drug Free Sports Act would require consistent review by performance enhancing drug testing experts in order to make sure that new designer steroids like THG do not impede the integrity of the program.²¹⁰ As denoted in H.R. 1862 § 3, the proposed program would be officially managed by the federal government.²¹¹

²⁰⁶ KOMESAR, *supra* note 32, at 69.

²⁰⁷ Freiwald, *supra* note 58, at 556-77.

²⁰⁸ See discussion *supra* Part III.D.

²⁰⁹ See discussion *supra* Part III.D.

²¹⁰ See Tagliabue, *supra* note 113.

²¹¹ Drug Free Sports Act, H.R. 1862, 109th Cong. § 3 (2005) (stating that the Secretary shall, by rule, issue a list of substances for which each athlete shall be tested. Such substances shall be those that are determined by the World Anti-Doping Agency to be prohibited substances; and determined by the Secretary to be performance-enhancing substances for which testing is reasonable and practicable).

So who pays for this program? The NFL has claimed they have invested over \$100 million over the past twenty years in performance enhancing drug testing programs and it could be assumed that through a proper economic analysis, this number would be quite a bit higher for the next twenty years.²¹² The legislation does not indicate who will pay for this proposed program, its organization, research, or management. It is likely that the government would need to finance the program's research as well as a staff to administer the outlined program. This government expenditure would need to come from somewhere and it is likely that the taxpayers would bear the brunt. If voters act in their own best interest, they would not want to financially support this legislation since they would now have to pay for the costs that the leagues currently pay. If this information is not clearly understood by the voter base, it is an indication that a misrepresentation in the polling process occurred because of the difficulty of disseminating the correct information to a diffused majority stakeholder power base. If this becomes the case, the polling process and the cost to obtain information become inefficient.

The sports leagues and the NFL in particular, have a high stake in the decision and the financing to influence decision makers. In evaluating the political process, an evaluator can determine the political process has a far reaching result that will likely be inefficient, costly, and not in the best interest of the public policy goal of eliminating performance enhancing drugs from all levels of athletic competition for the purpose of promoting public health. As in the ephedrine case study, and judging from the current progress of the Drug Free Sports Act, Congress would not be the best institution to make this decision.²¹³

E. Judiciary Analysis

In order for the courts to become an institution that is relevant, there would need to be a party that tests the law or rule. This can be done through judicial review or individual player action. An example of the judicial review process can be found in the ephedrine case study. Nutraceutical Corporation brought a claim against the FDA for its final rule on ephedrine.²¹⁴ The judicial review court found that the final rule violated agency rulemaking procedure and was consequently found invalid.²¹⁵ In individual player actions, a player who has been found to have violated the new law can challenge the validity after he has exhausted all of the remedies provided for by statute. In this section this article will examine relevant case law on the subject of workplace drug testing. Then institutional

²¹² See *Steroid Use in Sports: Hearing on H.R. 1862 Before the H.R. Gov't. Reform Comm.*, 109th Cong. (2005) (testimony of Paul Tagliabue). U.S. DEPARTMENT OF TRANSP., Fed. Highway Admin., Economic Analysis Primer (May 8, 2005), available at <http://www.fhwa.dot.gov/infrastructure/asstmgmt/primer03.htm>. The Consumer Price Index (CPI) is the best known inflation index and an explanation is provided. *Id.*

²¹³ See discussion *supra* Part III.D.

²¹⁴ *Nutraceutical Corp. v. Crawford*, 364 F. Supp. 2d 1310 (D.Utah 2005).

²¹⁵ *Id.*

choice theory will be applied to the relevant decision makers keeping the relevant case law in mind and drawing conclusions based on the ephedrine case study. This analysis will determine if the judiciary could implement a program that would achieve the public policy goal of eliminating performance enhancing drugs from all levels of athletic competition for public health reasons.

1. *Relevant Drug Testing Case Law*

Two of the first Supreme Court cases to test the constitutionality of drug testing in the workplace were *Skinner v. Railway Labor Executive Association*, and *National Treasury Employees Union v. Von Raab*.²¹⁶ The decisions for these companion cases were handed down from the Supreme Court on March 21, 1989.²¹⁷

The court held that railroad employers had limited discretion under the regulations and there was a strong governmental interest to regulate railroad employees' conduct to ensure public safety. The tests were not considered intrusive because there was a diminished expectation of privacy on the information relating to the physical condition of covered employees and to reasonable means of procuring the information because the industry was highly regulated for safety. The court found that most railroads required periodic physical exams for certain employees.²¹⁸

The testing programs in question were the first that considered random drug testing without any suspicion of use.²¹⁹ Prior to these two cases, an employer would need to have a reasonable suspicion in order to test an employee for drugs.²²⁰ The Court upheld the two testing programs because it found that drug testing comported with the Fourth Amendment's "reasonableness" requirement.²²¹ The majority in both cases decided, "What is reasonable, of course, depends on all of the circumstances surrounding the search or seizure and the nature of the search or seizure itself. Thus, the permissibility of a particular practice is judged by balancing its intrusion on the individual's Fourth Amendment interests against its

²¹⁶ *Skinner v. Railway Labor Executive Assn.*, 489 U.S. 602 (1989); *National Treasury Employees Union v. Von Raab*, 489 U.S. 656 (1989).

²¹⁷ ACLU, *Legislative Briefing Kit: Drug Testing* (Dec. 31, 1998), available at <http://aclu.org/news/NewsPrint.cfm?ID=9078&c=178>. See also *Skinner*, 489 U.S. at 614.

²¹⁸ See *Skinner*, 489 U.S. at 602 (1989).

²¹⁹ See ACLU, *supra* note 217.

²²⁰ *Id.*

²²¹ *Skinner*, 489 U.S. at 625 (upholding the reasonable requirement by saying, "[w]hen the balance of interests precludes insistence on a showing of probable cause, we have usually required some quantum of individualized suspicion before concluding that a search is reasonable").

promotion of legitimate governmental interests.”²²² The majority went on to hold that where the government could demonstrate “special needs” it could subject its workforce to suspicionless searches, in this case drug tests.²²³

Justice Scalia noted in his dissent, “[t]he broad, public safety rationale of the majority could lead to the suspicionless testing of automobile drivers, construction workers, and school crossing guards.”²²⁴ It seems that Justice Scalia was justified in his concerns because there has been over a 140 percent increase in private sector drug screening since 1987.²²⁵ In the post *Skinner/Von Raab* decisions, several trends have evolved. In general, courts are upholding drug-testing programs for jobs that implicate public safety.²²⁶ These are jobs like motor vehicle operator, locomotive engineers, and aircraft pilots.²²⁷ Secondly, the courts are upholding testing programs for jobs requiring the carrying of firearms.²²⁸ This would include police officers and prison guards.²²⁹ Finally the courts upheld programs for jobs that access highly classified material.²³⁰

Congress is trying to argue that because athletes are role models for children, there is an implicit nexus with public safety if athletes are perceived to have used performance-enhancing drugs.²³¹ The courts have developed the case law to the degree that they have balancing tests to determine if the act of drug testing interferes with the constitutionally given right to privacy as well as guides as to what professions may be tested. In order to continue the analysis, the evaluator must realize that this case law and the accompanying tests are what will be used by the courts to verify a challenge to the rule or law.

2. Institutional Choice Analysis

The central purpose of the participation-centered approach is that legal change will not occur without interested parties who push for it.²³² The institutional analysis must begin with the parties that are willing to bring suit.²³³ In this

²²² *Id.* at 619.

²²³ *Id.*

²²⁴ *Id.*

²²⁵ ACLU, *Drug Testing: An Overview* (Oct. 21 2002), available at <http://www.aclu.org/news/NewsPrint.cfm?ID=10997&cc=79>.

²²⁶ *AFGE Local 1533 v. Cheney*, 944 F.2d 503 (N.D. Cal. 1990).

²²⁷ *Id.*

²²⁸ *Taylor v. O'Grady*, 888 F.2d 1189 (7th Cir. 1989). See also *Brown v. City of Detroit*, 715 F. Supp. 832 (E.D. Mich. 1989).

²²⁹ *Taylor*, 888 F.2d at 1198; *Brown*, 715 F. Supp. at 834-35.

²³⁰ *Harmon v. Thornburgh*, 878 F.2d 484, 488 (D.C. Cir. 1989).

²³¹ *Steroid Use in Sports: Hearing on H.R. 1862 Before the H.R. Gov't. Reform Comm.*, 109th Cong. (2005).

²³² *Freiwald*, *supra* note 58, at 576.

²³³ *Id.* at 557.

case, that would be the NFL, the NFLPA, the federal government, and individual athletes who will be affected by the change in policy. The remaining actors are the lawyers and the officers of the court or the administrative law judge and the appropriate government agency. As mentioned in the ephedrine case study, the costs of litigation are very high.²³⁴ This not only includes lawyers fees, but also expert witnesses, researchers, writers, and the time it takes the litigants away from their own profession which limits their earning potential.²³⁵ What the courts do offer is a lack of minority bias as can be seen in the political process through lobbyists, and the market through advertising.²³⁶ If courts are selected as the institution to decide the question, the legal rule may fail to change as needed, or it may be decided on the basis of the one case that does go to court.²³⁷

Assuming that the challenge has a valid legal basis, the costs for the litigants would be substantial. The benefits however, would also be substantial. One problem in having the courts decide this policy is that the diffused majority of consumers who have a stake in the outcome are not given the right to be heard without high costs to organize and the high costs of attorneys.

The courts may also not be able to reach a decision that is far reaching because of the facts of the case. Depending on the cause of action, the courts may find that there is no legal recourse for those wishing to have the law examined. If this is the case, the courts would be the wrong institution to make the decision.

Although the officers of the court do not have a high stake in the outcome of the case, they are actors in the process and since they are human beings, they have the capacity to allow their own biases to be reflected in the decision making process.²³⁸ A federal judge has a lifetime appointment and has no outside pressure to disavow his own biases.²³⁹

In applying the institutional choice framework to the question at hand, we would first need to determine what kinds of challenges are available to potential litigants. In this case, the litigants would either be the leagues and the unions of the professional sports leagues and the U.S. government in a claim that would challenge the constitutionality of the law, or the procedure followed in the creation of such a rule like in the ephedrine case study. Alternatively, a player who tests positive may challenge the rule on the basis that the job of professional athlete has no inherent nexus with public safety.

²³⁴ See discussion *supra* Part III.E. See also KOMESAR, *supra* note 32, at 123, 227.

²³⁵ See KOMESAR, *supra* note 32, at 123-25.

²³⁶ See KOMESAR, *supra* note 32, at 100-105. See also discussion *supra* Part III.C.

²³⁷ Freiwald, *supra* note 58, at 578.

²³⁸ Jon'a Meyer & Paul Jesilow, *Research on Bias in Judicial Sentencing*, 26 N.M.L. REV. 107, 108 (1996).

²³⁹ See Marshall, *supra* note 146.

As discussed, the courts are bound to the facts of the case that is brought. As in the ephedrine case study, the circuit courts could only conclude that the FDA did not follow correct statutory procedure in the rulemaking, thus the rule was invalid.²⁴⁰ This delay caused several more ephedrine related deaths until the appeals court overturned the lower court's decision.²⁴¹ In this case, it is not clear what the controlling agency would be if any, and if there is a procedural rule that would need to be followed. If the challenge was based on the implicit nexus with public safety, it could certainly be argued that professional athletes are role models and as such have an implicit nexus with public safety if they promote the use of performance enhancing drugs.

The courts as a decision making institution, for the purpose of deciding how to implement the public policy goal of eliminating performance enhancing drugs from all levels of athletic competition for public health reasons, would be costly and inefficient. The majority of affected consumers and voters can not bring a suit with out the high costs of litigation. The litigation is costly, and if the case needs to be appealed, it could take years before a final decision is made. The decision may, after all of this, be limited to the facts of the case.

V. CONCLUSION

So here we are in 2006 estranged from the dreams of a level playing field and integrity in sport. Where do we go from here? Do I explain to my children that I was able to watch Barry Bonds in person the year he broke the record? Or do I tell them that I was witness to one of the greatest shams ever pulled on the American people? After all, sport is not only an American obsession, but it also encompasses how we define ourselves and how we play the game of life. "Don't stop playing till the whistle blows . . . fight for the extra yard . . . play by the rules . . . second place is the first to lose . . . it ain't over till its over" These euphemisms *are* our culture. In a country that is made up of several diverse and unique cultures, we can all relate to sports. Just ask. Now we need to put some ice on this black eye that we collectively share. Who should apply the ice? The NFL as an institution is the best alternative for deciding how to implement public policy with a goal of eliminating performance-enhancing drugs from all levels of athletic competition for the purpose of public health. This has been demonstrated through the application of institutional choice theory to potential decision making institutions and previous actions of these institutions under similar circumstances. As discussed, the NFL has already made the considerable investment in research and technology and due to the language of the collective bargaining agreement is capable of adapting to new drugs in a quick and decisive manner, as the ephedrine case study

²⁴⁰ *Nutraceutical Corp. v. Crawford*, 364 F. Supp. 2d 1310, 1321 (D.Utah 2005).

²⁴¹ See Moran, *supra* note 143. See also discussion *supra* Part III.D-III.E.

demonstrated.²⁴² Through the Drug Free Sports Act, the federal government is trying to decide policy for the market which in turn will promote policy for the nation as a whole. This is inefficient and the cost to the public should be prohibitive. The legislation, although instant and far-reaching, may not have an effect on the policy goal it is trying to achieve because of its inefficiency in digesting technical information and inherent delays due to biases. Although it is in the public interest to require performance-enhancing drug testing for all professional athletes, Congress is not the best alternative in deciding how this policy is to be instituted.

²⁴² NATIONAL FOOTBALL LEAGUE PLAYERS ASSOC., COLLECTIVE BARGAINING AGREEMENT BETWEEN THE NFL MANAGEMENT COUNCIL AND THE NFL PLAYERS ASSOCIATION, Art. XLIV § 6(b) (2006), available at http://nflpa.org/CBA/CBA_Complete.aspx.

Anabolic Steroids and Related Substances—The League's existing Policy and Procedure with respect to Anabolic Steroids and Related Substances will remain in effect, except as it may be modified in the future due to scientific advances with respect to testing techniques or other matters. The parties will establish a joint Advisory Committee, consisting of the League's Advisor for Anabolic Steroids and Related Substances and an equal number of members appointed by the NFLPA and by the Management Council, to study pertinent scientific and medical issues and to advise the parties on such matters.

Id. See also discussion *supra* Part IV.B.