

# INTELLIGENT DEFENSE: A CALL FOR FEDERAL REGULATION OF MIXED MARTIAL ARTS

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## INTRODUCTION

In early 2009, fight promoter Monte Cox sought to bring the worlds of boxing and mixed martial arts (MMA) together by promoting a boxing match in New Jersey between a representative from each sport.<sup>1</sup> Olympic gold medalist and World Boxing Organization (WBO) Heavyweight Champion Ray Mercer would represent boxing, while former Ultimate Fighting Championship (UFC) Heavyweight Champion Tim Sylvia would represent MMA.<sup>2</sup> Although both had impressive credentials in their respective forms of combat,<sup>3</sup> Mercer had significantly more experience in the boxing ring, as he had amassed a 36-7-1 record over his career, while Sylvia never competed in a professional boxing bout.<sup>4</sup>

The New Jersey State Athletic Control Board (NJACB), which would have been responsible for overseeing the fight,

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1. Tom Hamlin, *Sylvia's Boxing Debut Nixed*, SI.COM (Mar. 25, 2009, 12:18 PM), <http://sportsillustrated.cnn.com/2009/mma/03/25/sylvia-mercero-bout-off/index.html>.

This was not the first time a fight was set up between a boxer and an MMA fighter as, in the very first UFC event, jiu jitsu practitioner Royce Gracie fought boxer Art Jimmerson; the fight did not resemble MMA today, as few of the rules were in place and Jimmerson inexplicably wore only one boxing glove. See UFC CLASSICS 1 (Lions Gate Entertainment 2006) (on file with author). It was, however, rare for two fighters with past championships in their respective sports to be matched up like this, as evident by the fact that nowhere in American mainstream MMA history prior to the Mercer-Sylvia bout could a similar example of two former champions fighting be found. In August 2010, the UFC featured an MMA bout between former Heavyweight boxing champion James Toney (who had no previous MMA experience) and former UFC Heavyweight Champion Randy Couture, billing it in advertisements as "MMA vs. Boxing." John Morgan, *White: "We Won't Be Doing any More Boxing" After Toney's UFC 118 Loss*, MMAJUNKIE.COM (Aug. 29, 2010, 5:10 AM), <http://mmajunkie.com/news/20469/dana-white-we-wont-be-doing-any-more-boxing-after-james-toneys-ufc-118-loss.mma>. The bout was similarly uncompetitive, with Couture beating Toney via choke in around three minutes. *Id.* There are no public reports stating that the UFC faced problems with the athletic commission in getting the bout sanctioned despite the extreme difference in MMA experience.

2. John Morgan, *Tim Sylvia Set to Box Ray Mercer*, MMAJUNKIE.COM (Feb. 25, 2009, 6:55 PM), <http://mmajunkie.com/news/14104/tim-sylvia-set-to-box-ray-mercero-affliction-bout-possible.mma>. Although each would technically "represent" his respective sport in the matchup, the fight was not associated with the UFC or the WBO, but rather run by Cox, an independent promoter working with the organization Adrenaline. *Id.*

3. *Id.* (noting Mercer's boxing record as having thirty-six wins as to only seven losses, and pointing out that he won an Olympic gold medal); Josh Gross, *Testing the Best at Affliction*, SI.COM (July 18, 2008, 11:54 AM), [http://sportsillustrated.cnn.com/2008/writers/josh\\_gross/07/18/fedor.emelianenko.affliction/](http://sportsillustrated.cnn.com/2008/writers/josh_gross/07/18/fedor.emelianenko.affliction/) (describing Sylvia as a "former two-time UFC titleholder").

4. Hamlin, *supra* note 1.

vetoed the bout by refusing to sanction it within the state.<sup>5</sup> Presumably, the NJACB acted under the authority of the New Jersey Administrative Code, which allows the NJACB to “disapprove any [boxing] match on the ground that it is not in the best interest of boxing or of the health of either of the combatants.”<sup>6</sup> The Commissioner refused to comment publicly on why he vetoed the bout,<sup>7</sup> but it is possible that he was concerned about Sylvia’s boxing inexperience and the fact that Mercer was a former world champion and gold medalist.<sup>8</sup>

Undeterred, Cox rescheduled the fight to take place in Birmingham, Alabama.<sup>9</sup> At the time, Alabama did not have any state commission in place to oversee, and potentially put a stop to, the fight.<sup>10</sup> Two days before the fight was set to take place, however, the Association of Boxing Commissions (ABC) notified Cox that the match would directly violate federal law, and possibly subject the participants to criminal penalties.<sup>11</sup> The ABC was referencing the Muhammad Ali Boxing Reform Act (MABRA), amending the Professional Boxing Safety Act (PBSA), which provides that, if no state boxing commission is available to supervise a match, it may not be held unless another state’s boxing commission or an association of boxing

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5. *Id.*

6. N.J. ADMIN. CODE § 13:46-19.2 (2010).

7. See Hamlin, *supra* note 1. Also contributing to the Commissioner’s decision not to sanction the bout may have been the fact that the appearance of having a fight between two competitors with a wide disparity in experience was not in the best interest of boxing. See § 13:46-19.2 (granting the Commissioner power to also disapprove a bout on the ground it is not in the best interest of boxing).

8. See Morgan, *supra* note 2 (noting that Sylvia had competed in twenty-nine prior professional MMA bouts before the Mercer fight); Ray “Merciless” Mercer Statistics, SHERDOG, <http://www.sherdog.com/fighter/Ray-Mercer-22389> (last visited Apr. 25, 2011) (listing Mercer’s fight against Sylvia as his only professional MMA bout).

9. *Adrenaline 3, Tim Sylvia-Ray Mercer Moved to June 13*, MMAFIGHTING.COM (Mar. 30, 2009, 2:49 PM), <http://mmafighting.com/news/2009/03/30/adrenaline-3-tim-sylvia-ray-merc-er-moved-june-13>.

10. *ABC Balks at Mercer-Sylvia!*, FIGHTNEWS.COM (June 11, 2009), <http://www.fightnews.com/Boxing/abc-balks-at-merc-er-silva-13688>. The Governor of Alabama approved legislation to create a boxing commission on May 21, 2009, yet the commission was not in place before the June 13 event. See 2009 Ala. Legis. Serv. 622 (West) (creating Alabama Boxing Commission); Dana Beyerle, *Most State Boxing Commission Members Appointed*, GADSDENTIMES.COM (July 20, 2009, 9:13 PM), <http://www.gadsdentimes.com/article/20090720/news/907209983> (noting that the Alabama Boxing Commissioners were in the process of being appointed in late July 2009).

11. See *ABC Balks at Mercer-Sylvia!*, *supra* note 10.

commissions supervises it.<sup>12</sup> Compliance was not much of an option for Cox because it is highly unlikely that another boxing commission would have approved the fight after NJACB expressly refused to sanction it.<sup>13</sup>

After state and federal boxing regulations worked together to successfully prevent the potentially unsafe boxing match, Cox turned to MMA. With neither Alabama MMA regulations nor a federal safety net like the one provided for in boxing, the fight was able to take place.<sup>14</sup> Much as the NJACB likely feared when it rejected the fight, the result turned out to be lopsided, and endangered both Sylvia's health and MMA's reputation.<sup>15</sup> Mercer knocked the former UFC Champion unconscious after a mere nine seconds of stand-up fighting,

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12. 15 U.S.C. § 6303 (2006). Under the same section, the match must also be run in accordance with the most recent version of the ABC's recommended regulatory guidelines. § 6303(a).

13. Although there is no definitive proof that no other commission would sanction the boxing match in Alabama, it is a safe assumption considering two things: the fact that Cox did not go this route, and the fact that athletic commissions frequently work together to prevent fighters and promoters from taking advantage of the system. An example of this is the fact that athletic commissions generally honor suspensions of fighters laid down by other commissions. See Mike Chiappetta, *Referee Shoved by Keith Jardine Reacts to Fighter's Actions, Suspension*, MMA FIGHTING.COM (Sept. 17, 2010, 10:30 AM), <http://www.mmafighting.com/2010/09/17/referee-pushed-by-suspended-jardine-i-think-he-got-caught-in-t/> ("MMA Fighting spoke to one state athletic commission department head -- Nevada state executive director Keith Kizer -- who said while in MMA, honoring suspensions is not automatic, his influential state, like many others, often does so. 'I've never known us to not give reciprocity and honor suspensions for any sport for unsportsmanlike conduct,' he said."). See, e.g., Steven Morrocco, *NSAC Head: Chael Sonnen Needs to Answer for Testosterone, Referee Criticism*, MMAJUNKIE.COM (Apr. 5, 2011, 2:10 PM), <http://mmajunkie.com/news/23117/nsac-head-chael-sonnen-needs-to-answer-for-testosterone-referee-comments.mma> (describing how the Executive Director of the Nevada State Athletic Commission will require Chael Sonnen to go through an administrative hearing in Nevada in order to obtain a second's license in response to statements made during a suspension hearing in front of the California State Athletic Commission); *Florida State Boxing Commission Will Honor Shamrock Suspension*, Post to MMA Insider Blog, MMAWEEKLY.COM (Mar. 12, 2009), <http://insider.mmaweekly.com/ken-shamrock/florida-state-boxing-commission-will-honor-shamrock-suspension/> (discussing how the Florida State Boxing Commission refused to license Ken Shamrock for a fight in Florida due to a suspension levied by the California State Athletic Commission).

14. Loretta Hunt, *Sylvia-Mercer Goes MMA*, SHERDOG (June 11, 2009), <http://www.sherdog.com/news/news/Sylvia-Mercer-Goes-MMA-17922> (noting bout would go on unsanctioned by an athletic committee).

15. Jake Rossen, *Ray Mercer Beats Tim Sylvia; Boxing's Death Rattle Delayed*, ESPN (June 15, 2009, 11:26 AM), [http://espn.go.com/extra/mma/blog/\\_name/mma/id/4259955/mercer-beats-sylvia-boxing-death-rattle-delayed](http://espn.go.com/extra/mma/blog/_name/mma/id/4259955/mercer-beats-sylvia-boxing-death-rattle-delayed) (describing Sylvia as being "knocked into a previously undiscovered level of Internet infamy due to the quick knockout defeat").

which amounted to nothing more than boxing with lighter-than-normal gloves.<sup>16</sup>

Despite the fact that most states currently regulate MMA, and others are currently in the process of doing so,<sup>17</sup> there is still a need for uniform safety regulations. Although seemingly intrastate in nature, MMA affects interstate commerce under Supreme Court precedent.<sup>18</sup> Therefore, Congress has the power under the Interstate Commerce Clause and Indian Commerce Clause jurisprudence to promulgate uniform MMA health and safety regulations to adequately protect fighters.<sup>19</sup> This power permits Congress to legislate MMA without violating the Tenth Amendment principles of federalism articulated in *New York v. United States*<sup>20</sup> and *Printz v. United States*.<sup>21</sup>

Part I of this Article will outline MMA's currently fragmented regulatory structure, pointing out some of the stark differences between states and the problems with such a disjointed system. The focus of Part II is how Congress may use its Commerce Clause power to promulgate uniform MMA safety regulations, while not violating the Tenth Amendment under the standards espoused by the Supreme Court in *New York v. United States* and *Printz v. United States*. Part III concludes by providing suggestions for the content of a federal act, combining in part the most adaptable facets of the PBSA and MABRA, the proposed amendments to the MABRA, and the MMA Unified Rules of Conduct ("Unified Rules").

## I. CURRENT STATE OF MMA REGULATION

MMA can generally be characterized as a combat sport in

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16. See *id.*; Eldrick Bone, *Hang up the Boxing Gloves, It's MMA's Time*, DAILY SUNDIAL (Oct. 2, 2009), <http://sundial.csun.edu/2009/10/hang-up-the-boxing-gloves-its-mmas-time/#> (noting how, as opposed to boxing, "MMA fighters use only [four]-ounce gloves, which makes their punches more dangerous"). While one would assume that the switch to MMA rules would swing the experience factor in favor of Sylvia, that was not the case. Had the fight lasted longer than nine seconds, Sylvia may have been able to take advantage of the rule changes and taken Mercer down to the mat, where Mercer was considerably less experienced. See *supra* note 8 (describing experience gap).

17. See discussion *infra* Part I (discussing current MMA regulatory regimes among states and Indian tribes).

18. See *infra* Part II.A.

19. U.S. CONST. art. I, § 8, cl. 3. See discussion *infra* Part II.

20. 505 U.S. 144 (1992). See discussion *infra* Part II.C.

21. 521 U.S. 898 (1997). See discussion *infra* Part II.C.

which two fighters use some combination of boxing, wrestling, judo, jiu-jitsu, and karate.<sup>22</sup> The winner is the first to knock out the other fighter, make him submit, or be declared the winner by either the referee during the fight or the judges after it.<sup>23</sup> Currently, MMA is regulated on a state-by-state basis, generally falling under the governance of a state administrative agency.<sup>24</sup> Considering that MMA is relatively new to the mainstream sports landscape,<sup>25</sup> there are not many people with an extensive background in promoting, refereeing, judging, or even watching the sport.<sup>26</sup> As a result, most states have put MMA under the purview of the same agencies that had previously been created to govern boxing, whether they are termed “athletic commissions” or “boxing commissions.”<sup>27</sup>

### A. *The State System*

Although many states use similar regulatory schemes, it

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22. Fact Sheet, UFC, [http://www.ufc.com/about/Fact\\_Sheet](http://www.ufc.com/about/Fact_Sheet) (last visited Feb. 21, 2009). Most MMA bouts occur inside a cage and consist of a combination of striking (including blows with the hands, feet, knees, or elbows), and grappling (including choke holds, submissions, and takedowns). *Id.* In general, a combatant must be competent at striking and grappling while standing and on the ground in order to be successful. *The MMA Formula – How Striking, Takedowns and Groundfighting Interact*, GRAPPLEARTS, <http://www.grapplearts.com/The-MMA-Formula.htm> (last visited Apr. 7, 2011) [hereinafter *The MMA Formula*]. See generally OHIO ADMIN. CODE 3773:7-01 (2010) (defining many common MMA terms and techniques).

23. Fact Sheet, *supra* note 22.

24. See discussion *infra* Part I.A (outlining current status of MMA regulation).

25. *History of the Ultimate Fighting Championship*, <http://www.ufc.com/about/history>, UFC (last visited Jan. 20, 2010). The first UFC event took place in 1993, yet the sport did not gain traction with the mainstream sporting world in America until the company was purchased by Zuffa LLC in January 2001 and struck deals with Spike TV and pay-per-view providers. See Matthew Miller, *Ultimate Cash Machine*, FORBES, May 5, 2008, at 80. Prior to that time, events were held in relative anonymity, with the sport unregulated in many states and taken off the air by many pay-per-view providers due to its perceived brutal nature. *Id.*

26. See Miller, *supra* note 25, at 80 (explaining that state regulation was necessary to turn the UFC into a profitable endeavor because of its lack of previous exposure and poor image).

27. *Links to State Athletic Commissions*, ELITE MMA REFEREE SCHOOL, [http://elitemmareferees.com/index.php?option=com\\_content&view=article&id=47&Itemid=57](http://elitemmareferees.com/index.php?option=com_content&view=article&id=47&Itemid=57) (last visited Apr. 9, 2011) (listing states that regulate MMA and noting that most states regulate MMA with the state athletic commission while others use a boxing commission). See generally Devin Burstein, *The Muhammad Ali Boxing Reform Act: Its Problems and Remedies, Including the Possibility of a United States Boxing Administration*, 21 CARDOZO ARTS & ENT. L.J. 433, 434–35 (2003) (explaining the structure state boxing commissions).

can be argued that no two states treat a sport exactly the same, whether the differences are in the actual rules and regulations or the way in which they are—or in many cases are not—administered by the responsible government agency.<sup>28</sup> Most states base their MMA regulation on the MMA Unified Rules.<sup>29</sup> This has led to relative uniformity among states concerning actual fighting rules. There is, however, a greater regulatory variation for those fighting aspects that do not occur in the cage, even among states that have adopted something similar to the Unified Rules.<sup>30</sup> These differences—including procedures employed to test athletes for drug use—have led to forum-shopping and have potentially endangered many combatants.<sup>31</sup>

In addition, some states have administrative agencies in place to regulate boxing, but currently have yet to create rules and regulations for MMA.<sup>32</sup> While it would make sense to assume that these states do not permit MMA within their borders, that is generally not the case.<sup>33</sup> Promoters in these states occasionally book questionable fights—such as Mercer-Sylvia in Alabama—that take advantage of disinterested administrative agencies.<sup>34</sup>

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28. See discussion *infra* Part I.A.1–3.

29. See, e.g., N.J. ADMIN. CODE §§ 13:46-24A.01 to .17, -24B.1 to .5 (2010). The reason for most states adopting some form of these rules is likely the fact that the UFC—the most recognizable and profitable MMA organization in the country—will not run an event without the Unified Rules. See Fact Sheet, *supra* note 22 (explaining that the UFC utilizes the Unified Rules in its events).

30. See discussion *infra* Part I.A.1.

31. See discussion *infra* Part I.B (describing ways in which fighters have been able to exploit the system by forum-shopping to find a jurisdiction with fewer restrictions).

32. See discussion *infra* Part I.A.2 (outlining states whose MMA regulations, or lack thereof, fit this description).

33. See Hunt, *supra* note 14 (describing the unsanctioned Mercer-Sylvia fight in Alabama). West Virginia's athletic commission website at one time featured an advertisement for Toughman Competitions, a name usually associated with a no-rules variation of MMA, even though the commission appears to have no formal rules for MMA. See generally *The Original Toughman Contest West Virginia*, <http://www.wvtoughman.com>, TOUGHMAN (last visited Jan. 20, 2010).

34. See Rossen, *supra* note 16 (recapping Sylvia-Mercer fight). See also John Morgan, *Maynard Stifled in Debut, Drops Decision in Auburn Fight Night Main Event*, MMAJUNKIE.COM (Apr. 26, 2009, 12:00 AM), <http://mmajunkie.com/news/14694/maynard-stifled-in-mma-debut-drops-unanimous-decision-at-auburn-fight-night.mma> (describing fight taking place in Alabama that featured a combatant with neither arms nor legs); *Jeff Monson vs. Travis Fulton, DMX vs. Eric Martinez Headline Dec. 12 MMA/Boxing Event*, MMAJUNKIE.COM (Oct. 28, 2009, 4:10 PM), <http://mmajunkie.com/news/16652/jeff-monson-vs-travis-fulton-dmx-vs-eric-martinez-headline-dec-12-mmaboxing-event.mma> (describing booked boxing match between rapper DMX and an

Finally, there are currently two states, Alaska and Wyoming, that have no state athletic commission in place.<sup>35</sup> Similar to those states with only boxing regulations, holding an MMA event is not explicitly illegal in either state<sup>36</sup>—providing an option for promoter's seeking to skirt formal regulations and find a safe haven for a questionable bout.

### 1. The Unified Rules Regimes

In 2000, the NJACB codified the Unified Rules.<sup>37</sup> The Unified Rules are a comprehensive scheme of MMA regulations establishing—among other things—weight classes, health and safety requirements, and the particulars of actual fights.<sup>38</sup> In addition, the ABC created a committee—chaired by Nick Lembo of the NJACB and representatives from other states, Indian tribes, and Canadian provinces—to convene annually to review the Unified Rules and propose revisions.<sup>39</sup> It is likely that because the UFC and other large MMA promoting organizations have endorsed the Unified Rules,<sup>40</sup> most states that have formally regulated MMA have either codified, or are seeking to codify, some variation of the rules.<sup>41</sup> States that track the Unified Rules include Nevada<sup>42</sup> and California,<sup>43</sup> which, unsurprisingly, host a majority of marquee MMA events promoted by UFC and Strikeforce, the

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aspiring actor and noting how neither had any professional boxing experience).

35. See discussion *infra* Part I.A.3.

36. An organization known as Kick Down MMA regularly puts on events in the state. See *Barker Crowned 1st Ever Kick Down Flyweight*, Post to *Kick Down Events*, KICK DOWN MMA, [http://www.kickdownmma.com/index.php?option=com\\_content&view=category&layout=blog&id=1&Itemid=16](http://www.kickdownmma.com/index.php?option=com_content&view=category&layout=blog&id=1&Itemid=16) (last visited May 5, 2011).

37. See N.J. ADMIN. CODE §§ 13:46-24A.01 to .17, -24B.1 to .5 (2010).

38. See *id.*

39. *Unified Rules of MMA*, ASS'N OF BOXING COMM'NS, [http://www.abcboxing.com/unified\\_mma\\_rules.html](http://www.abcboxing.com/unified_mma_rules.html) (last visited Feb. 5, 2010) (listing members of committee appointed by ABC to review and propose changes to the Unified Rules).

40. The History of MMA, MMAFACTS, <http://www.mmafacts.com/main.cfm?actionId=globalShowStaticContent&screenKey=cmpHistory&s=MMA> (last visited Apr. 5, 2011) (noting that the UFC is governed by the Unified Rules); *Strikeforce to Adopt Unified Rules, Continue on Showtime*, SHERDOG (Mar. 11, 2011), <http://www.sherdog.com/news/news/Strikeforce-to-Adopt-Unified-Rules-Continue-on-Showtime-30840> (discussing how Strikeforce plans on adopting the Unified Rules).

41. Jordan T. Smith, *Fighting for Regulation: Mixed Martial Arts Legislation in the United States*, 58 *DRAKE L. REV.* 617, 631 (2010).

42. See NEV. ADMIN. CODE § 467.002-.956 (2010).

43. See CAL. CODE REGS. tit. 4, § 500 (2010).

major MMA promoters in the country.<sup>44</sup> Other jurisdictions that follow the Uniform Rules include Michigan,<sup>45</sup> Delaware,<sup>46</sup> and the Mohegan Tribal Gaming Authority.<sup>47</sup>

Although other states have codified the provisions of the Unified Rules that pertain to the actual fights and fighter safety, these states have unfortunately come up short in mandating drug testing.<sup>48</sup> States with such regimes include Texas,<sup>49</sup> Florida,<sup>50</sup> and the Seneca Nation of Indians.<sup>51</sup> This is of special consequence in Texas, which has hosted numerous high profile events, yet does not mandate any procedures for random testing of fighters for performance enhancing drugs.<sup>52</sup>

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44. UFC has its headquarters in Las Vegas and often holds live pay-per-view events there. See Miller, *supra* note 25, at 83. California, although not frequented as often by the UFC, often hosts large events ran by Strikeforce and World Extreme Cagefighting, which are generally considered the next biggest MMA organizations in the country. See John Morgan, *Strikeforce's Next "Arena Series" Show Likely for San Jose in December*, MMAJUNKIE.COM (Oct. 5, 2009, 8:00 AM), <http://mmajunkie.com/news/16385/strikeforces-next-arena-series-show-likely-for-san-jose-in-december.mma> (noting how Strikeforce is based in San Jose and had previously hosted ten events in San Jose).

45. See MICH. COMP. LAWS § 338.3622 (2010).

46. See 24 DEL. CODE REGS. § 8800 (LexisNexis 2010).

47. Although the Mohegan Sun Tribal Gaming Authority does not publish the Unified Rules as their own, its commissioner, Mike Mazzulli, is on the ABC committee that reviews and proposes yearly amendments to the Unified Rules. See *Unified Rules of MMA*, *supra* note 39. In addition, the Mohegan Sun Tribal Gaming Authority hosted UFC 55: Fury in 2005 under the Unified Rules. See UFC 55: FURY (StudioWorks 2005).

48. Compare 16 TEX. ADMIN. CODE § 61.1-.120 (2010) (containing no drug testing provisions), with NEV. ADMIN. CODE § 467.850 (2010) (outlining Nevada's comprehensive drug and alcohol testing procedure).

49. See 16 TEX. ADMIN. CODE § 61.1-.120; see also *infra* note 89 and accompanying text (discussing instance where Texas lack of drug testing was magnified).

50. See FLA. ADMIN. CODE ANN. 61K1-1.001 to 1.080 (2010); see also Kid Nate, *Nick Diaz vs. Marius Zaromskis for Strikeforce Welterweight Title in January*, BLOODY ELBOW (Dec. 19, 2009, 9:49 AM), <http://www.bloodyelbow.com/2009/12/19/1208499/nick-diaz-vs-marius-zaromskis-for> (pointing out how Florida does not mandate testing for compassionate use marijuana, and therefore allowed Nick Diaz to fight while potentially taking the drug, although he had previously not been allowed to in California, which does not allow such usage).

51. See generally THE SENECA NATION OF INDIANS ATHLETIC COMM'N, RULES AND REGULATIONS REGARDING UNARMED COMBAT SPORTS (2009), <http://ragingwolf.com/wp-content/uploads/2010/02/MMAfinalrules.pdf>. The published rules have no explicit provision requiring any pre or post-fight drug testing. See *id.*

52. See Dann Stupp, *UFC 103 Drug Tests Come Back Clean*, MMAJUNKIE.COM (Oct. 9, 2009, 1:25 PM), <http://mmajunkie.com/news/16439/ufc-103-drug-tests-come-back-clean.mma> (reporting that a spokesperson for the Texas Department of Licensing and Regulating stated: "Our rules were and still are that we do not require drug testing (for combat sports)"). High profile events held in Texas include UFC 69 in Houston and UFC 103 in Dallas. See *UFC Past Events*, UFC, [http://www.ufc.com/event/Past\\_Events](http://www.ufc.com/event/Past_Events)

This lack of testing is of particular importance given the dangers of performance enhancing drugs and the unfair advantage that results from their use, namely increasing the strength of the fighters.<sup>53</sup> Not only will fighters who use such drugs be viewed and questioned as possible cheaters,<sup>54</sup> but there is a concern that serious injury will result if a fighter with artificial strength administers a beating on a clean fighter without the added boost.<sup>55</sup>

## 2. The Unclear Regimes

There is a small group of states that have no expressly announced MMA regulations. Although many members of this group appear to have the framework in place to announce formal MMA regulations, they have made no concrete steps in that direction.<sup>56</sup> For example, Alabama recently created an athletic commission by statute.<sup>57</sup> Alabama will eventually use this agency to regulate MMA; however, on its face, the relevant statute creating the commission spoke only to boxing, other than its declaration that “unarmed combat” does not include a MMA event sanctioned, approved, or endorsed by a nationally recognized organization.<sup>58</sup> To accommodate MMA, the commission was renamed the Alabama Athletic Commission; yet since its initial creation in early 2009, the sanctioning body has yet to promulgate any formal MMA regulations.<sup>59</sup> Such ambiguity leads to a natural fear that,

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(last visited Feb. 6, 2010) (listing all past UFC sanctioned events).

53. See generally E. Tim Walker, Comment, *Missing the Target: How Performance-Enhancing Drugs Go Unnoticed and Endanger the Lives of Athletes*, 10 VILL. SPORTS & ENT. L.J. 181 (2003) (discussing the performance enhancing drug culture in professional sports and the problems that have resulted from it).

54. See *id.* at 201 (describing how baseball players using performance enhancing drugs are perceived by fans as cheaters, even though the actual benefits of the drugs may still be questionable).

55. See Maxwell J. Mehlman et al., *Health Law Symposium: Doping in Sports and the Use of State Power*, 50 ST. LOUIS U. L.J. 15, 18–19 (2005) (explaining how steroid and performance enhancing drug use among athletes is normally geared at increasing strength and building muscle tissue, with some scientific and anecdotal evidence pointing to their effectiveness); *The MMA Formula*, *supra* note 22 (describing importance of striking in MMA).

56. This describes the situation where there is a state athletic commission already in place, which already has express authority to regulate boxing. See ALA. CODE § 41-9-1021 to -1040 (2010) (pointing to Alabama’s recently created commission).

57. See *id.*

58. § 41-9-1021(18)(b)(6).

59. See Aaron Suttles, *Alabama Boxers Have to Wait Before Fighting*,

even once regulations are published, MMA in the state may remain disorganized and thus unsafe.

In addition to Alabama, regimes that fit into this category can be found in West Virginia,<sup>60</sup> and South Dakota.<sup>61</sup> Alabama is of particular relevance because it has hosted some especially notable MMA bouts, including the Mercer-Sylvia match,<sup>62</sup> and a fight featuring congenial amputee Kyle Maynard, who has neither full arms nor legs.<sup>63</sup> Such bouts have likely found their way to Alabama because of the state's lack of regulation, population, and location in comparison to the other few states without formal regulation.<sup>64</sup> Without any formal regulations in place, it is difficult to tell what standards the promoters are held to. It seems likely that the promoters are allowed to set most of the rules themselves. Unfortunately, it often seems that the promoters need not fear any regulatory body getting in the way of many of their proposed matchups, as evidenced by some of those that have taken place in Alabama.<sup>65</sup>

### 3. The Lawless Regimes

The third and most problematic group has no form of MMA regulation; luckily, it is also the smallest, given the obvious safety implications that can result from a lack of regulation. Alaska and Wyoming are currently the only two

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TUSCALOOSANEWS.COM (July 4, 2010, 3:30 AM), <http://www.tuscaloosaneews.com/article/20100704/news/100709904?p=1&tc=pg&tc=ar>.

60. See W. VA. CODE R. § 177-1-1 (2010).

61. On March 4, 2009, South Dakota's Legislative Assembly passed a bill creating the South Dakota Boxing Commission. See H.B. 1239, 2009 Leg., 84th Sess. (S.D. 2009), available at <http://legis.state.sd.us/sessions/2009/Bills/HB1239S.htm>. The Bill states that the commission shall regulate boxing and MMA, but that an event can also take place within the state if supervised by another commission. *Id.* No actual rules were outlined in the bill, but rather would presumably be left for the boxing commission to promulgate. See *id.*

62. See *supra* Introduction.

63. Morgan, *supra* note 34.

64. States without formal regulation include South Dakota, West Virginia, Wyoming, and Alaska. See *supra* notes 60–61 and accompanying text; see also discussion *infra* Part I.A.3 (discussing Alaska and Wyoming, regimes with no formal athletic commission).

65. While it is not clear how the individual promoters determine what rules would be used for their events, it is clear that they do not always follow the same standards of care as would be required under many other athletic commissions, as evident by the allowance of fights that had been disallowed by a commission. See, e.g., *supra* Introduction (describing Sylvia-Mercer ordeal).

states without any formal athletic commission.<sup>66</sup> In fact, Wyoming does not provide any formal guidance whatsoever on MMA regulation. As for Alaska, its former Director of the Division of Occupational Licensing merely recommended, in a 2002 letter, that boxing and wrestling promoters follow rules to ensure fighter safety, especially considering that wrestlers are eligible to compete at eighteen-years-old and boxers at twenty-one.<sup>67</sup> This letter makes no mention of MMA.<sup>68</sup>

These problems are compounded because MMA events are hosted in areas—including Indian Reservations such as the Sault Tribe of northern Michigan—that have not published any formal rules nor have any legislating body formally assigned to regulate the events.<sup>69</sup> Further, the mere fact that any jurisdiction in the country exists without a formal commission promulgating and enforcing rules has the potential to be dangerous for MMA fighters. Without federal legislation, nothing is stopping a crooked promoter from seeking refuge in that jurisdiction and putting on a fight that would not have been allowed by a formal athletic commission. The promoter may not care that the event takes place in a sparsely populated state because of the potential to make money from internet streaming, pay-per-view, and DVD sales.<sup>70</sup>

Currently, MMA is illegal in New York, which distinguishes it from the other states in this group, as any promoter or fighter seeking to partake in an event in New

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66. David Nelmark, *State Athletic Commission Websites*, MIXED MARTIAL ARTS L. BLOG (Aug. 2, 2009), <http://www.mixedmartialartslawblog.com/2010/08/articles/state-athletic-commissions/state-athletic-commission-websites/>.

67. Letter from Catherine Reardon, Dir., Div. of Occupational Licensing, Alaska Dep't of Cmty. & Econ. Dev., to Members of Alaska's Boxing and Wrestling Community (Sept. 18, 2002), <http://www.dced.state.ak.us/occ/path.htm>. The letter, signed by the Director of the Division of Occupational Licensing, asks promoters and participants in events to follow "standards for the conduct of professional boxing, club boxing and professional wrestling contests." *Id.*

68. *See id.*

69. Unlike many other tribes, the Sault Tribe is not a member of the ABC, nor does it post any formal MMA regulation with its other rules and regulations. *See Boxing Commissions – Contact Information*, ASS'N OF BOXING COMM'N, [http://www.abcboxing.com/commission\\_contacts.html](http://www.abcboxing.com/commission_contacts.html) (last visited Feb. 10, 2010) (listing ABC-member commissions).

70. Although the 2009 unsanctioned fight featuring congenial amputee Kyle Maynard took place in a venue with a dirt floor that was likely not fit to hold a legitimate MMA event, it was broadcast on internet pay-per-view. *See Morgan, supra* note 34.

York would be subject to criminal penalties.<sup>71</sup> There have been repeated pushes within the New York State Government to pass bills to legalize the sport.<sup>72</sup> It is safe to assume that, if the legislation is passed, New York will adopt express, formal regulations consisting of some version of the Unified Rules. This is a safe assumption because one of the stated rationales—if not the only—for the legislation is to attract tax dollars from a large-scale UFC event.<sup>73</sup>

### *B. Problems with the Current Regulatory Scheme*

There are many inherent problems with a scattered and inconsistent MMA regulatory climate. Until 1997, boxing regulation consisted of a similar state-only scheme.<sup>74</sup> Currently, MMA faces the same problems that boxing encountered with the state-only scheme.<sup>75</sup> For example, Congress was presented with evidence that many boxers were able to exploit the system by fighting in an unregulated or less-regulated state after receiving a medical suspension from another state.<sup>76</sup> Any medical suspension should have kept those boxers on the sidelines until a doctor cleared the medical issue prompting the suspension.<sup>77</sup> Additionally, the

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71. See N.Y. UNCONSOL. LAW CH. 7, § 5-a(3)(a) (Consol. 2010) (“A person who knowingly advances or profits from a combative sport activity shall be guilty of a class A misdemeanor, and shall be guilty of a class E felony if he or she has been convicted in the previous five years of violating this subdivision.”).

72. On January 19, 2010, New York Governor David Patterson introduced a state budget proposal that would legalize MMA in the state. See Jack Encarnacao, *New York Governor Introduces MMA Bill*, SHERDOG (Jan. 19, 2010), <http://www.sherdog.com/news/news/New-York-Governor-Introduces-MMA-Bill-22148>. The bill will now be put before the New York State Assembly for a vote. *Id.*

73. See *supra* note 40 and accompanying text (describing how the UFC and World Extreme Cagefighting (WEC) utilize the Unified Rules and therefore provide an incentive for a state commission to do the same).

74. See Sen. John McCain & Ken Nahigian, *A Fighting Chance for Professional Boxing*, 15 STAN. L. & POL’Y REV. 7, 19–20 (2004).

75. See S. REP. NO. 103-408, at 2 (1994).

76. *Id.* at 7–8. It is common practice for an athletic commission to suspend a fighter for medical reasons after a fight, with the suspension’s length often contingent on any injuries sustained in the fight. See, e.g., N.J. STAT. ANN. § 5:2A-8.1 (2010) (laying out New Jersey’s medical suspension authority).

77. See Kelley C. Howard, *Regulating the Sport of Boxing—Congress Throws the First Punch with the Professional Boxing Safety Act*, 7 SETON HALL J. SPORT L. 103, 109 (1997) (citing S. REP. NO. 103-408, at 8 (1994).) (describing how boxer Ricky Stackhouse was allowed to fight in Florida after receiving a lifetime medical suspension in New York).

Senate report showed that boxers would frequently compete multiple times in unregulated states within short periods of time, regardless of the fight results or any injuries sustained.<sup>78</sup> Some concerned more with money than their own health, others exploited by unscrupulous promoters looking to repeatedly cash in, these boxers risked serious health problems from an accumulation of injuries without proper rest.<sup>79</sup> In response to this and other evidence, Congress enacted uniform boxing regulations including: the PBSA of 1996 and its 2000 Amendments in the MABRA.<sup>80</sup> In 2009, Senator John McCain introduced into the Senate the Professional Boxing Amendments Act of 2009 (“2009 Amendments”) which, along with other changes, would have created the United States Boxing Commission (USBC) to administer the 2009 Amendments and oversee boxing contests throughout the country.<sup>81</sup>

The concerns facing MMA may be slightly less widespread than the problems that faced boxing in the 1990s due to the increase in formal state athletic commissions since that time.<sup>82</sup> Despite the increased presence of formal commissions, the differences between the regulatory schemes of the states and tribes still remain ripe for forum-shopping and manipulation by fighters and promoters. This endangers fighters who either value money more than personal health or are susceptible to exploitation. To illustrate how fighters and promoters can use forum-shopping to bypass safety regulations, consider a comparison between how a regime with comprehensive regulations and a regime without any formal published regulations handle the case of an aging fighter. Nevada, a state with comprehensive MMA regulations, forces any prospective fighter over thirty-five to attend a hearing to assure the athletic commission that he or

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78. *Id.* at 115.

79. *Id.*

80. 15 U.S.C. §§ 6301–6313 (2006). See Michael J. Jurek, *Janitor or Savior: The Role of Congress in Professional Boxing Reform*, 67 OHIO ST. L.J. 1187, 1202 (2006) (describing some of the problems, such as lack of oversight by state commissions and lack of boxer safety protections, the MABRA was designed to combat).

81. See Professional Boxing Amendments of 2009, S. 38, 111th Cong. (2009); see also S. REP. NO. 11-357, at 1 (2010) (recommending that bill be passed and ordering bill reported favorably without amendment); Professional Boxing Amendments of 2009, H.R. 523, 111th Cong. § 5 (2009) (introducing similar bill to House of Representatives).

82. See Jurek, *supra* note 80, at 1198 (“Forty-six state commissions are loosely affiliated under the [ABC].”).

she is fit to compete before allowing a match to go forward.<sup>83</sup> Fifty-five year old Dan Severn, on the other hand, was able to fight in the safe harbor of the Sault Indian Reservation in Michigan in 2009, against a relatively unknown fighter,<sup>84</sup> presumably without being subject to any formal, mandated inquiry into his fitness for fighting.

Along the same lines, the lack of uniform regulations creates forum-shopping opportunities for fighters and promoters who wish to dodge jurisdictions with more stringent health and safety regulations in the interest of not having a fight blocked for failure to comply.<sup>85</sup> This practice was a major complaint of boxing commentators leading up to the passage of the PBSA and the more stringent MABRA.<sup>86</sup> A similar analysis applies to present day MMA because of the regulatory scheme and motivations of fighters and promoters. The more fights in which a fighter partakes, or a promoter promotes, the more potential he or she will have to make money.<sup>87</sup> This creates the potential for fighters or promoters to seek a safe haven, allowing them to make money from fights while bypassing health and safety regulations that are in their best interest.

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83. See NEV. ADMIN. CODE § 467.017 (2010). Keith Kizer, Executive Director of the Nevada State Athletic Commission, asked forty-one-year-old Mark Coleman to come before the Commission prior to getting licensed for a fight because Kizer was concerned about Coleman's lack of conditioning in a previous fight, his age, and the fact that he has lost four of six bouts. John Morgan, *Coleman Granted License for UFC 100, Planning Las Vegas Training Camp*, MMAJUNKIE.COM (Apr. 15, 2009, 4:25 PM), <http://mmajunkie.com/news/14586/coleman-granted-license-for-ufc-100-planning-las-vegas-training-camp.mma>.

84. Ben Leeson, *Legendary Severn to Headline Kewadin Card*, SAULT STAR, <http://www.saultstar.com/ArticleDisplay.aspx?archive=true&e=1645559> (last visited Jan. 27, 2011).

85. Compare NEV. ADMIN. CODE §§ 467.017-.027 (2010) (outlining list of health and safety criteria a prospective fighter must satisfy before being licensed to fight in Nevada), with Letter from Catherine Reardon, *supra* note 67 (pointing out how in Alaska promoters only "are asked to follow the standard for the conduct" of boxing and wrestling, without any specific mention of MMA).

86. See David Altschuler, *On the Ropes: New Regulations and State Cooperation Step into the Ring to Protect Boxing from Itself*, 4 VAND. J. ENT. L. & PRAC. 74, 83-84 (2002); April R. Anderson, *The Punch that Landed: The Professional Boxing Safety Act of 1996*, 9 MARQ. SPORTS L.J. 191, 193 (1998); Kevin M. Walsh, *Boxing: Regulating a Health Hazard*, 11 J. CONTEMP. HEALTH L. & POL'Y 63, 73 (1994).

87. This is the case for fighters who are paid per event as independent contractors, as opposed to being salaried employees. See Kevin Iole, *UFC Hopeful Fighting for Survival, Post to Yahoo! Sports*, YAHOO! (Sept. 9, 2009, 6:46 PM), <http://sports.yahoo.com/mma/news?slug=ki-wilson090909> (pointing out that former UFC fighter Kris Wilson is an independent contractor who is only paid when he fights).

For example, California and Nevada have made it a practice to randomly test fighters for performance-enhancing drugs and other illegal substances as a condition to being licensed to fight.<sup>88</sup> In contrast, when the UFC hosted an event in Dallas in September 2009, the Texas Department of Licensing and Regulation informed the UFC that the organization would have to test its fighters because Texas did not, and still does not, have any formal testing procedure in place.<sup>89</sup> This was especially notable because Vitor Belfort,<sup>90</sup> scheduled to compete in the night's main event,<sup>91</sup> had previously failed a steroids test in Nevada.<sup>92</sup> Although the UFC took the initiative and tested its fighters,<sup>93</sup> it is unclear whether a smaller organization would do the same and bear the full cost of the tests<sup>94</sup> pursuant to a state's non-mandatory recommendation. Also, mainstream sports news outlets, such as *ESPN* and *Sports Illustrated*, generally do not cover promotions other than the UFC and Strikeforce, making it easier for smaller promoters to avoid public exposure and

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88. These states prohibit the use of drugs and have the statutory discretion to require fighters to complete drug tests before they are allowed to fight in a sanctioned bout overseen by the commission. See NEV. ADMIN. CODE § 467.850 (2010); CAL. CODE REGS. tit. 4, § 303(b) (2010). A high-profile example of the process at work occurred in 2009 when heavyweight Josh Barnett failed a test for steroids in California prior to a scheduled bout with World Alliance of Mixed Martial Arts (WAMMA) Heavyweight Champion Fedor Emelianenko, causing the bout to be cancelled and the show to be scrapped. Sergio Non, *Barnett 'Shocked' by Steroid Accusation, Affliction Cancellation*, USA TODAY (July 29, 2009, 10:32 PM), <http://content.usatoday.com/communities/mma/post/2009/07/barnett-shocked-by-steroid-accusation-affliction-cancellation/1>.

89. See Stupp, *supra* note 52 (reporting that a spokesperson for the Texas Department of Licensing and Regulating stated, "Our rules were and still are that we do not require drug testing (for combat sports)").

90. Belfort is a former UFC Light Heavyweight Champion who has amassed nineteen wins in his MMA career. Profile of Vitor Belfort "The Phenom", UNDERGROUND, <http://www.mixedmartialarts.com/f/B32725C4FE3EE744/Vitor-Belfort/> (last visited Apr. 9, 2011) (indicating that Belfort currently holds a 19-9-0 official mixed martial arts record).

91. Steve Sievert, *UFC 103 Preview: Wavering Between Divisions, Franklin and Belfort Meet in the Middle*, MMAJUNKIE.COM (Sept. 19, 2009, 9:05 AM), <http://mmajunkie.com/news/16225/ufc-103-preview-wavering-between-divisions-franklin-and-belfort-meet-in-the-middle-in-big-d.mma>.

92. Ivan Trembow, *Vitor Belfort & Pawel Nastula Test Positive for Steroids After Pride Event*, IVAN'S BLOG (Oct. 26, 2006, 9:08 PM), <http://www.ivansblog.com/2006/10/mixed-martial-arts-vitor-belfort-pawel.html>.

93. See Stupp, *supra* note 52.

94. See generally 1 EMPL. PRIVACY LAW § 2:6 (2009) (describing generally studies of the economic and social costs faced by employers when they implement employee drug testing programs).

scrutiny for not testing fighters.<sup>95</sup> Considering that these issues may be a problem in a state like Texas—with a formal commission and fairly extensive regulations—it becomes even more unrealistic to imagine a small promoter in Wyoming drug testing its fighters without any commission to provide even the mere recommendation to do so.

Much of the problem stems from the structure of the individual athletic commissions that are tasked with licensing fighters, referees, and judges.<sup>96</sup> Generally, governors appoint commissioners and board members who make the relevant decisions, leading to the appearance of political favoritism and “buddy” appointments.<sup>97</sup> Also, jurisdictions have set up their athletic commissions in many different ways, occasionally with the head of the commission being someone with little background in boxing, let alone MMA.<sup>98</sup> On its face, this is problematic because it is difficult to envision a commission sufficiently qualified to create and enforce rules for something as complex as MMA, especially if the officers in charge of that body are unfamiliar with it.

Another inherent problem with the current structure is the potential for conflicts of interest.<sup>99</sup> One jurisdiction may have a desire to enforce stringent health and safety regulations in the interest of fighter safety, but that jurisdiction runs the risk of losing the event to a state with fewer restrictions.<sup>100</sup> For example, Ohio MMA regulations provide that a fighter must weigh-in both the night before the event and the day of the event unless the executive director, presumably exercising his discretion, waives the second weigh-in.<sup>101</sup> The likely purpose behind the second weigh-in

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95. See generally Mixed Martial Arts, ESPN, <http://espn.go.com/mma/> (last visited Feb. 13, 2011); MMA & Boxing, SSI.COM, <http://sportsillustrated.cnn.com/mma/?eref=sinav> (last visited Feb. 13, 2011).

96. See Jurek, *supra* note 80, at 1198.

97. See Patrick B. Fife, Note, *National Boxing Commission Act of 2001: It's Time for Congress to Step into the Ring and Save the Sport of Boxing*, 30 HOFSTRA L. REV. 1299, 1306 (2002); Jack Newfield, *The Shame of Boxing*, NATION, Oct. 25, 2001, at 20, available at <http://www.thenation.com/article/shame-boxing>.

98. See Melissa Neiman, *Protecting Professional Boxers: Federal Regulations with More Punch*, 15 SPORTS LAW. J. 59, 79 (2008).

99. See *id.* at 80.

100. See *id.*

101. OHIO ADMIN. CODE § 3773.45 (2010). See Dann Stupp, *Same-Day Weigh-in Still Possible for Next Week's WEC 43 Event in Ohio*, MMAJUNKIE.COM (Aug. 24, 2009, 4:15 PM), <http://mmajunkie.com/news/15954/same-day-weigh-ins-still-possible-for-next-weeks-wec-43-event.mma>.

involves preventing the fighter from cutting weight—a process by which a fighter starves and dehydrates his body the night before the fight to weigh-in at the weight limit and then replenishes it over the next twenty-four hours, giving him the ability to fight many pounds over his weight class.<sup>102</sup> Ohio is seemingly unique, including this added safety precaution, yet it been willing to openly waive the requirement for the UFC on multiple occasions,<sup>103</sup> due, at least in part, to the increased tax revenue gained through the many spectators attending UFC events within the state.<sup>104</sup>

Jurisdictions with less stringent regulations have an incentive to provide less protection for lesser known fights and promoters at smaller events.<sup>105</sup> Without as much tax revenue and attention at stake, a jurisdiction's choice to expend a lesser amount of resources to oversee a smaller event, coupled with a smaller promoter's desire to maximize profit, opens the door to ignore safety precautions, such as medical and drug testing and on-site paramedics.<sup>106</sup> Similarly, while it is commonplace for athletic commissions to suspend even well-known fighters for medical and precautionary reasons,<sup>107</sup> jurisdictions without formal MMA regulations likely have no process in place to oversee fights and hand out such suspensions.<sup>108</sup> As a result, fighters who frequent events in under-regulated jurisdictions are often left without an important check on their safety, and can

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102. Although there is no way of knowing how much weight fighters actually cut because, Ohio notwithstanding, there is typically no formal weighing procedure the night of the fight, it is commonplace for fighters to be able to cut around fifteen pounds for the weigh-in and then re-coup that weight for the bout. See FORREST GRIFFIN, *GOT FIGHT?* 43–45 (2009).

103. Dann Stupp, *Ohio to Test New Amateur Cruiserweight Division, Alters Double Weigh-in Guidelines*, MMAJUNKIE.COM (Apr. 6, 2010, 1:20 PM), <http://mmajunkie.com/news/18599/ohio-to-test-new-amateur-cruiserweight-division-alters-double-weigh-in-guidelines.mma> (“[T]he procedure was usually waived for organizations such as the UFC and WEC.”).

104. See Kyle Nagel, *UFC 96 Draws 17,033 Spectators for a \$1.8 Million Live Gate*, MMAJUNKIE.COM (Mar. 8, 2009, 3:01 AM), <http://mmajunkie.com/news/14204/ufc-96-draws-17033-spectators-for-a-1-8-million-gate.mma>.

105. See McCain & Nahigian, *supra* note 74, at 16 (describing similar lack of protection for lesser-known boxers).

106. *Id.*

107. See *supra* note 76 and accompanying text (describing forced medical suspensions in New Jersey).

108. See discussion *supra* Part I.A.3 (discussing regimes without commissions in place).

potentially fight as often as they want, regardless of the health risks.<sup>109</sup>

The negative consequences of the state-only system are magnified when considering amateur MMA, in which the competitors are not paid as professionals but presumably compete for experience or enjoyment.<sup>110</sup> The regulatory landscape of amateur MMA is even more scattered than that of professional MMA.<sup>111</sup> Some states, such as California, apply the same rules to amateur MMA as they do to professional MMA with additional safety precautions, such as headgear, to counteract the inexperience of the fighters.<sup>112</sup> On the other hand, other states that regulate professional MMA, such as Michigan, do not regulate amateur MMA at all.<sup>113</sup> The potential for abuse in amateur MMA is magnified further in an unregulated jurisdiction because the legislature has effectively left safety regulation in the hands of the promoters and fighters.

## II. CONGRESSIONAL AUTHORITY TO REGULATE MMA

The most important question to consider in determining whether Congress should regulate MMA is whether Congress has the constitutional authority to do so. If Congress does not have the power to promulgate such regulations, any debate on their likely benefit would be merely academic. Congress can

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109. See discussion *supra* Part I.A.3; Kyle Nagel, *The MMA Ironman: Despite 200 Career Wins, Travis Fulton Still Looks to Reinvent Self*, MMAJUNKIE.COM (Oct. 18, 2009, 1:10 PM), <http://mmajunkie.com/news/16513/the-mma-iron-man-despite-200-career-wins-travis-fulton-still-hopes-to-reinvent-himself.mma>. For instance, little-known MMA journeyman Travis Fulton has fought in over 250 MMA fights, nearly forty boxing matches, and ten kickboxing bouts. Nagel, *supra* note 104. Fulton claims he took so many fights, often making between \$200 and \$300, simply as a way to supplement his income as a garbage truck driver. *Id.*

110. See, e.g., WASH. REV. CODE § 67.08.002(1) (2010) (defining “amateur” as a “person who has never received nor competed for any purse or other article of value, either for expenses of training or participating in an event, other than a prize of fifty dollars in value or less”).

111. Compare *Mixed Martial Arts Regulation in North America*, ASS’N OF BOXING COMM’NS, [http://abcboxing.com/states\\_regulate\\_mma.pdf](http://abcboxing.com/states_regulate_mma.pdf) (last visited Feb. 14, 2011), with *Amateur Mixed Martial Arts Regulation*, ASS’N OF BOXING COMM’NS, [http://www.abcboxing.com/states\\_regulate\\_amma.pdf](http://www.abcboxing.com/states_regulate_amma.pdf) (last visited Feb. 14, 2011).

112. See CAL. CODE REGS. tit. 4, §§ 700–723 (2010); see also *Mixed Martial Arts Regulation in North America*, *supra* note 111; *Amateur Mixed Martial Arts Regulation*, *supra* note 111.

113. See *Mixed Martial Arts Regulation in North America*, *supra* note 111; *Amateur Mixed Martial Arts Regulation*, *supra* note 111.

regulate MMA without running afoul of the Constitution, so long as it acts in accordance with its powers under the Interstate Commerce Clause and does not violate the Tenth Amendment principles of federalism.<sup>114</sup>

#### A. MMA as Interstate Commerce

Congress could presumably derive authority to regulate MMA within the states from its Interstate Commerce Clause power, granted by Article I, Section 8 of the Constitution.<sup>115</sup> Under *United States v. Lopez*, Congress has the authority to regulate intrastate activities that substantially affect interstate commerce.<sup>116</sup> If MMA is determined to constitute interstate commerce, the procedures under which MMA bouts are conducted consequently substantially affect interstate commerce and any regulation of those procedures is permissible.

The Supreme Court has not had an opportunity to rule on any congressional legislation regulating MMA, but the Court's treatment and classification of boxing as interstate commerce can provide insight as to how the Court would hold.<sup>117</sup> While boxing and MMA are concededly two different sports, they are often lumped together and compared by commentators.<sup>118</sup> Some of these comparisons might offend athletes in the respective sports, but it is fair to consider them similar in the eyes of the law because of the overarching perception and the undeniable similarities in the way governments treat sports.<sup>119</sup>

In *United States v. International Boxing Club of New York*, the Supreme Court, in addressing whether the promotion of championship boxing matches was subject to the federal

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114. See discussion *infra* Part II.A–C.

115. U.S. CONST. art. I, § 8, cl. 3.

116. 514 U.S. 549, 559 (1995). The Gun-Free School Zones Act made it a federal crime to possess a gun in a school zone. *Id.* at 551. The Court held that the Gun-Free School Zones Act was an unconstitutional exercise of Commerce Clause power because it did not substantially affect interstate commerce. See *id.* at 559, 567.

117. *United States v. Int'l Boxing Club of N.Y.*, 348 U.S. 236, 241 (1955).

118. See, e.g., Jurek, *supra* note 80, at 1198 (describing the UFC as having arguably surpassed boxing in terms of popularity); Bone, *supra* note 16 (comparing boxing to MMA).

119. See, e.g., N.J. ADMIN. CODE §§ 13:46-24B.1 to .5 (2010) (applying explicitly boxing regulations concerning health and safety, inspections, and promoter bonds to MMA).

Sherman Antitrust Act, determined that Congress had the authority to regulate boxing.<sup>120</sup> In support of its argument that championship boxing constituted interstate commerce, the Government alleged that promoters made substantial use of interstate commerce to negotiate contracts with required personnel,<sup>121</sup> arrange and maintain training quarters, lease suitable arenas, sell tickets, negotiate and sell rights to make and distribute motion pictures, and negotiate and sell rights to radio and television stations.<sup>122</sup> In a brief conclusion, the Court held that championship boxing constituted interstate commerce, finding sufficient that twenty-five percent of the revenue from championship boxing came from interstate operations through sale of radio, television, and motion picture rights.<sup>123</sup>

While it is impossible to tell exactly what percentage of MMA's total revenue comes from similar channels of interstate commerce,<sup>124</sup> it is reasonable to assume that the Court would find it sufficient to constitute interstate commerce. Similar to how championship boxing in the mid-1950s made a substantial portion of its revenue from selling radio and motion picture rights,<sup>125</sup> the UFC and other MMA promoters make a great portion of their revenue from selling

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120. *Int'l Boxing Club of N.Y.*, 348 U.S. at 240 n.1.

121. Required personnel includes the fighters, referees, judges, announcers, trainers, etc. *Id.* at 238.

122. *Id.* at 238–39.

123. *Id.* at 241.

124. It is difficult to come up with concrete figures because no formal findings have been made by a court or government agency and, considering that the UFC is owned by a private company, it has no obligation to report its pay-per-view or other sales numbers. Dave Meltzer, *UFC Remains King of the PPV Hill*, Post to *Yahoo! Sports*, YAHOO! (Feb. 15, 2010, 4:33 PM), <http://sports.yahoo.com/mma/news?slug=dm-ppvbiz021510>. A website created by the UFC's parent company states that the company made an estimated \$200 million in pay-per-view revenue in 2007. *The Numbers*, MMA FACTS, <http://www.mmafacts.com/main.cfm?actionId=globalShowStaticContent&screenKey=cmpNumbers&s=MMA> (last visited Feb. 14, 2011). According to Dave Meltzer of *Yahoo! Sports*, the UFC earned an estimated \$237.9 million in revenue from pay-per-view sales in 2008. Dave Meltzer, *Lesnar Blasts UFC Toward Record Year*, Post to *Yahoo! Sports*, YAHOO! (Dec. 12, 2008, 5:32 PM), <http://sports.yahoo.com/mma/news?slug=dm-ppvbuys121208>; see also Kyle Nagel, *The Ironman Dispute: Despite 200 Wins, Travis Fulton Still Looks to Reinvent Self*, MMAJUNKIE.COM (Oct. 18, 2009, 1:10 PM), <http://mmajunkie.com/news/16513/the-mma-iron-man-despite-200-career-wins-travis-fulton-still-hopes-to-reinvent-himself.mma>.

125. *Int'l Boxing Club of N.Y.*, 348 U.S. at 238–39.

pay-per-view and television rights.<sup>126</sup> Additionally, the UFC and other promoters regularly hold events in states throughout the country and employ many athletes and personnel from different states, causing them to cross state lines in order to compete.<sup>127</sup>

It is not clear from *International Boxing* how much involvement in boxing the Court was willing to concede to Congress;<sup>128</sup> however, that decision can be seen as the legitimizing basis for the PBSA and MABRA, which currently regulate all boxing matches contested in states and on Indian reservations.<sup>129</sup> Although admittedly not the best way to predict how the Court would rule on whether the PBSA, MABRA, and similar MMA regulations comport with congressional power under the Commerce Clause, the PBSA has been on the books since 1997. It has not yet faced a legitimate challenge over its constitutionality, even though its provisions have been litigated in state court.<sup>130</sup>

### B. MMA as Indian Commerce

Employing a similar analysis under the Indian Commerce Clause, Congress could justify the provisions in an MMA act regulating fights taking place on reservations. In 2004, the Court reaffirmed in *United States v. Lara* that Congress has broad, “plenary and exclusive” powers to legislate with respect to Indian tribes.<sup>131</sup> Also in *Lara*, the Court was more willing to uphold federal prosecution because it would not amount to a “radical change [] in tribal status.”<sup>132</sup> Any

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126. See Miller, *supra* note 25, at 80.

127. See generally UFC Fighter List, UFC, <http://www.ufc.com/fighter> (last visited Feb. 13, 2011) (listing current UFC roster with fighters coming from various states and countries); Full Schedule, UFC, <http://www.ufc.com/schedule/all> (last visited Feb. 13, 2011) (listing UFC events which have taken place in multiple states and countries).

128. See J. Bradley Clair, *Why Federal Preemption Is Necessary to Create Uniform Professional Boxer Safety Standards*, 73 BROOK. L. REV. 1173, 1204 (2008).

129. See 15 U.S.C. §§ 6303, 6312 (2006) (mandating that all boxing matches taking place in states and on Indian Reservations be overseen by an approved athletic commission).

130. See Echols v. Pelullo, 377 F.3d 272, 274 (3d Cir. 2004).

131. 541 U.S. 193, 200 (2004). Defendant Lara was charged for a crime by a federal court after previously being charged by a tribal court. *Id.* at 197. Lara pleaded guilty to the tribal count and claimed the federal count constituted double jeopardy. *Id.* The Court claimed that double jeopardy did not apply and that the federal prosecution was therefore not barred. *Id.* at 210.

132. *Id.* at 205.

regulation addressing MMA on tribal lands would seem similarly trivial compared to the general concepts of sovereignty, and it would therefore be unlikely that anyone could make a case that it would constitute a change in tribal status. In addition, a similar negative inference can be made from the PBSA, which regulates boxing on Indian reservations<sup>133</sup> and has not been challenged in any of the highest courts, even though Indian tribes have attempted to bring cases based on its provisions.<sup>134</sup> The MMA regulation would be similarly unassuming, seeking only to make sure that a sufficiently capacitated commission oversees any bout occurring on a reservation, whether the commission is of a tribe or a state.<sup>135</sup>

Under such a regime, Congress would be able to act under its authority granted by the Commerce Clause to regulate MMA. The Interstate Commerce Clause and the precedent set in *International Boxing* would permit regulation of MMA in the states,<sup>136</sup> while the broad power granted under the Indian Commerce Clause, as confirmed in *Lara*, would permit regulation of MMA on tribal lands.<sup>137</sup>

### C. Federalism Concerns in Federalizing MMA

Traditionally, the federal government has left the regulation of combat sports to the states, due in part to the lack of a central governing league, such as the National Football League or National Basketball Association.<sup>138</sup> It is likely that, at the very least, any federal regulation of MMA would dilute the power of the states to regulate MMA, and at most would rely on state officials to implement and enforce its provisions.<sup>139</sup> Concerns about taking power from the states in this manner have caused Congress to struggle, and fail, to enact legislation to create a federal boxing commission to oversee all fights in the country.<sup>140</sup> Any federal MMA

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133. § 6312.

134. See *Miccosukee Tribe of Indians of Fla. v. Fla. State Athletic Comm'n*, 226 F.3d 1226, 1228 (11th Cir. 2000); *State v. Romero*, 142 P.3d 887, 894 (N.M. 2006).

135. The provision would conceivably mirror what is currently in the PBSA/MABRA. See § 6312; see also discussion *infra* Part III.

136. See *supra* Part II.A.

137. See *supra* Part II.B.

138. See Burstein, *supra* note 27, at 438, 444.

139. See discussion *supra* Part III (outlining potential federal MMA regulations).

140. See Altschuler, *supra* note 86, at 77.

regulation should be drafted carefully so as to not be susceptible to a Tenth Amendment challenge for encroaching too far on states' rights under the Tenth Amendment.<sup>141</sup>

The Supreme Court analyzed similar Tenth Amendment and federalism concerns in *New York v. United States*<sup>142</sup> and *Printz v. United States*.<sup>143</sup> Both of these cases dealt with federal regulations that sought to mandate state government action. In *New York*, the Court held that a federal regulation violates the Tenth Amendment, even when passed pursuant to Congress's power under the Commerce Clause, if it commandeers the state's legislative authority by directing the state to implement and enforce its provisions.<sup>144</sup> In *Printz*, the Court went further to hold that a federal regulation also violates the Tenth Amendment if it seeks to get around the *New York* prohibition by mandating that state officials implement and enforce the regulation.<sup>145</sup> As outlined in *New York*: "[T]he Commerce Clause . . . authorizes Congress to regulate interstate commerce directly; it does not authorize Congress to regulate state governments' regulation of interstate commerce."<sup>146</sup>

The Court distinguished both *New York* and *Printz* from its 1981 holding in *Hodel v. Virginia Surface Mining & Reclamation Association, Inc.*<sup>147</sup> In *Hodel*, the Court outlined acceptable measures that could be taken by Congress to regulate commerce within a state while not running afoul of

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141. U.S. CONST. amend X.

142. 505 U.S. 144 (1992). *New York* challenged provisions of the Low-Level Radioactive Waste Policy Act. *Id.* at 154. Under the Act, states were mandated to take title to toxic waste within the state if they did not pass sufficient regulations. *Id.* at 153. The Court held that commandeering state functions, by not giving them meaningful choice in whether or not to enforce the constitutional program was an abuse of Congressional power under the Tenth Amendment and therefore unconstitutional. *See id.* at 180, 188.

143. 521 U.S. 898 (1997). A county sheriff sought to enjoin enforcement of provisions of the Brady Handgun Violence Act, which mandated that local and state law enforcement perform federally mandated background checks. *Id.* at 902–03. The Court held that this provision was an unconstitutional encroachment on states' rights under the Tenth Amendment because Congress cannot constitutionally commandeer state executives and officials and mandate their carrying out of a federal policy. *Id.* at 935.

144. *See New York*, 505 U.S. at 161–62.

145. *See Printz*, 452 U.S. at 935.

146. *New York*, 505 U.S. at 166.

147. 452 U.S. 264 (1981).

the Tenth Amendment.<sup>148</sup> The federal provision in question mandated that a state wishing to maintain permanent regulatory authority over surface coal mining operations within the state had to submit a program to the Secretary of the Interior for approval, and that the program must contain laws implementing certain environmental protection standards.<sup>149</sup> If a state chose not to submit a plan, or could not receive approval, the Secretary would be in charge of implementing and administering a federally-created program within the state, at the federal government's expense.<sup>150</sup> The Court stressed that the key characteristics which kept the statute compatible with the Tenth Amendment included the fact that it governed only the activities of private entities and that states were not compelled to expend state funds or resources to enforce the federal program.<sup>151</sup> In addition, a state could opt out of the program and therefore have the full regulatory burden fall on the shoulders of the federal government.<sup>152</sup> As a result, there could be no suggestion that the statute commandeered the legislative or executive function of the states because it did not directly compel state enactment and enforcement of the federal program.<sup>153</sup>

The Court in *New York* further stressed that a regulation like the Surface Mining Act in *Hodel* is constitutional because the people of the state are able to decide for themselves whether the state will comply and create a state regulatory scheme that comports with the federal regulation, and therefore, bear the costs of the program.<sup>154</sup> In the alternative, the people could choose to have the federal regulations preempt state regulations and govern, forcing the federal government to bear the expense of its own program.<sup>155</sup> The Court also looked at a provision in the legislation at issue in

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148. *See generally id.* In *Hodel* a group of coal producers challenged the Surface Mining Control and Reclamation Act. *Id.* at 273. The Act ultimately resulted in a federal regulatory program being adopted for each state, either by its own plan getting approved by the Secretary of the Interior or the Secretary enforcing the federal program in states that chose not to submit a plan. *Id.* at 270–71. Enforcement of the plan would rest with either the states or the Secretary in states that chose not to participate. *Id.*

149. *Id.* at 271.

150. *Id.* at 272.

151. *Id.* at 288.

152. *See id.*

153. *See Hodel*, 452 U.S. at 288.

154. *New York v. United States*, 505 U.S. 144, 168 (1992).

155. *Id.*

*New York*, which conditioned the receipt of federal funds on states achieving certain milestones in accordance with enforcement of the legislation.<sup>156</sup> The Court deemed this a valid exercise of congressional power under the Spending Clause<sup>157</sup> and did not invalidate it under the Tenth Amendment.<sup>158</sup>

In *South Dakota v. Dole*, the Court dealt with a similar application of the Spending Clause.<sup>159</sup> The challenged provision was a requirement conditioning state receipt of federal funds on participation in a federal program.<sup>160</sup> The Court held that this type of restriction would be valid if done (1) in pursuit of the general welfare, (2) unambiguously, and (3) if the conditions are related to the federal interest in the particular national projects or programs.<sup>161</sup>

In *Federal Energy Regulatory Commission v. Mississippi*, the Court held that federal legislation did not violate the Tenth Amendment by requiring states to enforce an energy program, with a state administrative agency adjudicating disputes arising under the legislation.<sup>162</sup> The Court noted that the same type of dispute resolution was already commonplace for a pre-existing state regulatory commission.<sup>163</sup> The Court reasoned that deciding the other way would allow the states to disregard both the supremacy of federal law and the congressional determination that existing state administrative and adjudicatory bodies could appropriately enforce the federal rights granted by the federal

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156. *Id.* at 171.

157. U.S. CONST. art. 1, § 8, cl. 11.

158. *New York*, 505 U.S. at 173.

159. 483 U.S. 203 (1987). South Dakota challenged the National Minimum Drinking Age Act, which withheld five percent of Federal Aid Highway Act funds from states that did not adopt a minimum age of twenty-one for purchasing alcohol. *Id.* at 205. The Court held that this was a valid exercise of congressional power under the Spending Clause. *Id.* at 209.

160. *See id.* at 205.

161. *Id.* at 207–08.

162. 456 U.S. 742, 760 (1982). The Public Utility Regulatory Policies Act (PURPA) was federal regulation, in part, designed to encourage adoption of regulatory policies that would encourage, among other things, conservation of energy and equitable rates to consumers. *Id.* at 746. The Court interpreted one of the provisions challenged by Mississippi on Tenth Amendment grounds and required state authorities to adjudicate disputes arising under the statute. *Id.* at 760.

163. *Id.* at 759–60 (reasoning that Mississippi already had jurisdiction to entertain analogous claims under state law and would merely be required to “open[] its doors to claimants” under the federal statute).

statute.<sup>164</sup>

### III. PROPOSAL FOR FEDERAL REGULATIONS

When outlining ideas for the proposed federal MMA regulation, it is important to keep in mind not only what Congress has the authority to do under the Constitution, but that any idea must be practical and have limits. While creating a fully staffed federal agency to enact and implement comprehensive MMA regulation would likely solve all of the problems associated with the current fragmented state regulatory scheme, it would also create federal budget expenditures that would make it impractical.<sup>165</sup> Therefore, it is important that the proposed regulations address the current problems while minimizing the need for federal funding to the greatest extent possible.

#### *A. The Undesirability of a Full-Fledged Federal Regulatory Body*

It is important that any proposed federal MMA legislation does not require state athletic commissions to implement and enforce extensive regulations; doing so would clearly commandeer the states' traditional administrative authority to regulate MMA and therefore violate the Tenth Amendment under *New York* and *Printz*.<sup>166</sup> Such a scheme would be distinguishable from *Hodel* and *Federal Energy Regulatory Commission* because, without a federal agency backing enforcement of the mandatory rules, a state would be left with no choice but to expend its own resources to enforce the federal regulations.<sup>167</sup> Rather, the legislation would be

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164. *Id.* at 760–61.

165. Many commentators currently contend that federal spending, on issues such as health care, has gotten out of control and will hurt the country financially in the future. See generally William Rutherford, *Voters Take Whack at Obama-nomics*, DAILY J. COM., Nov. 16, 2009, at 10; Raymond Keating, *Health Care Reform's Impact on Deficit Is Sickening*, LONG ISLAND BUS. NEWS, Sept. 4, 2009, at 8. Considering the outspoken critics of federal spending, even for concerns such as health care, it is highly unlikely that large expenditures to regulate MMA would be tolerated.

166. See discussion *supra* Part II.C (discussing holdings in each that federal legislation violates the Tenth Amendment by commandeering state officials for enforcement).

167. In *Hodel*, the Surface Mining Act created the Office of Surface Mining Reclamation and Enforcement within the Department of the Interior. *Hodel v. Va. Surface Mining & Reclamation Ass'n, Inc.*, 452 U.S. 264, 268 (1981). In *Federal Energy*

indistinguishable from the provision declared unconstitutional in *Printz*, which required local officials to enforce the federal Brady Act.<sup>168</sup> Even assuming the inclusion of a provision allowing states to choose between implementing the federal scheme or not regulating MMA at all satisfies *New York*, such a scheme would be undesirable.<sup>169</sup> There is no guarantee that a number of states will not choose the latter and leave MMA unregulated or illegal in the state, especially if enforcement of the regulations would lead to substantial expenses. In such a situation, the federal legislation would end up exacerbating the problem it would have been designed to remedy.

It is apparent under Supreme Court analysis, however, that Congress could bypass any Tenth Amendment concerns by creating a federal regulatory body to promulgate and enforce the MMA legislation.<sup>170</sup> Then, similar to *Hodel*, Congress could give the states the option to submit proposed MMA regulation for approval by the federal agency. The states would then have the ability to choose to regulate MMA using the federal standards or other standards approved by the federal agency. In the alternative, a state could choose to do nothing, thereby allowing the federal regulations to preempt any current state regulations, with the designated federal agency expending the resources and bearing the costs of enforcement. This scheme would comport with *New York*, leaving the final choice with the citizens of the states over which level of government will bear the costs for the enforcement in their state.<sup>171</sup>

It is fair to point out, however, that Congress may be quite reluctant to create a federal agency for the sole purpose of regulating MMA, considering the potential expense and other

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*Regulatory Commission*, PURPA enlisted the Secretary of Energy and the Federal Energy Regulatory Commission to work with state agencies to help administer the program. *Fed. Energy Regulatory Comm'n v. Mississippi*, 456 U.S. 742, 749 (1982).

168. *Printz v. United States*, 521 U.S. 898, 903–04 (1997).

169. In *New York*, the Court stressed that federal legislation regulating activity within the states must give residents of a state the ultimate choice of whether to enact and enforce the legislation with the state authorities, or choose to allow the federal government to enforce the legislation and bear the costs. *New York v. United States*, 505 U.S. 144, 167–68 (1992).

170. See *supra* note 167 (describing how Congress was able, in *Hodel* and *Federal Energy Regulatory Commission*, to use a federal regulatory body to enact and enforce legislation in the states).

171. See *supra* note 169.

issues of greater concern requiring attention.<sup>172</sup> In addition, federal expenditures on MMA may receive scorn from lawmakers and constituents who are not overly familiar with MMA and still consider it barbaric.<sup>173</sup> Further, it is likely Congress will fear infringing too far on states' rights, considering that similar concerns have been credited as a reason for avoiding creation of a federal boxing commission in the past.<sup>174</sup>

The problems caused by needing a new regulatory agency could be alleviated if the proposed 2009 Amendments to the PBSA pass into law, because the then-created USBC could also take MMA under its watch.<sup>175</sup> This alternative is undesirable, however, and would not serve the ultimate goals of the legislation. The 2009 Amendments call for the USBC to consist of three members appointed by the President—with the advice and consent of the Senate—each having extensive experience in boxing or a field directly related to professional sports.<sup>176</sup> But, as is the current problem with many state commissions, people with extensive experience in boxing may have little or no experience with MMA.<sup>177</sup> In addition, many of the provisions of the PBSA that the USBC would be in charge of administering—namely those dealing with fighter and promoter contracts—do not translate to MMA because of

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172. See *supra* note 165 (pointing out how many commentators already contend that Congress is spending too much money).

173. In the late 1990s, Senator John McCain led a crusade against MMA, seeking to banned it because it was, in his mind, repugnant and nothing more than human cockfighting. See Amy Silverman, *John McCain Breaks Up a Fight*, PHX. NEW TIMES (Feb. 12, 1998), <http://www.phoenixnewtimes.com/1998-02-12/news/john-mccain-breaks-up-a-fight>. In addition, many mainstream sport writers still produce pieces on MMA with similarly strong language and warnings about the sport's perceived brutality. See generally Dave Begel, *MMA Legislation Is Bad News for Wisconsin*, Post to Sports Commentary, ONMILWAUKEE.COM (Feb. 9, 2010, 3:07 PM), <http://onmilwaukee.com/sports/articles/mixedmartialartsapprovedinwisconsin.html?21670> ("It is barbaric pummeling of one individual by another. They snarl and kick and jump on damaged opponents. They pound heads into the ground. I don't think they bite, but I can't be sure. Blood doesn't stop the show, in fact it just fuels the battle"); John Canzano, *Go on UFC: Knock Yourself Out*, OREGONLIVE.COM (Aug. 30, 2009), [http://www.oregonlive.com/sports/oregonian/john\\_canzano/index.ssf/2009/08/in\\_this\\_ultimate\\_fighting\\_cham.html](http://www.oregonlive.com/sports/oregonian/john_canzano/index.ssf/2009/08/in_this_ultimate_fighting_cham.html).

174. See Altschuler, *supra* note 86, at 77.

175. See S. 38, 111th Cong. § 21 (2009) (establishing United States Boxing Commission).

176. See *id.*

177. See Neiman, *supra* note 98, at 79 (discussing problems with unqualified state commission officials).

the differences in the way fighter contracts are generally handled by MMA organizations.<sup>178</sup> As a result, the USBC would be forced to either apply different rules to the different sports or apply the boxing regulations to MMA. Those choices could cause unqualified people to regulate MMA with laws that have little or no relevance to the sport.

Likewise, while a federal MMA commission, whether part of the USBC or not, would unify the regulatory climate, it is not clear it would do a better job enforcing the regulations than the current state system does. One of the major problems with the current system revolves around commission inaction, a direct result of it being stretched too thin in terms of finances and resources.<sup>179</sup> Having one national body could actually compound this problem. Instead of a state with limited resources struggling to oversee events within its borders, a federal body would potentially be charged with overseeing bouts in all fifty states on the same night, and it is difficult to assume that the federal commission would be granted the resources, or practical ability, to do so effectively.<sup>180</sup>

### *B. Cooperative Federalism Between Legislation and Local Athletic Commissions*

A better option, still comporting with the *Hodel* framework,<sup>181</sup> would involve a plan of cooperative federalism

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178. S. 38, 111th Cong. § 10 (2009) (amending 15 U.S.C. § 6307a (2006)). *See also* 15 U.S.C. § 6307b (2006) (prohibiting coercive contracts between boxers and promoters and banning an individual from working as both a fighter's manager and promoter). These provisions would not have the same application to MMA because MMA events are generally put together by organizations that sign the fighters to contracts for periods of time as opposed to just an individual fight, while often acting as both a promoter and manager under the MABRA. *See generally* Brent Brookhouse, *MMA in Need of a Sanctioning Body? Nah*, BLOODY ELBOW (Apr. 8, 2008, 12:35 AM) <http://www.bloodyelbow.com/2008/4/8/03516/11244> (providing an overview of MMA contracts and distinguishing MMA and boxing deals).

179. *See* discussion *supra* Part I.B (discussing states' problems enforcing MMA legislation due to poorly structured commissions). *See also* Kevin Iole, *No Need for a Federal Commission*, Post to *Yahoo! Sports*, YAHOO! (Oct. 8, 2009, 2:10 PM), <http://sports.yahoo.com/box/news?slug=ki-commission100809&prov=yhoo&type=lgns> (explaining how a federal commission would likely be understaffed in comparison to the number of fights across the country it would be responsible for overseeing).

180. *See supra* note 165 and accompanying text (explaining unlikelihood of Congress spending a substantial amount of federal money on MMA regulation).

181. *See* discussion *supra* Part II.C; *see also supra* note 148 and accompanying text (discussing *Hodel*).

between Congress and the local athletic commissions, which would retain much of the control over events within their jurisdictions. This system would mandate standards for the athletic commissions to follow. While the regulatory structure would not be fashioned identically to *Hodel*, it should still survive a challenge under *New York* and *Printz* by leaving a good deal of discretion in the hands of the states and not commandeering them with explicit mandates.<sup>182</sup> The states would retain the choice as to the specifics of implementation and whether to add further safety precautions, or could opt to make MMA illegal within the state. The legislation would therefore be similar to a middle ground between the MABRA and the 2009 Amendments.<sup>183</sup> It would stop short of bringing MMA under either complete control of a federal agency or giving such an agency as much power as the proposed 2009 Amendments would grant to the USBC. At the same time, the legislation would establish unified MMA safety standards and a fighter registration system throughout the country, thus doing more than the MABRA and its general, loose framework for states.<sup>184</sup> The resulting legislation would have three major facets: a prohibition of events in jurisdictions where MMA is not formally regulated absent supervision of another commission, a federal fighter licensing and registry system, and minimum health and safety standards.

#### 1. Addressing the Problem of Jurisdictions Without Formal MMA Regulation

The first, and least constitutionally problematic, facet of the legislation would address the problem caused by states and tribes without formal MMA legislation or athletic commissions.<sup>185</sup> The provision would closely follow 15 U.S.C. § 6303 to assure that no MMA event would take place in a

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182. See *supra* note 169 (describing how the Court in *New York* stressed that states must be given a meaningful choice in terms of continuing to regulate the activity or allow complete preemption by the federal act).

183. See 15 U.S.C. § 6306 (2006) (mandating broadly that states develop procedures to, among other things, evaluate and suspend boxers); S. 38, 111th Cong. § 21 (2009) (establishing USBC to enforce rules and oversee boxing matches).

184. See § 6306 (mandating broadly that states develop procedures to, among other things, evaluate and suspend boxers).

185. See discussion *supra* Parts I.A.2–3 (discussing states and reservations either without a formal commissions, or without clear MMA regulations).

jurisdiction without formal MMA regulation unless the commission and regulations of another state or tribe control the bout.<sup>186</sup> This is important because it would prevent the dangerous matchmaking that can occur if a promoter is able to escape to the confines of a jurisdiction without formal oversight.<sup>187</sup> No established commission would be willing to oversee an event in an unregulated state that it would not be willing to oversee in its own.<sup>188</sup> As a result, some state or tribal commission would review and scrutinize every proposed bout throughout the country.

This provision would not be a cause of constitutional concern because it is a straightforward application of the Commerce Clause and Indian Commerce Clause.<sup>189</sup> There is little doubt after *International Boxing* that MMA should be considered interstate commerce.<sup>190</sup> This regulation, as well as the others, would substantially affect MMA, as is required under *Lopez*,<sup>191</sup> because it would impose a direct regulation on MMA that all events be sanctioned. The same analysis works under *Lara* when considering application to Indian tribes, because the regulation would affect Indian commerce while not changing anyone's tribal status.<sup>192</sup> While the legislation would take some power away from tribes, it would be minimal and certainly not rise to a level where anyone could argue that it interferes with their tribal character and sovereignty.

At the same time, there is no Tenth Amendment concern because there is no commandeering of state functions. Officials and legislators of unregulated states would not be mandated to do anything; rather, a *private* actor within the state would be forced to take the initiative to find an outside commission willing to oversee the event. Likewise, the commission sought out would not be commandeered because there would be nothing forcing it to accept the duty of

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186. 15 U.S.C. § 6303 (2006).

187. See discussion *supra* Part I.B (describing problems with forum-shopping in order to book potentially dangerous matches that would likely not be sanctioned by a formal committee).

188. See *supra* note 13 and accompanying text (explaining how commissions generally honor suspensions and decisions of other commissions).

189. See discussion *supra* Parts II.A–B (discussing application of Commerce Clause and Indian Commerce Clause to pass federal MMA regulation).

190. See discussion *supra* Part II.A (discussing *International Boxing* and interstate commerce analysis).

191. See discussion *supra* Part II.A.

192. See discussion *supra* Part II.B (covering Indian Commerce Clause).

oversight in another jurisdiction. While this may result in a reduction in the number of events in the unregulated states—which is more of a good thing than bad—the unregulated states and tribes would have the option to change that by promulgating MMA regulations and overseeing the events with their own commissions.

## 2. Federal MMA Fighter License and Registry

The second facet of the legislation would involve the creation of a federal licensing and database system. This system would detail the personal and medical information of fighters and store it in a central place. The information would then be available to all state and tribal athletic commissions as a convenient way to ascertain the professional and medical history of prospective fighters seeking to fight in their jurisdiction. This is important because it would allow athletic commissions to access the needed information from a neutral source, aiding in assessing whether it should give a prospective fight the green light. All fighters would have to apply for a federal license and then entered into the database. After every fight, the information would be updated to reflect the result of the bout and the results of any medical tests that followed. In addition, information about a suspension or other disciplinary action imposed by a commission would be included in the fighter's profile.<sup>193</sup> This would prevent fighters from using different identities or lying about their medical and professional history in front of a commission when seeking a future fight. By itself, this system would not conflict with the Tenth Amendment because it regulates the conduct of private individuals and not that of the states.<sup>194</sup>

Despite this, the legislation would not be able to constitutionally mandate that state officials enact and enforce the registry procedures, because that would be almost identical to the system declared unconstitutional in *Printz*.<sup>195</sup>

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193. This would include medical and drug suspensions as well as any disciplinary action taken by the commission because of misconduct.

194. See *supra* note 151 (describing the emphasis placed on the constitutionality of statutes regulating private conduct as opposed to state actors in *Hodel*).

195. Provisions of the Brady Act required local officials to perform certain duties in enforcement of the federal Act, including making a determining whether a proposed firearm transfer would be in violation of law. See *Printz v. United States*, 521 U.S. 898, 903 (1997). In addition, the Brady Act instructed the officials to research state and

As a result, there would need to be a federal entity backing the implementation of the system.<sup>196</sup> It would not matter if a new entity was created, or if Congress delegated the responsibility to an existing body, such as the Federal Trade Commission (FTC).<sup>197</sup> Assuming Congress further amends the PBSA in accordance with McCain's proposal,<sup>198</sup> the USBC could handle the licensing and national registry, as it would have a similar duty to do so for boxers.<sup>199</sup> Creating and maintaining the registry would not cause substantial federal expenditures because the responsible agency would presumably charge a fee for fighters to be licensed and registered, and could therefore be self-sustaining.<sup>200</sup> The fee would likely not be overly prohibitive, and the system would permit commissions to confidently assess the merits of proposed bouts.

Finally, in order for the licensing and registry system to remain useful, it is imperative to make sure the database is frequently and correctly updated with results of fights and medical tests. It would be impractical for the federal agency that licenses the fighters and maintains the database to keep track of every fight and resulting medical tests across the country,<sup>201</sup> necessitating local officials' cooperation. Requiring state officials to send information to the federal agency keeping the database would not, however, be a violation of the Tenth Amendment. This requirement would be similar to the one upheld by the Court in *Federal Energy Regulatory Commission*, where state administrative officers could adjudicate disputes under the federal law because the officers

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local recordkeeping systems in making the determination. *Id.*

196. This is to comport with *Hodel*, while staying distinct from *New York* and *Printz*. See discussion *supra* Part II.C.

197. The agency could really be any already in existence. The FTC may fit because MMA concerns interstate commerce and trade.

198. It is not clear how strong or weak this assumption is. Similar proposed legislation has failed in Congress in the past. See Altschuler, *supra* note 86, at 77 (pointing out how past attempts to pass a federal boxing commission have failed, at least in part due to a fear of violating states' rights).

199. S. 38, 111th Cong. § 21 (2009).

200. The 2009 Amendments propose a similar structure to make the USBC self-supporting. See *id.*

201. This would cause the same financial and practical problems as the federal agency overseeing everything as it would require a federal agent to keep track of every fight across the country, which the federal agency would not likely have the people and resources to do. See Iole, *supra* note 179 (contending that a federal regulatory body would not likely have the resources to monitor all bouts across the country).

routinely did the same thing for state law disputes.<sup>202</sup> In this case, the local officials would be asked to report results to the federal agency, much in the way they routinely report results to their own commission.<sup>203</sup> This form of cooperative federalism would render the federal fighter registry database neither unconstitutional nor without the needed updates.

### 3. Federal MMA Health and Safety Regulations

The third—and potentially most constitutionally problematic—facet of the legislation deals with health and safety regulations. These provisions are the most problematic because of the potential of commandeering athletic commissions by promulgating federal rules for the states to implement and enforce, which would likely be the most effective way to establish the regulations. On one hand, Congress has to be careful to comport with *New York* and *Printz* by not forcing a scheme that is too comprehensive and specific, commandeering local officials by leaving them no choice but to implement and enforce the provisions.<sup>204</sup> On the other hand, the federal regulations cannot be overly deferential to state and tribal legislatures and athletic commissions because doing so would run the risk that nothing would change, making the federal legislation ineffective.<sup>205</sup>

When drafting health and safety regulations in the PBSA and MABRA, Congress clearly decided to err on the side of constitutional caution and left most of the details up to the states, providing only recommendations and a loose framework.<sup>206</sup> While federal MMA regulation would not be able to prescribe very specific rules and regulations for states without providing an opt-out provision,<sup>207</sup> it can still

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202. Fed. Energy Regulatory Comm'n v. Mississippi, 456 U.S. 742, 759–60 (1982).

203. State officials are required to report the results of boxing matches under the PBSA. See 15 U.S.C. § 6307 (2006).

204. See discussion *supra* Part II.C.

205. An overly deferential regulation would not provide incentive for the states to change, as they would not likely make the needed changes out of an unwillingness to spend money.

206. The PBSA does not provide many explicit mandates for the states to follow, but rather leaves much for the states to interpret. See 15 U.S.C. § 6306 (2006) (leaving for each boxing commission to determine appropriate procedures for, among other things, assessing boxer injuries and making sure they are fit to compete).

207. Such a provision would give states the choice of enforcement by a federal agency, as was required to make the challenged Act in *Hodel* constitutional. See *Hodel*

effectively go further than the PBSA by providing a more detailed framework for states.

In an ideal situation, all states and tribes would be required to implement and enforce the Unified Rules—as promulgated and revised yearly by the ABC—as well as provisions requiring comprehensive medical examinations and random drug testing. Due to the forces of federalism and the Tenth Amendment, however, Congress would be required to do more to respect state sovereignty than merely announce such a mandate.<sup>208</sup> One constitutional possibility involves an incentive structure, which would be valid under *Dole*, and therefore comport with *New York*.<sup>209</sup> Under this option, Congress could condition state receipt of federal funds on implementation and enforcement of the federal MMA legislation. The states would have the option to not be preempted by the federal regulations, but that option would carry with it the forfeiture of federal funds. For example, Congress could create a fund arising out of the fees fighters and organizations pay to obtain the federal licenses.<sup>210</sup> Money from the fund would then be distributed to states that adopted the federal MMA provisions and withheld from those that did not.

It is unclear, however, whether the Court would be willing to hold that regulating MMA is in pursuit of the general welfare,<sup>211</sup> due to the relatively young popularity of the sport and the fact the regulations would not affect a large percentage of the population. This is true even though the regulations may not only make conditions safer for MMA fighters, but also prevent children and other non-professionals from injuring themselves with unsafe fighting

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v. Va. Surface Mining & Reclamation Ass'n, Inc., 452 U.S. 264, 292 (1981). See also discussion *supra* Part III.A.

208. See discussion *supra* Part II.C (discussing federalism constraints on federal legislation that seeks to commandeer state legislative or executive functions).

209. See discussion *supra* Part II.C (explaining holding in *Dole* that would allow this type of federal legislation); *New York v. United States*, 505 U.S. 144, 158–59 (1992) (authorizing financial incentive legislation).

210. This would be no different than what the PBSA Amendments propose the USBC do to remain a self-sufficient entity. See S. 38, 111th Cong. § 7 (2009).

211. This is a requirement under the *Dole* analysis. See *Dole v. South Dakota*, 483 U.S. 203, 207 (1987). Due to the lack of people that are affected by unsafe MMA, mainly just the fighters, it is an extremely small group compared to the general population and may not, therefore, be found as in pursuit of the general welfare.

techniques or using performance-enhancing drugs.<sup>212</sup> Regardless, the arguments for regulating MMA for the advancement of the general welfare are speculative and it is likely that the Court would find such regulations to be an invalid use of the Spending Clause.

Consequently, the most effective course of action would be to mandate minimum safety requirements for state and tribal athletic commissions to follow that still grant the commission's power to craft many of the details as they wish. The safety standards in the PBSA mandate that, in order to promote a boxing match, all fighters must go through a physical examination;<sup>213</sup> an ambulance, emergency personnel and a physician must be present at the site; and health insurance must be provided for each boxer.<sup>214</sup> Other than the prior medical test, which only requires a finding that the boxer is "fit to safely compete,"<sup>215</sup> all of the other safety provisions in the PBSA are designed to protect a fighter who was injured in the ring during the fight. There are few specific mandates to assure that the fighter should have been allowed to fight in the first place.<sup>216</sup> To address this problem, the MMA safety provisions should shift the focus to before the fight, mandating further safety precautions be taken before the bout in addition to those for fighters injured in bouts. Without proper pre-fight examinations, regulatory agencies would only be able to tell that a combatant is injured when he lies beaten in the ring—the same agency would not be able to determine whether the fighter should be there in the first place.

Therefore, to apply to MMA, Congress must expand and further clarify the physical examination requirement of the PBSA. Not only should Congress require that a fighter be found to be physically fit to safely compete and free of infectious diseases, but it should also require that it be

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212. This was an argument justifying congressional hearings regarding the use of performance-enhancing drugs in baseball. See Dave Sheinin, *Baseball Has a Day of Reckoning in Congress*, WASH. POST, Mar. 18, 2005, at A01.

213. The 2009 Amendments would add an explicit requirement for testing for infectious diseases. See S. 38, 111th Cong. § 6 (2009).

214. 15 U.S.C. § 6304 (2006).

215. The PBSA provides no definition for what finding a fighter "fit to safely compete" entails. See *id.*

216. For example, there are no specifically mandated eye tests or brain scans. Rather, the states are left to determine what "physically fit to safely compete" means and can define that phrase virtually any way they want.

confirmed that the fighter has not taken performance-enhancing drugs.<sup>217</sup> This would remedy the situation in which a fighter who is taking steroids or other drugs is able to forum-shop for a jurisdiction that does not test for the drugs before or after a fight.<sup>218</sup> Additionally, the “physically fit to compete safely” requirement should include more specific guidelines as to what Congress thinks that standard actually means.<sup>219</sup> The subsection would contain the language, “It is the sense of Congress that state athletic commissions should require a physician to test fighters for . . . ,” and would include a list of tests that studies show would best protect the fighters from serious injury. Working hand-in-hand with the federal fighter registry, state commissions could easily ascertain the results of these tests, helping them decide whether to allow a fighter to compete.

By generally laying the framework for which standards are mandatory, and making only strong suggestions for carrying out the specific requirements, the safety provisions would not violate the Tenth Amendment.<sup>220</sup> The legislation would provide only the minimum standards of what must be done and would leave many details to the states, which would still be free to choose whether they will follow all of the federal suggestions or continue to legislate by themselves. In *New York*, the Court stressed leaving the states with a meaningful choice in order to maintain constitutionality.<sup>221</sup> Here, Congress would only mandate the states to make sure that some tests are done to ensure fighters are physically fit to compete safely. They would then have the meaningful choice as to what exactly those standards entail. In addition, state officials would not be commandeered as they were in *Printz*<sup>222</sup> because they would be asked to apply their state’s

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217. See discussion *supra* Part I.B. (outlining how the current system allows fighters and promoters to forum-shop for a jurisdiction in which drug testing is not mandated, and the risks that come along with that).

218. See *supra* note 50 (describing the situation where Florida’s lesser drug testing standards allowed a fighter to compete there after previously being denied a license in California).

219. This would be for Congress to decide after the proper MMA safety studies had been completed.

220. Such framework would set forth what Congress determines to be the most crucial and the mandatory tests that need to be done to assure that a fighter is safe before stepping into a bout.

221. See *New York v. United States*, 505 U.S. 144, 167–68 (1992).

222. See discussion *supra* Part II.C (outlining *Printz*, in which the Court found

medical testing in whatever form the respective state determined to mandate it.

At the same time, the framework would likely accomplish the goal of having all state and tribal commissions apply sufficient, and mostly uniform, health and safety regulations. There is little incentive for the states not to follow the suggestions of Congress as to the specifics of what a fighter's physical examination should entail, unless the states wish to protect fighter safety even further. In addition, mandatory drug testing would solve one of the largest problems associated with forum-shopping because every state would be forced to have some minimum testing procedure. Finally, although states would be mandated to make sure sufficient testing is done, the legislation would not violate the Tenth Amendment because states would retain the choices of how and when to administer testing.<sup>223</sup>

The statute should also contain a provision in which Congress makes it clear that it is of the opinion that all state commissions should adopt and follow the Unified Rules as promulgated and revised by the ABC. As with the other health and safety regulations, Congress would be powerless under *Hodel* and *New York* to mandate that states adopt the rules without offering states a choice to opt out and have a federal agency enforce the regulations.<sup>224</sup> This is neither desirable nor practicable,<sup>225</sup> so the legislation should be drafted as only a strong suggestion that states adopt the Unified Rules in full. The fact that the health and safety minimums would be in place makes it less important if some states choose not to implement all of the Unified Rules, such as those relating to the specific rules of the fights. Further, because most states and organizations have already adopted the Unified Rules for MMA events, the suggestion would likely be successful since only a few commissions would need

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provisions of the Brady Act unconstitutional when they directed state and local officials to enforce the federal legislation).

223. This will go to the meaningful choice of the state since the legislation will not entirely commandeer the state legislature's ability to regulate. See *New York*, 505 U.S. at 167–68.

224. See discussion *supra* Part III.A (outlining the constitutional problem with not giving the states the option to opt-out and have a federal agency enforce legislation). See also *New York*, 505 U.S. at 168; *Hodel v. Va. Surface Mining & Reclamation Ass'n, Inc.*, 452 U.S. 264, 288 (1981).

225. See discussion *supra* Part III.A (explaining undesirability of a full-fledged federal MMA commission).

to amend their regulations.<sup>226</sup> In addition, the UFC, which provides the greatest revenue to states of organizations that promote events,<sup>227</sup> has given states a further incentive to adopt the suggestion by making it clear that it will only host events in jurisdictions that use the Unified Rules.<sup>228</sup>

Finally, to prevent an issue with the Tenth Amendment under *New York*,<sup>229</sup> the legislation should include a provision—similar to the proposed amendments to 15 U.S.C. § 6313—that deals with the statute's relationship to state law and state athletic commissions.<sup>230</sup> The provision should make it clear that nothing in the statute prevents an athletic commission from acting in a manner not inconsistent with the legislation or from enforcing local standards that exceed those in the act that promote fighter safety. This provision would give states a further choice, as it will explicitly allow them to provide greater safety standards while keeping their consistent regulations intact. At the same time, the provision will explicitly address *New York* and *Printz* by providing that nothing in the statute should be construed to mandate the actions of state officials in enforcement of the federal scheme.<sup>231</sup>

### CONCLUSION

Congress recently passed regulations promoting safety in boxing, and one would be hard-pressed to argue that the regulations have not been an improvement over the state-only regulatory scheme. Most of these regulations were passed in response to specific bad events,<sup>232</sup> but there is no reason why Congress should not act prior to a similar bad event in MMA; whether it be a scandal involving organized crime, a serious injury, or a death.

Currently, MMA is governed only on a statewide basis.

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226. See discussion *supra* Part I.A.1.

227. See Miller, *supra* note 25, at 80 (describing the UFC's financial success).

228. See *supra* note 22 and accompanying (explaining how the UFC utilizes the Unified Rules).

229. See discussion *supra* Part II.C (discussing *New York*).

230. 15 U.S.C. § 6313 (2006).

231. See discussion *supra* Part II.C (explaining the Court's holding in *Printz* that commandeering state officials to implement and enforce federal legislation violates the Tenth Amendment).

232. See Neiman, *supra* note 98, at 74–76 (pointing out how Congress began to get involved with boxing after fears of organized crime and allegations of fight fixing).

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While many jurisdictions have diligently incorporated the safety-maximizing Unified Rules, others have failed to implement important procedures, such as drug testing, and a few have fallen far shorter in their regulatory efforts. Certain states and Indian reservations allow events, but promulgate no explicit rules at all. For these reasons, Congress should step in and solve the problem by using its power under the Commerce Clause and Indian Commerce Clause to promulgate federal legislation that provides a sound framework to govern all MMA events in the country. In doing so, Congress can avoid violating the Tenth Amendment, which has been a fear that caused similar boxing legislation to fail.<sup>233</sup> Instead, a plan of cooperative federalism should be developed, allowing the states to maintain some independence, while still being forced to impose minimum safety standards, and assuring that fighter safety remains a priority in bouts throughout the country.

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233. See Altschuler, *supra* note 86, at 83.