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## NOTES

# PERFORMANCE-ENHANCING DRUGS IN BOXING: PREVENTING THE SWEET SCIENCE FROM BECOMING CHEMICAL WARFARE

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### TABLE OF CONTENTS

I. INTRODUCTION.....	336
II. BACKGROUND .....	342
A. THE BOXING INDUSTRY .....	342
B. THE REGULATORY FRAMEWORK .....	345
C. THE CURRENT STATE OF DRUG TESTING IN BOXING .....	347
D. THE LACK OF ENFORCEMENT .....	353
E. A COMPARISON TO OTHER SPORTS .....	355
III. FEDERAL REGULATION OF BOXING .....	357
A. HISTORY OF FEDERAL INTERVENTION.....	357
1. Early Boxing Legislation.....	357
2. A Period of Successful Boxing Reform.....	358
3. Deficiencies in the PBSA and Ali Act.....	359
4. Recent Legislative Attempts.....	361

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B. THE CONSTITUTIONALITY OF CONGRESSIONAL REGULATION OF PED USAGE .....	364
1. Tenth Amendment .....	364
2. Fourth Amendment .....	365
IV. POSSIBLE SOLUTIONS .....	366
A. EXISTING PROPOSALS .....	367
B. AMENDING THE PBAA TO ADDRESS THE PED ISSUE.....	370
V. ADDRESSING POTENTIAL CONCERNS .....	373
A. COST CONCERNS .....	373
1. The Costs of Establishing the USBA and Better PED Testing .....	373
2. Self-Funding and Benefits Outweigh the Costs.....	375
B. CONSTITUTIONAL CONCERNS .....	382
C. POLITICAL CONCERNS.....	384
VI. CONCLUSION .....	385

## I. INTRODUCTION

Throughout its history, the sport of boxing has been known as much for its corruption and scandals as its courageous fighters and memorable bouts.<sup>1</sup> Indeed, it has been referred to by some as the “red light district of sport[s].”<sup>2</sup> Even today, boxing is plagued by fixed fights,<sup>3</sup> exploitative promoters, greedy sanctioning organizations,<sup>4</sup> unnecessary health risks to boxers, incompetent state athletic commissions, and a confusing array of weight divisions with a multitude of world champions.<sup>5</sup> In fact, some of these issues were so rampant that Congress, in 1996 and 2000, passed federal legislation attempting to address them.<sup>6</sup>

1. Brad Ehrlichman, *In This Corner: An Analysis of Federal Boxing Legislation*, 34 COLUM. J.L. & ARTS 421, 421–22 (2011).

2. John McCain & Ken Nahigian, *A Fighting Chance for Professional Boxing*, 15 STAN. L. & POL’Y REV. 7, 7–8 (2004) (quoting Jack Newfield, *The Shame of Boxing*, NATION, Nov. 12, 2001, at 1) (internal quotation marks omitted).

3. *Boxer Suspended for Taking Dive*, ESPN (Feb. 13, 2013, 12:31 PM), [http://espn.go.com/boxing/story/\\_/id/8943634/north-dakota-suspends-nicholas-capes-taking-dive-ray-edwards](http://espn.go.com/boxing/story/_/id/8943634/north-dakota-suspends-nicholas-capes-taking-dive-ray-edwards).

4. See Ehrlichman, *supra* note 1, at 433–34 (discussing the financial interests of sanctioning organizations in determining boxing rankings).

5. McCain & Nahigian, *supra* note 2, at 8. As of October 11, 2012, there were eighty-eight different major world title belts being held by seventy-four champions in seventeen separate weight classes. Tim Starks, *The Transnational Boxing Rankings Board: An Opening Bell for Reform*, QUEENSBERRY RULES (Oct. 11, 2012), <http://www.queensberry-rules.com/2012-articles/october/the-transnational-boxing-rankings-board-an-opening-bell-for-reform.html>.

6. Professional Boxing Safety Act, 15 U.S.C. §§ 6301–6313 (2012).

Recently, a new problem has entered the conversation in boxing circles: illegal performance-enhancing drugs (“PEDs”).<sup>7</sup> This is not an issue unique to boxing; it has left an indelible stamp on the public consciousness in recent times.<sup>8</sup> In January 2013, Lance Armstrong, winner of seven consecutive Tour de France titles<sup>9</sup> and one of the most recognizable athletes in the world, was exposed for his PED use and ongoing cover-ups in what has been called “the most outrageous, cold-hearted and elaborate lie in the history of sports.”<sup>10</sup> In baseball, the 2013 hall of fame ballot included household names such as Barry Bonds, Mark McGwire, Sammy Sosa, and Roger Clemens, but strong links to PEDs for all of these players meant that baseball writers failed to induct any of these nominees.<sup>11</sup> This marked only the second time in forty years that no player managed to get the requisite number of votes for induction.<sup>12</sup> In football, decorated National Football League (“NFL”) linebacker Ray Lewis was suspected of using PEDs just months before he and his team won the 2013 Super Bowl.<sup>13</sup> For many of these sports, PED scandals are nothing new. Indeed, it has been such a prominent social issue that President George W. Bush brought up the pressing need to address PEDs in his 2004 State of the Union speech.<sup>14</sup> But only in the past few years has boxing been forced to

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7. Gabriel Montoya, *Dr. Margaret Goodman and VADA Hope to Educate and Clean Up Boxing*, DOGHOUSEBOXING.COM (Dec. 27, 2011), <http://www.doghouseboxing.com/Gabriel/Montoya122711.htm>.

8. In general, almost every major professional sport is dealing with this complicated PED issue. “That complexity reflects a mix of controverted justifications, enforcement mechanisms that implicate privacy interests and feature an inverse relationship between expense and reliability, and historically untrustworthy national and international enforcement authorities.” Lewis Kurlantzick, *Is There a Steroids Problem? The Problematic Character of the Case for Regulation*, 40 NEW ENG. L. REV. 789, 789–90 (2006) (footnotes omitted).

9. John Coon, *Lance Armstrong’s Career Highlights: His Top Cycling Moments*, YAHOO! SPORTS (Aug. 24, 2012, 6:18 PM), <http://sports.yahoo.com/news/lance-armstrongs-career-highlights-top-cycling-moments-221800399.html>.

10. Michael O’Keefe, *Lance Armstrong Sued by SCA Promotions for \$12.1 Million for ‘Cold-Hearted, Elaborate’ Lie*, NYDAILYNEWS.COM, (Feb. 8, 2013, 1:06 AM), <http://www.nydailynews.com/sports/i-team/armstrong-sued-12m-cold-hearted-elaborate-lie-article-1.1258614> (quoting *SCA Promotions, Inc. v. Armstrong*, No. 13-01564 (Tex. Dist. filed Feb. 7, 2013)).

11. Matt Smith & Steve Almasy, *Baseball Writers Balk at Hall of Fame Class of ‘13*, CNN, <http://www.cnn.com/2013/01/09/sport/baseball-hall-of-fame/> (last updated Jan. 10, 2013, 7:41 AM).

12. Darren Rovell, *Cooperstown Insists It Can Still Thrive*, ESPN, [http://espn.go.com/mlb/hof13/story/\\_id/8873058/baseball-hall-fame-cooperstown-mayor-shrugs-2013-induction-woes](http://espn.go.com/mlb/hof13/story/_id/8873058/baseball-hall-fame-cooperstown-mayor-shrugs-2013-induction-woes) (last updated Jan. 23, 2013, 4:33 PM).

13. Andrew Sharp, *Ray Lewis and PEDs in Pro Sports*, SBNATION (Feb. 2, 2013, 11:40 AM), <http://www.sbnation.com/nfl/2013/2/2/3942156/ray-lewis-PEDs-super-bowl-2013>.

14. Address Before a Joint Session of the Congress on the State of the Union, 1 PUB. PAPERS 81 (Jan. 20, 2004), available at <http://www.gpo.gov/fdsys/pkg/PPP-2004-book1/pdf/PPP-2004-book1-doc-pg81-2.pdf>.

recognize this problem,<sup>15</sup> as PEDs have become as much of a hot-button issue in prizefighting as it was in baseball during the steroid-rampant era of the 1990s.<sup>16</sup> However, the inherent nature of the sport of boxing, along with its unique structural features, requires a solution somewhat different from those proposed in other sports.

In boxing, the issue of PED testing gained steam in 2010 when Floyd Mayweather was negotiating a fight with Manny Pacquiao. Mayweather, the current pound-for-pound champion<sup>17</sup> and pay-per-view star, demanded that both fighters submit to PED testing by the United States Anti-Doping Agency (“USADA”) in addition to the customary and required state athletic commission and sanctioning organization drug testing.<sup>18</sup> Mayweather, among other boxers,<sup>19</sup> had voiced suspicions that Pacquiao used PEDs as he conquered weight class after weight class, seemingly gaining strength and power as he became an eight-division world champion.<sup>20</sup> Pacquiao refused, declaring that although he was a clean fighter, Mayweather had no right to dictate such terms to him, and insisted that he would only undergo testing under the usual mandatory state rules.<sup>21</sup>

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15. See, e.g., Steve Kim, *The Perils of Boxing*, SPORTS ON EARTH (Oct. 24, 2013), <http://www.sportsonearth.com/article/63283528/> (“Only now is boxing beginning to understand that PEDs are every bit as prevalent in their game as Major League Baseball or the NFL.”).

16. Steve Kim, *The Soapbox—Dec. 1, 2012*, MAXBOXING.COM, <http://www.maxboxing.com/news/max-boxing-news/the-soapbox--dec-1-2012> (last visited Dec. 25, 2013).

17. *Pound for Pound*, THE RING, <http://ringtv.craveonline.com/ratings> (last visited Dec. 25, 2013).

18. Gabriel Montoya, *Azad Championship Report—Floyd Mayweather and the New Wave of Drug Testing in Boxing*, MAXBOXING.COM, <http://www.maxboxing.com/news/max-boxing-news/azad-championship-report--floyd-mayweather-and-the-new-wave-of-drug-testing-in-boxing> (last visited Dec. 25, 2013).

19. Former champion Jorge Arce has said that he believes Pacquiao is using PEDs. Paul Magno, *Arce: Pacquiao Is Using PEDs, ‘That’s for Sure,’* YAHOO! SPORTS (Feb. 19, 2013, 5:37 AM), <http://sports.yahoo.com/news/arce-pacquiao-using-peds-thats-sure-103700827--box.html>. Current champion Paulie Malignaggi also hinted that he believed Pacquiao was using PEDs, but refused to get into specifics. Ryan Burton, *Malignaggi Blasts Diaz, Feels Weird About Manny Pacquiao*, BOXINGSCENE.COM, [www.boxingscene.com/malignaggi-blasts-diaz-feels-weird-about-manny-pacquiao--23552](http://www.boxingscene.com/malignaggi-blasts-diaz-feels-weird-about-manny-pacquiao--23552) (last updated Nov. 18, 2009).

20. Kevin Iole, *Floyd Mayweather Jr. Rants About Manny Pacquiao, PED Use and Bob Arum’s Untruths*, YAHOO! SPORTS (May 2, 2012, 1:49 AM), <http://sports.yahoo.com/news/boxing--floyd-mayweather-jr--rants-about-manny-pacquiao-and-bob-arum.html>. Pacquiao turned professional fighting at 106 pounds, eventually conquering eight weight classes and moving all the way up to 154 pounds to beat Antonio Margarito for a junior middleweight title. Tim Starks, *Manny Pacquiao: The Universe’s Questions, Answered*, QUEENSBERRY RULES (Sept. 9, 2011), <http://www.queensberry-rules.com/2011-articles/september/manny-pacquiao-the-universes-questions-answered.html>.

21. See John Whisler, *Mayweather Talking Pacquiao, but Drug Tests, Too*, MYSA, <http://www.mysanantonio.com/sports/boxing/article/Mayweather-talking-Pacquiao-but-drug-tests-too-1450425.php> (last updated July 3, 2011, 12:01 AM).

Pacquiao even sued Mayweather for defamation.<sup>22</sup> The result was that the biggest fight in boxing history—a bout expected to break all pay-per-view and revenue records—failed to come to fruition because of a disagreement over drug testing.<sup>23</sup>

But 2012 was the real “coming-out party” for PED awareness in professional boxing.<sup>24</sup> While baseball’s “Steroids Era” began in the 1980s and peaked more than a decade later,<sup>25</sup> and in other sports, including football, cycling, and track and field, the scandals came in waves,<sup>26</sup> boxing had previously only experienced ripples.<sup>27</sup> Now, following a string of high-profile fighters testing positive for banned substances, it is widely recognized that boxing has a serious PED usage problem,<sup>28</sup> and the discussion of better drug testing in prizefighting has reached a “fever pitch.”<sup>29</sup>

On May 4, 2012, it was revealed that the World Boxing Association (“WBA”) and the International Boxing Federation (“IBF”) junior welterweight champion Lamont Peterson had tested positive for synthetic testosterone, and his upcoming Las Vegas title bout was canceled.<sup>30</sup>

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22. T.M., *Boxing’s Two Titans: How “Money” Is Mayweather?*, *ECONOMIST* (Sept. 19, 2011, 4:45 PM), <http://www.economist.com/blogs/gametheory/2011/09/boxing%E2%80%99s-two-titans>. In September 2012, Pacquiao and Mayweather agreed to a settlement in the defamation suit. *Mayweather, Pacquiao Settle Defamation Case*, *USA TODAY*, <http://usatoday30.usatoday.com/sports/boxing/story/2012/09/25/mayweather-pacquiao-settle-defamation-case/57841644/1> (last updated Sept. 25, 2012, 5:40 PM).

23. Daniel Gandert & Fabian Ronisky, *American Professional Sports Is a Doper’s Paradise: It’s Time We Make a Change*, 86 *N.D. L. REV.* 813, 813 (2010).

24. Gabriel Montoya, *Yuriorkis Gamboa Tests Positive for Being a Modern Athlete*, *MAXBOXING.COM*, <http://www.maxboxing.com/news/max-boxing-news/yuriorkis-gamboa-tests-positive-for-being-a-modern-athlete> (last visited Dec. 25, 2013).

25. Holli N. Heiles, *Baseball’s “Growth” Problem: Can Congress Require Major League Baseball to Test Its Athletes for Human Growth Hormone? A Proposal*, 62 *ARK. L. REV.* 315, 322–23 (2009).

26. Joshua H. Whitman, Note, *Winning at All Costs: Using Law and Economics to Determine the Proper Role of Government in Regulating the Use of Performance-Enhancing Drugs in Professional Sports*, 2008 *U. ILL. L. REV.* 459, 462.

27. Gabriel Montoya, *A Conversation with Dr. Margaret Goodman Part Two: PEDs in Boxing*, *MAXBOXING.COM*, <http://www.maxboxing.com/news/max-boxing-news/a-conversation-with-dr-margaret-goodman-part-two-peds-in-boxing> (last visited Dec. 25, 2013).

28. Eric Raskin, *Boxing’s PEDs Issue Impossible to Ignore*, *ESPN* (Oct. 24, 2012, 12:32 PM), [http://espn.go.com/blog/Boxing/post/\\_id/1584/boxings-ped-problem-impossible-to-ignore](http://espn.go.com/blog/Boxing/post/_id/1584/boxings-ped-problem-impossible-to-ignore) (“[I]n 2012, for the first time, those of us who would like to pretend this problem doesn’t exist have no choice but to acknowledge that it does.”).

29. Montoya, *supra* note 7.

30. Thomas Hauser, *The PED Mess: Part One*, *MAXBOXING.COM*, <http://www.maxboxing.com/news/max-boxing-news/the-ped-mess-part-one> (last visited Dec. 25, 2013).

However, Peterson retained his IBF championship title<sup>31</sup> and successfully defended his championship belt eight months later in Washington, D.C., without receiving any punishment in the form of fines or suspensions.<sup>32</sup>

Just a few weeks after Peterson's positive test, Andre Berto, the World Boxing Council ("WBC") welterweight champion, tested positive for the anabolic steroid Norandrosterone while preparing for his own title defense in California.<sup>33</sup> Although that fight was also called off and Berto's license was temporarily suspended, he was quickly relicensed by the California State Athletic Commission without a hearing and fought in a championship bout in California less than six months later, making an undisclosed seven-figure payday.<sup>34</sup>

In October of the same year, Erik Morales, a Mexican boxing legend and champion in four different weight classes, repeatedly tested positive for Clenbuterol in samples taken before a championship bout headlining the first fight card at a new billion-dollar stadium in New York.<sup>35</sup> Although standard protocol dictates that test results be released after two positive tests, USADA conducted four separate tests with positive results without notifying the New York State Athletic Commission.<sup>36</sup> Despite the eventual public revelation that Morales had tested positive twice (in four separate samples) in the two weeks preceding the fight, the promoters, sanctioning organizations, and state athletic commission involved all permitted the fight to take place.<sup>37</sup> Meanwhile, in the span of a few short months,

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31. Gabriel Montoya, *Peterson vs. Holt: Another Bad Precedent for Boxing?*, MAXBOXING.COM, <http://www.maxboxing.com/news/max-boxing-news/peterson-vs-holt-another-bad-precedent-for-boxing> (last visited Dec. 25, 2013).

32. *Id.* Technically, the WBA did strip Peterson of his belt. *Id.* After that, Peterson requested a licensing hearing in Nevada, but he claims that the Nevada State Athletic Commission essentially told him that he did not even need a hearing to get relicensed. See Gabriel Montoya, *Peterson Comes Back, Goes Home and Moves Forward*, MAXBOXING.COM, <http://www.maxboxing.com/news/max-boxing-news/peterson-comes-back-goes-home-and-moves-forward> (last visited Dec. 25, 2013) [hereinafter Montoya, *Peterson Comes Back*].

33. Hauser, *supra* note 30.

34. Dan Rafael, *Robert Guerrero to Fight Andre Berto*, ESPN (Oct. 15, 2012, 8:16 PM) [http://espn.go.com/boxing/story/\\_/id/8509857/robert-guerrero-fight-andre-berto-november-24](http://espn.go.com/boxing/story/_/id/8509857/robert-guerrero-fight-andre-berto-november-24).

35. Gabriel Montoya, *Morales Test Positive for Clenbuterol, the Fight Tests Boxing Morals*, MAXBOXING.COM, <http://www.maxboxing.com/news/max-boxing-news/morales-test-positive-for-clenbuterol-the-fight-tests-boxing-morals> (last visited Dec. 25, 2013).

36. Thomas Hauser, *The PED Mess: Part Two*, MAXBOXING.COM, <http://www.maxboxing.com/news/max-boxing-news/the-ped-mess-part-two> (last visited Dec. 25, 2013).

37. Hauser, *supra* note 30. This fight "marked the first time the public knew a fighter was being allowed to compete despite test[ing] positive for a banned substance twice on two separate dates complete with 'B' sample confirmations leading up to a televised world title fight." Gabriel Montoya, *USADA, Golden Boy and Positive Drug Test Management Part One*, MAXBOXING.COM,

Antonio Tarver, Peter Quillin, Floyd Mayweather, and Julio Cesar Chavez Jr., all former or current boxing world champions, were implicated in PED usage scandals or suspicions, either by testing positive or refusing to release their drug test results.<sup>38</sup>

But 2012 did not see the end of PED issues in boxing. In late January 2013, the Biogenesis scandal broke out. Referred to by some journalists as “BALCO East Coast,”<sup>39</sup> Biogenesis, a Miami-based anti-aging clinic, leaked a lengthy list of athletes and coaches to whom it was supplying designer steroids. This list included baseball superstar Alex Rodriguez, tennis player Wayne Odesnik, and former WBA and IBF featherweight champion Yuriorkis Gamboa.<sup>40</sup> However, under state athletic commission rules, a professional boxer, unlike other professional athletes, cannot be fined or suspended retroactively if he has passed the drug test. Therefore, Gamboa faced no punishment in the face of this revelation.<sup>41</sup> In contrast, Alex Rodriguez was banned by Major League Baseball (“MLB”) for an unprecedented 211 games for the same infraction.<sup>42</sup>

In a period of less than twelve months, it was made crystal clear that boxing has two major problems with PEDs. First, many high-profile boxers are using banned substances. Second, the existing regulatory framework does little to detect PED use among professional boxers or enforce proper punishment once such use is discovered. There has been significant literature on the topic of PED regulation in professional sports, primarily for the major team sports of baseball, basketball, and football. There has also been some discussion about federal regulation of professional boxing with respect to general health and safety standards and other corrupt

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<http://www.maxboxing.com/news/max-boxing-news/usada-golden-boy-and-positive-drug-test-management-part-one> (last visited Oct. 24, 2013).

38. Hauser, *supra* note 30; Hauser, *supra* note 36.

39. Montoya, *supra* note 24. The BALCO scandal in 2004 was one of the biggest and most widespread steroids scandals in sports history. See *BALCO Investigation Timeline*, USA TODAY, <http://usatoday30.usatoday.com/sports/balco-timeline.htm> (last updated Nov. 27, 2007, 5:10 AM) (detailing key dates and events of the BALCO investigation).

40. Tim Elfrink, *A Miami Clinic Supplies Drugs to Sports' Biggest Names*, MIAMI NEW TIMES NEWS (Jan. 31, 2013), <http://www.miaminewtimes.com/2013-01-31/news/a-rod-and-doping-a-miami-clinic-supplies-drugs-to-sports-biggest-names/full/>.

41. Kevin Iole, *Yuriorkis Gamboa Linked to Anti-Aging Clinic Allegedly Distributing PEDs, but He'll Face No Consequences*, YAHOO! SPORTS (Jan. 29, 2013, 3:37 PM) <http://sports.yahoo.com/blogs/boxing/yuriorkis-gamboa-linked-anti-aging-clinic-allegedly-distributing-203749617--box.html>.

42. Teri Thompson et al., *Alex Rodriguez Hit with Unprecedented 211-Game Drug Suspension by Major League Baseball; Yankees Star Will Fight the Ban Which Starts Thursday*, NYDAILYNEWS.COM, <http://www.nydailynews.com/sports/i-team/a-rod-mlb-211-game-drug-suspension-article-1.1418060> (last updated Aug. 6, 2013, 1:55 AM).

practices. But there has been no meaningful scholarship on the rising issue of regulating PED use in boxing. This Note tackles that problem and argues that while the recent proposed Professional Boxing Amendments Act (“PBAA”) is a step in the right direction for boxing regulation, in light of the recent PED issues in the sport, further federal regulatory measures addressing PED regulation in professional boxing are warranted in order to better ensure its passage, adequately protect the health and safety of boxers, safeguard the public integrity of the sport, and preserve the economic value of professional boxing.

Part II of this Note examines the economic impact of the boxing industry, its regulatory framework, and the current state of drug testing in boxing. Part III reviews the history of federal legislation in boxing up to the present day and addresses accompanying constitutional concerns. Part IV summarizes some proposed solutions by others and recommends amending the PBAA to include PED regulation. Part V examines and addresses potential counterarguments against the measure, and Part VI concludes.

## II. BACKGROUND

### A. THE BOXING INDUSTRY

Boxing is an individual sport, much like fencing, wrestling, tennis, or taekwondo. Nevertheless, in terms of economic revenues generated, boxing is more similar to mainstream sports such as baseball and basketball.<sup>43</sup> In the United States alone, professional boxing is a multibillion dollar industry.<sup>44</sup> However, while there are more than 8500 licensed professional boxers in the United States, the majority do not make a substantial amount of money boxing, with many earning as little as \$400 per fight.<sup>45</sup> The structure of boxing is such that fighters give up most of their fight purses in license fees and payments to their promoters, managers, and trainers.<sup>46</sup> Because they are often uneducated and come from impoverished backgrounds, boxers are frequently exploited by their promoters and other major players in the game.<sup>47</sup>

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43. “While not considered within the mainstream of sports, the substantial dollars, glorified history and the ‘electricity’ that is generated at a major World Championship Boxing event is arguably unparalleled by any other sporting event.” Jeffrey S. Fried, *The Sweet Science, Legally Speaking (Professional Boxing)*, 14 J. LEGAL ASPECTS SPORT 75, 102–03 (2004).

44. Ehrlichman, *supra* note 1, at 441.

45. Melissa Neiman, *Protecting Professional Boxers: Federal Regulations with More Punch*, 15 SPORTS LAW. J. 59, 64 (2008).

46. *Id.*

47. *Id.*; Ehrlichman, *supra* note 1, at 441–42.

However, boxing is an event-driven sport, and fight cards can be quite lucrative.<sup>48</sup> Moreover, a professional boxer can attain wealth and reach superstar status if he becomes a pay-per-view star.<sup>49</sup> Past boxers who fit into this category include Mike Tyson, Oscar De La Hoya, and Evander Holyfield.<sup>50</sup> Current fighters who are true marquee attractions are Mayweather, Pacquiao, Saul Alvarez, Miguel Cotto, and Julio Cesar Chavez Jr.<sup>51</sup> At any given time, there are no more than a handful of these boxing mega stars, but they drive boxing in a way that is simply impossible for individuals in other sports, partly due to the highly dramatic, one-on-one nature of boxing fights.

For this reason, Home Box Office (“HBO”), the largest boxing television network in the United States, allocates over \$60 million per year to its boxing budget alone—a huge amount for a television network.<sup>52</sup> But these investments can be quite profitable. As of 2012, Mayweather, in nine pay-per-view fights, had generated 9.6 million buys and \$543 million in television revenue alone.<sup>53</sup> De La Hoya totaled \$696 million in his nineteen pay-per-view fights,<sup>54</sup> a figure so impressive it has been marked in the Guinness Book of Records.<sup>55</sup> The price of a pay-per-view fight has increased in recent years, with some fights costing up to \$65, plus an additional \$10 for high-definition.<sup>56</sup> Some of Mayweather’s recent fights have even been shown in select theatres around the country.<sup>57</sup> Additionally,

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48. Fried, *supra* note 43, at 99–103.

49. *Id.* at 95.

50. Andrew Eisele, *Top Pay Per View Events in Boxing History: Oscar De La Hoya Really Is the Golden Boy*, ABOUT.COM, <http://boxing.about.com/od/history/a/payperview.htm> (last visited Dec. 24, 2013).

51. Chris Mannix, *Has Andre Ward Earned the Right to Get a Big Payday for a Tuneup Fight?*, SPORTS ILLUSTRATED (Aug. 26, 2013), <http://mma-boxing.si.com/2013/08/26/andre-ward-hbo-boxing-next-fight/>.

52. Jake Emen, *The Economics of Boxing: How Do Pay-Per-Views, Ticket Sales and Fighter Demands Balance Out in the Boxing World?*, YAHOO! VOICES (Sept. 24, 2008), <http://voices.yahoo.com/the-economics-boxing-1952013.html?cat=3>.

53. Dan Rafael, *Floyd Mayweather Does \$94M in PPV*, ESPN, [http://espn.go.com/boxing/story/\\_/id/7919965/floyd-mayweather-miguel-cotto-rakes-94m-ppv-sales](http://espn.go.com/boxing/story/_/id/7919965/floyd-mayweather-miguel-cotto-rakes-94m-ppv-sales) (last updated May 11, 2012, 4:02 PM).

54. Richard Sandomir, *In Boxing, Pay-Per-View and a Fistful of Dollars*, N.Y. TIMES (Dec. 11, 2008), <http://www.nytimes.com/2008/12/12/sports/othersports/12sandomir.html>.

55. *De La Hoya Gets Guinness Record for Career PPV Sales*, ABS-CBNNEWS.COM, <http://www.abs-cbnnews.com/sports/12/13/11/de-la-hoya-gets-guinness-record-career-ppv-sales> (last Dec. 13, 2011, 8:32 PM).

56. Luis Sandoval, *Schaefer Confirms Mayweather-Canelo PPV Price as 64.95*, BOXINGSCENE.COM, <http://www.boxingscene.com/schaefer-confirms-mayweather-canelo-ppv-price-6495--67282> (last updated July 3, 2013).

57. Lem Satterfield, *Mayweather-Guerrero to Hit Movie Theaters*, THE RING (Mar. 26, 2013) <http://ringtv.craveonline.com/blog/177961-mayweather-guerrero-to-hit-movie-theaters>.

these top fighters routinely generate over \$10 million in live gate receipts.<sup>58</sup> Although boxing venues are generally smaller than those in baseball and football, their gate receipts can easily match up because the ticket prices are higher. For instance, the average price of a ticket for Pacquiao's 2011 fight against Juan Manuel Marquez was \$1409.<sup>59</sup> Even lesser-name fighters, with the right marketing and promotion, can draw large numbers of viewers. In 2012 there were sixteen different bouts that each drew over a million views.<sup>60</sup>

Other indicators of the magnitude of the industry include the individual earnings of some of these superstar boxers and the way their fights stimulate local economies. In 2012, Mayweather and Pacquiao placed first and second, respectively, on Forbes's list of highest paid athletes.<sup>61</sup> On February 19, 2013, Mayweather signed a six-fight deal worth an estimated \$250 million—the “richest individual athlete deal in all of sports.”<sup>62</sup> Much has also been written about the economic boost of boxing

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58. Scott Christ, *Pacquiao vs Marquez IV Generates \$10.8 Million Gate*, SBNATION (Dec. 10, 2012, 8:19 PM), <http://www.badlefthook.com/2012/12/10/3752876/pacquiao-vs-marquez-iv-generates-10-8-million-gate-nevada-mgm-grand-hbo-boxing-news>; *Nevada's Top 35 Boxing Largest Grossing Gates*, NEV. DEP'T BUS. & INDUSTRY, [http://boxing.nv.gov/results/Top\\_Boxing\\_Gates/](http://boxing.nv.gov/results/Top_Boxing_Gates/) (last visited Dec. 25, 2013).

59. Greg Bishop, *Pacquiao Packs an Economic Punch in Las Vegas*, N.Y. TIMES (Nov. 10, 2011), [http://www.nytimes.com/2011/11/11/sports/pacquiao-packs-an-economic-punch-in-las-vegas.html?pagewanted=all&\\_r=2&](http://www.nytimes.com/2011/11/11/sports/pacquiao-packs-an-economic-punch-in-las-vegas.html?pagewanted=all&_r=2&).

60. Kevin Iole, *Boxing on Cable in 2012: Lots of Fights, Lots of Viewers and Lots of Love for Julio Cesar Chavez Jr.*, YAHOO! SPORTS (Dec. 21, 2012, 4:01 PM), <http://sports.yahoo.com/blogs/boxing/boxing-cable-2012-lots-fights-lots-viewers-lots-210146022--box.html>.

61. Mayweather topped the list, having earned \$85 million, while Pacquiao made \$62 million. Tiger Woods was third with \$59.4 million. *Floyd Mayweather Tops Forbes List of Highest-Paid Athletes, Beating Manny Pacquiao & Tiger Woods*, HUFFINGTON POST, [http://www.huffingtonpost.com/2012/06/19/floyd-mayweather-jr-forbes-highest-paid-athlete\\_n\\_1607490.html](http://www.huffingtonpost.com/2012/06/19/floyd-mayweather-jr-forbes-highest-paid-athlete_n_1607490.html) (last updated June 19, 2012, 5:29 PM) [hereinafter *Forbes List*]. Mayweather is well on his way to the top spot for 2013 as well. *SI: Floyd Mayweather Highest-Paid*, ESPN, [http://espn.go.com/boxing/story/\\_/id/9277146/floyd-mayweather-jr-top-paid-us-athlete-2013-sports-illustrated](http://espn.go.com/boxing/story/_/id/9277146/floyd-mayweather-jr-top-paid-us-athlete-2013-sports-illustrated) (last updated May 15, 2013, 12:10 PM). Mayweather's projected earnings for 2013 doubled with the record breaking results of his September 2013 fight with Alvarez, for which he made somewhere in the neighborhood of \$100 million. Dan Rafael, *Mayweather Win Top-Grossing Fight*, ESPN, [http://espn.go.com/boxing/story/\\_/id/9694996/floyd-mayweather-canelo-alvarez-top-grossing-ppv-fight](http://espn.go.com/boxing/story/_/id/9694996/floyd-mayweather-canelo-alvarez-top-grossing-ppv-fight) (last updated Sept. 20, 2013, 1:00 PM).

62. *Mayweather Inks Record-Breaking Deal with Showtime/CBS*, SHO SPORTS (Feb. 13, 2013), <http://sports.sho.com/blogs/Mayweather/deal>. Alex Rodriguez's \$275 million deal with the New York Yankees is technically the biggest contract for an athlete in sports, but that spans ten years in contrast to the thirty months for Floyd Mayweather's deal. Kurt Badenhausen, *Floyd Mayweather Hits Jackpot with New Showtime PPV Deal*, FORBES (Feb. 20, 2013, 2:36 PM), <http://www.forbes.com/sites/kurtbadenhausen/2013/02/20/floyd-mayweather-hits-jackpot-with-new-showtime-ppv-deal/>.

megafights. In fact, megafights are sometimes referred to as local “economic stimulus plan[s].”<sup>63</sup> Aside from the contracted payments to fighters,<sup>64</sup> promoters, and those directly involved, the economic impact of a fight can be tremendous.<sup>65</sup> A typical Manny Pacquiao fight in Las Vegas brings in flocks of visitors,<sup>66</sup> increases gambling revenues and hotel prices in casinos as well as bottle service prices in nightclubs, and boosts the local economy by injecting hundreds of millions of dollars into the city in a single weekend.<sup>67</sup> In fact, a single Pacquiao fight generally funds the budget of the Nevada State Athletic Commission for an entire year.<sup>68</sup> Overall, “The economic impact of a fight on a state can be huge.”<sup>69</sup> Thus, the relative lack of attention professional boxing gets in the United States, compared to sports like football and baseball, belies its true economic impact.

## B. THE REGULATORY FRAMEWORK

Boxing is the only major sport in the United States that lacks a centralized organizational body.<sup>70</sup> This has been the primary source of many of its problems.<sup>71</sup> Instead, what exists is a multibody regulatory

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63. Bishop, *supra* note 59.

64. In such large-scale fights, it is “not unusual for top boxing stars like Manny Pacquiao to clear eight figures a fight.” Jonathan Snowden, *Mayweather vs Canelo Purse: How Golden Boy Can Afford to Pay Floyd \$41.5 Million*, BLEACHER REP. (Sept. 11, 2013), <http://bleacherreport.com/articles/1768324-mayweather-vs-canelo-purse-how-golden-boy-can-afford-to-pay-floyd-415-million> (explaining the economics of boxing megafights).

65. Patrick B. Fife, Note, *The 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, 1321 (2002).

66. Most importantly for the local casinos, there are numerous high-end gamblers attracted to Vegas when Pacquiao fights. Bishop, *supra* note 59.

67. *Id.* Another example is retired former English champion Ricky Hatton, who would bring an “army” of his fellow countrymen with him for his fights in Las Vegas. *Id.* For his 2007 fight against Mayweather, it was estimated that 30,000 Brits made the trip across the pond to cheer Hatton on, to the point where the MGM Grand Casino literally ran out of beer. Dan Rafael, *R. Hatton on Verge of Unretiring?*, ESPN (Sept. 11, 2012, 3:37 PM), [http://espn.go.com/blog/dan-rafael/post/\\_/id/1835/r-hatton-on-verge-of-unretiring](http://espn.go.com/blog/dan-rafael/post/_/id/1835/r-hatton-on-verge-of-unretiring).

68. For the third Pacquiao-Marquez fight alone, the commission received 6 percent of the live gate receipts, in addition to a \$50,000 fee, for an estimated total of \$758,000. Bishop, *supra* note 59.

69. J. Bradley Clair, Note, *Why Federal Preemption Is Necessary to Create Uniform Professional Boxer Safety Standards*, 73 BROOK. L. REV. 1173, 1203 n.209 (2008).

70. Neiman, *supra* note 45, at 61.

71. Michael J. Jurek, *Janitor or Savior: The Role of Congress in Professional Boxing Reform*, 67 OHIO ST. L.J. 1187, 1191 (2006). Former HBO executive and current boxing promoter Lou DiBella says that “the thought that state regulation has been adequate is preposterous. The local commissions have been under funded, under manned and have been monuments to political patronage and soft money.” *Symposium: Boxing at the Crossroads*, 11 SETON HALL J. SPORT L. 193, 214 (2001) [hereinafter *Symposium*]

system that can only be described as “chaotic.”<sup>72</sup> Professional boxing in the United States has traditionally been regulated by individual states.<sup>73</sup> Most states have state athletic commissions<sup>74</sup> that are in charge of licensing fighters, managers, and promoters, as well as qualifying referees and judges.<sup>75</sup> They also impose anti-doping policies and collect fees from fighters participating in fight cards in their jurisdiction.<sup>76</sup>

One major problem with this state-regulated system is that the state athletic commissioners often lack knowledge or experience in the field of boxing because they are appointed by governors as political favors.<sup>77</sup> This puts boxing commissioners in a situation in which they may be “more concerned with pleasing the governor that put them in their position than with enforcing the safety precautions.”<sup>78</sup> This set-up means many boxing commissioners are incompetent, politically influenced, or simply disinterested in their jobs. For example, the Governor of Nevada appointed T.J. Day, a successful businessman with strong ties to the Nevada Republican Party.<sup>79</sup> More importantly, Day had no prior experience in the boxing industry and acknowledged that his appointment was partly a result of his close relationship with the state’s Republican governor.<sup>80</sup> Bernard Kerik, longtime chairman of the New York Commission, was notorious for not even attending fights held in his own state.<sup>81</sup>

Another singular feature of boxing is that there are different versions

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72. Gandert & Ronisky, *supra* note 23, at 821.

73. Ehrlichman, *supra* note 1, at 424–25.

74. At least forty four states have established state athletic commissions to regulate professional boxing activities. Scott Baglio, Note, *The Muhammad Ali Boxing Reform Act: The First Jab at Establishing Credibility in Professional Boxing*, 68 *FORDHAM L. REV.* 2257, 2262 (2000); *Symposium, supra* note 71, at 205 (“There are some states where there are no commissions.”).

75. Gandert & Ronisky, *supra* note 23, at 825.

76. *Id.* at 825, 840; Bishop, *supra* note 59.

77. Clair, *supra* note 69, at 1200; Ehrlichman, *supra* note 1, at 425 (quoting Senator John McCain stating that “[a] large number of boxing commissioners wouldn’t know a boxing glove from a catcher’s mitt.” (quoting Dustin Brown, *Down for the Count?*, *CHRISTIAN SCI. MONITOR*, Aug. 24, 2001, at 13)).

78. Clair, *supra* note 69, at 1200.

79. *Id.* at 1197.

80. *Id.* at 1197–98. Day defended his appointment by saying that his business expertise was useful in handling the major financial impact of boxing on the state. *Id.* at 1197. This is problematic because a state’s financial interests can often conflict with its purpose to regulate for the health and safety of professional boxers participating in bouts within its jurisdiction. *See* Neiman, *supra* note 45, at 80. Nevada is a state where “the casino business is heavily reliant on boxing to generate traffic,” and so this conflict of interest is quite potent. *Symposium, supra* note 71, at 228–29.

81. Clair, *supra* note 69, at 1199. Since Kerik’s resignation in 2003, the New York commission has taken a number of steps to highlight boxer safety and familiarize itself with the complexities of boxing regulation. *Id.* at 1199–200.

of world championship belts. They are promulgated, most famously by the “big four” sanctioning bodies: the WBC, WBA, IBF, and World Boxing Organization (“WBO”).<sup>82</sup> These organizations rank the top fighters in each weight class and recognize championship bouts, collecting a sanctioning fee in return for these services.<sup>83</sup> They also have their own anti-doping practices, which are far more lax than those of the state athletic commissions.<sup>84</sup> Once the sanctioning body allows a fighter to fight for or defend a title, the fighters can negotiate with each other to select a venue for the fight.<sup>85</sup> Thus, for instance, if a fighter wanted to defend a WBC championship belt in New York, he would have to submit to both the anti-doping procedures of the New York State Athletic Commission as well as the WBC’s separate procedures.

In contrast, most other sports have a centralized league. Football has the NFL, basketball has the National Basketball Association (“NBA”), and baseball has the MLB. As a result, in those leagues, there is a single, unified drug testing procedure governing all participating athletes. Additionally, there is a players’ union or association. This is not the case for boxing.<sup>86</sup> If one state decides to upgrade its PED testing procedures, this does not mean other states must follow suit or that boxers must submit to that testing. Instead, boxers—or more likely, their promoters and sponsors—can simply choose another state as their fight venue. As we shall see, one consequence is that there is an incentive to implement less stringent drug testing. This system makes it much more difficult to improve drug testing in boxing than if there was a centralized league.

### C. THE CURRENT STATE OF DRUG TESTING IN BOXING

Due to the inadequate testing and inherent flaws in the multijurisdictional system, the current anti-doping approach in boxing has been likened to a state of “anarchy.”<sup>87</sup> Each state commission has its own drug testing policy, but almost all of them are out of date. Some states do not even test for PEDs at all.<sup>88</sup> The states that do have PED testing use an

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82. Starks, *supra* note 5.

83. Neiman, *supra* note 45, at 66.

84. Gandert & Ronisky, *supra* note 23, at 827.

85. *Id.* at 825.

86. For the difficulties of unionization in boxing, see Ehrlichman, *supra* note 1, at 449–52.

87. Gandert & Ronisky, *supra* note 23, at 838. Current PED testing and regulations are “simply pathetic and do not in any way address doping in the sport.” *Id.* at 839.

88. Hauser, *supra* note 36. Hauser elaborates that “[t]here’s no uniformity with regard to standards, degree of testing, or punishment from state to state. Testing on the day of a competition is notoriously ineffective in the face of sophisticated drug use. But that’s the only testing that most states utilize. Some states don’t drug test at all.” *Id.*

antiquated method of taking solely urine samples, and none of the states conduct out-of-competition testing.<sup>89</sup> Most importantly, the testing is not done randomly. Most state commissions simply do a preannounced prefight or postfight test.<sup>90</sup> With modern PEDs, such testing is easy to circumvent. Boxers can simply schedule their PED usage to cease a few weeks before the fight, thereby avoiding detection by letting the remnants of the drugs flush out of their systems.<sup>91</sup> Many of these inadequacies in testing procedures can be attributed primarily to a lack of funding and resources.<sup>92</sup>

Some procedures and policies, however, are inexplicable. For example, even though the World Anti-Doping Agency<sup>93</sup> (“WADA”) lowered the allowable Testosterone to Epitestosterone (“T/E”) ratio to 4:1 in 2005,<sup>94</sup> the Nevada and New York state athletic commissions, two of the most popular boxing jurisdictions in the United States, have continued to use a 6:1 ratio,<sup>95</sup> with no indication of updating this standard anytime soon.<sup>96</sup> Because the average human T/E ratio is 1:1,<sup>97</sup> these state commission testing methods allow athletes to pass PED tests despite having almost four to six times the average human amount of testosterone in their bodies.<sup>98</sup> Travis Tygart, Chief Executive Officer of USADA,

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89. Montoya, *supra* note 27. This is important because many modern PEDs, such as human growth hormone, can only be detected by blood tests. Heiles, *supra* note 25, at 333.

90. For example, the Nevada State Athletic Commission, if it decides to test at all, “can only test fighters before or immediately after fights.” Gandert & Ronisky, *supra* note 23, at 826.

91. For example, the blood boosting drug erythropoietin (“EPO”) will clear an athlete’s system less than twenty-four hours after being injected into his veins. Joaquin M. Henson, *Let’s Rid Boxing of Suspicion*, PHILSTAR.COM, <http://www.philstar.com/sports/2012-12-19/887623/lets-rid-boxing-suspicion> (last updated Dec. 19, 2012, 12:00 AM). This method is called “cycling.” Hauser, *supra* note 36.

92. *About VADA*, VADA, <http://vada-testing.org/about> (last visited Dec. 27, 2013).

93. WADA is a worldwide anti-doping organization that seeks to ensure a doping-free sports community on the national and international levels, advocating for a “harmonized, coordinated and effective anti-doping program.” While it does not test professional boxers, it has established the World Anti-Doping Code, which is widely recognized in sports around the world and has been adopted by the International Olympic Committee. WORLD ANTI-DOPING AGENCY, WORLD ANTI-DOPING CODE 11 (2009), available at <http://www.usada.org/uploads/testing/wada%20code.pdf>.

94. Montoya, *supra* note 18.

95. *Id.*

96. Gabriel Montoya, *New York, Nevada, and the 6:1 T/E Ratio Problem in Boxing*, MAXBOXING.COM, <http://www.maxboxing.com/news/max-boxing-news/new-york-nevada-and-the-6-1-te-ratio-problem-in-boxing-> (last visited Dec. 27, 2013). This is an especially serious problem when “the root of the performance enhancing drug (PED) problem in boxing these days is the use of synthetic testosterone.” Stephen Edwards, *Exclusive Interview: Journalist Gabe Montoya Investigates the Drug Testing Process*, BOXINGTALK (June 5, 2012), <http://boxingtalk.com/pag/article.php?aid=23521>.

97. Montoya, *supra* note 18.

98. It is quite simple for athletes to manipulate the amount of synthetic testosterone put into their bodies to come in just under the threshold of these current testing procedures. For example, “if the athlete is not being screened using Carbon Isotope Ratio testing, he can use testosterone and test at 1:1

admitted that beating the drug test in Nevada, widely considered to have “one of the best drug-testing programs in the country,” was as easy as “walking across the street.”<sup>99</sup> In sum, as Dick Pound, the founder of WADA, aptly described the situation, failing a drug test under these circumstances is like failing an IQ test.<sup>100</sup>

In addition to the outdated testing procedures of the state athletic commissions, there is a more fundamental structural problem in this state-run system. That is, because each state has its own rules on licensing, medical safety standards, and PED testing, there is an incentive for each state athletic commission to relax its standards to draw more fights, in effect creating a “race to the bottom.”<sup>101</sup> This has been a longstanding problem in boxing, as exemplified by the infamous Mike Tyson vs. Lennox Lewis fight in 2002.<sup>102</sup> In that case, a few states refused to grant Tyson a license due to his violent and criminal conduct. However, other state commissions “lined up to host the fight, eager to capitalize on what could have been significant revenue for their local economies.”<sup>103</sup> In the end, Tyson was licensed and fought in Tennessee, where the heavyweight bout grossed over \$100 million.<sup>104</sup> But with the explosion of the PED issue onto the boxing scene, this race-to-the-bottom problem has found an application not just in medical licensing, but also in forum shopping for states with less stringent drug testing.<sup>105</sup>

It would be naïve to say that the poor state of drug testing by state athletic commissions is due solely to lack of funds, although that is

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or 3.9:1 or in Nevada 5.9:1 and he will not be flagged or caught.” *Id.*

99. Hauser, *supra* note 36. Nevertheless, these outdated procedures will, on occasion, detect illegal PED usage. In February 2013, unbeaten lightweight Mickey Bey tested at an incredible 30:1 ratio, which was “the second-highest ratio the Nevada State Athletic Commission had ever seen, five times higher than the commission maximum of 6:1, and more than seven times the World Anti-Doping Agency maximum of 4:1.” David P. Greisman, *Fighting Words: Bey PED Case: Skepticism, Shades of Gray*, BOXINGSCENE.COM, <http://www.boxingscene.com/fighting-words-bey-ped-case-skepticism-shades-gray--63929> (last updated Apr. 1, 2013).

100. Montoya, *supra* note 96.

101. The race to the bottom in boxing exists because “each state is incentivized to set forth the most lax regulations possible in order to attract promoters and bouts.” Ehrlichman, *supra* note 1, at 425.

102. McCain & Nahigian, *supra* note 2, at 27.

103. *Id.*

104. Ehrlichman, *supra* note 1, at 425–26.

105. Journalists and critics are beginning to understand the import of PED testing run by the state commissions when “the commissions themselves have a vested interest in seeing these events through.” Kim, *supra* note 16. Indeed, PED regulations have an effect on attracting fights in the first place. The state commissions are “financially motivated to regulate doping leniently, because lenient policies will entice the better performing doping fighters to arrange fights in their state.” Gandert & Ronisky, *supra* note 23, at 840.

certainly one factor.<sup>106</sup> But more funding alone would not solve the problem because of the underlying incentive structure. Unlike team sports, if a boxer tests positive, there is no teammate or substitute; the fight cannot go on without him. If the bout is canceled, then nobody—not the fighters, promoters, sanctioning bodies, TV networks, or state athletic commissions—gets paid.<sup>107</sup> This can result in upwards of tens of millions of dollars in lost revenue.<sup>108</sup> Thus the states have an incentive to implement lax testing policies and be lenient in its enforcement, both in order to attract fights in their state and to ensure that the planned fight goes through.<sup>109</sup>

One example of this can be found in the 2010 welterweight championship fight between Manny Pacquiao and Antonio Margarito. Margarito, a former champion, had been suspended by the California State Athletic Commission for inserting plaster of Paris into his handwraps,<sup>110</sup> but the Texas commission granted him a license without even holding a hearing.<sup>111</sup> Aside from the obvious ethical and procedural concerns, it must be noted that the Pacquiao-Margarito fight was only made after Pacquiao's negotiated fight with Mayweather fell through. Mayweather had demanded that Pacquiao undergo more stringent drug testing than the state athletic commissions required.<sup>112</sup> Pacquiao refused, and went on to fight his next

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106. See Loretta Hunt, *Voluntary Drug Testing Elicits Varied Responses from Fighters*, SPORTS ILLUSTRATED, [http://sportsillustrated.cnn.com/2012/writers/loretta\\_hunt/10/31/vada/index.html](http://sportsillustrated.cnn.com/2012/writers/loretta_hunt/10/31/vada/index.html) (last updated Nov. 1, 2012, 6:46 PM) (discussing various reasons for the poor state of drug testing in boxing, including budget restraints and athlete resistance to additional testing).

107. See George Willis, *Boxing Needs Random Drug Testing*, N.Y. POST (May 12, 2012, 7:00 AM), [http://www.nypost.com/p/sports/boxing/boxing\\_needs\\_random\\_drug\\_testing\\_1QTt7oQHAeHmDILYb5xANP](http://www.nypost.com/p/sports/boxing/boxing_needs_random_drug_testing_1QTt7oQHAeHmDILYb5xANP) (discussing how the cancellation of a fight between Lamont Peterson and Amir Khan cost promoters millions of dollars).

108. Hauser, *supra* note 36.

109. When huge sums of money are potentially coming into a state, “it must be hard for state regulators to remain objective when deciding whether or not to allow a fight to take place.” Clair, *supra* note 69, at 1176. There is one instance in which a member of the Nevada State Athletic Commission, Dr. Edwin Homansky, noted a discrepancy on a fighter's medical record and was subsequently removed from his position. *Id.* at 1195. “This suggests that the Nevada State Athletic Commission wants to generate as much money as possible from the fights within the state without spending the money and time required to properly protect the fighters.” *Id.*

110. Sulfur and calcium were placed in Margarito's handwraps. Combined with oxygen, this combination forms plaster of Paris. *Tests Show Plaster of Paris Ingredients*, ESPN, <http://sports.espn.go.com/sports/boxing/news/story?id=4020190> (last updated Mar. 27, 2009, 6:00 PM). In this case, the sulfur and calcium would come into contact with water in the form of sweat, thus hardening the handwraps as the fight goes on. George Ogier, *Cotto vs Margarito: A Loaded Question*, MIRROR SPORT (Dec. 2, 2011, 9:51 AM), <http://www.mirror.co.uk/sport/boxing/cotto-vs-margarito-a-loaded-question-771297>.

111. John Larios, *Promoting the Safety of Knockout Kings: Maintaining Administrative Hearings in the Texas Department of Licensing and Regulation*, 13 TEX. TECH. ADMIN. L.J. 141, 142 (2011).

112. Dan Rafael, *Arum: 'The Fight's Off.'*, ESPN, <http://sports.espn.go.com/sports/boxing/news/story?id=4803490> (last updated Jan. 7, 2010, 1:36 PM).

two opponents, Joshua Clottey and Margarito, in Texas, which at the time did not require any drug testing at all.<sup>113</sup> Given that the projected revenue of the fight was in the tens of millions of dollars, the boxing officials in Texas eagerly welcomed the chance to host such a lucrative fight.<sup>114</sup> Although there is no concrete evidence that Pacquiao has ever used PEDs, this sequence of events demonstrates how easy it is for fighters fearing a positive drug test to choose a venue with looser drug testing standards.<sup>115</sup>

It is true that some clean fighters, wishing to be protected against PED users, may seek better drug testing.<sup>116</sup> However, the system works against the well-meaning boxer here. First, as explained, the state athletic commissions have a financial incentive to use inferior testing practices, which cost less and are less likely to lead to canceled fights. This same motivation drives the actions of the promoters and networks, who have an even bigger financial stake in the outcome of the fight. Unlike the state athletic commissions, promoters are private, for-profit entities who assume the financial risk for each bout.<sup>117</sup> Boxers may not get paid by the promoter if a fight gets called off, but the promoter will lose all the expenses it has incurred in negotiating, staging, and marketing the fight.<sup>118</sup> Notably, they do not owe any sort of fiduciary duty to the boxer;<sup>119</sup> in fact, promoters' financial interests are in direct conflict with the boxers'.<sup>120</sup> Since promoters, and to a lesser extent, the networks, place their financial

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113. Mark Zeigler, *Debate Beginning of Change in Boxing's Drug Culture?*, THE RING (Jan. 22, 2010), <http://ringtv.craveonline.com/blog/122789-debate-beginning-of-change-in-boxings-drug-culture>.

114. See Larios, *supra* note 111, at 156–57 (examining the Texas licensing commission's procedures and suggesting that a potential fight's profitability might overshadow health and safety concerns).

115. Even after Texas eventually implemented drug testing in 2011, it committed "one of the biggest title fight blunders in memory" by forgetting to test the selected fighters on the entire card; moreover, Julio Cesar Chavez, Jr., the main attraction of the fight card, had previously failed a drug test in Nevada. Gabriel Montoya, *Texas Stumbles into the Drug Testing Era*, MAXBOXING.COM, <http://www.maxboxing.com/news/max-boxing-news/texas-stumbles-into-the-drug-testing-era> (last visited Dec. 27, 2013).

116. In addition to Mayweather, Nonito Donaire recently released a statement that he too would require all his opponents to undergo stricter drug testing. *Donaire's Statement Regarding Rigondeaux Bout*, MAXBOXING.COM, <http://maxboxing.com/news/other-boxing-news/donaire-statement-regarding-rigondeaux-bout> (last visited Dec. 27, 2013). But most fighters do not have the bargaining power to unilaterally impose such terms.

117. Neiman, *supra* note 45, at 65.

118. These costs, which can include cultivating relationships with the media, network executives, and sanctioning organizations, can be quite substantial. *Id.* at 65–66.

119. Ehrlichman, *supra* note 1, at 423.

120. Because the promoter incurs almost all the expenses for a bout, whatever remaining revenue generated is kept by the promoter as profit. "Thus, in order to maximize profit, a promoter must minimize the purse paid to a fight's participants." *Id.*

interests over the boxer's health, only a handful of famous boxers have the influence to negotiate fight terms that their promoters disagree with.<sup>121</sup> Moreover, the costs of extra drug testing may force fighters to decline such testing to which they would otherwise be willing to submit.<sup>122</sup>

More significantly, most professional boxers do not have the financial leverage to make better testing actually happen, even if they are clean and do demand it.<sup>123</sup> Even Mayweather, the highest earning athlete of 2012,<sup>124</sup> was unable to get his opponent, Pacquiao, to agree to independent drug testing because Pacquiao insisted that Mayweather did not have the authority to do so.<sup>125</sup> Moreover, in many cases, the lack of effective testing and the increasing use of PEDs among boxers put pressure on boxers who would otherwise prefer to avoid PEDs but may feel that using PEDs are the only way they can level the playing field.<sup>126</sup> Given these circumstances, it is futile to depend on well-intentioned individual boxers to effect improvement in PED testing, with so many forces working against them.

Inadequate PED testing has far darker implications in boxing than in other sports. PED users in boxing are not hitting a ball farther or cycling faster.<sup>127</sup> They are inflicting more damage to their opponents' bodies and heads in the form of blunt force trauma.<sup>128</sup> Boxing is already a dangerous sport, and the lack of proper PED regulation is literally putting even more

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121. Promoters, for a number of reasons, are often able to wield significant influence over boxers, to the point of contractual exploitation. McCain & Nahigian, *supra* note 2, at 25.

122. Email from Tim Starks, boxing writer and Congressional Quarterly reporter, to Jonathan Koh (Mar. 1, 2013, 2:21 PM) (on file with author).

123. Although marketable boxers at the top of the sport can earn millions of dollars per fight, most boxers have very small fight purses, earning "as little as \$400 a fight." Neiman, *supra* note 45, at 64.

124. Michael McKnight, *The 50 Highest-Earning American Athletes*, SPORTS ILLUSTRATED, [sportsillustrated.cnn.com/specials/fortunate50-2012/](http://sportsillustrated.cnn.com/specials/fortunate50-2012/) (last visited Dec. 27, 2013).

125. See Tim Smith, *Blame Manny Pacquiao for Torpedoing Fight with Floyd Mayweather*, NYDAILYNEWS.COM (Jan. 12, 2010, 12:33 AM), <http://www.nydailynews.com/sports/more-sports/blame-manny-pacquiao-torpedoing-fight-floyd-mayweather-article-1.462223> (noting that Pacquiao would not agree to "Olympic style drug testing" demanded by Mayweather).

126. Kurlantzick, *supra* note 8, at 791.

127. "In other sports, you use PEDs, you run faster, you hit a baseball further, in boxing, you hit somebody in the head harder, and there's a big difference. And I think that is a potential crisis for boxing, once we become more aware of that." Telephone Interview with Thomas Hauser, boxing writer (Feb. 7, 2013) (on file with author) [hereinafter Hauser Interview].

128. Hall of Fame trainer Emanuel Steward has singled out PED use in boxing as being particularly dangerous:

Boxing isn't like other sports . . . In boxing, a human being is getting hit in the head. . . . So to my way of thinking, anyone in boxing who's part of using performance-enhancing drugs—I don't care if it's the fighter, the trainer, the strength coach, the conditioner, the manager, the promoter—that person is ruining the sport and doing something criminal.

Hauser, *supra* note 36 (internal quotation marks omitted).

lives at risk. Many critics agree that the state athletic commissions are not only “woefully unsuited” to improve the drug testing procedures but are simply incapable of doing so.<sup>129</sup> As noted boxing writer Thomas Hauser describes it, “Illegal PED users vs. the state athletic commissions is one of the biggest mismatches of all time.”<sup>130</sup> Some fear that putting better drug testing in the hands of the commissions is tantamount to waiting for the “Doomsday Scenario. . . a ring death coupled with the survivor testing positive for a banned substance.”<sup>131</sup>

#### D. THE LACK OF ENFORCEMENT

Another major problem with PED usage in boxing is that in the event that boxers are actually caught using illegal substances, the consequences they face are minimal at best. As mentioned above, a number of elite fighters tested positive for PEDs in 2012, and most of these positive tests were conducted by independent anti-doping agencies. But even though these agencies utilize more advanced PED testing methods, the state athletic commissions either gave the fighters a mere slap on the wrist or refused to recognize the test results at all.<sup>132</sup> To have done otherwise might have driven PED-using fighters and their fight revenues away from the state. Some states, like Nevada, do not even have official guidelines on disciplining fighters who test positive.<sup>133</sup>

To review, Berto had his license suspended for a few months before getting relicensed for a huge payday.<sup>134</sup> Morales tested positive in two

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129. *Id.* It has also been observed that “[a]s the testosterone issue has flared up, we are seeing more signs of athletic commissions making decisions based on finances & compromise.” Zach Arnold, *A Crash Course on Testosterone, Hypogonadism, and Doping*, BOXINGINSIDER (May 10, 2012), <http://www.boxinginsider.com/columns/a-crash-course-on-testosterone-hypogonadism-and-doping/>.

130. Hauser, *supra* note 36.

131. Gabriel Montoya, *Boxing's PED Problem: Where Do We Go from Here?*, MAXBOXING.COM, <http://www.maxboxing.com/news/max-boxing-news/boxings-ped-problem-where-do-we-go-from-here-> (last visited Dec. 27, 2013).

132. Hauser, *supra* note 36.

133. Gandert & Ronisky, *supra* note 23, at 826. The lack of clear guidelines can be seen in the inconsistent disciplining meted out by the Nevada State Athletic Commission in the past. *Id.* For example, on February 28, 2013, the Commission announced that Chavez Jr. was suspended for nine months and fined a whopping \$900,000 (30 percent of his fight purse) after testing positive for marijuana use. This was an absurd amount for a nonperformance-enhancing drug, considering the previous highest fine for doping in Nevada history was only \$100,000 for Fernando Vargas, who actually tested positive for steroids. Dan Rafael, *Julio Cesar Chavez Jr. Fined \$900K*, ESPN, [http://espn.go.com/boxing/story/\\_/id/8999557/julio-cesar-chavez-jr-suspended-fined-nevada-state-athletic-commission-failed-drug-test](http://espn.go.com/boxing/story/_/id/8999557/julio-cesar-chavez-jr-suspended-fined-nevada-state-athletic-commission-failed-drug-test) (last updated Mar. 1, 2013, 3:57 PM). In contrast, Bey, a boxer with relatively little drawing power, was fined \$1000 and suspended for three months for his outrageously high 30:1 testosterone to epitestosterone ratio. Greisman, *supra* note 99.

134. Rafael, *supra* note 34.

separate tests, was still allowed to fight, and never faced any sanctions from the New York State Athletic Commission afterwards.<sup>135</sup> Former light heavyweight champion Antonio Tarver tested positive for the anabolic steroid Drostanolone after his fight with Lateef Kayode in June 2012, and at least in that instance the result of the fight was retroactively changed to a “no-contest.”<sup>136</sup> Tarver was also suspended for a year in California, and fined \$2500.<sup>137</sup> But that is a paltry amount considering his million-dollar fight purse and the fact that Tarver was over forty years old and unlikely to fight much longer anyway.<sup>138</sup>

Even fighters who are suspended in one jurisdiction can easily go to another state to fight. Lamont Peterson proved this when he decided to defend his championship title in his hometown of Washington, D.C., and knocked out Kendall Holt in the eighth round on February 22, 2013.<sup>139</sup> In the meantime, his license was still pending in Nevada following a test result showing that he had used synthetic testosterone just eight months earlier.<sup>140</sup>

These situations arise because state commissions are under no obligation to honor other states’ suspensions.<sup>141</sup> If a fighter is never caught with a positive drug test but instead is revealed to have used PEDs by some other means, it is highly unlikely that he will face any reprimand. This was true of the aforementioned case of Gamboa as well as Shane Mosley in 2003, who was involved in the BALCO scandal and even testified before a

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135. Hauser, *supra* note 30. Almost six months after the positive drug tests, seemingly due to media backlash, USADA did finally issue a controversial two-year ban that was panned by boxing writers as meaningless because of USADA’s lack of authority to prevent boxers from fighting in any jurisdiction as well as Morales’s intention to retire. Dan Rafael, *Erik Morales Gets Two-Year Ban*, ESPN, [http://espn.go.com/boxing/story/\\_/id/9095985/united-states-anti-doping-agency-bans-erik-morales-two-years-failed-tests](http://espn.go.com/boxing/story/_/id/9095985/united-states-anti-doping-agency-bans-erik-morales-two-years-failed-tests) (last updated Mar. 25, 2013, 12:33 PM).

136. *Id.*

137. Gabriel Montoya, *A Long and Twisted Drug Testing Road for Boxing*, MAXBOXING.COM, <http://www.maxboxing.com/news/max-boxing-news/a-long-and-twisted-drug-testing-road-for-boxing> (last visited Dec. 27, 2013).

138. *Id.*

139. See *Lamont Peterson Stops Kendall Holt*, ESPN, [http://espn.go.com/boxing/story/\\_/id/8977015/lamont-peterson-stops-kendall-holt-8th-defend-ibf-crown](http://espn.go.com/boxing/story/_/id/8977015/lamont-peterson-stops-kendall-holt-8th-defend-ibf-crown) (last updated Feb. 26, 2013, 9:14 PM) (discussing Peterson’s fight against Holt in Washington, D.C., despite having had his title stripped after testing positive for drugs fourteen months earlier).

140. Montoya, *Peterson Comes Back*, *supra* note 32.

141. There are exceptions, but because reciprocity is only required where suspensions are for medical reasons, fighters like Lamont Peterson are able to exploit such loopholes. McCain & Nahigian, *supra* note 2, at 19; Tim Starks, *Scrutinizing Lamont Peterson (and the Rest) over PEDs*, QUEENSBERRY RULES (Feb. 21, 2013), <http://www.queensberry-rules.com/2013-articles/february/scrutinizing-lamont-peterson-and-the-rest.html>.

grand jury without being suspended for one day or fined a single cent.<sup>142</sup> The combination of this low probability of detection and the lack of punishment means that there is very little to deter boxers from using PEDs.

#### E. A COMPARISON TO OTHER SPORTS

This regulatory model is in stark contrast to other professional sports. For example, in the four major American professional team sports—baseball, basketball, football, and hockey—there is a single centralized league that regulates the teams, approves the matches, and governs many other aspects of the sport.<sup>143</sup> These independent governing bodies, which also exist for certain individual sports such as golf and tennis, provide for a uniform set of regulations and enforcement by imposing fines, bans, and suspensions.<sup>144</sup> These rules must be followed, and punishment must be accepted, if one is to participate in these leagues.<sup>145</sup> Thus sports with a single governing entity, unlike boxing, have a viable enforcement mechanism.

The question may be (and in fact has been) raised, whether such sports leagues may constitute a monopoly.<sup>146</sup> While this issue is outside the scope of this Note, some of its implications are relevant to our discussion. It is reasonable to assume that such single, private league structures may exhibit monopolistic effects. That is, if the NBA chose not to upgrade its drug testing policy, it can make such a decision without influence from the “invisible hand” of the free market. One would think, on the other hand, with such a variety of state athletic commissions and sanctioning bodies in boxing, there would be increased competition and therefore more efficient regulation.<sup>147</sup> One might presume that boxers have their own incentive to choose the safest and best-regulated states, forcing the other state commissions to update their testing and regulatory policies in order to attract lucrative fights.

Clearly, this does not actually happen. Instead, as explained before, the opposite effect occurs—there is a race to the bottom<sup>148</sup> because the state athletic commissions are “afflicted with conflicts of interest, which

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142. Iole, *supra* note 41.

143. Baglio, *supra* note 74, at 2264–65.

144. *Id.* at 2265.

145. *Id.*

146. Joseph P. Bauer, *Antitrust and Sports: Must Competition on the Field Displace Competition in the Marketplace?*, 60 TENN. L. REV. 263, 267 (1993).

147. For a simple explanation of how competitive markets generally lead to efficiency, see A. MITCHELL POLINSKY, AN INTRODUCTION TO LAW AND ECONOMICS 105–06 (3d ed. 2003).

148. See *supra* Part II.C.

impedes the development of viable and effective rules.”<sup>149</sup> Specifically, states are motivated to regulate doping more leniently so that PED users will choose to fight there, creating significant revenues for the local economy.<sup>150</sup>

Another problem with the multistate regulatory system becomes clear when we examine the evolution of PED testing in other sports. In baseball, the cloud of PED suspicions led some to regard the numerous record-setting achievements in “the entire 1990s as a statistical lie, claiming there is no way to tell who was taking PEDs and who was not.”<sup>151</sup> Nevertheless, despite widespread criticism of suspected PED use among baseball players, the MLB did not adopt drug testing for steroids until 2002.<sup>152</sup> Even then, this drug testing policy was seen as inadequate due to its prescheduled testing and lenient penalties.<sup>153</sup>

Since MLB was effectively a monopoly, there were no competitive pressures from other leagues. Players had no alternatives to which they could turn. With the outbreak of the BALCO scandal, public scrutiny reached a point where Congress had to take an active step. It thus held a number of “highly publicized hearings” and introduced several bills to impose stricter PED testing.<sup>154</sup> These bills were only withdrawn once the MLB and the Major League Baseball Players’ Association (“MLBPA”) came to an agreement over tougher drug testing.<sup>155</sup>

In recent times, baseball has continually upgraded its testing procedures, and the MLB has come a long way since Congress first addressed this steroids issue. As recently as January 2013, it approved in-season randomized HGH testing—a big step forward in modernizing its drug testing policy.<sup>156</sup> This exerted pressure on the NFL, whose officials were summoned to Congressional hearings in December 2012 to explain

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149. Gandert & Ronisky, *supra* note 23, at 840.

150. *Id.* See also *supra* Part II.C.

151. Lee A. Linderman, Note, *A Congressional Carve Out: The Necessity for Uniform Application of Professional Sports Leagues’ Performance-Enhancing Drug Policies*, 84 S. CAL. L. REV. 751, 752 (2011).

152. Joseph M. Saka, Note, *Back to the Game: How Congress Can Help Sports Leagues Shift the Focus from Steroids to Sports*, 23 J. CONTEMP. HEALTH L. & POL’Y 341, 350 (2007).

153. *Id.* at 350–51.

154. Whitman, *supra* note 26, at 464.

155. Saka, *supra* note 152, at 355. Even this new drug testing policy was “not as tough as MLB had hoped.” *Id.*

156. See Bill Shaikin, *Baseball to Have In-Season HGH Testing*, L.A. TIMES (Jan. 10, 2013), <http://articles.latimes.com/2013/jan/10/sports/la-sp-0111-baseball-hgh-testing-20130111> (discussing the MLB’s adoption of randomized in-season steroids testing).

why the NFL had not adopted similar HGH testing procedures.<sup>157</sup> But Congress has not addressed the PED issue in boxing, where it is uncertain whether mere threats of federal intervention would be sufficient to spur better drug testing, as it did in baseball. This is because, unlike the other major professional American sports, there is not a single authoritative boxing league or entity that can adequately react in response to such a threat.

### III. FEDERAL REGULATION OF BOXING

#### A. HISTORY OF FEDERAL INTERVENTION

The State of New York began regulating professional boxing in 1896. Since then, boxing in the United States has remained almost exclusively under the purview of state regulation.<sup>158</sup> Over time, more uniform regulations were put in place and more laws were passed, usually in response to boxing-related incidents or scandals.

##### 1. Early Boxing Legislation

Informal regulation of boxing began in Great Britain in 1743, after a fighter was tragically killed by his opponent. In response, Broughton's Rules were created, codified, and recognized as the definitive, if unofficial, set of rules for early prizefighting.<sup>159</sup> This was eventually replaced by the Marquis of Queensberry Rules in 1867 following "a public outcry that boxing was too violent," which would go on to form the basis of modern universal boxing rules.<sup>160</sup> These rules prohibited biting, kicking, and hitting opponents while they were down, required the use of padded gloves, and implemented rounds of set duration.<sup>161</sup> In the United States, the first substantive federal intervention did not occur until the late 1950s.<sup>162</sup> This came in the form of the Kefauver hearings and the Senate Select Committee, which investigated the interstate activities of organized crime in boxing.<sup>163</sup> Congress again revisited the topic of boxing reform in the 1970s, but despite introducing a series of boxing reform bills in the next

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157. *Id.*

158. Ehrlichman, *supra* note 1, at 424–25.

159. McCain & Nahigian, *supra* note 2, at 9.

160. *Id.*

161. Ian Forman, Note, *Boxing in the Legal Arena*, 3 SPORTS LAW. J. 75, 76 (1996).

162. Neiman, *supra* note 45, at 74 ("The federal government's first intervention into professional boxing did not occur until the 1950s when the Department of Justice (DOJ) began to investigate the activities of organized crime within the sport.")

163. *Symposium*, *supra* note 71, at 219.

few decades, nothing meaningful was passed until the 1990s.<sup>164</sup>

## 2. A Period of Successful Boxing Reform

In 1996, Congress passed the Professional Boxing Safety Act (“PBSA”).<sup>165</sup> This marked the “first major federal legislative involvement in the professional boxing industry”<sup>166</sup> and was the beginning of significant improvement in boxing reform.<sup>167</sup> Its stated purpose is “to assist State boxing commissions to provide proper oversight for the professional boxing industry in the United States.”<sup>168</sup> Passed in part due to significant boxer safety concerns,<sup>169</sup> the PBSA raises safety standards “by requiring certain minimum safety measures for all professional boxing matches” held in the United States.<sup>170</sup> This focus on fighter safety includes requiring certain ringside medical assistance, requiring all fighters to have an identification card from their state boxing commission, and prohibiting fighters suspended for medical reasons in one state from participating in bouts held in other states.<sup>171</sup>

In 2000, Congress passed another boxing reform bill into law, the Muhammad Ali Boxing Reform Act (“Ali Act”).<sup>172</sup> This time, the legislation targeted the unethical business practices rampant in the sport.<sup>173</sup> The Ali Act attempts to eliminate coercive and unethical contracts between boxers and promoters, eradicate rankings manipulation, and circumvent forum shopping among states.<sup>174</sup> The primary method by which the Act seeks to achieve these goals is through information disclosure requirements.<sup>175</sup> Although the PBSA and the Ali Act do represent an

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164. See McCain & Nahigian, *supra* note 2, at 14–15 (“Time and again . . . these proposals failed to garner sufficient support for passage.”). At least some of these bills failed to pass “because of congressional inaction and outside opposition.” Neiman, *supra* note 45, at 77.

165. Even the initial version of the PBSA was rejected and was passed only on the second attempt. Neiman, *supra* note 45, at 77.

166. McCain & Nahigian, *supra* note 2, at 20.

167. *Symposium*, *supra* note 71, at 213.

168. Professional Boxing Safety Act, 15 U.S.C. § 6302(2) (2012).

169. McCain & Nahigian, *supra* note 2, at 18.

170. Clair, *supra* note 69, at 1177.

171. McCain & Nahigian, *supra* note 2, at 19.

172. Neiman, *supra* note 45, at 77. The Ali Act is also referred to as “MABRA.”

173. McCain & Nahigian, *supra* note 2, at 20. See also Erlichman, *supra* note 1, at 421 (“While the PBSA was aimed at protecting boxers within the ring, the Ali Act was intended ‘to protect the rights and welfare of professional boxers . . . by preventing certain exploitative, oppressive, and unethical business practices’ outside the ring.” (ellipses in original) (quoting 15 U.S.C. § 6302(1))).

174. Erlichman, *supra* note 1, at 426.

175. See McCain & Nahigian *supra* note 2, at 21 (listing the Ali Act’s disclosure requirements as one of the key provisions of the Act). The Ali Act specifically gives the Association of Boxing Commissions (“ABC”) the authority to develop recommended rankings guidelines for the sanctioning

important step in the long process of boxing reform, they address only the symptoms, “not . . . the cause of the sport’s ailments.”<sup>176</sup> Thus, many recognized that further steps needed to be taken.<sup>177</sup>

### 3. Deficiencies in the PBSA and Ali Act

One major characteristic of the PBSA and the Ali Act is their great deference to state authorities while aiming to reform boxing by providing the states “with more effective and stronger enforcement authority to safeguard the well-being of boxers.”<sup>178</sup> Yet there remained considerable loopholes and deficiencies in these attempts. For one thing, the vague statutory language of the Acts did not resolve the wide variance in safety standards enacted from state to state. This has allowed the problem of lack of uniform standards to persist across the country.<sup>179</sup>

Additionally, enforcement was ultimately left up to the states, which have remained reluctant to punish fighters and drive away boxing revenue from their state.<sup>180</sup> Indeed, the timidity of the Ali Act is evident by the fact that many of its rules are permissive rather than mandatory.<sup>181</sup> The deference of the statutory language did more than just create a loophole—it effectively rendered many of its provisions mere guidelines rather than compulsory law.<sup>182</sup> Of course, with local financial interests in mind, state athletic commissions would hardly rush to adopt these suggestions.<sup>183</sup> As a

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organizations and requires the sanctioning organizations to fully disclose its rankings criteria and other policies to the Federal Trade Commission and to the ABC. Damon Moore, *Down for the Count: Is McCain’s Bill the One to Lift Boxing Off the Canvas?*, 4 VA. SPORTS & ENT. L.J. 198, 217 (2005). It also requires boxing promoters to disclose the terms of its contracts and bouts to the appropriate state organization. *Id.*

176. McCain & Nahigian, *supra* note 2, at 22. Hauser likens the effectiveness of the passage of the Ali Act to “putting a band-aid on a gaping wound that’s badly in need of sutures.” THOMAS HAUSER, A YEAR AT THE FIGHTS 209 (2003).

177. Neiman, *supra* note 45, at 60.

178. McCain & Nahigian, *supra* note 2, at 18.

179. Fife, *supra* note 65, at 1308 (“[S]tates have different standards for defining what it means to be ‘physically fit to safely compete.’” (quoting 15 U.S.C. § 6304(1) (2012))).

180. Jurek, *supra* note 71, at 1202; Clair, *supra* note 69, at 1200 (“The major problem with the PBAA is that it . . . effectively leaves the enforcement of its provisions in the hands of the state commissions . . .”).

181. Devin J. 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, 446 (2003) (“Although Congress suggests that State boxing commissions follow these rules, it does not make compliance mandatory.”).

182. One example can be found in the section of the Ali Act that grants the ABC power to approve minimum contractual provisions for bout agreements and boxing contracts: “It is the sense of the Congress that State boxing commissions should follow these ABC guidelines.” 15 U.S.C. § 6307a (2012).

183. See *supra* Part II.C.

result, the effect of the Ali Act has been likened to “requiring firefighters to drive their truck to a burning house, but not take any steps to put out the flames they encounter.”<sup>184</sup>

One initially promising aspect of the Ali Act was that it provides for both public and private rights of action in federal court.<sup>185</sup> Thus, even if the states were lethargic in enforcing the Act, individual boxers could bring lawsuits against those who violated the provisions of the Act. Unfortunately, “By any objective criterion, the Ali Act is not being enforced, either through federal or state actors, or through private actions.”<sup>186</sup> To date, the Justice Department, the primary enforcer of the Act, has not brought a single indictment for a violation of any Ali Act provision.<sup>187</sup> This has important consequences for the health and safety of boxers.<sup>188</sup> Enforcement at the state level has been just as nonexistent, partly due to a lack of resources.<sup>189</sup> The fact that there has not been a single prosecution for an Ali Act violation, however, must not be interpreted as evidence that the Act has been effective. On the contrary, there have been numerous instances of alleged violations.<sup>190</sup>

It is worrisome that the number of private civil suits actually brought for violations of the Ali Act has been laughably small.<sup>191</sup> One major reason is that most fighters are unaware of the Ali Act’s very existence, let alone the rights it provides them.<sup>192</sup> Even boxers who understand the Ali Act and wish to assert those rights may not be able to bring a lawsuit due to the high costs of litigation.<sup>193</sup> Indeed, each of the few Ali Act claims were

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184. Ehrlichman, *supra* note 1, at 437.

185. *Id.* at 438.

186. *Id.* at 439.

187. *Id.* One likely reason for this lack of enforcement from the Department of Justice (“DOJ”) is that these violations are misdemeanors, which reasonably receive less attention from the DOJ; as a result, some argue that such violations should be designated as felonies instead. Neiman, *supra* note 45, at 96.

188. Clair, *supra* note 69, at 1173.

189. *See supra* Part II.C.

190. “According to Tim Lueckenhoff, president of the ABC, his organization frequently alerts the Justice Department to violations of the Ali Act, yet gets no help whatsoever from U.S. Attorneys around the country.” Ehrlichman, *supra*, note 1, at 439 (citations omitted) (internal quotation marks omitted).

191. It is joked that “the number of boxers who have brought suit [under the Act] could all fit comfortably within an eighteen square foot ring.” *Id.* at 438.

192. *Id.* at 440. One suggestion to alleviate this problem of lack of information is to require the dissemination and posting of the Act’s relevant provisions in boxing gyms, similar to OHSA regulations; another possibility is to affix the short, eight-page Ali Act to all boxing contracts. *Id.* at 442–43.

193. It is unrealistic to expect fighters who earn “as little as \$200–\$400 per fight” to sustain the considerable litigation costs of bringing an Ali claim. *Id.* at 441 (quoting Jurek, *supra* note 71, at 1192) (internal quotation marks omitted).

brought by boxers who were bona fide stars with the necessary financial wherewithal to bring a suit in the first place.<sup>194</sup> As is true with many athletes, boxers are unlikely to pursue litigation even if they can afford it, because “litigation of any duration can be devastating to boxers because of the brevity of their careers and their need to stay active in order to maintain or advance their rankings.”<sup>195</sup> In fact, of over a hundred lawsuits brought against promoter Don King, all but two were dropped due to lack of funds—the other two settled—illustrating the dire nature of this problem.<sup>196</sup> Some critics have proposed implementing an arbitration or dispute resolution system like in other sports, but thus far, no action has been taken.<sup>197</sup> One of the foremost impediments is the lack of a players’ union or association, unlike most other professional sports, and so boxing has no built-in alternative dispute resolution system.<sup>198</sup>

Overall, while these statutes do provide some modest federal oversight of the boxing industry, “they do not significantly remedy the problem of state commissions failing to develop and enforce safety standards because of their reliance on these same commissions.”<sup>199</sup> Although this can be understood by Congress’s unwillingness to preempt the states’ police power,<sup>200</sup> the truth remains that the PBSA and the Ali Act have ultimately proved lacking in their desired effect.<sup>201</sup>

#### 4. Recent Legislative Attempts

Senator John McCain, the architect and driving force behind both the PBSA and the Ali Act,<sup>202</sup> understood these deficiencies<sup>203</sup> and, along with

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194. *Id.* at 441.

195. *Id.* at 429. Felix Trinidad, a superstar welterweight champion in the 1990s, dropped his contract claim against promoter Don King in order that he not “waste the prime of his career fighting in court.” Baglio, *supra* note 74, at 2274.

196. Ehrlichman, *supra* note 1, at 441. There is a separate deterrent to litigation—that “[t]he litigious boxer must . . . face the prospect of being blacklisted by the ‘promoters and sanctioning bodies [who] control any and all fighting opportunities.’” *Id.* at 440 (alteration in original) (quoting Burstein, *supra* note 181, at 461–62). This is no small concern in a sport where a handful of promoters rule the roost.

197. Nevada has an arbitration system for boxing that could be useful as a blueprint for a nationwide model. Fife, *supra* note 65, at 1325.

198. *Id.* at 1323.

199. Clair, *supra* note 69, at 1178.

200. Ehrlichman, *supra* note 1, at 438.

201. Clair, *supra* note 69, at 1186–87.

202. Arlin R. Crisco, Note, *Fighting Outside the Ring: A Labor Alternative to the Continued Federal Regulation of Professional Boxing*, 60 OHIO ST. L.J. 1139, 1159, 1163 (1999).

203. Part of the reason that these Acts ended up relatively toothless was not necessarily because McCain and the Acts’ backers did not foresee these weaknesses, but that in order for the Acts to get passed, repeated compromises were made, and “[they] kept getting cut back and cut back and

others, has called for further federal regulation of boxing.<sup>204</sup> In 2002, McCain introduced a piece of legislation entitled the Professional Boxing Amendments Act (“PBAA”).<sup>205</sup> The primary difference between the PBAA and previous federal legislation is that it would create a federal regulatory body, called the United States Boxing Administration (“USBA”), “to protect the health, safety, and general interests of boxers.”<sup>206</sup> In a sharp break from its previous continual deference to the state commissions, the USBA would be in charge of granting, revoking, and suspending licenses, and would establish nationwide uniform standards.<sup>207</sup> This proposal would not eliminate the need for state athletic commissions, which would still run the day-to-day operations in their local jurisdictions.<sup>208</sup>

Although the PBAA has been criticized by some for not going far enough,<sup>209</sup> it would represent a significant improvement in the way boxing is currently regulated<sup>210</sup> and would establish more effective safety standards for professional boxers.<sup>211</sup> Yet it seems that current boxing reform is again stuck in a similar stage to reform attempts in the 1980s and early 1990s, as different variations of the PBAA bill, usually brought out in the wake of some boxing controversy or scandal, have repeatedly failed to pass.<sup>212</sup> Yet McCain’s persistence has not been deterred.<sup>213</sup> As recently as

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compromised to the point where [they were ] pretty weak.” Hauser Interview, *supra* note 127.

204. McCain & Nahigian, *supra* note 2, at 24. See also Neiman, *supra* note 45, at 78 (noting McCain’s emphasis on increased federal regulation of boxing).

205. Professional Boxing Amendments Act of 2002, S. 2550, 107th Cong. (2002). This new piece of legislation was likely spurred by the blatant forum shopping and circumvention that took place for the Tyson-Lewis fight described in Part IIC of this Note. See Royce Feour, Reid, Ratner Reiterate Need for Boxing Regulation, LAS VEGAS REV. J., May 25, 2002, at 8C (discussing the U.S. Senate’s hearing about boxing two weeks before the Tyson-Lewis fight).

206. McCain & Nahigian, *supra* note 2, at 30.

207. *Id.* at 30–31.

208. *Id.* at 31.

209. See generally Clair, *supra* note 69 (arguing that due to several loopholes in the PBAA, many boxing matches have presumed approval, and the only way to provide proper oversight of boxing is for Congress to take a role in actively overseeing it).

210. Ehrlichman, *supra* note 1, at 444 (“The PBAA, through the creation of the USBA, directly addresses and mitigates many of the shortcomings and oversights of the Ali Act.”).

211. Jurek, *supra* note 71, at 1205–06.

212. Tim Starks, Sen. John McCain, Senate Majority Leader Harry Reid Introduce Federal Boxing Commission Legislation, QUEENSBERRY RULES (June 18, 2012), <http://www.queensberry-rules.com/2012-articles/june/sen-john-mccain-senate-majority-leader-harry-reid-introduce-federal-boxing-commission-legislation.html>. As Ehrlichman wryly notes, “Congress has knocked [the PBAA] down more times than Jack Dempsey floored Jess Willard.” Ehrlichman, *supra* note 1, at 456. However, in 2005, McCain almost succeeded when the bill was approved by the Senate but defeated in the House. Amol Sharma & Matthew Futterman, McCain Champions Boxing Regulations in Lonely Fight, WALL ST. J., <http://online.wsj.com/news/articles/SB122418182528041339> (last updated Oct. 16, 2008, 11:38 PM).

213. McCain’s “passion for this issue has at times annoyed colleagues on both sides of the aisle,

June 2012, McCain reintroduced a new version of the PBAA in the Senate after Timothy Bradley won a highly controversial split decision over Manny Pacquiao.<sup>214</sup> However, since the new version was referred to the Committee on Commerce, Science, and Transportation, no further action has been taken.<sup>215</sup>

One of the fundamental problems with the PBAA is that “the prospects of the bill being enacted seem slight.”<sup>216</sup> Indeed, many of the problems holding up the passage of boxing reform bills in the past ten years will likely reappear in any future congressional attempt to improve PED testing in boxing. Some members of Congress oppose the bill because they do not believe that the federal government ought to preempt the state’s authority in regulating boxing.<sup>217</sup> Others are just ideologically opposed to bigger government.<sup>218</sup>

Another legitimate concern is that the creation of a regulatory body such as the USBA would add an unnecessary burden on the Congressional budget.<sup>219</sup> The concern that it would constitute “government waste” is a valid one, given the Congressional Budget Office’s report that funding the USBA would cost \$34 million over five years, averaging out to \$6.8 million per year.<sup>220</sup> With the economy weak and national debt at an all-time high,<sup>221</sup> spending money to reform boxing may seem like “government waste.”

Finally, the fact that the current powers in boxing are very

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who felt he was pushing too hard” when he attempted to hold up the adjournment of Congress with this pending bill. Sharma & Futterman, *supra* note 212.

214. Professional Boxing Amendments Act of 2012, S. 3306, 112th Cong. (2012); Press Release, John McCain, Senator, U.S. Senate, Statement by Senator John McCain Introducing the Professional Boxing Amendments Act of 2012 (June 18, 2012), <http://www.mccain.senate.gov/public/index.cfm/press-releases?ID=016c8721-fc0d-1dc8-7bf8-2b54818d7496>.

215. *S. 3306 (112th): Professional Boxing Amendments Act of 2012*, GOVTRACK.US <http://www.govtrack.us/congress/bills/112/s3306#> (last visited Dec. 29, 2013).

216. Ehrlichman, *supra* note 1, at 448.

217. Even in 2001, it was stated that “the major outlook in Congress is that this is an issue for the states to address.” *Symposium*, *supra* note 71, at 210.

218. Hauser Interview, *supra* note 127.

219. According to Pablo Chavez, Chief Counsel for Senator McCain, there were two main groups that opposed the 2002 version of the PBAA: many Republicans who “believed \$5 million per year for a boxing commission was too much money to spend,” and the Democrats who were “influenced by the boxing industry.” Neiman, *supra* note 45, at 92.

220. Moore, *supra* note 175, at 226–27.

221. Bret Baier, *The Cost of Spending: National Debt Nears ‘Dangerous Level,’* FOX NEWS (Dec. 18, 2012), <http://www.foxnews.com/politics/2012/12/18/cost-spending-national-debt-nears-dangerous-level/>.

comfortable with the status quo and would strongly resist any change may be the most significant obstacle to meaningful boxing reform.<sup>222</sup> It has been well documented that powerful promoters have hired lobbyists to oppose boxing reform bills in the past.<sup>223</sup> State officials would also resist having their power stripped, and thus the prominent state athletic commissions would likely stir up political opposition to the passage of such bills.<sup>224</sup> In fact, in 2012, several organizations representing the television networks and sanctioning bodies had registered to lobby against the most recent version of the PBAA.<sup>225</sup>

## B. THE CONSTITUTIONALITY OF CONGRESSIONAL REGULATION OF PED USAGE IN BOXING

Since the advent of federal regulation of boxing, there have been accompanying constitutional concerns. Because there has been no previous attempt at Congressional regulation of PED usage specifically in boxing, this Note analogizes to cases and analyses involving federal regulation of PED testing in other sports, as well as Congressional regulation for general health and safety standards in boxing as found in the PBSA and the Ali Act. The two major constitutional hurdles at issue are the Tenth Amendment and the Fourth Amendment, which must be considered when proposing or analyzing future boxing regulation, specifically with respect to PED testing.

### 1. Tenth Amendment

The power to regulate boxing has traditionally been reserved to the states, and the Tenth Amendment seems to support this.<sup>226</sup> However, there is little doubt that Congress can use its Commerce Power<sup>227</sup> to regulate

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222. Ehrlichman, *supra* note 1, at 449.

223. See *Symposium, supra* note 71, at 221 (alleging that promoter Don King gave “\$50,000.00 in soft money” to one senator to block the bill).

224. *Id.* at 232 (“[T]he state officials from New York, Tennessee, Nevada, Florida, all of them, are going to go visit their senators and say, you know what, don’t vote for this. We don’t want that authority taken away from us.”). See also Sharma & Futterman, *supra* note 212 (explaining that members of state boxing commissions “are almost universally opposed to federal oversight”).

225. These organizations are the National Cable & Telecommunications Association, the WBA, and the IBF. *Clients Lobbying on S.3306: Professional Boxing Amendments Act of 2012*, OPENSECRETS.ORG, <http://www.opensecrets.org/lobby/billsum.php?id=s3306-112> (last visited Dec. 29, 2013) [hereinafter *Clients Lobbying on S.3306*].

226. The Tenth Amendment reads: “The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.” U.S. CONST. amend. X.

227. Congress’s Commerce Power is an enumerated power granted by the United States Constitution for Congress to “regulate Commerce . . . among the several States.” U.S. CONST. art. I, § 8,

interstate commerce.<sup>228</sup> In 1955, the Supreme Court ruled that Congress could regulate professional boxing under the Commerce Clause, and subsequent federal legislation of boxing has faced no constitutional challenges.<sup>229</sup>

It is important to note, though, that future federal intervention of a more substantive nature, such as that proposed in the PBAA and certainly in some proposals by other scholars, must be carefully tailored. In *Printz v. United States*, the Supreme Court reinforced the anti-commandeering principle inherent in the Tenth Amendment, holding that the federal government cannot commandeer or “impress [state officers] into its service.”<sup>230</sup> Thus, Congress cannot force the state athletic commissions to carry out and enforce rules and regulations that apply only on a federal level.<sup>231</sup> The federal government must either use federal agents for this purpose, or Congress may use its spending power to make federal oversight a requirement to receive federal funding. For example, in *South Dakota v. Dole*, the Supreme Court upheld a federal condition that withheld 5 percent of federal highway funds from states that did not establish a minimum drinking age of twenty-one years.<sup>232</sup>

## 2. Fourth Amendment

An even more problematic issue is the Fourth Amendment,<sup>233</sup> which protects individuals against “unreasonable searches and seizures.”<sup>234</sup> This has been a significant barrier to federal legislation requiring random, unannounced drug testing in other sports.<sup>235</sup> The collection of urine or

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228. See generally *Gonzales v. Raich*, 545 U.S. 1 (2005) (discussing Congress’s power to regulate interstate commerce).

229. *United States v. Int’l Boxing Club of N.Y., Inc.*, 348 U.S. 236 (1955). See also *McCain & Nahigian*, *supra* note 2, at 12 (“[W]hile a boxing match is an intrastate affair, professional boxing revenues are derived largely from interstate broadcasts and endorsements and promoters also use the channels of interstate commerce to negotiate contracts, lease arenas, and maintain training quarters.” (footnote omitted)).

230. *Printz v. United States*, 521 U.S. 898, 922 (1997).

231. *Clair*, *supra* note 69, at 1205–06.

232. *South Dakota v. Dole*, 483 U.S. 203, 210–12 (1987).

233. See *Heiles*, *supra* note 25, at 346 (“Although other constitutional challenges may exist, the main concern surrounding legislation that would subject the MLB Program to testing regulations is that drug testing would constitute an unreasonable search and seizure under the Fourth Amendment.” (footnotes omitted)).

234. U.S. CONST. amend. IV.

235. See Matthew J. Mitten, *Drug Testing of Athletes—An Internal, Not External, Matter*, 40 NEW ENG. L. REV. 797, 805–06 (2006) (discussing constitutional barriers to federal legislation in other sports).

blood samples on a random basis would constitute a search.<sup>236</sup> Therefore, Congress must show reasonableness, which usually translates into probable cause.<sup>237</sup> This reasonableness requirement applies only when such testing is attributable to the government<sup>238</sup>—not as problematic in other sports as it is in boxing, a state-regulated sport.<sup>239</sup>

However, the judicially created “special needs doctrine” provides a way around this stumbling block. The special needs doctrine allows for a warrantless search if there is a compelling government interest beyond the ordinary needs of law enforcement.<sup>240</sup> Alternatively, the special needs doctrine can apply where the persons that are tested have a diminished expectation of privacy.<sup>241</sup> Finally, the Supreme Court has upheld the constitutionality of mandatory drug testing among high-school athletes “to protect their health and safety.”<sup>242</sup> Since health and safety in boxing is a much bigger concern than in other sports<sup>243</sup> and has been a priority in boxing reform,<sup>244</sup> it would seem, by analogy, that federally mandated PED testing in boxing would be constitutional.

#### IV. POSSIBLE SOLUTIONS

While Congress has previously intervened in PED testing and regulation in other sports,<sup>245</sup> no such attempt has been made for the sport of boxing.<sup>246</sup> However, there have been a number of federal boxing reform

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236. Tiffany D. Lipscomb, Note, *Can Congress Squeeze the “Juice” out of Professional Sports? The Constitutionality of Congressional Intervention into Professional Sports’ Steroid Controversy*, 69 OHIO ST. L.J. 303, 322–23 (2008).

237. *Id.*

238. Blaine V. Roche, Note, *Congressional Involvement in Professional Sports’ Drug-Testing Policies: Get Involved but Don’t Infringe*, 4 PHOENIX L. REV. 489, 502 (2010).

239. Other professional athletes “lack the ability to sue on constitutional grounds regarding the drug-testing policies of their respective sport because the current drug-testing policies are created through the collective bargaining process and are not implemented by government action.” *Id.* at 503. This is not the case in boxing, where drug testing is carried out by state athletic commissions, and no boxers’ union exists as a buffer. See Ehrlichman, *supra* note 1, 449–52.

240. Roche, *supra* note 238, at 504.

241. See *Bd. of Educ. v. Earls*, 536 U.S. 822, 829–38 (2002) (finding that students involved in nonathletic extracurricular activities have a diminished expectation of privacy); *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 656–57 (1995) (holding that student athletes have a diminished expectation of privacy).

242. Mitten, *supra* note 235, at 805. See also *Vernonia Sch. Dist.*, 515 U.S. at 665.

243. Kevin McRae, *Nonito Donaire and Why Boxing Needs to Adopt VADA Drug Testing Immediately*, BLEACHER REP. (Dec. 17, 2012), <http://bleacherreport.com/articles/1446135-nonito-donaire-and-why-boxing-needs-to-adopt-vada-drug-testing-immediately> (“In boxing, the extra power or speed of a punch can end a career or even a life.”).

244. See, e.g., Neiman, *supra* note 45, at 96–97.

245. See *supra* Part II.E.

246. Christian Red, *Dr. Margaret Goodman Leads Effort to Clean Up Boxing, MMA*,

bills introduced in the last decade and a half, with varying degrees of success.<sup>247</sup> But in light of recent events, it is apparent that any serious boxing reform will have to address and indeed focus on this explosive new PED issue. This Note first looks at past suggestions on how to better regulate boxing and examines whether these suggestions can be applied to the PED problem. Concluding that the existing proposals are inadequate or unworkable, this Note then suggests amending the PBAA to explicitly include PED regulation and explains why that is the best solution.

#### A. EXISTING PROPOSALS

Due to concerns about the health of its participants, some have advocated completely banning professional boxing as a sport or, at the least, banning hits to the head.<sup>248</sup> Others suggest simply legalizing PED usage in boxing.<sup>249</sup> However, even if these are low-cost means of regulation and easy to implement, disallowing hits to the head or completely banning boxing would almost entirely eliminate the value of boxing<sup>250</sup> and therefore would be quite unrealistic.<sup>251</sup> If boxers were not allowed to hit each other in the head—changing an essential rule that has been in place since the very inception of boxing over a hundred years ago—many fans would simply stop watching.<sup>252</sup> This would greatly decrease revenues, to the point where boxing would hardly be viable as a professional sport. Legalizing PEDs is not as extreme, but again, it would undermine the integrity of the sport in the eyes of many fans and repel fan-based and corporate sponsorship, so that the benefits of the sport would be

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NYDAILYNEWS.COM, <http://www.nydailynews.com/sports/i-team/dr-margaret-goodman-leads-effort-clean-boxing-mma-article-1.999301> (last updated Jan. 1, 2012, 5:47 PM) (“When Congress held hearings on baseball and PEDs in March, 2005 and later in 2008, as well as a 2008 hearing on doping in thoroughbred horse racing, Goodman viewed it as further evidence that politicians were getting tough on steroid use in certain sports, but not boxing.”).

247. See *supra* Part III.A.

248. See generally Antoinette Vacca, *Boxing: Why It Should Be Down for the Count*, 13 SPORTS LAW. J. 207 (2006) (arguing that it is in the public interest to at least ban head hits in boxing).

249. Gareth A. Davies, *David Price’s Opponent, American Heavyweight Tony Thompson, Believes Doping in Sport Should Be Legalised*, TELEGRAPH (Feb. 21, 2013, 12:00 PM), <http://www.telegraph.co.uk/sport/othersports/boxing/9885175/David-Prices-opponent-American-heavyweight-Tony-Thompson-believes-doping-in-sport-should-be-legalised.html>. See also Nigel Collins, *Rethinking Boxing’s PED Conundrum*, ESPN, [http://espn.go.com/boxing/story/\\_/id/9128066/rethinking-boxing-peds-problem-solutions](http://espn.go.com/boxing/story/_/id/9128066/rethinking-boxing-peds-problem-solutions) (last updated Apr. 3, 2012, 3:37 PM) (arguing that legalizing PEDs in boxing would better serve the sport than current regulatory solutions).

250. Neiman, *supra* note 45, at 83–86.

251. *Id.*

252. *Id.* at 89.

wiped out.<sup>253</sup> Clearly, these are not the best solutions.

Since the root of many of boxing's problems, including its PED troubles, is found in the piecemeal state regulation system, one attractive proposition is to switch to a single league model like baseball, basketball, or even mixed martial arts.<sup>254</sup> Just like the MLB, a centralized authority would be able to effectively implement not only better drug testing, but also stricter safety requirements, successful enforcement mechanisms, and other badly needed regulations. One suggestion has been to model such a league after the Professional Golfers' Association.<sup>255</sup> Such a scheme would "obviate the perils of patchwork state regulation . . . without raising the specter of an intrusive and overreaching federal regulatory scheme."<sup>256</sup>

However, while the results of privatization of boxing regulation are appealing, it is unworkable in practice.<sup>257</sup> Aside from the potential Sherman Act antitrust concerns for those creating a new league in any professional sport,<sup>258</sup> the biggest flaw is that it would leave no room for the promoters and sanctioning organizations, who are currently the most powerful figures in boxing.<sup>259</sup> Because they have no incentive to change over to a system in which they would have to relinquish their power and influence, the promoters, managers, state boxing commissions, and sanctioning bodies would never consent to such a drastic alternative.<sup>260</sup> Therefore, although privatization is "the change most likely to provide real, lasting protection for boxers, it is also the change that is least likely to occur."<sup>261</sup> The only possible way to privatize boxing would be for Congress to step in and forcibly hand control over to an independent league entity, and while some

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253. One can look to professional baseball as an example, where rampant PED use was ignored for years, eventually tarnishing the image and reputation of the sport, which took years to rehabilitate. Hauser, *supra* note 36.

254. Email from Tim Starks, boxing writer and Congressional Quarterly reporter, to Jonathan Koh (Feb. 25, 2013, 11:31 PM) (on file with author).

255. Ehrlichman, *supra* note 1, at 453.

256. *Id.* at 454.

257. The privatization of boxing is highly unlikely to work because "boxing does not lend itself to a single, private-league structure." Neiman, *supra* note 45, at 91.

258. See Karen Jordan, *Forming a Single Entity: A Recipe for Success for New Professional Sports Leagues*, 3 VAND. J. ENT. L. & PRAC. 235, 236–41 (2001) (discussing the antitrust issues facing all major professional sports leagues).

259. Burstein, *supra* note 181, at 495–96.

260. Ehrlichman, *supra* note 1, at 455.

261. *Id.* Ehrlichman points out that as much as the interest groups have been wielding their influence to oppose boxing reform legislation, they would do everything in their power to prevent privatization, for "a private governing boxing organization would be far more disruptive to those who control boxing than the PBAA could ever hope to be." *Id.*

have wishfully called for this,<sup>262</sup> such unprecedented and intrusive government intervention would be in every way improbable.

Another possible solution is soft regulation. Some have endorsed extensive information disclosure as a feasible approach, using “blue sky” state securities regulation<sup>263</sup> or Sarbanes-Oxley<sup>264</sup> as a blueprint for PED regulation. For instance, rather than banning and testing for certain substances, all boxers would instead just disclose all the substances they ingest or intake.<sup>265</sup> However, a similar approach was taken with the Ali Act in 2000, which required sanctioning bodies and promoters to disclose various types of information to boxers and state boxing commissions,<sup>266</sup> and has proven to be ineffective.<sup>267</sup> The problem remains that information is disclosed to the state commissions, who lack the motivation to enact sufficient sanctions. This systemic lack of enforcement on the part of the state commissions and the individual boxers, in such a discordant regulation scheme, means that soft regulation would still lack teeth because there is no central regulatory body to which the information could be effectively disclosed.<sup>268</sup> Furthermore, such regulation would not actually prevent PED usage as boxers would basically only be liable for fraud. This might lead to more substance use, along with its consequent health effects and negative externalities.<sup>269</sup>

For those concerned with overly extensive federal regulation, one method could be to simply mandate minimum standards for the state athletic commissions to follow. With respect to drug testing, Congress could establish certain policies and procedures for each individual state commission to incorporate, similar to the way WADA sets standards for drug-testing agencies around the world. This would be less costly and at the same time effect a uniform standard throughout the country.

The hitch in this model is that not all states have boxing commissions. Moreover, as time passes, these federally mandated standards would

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262. Fife, *supra* note 65, at 1327.

263. Geoffrey Rapp, *Blue Sky Steroids*, 99 J. CRIM. L. & CRIMINOLOGY 599, 614–18 (2009).

264. Sarah R. Heisler, Note, *Steroid Regulation in Professional Sports: Sarbanes-Oxley as a Guide*, 27 CARDOZO ARTS & ENT. L.J. 199, 225 (2009).

265. Rapp, *supra* note 263, at 602.

266. Professional Boxing Safety Act, 15 U.S.C. §§ 6307c–6307f (2012).

267. *See supra* Part II.B–D.

268. Heisler recommends having Congress “require team owners and managers to design, implement, and maintain internal testing procedures and related controls to ensure their athletes are not using [PEDs].” Heisler, *supra* note 264, at 225. But this would not work for boxing because boxers are not employees of the promoters; rather, they are independent contractors. Yet again we see how proposed solutions for other sports are simply unworkable in boxing because of its unique structure.

269. Rapp, *supra* note 263, at 617. *See also infra* text accompanying notes 344–47.

become obsolete if there was no central regulatory body continually reviewing and updating the policies. Finally, the biggest problem is that there would again likely be no enforcement of the standards. Similar to the PBSA and the Ali Act suggesting guidelines for the states to follow, these standards would simply be ignored. Any attempt on the part of the federal government to make the state athletic commissions enforce the federal standards would clearly be in violation of the Tenth Amendment. Of course, Congress could offer federal funds conditional on such enforcement, but this would be quite expensive. Some states might even choose not to accept the federal money if they felt that by continuing lenient doping regulations, they could attract larger fight revenues than the funding offered by the federal government.

#### B. AMENDING THE PBAA TO ADDRESS THE PED ISSUE

This Note seeks regulation of PEDs in boxing in a manner that would be cost-efficient as well as legally constitutional and politically viable. The only way to do this is to create a federal commission or central regulatory agency directly overseeing and regulating boxing activities in the United States, such as the USBA in the proposed PBAA. This would be especially effective in achieving better PED testing. In light of the growing importance of PED usage in professional boxing, this Note proposes that the PBAA be amended to include PED regulation and that the USBA become the federal regulatory body that would, among its other responsibilities, regulate PED testing in professional boxing.

Of course, given the current state of boxing, the USBA requires some changes from the proposed 2012 version. First, since the stated purpose of every boxing reform bill has been to protect the health and safety of boxers, there should be a medical advisory board to the USBA to establish and update medical guidelines for professional fighters. This should include at least one member who is experienced in anti-doping procedures. Also, the legislative language should explicitly include uniform drug testing procedures under the USBA's purview. Having anti-doping experts in charge of creating and updating these drug testing procedures would be a significant improvement over the many current state commissions that do not have anyone clearly responsible for these procedures.<sup>270</sup> Testing would no longer vary state-by-state or according to individual fighters' demands. The USBA would set up-to-date uniform testing procedures for all

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270. Nevada State Athletic Commission Executive Director Keith Kizer, when asked, was unsure of who was responsible for creating the drug testing policy for the commission, making reference only to a non-WADA accredited laboratory. Montoya, *supra* note 96.

professional bouts in the United States.

In actually carrying out these drug testing procedures, the USBA would have two options: use independent testing agencies currently available like USADA and VADA, or create its own federal drug testing agency as a part of the USBA. The latter option seems unnecessarily costly when compared to simply designating an independent anti-doping agency to carry out the USBA-approved testing procedures. Some of the most up-to-date testing is done by these agencies already,<sup>271</sup> so the USBA could simply oversee their activities rather than start from scratch.

There have been many recent concerns about the independence of some of these “independent” drug testing agencies, especially in the wake of the Morales scandal.<sup>272</sup> One reason behind the alleged close relationships of some promoters and anti-doping agencies is that currently, boxing promoters are the ones hiring these agencies.<sup>273</sup> Thus, even as nonprofit organizations, these agencies are incentivized to make the terms of their testing and reporting policies more attractive to promoters. These are the same promoters who do not want to see their fights canceled due to positive testing.<sup>274</sup> This is one likely explanation for the difference in the way that USADA tests Olympic athletes and the way it tests professional boxers.<sup>275</sup> But allowing the USBA to choose the independent agencies in

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271. Telephone Interview with Ryan Connolly, General Counsel for VADA (Feb. 25, 2013) (on file with author).

272. Gabriel Montoya, *Lessons from Boxing's PED Files*, MAXBOXING.COM, <http://maxboxing.com/news/sub-lead/lessons-from-boxings-ped-files> (last visited Dec. 29, 2013). Another issue has been the extent of these individual anti-doping agencies' jurisdiction. When USADA did not disclose the positive test results of Morales to the New York State Athletic Commission in a timely manner, it was roundly criticized. Months later, USADA issued its own punishment, claiming to ban Morales for two years. However, many questioned USADA's authority to do so. Letter from Patrick C. English, Attorney, Dines and English, L.L.C., to Travis Tygart, CEO of USADA (Feb. 12, 2013), available at <http://www.doghouseboxing.com/Media/LettertoTravisTygart.pdf>; Lem Satterfield, *Morales Faces USADA Ban, but from What?*, THE RING (Feb. 12, 2013), <http://ringtv.craveonline.com/blog/177195-morales-faces-usada-ban-but-from-what>.

273. “Golden Boy, in a rather bizarre offshoot of the ‘Cold War,’ is strictly affiliated with USADA while Top Rank seems to be wed exclusively to VADA testing.” Steve Kim, *The Stigma: Part One (with Lamont Peterson)*, MAXBOXING.COM, <http://www.maxboxing.com/news/max-boxing-news/the-stigma-part-one-with-lamont-peterson> (last visited Dec. 29, 2013).

274. Hauser Interview, *supra* note 127. This is a legitimate concern, as USADA, for at least two separate fights, took samples from fighters according to their signed agreements, but later unilaterally canceled the testing without releasing the test results, raising suspicions of foul play. See Gabriel Montoya, *Broner vs. DeMarco and the Contracted USADA Testing That Didn't Happen*, MAXBOXING.COM, <http://www.maxboxing.com/news/max-boxing-news/broner-vs-demarco-and-the-contracted-usada-testing-that-didnt-happen> (last visited Dec. 29, 2013).

275. This is potentially a serious concern, as it stands, because USADA tests U.S. Olympic athletes and also receives federal funding of about \$10 million per year. U.S. ANTI-DOPING AGENCY, 2011 ANNUAL REPORT 45 (2011).

charge of carrying out the testing would eliminate this conflict of interest because the USBA would be worried about boxer safety instead of its bottom line. In turn, the drug testing agencies would not need to soften their PED testing or alter their reporting procedures, because whichever agency was chosen by the USBA would not be hired based on its results or on a fight-by-fight basis.<sup>276</sup>

Importantly, having the USBA in charge would mean that PED testing could finally be properly enforced. There would be one centralized authority in charge of all major boxing fights, thereby removing the incentives that currently allow fighters to evade detection. Since under the current PBAA proposal, the USBA licenses all professional fighters, professional boxing licenses could be made conditional upon an agreement to be randomly drug tested at any time. Even the threat of this would be more of a deterrent to PED use than the present system.<sup>277</sup>

In addition to mandatory testing, harsher penalties could be imposed *ex post*. With so many fighters testing positive and not even receiving a slap on the wrist, lengthy suspensions and draconian monetary fines would make fighters think twice before using PEDs. Rational boxers look at the expected value of cheating as a function of the probability of getting caught multiplied by the cost of getting caught.<sup>278</sup> Better drug testing would increase the probability of a PED-using athlete testing positive, but increasing the cost of positive tests would be just as effective, and much cheaper.

For example, Olympic standards operate under a strict liability rule—if an athlete is found with illegal substances in his or her body, a two year suspension is handed down.<sup>279</sup> In the case of a second offense, the punishment is a lifetime ban.<sup>280</sup> Likewise, in professional boxing, the USBA could make a fighter give up 50 percent of his fight purse and suspend him from fighting in the United States for at least two years in the

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276. If this approach is taken, however, it would be prudent to select just one anti-doping agency. The confusion and lack of transparency that can accompany multiple competing private testing agencies was illustrated in the build-up to the Pacquiao-Rios fight, where it was unclear for a time whether VADA or USADA would be overseeing the testing. Tim Starks, *Quick Jabs: Carl Froch and HBO Ratings; Manny Pacquiao and the Mauled Captain; More*, QUEENSBERRY RULES (May 27, 2013), <http://www.queensberry-rules.com/2013-articles/may/quick-jabs-carl-froch-and-hbo-ratings-manny-pacquiao-and-the-mauled-captain-more.html>.

277. Hauser Interview, *supra* note 127.

278. Kim, *supra* note 16.

279. Andy Dolich, *Sports Drug Testing Policies: NFL, NBA, NHL, Olympics*, CSNBAYAREA.COM (Jan. 9, 2013, 1:15 PM), <http://www.csnbayarea.com/blog/biz-ball/sports-drug-testing-policies-nfl-nba-nhl-olympics>.

280. *Id.*

event of a confirmed positive test result.<sup>281</sup> Compared to better PED testing, this would be a more cost-effective method of deterring PED use among pugilists. The USBA's penalties would actually be enforced and could be raised up to a level at which boxers, when deciding whether to use PEDs, would internalize more of the externalities associated with using PEDs.<sup>282</sup>

## V. ADDRESSING POTENTIAL CONCERNS

At first glance, many of the problems that have plagued past boxing reform efforts, specifically the PBAA, may still be at issue. However, the onslaught of PED scandals over the past year has significantly changed the boxing landscape and increased the probability of passing legislative countermeasures. While the traditional longstanding obstacles to federal boxing legislation are formidable, they are not insurmountable. In fact, in his most recent introduction of the PBAA bill, Senator McCain addressed many of these concerns.<sup>283</sup> This part looks at each of these problems and explains how a version of the PBAA, amended to include PED regulation, can answer these objections.

### A. COST CONCERNS

#### 1. The Costs of Establishing the USBA and Better PED Testing

One of the biggest reasons that prior boxing-related legislation has failed in the past has been the worries about the financial burden it would create. As noted before, the previous iterations of the PBAA that created a centralized regulatory body in the USBA have been estimated to cost just under \$7 million per year.<sup>284</sup> While this is not an insignificant amount, it is a drop in the bucket when compared to some other federal agencies' budgets.<sup>285</sup>

Outside of the costs of establishing the USBA, there are also the direct costs of carrying out better drug testing. Almost all of the high-profile

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281. Boxing writer Steve Kim suggests a similar "three strikes" version of this penalty scheme. Kim, *supra* note 273.

282. See *infra* Part V.A.2.

283. Starks, *supra* note 212.

284. Moore, *supra* note 175, at 226–27.

285. Federal regulatory spending has increased rapidly over the years, hitting a peak of \$59.1 billion in 2012, an 8.6 percent increase from 2011. However, the budget estimate for 2012 is projected to decrease slightly. SUSAN DUDLEY & MELINDA WARREN, GROWTH IN REGULATORS' BUDGET SLOWED BY FISCAL STALEMATE: AN ANALYSIS OF THE U.S. BUDGET FOR FISCAL YEARS 2012 AND 2013, at 1 (2012), available at <http://wc.wustl.edu/files/wc/imce/2013regreport.pdf>.

fighters caught in 2012 for PED use were tested by one of two independent organizations—VADA and USADA. Although drug testing by state athletic commissions is ineffective, there are considerable costs associated with the better drug testing employed by these independent agencies.<sup>286</sup> For two fighters to be tested for an eight to twelve week training camp, USADA charges roughly \$100,000,<sup>287</sup> while VADA's testing program costs fighters about \$3,000–\$10,000.<sup>288</sup> However, VADA has the more up-to-date testing and a better track record of catching fighters,<sup>289</sup> so the true costs would probably be closer to VADA's prices.

Furthermore, there are indirect costs that follow. Assuming a higher rate of positive test results, one could argue that fights would be called off on a more regular basis, causing the promoters, fighters, and television networks to lose tens of millions of dollars.<sup>290</sup> This must be calculated into the cost of implementing better drug testing. But these costs may be overstated, because another effect of better drug testing and more stringent enforcement is that more boxers would be deterred from using PEDs, and thus the probability of detection and canceled fights would decrease accordingly over time.

There would also be major costs associated not only with researching and implementing better drug tests initially, but also with continually updating these tests. In response, PED users and manufacturers would come up with more advanced PEDs that are more difficult to detect.<sup>291</sup> This type of "arms race" would be quite costly, but of course it would be costly to both sides. Thus better drug testing might not completely eradicate PED use, but it would make PED use more expensive even if there were costs to keep the drug testing policy up to date as well.

There are also substantial transaction costs involved in determining

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286. Carbon Isotope Ratio ("CIR") testing, a new technique to detect synthetic testosterone, has produced zero false positives to date and is responsible for catching Lamont Peterson when Kizer admitted that the Nevada drug testing procedures would not have found anything suspicious. Brent Brookhouse, *Entire Sport of Boxing to Blame for Failures to Truly Address Positive Drug Tests*, SB NATION (Feb 13, 2013, 6:24 PM), <http://www.badlefthook.com/2013/2/13/3985624/boxing-drug-test-failures-lamont-peterson-vada-nsac-andre-berto>; Montoya, *supra* note 18.

287. Montoya, *supra* note 137.

288. David P. Greisman, *VADA Interview, P2: Testosterone Ratios, Costs, More*, BOXINGSCENE.COM, <http://www.boxingscene.com/vada-interview-p2-testosterone-ratios-costs-more--56450> (last updated Aug. 27, 2012).

289. Montoya, *supra* note 137. *See also* Montoya, *supra* note 131 ("VADA has shown the ability to test fighters at a high level while maintaining the public trust.").

290. Hauser, *supra* note 36.

291. In the last ten years since the BALCO scandal, "tests have gotten more sophisticated since then, but so have the cheaters." *Id.*

the specifics of better drug testing procedures.<sup>292</sup> There are “significant costs in terms of both time and money required to develop tests for emerging PED threats. Beyond research, there are also costs associated with obtaining and examining samples, determining appropriate punishment, and enforcing sanctions.”<sup>293</sup> Once an ideal bill is drawn up, more transaction costs are incurred in the form of negotiations with fellow congressmen, as well as dealing with lobbyists hired by promoters and state officials who oppose the legislation. But once again, while going through the legislative process is costly, so is opposing it—lobbyists do not come cheap. This cost might deter some opponents of the bill as well. It is also important to note that there will always be transaction costs<sup>294</sup>—the question is whether they are so prohibitive that they should derail the transaction itself. In this case, these seem to be the regular transaction costs connected to any bill that becomes law.

## 2. Self-Funding and Benefits Outweigh the Costs

We have seen that there are a number of costs associated with federal legislation of better drug testing standards.<sup>295</sup> However, these costs are not exorbitant. In fact, the USBA could effectively be self-funded by taxing pay-per-view sales<sup>296</sup> and live gate receipts as well as collecting licensing fees.<sup>297</sup> One particular proposal has been to add a one dollar “integrity in sport fee” to pay-per-view championship fights.<sup>298</sup> In fact, Nevada statute NRS 467.108 already mandates that one dollar of each ticket sold be used for performing random drug testing.<sup>299</sup> The USBA, having jurisdiction over all professional fights, could implement a similar rule and more efficiently funnel that money to better uses, such as updated and effective drug testing.<sup>300</sup> Additionally, fines received from fighters and promoters for

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292. Transaction costs are divided into three categories: search costs, bargaining costs, and enforcement costs. Whitman, *supra* note 26, at 473. All three are relevant to PED regulation in boxing.

293. *Id.* at 475 (footnote omitted).

294. DANIEL H. COLE & PETER Z. GROSSMAN, *PRINCIPLES OF LAW & ECONOMICS* 21 (2d ed. 2011).

295. Whitman, *supra* note 26, at 475 (“All told, effective PED enforcement could impose significant overall costs.”).

296. With the huge revenues raised by pay-per-view events on a regular basis, “applying a tax of \$0.10–\$1 for pay-per-view sales [alone] would help fund much of the [USBA] budget.” Moore, *supra* note 175, at 227. *See also* Neiman, *supra* note 45, at 93 (suggesting that the USBA could be funded by a tax on pay-per-view sales).

297. Moore, *supra* note 175, at 226–27.

298. Montoya, *supra* note 18.

299. NEV. REV. STAT. § 467.108 (2011); Montoya, *supra* note 24.

300. There is ample evidence that some of the money is spent by the Nevada commission on things like ringside tickets to those connected with the commission as favors. Most ringside tickets cost

illegal PED use and positive tests could help offset the USBA's operating costs.<sup>301</sup> Having a self-funded USBA would eliminate any cost concerns because Congress would not have to appropriate money from an already tight budget for the proposed USBA.

More importantly, costs are only one aspect of the equation. Taking an economic perspective,<sup>302</sup> an efficient approach to PED regulation must weigh the marginal costs of implementing better PED testing against the ensuing benefits.<sup>303</sup> That is, one must also examine the potential benefits of the new regulation, in the form of the harms eliminated by the more effective testing. In the past few decades, cost-benefit analysis has become essential to the regulatory process,<sup>304</sup> and for good reason. Otherwise, anything with substantial costs would be shut down. This would be like the government choosing to outlaw driving because of the high costs of automotive accidents, without first considering the benefits of allowing people to drive and commute conveniently. The goal should instead be to set a speed limit, or in our case, a type of PED testing, such that the benefits of the regulation still exceed the costs. In other words, while it is impossible to prevent all boxing-related injuries, we can implement regulations that avoid unnecessary boxing injuries and deaths.<sup>305</sup>

And the benefits of effective PED testing in boxing are indeed sizeable. The first and arguably most substantial and direct benefit of effective testing is the increased revenue in the long run. While some fights may be canceled at first due to positive tests, fighters over time would use PEDs less frequently in the face of effective deterrence. Over the long term, this would lead to fewer canceled fights.<sup>306</sup> Moreover, with an effective PED testing policy backed by the United States government, the sport of boxing would begin to regain its integrity and, from an

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hundreds if not thousands of dollars, leading to a considerable amount of lost revenue. Montoya, *supra* note 24.

301. Ehrlichman, *supra* note 1, at 449.

302. See Whitman, *supra* note 26, at 464–65 (“From the perspective of law and economics, the primary purpose of the legal system is to encourage or discourage various behaviors to achieve socially desirable ends. For Congress to become actively involved in regulating certain conduct—here, the use of PEDs in professional sports—it must determine that the social inefficiencies resulting from suboptimal private decisions are so severe that they warrant government intervention.”).

303. See COLE & GROSSMAN, *supra* note 294, at 16 (discussing the use of cost-benefit analysis to determine whether a policy results in a net gain for social welfare).

304. See Cass R. Sunstein, *The Stunning Triumph of Cost-Benefit Analysis*, BLOOMBERG (Sept. 12, 2012, 3:30 PM), <http://www.bloomberg.com/news/2012-09-12/the-stunning-triumph-of-cost-benefit-analysis.html> (discussing how cost-benefit analysis has become engrained in bipartisan policymaking).

305. McCain & Nahigian, *supra* note 2, at 30.

306. See *supra* Part V.A.1.

entertainment perspective, attract more fans.<sup>307</sup>

While some may argue for legalizing PEDs, the fact remains that the prevalent public perception of PED use is a strongly negative one.<sup>308</sup> The reaction to Armstrong's admitted doping and the revelation of baseball stars' testosterone injections validates this point. Therefore the logic is simple: "[W]hen the sport has a more negative public profile, fewer people watch, and when fewer people watch, boxers make less money."<sup>309</sup> As HBO boxing commentator and expert Max Kellerman suggests, getting the government involved to clean up the sport may lead to corporate sponsorship flowing into the sport once again.<sup>310</sup> The mainstream media that has been scared off by past boxing scandals and corruption might also resume a stronger interest in boxing.<sup>311</sup> The bottom line is that problems undermining the integrity of the sport can negatively affect its financial performance<sup>312</sup> because "the economics of boxing revolves around the public's demand to see a fight."<sup>313</sup>

These economic effects are quite substantial when one recognizes that boxing is a multibillion dollar industry that has a major financial impact on the states<sup>314</sup> as well as nationwide figures such as promoters and television networks.<sup>315</sup> Indeed, there have long been concerns about the adequacy of

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307. Kurlantzick, *supra* note 8, at 794 ("A decision . . . to ban or limit the use of steroids . . . would make sense simply as a matter of sound commercial judgment to take action to avoid this customer alienation."). *See also Symposium, supra* note 71, at 219 ("Get the government involved. Get it cleaned up to the point where corporate money can come flowing in.").

308. George T. Stiefel III, Comment, *Hard Ball, Soft Law in MLB: Who Died and Made WADA the Boss?*, 56 BUFF. L. REV. 1225, 1264 (2008) ("The public has expressed a desire for clean sports to watch and freedom from having to resort to the health risks of performance-enhancing drugs to compete.").

309. Tim Starks, *The Pros of Antonio Margarito Getting a Boxing License, and the Rebuttals*, QUEENSBERRY RULES (Aug. 27, 2010), <http://www.queensberry-rules.com/2010-articles/august/the-pros-of-antonio-margarito-getting-a-boxing-license-and-the-rebuttals.html>.

310. *Symposium, supra* note 71, at 219. Others also argue that having the USBA successfully restore the public image of boxing would bring in corporate sponsorship and revenue that has not been present in the sport for many years. Fife, *supra* note 65, at 1327–28.

311. "Years of corruption, manipulation, and scandal have tarnished the sport to the point that it is hardly covered by the mainstream media." Jurek, *supra* note 71, at 1187. "[I]f you're a sponsor with money, you want to put it in something safe." Tim Starks, *Boxing Back on CBS, NBC This Weekend and Next: What it Means, What You Need to Know*, QUEENSBERRY RULES (Dec. 14, 2012), <http://www.queensberry-rules.com/2012-articles/december/boxing-back-on-cbs-nbc-this-weekend-and-next-what-it-means-what-you-need-to-know.html> (quoting Kevin Monaghan, director of new business development at NBC).

312. Fife, *supra* note 65, at 1321.

313. Emen, *supra* note 52.

314. Clair, *supra* note 69, at 1197.

315. For more on the economics of the boxing industry, see *supra* Part II.A.

the current regulation of such a lucrative sport.<sup>316</sup> This is further reinforced by the fact that the two highest earning athletes in the world are boxers.<sup>317</sup> With so much money at stake, the loss of potential earnings due to PED use is correspondingly huge. It is hard to overstate the negative economic effects that a revelation of PED use can have. When it was revealed that Lance Armstrong had used PEDs, he lost every single endorsement deal he had,<sup>318</sup> costing him an estimated \$150–\$200 million in lost earnings.<sup>319</sup> In contrast, when Tiger Woods, Michael Jordan, and Kobe Bryant were caught in infidelity scandals, they were still retained by most of their sponsors.<sup>320</sup> Woods's scandal was the most costly of the three, but even then he was still supported by half of his commercial sponsors.<sup>321</sup> In the eyes of many, the key difference was that unlike Armstrong, these athletes did not “cheat[] the spirit of fair play and competition.”<sup>322</sup> A superstar boxer caught in a PED scandal could potentially have an even more scandalous impact in the public eye, since he would not only be diminishing the integrity of the sport by cheating, but also causing a very real and dangerous health risk to his opponent.<sup>323</sup>

Having the federal government step in and establish effective uniform PED testing procedures would also eliminate the transaction costs that boxers would have to incur in negotiating for better drug testing. Since most boxers have begun to recognize the widespread use of PEDs, a number of them have requested better testing for themselves and their opponents.<sup>324</sup> But researching the credibility of independent anti-doping

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316. Despite boxing now being a multibillion dollar industry, Pennsylvania State Athletic Commission Executive Director Gregory Sirb laments the fact that “we run it like a five and dime store.” *Symposium, supra* note 71, at 212.

317. *Forbes List, supra* note 61.

318. Nathan Francis, *Lance Armstrong Endorsements: Cyclist Loses Final Sponsor in Oakley, Had Previously Pledged Support for Him*, INQUISITR (Oct. 22, 2012), <http://www.inquisitr.com/371825/lance-armstrong-endorsements-cyclist-loses-final-sponsor-in-oakley-had-previously-pledged-support-for-him/>.

319. Patrick Rische, *Armstrong Will Lose \$150 Million in Future Earnings After Nike and Other Sponsors Dump Him*, FORBES (Oct. 18, 2012, 9:23 AM), <http://www.forbes.com/sites/prishe/2012/10/18/nike-proves-deadlier-than-cancer-as-armstrong-will-lose-150-million-in-future-earnings/>.

320. *Id.*

321. Francis, *supra* note 318.

322. Rische, *supra* note 319.

323. *About VADA, supra* note 92.

324. Most notably, Nonito Donaire, four-division world champion and current Super Bantamweight champion, has voluntarily undertaken year-round drug testing and more recently released a press statement indicating that any opponent of his must undergo extra drug testing. *Donaire's Statement Regarding Rigondeaux Bout, supra* note 116. But recently, even if they desire extra testing, many fighters have disagreed over whether to use USADA or VADA, greatly increasing

agencies and drug testing policies and negotiating drug testing terms with opponents can be expensive for individual fighters and may not only be impractical but also leave a lot of uncertainty as to the effectiveness of these agencies.<sup>325</sup> Eliminating, or at least mitigating, these transaction costs could have substantial economic benefits, not just because it lowers costs, but also because it may cause some fights to happen that would otherwise fall through. For example, the Mayweather-Pacquiao fight famously fell apart at the negotiations stage due to a disagreement over drug testing.<sup>326</sup> Mayweather had demanded blood testing outside of the regular urine testing conducted by state commissions, but Pacquiao steadfastly refused.<sup>327</sup> In the end, a fight worth half a billion dollars did not take place.<sup>328</sup>

There are also sizable health benefits that would follow from better PED testing and less PED use. In boxing, the perverse effects of PED use are twofold. First, the PED-using pugilists will hit harder and cause more physical damage to their opponents.<sup>329</sup> Unlike in other sports, PED usage in boxing has serious health implications because the user is not cycling faster or hitting a ball further—he is punching someone harder.<sup>330</sup> This is

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these negotiation costs. Montoya, *supra* note 274. This current lack of certainty in testing procedures and agencies has led to an abundance of “half-truths and distortions” in PED testing, such that fighters and fight fans alike are left in the dark. See Tim Starks, *VADA, USADA, Nevada: On Victor Conte, Juan Manuel Marquez, Manny Pacquiao, and Other Drug Testing Questions*, QUEENSBERRY RULES (Oct. 25, 2013), <http://queensberry-rules.com/2013-articles/vada-usada-nevada-on-victor-conte-juan-manuel-marquez-manny-pacquiao-and-other-drug-testing-questions.html> (comparing the short history and potential problems of VADA and USADA). The lack of complete information thus leads to substantial search costs that could be eliminated by having a single regulatory body with no conflict of interest in charge of such procedures.

325. Lem Satterfield, *Peterson: ‘I Prefer VADA,’* THE RING (Feb. 13, 2013), <http://ringtv.craveonline.com/blog/177211-peterson-i-prefer-vada>. This is becoming an even more absurd case, Peterson, who had previously tested positive for elevated testosterone levels, did his own testing prior to his fight with Lucas Matthisse without involving USADA or VADA. Tim Starks, *Roy G Biv: Preview and Prediction for Lamont Peterson vs. Lucas Matthisse*, QUEENSBERRY RULES (May 17, 2013) <http://www.queensberry-rules.com/2013-articles/may/roy-g-biv-preview-and-prediction-for-lamont-peterson-vs-lucas-matthisse.html>. For questions regarding the independence of these outside drug testing agencies, see Montoya, *supra* note 137.

326. Rafael, *supra* note 112. But later, the fight was renegotiated after Pacquiao agreed to random blood testing. Nevertheless, for a host of other reasons, they failed to agree to all the terms and the fight was never made. Paul Magno, *Pacquiao OK with Lesser Share of Mayweather Purse? Don’t Hold Your Breath; Fan’s Take*, YAHOO! SPORTS (Sept. 22, 2012, 6:23 AM), <http://sports.yahoo.com/news/pacquiao-ok-lesser-share-mayweather-purse-dont-hold-102300158--box.html>.

327. Rafael, *supra* note 112.

328. T.M., *supra* note 22.

329. See McRae, *supra* note 243 (PEDs are of special concern in boxing because “the extra power or speed of a punch can end a career or even a life”).

330. Hauser Interview, *supra* note 127.

particularly notable given the current debates about concussions and head trauma in all sports, particularly football.<sup>331</sup> Second, PED users suffer from a multitude of side effects of anabolic steroid use. According to the National Institute on Drug Abuse, “The health risks of steroid use are abundant.”<sup>332</sup> Some of these health effects include “pulled muscles, torn ligaments and tendons, mood swings, and ceased production of testosterone.”<sup>333</sup> Other physiological side effects include high blood pressure, jaundice, liver tumors and cancer, growth stunts, as well as a number of gender-specific side effects.<sup>334</sup> Psychological problems such as depression, nervousness, hostility, and aggression (known as “roid rage”) have also been known to occur.<sup>335</sup>

In the worst case scenario, using PEDs can lead to death. On February 13, 2013, an eighteen-year-old university student in the United Kingdom named Sarmad Alladin died after taking lethal bodybuilding pills.<sup>336</sup> Due to insufficient regulation, such drugs can be advertised falsely or even simply mislabeled. Therefore it is clear that benefits of better PED regulation would be captured in the decreased medical costs.<sup>337</sup> With the well-documented influence of PED use on our nation’s youth,<sup>338</sup> many of these medical side effects would not be limited to current boxers, but would also affect current children and teenagers as well as future athletes. In short, PED use in sports has become a “public health crisis.”<sup>339</sup> Accordingly, “[T]he cost of a central administration should be weighed against the costs

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331. See, e.g., Steve Kim, *Concussed, Then Concerned*, MAXBOXING.COM, <http://www.maxboxing.com/news/max-boxing-news/concussed-then-concerned> (last visited Jan. 2, 2014) (“With so much attention given to concussions now in the NFL and the effects of head trauma in contact sports, like every other sport, boxing is more cognizant of the health and safety of its participants.”).

332. Linderman, *supra* note 151, at 771–72.

333. Roche, *supra* note 238, at 490.

334. Saka, *supra* note 152, at 344–45.

335. Roche, *supra* note 238, at 499–500.

336. Leon Watson, *University Student, 18, Known to His Friends as Mr Muscles Dies 'After Taking Fat-Burning Pills'*, MAILONLINE.COM, <http://www.dailymail.co.uk/news/article-2282158/Student-Sarmad-Alladin-18-known-Mr-Muscles-dies-taking-DNP-fat-burning-pills.html> (last updated Feb. 28, 2013, 8:05 AM).

337. These medical costs can be quite exorbitant for boxers. On November 2, 2013, Magomed Abdusalamov suffered a blood clot after a fight and fell into a coma, and a trust was set up for donations from fight fans to help “alleviate the financial burden” on Abdusalamov. *Magomed Abdusalamov: Trust Created for Boxer, Family*, BOXINGSCENE.COM, <http://www.boxingscene.com/magomed-abdusalamov-trust-created-boxer-family--71360> (last updated Nov. 5, 2013).

338. Lipscomb, *supra* note 237, at 307 (“Congressional findings have shown that the use of steroids is escalating in high schools as well, with the role-model status of professional athletes influencing use among America’s children.”).

339. Linderman, *supra* note 151, at 752 (internal quotation marks omitted).

to society in providing for the long-term care of injured boxers.”<sup>340</sup> As one doctor put it, “[F]ighters may think of [PED penalties] as punishment. The doctors think of it as saving [their lives].”<sup>341</sup>

At the same time, having a centralized PED testing policy would lower costs because of economies of scale.<sup>342</sup> Instead of having each state commission develop, implement, and carry out separate and mostly ineffective PED testing procedures and policies, it would be more cost-efficient for one centralized regulatory body—in my proposal, the USBA—to do this, since the costs would not have to be replicated for each individual state. Dr. Margaret Goodman, founder of VADA, also explains that the cost of testing would decrease as more fighters are tested due to this same economies of scale concept.<sup>343</sup>

The last notable economic benefit of centralized testing is that many externalities<sup>344</sup> would be internalized. In considering federal regulation, it is only proper to look at all the social costs and benefits involved. In professional sports, the use of PEDs engenders significant potential negative externalities.<sup>345</sup> When the chances of detection are miniscule and the rewards of success astonishingly high, the incentive to use PEDs can make a fighter overlook the effects of PED use on the public integrity of the sport, young athletes throughout the country, and the potential health hazards posed to his opponent, in his decisionmaking calculus.<sup>346</sup> For example, the significant medical costs imposed on fighters hurt by PED usage and incurred by promoters, medical care providers, and insurance companies are all affected by a boxer’s decision to use PEDs. But these are rarely taken into consideration by a PED user. Ultimately, it is the public that bears these medical costs as well as the resulting lost productivity.<sup>347</sup>

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340. Neiman, *supra* note 45, at 93.

341. Thomas Hauser, *Mayweather-Pacquiao, PEDs, and Boxing*, SECONDSOUT.COM, <http://www.secondsout.com/columns/thomas-hauser/mayweather-pacquiao-peds-and-boxing> (last visited Jan. 3, 2014) (quoting Todd Chapman, a ringside doctor licensed in Nevada) (internal quotation marks omitted).

342. COLE & GROSSMAN, *supra* note 294, at 380.

343. See Greisman, *supra* note 288 (“[I]f we had total cards or large numbers of athletes at a time, [costs] would be considerably less.”).

344. COLE & GROSSMAN, *supra* note 294, at 18.

345. The two main negative externalities are “(1) the negative influence that drug use among professional athletes has on the nation’s youth, and (2) the public’s lost confidence in the integrity of sports.” Whitman, *supra* note 26, at 476. “When the decision maker is a highly visible athlete and the drugs involved are PEDs, the potential negative externalities are significant.” *Id.*

346. For more information on the heuristic nature of athletes’ decisions to use PEDs, see *id.* at 491–95.

347. Vacca, *supra* note 248, at 223. In general, “sports-related injuries are a continuing social problem.” Timothy B. Fitzgerald, Comment, *The “Inherent Risk” Doctrine, Amateur Coaching*

Having Congress set the appropriate level of drug testing and enforcement measures can deter boxers considering using PEDs so that the optimal level of PED use will occur.

Therefore, the costs of better drug testing are not prohibitive and in fact can be largely eliminated by imposing a small tax to make the USBA self-funded. More importantly, “The benefits of implementing a thorough, WADA-accredited testing program for clean athletes, the integrity of the sport, and the health and safety of the competitors, far outweigh the cost.”<sup>348</sup> Far from increasing the existing burden of the federal budget, a cost-benefit analysis shows a strong argument for Congressional intervention in PED regulation in boxing.

#### B. CONSTITUTIONAL CONCERNS

Of course, actions taken by Congress to regulate boxing may raise constitutional concerns. However, in actually creating a federal regulatory commission that licenses and drug tests boxers, Tenth Amendment commandeering problems can be avoided. In the past, federal boxing legislation such as the PBSA and the Ali Act could only suggest minimum guidelines for all the states to follow. If the guidelines had been mandatory, the states would simply have chosen not to enforce them, and as seen in *Printz*, Congress cannot compel states to enforce federal legislation.<sup>349</sup> In this case, however, the USBA would be meting out the punishments directly, and being a federal regulatory body, it would have the necessary motivation and authority to enforce its rules. Even if the USBA were to hire independent anti-doping agencies like USADA and VADA to carry out the testing, these are not state entities. Therefore Tenth Amendment concerns can successfully be averted.

Some may also raise objections that the Fourth Amendment protects individuals against unreasonable searches and seizures, which would apply to compulsory blood and urine tests.<sup>350</sup> While this has been a problem for Congress in regulating other sports,<sup>351</sup> boxing is unique in that it is already regulated by the government via the state athletic commissions. Therefore, in more heavily regulated professional sports like horse racing and boxing,

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*Negligence, and the Goal of Loss Avoidance*, 99 NW. U. L. REV. 889, 890 (2005).

348. Montoya, *supra* note 18.

349. *Printz v. United States*, 521 U.S. 898, 924 (1997).

350. Michael T. Flannery & Raymond C. O'Brien, *Mandatory HIV Testing of Professional Boxers: An Unconstitutional Effort to Regulate a Sport That Needs to Be Regulated*, 31 U.C. DAVIS L. REV. 409, 459–60 (1998).

351. See Mitten, *supra* note 235, at 805–06.

mandatory randomized drug testing will likely be upheld as constitutional.<sup>352</sup> In *Shoemaker v. Handel*, five jockeys sued the New Jersey Racing Commission over regulations permitting the random drug testing of any official, jockey, trainer, or groom.<sup>353</sup> However, the Third Circuit Court of Appeals ruled that because horse racing was so heavily regulated, there was a strong governmental interest in ensuring the public integrity of the sport and the persons involved, who justifiably have reduced privacy expectations.<sup>354</sup> In another horse racing case, Judge Posner also agreed that “[w]hen we compare the plausible dangers, both to safety and to revenue, . . . we conclude that the [mandatory random drug testing] rule is not unreasonable, and therefore that it does not violate the Fourth Amendment.”<sup>355</sup>

Horse racing is the sport most similar to boxing in its level and structure of regulation.<sup>356</sup> Accordingly, the government interest in the public integrity of boxing is just as strong. With the widespread exposure of boxers such as Manny Pacquiao and Floyd Mayweather, there is arguably an even greater diminished privacy expectation for boxers. Further, the considerable safety concerns and impact on revenue<sup>357</sup> that the lack of effective PED testing would have on professional boxing points to a high likelihood that any Fourth Amendment challenge to mandatory random drug testing in boxing would fail, just as it did in horse racing. This last point also shows an alternate path to the same end. The special needs doctrine, articulated in *Skinner v. Railway Labor Executives’ Association*, allows for mandatory drug testing without individualized suspicion where there is a sufficiently compelling government interest in the safety of the railway passengers and employees.<sup>358</sup> Because of its heavy regulation and significant safety concerns, this special needs doctrine easily finds an application in boxing and protects the government against Fourth Amendment challenges to random PED testing.<sup>359</sup>

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352. Shepard Goldfein, James A. Keyte & Paul M. Eckles, *Labor Arbitration—Drug-testing and Grievances*, in 11 BUS. & COM. LITIG. FED. CTS. § 125:43 (Robert L. Haig ed., 3d ed. 2012); WALTER T. CHAMPION, JR., *FUNDAMENTALS OF SPORTS LAW* § 15:2 (2d ed. 2013).

353. *Shoemaker v. Handel*, 795 F.2d 1136, 1137 (3d Cir. 1986).

354. *Id.* at 1142.

355. *Dimeo v. Griffin*, 943 F.2d 679, 684 (7th Cir. 1991).

356. Hauser Interview, *supra* note 127.

357. *See supra* Part II.A.

358. *Skinner v. Ry. Labor Execs. Ass’n*, 489 U.S. 602, 620 (1989).

359. Flannery & O’Brien, *supra* note 350, at 462–63; Roche, *supra* note 238, at 506.

## C. POLITICAL CONCERNS

One final objection against the passage of an amended PBAA bill is that it has failed so many times before. Even if it makes economic sense, and even if it is constitutional, is Congress likely to pass it? It is tempting to dismiss Congress as simply lacking the motivation to pass such legislation. Some politicians have previously questioned the need for the proposed USBA or any sort of federal commission.<sup>360</sup> Of even greater concern are the influential interest groups, such as promoters, television networks, and state boxing commissions, that would strongly oppose such legislation because they profit so much from the status quo.<sup>361</sup> Even in the past, many of these interest groups have lobbied against boxing reform.<sup>362</sup> Hence, some may doubt that the PBAA will pass this time around.

Nevertheless, there are reasons to be optimistic. Notably, the 2012 version of the PBAA was not only sponsored by Senator McCain but also cosponsored by Nevada Senator and current Senate Majority Leader Harry Reid.<sup>363</sup> This shows promise of support from both the Democrats and the Republicans, and more importantly, a senator from the state with the greatest financial incentive to oppose the bill.<sup>364</sup> But with the strong government interest in public health and safety, as well as the precedent set by Congress in 2005 when it addressed the steroid problem in baseball, a robust argument can be made for the necessity of government action here.

Incorporating some PED regulation provisions into the PBAA would also be quite feasible considering that McCain was not only behind all the boxing reform bills, but also played a significant role in the Congressional bills regulating PED usage in baseball in 2005.<sup>365</sup> Also, one reason the PBAA failed to pass in 2012 was because it was an election year, when boxing took a backseat to other issues.<sup>366</sup> That year, the 112th Congress

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360. Moore, *supra* note 175, at 226.

361. Neiman, *supra* note 45, at 92.

362. *Clients Lobbying on S.3306*, *supra* note 225. Additionally, there are other "monied interests" that may not have filed lobbying reports but have still left their mark. Email from Tim Starks, boxing writer and Congressional Quarterly reporter, to Jonathan Koh, *supra* note 254.

363. Professional Boxing Amendments Act of 2012, S. 3306, 112th Cong. (2012); *About Senator Harry Reid*, HARRY REID, <http://www.reid.senate.gov/about#.UskSkLK26XY> (last visited Jan. 4, 2014).

364. Nevada, along with California, is one of the most popular boxing venues, and thus their state commissions are among the most prominent. Gandert & Ronisky, *supra* note 23, at 826.

365. Saka, *supra* note 152, at 355; *Steroid Use in Professional and Amateur Sports: Hearing Before the S. Comm. on Commerce, Sci., & Transp.*, 108th Cong. 1–2 (2004) (statement of Sen. John McCain, Chairman, S. Comm. on Commerce, Sci., & Transp.), available at <http://www.gpo.gov/fdsys/pkg/CHRG-108shrg76456/pdf/CHRG-108shrg76456.pdf>.

366. Email from Tim Starks, boxing writer and Congressional Quarterly reporter, to Jonathan

was also notorious for facing problems with the fiscal cliff and debt ceiling, and achieving almost nothing of note.<sup>367</sup> These unfortunate circumstances contributed to a lack of action on the PBAA. It is also worth mentioning that the boxing incident behind the reintroduction of that bill in 2012 was a controversial split decision, but making PEDs the driving force refocuses health and safety as the primary concerns of the bill. The timing is right, then, for Congress to act to fix this pressing problem.

Furthermore, since there is a demonstrated Congressional interest and precedent in preventing the use of PEDs in sports,<sup>368</sup> if Congress amends the previous versions of the PBAA to include PED regulation, its passage will stand a much better chance. Unlike match-fixing, poor judging decisions, corrupt rankings, and other problems specific only to boxing, PED problems have been well-understood and well-documented by Congress and society in general. The health and safety concerns of PEDs are especially highlighted in boxing, as both the PED user and his opponent may be harmed. This potential danger constitutes a compelling government interest in the safety of the participants as well as the public integrity of the sport.

## VI. CONCLUSION

Boxing has been beset by innumerable problems for decades; no single measure can hope to cure all of its ailments. The growing emergence of PEDs in boxing, however, has pushed this issue to the forefront. It has been proven that PED users suffer from significant medical side effects, both physical and mental. In combat sports, this problem is exacerbated because the opponent is also harmed by being hit harder and more often.<sup>369</sup> Recent developments and positive tests have only underscored the prevalence of PED usage in boxing. Yet self-regulation is impossible due to the current decentralized state regulatory regime, where “there are too

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Koh, *supra* note 254. This was also a reason that McCain ceased to push for boxing reform in 2008, when he himself was running for President. Sharma & Futterman, *supra* note 212.

367. Email from Tim Starks, boxing writer and Congressional Quarterly reporter, to Jonathan Koh, *supra* note 254. See also Ezra Klein, *Goodbye and Good Riddance, 112th Congress*, WASH. POST (Jan. 4, 2013, 8:00 AM), <http://www.washingtonpost.com/blogs/wonkblog/wp/2013/01/04/goodbye-and-good-riddance-112th-congress/> (evaluating the lack of productivity of the 112th Congress).

368. Roche, *supra* note 238, at 516.

369. “A fatality would be the most stark evidence of the crisis. But the dangers go far beyond a handful of deaths. Twenty years from now, an entire generation of fighters will have brain damage from having been hit in the head harder than would have been the case without PED use by their opponents.” Thomas Hauser, *Edwin Rodriguez, PEDs, and Al Haymon*, SWEET SCI. (Oct. 4, 2013, 9:14 PM) <http://www.thesweetscience.com/news/articles/17341-edwin-rodriguez-peds-and-al-haymon>.

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many people . . . benefiting from the system as it presently exists.”<sup>370</sup> In fact, because of the potential local earnings and financial stimulus that a big fight can bring, states have an incentive to issue more relaxed standards to attract these bouts, creating a race to the bottom among the different state commissions. The result is that the drug testing currently utilized by states is hopelessly out of date, and on the off chance that fighters do test positive, they are rarely punished.

Concrete steps can be taken to curb the problem before it is too late. With the creation of the USBA under the PBAA, boxing has a chance to effectively regulate PEDs. Furthermore, having a centralized regulatory body like the USBA would resolve many of boxing’s other problems as well because it would eliminate the piecemeal regulation and override the individual states’ incentives to deregulate.<sup>371</sup> Nevertheless, in light of the Lance Armstrong scandal, the recent baseball steroids debacle, and the head trauma controversy in the NFL, PEDs have never been a more prominent social issue and should be the focus of the PBAA. In addition to the health concerns, the potential economic harm to the boxing industry, if PED usage is allowed to continue unchecked, would be quite substantial. With Congress having intervened on the PED issue with baseball in 2005, the inclusion of PED regulation could be the push that the PBAA needs to become law. This is also more likely with the bill garnering some bipartisan support in the last year.

This Note urges Congress to take the opportunity of this “perfect storm” of timing and events to amend the PBAA to include mandatory and effective drug testing and deterrence measures. This will not only be successful in confronting the PED problem but also in increasing the probability that the PBAA will be passed at all. While historically there have been many objections to passing the PBAA, those concerns can be adequately addressed. The costs of the bill can be offset by making the USBA self-funded, and in any case, costs should not be considered in isolation. With the considerable amount of money at issue in the boxing industry, the potential benefits of such regulation far eclipse any minimal cost concerns. The overwhelming economic and health benefits of proper regulation of PEDs in boxing are much more certain because the USBA, as a centralized regulatory body, provides the PBAA with an enforcement mechanism that gives the bill teeth.

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370. *Symposium, supra* note 71, at 214.

371. *See* Jurek, *supra* note 71, at 1191 (“The absence of a centralized organizing and oversight body is the cause of many of boxing’s problems.”).

“When boxing is run right, it’s a scary sport. When it’s run wrong, the risks become unacceptable.”<sup>372</sup> Boxers have died in the ring before.<sup>373</sup> Unless something is done, it will be a matter of time until another boxer is killed; only this time, his opponent will be discovered to have been using PEDs. There is no reason to wait until such tragedy strikes to awaken Congress from its usual slumber—the time to act is now.

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372. Thomas Hauser, *Medical Issues and the AAPRP*, SECONDSOUT.COM, <http://www.secondsout.com/usa-boxing-news/usa-boxing-news/medical-issues-and-the-aaprp> (last visited Jan. 5, 2014).

373. In October 2013, professional boxer Frankie Leal was knocked out in the eighth round, placed on a stretcher, and brought to the hospital, where he passed away. Kim, *supra* note 15. Although there was no evidence of PED use, the takeaway is the same: boxing is “inherently dangerous, and unfortunately, at times, fatally so. But [one] would hope that in the wake of the latest tragedy that those who run the sport look upon the fate of Leal as an object lesson in what can happen when proper regulations . . . aren’t employed.” *Id.*

