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**THE HOME TEAM ADVANTAGE: WHY LAWMAKERS AND THE  
JUDICIARY SHOULD BENCH THE JOCK TAX**

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**THE STARTING LINE UP: AN INTRODUCTION TO THE JOCK  
TAX**

Sports commentators across the nation consider Tom Brady to be one of the greatest football players of all time.<sup>1</sup> As a five-time Super Bowl champion, Tom Brady certainly is a top-rated quarterback, yet he still gets sacked every single year by what is known as the jock tax.<sup>2</sup> The jock tax allows states to tax the income of nonresident professional athletes whenever they engage in athletic contests when visiting a state's jurisdiction.<sup>3</sup> Additionally, numerous cities levy jock taxes on nonresident professional athletes, resulting in the taxation of professional athletes on both the state and local level.<sup>4</sup> While it may be hard to

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<sup>1</sup> See generally, Lance Cartelli, *11 Reasons Why Tom Brady Might be the Greatest Quarterback Ever*, CBS SPORTS (Feb. 2, 2015), <https://www.cbssports.com/nfl/photos/11-reasons-why-brady-might-be-the-greatest/>.

<sup>2</sup> The term "sack" is a commonly used term in American football where a defender tackles the quarterback behind the line of scrimmage before the quarterback throws the ball. See Andrew Gould, *Tom Brady Poses with All 5 Super Bowls Rings at Patriots' Ceremony*, BLEACHER REPORT (June 10, 2017), <http://bleacherreport.com/articles/2714922-tom-brady-poses-with-all-5-super-bowls-rings-at-patriots-ceremony>.

<sup>3</sup> See Nick Overbay, Comment, *A Uniform Application of the Jock Tax: The Need for Congressional Action*, 27 MARQ. SPORTS L. REV. 217, 220 (2016) (Nick Overbay cites to the U.S. Supreme Court case *U.S. v. Shaffer*, where the Court ruled that a state could impose a tax on the income of nonresidents).

<sup>4</sup> See Kirk Berger, Note, *Foul Play: Tennessee's Unequal Application of its Jock Tax Against Professional Athletes*, 13 CARDOZO PUB. L. POL'Y & ETHICS J. 333, 338 (2015) (discusses the background of jock taxes, explaining that states did not begin imposing the jock tax until 1968, and thereafter, local governments began implementing the tax).

sympathize with professional athletes such as NBA star Steph Curry of the Golden State Warriors, who recently signed a \$201 million contract,<sup>5</sup> the jock tax also applies to coaches, trainers, and others who travel with professional sporting teams, and make “fairly modest salaries.”<sup>6</sup>

In this article, I will examine the constitutionality of the jock tax and argue that it violates both the Equal Protection Clause<sup>7</sup> and the Commerce Clause<sup>8</sup> of the Constitution because the jock tax: (1) allows states to practice intentional and systematic discrimination, and (2) taxes income extraterritorially. The jock tax encourages states to target professional athletes with surgical precision, and disregards other business professionals that are similarly situated to professional athletes.

In the first section of this article, I will explore the history of the jock tax and demonstrate the implications that the tax has on professional athletes, sports businesses, and society at large. Then, I will explain the origins of the jock tax and how it affects athletes and other professionals who work in the sports industry. Thereafter, I will demonstrate how the jock tax is calculated and present why it is inefficient and administratively burdensome. I will then analyze the constitutional arguments in support of invalidating the jock tax. Thereafter, I will present the only policy proposal that is consistent with what the law dictates and justice demands, the repealing of the jock tax entirely, which is followed by a brief conclusion.

As a threshold matter, the jock tax is an unchartered and unchallenged territory within the United States judicial system. The highest court that has analyzed the constitutionality of the

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<sup>5</sup> *Stephen Curry, Warriors Finalize \$201 Million, 5-year Deal*, USA TODAY (July 25, 2017), <https://www.usatoday.com/story/sports/nba/2017/07/25/stephen-curry-warriors-finalize-201-million-5-year-deal/103989466/>.

<sup>6</sup> *See* Thomas Heath & Albert B. Crenshaw, *In Professional Sports, States Often Claim Players*, WASHINGTON POST (Feb. 24, 2003), [https://www.washingtonpost.com/archive/sports/2003/02/24/in-professional-sports-states-often-claim-players/200ba244-d18e-49c8-b90f-b40d1aabb2c0/?utm\\_term=.33f1e4211eef](https://www.washingtonpost.com/archive/sports/2003/02/24/in-professional-sports-states-often-claim-players/200ba244-d18e-49c8-b90f-b40d1aabb2c0/?utm_term=.33f1e4211eef) (Heath analyzes the jock tax, which he dubs “the ultimate commuter tax,” and explains that the salary applies to athletes and working professionals of a sports organization who “make fairly modest salaries.”).

<sup>7</sup> *See* U.S. CONST. amend. XIV, § 1.

<sup>8</sup> *See* U.S. CONST. art. I, § 8, cl. 3.

jock tax is the Ohio Supreme Court in 2015,<sup>9</sup> where the tax scheme at issue was almost entirely irrelevant to the arguments I will present in this article. By examining cases considering the constitutionality of various state taxation measures, I have concluded that no matter the subject of the tax, the same general principles and rules apply, and courts often find that tax measures such as the jock tax, which discriminate against a specific class, are wholly unconstitutional.

### I. THE HALL OF SHAME: A BACKGROUND OF THE JOCK TAX

For years, the jock tax has been justified by the power of taxation bestowed upon the states.<sup>10</sup> It is undisputed that states and cities have the authority to tax the personal income of their residents.<sup>11</sup> Additionally, states can impose a tax on the income of nonresidents' derived from sources within the state, if done so constitutionally.<sup>12</sup> Indeed, if a nonresident benefits from the advantages provided by a state's government, it follows that the nonresident should pay taxes in that jurisdiction.<sup>13</sup> However, the jock tax runs afoul of constitutional taxation measures as states apply it arbitrarily, selectively, and upon income not derived specifically from state resources.

California was the first state to impose the jock tax.<sup>14</sup> The State of California conveniently imposed its new tax on

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<sup>9</sup> Hillenmeyer v. Cleveland Bd. of Review, 17 N.E.3d 1164, 1167 (Ohio 2015).

<sup>10</sup> See Mary Pilon, *The Jock-Tax Man*, THE NEW YORKER (Apr. 10, 2015), <https://www.newyorker.com/business/currency/the-jock-tax-man>.

<sup>11</sup> See *State and Local Taxes*, U.S. DEP'T. OF TREASURY, <https://www.treasury.gov/resource-center/faqs/Taxes/Pages/state-local.aspx> (last visited Apr. 15, 2018).

<sup>12</sup> See *Shaffer v. Carter*, 252 U.S. 37, 53 (1920) (holding that Oklahoma could impose a tax on a nonresident who owned oil-producing land in Oklahoma, "so long as the tax was no more onerous than that assessed against residents.").

<sup>13</sup> See *id.* at 51 (recognizing that because a nonresident of Oklahoma owned oil-producing land in Oklahoma, he thus "realize[d] . . . a pecuniary benefit[] under the protection of the government," and accordingly, was subject to a tax of Oklahoma).

<sup>14</sup> See CAL. REV. & TAX. CODE § 17951 (West 2018); see also John DiMascio, *The "Jock Tax": Fair Play or Unsportsmanlike Conduct*, 68 U. PITT. L. REV. 953, 956–57 (2007) (explaining that California began the first state to levy a jock tax against professional athletes in 1991, although "state taxation of nonresident income [was] not a new concept," it was not until

nonresident professional athletes from Illinois after the Chicago Bulls beat the Los Angeles Lakers four games to one in the 1991 NBA Finals, with the Bulls winning the last three games in California.<sup>15</sup> Thereafter, Illinois responded to California's jock tax scheme and enacted legislation known colloquially as "Michael Jordan's Revenge."<sup>16</sup> Sports commentators have argued that the Illinois jock tax was a form of retribution against California because it does not apply to nonresident professional athletes from non-jock-tax states, and therefore the tax is retaliatory in nature.<sup>17</sup> For example: Dak Prescott of the Dallas Cowboys plays for an NFL franchise that resides in Texas.<sup>18</sup> Texas is a non-jock-tax state, and therefore would not be subject to the Illinois retaliatory jock tax.<sup>19</sup> Illinois created its reciprocal taxing measure in an attempt to motivate other states to forego adopting the jock tax.<sup>20</sup>

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athlete salaries began getting larger that states found targeting athletes with the tax to be worthwhile).

<sup>15</sup> DiMascio, *supra* note 14, at 957–58. The Chicago Bulls beat the Lakers in the NBA finals, playing the last three games in California. *Id.* at 958. Thereafter, California retroactively imposed a tax on Chicago Bulls legend Michael Jordan and his teammates on the income the nonresident athletes earned while playing in the NBA finals in California. *Id.* Sports commentators have argued that California was a "sore loser," and imposed the tax because of the finals upset. *Id.*

<sup>16</sup> See Steven D. Hamilton, *Michael Jordan, The Grizzlies, and The Jock Tax*, CORE COMPASS (July 30, 2015), <https://www.corecompass.com/articles/michael-jordan-grizzlies-and-jock-tax> (discussing the tax consequences of the 1991 NBA finals and deeming Illinois' retaliatory tax as "Michael Jordan's Revenge").

<sup>17</sup> See 35 ILL. COM. STAT. 5/302 (2018). This Illinois statute allows the state tax director to "enter into an agreement with the taxing authorities of any state which imposes a tax on or measured by income to provide that compensation paid in such state to residents of this State shall be exempt from such tax." *Id.*

<sup>18</sup> *Dallas Cowboys: Dak Prescott*, NFL, <http://www.nfl.com/player/dakprescott/2555260/profile> (last visited Apr. 5, 2018).

<sup>19</sup> Stefanie Loh, *Fun Facts About the Jock Tax*, THE SAN DIEGO UNION-TRIBUNE (Apr. 20, 2015), <http://www.sandiegouniontribune.com/sports/nfl/sdut-jock-tax-fun-facts-origins-super-bowl-money-2015apr20-story.html>.

<sup>20</sup> See Elizabeth C. Ekmekjian, *The Jock Tax: State and Local Income Taxation of Professional Athletes*, 4 SETON HALL J. SPORT L. 229, 235 (1994) (in citing to the Daily Reporter for representatives, author finds that the reciprocal tax measure enacted by Illinois that taxed the income of nonresident professional athletes from states with jock tax regulations was designed to "put pressure on the states those currently tax nonresident professional athletes to eliminate the tax.").

Unfortunately, Illinois' efforts to eliminate the jock tax were ineffective.<sup>21</sup>

There are only seven states that do not have an income tax:<sup>22</sup> Alaska, Florida, Nevada, South Dakota, Texas, Washington, and Wyoming.<sup>23</sup> Of the seven non-income tax states, only four have major professional athletic teams: Texas, Florida, Nevada, and Washington.<sup>24</sup> Nevada only recently became home to a professional NHL team and soon will be home to an NFL team when the Oakland Raiders move to Las Vegas in the near future.<sup>25</sup> The acquisition of two professional sporting teams could result in Nevada considering the imposition of a jock tax on nonresident professional athletes. Currently, however, Florida, Nevada, Tennessee, Texas, and Washington<sup>26</sup> continue to be the only states

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<sup>21</sup> See Phil Rosenthal, *Tax day can be Especially Taxing for Pro Athletes*, CHICAGO TRIBUNE (Apr. 7, 2012, 5:57 PM), <http://www.chicagotribune.com/sports/columnists/ct-taxing-professional-athletes-spt-0418-20170417-story.html>. Of the 26 states (plus the District of Columbia) operating a “major four” professional sports teams, 22 impose the jock tax on nonresident athletes. See Robert Raiola, *Newton to Feel Effects of California's Taxes*, SPORTS ILLUSTRATED (Feb. 6, 2016), <https://www.si.com/nfl/2016/02/06/super-bowl-50-california-jock-tax-cam-newton>.

<sup>22</sup> See Chris Kahn, *States with No Income Tax: Better or Worse?*, BANKRATE (Jan. 13, 2015) <http://www.bankrate.com/finance/taxes/state-with-no-income-tax-better-or-worse-1.aspx> (discussing the advantages and disadvantages of states with no income taxes). Many of you are probably thinking about, New Hampshire, the “live free or die state.” New Hampshire however, is not considered a true non-income tax state because it taxes income from dividends and interest at a 5% rate. *Id.*

<sup>23</sup> *Id.*

<sup>24</sup> Texas, Florida and Washington are home to numerous major professional teams, including the Dallas Cowboys, dubbed “America’s Team,” the Miami Heat, the Washington Wizards, and just recently, Nevada acquired an NHL team, the Vegas Golden Knights. *Major professional Sports Teams in the United States and Canada*, WIKIPEDIA (Apr. 13, 2018), [https://en.wikipedia.org/wiki/Major\\_professional\\_sports\\_teams\\_of\\_the\\_United\\_States\\_and\\_Canada](https://en.wikipedia.org/wiki/Major_professional_sports_teams_of_the_United_States_and_Canada).

<sup>25</sup> Ken Belson & Victor Mather, *Raiders Leaving Oakland Again, This Time for Las Vegas*, N.Y. TIMES (Mar. 27, 2017), <https://www.nytimes.com/2017/03/27/sports/football/nfl-oakland-raiders-las-vegas.html>.

<sup>26</sup> See Andrew M. Ballard, *Game Over for Tennessee's 'Jock Tax' on NBA Players*, BLOOMBERG NEWS (June 3, 2016), <https://www.bna.com/game-tennessees-jock-n57982073582> (Tennessee had a jock taxation scheme which taxed nonresident professional athletes on a “professional privilege” tax basis, charging each nonresident athlete \$2500/game with a \$7500 annual cap. The

with professional sporting teams that do not impose a tax on nonresident professional athletes.<sup>27</sup> Accordingly, it is easy to see why Florida, with nice weather, sandy beaches, and zero income tax is home to more professional athletes than any other state.<sup>28</sup>

The far reaching implications of the jock tax do not stop at the state level, and currently eight cities tax nonresident professional athletes: Detroit, Kansas City, Philadelphia, Pittsburgh, St. Louis, Cincinnati, Columbus, and Cleveland.<sup>29</sup> Accordingly, a nonresident professional athlete who plays against the NFL team, the Philadelphia Eagles, in Philadelphia will be subject to taxation on both the state and local level—once by the state of Pennsylvania and once more by the city of Philadelphia.<sup>30</sup>

## II. PLAY BALL: THE JOCK TAX IN ACTION

The implications of the jock tax are best demonstrated by Super Bowl LI, where the New England Patriots defeated the Atlanta Falcons in Houston, Texas, a jurisdiction that does not impose an income tax. Reports claim each athlete on the winning Patriots team earned \$107,000, while athletes on the losing Falcons team earned \$53,000 for playing in the 2017 Super Bowl.<sup>31</sup> After most Super Bowls, there is a clear distinction

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NBA players settled with the state of Tennessee, and received refunds on the tax they paid).

<sup>27</sup> See Kathryn Kisska-Schulze & Adam Epstein, “*Show Me the Money!*” - *Analyzing the Potential State Tax Implications of Paying Student-Athletes*, 14 VA. SPORTS & ENT. L.J. 13, 33–34 (2014) (explaining that because Florida, Texas and Washington do not impose income tax on residents or nonresidents, they are ideal states to host championship games).

<sup>28</sup> See U. S. DEP’T OF LABOR, BUREAU OF LABOR STATISTICS, 27-202, ATHLETES AND SPORTS COMPETITORS (2017), [https://www.bls.gov/oes/current/oes272021.htm#\(9\)](https://www.bls.gov/oes/current/oes272021.htm#(9)).

<sup>29</sup> See David D. Savage, *Hillenmeyer v. Cleveland Board of Review*, 42 OHIO N.U. L. REV. 989, 1000 (2016) (according to New Jersey public accountant, Robert Raiola, only these eight cities impose the jock tax on nonresident professional athletes).

<sup>30</sup> See Anthony R. Wood, *Phila., Pa., N.J. Tax Visiting Athletes’ Salaries*, PHILLY.COM (Dec. 1, 2009), <https://www.geierfinancial.com/wp-content/uploads/2014/06/Philly-Inquirer-Phil.-PA.-N.J.-tax-visiting-athletes-salaries-20092.pdf> (where a Philadelphia Inquirer writer states, “the New York Yankees, just by spending an autumn weekend in Philadelphia, probably chipped in well over \$300k to the state and city treasuries in the form of income taxes).

<sup>31</sup> See Kay Bell, *No ‘Jock Tax’ for Patriots, Falcons at Super Bowl LI*, USA TODAY (Feb 2, 2017, 1:19 PM) <https://www.usatoday.com/story/money/2017/02/02/no-jock-tax-patriots->

between the winning and losing team; however, Super Bowl LI presented a situation where both teams won—in terms of taxes—because none of the players were subject to the jock tax. In contrast, Super Bowl LII took place in Minneapolis, Minnesota on February 4, 2018. Although only one team won the game this year,<sup>32</sup> both teams lost—9.85% of the income earned while in Minnesota,<sup>33</sup> the nation’s second largest income tax state, only second to California’s income tax rate of 13.3%.<sup>34</sup> Undoubtedly, this presents fairness concerns. The teams that make it to a Super Bowl in a non-income tax state will win the “Super Bowl of taxes,” while others who make it to a Super Bowl scheduled in a jock tax state will be subject to high tax rates and take home only a portion of their income. Eventually, this may cause the NFL selection committee to forego allowing states with high income tax rates from hosting the Super Bowl in an attempt to appease its top performers.

States imposing the jock tax do so likely on the basis of an “ability to pay” theory, contending that because most professional athletes have large salaries, they can afford to shoulder the jock tax.<sup>35</sup> This is known as the fairness principle of vertical equity, which taxes individuals based on the level of their

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falcons-super-bowl-li/97399106/ (analyzing the tax implications of the players in the 2017 Super Bowl between the Atlanta Falcons and the New England Patriots hosted in Houston, Texas).

<sup>32</sup> The Philadelphia Eagles defeated the New England Patriots 41-33 in Super Bowl LII. Mark Maske, *Eagles Defeat Patriots, 41-33 to Capture First Super Bowl*, WASHINGTON POST: NFL (Feb. 4, 2018), [https://www.washingtonpost.com/sports/eagles-defeat-patriots-41-33-to-capture-first-super-bowl-title/2018/02/04/240ae37e-0774-11e8-94e8-e8b8600ade23\\_story.html?utm\\_term=.6e986d40bdde](https://www.washingtonpost.com/sports/eagles-defeat-patriots-41-33-to-capture-first-super-bowl-title/2018/02/04/240ae37e-0774-11e8-94e8-e8b8600ade23_story.html?utm_term=.6e986d40bdde).

<sup>33</sup> See Nick Halter, *Adrian Peterson is Among the Highest-Taxed NFL Players*, MINNEAPOLIS/ST. PAUL BUS. J. (Nov. 5, 2015), <https://www.bizjournals.com/twincities/blog/sports-business/2015/11/adrian-peterson-taxes-bill-rate-vikings.html>. Minnesota Vikings NFL star, Adrian Peterson is one of the highest-taxed players in the league. *Id.* About half of Peterson’s almost \$16 million salary goes to taxes. *Id.* One of the reasons he has large tax liabilities is because he plays for a Minnesota team, and Minnesota subjects its citizens to a 9.95% income tax rate. *Id.*

<sup>34</sup> *Tax Year 2017 California Income Tax Brackets*, TAX-BRACKETS.ORG, <https://www.tax-brackets.org/californiataxtable> (last visited Apr. 17, 2018).

<sup>35</sup> See JOEL SLEMROD & JON BAKIJA, *TAXING OURSELVES: A CITIZEN’S GUIDE TO THE DEBATE OVER TAXES* 94 (5th ed. 2017) (defining the ability-to-pay principle of vertical equity).

income.<sup>36</sup> This type of taxation system ultimately reduces the incentive to become a top income-earner athlete, as the tax implications that a highly-paid athlete faces are colossal compared to those of a taxpayer in a lower income tax bracket.<sup>37</sup> Even if the majority of Americans feel as though the top income earners of this country should pay more income taxes to increase fairness, the jock tax does not alleviate such a concern, as it taxes even the medical staff and equipment managers who travel to games with professional sporting teams, irrespective of their seemingly average salaries.<sup>38</sup> This is known as tax shifting, where the taxation of one group results in the taxation of others.<sup>39</sup> It follows that subjecting nonresident professional athletes and professionals that travel with professional sporting teams to a jock tax is disproportionately unfair, especially in the context of Super Bowl earnings. Not only will this phenomenon discourage individuals from earning top dollar for their profession, but also, the jock tax burdens a group aside from nonresident professional athletes who arguably cannot stomach the tax.

State income tax implications force athletes to make personal and professional based on the corresponding tax consequences.<sup>40</sup> Athletes all over the country have chosen to live in states and sign with certain teams to avoid burdensome tax laws.<sup>41</sup> The AFC South Division of the National Football League is home to the Tennessee Titans, the Jacksonville Jaguars, the Houston Texans, and the Indianapolis Colts—three out of the four

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<sup>36</sup> See *id.* at 88.

<sup>37</sup> See *id.* at 97 (commenting on the idea that progressive tax structures “reduce the incentive or award of earning income.”).

<sup>38</sup> See *id.* at 108 (reviewing the results of an April 2015 Gallup poll which found that 62% of the American population felt as though “upper-income people” pay “too little” in taxes).

<sup>39</sup> See *id.* at 113 (where tax shifting is explained as the “phenomenon that taxes ostensibly levied on one group of people may end up being borne by others.”); see also *Glossary of Tax Terms – Tax Dictionary*, EFILE.COM, <https://www.efile.com/glossary/> (last visited Apr. 19, 2018) (where tax shifting is defined as, “when a tax is levied on one group of people but is in practice paid by another group.”).

<sup>40</sup> See Joshua Rhett Miller, *Millionaire Athletes Flee States with High Income Taxes*, FOX NEWS (Jan. 30, 2013), <http://www.foxnews.com/sports/2013/01/30/federal-state-tax-hikes-could-send-athletes-migrating-to-tax-friendlier-states.html> (Tiger Woods officially became a professional golf player in 1996, and thereafter he moved from California to Florida. Tiger Woods was public in asserting that the motivation behind the move was to avoid state income tax).

<sup>41</sup> See generally *id.*

teams in the division hailing from non-jock-tax states. For players on the Titans, Jaguars, and Texans, income taxes will only be imposed on division games played in Indianapolis. Accordingly, the tax consequences for players in the AFC South are “the lowest in the league.”<sup>42</sup> While the AFC South is not the best division of the previous NFL season, it is home to notable athletes such as Heisman Trophy winner Marcus Mariota, four-time Pro Bowl selectee, J.J. Watt, and the 2014 first-overall draft pick, Jadeveon Clowney—and why would these stars ever sign a deal with another team? The tax benefits athletes may reap from playing in the AFC South however, present fairness concerns for other NFL divisions, ultimately weakening the “equal treatment of equals” platform the Fourteenth Amendment of the Constitution stands on.<sup>43</sup> For example, a free agent could find an opportunity to play in the AFC South more attractive than an identical offer in the AFC West, which hosts two California teams, and the Kansas City Chiefs, a team in a jurisdiction that taxes athletes on both the state and local level.<sup>44</sup>

This principle of unfairness falls heaviest on the equipment managers, medical personnel, and other non-athletes that travel with professional sporting teams. The roles of top-rated athletes are lucrative and relatively elastic; therefore, top-performing athletes can be selective with their employment contracts and team designations. Thus, the non-athlete employees, with somewhat inelastic roles and average salaries, bear the burden of the jock tax. In most instances, such employees have no choice but to accept the job in front of them, with little negotiating

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<sup>42</sup> See Nick Wallace, *What do NFL Players Pay in Taxes?*, SMARTASSET (Jan. 23, 2017), <https://smartasset.com/taxes/NFL-jock-taxes> (where Nick Wallace compares and contrasts the tax consequences and implications of various NFL players, ultimately finding that the AFC South is the “most tax friendly NFL division”).

<sup>43</sup> See SLEMROD & BAKIJA, *supra* note 35, at 137 (horizontal equity requires “equal treatment of equals”); *see also*, *Hooper v. Bernalillo Cty. Assessor*, 472 U.S. 612, 624 (1985) (finding a tax scheme that created a divide in a class of similarly situated individuals to be unconstitutional, which will be explained in depth below).

<sup>44</sup> See Liz Mathews, *‘Jock Tax’: Pay Where you Play is Consideration for NFL Free Agents*, SEAHAWKS WIRE (Mar. 9, 2017), <http://seahawkswire.usatoday.com/2017/03/09/jock-tax-pay-where-you-play-is-consideration-for-nfl-free-agents/> (athletes who work outside Washington should consider the jock tax when making an employment decision, which is implemented by 23 out of the 28 states with professional sports teams).

power to pick and choose the division they work in. “A good rule of thumb is that the better the alternatives to what is taxed, the less likely one is to bear a burden.”<sup>45</sup> It follows that because there are not many “better alternatives” to the top-performing athletes in major league sports organizations, the non-athlete employees of professional sports leagues will bear the burden of the jock tax.<sup>46</sup>

Additionally, the jock tax hurts NFL franchises located in non-jock-tax-states, as athletes may ask for raises and additional compensation to recoup the costs of playing season games in jock tax states with no reciprocity. It is possible NFL franchises will start frontloading the income of professional athletes in the form of a “bonus,” because the IRS and state courts do not consider bonuses to be compensation for jock tax purposes.<sup>47</sup>

To further exemplify the efficiency costs and behavioral responses to the jock tax, look no further than LeBron James’ infamous “Decision,” which shocked the nation, basketball enthusiasts, and tax professionals alike.<sup>48</sup> In 2010, LeBron James announced that he would be signing with the Miami Heat instead of remaining in his home state to play for the Cleveland Cavaliers. While the Cleveland Cavaliers offered James a higher salary, which totaled \$10,000 more per game than the offer presented by the Miami Heat, James chose to play for the Miami Heat, and arguably made the right decision in light of tax implications.<sup>49</sup> In 2010, Ohio had a top tax rate of 5.295% and the city of Cleveland also imposed a 2% income tax, which would negate almost 8% of James’ overall salary.<sup>50</sup> By signing with the Miami Heat, James could be certain that his salary would remain untouched by state

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<sup>45</sup> See SLEMROD & BAKIJA, *supra* note 35, at 114 (discussing tax incidence and who is to bear the burden in tax-shifting scenarios).

<sup>46</sup> *Id.*

<sup>47</sup> See Elizabeth C. Ekmekjian, James C. Wilkerson & Robert W. Bing, *The Jock Tax Contest: Professional Athletes v. The States – Background and Current Development*, 20 J. OF APPLIED BUS. RES. 19 (2011), <https://www.cluteinstitute.com/ojs/index.php/JABR/article/download/2202/2179/> (references 58-145 INTERNAL REVENUE SERV. REVENUE RULING 1958-1 C.B. 360 and *Appeal of Testaverde*, No. 9A-0197 (Cal. Bd. Of Appeals Feb. 1, 2000) (Supp. App.6) where courts and administrators found that a signing bonus is not allocable compensation for purposes of the jock tax.)

<sup>48</sup> See Aaron Merchak, *State Jock Taxes: Is LeBron Better Off in Miami?*, TAX FOUNDATION (July 8, 2010) <https://taxfoundation.org/state-jock-taxes-lebron-better-miami/>.

<sup>49</sup> *Id.* (The Cleveland Cavaliers offered LeBron James \$100 million while the Miami Heat offered \$96 million, which, based on the author’s calculation, would equate to roughly an extra \$10k/game over 5 years).

<sup>50</sup> *Id.*

taxation schemes when playing at home for the Miami Heat.<sup>51</sup> The taxation of income earned in away games presented its own complexities, yet James was subject to less tax liability with the Miami Heat.<sup>52</sup> In addition to the five locations that do not impose a jock tax on nonresident athletes, James could also avoid the Illinois retaliatory jock tax, as a professional athlete from a non-jock tax state.<sup>53</sup>

While playing for the Miami Heat is certainly a more economically sound decision when considering the tax regulations enforced by Florida and Ohio, LeBron James ultimately opted out of his contract with the Miami Heat in 2014 and signed with the Cleveland Cavaliers.<sup>54</sup> In 2010, Cleveland offered James a larger salary than Miami, potentially to compensate for tax implications, and in 2014, it was no different.<sup>55</sup> As the saying goes, only two things in life are certain: death and taxes—and for LeBron James, even more taxes.

### III. A HEAVY HITTER: ENFORCEMENT OF THE JOCK TAX

There are two methods states utilize to calculate a professional athlete's tax liability: the duty days method and the games played method.<sup>56</sup> The duty days method is the most common and tax-friendly approach.<sup>57</sup> It considers all of an athlete's practice days, game days and travel days to be "duty days."<sup>58</sup> The duty days approach uses the following formula to calculate a nonresident professional athlete's tax liability owed to a state:

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<sup>51</sup> *Id.*

<sup>52</sup> *Id.*

<sup>53</sup> Aaron Merchak analyzes the jock tax implications of LeBron James signing with the Miami Heat instead of the Cleveland Cavaliers, finding that because he was from Florida, he would not be subject to Illinois' jock tax scheme. *Id.*

<sup>54</sup> See *LeBron Signs Reported 2-year, \$42Million Contract with Cavs*, NBA.COM (July 12, 2014, 9:59 PM), <http://www.nba.com/2014/news/07/12/lebron-contract.ap/>.

<sup>55</sup> See *id.* (discussing LeBron James' salary increase).

<sup>56</sup> See Ekmekjian, *supra* note 20, at 238.

<sup>57</sup> See *id.* at 240.

<sup>58</sup> *Id.*

Tax Liability Rate: (Total number of duty days spent in specific state) / (Total number of duty days in season)<sup>59</sup>

To demonstrate the duty days formula, I will refer to Major League Baseball (MLB) Hall of Famer and legend, Cal Ripken, Jr., who played twenty-one seasons for the Baltimore Orioles and holds the record for playing 2,632 consecutive games, which my father, a devoted Orioles fan, always reminded me of when I wanted to miss a day of school while growing up. Now suppose it is 1983 and Cal Ripken of the Baltimore Orioles is playing the Philadelphia Phillies in the World Series and played three games in Philadelphia. During the course of the series, Ripken spent three (3) days practicing and playing in Philadelphia—traveling to and from Philadelphia on the first and last game days of the series. After the 1983 Orioles/Phillies World Series, Ripken will have spent a total of three (3) duty days in Pennsylvania, out of the possible 220 duty days in an MLB season.<sup>60</sup> Of course, the more duty days considered, the less tax consequences there will be, as the tax liability rate becomes lower as the duty days total become greater. The differing approach by states in applying the duty days formula presents its own concerns which will be further examined below. Based on the traditional duty days approach, considering both preseason and regular season duty days, Ripken would owe taxes to Pennsylvania on 1.4% of his income, as demonstrated below:

Tax Liability Rate: (Total number of duty days spent in Pennsylvania (3)) / (Total number of duty days in MLB season (220)) = 1.4%

In the less common, “games played” method, states consider solely the regular season and exhibition games to calculate a professional athlete’s tax liability.<sup>61</sup> See below:

Tax Liability Rate: (Total number of games played in a specific state) / (Total number of games played)

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<sup>59</sup> *Id.* at 238.

<sup>60</sup> See Eric Seidman, *Checking the Numbers: The Jock Tax*, BASEBALL PROSPECTUS (Jan. 6, 2011), <https://www.baseballprospectus.com/news/article/12682/checking-the-numbers-the-jock-tax/> (demonstrating the jock tax by calculating a professional baseball player’s salary accounting for the 220 duty days in a regular baseball season).

<sup>61</sup> See Ekmekjian, *supra* note 20, at 240.

Using the earlier example, suppose again that Cal Ripken played three (3) games versus the Philadelphia Phillies in Pennsylvania during the 1983 World Series in a season of 162 games.

Tax Liability Rate: (Total number of games played in Pennsylvania (3)) / (Total number of games played in regular season (162)) = 1.85%

Thus, under the games played method, Ripken would owe taxes to Pennsylvania on 1.85% of his total income, more than that of the tax liability owed when using the duty days formula. Hypothetically, if in 1983, Ripken had a salary of \$10 million, he would owe \$4,186.36 to Pennsylvania under the duty days method and \$5,685.19 under the games played method, irrespective of the Philadelphia city wage tax or the likely increase in income gained from playing in a World Series. See below:

**Duty Days Method: Ripken’s Tax Liability to PA**

\$10 million \* [(3 duty days in Pennsylvania) / (220 total duty days)] = \$136,636.63 \* PA tax rate 3.07%<sup>62</sup> = **\$4,186.36**

**Games Played Method: Ripken’s Tax Liability to PA**

\$10 million \* [(3 games played in Pennsylvania) / (162 total games played)] = \$185,185.19 \* PA tax rate 3.07% = **\$5,685.19**

A. OUT OF BOUNDS: THE GAMES PLAYED METHOD FOUND UNCONSTITUTIONAL

The games played method was found to be unconstitutional by the Supreme Court of Ohio because it violated the Due Process Clause.<sup>63</sup> Under the Due Process Clause, “no state shall... deprive any person of life, liberty, or *property*, without due process of law...”<sup>64</sup> While the games played method is a simpler formula, only considering one factor—the number of

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<sup>62</sup> *Current Tax Rates*, PA. DEP’T OF REV., <http://www.revenue.pa.gov/GeneralTaxInformation/Current%20Tax%20Rates/Pages/default.aspx> (last visited Apr. 6, 2018).

<sup>63</sup> *Hillenmeyer v. Cleveland Bd. of Review*, 41 N.E.3d 1164, 1176 (Ohio 2015).

<sup>64</sup> U.S. CONST. amend. XIV, § 1 (emphasis added).

games played by an athlete—it fails to account for the numerous other days that a professional athlete works, such as practice days, appearances, and preseason obligations.<sup>65</sup> The result of considering only the games played, a small fraction of an athlete’s work, “dramatically overstates” the income earned by an athlete in that state, and disregards the “compensation an NFL player earns for training, practices, strategy sessions and promotional activities he is engaged in” ultimately taxing more income than a state may constitutionally tax.<sup>66</sup> Accordingly, the Ohio Supreme Court found that by using the games played method, Cleveland taxed “extraterritorially, beyond its power to tax.”<sup>67</sup> While the games played method has been denounced by the Ohio Supreme Court, certiorari was denied by the United States Supreme Court, and therefore, this approach could still arguably be utilized by any jurisdiction other than Ohio.<sup>68</sup>

#### B. IN OVERTIME: THE ADMINISTRATIVE BURDEN PRESENTED BY THE JOCK TAX

While the method a state may use to calculate an athlete’s tax liability is not 100% certain, what is certain is the number of tax returns each professional athlete must file as a result of the jock tax. In any given year, a professional athlete plays games and makes appearances in over a dozen states, and must file a tax return in each state. Josh Martin, a line-backer for the New York

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<sup>65</sup> See John DiMascio, *The “Jock Tax”: Fair Play or Unsportsmanlike Conduct*, 8 U. PITT. L. REV. 953, 962 (2007) (explaining that the games played method “fails to reflect that athletes are paid for services in addition to game performances such as practice days, team meetings and public relations activities”). At present, no states utilize the games played method, although it was previously the approach used in New York, Pennsylvania and Oregon).

<sup>66</sup> In *Hillenmeyer*, the former linebacker of the Chicago Bears, Hunter Hillenmeyer’s income was taxed at 5% when using the unconstitutional games played method for two days of work in Cleveland, but only 1.25% for the same two days when employing the widely accepted, duty days approach. Accordingly, the tax that Cleveland imposed on Hillenmeyer was extraterritorial, and reached income that was earned in other jurisdictions. *Hillenmeyer*, 41 N.E.3d at 1176.

<sup>67</sup> See *id.* (finding that Cleveland’s use of the games played method to tax a nonresident’s income reached beyond Cleveland’s taxing power because the games played method ultimately reached an athlete’s income for work completed outside of Cleveland, it was an extraterritorial tax).

<sup>68</sup> See *City of Cleveland Bd. of Review v. Hillenmeyer*, 41 N.E.3d 1164 (Ohio 2015), *cert. denied* 136 S. Ct. 491 (2015).

Jets described his tax return documents to be “as thick as a bible.”<sup>69</sup> To ensure compliance with the jock tax, professional athletes are forced to hire tax experts to file their tax returns with each individual state an athlete plays in, which is extremely costly.<sup>70</sup> On the flip side, the administratively burdensome nature of the jock tax has resulted in some states hiring employees to oversee athlete schedules and salaries, further adding to the administrative costs of the jock tax.

To make matters more complicated, every state has its own version of the jock tax, and therefore, there is little uniformity in the tax treatment of nonresident professional athletes across the country.<sup>71</sup> As alluded to previously, Arizona does not include the preseason in its duty days calculation, but rather defines duty days as, “all days during a taxable year from the *beginning* of a professional athletic team’s first regular game of the season through the last game in which the team competes.”<sup>72</sup> Arizona likely loosened its jock tax scheme because the State is one of the two locations where the MLB holds Spring Training—the other being the beloved, non-income tax state of Florida—and Arizona feared that if it taxed athletes participating in Spring Training, Florida would monopolize hosting the event. Arizona’s departure from the traditional duty days approach exemplifies yet another behavioral response to the jock tax. If Arizona included Spring Training in its duty days calculation, the state would have made \$14 million in tax revenue in 2013.<sup>73</sup> While this is certainly a win for players participating in Spring Training in Arizona, it also lessens the total possible duty days for tax liability calculation

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<sup>69</sup> See Steven Kutz, *This is What a Pro Athlete’s Tax Return Looks Like*, MARKET WATCH (Aug. 29, 2016) <https://www.marketwatch.com/story/the-jock-tax-and-why-a-professional-athletes-tax-form-can-be-as-big-as-a-bible-2016-07-27> (discussing the administratively burdensome nature of the jock tax, which requires professional athletes to file a tax return in every state in which he competes).

<sup>70</sup> See SLEMROD & BAKIJA, *supra* note 35, at 231 (explaining that the average taxpayer spends 12.5 hours complying with the federal individual income tax, which amounts to 1.8 billion total hours in the aggregate for the United States. Further, the average taxpayer pays \$198 in expenses preparing for filing an income tax return).

<sup>71</sup> See Ekmekjian, Wilkerson & Bing, *supra* note 47, at 21.

<sup>72</sup> Jonathan Nehring, *How Arizona Saves MLB Players Millions in Taxes*, TAXABALL BLOG (Feb. 17, 2015), <http://www.taxaball.com/blog/how-arizona-saves-mlb-players-millions-in-taxes-2015>.

<sup>73</sup> *Id.*

purposes, which could result in larger tax consequences at the tail end of the season.

Additionally, in some states, the mere presence of an athlete in a state for *part* of a day is considered an *entire* “duty day” for tax liability purposes. For example, if a Chicago Cubs player leaves New York City on a Friday morning after a Thursday night game in the Bronx and practices in Philadelphia, Pennsylvania on that same Friday in the afternoon, in preparation of taking on the Phillies, both states could arguably claim a duty day for tax revenue.<sup>74</sup> This results in two states taxing the same day of income, which is also known as double taxation, and is disfavored by courts across the country.<sup>75</sup>

There is no dispute that the jock tax increases the complexity of the United States tax system, as well as the costs of efficiency, compliance, and enforcement. From the perspective of the states and cities that impose the jock tax however, the tax revenue gained from the jock tax may be worth the high costs of administration and enforcement. In fact, in 2013 alone, California profited \$229 million from the imposition of the jock tax against nonresident professional athletes.<sup>76</sup>

#### IV. UNSPORTSMANLIKE CONDUCT: THE JOCK TAX VIOLATES THE EQUAL PROTECTION CLAUSE

As a threshold matter, the jock tax is a form of income tax that should apply to all visitors of a city or state who make income in that jurisdiction—professional athletes and businessmen alike.

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<sup>74</sup> See K. Sean Packard, *Income Taxes for Pro Athletes Are Reminder of How Complicated U.S. Tax Code Is*, FORBES, (Apr. 18, 2017, 9:20 AM), <https://www.google.com/amp/s/www.forbes.com/sites/kurtbadenhausen/2017/04/18/income-taxes-for-pro-athletes-are-reminder-of-how-complicated-u-s-tax-code/amp/> (discussing the complications of the duty days approach, the author explains that “In New York, if a person’s plane leaves from JFK at 12:01am, that entire day counts as a New York day.”).

<sup>75</sup> See Richard Wolf, *Supreme Court: Two States Can’t Tax the Same Income*, USA TODAY, (May 18, 2015, 1:54 PM), <https://www.usatoday.com/story/news/nation/2015/05/18/supreme-court-double-taxation/22066863/> (stating that this “scheme creates an incentive for taxpayers to opt for intrastate rather than interstate economic activity” and that “[t]he issue of double taxation seemed to worry the [sic] most justices.”).

<sup>76</sup> See Stefanie Loh, *Fun Facts About the Jock Tax*, THE SAN DIEGO UNION-TRIBUNE (Apr. 20, 2015, 6:30 AM), <http://www.sandiegouniontribune.com/sports/nfl/sdut-jock-tax-fun-facts-origins-super-bowl-money-2015apr20-story.html>.

This is referred to as “income apportionment,” a term used to describe the way in

which a state treats income earned within the state by nonresidents.<sup>77</sup> Traditionally, this nonresident income tax regulation has only been applied to professional athletes and entertainers. This is because of the public nature of their affairs, and the large salaries these professionals have, making the cost of administering the jock tax worthwhile for states.<sup>78</sup> By picking and choosing who to apply the jock tax to, the tax is applied in a manner that runs afoul to this nation’s taxation jurisprudence.

#### A. SWING AND A MISS: THE JOCK TAX FAILS THE RATIONAL BASIS TEST

To determine whether a taxpayer’s right to equal protection is being violated, the court must apply the rational basis test.<sup>79</sup> Under this test, courts ask whether the taxation constitutes selective taxation, and if so, whether the selection is rationally related to a legitimate state interest.<sup>80</sup> Although this standard is a relatively low threshold of scrutiny, countless tax regulations have been deemed unconstitutional for failing to promote a legitimate state interest.

In *Allegheny Pittsburgh Coal Company v. County Commission* for example, the Supreme Court invalidated a West Virginia County’s selective taxation scheme which resulted in a coal company’s recently purchased property to be taxed at a rate approximately 8 to 35 times greater than the tax rates applied to neighboring and comparable properties that had not been recently

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<sup>77</sup> See INCOME APPORTIONMENT ELEMENTS, 0130 REGSURVEYS 38 (Westlaw 2017) (Westlaw organizes all of the state specific statutes concerning income apportionment, i.e., the “jock tax”).

<sup>78</sup> See *Hillenmeyer v. Cleveland Bd. of Review*, 41 N.E.3d 1164, 1173 (Ohio 2015) (where the Supreme Court of Ohio explains that, “professional athletes are typically high paid, and their work is relatively easy to find.”).

<sup>79</sup> See *Nordlinger v. Hahn*, 505 U.S. 1, 30 (1992) (before analyzing the constitutionality of a selective tax regulation, the Supreme Court explained that “equal protection challenges to state tax regimes” must be rationally related to a legitimate state interest).

<sup>80</sup> See *N. New Eng. Tel. Operations, LLC v. Cty. of Concord*, 102 A.3d 1190, 1194 (N.H. 2014) (The Supreme Court of New Hampshire analyzed a taxpayer’s claim of selective enforcement).

sold.<sup>81</sup> The county asserted that the tax assessment scheme “was rationally related to its purpose of assessing properties at true current value.”<sup>82</sup> The Supreme Court felt otherwise, and found that, “[the] approach systematically produced dramatic differences in valuation between petitioners’ recently transferred property and otherwise comparable surrounding land” and therefore, constituted “intentional and systematic discrimination” in violation of the equal protection clause.<sup>83</sup>

In *Hooper v. Bernalillo County Assessor*, the Supreme Court found a New Mexico statute that exempted a selective class of Vietnam veterans from a state property tax to be unconstitutional.<sup>84</sup> Specifically, Vietnam veterans that established residency in New Mexico prior to 1976 were eligible to take advantage of the tax exemption, while Vietnam veterans who moved to New Mexico after 1976 could not.<sup>85</sup> New Mexico asserted two legitimate state interests: (1) to encourage Vietnam veterans to move to New Mexico; and (2) to serve as New Mexico’s expression of appreciation to its citizens for honorable military service.<sup>86</sup> The Court ultimately found that New Mexico’s statute “create[d] two tiers of Vietnam veterans, identifying resident veterans who settled in the state after 1976, second-class citizens” and that New Mexico’s “distinction between resident veterans [was not] rationally related to the State’s asserted legislative goal.”<sup>87</sup>

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<sup>81</sup> See *Allegheny Pittsburgh Coal Co. v. Cty. Comm’n of Webster*, 488 U.S. 336, 336–37 (1989). The West Virginia Constitution required that “taxation shall be uniform throughout the state, and that all real and personal property shall be taxed in proportion to its value.” *Id.* In light of this, the Supreme Court found a tax assessment which imposed taxes on the basis of recent purchases price unconstitutional because it imposed disproportionately higher taxes on recently sold property than property that had not recently been sold. *Id.* This exemplified in a disparity in similar property, and therefore, an equal protection violation. *Id.*

<sup>82</sup> *Id.* at 343.

<sup>83</sup> *Id.* at 341–42.

<sup>84</sup> *Hooper v. Bernalillo Cty. Assessor*, 472 U.S. 612, 624 (1985).

<sup>85</sup> *Id.* at 614.

<sup>86</sup> *Id.* at 618–19.

<sup>87</sup> *Id.* at 622–23 (holding that barring Vietnam veterans who moved to New Mexico after 1976 from being property tax exemption eligible did not further the interest of encouraging veterans to move to New Mexico or express New Mexico’s appreciation for its veterans.) This is in large part because “an infant who resided in New Mexico long ago would immediately qualify for the exemption upon settling in the state at any time in the future regardless of where he resided before, during, or after military service,” and, a Vietnam

Similar to *Allegheny Pittsburgh Coal Company*, the application of nonresident professional taxation schemes to athletes alone is intentional and systematic discrimination. Similar to *Hooper*, the jock tax creates a divide in a class of similarly situated citizens, and while the law behind the equal protection clause in the context of state taxation is complex and lacks clarity, the underlying purpose is easy: a state cannot define its interest as legitimate if it selectively enforces a tax measure that discriminates amongst members of the same class.

In the context of nonresident athletic professionals, the Ohio Supreme Court analyzed the constitutionality of Cleveland's jock tax scheme in *Hillenmeyer v. Cleveland Board of Review*.<sup>88</sup> There, Hunter T. Hillenmeyer, a former linebacker for the Chicago Bears, challenged Cleveland's jock tax regulation.<sup>89</sup> While the court ultimately found Cleveland's specific taxation scheme unconstitutional as it utilized the unpopular "games played" method, the court set forth what it considered to be a legitimate state interest rationally related to justify the jock tax.<sup>90</sup> In doing so, the court stated: "[i]mposing a limit on local taxation while protecting the cities' interest in collecting existing taxes constituted an adequate rational basis for the General Assembly's actions."<sup>91</sup> The court further reasoned: "the Constitution grants legislators, not courts, broad authority (within the bounds of rationality) to decide whom they wish to help with their tax laws and how much help those laws ought to provide."<sup>92</sup> Accordingly, the Supreme Court of Ohio found it justifiable to treat similarly situated members of a class differently than others of the same class to ensure that the city could continue to collect taxes—conveniently from those with the highest salaries and the most public schedules—and because overseeing tax regulation was provincially within the discretion of the legislature.

Pursuant to this nation's long lineage of equal protection case law, however, the singling out of professional athletes by way of the jock tax is not rationally related to the legitimate state

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veteran who settles in New Mexico after 1976 does not deserve less of an expression of appreciation than that of a Vietnam veteran who settles in New Mexico prior to 1976. *Id.*

<sup>88</sup> *Hillenmeyer v. Cleveland Bd. of Review*, 41 N.E.3d 1164 (Ohio 2015).

<sup>89</sup> *Id.* at 1167–68.

<sup>90</sup> *Id.* at 1174.

<sup>91</sup> *Id.*

<sup>92</sup> *Id.*

interest the Ohio Supreme Court asserted. Additionally, legislators are not benefitting any particular class by imposing the jock tax, and thus, the Ohio Supreme Court could have ruled on the selective application of the taxation of nonresident professionals without hijacking the role of the legislative branch. Further, the legitimate state interests the *Hillmeyer* Court analyzed were found to be rationally related in the specific instance of excluding a nonresident professional athlete from obtaining a 12-day grace period, which differs significantly from the jock tax at large, which excludes athletes from being treated similarly to its equivalents on a daily basis.<sup>93</sup>

In *Arkansas Writers' Project, Inc. v. Ragland*, the United States Supreme Court invalidated an Arkansas regulation that imposed a tax on receipts from sales of tangible personal property but exempted newspapers, as well as religious, professional, trade, and sports journals printed and published within Arkansas.<sup>94</sup> The central issue before the court was, “not whether the tax singled out the press as a whole, but whether it targets a small group within the press.”<sup>95</sup> The court found that the tax was unconstitutional because it was not “evenly applied to all magazines.”<sup>96</sup> In a dissenting opinion, Justice Scalia expressed that Arkansas’s selective taxation of magazine publications served the legitimate interest of “avoiding the collection of taxes where administrative cost exceeds tax proceeds.”<sup>97</sup> While this arguably is a persuasive argument in support of the jock tax, it is not rationally related to any legitimate state interest a jock tax state could advance. It is a well-known fact that the goal of the jock tax is to increase revenue within the states by targeting those who have large salaries and public schedules; however, states have not yet tried to tax other nonresident professionals.<sup>98</sup> Similar to *Hooper*, the jock tax creates a hierarchy system within a class, presupposing that one occupation of a class will increase state revenue but other

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<sup>93</sup> The *Hillmeyer* Court found that, “the classification of professional entertainers or athletes as distinct from occasional entrants, which neither involves fundamental rights nor proceeds along suspect lines, cannot run afoul of the Equal Protection Clause if there is a rational relationship between the disparity of treatment and some governmental purpose.” *Id.* at 1173. The *Hillmeyer* Court however, was dealing with a jock tax scheme that differs from the general jock tax at large. *Id.*

<sup>94</sup> Ark. Writers' Project, Inc. v. Ragland, 481 U.S. 221, 225 (1987).

<sup>95</sup> *Id.* at 229.

<sup>96</sup> *Id.*

<sup>97</sup> *Id.* at 235–36.

<sup>98</sup> Overbay, *supra* note 3, at 220–23.

occupations will not. Additionally, the jock tax deters local and state governments from even attempting to tax other nonresident professionals which ultimately cuts overall state revenue.<sup>99</sup>

Further, it is likely the jock tax will eventually encourage athletes and franchises of non-jock tax jurisdictions to avoid playing in jock tax states. Thus, Justice Scalia's proposed legitimate interest that a state could assert in enforcing selective taxation of athletes while "avoiding the collection of taxes [from other nonresident business professionals] where administrative costs exceed tax proceeds," fails.<sup>100</sup> Such an argument cuts against the stated goal of earning revenue in light of the circumstantial and behavioral affects that will follow.

It cannot be understated that the equal protection clause "protects an entity from state action which selects it out for discriminatory treatment by subjecting it to taxes not imposed on others of the same class."<sup>101</sup> The long lineage of equal protection jurisprudence makes clear that selective discrimination of similarly situated citizens without a legitimate state interest is unconstitutional.<sup>102</sup> Accordingly, the jock tax does not pass the constitutional muster of the rational basis test.

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<sup>99</sup> For example, if a plaintiff's attorney were licensed to practice in California and Texas, lived in Texas, and received a third of a \$9 million verdict while on trial in California, that attorney would most likely not be taxed on this income because of his residency in the non-income tax state of Texas. This is because the taxation of nonresidents is exclusively applied to athletes rather than all nonresident professionals alike. By targeting only one specific group, states and localities are limiting themselves from collecting tax revenue from other nonresident traveling professionals.

<sup>100</sup> *Ragland*, 481 U.S. at 235–36 (Scalia, J., dissenting).

<sup>101</sup> *See Allegheny v. Pittsburgh Coal Co. v. County Comm'n of Webster Cty.*, 488 U.S. 336, 345 (1989).

<sup>102</sup> *See Allegheny*, 488 U.S. at 336; *Ragland*, 481 U.S. at 221; *Hooper v. Bernalillo Cty. Assessor*, 472 U.S. 612, 612 (1985); *Minneapolis Star & Tribune Co. v. Minn. Comm'r of Rev.*, 460 U.S. 575, 585 (1983) (finding that a Minnesota tax regulation that treated publications differently from other enterprises was facially discriminatory, and therefore unconstitutional); *N. New Eng. Tel. Operations, LLC v. City of Concord*, 102 A.3d 1190, 1190 (N.H. 2014); *Verizon New Eng., Inc. v. City of Rochester*, 940 A.2d 237, 244 (N.H. 2007).

## V. FOUL BALL: THE JOCK TAX VIOLATES THE COMMERCE CLAUSE

A state tax regulation satisfies the Commerce Clause, if “(1) the tax is applied to an activity with a substantial nexus with the taxing state, (2) is fairly apportioned, (3) does not discriminate against interstate commerce, and (4) is fairly related to the services provided by the State.”<sup>103</sup> In this section, I will examine how the jock tax fails the second, third, and fourth prongs of this test.

### A. STRIKE ONE: THE JOCK TAX DISCRIMINATES AGAINST INTERSTATE COMMERCE

Before the Supreme Court decided the landmark case of *Comptroller of the Treasury v. Wynne* in 2015<sup>104</sup>, involving the dormant commerce clause, there was a complete lack of governing authority in tax discrimination jurisprudence.<sup>105</sup> Now, to determine whether a state tax regulation discriminates against interstate commerce, courts can apply one simple test by hypothetically applying the tax regulation at issue of one state to every state. Thereafter, the court will resolve whether the identical application of the tax regulation at issue to every state would put interstate commerce at a disadvantage in comparison to intrastate commerce.<sup>106</sup> This is known as the internal consistency test.<sup>107</sup> As the Supreme Court stated: “by assuming that every State has the same tax structure, the internal consistency test allows courts to isolate the effect of a State’s tax scheme.”<sup>108</sup>

In *Comptroller of the Treasury v. Wynne*, the Supreme Court applied the internal consistency test and found a Maryland income tax regulation unconstitutional because it resulted in the double taxation of Maryland residents by failing to provide a tax credit on the taxes paid to other states.<sup>109</sup> This caused Maryland residents to pay more tax on their income from other states than they would have paid on the same income, had they earned it in

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<sup>103</sup> See *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 279 (1977).

<sup>104</sup> *Comptroller of the Treasury v. Wynne*, 135 S. Ct. 1787 (2015).

<sup>105</sup> See Michael S. Knoll, *The Economic Foundation of the Dormant Commerce Clause*, 103 VA. L. REV. 309, 311 (2017).

<sup>106</sup> See *Wynne*, 135 S. Ct. at 1803 (2015).

<sup>107</sup> See *id.*

<sup>108</sup> See *id.* at 1787.

<sup>109</sup> See *id.*

Maryland.<sup>110</sup> To exemplify the illegality of Maryland's taxation scheme, the Supreme Court presented the following example:

Assume that every State imposed the following taxes, which are similar to Maryland's "county" and "special nonresident" taxes: (1) a 1.25% tax on income that residents earn in State, (2) a 1.25% tax on income that residents earn in other jurisdictions, and (3) a 1.25% tax on income that nonresidents earn in State. Assume further that two taxpayers, April and Bob, both live in State A, but that April earns her income in State A whereas Bob earns his income in State B. In this circumstance, Bob will pay more income tax than April solely because he earns income interstate.<sup>111</sup>

When applying the test set forth in *Wynne* and considering the above illustration, the jock tax also fails the internal consistency test. If every state applied the jock tax, nonresident professional athletes would be victims of double taxation as they would be taxed multiple times on the same income solely for earning income outside of their resident state. This would be heightened for athletes from jock tax states other than California. While those athletes would likely receive a tax credit from their own state for taxes paid to other states, athletes would never receive a full credit up to the high-income tax rate that California imposes against its residents and visiting nonresidents. This would essentially favor the local California economy over interstate commerce. Additionally, most states do not give credits to its residents for taxes paid to cities.<sup>112</sup>

Because the jock tax upsets interstate commerce for both nonresident professional athletes and the states, it is

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<sup>110</sup> *See id.*

<sup>111</sup> *See id.* at 1803–1804.

<sup>112</sup> *See* K. Sean Packard, *Income Taxes for Pro Athletes Are Reminder Of How Complicated U.S. Tax Code Is*, FORBES (Apr. 18, 2017), <https://www.google.com/amp/s/www.forbes.com/sites/kurtbadenhausen/2017/04/18/income-taxes-for-pro-athletes-are-reminder-of-how-complicated-u-s-tax-code/amp/> (discussing the tax credit availability for athletes among the states and how most states do not give credits for taxes paid to cities. This is concerning as eight states impose a jock tax).

unconstitutional and does not satisfy the requirements mandated by the Commerce Clause.<sup>113</sup>

#### B. STRIKE TWO: THE JOCK TAX IS NOT FAIRLY RELATED TO THE SERVICES PROVIDED BY THE STATES

The fourth prong of the Commerce Clause test requires that a taxing measure is fairly related to the services provided by the State.<sup>114</sup> However, the jock tax is not enforced to recover expenditures related to any services or benefits that were provided to nonresident professional athletes by the state. Rather, it is to target tax revenue from high salaried figures who have relatively public schedules. Unlike situations where a nonresident taxpayer has a corporation or business in a foreign state, and is benefited by having a permanent presence there, an athlete has relatively little control over which state he or she will play in and is not directly benefited by the services a state provides. Additionally, not all stadiums or professional sporting venues are owned by the state. Rather, some cities own stadiums and lease them to NFL franchises. Other stadiums, such as the old home of the New York Jets, was provided completely by the NFL.<sup>115</sup> Further, the jock tax fails to account for the benefits that a professional athlete brings to the state. When a popular team visits a certain jurisdiction, it creates an enormous amount of revenue for the state, its businesses, bars, restaurants, retail providers and more.<sup>116</sup>

Even if my argument were to concede that a state provides *some* services for a nonresident athlete, such as providing the athlete with a police force to address safety concerns or crowd control at a sporting event, such services are not fairly related to the jock tax as required by the Commerce Clause. Additionally, such services would be provided by the state for any large event

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<sup>113</sup> Both athletes and states can be harmed by the jock tax in the context of the commerce clause—athletes in the form of double taxation—and states, when issuing credits to its residents. To illustrate this, suppose NY and NJ, which both have professional sporting teams, grant tax credits to its residents for the taxes paid to the other state. If NY has a higher income tax rate than NJ, and NJ issues a tax credit in the amount of NY's income tax rate to its resident, then NY would benefit at the detrimental expense of NJ.

<sup>114</sup> *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 279 (1977).

<sup>115</sup> See Bob Collins, *Public Financing of Football Stadiums: This is How They Do It*, MINN. PUB. RADIO (May 3, 2010, 1:08 PM), [https://blogs.mprnews.org/newscut/2010/05/cleveland\\_browns\\_1999\\_stadium/](https://blogs.mprnews.org/newscut/2010/05/cleveland_browns_1999_stadium/).

<sup>116</sup> See Sharianne Walker & Michael Enz, *The Impact of Professional Sports on the Local Economy*, 29 W. NEW ENG. L. REV. 149, 152–53 (2006).

or convention, whether or not it was a sporting event. Thus, nonresident professional athletes are currently being forced to bear the burden for state services that benefit society as a whole by way of the jock tax.

In *Complete Auto Transit, Inc. v. Brady*, a nonresident corporation had a large operation of transporting vehicles within the state of Mississippi, and thus, was “dependent on the State for police protection and other State services, the same as other citizens.”<sup>117</sup> There, the nonresident corporation actively chose to engage in business in Mississippi, and had a continuing presence there.<sup>118</sup> In the context of the jock tax, however, professional athletes are not in control of their schedule, and therefore do not seek out particular states to engage in business. Rather, professional athletes travel as a team on behalf of a franchise and at the mercy of the league’s scheduling coordinators. If anything, the *franchise* should be taxed for doing business in a state, and not the athletes on an individual level. It follows that the large tax bills states impose upon athletes are not fairly related to the services provided by the state because (1) professional athletes have little control over their place of work for away games, and (2) the services provided by the state to nonresident athletes are minimal.

### C. THREE STRIKES, YOU’RE OUT!: THE JOCK TAX IS NOT FAIRLY APPORTIONED

The fair apportionment standard represents the proposition that a nonresident will only be taxed on the activities over which a state has jurisdiction, thereby “preventing extraterritorial taxation.”<sup>119</sup> In plain language, this means that a state can only tax its “fair share” of interstate business.<sup>120</sup>

For a tax measure to be fairly apportioned, it requires both internal and external consistency.<sup>121</sup> As previously explained, the

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<sup>117</sup> *Complete Auto*, 430 U.S. at 277.

<sup>118</sup> *Id.* at 276–77.

<sup>119</sup> See Bradley W. Joondeph, *The Meaning of Fair Apportionment and the Prohibition on Extraterritorial State Taxation*, 71 *FORDHAM L. REV.* 149, 150 (2002) (explaining the meaning of fair apportionment in the context of constitutional taxation).

<sup>120</sup> See *Goldberg v. Sweet*, 488 U.S. 252, 260–61 (1989), (discussing that “the central purpose behind the apportionment requirement is to ensure that each State taxes only its fair share of an interstate transaction.”).

<sup>121</sup> *Okla. Tax Comm’n v. Jefferson Lines*, 514 U.S. 175, 185 (1995).

jock tax fails the internal consistency test because it upsets interstate commerce. Along those lines, courts can resolve whether a taxation measure is fairly apportioned by reviewing the regulation as though it were applied in every state to examine the regulation's effect on interstate commerce.<sup>122</sup> The sum of the apportioned shares of a professional athlete taxed in every state, or at least by the states at issue, should equate to 100% of the taxed value.<sup>123</sup> While "the Constitution imposes no single [apportionment] formula on the States," the duty days calculation runs afoul of what the commerce clause stands for.<sup>124</sup> When calculating a professional athlete's tax liability by utilizing the duty days formula, the jock tax allows states to reach beyond their "fair share," resulting in the taxation of more than 100% of a professional athlete's income when reviewed in the aggregate. This is because some states account for more duty days than others, and professional athletes often make appearances and visits to many states while in the scope of their employment beyond the duty day cap. Consider for example, professional athletes that play in the NFL Pro Bowl or the MLB All-Star Game, participate in franchise-required charity events and make television appearances. Further, often times states will claim the same duty day of a professional athlete for tax revenue purposes when that athlete is present in multiple states on the same day, which results in double taxation. Thus, in the context of fair apportionment, the jock tax is not internally consistent.

To determine whether a tax regulation is externally consistent, the state's economic justification for taxing the value at issue is reviewed to resolve "whether a State's tax reaches beyond the value that is fairly attributable to economic activity within the taxing state."<sup>125</sup> This requires that the portion of a professional athlete's salary that is taxed to reflect either (1) the value of the state activity required to host the professional athlete, or (2) the benefits provided to the athlete by the state. But the taxation of a professional athlete's large salary is not fairly apportioned to the services a state may provide to a professional athlete. This is especially true in light of the varying salaries that exist in professional sporting organizations, in relation to the levels of security various celebrity figures require as opposed to

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<sup>122</sup> See Joondeph, *supra* note 116, at 157.

<sup>123</sup> *Id.*

<sup>124</sup> See *id.* at 261 (quoting *Container Corp. of Am. v. Franchise Tax Bd.*, 463 U.S. 159, 171 (1983)).

<sup>125</sup> See *Okl. Tax. Comm'n v. Jefferson Lines, Inc.* 514 U.S. 175, 185 (1995).

those non-athlete employees that work behind the scenes. Additionally, the differing approaches to the duty days calculation employed by states makes it challenging, if not impossible, to determine how the state services rendered would be fairly apportioned to the amount taxed. For the foregoing reasons, the jock tax is not fairly apportioned under Commerce Clause standards, because it lacks both internal and external consistency.

The Supreme Court made clear that “[a taxpayer] should pay its fair share of taxes so long, but only so long, as the tax does not discriminate against interstate commerce, and there is no danger of interstate commerce being smothered by cumulative taxes of several states.”<sup>126</sup> This however, is in common parlance with what the jock tax does.

## VI. LEVELING THE PLAYING FIELD: REPEALING THE JOCK TAX

The jock tax, as enforced, presents numerous constitutional concerns and is administratively burdensome. The tax is imposed by twenty-three states, and targets professional athletes with surgical precision, subjecting them and non-athlete employees to arbitrary tax. To date, there has only been one occasion where a court could have invalidated the jock tax, yet the Ohio Supreme Court shied away from fully analyzing the constitutional concerns in an effort to appease the legislative body of Ohio.<sup>127</sup> Such governance is unacceptable in light of the discriminatory nature of the jock tax. What is acceptable however, and the most suitable policy proposal in response to the jock tax, is to repeal the tax entirely.

### A. THROWING A HAIL MARY: THE JOCK TAX SHOULD BE REPEALED

To ensure the fair and efficient taxation of professional athletes, lawmakers and the judiciary of this country should repeal the jock tax entirely, and subject professional athletes and related employees to the same income tax as every other U.S. taxpayer—

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<sup>126</sup> See *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 277 (1977) (quoting *Complete Auto Transit, Inc. v. Brady* 330 So. 2d 268, 272 (1976)).

<sup>127</sup> See *Hillenmeyer v. Cleveland Bd. of Review*, 41 N.E.3d 1164, 1174 (2015) (choosing not to usurp the broad authority of the legislature to implement taxes).

the standard state income tax. In this scenario, each professional athlete would be subject to the state income tax where the athlete is domiciled, and would file a tax return in that state. This would put nonresident professional athletes on an equal footing to other, similarly situated, nonresident, traveling professionals.

Subjecting professional athletes to the state income tax of where they reside is consistent with the Equal Protection<sup>128</sup> and Commerce Clauses of the Constitution.<sup>129</sup> Not only would nonresident professional athletes and related nonresident employees be treated equally in comparison to those similarly situated in their class, such as businessmen and other traveling professionals, but also, states would be prevented from “picking and choosing” who to tax based on the sole fact that a salary is high or occupation details are public. Further, when nonresident professional athletes and related employees are subject to only one state’s income tax, the potential for double or extraterritorial taxation is eliminated. Fairness concerns would also be ratified, as the non-athlete employees of professional sporting organizations would not be subject to the tax shifting consequences that results from the jock tax. Additionally, the NFL and franchises alone would not be forced to overcompensate its players to appease its top performers for jock tax purposes.

By invalidating the jock tax, compliance and administration costs would be decreased dramatically. Professional athletes and related employees would expend significantly less time and money on filing a tax return, and could avoid the in-state credit redeeming process entirely. On the other hand, previous jock tax states could focus on their own residents, which would cut back on administrative costs exerted on employing individuals to track athletes, their salaries, and nonresident tax evasion.<sup>130</sup> Additionally, states such as California and Minnesota that charge the top income tax rates in the country, could still tax *resident* professional athletes for both home and away games, which would lessen the blow of repealing the jock tax. While states, athletes, and sports commentators may differ on the fairness of the jock tax, one thing that everyone can agree on

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<sup>128</sup> See U.S. CONST. amend. XIV § 1.

<sup>129</sup> See U.S. CONST. amend. XIV § 5.

<sup>130</sup> See SLEMROD & BAKIJA, *supra* note 35, at 230 (revealing that in 2014, the IRS spent \$11.6 billion enforcing federal taxation. While this is obviously lessened on the state level, the costs of compliance and enforcement are high, especially when overseeing the tax liabilities of individuals from foreign states.).

is that repealing the jock tax would increase simplicity in one of the most complex and comprehensive tax systems in the world.<sup>131</sup>

For the jock tax to be repealed, an individual that has been impacted by the regulation will have to take a stand. Additionally, because there are so many people that have been wronged by this tax, there is definite potential for a class-action suit. As discussed, the jock tax falls most heavily on non-athlete employees that travel with professional sporting organizations. Such individuals make modest salaries in comparison to professional athletes and therefore endure heightened consequences imposed by the jock tax. An individual bringing a cause of action opposing the jock tax on constitutionality grounds should do so in a state that has the most standard and traditional form of the jock tax, inclusive of the formula employed in determining a nonresident's tax liability. If the jock tax scheme is an outlier, the reign of *Hillenmeyer* will continue in that a court will invalidate the jock tax design at issue, but not the jock tax at large.

#### **THE HOME STRETCH—A CONCLUSION TO THE *HOME TEAM ADVANTAGE***

The jock tax presents numerous constitutional concerns but has seldom been challenged. Perhaps it is the precedent that was set by the Ohio Supreme Court in refusing to take a stand against the jock tax in *Hillenmeyer* that keeps those effected by the jock tax silent. Perhaps it is an athlete's fear of tarnishing his "America's Golden Boy" reputation by complaining about tax consequences on a multi-million-dollar salary, that pushes the jock tax further and further under the rug. Regardless of the reason, the unconstitutionality of the jock tax cannot continue to be overlooked, and the lawmakers and judiciary of this nation should bench the jock tax by repealing it entirely.

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<sup>131</sup> *Id.* at 237 (explaining that complexities in a tax system arise for a variety of reasons, sometimes to increase fairness, other times to encourage certain social activities, and in unfortunate circumstances, as a by-product of political maneuvering. The jock tax certainly does not increase fairness, or social activities, and thus, is complex simply for profit).

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