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Nick Overbay

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A UNIFORM APPLICATION OF THE JOCK TAX: THE NEED FOR CONGRESSIONAL ACTION

NICK OVERBAY*

I. INTRODUCTION

State taxation of nonresident professional athletes, commonly known as the “jock tax,” is foundationally constitutional,¹ but the states’ arbitrary and selective enforcement of the jock tax has and will continue to lead professional athletes to challenge the constitutionality of the jock tax under the Commerce Clause, Dormant Commerce Clause, Due Process Clause, Privileges and Immunities Clause, and the Equal Protection Clause. Congress needs to enact a uniform allocation method for states to follow when taxing nonresident professional athletes to eliminate the arbitrary and selective enforcement of the jock tax to ensure states’ application and enforcement of their jock tax is constitutional. Further, a uniform allocation method would ease the administrative burden and compliance costs afforded to professional athletes.

The Privileges and Immunities Clause² generally restricts a state from levying higher tax rates against nonresidents than it imposes on residents; however, some taxes are imposed with the sole purpose to collect substantial amounts of revenue from a specific group of nonresidents.³ This is the primary reason that states impose the jock tax.⁴ While some states have constitutional restrictions on enacting and applying nonresident taxes, there is little constraint upon state legislatures when they enact a tax on nonresidents, which results in

* Nick Overbay is a J.D. Candidate at Marquette University Law School in Milwaukee, Wisconsin and is a candidate for the Sports Law Certificate from the National Sports Law Institute. He attended the University of Minnesota–Twin Cities, where he earned a B.S. in Sport Management.

1. See *Shaffer v. Carter*, 252 U.S. 37, 52 (1920); *Travis v. Yale & Towne Mfg. Co.*, 252 U.S. 60, 75 (1920).

2. U.S. CONST. art. IV, § 2, cl. 1.

3. David Schmudde, *Constitutional Limitations on State Taxation of Nonresident Citizens*, 1999 L. REV. MICH. ST. U. DET. C.L. 95, 107 (1999).

4. See Michael McCann, *Pro Athletes Paid California \$216.8 Million in 2012 Income Taxes*, SPORTS ILLUSTRATED (July 21, 2014), <http://www.si.com/mlb/2014/07/21/california-professional-athletes-taxes>.

“offensive and economically counterproductive” nonresident taxation.⁵ Because nonresidents are unable to vote against state legislators and are provided little opportunity to be heard in their complaint opposing nonresident taxes, nonresident “taxpayers’ only recourse against a tax which is laid on them without the benefit of complaint[] is found in the Constitution of the United States.”⁶ Since the existing constitutional protections available for nonresidents challenging taxes imposed by states against nonresidents have proven insufficient, and since states’ “taxation of nonresidents [has] become[] excessive[,] . . . it is imperative that new protections be developed, or the current constitutional analyses be amended.”⁷

This Comment examines the constitutional validity of the jock tax and analyzes the reasons needed for congressional intervention to impose a uniform allocation method for states that levy a jock tax. Part II discusses the history and background of states taxing nonresidents. Part III examines the history of the jock tax, the states’ benefits from levying the jock tax, and the application methods used to determine the amount of tax liability owed to the visiting state by a nonresident professional athlete. Part IV highlights the states’ targeted and selective enforcement, explains the constitutional provisions involved with the enforcement of the jock tax, and discusses recent federal proposals to ease the burden of nonresident taxation. Part V analyzes the significance of two Ohio Supreme Court cases, and how the rulings will affect the future application and enforcement of the jock tax. Finally, Part VI illustrates how a uniform approach would alleviate the complexities and controversies involved with the states’ application and enforcement of the jock tax.

II. THE HISTORY AND BACKGROUND OF STATES TAXING NONRESIDENTS

In 1920, two cases were decided by the Supreme Court that firmly established the states’ ability to tax nonresidents on income earned and derived from sources within their respective state.⁸ In the first case, *Shaffer v. Carter*,⁹ an Illinois resident received income from properties owned in Oklahoma.¹⁰ Oklahoma imposed taxes against the entire net income derived from the properties, which the taxpayer challenged on constitutional grounds.¹¹ The

5. Schmutde, *supra* note 3, at 97.

6. *Id.*

7. *Id.* at 97–98.

8. Leslie A. Ringle, *State and Local Taxation of Nonresident Professional Athletes*, 2 SPORTS LAW. J. 169, 171 (1995).

9. 252 U.S. 37 (1920).

10. *Id.* at 45.

11. *Id.* at 46.

taxpayer asserted the tax imposed by Oklahoma violated due process, denied nonresidents equal protection, burdened interstate commerce, and denied nonresidents of the privileges and immunities of Oklahoma citizens.¹²

Addressing the due process claim, the Court emphasized its history of decisions that recognized “[t]he rights of the several States to exercise the widest liberty with respect to the imposition of internal taxes.”¹³ Further illustrating that due process was not violated, the Court stated:

[J]ust as a State may impose general income taxes upon its own citizens and residents whose persons are subject to its control, it may, as a necessary consequence, levy a duty of like character, and *not more onerous in its effect*, upon incomes accruing to non[]residents from their property or business within the State, or their occupations carried on therein; enforcing payment, so far as it can, by the exercise of a just control over persons and property within its borders.¹⁴

Relying on the “more onerous” language, the Court also found that neither the Equal Protection Clause nor the Privileges and Immunities Clause was violated by the tax imposed.¹⁵ Because Oklahoma had assumed no power to tax nonresidents’ income derived outside its jurisdiction, the tax was not more onerous in its effect as compared to Oklahoma residents.¹⁶ Thus, the tax assessed by Oklahoma was lawful because the Constitution “entitles [the taxpayer] to the privileges and immunities of a citizen, but no more; not to an entire immunity from taxation, nor to any preferential treatment as compared with resident citizens. It protects him against discriminatory taxation, but gives him no right to be favored by discrimination or exemption.”¹⁷

Similarly, in *Travis v. Yale & Towne Manufacturing Co.*,¹⁸ a nonresident corporation that conducted business in New York raised the constitutional claims of due process violations, privileges and immunities violations, interstate commerce clause violations, impairment of the obligation of contracts claims, and equal protection violations against the State of New York because the corporation, under New York income tax laws, was required to withhold the

12. *Id.*

13. *Id.* at 51.

14. *Id.* at 52 (emphasis added).

15. *See id.* at 53, 55–56.

16. *See id.* at 53, 56–57.

17. *Id.* at 53.

18. 252 U.S. 60 (1920).

taxes of its employees that were residents of Connecticut or New Jersey.¹⁹ Relying on the propositions established in *Shaffer*, the Court noted that the State of New York has jurisdiction to assess a tax on “the incomes of non[]residents arising from any business, trade, profession, or occupation carried on within its borders . . . and that such a tax, so enforced, does not violate the due process of law provision of the Fourteenth Amendment.”²⁰ However, there are more constitutional claims available for nonresident professional athletes that challenge a state’s jock tax; those claims are analyzed in Part IV(F) of this Comment. First, a background of the jock tax is provided to demonstrate why states began implementing such a tax and the complexities involved with applying and enforcing the jock tax.

III. BACKGROUND OF THE JOCK TAX

The jock tax is defined as “[t]he practice of making professional athletes pay to play, by reason of pro-rata application and enforcement of state and local income tax statutes upon non[]resident professional athletes who engage in athletic contests within the jurisdiction.”²¹ However, the jock tax is not limited to just the athletes, but is also imposed on the coaches, trainers, and team officials.²² Thus, the jock tax is a source-based tax rather than a resident-based tax²³ because it requires professional athletes and other team members to pay income taxes in every city and state where they earn income.²⁴ Though it is well established that states can tax nonresidents that have a sufficient nexus with that state,²⁵ issues arise when states unfairly tax nonresidents.²⁶

The first instance of a nonresident professional athlete being specifically targeted by state tax law was found in a 1976 appeal brought by former San Diego Chargers punter, Dennis Partee, against the State of California challenging the amount of taxes he owed to California for the year 1968.²⁷

19. *Id.* at 72, 74–75.

20. *Id.* at 75.

21. Kenneth H. Ryesky, *Devil’s Dictionary of Taxation*, 6 HOUS. BUS. & TAX L.J. 54, 66 (2005).

22. See Elizabeth C. Ekmekjian et al., *The Jock Tax Contest: Professional Athletes vs. the States – Background and Current Developments*, 20 J. APPLIED BUS. RES. 19, 20 (2004).

23. Steven Pahuskin, *Heads Up! Recent Federal and State Attempts to Address Nonresident Income Taxation Perpetuate Selective Enforcement and Unfairness of the “Jock Tax,”* 64 TAX LAW. 961, 964 (2011).

24. *Jock Taxes*, TAX FOUND., <http://taxfoundation.org/tax-topics/jock-taxes> (last visited Dec. 15, 2016).

25. See *Shaffer v. Carter*, 252 U.S. 37, 57 (1920); see also *Travis*, 252 U.S. at 77.

26. See Schmudde, *supra* note 3, at 98.

27. *What Is the “Jock Tax”?*, TAXABALL, <http://www.taxaball.com/what-is-the-jock-tax.html> (last visited Dec. 15, 2016).

However, with the escalation of professional athletes' salaries in the 1980s, states began to pursue and tax nonresident professional athletes more heavily.²⁸ The jock tax received more publicity and became popular in 1991 after the Chicago Bulls defeated the Los Angeles Lakers in the National Basketball Association (NBA) Finals.²⁹ California subjected the players on the Chicago Bulls' roster to pay state income tax against the salary earned for the time spent in California during the entire 1990-91 NBA season.³⁰

In response, Illinois enacted its own version of the jock tax, but only levied the tax against visiting professional athletes who played for teams whose home state taxed professional athletes from Illinois.³¹ Illinois's reciprocal taxing measure was designed to pressure states to eliminate the jock tax, but it instead created an inconsistent application.³² Thus, the states' arbitrary enforcement and application of the jock tax was born.

"Today, all [twenty] states with professional sports franchises and state income taxes have a jock tax."³³ The states excluded due to not having a state income tax are Florida, Tennessee, Texas, and Washington.³⁴ Additionally, nine cities home to a professional sports franchise levy their own jock tax, which includes "visiting players and anyone who accompanies the team."³⁵

A. *The Benefits Provided to States by Implementing the Jock Tax*

The ease of identifying a professional athlete's schedule has caused states to increase their enforcement efforts of the jock tax,³⁶ and athletes' high salaries have created a substantial amount of tax revenue for states.³⁷ Typically, the funds received are put into general state coffers;³⁸ however, some states use the

28. Richard R. DiFrischia, *State and Local Taxation of Nonresident Athletes*, 18 J. ST. TAX'N 120, 121 (2000).

29. Pahuskin, *supra* note 23, at 965.

30. *See id.*

31. *Id.*

32. *See* Elizabeth C. Ekmekjian, *The Jock Tax: State and Local Income Taxation of Professional Athletes*, 4 SETON HALL J. SPORTS L. 229, 235-37 (1994).

33. Pahuskin, *supra* note 23, at 965.

34. John DiMascio, *The "Jock Tax": Fair Play or Unsportsmanlike Conduct*, 68 U. PITT. L. REV. 953, 958 (2007).

35. Martin J. Greenberg, *Jock Tax*, GREENBERG L. OFF.: SPORTSBIZ (Mar. 6, 2015), <http://www.greenberglawoffice.com/jock-tax>.

36. Alan Pogroszewski, *When Is a CPA as Important as Your ERA? A Comprehensive Evaluation and Examination of State Tax Issues on Professional Athletes*, 19 MARQ. SPORTS L. REV. 395, 395 (2009).

37. *See* Luke Anderson, *Taxing the Professional Athlete*, EMPLOYER GROUP (Mar. 18, 2015), <http://www.theemployergroup.com/taxing-professional-athlete>.

38. Mary Pilon, *The Jock-Tax Man*, NEW YORKER (Apr. 10, 2015),

revenue received from the taxation of nonresident professional athletes to fund state-specific projects and stadiums.³⁹ Although recently repealed,⁴⁰ Tennessee used the revenue received from its jock tax to support and fund the venues in which athletes played.⁴¹ Further, some state legislatures turn to nonresident sources of income in the form of taxes when attempting to fund the construction of new professional sport stadiums.⁴² For example, in 2012, Wisconsin captured \$10.7 million in revenue from NBA athletes.⁴³ Thus, with professional athletes' income taxes expected to increase, especially NBA athletes because of the league's revenue growth, the revenue received by Wisconsin from taxing nonresident professional athletes would support the \$150 million state general obligation bonding for the Milwaukee Bucks' new arena.⁴⁴ Despite the current controversies surrounding the jock tax, the revenue received by the states is too substantial for the states not to enforce the taxation of nonresident professional athletes.

B. Application of the Jock Tax

There are two important concepts to understanding the states' practice of taxing nonresident professional athletes. First, a state can tax income earned by nonresidents within its jurisdiction, even though these nonresidents have no representation within that state.⁴⁵ Second, although an administrative burden exists on levying nonresident income taxation against sporadic visitors, professional athletes are easy targets because of their public schedules and their large salaries, creating an economic benefit that outweighs the administrative burden.⁴⁶ These two concepts are the foundation for the jock tax's existence.⁴⁷

To apply the first concept, it must be understood what portion of a professional athlete's income is subject to the jock tax, and the allocation methods used to collect it. The second concept requires a constitutional analysis to examine the arbitrary and targeted enforcement used by the states in applying

<http://www.newyorker.com/business/currency/the-jock-tax-man>.

39. See Schmudde, *supra* note 3, at 102.

40. Chris Stephens, *Tennessee Jock Tax Finally Sacked*, TAX FOUND. (Apr. 15, 2014), <http://taxfoundation.org/blog/tennessee-jock-tax-finally-sacked>.

41. Pilon, *supra* note 38.

42. *Id.*

43. Don Walker & Patrick Marley, *'Jock' Taxes Paid by Bucks Would Cover \$150 Million Arena Loan*, MILWAUKEE J. SENTINEL (Nov. 14, 2014), <http://www.jsonline.com/news/milwaukee/jock-taxes-paid-by-bucks-would-cover-150-million-arena-loan-b99390809z1-282721001.html>.

44. *Id.*

45. DiMascio, *supra* note 34, at 955.

46. *Id.*

47. *Id.*

the jock tax.

1. Income Subject to the Jock Tax

The Internal Revenue Code defines gross income broadly to include “all income from whatever source derived.”⁴⁸ A “professional athlete’s [gross income] portfolio includes wages, signing bonuses, performance bonuses, prize money, endorsements, royalties, license fees, personal appearance fees, gifts, and imputed interest on interest free loans.”⁴⁹ However, cities and states levy the jock tax on a professional athlete’s personal service income.⁵⁰ A professional athlete’s personal service income normally includes “wages, performance bonuses, and deferred compensation earned while within the taxing jurisdiction.”⁵¹ Most states exclude a professional athlete’s signing bonus from the athlete’s tax base because it is not considered personal service, but rather compensation for contracting with a team.⁵² Additionally, endorsement deals and public appearances are only taxed by an athlete’s home state.⁵³

An athlete’s personal service income “must be apportioned to the various sources where it is earned.”⁵⁴ This apportionment requirement “is based on the principal that gross income for city and state tax purposes includes only that income from sources within the jurisdiction.”⁵⁵ This means a professional athlete must actually perform services within a taxing jurisdiction to incur tax liability.⁵⁶

2. Allocation Methods Used To Apportion an Athlete’s Income

Traditionally, states have used two methods to apportion a professional athlete’s income: the “duty-days” method and the “games-played” method.⁵⁷ Steps have been taken to alleviate the varying allocation methods used by the states. These steps are further discussed in Part V of this Comment.

48. I.R.C. § 61(a) (2016); JAMES J. FREELAND ET AL., *FUNDAMENTALS OF FEDERAL INCOME TAXATION: CASES AND MATERIALS* 39 (17th ed. 2013).

49. Ekmekjian, *supra* note 32, at 231.

50. *Id.* at 237.

51. *Id.*

52. *Id.* at 238.

53. Anderson, *supra* note 37.

54. Ekmekjian, *supra* note 32, at 238.

55. *Id.*

56. *See id.*

57. Jeffrey L. Krasney, *State Income Taxation of Nonresident Professional Athletes*, 2 *SPORTS LAW. J.* 127, 136 (1995).

Nonetheless, a brief description of both the duty-days method and the games-played method will be given.

i. Duty-Days Method

The majority of states use the duty-days method.⁵⁸ The duty-days method “allocates income using a ratio of the number of days an athlete is present in the taxing jurisdiction to the total number of days . . . that the athlete is required to work.”⁵⁹ The duty-days method includes practices and meeting days.⁶⁰ The duty-days method is “calculated as the percentage of duty-days spent in the respective state, compared to the total duty-days that athlete had that tax year, multiplied by the player’s salary.”⁶¹ Its formula is as follows:

$$\text{Income Earned in State } X = \text{Yearly Salary} \times (\text{Duty-Days Spent in State } X \div \text{Total Duty-Days})^{62}$$

For example, assume LeBron James spends eight duty-days in California, and there are 200 duty-days in a NBA season. James’ yearly salary is approximately \$33 million.⁶³ When James plays in California, James is liable for California’s jock tax. California takes the duty-days James spends in California (8 days) and divides by the number of duty-days in the season (200 days). California then takes the percentage of duty-days spent within its jurisdiction (4%) and multiplies it by James’ total NBA income (\$33M) to calculate the portion of James’ income attributable to California (\$1.32M). California then multiplies James’ income earned in California by its income tax rate (13.3%) to arrive at James’ jock tax bill of \$175,560.

ii. Games-Played Method

Alternatively, the games-played method is “based on the ratio of games-played in a particular jurisdiction to the total games-played.”⁶⁴ The games-played method excludes “practice, training, and preseason days.”⁶⁵ Its

58. Greenberg, *supra* note 35.

59. Krasney, *supra* note 57, at 136.

60. *Id.*

61. *What Is the “Jock Tax”?*, *supra* note 27.

62. *Id.*

63. *LeBron James Contract, Salary Cap Details & Breakdowns*, SPOTRAC, <http://www.spotracs.com/nba/cleveland-cavaliers/lebron-james/> (last visited Dec. 15, 2016).

64. Krasney, *supra* note 57, at 137.

65. Pahuskin, *supra* note 23, at 965.

formula is as follows:

$$\text{Income Earned in State X} = \text{Yearly Salary} \times (\text{Games-Played in State X} \div \text{Total Games})$$

For example, the City of Cleveland utilizes the games-played method to calculate the jock tax owed by professional athletes. The Los Angeles Lakers played one game in Cleveland during the 2015-16 NBA season.⁶⁶ Kobe Bryant's salary for the 2015-16 NBA season was \$25 million.⁶⁷ To calculate Bryant's jock tax bill for the City of Cleveland, Cleveland takes the total number of games played within its jurisdiction (1 game) and divides it by the total number of games in that NBA season (82 games). Cleveland then takes this percentage (1.2195122%) and multiplies it by Bryant's total income (\$25M) to calculate the portion of Bryant's income attributable to Cleveland (\$304,878). Cleveland then multiplies this attributable income by its income tax rate of 2% to reach Bryant's jock tax bill of \$6,097.56 owed to the City of Cleveland. Furthermore, this amount would then be added to the amount Bryant owes the State of Ohio, which uses the duty-days method.

IV. SELECTIVE AND TARGETED ENFORCEMENT OF NONRESIDENT TAXATION

Each of the fifty states has the sovereignty to create and establish its own taxing system.⁶⁸ As such, the nonresident, interstate taxpayer faces a significant burden.⁶⁹ States are extremely aggressive in taxing nonresidents, which results in states treating nonresidents worse than residents.⁷⁰ Two main issues must be decided to determine "whether a statute taxing nonresidents violates constitutional protections."⁷¹ "First, does the [C]onstitution require equal treatment of nonresidents and residents? Second, how is equal treatment defined?"⁷² The equal treatment obligation is found in any of these three

66. *Los Angeles Lakers 2016 Schedule – Lakers Home and Away*, ESPN, http://www.espn.com/nba/team/schedule/_/name/LAL/year/2016/seasontype/2 (last visited Dec. 15, 2016).

67. *Kobe Bryant Contract, Salary Cap Details & Breakdowns*, SPOTRAC, <http://www.spotrac.com/nba/los-angeles-lakers/kobe-bryant/> (last visited Dec. 15, 2016).

68. Kathryn L. Moore, *State and Local Taxation: When Will Congress Intervene?*, 23 J. LEGIS. 171, 171 (1997).

69. *Id.*

70. See Schmudde, *supra* note 3, at 111.

71. *Id.*

72. *Id.*

constitutional provisions: the Commerce Clause;⁷³ the Equal Protection Clause of the Fourteenth Amendment;⁷⁴ and the Privileges and Immunities Clause.⁷⁵ All three clauses have an effect on the states' application and enforcement of the jock tax. Furthermore, potential challenges of a state's jock tax exist under the Dormant Commerce Clause and the Due Process Clause of the Fourteenth Amendment. Brief descriptions of each constitutional provision will be provided to illustrate the complexities involved with the jock tax. Further, potential challenges professional athletes can bring against the application of the jock tax will be explored.

A. *Commerce Clause*

The Commerce Clause provides that states may not discriminate against or excessively burden interstate commerce.⁷⁶ As applied to taxation, "courts have interpreted this to mean that a state may not give advantages to its own citizens at the expense of non[.]citizens."⁷⁷ "However, not all [state] discrimination against [nonresidents] will be found to be unconstitutional."⁷⁸ If a sufficient rationale exists for a state's enactment of a discriminatory tax against nonresidents, with minimal burden placed on nonresidents, the tax is held to be constitutional.⁷⁹ If nonresident taxpayers receive a tax credit from their home state for taxes paid to other states, no burden exists on those nonresident taxpayers.⁸⁰ "The Commerce Clause is used to prohibit any state from interfering with commerce or impeding the operation of businesses on an interstate basis."⁸¹ To escape this prohibition, a state's rationale for a nonresident tax is that "the tax only increases a burden on a [nonresident] choosing to do business within the state. It does not impose any restriction or burden on the [nonresident] doing business in any other state."⁸² Additionally, a nonresident tax is limited to the business conducted within the state's jurisdiction; therefore, "the tax is only imposed on 'intrastate commerce,' not 'interstate commerce.'"⁸³

73. U.S. CONST. art. I, § 8, cl. 3.

74. U.S. CONST. amend. XIV, § 1.

75. U.S. CONST. art. IV, § 2, cl. 1.

76. *See* U.S. CONST. art. I, § 8, cl. 3.

77. Schmudde, *supra* note 3, at 111.

78. *Id.*

79. *Id.*

80. *Id.* at 112.

81. *Id.*

82. *Id.*

83. *Id.*

In *Complete Auto Transit, Inc. v. Brady*,⁸⁴ the Supreme Court “provided an analytical framework for determining the constitutionality of a state tax under the Commerce Clause.”⁸⁵ For a state tax to be valid and not violate the Commerce Clause, the Supreme Court held that a state tax be “applied to an activity with a substantial nexus with the taxing State, fairly apportioned, non-discriminatory against interstate commerce, and fairly related to the services provided by the State.”⁸⁶ Prongs two, three, and four will not be addressed because each prong requires a separate, independent analysis for each state’s jock tax.

The first prong of the provided framework, “substantial nexus,” has two sub-parts for state tax jurisdictions: “(1) nexus with the taxpayer and (2) nexus with the income, transaction, activity, or property sought to be taxed.”⁸⁷ However, there is uncertainty about the nexus required under the Commerce Clause.⁸⁸ While the Supreme Court in *Quill Corp. v. North Dakota*⁸⁹ addressed whether the physical presence by the taxpayer is the nexus needed for state sales and use tax, a taxpayer’s economic presence may be sufficient for nonresident income taxation.⁹⁰ State courts are divided on the issue of which standard to apply, and the Supreme Court has yet to answer the question because “the Supreme Court’s exploration of the constitutional limits of income tax jurisdiction has been stymied by Congress’s enactment of legislation as an affirmative exercise of its Commerce Clause powers.”⁹¹ However, it is a reasonable inference that the nexus must be a “physical presence” based on the ruling by the Ohio Supreme Court in *Saturday v. Cleveland Board of Review*,⁹² a case that is further discussed in Part VI of this Comment. Nonetheless, states are still divided on which nexus applies to the taxation of nonresident professional athletes. The states’ division necessitates congressional intervention to establish which nexus standard applies to states’ jock tax application to provide uniformity in the enforcement of the jock tax.

84. 430 U.S. 274 (1977).

85. Alan Pogroszewski & Kari A. Smoker, *Is Tennessee’s Version of the “Jock Tax” Unconstitutional?*, 23 MARQ. SPORTS L. REV. 415, 421 (2013).

86. *Complete Auto Transit, Inc.*, 430 U.S. at 279.

87. Pogroszewski & Smoker, *supra* note 85, at 422.

88. *See id.*

89. 504 U.S. 298 (1992).

90. Pogroszewski & Smoker, *supra* note 85, at 422.

91. *Id.* at 422 n.44.

92. 33 N.E.3d 46 (Ohio 2015).

B. *Equal Protection Clause of the Fourteenth Amendment*

“The Equal Protection Clause of the Fourteenth Amendment . . . prohibits states from denying any person within its jurisdiction the equal protection of the laws.”⁹³ However, the Equal Protection Clause does not protect against all discrimination in tax statutes.⁹⁴ “It requires that any tax which discriminates against nonresidents be based upon a rational basis and not resort to arbitrary classifications.”⁹⁵ Typically, courts use three standards of review to analyze laws under the Equal Protection Clause: (1) strict scrutiny; (2) intermediate scrutiny; and (3) rational basis. Strict scrutiny applies to “suspect classifications” such as race and religion.⁹⁶ To pass strict scrutiny, the law must further a “compelling governmental interest,” and must be narrowly tailored to achieve that interest.⁹⁷ Intermediate scrutiny is used in equal protection challenges to gender classifications.⁹⁸ To pass intermediate scrutiny, the law must further an “important government interest” by means substantially related to that interest.⁹⁹ Rational basis is used when a law does not involve any fundamental rights or a suspect classification.¹⁰⁰ To pass rational basis, the law must be “rationally related” to a “legitimate government interest.”¹⁰¹

Under the Equal Protection Clause, rational basis applies to an analysis of the jock tax because residency is not a “suspect classification.”¹⁰² Additionally, because it is difficult to establish professional athletes as a “suspect class,”¹⁰³ courts will find a state’s jock tax constitutional if it has a “rational basis” to a “legitimate state purpose.”¹⁰⁴ Here, the rational basis for the jock tax is to generate revenue from nonresident professional athletes to help offset the costs associated with hosting a professional sporting event.

93. *Equal Protection*, LEGAL INFO. INST., https://www.law.cornell.edu/wex/equal_protection (last visited Dec. 15, 2016).

94. Schmutte, *supra* note 3, at 113.

95. *Id.*

96. *Equal Protection*, *supra* note 93.

97. *Id.*

98. *See id.*

99. *Id.*

100. *Id.*

101. *Id.*

102. Joel Michael, *Constitutional Restrictions on Taxation of Nonresidents*, MINN. HOUSE OF REPRESENTATIVES, <http://www.house.leg.state.mn.us/hrd/pubs/ss/clssnonr.pdf> (last visited Dec. 15, 2016).

103. Elaine S. Povich, *Superstar Athletes Pay Big Jock Taxes in Some States*, GOV’T EXEC. (Oct. 26, 2014), <http://govexec.com/state-local/2014/10/state-jock-taxes/97412/>.

104. *Equal Protection*, *supra* note 93.

C. Privileges and Immunities Clause

There are two clauses within the United States Constitution that protect the privileges and immunities of citizens. Article IV, Section 2 provides, “[t]he Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.”¹⁰⁵ Section 1 of the Fourteenth Amendment provides, “[n]o [s]tate shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States.”¹⁰⁶ Rather than the Equal Protection Clause, it is the Privileges and Immunities Clause that protects against discriminatory taxation levied against nonresidents.¹⁰⁷ “The ‘fairness’ which nonresident taxpayers must receive from other states is guaranteed by the Privileges and Immunities Clause.”¹⁰⁸ This clause must provide “the constitutional guarantee of fairness” in states’ treatment of nonresidents because without that guarantee, nonresidents would be “fair game” for the taxing state, and such discriminatory taxation would lead to “border wars” between the states.¹⁰⁹ An example of such border wars is illustrated by the action taken by the State of Illinois after California taxed the visiting members of the Chicago Bulls in 1991.

D. Dormant Commerce Clause

Pursuant to the Dormant Commerce Clause, states are not allowed to “discriminate against or burden the flow of interstate commerce.”¹¹⁰ “In the absence of congressional legislation regarding an area of commerce, the Supreme Court enforces the anti-economic protectionism purpose behind the Commerce Clause by striking down state discrimination against interstate commerce through the Dormant Commerce Clause Doctrine.”¹¹¹ In a recent decision, the Supreme Court ruled that Maryland tax statutes that imposed a tax on the income of Maryland residents earned outside of the state’s jurisdiction violated the Dormant Commerce Clause because Maryland did not offer its residents a full tax credit against the income taxes they paid to other states.¹¹² Therefore, if a professional athlete’s home state disallows a full tax credit for

105. U.S. CONST. art. IV, § 2, cl. 1.

106. U.S. CONST. amend. XIV, § 1.

107. Schmudde, *supra* note 3, at 115.

108. *Id.*

109. *Id.*

110. Morgan L. Holcomb, *Tax My Ride: Taxing Commuters in Our National Economy*, 8 FLA. TAX REV. 885, 897 (2008).

111. *Id.* at 899.

112. *See* Comptroller of the Treasury v. Wynne, 135 S. Ct. 1787 (2015).

the income taxes paid to other states, and the home state imposes a tax on 100% of the professional athlete's income, that state is in violation of the Dormant Commerce Clause.

E. Due Process Clause

Another limitation on the states' ability to tax is found in the Due Process Clause of the Fourteenth Amendment. The Due Process Clause mandates that no state may "deprive any person of life, liberty, or property, without due process of law."¹¹³ Since state taxation is a deprivation of property, it is subject to the Due Process Clause. There are two principles that must be satisfied before a state can impose a tax upon a nonresident on income generated in interstate commerce.¹¹⁴ In *Miller Bros. Co. v. Maryland*, the Supreme Court established that before a state can enact a tax, there must be "some minimum connection[] between a state and the person, property[,] or transaction it seeks to tax."¹¹⁵ Further, in *Mobil Oil Corp. v. Commissioner of Taxes*, the Supreme Court ruled that a tax must have "a rational relationship between the income attributed to the State and the intrastate values of the enterprise."¹¹⁶

Additionally, under the Due Process Clause, "a state is prohibited from the taxing, on an unapportioned basis, [of] property that was taxable in other states on an apportioned basis, otherwise taxation by two or more states of the same property would be unconstitutional."¹¹⁷ This act is commonly known as "double taxation." Due process can be violated by the jock tax with the critical question being "whether the home state may tax all of the compensation that a nonresident athlete earns from his professional sports services, including income tax earned from services performed in other states."¹¹⁸ Therefore, if a professional athlete's home state disallows a full tax credit for the income taxes paid to other states, and the home state imposes a tax on 100% of the professional athlete's income, that state is in violation of the Due Process Clause.

113. U.S. CONST. amend. XIV, § 1.

114. See *Miller Bros. Co. v. Maryland*, 347 U.S. 340, 341 (1954); *Mobil Oil Corp. v. Comm'r of Taxes*, 445 U.S. 425, 436–37 (1980).

115. *Miller Bros. Co.*, 347 U.S. at 345.

116. *Mobil Oil Corp.*, 445 U.S. at 437.

117. N. Anna Shaheen & Brent C. Estes, *The Tax Collector Comes Knocking: An Evaluation of the State Income Taxation of Nonresident Professional Athletes and the Role of Congress*, 15 J. LEGAL ETHICAL REG. ISSUES 131, 137 (2012).

118. *Id.*

F. Professional Athletes' Potential Challenges

“Unfair taxation should be broadly defined to include any tax which has the practical effect of being targeted predominately at nonresidents.”¹¹⁹ There are three remedies available to nonresident professional athletes that are subject to a possible unfair jock tax.¹²⁰ Professional athletes can:

- (1) look to the legislature to reduce or eliminate the tax;
- (2) bring suit in the hope that the judiciary will provide the protection of the equal protection clause and the privileges and immunities clause; and
- (3) demonstrate to the taxing state that nonresident taxation actually causes economic harm to the taxing state.¹²¹

Generally, state courts have been the improper venue for a nonresident taxpayer to seek redress against what is perceived as an unfair tax because “state courts have given very little protection to nonresidents.”¹²² However, nonresident professional athletes can find redress in federal courts because federal courts will “reinforce the constitutional provisions guaranteeing fair treatment by a state of the citizens of another state.”¹²³ Further, federal courts can deter the states’ aggressive nature of levying taxes against nonresidents.¹²⁴

Additionally, the remedy of looking to the legislature is generally ineffective unless the nonresident group is substantial enough to pressure legislators.¹²⁵ Nonresident professional athletes are an exception to this generality. As previously mentioned, the State of Tennessee recently repealed its version of the jock tax because it was “constitutionally suspect.”¹²⁶ The lead sponsor of the bill, Republican David Alexander,¹²⁷ believed Tennessee’s jock tax to be unconstitutional because it exempted NFL athletes while National Hockey League (NHL) and NBA athletes were subjected to the tax.¹²⁸ However, even the repeal has drawn criticism because at the time the repeal

119. Schmudde, *supra* note 3, at 108.

120. *See id.*

121. *Id.* at 108–09.

122. *Id.* at 108.

123. *Id.*

124. *Id.*

125. *Id.* at 109.

126. Stephens, *supra* note 40.

127. Nate Raunrau, *Tennessee Legislature Abolishes Jock Tax*, TENNESSEAN (Apr. 7, 2014), <http://www.tennessean.com/story/money/2014/04/07/tennessee-house-abolishes-jock-tax/7440595/>.

128. Stephens, *supra* note 40.

took effect, NHL players were immediately exempted, but Tennessee still subjected NBA players to the tax for an additional two years.¹²⁹ This fact can be contributed to the Memphis Grizzlies pressuring the Tennessee legislature because the revenue received from the tax went directly to the team to assist with the funding of arena upgrades and the hosting of additional events besides basketball games.¹³⁰

Lastly, the third remedy, showing economic harm, is likely to be unsuccessful for professional athletes because of the substantial amount of revenue each state pulls in from their enforcement of the jock tax. For economic harm to be shown, “the tax must be higher than what is normally expected, and it must cause a change in consumer’s behavior to the extent that a local group becomes interested and to an extent that the legislature takes action.”¹³¹ Typically, this remedy is utilized when a substantial tax is placed on hotel rooms or rental cars.¹³² Also, because every state’s jock tax rate must be equivalent to its resident income tax rate, professional athletes will be unlikely to satisfy this remedy.

V. PAST EFFORTS TO RESOLVE NONRESIDENT TAXATION ISSUES

States have begun to broadly apply nonresident income tax laws, which has led to increased compliance costs, complexity, and administrative difficulties.¹³³ As a result, Congress and the Multistate Tax Commission (MTC) have introduced legislation to ameliorate these difficulties; however, both Congress and the MTC explicitly exclude athletes from their scope, “thereby perpetuating an unjust selective enforcement of nonresident income taxes on athletes.”¹³⁴

The Mobile Workforce State Income Tax Simplification Act of 2015 was introduced by Republican Mark Bishop, but has yet to be passed by the House of Representatives and the Senate.¹³⁵ The purpose of this bill is to “limit the authority of States to tax certain income of employees for employment duties performed in other States.”¹³⁶ Section 2(a)(2) of the bill preempts states from taxing nonresident employees that work within the state for less than thirty days

129. *Id.*

130. *Id.*

131. Schmudde, *supra* note 3, at 109.

132. *See id.*

133. Pahuskin, *supra* note 23, at 970.

134. *Id.*

135. Mobile Workforce State Income Tax Simplification Act of 2015, H.R. 2315, 114th Cong. (2015).

136. *Id.*

in a single year.¹³⁷ However, athletes are not covered under this bill.¹³⁸ Section 2(d)(2) defines “employee,” but explicitly excludes “a professional athlete, professional entertainer, or certain public figures.”¹³⁹ Thus, rather than solving the states’ targeted enforcement, compliance burdens, and unfairness of the jock tax, this action by Congress only enhances these controversies. If this bill were to be passed, “Congress would be condoning states’ continued practice of selective enforcement against athletes. Such selective enforcement violates a fundamental principle of taxation: neutrality.”¹⁴⁰ Furthermore, the MTC also excluded “professional athletes and members of a professional athletic team” from its twenty-day *de minimis* model statute that it had recommended to “alleviate the burdens of nonresident taxation.”¹⁴¹

However, the most significant effort to address and alleviate issues involved with the taxation of nonresident professional athletes came from the Federation of Tax Administrators (FTA).¹⁴² Sport franchises and players’ associations requested the FTA to intervene and address the differing methods used because of the complications and costs of complying with each state’s independent allocation method.¹⁴³ In 1994, the FTA issued a report entitled *State Income Taxation of Nonresident Professional Team Athletes: A Uniform Approach*.¹⁴⁴ The report presented numerous issues faced by athletes, sport franchises, and state administrators including:

- (1) the compliance burden of filing numerous state and local tax returns;
- (2) inconsistent rules to govern apportionment of an athlete[’]s wages which may lead to multiple taxation of the same earnings;
- (3) burdens due to withholding and reporting requirements for teams; and
- (4) administering and enforcing compliance by state administrators and the treatment of athletes as compared to other taxpayers.¹⁴⁵

To resolve these issues, the FTA reviewed four alternatives: (1) Uniform Apportionment Formula; (2) Home State Apportionment; (3) Base State Model;

137. *Id.*

138. *See id.*

139. *Id.*

140. Pahuskin, *supra* note 23, at 971.

141. *Id.*

142. *See* Ekmekjian et al., *supra* note 22, at 23.

143. Pahuskin, *supra* note 23, at 966.

144. Ekmekjian et al., *supra* note 22, at 23.

145. *Id.* at 24.

and (4) Partnership Model.¹⁴⁶ The Uniform Apportionment Formula would “provide for a consistent approach to the division of income by all states taxing nonresident team members.”¹⁴⁷ Home State Apportionment would allow “team members [to] allocate income from the playing of all games to the state in which the team played its home games or otherwise maintained its primary facilities.”¹⁴⁸ The Base State Model would allow professional athletes to satisfy tax return filings by filing a single tax return “with the state in which the team was domiciled, which state would, in turn, be responsible for providing the relevant information and funds to all other states involved.”¹⁴⁹ The Partnership Model would allow the tax return filings to “be satisfied through a composite or consolidated return filed on behalf of all eligible team members.”¹⁵⁰

The FTA requested each state uniformly adopt the duty-days method to achieve “the fair treatment of the taxpayer, consistent taxation of the income, and a substantial reduction in difficulties involved in complying with state tax laws.”¹⁵¹ Ultimately, all states agreed to adopt the duty-days method¹⁵² with Massachusetts being the last state to adopt the duty-days method in 2002.¹⁵³ However, this proposal only applied to the states’ jock tax. Cities were still able to implement their own allocation method when enforcing their jock tax. Nonetheless, two cases recently decided by the Ohio Supreme Court could have significant ramifications for establishing a uniform allocation method.

VI. SIGNIFICANCE OF *HILLENMEYER V. CLEVELAND BOARD OF REVIEW* AND *SATURDAY V. CLEVELAND BOARD OF REVIEW*

The Ohio Supreme Court recently decided, in *Hillennmeyer v. Cleveland Board of Review*¹⁵⁴ and *Saturday v. Cleveland Board of Review*,¹⁵⁵ that Cleveland’s version of the jock tax “violates the Due Process Clause of the U.S. Constitution since it imposes an extraterritorial tax in violation of this clause.”¹⁵⁶

146. *Id.*

147. *Id.* (quoting JAMES W. WETZLER, FEDERATIONN OF TAX ADMINISTRATORS, STATE INCOME TAXATION OF NONRESIDENT PROFESSIONAL TEAM ATHLETES: A UNIFORM APPROACH 2 (1994)).

148. *Id.*

149. *Id.*

150. *Id.*

151. Pahuskin, *supra* note 23, at 966 (quoting JAMES W. WETZLER, FEDERATION OF TAX ADMINISTRATORS, *supra* note 147, at 3) (alteration in original).

152. *Id.*

153. Ekmekjian et al., *supra* note 22, at 24.

154. 41 N.E.3d 1164 (Ohio 2015).

155. 33 N.E.3d 46 (Ohio 2015).

156. Brian Gallagher, *Are States Taking ‘Jock Tax’ Too Far?*, LAW360 (Aug. 26, 2015), <http://www.law360.com/articles/694890/are-states-taking-jock-tax-too-far>.

In its *Hillenmeyer* opinion, the Ohio Supreme Court stated,

Due process requires an allocation that reasonably associates the amount of compensation taxed with work the taxpayer performed within the city By using the games-played method, Cleveland has reached extraterritorially, beyond its power to tax The games-played method reaches income for work that was performed outside of Cleveland, and thus Cleveland's income tax violates due process as applied to NFL players.¹⁵⁷

Under Cleveland's games-played approach, a visiting football player who plays one game in Cleveland out of a twenty-game schedule would have 5% of his income allocated to Cleveland.¹⁵⁸ However, under the duty-days method, the amount of income allocated to Cleveland for the same athlete would have been only slightly more than 1%.¹⁵⁹ The court stated "the duty-days method properly includes as taxable income only that compensation earned in Cleveland by accounting for all the work for which an NFL player . . . is paid, rather than merely the football games he plays each year."¹⁶⁰ The court reiterated this point in its *Saturday* opinion when it stated "NFL players are contractually employed to provide services to their employers . . . including mandatory mini-camps, the official preseason training camp, meetings, [and] practice sessions."¹⁶¹

Furthermore, in its *Saturday* opinion, the Ohio Supreme Court not only addressed the games-played method used by the City of Cleveland, but also addressed the issue of Saturday being taxed despite his lack of physical presence in Cleveland.¹⁶² The court reiterated its proposition in *Hillenmeyer* that Cleveland's use of the games-played method did not properly tax the income attributable to the work performed in Cleveland because it only considered games as employment services.¹⁶³ The court determined that because Saturday, in performing rehabilitation for an injury, was engaged in employment services in Indianapolis and was not physically present in Cleveland for the game, Cleveland had no jurisdiction to tax Saturday for the income he earned on that day. However, as previously mentioned in Part IV(A), under the Commerce

157. *Hillenmeyer*, 41 N.E.3d at 1176.

158. *See id.*

159. *Id.*

160. *Id.* at 1177.

161. *Saturday v. Cleveland Bd. of Review*, 33 N.E.3d 46, 50 (Ohio 2015).

162. *See id.* at 50–51.

163. *Id.*

Clause, states are split on which nexus applies when taxing nonresident professional athletes.

Nevertheless, the City of Cleveland has appealed to the U.S. Supreme Court contending that no court has ever held the games-played allocation method unconstitutional on any grounds.¹⁶⁴ Because the Supreme Court rejected the City of Cleveland's request for an appeal, the duty-days method is utilized by all states and cities to levy the jock tax. This exemplifies another reason why congressional intervention is needed. Rather than having uncertainty in which allocation method applies, Congress should enact legislation that requires every state and city to implement the duty-days method.

VII. THE NEED FOR CONGRESS INTERVENTION TO CREATE UNIFORMITY

“[T]he multitude of tax systems amounts to a drag on interstate trade almost as debilitating as the border restrictions our federal system was originally designed to prevent.”¹⁶⁵ Achieving a uniform allocation method for the jock tax would “reduce the states’ administrative costs and [professional athletes’] compliance costs.”¹⁶⁶ Additionally, a uniform allocation method would eliminate the risk of double taxation on professional athletes’ income, promote efficiency, and decrease planning costs.¹⁶⁷ Furthermore, a uniform allocation method would eliminate litigation and potential challenges by professional athletes.¹⁶⁸

A uniform allocation method can be achieved in one of three ways: “(1) by the United States Supreme Court’s interpretation of the [D]ormant Commerce Clause; (2) by the voluntary, joint action of the states; or (3) by congressional action.”¹⁶⁹ However, Supreme Court precedent has established that it is “neither willing nor able to mandate uniformity in state and local taxation.”¹⁷⁰ Thus, if a uniform allocation method is to be reached for jock tax enforcement, then “it must be through the voluntary, joint action of the states or congressional action.”¹⁷¹

164. *Cleveland Appeals ‘Jock Tax’ Ruling to Supreme Court*, ESPN (Oct. 7, 2015), http://www.espn.com/moresports/story/_/id/13827207/cleveland-appeals-jock-tax-ruling-supreme-court. Also, Supreme Court declined to hear appeal.

165. Moore, *supra* note 68, at 179 (quoting Gordon D. Henderson, *What We Can Do About What’s Wrong with the Tax Law*, 49 TAX NOTES 1349, 1352 (1990)) (alteration in original).

166. *Id.* at 179.

167. *See id.* at 179–80.

168. *Id.* at 180.

169. *Id.* at 171.

170. *Id.*

171. *Id.*

Even though the recommendation issued by the FTA succeeded in states agreeing to adopt the duty-days allocation method, concerns and controversies still exist as to the application of the duty-days method because “no two states calculate their jock tax exactly alike.”¹⁷² Though the states agree on using the duty-days method, and while state case precedent exists,¹⁷³ the states do not agree on what constitutes a “duty-day.”¹⁷⁴ While some jurisdictions treat practices and organized team activities as duty-days, other states do not.¹⁷⁵ This creates an administrative nightmare for athletes in determining what their tax liability is for every state they visit. Thus, unless the states voluntarily agree on what to include as a duty-day, administrative complications and sufficient compliance costs will continue to exist for both states and professional athletes. However, as opposed to the voluntariness of the states, congressional intervention is an easier and more efficient manner to ensure a uniform application method is reached.

Congressional intervention is the best method to determine and develop a precise definition for duty-day. This congressional action would allow more clarity to be provided and guarantee administration and enforcement of the jock tax are less burdensome on both states and professional athletes. Also, Congress can ensure every state’s jock tax conforms to the constitutional restrictions involved with the taxation of nonresidents, thereby eliminating potential claims and litigation.

VIII. CONCLUSION

States’ enforcement of the jock tax is not likely to disappear anytime soon. The revenue received is too significant. Therefore, the states’ application and enforcement efforts must be addressed. Because nonresident professional athletes are unable to challenge a state’s jock tax until after it has been implemented, there is often harm caused, and the available remedies are limited. Thus, with congressional involvement, professional athletes and states will be ensured that each state’s jock tax does not infringe upon the professional athletes’ constitutionally protected rights.

Although the states implement the same allocation method to impose tax liability against professional athletes, inconsistencies still exist because states

172. Martin J. Greenberg, *McCutchen’s Pay Stub Sheds Light on Jock Tax and Jock Tax Successfully Challenged in Cleveland*, GREENBERG L. OFF.: SPORT\$BIZ (July 1, 2015), <http://www.greenberglawoffice.com/mccutchens-pay-stub-sheds-light-on-jock-tax-and-jock-tax-successfully-challenged-in-cleveland/>.

173. *See Hume v. Limbach*, 575 N.E.2d 150, 151 (Ohio 1991).

174. *See id.*

175. Greenberg, *supra* note 172.

do not agree on what constitutes a “duty-day.” Further, the recent case law produced from the Ohio Supreme Court illustrates cities are still utilizing the games-played method. As a result, professional athletes are being subjected to multiple allocation methods that could be inherently unconstitutional. Therefore, congressional action is needed to correct the inconsistencies that exist to ensure professional athletes’ constitutional rights are being protected.

Overall, professional athletes will still have the daunting task of determining their tax liability for each state they visit. Nonetheless, Congress can assist in alleviating this burden by developing a uniform allocation method to be used by all states and cities that levy a jock tax. Especially since states and cities have shown no sign of lessening their enforcement of the jock tax, Congress should formulate a resolution as soon as feasibly possible.