ARTICLES

TAXING SPORTS

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Sports are no longer mere games. In today's money-driven culture, they have cultivated into a lucrative business enterprise where everyone—whether professional or amateur; owner or player; coach or spectator—stands to make significant money. Modern sports have also morphed into a landscape encompassing both the traditional athletic events and the more novel esports and daily fantasy sports (DFS) arenas. Across all these physical, digital, and biological spheres, sports revenues are being measured in terms of billions. It thus stands to reason why taxes have become a progressively critical discussion point within U.S. professional and collegiate sports, the video gaming world, and the newly legalized sports gambling industry. This Article is the first to provide a holistic and modern analysis of the impact of U.S. tax law across the contemporary business of sports and explore a more universal approach to the varying tax issues affecting numerous relevant stakeholders, including franchises, business ventures, universities, athletes, individuals, and federal and state taxing jurisdictions.

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INTRODUCTION

It's not just a game. To many, such sentiment embodies the acuteness of current modern sport in the United States.[1] In recent decades,

1. *See, e.g.*, *The Power and Politics of Sports: Why Games Aren't Just Games Anymore*, U. OF CHI. INST. OF POL., https://web.archive.org/web/20210630124430/https://politics.uchicago.edu/pages/juliet-macur-seminar-series (last visited Jan. 29, 2022); Luke Mason, *The Economic Impact of COVID-19 on US Sports*, EMSI (May 28, 2020), https://usmain.wpengine.com/2020/05/28/the-economic-impact-of-covid-19-on-us-sports-up-to-92-6k-lost-every-minute [https://perma.cc/S2WB-76DE]; Hunter Amadeus Bayliss, Note, *Not Just a Game: The Employment Status and Collective Bargaining Rights of Professional ESports Players*, 22 WASH. & LEE J. CIVIL RTS. & SOC. JUST. 359, 360–61 (2016); Maureen A. Weston, *COVID-19's Lasting Impact on the Sports Industry: Financial, Legal, and Innovation*, 61 SANTA CLARA L. REV. 121, 157 (2020) (offering that "[s]port is not 'just a game'"); Henry M. Abromson, Comment, *The Copyrightability of Sports Celebration Moves: Dance Fever or Just Plain Sick?*, 14 MARQ. SPORTS L. REV. 571, 574 (2004) ("Sport is not

professional and amateur sports have transcended the boundaries of American politics,[2] economics,[3] community values,[4] and mass media.[5]

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just a game it is a big business."); Eric I. Long, *The 1994 Baseball Strike Revisited: A Better Impasse Analysis*, 22 S. ILL. U. L.J. 117, 117 (1997) (opining that Major League Baseball is not a mere game anymore, but a hugely profitable industry); *see also* Valrie Chambers & Michael E. Bitter, *Potential Tax Implications of NCAA Family Travel Allowances*, 27 J. LEGAL ASPECTS SPORT 187, 192 (2017) (providing that college sports have morphed into a business); Marsha Durr, *The Tipping Point: Mayhem in College Sports Requires Congress to Finally Intervene in NCAA Governance*, 8 ARIZ. ST. SPORTS & ENT. L.J. 26, 27 (2018) (opining that college sports have evolved from a "niche pastime to a multi-billion-dollar industry"); David Ray Papke, *Athletes in Trouble with the Law: Journalistic Accounts for the Resentful Fan*, 12 MARQ. SPORTS L. REV. 449, 449 (2001) (noting that American sports have transitioned from being mere games to extremely lucrative commercial enterprises).

2. *See, e.g.*, *Sports, Politics & Social Movements*, 25 JEFFREY S. MOORAD SPORTS L.J. 147, 147 (2018) (discussing the heightened awareness of political expression in modern professional sports); Meredith McCleary, *Politics and Sports: A Long and Complicated Relationship*, NE. UNIV. POL. REV. (Feb. 26, 2019), https://www.nupoliticalreview.com/2019/02/26/politics-and-sports-a-long-and-complicated-relationship [https://perma.cc/N9WK-BTTR] (discussing players' recent use of their platforms to communicate their views on civil rights issues); Chris Sheridan, *Sports and Politics Are Mixed Forever; Get Used to It*, FORBES (Aug. 29, 2020, 8:08 AM), https://www.forbes.com/sites/chrissheridan/2020/08/29/sports-and-politics-are-mixed-forever-get-used-to-it/?sh=1f7e0d636a54 (listing several historical moments where athletes took publicized political stances).

3. *See, e.g.*, WLADIMIR ANDREFF & STEFAN SZYMANSKI, HANDBOOK ON THE ECONOMICS OF SPORT (2006) (examining the myriad components of the international sports economy and governance); Daniel A. Rascher et al., *The Unique Economic Aspects of Sports*, 6 J. GLOB. SPORT MGMT. 1, 1–13 (July 29, 2019) (observing that "what makes the economics of sports different from virtually any other product is that the product itself is unique"); Walter C. Neale, *The Peculiar Economics of Professional Sports*, 78 Q.J. ECONOMICS 1, 4 (1964) (describing professional sports as natural monopolies).

4. *See, e.g.*, Emily Sparvero & Laurence Chalip, *Professional Teams as Leverageable Assets: Strategic Creation of Community Value*, 10 SPORT MGMT. REV. 1, 3–4 (2007) (discussing the spike in public funding funneled into sports entertainment programs as a result of a neo-liberal model of profit-driven governance); Laura Depta, *12 Ways Sports Make a Positive Impact*, BLEACHERREPORT (Feb. 2, 2015), https://bleacherreport.com/articles/2347988-12-ways-sports-make-a-positiveimpact [https://perma.cc/6LH2-KZQ7] (listing the many public benefits derived from sports, including job production, health, and community enjoyment); Noelle Nikpour, *Impact of Sports Is Huge in Society*, SUN SENTINEL (Oct. 2, 2011), https://www.sun-sentinel.com/news/fl-xpm-2011-10-02-fl-nncol-sports-oped1002-20111002-story.html [https://perma.cc/KQ7L-5LWX] (regaling the sociocultural benefit of New Orleans Superbowl win in the wake of Hurricane Katrina).

5. *See, e.g.*, Aafid Gulam, *Role of Mass Media in Sports Communication*, 1 INT'L J. ADVANCED EDUC. RES. 5, 51–53 (2016) (evaluating the effects of sports across media platforms and detailing the benefit to historically underrepresented communities in sports); Cory Tadlock, Comment, *Copyright Misuses, Fair Use, and Abuse: How Sports and Media Companies Are Overreaching Their Copyright Protections*, 7 J. MARSHALL REV. INTELL. PROP. L. 621, 621 (2008) (evaluating how sports and media companies copyright

One need look no further than the social justice movements led by high-profile athletes like Colin Kaepernick and Trevor Lawrence who—among many others—established mobilized platforms to spur collective action.[6] Author Michael Lewis's bestseller, *Moneyball: The Art of Winning an Unfair Game*, brought to light the impact of game theory on strategizing sports and economics.[7] Society's longing for increased sports-related virtues like honesty, respect, teamwork, and dedication extends beyond chalk-lined fields into classrooms, workspaces, and communities.[8] Certainly, Hollywood, the video game industry, television broadcasters, sports media companies, and leagues have capitalized on

warnings often exceed their legal authority); *Arthur Miller Dialogue on "Sports, Media and Race: The Impact on America"*, 12 TEX. REV. ENT. & SPORTS L. 251, 256–57 (2011) (describing the prevalence of white men over Black people and women in the sports media industry); Frank Ryan & Matt Ganas, *Rights of Publicity in Sports-Media*, 67 SYRACUSE L. REV. 421, 421–24 (2017) (describing how the NLRB is changing students-athletes' rights in private universities).

6. *See* Adam Epstein & Kathryn Kisska-Schulze, *Northwestern University, The University of Missouri, and the "Student-Athlete": Mobilization Efforts and the Future*, 26 J. LEGAL ASPECTS SPORT 71, 89 (2016) (examining the impact of student-athlete mobilization efforts on U.S. collegiate athletic reform); Roger M. Groves, *Memorandum from Student-Athletes to Schools: My Social Media Posts Regarding My Coaches or My Causes Are Protected Speech—How the NLRB Is Restructuring Rights of Student-Athletes in Private Institutions*, 78 LA. L. REV. 69 (2017) (analyzing the relationship between student-athlete activism and the institutions they play for); Adam Epstein, *The Ambush at Rio*, 16 J. MARSHALL REV. INTELL. PROP. L. 350, 373 (2017) (offering that professional and amateur athletes embrace social media outlets to voice their opinions on select injustices); Nicholas C. Daly, Note, *Amateur Hour Is over: Time for College Athletes to Clock in Under the FLSA*, 37 GA. ST. U. L. REV. 471, 481–82 (2021) (noting that the NCAA's failure to issue COVID-19 directives to member institutions resulted in collective groups of athletes advocating for health and safety protocols so they could play).

7. *See* MICHAEL LEWIS, MONEYBALL: THE ART OF WINNING AN UNFAIR GAME (2004); *see also* Panelists: Jeffrey S. Moorad, Billy Beane, Omar Minaya, & Phil Griffin, Symposium, *"Moneyball's" Impact on Business and Sports*, 19 VILL. SPORTS & ENT. L.J. 425, 450–51 (2012); Lara Grow & Nathaniel Grow, *Protecting Big Data in the Big Leagues: Trade Secrets in Professional Sports*, 74 WASH & LEE L. REV. 1567, 1575 (2017) (offering that "Moneyball" launched sabermetric principles into the sports arena, effectuating a new way of thinking about sports).

8. *See* DISCOVERY EDUC., WHAT SPORT MEANS IN AMERICA: A STUDY OF SPORT'S ROLE IN SOCIETY 3 (2011), http://www.truesport.org/library/documents/about/what_sport_means_in_america/what_sport_means_in_america.pdf [https://perma.cc/PUN5-85H6] (detailing the role sport has in the moral development of young students).

the premise that sport—no matter its form—is not just a game, but a lucrative enterprise from which to financially capitalize on.[9]

Long gone are the days when athletes competed purely for spectator adoration.[10] Today, sports are a big business where players, coaches, owners, leagues, associations, commercial enterprises, fans, sponsors, the media, and anyone in between stand to make (or lose) considerable money.[11] U.S. sports have evolved into a multi-billion dollar industry,[12] encompassing both traditional athletic events and the more novel esports and daily fantasy sports (DFS) arenas.[13] PricewaterhouseCoopers forecasts the North American sports market value will reach $83.1 billion by 2023.[14] The National Football League (NFL) currently tops U.S. league market revenues at $13 billion with Major League Baseball (MLB) sitting second at $9.5 billion.[15] In fiscal year 2019, Division I college athletics boasted

9. *See, e.g.*, Chris Morgan, *Football and Hollywood: A Retrospective*, YARDBARKER (Aug. 28, 2021), https://www.yardbarker.com/entertainment/articles/football_and_hollywood_a_retrospective/s1__31243898#slide_1 [https://perma.cc/DK9M-C6VC] (listing a myriad of football stories depicted in Hollywood movies); STEPHEN F. ROSS & STEFAN SZYMANSKI, FANS OF THE WORLD UNITE! A (CAPITALIST) MANIFESTO FOR SPORTS CONSUMERS 22 (2008) (offering that avid fans enjoy sports, regardless of their exploitation); Shafin Diamond Tejani, *The Future of Sports Looks a Lot like Video Games*, MARKER (May 12, 2020), https://marker.medium.com/the-future-of-sports-looks-a-lot-like-video-games-591e55e8eb40 (noting that video games are a "natural pivot" from live sports).

10. Wm. Tucker Griffith, Note, *Beyond the Perfect Score: Protecting Routine-Oriented Athletic Performance with Copyright Law*, 30 CONN. L. REV. 675, 676 (1998) (noting that Grecian Olympiads completed in athletic events to win spectator affection).

11. *See* Kara Fratto, *The Taxation of Professional U.S. Athletes in Both the United States and Canada*, 14 SPORTS LAWS. J. 29, 29 (2007) (opining that increased athlete salaries, ticket prices, franchise costs, and contemporary sporting facilities have propelled professional sports into a big business); *see also* Kathryn Kisska-Schulze, *This Is Our House!—The Tax Man Comes to College Sports*, 29 MARQ. SPORTS L. REV. 347, 351–55 (2019) (discussing the lucrative business of college sports).

12. *See* PRICEWATERHOUSECOOPERS, PWC 2021 SPORTS OUTLOOK (2021), https://www.pwc.com/us/en/industries/tmt/assets/pwc-2021-tmt-sports-outlook.pdf [https://perma.cc/96WZ-WCYM] [hereinafter PWC 2021] (analyzing the compound annual growth rate of North American Sports).

13. *See* John T. Holden et al., *A Short Treatise on Esports and the Law: How America Regulates Its Next National Pastime*, 2020 U. ILL. L. REV. 509, 511 (2020) (offering that esports is a billion-dollar industry); *see also* Daniel J. Larson, Note, *Can Daily Fantasy Sports Overcome the Odds?*, 17 J. HIGH TECH. L. 451, 451 (2017) (documenting that DFS is a multi-billion dollar industry).

14. *See* PWC 2021, *supra* note 12, at 2.

15. Devon Anderson, *Ranking Professional Sports Leagues by Revenue*, ULTIMATE CORP. LEAGUE (Apr. 10, 2019), https://ultimatecorporateleague.com/ranking-professional-sports-leagues-by-revenue [https://perma.cc/46P5-2BDW].

revenues of $15.8 billion.[16] Although historically a mere "subset of sports culture," esports have since matured into an industry all to its own, with a 2022 market value forecast of $1.8 billion.[17] In 2018, the U.S. DFS industry generated $2.9 billion.[18] The recently expanded legalized sports betting industry is funneling millions of dollars into select state coffers monthly,[19] while in 2018, U.S. sports media rights revenue reached $21.88 billion.[20] Even youth sports have blossomed into a billion-dollar industry.[21] Although staggering, these numbers fail to reflect the engorged salaries of coaching staff and professional athletes.[22]

Measuring figures in terms of "billions" naturally gratifies the paradigm that sport is not just a game anymore. Across the globe, the sports industry is valued between $480 and $620 billion,[23] eclipsing national gross domestic product (GDP) rates in most countries.[24] Notably, the U.S. leads the global sports industry with 32.5% of the

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16. NCAA RSCH., 15-YEAR TRENDS IN DIVISION I ATHLETICS FINANCES (2020), https://ncaaorg.s3.amazonaws.com/research/Finances/2020RES_D1-RevExp_Report.pdf [https://perma.cc/KX4G-T4S2].

17. *Esports Ecosystem Report 2021: The Key Industry Companies and Trends Growing the Esports Market*, BUS. INSIDER (Aug. 3, 2021), https://www.businessinsider.com/esports-ecosystem-market-report [https://perma.cc/4JU3-N2N9].

18. MORDOR INTEL., NORTH AMERICAN FANTASY SPORTS MARKET—GROWTH, TRENDS, COVID-19 IMPACT, AND FORECASTS (2021–2026), https://www.mordorintelligence.com/industry-reports/north-america-fantasy-sports-market [https://perma.cc/4CUM-KNEU].

19. *US Sports Betting Revenue 2020*, LINES, https://www.thelines.com/betting/revenue [https://perma.cc/PGG2-MUWF].

20. Christina Gough, *Sports Media Rights Total Revenue in the U.S. 2021*, STATISTA (Feb. 26, 2021), https://www.statista.com/statistics/1024089/sports-media-rights-revenue-usa [https://perma.cc/RU2R-W4K2].

21. Sean Gregory, *How Kids' Sports Became a $15 Billion Industry*, TIME (Aug. 24, 2017, 6:45 AM), https://time.com/4913687/how-kids-sports-became-15-billion-industry.

22. *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, 29 (2014) (opining that escalating professional athlete salaries have prompted increased scrutiny from state taxing jurisdictions); Lora Wuerdeman, Comment, *Sidelining Big Business in Intercollegiate Athletics, How the NCAA Can De-Escalate the Arms Race by Implementing a Budgetary Allocation for Athletic Departments*, 39 N.C. CENT. L. REV. 85, 89 (2017) (noting that collegiate coaching salaries have risen 500% since 1985); Fratto, *supra* note 11, at 29 (opining that professional athletes' salaries have escalated).

23. *Sports Industry Highlights*, MEDIUM (Oct. 17, 2019), https://medium.com/qara/sports-industry-report-3244bd253b8 [https://perma.cc/5GG5-YG3F].

24. *The Sports Market*, KEARNEY, https://www.nl.kearney.com/communications-media-technology/article?/a/the-sports-market [https://perma.cc/78WM-53MA].

market share.[25] Thus, it stands to reason why taxation has become a progressively critical discussion point within U.S. professional and amateur sports arenas, the video gaming world, and legalized sports gambling industry. U.S. taxing jurisdictions continue to pursue opportunities to usurp larger portions of this revenue-sharing market.[26] Such efforts are not surprising, given that the U.S. economy has weathered two recessions since September 11, 2001, and a global pandemic.[27] Due in large part to these national economic crises, individual states are foraging for alternative revenue sources to counterbalance evaporating federal subsidies, with particular interest paid to the emergent legalized sports betting market.[28] In addition, Congress has shown increased interest in garnering a larger percentage of professional athletes' salaries and sports franchise operation revenue,[29] while making it more difficult for colleges and

25. D.Tighe, *Share of the Global Sports Market 2018, by Country*, STATISTA (Nov. 27. 2020), https://www.statista.com/statistics/1087429/global-sports-market-share-by-country (calculating that China holds a distant second spot at 12.7% of the market share).

26. *See, e.g.*, Kathryn Kisska-Schulze & John T. Holden, *Betting on Education*, 81 OHIO ST. L.J. 465, 509–10 (2020) (providing that over 100 bills have been introduced in the U.S. to legalize sports betting in an effort to support states' future budgets); Kisska-Schulze & Epstein, *supra* note 22, at 29 (noting that escalating professional athletes' salaries have led states to more closely scrutinize them for tax purposes); Ross Dellenger, *New Congressional NIL Bill Targets Expansive Change to Athlete Compensation, Video Game Licensing*, SPORTS ILLUSTRATED (Feb. 4, 2021), https://www.si.com/college/2021/02/04/ncaa-nil-video-game-rights-congress-bill [https://perma.cc/R987-LUB8] (detailing the Congressional bill granting college athletes the right to strike collective bargaining agreements).

27. *See* Rebecca N. Morrow, *Accelerating Depreciation in Recession*, 19 FLA. TAX REV. 465, 471 (2016) (noting that there have been two recent recessions, one in 2001 and the second in 2007); *see also* Rodney P. Mock & Kathryn Kisska-Schulze, *Saving the Nonessential with Radical Tax Policy*, 90 U. CIN. L. REV. 197, 199 (2021) (offering that the onset of the COVID-19 pandemic resulted in the United States suffering rapid economic decline).

28. *See* Kisska-Schulze & Holden, *supra* note 26, at 480–81; *see also* Andrew Osterland, *State Tax Departments Set Their Sights on Pro-Athletes' Earnings*, CNBC (Jan. 11, 2021, 8:30 AM), https://www.cnbc.com/2021/01/11/state-tax-departments-set-their-sights-on-pro-athletes-earnings-.html [https://perma.cc/LED8-RTMK].

29. *See* Mark Goldstick, *How Trump's New Tax Bill Will Impact Star Athletes*, SPORTS ILLUSTRATED (Apr. 17, 2018), https://www.si.com/more-sports/2018/04/17/donald-trump-new-tax-bill-athletes-salaries-states [https://perma.cc/V4YW-GDUH] (describing how former President Trump's tax plan would eliminate athletes' deductions for many items, including training expenses, union dues, and agent commission); *see also* Kari Smoker et al., *Pandora's Box Enters the Batter's Box: How the Tax Cuts and Jobs Act's Unintended Consequences Places MLB, and All North American Leagues, in Tax Chaos*, 26 JEFFREY S.

universities to acquire necessary funding for their athletic programs.[30] Taxes are definitely complicating sports.[31]

Over the last five decades, sports betting has eclipsed the separate industries that drove its development. In 2008, scholars Robert Holo and Jonathan Talansky published a formative article addressing the tax implications surrounding the "business of sports," or perhaps more appropriately branded, the "business of American professional franchises."[32] In particular, their work detailed the Internal Revenue Service's (IRS) varied attempts to keep pace with the rapidly growing professional sports industry amidst then-recent legislative and regulatory actions. Holo and Talansky focused primarily on taxing sponsorship and broadcasting revenue,[33] ticket sales and seat licensing,[34] franchise player contracts,[35] intangibles,[36] individual player contracts,[37] and catching the home run ball.[38] While these issues remain germane to professional franchises, thirteen years later the "business of sports" has expanded considerably.[39] DFS took off in 2009, after Nigel Eccles launched FanDuel, one of the two largest U.S.

MOORAD SPORTS L.J. 291–93 (2019) (evaluating the TCJA's impact on professional sports trades and noting that "[f]or the first time in over fifty years, the gains realized on professional sports trades are no longer tax-exempt").

30. Kisska-Schulze, *supra* note 11, at 347–48 (examining the impact of the TCJA on college sports programs).

31. *See, e.g.*, *Taxes in Sports Make Game Day Complicated*, NE. U. D'AMORE-MCKIM SCH. BUSINESS, https://onlinebusiness.northeastern.edu/blog/taxes-in-sports-make-game-day-complicated [https://perma.cc/NZT2-EVTV] (explaining how discrepancies in the top tax brackets across the states are magnified by salary caps); K. Sean Packard, *Income Taxes for Pro Athletes Are Reminder of How Complicated U.S. Tax Code Is*, FORBES (Apr. 18, 2021, 9:20 AM), https://www.forbes.com/sites/kurtbadenhausen/2017/04/18/income-taxes-for-pro-athletes-are-reminder-of-how-complicated-u-s-tax-code/?sh=7a4c60b3411e [https://perma.cc/4XJZ-YDQU] (describing how many people struggle to understand which tax forms to use to report income and which items to deduct); *The Esports Tax Reckoning: What Players and Teams Need to Know*, GORDON L. (Feb. 24, 2020), https://gordonlawltd.com/esports-tax-reckoning [https://perma.cc/84VB-YUC8] (noting that some states have initiated programs to help athletes understand their tax obligations).

32. Robert Holo & Jonathan Talansky, *Taxing the Business of Sports*, 9 FLA. TAX REV. 161, 162, 163 (2008).

33. *Id.* at 163–77.

34. *Id.* at 177–85.

35. *Id.* at 184–85.

36. *Id.* at 184–206.

37. *Id.* at 205–08.

38. *Id.* at 208–14.

39. *See* PWC 2021, *supra* note 12.

fantasy sports sites.[40] Although video games have been integral to U.S. culture since *Space Invaders* entered homes in the 1970s,[41] modern esports exploded after 2010, when the livestreaming gaming platform Twitch turned video games into a spectator sport.[42] In 2017, then-President Donald Trump signed into law the Tax Cuts and Jobs Act[43] (TCJA), impacting both professional and collegiate athletics.[44] Subsequently, in 2018, the U.S. Supreme Court held that the federal prohibition on sports wagering unconstitutionally commandeered state legislatures, thus opening the door for all states to capitalize on sports-betting revenue.[45] Just one year later, California became the first of many states to legislatively allow student-athletes to capitalize on the commercialized use of their name, image, and likeness (NIL).[46] Later, in 2021, the U.S. Supreme Court unanimously struck down the National Collegiate Athletic Association's (NCAA) rules restricting unlimited, in-kind benefits provided to Division-I basketball and bowl subdivision football student-athletes.[47]

The time is ripe to reexamine the impact of tax across the entire "business of sports" amidst a more contemporary setting. Certainly, there has always existed a connection between sports and taxation.[48] Indeed, the effect of tax law on the U.S. sports industry has cultivated into a rich platform of academic discourse.[49] However, there exists a

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40. *See* Joshua Shancer, *Legislative Update: Daily Fantasy Sports and the Clash of Internet Gambling Regulation*, 27 DEPAUL J. ART TECH. & INTELL. PROP. L. 295, 307 (2017).

41. *See Space Invaders*, ENCYC. BRITANNICA (Apr. 8, 2015), https://www.britannica.com/topic/Space-Invaders [https://perma.cc/XB7Q-4S2J].

42. Ben Popper, *Field of Streams: How Twitch Made Video Games a Spectator Sport*, VERGE (Sept. 30, 2013, 9:00 AM), https://www.theverge.com/2013/9/30/4719766/twitch-raises-20-million-esports-market-booming [https://perma.cc/H5JH-YCPU].

43. Pub. L. No. 115-97, 131 Stat. 2054 (codified at 26 U.S.C. §§ 274, 512).

44. *See* H.R. 1, 115th Cong. § 13704 (2018); *see also* Kisska-Schulze, *supra* note 11, at 347–48 (examining the TCJA's impact on college sports); Smoker et al., *supra* note 29 (evaluating impact of the TCJA on professional sports trades).

45. *See* Murphy v. Nat'l Collegiate Athletic Ass'n, 138 S. Ct. 1461, 1478 (2018); *see also* Kisska-Schulze & Holden, *supra* note 26, at 509–10 (analyzing the intersection between sports gambling, education, and taxation).

46. *See* Fair Pay to Play Act, CAL. EDUC. CODE § 67456(a)(1), (3), (e)(1) (2021); *see also* Kathryn Kisska-Schulze & Adam Epstein, *Changing the Face of College Sports One Tax Return at a Time*, 73 OKLA. L. REV. 3, 457–59 (2021) (examining the federal and state tax implications of student-athletes once they capitalize on NIL earnings).

47. *See* Nat'l Collegiate Athletic Ass'n v. Alston, 141 S. Ct. 2141 (2021).

48. *See infra* Part I.

49. *See, e.g.*, Richard Schmalbeck & Lawrence Zelenak, *The NCAA and the IRS: Life at the Intersection of College Sports and the Federal Income Tax*, 92 S. CAL. L. REV. 1087, 1087–

lacuna in the current literature in providing a holistic picture of the influence of tax across all facets of U.S. sport as it exists today. The purpose of this Article is to fill that void.

This Article adds to present scholarly literature by updating and extending Holo and Talansky's formative work, providing both historic and modernized analyses of the effect of U.S. tax law across the newly expanded "business of sports."[50] While Holo, Talansky, and others have focused their analyses on nuanced tax issues affecting professional and amateur sports, video gaming, DFS, and sports gambling,[51] this Article is the first to bring these discussions together to offer a more universal representation of the impact of U.S. taxes across multiple relevant players, including franchises, business ventures, universities, athletes, individuals, and federal and state taxing jurisdictions. This Article then proposes select tax recommendations for the future, in light of this rapidly expanding arena.

To appreciate the evolving tax landscape amidst a revolutionized U.S. sports industry, this Article proceeds as follows. Part I examines the historic connection between U.S. sports and taxation. Part II assesses the impact of tax legislation on the U.S. professional sports

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89 (2019) (scrutinizing the convergence of federal tax law and college athletics); Nathaniel Grow, *Regulating Professional Sports Leagues*, 72 WASH. & LEE L. REV. 573, 599–600 (2015) (opining on tax subsidy opportunities for new sports leagues); Addison Fontein, Comment, *The Home Team Advantage: Why Lawmakers and the Judiciary Should Bench the Jock Tax*, 7 ARIZ. ST. SPORTS & ENT. L.J. 327, 328 (2018) (disagreeing with the constitutionality of the jock tax); 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, 402 (2009) (discussing the application of state tax laws to professional athletes).

50. To the extent possible, the purpose of this Article is to examine major tax issues impacting professional and collegiate sports, as well as the legalized gambling, DFS, and esports industries. However, the Authors acknowledge that this analysis is not complete across all facets of sport. For example, there exist tax issues within select areas of sport, including the Olympics (*see, e.g.*, United States Appreciation for Olympians and Paralympians Act of 2016, H.R. 5946, 114th Cong. (2016)) and horse racing (*see, e.g.*, Horseracing Integrity and Safety Act of 2020, H.R. 1754, 116th Cong. (2020)), which are not touched on in this Article. Further, this Article does not purport to opine on every conceivable tax issue that may arise among relevant sports industry stakeholders.

51. *See* Holo & Talansky, *supra* note 32, at 162; *see also* John T. Holden & Thomas A. Baker III, *The Econtractor? Defining the Esports Employment Relationship*, 56 AM. BUS. L.J. 391, 418 (2019) (noting that taxes play a role in esports competitions); Matthew H. Hambrick, Comment, *Is the Recent Trend of States Legalizing Daily Fantasy Sports in an Effort to Raise Revenue a "Safe Play" to Make Money or Simply a "Hail Mary"?*, 48 CUMB. L. REV. 243, 274–82 (2017) (exploring state efforts to tax DFS revenue).

arena. Part III identifies the various tax exposures facing the college sports arena, both at the institutional and student-athlete levels. Part IV explores the tax implications surrounding the legalized sports gambling industry, DFS, and esports. Part V provides select tax recommendations surrounding the expanding U.S. sports arena. Finally, this Article concludes that taxes play an integral role in the continuously evolving sports industry, with both Congress and the states progressively targeting it.

I. TAXING U.S. SPORTS: A HISTORICAL EXPLORATION

In 2017, *Bloomberg* published an article headlined, "Buy a Sports Team, Get a Tax Break."[52] Facially, such a recommendation may sound absurd to the casual reader; however, following the implementation of the American Jobs Creation Act of 2004,[53] sports franchise owners can deduct large portions of their team's purchase price against their taxable income.[54] Such benefits allowed Los Angeles Clippers owner Steve Ballmer to pay just 12% in taxes on his 2018, $656 million earnings.[55]

Professional sports team owners have long used their franchises to entertain broad tax benefits, with few (if any) being more creative than businessman Bill Veeck.[56] After purchasing the Cleveland Indians (soon to be Guardians) baseball team in 1946, Veeck launched a successful lobbying effort to allow team owners to deduct player contracts as depreciable assets, thus codifying the Roster Depreciation Allowance (RDA).[57] The RDA allows professional sports team owners to amortize the purchase price of their franchise over a fifteen-year

52. Justin Fox, *Buy a Sports Team, Get a Tax Break*, BLOOMBERG (Sept. 8, 2017, 1:55 PM), https://www.bloomberg.com/opinion/articles/2017-09-08/buy-a-sports-team-get-a-tax-break.

53. Pub. L. 108-307 357, 118 Stat. 1418 (2004) (codified at 26 U.S.C. § 1).

54. *See* I.R.C. § 197 (establishing that the deductible amount is amortized over a fifteen-year period); Treas. Reg. § 1.197-2 (b)(10); *see also* Fox, *supra* note 52.

55. Robert Faturechi et al., *The Billionaire Playbook: How Sports Owners Use Their Teams to Avoid Millions in Taxes*, PROPUBLICA (July 8, 2021, 5:00 AM), https://www.propublica.org/article/the-billionaire-playbook-how-sports-owners-use-their-teams-to-avoid-millions-in-taxes?utm_source=sailthru&utm_medium=email&utm_campaign=IRS&utm_content=feature [https://perma.cc/29KL-S5J2].

56. Stephen R. Keeney, *The Roster Depreciation Allowance: How Major League Baseball Teams Turn Profits into Losses*, BASEBALL RSCH. J., Spring 2016, https://sabr.org/journal/article/the-roster-depreciation-allowance-how-major-league-baseball-teams-turn-profits-into-losses [https://perma.cc/T82K-PEEZ].

57. *Id.*; 26 U.S.C. § 197.

period.[58] Some argue that the RDA allows team owners to misrepresent the true value of their ownership stake through "gymnastic bookkeeping techniques."[59] Although Congress has periodically revised the tax laws that impact the RDA, it has never sought to end the exemption directly.[60]

Even before Veeck's successful RDA campaign, MLB team owners sued the IRS over the ability to deduct the entirety of player contracts.[61] During that same period, MLB franchise owners were not solely unique in seeking preferential IRS tax treatment. Between 1942 and 2015, the NFL[62]—which morphed from a million into a billion-dollar enterprise thanks in large part to broadcasting rights revenue—was recognized by the IRS as a not-for-profit tax-exempt entity.[63] As professional sports matured, and athletes and coaches were induced by more lucrative contract agreements, state jurisdictions launched individual efforts to gain a piece of the "business of sports" pie.[64]

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58. 26 U.S.C. § 197; Keeney, *supra* note 56.

59. Keeney, *supra* note 56. The RDA is not wholly unique. Numerous businesses depreciate the costs of tangible and intangible assets. *See, e.g.*, Elizabeth V. Zanet & Stanley C. Ruchelman, *Tax Basics of Intellectual Property*, LANDSLIDE, July/August 2018, at 39, 40, http://publications.ruchelaw.com/pdfs/2018/tax-basics-intellectual-property.pdf [https://perma.cc/HRT2-W6V3] (discussing depreciating costs in the intellectual property space where amortizable assets include intangible assets such as patents, copyrights, formulas, processes, and designs). However, the RDA is distinctive because it applies to sports franchises. Keeney, *supra* note 56. Unlike most assets, which become valueless after a period, sports franchise values continue to increase. *Id.* The normal depreciation allowance generally permits businesses to count losses as a cost of operation; however, the RDA permits companies to count losses on assets with increasing values. *Id.*

60. *Id.*

61. *Id.* (citing Chi. Nat'l League Ball Club v. Comm'r, No. 57620, 1933 WL 4911 (B.T.A. Apr. 17, 1933), *aff'd*, Comm'r v. Chi. Nat'l League Ball Club, 74 F.2d 1010 (7th Cir. 1935)); *see also* Comm'r v. Pittsburgh Athletic Co., 72 F.2d 883, 884 (3d Cir. 1934) (affirming the Board of Tax Appeals decision that the cost of a player's contract is a business expense in the year it was paid including a contract with an option to renew).

62. *See* Rohan Nadkarni, *NFL Teams Made Record $7.24 Billion in National Revenue Last Season*, SPORTS ILLUSTRATED (July 20, 2015), https://www.si.com/nfl/2015/07/20/nfl-national-revenue-money-sharing-billions [https://perma.cc/X8C9-C97F] (noting that in 2015, the NFL generated $7.24 billion in revenue, with each team receiving $226.4 million in revenue sharing from the league).

63. Jared Dubin, *NFL Ends Tax Exempt Status After 73 Years: 3 Things to Know*, CBS SPORTS (Apr. 28, 2015, 1:36 PM), https://www.cbssports.com/nfl/news/nfl-ends-tax-exempt-status-after-73-years-3-things-to-know [https://perma.cc/73BV-N8EQ]; *see also* John Vrooman, *The Economic Structure of the NFL*, *in* THE ECONOMIC STRUCTURE OF THE NATIONAL FOOTBALL LEAGUE: THE STATE OF THE ART, 7 (Kevin G. Quinn ed., 2012) (noting the impact of broadcast media on the NFL's economics).

64. *See infra* Section I.A.2.

Across a separate playing sphere, the college sports arena enjoyed vast preferential tax treatment until the implementation of the TCJA.[65] Unlike professional athletes, student-athletes enjoy a wide berth of favorable tax treatment based on their amateur status.[66] Similarly, the college sports industry as a whole has enjoyed relatively amicable tax treatment due to universities, athletic departments, and the NCAA qualifying for tax-exempt status.[67] Some of this geniality, however, is now shifting.[68]

To appreciate the current status of taxation across the broader sports arena, it is beneficial to first appraise a sampling of historic tax issues impacting the greater U.S. sports sphere. As such, Section A examines notable tax issues that have impacted professional sports. Section B explores the historic impact of taxes on college sports.

A. Notable Tax Issues in Professional Sports

In 1789, Benjamin Franklin penned the famous quote: "in this world nothing can be certain, except death and taxes."[69] No one likes paying taxes; but once revenue or income is generated, it is virtually guaranteed that the tax man cometh.[70] Amidst the billion-dollar professional sports industry, taxes play a critical role. In fact, significant academic literature is dedicated to examining the impact of taxation on both owners and athletes.[71] Across these varied discussions, three

65. Schmalbeck & Zelenak, *supra* note 49, at 1089.

66. Kisska-Schulze & Epstein, *supra* note 46, at 479.

67. Kathryn Kisska-Schulze & Adam Epstein, *The Claim Game: Analyzing the Tax Implications of Student-Athlete Insurance Policy Payouts*, 25 JEFFREY S. MOORAD SPORTS L.J. 231, 250 (2018).

68. Kisska-Schulze & Epstein, *supra* note 46, at 480.

69. *See* Madsen Pirie, *Death and Taxes*, ADAM SMITH INST. (Nov. 13, 2019), https://www.adamsmith.org/blog/death-and-taxes [https://perma.cc/QUB4-59H4].

70. *See* Ryan Cochran, Comment, *"Failure to File" Syndrome; Lawyers, Accountants and Specific Intent*, 30 CUMB. L. REV. 507, 507 (2000).

71. *See, e.g.*, Scott A. Jensen, Comment, *Financing Professional Sports Facilities with Federal Tax Subsidies: Is It Sound Tax Policy?*, 10 MARQ. SPORTS L.J. 425, 460 (2000) (proposing that the Internal Revenue Code be amended to restrict or eliminate stadium tax-exempt financing); Matthew Akers, *A Race to the Bottom? International Income Tax Regimes' Impact on the Movement of Athletic Talent*, 17 U. DENV. SPORTS & ENT. L.J. 11, 56–59 (2015) (providing tax recommendations to better attract international athletic talent); William H. Baker, *Taxation and Professional Sports—A Look Inside the Huddle*, 9 MARQ. SPORTS L.J. 287, 288 (1999) (examining the tax implications of professional sports franchises, stadiums, and athletes' income); Jeffrey L. Krasney, *State Income Taxation of Nonresident Professional Athletes*, 2 SPORTS LAWS. J. 127, 132 (1995) (examining state and local taxation on migratory nonresident professional athletes);

areas remain historically pronounced: (1) the preferential tax treatment of franchise owners and stadiums, (2) the jock tax, and (3) professional sports leagues' tax-exempt status.

1. *The preferential tax treatment of franchise owners and stadiums*

Numerous scholars have explored the historic use of taxpayer money and tax-exempt bonds to finance professional sports stadiums.[72] Following Veeck's successful campaign in securing the RDA,[73] then-MLB commissioner Ford Frick began working toward stadium subsidies to likewise revolutionize the business of sports.[74] Frick announced that cities seeking professional baseball teams would be required to subsidize stadium construction.[75] Effectively, tax dollars built professional sports facilities.[76] Prior to Frick's declaration, many

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Richard A. Kaplan, Note, *The NBA Luxury Tax Model: A Misguided Regulatory Regime*, 104 COLUM. L. REV. 1615, 1617 (2004) (exploring the NBA luxury tax model).

72. *See, e.g.*, Logan E. Gans, *Take Me out to the Ball Game, but Should the Crowd's Taxes Pay for It?*, 29 VA. TAX REV. 751, 754 (2010) (discussing the evolution of stadium construction financing and the taxes local governments use to finance the federally tax-exempt bonds used today); Steven D. Zavodnick, Jr., Note, *If You (Pay to) Build It, They Will Come: Rethinking Publicly-Financed Professional Sports Stadiums After the Atlanta Braves Deal with Cobb County*, 53 GA. L. REV. 407, 410 (2018) (using the Atlanta Braves's new stadium as a case study to examine the history of publicly funded stadiums, the bargaining power teams have over municipalities, and the perverse incentives of federal tax laws on local governments); Daniel McClurg, Comment, *Leveling the Playing Field: Publicly Financed Professional Sports Facilities*, 53 WAKE FOREST L. REV. 233, 234–35 (2018) (providing an overview of the tax loophole that allowed the use of tax-exempt bonds for stadium construction to become the norm and exploring challenges to financing plans); Frank A. Mayer, III, *Stadium Financing: Where We Are, How We Got Here, and Where We Are Going*, 12 VILL. SPORTS & ENT. L.J. 195, 196–97 (2005) (noting the historic use of private and public funding for stadiums and comparing the benefits and drawbacks of each type of financing); Courtney Gesualdi, Note, *Sports Stadiums as Public Works Projects: How to Stop Professional Teams from Exploiting Taxpayers*, 13 VA. SPORTS & ENT. L.J. 281, 283, 294 (2014) (examining how the tax code incentivizes local government officials to build professional sports stadiums using public funds).

73. *See supra* notes 56–60 and accompanying text.

74. Don Bauder, *San Diego's Welfare Plan for Hotel Owners*, SAN DIEGO READER (Apr. 27, 2016), https://www.sandiegoreader.com/news/2016/apr/27/city-lights-conventi on-centers-lose-bundles-money [https://perma.cc/E2WT-MDXK].

75. *Id.* Although demands for public financing of professional sports stadiums and arenas originated with Commissioner Frick, public construction of stadiums dates to the early 1800s when stadiums were constructed with a wide range of uses in mind. *See id.*; Mayer, *supra* note 72, at 207.

76. *See* Sarah Kunst, *Tax Cuts for Stadiums, Tax Cuts for Owners, Tax Cuts for Those Who Don't Need It*, FORBES (Nov. 28, 2017, 10:59 PM), https://www.forbes.com/sites/ sarahkunst/2017/11/28/tax-cuts-for-stadiums-tax-cuts-for-owners-tax-cuts-for-those-

teams played in privately owned stadiums, often constructed and operated by team owners.[77] While select locales extolled funds to construct stadiums in the hopes of attracting international events like the Olympics during the early part of the twentieth century, it was not until the 1960s that cities began funding professional sports stadiums en masse.[78] In fact, in the nearly forty years between Frick's nascent vision and the 1990s, more than 75% of professional sports teams' stadiums were erected via public funding.[79]

The prospect of acquiring a professional sports team prompted cities to seek avenues for enticement. Milwaukee was the first to construct a publicly funded stadium in the hopes of attracting the Braves baseball team in 1953.[80] The Dodgers left Brooklyn, New York for Los Angeles, California in 1958, due to the City of Angels's new publicly funded stadium, an event that launched a cascade of similarly funded stadiums across the country.[81] By the end of the 1950s, MLB team owners saw new stadiums constructed with nearly 100% public financing.[82] Capitalizing on the demand for baseball, MLB expanded the number of professional teams during the 1960s from sixteen to twenty-four.[83] With the rise in supply, public funding for stadiums later decreased to a low 60% range.[84]

During the 1970s and 1980s, cities continued bidding on professional sports teams with promises of new stadiums. During this period, thirty-nine stadiums were constructed.[85] Those numbers,

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who-dont-need-it/?sh=4bee428f3bf6 [https://perma.cc/2EEW-Z8HS] (noting that over the last fifteen years federal taxpayers have spent close to $4 billion funding the thirty-six stadiums build with tax-exempt bonds).

77. NEIL DEMAUSE & JOANNA CAGAN, FIELD OF SCHEMES: HOW THE GREAT STADIUM SWINDLE TURNS PUBLIC MONEY INTO PRIVATE PROFIT 28 (2008).

78. Zavodnick, *supra* note 72, at 411–12.

79. DEMAUSE & CAGAN, *supra* note 77, at 28.

80. *See* Marc Edelman, *Sports and the City: How to Curb Professional Sports Teams' Demands for Free Public Stadiums*, 6 RUTGERS J.L. & PUB. POL'Y 35, 39–40 (2008) (observing that in the two years after the Braves moved from Boston to Milwaukee, two other teams relocated for publicly funded stadiums as well: the St. Louis Browns, which became the Baltimore Orioles, and the Philadelphia Athletics, which moved to Kansas City).

81. Zavodnick, *supra* note 72, at 412.

82. Edelman, *supra* note 80, at 41. Professor Edelman attributes the rise in public financing to the MLB limiting the supply of new baseball teams. By limiting supply, the price for acquiring a team rose, namely in the form of public funding for stadium construction. *Id.*

83. *Id.* at 42.

84. *Id.*

85. *Id.* at 44.

however, were dwarfed by the next two decades. Between 1990 and 1998, thirty-two stadiums were built with public money, with another forty constructed between 1999 and 2008.[86] In addition, increased demands for sports stadiums ensued across shorter intervals. In 2002, for example, the San Antonio Spurs sought a replacement arena only ten years after the construction of its then-current stadium.[87] In the 1990s, cities began constructing new stadiums that appealed to older stylistics with modern amenities (referred to as the stadium renaissance), originating with the construction of Oriole Park at Camden Yards in Baltimore, Maryland.[88] Along with new construction came corresponding promises of economic redevelopment in surrounding areas; however, many such promises seemingly missed the mark.[89]

Despite the shortage of fulfilled returns, stadium construction projects endured with increasing frequency and significant taxpayer money.[90] For example, in 2017, Georgia taxpayers paid $700 million

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86. *Id.*

87. *Id.* at 45.

88. Noah Trister, *The Camden Effect: At 25, Ballpark's Legacy Is Large in MLB*, ASSOCIATED PRESS (Mar. 31, 2017), https://apnews.com/article/ef16520aaacf4d10ad1328e43e203e25?utm_campaign=socialflow&utm_source=twitter&utm_medium=ap_sports (following the construction of Camden Yards, the city of Cleveland constructed the similarly styled Jacobs Field, since re-named to Progressive Field).

89. Bloomberg News, *Orioles Stadium Yields No Baltimore Rebirth*, FIN. & COM. (Nov. 30, 2013, 6:55 AM), https://finance-commerce.com/2013/11/orioles-stadium-yields-no-baltimore-rebirth [https://perma.cc/7EHW-SW46]. *But see* Thomas Boswell, *Nationals Park Has Become an Urban Development Triumph. Who Knew?*, WASH. POST (Sept. 14, 2016), https://www.washingtonpost.com/sports/nationals/nationals-park-has-become-an-urban-development-triumph-who-knew/2016/09/14/7cf60e3c-7a80-11e6-bd86-b7bbd53d2b5d_story.html (remarking on the transformation of Southeast Washington, D.C. fueled in large part by the investment of taxpayer dollars in the ballpark).

90. *See* Andy McGeady, *The Great American Stadium: High Cost, Short Lifespan*, IRISH TIMES (May 24, 2016, 6:56 PM), https://www.irishtimes.com/sport/the-great-american-stadium-high-cost-short-lifespan-1.2659341 [https://perma.cc/AR4Y-9TB7] (noting how the lifespan of U.S. stadiums has shortened to twenty years or fewer). There are few areas studied by academic economists that seem to generate as much consensus as the proposition that public financing of sport stadiums fails to economically benefit taxpayers. *See* Robert A. Baade & Richard F. Dye, *Sports Stadiums and Area Development: A Critical Review*, 2 ECON. DEV. Q. 265, 274 (1988) (finding the economic development rationale used to justify publicly funding stadiums is weak and unsupported by evidence); John Siegfried & Andrew Zimbalist, *A Note on the Local Economic Impact of Sports Expenditures*, 3 J. SPORTS ECON. 361, 362 (2002) (noting the economic development argument for publicly funding stadiums has been persuasive despite being incorrect); Dennis Coates & Brad R. Humphreys, *Do Economists Reach a Conclusion on Subsidies for Sports Franchises, Stadiums, and Mega-Events*, 5 ECON J. WATCH

for the Atlanta Falcons's Mercedes-Benz Stadium.[91] Oriole Park cost Maryland citizens $14 million per year.[92] In fact, since 1997, NFL teams have received almost $7 billion in taxpayer money to fund new stadiums.[93] Moreover, professional sports teams have benefited from hundreds of millions of dollars in federal subsidies to finance stadiums via tax-exempt municipal bonds following the passage of the Tax Reform Act of 1986.[94] These subsidies have accounted for significant construction funding, including $431 million for the new Yankee Stadium in New York, $205 million for Soldier Field in Chicago, and $164 million for Paul Brown Stadium in Cincinnati.[95] Although some have tried to restrict the use of these tax benefits, tax-exempt bonds (in conjunction with taxpayer funding) continue to serve as the mainstay for funding professional sports facilities.[96]

294, 310–11 (2008) (highlighting the widespread agreement among economists that sports subsidies do not have a positive impact on the local economy).

91. Nicole Vowell, *Millions of Taxpayer Dollars Spent on Sports Stadiums—Who's Benefiting?*, FOX4 (Oct. 22, 2018, 2:41 PM), https://www.fox4now.com/news/national/democracy-2018/millions-of-taxpayer-dollars-spent-on-sports-stadiumswhos-benefiting.

92. James Dator, *Publicly Funding Stadiums for Billionaires Is a Scam*, SBNATION (June 9, 2021, 11:11 AM), https://www.sbnation.com/2021/6/9/22525916/public-funding-stadiums-nfl-panthers [https://perma.cc/ENQ8-4ZDQ].

93. Michael David Smith, *NFL Stadiums Have Received an Estimated $6.7 Billion from Taxpayers*, NBC SPORTS (Mar. 28, 2017, 9:23 AM), https://profootballtalk.nbcsports.com/2017/03/28/nfl-stadiums-have-received-an-estimated-6-7-billion-from-taxpayers [https://perma.cc/D5GT-9GPJ].

94. *See* Tax Reform Act of 1986, Pub. L. No. 99-514, 100 Stat. 2085 (1986) (codified in scattered sections of 26 U.S.C.); I.R.C. § 103(a); *see also* Jose Trejos, *Senate Bill May End Federal Tax Breaks for Stadiums*, TAX FOUND. (June 19, 2017), https://taxfoundation.org/senate-bill-may-end-federal-stadium-subsidies [https://perma.cc/24UA-RV2Q] (noting the tax break for stadiums was an unintended consequence of the Tax Reform Act of 1986 which has resulted in over $3 billion in federal tax exemptions in the last two decades).

95. Wayne Anderman, *Stadium Bonds: A Homerun or Strike out During the COVID-19 Pandemic?*, MUNICIPALBONDS.COM (Sept. 2, 2020), https://www.municipalbonds.com/education/stadium-bonds-homerun-or-strike-out-during-covid-19 [https://perma.cc/DN8F-3TJ3].

96. *See* Anoop K. Bhasin, *Tax-Exempt Bond Financing of Sports Stadiums: Is the Price Right?*, 7 VILL. SPORTS & ENT. L.J. 181, 183–85 (2000) (noting that U.S. Senator Moynihan opposed the use of tax-exempt bonds to fund professional stadiums); Trejos, *supra* note 94 (documenting that Senators Cory Booker and James Lankford sponsored a bipartisan bill in 2017 to end the practice of issuing tax-exempt bonds for sports stadium construction).

2. The jock tax

Like stadium subsidies, much has been written on the so-called "jock tax."[97] Although cities, counties, and states willingly subsidize stadium construction to the benefit of billionaire owners, many locales have not afforded such gratuitous tax benefits to professional athletes.[98] Jock taxes—which permit states to tax nonresident professional athletes' income when engaging in sporting events hosted within their jurisdictions[99]—originated in the 1960s, but became more widely familiar in 1991 when California sought to collect taxes from Michael Jordan and his Chicago Bulls teammates following their team's defeat of the Los Angeles Lakers in the National Basketball Association (NBA) finals.[100] Illinois lawmakers responded in kind by passing "Michael Jordan's revenge," which likewise taxed visiting teams playing in their state.[101] Soon after, other states and cities, including Cleveland, Kansas City, Philadelphia, and Detroit, passed similar taxes.[102]

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97. *See, e.g.*, Fontein, *supra* note 49, at 328–29 (arguing the jock tax is unconstitutional because it allows a state to intentionally and systematically discriminate and tax income extraterritorially); Alan Pogroszewski & Kari A. Smoker, *Is Tennessee's Version of the "Jock Tax" Unconstitutional?*, 23 MARQ. SPORTS L. REV. 415, 433 (2013) (examining Tennessee's version of the jock tax and concluding that it is unconstitutional); Nick Overbay, Comment, *A Uniform Application of the Jock Tax: The Need for Congressional Action*, 27 MARQ. SPORTS L. REV. 217, 217–18 (2016) (arguing that enacting a uniform allocation method for states to tax nonresident athletes would ease administrative burdens and preempt constitutional challenges); 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, 337 (2014) (comparing jock taxes in the United States and concluding that Tennessee's jock tax is unconstitutional).

98. *See* Mary Pilon, *The Jock-Tax Man*, NEW YORKER (Apr. 10, 2015), https://www.newyorker.com/business/currency/the-jock-tax-man [https://perma.cc/K4WP-NYXK] (describing special taxes levied against professional athletes when traveling to play in other states).

99. Fontein, *supra* note 49, at 327.

100. Pilon, *supra* note 98.

101. *Id.*; *see also* Jonathan Nehring, *An Overview and History of the Jock Tax*, TAXABALL INCOME (Apr. 15, 2014), http://www.taxaball.com/blog/an-overview-and-history-of-the-jock-tax [https://perma.cc/8K2A-9C3U] (documenting the origin of the jock tax to 1968 when Dennis Partee of the San Diego Chargers challenged the California state board of equalization over state taxes he owed).

102. Jesse Barnhill, *Michael Jordan Accidentally Created the 'Jock Tax' and Hurt the Paychecks of Pro Athletes Forever*, SPORTSCASTING (Nov. 13, 2020), https://www.sportscasting.com/michael-jordan-accidentally-created-the-jock-tax-and-hurt-the-paychecks-of-pro-athletes-forever [https://perma.cc/28VQ-FWP6].

The jock tax has certainly been lucrative for select jurisdictions, with California recouping more than $200 million in annual revenue;[103] however, the tax is not imposed universally. While many jurisdictions levy their established income tax rates on nonresident professional athletes, others have been more creative.[104] For example, in 2009, Tennessee imposed a privilege tax on NBA and National Hockey League (NHL) athletes playing in the state.[105] The tax was assessed at $2,500 per game, with a maximum annual tax burden of $7,500.[106] Following outcry from league unions, in 2014, Tennessee repealed the tax, with the state ultimately refunding more than $8 million of the approximately $18 million it acquired.[107]

Similarly, Cleveland faced challenges from players over its jock tax.[108] Former Chicago Bears player Hunter Hillenmeyer sued, arguing that Cleveland's jock tax violated due process by imposing a tax calculation formula based on games played.[109] Specifically, nonresident athletes who competed in games in Cleveland were taxed as though their sole job responsibility was to play games.[110] By competing in just one game per year in Cleveland (out of a possible twenty), the city assessed a tax on 5% of their salary.[111] Players objected, arguing that their wages were tied to substantially more activities than mere gameplay, and claimed the Cleveland tax burden was unconstitutionally high.[112] The Ohio

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103. Stefanie Loh, *Fun Facts About the Jock Tax*, SAN DIEGO UNION-TRIB. (Apr. 20, 2015, 6:30 AM), https://www.sandiegouniontribune.com/sports/nfl/sdut-jock-tax-fun-facts-origins-super-bowl-money-2015apr20-story.html.

104. *See, e.g.*, Jason Feingertz & Jonathon Nhering, *Tennessee's Failed Attempt to Be a Tax Titan*, CPA J. (Jan. 2017), https://www.cpajournal.com/2017/01/22/tennessees-failed-attempt-to-be-a-tax-titan [https://perma.cc/3PSJ-7YSH] (describing how Tennessee, a state without an income tax, imposed a professional privilege tax on out-of-state athletes).

105. *Id.*

106. *Id.*

107. *Id.*

108. Ameet Sachdev, *Former Chicago Bear Wins Suit over Cleveland's 'Jock Tax,'* CHI. TRIB. (Apr. 30, 2015, 5:15 PM), https://www.chicagotribune.com/business/ct-cleveland-jock-tax-0501-biz-20150430-story.html.

109. Hillenmeyer v. Cleveland Bd. of Rev., 41 N.E.3d 1164, 1167–68 (Ohio 2015); *Ohio Supreme Court Rules Cleveland's Tax on Nonresident Football Players Violates Constitutional Due Process*, WINSTON & STRAWN (June 2015), https://www.winston.com/images/content/9/7/97939/SALT-JUN2015-05-Cleveland-Tax-Football-Players.html [https://perma.cc/86XX-D228].

110. *Hillenmeyer*, 41 N.E.3d at 1167–68.

111. *Id.* at 1171.

112. *Id.* at 1168.

Supreme Court agreed, holding that Cleveland's calculation formula violated constitutional due process.[113] While select jurisdictions continue to impose jock taxes as a means of capturing a piece of the lucrative business pie (despite legal attacks from players and unions[114]), others afford a more generous approach, relieving nonresident professional athletes from tax imposition on their earnings.[115]

3. Tax exemptions

The third professional sports matter that historically garnered academic (and congressional) discourse pertains to the NFL and other leagues' tax-exempt status.[116] The NFL long-enjoyed Internal Revenue Code (I.R.C.) § 501(c)(6) tax-exempt status under the business league exemption.[117] Although the NBA never established tax-exempt status, the MLB enjoyed this preferential tax treatment until voluntarily relinquishing it in 2007.[118] Eight years later, in an abrupt move, the NFL surrendered its tax-exempt status in 2015, acknowledging that its

113. *Id.* at 1174.

114. *See* Bob Bauder, *Pro Athletes, Players' Unions Seek to Halt Pittsburgh 'Jock Tax'*, TRIBLIVE (Nov. 7, 2019, 10:32 PM), https://triblive.com/local/pittsburgh-allegheny/three-athletes-and-players-unions-seek-to-halt-pittsburgh-jock-tax [https://perma.cc/5DAW-LZL7] (describing lawsuits filed over Pittsburgh's jock tax).

115. *See* Loh, *supra* note 103 (noting that Arizona does not tax the earnings of MLB players who are in the state for spring training).

116. *See, e.g.*, Christian Schmied, Comment, *Official Timeout on the Field: Critics Have Thrown a Red Flag and Are Challenging the NFL's Tax-Exempt Status, Calling for It to Be Revoked*, 21 JEFFREY S. MOORAD SPORTS L.J. 577, 580 (2014) (discussing how the IRS has recently come under fire for targeting organizations that were applying for tax-exempt status); Jami A. Maul, Comment, *America's Favorite "Nonprofits": Taxation of the National Football League and Sports Organizations*, 80 UMKC L. REV. 199, 199–200 (2011) (analyzing sports franchises that are classified as nonprofit organizations under I.R.C. § 501(c)(6) (2018)); Naomi Hatton, Note, *Where Do Sports Leagues Stand After the NFL Revokes Its Tax Exempt Status?*, 15 AVE MARIA L. REV., 170, 170 (2017) (highlighting that the NFL recently gave up its tax exemption status in 2017); Dylan P. Williams, *Taking a Knee: An Analysis of the NFL's Decision to Relinquish Its § 501(c)(6) Federal Tax Exemption*, 26 J. LEGAL ASPECTS SPORT 127, 127 (2016) (examining the NFL's tax exempt status under I.R.C. § 501(c)(6)); *see also*, Alec Fornwalt, *Should Congress Reconsider the Tax Exemption of Pro Sports Organizations?*, TAX FOUND. (July 20, 2018), https://taxfoundation.org/congress-reconsider-tax-exemption-pro-sports-organizations [https://perma.cc/8NJR-L4WH] (arguing that congress should reconsider the status of tax exempted professional sports organizations).

117. *See* I.R.C. § 501(c)(6); *see also* Hatton, *supra* note 116, at 170–71.

118. Darren Rovell, *NFL League Office Relinquishing Tax-Exempt Status*, ESPN (Apr. 28. 2015), https://www.espn.com/nfl/story/_/id/12780874/nfl-league-office-gives-tax-exempt-status [https://perma.cc/86RW-CHJ4].

preferential tax treatment invited public distraction given the organization's multi-billion dollar annual revenues.[119]

In 2018, Congress considered abolishing the tax-exempt status of other professional leagues.[120] Specifically, on June 19, 2018, Iowa Senator Joni Ernst introduced Senate Bill 3086 (S. 3086), or the PRO Sports Act.[121] The bill's singular purpose was to stop professional sports leagues from qualifying for tax-exempt status.[122] The proposed legislation identified the NHL, along with the Professional Golf Association (PGA) Tour and Ladies Professional Golf Association (LPGA) as organizations generating more than one billion dollars in revenue, yet operating under the shield of I.R.C. § 501(c)(6).[123] While this legislation specifically targeted the three named entities, if passed the law would have stripped tax-exempt status from any organization with gross receipts exceeding $10,000,000.[124]

Variations of S. 3086 have been introduced repeatedly, but all have failed to gain traction despite the significant revenues many of these tax-exempt leagues enjoy.[125] Some note that the impetus to strip professional leagues of their preferred tax status is largely inconsequential.[126] As Professor and Economist Andrew Zimbalist opines, while some leagues enjoy tax-exempt status, the teams themselves (which serve as the profit-generating mechanisms of the

119. Chris Isidore, *NFL Gives Up Tax Exempt Status*, CNN (Apr. 28, 2015, 4:48 PM), https://money.cnn.com/2015/04/28/news/companies/nfl-tax-exempt-status/index.html [https://perma.cc/L36R-FFQM].

120. Fornwalt, *supra* note 116.

121. PRO Sports Act, S. 3086, 115th Cong. (2018).

122. *Id.*

123. *Id.*

124. *Id.*

125. *See, e.g.*, PRO Sports Act, H.R. 363, 117th Cong. (2021); *see also* PRO Sports Act, S. 1524, 113th Cong. (2013).

126. Andrew Zimbalist, *The Nonprofit Status of Sports Leagues Is Irrelevant*, N.Y. TIMES (Sept. 4, 2014, 12:59 PM), https://www.nytimes.com/roomfordebate/2014/09/03/should-pro-sport-leagues-get-tax-breaks/the-nonprofit-status-of-sports-leagues-is-irrelevant [https://perma.cc/WX8H-V7WA] ("The tax exemption does not apply to the individual teams, which must pay taxes on their profits . . . [but does] appl[y] to the central league offices . . . ."); *see also* Press Release, Greg Steube, House of Representatives, Steube Introduces Legislation to Close Loophole Allowing Professional Sports Organizations to Claim Nonprofit Status and Tax Breaks (Aug. 7, 2020), https://steube.house.gov/media/press-releases/steube-introduces-legislation-close-loophole-allowing-professional-sports [https://perma.cc/P9XZ-3QCL] (proposing to strip tax-exempt status from sports leagues for allowing players and coaches to kneel in protest during the national anthem).

leagues) remain taxable entities.[127] Of import, the debate over the tax-exempt status of sports organizations is not germane to the professional arena. As detailed in the following section, the NCAA's not-for-profit tax status has likewise been scrutinized.[128]

B. The Historic Relationship Between Taxes and College Sports

In 1906, the NCAA declared that college sports were to be founded on the principle of amateurism.[129] Over a century later, many argue that the primordial student-athlete model is misguided, given the expansive economic growth of contemporary collegiate athletics.[130] Certainly, as this amateur sports arena morphed into a billion-dollar enterprise,[131] increased tax deliberations ensued. Still, prior to the signing of the TCJA, the greater college sports arena enjoyed quite generous tax treatment, even amidst broader debates.[132] As this Section addresses, tax issues that have invited historic dialogue include: (1) the tax-exempt status of the NCAA and its member institutions; (2) the unrelated business income (UBI) tax; (3) taxing student-athletes' scholarship funds; and (4) the deductibility of charitable donations.

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127. Zimbalist, *supra* note 126.

128. *See infra* Section I.B.1.

129. Kisska-Schulze, *supra* note 11, at 350.

130. *See* Robert A. McCormick & Amy Christian McCormick, *The Myth of the Student-Athlete: The College Athlete as Employee*, 81 WASH L. REV. 71, 74 (2006) [hereinafter McCormick & McCormick, *The Myth of the Student-Athlete*] (opining that the student-athlete characteristic is, in reality, a façade); Robert John Givens, Comment, *"Capitamateuralism": An Examination of the Economic Exploitation of Student-Athletes by the National Collegiate Athletic Association*, 82 UMKC L. REV. 205, 205–07 (2013) (arguing to reform the NCAA's principal of amateurism amidst commercialized exploitation of student-athletes); Thomas A. Baker III et al., *Debunking the NCAA's Myth that Amateurism Conforms with Antitrust Law: A Legal and Statistical Analysis*, 85 TENN. L. REV. 661, 665 (2018) (noting that college sports is no longer "amateur" in nature, no matter the NCAA's insistence that it is); Kelly Charles Crabb, *The Amateurism Myth: A Case for a New Tradition*, 28 STAN. L. & POL'Y REV. 181, 183 (2017) (calling for the NCAA to abandon its amateurism model to allow student-athletes the ability to exploit themselves in commercialized fashion); Amy Christian McCormick & Robert A. McCormick, *The Emperor's New Clothes: Lifting the NCAA's Veil of Amateurism*, 45 SAN DIEGO L. REV. 495, 496 (2008) (portraying the collegiate sports arena as anything but amateurism).

131. *Finances of Intercollegiate Athletics*, NCAA, https://www.ncaa.org/about/resources/research/finances-intercollegiate-athletics [https://perma.cc/DJ39-63RV] (noting that in 2019 alone, NCAA athletic department revenues across all member schools reached $18.9 billion).

132. Kisska-Schulze, *supra* note 11, at 355.

1. The NCAA and member institutions' tax-exempt status

Akin to professional sports leagues as discussed *earlier*, the NCAA's tax-exempt status has been deliberated by many.[133] Along with numerous of its member institutions, the NCAA relishes from I.R.C. § 501(c)(3) status, which offers tax exemptions to organizations that advance "national or international amateur sports competition."[134] Section 501(c)(3) found root in the Tax Reform Act of 1969, which allowed qualifying non-profit entities to operate as private foundations.[135] By 1976, Congress eased restrictions on non-profits to the point that they were permitted to spend up to $1 million a year in lobbying efforts.[136] The rationale for extending such benefits beyond the NCAA and its member institutions, to include their affiliated athletic departments, which are often run as separate entities, resides in the conviction that college athletics compliment the overall academic experience and thus serve an "educational purpose."[137]

Some argue that the NCAA and many of its member schools are not promoting amateur sports per se, but are instead attempting to

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133. *See, e.g.*, Andrew D. Appleby, *for the Love of the Game: The Justification for Tax Exemption in Intercollegiate Athletics*, 44 J. MARSHALL L. REV. 179, 189 (2010) (documenting that in 2006, the House Ways and Means Committee directed the NCAA to substantiate its tax-exempt status); Brett T. Smith, *The Tax-Exempt Status of the NCAA: Has the IRS Fumbled the Ball?*, 17 SPORTS LAWS. J. 117, 118 (2010) (proposing that removal of the NCAA's tax-exempt status would result in minimal economic benefits); John D. Colombo, *The NCAA, Tax Exemption, and College Athletics*, 2010 U. ILL. L. REV. 109, 111–12 (2010) (examining the NCAA's tax-exempt status, and recommending alternatives to removing such beneficial tax treatment); Benjamin Kurrass, Comment, *The Swelling Tide of Commercialized Amateur Athletics: How Growing Revenues Have Called Public Attention to the NCAA and Its Member Universities' Tax-Exempt Status*, 27 JEFFREY S. MOORAD SPORTS L.J. 285, 291 (2020) (recommending the passage of the Student-Equity Act to "close the gap" between the NCAA and member institutions' tax-exempt revenue and amateur student-athletes); *see also* Ronald Katz, *Ending the NCAA's Tax Exemption Should Be a Slam Dunk*, NATION (Mar. 27, 2019), https://www.thenation.com/article/archive/march-madness-tax-exemption-inequality.

134. I.R.C. § 501(c)(3); *see also* Colombo, *supra* note 133, at 113.

135. Hana Muslic, *A Brief History of Nonprofit Organizations (and What We Can Learn)*, NONPROFIT HUB (Oct. 27, 2017), https://nonprofithub.org/a-brief-history-of-nonprofit-organizations [https://perma.cc/D28U-NDGX].

136. *Id.*

137. Lindsey Luebchow, *Are Tax Deductions for College Athletics Worth the Price?*, NEW AM. (Oct. 8, 2007), https://www.newamerica.org/education-policy/higher-education/higher-ed-watch/are-tax-deductions-for-college-athletics-worth-the-price [https://perma.cc/AGA5-FFEX].

"maximize revenue."[138] Even Congress challenged the NCAA's status in 2006, following the organization's evolution into a billion-dollar enterprise; however, such a move failed to gain traction.[139] More recent and creative efforts to eradicate the Association's tax-exempt status include recommendations that the NCAA's status be tethered to the opportunities it provides, which would allow student-athletes to monetize their publicity rights.[140] Still, despite the seemingly broad support for reining in tax-exemptions for sports organizations, Congress has thus far failed to act.[141]

2. The unrelated business income tax

While most colleges and universities qualify as tax-exempt entities, any UBI they earn is taxable.[142] Congress enacted the UBI rules in 1950 to help level the playing field between non-profit and for-profit entities when both participate in similar activities.[143] In 2008, the IRS issued a multi-page query to four hundred colleges and universities, requesting detailed information on their governance practices and compliance, to include soliciting data regarding institutions' activities falling outside the scope of their exempt purposes.[144]

Institutions are permitted to engage in revenue-generating activities outside of their educational missions, which might include running a bookstore or campus ice cream shop, renting facilities, advertising, and offering parking lot services.[145] However, such income is not protected under the purview of I.R.C. § 501(c).[146] Still, the broad and

138. Kisska-Schulze, *supra* note 11, at 365–66; *see also* Nat'l Collegiate Athletic Ass'n v. Bd. of Regents of the Univ. of Okla., 468 U.S. 85, 100–01 n.22 (1984) (finding that the NCAA and its members are in fact profit seeking entities).

139. Doyle Slifer, *Is the NCAA Fulfilling Its Tax-Exempt Status?*, ILL. BUS. L.J. (Feb. 21, 2010), https://publish.illinois.edu/illinoisblj/2010/02/21/is-the-ncaa-fulfilling-its-tax-exempt-status [https://perma.cc/L8MN-RMY9].

140. Kyle Jahner, *NCAA Tax Status Tied to Athletes' Image Rights Under New Bill*, BLOOMBERG L. (Mar. 14, 2019, 4:38 PM), https://news.bloomberglaw.com/ip-law/ncaa-tax-status-tied-to-athletes-image-rights-under-new-bill [https://perma.cc/RGC2-EAZN].

141. *See* Katz *supra* note 133 (noting the patent absurdity of the NCAA continuing to maintain non-profit status).

142. Kisska-Schulze, *supra* note 11, at 361. Unrelated business income refers to earned income that is not substantially related to an institutions' educational mission. *Id.*

143. *Id.*; *see also* William A. Bailey, *The Taxman on Campus: How Aggressive IRS Initiatives Are Increasing Audit and Compliance Risk for Colleges & Universities*, 2012 BYU EDUC. & L.J. 215, 226 (2012).

144. Bailey, *supra* note 143, at 215, 221.

145. Kisska-Schulze, *supra* note 11, at 361–62.

146. *Id.* at 362.

historical tax shield given to college athletics includes protecting these programs from the UBI tax, although such issue has periodically been weighed and measured.[147] Thus, virtually all revenue generated by college sports continues to be recognized as facilitating colleges' and universities' greater educational missions and thus not deemed taxable as UBI.[148]

3. Student-athletes' grants-in-aid

Currently, student-athletes' scholarship funds (also referred to as grants-in-aid) enjoy the benefits afforded by I.R.C. § 117, which excludes from gross income monies received in the form of qualified scholarships.[149] Such exclusion is limited to instances lacking any quid pro quo arrangement.[150] To date the IRS has denied the existence of quid pro quo relationships in college sports for purposes of student-athletes' grants-in-aid.[151] Specifically, in 1977, the IRS drafted Revenue Ruling 77-263, which purports that athletic scholarships "aid the recipients in pursuing their studies" and are thus excludable from gross income.[152] Almost forty years later, in 2014, the IRS confirmed its position that athletic scholarships remain protected from taxation under the umbrella of I.R.C. § 117.[153] Following the NCAA's 2019 announcement in support of student-athletes profiting from the use of their NIL, North Carolina Senator Richard Burr and Congressman Mark Walker proposed that those athletes who "cash in" should pay

147. *Id.*; *see also* Rev. Rul. 80-295, 1980-2 C.B. 194 (ascertaining that revenue generated by the sale of TV and broadcasting rights by a tax-exempt, national governing body for amateur sports is not UBI); Rev. Rul. 80-296, 1980-2 C.B. 195 (holding that revenue generated by college athletic conference organizations from the sale of broadcasting rights is not UBI); Prop. Treas. Reg. § 1.513-4(f) (Ex. 4) (1983) (demonstrating that payments generated from sponsorships for a college football bowl game do not constitute UBI); 58 Fed. Reg. 5690-91 (g) (Ex. 4) (Jan. 22, 1993) (illustrating that income generated from sponsorships for a college football bowl game is not UBI).

148. Kisska-Schulze, *supra* note 11, at 362.

149. *See* I.R.C. § 117; *see also* Kisska-Schulze, *supra* note 11, at 356.

150. *See* I.R.C. § 117(c); *see also* Bingler v. Johnson, 394 U.S. 741, 753 (1969).

151. Kisska-Schulze, *supra* note 11, at 356.

152. Rev. Rul. 77-263, 1977-2 C.B. 47; *see also* Kisska-Schulze, *supra* note 11, at 357 (explaining that the quid pro quo standard excludes athletic scholarships).

153. *See* Letter from John A. Koskinen, Internal Revenue Serv. Comm'r, U.S. Dep't of Treasury, to Richard Burr, N.C. Senator, U.S. Senate (Apr. 9, 2014), https://www.collegeathletespa.org/IRS-Letter-on-NLRB-Ruling.pdf [https://perma.cc/7FLU-AT7R].

taxes on their athletic scholarships.[154] Others have likewise criticized the IRS's interpretation of quid pro quo as it relates to student-athletes and the institutions they play for.[155] Still, currently the IRS has shown little interest in changing its stance on this issue.[156]

4. *Charitable donation deductions*

The origins of U.S. athletic program donations pre-date modern collegiate athletics, tracing back to 1869 when the YMCA accepted donations to construct exercise class gymnasiums.[157] By the turn of the twentieth century, industrialists like Cecil Rhodes and Andrew Carnegie emphasized the importance of athletics, along with academics, as an important factor in developing character.[158] Carnegie made the first athletic donations, giving funds to Princeton University for the construction of an artificial lake and boathouse, which opened in 1906 as Lake Carnegie.[159] The University of Chicago was among the first to utilize athletics as a means for university growth, using the school's football team as a marketing device.[160] Exploiting athletics as a marketing tool became popular when oilman and philanthropist Lloyd Noble made donations to the University of Oklahoma to invigorate a winning football program in order to attract top faculty

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154. Kisska-Schulze & Epstein, *supra* note 46, at 480; *see also* Annie Nova & Tucker Higgins, *Republican Sen. Richard Burr Proposes Taxing Scholarships of Student Athletes Who 'Cash in'*, CNBC (Oct. 29, 2019, 6:13 PM), https://www.cnbc.com/2019/10/29/richard-burr-proposes-taxing-scholarships-of-student-athletes-who-cash-in.html [https://perma.cc/FUN7-MQRZ].

155. *See, e.g.*, Schmalbeck & Zelenak, *supra* note 49, at 1089 (recommending that the IRS reconsider its favoritism toward college sports, and proposing that the Service reconsider its stance on excluding athletic scholarships from taxation); Timothy Davis, *Intercollegiate Athletics: Competing Models and Conflicting Realities*, 25 RUTGERS L.J. 269, 316 (1994) (opining that there exists a quid pro quo relationship between student-athletes and their institutions); Kathryn Kisska-Schulze & Adam Epstein, Northwestern*,* O'Bannon*, and the Future: Cultivating a New Era for Taxing Qualified Scholarships*, 49 AKRON L. REV. 771, 789 (2016) (noting that the *Bingler* standard has not been applied to student-athletes' scholarship funds); McCormick & McCormick, *The Myth of the Student-Athlete*, *supra* note 130, at 115 (promoting that student-athletes' grants-in-aid are directly related to their decision to play sports, thus evincing a quid pro quo).

156. Schmalbeck & Zelenak, *supra* note 49, at 1088–89.

157. John Feinstein, *The Passion and Pitfalls of Giving to College Sports*, PHILANTHROPY ROUNDTABLE (2016), https://www.philanthropyroundtable.org/philanthropy-magazine/article/the-passion-and-pitfalls-of-giving-to-college-sports [https://perma.cc/X34J-HW27].

158. *Id.*

159. *Id.*

160. *Id.*

and raise the spirits of Oklahoma residents who had been ravaged by the Great Depression.[161] Years later, using athletics as a marketing ploy became dubbed the "Flutie Effect," and it has become increasingly popular across institutions.[162]

The U.S. Tax Code has contributed to philanthropic and alumni donors' interests in giving charitably to athletic departments. Specifically, I.R.C. § 170 allows taxpayers to deduct gifted contributions made to charitable organizations.[163] In addition, prior to the enactment of the TCJA, taxpayers could take an 80% charitable deduction on donations made to educational institutions that included a right to purchase preferred seating at athletic events (referred to as the 80/20 rule).[164] In the five-year period between 1998 and 2003, athletic department donations increased from 14% to 26% of all college donations.[165] During the 2006–2007 athletic season, the largest college athletic programs received over $1.2 billion in alumni donations.[166] Certainly, as will be discussed Part III, the TCJA tax overhaul could play a critical role in some athletic departments abilities to solicit donor funding in the future.[167] As *Bloomberg* opines, athletic departments with "less-enthusiastic donor bases" could face financial disaster.[168]

The above examples illustrate notable and historical connections between U.S. sports and taxation. However, the buck does not stop here. Expanding the "business of sports," to include novel areas like esports and DFS, the signing of the TCJA into law, and the newly legalized sports betting industry is engorging the scope and impact of taxation across the greater sports industry. To appreciate the current

161. *Id.*

162. MURRAY SPERBER, BEER AND CIRCUS: HOW BIG-TIME COLLEGE SPORTS IS CRIPPLING UNDERGRADUATE EDUCATION 60 (2000); *see also* Feinstein, *supra* note 157 (offering that these marketing ploys were so-named for former Boston College quarterback Doug Flutie, who led a last-minute comeback over the favored University of Miami in the 1984 Orange Bowl). The "Flutie Factor" is the concept that universities utilize athletic success to market their school. *Id.*

163. *See* I.R.C. § 170 (b)(1)(B)(ii) (charitable deductions are capped at 50% of taxpayers' adjusted gross income); *see also* Rev. Rul. 67-246, 1967-2 C.B. 104 (articulating that so long as they are considered gifts, charitable donations are deductible).

164. *See* I.R.C. § 170(l)(2); *see also* Rev. Rul. 86-63, 1986-1 C.B. 88.

165. Luebchow, *supra* note 137.

166. *Id.*

167. *See infra* Section IV.A.1.

168. Jack Pitcher, *College Football Looks to Mega-Donors to Help Bail out Athletics*, BLOOMBERG (Aug. 17, 2020, 12:31 PM), https://www.bloomberg.com/news/articles/2020-08-17/college-football-looks-to-mega-donors-to-help-bail-out-athletics [https://perma.cc/R9XS-P4PR].

status of tax across this ever-expanding venture, Part II identifies current tax issues impacting the professional sports arena.

II. TAXING PROFESSIONAL SPORTS: A MODERN UPDATE

Despite the lack of academic support justifying the economic benefits of publicly subsidized stadiums, as discussed in Part I,[169] such structural undertakings continue and are often supported by questionable research promoting their positive impact on local communities.[170] New stadium construction has seen an uptick, and sports team owners and leagues demand that cities, municipalities, and states fund new stadiums (often via taxpayer subsidies) with increasing frequency.[171] In addition, the recently implemented TCJA has impacted the greater professional sports industry. As detailed below, Section A provides an update on publicly funded stadiums. Section B details various TCJA reforms that are affecting professional sports.

A. Financing Public Stadiums

The price tag on professional sports stadiums and arenas continues to rise; a 2019 estimate suggests the average cost of an NFL stadium over the past fifteen years is $1.2 billion.[172] Cities often cite job creation as a means of enticing billionaire owners to entertain new stadium subsidies.[173] As discussed, the origin of publicly funded stadiums began with federal law enabling states and localities to issue tax-exempt bonds

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169. *See supra* Section I.A.1.

170. *See, e.g.*, Kevin Draper, *Florida's Go-to Stadium Economist Is a Hack, a Shill, and Also Not an Economist*, DEADSPIN (Apr. 17, 2017, 9:24 AM), https://deadspin.com/floridas-go-to-stadium-economist-is-a-hack-a-shill-an-1794379314 [https://perma.cc/PN8Z-E3GN] (noting that various Florida stadium construction projects utilized research by an individual who, despite lacking a background in economics, conducted economic impact studies).

171. *See* Christopher M. McLeod & John T. Holden, *Ecological Economics and Sport Stadium Public Financing*, 41 WM. & MARY ENV'T. L. & POL'Y REV. 581, 581–82 (2017) (describing the increases in stadium construction and expenditures of public money on construction).

172. Karthik Vegesna, *The Economics of Sports Stadiums: Does Public Financing of Sports Stadiums Create Local Economic Growth, or Just Help Billionaires Improve Their Profit Margin?*, BERKELEY ECON. REV. (Apr. 4, 2019), https://econreview.berkeley.edu/the-economics-of-sports-stadiums-does-public-financing-of-sports-stadiums-create-local-economic-growth-or-just-help-billionaires-improve-their-profit-margin [https://perma.cc/6CL3-LJT5].

173. Andrew Zimbalist & Roger G. Noll, *Sports, Jobs, & Taxes: Are New Stadiums Worth the Cost?*, BROOKINGS (June 1, 1997), https://www.brookings.edu/articles/sports-jobs-taxes-are-new-stadiums-worth-the-cost [https://perma.cc/9AEJ-HSR6].

to finance stadium construction.[174] Use of these bonds for stadium construction projects was largely ignored by legislators until then-President Barack Obama's administration sought to end the exemption in its 2015 budget proposal.[175] This measure was followed by several bipartisan efforts to eliminate federal benefits to subsidize stadium construction; however, to date, these efforts have failed.[176]

Of the fifty-seven stadiums across the four major American sports leagues that have been constructed or substantially renovated, forty-three were at least partially funded by tax-exempt municipal bonds.[177] Such subsidies represent an estimated $4.3 billion loss in federal tax revenue.[178]

To mitigate the use of tax-exempt bonds in constructing sports stadiums, Congress executed the "Private Activity Test" within the purview of I.R.C. § 141 as part of the Tax Reform Act of 1986.[179] Under this test, federal bonds must qualify under one of two prongs to remain tax-exempt: (1)(a) the private business use test, and (1)(b) the private payment/security test, or (2) the private loan financing test.[180] Under the private business use test, if a private entity (including a privately owned sports team) consumes over 10% of the stadium's overall useful services, it can no longer be tax-exempt.[181] Per the private payment/security test, tax-exempt bonds are confined to those where less than 10% of the principal is secured by a private business property interest, or by revenues derived from that property.[182]

Rather than depressing the use of tax-exempt bonds to finance sports stadiums, the Private Activity Test actually made taxpayer-funded projects more attractive.[183] To meet the 10% restriction limit, which ultimately required that 90% of financing come from outside

174. *See supra* Section I.A.1.

175. Austin J. Drukker et al., *Tax-Exempt Municipal Bonds and the Financing of Professional Sports Stadiums*, 73 NAT'L TAX J. 157, 158 (2020).

176. *Id.*

177. *Id.* at 159.

178. *Id.*; *see also* I.R.C. § 141(a).

179. Nicholas Baker, Note, *Playing a Man down: Professional Sports and Stadium Finance—How Leagues and Franchises Extract Favorable Terms from American Cities*, 59 B.C. L. REV. 281, 303 (2018).

180. Bhasin, *supra* note 96, at 186–87. The Private Loan Financing Test is met if more than the lesser of 5% or $5 million of the proceeds of the issues is to be used (directly or indirectly) to make or finance loans to persons other than governmental persons. *Id.* at 188; *see also* I.R.C. § 141(c)(1).

181. Drukker et al., *supra* note 175, at 162.

182. Baker, *supra* note 179, at 303.

183. Gans, *supra* note 72, at 758.

resources unaffiliated with the property interest, localities were under increased pressure to use local tax revenue to fund the majority of these projects.[184] Jurisdictions introduced tourist taxes that levied taxes on items like hotel stays and car rentals to shift some of the tax burden to nonresidents.[185] In addition, sales taxes were assessed to help fund stadium construction. However, as scholar Austin Drukker and his colleagues note, both the tourist taxes and sales taxes are regressive, overly burdening lower income individuals while wealthy sports team owners realize the primary benefits of new stadiums.[186] While alternate means of financing stadiums are available,[187] to date, taxpayer-funded sports stadiums continue to remain in vogue.[188]

B. The TCJA's Impact on Professional Sports

On December 22, 2017, President Trump signed into law the TCJA.[189] While a major impetus of the TCJA was to reduce the corporate tax rate to 21%, select provisions impacted the greater sports industry.[190] Certainly, the decreased personal income tax rates benefit those within the highest tax bracket, including professional athletes.[191] However, the TCJA likewise limited state and local income, sales and property tax (SALT) deductions to $10,000 annually.[192] Prior to imposing such limits, SALT deductions were unlimited, thus affording high-income earners (like professional athletes) significant opportunities to reduce their overall tax burdens.[193] With this new (albeit temporary)

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184. *Id.*; *see also* Drukker et al., *supra* note 175, at 162, 163 (describing the ten percent restriction limit as an "artificial financing structure" in which the state or local governments achieve federal tax exemption by financing at least 90% of the debt service despite an inability to rely on stadium-generated revenue).

185. Drukker et al., *supra* note 175, at 163.

186. *Id.* at 163–64.

187. Options include circumstances where sports teams fund the stadium construction and subsequently sell the property to a state or locality while maintaining a facility lease. *See* Bhasin, *supra* note 96, at 190–92.

188. *See* Sebastian Pellejero & Heather Gillers, *as Covid-19 Closes Stadiums, Municipalities Struggle with Billions in Debt*, WALL ST. J. (June 4, 2020, 5:30 AM), https://www.wsj.com/articles/as-covid-19-closes-stadiums-municipalities-struggle-with-billions-in-debt-11591263000?mod=searchresults&page=1&pos=2 [https://perma.cc/5ZSW-2767] (noting the extent to which taxpayers fund sports stadiums).

189. Kisska-Schulze & Holden, *supra* note 26, at 467.

190. Smoker et al., *supra* note 29, at 293.

191. *See* Tax Cuts and Jobs Act §§ 11001(a), (b), 131 Stat. 2054–55 (2017) (codified as amended at I.R.C. § 1).

192. *See id.* § 11042(a) (codified as amended at I.R.C. § 164(b)(6)).

193. *See* I.R.C. § 164.

limitation in place, professional athletes playing on franchise teams located in high-tax jurisdictions, including California or New York, endure a tangible impact on their earnings, particularly as compared to athletes residing in low or no tax jurisdictions.[194]

In addition, the I.R.C. allows deductions for certain trade or business expenses that are "ordinary and necessary."[195] For professional athletes, expenses that are "(1) paid or incurred during the taxable year, (2) related to . . . [their] playing [a] professional sport[]," (3) common to professional athletes in a given sport, and (4) are of "reasonable . . . cost" are generally considered ordinary and necessary.[196] Historically, professional athletes' deductible expenses included the cost of agents and trainers, workout apparel, gym memberships, mobile phones, training equipment, and business attire.[197] However, as part of its sweeping overhaul, the TCJA suspended these "miscellaneous itemized deductions," thus disallowing athletes from deducting numerous unreimbursed employee business expenses previously available to them.[198]

The TCJA also impacted personnel contracts for professional sports teams. Prior to the law's signing, trading contracts and draft picks between sports teams qualified for "like-kind" exchange treatment under I.R.C. § 1031.[199] Essentially, players could be traded without major league sports teams recognizing any gain or loss on the transactions.[200] The TCJA changed this rule, reducing the types of assets subject to like-kind exchanges to only real property,[201] thereby subjecting sports franchises to gain (or lose) recognition under I.R.C. § 1001.[202] To remedy what seemed to be an oversight on Congress's part in drafting the TCJA, the IRS implemented a safe harbor rule for professional sports teams in 2019 that now allows teams that fall within four

194. *See* Steven Kutz, *Why Pro Athletes May Lose a Fortune Because of the New Tax Law*, MARKETWATCH (Dec. 9, 2018, 12:37 PM), https://www.marketwatch.com/story/why-pro-athletes-may-lose-a-fortune-because-of-the-new-tax-law-2018-12-06 [https://perma.cc/3ZZW-LP7Q]. The provision is set to expire December 31, 2025. *See* Tax Cuts and Jobs Act § 11042(a).

195. *See* I.R.C. § 162(a).

196. Kisska-Schulze & Epstein, *supra* note 46, at 489.

197. *Id.*

198. *Id.* at 489–90; *see also* I.R.C. § 67(g) (the suspension is in effect until the end of 2025).

199. Smoker et al., *supra* note 29, at 294, 304–05, 305 n.95.

200. *Id.* at 294–95, 304–05.

201. *Id.* at 294–95.

202. *See* I.R.C. § 1001.

prescribed requirements to treat trading contracts as having zero value when calculating gain or loss.[203] However, absent a legislative exemption for professional sports trades, player exchanges remain fully taxable if they fall outside the boundaries of the newly established safe harbor rule.[204]

A fourth TCJA issue impacting the professional sports arena pertains to I.R.C. § 199A. Congress established a qualified business income (QBI) deduction that allows select domestic businesses (operating as sole proprietorships, partnerships, S corporations, trusts, or estates) to deduct 20% of their QBI to better align pass-through entity income taxation with the newly decreased corporate income tax rate.[205] Such a deduction, however, is limited to returns on investment capital, rather than returns on labor.[206] Any business identified as a "specified services trade[] or business" (SSTB)—which includes any ventures performing athletic services—fails to qualify for the deduction.[207] The Treasury rejected criticisms from various commentators, including MLB Commissioner Robert Manfred Jr., who argued sports team owners should qualify for the deduction. Critics argued that team owners provide services that fall outside of the definition of SSTB under I.R.C. § 199A.[208]

Lawmakers raise taxes to collect revenue. As the dollar figures in professional sports escalate, it is unsurprising that Congress has

203. *See* Rev. Proc. 2019-18, 2019-18 I.R.B. 1077 (qualifying for the safe harbor requires (1) "[a]ll parties . . . must use [the] safe harbor;" (2) each trading party "must transfer and receive a personnel contract or draft pick;" (3) no contract or draft pick can be amortizable under I.R.C. § 197; and (4) the team's financial statements cannot "reflect assets or liabilities resulting from the trade other than cash"); *see also* Smoker et al., *supra* note 29, at 319–20.

204. Smoker et al., *supra* note 29, at 321.

205. *See* I.R.C. § 199A (allowing up to 20% deduction of qualified real estate investment trust (REIT) dividends and qualified publicly traded partnership (PTP) income).

206. *Section 199A Pass-Through Deduction Eludes Professional Sports Team Owners*, MORGAN LEWIS (Jan. 23, 2019) [hereinafter *Section 199A Pass-Through Deduction*], https://www.morganlewis.com/pubs/2019/01/section-199a-pass-through-deduction-eludes-professional-sports-team-owners#_ftn7 [https://perma.cc/DZZ7-GCMP].

207. The IRS defines an SSTB as "a trade or business involving the performance of services in the fields of . . . athletics . . . ." *See Facts About the Qualified Business Income Deduction*, IRS (Apr. 2019), https://www.irs.gov/newsroom/facts-about-the-qualified-business-income-deduction [https://perma.cc/Z9TC-5AZL].

208. *Id.*

increasingly sought opportunities to siphon off industry funds.[209] In conjunction, billionaire sports owners expose tax loopholes and advantageously use their teams to minimize otherwise hefty tax bills.[210] Realistically, such bartering will likely endure. Still, as the "business of sports" expands beyond the realm of traditional professional leagues, so too have the tax issues surrounding amateur sports. As Part III details, evidence supports that the collegiate sports industry is Congress's next target.

III. TAXING COLLEGE SPORTS

In select ways, professional sports differ from their collegiate counterparts when assessing rules of the game.[211] However, the critical distinction separating professional from collegiate athletics comes down to pay.[212] Professional athletes receive compensation for their athletic prowess, while student-athletes remain subject to the NCAA's principle of "amateurism."[213] Such division has prompted significant literary interest, particularly given that college football and basketball

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209. *See* William H. Baker, *Taxation and Professional Sports—A Look Inside the Huddle*, 9 MARQ. SPORTS L. REV. 287, 287–88 (1999); *Government, Community, and Sports Teams: Tax Credits*, POL'Y CIRCLE, https://www.thepolicycircle.org/minibrief/government-community-and-sports-teams-tax-credits [https://perma.cc/TED7-XPNW].

210. *See* Faturechi et al., *supra* note 55.

211. *See* Victoria Bryant, *The Differences Between College Football and the NFL*, HALL FAME EXPERIENCES (July 20, 2016), https://hofexperiences.com/blog/the-differences-between-college-football-and-the-nfl [https://perma.cc/2M4G-PJF5] (noting basic rule of game differences between collegiate and NFL football); Daniel Wilco, *College and NBA Basketball's Biggest Rule Differences*, NCAA (Oct. 9, 2019), https://www.ncaa.com/news/basketball-men/article/2019-09-26/college-and-nba-basketballs-biggest-rule-differences [https://perma.cc/A8X2-P2JA] (identifying "[g]ame time," "[s]hot clock," "[p]ossession arrow/jump balls," fouls, and the "3-point line" to help differentiate NCAA and NBA basketball rules).

212. *See* Jason Rossi, *All the Major Differences Between NFL and College Football*, SPORTSCASTING (Aug. 9, 2018), https://www.sportscasting.com/major-differences-between-nfl-and-college-football [https://perma.cc/398Z-FV8N].

213. *See* 2020–2021 NCAA DIVISION I MANUAL art. 2.9, The Principle of Amateurism, http://www.ncaapublications.com/productdownloads/D121.pdf [https://perma.cc/8GAH-BKSV] ("Student-athletes shall be amateurs in an intercollegiate sport, and their participation should be motivated primarily by education and by the physical, mental and social benefits to be derived. Student participation in intercollegiate athletics is an avocation, and student-athletes should be protected from exploitation by professional and commercial enterprises."); *see also* Daly, *supra* note 6, at 487–88 (noting the existence of a clear "line of demarcation between college athletics and professional sports" with regard to pay).

have morphed into productive business enterprises over the last seventy years.[214]

Much has evolved since the earliest days of college sports when Ivy League programs, such as Harvard and Yale, entertained "grudge match" rivalries.[215] Significant concerns over intercollegiate sports safety ultimately drew national attention, prompting the NCAA's founding in 1906.[216] From that juncture forward, public interest in amateur sports magnified so that by the 1950s college football's popularity eclipsed that of its professional equivalent.[217]

214. *See, e.g.*, Ellen J. Staurowsky, *"A Radical Proposal": Tile IX Has No Role in College Sport Pay-for-Play Discussions*, 22 MARQ. SPORTS L. REV. 575, 575, 580–81, 592 (2012) (proposing that Title IX may not apply if athletic scholarships eventually represent a form of "pay-for-play"); David A. Grenardo, *The Duke Model: A Performance-Based Solution for Compensating College Athletes*, 83 BROOK. L. REV. 157, 163–64, 205–07, 209–11, 213–14 (2017) (offering that the NCAA structure morph to remove the prohibition on compensation for student-athletes by implementing the Duke Model); William W. Berry III, *Amending Amateurism: Saving Intercollegiate Athletics Through Conference-Athlete Revenue Sharing*, 68 ALA. L. REV. 551, 556–57, 575, 577 (2016) (suggesting the formation of conference-athlete unions that allow for negotiated compensation opportunities for student-athletes); Michael N. Widener, *Compensating Collegiate Athletes in "Store Credit"*, 47 U. MEM. L. REV. 431, 435, 454–55, 457 (2016) (recommending the implementation of a stipend program over and above tuition, room, board, books, and miscellaneous items given to student-athletes); Marc Edelman, *The Future of College Athlete Players Unions: Lessons Learned from* Northwestern University *and Potential Next Steps in the College Athletes' Rights Movement*, 38 CARDOZO L. REV. 1627, 1629, 1642–45, 1648–50, 1652–53 (2017) (proposing strategies that allow for unionization of student-athletes); Kevin Brown & Antonio Williams, *out of Bounds: A Critical Race Theory Perspective on 'Pay for Play'*, 29 J. LEGAL ASPECTS SPORT 30, 38, 73, 80, 83–85 (2019) (arguing that the current amateur/education model in college sports is racially exploitive); Daly, *supra* note 6, at 531, 536 (promoting that the NCAA drop the amateur model to allow for collective bargaining and licensing agreements for student-athletes).

215. Kisska-Schulze, *supra* note 11, at 349 (referencing the nineteenth century rowing rivalry between Ivy league institutions); *see also* Blair Shiff, *The History Behind America's Oldest Active Collegiate Sporting Event*, ABC NEWS (June 9, 2017, 4:00 AM), https://abcnews.go.com/Sports/history-americas-oldest-active-collegiate-sporting-event/story?id=47852376 [https://perma.cc/6ELS-WPHM].

216. Michael A. McCann, *Jump Ball: The Unsettled Law of Representing College Basketball Stars and Monetizing Their Names, Images and Likenesses*, 61 SANTA CLARA L. REV. 177, 186 (2020).

217. Daniel Laws, Comment, *Amateurism and the NCAA: How a Changing Market Has Turned Caps on Athletic Scholarships into an Antitrust Violation*, 51 U. RICH. L. REV. 1213, 1225 (2017) (noting that the NCAA's principal of amateurism drove "college sports' popularity"); *see also 1950s Sports: History, Facts, MVPs & Champions*, RETROWASTE, https://www.retrowaste.com/1950s/sports-in-the-1950s [https://perma.cc/HY74-AAW4] (noting the popularity of college sports as compared to professional sports in the 1950s).

Increased social interest in college sports was due in large part to the advent of televised sports broadcasting.[218] Twenty years after the NCAA threatened the University of Pennsylvania with expulsion following its 1951 refusal to comply with the Association's prohibition on televised college football games,[219] all major college sports teams were actively pursuing television and media rights, even amidst rigid controls.[220] It was not until 1984, that the U.S. Supreme Court found the NCAA's restrictive media policies an unreasonable restraint on trade, thus initiating the start of competitive free market amateur sports operations.[221]

Today, broadcast media serves as a significant revenue source for both the NCAA and its member institutions.[222] For example, in 2012, the Atlantic Coast Conference (ACC) and ESPN extended their original twelve-year, $3.6 billion contract, thus allowing $17 million in annual revenue per member school.[223] In 2021, the NCAA generated $850 million in yearly revenue from television broadcasts and licensing

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218. *See* Allen R. Sanderson & John J. Siegfried, *The Role of Broadcasting in National Collegiate Athletic Association Sports*, 52 REV. INDUS. ORG. 305, 309–12 (2018) (documenting the impact of television broadcast on college sports in the 1950s and beyond); *see also 1950s Sports: History, Facts, MVPs & Champions*, *supra* note 217 and accompanying text.

219. Sanderson & Siegfried, *supra* note 218, at 309.

220. Michael Weinreb, *The Age of the Giants: How College Football's Arms Race Took off in the 1970s*, ATHLETIC (June 17, 2019), https://theathletic.com/1026003/2019/06/17/college-football-1970s-power-major-schools-ncaa [https://perma.cc/KVG9-BNCM]. Despite this active pursuit of televising games, the NCAA maintained a strict "Television Plan," limiting televised broadcasts among member schools from 1952 until 1984. Sanderson & Siegfried, *supra* note 218, at 309.

221. *See* Nat'l Collegiate Athletic Ass'n v. Bd. of Regents of the Univ. of Okla., 468 U.S. 85, 104–08, 110, 112–13, 120 (1984); *see also* Thomas Scully, Note, NCAA v. Board of Regents of the University of Oklahoma*: The NCAA's Television Plan Is Sacked by the Sherman Act*, 34 CATH. U. L. REV. 857, 858–59 (1985).

222. *See NCAA Television and Licensing Rights Revenue 2011–2025*, STATISTA (Mar. 1, 2021) [hereinafter *Revenue of the NCAA*], https://www.statista.com/statistics/219608/ncaa-revenue-from-television-rights-agreement (illustrating that the NCAA's revenue from broadcasting has continually increased since 2012); *see also* CHRIS MURPHY, MADNESS, INC.: HOW EVERYONE IS GETTING RICH OFF COLLEGE SPORTS—EXCEPT THE PLAYERS 4, 11, https://www.murphy.senate.gov/imo/media/doc/NCAA%20Report_FINAL.pdf [https://perma.cc/K9YQ-4K4F] (noting that college sports' revenue has tripled since 2003).

223. Mark Giannotto, *ACC, ESPN Agree to 15-Year Extension*, WASH. POST (May 9, 2012), https://www.washingtonpost.com/blogs/hokies-journal/post/acc-espn-agree-to-15-year-extension/2012/05/09/gIQAoRkdDU_blog.html [https://perma.cc/T6EN-VKY8].

rights.[224] Effective 2024, ESPN/ABC entered into a ten year, $300 million annual televised broadcasting contract with the Southeastern Conference (SEC).[225] Combined with ticket sales, branding, and internet broadcasting rights, such resources have fueled college sports growth, particularly among a select group of elite programs that enjoy annual revenues in excess of $100 million.[226]

College sports equate to big money, and big money leads to changes that appreciably impact the entire college sports landscape. Coaching salaries have soared, ushering in the so-called "arms race."[227] Millions are spent on extravagant new athletic facilities to entice top recruits.[228] Billionaire donors and ardent supporters pour serious money into successful college sports programs.[229] Student-athletes have filed numerous lawsuits in an effort to bridge the gap between amateur and professional sports, seeking employment-type protections under the

224. *See Revenue of the NCAA*, *supra* note 222; *see also* Mike Ozanian, *Here's the College Football TV Money at Stake for Each Conference and Network*, FORBES (June 8, 2020, 6:07 PM), https://www.forbes.com/sites/mikeozanian/2020/06/08/heres-the-college-football-tv-money-at-stake-for-each-conference-and-network/?sh=1324919c7dc9 [https://perma.cc/S4FY-5NK7].

225. Paul Myerberg, *Analysis: New ESPN/ABC TV Deal Will Give SEC Even More Resources to Dominate College Sports*, USA TODAY (Dec. 10, 2020, 7:38 PM), https://www.usatoday.com/story/sports/ncaaf/sec/2020/12/10/sec-contract-abc-espn-gives-league-more-resources-dominate/3884360001 [https://perma.cc/7497-RKQY].

226. *See* Kisska-Schulze, *supra* note 11, at 351; Brad Crawford, *Ranking College Sports' Highest Revenue Producers*, 247SPORTS (July 17, 2020), https://247sports.com/LongFormArticle/College-football-revenue-producers-USA-Today-Texas-Longhorns-Ohio-State-Buckeyes-Alabama-Crimson-Tide-149248012/#149248012_1 [https://perma.cc/4QFC-BEKT]. *But see* Kisska-Schulze & Holden, *supra* note 26, at 488–89 (offering that while the commercialization of colleges sports continues to increase, only a "small fraction" of programs actually make money).

227. Kisska-Schulze & Epstein, *supra* note 46, at 468.

228. Dave Wilson, *Massachusetts at the Forefront: How to Protect the Most Vulnerable Group in a Post-Legal Sports Betting World—NCAA Student-Athletes*, 15 U. MASS. L. REV. 124, 148 (2020).

229. Jack Pitcher, *College Football Looks to Mega-Donors to Help Bail out Athletics*, BLOOMBERG (Aug. 17, 2020, 12:31 PM), https://www.bloomberg.com/news/articles/2020-08-17/college-football-looks-to-mega-donors-to-help-bail-out-athletics [https://perma.cc/P5XC-BP72]; *see also* David A. Grenardo, *The Continued Exploitation of the College Athlete: Confessions of a Former College Athlete Turned Law Professor*, 95 OR. L. REV. 223, 238 (2016).

auspices of workers' compensation,[230] the Fair Labor Standards Act,[231] unionization and collective bargaining agreements,[232] and equitable pay-for-play models.[233] In 2018, the U.S. Supreme Court opened the door for all fifty states and the District of Columbia to legalize sports betting, to include wagers made on college athletic events.[234] Following California's recent passage of the Fair Pay to Play Act[235] (FPTPA), allowing student-athletes to capitalize on the commercialized use of their NIL, the majority of states have either introduced or passed similar laws.[236] Both the Supreme Court and Congress have become deeply involved in assessing the legality of restrictions on student-

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230. *See, e.g.*, Univ. of Denver v. Nemeth, 257 P.2d 423, 429–30 (Colo. 1953) (en banc) (holding that a college football player, who was also employed by the university, qualified for workers' compensation following an injury sustained during practice); State Comp. Ins. Fund v. Indus. Accident Comm'n of Colo., 314 P.2d 288, 290 (Colo. 1957) (en banc) (denying workers' compensation benefits to the widow of a college football player who died following an injury incurred during a football game); Coleman v. W. Mich. Univ., 336 N.W.2d 224, 225, 228 (Mich. Ct. App. 1983) (per curiam) (holding no employment contract existed between a university and student-athlete that would elevate to a level of workers' compensation eligibility).

231. 29 U.S.C. § 203 (1938); *see, e.g.*, Berger v. Nat'l Collegiate Athletic Ass'n, 162 F. Supp. 3d 845, 856–57 (S.D. Ind. 2016) (holding that NCAA student-athletes are not employees for Fair Labor Standards Act purposes), *aff'd*, 843 F.3d 285 (7th Cir. 2016).

232. *See, e.g.*, Nw. Univ. and Coll. Athletes Players Ass'n, No. 13-RC-121359, 2014 WL 1246914 (N.L.R.B. Mar. 26, 2014), review dismissed by Nw. Univ. & Coll. Athletes Players Ass'n (CAPA), 362 NLRB 1350, 1350, 1352 (Aug. 17, 2015) (declining to assert jurisdiction that would allow consideration of Northwestern University football players' efforts to unionize and bargain collectively).

233. *See, e.g.*, Waldrep v. Tex. Emps. Ins. Ass'n, 21 S.W.3d 692, 699, 702 (Tex. App. 2000) (finding no indication of an employer-employee relationship between Texas Christian University and its football player, Kent Waldrep); Rensing v. Ind. State Univ. Bd. of Trs., 444 N.E.2d 1170, 1173–74 (Ind. 1983) (holding that no employment relationship existed between a university and its football player); O'Bannon v. Nat'l Collegiate Athletic Ass'n, 802 F.3d 1049, 1079 (9th Cir. 2015) (finding that the NCAA's compensation rules surrounding Division I men's basketball and football players violate federal antitrust laws); *In re* Nat'l Collegiate Athletic Ass'n Athletic Grant-in-Aid Cap Antitrust Litig., 375 F. Supp. 3d 1058, 1062 (N.D. Cal. 2019), *aff'd*, 958 F.3d 1239 (9th Cir. 2020), *cert. granted*, NCAA v. Alston, 141 S. Ct. 123 (2020) (examining whether the NCAA eligibility rules pertaining to student-athlete compensation violate federal antitrust law), *cert. granted*, Am. Athletic Conf. v. Alston, 141 S. Ct. 972 (2020), *aff'd by* NCCA v. Alston, 141 S. Ct. 972 (2021).

234. *See* Murphy v. Nat'l Collegiate Athletic Ass'n, 138 S. Ct. 1461 (2018).

235. CAL. EDUC. CODE § 67456 (West 2021).

236. *See id.*; *see also* Kisska-Schulze & Epstein, *supra* note 46, at 471–76.

athletes' payment limits,[237] and the implementation of a national standard for student-athlete compensation.[238]

These important changes have prompted federal and state legislatures, and academic scholars, to assess the tax implications surrounding college sports.[239] Although historically protected by rather amiable tax treatment as discussed in Section I.B, more recently college sports have become the target of pointed tax measures.[240] In particular, the TCJA both directly and indirectly impacts the collegiate sports arena, indicating that Congress intends to narrow the tax-paying field between amateur and professional sports.[241] Still, such legislative action creates tension, particularly given the increased scrutiny over the NCAA's stance that college sports remain vital to the educational mission of their institutions, and are therefore not professional organizations.[242] To better evaluate the greater college sports tax landscape, Section A examines the TCJA's impact on college sports.

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237. *See Alston*, 141 S. Ct. at 972 (granting certiorari).

238. *See* Rebecca Shabad & Kyle Stewart, *Senators Agree on Need for a National Standard for College Athlete Compensation*, NBC NEWS (June 9, 2021, 2:32 PM), https://www.nbcnews.com/politics/congress/senators-agree-need-national-standard-college-athlete-compensation-n1270208 [https://perma.cc/NW2P-A9TA].

239. *See, e.g.*, Kisska-Schulze, *supra* note 11 (examining the tax implication for college athletics following the implementation of the TCJA); Kisska-Schulze & Epstein, *supra* note 46, at 461–62 (opining on the federal and state tax issue that could arise following California's passage of the Fair Pay to Play Act); Kisska-Schulze & Epstein, *supra* note 67, at 233 (examining the tax ambiguities surrounding student-athlete disability payouts when colleges or universities cover the cost of their insurance policies); Schmalbeck & Zelenak, *supra* note 49, at 1088–89 (proposing that the IRS consider following Congressional suit, and reassess the amicable tax treatment it has historically granted across the entire college sports arena); Kisska-Schulze & Epstein, *supra* note 22, at 16–17 (offering an in-depth exploration of the state tax consequences that could arise under a pay-for-play model); Marc Edelman, *From Student-Athletes to Employee-Athletes: Why a "Pay for Play" Model of College Sports Would Not Necessarily Make Educational Scholarships Taxable*, 58 B.C. L. REV. 1138, 1140 (2017) (suggesting tax planning options that may diminish the tax impact of student-athletes' grants-in-aid).

240. Kisska-Schulze, *supra* note 11, at 355.

241. *See* Tax Cuts and Jobs Act of 2017, Pub. L. No. 115–97, § 13704, 131 Stat. 2054, 2169 (codified at 26 U.S.C. § 170(l)) (repealing donors' ability to receive seating rights for donations and removing the deduction under the section).

242. Michael M. O'Hear, *Should College Sports Revenue Be Taxed?*, MARQ. U. L. SCH. FAC. BLOG (Apr. 25, 2010), https://law.marquette.edu/facultyblog/2010/04/should-college-sports-revenue-be-taxed [https://perma.cc/S8D5-D4PF]; *see also* Michael H. LeRoy, *Courts and the Future of "Athletic Labor" in College Sports*, 57 ARIZ. L. REV. 475, 497–98 (2015) (noting the NCAA's amateurism stance on the relationship between college sports and institutions' educational missions).

Section B addresses the potential tax consequences of student-athletes' capitalizing on their NIL.

A. The TCJA's Impact on College Sports

Similar to the professional sports arena, the TCJA also impacts the collegiate sports arena.[243] As introduced below, select provisions of the new law that threaten college sports' viability include (1) the elimination of the 80/20 rule on athletic seating rights, (2) the 21% excise tax on executive compensation, (3) the 1.4% excise tax imposed on private institution endowments, and (4) the impact of the increased standard deduction on charitable giving.

1. Eliminating 80/20

Perceived as a direct hit to college sports, the TCJA repealed the previously introduced 80% tax deduction on athletic booster contributions made in exchange for athletic ticket or seating rights at college athletic events.[244] Beginning in 1986, most major universities heavily relied on the 80/20 rule as a significant revenue boost for athletic program budgets.[245] Eliminating this deductibility allowance resulted in universities and booster clubs quickly recommending that donors make multi-year contributions before the close of 2017, to help moderate short-term budget shortfalls.[246] In conjunction, the TCJA eliminated the 50% deduction previously allowed for corporate business entertainment expenses, including the purchase price of tickets and stadium suites to sporting events.[247] Following the COVID-19 pandemic, some anticipate that corporate stadium seat renewals will deplete even further due to the pandemic's economic impact, thus resulting in additional revenue losses at the collegiate athletic level.[248]

243. Kisska-Schulze, *supra* note 11, at 347.

244. *See* Tax Cuts and Jobs Act of 2017, Pub. L. No. 115-97, § 13704, 131 Stat. 2054, 2169 (codified at 26 U.S.C. § 170(l)); I.R.C. § 170(b)(l)(A)(ii), (l); *see also supra* Section II.B.4.

245. *Forget the Playoffs, College Football's All About New Tax Laws and Tickets*, SOBUL, PRIMES & SCHENKEL (Dec. 1, 2018), https://www.spscpa.com/blog/forget-the-playoffs-college-footballs-all-about-new-tax-laws-and-tickets [https://perma.cc/E35H-MX9B].

246. Kisska-Schulze & Holden, *supra* note 26, at 492.

247. Tax Cuts and Jobs Act § 13304, 131 Stat. at 2124 (codified at 26 U.S.C. § 274(a)).

248. Alex Silverman, *Ticket Sales Pros Say They'd Welcome Back Tax Incentive, but It's Not a Game Changer*, MORNING CONSULT (Apr. 13, 2020, 4:25 PM), https://morningconsult.com/2020/04/13/ticket-sales-tax-deduction-coronavirus [https://perma.cc/WK76-5J7B].

2. Taxing executive compensation

Also impacting the college sports arena, the TCJA levied a 21% excise tax on the five highest paid employees at tax-exempt organizations, which include entities fostering "national or international amateur sports competition," whose compensation exceeds $1 million annually, or is considered an excess parachute payment.[249] The continued arms race in coaching salaries has been dubbed "unsustainable," yet remains among elite institutions belonging to the NCAA's Football Bowl Subdivision (FBS).[250] Currently, the average head college football coach earns $2.7 million annually.[251] University of Alabama head coach Nick Saban sits towards the top with a $9.75 million-per-year contract.[252] Across forty U.S. states, NCAA head coaches are the highest paid state employees.[253]

In December 2018, the IRS issued interim guidance on this provision, stipulating that the tax would not apply to college and university coaching salaries if their institutions proactively abandoned tax-exempt status, yet the guidance retained implied sovereign immunity as state instrumentalities.[254] In 2021, the Treasury finalized the I.R.C. § 4960 regulations concerning excess compensation.[255] Pursuant to these regulations, colleges and universities falling within the purview of I.R.C. § 501(a)—which most do[256]—could still be

249. *See* § 13602, 131 Stat. at 2157 (adding 26 U.S.C. § 4960(a)(1)); *see also* Tax Reform Act of 1976, Pub. L. No. 94-455, § 1313(a), 90 Stat. 1520, 1730 (codified as amended at I.R.C. § 501(c)(3)).

250. Tom McMillen & Brit Kirwan, Opinion, *Op-Ed: The 'Arms Race' in College Sports Is out of Control. Here's How to Stop It*, L.A. TIMES (Apr. 11, 2021, 3:05 AM), https://www.latimes.com/opinion/story/2021-04-11/ncaa-alston-professionalization-coaches-salaries [https://perma.cc/DL8B-V95M].

251. *Id.*

252. *College Football Head Coach Salaries*, USA TODAY (Oct. 14, 2021, 10:09 AM), https://sports.usatoday.com/ncaa/salaries.

253. McMillen & Kirwan, *supra* note 250.

254. Kisska-Schulze & Holden, *supra* note 26, at 494; *see also* I.R.S. Notice 2019-09, 2019-04 I.R.B. 403.

255. *See* I.R.C. § 4960; TD 9938 (2021); *see also* Seth J. Safra et al., *Final Regulations on Executive Compensation Excise Tax (Section 4960) Carries Forward Most Concepts from Proposal*, NAT'L L. REV. (Feb. 2, 2021), https://www.natlawreview.com/article/final-regulations-executive-compensation-excise-tax-section-4960-carries-forward [https://perma.cc/2AFB-H73Z] (noting that "covered employees" are identified as the five highest paid employees of the applicable tax-exempt organization).

256. Non-profit universities, and their affiliated athletic departments, generally fall within the purview of I.R.C. § 501(c), which grants non-profit status to those entities

subject to the excise tax. However, the embedded loophole remains, allowing public institutions to claim tax-exempt status as a state unit in lieu of a section 501 organization, thus relieving them from the 21% tax imposition.[257] Such relief, however, is not so readily available to private institutions.[258]

3. Taxing private endowments

Private institutions took an additional strike with the imposition of a 1.4% excise tax on net investment income at institutions with 500 or more students enrolled and with endowments worth at least $500,000 per student.[259] Prior to the TCJA's implementation of such tax, most private non-profit colleges and universities enjoyed tax-exempt status under the umbrella of I.R.C. § 501(c)(3).[260] In fall 2020, the IRS issued final regulations to clarify the I.R.C. § 4968 excise tax, ultimately subjecting numerous private institutions to the so-called "Harvard tax" on income derived from their controlled and supporting organizations.[261] Though not a direct impact on college athletic programs, Ivy League sports could be indirectly impacted by their institutions' revenue losses.[262]

4. Disincentivizing charitable giving

One of the TCJA provisions that could negatively impact college athletics is the effect of the increased standard deduction on charitable

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operating exclusively for (among other things) educational purposes. *See* I.R.C. § 501(c)(3).

257. Laura Davison & Samuel McQuillan, *Colleges Paying Top Dollar for Coaches Will Pay Extra to IRS*, BLOOMBERG (Jan. 11, 2021, 5:53 PM), https://www.bloomberg.com/news/articles/2021-01-11/colleges-paying-top-dollar-for-coaches-will-pay-extra-to-irs [https://perma.cc/UM4S-9ZKB].

258. *Id.*

259. Tax Cuts and Jobs Act of 2017, § 13701, 131 Stat. 2054, 2167 (codified at 26 U.S.C. § 4968).

260. *See Briefing Book: Key Elements of the U.S. Tax System—What is the Tax Treatment of College and University Endowments?*, TAX POL'Y CTR., https://www.taxpolicycenter.org/briefing-book/what-tax-treatment-college-and-university-endowments [https://perma.cc/32TJ-4NSA].

261. *See IRS Issues Final Regulations for Determining IRC Section 4968 Excise Tax on Net Investment Income of Private Colleges and Universities*, ERNST & YOUNG (Sept. 25, 2020), https://taxnews.ey.com/news/2020-2322-irs-issues-final-regulations-for-determining-irc-section-4968-excise-tax-on-net-investment-income-of-private-colleges-and-universities [https://perma.cc/9879-RMG7]; Kisska-Schulze & Holden, *supra* note 26, at 495.

262. Kisska-Schulze & Holden, *supra* note 26, at 495.

giving.[263] The TCJA almost doubled previous standard deduction amounts for individuals, resulting in millions of taxpayers electing the standard deduction over itemization.[264] Significant concerns emerged regarding taxpayers' resistance to philanthropic gifting without the hanging carrot of tax deductibility,[265] particularly given that thirty million U.S. households lost this charitable benefit.[266]

Data supports that taxpayers itemized $54 billion less in charitable contributions in 2019;[267] however, one year later, charitable giving actually rose 2%.[268] Fiscal year 2019 reports indicate record high donations to colleges and universities, though such amounts were skewed given Michael Bloomberg's one-time, $1.8 billion gift to Johns Hopkins University during that period.[269] More than 40% of higher education institutions anticipated a 10% or more decrease in fundraising for fiscal year 2020, with fiscal year 2021 expected to result in more pronounced deterioration with regard to gifted revenue.[270]

Reduced gifting at the college and university levels could result in a trickle-down effect to their affiliated sports programs.[271] Combined with unexpected COVID-19 revenue losses, over 300 college sports

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263. § 11021(a), 131 Stat. at 2072 (codified at 26 U.S.C. § 63(c)(7)(A)(ii)).

264. Kisska-Schulze, *supra* note 11, at 369–70 (noting that section 11021 of the TCJA now provides standard deductions in the amounts of $12,000 for individuals, $18,000 for heads of households, and $24,000 for married filing jointly through tax year 2025).

265. Eric S. Smith, *Exploiting the Charitable Contribution Deduction's Hypersalience*, 2020 UTAH L. REV. 419, 421–22 (2020).

266. Darla Mercado, *About 30 Million People Lost These Tax Breaks when They Filed Last Year*, CNBC (Apr. 9, 2020, 1:37 PM), https://www.cnbc.com/2020/04/09/about-30-million-people-lost-these-tax-breaks-in-2018.html [https://perma.cc/HH48-VSK4].

267. Leslie Albrecht, *Americans Slashed Their Charitable Deductions by $54 Billion After Republican Tax-Code Overhaul*, MARKETWATCH (July 11, 2019, 8:52 AM), https://www.marketwatch.com/story/americans-slashed-their-charitable-deductions-by-54-billion-after-trumps-tax-overhaul-2019-07-09 [https://perma.cc/9E7J-HWX4].

268. Leslie Albrecht, *Charitable Giving Rose in 2020, Despite Financial Turmoil from COVID-19—Why Did Americans Show Such Generosity?*, MARKETWATCH (Feb. 22, 2021, 8:00 AM), https://www.marketwatch.com/story/charitable-giving-rose-in-2020-despite-financial-turmoil-from-covid-19-why-did-americans-show-such-generosity-11613662427 [https://perma.cc/8RKP-YRCE].

269. Madeline St. Amour, *Giving Growth Slows*, INSIDE HIGHER ED (Feb. 6, 2020), https://www.insidehighered.com/news/2020/02/06/college-and-university-fundraising-rises-growth-slows-down [https://perma.cc/22V5-6J2K].

270. Emma Whitford, *Survey Warns of 'Dramatic Decline' in Fundraising*, INSIDE HIGHER ED (June 8, 2020), https://www.insidehighered.com/news/2020/06/08/survey-forecasts-%E2%80%98dramatic-decline%E2%80%99-fundraising-pandemic [https://perma.cc/9WDV-63PY].

271. *Id.*

teams were eliminated in 2020 across all three NCAA Divisions (I, II, and III), and the National Association of Intercollegiate Athletics (NAIA).[272] Absent increased funding measures, the future of collegiate athletics at some institutions remains uncertain.

B. Taxing NIL Income

A monumental revolution in collegiate sports came to fruition on September 30, 2019, when California Governor Gavin Newsom signed into law the FPTPA (also referred to as Senate Bill 206 (S. 206)).[273] The NCAA quickly attacked the action, threatening to ban California from membership; however, the Association changed course to later support student-athlete NIL revenue earnings so long as such funds are derived within the stricture of the amateur "collegiate model."[274] Since its passage, most states have introduced similar legislation.[275] To date, nineteen jurisdictions have signed some form of NIL legislation into law.[276]

Less than two years after S. 206's signing, on June 21, 2021, the U.S. Supreme Court unanimously held that the NCAA cannot limit educational benefits, such as computers, paid internships, study-abroad programs, and graduate scholarships offered to student-athletes by colleges and universities.[277] The Court deemed any limits imposed on education-related benefits to student-athletes as violative of antitrust laws.[278] While on its merits this decision has no direct effect

272. Molly Ott & Janet Lawrence, *Colleges Are Eliminating Sports Teams—and Runners and Golfers Are Paying More of a Price than Football or Basketball Players*, CONVERSATION (Mar. 3, 2021, 8:26 AM), https://theconversation.com/colleges-are-eliminating-sports-teams-and-runners-and-golfers-are-paying-more-of-a-price-than-football-or-basketball-players-148965 [https://perma.cc/Y63N-MNDQ].

273. *See* Fair Pay to Play Act, CAL. EDUC. CODE § 67456 (West 2021).

274. Kisska-Schulze & Epstein, *supra* note 46, at 458, 473; *see also Board of Governors Starts Process to Enhance Name, Image and Likeness Opportunities*, NCAA (Oct. 29, 2019), http://www.ncaa.org/about/resources/media-center/news/board-governors-starts-process-enhance-name-image-and-likeness-opportunities [https://perma.cc/V486-CKDA].

275. Kisska-Schulze & Epstein, *supra* note 46, at 473–76.

276. *Tracker: Name, Image and Likeness Legislation by State*, BUS. COLL. SPORTS (Sept. 21, 2021), https://businessofcollegesports.com/tracker-name-image-and-likeness-legislation-by-state [https://perma.cc/2YPK-9VPF]. States that have thus far passed NIL legislation are: Alabama, Arizona, Arkansas, California, Colorado, Florida, Georgia, Illinois, Louisiana, Maryland, Michigan, Mississippi, Missouri, Montana, Nebraska, Nevada, New Jersey, New Mexico, Oklahoma, Oregon, South Carolina, Tennessee, and Texas. *Id.*

277. *See* Nat'l Collegiate Athletic Ass'n v. Alston, 141 S. Ct. 2141, 2164–65 (2021).

278. *Id.*

on NIL licensing, it provides a modicum of protection to institutions and student-athletes from any bar(s) that the NCAA may attempt to enforce with regard to NIL rights.[279]

Once student-athletes start capitalizing on the commercialized use of their NIL, federal and state tax issues will surface. Paying taxes raise unique issues for student-athletes, particularly given the agreeable tax treatment the IRS has historically showered on them due to their amateur status.[280] From a federal income tax perspective, student-athletes capitalizing on the use of their NIL will have to include in their gross income all monetary earnings, as well as the fair market value of any nonmonetary items provided by third parties.[281] Specifically, earnings that must be included in a paid student-athletes' gross income could include endorsement contract royalties,[282] constructively received income,[283] income earned and held by an agent for their benefit,[284] pre-paid income,[285] and fringe benefits.[286]

Any income earned should qualify for some form of tax deduction (whether it be the standard deduction, or through itemization). Since only about 10% of American taxpayers continue to itemize post-TCJA,[287] it is reasonable to assume that most student-athletes will claim the standard deduction as well.[288] However, those who might

279. Marc Edelman, *What Happens Now that the Supreme Court Has Decided* Alston v. NCAA*?*, FORBES (June 22, 2021), https://www.forbes.com/sites/marcedelman/2021/06/22/what-happens-now-that-the-supreme-court-has-decided-alston-v-ncaa/?sh=475a45573937 (noting that the NCAA bans on universities that allow their student-athletes to capitalize on the use of their NIL would likely violate antitrust law).

280. *See supra* Section I.B.3.

281. *See* I.R.C. § 61; *see also* Kisska-Schulze & Epstein, *supra* note 46, at 481–82.

282. *See* Kisska-Schulze & Epstein, *supra* note 46, at 483–84 (noting that royalty payments could derive from a corporate sponsor's use of a student-athlete's NIL in their advertising).

283. *Id.* at 484 (meaning taxpayers have control over their earnings, even if not yet in their actual physical possession).

284. This situation is referred to as the "assignment of income doctrine," whereby income is taxed by those who earn it, regardless of when it is actually transferred over to them from an agent. *See* Comm'r v. Banks, 543 U.S. 426, 437 (2005).

285. *See* I.R.C. § 451(a).

286. *See id.* § 61(a)(1). Fringe benefits refer to compensation beyond the scope of cash earnings, to include items such as personal use of a corporate vehicle, subsidized meals, entertainment tickets, and health insurance.

287. *See Briefing Book: Key Elements of the U.S. Tax System*, TAX POL'Y CTR., https://www.taxpolicycenter.org/briefing-book/what-standard-deduction [https://perma.cc/3GHU-QS6Y].

288. *See* Kisska-Schulze & Epstein, *supra* note 46, at 487–93.

financially benefit from itemizing will have to keep detailed records of their business expenses.[289]

Due to the nature of current NIL legislation (which does not transform student-athletes into employees of their institutions per se, but instead allows them to entertain endorsement deals and/or receive financial benefits from outside third parties), student-athletes will be deemed self-employed taxpayers.[290] As such, most (if not all) student-athletes will be required to file an annual individual income tax return, and likely be subject to quarterly payment obligations.[291] Further, as self-employed taxpayers, student-athletes will have to pay the entire 15.3% self-employment tax on the first $142,800 of net earnings (which would otherwise be split between employer and employee as a payroll tax).[292] However, they can deduct 50% of this tax regardless of whether they choose to itemize or claim the standard deduction.[293]

From a state tax perspective, student-athletes earning NIL income will have to comply with various jurisdictional directives above and beyond their federal income tax obligations. The vast majority of states impose some form of income tax;[294] however, each levies the tax differently and at varying rates.[295] Likewise, state tax residency and nexus requirements differ across jurisdictions,[296] thus requiring that

289. *Id.* at 490–91.

290. Kisska-Schulze & Epstein, *supra* note 46, at 482; *see also Board of Governors Starts Process to Enhance Name, Image and Likeness Opportunities*, *supra* note 274 (reaffirming "that student-athletes are students first and not employees of the university").

291. *See* I.R.C. § 6017; *see also Self-Employed Individuals Tax Center*, IRS, https://www.irs.gov/businesses/small-businesses-self-employed/self-employed-individuals-tax-center [https://perma.cc/QG8B-G5VM] (stating that self-employed taxpayers who earn $400 or more during the tax year are required to file an individual income tax return).

292. *See* I.R.C. § 1401(a)–(b); *see also Self-Employment Tax (Social Security and Medicare Taxes)*, IRS, https://www.irs.gov/businesses/small-businesses-self-employed/self-employment-tax-social-security-and-medicare-taxes [https://perma.cc/F9QM-L48A] (stating the $142,800 wage base represents the 2021 base amount).

293. *See* I.R.C. § 1401(a)–(b).

294. States that do not impose an income tax include: Alaska, Florida, Nevada, South Dakota, Texas, Washington, and Wyoming. Tennessee and New Hampshire impose an income tax only on income from dividends and interest. Kisska-Schulze & Epstein, *supra* note 46, at 495.

295. *Id.* at 495–96.

296. *See* South Dakota v. Wayfair, Inc., 138 S. Ct. 2080, 2091 (2018). Prior to a tax being legitimately imposed by any jurisdiction under the purview of the Due Process and Commerce Clauses of the U.S. Constitution, there must exist sufficient nexus between the taxpayer and taxing jurisdiction. "Nexus" refers to a taxpayer's business having some minimum connection, or taxable presence, in a given jurisdiction, even if the taxpayer is not an actual resident of that jurisdiction. *Id.*

paid student-athletes manage potential dual-residency concerns, as well as multiple states asserting jurisdictional nexus over the same earned income.[297] In addition, many states require that self-employed taxpayers file quarterly estimated payments (akin to the federal requirements), resulting in student-athletes having to keep detailed records of the amount and location of their earnings.[298]

As transformations continue within college sports, so too does the evolution of the entire U.S. sports arena. The business of sports no longer encompasses mere traditional athletic events. In the current economic dominion of information technology, sports have expanded to include legalized gambling, DFS, and esports. As Part IV details, taxes play a visible role amidst this ever-expanding enterprise.

IV. TAXING THE EVOLVING U.S. SPORTS INDUSTRY

Once upon a time, the term "sport" was employed to showcase human physical activity.[299] Words that accentuated historic sports dialogues included the likes of *agility*, *speed*, *strength*, *endurance*, and *flexibility*.[300] If a certain activity was not broadcasted on ESPN, some questioned whether it was an actual sport at all.[301] In contrast, if an activity was aired on ESPN—like the World Series of Poker—others argued that it simply must qualify as sport.[302]

The world of sport is not static, but instead, continuously evolving. In this fourth industrial revolution, where artificial intelligence, robotics, and the internet reign prominent, the traditional boundaries of sport have blurred the physical, digital, and biological realms.[303]

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297. Kisska-Schulze & Epstein, *supra* note 46, at 496–98. Multi-state apportionment rules would come into play in those circumstances where earned income is subject to tax in multiple jurisdictions.

298. *Id.* at 498.

299. *See Sport*, MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY (11th ed. 2007) (defining *sport* as "physical activity engaged in for pleasure").

300. *See, e.g.*, Jonathan Wasserman, *2022 NBA Draft Class Rankings: The Top 5 Prospects at Every Position*, BLEACHER REPORT (Oct. 1, 2021), https://bleacherreport.com/articles/2948858-who-are-the-top-5-prospects-at-every-position-in-2022-nba-draft [https://perma.cc/CE82-U6HH].

301. Nathan Deen, *There's No Clear-cut Answer as to What Defines a Sport*, BRUNSWICK NEWS (June 4, 2014), https://thebrunswicknews.com/sports/local_sports/theres-no-clear-cut-answer-as-to-what-defines-a-sport/article_e7d2b1d1-fc6a-535d-a7ec-0c6de43a7065.html.

302. *Id.*

303. *See* Julien Chaisse & Cristen Bauer, *Cybersecurity and the Protection of Digital Assets: Assessing the Role of International Investment Law and Arbitration*, 21 VAND. J. ENT. & TECH.

DFS, which involves fantasy contests where players create virtual teams composed of real-life professional athletes from different sports to compete against other players in cash-prize tournaments, has propelled sports into a fresh and innovative cyber dimension.[304] The newly legalized sports gambling industry enables persons across the nation to lawfully place wagers on a multitude of sports-related predictions.[305] Esports, or competitive video gaming, has transcended the boundaries of what some might otherwise claim as true "sport."[306]

No matter the noise surrounding the definition of "sport," a particular activity's nomenclature, or the industry's blurring identity lines, one constant remains—sports make money. Esports revenue is projected to hit $1.5 billion by 2023.[307] The U.S. DFS industry generated $2.9 billion in 2018 revenue.[308] In August 2020 alone, Americans wagered a record $2.1 billion in legalized sports betting.[309] Such numbers incite tax implications. To better evaluate this evolving landscape, Section A examines the tax issues surrounding legalized sports gambling. Section B addresses the tax implications of DFS. Section C introduces esports taxation.

L. 549, 555 n.30 (2019) (explaining that sports are not immune from the widespread and transformative nature of the fourth industrial revolution).

304. *See* Zachary Shapiro, Note, *Regulation, Prohibition, and Fantasy: The Case of FanDuel, DraftKings, and Daily Fantasy Sports in New York and Massachusetts*, 7 HARV. J. SPORTS & ENT. L. 277, 278 (2016).

305. *See generally* Jim Sergent, *Six Charts Show Sports Betting's Digital Explosion with NFL Season About to Kick off*, USA TODAY (Sept. 12, 2021, 7:36 AM), https://www.usatoday.com/in-depth/graphics/2021/09/09/online-sports-gambling-good-bet-industry-continue-winning-ways/5686836001 [https://perma.cc/E6JM-MVZN] (illustrating that nearly half of U.S. States have fully implemented sports-betting legislation with more on the way, and identifying the current NFL season as a major contributor to the general rise in interest in online sports betting).

306. John T. Holden et al., *The Future Is Now: Esports Policy Considerations and Potential Litigation*, 27 J. LEGAL ASPECTS SPORT 46, 47 (2017) (examining whether esports are a sport).

307. Mariel Soto Reyes, *Esports Ecosystem Report 2021: The Key Industry Companies and Trends Growing the Esports Market Which Is on Track to Surpass $1.5B by 2023*, BUS. INSIDER (Jan. 5, 2021, 3:24 PM), https://www.businessinsider.com/esports-ecosystem-market-report?op=1 [https://perma.cc/72Y5-LUVK].

308. *North American Fantasy Sports Market—Growth, Trends, COVID-19 Impact, and Forecasts (2021–2026)*, MORDOR INTEL., https://www.mordorintelligence.com/industry-reports/north-america-fantasy-sports-market [https://perma.cc/D3SE-T6RQ].

309. Ryan Butler, *U.S. Sports Betting Handle Hits Record as Casinos Bounce Back Slowly*, ACTION NETWORK (Sept. 23, 2021, 2:06 PM), https://www.actionnetwork.com/legal-online-sports-betting/us-sportsbooks-betting-news-record-handle-revenue-total-august-2020 [https://perma.cc/4VBQ-33ZR].

A. *Taxing Legalized Sports Gambling*

For decades, state governments have pursued revenue opportunities outside the strictures of income and property taxes.[310] Following the U.S. Supreme Court's 2018 decision in *Murphy v. National Collegiate Athletic Ass'n*,[311] which ended a near-quarter century freeze on states' ability to authorize new sports gambling schemes, the majority of jurisdictions perceive gambling taxes as a means to solve fiscal problems.[312] In fact, thirty-one states have legalized sports gambling, with many citing increased tax revenue as a principal motivator.[313]

Gambling has long been used as a source of funding for both public and private endeavors dating back to pre-colonial times.[314] Social approval of U.S. gambling operations has experienced ebbs and flows over the last two centuries.[315] However, since the reauthorization of the first state lottery in New Hampshire in 1964, the United States has witnessed an ongoing expansion in wagering opportunities.[316] A

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310. *See* Kisska-Schulze & Holden, *supra* note 26, at 480 (discussing the Great Recession's impact on federal government funding for state and local governments).

311. 138 S. Ct. 1461 (2018).

312. *See* Charles Norton, *Why States Are Betting on Sports Gambling to Cover Budget Deficits*, FORBES (July 1, 2020, 8:52 AM), https://www.forbes.com/sites/charlesnorton/2020/07/01/why-states-are-betting-on-sports-gambling-to-cover-budget-deficits/?sh=35c4558f5255 ("Higher state budget deficits could serve as a potential catalyst for faster regulatory approval of sports betting, and its cousin, mobile casino gambling."); *see also* Jonathan D. Cohen, *Sports Gambling Could Be the Pandemic's Biggest Winner*, WASH. POST (Feb. 5, 2021, 6:00 AM), https://www.washingtonpost.com/outlook/2021/02/05/sports-gambling-could-be-pandemics-biggest-winner [https://perma.cc/2FFW-8ELL] ("Gambling is not a panacea, and, as history reveals, it never has been. The profits are small relative to states' overall income.").

313. *See, e.g.*, Will Yakowicz, *Mobile Sports Betting to Bring New York 100% More in Tax Revenue Than Cannabis*, FORBES (May 6, 2021, 9:56 AM), https://www.forbes.com/sites/willyakowicz/2021/05/06/mobile-sports-betting-to-bring-new-york-state-100-more-in-tax-revenue-than-cannabis/?sh=1bac670140f9 (noting that New York views sin taxes on both legal marijuana sales and sports betting to serve as prominent boosts to the state's budget); *see also* Jennifer McDermott & Geoff Mulvihill, *Most States' Sports Betting Revenue Misses Estimates*, ASSOCIATED PRESS (Apr. 2, 2019), https://apnews.com/article/21f9833e917948d6a36422bb286541b4 (discussing some states' early projections for sports betting revenues).

314. Kisska-Schulze & Holden, *supra* note 26, at 483.

315. *Id.* at 481–86. Professor Nelson Rose has referred to these ebbs and flows as "waves" of legalized gambling. *See* I. Nelson Rose, *Gambling and the Law: The Third Wave of Legal Gambling*, 17 VILL. SPORTS & ENT. L.J. 361, 368 (2010).

316. *See* Kisska-Schulze & Holden, *supra* note 26, at 484 (noting that in 1964, New Hampshire became the first state to reauthorize a state lottery); *see also* John T. Holden & Marc Edelman, *A Short Treatise on Sports Gambling and the Law: How America Regulates*

number of states moved quickly in an effort to capitalize on the new revenue stream post-*Murphy*.[317] While the federal government lagged in embracing this long-restricted activity,[318] it has been ardent about taxing it. As depicted below, both (1) federal and (2) state taxes play an integral role in this now legalized industry.

1. Federal taxation of sports gambling

In 1947, Nevada became the first state to allow sports wagering at gambling facilities across the state.[319] Two years later, such wagers were formally legalized.[320] In 1951, the federal government imposed a 10% excise tax on total amounts wagered with a bookmaker as a means of expressing the government's displeasure with sports betting and its connection to organized crime.[321] A separate annual occupational stamp tax on persons accepting wagers complemented the excise tax.[322] Significant penalties accompanied both taxes, including fines of $1,000 and $5,000 for failure to remit payments, and fines up to $10,000 (and five-years imprisonment) for willful violations.[323]

While the 10% excise tax was promoted to deter organized crime,[324] it was more likely intended as a show of disapproval of Nevada's regulated gaming industry because organized crime was rarely known

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Its Most Lucrative Vice, 2020 WIS. L. REV. 907, 942 n.302 (2020) (noting that Utah and Hawaii are the only two states without any form of legalized gambling, although a Hawaiian legislator introduced a bill that would have legalized sports gambling in 2019).

317. Holden & Edelman, *supra* note 316, at 947.

318. *See* John T. Holden, *Regulating Sports Wagering*, 105 IOWA L. REV. 575, 591–94 (2020) (describing failed efforts to regulate sports wagering, to some degree, at the federal level).

319. Becky Harris, *Federal Interference with State and Tribal Sports Betting Regulations Will Not Work: Where the Sports Wagering Integrity Act of 2018 Went Wrong and How Federal Legislation Might Be Effective*, 30 J. LEGAL ASPECTS SPORT 106, 106 (2020).

320. *Id.* at 110–11.

321. *Id.*; *see also* Ulrik Boesen, *Arcane Federal Tax on Sports Betting Is Too Much to Handle*, TAX FOUND. (Apr. 8, 2021), https://taxfoundation.org/federal-tax-on-sports-betting [https://perma.cc/SM62-EF3T] (offering that revenue projections initially estimated that the excise tax would generate $400 million; however, that estimate was revised to $9 million after only six months).

322. Note, *The Federal Gambling Tax and the Constitution*, 43 J. CRIM. L. CRIMINOLOGY & POLICE SCI. 637, 637 (1953).

323. *Id.*

324. *Id.*

for prompt and accurate I.R.C. compliance.[325] The 10% tax proved devastating to Nevada operators because it was imposed on the total amount wagered (referred to as the "handle"), even though bookmakers typically retain just a small portion of the handle.[326] For example, between 2000 and 2018, Nevada bookmakers only retained 7.6% of the handle, resulting in their profits failing to meet the minimum amount of tax owed to the federal government.[327] This tax ultimately claimed twenty-one of Nevada's twenty-four sportsbooks,[328] leading some operators to move their ventures underground while others chose to report just 1% of their handle as a means of staying in business.[329]

Following a pair of cases challenging both federal excise taxes, the U.S. Supreme Court found them to be "so unfair and onerous" as to violate bookmakers' Fifth Amendment rights against self-incrimination.[330] Following years of effort by Nevada's congressional delegation, in 1974, Senator Howard Cannon succeeded in reducing the 10% excise tax to 2%.[331] This tax was again modified in 1982.[332] It bifurcated legal from illegal wagers, charging legal sports betting operations .25% of the total handle, while maintaining the 2% rate for illegal operations.[333] This excise tax, however, created a narrow carve-out for state-run lotteries deemed exempt

325. *See* Brenda L. Roubidoux Taylor & Gregory R. Gemignani, *Feeling the Limits of McCarran's Power Today—The Remaining Wagering Excise Tax*, NEV. GAMING LAW. (Sept. 2019), https://www.nvbar.org/wp-content/uploads/15-Wagering-Excise-Tax.pdf [https://perma.cc/CH4M-D988].

326. *Id.*; Becky Harris, *Regulated Sports Betting: A Nevada Perspective*, 10 UNIV. NEV. LAS VEGAS GAMING L.J. 75, 76 (2020).

327. Taylor & Gemignani, *supra* note 325.

328. *Id.*

329. *See* Harris, *supra* note 326, at 76 (noting the underground movement of Nevada sports gambling); *see also* Holden & Edelman, *supra* note 316, at 918 (discussing operators' need to reduce their handle reporting to stay in business).

330. Kevin P. Braig, *Reform the Federal Sports Betting Excise Tax "Dilemma"*, SHUMAKER LOOP & KENDRICK (Nov. 3, 2017), https://www.lexology.com/library/detail.aspx?g=2b160213-645e-48bf-b484-f7bcb6941831 [https://perma.cc/FT7C-D9V5] (citing Grosso v. United States, 390 U.S. 62 (1968); Marchetti v. United States, 390 U.S. 39 (1968)). Interestingly, during the same era, an excise tax on cannabis was successfully challenged, leading to an overhaul of U.S. drug laws and the establishment of the Controlled Substances Act. *See* Leary v. United States, 395 U.S. 6 (1969); *see also* John T. Holden & Marc Edelman, *Regulating Vice: What the U.S. Marijuana Industry Can Learn from State Governance of Sports Gambling*, 2021 U. ILL. L. REV. 1051 (2021) (comparing the historical treatment of sports gambling and marijuana).

331. Braig, *supra* note 330.

332. 26 U.S.C. § 4401(a)(1)–(2) (1982).

333. *See* Holden & Edelman, *supra* note 330, at 1056 n.39; *see also* 26 U.S.C. § 4401(a)(1)–(2) (1982).

from the tax.[334] Despite more recent efforts to repeal it,[335] this federal tax remains a substantial outflow of sports betting operator revenue.[336]

While gambling operators face substantial federal tax burdens, so too do professional and recreational sports bettors.[337] Cash winnings and the fair market value of noncash prizes valued in excess of $600 during any taxable year must be reported as income[338] and are taxed at regular individual income tax rates.[339] Unlike capital losses from investments, which can be used to offset other income up to $3,000,[340] gambling loss deductibility is limited to the extent of gambling winnings.[341] In addition, loss deductibility is only available for those taxpayers who itemize.[342] Further, the TCJA removed the U.S. Tax Court's favorable determination that allowed professional gamblers with business expenses exceeding net gambling winnings to deduct a net operating loss as a trade or business.[343] Beginning in 2018, professional gamblers are temporarily prevented from deducting non-wagering business expenses (such as travel expenses to gambling locations) that exceed their net wagering income.[344]

334. Boesen, *supra* note 321; *see also* I.R.C. § 4402 (3).

335. Matt Rybaltowski, *Nevada Congresswoman Resumes Push to Repeal Excise Tax on Sports Betting*, SPORTS HANDLE (Mar. 24, 2021), https://sportshandle.com/titus-excise tax-proposal [https://perma.cc/XP6J-FK2Q].

336. BRENDAN BUSSMAN & JOHN ENGLISH, GLOBAL MARKET ADVISORS, RESEARCH BRIEF: THE ECONOMICS OF SPORTS BETTING 3 (2018), http://globalmarketadvisors.com/wp-content/uploads/Research-Brief-the-economics-of-sports-betting-1.pdf [https://perma.cc/FJT2-PCCR].

337. Taylor DesOrmeau, *Do You Have to Pay Taxes on Sports Betting Winnings in Michigan*, MICH. LIVE (Mar. 23, 2021, 10:32 AM), https://www.mlive.com/public-interest/2021/03/do-you-have-to-pay-taxes-on-sports-betting-winnings-in-michigan.html [https://perma.cc/F8LS-WVUV].

338. *See* I.R.C. § 61; *see also* Eric Smith, *Taxation of Gambling Income*, CPA J. (Dec. 2019), https://www.cpajournal.com/2019/12/24/taxation-of-gambling-income [https://perma.cc/XX7A-BLQ4].

339. *See* I.R.C. § 1; *see also* DesOrmeau, *supra* note 337.

340. *See* I.R.C. § 1211(b).

341. *See id.* § 165(d); s*ee also* Smith, *supra* note 338.

342. Smith, *supra* note 338.

343. *See* Mayo v. Comm'r, 136 T.C. 81 (2011); *see also* Wei-Chih Chiang et al., *Tax Reform Law Deals Pro Gamblers a Losing Hand*, J. ACCOUNTANCY (Oct. 1, 2018), https://www.journalofaccountancy.com/issues/2018/oct/pro-gambling-net-losses.htm l [https://perma.cc/524Q-YPHJ].

344. *See* I.R.C. § 165(d) (explaining that such modification extends from 2018–2025).

2. *State taxation of sports gambling*

In conjunction with the federal income tax considerations discussed above, sports gambling operators and individual gamblers must account for various state and local tax obligations. States vary in their approaches to taxing operators.[345] Some pursue maximized revenue from legalized sports gambling, typically restricting market access to select firms and imposing high tax rates on revenue.[346] Others elect to follow the Nevada model (or a similar variation), offering attractive tax rates and encouraging market competition in an effort to entice consumers away from the black or gray markets.[347] Still, others have granted sports betting monopolies to resident tribal nations, foregoing any state tax imposition in exchange for a share of tribal gaming revenues via a tribal gaming compact.[348]

For jurisdictions that do impose income taxes on sports betting, most levy their standard rates on gross gaming revenue rather than the total handle.[349] State tax rates range from Nevada's low of 6.75%, to

345. Jackson Brainerd, *The Early Bets Are in: Is Sports Betting Paying off?*, NAT'L CONF. STATE LEGISLATURES (Mar. 1, 2021), https://www.ncsl.org/research/fiscal-policy/the-early-bets-are-in-is-sports-betting-paying-off.aspx [https://perma.cc/LJ5F-R6S9].

346. For example, Rhode Island entered into an agreement with the sports betting operator DraftKings, granting the company a monopoly in the state in exchange for a 51% tax rate on the company's gross gaming revenue. *See* Hilary Russ, *Rhode Island Legalizes Sports Betting, Gets 51 Percent of Revenues*, REUTERS (June 22, 2018, 5:30 PM), https://www.reuters.com/article/us-usa-betting-rhode-island/rhode-island-legalizes-sports-betting-gets-51-percent-of-revenues-idUSKBN1JI2TQ [https://perma.cc/8SGG-QCXH]. A similar approach is being considered in New York. *See* Brad Allen, *Analysis: New York Wants $500 Million a Year from Sports Betting, so Good Luck with that*, LEGAL SPORTS REP. (Jan. 25, 2021), https://www.legalsportsreport.com/47017/ny-sports-betting-monopoly-analysis [https://perma.cc/F6ZZ-7FQK].

347. New Jersey closely followed the model laid out by Nevada. *See* John Brennan, *How New Jersey Became the U.S. Gambling Expansion Leader*, N.J. ONLINE GAMBLING (June 11, 2021), https://www.njonlinegambling.com/how-new-jersey-became-the-u-s-gambling-expansion-leader [https://perma.cc/8UL7-H5QV].

348. States cannot tax tribes as sovereign nations; however, the Indian Gaming Regulatory Act establishes a mechanism for states and tribes to enter into gaming compacts, which have frequently exchanged a form of gaming exclusivity for a share of tribal gaming revenues. *See* John Holden, *so What Exactly Is IGRA and Why Will It Shape Sports Betting in 2021?*, LEGAL SPORTS REP. (June 29, 2021), https://www.legalsportsreport.com/53497/explaining-igra-tribal-sports-betting [https://perma.cc/3WL6-X8EV]; *see also* Indian Gambling Regulatory Act, Pub. L. 100-497, 102 Stat. 2467 (1988) (codified at 25 U.S.C. § 2701).

349. Bussman & English, *supra* note 336.

Rhode Island's high of 51%.[350] From May 2018 to April 2021, states imposing higher tax rates generated more tax revenue per resident than states supporting a more "industry friendly" tax rate.[351] Nevada, however, remains an outlier due to Las Vegas attracting a significant volume of wagers from out-of-state residents.[352] New Jersey, similarly, benefits from the close proximity of New York residents who cross the state's boundary to place wagers.[353] As Table 1 illustrates, those states opting for a competitive market have not seen the same tax revenues of states choosing to tax gambling operators at significantly higher percentages of revenue.[354]

350. Brainerd, *supra* note 345 (providing that Rhode Island's tax rates stand as an outlier, as the majority state tax rates on sports gambling fall below 20%).

351. We refer to states with tax rates, as well as states affording monopolies and oligopolies to a few companies, as states seeking to maximize revenue. Conversely, states that have imposed low barriers to entry, such as median or lower tax rates, could be considered industry friendly.

352. Revenue per Adult is displayed in Table 1.

353. *See* Matthew Waters, *How Much Money Is Mobile NY Sports Betting Fail Sending to New Jersey*, LEGAL SPORTS REP. (Mar. 1, 2021), https://www.legalsportsreport.com/38180/ny-sports-betting-mobile-new-jersey [https://perma.cc/63NW-3SSG] (noting that one estimate in 2019 suggested as much as 18.3% of the total amount wagered in New Jersey came from New Yorkers).

354. *State Population by Characteristics: 2010–2019*, CENSUS, https://www.census.gov/data/tables/time-series/demo/popest/2010s-state-detail.html [https://perma.cc/RWA7-ANRN] (last updated Oct. 8, 2021); *Legal US Sports Betting Revenue, Handle and Tax Totals Since PASPA Repeal*, SPORTS HANDLE (Jan. 10, 2022), https://sportshandle.com/sports-betting-revenue [https://perma.cc/8QEM-DC3P]; Ulrik Boesen, *Large Spread in Tax Treatment of Sports Betting Operators*, Tax Found. (July 8, 2021), https://taxfoundation.org/sports-betting-tax-treatment [https://perma.cc/XDP8-H7G2].

Table 1: State Tax Revenue Per Adult

State	Population	2020 Handle	2020 Total Taxes Collected	Tax Revenue/ Adult
Arkansas	3,017,804	$32,822,807	$586,003	$0.19
Colorado	5,758,736	$1,185,754,317	$2,964,672	$0.51
Delaware	973,764	$90,242,755	$12,380,038	$12.71
Illinois	12,671,821	$1,882,855,414	$18,817,885	$1.49
Indiana	6,732,219	$1,768,632,211	$13,169,431	$1.96
Iowa	3,155,070	$575,239,746	$2,858,854	$0.91
Michigan	9,986,857	$130,793,498	$690,866	$0.07
Mississippi	2,976,149	$363,775,652	$5,256,452	$1.77
Montana	1,068,778	$17,779,330		State Collects Revenue Minus Expenses
Nevada	3,080,156	$4,283,213,926	$17,591,379	$5.71
New Hampshire	1,359,711	$292,550,239	$11,000,815	$8.09
New Jersey	8,882,190	$6,016,967,699	$50,025,117	$5.63
New York	19,453,561	$98,109,145	$ 1,094,831	$0.06
Oregon	4,217,737	$218,246,537		State Collects Revenue Minus Expenses
Pennsylvania	12,801,989	$3,580,864,479	$64,498,909	$5.04
Rhode Island	1,059,361	$221,916,076	$12,274,913	$11.59
Tennessee	6,829,174	$311,777,000	$5,443,918	$0.80
Washington, DC	705,749	$80,527,760	$1,354,845	$1.92
West Virginia	1,792,147	$392,488,754	$2,248,718	$1.25

A number of states allocate recuperated sports betting revenue to their general funds, while others earmark gambling tax revenue to state education funds.[355] Such interconnection between gambling and education has long existed, despite such a peculiar liaison given that persons under the age of twenty-one are generally not eligible to legally gamble.[356] Although jurisdictions anticipated that sports betting tax revenue would serve as a catalyst for managing distressed budgetary issues, many have not realized the kind of revenue that initially led them to legalize the activity.[357] This disconnect is due in part to the manner in which some jurisdictions draft their rules for calculating gross gaming revenue.[358]

Offering tax deductions for customer comps and promotions have led some states to lose significant revenue.[359] In Colorado, for example, sports betting companies can reduce a significant percentage of their taxable revenue by deducting from their taxable base uncapped, free play, and promotional bets.[360] Further, in this new legalized arena where customer acquisition is key to long-term venture viability, sports betting companies willingly offset current revenue by offering customer promotions in the hopes of gaining a more dominant market position in the future.[361]

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355. Kisska-Schulze & Holden, *supra* note 26, at 496–513 (discussing varying schemes for taxing sports betting revenue).

356. Brett Smiley, *Exploiting Kids for Florida Sports Betting Initiative 'Poor Form and Dangerous'*, SPORTS HANDLE (July 7, 2021), https://sportshandle.com/florida-sports-betting-ballot-campaign [https://perma.cc/H9KX-UGF5]; Kisska-Schulze & Holden, *supra* note 26, at 480–86.

357. *See* Wayne Parry, *Mobile Sports Betting Money Tempts Cash-Strapped States*, ASSOCIATED PRESS (Apr. 14, 2021), https://apnews.com/article/technology-new-york-smartphones-new-jersey-andrew-cuomo-5629c0abbe42e458cd351b13ee9b4875 (noting that a March 2021 report for the National Conference of State Legislatures highlighted the "gap between the seemingly vast amount of money being wagered and the much smaller amount of it flowing to states as tax revenue").

358. *See* Sam McQuillan, *FanDuel, DraftKings Save Millions on Taxes Thanks to Free Play*, BLOOMBERG TAX (July 1, 2021, 4:46 AM), https://news.bloomberglaw.com/daily-tax-report/fanduel-draftkings-save-millions-on-taxes-thanks-to-free-play [https://perma.cc/398C-HAV3] (highlighting state rules that allow gambling companies to give free plays to customers as promotions, and then deduct these promotions from the revenue they pay to the state).

359. *Id.*

360. *Id.* (noting that other states with similar provisions include Pennsylvania, Michigan, and Virginia).

361. *See* Pat Evans, *Sports Betting Primer*, FRONT OFF. SPORTS (Sept. 2020), https://frontofficesports.com/newsletter/sports-betting-primer [https://perma.cc/

For individual sports bettors, state income tax liability is determined based on the location in which they win money.[362] As there is no universal application of state income taxes across jurisdictions, taxing winnings varies widely across borders.[363] For example, New Jersey levies its state income tax on earnings, while Nevada (which has no income tax) does not impose a tax on winnings.[364] In Maryland, individuals must report winnings between $500 and $5,000, and pay the required tax due within sixty days,[365] whereas Iowa imposes an automatic 5% withholding.[366] In any jurisdiction that imposes an income tax on gambling winnings, failure to report and pay could result in penalties and interest accrual.

B. Taxing Daily Fantasy Sports

DFS origins date back to the mid-2000s, when fantasy sports contests (that some argue resemble gambling) became part of the everyday lexicon.[367] Although similarities exist between DFS and gambling, FanDuel and DraftKings—the two largest DFS companies—contend that their virtual products are distinct since they require skill, rather than chance.[368] Despite the substantial efforts and capital expended by

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7R7D-7Z4J] (noting that DraftKings was spending $371 on average to acquire a customer who would have a lifetime value to the company of $2,500).

362. Weston Blasi, *Do I Have to Pay Taxes on Sports Betting? The Taxman Could Be Coming for Your Winning Bets*, MARKETWATCH (May 18, 2021, 11:37 AM), https://www.marketwatch.com/story/did-you-bet-on-sports-this-year-the-taxman-could-be-coming-for-your-winnings-11614960257 [https://perma.cc/S8ET-95GX].

363. *Id.*

364. *Id.*

365. Jayne Thompson, *How Much State & Federal Tax Is Withheld on Casino Winnings?*, ZACKS (Dec. 9, 2018), https://finance.zacks.com/much-state-federal-tax-withheld-casino-winnings-3079.html [https://perma.cc/JXX3-Q2FT].

366. *Id.* (Iowa's law applies in circumstances where federal taxes are likewise applied).

367. *See* Marc Edelman, *Navigating the Legal Risks of Daily Fantasy Sports: A Detailed Primer in Federal and State Gambling Law*, 2016 U. ILL. L. REV. 117, 124 (2016) (noting that entrepreneur Kevin Bonnet conceived the concept of DFS in 2007); *see also* John T. Holden et al., *Regulatory Categorization and Arbitrage: How Daily Fantasy Sports Companies Navigated Regulatory Categories Before and After Legalized Gambling*, 57 AM. BUS. L.J. 113, 132–35 (2020).

368. *See* Holden et al., *supra* note 367, at 135–48 (discussing DraftKings' and FanDuel's efforts to couch their products as something other than gambling). Gambling has three elements: prize, consideration, and chance. The degree of chance is typically the element evaluated by states to determine whether an activity is allowed or prohibited as illegal gambling. State laws vary, but three tests are predominantly used. The any chance test, which deems any activity having a degree of chance as a

these companies to convince legislatures that DFS is not gambling,[369] the IRS disagreed.[370] In a 2020 memorandum issued by the IRS Office of Chief Counsel, Senior Counsel Amy Wei concluded, "[t]he amount paid by a daily fantasy sports player to participate in a daily fantasy sports contest constitutes an amount paid for a wagering transaction under [I.R.C.] § 165(d)."[371] Thus, DFS winnings and losses are subject to the same federal tax treatment as gambling, discussed in Section IV.A.[372] In reviewing the tax implications surrounding DFS, the IRS considered three issues: (1) whether DFS companies should be liable for the gambling excise tax at all; (2) whether the occupational stamp tax should apply to DFS; and (3) whether a DFS operator should be liable for the gambling excise tax at the lower .25% rate, or instead the higher 2% rate.[373] The IRS concluded affirmatively to the first two inquiries.[374] Regarding the third issue, the IRS noted that the applicable rate depends on whether the operators accept wagers in states that have legally authorized DFS.[375]

While numerous operators avoid operating in states where DFS violates state gambling laws,[376] others have flouted state attorney general

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type of gambling, and is thus, prohibited. The material element test, which evaluates whether or not a material element of the outcome of game is based on chance, if yes, the game or activity is classified as gambling, and the most permissive test, which asks whether chance is the dominant factor in the outcome of a game, if skill predominates over chance in determining the outcome, the contest is permissible. *See* John T. Holden, *Trifling and Gambling with Virtual Money*, 25 UCLA ENT. L. REV. 41, 79–81 (2018).

369. *See* Jacob Pramuk, *DraftKings, FanDuel Lobby Congress amid Legal Challenges*, CNBC (Jan 21, 2016, 1:24 PM), https://www.cnbc.com/2016/01/21/draftkings-fanduel-lobby-congress-amid-legal-challenges.html [https://perma.cc/4TNE-Q8GL] (detailing daily fantasy companies' lobbying efforts).

370. Taylor Anello & Peter Kulick, *Internal Revenue Service Makes Determination Regarding Tax Liability for Daily Fantasy Sports Operators and Potential Write-Offs for Players*, DICKINSON WRIGHT (Oct. 27, 2020), http://gamingandhospitalitypracticeblog.dickinson-wright.com/2020/10/internal-revenue-service-makes-determination-regarding-tax-liability-for-daily-fantasy-sports-operators-and-potential-write-offs-for-players [https://perma.cc/LM88-BZN9].

371. I.R.S. Gen. Couns. Mem. 2020-042015 (Sept. 14, 2020), https://www.irs.gov/pub/irs-wd/202042015.pdf [https://perma.cc/TZ39-QL44].

372. *See supra* Section V.A.

373. I.R.S. Gen. Couns. Mem. AM 2020-09 (July 23, 2020), https://www.irs.gov/pub/lanoa/am-2020-009.pdf [https://perma.cc/NXY7-6J8W].

374. *Id.*

375. *Id.*

376. *See generally What Are the States Where You Can Play Daily Fantasy Sports?*, LEGAL SPORTS REP., https://www.legalsportsreport.com/daily-fantasy-sports-blocked-allowed-

determinations regarding its legality, choosing to maintain operations within those borders regardless of its legal status.[377] Applying the "legal operation" tax rate of 0.25%, data supports that DFS companies would have owed roughly $8 million on their $335 million revenue in 2018.[378] Those operating in states that deem fantasy sports as illegal gambling operations could prove costly, as the "illegal operation" 2% tax on the handle could equate to 20% of total operator revenue.[379] Although DraftKings expressed intent to contest the IRS's ruling, it has yet to officially challenge the Treasury's tax determination.[380]

C. *Taxing Esports*

Esports, one of the fastest-growing segments of the sports and entertainment industries,[381] are competitive video gaming events played in highly organized settings.[382] This sub-industry's growth and popularity has attracted a diverse group of investors eager to generate significant financial gains.[383] In fact, in 2021, esports revenue is estimated to exceed $1.08 billion.[384] While many perceive esports as a

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states [https://perma.cc/WKJ6-3FN7] (noting the states that major DFS operators do, and do not, operate in).

377. *See* Darren Heitner, *DraftKings and FanDuel Are Playing with Fire in Florida*, FORBES (Feb. 22, 2016, 12:22 PM), https://www.forbes.com/sites/darrenheitner/2016/02/22/draftkings-and-fanduel-are-playing-with-fire-in-florida/?sh=1eb7223f39d0 [https://perma.cc/4NLJ-MYG6] (noting a 1991 Florida Attorney General opinion that determined pay-to-play fantasy sports violated Florida gambling laws).

378. Daniel Roberts, *IRS Guidance on Fantasy Fees Could Spell Major Trouble for DraftKings, FanDuel*, YAHOO (Aug. 14, 2020), https://www.yahoo.com/lifestyle/irs-guidance-on-fantasy-fees-spells-major-trouble-for-draft-kings-fan-duel-205130959.html [https://perma.cc/SY87-7AJK].

379. Allyson Versprille & Sam McQuillan, *DraftKings, FanDuel Fees Deemed Taxable in Landmark IRS Memo (1)*, BLOOMBERG TAX (Aug. 14, 2020, 9:53 AM), https://news.bloombergtax.com/daily-tax-report/draftkings-fanduel-fees-deemed-taxable-in-landmark-irs-memo [https://perma.cc/J9KJ-A3TX].

380. Marc Edelman, *The Daily Fantasy Sports Tax Showdown Begins in Two and a Half Months*, FORBES (Feb. 2, 2021, 9:30 AM), https://www.forbes.com/sites/marcedelman/2021/02/02/two-and-a-half-months-until-the-daily-fantasy-sports-tax-showdown-begins.

381. *See* Holden et al., *supra* note 13, at 511 (noting the relationship between esports and sports); *see also* John T. Holden & Mike Schuster, *Copyright and Joint Authorship as a Disruption of the Video Game Streaming Industry*, 2020 COLUM. BUS. L. REV. 943, 947 (2021) (examining the relationship between esports and entertainment).

382. Holden et al., *supra* note 13, at 511.

383. *Id.* at 530.

384. Christina Gough, *eSports Market Revenue Worldwide from 2019 to 2024*, STATISTA https://www.statista.com/statistics/490522/global-esports-market-revenue (last visited Jan. 29, 2022).

new phenomenon, its origins can be traced back decades.[385] Previously it has been argued that pinball machines were the predecessor to video games.[386] However, in the 1960s, Massachusetts Institute of Technology (MIT) students created the first computerized video game—Spacewar.[387] Such novelty was created using Cathcode Ray Tube monitors and a Programmed Data Processor (PDP-1) that inspired others to commercialize video gaming.[388] Nolan Bushnell, a pioneer in the video gaming space, was the first to develop a coin-operated machine that helped launch the arcade game industry.[389]

By the early 1980s, when over 13,000 arcades were in operation in the United States, the professional video gaming concept took root.[390] The 1980s saw the creation of the U.S. National Video Game Team, which was composed of six of the best video game players who traveled in roadshows across the country.[391] Contemporary esports are believed to have their origins in 1997, with the launch of the Red Annihilation *Quake* tournament.[392] Less than a decade later, tournament prize pools often exceeded $1 million.[393] Since 2014, eight competitions have individually offered prize pools surpassing $10 million,[394] with one of the largest international esports tournaments entertaining a pool of $40 million.[395]

Professional gamers are beginning to rise to the level of popularity of traditional sports athletes.[396] One of the most prolific esports players currently has an estimated net worth of $6.9 million.[397] Ninja, a popular

385. Holden et al., *supra* note 13, at 513.
386. *Id.*
387. *Id.* at 514.
388. *Id.*
389. *Id.*
390. *Id.* at 515.
391. *Id.*; *see also* Heyoka, *Before Esports: America's National Team*, TEAM LIQUID (July 26, 2011), https://tl.net/blogs/247767-before-esports-us-national-video-game-team [https://perma.cc/ZVE9-SJ8Y] (describing the formation of the U.S. National Video Game Team).
392. Holden et al., *supra* note 13, at 517.
393. *Id.* at 518.
394. *See Largest Overall Prize Pools in Esports*, ESPORTS EARNINGS, https://www.esportsearnings.com/tournaments [https://perma.cc/4B92-2BB9].
395. *US Tax Considerations for ESports and the Online Games Industry*, WOLTERS KLUWER (Feb. 18. 2021), https://www.lowtax.net/articles/US-Tax-Considerations-for-eSports-and-the-Online-Games-Industry-595943.html [https://perma.cc/WD39-2UUN].
396. *Id.*
397. *Id.*

American streamer, signed a streaming agreement in 2019 worth $30 million.[398]

Big money draws big tax issues, and because of the international nature of esports, the U.S. taxes are complicated.[399] U.S. citizens and resident aliens are taxed on their worldwide income.[400] Non-resident aliens are subject to U.S. taxes if their earnings derive from U.S. sources.[401] Thus, whether a gamer is a U.S. citizen, resident, or non-resident alien, income earned from their gaming activities could be subject to U.S. federal income taxes. Esports taxable income may include prize money,[402] royalties derived from endorsement contracts,[403] fringe benefits,[404] donations or tips paid by viewing audiences,[405] and any other form of employment or independent contractor income earned by professional gamers.[406] As discussed in Section III.B with regard to student-athletes' NIL earnings,[407] deductions (in the form of standard or itemized) can help reduce professional gamers' taxable income.[408] In conjunction with federal income taxes, professional gamers must also account for various state tax obligations, including the jock tax as discussed in Section I.A.2 with respect to professional athletes.[409]

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398. *Id.*; @Ninja, TWITTER (Jan. 2, 2013, 5:14 PM), https://twitter.com/Ninja?ref_src=twsrc%5Egoogle%7Ctwcamp%5Eserp%7Ctwgr%5Eauthor [https://perma.cc/2BHV-U9KN]. Ninja is the online alias for Richard Tyler Blevins.

399. *Id.*

400. *See* I.R.C. § 61(a); *see also* Treas. Reg. § 1.1-1 (2020).

401. *See* I.R.C. § 871(b). This Article focuses on tax issues relating to U.S. citizens and residents. While international gamers may be subject to tax in the U.S. for their gaming activities, it is beyond the scope of this Article to address United States and foreign jurisdiction tax issues that may apply to those identified as non-resident aliens (i.e., individuals who do not hold a Green Card or who do not qualify under the substantial presence test).

402. *See id.* § 74.

403. *See* Treas. Reg. § 1.61-8(a).

404. *See* I.R.C. § 61(a).

405. *US Tax Considerations for ESports and the Online Games Industry*, *supra* note 395.

406. *See* I.R.C. § 61(a); *see also id.* § 3101 (pertaining to the self-employment tax on income earned by independent contractors); *supra* Section IV.A.5 for further explanation on the impact of the self-employment tax.

407. *See supra* Section IV.A.5.

408. *See* I.R.C. § 63.

409. *See supra* Section II.A.2.

V. RECOMMENDATIONS FOR THE EVOLVING BUSINESS OF SPORTS

In 2008, Holo and Talansky observed a shift in what they referred to as the "special" tax treatment historically conferred upon the professional sports industry.[410] Not only have there been notable alterations to the federal and state taxing regimes impacting sports, but equally significant is the fact that there has been a monumental evolution of the business of sports since their article was published. Amidst this growing, billion-dollar enterprise encompassing both traditional and cyber events, extending into the professional and collegiate sports arenas—and that allows players, coaches, leagues, associations, commercial ventures, fans, sponsors, and the media to generate considerable income—it is unsurprising that U.S. taxing jurisdictions are pursuing a greater slice of the revenue-sharing pie. Taxes are increasingly impacting the expanding professional and collegiate U.S. sports industry. However, as the world of sports is not static, neither are federal or state tax laws. As such, this Article offers the following recommendations.

First, the federal government should remove the tax incentives afforded to professional sports leagues and teams to renovate or build new stadiums.[411] Academics and economists concur that stadium construction fails to spur economic development.[412] The federal government should terminate this program (which heavily benefits billionaire sports team owners) by passing legislation that officially ends tax exemptions for interest payments on municipal bonds.[413] Congress's failure to act in this effort has led to dwindling stadium lifespans and increased team owner wealth at the expense of taxpayers.[414] The amount of public dollars spent on stadium renovations and new construction between 1991 and 2004 was equivalent to "three *Nimitz*-class nuclear-powered aircraft carriers."[415] While it is unclear why Congress continues to allow this blatant tax exploitation to exist, it likely involves the power of sports league

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410. Holo & Talansky, *supra* note 32, at 214.

411. Patrick Hruby, *Let's Eliminate Sports Welfare*, SPORTS ON EARTH (Dec. 2012), https://www.patrickhruby.net/2012/12/lets-eliminate-sports-welfare.html [https://perma.cc/ZP5V-X3NR].

412. *See* Zimbalist & Noll, *supra* note 173; *see also* Drukker et al., *supra* note 175; *supra* Section I.A.

413. *See* Zimbalist & Noll, *supra* note 173.

414. *Id.*

415. Hruby, *supra* note 411.

lobbyists.[416] Rather than build new stadiums to benefit the wealthy without the spur of economic growth, taxpayer funds and tax-exempt bonds should be geared toward more critical social needs like healthcare, education, and urban development.

Second, the Treasury should amend I.R.C. § 197 to cease application of the RDA to professional sports teams. Although public stadium funding has been the subject of meaningful academic attention to the point where legislators have repeatedly threatened to close available tax loopholes afforded to teams and leagues,[417] the RDA has largely received a pass.[418] The RDA substantially benefits team owners because sports teams are appreciable, rather than depreciable, assets.[419] Allowing team owners to deduct the purchase price of a franchise over a fifteen-year amortization period is an archaic tax benefit, particularly considering that fifty of the most valuable sports franchises continued to enjoy a 9.9% valuation increase during the COVID-19 pandemic.[420] Over the previous five-year period, those same franchises increased in value by 55%.[421] Few tax benefits achieve the inverse of their purported objective as the RDA. As such, the time is ripe for Congress to reevaluate its effectiveness regarding professional sports teams and leagues.

Third, at this juncture, Congress should continue to bestow favorable tax treatment on student-athletes' grants-in-aid. As pay-for-play traction increases in collegiate sports, queries remain as to whether student-athletes' scholarship funds should continue to receive preferential tax treatment.[422] As discussed in Section III.B, student-

416. *See* Daniel Libit, *NBA Lobbying Spend Leaves D.C. for States as Gambling Grows*, SPORTICO (May 6, 2021, 5:55 AM), https://www.sportico.com/leagues/basketball/2021/nba-avoids-congressional-lobbying-1234629039 [https://perma.cc/J9SF-LVES] (describing sports leagues' lobbying spending).

417. *Supra* Section I.A.3.

418. *See* Trejos, *supra* note 94.

419. Keeney, *supra* note 56.

420. Mike Ozanian, *World's Most Valuable Sports Teams 2021*, FORBES (May 7, 2021, 6:00 AM), https://www.forbes.com/sites/mikeozanian/2021/05/07/worlds-most-valuable-sports-teams-2021/?sh=294c6c5d3e9e [https://perma.cc/58V5-HCJE] (noting this value increased over the period of May 2020 to May 2021).

421. *Id.*

422. *See, e.g.*, Kisska-Schulze & Epstein, *supra* note 155 (proposing that the IRS may categorize some student-athletes' grants-in-aid as taxable should a pay-for-play model be implemented in college sports); Edelman, *supra* note 239, at 1161 (proposing that grants-in-aid may not necessarily be taxable under a pay-for-play model); Schmalbeck & Zelenak, *supra* note 49, at 1153 (arguing that student-athletes' athletic scholarships are indeed taxable under the I.R.C., and that the IRS favors college sports); Adam

athletes enjoy meaningful tax amicability with regard to their athletic scholarship funds. Based on the current regime, athletic scholarships are granted based on degree-seeking interests, coupled with athletic ability, while NIL earnings are based on contractual relationships between players and third parties having no direct relationship to the student-athletes' educational/collegiate sport interests. Student-athletes will have to pay taxes on their NIL earnings; however, such income has no connection to their institutional grants-in-aid and, therefore, should play no role in their scholarship funding. Although such a premise could change if the pay-for-play model eventually morphs into that of an employer-employee relationship between institution and player, that day is not today.

In concert with the above recommendation, allowing student-athletes to benefit economically from the use of their NIL is a step toward increased equality across the lucrative college sports enterprise. However, earnings come at a price. For the first time in history, student-athletes will have to toggle complicated federal and state tax issues while playing sports and earning educational degrees. As there is no precedent for some of the tax issues that may arise due to the unique nature of college sports, this Article recommends that the Treasury promulgate rulings to provide clarity and uniformity on the federal taxability of student-athletes' NIL income. In addition, the NCAA and individual institutions should proactively assist student-athletes in understanding the complex nature of their tax obligations to help minimize tax penalties and interest accrual.

Fourth, this Article recommends that gambling tax revenue be redirected back into higher education. Between the TCJA's impact on collegiate athletics, and the more recent COVID-19 pandemic, higher education is in desperate need of funding.[423] Recent funding relief came in the form of the federal Coronavirus Aid, Relief, and Economic

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Hoeflich, Note, *The Taxation of Athletic Scholarships: A Problem of Consistency*, 1991 U. ILL. L. REV. 581, 615 (1991) (supporting that the IRS should tax student-athletes' athletic scholarships, regardless of the implementation of any pay-for-play model).

423. *See* Kisska-Schulze & Holden, *supra* note 26, at 468 (arguing college administrators should direct attention toward embracing legalized sports wagering to increase revenue to supplement loct income due to the TCJA); *see also* Emma Whitford, *Pandemic's Fall Financial Toll Adds Up*, INSIDE HIGHER ED (Jan. 12, 2021), https://www.insidehighered.com/news/2021/01/12/colleges-spent-millions-covid-19-expenses-fall-even-sources-income-shrank-data-show [https://perma.cc/XG6W-VP7Z] (elaborating on the significant financial losses felt by institutions in the wake of the COVID-19 pandemic).

Security (CARES) Act,[424] which provided $14 billion in financial assistance to colleges and universities impacted by COVID-19 losses.[425] However, even prior to that, another financial relief opportunity came in the form of sports gambling tax revenue. Post-*Murphy*,[426] over twenty-four states have legalized some form of sports betting.[427] Across those jurisdictions, total taxes collected exceeds $570 million.[428] Although each state earmarks their tax revenue differently, few have officially reinvested any of these earnings back into education.[429]

A portion of this tax revenue should be redirected back into higher education, and, more particularly, back into the same collegiate sports programs generating such newfound income. Already, the University of Colorado at Boulder (CU Boulder) is further capitalizing on sports betting market opportunities by entering into a five-year sponsorship contract with PointsBet, an Australian bookmaker.[430] The $1.6 million agreement requires Buffalo Sports Properties, which holds the media rights for CU Boulder, promote PointsBet on its media channels and at CU Boulder's Folsom Field and Events Center.[431] In addition, for every new bettor that registers on PointsBet using a Colorado Athletics

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424. 15 U.S.C. § 9001.

425. H.R. 748, 116th Cong. (2020); *see also Summary of Higher Education Provisions in H.R. 748, The Coronavirus Aid, Relief, and Economic Security (CARES) Act*, AM. COUNCIL ON EDUC., https://www.acenet.edu/Documents/Summary-CARES-Act-HigherEd-Provisions-032620.pdf [https://perma.cc/F7LC-RCYH] (summarizing the higher education provisions of the 2020 CARES Act).

426. *See* Murphy v. Nat'l Collegiate Athletic Ass'n, 138 S. Ct. 1461, 1484–85 (2018) (holding Congress could not direct state legislatures not to pass laws that would permit sports gambling).

427. Ryan Rodenberg, *United States of Sports Betting: An Updated Map of Where Every States Stands*, ESPN (Sept. 30, 2021, 2:19 PM), https://www.espn.com/chalk/story/_/id/19740480/the-united-states-sports-betting-where-all-50-states-stand-legalization [https://perma.cc/NY56-VYV3].

428. *US Sports Betting Revenue and Handle*, LEGAL SPORTS REP., https://www.legalsportsreport.com/sports-betting/revenue [https://perma.cc/8N7F-UPT3].

429. Jill R. Dorson, *How States Are Spending Their Sports Betting Tax Revenue*, SPORTS HANDLE (Oct. 25, 2018), https://sportshandle.com/how-states-are-spending-their-sports-betting-tax-revenue [https://perma.cc/3GHT-V6DX].

430. Chris Burt, *U. of Colorado Goes All in with Sports Betting Partnership*, UNIV. BUS. (Sept. 10, 2020), https://universitybusiness.com/u-of-colorado-goes-all-in-with-sports-betting-partnership [https://perma.cc/6LP4-4EU6]; *see also* Greta Anderson, *Profits over Principles?*, INSIDE HIGHER ED (Nov. 18, 2020), https://www.insidehighered.com/news/2020/11/18/cu-boulder-sports-betting-deal-goes-against-long-held-ncaa-stance [https://perma.cc/T53E-MYQX].

431. Anderson, *supra* note 430.

promotion code, the CU Boulder athletics department will earn $30.[432] For every bet placed in Colorado through a legal, regulated sportsbook like PointsBet, state taxes will be imposed, resulting in increased revenue in the jurisdiction. Whether other institutions entertain similar corporate sponsorships remains to be seen;[433] however, states should ensure that increased tax revenue generated from the legalized sports-betting market be redirected back into higher education.

Finally, state taxing jurisdictions must consider their primary objectives when crafting tax rates and licensing fees amidst the legalized sports gambling industry.[434] If a state's objective is to provide a regulated sports gambling market to recapture revenue from the black or gray markets, it must create an environment that fosters competition, resulting in consumers having a multitude of wagering options at their disposal. Alternatively, if a state's goal is to maximize jurisdictional tax revenue, it should impose higher taxes on gambling operators and consider granting a monopoly to just one or two high bidders.[435] Early legalized sports betting returns have demonstrated that states have not been penalized with decreased tax revenue, even when they have imposed significant tax rates.[436] As a result, states should have great latitude in setting tax rates that coincide with their jurisdictional objectives.

CONCLUSION

The "business of sports" is changing. No longer do athletes compete purely for love of the game. Sports have evolved into a highly productive enterprise, where everyone stands to make a buck. The business side of the industry has moved beyond professional sports into

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432. *Id.*

433. *See* Brett Smiley, *Recruiting Season: Just How Big a Deal Is the University of Colorado-PointsBet Sportsbook Pact?*, SPORTS HANDLE (Sept. 9, 2020), https://sportshandle.com/pointsbet-colorado-ncaa-sports-betting [https://perma.cc/TG9G-9BSG] (noting that the Colorado University Athletics and a sports betting operator is "one of the few in existence between a sports betting operator and a major NCAA Division I Athletics Program").

434. While licensing fees are not a tax, in some sense they can operate as a tax on operators. Holden, *supra* note 354.

435. *See supra* Table 1.

436. Andrew Maykuth, Opinion, *Pa.'s Sports Betting Taxes so High Legal Bookmakers May Shun State*, PHILA. INQUIRER (July 16, 2018), https://www.inquirer.com/philly/business/pa-legal-sports-bookmakers-taxes-new-jersey-casinos-20180716.html [https://perma.cc/5XT9-D9CX].

the realms of amateur athletics, DFS, esports, and the legalized sports gambling industry, and the dollar signs generated are big.[437]

Recently, Congress and states have shown increased interest in usurping a greater percentage of these sports-related revenues,[438] even amidst the more amicable treatment historically bestowed upon professional and collegiate athletics.[439] The newly legalized sports gambling industry allows states to capture tax revenues not previously available to them.[440] In addition, the fourth industrial revolution has blurred the traditional lines of sport, inviting significant revenue generation from novel subsets of the sports culture that blend the physical, digital, and biological spheres.[441] Across this ever-evolving industry, taxes are and will continue to play an integral role. Sport is not just a game anymore, and Congress and states taxing jurisdictions have indicated they are ready to play ball.

437. *See supra* Part IV.
438. *See supra* Parts II, III.
439. *See supra* Part I.
440. *See supra* Section IV.A.
441. *See supra* Sections IV.B–C.