

9-19-2017

From Student-Athletes to Employee-Athletes: Why a "Pay for Play" Model of College Sports Would Not Necessarily Make Educational Scholarships Taxable

Marc Edelman

City University of New York, medelman@hunter.cuny.edu

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Recommended Citation

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. 1137 (2017), <http://lawdigitalcommons.bc.edu/bclr/vol58/iss4/3>

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FROM STUDENT-ATHLETES TO EMPLOYEE-ATHLETES: WHY A “PAY FOR PLAY” MODEL OF COLLEGE SPORTS WOULD NOT NECESSARILY MAKE EDUCATIONAL SCHOLARSHIPS TAXABLE

MARC EDELMAN

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FROM STUDENT-ATHLETES TO EMPLOYEE-ATHLETES: WHY A “PAY FOR PLAY” MODEL OF COLLEGE SPORTS WOULD NOT NECESSARILY MAKE EDUCATIONAL SCHOLARSHIPS TAXABLE

MARC EDELMAN*

Abstract: In recent years, numerous commentators have called for the National Collegiate Athletic Association (“NCAA”) to relax its rules prohibiting athlete pay. This movement to allow athletes to share in the revenues of college sports arises from the belief that college athletes sacrifice too much time, personal autonomy, and physical health to justify their lack of pay. It further criticizes the NCAA’s “no pay” rules for keeping the revenues derived from college sports “in the hands of a select few administrators, athletic directors, and coaches.” Nevertheless, opponents of “pay for play” contend that several problems will emerge from lifting the NCAA’s “no pay” rules. One problem, opponents argue, is that granting college athletes the legal status of “employees” would convert the athletes’ tax-exempt scholarships into taxable income—a result that may offset any economic benefits of “pay for play.” Their argument, however, is not necessarily accurate. This article discusses the economic and legal landscape of big-time college sports, and introduces the fallacious legal argument that “pay for play” would saddle college athletes with substantial tax liability related to their educational scholarships. This article then provides a brief primer on the U.S. tax code—exploring sections of the code that may allow for paid college athletes to enjoy a tax-free education. Finally, this article explains that proper tax planning may allow colleges to pay their athletes without requiring the athletes to pay taxes on their educational scholarships.

INTRODUCTION

In recent years, numerous commentators have called for the National Collegiate Athletic Association (“NCAA”) to relax its rules prohibiting ath-

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* Professor Marc Edelman (Marc@MarcEdelman.com) is a tenured Professor of Law at the Zicklin School of Business, Baruch College, City University of New York. He is also an adjunct professor at Fordham University School of Law and advises numerous businesses on legal issues related to antitrust, gaming, intellectual property, collective bargaining, business and sports law. He is currently ranked among the top 600 most downloaded authors on the Social Science Research Network (“SSRN”).

lete pay.¹ This movement to allow athletes to share in the revenues of college sports arises from the belief that college athletes sacrifice too much time,² personal autonomy,³ and physical health to justify their lack of pay.⁴ It further criticizes the NCAA's "no pay" rules for keeping the revenues derived from college sports "in the hands of a select few administrators, athletic directors, and coaches."⁵

¹ See, e.g., Taylor Branch, *The Shame of College Sports*, THE ATLANTIC, Oct. 2011, <http://www.theatlantic.com/magazine/archive/2011/10/the-shame-of-college-sports/308643> [https://perma.cc/4VWN-TH7H]; Jay Mariotti, *Pay College Athletes, Duck the Slime*, S.F. EXAMINER (Sept. 9, 2015, 9:39 PM), <http://www.sfexaminer.com/pay-college-athletes-duck-the-slime> [https://perma.cc/7LSP-9UQA]; Joe Nocera, *A Way to Start Paying College Athletes*, N.Y. TIMES (Jan. 8, 2016), http://www.nytimes.com/2016/01/09/sports/a-way-to-start-paying-college-athletes.html?_r=0 [https://perma.cc/PZ7X-QGHX]; Andy Schwarz, *But Nobody Even Makes Any Money on College Sports*, SLATE (Jan. 6, 2014, 2:43 PM), http://www.slate.com/articles/sports/sports_nut/2014/01/paying_college_athletes_a_point_by_point_evisceration_of_the_ridiculous.html [https://perma.cc/R6VC-8UHY]; Marc Edelman, *The Case for Paying College Athletes*, U.S. NEWS (Jan. 6, 2014, 8:00 AM), <http://www.usnews.com/opinion/articles/2014/01/06/ncaa-college-athletes-should-be-paid> [https://perma.cc/JV7Z-PWLE]; Michael Wilbon, *College Athletes Deserve to Be Paid*, ESPN (July 18, 2011), http://www.espn.com/college-sports/story/_/id/6778847/college-athletes-deserve-paid [https://perma.cc/4H5N-NP76].

² See Marc Edelman, *A Short Treatise on Amateuism and Antitrust Law: Why the NCAA's No-Pay Rules Violate Section 1 of the Sherman Act*, 64 CASE W. RES. L. REV. 61, 77 (2013) (noting that the average Division I college football player spends more time playing and preparing for football than the typical full-time hourly worker); see also Michael H. LeRoy, *An Invisible Union for an Invisible Labor Market: College Football and the Union Substitution Effect*, 2012 WIS. L. REV. 1077, 1099 (citing to an NCAA study that showed the average Division I college football player devoted 43.3 hours per week to his sport).

³ See, e.g., Mark Dent et al., *Do Colleges Drop the Ball with Student Athletes?*, PITTSBURGH POST-GAZETTE (May 31, 2014, 10:58 PM), <http://www.post-gazette.com/sports/college/2014/06/01/Do-colleges-drop-the-ball-with-student-athletes/stories/201406010120> [https://web.archive.org/web/2017011193542/http://www.post-gazette.com/sports/college/2014/06/01/Do-colleges-drop-the-ball-with-student-athletes/stories/201406010120] (explaining how one college football player, Kain Colter, was discouraged from taking pre-med courses over the concern that they would interfere with football).

⁴ See Sara Ganim, *Unnecessary Roughness? Players Question NCAA's Record on Concussions*, CNN (Oct. 30, 2014, 9:00 AM), <http://www.cnn.com/interactive/2014/10/us/ncaa-concussions> [https://perma.cc/34V2-BRMY] (discussing the "devastating effects" of concussions on some college athletes); Jake New, *Wary of Concussions, College Athletes Choose Early Retirement*, INSIDE HIGHER ED (May 18, 2015), <https://www.insidehighered.com/news/2015/05/18/wary-concussions-college-athletes-choose-early-retirement> [https://web.archive.org/web/20160203182600/https://www.insidehighered.com/news/2015/05/18/wary-concussions-college-athletes-choose-early-retirement] (explaining how unpaid college athletes risk substantial long-term harm from repeated concussions); *Players: 0; Colleges: \$10,000,000,000*, THE ECONOMIST (Aug. 16, 2014), <http://www.economist.com/news/united-states/21612160-pressure-grows-let-student-athletes-share-fruits-their-own-labours-players-0> [https://perma.cc/74NM-HXQJ] (noting that college athletes risk serious injuries, especially "head-clashing American footballers").

⁵ Marc Edelman, Note, *Reevaluating Amateuism Standards in Men's College Basketball*, 35 U. MICH. J. L. REFORM 861, 864 (2002); see also *Players: 0; Colleges: \$10,000,000,000*, *supra* note 4 and accompanying text (explaining that "[a]cross all sports, college athletics revenues are

Nevertheless, opponents of “pay for play” cite to numerous problems that they believe will emerge from lifting the NCAA’s “no pay” rules.⁶ Among these problems, opponents argue, is that granting college athletes the legal status of “employees” would convert the athletes’ tax-exempt scholarships into taxable income—a result that may offset any economic benefits of “pay for play.”⁷

This article explains why a “pay for play” model of college sports would not necessarily require college athletes to pay taxes on their educational scholarships. Part I of this article discusses the economic and legal landscape of big-time college sports, and introduces the fallacious legal argument that “pay for play” would saddle college athletes with substantial tax liability related to their educational scholarships.⁸ Part II provides a brief primer on the U.S. tax code—exploring sections of the code that may allow for paid college athletes to enjoy a tax-free education.⁹ Finally, Part III explores how, with proper tax planning, colleges may provide their athletes with bona fide employment contracts that are unlikely to risk the tax-exempt status of the athletes’ college scholarships.¹⁰

\$10.5 billion a year, more than the NFL generates” but that “[l]ess than 30% of that goes towards scholarships and financial aid for players”).

⁶ See 160 Cong. Rec. S2362–66 (daily ed. Apr. 10, 2014) (statement of Sen. Alexander and Sen. Burr) (providing a detailed discussion of the opposition to “pay for play”); Kristi Dosh, *The Problems with Paying College Athletes*, FORBES (Jun. 9, 2011, 6:34 PM), <http://www.forbes.com/sites/sportsmoney/2011/06/09/the-problems-with-paying-college-athletes/#1ef4cc112c5d> [<https://web.archive.org/web/20161205124047/http://www.forbes.com/sites/sportsmoney/2011/06/09/the-problems-with-paying-college-athletes/#351b99c8bcd4>] (arguing that paying college athletes would lead to the need for colleges to receive greater tax subsidies); John R. Thelin, *Here’s Why We Shouldn’t Pay College Athletes*, TIME: MONEY (Mar. 1, 2016), <http://time.com/money/4241077/why-we-shouldnt-pay-college-athletes> [<https://perma.cc/N9VT-5LN7>] (concluding that paying college athletes would be against their interests given the tax ramifications).

⁷ See Thelin, *supra* note 6; see also Letter from John A. Koskinen, IRS Comm’r, to Richard Burr, U.S. Senator (Apr. 9, 2014) (on file with the Internal Revenue Service), <https://www.irs.gov/pub/irs-wd/14-0016.pdf> [<https://perma.cc/3SBZ-HG9V>] (explaining and rejecting Senator Burr’s perspective); Press Release, U.S. Senate Comm. on Health, Educ., Labor & Pensions, Alexander, Burr: Unionization Is No Sol. for Coll. Athletes (Apr. 11, 2014), <https://www.help.senate.gov/chair/newsroom/press/alexander-burr-unionization-is-no-solution-for-college-athletes> [<https://perma.cc/K24A-N78Q>] (referencing Senator Burr’s argument that if college athletes are employees, they may have tax obligations on their income).

⁸ See *infra* notes 11–62 and accompanying text.

⁹ See *infra* notes 63–148 and accompanying text.

¹⁰ See *infra* notes 149–197 and accompanying text.

I. THE CHANGING ECONOMIC LANDSCAPE OF BIG-TIME COLLEGE SPORTS

A. Historic Treatment of U.S. College Athletes

The college sports industry represents a more than eleven billion dollar U.S. enterprise.¹¹ At present, over fifty U.S. colleges generate upwards of seventy million dollars per year in athletic revenues.¹² Meanwhile, twenty-eight colleges generate annual athletic revenues that exceed \$100 million.¹³ Most colleges with big-time sports programs focus their efforts on generating revenues in two sports: football and men's basketball.¹⁴ In these sports, the star athletes devote upwards of forty hours per week to team travel, play, and practice.¹⁵

¹¹ See 2015–16 NCAA Finances, USA TODAY, <http://sports.usatoday.com/ncaa/finances> [<https://web.archive.org/web/20160428093619/http://sports.usatoday.com/ncaa/finances/>] (last visited Aug. 16, 2017); see also Michael H. LeRoy, *Courts and the Future of "Athletic Labor" in College Sports*, 57 ARIZ. L. REV. 475, 489 (2015) (stating that the NCAA's annual revenues stand at sixteen billion dollars per year); Jay D. Lonick, *Bargaining with the Real Boss: How the Joint-Employer Doctrine Can Expand Student-Athlete Unionization to the NCAA as an Employer*, 15 VA. SPORTS & ENT. L. J. 135, 138 (2015) (estimating the revenue generated by the college sports industry at twelve billion dollars per year).

¹² See 2015–16 NCAA Finances, *supra* note 11.

¹³ See *id.* Not all college athletic programs are profitable, and, according to one source, public universities have "pumped more than \$10.3 billion in mandatory student fees and other subsidies into their sports programs." See Brad Wolverson et al., *Sports at Any Cost*, HUFFINGTON POST (Nov. 15, 2015, 8:00 PM), <http://projects.huffingtonpost.com/ncaa/sports-at-any-cost> [<https://perma.cc/CWA3-5KAQ>].

¹⁴ See Will Hobson & Steven Rich, *Playing in the Red*, WASH. POST (Nov. 23, 2015), <http://www.washingtonpost.com/sf/sports/wp/2015/11/23/running-up-the-bills> [<https://perma.cc/9DZU-24P2>] (explaining that football is the number one revenue producing sport for college athletic programs while men's basketball is number two). The primary sources of athletic revenues include ticket sales, alumni donations, brand merchandising, and media rights. See *Nw. Univ. & Coll. Athletes Players Ass'n (Nw. Univ. II)*, 362 N.L.R.B. No. 167, 2015 WL 4882656, at *4 (Aug. 17, 2015) (explaining that revenues from big-time college football emerge from "gate receipts, concession and merchandise sales, and broadcasting contracts"); *College Athletic Revenues and Expenses - 2008*, ESPN, <http://espn.go.com/ncaa/revenue> [<https://perma.cc/QN27-23VN>] (last visited Apr. 21, 2016). See generally Amber Jorgensen, *Why Collegiate Athletes Could Have the NCAA, Et Al. Singing a Different Tune*, 33 CARDOZO ARTS & ENT. L. J. 367 (2015) (explaining that "[r]ising television and marketing rights fees have primarily contributed to the economic growth of the NCAA and its member institutions over the past 25 years, as together such fees accounted for 81% of the NCAA's total revenue in 2012"); Hobson & Rich, *supra* (stating that "[b]ig-time college sports departments are making more money than ever before, thanks to skyrocketing television contracts, endorsement and licensing deals, and big-spending donors").

¹⁵ See Edelman, *supra* note 2, at 77 (noting that the typical Division I college football player devotes on average over forty hours per week to his sport—more time than the typical U.S. worker spends practicing his profession); see also LeRoy, *supra* note 2, at 1099 (noting that "a self-study performed by the NCAA in 2011" found that "Division I [college] football players [devoted] an average of 43.3 hours per week to their sport").

If U.S. colleges were for-profit entities, the most successful football and men's basketball programs would produce high shareholder distributions.¹⁶ Because the NCAA consists of exclusively non-profit colleges, however, the collegiate sports enterprise operates subject to a “non-distribution constraint.”¹⁷ This means that colleges with big-time football and men's basketball programs either reinvest their revenues into other college programs, or they allocate their revenues as windfall payments to quasi-shareholders such as school administrators, athletic directors, and coaches.¹⁸

Given the revenues brought in by these programs, one might expect colleges to allocate some of their athletic revenues to the athletes.¹⁹ Nevertheless, the NCAA Principle of Amateurism disallows colleges from paying athletes and threatens to ban any NCAA member college that engages in “pay for play.”²⁰ Thus, pursuant to the NCAA's bylaws, no NCAA member

¹⁶ See 2015–16 NCAA Finances, *supra* note 11 (showing total revenues and net revenues of big-time college athletic departments, after the subsidies to cover the costs of operating non-revenue sports).

¹⁷ Hobson & Rich, *supra* note 14 (quoting sports economist Dan Rascher about how the lack of shareholders contribute to college athletic departments' spending patterns); Gordon Winston, *Why Can't a College Be More Like a Firm*, CHANGE, May 1997, at 34 (discussing the impact of the non-distribution restraint in higher education); cf. *Berger v. Nat'l Collegiate Athletic Ass'n*, 843 F.3d 285, 289 (7th Cir. 2016) (describing the NCAA as “a member-driven, unincorporated association of 1121 colleges and universities. It is divided into three divisions—Division I, II, and III—based roughly on the size of the schools and their athletic programs”).

¹⁸ Marc Edelman, *The Future of Amateurism After Antitrust Scrutiny: Why a Win for the Plaintiffs in the NCAA Student-Athlete Name & Likeness Licensing Litigation Will Not Lead to the Demise of College Sports*, 92 OR. L. REV. 1019, 1031 (2014); see also Nicholas Fram & T. Ward Frampton, *A Union of Amateurs: A Legal Blueprint to Reshape Big-Time College Athletics*, 60 BUFF. L. REV. 1003, 1020 (2012) (“Unable to offer financial inducements to players, athletic departments invest heavily in marquee coaches, whose reputations can ensure the recruitment of top-level talent.”); Ellen J. Staurowsky, *A Radical Proposal: Title IX Has No Role in College Sport Pay-For-Play Discussions*, 22 MARQ. SPORTS L. REV. 575, 578 (2012) (“While college-player labor costs are essentially zero, compensation packages for top-tier college football and men's basketball coaches are competitive or exceed those of coaches working in the National Basketball Association (NBA) and NFL”). See generally Hobson & Rich, *supra* note 14 (explaining that “[c]olleges generally treat athletic departments as stand-alone organizations, free to spend every dollar they earn”).

¹⁹ See *Players: 0; Colleges: \$10,000,000,000*, *supra* note 4 (highlighting the unusual nature of the college sports business model in the United States, and the treatment of college athletes as celebrities despite not allowing them to “share the fruits of their own [labor]”); cf. Maxwell Strachan, *Mitch Daniels Says NCAA Needs Serious Reform to Head Off Congress and Courts*, HUFFINGTON POST (May 13, 2015), http://www.huffingtonpost.com/2015/05/13/mitch-daniels-ncaa-division-i-sports_n_7274248.html [<https://perma.cc/PN6L-3XH3>] (explaining that the President of Purdue University, Mitch Daniels, “believes the term ‘college basketball’ is a ‘misnomer’ and that the teams are really ‘pseudo-professional teams attached to universities’”).

²⁰ See NAT'L COLLEGIATE ATHLETIC ASS'N, 2017–2018 DIVISION I MANUAL § 2.9 (2017) (stating that “[s]tudent-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”); see also Edelman, *supra* note 2, at 64–65 (explaining that “the NCAA is ‘the dominant

college would dare publicly offer any financial benefits to its athletes beyond a tax-exempt scholarship to cover the costs of tuition, books, and room and board.²¹

B. Three Approaches to Reforming College Sports

Based on the colossal disparity between the revenues derived from college sports and the college athletes' compensation, there is an emerging movement to reform the financial aspects of collegiate sports.²² Some advocates of reform have called for the NCAA to make voluntary changes to its Principle of Amateurism.²³ Others have explored the potential for players to unionize under federal labor laws.²⁴ Meanwhile, a third group of reformers has called for athletes to challenge the NCAA's "no pay" rules under federal antitrust laws.²⁵

trade association' of American colleges that compete in intercollegiate sports," and that "[i]t comprises approximately twelve hundred member schools that participate in ninety-five different active athletic conferences"); Edelman, *supra* note 5, at 864–68 (providing a brief history of colleges attempting to limit athlete benefits to just a free undergraduate education).

²¹ See Marc Edelman *The NCAA's "Death Penalty" Sanction—Reasonable Self-Governance or an Illegal Group Boycott in Disguise?* 18 LEWIS & CLARK L. REV. 385, 392–93 (2014) (explaining the NCAA's "death penalty" sanction and how it generates enormous financial incentives for members to avoid any detectable means of violating major NCAA rules, including the Principle of Amateurism).

²² See *supra* note 1 and accompanying text. *But see* 160 Cong. Rec. S2362–66 (arguing this disparity is not quite what it seems based on the notion that "a college degree adds \$1 million to [one's expected] earnings during a lifetime").

²³ See Strachan, *supra* note 19 (quoting Purdue University president Mitch Daniels arguing that the NCAA needs to make serious reforms to the compensation structure of college athletes before courts and Congress order changes); *infra* notes 26–32 and accompanying text.

²⁴ See Joe Nocera, *Unionized College Athletes?*, N.Y. TIMES (Jan. 31, 2014), <https://www.nytimes.com/2014/02/01/opinion/nocera-unionized-college-athletes.html> [<https://perma.cc/D9H7-YC5U>]; Kenneth Quinnell, *8 Reasons Why College Athletes Need a Union*, AFL-CIO (Jan. 30, 2014), <http://www.aflcio.org/Blog/Organizing-Bargaining/8-Reasons-College-Athletes-Need-a-Union> [<https://perma.cc/3AER-WA4W>]; *infra* notes 33–39 and accompanying text; see also Clay Travis, *The NCAA Needs a College Union to Negotiate With*, OUTKICK THE COVERAGE (Aug. 11, 2014), <http://www.outkickthecoverage.com/the-ncaa-needs-a-college-union-to-negotiate-with-081114> [<https://perma.cc/U4VF-N8X4>] (arguing that the NCAA collectively bargaining against a college athlete union presents a better outcome than the NCAA risking antitrust liability under Section 1 of the Sherman Act).

²⁵ See Tom Farrey, *Jeffrey Kessler Files Against NCAA*, ESPN (Mar. 18, 2014), http://www.espn.com/college-sports/story/_id/10620388/anti-trust-claim-filed-jeffrey-kessler-challenges-ncaa-amateur-model [<https://perma.cc/FV8E-2RKZ>] (quoting attorney as stating that "[i]n no other business . . . would it ever be suggested that the people who are providing the essential services work for free"); *infra* notes 40–51 and accompanying text.

1. Voluntary NCAA Reform

Thus far, attempts to reform the NCAA without resorting to litigation have achieved limited to moderate success.²⁶ A recent example of such reform was the NCAA's decision to abandon its rules limiting the amount of food that colleges may provide to their athletes.²⁷ This reform emerged after University of Connecticut men's basketball player Shabazz Napier exposed the hypocrisy of the NCAA's rules on food limits to the media just hours before playing in the 2014 men's basketball national championship game.²⁸ Napier's statement that he had experienced "hungry nights" at school went viral due, in part, to the absurdity of the NCAA earning nearly one billion dollars from men's basketball television revenues, while limiting how much food colleges may provide to their basketball players.²⁹

Another voluntary NCAA reform was the NCAA's 2011 decision to increase the maximum permissible scholarship amounts for college athletes by two thousand dollars—a decision that somewhat reduced the shortfall between the NCAA's scholarship maximum and the actual cost of attending college.³⁰ Some commentators attribute this change to social activism by college athletes and more liberal-minded coaches.³¹ Others, however, at-

²⁶ See *infra* notes 27–32 and accompanying text.

²⁷ See *NCAA Committee Approves Expanded Meal Allowances for Athletes*, NCAA (Apr. 15, 2014), <http://www.ncaa.com/news/ncaa/article/2014-04-15/ncaa-committee-approves-expanded-meal-allowances-athletes> [https://perma.cc/459J-LY4R] (stating that the NCAA Legislative Council had decided to allow NCAA Division I athletes to receive unlimited meals and snacks from their colleges in "conjunction with their athletics participation").

²⁸ See Mike Singer, *Connecticut's Shabazz Napier: 'We Do Have Hungry Nights'*, CBS SPORTS (Apr. 7, 2014), <http://www.cbssports.com/college-basketball/news/connecticuts-shabazz-napier-we-do-have-hungry-nights> [https://web.archive.org/web/20170625034618/http://www.cbssports.com/college-basketball/news/connecticuts-shabazz-napier-we-do-have-hungry-nights]; see also Kevin Trahan, *NCAA Allows 'Unlimited Meals' (Days After Shabazz Napier Claimed Hunger)*, SB NATION (Apr. 14, 2015, 5:26 PM), <http://www.sbnation.com/college-football/2014/4/15/5618236/new-ncaa-rules-meals-snacks-SNACKS> [https://perma.cc/3KGC-PUTN].

²⁹ See Singer, *supra* note 28; see also CBS Sports, *Turner Broadcasting, NCAA Reach 14 Year Agreement*, NCAA (Apr. 22, 2010), <http://www.ncaa.com/news/basketball-men/2010-04-21/cbs-sports-turner-broadcasting-ncaa-reach-14-year-agreement> [https://perma.cc/7WVD-NQ32] (discussing the NCAA's fourteen year, \$10.8 billion television contract to broadcast the annual March men's basketball tournament).

³⁰ See *NCAA Panel Approves Major Changes*, ESPN (Oct. 27, 2011), http://www.espn.com/college-sports/story/_/id/7156548/ncaa-panel-approves-major-scholarship-rules-changes [https://perma.cc/6Y87-AH9F] (discussing the NCAA's decision to allow conferences to vote to provide college athletes with two thousand dollars in "spending money" in addition their scholarships, and the recognition by Big Ten Commissioner Jim Delany that this amount still leaves college athletes with a shortfall).

³¹ See Bruce Pascoe, *UA Athletes Can Expect About \$1,000*, ARIZ. DAILY STAR (Oct. 28, 2011), http://tucson.com/sports/college/wildcats/ua-athletes-can-expect-about/article_952dbdaf-3900-5b02-b323-14cc61cc2d7d.html [https://perma.cc/YS4T-7LNZ] (explaining that in the days leading up to the NCAA's favorable vote to increase the permissible scholarship amount for college athletes

tribute the change more to the desire of elite colleges to compete more favorably in college athlete recruiting markets.³²

2. The Unionizing of College Athletes

A second approach to improving the financial status of college athletes entails the unionizing of athletes for the purposes of collective bargaining over the mandatory terms and conditions of employment—including hours, wages, and general working conditions.³³ The most notable attempt to unionize college athletes occurred in 2014, when the starting quarterback of Northwestern University’s men’s football team, Kain Colter, attempted to convince his teammates to unionize.³⁴ Region 13 of the National Labor Relations Board (“NLRB”) ultimately recognized that Northwestern University football players were “employees” under the National Labor Relations Act.³⁵ Nevertheless, the Board Commissioners refused to assert jurisdiction

by the lesser of two thousand dollars or the amount needed to meet the full cost of college attendance, many college athletes, including University of Arizona wide receiver David Roberts, signed a petition requesting a \$3,200 increase); see also Jon Nyatawa & Rich Kaipust, *Nebraska Football Notes: Pelini in Favor of NCAA’s Actions to Assist Athletes*, OMAHA WORLD-HERALD, Oct. 28, 2011, 2011 WLNR 22250322 (discussing University of Nebraska football coach Bo Pelini’s support for increasing the scholarship limits for college athletes).

³² See generally Elton Alexander, *NCAA Will Allow Schools to Provide Spending Money to Student-Athletes*, PLAIN DEALER (Oct. 28, 2011, 5:01AM), http://www.cleveland.com/osu/2011/10/ncaa_approves_spending_money_f.html [<https://perma.cc/2LET-NL58>] (explaining how the two thousand dollar scholarship increase is a neutral, or perhaps even positive, change from the perspective of Ohio State University—a school with an athletic department that operates at a surplus and wishes to continue recruiting the most elite college football and men’s basketball players).

³³ See 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 (2017) (explaining that “Congress passed the [National Labor Relations Act] in May 1935 to grant private employees the right to self-organize and engage in . . . concerted activities for the purpose of collective bargaining or other mutual aid or protection”) (internal quotations omitted); see also *First Nat’l Maint. Corp. v. N.L.R.B.*, 452 U.S. 666, 674–75 (1981) (“Although parties are free to bargain about any legal subject, Congress has limited the mandate or duty to bargain to matters of ‘wages, hours, and other terms and conditions of employment.’”) (citing 29 U.S.C. § 158(d) (2012)).

³⁴ See Edelman, *supra* note 33, at 1635 (discussing the efforts to create a college athlete players’ union among Northwestern University grant-in-aid football players).

³⁵ See *Nw. Univ. & Coll. Athletes Players Ass’n (Nw. Univ. I)*, No. 13-RC-121359, 2014 WL 1246914, at *1 (N.L.R.B., Region 13 Mar. 26, 2014), *rev’d on other grounds*, *Nw. Univ. II*, 2015 WL 4882656, at *1 (Aug. 17, 2015). Since the NLRB decision, the U.S. Court of Appeals for the Seventh Circuit rejected classifying athletes on the University of Pennsylvania women’s track and field team as employees for purposes of the right to minimum wage under the Fair Labor Standards Act. See *Berger*, 843 F.3d at 291–93. Although the *Berger* decision involved the Fair Labor Standards Act and not the National Labor Relations Act, the ruling is somewhat troubling with regard to the future classification of big-time college athletes as employees because the majority opinion references all “student athletes,” and not just those participating in women’s track and

over these particular football players due to a concern that doing so would create labor instability throughout the Big Ten athletic conference.³⁶

The NLRB's decision to deny jurisdiction over the Northwestern University football players, however, does not foreclose the possibility of the NLRB asserting jurisdiction over a different bargaining unit of revenue-generating college athletes.³⁷ One alternative bargaining unit that might receive more favorable treatment from the NLRB would include all of the football or men's basketball players in an athletic conference that includes multiple private colleges.³⁸ Another potential bargaining unit could include all of the private Football Bowl Subdivision ("FBS") football and Division I men's basketball players across the entire United States.³⁹

3. Reform Ordered by Antitrust Law

Finally, some college athletes have attempted to improve their economic status by challenging the NCAA's "no-pay" rules as illegal restraints of trade under the Sherman Antitrust Act.⁴⁰ To date, there have been three notable labor-side antitrust lawsuits against the NCAA that seek to change the financial relationship between colleges and their football and men's basketball players.⁴¹ The first lawsuit, *O'Bannon v. National Collegiate Athletic Ass'n*, was brought by the plaintiffs in 2009 and alleged that the NCAA's members violated Section 1 of the Sherman Act by conspiring "to fix the price of former student athletes' images at zero and to boycott former stu-

field. *Id.* at 293. Judge Hamilton's concurring opinion in *Berger* seems to take a more realistic view, suggesting as a note of caution that the non-treatment of the University of Pennsylvania women's track team as employees may be based in part on that "Penn does not offer athletic scholarships" and "track and field is not a 'revenue' sport at Penn or any other school." *Id.* at 294 (Hamilton, J., concurring).

³⁶ *Nw. Univ. II*, 2015 WL 4882656, at *5. More broadly than these particular qualms related to the nature of Northwestern University's conference affiliation, the NLRB cautioned that "of the roughly 125 colleges and universities that participate in FBS football, all but 17 are state-run institutions," that lie outside the scope of the NLRB's jurisdiction. *Id.*

³⁷ See Edelman, *supra* note 33, at 1643.

³⁸ See *id.* (citing *Nw. Univ. II*, 2015 WL 4882656, at *6).

³⁹ *Id.* at 1649–50. A third potential bargaining unit might include all FBS football and Division I men's basketball players at both public and private colleges, operating under the theory that the NCAA is a joint employer of all college athletes and thus even public colleges fall within the NLRB's jurisdiction. See *id.* Nevertheless, the Seventh Circuit in *Berger* seemed to reject the notion that the NCAA was a joint employer of college athletes. See *Berger*, 843 F.3d at 293 (holding that the relationship between University of Pennsylvania college athletes and the NCAA was too attenuated to establish employer liability).

⁴⁰ See *infra* notes 42–51 and accompanying text.

⁴¹ See *infra* notes 42–51 and accompanying text.

dent athletes in the collegiate licensing market.”⁴² The U.S. Court of Appeals for the Ninth Circuit upheld the lower court’s injunction that prevented the NCAA from sanctioning colleges that provide their athletes with scholarships valued at up to the full cost of their college attendance.⁴³

A second lawsuit, *Alston v. National Collegiate Athletic Ass’n*, was filed in 2014 and alleged that the NCAA and its five largest athletic conferences conspired to violate antitrust laws by capping the value of college athlete scholarships below the athletes’ actual cost of attendance.⁴⁴ The plaintiffs in *Alston* sought not only to enjoin NCAA member colleges from limiting scholarship amounts (a remedy similar to the remedy requested in *O’Bannon*), but also to receive damages from the NCAA for past antitrust wrongdoing.⁴⁵ In February of 2017, the class of plaintiffs in *Alston* and the NCAA reached a historic settlement.⁴⁶

A third antitrust lawsuit, *Jenkins v. National Collegiate Athletic Ass’n*, was filed in 2014 and sought to fully overturn the NCAA’s “no pay” rules that “plac[e] a ceiling on the compensation that may be paid to [college] athletes for their services.”⁴⁷ In contrast to *O’Bannon* and *Alston*, the *Jen-*

⁴² *O’Bannon v. Nat’l Collegiate Athletic Ass’n (O’Bannon I)*, No. C 09-1967 CW, 2010 WL 445190, at *5 (N.D. Cal. Feb. 8, 2010); see Joseph Liu, *Sports Merchandising, Publicity Rights, and the Missing Role of the Sports Fan*, 52 B.C. L. REV. 493, 511 (2011) (describing the *O’Bannon* case’s conflict over who owned college football and basketball players’ publicity rights: the players or the schools).

⁴³ *O’Bannon v. Nat’l Collegiate Athletic Ass’n (O’Bannon II)*, 802 F.3d 1049, 1079 (9th Cir. 2015). Prior to the decision, the NCAA capped the amount of athletic scholarships at member schools at a “full grant in aid” rather than “cost of attendance”—leaving college athletes with between a \$2000 and \$6000 annual shortfall resulting from transportation and reasonable personal expenses. See Fram & Frampton, *supra* note 18, at 1022 (describing the shortfall at some institutions as “more than \$6000”); William B. Gould IV et al., *Full Court Press: Northwestern University, A New Challenge to the NCAA*, 35 LOY. L.A. ENT. L. REV. 1, 45 (2014) (estimating the shortfall at nearly two thousand dollars).

⁴⁴ Complaint at 108–13, *Alston v. Nat’l Collegiate Athletic Ass’n*, No. 4:14-cv-01011 (N.D. Cal. Mar. 5, 2014) [hereinafter *Alston* Complaint]; Justin Sievert, *The Forgotten Antitrust Case: How an NCAA Loss in Alston Could Impact College Athletics*, SPORTING NEWS (Nov. 4, 2015), <http://www.sportingnews.com/ncaa-football/news/ncaa-antitrust-case-shawne-alston-effects-college-athletics/> Iuro6chmw5naj1o6n15opblfmy [https://perma.cc/P746-AM58].

⁴⁵ *Alston* Complaint, *supra* note 44 at 106–07, 115; Sievert, *supra* note 44.

⁴⁶ Michael McCann, *NCAA Reaches Settlement in Grant-in-Aid Class Action*, SPORTS ILLUSTRATED (Feb. 5, 2017), <https://www.si.com/college-football/2017/02/04/shawne-alston-grant-aid-class-action-lawsuit-ncaa-settlement> <https://web.archive.org/web/20170217035847/https://www.si.com/college-football/2017/02/04/shawne-alston-grant-aid-class-action-lawsuit-ncaa-settlement>. The settlement would require the NCAA to pay a total of \$208.7 million to a class of approximately forty thousand former Division I football, men’s basketball and women’s basketball players who have played since March 2010. *Id.* A class member who played one of those sports for four years could expect to receive, on average, \$6,763. *Id.*

⁴⁷ Complaint at 2, *Jenkins v. Nat’l Collegiate Athletic Ass’n*, No. 3:14-cv-01678 (D.N.J. Mar. 17, 2014) [hereinafter *Jenkins* Complaint]. The suit was later re-filed in the Northern District of

kins lawsuit did not seek to simply recover the true costs of attending college.⁴⁸ Rather, the lawsuit is attempting to create an entirely free labor market for NCAA colleges to hire athletes.⁴⁹ In other words, the *Jenkins* lawsuit seeks to obtain a labor market to recruit college athletes comparable to the market that already exists to hire non-unionized college professors and non-unionized research assistants.⁵⁰ If successful, this would mark a substantial departure from past practices in college sports.⁵¹

C. Political, Media, and Academic Perspectives on the Tax Implications of College Sports Reform

Among the many public policy issues that emerge from transitioning college sports into a “pay for play” model, one issue that has received substantial attention involves the tax implications that “pay for play” may have on college athletes’ scholarships.⁵² Not surprisingly, some of the staunchest opponents of “pay for play” have attempted to use the purported negative tax consequences as a red herring in the argument about whether college athletes deserve to share in the fruits of their labor.⁵³

Among politicians, one of the most outspoken critics of “pay for play” is U.S. Senator Richard Burr (R–North Carolina), a former scholarship football player at Wake Forest University who believes the United Steelworkers Union pressured “misguided college football players” into seeking to unionize.⁵⁴ Senator Burr recently penned a letter to the Internal Revenue

California. See Second Amended Complaint, *Jenkins v. Nat’l Collegiate Athletic Ass’n*, No. 14-cv-02758-CW (N.D. Cal. Feb 3, 2015).

⁴⁸ See *Jenkins* Complaint, *supra* note 47, at 1–4.

⁴⁹ *Id.* The argument advanced in the *Jenkins* suit mimics one that I had advanced in a law review article in 2013. See Edelman, *supra* note 2, at 64 (concluding that “[i]t is not just the outer fringes of the NCAA rules that violate antitrust law: it is the whole shebang”).

⁵⁰ Cf. Marc Edelman, *How Antitrust Law Could Reform College Football: Section 1 of the Sherman Act and the Hope for Tangible Change*, 68 RUTGERS U. L. REV. 809, 823 (2016) (comparing the desired result of the *Jenkins* lawsuit to the free market that already exists among colleges, competing for professors’ services).

⁵¹ See Associated Press, *NCAA President: Not A Good Idea*, ESPN (Sept. 17, 2013), http://www.espn.com/college-sports/story/_id/9682086/ncaa-budge-paying-college-athletes [<https://perma.cc/C6KN-Z46N>] (quoting NCAA President Mark Emmert as stating that, despite the ongoing litigation against the NCAA’s no-pay rules, “[o]ne thing that sets the fundamental tone is there’s very few members and, virtually no university president, that think it’s a good idea to convert student-athletes into paid employees”).

⁵² See, e.g., Thelin, *supra* note 6.

⁵³ See, e.g., Darren Rovell, *Players Could Get Big Tax Bill*, ESPN (Mar. 27, 2014), <http://www.espn.com/espn/print?id=10683398> [<https://perma.cc/9SUC-GWVD>].

⁵⁴ See 160 Cong. Rec. S2362–66 (providing the extensive statements of Senator Lamar Alexander (R-Tennessee) and Senator Richard Burr (R-North Carolina) in opposition to athletes unionizing and “pay for play” in college sports).

Service (“IRS”), arguing that any college athlete who obtains the classification of an “employee” should immediately lose the tax-exempt status of his college scholarship.⁵⁵ John Koskinen, the Commissioner of the IRS, however, disagreed.⁵⁶

Similarly, among sports journalists, ESPN writer Darren Rovell has noted that “pay for play” could harm the tax-exempt status of college athletes’ scholarships.⁵⁷ In one ESPN article, Rovell quoted an accountant in private practice for the proposition that if college athletes were to be reclassified as employees, “[t]he IRS may be able to make the argument that the scholarship is really payment for services . . . and is now taxable to the athlete.”⁵⁸ The accountant’s opinion, however, focused only on a single section of the tax code and not on the code in its entirety.⁵⁹

Meanwhile, among college professors, University of Kentucky Education Policy professor John R. Thelin has argued that if college athletes were to receive salaries rather than scholarships, the athletes would become worse off economically because they would lose the ability to obtain college tuition on a tax-exempt basis.⁶⁰ Similarly, professors Kathryn Kisska-Schulze and Adam Epstein claim in a recent *Akron Law Review* article that the IRS and courts “may categorize at least some scholarship athletes as employees of their institutions in the future, which may cultivate a new era in the taxing of qualified scholarships under federal income tax law.”⁶¹ None of these conclusions, however, consider the full nuance of the tax code.⁶²

⁵⁵ See Letter from John A. Koskinen, IRS Comm’r, to Richard Burr, U.S. Senator, *supra* note 7 (explaining and rejecting Senator Burr’s perspective); see also Press Release, U.S. Senate Comm. on Health, Educ., Labor & Pensions, *supra* note 7 (referencing Senator Burr’s college football experience at Wake Forest University); *Lawmakers Ask for Northwestern Football Union Ruling to Be Overturned*, LEGAL MONITOR WORLDWIDE, Jul. 4, 2014, 2014 WLNR 18206332 (discussing amicus brief signed by six Republican lawmakers, including Senator Burr, seeking to convince the Commissioners of the NLRB to overturn Region 13’s ruling that the Northwestern University football players constituted employees under labor law).

⁵⁶ See Letter from John A. Koskinen, IRS Comm’r, to Richard Burr, U.S. Senator, *supra* note 7.

⁵⁷ See Rovell, *supra* note 53 (arguing that even though Region 13 of the NLRB granted jurisdiction over the Northwestern University football players, “potential tax implications alone could kill the idea”).

⁵⁸ See *id.* (quoting tax accountant Garrett Higgins).

⁵⁹ See *id.* (noting that the tax analysis was exclusively based on § 117 of the U.S. tax code, which relates to “qualified scholarships,” while there are several sections of the tax code that arguably apply).

⁶⁰ Thelin, *supra* note 6.

⁶¹ Kathryn Kisska-Schulze & Adam Epstein, *Northwestern, O’Bannon and the Future: Cultivating a New Era for Taxing Qualified Scholarships*, 49 AKRON L. REV. 771, 775 (2016).

⁶² See *infra* notes 62–148 and accompanying text (discussing sections of the tax code that were ignored entirely by the aforementioned analyses).

II. A BASIC PRIMER ON FEDERAL INCOME TAX LAW

Despite the simple, widespread argument that paying college athletes makes educational scholarships taxable, a review of the U.S. tax code indicates that numerous different code sections may direct otherwise.⁶³ Section A of this Part will discuss U.S. tax law generally and explain the fundamental premise of “gross income.”⁶⁴ Section B of this Part will explain the various reductions an individual may take from their “gross income.”⁶⁵

A. An Introduction to U.S. Tax Law and the Definitions of “Gross Income” and Taxable Income

Before the IRS can compute one’s tax liability, the Internal Revenue Code (“IRC”) first requires a computation of one’s “gross income.”⁶⁶ The IRC defines “gross income” to include any “income from whatever source derived”—irrespective of whether the income is provided in the form of cash or property.⁶⁷

The tax code then lowers one’s taxable income based upon three types of reductions: exclusions, deductions, and credits.⁶⁸ A tax exclusion reduces the amount that a taxpayer must report as gross income.⁶⁹ For example, the code allows a taxpayer to exclude certain types of in-kind benefits from gross income because they are difficult to measure.⁷⁰ Meanwhile, taxpayers may exclude other types of benefits, such as 401(k) retirement plans, as a means to further a public policy that promotes retirement savings.⁷¹

Similarly, a tax deduction is an expense that an individual may subtract from his or her “gross income.”⁷² Taxpayers typically have a choice between accepting a “standard deduction” or accepting an aggregate of all of their line item deductions.⁷³ Some examples of deductible line-items include property taxes and mortgage interest, state and local income taxes, charitable contri-

⁶³ See generally I.R.C. §§ 1–1564 (2012) (income taxes).

⁶⁴ See *infra* notes 66–79 and accompanying text.

⁶⁵ See *infra* notes 80–148 and accompanying text.

⁶⁶ See I.R.C. § 61(a).

⁶⁷ *Id.*

⁶⁸ Rick Lindquist, *Tax Exclusions vs. Tax Deductions vs. Tax Credits in Healthcare*, ZANE BENEFITS: SMALL BUS. EMP. BENEFITS AND HR BLOG (Jan. 4, 2013), <https://www.zanebenefits.com/blog/bid/252608/tax-exclusions-vs-tax-deductions-vs-tax-credits-in-healthcare> [https://perma.cc/S9N5-RRP5].

⁶⁹ See I.R.C. §§ 101–140; Lindquist, *supra* note 68.

⁷⁰ See I.R.C. §§ 101–140; Lindquist, *supra* note 68.

⁷¹ See I.R.C. § 401(k); Lindquist, *supra* note 68.

⁷² See I.R.C. §§ 151–224; Lindquist, *supra* note 68.

⁷³ See Lindquist, *supra* note 68.

butions, and medical expenses not covered by insurance to the extent that they exceed a particular threshold.⁷⁴

Finally, a tax credit is a “dollar-for-dollar reduction of an individual’s tax liability.”⁷⁵ A tax credit is different from a tax deduction in that “[i]f the tax credit is refundable, individuals can receive its full amount even if they do not have any income tax to offset.”⁷⁶ Many tax credits, however, are limited to individuals with earned income below a certain threshold.⁷⁷ For example the earned income tax credit “is geared toward people with low to moderate income levels.”⁷⁸ In 2016, the credit allowed for a tax savings of up to \$6,269, with this amount varying based on income level, filing basis, and number of dependents.⁷⁹

B. Notable Reductions from “Gross Income”

When reviewing the entirety of the U.S. tax code, there are several possible ways for individuals to realize a tax savings on either their free receipt or purchase of an education.⁸⁰

1. Section 117: Qualified Scholarship Exemption

First, Section 117 of the IRC is the section of the code that college athletes traditionally have relied upon when electing not to declare their scholarships as gross income.⁸¹ This section of the tax code excludes from gross income the receipt of “qualified scholarships,” which are contingency-free educational grants and fellowships.⁸² To constitute a “qualified scholar-

⁷⁴ See I.R.C. §§ 163–164, 170, 213; Lindquist, *supra* note 68.

⁷⁵ Lindquist, *supra* note 68. See generally *What Is the Earned Income Tax Credit?*, TAX POL’Y CTR. <http://www.taxpolicycenter.org/briefing-book/what-earned-income-tax-credit-eitc> [https://perma.cc/P56E-JSQ6] (last visited Aug. 16, 2016).

⁷⁶ Lindquist, *supra* note 68.

⁷⁷ *Id.*

⁷⁸ See Jennifer Woods, *The Top 10 Tax Credits That Should Be on Your Radar*, CNBC (Apr. 11, 2016), <http://www.cnbc.com/2016/04/11/the-top-10-tax-credits-that-should-be-on-your-radar.html> [https://perma.cc/6JK6-6KE8].

⁷⁹ TAX POL’Y CTR., EARNED INCOME TAX CREDIT PARAMETERS, 1975–2016 (2016), http://www.taxpolicycenter.org/sites/default/files/legacy/taxfacts/content/PDF/historical_eitc_parameters.pdf [https://perma.cc/Y9P2-L88P]; Woods, *supra* note 78.

⁸⁰ See *infra* notes 81–148 and accompanying text.

⁸¹ See I.R.C. § 117(a)–(d) (qualified scholarships); see also Rev. Rul. 77-263, 1977-2 C.B. 47 (concluding that recipients of athletic scholarships do not need to pay income tax on these scholarships as long as the scholarships are guaranteed irrespective of whether the recipient ultimately chooses to play his or her sport).

⁸² See I.R.C. § 117(a)–(d); cf Kisska-Schulze & Epstein, *supra* note 61, at 783 (explaining that the “qualified scholarship” exemption for gross income first appeared in a U.S. tax code in 1954).

ship,” a particular payment or in-kind benefit must cover the tuition and fees required for college enrollment, books, supplies or equipment.⁸³ In addition, the scholarship’s primary purpose must be “to further the education and training of the recipient in his individual capacity” rather than in the recipient’s employee capacity.⁸⁴

The outer contours of what constitutes a “qualified scholarship” have emerged from federal case law.⁸⁵ Most notably, the U.S. Supreme Court held in its 1969 decision *Bingler v. Johnson* that a scholarship provided by one’s employer subject to the express promise to work for the employer upon graduation did not constitute a “qualified scholarship.”⁸⁶ This is because a scholarship of this nature includes an express condition to perform contemporaneous or subsequent work for an employer in exchange for the free education.⁸⁷ In other words, the underlying scholarship is more akin to a contractual arrangement than a gift.⁸⁸

⁸³ See I.R.C. § 117(a)–(c) (noting that the scholarship amount may not include room and board); see also Justin Morehouse, *When Play Becomes Work: Are College Athletes Employees?*, TAX ANALYSTS (Sep. 22, 2014), <http://www.taxanalysts.org/content/when-play-becomes-work-are-college-athletes-employees> [<https://perma.cc/9B73-8D6F>] (noting that, in 1986, “Congress explicitly limited the scope of qualified expenses to deny the exclusion for amounts received as room, board, and other living expenses”).

⁸⁴ Treas. Reg. § 1.117-4(c) (as amended in 1985). According to at least one scholar on the topic, it is believed that the underlying rationale to this distinction was that, in the early days of the tax code, “most scholarships [outside of the employment context] were given by local business leagues, charitable organizations, and education institutions themselves” and thus these scholarships were perhaps seen as akin to gifts. Charlotte Crane, *Scholarships and the Federal Income Tax Base*, 28 HARV. J. ON LEGIS. 63, 67 (1991). Although the nature of many scholarships is quite different today, the general treatment of scholarships has not changed because this tax deduction encourages the pursuit of education, and, furthermore, excluding such amounts from taxation is consistent with a general social welfare policy of “treat[ing] those individuals receiving scholarships equal to those receiving educational advantages from their environment.” *Id.* at 75, 103.

⁸⁵ See *infra* notes 86–109 and accompanying text.

⁸⁶ *Bingler v. Johnson*, 394 U.S. 741, 757 (1969) (noting that, under a predecessor version of the tax code, that under the taxpayer’s scholarship, the taxpayer, who was an engineer at Westinghouse, was “obligated to return to Westinghouse’s employ for a substantial period of time”).

⁸⁷ *Id.*; see also Crane, *supra* note 84, at 104 (explaining that, based on the interpretation in *Bingler* and subsequent cases, “[n]o longer can any services be made an express condition of scholarships exempt under section 117” and “[h]owever, the statute sets forth no standard to apply when there is no such express condition and a student both works for and seeks scholarship aid from a single institution”); *cf. id.* at 105 (concluding that “in many instances, the line between merit and services can be a fine one, even at the undergraduate level” and pointing to the engagement in an extracurricular activity in exchange for a scholarship as perhaps, in the author’s opinion, blurring the line).

⁸⁸ See ARTHUR L. CORBIN ET AL., CORBIN ON CONTRACTS § 1.3 (Joseph M. Perillo ed. 2017) (describing one definition of a contract to constitute a relation between parties to exchange and contrasting such definitions with gifts); *Frequently Asked Questions of Gift Taxes*, IRS, <https://www.irs.gov/businesses/small-businesses-self-employed/frequently-asked-questions-on-gift-taxes> [<https://perma.cc/R3R9-28LK>] (last updated Apr. 10, 2017) (explaining that a “gift” is “[a]ny transfer to an

Similarly, in 1969, in *Proskey v. Commissioner*, the U.S. Tax Court explored the outermost limits of the definition of a “qualified scholarship” in the context of a resident physician at a university hospital.⁸⁹ In *Proskey*, the court held that a cash stipend the University of Michigan had paid to one of its resident physicians was taxable under the U.S. tax code because the physician’s primary responsibilities—diagnosing patients and prescribing treatment—were not related to his own education.⁹⁰ Although the U.S. Tax Court recognized that the resident physician had teaching responsibilities at the University of Michigan’s medical school, these teaching responsibilities were performed under the “constant direction and control” of the resident physician’s hospital, and the resident physician “was not free to pursue studies or research of his choice.”⁹¹

The previous year, in *Zolnay v. Commissioner*, the U.S. Tax Court held that the annual cash payment of \$9,600 from a university laboratory to an Ohio State University Ph.D student who performed lab research constituted compensation for services and was not an excludable scholarship or fellowship under the U.S. tax code.⁹² In *Zolnay*, the court noted that the laboratory worker was paid a salary on par with university professors, and that he had worked in the laboratory for upwards of forty hours per week—far longer than was needed to meet any obligations related to his Ph.D. program.⁹³ Furthermore, the laboratory worker’s payment came in the form of cash, and his pay was not allocated to any direct costs pertaining to Ohio State University.⁹⁴ The laboratory worker even continued to perform the same work and receive the same paycheck after he withdrew from the university.⁹⁵

Nevertheless, in contrast to the court rulings in *Bingler*, *Proskey*, and *Zolnay*, a 1977 IRS ruling concluded that under the “student-athlete” amateurism model, “[t]he value of athletic scholarships, which may not exceed expenses for tuition, fees, room, board, and necessary supplies . . . is excludable from the recipient’s gross income” as long as the scholarship offer remains binding irrespective of whether the student ultimately chooses to

individual, either directly or indirectly, where full consideration (measured in money or money’s worth) is not received in return” and that where there is a tax on such gift, “[t]he donor is generally responsible for paying the gift tax”).

⁸⁹ 51 T.C. 918, 923–24 (1969).

⁹⁰ *See id.* at 923 (explaining further that the University of Michigan Hospital was “not operated primarily as an institution for teaching”).

⁹¹ *Id.* at 924.

⁹² *See* 49 T.C. 389, 399 (1968).

⁹³ *See id.* at 397–98.

⁹⁴ *See generally id.* (explaining that taxpayer’s use of his stipend for every day financial support, unrelated to his supposed studies, cut in favor the IRS’s argument the stipends were compensation for work).

⁹⁵ *See id.* at 398.

participate in his sport.⁹⁶ The ruling further explains that if an “athletic scholarship” was crafted to make scholarship money contingent upon the athlete actually competing in his sport or fulfilling some other legal requirement, then the IRS would instead treat the “scholarship” as a quid pro quo, and thus it would not be excludable from “gross income.”⁹⁷

There are several ways to reconcile the favorable tax treatment of athletic scholarships by the IRS with the adverse court rulings in *Bingler*, *Proskey* and *Zolnay*.⁹⁸ First, as articulated by the IRS, traditional athletic scholarships at the time were perceived as binding even if an athlete were to quit his team.⁹⁹ Thus, the athletic scholarships in question were not tied to performing in any particular athletic activity.¹⁰⁰ By contrast, in *Bingler*, *Proskey*, and *Zolnay*, the recipients’ scholarships were contingent upon either contemporaneous or future work.¹⁰¹ Thus, the scholarship came far closer to representing one side of a quid pro quo.¹⁰²

In addition to the difference in the binding nature of the scholarships, recipients of college athletic scholarships generally maintain full discretion to choose their courses based on personal interests.¹⁰³ Indeed, NCAA Division I athletes have held majors as varied as aeronautics, linguistics, and medical anthropology.¹⁰⁴ By contrast, the scholarship recipients in *Bingler*

⁹⁶ Rev. Rul. 77-263, 1977-2 C.B. 47.

⁹⁷ *Id.* Since the 1977 ruling, many colleges have moved to one-year scholarships that are not renewed if an athlete quits, plays poorly, or is injured. Even absent a “pay for play” model, these scholarships may reasonably fail under the test for “qualified scholarships” under § 117 of the tax code. See Jon Solomon, *Schools Can Give Out 4-Year Athletic Scholarships, but Many Don’t*, CBS SPORTS (Sept. 16, 2014), <http://www.cbssports.com/college-football/news/schools-can-give-out-4-year-athletic-scholarships-but-many-dont> [<https://web.archive.org/web/20160612091032/http://www.cbssports.com/college-football/news/schools-can-give-out-4-year-athletic-scholarships-but-many-dont>] (explaining that for many years leading up to 2012 the NCAA banned multi-year scholarships, and, since 2012, the NCAA reinstated multi-year scholarships but have made them optional for member colleges).

⁹⁸ See *infra* notes 99–109 and accompanying text.

⁹⁹ See Rev. Rul. 77-263, 1977-2 C.B. 47.

¹⁰⁰ See *id.*

¹⁰¹ See *Bingler*, 394 U.S. at 757; *Proskey*, 51 T.C. at 923; *Zolnay*, 49 T.C. at 399.

¹⁰² See generally *supra* note 97 and accompanying text (explaining that a quid pro quo is often associated with a contractual arrangement).

¹⁰³ See generally David Biderman, *Why Football Players Don’t Speak Spanish*, WALL STREET J. (Sept. 16, 2010, 12:01 AM), <https://www.wsj.com/articles/SB10001424052748703743504575493773613076844> [<https://web.archive.org/web/20150115193525/https://www.wsj.com/articles/SB10001424052748703743504575493773613076844>] (discussing the range of subjects in which college football players choose to major).

¹⁰⁴ See Ava, *15 Athletes with Incredibly Weird Degrees*, THE SPORTSTER (Jun. 28, 2015), <http://www.thesportster.com/entertainment/top-15-athletes-with-incredibly-weird-degrees> [<https://perma.cc/6YJX-YFV5>] (mentioning that NFL player Cameron Fleming studied aeronautics at Stanford University, former NBA player Dikembe Mutumbo studied linguistics at Georgetown University, and former NFL player Myron Rolle studied medical anthropology at Florida State University).

and *Proskey* had limited, if any, discretion in choosing their courses.¹⁰⁵ The subject matter was determined by their employer for the purpose of improving the services that the scholarship recipients provided to their employer.¹⁰⁶

Finally, the athletic scholarships described in the IRS's 1977 ruling provided athletes with in-kind educational and living benefits rather than cash payments.¹⁰⁷ By contrast, the payments in *Proskey* and *Zolnay* were cash payments.¹⁰⁸ While the U.S. tax code does not expressly delineate between in-kind benefits and the receipt of cash, the former is implicitly preferred for tax purposes because it is less likely that in-kind benefits would serve as a disguise for additional salary.¹⁰⁹

2. Section 127: Exemption for Educational Assistance Paid by Employer

Additionally, § 127 of the IRC allows employees to exclude up to \$5,250 from their gross income per year in educational assistance, paid by an employer toward one's undergraduate education, if the employer maintains a written educational assistance plan.¹¹⁰ Under this section of the tax code, employees may use the \$5,250 exclusion amount, unless otherwise restricted by the company's educational assistance plan, toward tuition and fees, as well as books, supplies, and equipment.¹¹¹ An employee may qualify for a § 127 exemption irrespective of whether the intended course of

¹⁰⁵ See *Bingler*, 394 U.S. at 742 (noting that the scholarship at issue in *Bingler* was limited in availability to "postgraduate study in engineering, physics, or mathematics"—all subjects that would relate to employment subsequent to completing the program); *Proskey*, 51 T.C. at 923 (concluding that the "the broad scope of the services [petitioner] was required to perform" was an "important indication that petitioner's activities at University Hospital . . . were geared not to study and research but to the operational needs of University Hospital").

¹⁰⁶ See generally *Bingler*, 394 U.S. at 742 (noting the subject matter related to the recipient's would-be engineering job at Westinghouse upon program completion).

¹⁰⁷ See Rev. Rul. 77-263, 1977-2 C.B. 47 (describing the traditional athletic scholarship provided directly by a college to its athletes, primarily in the form of in-kind benefits such as free tuition).

¹⁰⁸ See *Proskey*, 51 T.C. at 919 (describing the disputed "scholarship" related to a cash stipend that the recipient taxpayer wished to exclude from gross income, rather than the receipt of in-kind benefits); *Zolnay*, 49 T.C. at 389 (describing the disputed "scholarship" as a \$9,600 payment from the university's Electro-Science laboratory).

¹⁰⁹ See *Proskey*, 51 T.C. at 919 (explaining the cash nature of taxpayer's "stipend" lent credibility to the argument the cash was compensation for services).

¹¹⁰ See I.R.C. § 127; see also Crane, *supra* note 84, at 108 ("An employer can provide up to \$5,250 of educational assistance each calendar year to an employee if the assistance is provided under a nondiscriminatory program."); Stuart Lazar, *Schooling Congress: The Current Landscape of the Tax Treatment of Higher Education Expenses and a Framework for Reform*, 2010 MICH. ST. L. REV. 1047, 1087–88 (noting that nothing in § 127 precludes taxpayers from deducting amounts exceeding the \$5,250 threshold so long as such expenses "qualify as a working condition fringe benefit").

¹¹¹ I.R.C. § 127(c).

study is job-related.¹¹² However, the § 127 exemption does not include any tax exemption for “education involving sports, games, hobbies (unless job-related), meals, lodging or transportation.”¹¹³

3. Section 132: Exempted Fringe Benefits

Section 132 of the IRC, meanwhile, excludes from “gross income” any fringe benefits offered by employers that constitute one of the following categories: (1) no-additional-cost services; (2) qualified employee discounts; (3) working condition fringe benefits; and (4) *de minimis* fringe benefits.¹¹⁴

A “no-additional-cost service” includes any service provided by an employer to an employee if “(1) such service is offered for sale to customers in the ordinary course of the line of business of the employer in which the employee is performing services, and (2) the employer incurs no substantial additional cost (including forgone revenue) in providing such service to the employee”¹¹⁵ One example of a “no-additional-cost service” is an airline carrier’s policy of “allowing employees to fly free-of-charge on flights having empty seats.”¹¹⁶ Other examples of no-additional-cost services include “excess capacity services” such as hotel accommodations, commercial bus or train tickets, use of entertainment facilities, and free communication services for employees of the telephone company.¹¹⁷

A “qualified employee discount,” meanwhile, includes:

[A]ny employee discount with respect to qualified property or services to the extent such discount does not exceed (A) in the case of property, the gross profit percentage of the price at which

¹¹² See Lazar, *supra* note 110, at 1088–89.

¹¹³ I.R.C. § 127(c)(1); see also INTERNAL REVENUE SERV., FRINGE BENEFIT GUIDE 79 (2014), <https://www.irs.gov/pub/irs-pdf/p5137.pdf> [<https://perma.cc/2LBX-MKFF>].

¹¹⁴ I.R.C. § 132 (also exempting, under this section of the tax code, qualified transportation fringe benefits, qualified moving expense reimbursement, qualified retirement planning services, and qualified military base realignment and closure fringe benefits); see also Bertrand M. Harding Jr., *Taxation, in COLLEGE AND UNIVERSITY BUSINESS ADMINISTRATION* 10–11 (2013) (discussing the application of § 132 in the context of higher education); Wayne M. Gazur, *Assessing Internal Revenue Code Section 132 After Twenty Years*, 25 VA. TAX REV. 977, 980–81 (2006) (explaining that “[a] leading dictionary in current use identifies the term ‘fringe benefit’ as of U.S. origin and defines it as ‘a perquisite or belief of some kind provided by an employer to supplement a money wage or salary’”) (citing 8 OXFORD ENGLISH DICTIONARY 200 (2d ed. 1989)).

¹¹⁵ I.R.C. § 132(b)(1)–(2).

¹¹⁶ ALAN D. BERKOWITZ, 11 WEST’S PA. FORMS, EMPLOYMENT LAW § 12.40, Westlaw (database updated Aug. 2017).

¹¹⁷ See WILLIAM P. STRENG & MICKEY R. DAVIS, TAX PLANNING FOR RETIREMENT ¶ 6.03 (2017) (internal quotations omitted); INTERNAL REVENUE SERV., *supra* note 113, at 18.

the property is being offered by the employer to customers, or (B) in the case of services, 20 percent of the price at which the services are being offered by the employer to customers.¹¹⁸

Similarly, a “working condition fringe” consists of “any property or services provided to an employee of the employer to the extent that, if the employee paid for such property or services, such payment would be allowable for deduction [as a trade or business expense or as depreciation].”¹¹⁹ For example, according to the 2014 IRS Fringe Benefit Guide, an employee may exempt from his gross income as a “working condition fringe” a free education if the education “improves or develops the job-related capabilities of an employee.”¹²⁰ This may include the receipt of an undergraduate or advanced degree needed to retain one’s job or pay level, as long as the degree does not prepare an employee to enter a new trade or business.¹²¹

Finally, a “de minimis fringe” benefit includes “any property or service the value of which is . . . so small as to make accounting for it unreasonable or administratively impracticable.”¹²² For example, dinner money and local transportation fare are two examples of de minimis fringe benefits, as long as the benefits are not provided on a daily basis.¹²³ In addition, the IRC specifically includes as a de minimis fringe benefit “the operation by an employer of any eating facility for employees” so long as “such facility is located on or near the business premises of the employer” and “revenue derived from such facility normally equals or exceeds the direct operating costs of such facility.”¹²⁴

¹¹⁸ I.R.C. § 132(c)(1).

¹¹⁹ *Id.* § 132(d).

¹²⁰ INTERNAL REVENUE SERV., *supra* note 113, at 75; *see also id.* at 76 (explaining that “[f]or educational reimbursement to qualify as a working condition fringe benefit, the education must be job-related,” and that “[i]t is not required that the employer have a written plan or dollar limitations, and the employer may discriminate in favor of highly-compensated employees”).

¹²¹ INTERNAL REVENUE SERV., *supra* note 113, at 76.

¹²² I.R.C. § 132(e)(1).

¹²³ BERKOWITZ, *supra* note 116; *see also* INTERNAL REVENUE SERV., *supra* note 113, at 4 (explaining that when certain benefits such as meal money are provided on a daily basis they are not *de minimis*, and explaining the distinction is that some exempt benefits are “not routine”); *id.* at 15 (“Regularly-provided meal money does not qualify for the exclusion for de minimis fringe benefits provided by an employer. Occasional meal money can meet an exception and be excludable, if the following three conditions are met: [occasional basis, provided for overtime work, and enables overtime work].”).

¹²⁴ I.R.C. § 132(e)(2).

4. Section 119: Meals and Lodging for the Convenience of the Employer

Section 119 of the IRC, meanwhile, allows for an individual to exclude from gross income any “meals and lodging furnished for the convenience of the employer.”¹²⁵ Under this section of the tax code, meals are excludable in-kind benefits if they are provided “on the employer’s business premises” and “for the employer’s convenience.”¹²⁶ Similarly, lodging is excludable from wages if the lodging is provided on the employer’s business premises, for the employer’s convenience, and as a condition of employment.¹²⁷

The IRC does not provide an exclusive list of jobs that allow employees to receive tax-free lodging.¹²⁸ Nevertheless, the IRS Fringe Benefits Guide lists some common examples of professions where lodging is generally excludable, such as: “park rangers, firefighters or apartment managers.”¹²⁹ These are all jobs where living in close proximity to one’s work is essential for performing one’s job appropriately.¹³⁰

5. Section 162(a): Trade or Business Expenses Deduction

Lastly, § 162(a) of the U.S. tax code states that, where an individual pays certain expenses, “[t]here shall be allowed as a [tax] deduction all the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business.”¹³¹ As the U.S. Supreme Court explained in its 1987 decision in *Commissioner v. Groetzinger*, to constitute “carrying on any trade or business,” an individual “must be involved in the activity with continuity and regularity and . . . the taxpayer’s primary purpose for engaging in the activity must be for income or profit.”¹³² While a tax deduction for out-of-pocket expenses is not as valuable as the opportunity to exclude in-kind benefits from gross income, § 162(a) still provides meaning-

¹²⁵ See I.R.C. § 119(a)–(b); see also Harding, *supra* note 114, at 12.

¹²⁶ INTERNAL REVENUE SERV., *supra* note 113, at 43.

¹²⁷ *Id.* at 47.

¹²⁸ See *id.* at 49.

¹²⁹ *Id.*

¹³⁰ See generally *id.* (explaining examples of when a profession may require someone to live on or near their place of work).

¹³¹ I.R.C. § 162(a); see also *Kopaigora v. Comm’r*, T.C. Summ. Op. 2016-35, 2016 WL 4094723, at *3 (T.C. Aug. 2, 2016) (citing Treas. Reg. § 1.162-5(b)); *Ford v. Comm’r*, 56 T.C. 1300, 1305 (1971), *aff’d*, 487 F.2d 1025 (9th Cir. 1973) (per curiam) (explaining how analysis of a business deduction begins by examining whether the taxpayer was engaged in a particular trade or business, and whether the expenditure was directly related to that trade or business); Lazar, *supra* note 110, at 1053–54 (discussing the implications of § 162(a) in terms of deducting the cost of education as a business expense).

¹³² 480 U.S. 23, 35 (1987).

ful benefits for those who are either self-employed or have an employer who does not cover all of their business expenses.¹³³

As a general matter, § 162(a) of the tax code is commonly used to deduct expenses such as one's home office, business phone and utilities, professional publications, office supplies, and business travels.¹³⁴ Nevertheless, this deduction is also available for educational expenses where the expenses are incurred in connection with carrying on a trade or business, are not required to meet the minimum threshold of a taxpayer's trade or business, and do not lead to the qualification of a taxpayer in a new trade or business.¹³⁵

Numerous court decisions have assessed whether, under particular scenarios, individuals may deduct their non-scholarship educational expenses from their taxable income.¹³⁶ For example, in its 1950 decision *Hill v. Commissioner*, the U.S. Court of Appeals for the Fourth Circuit considered whether a taxpayer who taught high school English in Virginia may deduct from her tax returns the cost of taking summer classes at Columbia University in the subjects of short-story writing and abnormal psychology.¹³⁷ In reaching a favorable conclusion for the taxpayer, the court emphasized that the Virginia State Board of Education required teachers to complete one of several forms of continuing education, and that acquiring college credits falls within those permissible forms.¹³⁸ Thus, the teacher's coursework at Columbia University represented a good faith trade or business expense.¹³⁹

Similarly, in 1973, in *Ford v. Commissioner*, the U.S. Court of Appeals for the Ninth Circuit upheld a U.S. Tax Court decision that allowed an English teacher to deduct the costs related to his one year of graduate studies in

¹³³ See *infra* notes 134–148 and accompanying text.

¹³⁴ See Treas. Reg. § 1.162-1(a) (stating acceptable business expenses); *25 Common Business Deductions and Expenses*, STAPLES, <http://www.staples.com/sbd/content/open/deductions.html> [<https://perma.cc/79VA-NZN7>] (last visited Aug. 10, 2017).

¹³⁵ See Lazar, *supra* note 110, at 1054 (internal citations and quotations omitted); see also *Kopaigora*, 2016 WL 4094723, at *2 (“Education expenses are deductible if they satisfy the general requirements under section 162 as well as the specific requirements under the regulations. Section 162 requires a taxpayer to be presently engaged in a trade or business in order for education expenses to be deductible.”)

¹³⁶ See *infra* notes 137–148 and accompanying text.

¹³⁷ See 181 F.2d 906, 906–08, 911 (4th Cir. 1950).

¹³⁸ See *id.* at 909 (explaining that “the very logic of the situation here shows that [the taxpayer] went to Columbia to maintain her present position; not to attain a new position; to preserve not expand or increase; to carry on, not to commence”). The court further concluded that it made no difference that the taxpayer admitted to enjoying her summer courses, as the test for an “ordinary and necessary” business expense turns on the business relevance of the activity, and not whether the activity was separately enjoyable. See *generally id.* (holding that the taxpayer's admission that she enjoyed the courses as irrelevant to the issue of tax deductibility given that they served a business purpose in allowing her to carry out her current line of work).

¹³⁹ See *supra* notes 131–135 and accompanying text.

anthropology at the University of Oslo—studies that included courses taken in English, Spanish, and social studies.¹⁴⁰ The U.S. Tax Court originally had held that the teacher’s program of study in *Ford* was deductible because the “study in anthropology and linguistics was appropriate and helpful, and did in fact improve [the taxpayer’s] skills in teaching English, social studies, and Spanish.”¹⁴¹ The court further pointed out that the study did not prepare the taxpayer for a new line of work, but related specifically to his current field of employment.¹⁴²

Likewise, in 1968, in *Furner v. Commissioner*, the U.S. Court of Appeals for the Seventh Circuit held that a junior high school social studies teacher who resigned from her school system to pursue a year of full-time graduate study in history may deduct the costs of her studies because they were a normal incident of carrying on the business of teaching.¹⁴³ In *Furner*, the court also held it immaterial that the junior high school social studies teacher had quit her teaching job to pursue the studies.¹⁴⁴ Importantly, the court held that the teacher intended to return to her profession upon the completion of her year’s study.¹⁴⁵

Finally, in its 2016 decision of *Kopaigora v. Commissioner*, the U.S. Tax Court allowed an accounting professional to deduct his tuition, travel costs, and meals related to an Executive M.B.A. program at Brigham Young University.¹⁴⁶ The *Kopaigora* decision expressed no concern that the taxpayer’s deductions included more than \$18,000 for one year’s tuition, nor that the taxpayer travelled across state lines to attend his classes.¹⁴⁷ All that mattered was that the expenses actually met the requirements of the particular tax deduction.¹⁴⁸

¹⁴⁰ *Ford v. Comm’r (Ford II)*, 487 F.2d 1025, 1025–1026 (9th Cir. 1973) (per curiam); *Ford v. Comm’r (Ford I)*, 56 T.C. 1300, 1301 (1971) *aff’d* 487 F.2d at 1025–1026.

¹⁴¹ *Ford I*, 56 T.C. at 1306.

¹⁴² *See id.* at 1304 (providing “evidence of [the taxpayer’s] continuing active participation in the teaching profession”).

¹⁴³ 393 F.2d 292, 292 (7th Cir. 1968).

¹⁴⁴ *Id.* at 295 (rejecting the tax court’s finding of evidence to support the conclusion that the taxpayer did not plan to return to teaching at the conclusion of her studies).

¹⁴⁵ *Id.*

¹⁴⁶ 2016 WL 4094723, at *1–2.

¹⁴⁷ *Id.* at *2.

¹⁴⁸ *See id.*

III. HOW COLLEGES MIGHT PROVIDE THEIR ATHLETES WITH BONA FIDE EMPLOYMENT CONTRACTS WITHOUT RISKING THE TAX-EXEMPT STATUS OF ATHLETES' SCHOLARSHIPS

Section A of this Part discusses how, based upon the foregoing, it seems likely that colleges, with proper tax planning, could pay their athletes without compromising the tax-exempt status of the athletes' scholarships.¹⁴⁹ Section B of this Part explores the numerous ways colleges could structure athlete compensation to conform to the rules under the U.S. tax code for tax-exempt education.¹⁵⁰

A. "Pay for Play" Athletes and the "Qualified Scholarship" Exemption

To begin with the simplest alternative, colleges likely may continue to offer their "pay for play" athletes "qualified scholarships" under § 117 of the tax code as long as the colleges do not place any express conditions on these scholarships.¹⁵¹ For example, this means that the colleges would need to allow their "pay for play" athletes to keep their scholarships even if these athletes breach their "pay for play" agreements, or otherwise quit their sport.¹⁵²

Structuring athlete scholarships in this guaranteed manner would seem to present some financial risk to colleges.¹⁵³ For example, a college athlete could conceivably quit after receiving a scholarship and enjoy four years of free tuition without providing any benefit to the college athletic program for which he was given a scholarship.¹⁵⁴ Nevertheless, this risk seems rather low under a "pay for play" model because paid, elite college athletes would still have a financial incentive to perform in their sports.¹⁵⁵ Indeed, the most likely candidates to take advantage of a guaranteed four-year scholarship without participating in their intended sport would be athletes who decide to

¹⁴⁹ See *infra* notes 151–164 and accompanying text.

¹⁵⁰ See *infra* notes 165–197 and accompanying text.

¹⁵¹ See I.R.C. § 117(a)–(d) (2012) (qualified scholarships).

¹⁵² Rev. Rul. 77-263, 1977-2 C.B. 47.

¹⁵³ See Solomon, *supra* note 97 (explaining that many colleges do not like to give athletes four-year guaranteed athletic scholarships because they "complained that players were accepting these deals and not playing" and "[s]chools wanted a two-way street").

¹⁵⁴ See *id.*

¹⁵⁵ This financial incentive would result from the reality that, even though the athletes' scholarship was guaranteed and non-rescindable, the athletes' pay, as part of an employment contract, would be contingent upon work performed. While it is theoretically true that a college athlete could enjoy his free scholarship while "holding out" on athletic performance for a higher paying salary, such "hold out" scenario is unlikely given the limited length of the college football season, the limited number of years college athletes maintain eligibility, and that athletes may have some incentive to both showcase their talent and not engage in "hold out" practices to avoid scaring off potential future NFL and NBA employers.

focus on an educational pursuit other than professional sports during the course of their college experience.¹⁵⁶ Generally, the loss of these athletes do not represent substantial harm to college athletic programs.

In addition to § 117's requirement that an athlete's scholarship be non-contingent, colleges also would need to ensure their "pay for play" athletes maintain complete control over their course of study to avoid the appearance of improper employer control or oversight.¹⁵⁷ Thus, colleges should implement firewalls between their athletic departments and their course advisors to ensure that athletes are not impermissibly influenced by the athletic department in their course selection.¹⁵⁸

In a similar vein, colleges that seek to offer "qualified scholarships" to "pay for play" athletes must ensure that their athletes are provided with scholarships in the form of in-kind benefits rather than cash.¹⁵⁹ The importance of not providing "pay for play" athletes with cash scholarships emerges from the U.S. Tax Court's rulings in *Proskey v. Commissioner* and *Zolnay v. Commissioner*—each of which, at least implicitly, viewed the payment of a cash stipend as hindering an individual taxpayer's "qualified scholarship" argument.¹⁶⁰

Finally, wherever possible, it is advantageous for a college to provide its "pay for play" athletes with scholarships in the same format and on the

¹⁵⁶ See generally Ben Shumate, *30 Percent of Athletes Quit Respective Teams*, BROWN DAILY HERALD (Apr. 28, 2016), <http://www.browndailyherald.com/2016/04/28/30-percent-of-athletes-quit-respective-teams> [<https://perma.cc/W54B-SHQD>] (concluding that about thirty percent of students that arrive at Brown University as college athletes—about eighty students out of 260—leave their sports team before their senior season).

¹⁵⁷ See Treas. Reg. § 1.117-4(c)(2) (as amended in 1985) (explaining that to constitute a "qualified scholarship" the primary purpose must be "to further the education and training of the recipient in his individual capacity" and too much oversight over how a recipient were to use their scholarship may begin to step beyond the "individual capacity" and into an employee capacity).

¹⁵⁸ See *Proskey v. Comm'r*, 51 T.C. 918, 924 (1969) (explaining how the taxpayer was not able to pursue his own course of study because of the supervision of the hospital where he worked); see also Marc Edelman, *Moving Past Collusion in Major League Baseball: Healing Old Wounds, and Preventing New Ones*, 54 WAYNE L. REV. 601, 638 (2008) (explaining how firewalls are used "to prevent the disclosure of sensitive information" between parties); *Definition of Firewall*, INVESTOPEDIA, <http://www.investopedia.com/terms/f/firewall.asp> [<https://perma.cc/X3UZ-4894>] (last visited Aug. 11, 2017) (explaining that "[a] firewall is a legal barrier preventing the transference of inside information"). It is worth noting that the NCAA already requires such firewalls to a limited extent, as indicated by association rules that limit a single faculty member, the Faculty Athletics Representative to handling interactions between the athletic department and the faculty related to college athletes' obligations and in-class performance. See generally MICHAEL A. MIRANDA & THOMAS S. PASKUS, NAT'L COLLEGIATE ATHLETICS ASS'N, ROLES, RESPONSIBILITIES AND PERSPECTIVES OF NCAA FACULTY ATHLETICS REPRESENTATIVES 10 (2013), https://www.ncaa.org/sites/default/files/FAR_STUDY_Report_final.pdf [<https://perma.cc/BQ3B-HTVF>].

¹⁵⁹ See *supra* note 83 and accompanying text.

¹⁶⁰ See *Proskey*, 51 T.C. at 924–26; *Zolnay v. Comm'r*, 49 T.C. 389, 398 (1968).

same terms as non-athletes' scholarships.¹⁶¹ Where college athletes otherwise qualify for pure academic scholarships, colleges should provide athletes with traditional academic scholarships.¹⁶² Similarly, where athletes otherwise qualify for state tuition assistance programs, colleges should help the athletes to obtain these other forms of aid.¹⁶³ At highly endowed colleges that offer free college attendance to students from low-income families, athletes who qualify under this basis should receive free tuition this way, rather than through special athletic scholarships.¹⁶⁴

B. Alternative Tax Reductions under "Pay for Play"

Furthermore, even if some college athletes would not meet the requirements for a "qualified scholarship" exemption, there are still other ways that colleges may assist their "pay for play" athletes in achieving meaningful tax savings on their education.¹⁶⁵

1. Devising an Educational Assistance Program that Benefits College Athletes

Aside from the "qualified scholarship" exemption, colleges can provide employee-athletes with some tax relief for their education by offering the education through a formal "educational assistance program," as articulated by § 127 of the tax code.¹⁶⁶ In some ways, the U.S. tax code's educational assistance exemption is more flexible than the "qualified scholarship" exemption because it allows recipients to accept the exemption as a quid pro quo for services rendered.¹⁶⁷ In addition, the recipient of educational assistance may choose courses that are either related or unrelated to their jobs.¹⁶⁸

¹⁶¹ The reason being that, this reduces the argument that the scholarships are simply "pay for play" and thus relate to some form of an implied-in-fact contract. *See supra* notes 85–87 and accompanying text.

¹⁶² *See* I.R.C. § 117. Providing conventional academic scholarships in lieu of athletic scholarships removes any problems related to student-athletes rendering services to their college or university. *See id.*; Solomon, *supra* note 97.

¹⁶³ *Cf.* 160 Cong. Rec. S2362–66 (noting that under the current college sports business model that disallows pay to athletes, approximately forty percent of college athletes qualify for Pell grants).

¹⁶⁴ *See* Jonathan Ping, *Stanford Offers Free Tuition to Low and Middle-Income Families*, MY MONEY BLOG (Feb. 22, 2008), <http://www.mymoneyblog.com/stanford-offers-free-tuition-to-low-and-middle-income-families.html> [<https://perma.cc/TBW9-473D>].

¹⁶⁵ *See infra* notes 166–197 and accompanying text.

¹⁶⁶ *See* I.R.C. § 127.

¹⁶⁷ *Compare id.* (discussing the "educational assistance program", *with id.* § 117 (discussing "qualified scholarships").

¹⁶⁸ *See id.* § 127.

Nevertheless, one of the major drawbacks of “pay for play” athletes relying on the educational assistance exemption is that the exemption caps excludable educational expenses at \$5,250 per year.¹⁶⁹ Even for students at state colleges that offer in-state tuition discounts, this exemption would reasonably cover the costs of approximately six to eighteen annual credit hours.¹⁷⁰ Thus, as long as the NCAA Division I rules continue to require college athletes to complete at least six credit hours per term (plus, make continued annual progress toward graduating), “pay for play” college athletes who receive in-kind tuition benefits exclusively under this section would still suffer a major shortfall.¹⁷¹

Furthermore, the educational assistance exemption does not apply to meals or lodging.¹⁷² Thus, athletes who rely on the § 127 exemption would need to simultaneously rely upon § 119 of the code to exclude any meals provided by their athletic department employer.¹⁷³ If a college wishes to provide free meals to its “pay for play” athletes, the college should offer these meals on their premises, ideally at the college’s athletic facilities.¹⁷⁴ The college should also ensure the meals are selected and prepared with the aid of a nutritionist to help ensure athletes’ peak performances in their sport.¹⁷⁵ Doing so would help to support the argument that the meal provi-

¹⁶⁹ See *id.*; see also Crane, *supra* note 84, at 108 (“An employer can provide up to \$5,250 of educational assistance each calendar year to an employee if the assistance is provided under a nondiscriminatory policy.”); Lazar, *supra* note 110, at 1087–88 (2010) (noting that that nothing in § 127 precludes taxpayers from deducting amounts exceeding the \$5,250 threshold so long as such expenses “qualify as a working condition fringe benefit”).

¹⁷⁰ On one end of spectrum, Baruch College, which is part of the City University of New York, offers one of the nation’s lowest in-state tuitions at \$285/credit hour; this means at the \$5,250 threshold, the educational assistance exemption cover 18.4 credit hours of education, less the costs of student services and other fees. See *Tuition and Fee Information*, BARUCH COLLEGE, <https://www.baruch.cuny.edu/tuition/#costs> [<https://perma.cc/WB84-9BNC>] (last visited Aug. 12, 2017). On the other end of the spectrum, the University of Michigan–Ann Arbor charges in-state tuition to upperclassmen at its undergraduate business school \$1,158 for the first hour and \$782 for each additional hour; this means at the \$5,250 threshold, the educational assistance exemption would cover just 6.2 credit hours of tuition. See *Tuition and Registration Fees*, UNIVERSITY OF MICHIGAN, <http://www.ro.umich.edu/tuition/tuition-fees.php> [<https://perma.cc/9TZA-SC8T>] (last visited Aug. 12, 2017).

¹⁷¹ See *Staying on Track to Graduate*, NCAA, <http://www.ncaa.org/student-athletes/current/staying-track-graduate> [<https://perma.cc/6HLH-TJLC>] (last visited Aug. 11, 2017).

¹⁷² See I.R.C. § 127(c)(1)(B).

¹⁷³ See *id.* § 119.

¹⁷⁴ See INTERNAL REVENUE SERV., *supra* note 113, at 43–44 (explaining that for meals to qualify as tax-exempt, they must be provided “on the employer’s business premises” and “for the employer’s convenience”).

¹⁷⁵ See Paul Myerberg, *NCAA Schools Put Money Where Athletes’ Mouths Are*, USA TODAY (Apr. 26, 2015, 4:54 PM), <http://www.usatoday.com/story/sports/college/2015/04/26/unlimited-food-snacks-wisconsin-oregon-ncaa-student-athletes/26405105> [<https://perma.cc/W9YB-XSKH>] (discussing how, because the NCAA lifted its restriction on the amount and type of food colleges may pro-

sions are truly “for the convenience of the employer” and not simply a form of latent compensation.¹⁷⁶

With respect to attempting to provide employee-athletes with tax-free lodging benefits under § 119, the arguments for this tax exclusion are comparatively more dubious.¹⁷⁷ It would be a stretch to compare college athletes’ need for lodging with the lodging needs of those in professions where services are occasionally required in the middle of the night such as “park rangers, firefighters, or apartment managers.”¹⁷⁸ Nevertheless, given the very early morning practices and unusual late night travel required of some college sports teams, one might be able to argue that this exemption would apply to the in-kind benefit of free housing if the housing is located next to either the gymnasium or near the airport (for road games requiring air travel).¹⁷⁹

2. Offering Free Education to Athletes as a Fringe Benefit

Yet another way for colleges to provide their “pay for play” athletes with free in-kind tuition would entail applying the fringe benefit provisions of § 132 of the tax code.¹⁸⁰ While a free education does not generally constitute a fringe benefit, the January 2014 IRS Fringe Benefit Guide recognizes that employee-athletes may be able to exempt the cost of their free educations from gross income as a “working condition fringe” as long as the courses selected “improve[] or develop[] the job-related capabilities” of the employee-athlete.¹⁸¹

Alternatively, even if the free education is not job-related, there still may be a reasonable argument that the free education constitutes a “no-

vide to their athletes, schools such as the University of Wisconsin and the University of Oregon have used the universities’ nutrition staffs to ensure athletes are being provided with the types of food to improve their on-field performance).

¹⁷⁶ See I.R.C. § 119.

¹⁷⁷ See *infra* notes 178–179 and accompanying text; see also I.R.C. § 119.

¹⁷⁸ INTERNAL REVENUE SERV., *supra* note 113, at 49.

¹⁷⁹ See I.R.C. § 119; see also Nikki Chavanelle, *A Day in the Life of a Division I Athlete*, DAILY CAMPUS (Mar. 5, 2015, 7:38 PM), <http://www.smudailycampus.com/sports/a-day-in-the-life-of-a-division-i-athlete> [<https://perma.cc/95F8-NFBB>] (describing the day of a college athlete, whose day begins with waking up at 5:30 a.m. for practice at 6 a.m.); Laura Pappano, *How Big-Time Sports Ate College Life*, N.Y. TIMES (Jan. 20, 2012), <http://www.nytimes.com/2012/01/22/education/edlife/how-big-time-sports-ate-college-life.html> [<https://perma.cc/X3H5-AQ52>] (quoting a 2008 report by the Duke University athletics department that described how athletes, who often play in evening road games, “are required to board a flight at 2 a.m., arriving back at their dorms at 4 or 5 a.m., and then are expected to go to class, study and otherwise act as if it were a normal school day”).

¹⁸⁰ See I.R.C. § 132.

¹⁸¹ INTERNAL REVENUE SERV., *supra* note 113, at 76.

additional-cost service.”¹⁸² Although one most often thinks about free airline tickets and hotel rooms when considering “no-additional-cost services,” enrollment in college courses generally fits the same criteria because colleges bear little, if any, variable costs to adding a few additional students into a course that fails to otherwise achieve full enrollment.¹⁸³ Indeed, most college professors, subject to special exceptions, are paid based on the number of credits they teach and not the number of students.¹⁸⁴

Nevertheless, to make an employee-athlete’s free education truly conform to the tax code’s description of a “no-additional-cost service,” colleges would need to make some changes in their method of enrolling athletes into courses.¹⁸⁵ For example, employee-athletes that want their educational benefits to qualify as “no-additional-cost services” would need to enroll in their classes after all of the paying students have chosen their classes.¹⁸⁶ This way, the college athletes that seek this exemption are only able to enroll in courses where there truly is additional capacity and little, if any, variable costs to the college related to their enrollment.¹⁸⁷

3. Allowing Athletes to Pay for College Themselves and Then Take the Costs as a Trade or Business Deduction

Finally, the most elite college athletes—those who would earn substantial income under “pay for play” (whether from their colleges or through third-party endorsements)—may be able to argue that the cost of their education is a “trade or business expense” under § 162(a) of the tax code.¹⁸⁸

Case law seems to support the possibility that the personal payment of a college education represents a deductible business expense as long as the “pay for play” athlete’s educational expenses meet three criteria.¹⁸⁹ These criteria include: (1) the expenses are incurred in connection with carrying on a trade or business; (2) the expenses are not required to meet the mini-

¹⁸² I.R.C. § 132(b)(1)–(2).

¹⁸³ See *id.*; see also BERKOWITZ, *supra* note 116 (describing airline tickets as the classic example of a no-additional-cost service); Martin Saiz, *Economies of Scale and Large Classes*, THOUGHT & ACTION 149, 149 (Fall 2014), https://www.nea.org/assets/docs/HE/t-SF_Saiz.pdf [<https://perma.cc/X8G7-NRQM>] (describing how public universities save money with larger class sizes given the very low variable costs associated with increasing the number of students in a given classroom).

¹⁸⁴ Saiz, *supra* note 183, at 149.

¹⁸⁵ See *infra* note 186 and accompanying text.

¹⁸⁶ See BERKOWITZ, *supra* note 116 (noting that to qualify as a no-additional-cost service, the provided service must represent additional capacity that the provider would not otherwise be able to sell).

¹⁸⁷ See I.R.C. § 132(b)(1); BERKOWITZ, *supra* note 116.

¹⁸⁸ See I.R.C. § 162(a).

¹⁸⁹ See *supra* note 131–148 and accompanying text.

minimum threshold of a taxpayer's trade or business, and (3) the expenses do not lead to the qualification of a taxpayer in a new trade or business.¹⁹⁰

"Pay for play" college athletes likely will meet the first and third criteria as long as they pursue coursework directly related to their athletic endeavors.¹⁹¹ Majors such as sports management and kinesiology provide a relatively easy fit. Meanwhile, studies related to business, communications, and public speaking might also have a sufficient nexus to athletics.

With respect to the second requirement of not meeting the minimum threshold of employment, on the one hand, if one were to look at the narrow profession of a collegiate athlete, it would seem difficult for a "pay for play" athlete to meet this requirement.¹⁹² This is because the NCAA currently requires all college athletes to be full-time students enrolled in the college for which they perform.¹⁹³ Thus, unless the NCAA lifts this requirement, one could reasonably presume that pursuing a college degree (albeit, not necessarily having completed one) is a "minimum threshold requirement" to remain "employed."¹⁹⁴

On the other hand, however, if one were to describe the "pay for play" athlete's profession more generally as a professional athlete (rather than as a collegiate athlete), an athlete could make a far stronger argument that earning a degree is not required to meet the minimum threshold for his trade or business.¹⁹⁵ Indeed, only fifty percent of professional football players (using NFL players as a relevant sample) and less than fifty percent of men's professional basketball players (using NBA players as a relevant sample) have a college degree.¹⁹⁶ Thus, it seems reasonable to argue that a college degree is not required in general to meet the minimum threshold for employment as either a football or men's basketball player.¹⁹⁷

¹⁹⁰ See INTERNAL REVENUE SERV., *supra* note 113, at 76.

¹⁹¹ See *infra* note 195–197 and accompanying text.

¹⁹² See *infra* note 193–194 and accompanying text.

¹⁹³ See *Division I Progress-Toward-Degree Requirements*, NCAA, <http://www.ncaa.org/about/division-i-progress-toward-degree-requirements> [<https://perma.cc/XGA7-YNKN>] (last visited Aug. 11, 2017).

¹⁹⁴ See I.R.C. § 162(a); INTERNAL REVENUE SERV., *supra* note 113, at 77.

¹⁹⁵ See *infra* note 196–197 and accompanying text.

¹⁹⁶ See Valerie Strauss, *Dear LeBron: Time to Get a College Degree (Other Big-Time Athletes Did)*, WASH. POST (Jun. 17, 2014) (quoting Jonathan Abrams, *N.B.A. Players Make Their Way Back to College*, N.Y. TIMES (Oct. 5, 2009)), https://www.washingtonpost.com/news/answer-sheet/wp/2014/06/17/dear-lebron-time-to-get-a-college-degree-other-big-time-athletes-did/?utm_term=.8e5e43cefd9 [<https://perma.cc/MU82-TV2X>].

¹⁹⁷ See *id.*

CONCLUSION

It is understandable why some university employees and congressmen have expressed trepidation about the movement to bring “pay for play” to college sports. If colleges with big-time athletics programs share their revenues with athletes, it leaves less revenue for colleges to either reinvest into other programs or to allocate to school administrators, athletic directors or coaches. In addition, for those colleges that do not substantially profit from their football and men’s basketball programs, the “pay for play” model forces them to choose between forgoing the recruitment of elite athletes, cutting expenses in other ways, or potentially increasing operating losses.¹⁹⁸

Nevertheless, any attempts to use purported tax liability as the reason to avoid the “pay for play” model either misconstrues the plain meaning of the U.S. tax code or is simply disingenuous. Even if college sports were to move to a “pay for play” model, with careful tax planning, colleges could likely continue to provide their athletes with “qualified scholarships” under § 117 of the U.S. tax code. In addition, colleges most likely could continue to offer their athletes tax savings through a formal “education assistance program” or by providing education as a “working condition fringe” or “no-additional-cost service.”

Based on the foregoing, there is reasonable uncertainty as to whether colleges that hire “pay for play” athletes would ever need to treat their athletes’ free education as taxable. Thus, the argument that a “pay for play” model of college sports would transform all college athletic scholarships into taxable gains is far weaker than “pay for play” opponents would have people to believe. Although there may indeed be good faith reasons for the concern over shifting college sports to a “pay for play” model, claims that “pay for play” would impose colossal tax liability on college athletes are simply dubious.

¹⁹⁸ See generally Hobson & Rich, *supra* note 14 (noting how less successful college sports programs such as Rutgers University have refused to make the choice to downgrade their athletic programs or offer less money to their coaches—thus causing these programs to operate at a loss, even without a free market to pay college athletes).