Fall 2010


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http://repository.jmls.edu/lawreview/vol44/iss1/4

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FOR THE LOVE OF THE GAME: THE JUSTIFICATION FOR TAX EXEMPTION IN INTERCOLLEGIATE ATHLETICS

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INTRODUCTION

Intercollegiate athletics are a fundamental part of the American college experience. Nothing else unites and impassions entire campuses while providing educational opportunities to thousands of students who might not otherwise be able to attend college. Congress and the IRS have long recognized the immense educational value of intercollegiate athletics and have properly exempted intercollegiate athletics from federal income taxation. However, a few vocal critics have overreacted to escalating broadcasting agreements and coaching salaries, often without stepping back to examine these transactions in a broader tax policy context. This Article does just that, and demonstrates that longstanding tax exemption is undeniably justified in intercollegiate athletics.

This Article begins in Part I with an overview of tax exemption fundamentals, including a discussion of the tax policy justifications for tax exemption. Part II provides a brief history of tax exemption for intercollegiate athletics, as well as an overview of the current legislative posture. Part III provides an analysis of tax exemption in intercollegiate athletics. This part illustrates that intercollegiate athletics satisfy all the requirements for tax exemption, and that even activities such as big-time D-I football and basketball very likely avoid the Unrelated Business Income Tax (UBIT).1 Additionally, this part demonstrates that tax exemption is justified for intercollegiate athletics under several tax policy justifications, and that intercollegiate athletics also fall outside the UBIT justifications. This part concludes with a proposal to clarify that intercollegiate athletics should remain fully exempt from federal income taxation.

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I. TAX EXEMPTION FUNDAMENTALS

Since the inception of the federal income tax, Congress has exempted certain types of organizations from taxation because of their charitable purposes. An organization must satisfy several requirements to qualify for federal income tax exemption. Additionally, an exempt organization's income from certain unrelated activities can be subject to taxation under the UBIT. There are many underlying justifications for general tax exemption, and several reasons for the UBIT.

A. The Requirements for Tax Exemption under the I.R.C.

Charitable organizations—such as educational institutions and organizations that promote amateur sports—fall under § 501(c)(3). Section 501(c)(3) provides two primary tests for tax exemption of charities: the organizational test and the operational test. The organizational test essentially requires the organization's charter to limit the organization to one or more charitable purposes. The operational test requires the organization to engage primarily in activities that further the organization's exempt purposes. The operational test looks beyond the nature of the activities themselves and focuses on the organization's purposes for conducting the activities.

There are two further restrictions on charitable tax exemption: no private inurement and no private benefit. The private inurement prohibition requires that no part of the organization's net earnings may inure to the benefit of any "insider"—a private shareholder or individual that has a personal

2. See Staff Of Joint Committee on Taxation, 109th Cong., Historical Development And Present Law Of The Federal Tax Exemption For Charities And Other Tax-Exempt Organizations 46-47 (2005) [hereinafter JCT Report] available at http://www.novoco.com/low_income_housing/resource_files/research_center/JCT_TaxExempt_April05.pdf (explaining that there are several justifications for tax exemption, which this Article discusses below). Tax exemption is essentially a way for the government to subsidize charitable activities. Alternatively, the government can provide direct subsidies if it so chooses. However, as this Article illustrates, tax exemption is proper for intercollegiate athletics.

5. See generally I.R.C. § 501(c)(3) (West 2010).
6. Treas. Reg. § 1.501(c)(3)-1(b) (2010). The organization's charter should also specify that the organization's assets are dedicated to the exempt purpose.
8. American Campaign Acad. v. Comm'r, 92 T.C. 1053, 1064 (1989). Further, an organization may operate a trade or business as a substantial part of its activities and still meet the operational test if the trade or business is in furtherance of the organization's exempt purposes and if the organization is not organized or operated for the primary purpose of carrying on an unrelated trade or business. Treas. Reg. § 1.501(c)(3)-1(e) (2010).
and private interest in the activities of the organization. Generally, intermediate sanctions apply to violations of the private inurement prohibition instead of exemption revocation. The private benefit restriction requires an organization to establish that it is not organized or operated for the benefit of private interests. This restriction can apply to anyone, including "outsiders," and can apply even to transactions entered into at fair market value. However, a private benefit is not disqualifying if it is qualitatively and quantitatively incidental. Thus, charitable organizations under § 501(c)(3) must fulfill several requirements to achieve and maintain tax exemption.

In addition to charities under § 501(c)(3), there are also many other types of tax-exempt organizations under § 501. Although universities and the NCAA fall squarely under § 501(c)(3), professional sports leagues do not. Instead, professional sports leagues such as the NFL, NBA, and MLB are organized as trade associations under § 501(c)(6). The requirements for exemption under § 501(c)(6) are less restrictive than § 501(c)(3), however the trade-off is that donors cannot deduct their donations to § 501(c)(6) organizations.

It is critical to note that public universities fall under a different tax-exemption category altogether; essentially under intergovernmental immunity or as a state subdivision. Donations to a public university are deductible even if the university does not have § 501(c)(3) status. Although public universities are still subject to the UBIT, none of the above requirements or restrictions apply.

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12. American Campaign Acad., 92 T.C. at 1066. The qualitative determination depends on necessity, while the quantitative determination depends on balancing private v. public benefit. Id.
15. I.R.C. § 115 (West 2010). Public universities can elect for § 501(c)(3) status to eliminate donors' confusion regarding deductibility of donations, however they need not elect into this restrictive regime. I.R.C. § 501(c)(3) (West 2010).
B. UBIT: The Unrelated Business Income Tax

Congress enacted the UBIT in 1950 because tax-exempt colleges and universities began directly operating commercial businesses. These businesses included auto parts, cotton gins, food products, oil wells, and even an airport. However, the most widely publicized example—and likely strongest impetus underlying the Congressional action—was New York University’s ownership of the C.F. Mueller macaroni company. Representative Dingell famously illustrated Congress’s unrest when he recognized that “eventually all the noodles produced in this country will be produced by corporations held or created by universities . . . and there will be no revenue to the Federal Treasury from this industry. That is our concern.”

Congress took action—at the behest of President Truman—and crafted a solution to prevent organizations from using their tax-exempt status to gain a “competitive advantage over private enterprise” in “entirely unrelated” activities. Prior to the 1950 UBIT legislation, tax-exempt organizations were not subject to any taxation as long as income was eventually used for charitable purposes. However, this “destination” of income test under Trinidad proved ineffective where colleges were engaged in entirely unrelated, purely commercial businesses—such as Mueller macaroni—so Congress created a “source” test instead.

1. UBIT: Three Requirements

Congress imposed a tax on the net “unrelated business taxable income” of an exempt organization. Any of the exempt

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23. Message of President, 96 CONG REC. 769, 771, reprinted in House Hearings, supra note 20, at 4. President Truman recognized that “an exemption intended to protect educational activities has been misused in a few instances to gain competitive advantage over private enterprise through the conduct of business and industrial operations entirely unrelated to educational activities.” Id.


25. See Kaplan, supra note 19, at 1433-1434 (explaining Congressional reasoning underlying the UBIT) (citing C.F. Mueller Co. v. Comm’r., 190 F.2d 120 (3d Cir. 1951), rev’d C.F. Mueller Co. v. Comm’r., 14 T.C. 922 (1950)).

organization's activities that satisfied the new three-part test would be considered an "unrelated business."\(^{27}\) The activity must be: (1) a trade or business, (2) regularly carried on, and (3) not substantially related to the exempt organization's charitable purpose.\(^ {28}\) If an activity satisfies all three requirements, customary business deductions are allowed and the resulting net income is taxable to the exempt organization.\(^ {29}\) Additionally, activities can be fragmented and evaluated outside the scope of the larger aggregate activity.\(^ {30}\) For example, the IRS can "apply the UBIT separately to football and/or basketball revenues rather than the athletic department as a whole."\(^ {31}\)

2. **UBIT Exclusions & Exceptions**

Congress created several exclusions and exceptions from the UBIT. Congress generally excluded passive income such as interest, dividends, capital gains, most rents, and most royalties.\(^ {32}\) The two primary UBIT exceptions are the Volunteer Exception and the Member/Student Exception.\(^ {33}\) The Volunteer Exception prevents UBIT where substantially all the work is performed for the organization without compensation.\(^ {34}\) The Member/Student Exception prevents UBIT where the business is primarily for the convenience of the members, students, patients, officers, or employees.\(^ {35}\) Additionally, in response to the Mobil Cotton Bowl controversy in 1977,\(^ {36}\) Congress created a Qualified Sponsorship Exception to UBIT.\(^ {37}\) A qualified sponsorship payment is excluded

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\(^{27}\) Id.

\(^{28}\) Id.

\(^{29}\) I.R.C. §§ 11 (West 2010), 511(a)(1) (West 2010), 512(a)(1) (West 2010); Kaplan, supra note 19, at 1434. Business expenses must be "directly connected" to the activity producing the income. I.R.C. § 512(a)(1) (West 2010); Treas. Reg. § 1.512(a)-1(a) (2010).

\(^{30}\) I.R.C. § 513(c) (West 2010); See Rev. Rul. 73-105, 1973-1 C.B. 264 (illustrating UBIT "fragmentation" in a museum context); see also Rev. Rul. 73-104, 1973-1 C.B. 263 (illustrating UBIT "fragmentation" in a museum context).

\(^{31}\) Colombo, supra note 18, at 117.

\(^{32}\) I.R.C. § 512(b) (West 2010). These exclusions work to prevent a university's endowment from being subject to taxation. Kaplan, supra note 19, at 1435.

\(^{33}\) I.R.C. §§ 513(a)(1), (2) (West 2010). There is also an exception for an organization reselling donated merchandise, referred to as the Goodwill Exception. I.R.C. § 513(a)(3) (West 2010).

\(^{34}\) I.R.C. § 513(a)(1) (West 2010).

\(^{35}\) I.R.C. § 513(a)(2) (West 2010). The Member/Student Exception generally applies to dormitories, dining halls, and college bookstores. Kaplan, supra note 19, at 1435.

\(^{36}\) See discussion infra Part III.B.3 (discussing the "not substantially related" test).

\(^{37}\) I.R.C. § 513(i) (West 2010).
C. Policy Justifications for Tax Exemption

There is no single, definitive tax policy justification for tax-exemption. Rather, there are many generally excepted justifications.

1. Public Benefit Justification

Public benefit is the classic tax-exemption justification. The public benefit justification is based on Congress providing "support for organizations that perform functions and services that are public in nature and that otherwise would have to be provided by the government." These functions and services can range from those "not available from the private market (e.g., symphonic music) or something as diffuse as a 'nonprofit ethic' that takes a different (and presumably unique) approach to providing something that might otherwise be available in the market." The "community benefit" interpretation of the public benefit justification is a broader, yet appropriate, justification for tax exemption. Under the "community benefit" interpretation, tax exemption is justified not only where the government would have to provide the function directly, "but rather to all sorts of 'good things' done by charities" that are not otherwise being performed, or which differ from those being performed, by the private market or government directly. Thus, organizations that perform functions that otherwise would not be performed in the same charitable manner, or would be provided by the government, should be exempt from taxation because they provide a valuable public benefit.

38. Treas. Reg. § 1.513-4 (2010). This test is known as the No Substantial Return Benefit Test. Under the test, the payment cannot be contingent on the level of attendance, but can be contingent on whether the event is actually held. Treas. Reg. § 1.513-4 (2010). An exclusive provider arrangement is not qualified because there is a substantial return to the payor, however an exclusive sponsor arrangement is qualified. Id. There is also a de minimis exception where, if the substantial benefit is two percent or less of the total sponsorship payment, it is disregarded and the payment is qualified. Id.

39. See Colombo, supra note 18, at 147 (discussing theories of tax exemption).

40. JCT Report, supra note 2, at 69.

41. Colombo, supra note 18, at 147 (citing JOHN D. COLOMBO & MARK A. HALL, THE CHARITABLE TAX EXEMPTION 4, 5-6 (Westview Press 1995)).

2. Pluralism/Altruism Justification

Pluralism is a widely regarded tax exemption justification.\footnote{JCT Report, supra note 2, at 71.} This justification provides that tax exemption is proper for organizations that promote pluralism and altruism because these qualities intrinsically benefit society. Professor Atkinson asserts that, "beyond the specific and direct benefits that charities provide, charities also deliver certain 'metabenefits,' including the promotion of pluralism and altruism, which are inherently good and thus deserve subsidization through tax exemption."\footnote{Id. at 72 (citing Rob Atkinson, Altruism in Nonprofit Organizations, 31 B.C. L. REV. 501, 605 (1990)).} Therefore, organizations that promote pluralism and altruism should be rewarded with tax exemption because they innately benefit and improve society.

3. Expediency Justification

Expediency is an important, longstanding, and underappreciated justification for tax exemption. Essentially, tax exemption is appropriate where the potential tax revenues do not justify the costs to administer the tax.\footnote{H.R. REP. NO. 64-922, at 4 (1916). In 1916, Congress stated: “the securing of returns from [certain nonprofits] has been a source of annoyance and expense and has resulted in the collection of either no tax or an amount which is practically negligible.” Id.} Thus, nonprofits should be exempt from taxation "essentially as a matter of administrative convenience."\footnote{Colombo, supra note 18, at 148.}

Professors Bittker and Rahdert further developed the expediency theory in the 1970s.\footnote{Boris I. Bittker & George K. Rahdert, The Exemption of Nonprofit Organizations from Federal Income Taxation, 85 YALE L.J. 299, 307 (1976).} They assert that charities are tax-exempt "because there is no reasonable way of measuring net income under established principles developed for the taxation of for-profit entities."\footnote{JCT Report, supra note 2, at 70 (citing Bittker & Rahdert, supra note 47, at 305).} The established conception of gross income relies on a motive of profit maximization, and thus does not readily apply to nonprofit organizations that lack a profit motive.\footnote{See Bittker & Rahdert, supra note 47, at 307 (discussing income measurement of not-for-profit entities).} For instance, it is difficult to determine "whether contributions to a charity should be included in its ordinary income or excluded from ordinary income as gifts received."\footnote{JCT Report, supra note 2, at 70-71.} Additionally, expense deductibility is problematic "as business expenses generally are deductible only when incurred with a profit motive."\footnote{Id. at 71 (citing Bittker & Rahdert, supra note 47, at 309-10).}

\footnotesize{43. JCT Report, supra note 2, at 71.  
44. Id. at 72 (citing Rob Atkinson, Altruism in Nonprofit Organizations, 31 B.C. L. REV. 501, 605 (1990)).  
45. H.R. REP. NO. 64-922, at 4 (1916). In 1916, Congress stated: “the securing of returns from [certain nonprofits] has been a source of annoyance and expense and has resulted in the collection of either no tax or an amount which is practically negligible.” Id.  
46. Colombo, supra note 18, at 148.  
48. JCT Report, supra note 2, at 70 (citing Bittker & Rahdert, supra note 47, at 305).  
49. See Bittker & Rahdert, supra note 47, at 307 (discussing income measurement of not-for-profit entities).  
50. JCT Report, supra note 2, at 70-71.  
51. Id. at 71 (citing Bittker & Rahdert, supra note 47, at 309-10).}
Further, Professors Bittker and Rahdert cogently recognize that even if the net income of nonprofits could be adequately measured, it is impossible to establish appropriate tax rates. Specifically, the tax burden would fall on the organization’s ultimate beneficiaries, and “the burden of the tax would not reflect the ability to pay of the individual beneficiaries.” Thus, charitable organizations should be exempt from taxation because potential tax revenues do not justify the administrative costs, and because fundamental income tax principles and policies are unsuitable in the context of nonprofit organizations.

A related justification is based on the efficiency of keeping the government and charities separated. Professor Brody posits this “third sovereign” justification, which justifies tax exemption because it “keeps government out of the charities’ day-to-day businesses, and keeps charities out of the business of petitioning government for subvention.” Thus, charitable organizations should be exempt from taxation because it is more efficient for both the government and the charitable organizations if they are kept separate.

4. Donative Theory Justification

Professors Colombo and Hall advance a “donative theory” justification for tax exemption. Under the donative theory, exemption is justified only for organizations capable of attracting substantial support from the public. Essentially, the willingness of individuals to donate to an organization demonstrates the organization’s worthiness of public support. The tax exemption is intended to subsidize charitable organizations to make up for shortfalls, generally attributed to the “free-rider” problem. Further, Professors Colombo and Hall “assert that neither the particular market defect that leads to the donation nor the motivation for the donation is relevant to whether the recipient of the donation qualifies for a subsidy (i.e., for exemption).” Thus, organizations that can attract substantial donations should be exempt from taxation because the donations indicate that the

52. Bittker & Rahdert, supra note 47, at 314.
53. Id. at 315, 358.
56. JCT Report, supra note 2, at 73 (citing Hall & Colombo, supra note 55, at 1379).
57. JCT Report, supra note 2, at 73.
59. JCT Report, supra note 2, at 73 (citing Hall & Colombo, supra note 55, at 1379).
organization is worthy of public support.

5. **Economic Justifications**

There are two primary economic justifications for tax exemption. The first is the "contract failure" justification.\(^6\) The contract failure justification interprets tax exemption as a capital subsidy for nonprofit organizations that cannot attract sufficient capital due to the nondistribution restrictions.\(^6\) The second is the "risk compensation" justification.\(^6\) The risk compensation justification contends that "tax exemption is a non-volatile expected return to compensate rational charitable organizations for undertaking the provision of 'inherently risky' public goods and services."\(^6\)

6. **Promoting a Specific Policy & Legislative Influence Justifications**

There are also two legislative-based justifications for tax exemption.\(^6\) First, Congress may desire to promote a specific public policy. Congress can use tax exemption to encourage the activities that will promote the desired policy.\(^6\)

Second, legislative influence and the overall nature of the legislative process can justify tax exemption.\(^6\) Congress did not exempt all nonprofit organizations from taxation. Instead, "the general rule is that an organization is subject to tax absent a specific exemption."\(^6\) Because exemption categories are separately codified, the result is many specific and narrowly-tailored enumerated exemption categories depending on legislative influence.\(^6\)

7. **Structure & Operation Justification**

The structure and operation of some organizations justify tax exemption. There are certain organizations that "are funded

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61. *Id.* at 69.
63. *Id.* at 424-25.
64. These legislative "justifications" may be better described as "explanations," nevertheless they are accepted principles. See JCT Report, *supra* note 2, at 28-29.
65. *Id.* at 28.
66. *Id.* at 29.
67. *Id.*
68. *Id.*
exclusively by their members and expend all funds exclusively for members." These organizations, such as social clubs, reinvest any excess member dues back into the organization for the benefit of its members. Therefore, the organization does not have any income "because there has not been a shifting of benefit from the member to the organization—the organization merely facilitates a joint activity of its members." Thus, organizations such as social clubs should be tax-exempt because they simply pool member dues and have no income.

II. THE BACKGROUND OF TAX EXEMPTION IN INTERCOLLEGIATE ATHLETICS

When Congress was enacting the UBIT, it was universally accepted that intercollegiate athletics would be exempt from the new tax. Congress did not feel the need to conduct hearings, presumably because intercollegiate athletics have traditionally been such an important element of higher education in the United States. The House Ways and Means Committee explicitly stated that "the income of an educational organization from charges of admission to football games would not be deemed to be income from an unrelated business, since its athletic activities are substantially related to its educational program." Additionally, the Committee declared that a university "would not be taxable on income derived from a basketball tournament sponsored by it, even where the teams were composed of students of other schools." In keeping with the times, the IRS recognized that "there is no meaningful distinction between exhibiting the game in person to 100,000 people and exhibiting the game on television to a much larger audience." Thus, legislative history strongly supports tax exemption for intercollegiate athletics.

In the sixty years since Congress enacted the UBIT, the IRS attempted to apply it to intercollegiate athletics only a handful of times, and without any real success. The IRS first challenged intercollegiate athletics in 1977. However, the IRS quickly reversed its position and has consistently held that the sale of broadcast rights—the primary revenue source in intercollegiate athletics does not fall under this justification.

69. Id. at 28.
70. Id.
71. Id.
72. Educational institutions and intercollegiate athletics do not fall under this justification.
74. Id. at 37.
76. Kaplan, supra note 19, at 1431.
athletics—is not subject to the UBIT.\textsuperscript{77} Appropriately, the IRS has not attempted any UBIT challenges of intercollegiate athletics activities since 1990.\textsuperscript{78}

Although Congress recently examined intercollegiate athletics, it properly let the inquiry rest without unnecessary legislative action. In 2006, the House Ways and Means Committee Chairman Bill Thomas sent a letter to the NCAA asking the NCAA to support its tax-exempt status.\textsuperscript{79} Then-NCAA President Myles Brand responded with a detailed and cogent justification that satisfied Congress.\textsuperscript{80} In light of the legislative history, legal precedent, and favorable outcome of the 2006 inquiry, Congress is unlikely to reverse the longstanding tax exemption for intercollegiate athletics.

III. ANALYSIS: THE JUSTIFICATION FOR TAX EXEMPTION IN INTERCOLLEGIATE ATHLETICS

Under the current legal framework, intercollegiate athletics satisfy all the requirements for tax exemption. Further, even activities such as big-time D-I football and basketball very likely avoid the UBIT. More importantly, tax exemption is justified for intercollegiate athletics under several tax policy justifications. Intercollegiate athletics also fall outside the UBIT justifications, thus intercollegiate athletics should remain fully exempt from federal income taxation.

\begin{itemize}
\item \textsuperscript{78} Professor Colombo declares that the IRS has “basically given up” on taxing intercollegiate athletics. Colombo, supra note 18, at 141. However, it is the IRS’s job to administer the tax law, and the tax law—and its legislative intent—clearly supports the exemption of intercollegiate athletics from taxation.
\item \textsuperscript{80} NCAA Response to the House Committee on Ways and Means concerning the NCAA’s tax-exempt status, NCAA (Nov. 16, 2006) http://www.ncaa.org/wps/Portal/ncaahome?WCM_GLOBAL_CONTEXT=/wps/wcm/connect/ncaa/NCAA/ Media+and+Events/Press+Room/News+Release+Archive/2006/Official+Statements/20061115_ways_means_rls (last visited Mar. 6, 2011) [hereinafter NCAA Response].
\end{itemize}
A. Intercollegiate Athletics Satisfy the § 501(c)(3) Requirements

Intercollegiate athletics satisfy the requirements of § 501(c)(3). Professor Colombo properly recognizes that "current law makes it virtually impossible for the IRS to withdraw exemption" of intercollegiate athletics. Only entities—not activities—are tax-exempt. Because athletic departments are not separately incorporated, the taxable entity in the context of intercollegiate athletics is the university as a whole. Universities fall squarely within the charitable purpose of education.

Universities would lose their tax-exempt status only if intercollegiate athletics were considered both "substantial" and not "in furtherance of" an exempt purpose. Professor Colombo dismissively asserts that it is "probably easy" to conclude that intercollegiate athletics are "substantial" simply due to the level of revenue. However, even the most successful programs do not achieve a significant taxable profit. Even assuming that intercollegiate athletics were substantial, they are in furtherance of an exempt purpose. Critics submit three potential arguments to support intercollegiate athletics not being "in furtherance of" an exempt purpose. They offer that intercollegiate athletics are simply "minor leagues for the pros," benefit only a tiny proportion of a university's student body, and are detrimental to the overall education of the student athlete. All three of these arguments are specious. In fact, the opposite is generally true. And as

81. This Article focuses on the intercollegiate athletics activities of colleges and universities. The NCAA and other governing bodies are also properly tax-exempt because they further their charitable purpose of advancing amateur athletics. Additionally, if the IRS were to revoke the NCAA's § 501(c)(3) status, the NCAA would still qualify as a tax-exempt trade association under § 501(c)(6)—similar to the NFL, NBA, MLB, etc. Donations are not deductible to § 501(c)(6) organizations, however, the NCAA only received approximately 0.055% of its 2006 revenue from donations. See Colombo, supra note 18, at 114 n.14 (illustrating that in 2006 the NCAA only received $318,939 from donations, compared to program service revenue of over $584 million).
82. Id. at 112.
83. Id. at 117.
84. Id.
86. Colombo, supra note 18, at 131.
88. Professor Colombo appropriately notes that tax-exempt policy knowledge of intercollegiate athletics critics "has appeared woefully inadequate." Colombo, supra note 18, at 111 n.10.
90. Professor Colombo presents the examples of high-tech laboratories
Professor Colombo recognizes, "the IRS has consistently ruled over many decades that college athletics are, in fact, functionally related to educational programs of universities." 92

Further, the "destination of income" test likely still applies outside the UBIT inquiry.93 Under this argument, if commercial revenues subsidize charitable outputs, then the activities are "in furtherance of" the exempt purpose.94 Thus, even in the extremely unlikely case that athletic departments were found to be unrelated to their university's exempt purposes of education and promoting amateur athletics, the university would still satisfy the operational test because intercollegiate athletics revenues support non-revenue athletic programs and provide billions of dollars in scholarships.95

Absent extraordinary circumstances, intercollegiate athletics do not result in any private inurement.96 Critics' only plausible argument is that escalating coaching salaries result in private inurement because they qualify as unreasonable compensation. However, the Regulations clearly provide that "reasonableness" of compensation is determined by what the market—including the for-profit market—is paying for similar services.97 When compared directly benefiting only a few students, and fine arts students putting in similar practice time to athletes. Colombo, supra note 18, at 123-33.

91. See discussion infra Part III.B.3 (discussing the "not substantially related" standard).

92. Colombo, supra note 18, at 132 (referencing IRS "substantially related" UBIT holdings).

93. Id. at 129-30.

94. See id. at 133 (discussing the destination of income test as applied to NCAA athletics). This destination of income test is supported by the IRS "commensurate-in-scope" rulings. Id. at 130 n.99 (citing Rev. Rul. 64-182, 1964-1 C.B. 186; I.R.S. Tech. Adv. Mem. 96-36-001 (Jan. 4, 1995); I.R.S. Tech. Adv. Mem. 97-11-003 (Nov. 8, 1995); I.R.S. Priv. Ltr. Rul. 2000-21-056 (Feb. 8, 2000)).

95. See Colombo, supra note 18, at 129-30, 133 (discussing tax exemptions for education and charity); NCAA Response, supra note 80, at 1, 17 (providing an NCAA press-release addressing its tax exempt status).

96. Even if intercollegiate athletics did result in private inurement, the university would likely face only intermediate sanctions instead of exemption revocation. See I.R.C. § 4958 (West 2010).

to professional football or basketball head coaches, even the highest paid college head coaches are “reasonably” compensated.98

Intercollegiate athletics do not result in any impermissible private benefit. The balancing test of the benefits to private individuals versus the benefits to the charitable class weighs heavily in favor of the universities.99 Further, neither the IRS nor Congress has ever raised impermissible private benefit in the context of intercollegiate athletics.100

Finally, none of the above requirements affect public universities.101 Although public universities can elect § 501(c)(3) status, the only benefit they receive is reduced confusion regarding deductibility of donations.102 This structure is significant because the vast majority of the most successful football and basketball programs—those programs under scrutiny for commercialization—are of public universities.103 And if Congress wants to tax only Miami and Duke, I will certainly not complain.

B. Intercollegiate Athletics Avoid the UBIT Requirements

Virtually all activities in intercollegiate athletics fall outside the current UBIT requirements. Although many intercollegiate athletics activities satisfy the “trade or business” requirement,

98. In 2009, there were ten college football coaches that were paid over two million dollars per year, with Saban being the highest at $4 million. Compensation for Div. I-A College Football Coaches, USA TODAY, http://www.usatoday.com/sports/graphics/coaches_contracts/flash.htm (last visited Mar. 6, 2011). There were several NFL coaches that were paid over $5 million per year, and Phil Jackson, the coach of the NBA's L.A. Lakers, made over $10 million. The Highest-Paid Coaches, FORBES, May 14, 2009, http://www.forbes.com/2009/05/13/highest-paid-coaches-business-sports-nba.html.

99. Colombo, supra note 18, at 124-26. Although television networks and professional teams certainly benefit from intercollegiate athletics, this incidental benefit is not likely impermissible. Id.

100. Id. at 125-26.

101. Id. at 133-34.

102. Donations are still deductible absent a § 501(c)(3) election under § 170(c)(1), and the university is still tax-exempt under § 115. I.R.C. § 170(c)(1) (West 2010); I.R.C. § 115 (West 2010). Professor Colombo suggests that Congress could limit deductibility of donations under § 170 strictly to universities that complied with athletic regulations. Colombo, supra note 18, at 155 n.189. Congressional support for such a restriction seems highly unlikely.

many do not satisfy the “regularly carried on” requirement, and practically none satisfy the “not substantially related” requirement. Additionally, many intercollegiate athletics activities fall under a UBIT exclusion.

1. Trade or Business

Many activities in intercollegiate athletics do qualify as a “trade or business” under the first UBIT requirement.\(^4\) A trade or business “includes any activity which is carried on for the production of income from the sale of goods or performance of services.”\(^5\) Essentially, any activity where profit is a motive is properly considered a trade or business.\(^6\) Thus, under this very broad and fact-based test, most universities will likely have some intercollegiate athletics-related activities that qualify as a “trade or business.”\(^7\) However, these activities will almost never satisfy both of the remaining two UBIT requirements.

2. Regularly Carried On

Prior to 1990, commentators had little doubt that intercollegiate athletics clearly satisfied the “regularly carried on” test.\(^8\) However, the Tenth Circuit surprised those commentators when it held the NCAA “March Madness” basketball tournament not to be “regularly carried on” for UBIT purposes.\(^9\) In evaluating whether an activity is “regularly carried on,” the key factors are “the frequency and continuity with which the activities . . . are conducted” and whether they “are pursued in a manner generally similar to comparable commercial activities.”\(^10\) The Regulations explicitly state that intermittent activities that occur infrequently

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104. Most activities in a university setting that can generate revenue are expected to do so. In this respect, intercollegiate athletics are very similar to a research center generating income through grants or sale of intellectual property.

105. I.R.C. § 513(c) (West 2010), added by the Tax Reform Act of 1969, Pub. L. No. 91-172, § 121(c), 83 Stat. 487 (1969). Further, an activity can be considered a trade or business even if “it is carried on within a larger aggregate of similar activities or within a larger complex of other endeavors which may, or may not, be related to an exempt purpose of the organization.” Id.


107. I couch my language in this assertion because one can never be sure how much deference a court will afford intercollegiate athletics. A court could surprise all commentators—as one did with the “regularly carried on” test—and rule that intercollegiate athletics are not a trade or business.

108. See Kaplan, supra note 19, at 1449 (describing the satisfaction of the requirement as “rather straightforward”).


110. Treas. Reg. § 1.513-1(c)(1) (2010); Kaplan, supra note 19, at 1449.
will not qualify as “regularly carried on” even if they recur annually.\footnote{111}{Treas. Reg. § 1.513-1(c)(2)(iii) (2010); Kaplan, supra note 19, at 1449.}

There is significant precedent that an annual athletic event will not qualify as “regularly carried on.”\footnote{112}{NCAA, 914 F.2d at 1426; S. Rep. No. 91-552, at 68 (1969) (finding an “annual athletic exhibition” as not being “regularly carried on”); see Mobile Arts and Sports Ass’n v. U.S., 148 F. Supp. 311 (S.D. Ala. 1957) (holding that the annual Senior Bowl football game is not subject to UBIT).} Thus, the activity of a championship tournament or bowl game should not be considered “regularly carried on,” and thus not subject to the UBIT.\footnote{113}{Activities undertaken during the regular season are very likely to be considered “regularly carried on,” however commentators could be surprised again.}

3. Not Substantially Related

Finally, even if the first two requirements are satisfied, it is unlikely that any activities in intercollegiate athletics are “not substantially related” to the university’s exempt purpose. This test requires an examination of the university’s exempt purpose and the relationship of the activity to that purpose.\footnote{114}{Kaplan, supra note 19, at 1450, 1452.} The Regulations provide a liberal standard; an activity is “substantially related” if it “contributes importantly” to the university’s exempt purpose,\footnote{115}{Treas. Reg. § 1.513-1(d)(2) (2010). The current Regulations were properly revised to provide a more liberal definition of “substantially related” in 1967. I.R.S. Tech. Inf. Release 899 (Apr. 14, 1967).} “even if the activity’s principal purpose is financial or is otherwise unrelated to the exempt purpose.”\footnote{116}{Kaplan, supra note 19, at 1451. Essentially, Congress aimed to prevent “entirely unrelated” activities, such as a university selling macaroni. Id.}

The Regulations broadly define the exempt purpose of “education” as “the instruction or training of an individual for the purpose of improving or developing his capabilities.”\footnote{117}{Treas. Reg. § 1.501(c)(3)-1(d)(3)(i) (2010). The Mobile Arts court held that even the Senior Bowl halftime show had some educational value. 148 F. Supp. at 315.} Intercollegiate athletics develop a vast range of individuals’ capabilities; including teamwork, competition, personal drive, discipline, perseverance, character, fair play, courage, inner strength, physical strength, courage, and cooperation.\footnote{118}{See LAWRENCE J. HATAB, THE GREEKS AND THE MEANING OF ATHLETICS, IN RETHINKING COLLEGE ATHLETICS 31-39 (1991) (describing the traits that college athletics develop in participating athletes); Kaplan, supra note 19, at 1455; see also I.R.S. Priv. Ltr. Rul. 78-51-002 (Aug. 31, 1978) (ruling that an audience for a sporting event develops an athlete’s inner strength).} Some commentators argue that D-I intercollegiate athletics focus too heavily on winning.\footnote{119}{See Kaplan, supra note 19, at 1456. Conversely, Peyton Manning...}

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athletics? In comparison, the overarching desire to win is lauded in law school moot court competitions. And surely sales managers require their sales personnel to go out and compete as hard as possible to close a sale. It seems that instilling in a college student a burning desire to win would make that student much more capable in his or her endeavors after school, which is precisely the purpose of a university.

Some argue that intercollegiate athletics are not substantially related to education because, for most student-athletes, intercollegiate athletics do not lead to a professional sports career. However, that argument actually supports the amateurism aspect of intercollegiate athletics because it illustrates that intercollegiate athletics are not simply “minor leagues” for the professionals. Instead, student-athletes develop skills through intercollegiate athletics that will make them more marketable in any employment scenario—including those outside professional sports. Additionally, participating in intercollegiate athletics can open doors for student-athletes through publicity and networking, particularly if the university has a supportive alumni base. Commentators also argue that intercollegiate athletics require too large a time commitment from student-athletes, thereby detracting from their academic development. However, balancing the commitments of two serious endeavors develops

recognized that college athletics “have a lot more to do with learning than they do with winning.” NCAA Response, supra note 80, at 4.

120. See id. at 1458 (citing several sources that illustrate the low probability of a student-athlete becoming a professional athlete).

121. In fact, the NCAA’s slogan is “There are over 380,000 student-athletes, and most go pro in something other than sports.” NCAA TV Spots, NCAA, Jan. 5, 2011, http://www.ncaa.org/wps/wcm/connect/public/NCAA/About+the+NCAA/Who+We+Are/TV+Spots+landing+page/Making+of+a+PSA.


123. Unsurprisingly, a supportive alumni base often accompanies winning sports teams.

124. Knight Comm’n Report, supra note 89, at 19. It should be noted that many, if not most, college students have substantial employment in addition to their schoolwork. Most student-athletes at top programs receive a full-tuition scholarship, thus obviating the need to work during the academic year. Furthermore, college football players often miss less class time than other student-athletes because they play only one game each week, half of which are home games. NCAA Response, supra note 80, at 5.
time-management skills and discipline, and illustrates to potential employers that the student-athlete will be able to prioritize and multi-task in the business world.

Intercollegiate athletics also produce myriad "community-creating benefits." Intercollegiate athletics often instill school loyalty and spirit, which may have the added benefit of increased contributions from donors. Further, intercollegiate athletics can provide entertainment and create a unique campus culture, effectively enriching student life. For millions of college students, a fundamental piece of their college experience is spending a Saturday afternoon voraciously cheering on their team along with ninety thousand of their closest friends.

Furthermore, there is a very strong legal precedent against applying the UBIT to intercollegiate athletics. Legislative history explicitly states that the UBIT does not apply to a basketball tournament or admissions to football games because a university's "athletic programs are substantially related to its educational program." The IRS has ruled "several times in many different contexts that intercollegiate athletics are an 'integral part' of the educational program of a university (and therefore clearly 'substantially related' to a university's educational program)." And the Regulations provide a liberal university-related example. The Regulations state that a university that brings professional theatre groups or symphony orchestras to campus will not be subject to UBIT because these performances "contribute importantly to the overall educational and cultural function of the university." Therefore, "if paid-admission performances in the arts are substantially-related to student education, consistency would demand similar deference to paid-admission performances in athletics."

In addition to being substantially related to the exempt

126. Amy Christian McCormick & Robert A. McCormick, The Emperor's New Clothes: Lifting the NCAA's Veil of Amateurism, 45 SAN DIEGO L. REV. 495, 545 n.180-81 (citing dozens of sources that illustrate increased donations and applications to a university when its football or basketball team is successful).
128. Colombo, supra note 18, at 141.
132. Colombo, supra note 18, at 141.
purpose of education, intercollegiate athletics are also substantially related to the exempt purpose of advancing amateur athletics. In 1976, Congress amended § 501(c)(3) and explicitly declared the promotion of amateur athletics a charitable purpose.\(^{133}\) Despite increased revenues from broadcasting, intercollegiate athletics are still performed completely by amateurs.\(^{134}\) Student athletes are not paid for their athletic performance, and the NCAA goes to great lengths to protect amateurism in intercollegiate athletics.\(^{135}\) Thus, intercollegiate athletics activities are substantially related to both the exempt purpose of education and promotion of amateur sports.

4. UBIT Exclusions

Even if an intercollegiate athletics activity were to satisfy all three UBIT requirements, the activity would still likely avoid UBIT through one of the exclusions. The Volunteer and Member/Student Exclusions are likely inapplicable in most cases, although a tenuous but somewhat plausible argument can be advanced.\(^{136}\) However, the activities that have the highest likelihood of falling into the UBIT can generally be structured to satisfy the Qualified Sponsorship Exclusion.\(^{137}\) Therefore, the UBIT is inapplicable to essentially all activities in intercollegiate athletics.

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134. Intercollegiate athletics are being increasingly televised, which illustrates that universities and the NCAA are effectively promoting these amateur sports. See, e.g., Sandy Gholston, Division II Games Getting More Television Coverage from CBS College Sports Network, MLIVE.COM (Mar. 11, 2010) http://blog.mlive.com/crimson_and_gold_report/2010/03/division_ii_games_getting_more_television_coverage_from_cbs_college_sports_network.html (illustrating that even smaller, less popular college sports programs are receiving more television coverage).

135. See generally, NCAA Response, supra note 80.

136. The Volunteer Exclusion argument relies on the athletes not being paid to participate in the activity. Kaplan, supra note 19, at 1460-64. The Member/Student Exclusion argument relies on intercollegiate athletics primarily satisfying the campus community’s need for entertainment. Id.

137. See MICHAEL I. SANDERS, JOINT VENTURES INVOLVING TAX-EXEMPT ORGANIZATIONS 721-25 (3d ed. 2007) (discussing the various ways that sponsorship, advertising, and pouring rights can be structured to fall within I.R.C. § 513(j) (West 2010)).
C. Intercollegiate Athletics Satisfy Several Justifications for Tax Exemption

Intercollegiate athletics fall under many tax policy justifications for tax exemption. As a matter of tax policy, revenues from intercollegiate athletics should not be taxed. However, under the current organizational structure, analyzing the tax exemption justification for intercollegiate athletics is unnecessary and improper. When analyzing the justification for overall tax exemption, as opposed to the UBIT, we must examine the entity—not the activity. Thus, the proper exemption justification analysis focuses on the university as a whole, which we know to fall under several justifications. Nevertheless, tax exemption for intercollegiate athletics is justified even if we were to examine the athletic activities independently; for instance, if the athletic department was separately incorporated.

1. Public Benefit Justification

Tax exemption of intercollegiate athletics is proper under the public benefit justification. Intercollegiate athletics, as a whole, would not be supplied absent tax exemption. The majority of intercollegiate athletics are non-revenue-generating. Thus, the majority of the functions provided by athletic departments would not be supplied in the for-profit private market. Further, the fact that essentially all public universities provide intercollegiate athletic activities strongly supports the public benefit justification by illustrating that intercollegiate athletic activities are “public in nature.”

In addition to intercollegiate athletics providing a valuable public function that would not otherwise be available in the for-profit private market, intercollegiate athletics also utilize a different approach to provide something that is available in the market. Intercollegiate athletics provide the public with amateur sports entertainment. Certainly in the case of non-revenue-generating sports, intercollegiate athletics provide a valuable and very different function compared with professional athletics.

138. This Article argues that Professor Colombo's conclusion is incorrect. See Colombo, supra note 18, at 146 (arguing that tax exemption theories do not justify the exemption of big-time intercollegiate athletics).
139. Colombo, supra note 18, at 117.
140. Although fragmentation of activities is allowed in the UBIT context, it is not allowed in the overall exemption context. Rather, the entity is the subject of analysis instead of the activity. Id. This Article assumes for the sake of argument that the entity is the athletic department and not the university. However, the analysis cannot dig deeper and fragment revenue-generating sports from non-revenue-generating sports.
141. For instance, the College World Series is a much different event than the MLB World Series because of the amateur aspects.
Additionally, some popular intercollegiate sports do not have legitimate professional equivalents. Even big-time D-I football and basketball programs utilize a different approach than professional football or basketball leagues. For example, the post-season structure of these college sports barely resembles the post-season playoffs of their professional counterparts. And regardless of anti-amateurism arguments, intercollegiate athletics generate a unique enthusiasm and sense of unity when students can watch their fellow classmates and peers representing their university on national television.

Additionally, intercollegiate athletics satisfy the broader “community benefit” interpretation. Intercollegiate athletics provide an opportunity for thousands of students to achieve a free college education. Many of the students who are awarded athletic scholarships are from families that would have qualified for some degree of educational financial aid from the government. Thus, intercollegiate athletics—particularly D-I football programs—provide a service that would otherwise be provided by the government. Therefore, intercollegiate athletics should be exempt from taxation because they provide a valuable public benefit.

2. Pluralism/Altruism Justification

Intercollegiate athletics satisfy the pluralism/altruism justifications as well. Athletic departments use revenues from financially successful sports programs to subsidize non-revenue sports programs.142 Further, athletic programs do not benefit only a “tiny proportion” of college students, as there are over 380,000 student-athletes that benefit from intercollegiate athletics.143 Intercollegiate athletic programs, particularly big-time programs, also facilitate significant diversity. Intercollegiate athletic programs provide a means for low-income students to achieve a higher education. Further, athletic programs attract students from diverse backgrounds; racially, geographically, and socio-economically. Many foreign student-athletes bring their diverse perspectives to the classrooms of domestic universities because they come to the United States to compete in intercollegiate athletics.144 And a successful athletic program can attract students from a much broader geographic range, enhancing geographical and cultural diversity in the student body.145 Further, participation in intercollegiate athletics promotes altruism which

142. NCAA Response, supra note 80, at 18.
143. Id. at 4.
144. The number of non-American Olympic athletes who are currently enrolled in American universities is astonishing.
145. For example, if Florida State University did not win the BCS Championship in the 1999 season, it probably would not have even been on the radar for a Massachusetts high school student choosing a college.
often manifests in student-athletes after graduation, ultimately benefiting society. Thus, intercollegiate athletics promote pluralism and altruism and should be rewarded with tax exemption.

3. Expediency Justification

Expediency is an extremely important and applicable justification for the tax exemption of intercollegiate athletics. In the realm of intercollegiate athletics, the potential tax revenues do not justify the costs to administer the tax. There are over 1,200 members of the NCAA alone, each of which needs to be analyzed individually, in painstaking detail, to determine whether it is taxable—likely under the UBIT—and to what extent. Professor Kaplan appropriately recognized this expediency justification in the UBIT context due to the administrative difficulties inherent in taxing intercollegiate athletics.

Further, although revenues from big-time intercollegiate athletics do fit our normative tax base, establishing appropriate tax rates is extremely problematic. Specifically, the tax burden would fall on the university’s ultimate beneficiaries—primarily students, and especially student-athletes in non-revenue sports. Clearly, the burden of the tax would not reflect the individual beneficiaries’ ability to pay. Thus, intercollegiate athletics should be exempt from taxation because potential tax revenues do not justify the administrative costs, and because establishing an appropriate tax rate is unfeasible.

Additionally, intercollegiate athletics is a perfect fit under the “third sovereign” justification. The government is particularly ill-suited to manage the operations of intercollegiate athletics. Further, Congress and the IRS have much more pressing concerns than managing intercollegiate athletic programs. It is certainly

146. See, e.g., Thompson, supra note 122 (discussing former FSU football stars turned philanthropists Myron Rolle and Warrick Dunn); see also THE WARRICK DUNN FOUNDATION, http://www.warrickdunnfoundation.org/index.php (last visited Mar. 6, 2011) (discussing the philanthropic endeavors of former Seminole Warrick Dunn).

147. Diversity and Inclusion, NCAA http://www.ncaa.org/wps/wcm/connect/public/NCAA/Key+Issues/Diversity+and+Inclusion/ (last visited Mar. 6, 2011). There are several other intercollegiate athletic governing bodies in addition to the NCAA.

148. Kaplan, supra note 19, at 1471. The decision not to subject intercollegiate athletics to the UBIT “may accurately reflect administrative difficulties in doing so.” Id.

149. As Professor Alfred Mathewson aptly recognizes, “[f]ederal intervention effectuates the highest level of attention, and therefore a significant misallocation of resources.” Alfred D. Mathewson, By Education or Commerce: The Legal Basis for the Federal Regulation of the Economic Structure of Intercollegiate Athletics, 76 UMKC L. REV. 597, 601 (2008). Professor Mathewson implores us “to remember: It’s just sports.” Id.
more efficient for both the government and athletic departments if
they are kept separate. Thus, intercollegiate athletics should
also be exempt from taxation under the “third sovereign”
justification.

4. Donative Theory Justification

The “donative theory” also justifies tax exemption for
intercollegiate athletics. Although the “donative theory” is a very
pragmatic justification, its application to intercollegiate athletics
is slightly obfuscated. The outcome may be different if we analyze
donations to the athletic programs compared with donations to the
university as a whole. Professor Colombo examines only donations
to athletic programs—generally through booster organizations—
and properly recognizes that these donations often include seating
preferences or other perks. However, the IRS still allows donors
to deduct 80% of the amount of these donations, and they still
reflect public support of the activities carried on by the athletic
department and university. Thus, there is a strong argument
that donations to athletic departments justify tax exemption under
the “donative theory.” Furthermore, donations to the overall
university may be a more appropriate signal of public support.
Donations to universities have a variety of motivations,
many of which are related to the university’s athletic program. For
instance, alumni may donate because of loyalty and spirit that was
cultivated during their collegiate experience—and subsequently
maintained—through the success of an athletic program.

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150. “Political solutions rarely provide optimal answers to sports problems
and therefore should be reluctantly embraced.” Id. at 601.
151. The “third sovereign” justification also supports the use of tax
exemption instead of a direct government subsidy.
152. Colombo, supra note 18, at 149 n.173.
153. I.R.C. § 170(f) (West 2010). In 2005, D-I athletic departments received
approximately $845 million in donations, comprising twenty-one percent of
their total operating revenue. NCAA Response, supra note 80, at 24.
154. Professor Colombo believes that these donations do not qualify under
the “donative theory” because they are not donations at all, but rather
purchases. Colombo, supra note 18, at 149 n.173. Although Professor Colombo
may be correct, the IRS considers eighty percent of the contribution to be a
donation. I.R.C. § 170(f) (West 2010). And because motivation is irrelevant, at
least eighty percent of these contributions should be considered donations.
155. Professors Colombo and Hall argue that the motivation for the donation
is irrelevant to whether the recipient of the donation qualifies under the
donative theory. Hall & Colombo, supra note 55, at 1398-1415. This Article
uses donors’ motivation solely to illustrate the connection between donations
to the general university and the success of the athletic program.
156. My conversations with athletic directors and alumni of successful
programs support this argument. See McCormick & McCormick, supra note
126, at 524-25 n.180-81 (citing dozens of sources that illustrate increased
donations and applications to a university when its football or basketball team
is successful).
athletic departments—and certainly universities—are capable of attracting substantial public support, and are therefore worthy of tax exemption.

5. Economic Justifications

The economic justifications are not as straightforwardly applicable to intercollegiate athletics, however both likely provide a justification for tax exemption. Under the contract failure justification, it is appropriate to use tax exemption as a capital subsidy for athletic departments that cannot attract sufficient capital due to the nondistribution restrictions. Although certain prominent D-I football and basketball programs may be able to generate sufficient capital, most athletic departments are composed primarily of non-revenue-generating programs. Thus, athletic departments likely qualify for tax exemption under the contract failure theory.

The “risk compensation” theory also likely justifies tax exemption for intercollegiate athletics. Athletic departments provide financially-risky public services—specifically non-revenue-generating intercollegiate athletic programs—and thus qualify for a non-volatile expected return through tax exemption.

6. Promoting a Specific Policy & Legislative Influence Justifications

Although the legislative-based justifications may not be as compelling as other justifications, intercollegiate athletics satisfy both. Congress can use tax exemption to encourage the activities that will promote a desired policy. As detailed above, Congress has repeatedly used the tax code to promote activities that further intercollegiate athletics—and their underlying purpose of education and development. The Congressional preference in favor of intercollegiate athletics reflects society’s policy preference. As a further example of intercollegiate athletics’ policy preference and legislative influence, Congress promptly delivered legislative relief by enacting the Qualified Sponsorship Exclusion when the IRS imprudently challenged sponsorship income in 1977. Thus, Congress—and indirectly American society—has a strong policy preference in favor of advancing intercollegiate athletics through tax exemption.

157. Again, these justifications may be more properly described as explanations for exemption.
158. One Congressional staffer recognized that, “[j]ust about every member of Congress either went to an NCAA school or has one in his district . . . . Let’s say they tend to be sympathetic to their athletic interests.” Kaplan, supra note 19, at 1471 (quoting Klein, NCAA Gets the Credit (Or Blame) as Sports In Colleges Expand, WALL ST. J., Dec. 5, 1979, at 33).
7. Public University Justification

Public universities are exempt from federal taxation because of intergovernmental tax immunity, or because they are an “instrumentality” of state government engaged in an essential government function. Thus, tax exemption is necessarily justified for public universities and their athletic departments.

D. Intercollegiate Athletics Satisfy Several Justifications for UBIT Exemption

There are two fundamental policy justifications for the UBIT: preventing unfair competition and increasing federal revenue by protecting the tax base. Neither policy justifies subjecting intercollegiate athletics to the UBIT.

The primary justification for the UBIT is preventing unfair competition. Congress did not want tax-exempt organizations to drive taxable competitors out of business. Further, the Regulations reiterate this legislative intent by referencing unfair competition as the overarching “policy of the tax.” As Professor Kaplan properly recognizes, although the presence of taxable competition is not a literal requirement for UBIT, it is the “raison d’etre” of the tax and is considered heavily by courts.

There is no reasonable argument of unfair competition in the realm of intercollegiate athletics. First, we must define the market. Most analysts have concluded that intercollegiate athletics’ only meaningful competition is professional sports, although even this conclusion is too broad. Professor Kaplan improperly analyzes competition by comparing attendance figures in cities that have both professional and college sports teams with cities that have only one or the other. Instead, we should analyze competition by examining the effect of the college or

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163. Kaplan, supra note 19, at 1464-65 (citing 96 CONG. REC. 9366 (1950) (remarks of Rep. Lynch)). Tax-exempt organizations “should not compete with the businessmen of this country.” Kaplan, supra note 19, at 1434 (quoting House Hearings, supra note 20, at 580 (remarks of Rep. Dingell)).
165. Kaplan, supra note 19, at 1468. Taxable competition actually is an added requirement for UBIT to apply to bingo games. Id. at 1467-68.
166. Id. at 1468 (citing G. HANFORD, AN INQUIRY INTO THE NEED FOR AND FEASIBILITY OF A NATIONAL STUDY OF INTERCOLLEGIATE ATHLETICS 67 (1974); M. RAIBORN, FINANCIAL ANALYSIS OF INTERCOLLEGIATE ATHLETICS 27 (1970); Klein, supra note 158, at 1).
167. This analysis is affected by far too many exigent factors including regional cultural preferences.
professional team being eliminated from the local market. For instance, how would the elimination of the Atlanta Falcons affect attendance at Georgia Tech and University of Georgia football games, and vice versa? It is unlikely that the elimination of either the professional or college teams would result in any significant increase in attendance for the remaining team.\textsuperscript{168} The outcome of this analysis is likely identical in most other geographic markets for both football and basketball. Further, many of the most successful college football programs are located in smaller college towns with no professional teams within a reasonable distance.\textsuperscript{169} And the Supreme Court has even suggested that college football does not compete with professional football.\textsuperscript{170} Therefore, intercollegiate athletics should not be subject to the UBIT under the unfair competition justification.

The secondary justification for the UBIT was not as much to increase federal revenue, as to protect the federal tax base from erosion by all business being performed through tax-exempt feeder corporations.\textsuperscript{171} However, tax base erosion is not a concern with intercollegiate athletics. As of 2006, only 53\% of D-IA football programs and 28\% of D-I basketball programs showed any level of profitability.\textsuperscript{172} Further, capital expenditures, such as costs to build facilities, are generally not allocated to the athletic departments.\textsuperscript{173} James Shulman and William Bowen recognize that if capital costs were properly allocated to athletic departments, no athletic program would achieve any taxable profit.\textsuperscript{174} Even if the activities of an athletic department were profitable, the athletic department would have incentive to spend more to avoid the tax—which could result in higher coaching salaries and more lavish facilities—exactly the spending that

\textsuperscript{168} Actually, the mutual existence of professional and college teams likely benefits each team because each brings thousands of people—fans and students—to the area. It is certainly conceivable that many football fans in town for a college game on Saturday would stick around and catch the professional game on Sunday.

\textsuperscript{169} For example: FSU in Tallahassee, FL; UA in Tuscaloosa, AL; UF in Gainesville, FL; OU in Norman, OK; OSU in Columbus, OH; LSU in Baton Rouge, LA; UT in Austin, TX; PSU in State College, PA; and the list goes on.


\textsuperscript{171} House Hearings, supra note 20, at 580 (remarks of Rep. Dingell).

\textsuperscript{172} NCAA Response, supra note 80, at 17-18. Overall, there were only twenty-three athletic departments in all of Division I athletics that were profitable. \textit{Id.} at 18. Further, the programs that do happen to be profitable are not necessarily the big-time programs. See Mathewson, supra note 149, at 624 (illustrating that the largest sports programs are often not the most profitable).

\textsuperscript{173} WALTER BYERS WITH CHARLES HAMMER, UNSPORTSMANLIKE CONDUCT: EXPLOITING COLLEGE ATHLETES 221 (1998).

\textsuperscript{174} SHULMAN & BOWEN, supra note 87, at 250.
critics seek to discourage. It is widely known that the UBIT does not result in significant tax revenue because most exempt organizations increase spending in years of profitability.\textsuperscript{175}

Despite these pragmatic arguments that tax base erosion is not a concern regarding intercollegiate athletics, Professor Colombo asserts that “college athletics clearly violates the tax base protection and diversion rationales for the UBIT.”\textsuperscript{176} Professor Colombo uses a theoretical and impractical test to determine tax base impairment: “if we assume that big-time college athletics would be carried on even in taxable form (e.g., inside a taxable subsidiary of a university), permitting revenues from these programs to escape taxation impairs the general tax base.”\textsuperscript{177}

First, this Article has illustrated that independent athletic departments would fall under several justifications for tax exemption. Thus, even in this completely unrealistic assumed “taxable subsidiary” structure, the general tax base would not be threatened. Second, Professor Colombo recognizes that in the case of intercollegiate athletics, any impairment of the general tax base is theoretical because even the most successful D-I sports are unlikely to produce any taxable revenue.\textsuperscript{178}

Further, the attention of charitable managers—athletic directors in this case—is not “diverted from their core charitable mission to for-profit empire building.”\textsuperscript{179} Athletic directors are keenly aware of their charitable mission and appropriately do everything in their power to generate revenue through their few financially successful sports in order to provide abundant opportunities for student-athletes in non-revenue sports. Contrary to Professor Colombo’s argument, furthering education and winning college football games are not mutually exclusive.\textsuperscript{180}

Additionally, Professor Colombo suggests that, even though virtually no tax revenue would be generated, imposing the UBIT

\begin{itemize}
\item \textsuperscript{175} See Colombo, supra note 18, at 144 (“charities in general have shown remarkable ability to ‘zero out’ any net income from unrelated business activity”); Peter Panepento & Grant Williams, A Question of Calculation: Many Charity Businesses Manage to Avoid Paying Federal Taxes, CHRON. PHILANTHROPY, Feb. 7, 2008, at 33; IRS, SOI TAX STATS—EXEMPT ORGANIZATIONS’ UNRELATED BUSINESS INCOME (UBI) TAX STATISTICS, available at http://www.irs.gov/taxstats/charitablestats/article/0,,id=97210,00.html (last visited Mar. 6, 2011).
\item \textsuperscript{176} Colombo, supra note 18, at 154.
\item \textsuperscript{177} Id. at 152. If big-time intercollegiate athletics were separated into a taxable subsidiary, non-revenue sports would likely disappear at those universities.
\item \textsuperscript{178} Id. at 163 n.184. Further, the programs that are profitable will have incentive to increase spending within that program and not subsidize non-revenue sports to avoid taxable income.
\item \textsuperscript{179} Id. at 151. Professor Colombo calls this conclusion “obvious.” Id. at 153.
\item \textsuperscript{180} Id. at 153. Certainly promoting amateur sports and winning college football games are not mutually exclusive.
\end{itemize}
would have a "salutary effect" because it would "publicly embarrass those who maintain that big-time college athletics are an inherent part of the educational enterprise." If Congress wanted to embarrass those individuals and entities, it could do so in a much more efficient and effective manner than through the tax code. And it would probably not be a politically wise maneuver for Congressmen to embarrass many—or in some cases essentially all—of their constituents.

Finally, Professor Stone provides a very cogent and pragmatic alternative view of UBIT policy. Professor Stone asserts that the UBIT enactment was essentially a Congressional statement intended to keep charities from expanding outside traditional charitable activities. Intercollegiate athletics have been a traditional activity of charitable educational institutions for over a century. Congress even clearly stated that intercollegiate athletics were a traditional charitable activity when it was enacting the UBIT.

Neither of the two fundamental UBIT policy justifications apply to intercollegiate athletics. Eliminating unfair competition is not a concern because intercollegiate athletics do not have any direct competitors. And tax base erosion is not a concern because intercollegiate athletics are properly tax-exempt activities, and would not result in any taxable revenue anyhow. Therefore, intercollegiate athletics are properly excluded from the UBIT.

E. The Proper Solution to the Intercollegiate Athletics Tax Exemption Debate

Despite the clear legislative history and legal precedent—along with several tax policy justifications—supporting the longstanding tax exemption of intercollegiate athletics, some critics continue to challenge this exemption. Thus, Congress

181. Id. at 145.
182. For example, imagine the reaction of Alabama residents if their Congressman publicly embarrassed all those who support 'Bama and Auburn athletics as an inherent part of the college educational experience.
184. H.R. REP. NO. 81-2319, at 109 (1950); H.R. REP. NO. 81-2319, at 37 (1950). Professor Colombo presents the counterargument that the commercialization of big-time D-I sports have expanded intercollegiate athletics into activities that are not traditionally charitable. Colombo, supra note 18, at 163 n.181. However, beginning to nationally televise football games that have been played for decades is much different than establishing a macaroni company.
185. As Professor Mathewson recognizes, tax law is "inadequate to address the economic structure problems in intercollegiate athletics, and if Congress ventured to do so, it would transform the Internal Revenue Service into a bureau of intercollegiate athletics." Mathewson, supra note 149, at 614.
should end all debate and explicitly exempt intercollegiate athletics from taxation, including the UBIT. Congress could achieve this goal without undercutting the UBIT by statutorily adopting the “destination of income” test for intercollegiate athletics.\footnote{The “destination of income” test likely still applies outside of the UBIT context.} Although universal use of the “destination of income” test proved impractical, the test is well-suited for intercollegiate athletics because intercollegiate athletics are not “entirely unrelated” to the university’s charitable purposes and revenues are utilized to further those charitable purposes.

Congress provided swift legislative relief with the Qualified Sponsorship Exclusion, and it would be even easier for Congress to act here. Congress need not create any new law, it must simply clarify the existing state of the law.\footnote{And if the UBIT enactment was a Congressional statement to keep charities out of non-charitable activities, as Professor Stone suggests, then Congress simply needs to clarify it as such in the context of intercollegiate athletics.} If Congress were to explicitly clarify that intercollegiate athletics are fully exempt from federal income taxation, athletic directors and sports fans alike would certainly rest easier.

IV. CONCLUSION

Under the current legal framework, intercollegiate athletics satisfy all the requirements for tax exemption. Further, even activities such as big-time D-I football and basketball very likely avoid the UBIT. More importantly, tax exemption is justified for intercollegiate athletics under several tax policy justifications, and intercollegiate athletics also fall outside the UBIT justifications. Therefore, Congress should end all debate and explicitly recognize that intercollegiate athletics are to remain fully exempt from federal income taxation.