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Promoting Health with Sports: When Should Nonprofits Qualify for Tax Benefits?

William Drennan

Southern Illinois University School of Law, wdrennan@law.siu.edu

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PROMOTING HEALTH WITH SPORTS: WHEN SHOULD NONPROFITS QUALIFY FOR TAX BENEFITS?

William A. Drennan*

ABSTRACT

Medical researchers are sounding the alarm that our society's shift to sedentary jobs is triggering an epidemic of chronic diseases, such as type 2 diabetes. This Article brings that modern medical research to a tax debate and hopes to help revolutionize the sports world. This Article's proposal seeks to shift our current excessive emphasis on youth, college, and elite sports to an emphasis on participation by all. Currently, the tax exemption rules vigorously promote youth and college sports but generally deny most-favored tax status to nonprofits promoting nonelite adult sports. These rules are based on doctrines linking sports with education, which developed in a bygone era when sports were for students and the idle rich, and most adults got plenty of physical activity at work. As recently as 1960, approximately fifty percent of all jobs required at least moderate physical activity. By 2006, that figure had plummeted to twenty percent, and the average U.S. male age forty to fifty was thirty-two pounds heavier than his counterpart in 1960. Over this same time span, there has been a dramatic increase in chronic diseases associated with inactivity. Scientists say that greater physical activity and improved diet are the ways to fight this epidemic. This Article makes the case for granting most-favored tax status to organizations that promote nonelite adult athletics and do not charge high fees that would exclude a significant portion of the community.

TABLE OF CONTENTS

I. CURRENT LAW IGNORES ARGUMENTS THAT SPORTS PROMOTE HEALTH	472
II. PROPOSAL: THE IRS AND THE COURTS SHOULD RECOGNIZE THAT SPORTS PROMOTE HEALTH ...	475

* Associate Professor, Southern Illinois University School of Law; New York University School of Law, LL.M. (Executive) 2013; Member, American Law Institute; Partner and Associate, Husch Blackwell Sanders LLP (1985-2005); Washington University School of Law, Adjunct Professor, Graduate Tax Program (1996-2000); Washington University School of Law, LL.M. in Intellectual Property (2003); Washington University School of Law, LL.M. in Taxation (1997); St. Louis University School of Law, J.D. (1985). Special thanks to Thomas Drysdale, Southern Illinois University School of Law, Class of 2014, and Kyle Boose, Southern Illinois University School of Law, Class of 2016, for their excellent research assistance.

A.	PLACING THE PROMOTION OF HEALTH IN THE STRUCTURE OF IRC § 501(c)(3) QUALIFICATION	475
B.	CAN ADULT SPORTS PROMOTE HEALTH?	478
1.	<i>Medical Research, Inactivity, and the Epidemic of Chronic Diseases</i>	478
2.	<i>Occupational Inactivity and Leisure Time Activity</i>	480
3.	<i>Costs of Inactivity</i>	482
4.	<i>Benefits from Types of Physical Activity</i>	482
C.	OTHER CONDITIONS FOR IRC § 501(c)(3) QUALIFICATION: REASONABLE FEES AND OTHER COMMUNITY BENEFIT CONCERNS	484
D.	POTENTIALLY SURPRISING CONSEQUENCES INVOLVING DANGEROUS SPORTS	486
E.	EVALUATING THE IRS'S POSITIONS ON NONELITE ADULT SPORTS	490
F.	TRACING THE IRS'S FOCUS ON EDUCATION TO A BYGONE ERA	497
1.	<i>IRS Reliance in 1964 on a 1904 Case That Was Overruled in 1945</i>	497
2.	<i>Questionable Factual Foundation for the 1904 Case Relied on by IRS</i>	499
3.	<i>Rich Judicial History Reflects Various Positive Impacts of Sports</i>	501
III.	CONCLUSION: REFORMING THE SPORTS WORLD BASED ON MEDICAL EVIDENCE	503

*“The encouragement to active participation in athletic exercise [such as tennis] and the consequent development of a strong, healthy, and physically alert population cannot but contribute in the national interest.”*¹

*“[W]ith the possible exception of diet modification, we know of no single intervention with greater promise than physical exercise to reduce the risk of virtually all chronic diseases simultaneously.”*²

*“[I]t is unlikely that there will be a return to occupations that demand moderate levels of physical activity . . . [so it is important to promote] physically active lifestyles outside of the work day.”*³

1. U.S. Lawn Tennis Ass'n v. Comm'r, 47 B.T.A.M. (P.H.) ¶ 42,457 (1942), available at 1942 WL 9367.

2. Frank W. Booth et al., *Waging War on Modern Chronic Diseases: Primary Prevention Through Exercise Biology*, 88 J. APPL. PHYSIOL. 774, 778 (2000), available at <http://www.ncbi.nlm.nih.gov/pubmed/10658050>.

3. Timothy S. Church et al., *Trends over 5 Decades in U.S. Occupation-Related Physical Activity and Their Associations with Obesity*, 6 PLoS ONE 2 (2011), available at journals.plosone.org/plosone/article?id=10.1371/journal.pone.0019657.

U.S. tax policy encourages all youth and college sports, including head-banging, collision sports. It also encourages a strange mix of dangerous adult sports organizations that fit into a few narrow categories. For example, the Internal Revenue Service (IRS) and the courts have granted most-favored tax status to nonprofits promoting daredevil motorcycle stunts, drag racing for amateurs using unmodified cars, and elite college football bowl games.⁴ In contrast, it has denied most-favored tax status to nonprofits promoting nonelite soccer, baseball, volleyball, and other sports for senior citizens and other adults.⁵ These disturbing results stem from a tendency to analyze whether sports are *educational* and ignore whether sports *promote health*.⁶

This Article asserts that courts and the IRS should recognize that nonprofits promoting nonelite adult sports and meeting certain conditions should qualify for Internal Revenue Code Section 501(c)(3) (IRC § 501(c)(3)) status because they promote health. The courts and the IRS have consistently ignored or downplayed health arguments in this area.⁷ Although Congress and a commentator have expressed frustration over the IRS's approach generally, neither have considered the impact that a fair appreciation of the health benefits of sports would have.⁸ This Article predicts that a new focus on health could generate surprising, but appropriate, results. It would promote nonprofit adult sports that provide substantial public benefits. Also, it might withhold tax advantages from some

4. Evel Knievel Days 2011 IRS Form 990-EZ, page 1, line J (reporting that the organization is an I.R.C. § 501(c)(3) organization), available at www.guidestar.org/organizations/46-0511839/evel-knievel-week.aspx; see also Kevin Barry & Marcy Karin, *Law Clinics and Lobbying Restrictions*, 84 U. COLO. L. REV. 985, 1021 n.175 (2013) (describing the procedure for locating the IRS Form 990 for an organization at www.guidestar.org); *Lions Associated Drag Strip v. United States*, No. 63-45-WM, 1963 U.S. Dist. LEXIS 9608, at *12-13, 15, (S.D. Cal. Nov. 26, 1963), available at 64-1 U.S. Tax Cas. (CCH) ¶ 9283, 91.673075 (promoting amateur drag racing in unmodified cars); *Mobile Arts & Sports Ass'n, Inc. v. United States*, 148 F. Supp. 311, 316 (S.D. Ala. 1957) (concluding that a nonprofit's sponsorship of a college football all-star game is an integral part of its educational objectives); Rev. Rul. 80-296, 1980-2 C.B. 195 (concluding that revenue from a college football bowl game is not subject to tax); I.R.S. Gen. Couns. Mem. 39,775 (Feb. 6, 1989) (concluding that a nonprofit sponsoring a post-season college football bowl game is tax-exempt as a qualified amateur athletic organization promoting a national competition).

5. See, e.g., *Wayne Baseball, Inc. v. Comm'r*, 78 T.C.M. (CCH) 437 (1999) (promoting baseball by sponsoring an amateur team with players typically over age 21); *Media Sports League, Inc. v. Comm'r*, 52 T.C.M. (CCH) 1093 (1986) (promoting volleyball and other sports); I.R.S. Priv. Ltr. Rul. 2008-49-018 (Dec. 5, 2008) (promoting an amateur soccer team composed of males ages 18 through 40).

6. See *infra* notes 184-93 and accompanying text.

7. See *infra* notes 24-25 and accompanying text.

8. See, e.g., H.R. 10612, 94th Cong. at 423 (2d Sess. 1976), reprinted at 1976-3 C.B. (Vol. 2) 435 (observing that the IRS's application of I.R.C. § 501(c)(3) has been a "source of confusion and inequity for amateur sports organizations whereby some gained favored tax-exempt status while others, apparently equally deserving, did not"), quoted in *Hutchinson Baseball Enters., Inc. v. Comm'r*, 73 T.C. 144, 153 (1979), *aff'd* 696 F.2d 757 (10th Cir. 1982), *nonacq.* 1980-2 C.B. 2; Robert C. Moot, Jr., *Tax Exempt Status of Amateur Sports Organizations*, 40 WASH. & LEE L. REV. 1705, 1717-18 (1983) (stating that the IRS has failed to treat amateur sports organizations consistently); *id.* at 1727 (stating that the IRS's position is inconsistent with the legislative history).

currently tax-favored organizations and activities that pose a substantial risk for players, such as the risk of brain damage from concussions.⁹

Part I of this Article summarizes current law on when a nonprofit sports-promoting organization qualifies for most-favored tax status, namely qualification under IRC § 501(c)(3). Current law's tendency to obsess over whether a sports-promoting nonprofit is *educational* favors some classes of organizations, and not others, even though that focus can ignore the totality of public benefits an organization provides.

In Part II, this Article makes the case that courts and the IRS should recognize that nonprofit sports organizations can promote health. Some of the doctrines that ignore whether sports organizations promote health were developed over a hundred years ago when sports were primarily for school students and the idle rich. A doctrine developed in 1904 linking U.S. schools and sports probably led the IRS to obsess over whether nonprofits promoting sports are educational. This approach is outmoded because modern social and medical research has determined that our nation has become much more sedentary at work, that the current level of leisure time activity is inadequate to compensate, and that this inactivity is associated with an epidemic of chronic diseases, such as cardiovascular disease and type 2 diabetes. Any concerns that a new approach would benefit only the idle rich are resolved by requirements that charitable IRC § 501(c)(3) organizations cannot exclude a significant segment of the community through excessive fees or other devices. A surprising consequence of a new focus on the promotion of health would be that organizations and activities historically enjoying IRC § 501(c)(3) status while promoting dangerous sports which jeopardize the mental or physical health of the players may no longer qualify.

Part III concludes that rethinking the test, rather than clinging to ancient precedents, may help reform the world of sports. The reformation can include fewer spectators on their couches, more participants on the field, and a reduced obsession with violent sports.

I. CURRENT LAW IGNORES ARGUMENTS THAT SPORTS PROMOTE HEALTH

Some nonprofits merely *instruct* individuals about a sport. The IRS has consistently held that these organizations qualify as educational under IRC § 501(c)(3) whether the individuals instructed are minors, college students, or adults.¹⁰ The IRS typically cites the language of the applica-

9. See, e.g., George Will, *Would We Have to Kill Football in Order to Fix It?*, SUN HERALD (BILOXI, MS), Aug. 6, 2012, at 11, available at 2012 WLNR 16493051. See generally *infra* Part II.D.

10. See Rev. Rul. 77-365, 1977-2 C.B. 192 (concluding that an organization conducting clinics, workshops, lessons, and seminars at municipal parks and recreation areas for persons of all ages about a particular sport qualifies under I.R.C. § 501(c)(3) as educational); Rev. Rul. 65-2, 1965-1 C.B. 227 (involving an organization providing free instruction, equipment, and facilities to children playing a game); Rev. Rul. 64-275, 1964-2 C.B. 142 (organization conducting symposiums about sailboat racing primarily for adults).

ble Treasury Regulations that defines the word *educational* broadly to include the “instruction or training of the individual for the purpose of improving or developing his capabilities.”¹¹

In contrast, for nonprofits promoting sports *competition*, age is incredibly important. If the competitors are minors or college students, the IRS consistently concludes that nonprofits promoting sports competition among these groups qualify as educational under IRC § 501(c)(3).¹² But when the competitors are adults, the IRS refuses to conclude that the nonprofit promoting sports competition is educational. The IRS typically employs a rather arbitrary line-drawing approach.¹³ The IRS quotes the applicable regulatory definition of the word *educational*, which includes the “training of the individual for the purpose of improving or developing his capabilities,”¹⁴ acknowledges that sports competition can enhance an adult’s *skills*, but the IRS then concludes that the adult participants’ *capabilities* are neither improved nor advanced.¹⁵ The IRS rulings fail to explain why enhancing one’s skills as an adult does not improve one’s capabilities.¹⁶ Furthermore, the IRS fails to explain why sports competition improves the capabilities of college students, but it does not improve the capabilities of senior citizens or other adults.

Some adult sports organizations have qualified under IRC § 501(c)(3) as *charitable* on the theory that they promote social welfare or lessen the burdens of government. However, these categories are available only to organizations that provide their services for free or charge only a nominal amount.¹⁷ Also, Congress has created a narrow path to qualification for

11. Treas. Reg. § 1.501(c)(3)-1(d)(3)(i) (1959) (also including in the definition of *educational* the “instruction of the public on subjects useful to the individual and beneficial to the community”).

12. Rev. Rul. 55-587, 1955-2 C.B. 261 (organization directs and controls high school athletic competitions); Rev. Rul. 80-215, 1980-2 C.B. 174 (concluding that a nonprofit organizing local and state-wide competitions for individuals under age 18 both promotes education and is charitable because it combats juvenile delinquency); I.R.S. Priv. Ltr. Rul. 2005-36-024 (Sept. 9, 2005) (organization sponsors youth golf tournaments); I.R.S. Gen. Couns. Mem. 37,518 (Apr. 28, 1978) (nonprofit organizes soccer competitions for individuals under age 18).

13. Part II.E of this Article discusses, in greater detail, three IRS approaches.

14. Treas. Reg. § 1.501(c)(3)-1(d)(3)(i) (1959).

15. Rev. Rul. 70-4, 1970-1 C.B. 126; *see also* Rev. Rul. 78-98, 1978-1 C.B. 167 (concluding that the income from the public use of a school’s ski slope and ski-lift is not substantially related to the school’s educational purpose); I.R.S. Priv. Ltr. Rul. 2008-49-018 (Dec. 5, 2008) (stating that an amateur soccer team composed of males age 18 to 40 is not educational because the promotion of a sport for adults does not “develop their capabilities”); I.R.S. Gen. Couns. Mem. 39,459 (Dec. 26, 1985) (stating that the “promotion of recreational sports among adults” is not educational under IRC § 501(c)(3)).

16. *See* I.R.S. Priv. Ltr. Rul. 2008-49-018 (Dec. 5, 2008).

17. *See, e.g.,* *Peters v. Comm’r*, 21 T.C. 55, 59 (1953) (concluding that a foundation furnishing public swimming facilities for free to all community residents promoted social welfare and therefore qualified as charitable under IRC § 501(c)(3)); Rev. Rul. 59-310, 1959-2 C.B. 146 (concluding that an organization providing swimming and other recreational facilities for community residents and only charging a nominal fee “lessen[s] the burdens of government” and therefore qualifies as charitable under IRC § 501(c)(3)); the IRS in Revenue Ruling 59-310 specifically refused to follow the approach in the *Peters* case, *supra*, that such an organization qualifies because it promotes social welfare). *But see* I.R.S. Tech. Adv. Mem. 85-05-002 (Aug. 5, 1984) (concluding that a nonprofit operating a

nonprofits that assist U.S. Olympic athletes or otherwise promote elite national or international amateur sports competition.¹⁸

A related area that has not drawn as much attention is organizations promoting noncompetitive athletic activities, commonly described as exercises or workouts. The IRS has issued at least seven rulings involving fitness centers or health clubs, with mixed results, but the IRS has rejected the claim that these organizations *promote health* for purposes of IRC § 501(c)(3).¹⁹ Notwithstanding the IRS position, medical research suggests that these organizations can be important in disease prevention for adults by encouraging walking, bicycling, and exercising at gyms.²⁰

Under this regime for analyzing sports-promoting nonprofits, the IRS has denied IRC § 501(c)(3) status to sports organizations promoting leagues, tournaments, and other competitions in touch football, softball, soccer, baseball, football, and volleyball among nonelite adult athletes.²¹ The IRS sometimes states that these organizations fail to qualify as educational, and at other times the IRS concludes that they fail to qualify because they have a substantial purpose to promote the recreational or social interests of the competitors.²²

No IRS ruling or court case clearly supports the position that a nonprofit promoting adult nonelite sports qualifies under IRC § 501(c)(3) because it promotes health. Two court opinions from the 1940s arguably note the health benefits of sports and physical activity, but on both occasions those courts based their holdings in favor of tax exemption on a finding that the nonprofit was educational.²³ In several situations, a sports organization's articles of incorporation or other governing document stated that it promotes health, or the organization argued that it pro-

health club would be charitable under IRC § 501(c)(3) if its fees are "within the financial reach of the local community as a whole").

18. I.R.C. §§ 501(c)(3), 501(j) (2014); *see infra* notes 217–32 and accompanying text.

19. *See* BRUCE R. HOPKINS, *THE LAW OF TAX-EXEMPT ORGANIZATIONS* 204 (10th ed. 2011) (discussing seven IRS rulings under the heading "Fitness Centers"); *see also infra* notes 134–39 and accompanying text (discussing Revenue Ruling 79-360 in which the IRS held that the fitness center's operations were not charitable, and I.R.S. Tech. Adv. Mem. 85-05-002 in which the IRS concluded that the fitness center activities were substantially related to a charitable purpose because they benefitted the community at large; nevertheless, the IRS concluded that the fitness center activities *did not promote health* under IRC § 501(c)(3)).

20. *See infra* notes 109–11 and accompanying text.

21. *See* *The Media Sports League, Inc. v. Comm'r*, 52 T.C.M. (CCH) 1083 (1986) (promoting touch football, softball, and volleyball leagues and other competitions); *Wayne Baseball, Inc. v. Comm'r*, 78 T.C.M. (CCH) 437 (1999) (promoting baseball); I.R.S. Priv. Ltr. Rul. 2008-49-018 (Dec. 5, 2008) (promoting soccer); I.R.S. Priv. Ltr. Rul. 2013-13-033 (Mar. 29, 2013) (promoting football).

22. *See infra* notes 184–93 and accompanying text (denying IRC § 501(c)(3) status because the organization is not educational); *infra* notes 200–05 and accompanying text (denying IRC § 501(c)(3) status because the organization has a substantial recreational or social purpose).

23. *Bohemian Gymnastic Ass'n Sokol of N.Y. v. Higgins*, 147 F.2d 774, 777 (2d Cir. 1945) (involving an exemption under the social security tax for charitable or educational nonprofits); *United States Lawn Tennis Ass'n v. Comm'r*, 47 B.T.A.M. ¶ 42,457 (1942), *available at* 1942 WL 9367 (considering an exemption under the predecessor of IRC § 501(c)(3)).

motes health.²⁴ Unfortunately, the IRS consistently disregards these governing documents and the arguments that a nonprofit sports organization promotes health.

II. PROPOSAL: THE IRS AND THE COURTS SHOULD RECOGNIZE THAT SPORTS PROMOTE HEALTH

A. PLACING THE PROMOTION OF HEALTH IN THE STRUCTURE OF IRC § 501(c)(3) QUALIFICATION

Congress and the U.S. Supreme Court agree that the fundamental reason certain nonprofits qualify for the tax benefits of IRC § 501(c)(3) is that they provide a public benefit at least equal to the value of the IRC § 501(c)(3) tax benefits.²⁵ Some commentators have proposed other explanations, but the public benefit approach is widely accepted.²⁶

This public benefit rationale is reflected in at least three tests that a nonprofit organization must satisfy to qualify under IRC § 501(c)(3).

24. See, e.g., *The Media Sports League*, 52 T.C.M. (CCH) at 1094 (the organization's articles of incorporation "state that [it] is organized to promote . . . the physical and moral well-being of all athletes . . ."); Rev. Rul. 70-4, 1970-1 C.B. 126 ("The organization was formed for the stated purpose[] of promoting the health of the general public by encouraging all persons to improve their physical condition . . ."); Rev. Rul. 55-587, 1955-2 C.B. 261 (the organization was formed for the "purpose[] of promoting and protecting the health of high school students through uniform interscholastic competition . . ."); I.R.S. Tech. Adv. Mem. 85-05-002 (Aug. 5, 1984) (concluding that the operation of a fitness club will not be recognized as promoting health under IRC § 501(c)(3)). *But see* I.R.S. Gen. Couns. Mem. 37,518 (Apr. 28, 1978) (indicating that trusts providing recreational opportunities can be charitable because they advance health and tend to reduce crime and juvenile delinquency).

25. *Wayne Baseball, Inc. v. Comm'r*, 78 T.C.M. (CCH) 437, 438 (1999) ("The theory behind the exemption is that the Government is compensated for the loss of revenue by its relief from the financial burden that would otherwise have to be met from public funds and that the Government realizes benefits resulting from private promotion of the general welfare." (quoting H.R. REP. NO. 1860, 75th Cong., 3d Sess. (1938), 1939-1 C.B., pt. 2, 728, 742)); *see also* *Bob Jones Univ. v. United States*, 461 U.S. 574, 591 (1983) ("Charitable exemptions are justified on the basis that the exempt entity confers a public benefit . . ."); *Trinidad v. Sagrada Orden de Predicadores*, 263 U.S. 578, 581 (1924) ("Evidently the exemption is made in recognition of the benefit which the public derives from . . . [the] activities of the [organizations] named, and is intended to aid them . . ."). This public benefit approach arguably may not explain the granting of IRC § 501(c)(3) status in all situations, such as to various religious organizations, which could not be established by the federal government. *See* I.R.C. § 501(c)(3) (2014) (allowing religious organizations to qualify under IRC § 501(c)(3)); *HOPKINS*, *supra* note 19, at 267 (discussing the constitutional "clause . . . designed to prohibit government from establishing a religion, aiding a religion, or preferring one religion over another").

26. *See* John D. Colombo, *The Marketing of Philanthropy and the Charitable Contributions Deduction: Integrating Theories for the Deduction and Tax Exemption*, 36 WAKE FOREST L. REV. 657, 682 (2001) (stating that the public benefit rationale is the "most widely accepted rationale"); Mark P. Gergen, *The Case for a Charitable Contribution Deduction*, 74 VA. L. REV. 1393, 1397-98 (1988); *see also* Saul Levmore, *Taxes as Ballots*, 65 U. CHI. L. REV. 387, 409 (1998). Many other law review articles propose other rationales. *See, e.g.*, Rob Atkinson, *Theories of the Federal Income Tax Exemption for Charities: Thesis, Antithesis, and Syntheses*, 27 STETSON L. REV. 395, 423-24 (1997) (discussing "Atkinson's altruism theory" in which granting tax benefits to promote virtuous behavior is appropriate); Miranda Perry Fleischer, *Theorizing the Charitable Tax Subsidies: The Role of Distributive Justice*, 87 WASH. U. L. REV. 505, 557 (2010) (discussing a theory based on the redistribution of resources in society).

First, the organization must be organized and operated exclusively for one of the eight purposes listed in the statute.²⁷ The list of eight purposes includes educational, charitable, religious, and scientific.²⁸ This exclusivity test is not strictly construed; an organization can have an insubstantial nonexempt purpose and still qualify under IRC § 501(c)(3).²⁹ Second, the organization must provide a public benefit rather than a private benefit.³⁰ Third, if an organization operates for a substantial nonexempt purpose, such as providing social or recreational benefits to its members, it will not qualify under IRC § 501(c)(3).³¹

The eight exempt purposes listed in IRC § 501(c)(3) include *charitable* purposes, but they do not expressly mention the promotion of health. Likewise, the Treasury Regulations do not expressly list the promotion of health among the charitable purposes.³² Nevertheless, the word *charitable*, for purposes of IRC § 501(c)(3), has its generally accepted legal meaning.³³ As a result, several purposes, including the promotion of health,³⁴ lessening the burdens of government, combating juvenile delinquency,³⁵ and relieving the needs of the poor, are recognized as charitable.³⁶ Many organizations qualify for IRC § 501(c)(3) status under the charitable category because they promote health, such as hospitals, nursing homes, clinics, and other health care organizations.³⁷ Also, medical research organizations striving to prevent diseases qualify under IRC § 501(c)(3) because they promote health.³⁸ Unfortunately, the courts and the IRS have ignored arguments that nonprofit sports organizations promote health.³⁹

An organization generally must apply to the IRS to obtain IRC § 501(c)(3) status.⁴⁰ There can be many financial benefits from obtaining an IRS determination that an organization qualifies. The designation allows the organization to avoid paying income tax.⁴¹ Also, donors usually can claim a tax deduction for contributions to the organization, and this

27. I.R.C. § 501(c)(3) (2014).

28. *Id.*

29. Treas. Reg. § 1.501(c)(3)-1(c)(1) (1959); *New Dynamics Found. v. United States*, 70 Fed. Cl. 782, 799 (Ct. Cl. 2006) (stating that the word *exclusively* in the statutory context is a term of art and does not mean solely); HOPKINS, *supra* note 19, at 72 (stating that the law treats the word *exclusively* in IRC § 501(c)(3) as if it means primarily).

30. Treas. Reg. § 1.501(c)(3)-1(d)(1)(ii) (1959).

31. *See Better Bus. Bureau of Wash., D.C. v. United States*, 326 U.S. 279, 283 (1945).

32. *See* Treas. Reg. § 1.501(c)(3)-1(d)(2) (1959).

33. *Id.*

34. Rev. Rul. 69-545, 1969-2 C.B. 117. *See generally* HOPKINS, *supra* note 19, at 191–206.

35. *See infra* note 46.

36. Treas. Reg. § 1.501(c)(3)-1(d)(2) (1959).

37. *See generally* HOPKINS, *supra* note 19, at 191–206.

38. *See* Treas. Reg. § 1.170A-9(d)(2)(iii) (1972) (defining the phrase “medical research” to include prevention or control of physical or mental diseases).

39. *See supra* note 24 and accompanying text.

40. *See* I.R.C. § 508(c)(1) (2014) (excluding churches and organizations with annual gross receipts of less than \$5,000). *See generally* HOPKINS, *supra* note 19, at 734–41.

41. I.R.C. § 501(c)(3) (2014). *But see* I.R.C. §§ 511–13 (2014) (imposing a tax on the unrelated business taxable income of an otherwise tax-exempt organization).

can significantly help fundraising efforts.⁴² In addition, the IRC § 501(c)(3) designation may allow the organization to avoid paying property and sales taxes, may permit the organization to issue bonds paying tax-exempt interest, and may allow the organization to qualify for reduced postage rates.⁴³

Under current law, it is possible for nonprofits promoting sports to qualify under IRC § 501(c)(3) in at least four statutory categories.⁴⁴ First, certain organizations have qualified as educational.⁴⁵ Second, some have qualified as charitable because they contribute to social welfare or combat juvenile delinquency. Unfortunately, this category only appears to be available to sports organizations that charge either no fee or nominal fees.⁴⁶ Third, a nonprofit may qualify if it fosters national or international amateur sports competition, such as the Olympics or the Pan-American Games, but organizations in this third category cannot furnish equipment or facilities to the players.⁴⁷ Fourth, some have met the tests for being a qualified amateur sports organization described in I.R.C. §501(j).⁴⁸ The nonprofits in this fourth category can provide equipment or facilities, but the IRS has devised a seven-factor test tending to approve only organizations that promote or select the U.S. Olympic team, the U.S. team for the Pan-American Games, or other elite national or international teams.⁴⁹ The IRS has declared that a nonprofit promoting a sport for nonelite adult athletes will not meet the test for being a qualified amateur sports organization because there is no realistic expectation that casual athletes

42. See I.R.C. § 170(c)(2) (2014) (listing the same eight exempt purposes as I.R.C. § 501(c)(3) (2014)); I.R.C. § 2055 (a)(2) (2014) (estate tax charitable deduction); I.R.C. § 2522 (a)(2) (2014) (gift tax charitable deduction).

43. See HOPKINS, *supra* note 19, at 47–55 (describing many benefits, including sales tax exemptions, property tax exemptions, and preferred postal rates); Colombo, *supra* note 26, at 703 (discussing ability to issue tax-exempt bonds).

44. I.R.S. Priv. Ltr. Rul. 2008-42-055 (Oct. 17, 2008); see Moot, *supra* note 8, at 1713–14.

45. See *supra* notes 10–12 and accompanying text (discussing organizations that merely instruct individuals about a sport, and organizations that promote sports competition for students).

46. See, e.g., *Peters v. Comm’r*, 21 T.C. 55 (1953) (foundation furnishing public swimming facilities for community residents and charging no fee qualified as charitable because it promoted social welfare); Rev. Rul. 59-310, 1959-2 C.B. 146 (organization providing a public swimming pool and other recreational facilities for all community residents for a fee that was “purely incidental to the orderly operation of the pool” qualified as charitable because it lessens the burdens of government); *Hutchinson Baseball Enters., Inc. v. Comm’r*, 696 F.2d 757, 761 (10th Cir. 1982) (nonprofit organization owning and operating an amateur baseball team composed primarily of college baseball players qualified as charitable because it “further[ed] the development and sportsmanship of children and young men”).

47. See, e.g., *Int’l E22 Class Ass’n v. Comm’r*, 78 T.C. 93 (1982) (qualifying under IRC § 501(c)(3) as an amateur sports organization which does not provide equipment or facilities).

48. See, e.g., I.R.S. Gen. Couns. Mem. 39,560 (Sept. 30, 1986) (providing a national training center for developing and training athletes with the potential to qualify for the Olympic Games and engaging in several other activities); I.R.S. Gen. Couns. Mem. 39,459 (Dec. 26, 1985) (organization recognized by the U.S. Olympic Committee as the national governing body of the sport).

49. See I.R.S. Priv. Ltr. Rul. 2008-49-018 (Dec. 5, 2008).

will compete in the Olympics, the Pan-American Games, or any other international or national competitions.⁵⁰

B. CAN ADULT SPORTS PROMOTE HEALTH?

1. *Medical Research, Inactivity, and the Epidemic of Chronic Diseases*

“[The] human genome evolved within an environment of high physical activity.”⁵¹ We are “designed by nature . . . to move.”⁵² Researchers have determined that modern chronic diseases, such as type 2 diabetes, are rarely the result of gene defects,⁵³ but instead are “highly dependent on the environment.”⁵⁴

Chronic diseases develop over an extended time period, are “long-lasting, and can be controlled but not cured.”⁵⁵ They include heart disease, diabetes, some forms of cancer, obesity, osteoporosis, and several other conditions.⁵⁶ Researchers studying chronic diseases have seen a sharp rise over the last few decades. For example, from 1980 to 2008, obesity rates doubled for adults and tripled for children.⁵⁷ “More than one-third of U.S. adults (over 72 million people) . . . are obese.”⁵⁸ Researchers now estimate that one in two adults have at least one chronic illness.⁵⁹ Several commentators describe the rise of chronic diseases in the U.S. as an epidemic.⁶⁰

Researchers report that the increase of chronic diseases is associated

50. *Id.* (stating that the organization “has not provided information that its athletes are of a caliber that makes them serious contenders” for the Olympics); *see also* I.R.S. Gen. Couns. Mem. 39,775 (Feb. 6, 1989) (concluding that an organization promoting a college football bowl game could be a qualified amateur athletic organization but only after emphasizing that at the time there was no college football playoff system to determine a national champion; thus, the favorable status was only available because the particular bowl game could influence the voters choosing the national champion).

51. Booth et al., *supra* note 2, at 774.

52. *Study: Everyday Activities Might Have Same Health Benefits as Going to Gym*, WAUSAU DAILY HERALD (WAUSAU, WI), Feb. 17, 2013, at S3, available at 2013 WLNR 4206367.

53. Booth et al., *supra* note 2, at 777.

54. *Id.*

55. SICK! EPIDEMIC CHRONIC DISEASES, <http://www.bestmasterofscienceinnursing.com/epidemic/> (last visited Feb. 18, 2015); Booth et al., *supra* note 2, at 775.

56. Booth et al., *supra* note 2, at 779.

57. Centers for Disease Control and Prevention, *Obesity: Halting the Epidemic by Making Health Easier* (2011), <http://www.cdc.gov/chronicdisease/resources/publications/aag/pdf/2011/obesity-aag-web.508.pdf>.

58. *Id.*; *see also infra* note 74 (discussing the test for obesity).

59. SICK! EPIDEMIC CHRONIC DISEASES, *supra* note 55.

60. *See, e.g., id.*; *Countdown Reason #8: How Did We Miss This Chronic Disease Epidemic?*, DONNA JACKSON NAKAZAWA (Feb. 12, 2013) <http://donna.jacksonnakazawa.com/countdown-reason-8-how-did-we-miss-this-chronic-disease-epidemic/>; *see also* Richard Perez-Pena, *Hong Kong Group to Give Harvard's School of Public Health \$350 Million*, N.Y. TIMES, Sept. 8, 2014, at A11, available at www.nytimes.com/2014/08/08/education/harvards-school-of-public-health-gets-350-million-from-the-morningside-foundation.html (describing global obesity as a “pandemic”).

with inactivity,⁶¹ poor diet, smoking, and other factors.⁶² They maintain that a “sedentary population [has a] predisposition to modern chronic diseases”⁶³ and that “[a] strong association exists between . . . inactivity and the emergence of modern chronic disease in 20th century industrialized societies.”⁶⁴ A report concludes, “Physical inactivity is one of the major underlying causes of premature mortality in the United States.”⁶⁵ In effect, we are genetically designed to move a lot, and bad things happen when we do not. Chronic diseases cause suffering for the patients⁶⁶ and their caregivers, grief for the patient’s family and friends upon death, and increased costs for the patient’s family, employer, society, and the U.S. healthcare system.⁶⁷

Inactivity has been associated with seventeen major chronic diseases or unhealthy conditions.⁶⁸ Three major chronic diseases associated with inactivity, referred to as the *triad*,⁶⁹ are cardiovascular disease, obesity, and type 2 diabetes.⁷⁰

The leading cause of death in the U.S. by a wide margin is cardiovascular disease.⁷¹ “Since 1900, . . . cardiovascular disease has been the number one killer in the U.S. every year” except in 1918.⁷² It is the cause of approximately forty percent of all deaths, and it is the primary or a contributing cause of approximately sixty percent of all deaths.⁷³

61. See *infra* notes 68–84.

62. See Booth et al., *supra* note 2, at 777–78 (discussing diet modification); see, e.g., Centers for Disease Control and Prevention, *Diabetes Successes and Opportunities for Population-Based Prevention and Control* (2011), http://www.cdc.gov/chronic_disease/resources/publications/aag/pdf/2011/diabetes-AAG-2011-508.pdf (“Type 2 diabetes can be prevented through healthy food choices, physical activity, and weight loss.”); NAKAZAWA, *supra* note 60 (including expanded lifespans).

63. Booth et al., *supra* note 2, at 774 (also stating that we are “genetically programmed to expect physical activity”).

64. *Id.*

65. *Id.* at 778 (citing a 1998 report from the Centers for Disease Control and Prevention).

66. *Id.* at 775 (“Chronic disease conditions cause great human suffering affecting [ninety] million Americans . . .”).

67. See *infra* notes 103–09 and accompanying text; Booth et al., *supra* note 2, at 775.

68. Booth et al., *supra* note 2, at 774.

69. *Id.* at 775.

70. *Id.*; see also *SJI Recognized by Heart Ass’n as Fit-Friendly Site*, DAILY JOURNAL (VINELAND, NJ), June 25, 2014, at A2, reprinted at 2014 WLNR 17202943 (including high blood pressure); Booth et al., *supra* note 2, at 775 (including osteoporosis and frailty in old age, referred to as sarcopenia); Y. Claire Wang et al., *Health and Economic Burden of the Projected Obesity Trends in the USA and the UK*, 378 THE LANCET 815, (Aug. 27, 2011) (listing other chronic diseases such as high blood pressure, esophageal cancer, colon cancer, osteoporosis, and gallbladder cancer).

71. *Actual Causes of Death in the U.S.: Not What You Think*, COMMON SENSE FAMILY DOCTOR (Aug. 26, 2011), <http://commonsensemd.blogspot.com/2011/08/actual-causes-of-death-in-us-not-what.html>; see also Ali H. Mokdad et al., *Actual Causes of Death in the United States, 2000*, 291 AMA, 1238, 1239 (2004) (listing heart disease as the leading cause of death in 2000).

72. Booth et al., *supra* note 2, at 775–76.

73. *Id.* at 776.

In considering obesity,⁷⁴ a group of researchers reviewed data from National Health Surveys and found that the average U.S. male age forty to fifty weighed 169 pounds in 1960, and his counterpart weighed 201 pounds in 2006.⁷⁵ These researchers calculate that the weight gained by failing to burn calories at work adds up to this increase in average weight.⁷⁶

Diabetes is the seventh leading cause of death and the “leading cause of kidney failure, new cases of blindness, and amputations of feet and legs not related to accidents or injuries.”⁷⁷ Type 2 diabetes accounts for over ninety percent of diabetes cases.⁷⁸ Type 2 diabetes reportedly has reached epidemic proportions.⁷⁹ There was a “six-fold increase [of diabetes cases] . . . between 1958 and 1993.”⁸⁰ As further evidence of an epidemic, throughout the 1980s, the percentage of adults diagnosed with diabetes each year was between 3.4% and 3.6%.⁸¹ In contrast, from 2008 through 2011, the figure ranged from 8.4% to 9% each year.⁸² “If trends continue, 1 of 3 U.S. adults will have diabetes by 2050.”⁸³ In addition, the Centers for Disease Control and Prevention estimates that 79 million U.S. adults are prediabetic, meaning they are at high risk of developing type 2 diabetes.⁸⁴ Researchers maintain that type 2 diabetes can be prevented by physical activity and good diet.⁸⁵

In commenting on the chronic disease epidemic, a group of researchers states that the “biomedical establishment” has focused on treating existing conditions rather than prevention.⁸⁶ This same group evaluates the biomedical establishment’s approach by asking “Are we winning the war on chronic disease?” The group then concludes, “the answer is a resounding no!”⁸⁷

2. Occupational Inactivity and Leisure Time Activity

In evaluating whether there really is an association between chronic disease and inactivity, it is necessary to consider trends in activity levels. Studies sometimes measure physical activity in two categories: an occupa-

74. Researchers will classify an adult with a weight in excess of what is generally considered healthy as overweight or obese based on a number referred to as the body mass index, or BMI. BMI is determined by height and weight. Researchers classify an adult with a BMI of 25 to 29 as overweight and classify an adult with a BMI over 30 as obese. Centers for Disease Control and Prevention, *Defining Overweight and Obese*, <http://www.cdc.gov/obesity/adult/defining.html> (last updated Apr. 27, 2012).

75. Church et al., *supra* note 3, at 2.

76. *See id.*

77. Centers for Disease Control and Prevention, *supra* note 62.

78. *Id.*

79. Booth et al., *supra* note 2, at 776.

80. *Id.*

81. SICK! EPIDEMIC OF CHRONIC DISEASES, *supra* note 55.

82. *Id.*

83. Centers for Disease Control and Prevention, *supra* note 62.

84. *Id.*

85. *Id.*

86. Booth et al., *supra* note 2, at 774.

87. *Id.* at 775; *see also* NAKAZAWA, *supra* note 60.

tional category, and a leisure time category.⁸⁸ In regards to leisure time activity, the recommended guideline is generally one hundred and fifty minutes of moderate to vigorous physical activity per week for ten minutes or longer at a time.⁸⁹ Despite the significant rise in the incidence of chronic disease, the percentage of people attaining the recommended physical activity guidelines during *leisure time* has increased since 1998. For example, for those age 45 to 64, the increase was from 11.4 percent in 1998 to 17.5 percent in 2011.⁹⁰

Unfortunately, the percentage of people attaining the physical activity guidelines⁹¹ is small,⁹² and the percentage of people achieving the guidelines drops as age increases. According to a 2012 report from the Centers for Disease Control, the following percentages of people in the following age groups met the guidelines: 26 percent for ages 18 to 44, 17.5 percent for ages 45 to 64, 11.3 percent for ages 65 to 74, and 7.7 percent for ages 75 and over.⁹³ In addition, leisure time is a relatively small part of the total hours in a week for working adults.⁹⁴

In contrast to leisure time activity levels, the amount of physical activity at work has dropped sharply. In 1960, approximately 48 percent of workers engaged in at least moderately intense physical activity on the job,⁹⁵ and more than 30 percent of U.S. private sector jobs were in manufacturing. Other significant sectors included agriculture, mining, and logging.⁹⁶ By 2008, only approximately 20 percent of workers engaged in at least moderately intense physical activity on the job.⁹⁷ A big part of this change has been the rise in service occupations. In the 1960s, the occupation categories consisting of professional services, health care, education, and leisure and hospitality made up only 20 percent of U.S. occupations; by 2008 that percentage had risen to 43 percent.⁹⁸

Because of this shift from a physically active work force to a more sedentary one, “[f]rom 1960 to 2008 there was an approximate drop in occupation-related *daily* energy expenditure of 140 calories for men and 124

88. Church et al., *supra* note 3.

89. See *Many Overestimate Exercise Intensity: York University Study*, NEWSFILE, June 30, 2014, at 173, available at 2014 WLNR 17385287.

90. Centers for Disease Control, National Center for Health Statistics, HEALTH, UNITED STATES, 2012, 234 (2013) (DHHS Publication No. 2013-1232), available at <http://www.cdc.gov/nchs/data/hus/hus12.pdf>.

91. Church et al., *supra* note 3, at 4 (describing the guidelines as “150 minutes per week of moderate intensity activity or 75 minutes per week of vigorous intensity activity”).

92. See *supra* note 89; U.S. DEP’T. OF HEALTH & HUMAN SERVICES, PHYSICAL ACTIVITY & HEALTH, A REPORT OF THE SURGEON GENERAL 14 (1996), available at <http://www.cdc.gov/nccdphp/sgr/pdf/execsum.pdf> (stating that only fifteen percent of U.S. adults engage in vigorous physical activity at least three times a week).

93. Centers for Disease Control, National Center for Health Statistics, HEALTH, *supra* note 90.

94. DAILY JOURNAL, *supra* note 70, at A2; see also Church et al., *supra* note 3, at 1, 4.

95. Church et al., *supra* note 3, at 2.

96. *Id.*

97. *Id.* (also reporting that by 2008, only twelve percent of U.S. jobs were in manufacturing).

98. *Id.*

calories for women.”⁹⁹ The researchers calculated that “this reduction in occupational energy expenditure account[ed] for a large portion of the observed increase in mean U.S. weight over the last [five] decades.”¹⁰⁰ Again, for the average U.S. male age 40 to 50, this increase was from 169 pounds in 1960 to 201 pounds in 2006.¹⁰¹ Because “it is unlikely that there will be a return to occupations that demand moderate levels of physical activity . . . [it is important to promote] physically active lifestyles outside of the work day.”¹⁰²

3. *Costs of Inactivity*

Researchers state that addressing the inactivity problem “would be an investment to avoid U.S. healthcare system bankruptcy.”¹⁰³ The costs associated with obesity alone are substantial. “[O]bese individuals [have] medical costs [thirty percent] higher than those with normal weight,”¹⁰⁴ have twenty-seven percent more physician visits, and spend eighty percent more on prescription drugs.¹⁰⁵ “The annual extra medical costs of obesity in the USA were estimated at \$75 billion in 2003,”¹⁰⁶ and “employers face \$12.7 billion in annual medical expenses due to obesity alone.”¹⁰⁷ Additional societal costs include “decreased years of disability-free life, increased mortality before retirement, early retirements, disability pensions, and work absenteeism or reduced productivity (sometimes called presenteeism).”¹⁰⁸ Lost productivity costs are significant. “The annual cost from presenteeism [for a] very obese [employee] . . . was [estimated at] the equivalent of 1 month of lost productivity”¹⁰⁹

4. *Benefits from Types of Physical Activity*

The U.S. Office of Disease Prevention and Health Promotion reports there is strong evidence that regular physical activity improves cardiovascular and cardiorespiratory fitness and lowers the risk of coronary heart disease, type 2 diabetes, obesity, colon cancer, stroke, and early death.¹¹⁰ The federal government’s suggested guideline for physical aerobic activ-

99. *Id.* at 3 (emphasis added).

100. *Id.* at 4.

101. *Id.* at 2.

102. *Id.* at 4.

103. See Booth et al., *supra* note 2, at 775; *id.* at 776 (stating that “our health care system is headed for deep trouble unless we soon find . . . preventative measures”).

104. Wang et al., *supra* note 70, at 815.

105. *Id.* at 816.

106. *Id.*

107. DAILY JOURNAL, *supra* note 70, at A2.

108. Wang et al., *supra* note 70, at 817.

109. *Id.*

110. OFFICE OF DISEASE PREVENTION AND HEALTH PROMOTION, PHYSICAL ACTIVITY GUIDELINES, <http://www.health.gov/paguidelines/guidelines/chapter2.aspx>; see also MAYO CLINIC, EXERCISE AND CHRONIC DISEASE: GET THE FACTS, <http://www.mayoclinic.org/healthy-living/fitness/in-depth/exercise-and-chronic-disease/art> (last updated June 7, 2015) (stating that in regards to type 2 diabetes, “[r]egular exercise can help insulin more effectively lower your blood sugar level”).

ity is “150 minutes a week of moderate-intensity . . . activity, such as brisk walking, [running, bicycling, or swimming].”¹¹¹ Scientists analyzing the link between inactivity and chronic diseases have concluded that “[u]ndoubtedly, one of the best public health approaches would be to concentrate on measures to prevent obesity.”¹¹² Researchers can analyze physical activities based on their ability to (i) improve aerobic capacity, and (ii) build muscle strength.¹¹³

Aerobic activity “causes a person’s heart to beat faster than usual”¹¹⁴ and “require[s] the integrated efforts of the heart, lungs, and circulation to deliver oxygen to the metabolically active muscle mass.”¹¹⁵ “Aerobic capacity declines [eight percent] to [ten percent] per decade in nonathletic subjects . . . [but declines by only five percent] per decade in endurance-trained subjects who continue to exercise vigorously.”¹¹⁶

Also, weight lifting and other resistance exercises¹¹⁷ can have important health benefits. Muscle mass declines with age without resistance exercises. Until age 50, adults tend to lose five pounds of muscle mass every decade, but after age 50 “the rate of muscle loss doubles to a debilitating ten pounds every ten years.”¹¹⁸ Muscle loss is associated with multiple health problems involving movement, balance, and bone density.¹¹⁹ Muscle mass also has an impact on metabolic rate. “[L]ess muscle means fewer calories burned and more calories stored as fat every day.”¹²⁰ With no resistance exercise, every pound of skeletal muscle burns five to six calories a day to maintain tissue function, but with regular resistance exercise, the number jumps to nine calories daily.¹²¹ As a result, researchers conclude that “regular resistance exercise [can be] a highly effective

111. OFFICE OF DISEASE PREVENTION AND HEALTH PROMOTION, *supra* note 110, at 1 (stating that meeting this guideline “consistently reduces the risk of many chronic diseases and other adverse health outcomes”).

112. Booth et al., *supra* note 2, at 776; *see also id.* at 778 (“With the possible exception of diet modification, we know of no single intervention with greater promise than physical exercise to reduce the risk of virtually all chronic diseases simultaneously.”).

113. OFFICE OF DISEASE PREVENTION AND HEALTH PROMOTION, *supra* note 110 (discussing aerobic activity, muscle-strengthening activity, and bone-strengthening activity, although the report states that “bone-strengthening activities can also be aerobic and muscle strengthening”).

114. *Id.*

115. AMERICAN HEART ASS’N, ASSESSMENT OF FUNCTIONAL CAPACITY IN CLINICAL AND RESEARCH APPLICATIONS, <http://circ.ahajournals.org/content/102/13/1591.full> (last visited June 7, 2015).

116. *Id.*

117. OFFICE OF DISEASE PREVENTION AND HEALTH PROMOTION, *supra* note 110, at 2 (describing “resistance training” as activities which “cause[] the body’s muscles to work or hold against an applied force or weight”).

118. Wayne L. Wescott, *10 Reasons to Continue Resistance Training*, HERALD NEWS (FALL RIVER, MASS.), June 23, 2014, at B10, available at 2014 WLNR 17055604; *see also* Clarence Bass, *Father of Aerobics Pumps More Iron*, RIPPED, <http://www.cbass.com/CooperBook.htm> (last visited June 7, 2015) (“As you grow older, the need to do strength training becomes increasingly important to help you retard the loss of muscle and bone mass.”).

119. Wescott, *supra* note 118, at B10.

120. *Id.*

121. *Id.*

means for maintaining desirable body weight and optimal body composition.”¹²²

A physician and leading fitness expert, Doctor Kenneth Cooper, recommends a mix of aerobic and resistance exercise based on age. “At age 40 and younger, he suggests 80% aerobics and 20% strength, age 41 to 50, 70/30, age 51 to 60, 60/40, and at age 61 and older, 55/45.”¹²³

C. OTHER CONDITIONS FOR IRC § 501(c)(3) QUALIFICATION:
REASONABLE FEES AND OTHER COMMUNITY
BENEFIT CONCERNS

A potential concern with allowing sports-promoting nonprofits to enjoy the tax benefits of IRC § 501(c)(3) status is that the wealthy will form clubs and charge excessive fees to exclude segments of the community. This concern is addressed by existing doctrines.

Under IRC § 501(c)(3), the term *charitable* has its generally accepted legal meaning,¹²⁴ and as a result, “[c]ollateral principles derived from the law of charitable trusts” apply for determining federal tax exemption.¹²⁵ Two collateral principles are that the nonprofit’s activities must benefit a charitable class, and any fees charged must be within the financial reach of a significant segment of the community.

In regards to charitable class, an organization will not qualify as charitable if the benefited group is very limited.¹²⁶ At one time, IRC § 501(c)(3) status under the charitable category was restricted to organizations benefiting the poor.¹²⁷ However, in the 1970s, the IRS issued two key rulings reflecting a much more expansive view.¹²⁸ In one ruling, the IRS concluded that an organization need not benefit only the poor as long as a significant segment of the community can benefit.¹²⁹ In the other, the IRS considered a law library which limited “access to . . . a designated class of persons.”¹³⁰ In concluding that the law library qualified under IRC § 501(c)(3), the IRS emphasized that the library served a significant number of people, and the library imposed the restrictions be-

122. *Id.*

123. Bass, *supra* note 118 (quoting Doctor Cooper); see KENNETH H. COOPER, AEROBICS vii-x (1968) (Bantam Books) (discussing Doctor Cooper’s qualifications).

124. Treas. Reg. § 1.501(c)(3)-1(d)(2) (1959); see also Rev. Rul. 67-325, 1967-2 C.B. 113.

125. HOPKINS, *supra* note 19, at 166.

126. I.R.S. Priv. Ltr. Rul. 2010-17-067 (Apr. 30, 2010).

127. See, e.g., Rev. Rul. 56-185, 1956-1 C.B. 202 (regarding homes for the aged), *modified* by Rev. Rul. 69-545, 1969-2 C.B. 117. This approach denied IRC § 501(c)(3) status to social clubs and fraternal organizations. See HOPKINS, *supra* note 19, at 166 (citing Rev. Rul. 56-403, 1956-2 C.B. 307).

128. See HOPKINS, *supra* note 19, at 170 (stating that “[t]he concept of what is *charitable* is continually changing and evolving”); *Green v. Connally*, 330 F. Supp. 1150, 1159 (D.D.C. 1971) (“[C]hanges are wrought by changes in moral and ethical precepts generally held, or by changes in relative values assigned to different and sometimes competing and even conflicting interests of society.”), *aff’d sub nom.*; *Colt v. Green*, 404 U.S. 997 (1971).

129. Rev. Rul. 79-18, 1979-1 C.B. 194 (involving a home for the aged).

130. Rev. Rul. 75-196, 1975-2 C.B. 155.

cause of its limited size and scope.¹³¹ Thus, to qualify as charitable under IRC § 501(c)(3), a nonprofit promoting sports must serve a significant number of people consistent with the size and scope of its resources.

The second restriction is the amount of fees that a charitable IRC § 501(c)(3) organization may charge. A nonprofit promoting nonelite adult sports may need to charge the players fees to cover its operating costs, rather than relying on donations. The IRS approach to organizations financed by fees has evolved over time, as demonstrated by a series of rulings involving nursing homes. In a 1957 ruling, the IRS concluded that a nursing home would only qualify for IRC § 501(c)(3) status as charitable if it provided its services for free or for amounts below cost.¹³² In 1972, the IRS retreated from this position and concluded that a nursing home providing services “at the lowest feasible cost” would qualify as charitable under IRC § 501(c)(3).¹³³ In 1979, the IRS further modified the standard to allow otherwise qualifying nursing homes to charge fees “within the financial reach of a significant segment of the community’s elderly persons.”¹³⁴

Similarly, nonprofits promoting nonelite adult athletics should only qualify as charitable under IRC § 501(c)(3) if their fees are affordable for a significant segment of the community. A 1984 IRS ruling involving the unrelated business income tax may provide some guidance on how this standard could apply. In the 1984 ruling, the organization already qualified under IRC § 501(c)(3) and subsequently opened a health club with a swimming pool, gymnasium, fitness area, weight training room, exercise room, and handball and squash courts.¹³⁵ The health club solicited memberships from the general public and had two classes of members. The fees for one class were significantly higher and were “comparable to fees at commercial health clubs.”¹³⁶ The members paying the higher fees had access to a separate exercise room, separate showers, and individual lockers. After discussing a 1979 ruling¹³⁷ in which the IRS held that another health club did *not* contribute importantly to an organization’s charitable purpose because its fees were comparable to commercial health club fees, the IRS stated in 1984 that an organization may be charitable even if it charges “commercially comparable fees.”¹³⁸ As evidence of the affordability of its fees, the organization in the 1984 ruling provided a comparison of its member income and occupation data with the income and occupation data of the community the organization served. Also, the organization submitted information on the average family’s discretionary

131. *Id.*

132. Rev. Rul. 57-467, 1957-2 C.B. 313, *superseded by* Rev. Rul. 72-124, 1972-1 C.B. 145.

133. Rev. Rul. 72-124, 1972-1 C.B. 145; *see* HOPKINS, *supra* note 19, at 170.

134. Rev. Rul. 79-18, 1979-1 C.B. 194.

135. I.R.S. Tech. Adv. Mem. 85-05-002 (Aug. 5, 1984).

136. *Id.*

137. Rev. Rul. 79-360, 1979-2 C.B. 236.

138. I.R.S. Tech. Adv. Mem. 85-05-002 (Aug. 5, 1984), *explained in* I.R.S. Gen. Couns. Mem. 39,327 (Jan. 18, 1985).

recreational expenses as reported in a recent edition of the *Statistical Abstract of the United States*.¹³⁹ The IRS concluded the health club fees were “within the financial reach of the local community as a whole” because the fees were “affordable by most segments of the community served.”¹⁴⁰

Although this 1984 ruling might be read to suggest the IRS will grant IRC § 501(c)(3) status to nonprofits promoting casual exercise, the applicability of the ruling is severely limited. The ruling states that it applies only to the organization receiving the ruling, and it cannot be used or cited as precedent by any other organization.¹⁴¹ Also, the IRS expressly refused to recognize the activities as charitable on the grounds that the organization promotes health. The IRS stated, “While many of [the organization’s] activities may relate to preventive and recuperative health care in the broad sense of being consistent with medical principles and conducive or beneficial to physical and mental soundness, we do *not* recognize such activities as promoting health within the meaning of section 501(c)(3) of the Code.”¹⁴² The IRS concluded that the activities were for charitable purposes under IRC § 501(c)(3) because they benefitted the community at large, and refused to find that the activities promote health. Also, the ruling involved the unrelated business income tax, not whether an organization qualified under IRC § 501(c)(3). Finally, the organization in the ruling had two classes of members, and one class apparently paid fees significantly below comparable fees at commercial health clubs. The ruling failed to provide detailed information about each class. Perhaps if the organization had not offered the cheap second-tier memberships, the activities would not have qualified as charitable. As a result, the IRS may have reached a different result if the club had charged all patrons the same fee sufficient to cover costs.

D. POTENTIALLY SURPRISING CONSEQUENCES INVOLVING DANGEROUS SPORTS

This Article’s proposal, which seriously considers the health effects for players, could have surprising consequences for organizations that promote dangerous sports and have traditionally enjoyed IRC § 501(c)(3) status. These organizations may have qualified under IRC § 501(c)(3)’s educational category because they primarily provide instruction about a sport, or because they promote competition among youth or college students. Under the proposed approach, their most-favored tax status could be in jeopardy.

A complexity in evaluating whether sports organizations are truly educational is that the relevant statute provides no substantive definition of

139. I.R.S. Tech. Adv. Mem. 85-05-002 (Aug. 5, 1984) (considering the recreational expenses in 1978 as published in the 1984 edition of the STATISTICAL ABSTRACT).

140. *Id.*

141. *Id.* at 8 (citing I.R.C. § 6110(k)(3)).

142. I.R.S. Tech. Adv. Mem. 85-05-002 (Aug. 5, 1984) (emphasis added).

the word *educational*.¹⁴³ While the regulations provide a definition, that definition is malleable.¹⁴⁴ The regulatory definition refers to “improving or developing [an individual’s] capabilities,”¹⁴⁵ but it provides no significant guidance on the type of capabilities that must be improved or developed.¹⁴⁶ On one occasion, the D.C. Circuit Court of Appeals held this regulatory definition unconstitutionally vague.¹⁴⁷ On another occasion, the court stated “[w]e do not attempt a definition”¹⁴⁸ of the word *educational* and stated that “attempting a definition suitable for all comers, IRS, or any legislature, court, or other administrator is beset with difficulties which are obvious.”¹⁴⁹

Nevertheless, the D.C. Circuit Court of Appeals, in dicta, has suggested that the term *educational* should have an association with *mental* development. The court indicated that “intellectual[] appeal[]” and “help[] in a learning process” are important elements of an educational organization’s activities.¹⁵⁰ A new requirement that sports organizations provide some likelihood of mental development to qualify as educational would be particularly appropriate in connection with this Article’s proposal that courts and the IRS should seriously consider whether sports organizations promote health. Under this proposed approach, to qualify under IRC § 501(c)(3), most sports promoting organizations would need to prove they either (i) further mental development, or (ii) promote health.¹⁵¹

Under this proposed approach, some organizations promoting dangerous contact sports may be hard-pressed to prove continued qualification under IRC § 501(c)(3), for example, because of the possible risks of brain damage. In the last decade, many researchers have focused on concussions and sports,¹⁵² and they have noted a disturbing trend. From 2000 to

143. See I.R.C. § 501(c)(3) (2014) (providing no definition of the word *educational*).

144. Treas. Reg. § 1.501(c)(3)-1(d)(3)(i) (1959).

145. *Id.*

146. The regulation does not define whether the capacities developed must be mental, moral, physical, or otherwise. The regulations provide a list of examples, including “[m]useums, zoos, planetariums, [and] symphony orchestras.” Treas. Reg. § 1.501(c)(3)-1(d)(3)(ii) (Example 4) (1959).

147. *Big Mama Rag, Inc. v. United States*, 631 F.2d 1030, 1036 (D.C. Cir. 1980) (finding that the regulation violates the right of free speech, in part because it lacks the “requisite clarity . . . in explaining . . . its substantive requirements”).

148. *Nat’l All. v. United States*, 710 F.2d 868, 873 (D.C. Cir. 1983).

149. *Id.*

150. *Id.* at 875. See generally HOPKINS, *supra* note 19, at 238.

151. Organizations supporting U.S. Olympic athletes or other elite U.S. athletes competing in national or international competitions could still qualify under IRC § 501(c)(3) as an amateur sports organization. See *infra* note 229 and accompanying text. Also, some sports nonprofits might qualify as charitable organizations. See *supra* notes 17–18 and accompanying text.

152. Many researchers study sports, concussions, and brain damage, and this research is especially challenging for at least two reasons. First, players frequently hide concussion symptoms to stay in the game. This makes concussion detection and counting difficult. For example, “Estimates by the Centers for Disease Control and Prevention range anywhere from 1.6 million to 3.8 million sports-related brain injuries in the U.S. annually.” LINDA CARROL & DAVID ROSNER, *THE CONCUSSION CRISIS: ANATOMY OF A SILENT EPIDEMIC* xii (2011); see also Sean Gregory, *The Problem with Football: How to Make It Safer*, TIME,

2010, for players age eight to thirteen, trips to the emergency room for sports-related brain injuries doubled, and for players age fourteen through nineteen the number tripled.¹⁵³ “Emergency rooms now treat 175,000 kids each year for sports-related brain injuries.”¹⁵⁴ These youth injuries may set the stage for adult problems. “Concussion damage can remain hidden for years only to show up later as early-onset dementia.”¹⁵⁵ “Nearly a quarter of a million new patients turn up each year with long-term deficits resulting from . . . so-called mild traumatic brain injuries.”¹⁵⁶ Although some experts disagree,¹⁵⁷ others maintain that brain trauma from playing football is associated with early-onset Alzheimer’s disease, death resulting from the brain disease chronic traumatic encephalopathy, depression, the inability to work, and the inability to function without a caregiver.¹⁵⁸

Players involved in many sports suffer concussions and related brain injuries, but football draws a great deal of attention, in part because it is America’s favorite spectator sport.¹⁵⁹ One famous columnist opines, “[A]ccumulating evidence about . . . the human body [and especially] the brain . . . compel[s] the conclusion that football is a mistake because the body is not built to absorb, and cannot be adequately modified by training or protected by equipment to absorb, the game’s kinetic energies.”¹⁶⁰ In football, a player may hit another player with “fifteen hundred pounds of force at speeds approaching twenty-five miles per hour . . . [possibly generating an] impact . . . [at] ninety-eight times the force of gravity.”¹⁶¹

Jan. 28, 2010 (stating that “more than [fifty percent] of concussed athletes are suspected of failing to report their symptoms”). Second, concussion symptoms may at first be hard to notice, and concussions do not always have the same symptoms. Ken Belson, *Concussion Guidelines Are Revised to Stress Individual Treatment*, N.Y. TIMES, Mar. 19, 2013, at B9 (“[C]oncussions are too idiosyncratic to be categorized neatly.”).

153. CARROLL & ROSNER, *supra* note 152, at xii.

154. J. R. Moehringer, *Football Is Dead; Long Live Football*, ESPN THE MAGAZINE, Sept. 3, 2012, at 46, 52 (reporting statistics from the Centers for Disease Control and Prevention).

155. CARROLL & ROSNER, *supra* note 152, at xiii.

156. *Id.* at xii.

157. See Gary Mihoces, *Documentary says NFL is a ‘League of Denial’*, USA TODAY, Oct. 8, 2013, at 3C (“There’s no proof at this point in time determining that concussions are an isolative factor in causing CTE” (quoting Michael Collins, Director of the Sports Medicine Concussion Program at the University of Pittsburgh Medical Center)); MARK FAINARU-WADA & STEVE FAINARU, *LEAGUE OF DENIAL: THE NFL, CONCUSSIONS, AND THE BATTLE FOR TRUTH* 343 (2013) (“The vast majority of the neuroscience community does not believe that research has established a causal relationship linking repetitive head trauma in football and CTE . . .” (quoting Kevin Guskiewicz, Professor at the University of North Carolina and winner of a MacArthur genius award)).

158. See CARROLL & ROSNER, *supra* note 152, at xiii (dementia); Ken Belson, *N.F.L. Doctor Says Disease Is Overstated*, N.Y. TIMES, Mar. 28, 2013, at B14, available at <http://www.nytimes.com/2013/03/28/sports/football/doctor-for-nfl-says-study-overstates-effects-of-cte.html?pagewanted=all> (Alzheimer’s disease and chronic traumatic encephalopathy); FAINARU-WADA & FAINARU, *supra* note 157, at 170 (depression); Will, *supra* note 9, at A11 (discussing several football players who committed suicide).

159. CARROLL & ROSNER, *supra* note 152, at 41.

160. Will, *supra* note 9, at 11.

161. CARROLL & ROSNER, *supra* note 152, at 42–43.

A 2001 study found that there are over one million boys playing high school football. Half will sustain a concussion during their four years of high school, and more than a third will sustain multiple concussions.¹⁶² An advocate argues, “We’re exposing more than [one] million [high school] kids to early-onset brain damage and we [do not] know yet how to prevent it.”¹⁶³ A report found that thirty percent of college football players have had two or more concussions.¹⁶⁴ Another study concludes that, “College players with [three] or more concussions are over [three] times more likely to sustain a new concussion.”¹⁶⁵

Football gets a lot of attention, but other sports also pose significant risks of concussions. Hockey is a collision sport with players traveling at high speeds, and reportedly, professional hockey players are five times more likely than professional football players to suffer a concussion.¹⁶⁶ In half-pipe skiing, even the elites suffer concussions in this extreme sport in which participants “hurtle themselves three stories in the air [and try to land safely] on a hard-packed [curved sheet of ice and snow].”¹⁶⁷ Boxers absorb “repeated blows [to the head that] set many of them up for neurodegenerative disease.”¹⁶⁸ Boxing inspired the phrase *punch drunk*, and the medical community accepted the related syndrome, dementia pugilistica, as reputable science in 1973.¹⁶⁹

Although much concussion research focuses on men, women playing college hockey suffer concussions at double the rate of men playing college hockey and football.¹⁷⁰ Also, women have significantly more concussions than men when playing soccer or basketball.¹⁷¹

If an organization’s activities must have “intellectual[] appeal[]”¹⁷² and “help[] in a learning process”¹⁷³ to be educational, some organizations promoting traditional sports that diminish mental capacity for many participants may have difficulty proving IRC § 501(c)(3) status under the

162. *Id.* at 26; Gregory, *supra* note 152 (stating that in 2010, 1.2 million students played, and annually 43,000 to 67,000 report having a concussion “though the true incidence is likely much higher [because] more than [fifty percent] of concussed athletes are suspected of failing to report their symptoms”).

163. Gary Milhoses, *USA Football Puts Focus on Safety*, USA TODAY, Mar. 4, 2013, at 3C (quoting Chris Nowinski, a former college football player and professional wrestler).

164. Jim Thomas, *Frequency of Injury Among College Athletes*, LIVESTRONG.COM (Aug. 11, 2011), <http://www.livestrong.com/article/513231-frequency-of-injury-among-college-athletes>.

165. CARROLL & ROSNER, *supra* note 152, at 25.

166. *Id.* at 56.

167. Rachel George, *Head Injuries Soar on Halfpipe*, USA TODAY, Feb. 26, 2013, at 1C, available at www.usatoday.com/story/sports/olympics/2013/02/25/snowboarders-skiers-kevin-pearce-concern-concussions/1947593 (reporting that two-time Olympic gold medalist Shaun White has suffered nine concussions).

168. CARROLL & ROSNER, *supra* note 152, at xiii.

169. *See id.* at 185; FAINARU-WADA & FAINARU, *supra* note 157, at 158–59.

170. CARROLL & ROSNER, *supra* note 152, at 56.

171. *Id.* at 27 (reporting that women have fifty percent more concussions in youth soccer, approximately thirty percent more concussions in college soccer, three times as many concussions in youth basketball, and sixty percent more concussions in college basketball).

172. *Nat’l All. v. United States*, 710 F.2d 868, 875 (D.C. Cir. 1983).

173. *Id.*

educational category. These organizations also may have difficulty proving that they promote health if a large percentage of participants suffer injuries or disabilities. When evaluating the mental and physical impact on players, relevant factors could include, on the one hand, the number and percentage of players injured, the nature and severity of the injuries, and the immediate and long-term consequences of the injuries. On the other hand, positive consequences from a sport should be considered, such as the intellectual stimulation provided both for beginners and experienced players and the positive health impacts such as greater muscular strength, balance, and increased cardiovascular capacity.¹⁷⁴

A switch to this new approach could deliver a disturbing shock to some traditional sports programs that have long enjoyed the government subsidy of most-favored tax status. Even if a bona fide school sponsoring dangerous sports could retain its IRC § 501(c)(3) status because its primary purpose is still education and the dangerous sports are insubstantial compared to the school's total activities,¹⁷⁵ any net income generated by the dangerous sport might be taxed as unrelated business income.¹⁷⁶ Similarly, there could be surprises for community youth sports programs promoting dangerous sports. Nevertheless, this more balanced approach would be appropriate under the fundamental purpose of IRC § 501(c)(3). Congress and the U.S. Supreme Court have declared that an IRC § 501(c)(3) organization should provide a public benefit at least commensurate with the value of the tax subsidies provided with IRC § 501(c)(3) status.¹⁷⁷

E. EVALUATING THE IRS'S POSITIONS ON NONELITE ADULT SPORTS

Key tests for qualifying under IRC § 501(c)(3) involve multiple fact determinations, so the courts and the IRS have some flexibility in this area.¹⁷⁸ First, the definitions of *charitable* and *educational* are malleable and inclusive.¹⁷⁹ Second, the statute provides that a nonprofit must be operated exclusively for a tax-exempt purpose,¹⁸⁰ but the regulations and the court opinions are clear that an insubstantial nonexempt purpose will

174. See *supra* notes 110–23 and accompanying text (regarding the benefits of activities that increase aerobic capacity and promote muscular development).

175. See *Better Bus. Bureau of Wash., D.C. v. United States*, 326 U.S. 279, 283 (1945) (stating that an organization will not qualify under IRC § 501(c)(3) if it has a substantial nonexempt purpose).

176. See I.R.C. §§ 511–13 (2014) (imposing an income tax on an otherwise tax-exempt organization's net income from activities not related to an exempt purpose).

177. See *supra* note 25 and accompanying text.

178. See, e.g., *Church of Bost. v. Comm'r*, 71 T.C. 102, 108 (1978); *N. Am. Sequential Sweepstakes v. Comm'r*, 77 T.C. 1087, 1094–95 (1981); *St. Louis Sci. Fiction v. Comm'r*, 49 T.C.M. (CCH) 1126, 1129 (1985); see also *infra* note 181.

179. See HOPKINS, *supra* note 19, at 165 (“Conceptually, the term *charitable* has a broad, wide-ranging, multifaceted meaning.”); *id.* at 247 (In regards to educational purposes, “tax exemption is not dependent on the subjects under instruction or the number or motives of those being instructed . . .”).

180. I.R.C. § 501(c)(3) (2014).

not disqualify an organization.¹⁸¹ In applying this operational test, courts and the IRS first analyze a nonprofit's activities, but then must consider the purpose for each activity.¹⁸² Different people can have different purposes for engaging in the same activity, and one person can have multiple purposes for participating in one activity.¹⁸³ "Human motivations are terribly complex."¹⁸⁴ Given the vague standards, it is not surprising that the IRS has attempted to create some automatic rules for certain classes of cases. The artificial imposition of strict rules, however, can lead to inappropriate results.

The IRS has employed at least three different approaches for denying IRC § 501(c)(3) status to nonprofits promoting sports for nonelite adult athletes. The first approach focuses exclusively on the educational test; the second approach disqualifies the organization because it has a substantial social or recreational purpose; and the third approach considers whether the organization promotes national or international sports competition.

The first approach is the IRS's typical attack. In this approach, the IRS evaluates whether the nonprofit promoting a sport is educational, and if it fails the educational test, the IRS automatically denies IRC § 501(c)(3) status. In a seminal ruling, Revenue Ruling 70-4, the nonprofit attempted to revive a sport through multiple activities, including conducting tournaments.¹⁸⁵ Although the regulations define *educational* purposes broadly, including the "instruction or training of the individual for the purpose of improving or developing his capabilities,"¹⁸⁶ the IRS stated in a conclusory manner that the organization's activities "neither improve[d] nor develop[ed] the capabilities of the individual."¹⁸⁷ The IRS concluded that "these activities are not educational," and as a result, "this organization is not exempt . . . under [IRC § 501(c)(3)]."¹⁸⁸

Revenue Ruling 70-4 reflects a myopic view of IRC § 501(c)(3) status because an organization that is not educational could still qualify under IRC § 501(c)(3) as a charitable organization or could qualify under an-

181. Treas. Reg. § 1.501(c)(3)-1(c)(1) (1959) (stating that an organization must "engage[] primarily in activities which accomplish one or more . . . exempt purposes"); HOPKINS, *supra* note 19, at 79 ("Whether an organization has a substantial nonexempt purpose is a question of fact, to be resolved on the basis of all the appropriate evidence.") (citing *Church by Mail, Inc. v. Comm'r*, 765 F.2d 1387 (9th Cir. 1985), *aff'g* 48 T.C.M. (CCH) 471 (1984)); *see also infra* note 206.

182. *See* HOPKINS, *supra* note 19, at 78 ("The operational test focuses on the actual purposes the organization advances by means of its activities . . .").

183. *See* Copyright Clearance Ctr., Inc. v. Comm'r, 79 T.C. 793, 803 (1982); I.R.S. Priv. Ltr. Rul. 2010-31-035 (Aug. 6, 2010) (when multiple people participate, the government considers the purposes of the participants generally); *see also* HOPKINS, *supra* note 19, at 79.

184. Colombo, *supra* note 26, at 669.

185. Rev. Rul. 70-4, 1970-1 C.B. 126.

186. Treas. Reg. § 1.501(c)(3)-1(d)(3)(i) (1959).

187. Rev. Rul. 70-4, 1970-1 C.B. 126.

188. *Id.*

other category.¹⁸⁹ Revenue Ruling 70-4 vividly demonstrates the IRS's obsessive focus on the educational test because the IRS failed to address whether the particular nonprofit was charitable as a result of promoting health, even though the nonprofit stated that its purpose was to "promot[e] the health of the general public by encouraging all persons to improve their physical condition."¹⁹⁰

Similarly, in a 2008 ruling,¹⁹¹ the IRS considered an adult amateur soccer team. The team played matches once a week, and player training consisted of drills, conditioning, and teaching soccer plays. The IRS said the drills and other activities "may help develop the soccer players' *skills*,"¹⁹² but the IRS concluded that developing skills does not "develop the capabilities of the individual" under the regulatory definition of the word *educational*.¹⁹³ The IRS concluded that because the organization's activities were not educational, the organization failed to qualify under IRC § 501(c)(3).

The IRS's strained reasoning in this area may have reached its zenith in Revenue Ruling 78-98, which involved a school that operated a ski slope and ski lift six miles from its main campus.¹⁹⁴ The IRS ruled that recreational skiing on the slope by the school's *students* was substantially related to the school's educational purpose, but also concluded that skiing by the *general public* was not related to an educational purpose. A tax regime in which a college senior's skiing is educational, but the next winter, after graduation, her skiing on the same slope is not educational, is suspect.

The Tax Court has suggested a more detailed approach for determining when adult athletic training is educational under IRC § 501(c)(3). In *Syrang Aero Club, Inc. v. Commissioner*, the Tax Court considered an organization with one activity; it rented its one airplane at a low cost to its thirty members to provide them with flying time.¹⁹⁵ The Tax Court noted, on the one hand, the members were increasing their *skills* by practicing their flying and that "flight experience in itself is necessary to advance the skill of an aviator."¹⁹⁶ But on the other hand, the Tax Court stated that "[u]nsupervised flying time may actually result in acquiring and reinforcing bad habits."¹⁹⁷ The Tax Court concluded this particular flying club did not qualify because "to be educational, such [flying] time should be eval-

189. See Treas. Reg. § 1.501(c)(3)-1(c)(1) (1959) (stating that an organization must engage in activities that accomplish "one or more of such exempt purposes specified in section 501(c)(3)"); HOPKINS, *supra* note 19, at 152 (stating that the list of exempt purposes in IRC § 501(c)(3) "is framed in the disjunctive . . . [which] evidences congressional intent to accord tax exemption to any organization organized . . . for any *one* of the designated purposes or functions").

190. Rev. Rul. 70-4, 1970-1 C.B. 126.

191. I.R.S. Priv. Ltr. Rul. 2008-49-018 (Dec. 5, 2008).

192. *Id.* (emphasis added).

193. See Treas. Reg. § 1.501(c)(3)-1(d)(3)(i) (1959).

194. Rev. Rul. 78-98, 1978-1 C.B. 167.

195. 73 T.C. 716 (1980).

196. *Id.* at 721.

197. *Id.*

uated and criticized by a more experienced person who can direct the member's training so that the practice time will effect improvement."¹⁹⁸ Under the Tax Court's method of analysis, the educational determination could turn on whether an organization's practices and competitions are supervised by a coach, a manager, a personal trainer, or other similar supervisor. An open question is how the Tax Court would decide if a nonprofit's players critiqued one another's performances, analyzed their own performances by watching video tapes, or reviewed statistics after the practice or competition.

The conclusion that nonprofits promoting nonelite adult sports competitions generally are not educational when there is no instruction, review, or supervision likely is a sound position. While repetitive practice and competition can develop skills and might lead to intellectual insights and new understandings, in many situations it would be a stretch to say that unsupervised athletic training or competition is an educational endeavor.¹⁹⁹ As a practical matter, a person who is reading, studying, or researching would normally view a tennis match or other sporting activity as a respite from cerebral pursuits. The problem with the IRS's approach is the excessive fixation on whether sports organizations are educational, and the IRS's failure to consider whether these organizations are charitable under IRC § 501(c)(3) because they promote health.²⁰⁰

A second approach that the IRS and the courts use to deny IRC § 501(c)(3) status to nonprofit adult sports organizations is to declare that the organizations have a substantial recreational or social purpose.²⁰¹ If an organization has a single, substantial nonexempt purpose, it cannot qualify under IRC § 501(c)(3).²⁰² In a 2013 ruling,²⁰³ the nonprofit's primary activity was the operation of a minor league, adult football team. The team competed in a league with a ten-game season, and the team practiced two days a week. The team also sponsored a weekly "players' night out."²⁰⁴ The IRS concluded that "[m]any of your players play for the love of the sport, and community benefit if any is incidental to the main purpose of playing on a team"²⁰⁵ Similarly, in *Wayne Baseball, Inc. v. Commissioner*, the Tax Court concluded that an organization sponsoring an adult, amateur baseball team failed to qualify because it had a substantial recreational or social purpose, referring to the "purpose of

198. *Id.* at 719.

199. *See Nat'l All. v. United States*, 710 F.2d 868, 875 (D.C. Cir. 1980) (noting that the D.C. Circuit Court of Appeals has stated, *in dicta*, that an activity must have intellectual appeal and help in a learning process to be educational); *see supra* text accompanying note 150.

200. *See supra* text accompanying notes 185–88.

201. *See, e.g., Wayne Baseball, Inc. v. Comm'r*, 78 T.C.M. (CCH) 437 (1999); *Media Sports League, Inc. v. Comm'r*, 52 T.C.M. (CCH) 1093 (1986); I.R.S. Gen. Couns. Mem. 39,560 (Sept. 30, 1986).

202. *Better Bus. Bureau of Wash. D.C. v. United States*, 326 U.S. 279, 283 (1945).

203. I.R.S. Priv. Ltr. Rul. 2013-13-033 (Mar. 29, 2013).

204. *Id.* The players night out gave the players an opportunity to spend time together. *See id.*

205. *Id.*

providing a team for the enjoyment, recreation, and social interaction of the players.”²⁰⁶

Summarily concluding that the purpose of any sport is substantially recreational has some intuitive appeal, but upon closer examination such an approach should be fine-tuned. It is true that the U.S. Supreme Court has held that an organization with a substantial, nonexempt purpose does not qualify for IRC § 501(c)(3) status,²⁰⁷ and cases hold that a recreational or social purpose is a nonexempt purpose.²⁰⁸ Furthermore, the word *recreational* is a broad term that can apply to all sports.²⁰⁹ Indeed, sports may be viewed as a subset of the universe of recreational activities; other recreational categories would include games, child’s play,²¹⁰ diversions, entertainments, and amusements.²¹¹

Nevertheless, treating all sports as recreation, and summarily denying IRC § 501(c)(3) status to all nonprofits promoting sports, would be inconsistent with congressional guidance. IRC § 501(c)(3) includes, within the list of eight exempt purposes, organizations that “foster national or international amateur sports competition.”²¹² In addition, in support of the Revenue Act of 1950, Congress in the legislative history states that college football games are educational.²¹³ Furthermore, the IRS consistently has held that promoting sports competition among minors or college students is educational and, therefore, exempt under IRC § 501(c)(3).²¹⁴

A more detailed approach is appropriate. A court or the IRS should carefully consider the significance of the nonprofit’s exempt purpose and the significance of the social or recreational purposes separate and apart from the sports promotion activities. For example, if the organization

206. 78 T.C.M. (CCH) 437 (1999); *see also* Media Sports League, Inc. v. Comm’r, 52 T.C.M. (CCH) 1093 (1986) (concluding that more than an insubstantial part of the nonprofit’s activities further the nonexempt social and recreational interests of its members).

207. *Better Bus. Bureau of Wash., D.C.*, 326 U.S. at 283 (1945).

208. *See, e.g.*, St. Louis Sci. Fiction Ltd. v. Comm’r, 49 T.C.M. (CCH) 1126 (1985); Minn. Kingsmen Chess Ass’n, Inc. v. Comm’r, 46 T.C.M. (CCH) 1133 (1983).

209. *See* McKinney v. Bd. of Zoning Adjustment of Kansas City, 308 S.W.2d 320, 325 (Mo. App. 1957) (“[R]ecreation in its popular sense . . . is of very comprehensive signific[ance] and includes in its general meaning games, sports, and plays.”); *Denmark v. State*, 954 P.2d 624, 626 (Colo. App. 1997) (defining the phrase *recreational area* to include a place where an individual could play sports); RECREATION, WEBSTER’S THIRD NEW INT’L DICTIONARY 1899 (1993) (including the terms refreshment, diversion, play, amusement, and entertainment to define the word *recreation*).

210. *Martinez v. Harris Cnty.*, 808 S.W.2d 257, 259 (Tex. App. 1991) (concluding that recreation includes playing on a swing).

211. *See* RECREATION, WEBSTER’S THIRD NEW INT’L DICTIONARY 1899 (1993) (including the terms refreshment, diversion, play, amusement, and entertainment to define the word *recreation*).

212. I.R.C. § 501(c)(3) (2014).

213. S. REP. NO. 81-2375, at 79 (1950), *as reprinted in* 1950 C.B. 559 (“Of course, income of an educational organization from charges for 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.”); 1950-2 C.B. 458 (House version).

214. *See* Rev. Rul. 77-365, 1977-2 C.B. 192; *see also supra* text accompanying note 10.

hosts pool parties,²¹⁵ players' nights out,²¹⁶ masquerade parties,²¹⁷ or other similar activities, those could be considered activities with a social or recreational purpose. A court or the IRS should consider whether the nonprofit's social or recreational purposes are substantial when compared to its exempt purposes such as educating, combatting juvenile delinquency, lessening the burdens of government, or promoting health. Thus, a court or the IRS should not automatically treat sports training or competition that promotes health as social or recreational when deciding if the organization has a substantial nonexempt purpose.

The IRS's third approach for denying IRC § 501(c)(3) status to organizations promoting nonelite adult sports appears in a few rulings considering whether an organization is a qualified amateur sports organization as described in IRC § 501(c)(3) and IRC § 501(j). In this category of exemption, Congress's intent is not perfectly clear. In 1976, Congress added nonprofits that "foster national or international amateur sports competition" and that do not provide athletic facilities or equipment, to the list of enumerated exempt purposes under IRC § 501(c)(3).²¹⁸ In the legislative history, Congress expressed frustration with the IRS's pre-1976 application of the rules in this area,²¹⁹ it emphasized that the change was not intended to deny exempt status to any sports organizations previously recognized as exempt under IRC § 501(c)(3), and it expressed a clear desire for the IRS to grant IRC § 501(c)(3) status to certain organizations promoting national or international sports.

In 1982, Congress liberalized these rules by removing, as a practical matter, the restriction on providing the athletes with facilities or equipment, clarifying that such an organization can qualify even if its membership is merely "local or regional in nature," and specifying that a nonprofit can qualify if it is "organized and operated exclusively to foster national or international amateur sports competition . . . or to support and develop amateur athletes for national or international competition in sports."²²⁰ Earlier drafts of this legislation attempted to restrict this category of exemption to organizations promoting the U.S. Olympic team or the U.S. team for the Pan-American Games, or to organizations promoting sports listed on the programs of the Olympics or the Pan-American Games,²²¹ but Congress ultimately rejected those restrictions.

When applying these rules, the IRS has focused on one Congressman's comments, made on the Senate floor in 1976, although those comments do not appear in the statutes nor the House, Senate, or Joint Committee

215. See, e.g., *St. Louis Science Fiction Ltd. v. Comm'r*, 49 T.C.M. (CCH) 1126, 1127 (1985).

216. See, e.g., I.R.S. Priv. Ltr. Rul. 2013-13-033 (Mar. 29, 2013).

217. See, e.g., *St. Louis Science Fiction*, 49 T.C.M. (CCH) at 1127.

218. Tax Reform Act of 1976, Pub. L. No. 94-455, § 1313(a) 90 Stat. 1520 (1976), (codified at I.R.C. § 501(c)(3) (2014)).

219. See H.R. 10612, 94th Cong. at 423, 2d Sess. (1976); see also *supra* text accompanying note 8.

220. I.R.C. § 501(j)(2) (2014).

221. See I.R.S. Gen. Couns. Mem. 39,459 (Dec. 26, 1985) (emphasis added).

Reports. This one Senator, in explaining his understanding of the 1976 amendments, stated in part, “[This change] is not intended to make social clubs or *organizations of casual athletes* into tax-exempt charities . . . organizations whose primary purpose is the recreation of their members or whose facilities are used primarily by casual athletes will not qualify.”²²² As noted, Congress effectively removed the restrictions on providing equipment and facilities in 1982.²²³

The IRS interprets this category of exemption in a manner that likely will promote only elite athletics. In a 2008 ruling, the IRS concluded that a club of adult males conducting a moto tournament failed to qualify because its activities were merely local.²²⁴ In another 2008 ruling, the IRS concluded that an adult soccer team occasionally scheduling games against teams in another state did not qualify because those games were not part of a national competition.²²⁵ In response to the nonprofit’s assertion that it helped prepare players for college, professional, and Olympic soccer, the IRS said there was no information that “its athletes are of a caliber that makes them serious contenders [for the Olympics],” and there was no “evidence that there is a reasonable probability that the members will participate in national or international competition.”²²⁶ In the same ruling, the IRS established a seven-factor test to help determine whether a nonprofit fosters national or international competition.²²⁷ The IRS stated these factors are “not solely determinative.”²²⁸ Nevertheless, all seven factors suggest that this category of exemption is reserved for organizations promoting elite athletics,²²⁹ particularly the factor considering whether the athletes are “of a caliber that makes them serious contenders for the Olympic or Pan-American Games.”²³⁰

The IRS has held that this category of exemption is available to (i) an organization recognized as the national governing body of a sport by the U.S. Olympic Committee;²³¹ (ii) an organization that provides a national training center for developing Olympic athletes;²³² and (iii) an organization that sponsors a major post-season college football bowl game that could influence the voting for major college football’s national champion

222. 122 CONG. REC. 25,961 (1976) (comments by Senator Culver) (emphasis added), quoted in I.R.S. Gen. Couns. Mem. 39,459 (Dec. 26, 1985).

223. See *supra* notes 48–50 and accompanying text (the restriction is stated in IRC § 501(c)(3), but IRC § 501(j) allows organizations that provide equipment or facilities to qualify).

224. I.R.S. Priv. Ltr. Rul. 2008-42-055 (Oct. 17, 2008).

225. I.R.S. Priv. Ltr. Rul. 2008-49-018 (Dec. 5, 2008).

226. *Id.*

227. *Id.*

228. *Id.*

229. *Id.* Other factors include (i) whether the sport involved is an Olympic or Pan-American Games sport; (ii) whether the athletes are “in the age group from which Olympic-quality athletes are usually chosen;” (iii) whether the organization provides daily training; and (iv) whether the organization is “a member of the [U.S.] Olympic Committee.” *Id.*

230. *Id.*

231. I.R.S. Gen. Couns. Mem. 39,459 (Dec. 26, 1985).

232. I.R.S. Gen. Couns. Mem. 39,560 (Sept. 30, 1986).

team.²³³

Based on the statutory language, this category of exemption should be interpreted more broadly than under the IRS approach. National and international sports competition should include senior events as well as the Olympics and the Pan American Games. Organizations promoting senior or other age-group adult national athletic competitions, or assisting the competing athletes, should be eligible if they meet all the other statutory criteria. Nevertheless, most nonelite adult athletes do not compete nationally, so even if applied liberally, many nonprofit adult sports organizations would need to qualify in a different category of IRC § 501(c)(3), such as the promotion of health.

F. TRACING THE IRS'S FOCUS ON EDUCATION TO A BYGONE ERA

A body of case law rooted a century ago,²³⁴ when sports were primarily for the young and the idle rich,²³⁵ and long before the modern medical research linking inactivity to an epidemic of chronic diseases,²³⁶ helps explain the IRS's tendency to evaluate sports nonprofits based solely on whether they are educational. These cases also help explain why the IRS tends to hold that all sports activities affiliated with colleges and other schools are educational.

1. IRS Reliance in 1964 on a 1904 Case that Was Overruled in 1945

In a fascinating ruling, the IRS left clues that this old body of case law has influenced its approach. In Revenue Ruling 64-275, the organization's charter provided that it "operated exclusively for educational purposes."²³⁷ Its specific purposes included furnishing training in racing small sailboats "to improve the caliber of [U.S.] candidates . . . in the Olympic and Pan-American Games and other international racing events" and "[t]o provide practice racing sessions, classroom lectures, seminars and panel discussions through which selected trainees may be schooled in competitive helmsmanship, sail handling and racing tactics."²³⁸ Each summer, the organization annually hosted three symposiums, each lasting three-to-five days, conducted by sailboat racing experts. The symposiums included practice racing by the participants, post-mortem reviews by the experts, demonstrations by the experts while the participants watched "from launches in which a running commentary [was] given by additional members of the staff,"²³⁹ classroom sessions,

233. I.R.S. Gen. Couns. Mem. 39,775 (Feb. 6, 1989).

234. See generally *Kesserling v. Bonneycastle Club, Inc.*, 186 S.W.2d 402, 404-05 (Ky. Ct. App. 1945) (citing 95 A.L.R. 62 (1935)).

235. See Eva Jacobs & Stephanie Shipp, *How Family Spending Has Changed in the U.S.*, MONTHLY LABOR REVIEW, Mar. 1990, at 20, 27 ("Increasing free time and incomes [in the early 1920s] meant that families had more time for sports, once the exclusive province of the 'idle rich.'").

236. See *supra* notes 60-70 and accompanying text.

237. Rev. Rul. 64-275, 1964-2 C.B. 142, 143.

238. *Id.*

239. *Id.*

and panel discussions in the evenings.²⁴⁰ In addition, the organization “assist[ed] the United States Olympic Association in the selection of boats and sailing teams to represent the United States in the Olympic and Pan-American Games.”²⁴¹ “Over 1000 persons have attended the symposiums and lectures and the activities have not been limited to a privileged few.”²⁴²

As a preliminary matter, if the IRS had evaluated the organization after 1982, it could have concluded that the organization qualified under IRC § 501(c)(3) and § 501(j) as a qualified amateur sports organization because the organization supported elite athletes capable of competing for the U.S. in the Olympics or the Pan-American Games.²⁴³ However, in 1964, the IRS considered whether the organization qualified under IRC § 501(c)(3) as educational and chose to begin its substantive analysis by stating, “In the area of judicial construction, the courts have consistently held that training in athletics and physical fitness is ‘educational.’”²⁴⁴ As authority for this broad statement, the IRS cited a 1904 Kentucky case that was overruled in 1948.²⁴⁵ The IRS also cited a 1927 Washington D.C. case²⁴⁶ that relied heavily on the overruled 1904 Kentucky case.

In the 1904 Kentucky case, a nonprofit named German Gymnastics Association owned and operated a gymnasium and desired to qualify for a real property tax exemption on the basis that it was an educational institution under Kentucky law.²⁴⁷ The organization regularly employed a teacher who instructed its members in gymnastics classes.²⁴⁸ The case does not indicate the age of the members or whether the nonprofit had any connection with a school. Nevertheless, in deciding whether the nonprofit was an educational institution, the Kentucky court made an important pivot that linked sports, education, and schools. The court stated that education involves three areas, namely the cultivation of the mind, the improvement of religious or moral sentiments, and the “development of one’s physical faculties.”²⁴⁹ The court’s support for including all three fields within the term *educational* was that “[t]hose in charge of colleges and institutions of learning recognize this to be true,” and colleges maintain gymnasiums and encourage “football and other athletic sports.”²⁵⁰ Thus, the 1904 Kentucky court’s rationale appears to be that if colleges do it, it must be educational. The Kentucky court stated that an institu-

240. The organization also sponsors three winter symposiums featuring lectures and panel discussions regarding racing techniques, rules, and boating safety. *Id.*

241. *Id.* at 144.

242. *Id.* at 145.

243. *See, e.g.*, I.R.C. § 501(j)(2) (2014); I.R.S. Gen. Couns. Mem. 39,560 (Sept. 30, 1986).

244. Rev. Rul. 64-275, 1964-2 C.B. 142, 145.

245. *German Gymnastics Ass’n v. Louisville*, 80 S.W. 201 (Ky. Ct. App. 1904), *overruled by* 209 S.W.2d 75 (Ky. Ct. App. 1948).

246. *Comm’rs of D.C. v. Shannon & Luchs Const. Co.*, 17 F.2d 219 (D.C. Cir. 1927).

247. *German Gymnastics*, 80 S.W.2d at 201.

248. *Id.*

249. *Id.*

250. *Id.*

tion that cultivates all three—the mind, religious sentiments, and physical development—provides the “perfect education,” but stated that any institution that develops any one of the three is educational.²⁵¹ In demonstrating the consequences of this proposition, the Kentucky court stated, “[i]f three institutions are organized—one seeking by a course of instruction to cultivate the mind, one by a method of instruction to improve students’ religious or moral conditions, and another to teach physical culture to produce a better physical development, *each* is an institution of education, as much as the one at which the student can acquire the threefold knowledge.”²⁵²

In Revenue Ruling 64-275, the IRS also cited the *Commissioners of D.C. v. Shannon & Luchs Construction Co., Inc.* case.²⁵³ This 1927 opinion discussed *German Gymnastics* at length and adopted the 1904 *German Gymnastics* proposition that physical development is part of the perfect education.²⁵⁴ The court in *Commissioners of D.C.* concluded that an athletic field for Western High School qualified as an educational institution under a zoning ordinance.²⁵⁵

It is puzzling that in 1964 the IRS chose to rely on *German Gymnastics* and *Commissioners of D.C.* because the Kentucky Court of Appeals overruled *German Gymnastics* in 1945.²⁵⁶ In a rejection of the three-part perfect education proposition in *German Gymnastics*, in 1945, the Kentucky Court of Appeals concluded that if an institution’s athletic activities greatly exceed its mental activities, the organization is not an educational institution.²⁵⁷ In 1948, the Kentucky Court of Appeals specifically reviewed the property tax exemption of the German Gymnastics Association, overruled its 1904 conclusion, and held that the German Gymnastics Association was not an educational institution and must pay property tax. In a clear denial of the 1904 analysis, the court specifically noted that there were “no material changes in the [German Gymnastics] Association’s methods of operation since 1904.”²⁵⁸

2. Questionable Factual Foundation of the 1904 Case Relied on by IRS

In addition, the IRS’s reliance on *German Gymnastics* is puzzling because the case’s factual basis is questionable. The court in the 1904 *German Gymnastics* opinion states that education consists of the

251. *Id.*

252. *Id.* (emphasis added); see also *Louisville Coll. of Pharm. v. City of Louisville*, 82 S.W. 610, 612 (Ky. Ct. App. 1904) (quoting *German Gymnastics* for the principle that the perfect education cultivates the mind, morals, and physical culture).

253. 17 F.2d 219 (D.C. Cir. 1927).

254. *Id.* at 221.

255. *Id.* at 220 (“An educational institution consists, not only of the buildings, but of all the grounds necessary for the accomplishment of the full scope of educational instruction.”).

256. *Kesserling v. Bonnycastle Club, Inc.*, 186 S.W.2d 402, 405 (Ky. Ct. App. 1945).

257. *Id.*; see also *State v. Rowan*, 106 S.W.2d 861, 865 (Tenn. 1937) (stating that “[w]e do not feel justified . . . in holding that an institution devoted chiefly to physical education is such an institution as may be exempted from taxation”).

258. *German Gymnastic Ass’n v. Louisville*, 209 S.W.2d 75, 76 (Ky. Ct. App. 1948).

development of one's physical faculties because "[t]hose in charge of colleges and institutions of learning recognize this to be true . . . and a gymnasium is maintained and football and other athletic sports are encouraged."²⁵⁹

The implication that all chancellors, presidents, provosts, and others in charge of colleges and universities have always unanimously supported all sports on campus is inaccurate. A historian writes that as early as the 1880s, "Some of the [college] presidents wanted to ban athletics, or at least football, or reform them"²⁶⁰ After nineteen young men died playing football in 1905, a reporter described playing football as participating in a "death harvest."²⁶¹ The President of Harvard University and other college officials tried to "abolish [football] altogether" in the early 1900s.²⁶² In his book, *The Big Scrum: How Teddy Roosevelt Saved Football*, John J. Miller describes President Roosevelt calling a meeting of college presidents at the White House in the Fall of 1905 to force rule changes.²⁶³ The primary reason for creating the predecessor of the NCAA in 1905-1906 was to address violence in football.²⁶⁴ A former president of the University of Chicago stated that it would make as much sense for a college to have a race horse as it would to have a football team.²⁶⁵ As discussed in Part II.D of this Article, grave concerns about the appropriateness of college football continue, particularly because of medical findings regarding concussions.²⁶⁶

Also, many leaders of European colleges and universities apparently do not view physical development as a key part of school. "Americans devote [much] time, effort and money to the business of college sports, [when] the rest of the world barely bats an eye."²⁶⁷ In Europe, opportunities for college athletes are "few and far between."²⁶⁸ Even though soccer is Europe's most popular sport, and soccer is not a major sport in the

259. *German Gymnastics*, 80 S.W. at 201.

260. RONALD A. SMITH, *PAY FOR PLAY: A HISTORY OF BIG-TIME COLLEGE ATHLETIC REFORM* 39 (2011).

261. See Michael Beschloss, *How a Son Inspired a President to Help Rescue a Sport*, N.Y. TIMES, Aug. 2, 2014, at D5 (stating that "[t]he Chicago Tribune reported that [nineteen] people died playing college, high school and sandlot football [in 1905]"); Milhoses, *supra* note 163, at 3C (referring to the "death harvest" quote in an article).

262. Beschloss, *supra* note 261, at D5.

263. JOHN J. MILLER, *THE BIG SCRUM: HOW TEDDY ROOSEVELT SAVED FOOTBALL* (2011) (Harper Publishing); Beschloss, *supra* note 261, at D5.

264. Milhoses, *supra* note 163, at 3C.

265. ANDREW ZIMBALIST, *UNPAID PROFESSIONALS: COMMERCIALISM AND CONFLICT IN BIG-TIME COLLEGE SPORTS* 3 (2001) ("A college racing stable makes as much sense as college football. The jockey could carry the college colors; the students could cheer; the alumni could bet; and the horse wouldn't have to pass a history test.") (quoting Robert Hutchins).

266. See, e.g., Will, *supra* note 9, at 11; Taylor Branch, *The Shame of College Sports*, ATLANTIC MONTHLY, Oct. 2011, at 80; CARROL & ROSNER, *supra* note 152, at xii; see also *supra* notes 157-65 and accompanying text.

267. Kathryn Burkholder, *Why Us? College Sports and the American Experience*, RUTGERS <http://amerstudies.rutgers.edu/archives/98-why-us-college-sports-and-the-american-experience> (last visited Feb. 18, 2015).

268. *Id.*

U.S.,²⁶⁹ students who want to pursue both a college education and competitive soccer leave Europe and enroll in U.S. universities. A nineteen-year-old who spent two years at a college in England and moved to the U.S. for both a college education and greater soccer opportunities said, “College in England serves the purpose of ‘education only.’”²⁷⁰ European college teams typically train only once or twice a week, compete only once a month, and the players “pay sizeable fee[s] . . . to cover expenses, with no athletic scholarships.”²⁷¹

3. Rich Judicial History Reflects Various Positive Impacts of Sports

Although the IRS chose to focus on an overruled case, founded on a dubious factual basis, and continues to obsess over whether sports activities are educational, a more thorough analysis of older U.S. cases reveals a rich judicial appreciation for the many positive societal influences of sports and physical activities.

A series of cases conclude that because grade school and high school students may spend almost half of their waking time, five days a week, nine months a year, in the custody of a school, physical or athletic activity is a necessary part of a school’s activities.²⁷² For example, the Illinois Supreme Court held that recreational grounds and athletic fields are necessities for the proper development of grade school children.²⁷³ Another court observed that the recreational facilities, as well as the food production and preparation areas used to provide nourishment to students, were all parts of the educational institution and entitled to a property tax ex-

269. See Zach Beauchamp, *MAP: The Most Popular Sport in Every Country*, Vox, (July 3, 2014; 2:43PM), <http://www.vox.com/2014/7/3/5868115/most-popular-sports-world-cup> (“In virtually all of Europe . . . soccer is king.”); Daniel Cox, *Is Soccer Destined to Become America’s National Pastime?*, HUFFINGTON POST, (Feb. 8, 2014; 5:59 AM), http://www.huffingtonpost.com/daniel-cox/soccer-in-america_b_4740668.html (“[T]he idea that soccer could compete for the honor of American’s most popular sport seems preposterous on its face.”).

270. Burkholder, *supra* note 267 (quoting Chris Moore, who attended East Durham & Hougall Community College in his native Newcastle, England, and moved to the U.S. to attend Rutgers University); see also Stefanie Loh, *Club Sports is King In Europe, But There Are Downsides to That System Too*, THE PATRIOT-NEWS, (Apr. 24, 2011, 10:54 AM), http://blog.pennlive.com/patriotnewssports/print.html?entry=/2011/04/club_sports_is_king_in_europe.html (regarding Oli Templeton from Manchester, England who “realized he could play soccer and go to school simultaneously” in the U.S. and is attending Shippensburg University in Pennsylvania).

271. Burkholder, *supra* note 267; see also Loh, *supra* note 270.

272. See *McNair v. Sch. Dist. No. 1 of Cascade Cnty.*, 288 P. 188, 190 (Mont. 1930). In addition, a 1927 Arizona case observed that the length of the school day had to increase because initially “school taught only the Three R’s,” but as the world progressed, students needed to be trained in all fields. *Alexander v. Phillips*, 254 P. 1056, 1058 (Ariz. 1927).

273. *Reiger v. Bd. of Educ.*, 122 N.E. 838, 839 (Ill. 1919); see also *Burlington ex rel. Bd. of Sch. Comm’rs v. Burlington*, 127 A. 892, 897 (Vt. 1925) (describing physical training as a necessity at secondary schools); *State ex rel. Sch. Dist. v. Super. Ct. of Chelan Cnty.*, 124 P. 484, 486 (Wash. 1912) (approving a school’s appropriation of additional land for use as a playground on which the students can play athletic games).

emption.²⁷⁴ Two courts have indicated that the ancient Greek philosophers and their students believed that physical activity was necessary for sustained mental activity. During “[t]he intervals of running, wrestling, and the like, the Greek youths [spoke] to philosophers who had come to watch the games, on the ‘good, the beautiful, and the true.’”²⁷⁵

Perhaps this ancient Greek approach is appropriate for adults today. Many U.S. office workers spend half their waking hours on weekdays in intellectual pursuits with relatively little physical activity.²⁷⁶ Perhaps consistent with the practices of the ancient Greek civilization, the U.S. should encourage the integration of physical activity with mental activity.

A series of older cases granted tax exemption, or other favored status, to athletic activities and facilities because they promoted health. In a case involving Our Lady of Angels Seminary in New York, the court stated, “Suitable recreation and physical exercise are deemed requisite to health and successful mental culture. The means and opportunity for that purpose may therefore properly be provided upon the premises of a literary institution for its students.”²⁷⁷ In a wide-ranging opinion, the Montana Supreme Court approved the construction of a gymnasium and athletic field in part because it would promote physical well-being.²⁷⁸ In support, the court noted that the English schools promoted “physical vigor.”²⁷⁹ An Arizona court observed “athletic games under proper supervision tend to the proper development of the body [and that] is a self-evident fact.”²⁸⁰

Other, older cases endorse diverse rationales for approving tax exemptions of nonprofit sports organizations. One court concluded that the government needed to promote sports and physical activities because of the shift from a rural to an urban society. “When eighty to ninety percent of our population was composed of farmers, it was universally thought the growing generation found . . . physical training in the manifold duties of the home.”²⁸¹ With the great shift of half the population to urban areas, there was “little or no chance for physical training for children in the home.”²⁸²

274. *State ex rel. Our Lady of Angels v. Baden*, 3 N.Y. Sup. Ct. 367, 370 (N.Y. Gen. Term 1886) (cited in *German Gymnastics Ass’n v. Louisville*, 80 S.W. 201, 201 (Ky. Ct. App. 1904)) .

275. *McNair*, 288 P. at 191 (Mont. 1930); *see also* *Dodge v. Jefferson*, 181 S.W.2d 406 (Ky. Ct. App. 1944) (also endorsing a Greek view of mixing athletics and mental training).

276. *See supra* notes 91–102 and accompanying text.

277. *Our Lady of Angels*, 3 N.Y. Sup. Ct. at 370; *see also* *Comm’rs of D.C. v. Shannon & Luchs Const. Co., Inc.*, 17 F.2d 219, 221 (D.C. Cir. 1927) (“Suitable recreation and physical exercise are deemed requisite to health and successful mental culture.”); *State ex rel. Sch. Dist. v. Super. Ct. of Chelan Cnty.*, 124 P. 484, 486 (Wash. 1912) (“The physical development of a child is as essential to his well being as is his mental development . . .”).

278. *McNair*, 288 P. at 190.

279. *Id.* at 191.

280. *Alexander v. Phillips*, 254 P. 1056, 1057 (Ariz. 1927).

281. *Id.* at 1058.

282. *Id.*

Another rationale was that sports and physical activity provided proper values for good citizenship. As an example, one court extolled the virtues of football players.

[T]he boy who makes a successful football player must necessarily learn self-control under the most trying circumstances, courage, both physical and moral, in the face of strong opposition, sacrifice of individual ease for a community purpose, teamwork to the exclusion of individual glorification, and above all that “die in the last ditch” spirit which leads a man to do for a cause everything that is reasonably possible, and when that is done, to achieve the impossible by sheer will-power. The same is true to a greater or lesser degree of practically every athletic sport which is exhibited in a stadium.²⁸³

President Theodore Roosevelt once described football as the “greatest exercise of the fine moral qualities, such as resolution, courage, endurance, and capacity to hold one’s own and stand up under punishment.”²⁸⁴

Combat preparation for World Wars is another judicially approved rationale for the “impetus [for] greater attention to physical training as a legitimate function of education.”²⁸⁵

III. CONCLUSION: REFORMING THE SPORTS WORLD BASED ON MEDICAL EVIDENCE

Medical research demonstrates that inactivity is associated with the modern epidemic of chronic diseases. Nevertheless, the courts and the IRS cling to approaches developed in a bygone era and consistently ignore claims that sports promote health. The IRS’s outmoded approach relies on a doctrine dating back to 1904 from a Kentucky case that was overruled in 1948.²⁸⁶

Adopting this Article’s proposal could encourage major shifts in the U.S. approach to sports; from an excessive emphasis on youth, college, and elite sports, to encouraging everyone to compete; from huge numbers of spectators and few players, to greater participation; and from an emphasis on violent collision sports, to a more diverse sports scene. This proposal could inspire the development of U.S. sports organizations that would share key features found in European sports clubs. Everyone could be eligible to participate in age-group categories, with people remaining athletic for life, and with reasonable participants’ fees financing the organizations.²⁸⁷ Germany often provides direct government subsidies to athletic clubs promoting both youth and adult athletics.²⁸⁸ With a population of eighty-four million, Germany has twenty-four million people regis-

283. *Id.* at 1059.

284. Beschloss, *supra* note 261, at D5.

285. *McNair v. Sch. Dist.*, 288 P. 188, 191 (Mont. 1930); *see also* *Dodge v. Jefferson*, 181 S.W.2d 406, 408 (Ky. 1944).

286. *See supra* notes 253–58 and accompanying text.

287. *See* Loh, *supra* note 270.

288. *Id.* (reporting that “these clubs offer competition for people of all ages including adults in a variety of different sports”).

tered with sports clubs.²⁸⁹ A German professor of sports studies commented, “There’s much more sports for adults than over [in America], and it’s cheaper.”²⁹⁰ The U.S. tax system should help reform the U.S. sports world to combat the modern epidemic of chronic diseases.

289. *Id.*

290. *Id.* (quoting Professor Annette Hofmann, Professor of Sports Studies at the Ludwigsburg University of Education in Germany).