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# The 21st Century Fight Over Who Sets the Terms of the Charity Property Tax Exemption

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## The 21st Century Fight Over Who Sets the Terms of the Charity Property Tax Exemption

by Evelyn Brody



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Conference of the National Center on Philanthropy and the Law, New York University School of Law (New York, Oct. 29-30, 2015). I thank the NCPL conference participants, especially my discussants, Sean Delany and Jonathan Small, and subsequent suggestions from David Thompson and Betsy Schmidt. I appreciate additional support from the Urban Institute's Tax Policy and Charities Project, funded by the Bill and Melinda Gates Foundation and the Charles Stewart Mott Foundation. All views expressed here are mine. Along with a title change prompted by the NCPL discussion, this version is updated to March 20, 2016.

"[O]ut of kindness and benevolence, one could build a water fountain in a park, and rich and poor alike could come and drink. But the designation of 'charity' would be problematic if the water fountain were coin-operated."<sup>1</sup>

"From a commercial standpoint the Girl Scouts are not readily distinguishable from Dunkin' Donuts."<sup>2</sup>

"[The hospital asserts that i]f Morristown's position was accepted by the Court, *the traditional and historic*

<sup>1</sup>*Provena Covenant Medical Center v. Dept. of Revenue*, 894 N.E.2d 452 (Ill. App. 2008), *aff'd*, 925 N.E.2d 1131 (Ill. 2010). To the appellate court, "The term 'charity' has become magical gibberish to sanctify any socially beneficial use of property that a court deems worthy of subsidy." *Id.* at 481.

<sup>2</sup>*Girl Scouts of Manitou Council v. Girl Scouts of USA*, 646 F.3d 983, 987 (7th Cir. 2011) (Posner, J.). So, OK, this isn't a tax case, but it does illustrate the changing view of nonprofit activities.

*means by which hospitals throughout New Jersey provided hospital services will have always violated the Statute and the Statute is a nullity.*"<sup>3</sup>

In the "Why us?" department, nonprofits can be forgiven for fretting about the constant — and seemingly increasing — attention to property tax exemption for charities. After all, the term "tax-exempt property" makes it sound like the eds, meds, and churches are massive leeches on local property tax payers, but the lion's share of exempt property is owned by governments. Moreover, states have always offered exemptions and other subsidies to encourage business creation (or entice businesses to relocate).<sup>4</sup> Individuals, too, whether as homeowners, low-income persons, veterans, or the elderly, enjoy an array of tax abatements, credits, and caps. Accordingly, the property tax has always been more properly viewed as a question of "Who pays?" rather than "Who is exempt?"<sup>5</sup>

Staying off the rolls or minimizing the tax bite often results from compromise — whether at the state constitutional level, in state statutes, as a matter of assessment, or through negotiation with local governmental bodies. Such an application of a multilevel framework for mischief leads to legal incoherence. This article examines developments in the nonprofit property tax exemption since the last piece I published on the subject, in 2010.<sup>6</sup>

<sup>3</sup>*AHS Hospital Corp. v. Town of Morristown*, 28 N.J. Tax 456, 479 (NJ Tax Court 2015) (emphasis in original). As to the hospital's historical assertion, the court concludes, at 20: "The court rejects the Hospital's contentions." See discussion in Part III.A.

<sup>4</sup>See, e.g., <http://www.goodjobsfirst.org/subsidy-tracker> ("SUBSIDY TRACKER 3.0 is the first national search engine for economic development subsidies and other forms of government financial assistance to business"). See also Theo Francise, "New Rule to Lift Veil on Tax Breaks," *Wall St. J.*, Aug. 4, 2015, describing a Government Accounting Standards Board project, available at [http://www.gasb.org/jsp/GASB/Page/GASB/BridgePage&cid=117616447224\\_8](http://www.gasb.org/jsp/GASB/Page/GASB/BridgePage&cid=117616447224_8), to require tax abatement disclosures on government financial statements.

<sup>5</sup>See generally Evelyn Brody, ed., *Property-Tax Exemption for Charities: Mapping the Battlefield* (Urban Institute Press 2002).

<sup>6</sup>Evelyn Brody, "All Charities Are Property-Tax Exempt, but Some Charities Are More Exempt Than Others," 44 *New Eng. L. Rev.* 621, 635 (2010), available at <http://www.nesl.edu/userfiles/file/lawreview/Vol44/3/Brody.pdf>, an earlier version of which I presented at "Shades of Virtue: Measuring the Comparative Worthiness of Charities," Annual Conference of the National

(Footnote continued on next page.)

We begin by examining a knockdown, drag-out separation-of-powers fight that has arisen in Illinois and Pennsylvania: Which branch, the judicial or legislative, defines “charities” granted exemption by the state constitution?

Next we turn to the more mundane world of statutory interpretation, where even here we find courts second-guessing the legislature. A June 2015 decision by the New Jersey tax court exemplifies what I view as “passive-aggressive separation of powers,” when the court basically says, “Surely the legislature could not have meant this entity (or this use of property) to qualify as charity.” This latest decision not only seemed to render all “sophisticated centers of medical care” in New Jersey taxable, but also is causing sleepless nights for Princeton University: The same judge has allowed a challenge to the university’s exemption brought by local taxpayers to go forward.

New Jersey’s January 2016 proposed legislation — which fell a pocket veto short of enactment — to impose a formula community-service fee on nonprofit hospitals suggests that a third-way solution might become more common. To set up the discussion, I describe disputes — which occasionally raises federal constitutional commerce clause concerns — over the requirement that an exempt charity “reduce the burdens of government.” Some legislatures, courts, and administrative agencies ask, “which government”?

Attempts to tailor exemption to benefits to local taxing jurisdictions lead to our final topic, payments in lieu of taxes (PILOTs). Examples are literally all over the map, from Boston’s revamped comprehensive PILOT program to a Florida appellate court’s striking of a PILOT program as inconsistent with statutory exemption. Will the people’s branch get the last word after all?

In keeping with the episodic — if not anecdotal — feature of a state-by-state tax regime, the paper concludes with an appendix, alphabetized by state, summarizing some other notable developments.<sup>7</sup>

### I. Separation of Powers Between Courts and Legislature: Which Branch Construes the State Constitution?

Almost half of the state constitutions provide property tax exemption for classes of nonprofits — notably, churches, educational institutions, and “institutions of

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Center on Philanthropy and the Law, New York University School of Law (New York City, Oct. 29-30, 2009).

<sup>7</sup>A more comprehensive, but slightly older, list that I prepared for a May 2012 conference of the Urban Institute’s Tax Policy and Charities project, <http://www.urban.org/events/state-and-local-budget-pressures-charitable-property-tax-exemption-and-pilots>, is available as “Selected Recent Bibliography on Property-Tax Exemption for Charities and Payments in Lieu of Taxes (PILOTs),” at <http://www.urban.org/sites/default/files/prop-tax-brody-biblio-july-2012.pdf>.

purely public charity” (or some similar term).<sup>8</sup> In some states the high court has adopted a multifactor test (without specifying how the factors weigh and whether any is an absolute requirement). These tests typically call for the property owner to demonstrate that it and its use of the property: (1) benefit the general welfare of an indefinite number of persons, and render gratuitously a substantial portion of its services; (2) do not result in private benefit or profit; (3) operate with funds deriving mainly from donations; (4) reduce the burdens of government; and (5) result in charity dispensed to all who need and apply for it. These factors — particularly those requiring some level of donative support and gratuitous expenditure, absence of profit, and reducing governmental burdens — are themselves so ambiguous, broad, and overlapping that going to court still is often required, with differing consequences across the states.

What if the legislature’s views of the constitutional term “charity” or “charitable use” differ from the court’s? State high courts vary on the degree of vigilance with which they assert their authority over constitutional terminology.<sup>9</sup> I recently compared,<sup>10</sup> in their construction of similar state constitutional language, the absolutist approach of the Illinois Supreme Court<sup>11</sup> with the apparent deference in Minnesota to a legislative compromise.<sup>12</sup> In 2012, echoing Illinois, the Pennsylvania Supreme Court declared that the legislature could curtail, but not enlarge, the Court’s definition of the constitutional term “institution of purely public charity.”<sup>13</sup> In states like Illinois and Pennsylvania, real clarity or change requires an amendment to the state constitution.

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<sup>8</sup>As described in the appendix to Brody (2010), *supra* note 6, 17 state constitutions mandate exemption for charities (variously termed); 25 state constitutions grant the legislature authority to exempt charities; and eight state constitutions (and the U.S. Constitution, with respect to the District of Columbia) are silent on taxes or exemption.

<sup>9</sup>For example, Tennessee courts have recognized that “the Tennessee Constitution does not define the term ‘charitable.’ This fact necessarily allows the Legislature some discretion in determining the meaning of the term.” *Club Sys. of Tenn., Inc. v. YMCA of Middle Tenn.*, 2005 Tenn. App. LEXIS 793 (Dec. 19, 2005).

<sup>10</sup>Brody (2010), *supra* note 6.

<sup>11</sup>See *Provena Covenant Med. Center v. Dep’t of Revenue*, 925 N.E.2d 1131 (Ill. 2010), discussed in the text below.

<sup>12</sup>In *Under the Rainbow Child Care Center Inc. v. County of Goodhue*, 741 N.W.2d 880, 886 (Minn. 2007), the Minnesota Supreme Court ruled that the “factor three inquiry” — “the extent to which the recipients of the charity are required to pay for the assistance received” — is not merely to be taken into account, but rather “tests for a value that is fundamental to the concept of charity — that is, whether the organization gives anything away” (emphasis in original). While “not contract[ing] or expand[ing] the definition,” Minn. Stats. section 272.02(7)(a), as amended in 2009, requires charities to meet all six judicially created factors, with factors (1), (4), and (6) being mandatory, and factors (2), (3), and (5) allowing a “reasonable justification” exception.

<sup>13</sup>*Mesivtah Eitz Chaim of Bobov Inc. v. Pike County Bd. of Assessment Appeals*, 44 A.3d 3 (Pa. 2012).

## A. Illinois

The modern Illinois dispute begins with Provena Covenant Medical Center (now Presence Covenant). The appellate court had issued a strong opinion upholding revocation of Provena's exemption because, in large part, it provided a minuscule percentage of charity care. In the Supreme Court deliberations, two of the seven justices recused themselves. While the five remaining justices agreed that Provena was not entitled to property tax exemption for the year at issue, the two concurring justices focused on proof problems and dissented from the plurality's asserted charity care standard. Failing to obtain an absolute majority of four justices, the standard propounded in the plurality opinion is nonprecedential.<sup>14</sup>

On the separation-of-powers issue, the *Provena* plurality declared: "The legislature cannot add to or broaden the exemptions specified in section 6 [of the Illinois constitution]."<sup>15</sup> The other two justices took a different view of the court's role: "The legislature did not set forth a monetary threshold for evaluating charitable use. We may not annex new provisions or add conditions to the language of a statute."<sup>16</sup> Their opinion explained: "Setting a monetary or quantum standard is a complex decision which should be left to our legislature, should it so choose. The plurality has set a quantum of care requirement and monetary requirement without any guidelines. This can only cause confusion, speculation, and uncertainty for everyone: institutions, taxing bodies, and the courts."<sup>17</sup>

Subsequent Illinois budget negotiations demonstrate that charities enjoy political support. In 2011 the governor responded to the Revenue Department's revocation of several nonprofit hospitals' exemptions with a moratorium, pending negotiation over a legislative solution.<sup>18</sup> Interestingly, the hospitals accepted the state's "quid pro quo" view of exemption,<sup>19</sup> and focused their efforts on assuring a broad definition of community benefit. At the end of May 2011, the legislature passed provisions that

"establish quantifiable standards for the issuance of charitable exemptions for such property" and dispel the "considerable uncertainty surrounding the test for charitable property tax exemption, especially regarding the application of a quantitative or monetary threshold."<sup>20</sup> The broad statutory definition of community benefit includes not just charity care but also, for example, Medicaid shortfalls and unreimbursed costs of providing or subsidizing goods, activities or services addressing the health of low-income or underserved individuals; services relieving the burden of government related to healthcare for low-income individuals; and "providing medical education; and conducting medical research or training of health care professionals."<sup>21</sup>

In an apparently unprecedented feature designed to protect hospitals from charges of unfair competition, the legislation also provides an income tax credit for investor-owned hospitals equal to the lesser of the cost of charity care they provide or the property tax they pay.<sup>22</sup> It will be interesting to see the data, when available, on for-profit hospitals' income tax credits for community benefit provided. If nonprofit hospitals find, as expected, that the broad definition of community benefit they enjoy outweighs the value of their property tax exemption, the new statute might actually cost the state revenue!

The Illinois governor's letter (as quoted in footnote 18 above), acknowledged a concern with constitutional constraints. In litigation over a hospital's exemption, the Illinois courts, as described above, could determine that the legislative efforts fail to satisfy the judicially defined constitutional term "charity." As a separate matter, charities other than hospitals are not addressed in the new statute — so does the state's quid pro quo conception of exemption apply to them too? (Do churches and educational institutions need not worry about this because they fall under exemptions specifically named in the constitution?) If non-hospital charities must demonstrate a quid pro quo, do they enjoy a broad definition of community benefit, as do hospitals under the statute? Or does some narrower conception, such as the quantum of charity care, apply? Ominously, in 2011, an Illinois appellate court denying exemption to a retirement home commented (in an unpublished opinion): "The amount of

<sup>14</sup>See John D. Colombo, "Provena Covenant: The (Sort of) Final Chapter," *Exempt Org. Tax Rev.* 489 (May 2010) (quoting the concurring justices' observation, "the discussion of charitable use does not command a majority of the court and, therefore, is not binding under the doctrine of *stare decisis*").

<sup>15</sup>*Provena*, 925 N.E.2d at 1145. The plurality cited an earlier state Supreme Court case rejecting property tax exemption for the Chicago Bar Association on the ground that only the courts, and not the legislature, may determine whether particular property is used "exclusively for \* \* \* school \* \* \* purposes" within the meaning of the constitution.

<sup>16</sup>*Id.* at 1157 (Burke, J., concurring and dissenting).

<sup>17</sup>*Id.* at 1159.

<sup>18</sup>See letter from Gov. Pat Quinn to Illinois Hospital Association president (Sept. 19, 2011), announcing moratorium on Department of Revenue hospital revocations until March 1, 2012, to allow the state and private stakeholders to develop recommendations for legislation "that is fair to both hospitals and taxpayers and meets the requirements of the Illinois Constitution," at <http://www.ihatoday.org/uploadDocs/1/govltrtaxexemption.pdf>.

<sup>19</sup>See generally Evelyn Brody, "The States' Growing Use of a Quid-Pro-Quo Rationale for the Charity Property Tax Exemption," *Exempt Org. Tax Rev.* 269 (April 2007).

<sup>20</sup>Illinois Property Tax Code section 15-86(a)(5) & (a)(1) (35 ILCS 200/15-86(a)(5) & (a)(1)), added by Public Act 97-688, section 5-55 (eff. June 14, 2012).

<sup>21</sup>*Id.*, subsection (e).

<sup>22</sup>Illinois Income Tax Code section 223(a) (35 ILCS 5/223) ("a taxpayer that is the owner of a hospital licensed under the Hospital Licensing Act, but not including an organization that is exempt from federal income taxes under the Internal Revenue Code, is entitled to a credit against the taxes imposed under subsections (a) and (b) of Section 201 of this Act in an amount equal to the lesser of the amount of real property taxes paid during the tax year on real property used for hospital purposes during the prior tax year or the cost of free or discounted services provided during the tax year pursuant to the hospital's charitable financial assistance policy, measured at cost").

charity that it dispenses, \$30,000, is far less than the property tax it would pay in the absence of an exemption, \$160,501.43.”<sup>23</sup>

Urbana has continued to fret over the property tax exemption of two major hospitals it hosts, Presence (née Provena) Covenant and Carle Hospital.<sup>24</sup> Urbana spurned — as an attempted “bribe,” according to its mayor — Carle’s checks for \$100,000 to cover costs of police and fire protection.<sup>25</sup> In early January 2016, accepting arguments made by the government defendants in Carle’s bid for exemption, an appellate court held the new statute unconstitutional.<sup>26</sup> Remember that property tax exemption is different from income tax exemption: It’s not enough for the property owner to be a charity; it also has to use the subject property for a charitable purpose. The court declared: “Under section 15-86, a hospital entity can obtain a charitable exemption simply by paying subsidies to community clinics, for example, or by paying subsidies to the state or local government. . . . A property owner cannot buy a charitable exemption.”<sup>27</sup> Accordingly, the court held:

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<sup>23</sup>*Meridian Vill. Ass’n v. Hamer*, 2011 Ill. App. Unpub. LEXIS 222. For analysis of charity care provided by nonprofit hospitals in other states, compare Erica Valdovinos, Sidney Le, and Renee Y. Hsia, “In California, Not-For-Profit Hospitals Spent More Operating Expenses on Charity Care Than For-Profit Hospitals Spent,” 34 *Health Aff* 1296 (August 2015), abstract available at <http://content.healthaffairs.org/content/34/8/1296.abstract> (“Using data from California, we examined whether the levels of charity and uncompensated care provided differed across general acute care hospitals by profit status and other characteristics during 2011-13. The mean proportion of total operating expenses spent on charity care differed significantly between not-for-profit (1.9 percent) and for-profit hospitals (1.4 percent), in contrast to the mean proportion spent on uncompensated care.”), with Frances A. Kennedy, Laurie L. Burney, Jennifer L. Troyer, and J. Caleb Stroup, “Do Non-Profit Hospitals Provide More Charity Care When Faced With a Mandatory Minimum Standard? Evidence From Texas,” 29 *J. Acc’g & Pub. Pol.* 242 (2010), abstract at <http://www.sciencedirect.com/science/article/pii/S0278425409000921?n p=y> (analyzing a 1993 Texas statute requiring tax-exempt hospitals to spend a minimum of 4 percent of net patient revenue on charity care, a requirement modified in 1995 to allow a deduction for bad debts; finding that “hospitals with higher total margins decreased charity care spending, an unintended consequence of the legislation” and observing that “[s]eventeen states have followed Texas’ lead by enacting legislation regarding the charity care spending by NFPs”).

<sup>24</sup>At the 2015 NCPL conference, participant John Colombo explained that Champaign, Illinois, has been free riding on the costs of exemption borne by its twin city, Urbana, which hosts both Carle and Provena.

<sup>25</sup>“Urbana Rejects Over \$100,000 From Carle Foundation Hospital,” *Daily Illini: University of Illinois at Urbana — Champaign*, Nov. 20, 2014. The story quoted Urbana’s mayor: “You don’t get to pick and choose what taxes you pay for. When you get a tax bill, that’s your share, and you’re supposed to pay for the whole thing,” Prussing said.”

<sup>26</sup>*Carle Foundation v. Cunningham Township*, 2016 IL App (4th) 140795 (Jan. 5, 2016), available at <http://www.illinoiscourts.gov/Opinions/AppellateCourt/2016/4thDistrict/4140795.pdf>.

<sup>27</sup>Slip op. at para. 142 (citations omitted).

If the legislature wished, it could provide that *even though* property is used exclusively for charitable purposes, the property shall be exempt from taxation only if, additionally, the value of the charitable services equals or exceeds the estimated property tax liability — because, again, the legislature is free to make the terms of an exemption more restrictive than the terms in article IX, section 6 (*Provena*, 384 Ill. App. 3d at 741). But the legislature lacks the constitutional authority to provide that, *regardless of whether* the property is used exclusively for charitable purposes, the property shall receive an exemption if the value of the charitable services equals or exceeds the estimated property tax liability — because that would be adding to or broadening the exemption in article IX, section 6 (see *id.*).<sup>28</sup>

Because a state statute was ruled unconstitutional, the Illinois Supreme Court would have to accept Carle’s February 2016 appeal. In the meantime, Carle faces the prospect of paying \$6.5 million in property tax a year, and the Department of Revenue has to decide what to do with five pending exemption applications, to say nothing of those already under review.<sup>29</sup>

## B. Pennsylvania

The 2012 Pennsylvania case involved a 61-acre summer camp run by an orthodox Jewish nonprofit. The intermediary Commonwealth Court had found that the camp failed to meet the judicially established factor of reducing the burdens of government — a factor that the camp argued it satisfied under the legislative definition. The Pennsylvania Supreme Court refused to weigh in on the merits of the case, limiting the appeal to the sole question of the validity of the Court’s multifactor test for exemption, propounded in *Hospital Utilization Project* (the HUP test).<sup>30</sup> Four of the seven justices held: “our prior

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<sup>28</sup>Slip op. at para. 155 (emphases in original).

<sup>29</sup>See Lisa Schneckner, “Ruling Throws Illinois Hospitals’ Tax Exemptions Into Question,” *Modern Healthcare*, Jan. 7, 2016 (“the city has lost 11 percent of its assessed tax value since Carle was relieved of paying \$6.5 million a year in property taxes — the vast majority of which went to Urbana and its school district”), at [www.modernhealthcare.com/article/20160107/NEWS/312259999](http://www.modernhealthcare.com/article/20160107/NEWS/312259999).

<sup>30</sup>See two subsequent Commonwealth Court cases denying exemption for failure to satisfy one of the HUP factors: *Camp Hachshara Moshava of New York v. Wayne County Board for the Assessment and Revision of Taxes*, 47 A.3d 1271 (Pa. Commw. 2012) (religious summer camp does not lessen the burdens of government); *In re Appeal of Dunwoody Vill.*, 52 A.3d 408 (Pa. Commw. 2012) (continuing care retirement; community meets none of the HUP factors; note, in particular, the holding that “given that a substantial percentage of DVI’s officers’ and executives’ compensation is based on DVI’s financial or marketplace performance, . . . DVI failed to establish that it operates entirely free from private profit motive”). In writing about this latter case, Philadelphia nonprofit legal authority Don Kramer comments: “This is another example of how Pennsylvania’s common law cases fail to set out specific benchmarks for meeting the five-prong test and the language of the case law is so inconsistent that both sides can cite language to support their

(Footnote continued on next page.)

jurisprudence sets the constitutional minimum for exemption from taxes; the legislation may codify what is intended to be exempted, but it cannot lessen the constitutional minimums by broadening the definition of 'purely public charity' in the statute."<sup>31</sup>

While the majority declared that "our courts will apply the [HUP] test in light of evolving circumstances," the three-justice dissent observed that the majority failed to explain how changes to that test may occur. Rather, the dissent asserted, "so long as the statute otherwise comports with the Constitution, . . . the catalyst for such alterations in the constitutional standards can only be found in a function served by the Legislature — monitoring policies as they shift with societal changes." After all, courts must wait for disputes between two opposing parties to arise, and so the judiciary cannot systematically and proactively effect a nuanced solution to societal change. Indeed, the very statute at issue, Act 55 (1997), resulted from a years-long negotiation among all parties. In that compromise, the nonprofits agreed that for-profit competitors would have standing to complain in court about a given nonprofit's property tax exemption. If the definition of "institution of purely public charity" cannot be determined by the legislature, what happens to those standing rights?

The Pennsylvania nonprofit sector fears that this decision shifts the balance of power — or, at the least, the likelihood of PILOT "requests" — to the municipalities. It did not take long for the sector to find help back in the statehouse. An amendment to the Pennsylvania constitution requires the approval of the House and the Senate two years in a row, as well as approval by the electorate. In June 2013, the Pennsylvania legislature approved by joint resolution an amendment that would authorize the legislature to determine the qualifications for exemption for institutions of purely public charity; in the next two-year session, the legislative votes took place in 2015.<sup>32</sup> But progress was not smooth, and there is concern that the legislature's proposal to amend the state constitution — still to be ratified by referendum — will not work.

Storm clouds had appeared in December 2014, when the state's auditor general reported \$1.5 billion in lost tax revenue on account of charities located in the 10 counties experiencing debate over their exemptions.<sup>33</sup> In February

respective positions." Don Kramer, "PA Court Denies Exemption to Continuing Care Retirement Community." *Nonprofit Issues*, Article Archives, Tax Matters, July 1-15, 2012.

<sup>31</sup>Mesivtah Eitz Chaim of Bobov Inc., *supra* note 13.

<sup>32</sup>The bill would amend section 2(b) of Article VIII by adding a clause (vii) to read:

Section 2. Exemptions and special provisions.

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(b) The General Assembly may, by law:

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(vii) Establish uniform standards and qualifications which shall be the criteria to determine qualification as institutions of purely public charity under clause (v) of subsection (a) of this section.

<sup>33</sup>Pennsylvania Auditor General, "Review of Potential Lost Revenue Due to Property Tax Exemptions" (December 2014), (Footnote continued in next column.)

2015 the Republican-controlled Senate passed the proposed constitutional amendment on a 30-19 party-line vote.<sup>34</sup> Even though the House was also Republican-controlled, action stalled. The bill was referred to the House Finance Committee, whose chair (supported by some of the committee's Democratic members) announced public hearings. Approval by early August would allow for the proposal to appear on the November ballot. According to one press report: "Lobbyists engaged on the issue said that amendment proponents — including tax-exempt hospitals — appear to be weighing whether to push for a referendum in November's off-year balloting versus in next year's high-turnout presidential election."<sup>35</sup>

Moreover, legislators and others are expressing uncertainty over the legal consequences of the proposal. A news story commented: "The problem, as the House weighs whether to put the amendment before voters, is that no one really knows whether its approval would prompt a wholesale review of the rules. Some legislators contend it would merely revive rules made two decades ago, or spur a court fight. . . . [The latter] would be ironic, since the 28-word amendment aims to reduce the role of courts in deciding questions of tax exemption."<sup>36</sup>

Separately, on June 29, 2015, Senate Resolution 28, "A Concurrent Resolution establishing the Joint Select Committee on Institutions of Purely Public Charity . . . to examine, investigate and complete a study of the laws of this Commonwealth regarding tax exemptions provided to institutions of purely public charity," was referred to the House Committee on Finance.<sup>37</sup> No action occurred in 2015 on the proposal to amend the Pennsylvania constitution.

### C. The Constitutional Way Forward?

The approach of the Illinois and Pennsylvania Supreme Courts means that court-imposed definitions of charitable use can be expanded in those states only through a constitutional amendment process. This approach creates several problems.

available at <https://s3.amazonaws.com/s3.documentcloud.org/documents/1383411/rpt-proptaxexemptions-12182014-1gw2-final2.pdf>.

<sup>34</sup>Senate Bill 4; Regular Session 2015-2016, <http://www.legis.state.pa.us/cfdocs/billinfo/billinfo.cfm?year=2015&ind=0&body=S&type=B&bn=0004>. For the National Council of Nonprofit's blog post on the Feb. 2015 hearing, go to <https://www.councilofnonprofits.org/thought-leadership/the-fault-line-nonprofit-property-tax-exemptions>. For David Thompson's testimony, go to <http://finance.pasenategop.com/files/2015/02/david-thompson.pdf>

<sup>35</sup>Rich Lord, "Proposed Pennsylvania Tax-Exemption Amendment Stalls," *Pittsburgh Post-Gazette*, Mar. 27, 2015 ("A proposed change to the state Constitution, which aims to give legislators more power to set rules for tax exemptions, has stalled in the House after whizzing through the Senate, jeopardizing its chances of appearing on the November ballot").

<sup>36</sup>Chris Potter and Rich Lord, "Pennsylvania Bill Debates Definition of Taxable Charities," *Pittsburgh Post-Gazette*, Mar. 30, 2015.

<sup>37</sup><http://www.legis.state.pa.us/cfdocs/billInfo/BillInfo.cfm?year=2015&ind=0&body=S&type=R&bn=28>.

First, unless the courts are flexible, this view of constitutional supremacy locks in definitions of charity that often do not account for societal changes. Indeed, the modern nonprofit hospital looks nothing like the stand-alone community hospital of the 1960s. While that does not necessarily mean that exemption standards should change to accommodate the evolution of these organizations, it does mean that one of the traditional roles of the legislature — adjusting the law to account for societal changes — cannot be applied to definitions of charity for property tax exemption purposes. The 2015 New Jersey tax court’s invitation to the legislature in denying exemption to Morristown Medical Center (discussed in Part III.A., below) provides an interesting contrast: “If the property tax exemption for modern non-profit hospitals is to exist at all in New Jersey going forward, then it is a function of the legislature and not the court to promulgate what the terms and conditions will be. Clearly, the operation and function of modern non-profit hospitals do not meet the current criteria for property tax exemption under . . . applicable case law.”<sup>38</sup>

Second, while disputes over the validity of legislative solutions are being litigated, gaps persist, leaving taxpayers and local taxing jurisdictions dealing with continual uncertainty. (The justices in the minority in both the Illinois *Provena* case and the Pennsylvania *Camp Hachshara* case recognized the difficulties that would ensue with a hamstrung legislature.) Indeed, when the Illinois legislation was being worked out, the Civic Federation had suggested that the only definitive way forward would be to amend the state constitution.<sup>39</sup>

Although the doctrine of separation of powers offers an important balance in a constitutional system, state supreme courts should reflect on the downside of too narrowly construing legislative authority regarding charitable property tax exemptions. Recognizing that the legislature has a significant role to play in the evolution of the definition of charity is not capitulation to the legislative branch but rather a pragmatic acknowledgment that litigation is an unsatisfactory way to resolve public policy differences, particularly when it is a question of public finance and more particularly when concepts as vague as “charity” are involved.

<sup>38</sup>AHS Hospital Corp., *supra* note 3.

<sup>39</sup>In its recommendations for legislative action, the Civic Federation cautioned: “To eliminate any possible uncertainty as to whether the General Assembly lacks plenary authority to define clear legislative standards of eligibility because of judicial decisions limiting ‘charitable use’ under . . . the Illinois Constitution to criteria defined by the courts, the Civic Federation recommends that, longer term, a constitutional amendment be proposed to confirm such authority in the General Assembly.” Civic Federation Position Statement on Charitable Property Tax Exemptions for Non-Profit Hospitals (Chicago, Feb. 27, 2012), at <http://www.civiced.org/civic-federation/publications/position-statement-charitable-property-tax-exemptions>.

#### D. Applying Standards for Property-Tax Exemption for Charities

Meanwhile in New Jersey, all eyes have been focused on Princeton University’s efforts to fight off a challenge to its tax exemption. As explained by the New Jersey Center for Non-Profits:<sup>40</sup>

In *Fields v. Trustees of Princeton University*, a case attracting national attention, four Princeton residents are seeking to revoke the entire property tax exemption of Princeton University based on a far-reaching set of grounds, including the University’s investments, the payment of patent royalties to some of its faculty in accordance with federal statute, and some fee-based operations such as cafés.

Since 2001 New Jersey law has provided for a prorated property tax exemption structure under which a property owned by a charitable organization that is used for mixed purposes, both charitable and non-charitable, is only subject to tax on the non-charitable portion. Yet the plaintiffs in the Princeton case are seeking to revoke the University’s property tax exemption in its entirety based on allegations surrounding some of the University’s properties, without regard to their proportion in relation to the University’s mission or other exempt functions. Unlike many of the other property tax challenges across the nation, in this case the municipality is named as a codefendant.

According to one press report on Tax Court Judge Vito Bianco’s decision to allow the case to proceed: “Public interest lawyer Bruce Afran, who represents a handful of Princeton residents in the case, said yesterday . . . ‘This is the first time this type of challenge has been filed in any state.’”<sup>41</sup> Note that because of the direct injury, a taxpayer may more easily challenge property tax exemption than meet the requirements for standing under federal jurisprudence.

It seems preposterous that Princeton University has been unable to shake this challenge from a private litigant charging that high levels of income from royalties, some shared with faculty, converts the institution into a commercial enterprise precluded from the charitable property tax exemption. (In 2014 the town, which has no beef with the university, entered into a seven-year, \$21.7 million PILOT agreement.<sup>42</sup> The plaintiff’s attorney,

<sup>40</sup>Go to [http://www.njnonprofits.org/AmicusBriefFiled\\_PrincetonU.html](http://www.njnonprofits.org/AmicusBriefFiled_PrincetonU.html); see also <http://www.njnonprofits.org/PropertyTaxExemption.html>.

<sup>41</sup>Jon Offredo, “Lawsuit Challenging Princeton University’s Tax-Exempt Status Won’t Be Dismissed,” *Times of Trenton*, June 29, 2013. This article’s subheading reads: “The school’s policy of sharing patent royalties with faculty could cost the university an additional \$20 to 30 million in taxes a year.”

<sup>42</sup>Nicole Mulvaney, “Princeton Council Votes to Accept 7-year, \$21.7 Million Deal with Princeton University,” *Times of Trenton*, Apr. 28, 2014 (“The university will also make five additional payments for municipal projects that serve the university’s interests as well as the town’s, such as \$500,000 for construction of a new Princeton First Aid and Rescue Squad

(Footnote continued on next page.)

however, told town residents that their property taxes would fall by a third if Princeton University were taxable.<sup>43</sup> Granted, property tax exemption does not necessarily track the federal regime, but does anyone really think Princeton is going to lose exemption on this ground?

But the *Princeton* case is a distraction to the real action in New Jersey.<sup>44</sup> At the end of June, the same judge<sup>45</sup> essentially ended property tax exemption for most, if not all, nonprofit hospitals in New Jersey in upholding the municipality's denial of exemption for Morristown Medical Center.<sup>46</sup> (The named party is the corporate parent, Atlantic Health System (AHS).)

In *Morristown*, Judge Bianco's observations<sup>47</sup> brought back memories of the U.S. House Ways and Means Oversight Subcommittee hearings on the unrelated business income tax, where Chairman Jake Pickle, D-Texas, expressed alarm that the corporate chart of a modern hospital system demonstrated uncharitable "empire building." Judge Bianco declared:

Non-profit hospitals have changed significantly, however, from their early origins as charitable alms houses providing free basic medical treatment to the infirm poor. Today they are sophisticated centers of medical care, and in some cases, education, providing a litany of medical services regardless of a patient's ability to pay.

Recently, New Jersey has experienced the emergence of tax-paying, *for-profit hospitals* now competing for the same pool of medical professionals and

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facility and \$500,000 toward the purchase of fire-fighting apparatus, among others"). For the university's take on the PILOT agreement, go to <http://www.princeton.edu/main/news/archive/S39/83/46A51/index.xml?section=newsreleases>.

<sup>43</sup>Lea Kahn, "Community Gathers to Talk About Possible Solutions to Affordable Housing Issue," May 18, 2015, at [http://www.centraljersey.com/articles/2015/05/28/the\\_princeton\\_packe\\_t/news/doc555a30cdd6b9a310507408.txt](http://www.centraljersey.com/articles/2015/05/28/the_princeton_packe_t/news/doc555a30cdd6b9a310507408.txt) ("If the university's tax-exempt status is voided, the town could collect millions of dollars in property taxes, Mr. Afran said. The average property tax bill could be reduced by about 35 percent . . . , he said."). The lead private plaintiff is the same litigant, I understand, who also sought to stop the "dinky" train station from relocating a few hundred feet.

<sup>44</sup>Princeton and the plaintiffs might resolve the dispute through mediation. See Nicole Mulvaney, "Mediator May Resolve Lawsuit Challenging Princeton University's Tax-Exempt Status," *Times of Trenton*, May 8, 2015.

<sup>45</sup>In September 2014, Princeton lost an attempt to move its case from Morristown to Trenton, arguing it would make "it more convenient for school officials and attorneys to attend the hearings at a closer location." Nicole Mulvaney, "Princeton Univ. Denied Attempt to Dismiss Another Lawsuit Challenging Tax-Exempt Status," *Times of Trenton*, Feb. 12, 2015.

<sup>46</sup>An excellent summary and other material is available at [http://www.njnonprofits.org/PropertyTax\\_MorristownMedical.html](http://www.njnonprofits.org/PropertyTax_MorristownMedical.html).

<sup>47</sup>The court appended to its opinion two appendices: one setting out the Atlantic Health System Inc.'s organizational chart and the other itemizing the corporate officers and executives (and their duties) for each of these entities. AHS Hosp. Corp., 28 N.J. Tax Ct. at 538.

patients as their non-profit forebears. Like their new for-profit competitors, today's non-profit hospitals have evolved into labyrinthine corporate structures, intertwined with both *non-profit* and *for-profit* subsidiaries and unaffiliated corporate entities.<sup>48</sup>

Later in his opinion<sup>49</sup> he stated: "despite this evolution, hospitals continued to benefit from tax exemptions due to their long tradition of providing free charitable care for those in need. . . . As American hospitals have evolved from their charitable origins dating to the mid-18th century, so too have our laws granting tax exemptions to hospitals, originally as charitable institutions for *charitable purposes*, and later as associations or corporations for *hospital purposes*."

The activities of for-profit physicians on the premises doomed Morristown's claim for exemption, the court explained: "Of the three types of physicians that provide care at the subject property, voluntary physicians and exclusive contract physicians (i.e. RAP doctors) are private, for-profit doctors that are not employed by the Atlantic healthcare system." Because these physicians are taxable, the court sought to "determine where these physicians practice on the Subject Property" and "where these physicians *do not* practice on the Subject Property in order to identify the areas of the Hospital where exemption may be preserved." However, it "became clear that employed physicians, voluntary physicians, and RAP doctors were not contained within any particular area of the Subject Property. In fact, they all worked throughout the Subject Property without limitation or restriction." Moreover, the court expressed alarm that these physicians "not only operate throughout the Hospital, but they use the Hospital facility to generate private medical bills to patients. These bills are charged directly by the private physicians to the patients, and all the money goes directly to the physicians."<sup>50</sup> The court concluded: "assuming that for-profit hospitals have the same kinds of arrangements with for-profit doctors as here, . . . the Hospital is asking the court to embrace an interpretation of N.J.S.A. 54:4-3.6 that would result in an inequitable advantage to non-profit hospitals over for-profit hospitals."

Separately, Judge Bianco held that the hospital's relationships with for-profit affiliates precludes exemption:

By entangling its activities and operations with those of for-profit entities, the Hospital allowed its property to be used for profit. This commingling of effort and activities with for-profit entities was significant, and a substantial benefit was conferred upon for-profit entities as a result. Accordingly, the Hospital failed to satisfy the profit test as set forth in *Paper Mill Playhouse*, and is precluded from exemption.<sup>51</sup>

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<sup>48</sup>*Id.* at 465.

<sup>49</sup>*Id.* at 484 (emphasis in original).

<sup>50</sup>*Id.* at 501-502 (emphasis in original).

<sup>51</sup>The court stated, *id.* at 513 (emphasis in original):

"The Hospital provided substantial subsidies to various related and unrelated for-profits in the form of working capital  
(Footnote continued on next page.)

As to executive compensation, even though the hospital's board followed the practices under the federal rebuttable presumption of reasonableness, the court refused to apply this presumption on the ground that the hospital's expert failed to address whether "the hospitals he chose for the peer group in fact did the same thing." The court added: "This is similar to why comparing assessments of different properties in a property tax appeal is disallowed — the other assessment may be incorrect."<sup>52</sup> The court concluded: "If the only consideration is what similar hospitals set as salaries, then the salaries would always be reasonable; a conclusion wholly self-serving to all non-profit hospitals." The court was also critical of incentive compensation paid to staff physicians: "The incentive pools were derived from departmental expenses and the profit was split between the hospital and the employed physicians, indicating the operation was conducted for a profit-making purpose. Accordingly, the court finds that this incentive provision of the employed physicians' contracts violates the profit test."<sup>53</sup>

Judge Bianco separately ruled that the managed services contract with Aramark (for food and the cafeteria, laundry, environmental, and patient transportation) also violated the profits test, and so "the corresponding areas of the Hospital where Aramark operates are subject to taxation."<sup>54</sup>

Finally, the court rejected exemption for the gift shop.<sup>55</sup> The court, though, upheld exemption for the visitors' parking garage,<sup>56</sup> employee fitness center, and

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loans, capital loans, and recruitment loans. With respect to the captive P.C.'s, these physician groups routinely operated at a loss and money from profitable departments at the Hospital was transferred to these 'loss leaders' to subsidize them. Moreover, Hospital employees worked at these practices, which continued to operate as for-profit entities.

Furthermore, Dr. Conroy served as the President and sole shareholder of each of these practices, and as the Vice President of Atlantic and President of the Hospital. The court finds it impossible for an arm's-length transaction to occur under such circumstances. The court is satisfied that the Hospital's arrangement with its captive P.C.'s violates the profit test as applied in *International Schools*.<sup>57</sup>

<sup>52</sup>*Id.* at 520 (footnote and citation omitted).

<sup>53</sup>*Id.* at 526.

<sup>54</sup>*Id.* at 530, citing the contract's revenue and expense-splitting features (or, at least, potential).

<sup>55</sup>*Id.* at 533 ("the Gift Shop is merely a convenience for hospital visitors who could otherwise purchase similar gift items at a variety of stores outside the Subject Property. The use of the Gift Shop is therefore, not reasonably necessary to any hospital purpose, but rather it serves as a form of competition to commercially owned facilities. For this reason, the Gift Shop fails the use test and is not exempt from taxation.")

<sup>56</sup>*Id.* at 528-29 ("Because the Hospital paid a fixed management fee and the Hospital bore the expenses of operating the parking garage, the Hospital's fee arrangement with Gateway is no different than compensation paid to Hospital employees. There is also no allegation that the management fee paid to Gateway or the salaries paid to Gateway employees were excessive. Finally, the Hospital operates the Visitors' Parking Garage at a loss. Accordingly, the court is satisfied that the Management Agreement between the Hospital and Gateway

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auditorium (but held that the claim for exemption for the employee daycare center failed for lack of proof).<sup>57</sup>

In its concluding section, the opinion declared: "if the property tax exemption for modern non-profit hospitals is to exist at all in New Jersey going forward, then it is a function of the Legislature and not the courts to promulgate what the terms and conditions will be. Clearly, the operation and function of modern non-profit hospitals do not meet the current criteria for property tax exemption under N.J.S.A. 54:4-3.6 and the applicable case law."

Morristown Medical Center's vulnerabilities seem more typical than for Princeton University, in which the challenge comes from a taxpayer. Both cases, though, suggest saber rattling, a prelude to a negotiated financial arrangement. As to the immediate matter, Morristown and AHS Hospital Corp quickly reached a settlement, calling for the hospital to pay about \$15.5 million in back taxes, interest, and penalties, plus tax on almost a quarter of its facility, estimated at \$1.05 million a year, for the next 10 years.<sup>58</sup>

But it didn't take much longer for a legislative response.<sup>59</sup> With the unanimous support of the New Jersey Hospital Association board,<sup>60</sup> a year-end deal would have required all financially healthy hospitals in New Jersey to make annual "Community Service Contributions" payments. Proposed to take effect in January 2016, the new statute called for tax-exempt hospitals (but not government facilities) to pay \$2.50 per day for each hospital bed in the prior year plus \$250 per day (reduced in committee from the original proposal of \$750) for any satellite emergency care facility.<sup>61</sup> Unprofitable hospitals

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meets the requirements of the profit test as articulated in *Paper Mill Playhouse*, and therefore, the Visitors' Parking Garage area is exempt from taxation.")

<sup>57</sup>*Id.* at 534-35.

<sup>58</sup>The Nov. 11, 2015, settlement is available at <http://assets.njspotlight.com/assets/15/1116/1922>. The settlement requires Atlantic Health System, the parent entity, to pay whichever is higher, the agreed amount specified or any payment required by future legislation. A hospital spokesman stated that AHS is also seeking to resolve tax issues with its other host communities. Tim Darragh, "Morristown Settlement Could Lead to N.J. Hospitals Shelling Out Millions," Nov. 14, 2015, at [http://www.nj.com/healthfit/index.ssf/2015/11/morristown\\_settlement\\_could\\_lead\\_to\\_nj\\_hospitals\\_shelling\\_out\\_millions.html](http://www.nj.com/healthfit/index.ssf/2015/11/morristown_settlement_could_lead_to_nj_hospitals_shelling_out_millions.html).

<sup>59</sup>Links to the bill text and other information are available at <http://www.njleg.state.nj.us/bills/BillView.asp?BillNumber=A4903>.

<sup>60</sup>Press Release, "Statement of Betsy Ryan, NJHA President and CEO, on NJHA's Support of S-3299/A-4903," Dec. 21, 2015, <http://www.njha.com/pressroom/2015-press-releases/dec-21-2015-statement-of-betsy-ryan-njha-president-and-ceo-on-njhas-support-of-s-3299a-4903/>.

<sup>61</sup>As the bill rushed to passage, the Assembly and Senate agreed to add a 2 percent annual inflationary adjustment to mollify the unhappy municipalities, who "complained the fee was too small." Susan Livio, "'Tax' on N.J. Nonprofit Hospitals Advances," Jan. 8, 2016, at [http://www.nj.com/politics/ind-ex.ssf/2016/01/nj\\_panel\\_approves\\_first-ever\\_tax\\_on\\_nonprofit\\_hosp.html](http://www.nj.com/politics/ind-ex.ssf/2016/01/nj_panel_approves_first-ever_tax_on_nonprofit_hosp.html).

could have applied for an exemption. A statement prepared by the Assembly Appropriations Committee explained:<sup>62</sup>

As amended, this bill maintains the property tax-exempt status of a nonprofit hospital with for-profit medical providers on site . . . , and requires nonprofit hospitals to, in lieu of property taxes, pay an annual community service contribution to their host municipalities. The . . . community service contributions are required to be used to offset the costs of public safety services, such as police and fire safety services, or to reduce the property tax levy. Any voluntary payments made by a nonprofit hospital for the same purpose of offsetting public safety costs will count towards the obligation. . . .

The bill's legislative fiscal estimate determined community service contributions from exempt hospitals would total almost \$21 million in the first year.<sup>63</sup> The Office of Legislative Services added: "Total collections will be affected by the effect of other voluntary contributions made by owners of nonprofit hospitals to municipalities on community service contribution liabilities, and whether any owner receives an exemption from payment for a particular tax year" — while noting that "[i]nformation on the total amount of voluntary contributions made by the owners of nonprofit hospitals is not available at this time."

Despite the opposition of the New Jersey League of Municipalities,<sup>64</sup> the state Senate and Assembly passed the bill on January 11, 2016, the last day of the legislative session, but the bill was allowed to lapse by the governor.<sup>65</sup> With 15 nonprofit hospitals appealing tax bills, on March 18, 2016 Governor Christie announced a two-year moratorium to give a newly appointed commission time to find a solution, but that controversial route requires legislative enactment.<sup>66</sup>

<sup>62</sup>See N.J. Assembly Appropriations Committee, Statement to A4903 with committee amendments, Jan. 7, 2016 at [http://www.njleg.state.nj.us/2014/Bills/A5000/4903\\_S1.HTM](http://www.njleg.state.nj.us/2014/Bills/A5000/4903_S1.HTM).

<sup>63</sup>Legislative Fiscal Estimate, S3299, State of New Jersey, 216th Legislature (Dec. 24, 2015), available at [http://www.njleg.state.nj.us/2014/Bills/S3500/3299\\_E1.HTM](http://www.njleg.state.nj.us/2014/Bills/S3500/3299_E1.HTM). The municipalities would be required to remit 5 percent of this amount to the appropriate county governments.

<sup>64</sup>N.J. League of Municipalities, Weekly Policy Update, Jan. 8, 2016, at <http://www.njslom.org/letters/2016-0108-weekly-update.html> ("[By exempting] all acute care hospital properties owned by non-profits incorporated in New Jersey [the bill] also extends that exemption to any for-profit medical service activity which takes place on that property. In effect, non-profits that act as real-estate holding companies will provide a property tax exemption benefit for the for-profit activities which take place on their properties").

<sup>65</sup>Go to <http://www.njleg.state.nj.us/bills/BillView.asp> ("1/19/2016 Pocket Veto — Bills not Acted on by Governor-end of Session"); Governor Chris Christie Takes Action on Pending Legislation from the 216th Legislative Session, Jan. 19, 2016, at <http://www.nj.gov/governor/news/news/552016/approved/20160119a.html>.

<sup>66</sup>See Susan K. Livio, "Christie Pushes for 2-Year 'Freeze' on Taxing Hospitals," *NJ Advance Media for NJ.com*, Mar. 18, 2016, at

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The implications of the *Morristown* decision for other types of nonprofits await a separate legislative solution — if any.<sup>67</sup> Ominously, in November 2015, Judge Bianco denied Princeton University's motion that the burden of proof should shift from it, the claimant for exemption, to the plaintiffs challenging the exemption.<sup>68</sup>

## II. Reducing the Burdens of Which Government?

"Government" not being a monolith, a "quid pro quo" theory of property tax exemption raises interesting constitutional and interpretive questions of fit between the jurisdiction bearing the cost of exemption and the population served by the would-be exempt charity.

### A. Out-of-State Beneficiaries and the Commerce Clause

States on occasion try to limit favorable tax treatment to charities that serve only in-state residents.<sup>69</sup> The issue has arisen under both the property tax regime and the income tax regime, with respect to the charitable contribution deduction.

One would have thought the U.S. Supreme Court's decision in *Camps Newfound/Owatonna* would preclude attempts to deny tax exemption or deductibility to charities that benefit those beyond state borders.<sup>70</sup> And indeed the few subsequent statutory or administrative proposals taking this position, when challenged, have died the death they deserve.

[http://www.nj.com/politics/index.ssf/2016/03/christie\\_puts\\_a\\_hold\\_on\\_taxing\\_nonprofit\\_hospitals.html](http://www.nj.com/politics/index.ssf/2016/03/christie_puts_a_hold_on_taxing_nonprofit_hospitals.html) (identifying the 15 hospitals); Press Release, "Governor Christie Announces Agreement to End Uncertainty on Property Tax Exemptions for New Jersey's Community Hospitals" (Mar. 18, 2016), at <http://www.state.nj.us/governor/news/news/552016/approved/20160318a.html>.

<sup>67</sup>See editorial, "One-Size-Fits-All Hospital Tax Bill Flawed," [*Bergin*] *Record*, Jan. 8 2016, at <http://www.dailyrecord.com/story/opinion/editorials/2016/01/08/one-size-fits-hospital-tax-bill-flawed/78523682/> ("the state League of Municipalities . . . rightly questioned whether the 'contribution' would pass constitutional muster by giving special treatment to one type of tax-exempt institution").

<sup>68</sup>*Fields v. Princeton University*, 28 N.J. Tax 574 (Nov. 5, 2015). The university is seeking an interlocutory appeal. See New Jersey Center for Nonprofits, Motion and Brief (Dec. 7, 2015), at [http://www.njnonprofits.org/12072015Amici\\_sMotionForLeaveToAppearAsAmiciCuriae.PDF](http://www.njnonprofits.org/12072015Amici_sMotionForLeaveToAppearAsAmiciCuriae.PDF).

<sup>69</sup>Not all states act parochially. As a matter of statutory interpretation, the Vermont Supreme Court rejected the argument of a town that argued "that implicit in the definition of public use is a requirement that the people served must be primarily citizens of Vermont and the Town because the Legislature would have no reason to make property exempt to benefit residents of other states." *Inst. of Prof'l Practice, Inc. v. Town of Berlin*, 811 A.2d 1238, 1240 (Vt. 2002) (holding exempt a building used for the administration of a charity operating out-of-state group homes, foster homes, and assisted living programs for those with developmental and other disabilities).

<sup>70</sup>*Camps Newfound/Owatonna, Inc. v. Town of Harrison, Maine*, 520 U.S. 564 (1997); see Evelyn Brody, "Hocking the Halo: Implications of the Charities' Winning Briefs in *Camps Newfound/Owatonna, Inc.*," 27 *Stetson L. Rev.* 433 (1997), reprinted in *Exempt Org. Tax Rev.* 31 (April 1998).

California charities suffered a scare in 2011.<sup>71</sup> Efforts by attorney Ofer Lion and others moderated an attempt by the Board of Equalization<sup>72</sup> to construe California's "welfare exemption" as requiring a nonprofit to "primarily benefit persons within the geographical boundaries of the State of California."<sup>73</sup> Lion explained: "The Board's geographically-based benefit requirement for qualification under the welfare exemption is known as the 'community benefit test.'" He reported: "The 2011 Letter now specifically indicates that '[i]n no event . . . is the community benefit test applied on a strict mathematical basis with a threshold over which the test is met (e.g., 50 percent or more of the activities must benefit the California community) and under which the test fails.'" <sup>74</sup> However, the BOE's website in June 2015 shows that the agency continues to require benefit to Californians.<sup>75</sup> In

<sup>71</sup>See generally David van den Berg, "Some California Tax Lawyers Question Property Tax Exemption Rule," *Exempt Org. Tax Rev.* 235 (Sept. 2011) (reporting: "Since May 1, 2008, the BOE has denied exemption to at least four organizations because the applicants did not meet the community benefit test, according to BOE spokeswoman Anita Gore"); Stephanie Strom, "California Scrutinizes Nonprofits, Sometimes Ending a Tax Exemption," *N.Y. Times*, Aug. 15, 2011, p. B3.

<sup>72</sup>See <http://www.boe.ca.gov/proptaxes/pdf/lta11044.pdf>.

<sup>73</sup>Compare Ofer Lion, "California Enforces New Isolationist View on Property Tax Exemptions for Nonprofits," *Mitchell Silberberg & Knupp Charitable Sector Alert* (Aug. 4, 2011), available at <http://www.msk.com/news/pub.cfm?id=1716&type=Alert>, with Ofer Lion, "California Loosens Its Geographically-Based Restriction on Property Tax Exemptions for Nonprofits," *Mitchell Silberberg & Knupp Charitable Alert* (Dec. 12, 2011), available at [http://www.msk.com/images/ps\\_attachment/attachment1782.pdf](http://www.msk.com/images/ps_attachment/attachment1782.pdf).

<sup>74</sup>California State Board of Equalization, Letter to Assessors, No. 2011/044 (Dec. 7, 2011), <http://www.boe.ca.gov/proptaxes/pdf/lta11044.pdf>, clarifying the "use of the term 'primarily' in the administration and application of the community benefit test to a charitable organization's claimed charitable activities for purposes of the welfare exemption." The guidance concludes: "Even in situations where quantification of charitable activities benefitting the California community is possible, all facts and circumstances are considered to determine whether the test is met even in situations where the California community receives only a small percentage of benefit from the charitable activities. As currently applied by staff, the community benefit test is met if all of the facts and circumstances demonstrate that the charitable activities performed by the nonprofit organization confer some 'meaningful,' 'important,' or 'significant' benefit to persons within the geographic boundaries of the State of California." See also California State Board of Equalization, *Property Tax Welfare Exemption* (Publication 149 March 2008), available at <http://www.boe.ca.gov/proptaxes/pdf/pub149.pdf>; and Memorandum from the CSBOE, "Property and Special Taxes Department, to County Assessors, Community Benefit Test For The Welfare Exemption" (No. 2008/034, May 2, 2008), available at <http://www.boe.ca.gov/proptaxes/pdf/lta08034.pdf>. Background documents and timeline are maintained at [http://www.boe.ca.gov/proptaxes/welfarebenefit\\_test.htm](http://www.boe.ca.gov/proptaxes/welfarebenefit_test.htm).

<sup>75</sup>This and other documents and timeline are maintained at [www.boe.ca.gov/proptaxes/welfarebenefit\\_test.htm](http://www.boe.ca.gov/proptaxes/welfarebenefit_test.htm). See also FAQ 11 at [http://www.boe.ca.gov/proptaxes/faqs/welfarebenefit\\_test.htm](http://www.boe.ca.gov/proptaxes/faqs/welfarebenefit_test.htm), which concludes: "The charitable activities must be

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the online file of memos leading up to the BOE's 2008 directive, the revenue estimate<sup>76</sup> assumes that current practice has been to follow the narrower view of eligibility, and so the estimate is of how much revenue would be lost if the board adopted the broader view. To what extent do we know if this was actually the case, or did assessors just give charities their exemption without regard to where the community benefit fell?

Note that a similar issue arose in the Pennsylvania summer camp case described above. That court, however, dodged the issue by describing the issue as outside its grant of review.<sup>77</sup>

A similar constitutional dispute recently was also avoided in Vermont. The end of the 2015 budget process in Vermont brought a sigh of relief to taxpayers seeking to deduct their charitable contributions under the state income tax.<sup>78</sup> Under the version passed by the state Senate, deductible donations would have been defined as those made to charities located in (or near) Vermont and

found to primarily benefit persons within the geographical boundaries of the State of California."

<sup>76</sup>Available at [http://www.boe.ca.gov/proptaxes/pdf/Item\\_L1\\_031808.pdf](http://www.boe.ca.gov/proptaxes/pdf/Item_L1_031808.pdf). But see Memorandum from General Counsel to the California State Board of Equalization, "Request for Guidance — Welfare Exemption; 'Community Benefit Test' Under Revenue and Taxation Code section 214; Feb. 1, 2008 Board Meeting — Chief Counsel Matters" 10-11 (Jan. 11, 2008) (discussing the commerce clause issue).

<sup>77</sup>*Mesivtah Eitz Chaim of Bobov Inc.*, *supra* note 13 ("a charity can relieve the government of some of its burden, even if the beneficiaries are not in the jurisdiction from which it seeks a tax exemption. . . . However, this issue is outside the scope of our grant of allocatur.")

<sup>78</sup>See <http://legislature.vermont.gov/bill/status/2016/H.489>. See also the National Council of Nonprofits' May 18, 2015, Nonprofit Advocacy Matters:

In a deal struck Saturday night at the end of the Vermont legislative session, legislators voted to protect the existing state tax incentive for charitable giving, thus rejecting separate approaches passed earlier in the session that would have restricted charitable deductions. The final deal exempts the charitable deduction and medical expenses from a new cap on itemized deductions. In March, the House passed a bill that would have capped all itemized deductions (including mortgage interest, health costs, and charitable donations) at \$15,000 for individuals and \$31,000 for couples. The Senate version would have preserved the charitable deduction for state-based nonprofits, but denied taxpayers tax deductions for donations to nonprofits that do not both reside and operate in the state. A similar provision was ruled unconstitutional by the Minnesota Supreme Court in 2004. Throughout the legislative session, CommonGood Vermont and other nonprofit leaders demonstrated to lawmakers the value of the work of charitable nonprofits and the adverse consequences of limiting giving incentives. On May 13th, the Governor held a news conference on the statehouse steps, where he said, "Limiting the ability of Vermonters to give to charities is not just a bad idea, it would be terrible economic policy. Charities and nonprofits in this state not only provide services to our neighbors in need, they employ our neighbors, drive economic activity, and contribute greatly to our state's economic success."

serving Vermonters.<sup>79</sup> The National Council of Nonprofits commented that such a provision “would no longer permit tax deductions for donations to international efforts, even relief related to the Nepal earthquake.”<sup>80</sup>

A similar parochial provision had been voided by the Minnesota Supreme Court, which cited *Camps Newfoundland/Owatonna* to strike down a state alternative minimum tax deduction allowed only for contributions made to charities that serve Minnesota residents.<sup>81</sup> The plaintiff had made a lump sum contribution to a donor-advised fund established by the Fidelity Charitable Gift Fund in Boston and had argued that future distributions would be made only to Minnesota charities. The Minnesota Supreme Court remanded for a determination of remedy: expanding or eliminating the Minnesota AMT deduction so that it applied equally to all charitable donations. In the meantime, the Minnesota Legislature chose the former remedy.<sup>82</sup>

But parochial attempts to limit exemption continue. In April 2015 the Wyoming Department of Revenue issued final regulations setting forth standards for property tax exemption.<sup>83</sup> With respect to schools, orphan asylums, and hospitals, the regulation provides in part:<sup>84</sup> “(a) The fundamental basis for this exemption is the benefit conferred upon the public by schools, orphan asylums and hospitals, and the consequent relief, to some extent, of the burden upon the state to educate, care and advance the interests of its citizens. Such institutions thus confer a benefit upon the general citizenry of the state and render an essential service for which they are relieved of certain burdens of taxation.” Paragraph (e) states: “If a school, orphan asylum or hospital confers benefit only upon the citizens of another state, its property is not exempt.” Similarly, the regulation dealing with “charitable societies or associations”<sup>85</sup> declares at the end of paragraph (a): “The fundamental basis for this exemption is the benefit conferred upon the public, and the consequent relief, to some extent, of the burden upon the state to care and advance the interest of its citizens.” Paragraph (c) pro-

vides: “The property must be used directly for the operation of the charity, which would directly benefit the people of this state.”

## B. Intrastate Taxing Jurisdictions: War Within the States

Municipalities and other local taxing jurisdictions suffer under a structure in which exemption is decided at the state level, but the burden is felt within the borders of the localities. Because the population served by exempt charities often extends more broadly, the taxpayers understandably wonder why they should pick up the burden of financing services that benefit exempt properties. (See also the discussion of PILOTs and user fees, in Part III, below.)

In *Provena*, the Illinois Supreme Court’s plurality opinion included the novel proposition that “reducing the burdens of government” requires that the government whose burden is reduced must be the same government that would collect revenue if the property were taxable. Specifically, the three justices declared: “While Illinois law has never required that there be a direct, dollar-for-dollar correlation between the value of the tax exemption and the value of the goods or services provided by the charity, it is a *sine qua non* of charitable status that those seeking a charitable exemption be able to demonstrate that their activities will help alleviate some financial burden incurred by the affected taxing bodies in performing their governmental functions.”<sup>86</sup> The concurrence/dissenting opinion disagreed with the plurality’s premise: “Alleviating some burden on government is the reason underlying the tax exemption on properties, not the test for determining eligibility. Despite acknowledging this (slip op. at 19-20), the plurality converts this rationale into a condition of charitable status. I neither agree with this, nor do I believe that Provena Hospitals failed to show it alleviated some burden on government.”<sup>87</sup>

Compare a similar argument raised and rejected in Kansas, where an appeals court held that the statute was

<sup>79</sup>See posting by CommonGood Vermont on May 3, 2015, at <http://blog.commongoodvt.org/2015/05/vt-senate-passes-budget-tax-bills-mostly-preserves-charitable-deductions/> (quoting bill language defining “qualified donee” as “a donee that provides a direct benefit to a charitable cause in this State”). The bill included a favorable presumption if “(ii) the [charitable] donee maintains a physical presence, local affiliate, or chapter within the State, or within 25 miles of the State; and (iii) at least some part of the donee’s charitable work occurs within the State, or within 25 miles of the State.” Finally, the bill would have required the tax department to publish, by December 1 each year, “the list of donees who are considered qualified under this section for the current tax year.”

<sup>80</sup>*Nonprofit Advocacy Matters*, May 4, 2015.

<sup>81</sup>*Chapman v. Commissioner of Revenue*, 651 N.W.2d 825, 833-35 (Minn. 2002).

<sup>82</sup>See discussion in Evelyn Brody, “Whose Public? Parochialism and Paternalism in State Charity Law Enforcement,” 79 *Ind. L.J.* 937 (2004).

<sup>83</sup>In LEXIS, these are available at 2014 WY Regulation Text 5722 (adopted Apr. 7, 2015).

<sup>84</sup>Section 12, issued under W.S. 39-11-105(a)(xxv).

<sup>85</sup>Section 15, issued under W.S. 39-11-105(a)(xli).

<sup>86</sup>*Id.* at 1148. The plurality identified the 10 taxing jurisdictions interested in this case: “Champaign County, Champaign County Forest Preserve District, Community College District 505, Unit School District 116, Urbana Corporation, Cunningham Township, Urbana-Champaign Sanitary District, Urbana Park District, Champaign-Urbana Mass Transit District, and Champaign-Urbana Public Health District.” *Id.* The opinion noted: “In reaching this conclusion, we do not mean to suggest that Provena Hospital’s entitlement to a charitable property tax exemption was dependent on its ability to show that its use of the PCMC parcels reduced the burden on each of the affected taxing districts. It was, however, required to demonstrate that its use of the property helped alleviate the financial burdens faced by the county or at least one of the other entities supported by the county’s taxpayers.” *Id.* at note 10.

<sup>87</sup>Burke, J., at 1159. The concurrence/dissent could have made a different point about “alleviat[ing] some financial burden incurred by the affected taxing bodies.” If we don’t care about federal tax policy, as the plurality suggests, then getting inadequate compensation from Medicare and Medicaid should count as making a gratuitous transfer to the local government that would otherwise have to care for these patients!

satisfied when “the evidence shows that [Boy Scouts of America] served the needs of the Boy Scout community in its 30-county region, which included Chautauqua County [where the property was located].”<sup>88</sup> The court explained:

The County argues on appeal that community need should be assessed based on meeting a need within the County where the property is located. The argument is premised on the fact that Chautauqua County will bear 100% of the burden if the ranch acreage is removed from the tax rolls, so the County suggests that, to be exempt, the property should be meeting a need within the “community” of the county affected. Such a provincial conception of community need has never been recognized by our caselaw construing 79-201 *Ninth*. For purposes of this statutory exemption, community need must not be assessed solely based on services within the county where the property is located.

### III. Local Self-Help: User Fees and PILOTs

#### A. Data Deficiencies

As a threshold matter, research into property tax exemption suffers from two serious data issues: No ready database exists of real estate owned by nonprofits, and estimates of current fair market value are hard to come by. Looking at holdings of land, buildings, and equipment on Forms 990 (for circa 2009) shows that 52.2 percent of filing nonprofits reported amounts greater than zero; 30.3 percent reported amounts greater than \$100,000; and 19.2 percent reported amounts greater than \$500,000.<sup>89</sup> These self-reported amounts are likely to be book value, and property rolls are even less reliable because assessors have little incentive to spend time valuing property that will not be taxed.

Not surprisingly — in light of their extensive real estate holdings, for-profit competitors, perceived profitability, and even high executive salaries — nonprofit hospitals (and, to a lesser extent, universities) have attracted the most attention from reformers and researchers. A 2015 report published in *Health Affairs* examined the value of all tax benefits, federal and state, provided to

nonprofit hospitals.<sup>90</sup> Overall, the estimated \$24.6 billion in forgone taxes looks like a good deal compared to the \$62.4 billion of community benefits hospitals reported to the IRS.<sup>91</sup> This study found that “estimating the value of the property tax exemption is the most challenging because the methods for appraising hospitals are complex, and the data are difficult to obtain: We relied on a method that uses patient revenue — that is, the amount of revenue generated by patient care — instead of expected earnings to estimate the property value and corresponding property tax. This method has the limitation of assuming that all facilities are equally profitable. In addition, property tax rates vary by municipality, and we were not able to account for this variability.”<sup>92</sup> The report found: “Applying the state-specific property tax-to-revenue ratio to each nonprofit hospital, we estimated a total property tax value of \$4.3 billion (Exhibit 1).”<sup>93</sup>

Similarly, systematic PILOTs literature is sparse. See Parts III.B and C, below, for a discussion of a broad survey by the Lincoln Institute<sup>94</sup> and a survey focused on Illinois.<sup>95</sup>

#### B. Intermediate Tools: First User Fees, Then PILOTs?

Inching toward a negotiated tax result, municipalities seeking to recoup from nonprofits some of the costs of public services provided to their property can turn to user fees and PILOTs (or both).

Unless provided by statute, nonprofit property owners enjoy no exemption from user fees for specific services (such as water, sewage, and trash collection) or from special assessments that relate to improvements that benefit specific property. This feature is not lost on local governments: Census Bureau data from several years ago show that only 30 percent of municipalities’

<sup>88</sup>In the Matter of the Application of Boy Scouts of America Quivira Council for Exemption from Ad Valorem Taxation in Chautauqua County, Kansas, 270 P.3d 1218, 1225 (Kan. App. 2012).

<sup>89</sup>National Center for Charitable Statistics, Digitized 990 Data, 2012 in Joseph Cordes, Presentation on “The Nonprofit Property Tax Exemption: Who Benefits, Who Pays, and by How Much?” for The Urban Institute’s conference on “State and Local Budget Pressures: The Charitable Property-Tax Exemption and PILOTs,” on May 21, 2012, in table on page 5 of Evelyn Brody, Mayra Marquez, and Katherine Toran, “The Charitable Property-Tax Exemption and PILOTs” (Aug. 29, 2012), available at [http://www.urban.org/research/publication/charitable-property-tax-exemption-and-pilots/view/full\\_report](http://www.urban.org/research/publication/charitable-property-tax-exemption-and-pilots/view/full_report). Event material and audio for the gathering on which this policy brief is based, “State and Local Budget Pressures: The Charitable Property-Tax Exemption and PILOTs” (May 21, 2012, Urban Institute, Washington, D.C.), are available at <http://www.urban.org/taxandcharities/events.cfm>.

<sup>90</sup>Sara Rosenbaum, David A. Kindig, Jie Bao, Maureen K. Byrnes, and Colin O’Laughlin, “The Value of the Nonprofit Hospital Tax Exemption Was \$24.6 Billion in 2011,” 34 *Health Affairs* 1, June 17, 2015, available at <http://content.healthaffairs.org/content/early/2015/06/12/hlthaff.2014.1424.full.html>.

<sup>91</sup>*Id.* at 2 (citing “Internal Revenue Service January 28, 2015, report to Congress on private tax-exempt, taxable, and government-owned hospitals. The report is not publicly available and is contained in a letter transmitted to Rep. Paul Ryan (R-WI), chair of the House Budget Committee. Authors will provide the letter containing the report upon request.”).

<sup>92</sup>*Id.* at 4.

<sup>93</sup>*Id.* at 5.

<sup>94</sup>Adam Langley, Daphne A. Kenyon, and Patricia C. Bailin, “Payments in Lieu of Taxes by Nonprofits (Working Paper): Which Nonprofits Make PILOTs and Which Localities Receive Them?” (Sept. 2012), at [http://www.lincolnst.edu/pubs/2143\\_Payments-in-Lieu-of-Taxes-by-Nonprofits](http://www.lincolnst.edu/pubs/2143_Payments-in-Lieu-of-Taxes-by-Nonprofits).

<sup>95</sup>Fred Mayhew and Tammy R. Waymire, “From Confrontation to Congruence: The Potential Role of Payments in Lieu of Taxes in the Economic Development Conversation,” 35 *Public Budgeting & Finance* 19 (Summer 2015).

revenue is attributable to property tax, while 40 percent comes from user fees (the rest is redistributed from the federal and state levels).<sup>96</sup>

As a political and strategic matter, however, the municipality cannot simply target user fees just to nonprofit owners; for example, a water charge has to apply to all similarly situated property regardless of the type of owner. Also, user fees and assessments cannot recoup the general portion of the forgone tax, notably the amount paid for public schools. Moreover, courts will strike down fees to cover the costs of providing essential services, like police and fire protection, that are really disguised taxes from which charities are exempt. Legislative proposals emerge from time to time that would authorize the municipalities to collect a “service fee” to replace a portion of lost tax,<sup>97</sup> but so far, none has been enacted.<sup>98</sup>

Unlike user fees, PILOTs are voluntary. Accordingly, the Lincoln Institute PILOTs study (discussed below) explains: “While the term PILOT can refer to many different types of payments, this report imposes a consistent definition that excludes any payments from for-profit companies or public entities (e.g., housing authorities) and any payments from nonprofits that are not voluntary, such as fees.”<sup>99</sup> Intriguingly, though, the Illinois study suggests that municipalities that seek nonprofit PILOTs typically have already imposed user fees — and, indeed, view PILOTs as a last resort.<sup>100</sup>

<sup>96</sup>Penelope Lemov, “Full Interviews With User-Fee Experts,” *Governing*, May 1, 2009, available at [www.governing.com/article/full-interviews-user-fee-experts](http://www.governing.com/article/full-interviews-user-fee-experts). But see Urban Institute-Brookings Institution Tax Policy Center, “Tax Facts: Local Property Taxes as a Percentage of Local Tax Revenue” (Jan. 12, 2015), at [www.taxpolicycenter.org/taxfacts/displayafact.cfm?Docid=518](http://www.taxpolicycenter.org/taxfacts/displayafact.cfm?Docid=518), reporting that U.S. Census Bureau data found that nationwide property taxes represented 73.5 percent of local government revenue in 2012.

<sup>97</sup>For a 2012 bill that would have enabled a 25 percent essential services PILOT, go to <http://www.rilin.state.ri.us/news/pr1.asp?prid=8059>. For a compilation of news coverage, go to <http://news.providencejournal.com/breaking-news/budget.html?p=1>.

<sup>98</sup>With respect to educational institutions, a “tuition tax” or head tax on students has been beaten back everywhere in the country it has been proposed (notably in Providence and Pittsburgh), but the idea remains attractive to revenue-hungry college towns and cities.

<sup>99</sup>Abstract from Langley, Kenyon, and Bailin, *supra* note 94.

<sup>100</sup>Mayhew and Waymire, *supra* note 95, at 29-30 (“Figure 2 shows that of the nine municipalities reporting a current PILOT agreement [with nonprofits], eight (or 88.9 percent) also charge user fees to nonprofit organizations and have economic development tools including property tax exemptions or abatements. In contrast, only 21 of the 44 cities that report having never considered PILOTs (47.7 percent) also charge user fees and have economic development plans that meet our narrower definition. These results are consistent with our expectations that PILOTs represent a revenue option that will be pursued after having exhausted other options”).

## C. The Shadow World of PILOTs

### 1. Overview

In contrast to other charity tax regimes — and not captured in the data on the value of tax exemption — charities’ property tax benefits can operate on both a formal and an informal level. De jure, tax exemption is principled and fixed, and extra-statutory PILOTs are ad hoc and lack transparency; de facto, however, systematic PILOT programs can be found and an exemption regime can have “political” features. The formal level, though, obviously influences the informal: When a municipality asks a charity for a PILOT, the parties are negotiating in the shadow of the law. The more likely, under state law, that the municipality would succeed in a judicial challenge to the charity’s exemption, the less bargaining power the charity has to resist.

As described in Part II.B, above, the fact that exemption is granted at the state level means it’s only fair that states shoulder some responsibility for the uneven adverse effects of property tax exemptions on local governments. Models of states directly making partial PILOTs on account of some nonprofit property are found in Connecticut (by statute for nonprofit hospitals and schools);<sup>101</sup> Maine (by constitution, for exemptions

<sup>101</sup>Since the 1970s, Connecticut has paid municipalities up to 77 percent of taxes lost on exempt property owned by nonprofit colleges and hospitals. The payments must be appropriated, though, and the percentage has been declining; September 2009 payments replaced only 45.7 percent of lost taxes (but still topped \$115 million). See also Conn. Office Of Policy & Mgmt., Intergovernmental Policy Div., “Colleges (Private) and General/Free Standing Chronic Disease Hospitals — Payment in Lieu of Taxes,” <http://www.ct.gov/opm/cwp/view.asp?a=2985&q=383134> (reporting \$115.4 million paid in FY2014 to 59 municipalities and 14 taxing districts, and the same amount in FY2013 to 58 municipalities and 11 taxing districts); “Payments To or On Behalf of Local Governments,” at [http://www.ct.gov/opm/lib/opm/budget/2016\\_2017\\_biennial\\_budget/budget\\_section\\_e.pdf](http://www.ct.gov/opm/lib/opm/budget/2016_2017_biennial_budget/budget_section_e.pdf) (estimating almost \$125.5 million for FY2015, and recommending like amounts in FY2016 and FY2017). For a detailed analysis, see Michael Bell, “Properties Exempt from Paying Property Taxes in Connecticut” (discussion draft prepared for Conn. Tax Study Panel, Oct. 27, 2015), available at [https://www.cga.ct.gov/fin/tfs%5C20140929\\_State%20Tax%20Panel%5C20151027/Prop%20Tax%20Exempts%20Bell.%20Draft.pdf](https://www.cga.ct.gov/fin/tfs%5C20140929_State%20Tax%20Panel%5C20151027/Prop%20Tax%20Exempts%20Bell.%20Draft.pdf). Appropriations legislation enacted in June 2015 consolidates the state grant programs reimbursing local governments for forgone property taxes due to state-imposed exemptions. See Conn. Office of Leg. Res., “Summary of Public Act 15-244 (no date), sections 183-205 - Payment in Lieu of Taxes (PILOT) Program,” at <https://www.cga.ct.gov/2015/SUM/2015SUM00244-R02HB-07061-SUM.htm>. Separately, a special session budget bill passed in July 2015 put on the tax rolls “any new medical facility acquired by a hospital network that netted patient revenue of \$1.5 billion as of 2013” and off-campus residential property owned by nonprofit schools (institutions specifically exempted by statute or the state constitution, like Yale, are not included); taxability would correspondingly reduce the state PILOTs. Christine Stuart, “Sharkey’s Property Tax Legislation Rides Through in the Budget Implementer,” July 9, 2015, at [http://www.ctnewsjunkie.com/archives/entry/sharkey\\_property\\_tax\\_legislation\\_rides\\_through\\_in\\_the\\_budget\\_im](http://www.ctnewsjunkie.com/archives/entry/sharkey_property_tax_legislation_rides_through_in_the_budget_im) (Footnote continued on next page.)

granted after April 1, 1978); and Rhode Island (by statute for hospitals and schools). More widespread are state-made PILOTs for state-owned real estate. The federal government similarly makes PILOTs under various statutes.

One might think that states would facilitate fair and consistent PILOT programs for their local governments. Uniquely, apparently, Pennsylvania's 1997 Act 55 (discussed above) encourages nonprofits to make PILOTs. Curiously, the 2011 Illinois statute adding requirements for nonprofit hospitals does not address the compromise approach of PILOTs. The use of "voluntary" PILOTs has not yet become systematic throughout any particular state, much less throughout the country, but is spreading to increasing numbers of financially struggling municipalities. PILOT arrangements vary, sometimes even within a given city or town. Some agreements recognize "services in lieu of taxes" or "SILOTs," a term that covers a variety of in-kind transactions.<sup>102</sup>

Moreover, as mentioned above, the likelihood of overlapping local taxing jurisdictions suggests that a charity might receive multiple requests for PILOTs and should be prepared to explain why it might agree to one but not another. Note that the local governments might be competing with each other in the race to obtain voluntary revenue. As Rick Cohen cautioned: "part of the attraction of PILOTs, like abatements for for-profit developers, is that the sponsoring municipality might be able to craftily keep all of the booty for itself. . . . The politics of abatements and exemptions make tax-exempt property owners into pawns in games among taxing jurisdictions."<sup>103</sup>

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plementer/ (citing to proposed legislation set forth at [https://www.cga.ct.gov/asp/cgabillstatus/cgabillstatus.asp?selBillType=Bill&which\\_year=2015&bill\\_num=6965](https://www.cga.ct.gov/asp/cgabillstatus/cgabillstatus.asp?selBillType=Bill&which_year=2015&bill_num=6965)).

<sup>102</sup>See, e.g., the following discussion of payments included in an agreement between Stanford University and Palo Alto with respect to Stanford's \$5 billion hospital project:

To obtain the city's permission for the expansion, Stanford has offered a package of community benefits that includes \$23.2 million for infrastructure and affordable housing projects; \$12 million for climate-change programs; \$5.6 million in health-care services for low-income residents; \$4 million for community-health programs; \$3.4 million for improved pedestrian and bicycle connections; and \$8.1 million in construction-use-tax revenue. Stanford will also pay about \$91 million to purchase Caltrain Go Passes for all hospital employees.

While Stanford values the "community benefits" package at about \$173 million, the city says it's closer to \$43 million. Palo Alto officials argue that many of the benefits in the Stanford proposal, including the Caltrain passes, are mitigations that hospitals are required to provide to get environmental clearance for the project.

Gennady Sheyner, "Stanford Hospital Expansion Up for Final Vote," *Palo Alto Online*, June 2, 2012 at [www.paloaltoonline.com/news/show\\_story.php?story\\_id=21333](http://www.paloaltoonline.com/news/show_story.php?story_id=21333).

<sup>103</sup>Rick Cohen, "The Politics of PILOTs: A Flight Plan for Productive Local Government-Nonprofit Talks," *Nonprofit Q.*, June 13, 2012, at <http://www.nonprofitquarterly.org/policy-social-context/20500-the-politics-of-pilots-a-flight-plan-for-productive-local-government-nonprofit-talks.html>.

While PILOTs from the eds and meds get media attention, smaller charities and even churches have found themselves the subjects of PILOT requests.<sup>104</sup> Given that PILOT agreements are governed by "politics" rather than the law, Cohen advised: "Rather than slugging it out in a scrum with local governments (which are often as revenue-starved as many nonprofits), the nonprofit sector can and should be a partner to local government, drafting the talent within 1.8 million 501(c) entities plus another few hundred thousand churches to come up with long-term solutions that serve the overlapping interests of nonprofits and government alike."<sup>105</sup>

## 2. Data on PILOTs

A 2013 report from the Lincoln Institute provides the most thorough PILOT study available.<sup>106</sup> It analyzes three years' worth of data from a 2011 survey of local government officials in 599 jurisdictions with the largest nonprofit sectors. The report finds that since 2000, at least 218 localities in 28 states collected PILOTs annually worth, in the aggregate, more than \$92 million.<sup>107</sup> More than 90 percent of PILOT revenue comes from the eds and meds, with colleges contributing about two-thirds of PILOTs and hospitals about a quarter. As summarized in the report's abstract:

While at least 420 nonprofits make PILOTs, the majority of revenue comes from just 10 organizations: Harvard University, Yale University, Stanford University, Brown University,<sup>108</sup> Boston University, Massachusetts General Hospital, Dartmouth College, Brigham & Women's Center, Massachusetts Institute of Technology, and Princeton University (in order of payments, beginning with the highest).

The other 10 percent of PILOTs came from various types of surveyed organizations, including housing (47); religious organizations, including churches (36); social

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<sup>104</sup>*Id.* See also Karen Setze, "Proposed California Initiative Would Revoke Property Tax Exemptions For Churches," 2012 *State Tax Today* 113-3 (June 11, 2012): "California officials have authorized signature gathering for a constitutional amendment to revoke the property tax exemption for churches and other buildings used for worship or other religious purposes. Proponents must turn in 807,615 signatures of registered voters by November 2 to get the amendment on the ballot in 2013."

<sup>105</sup>Cohen, *supra* note 103.

<sup>106</sup>Langley, Kenyon, and Bailin, *supra* note 94.

<sup>107</sup>"Most nonprofits make fairly small PILOTs while most revenue generated comes from a small number of multi-million dollar PILOTs. As a result, the average PILOT for all nonprofits (\$292,952) is nearly 10 times larger than the median (\$30,000)." *Id.* (abstract).

<sup>108</sup>For the May 1, 2012, agreement between Providence and Brown University, go to <http://news.providencejournal.com/breaking-news/2012/05/01/brown-providence-agreement.pdf>; the city's items on the 2012 PILOT agreements with Johnson & Wales College, Lifespan Hospital, and Brown are at <http://www.providenceri.com/saving-providence/>; and Brown's press release is at <http://news.brown.edu/pressreleases/2012/05/agreement> (for an undated fact sheet on Brown's exemption and its 2003 PILOT agreement, go to <http://brown.edu/web/providence/factsheets/Brown-Supports-Providence-FAQ.pdf>).

services (15); and arts/culture (11). Regional differences, as expected, are strong: “The Northeast accounts for roughly 75 to 80 percent of PILOT activity, with the largest share in Massachusetts and Pennsylvania.” From the taxing jurisdictions’ perspective, the report found that PILOTs produced “less than 1 percent of total general revenue in 165 out of 181 localities that have information available.” The survey further found that PILOT agreements typically run long-term (58 percent of localities<sup>109</sup>) and call for routine annual payments (34 percent).

The recent Illinois survey covered PILOTs negotiated with public and business property owners, as well as with nonprofits. The report determined that “nine of the 59 municipalities [responding] report having at least one PILOT arrangement currently in place, while the overwhelming majority (44 of 59) have never had, and are not currently considering, PILOTs as a revenue generation tool. . . . The municipalities reported having an average of 2.4 PILOT agreements, with a minimum of one and a maximum of ten. The PILOTs generate an average of \$112,689 annually, with a range of \$3,000-\$600,000. PILOT arrangements are fairly evenly spread across other local governments, state governments, nonprofit entities, and business entities. Only three of the nine municipalities with PILOTs in place report having such an agreement with nonprofit organizations.”<sup>110</sup> The authors of this report observe:

Consistent with Brody, Marquez, and Toran (2012) and Longoria (2011), our quantitative analyses and follow-up interviews reveal that local government managers are reluctant to pursue PILOT arrangements, particularly with nonprofit organizations, because of the potential political costs of doing so. One manager’s comment was that PILOTs might become more common in Illinois if one municipality would blaze the trail. His comments suggest that if one municipality were able to effectively implement PILOTs without significant political costs, others would follow suit. Political costs may be particularly salient in Illinois given the litigation that has challenged the tax exempt status of nonprofit hospitals based on their aggressive collection practices for charges of the uninsured or underinsured (i.e., charity care).

These trends (political costs, litigation) speak to the basic confrontational tenor that surrounds nonprofit property tax exemption. As long as this area of local government policy remains combative, PILOTs will continue to be seen as a zero sum game where there is a winner and a loser. Viewed alternatively, PILOTs offer a means of engaging the

public, nonprofit, and business sectors in a productive dialogue. While the initiation of such a dialogue may be uncomfortable, the successes of the municipalities which attempted PILOTs, although few in number, suggest that such efforts have the potential to encourage collaboration and therefore contribute to the universal goal of a strong and vibrant community. . . .<sup>111</sup>

Boston continues to run the most comprehensive, and most successful, voluntary PILOT program.<sup>112</sup> Following a 2012 conference on the charity property tax exemption, the Urban Institute’s research report summarized the Boston Task Force’s recommendations that:<sup>113</sup>

PILOTs would remain voluntary; all nonprofits would be asked to contribute except those with total property value less than \$15 million; PILOTs would be calculated based on 25 percent of what the nonprofit’s property would yield if taxable; a dollar-for-dollar credit would be offered for SILOTs but limited to 50% of the payment; institutions would receive a credit on their PILOT in the amount of real estate taxes paid on properties that would ordinarily qualify for a tax exemption based on use; and the new program would be gradually phased in over a five-year period. Qualifying SILOTs should directly benefit Boston residents; support the city’s mission and priorities; offer ways the city and institution could collaborate to meet shared goals; and be quantifiable.

The Urban Institute report continued: “Overall, the new PILOT program was considered a success; for the first half of fiscal year 2012, the city received \$9.9 million in payments, 92 percent of the \$10.8 million requested, and a 24 percent increase over what would have been paid under the prior PILOT program.”<sup>114</sup>

The Urban Institute reported on the initial lessons learned from Boston’s overhauled program, as described

<sup>111</sup>*Id.* at 35-36. The second citation is to Thomas Longoria’s 2011 working paper, “Local Government Financial Manger Perceptions Associated With Payments In-Lieu of Taxes,” presented at the Urban Institute program cited in notes 8 and 76, above. See also Thomas Longoria, “Predicting Use and Solicitation of Payments in Lieu of Taxes,” *Nonprofit & Voluntary Sector Q.* (forthcoming). Compare a 2010 survey of Indiana local government officials: Kirsten Grønberg and Kellie McGiverin-Bohan, “Local Government Interest In and Justifications for Collecting Payments-in-Lieu of (Property) Taxes from Charities,” 7(1) *Nonprofit Policy Forum* 7 (Oct. 2015), available at <http://www.degruyter.com/view/j/npf.2016.7.issue-1/npf-2015-0043/npf-2015-0043.xml> (“[A]lthough only a handful of local jurisdictions in Indiana have actually imposed PILOTs, . . . [a]bout half of local government officials support requiring PILOTs and/or SILOTs from universities/schools and hospitals and about one-third do so for churches.”).

<sup>112</sup>Boston’s collections under their revised PILOT program (starting in 2012) are available at <http://www.cityofboston.gov/assessing/PILOTProgram.asp>.

<sup>113</sup>Brody, et al., *supra* note 89, at 9. For an audio of the Urban Institute Panel that included the speaker from Boston, go to <http://www.urban.org/taxandcharities/upload/STE-001.mp3>.

<sup>114</sup>*Id.* at 9.

<sup>109</sup>Langley, et al., *supra* note 94 (abstract): “Most PILOTs go to cities and towns, but at least seven school districts and four counties also receive PILOTs.”

<sup>110</sup>Mayhew and Waymire, *supra* note 95, at 26-28. The researchers sent surveys to the 235 corporate managers of the Illinois City/County Management Association, a professional organization for Illinois city and county administrators. The response rate was a little more than 25 percent. *Id.* at 25.

by Boston official Ron Rakow. Most significantly, nonprofits vastly prefer to give services that benefit the community to giving cash, the city's preferred type of payment; this might put pressure to adjust the 50 percent credit limit on SILOTs. Also, cultural institutions (notably museums) operate under a different economic model than do the eds and meds, suggesting differing treatment could be appropriate. More broadly, Rakow observed that a successful PILOT program requires time, effort, commitment, and a strong long-term relationship with nonprofit organizations.

Eric Lustig recently provided a comparison of Boston's collections in each of its first three years with the 2011 base year. He found:

While the overall nonprofit PILOT contributions have increased since the revised program was implemented, the medical sector has a greater overall participation than the other sectors for FY 2011 and years FY 2012 through 2014. Moreover, Table 5 shows the medical sector has a significantly greater percentage of institutions fully participating (*i.e.*, paying the full requested PILOT payment). And as further provided in Table 5, the medical sector has paid in the aggregate an overwhelmingly higher percentage of the requested payments than the other sectors. Indeed, the percentage of fully participating institutions and percentage of requested contributions paid for the education sector has gone down since FY 2012.<sup>115</sup>

### 3. Recent PILOT Developments: Florida court strikes PILOT as inconsistent with statutory exemption; Rhode Island legislature singles out a college.

In a case on its way to the Florida Supreme Court, a nonprofit buyer of an affordable housing project repudiated a PILOT agreement entered into (and honored) by a nonprofit developer as a condition of qualifying to issue tax-exempt bonds. The appellate court reversed the trial court and held that the new owner could not be compelled to make PILOTs:

We conclude that based on the statutory exemption, the City did not have authority to collect ad valorem taxes from AHF via enforcement of the PILOT agreement. The PILOT agreement violates the public policy of promoting the provision of affordable housing for low to moderate income families and is therefore void. Additionally, we hold that a PILOT agreement that requires a party to make payments that are the equivalent of ad valorem taxes that would otherwise be due but for

a statutory tax exemption violates article VII, § 9(a) of the Florida Constitution, which permits municipalities to impose taxes only as authorized by law.<sup>116</sup>

Because of the breadth and significance of its holding, the court ended by certifying the issue to the Florida Supreme Court, which accepted jurisdiction on December 8, 2015.<sup>117</sup>

At the other extreme, in 2013, as summarized by Rick Cohen: "despite the protests of Bryant University and others, Governor Lincoln Chafee signed a bill that would require Bryant University to pay Smithfield for the costs of police, fire, and rescue services — voluntarily, so to speak — but if Bryant doesn't agree to a deal to fork over the costs to Smithfield by March 2014, the university will be forced to make the payments to the city."<sup>118</sup> In the subsequent negotiations, "Smithfield had been seeking a flat \$300,000 a year plus \$150,000 every four years to help cover the cost of new emergency vehicles."<sup>119</sup> The university, though, countered: "We simply believe Bryant is already paying its 'fair share,' and then some. . . . Town officials are now working with [Bryant's] consultant and we are optimistic that this collaborative process will result in determining exactly what Bryant's fair share for

<sup>116</sup>*AHF-Bay Fund, LLC v. City of Largo*, 169 So. 3d 133 (Fla. App. April 22, 2015) (citations omitted), *rev. granted* 2015 Fla. LEXIS 276 (Fla. Dec. 8, 2015). The court cited to a similar holding in *School District of Monessen v. Farnham & Pfile Co. Inc.*, 878 A.2d 142 (Pa. Commw. Ct. 2005).

<sup>117</sup>*Id.*:

Finally, we recognize that PILOT agreements similar to the one in this case abound in municipalities throughout Florida. Thus, the magnitude of our opinion holding that these types of agreements violate Florida law may pose a significant hardship on municipalities that rely on such payments to meet their budget requirements. We therefore certify to the Florida Supreme Court the following question to be of great public importance:

DO PILOT AGREEMENTS THAT REQUIRE PAYMENTS EQUALING THE AD VALOREM TAXES THAT WOULD OTHERWISE BE DUE BUT FOR A STATUTORY TAX EXEMPTION VIOLATE SECTION 196.1978, FLORIDA STATUTES (2000), AND ARTICLE VII, § 9(a) OF THE FLORIDA CONSTITUTION?

<sup>118</sup>Rick Cohen, "The Mandatory-Voluntary PILOT: RI Effectively Taxes University," *Nonprofit Q.*, Aug. 7, 2013, available at <http://www.nonprofitquarterly.org/policysocial-context/22713-the-mandatory-voluntary-pilot-ri-effectively-taxes-university.html>. Specifically, HB 5083 SUB A, as amended, available at <http://webserver.rilin.state.ri.us/BillText/BillText13/HouseText13/H5083Aaa.pdf>, added to section 44-3-3 of the statute providing for property tax exemption for education: "provided, however, that unless any private nonprofit corporation organized as a college or university located in the town of Smithfield reaches a memorandum of agreement with the town of Smithfield, the town of Smithfield shall bill the actual costs for police, fire, and rescue services supplied, unless otherwise reimbursed, to said corporation commencing March 1, 2014. . . ."

<sup>119</sup>Marcia Green, "Bryant Offer Would Cover Town's Estimate of Rescue and Police Calls to Campus," [Smithfield, RI] *Valley Breeze & Observer*, Mar. 6, 2014.

<sup>115</sup>Eric A. Lustig, "A Continuing Look at Boston's Revised Payment in Lieu of Taxes (PILOT) Program: Update Version 2.0," 50 *New Eng. L. Rev. On Remand* 1, 11 (2015), at <https://newengrev.com/on-remand-2/volume-50-on-remand/lustig-a-continuing-look-at-bostons-revised-payment-in-lieu-of-taxes-pilot-program/>. For news coverage of Boston's latest report, see <https://www.bostonglobe.com/metro/2015/07/21/many-bost-on-colleges-fall-short-voluntary-payments-city/D8jVTjEKrPkM OZq8N4q83M/story.html>.

public safety cost reimbursement is.”<sup>120</sup> In June 2014 the parties agreed that Bryant would pay the city a flat \$25,000 per quarter, adjusted based on actual costs.<sup>121</sup> This compromise (Bryant had considered protesting the statute in court) papers over the concern noted by Cohen “that the Bryant University/Smithfield legislation is particularly odious in that it involves the targeting of a specific institution. Can legislators simply pick and choose targets for special legislative treatment?”

### CONCLUSION

Today the legal question regarding property tax exemption for charities is more properly about who determines what is exempt, and how, as well as whether the affected parties will negotiate a partial payment. The three topics described above — constitutional power, statutory interpretation, and the “intermediate sanctions” of user fees and PILOTs — braid together to form the procedural framework for the financial relationship between nonprofit property owners and the taxing jurisdictions that host them.<sup>122</sup> Change the parameters of one, and you change the others. As observed of the debate in Pennsylvania: “When State Auditor General Eugene DePasquale (D) held a public hearing in March in Pittsburgh on SB 4, which would give the state legislature rather than the courts the authority to define which group is a purely public charity and, therefore, able to avoid paying certain taxes, township officials expressed concern . . . that Wolf’s proposed legislation will limit their ability to negotiate payments in lieu of taxes.”<sup>123</sup>

But statehouses are beginning to pay attention to the woes of their municipalities: “Data from the National Conference of State Legislatures and the National Council of Nonprofits show that in the last three years, a majority of states have established tax task forces to scrutinize tax exemptions and credits, and about a dozen

states have given serious consideration to repealing tax exemptions for nonprofits.”<sup>124</sup> This account added: “‘Hospitals and private universities are big businesses,’ [New Hampshire Rep. David] Hess told Tax Analysts, arguing that despite being organized as nonprofits, they are among the state’s largest accumulators of wealth. ‘I think we need to start a conversation about why we are carving out a special exception for them.’”

This debate will continue as it has been waged: contingent, messy, and ad hoc. Exemption for most charities in most states will endure. Some states will see repeated skirmishes prompted by localities hosting significant exempt property, and a few courts will mediate turf battles between legislatures and the judiciary. Occasionally, though, exemption will be beside the point, as vulnerable property owners — particularly those that earn significant profits, pay high executive salaries, and have for-profit competitors — will face pressure to make “voluntary” PILOTs or provide SILOTs.<sup>125</sup>

### APPENDIX

#### ADDITIONAL SELECTED RECENT CITATIONS ON PROPERTY TAX EXEMPTION FOR CHARITIES AND PAYMENTS IN LIEU OF TAXES (PILOTs)<sup>126</sup>

**NOTE: I rely on the following three essential (and free) sources to keep current —**

National Council of Nonprofits, “Taxes, Fees, and Payments in Lieu of Taxes (PILOTs),” <http://www.councilofnonprofits.org/public-policy/state-policy-issues/nonprofits-taxes-pilots>, setting out developments in various states. The National Council emails biweekly issues of “Nonprofit Advocacy Matters” and maintains archives at: <https://www.councilofnonprofits.org/newsletter-archive#admat>.

For the late Rick Cohen’s irreplaceable coverage of state and local tax issues for *The Nonprofit Quarterly*, use the search box at [www.nonprofitquarterly.org](http://www.nonprofitquarterly.org).

<sup>120</sup>Michael E. Fisher, Chair, Bryant University Board of Trustees, Letter to the Editor, “Consultant, Town, Will Decide Bryant’s ‘Fair Share,’” [Smithfield, RI] *Valley Breeze & Observer*, Dec. 12, 2013. The letter explained: “For the year 2013, Bryant will have paid the town approximately \$1.5 million in voluntary payments, property tax payments, fees, and in-kind contributions including paying for the annual Independence Day fireworks and hosting Smithfield High School’s graduation ceremonies.” It added: “All of what Bryant does is in addition to the nearly \$500,000 annually that Smithfield receives from the State of Rhode Island as part of their Payment in Lieu of Taxes (PILOT) program intended to compensate for any burdens an institution of higher learning might place on local resources such as fire or police services.”

<sup>121</sup>Melanie Thibeault, “The Year in Smithfield,” [Smithfield, RI] *Valley Breeze & Observer*, Jan. 8, 2015.

<sup>122</sup>See also Grønberg & McGiverin-Bohan, *supra* note 111 (“[D]etails about existing or proposed PILOT policies are very difficult to come by, suggesting that the actual payment of property taxes is not the primary consideration. Rather, PILOT policies are at least in part symbolic politics — occasions for local government officials and spokespersons of local charities to negotiate their mutual dependencies and relationships.”)

<sup>123</sup>Frank Shafroth, “Keystone State Tax Reform: Whither Property Taxes?” 2015 *State Tax Today* 102-12, text accompanying notes 25 and 26 (May 28, 2015) (footnote omitted).

<sup>124</sup>Jennifer DePaul, “Short on Revenue, State and Local Governments Exert Pressure on Nonprofits,” 2014 *State Tax Today* 17-1, Jan. 27, 2014. This account described a separate proposal that failed to advance in 2015:

“In New Hampshire, Rep. David Hess (R) on January 8 introduced a bill (HB 1509 (*Doc 2014-804*)) to expand the business enterprise tax to include large nonprofits, colleges, and universities. The tax is a 0.75 percent levy on interest, dividends, and compensation above a threshold. The bill would exempt churches and other religious institutions and would apply only to nonprofits with more than \$1.5 million in gross operating expenditures annually, according to a fiscal note.”

<sup>125</sup>Academics might not be helping! See Mayhew and Waymire, *supra* note 95, at 33: “We interviewed four managers for cities that reported no current or planned PILOTs. All four reported that until the survey, the potential for PILOT arrangements with nonprofit entities had never come up in discussions.”

<sup>126</sup>This selected bibliography does not include sources cited in the substantive discussion above.

*The Chronicle of Philanthropy* ([www.philanthropy.com](http://www.philanthropy.com)) emails a daily roundup of links to its own reporting and to media reports on other sites.

## STATE-BY-STATE DEVELOPMENTS

**Set out, in state alphabetical order, is an account of almost all state supreme court property tax exemption decisions, plus other major developments, since my 2012 bibliography and not otherwise addressed in the text, above. Note that lower court decisions, particularly trial level or Tax Tribunal decisions, are typically more adverse to the claimant.**

### Connecticut:

In June 2015 the Connecticut Senate rejected a proposal by the House to allow municipalities to tax real and personal taxable property acquired by nonprofit hospitals (but not their main facility) acquired on or after October 1, 2015, and to tax nonprofit colleges' and universities' student housing, regardless of when acquired, other than dormitories with at least 20 beds. See Jennifer Carr, *Connecticut Senate Rejects Bill to Make Hospital, University Property Taxable*, 2015 *State Tax Today* 108-4 (June 5, 2015); Neil Downing, *Connecticut Looking to Tax Hospital, College Property*, 2015 *State Tax Today* 104-5 (June 2015).

### Louisiana:

2013 *State Tax Today* 77-12 (April 22, 2013), *Louisiana AG: Conservation Nonprofit Must Show It Alleviates Government Burdens To Receive Exemption*. (Opinion 12-0179) (April 11, 2013):

Louisiana jurisprudence provides that exemptions of property devoted to charitable purposes are justified only on the theory that the charitable acts alleviate the burdens of government. [Citing *Sherwood Forest Country Club v. Litchfield*, 2008-0194, pp. 5-6 (La. 12/19/08), 998 So.2d 56, 621] Historically, exemptions were allowed based on the theory that the concessions are due as quid pro quo for the performance of services that are essentially public. [Footnote omitted.] In other words, the charitable purposes of the nonprofit corporation must alleviate the burdens of government. [Footnote omitted.]

### Maine:

As reported by the National Council of Nonprofits on May 4, 2015:

A key committee of the Maine Legislature rejected two bills related to taxing the property of nonprofits. One bill would have allowed municipalities to hold public votes to deny tax-exempt status to land trusts that are 20 acres or larger. Another measure would have ordered a study to examine the nonprofit property tax exemption and determine whether the loss of revenue to a municipality is outweighed by the benefits provided to the community by the nonprofit organization.

*Francis Small Heritage Trust, Inc. v. Town of Limington*, 98 A.3d 1012, 1021 (Me. 2014) ("the Trust essentially operates its properties in the manner of a state park . . . [and so] assists the state in achieving its conservation goals"). Citing decisions from California, Florida, Massachusetts

(see below), New Mexico, Ohio, and Vermont, the court observed that "[a]ppellate courts in several other jurisdictions have concluded that land conservation is a charitable purpose, at least when coupled with public access, or where conservation of the land otherwise confers a public benefit." Moreover: "There can be little doubt that the Legislature has enunciated a strong public policy in favor of the protection and conservation of the natural resources and scenic beauty of Maine." [But see North Carolina, below.]

*Hebron Academy v. Town of Hebron*, 60 A.3d 774, 782 (Me. 2014) (affirming the finding that because "Hebron Academy's rental activity amounted to approximately one percent of its operating budget and did not interfere with its tax-exempt purpose . . . , Hebron Academy's property rental is a de minimis 'incidental use'").

### Massachusetts:

*New England Forestry Foundation v. Board of Assessors of Town of Hawley*, 9 N.E.3d 310 (Mass. 2014) (holding exempt land owned by a charitable conservation organization and open to the public; ruling further that the nonprofit owner of conservation land to which the public is denied access carries a heightened burden to qualify for exemption. [Compare Maine, above, and North Carolina, below.]

### Michigan:

The anomalous *SBC Health Midwest Inc. v. City of Kentwood*, 2015 Mich. App. LEXIS 578 (March 19, 2015), reversed and remanded the denial of the Tax Tribunal decision, ruling that under the unambiguous language of the relevant exemption statute "an educational institution incorporated under the laws of this state" need not be a nonprofit organization.

### Nebraska:

*Harold Warp Pioneer Village Foundation v. Ewald*, 287 Neb. 19 (Neb. 2013) (holding exempt a motel and campground, owned and exempt since 1984, primarily used by patrons of a nonprofit museum). "The museum is an educational institution designed to preserve history and technology for future generations. The museum displays approximately 50,000 exhibits in 28 buildings on 20 acres of land. A museum patron wishing to view every exhibit offered would need to visit the museum every day for more than 1 week. Approximately 30 percent of museum patrons spend more than 1 day viewing the exhibits."

### New Jersey:

*Advance Housing Inc. v. Township of Teaneck*, 74 A.3d 876 (N.J. 2013) (holding exempt a nonprofit corporation's residential facilities for individuals with psychiatric disabilities). "Advance Housing is playing a role in fulfilling an articulated State policy of deinstitutionalizing the mentally disabled. In doing so, it also is relieving the State of the expense that it would otherwise bear in housing and caring for the mentally disabled."

### New York:

*In the Matter of Greater Jamaica Development Corporation v. New York City Tax Commission*, (July 1, 2015), [http://www.courts.state.ny.us/REPORTER/3dseries/2015/2015\\_05620.htm](http://www.courts.state.ny.us/REPORTER/3dseries/2015/2015_05620.htm) ("The parking facilities may very well provide a 'public benefit,' but the overall use to which these

facilities are put, i.e., to further economic development and lessen the burdens of government, cannot be deemed 'charitable' within the meaning of section 420-a(1)(a).").

*Merry-Go-Round Playhouse Inc. v. Assessor of the City of Auburn*, 23 N.E.3d 984 (NY 2014): "Petitioner established that the housing is used to attract talent that would otherwise look to other theaters for employment, that the living arrangement fosters a sense of community and that the staff spends a significant portion of its off-hours in furtherance of theater-related pursuits. In addition, \* \* \* petitioner would have difficulty recruiting qualified staff if it did not provide the housing, which would undermine its primary purpose. Although we have not previously addressed the provision of tax exempt housing in relation to an arts organization, the statute does not elevate one exempt purpose over another."

#### North Carolina:

*In re Grandfather Mountain Stewardship Foundation Inc.*, 762 S.E.2d 364 (N. Car. App. 2014) (reversing the state property tax commission, holding that land owned by a nonprofit land stewardship foundation was not used wholly and exclusively for scientific and educational purposes because it included commercial enterprises that sold goods to support the nonprofit). As someone who 25 years ago hiked up to the summit and paid on the spot for lodging (where the dinner menu offered only two selections, ostensibly because no one would stay more than two nights), I was fascinated by the findings:

President Dameron testified that prior to 1950, Grandfather Mountain was not a travel attraction; individuals visited Grandfather Mountain to hike and explore. Subsequently, the owner of Grandfather Mountain "set about converting it into a more formalized, accessible attraction. . . . Of the improvements constructed, President Dameron noted a swinging bridge, a small woodcarving shop, two guest cottages, a visitor's center, an animal habitats center, a museum, a fudge shop, and an administrative offices building. In 2010, 244,215 guests visited Grandfather Mountain. Gift shops located in the museum and the visitor's center sold retail items, such as hiking equipment, souvenirs, and snacks. Honey, jelly, fruit, woodcarvings, and books on woodcarving were also sold on the property. Within the nature museum, visitors could purchase food and beverages from an on-site restaurant; nearby, treats could be purchased from a free-standing fudge shop. President Dameron also noted that in 2010, GMSF recognized \$1,108,971.00 in profit from retail sales.

The court noted additional uses, and pointed out that: "The land parcels comprising Grandfather Mountain are also subject to a conservation easement with the Nature Conservatory, and have been honored with conservation

awards and designated a United Nations Biosphere Reserve. The record supports that the attraction of Grandfather Mountain offers educational and scientific presentations about birds, reptiles, animals, and native flora and fauna; and that revenue from the operations on the property is used to further educational and scientific uses on the property." LEXIS reports that the state Supreme Court dismissed the appeal as moot.

#### Ohio:

*Grace Cathedral Inc. v. Testa*, 2015 Ohio LEXIS 1379 (Ohio 2015) (4-3 decision) (holding a church's recently constructed dormitory qualified for the public worship property tax exemption because its primary use facilitated attendance at the public worship service of the church in the principal, primary, and essential way). The lengthy dissent opens with: "The dormitory at issue in this case is essentially a free hotel"; the dissent later observes: "The dormitory was built to provide residential housing for students at an on-site college that never came to be; it was not built because overnight housing was needed for Grace Cathedral to be able to accommodate public worship." As a legal matter, the dissent complains that the majority "erroneously placed the burden on the tax commissioner to establish why Grace Cathedral's application should fail."

#### Oklahoma:

*AOF/Shadybrook Affordable Housing Corp. v. Yazel*, 282 P.3d 775 (Okla. 2012) ("We find that Shadybrook has overcome its burden of proving the existence of an exemption and has demonstrated that its operation of the low-income housing complex was a charitable use entitling it to the ad valorem tax exemption in § 6. *London Square Village* is overruled. The statutory language in 68 O.S. 2004 § 2887(8)(a)(2)(b) excluding property funded with proceeds from the sale of federally tax-exempt bonds from ad valorem exemption is unconstitutional.").<sup>127</sup>

#### Vermont:

*Brownington Center Church v. Town of Irasburg*, 87 A.3d 502 (Vt. 2013) (denying a "pious use" exemption to a church-owned camp because the legislature did not expressly exempt church camps, the church's description of the camp as an exempt "church edifice" "stretches the statutory term far beyond its ordinary meaning").



<sup>127</sup>The court quoted Brody, *supra* note 6, at 635 ("Courts must recognize that the concept of charity evolves over time to take into account the changing needs of society, new discoveries, and the varying conditions, characters, and needs of different communities.").

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