ALL CHARITIES ARE PROPERTY-TAX EXEMPT, BUT SOME CHARITIES ARE MORE EXEMPT THAN OTHERS

EVELYN BRODY*

Abstract: Attention from the media notwithstanding, the nonprofit sector continues to achieve remarkable success in state supreme courts and statehouses in defending property-tax exemptions. But budget pressures remain. While the intermediate use of "payments in lieu of taxes" has not yet become a systematic compromise solution, PILOTs are attracting growing interest from local taxing jurisdictions. This Article highlights three issues—who decides the parameters of exemption, legislatures or courts; what are the specific factors and vulnerable subsectors; and how exemption is granted or withheld in practice—and concludes with several PILOT case studies. The Appendix sets forth a fifty-one-jurisdiction review of state constitutions, statutes, and high-court decisions, and finds that the regimes generally are more similar than not.

* Professor of Law, Chicago-Kent College of Law, Illinois Institute of Technology. I thank Eric Lustig and the *New England Law Review* for inviting me to participate in their conference, and for the suggestions from my fellow presenters and attendees. I presented an earlier version of this article at "Shades of Virtue: Measuring the Comparative Worthiness of Charities," Annual Conference of the National Center on Philanthropy and the Law, New York University School of Law (New York City, Oct. 29-30, 2009). I am grateful to that conference's organizers, Harvey Dale and Jill Manny, for inviting me to write that draft, and to my discussants, Marion Fremont-Smith and Peter Swords, and to other participants for their helpful comments.

> "The term 'charity' has become magical gibberish to sanctify any socially beneficial use of property that a court deems worthy of subsidy."
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> *Provena Covenant Medical Center v. Department of Revenue*[1]

INTRODUCTION

In 2002, I edited a volume examining the issue of property-tax exemption for charities from a variety of perspectives and disciplines.[2] My Introduction predicted that "the issues covered in this study will only accelerate in importance in the coming years." In 2007, I published an update that concluded:

> State exemption requirements generally reflect more of a quid-pro-quo rationale [for granting exemption] than does federal exemption. [While it can be difficult to categorize the cases,] [m]any . . . revolve around four basic issues: demonstrating charitable as distinct from private or other nonprofit purposes; satisfying multi-factor tests adopted by state supreme courts under state constitutions; the relevance of government financing and donations; and the relevance of [profit motive,] fee-charging[,] and competition with for-profits. The many recent decisions from state supreme courts—particularly involving hospitals, housing and skilled nursing facilities, and day care—demonstrate the importance of property-tax exemption [to the states]. The solution to many disputes between property-owning charities and the municipalities they inhabit is often more likely to be "political" than legal, such as the agreement to make payments in lieu of taxes.[3]

1. 894 N.E.2d 452, 481 (Ill. App. 2008), *aff'd,* 2010 Ill. LEXIS 289 (Ill. 2010).

2. PROPERTY-TAX EXEMPTION FOR CHARITIES: MAPPING THE BATTLEFIELD (Evelyn Brody ed., 2002).

3. Evelyn Brody, *The States' Growing Use of a Quid-Pro-Quo Rationale for the Charity Property Tax Exemption*, 56 EXEMPT ORG. TAX REV. 269, 288 (2007) [hereinafter *Quid-Pro-Quo Rationale*].

The last two years—with the economic meltdown of state and local tax revenues at a time of increasing demand for social services—have confirmed my 2002 prediction, along the lines of my 2007 observations. The number of state supreme court decisions and legislative proposals put to rest any assumption that issues of property-tax exemption concern only the narrowly bounded jurisdictions in the Northeast. The current desperate financial situation of many local governments might find sympathetic ears in equally desperate statehouses. Indeed, in an April 29, 2009 email, Tim Delaney, Executive Director of the National Council of Nonprofits, warned:

> With legislation that would have taken away nonprofit property tax exemptions introduced earlier this year in at least [four] . . . states (where fortunately the bills appear to be dead), . . . at least [ten percent] of the states have been actively probing the viability of taxing nonprofits.
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> . . . We may have just hit the tipping point, because these latest activities pile onto a growing list of other attempts to add new financial burdens on nonprofits . . . .
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> . . . My fear is that state and local governments, with their constitutional mandates to balance budgets, will suddenly attempt to take away the property tax exemptions, sales tax exemptions (in states that provide them to nonprofits), and any other tax exemptions that nonprofits historically have received, thus drastically increasing costs of operating nonprofits at a time when demands for our services are up and our ability to get funds to pay more in new taxes is zero.[4]

Despite frequent pressure from the media,[5] however, the nonprofit sector continues to show remarkable success in state supreme courts and statehouses in defending exemptions against municipal and legislative challenge.[6] The intermediate use of payments in lieu of taxes ("PILOTs")

4. Email from Tim Delaney, Executive Director, National Council of Nonprofits, to Evelyn Brody, Professor of Law, Chicago-Kent College of Law, Illinois Institute of Technology (Apr. 29, 2009, 10:16 EST) (on file with author).

5. *See, e.g.*, Sarah Jane Tribble, *Local Nonprofit Hospitals Say They Write Off About 2 Percent of Revenues on Charity Care*, CLEVELAND PLAIN DEALER, Apr. 6, 2009, http://blog.cleveland.com/medical/2009/04/Local_nonprofit_hospitals_say.html.

6. *See, e.g.*, Wisconsin Nonprofits Association, Success – Property Tax Exemptions Saved, http://www.wisconsinnonprofits.org/content/property-tax-exemption-nonprofits-risk (including a link to AB75 (2009-2010 budget signed by the governor on June 29, 2009),

has not yet become a systematic compromise solution, but it is attracting growing interest at the local level, met with uneasiness from the targeted types of nonprofits and the nonprofit sector in general.

The Appendix to this paper sets forth a fifty-one-jurisdiction review of state constitutions, statutes, and high-court decisions relating to property-tax exemption for charities. As the Appendix demonstrates, while the details of the charity exemption from property tax vary from state to state (and the District of Columbia), the regimes generally are more similar than not. A few themes have emerged in those states that struggle with this issue. This paper addresses the following three:

Issue I: Who Decides?

In about one half of the states, the state constitution mandates exemption for charities; in about twenty others, the constitution grants the legislature the authority to provide exemption.[7] The issue occasionally arises as to which branch of government has the authority to define charity. Some high courts have declared that they are the guardians of the constitution, retaining the authority to strike a legislative exemption regime as unconstitutionally broad. (An overly narrow statute rarely arises.[8])

A separate question is the role of the executive branch—specifically, whether the state agencies speak with one voice. Of course, an entity can be a charity for state registration and reporting purposes without necessarily being property-tax exempt, but anecdotal evidence suggests, unfortunately, that the state department of revenue rarely (if ever) consults with the state attorney general's office about whether a particular entity is a charity.[9]

Issue II: Income-Producing Nonprofit Industries

The answer to the riddle, "when is a property tax not a property tax?," might be, "when it's an income tax." Several subsectors or properties repeatedly find themselves in litigation with municipal governments:

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which contains language protecting property-tax exemptions for nonprofit rental housing) (last visited Apr. 15, 2010); *see infra* Part III.A (discussing the Madison, Wisconsin experience).

7. The terminology varies: Notably, some states use the term "purely public charity" and some others refer to "public charity."

8. *But see* Texas Monthly, Inc. v. Bullock, 489 U.S. 1, 25 (1989) (striking down, on First Amendment Establishment Clause grounds, exemption from sales tax that was limited to religious literature). *See also* cases cited *infra* note 55 (striking down statutes that deny exemption to charities that do not serve in-state residents or that are incorporated in another state).

9. *See also* Part III (discussing the importance of understanding the process for granting or challenging exemption).

hospitals; low-income or elderly housing and nursing homes; daycare centers; and ancillary facilities such as parking structures, dormitories, and administrative space. These industries or uses are typified by positive income streams that attract attention. Particularly—but not only—those states having multifactor tests see litigation concerning property owned by charities that charge fees, rely on government funding, report a relatively low level or percentage of gifts received or gratuitous services provided, or that compete with for-profit providers of similar services.

Issue III: Exemption Regimes "On the Ground"—and PILOTs

More than the income tax, the property-tax regime (and exemption from it) suffers from a lack of consistency and transparency. While the technical apparatus of a state's property-tax regime is generally beyond the scope of this paper, I do highlight a few important points.

First, decisions by local assessors are key. However, different approaches by different assessors and local administrators can lead to variable treatment in the same state. These inconsistencies can occur with respect to the types of charities receiving particular scrutiny or the types of questions asked (e.g., whether government funding is an area of concern).

The process too cautions that we should interpret case law with care. Lower courts within a state can apply various criteria—and are often less sympathetic to exemption than are state high courts. Often, a would-be-exempt charity simply failed to meet its burden of proof for the year at issue and, presumably, will remedy this deficiency in future years. Thus, a legal pronouncement as to exemption of a particular charity might turn out not to be a lasting, substantive impediment to the affected subsector.

In some localities, a percentage of or certain types of charitable property owners provide "voluntary" PILOTs (or services in lieu of taxes—"SILOTs"), at various levels relative to the tax that would otherwise be imposed. No systematic data are available on nonprofit PILOTs and SILOTs. Note that because they are often initiated by municipal governing boards (or mayors or executives), these arrangements also can vary within a particular state.

I. Who Decides the Parameters of Exemption?[10]

A. Courts Versus Legislatures

While state constitutions and exemption statutes can be quite detailed,[11] every state recognizes property-tax exemption for those

10. The discussion in this part draws substantially from Brody, *Quid-Pro-Quo Rationale*, *supra* note 3.

nonprofits that are classified as charities.[12] But being a charity is not enough—states focus not only on the identity of the owner of the property but also the use of the specific property for which exemption is sought. To the surprise of many nonprofits, having federal income-tax exemption under Internal Revenue Code section 501(c)(3) is not enough.[13] Entitlement to exemption, as a threshold matter, requires both a charitable owner and a charitable use of the subject property.

State constitutions sometimes limit property-tax exemption to "institutions of purely public charity" (or some similar term), defined by state legislatures and courts as requiring the applicant to satisfy a variety of factors: notably some level of donative support and gratuitous expenditure, and a reduction of the government's burden. However, the ambiguities and generalities used in these sometimes-overlapping factors to define charity means that resorting to courts is often still required, with differing consequences across the states.

An important aspect of the state-level tax regime flows from the existence of property-tax exemptions granted in or authorized by state constitutions, and the degree of vigilance with which the courts guard their authority over constitutional terminology. Compare, in their construction of similar state constitutional language, the more deferential attitude of the Pennsylvania Supreme Court to the legislature, with the absolutist approach of the Illinois Supreme Court—and a 2009 compromise reached in Minnesota.

Pennsylvania's Constitution provides: "The General Assembly may by law exempt from taxation: . . . (v) Institutions of purely public charity, but in the case of any real property tax exemptions only that portion of real property of such institution which is actually and regularly used for the purposes of the institution."[14] In a 1985 case, the Pennsylvania Supreme Court promulgated a five-part test requiring that an entity claiming classification as a "purely public charity" under the Pennsylvania Constitution must prove that it: "(a) advances a charitable purpose; (b)

11. *See* Appendix.

12. *See* Brody, *Quid-Pro-Quo Rationale*, *supra* note 3; *see generally* PROPERTY-TAX EXEMPTION FOR CHARITIES: MAPPING THE BATTLEFIELD, *supra* note 2, especially Janne Gallagher, *The Legal Structure of Property-Tax Exemption*, *in* PROPERTY-TAX EXEMPTIONS FOR CHARITIES: MAPPING THE BATTLEFIELD, *supra* note 2, at 3-22.

13. State income-tax exemption often piggybacks on federal income-tax exemption (including, in some states, the tax on unrelated business income). Accordingly, this Article focuses on the more idiosyncratic property-tax regimes. Beyond the scope of this Article are considerations of exemption from sales and use tax, often more similar to property-tax regimes than to income-tax regimes.

14. PA. CONST. art. VIII, § 2(a)(v).

donates or renders gratuitously a substantial portion of its services; (c) benefits a substantial and indefinite class of persons who are legitimate subjects of charity; (d) relieves the government of some of its burden; and (e) operates entirely free from private profit motive."[15] Based on the name of the applicant, the Hospital Utilization Project, Pennsylvania's approach has become known as the "*HUP* test."

In 1997, the Pennsylvania Legislature passed Act 55, "The Institutions of Purely Public Charity Act," in an effort to:

> eliminate inconsistent application of eligibility standards for charitable tax exemptions, reduce confusion and confrontation among traditionally tax-exempt institutions and political subdivisions and ensure that charitable and public funds are not unnecessarily diverted from the public good to litigate eligibility for tax-exempt status by providing standards to be applied uniformly in all proceedings throughout this commonwealth for determining eligibility for exemption from state and local taxation which are consistent with the traditional legislative and judicial applications of the constitutional term. . . .[16]

While the statute is designed around the five-prong *HUP* test, "it greatly expanded those standards well beyond what any appellate court had ever decided."[17] Indeed, both before and after the enactment of Act 55, the Pennsylvania judiciary differed internally on the definition of "purely public charity." Lower courts tend to construe the test strictly, while the Pennsylvania Supreme Court is more accepting of an expanded definition.[18]

Even though the Pennsylvania Supreme Court is the final arbiter of Pennsylvania's constitution, a challenge to the constitutionality of the legislative scheme created by Act 55 has not materialized. Instead, the Pennsylvania Supreme Court has twice side-stepped the issue, reversing decisions of the commonwealth court in 2002 and 2007.[19] The more recent

15. Hosp. Utilization Project v. Commonwealth, 487 A.2d 1306, 1317 (Pa. 1985) (paragraph breaks and initial capitalization omitted).

16. 10 PA. STAT. ANN. § 372(b) (West 1999).

17. David B. Glancey, *PILOTs: Philadelphia and Pennsylvania*, *in* PROPERTY-TAX EXEMPTION FOR CHARITIES: MAPPING THE BATTLEFIELD, *supra* note 2, at 211, 211-32.

18. *See* Unionville-Chadds Ford Sch. Dist. v. Chester County Bd. of Assessment Appeals, 714 A.2d 397 (Pa. 1998) (upholding the exemption of Longwood Gardens); City of Washington v. Bd. of Assessment Appeals, 704 A.2d 120, 122-26 (Pa. 1997) (upholding the exemption of Washington and Jefferson College).

19. *See* Alliance Home of Carlisle, Pa. v. Bd. of Assessment Appeals, 919 A.2d 206, 227 (Pa. 2007); Cmty. Options, Inc. v. Bd. of Prop. Assessment, 813 A.2d 680, 684 (Pa. 2002). Note that in the two cases cited *supra* footnote 18, the commonwealth court had ruled in favor of exemption, and the years at issue predated Act 55.

decision upheld exemption for an independent living apartment facility in a licensed continuing care retirement community that also included a skilled nursing facility and an assisted living facility. More important than the specific holding is the Pennsylvania Supreme Court's observations about the problems that would be raised by a conflict between the state constitution and the statute:

> If the Act 55 presumption and test would lead to a holding that a taxpayer qualified as "an institution of purely public charity," where the *HUP* test would not, fundamental and foundational questions could arise concerning whether: (1) the *HUP* test, which was adopted in the absence of legislation addressing the constitutional term, occupied the constitutional field concerning the exemption, or instead left room for the General Assembly to address the matter; (2) the legislative scheme as adopted comported with the constitutional command and displaced the *HUP* test; and/or (3) if *HUP* were deemed authoritative and comprehensive, whether the legislative findings and scheme set forth in Act 55 gave reason to reconsider the contours of the test thus distilled from judicial experience with individual cases.[20]

Thus, while the commonwealth court seems to suggest that in a conflict between Act 55 and *HUP*, *HUP* wins, the supreme court seems to believe that the legislation should be given greater weight.[21]

By contrast, consider a 2004 ruling by the Illinois Supreme Court involving Eden Retirement Center.[22] The Illinois Constitution permits the legislature to exempt certain types of property from taxation: "The General Assembly by law may exempt from taxation only the property of the State, units of local government and school districts and property used exclusively for agricultural and horticultural societies, and for school, religious, cemetery and charitable purposes."[23] As to the meaning of "charitable purposes," two years before this constitution was adopted, the Illinois Supreme Court had set forth its own multi-factor test for charitable exemption under the constitution then in effect. *Methodist Old Peoples Home v. Korzen*[24] required that: (1) the benefits extend to an indefinite number of persons for their general welfare or in some way reduce the

20. *Alliance Home*, 919 A.2d at 223. Footnote 9, after this text, begins: "Of course, this Court is not obliged to defer to the legislative judgment concerning the proper interpretation of constitutional terms." *Id.* at 223 n.9.

21. *See* Joseph C. Bright, *State Supreme Court Overturns Ruling on Charitable Exemptions*, STATE TAX NOTES, Apr. 30, 2007, at 320.

22. Eden Ret. Ctr., Inc. v. Dep't of Revenue, 821 N.E.2d 240 (Ill. 2004).

23. ILL. CONST. art. IX, § 6.

24. 233 N.E.2d 537, 541-42 (Ill. 1968).

burdens on government; (2) the organization have no capital, capital stock, or shareholders, and does not profit from the enterprise; (3) funds derive mainly from private and public charity, and are held in trust for the objects and purposes expressed in the organization's charter; (4) charity is dispensed to all who need and apply for it; (5) no obstacles are placed in the way of those seeking the benefits; and (6) the exclusive (i.e., primary) use of the property is for charitable purposes.

In 1984, the Illinois legislature enacted a detailed property-tax statute that granted exemption to specific categories, including "old people's homes" that are tax-exempt under Internal Revenue Code § 501(c)(3) if

> [E]ither: (i) the bylaws of the home or facility or not-for-profit organization provide for a waiver or reduction, based on an individual's ability to pay, of any entrance fee, assignment of assets, or fee for services, or (ii) the home or facility is qualified, built or financed under Section 202 of the National Housing Act of 1959, as amended.[25]

In *Eden Retirement Center*, the lower courts concluded that the home qualified for the charitable-use property-tax exemption based solely on: (1) its exemption from federal income taxes; and (2) its bylaw provision allowing for the reduction or waiver of charges based on residents' inability to pay. The Illinois Supreme Court reversed:

> The appellate court's analysis is erroneous. The *Methodist Old Peoples Home* criteria are not mere nonstatutory "hurdles" intended to apply only to the pre-1984 version of the charitable-use property tax exemption statute. Rather, this court articulated the criteria in *Methodist Old Peoples Home* to resolve the *constitutional* issue of charitable use. The legislature could not declare that property, which satisfied a *statutory* requirement, was *ipso facto* property used exclusively for a tax-exempt purpose specified in section 6 of article IX of the Illinois Constitution. It is for the courts, and not for the legislature, to determine whether property in a particular case is used for a constitutionally specified purpose.[26]

The Illinois Supreme Court did not explain why only the courts, and not the legislature, may put a gloss on the constitutional term "charitable purposes."[27] Unfortunately, the plurality opinion of the Illinois Supreme Court reiterated this position in its March 2010 ruling in *Provena Covenant*

25. 35 ILL. COMP. STAT. ANN. 200/15-65 (West 2006).

26. *Eden Ret. Ctr., Inc.*, 821 N.E.2d at 250 (internal citations omitted).

27. *See id.*

Medical Center v. Department of Revenue,[28] discussed in Part II.C below. While not citing *Eden Retirement Center, Inc. v. Department of Revenue* as to this issue, the plurality declared: "The legislature cannot add to or broaden the exemptions specified in section 6 [of the Illinois Constitution]," and cited a case that rejected property-tax exemption for the Chicago Bar Association.[29] In that case, the Illinois Supreme Court ruled: "Whether particular property is used 'exclusively for . . . school . . . purposes' within the meaning of the constitution is a matter for the courts, and not the legislature, to ascertain. The legislature cannot, by its enactment, make that a school purpose which is not in fact a school purpose."[30] The two justices in *Provena* who concurred only in the result, disagreed: "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."[31]

At the very end of its legislative session in May 2009, Minnesota adopted statutory language to address the concerns of the nonprofit sector following a 2007 state supreme court decision denying exemption to a daycare center claiming to be an institution of purely public charity. Under the state constitution, "institutions of purely public charity" are a separate, catchall category rather than an overarching definition—the full list includes: "public burying grounds, public school houses, public hospitals, academies, colleges, universities, all seminaries of learning, all churches, church property, houses of worship, institutions of purely public charity, and public property used exclusively for any public purpose."[32] A 1975 state supreme court decision set forth what has come to be known as the *North Star* six-factor test for classifying an institution of purely public charity.[33]

In the 2007 decision in *Under the Rainbow Child Care Center v. County of Goodhue*, the Minnesota Supreme Court, applying statutory analysis, ruled that the "factor three inquiry"—"the extent to which the

28. Provena Covenant Med. Ctr. v. Dep't of Revenue, No. 107328, 2010 Ill. LEXIS 289 (Ill. Mar. 18, 2010).

29. *Id.* at *28 (citing Chicago Bar Ass'n v. Dep't of Revenue, 644 N.E.2d 1166, 1171 (Ill. 1994)).

30. *Chicago Bar Ass'n*, 644 N.E.2d at 1171 (internal citations omitted).

31. *Provena*, 2010 Ill. LEXIS 289, at *65 (Burke, J., concurring and dissenting). Justice Burke 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." *Id*. at *70.

32. MINN. CONST. art. X, § 1; *see* MINN. STAT. § 272.02(7) (2009).

33. N. Star Research Inst. v. County of Hennepin, 236 N.W.2d 754, 757 (Minn. 1975).

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."[34] The court rejected the argument that it was enough to have charitable purposes: "*If the legislature had intended* all organizations exempt from payment of federal income taxes under I.R.C. § 501(c)(3) also to be exempt from payment of real property taxes, it could have so provided, as it did with regard to state income taxation."[35] The majority commented: "The second broad consequence of the dissent's interpretation of charity would be that a 'charitable' enterprise could charge the same for its services as a for-profit competitor and nevertheless enjoy exemption from property taxation, as long as no profits inured to the benefit of members of the organization."[36] The court cautioned:

> Moreover, it is not sufficient to provide free or reduced-rate goods or services on such a small scale that they are merely an incidental part of the organization's operations. Nor will free or reduced-rate goods or services that are provided primarily for business purposes be adequate. The organization must demonstrate that its intended purpose is to provide a substantial proportion of its goods or services on a charitable basis. If the organization does not operate on these terms, it is indeed not an institution of purely public charity and cannot qualify for tax exemption on that basis.[37]

In 2008 the Minnesota Legislature adopted a moratorium on *Under the Rainbow*, and required the Department of Revenue to analyze the applicable standards for determining the tax status of these organizations, to survey all county assessors on their practices and policies, and to report the findings to the 2009 legislature.[38] The moratorium allowed for months of deliberations among the Minnesota Council of Nonprofits, the Department of Revenue, and the Association of County Assessors. The consensus, adopted by the legislature in May 2009, codifies the definition of an institution of purely public charity, effective beginning in 2010.

34. Under the Rainbow Child Care Ctr. v. County of Goodhue, 741 N.W.2d 880, 886 (Minn. 2007).

35. *Id.* at 889 (emphasis added).

36. *Id.*

37. *Id.* at 892.

38. The resulting report, MINN. DEP'T OF REVENUE, ASSESSMENT AND CLASSIFICATION REPORT: INSTITUTIONS OF PURELY PUBLIC CHARITY (2009), as well as an executive summary and survey results by county, are available at http://www.taxes.state.mn.us/property_tax_administrators/other_supporting_content/summary.pdf. See Part III for excerpts from the report.

While "not contract[ing] or expand[ing] the definition," Minnesota Statutes section 272.02(7)(a), as amended, requires charities to meet all six judicially created factors for determining tax exempt status, with factors (1), (4), and (6) being mandatory and factors (2), (3), and (5) allowing a "reasonable justification" exception (rejecting the Senate's "compelling factual reason"). See the Appendix for guidance issued March 1, 2010 by the Minnesota Department of Revenue.

B. Intrastate Inconsistency

In 2001 in Illinois, the Attorney General sought to freeze the assets of a white supremacist group, the World Church of the Creator, for failing to register with his office as a charity under the Charitable Solicitations Act.[39] (The Illinois statute does not exempt churches.) The organization succeeded at the trial level in having the statute voided as unconstitutionally vague. On a direct appeal (because a state statute had been ruled unconstitutional), the Illinois Supreme Court upheld the solicitation statute, in part by invoking property-tax exemption precedent:

> In fact, the terms "charity" and "charitable" have a settled meaning in Illinois case law. For example, in *Congregational Sunday School & Publishing Society v. Board of Review*, 290 Ill. 108, 125 N.E. 7 (1919), the appellant's claimed exemption from personal property taxation for religious books and Sunday school supplies was denied . . . . This court, in construing the statutory term "beneficent and charitable organizations," noted that charity is a gift to be applied for the benefit of an indefinite number of persons, by bringing their "'minds and hearts under the influence of education or religion, . . . by assisting them to establish themselves in life . . . or by otherwise lessening the burdens of government.'"[40]

39. People *ex rel.* Ryan v. World Church of the Creator, 760 N.E.2d 953, 955 (Ill. 2001).

40. *See id.* at 960-61 (quoting Congregational Sunday Sch. & Pub. Soc. v. Bd. of Review, 125 N.E. 7, 9 (Ill. 1919)); *see also id.* at 959. As recognized by the court, this commonly cited definition actually traces to *Jackson v. Phillips*; the court quoted an 1893 Illinois Supreme Court decision that stated:

> A charity, in a legal sense, may be more fully defined as a gift to be applied, consistently with existing laws, for the benefit of an indefinite number of persons, either by bringing their hearts under the influence of education, religion, by relieving their bodies from disease, suffering, or constraint, by assisting them to establish themselves for life, or by erecting or maintaining public buildings or works, or otherwise lessening the burdens of government.

The Illinois Supreme Court's opinion in *People ex rel. Ryan v. World Church of the Creator* quoted an appellate decision that had previously construed the solicitation statute:

> "The courts in this State are in accord in applying a broad legal definition of 'charity' to include almost anything that tends to promote the improvement, well[-]doing and well[-]being of social man. Moreover, charitable organizations may include organizations whose primary purpose is *not* to provide money or services for the poor, the needy or other worthy objects of charity, but *to gather and disseminate information about and to advocate positions on matters of public concern*."[41]

Because of the different policy goals of the two regimes, it is possible, if not likely, that the solicitation statute uses a broader definition than does the tax-exemption statute. Indeed, a nonprofit organization might have income-tax exemption but not property-tax exemption or sales-tax exemption. Reportedly, the World Church of the Creator had applied for sales-tax exemption, but the Illinois Department of Revenue (which also has the final administrative word on property-tax exemption in Illinois) denied it charity status.[42]

It seems that, at least as a starting point, the state revenue agency might consult with the state attorney general about whether a particular organization is a charity. Anecdotally, however, this sort of communication rarely occurs.[43] The reverse, of course, can be true: As discussed below, a charity as such can exist under state law even when the entity is denied (or, perhaps, has not satisfied the administrative requirements for) property-tax exemption.[44] Indeed, some states require the revenue department to notify the state attorney general of loss of exemption.[45]

Crerar v. Williams, 34 N.E. 467, 470 (Ill. 1893) (quoting Jackson v. Phillips, 96 Mass. (14 Allen) 539, 556 (1867)).

41. *World Church of the Creator*, 760 N.E.2d at 961 (quoting People *ex rel.* Hartigan v. Nat'l Anti-Drug Coal., 464 N.E.2d 690, 694 (Ill. App. Ct. 1984)) (citation omitted).

42. *See* Kirsten Scharnberg, *Smith's Legacy of Hate and Fear Six Months After Benjamin Smith's Spree, the Pain He Inflicted Is Far from over*, CHI. TRIB., Jan. 3, 2000, at N1.

43. In response to an informal query forwarded to a network of charity regulators in state attorneys general offices, one responder told me in a February 13, 2009 email: "If the Department of Finance were to do anything like what you are saying, which I doubt, they would most likely not even think that they should contact our office." Another charity regulator emailed me, on the same date: "The County property tax assessors have never contacted me to ask whether a particular charity is really a charity."

44. *See* John W. Vinson, *The Charity Oversight Authority of the Texas Attorney General*, 35 ST. MARY'S L.J. 243, 251 n.48 (2004).

II. Specific Factors and Vulnerable Subsectors

State property-tax regimes require both that the property owner be charitable (generally the subject of Part A) and that the charitable owner use the property for a charitable purpose (generally the subject of Part B). The division between these two requirements is not always clear or useful.

A. Evolving Definition of Charity

Charitable organizations are defined under a common law tradition that traces back to the Statutes of Elizabeth in the late sixteenth and early seventeenth centuries.[46] The term "charity" has been fleshed out over

> One critical point . . . is that tax exemption authority and precedents may have little application to the question of whether an entity or specific assets are impressed with a charitable obligation. The presumptions, burdens of proof, and underlying policy assumptions in cases involving a purported charity's entitlement to exemptions and other governmental/legal benefits are often quite distinct. To be so entitled, the purported charity must demonstrate not only that it is organized as a charity, but that it actually operates as a charity. *See* N. Alamo Water Supply Corp. v. Willacy County Appraisal Dist., 804 S.W.2d 894, 899 (Tex. 1991) (holding that "exemptions from taxation are not favored by the law and will not be favorably construed"); *see also* Circle C Child Dev. v. Travis Cent. Appraisal Dist., 981 S.W.2d 483, 486 (Tex. App.–Austin 1998, no writ) (announcing that the party seeking a tax exemption has the burden to clearly show the exemption applies). Also, organizations must affirmatively apply for tax-exempt status, whereas common law charity status, and the obligations imposed by law because of such status, will be applied as a matter of law.
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> *Id.*

45. *See, e.g.*, N.Y. EST. POWERS & TRUSTS LAW § 8-1.4(o) (Consol. 2009) ("Every officer, agency, board or commission of this state or political subdivisions of this state or agencies thereof receiving applications for exemption from taxation of any trustee subject to this section shall annually file with the attorney general a list of all applications received during the year and shall notify the attorney general of any suspension or revocation of a tax exempt status previously granted.").

46. In one important sense, however, the definition of charity in the Charities Act 2006 of England and Wales might be narrower than the traditional common law definition—depending on how the Charity Commission for England and Wales resolves the debate about "public benefit." The Charity Commission construes Charities Act 2006 to require that "[p]eople in poverty must not be excluded from the opportunity to benefit" from the activities of a charity. CHAR. COMM'N, FOR ENG. AND WALES, CHARITIES AND PUBLIC BENEFIT § F11 (2008), *available at* http://www.charity-commission.gov.uk/Library/guidance/publicbenefittext.pdf. *See generally* CHAR. COMM'N, FOR ENG. AND WALES, NEW PUBLIC BENEFIT GUIDANCE (2008), *available at* http://www.charity-commission.gov.uk

hundreds of years of Anglo-American jurisprudence; the current U.S. common law meaning appears in Restatement (Third) of Trusts sections 28 and 29. Broader than eleemosynary institutions, the common law term encompasses, among other categories of nonprofit organizations, hospitals, universities, religious organizations, and arts and cultural organizations, as well as social service and grant-making organizations.

The reference in some state constitutions to exemption for "institutions of purely public charity" (or some similar phrase) has been interpreted by their state supreme courts as requiring the satisfaction of a multi-factor test.[47] In a few other states, a multi-factor test appears in the statute. These tests create problems for compliance and application, however. The factors are not quantitative and data—such as level of donations—may vary from year to year, raising the possibility of flipping in and out of exemption. Nor do the courts weigh the factors, some of which overlap. Other uncertainties—such as whether the charity's receipt of government support means the charity is not lessening the burdens of government, or whether the presence of for-profit competitors means the charity should charge lower prices—lead different courts to reach different conclusions. Most importantly, the courts generally describe the factors collectively as suggestive, raising the question of whether any one or more factor is mandatory. In 2008, an Illinois appellate court singled out the "gift" factor as a *sine quo non* for charity exemption; the case is on appeal to the state supreme court.[48] In 2009, the Minnesota Legislature identified which factors are mandatory and which factors may be excused upon a reasonable exception.[49]

The courts 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. The Restatement (Third) of Trusts provides numerous examples of "purposes that are beneficial to the community" that fall into the residual category,

/news/pblatest.asp; CHAR. COMM'N, FOR ENG. AND WALES, PUBLIC BENEFIT ASSESSMENT RECORDS: INDEPENDENT SCHOOLS (2009), http://www.charity-commission.gov.uk/Charity_requirements_guidance/Charity_essentials/Public_benefit/default.aspx (follow "the public assessment reports" hyperlink for each school listed) (finding that two of the five private schools examined did not provide enough means-tested tuition abatements to allow poor children to benefit from the school's education). All of the reports are available at http://www.charity-commission.gov.uk/Charity_requirements_guidance/Charity_essentials/Public_benefit/default.aspx. See generally Debra Morris's contribution to the NYU conference, "Shades of Virtue: Measuring the Comparative Worthiness of Charities," described in note *, above.

47. *See supra* Part I.A.

48. *See* discussion *infra* Part II.C.

49. *See supra* Part I.A; *see generally* Appendix for details.

including: "[a] trust to prevent or alleviate the suffering of animals"; a trust to promote national security; and "a trust to beautify a city or preserve the beauties of nature or otherwise add to the aesthetic enjoyment of the community."[50] Moreover, charity might include any purpose recognized as having public benefit as may be provided by statute and administrative guidance.

For example, tax exemption for land set aside for conservation is a hot topic under both federal and state-tax policy. At the federal level, the Internal Revenue Code permits a charitable contribution deduction for the perpetual protection of land for enumerated conservation purposes through a grant of a conservation easement to a government entity or charitable organization. For our purposes, consider the concern expressed by a bill introduced in New Jersey, whose legislative findings included the following statement:

> The Legislature further finds and declares that while the dedication of privately-owned open space to public use and enjoyment is a significant governmental interest, there needs to be a balance between the tax incentives granted to encourage that dedication and the burden placed on municipalities that lose that tax revenue; and that no municipality, without its prior consent, shall be required to grant a tax exemption under this act if the land area of the real property for which the exemption would be granted, when combined with the land area already owned in fee simple for recreation and conservation purposes in the municipality by the State, a local government unit, or a qualifying tax exempt nonprofit organization, would exceed [thirty percent] of the total land area of the municipality.[51]

A new frontier might be nonprofit journalism as a means to save the newspaper trade.[52]

All charitable purposes must be viewed in light of the prohibition on private benefit. Thus, commentary to the Third Restatement recognizes that: "The common element of charitable purposes is that they are designed to accomplish objects that are beneficial to the community—i.e., to the

50. RESTATEMENT (THIRD) OF TRUSTS § 28, cmt. *l* (2001).

51. A.D. 3065, 212th Leg. (N.J. 2006), *available at* www.njleg.state.nj.us/2006/Bills/A3500/3065_I1.pdf.

52. *See generally* MARION FREMONT-SMITH, JOAN SHORENSTEIN CTR. ON THE PRESS, POL. AND PUB. POL'Y, CAN NONPROFITS SAVE JOURNALISM? LEGAL CONSTRAINTS AND OPPORTUNITIES, (2009), *available at* http://www.hks.harvard.edu/presspol/publications/papers/can_nonprofits_save_journalism_fremont-smith.pdf.

public or indefinite members thereof—*without also serving what amount to private trust purposes*."[53]

The particular segment of the public being served by the charity is one aspect of the charity's purpose. Importantly, the requirement of a public benefit does not imply that all members of the general public or of a particular political jurisdiction are necessarily the beneficiaries. Indeed, the use of the terms "public" or "community" is not necessarily geographic.[54] Rather, the charity's founders, and thereafter those governing the charity and its members (if any), determine whether the charity's operations will have a particular geographic scope, or target a segment of the public within that scope. For example, a charity could provide scholarships for any graduate students in philosophy, regardless of where they study, or for philosophy graduate students at a particular institution or from a particular town or state. The U.S. Supreme Court, and several state supreme courts, struck down exemption regimes that limited exemptions only to charities (or their property) serving state residents.[55]

A focus on the definition of charity risks missing the complexity of most state property-tax exemption regimes. "Charity" is often a catchall, while the state constitution provides an explicit—and sometimes more generous or more limited—exemption for certain types of nonprofit organizations. As Woods Bowman and Marion Fremont-Smith found:

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53. RESTATEMENT (THIRD) OF TRUSTS § 28 cmt. a (emphasis added); *see also id*. § 28 cmt. l.

54. In the context of property-tax exemption, however, see the discussion of complex corporate structures and transfers to affiliated nonprofits out of the taxing jurisdiction. John Colombo, *The Provena Tax Exemption Case: The Demise of Community Benefit?*, 55 EXEMPT ORG. TAX REV. 175 (2007).

55. Camps Newfound/Owatonna, Inc. v. Town of Harrison, Me., 520 U.S. 564, 586-88 (1997) (ruling that charitable activity is entitled to protection under the Commerce Clause, which prohibits states from discriminating in interstate commerce). 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). Compare these decisions with the commentary in the Restatement (Third) of Trusts addressing the scope of the word "public":

> The mere fact that a trust is created for the benefit of members of a community outside the state . . . does not prevent the trust from being charitable. Thus, a trust for the benefit of impoverished residents of another state, or to establish a hospital in a foreign country, is charitable.
>
> RESTATEMENT (THIRD) OF TRUSTS § 28 cmt. l (2001).

> The most common exemptions are, in descending order, with the number of states indicated in parentheses, religious (35, mostly limited to houses of worship), charitable or benevolent (33), educational (33), and cemeteries (27). Nineteen states exempt all four categories. Other exemptions appearing in the constitutions of at least two states are libraries (12), literary and scientific organizations (8), hospitals (4), cultural organizations and museums (4), agricultural and horticultural organizations (3), and patriotic and veterans' organizations (3). . . .
>
> With or without a constitutional mandate, every state exempts charitable property, but only eleven states define charity in the tax statutes.[56]

Moreover, many state statutes set forth separate provisions for certain subsectors of charities within those enumerated in the constitution, including, notably, nonprofit health care and fitness facilities (including YMCAs), housing (for low-income, elderly, or disabled populations), daycare facilities, and conservation property. A state that would prefer a more systemic reform of the property-tax treatment of the catchall category of charities might need to pursue a state constitutional amendment.[57] So far, though, charities have succeeded in fighting fundamental change.[58]

B. Rationales for Exempting Charitable Property

The question of why charities are tax-exempt has been framed in general theoretical terms of whether the exemption is, on the one hand, a subsidy or, on the other, an acknowledgment that charitable activity falls outside the proper tax base.[59] Uniquely, exemption for charitable activity has been justified on both subsidy grounds and base-defining grounds.[60]

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56. Woods Bowman & Marion R. Fremont-Smith, *Nonprofits and State and Local Governments*, *in* NONPROFITS AND GOVERNMENT: COLLABORATION AND CONFLICT 181, 203 (Elizabeth T. Boris & C. Eugene Steuerle eds., 2d ed. 2006) (footnote omitted).

57. See proposals for state constitutional amendments in Richard D. Pomp, *The Collision Between Nonprofits and Cities over the Property Tax: Possible Solutions*, *in* PROPERTY-TAX EXEMPTION FOR CHARITIES: MAPPING THE BATTLEFIELD, *supra* note 2, at 383, 383-91.

58. *See, e.g.*, David Salomone, *Property-Tax Exemption for Charities: The Minnesota Experience*, *in* PROPERTY-TAX EXEMPTION FOR CHARITIES: MAPPING THE BATTLEFIELD, *supra* note 2, at 353, 353-59.

59. For historical studies of tax exemption in the United States, see Stephen Diamond, *Efficiency and Benevolence: Philanthropic Tax Exemptions in 19th-Century America*, *in* PROPERTY-TAX EXEMPTION FOR CHARITIES: MAPPING THE BATTLEFIELD, *supra* note 2, at 115; Richard L. Gabbler & John F. Shannon, *The Exemption of Religious, Educational, and Charitable Institutions from Property Tax Exemption*, *in* IV RESEARCH PAPERS SPONSORED

Viewed as subsidies, property-tax exemption and income-tax exemption function quite differently. In contrast to income-tax exemption, property-tax exemption (like sales tax exemption and the charitable contribution deduction) is an input subsidy: The tax treatment makes it cheaper to conduct charitable activity. But exemption as a form of subsidy has some peculiar features—notably, as described below, the property-tax exemption has the most value to the most real-estate-rich charities. Moreover, subsidies delivered through exemptions lack the public finance virtues of visibility and adjustability. While exemptions do have the administrative advantage of providing a subsidy at a minimal transaction cost, this virtue is undercut when municipalities (as they occasionally do) engage in individualized negotiations with charities for payments in lieu of taxes.[61] Interestingly, no court following a quid-pro-quo rationale for exemption has quantified whether the public gain equaled or exceeded the forgone tax revenue.[62]

BY THE COMMISSION ON PRIVATE PHILANTHROPY AND PUBLIC NEEDS 2535 (1977) [hereinafter FILER COMMISSION]; PETER D. HALL, INVENTING THE NONPROFIT SECTOR (1992). Evelyn Brody, *Of Sovereignty and Subsidy: Conceptualizing the Charity Tax Exemption*, 23 J. CORP. L. 585 (1998) supplies a perspective over the standard subsidy and base-defining theories of exemption that she dubbed the "sovereignty view" of the tax treatment of the nonprofit sector. It compares the tax treatment of charities to a clear sovereignty set of examples: the tax treatment of governments. *Id.* at 587-89. Note that the largest percentages of untaxed property belongs to federal, state, and local governments, and states (and their subdivisions) tax neither federal property nor their own property. *Id.* at 599.

60. The most thorough analysis of the very complicated U.S. tax treatment of charities can be found in John Simon, Harvey Dale & Laura Chisolm, *The Federal Tax Treatment of Charitable Organizations*, *in* THE NONPROFIT SECTOR: A RESEARCH HANDBOOK 267 (Walter F. Powell & Richard Steinberg eds., 2d ed. 2006). These authors group a variety of policy goals under four headings that they call the support function (subsidy), the equity function (notably redistribution), the regulatory function (constraints on managerial behavior), and the border-patrol function (that is, between charities and both the business and public sectors). *See id.*

61. *See infra* Part III.B.

62. *See* Walz v. Tax Comm'n of N.Y., 397 U.S. 664, 676 (1970); Regan v. Taxation With Representation of Wash., 461 U.S. 540, 544 (1983). But see *American Ass'n for Lost Children, Inc. v. Westmoreland County Board of Assessment Appeals*, 977 A.2d 595, 601 (Pa. Commw. Ct. 2009) (Jubelirer, J., dissenting), in which the dissent criticized such an interpretation of the exemption statute:

> The majority and trial court engraft an additional component to the factual analysis that is not required by Section 5(f)(2); in particular, what tangible financial impact the Association's efforts have on the government. Section 5(f)(2) contains no references to finances, but looks only at whether the government has a legal duty to do a particular service, and whether the institution also performs that service.

Conditions on tax exemption can be used to induce charities to undertake specific activities or to engage in certain behavior. The subsidy theory places charities in a position subordinate to the state, which can determine the parameters of its burdens. To the extent the state is unhappy with—or simply uninterested in subsidizing—certain activities, the state can fine-tune the property-tax exemption.[63]

Under the narrowest conception of the quid-pro-quo approach, the state bestows exemption because charities lessen the burdens of government. Some states explicitly require that a charity must relieve the burdens of government, either in all cases or as one factor. However, an absolute "lessening the burdens of government"[64] requirement cannot apply to churches engaged in activity constitutionally prohibited to government; some state property-tax exemption statutes carve out a category for churches in order to exclude them from this requirement. Moreover, a literal application of the requirement can lead to preposterous results. Consider the decision of a divided panel of the Pennsylvania Commonwealth Court to deny property-tax exemption to a group devoted to finding missing children, partly on the trial court's finding that "the law does not favor the delegation of governmental police duties to private entities."[65] More important though, such a grounding for the charity exemption reflects an overly cramped view of the role of the Third Sector. At the associational level, a wide variety of charities focus on competing approaches to social problems and need not reflect governmental or even majority perspectives.[66]

The dissent concluded:

> It is unclear to me what type of evidence the majority would deem sufficient to establish that an institution has *financially* relieved the government of a burden. I would suggest that requiring a reviewing body to look at the exact amounts of money that a taxpayer's efforts saved the government is an approach that few, if any, taxpayers will, or can, ever succeed at, particularly if the government's own spending on that duty is negligible to non-existent.

Id. at 601 n.5.

63. *See* Camps Newfound/Owatonna, Inc. v. Town of Harrison, Me., 520 U.S. 564, 598-600 (1997) (Scalia, J., dissenting) (explaining that states have denied exemptions "to organizations that do not provide substantial public benefits" as outlined by state public policy). For example, Maine denied an exemption to a wildlife sanctuary on the grounds that its deer-hunting prohibition conflicted with the state's game management policy. *Id.* at 599.

64. *Id.*

65. *Am. Ass'n for Lost Children, Inc.*, 977 A.2d at 596-99.

66. *See* Evelyn Brody & John Tyler, *How Public Is Private Philanthropy?: Separating Reality from Myth*, PHILANTHROPY ROUNDTABLE, June 2009, at 21 (forthcoming in 85 CHI.-

At the practical level, the activities of the charity need not necessarily be congruent with services currently provided by government. Separately, charities (such as think tanks) that are seen to take controversial positions on social, economic, and cultural issues sometimes attract hostile attention. Worse, a requirement to lessen the burdens of government raises particular difficulties for those charities that rely on government funding for service delivery. Courts ruling in favor of exemption in such cases emphasize the beneficial form of the services the charity provides.[67] In denying exemption to a government-subsidized low-income housing charity, though, the Indiana Tax Court followed what it found to be the majority position of states around the country.[68]

KENT L. REV.) (challenging the view that charitable assets are public assets subject to democratic will).

67. *See* Steven R. Smith, *Government Financing of Nonprofit Activity*, *in* NONPROFITS AND GOVERNMENT: COLLABORATION AND CONFLICT, *supra* note 56, at 219; STEVEN R. SMITH & MICHAEL LIPSKY, NONPROFITS FOR HIRE: THE WELFARE STATE IN THE AGE OF CONTRACTING 4 (1993); *see generally* Lester M. Salamon, *The Marketization of Welfare: Changing Nonprofit and For-Profit Roles in the American Welfare State*, 67 SOC. SERV. REV. 16, 16, 19 (1993) ("As of 1980 . . . over [forty] percent of the funds spent by federal, state, and local governments in the United States for a broad range of human service activities supported service delivery by nonprofit organizations. Almost [twenty] percent went to support for-profit providers.").

68. Jamestown Homes of Mishawaka, Inc. v. St. Joseph County Assessor, 909 N.E.2d 1138, 1142-43 n.10 (Ind. T.C. 2009). The court looked to the following sources for guidance:

> *See, e.g.*, Waterbury First Church Hous., Inc. v. Brown, 170 Conn. 556, 367 A.2d 1386 (Conn. 1976) (non-profit housing corporation that rented apartments to the elderly at below market rates was not a "charitable organization" because it did not achieve its charitable purpose through use of its own charitable funds, but rather from government subsidies); Housing Sw., Inc. v. Washington County, 128 Idaho 335, 913 P.2d 68 ([Idaho] 1996) (non-profit housing corporation's provision of housing to the elderly and disabled at below market rates did not perform a function which might otherwise be an obligation of government because the housing was supported by federal tax dollars and not private donations); P'ship for Affordable Hous. v. Bd. of Review, 550 N.W.2d 161 (Iowa 1996) (low-income housing was not a charitable use of property because owner provided residents with nothing more than housing partly subsidized by the government and did not make concessions for tenants who were unable to pay their rents); Supervisor of Assessments v. Har Sinai W. Corp., 95 Md. App. 631, 622 A.2d 786 (Md. Ct. Spec. App. 1993) (nonprofit corporation's purpose in providing low income housing was not charitable because it did not provide any services other than housing, and subsidies were provided by federal government rather than taxpayer itself); Better Living Serv., Inc.

Property-tax exemption—in contrast to income-tax exemption—typically focuses not only on the charitable character of the property owner, but also on whether the charity uses *the property* for exempt purposes. It is usually not enough that the charity occupies the premises or is overall engaged in exempt activities. Moreover, some courts reject exemption for property used for administration on the ground that only property used for the direct conduct of charitable activity qualifies.[69] One of the more baffling strands of cases relates to nonprofit housing providers that lease units to low-income, elderly, or disabled tenants, or rentals by educational institutions to students (dorms). Obviously, the nonprofit first has to qualify as a charity independent of merely providing housing,[70] but a few courts have denied exemption on the owner's failure to use the property itself—that is, the fact that the property is rented to tenants defeats use by the nonprofit. (In Michigan, the statute requires "occupancy," which a majority of the state supreme court distinguished from "use."[71]) Other courts view

> v. Bolivar County, 587 So.2d 914 (Miss. 1991) (nonprofit corporation operating low cost apartments was not a "charitable society" entitled to exemption when it received all of its income through government subsidies and tenant rents); Pittman v. Sarpy County Bd. of Equalization, 258 Neb. 390, 603 N.W.2d 447 ([Neb.] 1999) (stating that low-income housing is not a charitable use of property). *But see* Banahan v. Presbyterian Hous. Corp., 553 S.W.2d 48 (Ky. 1977) (housing provided to the elderly and handicapped for below market rates by "institutions of purely public charity" was employed for a purely charitable purpose); *In re* Rio Vista Non-Profit Hous. Corp. v. County of Ramsey, 277 N.W.2d 187 (Minn. 1979) (housing for low and moderate income families furthers a charitable objective and lessens the burdens of government).
>
> *Id.*

69. *See* ARIZ. REV. STAT. ANN. § 42-11107 (2006) ("Property of charitable institutions for the relief of the indigent or afflicted, appurtenant land and their fixtures, equipment and other reasonably required property including property used for the administration of such relief, are exempt from taxation if the institutions and property are not used or held for profit."). *Compare* Lifespan Corp. v. City of Providence, 776 A.2d 1061, 1062 (R.I. 2001) (denying exemption to property in an administrative building used by an "umbrella entity" to provide services to the hospital and entities: "Lifespan's request that we should equate a corporate office computer to a hospital bed should be directed to the Legislature and not to this Court"), *with* Cmty. Health Prof'ls, Inc. v. Levin, 866 N.E.2d 478, 483 (Ohio 2007) (holding that lease was incidental; administration building exempt).

70. *See* Christine G. Solt & Marion R. Fremont-Smith, *An Argument for Charitable Status and Property Tax Exemptions for Nonprofit Assisted Living Facilities*, 2 ST. & LOC. TAX LAW. 65, 80 (1997) ("If a facility merely provides housing, local assessors or the state tax courts are likely to find that the elderly individual leasing the apartment, rather than the charity, occupies the space, thereby requiring taxation of the property.").

71. *See* Liberty Hill Hous. Corp. v. City of Livonia, 746 N.W.2d 282, 291-92 (Mich.

the rental in this context as charitable use by the nonprofit.[72] A specific statute can clarify the result, perhaps with conditions. For example, the very detailed Texas low-income housing exemption statute allows "a taxing unit any part of which is located in a county with a population of at least 1.4 million" to deny the exemption if "the taxing unit cannot afford the loss of ad valorem tax revenue that would result from approving the exemption."[73] More generally, however justified, tax exemption for charities results in lost tax revenue. Estimating the amount of forgone property-tax revenue cannot be achieved with any precision—not only because of the myriad tax rates that apply at the municipal level throughout the country, but also because few jurisdictions bother appraising property excluded from the tax base. Occasionally cities and other municipalities publish estimates of exempt property, although these usually lump in government-owned real estate, which far exceeds nonprofit-owned property.[74] One national study arrived at a rough "order of magnitude" of

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2008). The court explained:

> Petitioner, a nonprofit organization, leased housing to disabled and low-income individuals during the tax years at issue. In question is whether petitioner was entitled to a property-tax exemption for charitable institutions under MCL 211.7*o*(1), which requires that the charitable institution has "occupied" the property. We affirm the Court of Appeals holding that because petitioner did not occupy the property under the unambiguous language of MCL 211.7*o*, it was not entitled to the property-tax exemption. Petitioner did not maintain a regular physical presence on the property, but instead leased the housing on the property for tenants to use for their own personal purposes.

Id. at 284.

72. *See, e.g.*, Mary Ann Morse Healthcare Corp. v. Bd. of Assessors of Framingham, 910 N.E.2d 394, 398 n.7 (Mass. App. Ct. 2009). The court explained:

> Cases dealing with analogous shared possession have held that, in the absence of exclusive possession by tenants, the owner is considered the "occupant." See *M.I.T. Student House, Inc. v. Assessors of Boston*, 350 Mass. 539, 542 (1966) (occupation of cooperative living arrangement home was by corporation rather than those to whom it afforded home). See also *Franklin Square House v. Boston*, 188 Mass. 409, 410-411 (1905) (holding the same for a "home for working girls").

Id.

73. TEX. TAX CODE ANN. § 11.1825(v), (x)(3)(A) (Vernon 2008). The application of this statute was upheld in *Dallas Independent School District v. Outreach Housing Corp./Desoto I, Ltd.*, 251 S.W.3d 152 (Tex. App. 2008). "[T]he 'loss' referred to . . . is loss *as a result of approving an exemption*, not loss of tax revenue when compared to tax revenues collected before a property is improved." 251 S.W.3d at 155. For a discussion of the significance of government-subsidized housing, see also Part II.C.

74. For a targeted study, see the Cook County Board of Commissioners' requested

between eight and thirteen billion dollars nationally for the annual value of property-tax exemption owned by secular charities, plus an additional one-third for real estate owned by churches.[75] Similarly, another study estimated the value of property-tax exemption for charities other than churches at between nine and fifteen billion dollars.[76]

Of course, the effects of property-tax exemption are not spread uniformly. First, the exemption typically does no good to nonprofits that rent their space; in thirty-nine states, the (same) charity must both own and use the property for charitable purposes, while in only eleven states, use suffices.[77] The distribution of real-estate-owning nonprofits tends to cluster in center cities, although in recent years, this problem of the cities has been migrating to the suburbs. A 2006 report published in the Chronicle of Philanthropy estimated that nonprofit property-tax exemptions annually cost New York City $605 million and Boston $258 million.[78] In contrast, the benefits provided by these nonprofits might be enjoyed by a broader population. Only Connecticut, and to a lesser extent, Rhode Island and Maine, require the state to provide partial compensation to municipalities hosting certain types of exempt nonprofits (hospitals and schools in Connecticut and Rhode Island and newer exempt organizations in Maine).[79]

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report estimating the value of property owned by exempt hospitals in Cook County, Illinois. Assuming that the real estate of fifty-four Illinois licensed general not-for-profit hospitals is fully taxable, the Assessor's Office estimated a value of about $4.5 billion (as of January 2006), which amounts to about 0.75% of total property value in Cook County. This translates into about $240 million in tax savings. COOK COUNTY ASSESSOR'S OFFICE, EXEMPT HOSPITALS: VALUATION ESTIMATES AND APPRAISAL METHODOLOGY 2, 11 (2007), www.cookcountyassessor.com/forms/ExemptHospitalValuationEstimates.pdf.

75. Joseph J. Cordes, Marie Gantz & Thomas Pollak, *What Is the Property-Tax Exemption Worth?*, *in* PROPERTY TAX EXEMPTION FOR CHARITIES: MAPPING THE BATTLEFIELD, *supra* note 2, at 81.

76. Bowman & Fremont-Smith, *supra* note 56, at 181, 202.

77. *See* Jaye A. Calhoun, State and Local Tax Issues for Nonprofits and Charitable Organizations, materials presented at a meeting of the American Bar Association, Section of Taxation, State & Local Tax Committee (Washington, D.C., May 5, 2009), at 4, *available at* http://www.mcglinchey.com/doc/2010/SALTCalhoun.pdf.

78. Harvy Lipman, *The Value of a Tax Break & Cities Take Many Approaches to Valuing Tax-Exempt Property*, CHRON. OF PHILANTHROPY, Nov. 23, 2006, at 13. The online article includes a chart captioned "How Much the Nation's Biggest Cities Lose Because Charities Are Exempt from Property Taxes," along with tables of the ten most valuable properties owned by nonprofits in each of the following twenty-three cities: Baltimore, Boston, Charlotte, Columbus, Dallas, Denver, El Paso, Fort Worth, Houston, Jacksonville, Los Angeles, Memphis, Nashville, New York, Philadelphia, Phoenix, Portland, San Diego, San Francisco, San Jose, Seattle, Tucson, and Washington, D.C. *Id.*, *available at* http://philanthropy.com/article/The-Value-of-a-Tax-Break/54882/.

79. Additionally, Wisconsin has provided for payments for exempt-research property in

Politics often results in the passage of legislation favorable to certain types of nonprofits or nonprofit activity.[80] Nevertheless, regardless of the chosen rationale for tax exemption, charities remain vulnerable to tax reforms,[81] although many proposals fade away or, more rarely, are voted down.[82] At the state level, "lawsuits and legislation (enacted or proposed) asserting tighter definitions for exemption reflect a growing divergence of federal and state policies, and a growing acceptance by the states of a quid pro quo rationale for granting exemption."[83]

C. Mandating Redistribution Versus Avoiding Private Benefit

The issue arises from time-to-time with respect to tax-exemption whether any given charitable purpose additionally includes a special obligation to serve the poor.[84] For example, policy makers hear increasing demands for charities—notably the two largest nonprofit subsectors, hospitals and higher education—to provide greater distributional equity to society as a whole. At the federal level, Congress worries not just about current financial pressures on public finance systems, but also whether to reevaluate the role of nonprofit hospitals following national health care reform.[85] Similarly, congressional calls for universities to increase the

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its 2009-2011 budget. *See* Act of June 29, 2009, 2009 Wis. Act 28 sec. 176 (2009).

80. *See, e.g.*, Tax Analysts, *Texas Final SB 2442 Expands Property Tax Exemption for Charitable Organizations*, STATE TAX TODAY, July 30, 2009, *available at* 2009 LEXIS STT 144-26 ("Texas SB 2442 as signed into law provides a property tax exemption for charitable organizations operating radio stations that broadcast public interest programming, and for real property that is owned by a charitable organization and leased to an institution of higher education.").

81. Evelyn Brody, *Charities in Tax Reform: Threats to Subsidies Overt and Covert*, 66 TENN. L. REV. 687, 689 (1999).

82. *See, e.g.*, North Dakota Association of Nonprofit Organizations, Legislative Update (May 7, 2009), http://archive.constantcontact.com/fs062/1102179965161/archive/1102571299154.html (noting that HB 1200, which "would have allowed cities and counties to impose property tax levies on some nonprofits for the cost of fire, law enforcement and emergency services[,] [f]ailed in the House 36-57").

83. Brody, *Quid-Pro-Quo Rationale*, *supra* note 3, at 270. For individual PILOT agreements between various municipalities and their hosted nonprofits, see Part III.

84. *See, e.g.*, John D. Colombo, The Role of Redistribution to the Poor in Federal Tax Exemption for Charities, paper presented at the NCPL conference, "Shades of Virtue: Measuring the Comparative Worthiness of Charities," *supra* note *; Miranda Perry Fleischer, *Theorizing the Charitable Tax Subsidies: The Role of Distributive Justice*, 87 WASH. U. L. REV. 505 (2010).

85. *See* SENATE FINANCE COMMITTEE, FINANCING COMPREHENSIVE HEALTH CARE REFORM: PROPOSED HEALTH SYSTEM SAVINGS AND REVENUE OPTIONS 33-34 (May 20, 2009), *available at* http://finance.senate.gov/sitepages/leg/LEG%202009/051809%20Health%20Care%20Description%20of%20Policy%20Options.pdf.

draws from their endowments in order to reduce tuition effectively would mandate exempt organizations to meet the needs of consumers (i.e., constituents).

As a general matter, Boris Bittker and George Rahdert[86] shifted the exemption analysis from the charity's to the beneficiaries' "ability to pay" taxes'. To the extent a charity serves low-income persons, any tax rate other than zero could be viewed as the wrong rate. However, the few studies of the distributional effects of charity[87] suggest that most charities do not focus their services on the poor. A disjunction between burdens and benefits is particularly salient in the context of property tax, because exemptions are granted at the state level, but taxing jurisdictions can be more strictly bounded than the reach of the services provided by nonprofits (notably, cultural institutions, hospitals, and universities). As Thomas Heller commented: "Since the bulk of charitable property is located in

> The Committee could consider a policy option that would codify organizational and operational requirements for determining whether a hospital is a charitable organization for purposes of section 501(c)(3) tax-exempt status.
>
> Such requirements include, among other things, that section 501(c)(3) hospitals regularly conduct a community needs analysis, provide a minimum annual level of charitable patient care, not refuse service based on a patient's inability to pay, and follow certain procedures before instituting collection actions against patients.
>
> Certain hospitals that are critical to the communities they serve or which have an independent basis for tax exemption (e.g., as an educational or scientific research organization) are excluded from the minimum charity care requirement. The proposal includes provisions designed to ensure proper reporting and transparency of operations. In addition, the proposal provides for excise taxes, or "intermediate sanctions," designed to encourage compliance with the operational requirements. These intermediate sanctions could be imposed, for example, in situations where revocation of tax-exempt status is viewed as inappropriate.

Id. But see MAX BAUCUS, SENATE FINANCE COMMITTEE CHAIR, FRAMEWORK FOR COMPREHENSIVE HEALTH REFORM 18 (2009), *available at* http://finance.senate.gov/press/Bpress/2009press/prb090909.pdf ("Non-profit Hospitals Requirements. This proposal would establish new requirements applicable to nonprofit hospitals. The requirements would include a periodic community needs assessment.") (typeface altered).

86. Boris I. Bittker & George K. Rahdert, *The Exemption of Nonprofit Organizations from Federal Income Taxation*, 85 YALE L.J. 299, 314-16 (1976).

87. See the studies collected in WHO BENEFITS FROM THE NONPROFIT SECTOR? (Charles T. Clotfelter ed., 1995).

urban centers, the overpaying group is likely to be relatively poorer than the proper donor class which benefits from charitable activities."[88]

Most visibly, as states become increasingly concerned about the health needs of the uninsured, legislatures, if not courts, are tempted to equate "charity care" with "charity" as a condition of property-tax exemption for nonprofit hospitals.[89] The most recent case arose in Illinois, but ended with an anticlimactic plurality decision that failed to establish precedent—to the distress or relief of observers, depending on their views of judicial authority[90] and the merits of the debate.[91] Provena Covenant Medical Center, a nonprofit hospital in Urbana, appealed from an appellate court decision upholding the ruling of the Department of Revenue that Provena should lose its $1 million a year exemption because it spent less than one percent of revenue on charity care. The Revenue Department's ruling came on the heels of an unnerving legislative proposal by Illinois Attorney General Lisa Madigan that property-tax exemption for a hospital

88. Thomas C. Heller, *Is the Charitable Exemption from Property Taxation an Easy Case? General Concerns About Legal Economics and Jurisprudence*, *in* ESSAYS ON THE LAW AND ECONOMICS OF LOCAL GOVERNMENTS 183, 211 (Daniel Rubinfeld ed., 1979).

89. Health care reform could alter this metric. *See* Scott Allen & Marcella Bombardieri, *Much Is Given by Hospitals, More Is Asked*, BOSTON GLOBE, May 31, 2009, *available at* 2009 WLNR 10311580 ("[H]ospital spending on free care is declining because of the state's 2006 healthcare reforms. Today, hospitals typically spend about one percent of expenses on free medical care, as measured by the attorney general, half of what they spent before reform made insurance available to many more low-income people."); *see also* Letter from Douglas M. Mancino to Senate Finance Committee, May 26, 2009, at 2, *available at* http ://www.healthcarelawreform.com/uploads/file/Letter%20re%20policy%20options(2).pdf :

> In its September 2008 report, "Nonprofit Hospitals: Variation in Standards and Guidance Limits Comparison of How Hospitals Meet Community Benefit Requirements," (GAO-08-880, September 2008), the Government Accountability Office (GAO) found that as of March 2008 [fifteen] states required that hospitals provide community benefits in order to receive state tax exempt or nonprofit status, although those requirements "vary substantially in scope and detail." GAO Report at page 16. In addition to these [fifteen] states that have specific community benefit requirements for hospitals seeking tax-exempt or nonprofit status, other states impose such requirements on hospitals as a condition of licensing, real property tax exemptions, or by guidance issued by the state's attorney general. GAO Report at page 16, note 44.

Id. See generally Douglas M. Mancino, *The Charity Care Conundrum for Nonprofit Hospitals*, 20 TAX'N OF EXEMPTS 3 (2008).

90. *See supra* Part I.

91. For an analysis, see John Colombo, Provena Covenant*: The [Sort of] Final Chapter*, EXEMPT ORG. TAX REV. (forthcoming May 2010).

should be conditioned on spending at least eight percent of operating costs on charity care.[92]

The appeals court in *Provena* declared: "[b]y holding medical care to be, in and of itself, charity, we effectively would excuse charitable hospitals from their ongoing mission of giving. . . . That holding not only would create a deafening cognitive dissonance, but it would ignore the supreme court's repeated rationale in cases involving charitable hospitals."[93] The appellate court explained:

> Provena quotes *People v. Young Men's Christian Ass'n of Chicago*, 365 Ill. 118, 122, 6 N.E.2d 166, 169 (1936): "'Charity,' in law, is not confined . . . to mere almsgiving." That is true. But it is confined to giving. Charity is a gift, and one can give a gift to a rich person as well as to a poor person, the object being "the improvement and promotion of the happiness of man." For example, out 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. Regardless of whether the recipient of the goods or services is rich or poor or somewhere in between, it is nonsensical to say one has given a gift to that person, or that one has been charitable, by billing that person for the full cost of the goods or services—whether the goods or services be medical or otherwise. For a gift (and, therefore, charity) to occur, something of value must be given for free.[94]

The appellate court upheld, as not clearly erroneous, the determination by the Illinois Department of Revenue that the nonprofit hospital failed to establish that it was charitable where it spent 0.7% of its revenue on charity care. The court examined the record against the "backdrop of familiar facts" on the large number of uninsured Americans, declaring:

> The Director [of the Department of Revenue] could have drawn either of two inferences from that percentage. He could have inferred that in 2002, medical care in Champaign County was so affordable, and the citizenry so prosperous, that there simply was no occasion for Covenant to spend more than 0.7% of its revenues on charity care; a higher percentage would have required Covenant to "manufacture patients in need," as Provena

92. Provena Covenant Med. Ctr. v. Dep't of Revenue of Ill., No. 107328, 2010 Ill. LEXIS 289, at *7 (Ill. 2010), *aff'g* 894 N.E.2d 452, 481-82 (Ill. App. Ct. 2008).

93. 894 N.E.2d at 465.

94. *Id.* at 467-68 (citation omitted).

> puts it. Alternatively, the Director could have inferred that Covenant did not dispense charity to all who needed it and that Covenant, therefore, was not used "exclusively" for "charitable purposes." The Director chose the latter inference, and we are not left with a definite and firm conviction that he thereby made a mistake.[95]

Note that the court disregarded evidence of community-benefit activities off-site, because property-tax exemption focuses on the use of the premises for which exemption is sought.[96]

Because two of the seven justices recused themselves, the Illinois Supreme Court's decision was rendered by the five remaining justices. While all five 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.[97] Accordingly, the opinion creates no legal precedent.[98]

Moreover, the plurality made the assertion—which I've never seen before—that the charity factor of "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 plurality 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.[99]

The plurality identified the multiple 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

95. *Id*. at 471.

96. *Id.* at 478 ("In this respect, the Illinois standard for exemption from property taxes is different from the more diffuse 'community benefit' standard for exemption from the federal income tax." (citing Rev. Rul. 69-545, 1969-2 C.B. 117-18)); John D. Colombo, *Hospital Property Tax Exemption in Illinois: Exploring the Policy Gaps*, 37 LOY. U. CHI. L.J. 493, 497-98 (2006).

97. *See* discussion *supra* Part I.

98. *See* Colombo, *supra* note 84.

99. *Provena Covenant Med. Ctr.*, 2010 Ill. LEXIS 289, at *37-38. For the Commerce Clause prohibition on limiting exemption to charities that favor in-state residents, see *supra* note 55 and accompanying text.

District, Urbana Park District, Champaign-Urbana Mass Transit District, and Champaign-Urbana Public Health District."[100] The minority 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.[101]

Compare a 2008 decision in which the high court of Massachusetts refused to make free care (in any percentage) a sine qua non of charitability:

> To determine whether an organization is charitable, the court weighs a number of nondeterminative factors. These factors include, but are not limited to, whether the organization provides low-cost or free services to those unable to pay; whether it charges fees for its services and how much those fees are; whether it offers its services to a large or "fluid" group of beneficiaries and how large and fluid that group is; whether the organization provides its services to those from all segments of society and from all walks of life; and whether the organization limits its services to those who fulfil certain qualifications and how those limitations help advance the organization's charitable purposes.[102]

Rather, the court looked at how "traditionally charitable" the "purposes and methods" of the applicant are:

> The closer an organization's dominant purposes and methods are to traditionally charitable purposes and methods, the less

100. *Id*. at *38-39. The opinion noted:

> In reaching this conclusion, we do not mean to suggest that Provena Hospitals' 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 *39 n.10.

101. *Id.* at *70-71 (Burke, J., concurring in part and dissenting in part) (citation omitted).

102. New Habitat, Inc. v. Tax Collector of Cambridge, 889 N.E.2d 414, 418-19 (Mass. 2008) (citations omitted).

> significant these factors will be in our determination of the organization's charitable status under G. L. c. 59, § 5, Third. The farther an organization's dominant purposes and methods are from traditionally charitable purposes and methods, the more significant these factors will be.[103]

The court added: "In weighing this factor, we consider whether the organization's charging of fees helps to advance the organization's charitable purpose."

In finding that New Habitat's purpose and methods are traditionally charitable, the court explained:

> New Habitat provides long-term housing for persons with acquired brain injury and provides its residents with personal assistance programs, educational programs, and programs to improve their physical and psychological health. There is also undisputed evidence that New Habitat's residents cannot live independently or care for themselves and that they need twenty-four-hour support each day.[104]

Moreover, while

> New Habitat charges substantial fees for its services, . . . the tax collector does not contend that those fees are unreasonable for the services provided, and the parties agree that all fees and revenue derived from the property are expended solely for the successful operation of the residence. The fees thus help to advance the organization's charitable purpose.[105]

Fundamentally, one can argue that an anti-poverty requirement for exemption has the normative policy backwards: that charity should *complement* not *supplement* government.[106] Because of its ability to raise taxes and to allocate resources across the population as a whole, government has the comparative advantage in redistributing income or benefits in a fair and cost-effective way.[107] At the same time, charities have the comparative advantage of ascertaining local and specialized needs,

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103. *Id.* at 419 (citations omitted). In adopting this approach, the court dropped a "but see" citation to *Under the Rainbow Child Care Center, Inc. v. County of Goodhue*, 741 N.W.2d 880, 887 (Minn. 2007). *New Habitat, Inc.*, 889 N.E.2d at 419; *see also supra* Part I.A.

104. *New Habitat, Inc.*, 889 N.E.2d at 420.

105. *Id.*

106. *See* Brody & Tyler, *supra* note 66, at 22-23.

107. *Compare generally* BURTON A. WEISBROD, THE NONPROFIT ECONOMY (1988) (explaining that the government responds to the median voter and private philanthropy remedies this government failure).

allowing for service delivery that is flexible and compassionate. In upholding property-tax exemption for Longwood Gardens, a world-renowned arboretum and research facility outside Philadelphia, the Pennsylvania Supreme Court echoed the Illinois Appellate Court decision in *Provena* by focusing not on income redistribution, but rather on whether the overall operations provided a gift:

> [A] facility as large and multi-faceted as Longwood is a unique resource that virtually no individual could afford to maintain on his or her own. It is in this regard comparable to a public library, museum, or art gallery. Such institutions have qualified as purely public charities notwithstanding the fact that many, indeed probably most, of their visitors are not incapacitated or poor.[108]

The desire to deny exemption in cases of private benefit sometimes turns on state statutes or judicial decisions prohibiting the charity from operating the property "for profit." After all, property-tax exemption typically does not extend to real estate held simply for investment or for use in an unrelated business.[109] But the line can be hard to draw. Special focus falls on charities that charge clients a fee for their services. The Massachusetts high court recently disavowed the implication from previous cases "that the charging of a substantial fee, in itself, might render an organization not charitable under G. L. c. 59, § 5, Third."[110]

Indeed, the existence of for-profit competitors is generally not alone enough to render property taxable. The Massachusetts decision just

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108. Unionville-Chadds Ford Sch. Dist. v. Chester County Bd. of Assessment Appeals, 714 A.2d 397, 400 (Pa. 1998).

109. Compare this with the federal unrelated business income tax ("UBIT"), which defines a business activity as unrelated to the organization's exempt purpose if its purpose is merely to generate funds that will be used to support exempt activities. *See* I.R.C. § 513(a) (2006). The federal rules are more forgiving, however, because they exclude from the UBIT many forms of investment income. *See id.* § 513(b).

110. *New Habitat, Inc.*, 889 N.E.2d at 421. The court declined to follow "cases [that] can be read to support such a proposition," while noting "that the results in those cases are fully in line with the result reached here and with the principles articulated in this decision." *Id.* The court gave as one example the decision in *Boston Symphony Orchestra, Inc. v. Assessors*, 1 N.E.2d 6 (Mass. 1936), in which

> the court held that an organization was not charitable for purposes of the real estate tax exemption where the organization charged a fee for its concerts. However, the court expressed doubt whether the dominant purpose of the organization was traditionally charitable and reasoned that its concerts may have been geared more to entertain than to educate.

Id. (Not to worry—the Symphony was able to obtain exemption shortly after that decision. Comments of Marion Fremont-Smith at the NCPL conference, "Shades of Virtue: Measuring the Comparative Worthiness of Charities," *supra* note *.)

discussed rejected a test proposed by the tax collector "whereby the charitable status of an organization depends on the wealth of its beneficiaries and the existence of sufficient alternative organizations that can perform the functions of the organization in question," on the ground that such a test "would set an exceedingly difficult standard to apply as it would require the court to delve into the personal finances of individual beneficiaries, determine the existence of comparable alternative organizations, and compare the quality and services of those organizations with the organization in question."[111]

Nevertheless, courts often do consider competition as a factor in the analysis. (Providing high executive compensation can also trigger questions.) While health clubs remain a focus of municipal challenge, hospitals are also vulnerable, even when charity care (as discussed above) is not the issue. Given their visibility in the community—both in terms of property ownership and economic power as employers—hospitals sometimes find that even an explicit statutory mention does not ensure their exemption. Long-term housing gives rise to frequent litigation, particularly retirement housing offered at market rates—after all, elderly individuals must pay property tax on their homes, even if legislatures often give them a homestead-exemption amount.

Decisions relating to retirement, assisted-living, housing for a special-needs population, and low-income housing facilities vary depending on differences in state law. Separately, exemption might be available for clergy housing (parsonages). Depending on the vagaries in a state's property tax scheme, a nonprofit daycare facility might have to rely on the education category of exemption, which would not be available if the daycare service is merely custodial.

Churches usually fall outside the types of charities from which states or municipalities seek to remove exemption or impose PILOTs.[112] This

111. *New Habitat, Inc.*, 889 N.E.2d at 422-23.

112. As to the practical difficulties of applying constitutional constraints, see the Kentucky Supreme Court decision "'interpret[ing] the meaning of 'occupied' in the strict context of this constitutional provision":

> In keeping with this endeavor, we recognize that churches are unique. For the most part, they are never "occupied" in the conventional sense. A vast majority of properties owned by "institutions of religion" such as churches, mosques, tabernacles, temples, and the like, are used for places of worship at specified times and may remain vacant for substantial periods during the week. We further recognize that adjacent facilities, such as activity buildings, gymnasiums, even shelters, may be owned by religious institutions, but perhaps utilized irregularly on an as needed basis. School buildings owned by religious institutions may, in fact, sit idle for a great deal of time. This would not preclude these

attitude might be based as much on expediency as on constitutional delicacy—churches do not usually have operating income streams like patient revenue or tuition. However, even a proliferation of churches can rankle.[113]

III. Exemption in Practice

A. Administering and Evaluating Property-Tax Exemption Schemes

The apparatus for administering the property tax, and thus exemptions from property tax, vary among the states. Details might appear in a state's administrative code or agency regulations.[114]

However, inconsistencies in application also exist *within* states. For example, the 2008 legislatively mandated survey of Minnesota assessors found a range of responses by county:

> It is clear that many of the guidelines used are "feeling-based" as opposed to "fact-based." Some criteria are possible to verify through documentation: 501(c)(3) statuses, Articles of Incorporation, amount of donations, fees charged, etc. However, some criteria are less obvious in terms of proving: defining "charity," lessening the burden of government, competition in market, etc.
>
> Of the [eighty-five] respondents, [fifty] said that they did require institutions to provide goods or services for free or at below-market prices (representing approximately [fifty-nine percent] of respondents). However, [twelve] counties do not require this practice. Of the remaining respondents, difficulty ascertaining market prices or lack of similar organizations made this question unanswerable. Other counties said that, while this is a factor that is regarded, it is not the sole determining factor used

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> buildings from being "occupied" under [s]ection 170 of Kentucky's Constitution. It is precisely for these reasons that we find that the trial court's findings were supported substantially by the evidence in this case as to the property not being rented out as residences.

Freeman v. St. Andrew Orthodox Church, Inc., 294 S.W.3d 425, 429 (Ky. 2009); *see* discussion *supra* Part III.B.

113. *See* Lianne Hart, *Churches Putting Town Out of Business: Stafford, Texas, Has 51 Tax-Exempt Religious Institutions and Wants No More: "Somebody's Got to Pay for Police, Fire and Schools,"* L.A. TIMES, July 31, 2006, at A13; *see also supra* Part III.A.

114. *See, e.g.*, PROP. TAX DIV., UTAH STATE TAX COMMISSION PROPERTY TAX EXEMPTIONS: STANDARDS OF PRACTICE 2 (June 2007), *available at* http://propertytax.utah.gov/standards/standard02.pdf. Specific criteria for hospitals, nursing homes, and other health-care related organizations appear in Appendix 2D. *Id.* at 2-36.

> in whether or not an exemption is granted. The determination of "market rates" was discussed as a problem by members of the nonprofit community as well.[115]

Moreover, counties variously answered yes, no, or maybe (as well as "?" or left blank) to two questions: "Do you treat government payments for goods or services as donations?" and "Do you treat government grants as donations?"[116]

For another example of differences in application within a state, charities can claim exemption in New York not only for property used for their charitable purposes, but also for unimproved real estate that is "in good faith contemplated" to be used for charitable purposes.[117] A recent news story provides an example of the back and forth that can occur between assessors and the reviewing body:

> The cursory nature of the forms and the potential for fraud prompted the city of Rochester last fall to begin scrutinizing the 1,095 tax-exempt properties owned by nonprofits, including churches.
>
> Appraisers have examined 306 of the properties to date and revoked [fourteen] exemptions worth nearly $3 million in assessed value. Only $1.3 million of that is taxable today because the Board of Assessment Review reinstated some exemptions or property owners sold to other nonprofits.[118]

115. MINN. DEP'T OF REVENUE, *supra* note 38, at 9. Of eighty-seven counties, eighty-four (and the city of Minneapolis) returned the survey. *Id.* at 7.

116. *Id.* at 17-147.

117. *See infra* Appendix. The high court of New York describes the squishiness of this test in *Legion of Christ, Inc. v. Town of Mt. Pleasant*, 806 N.E.2d 973, 977 (N.Y. 2004):

> The inquiry necessarily is fact-specific. Moreover, each taxable year is distinct and separate for purposes of RPTL 420-a (3)(a) exemption eligibility. With each application for renewal, the boundaries of good faith take on new dimensions. As years pass, the taxpayer may reasonably be required to show some concrete act toward developing or otherwise improving the property to carry out the tax exempt purpose. Property must not be allowed to lie idle indefinitely at the expense of the locality and its citizens. This "landbanking" has the effect of diminishing the tax base of a locality and increasing the tax burden for schools and other municipal operations.

118. David Andreatta, *Religious Groups Have Wide Latitude for Property Tax Breaks*, ROCHESTER DEMOCRAT AND CHRON., Aug. 23, 2009, *available at* http://rocnow.com/article/local-news/2009908230329.

As a threshold matter to appealing an adverse ruling, a would-be exempt charity usually must pay the tax and sue for a refund: "there are countless tax-exempt groups which do not have the resources to pay a hefty property tax bill, not to mention the funds for a lengthy court battle against a municipality."[119]

Of paramount practical importance is the burden of proof, which is essentially a positive versus a negative requirement regarding public benefit. Even though the putative exempt organization has the burden under both the federal and state tax systems, it is harder for a charity to demonstrate existence of specific requirements for public benefit (as under some state law systems) than generally to show a charitable purpose (public benefit assumed). Compare this to the removal of a presumption of public benefit for charities of all types—reportedly aimed at private schools—in the Charities Act 2006 of England and Wales, mentioned above.

While a nonprofit usually need not apply for exemption every year, state requirements vary on how often the nonprofit must renew its exemption. In the *Provena* case in Illinois, for example, the hospital had to reapply for exemption after a change in ownership, at which time the county board of review scrutinized the level of charity care the hospital provided.[120] Moreover, each tax year stands on its own. In many of the cases described above and in the Appendix, the court emphasized that the charity failed to meet its burden for the year at issue. Presumably, the now-instructed applicant will cure the defects in the record for future years.

Some jurisdictions have undertaken studies to assess and quantify the impact of exempt property.[121] In one statewide study, Pennsylvania issued a detailed report in May 2009 on: (1) the value of tax-exempt property in individual municipalities by property type ("federal, state, or local governments; government designated instrumentalities; churches; hospitals;

119. Glen Fries, *To Tax, or Not to Tax?* Elder Trust v. Town of Epsom *Answers the Question*, N.H. BAR J., Summer 2007, at 14, *available at* www.nhbar.org/publications/archives/display-journal-issue.asp?id=368.

120. Debra Pressey, *Arguments on Provena's Tax Case in High Court Begin*, THE NEWS-GAZETTE (Urbana/Champaign), Sept. 24, 2009, *available at* http://www.new-gazette.com/news/health-care/2009-09-24/arguments-provenas-tax-case-high-court-begin.html.

> The Provena tax case originated with a 2003 decision by the local board of review after it came to light that a change of ownership for the long tax-exempt Catholic hospital required a new application for a tax exemption. The board of review took a look at how much charity care Covenant offered needy patients during the 2002 tax year and deemed it insufficient to warrant an exemption.

Id.

121. *See* discussion of PILOTs *infra* Part III.B.

private colleges and universities; parks and recreations; museums; and other federal 501(c)(3) entities holding tax-exempt real property"); (2) PILOTs, SILOTs, and other taxes, fees, and grants provided to individual municipalities by tax-exempt property owners, including governments and government affiliates; (3) the "effect of a disproportionate share of tax-exempt properties on the fiscal health of the Commonwealth's municipalities"; (4) Pennsylvania programs addressing the disproportionate impact of tax-exempt real properties on local government; and (5) "[a]pproaches taken by the federal government and other states to address the disproportionate impact of exempt real property on municipal government and their options for replication in the Commonwealth."[122] Portions of the study "capture the value of nonprofit services to their local communities" and "underscore the importance of nonprofit collaboration with the legislature and with each other."[123] The report found, among other things:

1. Governments and religious organizations are the major holders of tax-exempt property;
2. Relatively few Pennsylvania municipalities host non-profit acute-care hospitals and public and private universities;
3. Of the Pennsylvania municipalities that host non-profit acute-care hospitals and public and private higher education institutions, only about twenty-five percent have high fiscal distress scores;
4. Host municipalities, hospitals and public and private colleges and universities have developed a variety of approaches to strengthen their community and, in the words of the state-owned universities' governing board, "minimize, to the extent practicable, the burden of municipal services provided to the university"; and
5. While many hospitals and universities, including those with thin operating margins, seek to assist their municipalities, some are better positioned financially than others.

A bitter dispute over exemption for low-income rental housing in Madison, Wisconsin illustrates the complexities and indeterminacy of

122. LEGISLATIVE BUDGET AND FIN. COMM.: A JOINT COMM. OF THE PA. GEN. ASSEMBLY, TAX-EXEMPT PROPERTY AND MUNICIPAL FISCAL STATUS 1 (2009), *available at* http://lbfc.legis.state.pa.us/reports/2009/26.PDF [hereinafter PENNSYLVANIA LEGISLATIVE BUDGET & FINANCIAL COMMITTEE] .

123. Pano.org, State Releases Report on Impact of Property Tax Exemptions on Municipalities LB&FC Report (Apr. 1, 2009), http://www.pano.org/publicpolicy/publicpolicy-state_taxation.php.

administering a property-tax regime. Madison had prevailed in court in 2008 with its argument:

> [T]hat to qualify for a property tax exemption, nonprofits can only use rental income for maintenance or construction debt. Housing providers say they use rent income for all sorts of management costs and that they cannot afford to pay property taxes. Some say they might have to close their doors if forced to pay—putting hundreds of low-income people out on the streets.[124]

A majority of the city council wanted to grant a two-month grace period for collecting taxes from several organizations that filed appeals, rejecting the advice of the city attorney who asserted that the city lacked discretion to forbear collecting tax.[125] The local newspaper quoted one council member: "[City Attorney] Mike May looked very upset the other night. But I simply don't agree. I'm the policymaker, I'm not the attorney. I have to do the best for the people of the city of Madison, and I think I did."[126] The issue was resolved in favor of exemption in the 2009-2010 budget legislation.[127]

B. Exemption Work-Arounds: User Fees and PILOTs

As the current recession grinds on, municipalities and their educational institutions and other nonprofit organizations increasingly find themselves cast as misunderstood fiscal opponents. The barrage of news stories attests to the degree that tax-exempt real estate can rankle in times when home values are falling, jobs are in jeopardy or hard to find, and pressure for municipal services grows while governments adopt deep cuts to meet shrinking budgets.

Even in good times, the picture is not a simple one of the taxed versus the tax-exempt. Charities are not exempt 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.

124. Joe Tarr, *Low-Income Property Tax Issue Spurs 'Tent City' Protest at Capitol*, ISTHMUS-THE DAILY PAGE (Madison, Wis.), May 12, 2009, http://www.thedaily page.com/daily/article.php?article=25869.

125. Joe Tarr, *Alders Clash with Madison City Attorney over Property Tax Exemption*, ISTHMUS-THE DAILY PAGE (Madison, Wis.), April 30, 2009, http://www.thedailypage. com/daily/article.php?article=25760.

126. *Id.* For discussion of the "rent use restriction" and the political process, see Posting of Kristiin Czubkowski to Madison.com, http://host.madison.com/news/local/govt_and_ politics/city_hall/article_dade90d0-730c-5472-8647-7ea75ce1cf77.html (Apr. 29, 2009, 12:00 EST).

127. *See* Wisconsin Nonprofits Association, *supra* note 6.

Census Bureau data show that only thirty percent of municipalities' revenue is attributable to property tax, while forty percent comes from user fees (the rest is redistributed from the federal and state levels).[128] However, specific charges cannot recoup the general portion of the forgone tax, notably the amount paid for public schools. Nor can taxes legitimately be disguised as fees to cover the costs of imposing essential services such as police and fire protection. The Nelson A. Rockefeller Institute reported in January 2010[129] that property taxes "tend to be relatively stable" and indeed rose by 3.3% in the third quarter of 2009. But this is because property-tax rates are calculated after the jurisdiction determines the value of taxable property—in order to hit a target. Thus, unless the jurisdiction operates under a tax-rate cap—like Proposition 2-1/2 in Massachusetts—only political considerations prevent a town from increasing the rate on taxable property to meet a revenue target. Of course, when property values fall, this means higher rates for those paying tax. What can a revenue-hungry municipality burdened by significant exempt property do?

A few states explicitly authorize or encourage municipalities and exempt charities to enter into "voluntary" PILOT agreements.[130] But the

128. Penelope Lemov, *Full Interviews with User-Fee Experts*, GOVERNING, May 1, 2009, *available at* www.governing.com/article/full-interviews-user-fee-experts (Mike Pagano, Dean of Urban Planning and Public Affairs at the University of Illinois, Chicago, and a long-time consultant to the National League of Cities on local revenues was quoted: "If you look at municipal revenues, the largest own-source revenue is no longer the property tax. Today, [forty] percent of own-source revenue comes from fees, [thirty] percent from property taxes."). The third category of local-government revenue is made up of intergovernmental (federal and state) transfers. *See* U.S. CENSUS BUREAU, 4 COMPENDIUM OF GOVERNMENT FINANCES: 2002: 2002 CENSUS OF GOVERNMENTS 168, Tbl.48 (2005), *available at* http://www.census.gov/prod/2005pubs/gc024x5.pdf; *see also* FEDERATION OF TAX ADMINISTRATORS, 2007 STATE & LOCAL OWN SOURCE REVENUE (reporting Census Bureau data that local own-source revenue represents 44.8% of total local revenue), http://www.taxadmin.org/fta/rate/slshare.html (last visited Apr. 15, 2010). *Contra* Tax Policy Center, Urban Institute & Brookings Institution, Local Property Taxes as a Percentage of Local Tax Revenue, http://www.taxpolicycenter.org/taxfacts/displayafact.cfm?Docid=518 (last visited Apr. 15, 2010) (reporting that U.S. Census Bureau data found that nationwide property tax represents 71.1% of local government revenue).

129. Lucy Dadayan & Donald J. Boyd, *Recession or No Recession, State Tax Revenues Remain Negative*, ROCKEFELLER INST., Jan. 2010, http://www.rockinst.org/pdf/government_finance/state_revenue_report/2010-01-07-SRR_78.pdf.

130. *See, e.g.*, Institutions of Purely Public Charities Act, Act No. 1997-55, 10 P.S. § 371 et seq. The legislative intent for which included the following declaration:

> It is the intent of this act to encourage financially secure institutions of purely public charity to enter into voluntary agreements or maintain existing or continuing agreements for the purpose of defraying some of the cost of various local

practice is found in many states, albeit with variation within the state. Some arrangements include SILOTs, a term that covers a variety of in-kind transactions. Unfortunately, the data that exist on PILOTs and SILOTs are not systematic or comparable,[131] but apparently a growing number of charities find themselves in this shadowy realm.

The dollar amounts that can be raised by even a modest PILOT program can add up. A January 2009 report by the City of Boston explained:

> The City of Boston began collecting Payment-in-Lieu-of-Tax ("PILOT") contributions from tax-exempt institutions many years ago in an attempt to relieve the strain on residential and commercial taxpayers by diversifying the City's revenue stream. In Fiscal Year 2008, [forty-three] tax-exempt organizations made PILOT contributions totaling $31.1 million [$15.6 million of which came from Massport]. Of that amount, educational and medical institutions contributed $12.7 million. For Fiscal Year 2009, it is estimated that education and medical institutions will contribute $14.5 million.
>
> Tax-exempt institutions are not required by law to make annual PILOT contributions to the City of Boston. These institutions enter into PILOT agreements with the City on a

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> government services. Payments made under such agreements shall be deemed to be in compliance with any fiduciary obligation pertaining to such institutions of purely public charity, its officers or directors.

Id. at § 372(a)(7); see also New Hampshire's authorization of "voluntary" PILOTs, set forth in the Appendix.

131. The Springfield study laments:

> No statistics are kept nationally on the number of PILOTs in local jurisdictions, or on the amounts collected. There are occasional regional studies conducted on the subject, but surprisingly no national municipal or state organizations (International City Managers Association, Government Finance Officers Association, U.S. Conference of Mayors, National League of State Legislators, etc.) or academic institution or association collects the information on a regular basis. However, there is ample evidence that some jurisdictions have been more aggressive in soliciting PILOTs from local nonprofit organizations over the past [twenty] years—particularly as the fiscal plight of many urban communities has worsened.

J.F. RYAN ASSOCIATES, INC., SPRINGFIELD FINANCIAL CONTROL BOARD PROJECT PLAN: ESTABLISHMENT OF A PAYMENT IN LIEU OF TAX (PILOT) PROGRAM 2 (2005), *available at* http://www.mass.gov/Asfcb/docs/PILOTProjectPlan.pdf (last visited Apr. 15, 2010).

> voluntary basis. In so doing, the institutions provide the City with funds to help offset a portion of the cost of providing essential City services to the institutions. PILOT payments are an important measure of civic engagement, but they represent just one category of benefits that colleges and hospitals provide to the City. Many institutions also provide other services and contributions, such as scholarships for Boston Public School students and low-cost medical care, which can directly benefit Boston residents.[132]

PILOTs and SILOTs represent a compromise between the parties using what leverage they have available and negotiating in light of the hazards of litigation.[133] As in any negotiation, either party could be making the concession: in some cases, PILOTs represent an erosion of statutory tax exemption; in other cases, they forestall the imposition of tax, and so are synonymous with giveaways. Municipalities often find their hand to be strongest when a university or other nonprofit is expanding and needs a zoning waiver or other approval, and the agreement might apply only to property being taken off the taxable rolls. The town has to be careful, though, since it cannot use the threat of disapproval to extract PILOTs on account of property entitled to exemption.[134] The case studies from 2009 in the Conclusion illustrate the limits on the legal authority—and thus negotiating leverage—of municipalities and other local taxing jurisdictions. In the battles fought in this realm, it is sometimes difficult to agree even on rhetoric: charity partisans characterize PILOTs as "extortion," while municipality supporters label them "contributions."[135]

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132. CITY OF BOSTON ASSESSING DEPARTMENT, EXEMPT PROPERTY ANALYSIS: EDUCATIONAL AND MEDICAL INSTITUTIONS 6 (Fiscal Year 2009), *available at* http://www.cityofboston.gov/TridionImages/ExemptRPT_09_WEB_tcm1-3932.pdf.

133. *See* David L. Sjoquist, *A Public-Choice Approach to Explaining Exemptions and PILOTs*, *in* PROPERTY-TAX EXEMPTION FOR CHARITIES: MAPPING THE BATTLEFIELD, *supra* note 2, at 361-67.

134. *See, e.g.*, Hosp. Council of W. Pa. v. City of Pittsburgh, 949 F.2d 83, 85 (3d Cir. 1991) (granting standing to the plaintiff Council—"a Pennsylvania nonprofit corporation which functions as a membership organization that represents, assists and speaks for its members in matters where joint action is appropriate"—to pursue a complaint alleging "that the defendant governmental units had attempted and were attempting to 'coerce' or 'force' tax-exempt member hospitals to make payments in lieu of taxes by 'indicat[ing] that those [hospitals] which [did] not agree to such payments and/or agreements "in lieu of taxes" [would] have their tax exempt status challenged, [would] be likely to run into difficulties in obtaining zoning approvals, and [would] not be offered the opportunity to provide services to the taxing authority.'") (alteration in the original).

135. *See generally* PROPERTY-TAX EXEMPTION FOR CHARITIES: MAPPING THE BATTLEFIELD, *supra* note 2, especially the Introduction and the chapters by Pam Leland, Joan Youngman, David Glancey, and Janne Gallagher.

The lack of consistency and transparency in PILOT programs results in uncomfortably ad hoc public-finance regimes. A 2005 Springfield (Mass.) study[136] found "that virtually every successful PILOT program focuses exclusively on only the large, private, tax exempt institutions—primarily hospitals and universities. Churches, social service agencies, social clubs, etc. are generally excluded from these efforts due to social and political opposition."[137] Complicating matters, that report observes:

> Operationally, PILOT programs are not necessarily the typical function of one municipal department. The highly successful Boston program is managed by the Assessor's Office, but requires a great deal of interdepartmental cooperation among several departments. For instance the Inspectional Services Department and the Boston Redevelopment Authority work closely with the Assessor's Office to notify them when an exempt institution intends to remodel or expand. The Law Department typically drafts the formal agreements; the Fire and Police Departments track and provides [sic] information on direct service calls to exempt institutions; the Budget Office provides the data on the costs of services; the Press Office assists with the public relations; and on occasion the Mayor's Office lends its authority. However, one office in the City, the Assessor's Office coordinates, manages and ultimately is responsible for effective implementation of the PILOT program.[138]

Some cities have adopted a variety of town-gown economic development and strategic collaborations—for example, Worcester, Massachusetts's now-disbanded "UniverCity Partnership" (2004-2008) was established following a proposal for a PILOT program.

Separately, tuition proposals were beaten back everywhere in the country they were proposed[139] but remain attractive to revenue-hungry college towns and cities. A proposal by the mayor of Montclair, New Jersey, in December 2009 asking for state legislation allowing towns to impose municipal-service fees—generally, one-hundred dollars annually for full-time students, fifty dollars for part-timers—was supported by almost one-hundred mayors attending the New Jersey League of Municipalities annual convention.[140] A January 2, 2010 editorial in the

136. *See* J.F. RYAN ASSOCIATES, INC., *supra* note 131.

137. *Id*. at 4.

138. *Id.* at 9.

139. See the Conclusion for discussion of Providence and Pittsburgh.

140. Richard Khavkine, *S. Orange Aims to Collect Cash from Students,* STAR-LEDGER (Newark, N.J.), Dec. 16, 2009, http://www.nj.com/news/ledger/essex/index.ssf?/base/news-

Star-Ledger opposing the proposal reported that on December 21, "South Orange's village council approved its own nonbinding resolution to institute a student fee."[141]

Generally, local governments depend on state legislation for authority to impose not just taxes, as described above, but also charges that look like taxes. The fact that the state grants an exemption makes it fair that states should shoulder some responsibility for the uneven adverse effects of the property-tax exemptions they create. The Pennsylvania report described in Part III.A, above, concludes by analyzing several proposals, including amending Act 55 to require—not just encourage—nonprofits to pay PILOTs. In considering a state-paid PILOT for nonprofit property (along the Connecticut/Rhode Island model), the report observes:

> [A] challenge to successful implementation of such an approach is the absence of standard county assessment data systems. . . . Alternatively, some standard distribution unit could be developed, as occurs with the distribution of earmarked revenues for local municipal pension funds, with units assigned based on the number, size, and type of institutions (e.g., one unit for a small non-profit hospital, two units for a mid-size university, etc.), possibly weighted by other factors such as percent of the municipality living in poverty.[142]

In addition, many municipalities complain that their resident educational institutions and other nonprofits serve out-of-town residents—while leaving behind that much less taxable real estate to support city services. In a model for other states, Connecticut (and to a lesser extent Rhode Island) makes PILOTs to those of its municipalities that host nonprofit hospitals and universities. Under a statute dating back to the 1970s, Connecticut pays municipalities up to seventy-seven percent of the taxes they lose because of exempt property owned by nonprofit hospitals and educational institutions.[143] These state payments are funded by

6/1260936907128440.xml&coll=1.

141. Editorial, *Local Taxes on Colleges Would Burden Students*, STAR-LEDGER (Newark, N.J.), Jan. 2, 2010, http://blog.nj.com/njv_editorial_page/2010/01/local_taxes_on_colleges_would.html.

142. PENNSLYVANIA LEGISLATIVE BUDGET & FINANCIAL COMMITTEE, *supra* note 122, at S-11.

143. CONN. GEN. STAT. ANN. § 12-20a (West 2008). *But cf.* Town of Stonington v. State of Connecticut, CV064006164, 2009 Conn. Super. LEXIS 2291, at *2 (Conn. Super. Ct. July 2, 2009) (upholding decision of the Office of Policy & Management to deny payments on account of real estate leased indefinitely to Williams College but owned by the Mystic Seaport Museum, which is not a "private nonprofit institution of higher learning" as defined in the statute).

appropriation, however, and the percentage has been declining. The payments made in September 2009 represented 45.7% of lost taxes—but still came to more than $115 million.[144] Connecticut paid $37 million to New Haven alone, in addition to PILOTs and SILOTs that Yale provides.

Charities commonly complain—justifiably—that most exempt property is government owned (including parks and streets). But whether it makes sense for higher levels of government to make PILOTs to municipalities for their real estate, nonprofits are not off the hook. Indeed, if the state makes PILOTs for the public university, why shouldn't the private schools compensate their host towns? If the state does not make PILOTs for its property, this could be viewed as an illustration of the state not requiring payments to itself.

Separately, a charity occasionally declares that its donors did not make gifts so that it could make payments in lieu of taxes.[145] As a legal matter, though, a charity generally has the power to make a contribution to the community in which it operates—as, indeed, businesses can be good corporate citizens.[146] Except perhaps in the case of a charity with an extremely narrow charitable purpose all of whose funding is dedicated to that purpose, charities that enjoy property-tax exemption cannot properly

144. Telephone interview with Paul LaBella, Intergovernmental Policy Division, Conn. Office of Policy & Mgmt. (Jan. 11, 2010). Data for 2007 and 2008 are available at 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 (last visited Apr. 15, 2010).

145. *See, e.g.*, Press Release, Ruth J. Simmons, President of Brown University, The Success of Colleges and Universities Is Crucial to R.I. Cities and Towns (Mar. 7, 2003), *available at* http://brown.edu/Administration/News_Bureau/2002-03/02-086.html.

> Our donors, whether individuals, corporations or foundations, know their philanthropy will be used entirely for the academic and scholarly activities they wish to support. In fact, Brown's endowment is rightly understood as an historical record of donor intentions, which are stringently protected by Rhode Island law. If a donor has provided specific endowment funding for a lecture series, it would be a breach of faith to use it for another purpose. More than three-quarters of Brown's endowment is restricted as to purpose.

Id. Shortly thereafter, Brown made a slightly different argument: "Ruth J. Simmons, Brown president, said it would be 'wrongheaded' to tax a nonprofit institution such as Brown, which would be forced to raise tuition, already at $29,200 a year." Gina Macris, *Graphic Improvements at Hope*, PROVIDENCE J.-BULL., Mar. 12, 2003, at B1. Within three months, Brown joined with five other Providence area institutions in entering into a PILOT agreement with the city. Scott MacKay, *Colleges to Pay Millions to City*, PROVIDENCE J.-BULL., June 6, 2003, at A1. See case study in the Conclusion below.

146. *Cf.* PRINCIPLES OF CORPORATE GOVERNANCE: ANALYSIS AND RECOMMENDATIONS § 2.01, cmt. *i* (Am. L. Inst. 1994).

refuse to make PILOTs solely on the argument that such payments would conflict with their charitable purposes.

On the other hand, charities argue that viewing nonprofits as "tax exempt" fails to recognize the many financial contributions they make to the economy, including through tax payments. Not only do they pay the employers' share of payroll taxes, but everyone they deal with—employees and suppliers of goods and services—pays taxes on what they earn. But nonprofits might find touting their economic power to be a risky strategy. After all, if—as is often true—the nonprofit sector is the healthiest in the community, why should those that own real estate be subsidized by the less-well-off?

Colleges and universities also need to worry about the difficulties that property-tax exemption raises in mixed industries. Notably, we find for-profit, nonprofit, and public hospitals. As described above, low-income and assisted housing, administrative facilities, ancillary facilities such as parking structures, "commercial" property, and even large endowments and "high salaries" are pressure points.

Certain charities have a strong argument about unfairness. While the eds and meds garner much of the focus of revenue-starved and geographically bounded municipalities, focusing just on a subsector raises troubling questions. If the property tax is a "benefits tax"—that is, it reflects services provided to the property—then why shouldn't churches, cultural institutions, and even social-service agencies also make PILOTs? Remember that we're talking about nonprofits that own their real estate—the landlord of a social-service-agency tenant already pays tax. Separately, municipalities commonly use tax abatements to lure and keep for-profit businesses, which create jobs and stabilize communities.

Finally, PILOTs—and perhaps even more so SILOTs—raise the potential for "pay to play" or special treatment. Is that agreement to grant scholarships to the children of municipal employees made in return for a zoning waiver?

The lesson of the property-tax exemption for educational institutions and other nonprofits is that all real estate is local—and therefore political. Even if a college or university is only one of many nonprofits in the municipality, the larger the nonprofit exempt footprint, the greater the pressure will be on the ones which look like they have the financial wherewithal to pay.

CONCLUSION: A TALE OF THREE CITIES

To get a sense of how statehouses and municipalities are approaching these issues, this Article concludes with a brief case study of the recent (indeed, ongoing) wrangling taking place in Boston, Providence, and Pittsburgh.

Boston

In January 2009, the mayor of Boston appointed a PILOT task force, charged with reviewing the current PILOT system, as well as the institutions' community benefits, and to recommend ways to standardize the level of contributions and strengthen the partnership between Boston and its tax-exempt institutions, particularly educational and medical nonprofits.[147] It might seem surprising that the municipality with the oldest (since 1925) and most systematic program for collecting PILOTs is back at the drawing board. However, Boston found a wide variety of responses by specific institutions to the city's request for twenty-five percent of the amount a non-exempt property owner would pay—a level calculated to cover the cost of providing the institutions with essential city services such as police, fire, and snow removal.

Needless to say, moreover, these amounts were all below—often far below—the city's desired level. To use everyone's favorite example, Harvard University's real estate in Boston, according to a 2009 city report, is worth nearly $1.5 billion; if the property were taxable, Harvard would pay $40 million a year, compared with the $2 million it makes in PILOTs.[148] "Eds and meds" collectively contributed an estimated $14.5 million for fiscal year 2009—not counting significant SILOTs. In September 2009, the task force published a detailed interim report.[149] If negotiations do not produce satisfactory results, the task force will consider recommending legislative changes.

Separately, one member of Boston's Task Force said he was considering a payroll tax on eds and meds, another common municipal approach that raises state legal issues.[150]

Providence

Rhode Island—unusually—has no state constitutional provision addressing property taxes, much less property-tax exemption for charities. Rhode Island General Laws § 44-3-3(8) provides exemption for:

147. For background and material (including public meeting minutes) relating to the Task Force, see generally PILOT TASK FORCE: PAYMENT IN LIEU OF TAXES, http://www.cityofboston.gov/assessing/PILOT.asp (last visited Apr. 15, 2010).

148. *See* CITY OF BOSTON ASSESSING DEPARTMENT, *supra* note 132, at 7 tbl.

149. MAYOR'S PILOT TASK FORCE, INTERIM REPORT (2009), *available at* http://www.cityofboston.gov/Images_Documents/PILOT_Interim%20Report_tcm3-8009.pdf.

150. *See generally* Eric A. Lustig, *The Boston City PILOT Task Force: An Emerging Best Practice?*, 44 NEW ENG. L. REV. 601, 611-12 (2010).

> Buildings and personal estate owned by any corporation used for a school, academy, or seminary of learning, and of any incorporated public charitable institution, and the land upon which the buildings stand and immediately surrounding them to an extent not exceeding one acre, so far as they are used exclusively for educational purposes, but no property or estate whatever is hereafter exempt from taxation in any case where any part of its income or profits or of the business carried on there is divided among its owners or stockholders.[151]

Separately—partially following the Connecticut statute—Rhode Island requires the state to make PILOTs to towns in the amount of twenty-seven percent of taxes that would otherwise have been paid by resident nonprofit schools and hospitals.[152] As in Connecticut, this appears to create an incentive for local assessors to overvalue nonprofit real estate!

In Rhode Island, legislative proposals arose in 2009 that initially focused on institutions of higher education and then extended to nonprofit hospitals. February brought a senate bill to tax twenty percent of the assessed value of all real and personal property owned by private colleges and universities—except for institutions with a PILOT agreement with their municipality.[153] In May, the Rhode Island House took a different track, considering an "impact fee" to be imposed on hospitals and private universities and colleges with more than twenty million dollars worth of real estate within the municipality. The impact fee could not exceed twenty-five percent of the municipality's property-tax rate.[154]

Separately, in May 2009 a bill was introduced in the Rhode Island House to impose a $150 per-student, per-semester fee on institutions of higher education to defray the costs of fire and police protection provided to students.[155] This proposal came at the urging of Providence Mayor Cicillene, who initially suggested that the tax apply at the student level.

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151. R.I. GEN. LAWS § 44-3-3(8) (2008).

152. *See id.* § 45-13-5.1.

153. S.0181, Gen. Assem., Jan. Sess. (R.I. 2009) (introduced Feb. 4, 2009, by Senators Tassoni, McBurney, and Ciccone).

154. H.R. 6214, Gen. Assem., Jan. Sess. (R.I. 2009) (introduced May 26, 2009, by Representatives Slater, Costantino, Almeida, and Diaz). As just mentioned, the state already makes partial PILOTs. If the organizations now have to pay a percent of the tax that would otherwise be collected, nonprofits will put pressure on the assessor to hold down the value, thus returning tension to the appraisal process.

155. H.R. 6205, Gen. Assem., Jan. Sess. (R.I. 2009). This bill would have added section 16-57-6.8, to read, in part:

> (a) Notwithstanding any statute, regulation or charter to the contrary, commencing with the fiscal year starting July 1, 2009, every city and town is authorized to assess a fee of one hundred fifty dollars ($150) per semester, or one hundred dollars ($100) per trimester, upon every private college or university for each full-time student at a private

Importantly, though, four Providence educational institutions have already been making millions of dollars in annual PILOTs under a memorandum of understanding relating to property these institutions took off the tax rolls. In 2003, the City of Providence reached an agreement with Brown University, the Rhode Island School of Design ("RISD"), Providence College, and Johnson & Wales University calling for PILOTs totaling $50 million dollars over the next twenty years.[156] While Brown University might seem to be the wealthiest institution, over the first four years RISD was scheduled to make the highest payments because of the amount of then-taxable property it was acquiring.[157]

In 2009, Brown University and RISD, among others, lobbied hard against both the impact fee and head tax, in a strategy that focused on their positive contributions and gratitude to Providence (RISD appropriately produced a lovely design—"RISD Providence"—in a Robert-Indiana style square). Their efforts paid off. In a flurry of hearings and activity before the assembly broke for indefinite recess, a vote on the impact-fee proposal was avoided on the House floor; the head-tax proposal was not voted on by the House Finance Committee. Consideration of these proposals, however, seemed intended to pressure Providence institutions to agree to reopen the 2003 PILOTs agreement.

With the failure of progress in the statehouse, the focus immediately shifted to the Providence City Council. On July 2, 2009, the Council approved the creation of the Commission to Study Tax-Exempt Institutions, which will have 180 days to report its recommendations "to

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> institution of higher education within said city or town for the express purpose of off-setting, in part, the municipality's costs of providing police, fire, rescue, and other municipal services to students. . . .

Id. Subsection (c) provided:

> Any student who is a bona fide resident of the state of Rhode Island who has demonstrated payment of real estate taxes by the student or his or her parent or guardian to a Rhode Island municipality during the relevant semester or trimester shall be exempt from this student assessment fee.

Id.

156. Scott MacKay, *Colleges to Pay Millions to City*, PROVIDENCE J.-BULL., June 6, 2003, at A1.

157. The agreement provides for two types of payments: "annual cash payments, which are based roughly on the size of each institution's budget" and "payments instead of property taxes for [fifteen] years on taxable properties [the colleges] buy in Providence." *Id.* Specifically: "The institutions will pay [one-hundred] percent of the assessed rate for the first five years they own a property. That will drop to [sixty-six] percent for the next five years and [thirty-three] percent for the next five. After [fifteen] years, the properties will become fully tax-exempt . . . ." *Id.*

establish a standard level of contributions by major tax-exempt institutions" to the Council. Similar to the task force created by Boston Mayor Thomas Menino, the Providence Council Commission will include representatives from the business community, tax-exempt and community organizations, labor unions, and two council members and a mayoral appointee.[158]

Pittsburgh

For the three-year period from 2005 to 2007, a coalition of about one-hundred nonprofit organizations known as the Pittsburgh Public Service Fund—following extensive negotiation with the mayor and city council—"voluntarily" transferred $14 million to the city to help ameliorate the ailing city budget.[159] The fund released the names of the 102 contributing organizations, but not the amounts they contributed—although some numbers leaked out.[160] This unique experiment in collective action raised several interesting possibilities. Because this agreement replaced existing PILOT agreements, it seemed to provide an opportunity for those nonprofits making high payments to reduce their contributions. At the same time, one might expect particularly generous nonprofits to want public credit. One press report observed critically: "[S]ome of the organizations that chose not to contribute to the cash-strapped city constitute a Who's Who of prominent charities in Pittsburgh."[161] Eventually, even the amounts given by each participating charity leaked out.[162] "But the agreement with tax-exempt groups that brought the city $14 million from 2005 to 2007 has eroded to a proposed $5.5 million in donations for 2008 through 2010. So far, city council has turned up its nose at that deal."[163]

158. Philip Marcelo, *Panel to Study City's Nonprofit Tax-Free Entities*, PROVIDENCE J.-BULL., July 3, 2009, at B1.

159. Rich Lord, *2004 Plan Revisited for Nonprofits*, PITTSBURGH POST-GAZETTE, Dec. 9, 2009, *available at* 2009 WLNR 24833084.

160. Rich Lord, *City Asking Nonprofits for Consistent Contributions*, PITTSBURGH POST-GAZETTE, Feb. 20, 2007, *available at* 2007 WLNR 3352078 [hereinafter Lord, *City Asking*].

161. Jeremy Boren, *Some Nonprofits Do Not Chip In*, PITTSBURGH TRIB. REV., Jan. 6, 2006, *available at* 2006 WLNR 355468. For the list of contributing organizations, see *City Gets First Payment from Nonprofit Coalition*, PITTSBURGH POST-GAZETTE, Jan. 5, 2006, *available at* http://www.post-gazette.com/pg/06005/632763.stm.

162. See Lord, *City Asking*, *supra* note 160; *see also* Rich Lord, *City Backs Formula for Taxing of Nonprofit Organizations; Nonprofits' Group Opposes Guidelines for What It Views as Gifts to the City*, PITTSBURGH POST-GAZETTE, Feb. 21, 2007, *available at* http://www.post-gazette.com/pg/07052/76397-53.htm (reporting that for 2005, "according to documents obtained by the Pittsburgh Post-Gazette, donations ranged from $10 by the Pittsburgh Ballet Theater to $1.5 million by the University of Pittsburgh Medical Center").

163. Rich Lord, *Mayor Ravenstahl to Nonprofits: Pay Up or Else; Says He'll Impose*

Instead, the city considered seeking General Assembly approval under its recovery plan to expand the business payroll tax to include nonprofit institutions.[164] A 2009 Pennsylvania report concludes by analyzing several proposals, including amending the state property-tax exemption statute to require—not just encourage, as it currently does—nonprofits to pay PILOTs.[165] The report also considers a state-paid PILOT for nonprofit property, along the Connecticut-Rhode Island model.[166]

At year-end 2009, the mayor of Pittsburgh conceded defeat in his bid for a "Fair Share Tax"—a tax equal to one percent of tuition paid to the City's ten colleges and universities—to raise over $15 million to address shortfalls in the city's pension obligations.[167] Instead, the nonprofits pledged to donate (an unspecified amount) to the City and help lobby the legislature for a long-term solution to the City's fiscal challenges.[168] Separately, in November, the Allegheny County Executive vetoed as illegal a proposal passed by the County Council to impose a "tax-exempt certification and essential services fee" for tax-exempt property owned by nonprofits other than churches, with the resulting funds to be used for homeowner property-tax relief.[169]

In early January 2010, Senator Fontana and Representative Solobay reintroduced their bill (S.B. 1175 and H.B. 2191) for an "essential services fee" that could be imposed, at the option of a municipality, annually on tax-exempt real property owned by resident charities.[170] The fee would be uniformly applied. It does not apply to the first 5000 square feet of

Surcharges to Hike Revenues if They Aren't Willing, PITTSBURGH POST-GAZETTE, June 20, 2009, *available at* http://www.post-gazette.com/pg/09171/978773-53.stm [hereinafter Lord, *Pay Up or Else*].

164. Editorial, *Time to Deal: Pittsburgh's Budget Needs Should Be Approved Now*, PITTSBURGH POST-GAZETTE, July 22, 2009, *available at* http://www.post-gazette.com/pg/09203/985405-192.stm. "The administration has concluded that it doesn't need the state's OK to charge hospitals $25 per inpatient admission, or colleges and universities $50 per undergraduate student per semester. Those fees would raise $5.4 million and $3 million, respectively." Lord, *Pay Up or Else*, *supra* note 163.

165. *See supra* note 122 and accompanying text.

166. *Id.*

167. Rich Lord & Tom Barnes, *Pittsburgh's Mayor Drops Tuition Tax; Cites an Undefined Promise of Help from Schools, Tax-Exempts and Corporations on Pension Solution*, PITTSBURGH POST-GAZETTE, Dec. 22, 2009, *available at* http://www.post-gazette.com.pg/09356/1022750.stm.

168. *See id.*

169. *See* Karamagi Rujumba, *Onorato Vetoes Fee on Nonprofits*, PITTSBURGH POST-GAZETTE, Nov. 7, 2009, *available at* http://post-gazette.com/pg/09311/1011618-455.stm.

170. Press Release, Fontana and Solobay Introduce Non-Profit Services Fee Bill (Jan. 4, 2010), http://www.senatorfontana.com/media/Releases/2010/Jan4.htm.

structures on the parcel, and could not exceed $100 per every 1000 square feet of these structures. With a phase-in for property acquired in 2009, no fee could exceed fifty percent of the tax that would otherwise apply. The fee would not apply if the town and the charity have a PILOT agreement.[171]

But Allegheny County has not given up, leading to the ominous potential that both the city and the county have their sights on the same nonprofit property owners for PILOTs.[172] It seems that the next generation of the property-tax debate will be even more layered.

Final Thoughts

The three stories in this Conclusion illustrate the limits of legal protection from property tax, and the need for nonprofits to become willing to enter into political negotiations and the possibility of being called upon to make PILOTs or SILOTs. Because PILOT agreements are voluntary, though, both sides can feel unappreciated and slighted. Many nonprofits make monetary and in-kind contributions to their communities, but few arrangements are transparent. It is time for nonprofits to trumpet their agreements.

APPENDIX: FIFTY-ONE-JURISDICTION SURVEY

CONSTRUING CHARITY PROPERTY-TAX EXEMPTION

Caveats: A state-by-state comparison does not allow for easy comparisons even though, with a few exceptions, this Appendix focuses on the general category of charities. Frequently, specific constitutional or statutory provisions apply to such entities as nonprofit schools, hospitals, nursing homes, libraries, assisted or affordable living facilities, art galleries, and open/conservation space. Property-tax statutes are often complex and detailed—some statutes even name specific organizations. Some statutes allow for partial exemption of property used in part for unrelated commercial purposes. Cases (which in different states have gone both ways) typically involve housing (low-income, elderly, and parsonage) and nursing homes, hospitals, medical-office buildings owned by otherwise exempt hospitals, health clubs (YMCA's), and daycare centers. Factors affecting the outcome primarily include market-rate fees, government financing, level of donations, level of charity care (for hospitals), and, of course, inurement or private benefit. Also dependent on state law is the

171. *See* S. 1175, Gen. Assem. Reg. Sess. (Pa. 2010).

172. *See* Rich Lord & Karamagi Rujumba, *City, County Chase Same Dollars: Which Would Have First Dibs on Nonprofit Contributions?*, PITTSBURGH POST-GAZETTE, Feb. 1, 2010, *available at* http://post-gazette.com/pg/10032/1032596-53.stm.

exemption of property used for administration (or other support activities such as parking structures or lots) or property rented from the nonprofit owner to another nonprofit.

Eighteen State Constitutions Mandate Exemption for Charities (variously termed): Alabama, Alaska, Arkansas, Kansas (legislature may broaden), Kentucky, Louisiana, Maine, Michigan, Minnesota (for churches; legislature may exempt others), New Jersey, New Mexico, New York, North Dakota (except for property used for conservation, which legislature may exempt), Oklahoma, South Carolina, South Dakota ("the Legislature shall . . . exempt"), Utah, and Vermont.

Twenty-Five State Constitutions Grant Exemption Authority to the Legislature: Arizona, California, Colorado (shall be exempt unless general law says otherwise), Delaware ("public welfare"), Florida (note: court struck down an unconstitutional limit on low-income housing), Georgia (requires 2/3 vote of each legislative body to repeal charity exemption), Idaho, Illinois (legislature may restrict but not expand charity exemption), Indiana, Massachusetts, Minnesota (mandating exemption for churches), Mississippi, Missouri, Montana, Nebraska, Nevada, North Carolina, Ohio, Pennsylvania, Tennessee, Texas, Virginia (legislature may repeal or modify—but not extend), Washington, West Virginia, and Wyoming.

Eight State Constitutions (and the U.S. Constitution, with respect to the District of Columbia,) are Silent on Taxes or Exemption: Connecticut, District of Columbia, Hawaii, Iowa, Maryland, New Hampshire, Oregon, Rhode Island, and Wisconsin.

Three States Make Partial PILOTs on Account of Some Nonprofit Property: Connecticut (by statute for hospitals and schools), Maine (by constitution for exemptions granted after April 1, 1978), and Rhode Island (by statute for hospitals and schools).

Alabama

Constitution & Statute(s)

ALA. CONST. art. IV, § 91 prohibits the legislature from taxing property "used exclusively . . . for purposes purely charitable," and Amendment No. 373(k) exempts from all ad valorem taxation "property devoted exclusively to religious, educational or charitable purposes."

ALA. CODE § 40-9-1 (2003), exempts, in part:

> (1) . . . [A]ll property, real and personal, used exclusively for religious worship, for schools or for purposes purely charitable; provided, that property, real or personal, owned by any educational, religious or charitable institution, society or corporation let for rent or hire or for use for business purposes shall not be exempt from taxation, notwithstanding that the income from such property shall be used exclusively for education, religious or charitable purposes; . . . .
>
> (2) All property, real or personal, used exclusively for hospital purposes, to the amount of $75,000, where such hospitals maintain wards for charity patients or give treatment to such patients; provided, that the treatment of charity patients constitutes at least [fifteen] percent of the business of such hospitals. . . .

Case Holding(s)

Mingledorff v. Vaughan Regional Medical Center, Inc., 682 So. 2d 415, 416 (Ala. 1996) implicitly rejected the theory that I.R.C. § 501(c)(3) status automatically entitles a taxpayer to exemption from ad valorem taxation: "The dispositive issue is whether the property sought to be taxed, which is being used exclusively as a hospital, is being used exclusively in charitable pursuits. If it is, then there is no question that [the hospitals] are exempt from ad valorem taxation under the clear wording of Amendment 373(k) and [Ala. Code] § 40-9-1(1)."

Cf. Surtees v. Carlton Cove, Inc., 974 So. 2d 1013, 1022 (Ala. Civ. App. 2007) ("Although a charitable facility, to be considered as such, is not limited . . . to the provision of free or reduced-cost services, there must be an element of gift and of service to the general public. There is at least substantial evidence that this public benefit is not present . . . here, given the luxury accommodations, the high fees, and the limited number of elderly persons who meet the facilities' financial guidelines.") (footnote omitted).

Alaska

Constitution & Statute(s)

ALASKA CONST. art. IX, § 4 exempts from municipal property tax real property exclusively used for "non-profit . . . charitable . . . purposes."

ALASKA STAT. § 29.45.030(a)(3) (2008) requires exemption for: "property used exclusively for nonprofit religious, charitable, cemetery, hospital, or educational purposes."

Case Holding(s)

In absence of constitutional or statutory definition, the courts adopted

> [T]he broad common law definition of "charity" [] and observed that this definition reflects the "humanitarian rationale" of property tax exemptions: they are granted "as an aid or encouragement to individuals, corporations, or businesses, to do something supposedly for the good of the community at large, although such an act is not itself a proper or even permissible function of the government." This definition provides some guidance, but it does not purport to specify prerequisites for eligibility. It provides only a general framework for determining eligibility. Applying this framework, we have concluded that properties used for a youth summer recreational camp, a youth hostel, and a church radio station were being used for charitable purposes.

Fairbanks North Star Borough v. Dena' Nena' Henash, 88 P.3d 124, 132 (Alaska 2004) (internal quotations and footnotes omitted).That case upheld tax exemption of an organization that provides health, social, and economic services to Alaska Natives and villages, despite the borough assessor's factual finding "that TCC is fully, or more than fully, remunerated for its services by federal and state government funding, medical insurance payments, and its investment and rental income." *Id.* at 130. The Alaska Supreme Court explained: "Our constitution and statutes do not mention lessening of a governmental burden as a factor in charitable-purpose analysis, nor do our cases." *Id.* at 137. The court observed: "It may also be significant that some cases in which receipt of government funding rendered property ineligible, federal grant money was used to construct low-income housing and subsidize rent." *Id.* at 134. By contrast, "many of the cases upholding exemptions despite government funding involved corporations that provided services to their beneficiaries." *Id.* (footnotes omitted).

See also McKee v. Evans, 490 P.2d 1226, 1230 (Alaska 1971) (holding that the statutory definition of "educational purposes . . . includes systematic instruction in any and all branches of learning from which a substantial public benefit is derived," and rejecting the argument "that only such school properties as relieve some substantial educational burden from the state should receive rights of tax exemption"). The court noted:

> Nor do we find the *quid pro quo* policy logically compelling. Even if the education given at a private school (*e.g.*, a trade school) were not substantially similar to that provided in publicly supported schools, some lessening of the state educational tax burden probably occurs from election by students to forego general public education in favor of more specialized training. Moreover, where no such tax relief occurs, the public benefit may be most profound since without the private school there would be no such specialized training.

Id. at n.16 (citation omitted).

Arizona

Constitution & Statute(s)

ARIZ. CONST. art. IX, § 2(2): "Property of educational, charitable and religious associations or institutions not used or held for profit may be exempt from taxation by law."

ARIZ. REV. STAT. ANN. § 42-11107 (2006) provides: "Property of charitable institutions for the relief of the indigent or afflicted, appurtenant land and their fixtures, equipment and other reasonably required property including property used for the administration of such relief, are exempt from taxation if the institutions and property are not used or held for profit."

Other special statutes include § 42-11116 ("Property of musical, dramatic, dance and community arts groups, botanical gardens, museums and zoos [if exempt under Internal Revenue Code § 501(c)(3)].") and § 42-11105 (exemption for health care property). ARIZ. REV. STAT. ANN. §§ 42-11105, 42-11116.

Case Holding(s)

No Supreme Court cases.

See University Physicians v. Pima County, 75 P.3d 153 (Ariz. Ct. App. 2003) (ruling that a hospital—which for some reason did not seek exemption under section 42-11105—is not entitled to exemption as an institution for the relief of the afflicted). See definitions in section 42-11101:

> In this article, unless the context otherwise requires:
>
> 1. "Afflicted" means persons who, because of a mental or physical condition, illness or condition of distress, adversity or harassment, or imminent risk of such condition, are unable to reasonably take care of themselves or their families or to properly function in society without periodic or continuous assistance.
>
> 2. "Indigent" means a person who is without sufficient means or ability to provide themselves with adequate food, shelter or social necessaries.

ARIZ. REV. STAT. ANN. § 42-11101.

See also Volunteer Center of Southern Arizona v. Staples, 147 P.3d 1052 (Ariz. Ct. App. 2006) (ruling that the nonprofit was entitled to exemption on the entire building even though it leased a portion to another tax-exempt organization).

Arkansas

Constitution & Statute(s)

ARK. CONST. art. 16, § 5(b) provides: "The following property shall be exempt from taxation: public property used exclusively for public purposes; . . . and buildings and grounds and materials used exclusively for public charity."

ARK. CODE ANN. § 26-3-301(7) (2009) exempts: "All buildings belonging to institutions of purely public charity, together with the land actually occupied by these institutions, not leased or otherwise used with a view to profit . . . ."

Case Holding(s)

See *Crittenden Hosp. Ass'n v. Board of Equalization*, 958 S.W.2d 512, 516 (Ark. 1997) (Corbin, J., dissenting) (denying exemption to nonprofit hospital's medical office building):

> The majority's decision is based on a long-standing precedent that entitlement to a tax exemption has to be proven beyond a reasonable doubt. It gives no consideration to the legislative intent . . . . The burden here is too onerous. Proof beyond a reasonable doubt is a criminal standard and should not be applicable in a civil proceeding because it violates due process guaranteed by the Fifth and Fourteenth Amendments to the

> United States Constitution and Article 2 of our Arkansas Constitution.
>
> . . . .
>
> I am forced to the inescapable conclusion that, historically, it is rare to find a tax that this court does not like.

California

Constitution & Statute(s)

CAL. CONST. art. XIII, § 4 provides in part:

> The Legislature may exempt from property taxation in whole or in part:
>
> . . . .
>
> (b) Property used exclusively for religious, hospital, or charitable purposes and owned or held in trust by corporations or other entities (1) that are organized and operating for those purposes, (2) that are nonprofit, and (3) no part of whose net earnings inures to the benefit of any private shareholder or individual.

CAL. REV. & TAX. CODE, § 214(a)(1) (West 2009) (other subsections include various special provisions for, e.g., affordable housing):

> However, in the case of hospitals, the organization shall not be deemed to be organized or operated for profit if, during the immediately preceding fiscal year, operating revenues, exclusive of gifts, endowments and grants-in-aid, did not exceed operating expenses by an amount equivalent to [ten] percent of those operating expenses. As used herein, operating expenses include depreciation based on cost of replacement and amortization of, and interest on, indebtedness.

Case Holding(s)

71 Ops. Cal. Atty. Gen. 106 (1988):

> [W]e . . . view [the hospital earnings provision] as an additional protection for nonprofit hospitals in the face of the [*Sutter Hospital v. City of Sacramento*, 244 P.2d 390 (Cal. 1952)] decision rather than the exclusive means by which they can qualify for the welfare exemption. In other words the proviso was never meant to prevent a non-profit hospital that did earn surplus revenue in excess of ten percent during the immediate fiscal year from still qualifying for the "welfare exemption" under the general provision of section 214 subsection (a)(1).

Colorado

Constitution & Statute(s)

COLO. CONST. art. X, § 5 provides: "Property, real and personal, that is used solely and exclusively for religious worship, for schools or for strictly charitable purposes, also cemeteries not used or held for private or corporate profit, shall be exempt from taxation, unless otherwise provided by general law."

COLO. REV. STAT. § 39-3-101 (2008) ("Legislative declaration–presumption of charitable purpose."):

> The general assembly recognizes that only the judiciary may make a final decision as to whether or not any given property is used for charitable purposes within the meaning of the Colorado constitution; nevertheless, in order to guide members of the public and public officials alike in the making of their day-to-day decisions and to assist in the avoidance of litigation, the general assembly hereby finds, declares, and determines that the uses of property which are set forth in this part 1 as uses for charitable purposes benefit the people of Colorado and lessen the burdens of government by performing services which government would otherwise be required to perform. Therefore, property used for such purposes shall be presumed to be owned and used solely and exclusively for strictly charitable purposes and not for private gain or corporate profit . . . . This legislative finding, declaration, determination, and presumption shall not be questioned by the administrator and shall be entitled to great weight in any and every court.

Case Holding(s)

> To the extent that *Young Life* [*Campaign v. Board of County Commissioners*, 300 P.2d 535 (Colo. 1956),] established some requirement of benefit to the people of the state of Colorado as a

> condition for the property tax exemption of *religious* organizations, it is hereby overruled. While such 'social benefit' analysis may have continuing validity in the determination of *charitable* exemptions, *see WHYY, Inc. v. Borough of Glassboro*, 393 U.S. 117 (1968), it has no place in the state's evaluation of its treatment of bona fide religious groups. This conclusion is self-evident from the rationale for the grant of a tax exemption that was articulated in *Young Life*. There the court concluded that the purpose of the exemption was to relieve taxpayers of obligations that they would otherwise have to perform . . . .

General Conference of Church of God–7th Day v. Carper, 557 P.2d 832, 833 (Colo. 1976) (parallel citations omitted); *cf*. *Catholic Health Initiatives Colorado v. City of Pueblo*, 207 P.3d 812 (Colo. 2009) (including religious organizations in a municipal sales tax exemption for "*charitable organization*[*s*] . . . which exclusively, . . . and for the benefit of an indefinite number of persons, freely and voluntarily ministers to the physical, mental or spiritual needs of persons, and which thereby lessens the burdens of government").

For the denial of exemption to a (not primarily religious) recreational ranch, see *West Brandt Foundation, Inc. v. Carper*, 652 P.2d 564 (Colo. 1982) ("While not dispositive, it is nevertheless noteworthy that the uses made of the camp during the most desirable times of year involve non-residents and do not benefit the people of Colorado."). Factors applied included: charging "remunerative" fees (although merely earning a surplus is not fatal so long as devoted to charitable purpose); lessening the burdens of government; "showing that the normal fees were ever reduced or waived because of an individual''s inability to pay"; and whether access is limited "based on any criteria of worthiness" or providing "lower rates for [religious and charitable] groups than for any others." *Id.* at 568-70.

Connecticut

Constitution & Statute(s)

No applicable constitutional provision.

CONN. GEN. STAT. ANN. § 12-81 (2009) provides in relevant part:

> The following-described property shall be exempt from taxation:
>
> . . . .
>
> (7)(A) [R]eal property [used] for scientific, educational, literary, historical or charitable purposes . . . and used exclusively for

> carrying out one or more of such purposes . . . provided (i) any officer, member or employee thereof does not receive or at any future time shall not receive any pecuniary profit from the operations thereof, except reasonable compensation for services in effecting one or more of such purposes or as proper beneficiary of its strictly charitable purposes . . . .

The state makes PILOTs to municipalities hosting private hospitals and colleges, but the program still depends on annual legislative appropriation. Notably, the statute allows the state to pay up to seventy-seven percent of the property taxes the nonprofit hospitals and colleges would otherwise pay, but as of 2006, the appropriated rate was sixty-four percent.

Case Holding(s)

Isaiah 61:1, Inc. v. City of Bridgeport, 851 A.2d 277, 287 (Conn. 2004) (exempting a halfway house for prison inmates that received ninety percent of its funding from the state department of correction) (citations omitted):

> We glean from the . . . cases a number of principles to apply in determining whether property is exempt from taxation under § 12-81(7). First, the rental of property does not necessarily prevent the property from qualifying for tax exemption, as long as the property is used exclusively for carrying out the charitable purposes of the organization to which the property belongs. Second, when a charitable organization does nothing to "make it less likely that [the individuals it services] will become burdens on society and more likely that they will become useful citizens," the subject property cannot qualify for a tax exemption. Finally, housing provided for low or moderate income individuals is not tax-exempt.

St. Joseph's Living Center, Inc. v. Town of Windham, 966 A.2d 188, 221 (Conn. 2009):

> Providing short-term rehabilitative care to the general public, although a necessary service and surely helpful to the Center's bottom line, simply cannot be characterized as falling within the Center's charitable purpose. If the Center limited its provision of rehabilitative care to its existing population of elderly, long-term residents, we would be inclined to conclude that such services are within the scope of its charitable purpose as expressed in its corporate charter. Alternatively, the Center could amend its charter to broaden the availability of rehabilitative services for those elderly persons who are not part of its long-term patient population but who are drawn from the community at large.

Delaware

Constitution & Statute(s)

DEL. CONST. art. VIII, § 1 provides in part: "County Councils of New Castle and Sussex Counties and the Levy Court of Kent County are hereby authorized to exempt from county taxation such property in their respective counties as in their opinion will best promote the public welfare."

DEL. CODE ANN. tit. 9, § 8103 (1989) provides:

> Property belonging to . . . any church or religious society, and not held by way of investment, or any college or school and used for educational or school purposes, except as otherwise provided, shall not be liable to taxation and assessment for public purposes by any county or other political subdivision of this State. Nothing in this section shall be construed to apply to ditch taxes, sewer taxes and/or utility fees. Corporations created for charitable purposes and not held by way of investment that are in existence on July 14, 1988, together with existing and future charitable affiliates of such corporations that are also not held by way of investment, shall not be liable to taxation and assessment for public purposes by any county, municipality or other political subdivision of this State.

Case Holding(s)

New Castle County Department of Land Use v. University of Delaware, 842 A.2d 1201, 1212 (Del. 2004) (distinguishing "school purposes" from "educational purposes" in the statute, requiring, for the former, that "the use of the school-owned property must contribute to the legitimate welfare, convenience, and/or safety of the school community or its members," and upholding exemption for space in the student center leased to a bank).

Burris v. Tower Hill School Association, 179 A. 397, 399-400 (Del. Super. Ct. 1935) ("[S]tatutes exempting from taxation property devoted to educational purposes are in general construed more liberally than other tax exempting statutes . . . .").

District of Columbia

Constitution & Statute(s)

D.C. CODE § 47-1002 (2009) exempts from taxation: "(8) Buildings belonging to and operated by institutions which are not organized or operated for private gain, which are used for purposes of public charity principally in the District of Columbia[.]"

Case Holding(s)

District of Columbia v. Cato Institute, 829 A.2d 237, 245-46 (D.C. 2003) (holding that because the Commerce Clause does not bind Congress itself, the property-tax exemption law Congress wrote for the District of Columbia could properly limit exemption to those charities that benefit District residents; on statutory interpretation grounds, reversing the trial court's finding that the Cato Institute provides benefits in the District by focusing its charitable activities on educating Congress).

Florida

Constitution & Statute(s)

FLA. CONST. art. VII, § 3(a): "Such portions of property as are used predominantly for educational, literary, scientific, religious or charitable purposes may be exempted by general law from taxation."

FLA. STAT. § 196.196 (2009) reads, in part:

> (1) In the determination of whether an applicant is actually using all or a portion of its property predominantly for a charitable, religious, scientific, or literary purpose, the following criteria shall be applied:
>
> (a) The nature and extent of the charitable, religious, scientific, or literary activity of the applicant, a comparison of such activities with all other activities of the organization, and the utilization of the property for charitable, religious, scientific, or literary activities as compared with other uses.
>
> (b) The extent to which the property has been made available to groups who perform exempt purposes at a charge that is equal to or less than the cost of providing the facilities for their use. Such rental or service shall be considered as part of the exempt purposes of the applicant.

Case Holding(s)

Presbyterian Homes of the Synod v. Wood, 297 So. 2d 556, 558 (Fla. 1974) (ruling unconstitutional the statutory exemption regime for affordable housing because it contained limits on residents' income: "Inasmuch as an 'income test' is the primary determinant of the eligibility for tax exemption of a home, other factors traditionally used in determining the status of such a home are minimized contrary to the intent of the constitutional limitation.").

Haines v. St. Petersburg Methodist Home, Inc., 173 So. 2d 176, 185 (Fla. Dist. Ct. App. 1965) (noting "Florida's welcome aggregation of elderly citizens," rejecting exemption for nonprofit elderly housing facility that "though altruistically motivated and serving a socially constructive purpose, is nevertheless a financially viable institution . . . .").

Georgia

Constitution & Statute(s)

GA. CONST. art. VII, § 2, para. IV provides:

> [E]xemptions from ad valorem taxation provided for by law on June 30, 1983, are hereby continued . . . until otherwise provided for by law. . . . Any law which reduces or repeals exemptions granted to . . . institutions of purely public charity must be approved by two-thirds of the members elected to each branch of the General Assembly.

GA. CODE ANN. § 48-5-41 (1999 & Supp. 2009), exempts, in part:

> (a)(4) All institutions of purely public charity;
>
> . . . .
>
> [(b) requires colleges, schools, and nonprofit hospitals to be open to the general public.].
>
> (c) The property exempted . . . shall not be used for the purpose of producing private or corporate profit and income distributable to shareholders . . . or to other owners . . . .
>
> (d)(1) Except as . . . provided in paragraph (2) . . . , this Code section . . . shall not apply to real estate or buildings which are rented, leased, or otherwise used for the primary purpose of securing an income thereon . . . .
>
> (2) With respect to paragraph (4) of subsection (a) . . . , a building which is owned by a charitable institution . . . that is exempt from taxation under [IRC] Section 501(c)(3) . . . and which building is used . . . exclusively for the charitable purposes of such charitable institution, and not more than 15 acres of land on which such building is located, may be used for the purpose of securing income so long as such income is used exclusively for the operation of that charitable institution.

Case Holding(s)

York Rite Bodies of Freemasonry v. Board of Equalization, 408 S.E.2d 699, 700 (Ga. 1991) (emphasis in original) (internal quotations omitted) (alteration to the original in the quoted text):

> In determining whether property qualifies as an institution of 'purely public charity' as set forth in OCGA § 48-5-41 (a)(4), three factors must be considered and must coexist. First, the owner must be an institution devoted entirely to charitable pursuits; second, the charitable pursuits of the owner must be for the benefit of the public; and third, the use of the property must be exclusively devoted to those charitable pursuits.
>
> . . . .
>
> . . . However, "'[n]o matter how high the ideals of an institution, nor how lofty its purposes, in order for it to qualify as a charitable institution for tax exemption under [OCGA § 48-5-41 (a)(4)], it must have the sole purpose and activity of dispensing *public* charity."

Board of Tax Assessors of Ware County v. Baptist Village, Inc., 605 S.E.2d 436, 438, 440 (Ga. Ct. App. 2004) (granting exemption under a specific statute for nonprofit homes for the aged—the court rejected the argument that the independent-living units located on a property that also included assisted-living and nursing-care facilities were held for investment purposes, which under the statute would have resulted in taxability).

GA. CODE ANN. § 48-5-41(d)(2), added pursuant to statewide referendum in 2006, was construed in *Athens-Clarke County Board of Tax Assessors v. Nuci Phillips Memorial Foundation, Inc.*, Case No. SU-08-CV-2067-S (Ga. Super. Ct. Dec. 12, 2008), *rev'd* 686 S.E.2d 371 (2009), *available at* www.gaappeals.us/docket/results_one_record.php?docr_case_num=A09A1480.

Hawaii

Constitution & Statute(s)

No applicable constitutional provision.

At the municipal level, *see, e.g.*, HONOLULU, HAW., REV. ORDINANCES § 8-10.10, *available at* http://www.honolulu.gov/refs/roh/8a1_4.htm, reading as follows: "(a) There shall be exempt from real property taxes real property . . . designated in subsection (b) or (c) . . . and meeting the

requirements stated therein, actually and (except as otherwise specifically provided) exclusively used for nonprofit purposes."

However, a general excise tax, originally enacted in 1935, is the state's principal source of governmental revenue; exemptions are available for entities, among other things, "organized and operated exclusively for religious, charitable, scientific, or educational purposes . . . ." HAW. REV. STAT. § 237-23(a)(4) (2001 & Supp. 2007).

Case Holding(s)

Matter of Tax Appeal of Queen's Medical Center, 715 P.2d 349, 353 (Haw. Ct. App. 1985) ("The physicians are providing a service to their patients, not all of whom are the hospital's patients. Additionally, the parking structure is serving not only the hospital's parking needs, but those of the physicians and their patients.").

Under the general excise tax, *see, e.g.*, *Matter of Tax Appeal of Central Union Church-Arcadia Retirement Residence*, 624 P.2d 1346, 1352 (Haw. 1981):

> Proverbially, charity should know no bounds; practically, it must often be tempered by available means. . . . However, . . . not . . . all enterprises providing residential accommodations and other services for the elderly, even when conducted by religious organizations, are charitable activities. Exempt status still turns on the absence of a profit motive and the presence of an altruistic goal.

Cf. Matter of Tax Appeal Queen's Medical Center, *reconsideration denied*, 661 P.2d 1201, 1205 (Haw. 1983) ("While we do not doubt the construction and operation of an office building and parking garage can be related to 'better, more efficient, and cost effective medical care,' we do not think the activities constitute hospital activities in themselves.").

Idaho

Constitution & Statute(s)

IDAHO CONST. art. VII, § 5 states: "All taxes shall be uniform . . . : provided, that the legislature may allow such exemptions from taxation from time to time as shall seem necessary and just, and all existing exemptions provided by the laws of the territory, shall continue until changed by the legislature of the state . . . ."

IDAHO CODE ANN. § 63-602C (2010): "The following property is exempt from taxation: property belonging to any fraternal, benevolent, or charitable [limited liability company,] corporation or society, . . . used exclusively for the purposes for which such [limited liability company,] corporation or society is organized . . . ."

Case Holding(s)

Matter of the Appeal of Sunny Ridge Manor, Inc., 675 P.2d 813, 815 (Idaho 1984) (citation omitted):

> A number of factors must be considered: (1) the stated purposes of its undertaking, (2) whether its functions are charitable . . . , (3) whether it is supported by donations, (4) whether the recipients of its services are required to pay for the assistance they receive, (5) whether there is general public benefit, (6) whether the income received produces a profit, (7) to whom the assets would go upon dissolution of the corporation, and (8) whether the 'charity' provided is based on need. . . . Determination of an institution's charitable status is necessarily . . . to be decided on a case-by-case basis. There may be factors listed above which have no application to particular cases, and factors not listed which would need to be considered.

Housing Southwest, Inc. v. Washington County, 913 P.2d 68, 72 (Idaho 1996) (holding that because Housing Southwest was funded by government loans and grants, rather than private donations, it did not lessen the burdens of government); *see also Community Action Agency, Inc. v. Board of Equalization of Nez Perce County*, 57 P.3d 793, 795-96 (Idaho 2002) (noting that to make up the shortfall from rental income, CAA received in one year private donations of only $760,575 compared with $3,563,810 in government grants).

Illinois

Constitution & Statute(s)

ILL. CONST., art. IX, § 6 begins: "The General Assembly by law may exempt from taxation only the property of the State, units of local government and school districts and property used exclusively for agricultural and horticultural societies, and for school, religious, cemetery and charitable purposes."

35 ILL. COMP. STAT. 200/15-65 (2009) begins: "All property of the following is exempt when actually and exclusively used for charitable or beneficent purposes, and not leased or otherwise used with a view to profit: (a) Institutions of public charity."

Case Holding(s)

Methodist Old Peoples Home v. Korzen, 233 N.E.2d 537, 541-42 (Ill. 1968), required that: (1) the benefits extend to an indefinite number of persons for their general welfare or in some way reduce the burdens on government; (2) the organization has no capital, capital stock, or shareholders, and does not profit from the enterprise; (3) funds derive mainly from private and public charity, and are held in trust for the objects and purposes expressed in the organization's charter; (4) charity is dispensed to all who need and apply for it; (5) no obstacles are placed in the way of those seeking the benefits; and (6) the exclusive (i.e. primary) use of the property is for charitable purposes. See the discussion of the inconclusive decision in *Provena Covenant Medical Center v. Department of Revenue*, No. 107328, 2010 Ill. LEXIS 289 (Ill. March 18, 2010), in Parts I and II, above.

Indiana

Constitution & Statute(s)

IND. CONST. art. 10, § 1 begins:

> (a) The General Assembly shall provide, by law, for a uniform and equal rate of property assessment and taxation and shall prescribe regulations to secure a just valuation for taxation of all property, both real and personal. The General Assembly may exempt from property taxation any property in any of the following classes:
>
> (1) Property being used for municipal, educational, literary, scientific, religious, or charitable purposes.

IND. CODE § 6-1.1-10-16(a) (2009).

Case Holding(s)

No recent supreme court case.

Indianapolis Osteopathic Hospital, Inc. v. Department of Local Government Finance, 818 N.E.2d 1009, 1014 (Ind. Tax Ct. 2004) (citation omitted) ("A charitable purposes exemption is granted when there is an expectation of a benefit that will inure to the public by reason of the exemption. 'The rationale justifying a tax exemption is that there is a present benefit to the general public from the operation of the charitable institution sufficient to justify the loss of tax revenue.'"); *see also College Corner, L.P. v. Department of Local Government Finance*, 840 N.E.2d 905, 911 (Ind. Tax Ct. 2006) (noting that the legislation "does not

differentiate between entities that are not-for-profit and entities that operate for profit").

Iowa

Constitution & Statute(s)
No relevant constitutional provision.

IOWA CODE § 427.1 (2009) reads, in part:

> The following classes of property shall not be taxed:
>
> . . . .
>
> 8. . . . All grounds and buildings used or under construction by literary, scientific, charitable, benevolent, agricultural, and religious institutions and societies solely for their appropriate objects, not exceeding three hundred twenty acres in extent and not leased or otherwise used or under construction with a view to pecuniary profit.

Case Holding(s)
Carroll Area Child Care Center, Inc. v. Carroll County Board of Review, 613 N.W.2d 252, 257 (Iowa 2000) ("[C]harity—gratuitous or partly gratuitous care—can be provided in two different ways. One manner . . . is to subsidize the care of those who are unable to pay. Another . . . is to use charitable contributions to cover the costs of establishing the facility and some portion of the ongoing operating expenses, thereby subsidizing the cost of the facility for all persons who use it, regardless of their ability to pay."), cited in *Deerfield Retirement Community, Inc. v. Board of Review of Polk County*, No. 08-0115, 2009 WL 1491902, at *1-3 (Iowa App. May 29, 2009) (denying exemption to a retirement and life-care facility that did not accept Medicaid: "Deerfield has not established charitable or volunteer subsidies to underwrite indigent patients").

Kansas

Constitution & Statute(s)
KAN. CONST. art. 11, § 1: "(b) All property used exclusively for state, county, municipal, literary, educational, scientific, religious, benevolent and charitable purposes, . . . and all household goods and personal effects not used for the production of income, shall be exempted from property taxation."

Paragraph Second of the detailed KAN. STAT. ANN. § 79-201 (2009) exempts:

> All real property, and all tangible personal property, actually and regularly used exclusively for literary, educational, scientific, religious, benevolent or charitable purposes . . . . Except with regard to real property which is owned by a religious organization, . . . this exemption shall not apply to such property, not actually used or occupied for the purposes set forth herein, nor to such property held or used as an investment. . . . . ..

Paragraph Fourth of § 79-201b is a more specific statute addressed to various charitable housing purposes.

Case Holding(s)

In the Matter of the Appeal of University of Kansas School of Medicine-Wichita Medicine Practice Ass'n, 973 P.2d 176 (Kan. 1999) (detailing the history of narrow Supreme Court decisions followed by liberalizing legislation of the exemption regime for housing and for humanitarian purpose, and the differences in the statutory regimes for different types of nonprofit activities—notably, whether leasing to another jeopardizes exemption); cf. *Matter of Application of KSU Foundation*, 114 P.3d 176, 182 (Kan. App. 2005), held that a foundation formed to support Kansas State University was not entitled to a property-tax exemption on a building that it acquired at the university's request to lease at cost for the university's printing operations: "Under this lease arrangement, we conclude the Foundation's only use of the property is a financial one."

Appeals courts have ruled that section 79-201b applies for exemption of elderly, low-income, or other housing. *Cf. In the Matter of the Application of KSU. SE Agricultural Research Center for Exemption*, 157 P.3d 1, 5 (Kan. Ct. App. 2007) (stating that Paragraph Second exempts property owned and operated by a state educational institution for the caretaker of its research farm: "occupancy was clearly for the benefit of KSU rather than the occupant; it was part of the machinery by which the education and research affairs of KSU were administered"). In December 2009, however, the state supreme court recognized the "plain-language requirements of K.S.A. 2008 Supp. 79-201 *Second and Ninth*" to the nonprofit owner of property used, without profit, "to provide both living quarters and counseling for severely mentally ill citizens. . . . [N]o cost or reduced cost to individuals who would otherwise likely be homeless and without access to public assistance programs." *Matter of Mental Health Ass'n of the Heartland*, 211 P.3d 580, 586 (Kan. 2009). The court held that the two

statutes were not in conflict; moreover, "The analysis by the Court of Appeals reaches an incongruous contrary result—that the legislature enacted three statutes with the intention each would expand the scope of tax-exempt charitable-use property beyond the restrictive constitutional language, but that these statutes operate to cancel each other out."

Kentucky

Constitution & Statute(s)

KY. CONST. § 170:

> There shall be exempt from taxation public property used for public purposes; . . . real property owned and occupied by, and personal property both tangible and intangible owned by, institutions of religion; institutions of purely public charity, and institutions of education not used or employed for gain by any person or corporation, and the income of which is devoted solely to the cause of education, public libraries, their endowments, and the income of such property as is used exclusively for their maintenance . . . .

KY. REV. STAT. ANN. § 132.190 (West 2005) begins: "(1) All property shall be subject to taxation, unless it is exempted by the Constitution or in the case of personal property unless it is exempted by the Constitution or by statute."

Note: In 1992, the legislature repealed KY. REV. STAT. § 132.011 ("Public charity" defined); no reported case cited that statute.

Case Holding(s)

Department of Revenue ex rel. Luckett v. Isaac W. Bernheim Foundation, Inc., 505 S.W.2d 762, 763 (Ky. Ct. App. 1974) (citation omitted):

> No case has been called to our attention which requires that a charity have as its objective the fulfillment of basic human needs for food, clothing and shelter to qualify as a charity for purposes of tax exemption under Section 170 of the Constitution.
>
> We are mindful that tax exemption deprives the treasury of revenue which must be replenished from other sources and consequently all claims for tax exemptions should be carefully scrutinized. We do not propose to allow the perpetuation of individual idiosyncrasies in a tax-exempt status under the guise of charity. Nevertheless, we feel that charity is broader than

> relief to the needy poor and includes activities which reasonably better the condition of mankind.

Banahan v. Presbyterian Housing Corp., 553 S.W.2d 48 (Ky. 1977) (recognizing exemption for housing and related facilities provided by a nonprofit to low-income senior citizens and disabled persons).

Louisiana

Constitution & Statute(s)

LA. CONST. art. VII, § 21 provides, in part:

> [T]he following property and no other shall be exempt from ad valorem taxation:
>
> . . . .
>
> (B)(1)(a)(i) Property owned by a nonprofit corporation or association organized and operated exclusively for religious, dedicated places of burial, charitable, health, welfare, fraternal, or educational purposes, no part of the net earnings of which inure to the benefit of any private shareholder or member thereof and which is declared to be exempt from federal or state income tax; and
>
> . . . .
>
> (2) property of a bona fide labor organization representing its members or affiliates in collective bargaining efforts; and
>
> (3) property of an organization such as a lodge or club organized for charitable and fraternal purposes . . . , and property of a nonprofit corporation devoted to promoting trade, travel, and commerce, and also property of a trade, business, industry or professional society or association . . . .
>
> None of the property . . . shall be exempt if owned, operated, leased, or used for commercial purposes unrelated to the exempt purposes of the corporation or association.

Case Holding(s)

Sherwood Forest Country Club v. Litchfield, 998 So. 2d 56, 61 (La. 2008), *remanded on rehearing*, 6 So. 3d 141 (La. 2009): "The people of our state are called upon to sustain the burdens of taxation as a requisite of civil government. Historically, exemptions were allowed based upon the theory

that the concessions are due as *quid pro quo* for the performance of services essentially public."

See also id. at 62 (citations omitted):

> [A]ll property shall pay its just portion of public burdens. Historically, when property is put to some use calculated to minimize the expenses of government are exemptions justified. Although the word 'fraternal' can be defined broadly,—and in one sense neighbors who get together for back-yard barbeques are gathering for fraternal purposes—it is only on the theory that fraternal acts alleviate the burdens of government that tax exemptions of property devoted to fraternal purposes can be justified. The predominate rule is to deny a property tax exemption for property used primarily for social or recreational purposes, even if that property is owned by a fraternal organization.

See also id. at 67:

> Of the four activities cited by sociologists that formed the basis for the establishment of the large contingency of fraternal orders that exists in the United States today, three obviously conferred public benefits—social integration, through education, into a democratic society; economic security with insurance and/or welfare benefits; and religious and morality practices and/or education. The fourth attribute of fraternal associations—social prestige—is more personal than public, but can be said to contribute to a cohesive community.

Maine

Constitution & Statute(s)

ME. CONST. art. IV, pt. 3, § 23 begins:

> The Legislature shall annually reimburse each municipality from state tax sources for not less than [fifty percent] of the property tax revenue loss suffered by that municipality during the previous calendar year because of the statutory property tax exemptions or credits enacted after April 1, 1978. The Legislature shall enact appropriate legislation to carry out the intent of this section.

ME. REV. STAT. ANN. tit. 36, § 652(1)(A) (2009) begins:

> The real estate and personal property owned and occupied or used solely for their own purposes by benevolent and charitable institutions incorporated by this State are exempt from taxation.

> Such an institution may not be deprived of the right of exemption by reason of the source from which its funds are derived or by reason of limitation in the classes of persons for whose benefit the funds are applied.

Case Holding(s)

Christian Fellowship & Renewal Center v. Town of Limington, 896 A.2d 287, 295 (Me. 2006) (4-3 decision) (citations omitted), granted exemption for facilities rented out to houses of worship or other religious societies at a low rate. The dissent emphasized the ambiguous record that could support either a recreational, charitable, or religious use. The majority stated:

> The charitable exemption was created in an age when government provided few services and religious institutions and charities provided many services that government neither provided nor subsidized. Then and now, organizations need not displace government programs in order to serve the common good and qualify for the charitable exemption by providing charitable services to defined groups or to the public at large. One legislative study indicated that the original purposes of the charitable exemption were to promote not only providing services in lieu of government services, but also "providing a service in which the state has a genuine interest."

Maryland

Constitution & Statute(s)

No constitutional provision exists on tax exemption. *Murray v. Comptroller of Treasury*, 216 A.2d 897, 902 (Md. 1966) (upholding tax exemption of churches, noting that: "This Court has consistently recognized the power of the legislature to grant full exemptions from taxation when reasonable and for a public purposee").

MD. CODE ANN., TAX-PROP. § 7-202(b)(1) (LexisNexis 2007) reads, in part:

> Property is not subject to property tax if the property:
>
> (i) is necessary for and actually used exclusively for a charitable or educational purpose to promote the general welfare of the people of the State, including an activity or an athletic program of an educational institution; and
>
> (ii) is owned by:

> 1. a nonprofit hospital;
>
> 2. a nonprofit charitable, fraternal, educational, or literary organization . . . .

Case Holding(s)

Supervisor of Assessments v. Group Health Ass'n, 517 A.2d 1076, 1079 (Md. 1986) (citations omitted):

> We do not at this time attempt to establish a hard-and-fast rule as to the meaning of 'charitable' for purposes of [the statutes]. Indeed, we doubt whether such a rule can be formulated. Clearly, however, a determination of whether an institution is charitable must include a careful examination of the stated purposes of the organization, the actual work performed, the extent to which the work performed benefits the community and the public welfare in general, and the support provided by donations.

Baltimore Science Fiction Society, Inc. v. State Department of Assessment & Taxation, 863 A.2d 969, 971, 975 (Md. 2004). Rejecting the tax department's argument that "the property did not qualify for the tax exemption because it was used primarily as a social or hobby club," the court ruled that "educational" cannot be limited to formal instruction, noting the Society's use of the property for the following educational purposes: a library's writing workshops, readings and presentations by authors; and encouraging high school students to compose literature.

Massachusetts

Constitution & Statute(s)

MASS. CONST. pt. 2, ch. 1, § 1, art. IV reads, in part:

> And further, full power and authority are hereby given and granted to the said general court [the legislature], from time to time, . . . to impose and levy proportional and reasonable assessments, rates, and taxes, upon all the inhabitants of, and persons resident, and estates lying, within the said commonwealth, except that . . . reasonable exemptions may be granted. . . .

MASS. GEN. LAWS ch. 59, § 5 (2009) provides, in part:

> The following property shall be exempt from taxation . . .

> . . . .
>
> Third, Personal property of a charitable organization, which term, as used in this clause, shall mean (1) a literary, benevolent, charitable or scientific institution or temperance society . . . and . . . real estate owned by or held in trust for a charitable organization and occupied by it or its officers for the purposes for which it is organized or by another charitable organization or organizations or its or their officers for the purposes of such other charitable organization or organizations. . . .

Case Holding(s)

Massachusetts (and many other states) adopted the following definition (in other states, sometimes without attribution or by citing Black's Law Dictionary):

> "A charity, in the legal sense, may be more fully defined as a gift to be applied consistently with existing laws, for the benefit of an indefinite number of persons, either by bringing their minds or hearts under the influence of education or religion, by relieving their bodies from disease, suffering or constraint, by assisting them to establish themselves in life, or by erecting or maintaining public buildings or works or otherwise lessening the burdens of government."

Boston Symphony Orchestra, Inc. v. Board of Assessors, 1 N.E.2d 6, 9 (Mass. 1936) (quoting *Jackson v. Phillips*, 96 Mass. (14 Allen) 539, 556 (1867)). As discussed above in footnote 109, the court denied exemption to the Symphony, explaining: "The way in which the appellant carried out its purpose by means of concerts in Symphony Hall has features which differentiate it from other corporations whose profits have been held to be exempt under the statute." *Id.* at 10.

New Habitat, Inc. v. Tax Collector, 889 N.E.2d 414, 418-19 (Mass. 2008) (citations omitted):

> To determine whether an organization is charitable, the court weighs a number of nondeterminative factors. These factors include, but are not limited to, whether the organization provides low-cost or free services to those unable to pay, whether it charges fees for its services and how much those fees are, whether it offers its services to a large or 'fluid' group of beneficiaries and how large and fluid that group is, whether the organization provides its services to those from all segments of society and from all walks of life, and whether the organization

> limits its services to those who fulfill certain qualifications and how those limitations help advance the organization's charitable purposes.
>
> The significance of these factors depends in no small part on the dominant purposes and methods of the organization. The closer an organization's dominant purposes and methods are to traditionally charitable purposes and methods, the less significant these factors will be in our determination of the organization's charitable status under G. L. c. 59, § 5, Third.

Michigan

Constitution & Statute(s)

MICH. CONST. art. IX, § 3 begins: "The legislature shall provide for the uniform general ad valorem taxation of real and tangible personal property not exempt by law except for taxes levied for school operating purposes."

MICH. CONST. art. IX, § 4: "Property owned and occupied by nonprofit religious or educational organizations and used exclusively for religious or educational purposes, as defined by law, shall be exempt from real and personal property taxes."

MICH. COMP. LAWS ANN. § 211.7*o* (West 2009) begins: "(1) Real or personal property owned and occupied by a nonprofit charitable institution while occupied by that nonprofit charitable institution solely for the purposes for which that nonprofit charitable institution was incorporated is exempt from the collection of taxes under this act."

Case Holding(s)

Wexford Medical Group v. City of Cadillac, 713 N.W.2d 734, 737 (Mich. 2006) (finding no particular monetary level of charity care required by the exemption statute; the total amount of pure charity care in one year was $2400 out of a total budget of $10 million). On the difficulty of determining what forgone revenue to count as charity care, the court concluded: "Clearly, courts are unequipped to handle these and many other unanswered questions. Simply put, these are matters for the legislature." *Id.* at 746. Defining factors include:

> (1) A "charitable institution" must be a nonprofit institution.
>
> (2) A "charitable institution" is one that is organized chiefly, if not solely, for charity.

> (3) A "charitable institution" does not offer its charity on a discriminatory basis by choosing who, among the group it purports to serve, deserves the services. Rather, a "charitable institution" serves any person who needs the particular type of charity being offered.
>
> (4) A "charitable institution" brings people's minds or hearts under the influence of education or religion; relieves people's bodies from disease, suffering, or constraint; assists people to establish themselves for life; erects or maintains public buildings or works; or otherwise lessens the burdens of government.
>
> (5) A "charitable institution" can charge for its services as long as the charges are not more than what is needed for its successful maintenance.
>
> (6) A "charitable institution" need not meet any monetary threshold of charity to merit the charitable institution exemption; rather, if the overall nature of the institution is charitable, it is a "charitable institution" regardless of how much money it devotes to charitable activities in a particular year.

See id. at 746.

Minnesota

Constitution & Statute(s)

MINN. CONST., art. X, § 1 reads, in part:

> Taxes shall be uniform upon the same class of subjects . . . , but . . . academies, colleges, universities, all seminaries of learning, all churches, church property, houses of worship, [and] institutions of purely public charity . . . shall be exempt from taxation except as provided in this section. . . . The legislature may authorize municipal corporations to levy and collect assessments for local improvements upon property benefited thereby without regard to cash valuation. The legislature by law may define or limit the property exempt under this section other than churches, houses of worship, and property solely used for educational purposes by academies, colleges, universities and seminaries of learning.

See the legislative change described below.

Case Holding(s)

North Star Research Institute v. County of Hennepin, 236 N.W.2d 754, 757 (Minn. 1975), adopted a six-factor test to qualify an institution as a purely public charity:

> (1) whether the stated purpose of the undertaking is to be helpful to others without immediate expectation of material reward; (2) whether the entity involved is supported by donations and gifts . . . ; (3) whether the recipients of the 'charity' are required to pay for the assistance received . . . ; (4) whether the income received from gifts and donations and charges to users produces a profit to the charitable institution; (5) whether the beneficiaries of the 'charity' are restricted or unrestricted and, if restricted, whether the class of persons to whom the charity is made available is one having a reasonable relationship to the charitable objectives; (6) whether dividends, in form or substance, or assets upon dissolution are available to private interests.

Under the Rainbow Child Care Center, Inc. v. County of Goodhue, 741 N.W.2d 880 (Minn. 2007), found that a daycare center was not an institution of purely public charity. The "factor three inquiry"—"the extent to which the recipients of the charity are required to pay"—"tests for a value that is fundamental to the concept of charity—that is, whether the organization *gives* anything away." *Id.* at 886. "If the legislature had intended all organizations exempt . . . under I.R.C. § 501(c)(3) also to be exempt from payment of real property taxes, it could have so provided, as it did with regard to state income taxation." *Id.* at 889. Under "the dissent's interpretation of charity[,] . . . a 'charitable' enterprise could charge the same for its services as a for-profit competitor and nevertheless enjoy exemption from property taxation, as long as no profits inured to the benefit of members of the organization." *Id.*

> [I]t is not sufficient to provide free or reduced-rate goods or services on such a small scale that they are merely an incidental part of the organization's operations. Nor will free or reduced-rate goods or services that are provided primarily for business purposes be adequate. The organization must demonstrate that its intended purpose is to provide a substantial proportion of its goods or services on a charitable basis.

Id. at 892.

After *Under the Rainbow*, months of deliberations among the Minn. Council of Nonprofits, the Department of Revenue, and the Association of County Assessors reached a consensus, adopted by the legislature in May

2009, to codify the definition of an institution of purely public charity. While "not contract[ing] or expand[ing] the definition," MINN. STAT. § 272.02(7)(a) (2009) requires charities to meet all six judicially created factors for determining tax exempt status; factors (1), (4), and (6) are mandatory and factors (2), (3), and (5) allow a "reasonable justification" exception (rejecting the Senate's proposed "compelling factual reason").

Guidance published by the Minnesota Department of Revenue explains that the three mandatory factors are automatically satisfied by Internal Revenue Code § 501(c)(3) status, and provides examples for satisfying (or not) the three other factors. *See* Letter from Minn. Rev. Dept., Property Tax Division, Bulletin to All City and County Assessors, Property Tax Exemptions for Institutions of Purely Public Charity, at 7-12 (Mar 1, 2010) *available* at http://www.mncn.org/charitable_tax_exemption/final%20Revenue%20Bulletin.pdf.

HealthEast v. County of Ramsey, 770 N.W.2d 153 (Minn. 2009), denied exemption to nonprofit health system parent that not only leased property to charitable affiliate but also performed services for non-affiliated, albeit charitable, organizations.

Mississippi

Constitution & Statute(s)

MISS. CONST. art. 4, § 112 reads, in relevant part: "The Legislature may, by general laws, exempt particular species of property from taxation, in whole or in part."

MISS. CODE ANN. § 27-31-1 (1972) exempts, in part: "(d) All property, real or personal, belonging to any religious society, or ecclesiastical body, or any congregation thereof, or to any charitable society, or to any historical or patriotic association or society . . . and used exclusively for such society or association and not for profit. . . ." It also exempts property of nonprofit schools and property owned and occupied by fraternal and benevolent organizations. *Id.* Also there is an exemption for nonprofit hospitals. *Id.* § 27-31-1(f).

Case Holding(s)

Hattiesburg Area Senior Services v. Lamar County, 633 So. 2d 440, 444-45 (Miss. 1994), while denying exemption to a retirement home, footnote 5 notes: "Since the inception of this litigation the legislature has provided that properties such as the properties here in question shall be [prospectively] exempt. Miss. Code Ann. 1972 § 27-31-1(dd) (Supp.

1992)." The court cited *Better Living Services, Inc. v. Bolivar County*, 587 So. 2d 914 (Miss. 1991), which denied exemption to a corporation which operated federally-subsidized apartments for the elderly, destitute, handicapped, and disabled. That court noted: "We see no reason why an institution, merely because it caters to the needs of the aged and infirm, should be exempt from taxation if someone other than that institution is furnishing the cost of the care and maintenance provided by the institution." *Id*. at 917 (quoting *Oea Senior Citizens, Inc. v. Douglas County*, 185 N.W.2d 464, 470 (Neb. 1971)).

Missouri

Constitution & Statute(s)

MO. CONST. art. X, § 6(1) provides: "All property . . . not held for private or corporate profit and used exclusively for religious worship, for schools and colleges, for purposes purely charitable, or for agricultural and horticultural societies, or for veterans' organizations may be exempted from taxation by general law."

MO. ANN. STAT. § 137.100(5) (2009) exempts:

> All property . . . actually and regularly used exclusively for religious worship, for schools and colleges, or for purposes purely charitable and not held for private or corporate profit, . . . [but not] real property not actually used or occupied for the purpose of the organization but held or used as investment even though the income or rentals received therefrom is used wholly for religious, educational or charitable purposes[.]

Case Holding(s)

Franciscan Tertiary Province, Inc. v. State Tax Commission, 566 S.W.2d 213, 218-19, 223-24, 226 (Mo. 1978), found that:

> An analysis of the cases relied on to support those respective positions has led us to the conclusion that the cases considering a charitable exemption for housing for the elderly and those considering such an exemption with reference to property used for other purposes have interpreted the words "used exclusively . . . for purposes purely charitable" differently and have established different requirements for granting an exemption under such language. It is beyond question that the language enacted may have but one meaning to be consistently applied in all areas.

The court continued:

> We hold that the words 'used exclusively . . . for purposes purely charitable, and not held for private or corporate profit' which appear in § 137.100 should and do have the same meaning whether applied to property used for a hospital, for training handicapped workers, for operating a YMCA type of program or for providing housing for the aged.

Applying a three-factor test, the court concluded:

> Franciscan is a not-for-profit corporation whose clearly stated purpose was to operate a rental facility for the aged on a non-profit basis. It did not operate at a profit. It contributed some of its own funds to supplement rentals received in order to meet expenses of operating Chariton. No profit to any individual or corporation may result even if the full subsidy contemplated is eventually realized.

Montana

Constitution & Statute(s)

MONT. CONST. art. VIII, § 5 reads, in part: "(1) The legislature may exempt from taxation: . . . (b) Institutions of purely public charity, hospitals and places of burial not used or held for private or corporate profit, places for actual religious worship, and property used exclusively for educational purposes."

MONT. CODE ANN. § 15-6-201 (2009).

Case Holding(s)

Steer, Inc. v. Department of Revenue, 803 P.2d 601, 605 (Mont. 1990) notes that:

> Steer, through its innovative stewardship program, provides a valuable service by raising funds which, in turn, are donated to needy people world-wide. However, the fact that Steer's unique fund-raising method produces worthwhile results through its member evangelical organizations does not negate its tax obligations under Montana constitutional and statutory mandate. We have already held that Steer's use of its cattle as a capital investment was determinative in deciding that it did not qualify for a tax-exemption based on being an "institution of purely public charity." We feel, however, that this case requires us to further clarify "institutions for purely public charity."
>
> . . . .

> . . . Taken together, the Montana Constitution and the Montana legislative acts intend "institutions" to mean property or place employed for purely public charitable purposes or activities rather than an entity. The cattle are property and tax is imposed on property. If it is charitable property in its purpose and employment and not for profit or gain of income, taxes are not imposed. Here, the cattle's employment was for the gain of income, and therefore, the cattle are taxable.
>
> Mont. Const. art. VIII, § 5(1) provides that the legislature *may* exempt property from taxation. The exemptions of property from taxation is clearly left to the discretion of the legislature and as noted, are to be strictly construed. The history and provisions of § 15-6-201, MCA, reflect the many times when this section of the code has been amended to add property to the list of exempted items, which includes such items as residences of the clergy to a bicycle used for personal transportation of the owner. The judiciary may not add livestock to the list of exemptions.

Nebraska

Constitution & Statute(s)

NEB. CONST. art. VIII, § 2(2) reads: "[T]he Legislature by general law may classify and exempt from taxation property owned by and used exclusively for . . . educational, religious, charitable, or cemetery purposes, when such property is not owned or used for financial gain or profit to either the owner or user . . . ."

NEB. REV. STAT. § 77-202(1)(d) (2003) reads:

> Property owned by educational, religious, charitable, or cemetery organizations, or any organization for the exclusive benefit of any such educational, religious, charitable, or cemetery organization, and used exclusively for . . . [such] purposes, when such property is not (i) owned or used for financial gain or profit to either the owner or user, (ii) used for the sale of alcoholic liquors for more than twenty hours per week, or (iii) owned or used by an organization which discriminates in membership or employment based on race, color, or national origin. . . . [E]ducational organization means (A) an institution operated exclusively for the purpose of offering regular courses with systematic instruction . . . or (B) a museum or historical society operated exclusively for the benefit and education of the public. . . . [C]haritable organization means an organization

> operated exclusively for the purpose of the mental, social, or physical benefit of the public or an indefinite number of persons . . . .

Case Holding(s)

Bethesda Foundation v. Buffalo County Board of Equalization, 640 N.W.2d 398, 404-05 (Neb. 2002). In granting an exemption to an assisted living facility, the court stated:

> The residents . . . are admitted without regard to race, color, or national origin and without regard to the ability of the residents to pay. The criteria for admission is the need for care. No resident has ever been discharged for failure to pay, nor has Bethesda ever filed a suit to collect delinquent accounts. . . . In the event a facility needs improvements or is unable to pay for them, Bethesda uses excess receipts from other facilities to pay the deficit or cover expenses.

Cf. Pittman v. Sarpy County Board of Equalization, 603 N.W.2d 447, 455 (Neb. 1999) ("It is well established that low-income housing is not a charitable use of property.").

Nebraska State Bar Foundation v. Lancaster County Board of Equalization, 465 N.W.2d 111, 124 (Neb. 1991) (ruling that the Nebraska Bar Foundation is not a charitable or educational organization).

> [Section] 77-202(1)(c) contains a two-tier approach to tax exemption for property. At the first tier is the particular nature, character, or status of a property owner as an organization which is one of the types designated in § 77-202(1)(c). At the second tier is use of the property, that is, the specific kinds and degrees of use which qualify or disqualify property concerning the charitable or educational tax exemptions available under § 77-202(1)(c). At the first tier, if an owner is not an organization of a type entitled to property tax exemption pursuant to § 77-202(1)(c), continuation to the second tier, namely, consideration of the property's use, is unnecessary, since the property owner has failed to qualify as an organization entitled to tax exemption for its property.

See also Fort Calhoun Baptist Church v. Washington County Board of Equalization, 759 N.W.2d 475, 481-82 (Neb. 2009) (holding that church property leased to a school during the week, except when school use would interfere with a church function, "was used exclusively for religious and/or educational purposes"). "The Constitution and the statutes do not require that the ownership and use must be by the same entity." *Id.*

Nevada

Constitution & Statute(s)

NEV. CONST. art. 8, § 2: "All real property, and possessory rights to the same . . . belonging to corporations . . . shall be subject to taxation . . . ; Provided, that the property of corporations formed for Municipal, Charitable, Religious, or Educational purposes may be exempted by law."

NEV. CONST. art. 10, § 1, cl. 8 reads, in part: "The legislature may exempt by law property used for municipal, educational, literary, scientific or other charitable purposes. . . ."

NEV. REV. STAT. § 361.140(2) (2009): "All buildings belonging to a corporation defined in subsection 1, together with the land actually occupied by the corporation for the purposes described and the personal property actually used in connection therewith, are exempt from taxation when used solely for the purpose of the charitable corporation."

See also § 361.105 (exemptions of nonprofit private schools); § 361.125 (exemption of churches and chapels); § 361.135 (exemptions of certain lodges, societies and similar charitable or benevolent organizations).

NEV. REV. STAT. § 361.140(1):

> In addition to the corporations defined by law to be charitable corporations there are hereby included:
>
> (a) Any corporation whose objects and purposes are religious, educational or for public charity and whose funds have been derived in whole or substantial part from grants or other donations from governmental entities or donations from the general public, or both, not including donations from any officer or trustee of the corporation; and
>
> (b) Any corporation prohibited by its articles of incorporation from declaring or paying dividends, and where the money received by it is devoted to the general purpose of charity and no portion of the money is permitted to inure to the benefit of any private person engaged in managing the charity, except reasonable compensation for necessary services actually rendered to the charity, and where indigent persons without regard to race or color may receive medical care and attention without charge or cost.

Case Holding(s)

Simpson v. International Community of Christ, 796 P.2d 217, 219 (Nev. 1990) ("[Not all of the] two square miles of vacant land should be tax exempt because a religious group conducts open-air religious ceremonies a few times a week at different locations on the land."); *see also id*. at 221 (Mowbray, J., concurring):

> While I certainly favor and support the tax exemptions granted religious and charitable organizations by the legislature, enough is enough!
>
> As in all cases, reasonableness and honesty must be applied in granting those exemptions. To do otherwise, is not only unfair to all religious and charitable organizations, but also to our citizens who must bear and pay their individual share of the overall tax burden.

New Hampshire

Constitution & Statute(s)

No constitutional provision.

N.H. REV. STAT. ANN. § 72:23(V) (LexisNexis 2009), exempts: "The buildings, lands and personal property of charitable organizations and societies . . . used and occupied by them directly for the purposes for which they are established. . . ."

Section 72:23-*l* reads:

> The term 'charitable' . . . shall mean a corporation, society or organization established and administered for the purpose of performing, and obligated, by its charter or otherwise, to perform some service of public good or welfare advancing the spiritual, physical, intellectual, social or economic well-being of the general public or a substantial and indefinite segment of the general public that includes residents of the state of New Hampshire, with no pecuniary profit or benefit to its officers or members, or any restrictions which confine its benefits or services to such officers or members, or those of any related organization. The fact that an organization's activities are not conducted for profit shall not in itself be sufficient to render the organization 'charitable' . . . , nor shall the organization's treatment under the United States Internal Revenue Code . . . . This section is not intended to abrogate the meaning of 'charitable' under the common law of New Hampshire.

Section 72:23-n provides: "The governing body of any municipality may enter into negotiations for a voluntary payment in lieu of taxes from otherwise fully or partially tax exempt properties. . . ."

While the legislature may create exemptions, there is no constitutional right to exemption. *See Franklin Street Society v. Manchester*, 60 N.H. 342, 350-51 (1880) ("Whether any exemption of the plaintiff's property is constitutional is a question we do not decide. . . . The plaintiff [church] . . . cannot claim that it shall not pay any tax because $10,000 of its property is not taxed.").

Case Holding(s)

St. Paul's School v. City of Concord, 372 A.2d 269, 271-72 (N.H. 1977) (answering detailed questions as to use of specific types of educational property).

There are several cases regarding assisted living centers which go both ways. See the "close" case of *ElderTrust of Florida, Inc. v. Town of Epsom*, 919 A.2d 776, 780 (N.H. 2007), where the New Hampshire Supreme Court took "the opportunity to join a number of other courts," and set out a four-part test to clarify the statutory requirements, asking whether the organization: (1) was established and is administered for a charitable purpose; (2) has an obligation to perform its stated purpose to the public rather than simply to its members; (3) occupies and uses its property directly for the stated charitable purposes; and (4) uses income or profits for any purpose other than the purpose for which it was established (which prohibits the organization's officers and members from deriving any pecuniary profit or benefit).

Town of Peterborough v. MacDowell Colony, Inc., 943 A.2d 768, 770-71 (N.H. 2008) (upholding exemption for 450 acres "on which are located thirty-two art studios and various common buildings . . . . MacDowell operates an artist-in-residence program on the property. Each artist admitted to the program . . . may spend up to eight weeks at the Colony, where he or she is provided a studio in which to create art. The studios . . . provide, in the trial court's words, 'a secluded, natural environment in which to work.'"). "The provision of that service benefits a far greater segment of society than the artists who actually use MacDowell's property and, in so doing, serves the 'general public' as that term is used in RSA 72:23-*l*." *Id.* at 773. While the artists may sell or do what they please with the art, the statute's "prohibition against private inurement applies to it, not the Colony Fellows." *Id*. at 775.

New Jersey

Constitution & Statute(s)

N.J. CONST. art. VIII, § 1, ¶ 2, ends:

> Exemptions from taxation may be altered or repealed, except those exempting real and personal property used exclusively for religious, educational, charitable or cemetery purposes, as defined by law, and owned by any corporation or association organized and conducted exclusively for one or more of such purposes and not operating for profit.

N.J. STAT. ANN. § 54:4-3.6 (West 2002), exempts, in part:

> [A]ll buildings actually used for colleges, schools, academies or seminaries . . . ; all buildings actually used for historical societies, associations or exhibitions, when . . . located on land owned by an educational institution which derives its primary support from State revenue; all buildings actually and exclusively used for public libraries . . . ; all buildings actually used in the work of associations and corporations organized exclusively for religious purposes . . . ; all buildings actually used in the work of associations and corporations organized exclusively for hospital purposes . . . ; [and] all buildings owned by a corporation . . . subject to the provisions of Title 15 . . . or Title 15A of the New Jersey Statutes and actually and exclusively used in the work of one or more associations or corporations organized exclusively for charitable or religious purposes. . . .

Case Holding(s)

See *Hunterdon Medical Center v. Township of Readington*, 951 A.2d 931, 945 (N.J. 2008) for a discussion of the factors to be considered when an entity claims an exemption, including: (1) "the core aspects of a hospital's purposes are to address the needs of all of the types of patients that a hospital is expected to serve. Therefore, we hold that any medical service that a hospital patient may require pre-admission, during a hospital stay . . . or post-admission, constitutes a presumptive core 'hospital purpose'"; (2) "whether the hospital delivers such services in the hospital's main facility . . . or in a hospital-owned building adjoining or adjacent to the main hospital campus, makes no difference"; (3) "as the hospital-used property is situated away from the main hospital campus and adjacent or adjoining property, concerns about hospital integration and supervision become more pronounced, even when the use is for a core hospital purpose."

> [I]n the analysis under factor three above when the hospital's off-site activity is not one for which the hospital has been licensed to perform off site by regulatory authorities . . . [we also consider]: (1) whether the facility competes with like commercial or privately owned facilities; and, even if the answer to (1) is in the affirmative, (2) whether the facility, or the particular disputed part, is actually used predominantly by patients and hospital employees or by commercial members. . . . [T]his part to the analysis does not replace the separate consideration . . . that an endeavor not be established or run as a profit-making operation.

See also id. at 946

Unlike for hospitals, the legislature does not require assisted living facilities to provide charity care. *See Presbyterian Home at Pennington, Inc. v. Borough of Pennington*, 976 A.2d 413, 415 (N.J. Super. Ct. App. Div. 2009).

Cf. University Cottage Club of Princeton New Jersey Corp. v. New Jersey Department of Environmental Protection, 921 A.2d 1122, 1131 (N.J. 2007) (upholding agency requirement (now codified in specific statute) that "public access is a fundamental element of an historic site tax exemption," and that this Princeton private eating club satisfied the requirement). The court commented: "important is the fact that tax exemptions drain the public coffers just as expenditures do, and could not be justified in the absence of public access." *Id.*

New Mexico

Constitution & Statute(s)

N.M. CONST. art. VIII, § 3 begins: "[A]ll church property not used for commercial purposes, [and] all property used for educational or charitable purposes . . . shall be exempt from taxation."

N.M. STAT. § 7-38-8.1 (2009) reads:

> The [tax] division shall adopt regulations to insure that all real property owned by any nongovernmental entity and claimed to be exempt from property taxation . . . shall be reported for valuation purposes to the appropriate valuation authority. These regulations shall include provisions for initial reporting of the property and claiming of the exempt status pursuant . . . .

Case Holding(s)

Georgia O'Keeffe Museum v. County of Santa Fe, 62 P.3d 754, 758 (N.M. Ct. App. 2002) ("We hold the phrase 'used for educational purposes' to mean 'the direct, immediate, primary and substantial use of property that embraces systematic instruction in any and all branches of learning from which a substantial public benefit is derived.'" (citing *NRA Special Contribution Fund v. Board of County Commissioners*, 591 P.2d 672, 679 (N.M. Ct. App. 1978)). *NRA* ruled that lobbying on legislation is inconsistent with education. Concerned about the burden to other taxpayers of exempting the NRA's 36,300 acres, the court observed:

> We note also that the necessary expenses of government are becoming greater and the necessity for better utilization of the existent property tax is urgent. Tax exemption has a direct effect on the size of the tax base. The scope of tax exemption has broadened so that exempt organizations tend to grow wealthier and often increase the percentage of exempt property within the state . . . . Such increased exemptions may create a serious problem because a diminished tax base lessens the amount available to meet governmental costs. This factor also requires an organization that seeks a tax exemption to give the public a "substantial public benefit."

NRA Special Contribution Fund, 591 P.2d at 679.

Georgia O'Keeffe Museum declared:

> [F]or us now to read *NRA* to allow an exemption only for a formal, structured, teacher-student instructional school environment would be too restrictive a reading of *NRA*. Application of too narrow a standard can easily defeat the obvious purpose of the exemption, which is to encourage private citizens to engage in educational pursuits from which the public derives a substantial benefit. To adhere to *NRA* as narrowly as the County suggests in order to defeat an exemption, with respect to a private museum that provides a substantial educational benefit to the community, is too restrictive . . . .

Georgia O'Keeffe Museum, 62 P.3d at 765. The court adds: "Museums, whether private or public, must integrate themselves into the community and have subjects of public interest in order to survive. . . . [T]hey depend primarily on donations (including grants and legislative funding), admission fees, and retail sales in gift shops." *Id*. at 766.

New York

Constitution & Statute(s)

N.Y. CONST. art. XVI, § 1 ends:

> Exemptions from taxation . . . may be altered or repealed except those exempting real or personal property used exclusively for religious, educational or charitable purposes as defined by law and owned by any corporation or association organized or conducted exclusively for one or more of such purposes and not operating for profit.

N.Y. REAL PROP. TAX LAW § 420-a (McKinney 2008) begins:

> 1. (a) Real property owned by a corporation or association organized or conducted exclusively for religious, charitable, hospital, educational, or moral or mental improvement of men, women or children purposes, . . . and used exclusively for carrying out . . . such purposes . . . shall be exempt from taxation . . . .
>
> (b) Real property . . . shall not be exempt if any officer, member or employee . . . receive[s or is entitled to] any pecuniary profit from the operations thereof, except reasonable compensation for services in effecting one or more of such purposes, or as proper beneficiaries of its strictly charitable purposes; or if the organization thereof for any such avowed purposes be a guise or pretense for directly or indirectly making any other pecuniary profit . . . ; or if it be not in good faith organized or conducted exclusively for one or more of such purposes.

Subsection 3 exempts, in part, nonrevenue-producing property whose "improvement[] is in progress or is in good faith contemplated . . . ." *Id.* § 420-a(3).

N.Y. REAL PROP. TAX. § 420-b contains a local option to revoke exemption, adopted in 1971 out of concern over lost tax base:

> 1. (a) Real property owned by a corporation or association which is organized exclusively for bible, tract, benevolent, missionary, infirmary, public playground, scientific, literary, bar association, medical society, library, patriotic or historical purposes, for the development of good sportsmanship for persons under the age of eighteen years through the conduct of supervised athletic games, for the enforcement of laws relating to children or animals, or for

> two or more such purposes, and used exclusively for carrying out thereupon one or more of such purposes either by the owning corporation or association, or by another such corporation or association as hereinafter provided, shall . . . be taxable by any municipal corporation within which it is located if the governing board of such municipal corporation, after public hearing, adopts a local law, ordinance or resolution so providing.

This statute was upheld by *Ass'n of the Bar of the City of New York v. Lewisohn*, 313 N.E.2d 30, 32 (N.Y. 1974).

Case Holding(s)

Adult Home at Erie Station, Inc. v. Assessor of Middleton, 886 N.E.2d 137, 142 (N.Y. 2008) (upholding exemption for housing rented to participants in the nonprofit's programs to combat homelessness, substance abuse, and other social ills):

> [A]partments in commercial complexes are not provided solely to people struggling against alcoholism, drug addiction and the like on condition that they participate in programs designed to help them. That these people (or the government agencies that support them) pay market rents, and that RECAP may even benefit economically from its rental income, does not change the result. The issue is not whether RECAP benefits, but whether the property is "used exclusively" for RECAP's charitable purposes. RECAP could lose its exemption under RPTL 420-a (1) (b) if the economic benefit went to its officers or employees personally, but an economic benefit to a charitable organization does not by itself extinguish a tax exemption. The question is how the property is used, not whether it is profitable.

North Carolina

Constitution & Statute(s)

N.C. CONST. art. V, § 2(3) reads, in part: "The General Assembly may exempt cemeteries and property held for educational, scientific, literary, cultural, charitable, or religious purposes . . . . No taxing authority other than the General Assembly may grant exemptions, and the General Assembly shall not delegate the powers accorded to it . . . ."

N.C. GEN. STAT. § 105-278.7 (2009) exempts buildings and land owned by a "charitable association or institution" if "[w]holly and exclusively used by its owner for nonprofit educational, scientific, literary, or charitable purposes . . . ." Subsection (f)(4) states: "A charitable purpose is one that

has humane and philanthropic objectives; it is an activity that benefits humanity or a significant rather than limited segment of the community without expectation of pecuniary profit or reward. The humane treatment of animals is also a charitable purpose." *Id.* § 105-278.7(f)(4).

Case Holding(s)

No recent North Carolina high court decision.

See, e.g., *In re Appeal of Chapel Hill Residential Retirement Center*, 299 S.E.2d 782, 788-89 (N.C. Ct. App. 1983):

> [M]erely supplying care and attention to elderly persons cannot, alone, constitute charity. Petitioner does not rely on outside funding in order to operate. The contributions it has received are not a primary source of its financing. The Center is more in the nature of a cooperative operated for the mutual benefit of its residents who collectively pay for their care; it is not an institution providing for the special needs of individuals who are in need of charity, the aid of whom benefits society as a whole in addition to the residents.

The court observed:

> To allow petitioner's property to qualify for exemption because its residents are elderly would be to give such persons clearly preferential treatment over those persons over 65 years of age who continue to live in their own discretely owned residences. While we recognize and applaud efforts similar to Carol Woods as being a progressive and desirable approach to the residential and health care and personal security of elderly persons, these laudable aspects of petitioner's operation do not suffice to bring it within the statutory classification of a charitable purpose.

In response, in 1987 the legislature enacted "An Act to Classify Property Owned by Certain Non Profit Homes for the Aged, Sick or Infirm and Exclude this Property from Taxation," codified at section N.C. GEN. STAT. § 105-275(32) (2009) and upheld by *In Matter of the Appeal of Barbour*, 436 S.E.2d 169, 177 (N.C. Ct. App. 1993).

North Dakota

Constitution & Statute(s)

N.D. CONST. art. X, § 5 reads, in part: "[P]roperty used exclusively for schools, religious, cemetery, charitable or other public purposes shall be exempt from taxation. Real property used for conservation or wildlife

purposes is not exempt from taxation unless an exemption is provided by the legislative assembly."

The lengthy and detailed N.D. CENT. CODE § 57-02-08 (2009) exempts, among other things, "buildings belonging to institutions of public charity." *See also* § 57-02-08.4 (conditional property-tax exemption for owners of wetlands).

See also section 57-02.3-02: "The board of [state-owned] university and school lands shall annually make payments, subject to legislative appropriations, to any county in which property subject to valuation is located. The payments are in lieu of ad valorem taxes that would be payable to the county if the real property for which the payments are made were not owned by the state. . . ."

Case Holding(s)
Riverview Place, Inc. v. Cass County, 448 N.W.2d 635, 642 (N.D. 1989) ("[A] facility for the elderly must supply some type of care for their residents in order to constitute a charitable use.").

Ohio

Constitution & Statute(s)
OHIO CONST. art. XII, § 2 ends:

> [G]eneral laws may be passed to exempt burying grounds, public school houses, houses used exclusively for public worship, institutions used exclusively for charitable purposes, and public property used exclusively for any public purpose, but all such laws shall be subject to alteration or repeal; and the value of all property so exempted shall, from time to time, be ascertained and published as may be directed by law.

Exemption for charities is provided in OHIO REV. CODE § 5709.12 as defined in § 5709.121 (2010), which, among other things, exempts property leased from one charity to another for charitable purposes.

American Committee of Rabbinical College of Telshe, Inc. v. Board of Tax Appeals, 102 N.E.2d 589, 590 (Ohio 1951):

> In both Section 2 of Article XII of the Constitution and Section 5353, General Code, the words "institutions of purely public

> charity" have now been replaced by the words "institutions used exclusively for charitable purposes." It follows that it is no longer necessary that an institution used exclusively for the lawful advancement of education and of religion be open generally to the public in order to have tax exemption of property owned and used by it exclusively for lawful educational or religious purposes.

Case Holding(s)

Northeast Ohio Psychiatric Institute v. Levin, 903 N.E.2d 1188, 1193 (Ohio 2009) (denying exemption to charitable property owner leasing to charitable affiliate because the rental income is more than incidental). The dissent commented:

> Funding for social services such as mental-health care for the underprivileged is scarce enough and is increasingly being cut during these tough economic times. Permitting the taxation of the property herein further deprives a charitable-care provider of funding to continue treatment, much of which is provided by the state . . . in the first place. Peter is being robbed to pay Paul instead.

Id. at 1196 (Lundberg Stratton, J., dissenting); *cf. Community Health Professionals, Inc. v. Levin*, 866 N.E.2d 478, 483 (Ohio 2007) (noting that the lease was incidental and the administration building was exempt).

Oklahoma

Constitution & Statute(s)

OKLA. CONST. art. X, § 6(A): "[A]ll property used for free public libraries, free museums, public cemeteries, property used exclusively for nonprofit schools and colleges, and all property used exclusively for religious and charitable purposes . . . shall be exempt from taxation . . . ."

OKLA. STAT. tit. 68, § 68-2887(9) (2000) adds: "All property used exclusively and directly for charitable purposes within this state, provided the charity using said property does not pay any rent . . . unless the owner is a charitable institution described in Section 501(c)(3) of the Internal Revenue Code. . . ."

Case Holding(s)

Integris Realty Corp. v. Oklahoma County Board of Tax Roll Corrections (In re Assessment of Real Property), 58 P.3d 200, 206 (Okla. 2002) (ruling

that property leased by nonprofit tenants from a for-profit owner was exempt):

> In recognition of the burden on state government which is lifted by the charitable acts of others, the framers allow an exemption from taxation for property which is "used exclusively"—i.e., property which is physically dedicated and devoted—for charitable purposes. . . . 68 O.S. 2001 § 2887(9) to the extent that it creates a burden on entitlement to an art. 10, § 6 exemption in a way inconsistent with the constitutional provision's language is disapproved.

A dissenting opinion expressed skepticism that the use by the nonprofit tenants was charitable:

> There is documentary evidence establishing the general identities of the tenants as engineering, education and training, facility planning, physician services, foundation, legal, plaza hotel, managed care, CVI lab, diabetes center, heart center, surgery center, and fertility institute. However, there is no evidence that these tenants are care centers providing services to the public or that these tenants' doors are open to the public, poor persons and paying persons alike.

Id. at 207 (Boudreau, J., dissenting).

Oregon

Constitution & Statute(s)

No exemptions referenced in Constitution.

OR. REV. STAT. § 307.130(2) (2000) reads, in part: "property owned . . . by . . . incorporated literary, benevolent, charitable and scientific institutions shall be exempt from taxation . . . [but] only such real or personal property, or proportion thereof, as is actually and exclusively occupied or used in the literary, benevolent, charitable or scientific work carried on by such institutions." And in (3) and (4), an "institution shall not be deprived of an exemption . . . solely because its primary source of funding is from one or more governmental entities" or "because its purpose or the use of its property is not limited to relieving pain, alleviating disease or removing constraints." *Id.* at § 307.130(3)-(4).

Case Holding(s)

Southwestern Oregon Public Defender Services, Inc. v. Department of Revenue, 817 P.2d 1292, 1298 (Or. 1991) ("[T]he fact that taxpayer contracts with the state to perform indigent defense in Coos County does

not disqualify it from receiving an exemption . . . ."). The Court explained that the statute has three requirements: "(1) the organization must have charity as its primary, if not sole, object; (2) the organization must be performing in a manner that furthers its charitable object; and (3) the organization's performance must involve a gift or giving." *Id*. at 1296. As to the last, "the question becomes, not whether taxpayer gains some kind of remuneration from some source, but whether, *so far as the recipient is concerned*, the taxpayer's services are given to the recipients with strings attached." *Id.* at 1297.

The Oregon Tax Court recently denied exemption for a college bookstore. *Portland State University Bookstore v. Multnomah County Assessor*, No. TC-MD 060824C, 2009 Ore. Tax LEXIS 27, at *19 (Or. T.C. January 29, 2009) ("There is no allegation or evidence that the relatively few college students benefiting from Plaintiff's nominal giving fall into the category of 'poor and needy.'").

Pennsylvania

Constitution & Statute(s)

PA. CONST. art. 8, § 2(a) permits the General Assembly to exempt from taxation, among other property, "(v) Institutions of purely public charity, but . . . only that portion of real property of such institution which is actually and regularly used for the purposes of the institution."

The 1997 Institutions of Purely Public Charity Act set forth statutory factors in response to *Hospitalization Utilization Project v. Commonwealth*, 487 A.2d 1306, 1317 (Pa. 1985), which set forth five requirements: "(a) Advances a charitable purpose; (b) Donates or renders gratuitously a substantial portion of its services; (c) Benefits a substantial and indefinite class of persons who are legitimate subjects of charity; (d) Relieves the government of some of its burden; and (e) Operates entirely free from profit motive." The very detailed provisions of 10 PA. STAT. ANN. § 375 (West 1999) explicate and expand on these criteria, and provide safe harbors and rebuttable presumptions. The statute encourages nonprofits to make PILOTs by offering an exemption safe harbor and gives standing to aggrieved for-profit competitors.

Case Holding(s)

The Commonwealth Court repeatedly asserts that only the courts can interpret the constitutional term "institution of purely public charity" despite reversals by the State Supreme Court, which seems to suggest more deference to the legislature. *See, e.g.*, *Alliance Home of Carlisle v. Board of*

Assessment Appeals, 919 A.2d 206, 223 (Pa. 2007) (footnote omitted):

> If the Act 55 presumption and test would lead to a holding that a taxpayer qualified as "an institution of purely public charity," where the *HUP* test would not, fundamental and foundational questions could arise concerning whether: (1) the *HUP* test, which was adopted in the absence of legislation addressing the constitutional term, occupied the constitutional field concerning the exemption, or instead left room for the General Assembly to address the matter; (2) the legislative scheme as adopted comported with the constitutional command and displaced the *HUP* test; and/or (3) if *HUP* were deemed authoritative and comprehensive, whether the legislative findings and scheme set forth in Act 55 gave reason to reconsider the contours of the test thus distilled from judicial experience with individual cases.

Government-funded nonprofits (e.g., prisons, low-income and elderly housing) are a particular area of dispute, leading one commentator to call on the Pennsylvania Supreme Court to clarify the question. "Otherwise, well-meaning charitable social service organizations will continue to waste money pursuing lengthy litigation with frustrating results." Joseph C. Bright, *Pennsylvania Charities Suffer String of Defeats from Commonwealth Court*, STATE TAX TODAY, July 6, 2007, *available at* 2007 STT 130-21. Nonprofit health clubs (e.g., YMCAs) are another pressure point.

Rhode Island

Constitution & Statute(s)

No tax provision in Constitution.

R.I. GEN. LAWS § 44-3-3(8) (2005) exempts:

> Buildings and personal estate owned by any corporation used for a school, academy, or seminary of learning, and of any incorporated public charitable institution, and the land upon which the buildings stand and immediately surrounding them to an extent not exceeding one acre, so far as they are used exclusively for educational purposes, but no property or estate whatever is hereafter exempt from taxation in any case where any part of its income or profits or of the business carried on there is divided among its owners or stockholders. . . .

Note: R.I. GEN. LAWS § 45-13-5.1 (1999) requires state PILOTs to towns of twenty-seven percent of taxes that would otherwise have been paid by nonprofit schools and hospitals. [Update for 2009 proposed "impact fee"].

Case Holding(s)

Few cases. *See, e.g.*, *Order of St. Benedict v. Gordon*, 417 A.2d 881 (R.I. 1980) (granting exemption to faculty housing in dorms at boarding school); *Roger Williams General Hospital v. Littler*, 566 A.2d 948 (R.I. 1989) (denying exemption to equipment leased from business vendor). Old charters set forth a tax exemption that is not affected by the statute.

See also Lifespan Corp. v. City of Providence, 776 A.2d 1061, 1061-62 (R.I. 2001) (denying exemption to property in an administrative building used by an "umbrella entity" to provide services to the hospital and entities): "Lifespan's request that we should equate a corporate office computer to a hospital bed should be directed to the Legislature and not to this Court."

South Carolina

Constitution & Statute(s)

S.C. CONST. art. X, § 3 reads, in part:

> There shall be exempt from ad valorem taxation:
>
> . . . .
>
> (b) all property of all schools, colleges and other institutions of learning and all charitable institutions in the nature of hospitals and institutions caring for the infirmed, the handicapped, the aged, children and indigent persons, except where the profits of such institutions are applied to private use;
>
> (c) all property of all public libraries, churches, parsonages and burying grounds;
>
> (d) all property of all charitable trusts and foundations used exclusively for charitable and public purposes;
>
> . . . .
>
> . . . In addition . . . the General Assembly may provide for exemptions from the property tax, by general laws applicable uniformly to property throughout the State . . . , but only with the approval of two-thirds of . . . each House.

Lengthy and detailed S.C. CODE ANN. § 12-37-220(B) (2009) adds exemptions for specific types of nonprofits (e.g., Boy Scouts, YMCA's,

museums, theaters and symphonies, and certain housing for low-income, disabled, or elderly persons). Subsection (B)(16)(a) covers:

> The property of any religious, charitable, eleemosynary, educational, or literary society, corporation, or other association, when the property is used by it primarily for the holding of its meetings and the conduct of the business of the society, corporation, or association and no profit or benefit therefrom inures to the benefit of any private stockholder or individual.

S.C. CODE ANN. § 12-37-220(B)(16)(a).

Case Holding(s)

No recent state supreme court cases, and few appeals court cases. *See, e.g.*, *Citadel Development Foundation v. County of Greenville*, 308 S.E.2d 797, 800 (S.C. Ct. App. 1983) ("It is one thing to say the Foundation benefits The Citadel, but quite another to claim The Citadel is the beneficial owner of Foundation property.").

South Dakota

Constitution & Statute(s)

S.D. CONST. art. XI, § 6 reads: "The Legislature shall, by general law, exempt from taxation, property used exclusively for agricultural and horticultural societies, for school, religious, cemetery and charitable purposes. . . ."

S.D. CODIFIED LAWS § 10-4-9.1 (1996) reads:

> Property owned by a public charity and used for charitable purposes is exempt from taxation. A public charity is any organization or society which devotes its resources to the relief of the poor, distressed or underprivileged. A public charity must receive a majority of its revenue from donations, public funds, membership fees or program fees generated solely to cover operating expenses; it must lessen a governmental burden by providing its services to people who would otherwise use governmental services; it must offer its services to people regardless of their ability to pay for such services; it must be nonprofit and recognized as an exempt organization under section 501(c)(3) of the United States Internal Revenue Code of 1954, as amended, and in effect on January 1, 1986; and it may not have any of its assets available to any private interest.

Separately, S.D. CODIFIED LAWS § 10-4-9.3 (1996) exempts property used for human health care.

Case Holding(s)

See Sioux Valley Hospital Ass'n v. South Dakota State Board of Equalization, 513 N.W.2d 562 (S.D. 1994) (rejecting exemption for fitness center run by hospital). The court considered both exemption statutes, beginning with section 10-4-9.3:

> When the Legislature provided a tax exemption for human health care and human health care related purposes, it did not intend to give a tax exemption for "Splashbash Parties." Despite the Center's mandate on health over physique, we find it contrary to . . . associate these fitness activities with human health care per SDCL 10-4-9.3.

Id. at 565.

On the separate question of exemption under section 10-4-9.1, the court concluded:

> Although Minnehaha County does provide swimming and some fitness activities, the Center does not alleviate a governmental burden merely by providing some similar services. Federal Express delivers letters and packages, but does not achieve charitable status by competing with the United States Postal Service.
>
> A charitable exemption "is granted as a concession by government in return for unselfish ministrations to human welfare," and is "accorded as a matter of legislative grace and not as a matter of tax payer right." We do not impugn the Center for its good acts; however, the Center does not primarily devote its resources to the poor, distressed or underprivileged. We find that the facts do not support the conclusion that the Center is a charitable organization per SDCL 10-4-9.1.

Id. at 566 (citations omitted).

Cf. Freeman Community Hospital & Nursing Home v. Hutchinson County, 633 N.W.2d 179, 184 (S.D. 2001) (ruling exempt a congregate living facility owned and operated by a community hospital), explaining that section 9.1:

> [R]equires its subject entity to relieve a governmental burden . . . . Section 9.3 governs tax-exempt status for nonprofit corporations, such as Hospital. Importantly, section 9.3 does not require a nonprofit corporation to relieve a governmental burden. Had the legislature intended to place that requirement on nonprofit corporations it would have done so, but it did not.

Tennessee

Constitution & Statute(s)

TENN. CONST. art. II, § 28 begins: "[A]ll property real, personal or mixed shall be subject to taxation, but the Legislature may except . . . such as may be held and used for purposes purely religious, charitable, scientific, literary or educational. . . ."

TENN. CODE ANN. § 67-5-212(a)(1) (2006) begins:

> There shall be exempt from property taxation the real and personal property, or any part . . . owned by any religious, charitable, scientific or nonprofit educational institution that is occupied and actually used by the institution or its officers purely and exclusively for carrying out one (1) or more of the exempt purposes for which the institution was created or exists . . . [As well as] property . . . owned by an exempt institution that is occupied and actually used by another . . . [for] which the owning institution receives no more rent than a reasonably allocated share of the cost of use, excluding the cost of capital improvements, debt service, depreciation and interest, as determined by the board of equalization.

Subsection (c) provides: "As used in this section, 'charitable institution' includes any nonprofit organization or association devoting its efforts and property, or any portion thereof, exclusively to the improvement of human rights and/or conditions in the community." *Id.* § 67-5-212(c).

Case Holding(s)

Shared Hospital Services Corp. v. Ferguson, 673 S.W.2d 135, 137 (Tenn. 1984) (exempting a nonprofit organization that supplies laundry services to its charitable hospital members on a cooperative basis):

> It is insisted by appellee that the furnishing of laundry services is an essential and integral part of the operation of a hospital. Most cases which have considered this subject support that contention, and we agree. There is no question but that if each member hospital operated its own laundry, the laundry facilities would be exempt.

See also *Youth Programs, Inc. v. Tennessee State Board of Equalization*, 170 S.W.3d 92, 97 (Tenn. Ct. App. 2004) where the court affirmed exemption for a golf tournament, observing: "In Tennessee, unlike many other states, tax exemption statutes are construed liberally in favor of religious, charitable, scientific, and educational institutions." The court continued:

> The fact that a charitable institution's activities may be similar to or in competition with tax-paying businesses does not by itself render the property on which it conducts those activities taxable. For-profit entities may exist to provide the same services as non-profit, charitable entities. We recognize, moreover, that the tournament in this case includes a substantial purse or profit to the tournament winner. However, the fact that a profit is generated by an organization's activities is not determinative. Section 67-5-212 disallows the exemption only where stockholders, officers, members, or other employees receive or are entitled to receive profits other than reasonable compensation for services.

Id. at 104-05 (citations omitted). Furthermore:

> The State vehemently asserts that the statutes were not intended to encompass charities which exist to raise funds for other charities. We note, as Youth Programs submits, that this argument has broad implications for a number of charitable institutions such as, for example, the United Way. In light of the ambiguity of the statutes and the historically liberal construction in favor of charitable institutions, we are loathe to disturb that construction here. Without so suggesting, if such institutions should not be recognized as charitable, it is within the province of the legislature to disturb the construction of the statutes historically afforded in Tennessee.

Id. at 106 (citations omitted).

Texas

Constitution & Statute(s)

TEX. CONST. art. VIII, § 2(a) reads:

> [T]he legislature may, by general laws, exempt from taxation . . . places of religious worship [and a parsonage]; . . . all buildings used exclusively and owned . . . for school purposes . . . and property used . . . [by] any association engaged in promoting the religious, educational and physical development of boys, girls, young men or young women operating under a State or National organization of like character; also the endowment funds of such institutions of learning and religion not used with a view to profit[;] . . . and institutions engaged primarily in public charitable functions, which may conduct auxiliary activities to support those charitable functions.

TEX. TAX CODE ANN. § 11.18 (2010) describes specific requirements for charities generally and for certain types of charities. Subsection (d) begins: "A charitable organization must be organized exclusively to perform religious, charitable, scientific, literary, or educational purposes" *and* "engage exclusively in performing one or more of the following charitable functions"—and as long as that list is, it does not contain a catchall category. (The first item requires "providing medical care without regard to the beneficiaries' ability to pay, which in the case of a nonprofit hospital or hospital system means providing charity care and community benefits in accordance with Section 11.1801").

Moreover, subsection (f) requires assets to be committed, on dissolution, for transfer to a *similar* charity or to the government. *Id.* § 11.18(f).

Case Holding(s)

City of McAllen v. Evangelical Lutheran Good Samaritan Society, 530 S.W.2d 806, 810 (Tex. 1975):

> With the advent of present day social security and welfare programs, the traditional concept of charity, involving the extension of free services to the poor and alms-giving, will be rarely found since wide ranging assistance is available to the poor under such programs. Furthermore, the courts have defined charity to be something more than mere alms-giving or the relief of poverty and distress. The ultimate consideration then, should be based upon an evaluation of the total operation of the institution engaged in humanitarian activities whose services are rendered at cost or less and which are maintained to care for the physical and mental well-being of the recipients. By that total operation the institution must assume "to a material extent, that which otherwise might become the obligation or duty of the community or the state."

North Alamo Water Supply Corp. v. Willacy County Appraisal District, 804 S.W.2d 894, 898-99 (Tex. 1991) (denying exemption to nonprofit organizations that supply water "to individual water district 'members' who are able to pay for those benefits"):

> Any organization, whether classified as almsgiving or non-almsgiving, which seeks to be classified as a 'purely public charity' must make no gain or profit and be organized to accomplish ends wholly benevolent by engaging in humanitarian services maintained to care for the physical or mental well-being of its recipients. The total operation of the charity must affect all

> the people of a community or state by assuming, to a material extent, services which otherwise might devolve to and become the obligations of the community or state.

Rejecting the argument that the plaintiff satisfies the statute, the court added: "Before an organization can be considered for qualification for tax exempt status under section 11.18 of the Texas Tax Code, that organization must first meet the applicable constitutional requirements which entitle those organizations to seek the exemption." *Id*. at 899.

Utah

Constitution & Statute(s)

UTAH CONST. art. XIII, § 3(1)(f) exempts "property owned by a nonprofit entity used exclusively for religious, charitable, or educational purposes."

UTAH CODE ANN. § 59-2-1101 (2008).

Case Holding(s)

Utah County by County Board of Equalization v. Intermountain Health Care, 709 P.2d 265 (Utah 1985), ruled unconstitutional a statute automatically exempting nonprofit hospitals, and denied exemption to two hospitals that failed to prove they made a substantial gift of services—payments from the government, insurers, and patients basically covered the hospitals' operating expenses for the years at issue (the court ignored $4 million donated for construction) (citing Mark Pauley & Michael Redisch, *The Not-For-Profit Hospital as a Physicians' Co-operative*, 63 AM. ECON. REV. 87 (1973) and Robert Charles Clark, *Does the Nonprofit Form Fit the Hospital Industry?*, 93 HARV. L. REV. 1416 (1980)):

> It may very well be . . . that *all* hospitals, for-profit and nonprofit, should be granted a tax exemption because of the great public need they serve. But it is beyond the power of the Legislature to grant such a public policy-based exemption under the language of the Utah Constitution as it now reads. This Court has clearly and recently affirmed the necessity of identifying the element of "gift," a nonreciprocal contribution to the community.

Intermountain Health Care, 709 P.2d at 277. "Furthermore, nonprofit hospitals that generate a surplus from their operations ought not to be tax exempt under the 'burden' theory because they are not passing along the benefit of the exemption to the public unless they are charging less for services than would be required absent the tax exemption[.]" *Id*. at 278; *see also Howell v. County Board ex rel. IHC Hospitals, Inc.*, 881 P.2d 880, 882 (Utah 1994) (upholding State Tax Commission's standards for

exempting nonprofit hospitals and nursing homes, and Intermountain's satisfaction of them).

Intermountain Health Care's factors for charitable use are:

> (1) whether the stated purpose of the entity is to provide a significant service to others without immediate expectation of material reward; (2) whether the entity is supported, and to what extent, by donations and gifts; (3) whether the recipients of the "charity" are required to pay for the assistance received, in whole or in part; (4) whether the income received from all sources (gifts, donations, and payment from recipients) produces a "profit" to the entity in the sense that the income exceeds operating and long-term maintenance expenses; (5) whether the beneficiaries of the "charity" are restricted or unrestricted and, if restricted, whether the restriction bears a reasonable relationship to the entity's charitable objectives; and (6) whether dividends or some other form of financial benefit, or assets upon dissolution, are available to private interests, and whether the entity is organized and operated so that any commercial activities are subordinate or incidental to charitable ones.

Intermountain Health Care, 709 P.2d at 269-70. Note six adds: "adapted from the test articulated by the Minnesota Supreme Court in *North Star Research Institute v. County of Hennepin*, 236 N.W.2d 754, 757 (Minn. 1975)." *Id.* at 270 n.6.

Cf. Yorgason v. County Board of Equalization, 714 P.2d 653, 654 (Utah 1986) (exempting a nonprofit apartment building leased under HUD regs to the needy, elderly and handicapped). The dissent was skeptical:

> [W]hat happens here is simply shifting the burden for providing housing for the elderly and handicapped from local and state government to the federal government . . . . Shifting the financial burden from local and state government to the federal government does not relieve the taxpayers of Salt Lake County [who also pay federal taxes] from any burden.

Id. at 665-66 (Howe, J., dissenting).

Vermont

Constitution & Statute(s)

VT. STAT. ANN. tit. 32, § 3802(4) (2009) exempts:

> Real and personal estate granted, sequestered or used for public, pious or charitable uses; real property owned by churches

> or church societies or conferences and used as parsonages . . .; real and personal estate set apart for library uses . . . ; and lands owned or leased by colleges, academies or other public schools . . . ; but private buildings on such lands shall be set in the list . . . and shall not be exempt. The exemption of lands owned or leased by colleges, academies or other public schools, shall not apply to lands or buildings rented for general commercial purposes . . . .

In my favorite case, *American Museum of Fly Fishing, Inc. v. Town of Manchester*, 557 A.2d 900, 905 (Vt. 1989), the dissent complained that by the majority's overruling of its governmental function test, "[t]he door has been opened wide for every fly-by-night enterprise to acquire property and forthwith remove it as a source of revenue for the town in which it is located." *Id.* at 907.

Case Holding(s)

Medical Center Hospital v. Burlington, 566 A.2d 1352, 1355 (Vt. 1989) (citations omitted):

> [T]his state has never required a certain percentage of free care to be rendered before finding an organization to be a tax-exempt charity, unlike other jurisdictions which have imposed such restrictions. In our opinion, pegging charitability to a stated amount of free care rendered would not be workable in determinating an organization's taxable status. Instead, uncertainty would reign, with taxability determined on a yearly basis depending on economic factors not within the control of any one person or organization.

Rather, an "'open-door' policy . . . reflects settled Vermont law regarding the characteristics of charitable trusts, an area of law closely connected to the inquiry at hand." *Id.*

> [I]t is unreasonable to suggest that because modern medical institutions no longer operate in precisely the same manner as they did many years ago, they should lose their traditional tax-exempt status. We recognize, as have other jurisdictions, that the definition of "charitable organization" need not be locked into the past.

Id. at 1356. "Our case law supports the proposition that not-for-profit institutions may generate revenues in excess of their expenses in order to maintain the organization, the criteria being only that such revenues not be passed through to shareholders as profits but put back into operating expenses." *Id.* at 1357. "We have found no case, and defendant has directed

us to none, requiring employees of not-for-profit institutions to work for less than market rate in order for that institution to be deemed 'charitable' for tax purposes. " *Id.*

Virginia

Constitution & Statute(s)

VA. CONST. art. X, § 6(a) exempts churches and parsonages, nonprofit libraries and educational institutions, and, on or after January 1, 2003, "[p]roperty used by its owner for religious, charitable, patriotic, historical, benevolent, cultural, or public park and playground purposes, as may be provided by classification or designation by an ordinance adopted by the local governing body and subject to such restrictions and conditions as provided by general law." *Id.* § 6(a)(6). However, "the General Assembly by general law may restrict or condition, in whole or in part, but not extend, any or all of the above exemptions." *Id.* § 6(c). Existing exemptions are either grandfathered or revocable only by the General Assembly.

VA. CODE ANN. § 58.1-3606 (2009) exempts specified classes of property (e.g., property occupied and used by the YMCA).

VA. CODE ANN. § 58.1-3651(B) sets forth the process for exemption by classification or designation by ordinance adopted by a local governing body; factors to consider include: (1) I.R.C. § 501(c) status; (3) payment of unreasonable compensation; (4) whether a significant portion of the org is funded by donations (including volunteer time), or local, state or federal grants; (5) "Whether the organization provides services for the common good of the public" or (6) is involved in political campaigns or lobbying; (7) "The revenue impact to the locality and its taxpayers of exempting the property"; and (8) any other relevant criteria. *Id.*§ 58.1-3651(B)(1), (3)-(8).

Case Holding(s)

Virginia Baptist Homes, Inc. v. Botetourt County, 668 S.E.2d 119, 125 (Va. 2008) (recognizing the exemption of "The Glebe," a continuing-care-retirement community owned by Virginia Baptist Homes ("VBH"), under Virginia Code § 58.1-3650.33, the successor statute to the statute enacted by the General Assembly designating VBH exempt for religious or benevolent purposes).

Cf. City of Richmond v. Virginia United Methodist Homes, *Inc.*, 509 S.E.2d 504 (Va. 1999) (involving the effect on exemption of a change in purpose in the articles of incorporation). United Methodist Homes had initially defined its corporate purpose as providing "a home or homes for the aged

and infirm and needy persons." *Id.* at 505. A change to the articles of incorporation replaced the reference to "the aged and infirm and needy persons" with the term "aging persons." *Id.* The court held that this new language was a "significant change" requiring further examination to determine if United Methodist Homes' property still qualified for tax-exempt status as an "asylum" under the classification statute it relied on. *Id.* at 509. The *Virginia Baptist Homes* case observed: "It is significant that the *Richmond* case was a classification case rather than a designation case; because we noted that upon the same facts presented, 'Nothing in this opinion should be interpreted as restricting Methodist Homes from obtaining a legislative exemption from local taxes by designation under Code § 58.1-3607.'" *Virginia Baptist Homes*, 668 S.E.2d at 124 (quoting *Virginia United Methodist Homes*, 509 S.E.2d at 509 n.5).

The *Virginia Baptist Homes* court commented:

> While there may have been some changes made to the corporate structure of VBH since the designation in order to limit tort liability, adjust to changes in federal tax law, and allow for greater flexibility when making capital improvements, the record . . . reflects that its dominant purposes and that of The Glebe have not changed since the General Assembly granted its tax-exempt designation.

Id. at 124. The concluding footnote reads: "The General Assembly may revoke VBH's tax-exempt designation pursuant to Code § 58.1-3605." *Id.* at 124 n.*.

Washington

Constitution & Statute(s)

WASH. CONST. art. VII, § 1 reads, in relevant part: "Such property as the legislature may by general laws provide shall be exempt from taxation."

WASH. REV. CODE ANN. § 84.36.040(1) (West 2010) exempts nonprofit day care centers, libraries, orphanages, homes or hospitals for the sick or infirm, and outpatient dialysis facilities as long as "the benefit of the exemption inures to the user."

The general exemption statute seems to be section 84.36.030(1)(a), which exempts: "Property owned by nonprofit organizations or associations, organized and conducted for nonsectarian purposes, which shall be used for character-building, benevolent, protective or rehabilitative social services directed at persons of all ages." WASH. REV. CODE ANN. § 84.36.030(1)(a).

Case Holding(s)

The anti-inurement quoted statutory language used to read "when such institutions are supported in whole or in part by public donations or private charity, and all of the income and profits thereof are devoted, after paying the expenses thereof, to the purposes of such institutions. . . ." *Yakima First Baptist Homes, Inc. v. Gray*, 510 P.2d 243, 245 (Wash. 1973). Construing the donation language, the state supreme court ruled that federal rent subsidies paid under a contract between an institution and the federal government do not count as public donations. *Id.* at 246.

Adult Student Housing, Inc. v. Department of Revenue, 705 P.2d 793 (Wash. App. 1985), ruled that in Washington, "benevolent" and "charitable" are interchangeable terms. The court turned to a supreme court decision on charitable immunity: "[A] charitable corporation to be such must not only engage in works tending to the betterment of mankind, but it must do so as a charity. If it renders no services except those for which it receives an adequate reward it is a business, not a charitable, concern, and cannot claim the immunities of the latter." *Adult Student Housing*, 705 P.2d at 798 (quoting *Susmann v. Young Men's Christian Ass'n of Seattle*, 172 P. 554, 556 (Wash. 1918)).

West Virginia

Constitution & Statute(s)

W. VA. CONST. art. X, § 1: "[P]roperty used for educational, literary, scientific, religious or charitable purposes . . . may by law be exempted from taxation . . . ."

W. VA. CODE ANN. § 11-3-9 (West 2010) reads, in part: "(12) Property used for charitable purposes and not held or leased out for profit.. . . ." Compare the sales-tax exemption statute, applicable to a "corporation or organization which annually receives more than one half of its support from any combination of gifts, grants, direct or indirect charitable contributions or membership fees[.]" W. VA. CODE § 11-15-9(a)(6)(C).

Case Holding(s)

In re Tax Assessment of Foster Foundation's Woodlands Retirement Community, 672 S.E.2d 150, 170-71 (W. Va. 2008) ("[T]he Foundation asks that we reduce the assessment further in light of its § 501(c)(3) status, but, in order to prevail, the Foundation must present clear and convincing evidence that the assessment is erroneous. Upon a review of the record in this case, we conclude that the Foundation has not sustained its burden of

proof."). Evidently the retirement facility is taxable because the property is leased out for profit.

Cf. Davis Memorial Hospital v. West Virginia State Commissioner, 671 S.E.2d 682 (W. Va. 2008) (denying sales tax exemption to a hospital earning $64 million in exempt-purpose income, which is to be included in support); *cf. Apollo Civic Theatre, Inc. v. State Tax Commissioner*, 672 S.E.2d 215 (W. Va. 2008) (construing support—and donations—to include contribution of services).

Wisconsin

Constitution & Statute(s)
No specific constitutional provision.

WIS. STAT. § 70.11(4) (2010) exempts, among other property: "Property owned and used exclusively by educational institutions offering regular courses [six] months in the year; or by churches or religious, educational or benevolent associations, including benevolent nursing homes and retirement homes for the aged but not including . . . a health maintenance organization. . . ." *Id.* The exemption for hospitals in (4)(m)(a) "does not apply to property used for commercial purposes, as a health and fitness center or as a doctor's office." *Id.* § 70.11(4)(m)(a).

Note extensive debate culminating in 2009 legislation for exemption of "Benevolent Low-Income Housing" in Wis. Stat. § 70.11(4a), as described in Legislative Fiscal Bureau, Comparative Summary of Recommendations: Assembly, Senate, and Conference Committee Changes to Joint Committee on Finance, 2009-11 Wisconsin State Budget 125-26 (Property Tax Exemption for Certain Types of Housing) (June 25, 2009), at http://www.legis.state.wi.us/lfb/2009-11Budget/2009_06_25Conf%20Comm.pdf.
Under the budget bill signed June 29, 2009, "the state compensates the taxing jurisdictions in which tax-exempt research property is located for the property taxes that the jurisdictions would otherwise have collected." Assem. 75, 2009-2010 Leg., Reg. Sess. (Wis. 2009).

Case Holding(s)
Milwaukee Regional Medical Center, Inc. v. City of Wauwatosa, 735 N.W.2d 156, 173 (Wis. 2007) (ruling that a daycare center for nonprofit hospitals' employees and the public is not exempt because Milwaukee Regional Medical Center ("MRMC") is not an educational association):

> [U]nder the five-part statutory test, both the organization (MRMC) and the property (day care facility) must qualify for exemption under Wis. Stat. § 70.11(4). Hence, (1) the organization must qualify as an educational association; and (2) the property of the organization must be owned and used exclusively for the purposes of the association. If only the organization's activities at the property were relevant in determining whether an organization is an educational association, the second part of the statutory test would become superfluous because the use of the property would already be determined.

Id. at 172 (citations omitted).

> Education of young children is incidental to MRMC's primary goal of "aid[ing] and support[ing] the development and provision of health services in the Milwaukee region" and "facilitat[ing] the efficient development and functioning of the Medical Center campus."
>
> . . . .
>
> [I]n addition, . . . Campus Day Care is not MRMC's primary business activity, as it is not MRMC's primary source of revenue.

Id. at 173.

Ridge Side Cooperative v. City of Madison, No. 2006AP1100, 2007 Wis. App. LEXIS 172, at *4 (Wis. Ct. App. Mar. 1, 2007) (unreported) (footnote omitted) ("We agree with the circuit court that, under the no-profit-to-members interpretation of WIS. STAT. § 70.11(4) in Milwaukee Protestant Home for the Aged [v. City of Milwaukee, 164 N.W.2d 289 (Wis. 1969)], Ridge Side is not a 'benevolent association' because its members are eligible for up to a [five-percent] annual gain on their transfer fees.").

Wyoming

Constitution & Statute(s)

WYO. CONST. art. 15, § 12: "The property of . . . public libraries, lots with the buildings thereon used exclusively for religious worship, church parsonages, church schools and public cemeteries, shall be exempt from taxation, and such other property as the legislature may by general law provide."

WYO. STAT. ANN. § 39-11-105(a) (2009) exempts, in part: "(xvi) Property of a museum or hospital district"; "(xix) Property of charitable trusts"; and "(xxv) Property used for schools, orphan asylums or hospitals to the extent they are not used for private profit . . . ."

Case Holding(s)

I could find no cases construing exemption for private nonprofits of any sort (except for a case denying exemption for property leased to a nonprofit). Several cases construe exemption for government-owned property, including *Deromedi v. Town of Thermopolis*, 45 P.3d 1150, 1154 (Wyo. 2002) ("[A] public museum serves a governmental purpose similar to that served by a library, park, golf course, art gallery or other public recreational facility, and we hold that the [County Board of Equalization]'s finding that the museum had a governmental purpose is supported by substantial evidence.").