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The Rules of the Fight Must be Fair: States Should Pass a Uniform Code for Nonprofit Hospital Tax Exemption of Real Property

Lowell R. Mintz

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**THE RULES OF THE FIGHT MUST BE FAIR:
STATES SHOULD PASS A UNIFORM CODE FOR
NONPROFIT HOSPITAL TAX EXEMPTION OF
REAL PROPERTY**

LOWELL R. MINTZ^{*}

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I. INTRODUCTION

Let’s Get Ready to Rumble!¹ Iconic words said at the start of heavyweight bouts. The struggle between municipalities and nonprofit hospitals over real

¹ John Berman & Michael Milberger, ‘Let’s Get Ready to Rumble’ Worth \$400M, ABC GOOD MORNING AMERICA, Nov. 9, 2009, <http://abcnews.go.com/GMA/Weekend/lets-ready-rumble-meet-man-catchphrase/story?id=9022704> (the phrase “Let’s Get Ready to Rumble” is trademarked by Boxing Announcer Michael Buffer).

property tax exemption has been a recurring fight between these two heavyweights.² In most cases, hospitals have preserved their real estate tax exemption.³ In two cases, however, one from 1985 in Utah and another from 2010 in Illinois, local governments have successfully stripped traditional nonprofit hospitals of their real property tax exemption.⁴ These two cases are illustrative of the problems that exist under the current standards that a hospital must meet for real property tax exemption from state to state.⁵

Governmental challenges to charitable hospitals' tax exempt status is not a new fight.⁶ While the conflict is classic, the landscape and players have changed. Once flush with tax revenues, local governments are now seeking new revenue for cash strapped schools, a problem that was originally limited to the inner city but has since spread to suburbs.⁷ Nonprofit hospitals have been expanding into the suburbs and to surrounding states.⁸ Nonprofit hospitals are operating like for-profit hospitals,⁹ starting subsidiary businesses,¹⁰ and closing unprofitable emergency rooms in poor neighborhoods where charity care is most sought after.¹¹ As nonprofit hospitals have evolved, their business model is more and more like for-profit hospitals, getting away from providing charity care to those who cannot afford to pay for healthcare

² See *Pasadena Hosp. Ass'n, v. Cnty. of L.A.*, 221 P.2d 62, 62 (Cal. 1950) (illustrating hospital tax exemption case from 1950 showing that tax exemption challenges have been occurring for at least the last 62 years).

³ See Evelyn Brody, *All Charities are Property-Tax Exempt, but Some Charities are More Exempt than Others Symposium: Tax-Exempt Organizations and the State: New Conditions on Exempt Status*, 44 NEW ENG. L. REV. 621 (2010) (Non-profits continue to defend property tax exemptions successfully, "[a]ttention from the media notwithstanding, the nonprofit sector continues to achieve remarkable success in state supreme courts and statehouses in defending property-tax exemptions.").

⁴ *Utah Cnty. ex rel. Cnty. Bd. of Equalization of Utah Cnty. v. Intermountain Health Care, Inc.*, 709 P.2d 265, 278 (Utah 1985) (reversing the Tax Commission's grant of tax exemption for two traditional nonprofit hospitals); *Provena Covenant Med. Ctr. v. Dept. of Rev.*, 925 N.E.2d 1131, 1156 (Ill. 2010) (denying tax exempt status to a charitable hospital).

⁵ *Intermountain Health Care*, 709 P.2d at 278; *Provena*, 925 N.E.2d at 1156.

⁶ See *Pasadena Hosp. Ass'n*, 221 P.2d at 62.

⁷ See Joan Mazzolini, *Clinic and UH Worth a lot, But Taxed a Little*, THE PLAIN DEALER (Apr. 9, 2006), <http://www.cleveland.com/hospitals/plaindealer/index.ssf?/hospitals/more/1144571880146370.html>.

⁸ *Id.*

⁹ Jeremy J. Schirra, *A Veil of Tax Exemption: A Proposal for the Continuation of Federal Tax-Exempt Status for "Nonprofit" Hospitals*, 21 HEALTH MATRIX 231, 250 (2011).

¹⁰ See *Google in Joint Venture with Cleveland Clinic*, SILICON VALLEY/SAN JOSE BUS. J. (Feb. 21, 2008, 6:43 AM), <http://www.bizjournals.com/sanjose/stories/2008/02/18/daily58.html>.

¹¹ Sarah Jane Tribble, *East Cleveland's Huron Hospital Closing Despite Best Efforts of its Longtime Advocate*, THE PLAIN DEALER, (June 11, 2011), http://www.cleveland.com/medical/index.ssf/2011/06/huron_hospital_closing_despite.html.

services.¹² As hospitals operate more and more like for-profit businesses, cities' need for tax revenue increases, local governments have renewed efforts to tax nonprofit hospitals' real estate by challenging their state level charitable tax exemption.¹³ The taxing authority's recent success in the Illinois Supreme Court¹⁴ is expected to spur a renewed effort to fight tax exemptions for nonprofit hospitals around the country.¹⁵

The lines have been blurred between a charitable hospital and a profit-generating healthcare business. The definition of charitable care has been under pressure from government taxing authorities seeking to raise tax revenues by challenging the tax exemption for vast amounts of hospital real estate.¹⁶ Charitable hospitals are pushing to expand the definition of charitable care,¹⁷ while at the same time seeking tax exemption for a growing number of satellite properties.¹⁸ This conflict between governments and hospitals is leading to confusion about what qualifies as charity care, warranting nonprofit status, and the privilege of tax exemption.¹⁹ Local taxing authorities, state courts, and nonprofit hospitals all need a clear codified standard for charitable care to differentiate between medical facilities that ought to qualify for an exemption from real property tax and those that should not.

¹² See Schirra, *supra* note 9, at 239.

¹³ See Mazzolini, *supra* note 7.

¹⁴ *Provena*, 925 N.E.2d. at 1156.

¹⁵ Bruce Japsen, *State Challenging Hospitals' Tax Exemptions*, N.Y. TIMES (Sept. 10, 2011), <http://www.nytimes.com/2011/09/11/us/11cnchospitals.html?scp=1&sq=Hospital%20tax%20exemption&st=cse> (describing the Department of revenues for the State of Illinois' newfound desire to challenge the tax exempt status of nonprofit hospitals in the wake of the *Provena* decision that stripped a nonprofit hospital of its tax exemption; Japsen suggests that if Illinois succeeds again by stripping three additional nonprofit hospitals of their tax exemption there will be several more challenges to come); see also Lorene Yue, *Illinois Supreme Court Upholds Ruling Against Provena In Tax-Exempt Case*, HEALTH & MED. POLICY RESEARCH GRP (March 18, 2010, 8:41 AM), <http://hmprg.typepad.com/healthmedicine-hmprg/2010/03/illinois-supreme-court-tax-ruling-on-provena-harbinger-of-more-lawsuits-to-come.html> (“[t]he decision will be watched closely by hospitals and policymakers nationally . . . It's the most notable case nationally in the past two decades of a hospital losing its tax-exempt status over questions of its charitable commitment . . .”).

¹⁶ See *Provena*, 925 N.E.2d. at 1157 (Burke, J., dissenting) (objecting to the plurality imposing a minimum quantity of charity care required to qualify for tax exemption without citing authority when previously a hospital was only required to show that it provided charity care).

¹⁷ Japsen, *supra* note 15 (“[H]ospitals in Illinois are preparing a lobbying push that would seek to redefine the qualifications for tax exemptions. The new definition would go beyond just charity care and expand to include patients' unpaid debts, costs of medical care not covered by Medicare health insurance for the elderly, Medicaid coverage for the poor, as well as direct costs that teaching hospitals pay to train doctors and conduct research.”).

¹⁸ Mazzolini, *supra* note 7 (“The untaxed holdings suddenly have governments drooling, wondering how to change the rules and get extra cash from the hospitals. As suddenly, the hospitals want more holdings exempted from taxes.”).

¹⁹ See *Utah Cnty. ex rel. Cnty. Bd. of Equalization of Utah Cnty. v. Intermountain Health Care, Inc.*, 709 P.2d 265 (Utah 1985); *Provena*, 925 N.E.2d at 1156.

This Note will propose a new uniform code to be adopted by each state, specific to nonprofit hospital real property, which requires hospitals to establish a clear and measurable standard for charitable care to qualify for tax exemption. This Note does not dispute that tax exemption is appropriate where charitable care is provided. Rather, nonprofit hospitals should be tax exempt at the locations at which they provide charitable care and should be required to pay taxes where they do not provide such charitable care.

Section II will begin by explaining the basis for nonprofit hospital tax exemption, define the differences between charitable tax exemption at the state and federal level. Also, this section will explore what constitutes a charitable hospital, and conclude by discussing the historical purpose and policy supporting the charitable tax exemption. Section III will discuss state laws governing hospital tax exemption and explain the three tests states apply to determine if hospitals should be exempt, profiling three states to illustrate each test. Section IV will address how nonprofit hospitals are lumped in with traditional charities under the law for charitable tax exemption. Section V will explain the problems concerning hospital tax exemption under the current law. Lastly, Section VI proposes and discusses a new uniform model code establishing a law for tax exemption specific to charitable hospitals, which will define charitable care and establish a measurable standard so both taxing authorities and hospitals will have clear guidance for the kind of charitable care necessary to justify having a tax exempt status.

II. BASIS FOR HOSPITAL TAX EXEMPTION

A. Real Property Tax Exemption is Derived from State Level Tax Exemption

Real property tax exemption is initially derived from the state level charitable tax exemption.²⁰ Every entity seeking charitable tax exemption in this country operates under two different systems, one at the state level, and the other at the federal level.²¹ State and federal systems for charitable tax exemption are completely different.²² Each system provides different benefits to exempt entities. Federal tax exempt status provides exemption from federal income taxes, makes gifts to a tax exempt entity deductible to the benefactor, and subsequently results in lower interest rates for a tax exempt entity seeking funds in the public bond market.²³ State tax exemption relieves an exempt entity from personal property taxes and real property taxes.²⁴

The standards used by the two systems to determine if an entity qualifies for tax exempt status are different. The federal system applies the community benefit

²⁰ See EDWARD J. BERNERT & CHRISTOPHER J. SWIFT, THE “CHARITY CARE” REQUIREMENT FOR HOSPITAL PROPERTY TAX EXEMPTIONS (2009). Throughout this Note, the terms “charitable tax exemption,” “hospital tax exemption,” “real property tax exemption,” or “state tax exemption” are all intended to mean the state level charitable tax exemption which exempts real property tax.

²¹ See Schirra, *supra* note 9, at 251 n. 130 (describing the differences between state and federal tax exemption laws by noting that state lawsuits challenging real property tax exemption are not also challenging federal tax exemption).

²² See Schirra, *supra* note 9, at 251 n. 130.

²³ See Schirra, *supra* note 9, at 251 n. 130.

²⁴ See Schirra, *supra* note 9, at 251 n. 130.

standard, while most state systems rely on some form of a charitable care standard.²⁵ To further complicate matters, each state has its own laws governing state tax exemption and those laws vary.²⁶ This Note will examine state tax exemption, focusing on the resulting real property estate tax exemption.

B. Hospitals Began as Charities

The Webster's Dictionary definition for hospital is "[a] charitable institution for the needy, aged, infirm, or young . . . an institution where the sick or injured are given medical or surgical care."²⁷ Caring for the sick is considered to be charity.²⁸ The plain meaning of the word hospital is understood to mean that hospitals are charities.²⁹ This definition has been ingrained into our society because of how hospitals have historically operated.

Prior to the Declaration of Independence, hospitals were established for the purpose of caring for those who could not pay.³⁰ From the founding of Penn Hospital in 1751 into the 1880's, hospitals solely provided care to those who could not afford to pay a private physician.³¹ Medical care administered at hospitals was thought to be inferior because it was provided to the poor free of charge.³² Those who could pay went to private physicians and paid for medical care believing that if care were paid for it was superior to the free care provided to indigents at hospitals.³³ Early hospitals were entirely funded by charitable gifts and donations, and doctors

²⁵ See Schirra, *supra* note 9, at 243; BERNERT & SWIFT, *supra* note 20, at 2. The IRS stopped using the charity care standard in 1969 when it adopted the community benefit standard establishing that a nonprofit hospital could qualify for tax exemption in more ways than just providing reduced rate or free medical care. *Id.*

²⁶ *Id.* at 671-732 (surveying the various laws for real property charitable tax exemption in all fifty states and the District of Columbia). Brody's fifty-one jurisdiction survey at the end of her note is indicative of how complicated real property charitable tax exemption is, especially for a multistate nonprofit hospital. *Id.*; see Schirra, *supra* note 9, at 243; Brody, *supra* note 3, at 621.

²⁷ WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY 583 (Merriam-Webster Inc., 9th ed. 1987).

²⁸ See Utah Cnty. *ex rel.* Cnty. Bd. of Equalization of Utah Cnty. v. Intermountain Health Care, Inc., 709 P.2d 265, 270 (Utah 1985).

²⁹ WEBSTER'S, *supra* note 27, at 583.

³⁰ See Schirra, *supra* note 9, at 237 (discussing the founding of Pennsylvania Hospital in 1751 for the purpose of caring for the sick and poor who were wandering the streets of Philadelphia).

³¹ See Schirra, *supra* note 9, at 237.

³² See Schirra, *supra* note 9, at 233, 238.

³³ See Schirra, *supra* note 9, at 233, 238.

volunteered their services to care for the poor free of charge.³⁴ Thus, hospitals originated as purely charitable institutions.³⁵

C. Policy Underlying Tax Exemption for Charitable Institutions

There are two lines of policy that form the foundation for nonprofit tax exemption in the United States.³⁶ First, nonprofit organizations allow private citizens and organizations to solve society's problems rather than relying on the government.³⁷ Nonprofit organizations are effectively reducing government burdens by providing charity.³⁸ Government grants tax exemption to a nonprofit for reducing its burden "*quid pro quo*."³⁹ Second, exemption is granted to charitable organizations that engage in activities that further the values or goals of the community thereby conferring a benefit.⁴⁰ Conceptually, the offsetting effect of the community benefit justifies the loss of tax revenue from the exemption.⁴¹ This community benefit is considered a gift to the community justifying the tax exemption.⁴²

There are several ways in which a hospital may establish itself as a public charity qualifying for tax exempt status; the most traditional of these is to provide relief to the poor.⁴³ "Assistance to the poor . . . is the common concept of giving charity . . ." ⁴⁴ Nonprofit hospitals that provided charity care were thought to relieve government of the burden of caring for the sick and injured who were too poor to pay for their own care.⁴⁵ By providing charity care to reduce government's burden,

³⁴ See Schirra, *supra* note 9, at 233; *Intermountain Health Care, Inc.*, 709 P.2d at 270 ("until late in the 19th century, they [hospitals] were true charities providing custodial care for those who were both sick and poor. The hospitals' income was derived largely or entirely from voluntary charitable donations").

³⁵ See *Utah Cnty. ex rel. Cnty. Bd. of Equalization of Utah Cnty. v. Intermountain Health Care, Inc.*, 709 P.2d 265, 270 (Utah 1985).

³⁶ *Id.* at 268 ("These exemptions confer an indirect subsidy and are usually justified as the *quid pro quo* for charitable entities undertaking functions and services that the state would otherwise be required to perform. A concurrent rationale, used by some courts, is the assertion that the exemptions are granted not only because charitable entities relieve government of a burden, but also because their activities enhance beneficial community values or goals. Under this theory, the benefits received by the community are believed to offset the revenue lost by reason of the exemption.") (Internal citations omitted).

³⁷ THOMAS K. HAYATT & BRUCE R. HOPKINS, *THE LAW OF TAX-EXEMPT HEALTHCARE ORGANIZATIONS* 8 (John Wiley & Sons eds., 2d ed. 2001) ("[C]haritable activities are defined as including purposes such as relief of the poor, advancement of education or science, erection or maintenance of public buildings, lessening of the burdens of government.").

³⁸ *Id.*

³⁹ *Intermountain Health Care*, 709 P.2d at 268.

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *Id.* at 268-69.

⁴³ See Schirra, *supra* note 9, at 241.

⁴⁴ HAYATT & HOPKINS, *supra* note 37, at 15.

⁴⁵ See HAYATT & HOPKINS, *supra* note 37, at 15; see also Schirra, *supra* note 9, at 241.

hospitals provide a public benefit justifying their tax exempt status under both of the foregoing policies.⁴⁶

III. GENERAL DISCUSSION OF STATE METHODS TO DETERMINE TAX EXEMPTION

A. *What is Charity Care?*

There is no easy answer to define exactly what charity care is; that is the problem. In its simplest form, charitable care is medical care provided without charge to those unable to pay.⁴⁷ The law establishing exemption from property taxes differs from state-to-state.⁴⁸ The major differences among states' laws are (1) the tests used to determine if a hospital should be tax exempt and (2) the branch of government that controls tax exemption.⁴⁹ The different tests to determine if a charitable hospital should be tax exempt have two different sources.⁵⁰ Some states have judicially created rules governing tax exemption, while other states have enacted statutes.⁵¹ In some instances, the legislature effectively codified the common law test for tax exemption.⁵²

While the test for charity care varies by state, there are some similarities. All states examine real property tax exemption on a parcel-by-parcel basis.⁵³ The tests focus on the parcel's use to determine if it should be tax exempt.⁵⁴ Generally, for a nonprofit hospital's real property to be tax exempt, the property must be owned by a charitable institution and the property's use must be for a charitable purpose.⁵⁵ To determine if these two requirements are met, the various tests attempt to filter out whether or not a hospital provides some form of charity. Charity care has become the medium from which state courts mold their decisions.⁵⁶ These tests can be subdivided by method. There are quantitative tests that set a benchmark for percentage of charity care that must be provided relative to the total care provided at the hospital.⁵⁷ There are multifactor tests that set non-mandatory guidelines used to

⁴⁶ See *Intermountain Health Care*, 709 P.2d at 268; see also HAYATT & HOPKINS, *supra* note 37, at 15; Schirra, *supra* note 9, at 241.

⁴⁷ HAYATT & HOPKINS, *supra* note 37, at 34.

⁴⁸ See Brody, *supra* note 3, at 624.

⁴⁹ See Brody, *supra* note 3, at 621.

⁵⁰ See Brody, *supra* note 3, at 621.

⁵¹ See Brody, *supra* note 3, at 624.

⁵² See Brody, *supra* note 3, at 624.

⁵³ *Provena Covenant Med. Ctr. v. Dept. of Rev.*, 925 N.E.2d. 1131, 1157-59 (Ill. 2010).

⁵⁴ *Id.*

⁵⁵ See Brody, *supra* note 3, at 642 ("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.").

⁵⁶ See Brody, *supra* note 3, at 647.

⁵⁷ *Provena*, 925 N.E.2d. at 1157-59.

determine if a hospital's use qualifies as charity care.⁵⁸ Finally, there are hybrid tests that have some required elements and some non-mandatory factors.⁵⁹ Each state uses some form of one of these tests.⁶⁰

Some state courts apply factors established by statute or held at common law to determine if a use is "charity."⁶¹ Some courts have engaged in a quantitative analysis of the amount of free care relative to the amount of fee for service care that was provided by a nonprofit hospital without any kind of monetary threshold or benchmark.⁶² Other courts have stated that no artificial monetary threshold should be placed on the amount of free service provided by a nonprofit hospital when determining if the hospital's use qualifies as "charity" to merit tax exemption.⁶³

B. Quantitative Test

Courts that apply a quantitative test typically measure money or patients.⁶⁴ When a court applies a quantitative test by examining money, the court will determine how much the hospital spent on charity care relative to the amount of revenue the hospital earned from paying patients.⁶⁵ Alternatively, courts measure the total number of patients who receive charity care relative to the total number of patients cared for at the hospital.⁶⁶ Courts seem to engage in a quantitative test more often to determine if a hospital qualifies for tax exemption, despite the existence of the two other kinds of tests.⁶⁷

There are three problems with the quantitative approach. First, there is normally no benchmark to make an effective comparison.⁶⁸ Second, in the absence of a statutory benchmark, the court should not be left to decide how much charity care should be required for a hospital to be granted tax exemption.⁶⁹ Third, if a benchmark did exist, a quantitative test can be skewed based on numbers of patients or the cost of care increasing or decreasing on either side of the equation; reasons

⁵⁸ See Brody, *supra* note 3, at 695.

⁵⁹ See Brody, *supra* note 3, at 697-99 (creating a hybrid test, Minnesota adopted six common law factors making four elements and leaving two as factors).

⁶⁰ See Brody, *supra* note 3, at 671-732 (surveying nonprofit tax exemption law in all fifty states and the District of Columbia).

⁶¹ See Brody, *supra* note 3, at 635 (noting that the Florida Statute established three factors as a test for charitable tax exemption).

⁶² See *Provena*, 925 N.E.2d. at 1157.

⁶³ *Wexford Med. Grp. v. City of Cadillac*, 713 N.W.2d 734, 745 (Mich. 2006).

⁶⁴ See *id.*

⁶⁵ See *Provena*, 925 N.E.2d at 1140.

⁶⁶ *Id.*

⁶⁷ See *id.* (stating a hybrid test is the standard then engaging in a quantitative test focused on the amount of charity care provided).

⁶⁸ See *id.* at 1157, 59 (dissenting to the application of a quantum of care standard without setting a benchmark level of care).

⁶⁹ *Id.* at 1159 (insisting that setting a quantum of care standard should be done by the legislature).

unrelated to whether or not a hospital was providing adequate charity care.⁷⁰ Hospitals would have no foreseeability as to whether they qualify for exemption from year-to-year, resulting in a very uncertain situation.⁷¹

For example, assume a benchmark has been established by the state legislature requiring that one percent of patients at a hospital seeking tax exemption must receive charity care. Also, assume that hospital was exempted last year and met the benchmark for charity care. Now, assume this year only 200 people came to the hospital seeking charity care, which the hospital provided, and the hospital treated a total of 50,000 patients, resulting in four tenths of one percent of total patients who received charity care. The hospital in this example would have been exempted last year and would not be exempted this year.⁷² A similar problem may occur based on the kinds of care that is needed. For example, the cost to treat a broken leg is much less than the cost to treat cancer. Without going through another lengthy example, it should be clear that a quantitative test is unpredictable and therefore not a reliable standard to be used in the law.

C. Multifactor Test

Factors used to determine if a nonprofit hospital's use is "charity" are ambiguous, resulting in arbitrary and inconsistent application.⁷³ States themselves have acknowledged the confusion and inconsistent application that stems from the use of a multifactor test to determine if a use is "charity."⁷⁴ Pennsylvania specifically enacted a law intended to "eliminate inconsistent application of eligibility standards for charitable tax exemptions, reduce confusion and confrontation among traditionally tax exempt institutions and political subdivisions . . ."⁷⁵

D. Hybrid Test

Minnesota has established a hybrid test of consisting of factors and mandatory elements.⁷⁶ Minnesota also recognized the problem that Pennsylvania addressed by statute and attempted to bring clarity to their multifactor test applied at common law by codifying the definition of an "institution of public charity."⁷⁷ The Minnesota legislature merely adopted the common law factors by making three of six factors mandatory while allowing the remaining three factors to be subjectively applied by courts.⁷⁸ A multifactor test fails to establish a clear, predictable, and fair standard of

⁷⁰ *Id.* at 1158 (quoting *Med. Ctr. Hosp. of Vt. v. City of Burlington*, 566 A.2d 1355 (Vt. 1989)).

⁷¹ See Brody, *supra* note 3, at 634.

⁷² See Brody, *supra* note 3, at 635.

⁷³ See Brody, *supra* note 3, at 634.

⁷⁴ See Brody, *supra* note 3, at 627.

⁷⁵ See Brody, *supra* note 3, at 627 (quoting 10 PA. STAT. ANN. §372(b) (West 1999)).

⁷⁶ See Brody, *supra* note 3, at 699.

⁷⁷ See Brody, *supra* note 3, at 699.

⁷⁸ See Brody, *supra* note 3, at 699.

“charity” whether it is statutory or established at common law, and a hybrid test fails for the same reasons.⁷⁹

IV. THE MAJORITY OF STATES TREAT NONPROFIT HOSPITALS AS GARDEN VARIETY CHARITIES UNDER THE LAW FOR TAX EXEMPTION

Just about every state derives the power to lay taxes from its own constitution.⁸⁰ The power to exempt those taxes is usually also derived from the state’s constitution.⁸¹ About half of the states’ constitutions expressly exempt specific kinds of institutions such as religious, educational, and charitable institutions.⁸² In about twenty other states, the state constitution grants the legislature the authority to grant exemption.⁸³ Nonprofit hospital property is typically not expressly exempted in state constitutions.⁸⁴ Tax exemption for hospitals, other nonprofit organizations, and traditional charities is generally derived under the catch all term of “charity” or “charitable use.”⁸⁵ As a result, the overwhelming majority of state law for hospital tax exemption has evolved out of law for charity tax exemption.

A. Utah

Utah’s constitution does not expressly grant tax exemption to nonprofit hospitals,⁸⁶ grouping nonprofit hospitals with all other nonprofit entities.⁸⁷ Utah’s code has the exact same language contained in its constitution, which effectively groups hospitals with ordinary charities by establishing a blanket exemption for property owned by any nonprofit entity that is used exclusively for charitable purposes.⁸⁸ Utah’s code specifically designates other kinds of property as tax exempt, including property belonging to the state, counties, cities, towns, public libraries, and schools.⁸⁹ Utah had passed a law intended to clarify tax exemption for

⁷⁹ See Brody, *supra* note 3, at 635.

⁸⁰ See Brody, *supra* note 3, at 624.

⁸¹ See Brody, *supra* note 3, at 624.

⁸² See Brody, *supra* note 3, at 624.

⁸³ See Brody, *supra* note 3, at 624.

⁸⁴ See Brody, *supra* note 3, at 671-732 (survey of the law in all fifty states and the District of Columbia).

⁸⁵ See Brody, *supra* note 3, at 637.

⁸⁶ See UTAH CONST. art. XIII, § 3(1)(f) (omitting nonprofit hospitals);

§ 3. [Property tax exemptions.] (1) The following are exempt from property tax:(f) property owned by a nonprofit entity used exclusively for religious, charitable, or educational purposes;

⁸⁷ *Id.* (including nonprofit charitable hospitals implicitly as part of a “charitable entity,” effectively lumping nonprofit charitable hospitals in with traditional charities).

⁸⁸ UTAH CODE ANN. § 59-2-1101(3)(a)(iv) (LexisNexis 2011) (“(3)(a) The following property is exempt from taxation . . . property owned by a nonprofit entity which is used exclusively for religious, charitable, or educational purposes . . .”).

⁸⁹ UTAH CODE ANN. § 59-2-1101(3)(a):

nonprofits, which included specific mention of nonprofit hospitals,⁹⁰ but this law was repealed.⁹¹ Utah's statute has left much room for clarification on the issue of nonprofit hospital tax exemption as no standard or test is established in the code, except that if a hospital is to qualify for tax exemption it must be a nonprofit and a charity.⁹²

In the absence of a clear statutory standard or test, Utah's Supreme Court established a six factor test for a nonprofit hospital to qualify for real property tax exemption.⁹³ Utah's multifactor test consists of the following factors: (1) stated

(3)(a) The following property is exempt from taxation: (i) property exempt under the laws of the United States; (ii) property of: (A) the state; (B) school districts; and (C) public libraries; (iii) except as provided in Title 11, Chapter 13, Interlocal Cooperation Act, property of: (A) counties; (B) cities; (C) towns; (D) local districts; (E) special service districts; and (F) all other political subdivisions of the state; (iv) property owned by a nonprofit entity which is used exclusively for religious, charitable, or educational purposes; (v) places of burial not held or used for private or corporate benefit; (vi) farm equipment and machinery; (vii) intangible property; and (viii) the ownership interest of an out-of-state public agency, as defined in Section 11-13-103: (A) if that ownership interest is in property providing additional project capacity, as defined in Section 11-13-103; and (B) on which a fee in lieu of ad valorem property tax is payable under Section 11-13-302.

UTAH CODE ANN. § 59-2-1101(3)(a) (LexisNexis 1953).

⁹⁰ UTAH CODE ANN. § 59-2-31 (Repealed 1985) ("Charitable hospital, which met criteria set forth in statute for exemption from ad valorem property taxes as charitable hospital, was entitled to property tax exemption while it was undergoing construction.").

⁹¹ *Id.*

⁹² UTAH CODE ANN. § 59-2-1101(3)(a)(iv) (LexisNexis 1953) ("property owned by a nonprofit entity which is used exclusively for religious, charitable, or educational purposes.").

⁹³ See UTAH CODE ANN. § 59-2-1101(3)(a) (LexisNexis 1953); Utah Cnty. *ex rel.* Cnty. Bd. of Equalization of Utah Cnty. v. Intermountain Health Care, Inc., 709 P.2d 265, 269-70 (Utah 1985) (adopting its test from the Minnesota factors established at common law later codified into a hybrid test of factors and elements); Brody, *supra* note 3, at 698-99; MINN. STAT. ANN. § 272.01(a) (West 2011):

Subd. 7. Institutions of public charity. (a) Institutions of purely public charity that are exempt from federal income taxation under section 501(c)(3) of the Internal Revenue Code are exempt if they meet the requirements of this subdivision. In determining whether real property is exempt under this subdivision, the following factors must be considered:

- (1) whether the stated purpose of the undertaking is to be helpful to others without immediate expectation of material reward;
- (2) whether the institution of public charity is supported by material donations, gifts, or government grants for services to the public in whole or in part;
- (3) whether a material number of the recipients of the charity receive benefits or services at reduced or no cost, or whether the organization provides services to the public that alleviate burdens or responsibilities that would otherwise be borne by the government;
- (4) whether the income received, including material gifts and donations, produces a profit to the charitable institution that is not distributed to private interests;

purpose of the entity; (2) whether or not the entity is supported by donations and gifts; (3) whether recipients of the charity are required to pay; (4) whether income exceeds expenses producing a profit; (5) whether the beneficiaries of the charity are restricted; (6) whether any private interests receive a financial benefit.⁹⁴

B. Illinois

The Illinois constitution states “[t]he 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.”⁹⁵ The relevant part of the Illinois code establishes tax exemption for charities, including hospitals, if two elements are met: (1) the institution must be a public charity; (2) the property must be “exclusively used for charitable or beneficial purposes.”⁹⁶ Illinois also associates hospitals with charities for purposes of establishing tax exemption.⁹⁷

(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; and

(6) whether dividends, in form or substance, or assets upon dissolution, are not available to private interests.

A charitable organization must satisfy the factors in clauses (1) to (6) for its property to be exempt under this subdivision, unless there is a reasonable justification for failing to meet the factors in clause (2), (3), or (5), and the organization provides to the assessor the factual basis for that justification. If there is reasonable justification for failing to meet the factors in clause (2), (3), or (5), an organization is a purely public charity under this subdivision without meeting those factors. After an exemption is properly granted under this subdivision, it will remain in effect unless there is a material change in facts.

The factors in this Minnesota statute are very similar to those applied by the Utah Supreme Court in *Intermountain*.

⁹⁴ Utah Cnty. *ex rel.* Cnty. Bd. of Equalization of Utah Cnty. v. Intermountain Health Care, Inc., 709 P.2d 265, 269-70 (Utah 1985). The factors applied in *Intermountain* as described in this Note have been abbreviated to quickly summarize the law in Utah, the verbatim factors from *Intermountain* are as follows:

(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.

⁹⁵ ILL. CONST. art. IX, § 6.

⁹⁶ 35 ILL. COMP. STAT. ANN. § 200/15-65(a) (LexisNexis 2011) (“Charitable purposes. All property of the following is exempt when actually and exclusively used for charitable or

The Illinois court has established a multifactor test to flesh out the two statutory elements required for a charity to receive tax exemption.⁹⁸ These factors are (1) it has no shareholders; (2) it obtains its revenue mainly from private and public charity; (3) it provides charity to all who need it and request it; (4) there is no gain or profit to any private person; and (5) it does not appear to create any obstructions preventing those in need of its charity from receiving it.⁹⁹ The Illinois test for hospital tax exemption is a hybrid test with its combination of elements and factors.¹⁰⁰

C. Ohio

The Ohio Constitution does not establish tax exemption for any kind of property; implicitly, it vests the power to establish laws for tax exemption in the legislature.¹⁰¹ Ohio has codified its law for tax exemption.¹⁰² However, Ohio's test for hospital tax

beneficent purposes, and not leased or otherwise used with a view to profit: (a) Institutions of public charity.”).

⁹⁷ ILL. CONST. art. IX, § 6; 35 § 200/15-65(a).

⁹⁸ *Provena Covenant Med. Ctr. v. Dep't of Revenue*, 925 N.E.2d 1131, 1145 (Ill. 2010), (citing *Methodist Old Peoples Home v. Korzen*, 233 N.E.2d 537, 541-42 (Ill. 1968)).

⁹⁹ *Provena*, 925 N.E.2d. at 1145. For the purpose of this Note these factors were abbreviated to quickly summarize the law, the full text is as follows:

(1) it has no capital, capital stock, or shareholders; (2) it earns no profits or dividends but rather derives its funds mainly from private and public charity and holds them in trust for the purposes expressed in the charter; (3) it dispenses charity to all who need it and apply for it; (4) it does not provide gain or profit in a private sense to any person connected with it; and (5) it does not appear to place any obstacles in the way of those who need and would avail themselves of the charitable benefits it dispenses.

Id.

¹⁰⁰ *Id.*; 35 § 200/15-65(a) (laying out the factors and the elements which are codified in 35 § 200/15-65 of the Illinois code, and the two combined create the hybrid test).

¹⁰¹ OHIO CONST. art. XII, § 2 (the words “general laws may be passed” imply that power to has been vested in the legislature):

Without limiting the general power, subject to the provisions of Article I of this constitution, to determine the subjects and methods of taxation or exemptions therefrom, general 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.

Id.

¹⁰² OHIO REV. CODE ANN. § 5709.12 (LexisNexis 2011) (“[r]eal and tangible personal property belonging to institutions that is used exclusively for charitable purposes shall be exempt from taxation”); OHIO REV. CODE ANN. § 5709.121(A) (LexisNexis 2011) (defining “exclusive charitable or public use”):

(A) Real property and tangible personal property belonging to a charitable or educational institution or to the state or a political subdivision, shall be considered as

exemption has been established at common law because the underlying statute is too ambiguous.¹⁰³ Ohio's statute does not explicitly include hospitals as organizations that qualify for tax exemption as it does other entities such as the state itself, and its political subdivisions and educational institutions.¹⁰⁴ Hospitals qualify for exemption under the broad term "charitable institution."¹⁰⁵ Though the relevant Ohio Revised Code section is entitled "Exclusive Charitable or Public Use, defined," there is no language specifically addressing charitable hospitals and there is no clear definition of charitable care in the Ohio Revised Code.¹⁰⁶

For a charitable hospital to receive real property tax exemption under Ohio Revised Code § 5709.121, the hospital must meet the following criteria; (1) The real property must be owned by a charitable institution, and; (2) The real property must be used exclusively for a charitable purpose.¹⁰⁷ The courts have defined the term "charitable use" for hospitals to mean a hospital facility must provide uncompensated care to all who need it in order for its use to qualify as charity care.¹⁰⁸ There is no bright line test for the amount of charity care that must be provided for a hospital to qualify for tax exemption, it is left to the court to consider the totality of the circumstances.¹⁰⁹ Ohio uses a quantitative approach, with no

used exclusively for charitable or public purposes by such institution, the state, or political subdivision, if it meets one of the following requirements: (1) It is used by such institution, the state, or political subdivision, or by one or more other such institutions, the state, or political subdivisions under a lease, sublease, or other contractual arrangement: (a) As a community or area center in which presentations in music, dramatics, the arts, and related fields are made in order to foster public interest and education therein; (b) For other charitable, educational, or public purposes. (2) It is made available under the direction or control of such institution, the state, or political subdivision for use in furtherance of or incidental to its charitable, educational, or public purposes and not with the view to profit. (3) It is used by an organization described in division (D) of section 5709.12 of the Revised Code. If the organization is a corporation that receives a grant under the Thomas Alva Edison grant program authorized by division (C) of section 122.33 of the Revised Code at any time during the tax year, "used," for the purposes of this division, includes holding property for lease or resale to others.

Id.

¹⁰³ *Cleveland Osteopathic Hosp. v. Zangerle*, 91 N.E.2d 261, 263 (Ohio 1950).

¹⁰⁴ *See* § 5709.12; *see* § 5709.121(A).

¹⁰⁵ *See* § 5709.12; *see* § 5709.121(A).

¹⁰⁶ *See* § 5709.12; *see* § 5709.121(A).

¹⁰⁷ *See* § 5709.12; *see* § 5709.121(A).

¹⁰⁸ *See Bethesda Healthcare Inc. v. Wilkins*, 806 N.E.2d 142, 147 (Ohio 2004); *Vick v. Cleveland Mem'l Med. Found.*, 206 N.E.2d 2, 4 (Ohio 1965).

¹⁰⁹ *Cleveland Osteopathic Hosp. v. Zangerle*, 91 N.E.2d 261, 263 (Ohio 1950).

It seems obvious that no single test is dispositive of whether a hospital, for example, is being conducted *exclusively* as a charitable project. All the facts in each individual case must be assembled and examined in their entirety and the substance of the scheme or plan of operation exhibited thereby will determine whether the institution involved is entitled to have its property freed from taxes.

established benchmark, to test if a hospital provides enough charitable care to qualify for real estate tax exemption.¹¹⁰

V. PROBLEMS UNDER THE CURRENT LAW OF TAX EXEMPTION

A. *The World has Changed*

The theory behind tax exemption for nonprofit hospitals remains to be the provision of charity care to relieve government of that burden.¹¹¹ Hospitals have changed in the way they operate and the communities where they reside are struggling to find new sources of revenue to balance budgets.¹¹²

B. *Evolution of the Nonprofit Hospital*

Nonprofit hospitals have evolved, as they no longer exist only to provide care for the poor and insane.¹¹³ Nonprofit hospitals have developed into large and complex multi-branch medical care providers that charge for their services.¹¹⁴ Nonprofit hospitals continue to provide some charity care, however they have begun to engage in a number of activities that resemble for-profit hospitals, calling into question their

Id.

¹¹⁰ See *Bethesda*, 806 N.E.2d at 148 (finding that “[e]ight scholarships out of 5,400 members amounts to only slightly over one tenth of one percent of the total members.”).

¹¹¹ HAYATT & HOPKINS, *supra* note 37, at 8 (“stating that, among other activities, the provision of charity care and the relief of government burden are rational reasons to grant tax exemption to a nonprofit charitable hospital.”). This is pulled together to justify real property tax exemption for nonprofit charitable hospitals by some common elements of the justifications for tax exemption. Hospitals provide relief to the poor in the form of free medical care (charity care). This same activity of providing charity care is also a form of relief of government burden to the extent that the government engages in the provision of medical care which local governments do by running public hospitals. In addition, nonprofit charitable hospitals promote the health of the community by making health care services available, providing care regardless of race creed, color, age, or gender. Nonprofit charitable hospitals also promote a healthy community by building and operating healthcare facilities that either lose money or do not make money that a for-profit hospital could not afford to operate because the for-profit hospital must make an adequate profit to provide a return on investment to its shareholders. HAYATT & HOPKINS, *supra* note 37, at 8-12; see Schirra, *supra* note 9, at 241, 247-51, 257-58; see Mazzolini, *supra* note 7 (quoting the Vice President of Communications from University Hospitals in Cleveland: “[t]wo of the biggest projects are a new emergency room and a new neonatal intensive care unit Neither of those things are money makers.”).

¹¹² See Japsen, *supra* note 15 (describing both local government’s revenue problems and the change in the way hospitals operate); see Schirra, *supra* note 9, at 237 (describing the pure charity origins of the nonprofit charity hospital); Schirra, *supra* note 9, at 250 (describing how contemporary nonprofit charitable hospitals are criticized for engaging in the same kinds of activities as for-profit hospitals); Brody, *supra* note 3, at 623 (discussing how State governments have been attempting to raise revenues to meet increasing demand for services by proposing laws that would take away nonprofit tax exemption in the wake of the tax losses incurred as a result of the “economic meltdown”).

¹¹³ Schirra, *supra* note 9, at 232.

¹¹⁴ Schirra, *supra* note 9, at 232-41.

tax exempt status.¹¹⁵ As nonprofit hospitals have grown, so have their tax exempt real estate holdings.¹¹⁶

Nonprofit hospitals are operating like for-profit businesses.¹¹⁷ The only major difference between a for-profit and a nonprofit hospital today is the way in which the profits are applied; otherwise their business models are the same.¹¹⁸ For-profit hospitals pay out their profits to their owners or shareholders.¹¹⁹ Nonprofit hospitals use their profits for capital expenses for new buildings and equipment, and to cover the cost of charity care.¹²⁰ The nonprofit hospital does not distribute any of its profit to any private individual or entity.¹²¹ Both types of hospitals employ doctors, nurses, and support staff. They both contract with for-profit business to provide various goods and services necessary to operate the hospital such as food service, and linen suppliers. Both provide healthcare and charge for that service.¹²² When a bill for their service is not paid, both nonprofit and for-profit hospitals send the unpaid accounts to collection.¹²³

Nonprofit hospitals have entered into joint venture entities with for-profit businesses to create new technologies or provide services to other business for a profit.¹²⁴ For example, Cleveland Clinic Foundation (“CCF”), a nonprofit hospital in Cleveland, Ohio, has formed at least two joint ventures, one with Google and the other with Numoda Corporation. CCF’s joint venture with Google is aimed at the

¹¹⁵ Schirra, *supra* note 9, at 250, 260.

¹¹⁶ See Mazzolini, *supra* note 7.

“Between the Clinic and UH, they’re spending over \$1 billion in construction,” Rokakis said. “When you ask them to contribute an insignificant amount of money to help the schools, they balk” . . . The growth of the two hospital systems, especially the explosive building boom of the Clinic . . . Hospitals increasingly find themselves in tax exemption battles in the suburbs. “They’re buying doctors offices that were taxable, and the next day they’re claiming they should be exempt,” said Lorain County Auditor Mark Stewart . . . The two hospital systems regularly fight to reduce taxes, by chopping the appraised value of real estate or seeking to have it declared tax-exempt. At least two dozen such requests are pending in Cuyahoga County.

Mazzolini, *supra* note 7.

¹¹⁷ Schirra, *supra* note 9, at 250, 260.

¹¹⁸ Schirra, *supra* note 9, at 246 (discussing the Private Inurement Doctrine which prohibits a nonprofit charitable hospital from distributing its profits to people who control the hospital whereas a for-profit hospital runs the hospital to create a benefit (generate a profit to be paid as a return on capital) for its stakeholders (shareholders or owners)).

¹¹⁹ Schirra, *supra* note 9, at 246.

¹²⁰ Schirra, *supra* note 9, at 239, 251.

¹²¹ Schirra, *supra* note 9, at 245, 251.

¹²² Schirra, *supra* note 9, at 250-51.

¹²³ See Virginia Legal Aid Society, *Medical Debt* (May 25, 2011), <http://www.lawhelp.org/documents/498011Medical%20Debt.pdf> (discussing hospital collection practices and the effects they cause on patients who are unable to pay).

¹²⁴ See SILICON VALLEY / SAN JOSE BUSINESS J., *supra* note 10.

development of an online medical records system.¹²⁵ The Numoda joint venture was formed to create a service to perform clinical drug trials that drug companies can use to outsource the clinical trial process they traditionally perform with their own employees.¹²⁶ Google and Numoda are both for-profit companies that have presumably entered these ventures with an eye for profit.¹²⁷ If either venture is successful, it seems that the new services could be brought to the market to generate great profits of which the hospital will participate as a joint venture partner.¹²⁸

C. Hospital Consolidation

Like their for-profit cousins, nonprofit hospitals have been growing by acquisition.¹²⁹ Nonprofit hospitals have begun purchasing private doctor's practices and hospitals (including their real estate) as a method to increase their size and

¹²⁵ See SILICON VALLEY / SAN JOSE BUSINESS J., *supra* note 10 (discussing a joint venture between the two entities to create online medical records software: "The Wall Street Journal reported Thursday that analysts and observers believe the company has big plans in the health-care market, and could boost advertising business by becoming a destination for information and services related to health care.").

¹²⁶ *Cleveland Clinic, Numoda Partner to Speed Brain Drugs to Market*, NUMODA TECHNOLOGIES, <http://www.numodatechnologies.com/pdfs/CCF-in-MedCity-news.pdf> (last visited Dec. 20, 2011) (describing a joint venture between Numoda Technologies and the Cleveland Clinic Foundation).

The Clinic will contribute the medical and clinical trial expertise of its doctors and researchers to the venture. Numoda in Philadelphia, Pennsylvania, will contribute its clinical trial management technology The "joint venture of equals" is aimed at developing a "one-stop shop" for small and mid-sized drug companies that are sponsoring clinical trials, said Dr. Robert Fox, the Clinic neurologist who is co-directing the joint venture. The two organizations will start with trials for neurological drugs but are likely to expand to other drug types over time "The original concept was that large pharmaceutical companies like Merck and Johnson & Johnson typically have the expertise in-house to develop and implement clinical trials," Fox said. "But the small to medium-sized pharmaceutical companies often do not. "So the idea was to match an academic medical center like Cleveland Clinic with a clinical research organization, which provides all the nuts and bolts of how a clinical trial works, to be one-stop shopping for a sponsor." The venture is expected to begin generating revenue to compensate Clinic researchers by Fall. Numoda is expected to benefit from a flow of new deals for its venture arm, Numoda Capital Innovations, according to Dow Jones Venture Wire. *Id.*

¹²⁷ See *id.*; see also SILICON VALLEY / SAN JOSE BUSINESS J., *supra* note 10.

¹²⁸ See NUMODA TECHNOLOGIES, *supra* note 126; SILICON VALLEY / SAN JOSE BUSINESS J., *supra* note 10; *Cleveland Clinic Collaborates with Google*, PR NEWswire (Feb. 21, 2012), www.prnewswire.com/news-releases/Cleveland-clinic-collaborates-with-google-57061622.html.

¹²⁹ Bob Herman, *Non-Profit Hospitals Taking More Aggressive Stance Toward M&A, But Deals Aren't Always Easy*, BECKER'S HOSP. REVIEW (Aug. 30, 2011), <http://www.beckershospitalreview.com/hospital-transactions-and-valuation/non-profit-hospitals-taking-more-aggressive-stance-toward-maa-but-deals-arent-always-easy.html> (discussing growth of nonprofit hospitals by merger and acquisition).

presence.¹³⁰ Each time a nonprofit hospital purchases real estate with an acquisition, the hospital will seek to have the new property exempted from real estate tax.¹³¹ If the property is exempted, a tax paying property is converted into an exempt property, eliminating that property from the tax rolls of the city in which it is located.¹³²

D. The Growth Trend for Nonprofit Hospitals is Expected to Continue to be Fueled by Increasing Demand for Medical Care

Increasing demand for medical care is prompting hospitals to expand in order to properly meet the new demands.¹³³ Demand for medical care is expected to surge in the near future as thirty-two million previously uninsured people will be able to obtain insurance as a result of President Obama's recent health care reform act, the Patient Protection and Affordable Care Act.¹³⁴ As the Baby Boomer Generation continues to age, their increasing needs for medical care will drive hospital growth at a steady pace for the foreseeable future.¹³⁵ The vast majority of hospitals in this nation are nonprofit.¹³⁶ Naturally, nonprofit hospitals will be responsible for most of this growth.¹³⁷

E. Municipal Budget Problems

Many of this nation's local municipalities are cutting services, at a time when demand for service is growing, in order to balance their budgets because of shrinking tax revenues.¹³⁸ Local governments derive the majority of their revenue from

¹³⁰ See Mazzolini, *supra* note 7 (discussing how nonprofit charitable hospitals have been purchasing properties along with the private practices, these properties had been tax paying properties and the hospitals then apply to make the property exempt, or appeal its tax value to reduce the taxes).

¹³¹ See Mazzolini, *supra* note 7.

¹³² See Mazzolini, *supra* note 7.

¹³³ Julie Satow, *Shifts in Health Care Delivery Stimulate a String of Property Deals*, N.Y. TIMES (Dec. 27, 2011), http://www.nytimes.com/2011/12/28/realestate/commercial/changes-in-health-care-delivery-promptpropertydeals.html?_r=1&scp=1&sq=US%20Hospital%20growth&st=cse.

¹³⁴ *Id.*

¹³⁵ *Id.*

¹³⁶ Schirra, *supra* note 9, at 234.

¹³⁷ Schirra, *supra* note 9, at 234.

¹³⁸ Karen Hube, *States Balance Budgets with Drastic Service Cuts*, THE FISCAL TIMES (May 27, 2011), <http://www.thefiscaltimes.com/Articles/2011/05/27/States-Balance-Budgets-with-Drastic-Service-Cuts.aspx#page1>

The reality is that state budget problems are the worst they've been since the start of the recession. State tax revenues are more than 10 percent below their 2008 levels, and 44 states and Washington, D.C. have been scrambling to close a collective \$112 billion budget shortfall for fiscal year 2012. . . For taxpayers – already weary of rising taxes and cuts to critical services – the fiscal noose is tightening sharply as states resort almost entirely to deep spending cuts and tax hikes to balance their budgets.

Id.

property taxes.¹³⁹ Aside from the effects of the recession, the number of tax exempt properties has been increasing since the 1980s.¹⁴⁰ Nonprofit hospitals continue the push to expand the number of exempt properties by purchasing real estate in their growth efforts as described in the previous sections of this Note.¹⁴¹ Because of the associated loss of tax revenues, local governments have taken a somewhat prejudicial view of property tax exemption, especially as it relates to hospitals.¹⁴² Local municipal budget problems have grown as a result of the recent recession's effect on payroll taxes, which resulted from layoffs, and as a result of reductions in real estate tax revenue based upon tumbling real estate valuations.¹⁴³ To fill the void, taxing authorities have taken aim at nonprofit hospitals because, for them, business is booming and the hospitals own large amounts of untaxed real estate.¹⁴⁴ Hospitals have become a popular target for taxing authorities because they are thriving businesses with large tax exempt real estate holdings.¹⁴⁵ A popular feeling of unfairness fueled by newspapers has given taxing authorities confidence to attack the tax exempt status of nonprofit hospitals.¹⁴⁶

F. Nonprofit Hospitals have Evolved into a Unique form of Charitable Institution much Different from the Model of Charity used by the Law

Categorizing hospitals and other nonprofit organizations together as traditional charities has created a tension in the system because nonprofit hospitals are fundamentally different in three ways from traditional charities.¹⁴⁷ The garden

¹³⁹ Utah Cnty. *ex rel.* Cnty. Bd. of Equalization of Utah Cnty. v. Intermountain Health Care, Inc., 709 P.2d 265, 268 (Utah 1985).

¹⁴⁰ *Intermountain Health Care*, 709 P.2d at 268 n. 5 (citing *Real Estate Tax Exemption for Federally Subsidized Low-Income Housing Corporations*, 64 MINN. L. REV. 1094, 1096 n. 17 (1979-1980), available at <http://heinonline.org/HOL/LandingPage?collection=journals&handle=hein.journals/mnlr64&div=45&id=&page=> ("The ratio of tax exempt property to taxable property is steadily increasing. . .)).

¹⁴¹ See Satow, *supra* note 133 (discussing a hospital's purchasing of a parking lot for future development and the attempt to make the property tax exempt).

¹⁴² See *Intermountain Health Care*, 709 P.2d at 268 (citing *Real Estate Tax exemption for Federally Subsidized Low-Income Housing Corporations*, 1980 WL 62591 (LRI), 64 MINN. L. REV. 1094 at 1096 "The ratio of tax exempt property to taxable property is steadily increasing. Because of the resulting loss of tax revenues, local government subdivisions cast a jaundiced eye upon property tax exemptions.").

¹⁴³ Philip Puccia, *Recession Pushes Municipalities to the Brink: Fundamental Changes Require Re-examination of Budget Model*, TURNAROUND.ORG (Mar. 10, 2011), <http://www.turnaround.org/Publications/Articles.aspx?objectId=13460> (discussing local municipality budget problems resulting from the effects of the recession and suggesting some cities may have to seek Chapter 9 bankruptcy protection).

¹⁴⁴ See Mazzolini, *supra* note 7.

¹⁴⁵ See Mazzolini, *supra* note 7.

¹⁴⁶ See Mazzolini, *supra* note 7; see Brody, *supra* note 3, at 1.

¹⁴⁷ See Schirra, *supra* note 9, at 238; see *Intermountain Health Care*, 709 P.2d at 275-76. Nonprofit hospitals are required to operate on a fee for service model to support the high costs of running a hospital. Under this model, courts continually take issue with the hospital making a profit in the sense that its revenues exceed expenses and with the lack of a "gift" to the

variety charitable organization is financially supported by donations, gifts and grants.¹⁴⁸ The typical charitable institution bestows some benefit onto the recipient, normally without remuneration.¹⁴⁹ For example, a soup kitchen feeds the hungry without charge.¹⁵⁰ Courts have described this action as a gift to the community.¹⁵¹ Some nonprofits, which are viewed as charities in the eyes of the law, may charge a nominal fee for their service, but their primary source of revenue remains to be gifts and donations.¹⁵² For example, an orchestra sells concert tickets, and museums charge admission.¹⁵³ Operating and maintaining nonprofit hospitals is too expensive for the institution to be solely supported by donations gifts and grants, necessitating a fee for service model to ensure public access to healthcare.¹⁵⁴ This difference in the source of primary funding makes nonprofit hospitals fundamentally different from other charities.

Another structural difference between the traditional charity model and the nonprofit hospital is profit. Typical charities essentially do not make a profit in the sense that their revenues usually match their expenses with a small reserve for maintenance.¹⁵⁵ Traditional charities usually spend almost all of their revenues to further their stated purpose, essentially breaking even.¹⁵⁶ Hospitals charge those who are capable of paying more for healthcare services than the cost of those services, making a profit in the sense described above.¹⁵⁷ Nonprofit hospitals use the so-called profit to further their stated “charitable purpose of providing hospital services to the sick and infirm”¹⁵⁸ by investing in new equipment, hiring additional staff, building new hospital facilities, and providing charity care to those who are in need and unable to pay.¹⁵⁹

The third difference between nonprofit hospitals and traditional charities is the kind of benefit they bestow on the community, which justifies tax exemption. A

community because the hospital has to charge for its service to keep its operation from going bankrupt.

¹⁴⁸ See *Intermountain Health Care*, 709 P.2d at 275-76.

¹⁴⁹ See *Intermountain Health Care*, 709 P.2d at 275-76.

¹⁵⁰ *Id.*

¹⁵¹ *Id.* at 278 (requiring and not finding a “gift” to the community in the form of free medical care or the relief of government burden).

¹⁵² See *id.*

¹⁵³ Schirra, *supra* note 9, at 239.

¹⁵⁴ Schirra, *supra* note 9, at 239.

¹⁵⁵ Schirra, *supra* note 9, at 242.

¹⁵⁶ *Frequently Asked Questions*, NAT’L CENTER FOR CHARITABLE STAT., <http://nccs.urban.org/resources/faq.cfm> (last visited Dec. 24, 2012) (“they [nonprofit organizations] must devote any surplus [revenue] to the continuing operation of the organization or distribute it”).

¹⁵⁷ Schirra, *supra* note 9, at 238.

¹⁵⁸ *Utah Cnty. ex rel. Cnty. Bd. of Equalization of Utah Cnty. v. Intermountain Health Care, Inc.*, 709 P.2d 265, 283 (Utah 1985).

¹⁵⁹ Schirra, *supra* note 9, at 255.

typical charity's benefit is described as a gift because they provide a benefit free of charge.¹⁶⁰ Hospitals promote the health and wellness of the community by making medical care available to all, including the provision of charity care.¹⁶¹ This furthers the values or goals of the community thereby conferring a benefit on the community.¹⁶² Only the charity care part of this benefit is considered a gift.¹⁶³

G. Lumping Hospitals Together with Garden Variety Charities for Real Estate Tax Exemption is Problematic

The origin of this nation's nonprofit hospitals is the purely charitable institution.¹⁶⁴ As a result, the law for nonprofit hospital tax exemption is rooted in the law for tax exemption of charitable institutions.¹⁶⁵ Hospitals adopted the fee-for-service model in order to sustain the high costs of the operation, medical equipment, and facilities.¹⁶⁶ Nonprofit hospitals have evolved and the law has not kept pace. When nonprofit hospitals are examined under the same criteria as other charities for tax exemption there is a disconnect between the law and its application. This disconnect occurs because hospitals are functionally different than the traditional charities with which they are classified.

The way in which these problems manifest themselves will be illustrated by examining how they arise under each kind of test. The three states used as examples previously will again be used to make this illustration.

H. Utah

In *Utah County v. Intermountain Health Care Inc.*, the Utah Supreme Court stripped two traditional nonprofit hospitals of their real property tax exemptions because the law in Utah is tailored to fit traditional charities.¹⁶⁷ As discussed above, Utah uses a six-factor test to determine if a hospital should be tax exempt or not.¹⁶⁸ Of the six factors required for tax exemption, three are almost impossible for the nonprofit hospital to satisfy because of the differences between the operating model for a nonprofit hospital and traditional charity.¹⁶⁹

¹⁶⁰ See *Intermountain Health Care*, 709 P.2d at 274.

¹⁶¹ See Schirra, *supra* note 9, at 242-44; HYATT & HOPKINS, *supra* note 37, at 16.

¹⁶² See HYATT & HOPKINS, *supra* note 37, at 16.

¹⁶³ See *Provena Covenant Med. Ctr. v. Dept. of Rev.*, 925 N.E.2d 1131, 1146-50 (Ill. 2010) (requiring a gift be made to the community and only counting charity care as that gift); see *Intermountain Health Care*, 709 P.2d at 274 (requiring a "gift" in the form of free medical care as one of the "most significant factors," and holding that the hospital did not provide the "gift" because there was no major imbalance between the value of hospital services provided and the payments received for such service).

¹⁶⁴ See Schirra, *supra* note 9, at 237.

¹⁶⁵ Schirra, *supra* note 9, at 241-42.

¹⁶⁶ Schirra, *supra* note 9, at 238-39.

¹⁶⁷ *Utah Cnty. ex rel. Cnty. Bd. of Equalization of Utah Cnty. v. Intermountain Health Care, Inc.*, 709 P.2d 265, 278 (Utah 1985).

¹⁶⁸ *Intermountain Health Care*, 709 P.2d at 269-70.

¹⁶⁹ See Schirra, *supra* note 9, at 238. The fee for service is problematic. See *id.*

The problematic factors are the source of revenue factor, the payment for service factor or “gift” factor, and the profit factor.¹⁷⁰ In *Intermountain*, the Utah Supreme Court found that both hospitals owned by Intermountain Health Care Inc. received the great majority of their revenues by charging patients for their services rather than obtaining funding from typical sources for traditional charities.¹⁷¹ Similarly, the court found that the Intermountain hospitals did not provide enough charity care (care provided free of charge).¹⁷² The Court also found that the Intermountain hospitals had made a profit because their revenues exceeded their expenses.¹⁷³ The *Intermountain* Court focused on this factor as a major reason for removing the hospitals’ tax exemption.¹⁷⁴ The Court asserted that there is no difference between for-profit and nonprofit hospitals because they both make a profit (revenues exceeding expense).¹⁷⁵

Based on the *Intermountain* Court’s view of a charitable hospital, a nonprofit hospital would have to operate at a deficit to qualify for tax exemption in the sense that the cost of patient care would have to exceed the cost of fees derived from patients and the difference would have to be made up by donations.¹⁷⁶ The problem with this line of logic is that no nonprofit hospital would be able to qualify for tax exemption under this view of charity. Another criticism is the court stopped following the money before getting to the end of the line.¹⁷⁷ A for-profit hospital is in business to make a profit for its shareholders, the shareholders are the end of the line in that case.¹⁷⁸ Nonprofit hospitals have a prohibition on private profit in their respective articles of organization, they are required to use any excess revenue to further their stated purpose.¹⁷⁹ The nonprofit hospital is in business to provide access to healthcare and promote a healthy community.¹⁸⁰ The nonprofit hospital uses its excess revenue to purchase equipment, hire more staff, and build new facilities expanding its ability to provide healthcare for the community.¹⁸¹

¹⁷⁰ See *Intermountain Health Care*, 709 P.2d at 273.

¹⁷¹ *Id.*

¹⁷² *Id.* at 274.

¹⁷³ *Id.*

¹⁷⁴ *Id.* at 275-276.

¹⁷⁵ *Id.* at 275 (finding that Intermountain Hospital made a profit, the court concluded that the only difference between Intermountain and a for-profit hospital was its corporate structure as a nonprofit).

¹⁷⁶ See *id.* at 275-276.

¹⁷⁷ See *id.*

¹⁷⁸ Pete Stark, *The Pursuit of Profit: Non-Profit Hospitals Become the Big Public Giveaway of the Nineties*, STARKHOUSE.GOV, http://www.stark.house.gov/index.php?option=com_content&view=article&id=1670:the-pursuit-of-profit-non-profit-hospitals-become-the-big-public-giveaway-of-the-nineties&catid=74 (last visited Sept. 4, 2012).

¹⁷⁹ See *Intermountain Health Care*, 709 P.2d at 272-73.

¹⁸⁰ See Stark, *supra* note 178.

¹⁸¹ See *Intermountain Health Care*, 709 P.2d at 275.

I. Illinois

In 2010 the Illinois Supreme Court decided *Provena Covenant Medical Center v. Department of Revenue*.¹⁸² This case also resulted in a traditional nonprofit hospital losing its charitable tax exemption.¹⁸³ Illinois courts apply a form of the hybrid test to determine if a hospital's use is charitable warranting tax exemption.¹⁸⁴ The Illinois factors that are problematic for a hospital to meet for tax exemption are similar to those discussed above in *Intermountain* for most of the same reasons.¹⁸⁵ In *Provena* the three factors that the court found the nonprofit hospital failed to satisfy because of its operating model are (1) its source of funds; (2) whether it dispensed charity care; (3) whether it placed obstacles in the way of those in need preventing them from receiving the benefits of its charity.¹⁸⁶ The source of funds factor will always be problematic for any nonprofit hospital to meet because of its fee-for-service model. The *Provena* Court took great issue with the amount of charity care that Provena provided, finding that the hospital did not provide enough charity care to justify tax exemption.¹⁸⁷ This is where the problem creeps in. The Illinois legislature never established a minimum quantum of charity care that is required for a hospital to be tax exempt, yet the *Provena* Court quantifies the amount of charity care provided by Provena hospitals and declares it "*de minimus*."¹⁸⁸ In the wake of this decision, nonprofit hospitals in Illinois will have to prove they provided enough charity care with no established benchmark minimum requirement and no established unit of measurement.¹⁸⁹ This kind of test can only create havoc in the law. The *Provena* Dissent expressed this concern when it stated "This can only cause confusion, speculation, and uncertainty for everyone: institutions, taxing bodies, and the courts."¹⁹⁰

J. Ohio

In Ohio, like the majority of states, tax exemption for the nonprofit hospital is based on the concept that a nonprofit hospital is a charity like all other charities.¹⁹¹ As discussed above, Ohio's law states that "Real and tangible personal property belonging to institutions that is used exclusively for charitable purposes shall be exempt from taxation. . ."¹⁹² Notably, Ohio's code has specific sections that grant tax

¹⁸² *Provena Covenant Med. Ctr. v. Dep't of Revenue*, 925 N.E.2d 1131, 1136 (Ill. 2010).

¹⁸³ *Id.*

¹⁸⁴ See sources cited *supra* note 100.

¹⁸⁵ See *Provena*, 925 N.E.2d. at 1149 (balancing the "source of revenue" and "gift" factors against Provena).

¹⁸⁶ *Id.*

¹⁸⁷ *Id.*

¹⁸⁸ *Id.*

¹⁸⁹ *Id.*

¹⁹⁰ *Id.* at 1159.

¹⁹¹ See OHIO REV. CODE ANN. § 5709.12 (LexisNexis 2012); OHIO REV. CODE ANN. § 5709.121 (LexisNexis 2012)

¹⁹² § 5709.12(B).

exemption to many other uses deemed by the state legislature to be tax exempt such as schools, churches, and colleges, as well as some uses that are not stereotypically considered to be exempt activities such as oil and gas extraction,¹⁹³ but no section that specifically addresses nonprofit hospitals.¹⁹⁴ Ohio has adopted a “one size fits all” test tailored to fit the traditional charity model,¹⁹⁵ and the Ohio Supreme Court has struggled to apply the test to the nonprofit hospital because it cannot define how much charity care is required for tax exemption.¹⁹⁶

Nonprofit hospitals are the proverbial square peg forced into the round hole. Lack of legislative clarity in this area has opened the door for wide use of judicial discretion.¹⁹⁷

K. Lack of a Uniform Standard

States’ lack of a uniform standard for “charity” has led to inconsistency and unpredictability for exemption status of nonprofit hospitals. States continue to apply

¹⁹³ § 5709.07; § 5709.112.

(A) The following property shall be exempt from taxation:
(1) Real property used by a school for primary or secondary educational purposes, including only so much of the land as is necessary for the proper occupancy, use, and enjoyment of such real property by the school for primary or secondary educational purposes. The exemption under division (A)(1) of this section does not apply to any portion of the real property not used for primary or secondary educational purposes.

(2) Houses used exclusively for public worship, the books and furniture in them, and the ground attached to them that is not leased or otherwise used with a view to profit and that is necessary for their proper occupancy, use, and enjoyment;

(3) Real property owned and operated by a church that is used primarily for church retreats or church camping, and that is not used as a permanent residence. Real property exempted under division (A)(3) of this section may be made available by the church on a limited basis to charitable and educational institutions if the property is not leased or otherwise made available with a view to profit.

(4) Public colleges and academies and all buildings connected with them, and all lands connected with public institutions of learning, not used with a view to profit, including those buildings and lands that satisfy all of the following:

§ 5709.07;

For tax year 2006 and each tax year thereafter, all tangible personal property used in the recovery of oil or gas, when installed and located on the premises or leased premises of the owner, shall be exempt from taxation. Such tangible personal property shall be subject to taxation if it is not installed on the premises or leased premises of the owner, or if it is used for the transmission, transportation, or distribution of oil or gas, as provided in section 5711.22 of the Revised Code. The tax commissioner may adopt rules governing the administration of the exemption provided by this section.

§ 5709.112.

¹⁹⁴ See OHIO REV. CODE ANN. §§ 5709.07-19 (noting that there is no specific statute for nonprofit hospital property tax exemption).

¹⁹⁵ See § 5709.12; see § 5709.121.

¹⁹⁶ See *Cleveland Osteopathic Hosp. v. Zangerle*, 91 N.E.2d 261, 263 (Ohio 1950).

¹⁹⁷ See *id.*

a charity care standard without clearly defining what it means, what standard of measurement is applied, or what it takes for a nonprofit hospital to qualify for tax exemption.¹⁹⁸ The result is a doctrine that is unfair to both government taxing authorities and nonprofit hospitals.¹⁹⁹ Courts have not been able to lay down a clear definition of what constitutes “charity” because a single definition or standard does not fairly apply to the entire group of nonprofit hospitals and traditional charitable institutions.²⁰⁰ Courts have adopted a broad standard definition for what constitutes “charity,” without separating nonprofit hospitals from charities.²⁰¹ The gift requirement (free medical care in the context of nonprofit hospitals) is central to this ambiguous standard.²⁰² As a result the definition and tests derived under this model favor traditional charities to the detriment of the nonprofit hospital.²⁰³ This makes the law in this area is confusing, inconsistent, and unpredictable.

¹⁹⁸ In 2010 the State of Illinois was the most recent state to decide a case on hospital tax exemption applying a charity care standard. In *Provena* the plurality took the hybrid test that had been applied previously in Illinois, which required a couple of mandatory elements and then the balancing of factors to determine if a hospital had met the charity care requirement necessary for tax exemption, and threw them out the window in favor of a quantitative test measuring the amount of charity care the hospital provided. The *Provena* plurality did not set any kind of benchmark or minimum amount of charity care required for a hospital to receive tax exemption. The plurality did not make it clear what would and would not qualify as charity care. The plurality only considered the free treatment of patients as charity care, the plurality would not consider discounted treatment or charges that had been written off for people who could not afford to pay as charity care. The plurality arbitrarily applied a charity care standard without clearly defining what was being measured (what qualified as charity care), and what the hospital’s charity care was being compared too. See *Provena Covenant Med. Ctr. v. Dep’t of Revenue*, 925 N.E.2d 1131, 1157-60 (Ill. 2010) (dissenting to the plurality’s arbitrary test of charity care).

¹⁹⁹ See *Zangerle*, 91 N.E.2d at 263.

²⁰⁰ See *id.*; *Utah Cnty. ex rel. Cnty. Bd. of Equalization of Utah Cnty. v. Intermountain Health Care, Inc.*, 709 P.2d 265, 269-270 (Utah 1985).

²⁰¹ In the application of all three tests discussed in this Note, no state has established a test or standard that is tailored to the nonprofit hospitals’ unique nonprofit business model where the hospital charges those who can pay for their services, the hospital makes a profit in the sense that their revenues exceed their expenses, and the hospital is not primarily funded by gifts, grants, and donations. Rather, each of the states analyzed in this Note, which are representative of the way all states deal with nonprofit hospital tax exemption, have one test or set of factors that are applied to both nonprofit hospitals and traditional charities. See *Provena*, 925 N.E.2d. at 1145; *Intermountain Health Care*, 709 P.2d at 269-70; *Cleveland Osteopathic Hosp.*, 91 N.E.2d at 263; Brody, *supra* note 3, at 671-732 (discussing the law for charitable tax exemption all fifty states and the District of Columbia).

²⁰² See *supra* note 201 and accompanying text.

²⁰³ See *supra* note 201 and accompanying text.

VI. THE SOLUTION: A UNIFORM MODEL CODE FOR TAX EXEMPTION OF NONPROFIT HOSPITALS; ESTABLISHING A CLEAR STANDARD FOR “CHARITY CARE”

“The term ‘charity’ has become magical gibberish. . .”²⁰⁴ States should enact a statute that does two things: (1) sets specific mandatory requirements (elements) for nonprofit hospitals to qualify for real estate tax exemption and (2) establishes a clear, measureable standard for the amount of charity care required to qualify for exemption. The statute should be fair and should balance the needs of both hospitals and governments. Adopting a statute that accomplishes these goals will redefine and clarify the law for nonprofit hospital real property tax exemption.

A. Tax Exemption for Hospitals Should Be Established in a Statute that is Separate from the Law Establishing Tax Exemption for Other Charities

Nonprofit hospitals operate on a completely different revenue model than their traditional charity cousins. For this reason, nonprofit hospitals need requirements specific to their revenue model to achieve tax exempt status.²⁰⁵ The concept of establishing unique rules for a specific kind of use to qualify for tax exemption is not a new idea.²⁰⁶ States have already enacted this kind of legislation for uses other than nonprofit hospitals.²⁰⁷ For example, schools, churches, colleges, and oil and gas extraction each have their own unique rules that are set out in a section of their own in the Ohio Revised Code.²⁰⁸ Ohio has statutes for many other specific uses that require and receive unique treatment under the law to determine if tax exemption is appropriate. These include uses such as public utility works, nature preserves, convention centers, graveyards, children’s homes, and others.²⁰⁹ Illinois also has passed several statutes establishing exemption for specific uses including, but not limited to, parking areas, military schools and academies, agricultural or horticultural societies, and park and conservation districts.²¹⁰ Other states have begun to understand that nonprofit hospitals need to be treated differently than traditional charities, but have not completely established this distinction.²¹¹ Some states have supplemented their statute establishing tax exemption for charitable organizations (of

²⁰⁴ Brody, *supra* note 3, at 1 (quoting *Provena Covenant Med. Ctr. v. Dept. of Rev.*, 894 N.E.2d 452, 481 (Ill. App. 2008), *aff’d*, 925 N.E.2d 1131 (Ill. 2010)).

²⁰⁵ *Supra* note 201 and accompanying text.

²⁰⁶ OHIO REV. CODE ANN. § 5709.07 (LexisNexis 2012); OHIO REV. CODE ANN. § 5709.112 (LexisNexis 2012).

²⁰⁷ § 5709.07; § 5709.112.

²⁰⁸ § 5709.07; § 5709.112.

²⁰⁹ § 5709.

²¹⁰ 35 ILL. COMP. STAT. ANN. 200/15-125 (LexisNexis 2011) (exempting parking areas for charitable institutions); 35 ILL. COMP. STAT. ANN. 200/15-90 (LexisNexis 2011) (exempting military school and academies); 35 ILL. COMP. STAT. ANN. 200/15-85 (LexisNexis 2011) (exempting agricultural and historical societies); 35 ILL. COMP. STAT. ANN. 200/15-105 (LexisNexis 2011) (exempting park and conservation districts).

²¹¹ Brody, *supra* note 3, at 638.

which hospitals are a part) by adding additional criteria specific to hospitals.²¹² The next logical step in this progression is to establish a specific and unique tax

²¹² FLA. STAT. ANN. §196.197 (LexisNexis 2011) (additional criteria for exempting hospitals); ARIZ. REV. STAT. § 42-11105 (LexisNexis 2011) (Exemption for health care property); 35 ILL. COMP. STAT. ANN 200/15-65 (d) (LexisNexis 2011) (establishing health maintenance organizations, including nonprofit hospitals, as a charitable purpose for exemption);

In addition to criteria for granting exemptions for charitable use of property set forth in other sections of this chapter, hospitals, nursing homes, and homes for special services shall be exempt to the extent that they meet the following criteria: (1) The applicant must be a Florida corporation not for profit that has been exempt as of January 1 of the year for which exemption from ad valorem property taxes is requested from federal income taxation by having qualified as an exempt organization under the provisions of Section 501(c)(3) of the Internal Revenue Code of 1954 or of the corresponding section of a subsequently enacted federal revenue act. (2) In determining the extent of exemption to be granted to institutions licensed as hospitals, nursing homes, and homes for special services, portions of the property leased as parking lots or garages operated by private enterprise shall not be deemed to be serving an exempt purpose and shall not be exempt from taxation. Property or facilities which are leased to a nonprofit corporation which provides direct medical services to patients in a nonprofit or public hospital and qualifies under Section. 196.196 of this chapter are excluded and shall be exempt from taxation.

§ 196.197;

A. Hospitals for the relief of the indigent or afflicted, appurtenant land and their fixtures and equipment are exempt from taxation if they are not used or held for profit.
B. Property that is used to operate a health care institution that provides medical, nursing or health related services to persons who are handicapped or sixty-two years of age or older is exempt from taxation if the property is not used or held for profit.
C. Qualifying community health centers as defined in section 36-2907.06, subsection H, appurtenant land and their fixtures and equipment are exempt from taxation if they are not used or held for profit.
D. Property that is owned by a health care provider, recognized under section 501(c)(3) of the internal revenue code and organized as a nonprofit corporation is exempt from taxation if the property is used to provide health care services and the property is not used or held for profit. An exemption under this subsection includes all buildings, appurtenant land, fixtures, equipment and other reasonably required property, including property used for the administration of services. For the purposes of this subsection, "health care provider" means a health care institution as defined in title 36 or an entity that provides health care services directly to patients through health care providers who are licensed pursuant to title 32.

§ 42-11105;

(d) Not-for-profit health maintenance organizations certified by the Director of the Illinois Department of Insurance under the Health Maintenance Organization Act [215 ILCS 125/1-1 et seq.], including any health maintenance organization that provides services to members at prepaid rates approved by the Illinois Department of Insurance if the membership of the organization is sufficiently large or of indefinite classes so that the community is benefited by its operation. No exemption shall apply to any hospital or health maintenance organization which has been adjudicated by a court of competent jurisdiction to have denied admission to any person because of race, color, creed, sex or national origin.

exemption law for the nonprofit hospital that clearly establishes a measurable standard for charity care.

B. A Uniform Standard is Needed

Nonprofit hospitals have recognized the need for a uniform and measurable standard of charity care in the absence of a clear statutory standard.²¹³ In 2007, all community hospitals in the state of Washington adopted a uniform standard for charity care for the first time.²¹⁴ Every nonprofit hospital in Washington State entered into the voluntary agreement to establish a standard for charity care, even if the hospital already had its own policy in place.²¹⁵ The purpose for establishing this new standard of charity care was to improve the ambiguous standard established by state law.²¹⁶ This illustrates the need for a uniform standard.

C. Should a Quantitative Test be Applied?

The answer is yes. Regardless of what kinds of tests a state may apply, courts always revert to a quantitative analysis to determine if elements or factors are met or if in the totality of the circumstances the hospital's use is charitable.²¹⁷ Any test that has factors is problematic, as illustrated above.²¹⁸ Hospitals, including those in Washington State and some in Ohio, are already using a quantitative standard in their own financial assistance policies.²¹⁹ A uniform statute adopting this approach is a natural evolution in the law.

200/15-65 (d).

²¹³ Kyung M. Song, *Standards Set for Charity Care*, SEATTLE TIMES (Jan. 11, 2007), http://seattletimes.nwsourc.com/html/localnews/2003519399_charitycare11m.html; *Financial Assistance Changes at Cleveland Clinic*, CLEVELAND CLINIC (Dec. 6, 2010), <http://my.clevelandclinic.org/news/2010/financial-assistance-changes-at-cleveland-clinic.aspx>; *Mayo Clinic- Charity Care Policy - Administration of Financial Assistance*, MAYO CLINIC (May 1, 2011), <http://www.mayoclinic.org/pdfs/charity-care-policy.pdf> (setting out a six page policy for charity care and administration of financial assistance); *Medical Financial Assistance*, KAISER PERMANENTE (Aug. 30, 2012), http://info.kaiserpermanente.org/communitybenefit/html/our_work/global/our_work_4_b.html (setting out one of the most generous charity care programs in the industry, Kaiser Permanente provides charity care to “low-income people for medically necessary services” and will not take legal action to collect for medical service if a person is unemployed or is “without other significant income”).

²¹⁴ Song, *supra* note 213 (“All 97 community hospitals in Washington have agreed to provide free or discounted care to patients based on income, the first time a uniform standard for charity care has been adopted.”).

²¹⁵ Song, *supra* note 213.

²¹⁶ See Song, *supra* note 213.

²¹⁷ Brody, *supra* note 3, at 622.

²¹⁸ Brody, *supra* note 3, at 622.

²¹⁹ Song, *supra* note 213 (Washington Hospitals have set the standard for charity care, anyone with an income level below the poverty limit will receive free care “Under the new guidelines, anyone with income at or below the poverty level (\$13,200 for a couple; \$20,000 for a family of four) will receive free care. Those with incomes up to twice the poverty level will pay just the hospital's cost.”); CLEVELAND CLINIC, *supra* note 213 (Cleveland Clinic’s

Courts have looked at the quantitative test as percentage of care provided.²²⁰ Framed this way, it is understandable why courts won't articulate a bright line rule. This also explains why some courts are reluctant to adopt a quantitative test.²²¹ The problem with the law is how the test is framed. Looking at the amount of charity care provided as a percentage of total care provided is messy.²²² If a court were to state that X percentage of all care provided has to be charity care for a hospital to qualify for real estate tax exemption, two problems arise. First, does that percentage measure dollars or patients? Second, if there is a drop in the amount of charity care provided or a substantial increase in the amount of non-charity care provided, the percentage will be skewed and could result in tax exemption one year, but not the next.²²³ There is no consistency or predictability with this method.

States should adopt the quantitative approach that some hospitals have already applied in their financial assistance policies because it will set a clear and realistic standard for charity care.²²⁴ Hospitals have established policies that state they will provide charity care to every patient living within a certain distance from the hospital whose income is below a clearly established benchmark, such as the federal poverty level.²²⁵ States would create a clear and measureable standard for charity care by establishing that every patient who qualifies for charity care must receive charity care for a hospital to qualify for charitable tax exemption. Hospitals either provided charity care to all who qualify or they did not.²²⁶ States would establish a clear standard of measurement to determine the number of qualified patients who were denied charity care, eliminating the need for courts to attempt to determine if some arbitrary percentage of charity care had been met.²²⁷ This standard also negates

charity care standard is to provide charity care to anyone whose income is 400% of the poverty limit living within 150 miles of the Clinic).

²²⁰ *Bethesda Healthcare, Inc. v. Wilkins*, 806 N.E.2d 142, 147 (Ohio 2004).

²²¹ *Cleveland Osteopathic Hosp. v. Zangerle*, 91 N.E.2d 261, 263 (Ohio 1950); *Wexford Med. Grp. v. City of Cadillac*, 713 N.W.2d 734, 745 (Mich. 2006).

²²² *Provena Covenant Med. Ctr. v. Dep't of Revenue*, 925 N.E.2d 1131, 1158-1159 (Ill. 2010).

²²³ *Id.*

²²⁴ CLEVELAND CLINIC, *supra* note 213.

²²⁵ CLEVELAND CLINIC, *supra* note 213.

²²⁶ *See Provena*, 925 N.E.2d at 1159. By making it a zero sum game, hospitals either provide charity care or they do not. Courts have set a standard to which they can compare a hospital's charity care, making for a simple test to determine if a hospital has provided adequate charity care to warrant property tax exemption. *Id.*

²²⁷ *See id.* (dissenting to the plurality setting a quantum of care requirement without establishing a minimum standard). *Provena* is an excellent example of the kind of arbitrary decisions that can result from the existing doctrine. The Illinois Revenue Department has held off any additional challenges to nonprofit hospitals' tax exemptions apparently acknowledging the weakness of the plurality decision in *Provena*; Bruce Japsen, *Illinois Halts Inquires of Nonprofit Hospitals*, N. Y. TIMES (Sept. 26, 2011), <http://prescriptions.blogs.nytimes.com/2011/09/26/illinois-halts-inquiries-of-nonprofithospitals/?scp=1&sq=proven&st=cse>. It seems the State of Illinois is using the *Provena* decision to strong-arm the hospitals into discussion about how much charity care should be required so Legislators may enact a law setting out a mandatory requirement for charity that the hospitals helped to craft.

the need for state legislatures or courts to establish some arbitrary benchmark of minimum charity care.

The major change proposed is how a quantitative standard for charity care should be framed. Rather than examining a percentage of charity care in relation to the amount of total care provided, courts should examine and quantify the number of patients who qualified for charity care that were either turned away or who received care but were inappropriately charged for the medical services they received. It is proposed that every patient in need of care whose income is below a benchmark level should receive charity care. A zero tolerance policy should apply to ensure hospitals provide charity care to those who qualify. If charity care is not provided, the hospital will lose its tax exempt status for a stipulated period of time. Framed this way, a court has a clear standard of measurement (number of patients who qualify for charity care), and clear standard for whether or not the hospital met its requirement to provide charity care, qualifying for tax exemption (was one or more qualifying patients refused charity care?).

Following the hospital model already established by some nonprofit hospitals, two quantitative standards should be established to determine who qualifies for charity care. First, residency should be required within the taxing district where the hospital is located because the taxpayers of that tax district are providing the subsidy and therefore should receive the benefit of the charity. Second, a maximum income benchmark should be established defining which local residents should qualify for charity care. For the same reasons stated above, the maximum income benchmark should be derived from the poverty level in each taxing district.

D. Proposed Uniform Code for Nonprofit Hospital Tax Exemption

Below is the proposed Uniform Code defining mandatory requirements for nonprofit hospital tax exemption:

Exemption of Property Used as a Nonprofit Hospital

- (A) Each parcel owned and used by a Charitable Hospital as defined in part (B) of this section shall be exempt from taxation.
- (B) For purposes of this section, an institution that meets all of the following requirements is conclusively presumed to be a “Charitable Hospital.”
 - (1) The institution is a licensed hospital or provider of healthcare services, and;²²⁸
 - (2) The institution qualifies for federal tax exemption under Internal Revenue Service Code Section 501(c)(3), and;

²²⁸ Each state would retain control of the kinds of healthcare providers that qualify for charitable tax exemption under this code through the licensing process. States may limit or expand this definition by broadening or narrowing the categories of medical providers it licenses. States may use this device to limit nonprofit hospitals from seeking exemption at a property it has purchased when the only thing that has changed is the status of the owner changing from a for-profit into a nonprofit while the use is unchanged. An example of a situation when this would be applicable is when a nonprofit hospital has purchased a doctor’s practice, including its real estate. Some states prohibit tax exemption for nonprofit hospital’s doctor’s offices. States could continue to prevent this kind of exemption through the licensing control. *See also Provena*, 925 N.E.2d at 1159.

- (3) The institution's bylaws include a policy that all persons in need of care receive care regardless of race, color, national origin, sex, age, familial status, religion, or ability to pay, and;
 - (4) The institution's bylaws prohibit private profit including, but not limited to revenues, dividends, or distributions made to any private person or entity that is not a nonprofit organization, and;
 - (5) The institution provides Charity Care as defined in part (C) of this section, and;²²⁹
 - (6) No Qualified Person shall be billed for service and subsequently sent to collections if the Qualified Person is unable to pay, and;
 - (7) Every patient treated at a nonprofit hospital shall be informed of the availability of charity care and the requirements that must be shown for that patient to be a Qualified Person.
- (C) For purposes of this section, the term "Charity Care" shall mean medical care or service provided free of any cost to every Qualified Person as defined in part (1) below.
- (1) For the purpose of this section, the term "Qualified Person" shall mean any potential patient seeking treatment at a nonprofit hospital that shall meet the following requirements.
- (a) A Qualified Person's primary place of residence is within the taxing district in which the nonprofit hospital where Charity Care is sought is located, and;
 - (b) A Qualified Person's income is equal to or less than one hundred twenty-five percent (125%) of the poverty level within the taxing district where Charity Care is sought.
- (D) Any location where a nonprofit hospital shall fail to provide Charity Care to any Qualified Person or attempt to collect on any Qualified Person for Charity Care rendered shall lose its charitable tax exemption for a mandatory period of two (2) calendar years before it may reapply for exemption under this section.

The basis of this proposed model code are ideas taken from statutes, case law, and hospital policy that currently govern this issue because these concepts are either generally accepted or they offer workable solutions to some of the existing problems described in this Note.²³⁰ Elements common to the majority of states have been incorporated into this model code because they are familiar and not contested by government or hospitals.²³¹ For example, the concept that the owner of a property must be a charitable institution and the use of that property must be a charitable for

²²⁹ The requirement that the property must be (1) owned by a charitable institution and (2) the primary use of the property must be a charitable use is fully satisfied by the proposed code. The owner is defined as a Charitable Hospital (charitable institution) by satisfying all seven requirements in (B). By providing charity care to any person in need and who qualifies for, the hospital's use is a primarily charitable use, fully satisfying both of the traditional requirements for charitable tax exemption. *See id.*

²³⁰ *See Brody, supra note 3, at 671-732.*

²³¹ *See Brody, supra note 3, at 671-732.*

the property to receive tax exemption is common among the majority of states.²³² Other concepts are brought from the charitable care policies of various nonprofit hospitals because these policies offer solutions to problems that have resulted in litigation under existing laws.²³³ The sliding scale concept, where a person is eligible for charity care based on income levels relative to poverty levels, was one of the ideas adopted from some nonprofit hospitals' current charity care policies.²³⁴ It was thought that concepts that work in practice should be retained because they have been working and familiar concepts would meet less resistance in the legislative process, making it more likely the model code will be passed into law.²³⁵ Drawing from the hospitals' charity care policies and from existing state laws sets forth a compromise that, when adopted, would easily fit into the existing system to establish a fair and predictable set of rules to establish whether a property should receive real estate tax exemption or not.

E. The Principals Proposed in This Model Code are Generally Accepted by the Great Majority of States

Several principals of charitable tax exemption for nonprofit hospitals are generally accepted by the majority of states.²³⁶ All states agree that the following are required of a nonprofit hospital in order for it to qualify for charitable tax exemption.²³⁷ First, the use of the property must be charitable to qualify for exemption.²³⁸ This is typically splintered into a two part requirement (1) that the property owner is a charitable institution; (2) that the property's primary use be charitable. There can be no private profit or gain from a nonprofit hospital.²³⁹ The hospital must be open to the public without discrimination in terms of race, color, creed, or ability to pay.²⁴⁰ Hospitals are already required to provide care regardless of ability to pay.²⁴¹ Recognizing that hospitals operate on a different model than traditional charities, most states have held that nonprofit hospitals are not disqualified from exemption because they charge patients who are able to pay for services so long as the funds are used for charitable purposes.²⁴² Courts have rejected

²³² See Song, *supra* note 213 (describing how Washington hospitals voluntarily set a sliding scale for their charity care policy).

²³³ See Brody, *supra* note 3, at 625.

²³⁴ CLEVELAND CLINIC, *supra* note 213.

²³⁵ See Brody, *supra* note 3, at 621.

²³⁶ Utah Cnty. *ex rel.* Cnty. Bd. of Equalization of Utah Cnty. v. Intermountain Health Care, Inc., 709 P.2d 265, 297 (Utah 1985).

²³⁷ See Brody, *supra* note 3, at 634.

²³⁸ See Brody, *supra* note 3, at 634.

²³⁹ Brody, *supra* note 3, at 671-732.

²⁴⁰ *Intermountain Health Care*, 709 P.2d at 297 (reviewing several state tax exemption laws). The *Intermountain* dissent reviews an extensive collection of authority from states around the nation establishing many generally accepted principals for hospital tax exemption among the majority of states.

²⁴¹ 42 USC § 1395(d)(d) (LexisNexis 2012).

²⁴² See Brody, *supra* note 3, 671-732.

the idea that the charitable status of a hospital is determined by a quantity of almsgiving.²⁴³ The proper requirement for charitable status is that charity care be made available to those who need it, who qualify and apply for it, not the amount of charity care provided.²⁴⁴ States' adoption of this proposed model code solidifies into statute principals already accepted by the majority of states.²⁴⁵

F. This Model Code Should be Adopted Because Interstate Hospital Growth Will Continue Necessitating a Uniform Law for Real Property Tax Exemption

The majority of hospitals in this nation are nonprofit hospitals.²⁴⁶ These nonprofit hospitals are growing and will continue to do so for the foreseeable future.²⁴⁷ As nonprofit hospitals grow, they will expand into new states. This trend is already occurring and is expected to continue.²⁴⁸ A multistate nonprofit hospital would benefit from the predictable nature of the uniform code and its clear and measurable standard for charity care because hospitals would be able to follow the same policies in each state in order to ensure compliance with the requirements needed to receive a charitable tax exemption. States should desire a predictable law and a clear measurable standard for charity care so their taxing authorities may easily determine if a nonprofit hospital is compliant. Another reason states should want to adopt this model is to attract new nonprofit hospitals within its border. New hospitals will provide greater access to healthcare for state residents and would be an economic engine eventually resulting in additional tax revenue for the state.

VII. CONCLUSION

The aforementioned uniform statute may not be the perfect solution; however, it is a major improvement over the existing standards found in the various states.²⁴⁹ Establishing mandatory elements for a nonprofit hospital to qualify for charitable tax exemption along with a clear definition of charity care goes a long way in addressing all of the issues and problems that exist under the current law.²⁵⁰ Tailored for the nonprofit hospital's fee for service structure, this statute has defined elements that

²⁴³ *Intermountain Health Care*, 709 P.2d at 278.

²⁴⁴ *Intermountain Health Care*, 709 P.2d at 278.

²⁴⁵ See *supra* Part VI(E).

²⁴⁶ See generally Schirra, *supra* note 9, at 234 (discussing accepted principals among state real property tax exemption regimes around the country).

²⁴⁷ See Herman, *supra* note 129.

²⁴⁸ Several nonprofit hospitals have already grown into multi state hospitals. The Cleveland Clinic is a nonprofit hospital from Ohio that now has locations in Florida and Nevada. CLEVELAND CLINIC, *supra* note 213. The Mayo Clinic is a nonprofit hospital from Minnesota and as grown to include locations in Arizona and Florida as well. MAYO CLINIC, *supra* note 213. Kaiser Permanente is a nonprofit hospital from California that now has hospitals in nine states and the District of Columbia. KAISER PERMANENTE, *supra* note 213.

²⁴⁹ *Intermountain Health Care*, 709 P.2d at 283 (illustrating problems under current law).

²⁴⁹ See Brody, *supra* note 3, at 671-732 (showing the current charity property tax exemptions in fifty-one US jurisdictions).

²⁵⁰ *Intermountain Health Care*, 709 P.2d at 283.

are required in order for a nonprofit hospital to be tax exempt, and it has a clear benchmark for hospitals to meet the charity care standard.²⁵¹ This proposed statute establishes a law that will bear predictable and consistent results when adjudicated creating a fair rule for both hospitals and municipalities.²⁵² If adopted, this statute will bring better clarity to this area of law.

²⁵¹ See *supra* Part VI(D) (Proposing a Uniform Code for Nonprofit Hospital Tax Exemption).

²⁵² See *supra* Part VI(D) (Proposing a Uniform Code for Nonprofit Hospital Tax Exemption).