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Weighing the Costs and Benefits of Property Tax Exemption: Nonprofit Organization Land Conservation

by

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I. INTRODUCTION

In the state of Maine and throughout the United States, increasing fiscal demands at the municipal level are exerting unprecedented pressures on the local property tax.[1] Federal and state spending reductions, unfunded mandates, budget deficits in some of the largest cities, and an overdependence on property tax as the major revenue source for municipalities are some of the main causes for scrutiny of the property tax.[2] Additional attacks on the property tax arise from questions about the fairness of using property as a measure of wealth and the role of the tax in funding education.[3] Finally, local governments are competing[4] for new net-property tax producers while shunning low-revenue producing entities, causing municipalities to examine their tax rolls.[5] On the other hand, the relative sta-

1. The Maine Legislature stated the situation concisely in the "Findings and purpose" section of the State-municipal revenue sharing statute: "The principal problem of financing municipal services is the burden on the property tax." ME. REV. STAT. ANN. tit. 30-A, § 5681(1) (West 1996).

2. Nationally, state and local governments are collecting an increasing percentage of all taxes, a trend that is expected to continue with "government service expansion[s] likely to occur below the national level . . . ." Daniel Shaviro, *An Economic and Political Look at Federalism in Taxation*, 90 MICH. L. REV. 895, 895 (1992) (footnote omitted). Property taxes made up three quarters of all local tax revenues in 1991. As a percentage of total local taxes, the property tax ranges from 99.4% (New Hampshire) to 36.9% (Alabama), with Maine ranked fifth highest in the nation at 98.6%. Philip M. Dearborn, *Local Property Taxes: Emerging Trends*, INTERGOVERNMENTAL PERSPECTIVE, Summer 1993, at 10, 11 (citing BUREAU OF THE CENSUS, U.S. DEPT. OF COMMERCE, GOVERNMENT FINANCES IN 1990-91). As a region New England has the largest dependence on local property tax. *See id.* tbl. 2.

3. *See* Dearborn, *supra* note 2, at 12.

4. Tax-base sharing has been hailed as an innovative antidote to excessive competition and fiscal disparities, by which all participating municipalities share in revenues produced by new tax revenue growth in the area. *See* Note, *Minnesota's Metropolitan Fiscal Disparities Act—An Experiment in Tax Base Sharing*, 59 MINN. L. REV. 927, 935-46 (1975). *See also* Jack L. Dustin et al., *Tax Base Sharing: The Potential and Experience*, *in* TAX BASE SHARING: AN EVALUATION OF ITS USE AND POTENTIAL IN THE STATE OF OHIO 3 (1990). Maine statute authorizes the creation of tax base sharing districts. ME. REV. STAT. ANN. tit. 30-A, § 5752 (West 1996). However, only a handful of municipalities have pursued the concept. *See* Sharon Mack, *Tax Base-Sharing Districts Can Work*, BANGOR DAILY NEWS, Oct. 19, 1993, at 14.

5. *See* Editorial, *Taxing Nonprofits: Is There a Trend?*, ST. TAX TRENDS FOR NONPROFITS (National Council of Nonprofit Ass'ns), Spring 1995, at 1 [hereinafter *Taxing Nonprofits*].

bility and predictability of the property tax continue to make it an essential part of the local tax base, and one that is likely to remain a central part of local government operation.[6]

As fiscally strapped local governments review revenues from owners of property, it is understandable that they should look to exempt properties as potential revenue sources.[7] Recently "the principle of tax exemption is being reexamined with a vigor that is unprecedented, at least in this generation."[8] The property tax exemption, allowed to charitable organizations by all states under either statutory or constitutional provisions,[9] is a natural target for local officials. Where a single exempt property owner holds title to a large portion of a municipality's valuation, or where exempt organizations that serve an entire region cluster in a single city,[10] local officials are especially bound to perceive an inequity, and hence seek legal remedies. If the town can find grounds for questioning the organization's exempt status, it may well assess the property as nonexempt.

Nonprofits dedicated to the conservation of land are one class of organization owning exempt property. Today they are engaged in a number of strategies to minimize unnecessary conflicts with local

6. *See* Hugh Mields, Jr., *The Property Tax: Local Revenue Mainstay*, INTERGOVERNMENTAL PERSPECTIVE, Summer 1993, at 16 (citing the fixed nature of the tax base, predictability of revenues, stability of yields from year to year, and reliability as a source for local services and the payment of general obligation bonds as reasons for local tax base perseverance).

Local governments also utilize the property tax as a means of taxing nonresident land owners who would escape, for example, from state income tax. *See* CLAYTON P. GILLETTE, LOCAL GOVERNMENT LAW 537-38 (1994).

7. *See* John K. Mullen, *Property Tax Exemptions and Local Fiscal Stress*, 43 NAT'L TAX J. 467 (1990) (suggesting that exemption policies are likely to figure prominently in efforts to alleviate fiscal stress caused by predicted growth in real per capita tax revenues).

8. *Taxing Nonprofits*, *supra* note 5, at 1. *See also* Charles J. Fausold & Robert J. Lilieholm, *The Economic Value of Open Space*, LANDLINES (Lincoln Inst. of Land Pol'y, Cambridge, Mass.), Sept. 1996, at 4 (local officials now scrutinize the fiscal consequences of land use decisions more than ever before).

9. *See* W. HARRISON WELLFORD & JANNE G. GALLAGHER, UNFAIR COMPETITION? THE CHALLENGE TO CHARITABLE TAX EXEMPTION 122 (1988). The precise requirements for exemption vary from state to state because federalism has left power in the states to formulate policy in this area. *See also* Shaviro, *supra* note 2 (examining the relationship between state and local taxes and federalism).

10. The fiscal impacts of exemption can be greater in non-urban areas than in larger cities because of a greater tendency for exempt property to be unevenly distributed. Mullen, *supra* note 7, at 468. However, because of the tendency for nonprofit and government service providers to concentrate where they can serve the most people, the aggregate effect is usually the greatest in cities. A self-perpetuating cycle results, with persons needing services relocating to these areas. *See* OFFICE OF POLICY AND LEGAL ANALYSIS, MAINE LEGISLATURE, THE COMMISSION TO STUDY THE GROWTH OF TAX-EXEMPT PROPERTY IN MAINE'S TOWNS, CITIES, COUNTIES AND REGIONS 11 (1996).

governments over tax exemption.[11] While some organizations are financially incapable of foregoing their tax exemption, others do not apply for tax exemption on all of their properties. Instead, they may choose to: (1) pay full taxes on the property, (2) enroll the property in a current use program and pay the reduced taxes authorized by applicable current use statute,[12] (3) pay a service fee through an agreement with the local government covering services provided to the exempt property,[13] or (4) make a donation or payment in lieu of taxes.[14]

At the same time, policy makers in a number of states have begun to devise just mechanisms for assessing fees on exempt properties for benefits provided to them by the municipality.[15] These efforts aim to reduce inevitable inequities at the local level and the ensuing frictions between all kinds of exempt organizations and local governments.

This Comment addresses the issue of property tax exemption for nonprofit organizations, especially those dedicated to land conservation. Part II looks at the general grounds for exempting nonprofits from taxation generally, and analyzes how land conservation fits into the doctrine of charitable exemption. This analysis is aided by an inquiry into the economics of land conservation—the cost-benefit balance of land that is not available for development. Part III analyzes the legal doctrines of property tax exemption embodied in recent decisions in Maine and the nation, and how well they reflect the doctrines of charitable exemption discussed in Part II. Part IV addresses the specific deficiencies in the property tax which tend to put pressure on exemptions for conservation and other nonprofit land uses, and suggests such remedies as adopting a broader based array of taxes to relieve pressure on the property tax. Part V proposes mechanisms for taxing conservation and other exempt land fairly in the context of its value to local governments and to society while protecting local governments from potentially inequitable fiscal losses. Part VI describes current use statutes that attempt to relieve the tax burden on land that is providing benefits associated with open space. These statutes tax such land at a value based on its current use, rather than the normal taxation at the highest and best use. This Part also examines whether current use classification for conservation lands is an option that properly reflects the public benefits they provide.

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11. This observation derives from the Author's experience as board president of a local conservation organization over a ten-year period.

12. *See infra* Part VI.

13. *See* ME. REV. STAT. ANN. tit. 36, § 652(1)(L) (West 1990).

14. *See* Monroe H. Rosner, *In-Lieu-of-Tax Payment by Exempt Organizations: Issues, Trends and Innovations*, *in* PROCEEDINGS OF THE SEVENTY-NINTH ANNUAL CONFERENCE ON TAXATION 104 (Stanley J. Bowers & Janet L. Staton eds., 1986).

15. *See infra* Part V.

II. The Basis for Granting Exemptions to Charitable Purposes

Why should nonprofit organizations[16] be subsidized by being exempted from taxation? This question is increasingly asked by municipal governments and land-owning taxpayers who perceive a revenue loss at the local level, imposed upon them by actors at the state level. Numerous theories may answer their increasingly vociferous questions. Nonprofit sector advocates claim that the underlying criteria for whether income or property is taxable is whether it is used for private, individual purposes.[17] They argue that property that does not advance private interests but rather solely advances the welfare of the community should not be taxed.[18] This is so because activities that directly or indirectly relieve government of its burden of providing services or benefits logically do not merit having their capacities reduced by government taxation, especially when government has been unable or does not choose to provide the recognized public benefit.[19] At least in a general sense, the list of categories that are typically exempt supports this division, and includes: property of state, federal, and local government; certain public works; and charitable, literary, and scientific institutions.[20] Statutes require all income of nonprofits to further the organization's tax-exempt purpose, with no income inuring to the benefit of private individuals except as reasonable compensation for services rendered.[21]

Nonprofit conservation organizations serve, in economic terms, as private market providers of public goods—goods which, if supplied to one individual, are also available to all other members of society.[22] A charitable public good often arises due to a form of market failure, in which neither the for-profit sector nor the government has

16. A nonprofit organization may earn profits, but it may not distribute them to the individuals who control it. *See* Henry B. Hansmann, *The Role of Nonprofit Enterprise*, 89 YALE L.J. 835, 838 (1980).

17. *See id.*

18. *See* WELLFORD & GALLAGHER, *supra* note 9, at 123.

19. Perhaps the more difficult legislative question is which organizations and properties merit being considered as relieving a government burden and thus qualifying for exemption under state statute. Maine effectively imposes upon municipalities its own definition of government burden. *See infra* Part III.

20. *See* ME. REV. STAT. ANN. tit. 36, §§ 651-652 (West 1990 & Supp. 1996-1997).

21. *See id.* § 652(1)(C)(2). Some states withhold exemption if the organization regularly earns more in fees than it spends. WELLFORD & GALLAGHER, *supra* note 9, at 122-23.

22. *See, e.g.*, Hansmann, *supra* note 16, at 848 (defining public goods as those that cost no more to provide to many persons than to one person and which, once provided, cannot be kept from other persons enjoying them); *Developments in the Law—Nonprofit Corporations*, 105 HARV. L. REV. 1578, 1624 n.88 (1992) (citing national defense and pollution control as examples of public goods); Fausold & Lilieholm, *supra* note 8, at 2 (public goods are nonexcludable and nonconsumptive).

provided for something recognized as essential.[23] In the land conservation context, for example, the organization fills a demand for conservation land with donations from patrons who are either actual users of the conserved lands or who derive a psychic benefit from the perceived effect of their donation. The number of free riders—those who make no donation but who actively or passively derive benefits from conservation land—is undoubtedly great. But where the paying patrons constitute a critical mass, the nonprofit provider is able to operate, assisted by government policies on property tax exemption and the tax deductibility of donations.

The preferential tax treatment of conservation organizations is based in part, then, on the assumption that it is delivering a public benefit to a constituency composed both of patrons and free riders, where private individuals, corporations, or government are not sufficiently able to provide the function affordably.[24] Further, although demand for the good may not command a great enough political majority to cause government to supply it directly, a significant level of demand for the good exists, as evidenced by the charitable support of the nonprofit organization.[25] The fact that the purposes of the organization must satisfy the statutory requirements that a legislative majority has agreed merit the subsidy further reflects a societal choice for conservation.[26]

Legislative findings reveal consistent implicit support for this economic theory of conserved land as public goods. Maine's Protection

23. An inevitable debate involves the definition of "essential." *See infra* Part V.

24. "Conservation trusts present a special case of the nonprofit . . . performing quasi-public functions. . . . [T]his is a function which very few private individuals or corporations can afford to perform and is therefore a proper one for government to support through exemption from tax." C. K. Cobb, Jr., Property Tax Exemptions for Nonprofit Institutions (1972) (unpublished memorandum), *quoted in* OLIVER OLDMAN & FERDINAND P. SCHOETTLE, STATE AND LOCAL TAXES AND FINANCE 346 (1974).

25. *See Developments in the Law—Nonprofit Corporations*, *supra* note 22, at 1624.

26. It has been argued that the so-called subsidy of an exemption is a limited one in that the government does not necessarily contribute to other costs of the charitable activity other than by relieving the burden of the tax. OLDMAN & SCHOETTLE, *supra* note 24, at 330. However, depending on the nonprofit activity, government may in fact provide direct services to nonprofits. As a local example, Bangor has contributed $2.5 million to the nonprofit Bangor Public Library. Telephone Interview with Erik Stumpfel, Bangor City Solicitor (June 1996). Similarly, if the regional hospital expands from seven to eight stories, a new ladder truck is required or Bangor's fire insurance will increase by over $1 million; in either case, the hospital will likely contribute nothing. *See id.* If the hospital buys a parking lot valued at $1 million and it is exempted from property tax, the immediate impact, at least, is a direct revenue loss to the city. *See id.*

of Natural Resources Act[27] is illustrative of the public benefit that the legislature has found to inhere in land conservation:

> The Legislature finds and declares that the State's rivers and streams, great ponds, fragile mountain areas, freshwater wetlands, significant wildlife habitat, coastal wetlands and coastal sand dunes systems are resources of state significance. These resources have great scenic beauty and unique characteristics, unsurpassed recreational, cultural, historical and environmental value of present and future benefit to the citizens of the State . . . .[28]

Conservation organizations that concentrate their efforts on preserving such resources for the benefit of the public are presumably at the donative rather than the commercial end of nonprofits, in that their incomes generally derive from donations rather than from fees for services or goods.[29] As such, they are generally in a less suspect class[30] of the nonprofit spectrum. This provides some immunity from the accounting that is increasingly being sought of the United States' 1.1 million nonprofits,[31] many of which have spun off successful commercial ventures arguably straying far afield from their stated tax-exempt purposes.[32]

Exempt organizations are obviously a diverse group. While critics of tax exemption cite egregious examples of the abuse of their nonprofit status,[33] defenders cite an equally profound belief in the sanctity of the nonprofit sector. This group of defenders resists turning to nonprofits as a tax revenue source, since they are, in fact, vital

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27. ME. REV. STAT. ANN. tit. 38, §§ 480-A to 480-Y (West 1989 & Pamph. 1996-1997).

28. *Id.* § 480-A.

29. *See Developments in the Law—Nonprofit Corporations*, *supra* note 22, at 1620.

30. *See id.* Some conservation organizations have significant commercial components in their overall operations. Exemption is arguably less deserved if the organization's local activities generate sufficient revenues to pay for local services, or if the activities largely benefit the middle and upper classes. *See* Rebecca S. Rudnick, *State and Local Taxes on Nonprofit Organizations*, 22 CAP. U.L. REV. 321, 336-37 (1993).

31. While no state bars the collection of fees by nonprofits entirely, a number of states require organizations to offer free or below-cost service, or require at least some of the organization's income to come from charitable contributions as opposed to fees. *See* WELLFORD & GALLAGHER, *supra* note 9, at 126-27.

32. Edward T. Pound et al., *Tax Exempt!*, U.S. NEWS & WORLD REPORT, Oct. 2, 1995, at 36, 51 (reporting that New York City's exempt nonprofits could yield more than $524 million in property taxes). According to an analysis of the Internal Revenue Service's records, the United States' 1.1 million nonprofits generate $1.1 trillion in revenue, control $1.475 trillion in assets, and are growing by 45,000 organizations per year. *See id.* at 36.

33. Critics of exemption policies point to abusers of the system such as a church that classified over 100 acres of land as a cemetery in order to get a tax exemption, despite the fact that only one body was buried there. OLDMAN & SCHOETTLE, *supra* note 24, at 323-24.

service providers themselves. The explicit rationale is that taxing this sector makes as much sense as taxing government itself.[34] Without this rationale, the argument against taxing exempt organizations is diminished. But to the extent that exempt organizations supply vital services and their benefits inure to public and not private beneficiaries, the rationale remains valid. The greatest source of tension is the fact that defining what constitutes an exempt sector is done at the state level, yet local governments are most acutely affected.

Regardless of the moral force behind nonprofit activities, critics of tax exemptions are quick to point out that they are tax expenditures.[35] When state government exempts an entity from a tax that it otherwise would have to pay, it is argued that it is in essence spending this foregone revenue and making a fiscal choice favoring activities that qualify as exempt, often at the expense of the local government. Tension arises when the resulting benefits are not shared equally among either the state's nonprofits or its municipalities.[36]

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34. As stated by a leader in the nonprofit sector:

> The problems faced by the local, state and federal governments are the result of converging structural, economic and demographic forces. Nonprofits have, in fact, tended to be the bulwarks of economically troubled areas. Nonprofits embody and sustain the fundamental social, cultural, and spiritual values of trust, compassion, justice and moral behavior that bind us together. For this reason we as a society gave them a special status as tax-exempt entities.

Memorandum attaching Statement on Nonprofit Tax Exemption from Ann Mitchell, National Council of Nonprofit Associations, to Nonprofit Minutepersons 3 (Jun. 1, 1995) (on file with the *Maine Law Review*).

A countervailing view is that many individuals and enterprises with similar noble motivations must pay taxes. Memorandum from Professor Orlando Delogu, University of Maine School of Law (Sept. 1996) (on file with the *Maine Law Review*).

35. *See Developments in the Law—Nonprofit Corporations*, *supra* note 22, at 1620-21 (1992). *See also* ME. REV. STAT. ANN. tit. 36, §§ 195-196 (West 1990) (including exemptions as "tax expenditures [that] constitute a permanent reduction in tax revenues . . . and result in an increased tax burden on taxpayers who are not benefited").

36. For example, the organization that has minimal land and profits derives little benefit from its exempt status, while the nonprofit with greater assets does. *See Developments in the Law—Nonprofit Corporations*, *supra* note 22, at 1621. *See also* Rudnick, *supra* note 30, at 336 (stating that poor, struggling entities may not benefit from exemptions while wealthy nonprofits receive significant benefit).

Another economic argument leveled against nonprofits is that exemptions afford them an unfair market share. However, there is evidence that removing exemptions for a given service may not increase the market share of for-profit providers of that service. For example, higher tax rates for hospitals will make it more likely that only one hospital can survive financially in a given community, but it does not make the nonprofit hospital any more likely to succeed than the for-profit. *See* Cyril F. Chang & Howard P. Tuckman, *Do Higher Property Tax Rates Increase the Market Share of Nonprofit Hospitals?*, 43 NAT'L TAX J. 175, 185 (1990).

A. *The Magnitude of Charitable Exemptions in Maine*

To appreciate the legal issues involved in property tax exemption, it is useful to put conservation organization tax exemption into perspective. Exempt land of conservation organizations is a small fraction of three quarters of one percent of Maine's total property valuation.[37] All classes of tax-exempt property make up approximately thirteen percent of the total Maine property valuation.[38] Of this fraction, municipal, federal, and state lands comprise well over half of exempt property values.[39] Charitable and literary/scientific organizations account for, respectively, six percent and eleven percent of exempt property values.[40] Charitable organizations account for approximately three quarters of one percent of all of Maine's valuations.[41]

Since conservation organizations are just one of the many kinds of nonprofits that are normally in the charitable classification, their lands constitute an even smaller fraction of this three quarters of one percent.[42] Recent statistics indicate that the exempt properties' share of total state valuation in Maine has actually decreased—from twelve percent in 1984, to eleven percent in 1986, to ten percent in 1994.[43] However, the importance of the exemption to conservation efforts and the level of opposition to exemptions in a number of municipalities merits an understanding of how the legal basis of exemption relates to the economic and social theories discussed in Part II.

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37. *See* MAINE MUNICIPAL ASSOCIATION, TAX EXEMPT PROPERTY IN MAINE: IMPACT ON LOCAL TAX BASES 1 (1989).

38. *See id.* A useful figure in this analysis would be an estimate of the degree of undervaluation of exempt properties.

39. *See id.*

40. *See id.*

41. *See id. See also* PROPERTY TAX DIVISION, MAINE BUREAU OF TAXATION, 1994 MUN. VALUATION RETURN STATISTICAL SUMMARY, part v.

42. *See id.*

43. *See* ROY W. LENARDSON & SHIRRIN BLAISDELL, OFFICE OF POLICY AND LEGAL ANALYSIS, THE COMMISSION TO STUDY THE GROWTH OF TAX-EXEMPT PROPERTY IN MAINE'S TOWNS, CITIES, COUNTIES AND REGIONS 17 (1996). The assessed value of tax-exempt property in Maine, taken as a proportion of all tax-exempt and taxable property declined over the years 1984-1994. This finding excludes federally owned property, and is based on municipal records. *See id.* Several caveats important to interpretation of these figures are: (1) valuations for tax-exempt property tend to be less accurate, since assessors have little incentive to ascertain just valuation; (2) valuation is largely self-reported and can be very low, based on old information, or very high, based on insurance replacement costs; (3) comparable sales, especially arms-length transactions of unique lands and other nonprofit property are relatively rare; and (4) many municipalities did reassessments during this period because their properties were undervalued, and exempt properties are less likely to have been reassessed. *See id.*

B. *Weighing the Costs and Benefits of Exempt Property at the Local Level*

It has been argued that local government is best suited to weigh the burdens and benefits of a nonprofit corporation in the community because of the impact of property tax exemption on its tax base, and because it is best able to monitor the level of public benefit the nonprofit is providing.[44] As a form of state level tax expenditure with potentially large local impact, exemptions have been framed as an overreaching of the states' centralized taxing power.[45] In theory, perhaps, the local government should be able to exempt the nonprofit only to the extent that it provides some measurable quantum of public benefits to local residents.[46]

Such a proposal is problematic in that most nonprofit activity in town X, including conservation, often benefits the residents of town Y. The veto power of any individual town over an activity on the grounds that the local benefits are too meager would seem to stymie many ventures that provide multi-jurisdictional benefits.[47] The potential for this veto power to exacerbate parochialism makes it a cause for concern. At the same time, a town should, perhaps, not have to bear the entire burden when half of its valuation is owned by an exempt organization that makes use of the property in a manner that provides broad benefits to residents throughout the state. Oft-cited examples in this category are municipalities whose universities and hospitals serve residents from throughout a state or region, but whose service needs are borne solely by the local property taxpayers.[48] The tension between local and non-local beneficiaries can be glaring, or at least appear to be so.

In the context of land conservation, some writers have suggested that while keeping land undeveloped provides a public benefit, the

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44. *See Developments in the Law—Nonprofit Corporations*, *supra* note 22, at 1626-27 (urging a rebuttable presumption that all of a nonprofit's property is taxable when a municipality tries to revoke its property tax exemption). Technically speaking, Maine law is consistent with this policy in that the legal presumption is that all property is taxable. *See infra* Part III.

45. *See* CHARLES E. MCLURE, JR. & PETER MIESZKOWSKI, FISCAL FEDERALISM AND THE TAXATION OF NATURAL RESOURCES 106 (1983) (recognizing that many commentators believe "[l]ower levels of government . . . to be . . . more responsive to needs . . . of local residents and more effective at providing public goods and services of a purely local sort").

46. New York passed a statute in 1971 allowing municipalities to remove the exemption status from, inter alia, historical societies, libraries, bar associations, playground associations, and missionary societies. *See* Rosner, *supra* note 14, at 106, 109 n.3. (citing 1971 N.Y. Laws, ch. 50-A, § 420-b). Only a handful of local jurisdictions have used this power. *See id.*

47. *See Developments in the Law—Nonprofit Corporations*, *supra* note 22, at 1628 (conceding that under local veto, exemptions could be defeated due to the not-in-my-backyard syndrome, religious or other discrimination, or other bias).

48. *See id.* at 1632-33.

specific individuals who use the land for recreation should pay a fee for that benefit, and the municipality should levy an excise on the receipts.[49] Yet, communities often fail to analyze the benefits of exempt activities, as is the case with undeveloped land. Thus, even if municipalities had the ability to grant or deny exemptions on their own, their analytical capabilities are often found wanting and their opposition to the exemption of conservation land may have no basis in fact.[50] Part V of this Comment describes the possible outlines of such a system, and the challenges of creating a system that is manageable and equitable.

C. *Cost-Benefit Analysis of Conservation Land*

Given the potential tension just described, an examination of both the local and regional monetary and non-monetary costs and benefits of land conservation is critical. This is especially so in light of the commonplace assumption that development will increase local tax revenues and thus relieve the individual landowner's tax burden, and the concomitant belief that land preserved by a tax-exempt conservation organization is inherently a drain on the local tax base. A significant body of research shows that the contrary is often true.[51] Open space, even if it is owned by an exempt organization that pays

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49. *See* Cobb, *supra* note 24. Alternatively, Cobb suggests making income producing properties of nonprofits fully taxable at the local rate, as are the auxiliary services of various nonprofit institutions in some jurisdictions. *See id. But cf.* Maine Med. Ctr. v. Lucci, 317 A.2d 1, 2 (Me. 1974) (reaffirming the property tax exemption for parking facility which generated income where such utilization is not oriented toward pecuniary profit). See *infra* Part V.D. for the related discussion of direct benefit service fees.

50. *See* AMERICAN FARMLAND TRUST, IS FARMLAND PROTECTION A COMMUNITY INVESTMENT? HOW TO DO A COST OF COMMUNITY SERVICES STUDY (1993). For example, "[a]lthough a rural acre with a new house will undoubtedly generate more total revenue than an acre of cows or corn, such simplistic arguments do not provide communities with a realistic bottom line." *Id.* at 1.

51. *See, e.g.*, MAINE COAST HERITAGE TRUST, TECHNICAL BULLETIN NO. 112, THE POSITIVE ECONOMICS OF CONSERVATION (1991) [hereinafter THE POSITIVE ECONOMICS OF CONSERVATION]. *See also* NATIONAL PARK SERVICE, ECONOMIC IMPACTS OF PROTECTING RIVERS, TRAILS, AND GREENWAY CORRIDORS (1990) (providing a methodology to quantify the effects of land protection on property values, tourism, public cost reduction, and commerce). The unfortunate conclusion of this analysis is that nonprofit residential land uses put the greatest fiscal burden on municipalities. *See also* DEBORAH BRIGHTON, MAINE COAST HERITAGE TRUST, OPEN LAND, DEVELOPMENT, LAND CONSERVATION AND PROPERTY TAXES IN MAINE'S ORGANIZED MUNICIPALITIES (1995). Brighton concludes:

> It is generally true in Maine that the towns with the most development have higher rather than lower tax bills. . . . [O]pen land pays more in taxes than it costs the town in services while the opposite is true for residences; commercial and industrial developments, although they pay more in taxes than they directly cost the town to service, create jobs and people move in to fill the jobs; and, larger towns have more services and larger budgets. For this reason, permanent protection of land should not be looked at as

no property tax, may be more fiscally advantageous than a new residential subdivision. The costs of residential development in additional solid waste disposal, education, police and fire protection, road maintenance, and other services frequently result in an increase in the local tax rate.[52] For example, a study conducted in South Portland, Maine, found that while the commercial-industrial sector generated slightly more in revenue than it demanded in services, residential growth was a net loser, costing one dollar in services for every seventy-seven cents of revenue.[53] A related, though smaller, negative effect of higher valuations is the corresponding decrease in revenues from the state educational subsidy, which is inversely related to local valuation.[54]

According to the betterment theory, conservation land may actually increase adjacent land values, thus supporting the tax base indirectly, even if taxable value is lost by virtue of exemption of the conservation property.[55] Economists often use this type of analysis to infer the social value of potentially intangible public goods by proxy.[56] Other benefits inferable by proxy that municipalities might overlook if their calculus is strictly focused on an exempt property's lost valuation include: the land's value in preserving a landscape

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precluding a more lucrative option; it may be more appropriate to look at it as protection against a more expensive option.

Id. at 3.

52. *See* THE POSITIVE ECONOMICS OF CONSERVATION, *supra* note 51, at 2. *See also* AMERICAN FARMLAND TRUST, *supra* note 50. Three studies in Massachusetts by the American Farmland Trust found that "[f]or every dollar of revenue raised from the residential sector, . . . towns spent $1.12 on public services[, while] for every dollar raised by undeveloped lands, towns spent 33 cents . . . ." *Id.* at 2. In addition, there is a local multiplier effect from active forest and farm land that is even greater. *See id.* at 3. "Common estimates place the multiplier effect of local agriculture at $3 to $5. . . . [F]or every dollar received from farmers, . . . $3 - $5 are earned by local businesses and processors serving farmers and their customers." *Id.* It should be noted that the multiplier effect cannot be claimed exclusively by these land uses; indeed, a commercial land use has a similar effect. The concept simply stands as a rebuttal to the proposition that undeveloped land has little economic utility.

53. *See* THE POSITIVE ECONOMICS OF CONSERVATION, *supra* note 51, at 2.

54. Under ME. REV. STAT. ANN. tit. 30-A, § 5681(4) (West 1996), "[t]hose municipalities having a greater property tax burden . . . receive a larger per capita revenue-sharing distribution."

55. *See* Kenneth A. Clarke, *Taxation of Preservation Interests as Property in Vermont*, 5 VT. L. REV. 161, 177 (1980) (citing studies of benefits accruing to land parcels adjacent to conservation and historic conservation land reflected by increased taxable values); OLDMAN & SCHOETTLE *supra* note 24, at 346 ("[A] higher price can be charged for a room with a view than for a room on an airshaft."). The phenomenon is known by appraisers as "enhancement," and is a well-documented factor in appraising property. The potential for exempt properties to generate positive net benefits has been recognized, where the "property is sufficiently stimulative of economic activity." Mullen, *supra* note 7, at 468.

56. *See* FAUSOLD & LILIEHOLM, *supra* note 8, at 4.

that attracts tourism, recreation,[57] or commerce to the area; the availability of the land for public recreation or educational use; and its role in conserving wildlife and other ecological systems that are enjoyed by citizens of the municipality and visitors.[58]

This discussion can be distilled into three main conclusions. First, land conservation—like many other exempt uses of land—provides clear public benefits that legislatures have recognized as being worthy of exemption from local property tax. Second, municipal budgets stretched thin by inherent deficiencies in a system that relies almost wholly on the property tax may erroneously limit their calculus to the difference between the direct tax revenues from exempt versus non-exempt property, without looking at the benefits the exempt properties provide and the municipal costs avoided by keeping land undeveloped. Third, concern at the local level may be exacerbated by numerous factors which obscure the perception of the public benefit from conservation land: the imposition of the exemption scheme by state government; a high concentration of exempt property in a given municipality disproportionate to local benefits; and beliefs of local citizens and assessors about equitable distribution of the property tax burden.[59] In light of these conclusions, the operative analysis from a societal perspective may be less one of an overall comparison of benefits to costs, and more an inquiry into whether the burdens of this public good are adequately shared between local residents and nonresidents.

The foregoing discussion affirms the philosophical bases for the exemption of nonprofit providers in general, and conservation organizations in particular. At the same time, it recognizes the prevalence of common misperceptions about the social and economic value of conservation land. These misperceptions, combined with frequent instances of local inequities and the high degree of pressure on the property tax as a local revenue source, may increasingly cause legal scrutiny of various aspects of property tax exemption. Part III of the Comment examines the legal foundation for exemption and the challenges municipalities have brought against the exempt status of conservation and other exempt properties.

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57. Methodologies for calculating the monetary value of outdoor recreational activities have been widely recognized. *See id.* at 3.

58. These factors are among those in the public benefit test required for tax reduction in Maine's Farm and Open Space Tax Law. ME. REV. STAT. ANN. tit. 36, § 1102(6) (West 1990). See *infra* Part VI for a discussion of current use taxation policies.

59. Resentment in certain communities may arise from the perceived ability of the wealthy to take better advantage of the estate tax and income tax benefits associated with nonprofit land conservation programs. Also, conservation organizations often attract and may deliberately cultivate a highly educated segment of the population for fund raising and leadership. Local efforts to prevent perceived benefits for the rich may thus take on a strong populist flavor.

III. Legal Interpretations of the Maine Charitable Exemption Statute

Challenges to tax exemptions by town officials may rest on a number of legal foundations, but most have been directed at whether the organization's purposes or its uses of the exempt property actually comport with state statute.[60] Interestingly, the requirements for exempt status have been interpreted differently by the Maine Supreme Judicial Court, sitting as the Law Court, municipalities, nonprofits, and the State Bureau of Taxation.[61]

This part of the Comment finds that Maine decisions regarding property tax exemption establish relatively stringent procedural requirements for property owned by entities dedicated to the conservation of land and wildlife. These decisions have precluded exemption for a number of properties whose uses are arguably beneficial to the public.[62] At the same time, recent decisions of the Law Court reaffirm the relatively broad definition of the charitable classification upon which most land conservation organization exemptions are based.[63] The legal theories underlying the broader definition of "charitable" in these decisions are supported by generally accepted notions of the societal support merited by public goods providers which relieve a burden of government and whose benefits do not inure to individuals.[64] These decisions, at a societal or macroeconomic perspective, are an expression of Maine's exemption policy. Simply put, the legal system attempts to consider the overall societal benefits of Maine's nonprofit sector in determining which organizations merit exemption, but does not consider local costs and benefits.[65]

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60. Telephone Interview with David Ledew, Maine State Bureau of Taxation (July 9, 1995) (noting differences in the interpretation of the term "charitable").

61. *See id.*

62. *See, e.g.*, The Nature Conservancy of the Pine Tree State, Inc. v. Town of Bristol, 385 A.2d 39, 42 (Me. 1978) (tax exemption precluded if grantors transfer title to conservation organizations but reserve rights of access, passage, or custodianship).

63. *See, e.g.*, Town of Poland v. Poland Spring Health Inst., 649 A.2d 1098, 1100 (Me. 1994) (allowing exemption as long as institution is organized and conducting its operation for purely benevolent and charitable purposes in good faith with production of revenue "purely incidental" to a dominant purpose which is benevolent and charitable") (citing Green Acre Baha'i Inst. v. Town of Eliot, 150 Me. 350, 354, 110 A.2d 581, 584 (1954).

64. *See supra* Part II.

65. In general, there may be judicial resistance to an attempt to measure the nonprofit's delivery of local benefits when the organization's purpose and activities are shown to be generally consistent with the exemption statute. In Maine, at least once, the Law Court has encountered and rejected a municipality's attempt to argue that a nonprofit was not charitable because it failed to show that the supposed beneficiaries of its largesse were better off than they would be without its services. *See* Maine AFL-CIO Hous. Dev. Corp. v. Town of Madawaska, 523 A.2d 581, 585 (Me. 1987). The court was satisfied that the purposes of the nonprofit, a housing corpora-

To the extent that inequities occur at a local level where particular exempt properties exert demands that are disproportionate to the benefits they provide, judicial action is not the optimal vehicle for providing relief without further legislative direction. In Parts IV and V of this Comment, the Author suggests precisely such legislative reform through mechanisms for reducing local dependence on the property tax and a system for measuring costs and benefits of exempt properties. The discussion of current use tax laws in Part VI provides an example of how existing Maine statutes include a system which reduces—though does not eliminate—taxation of undeveloped land commensurate with the public benefits it provides and its costs to the local fisc.

In legal terms, nonprofits face the presumption that real property is taxable. Real property located within the state is generally subject to taxation at the local rate,[66] prompting the Law Court to state: "[T]axation is the rule and . . . exemptions are exceptions to the rule and are to be strictly construed."[67] The property owner carries the burden of proving the qualification for exemption, and uncertainty as to entitlement for the exemption is weighted in favor of taxation.[68]

Only assessors, acting under the power granted to them by state statute, are empowered to grant exemptions.[69] Assessors are agents of the state, authorized by legislative authority to grant exemptions if presented with satisfactory written evidence by the entity seeking exemption.[70] Assessors also possess the potent authority to require

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tion, fit within the general purposes of congressional policy furthering housing for elderly and handicapped persons. *See id.* at 584-85. The court did not require an actual quantification of the local benefits provided by the specific nonprofit. *See id.* at 585.

66. MAINE DEP'T OF ADMIN. & FIN. SERV., MAINE PROPERTY TAX LAW: BASIC COURSE 2, 63 (1994). Property tax in Maine is a local government responsibility in incorporated cities, towns, and plantations. In the unincorporated area, the state administers property taxes. *See id.* at 22.

While all real property is subject to taxation, various mechanisms effectively alter the liability for property tax. In addition to allowing exemption for nonprofit and other entities, the state also uses the taxation system to subsidize economic development, for example through tax increment financing. *See* ME. REV. STAT. ANN. tit. 30-A, §§ 5251-5261 (West 1996 & Supp. 1996-1997).

67. Owls Head v. Dodge, 151 Me. 473, 481, 121 A.2d 347, 352-53 (1956). "Taxpayers may appeal to the Board of Property Tax Review, county commissioners, or to the Superior Court for relief from decisions of the county commissioners." [Me.] All St. Tax Rep. (CCH) 2073.

68. MAINE DEP'T OF ADMIN. & FIN. SERV., *supra* note 66, at 63 (citing Silverman v. Alton, 451 A.2d 103, 105 (Me. 1982)). *See also* Hurricane Island Outward Bound v. Vinalhaven, 372 A.2d 1043, 1046 (Me. 1977).

69. *See* MAINE DEP'T OF ADMIN. & FIN. SERV., *supra* note 66, at 63.

70. *See id.* The Bureau of Taxation directs its assessors to verify statutory eligibility for exemption by insisting on: "a fiscal report for the corporation's preceding fiscal year, a copy of the property deed, a copy of the articles of incorporation filed

taxpayers to furnish, under oath and in writing, lists of their property, its nature, situation, and value.[71] Municipalities do not possess the power to establish exemptions. This derives from the theory that, if they did, local majorities could, by vote, unfairly single out those on whom the burdens of taxation fall.[72]

Maine statute provides two categories of locally exempt property that are relevant to nonprofit conservation organizations: "real estate . . . owned and occupied or used solely for their own purposes by benevolent and charitable institutions incorporated by this State"[73] and "real estate . . . owned and occupied or used solely for their own purposes by literary and scientific institutions."[74] Nonprofit land conservation organizations are typically classified as benevolent and charitable. The literary and scientific category might apply to certain conservation organizations.[75] A conservation organization claiming a scientific classification must show that science is its "only primary object."[76]

In municipalities where there is a perception that land-owning conservation organizations are not paying their way, assessors may scrutinize applications for exemption and possibly reject them, claiming they do not satisfy the statutory requirements.[77] Past challenges to conservation land exemption claims reveal that entities desirous of such tax exemption must operate within definite boundaries, which the Law Court will scrutinize.[78]

While exemption on a literary and scientific basis is generally strictly construed for nonprofit organizations, the claim to a benevo-

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with the Maine Secretary of State, a copy of the by-laws and a description of how the various elements of the property are being used." *Id.* at 65.

71. *See* ME. REV. STAT. ANN. tit. 36, § 706 (West 1990 & Supp. 1996-1997).

72. That the power to tax and grant exemptions vests exclusively in the legislature was first forcefully asserted in *Brewer Brick Co. v. Brewer*, 62 Me. 62 (1873), which invalidated Maine statutes giving municipalities discretion to dispense certain property tax exemptions. The Law Court likened such exemptions to raising tax money and giving it away, in derogation of the principle that assessments must be public. The Law Court stated: "To have uniformity of taxation, the imposition of, and the exemption from taxation, must be by one and the same authority—that of the legislature." *Id.* at 74. *See also* ME. CONST. art. IX, § 9 ("The Legislature shall never, in any manner, suspend or surrender the power of taxation.").

73. ME. REV. STAT. ANN. tit. 36, § 652(1)(A) (West Supp. 1996-1997).

74. *Id.* § 652(1)(B) (West 1990).

75. Telephone Interview with David Ledew, Property Appraiser, Maine State Bureau of Taxation (July 1995).

76. Hurricane Island Outward Bound v. Vinalhaven, 372 A.2d 1043, 1047 (Me. 1977).

77. The uncertainty of local tax exemption policy for conservation land may cause the nonprofit to take legal action. In *Nature Conservancy of the Pine Tree State, Inc. v. Town of Bristol*, 385 A.2d 39 (Me. 1978), the land conservation organization sought a declaratory judgment to determine the tax exempt status of land it owned.

78. *See infra* note 83.

lent and charitable exemption is treated more liberally by the Law Court. Thus in *Hurricane Island Outward Bound v. Vinalhaven*,[79] the Law Court rejected Outward Bound's claim to a section 652(1)(B) scientific organization exemption because there was no statement in the outdoor school's charter that its objects were exclusively scientific.[80]

In *Silverman v. Town of Alton*,[81] even a wildlife sanctuary incorporated as a charitable trust for the sole benefit of the University of Maine—itself a valid literary and scientific institution—was deemed non-exempt.[82] The mere creation of a sanctuary for the protection of wildlife did not bring into being a scientific institution, notwithstanding the fact that the sanctuary permitted or encouraged scientific studies or educational uses.[83] The court found that the trust's primary purpose was to create a haven for wildlife, and that the scientific objectives were merely incidental.[84]

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79. 372 A.2d 1043 (Me. 1977).

80. *Id.* at 1047. The Law Court restated this rule in *Nature Conservancy of the Pine Tree State, Inc. v. Town of Bristol*, 385 A.2d at 41 n.3. While the distinction between exemption for literary and scientific and the exemption for charitable and benevolent purposes may appear trivial, it shows the presence of the boundaries within which conservation organizations are permitted to operate.

81. 451 A.2d 103 (Me. 1982).

82. *See id.* at 106.

83. *See id.* The court rejected the University's claim that it held equitable title as sole beneficiary of the trust. *See id.* The Court found that this interest did not qualify the trust for exemption based on the University's exempt status. *See id.* Only property owned and occupied by the charitable organization or used solely for its own purposes will be exempted from property taxation. *See* ME. REV. STAT. ANN. tit. 36, § 652(1)(A) (West 1990 & Supp. 1996-1997). In *Silverman*, the trustees of the sanctuary had significant powers precluding the University's exclusive use or occupation. *See* Silverman v. Town of Alton, 451 A.2d at 106.

The exclusive use or occupation requirement limits exemption of conservation land in other ways. In *Nature Conservancy of the Pine Tree State, Inc. v. Town of Bristol*, 385 A.2d at 42, the Law Court held that tax exemption is precluded where a grantor transfers title to a charitable organization but reserves rights of access, passage, or custodianship. The court stated:

> We hold that the intendment of [ME. REV. STAT. ANN. tit. 36, § 652(1)(A)] is to deny the tax exemption where there is an attempt by grantors to reserve private rights of use without the incident burden of paying taxes for the enjoyment of the property. The word "solely" is employed to indicate that a grantor who conveys property to the charitable institution may not retain any strings in terms of use.

Id. at 43. This rule does not preclude exemption of property used by an ancillary service that is not profit-oriented and is reasonably related to the principal purpose of the charitable institution. *See* Maine Medical Ctr. v. Lucci, 317 A.2d 1, at 3 (Me. 1974) (upholding exemption for hospital parking facility that charged fees where purpose of facility was "reasonably incident to the major purpose for which a benevolent and charitable institution is incorporated"). *But see* City of Lewiston v. Marcotte Congregate Hous., Inc., 673 A.2d 209 (Me. 1996) (applying liberal interpretation of "charitable purposes" while denying exemption to a building, 18% of which was not used solely for the organization's charitable purpose).

84. Silverman v. Town of Alton, 451 A.2d at 106.

In *Holbrook Island Sanctuary v. Brooksville*,[85] the Law Court found a charitable organization's wildlife sanctuary was not inherently exempt from taxation.[86] This holding, that a benefit to wild animals did not equate to a benefit to the community and was therefore not charitable, might be assessed differently by a court with a modern awareness of the public benefits of ecosystem preservation. Yet it should allay the belief that *any* undeveloped land held by any organization may be deemed exempt. The sanctuary also failed to qualify as a scientific institution, despite the facts that the area was available for nature study, observation and photography, and that the site housed a library on nature and conservation.[87]

While few Maine cases have considered organizations dedicated to land conservation, these organizations are most likely to satisfy exemption requirements by incorporating as charitable and benevolent organizations. *Town of Poland v. Poland Spring Health Institute, Inc.*[88] represents the current, more liberal interpretation of the benevolent and charitable classification. In *Poland Spring Health Institute*, the town challenged the medical center's tax-exempt status, claiming that the Institute's religious affiliation compromised its benevolent and charitable purposes.[89]

In rejecting the town's argument, the court reaffirmed the fairly nonspecific test for benevolent and charitable tax exemption status set out in *Green Acre Baha'i Institute v. Town of Eliot*.[90] To determine whether an organization is tax-exempt:

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85. 161 Me. 476, 214 A.2d 660 (1965).

86. *See id.* at 484-86, 214 A.2d at 664-65.

87. *See id.* at 488, 214 A.2d at 667. The court found these "uses too small on which to place the plaintiff in the ranks of scientific institutions." *Id.*

88. 649 A.2d 1098 (Me. 1994). The court construed benevolent as "synonymous with the word charitable." *Id.* at 1100 (citing Maine AFL-CIO Housing Dev. Corp. v. Madawaska, 523 A.2d 581, 584 (Me. 1987)).

See also City of Lewiston v. Marcotte Congregate Hous., Inc., 673 A.2d 209 (Me. 1996). In *Marcotte*, the State Board of Property Tax Review had allowed Marcotte Congregate House (MCH) an exemption from property tax, even after finding that the nonprofit leased a portion of its building worth 18% of its value to private physicians and nonsubsidized housing tenants. The Board exempted the remaining 82% of the building's value. The Law Court denied MCH the exemption entirely by virtue of the fact that the lessees were not exempt organizations and therefore the property was not "occupied or used solely for their own purposes by one or more other [qualifying] organizations." *Id.* at 212. The *Marcotte* decision suggests the readiness of municipalities, as well as the Law Court, to hold nonprofit organizations to the letter of the exemption statute. *Marcotte* sent shock waves through the ranks of nonprofit organizations in Maine, and caused many of them to scrutinize their operations for potentially for-profit activities. *See, e.g.* Dave Boardman, *Court Ruling a Tax Woe for College*, TIMES RECORD (Brunswick, Me.), May 21, 1996 at 1 (tax assessor considering challenge to Bowdoin College's property tax exemption for campus building in which private travel agency rents space).

89. Town of Poland v. Poland Spring Health Inst., 649 A.2d at 1100.

90. 150 Me. 350, 354, 110 A.2d 581, 584 (1954).

> [T]here must be a careful examination to determine whether in fact the institution is organized and conducting its operation for purely benevolent and charitable purposes in good faith, whether there is any profit motive revealed or concealed, whether there is any pretense to avoid taxation, and whether any production of revenue is purely incidental to a dominant purpose which is benevolent and charitable. When these questions are answered favorably to the petitioner for exemption, the property may not be taxed.[91]

As the seminal case for determining qualification for exemption, *Green Acre* provides a surprisingly superficial definition of what an organization must show to be deemed charitable under the exemption statute. As in numerous other jurisdictions, "purely benevolent" and "charitable purposes" are left wholly undefined.[92]

This lack of a specific definition seems finally to have been at least tentatively grappled with in the Law Court's most recent opinion on the definition of benevolent or charitable purpose. In *Episcopal Camp Foundation, Inc. v. Town of Hope*,[93] the Law Court provided a test of charitable purpose that relies heavily on a quid pro quo analysis by which the charitable institution legally merits its exempt status if it "relieves the government" of part of its burden "[by] conferring a pecuniary benefit upon the body politic . . . ."[94] The Law

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91. Town of Poland v. Poland Spring Health Inst., 649 A.2d at 1100 (quoting Green Acre Baha'i Inst. v. Town of Eliot, 150 Me. at 354, 110 A.2d at 584).

92. Leaving charitable largely undefined is not uncommon. *See* WELLFORD & GALLAGHER, *supra* note 9, at 127-29.

93. 666 A.2d 108 (Me. 1995).

94. *Id.* at 110. The court described a charity as being

> for the benefit of an indefinite number of persons, either by bringing their minds or hearts under the influence of education or religion, by relieving their bodies from disease, suffering, or constraint, or by assisting them to establish themselves in life, erecting or maintaining public buildings or works or otherwise lessening the burdens of government.

Id. (quoting Johnson v. South Blue Hill Cemetery Ass'n, 221 A.2d at 280, 287) (Me. 1966).

The characterization of charitable activities as those which assume a burden that government could or might otherwise carry seems to have roots in the English Charitable Uses Act. *See* English Charitable Uses Act of 1601, 43 Eliz., ch. 4 (Eng.). Interpreting the extent of the charitable classification, which had been under criticism for abuses, Lord Macnaghten in 1891 found that there were four principal purposes that satisfied the legal definition of charity, as opposed to the popular definition. The four classifications were: the relief of poverty, the advancement of education or religion, and "*for other purposes beneficial to the community, not falling under any of the preceding heads.*" Commissioners for Special Purposes of the Income Tax v. Pemsel, [1891] App. Cas. 531, 580-83 (appeal taken from C.A.) (emphasis added).

In the closely-related realm of construing allegedly charitable testamentary trusts, the standards applied are frequently the same (and similarly as broad) as those often used to determine whether organizations are charitable. The *Restatement of Trusts* mirrors Lord Macnaghten's statement with a similar category of "charitable trusts for the Promotion of Other Purposes Beneficial to the Community." RESTATEMENT

Court upheld the trial court's finding that the organization's program that integrated religious teachings, moral instruction, social living, and civil responsibility was well within the relieving-government-burdens requirement set out in the *Johnson v. South Blue Hill Cemetery Association* definition of charitable.[95]

While the requirement that organizations qualify as charitable by "lessening the burdens of government" is rather general, it provides a more functional test of "charitable" than the prior, circular standard that property "is exempt from taxes if it is used to further the organization's charitable purposes."[96] On the other hand, by stating that a charitable organization is merely being given a quid pro quo for its services in providing something which otherwise the government would have to provide, *Episcopal Camp Foundation* leaves open the question of precisely what the government *is* obligated to provide.

Municipalities may argue in the future that government has no actual obligation to provide *any* quantum of open space, wildlife habitat, or undeveloped land, and therefore that a conservation organization should not qualify as exempt. Such litigants are likely to seize on language such as that cited by the dissent in *Episcopal Camp Foundation*: "Implicit . . . in each case that presents the issue whether an organization has been conducted exclusively for charitable purposes is an evaluation of its activities to determine if they alleviate a public need 'which otherwise the government would have to provide.'"[97] This dissenting opinion would read into the charitable exemption statute and precedent a stringent government obligation requirement that exemption be denied for organizations whose services are not those that government is bound to provide.[98]

Conservation interests might have difficulty countering the scrutiny that this dissenting view extols; nevertheless, they could cite numerous legislative determinations of the critical importance of natural resources to the state's economy and the well-being of its citizens. For instance, in 1988 Maine voters approved a thirty-five million dollar bond issue for acquisition of fee ownership of conservation land.[99] The fact that insufficient revenues prevented further

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(SECOND) OF TRUSTS § 374 (1959). This section reads: "Promotion of Other Purposes Beneficial to the Community. A trust for the promotion of purposes which are of a character sufficiently beneficial to the community to justify permitting property to be devoted forever to their accomplishment is charitable." *Id.*

95. *See* Episcopal Camp Found. v. Town of Hope, 666 A.2d at 111.

96. Town of Poland v. Poland Spring Health Inst., 649 A.2d at 1100.

97. Episcopal Camp Found., Inc. v. Town of Hope, 666 A.2d at 111 (Glassman, J., dissenting) (quoting YMCA of Germantown v. City of Philadelphia, 187 A. 204, at 210 (Pa. 1936)).

98. *See id.*

99. *See* Findings, Land for Maine's Future Fund, ME. REV. STAT. ANN. tit. 5, § 6200 (West 1989 & Supp. 1996-1997) ("[P]ublic interest in the future quality and

reauthorizations of the Act lends some credence to the position that land conservation organizations—operating with the same conservation purposes as the Land for Maine's Future Board—are in fact relieving the government of the obligation to carry out its articulated policies. In *Episcopal Camp Foundation* terms, they are "conferring a pecuniary benefit upon the body politic."[100] Yet short of a constitutional or legislative statement that the state must provide open space to its citizens, a strict application of the relieving-government-burden test might well leave land conservation a non-exempt activity.

The most obvious difficulty of a strict government obligation theory is that the apparent obligations of government are constantly in flux. The answer to the question of whether financial relief for the cost of fuel during the winter is an obligation owed by government to elderly persons changes with congressional and legislative temperaments. Yet to deny exemption to a charitable organization dedicated to providing energy to the indigent elderly merely because government is not currently obligated by law to provide such relief would be an arbitrary standard. It carries the lessening of the burdens of government test to an illogical extreme.

Another possible and unintended result of this type of strict interpretation is that, when laws requiring government to provide goods are repealed, the nonprofit sector is often called upon to fill the resulting vacuum, a phenomenon as likely in the context of medical benefits as in land acquisition for public use. Yet, ironically, precisely when the governmental obligation is removed by legislative act, a strict application of the government obligation test would remove the nonprofit's tax-exempt status. Such a judicial interpretation is possible. In some jurisdictions certain types of exemptions have, in fact, been allowed or disallowed by the courts based on whether government is required to provide the service at issue.[101]

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availability for all Maine people of lands for recreation and conservation is best served by significant additions of lands to the public domain.").

100. Episcopal Camp Found., Inc. v. Town of Hope, 666 A.2d at 110 (quoting Johnson v. South Blue Hill Cemetery Ass'n, 221 A.2d at 287). *See also* ME. REV. STAT. ANN. tit. 5, § 6200 (West 1989 & Supp. 1996-1997) which provides:

> The Legislature further finds that Maine's private, nonprofit organizations . . . have made significant contributions to the protection of the State's natural areas and . . . should be encouraged to further expand and coordinate their efforts by working with state agencies as "cooperating entities" in order to help acquire, pay for and manage new state acquisitions of high priority natural lands.

Id.

101. Although now overruled, the opinion in *Brattleboro Child Development Inc. v. Town of Brattleboro*, 416 A.2d 152 (Vt. 1980) conceded that the day care facility's services were beneficial to the general public but nonetheless denied it property tax exemption in the classification of land used for public uses or schooling. The court stated: "[T]he particular function of child day care is not now recognized as an obli-

A final and not unimportant legal test for tax-exempt status that the Maine Law Court has now implicitly recognized is whether the organization's members and other donors provide the bulk of its revenues.[102] *Episcopal Camp Foundation* found the fact that the charity could not operate without substantial donations an indication of charitable status.[103] This legal rationale is consistent with the economic theory posited in Part II—that nonprofit organizations are private market providers of public goods supported by at least a modicum of financial donations, and enjoyed by both patrons and free riders.[104] The exemption of conservation land in general meets this requirement. The land is obtained and purchased in the typical case by a local or regional land trust which has raised most of the funds through donations from its members and local citizens.

State statute and common law have evolved tests which consider, at least in broad terms, the costs and benefits of nonprofit activity to society as a whole. Judicial decisions on exemptions for charitable organizations interpret statutes rationally and are supported by accepted social and economic theory. Therefore, to the extent that inequities persist at the local level, their resolution may lie in legislatively enacted mechanisms. The balance of this Comment discusses the prospects of such mechanisms, existing and potential, and analyzes current use taxation as the conservation organization's other option for reducing, though not eliminating, taxes on the lands it conserves in the public interest.

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gatory municipal service in this state. [The day care facility] does not, therefore, assume a burden of the municipality to provide a service which the legislature has determined to be an essential governmental function." *Id.* at 155. The decision was overruled in *American Museum of Fly Fishing, Inc. v. Town of Manchester*, 557 A.2d 900 (Vt. 1989).

See also discussion *infra* Part V. In the specific realm of hospital tax exemptions, the Pennsylvania Supreme Court has set higher standards that hospitals must meet: they must advance a charitable purpose, donate a substantial portion of their services, benefit a substantial and indefinite class of persons who are subjects of charity, relieve the government of some of its burden, and not operate with a profit motive. *See* Hospital Utilization Project v. Commonwealth, 487 A.2d 1306, 1317 (Pa. 1985).

102. *See* Episcopal Camp Found., Inc. v. Town of Hope, 666 A.2d at 111 (citing City of Bangor v. Rising Virtue Lodge No. 10, 73 Me. 428, 434 (1882)).

103. *See id.*

104. Precisely the same rationale has been applied to tort law immunity for nonprofits under common law principles for charitable organizations; immunity may be abrogated when most of an organization's funds come from fees as opposed to donations, or negligence occurs in the course of activities that are primarily commercial in nature. *See* Child v. Central Maine Med. Ctr., 575 A.2d 318, 319 (Me. 1990) ("an organization . . . which receives and administers virtually no charitable gifts or donations is not entitled to immunity from liability for its torts"). *See also* Janet Fairchild, Annotation, *Tort Immunity of Nongovernmental Charities—Modern Status*, 25 A.L.R. 4TH 517, 558-59 (1983); 15 AM. JUR. 2D *Charities* § 211 (1976).

IV. CORRECTING THE OVERDEPENDENCE ON THE PROPERTY TAX

The New England states are above the national norm for the percentage of local revenues attributable to property tax, and at approximately fifty percent, Maine is well above it.[105] Even at much lower levels, the property tax generates high levels of citizen involvement and nearly universal unpopularity.[106] At levels as high as Maine's, a state becomes susceptible to political pressures effecting radical changes in the tax structure.[107] If the legislature does not satisfy the demands of the electorate, citizen referendum or initiative will.[108] The heart of such measures is often a limit on the total property tax rate to a given percentage of the property's full cash value, a requirement for a super-majority to enact new taxes or override the limitation imposed by the statute, and a reimbursement requirement for state-imposed municipal services.[109]

While the degree of success of property tax limitations is debated, it is fair to characterize them as last resorts, prompted by a failure of legislatures to craft solutions to an excessive dependence on the property tax.[110] Absent this dependence, the property tax has been recognized as an efficient means for local governments to provide a level of services that local residents are willing to support through taxation. In theory, citizens will move to municipalities that provide the services they desire at a tax cost that they can afford.[111] An

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105. *See* Dearborn, *supra* note 2, at 11.

106. *See* Mields, Jr., *supra* note 6, at 17 (unpopularity of property tax is exceeded only by that of the income tax.)

107. The overreliance on the property tax is no secret to the Maine legislature. *See* ME. REV. STAT. ANN. tit. 30-A, § 5681(1)(B) (West 1996) ("To stabilize the municipal property tax burden and to aid in financing all municipal services, it is necessary to provide funds from the broad-based taxes of State Government.").

108. *See infra* note 120 and accompanying text (discussing Massachusetts Proposition 2½).

109. *See generally* ARLO WOOLERY, PROPERTY TAX PRINCIPLES AND PRACTICE 69-76 (1989). The California Proposition 13 initiative amended the state constitution to: (1) limit the *ad valorem* tax on real property to one percent of full cash value, (2) freeze property values as of March 1, 1975, or as of the date property changes ownership or is newly constructed, (3) limit annual adjustments for inflation to two percent for any one year, (4) bar state and local governments from imposing new *ad valorem* taxes on real property or on its sale, and (5) require a two-thirds vote of the legislature for new or increased taxes and a two-thirds vote of the electorate to increase or add new local taxes. *See id.* at 71-72.

110. *See* WOOLERY, *supra* note 109, at 69-70.

111. *See id.* The Tiebout model is the pioneering theoretical construct describing the phenomenon. *See* Charles Tiebout, *A Pure Theory of Local Expenditures*, 64 J. POL. ECON. 416 (1956) *reprinted in* GILLETTE, *supra* note 6, at 377, 378 ("Given [local government] revenue and expenditure patterns, the consumer-voter moves to that community whose local government best satisfies his set of preferences."). *But cf.* Vicki Been, *"Exit" as a Constraint on Land Use Exactions: Rethinking the Unconstitutional Conditions Doctrine*, 91 COLUM. L. REV. 473, 514-18 (1991) (questioning

excessive dependence on the property tax, however, would seem to skew the relationship: those who own property perceive that they are being overburdened by those who do not own property, the free rider phenomenon[112] is accentuated, and property owners are likely to be induced to organize at the state level behind some form of tax cap legislation.[113]

The tax cap referendum recently proposed in Maine[114] is similarly symptomatic of the overreliance on the property tax. But opposition to the proposed Maine referendum by coalitions of businesses, schools, and municipal leaders suggests that unnecessary limitations on local government could be avoided if legislatures would facilitate other funding sources for municipalities.[115] Legislatures might also help prevent the perceived overvaluations in real estate caused by inflated land values by numerous mechanisms.[116]

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whether citizens actually have ample choice of communities in which to live and whether levels of taxation and public service are critical factors).

112. *See* GILLETTE, *supra* note 6, at 39 (describing actors who "can obtain a benefit without making any contribution toward its creation as long as someone else is willing to produce the benefit").

113. Commentators have noted that the Tiebout model breaks down where dissatisfied citizens can neither exit their community nor effect change locally. At such a juncture they "may find it easier to coalesce at the state level. . . . [T]he state is the forum for those who are excluded from the local decision-making process." GILLETTE, *supra* note 6, at 508. Recourse to either state legislation or to referenda for property tax *exemption* reform has not seemed to have reached the critical mass apparent in successful tax reform measures in general.

114. The proposed Maine ballot question reads: "Do you want to change Maine law to limit property taxes to 1 percent of the full cash value of the property?" Citizen initiative filed with Maine Attorney General, Jan. 29, 1996. Opponents claimed that the one percent limit would have reduced local property tax revenues by 41%, or $428 million statewide, and that Portland would have lost $31 million of its $77 million in property taxes. *See* Maine Citizens for Responsible Government, Fact Sheet, Feb. 6, 1996; Steven G. Vegh, *Opponents: Tax Cap Threatens Town, Cities*, PORTLAND PRESS HERALD, Jan. 31, 1996, at 4B.

The tax cap proposal was rejected by Maine Secretary of State Bill Diamond on February 16, 1996, for lack of sufficient valid signatures. *See* Francis X. Quinn, *Diamond Rejects Tax-cap Initiative*, PORTLAND PRESS HERALD, Feb. 17, 1996, at 1A. It should be noted that the constitutionality of tax cap measures need not be an issue if the legislation is carefully drafted—California's Proposition 13 easily survived an equal protection challenge in the eight to one United States Supreme Court ruling in *Nordlinger v. Hahn*, 505 U.S. 1 (1992), which held that California's acquisition-value taxation system benefiting longer-term property owners at the expense of newer owners had rational basis, created no suspect classification subject to strict scrutiny, and posed no threat to any fundamental interest.

115. Vegh, *supra* note 114, at 4B.

116. For example, legislation could allow a landowner to make an election for a five-year moving average of taxable values as a basis for the current year's property taxes. *See* WOOLERY, *supra* note 109, at 28-29. This method would provide the revenue stability during periods of inflation and deflation which has long been hailed as the primary virtue of the property tax for municipalities. At the same time, it would save taxpayers from the type of unpredictable assessments that generate emotional attacks on the property tax in the first place. *See id.*

Citizen-initiated tax limits should not be dismissed out of hand. Proponents cite numerous benefits, including increased state funding for local government services and public education.[117] Proponents of citizen-initiated tax limits also claim that the strict limits on the percentage of local valuation that may be placed on the property tax under California's Proposition 13, for example, did not result in many substantive reductions in local government services.[118] The indisputably reduced revenues[119] have arguably been made up by state aid, and the State of California has assumed primary responsibility for public school financing.[120]

The Maine initiative had the apparent potential to hamstring many local government operations. Ironically, an ensuing beneficial effect of such a measure would likely be to build political support for other revenue sources to complement the property tax, while at the same time rendering tax exemption less of a target. Perhaps the best solution, then, would blend a careful reduction of dependence

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117. *See id.* at 97.

118. *See id.*

119. Property tax levies in California declined 52.2% in 1979. *See id.* at 73.

120. *See id.* Massachusetts enacted a similar measure in 1980, Proposition 2½, limiting the total property tax rate to 2½% of full and fair cash value of taxable property. *See id.* at 74. It also required any jurisdiction with a tax rate over 2½% to lower its rate to 2½%, and limited annual increases to 2½%. *See id.* At the same time, the state was required to reimburse municipalities for state-mandated expenditures, and allowed for local override of Proposition 2½ provisions only by a two-thirds majority vote. *See id.*

The "outstanding success" attributed by many to the resulting reductions in the growth of local government, *see* WOOLERY, *supra* note 109, at 75, deserves critical examination, because the economic prosperity in the decade after its enactment appears to have been a short-lived boom. Elsewhere, Woolery worries that Proposition 13, for example, has precluded the possibility of the property tax to respond to valid revenue needs in the face of a declining value base. *See* WOOLERY, *supra* note 109, at 28.

Tax cap legislation may also include mechanisms to limit annual rate increases, as opposed to percentage limits on total local valuation. This is preferable because percentage limits on total local valuation can be crippling during recessionary periods when land values drop. *See* Dearborn, *supra* note 2, at 12.

States or municipalities can place limits on the following: (1) the total amount of property taxes collected by the jurisdiction, (2) the total revenue available to the jurisdiction, or (3) the total revenue that can be raised by property taxes. *See* WOOLERY, *supra* note 109, at 70. There are three less direct mechanisms: (1) limits on the amount a jurisdiction can spend each year, (2) limits on the amount the jurisdiction's spending can increase each year, or (3) limits based on a fixed percentage of an economic indicator such as personal income or the rate of inflation. *See id.* at 71.

"Truth in taxation" legislation is another strategy by which local assessors are required to inform taxpayers of how much the local tax rate would have to be reduced in order to produce tax revenues the same as the prior year. *See id.* The goal of such disclosure laws is to prevent public officials from increasing spending without first engaging in public discourse. *See id.*

on the property tax with complementary modifications in exemption law.

A. *Diversifying the Tax Base*

Political support is thought to be the prerequisite to any effective property tax reform.[121] Conventional wisdom suggests that there is a certain measure of political safety in keeping residential property taxes at the lowest level possible consistent with the revenue needs of a taxing jurisdiction.[122] The solutions examined below would tend to cause property to be taxed at lower levels and thus should enhance the political capital of their legislative proponents.

In the wake of Proposition 13, California localities resorted to user fees, exactions, and leaseback arrangements, which generally were sustained by the state supreme court even when the locality did not obtain the two-thirds popular majority required for new taxes.[123] Local officials also sought voter support, with limited success, for special purpose taxes for libraries, transit, and fire and police protection.[124] Commentators cite both the aggregate amount of taxation and the distribution of the tax burden as motivating factors in tax reform.[125] This suggests that neither diversifying taxes nor reducing the property tax alone is certain to solve popular unrest with the overall tax structure. Both strategies are necessary.[126]

B. *Local Option Taxes*

While property taxes make up an above-average percentage of total state revenues in Maine, the dependence on the property tax at the local level is even more stark. At 98.6%, Maine is one of the top five states in the country in a ranking of property taxes as a percent-

121. *See* WOOLERY, *supra* note 109, at 31 ("Could it be that [the property tax] offers greater political opportunity to more politicians at more levels of government than any other tax ever devised?"). *See also* JANE MALME, PREFERENTIAL PROPERTY TAX TREATMENT OF LAND 8 (1993) ("There is general agreement that a diversified revenue system is desirable, with a balance of funding from taxes on income, consumption and wealth so that tax rates on each object of taxation may be kept at a reasonably low level.").

122. *See* WOOLERY, *supra* note 109, at 38 ("Policy makers . . . tailor their distribution of property tax burdens to obtain maximum political advantage with minimal political damage.").

123. *See* DAVID O. SEARS, TAX REVOLT 245 (1993).

124. *See id.* at 245-46.

125. *See id.* at 4-5.

126. The difficulty of singling out the causes for citizen discontent is further evidenced by surveys about Proposition 13 in California, which show that the taxpayer whose main complaint was the property tax was likely to support limits on the state income tax as well. *See id.* at 4-7. Commentators then explain the tax revolt as a public protest of overall government spending, but they too are contradicted by surveys that consistently show the public desire to maintain the level of government service. *See id.*

age of total municipal taxes.[127] This is well above the national average of 75.7% and a universe above the opposite end of the spectrum, in Louisiana and Alabama, where local property taxes contribute 41% and 36%, respectively.[128] In addition to significant variance among the states, percentages within states vary even more widely, with some major cities relying on the local property tax for only approximately one-tenth of their total tax revenues.[129] A common factor allowing low local property tax rates are state statutes permitting local alternative taxes on sales and income.[130]

Reducing the dependence on local property tax, and thus easing the hostility toward exemptions granted for socially beneficial uses could, in part, be achieved by the creation of local option taxes on meals, accommodations, or sales. Critics have concerns that such taxes are regressive in that they are proportional and thus tend to exact a higher percentage of total income from poorer than from wealthier families.[131] Yet the exclusion of groceries, medicine, and other necessities—as well as the expected tendency for wealthier families to purchase more discretionary items—should cause wealthier families to pay a higher percentage of the total sales tax than would lower-income families.[132]

No municipality in the State of Maine currently imposes local sales or use taxes.[133] Some states have constitutional provisions granting municipalities this capability as part of their home rule power.[134] Florida provides an example of the mix of local taxes that

127. *See* Dearborn, *supra* note 2, at 11 (citation omitted).

128. *See id.*

129. St. Louis and Columbus rank lowest at 12.5% and 8.5%, respectively. *See id.* at 12 (citing PHILIP M. DEARBORN ET AL., City Finances in the 1990s (1992)).

130. *See id.* at 11; *see also* Gary C. Cornia, *State and Local Revenues, 1978-88, in* A LOOK AT STATE AND LOCAL TAX POLICIES 3, 17 (Frederick D. Stocker, ed., 1991) (citing data that show growing importance of local sales tax, largely on account of its "acceptability and productivity").

131. *See* WOOLERY, *supra* note 109, at 41. Voters may share these concerns. Michigan voters in 1993 defeated a referendum that would have allowed a 50% increase in sales tax in return for a cap on local property tax and a guaranteed minimum in state per capita school aid. In the same year a similar proposal in Montana lost overwhelmingly. *See* Mields, *supra* note 6, at 17. *See also* Harold Hovey, *State and Local Tax Issues in the 1990s, in* A LOOK AT STATE AND LOCAL TAX POLICIES, *supra* note 130, at 67.

132. *See* WOOLERY, *supra* note 109, at 41.

133. *See* Severin M. Beliveau & Michael L. Sheehan, *Maine Sales & Use Taxes, in* ABA SALES AND USE TAX DESK BOOK, 1994-95 ed., at 20-4 (D. Michael Young & John T. Piper eds., 1994).

134. For example, "Colorado home rule cities enjoy plenary constitutional authority over the imposition, collection and uses of local sales taxes." John E. Hayes & Paul D. Godec, *Taxation Innovations: Enhanced Sales Tax Incentive Programs*, 22 URB. LAW. 143, 156 (1990). Hayes and Godec present a strong case for a further extension of local option taxes called "Enhanced Sales Tax Incentive Programs" [hereinafter ESTIP], which they believe to be superior to conventional tax increment financing. *See id.* at 157. An ESTIP entices local retailers to invest in im-

can diversify revenue sources and lessen pressure on the property tax. In the face of curbs on state monies and increasing demands for services at the local level, Florida implemented local discretionary sales surtaxes (including a local government infrastructure surtax),[135] local option gas taxes,[136] a local occupational license tax,[137] and a municipal revenue-sharing program.[138]

Neither the Maine Constitution nor state statute makes any mention of the taxing powers of municipalities save for property taxes and local license taxes.[139] However, the justices of the Maine Supreme Judicial Court have given their opinion that it would be constitutional for the legislature to allow a city to impose a one percent gross receipts tax without concurrently providing the same power to all other municipalities.[140] Because it is an open question as to whether such taxes are authorized under state law, the Maine Legislature would likely be the place for a local option tax to be legitimized. Enabling legislation could give cities and towns the ability to add a one-half or one percent tax, for example, on purchases in designated categories.

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provements that are both public in nature and in proximity to their businesses, by guaranteeing the participating retailers a share in an agreed upon percentage of the incremental increase in municipal sales taxes received from the time the retailer completes the improvement until an agreed upon future date. *See id.* at 143-44.

Conceptually, the scheme benefits both businesses and the municipality. The retailers stand to increase their sales while making valuable improvements at a reduced cost. The municipality benefits by an expanded tax base, expanded tax revenues, and public improvements at no public cost. *See id.* at 157. ESTIPs offer the additional advantage of requiring no bond issues as do conventional tax increment financing schemes. *See id.*

135. *See* Mary Kay Falconer et al., *Local Government Revenues Post 1993 Legislative Session: A Combination of New and Improved*, 21 FLA. ST. U. L. REV. 585, 589-94 (1993). By Florida statute, one-half of one percent or one percent may be set as the local surtax on all taxable transactions, if approved through a local referendum. *See id.* at 589-90. The use of the tax proceeds was originally limited to financing, planning, and constructing infrastructure, but is now allowed for the closing of municipal or county-owned landfills and the purchase of emergency vehicles. *See id.* at 590-91, 593. Municipalities may also share the proceeds with school boards or use the funds to acquire land for public recreation, conservation, or for the protection of natural resources. *See id.* at 591.

136. Nearly all counties in Florida levy the legislatively authorized motor fuel surtax of one to six cents. *See id.* at 594-95 (citing FLA. STAT. ANN. § 336.021(1) (West 1991 & Supp. 1997)). The county tax may be approved by majority vote of the governing body or by referendum, and inter-local agreements can be made for allocation of funds to municipalities. *See id.* at 594, 596. Maine's gasoline tax is state-imposed. ME. REV. STAT. ANN. tit. 36, § 2903 (West 1990 & Supp. 1996-1997).

137. Under Florida law, municipalities can assess a local occupational license tax for the express purpose of raising general revenue for local government, separate and distinct from license fees, which are essentially limited to covering the cost of regulating the particular type of business. *See* Falconer, *supra* note 135, at 601-02.

138. *See id.* at 613-16.

139. *See* [Me.] All St. Tax Rep. (CCH), *supra* note 67, ¶ 72-001.

140. Opinion of the Justices, 159 Me. 420, 424-27, 191 A.2d 627, 630-32 (1963).

The foregoing ideas are aimed at reducing reliance on the property tax but do not independently solve the inequities of property tax exemption in Maine. They are significant in that they can and should be part of a several-prong strategy to improve a system that is not fully in balance.

V. How Much of an Exemption is Fair? Devising a Mechanism to Counter Local Inequities

Chief among the deficiencies of the local property tax system is its tendency to exacerbate tensions between the state and its municipalities. Broad categories of exemption—legacies from the nineteenth century—remain codified despite legislatures' limited awareness of how exemptions will be distributed geographically in a state. States grant the property tax exemption in broad categories without an understanding of who will bear the burden of the subsidy. While exemption is created at the state level, the fiscal impact is most acutely felt at the local level by the shift of tax burden to other, non-exempt properties. The ensuing disagreements between the municipality and the nonprofit are either litigated in court, or some type of agreement is negotiated. Maine charitable exemption law would be greatly improved if it could somehow gauge the costs and benefits of the various exempt entities, and establish clearer standards for exempt status.[141]

A. A New Tax Exemption Statute for Maine

As discussed in Part II, a government's first available means of ensuring the fairness of exemptions is in legislatively defined requirements for classification as tax exempt. While most states have broad definitions for the charitable purpose required for exemption,[142] some states have adopted tests that seek to measure the value of the charitable activity to society. These either require that the organization's activities relieve a burden of the government or, more commonly, that the activity be one that the government has the power to undertake.[143] One criterion in New Mexico case law, for example, is whether the organization relieves a government expenditure commensurate with the loss of tax revenue.[144]

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141. As a solution to the state-local conflict, one public official has proposed "a tripartite group including state officials, local officials, and dispassionate third parties . . . to consider each tax exemption request rather than have the decision lie with the state solely." Memorandum from Harry H. Dresser, Jr., Selectman, Town of Bethel, Maine (on file with the *Maine Law Review*).

142. *See generally* Wellford & Gallagher, *supra* note 9, at 125-38.

143. *See id.* at 127-28.

144. *See id.* at 130 (citing Mountain View Homes, Inc. v. State Tax Comm'n, 427 P.2d 13, 17 (N.M. 1967)).

Similarly, Vermont organizations seeking exempt status for public uses were formerly required to provide a service that the government is required to provide. Decisions denied exemption, for instance, to a day care center, because the state was not required to provide day care,[145] and a school that taught English to foreign citizens similarly failed because the state has no duty to provide that service.[146] Where the state had an obligation to educate blind children, however, the Vermont Supreme Court ruled a camp for the blind exempt.[147] These decisions were eventually overruled; instead of requiring the exempt organization to provide an "essential governmental function," the Vermont Supreme Court now interprets the exemption statute in a more liberal fashion.[148]

As discussed in Part III, Maine has a rational exemption statute which is interpreted by the Maine Law Court consistently with the statutory language and with the generally accepted societal justifications for exemption to nonprofits that provide public services that the government should or could provide. However, the statutory language is not greatly changed from the 1840s, when the nonprofit presence in many towns was likely limited to the church and the library.[149] Legislators could not envision today's proliferation of nonprofits, some of which have large staffs and payrolls. If a critical mass of property tax payers, town officials, and voters demand an even greater accounting of the purported benefits of property tax exemption, the legislature could set a higher standard.

B. Legislative Scrutiny of Exemptions and Other Tax Expenditures

Officially, the Maine Legislature has recognized that "tax expenditures constitute a permanent reduction in tax revenues of the State and result in an increased tax burden on taxpayers who are not benefited."[150] "Tax expenditures" are defined as "provisions of state law which result in a reduction of tax revenue due to special exclusions, *exemptions*, deductions, credits, preferential rates or deferral

145. *See* Brattleboro Child Dev., Inc. v. Town of Brattleboro, 416 A.2d 152, 155 (Vt. 1980).

146. *See* English Language Ctr., Inc. v. Town of Wallingford, 318 A.2d 180, 182-83 (Vt. 1974).

147. *See* New York Inst. for the Educ. of the Blind v. Town of Wolcott, 262 A.2d 451, 455 (Vt. 1970).

148. *See* American Museum of Fly Fishing, Inc. v. Town of Manchester, 557 A.2d 900, 904-05 (Vt. 1989) ("[W]hile properties which actually provide essential governmental functions may be exempt as a public use, we no longer will require a property to assume such a burden in order to achieve tax-exempt status."); *accord* Kingsland Bay Sch., Inc. v. Town of Middlebury, 569 A.2d 496 (Vt. 1989).

149. *See* DAVID WIHRY, UNIVERSITY OF MAINE, INSTITUTIONAL PROPERTY TAX EXEMPTIONS IN MAINE 19-24 (1975) (describing a steady growth in exempt property from the colonial era to the 1970s).

150. ME. REV. STAT. ANN. tit. 36, § 195 (West 1990).

of tax liability."[151] Consistent with these concerns, the Maine statute calls on a legislative committee to review tax expenditures in a number of categories every four years.[152]

But in practice the overall scrutiny of tax exemptions is limited. In fact, the statute that exempts charitable and benevolent as well as literary and scientific organizations is not among the tax expenditures scheduled for periodic review.[153] This review should occur regularly, at the very least to ensure that legislators can begin to discuss the sharing of costs and benefits, and address the areas where the courts have lacked guidance. For example, a needed discussion is whether to add a specifically defined relieving-public-burden test to the exemption statute, rather than leaving it up to the courts that created the test in the first place.

C. State Compensation for Exemption

If state policy exempts property from taxation to the detriment of local taxpayers and to the general benefit of the commonwealth, a logical theoretical solution is for the state to compensate municipalities for the loss to the extent external benefits exceed local benefits. If the state legislature agrees that the state should bear some burden of local exemptions, the question becomes how to determine the state share. If an exempt organization's local activities provide benefits equal to or greater than the cost of municipal services provided to the organization, the state subsidy should arguably be zero. Conversely, to the extent that the benefits provided by the organization are largely enjoyed by non-local persons, the argument that the state should bear the burden of compensation is stronger. The great challenge in devising an equitable system in the latter situation would be

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151. *Id.* § 196 (emphasis added). Although questioning its legality and claiming the proposition is "typically presented for rhetorical effect," some commentators have called for a system by which legislatures distribute cash grants to nonprofits instead of exemptions. *See* Rosner, *supra* note 14, at 107. Such a system would have the appeal of subjecting the nonprofit property use to periodic scrutiny like other expenditures of public monies, and "would probably serve to constrain the generosity of the legislature . . . ." *Id.*

In stating the case for the status quo, Rosner reveals the political dynamic at the heart of any attempted reform of the exemption statutes:

> [E]xemptions are preferred over cash grants because they insulate exempt organizations from state interference and control, free them from the vagaries of periodic legislative review . . . and most importantly, avoid the need for each organization to reveal its property wealth and justify its subsidy. . . . [S]ome affluent organizations would fare considerably less well in the expenditure process than they have with exemptions.

Id.

152. *See* ME. REV. STAT. ANN. tit. 36, § 198 (West 1990 & Supp. 1996-1997).

153. *See id.* § 652(1)(A), (B).

determining the proportion of the exemption that the state as a whole should bear.[154]

Legislatures in a number of states have created mechanisms for limiting the extent to which the state can create new exempt property without compensating the town for loss of tax revenue. Maine, for instance, adopted a constitutional provision requiring the Legislature to reimburse each municipality for at least fifty percent of the property tax revenue lost as a result of new categories of property tax exemptions or credits enacted after April 1, 1978.[155]

Unfortunately, while such legislation may protect the local fisc in the future and does show the important awareness of excesses in exemption policy, practically speaking it fails to compensate towns for categories of exemptions granted prior to the constitutional enactment. These exemptions constitute the bulk of exempt properties. Since new exempt properties are largely based on exemption categories created prior to 1978, little relief is provided by the state constitution. And, as is often the case, exemption categories that would appear to be new may be creatively classified under categories existing prior to 1978, and legislatures will inevitably phrase such exemptions so as to escape constitutional compensation requirements.[156]

Political inertia would likely resist a legislative attempt to apply the fifty percent reimbursement requirement to exemption categories that existed before 1978.[157] Nonetheless, this strategy has its proponents[158] who argue, for example, that "[t]he cost of exempting these institutions because of their social value would thus be spread across the state rather than being borne . . . by the communities in which they are physically located . . . ."[159] A significant, beneficial

154. *See* Rudnick, *supra* note 30, at 341 ("[T]he local government should remain responsible for that proportion of the exemption that benefits local citizens.").

155. ME. CONST. art. IV, pt. 3, § 23.

156. *See, e.g.*, ME. REV. STAT. ANN. tit. 36, § 458 (West 1990) ("continuation of exemption" of telecommunications personal property) ("It is the intent of the Legislature that this section not be considered a new property tax exemption requiring state reimbursement under the Constitution of Maine . . . .").

157. Another problematic issue is the difficulty of valuation for the bulk of exempt properties—notably colleges, churches, private schools, and hospitals, not to mention government properties. *See* OLDMAN & SCHOETTLE, *supra* note 24, at 344 (referring to analysis by a noted tax expert claiming that "nothing but trouble" can result from attempted valuations of types of properties rarely sold on the market).

158. Municipal assessors have discussed a proposal by which all tax exempt properties would lose their exemptions at five percent per year, providing adequate time, effectively twenty years, to adjust. At the same time, a ceiling would be set such that the entity's tax would never exceed a standardized percentage of full valuation. Telephone Interview with Charles Lane, Esq., Portland City Attorney (June 11, 1996).

159. OLDMAN & SCHOETTLE, *supra* note 24, at 332. Proponents of state compensation for exemption concede the importance of "not only the value [of the property] to the community of the function performed by the institution, but also the

side effect would be to maintain more accurate valuations of tax-exempt property by local assessors, because the opportunity for state-subsidized compensation to the municipality would provide an incentive for more frequent revaluation.[160]

States have successfully compensated municipalities for revenue loss due to exemption. In Connecticut, for example, the state makes in-lieu-of-tax payments for the exempt property of both nonprofit hospitals and private nonprofit institutions of higher education, computed at sixty percent of what the local property tax would be if the property were taxable.[161] With an appropriation of ten million dollars per annum, Connecticut's legislation to compensate exemption tax losses grew out of an existing system for compensating municipalities for the tax lost from exempt state-owned urban facilities, and was seen as a means of lessening strife between institutions and local government.[162]

State compensation for exemption would be a meaningful method of shifting the burden of exemption from local taxpayers to citizens throughout the state. If perceived inequities at the local level rise above a critical threshold, the legislative process, perhaps following the Connecticut model, is available to redistribute the tax burden. If these inequities are as large as some suggest, support of nonprofit activities by the state budget not only may further fairness, but may temper reliance upon imprudent or radical tax reform efforts.

D. Exemption of Government Property

At thirty-three percent, United States government property is by far the largest category of exempt valuation in the state of Maine.[163] A more detailed analysis is necessary to determine the extent to which government property at state and local levels requires signifi-

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effect which that value has on the taxable valuation of other property in the neighborhood or in the community as a whole." *Id.*

160. *See* LENARDSON & BLAISDELL, *supra* note 43, at 9 (suggesting revaluation of tax exempt property no less frequently than at five-year intervals).

161. *See* Rosner, *supra* note 14, at 105-06 (describing CONN. GEN. STAT. ANN. §§ 12-20a to 12-12b) (West 1993 & Supp. 1996)). The compensation is available to the extent of the legislative appropriation in any given year. *See id.*

162. *See id.* at 105. New Jersey and Wisconsin also compensate municipalities for state exempt property. *See id.*

163. *See* LENARDSON & BLAISDELL, *supra* note 43, at 5. In some western states, government property occupies as much as 85% of the state's land area. *See* WOOLERY, *supra* note 109, at 64. Military acquisitions can radically alter the tax structure of the municipality in which they are located. Government land holdings also affect neighboring municipalities, such as where metropolitan aqueducts and reservoirs located outside a city provide benefits solely to the city while keeping land off of the local tax rolls. *See* OLDMAN & SCHOETTLE, *supra* note 24, at 324; *see also* ME. REV. STAT. ANN. tit 36, § 651(1)(E) (West 1990) (exempting, for example, pipes, fixtures, dams, and reservoirs of public municipal corporations supplying water, power, or light and located outside of the limits of the municipal corporation).

cant services incommensurate with local benefits. There is little doubt that government property, especially in urban centers, which tend to provide many government services, is in large part responsible for a shrinking of the tax base at the expense of local citizens.[164] Unfortunately, removal of the government property exemption appears to be a clear violation of the recognized illogic of taxing the sovereign, which is in itself supported by taxes.[165] It is also unclear whether taxing the government provides any better answer to the question of how tax burdens could be most fairly distributed.[166]

Assuming a state has the authority to tax a given federal property,[167] one might question whether the federal income taxes of the California taxpayer should abate the local property taxes of the elderly in Portland, Maine. On the other hand, the notion has precedent: The federal government recognizes the demands it puts on school districts near its military bases and provides some relief in lieu of taxes.[168] This example suggests a congressional recognition of the general proposition that local taxpayers should be spared from inordinate burdens of taxation due to activities that largely benefit the national interest. Although the Maine Legislature has no realistic control of federal reimbursement policy, states that perceive that local tax burdens due to the presence of particular federal agencies or activities are excessive may find a common interest and coalesce at a national level.

E. User or Service Fees

One remedy for lessening the burden that exempt entities place on municipalities is the use of various types of charges imposed in

164. *See* WOOLERY, *supra* note 109, at 64-65 (also noting that the poor and the elderly often feel the effects of the shrinking tax base most acutely).

165. *See id.* at 64. Taxing the state also adds another administrative layer, with some loss of efficiency. *See id.*

166. Woolery draws a distinction between tax fairness, which is legislatively defined through the tax law, and tax equity, which is achieved through good administration of that law. *See id.* at 43. In the exemption arena there is an area of overlap between tax fairness and tax equity, especially where valuation is concerned, because exempt properties are typically not appraised frequently or accurately. *See* Rudnick, *supra* note 30, at 349. Legislation that attempts to assess various types of charges against exempt properties on the basis of valuation thus implicates both equity and fairness issues.

167. No state has the right to tax the United States absent congressional authority. *See* [Me.] All St. Tax Rep. (CCH), *supra* note 67, ¶ 20-024.01. The language of the statute creating a particular corporation or agency must be examined to determine whether the entity is subject to state and local taxation. *See id.* ¶ 20-204.20.

168. According to the Treasury Department, up to two billion dollars is spent annually through "a complex of 57 ad hoc federal programs." Rosner, *supra* note 14, at 109 n.2 (citation omitted). *See* 20 U.S.C. § 7702 (1994) (providing for compensation to local school districts where federal lands exceed ten percent of local assessed values).

lieu of taxes.[169] Beyond purely voluntary in-lieu payments, a user or service fee system can allow municipalities to impose fees commensurate with services provided to exempt properties. Authorities disagree as to which services should be part of a fair cost recovery system—an uncertainty which is reflected in the lack of consistent labeling of the varying types of fee systems.[170] In apparent response to increasing use of such fees, the nonprofit sector has urged a distinction between user fees assessed for the actual charges incurred for discrete amounts of water, sewer, and waste disposal used, and service fees assessed for the exempt property's purported share in generally provided municipal services such as police and fire protection and road maintenance.[171]

User fees—for services that can be readily measured, that the exempt organization consumes, and the use of which it can control—appear to be accepted by some nonprofit advocates, provided that they are not applied only to recapture revenue allegedly lost through valid tax exemptions.[172] If all users—exempt and non-exempt alike—pay for the discrete units they consume, the user fee theory is not discriminatory. Such an approach is further supported by the economic argument that consumers will minimize waste of resources for which they must pay, as long as the usage is measurable. H. William Batt has aptly characterized the distinction between these *user* fees and *service* fees, and draws a reasonable test for determining which publicly provided goods and services are appropriate for charging all properties at the point of consumption:

> Goods and services that are substantially public in their nature are best financed by general, broad-based taxes—taxes that should be evaluated according to ability to pay. User fees, however, are best used to support the provision of goods and services that are in good part private in their character but that, for whatever reason, are provided by government rather than the private-sector economy.[173]

Legislative efforts to introduce fee systems for police, fire, and emergency medical services have been made in Maine and elsewhere,[174] but this Author has found no successful current model in active use. For example, Maine's service fee statute is seldom in-

169. Many nonprofit organizations provide payments in lieu of taxes on a voluntary basis, but the limitations, from the municipal point of view, of leaving the option of making such payments to the exempt organization are apparent.

170. *See* Rudnick, *supra* note 30, at 342-50 (discussing several fee systems for government services to exempt properties).

171. *See id.* at 342. Perhaps a clearer terminology would be "usage" fees instead of "user" fees.

172. *See id.*

173. H. William Batt, *User Fees: The Nontax Revenue Alternative*, 1993 STATE TAX NOTES 787, 788.

174. *See* Rudnick, *supra* note 30, at 345, 349.

voked.[175] The successful system would have to meet a number of challenges. It would have to find an accurate means of measuring the value of the exempt entity's services to both the municipality and to residents of the state. The system would need not only to measure the cost of benefits provided to the nonprofit but also to agree on what assessments are fair for government to assess against a fellow service provider.[176] If the fee formula were to be based on valuation, assessments would have to be made frequently and accurately, which exempt properties as a rule are not. In short, such a system would be a formidable challenge to implement.[177]

F. User or Service Fees in Maine

A proposal recently considered by Maine lawmakers would allow municipalities an option of assessing such service fees on otherwise exempt, improved properties which produce revenues.[178] The fees would be limited to 1.5% of the tax entity's annual receipts from services provided at the property or 25% of the amount that would have been assessed as taxes on the property if it were not exempt.[179] This resembles a tax on the business income of a nonprofit, analogous to the federal tax on the unrelated business income of nonprofits.[180]

While the proposed legislation's focus on improved, revenue-producing property would tend to remove most nonprofit conservation land from the ambit of the service charges, it is still significant to conservation organizations because it gives municipalities a means to recoup a reasonable degree of revenues from the other types of nonprofit organizations that do make greater direct use of government services. This recourse in some municipalities might make the land conservation organization a less likely target of broad-based animosity toward exemption, and has the potential advantage of offering a rational framework that can open a public discourse on the costs and benefits of exempt property.

The proposal is arguably inequitable, however, because it relies on the exempt property's valuation as the prime determinant of the

175. ME. REV. STAT. ANN. tit. 36, § 652(1)(L) (West 1990).

176. *See* Rudnick *supra* note 30, at 347. "As a fellow service provider of public goods, nonprofits should not be taxed for [public goods] or pay charges for them." *Id.* at 345.

177. *See* Rudnick, *supra* note 30, at 347.

178. *See* LENARDSON & BLAISDELL, *supra* note 43, at 7 (recommending amendments to ME. REV. STAT. ANN. tit. 36, § 652(1)(L) (West 1990)).

179. *See id.* at 24. Municipalities have litigated to try to remove exemptions from property that produces revenue for the nonprofit. However, the Maine Law Court has upheld the exemptions for such property which "is not oriented toward pecuniary profit" but, rather, to "serve the purpose for which the [nonprofit] was organized." Maine Med. Ctr. v. Lucci, 317 A.2d 1, 2 (Me. 1974).

180. *See* 26 U.S.C. § 501(b) (1994).

exempt organization's prorated charge for direct services, to the exclusion of any compensating factor for the amount of direct services that the exempt organization provides to the municipality. While a laudable clause in the proposed bill exempts non-improved land and tax-exempt entities that spend over half of their annual income on goods and services for the poor, the formula otherwise lacks the "benefit" inquiry of the cost-benefit analysis that this Comment has urged is the central issue in assessing the role of nonprofits in society. The proposed statute addresses this issue only vaguely, by allowing payment of the service charges to be made in-kind, in the form of goods or services provided to the municipality or its residents at no or reduced charge.[181] This provision offers no guidance as to how such in-kind payments are to be valued, seeming to leave the town with the ability to disallow a nonprofit's claimed in-kind payment if the town perceived it to be immeasurable or inadequate to pay the service charge.

A system of reasoned accounting doubtless has a valuable role in local government administration, provided that it is not a system that exacts socially useful resources from charitable organizations without a full cost-benefit analysis.[182] While conservation land is currently exempted from the proposal, future legislation might include unimproved property—and the benefits that conservation lands provide could be similarly ignored and their acreage assessed.[183]

VI. Current Use Tax Laws as Another Option for a Fair Tax on Conservation Lands

Where a conservation organization in Maine decides, for diplomatic or other reasons, not to apply for tax exemption on a property, like any landowner, it has the right to enroll the property in a current use program, where it is likely to pay taxes at a rate far below full assessed value.[184] This section examines how current use programs function, and considers to what extent they are an appropriate and just mechanism for the taxation of conservation land. It

181. *See* Lenardson & Blaisdell, *supra* note 43, at 9, 25.

182. Tax-exempt entities that spend half or more of their income providing goods and services for persons below the poverty level would be exempt from the proposed legislation. *See id.* at 23. This provision answers potential criticism that the proposal prejudices such charities while favoring organizations owning conservation land.

183. Other states have given local governments the power to impose service fees, but based on their experience it is unclear whether most local officials want this authority or are willing to use it. *See* Rosner, *supra* note 14, at 108. "[I]f we take recent events as our guide, we will continue to see modest legislative proposals . . . by minor classes of exempt property, but few, if any, will be enacted." *Id.*

184. *See* Maine Tree Growth Tax Law, Me. Rev. Stat. Ann. tit. 36, § 572 (West 1990).

questions whether the programs are useful and fair adjustments to the tax system, and whether they should be the nonprofit conservation organization's only option.

Maine law has required that land be assessed at just value since the Act of Separation in 1820.[185] In the 1970s the Legislature determined that taxing timber land *ad valorem* was not encouraging forest land owners to operate on a sustained yield basis and that public policy would be best served by tax measures that would "protect this unique economic and recreational resource."[186] The legislature chose to enact current use tax laws allowing qualifying land owners to have their lands taxed at the value of the existing use of the land rather than at its *ad valorem* "highest and best economic use" or "just value."[187]

The Maine statute is comparable to similar statutes in nearly every state providing tax relief for agricultural, forest, scenic, habitat, or recreational land.[188] Such statutes use "preferential" taxation programs to effect land use policy where the property tax is exerting influence perceived as contrary to optimal use of land.[189] This influence is often seen where growth and development cause land values to rise, resulting in tax levels that make it difficult for agricultural and forest uses to operate at a profit.[190] Another statute offers similar reductions in property tax for land owners who maintain their land in an undeveloped state, even if they do not farm or harvest timber on the land.[191] This statute was stimulated by similar pressures forcing owners to develop because of increased property taxes based on the land's speculative value.[192] Despite

185. *See* KARIN MARCHETTI-KAISER, MAINE COAST HERITAGE TRUST, TECHNICAL BULLETIN NO. 104, PROPERTY TAXATION OF CONSERVATION LAND 3 (1995).

186. ME. REV. STAT. ANN. tit. 36, § 572. For an explanation of technical details of the Maine Tree Growth Tax Law see MAINE BUREAU OF TAXATION, PROPERTY TAX BULLETIN NO. 19 (1995).

187. *See* ME. REV. STAT. ANN. tit. 36, § 572. In some states efforts to achieve uniformity in property revaluations spurred the adoption of current use programs in order to codify extra-legal assessing procedures that were already in practice in preferential use taxation. *See* MALME, *supra* note 121, at 21.

188. *See* MALME, *supra* note 121, at 21-25.

189. *See id.* at 25. "[T]raditional principles of appraisal based on highest and best economic use conflict with the social and political notions that the highest and best use of agricultural, forest and open space lands are their present uses." *Id.* For an example of how current use taxation can be used to influence natural resource policy, see William Butler, *Deny Current Use Tax Breaks to Landowners Who Export Raw Logs*, N. FOREST F., Mid-Summer 1994, at 16 (recommending no Tree Growth tax shelter for landowners whose exports undermine Maine economy).

190. *See* MALME, *supra* note 121, at 2.

191. *See* Farm and Open Space Tax Law, ME. REV. STAT. ANN. tit. 36 § 1102(6) (West 1990).

192. *See* MARCHETTI-KAISER, *supra* note 185, at 4 (describing current use legislation and conservation easements as responses to the fact that "the property tax has emerged as a driver of land use").

inevitable criticism that current use policy is an inefficient, interventionist land use policy, its continued widespread support in state legislatures supports its utility.[193]

Maine's statutes embody the above precepts. The purpose of the Maine Tree Growth Tax Law is to tax forest lands "on the basis of their potential for annual wood production"[194] rather than on the conventional basis of their highest and best use, in order to encourage sustained yields.[195] Thus, a forest landowner whose forest management and harvest plan is certified by a licensed professional forester on a fifty-acre hardwood stand, for example, will be valued at a standard rate, adjusted by county, for that stand type.[196] Because this current use rate is usually well below the normal assessment, the Legislature reimburses the town for up to "90% of the per acre tax revenue lost as a result" of the Maine Tree Growth Tax Law[197] *when the program is fully funded.*[198] To further the purposes of the statute, withdrawal of the property from the program for development or otherwise triggers at least the constitutionally mandated minimum penalty[199] or a higher penalty between twenty to thirty percent of the fair market value of the withdrawn land, which attempts to recapture the tax benefit that the landowner has enjoyed while the property was involved in the program.[200]

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193. *See* MALME, *supra* note 121, at 2, 3.

194. ME. REV. STAT. ANN. tit. 36, § 572 (West 1990).

195. *See id.* This rationale has been the basis for current use taxation on forest land since the nineteenth century. In fact, even early legislation sought to conserve the tax base by preventing the wasting of timberland. *See* MALME, *supra* note 121, at 5, 29 & n.27.

196. *See* MARCHETTI-KAISER, *supra* note 185, at 13. Rates in 1996 range from $40.00 to $210.00 per acre. *See id.* The plan must be consistent with sound forestry practices and the growth of timber for commercial use, although no sale of products nor intensive harvesting is required. *See id.* at 13-14.

197. ME. REV. STAT. ANN. tit. 36, § 578(1) (West 1990 & Supp. 1996-1997). Specifically, the reimbursement is 90% of the difference between the Maine Tree Growth Tax and the tax on the state's average undeveloped land value, currently set at approximately $500. *See* MARCHETTI-KAISER, *supra* note 185, at 13. A municipality also receives penalty revenues from land removed or disqualified from current use classification in its jurisdiction. *See* ME. REV. STAT. ANN. tit. 36, § 578(1).

198. If the sum of all claims in a given year exceeds the Legislature's appropriation, reimbursements are prorated among municipalities. *See id.* § 578. The Tree Growth and Open Space reimbursement requirements pre-date Article IV of the Maine Constitution. Article IV requires the State to reimburse each municipality for at least "50% of the property tax revenue loss suffered by that municipality . . . because of the statutory property tax exemptions or credits enacted after April 1, 1978." ME. CONST. art. IV, pt. 3, § 23.

Only Michigan and Wisconsin have eliminated revenue loss at the local level in their current use tax relief program for farmers. *See* MALME, *supra* note 121, at 22.

199. ME. CONST. art. IX, § 8(2).

200. *See* ME. REV. STAT. ANN. tit. 36, § 581 (West 1990 & Supp. 1996-1997) (describing the calculations for the penalty). The constitutionally mandated minimum penalty "calls for the recapture of taxes that would have been due in each of the previous five years . . . had the real estate been assessed . . . at its 'fair market

The Farm and Open Space Tax Law provides analogous provisions for agricultural lands and lands that provide public benefit by conserving scenic resources, enhancing public recreation, promoting game management, or preserving wildlife or wildlife habitat.[201] The Legislature determined "that it is in the public interest to prevent the forced conversion of farmland and open space land to more intensive uses as the result of economic pressures caused [by taxation] at values incompatible with their preservation as such farmland and open space land . . . ."[202] There is currently no reimbursement for towns from the state for the Farm and Open Space Tax Law.[203]

In the Open Space classification, assessors have the option of valuing the land as if it were permanently undevelopable, or using a simpler formula that reduces the ordinary assessed valuation by cumulative percentage reductions for ordinary open space (20%), permanently protected open space land (30%), forever wild open space land (20%), and open space land open to public access (25%).[204] Thus, open space land that was permanently protected, forever wild, and open to public access would have its valuation reduced by 95%. The valuation of forested Open Space acreage cannot be reduced below the rate it would have under the Tree Growth Tax Law, nor can Open Space valuation exceed just value as defined by Maine statute.[205]

The expansion of current use taxation on non-commercial land is indicative of the non-economic values furthered by current use laws that have gained popular support in states like Maine. These non-economic values (for example, scenic, ecological, recreational)[206] are also increasingly being sought from lands benefiting from agricultural and forestry current use tax programs.[207] In other words,

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value on the date of withdrawal,' minus all taxes paid during those previous five years, plus interest." MARCHETTI-KAISER, *supra* note 185, at 15 (quoting section 581). Section 581 also allows qualifying property to be transferred without penalty to another current use classification such as Farm and Open Space. *See id. See also* ME. CONST. art. IX, § 8(2).

201. *See* ME. REV. STAT. ANN. tit. 36, § 1102(6) (West 1990 & Supp. 1996-1997). For detailed information on the Open Space Law, see MAINE BUREAU OF TAXATION, PROPERTY TAX BULLETIN NO. 18 (1993); MARCHETTI-KAISER, *supra* note 185, at 18-25.

202. ME. REV. STAT. ANN. tit. 36, § 1101 (West 1990). Farmland classification values currently range from $250 to $500 per acre. *See* MARCHETTI-KAISER, *supra* note 185, at 12. The values are based on the average productive value of different types of farmland and "may not reflect development or market value purposes other than agricultural or horticultural use." ME. REV. STAT. ANN. tit. 36, § 1105 (West 1990 & Supp. 1996-1997).

203. *See* MARCHETTI-KAISER, *supra* note 185, at 20.

204. *See* ME. REV. STAT. ANN. tit. 36, § 1106-A(2) (West Supp. 1996-1997).

205. *See id. See also id.* § 701-A (West 1990 & Supp. 1996-1997) (defining just value).

206. *See* MALME, *supra* note 121, at 6.

207. *See id.*

taxpayers scrutinizing perceived revenue losses may question current use programs whose benefits to the private commercial concern outweigh those provided to the general public.[208]

The nonprofit conservation organization has not been portrayed, of course, in the same light as the commercial concern, minimizing any public policy criticism of the current use program in this context. The largest drawback to the current use program for the nonprofit is that despite its reduced tax assessment it nonetheless adds costs to the nonprofit's operations that could be better spent in furthering its mission. The organization forced to enroll a property in current use because a municipality has refused a properly filed request for exemption is in an awkward situation, especially if the municipality provides minimal or no services to the property, or where the property requires none. In spite of having complete legal basis for the exemption, the desire for amicable town relations usually forecloses legal action and current use may be the only means of avoiding litigation or a tax lien, unless a donation in lieu of taxes can be negotiated. While not an inappropriate reflection of the costs and benefits of conservation land in many situations, current use taxation should not be seen as a way to replace tax exemption for nonprofit organizations holding land for the benefit of the public.

Current use programs implicate the same set of cost-benefit analysis questions as exemption policy, and local governments have similar concerns about the loss of tax revenue.[209] Yet, for the same reason that this Comment has provided a basis to sustain exemption of conservation land, the reduced taxation of conservation land in current use programs is sound public policy, especially where, as in

208. *See generally id.* (suggesting that taxpayers will be less supportive of current use programs "if they perceive their extra tax burden is giving 'tax breaks' to 'undeserving' land owners").

It should be noted that forest land holdings are also taxed by a *statewide* assessment by the Commercial Forestry Excise Tax levied on owners of 500 or more acres of forest land, to pay for the cost of fire control as calculated by the State Tax Assessor. *See* ME. REV. STAT. ANN. tit. 36, § 2721 (West 1990 & Supp. 1995-1996). In addition, the Maine Spruce Budworm Management Act imposes an excise tax on owners of forest land located within the spray program area. *See* ME. REV. STAT. ANN. tit. 12, § 8421 (West 1994 & Supp. 1996-1997). These modest, state-imposed forestry taxes are indicative of the existing state taxes that measure the cost of services provided to forest land. While narrow in scope, they suggest how the overall statewide taxation system can measure benefits provided by a given land type and tax it accordingly. While one might worry that this logic could lead to a hopeless proliferation of excise taxes, there is equity in a system in which property owners "render unto Caesar that which is Caesar's."

209. *See* MALME, *supra* note 121, at 7. For lost revenues not compensated by state government, most taxing units "are able to raise the tax rate and shift the loss of value to other property owners." *Id.*

Maine, the current use statutes require clear public benefits to qualify for enrollment.[210]

VII. CONCLUSION

Albeit imperfect, exemptions and current use programs are fair means for encouraging and supporting land uses with substantial public benefits, and should remain in place. Even if charitable exemptions are a substantial drain on some municipal governments, the overall value of exempt land uses to society is great. Provided the Legislature can reduce pressures on the property tax as the nearly exclusive revenue source for towns in Maine, existing exemption and current use law does not demand a comprehensive overhaul.

Numerous strategies should, however, be undertaken both to refine the exemption statute and to moderate the effect of the property tax on non-exempt owners. The exemption statute should clarify certain requirements for charitable and benevolent status, especially given the Law Court's difficulty in defining the term "charitable" under the statute. The requirement stated by the Law Court, that an organization lessen the burden of government in order to be exempt, should be further developed and implemented in statutory language. This would avoid a total lack of accountability if nonprofits are exempted by a showing of any colorable benefit of their activity to society. Additionally, it would avoid the equally undesirable extreme of denying exemption if a worthy nonprofit service is not one that state government is required by statute to provide.

The Legislature should avoid overly harsh reductions in tax exemptions, because nonprofits selflessly provide benefits to society. Such reactive legislation is probable due to discontent with the property tax, but can be avoided by efforts to diversify local tax bases with mechanisms that are productive and fair. Carefully crafted local option taxes and direct benefit service fees are examples that might serve this purpose.

Equally important is a greater willingness of state government to take some responsibility for the burdens that its tax exemption policy has impressed upon local government. Partial compensation from the state for property tax revenues lost by municipalities to exempt properties would be at least a constructive beginning at spreading the financial burden of a government policy that is the functional equivalent of a state tax. More fully funding the reimbursement for local tax revenues reduced by the Tree Growth Tax Law is similarly critical. Such a compensation scheme would be fair,

210. *See id.* at 23. "As a public expenditure, preferential taxation is an expensive method of preserving land unless it is targeted specifically to clear land use goals." *Id.*

and more likely to build the political will to give more regular and sustained attention to exemption policy and how its costs and benefits are shared.

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