Property Tax Exemptions for Illinois Nonprofit Hospitals: The Futility of the Present Controversy, and a Modest Proposal

by Mark R. Davis

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This article examines recent appellate decisions that reached opposite conclusions about the constitutionality of an Illinois statute enacted to facilitate the exemption of nonprofit hospitals. Even review of the recent cases by the Illinois Supreme Court may not clarify the law, and the statute may fail in its purpose to significantly change the requirements for hospital exemptions. It is suggested that an amendment to the Illinois Constitution may be needed to create a separate exemption category for nonprofit healthcare and hospital property.

Introduction

Like many states, Illinois has historically exempted most nonprofit hospitals from property taxation as "institutions of public charity."[1] Debates over whether modern nonprofit hospitals can still satisfy all the elements of this criterion for exemption are by now familiar. Similar issues are being raised nationally regarding other large nonprofit institutions (primarily universities) that, like hospitals, are or were traditionally exempt on charitable grounds. The issues are driven by these organizations' extensive revenues compared to the amount of charity services they provide (a comparison somewhat dependent on the definition of charity); the complexity of their organizational structures; their entanglement with affiliated and unaffiliated entities, some of which are for-profit; and the substantial compensation paid to their principal executives.[2] In Illinois, hospitals have been at the center of these debates at least since the court decisions resulting in the revocation of the exemption of Provena Covenant Medical Center, a major downstate hospital, during 2008-2010.[3]

Property tax exemptions for several other prominent Illinois hospitals were also revoked in the wake of *Provena*. The Illinois Supreme

[1] 35 ILCS 200/15-65(a) ("All property of the following is exempt when actually and exclusively used for charitable or beneficent purposes, and not leased or otherwise used with a view to profit: (a) Institutions of public charity.").

[2] *See, e.g.*, "Charity Officials Are Increasingly Receiving Million-Dollar Paydays," *The Wall Street Journal*, March 6, 2017 (https://www.wsj.com/articles/charity-officials-are-increasingly-receiving-million-dollar-paydays-1488754532).

[3] Illinois had a moratorium on hospital exemptions declared by the governor and the Department of Revenue after the decisions of the Illinois Supreme and Appellate Courts in *Provena Covenant Medical Center v. Department of Revenue*, 384 Ill. App. 3d 734, 894 N.E.2d 452 (4th Dist. 2008), affirmed, *Provena Covenant Medical Center v. Department of Revenue*, 236 Ill. 2d 368, 925 N.E.2d 1131 (2010) (*Provena*). Grants of exemption resumed on enactment of new legislation, then were interrupted again by court decision, as discussed in the text. A similar moratorium was called for in New Jersey after the revocation of exemption of a Morristown hospital in *AHS Hosp. Corp. v. Town of Morristown*, 28 N.J. Tax 456, 536, 2015 WL 3956132 (2015), *as revised (June 26, 2015), as revised (June 29, 2015), as revised (July 15, 2015)* ("Clearly, the operation and function of modern non-profit hospitals do not meet the current criteria for property tax exemption under *N.J.S.A.* 54:4–3.6 and the applicable case law."). Disputes involving 35 New Jersey hospitals were pending in 2016. *See* "N.J. Hospitals Settle Property Tax Challenges as Legislation Languishes," *Modern Healthcare* (Aug. 22, 2016), http://www.modernhealthcare.com/article/20160822/NEWS/160829992. For general discussion of these developments, *see* Evelyn Brody, *The 21st Century Fight Over Who Sets the Terms of the Charity Property Tax Exemption*, 77 *The Exempt Organization Tax Rev.* 259 (April 2016).

Court's failure in that case to produce a majority opinion on the central question, coupled with an invitation from two justices for the legislature to set "a monetary threshold for evaluating charitable use," led the Illinois General Assembly to act.[4] In 2012 the legislature passed and the governor signed Public Act 97-688, creating section 15-86 of the Illinois Property Tax Code.[5] Section 15-86 led to the approval of every application for charitable exemption submitted by a nonprofit hospital from the time of its enactment until the decision of the Illinois Appellate Court in *The Carle Foundation v. Illinois Department of Revenue (Carle II)*.[6] *Carle II* struck down section 15-86 as facially unconstitutional under Article IX, Section 6, of the Illinois Constitution of 1970, and the case was promptly appealed to the Illinois Supreme Court.

On March 23, 2017, the supreme court vacated and remanded *Carle II* without addressing the constitutionality of section 15-86.[7] The court held that neither it nor the appellate court had jurisdiction of the appeals, on grounds that the trial court's order deciding the plaintiff's motion for summary judgment on the constitutional issue did not dispose of a separate "claim" so as to be immediately appealable.[8] The court also declined to take up the parties' request to decide the constitutional issue based on its supervisory authority over the lower courts.[9] Although it said the issue was premature even in the context of the trial court's proceedings, the court may also have known that it might soon receive another case that could present a second occasion for the decision the *Carle II* parties had sought.

Shortly before the oral argument to the supreme court in *Carle II*, a panel in the First District of the Illinois Appellate Court in *Oswald v. Hamer* declined to follow *Carle II* and held section 15-86 to be constitutional.[10] The appellate court has denied the petition for rehearing filed by the plaintiff challenging the statute. The plaintiff has filed for review in the supreme court.

Following the appellate court's decision in *Carle II*, a *de facto* moratorium has again been put in place for hospital exemption applications. Given the uncertainty over the ultimate resolution of the constitutionality of section 15-86, the moratorium seems likely to continue until the supreme court finally rules on the issue.

Despite the formidable array of resources devoted to the shape and scope of the charitable exemption for Illinois nonprofit hospitals over the past decade, it is hard to see how the supreme court's eventual ruling will clarify this issue. The difficulty lies in the unusual implications of the arguments for *and* against the constitutionality of section 15-86.

Section 15-86 reflected the legislature's intention to clear up perceived uncertainty arising out of the *Provena* decisions. The first preambles to the statute state:

> (a) The General Assembly finds:
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> (1) Despite the Supreme Court's decision in *Provena Covenant Medical Center v. Dept. of Revenue*, 236 Ill.2d 368, there is considerable uncertainty surrounding the test for charitable property tax exemption, especially regarding the application of a quantitative or

[4] All five of the supreme court justices who participated in *Provena* agreed that Provena Hospitals, the entity that owned the hospital in question (as opposed to Provena Covenant Medical Center (PCMC), the entity that operated the hospital), failed to prove that it was an "institution of public charity" or to satisfy the elements of charitable use under the Illinois constitution and 35 ILCS 200/15-65. 236 Ill. 2d at 393, 925 N.E.2d at 1147 (Karmeier, joined by Fitzgerald and Thomas, JJ.); 236 Ill. 2d at 411-12, 925 N.E.2d at 1156-57 (Burke, joined by Freeman, JJ., concurring in part). The dissent refused to join in the plurality's explanation of the doctrine of charitable use, and apparently it would have held that PCMC could have satisfied the charitable use elements; the dissent objected particularly to the plurality's "imposing a quantum of care and monetary threshold," which it would have held to be a matter reserved to the legislature. 236 Ill. 2d at 412, 925 N.E.2d at 1157 (Burke, joined by Freeman, JJ., dissenting in part).

[5] P.A. 97-688, eff. June 14, 2012, codified at 35 ILCS 200/15-86.

[6] 2016 IL App (4th) 140795. An earlier decision (*Carle I*), *The Carle Foundation v. Illinois Department of Revenue*, 396 Ill.App.3d 329 (4th Dist. 2009), predated section 15-86 and involved questions of procedure for establishing exemptions; it did not reach the substantive issues in *Carle II*.

[7] *The Carle Foundation v. Cunningham Township*, 2017 IL 12042.

[8] *Id*. paragraphs 23, 31.

[9] *Id*. paragraph 34.

[10] *Oswald v. Hamer*, 2016 IL App (1st) 152691 (Dec. 22, 2016), petition for leave to appeal filed May 24, 2017 (IL S. Ct. No. 122203). The petition is expected to be decided in the fall of 2017.

monetary threshold. In *Provena*, the Department stated that the primary basis for its decision was the hospital's inadequate amount of charitable activity, but the Department has not articulated what constitutes an adequate amount of charitable activity. After *Provena*, the Department denied property tax exemption applications of 3 more hospitals, and, on the effective date of this amendatory Act of the 97th General Assembly, at least 20 other hospitals are awaiting rulings on applications for property tax exemption.

(2) In *Provena*, two Illinois Supreme Court justices opined that "setting a monetary or quantum standard is a complex decision which should be left to our legislature, should it so choose." The Appellate Court in *Provena* stated: "The language we use in the State of Illinois to determine whether real property is used for a charitable purpose has its genesis in our 1870 Constitution. It is obvious that such language may be difficult to apply to the modern face of our nation's health care delivery systems." The court noted the many significant changes in the health care system since that time, but concluded that taking these changes into account is a matter of public policy, and "it is the legislature's job, not ours, to make public policy."[11]

It is easy to see the implications of the arguments *against* the constitutionality of the new statute. If section 15-86 is struck down, as it was by *Carle II*, nonprofit hospitals seeking exemption will be relegated to the original charitable provision of the Property Tax Code, Section 15-65, and the corresponding case law on the definition of "charitable" use under the Illinois Constitution.[12] Of course, this is the law that culminated in *Provena*, was criticized by the General Assembly when it established section 15-86, and imposed criteria for charitable exemption that many hospitals could not meet.

It is less apparent, yet still predictable, that the implications of arguments *for* the constitutionality of the new statute are essentially identical. This was illustrated in both *Carle II* and *Oswald*. The Illinois Department of Revenue (IDOR) and other parties defending section 15-86 were forced to argue that the constitutional requirement of exclusive use of the subject property for "charitable purposes," explicitly included in section 15-65 but omitted from section 15-86, nonetheless had to be read into section 15-86. Reading this requirement into section 15-86 saved it from facial unconstitutionality, according to its defenders. The *Carle II* court rejected this argument as an improper judicial rewriting of the statute.[13] The *Oswald* court, however, accepted the argument, even holding that some terms of section 15-65 could be read into section 15-86.[14] *Oswald* therefore held section 15-86 to be facially constitutional.[15]

What neither court seems to have considered is that if reviving the requirements for "charitable use" based on the constitution or section 15-65 is the precondition to upholding section 15-86, what has been revived is precisely the law that culminated in the *Provena* decisions, which section 15-86 was enacted to change.

In other words, if section 15-86 is struck down, we are left with constitutional standards as enunciated in *Provena* and its judicial predecessors and progeny — and if section 15-86 is upheld, we are still left with *Provena* and its predecessors and progeny. The crucial aspects of the governing law for charitable exemptions for nonprofit hospitals will be essentially identical in either case.[16] It is hard to say that the enormous efforts by the stakeholders in this

[11] 35 ILCS 200/15-86(a)(1)-(2).

[12] 35 ILCS 200/15-65; Ill. Const. 1970, Art. IX, section 6; *see* the discussion in text accompanying footnotes 19-50.

[13] *Carle II*, 2016 IL App (4th) 140795, at paragraphs 134-43.

[14] *Oswald*, 2016 IL App (1st) 152691, at paragraphs 27-46.

[15] *Id*. paragraph 46.

[16] Of course, if section 15-86 is upheld, hospital applicants will have to meet its requirements in addition to the traditional constitutional requirements. However, as has already been demonstrated after the enactment of section 15-86 and before the decision in *Carle II*, it is unlikely any nonprofit hospital in the state would ever be unable to meet the requirements of the new statute.

debate, in the legislature, the courts, and administrative agencies such as IDOR are well spent when all that can be accomplished is such a relatively meaningless result.

The supreme court briefs filed in *Carle II* indicate that some defenders of section 15-86 know the risk of a purely Pyrrhic victory. Thus, they urged the supreme court to effectively revise the historically applied constitutional standards for charitable use, which are discussed briefly below. Presumably these arguments will be repeated if *Oswald* reaches the supreme court. The supreme court obviously has wide latitude, and it may be persuaded by one or another of these arguments, although, as discussed below, this would involve a considerable revision of prior decisions and accepted principles governing exemptions.

On the other hand, it may not be persuaded. Moreover, the collateral consequences of rewriting the law regarding charitable use for purposes of property tax exemption reach far beyond the hospital industry, which is driving the present arguments.

Therefore, I propose a different approach to the goals embodied in section 15-86. On February 27, 2012, The Civic Federation issued its "Position Statement on Charitable Property Tax Exemptions for Non-Profit Hospitals," supporting legislation embodying policies that were eventually reflected in section 15-86.[17] The Federation said:

> To eliminate any possible uncertainty as to whether the General Assembly lacks plenary authority to define clear legislative standards of eligibility because of judicial decisions limiting "charitable use" under Article IX, Section 6 of the Illinois Constitution to criteria defined by the courts, the Civic Federation recommends that, longer term, a constitutional amendment be proposed to confirm such authority in the General Assembly.[18]

The time has come for such confirmation of the General Assembly's authority. Recent experience suggests that with adequate public support, amending the constitution is not as daunting as one might think. In any event, because the supporters of section 15-86 clearly want a constitutional adjustment, it would at least make sense to consider the method for such adjustments that is laid down in the Illinois Constitution.

A Brief Review of Constitutional Limitations on Charitable Exemptions From Property Tax in Illinois

Property tax exemptions are authorized but not required by Article IX, section 6 of the 1970 Illinois Constitution. With the exception of its provision for homestead exemptions, section 6 was substantially a carryover from Article IX, section 3 of the 1870 Constitution.[19] The 1970 Constitutional Convention's Revenue Committee noted that "[i]n comparison with other states . . . Illinois is considerably stricter than the average" in the requirements for exemption, and this was something the convention delegates clearly intended to preserve.[20] The committee report noted several instances in which "the Illinois Supreme Court has declared attempted exemptions unconstitutional because the legislature had given the language of [the 1870 constitution's exemption provision] a much broader interpretation than the Court thought warranted."[21]

The constitutional limits on legislative power have always been prominent in charitable exemption cases, although the courts

[17] As noted on its website, "[f]ounded in 1894, The Civic Federation is an independent, non-partisan government research organization that provides analysis and recommendations on government finance issues for the Chicago region and State of Illinois." https://www.civicfed.org/about-us (accessed 5/10/17).

[18] https://www.civicfed.org/civic-federation/publications/position-statement-charitable-property-tax-exemptions (accessed 5/10/17). The author of this article is a board member and former board chairman of The Civic Federation, and participated in discussions leading to the 2/27/12 position statement. However, the views expressed in this article are those of the author and not the Federation.

[19] 7 *Record of Proceedings, Sixth Illinois Constitutional Convention* 2150-51 (1969-1970) (hereafter "*IL Constitutional Proceedings*").

[20] *Id*. at 2152, 2157, citing Braden and Cohn, *The Illinois Constitution: An Annotated and Comparative Analysis*, 438 (1969).

[21] *Id*. at 2151, discussing Ill. Const. 1870, Art. IX, section 3.

tend to enforce the statutory requirements with those derived from the constitution rather than strike statutory provisions. This has been the case even when the statute was likely intended to relax the boundaries of the exemption in a manner the court would not approve. Regardless of one's judgment of the legislative intent of section 15-86, arguments that the constitutional requirements can be enforced in conjunction with the statute were the centerpiece of the efforts to overturn *Carle II* and to produce and sustain the present result in *Oswald*. This approach was foreshadowed in *Methodist Old Peoples Home v. Korzen,* the seminal modern case in which the Illinois Supreme Court enumerated a six-part definition of the requirements for a charitable exemption under the provision now codified as section 15-65.[22]

The constitutional requirements were discussed in *Provena*,[23] but a more complete summary appears in the 2006 decision in *Eden Retirement Center Inc. v. Department of Revenue*.[24] In that case the supreme court harshly criticized the lower courts for failing to observe the restrictions established by its previous decisions, which it summarized as follows:

> Article IX of the 1970 Illinois Constitution generally subjects all real property to taxation. [Citations omitted.] Thus: "'It is the well settled rule of law in the State of Illinois that all property is subject to taxation, unless exempt by statute, in conformity with the constitutional provisions relating thereto. Taxation is the rule — tax exemption is the exception.'" [Citations omitted.]
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> *Section 6 of article IX of the 1970 Illinois Constitution* permits the legislature to exempt certain property from taxation:
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> "The General Assembly by law may exempt from taxation only the property of the State, units of local government and school districts and property used exclusively for agricultural and horticultural societies, and for school, religious, cemetery and charitable purposes. The General Assembly by law may grant homestead exemptions or rent credits."
>
> *Ill. Const. 1970, art. IX, section 6.*
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> * * *
>
> *Section 6 of article IX* divides property that the legislature may exempt from taxation into two classes: (1) property owned by "the State, units of local government and school districts" (*Ill. Const. 1970, art. IX, section 6*); and (2) property used exclusively for the purposes defined in the second clause of the section. [Citation omitted.] By enumerating the classes of property that the legislature may exempt from taxation, *section 6 of article IX* limits the legislature's authority to exempt; such enumeration excludes all other subjects of property tax exemption. The legislature cannot add to or broaden the exemptions that *section 6 of article IX* specifies. "Equally familiar is the rule that courts have no power to create exemption from taxation by judicial construction." [Citation omitted.]
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> One class of property that the legislature may exempt from taxation is property used for charitable purposes. Charitable use is a *constitutional* requirement. An applicant for a charitable-use property tax exemption must "comply unequivocally with the constitutional requirement of exclusive charitable use." [Citations omitted.] In *Methodist Old Peoples Home v. Korzen, 39 Ill. 2d 149, 233 N.E.2d 537 (1968)*, this court articulated guidelines or criteria for resolving the constitutional question of charitable use: (1) the benefits derived are for an indefinite number of persons for their general welfare or in some way reducing the burdens on government;

[22] 39 Ill. 2d 149, 233 N.E.2d 537 (1968).

[23] 236 Ill. 2d at 390.

[24] 213 Ill.2d 273, 821 N.E.2d 240 (2006).

> (2) the organization has no capital, capital stock, or shareholders, and does not profit from the enterprise; (3) funds are derived mainly from private and public charity, and the funds are held in trust for the objects and purposes expressed in the organization's charter; (4) charity is dispensed to all who need and apply for it; (5) no obstacles are placed in the way of those seeking the benefits; and (6) and the exclusive, *i.e.* primary, use of the property is for charitable purposes.[25]

Most of the arguments in charitable exemption disputes such as *Provena*, *Carle II*, and *Oswald* have revolved around these six '*Korzen* factors.'

Although the constitution ostensibly requires only charitable use as a condition of exemption, the original charitable exemption provision of the Property Tax Code, section 15-65, also requires ownership by a charitable institution.[26] The first five *Korzen* factors are often identified as the characteristics of a charitable *institution*.[27] This suggests that relaxing the ownership requirement would enable a relaxation of the overall standard, and section 15-86 clearly intended to alter the ownership requirement in a manner that was easier for hospitals to meet.[28] But although this intention drove much of the structure of section 15-86 and weighs heavily in the arguments to uphold that section against constitutional challenge, it is fraught with problems when examined against the traditional constitutional criteria.

Problems in Reconciling Section 15-86 With the Traditional Constitutional Criteria For Charitable Exemption

Despite the occasional identification of the *Korzen* factors as pertaining primarily to the characteristics of *ownership* by a charitable institution, numerous decisions note that the factors also pertain to the determination of charitable *use*.[29] As the supreme court stated in *Eden Retirement*:

> Charitable use is a *constitutional* requirement. An applicant for a charitable-use property tax exemption must "comply unequivocally with the constitutional requirement of exclusive charitable use." [Citations omitted.] **In *Methodist Old Peoples Home v. Korzen, 39 Ill. 2d 149, 233 N.E.2d 537 (1968)*, this court articulated guidelines or criteria for resolving the constitutional question of charitable use**: [listing the six factors, referred to as "guidelines or criteria"].[30]

Although changing the criteria for charitable ownership was a declared purpose of section 15-86, the General Assembly also intended to affect determinations of charitable use. The preambles to section 15-86 state:

> It is the intent of the General Assembly to establish a new category of ownership for charitable property tax exemption to be applied to nonprofit hospitals and hospital affiliates in lieu of the existing ownership category of "institutions of public charity." *It is also the intent of the General Assembly to establish quantifiable standards for the issuance of charitable exemptions for such property.* It is not the intent of the General Assembly to declare any property exempt ipso facto, but rather to establish criteria to be applied to the facts on a case-by-case basis.[31]

[25] 213 Ill.2d at 285-87 (italics original).

[26] 5 ILCS 200/15-65 provides in pertinent part that "All property of the following is exempt when actually and exclusively used for charitable or benevolent purposes, and not leased or otherwise used with a view to profit: (a) Institutions of public charity. . . ." However, as discussed in the text accompanying footnotes 51-67, ownership plays an essential part in determinations of charitable use.

[27] *E.g.*, *Provena*, 236 Ill.2d at 390.

[28] *See* section 15-86(a)(5) (stating that the General Assembly intended to "establish a new category of ownership").

[29] *See, e.g.*, *Provena*, 236 Ill.2d at 394-96; *see also*, *Provena Covenant Medical Center v. Department of Revenue*, 384 Ill. App. 3d 734, 742, 894 N.E.2d 452, 460-61 (4th Dist. 2008), and decisions cited therein.

[30] 213 Ill.2d at 287 (italics in original, boldface added).

[31] Section 15-86(a)(5) (emphasis supplied).

As noted earlier, it is hard to see how any statute could affect the problems perceived in applying the *Korzen* use factors to cases such as *Provena*, without somehow affecting the determination of charitable use.[32]

In *Carle II,* the appellate court struck down section 15-86 because "it purports to grant a charitable exemption on the basis of an unconstitutional criterion, i.e., providing services or subsidies equal in value to the estimated property tax liability (35 ILCS 200/15-86(c) (West 2014)), without requiring that the subject property be 'used exclusively *** for charitable purposes.'"[33] The *Carle II* appellants and their *amici curiae* tried to avoid this interpretation by arguing that section 15-86 should nonetheless be construed to have altered only the statutory requirements for charitable *ownership* while implicitly incorporating the *Korzen* requirements for charitable *use*.

The *Oswald* court essentially accepted these arguments in rejecting the facial challenge. The court first held that the section 15-86(c) provision central to *Carle II*'s critical analysis, stating that a hospital applicant "shall" be granted a charitable exemption if the enumerated services or subsidies equaled or exceeded the property tax liability, was directory rather than mandatory despite the statute's use of the term "shall."[34]

The court also held that because there are hypothetical circumstances in which a hospital could meet both the requirements of section 15-86(c) and the *Korzen* requirements, and because the new law did not mandate an exemption without consideration of the constitutional requirements, it was not unconstitutional under all circumstances.[35]

Finally, the court held that section 15-86 could be read as incorporating the constitutional requirements of charitable use, even exactly as they have been applied under section 15-65.

However, the court conceded that the language of section 15-65 requiring exclusive charitable use was not included in section 15-86.[36] The court noted that under section 15-65, property owned by an "institution of public charity" was the only type of property that could be exempt if used for purposes meeting the constitutional criteria. The court held that section 15-86 intended to dispense with only this part of section 15-65, substituting "a new category of ownership for charitable property tax exemption to be applied to nonprofit hospitals and hospital affiliates in lieu of the existing ownership category of 'institutions of public charity.'"[37] Therefore, the court held, one could "read the exclusive [use] language from section 15-65 as applicable to section 15-86," without also reading into section 15-86 the older statute's requirement of ownership by a charitable institution.[38]

There are several problems with *Oswald*'s approach to section 15-86 on these points. First, in the same paragraph of section 15-86 in which it said it would establish new requirements for charitable ownership, the General Assembly also stated its intention to "*establish quantifiable standards for the issuance of charitable exemptions for such property*."[39] Read in conjunction with section 15-86(c), this clearly suggests that quantifying the services or subsidies of equal or greater value to the estimated property tax liability under section 15-86(c) was intended to govern the ultimate question of exemption, instead of the *Korzen* use factors. There is no indication in section 15-86 that the legislature expected any application of the *Korzen* use factors to hospital applicants under the new law. In fact, since its enactment, and before the appellate decision in *Carle II*, section 15-86 was

[32] It is true that all five supreme court justices in *Provena* concurred in the decision that the hospital applicant had failed to prove the element of ownership by a charitable institution. *Provena*, 236 Ill. 2d at 393, 411-12, 925 N.E.2d at 1147, 1156-57. However, this failure did not involve any complex issues regarding charitable ownership; the applicant hospital simply failed to submit any proof of the charitable nature of the entity that actually owned the property. The real problems in *Provena* concerned the application of the *Korzen* use factors. Ownership was simply seized on by the legislature as something that supposedly could be changed easily without crossing the constitutional limits.

[33] *Carle II*, at paragraph 164.

[34] *Oswald*, at paragraphs 21-25.

[35] *Id*. at paragraphs 20, 47.

[36] *Id*. at paragraphs 27-46.

[37] *Id*. at paragraph 44, quoting the General Assembly's finding in section 15-86(a)(5).

[38] *Id*. at 44-45.

[39] Section 15-86(a)(5) (emphasis supplied).

applied by IDOR without any regard to the *Korzen* use factors. This is evident from the department's Form PTAX-300-H, promulgated in 2013, which clearly states that the comparison of the value of "services or subsidies" and the "estimated property tax liability" is the sole determinant of the right to exemption.[40]

Second, the court's conclusion that section 15-86(c)'s statement that a hospital whose services or subsidies equaled or exceeded its potential tax liability "shall" be exempt should not be given a mandatory construction is flawed as a matter of statutory interpretation. "Generally, the use of the word 'shall' is regarded as indicative of a mandatory intent. . . . However, the verb 'shall' may also be interpreted to mean 'must' or 'may' depending upon the context and the drafters' intent."[41] The *Oswald* court correctly observed that statutes are ultimately construed as mandatory if the legislative intent dictates particular consequences for failure to comply, but if no particular consequence flows from the failure, the statute is merely directory.[42]

The court's conclusion that section 15-86 is merely directory because "no consequence is triggered by [IDOR's] failure to issue a charitable exemption" erroneously focuses only on the absence of consequences for IDOR.[43] The statute is a framework to determine whether nonprofit hospital applicants "shall" be exempt. IDOR's failure to issue such an exemption obviously has profound consequences for the applicant, who has to be the real focus of section 15-86. Thus the *Carle II* court's conclusion that section 15-86 mandated an exemption based solely on the monetary calculation under subsection (c) is far more in keeping with accepted principles of statutory construction.[44]

Third, *Oswald*'s conclusion that section 15-86 is facially constitutional because one can hypothesize some set of circumstances in which a hospital applicant could meet both the *Korzen* use factors and the new statute's requirements is also flawed.[45] The court viewed this hypothesis as a "test" for facial unconstitutionality.[46] However, other case law suggests that "no set of circumstances" is a conclusion to be reached after a full analysis of the statute's operation rather than a test used to conduct that analysis. Recent decisions from the Illinois Supreme Court and U.S. Supreme Court suggest that analysis of a statute's facial constitutionality may not be divorced from a practical consideration of the persons or conduct that the statute really affects as opposed to persons or conduct that are affected inconsequentially.

An example is the Illinois Supreme Court's decision in *People v. Burns*,[47] in which the court struck down as facially unconstitutional under the Second Amendment a statute defining "aggravated unlawful use of a weapon" (AUUW). The statute said AUUW covered almost any possession of a firearm outside the home if particular factors were present. The court struck it but conceded the legislature could have defined such an offense constitutionally as applying to particular classes of people, such as felons, stating:

> The State, in support of the appellate court judgment in this case, contends that the offense of AUUW . . . is not *facially* unconstitutional *because it can be applied to felons without violating the*

[40] On the PTAX-300-H form, the crucial analysis is titled "Step 4: Calculate and Determine the Exemption." In Line 19, the hospital applicant is required to state the total value of services or subsidies provided under section 15-86(e). In Line 20, the applicant quantifies the actual or estimated property tax liability under section 15-86(g). The form states, immediately following Line 20: "**If Line 20 is equal to or less than Line 19, you qualify for this exemption. If Line 20 is greater than Line 19, you do not qualify for this exemption.**" PTAX-300-H (emphasis added). IDOR should not be criticized for applying section 15-86 as the legislature apparently intended. For IDOR to have simply continued to apply the *Korzen* factors as they were debated in *Provena* would not only have been futile; it would also have been strange after all the effort that went into enacting the new law. Alternatively, IDOR could not interpret section 15-86 as unconstitutional. *Cinkus v. Village of Stickney Mun. Officers Electoral Bd.*, 228 Ill. 2d 200, 214, 886 N.E.2d 1011, 1020 (2008) ("an administrative agency lacks the authority to declare a statute unconstitutional, or even to question its validity").

[41] *Grossman v. Gebarowski*, 315 Ill. App. 3d 213, 221, 732 N.E.2d 1100, 1106 (1st Dist. 2000) (internal citations omitted).

[42] *Oswald* at paragraph 24.

[43] *Id*. at paragraphs 25-26.

[44] *Carle II* at paragraph 140.

[45] *See Oswald* at paragraph 47.

[46] *Id*.

[47] 2015 IL 117387.

second amendment. Quoting *Hill v. Cowan*, 202 Ill.2d 151, 157, 269 Ill.Dec. 875, 781 N.E.2d 1065 (2002), and *United States v. Salerno*, 481 U.S. 739, 745, 107 S.Ct. 2095, 95 L.Ed.2d 697 (1987), *the State relies on the long-accepted principle that a statute is facially unconstitutional "only if 'no set of circumstances exists under which the [statute] would be valid.'" . . . The State's argument, however, is misplaced.*

In *Patel*, . . . 135 S.Ct. at 2451, the United States Supreme Court explained the proper analysis for facial challenges:

"Under the most exacting standard the Court has prescribed for facial challenges, a plaintiff must establish that a 'law is unconstitutional in all of its applications.' *Washington State Grange v. Washington State Republican Party*, 552 U.S. 442, 449 [128 S.Ct. 1184, 170 L.Ed.2d 151] (2008). *But when assessing whether a statute meets this standard, the Court has considered only applications of the statute in which it actually authorizes or prohibits conduct.* For instance, in *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833 [112 S.Ct. 2791, 120 L.Ed.2d 674] (1992), the Court struck down a provision of Pennsylvania's abortion law that required a woman to notify her husband before obtaining an abortion. Those defending the statute argued that facial relief was inappropriate because most women voluntarily notify their husbands about a planned abortion and for them the law would not impose an undue burden. The Court rejected this argument, explaining: *The '[l]egislation is measured for consistency with the Constitution by its impact on those whose conduct it affects. . . . The proper focus of the constitutional inquiry is the group for whom the law is a restriction, not the group for whom the law is irrelevant.' Id.*, at 894 [112 S.Ct. 2791]."[48]

The *Burns* court held the AUUW statute facially unconstitutional, saying it could not uphold it merely because the legislature *could* have provided that a prior felony conviction was an element of the offense.[49] "An unconstitutional statute does not 'become constitutional' simply because it is applied to a particular category of persons who could have been regulated, had the legislature seen fit to do so."[50]

When applying these principles to section 15-86, it seems clear that the statute's facial constitutionality cannot be saved by hypothesizing that it might be applied to nonprofit hospitals that could also have qualified for exemption under the traditional constitutional standards. Recall that the traditional standards would have entitled such hospitals to exemption under the earlier law, section 15-65. Just as the abortion law struck down in *Planned Parenthood of Southeastern Pa. v. Casey*, as discussed in *City of Los Angeles v. Patel*, was irrelevant to those who would have voluntarily complied with its terms even if the law didn't exist, section 15-86 is effectively irrelevant to hospitals that already were entitled to exemption under section 15-65 because they met all of the traditional constitutional standards. The only class of hospitals the new law could affect would be those who could *not* meet the traditional standards under the earlier law. Only to that class would section 15-86 represent a change in the law, but the change would be the substitution of a purely monetary test instead of the constitutional standards. The legislature cannot do that. The only effective part of section 15-86 is what, when considered by itself, even its defenders would concede is unconstitutional.

The Central Flaw in the Design of Section 15-86

The central argument advanced by the defenders of section 15-86 is premised on the General Assembly's intention "to establish a new category of ownership for charitable

[48] *People v. Burns*, 2015 IL 117387, paragraphs 26-27, quoting *City of Los Angeles v. Patel*, 135 S.Ct. 2443, 2451, 192 L.Ed. 2d 435 (2015) (emphases added).

[49] *Id.*, at paragraph 29.

[50] *Id.*

property tax exemption to be applied to nonprofit hospitals and hospital affiliates in lieu of the existing ownership category of 'institutions of public charity.'"[51] This argument probably would also be used in response to the point about the inadequacy of the "no set of circumstances" argument against the facial unconstitutionality of section 15-86. Its defenders in effect say section 15-86 *did* change the classes of nonprofit hospitals eligible for exemption. This change would have to relieve hospitals that could meet the *Korzen* charitable use requirements from the requirement under section 15-65 of proving charitable ownership and qualification as charitable institutions.

This argument is flawed because it rests on a misconception of the relationship between ownership and use in evaluating applications for exemption under the Illinois Constitution. The flaw is in the design of section 15-86, because the legislature has no constitutional power to *relax* the requirements for charitable exemption by redefining exempt ownership.

The distinction between the requirements of ownership and use is rooted in the two clauses of the first sentence of the exemption provision of the Illinois Constitution:

> The General Assembly by law may exempt from taxation only the *property of the State, units of local government and school districts* and property used exclusively for agricultural and horticultural societies, and for school, religious, cemetery and charitable purposes.[52]

The first italicized clause permits the General Assembly to exempt property only if it is owned by particular governmental entities. As to all other properties, under the second underlined clause the General Assembly may exempt only properties used for the enumerated purposes, including charitable purposes.

Like all the provisions of the Revenue Article (and many other articles) of the constitution, these clauses are to be understood not only as *grants* of authority but as *limitations* on the legislative power.[53] Thus, the supreme court has declared:

> By enumerating the classes of property that the legislature may exempt from taxation, *section 6 of article IX* limits the legislature's authority to exempt; such enumeration excludes all other subjects of property tax exemption. **The legislature cannot add to or broaden the exemptions that section 6 of article IX specifies**. * * * "Equally familiar is the rule that courts have no power to create exemption from taxation by judicial construction."[54]

It is wrong to assume, as did the drafters and defenders of section 15-86, that by authorizing particular governmental exemptions to be based on ownership, while not authorizing charitable exemptions to be based on ownership, the constitution somehow empowered the legislature "to establish a new category of ownership for charitable property tax exemption to be applied to nonprofit hospitals and hospital affiliates."[55] What the legislature has tried to do in section 15-86 is "add to or broaden the exemptions that section 6 of article IX specifies," precisely what the supreme court has repeatedly held the legislature cannot do.

Arguments that section 15-86 merely created a new category of ownership for charitable property tax exemption while silently incorporating traditional constitutional requirements for charitable use also fail to consider that the use of property for any

[51] Section 15-86(a)(5).

[52] Ill. Const. 1970, Art. IX, section 6 (emphasis added).

[53] *Client Follow-Up Co. v. Hynes*, 75 Ill. 2d 208, 215 (1979) ("limitations written into the Constitution are restrictions on legislative power and are enforceable by the courts"); *see gen. In Re Pension Reform Litigation*, 2015 IL 118585, at paragraphs 78-81. Even explicit grants of power to exempt new classes of property from taxation, such as the provision for homestead exemptions added by the second sentence of Ill. Const. 1970, Art. IX, section 6, must be restricted to a narrow definition of the defined terms. *Proviso Twp. High Sch. Dist. No. 209 v. Hynes*, 84 Ill. 2d 229, 240 (1980) ("homestead" is limited to owner-occupied property).

[54] *Eden Retirement Center Inc. v. Department of Revenue*, 213 Ill.2d 273, 286 (2004) (italics original, boldface added), quoting *Spring Hill Cemetery v. Ryan*, 20 Ill. 2d 608, 616 (1960).

[55] Section 15-86(a)(5).

purpose cannot be analyzed without considering who or what uses the property. That analysis begins by considering the use of the property from the perspective of its owner. This point is established for purposes of exemption in a line of Illinois cases that seems to have been ignored in the debates about the facial constitutionality of section 15-86.

Because Illinois' basic charitable exemption statute, section 15-65, has always required the property owner to be a charitable institution, arguments that an exemption could be established based solely on use of the property have historically focused on other exemption categories under other statutes. The two categories for which these arguments have been made have involved religious and educational (school) exemption claims.

The Property Tax Code exempts "property of schools, not sold or leased or otherwise used with a view to profit," and also exempts property "used for public school, college . . . university, or other educational purposes, whether held in trust or absolutely."[56] The basic provision requires ownership as well as educational use (property *of* schools), but subsection (c) (educational purposes) could imply that educational use is sufficient for exemption without regard to ownership. Similarly, the code exempts property "used exclusively for: (1) religious purposes; or (2) school and religious purposes; or (3) orphanages . . . as long as it is not used with a view to profit."[57] None of these subsections explicitly includes an ownership requirement.

Despite the apparent focus on "use" in these provisions, the Illinois Supreme Court long ago held in a case involving educational property that, "*[i]n determining whether the use to which certain property is put is for an exempt purpose, the intention of the owners of such property when putting it to use must first be ascertained*."[58] The Illinois Appellate Court has repeatedly applied this principle to hold that use for exempt purposes must be evaluated from the perspective of the owner of the property, even under statutes that impose no explicit requirement for exempt ownership.

Thus, in a case involving property leased by its owner to a church, which then used it for religious purposes, the appellate court stated:

> Section 19.2, on the other hand, provides an exemption for "[a]ll property used exclusively for religious purposes" and makes no mention of the ownership of the property. [Citation omitted.] Arguably, therefore, property which is used for religious purposes but which is owned by a for-profit entity could qualify under this exemption. In 1922, the Illinois Supreme Court held that to qualify for the religious-use tax exemption, a religious institution need not own the property as long as it uses the property for religious purposes. (*People ex rel. Bracher v. Salvation Army* (1922), 305 Ill. 545, 548, 137 N.E. 430 (interpreting a statute substantially similar to the statute that applies to this case).) The church in *Salvation Army*, however, did not lease the property but instead held the property in a contract for sale. The church had made a down payment on the property, assumed a mortgage, and was to obtain the title to the property as soon as the mortgage was paid off. Although the church did not have actual title to the property, it had all other indicia of ownership. (*Salvation Army*, 305 Ill. at 546, 137 N.E. 430.) The titleholder to the property had, in effect, already sold the property. More recent cases have held that similar finance agreements conferred the equivalent of ownership. [Citations omitted.]
>
> Even if section 19.2 does not require actual ownership, to qualify under that section, the property must not be "leased or otherwise used with a view to profit." [Citation omitted.] *Whether property is used for profit depends on the intent of the owner in using the property.* (People ex rel. Goodman v. University of Illinois

[56] 35 ILCS 200/15-35, 15-35(c).

[57] 35 ILCS 200/15-40(a)(1)-(3).

[58] *People ex rel. Goodman v. Univ. of Illinois Found.*, 388 Ill. 363, 371 (1944) (emphasis added).

> Foundation (1944), 388 Ill. 363, 371 . . . *Salvation Army*, 170 Ill.App.3d at 343 . . . In this case, Kristof leased the property to Zion [the church] for a profit. That Zion intended to purchase the property, was liable under its lease to pay owner Kristof a monthly sum for property taxes, and used the property for religious purposes, does not alter the fact that the owner of the property leased the property for a profit. In light of the presumption in favor of taxation, we hold that the Department correctly found that the property owned by Kristof and leased by Zion was not exempt from property tax.[59]

In another case involving property leased by its owner to a church, which applied for an exemption under the same provision based on its religious use, the appellate court again cited *Goodman*:

> This case indicates that before one looks to the primary use to which the property is used after the leasing, one must look first to see if the owner of the real estate is entitled to exemption from property taxes. If the owner of the property is exempt from taxes, then one may proceed to examine the use of the property to see if the tax exempt status continues or is destroyed.[60]

In a case involving an educational claim under section 15-35(c) of the Property Tax Code, a nonprofit argued that even though it owned the property, an exemption should be granted based strictly on educational use. After an extensive review of the case law, the appellate court rejected the argument on grounds that the applicant was not a school, nor was it closely enough associated with a school in its use of the property. The court stated that "*[t]hese cases illustrate the fallacy of [applicant's] contention that the test for exemption under section 15–35(c) is strictly use*."[61]

The lesson from these cases is that ownership and use for exempt purposes are inextricably linked, and this linkage arises out of constitutional principles regardless of whether it is specified in a statute. In the case of charitable use, there is no question that the General Assembly had the power to *narrow* the scope of permissible exemptions for nonprofit hospitals. For example, the law could specify that only particular kinds of charitable hospital owners would be exempt, provided that they used specific hospital properties solely for charitable purposes, all in conformity with the *Korzen* requirements. But that is far from what the legislature attempted to do in section 15-86.

Section 15-86's new concept of charitable ownership includes almost any complex web of interlocking hospital-related entities that a lawyer could dream up. The law defines a "hospital applicant [for exemption]" as a hospital owner or a hospital affiliate.[62] Any number of affiliates can have virtually any organizational relationship to a hospital owner, provided the relationship involves direct or indirect common control, which is very broadly defined.[63] A hospital system can include any number of affiliates related by common control.[64]

The "relevant hospital entity" for purposes of the exemption application can be any of the following: an owner, affiliate, or the entire system.[65] The statute does exclude from exemption any part of the subject property that is owned, leased to, or operated by a for-profit entity.[66] However, beyond that limitation, an unspecified amount of the activities to be weighed under section 15-86(c) may occur in any part of a complex hospital system, even if they have no relation to the property that is

[59] *Am. Nat. Bank & Trust Co. v. Dep't of Revenue*, 242 Ill. App. 3d 716, 723–24, 611 N.E.2d 32, 37–38 (2nd Dist. 1993) (emphasis added). The statute involved section 19.2 of the Revenue Act of 1939 and is now codified as 35 ILCS 200/15-40.

[60] *Victory Christian Church v. Dep't of Revenue*, 264 Ill. App. 3d 919, 922, 637 N.E.2d 463, 465, (1st Dist. 1994).

[61] *Illinois Beta House Fund Corp. v. Illinois Dept. of Revenue*, 382 Ill. App. 3d 426, 434, 887 N.E.2d 847, 854 (1st Dist. 2008) (emphasis added).

[62] Section 15-86(b)(2), (3), (5), (6).

[63] *Id.*

[64] Section 15-86(b)(4).

[65] Section 15-86(b)(7).

[66] Section 15-86(c).

proposed to be exempt, provided only that those parts are located in Illinois.

Section 15-86 attempts to broaden the scope of hospital ownership to such a degree that it would be impossible for IDOR or the courts to determine what entity with what interest is using what part of the hospital property for what purpose. It is illogical to contend that this is charitable ownership. There is no way to determine whether a particular owner, as the courts have used that term in exemption and other taxation contexts,[67] is charitable or is using the property for any charitable purpose as defined by the *Korzen* requirements and hence as required by the constitution.

To the contrary, section 15-86's new category of ownership for charitable property tax exemption is deliberately crafted to frustrate any such determination. Ownership related to the charitable use of any part of hospital property is evidently intended by the General Assembly to play no further role in hospital exemption cases. This broadens the grounds for exemption into new categories beyond those enumerated in the Illinois Constitution. As such it is forbidden by almost every exemption court opinion to date.

An Alternative Approach: A Potential Constitutional Amendment for Healthcare Property

The only way healthcare property tax exemptions could be brought within the plenary power of the General Assembly, without a significant alteration in the judicially imposed requirements for charitable use, would be by constitutional amendment. Though daunting, this is possible.

Amendments may originate in either house of the General Assembly and must be approved by a three-fifths majority in each house. On approval, the proposed amendment is placed on the ballot for the next general election scheduled at least six months thereafter.[68] At least one month before the election, an explanation of the proposal must be published for the voters. The amendment will be adopted if it receives the favorable votes of either three-fifths of all those voting on the question or a majority of all voters in that election (even if that majority comprises fewer than three-fifths of those who voted on the question).[69]

Since the adoption of the constitution in 1970, at least 21 amendments have been proposed. The most recent, seeking to establish a lockbox-type restriction on transportation spending, was approved on November 8, 2016.[70] Slightly more than half of the proposals have been approved.

There have been three attempts — in 1978, 1984, and 1986 — to amend the exemption provision of the constitution's Revenue Article. All would have allowed the exemption of veterans' organization property, which the supreme court has consistently refused to exempt unless it otherwise qualifies as charitable use property under existing constitutional language.[71] All three proposals failed.

Those who argue that amending the constitution would be too burdensome might consider the lockbox amendment. The proposal was criticized by news organizations and public interest organizations who argued it would further special interests rather than the public welfare and interfere with the General Assembly's normal function.[72] Despite

[67] Either equitable or legal ownership suffices for exemption or other determination of tax liability, provided it involves possession and control of the property and receipt of the benefits normally associated with ownership. *Christian Action Ministry v. Dep't of Local Gov't Affairs*, 74 Ill. 2d 51, 62, 383 N.E.2d 958, 964, (1978); *People v. Chicago Title & Trust Co.*, 75 Ill. 2d 479, 489, 389 N.E.2d 540, 544 (1979).

[68] Ill. Const. 1970, Art. XIV, section 2(a).

[69] *Id*. (b).

[70] Ill. Const. 1970, Art. IX, section 11.

[71] Section 15-145 of the Property Tax Code exempts "property of veterans' organizations used exclusively for charitable, patriotic and civic purposes." 35 ILCS 200/15-145. In *North Shore Post No. 21 of American Legion v. Korzen*, 38 Ill. 2d 231, 230 N.E.2d 833 (1967), the supreme court followed its traditional analysis and held: (1) the provision now codified as section 15-145 could not relax the strictures of "charitable use" as defined by the court's prior decisions; (2) the requirement of "patriotic and civic purposes" was therefore *additional* to the judicially defined requirement of "charitable use"; and (3) the traditional activities conducted at the subject property by the American Legion did not constitute charitable use.

the criticism, the amendment passed easily. The point is that a well-funded, well-supported campaign communicating the importance of adopting a proposed amendment could succeed.

An amendment for nonprofit hospital and healthcare property could make these a separate category of exempt use, thereby removing them from the charitable use category. This could read as follows:

> The General Assembly by law may exempt from taxation only the property of the State, units of local government and school districts and property used exclusively for agricultural and horticultural societies, and for school, religious, cemetery, charitable, *and nonprofit hospital or nonprofit healthcare* purposes. The General Assembly by law may grant homestead exemptions or rent credits.[73]

This approach is specifically tailored to the problem of hospital and healthcare exemption claims that has arisen in the wake of *Provena*. By restricting itself to the healthcare field, the proposal addresses the necessity of monetary compensation for most healthcare services without overturning judicial precedents that define charitable use. It would also leave unaffected charitable exemptions for any other type of property.

Although many lawyers believe that judicial decisions on charitable exemption claims outside of healthcare lack sufficient consistency and coherence, others are generally satisfied with the decisions while still others are satisfied with *Provena* and thus were presumably unsurprised by *Carle II*. While amending the constitution is in some respects a more radical approach than seeking a new judicial interpretation of the existing constitutional provision, in the present circumstances it may be the more conservative choice.

Those who argue that some large hospitals and healthcare organizations produce and distribute too much revenue to justify giving them property tax exemptions would not necessarily have to abandon these arguments in the face of a constitutional amendment. Under well settled principles of interpretation, as noted above, none of the constitutional exemption categories are self-executing and all are subject to plenary restriction by the General Assembly. The amendment would shift the debate about nonprofit hospital exemptions to the legislature. The General Assembly could decline to exempt them or could exempt them only if the hospitals satisfied a particular regulatory regime. The quantitative requirements of section 15-86 could be incorporated into such a regime or other requirements could be added or substituted.

Broadening the categories of property that the General Assembly could exempt raises legitimate concerns about the erosion of the tax base. Perhaps this concern should receive more attention. But because most nonprofit healthcare properties have been exempt in Illinois, the concern is not as great now as it otherwise could be. It is also useful to consider the legal philosophical basis on which anything is exempt, particularly regarding Illinois constitutional history. An examination of the constitutional basis of exemptions in Illinois suggests that the underlying philosophy is not very clear.

As noted earlier, the drafters of the 1970 constitutional provision wanted to maintain what they considered Illinois' strict approach to granting exemptions.[74] The drafters noted that 10 other state constitutions permitted their legislatures to exempt any property by general law, and in an unspecified number of other states, the constitutional exemption categories were self-executing, unlike in

[72] *See, e.g.* an editorial in the *Chicago Tribune* on Sept. 8, 2016, urging voters to "Vote No: Bulldoze the Diabolical 'Safe-Roads' Amendment." http://www.chicagotribune.com/news/opinion/editorials/ct-constitutional-amendment-road-funding-illinois-edit-0906-pw-20160906-story.html (accessed 5/11/17). On Oct. 16, 2016, a coalition of public interest groups including the Better Government Association, the Civic Committee of the Commercial Club of Chicago, The Civic Federation, the Heartland Alliance, Illinois Partners for Human Service, the Shriver Center, and the Taxpayer's Federation of Illinois, all signed a public letter urging rejection of the amendment. *See* https://www.civicfed.org/iifs/blog/letter-editor-lockbox-amendment (accessed 5/11/17).

[73] Ill. Const. 1970, Art. IX, section 6, with proposed broadening of authority for hospital and healthcare purposes.

[74] 7 *IL Constitutional Proceedings*, at 2150-63.

Illinois.[75] Illinois' somewhat conservative approach is particularly evident in that governmental property is included with the other categories that are all presumptively taxable, because the principle of non-self-executing exemption categories was retained. This differs from the traditional view that state and local governmental property is implicitly exempt, even without a positive statutory provision, as an attribute of sovereignty or because government should not have to "pay taxes to itself." [76]

The 1970 constitution made no changes other than modernizing language from its 1870 predecessor, except for authorizing homestead exemptions and rent credits.[77] The written dissent from the committee recommendation, which became Art. IX, section 6 of the Constitution with no substantive change, solely addressed homestead exemptions.[78] The concern was that the legislative power could extend to exempting the entire class of homestead property — in other words, the vast majority of all residential property — to the 100 percent level. While the committee considered limiting these exemptions to the "elderly and/or needy," it ultimately decided not to.[79]

The committee also retained two other use-based exemption categories for agricultural and horticultural society property and cemetery property from the 1870 constitution. The former category was included in 1870 to exempt county fairs. There is no record of why the latter was included.[80] Though some property in these categories could have come within school, religious, or charitable exemptions, the committee retained them separately to avoid "unforeseeable hardships" and because it trusted the legislature to restrict the exemptions if they were too broad.[81] In fact, the General Assembly has slightly broadened the exemption for cemetery property, removing the restriction to grounds used for existing burials.[82]

It is hard to find general themes connecting all these categories. They seem merely to reflect property uses traditionally thought to be exempt or the interests of large numbers of people. The theory of partially alleviating the burden of government, which has played a role in the charitable exemption, is not a general theme: the government is not obligated to operate cemeteries or agricultural or horticultural societies, and the First Amendment prohibits government involvement in religious activity.

Conclusion

Hospital and healthcare uses are a good fit within the loose themes that have been the apparent basis for the existing exempt use categories in the Illinois Constitution. And as noted, many hospital or healthcare properties, at least in the nonprofit subcategory, have traditionally been regarded as exempt. The same reliance on the legislature's discretion, which has limited homestead, cemetery, agricultural, and other use-based exemptions, may serve nonprofit healthcare as well.

Finally, it should be noted that a heroic effort by the Illinois Supreme Court to shoehorn modern hospitals into the charitable use exemption might broaden the concept of charitable use so that an unknown quantity of "charitable" property will also be removed from the tax rolls. It will be impossible to know whether this collateral consequence has ensued until many years after a decision is made about hospital exemptions in *Oswald*, *Carle II*, or in any other case.

On the other hand, explicitly recognizing a nonprofit hospital and healthcare category of exempt use would facilitate a more rigorous and limited definition of charitable use in other contexts. This might do less harm to both the law and the tax rolls. ■

[75] *Id.* at 2159.

[76] *See, e.g., Van Brocklin v. Tennessee*, 117 U.S. 151, 173–75 (1886) ("General tax acts of a state are never, without the clearest words, held to include its own property, or that of its municipal corporations, although not in terms exempted from taxation.")

[77] 7 *IL Constitutional Proceedings*, at 2150, 2158-59.

[78] *Id.* at 2160-62.

[79] *Id.* at 2159.

[80] 7 *IL Constitutional Proceedings*, at 2155, citing Braden and Cohn, *The Illinois Constitution: An Annotated and Comparative Analysis*, 436 (1969).

[81] 7 *IL Constitutional Proceedings*, at 2157-58.

[82] Compare *Proceedings*, *supra* n. 80, at 2155, with 35 ILCS 200/15-45, as amended by P.A. 92-7333 eff. July 25, 2002.