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DAVID J. COLLIGAN*

INTRODUCTION

"Don't tax you, don't tax me. Tax that fellow behind the tree."[1] Chances are that fellow behind the tree is a private forest owner.[2] These woodland owners increasingly feel pressure due to property taxation and urban sprawl. In the last century, property owners broke up large industrial forest tracts and abandoned marginal farms. Once abandoned farmland "on the hills," owners sold their tracts "for amenity values, recreational use, and in some cases, timber production."[3] The self-perception of modern forest owners is evolving to a view of themselves as ephemeral stewards of the land with a responsibility to enhance future enjoyment and use of the forests.

Quietly, but steadily, this forest stewardship evolution caused or coincided with a revolution in the state taxation of forests. A vast majority of the states changed their ad valorem tax rules[4] to encourage the forest owner to perpetuate forest land and develop forest management plans utilizing sound silvicultural practices.[5]

SUMMARY

Section I, of this article examines the historical revolution that created a different property tax scheme for forest land as it evolved during

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1. George F. Will, *Morality and the 'Martini' Lunch*, NEWSWEEK, Oct. 17, 1977, at 120.

2. *See generally* Thomas Lundmark, *Methods of Forestry Law-Making*, 22 B.C. ENVTL. AFF. L. REV. 783, 784 (1995) (relaying that "[s]eventy-two percent of the commercial timberland in the United Stated is in private ownership").

3. *See* Hugh O. Canham, *New York State Forest Preserve*, *in* 2 ENCYCLOPEDIA OF AMERICAN FORESTS AND CONSERVATION HISTORY 491 (Richard C. Davis ed., 1983).

4. In 1982, Siegel and Kerr found that 39 states possess laws that reduce property taxes for forest lands. William C. Siegel and Ed Kerr, *Update on Property Tax Laws*, 88 AM. FORESTS 36, 37-38 (July 1982). *See infra* Table I, Forest Class or Current Use column shows that this number is now 47.

5. *See infra* Table I. Table I lists states that require management plans as a prerequisite to obtaining property tax relief.

the twentieth century. Section II reviews the constitutional underpinnings of the Equal Protection Clause in both State and Federal Constitutions. Section II then reviews how the courts have interpreted the Equal Protection Clause in permitting the passage of forest land taxation statutes. Section III examines the incentives the new tax laws created, such as the incentive to produce timber and to encourage non-timber benefits. Non-timber benefits include such benefits as wildlife, recreation, and aesthetic appreciation. Section III also describes how to use yield taxes to more fairly tax forest land. Section IV reviews how each state's law has tried to balance the tension between local issues and state public policy. Finally, Table I illustrates the current forest taxation statutory schemes of all fifty states.[6]

I. A BRIEF HISTORY OF PRIVATE FOREST LAND TAXATION

What a difference a century makes! At the beginning of the last century, forty-one states had constitutional provisions requiring that the states equally apply all property taxes.[7] Ad valorem taxation is the term that defines equal taxation of land based on property value.[8] Therefore, owners of forest land at the beginning of the last century expected to be taxed based upon the relative value of their properties compared to other similarly situated properties. However, the states often compared property forest land to farmland. But unlike farmland, where crops have a usual rotation of one year[9] with annual income to pay property taxes, forest land's timber has rotations sometimes exceeding one hundred

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6. *See infra* Table I.

7. Forty-one states have constitutional provisions addressing equality of taxation and/or ad valorem taxation. These states are: Alabama (ALA. CONST. art. XI, § 211), Alaska (ALASKA CONST. art. VIII, § 17), Arizona (ARIZ. CONST. art.9, § 1), Arkansas (ARK. CONST. art. XVI, § 5(a), California (CAL. CONST. art. XIII, § 1), Colorado (COLO. CONST. art. X, § 3), Delaware (DEL. CONST. art. VIII, § 1), Florida (FLA. CONST. art. VII, § 2), Georgia (GA. CONST. art. VII, § 1, ¶ III), Idaho (IDAHO CONST. art. VII, § 5), Illinois (ILL. CONST. art. IX, § 2), Indiana (IND. CONST. art. X, § 1), Kansas (KAN. CONST. art. 11, § 5), Kentucky (KY. CONST. § 171), Louisiana (LA. CONST. art. VII, § 18), Maryland (MD. CONST. art. XV), Michigan (MICH. CONST. art. IX, § 3), Minnesota (MINN. CONST. art. X, § 1), Mississippi (MISS. CONST. art. IV, § 112), Missouri (MO. CONST. art. X, § 3), Montana (MONT. CONST. art. VIII, § 4), Nebraska (NEB. CONST. art. VIII, § 1), Nevada (NEV. CONST. art. X, § 1), New Jersey (N.J. CONST. Art. VIII § 1 ¶ 1), New Mexico (N.M. CONST. art. VIII, § 1), North Carolina (N.C. CONST. art. V, § 2), North Dakota (N.D. CONST. art. X, § 5), Ohio (OHIO CONST. art. XII, § 2A), Oklahoma (OKLA. CONST. art. X, § 5), Oregon (OR. CONST. art. IV, § 32), Pennsylvania (PA. CONST. art. VIII, § 1), South Carolina (S.C. CONST. art. X, § 1), South Dakota (S.D. CONST. art. VI, § 17), Tennessee (TENN. CONST. art..II, § 28), Texas (TEX. CONST. art. VIII, § 1-a), Utah (UTAH CONST. art. XIII, § 2), Virginia (VA. CONST. art. X, § 1), Washington (WASH. CONST. art. VII, § 1), West Virginia (W. VA. CONST. art. X, § 1), Wisconsin (WIS. CONST. art. VIII, § 1), Wyoming (WYO. CONST. art. I, § 28). The states without any such provisions are: Connecticut, Hawaii, Iowa, Maine, Massachusetts, New Hampshire, New York, Rhode Island, and Vermont.

8. The term "ad valorem" is defined as "a tax imposed on the value of property." BLACK'S LAW DICTIONARY 51 (6th ed. 1990).

9. *See generally* John H. Davidson, *Conservation Agriculture: An Old New Idea*, 9 WTR NAT. RESOURCES & ENV'T. 20, 21 (1995) (illustrating the one year time period of crop rotation).

years[10] with infrequently produced income from the timber harvest.[11] At about this time, the science of silviculture in this country was rapidly developing and the highest level of government was recognizing wise forest management.[12] In a seminal monograph appearing in Roosevelt's Conservation Commission report in 1909, the director of the United States Department of Agriculture, Fred Rogers Fairchild, criticized the wisdom of applying traditional ad valorem taxation methods to forest land.[13] Essentially, Fairchild concluded that ad valorem taxation acted as a disincentive to long-term timber management.[14]

In 1924, Congress passed the Clarke-McNary Act "to study the effects of laws, methods, and practices upon forest perpetuation."[15] In 1935, this Act funded Fairchild to thoroughly examine this subject and issue another report.[16] The report concluded that the burdensome effect of the property tax was a serious or insurmountable handicap to forest perpetuation in private ownership (the "Fairchild Report").[17] Fairchild succeeded in pointing out that the difference in timing between the payment of ad valorem property taxes and the receipt of income from timber land caused a time bias, effectively inducing timber owners to liquidate their investments prematurely, therefore, shortening production rotations.[18] Fairchild also observed that the public recognized the need for the protection that forests provide against floods, erosion, pollution and scenic spoliation.[19] He concluded that while these are vitally important from the public point of view, they were less important from the point of view of the private owner, as "the public interest requires not only less severe cutting, but also as a rule, more expensive cultural operations and methods of cutting."[20]

The report determined ad valorem property taxation of forest land resulted in deforestation, shorter timber stand rotations, and a conversion of use coinciding with the growth of suburban America. The ad valorem taxation method encouraged both residential land development and the

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10. *See generally* Steven A. Daugherty, *The Unfulfilled Promise of an end to Timber Dominance on the Tongass: Forest Service Implementation of the Tongass Timber Reform Act*, 24 ENVTL. L. 1573, 1600 n.145 (1994) (illustrating the Forest Service's prescription of a rotation age of approximately 100 years for timber production).

11. *See* FRED ROGERS FAIRCHILD, FOREST TAXATION IN THE UNITED STATES (U.S. Dep't of Agric. Misc. Pub. No. 218, 7 (Oct. 1935); Richard W. Trestrail, *Forests and the Property Tax - Unsound Accepted Theory*, 22 NAT'L TAX J. 347, 349 (1969).

12. THEODORE ROOSEVELT, AN AUTOBIOGRAPHY 299, 323-25, 408-27, 431-35 (reintroduced by Elting E. Morison, Da Capo Press, Inc. 1985).

13. *See* FAIRCHILD, *supra* note 11, at 4.

14. *See* FAIRCHILD, *supra* note 11.

15. *See id.* at 5 (quoting from § 3 of the Clarke-McNary Act).

16. See id.

17. *See id.* at 6-10.

18. *See id.* at 7.

19 *See id.*

20. *See id.*

creation of recreational subdivisions, greatly increasing the raw land's value regardless of whether productive forests existed thereon.[21] The pressures of suburban development caused forest owners to be unable to justify growing timber under the resulting ad valorem tax burden.[22]

As Fairchild observed, it was not within the public interest to penalize forest owners.[23] Most of the states realized that to strive for the public policy goal of forest perpetuation, the ad valorem tax system had to be modified to tax forest land at less than full market value.[24] These special tax laws were slow in coming because state constitutions had to be changed in order to accomplish a different method of taxation.[25] State legislatures did not pass the majority of state forest incentive tax laws until the 1960's and 1970's.[26] Now, forty-seven states[27] have carved out exceptions to traditional ad valorem taxation of forest lands in order to induce both timber production and encourage the many non-timber related benefits that forests provide to the public.[28]

II. EQUAL PROTECTION CLAUSE AND PROPERTY TAXES

A. *Application to Property Taxes*

The last presidential election gave Americans a lesson in federal constitutional equal protection.[29] The equal protection clauses contained in the federal and in most state constitutions also apply to state property taxes. "Perhaps the most widely accepted principle of equity in taxation is that people in equal positions should be treated equally."[30] This principle is termed "horizontal equity".[31] Historically, the courts have left a determination of fairness in taxation in the province of state legislatures.[32] "[A] large discretion is necessarily vested in the legislature to determine not only what the interests of the public require, but what

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21. *See* Siegel and Kerr, *supra* note 4, at 36.
22. *See id.*
23. *See* FAIRCHILD, *supra* note 11. at 7.
24. *See* Siegel and Kerr, *supra* note 4, at 38.
25. *See id.*
26. *See id.* at 63.
27. *See infra,* Table I.
28. *See id.*
29. *See generally* Gore v. Bush, 121 S.Ct. 525, 530, 532 (2000) (holding that (1) having once granted the right to vote on equal terms, the state may not, under the Equal Protection Clause of the U.S. Constitution, value one person's vote over that of another by later arbitrary and disparate treatment, and (2) when state courts order statewide recounts in Presidential election, equal protection requires that there be at least some assurance that the rudimentary requirements of equal treatment and fundamental fairness are satisfied).
30. *See* John A. Miller, *Rationalizing Injustice: The Supreme Court and the Property Tax*, 22 HOFSTRA L. REV. 79, 125 (1993).
31. *See id.*
32. *See* William C. Cohen, *State Law is Equality Clothing: A Comment on Allegheny Pittsburgh Coal Company v. County Commission*, 38 UCLA L. REV. 87, 99 (1990)

measures are necessary for the protection of such interests."[33] Parties have challenged perceived unjust property taxes by bringing Equal Protection cases.

B. *The Ad Valorem Tax System*

To review the constitutional challenges to property taxes as they apply to forest land taxation, one must start with a closer inspection of the ad valorem taxation system. In a theoretically perfect ad valorem taxation system, a person who owns land served by the community pays taxes to the community based on the value of the land owned.[34] In theory, those who own the most valuable property pay the most tax.[35]

The ad valorem taxation is a two part process first establishing the value and secondly applying a tax rate expressed in either "mils"[36] or cents per hundred dollars assessed value to arrive at the imposed tax. "Traditionally, the base against which the rate is levied is the fair market value of the property subject to the tax."[37]

Fair market value for ad valorem taxation purposes requires a determination of the property's highest and best use.[38] Ensuring a high quality valuation system demands highly skilled and professional staff.[39] Assessing forest land requires highly specialized appraisal skills requiring a knowledge of land sales, timber markets, and timber measurement techniques. Often the valuation system applied by the taxing authority indicates that the property's current use as forest land is not the highest and best use. This gives rise to the forest owner's perception that forest land assessors are treating them unfairly. Further, there is an inherent problem in valuing property that has not been subject to a recent arm's length sale.[40]

C. *Rational Basis Standard*

The level of subjectivity of the local assessor has created numerous constitutional challenges that have proceeded through the courts all the way to the Supreme Court of the United States.

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33. Lawton v. Steele, 152 U.S. 133, 136 (1894).

34. James S. Wershow & Edward S. Schwartz, *Ad Valorem Assessments in Florida - Recent Developments*, 36 U. MIAMI L. REV. 67, 67 (1981).

35. *Id.*

36. Miller, *supra* note 30, at 84.

37. *Id.*

38. *See* William C. Unkel & Dean Cromwell, *California's Timber Yield Tax*, 6 ECOLOGY L.Q. 831, 832 (1978).

39. *See generally* INT'L ASS'N OF ASSESSING OFFICERS, STANDARD ON PROPERTY TAX POLICY (1997), at http:www.iaao.org (representing a consensus in the assessing profession and the objective of these standards is to provide a systematic means by which concerned assessing officers can improve and standardize the operation of their offices).

40. Miller, *supra* note 30, at 85.

In *Cumberland Coal Co. v. Bd. of Revision*,[41] the Supreme Court found that the local assessor assumed that all coal properties in the town should be taxed at the same rate, regardless of remoteness or accessibility of the parcel, costs of the operation of extracting the coal or the availability of transportation.[42] The Court found this over-simplified subjective approach was an intentional and systemic under valuation, which, if proven, violates Federal Equal Protection.[43] The Court held a legislature is not bound to tax every member or no member of a class. It may make distinctions of degree when it has a rational basis for that distinction. When subjected to judicial scrutiny, the Court must be presumed to rest on a rational basis if there is any conceivable state of facts that would support it.[44] We call this the "rational basis" Equal Protection test.

For over fifty-five years, the Supreme Court of the United States consistently adhered to the deferential rational basis review in tax cases that did not require "heightened scrutiny," that is, unless the taxation scheme was "palpably arbitrary" or "invidious."[45] This heightened scrutiny shifts the burden to the state to prove a compelling state interest if a "suspect classification" exists or the law impinges on a "fundamental interest."[46]

Then, in 1989, the Supreme Court of the United States decided the *Allegheny* case, which held that a West Virginia tax assessor's practices violated equal protection because certain properties received dramatically higher assessments than neighboring "comparable properties."[47] The Court found that the county assessor determined the appraised value of the coal company's properties relying heavily on recent sale prices of the coal company's properties which resulted in assessments thirty-five times higher than neighboring "comps"[48] which had not generally been tested for coal.[49] Additionally, the Court found that even though the similarly situated properties were subjected to regular ten percent incremental increases in assessed valuation, it would have taken 500 years to equalize assessments between the coal company's properties and neighboring lands.[50] The *Allegheny* Court implied that the Webster County assessor's actions would not be subjected to constitutional review if he

41. 284 U.S. 23 (1931).
42. *Cumberland Coal. Co.*, 284 U.S. at 24.
43. *Id.* at 28.
44. *Id.*
45. *See* Robert Jerome Glennon, *Taxation and Equal Protection*, 58 GEO. WASH. L. REV. 261, 284-85 n.144.
46. *See id.* at 278 nn. 99-103.
47. Allegheny Pitt. Coal Co. v. County Comm'n, 488 U.S. 336, 342-43 (1989).
48. "Comps" is a term of art referring to comparable properties used to compare the subject tax parcel in order to prove or disapprove valuation fairness.
49. *See Allegheny*, 488 U.S. at 338, 340.
50. *See id.* at 341-42.

had followed the state guidelines and based all coal land assessments on a "least valuable seam of mineral coal" standard.[51]

The *Allegheny* case called into question the ad valorem taxation system in general and the special exception statutes that allowed forest owners to elect to assess their forest properties based on methods other than fair market value.[52] We did not have to wait long to find out if the Supreme Court would throw out the rational basis review of tax statutes from the *Cumberland Coal* case. The Supreme Court issued its decision in *Nordingler*[53] in 1992, whereby the Court concluded that the acquisition cost assessment scheme of California's Proposition 13 has a rational basis, and thus did not violate the equal protection clause.[54] *Nordingler* distinguished the *Allegheny* decision because in *Allegheny* an individual local assessor who was not following state law caused the violation of the equal protection law, while Proposition 13 is a statutory scheme the voters of the State of California established.[55]

D. *Forest Land Tax Statutes Challenges*

The new forest land special tax classification laws do not appear to apply the heightened standard of equal protection that was a concern after the *Allegheny* decision. Before *Allegheny*, one state court using the rational basis standard, held that challenging the valuation of timber land for tax purposes required no judicial interference unless fraud or flagrantly excessive valuations showed an intention to discriminate.[56]

In the 1969 class action suit *Weissinger v. White*, the Eleventh Circuit found an Alabama state statute unconstitutional because the ad valorem assessment rates ranged from nine to thirty percent.[57] This case best illustrates the effects of rational basis equal protection on the changing legal landscape in the field of forest land taxation.[58] As a result, the legislature passed Amendment 373 to the Alabama Constitution which created four classes of property for taxation purposes.[59] Class Three in the scheme was farm, timber, residential and historical property. In an attempt to further subdivide Class Three, the amendment treated farm and timber property separate from residential and historic land.[60] In a follow-up case brought to the Eleventh Circuit Court of Appeals, the court held that Alabama was justified in the disparate treatment of one-half of the

51. *See* Glennon, *supra* note 44, at 292 n.207.
52. *See id.* at 304-05 n.265.
53. Nordingler v. Hahn, 505 U.S. 1 (1992).
54. *See id.* at 28.
55. *See* Erin A. O'Hara & William R. Dougan, *Redistribution through Discriminatory Taxes: A Contractarian Explanation of the Role of Courts*, 6 GEO. MASON L. REV. 869, 907-08 (1998).
56. *See* Powell v. Kelly, 223 So. 2d 305, 307 (Fla. 1969).
57. Weissinger v. White, 733 F.2d 802, 804, (11th Cir. 1984).
58. *See id.*
59. *See id.*
60. *See id.* at 805.

Class Three property for two reasons: (1) individual assessment of income producing property was not administratively feasible; and (2) the state had a special interest in preserving farm and timber land in an attempt to perpetuate certain desirable uses of its land in the face of economic pressures to convert the property to more lucrative pursuits.[61] The court concluded that any disparity that is rationally related to a permissible state purpose would pass the test of constitutionality.[62] The Alabama case is consistent with the often-articulated proposition that the Equal Protection Clause does not preclude states from creating different statutory classifications.[63]

In 1997, the Mississippi Supreme Court held that a forest owner who claimed to have devoted forty-seven forested acres near downtown Madison to timber use but had not actually prepared the property for planting was entitled to receive agricultural use valuation for the property.[64] As a result, the forest owner successfully challenged a revaluation to $2,525,000 for tax purposes and received an assessment consistent with her use of the land as forest land.[65]

In 2000, the Supreme Court of Alabama held that the valuation based on a "current use" as forest land as opposed to its fair and reasonable market value was not a constitutional violation even though the property had curbs and storm sewers the owner installed prior to the timber being cut. The special jury returned an interrogatory finding that on the tax record date in 1991 the property was "growing for sale timber and forest products."[66] The Alabama Court found that using the property as a forest on the tax date was all that mattered and the value of the surrounding property was immaterial.[67]

E. *Future Challenges*

These cases generally indicate property tax laws do not violate Equal Protection, including forest land incentive statutes. However, if there is gross discrimination within a class or if a fundamental interest is impinged upon, court may invoke equal protection. The author found only one state court decision holding that the statute taxing agriculture and timber land by "current use" is unconstitutional.[68]

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61. *See id.* at 806.
62. *See id.* at 806-07.
63. *See id.* at 805-06.
64. Madison County v. Lenoir, 695 So.2d 596, 596-97, 600 (1997).
65. *See Madison Co.*, at 596, 597, 600.
66. *See* Delaney's, Inc. & Springdale Stores, Inc. v. Ala., 2000 Ala. LEXIS 401, *11-12 (2000).
67. *See id.*
68. *See* Ark. Pub. Serv. Comm'n v. Pulaski County Bd. Of Equalization, 582 S.W.2d 942, 950 (1979).

III. YIELD TAX

A. *New Taxation Models*

Forest owners have unsuccessfully challenged the ad valorem tax system on Equal Protection grounds. Despite this failure, a general understanding has developed that disincentives inherent in an ad valorem tax system were not meeting the public policy goals to encourage green space and forest land. This realization led to a borrowing of the European model whereby countries tax forest property based upon yields, not fair market values.[69]

Prior to 1976, California's forest tax scheme was such a confused mess that three studies were conducted examining whether a new system could effectively replace the ad valorem tax system.[70] The California studies supported a yield tax as a form of timber land taxation for three reasons: (1) the yield tax would not affect timber management decisions as much as ad valorem taxes, including not penalizing owners who did not commercially harvest their trees; (2) the yield tax would correct major inequities in pre-Forest Tax Reform Act (FTRA) system; and, (3) collection and distribution at the state level could dispel local concerns over loss of income because the design of FTRA was revenue neutral.[71] California also had to pass a Constitutional Amendment before enacting FTRA.[72]

B. *Severance and Productivity Taxes*

Yield taxes come in two forms: severance and productivity taxes. States charge severance taxes as either a percent of the cut timber sales price or a tax per unit of harvested wood fiber in lieu of annual property taxes.[73] Severance taxes have the advantages of timing tax payments with harvest receipts and collecting the greatest amount from those with the greatest incomes from their forest lands.

The second form of yield taxes is a productivity tax. The hypothetical value of the land, as calculated by its expected future yield, forms the basis for productivity taxes. Productivity taxes are sometimes called "current use" taxes as they use estimated incomes from the property based on its current use as a forest.[74] Productivity taxes are also commonly used to tax agricultural lands which have many of the same public policy objectives as forest tax laws, such as to encourage agricultural

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69. *See* William C. Unkel & Dean Cromwell, *California's Timber Yield Tax*, 6 ECOLOGY L.Q. 831, 839 (1978).

70. *See id.*

71. *See id.* at 839; *see generally* Forest Tax Reform Act, ch. 176, 1976 Cal. Legis. Serv. 373-420 (1976) (codified as amended at CAL. REV. & TAX CODE §§ 431-37 (Deering 2000)).

72. *See id.* at 842.

73. *See infra* Table I.

74. *See Ark. Pub. Serv. Comm'n*, 582 S.W.2d at 948.

production and preserve "green belts" surrounding urban areas.[75] Soil productivity and capability form the basis of productivity taxes. These concepts are difficult to apply in practice since the assessor requires a great deal of knowledge in order to ascertain land values. Many states have elected to create forest land valuation matrixes[76] that state agencies developed to establish valuations by regions and by soil type or site index. In theory, productivity taxes incentivize the most productive use of forest lands provided the productivity taxes do not approach the level of the ad valorem taxes resulting in voluntary conversions.

C. *Green Belt Areas*

Many states have used yield taxes as a way to incentivize preservation of green space. Whether the states term the statutory scheme as open space, green belt space, vegetated filter strips, recreational open land, or forest land preserve areas, it recognizes the non-timber values many owners associate with owing their land. These statutory schemes do not penalize the land owners or forest owners who value wildlife, recreation, and aesthetic appreciation more than timber production. They may opt into the favorable tax schemes and enjoy the tax benefits that flow from them. Otherwise, the same ad valorem tax pressures would subject these owners to similar pressures as the forest owner whose primary objective is timber production. The states tax these properties based upon a current use theory. The state assumes the owner holds this property for timber production purposes; therefore, whether or not the owner intends to someday produce timber off the property, the state incentivizes them to keep it as forest land and to manage it for future timber and non-timber benefits. The net effect to the forest owner is that he does not have to pay potentially higher taxes based upon commercial and residential development around the property. The cases cited in the previous section demonstrate that courts have upheld this strongly indicated public policy which the state statutory schemes have expressed.[77]

IV. BALANCING STATE PUBLIC POLICY WITH LOCAL CONTROLS

A. *Owner Option*

Rather than mandate stewardship responsibilities upon every forest owner within the state, most states have provided the forest owner with the option of enrolling their property within the tax incentive program. The forest owner may opt for this voluntary election creating the classic

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75. *See, e.g.*, N.Y. Agric. & Mkts. Law §§ 300, 304(1) (2000).

76. A central state taxing authority which establishes values per acre for lands in different counties or regions using detailed soil maps, agricultural or timber product sale information, and other relevant, objective information usually sets up matrixes.

77. *See* discussion of Madison County v. Lenoir, 695 So.2d 596 (1997) and Delaney's, Inc. & Springdale Stores, Inc. v. Ala., 2000 Ala. LEXIS 401 (2000) *infra* Part II. D.

quid pro quo whereby the forest owner receives a lower tax burden in exchange for good forest stewardship.

B. *Management Plans*

Many states offering forest land tax incentives have a requirement that land owners must prepare a management plan in order to be qualified to obtain the special tax benefits. Management plans help land owners think through the issues confronting them as stewards of the land. Consulting foresters will make recommendations within a management plan as to wildlife enhancements and/or aesthetic appreciation strategies. The silvacultural principles, which are now well established, are not generally known to the average forest owner unless the forest owner is encouraged to obtain professional forester advice on how to manage the land in order to gain the benefit of the tax incentives. However, the level of plan requirements vary greatly from state to state. Compare Idaho,[78] which merely requires a general statement of eventual timber harvest intention, to New York, which requires detailed management plans and the forest owner's active participation while the property is enrolled in the program.[79]

C. *Time Commitment*

At the outset, forest owners in most states have to make a decision at the outset regarding their willingness to participate in good forest stewardship practiced for an extended period of time in exchange for reduced property taxes under the various forestry incentive laws. Most states express this commitment in terms of a minimum enrollment period.[80] By making the enrollment optional, states have essentially given the forest owner a choice between choosing ad valorem taxation based on the highest and best use of the property or choosing tax incentivized forest ownership.

A few states have mandatory participation of all forest owners; therefore, all forest owners receive forest tax incentives. Some states, such as California, have required forest commitments in what is called a "Timberland Preserve Zone".[81] Forest owners in California who are not in the mandatory Timberland Preservation Zone can apply for benefits and tax incentives but must meet three state mandated criteria. The state also allows local communities to add two optional criteria for owners who wish to apply, involving minimum acreage and minimum site character-

78. IDAHO CODE §63-1701(Michie 2000).

79. N.Y. REAL PROPERTY TAX, §480(a) (2000). *See generally* New York Dep't of Environmental Conservation Form No. 81-06-5(6/89)-90 "Certificate Of Approval" (conditioning approval and continued eligibility upon the work schedule listed on the form).

80. *See infra* Table I for states that have minimum enrollment periods.

81. Unkel, *supra* note 67, at 848.

istics.[82] Note, California does not permit any additional criteria for local government permissive granting of timber land preservation zone classification.[83]

D. *Acreage Requirement*

Many states have maximum or minimum acreages that are eligible to participate in the forest incentive tax program of that state.[84] Minimum acreage requirements allow each state to establish its public policy regarding what qualifies as forest land in its state. States with low minimum acreages do not appear to be concerned with further fragmentation of the timber land. Presumably, states with high minimum acreages have determined that not all forest land in the state is eligible for tax incentives, or they are providing a deterrent to fragmentation. States with maximum acreage requirements as part of their forest land tax incentive schemes appear to recognize that owners of large tracks of timber land are less likely to need or want state tax incentives to apply to their vast holdings with the co-commitments to management plans and yield taxes.

E. *Change of Use Penalties*

Many states have penalties for converting forest lands to other uses.[85] Some states call these penalties "rollback penalties," other states refer to them as "recapture penalties". At least nineteen states have no change of use penalty at all.[86] New Jersey has a short two year rollback[87] while Pennsylvania has a seven year rollback.[88] Meanwhile, New York appears to have the most severe penalties as it has a ten year rollback feature, plus interest.[89] If it is a full removal of the property from the RPTL Section 480(a) program, the New York land owner pays an additional penalty equal to two and one-half times the rollback amount.[90] If the land owner attempts to withdraw a portion of the qualified property, the State of New York exacts a penalty of five times the rollback figure.[91] This amounts to a penalty of fifty times the current year's tax savings! Other states having relatively heavy penalties include Hawaii, Washington, Pennsylvania, Vermont and California.[92] In states which have voluntary participation in the forest incentive programs, the level of participation is often correlated to the penalty feature alone. For instance, Louisiana has

82. *See id.* at 853.
83. *See id.*
84. *See infra* Table I.
85. *See infra* Table I.
86. *See infra* Table I.
87. N.J. STAT. ANN. § 54:4-23.8 (West 2000).
88. 72 PA. CONS. STAT. ANN. § 5490.5a (West 2000).
89. N.Y. REAL PROP. TAX LAW § 480(a) (McKinney 2000).
90. *Id.*
91. *Id.*
92. *See* Siegel & Kerr, *supra* note 4, at 62.

eighty percent and Florida has one hundred percent participation.[93] New York, meanwhile, has only four percent of the eligible land enrolled in the RPTL 480(a) Program.[94]

F. *Parcel Eligibility*

Most states try to balance state public policy as expressed in its forest taxation law against local interest in maintaining and preserving income and other benefits derived through the property tax system. States that have forest incentive laws often establish some local control, such as forcing the land owner to register the property on an annual basis[95] or requiring the forest land owner to petition local government to include timber land for special zoning designation.[96] By establishing state standards for which properties qualify, the state effectively overcomes local resistance to "down zoning"[97] or removal of property from local tax rolls completely, resulting in tax shifts to remaining property from those owners qualifying for the forest land tax incentives.[98]

Some states have built provisions into their forest tax incentive laws to help the local communities. For instance, Alabama has a yield tax premium of approximately fifty percent on both hardwood and softwood log sales exported from the state.[99] This disincentive to perform value added processing of the raw timber outside the state helps the local communities retain jobs and is an attempt to stem the tide of rising log exports that many states are experiencing. Other states, such as Arkansas, have imposed a $.15 per acre surtax on all forest land to help defray the costs of fire protection of those timber stands.[100] Courts have upheld the cost of fire protection as a property tax component with respect to forest land after a court challenge.[101] Michigan and Wisconsin have a requirement that in order to be eligible for tax incentives, property cannot be posted, which is one reason cited for low enrollment in those states [102]

G. *School Taxes*

Traditionally, most school districts in this country rely either solely or in large part upon property taxes generated within the district bounda-

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93. *Id.*

94. Joint Report of the New York State Dept. of Env't Conservation and Bd. Of Equalization and Assessment on The Forest Tax Laws (Sections 480 & 480a of the Real Property Tax Law) 2 (Dec. 1993) [hereinafter Joint Report, The Forest Tax Laws].

95. *See id.* at 2.

96. *See* Unkel, *supra* note 67, at 853.

97. *See id.*

98. *See* JOINT REPORT, THE FOREST TAX LAWS, *supra* note 92, at 4.

99. ALA. CODE § 9-13-82 (2000).

100. ARK. CODE ANN. §26-61-103 (Michie 2000).

101. *See generally* State v. Pape, 174 P. 468 (1918); Chambers v. McCollum, 272 P. 707 (1928).

102. *See* Siegel & Kerr, *supra* note 4, at 63.

ries.[103] A great deal of tension has developed at the local level between school districts who rely on property tax revenues as their sole source of funding and forest owners who are raising trees that will never attend the local schools. A series of cases that are unrelated to forest tax incentives may resolve this tension and should have a profound impact on how states fund local school districts. Essentially, three "waves" of cases have swept across the United States, challenging the local funding of schools through levies on local real property tax base.[104] The first wave challenged the state statutes based upon an equal protection theory that the poorer districts did not fair equally compared to the more wealthy districts because they had less tax base to support their educational programs. The Supreme Court rejected this view that wealth was a suspect classification because education was not a fundamental interest.[105] The second wave of cases found that, although the Federal Constitution did not protect education, certain State Constitutions' equal protection clauses specifically mention education; therefore, the local school districts across the state were entitled to be funded on an equal basis.[106] The third wave of cases all rely solely on the education clause of state constitutions. These cases have held that the state has been responsible through its actions for a substantial portion of the under funding of poorer districts resulting in a constitutional violation.[107]

These new school tax cases challenging local taxation should be a great relief to forest land owners. Now, through centralized state school funding, the states can equitably distribute property tax levies throughout the state. Forest owners will pay their fair share of the school taxes regardless of what percent of the local town's tax base the forest land represents. School districts in poor rural areas will be assured that their education funding will be equal to the wealthier districts within the state regardless of property tax base and receipts of yield taxes from forest lands. It is fortunate that trees versus school children will no longer be a source of local tension.

CONCLUSION

Essentially, there are three methods to choose from to encourage private forest ownership: regulations, incentives, and voluntary management.[108] All three methods are blended together in the various state laws to advance public policy objectives. As the Fairchild Report stated, "[t]he ideal method of taxing forests is that which will require a just contribu-

103. *See generally* Campaign for Fiscal Equity v. State of New York, 2001 N.Y. Misc. LEXIS 1, 36-40 (2001) (discussing New York State's school aid distribution system).

104. *Campaign for Fiscal Equity*, 2001 N.Y. Misc. LEXIS at 9-17.

105. *See* San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1, 18 (1973).

106. *See generally* Serrano v. Priest, 557 P.2d 929 (Cal. 1976).

107. *See Campaign for Fiscal Equity*, 2001 N.Y. Misc. LEXIS at 14-17.

108. *See* Lundmark, *supra* note 2, at 792.

tion from forest owners, while being of such form as will not place a special obstacle (beyond what any just tax must impose) in the way of best use of the forests and the forest lands from the viewpoint of the public interest."[109]

There is probably no such thing as an ideal law, but a good forest taxation law should include four essential elements: (1) the law should base all assessments upon the productive capability of the land; (2) the laws should compute the assessment values on a statewide basis; (3) the state law should include some rollback taxes or other penalties so that the properties do not get prematurely withdrawn; and, (4) the statutes should protect local public interest without sacrificing too much state control over the process to ensure equity and fairness.[110]

The last century has witnessed a tax revolt and constitutional upheaval in forest taxation. The individual forest owner now has an incentive to be a forest steward who is managing his forest for future generations to enjoy the many resulting benefits.

109. FAIRCHILD, *supra* note 11, at 9-10.
110. *See* Siegel & Kerr, *supra* note 4, at 63.

TABLE I

STATE	FOREST CLASS OR CURRENT USE YES/NO	SEVERANCE TAX UNIT OR % NO	FOREST OWNER OPTION YES/NO	MANAGEMENT PLAN REQUURENEBT YES/NO	MINIMUM TERM # OF YRS/NO	ACREAGE REQUIREMENT MAX. OR MIN./NO	CHANGE USE PENALTY YES/NO
ALABAMA	YES	UNIT	YES	NO	NO	NO	YES
ALASKA	NO	NO	NO	NO	NO	NO	NO
ARIZONA	NO	NO	NO	NO	NO	NO	NO
ARKANSAS	YES	UNIT	NO	NO	NO	NO	NO
CALIFORNIA	YES	2.9%	YES	NO	NO	NO.	YES
COLORADO	YES	NO	YES	NO	NO	• 40 AC	NO
CONNECTICUT	YES	2-10%	YES	NO	10 YR	•25 AC	YES
DELAWARE	YES	NO	YES	YES	2YR	•10 AC	YES
FLORIDA	YES	NO	YES	NO	NO	NO	NO
GEORGIA	YES	UNIT	YES	NO	10 YR	•10•2000	YES
HAWAII	YES	NO	YES	YES	20 YR	• 10 AC.	NO
IDAHO	YES	3%	YES	YES	10 YR	•5•5000	YES
ILLINOIS	YES	4%	YES	YES	2YR	NO	NO
INDIANA	YES	NO	YES	NO	NO	•10 AC.	NO
IOWA	YES	NO	YES	NO	8 YR	•2 AC.	YES
KANSAS	YES	NO	NO	NO	NO	•10 AC	YES
KENTUCKY	YES	NO	NO	NO	NO	•10 AC	NO
LOUSIANA	YES	2.5-5%	YES	YES	NO	•3 AC	NO
MAINE	YES	NO	YES	YES	10 YR	•10 AC	YES
MARYLAND	YES	NO	YES	YES	NO	•5 AC	NO
MASSACHUSETT	YES	5%	YES	YES	10 YR	•10 AC	YES
MICHIGAN	YES	5%	YES	YES	NO	•20 AC	YES
MINNESOTA	YES	2.0-10%	YES	YES	6 YR	•5 AC	YES
MISSISSIPPI	YES	UNIT	NO	NO	NO	NO	NO
MISSOURI	YES	6%	YES	NO	NO	•20 AC	YES
MONTANA	YES	UNIT	NO	NO	NO	•15 AC	NO
NEBRASKA	YES	NO	NO	NO	NO	NO	NO
NEVADA	YES	NO	YES	NO	3 YR	•7 AC	YES
NEW	YES	10%	YES	YES	NO	•10 AC	YES
NEW JERSEY	YES	NO	YES	YES	2 YR	•5 AC	YES
NEW MEXICO	YES	1/8TH%	YES	NO	1 YR	•1 AC	NO
NEW YORK	YES	6%	YES	YES	10 YR	•50 AC	YES
NORTH	YES	6%	YES	YES	4 YR	•20 AC	YES
NORTH DAKOTA	YES	NO	YES	YES	5 YR	•5 AC	NO
OHIO	YES	NO	YES	YES	3 YR	•10 AC	YES
OKLAHOMA	YES	NO	NO	YES	NO	NO	NO
OREGON	YES	UNIT	YES	YES	NO	•10 AC	YES
PENNSYLVANIA	YES	NO	YES	NO	NO	•10 AC	YES
RHODE ISLAND	YES	NO	YES	YES	NO	•10 AC	YES
SOUTH	YES	UNIT	YES	NO	NO	•5 AC	YES
SOUTH DAKOTA	NO	NO	NO	NO	NO	NO	NO
TENNESSEE	YES	NO	YES	YES	NO	•15 AC	YES
TEXAS	YES	NO	YES	NO	5 YR	NO	YES
UTAH	YES	NO	YES	NO	NO	•10 AC	YES
VERMONT	YES	NO	YES	YES	10 YR	•5 AC	YES
VIRGINIA	YES	UNIT	YES	YES	NO	•25 AC	YES
WASHINGTON	YES	5%	YES	YES	10 YR	•20 AC	YES
WEST VIRGINIA	YES	3.22%	YES	YES	5 YR	•10 AC	YES
WISCONSIN	YES	5%	YES	YES	25 YR	•10 AC	YES
WYOMING	YES	NO	NO	NO	2 YR	NO	NO