

# Tax Liens, Tax Sales, and Due Process<sup>†</sup>

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I. INTRODUCTION .....	748
II. THE CONTEXT .....	752
<i>A. Real Property Taxation in State and Local Government Finance</i> ....	753
<i>B. The Collection of Delinquent Property Taxes</i> .....	758
<i>C. The Evolving Requirements of Due Process</i> .....	764
III. THE VARIOUS FORMS OF PROPERTY TAX ENFORCEMENT .....	770
<i>A. The Super-Priority Status of the Property Tax Lien</i> .....	770
<i>B. The Range of Approaches</i> .....	771
<i>C. Redemption Periods: Interest and Penalties</i> .....	774
IV. DUE PROCESS APPLIED: THEORY BECOMES PRACTICE .....	778
<i>A. Events Requiring Due Process</i> .....	779
<i>B. "Legally Protected Property Interests"</i> .....	783
1. Owners. ....	784
2. Creditors. ....	786
3. Occupants. ....	786
4. Shared Interests. ....	788
<i>C. Identifying the Interests</i> .....	789
<i>D. Notifying the Holders of the Interests</i> .....	792
<i>E. Request Notice Statutes</i> .....	795
<i>F. Consequences of Inadequate Notice</i> .....	798
<i>G. Hearings</i> .....	800
V. A REVISED APPROACH TO PROPERTY TAX LIEN ENFORCEMENT .....	801
<i>A. A Single Enforcement Proceeding</i> .....	802
<i>B. Notice</i> .....	805
VI. CONCLUSION .....	806

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## I. INTRODUCTION

There is nothing like the property tax. It is the primary source of revenues controlled by our local governments, yet it is one of the most unpopular taxes. It is the target of recurring popular revolts establishing limits on the tax, yet tax rates consistently find a way to rebound. It is attacked as the worst tax and its demise frequently predicted, yet it has been around in various forms for thousands of years and is likely to remain with us for decades to come.

The property tax is the most difficult of all taxes to administer. With every form of ad valorem tax, there are four key steps: determining what property is subject to the tax, determining the value of that property, establishing the rate of taxation, and collecting the tax. The fourth step of collecting the tax should be the easiest to administer, particularly in light of the fact that in virtually every jurisdiction an ad valorem tax lien achieves priority over all other liens and encumbrances on the property. The experience of our state and local governments, however, has been to the contrary.

If our federal system of government is intended, at least in part, to permit experimentation among our various states in achieving the best forms of governance, then there should be clear models of excellence and efficiency in the collection of this tax. Instead, there are over 150 different systems in the United States for collecting the property tax. Most states have at least two entirely different approaches for enforcing payment of the property tax, with one procedure having its origins in the mid-nineteenth century and an alternative second procedure, equally available for use by local governments, having been developed in the middle of the twentieth century. Other states leave the enforcement of the property tax to local governments, with little consistency in procedures as one moves from city to city and from county to county across a state.

The property tax is predominantly a local tax. While the property tax has declined in recent decades, as a percentage of the total revenues available to local governments, it continues to be predominant among the sources of revenue that are within the control of our cities, counties, and school districts. As responsibility for social programs shifts from the federal government to state and local governments, increasing financial pressure is placed on local governments. The efficient and fair enforcement of payment of property taxes becomes paramount.

Collection of delinquent property taxes is not for the faint hearted.<sup>1</sup> Property owners don't want to pay these taxes, and local governments frequently don't want to collect them or else prefer to sell the right to collect them to private third parties. There are no uniform laws on enforcement of property tax liens, and few title insurance companies will insure title derived from a tax sale. Federal courts have historically stayed away from issues involving the administration of property taxes, and state courts have routinely set aside tax sales, insisting on exact compliance with statutory procedures. Despite the unappealing nature of the subject matter, collection of delinquent property taxes must be done. Failure to enforce payment of such taxes

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1. "For most mortals, mere mention of property tax administration is sufficient to make eyes glaze over and heads nod." HENRY J. AARON, WHO PAYS THE PROPERTY TAX?: A NEW VIEW 56 (1975).

in a fair and efficient manner can have a devastating impact on property owners, on neighborhoods, and on local governments.

Nonpayment of property taxes tends to occur in three contexts. The first is when general economic conditions depress property values, or incomes, or both. Assessed values as established by the government may be too high, failing to reflect neighborhood declines in actual value. In times of economic recession property owners may simply lack the income to pay the annual tax. The second context is when property tax rates exceed the level of popular tolerance, and nonpayment is a form of public protest. The third context occurs when property owners, usually investors, elect to maximize income derived from the property by forgoing payment of the property taxes, eventually abandoning the property. This occurs most commonly in major urban areas which have experienced residential and commercial flight to the suburbs. Tax delinquent properties become a cause of accelerating neighborhood deterioration and a further drain on public revenues.

After centuries of deference to state autonomy in the field of property tax collection, the United States Supreme Court in 1983 confronted the deceptively simple question of the application of due process notice requirements to the foreclosure of a property tax lien. In *Mennonite Board of Missions v. Adams*,<sup>2</sup> Elkhart County, Indiana conducted a routine tax foreclosure, publishing notice of the pending sale once a week for three weeks in accordance with state law. Following completion of the sale, the purchaser initiated an action to quiet title, necessitated in all likelihood by its inability to obtain title insurance based on a tax sale. In this subsequent proceeding, a lender which held a properly recorded mortgage on the property challenged the adequacy of notice to it by publication. The Supreme Court held that the Fourteenth Amendment guaranty of due process<sup>3</sup> requires that a government conducting a tax foreclosure sale provide notice to a mortgagee of the pending foreclosure sale.

Confirming what most title insurance companies had suspected for decades, this decision of the United States Supreme Court cast into doubt the majority of property tax lien and tax sale procedures used throughout the United States. The decision was deceptively simple. Though the particular holding on the facts of the case was clear, the application of the holding has been subject to a wide range of interpretations. Reluctant to create bright lines of universally applicable rights and duties, the Court concluded that a party holding a "legally protected property interest"<sup>4</sup> whose name and address are "reasonably ascertainable"<sup>5</sup> based upon "reasonably diligent efforts"<sup>6</sup> is entitled to notice "reasonably calculated"<sup>7</sup> to inform it of the proceeding. This open textured rule of law has left for further debate four subsidiary questions: (1) What events, or stages, in a property tax enforcement proceeding give rise to the requirement of adequate notice? (2) What property interests are entitled to more than

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2. 462 U.S. 791 (1983).

3. "[N]or shall any state deprive any person of life, liberty, or property without due process of law . . ." U.S. CONST. amend. XIV, § 1.

4. *Mennonite*, 462 U.S. at 798.

5. *Id.* at 800.

6. *Id.* at 798 n.4.

7. *Id.* at 798.

notice by publication? (3) How is the existence of the interests to be ascertained? (4) What efforts are required in order to identify accurate addresses of the interested parties?

In the sixteen years since the *Mennonite* decision, a large number of the states have modified, or entirely rewritten, their laws on tax liens and tax sales. Even though *Mennonite* established common constitutional minimum requirements of notice in such proceedings, there is virtually no consensus among the state and local taxing jurisdictions on the application of the constitutional requirements to these four subsidiary questions, with many courts and commentators blending inappropriately the analysis of two or more questions. The lack of common interpretation leaves the procedures of a large number of jurisdictions subject to constitutional challenge. It also leads to dramatic inefficiencies in the collection of taxes, inconsistent rules and standards, and impairs the ability of local governments and property owners alike to anticipate enforcement of the obligation to pay property taxes. Clarity in the due process notice requirements is necessary in each of the four subsidiary questions.

Complexity, rather than clarity and simplicity, characterizes property tax collection procedures in most jurisdictions. The procedures of many jurisdictions fall short of the *Mennonite* constitutional standards. Few states offer a procedure which permits a clear answer to the first subsidiary question: Which events trigger constitutional notice requirements? Many jurisdictions currently utilize procedures involving two, three, or four distinct steps to enforce a property tax lien. Some states conduct two sales—an initial sale of the property or the lien, followed by a statutory period of time before a final sale. Others conduct a sale of the property, followed by a statutory redemption period. These multiple steps in the tax lien foreclosure process were commonly added to state procedures partially out of concern of the adequacy of notice to the delinquent taxpayer or other interested parties. The question arises whether notice must be given at each step of these proceedings, only at the initial step, or perhaps only at the final step in the enforcement proceeding. Unfortunately, since *Mennonite*, tax lien foreclosure procedures have tended to become more complex rather than clearer and simpler. This result simply does not have to follow from the creation of a constitutional floor of notice requirements.

The *Mennonite* decision held that adequate notice must be given to any party holding a “legally protected property interest.”<sup>8</sup> The second subsidiary question is the essential nature of these legally protected property interests, and this question has received inconsistent treatment by state and federal courts. For reasons which are not clear, judgment creditors are frequently not extended the same statutory notice as is given to mortgagees. Similar results occur in examining the rights of lessees and other occupants of the property, of purchasers under land sales contracts, and of the holders of easements and covenants. The result is that while a mortgage is now recognized as a legally protected property interest for these purposes, constitutional doubt is cast on tax lien foreclosure proceedings when any of these other parties do not receive appropriate notice. Tax lien and tax sale purchasers, as well as title insurance companies, remain at risk whenever adequate notice is not given to the holders of a legally protected property interest.

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8. *Id.*

The third subsidiary question involves the task of identifying the property interests relevant to the tax enforcement proceeding. Examination of the records of the tax collector is certainly required, and the strong implication of *Menmonite* is that a title examination of public records is also necessary. Though a substantial number of jurisdictions now require a title examination as part of the process, many jurisdictions are reluctant to impose such responsibilities on government entities seeking to enforce collection of property taxes.

The widest range of interpretation occurs with respect to the fourth subsidiary question—the nature and scope of the reasonably diligent efforts which must be undertaken to identify correct names and addresses of parties holding the various protected property interests. Most jurisdictions are content simply to mail notice to the last known address found in the official public records, but increasingly courts are holding that when letters are returned, the governmental actors must do something more to identify a correct name or address. The tension between the presumed responsibility of property owners to provide correct addresses, and the duty of the government to undertake reasonable steps to notify owners of the pending loss of property, is greatest in this context.

The lack of clarity about the constitutional requirements applicable to property tax foreclosure procedures profoundly affects the social and financial stability of a local government. Ineffective and inefficient procedures encourage tax delinquency and the abandonment of inner city properties. As financial burdens on local governments increase, the fiscal impact of a 3%, or 10%, delinquency rate in property tax collections becomes dramatic. Over the past decade local governments have increasingly looked to private entities to assist in the collection of property taxes, a return in some ways to the Roman era of “tax farming” or the nineteenth-century reliance on “tax ferrets” or “tax scavengers.” It is with a late twentieth-century twist, however, that local governments are beginning to sell, or “securitize,” large volumes of delinquent tax liens in bulk transactions. The dilemma here is simply whether the financial markets, or bulk tax lien purchasers, appreciate the constitutional questions which may taint the enforceability of the underlying tax liens.

This Article examines the constitutional requirements of notice in the context of property tax lien enforcement procedures in order that clarity and simplicity may lead to a more just and more efficient method of enforcing the collection of such taxes. Part II of this Article describes the context of property taxes in state and local government finance, the evolution of property tax collection procedures, and the recent trend towards the sale and securitization of tax liens. It also traces the evolution of constitutional due process as applied to tax lien enforcement, culminating in the *Menmonite* decision.

An examination of the property tax foreclosure procedures used throughout the United States is set forth in Part III. It describes the varied reliance on nonjudicial foreclosure methods and judicial proceedings, as well as those jurisdictions which use a combination of approaches. It summarizes the usage of redemption periods, both pre-sale and post-sale, as well as the mechanics of the sale processes themselves.

Part IV of this Article evaluates the application of the constitutional theory to the practice of property tax lien enforcement procedures. The interpretation of the *Menmonite* requirements, and the questions left open by *Menmonite*, by state and federal courts, and by state legislatures, are examined in detail. Trends towards clear

and consistent interpretations are noted, as are the issues upon which there is still wide divergence.

A proposal for a clear, just, and efficient application of the constitutional requirements in this field is set forth in Part V. Drawn from the vast marketplace of procedures used throughout the country, the proposal builds upon the constitutional floor of fairness to holders of property interests and enhances efficient enforcement of property tax liens.

## II. THE CONTEXT

Governments have derived revenues by taxing the value of property for thousands of years. Though property taxation has at times included taxation of tangible and intangible personal property,<sup>9</sup> it is the taxation of interests in real property which has been the dominant source of revenues for local governments in the United States.<sup>10</sup> Real property taxation occurs by the establishment of the fair market value of the property,<sup>11</sup> and the imposition of a rate of taxation, a millage rate,<sup>12</sup> upon the taxable value.<sup>13</sup> Much of the history of real property taxation has focused on the difficulties of establishing values, and on creating different rates of taxation for different classes of real property.

In contrast, the procedures for enforcement of property taxes, once these taxes are properly established and levied, have rarely been the focus of careful scrutiny. Collecting the revenues remains essential in light of the importance of these revenues

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9. See Alfred G. Buehler, *Personal Property Taxation*, in PROPERTY TAXES 117-34 (1940). Buehler predicted that "[t]he common evasion and growing exemption of personal property from property taxation may, in time, cause its complete abandonment in the United States." *Id.* at 133. Such prediction has proven accurate, as personal property taxes provide a de minimis amount of revenue to state and local governments today. See Arthur D. Lynn, Jr., *The Property Tax*, in MANAGEMENT POLICIES IN LOCAL GOVERNMENT FINANCE 99-102 (J. Richard Aronson & Eli Schwartz eds., 1975); see also Harold M. Groves, *Property Taxation of Intangibles*, in PROPERTY TAXATION USA 117-30 (Richard W. Lindholm ed., 1967).

10. The term "property tax" is used in this Article to refer to ad valorem taxes assessed and levied upon interests in real property, as opposed to tangible and intangible personal property. This tax is distinguishable from fees or charges which are levied in response to specific actions such as sidewalk improvements or water or sanitation fees. The real property tax is generally taxation for provision of general revenues to the governmental entity as opposed to payment for a specific service or fee. The relative importance of charges, fees, and assessments in local government finance has increased significantly over the past forty years as public pressure has mounted against increases in the real property taxes. See C. Kurt Zorn, *User Charges and Fees*, in LOCAL GOVERNMENT FINANCE 135 (John E. Petersen & Denis R. Strachota eds., 1991).

11. The determination of the fair market value of property subject to taxation is one of the most difficult, and most controversial, aspects of the administration of the real property tax.

12. The "millage rate" is the amount of tax per \$1000 of taxable value. A tax of twenty mills is a tax of \$20 per \$1000 of taxable value.

13. Jurisdictions vary in their approaches of requiring that the tax be levied against the full fair market value of the property, or against some percentage of the fair market value—the "assessed valuation."

to the provision of services by local governments. The United States Supreme Court, in *Mennonite*, fundamentally altered the manner in which delinquent property taxes can be collected.

*A. Real Property Taxation in State and  
Local Government Finance*

Property taxation is consistently described as one of the worst forms of taxation from virtually every perspective,<sup>14</sup> even when compared with other forms of taxation.<sup>15</sup> Its demise has been regularly predicted,<sup>16</sup> and yet it manages to survive. "The property tax is nothing if not durable. It has been decried for generations as one of the worst of taxes, yet it remains the pillar of local government finance."<sup>17</sup>

14. One expert noted:

"Practically, the general property tax as actually administered is beyond all doubt one of the worst taxes known in the civilized world. . . . It puts a premium on dishonesty and debauches the public conscience; it reduces deception to a system, and makes a science of knavery; it presses hardest on those least able to pay; it imposes double taxation on one man and grants entire immunity to the next. In short, the general property tax is so flagrantly inequitable, that its retention can be explained only through ignorance or inertia. It is the cause of such crying injustice that its alternation or its abolition must become the battle cry of every statesman and reformer."

Arthur D. Lynn, Jr., *Property Tax Development: Selected Historical Perspective*, in PROPERTY TAXATION USA, *supra* note 9, at 7-8 (emphasis in original) (omission added) (quoting E.R.A. Seligman, *The General Property Tax*, in ESSAYS IN TAXATION 62 (1921)).

15. "[T]he quality of administration of the property tax is *universally* worse than the quality of administration we have come to expect in connection with income and sales taxes." THE PROPERTY TAX AND ITS ADMINISTRATION 4 (Arthur D. Lynn, Jr., ed., 1969) (alteration added) (emphasis in original) (quoting Dick Netzer, *Some Alternatives in Property Tax Reform*, 33 TAX POL'Y 12 (1966)).

16. "Over the next two decades, I would expect to see the property tax all but wither away. Further relative decline is a foregone conclusion, but I would go beyond this and predict that in absolute terms, the property tax is headed for oblivion." George W. Mitchell, *Is This Where We Came in?*, Proceedings of the Forty-Ninth Annual Conference on Taxation 492 (1957), quoted in Michael E. Bell & John H. Bowman, *Property Taxes*, in LOCAL GOVERNMENT FINANCE, *supra* note 10, at 109.

17. William Gorham, *Foreword* to PROPERTY TAX REFORM at v (George E. Peterson ed., 1973). Part of the inherent difficulty with the property tax is that there is little consensus on its underlying policy justification. It originated as a tax on general wealth with clear historical parallels. The closest historical analogy to our present real estate ad valorem tax is probably the "Fifteenth and Tenth" which was "originally a levy of one-tenth on property in the royal demesne, towns and cities, and one-fifteenth on property elsewhere." M.J. BRADDICK, PARLIAMENTARY TAXATION IN SEVENTEENTH-CENTURY ENGLAND: LOCAL ADMINISTRATION AND RESPONSE 23 (1994). This particular tax has historical origins in the Saladin tithe of 1188. See JENS PETER JENSEN, PROPERTY TAXATION IN THE UNITED STATES 23 (1931); see also Lynn, *supra* note 14, at 9-10. The property tax in the United States has had a schizophrenic identity. It has been perceived by some to be in essence a wealth tax, while others have viewed it more narrowly as a tax on the income producing potential of land. See JENSEN, *supra*, at 48-49; Harold M. Groves, *Is the Property Tax Conceptually and Practically Administrable?*, in

Opposition to the property tax derives from numerous sources.<sup>18</sup> Much of the criticism pertains to the relative accuracy, or inaccuracy, of the determination of fair market value.<sup>19</sup> A second source of criticism stems from the use of differential classifications of property, resulting in widely disparate tax levels.<sup>20</sup> A third criticism has focused on the regressive nature of the tax in imposing much higher tax burdens on lower income families.<sup>21</sup> On a recurring basis there have been widespread public revolts against the property tax, imposing limitations on the ability of governments to increase the taxes,<sup>22</sup> or creating various forms of "circuit breakers" to protect certain uses of property, or certain classes of property owners.<sup>23</sup>

In terms of total government revenues and expenditures, there has been a steady decline in the relative significance of the property tax. At the beginning of the twentieth century, property taxes provided over 80% of *all* revenues received by state and local governments.<sup>24</sup> This reliance on the property tax to finance government operations continued through the Great Depression, but gradually declined as state and local governments increased reliance on income taxes, sales taxes, and intergovernmental transfers. By 1948 property taxes comprised only 35% of all state and local general revenue, and this had dropped further, to 21%, by 1978.<sup>25</sup> Since

THE PROPERTY TAX AND ITS ADMINISTRATION, *supra* note 15, at 15, 20-24.

18. See generally George E. Peterson, *The Issues of Property Tax Reform*, in PROPERTY TAX REFORM, *supra* note 17, at 1.

19. See Henry Aaron, *Some Observations on Property Tax Valuation and the Significance of Full Value Assessment*, in THE PROPERTY TAX AND ITS ADMINISTRATION, *supra* note 15, at 153. There are over 15,000 separate units of government in the United States which assess property for ad valorem tax purposes. See GLENN W. FISHER, *THE WORST TAX? A HISTORY OF THE PROPERTY TAX IN AMERICA* 197 (1996).

20. See FISHER, *supra* note 19, at 45-62.

21. "No other major tax in our public finance system bears down so harshly on low-income households, or is so capriciously related to the flow of cash into the household." John Shannon, *The Property Tax: Reform or Relief*, in PROPERTY TAX REFORM, *supra* note 17, at 25, 26; see Howard Chernick & Andrew Reschovsky, *The Taxation of the Poor*, 25 J. HUM. RESOURCES 712-35 (1990); see also STEVEN DAVID GOLD, *PROPERTY TAX RELIEF* 16-17 (1979) (summarizing the evolving perspectives on the regressivity of the property tax).

22. See ADVISORY COMM'N ON INTERGOVERNMENTAL RELATIONS, *TAX AND EXPENDITURE LIMITS ON LOCAL GOVERNMENTS* 11-42 (1995).

23. See AARON, *supra* note 1, at 72-75; GOLD, *supra* note 21; Henry Aaron, *What Do Circuit Breaker Laws Accomplish?*, in PROPERTY TAX REFORM, *supra* note 17, at 53. Aaron argues that "circuit-breakers" tend to confer tax benefits on higher income families rather than the reverse, and that the regressive features of the property tax should be offset by an income support payment to low-income families.

24. See JENSEN, *supra* note 17, at 2. Professor Jensen's treatise was the first comprehensive analysis of property taxation in the United States, and remains one of the leading historical and economic reference texts today. He observed in 1931, "From a fiscal point of view property taxes are now and always have been more important than any other tax, and for state and local purposes in the United States, more important than all other taxes together." *Id.* at 1.

25. See ADVISORY COMM'N ON INTERGOVERNMENTAL RELATIONS, *2 SIGNIFICANT FEATURES OF FISCAL FEDERALISM* 15 tbl. 57 (1992) [hereinafter *FISCAL FEDERALISM* 1992]. In 1948 individual income taxes provided 3.1% of state and local general revenues. By 1978 this had increased to 10.5%. See *id.* If one focuses solely on state and local taxes (excluding



1978 the percentage of aggregate state and local general revenues derived by state and local governments from the property tax has remained consistent at approximately 18%.<sup>26</sup>

Despite this decline in the *relative* significance of the property tax, there are three vitally important reasons to continue to focus on the proper administration of the property tax as we enter the twenty-first century. First, the property tax remains the primary source of revenues which can be controlled by our local governments, and thus is central to their financial health. Second, given the sheer magnitude of revenues derived from the property tax, and the constant rate of increase in these revenues, the property tax remains a significant aspect of our governmental finance structure. Third, so long as the property tax continues to exist, the failure to enforce collection of delinquent property taxes is destructive to the social and financial health of our cities.

The property tax is a local tax. The federal government derives no revenue from the property tax, and state governments receive less than 4% of all property tax revenues.<sup>27</sup> For the past forty years local governments and special districts have received over 96% of all property tax revenues.<sup>28</sup> It is the central method by which local governments can, on their own initiative and within their own control, impose taxes to finance government services. The property tax has provided approximately three-quarters of all *tax* revenues raised solely by local governments since 1980.<sup>29</sup> It continues to provide roughly 29% of all *general* revenues available to the local governments.<sup>30</sup> Certain forms of governmental entities are even more dependent on the property tax. Approximately 41% of all property tax revenues are paid to school districts, comprising 97% of the total tax revenues received by these districts.<sup>31</sup>

Even though property tax revenues declined in the relative percentage of aggregate state and local revenues in recent decades, the amount of property tax revenues, in absolute terms, has grown dramatically. In 1957 the aggregate national revenue from the property tax was \$12.8 billion;<sup>32</sup> by 1992 it was \$178 billion.<sup>33</sup> The annual rate of growth in property tax revenues has ranged from 6.2% to 10.5% over the past fifty years,<sup>34</sup> and has consistently equalled 2.4% to 2.9% of the gross domestic national

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nontax revenues and federal governmental transfers), property taxes constituted 44.1% of all state and local taxes in 1965, and between 30.7% and 32.1% of such taxes since 1980. *See* ADVISORY COMM'N ON INTERGOVERNMENTAL RELATIONS, 2 SIGNIFICANT FEATURES OF FISCAL FEDERALISM 97 tbl. 53 (1994) [hereinafter FISCAL FEDERALISM 1994].

26. *See* FISCAL FEDERALISM 1992, *supra* note 25, at 115 tbl. 57.

27. *See id.* at 124 tbl. 64.

28. *See id.*

29. *See* FISCAL FEDERALISM 1994, *supra* note 25, at 118 tbl. 64.

30. *See* FISCAL FEDERALISM 1992, *supra* note 25, at 119 tbl. 61. Between 1979 and 1990, this percentage remained constant between 28.0% and 29.5%. *See id.*

31. *See id.* at 124 tbl. 64, 127 tbl. 65.

32. *See id.* at 124 tbl. 64.

33. *See* FISCAL FEDERALISM 1994, *supra* note 25, at 70 tbl. 36.

34. *See* FISCAL FEDERALISM 1992, *supra* note 25, at 129 tbl. 66. The only exception to this was during the period from 1978-80, in which the annual rate of increase was only 1.2%. This is attributable to the popular initiatives in California and Massachusetts severely limiting, or reducing, property taxes. *See* Dick Netzer, *Property Taxes: Their Past, Present, and Future*

product since 1980.<sup>35</sup> There is little evidence that total property tax revenues will do anything other than at least keep pace with the financial health of this country.

The property tax is resilient and durable simply because local governments have few other options available to fund local services. Governmental transfers, made possible primarily through federal block grant and revenue sharing programs, had a significant positive impact on revenues available to local governments in the 1960s and 1970s. By the mid-1980s, however, general federal revenue sharing with local governments had come to an end, and the rate of increase in federal intergovernmental transfers declined dramatically.<sup>36</sup> In coming years local governments will be under increasing pressure to fund programs and services from revenues within their control, and, absent radical reformulation of tax systems, this will continue the reliance on the property tax.<sup>37</sup> “The question we must ask is: *How will local governments respond to this challenge?* The short answer to this question is that they will return to what has always been the backbone of local government finance: the property tax.”<sup>38</sup>

The failure to collect even a small portion of property taxes can have a dramatic impact on local governments. A delinquency rate of 2% or 4% in the collection of these taxes translates into \$3-6 billion in revenues lost nationally to local governments and, in particular, to school districts. Local governments have usually imposed some combination of penalties and interest on delinquent taxes, but this alone does not suffice to deter property tax delinquencies.<sup>39</sup> Little attention has been devoted to the study of the various methods of property tax collection, and what study has been conducted has been in the aftermath of a general economic collapse resulting in declining property values and spiraling delinquency rates.<sup>40</sup> In the middle of the economic depression in 1933, delinquencies exceeded 20% of aggregate property tax assessments,<sup>41</sup> and a model tax collection statute was drafted in an attempt to address some of the barriers to enforcement.<sup>42</sup>

*Place in Government Finance*, in *URBAN FINANCE UNDER SIEGE* 51, 65-66 (Thomas R. Swartz & Frank J. Bonello eds., 1993). In 1991-92 the rate of growth was 6.2%. See *FISCAL FEDERALISM*, *supra* note 25, at 72 tbl. 37.

35. See *FISCAL FEDERALISM* 1994, *supra* note 25, at 73 tbl. 38.

36. See Thomas R. Swartz, *Rethinking Urban Finance in America*, in *URBAN FINANCE UNDER SIEGE*, *supra* note 34, at 3, 9.

37. “Federal grants-in-aid, once dominating the fiscal landscape, remain significant but are receding in importance. State governments, in response, are reappraising program spending priorities. Local governments are becoming more reliant on own-source revenues.” James Edwin Kee & John J. Forrer, *Intergovernmental Revenues*, in *LOCAL GOVERNMENT FINANCE*, *supra* note 10, at 153, 153.

38. Swartz, *supra* note 36, at 10 (emphasis in original).

39. For a summary of current penalties and interest charges levied for delinquent taxes, see *infra* text accompanying notes 153-55.

40. “Of all the stages in the administration of the general property tax, the final stage, that of collecting the taxes extended on the roll, is the least explored, yet most in need of careful study.” JENSEN, *supra* note 17, at 307.

41. See Leo Day Woodworth, *Importance of Property Tax in State and Local Tax Systems*, in *PROPERTY TAXES*, *supra* note 9, at 3, 12.

42. See Frederick L. Bird, *Relation of Tax Collection Methods to Delinquency*, in *PROPERTY TAXES*, *supra* note 9, at 254, 256; *infra* text accompanying notes 109-10.

The direct loss of funds to local governments is just one part of the harm caused by property tax delinquencies. An equal, if not greater, harm occurs when property owners simply elect to abandon properties as the amount of delinquent tax approaches the value of the property. Decaying inner city neighborhoods in our larger cities are testimonies of the effect of abandoned tax delinquent properties. Several state legislatures have identified such problems as they have reformed their tax foreclosure laws:

The General Assembly finds that the nonpayment of ad valorem taxes by property owners effectively shifts a greater tax burden to property owners willing and able to pay their share of taxes, that the failure to pay ad valorem taxes creates a significant barrier to neighborhood and urban revitalization, that significant tax delinquency creates barriers to marketability of the property, and that nonjudicial foreclosure procedures are inefficient, lengthy, and commonly result in title to real property which is neither marketable nor insurable. In addition, the General Assembly finds that tax delinquency in many instances results in properties which present health and safety hazards to the public.<sup>43</sup>

Abandonment of properties in the face of rising property taxes is a major problem in urban areas.<sup>44</sup> At times this may represent a conscious decision on the part of an owner of investment property to “milk the equity” from the property simply by inflating cash flow returns while ignoring the accruing property liability. In other contexts it may reflect the inability or unwillingness of a property owner to pay property taxes based upon what it perceives to be a grossly inaccurate assessed value. In either context, the greater the amount of accrued delinquent taxes relative to fair market value, the greater the disincentive for the property owner to make payment of the taxes.<sup>45</sup> When the total amount of accrued taxes, penalties, and interest equals or exceeds the fair market value of the property, no owner or third party will pay the taxes or make any investment in the property.<sup>46</sup> Compounding the problem, the local government will not be able to find any purchaser at a tax foreclosure sale when the minimum bid for such a purchase is the total amount of the delinquent tax liability.

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43. GA. CODE ANN. § 48-4-75 (1998); *see also* W. VA. CODE § 11A-3-1 (1995).

[T]he Legislature declares that its purposes in the enactment of this article are as follows: (1) To provide for the speedy and expeditious enforcement of the tax claims of the state and its subdivisions; (2) to provide for the transfer of delinquent and nonentered lands to those more responsible to, or better able to bear, the duties of citizenship than were the former owners . . . .

*Id.*

44. *See* George E. Peterson, *The Property Tax and Low-Income Housing Markets, in* PROPERTY TAX REFORM, *supra* note 17, at 107, 117-21.

45. *See* George Sternlieb & Robert W. Burchell, *Residential Tax Delinquency: A Forerunner to Residential Abandonment*, 1 REAL EST. L.J. 256 (1973).

46. One approach that has been developed to address the problems posed by abandoned tax delinquent properties, where taxes exceed fair market value, is the creation of a public land bank authority to acquire such properties and convert them to public use, or transfer the properties to third party entities for development activities in furtherance of public purposes. *See* GA. CODE ANN. §§ 48-4-60 to -64 (1998); Frank S. Alexander, *Property Tax Foreclosure Reform: A Tale of Two Stories*, GA. B.J., Dec. 1995, at 10, 10-11.

Abandoned properties can quickly become public nuisances, foster crime, and cause decline in neighboring property values.

*B. The Collection of Delinquent Property Taxes*

The collection of taxes has never been a pleasant task, but somebody has had to do it. Throughout much of history the task has been accomplished by selling the right to collect the taxes to a private third party—the tax collector as a private individual acting to collect his (and the government's) due. The Ptolemaic Egyptians and ancient Greeks both conducted auctions of the right to collect taxes due, providing the governments with a definite amount of revenues in the face of uncertain and unpredictable yields.<sup>47</sup> The Roman Empire raised this to a fine art, auctioning the right to collect taxes for five year periods of time.<sup>48</sup> The successful bidder was required to pay its bid in cash, though it could make such payments in installments.<sup>49</sup> This "tax farming" during the Roman Empire was the basis for the creation of the *societas*, partnerships formed solely for the purpose of advancing the government its revenues by purchasing the tax collection rights.<sup>50</sup> This had the added advantage of recognizing a legal entity possessing the right to collect the taxes, without increasing the size of a government bureaucracy.<sup>51</sup> These tax collectors, the *publicani*, found ways of increasing the yields on their investments by adding charges or increasing the estimate of the size of the agricultural crops.<sup>52</sup> In the face of wide resentment of the *publicani*, whose primary motivation was to manipulate the tax system for their private gain, Caesar Augustus reformed the tax system by shifting primarily to a fixed rate property tax and poll tax.<sup>53</sup>

Financing of government operations by the sale, or lease, of the right to collect taxes continued as a centerpiece of English legal and financial history. It was the dominant method of raising revenues, through Italian banking syndicates, in the thirteenth century<sup>54</sup> and the primary procedure for collection of the cloth tax in the fourteenth century.<sup>55</sup> In the sixteenth and seventeenth centuries tax farming went

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47. See A.H.M. JONES, *THE ROMAN ECONOMY: STUDIES IN ANCIENT ECONOMIC AND ADMINISTRATIVE HISTORY* 153-56 (P.A. Brunt ed., 1974). The basic tax during this early Roman period was an agricultural tithe, based on the final crop yield. See E. BADIAN, *PUBLICANS AND SINNERS: PRIVATE ENTERPRISE IN THE SERVICE OF THE ROMAN REPUBLIC* 16, 81 (1972).

48. See JOHN R. LOVE, *ANTIQUITY AND CAPITALISM: MAX WEBER AND THE SOCIOLOGICAL FOUNDATION OF ROMAN CIVILIZATION* 175-79 (1991).

49. See T. FRANK, *AN ECONOMIC HISTORY OF ROME TO THE END OF THE REPUBLIC* 139 (1970).

50. See P.A. BRUNT, *SOCIAL CONFLICTS IN THE ROMAN REPUBLIC* 22, 370-72 (1971).

51. See P.A. BRUNT, *THE FALL OF THE ROMAN REPUBLIC AND RELATED ESSAYS* 164 (1988).

52. See BADIAN, *supra* note 47, at 81; JONES, *supra* note 47, at 118.

53. See JONES, *supra* note 47, at 81; LOVE, *supra* note 48, at 186.

54. See RICHARD W. KAEUPER, *BANKERS TO THE CROWN: THE RICCARDI OF LUCCA AND EDWARD I* 79-81, 150-51 (1973).

55. See G.L. HARRIS, *KING, PARLIAMENT, AND PUBLIC FINANCE IN MEDIEVAL ENGLAND TO 1369*, at 458-59 (1975).

through regular cycles of heavy usage, followed by abolition in the face of public outcry. After a period of direct governmental collection of taxes resulted in disappointing receipts, the government of Queen Elizabeth I returned to reliance on private collections by farming the right of collection.<sup>56</sup> The "Great Farm of the Customs" in 1604<sup>57</sup> marked a major commitment to tax farming, partially in order to deal with rising government debts.<sup>58</sup> During this period of time there were three primary reasons for the government's reliance on the private collection of taxes. First, the sale or lease of the right to collect the taxes provided a certain and predictable income stream for government operations.<sup>59</sup> Second, it was felt that private collectors, motivated by the desire to maximize their own rates of return, would be more "energetic, efficient, and economical than salaried administrators."<sup>60</sup> Third, the very presence of a tax farm gave rise to the possibility of government borrowing against the value of the lease of tax receivables—deficit financing in its embryonic stage.<sup>61</sup> These advantages to tax farming, from the government's perspective, ran into direct opposition from those who had to pay the tax. The tax farmers were motivated to maximize their profit—a role at odds with public administration of the tax. Taxpayers objected to the loss of public accountability for the levying and enforcement of the taxes. Opposition to tax farming became a rallying cry for the English Revolution.<sup>62</sup>

The concept of using private entities to collect governmental taxes carried over to the United States, both during the colonial period<sup>63</sup> and after nineteenth-century industrialization, but in a much more limited fashion. Throughout the nineteenth century the responsibility for property tax collections was placed either on the sheriff or on the local government treasurer.<sup>64</sup> It was also common to select, in a temporary capacity, a town collector to perform these duties.<sup>65</sup> Until the expansion of governmental administrative structures had reached a critical mass, these collectors usually were not salaried employees, but rather were compensated on a commission basis. Collectors were paid, for example, a commission of "one percent for current collections, five percent for collection of delinquent taxes, and two percent for taxes not collected."<sup>66</sup> Local governments frequently relied upon private individuals, known

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56. See MICHAEL J. BRADDICK, *THE NERVES OF STATE: TAXATION AND THE FINANCING OF THE ENGLISH STATE 1558-1714*, at 36 (1996).

57. ROBERT ASHTON, *THE CROWN AND THE MONEY MARKET 1603-1640*, at 79-105 (1960).

58. See FREDERICK C. DIETZ, *ENGLISH PUBLIC FINANCE 1558-1641*, at 328-32 (1932).

59. See BRADDICK, *supra* note 56, at 36.

60. CHARLES P. KINDLEBERGER, *A FINANCIAL HISTORY OF WESTERN EUROPE 158* (2d ed. 1993); see also ASHTON, *supra* note 57, at 80-81; DIETZ, *supra* note 58, at 119.

61. See ASHTON, *supra* note 57, at 87; BRADDICK, *supra* note 56, at 37; DIETZ, *supra* note 58, at 343.

62. See BRADDICK, *supra* note 17, at 197-201.

63. See FREDERICK ROBERTSON JONES, *HISTORY OF TAXATION IN CONNECTICUT 1636-1776*, at 15 (1896).

64. See JENSEN, *supra* note 17, at 309-10.

65. See STATE AND LOCAL TAXATION OF PROPERTY 71 (National Industrial Conference Board, Inc., 1930) [hereinafter Industrial Conference Board].

66. *Id.* at 71 ("Such a system of remuneration is absurd. It results in high collection costs and sometimes in unnecessary delinquency. New York assessors have been known to place

as "tax ferrets," or "tax inquisitors," to identify property for which no taxes were being paid.<sup>67</sup> This variation of tax farming, however, was routinely condemned,<sup>68</sup> and has largely been abandoned in the context of contemporary property tax collection procedures.<sup>69</sup>

The collection of delinquent property taxes today does contain one key feature which draws from the historical use of tax farming. Once the taxes have been declared delinquent, most jurisdictions in the United States permit a private third party to purchase the local government's lien for the taxes due. This transfer of the lien is distinct from the sale of the underlying property which occurs at a tax foreclosure sale. Instead, what is transferred is the lien itself, vesting in the purchaser the right to enforce the lien in accordance with statutory procedures.

The transferability of property tax liens to private third parties is not new.<sup>70</sup> What is new is that local governments, within the past few years, have begun to view their delinquent tax digests as potential assets rather than administrative burdens. There are three reasons why a delinquent tax lien may be attractive to a third party purchaser, or investor, in today's market. The first is that in all jurisdictions the property tax lien is accorded the status of being the first lien in priority of claims against the property.<sup>71</sup> This permits the holder of the lien to enforce the lien and receive payment prior to payment of any and all other claims against the property, including all mortgages. The second is that delinquent taxes carry substantial penalties and rates of interest, all of which accrue to the benefit of the investor from the date of its purchase of the lien.<sup>72</sup> This could provide rates of return from a minimum of 12% to more than 40%.<sup>73</sup>

The third reason for renewed attention to delinquent tax digests is that local governments are increasingly being granted authority to enter into negotiated bulk sale transactions, in which large volumes of a delinquent tax digest are transferred to an investor, frequently at a discount from the face value of the liens. Purchasing the liens at a discount simply increases further the effective yield received by the investor when the face amount of the accrued taxes, interest, penalties and costs are paid upon

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obstacles in the way of prompt payment of taxes.").

67. JENSEN, *supra* note 17, at 354-55.

68. See E.A. Angell, *The Tax Inquisitor System in Ohio*, 5 YALE L.J. 350, 369 (1897).

69. "Farming out tax administration is an ancient expedient; the experience seems to demonstrate that the ethics of tax administration cannot be maintained except by public officials under oath to follow the law." Harold M. Groves, *Is the Property Tax Conceptually and Practically Administrable?*, in THE PROPERTY TAX AND ITS ADMINISTRATION, *supra* note 15, at 15, 21 (citing JOHN E. BRINDLEY, HISTORY OF TAXATION IN IOWA (1911)).

70. See, e.g., GA. CODE ANN. § 48-3-19 (1998). This right of private third parties to acquire tax executions from the government was authorized by the first legislative session of the Georgia General Assembly following the end of military rule. 1872 Ga. Laws 75. Prior to 1872 the transfer of tax executions in Georgia was not permitted. See *Smith v. Mason*, 48 Ga. 177 (1872).

71. See *infra* text accompanying notes 129-30.

72. See *infra* text accompanying notes 152-53.

73. See *infra* text accompanying note 154.

redemption or foreclosure sale. A variation on a bulk sale of delinquent tax liens is the securitization of the delinquent tax digest that is accomplished by selling the liens to a special purpose trust which then issues bonds to investors.<sup>74</sup>

The first large scale securitization of a delinquent property tax digest occurred in 1993, when Jersey City, New Jersey, transferred approximately \$44 million in delinquent tax liens.<sup>75</sup> Since that initial transaction, Jersey City completed a second transaction in 1994, and other jurisdictions have quickly followed. These include New Haven (\$23 million, 1995),<sup>76</sup> Fulton County/City of Atlanta (\$30 million, 1995),<sup>77</sup> New York City (\$250 million, 1996),<sup>78</sup> Washington, D.C. (\$50 million, 1996),<sup>79</sup> Philadelphia (\$106 million, 1997),<sup>80</sup> Puerto Rico (\$400 million, 1998),<sup>81</sup> and hundreds of other local governments are actively considering such sales.<sup>82</sup> By 1998, over \$1.5 billion in tax lien securitizations had been completed or were in process.<sup>83</sup> This conversion of tax lien receivables into instant funds for local governments has not been limited to large cities, as Arlington, Virginia<sup>84</sup> and Marlborough, Massachusetts<sup>85</sup> both have undertaken such transactions.<sup>86</sup>

Because of the wide diversity in the types of tax lien foreclosure procedures, it is difficult to ascertain precisely how many states, or local governments, permit large

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74. There are comparative advantages and disadvantages between a negotiated bulk sale of liens, and the securitization of tax liens, though such differences may well be a matter of the applicable state law. *See generally* Georgette C. Poindexter et al., *Selling Municipal Property Tax Receivables: Economics, Privatization, and Public Policy in an Era of Urban Distress*, 30 CONN. L. REV. 157 (1997).

75. *See id.* at 191; Patricia Tigue, *Tax Lien Securitization: Putting Nonperforming Assets to Work*, GOV'T FIN. REV. June 1996, at 33. *See generally* Michael G. Pelligrino & Ralph P. Allocca, *Tax Certificates: A Review of the Tax Sale Law*, 26 SETON HALL L. REV. 1607 (1996) (reviewing New Jersey tax sale law).

76. *See* Poindexter et al., *supra* note 74, at 186; Tigue, *supra* note 75, at 34.

77. *See* Joseph T. Whelihan, *The Advantages of Tax Lien Privatization*, NATION'S CITIES WKLY., Oct. 28, 1996, at 5, 5.

78. *See* Alvin L. Arnold, *New York Makes Largest Tax Lien Offering*, MORTGAGE & REAL EST. EXECUTIVE'S REP., Sept. 15, 1996.

79. *See* Jay Sherman, *Washington, D.C. Readies the Latest Tax Lien Deal*, INVESTMENT DEALERS' DIGEST, July 22, 1996, at 12.

80. *See* Ben Hayllar, *Philadelphia's Tax Lien Sale and Securitization*, GOV'T FIN. REV., Dec. 1997, at 17, 18. The Government Finance Officers Association has adopted a set of policy recommendations for the sale and securitization of tax liens. *See id.* at 19.

81. *See* *Puerto Rico To Securitize \$400 Million in Tax Liens*, BOND BUYER, Apr. 15, 1998, at 1.

82. *See* Patricia Tigue et al., *GFOA/MBIA 1997 Survey on Revenue Collection Practices in State and Local Governments*, GOV'T FIN. REV., Aug. 1997, at 13, 13-14.

83. *See* Ted Cornwell, *Tax Lien Servicing Joint Venture Receives Approval From S&P*, NAT'L MORTGAGE NEWS, Sept. 7, 1998, at 22.

84. *See id.*

85. *See* David Kaplan, *Malborough, Mass. Is First in State To Have Successful Bulk Lien Sale*, BOND BUYER, July 17, 1998, at 28.

86. One estimate of the total amount of property tax delinquencies nationally is \$60 billion, leaving perhaps \$5-7 billion available for securitization at any one time. *See Breen Welcomes the Big Boys into Tax-Lien Market*, ASSET SALES REP., Nov. 25, 1996, at 1, 1.

scale transfers of tax liens to private sector investors through bulk sales.<sup>87</sup> A number of jurisdictions do have express statutory authority for negotiated transactions.<sup>88</sup> Other jurisdictions conduct public auctions of tax liens at which private investors may participate.<sup>89</sup> In many jurisdictions, the public "sale" is more accurately a sale of the underlying property in which a certificate is issued entitling the purchaser to a deed to the property if the taxes are not redeemed.<sup>90</sup>

This "privatization of collection of delinquent real estate taxes"<sup>91</sup> is justified on the same grounds upon which tax farming was justified for thousands of years. It provides an immediate, and reliable, source of revenues as against an otherwise unpredictable rate of return over time.<sup>92</sup> It allows the private market to function, presumably more efficiently, in collecting the revenues. It increases the ability of the local governments to borrow against existing tax receivables.<sup>93</sup> The one key difference between the current sale and securitization of tax liens, and historic tax farming, is that tax farming involved the transfer, or sale, of the right to collect *future* taxes whereas the bulk sale of tax liens involves the transfer only of the right to collect taxes which, by their terms, are already delinquent in payment.

87. Two separate sources indicate that 28 or 29 jurisdictions permit bulk sales or securitizations of tax liens. See Whelihan, *supra* note 77, at 5 ("Twenty-nine states currently permit the privatization of delinquent tax liens."); Elwood F. Collins, Jr. & Max Von Hollweg, *Tax Lien Securitization*, in *NEW DEVELOPMENTS IN SECURITIZATION* 251, 261-627 (Practising Law Institute, 1996) (stating that approximately 28 states have statutes that permit counties to sell accrued taxes in a public auction). Unfortunately, neither source provides a description of the statutory authority, or procedure for the sale of such liens.

88. See, e.g., ALA. CODE § 40-10-180(3) (Supp. 1997); ARIZ. REV. STAT. ANN. § 42-18104(B) (West Supp. 1999); CAL. REV. & TAX. CODE §§ 4511, 4528-4530 (West 1998); CONN. GEN. STAT. ANN. §§ 7-148(c)(2)(L), 12-195h (West Supp. 1999); D.C. CODE ANN. § 47-1303.4 (1981); GA. CODE ANN. § 48-3-19 (1999); MICH. COMP. LAWS ANN. §§ 211.921-.941 (West Supp. 1999); N.J. STAT. ANN. § 54:5-113 (West Supp. 1999); N.Y. REAL PROP. TAX LAW § 1042 (McKinney Supp. 1999); OHIO REV. CODE ANN. § 5721.33 (Anderson 1999); 53 PA. CONS. STAT. ANN. § 7147 (West 1997); R.I. GEN. LAWS § 44-5-73 (Supp. 1998); see also N.Y. LOCAL FIN. LAW § 11.00(36), (37) (McKinney 1968) (granting authority to finance expenditures related to enforcement of ad valorem tax liens).

89. See, e.g., COLO. REV. STAT. ANN. §§ 39-11-108, -131 (West 1990 & Supp. 1999); FLA. STAT. ANN. § 197.432 (West 1989 & Supp. 1998); KY. REV. STAT. ANN. §§ 134.430(4), .450 (Michie 1991 & Supp. 1998); MASS. ANN. LAWS ch. 60, § 2C(b) (Law. Co-op. Supp. 1999); MONT. CODE ANN. § 15-17-212 (1997); N.H. REV. STAT. ANN. § 80:80(II-a) (Supp. 1999); W. VA. CODE § 11A-3-2 (1995); WYO. STAT. ANN. § 39-13-108(e)(ii)(A)-(e)(iii) (Michie 1999).

90. See, e.g., 35 ILL. COMP. STAT. ANN. 200/21-260(a)-(f) (West 1996 & Supp. 1999); IND. CODE ANN. § 6-1.1-24-9 (Michie 1995 & Supp. 1998); IOWA CODE ANN. § 446.9 (West 1998); MD. CODE ANN., TAX-PROP. § 14-817 (1994 & Supp. 1998); MONT. CODE ANN. § 15-17-212 (1999); NEB. REV. STAT. §§ 77-1806 to -1818 (1996).

91. Poindexter et al., *supra* note 74, at 157.

92. "There are four basic statutory provisions authorizing sale or assignment of municipally held tax sales certificates. All of these provisions are designed to convert tax sales certificates into usable cash without necessity of the municipality first proceeding to bar or foreclose the right of redemption." Dvorkin v. Dover Tp., 148 A.2d 793, 796 (N.J. 1959).

93. See Poindexter et al., *supra* note 74, at 159-62, 185-89.



The recent trend toward the securitization of property tax liens raises a number of broader public policy concerns imbedded in the willingness of a government to utilize private actors to implement its policies. Questions are raised as to whether the properties which are subject to delinquent tax lien enforcement may adversely affect particular groups of property owners, such as low income and elderly owners.<sup>94</sup> The transfer of tax liens to a third party purchaser may reduce, or eliminate, the availability of public tax forgiveness programs and favorable tax repayment programs designed to ameliorate the tax burdens on classes of disadvantaged owners. It is also possible that the sale of delinquent tax liens to private third parties effectively shields the government from political pressures associated with challenges to the accuracy of the assessment process, or the importance of various "circuit breaker" programs such as homestead exemptions.<sup>95</sup> There is no assurance that the tax lien purchasers themselves, if they ultimately acquire the property at a tax foreclosure, will pay property taxes in subsequent years, or will adequately maintain the property. As was characteristic of the public antipathy towards tax farming generally, the interests of the private investor in maximizing its return on investment are simply not the same as the interest of public officials in the administration of government.<sup>96</sup>

One of most critical determinants in the willingness of a private investor to purchase a property tax lien is the validity of the underlying security.<sup>97</sup> While the super-priority status of a property tax lien may be relatively assured,<sup>98</sup> and it is possible for a potential investor to make an informed judgment about the lien-to-value ratio of a particular lien on a specific piece of property,<sup>99</sup> a potential investor in a large volume of property tax liens faces two fundamental challenges which remain unresolved. The first concern is simply the wide diversity among jurisdictions in their property tax lien foreclosure procedures. Efficiency, and economies of scale, push towards the aggregation of liens of multiple cities, or states, but the absence of any uniform approach makes this quite difficult. The second is the uncertainty created by the application of the due process standards of *Mennonite Board of Missions v. Adams*<sup>100</sup> to the tax lien foreclosure procedure.

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94. See Hayllar, *supra* note 80, at 18-19.

95. Poindexter et al., *supra* note 74, at 184, 207-08.

96. The recommended practices adopted by the Government Finance Officers Association emphasizes the need for the governmental entity to "[b]e clear about the public policy objectives to be achieved" by the sale of tax liens, and its community relations impact. Hayllar, *supra* note 80, at 19.

97. See Collins & Von Hollweg, *supra* note 87, at 264.

98. One of the potential uncertainties of the priority of a property tax lien is whether a delinquency accruing in a subsequent year takes priority over the delinquency of a prior year. While there is divergence among the states on this point, an investor can make a calculated program decision on whether to pay subsequently accruing taxes, if indeed they take priority over the lien which is purchased.

99. The lien-to-value ratio is the ratio determined by the aggregate indebtedness (taxes, interest, penalties, and costs) secured by the lien, divided by the unencumbered fair market value of the property.

100. 462 U.S. 791 (1983).

The 1950 decision of the United States Supreme Court in *Mullane v. Central Hanover Bank & Trust Co.*<sup>101</sup> represented a shift in due process jurisprudence which, for present purposes, became fully manifest in *Menonite*. A tax lien investor, whether purchasing a single tax lien on a single tract of property, purchasing a large volume of tax liens through a negotiated bulk sale, or investing in a securitized pool of tax liens, faces the risk that compliance with applicable statutory procedures for lien enforcement may simply not be enough to satisfy the due process requirements of the Fourteenth Amendment.<sup>102</sup> The constitutional floor of notice requirements created by *Menonite* has received widely disparate judicial treatment, leaving at times far more questions than answers.

### C. The Evolving Requirements of Due Process

By the end of the nineteenth century, judicial jurisdiction over the subject matter of a dispute could be accomplished in two ways that satisfied the due process requirements of the United States Constitution: the parties to the dispute could be reached by personal service within the territorial limits of the state, or the subject matter of the dispute was physically located within the state.<sup>103</sup> In the first context, *in personam* jurisdiction, due process jurisprudence had to face the challenge of establishing necessary and sufficient criteria by which jurisdiction could be obtained over a defendant with minimal contacts with the jurisdiction. Concerns over the fairness of the expansion of jurisdiction led to increased emphasis on the adequacy of notice to parties who could not be physically served within the territorial limits. In the second context, *in rem* jurisdiction, the presence of the subject matter within the territorial limits of the judiciary led to less reliance on the adequacy of notice as an essential element of the process due under the constitution. A judgment in an *in rem*

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101. 339 U.S. 306 (1950).

102. This assumes that the enforcement of property tax liens by private third parties constitutes state action for purposes of the Fourteenth Amendment. Though it is beyond the scope of this Article to explore in depth the boundaries of state action doctrine which are tested by the movement towards privatization of governmental functions, the essential elements as established by the United States Supreme Court in *Tulsa Professional Collection Services, Inc. v. Pope*, 485 U.S. 478 (1988), appear to be present. A governmental entity which defines the terms and conditions for property tax lien enforcement, and then enters into a transaction with a private third party transferring the government's enforcement rights to such party, invokes "involvement [which] is so pervasive and substantial that it must be considered state action subject to the restrictions of the Fourteenth Amendment." *Tulsa*, 485 U.S. at 487. "In structuring the sale of the liens, the city can contractually obligate the purchaser to act with the same legal duties to the taxpayer that the city would have. In fact, this contractual obligation should be a non-negotiable element of the transaction." Poindexter et al., *supra* note 74, at 206. A related question is whether a private third party that has purchased a governmental property tax lien is subject to the possibility of an action under 42 U.S.C. § 1983 (1994) if its actions fail to meet the constitutional due process requirements. See *Sallie v. Tax Sale Investors, Inc.*, 998 F. Supp. 612 (D. Md. 1998) (denying summary judgment on the grounds that a more thorough factual development is needed to determine whether tax lien purchaser's involvement constituted state action).

103. See *Pennoyer v. Neff*, 95 U.S. 714, 724-25 (1877).

proceeding is limited to the defendant's interest in the property.<sup>104</sup> Notice by publication could suffice in an *in rem* action, while it would rarely be sufficient in an *in personam* proceeding.

In four decisions at the turn of the nineteenth century, the United States Supreme Court sustained the adequacy of notice by publication in proceedings to enforce delinquent property taxes.<sup>105</sup> Three overlapping justifications were given for this conclusion. The first rationale is that an *in rem* proceeding, which creates no personal liability, requires less notice to owners in order to meet the fairness standard of due process.<sup>106</sup> A state must, of necessity, be able to resolve title to property within its jurisdiction. The second rationale is the "caretaker" principle, a premise that each property owner knows, or should know, of obligations related to the fact of its ownership and is responsible to meet those obligations.<sup>107</sup> The third rationale derives from the special nature of taxation. The imposition of ad valorem taxes and assessments does not require personal service to the property owner, and so long as some opportunity is given for the owner to contest the accuracy of the tax, no further notice obligation exists upon enforcement of procedures for nonpayment of the tax.<sup>108</sup>

104. Constitutionally inadequate *in personam* jurisdiction cannot be the basis for subsequent enforcement of a resulting judgment in an *in rem* proceeding. *See id.* The classic *in rem* proceeding adjudicates the rights and claims of all parties to specific property. Due process jurisprudence further refined *in rem* jurisdiction into two additional categories of *quasi in rem* jurisdiction: one where a claimant seeks to establish an interest in real property, and a second where a claimant seeks to satisfy a claim, unrelated to title to the property, by attachment, levy, or seizure of the property. *See Hanson v. Denckla*, 357 U.S. 235, 246 n.12 (1958).

105. *See Longyear v. Toolan*, 209 U.S. 414, 418 (1907); *Ballard v. Hunter*, 204 U.S. 241, 261-62 (1906); *Leigh v. Green*, 193 U.S. 79, 93 (1904); *Winona & St. Peter Land Co. v. Minnesota*, 159 U.S. 526, 537-38 (1895).

106. *See Leigh*, 193 U.S. at 90, 92.

But it is to be remembered that the primary object of the [*in rem*] statute is to reach the land which has been assessed. . . . "Looked at either from the point of view of history or of the necessary requirements of justice, a proceeding *in rem*, dealing with a tangible *res*, may be instituted and carried to judgment without personal service upon claimants within the state, or notice by name to those outside of it, and not encounter any provision of either constitution."

*Id.* at 90-92 (quoting Justice Holmes, then Chief Justice of Massachusetts, in *Tyler v. Judges of the Court of Registration*, 55 N.E. 812, 813 (Mass. 1900)). A proceeding to enforce a lien for delinquent ad valorem taxes usually is a classic *in rem* proceeding, affecting all other interests in the property, precisely because the tax lien is accorded a "super-priority" status. *See infra* text accompanying notes 129-30.

107. *See Longyear*, 209 U.S. at 418 ("The owner of property whose taxes, duly assessed, have remained unpaid for more than one year must be held to the knowledge that proceedings for sale are liable to be begun . . ."); *Ballard*, 204 U.S. at 254 ("The land stands accountable to the demands of the state, and the owners are charged with the laws affecting it and the manner by which those demands may be enforced.").

108. *See Leigh*, 193 U.S. at 89 ("The process of taxation does not require the same kind of notice as is required in a suit at law, or even in proceedings for taking private property under the power of eminent domain.") (quoting *Bell's Gap R. Co. v. Pennsylvania*, 134 U.S. 232, 239 (1890)); *Winona*, 159 U.S. at 537-38 (holding that there is no due process violation "if the owner has an opportunity to question the validity or the amount of [the tax] either before that amount is determined or in subsequent proceedings for its collection").

During the first half of the twentieth century local government officials moved to embrace the possibility of *in rem* proceedings, with notice by publication, as the optimum method of collecting property taxes. In the face of massive tax delinquencies spawned by the Great Depression, the National Municipal League adopted in 1935 "A Model Real Property Tax Collection Law."<sup>109</sup> This Model Law proposed a two stage process in which the property is first sold in a nonjudicial proceeding, followed by a statutory right of redemption. A minimum one year right of redemption exists until foreclosed by the purchaser at the initial sale. At both stages, notice to interested parties is provided by publication, with additional notice mailed to the owner at the time of the initial sale if the owner's identity is known. This Model Law was republished in a second edition in 1954, in which the economic efficiency and constitutional soundness of the procedures were emphasized.<sup>110</sup>

At the very time, however, that state and local governments were moving to implement tax foreclosure procedures based upon the "real innovation"<sup>111</sup> of the *in rem* procedure of the Model Law, the due process jurisprudence of the Supreme Court was moving in the opposite direction. Jurisdiction over a dispute requires not just jurisdiction over the persons or the property, but also adequate notice to the parties in order that they will have an opportunity to be heard. While property tax officials assumed that physical jurisdiction was a sufficient condition for proceeding summarily, the Supreme Court clarified that notice to interested parties is an independent, and necessary, condition of due process. In its 1950 decision in *Mullane v. Central Hanover Bank & Trust Co.*,<sup>112</sup> the Supreme Court held that the distinction between *in personam* and *in rem* jurisdiction is not a basis for differences in the duty to provide notice of the proceeding to interested parties.<sup>113</sup> At the core of any proceeding is the requirement that there is "notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections."<sup>114</sup> At issue was the adequacy of notice by publication. While the Court recognized that notice by publication alone may be sufficient "where it is not reasonably possible or practicable to give more adequate warning,"<sup>115</sup> the Court held that publication alone does not meet the requirements of due process when the identities and addresses of interested parties are known.<sup>116</sup>

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109. *Spitcaufsky v. Hatten*, 182 S.W.2d 86 (Mo. 1944) (en banc) (sustaining Missouri Land Tax Collection Act against constitutional challenges); National Municipal League, *A Model Real Property Tax Collection Law*, 24 NAT'L MUN. REV. 289 (1935).

110. See NATIONAL MUNICIPAL LEAGUE, MODEL REAL PROPERTY TAX COLLECTION LAW at xi-xvi (2d ed. 1954). "The effect of the action is to vest title in fee in the foreclosing tax district. Under the action *in rem* no tax title searches are required; no summons and complaint need be served personally; there are no referees' fees or filing fees. The action is simple, summary and inexpensive." George Xanthaky, *Improvements in Foreclosure Procedure*, in PROPERTY TAXES, *supra* note 9, at 262, 265-66.

111. National Municipal League, *supra* note 109, at xii.

112. 339 U.S. 306 (1950).

113. See *id.* at 312-13.

114. *Id.* at 314.

115. *Id.* at 317.

116. The Court doubted that notice by publication would usually provide sufficient notice:

The *Mullane* decision had a profound impact on the statutory procedures for collecting delinquent property taxes. It cast into doubt the constitutional adequacy of the tax foreclosure procedures which had been recommended and adopted in many jurisdictions. It created a flexible standard of reasonableness in which the adequacy of notice provisions is dependent on a number of variables. While it expressly rejected one of the three rationales at the basis of its early twentieth century opinions, the distinction between *in personam* and *in rem* jurisdiction, it left open the viability of the two other rationales, the "caretaker" proposition and the unique nature of tax policies, in justifying different treatment of property tax foreclosure procedures.

*Mullane* did not establish a clear set of requirements for the notice that must be given in order to meet the requirements of due process. It suggested that the adequacy of any given notice will depend on the nature of the legal proceedings, the due diligence necessary to identify the interested parties and their addresses, the costs associated with such identification, and whether the notice is likely to reach and inform the interested parties of the proceeding. It was clear that more than notice by publication was required when the identity and address of the owner were readily available,<sup>117</sup> yet it was anything but clear whether tax officials must conduct full title examinations, or examine other public records, in order to identify the interested parties. In the context of an eminent domain proceeding, the Supreme Court held, in 1956, that such a title examination was not an undue burden so as to outweigh the due process protections of notice.<sup>118</sup>

Between the 1950 decision in *Mullane* and the 1983 decision in *Mennonite*, courts throughout the country wrestled with the due process requirements applicable to tax foreclosure proceedings and reached little consensus. Most held that notice by publication alone was inadequate when mailed notice could easily be provided to owners and other interested parties,<sup>119</sup> but little consensus emerged on what steps

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Notice by publication cannot simply bear the normative weight expected of it. Chance alone brings to the attention of even a local resident an advertisement in small type inserted in the back pages of a newspaper, and if he makes his home outside the area of the newspaper's normal circulation the odds that the information will never reach him are large indeed. The chance of actual notice is further reduced when, as here, the notice required does not even name those whose attention it is supposed to attract, and does not inform acquaintances who might call it to attention.

*Id.* at 315.

117. See *Covey v. Town of Somers*, 351 U.S. 141, 146-47 (1956) (holding even mailed notice is insufficient when the government is aware of the incompetency of the property owner); Note, *Requirements of Notice in In Rem Proceedings*, 70 HARV. L. REV. 1257 (1957). This note anticipated both the subsequent *Mennonite* opinion and the difficulties posed by the uncertainty of a "reasonableness" standard. *Id.* at 1268-71. "Even though the existence of property within a state will ordinarily furnish the minimum contact prerequisite to the assertion of jurisdiction, the issue of adequate notice is more likely to depend on the reasonableness of the notice and the availability of a fair opportunity to be heard than on the rigid formulas relied on in the past." *Id.* at 1264; see also Jonnathoan W. Still, *The Constitutionality of Notice by Publication in Tax Sale Proceedings*, 84 YALE L.J. 1505 (1975).

118. See *Walker v. City of Hutchinson*, 352 U.S. 112 (1956); see also *Schroeder v. City of New York*, 371 U.S. 208, 211 (1962).

119. See *Laz v. Southwestern Land Co.*, 397 P.2d 52, 56 (Ariz. 1964); *Sedgwick County*

must be taken by local governments to identify and contact the parties who may have an interest in the property.

*Mennonite Board of Missions v. Adams*<sup>120</sup> made clear, in the context of property tax foreclosure proceedings, what *Mullane* had foreshadowed. When the identity and address of a party having an interest in real property are readily available from public records, notice by publication alone is insufficient—mailed notice at a minimum is required. In *Mennonite* a lender, whose mortgage was recorded in the public records, challenged the adequacy of the property tax foreclosure proceedings, conducted in accordance with Indiana law, which required only notice by publication to all parties other than the owner of record. The lender was not given notice by mail of either the original tax sale of the property or of the end of the redemption period. Applying the *Mullane* analysis, the Court held: "Notice by mail or other means as certain to ensure actual notice is a minimum constitutional precondition to a proceeding which will adversely affect the liberty or property interests of *any* party, whether unlettered or well versed in commercial practice, if its name and address are reasonably ascertainable."<sup>121</sup>

*Mennonite* built upon *Mullane* and resolved any lingering doubts on three issues. First, the standards of notice applicable to *in personam* jurisdiction are equally appropriate in *in rem* jurisdiction.<sup>122</sup> Second, mortgagees, as holders of legally protected property interests, are entitled to the protections of due process just as much as owners. Third, names and addresses available from the deed records must be used to provide notice to interested parties. The due process standard for property tax foreclosures became "notice reasonably calculated" to inform those parties who hold "legally protected property interests" whose names and addresses are "reasonably ascertainable" by "reasonably diligent efforts."

Given the wide range of existing property tax foreclosure procedures across the United States, however, the tightening of due process standards in *Mennonite* has raised far more questions than it resolved. Most jurisdictions continue to utilize a two-step procedure in which there is an initial sale of the property, or the tax lien, followed by a fixed redemption period that is terminated by a second proceeding. It is not clear whether due process requires notice of each of these proceedings, or whether the provision of adequate notice at one stage alone is sufficient. Though a mortgagee holds a "legally protected interest" and is entitled to the requisite notice, there is no consensus on whether such notice obligation also extends to concurrent owners, holders of subordinate judgment liens, occupants of the property, holders of easements and covenants, and other potentially interested parties. A full title examination, in accordance with title insurance standards, would reveal most of these interests, but not all jurisdictions today require such a title search as part of a tax

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Comm'rs v. Fugate, 499 P.2d 1101, 1102 (Kan. 1972); *Dow v. State*, 240 N.W.2d 450, 458 (Mich. 1976); *Township of Montville v. Block 69, Lot 10*, 376 A.2d 909, 916 (N.J. 1977); see also Kristin E. Earls, *Due Process in Tax Sales in New York: The Insufficiency of Notice by Publication*, 25 SYRACUSE L. REV. 769, 783-84 (1974).

120. 462 U.S. 791 (1983).

121. *Id.* at 800 (emphasis in original).

122. See *id.* at 796 n.3.

foreclosure, and there is no consensus on what constitutes reasonably diligent efforts to locate interested parties.

In establishing a standard of reasonableness for notification to interested parties, the Supreme Court also left open the continuing relevancy of two justifications put forth earlier in this century. In the spirit of the "caretaker" premise which imposes ongoing responsibilities on property owners to be aware of their governmental obligations, many jurisdictions responded to *Mennonite* by enactment of "request-notice" statutes which permit any interested party to file a request for notice of tax proceedings. This question, expressly unresolved by *Mennonite*,<sup>123</sup> leaves uncertainty across the country. In determining the reasonableness of notice and identification of parties, the fact that this is a tax procedure continues to be injected into the balancing equation. As argued by the dissent in *Mennonite*, state and local governments have a vital interest in the collection of taxes, and in avoiding expensive burdens of foreclosure proceedings.<sup>124</sup> This has led some courts to emphasize the importance to local governments of securing the prompt and efficient payment of taxes,<sup>125</sup> while others have concluded that efficiency is fully subordinate to due process.<sup>126</sup> *Mullane* and *Mennonite* provide for a balancing of interests to achieve a reasonable result.<sup>127</sup>

In the years since *Mennonite*, state and local governments have struggled to develop constitutionally adequate procedures for the enforcement of property tax collections, but many statutes still fall short of the constitutional guarantee of due process. Property tax revenues continue to be a vital part of the health of local governments, and the inability to collect such taxes imposes significant financial and cultural costs. The recent rise in the bulk sale and securitization of property tax liens must confront directly the uncertainty of the underlying security in the face of constitutional questions.

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123. *Id.* at 793 n.2.

124. *Id.* at 806 (O'Connor, J., dissenting).

125. See *Sallie v. Tax Sale Investors, Inc.*, 998 F. Supp. 612, 618-19 (D. Md. 1998).

Requiring a local tax collector or a tax sale purchaser to identify holders of unrecorded interests at the early stages of the process would be extraordinarily burdensome, and would very likely discourage prospective purchasers from participating in tax sales. If this were to happen, the state's significant interest in combating abandonment of properties, especially in urban areas, and in securing for its citizens the revenue necessary to carry out important governmental functions, would be frustrated.

*Id.*

126. "Moreover, the interests of efficient revenue collection and secure tax titles, although legitimate, do not have the same high order of importance under our legal system as the prevention of forfeitures of private property without prior notice." *Register v. Kenai Peninsula Borough*, 667 P.2d 1236, 1239 (Alaska 1983); see also *Small Engine Shop, Inc. v. Cascio*, 878 F.2d 883, 892 (5th Cir. 1989) ("[E]fficiency is not the standard-bearer of due process. Indeed, efficient governance and due process struggle in an inherently tense relationship.").

127. See *Tulsa Prof'l Collection Servs., Inc. v. Pope*, 485 U.S. 478, 484-85 (1988); see also *FDIC v. Lee*, 933 F. Supp. 577, 580 (D. La. 1996) ("The notice requirement is tempered by the notion of reasonableness. The pertinent inquiry is whether a state actor could through *reasonable diligence* discover the interest of the party and then attempt notification.") (emphasis in original).

## III. THE VARIOUS FORMS OF PROPERTY TAX ENFORCEMENT

If all jurisdictions in the United States had a common approach to enforcement of property tax liens, or at least had a common theory as to what occurs at the initial tax sale, reform of procedures in light of evolving Supreme Court jurisprudence would be challenging but not overwhelming. Instead, no two states have the same procedures, many states have more than one possible procedure which can be utilized, and a significant number of states with strong home-rule provisions permit cities and counties to adopt their own independent provisions. Application of a due process balancing test of reasonableness in particular circumstances yields a seemingly infinite range of conclusions on the permutations of the property tax foreclosure procedures. Many of these existing procedures fail to meet constitutional minimum standards, and many more are likely to fail as clarity emerges in coming years.

*A. The Super-Priority Status of  
the Property Tax Lien*

In theory, at least, the property tax should be the simplest of all taxes to enforce.<sup>128</sup> Once there is a final and binding determination of the assessed value of the property, and the taxes are imposed, all that remains is voluntary payment of the taxes, or involuntary enforcement. The key to the simplicity (at least in theory) in the enforcement of property taxes lies in the fact that in virtually every jurisdiction a lien against the property arises by operation of law as of a date certain. In most jurisdictions the lien arises as of a statutory date each year, with taxes due and payable at a subsequent date following the issuance of the tax bill. Based solely upon the importance of the power of taxation to the existence of the government, the property tax lien is the first and senior lien against the property, senior even as to mortgages and other liens arising prior in time and properly recorded earlier in time.

Most jurisdictions accord this "super-priority" status to property tax liens as a matter of statute,<sup>129</sup> though other jurisdictions have reached the same result as a matter

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128. Professor Jensen observed in 1931:

It should be a relatively simple matter to collect the tax, once it has been extended on the roll and a proper warrant has made it a legally collectible claim. On paper, at least, the collector has adequate legal authority; the tax is usually prior to all other claims; barring fraud and illegality in the levy and assessment, nothing should stay the collection.

JENSEN, *supra* note 17, at 307.

129. See ALA. CODE § 40-1-3 (1975); ALASKA STAT. § 29.45.300(b) (Michie 1998); ARIZ. REV. STAT. ANN. § 42-17153(B)(3) (West 1999); ARK. CODE ANN. § 26-34-101(a) (Michie 1997); CAL. REV. & TAX. CODE § 2192.1 (West 1998); COLO. REV. STAT. ANN. § 39-1-107(2) (West 1990 & Supp. 1998); CONN. GEN. STAT. ANN. § 12-172 (West 1993); DEL. CODE ANN. tit. 25, § 2901(a)(3) (Supp. 1998); D.C. CODE ANN. § 47-1312(a-1) (1997); FLA. STAT. ANN. § 197.122(1) (West Supp. 1999); GA. CODE ANN. §§ 48-2-56, -5-28 (1999); HAW. REV. STAT. ANN. § 246-55(a) (Michie 1993 & Supp. 1998); IDAHO CODE § 63-1003(2) (1996); 35 ILL. COMP. STAT. ANN. 200/21-75 (West 1996 & Supp. 1999); IND. CODE ANN. § 6-1.1-22-13(c) (Michie 1995); KAN. STAT. ANN. § 79-1804 (1989); KY. REV. STAT. ANN. § 134.420(1)



of judicial decision.<sup>130</sup> However, the relative priority of a lien for a specific year's taxes, as against prior or subsequent years, does not receive consistent treatment. Similarly, questions always exist with respect to the relative priority of the liens as among different governmental units within a state. Liens for special assessments are commonly treated different than property tax liens for purposes of due process analysis.<sup>131</sup>

### B. The Range of Approaches

The multiplicity of different approaches to the enforcement of property tax liens exceeds that of virtually any other aspect of state and local government law. Part of this is attributable to the origins of the property tax as one upon personal property (both tangible and intangible) as well as real property,<sup>132</sup> giving rise to personal liability of the property owner, and the gradual evolution towards a real property tax only, with a focus on *in rem* procedures. It is also due to the fact that while in most states one or more procedures are authorized for statewide use, in some jurisdictions the procedures for enforcement of property tax liens differ according to the nature of the local government,<sup>133</sup> or are largely within the authority of local

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(Michie 1991 & Supp. 1998); LA. REV. STAT. ANN. § 47:2183 (West 1990 & Supp. 1999); ME. REV. STAT. ANN. tit. 36, § 552 (West 1990); MD. CODE ANN., TAX-PROP. § 14-805(a) (1994); MASS. GEN. LAWS ANN. ch. 60, § 37 (Law. Co-op. 1990); MISS. CODE ANN. § 27-35-1 (1995 & Supp. 1999); NEB. REV. STAT. §§ 77-203, -208 (1996); NEV. REV. STAT. ANN. § 361.450 (Michie 1999); N.J. STAT. ANN. § 54:5-9 (West 1986); N.M. STAT. ANN. § 7-38-48 (Michie 1998); N.C. GEN. STAT. § 105-356(a) (1997); N.D. CENT. CODE § 57-02-40(1) (1993); OHIO REV. CODE ANN. § 5721.10 (Anderson 1996); OR. REV. STAT. § 311.405(7)(a) (1993 & Supp. 1998); 53 PA. CONS. STAT. ANN. §§ 7102-7103 (1997); R.I. GEN. LAWS § 44-9-1(b) (1995); S.C. CODE ANN. § 12-49-10 (Law. Co-op. 1976); TENN. CODE ANN. § 67-5-2101(a) (1998); TEX. TAX CODE ANN. § 32.05 (West 1992); UTAH CODE ANN. § 59-2-1325 (1996); VT. STAT. ANN. tit. 32, § 5061 (1994 & Supp. 1999); VA. CODE ANN. § 58.1-3340 (Michie 1997); WASH. REV. CODE ANN. § 84.60.010 (West 1991); WIS. STAT. ANN. § 70.01 (West 1999); WYO. STAT. ANN. § 39-13-108(d)(ii) (Michie 1999); 1999 Mich. Pub. Acts 123, § 60(4).

130. *See, e.g.*, *United States v. Christensen*, 218 F. Supp. 722, 729 (D. Mont. 1963) (holding that liens for ad valorem taxes have priority over private mortgages); *Barker's Inc. v. B.D.J. Dev. Co.*, 308 N.W.2d 78, 83 (Iowa 1981) (interpreting IOWA CODE ANN. §§ 445.28-32 to create super-priority status); *Granite Bituminous Paving Co. v. Parkview Realty & Improvement Co.*, 201 S.W. 933, 934-35 (Mo. Ct. App. 1933) (holding that a special tax bill has first priority over a prior deed of trust); *First NH Bank v. Town of Windham*, 639 A.2d 1089, 1092 (N.H. 1994) (holding that superior rank of tax lien over a bank mortgage is implied by statute and established by case law).

131. *See, e.g.*, *Zippcrer v. City of Fort Myers*, 41 F.3d 619, 624 (11th Cir. 1995) ("The imposition of the special assessments and their lien prioritization do not immediately and drastically diminish his interests in a manner that would implicate a Mennonite due process deprivation."); *FDIC v. City of New Iberia*, 921 F.2d 610, 614-16 (5th Cir. 1991) (holding that a special assessment, with super-priority, does not violate mortgagee's due process rights when it is established without notice to the mortgagee).

132. *See* JENSEN, *supra* note 17, at 48-99.

133. *See* ARK. CODE ANN. § 14-117-427 (Michie 1998) (creating a separate procedure for improvement districts); DEL. CODE ANN. tit. 9, §§ 8721, 8742, 8771 (1989 & Supp. 1998)

governments.<sup>134</sup> Added to this is the tendency of states, when presented with new foreclosure procedures, simply to add the new procedures as optional ones for use by local governments.<sup>135</sup>

While all jurisdictions recognize a lien for property taxes, and all provide some mechanism for enforcement of that lien, the similarities end at that point. A small minority of jurisdictions functionally recognize a form of "strict foreclosure"<sup>136</sup> in which a final date is established for payment of the taxes, and upon nonpayment the property is conveyed to the government.<sup>137</sup> In these jurisdictions, the levy of the property tax lien does not involve a public or private sale. In the overwhelming majority of jurisdictions enforcement of the property tax lien involves a sale of the lien itself, or of the underlying property, or sequential sales of first the lien and then the property. Part of the confusion of what is being sold is likely attributable to the decision of the authors of the 1935 Model Real Property Tax Collection Law to use language of selling the property, while states nonetheless continued the practice of selling liens.<sup>138</sup> Some states use the concept that, at a sale, a "certificate" is transferred, but this, too, has inconsistent use. Some states use "certificate" as

(establishing different procedures for particular counties); KY. REV. STAT. ANN. § 91.450 (Michie 1982 & Supp. 1998) (prescribing separate procedure for first class cities); MISS. CODE ANN. § 21-33-57 (1998 & Supp. 1999) (creating separate procedures for municipalities); MO. ANN. STAT. §§ 94.170, .320 (West 1998) (prescribing different procedures for different class cities); 53 PA. CONS. STAT. ANN. § 7102 (West 1997) (creating separate procedures for first class and second class cities).

134. See, e.g., MICH. COMP. LAWS ANN. §§ 211.107, .108 (West 1998 & Supp. 1999), amended by 1999 Mich. Pub. Acts 123, §§ 107, 108 (procedures may be adopted by cities and villages); N.Y. REAL PROP. TAX LAW §§ 1100-1138 (McKinney 1989) (statewide *in rem* foreclosure statute except when authorized in local charters).

135. Some jurisdictions have completely rewritten the property tax foreclosure statutes in recent years, partially in recognition of the disparity in approaches used within the state. See, e.g., 1999 Mich. Pub. Acts 123, 132, 133, 134; 1999 N.D. Laws 503; S.C. CODE ANN. § 12-45-180 (1976), repealed by 1993 S.C. Acts 100, § 1 (Law. Co-op. Supp. 1988).

136. Strict foreclosure was the dominant method of foreclosing upon mortgages prior to the late-seventeenth-century recognition of the "equity of redemption." In strict foreclosure, a date certain is established for final payment of the debt, and upon passage of the date without payment the property vests in the creditor. See FRANK S. ALEXANDER, GEORGIA REAL ESTATE FINANCE AND FORECLOSURE LAW 4-8 (2d ed. 1994).

137. See ALASKA STAT. § 29.45.390(a) (Michie 1999); IDAHO CODE § 63-1006(1) (1996); MINN. STAT. ANN. § 280.001 (West 1999); NEV. REV. STAT. ANN. § 361.570(3) (Michie 1993 & Supp. 1997); N.H. REV. STAT. ANN. § 80:76 (1991); N.Y. REAL PROP. TAX LAW § 1136(3) (McKinney 1989 & Supp. 1999); N.D. CENT. CODE § 57-28-05 (1993); OR. REV. STAT. §§ 312.050-.100 (1993); WIS. STAT. ANN. §§ 75.14(1), .521(13)(b) (West 1999); 1999 Mich. Pub. Acts 123, § 78k.

138. See National Municipal League, *supra* note 109, at 298 n.16 ("In a sense, perhaps, it is the lien which is sold. It is desired, however, to use the language of property sales in order to emphasize the fact that another sale is not required on foreclosure."). Other scholars recognized that there is a fundamental distinction between a sale of the land, and a sale of the lien. "The *land* itself is *not* being sold; rather the taxing unit's *lien* on the real estate for taxes due the unit is being sold." HENRY W. LEWIS, PROPERTY TAX COLLECTION IN NORTH CAROLINA 258 n.17 (1957) (emphasis in original).

reflective of a sale of the property which entitles the certificate holder to a deed after expiration of the redemption period.<sup>139</sup> In other states a certificate is simply a certificate of delinquency, entitling the holder to proceed with a subsequent foreclosure and sale of the property.<sup>140</sup> In those jurisdictions that enforce the property tax lien through one public sale, the sale is a sale of the underlying property, though the sale may be followed by a statutory right of redemption which requires subsequent termination by the passage of time or by affirmative action by the purchaser at the initial sale. Jurisdictions that recognize two separate sales are first selling the lien, which is then enforced by a subsequent foreclosure sale.

Judicial involvement in the property tax lien enforcement process also varies significantly across the country. Slightly less than half of the states permit enforcement of the lien, and sale of the property, without any judicial process.<sup>141</sup> Roughly the same percentage have some form of judicial involvement, either at the sale itself (if there is only one sale), or at the termination of the redemption period.<sup>142</sup> At least nine states presently permit the option of enforcing property tax liens through either nonjudicial or judicial procedures.<sup>143</sup>

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139. See FLA. STAT. ANN. § 197.502 (West 1999); IND. CODE ANN. § 6-1.1-25-4 (Michie 1995 & Supp. 1999); IOWA CODE ANN. § 446.29 (West 1998); MD. CODE ANN., TAX-PROP. §§ 14-820, -833 (1994); NEB. REV. STAT. § 77-1818 (1996).

140. See KY. REV. STAT. ANN. § 134.450 (Michie Supp. 1998); OHIO REV. CODE ANN. § 5721.06 (Anderson 1996 & Supp. 1999).

141. See ARK. CODE ANN. §§ 26-37-101, -202 (Michie 1997); CAL. REV. & TAX. CODE § 3691 (West 1998); COLO. REV. STAT. ANN. § 39-11-108 (West 1990 & Supp. 1998); HAW. REV. STAT. § 246-56 (Supp. 1998); IOWA CODE ANN. § 446.15 (West 1998); MISS. CODE ANN. § 27-41-55 (1999); MONT. CODE ANN. § 15-17-211 (1999); NEV. REV. STAT. ANN. § 361.595 (Michie 1993); N.H. REV. STAT. ANN. § 80:76 (1991); N.M. STAT. ANN. § 7-38-66 (Michie 1998); N.D. CENT. CODE § 57-24-12 (1993); OKLA. STAT. ANN. tit. 68, § 3105 (West 1992); S.C. CODE ANN. § 12-51-50 (Law. Co-op. 1976 & Supp. 1998); S.D. CODIFIED LAWS § 10-23-7 (Michie 1996); UTAH CODE ANN. § 59-2-135I (1996); W. VA. CODE § 11A-3-5 (1995).

142. See ALA. CODE § 40-10-12 (1993); ALASKA STAT. § 29.45.370 (Michie 1998); ARIZ. REV. STAT. ANN. § 42-18201 (West 1999); DEL. CODE ANN. tit. 9, § 8742 (1989 & Supp. 1998); 35 ILL. COMP. STAT. ANN. 200/21-75 (West 1996); IND. CODE ANN. § 6-1.1-24-4.7(a) (Michie 1995 & Supp. 1999); KY. REV. STAT. ANN. § 134.490 (Michie 1991 & Supp. 1998); MD. CODE ANN., TAX-PROP. § 14-834 (1994); MASS. ANN. LAWS ch. 60, § 65 (Law. Co-op. 1990); N.Y. REAL PROP. TAX LAW § 1123 (McKinney Supp. 1999); N.C. GEN. STAT. § 105-374 (1997); OHIO REV. CODE ANN. § 5721.14 (Anderson 1996); OR. REV. STAT. § 312.050 (1993); R.I. GEN. LAWS § 44-9-25 (1995); TENN. CODE ANN. § 67-5-2405 (1998); TEX. TAX CODE ANN. § 33.41 (West 1992); VA. CODE ANN. § 58.1-3967 (Michie 1997 & Supp. 1999); WASH. REV. CODE ANN. § 84.64.080 (West 1991); 1999 Mich. Pub. Acts 123, § 78h.

143. See CONN. GEN. STAT. ANN. §§ 12-157 (nonjudicial) (West 1993 & Supp. 1999), 12-181 (judicial) (West 1993); FLA. STAT. ANN. §§ 197.502 (nonjudicial), 173.01 (judicial) (West 1987); GA. CODE ANN. §§ 48-3-3(a) (nonjudicial), -4-76(a) (judicial) (1999); KAN. STAT. ANN. §§ 79-2306(a) (nonjudicial) (1989), -2801 (judicial) (1989 & Supp. 1996); MO. ANN. STAT. §§ 140.190 (nonjudicial) (West 1998 & Supp. 1999), 141.040, .400 (judicial) (West 1998); NEB. REV. STAT. §§ 77-1806 (nonjudicial), -1902 (judicial) (1996); PA. STAT. ANN. tit. 53, §§ 30901 (nonjudicial), 7143 (judicial) (West 1998); VT. STAT. ANN. tit. 32, §§ 5252 (nonjudicial), 5061(b) (judicial) (1994); WIS. STAT. ANN. §§ 75.12 (nonjudicial), .19 (judicial) (West 1999).

The public sale of a tax lien, or sale of the property itself, is conducted in three different ways across the country. The predominant approach is to offer the property at public auction to the highest bidder, with a minimum bid equal to the aggregate amount of delinquent taxes, interest, penalties and costs.<sup>144</sup> If the sale price is in excess of the minimum bid, the surplus is held for the benefit of subordinate claimants and the original owner. A minority of jurisdictions conduct the public auction by awarding the property to the purchaser willing to purchase the smallest percentage undivided interest in the real property.<sup>145</sup> As a way of reflecting market conditions and market interest rates, four states sell the property to the purchaser offering the lowest effective rate of interest pending redemption of the property by the owner.<sup>146</sup>

*C. Redemption Periods:  
Interest and Penalties*

Recognizing the severity of the consequences to the property owner from enforcement of a property tax lien, the fact that the amount of delinquent property taxes may commonly be a small percentage of the fair market value of the property, and the difficulty a property owner may have in obtaining sufficient cash to pay the necessary taxes, every jurisdiction in the country grants some period of time to the owner to make the necessary payment even after the taxes are delinquent. This extended period of time, once the taxes are declared delinquent, takes one of two forms. The most common approach mirrors that followed by many states in the enforcement of mortgages, which is to grant a statutory right of redemption for a

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144. See ALA. CODE § 40-10-16 (1993); ARK. CODE ANN. § 26-37-201 (Michie 1997); CAL. REV. & TAX. CODE § 3698.5(a) (West 1998); COLO. REV. STAT. ANN. § 39-11-115(2) (West Supp. 1999); CONN. GEN. STAT. ANN. § 12-157(c) (West Supp. 1999); D.C. CODE ANN. § 47-1303(a) (1997); GA. CODE ANN. § 48-4-81(b) (1999); HAW. REV. STAT. § 246-55(d) (1993); 35 ILL. COMP. STAT. ANN. 200/21-260 (West 1996 & Supp. 1999); IND. CODE ANN. § 6-1.1-24-5(e) (Michie 1995); KAN. STAT. ANN. § 79-2804 (1989); KY. REV. STAT. ANN. § 426.200(1) (Michie 1992); MD. CODE ANN., TAX-PROP. § 14-817(a)(2) (Supp. 1998); MISS. CODE ANN. § 27-41-59 (1999); N.M. STAT. ANN. § 7-38-67(E) (Michie 1998); N.C. GEN. STAT. § 105-374(k) (1997); OHIO REV. CODE ANN. § 5723.06(A)(1) (Anderson 1999); PA. STAT. ANN. tit. 53, §§ 27301, 27306 (West 1998); S.C. CODE ANN. § 12-51-40(d) (Law. Co-op. Supp. 1998); TENN. CODE ANN. § 67-5-2501(a)(2) (1998); TEX. TAX CODE ANN. § 34.01(f) (West Supp. 1999); UTAH CODE ANN. § 59-2-1351.1(4) (1996); VT. STAT. ANN. tit. 32, § 5254 (Supp. 1999); VA. CODE ANN. § 58.1-3967 (Michie 1997 & Supp. 1999); WASH. REV. CODE ANN. § 84.64.080 (West 1991); W. VA. CODE § 11A-3-5(a) (1995); WYO. STAT. ANN. § 39-13-108(e) (Lexis 1999).

145. See IOWA CODE ANN. § 446.16(1) (West 1998); LA. REV. STAT. ANN. § 47:2184 (West 1990); ME. REV. STAT. ANN. tit. 36, § 1074 (West 1990); MASS. ANN. LAWS ch. 60, § 43 (Law. Co-op. 1990); NEB. REV. STAT. § 77-1807 (1996) (smallest portion of property); N.H. REV. STAT. ANN. § 80:24 (1991); R.I. GEN. LAWS § 44-9-8 (1995); S.D. CODIFIED LAWS § 10-23-8 (Michie 1996 & Supp. 1999).

146. See ARIZ. REV. STAT. ANN. § 42-18114 (West 1999); FLA. STAT. ANN. § 197.432(5) (West 1999); 35 ILL. COMP. STAT. ANN. 200/21-215 (West 1996); N.J. STAT. ANN. § 54:5-32 (West 1986).

period of time following the foreclosure sale.<sup>147</sup> Post-sale redemption periods are typically one to three years,<sup>148</sup> with some jurisdictions creating shorter redemption periods following judicial foreclosure proceedings.<sup>149</sup> Other jurisdictions establish a grace period or statutory period of time for payment of delinquent taxes *prior* to the occurrence of a final sale with little or no redemption period after the sale.<sup>150</sup> It is also not uncommon for jurisdictions to create different statutory periods of time depending on the nature of the use of the underlying property.<sup>151</sup>

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147. See generally GRANT S. NELSON & DALE A. WHITMAN, REAL ESTATE FINANCE LAW § 7.1 (3d ed. 1994).

148. See, e.g., ALA. CODE § 40-10-29 (1993) (three years after sale); ARIZ. REV. STAT. ANN. § 42-18152 (West 1999) (three years after sale of liens); COLO. REV. STAT. ANN. § 39-11-120(1) (West 1990) (three years after sale of tax lien); CONN. GEN. STAT. ANN. § 12-157(f) (West Supp. 1999) (one year after sale); DEL. CODE ANN. tit. 9, § 8758 (1989) (lienholders may redeem 60 days after judicial confirmation of sale); FLA. STAT. ANN. § 197.502 (West 1999) (two years after issuance of tax certificate); HAW. REV. STAT. § 246-60 (Supp. 1998) (one year after sale); IND. CODE ANN. § 6-1.1-25-4(a)(1) (Michie 1995) (one year); IOWA CODE ANN. § 447.9(1) (West Supp. 1999) (two years after sale); MD. CODE ANN., TAX-PROP. § 14-833(a) (1994 & Supp. 1998) (at least six months after sale of lien); MASS. ANN. LAWS ch. 60, § 65 (Law. Co-op. 1990) (at least six months after sale); MISS. CODE ANN. § 27-45-3 (1999) (two years after sale); MO. ANN. STAT. § 140.340(1) (West 1998) (two years after sale); MONT. CODE ANN. § 15-18-111(I) (1997) (three years after sale); NEB. REV. STAT. § 77-1837 (1996) (three years after sale); N.H. REV. STAT. ANN. § 80:38(I) (1991) (two years after sale); N.D. CENT. CODE § 57-28-01 (1993) (three years after sale); OHIO REV. CODE ANN. § 5721.37(A)(1) (Anderson 1999) (one year after sale of lien); OKLA. STAT. ANN. tit. 68, § 3118(a) (West 1992 & Supp. 1999) (two years after sale); OR. REV. STAT. § 3I2.120(1) (1993) (two years after judgment); PA. STAT. ANN. tit. 53, § 7293(a) (West 1997) (one year); R.I. GEN. LAWS § 44-9-25 (1995) (one year); S.C. CODE ANN. § 12-5I-90 (Law. Co-op. Supp. 1998) (one year); S.D. CODIFIED LAWS § 10-25-1 (Michie 1996) (three years after sale if within municipality); TENN. CODE ANN. § 67-5-2702 (1998) (one year); VT. STAT. ANN. tit. 32, § 5260 (1994) (one year); W. VA. CODE § 11A-3-19(a) (Supp. 1999) (12 to 15 months after sale); WYO. STAT. ANN. § 39-13-109(e)(i) (Lexis 1999) (four years).

149. See, e.g., GA. CODE ANN. §§ 48-4-40, -81(c) (1999) (1 year after nonjudicial sale; 60 days after judicial sale); ME. REV. STAT. ANN. tit. 36, §§ 941, 943 (West 1990) (18 months in nonjudicial proceedings; 1 year following judicial sale); N.J. STAT. ANN. §§ 54:5-86, :5-104.34 (West Supp. 1999) (two years after nonjudicial sale; six months after judicial *in rem* proceeding).

150. See ARK. CODE ANN. § 26-37-301(b) (Michie 1997) (two years before final sale); GA. CODE ANN. § 48-4-78(a) (1999) (judicial tax foreclosure available only when taxes are delinquent one year); IDAHO CODE § 63-1005(1) (1996) (three years before deed is issued); KY. REV. STAT. ANN. § 134.490(2), (3) (Michie Supp. 1998) (one year before sale); MICH. COMP. LAWS ANN. §§ 211.60 (three years for taxes prior to 1999), .78g (one year redemption prior to forfeiture) (West 1998), amended by 1999 Mich. Pub. Acts 123, §§ 60(2), 78g; NEV. REV. STAT. ANN. §§ 361.585(1), .570(1) (Michie 1993) (two years prior to issuance of deed); N.M. STAT. ANN. § 7-38-51(B)(3) (Michie 1998) (sale may not occur until three years of delinquency); UTAH CODE ANN. § 59-2-1343 (1996) (four years delinquency pre-sale); WASH. REV. CODE ANN. § 84.64.050 (West Supp. 1999) (three years delinquency pre-sale); WIS. STAT. ANN. § 74.57(2)(b) (West 1989) (two years delinquency pre-sale).

151. See, e.g., CAL. REV. & TAX. CODE §§ 3691(a)(1), (b) (West 1998) (five years before final sale; three years in the case of nuisance properties); 35 ILL. COMP. STAT. ANN. 200/21-

In the absence of some strong disincentive, owners may delay payment of property taxes as long as possible. In the early 1930s, roughly half the states imposed penalties of 5-10% for nonpayment, and all jurisdictions added an interest charge, which ranged from 6% to 18% annually.<sup>152</sup> Higher statutory penalties and interest rates are prevalent in every jurisdiction today, with penalties in the range of 10% and interest in the range of 16-18% annually.<sup>153</sup> In lieu of penalties added upon delinquency, a

350 (West 1996) (two years after sale; six months for vacant land); KAN. STAT. ANN. § 79-2401(a) (1997) (three years for homestead properties; one year for abandoned properties, all others two years); MINN. STAT. ANN. §§ 279.06, 281.173 (West 1999) (three to five years depending on location and usage of property; five weeks for abandoned property); TEX. TAX CODE ANN. § 34.21(a)-(e) (West Supp. 2000) (six months, except two years for homestead and agricultural); VA. CODE ANN. § 58.1-3965 (Michie 1999) (two years delinquency pre-sale; one year where structures are a nuisance); 1999 Mich. Pub. Acts 132, 133 (special provisions for property which is certified as abandoned).

152. See Industrial Conference Board, *supra* note 65, at 73, 218-22 tbl. 19.

153. See ALA. CODE § 40-10-121(a) (1993) (12% annual interest); ALASKA STAT. § 29.45.250(a) (Lexis 1998) (20% penalty; 15% annual interest); ARIZ. REV. STAT. ANN. §§ 42-18053(a) to -18107(a) (West 1999) (5% penalty; 16% annual interest); CAL. REV. & TAX. CODE § 4103(a) (West 1998) (redemption penalty of 1.5% per month); COLO. REV. STAT. ANN. § 39-10-104.5(3) (West Supp. 1999) (1% interest per month); CONN. GEN. STAT. ANN. § 12-146 (West 1993) (18% annual interest); D.C. CODE ANN. § 47-811(c) (1997) (10% penalty; 1.5% interest monthly); FLA. STAT. ANN. § 197.402(2) (West 1999) (18% annual interest); HAW. REV. STAT. §§ 246-49, -60 (1993) (2/3% monthly interest pre-sale; 12% annual interest post-sale, up to 10% penalty); IDAHO CODE §§ 63-201(7), -1001 (1996 & Supp. 1999) (1% interest monthly; 2% late charge); 35 ILL. COMP. STAT. ANN. 200/21-15 (West 1996) (1 1/2% interest monthly); IOWA CODE ANN. §§ 445.39, 447.1 (West 1998) (1 1/2% interest monthly pre-sale; 2% interest monthly post-sale); KAN. STAT. ANN. §§ 79-2004, -2968 (1997) (1% above federal internal revenue code rate for underpayment of taxes); LA. REV. STAT. ANN. § 47:2101(A)(3) (West Supp. 1999) (1% interest monthly); ME. REV. STAT. ANN. tit. 36, § 892-A (West 1990) (rates established annually); MD. CODE ANN., TAX-PROP. §§ 14-602, -702 (1994) (1% interest monthly on state taxes; others set locally); MASS. ANN. LAWS ch. 59, § 57, ch. 60, § 62 (Law. Co-op. 1990) (14% annual interest pre-sale; 16% annual interest post-sale); MINN. STAT. ANN. §§ 279.01, .03 (West 1998) (10-14% annual interest; 4-6% annual penalty); MISS. CODE ANN. §§ 27-41-9, -45-3 (1999) (1% interest monthly pre-sale; 1 1/2% interest monthly post-sale; 5% penalty); MO. ANN. STAT. §§ 140.100, .340 (West 1998) (up to 10% annual interest and 18% annual penalty); MONT. CODE ANN. § 15-16-101 (1999) (10% annual interest; 2% penalty); NEB. REV. STAT. § 77-207 (1996) (14% annual interest); NEV. REV. STAT. ANN. §§ 361.483(5), .5648(2)(d) (Michie Supp. 1997) (10% annual interest; penalties ranging up to 15%); N.H. REV. STAT. ANN. §§ 80:32, :69 (1991 & Supp. 1998) (18% interest post-sale); N.J. STAT. ANN. § 54:4-67(a) (West 1986) (up to 18% annual interest; up to 6% premium); N.M. STAT. ANN. §§ 7-38-49, -50 (Michie 1998) (1% interest monthly; up to 5% penalty); N.C. GEN. STAT. §§ 105-360(a), -374(i) (1997) (9% annual interest; 5% fee); OHIO REV. CODE ANN. §§ 323.121, 5703.47 (Anderson 1999) (annual interest at federal funds rate plus 3%; 10% penalty); OKLA. STAT. ANN. tit. 68, § 2913(D) (West Supp. 1999) (18% annual interest); PA. STAT. ANN. tit. 53, §§ 7143, 7203, 7293 (West 1997) (up to 10% annual interest; 5% penalty); S.C. CODE ANN. §§ 12-51-90, -45-180(a) (Law. Co-op. Supp. 1998) (8% annual interest pre-sale; 12% annual interest post-sale; 15% penalty); S.D. CODIFIED LAWS § 10-21-23 (Michie Supp. 1999) (10% annual interest); UTAH CODE ANN. § 59-2-1331(2) (Supp. 1999) (interest at federal discount rate plus 6%; 2% penalty); VT. STAT. ANN. tit. 32, §§ 3202(b)(1),

few jurisdictions create the same economic incentive by granting discounts for early payment.<sup>154</sup> Penalties in some jurisdictions are clearly designed to accomplish more than an incentive for prompt payment, as the penalties are cumulative annually and may rapidly approach fair market value of the property.<sup>155</sup> Costs associated with notices, advertisements, and judicial proceedings are invariably included in the aggregate amount necessary to clear the delinquency, or redeem the property from a sale. It is precisely these high rates of return which attract private investors to the potential purchase of tax liens.

These various forms of property tax enforcement procedures throughout the United States reflect the diversity of the marketplace of ideas, but also contain within them a high degree of noncompliance with the constitutional due process requirements of *Mennonite*. Jurisdictions that follow exclusively, or partially, a judicial tax foreclosure process tend to have more comprehensive notice requirements included within the procedures. Jurisdictions that rely on nonjudicial procedures tend to minimize the notice given to interested parties, creating significant constitutional doubts about the adequacy of notice. The analysis becomes even more complex in light of the multiple stages, or events, in the enforcement of a property tax lien which are common in most jurisdictions. Property may be sold at an initial tax sale with minimal or no notice to interested parties, but with more comprehensive notice provided at the stage of termination of the right of redemption. Unfortunately, over the past forty years state and local governments have attempted to respond to constitutional questions by expanding the procedures, and increasing notice

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5136(a) (1994 & Supp. 1998) (in the case of a municipality collection, 1% interest monthly post-sale; the state imposes a 5% penalty monthly up to a maximum of 25% of the original unpaid tax liability in addition to variable interest); VA. CODE ANN. § 58.1-3916 (Michie Supp. 1999) (municipalities may impose interest not exceeding the rate set by the Internal Revenue Service or 10%, whichever is greater); WASH. REV. CODE ANN. § 84.56.020(5) (West Supp. 1999) (12% annual interest; 11% penalty); WIS. STAT. ANN. §§ 74.47(1)-(2) (West 1999) (1% interest monthly; 1/2% penalty monthly, cumulative); WYO. STAT. ANN. § 39-13-108(b)(ii) (Michie 1999) (18% annual interest); 1999 Mich. Pub. Acts 123, § 60(3) (1 1/4% interest monthly, 4% fee)

154. See KY. REV. STAT. ANN. §§ 134.020(2), .020(4), .460(1) (Michie 1991 & Supp. 1998) (2% discount for early payment, 10% annual interest; 12% annual interest on certificates of delinquency); N.D. CENT. CODE §§ 57-20-01, -09 (1993) (12% annual interest; 12% penalty; 5% discount for early payment); OR. REV. STAT. §§ 311.500(1), .505(2), .505(3)(b) (Supp. 1998) (1 1/3% interest monthly; 5% penalty; 3% discount for early payment); TENN. CODE ANN. §§ 67-5-1804, -2410(a)(1)(A) (1998) (10% penalty post-sale; up to 2% discount for early payment); TEX. TAX CODE ANN. §§ 31.05(b), 33.01(a), .01(c), 34.21(a) (West 1992 & Supp. 1999) (1% interest monthly; 12% penalty after one year, redemption premium of 25% within one year, 50% during second year, up to 3% discount for early payment); W. VA. CODE §§ 11A-1-3(a), -3-23(a) (1995) (9% annual interest for delinquent taxes; 1% interest monthly post-sale; 2 1/2% discount for payment on time).

155. See ARK. CODE ANN. §§ 26-36-201(b), -202(b) (Michie 1997) (10% penalty; 10% interest); GA. CODE ANN. §§ 48-3-8, -2-44, -4-42 (1999) (1% interest monthly, 10% penalty pre-sale; 20% annual penalty); IND. CODE ANN. §§ 6-1.1-24-2(a)(4), -37-10(a) (Michie 1995) (10% annual interest; 10% penalty added every six months); R.I. GEN. LAWS §§ 44-1-7(b), -9-19 (1995) (annual interest at prime rate plus 2%; 10% initial penalty plus 1% additional penalty monthly).

requirements only at one of the many stages in the process, and usually the final stage. Both *Mullane* and *Menonite* leave unresolved this issue of whether “notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action”<sup>156</sup> requires a local government to inform the parties at the very first step in the tax foreclosure process, or only at the very last step in the termination of the rights of the interested parties.

When to give the constitutionally required notice is but part of the challenge facing state and local legislative bodies responsible for the design of delinquent property tax collection procedures. They must also make judgments about the amorphous standard of “reasonableness” which the *Mullane* and *Menonite* decisions use to describe the constitutional duty. It is a question not just of when the notice is to be given, but also what interests are entitled to notice, what actions must be undertaken to identify the interests, and what efforts are necessary to locate names and addresses for the holders of these interests.

#### IV. DUE PROCESS APPLIED: THEORY BECOMES PRACTICE

The notice requirements of due process, as established by *Mullane* and *Menonite*, offer few categorical lines. The Supreme Court has acknowledged that what is required is a balancing of the interests of the state in collecting taxes and the constitutional protection of individual interests. The reasonableness of the balance, the Court suggests, depends on the particular circumstances.<sup>157</sup> A justification for the loose nature of this balancing test of reasonableness may well lie in the fact that no two jurisdictions follow precisely the same approach, and each has a different set of circumstances. Federal constitutional rights, however, do not and should not depend on the location of one’s property. The challenge is to ascertain the constitutional floor of the notice required by due process, and to establish that floor as the basis for each jurisdiction, leaving the jurisdictions free to adopt their own procedures consistent with that foundation.

In light of the wide variety of approaches across the country, the application of federal constitutional due process standards to the enforcement of liens for delinquent property taxes requires careful analysis of four separate questions. The threshold question is what events or actions trigger the constitutional protections. The

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156. *Menonite Bd. of Missions v. Adams*, 462 U.S. 791, 795 (1983).

157. *See Tulsa Prof'l Collection Servs., Inc. v. Pope*, 485 U.S. 478, 484 (1988).

In the years since *Mullane* the court has adhered to these principles, balancing the “interest of the State” and “the individual interest sought to be protected by the Fourteenth Amendment.” The focus is on the reasonableness of the balance, and, as *Mullane* itself made clear, whether a particular method of notice is reasonable depends on the particular circumstances.

*Id.* (quoting *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950)); *see also Municipality of Anchorage v. Wallace*, 597 P.2d 148, 154 (Alaska 1979).

What we are requiring [mailed notice] is a fair adjustment or balance between the rights of the municipal government to collect its taxes on the one hand, and on the other, the right of a property owner not to be deprived of property except in a fair and just manner.

*Id.*



multiplicity of stages in the typical foreclosure process requires clarity as to the point at which the government must provide notice to all interested parties. The second question is the scope of the interests that fall within the range of “legally protected property interests.” Such interests are clearly entitled to notice, but the Supreme Court has yet to provide the substance of this broad category and there remains a wide range of perspectives on this across the country. The third question involves the challenge of identifying these interests. Only a few jurisdictions presently require title examinations as part of the tax foreclosure process, but a large number are finding it necessary to define with increasing specificity the scope of records to be examined in order to identify the parties. The fourth question is in many ways the most difficult one pragmatically—determining the contours of the constitutional obligations to identify accurately the holders of the various interests and ascertain current addresses for them.

#### *A. Events Requiring Due Process*

The constitutional due process requirement of notice does not apply to the imposition of the property tax. Both the “caretaker” rationale and the rationale of the importance of taxation to government, enunciated in the early twentieth century Supreme Court analysis, support this result.<sup>158</sup> Every owner of property knows or should know that real property is subject to taxation, and that the ability to impose such taxes is essential to the provision of public services, particularly at the local level. It is when the power to impose such taxes might result in the loss of property interests that due process requires notice to interested parties.

At the earliest point in the process of enforcing payment of property taxes, the occurrence of a delinquency, there is no constitutional requirement that the government provide notice. Conversely, providing notice to an owner, or to mortgagees, merely that property taxes have become delinquent is not sufficient notice of procedures which may terminate the property rights. “[A] mortgagee’s knowledge of delinquency in the payment of taxes is not equivalent to notice that a tax sale is pending.”<sup>159</sup>

The variety of approaches throughout the country can be divided roughly into three categories for purposes of analyzing the event or events that trigger a notice requirement. The first category is when the enforcement procedures contemplate one event, such as a public sale or transfer of the property to the government, with no redemption period following the event. The second category is when the enforcement procedures contemplate only one event, but it is followed by a redemption period. The nature of the redemption period in this second category of procedures is that it is for a fixed period of time, commencing upon the event of sale or transfer and expiring automatically in the absence of redemption. The third category contains those procedures that contemplate two separate events in the property tax foreclosure process. The jurisdictions which fall into this third category are those in which the initial event is the sale of the property, and the second event is the termination of the

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158. *See* *Winona & St. Peter Land Co. v. Minnesota*, 159 U.S. 526, 535 (1895).

159. *Mennonite*, 462 U.S. at 800.

right of redemption. The occurrence of this second event must follow the first event in order to terminate all rights of interested parties, but is independent of the first event in terms of timing and process.

Jurisdictions that rely upon procedures in the first category face the simplest constitutional duties of notice. When the applicable enforcement procedures involve only a single event, such as a tax sale that is final and binding without any subsequent statutory redemption period, the constitutionally required notice must be given of the pendency of the sale.<sup>160</sup> Thus, those jurisdictions that establish a minimum period of time *prior* to the initiation of tax foreclosure proceedings, and which conduct a tax foreclosure sale with no additional redemption period post-sale, are constitutionally required to give notice only of the pending sale.<sup>161</sup>

Property tax procedures that fall into the second category may also avoid the need to provide constitutionally adequate notice on multiple occasions. If the statutory procedures provide for adequate notice to all interested parties at the commencement of enforcement proceedings, this may be sufficient notice in certain circumstances. When, for example, the enforcement proceeding involves judicial action followed by a fixed redemption period, with no sale or public auction of the property, notice of the commencement of the judicial proceeding is sufficient notice of the entire enforcement proceeding and no separate notice must be given of the end of the redemption period.<sup>162</sup> Even in a nonjudicial proceeding in which a tax lien mortgage is filed, followed by the expiration of a fixed redemption period without a sale, if constitutionally adequate notice is given of the filing of the tax lien mortgage, no additional notice is required of the forfeiture of the property at the expiration of the redemption period.<sup>163</sup> Thus, when the proceeding is one continuous proceeding, whether judicial or nonjudicial in nature, and all subsequent events flow automatically from the commencement of the proceeding through the termination of property rights (in the absence of redemption), then interested parties who receive adequate notice at the commencement of the proceedings have been given adequate notice of the statutory course of events. Constitutionally adequate notice given at the outset of a proceeding to enforce a property tax lien should constitute adequate notice of the entire proceeding, with no additional *constitutional*<sup>164</sup> notice requirements only

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160. See *M & P Enters., Inc. v. Transamerica Fin. Servs.*, 944 S.W.2d 154 (Mo. 1997).

161. See *Federal Home Loan Mortgage Corp. v. Dutch Lane Assocs.*, 810 F. Supp. 86 (S.D.N.Y. 1992); *In re Foreclosure of Liens for Delinquent Taxes*, 607 N.E.2d 1160 (Ohio Ct. App. 1992). For jurisdictions which establish a minimum period pre-sale, see *supra* text accompanying note 150.

162. See *Weigner v. City of New York*, 852 F.2d 646, 652 (2d Cir. 1988) ("[D]ue process only requires notice of the 'pendency of the action' and an opportunity to respond. . . . Once the City sent this notice, it was not required to send additional notices as each step in the foreclosure proceeding was completed or when each of the available remedies was about to lapse."); see also *Calhoun v. Jennings*, 512 N.E.2d 178, 184 (Ind. 1987) ("[T]he due process clause of the fourteenth amendment does not require that actual notice be given of either the lapse of the redemption period or the subsequent issuance of the tax deed.").

163. See *Cummings v. Town of Oakland*, 430 A.2d 825 (Me. 1981).

164. The emphasis here is on the notice requirements necessary to comply with Fourteenth Amendment due process. This is not to suggest that state statutes do not, or should not, create statutory obligations for additional forms of notice of subsequent proceedings. There may be

in these limited circumstances. In both the first and second categories of procedures, notice of the event, or proceeding, must be filed of public record in order to provide notice of the proceeding to all parties who may acquire interests subsequent to the commencement of the proceeding.<sup>165</sup>

It is the third category of property tax enforcement procedures that faces the greatest constitutional difficulties in providing adequate notice on multiple occasions. Jurisdictions have adopted multistage enforcement proceedings for a variety of reasons, such as a public policy desire to afford property owners as much latitude as possible to pay their taxes, a policy decision to sell tax liens and allow private investors to conduct the tax foreclosures, or a legislative decision to remedy procedural defects by adding procedures instead of reforming the existing procedures. Ironically, however, these multistage proceedings face a more substantial constitutional hurdle. The existence of multistage procedures may well give rise to constitutional duties at each stage.

When an initial event, whether a sale of a tax lien or a sale of the property, is followed by a subsequent event, such as a final tax sale or a termination of a redemption right, and the latter event is not solely dependent on the passage of time, adequate notice of the first event is not adequate notice of the final event. For example, where a state statute specifies constitutionally adequate notice at the creation of a tax lien mortgage, but no notice of the subsequent issuance of a tax deed, the procedure is constitutionally deficient.<sup>166</sup> When there is adequate notice of the sale of a tax lien to third parties, but the timing and circumstances of the final termination of property rights are left to the discretion of the tax lien purchaser, the initial notice provides little, if any, information to the interested parties about when their rights will be finally terminated, and by whom. Due process requires more than notice that you may lose your property rights for nonpayment of taxes at some unknown date in the future.<sup>167</sup> Thus, state statutes that create a discretionary period of time for final termination of property rights, usually by specifying only a minimum, as opposed to a fixed, redemption period, should be subject to constitutional scrutiny for the adequacy of notice of the final event. Adequate notice of the commencement of the enforcement proceedings is *not* adequate notice when a third party has wide discretion on the timing and circumstances in which to invoke final termination of rights. In these contexts constitutionally adequate notice must be given of the initial event *and* of the final event.

For corresponding reasons it is doubtful that giving constitutionally adequate notice *only* at the final step of a multistage enforcement proceeding will be sufficient. If statutory procedures contemplate a two-stage process, either with an initial sale

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strong policy grounds for such additional notice. For purposes of present analysis, the essential step is to appreciate the distinction between the constitutionally mandated notice, and such additional notice as may be required by statute. *See, e.g.*, Board of Comm'rs v. Forth, 528 N.E.2d 490 (Ind. Ct. App. 1988) (holding that failure to comply with statutory notice invalidates tax deed, without need to address constitutional claims).

165. *See infra* text accompanying notes 175-77.

166. *See* First NH Bank v. Town of Windham, 639 A.2d 1089 (N.H. 1994).

167. *See In re* Foreclosure of Liens for Delinquent Taxes, 607 N.E.2d 1160, 1163 (Ohio Ct. App. 1992) ("[T]he fact that [the mortgagee] knew that the sale of the subject property would take place some time in the future is not equivalent to notice of the time and place of sale.").

followed by a subsequent termination of a right of redemption, or an initial sale followed by a subsequent order or date for issuance of a tax deed, the failure to provide adequate notice at the commencement of the procedures may render the entire proceeding invalid. Some jurisdictions have held that the only notice that is constitutionally required is notice of the final event, such as the issuance of a tax deed.<sup>168</sup> Others have held that adequate notice of foreclosure of the right of redemption is not a substitute for notice of a prior tax sale.<sup>169</sup> If notice, in a constitutionally adequate form, is given only at the final step, it is likely that substantial interest, penalties, and costs will have accrued, and there is often no opportunity for a hearing.<sup>170</sup>

Constitutionally adequate notice of only a single event in the property tax foreclosure process is clearly adequate notice of the entire process in only the first category. When there is but a single event which controls and determines the rights of the parties to the property, adequate notice of the event needs only be given once if the notice includes notice of the time and place of the sale. In the second category of procedures, so long as the redemption period is self-executing and notice of the event is of public record, notice given only once still constitutes sufficient notice. In multistaged tax enforcement proceedings, adequate notice of an initial event is not adequate notice of the final event. When there is a multistaged proceeding and notice is given only of the final event which terminates the rights of interested parties, such notice only of the final event, and no earlier events, may still be sufficient if there is a meaningful opportunity to be heard, and to exercise redemption rights. The weakness of this latter conclusion is that the failure to provide adequate notice of the earlier stages in the enforcement proceeding increases the redemption amount by additional interest, penalties and costs, and shortens the period of time in which an interested party may act to protect its property interests. Jurisdictions utilizing a multistaged property tax enforcement procedure are therefore required to provide constitutionally adequate notice to all interested parties at each stage of the proceedings.<sup>171</sup>

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168. See *Rosewell v. Cook County Treasurer*, 512 N.E.2d 1256, 1261-62 (Ill. 1987) (holding that procedure is adequate so long as there is still constitutionally adequate notice and a meaningful opportunity to be heard); see also *Acirema, N.V. v. Lilly*, No. CIV.A. 1:96-0559, 1997 WL 876738, at \*4 (S.D. W. Va. Aug. 11, 1997), *aff'd*, 141 F.3d 1157 (4th Cir. 1998) (suggesting in dicta that notice prior to the end of the redemption period was sufficient, and that notice prior to the initial sheriff's sale was not constitutionally required).

169. See *Ashness v. Tomasetti*, 643 A.2d 802 (R.I. 1994).

170. See *McCann v. Scaduto*, 519 N.E.2d 309 (N.Y. 1987). *But see* *Durham v. United Cos. Fin. Corp.*, 503 S.E.2d 465 (S.C. 1998) (holding, on statutory construction grounds only, that notice to mortgagee only of a final 30 day period before issuance of tax deed was permissible, even though no notice was given of prior tax sale and redemption period).

171. See *First NH Bank*, 639 A.2d at 1095 (holding that state constitution requires notice to the mortgagee of the issue date of tax lien deeds, the expiration of the right of redemption, and a warning that the mortgage will be eradicated by the tax lien deed); *White v. Lee*, 470 A.2d 849 (N.H. 1983).

B. "Legally Protected Property Interests"

The basis of the Supreme Court's decision in *Mennonite* is that a mortgagee holds "a legally protected property interest"<sup>172</sup> which is substantially affected by a tax sale. The Court did not go further and describe the range of such property interests, and it has been left to legislatures and lower courts to attempt to define the parameters of interests entitled to due process protections in this context. It is accurate that *Mennonite* did not impose "a blanket requirement of notice to every party with a publicly recorded interest in property,"<sup>173</sup> but it is also true that many interested parties, other than the owner and mortgagees, have enforceable property rights protected by the Fourteenth Amendment. A substantial minority of jurisdictions continue to require notice only to owners and mortgagees, leaving them open to constitutional attacks by interested parties other than owners and mortgagees.<sup>174</sup>

A statutory requirement of notice to owners and mortgagees of record potentially leaves without adequate notice parties such as land sale contract purchasers, lessees, and judgment creditors, even though they may have an interest of record. A statutory requirement that notice be given to all parties having an interest of record encompasses the overwhelming majority of property rights, but will not serve to provide notice to occupants of the property pursuant to unrecorded leases, or parties in adverse possession of the property. There is also a range of interests for which there may be question as to whether they are property rights entitled to the protection of due process.<sup>175</sup> A right of redemption, even if held by someone other than the

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172. *Mennonite Bd. of Missions v. Adams*, 462 U.S. 791, 798 (1983); *see also* *District of Columbia v. Mayhew*, 601 A.2d 37, 42-43 (D.C.1991); *In re Tax Deed Petition of Thomas*, 587 N.E.2d 637 (Ill. App. Ct. 1992).

173. *FDIC v. Lee*, 933 F. Supp. 577, 580 (E.D. La. 1996).

174. *See, e.g.*, ALA. CODE §§ 40-10-4, -73, -74 (1993) (notice to owners, mortgagees, and lienholders); ARIZ. REV. STAT. ANN. § 42-18202(A)(1) (West 1999) (notice to property owner only); MASS. ANN. LAWS ch. 60, § 16 (Law. Co-op. 1990) (notice to owner and to mortgagees who file request for notice); MINN. STAT. ANN. §§ 279.091, 281.13 (West 1999) (notice to taxpayers and to mortgagees of record); MISS. CODE ANN. §§ 27-43-1, -3, -5 (1999) (notice to owners and to mortgagees); N.H. REV. STAT. ANN. §§ 80:38-a, :38-b (1991 & Supp. 1998) (notice to owner and to mortgagees); N.J. STAT. ANN. § 54:5-26 (West Supp. 1999) (notice to owner); N.M. STAT. ANN. § 7-38-66 (Michie 1998) (notice to owner and holders of liens or security interests); OKLA. STAT. ANN. tit. 68, § 3118 (West 1992 & Supp. 1999) (notice to owner and mortgagees of record); R.I. GEN. LAWS §§ 44-9-10(a), -11 (1995) (only owners and mortgagees are entitled to mailed notice; other interested parties receive notice by publication and posting); S.C. CODE ANN. §§ 12-49-300, -51-120 (Law. Co-op. 1976 & Supp. 1998), 12-51-140 (Law. Co-op. 1976) (notice to owner and to mortgagees); VA. CODE ANN. § 58.1-3965(A) (Michie 1997 & Supp. 1999) (notice to owner and mortgagees); WIS. STAT. ANN. §§ 75.12(1), .521(3)(c) (West 1999) (notice to owner and mortgagees of record); WYO. STAT. ANN. § 39-13-108(e)(v)(B) (Michie 1999) (notice to owner, occupant, and mortgagees).

175. For example, a party, other than a current owner, personally liable for indebtedness secured by a mortgage which is affected by a tax sale is not constitutionally entitled to notice of the tax sale. *See French Mkt. Homestead v. Portillo*, 562 So. 2d 1139 (La. Ct. App. 1990).

original owner at the time the taxes became delinquent, is a property interest entitled to such protection.<sup>176</sup> In the context of shared property interests, such as easements and covenants, clarity of analysis is no less significant.

### 1. Owners

The obligation to provide notice to interested parties usually focuses first on the underlying owner in fee simple of the property which is subject to delinquent tax enforcement proceedings. Property ownership, however, is rarely simple, and it is necessary to give separate consideration to parties who acquire interests during the course of the enforcement proceedings, to concurrent owners, to the holders of present and future interests, and to parties who are acquiring the property through installment land contracts.

Parties who acquire interests in property after the commencement of the proceedings to enforce a lien for delinquent taxes may not have an independent right to notice of events or steps in the process which occur after they acquired their interests. This proposition rests on the factual determination of whether there is recorded evidence of the commencement of the proceeding, such that subsequent purchasers are deemed to be on record notice of the pendency of the proceeding,<sup>177</sup> and whether the subsequent purchaser itself recorded its interest.<sup>178</sup> If there is no publicly recorded evidence of the commencement of the proceedings, then parties who acquire interests prior to a final tax sale, and record evidence of their interests, are entitled to constitutionally adequate notice of the sale.<sup>179</sup>

Where property is held in a form of concurrent ownership, such as a tenancy in common, and the entire property interest is subject to the tax enforcement proceeding, notice should be given to each of the owners of the undivided interests.<sup>180</sup> It is not sufficient to provide notice to only one concurrent owner, identifying the other

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176. *See* *Tax Lien Services v. Hall*, 919 P.2d 396 (Mont. 1996).

177. *See* *Nitchie Barrett Realty Corp. v. Biderman*, 704 F. Supp. 369 (S.D.N.Y. 1988); *City of Auburn v. Mandarelli*, 320 A.2d 22 (Me. 1974); *In re King County for the Foreclosure of Liens for Delinquent Real Property Taxes*, 811 P.2d 945 (Wash. 1991).

178. *See* *Brown v. Greig*, 740 P.2d 1186 (N.M. Ct. App. 1987) (stating that notice must be given to parties holding ownership of record, even though property was transferred pursuant to an unrecorded deed).

179. *See* *Campbell v. Siegfried*, 823 S.W.2d 156 (Mo. Ct. App. 1992); *Buescher v. Jaquez*, 677 P.2d 615 (N.M. 1983). Conversely, a party who acquires the underlying property during the enforcement proceedings, but who fails to record the contract, is not in a position to insist on notice of the proceedings. *See* *Crager v. Fry*, 479 N.E.2d 613 (Ind. Ct. App. 1985). If a party acquires the pre-existing interest of a party, after the commencement of proceedings, and the subsequent party's identity and address are ascertainable from the records, such subsequent party should be given notice of the final step of the proceedings. *See* *Wylie v. Patton*, 720 P.2d 649 (Idaho Ct. App. 1986).

180. *See* *Olson v. Town of Fitzwilliam*, 702 A.2d 318 (N.H. 1997); *Morrow v. Bobbitt*, 943 S.W.2d 384 (Tenn. Ct. App. 1996). When property is held by a limited partnership, notice to the general partner alone should be adequate, and separate notice to the limited partners is not required. *See* *Winter Park Devil's Thumb Inv. Co. v. BMS Partnership*, 926 P.2d 1253 (Colo. 1996). Notice sent to husband and wife, and signed for by husband alone, is adequate notice to both husband and wife. *See* *Shamblin v. Beasley*, 967 P.2d 1200 (Okla. 1999).

owners as "et al."<sup>181</sup> Providing notice to one concurrent owner but failing to provide adequate notice to another concurrent owner will leave the latter owner's interest unaffected.<sup>182</sup> If legal, as opposed to equitable, title clearly vests in one person, notice to that person alone is sufficient.<sup>183</sup> If the taxes are delinquent only as to a portion of the property held in an undivided interest, notice to the holder of the interest which is delinquent is sufficient, and notice to a concurrent owner is not required as the concurrent interest is not subject to the enforcement proceedings.<sup>184</sup>

When ownership of the property is divided between present and future interests, and the entire underlying fee is subject to the tax enforcement proceeding, the holders of both present and future interests should be given notice. Thus, if the present possessory property interest is held in a life estate, both the life tenant and the parties holding the remainder interests should be given notice.<sup>185</sup> If ownership of the property is held in a defeasible fee, such as a fee simple determinable or a fee simple subject to a condition subsequent, and the nature of the limitation is not affected by a transfer of the property in a tax sale, there should be no need to give notice to the holders of the possibility of reverter or right of entry as the defeasance clause of their interest will not be affected by the tax enforcement proceeding.<sup>186</sup>

When property is subject to a land sales contract, particularly a long term installment sales contract, both the seller and the purchaser under the contract have substantial property interests entitled to due process.<sup>187</sup> If the contract is recorded, there is clear evidence of the interests, and if the contract is not recorded, the issue is not whether they lack interests deserving of due process protection, but whether the government can identify the interests and appropriate addresses. Notice addressed

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181. See *Jenkins v. Richmond County*, 394 S.E.2d 258 (N.C. Ct. App. 1990).

182. See *Masick v. City of Schenectady*, 564 N.Y.S.2d 569 (App. Div. 1991). See *infra* Part IV.F. on the effects generally of the provision of inadequate notice.

183. See *Van Raden Homes, Inc. v. Dakota View Estates*, 546 N.W.2d 843 (N.D. 1996).

184. See *Clallam County v. Folk*, 922 P.2d 73 (Wash. 1996).

185. See *Wright v. Spriggs*, 567 So. 2d 3 (Fla. Dist. Ct. App. 1990); *Brashears v. Collison*, 115 A.2d 289 (Md. 1955); *Brewen v. Leachman*, 657 S.W.2d 698 (Mo. Ct. App. 1983); *Freeman v. City of Kingsport*, 926 S.W.2d 247 (Tenn. Ct. App. 1996).

186. See, e.g., 35 ILL. COMP. STAT. ANN. 200/22-15 (West 1996) (stating that holders of rights of entry and possibilities of reverter shall not be deemed parties interested in the property); *Butler v. Hoover Nature Trail, Inc.*, 530 N.W.2d 85, 89 (Iowa Ct. App. 1994) (finding that owner of property abutting abandoned railroad right of way had sufficient interest so as to be entitled to notice).

187. See *Harris v. Gaul*, 572 F. Supp. 1544 (N.D. Ohio 1983); *Gainer v. Brown*, 558 N.E.2d 867 (Ind. Ct. App. 1990); *Dow v. State*, 240 N.W.2d 450 (Mich. 1976); *Foreclosure of Tax Liens v. Young*, 316 N.W.2d 362 (Wis. 1982). There is no reason why a similar result should not be reached in the context of a right of first refusal. However, relying solely on statutory interpretation, one court has held that a right of first refusal, even if the identity and address of the holder of the right are available in the public records, is not entitled to actual notice. See *Ayres v. Townsend*, 598 A.2d 470 (Md. 1991).

simply to the "occupant" will not suffice to provide notice to a purchaser under such a contract.<sup>188</sup> Several jurisdictions which recognize long term contracts for deed specifically require notice to both sellers and purchasers under such contracts.<sup>189</sup>

## 2. Creditors

Though mortgages are legally protected property interests for purposes of the Due Process Clause,<sup>190</sup> extension of the same recognition to the class of judgment creditors has not been as clear. Part of the reason for this is that while mortgagees, by definition, have some interest in real property as security for their debt, the claim of an unsecured creditor is not necessarily perceived as a property interest.<sup>191</sup> In *Tulsa Professional Collection Services, Inc. v. Pope*,<sup>192</sup> however, the United States Supreme Court held that the intangible interest of an unsecured creditor is an interest protected by the Fourteenth Amendment guarantee of due process. Upon the filing of a judgment in the appropriate records, a creditor obtains a lien against the real property of the judgment debtor, placing him in a stronger position than a class of unsecured creditors. In recent years both federal<sup>193</sup> and state courts<sup>194</sup> have concluded that judgment creditors do have sufficient interest in property so as to be entitled to due process notice. The holder of a tax certificate, held pending the completion of enforcement proceedings, is in functionally the same position and is also entitled to adequate notice.<sup>195</sup>

## 3. Occupants

The due process rights of occupants of property subject to property tax enforcement proceedings require a careful distinction between two separate points inherent in the *Mullane* and *Memmonite* analysis. The threshold point is whether the party has a sufficient interest so as to trigger the Fourteenth Amendment guarantees; the second

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188. See *City of Detroit v. John J. Blake Realty Co.*, 376 N.W.2d 114 (Mich. Ct. App. 1984).

189. See, e.g., FLA. STAT. ANN. § 197.502(4)(d) (West 1999); MONT. CODE ANN. § 15-18-111(3) (1999); S.D. CODIFIED LAWS § 10-23-2.4 (Michie 1996); see also Randall Thomsen, *Washington State Property Tax Foreclosures: Quoerere Dat Sapere Quoe Sunt Legitima Vere*, 32 GONZ. L. REV. 123, 143-44 (1996).

190. Deeds of Trust are treated the same as mortgages for purposes of constitutional notice requirements. See *Wylie v. Patton*, 720 P.2d 649, 653 (Idaho Ct. App. 1986); *Lohr v. Cobur Corp.*, 654 S.W.2d 883 (Mo. 1983).

191. See *Nelson v. Every*, No. 87-1665, 1988 WL 143145 (Wis. Ct. App. Oct. 6, 1988) (holding that Wisconsin law did not recognize a judgment lien as entailing an interest in the property subject to a tax sale).

192. 485 U.S. 478, 485 (1988).

193. See *Verba v. Ohio Cas. Ins. Co.*, 851 F.2d 811 (6th Cir. 1988).

194. See *Parkview Oak Subdiv. Corp. v. Tridico*, 667 So. 2d 1101, 1104 (La. Ct. App. 1995); *New Brunswick Sav. Bank v. Markouski*, 587 A.2d 1265 (N.J. 1991); *Central Trust Co., N.A. v. Spencer*, 535 N.E.2d 347 (Ohio Ct. App. 1987); *Nolf v. Schumo*, 479 A.2d 940 (Pa. 1984); *First Nat'l Bank v. Meyer*, 476 N.W.2d 267 (S.D. 1991).

195. See *Township of Jefferson v. Block 447A, Lot 10*, 548 A.2d 521, 524 (N.J. Super. Ct. App. Div. 1988).



point is whether the identity and address of that party are reasonably ascertainable. Unfortunately, courts and legislatures have at times conflated these points and concluded that because the identity of an occupant may be difficult to ascertain, the occupant does not have a property interest deserving of protection. The rationale of the importance of tax collection, and the avoidance of imposing burdens on the government, is used to justify a result that fails to make the proper distinction.<sup>196</sup>

A lease is a substantial property right that entitles a lessee, in the presence of state action, to constitutionally adequate notice of a proceeding that may terminate its interests.<sup>197</sup> Several states, by statute, recognize the substantial interest which may be held by an occupant of property, and expressly require that notice of tax enforcement proceedings be given to the occupant, or to parties in possession of the property.<sup>198</sup> If the lease is of record, then those jurisdictions that require notice to be given to all parties with an interest of record anticipate notice to all lessees of record as well.<sup>199</sup> The more difficult situation arises in the context of occupants of property who may not have any evidence or record of their possessory interest. The interests of parties in possession which are not shown of record may well be the interests of an owner pursuant to an unrecorded deed, a lessee in possession pursuant to an unrecorded lease, or an adverse possessor in possession of the property for decades. In all jurisdictions such interests are valuable interests in real property which may be enforced in certain circumstances against third parties. There is little reason to exclude categorically such interests from the protection of due process guarantees even in the context of tax foreclosures. The issue should not be the identity of their

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196. See *Sallie v. Tax Sale Investors, Inc.*, 998 F. Supp. 612, 618-19 (D. Md. 1998).

I am constrained to the view that neither the holding nor the rationale of *Mennonite* undermines the presumed constitutionality of Maryland's election to employ constructive notice by publication to extinguish the unrecorded leasehold interest of one in actual possession of real property in a tax sale setting. . . .

. . . I am persuaded that Maryland has a significant interest in encouraging participation in its tax sale program and in decreeing marketable title. Further, Maryland's tax sale mechanism is an effective means of collecting property taxes for the state, and is critical to the state's need to provide a source of revenue for a host of governmental services provided to its citizens. Requiring a local tax collector or a tax sale purchaser to identify holders of unrecorded interests at the early stages of the process would be extraordinarily burdensome, and would very likely discourage prospective purchasers from participating in tax sales. If this were to happen, the state's significant interest in combating abandonment of properties, especially in urban areas, and in securing for its citizens the revenue necessary to carry out important governmental functions, would be frustrated.

*Id.*

197. See *Davis Oil Co. v. Mills*, 873 F.2d 774, 787 (5th Cir. 1989).

198. See GA. CODE ANN. §§ 48-4-45(a)(1)(B), -78 (1999); MD. CODE ANN., TAX-PROP. §§ 14-834, -836(b)(4)(i)(2) (1994 & Supp. 1998); Neb. Rev. Stat. § 77-1832 (1996); N.D. CENT. CODE § 57-28-04 (1993 & Supp. 1999) (amended by S.L. 1999, ch. 503, § 124); WYO. STAT. ANN. § 39-13-108(e)(V)(B)(I) (Michie 1999); 1999 Mich. Pub. Acts 123, § 78i(3). It is entirely possible that more than one party will be in possession of property. See *Nelson v. Forbes*, 545 N.W.2d 576 (Iowa Ct. App. 1996).

199. See *Taylor v. Lutin*, 102 P.2d 484 (Colo. 1940); *In re Application for Tax Deed*, 675 N.E.2d 285 (Ill. App. Ct. 1997); *Weathers v. Anderson*, 189 N.W.2d 398 (Minn. 1971).

property interests; it should be the challenge posed in identifying and providing notice to such parties. The names of such parties are not likely to be reasonably ascertainable, but the address of the property is a premise of the foreclosure action. In this context, the constitutionally required notice should be mailed notice, addressed to the "occupant,"<sup>200</sup> and notice of the tax enforcement procedure posted on the property. Such steps can be taken with minimal additional effort in light of the notices being sent to all other identifiable interested parties.<sup>201</sup>

#### 4. Shared Interests

When property rights are divided according to use, such as in the context of easements and real covenants, there is less of a question of due process application and more of an issue of the appropriate public policy treatment of such interests. There is little doubt that easements and covenants are substantial real property interests, but the primary emphasis appears to be on ensuring that property tax enforcement proceedings do not adversely affect the existence of such interests. A number of states expressly exclude by statute easements and covenants from the scope of the proceeding, leaving them unaffected.<sup>202</sup> In a jurisdiction in which easements are expressly excluded from tax sales, but not real covenants, judicial construction has applied the exception to real covenants as well.<sup>203</sup> In other jurisdictions easements and covenants are unaffected by a tax foreclosure as a matter of judicial interpretation. The rationale is that property taxes are imposed on real property assessed as encumbered by an easement, or restrictive covenant, so that the

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200. Mailed notice addressed to the occupant may also serve, at minimal cost, as additional notice to an owner who resides on the property. *See Dawson v. Douglas*, 849 P.2d 441 (Okla. Ct. App. 1993).

201. Some jurisdictions require, in addition to mailed notice to all interested parties, a copy of the notice be mailed to the "occupant" and posted on the property. *See, e.g.*, GA. CODE ANN. § 48-4-78(d) (1999). This approach reaffirms that there are more than just three methods of providing notice—personal service, mailed notice, or constructive notice by publication—and avoids the need to respond to the due process rights of occupants by placing them in one of these three categories. *See, e.g.*, *Overstreet v. City of Raleigh*, 330 S.E.2d 643 (N.C. Ct. App. 1985) (holding that adverse possessor entitled only to notice by publication, not personal notice).

202. *See* CAL. REV. & TAX. CODE § 3712(d) (West 1998); FLA. STAT. ANN. § 197.573 (West 1999); 35 ILL. COMP. STAT. ANN. 200/22-70 (West 1996); IND. CODE ANN. § 6-1.1-25-4(d) (Michie 1998 & Supp. 1999); MASS. GEN. LAWS ANN. ch. 60, § 45 (West 1990); MO. ANN. STAT. § 140.722 (West Supp. 1999); OKLA. STAT. ANN. tit. 68, §§ 3145-3147 (West 1992); TEX. TAX CODE ANN. § 32.05(c) (West 1992); WASH. REV. CODE ANN. § 36.35.290 (West Supp. 1999) (covering easements only); WIS. STAT. ANN. § 75.14(4) (West 1999) (excepting restrictive covenants other than certain affirmative covenants to pay money); 1999 Mich. Pub. Acts 123, § 78k(5)(e).

203. *See* GA. CODE ANN. § 44-9-7 (1999); *Hendley v. Overstreet*, 318 S.E.2d 54 (Ga. 1984); *Smith v. Gwinnett County*, 286 S.E.2d 739 (Ga. 1982).

taxes themselves are not levied on an unencumbered fee simple but on the fee as encumbered.<sup>204</sup> Thus, the super-priority nature of the tax lien attaches, in effect, after the priority of the easement or covenant.

As one moves towards the more unusual, and creative, usage of easements, covenants, conditions and other restrictions found in condominiums, planned unit developments, and subdivisions, a similar result occurs, though with varying rationales. One explanation which has been offered, which is circular in its reasoning, is that the holders of the benefit of condominium covenants do not hold a substantial property interest entitling them to notice, and because no notice is given, the interests are unaffected.<sup>205</sup> A more straightforward analysis is based on statutory exclusion of such shared interests, on judicial acknowledgment of the adverse public policy consequences of terminating easements and covenants through tax sales,<sup>206</sup> or on the proposition that such interests are substantial interests but that failure to provide notice leaves the interests unaffected.<sup>207</sup> A few jurisdictions have created special statutory procedures for enforcement of tax liens on common areas held by homeowners associations<sup>208</sup> and time share units.<sup>209</sup>

### C. Identifying the Interests

In light of this broad range of property interests which are entitled to the constitutional protections of due process in the context of enforcement of property tax liens, the challenge confronting state and local governments is to establish procedures which identify such interests. For most of the twentieth century this has been the primary source of resistance to changing from notice by publication to other forms of notice. A comprehensive title examination is the single most effective means of identifying interested parties, but it can also be an expensive undertaking on a parcel by parcel basis. On parcels of land with relatively low value, the cost of a title examination may approximate the annual amount of property taxes due from that parcel. When the costs of a title examination, however, are weighed against the average annual property tax bill, multiple years of tax delinquency, and the larger adverse effects of abandoned tax delinquent properties, the cost of a title examination is small in relation to these greater costs.

*Mennonite* did not expressly create a requirement that full title examinations occur as part of the procedures for tax lien enforcement. The emphasis, in the majority

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204. See *Thirteen South Ltd. v. Summit Village, Inc.*, 866 P.2d 257 (Nev. 1993); *Metropolitan Life Ins. Co. v. McGurk*, 193 A. 696 (N.J. Cir. Ct. 1937), *aff'd*, 197 A. 47 (N.J. 1938); *Hayes v. Gibbs*, 169 P.2d 781, 786 (Utah 1946).

205. See *In re King County for the Foreclosure of Liens for Delinquent Real Property Taxes*, 811 P.2d 945 (Wash. 1991).

206. See *City of Olympia v. Palzer*, 728 P.2d 135 (Wash. 1986); see also *Scott v. Seek Lane Venture, Inc.*, 605 A.2d 942 (Md. Ct. Spec. App. 1992) (finding a duty to notify homeowners association of foreclosure of common areas). See generally Daniel W. Galvin, Note, *The Effect of Tax Foreclosure Sales on Servitudes: Olympia v. Palzer*, 11 U. PUGET SOUND L. REV. 193 (1987).

207. See *Wittemyer v. Cole*, 689 P.2d 720 (Colo. Ct. App. 1984).

208. See, e.g., MD. CODE ANN., TAX-PROP. § 14-836(b)(4)(i)(1) (1994 & Supp. 1998).

209. See, e.g., ME. REV. STAT. ANN. tit. 36, § 942-A (West 1990 & Supp. 1998).

opinion, was on whether the interested party was "reasonably identifiable."<sup>210</sup> The dissent in *Mennonite* stressed that reasonableness required a balancing of the state's interest in tax collection against the burden of identifying the protected interests.<sup>211</sup> Five years after *Mennonite*, the United States Supreme Court, in *Tulsa Professional Collection Services, Inc. v. Pope*,<sup>212</sup> expanded upon *Mennonite* and applied due process notice requirements to the class of unsecured creditors in probate proceedings. The Court concluded that unsecured creditors, whose identities are not available through any title examination, nonetheless have a right to more than notice by publication. This balancing led to the conclusion that mailed notice "to known or reasonably ascertainable creditors is not so cumbersome as to unduly hinder the dispatch with which the probate proceedings are conducted."<sup>213</sup> The basic proposition of *Mennonite*, that a party whose identity can be found in the public records is entitled to mailed notice, was strengthened by the reasoning of *Tulsa*.<sup>214</sup>

In the aftermath of *Mennonite* and *Tulsa*, many states now have notice requirements that reach those property interests that are reflected in the public land records. A majority of jurisdictions presently takes an approach that functionally, if not expressly, requires a title examination by mandating notice to owners, mortgagees, lienholders and other parties whose interests are of record.<sup>215</sup> Traditionally a tax collector might examine solely those records within the office of the collector, and not undertake an examination of the land records more generally.<sup>216</sup> In the absence of statutory requirements for a title examination, there is a split of judicial opinion regarding the government's obligation to examine records other than

210. *Mennonite Bd. of Missions v. Adams*, 462 U.S. 791, 798 (1983).

211. *Id.* at 806.

212. 485 U.S. 478 (1988). Justice O'Connor authored the opinion in *Tulsa*, expanding the scope of due process protections, after having written the dissent in *Mennonite*.

213. *Id.* at 490.

214. This expansion of the "burden" placed upon local governments is not without criticism. See Carla Williams Tanner, *Forfeited and Delinquent Lands: Resolving the Due Process Deficiencies*, 96 W. VA. L. REV. 251, 271 (1993) (calling the requirements "a somewhat unrealistic standard for the state to obtain").

215. See ARK. CODE ANN. § 26-37-301(c) (Michie 1997); CAL. REV. & TAX. CODE §§ 3701, 4675 (West 1998 & Supp. 1999); COLO. REV. STAT. ANN. § 39-11-128(1) (West 1990 & Supp. 1999); CONN. GEN. STAT. ANN. § 12-157(a) (West 1993 & Supp. 1999); FLA. STAT. ANN. § 197.502(4) (West 1999); GA. CODE ANN. §§ 48-4-45(a)(1), -77(1) (1999); IND. CODE ANN. § 6-1.1-24-1.9 (Michie 1999); IOWA CODE ANN. § 447.9(1)-(2) (West 1998 & Supp. 1999); KY. REV. STAT. ANN. § 91.4884(1) (Michie Supp. 1998); MD. CODE ANN., TAX-PROP. § 14-836(b) (1994); MO. ANN. STAT. § 140.405 (West 1988 & Supp. 1999); MONT. CODE ANN. § 15-18-111(3) (1999); NEB. REV. STAT. § 77-1832 (1996); NEV. REV. STAT. ANN. § 361.595(3)(b) (Michie 1993); N.Y. REAL PROP. TAX LAW § 1125(1) (McKinney Supp. 1999); N.C. GEN. STAT. § 105-375(c) (1997); N.D. CENT. CODE § 57-28-04(2) (1993 & Supp. 1999); OHIO REV. CODE ANN. § 5721.14(B) (Anderson 1999); OR. REV. STAT. § 312.125(1) (1993 & Supp. 1998); 53 PA. CONS. STAT. § 7193.2(a)(3) (1997); S.D. CODIFIED LAWS § 10-25-3 (Michie 1996); TENN. CODE ANN. § 67-5-2502(c) (1998); UTAH CODE ANN. § 59-2-1351(2)(a) (1996); WASH. REV. CODE ANN. § 84.64.050(4) (West 1991 & Supp. 1999); W. VA. CODE § 11A-3-19(a) (1995 & Supp. 1999); 1999 Mich. Pub. Acts 123, § 78i(1), (2).

216. See Guy Lamoyne Black, *Tax Titles in Utah: Caveats for Potential Purchasers and Proposals for Change*, 1991 BYU L. REV. 1573, 1580 n.42.

those maintained by the tax officials themselves.<sup>217</sup> A few courts have held that while the government has imputed knowledge of all information contained in the *tax* records, the government is not required to search all public *land* records.<sup>218</sup> Other courts have held that the government does have a constitutional obligation to examine public land records that are within the government's possession and control.<sup>219</sup>

Though there is growing consensus on the necessity of examining both the records of the tax collector, and the land records, there is little consensus on the need to search other records to identify interested parties. If an examination of probate records can easily identify interested parties, then such an examination may be required,<sup>220</sup> but the burden would be excessive if the government were held to a standard of identifying every potential heir or beneficiary in a probate proceeding.<sup>221</sup> It is hard to discern why a physical inspection of the property searching for clues as to the identity of the owner may be required as a "reasonably diligent" effort,<sup>222</sup> but checking land records is not.<sup>223</sup>

The due process standard for notice as it has evolved from *Mullane* to *Mennonite* in recent years no longer permits state and local governments to rely upon the ease of notice by publication to notify property owners and other interested parties of a property tax enforcement proceeding. All interests which may be readily identified in public records are legally protected interests, and such records include at a minimum the records of the tax collector and the public records used for transferring and recording interests in real property. Some form of title examination, as part of the enforcement proceeding, is thus essential in order to meet the constitutional guarantee of due process. The only remaining ambiguity pertains to the scope of the review of the public records, such as the nature of information that may be revealed in probate proceedings.

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217. A tax official may be held to be on notice of information contained in the records of other tax officials. *See Kron v. VanCleave*, 339 So. 2d 559, 562 (Miss. 1976). Conversely, an examination of land records, but not municipal tax records, is insufficient. *See Kennedy v. Cummings*, 603 A.2d 1251, 1254 (Md. Ct. Spec. App. 1992).

218. *See Elizondo v. Read*, 588 N.E.2d 501, 504 (Ind. 1992); *Fidelity Fin. Servs., Inc. v. Sims*, 630 N.E.2d 572, 575 (Ind. Ct. App. 1994); *see also Bequette v. S.I.V.I.*, 184 B.R. 327, 338 (Bankr. S.D. Ill. 1995) (stating that tax purchaser is required to search real estate and tax records, but is not required to search outside the chain of title in order to ascertain interested parties).

219. *See In re Application of County Treasurer*, 576 N.E.2d 255, 261-62 (Ill. App. Ct. 1991); *Lamontagne v. Knightly*, 572 N.E.2d 1375, 1380 (Mass. App. Ct. 1991); *Isern v. Summerfield*, 956 P.2d 28, 31 (Mont. 1998); *Bell v. Anderson*, 849 P.2d 350, 352 (Nev. 1993); *DeFranco v. Sullivan County*, 492 N.Y.S.2d 924 (Sup. Ct. 1985). Discovering an error in the indexing of documents in the public land records has been held to be an extraordinary effort beyond that which the Constitution requires. *See Citizens Nat'l Bank v. Dunnaway*, 400 S.E.2d 888, 892-93 (W. Va. 1990).

220. *See In re Application of County Collector*, 516 N.E.2d 736 (Ill. App. Ct. 1987); *Robertson v. Plymouth*, 468 N.E.2d 1090, 1093 (Mass. App. Ct. 1984).

221. *See Bender v. City of Rochester*, 765 F.2d 7, 11 (2d Cir. 1985).

222. *See Gacki v. La Salle Nat'l Bank*, 669 N.E.2d 936 (Ill. App. Ct. 1996) (inspecting the premises, or contacting neighbor, might have enabled notice to be given to occupant).

223. *See Elizondo*, 588 N.E.2d at 504 (finding no duty to search records of other offices such as the recorder or the court clerk).

Those jurisdictions that create separate procedural requirements for different classes of property based upon its use or value cannot avoid the essential requirements of due process. Efficiency, even in light of properties with low market values, does not override constitutional guarantees. "[T]he value of a property interest does not measure the scope of the constitutional protection against a taking without just compensation and a deprivation of property without due process."<sup>224</sup>

#### D. Notifying the Holders of the Interests

Part of the reason for the current lack of clarity and consistency in the interpretation and application of the *Mullane-Mennonite-Tulsa* standard of due process in property tax enforcement proceedings is the blurring of two distinct tasks. Assuming there is consensus on the nature of the legally protected property interests, the first task is the identification by a title examination of the interests that would be adversely affected by an enforcement proceeding. The second task is the provision of notice to the identified parties.

This second task, of providing notice to the holders of the identified interests, is far more elusive in its interpretation and application. Constructive notice, or notice by publication, is not an acceptable form of notice unless the interested party "is not reasonably identifiable."<sup>225</sup> The Second Circuit Court of Appeals, in a decision issued shortly after *Mennonite*, correctly recognized that *Mennonite* shifted the emphasis of the balancing test from identifying the interests which are entitled to protection "to a more focused examination of whether the names of such persons are 'reasonably ascertainable.'"<sup>226</sup> The current constitutional standard is that notice must be sent to those parties whose names and addresses are reasonably ascertainable based upon "reasonably diligent efforts."<sup>227</sup>

When the name and address of an interested party are ascertainable from the tax collector's records, or the deed records, notice must be mailed to such address.<sup>228</sup> There is wide variance, however, in interpreting the scope of the government's duty when notice is mailed to the last known address available from the public records and is returned as undeliverable. A small minority of jurisdictions have held that a diligent

224. *Brandon Township v. Tomkow*, 535 N.W.2d 268, 271 (Mich. Ct. App. 1995). *But see Lamontagne*, 572 N.E.2d at 1379 (holding less effort by a municipality constitutes reasonable diligence in the case of low value land).

225. *Mennonite Bd. of Missions v. Adams*, 462 U.S. 791, 798 (1983); *see also Schroeder v. City of New York*, 371 U.S. 208 (1962) (holding that notice by publication in an eminent domain proceeding is inadequate when a party name and address are readily ascertainable in deed records and tax rolls).

226. *Bender*, 765 F.2d at 11; *see also* Richard L. Skow, Comment, *Constitutional Law—Davis Oil v. Mills: Proper Notice in the Foreclosure Setting Under the Fourteenth Amendment Due Process Clause*, 20 MEMPHIS ST. U. L. REV. 451, 458 (1990).

227. *Mennonite*, 462 U.S. at 798 n.4.

228. *See Bogart v. Lathrop*, 523 P.2d 838 (Nev. 1974); *see also Bell v. Anderson*, 849 P.2d 350, 352 (Nev. 1993) (stating that the county must make a reasonable inquiry as to ownership of the property by consulting the county's land title records); *Miles Homes v. City of Westhope*, 458 N.W.2d 321, 325 (N.D. 1990) (finding a duty to search file of tax payment receipts for possibility of correct address).

inquiry in such circumstances is limited to making sure that no other addresses are available from tax records and deed records, and beyond that no further duties are imposed by due process.<sup>229</sup> If accurate addresses *are* available in the public records, whether provided by a change of address notice given by the owner,<sup>230</sup> or due to a mistake in the tax collector's office in identifying common ownership of contiguous parcels,<sup>231</sup> notice must be given to those addresses. If accurate addresses are not available from existing public records, according to these opinions, there is no obligation to search further.<sup>232</sup> The analysis of reasonable diligence, limiting the burden of the government in this context, is always highly fact specific. It is not the responsibility of the government to maintain current addresses, or multiple addresses, for all interested parties.<sup>233</sup> Thus, reliance on a summer address alone when that is the only address readily available has been held adequate,<sup>234</sup> and notice mailed to the correct address of the sole stockholder of a corporate property owner was sufficient when it was also the address of the sole legatee of the corporate shares.<sup>235</sup>

The majority of jurisdictions that have addressed this issue, however, have held that the government must undertake additional efforts when the mailed notice is returned.<sup>236</sup> Reasonable diligence, under such reasoning, extends to checking records of the secretary of state for corporate or partnership addresses,<sup>237</sup> or checking with a

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229. See *Schmidt v. Langel*, 874 P.2d 447 (Colo. Ct. App. 1994); *Elizondo v. Read*, 588 N.E.2d 501, 504 (Ind. 1992); *Kakris v. Montbleau*, 575 A.2d 1293, 1299 (N.H. 1990).

230. See *Hoffman v. State*, 871 P.2d 27, 31 (N.M. Ct. App. 1994); *Chavez v. Sharvelle*, 750 P.2d 1119, 1122 (N.M. Ct. App. 1988); *Snelgrove v. Lanham*, 379 S.E.2d 904 (S.C. 1989). *But see* *Smith v. Breeding*, 586 N.E.2d 932, 937 (Ind. Ct. App. 1992) (holding that failure of tax auditor to record correct address from deed is not controlling when subsequent notices are sent to correct address).

231. See *Slattery v. Friedman*, 636 A.2d 1, 7 (Md. Ct. Spec. App. 1994); *Brewen v. Leachman*, 657 S.W.2d 698, 700-01 (Mo. Ct. App. 1983).

232. See *Yoder v. Elkhart County Auditor*, 632 N.E.2d 369, 373-74 (Ind. Ct. App. 1994); *Breeding*, 586 N.E.2d at 937.

233. See *Dahn v. Trowsell*, 576 N.W.2d 535, 540 (S.D. 1998).

234. See *McNaughton v. Kelsey*, 698 A.2d 1049, 1051-52 (Me. 1997).

235. See *Pompe v. City of Yonkers*, 578 N.Y.S.2d 585, 586-88 (App. Div. 1992).

236. See *Consolidated Rail Corp. v. Michigan*, 976 F. Supp. 1085, 1088 (W.D. Mich. 1996) (holding that it was "reasonable to expect [the] county to obtain the proper address [of] a well known national corporation"); *Malone v. Robinson*, 614 A.2d 33, 36 (D.C. 1992) (holding that the statute requires additional efforts when notice letters are returned unclaimed); *Bryant v. T.C.B. Enters.*, 395 So. 2d 823 (La. Ct. App. 1981); *City of Boston v. James*, 530 N.E.2d 1254, 1256 (Mass. App. Ct. 1988); *Patrick v. Rice*, 814 P.2d 463, 467-68 (N.M. Ct. App. 1991); *O'Brien v. Port Lawrence Title & Trust Co.*, 688 N.E.2d 1136 (Lucas County Ct. C.P. 1997) (holding that the government could have ascertained correct address available from other property owned); *Wells Fargo Credit Corp. v. Ziegler*, 780 P.2d 703, 705 (Okla. 1989); *Michener v. Montgomery County Tax Claim Bureau*, 671 A.2d 285, 289 (Pa. Commw. Ct. 1996); *In re Tax Claim Bureau of Beaver County Tax Sale Sept. 10, 1990*, 600 A.2d 650, 654 (Pa. Commw. Ct. 1991); *Benton v. Logan*, 474 S.E.2d 446 (S.C. Ct. App. 1996); *Freeman v. City of Kingsport*, 926 S.W.2d 247, 250 (Tenn. Ct. App. 1996) ("The issue of whether names and addresses were reasonably ascertainable is a question of fact and must be determined upon trial.").

237. See *Scott v. Seek Lane Venture, Inc.*, 605 A.2d 942, 951 (Md. Ct. Sec. App. 1992)

mortgagee<sup>238</sup> or title insurance company<sup>239</sup> that is identified in the records and may be in a position to provide a correct address for the interested party. Similar reasoning has been applied where the government might have identified accurate addresses by contacting the tenants occupying the subject property,<sup>240</sup> or a known attorney for an interested party.<sup>241</sup> Such duty may also extend to checking available telephone directories.<sup>242</sup>

Imposing a broader duty than examination of public records alone for the "last known addresses" is justified in part by recognition of the shift which occurs when tax liens are sold to a private investor. When the government holds the tax lien, its sole interest is in the payment of taxes. When the lien is transferred to a private third party purchaser, that party's interest is to maximize the return on its investment, which may translate into minimum efforts to locate accurate addresses for interested parties.<sup>243</sup> However, creating different statutory procedures for notification by the government, and for notification by private purchasers of tax certificates, only increases the potential confusion.<sup>244</sup>

State and local government law largely controls the form of the notice to be provided to interested parties, whether certified mail, registered mail return receipt requested, or regular first class mail. The constitutional due process requirements do not dictate a particular form of mailed notice to interested parties,<sup>245</sup> and regular mail

(holding that there is a duty to check articles of incorporation of defunct corporation for identity and addresses of directors); *Tracy v. County of Chester*, 489 A.2d 1334, 1338-39 (Pa. 1985).

238. *See* *Nichol v. Howard*, 684 A.2d 861, 866-67 (Md. Ct. Spec. App. 1996); *Schreiber v. Tax Claim Bureau*, 545 A.2d 950, 955 (Pa. Commw. Ct. 1988).

239. *See* *Giacobbi v. Hall*, 707 P.2d 404, 408-09 (Idaho 1985); *St. George Antiochian Orthodox Christian Church v. Aggarwal*, 603 A.2d 484, 490-91 (Md. 1992).

240. *See* *Kester v. Ives*, 960 P.2d 865 (Okla. Ct. App. 1998).

241. *See* *Gillespie v. Clay*, 723 P.2d 263, 263 (Okla. 1986).

242. *See* *Sinclair & Valentine Co. v. County of Los Angeles* 247 Cal. Rptr. 568, 572 (Ct. App. 1988); *District of Columbia v. Mayhew*, 601 A.2d 37, 44 (D.C. 1991); *L. Brayton Foundry Bldg., Inc. v. Santilli*, 676 A.2d 1364, 1365-66 (R.I. 1996) (holding that a correct address could have been determined by checking telephone directory). *But see* *Elizondo v. Read*, 588 N.E.2d 501, 504 (Ind. 1992) (checking telephone directories is not required).

243. *See* *Aggarwal*, 603 A.2d at 490 ("[W]e believe an interpretation that would permit a purchaser to engage in deliberate ignorance to the detriment of the owner's interest in the land would be at least constitutionally suspect."); *Slattery v. Friedman*, 636 A.2d 1, 6 (Md. Ct. Spec. App. 1994) ("We also recognize that the holder of the certificate of sale has little incentive to locate the owners of the property, and will often benefit if the owners are not located.").

244. *But see* *Mund v. Rambough*, 432 N.W.2d 50, 56 (N.D. 1988) (requiring different forms of notice depending on the party enforcing the delinquent tax lien procedure does not violate equal protection).

245. *See* *Tulsa Prof'l Collection Servs., Inc. v. Pope*, 485 U.S. 478, 490 (1988) ("[M]ail service is an inexpensive and efficient mechanism that is reasonably calculated to provide actual notice."); *Mennonite Bd. of Missions v. Adams*, 462 U.S. 791, 798 (1983) ("When the mortgagee is identified in a mortgage that is publicly recorded, constructive notice by publication must be supplemented by notice actually mailed to the mortgagee's last known available address or by personal service.").



has been held to be sufficient to meet federal due process standards.<sup>246</sup> It is entirely possible, however, that a state constitution may be interpreted to require certified or registered mail notice as a form of greater assurance of actual notice.<sup>247</sup>

The open texture of “reasonably diligent efforts” makes it quite difficult to determine whether the government has undertaken sufficient actions to notify interested parties, as indicated by the breadth of judicial interpretations of this duty. If notices are sent, but are returned as unclaimed or undeliverable, it is hard to see how the absence of any further efforts to locate a correct address could be equated with reasonably diligent efforts.<sup>248</sup> The burden is on the governmental actor to demonstrate that it has exercised such diligence, whether by checking other public records available to it, telephone directories, or potential leads found in the public records. There is, for example, little reason not to send a copy of the notice to the address of the property being foreclosed, addressed simply to “Occupant,” as well as addressed to the name of the owner or owners.<sup>249</sup> As a matter of prudence, and in order to demonstrate its efforts to locate addresses of interested parties, the governmental actor should maintain records of all notices returned and a checklist of all supplemental steps undertaken to identify correct addresses.

#### *E. Request Notice Statutes*

As constitutional jurisprudence has evolved toward a requirement of notice to all interested parties, the balance between the burdens this places on the government and the responsibilities that should be borne by property owners has continued to be a major public policy struggle. The tensions among the early twentieth century perspectives on the efficient collection of taxes, the “caretaker” approach to property ownership, and the protection of property rights are all present in the determination of the extent of duties placed on the government in locating accurate names and addresses for interested parties. One solution, advocated by numerous commentators, adopted by many jurisdictions, and sustained by many courts, is a statutory “request notice” procedure. Such a procedure permits any party with an interest in real property to file a request to receive copies of notices of tax delinquency and tax enforcement proceedings concerning the property. This approach minimizes the burden on the government to search for parties who have moved, or who can’t be located, and relies upon the diligence and responsibility of the property owner, or interested party, to file the appropriate request for notice. The argument is that if the request is properly filed, the party must be given notice of the proceeding; if not, the

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246. *See* *United Cos. Fin. Corp. v. Mellon Fin. Servs. Corp.* #7, 922 F.2d 270 (5th Cir. 1991); *Weigner v. City of New York*, 852 F.2d 646, 650 (2d Cir. 1988).

247. *See* *Dow v. State*, 240 N.W.2d 450, 459 (Mich. 1976); *see also* *Weigner*, 852 F.2d at 654 (Oakes, J., dissenting) (notice should be given by certified or registered mail).

248. *See In re* O.B. Campbell, 574 So. 2d 539, 541 (La. Ct. App. 1991) (“[W]e do not have to test the reasonableness of the subsequent steps taken by the tax collector, for by his own testimony, nothing was done; no steps were taken.”).

249. *But see* *Yoder v. Elkhart County Auditor*, 632 N.E.2d 369, 373 (Ind. Ct. App. 1994) (holding that notice mailed to a “last known address” but not the address of the property was sufficient).

government need only give notice to parties and addresses as they appear in the government's records.

The policy justification for the adequacy of the request notice approach is that it affords a means of protecting property interests while still permitting the enforcement of property tax obligations by local governments. This procedural balance of rights and duties was advocated by one commentator forty years ago shortly after the *Mullane* decision,<sup>250</sup> and by another in the aftermath of *Mennonite*.<sup>251</sup> The Supreme Court, in *Mennonite*, expressly left open the question of the constitutional adequacy of a request notice statute,<sup>252</sup> and a substantial number of jurisdictions continue to make this procedure available to interested parties.<sup>253</sup> The issue is whether the ability of an interested party to file a request notice strikes a constitutionally acceptable balance and relieves the government of its obligation to provide notice when the interested party has failed to request notice.

Judicial decisions which have sustained the adequacy of a request notice statute have emphasized that the ability of an interested party to protect itself by filing a request for notice is but one factor which must be evaluated and balanced under the Supreme Court's proposition that "whether a particular method of notice is reasonable depends upon the particular circumstances."<sup>254</sup> The balancing involves weighing the balancing of the governmental efforts in undertaking a full title examination and checking other sources of information as against the relatively small burden imposed upon an interested party of filing of a request for notice.<sup>255</sup> Other

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250. See Note, *Requirements of Notice in In Rem Proceedings*, 70 HARV. L. REV. 1257, 1268 (1957).

251. See Ellen F. Friedman, Note, *The Constitutionality of Request Notice Provisions in In Rem Tax Foreclosures*, 56 FORDHAM L. REV. 1209 (1988); see also Jeanni Atkins et al., *The Threat to Notice by Publication Posed by Mennonite Board of Missions v. Adams*, 21 OHIO N.U. L. REV. 107, 110 (1994) ("Shifting the full burden of responsibility for protecting property interests from the individual to the State runs counter to the historical constitutional justification of constructive notice by publication which is based on the caretaker theory . . .").

252. *Mennonite Bd. of Missions v. Adams*, 462 U.S. 791, 793 n.2 (1983).

253. See ALASKA STAT. § 29.45.350 (Michie 1998); FLA. STAT. ANN. § 197.344(2) (West Supp. 1999); 35 ILL. COMP. STAT. ANN. 200/21-135 (West Supp. 1999); IND. CODE ANN. § 6-1.1-24-3(b) (Michie 1998); IOWA CODE ANN. § 446.9(3) (West Supp. 1999); LA. REV. STAT. ANN. § 47:2180.1(A) (West 1990); MASS. ANN. LAWS eh. 60, §§ 38, 39 (Law. Co-op. 1990); MICH. COMP. LAWS ANN. § 211.57(4) (West 1998), amended by 1999 Mich. Pub. Acts 123, § 57(4); MINN. STAT. ANN. § 276.041 (West 1999); NEV. REV. STAT. ANN. § 361.5648(I)(c) (Michie Supp. 1997); N.J. STAT. ANN. § 54:5-104.48 (West 1986); N.Y. REAL PROP. TAX LAW § 1126(1) (McKinney Supp. 1999); OR. REV. STAT. ANN. § 312.140 (Lexis Supp. 1998); 53 PA. CONS. STAT. ANN. § 7193.1 (West 1997); S.C. CODE ANN. § 12-49-240 (Law. Co-op. 1976); S.D. CODIFIED LAWS § 10-23-2.2 (Michie 1996); VA. CODE ANN. § 58.1-3926 (Michie 1997); W. VA. CODE § 11A-3-3 (1995).

254. *Tulsa Prof'l Collection Servs., Inc. v. Pope*, 485 U.S. 478, 484 (1988); see *Matter of Tax Foreclosure No. 35*, 514 N.Y.S.2d 390, 394 (App. Div. 1987), appeal dismissed, 512 N.E.2d 556 (N.Y. 1987), *aff'd on other grounds*, 522 N.E.2d 1044 (N.Y. 1988) (finding that a procedure permitting the filing of an *in rem* eard, entitling the owner to mailed notice, was a reasonable and balanced approach).

255. See *Davis Oil Co. v. Mills*, 873 F.2d 774, 789-90 (5th Cir. 1989); *Mid-State Homes*,

judicial decisions have sustained the adequacy of request notice statutes but only because state or local law required some form of mailed notice to be provided even when a request for notice was absent.<sup>256</sup>

The majority of the courts that have directly confronted this issue have reached a different conclusion by emphasizing two aspects of the *Mennonite* reasoning. The first proposition is that the ability of an interested party to protect itself by filing a request for notice does not relieve the government of its constitutional obligations.<sup>257</sup> The fact that many owners, and mortgagees, may possess sufficient sophistication to adopt procedures to avoid the loss of property interests in tax foreclosures is not a justification for undercutting the foundation of due process analysis.<sup>258</sup> The second proposition recasts the balancing in a dramatically different fashion. The appropriate balancing involves “the relatively modest administrative burden of providing notice by mail”<sup>259</sup> as against the property rights of an interested party.

The first proposition is the cornerstone of most of the judicial decisions that have rejected the presence of a request notice statute as an adequate substitute for the government’s obligation to provide notice.<sup>260</sup> The ability of interested parties to use a request notice statute to protect their interests does not shift the responsibility of adequate notice away from the government.<sup>261</sup> Parallel arguments that failure to take advantage of a request notice provision constitutes a waiver of the right to notice have been quickly rejected.<sup>262</sup>

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Inc. v. Portis, 652 F. Supp. 640, 644-45 (W.D. La. 1987); Elizondo v. Read, 588 N.E.2d 501, 503-04 (Ind. 1992); Miller Reeder Co. v. Farmers State Bank of Wyatt, 588 N.E.2d 506, 506-07 (Ind. 1992); Skow, *supra* note 226 (discussing an equitable compromise for due process notice protection of property interests).

256. See ISCA Enters. v. City of New York, 572 N.E.2d 610, 615-17 (N.Y. 1991); Grant County v. Guyer, 672 P.2d 702, 707 (Or. 1983).

257. See *Mennonite*, 462 U.S. at 799 (“More importantly, a party’s ability to take steps to safeguard its interests does not relieve the State of its constitutional obligation.”).

258. See *id.* (“[I]t may well be the least sophisticated creditor whose security interest is threatened by a tax sale.”).

259. *Id.* at 800.

260. See Parkview Oak Subdiv. Corp. v. Tridico, 667 So. 2d 1101, 1104 (La. Ct. App. 1995); Township of Jefferson v. Block 447A, Lot 10, 548 A.2d 521, 524 (N.J. Super. Ct. App. Div. 1988) (“[A] person’s entitlement to the notice required by due process cannot be conditioned on the requirement that he request it.”); *In re* Foreclosure of Tax Liens by the County of Erie, 481 N.Y.S.2d 547, 550 (App. Div. 1984) (“The State has an obligation to all mortgagees, not merely those who request notice.”); Sunburst Bank v. Patterson, 971 S.W.2d 1, 5 (Tenn. Ct. App. 1997).

261. See Wylie v. Patton, 720 P.2d 649, 652-53 (Idaho App. 1986); Seattle-First Nat’l Bank v. Umatilla County, 713 P.2d 33, 35-36 (Or. Ct. App. 1986); see also USX Corp. v. H.H. Champlin, 992 F.2d 1380, 1385 (5th Cir. 1993) (holding that, although state law did not mandate notice to parties who failed to comply with request notice statute, the Fourteenth Amendment did require notice); United States v. Malinka, 685 P.2d 405, 408 (Okla. Ct. App. 1984) (holding that, even though a mortgagee “might take certain steps to protect its own interest,” the burden is on the state to provide notice).

262. See Davis Oil Co. v. Mills, 873 F.2d 774, 787 (5th Cir. 1989); FDIC v. Lee, 933 F. Supp. 577, 580-81 (E.D. La. 1996), *aff’d on other grounds*, 130 F.3d 1139 (5th Cir. 1997); Murchison v. Marzullo, 705 So. 2d 1129, 1130-31 (La. Ct. App. 1998).

The second proposition rejects the view that the burdens to be balanced are the relative costs of title examinations and the costs of filing a request for notice.<sup>263</sup> "Such a novel system undoubtedly would provide notice in a uniform and orderly manner, but efficiency is not the standard-bearer of due process. Indeed, efficient governance and due process struggle in an inherently tense relationship."<sup>264</sup> Instead, the appropriate balance is one that compares the lack of difficulty in checking records for recorded interests with the significance of property rights of the interested parties.<sup>265</sup>

When the identity and addresses of holders of protected property interests are readily ascertainable, the failure of such parties to file a request for notice is no substitute for notice required by due process. There is still, however, an important justification for use of a request notice procedure. Because there is no absolute requirement of mailed notice, with notice to be given only when the identity and addresses of interested parties are readily ascertainable, a request notice statute can afford an additional means by which a party can ensure that notice will be given.<sup>266</sup> There are numerous contexts in which a party's interests may not be readily ascertainable, such as when a party's interest is not recorded in public records, a contested probate proceeding leaves ownership in doubt, or a mortgagee transfers the servicing of the loan or pledges it as collateral. A request notice statute, in such circumstances, fills the gap between the constitutional obligation of notice to those who are readily ascertainable, and those who are not, without imposing "extraordinary efforts"<sup>267</sup> in the process.

#### *F. Consequences of Inadequate Notice*

Upon finding that an interested party has not received notice in accordance with the requirements of due process, a court must determine the consequences that flow from such a violation.<sup>268</sup> There are essentially two forms of relief that a court is likely to award. The first is to declare the entire tax enforcement proceeding, or some portion

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263. See *Town of Phillipsburg v. Block 22, Lots 14, 15, 16*, 528 A.2d 98, 101 (N.J. Super. Ct. Ch. Div. 1987) (holding that mailed notice is not an exceptional burden on the municipality and that "[t]he property rights of a mortgagee or other lien holder are substantial"); *Alliance Property Management & Dev., Inc. v. Andrews Ave. Equities, Inc.*, 518 N.Y.S.2d 804, 805-06 (App. Div. 1987), *aff'd on other grounds*, 517 N.E.2d 1327 (N.Y. 1987).

264. *Small Engine Shop, Inc. v. Cascio*, 878 F.2d 883, 892 (5th Cir. 1989).

265. See *Seattle-First Nat'l Bank*, 713 P.2d at 37; see also *McCann v. Scaduto*, 519 N.E.2d 309, 314 (N.Y. 1987) ("We conclude that the tax lien sale, in the context of this Code, creates 'momentous consequences' for the homeowner and that—balanced against these consequences—requiring that a notice be mailed to a person whose name and address are known imposes a minimal burden on the County.").

266. See *Small Engine Shop, Inc.*, 878 F.2d at 893; *Lee*, 933 F. Supp. at 581 ("[The] statute . . . allows those with interest in property, who are not reasonably ascertainable to a diligent state actor, an opportunity to request such notice."); *Island Fin. Inc. v. Ballman*, 607 A.2d 76, 81-82 (Md. Ct. Spec. App. 1992).

267. *Mennonite Bd. of Missions v. Adams*, 462 U.S. 791, 798 n.4 (1983).

268. See generally *Nora A. Uehlein*, Annotation, *Right of Interested Party Receiving Due Notice of Tax Sale or of Right To Redeem To Assert Failure or Insufficiency of Notice to Other Interested Party*, 45 A.L.R.4th 447 (1986) (summarizing split in jurisdictions on ability of omitted third parties to contest validity of sale).

of it, null and void.<sup>269</sup> The second is to sustain the validity of the tax enforcement proceeding as to all parties that did receive adequate notice, leaving the interest of the party that did not receive notice unaffected by the proceeding.

When it is the owner in fee simple, or its heirs, successors, or assigns by operation of law, who was not given notice of the tax sale or the end of the redemption period, the plausible result is to void the entire proceeding, or at least that portion of it for which notice was not properly given, as to such owner and as to all other interested parties even if they did receive adequate notice.<sup>270</sup> Though not required as a matter of constitutional due process, such an approach is necessary as a matter of equity. To void a proceeding only as to an underlying fee owner, permitting the fee owner to redeem the property from the lien or sale, while terminating the rights of mortgagees, judgment creditors, and other subordinate parties, would likely result in an unjustified windfall for the fee owner. The fee owner could obtain clear title to the property without those encumbrances that previously affected the property. Depending upon the statutory nature of tax enforcement proceedings, it is also plausible to conclude that the lack of adequate notice constituted a fundamental defect that deprived the original proceeding of adequate jurisdiction.<sup>271</sup> The lack of jurisdiction from constitutionally inadequate notice goes directly to the issue of the applicability of a statute of limitations barring challenges to the validity of a tax deed. If jurisdiction was lacking initially, any such statute should be inapplicable.<sup>272</sup>

When the underlying fee owner receives adequate notice of the enforcement proceeding, but a mortgagee, judgment creditor, lessee, or other interested party is not given constitutionally adequate notice, alternative forms of relief are possible. One is to follow the same approach as in the case of owners who do not receive notice, and void the entire proceeding as to all parties, requiring that the enforcement

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269. It is also possible, of course, for a court to determine that part of all interest, penalties, and costs which accrued during a period of time for which notice was not adequately provided should be eliminated, and, in certain circumstances, it may be possible for an aggrieved party to pursue a cause of action under 42 U.S.C. § 1983 (1994). *See supra* note 102.

270. *See Rives v. Balsa*, 478 S.E.2d 878, 881 (S.C. Ct. App. 1996) ("Failure to give the required notice [of tax sale to true owner] is a fundamental defect in tax [sale] proceedings which renders proceedings absolutely void."); *see also Turkey Creek, LLC v. Rosania*, 953 P.2d 1306, 1313 (Colo. Ct. App. 1998) (holding that failure to comply with statutory notice requirements may render tax deed void).

271. *See Benoit v. Panthaky*, 780 F.2d 336, 339 (3d Cir. 1985) ("Constitutionally inadequate notice to the owner of the property sold at a tax foreclosure is a jurisdictional defect."); *Moran v. Robbin*, 863 P.2d 395, 398 (Mont. 1993) ("The giving of notice is jurisdictional; if the legal requirements with respect to notice are not complied with, a county treasurer may not legally issue a tax deed."); *Good v. Kennedy*, 352 S.E.2d 708, 711 (S.C. Ct. App. 1987) (holding that the requirement of adequate notice is jurisdictional prerequisite).

272. *See Luster v. Bank of Chelsea*, 730 P.2d 506, 510 (Okla. 1986). But the Michigan Court of Appeals in *Smith v. Cliffs on the Bay Condo. Ass'n*, 573 N.W.2d 296 (Mich. Ct. App. 1997), held that failure to provide notice rendered the tax deed void, and the statute of limitations was tolled by such a fundamental lack of jurisdiction. The Michigan Supreme Court, however, vacated and remanded for reconsideration of summary judgment motions in light of a statutory provision barring actions challenging tax deeds after six months. *See Smith v. Cliffs on the Bay Condo. Ass'n*, 589 N.W.2d 779, 779-80 (Mich. 1998).

proceedings be recommenced.<sup>273</sup> Such an approach, once again, might be necessary as a matter of equity to avoid the situation where a senior creditor receives adequate notice, and fails to redeem the property, but a junior creditor who does not receive notice is given the opportunity to redeem because of the constitutional violation. This would grant a windfall to the junior creditor, placing it in a better position than before the proceedings commenced. Declaring the entire proceeding void as to all parties may also be justified in light of the fact that the cost of redeeming property from a tax lien or tax sale may be but a small fraction of the fair market value of the property. If a creditor, as a matter of constitutional relief, is permitted to redeem the property and thereby acquire ownership of the property, it could be gaining all equity in the property at the expense of the owner who received notice, yet failed to redeem.<sup>274</sup> Thus, when the party who fails to receive the constitutionally adequate notice is a mortgagee or other subordinate creditor, the equitable result in most contexts would be to void the entire proceeding.

The second approach is to sustain the validity of the sale as to owners and creditors who did receive adequate notice, but hold that the sale is ineffective as to other interested parties who failed to receive adequate notice, such as the holder of a leasehold interest, a future interest, or an easement or covenant. In this situation, a purchaser at a tax sale will acquire the property free and clear of all interests which received proper notice, but the property will continue to be encumbered by leases, future interests, easements, and covenants which were not given notice of the proceeding.<sup>275</sup>

### G. Hearings

As a general proposition, the deprivation of property interests by the state triggers not only the provision of adequate notice, but also the right to be heard. The nature of the hearing is dependent on the nature of the right and the context of the deprivation, a "hearing appropriate to the nature of the case."<sup>276</sup> The scope of the right to a hearing was not addressed by the Supreme Court in *Menonite*, and two state supreme courts have reached differing conclusions. One held that while there does not have to be a judicial hearing on the foreclosure, an opportunity to be heard in an administrative hearing with ultimate recourse to the judiciary is constitutionally required.<sup>277</sup> The other has interpreted the underlying statutory procedures to be purely ministerial in nature, with no fact finding or adjudicative function by the tax collector

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273. See *FDIC v. Lee*, 933 F. Supp. 577, 581 (E.D. La. 1996) ("The tax sale in question was constitutionally deficient and thus void ab initio. Consequently, the sale, from its inception, was null.").

274. This issue does not seem to have been presented to those courts which have held a mortgage unaffected by a tax foreclosure without adequate notice. See, e.g., *Anheuser-Busch Employees' Credit Union v. Davis*, 899 S.W.2d 868 (Mo. 1995).

275. See DEL. CODE ANN. tit. 9, § 8750 (1989) (stating that failure to give notice only means that the interests of those parties are unaffected); MISS. CODE ANN. § 27-43-11 (1999) ("A failure to give the required notice to such lienors shall render the tax title void as to such lienors . . .").

276. *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313 (1950).

277. See *Dow v. State*, 240 N.W.2d 450, 460 (Mich. 1976).

or by the judiciary, and concluded that due process does not require a hearing.<sup>278</sup> In tax foreclosure proceedings the issues which could be contested are usually very narrow in scope: the delinquency of the taxes, the adequacy of notice, and compliance with statutory procedures. Challenges to the original imposition of liability for taxes do carry a right to a hearing,<sup>279</sup> but once proceedings are commenced for enforcement of a lien for delinquent property taxes, questions of the validity of the assessment and rate of taxation usually cannot be raised. The ability of a property owner to contest tax liability during the assessment process is frequently coupled with the "caretaker" rationale and the importance of taxation to government as justification for concluding that no hearing is required by due process at the stage of a property tax foreclosure.<sup>280</sup>

#### V. A REVISED APPROACH TO PROPERTY TAX LIEN ENFORCEMENT

The evolution over the last fifty years of constitutional standards of notice required by due process presents a direct challenge to the collection of delinquent property taxes by state and local governments. As state and local governments moved to adopt simpler *in rem* procedures relying on notice by publication, the Supreme Court moved in the opposite direction, increasing the notice requirements of due process applicable to all state actions. As local governments expanded the steps and stages in the foreclosure process, courts looked at each step as possibly triggering a notice requirement. As jurisdictions sought to place responsibility for requesting notice on interested parties, they learned that the constitutional duties of the state could not be shifted so easily. As tax collectors sought to provide notice only to those parties identified in their own records, they discovered that their constitutional duty included examining other public records and exercising reasonably diligent efforts.

The collection of delinquent property taxes is far too important to the fiscal and social health of our communities to continue in the direction of increasing complexity and uncertainty. Financial pressures are increasing as responsibilities devolve from the federal to the local levels, and the property tax remains one of the few sources of revenues entirely within the control of local governments. When even a small percentage of a property tax digest lingers with delinquent taxes for years, there can be a devastating impact on neighborhood and community development. The attempts of local governments to relieve part of their financial pressures by the sale and securitization of billions of dollars in delinquent tax receivables will run head long into legal doubts about the enforceability of the underlying security.

Instead of further expanding the procedures and steps in the enforcement of property tax liens, with additional constitutional duties at each step, the reform needs to be in the opposite direction. There are two components to a property tax

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278. See *Associates Fin. Servs. of Am., Inc. v. Sorenson*, 700 A.2d 107, 111 (Conn. Ct. App. 1997), *cert. granted*, 704 A.2d 798 (Conn. 1997), *appeal dismissed*, 710 A.2d 769 (Conn. 1998).

279. See *Reich v. Collins*, 513 U.S. 106, 110-11 (1994); see also *Leger v. Commissioner of Revenue*, 654 N.E.2d 927 (Mass. 1995) (holding that due process does not require a hearing prior to the imposition of a lien for taxes).

280. See *McNaughton v. Kelsey*, 698 A.2d 1049, 1052 (Me. 1997); *City of Auburn v. Mandarelli*, 320 A.2d 22, 29-30 (Me. 1974).

foreclosure procedure that is efficient, fair, and consistent with constitutional rights and duties. First, there should be a single enforcement event. Second, constitutionally adequate notice should be provided to all interested parties only once for the single event. The property tax is one of the most difficult of all forms of public revenue to administer; the enforcement of delinquent property tax liens should be, and can be, one of the simplest parts of this complex system.

*A. A Single Enforcement Proceeding*

A property tax lien enforcement proceeding which relies upon two or more distinct events creates the most difficult possible circumstances for compliance with constitutional due process notice requirements. Far too commonly, this consists of an initial event in which the property is sold but the sale is not deemed complete or final until some final event is taken such as termination of the right of redemption. These two events are usually not tied together as part of a single proceeding, nor are they necessarily initiated by the same entities. Though there may be a minimum period of time separating the two events, there is rarely a fixed period of time within which the second event must happen. The party holding the right to the final event of enforcement of the tax foreclosure frequently has discretion as to when the proceeding will be initiated. The presence of two separate events controlled by separate parties and separated in time by a range of months or years, triggers the need for adequate notice to all interested parties of both events.

The longer the period of time between the initial tax enforcement event and the final event which terminates the rights of all interested parties in the absence of redemption, the greater the difficulty of identifying the interests and identifying names and addresses for the interested parties. A property tax enforcement proceeding which requires six months to complete is difficult. One that involves multiple events over one to five years ends up creating precisely the kind of extraordinary burden on the government which the "caretaker" theory seeks to avoid.<sup>281</sup> Over a period of years it is highly probable with respect to any given tract of property that new property interests will be created, interests will be transferred, and owners of various property interests will change addresses, if not identities. A multistaged proceeding spread out over a period of years and controlled by different entities with different motivations faces significant burdens of providing constitutionally adequate notice at each stage of the process.

The tax enforcement proceeding should consist of a single event, thus allowing comprehensive and constitutionally adequate notice to be given only once at the initiation of the proceeding. Notice of the tax enforcement proceeding, whether judicial or nonjudicial in nature, should be filed in the appropriate *lis pendens* docket, or such other public record as is maintained to reflect pending litigation involving the property. Such filings will constitute notice under the recording acts of all jurisdictions of the pendency of the proceedings, and any and all parties who acquire interests after the initiation of the proceedings will do so subject to the enforcement proceedings.

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281. *See supra* text accompanying note 107.



The length of the tax enforcement proceeding should be as short as possible. It should be long enough only to ensure that all interested parties received proper notice and have a reasonable amount of time to respond to the notice by payment or by seeking a hearing to challenge the proceeding. Because the consequences of a property tax enforcement proceeding are so significant, involving a loss of all property rights and ownership interests even when the amount of delinquent taxes is extremely small relative to the value of the property interests, all jurisdictions have sought to soften this potential loss by providing additional periods of time by which owners and interested parties can protect their interests.<sup>282</sup> Traditionally, such additional periods of time have been statutory redemption periods after the sale of the property. This approach, however, multiplies the difficulty of providing notice by requiring notice of separate events. A simpler, more efficient approach which still affirms the ability of owners to avoid the loss of property rights within months after taxes are delinquent is to shift the extended period of time *before* the commencement of enforcement proceedings. Thus, if a jurisdiction elects as a matter of public policy to provide owners and other interested parties with a one- to two-year period of time before the final loss of all property rights, such a period should be established as the minimum period of time which must pass *after* the initial date of tax delinquency and *before* the commencement of enforcement proceedings. Shifting the redemption period from postsale to presale of the property affirms the policy protections of property owners, and yet still permits the enforcement in a single proceeding requiring only a short period of time. If a jurisdiction desires to retain a postsale redemption period, it should be a minimal period of time such as thirty days, the expiration of which is automatic in the absence of redemption. The expiration of a short postsale redemption period must be recited in the deed or judicial proceedings, and be available as a matter of public record.

Part of the current constitutional complexity in the enforcement of property tax liens derives from the different roles played by different parties. Commonly, the local government conducts an initial sale of the property, and sells it to a third party. It is then within the authority and control of the third party to terminate the right of redemption and otherwise acquire the final tax deed. Not only are multiple notices and title examinations likely to be required of these separate events, but they leave the owners and other interested parties with the responsibility of identifying both the fact of the initial sale and the purchaser at the initial sale. Instead, the commencement and completion of the tax enforcement proceedings should be within the control of a single entity. If the governmental entity retains the lien for property taxes, the governmental entity should initiate and complete the tax enforcement proceeding. If the government has sold or transferred the tax lien to a third party, the responsibility for the entire tax enforcement proceeding should rest on the holder of the tax lien.

It will simplify the tax enforcement proceedings considerably if there is only one event or sale involving transfer of title to the property. If the jurisdiction permits the transfer of a property tax lien, whether by sale of individual liens or through negotiated bulk sale transfers, it should be clear that the lien for delinquent property taxes is the only subject matter of the sale. To avoid any possible confusion that the property is being sold, the consideration to be paid at the transfer of a lien should be

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282. See *supra* text accompanying notes 147-52.

limited to the value of the lien, that is, delinquent taxes, penalties, interest and costs. The transfer by a governmental entity to a third party of a property tax lien is not, and should not, be part of an enforcement proceeding. Thus, the transfer of the lien does not, as a matter of constitutional due process, require separate notice to the owner and other interested parties of the transfer. Notice of such a transfer may be required as a matter of other public policies, but is not constitutionally mandated.

The mechanics of the sale process are not determined as a matter of federal constitutional law. Assuming the provision of adequate notice and opportunity for a hearing, state governments should be free to follow a procedure of strict foreclosure—vesting title in a governmental entity at the completion of the enforcement proceedings—or to conduct an auction of the property. At the auction the property can be sold either to the highest bidder (above a minimum bid of taxes, interest, penalties, and costs), or to the purchaser who bids for a lowest percentage undivided interest in the property. The former procedure poses issues with respect to the receipt, control, and distribution of surplus funds bid in excess of the minimum bid. The latter procedure poses issues with respect to the subsequent marketability of fractional, undivided interests in the property. If the enforcement proceeding is short in duration, without any subsequent lengthy redemption period, there should be no need to follow the approach of those jurisdictions that sell the property to the purchaser offering the lowest rate of interest during a postsale redemption period.

At the present time there is no federal constitutional directive as to whether the property tax enforcement proceedings should be entirely nonjudicial in nature, exclusively judicial, or some combination of the two. What is now clear is that the presence of state action compels compliance with the guarantees of due process. The historic advantages, in terms of speed and efficiency, of a nonjudicial *in rem* proceeding, with constructive notice only by publication and no requirements of judicial jurisdiction, are no longer available. The property rights of owners and other interested parties are entitled to constitutional protection regardless of the nature of the proceeding.

There are several distinct advantages to the utilization of a judicial tax enforcement proceeding. First, a judicial proceeding will constitute a permanent public record of all aspects of the proceeding. The identification of interested parties, the provision of notice to such parties, and the exercise of reasonably diligent efforts to locate names and addresses of such parties, will all constitute a part of the official records and contain formal findings of fact by the judiciary. Significantly, a judicial proceeding will clearly offer an opportunity for a hearing as part of the process—an opportunity not presently available in most jurisdictions. A judicial order of sale and issuance of a final tax deed will be *res judicata* of the issues and parties before the court, establishing a foundation for subsequent title insurance and transfers of the property. The primary argument against reliance on judicial proceedings to enforce property tax liens is the burden upon the judiciary. The nature of judicial property tax enforcement proceedings, however, should and could be limited in scope. The sole issues to be decided by a court would be the existence of the delinquency and the provision of adequate notice. There is no structural or constitutional reason why such proceedings would not be relatively brief, and could not be conducted in large volumes.

### B. Notice

Constitutional jurisprudence now holds that due process requires notice in property tax enforcement proceedings, but it is notice that is reasonably calculated to inform interested parties whose identity is *reasonably* ascertainable based upon *reasonably* diligent efforts. The elusive nature of this constitutional test poses significant barriers to predictability, certainty, and stability in the tax foreclosure process. It leaves property owners and other interested parties subject to the vagaries of local law and particularized judicial conceptions of reasonableness. It also casts continuing doubt on the insurability and marketability of properties.

The only effective and efficient response to this elusive constitutional standard is to undertake a comprehensive approach to providing notice to all possible interested parties. If property tax enforcement proceedings consist of a single proceeding, this notice is to be given only once, at the initiation of the proceeding. The interests that are entitled to adequate notice include all property interests which would be terminated or adversely affected by the tax enforcement proceeding. The identification of all such interests will almost never be revealed solely by the records of the tax collector, as such records usually identify only the owner in fee simple of the subject property. A purchaser under a long term installment land sale contract may have greater financial interests in the property than a seller, but the interests of the purchaser are not necessarily reflected in the tax collector's records. Mortgages are clearly protected property interests, and there is no substantive distinction for these purposes between mortgages and judgment creditors. Similarly, there is no necessary distinction, as a matter of the existence of enforceable property rights, between a mortgage and a leasehold estate that encumbers a tract of property.

There is now no substitute for an examination of title to reveal the existence of the interests that will be affected by a tax enforcement proceeding. The government has a constitutional obligation to identify those interests which exist as a matter of public record, and such records include not just the tax collector's records, but also the public records maintained for purposes of providing notice of the creation and transfer of interests in real property. This examination should be done immediately prior to the commencement of the enforcement proceedings, and notice should be provided to all parties holding identified interests.

It is also likely that a legally enforceable interest in real property will not be revealed in the public records. The rights of occupants of property under unrecorded leases, and parties in possession for extended periods of time without evidence of record, should also receive constitutional protection when notice can be provided to them without creating extraordinary burdens on the government. Because such notice can be provided simply by mailing an extra copy of the notice addressed to the "Occupant," and by posting a copy of the notice on the property, the burden is light.

Though a jurisdiction may elect to require more formal service of process as to particular classes of interested parties, such as residents, what the Constitution requires as a minimum is notice reasonably calculated to inform the interested parties of the proceedings, and mailed notice will suffice in most circumstances. Because reasonably diligent efforts are required, it would be advantageous to utilize registered mail, or certified mail return receipt requested, to transmit the notice. The scope of the government's duties when mailed notice is returned, or when adequate addresses are not revealed by a title examination, is the most problematic aspect of a revised

property tax enforcement proceeding. While it is accurate that the government does not have the duty to maintain at all times accurate addresses for all interested parties, it is still incumbent upon the government to undertake some efforts to obtain correct addresses. No efforts can not equate with reasonably diligent efforts. As part of the administration of the tax enforcement proceeding, the government should maintain a checklist of actions taken with respect to returned notices and insufficient addresses. Such a checklist should include a review of other resources for more accurate information.

A request notice statute is not an adequate substitute for the performance of the government's constitutional obligations. It may still serve, however, a valuable function by permitting interested parties whose identities and addresses are not reasonably ascertainable to file necessary information with the tax collector's office. It should always be supplemental to, and not in lieu of, the constitutionally required notice.

Notice by publication, or constructive notice, continues to be constitutionally adequate when the identities of interested parties are not available through reasonably diligent efforts. Because there is always the possibility that unrecorded interests exist, or that notice is not received by all interested parties, notice of the commencement of tax enforcement proceedings should also be published. In many jurisdictions publication of notice serves two different functions, and care must be taken to differentiate these functions. One function of published notice is to apprise interested parties of the initiation of tax enforcement proceedings. The second function is to advertise the existence of a public auction, or sale, of the property in order to encourage prospective purchasers. The first function is that which is constitutionally required. The second function is purely a matter of local procedures and should occur, if at all, at a separate date when the time of the sale is known.

## VI. CONCLUSION

Property tax enforcement procedures have always involved a delicate balance of public and private rights and duties. The caretaker premise assumes that all property owners and interested parties have some degree of responsibility with respect to the care and management of their property interests. They are held to the knowledge that their property is potentially subject to taxation, and particularized notice of the annual imposition of a property tax rate is not constitutionally required. The government may impose taxes, interest, and penalties upon nonpayment. This caretaker premise, and the special nature of taxation as central to government operations, continue to be dominant forces in our culture. Where they have been modified by changing constitutional jurisprudence in recent decades is in the subtle, yet significant shift in the role of notice in this delicate balance.

Expansion of the notice requirements increases the burden imposed on state and local governments in conducting property tax enforcement proceedings, but the magnitude of this burden can be offset by a reform of existing tax foreclosure proceedings. Shifting to a single stage enforcement proceeding, in which the final event concludes all issues of ownership, dramatically reduces the number of times in which notice must be given and increases the accuracy of the notice that is given. Even when jurisdictions retain a presale redemption period, or grace period, prior to the commencement of enforcement proceedings, a single enforcement proceeding

routinely brought at the end of such period will eliminate much of the uncertainty and instability which currently plagues property owners and contributes to the deterioration of inner cities by abandoned tax delinquent properties. The costs of property tax enforcement proceedings have always been included in the amount necessary to redeem the property from the tax lien, and the additional costs associated with the examination of title and other reasonably diligent efforts to locate the interested parties should be included as well.

An enforcement proceeding that can be commenced, and completed, in a relatively short period of time eliminates the necessity of the more indirect coercion that is used by many jurisdictions in the form of substantial, and cumulative, penalties that accrue with the passage of time. Ironically, as penalties mount towards the fair market value of the property, owners and interested parties have even less incentive to redeem the property from the tax lien or to manage the property. When the redemption amount equals or exceeds the fair market value of the property, there will be no sale of the property at a public auction, and a statutory provision should be made for transfer of the property to the local government, or a special purpose entity, for public use or for resale.

As state and local governments respond to the challenges presented by evolving federal constitutional law, reform of property tax enforcement procedures should not be limited to the mere addition of yet another approach to the procedures which have been in place for over a century. Reform in the past has simply added steps or stages to existing laws, or added new procedures as additional options available to local governments. The result is a patchwork of laws that is confusing, inconsistent, and in large measure constitutionally deficient. The existing laws should be replaced entirely by a simpler, single enforcement proceeding in which comprehensive notice is provided once, at the commencement of the proceeding, to all interested parties.