THE COMMON LAW REMEDY TO THE TAX DEED AND TAX LIEN'S DISPARATE IMPACT ON COMMUNITIES

Michael Taddonio[*]

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INTRODUCTION

Gladys Wisner lived on 480 acres of cropland outside of North Platte in Lincoln County, Nebraska, since 1941.[1] At 90 years old and suffering from mini-strokes, Gladys moved from her home of over 70 years to a supervised living facility.[2] Gladys' eldest of four, Roger, handled all of her finances and the farm's.[3] Roger unexpectedly passed away and Gladys' second son, Robin, stepped in to handle all the finances.[4] In the transition, Robin failed to pay the property taxes one year because he misunderstood the family's land trust.[5] The County sold a property tax lien on the land to a third party.[6] Then, the original third-party purchaser sold the property tax lien to Vandelay Investments.[7] No one told Robin or Gladys their taxes were delinquent or that interest in their land moved through so many hands.[8]

After paying Gladys' property taxes for three years, Vandelay sent a letter to Gladys' retirement home telling her that she would lose her family's 480 acres if she did not pay three years-worth of property

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[1] Wisner v. Vandelay Inv., LLC, 916 N.W.2d 698, 709 (2018).
[2] *Id.*
[3] *Id.*
[4] *Id.*
[5] *Id.*
[6] *Id.*
[7] *Id.*
[8] Joe Duggan, *Nebraska Supreme Court Rules in Favor of Firm That Acquired Land of 94-Year Old Who Didn't Pay Taxes*, OMAHA WORLD-HERALD (Aug. 26, 2018), https://omaha.com/news/courts/nebraska-supreme-court-rules-in-favor-of-firm-that-acquired/article_38a0189c-b2b4-5e24-8bde-2b543c0fcce8.html (stating Robin found out about the back taxes from a tenant who farmed the property and immediately offered to pay the debt); *see also Wisner*, 916 N.W.2d at 709 (holding that notice by publication was valid when the local newspaper listed every delinquent property as its legal description).

taxes, costs and fees, plus a 14% interest rate.[9] Gladys never got any notice, and the post office returned Vandelay's notice to them.[10] Vandelay did nothing with the returned notice, they did not try to reach Gladys or Robin.[11] Ninety days after Vandelay sent out the notice, the county transferred Gladys's property to Vandelay, free and clear.[12] When Robin found out about the transfer, he offered to pay the full price of taxes, costs, fees, and 14% interest to keep his family's land, but Vandelay rejected the payment.[13] Vandelay paid roughly $50,000 in delinquent taxes to receive a farm worth $1.1 million. This is the tax lien process.

Two common ways governments can take someone's property for delinquent property taxes is by selling a tax lien or tax deed.[14] A tax lien allows a third party to purchase an interest in an original property owner's land.[15] Once a third-party purchaser has an interest, they pay the property taxes on the land until the government transfers the property to them or the owner pays a redemption fee.[16] In contrast, a tax deed allows a local government to briefly take control of the land to sell the title at a tax deed auction, and allows the highest bidder to purchase and receive the deed to land that day.[17] For the purposes of this Note, the main difference between the two is time of purchase. This Note will use tax sale process to refer to them generally, but differentiate between the two processes where necessary.

The tax sale process is "exceedingly complicated and . . . understood only by investors who profit from the purchase of properties at tax sales."[18] Each local government has the power to enact its own tax sale statutes and coordinate its procedures, sale process,

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[9] *Wisner*, 916 N.W.2d at 710.
[10] *Id.*
[11] *Id*.
[12] *Id.*
[13] *Id.*
[14] JOHN RAO, THE OTHER FORECLOSURE CRISIS, NAT'L CONSUMER L. CTR. 13 (July 2018), https://www.nclc.org/images/pdf/foreclosure_mortgage/tax_issues/tax-lien-sales-report.pdf.
[15] *Id.*
[16] *Id.*
[17] *Id.*
[18] *Id.* at 8.

and enforcement.[19] There are many steps that due process requires local governments to follow; however, those processes greatly vary by state and methods of enforcement.[20] Broadly, the process follows three essential steps once a property owner misses one property tax payment:

> 1. The government levies the tax lien/deed and provides notification of the pending tax sale;
> 2. The government sells the tax lien/deed;
> 3. The government transfers property to third party purchaser in return of satisfying the original property owner's tax debt, who generally sells property for profit.[21]

Each state has a redemption period in between steps one and three.[22] Once delinquent, the cost to redeem, or take back the original property owner's property rights, is no longer just balancing the property owner's debt.[23] Instead, to regain property rights, the original property owner must pay the balance of their debt, a high interest rate, and additional costs and fees set by the local government.[24]

Property tax payments are important to local governments because they are their primary revenue source for many government programs.[25] Any loss in revenue, no matter the amount, can cause

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[19] *Id.* at 11.
[20] *See* Frank S. Alexander, *Tax Liens, Tax Sales, and Due Process*, 75 IND. L. J. 747, 750 (2000) (analyzing the impact of *Mennonite Bd. of Missions v. Adams* on due process standards of the tax lien process); Lorrin Hirano, *Notice in Non-Judicial Tax Sales*, HAW. B. J. 4, 4 (Aug. 2006) (addressing the implications of *Jones v. Flowers* on due process for Hawaii's tax lien process); Daniel Koen, *Trying to Protect Elderly and Mentally Incompetent Homeowners: One Tax Deed Case at a Time*, 14 PUB. INT. L. REP. 10, 15 (2008) (focusing on Due Process Clause requirements and subsequent failures of notice requirements in Cook County, Illinois).
[21] RAO, *supra* note 14, at 12.
[22] *Id*.
[23] *Id*.
[24] *See id.*, app. at 43 (documenting states with tax sale processes having interest rates averaging over 10%, with some as high as 48%).
[25] *The National Tax Lien Association's Response to the National Consumer Law Center's Report*, NAT'L TAX LIEN ASSOC. 1, https://cdn.ymaws.com/www.ntla.org/resource/resmgr/press_kit/the_national_tax_lien_associ.pdf (last visited Apr. 29, 2022) [hereinafter *NTLA Response*].

serious harm to local governments.[26] Local governments use tax sales to cure deficits from delinquent property taxes and to entice tax sale investors by offering steady investment returns.[27] Additionally, local governments entice tax sale investors by offering land for a fraction of its value if the original property owners cannot redeem.[28] In 2012, tax lien investors invested over $1.5 billion into local governments to remedy the losses from delinquent property tax payments.[29] Overall, both parties greatly benefit from the process, because local governments remedy deficits by offering guaranteed returns to investors.[30]

Local governments and third-party purchasers have a symbiotic relationship strengthened by favorable judicial and legislative decisions that subsequently weaken property rights. Court decisions give expansive rights to tax-lien holders that supersede other foundational property rights.[31] The Supreme Court's limited jurisprudence in its few peripherally related cases expanded third-party purchaser rights.[32] Courts and the criminal justice system protect third-

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[26] *See* Georgette C. Poindexter et al., *Selling Municipal Property Tax Receivables: Economics, Privatization, and Public Policy in the Era of Urban Distress*, 30 CONN. L. REV. 157, 159 (1997) ("[T]he sheer magnitude of the problem coupled with the pivotal role of property taxes to a healthy city lends urgency to the discussion [of tax lien sales].").

[27] RAO, *supra* note 14, at 8 (explaining the allure of tax sales for investors comes from interest rates ranging between 20–50%).

[28] *See id.* (comparing the stark loss of equity from tax sale auctions to other auction sales, like a mortgage foreclosure).

[29] *See NTLA Response*, *supra* note 25, at 1 (reporting proceeds resulting from tax lien sales, which does not account for sales local governments made in tax deed auctions).

[30] *See* RAO, *supra* note 14, at 13 ("The ability to collect interest and penalties, which can be substantial, makes these sales attractive to purchasers even if the homeowner eventually redeems the property.").

[31] *See* Collier v. Kincheloe, 180 P.3d 1157, 1160 (Mont. 2008) (allowing tax lien sales to create a new title for tax lien purchasers. This subsequently destroyed the remainder interest after life estate holders failed to pay their property taxes).

[32] *See* Bridge v. Phoenix Bond & Indem. Co., 553 U.S. 639, 639 (2008) (allowing standing for treble damages under civil RICO statute when one third-party purchaser sued another); Jones v. Flowers, 547 U.S. 220, 236 (2006) (holding the State provided adequate notice despite the homeowner not living at the address when the post office returned notice); Permanent Mission of India to UN v. City of New York, 551 U.S. 193, 200 (2007) (expanding third-party purchaser rights to defeat a sovereign immunity defense).

party purchasers' rights to fairly bid on delinquent property taxes, like pursuing fraudulent bidding practices.[33] Yet, the original property owners' rights rarely receive equal attention or diligence.[34] Approaching the tax sale process from the original property owner's perspective is not a common analysis—which the lack of jurisprudence determining original property owners' rights reflects. This Note takes a novel approach to the tax sale process by analyzing tax sale rights owed to the original property owner through identifying inherent rights owed to everyone under the Constitution.

This Note explains why the tax sale process qualifies as an unconstitutional taking under the Fifth Amendment when the government withholds surplus proceeds from the original property owner. First, important social and financial incentives motivate local governments to use the tax sale process, despite its high cost to individual community members. Second, courts across the country have yet to conclude on what rights parties have under the tax sale

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[33] *See* OFF. OF PUB. AFF., DEP'T OF JUST., SIX INVESTORS INDICTED FOR THEIR ROLES IN BID-RIGGING SCHEME AT MUNICIPAL TAX LIEN AUCTIONS IN NEW JERSEY (2013), https://www.justice.gov/opa/pr/six-investors-indicted-their-roles-bid-rigging-scheme-municipal-tax-lien-auctions-new-jersey (showing how four people and two entities related to tax-lien investing firms, rigged tax lien bids, which resulted in them receiving more liens from local governments than allowed by statute); Fred Schulte & Scott Calvert, *Witness Says He Rigged Bids in Property Tax Lien Auctions in Maryland*, THE CTR. FOR PUB. INTEGRITY (Mar. 4, 2011), https://publicintegrity.org/inequality-poverty-opportunity/witness-says-he-rigged-bids-in-property-tax-lien-auctions-in-maryland/ (introducing the key witness for a federal criminal case centered around Maryland-based law firm's fraudulent tax lien scheme where they allegedly bid on behalf of a Florida bank).

[34] *See* Johnny Edwards, *Efforts Intensify to Curb Fulton's Tax Lien Sales*, ATLANTA JOURNAL-CONSTITUTION (Jan. 13, 2012), https://www.ajc.com/news/local/efforts-intensify-curb-fulton-tax-lien-sales/NjF5ZIWe2yJF848aRD4t8L/ (reporting how tax lien reform is dying in Fulton County's legislature because experts said that expanding notice and using certified mail is overly burdensome and costly for local governments); Joe Duggan, *'Legal Ripoff'? Nebraska Makes it Easier for Investors to Take Farms, Homes for Unpaid Taxes*, OMAHAWORLD-HERALD (Nov. 17, 2018), https://omaha.com/state-and-regional/legal-ripoff-nebraska-makes-it-easier-for-investors-to-take-farms-homes-for-unpaid-taxes/article_00777ae3-f354-5172-8a8d-629c7614be29.html (reporting that the third-party purchaser that bought Gladys Wisner's house spent $75,000 to lobby the Nebraska Legislature to block a tax lien reform bill).

process, but a common line of jurisprudence incorrectly relies on the only Supreme Court case that addressed the constitutionality of the issue.[35] Third, taxes complicate the legal analysis of a taking, because the government equates taking someone's real property as per se payment for taxes. Fourth, since the government treats taking someone's property as per se payment of taxes, common law principles require the government to only take the amount of tax due and give the surplus back to taxpayer. Lastly, the government employs third-party lien purchasers as tax collectors, those private purchasers qualify as state actors, thus subject to return surplus to original property owners. The tax sale process allows local governments and third-party purchasers to take delinquent property owner's land without providing the surplus owed through just compensation.

I. LOCAL GOVERNMENTS USE THE TAX SALE PROCESS AT THE DETRIMENT OF THEIR CONSTITUENTS

Elderly; Black, Indigenous, and People of Color (BIPOC); and low-income communities face disproportionate loss of equity from the tax sale process, while governments use it to balance budgets.[36] The tax sale process's benefits to local governments are not worth the disproportionate harm suffered by elderly, BIPOC, and low-income populations. During times of financial uncertainty, local governments turn to the tax sale process to ensure they can continue providing important services and programs, like funding public schools and fire departments.[37] For example, local governments turned to the tax sale

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[35] *See* United States v. Taylor, 104 U.S. 216, 221 (1881) (analyzing how the Act of 1862 did not inherently overturn the clause in the Act of 1861 that "allowed owners of lands sold for taxes to . . . receive the surplus proceeds remaining after payment of taxes and charges"); United States v. Lawton, 110 U.S. 146, 146 (1884) (using the Act of 1862 to justify requiring the government to pay the $929.50 surplus resulting from the government's bid for the claimant's property); *infra* Part III.A.

[36] RAO, *supra* note 14, at 8; Andrew W. Kahrl, *Investing in Distress: Tax Delinquency and Predatory Tax Buying in Urban America*, 43 CRITICAL SOCIO. 199, 213 (2017).

[37] *NTLA Response*, *supra* note 25, at 4; *see also* Patrick D. Dolan et al., *Tax Lien Securitization: Opportunities and Risks*, DECHERT ON POINT (Dec. 15, 2010), https://www.dechert.com/knowledge/onpoint/2010/12/tax-lien-securitization-

process to recoup losses during the Great Recession.[38] Since 2008, noticeable tax sale success further encouraged local governments to use the tax sale process.[39] Some local governments fast-tracked the tax lien process by selling tax liens in bulk to large companies[40] and moving the process online to reduce costs.[41] As local governments suffer from COVID-19 losses, like delinquent property tax payments and inflation-related costs, more cities will likely turn to the tax sale process.[42] Despite providing a catalyst to cash-strapped local governments, the tax lien process comes at a dire cost.

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opportunities-and-risks.html (analyzing a National Tax Lien Association report showing how the number of delinquent property taxes greatly increased during the 2008 financial crisis); Poindexter, *supra* note 26, at 172 (explaining the reason municipalities are increasingly turning to the tax lien process to alleviate deficits).

[38] *See* RAO, *supra* note 14, at 10–12 (chronicling the 2008 recession, and its impact on local governments which used tax sales to recover from increased delinquent property taxes).

[39] *See* Auduti Gaha, *Dartmouth to Auction More than $1 Million in Tax Liens*, S. COAST TODAY (Nov. 1, 2014), https://www.southcoasttoday.com/article/20141101/news/141109922?template=ampart (communicating to town of Dartmouth, MA that 153 delinquent property tax payments were for sale at the cities first tax lien auction); Mike Lawrence, *Tax Debt Sale Raises $3.1 Million*, S. COAST TODAY, https://www.southcoasttoday.com/article/20160517/NEWS/160619544 (selling bulk property liens to one company from Boston, MA for $3.1 million in the city of New Bedford, MA first tax lien sale) (last updated June 17, 2016); Carly Cahur, *Property Auction Sale Announced for Land Along Mermentau River*, NAT'L TAX LIEN ASS'N (July 12, 2019), https://www.ntla.org/news/460800/Property-auction-sale-announced-for-land-along-Mermentau-River.htm (opening up 4,000 acres to tax lien purchasers and requiring no minimum bid).

[40] *See* Kahrl, *supra* note 36, at 200 (describing the recent tax lien process where growth arises from both an increased amount of financially distressed communities, and innovations in the process to reduce government costs, such as bulk-lien purchasing to expedite the process); ANGELA C. ERICKSON ET AL., VIOLATING THE SPIRIT OF AMERICA: HOME EQUITY THEFT IN MASSACHUSETTS, PAC. LEGAL FOUND. (2021) (reporting how one company in Massachusetts, Tallage Lincoln, bought at least 154 properties through the tax sale process between 2014 and 2020).

[41] *See* Carly Cahur, *First Ever Online Tax Sale Brings in $115,000*, NAT'L TAX LIEN ASS'N (Dec. 9, 2019), https://www.ntla.org/news/481018/First-Ever-Online-Tax-Sale-Brings-in-115000.htm (reporting on an online bidding, contrary to normal practice of in-person bidding).

[42] *See* Louise Sheiner & Sophia Campbell, *How Much Is Covid-19 Hurting State and*

While the tax sale process provides integral funding for local governments, it disproportionately impacts elderly, BIPOC, and low-income populations.[43] The tax sale process is not inherently biased; instead, it is the product of the larger inequality surrounding housing in America.[44] Tax sales arise from the failure to pay a bill, yet the bill's cost can be inaccurate or have inflated costs due to local government's deficient or absent property assessment,[45] and unethical omitting of escrow accounts,[46] among any other combination of biases and discrimination.[47] Instead of giving people manageable means to repay their debts, local governments offer delinquent owner's land to the highest bidder looking to turn a profit.[48] Essentially, local governments

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Local Revenues, BROOKINGS INST. (Sept. 24, 2020), https://www.brookings.edu/blog/up-front/2020/09/24/how-much-is-covid-19-hurting-state-and-local-revenues/ (indicating that Covid-19 will cause state and local revenues to decline for the next three years starting at 5.5% for 2021).

[43] *See* Andrew W. Kahrl, *Dignity Takings and Dignity Restoration: Unconscionable: Tax Delinquency Sales as a Form of Dignity Taking*, 92 CHI.-KENT L. REV. 905, 906 (2017) ("African American homeowners have been and remain more vulnerable to predatory tax buying."); *Tax Lien Sales Put Low-Income, Seniors, and Disabled at Risk for Foreclosure*, AM. BAR ASS'N (Aug. 31, 2011), https://www.americanbar.org/groups/law_aging/publications/bifocal/vol_33/issue_1_oct2011/tax_lien_sales_putlow-incomeseniorsandthedisabledatriskofforeclo/ (highlighting the issues facing elderly people that lose their home they lived in for decades over misunderstandings, especially with reverse-mortgage and escrow accounts).

[44] *See* Kahrl, *supra* note 36, at 202 (contrasting how black people's wealth, relative to their homes, makes up a larger percentage of their overall wealth compared to white people's overall wealth).

[45] *See* CARLOS AVENANCIO-LEÓN & TROUP HOWARD, THE ASSESSMENT GAP: RACIAL INEQUALITIES IN PROPERTY TAXATION, WASH. CTR. FOR EQUITABLE GROWTH, 37–38 (2020) (exhibiting the disparate impact of property tax values to BIPOC populations and how that disparate impact is increasing).

[46] *See* RAO, *supra* note 14, at 10 (aligning relationship between escrow accounts, subprime mortgages, and increases in tax sales).

[47] *See id.* at 31 (reporting from the New York City's Comptroller that "the tax liens sold in 2011 were highly concentrated in low-income communities with large populations of African-American and Hispanic New Yorkers.").

[48] *See* Caroline Enright, *Someone To Lien on: Privatization of Delinquent Property Tax Liens and Tax Sale Surplus in Massachusetts*, 61 B.C. L. REV. 667, 689 (2020) (comparing tax sale incentives between participants: local governments want to balance their budget to continue paying for services and programs, while out-of-state tax-lien investors want to maximize profit).

allow corporations to purchase these tax liens, without needing to step foot in their jurisdiction, to expedite repayment of municipal funding at the expense of their community members.[49]

Like Gladys Wisner, Bennie Coleman was a victim of the tax sale process.[50] Bennie was a 76-year-old retired Vietnam Veteran with dementia who lost his home for $134 in delinquent property taxes.[51] Bennie's debt snowballed into an unaffordable $4,999 bill in the two years Embassy Tax Services, LLC (Embassy) owned the lien on his house.[52] The court gave Bennie a mental-health extension to gather the money, however the court granted Embassy's motion for default judgement after Bennie failed to make it to court.[53] Embassy then began the process of removing Bennie from his home worth $197,000, which forced Bennie to move into the homeless shelter down the street.[54] Bennie was a victim of the tax sale process like many others, however given the exponential bill growth, his dementia diagnosis, and identity as a black, retired marine, his story incited national outrage and sparked a full investigation into the tax lien process in Washington, D.C.[55]

Bennie's story led the Washington Post to uncover the tax lien process inequality in Washington D.C..[56] The investigation focused on the D.C. area, and exhibited the multiple out-of-state third-party purchasers taking advantage of D.C.'s tax lien process.[57] The investigation revealed that in the D.C. area alone, over half of the tax lien foreclosures occurred in the two poorest wards in the city, 72% of pending foreclosures were in neighborhoods with over 80% non-white

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[49] *See* RAO, *supra* note 14, at 19 ("Bank of America, JPMorgan Chase, and Fortress Investment Group all have owned or financed tax lien investment firms.").
[50] Coleman v. District of Columbia, 70 F. Supp. 3d 53, 58 (D.D.C. 2014).
[51] Michael Sallah et al., *Left with Nothing*, WASH. POST (Sept. 8, 2013), https://www.washingtonpost.com/sf/investigative/2013/09/08/left-with-nothing/?tid=a_inl_manual [hereinafter *Left with Nothing*].
[52] *Id.*
[53] *Coleman*, 70 F. Supp. 3d at 65.
[54] *Id.*
[55] *Left with Nothing*, *supra* note 51.
[56] *Id.*
[57] *See id.* (reporting out-of-state investment firms purchased liens from a 65-year-old on hospice care for $1,025 in delinquent taxes and a 95-year-old suffering from Alzheimer's for $44.79 in delinquent taxes).

populations, and one-third of the houses lost arose from liens worth less than $1,000.[58] The investigation noted these problems were not exclusive to the D.C. area, and reform often fell short.[59] The report concluded by noting most people cannot fight the process when they do not have the funds to endure a long, drawn out legal battle against these third-party purchasers, on top of facing the potential costs of attorneys' fees if they lose.[60]

This issue is a nationwide problem. While some states have recently passed new laws to protect home owners from this process, there are still many states where original property owners lose all their equity for a single missed property tax payment.[61] Across the country, local governments continue to take people's property, even during a pandemic.[62] And due to the circumstances surrounding tax sales, they disproportionately impact the elderly, BIPOC, and low-income communities.[63] Tax sales impact people often too poor to pay their

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[58] *Id.*

[59] *See id.* (listing states and local governments with meager restrictions on the tax lien process, like capping legal fees that third-party purchasers can charge original property owner challengers to $1,500).

[60] *Id.*

[61] *See* ERICKSON ET AL., *supra* note 40 (discussing the bills North Dakota and Montana passed to protect homeowners from losing their equity in the tax lien process); *id.* (explaining how one individual underpaid his Michigan 2011 property taxes by $8.41 and was foreclosed on without notice).

[62] *See* Roxana Hegeman, *Black Neighborhoods in Kansas Hard Hit by Property Tax Sales*, ABC NEWS (Apr. 24, 2021), https://abcnews.go.com/US/wireStory/black-neighborhoods-kansas-hard-hit-property-tax-sales-77286739 (reporting on a black family that lost their home because they could no longer pay their property taxes after losing their job during the pandemic); Andy Barrand, *Tax Sale Features 162 Different Properties*, STAR (Oct. 21, 2021), https://www.kpcnews.com/thestar/article_d50a8719-a349-5269-90b7-6b41b1692587.html (describing the properties that will sell at the Dekalb County, Indiana tax sale in 2021, as well as the $403,359 resulting from 2020's sale).

[63] *See* Hegeman, *supra* note 62 (detailing how one Kansas county with one of the highest BIPOC percentages in the state and 21% poverty rate has substantially more tax sale properties every year than the rest of the state); *see also* CAROL PARK & DAVID J. DEERSON, LOOKING UP: ENDING HOME EQUITY IN THE NORTH STAR STATE, PAC. LEGAL FOUND. (2021) (detailing how a 92 year-old woman in Minnesota lost her home, with $90,000 of equity in it, over roughly $2,000 in delinquent property taxes, which the county then sold for $43,000 and kept the profit).

property taxes, much less pay for legal representation, so relevant case law on the topic is sparse.

II. COURTS HAVE INCONSISTENT TAX SALE JURISPRUDENCE

Courts incorrectly interpret the Supreme Court's only relevant case that challenged a state's tax lien process for violating the Takings Clause.[64] *Nelson v. City of New York* held that original property owners could not receive surplus proceeds because they had not formerly requested surplus proceeds within a reasonable time.[65] Courts incorrectly interpret *Nelson* to wholly preclude takings claims from the tax sale process, unless a statute provides original property owners a recognized interest in the surplus.[66] Other courts noticed the error and correctly interpreted *Nelson* in recent years, which led to challenging the constitutionality of its respective state's tax sale process.[67] Specifically, in *Rafaeli, LLC v. Oakland County*, the Michigan Supreme Court found a common law right to surplus in Michigan's tax sale process.[68]

A. Courts Incorrectly Analyzed Nelson *To Foreclose Unconstitutional Takings Arguments for Disputed Tax Sales*

State and lower federal courts used *Nelson v. City of New York* as the touchstone case for the tax sale process because they misinterpreted *Nelson's* range of applicability. Despite the tax sale process being in front of the Court on multiple occasions, *Nelson* is the only time the tax sale's Fifth Amendment constitutionality was at issue.[69] *Nelson* is the only Supreme Court case that calls for surplus proceeds through an unconstitutional takings claim stemming from the

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[64] *Infra* Part III.A.
[65] Nelson v. City of New York, 352 U.S. 103, 110 (1956).
[66] *Infra* Part III.A.
[67] *Infra* Part III.B.
[68] 505 Mich. 429, 460 (Mich. 2020).
[69] *See* Bridge v. Phoenix Bond & Indem. Co., 553 U.S. 639, 641–42 (2008) (analyzing a civil RICO claim that arose from fraudulent tax lien bidding); Jones v. Flowers, 547 U.S. 220, 223–25 (2006) (examining the constitutionality of the notice provided in a tax lien sale).

tax sale process.[70] New York City took Nelson's property for a delinquent $65 water bill and sold the property for $7,000.[71] When Nelson found out about the sale four years later, they wanted to collect the resulting surplus from the tax sale, which the statute made available to them.[72] The precise issue was whether the Fifth Amendment's Taking Clause can circumvent the statutory requirement for a timely filing to receive surplus proceeds.[73] The Court held the Takings Clause did not permit Nelson to receive surplus proceeds, because they failed to timely exercise that statutory right.[74] Courts often cite to the holding, but not the explanation that narrowed *Nelson*'s precedent.

Since *Nelson* barred surplus under the Fifth Amendment, courts misinterpret *Nelson* to bar any surplus recovery when no statute first provides the right.[75] A few key cases highlight the *Nelson* misrepresentation, and how it built precedent in both federal and state courts completely precluding a Fifth Amendment Takings Clause argument in tax sale cases: *Balthazar v. Mari, Ltd.*, *Auburn v. Mandarelli*, and *Ritter v. Ross*.[76] In *Balthazar v. Mari, Ltd*., the court cited *Nelson* to dismiss the takings argument, and explained that the only constitutional guarantee granted to Balthazar was notice and a

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[70] *See Nelson*, 352 U.S. at 109–10 (distinguishing the other previous tax sale surplus cases from *Nelson* because *Nelson* provided means to get surplus) (citing United States v. Lawton, 110 U.S. 146, 150 (1884); United States v. Taylor, 104 U.S. 216, 222 (1881)).

[71] *See Nelson*, 352 U.S. at 105–06.

[72] *See id.* at 108 (describing the circumstances in which the Nelsons failed to get their bill, including their bookkeeper deliberately hiding the bill from them out of spite).

[73] *Id.* at 110.

[74] *Id.*

[75] Despite the lengthy precedent in some jurisdictions on *Nelson*, courts today are still relying on it to preclude takings claims in the tax sale process. *See* Tyler v. Hennepin Cnty., 505 F. Supp. 3d 879, 891 (D. Minn. 2020).

[76] *See* Auburn v. Mandarelli, 320 A.2d 22, 31 (Me. 1974) (referring to *Balthazar* to draw similarities in calling the city's windfall as acceptable exercise of government power); Ritter v. Ross, 207 Wis. 2d 476, 486 n.7 (Wis. App. Ct. 1996) (citing *Auburn* and *Balthazar* to support holding); Reinmiller v. Marion Cnty., 2006 U.S. Dist. LEXIS 75597 *1, *12 n. 8 (D. Or. 2006) (using *Auburn* and *Balthazar*'s denial of cert to the United States Supreme Court to justify an endorsement of both cases conclusions).

public auction for delinquent taxes.[77] The court held that the defendant's windfall of all "'surplus value' which exceeds the land's tax and interest liabilities" was justifiable when people are delinquent on their property taxes.[78] The court further suggested that Illinois offered a two-year redemption period for property owners who cannot pay their delinquent taxes, so they could sell their land and use the proceeds to balance their debt.[79] The court concluded delinquent land owners selling their property to satisfy their tax debts was a normal remedy because forced foreclosure on tax liens are "often sold for substantially less than it's apparent market value."[80] Despite courts reliance on *Balthazar* to preclude takings arguments, the court only directly addressed the takings claim in a footnote that classified the transfer of land as a tax payment, thus not a taking.[81]

The Maine Supreme Judicial Court concluded in *Auburn v. Mandarelli* that *Nelson* prohibited surplus recovery, unless a statute conveyed that right to the original property owner.[82] There, Samuel Mandarelli claimed an unconstitutional taking occurred because he did not receive any surplus proceeds.[83] The City of Auburn and Androscoggin County took his property for $399 in delinquent property taxes, but sold it for $13,520.[84] The court held that since no statute provided surplus rights, the original property owner had no viable takings claim.[85] The court concluded the loss suffered by the original home owner was just because he failed to comply with the law, but acknowledged the harshness of the statute and need for

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[77] Balthazar v. Mari, Ltd., 301 F. Supp. 103, 105 (N.D. Ill. 1969) (citing Nelson v. City of New York, 352 U.S. 103, 110 (1956)).
[78] *Id.*
[79] *See id.* at 106 ("Two years afford[s] property owners ample opportunity to raise enough money to redeem or canvass for prospective buyers . . . .").
[80] *Id.*
[81] *See id*. at 105 n.6 ("Rather than taking private property for a public purpose, Illinois is here collecting taxes which are admittedly overdue.").
[82] Auburn v. Mandarelli, 320 A.2d 22, 31 (Me. 1974) (citing Nelson v. New York, 352 U.S. 103, 105–06 (1956)).
[83] *Id.* at 25.
[84] *Id.* at 24–25.
[85] *Id*. at 32.

legislative reform.[86] The court in *Auburn* and *Balthazar* draw from the same line of reasoning: *Nelson* barred any claim to surplus if no statute gave this right to the claimant.

The Wisconsin Court of Appeals saw no merit in a takings argument for a tax sale case when there was no statutory right to surplus.[87] The court cited *Nelson* to preclude any claims for surplus.[88] Relying on *Balthazar* and *Auburn*, the court refused to stop the county from transferring property to a third-party purchaser for $17,345, when the original owners only owed $84.43 after paying government over $500 in back taxes.[89] The court's reasoning aligned with the incorrect interpretation of *Nelson*: the original property owner does not have a right to the surplus if there is no statutory right established.[90] The court held there were no statutory surplus rights, but that the legislature could enact such rights at a later date.[91]

The interpretation that *Nelson* bars a right to surplus without a statute to prescribe such right is incorrect. *Balthazar*, *Auburn*, and *Ritter* are examples of tax sale cases that rely on that incorrect interpretation of *Nelson*.[92] However, the Supreme Court never addressed the constitutional right to surplus. Courts generally cite the same quote to preclude the takings argument: "We hold that nothing in the Federal Constitution prevents [denying surplus proceeds] were [sic] the record shows adequate steps were taken to notify the owners of the charges due and the foreclosure proceedings."[93] But courts fail

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[86] *See id.* ("Amelioration of the oppressiveness of this statute must be made."); *see also id.* at 32 ("Thus, upon expiration of the period of redemption the defendant lost all rights which he might otherwise have had in the property.").
[87] Ritter v. Ross, 207 Wis. 2d. 476, 480 (Wis. App. Ct. 1996).
[88] *See id.* at 485 (citing Nelson v. City of New York, 352 U.S. 103, 105–06 (1956) ("[T]he United States Supreme Court rejected a claim under the Takings Clause when the municipality sold the plaintiff's property for $7000—to satisfy a $65 tax delinquency—and retained the proceeds.").
[89] *See id.* at 478 (relying on other cases precluding surplus to original owners because no statute conferred such right).
[90] *See id.* at 486 ("Thus, when a state's constitution and tax codes are silent as to the distribution of excess proceeds received in a tax sale, the municipality may constitutionally retain them").
[91] *Id.* at 487.
[92] *Infra* Part III.A.
[93] Nelson v. City of New York, 352 U.S. 103, 110 (1956).

to include the sentence directly before, which constricts the holding's applicability: "What the City of New York has done is to foreclose real property for charges four years delinquent and, *in the absence of timely action to redeem or to recover any surplus,* retain the property or the entire proceeds of its sale."[94] The Supreme Court's holding stopped a party from usurping a statutory time limitation through a Takings Clause argument.[95] The Court does not address whether a property owner has a vested property right to surplus proceeds under the Fifth Amendment. The Supreme Court only analyzed a person's statutory rights to surplus under the New York law. Therefore, courts reliance on *Nelson* is erroneous, because the Supreme Court has yet to answer whether property owners have a constitutional right to surplus in tax sales.

B. State Courts Identified Surplus Rights in State Constitutions' Takings Clauses

State courts have identified surplus rights arising from the tax sale process through their respective state constitutions.[96] The Supreme Court never addressed the validity of the original property owner's constitutional claim to surplus proceeds from a property tax sale.[97] Yet, some state courts refuted the misinterpretation of *Nelson* by holding the state's Takings Clause covers the tax sale process's surplus.[98] Courts that identified surplus rights distinguished from *Nelson* and exemplified where past courts mistakenly relied on *Nelson*.[99] The most recent identification of surplus rights came from

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[94] *Id.* (emphasis added).
[95] *Id.*
[96] *See* Rafaeli, LLC v. Oakland Cnty., 952 N.W.2d 434, 457 (Mich. 2020) (establishing surplus rights through common-law origins); Thomas Tool Serv., Inc. v. Croydon, 761 A.2d 439, 441 (N.H. 2000) (holding the tax lien process violated the Fifth Amendment and New Hampshire State Constitution); Bogie v. Barnet, 129 Vt. 46, 49, 270 A.2d 898, 900 (Vt. 1970) (finding the Vermont Constitution enlisted rights to surplus).
[97] *Infra* Part III.A.
[98] *See* cases cited *supra* note 96.
[99] *See* Coleman v. District of Columbia, 70 F. Supp. 3d 58, 77 (D.D.C. 2014) (correcting the government's reliance on *Nelson* by properly parsing *Nelson*'s narrow holding).

the Michigan Supreme Court's holding in *Rafaeli*, *LLC v. Oakland County,* when the court ruled that common law principles established the original property owner's right to surplus in the Michigan Constitution's Takings Clause.[100]

Bogie v. Barnet and *Thomas Tool Services, Inc. v. Croydon* are two state court cases that established their respective state constitution provided original property owners with rights to surplus.[101] While both cases relied on the state constitution to support holdings favoring surplus rights, each came to different conclusions on how their state constitution provided surplus rights. The court in *Bogie* held that the original property owner had a right to surplus under the Vermont Constitution's Takings Clause, thus the government can only take property amounting to taxes due.[102] The court reasoned that the objective of the state's tax sale "is to recover taxes and costs incurred in the process of collection, not operate a real estate business for profit."[103]

Thomas Tool Services, Inc. v. Croydon held the tax lien statute was unconstitutional under the New Hampshire Constitution because there was no statutory avenue to recover surplus.[104] The New Hampshire Supreme Court's decision pointed out the original property owner lost their $65,000 property, for $370.26 in delinquent property taxes, which was "an unduly harsh" loss of surplus.[105] The court reached this conclusion by implying that surplus should subtract the what the original property owner's paid for the property minus the tax lien.[106] The court declared the tax lien statute unconstitutional because

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[100] *Rafaeli, LLC*, 952 N.W.2d at 460.
[101] *Bogie*, 129 Vt. at 49, 270 A.2d at 900; *Thomas Tool Services, Inc.*, 761 A.2d at 441.
[102] *See Bogie*, 129 Vt. at 50, 270 A.2d at 900 (analogizing Vermont's Constitution with *United States v. Lawton* by holding both preclude the government to profit from taking property in pursuit to recover delinquent taxes).
[103] *Id*.
[104] *Thomas Tool Serv., Inc.*, 761 A.2d at 441.
[105] *Id.*
[106] *See id.* (deciding the "unduly harsh punishment" arose from the difference in the $65,000 the plaintiff paid, and the $370.26 the defendant paid for the same property).

the statute does not provide for a " taking of taxable property *only* to the extent of the lien."[107]

The Michigan Supreme Court held that common law principles of taxation established vested property rights in surplus proceeds, thus invoking the State's Takings Clause for the tax deed process.[108] In *Rafaeli, LLC v. Oakland County*, the court ruled Michigan's tax deed process unconstitutional because the government retained the surplus without providing just compensation.[109] Both petitioners lost their property for a tax debt substantially lower than the value the government sold the property for at the tax deed auction.[110] The court's holding specifically relied on the common law principle that taxpayers should only pay taxes owed, not anything more.[111] The court held that since common law established a constitutionally protected right in surplus proceeds, the Michigan statute was unconstitutional without just compensation of the surplus proceeds.[112] The court concluded by declaring the statute was unconstitutional by withholding original property owners' last bit of equity they own in their house.[113]

III. TAKING PROPERTY FOR DELINQUENT TAXES SHOULD BE A TAKING, BUT COURTS CLASSIFY IT AS PER SE PAYMENT FOR DELINQUENCY INSTEAD

Courts should treat the government's taking of real property as an exercise of the eminent domain powers, yet courts attribute taking land for delinquent property taxes as an exercise of the taxing power. The Fifth Amendment requires local governments to pay just

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[107] *Id.* (citing First NH Bank v. Town of Windham, 138 N.H. 319, 332 (1994) (Horton, J., concurring)) (emphasis added).
[108] Rafaeli, LLC v. Oakland Cnty., 952 N.W.2d 434, 460 (Mich. 2020).
[109] *Id.* at 461.
[110] *See id.* at 440 (comparing one petitioner's outstanding debt of $8.41, and growing to $285.81, to the government's selling price at auction for $24,500 and comparing the other petitioner's approximate final tax bill equaling $6,000 to government's selling price of $82,000).
[111] *Id.* at 463–64.
[112] *Id.* at 455, 466.
[113] *See id.* at 466 ("[J]ust compensation requires the foreclosing governmental unit to return any proceeds from the tax-foreclosure sale in excess of the delinquent taxes . . . .").

compensation when it takes a person's property.[114] Specifically, the Fifth Amendment provides: "[N]or shall private property be taken for public use, without just compensation."[115] The government can exercise its eminent domain-taking powers by meeting two requirements: the taking is for public use and the government provides just compensation.[116] Collecting taxes to fund municipalities is likely a valid public use.[117] However, taking property that has a far greater value than the taxes owed subsequently creates equity instability without just compensation.[118] Since the government does not provide just compensation when it takes property for delinquent taxes, but generally sells taken property for a profit, it should be an unconstitutional taking under the Fifth Amendment.[119] Nevertheless, courts deny Takings Clause arguments and ascribe the loss to a proper exercise of the taxing power.[120] Equating taking real property for delinquent property taxes to a taxing power exercise essentially makes the real property per se payment for the debt.[121]

A. The Tax Lien Process Provides a Simple Takings Claim for the Original Property Owner

The Fifth Amendment allows the government to use its eminent domain powers if it takes property for (1) a public purpose and (2) provides just compensation.[122] The purpose of the Takings

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[114] U.S. CONST. amend. V.
[115] *Id.*
[116] *Id.*
[117] *See* Carmichael v. S. Coal & Coke Co., 301 U.S. 495, 514 (1937) ("This Court has long and consistently recognized that the public purposes of the state, for which it may raise funds by taxation, embrace expenditures for its general welfare.").
[118] *See* United States v. Miller, 317 U.S. 369, 373 (1943) ("Such compensation means the full and perfect equivalent in money of the property taken.").
[119] *See* RAO, *supra* note 14, at 13 (clarifying that tax deed proceeds rarely go to the original property owner, and usually municipalities keep the profits).
[120] *See* Balthazar v. Mari Ltd., 301 F. Supp. 103, 105 n. 6 (N.D. Ill. 1969) (concluding the government was not taking property for a public purpose, rather collecting unpaid taxes).
[121] *See infra*, Part IV.C.
[122] U.S. CONST. amend. V; *see* Fallbrook Irrigation Dist. v. Bradley, 164 U.S. 112,

Clause is to "bar Government from forcing some people alone to bear public burdens which, in all fairness, should be borne by the public as a whole."[123] While an unconstitutional taking can assume many forms, taking one's real property, such as their home, is a classic example.[124] When determining the public purpose validity in a taking, the Supreme Court often defers to state legislatures to determine what the public needs, thus affording a wide latitude to the legislature.[125] Determining just compensation is more straightforward: "compensation must generally consist of the total value of property when taken . . . ."[126] The tax deed process exemplifies a taking since the government transfers property from a private owner to itself without just compensation.[127]

Taking someone's property for delinquent property taxes is likely a public purpose because local governments use the tax sale process to maintain their budget in lieu of timely paid taxes.[128] Local legislatures enact tax sale laws for two reasons: to maintain revenue for important community services and programs, and to incentivize timely property tax payments.[129] The judiciary's role in determining the "public purpose" of a taking is extremely narrow.[130] Within that role, courts defer to the legislature unless the public purpose is irrational, thus setting a high threshold to overturn a taking based on

158, 161, 164 (1896) (broadening the Fifth Amendment's "public use" standard to a "public purpose" standard).

[123] Ark. Game & Fish Comm'n v. United States, 568 U.S. 23, 31 (2012) (citing Armstrong v. United States, 364 U.S. 40, 49 (1960)).

[124] Horne v. Dep't of Agric., 576 U.S. 351, 357–58 (2015); *see also* Knick v. Twp. of Scott, 139 S. Ct. 2162, 2176 (2019) ("The framers meant to prohibit the . . . government from taking property without paying for it.").

[125] Kelo v. City of New London, 545 U.S. 469, 480 (2005).

[126] *Knick*, 139 S. Ct. at 2170.

[127] *See* RAO *supra* note 14, at 13 (highlighting the government's role in transferring property and selling the deed to third-party purchasers).

[128] *See* Balthazar v. Mari Ltd., 301 F. Supp. 103, 105 n.6 ("Rather than taking private property . . . Illinois is here collecting taxes which are admittedly overdue."); *see also* Smith v. SIPI, LLC, 811 F.3d 228, 235 (7th Cir. 2016) (weighing the state's "vital interest in collecting delinquent" taxes as justifying distinction from normal tax delinquency laws to support the state's need for the tax lien system).

[129] *NTLA Response*, *supra* note 25, at 4.

[130] Berman v. Parker, 348 U.S. 26, 32 (1954).

failure to provide a valid public purpose.[131] Since legislatures enacted these laws for the rational reason of retrieving unpaid taxes, it is likely a valid public purpose.[132]

Since there is likely an acceptable public purpose, the government's land grab is a clear example of a taking that requires just compensation.[133] The general standard for just compensation is the fair market value of property.[134] Yet, original property owners rarely receive *any* payment when the government transfers their property to a third party.[135] Instead, local governments take property with no compensation and transfer it to whichever third party bid the most, which is usually a fraction of the property's fair market value.[136] If just compensation "must generally consist of the total value of property,"[137] then many original property owners deserve just compensation for the difference between taxes due and total value of property.[138] The property owner suffers from the stark difference in

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[131] *See* Haw. Hous. Auth. v. Midkiff, 467 U.S. 229, 244 (1984) ("Thus if a legislature . . . determines there are substantial reasons for an exercise of the taking power, courts must defer to its determination that the taking will serve a public purpose.").

[132] *See id.* at 243–44 ("The mere fact that property taken outright by eminent domain is transferred in the first instance to private beneficiaries does not condemn that taking as having only a private purpose.").

[133] Rafaeli, LLC v. Oakland Cnty., 952 N.W.2d 434, 450 (Mich. 2020).

[134] Olson v. United States, 292 U.S. 246, 256–57 (1934).

[135] RAO, *supra* note 14, at 13.

[136] *See id.* at 8 ("The structure of tax lien sales also makes it far more likely that a homeowner will suffer a devastating loss of home equity . . . ."); RM & DB, LLC v. Stewart, 2015 MT 327, 328, 381 Mont. 429, 362 P.3d 61, 67 ("Until the tax deed is issued, the tax sale procedure is essentially nothing more than a tax collection device.") (quoting 5 RICHARD R. POWELL, POWELL ON REAL PROPERTY § 39.04 (Michael Allen Wolf ed., 2015)).

[137] Knick v. Twp. of Scott, 139 S. Ct. 2162, 2170 (2019).

[138] *See* Tallage LLC v. Meaney, No. 11TL143094, 2015 WL 4207424, at *12 (Mass. Land Ct. June 26, 2015) (confirming Tallage's $1,052.84 payment as valid exercise of tax lien statute to acquire property with a fair market value of $270,000); Joe Duggan, *'Legal Ripoff'? Nebraska Makes it Easier for Investors to Take Farms, Homes for Unpaid Taxes*, OMAHA WORLD-HERALD (Nov. 17, 2018), https://omaha.com/state-and-regional/legal-ripoff-nebraska-makes-it-easier-for-investors-to-take-farms-homes-for-unpaid-taxes/article_00777ae3-f354-5172-8a8d-629c7614be29.html (documenting a farmer who lost $60,000 in acreage and his

equity when the government takes their home to balance delinquent property taxes valued substantially less than its market value and gave them nothing in return.

B. Local Governments Use Their Taxing Power To Remedy Delinquent Taxes, Which Precludes a Takings Clause Argument

The tax-sale process is an exercise of the local government's taxing power—which shields it from any unconstitutional takings claims for real property.[139] This confusing distinction in tax-sale cases surfaces when original property owners challenge the government's taking of their homes.[140] Courts justify denying recovery in tax-sale cases by classifying the government's taking of real property as a payment for delinquent taxes.[141] Essentially, this distinction raises the standard from proving a taking occurred, to requiring the original property owners to prove the tax is irrational.[142] This distinction creates a higher burden of proof for original property owners to

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home for $500 in delinquent tax payments); Fred Schulte, *Wall Street Quietly Creates a New Way To Profit from Homeowner Distress*, CTR. FOR PUB. INTEGRITY (Dec. 9, 2010), https://publicintegrity.org/inequality-poverty-opportunity/wall-street-quietly-creates-a-new-way-to-profit-from-homeowner-distress/ (chronicling the process of a Florida woman losing her $62,000 home over $768.25).

[139] *See* Bell's Gap R.R. Co. v. Pennsylvania, 134 U.S. 232, 239 (1890) (distinguishing taxation and takings by explaining taxing has less restrictions than other government powers like eminent domain).

[140] *See* Speed v. Mills, 919 F. Supp. 2d 122, 129 (D.D.C. 2013) ("However, while the tax sale deprived Mills of title to a portion of property that was lawfully his, it cannot be a 'taking' under the Fifth Amendment. The [taking] took place pursuant to the District's taxing power . . . .").

[141] *See* Indus. Bank of Washington v. Sheve, 307 F. Supp. 98, 99 (D.D.C. 1969) (concluding tax sales do not require just compensation because they are not products of government takings); Sol-G Constr. Corp. v. United States, 231 Ct. Cl. 846, 850 (Ct. Cl. 1982) (classifying original property owner's loss of property as a consequence of legal government action to recover delinquent taxes); Golden v. Mercer Cnty. Tax Bureau, 190 B.R. 52, 57 (Bankr. W.D. Pa. 1995) (specifying true purpose of taking someone's property for delinquent property taxes is to collect taxes).

[142] *See* Miller v. Standard Nut Margarine Co., 284 U.S. 498, 509 (1932) (requiring irrational basis for tax to overturn it).

overcome, since the taxing power gives local governments a broader range of powers than the eminent domain powers.[143]

The taxing power distinction thus classifies taking someone's home for delinquent property taxes as per se payment since courts equate tax sales to a form of tax collection.[144] The government's taxing power provides a range of actions to raise funds through taxation.[145] Governments receive a wide range of "enforcement tools available . . . for the collection of delinquent taxes," including the right to take any real property.[146] Legislatures use a "formidable arsenal of collection tools" to ensure timely tax payments.[147] One of these formidable collection tools is taking someone's property and selling it.[148] Since taking someone's house for delinquent taxes becomes a form of tax collection, the taxing power gives a government priority to collect funds and remedy mistakes later.[149] The government's taxing

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[143] *See* Leigh v. Green, 193 U.S. 79, 89 (190) ("The state has a right to adopt its own method of collecting taxes, which can only be interfered with . . . when necessary for the protection of rights guaranteed by the Federal Constitution."); Ky. Union Co. v. Kentucky, 219 U.S. 140, 151 (1911) ("The State is left to choose its own methods of taxation and its form and manner of enforcing the payment of the public revenues, subject . . . to the restricting regulations of the Constitution of the United States").

[144] *See* Wright v. Pappas, 256 F.3d 635, 637 (7th Cir. 2001) (citing Simon v. Cebrick, 53 F.3d 17, 22 (3rd Cir. 1995); Dawson v. Childs, 665 F.2d 705, 710 (5th Cir. 1982) (holding a lien sale is a mode of tax collection); *see also* Balthazar v. Mari Ltd., 301 F. Supp. 103, 105 n. 6 (N.D. Ill. 1969) ("Rather than taking private property for a public purpose, Illinois is here collecting taxes which are admittedly overdue."); Speed v. Mills, 919 F. Supp. 2d 122, 129 (D.D.C. 2013) (establishing taxing power as source for government to take someone's property for delinquent property taxes as means to pay off delinquency).

[145] *See* License Tax Cases, 72 U.S. 462, 471 (1867) ("It is true that the power of Congress to tax is a very extensive power.").

[146] *See* United States v. Rodgers, 461 U.S. 677, 682 (1983) (recalling the "usual right" remedy for delinquent property taxes have always been taking property and selling it); *see also* Poindexter, *supra* note 26, at 280 (attributing the rise in property tax collection compliance from 78% to 94% to instituting a sale of tax liens to the private sector).

[147] *Rodgers*, 461 U.S. at 683.

[148] *NTLA Response*, *supra* note 25, at 3.

[149] *See* McKesson Corp. v. Div. of Alcoholic Bevs. & Tobacco, 496 U.S. 18, 37 (1990) (articulating the government's "exceedingly strong interest in financial stability" requiring "timely payments prior to the resolution of any dispute over the

power prevents the original property owner from recovering under the Takings Clause and the original property owner lacks the means to prove the entire tax is irrational, so they lose their home for pennies on the dollar.[150] However, the original property owner only loses the interest in their real property, they do not lose all interest in their property rights "bundle of sticks."

IV. COMMON LAW REQUIRES LOCAL GOVERNMENTS TO PAY SURPLUS PROCEEDS

Original property owners have a recognized right to surplus through the common law, so the government cannot take surplus without providing just compensation. Early American Colonists used English common law principles to build the legal foundations of our country.[151] Common law influences courts in determining the breadth of property rights, or rephrased, what sticks are in a property owner's bundle.[152] Common law principles and contemporaneous jurisprudence acknowledge that taxpayers should pay their taxes, but should not pay in excess of those taxes.[153] Since courts interpret taking property for delinquent property taxes as per se payment,[154] then surplus proceeds represent the original property owner's excess tax payment.[155] The government's taxing power is not an absolute power that permits keeping excess tax payments.[156] Therefore, when the

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validity of the tax assessment"); Hibbs v. Winn, 542 U.S. 88, 104 (2004) (enunciating the purpose of the Tax Injunction Act was to prevent taxpayers from disrupting state government finances by withholding large sums of money).

[150] Miller v. Standard Nut Margarine Co., 284 U.S. 498, 509 (1932) (citing Dows v. Chicago, 78 U.S. 108 (1871)); State Railroad Tax Cases, 92 U.S. 575, 614 (1875).

[151] Horne v. Dep't of Agric., 576 U.S. 351, 358 (2015) (noting that Magna Carta principles provided the foundation for future common law principles).

[152] *Infra* Part V.A; *see Bundle of Property Rights*, N.D. ST. UNI. AG. L. & MGMT. (last visited May 1, 2022), https://www.ag.ndsu.edu/aglawandmanagement/appliedaglaw/graphics/bundle1 ("Property rights have been described as a bundle of sticks wherein each stick represents a different property right.").

[153] *See infra* Part V.B.

[154] *See supra* Part IV.B.

[155] *See infra* Part V.B.

[156] *See* Segarra, *infra* note 171.

government retains this excess payment, it is withholding the taxpayer's property and it is an unconstitutional taking.[157]

A. Common Law Established a Property Interest in the Surplus Arising from Tax Collection

English common law recognized that tax collectors could only seize enough property to satisfy the debt payable to the Crown.[158] The Magna Carta limited tax collectors to only take property for taxes due, and identified surplus as a protected property right.[159] This protection arose when tax collectors seized property to pay a decedent's debt, but refused to give any excess proceeds to decedent's heirs.[160] Clause 26 of the Magna Carta required that the property seized should approximately equal the debt.[161] Common law declared that the delinquent decedent's family receive all excess from the sale that satisfied their debt.[162] This principle should apply to property taxes as well, because using property for per se payment should not allow local governments to take in excess of what a taxpayer owes.[163]

Courts and legislatures use the common law to guide their decisions, which can lead to a legislature's adoption or refusal of common law principles in the form of statute.[164] The Constitution does not create property interests; it protects property interests "that stem

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[157] *See infra* Part V.B.
[158] Rafaeli, LLC v. Oakland Cnty., 952 N.W.2d 434, 454–55 (Mich. 2020).
[159] Vincent R. Johnson, *The Ancient Magna Carta and the Modern Rule of Law: 1215 to 2015*, 47 ST. MARY'S L.J. 1, 47 (2015).
[160] *Id.*
[161] *Id.*
[162] Martin v. Snowden, 59 Va. 100, 136 (Va. 1868); *see* 2 WILLIAM BLACKSTONE, COMMENTARIES *452 (referring to the process of collecting delinquent taxes by the crown as "an implied contract in law" to either return property after payment of debt or use surplus to satisfy other debts).
[163] *See Rafaeli, LLC*, 952 N.W.2d at 454–55 (summarizing the common law property interest in tax surplus resulting from sale of property for delinquent payment).
[164] *See* Munn v. Illinois, 94 U.S. 113, 134 (1876) (describing the process to override common law principles is simply writing legislation proscribing the opposite); Horne v. Dept. of Agric. 576 U.S. 351, 358 (2015) (recalling how the colonists used the Magna Carta's principles to shape colonist statutes and build the foundation of our legal system today).

from an independent source such as state law."[165] Common law provides the government with an independent source of judicially recognized property rights when no statute provides such guidance.[166] Courts recognize adopted common law property rights, unless there is a statute that overrides it.[167] There is no statute barring surplus recovery, so courts should allow original property owners to collect any money in excess of their delinquent property taxes, unless the legislature enacts a statute to bar such recovery.[168]

Additionally, the adoption of surplus rights is commonplace in tax law,[169] and courts recognize the different avenues for taxes refunds.[170] This adoption is so common that the government provides surpluses for overpayment of taxes every spring—which every American recognizes as a tax refund.[171] This principle stretches beyond any single tax.[172] Even in regards to taking property, the federal

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[165] Bd. of Regents v. Roth, 408 U.S. 564, 577 (1972).

[166] *See Horne*, 576 U.S. at 358 (chronicling the adoption of Magna Carta principles throughout American History and how courts interpret them similarly today).

[167] *See* Pruneyard Shopping Ctr. v. Robins, 447 U.S. 74, 92–93 (1980) (citing *Munn*, 94 U.S. at 134) (emphasizing that the whole point of legislation is to amend the errors of common law).

[168] *See supra* Part III.A (listing court holdings that barred surplus recovery because there was no statute granting the right).

[169] *See* 26 C.F.R. § 514.9 (2020) (permitting surplus refunds to taxpayers that paid excess in federal taxes during the years of 1952–56); OR. REV. STAT. § 305.270(1) (2021) (providing a procedure for Oregon taxpayers to recover if they overpaid on certain state taxes); STATE OF MICH. DEP'T OF TREASURY, CREDIT OR REFUND OF OVERPAYMENT OF TAXES OR CREDITS IN EXCESS OF TAX DUE AND APPLICABLE INTEREST (1996) (notifying taxpayers of recent court case that changed the procedure for filing for tax refund).

[170] *See* Comm'r v. Lundy, 516 U.S. 235, 242 (1996) (discussing the limitations of "look-back periods" for tax refunds to taxpayers); Graham v. Du Pont, 262 U.S. 234, 256 (1923) (relying on § 252 of the Revenue Act of 1918 to illustrate plaintiff's attempt to capture surplus from taxes related to stocks).

[171] *See* Marielle Segarra, *The History—and Psychology—Behind the Tax Refund*, MARKETPLACE (Feb. 20, 2019), https://www.marketplace.org/2019/02/20/history-and-psychology-behind-tax-refund/ (chronicling the history of the tax refund since its genesis in the 1940's because of an over-expansion of income tax).

[172] *See* Strategic Hous. Fin. Corp. v. United States, 86 Fed. Cl. 518, 523 (2009) (addressing arbitrage tax refunds); Pittston Co. v. United States, 199 F.3d 694, 699, 706 (4th Cir. 1999) (allowing party to collect refund for premium taxes under the

government allows for debtors' redress in bankruptcy law if property transfers for "less than 'reasonably equivalent value.'".'"[173] Courts often decide cases in terms of *how much* time Americans have available to get their refund.[174] This was the very issue in *Nelson,* which remains the only Supreme Court case addressing the Takings Clause in a tax sale proceeding.[175] All these examples of collecting taxes for only the amount owed represent the adoption of the same principles in the Magna Carta: the government can only collect taxes owed and nothing more.[176]

Without a statute advising otherwise, governments have no right to keep excess surplus proceeds after satisfying the original property owner's delinquent property tax debt.[177] Essentially, the taxpayer gives up their property to satisfy delinquent taxes, the taxpayer does not give up their property to increase local government funding.[178] Courts recognize that taxpayers should have avenues to collect surplus tax payments from the government.[179] Forcing people

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Coal Act); U.S. Shoe Corp. v. United States, 296 F.3d 1378, 1382 (Fed. Cir. 2002) (limiting interest provision on refunds from the Harbor Maintenance Tax).

[173] Smith v. SIPI, LLC, 811 F.3d 228, 234 (7th Cir. 2016) (citing 11 U.S.C. § 548(a)(1)(B)).

[174] *See* Georgeff v. United States, 67 Fed. Cl. 598, 603 (Fed. Cl. 2005) (providing the general rule courts identify for refund tax claim submission) (emphasis added); Haller v. Comm'r, 181 T.C.M. (CCH) LEXIS *1, *13 (2010) (analyzing the requirements of refund filing extensions for mental and physical disabilities).

[175] *See supra* Part II.A.

[176] *See supra* text accompanying notes 148–51.

[177] *See* Rafaeli, LLC v. Oakland Cnty., 952 N.W.2d 434, 439 (Mich. 2020) (calculating surplus as $24,500, the sale price at the tax auction, minus the delinquent taxes as $285.81, equaling the government getting a $24, 214.19 surplus profit); *see also* Nelson v. City of New York, 352 U.S. 103, 106 (1956) (barring recovery because claim fell outside the prescribed statute of limitations); United States v. Lawton, 110 U.S. 146, 146–51 (1884) (allowing the original property owner to recover the $929.50 surplus that the government held, because a statute barred the government from keeping excess payments).

[178] *See Rafaeli, LLC*, 952 N.W.2d. at 472 (putting surplus proceeds into the county's general fund is a taking).

[179] *See* Borenstein v. Comm'r, 919 F.3d 746, 751 (2d Cir. 2019) (interpreting 26 U.S.C. § 6512(b)(3) as expanding the tax court's jurisdiction to provide taxpayers with refunds); Strategic Hous. Fin. Corp. v. United States, 86 Fed. Cl. 518, 523 (2009) (detailing the process for tax refunds when a party overpays taxes due in

to pay in excess of taxes owed conflicts with the very purpose of collecting one's property to balance the local government's revenue loss.[180] Therefore, since courts acknowledge the principle of returning tax surplus, property owners have a valid property interest in surplus where no statute bars them from this common law right. [181]

B. Surplus Property Rights Are Separate from the Real Property Taken

As a threshold issue, surplus proceeds arising from property sold to satisfy delinquent taxes is a separate property interest from the real property sold.[182] Precedent holds that taking property to satisfy delinquent property taxes is constitutional.[183] The government's purpose for taking property through the tax deed process is to supplement funding deficiencies caused by delinquent property taxes.[184] Since the tax sale satisfies the tax debts and dissolves the original property owner's interest in the real property, the original property owner's surplus interest is separate, so any surplus claim is outside the purview of the taxing power.[185] Because the surplus interest

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arbitrage rebate under 26 C.F.R. § 1.148-3); Fidlin v. Collison, 156 N.W.2d 53, 59 (Mich. 1967) (pronouncing the taking of $10,500 in private property to satisfy $629.32 jeopardy assessment tax as unlawful seizure).

[180] *See Rafaeli, LLC*, 952 N.W.2d at 475 (retaining surplus proceeds forces delinquent taxpayers to contribute to government revenues beyond their fair share); *see also* Armstrong v. United States, 364 U.S. 40, 49 (1960) (promoting the idea that individuals should not "alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole").

[181] *See Nelson*, 352 U.S. at 110 (holding that no statute precludes an owner from obtaining surplus proceeds).

[182] *See* Coleman v. District of Columbia, 70 F.Supp.3d 58, 69 (D.D.C. 2014) (differentiating between the house used as tax payment and subsequent surplus "indisputably not owed for taxes").

[183] *See supra* Part III.B.

[184] *See* Bogie v. Barnet, 129 Vt. 46, 49, 270 A.2d 898, 900 (Vt. 1970) (holding the government's sale of property for $5,314 of land foreclosed for $848.67 was in direct conflict with the purpose of collecting taxes).

[185] *See Coleman*, 70 F.Supp.3d at 68 (citing Wells v. Malloy, 510 F.2d 74 (2d Cir. 1975)) (comparing a challenge for surplus proceeds to other case law challenging the results of taxation, but not challenging the tax); *id.* at 68–69 (classifying challenge for surplus proceeds as separate from challenge to the act of taxation).

is separate from the taxing power of the government—unlike the analysis behind the taking of real property—a taking analysis applies.[186]

C. Retaining Surplus Proceeds from Original Property Owners Is an Unconstitutional Taking

Local governments retaining surplus from the land sold to satisfy delinquent property taxes violates the Takings Clause. Original property owners have a recognized property interest in keeping tax surplus, thus giving them a vested property right.[187] Original property owners balanced their debt with the government when it took their property.[188] The government sold the land to recoup delinquent taxes; the government did not sell the land to raise its revenue or turn a profit.[189] When the government keeps the excess sale money, the original property owner cannot receive excess tax payments. This is the very conflict that led to enacting Clause 26 of the Magna Carta and is an unconstitutional taking.[190]

A taking is only constitutionally valid if the taking was for a public purpose and the government provided just compensation.[191] The Court generally defers to the legislature that enacted the law to determine if it falls within the purview of public purpose.[192] The tax sale itself is likely for a public purpose.[193] Tax sale statutes are silent on surplus disbursement and fail to give any public purpose to justify keeping them. Despite courts generally giving deference to legislatures

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[186] *See* Rafaeli, LLC v. Oakland Cnty., 952 N.W.2d 434, 476 (Mich. 2020) (comparing the property interest in surplus proceeds to property owner's interest in personal property on land taken for delinquent taxes).
[187] *See supra* Part IV.A.
[188] *Supra* Part III.B.
[189] *See Bogie*, 129 Vt. at 49, 270 A.2d at 900 ("The objective [of the tax deed process] is to recover taxes and costs incurred in the process of collection, not operate a real estate business for profit.").
[190] *See supra* text accompanying notes 159–62.
[191] *Supra* Part III.A; *see* Kelo v. City of New London, 545 U.S. 469, 483 (2005) (recalling the Court has "afforded legislatures broad latitude in determining what public needs justify the use of the takings power" for over a century).
[192] *See supra* text accompanying note 131.
[193] *Supra* Part III.A.

on public purposes, legislatures still must provide a public purpose for the court to analyze.[194] Without providing a single possible public purpose, it is impossible for courts to determine whether this kind of taking is a valid exercise of the Takings Clause.[195]

Failure to provide the original property owner with surplus proceeds, or an equal sum of money, is a failure to provide just compensation. The original property owner has a vested interest in the surplus.[196] The government withholds their property by retaining the proceeds.[197] Just compensation generally requires market value of the property taken, which here is the amount of surplus proceeds.[198] Therefore, governments must pay original property owners the surplus from the tax deed sale, otherwise they violate the Fifth Amendment by not providing just compensation or providing public purpose.

V. THIRD-PARTY PURCHASERS ARE STATE-ACTORS THUS SUBJECT TO THE TAKINGS CLAUSE

Third-party purchasers should pay original property owners surplus proceeds. Normally, private parties are exempt from constitutional limitations; however, if third-party purchasers are state actors, then they are subject to liability.[199] There are two state-action tests that likely qualify third-party purchasers as government actors: the public function test and the entanglement test.[200] If third-party

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[194] *See* Cincinnati v. Vester, 281 U.S. 439, 447 (1930) ("[T]he municipality is called upon to specify definitely the purpose of the appropriation.").
[195] *See id.* (articulating that a city arguing it can take without a specific public purpose essentially creates a sweeping authority that makes the eminent domain power, or limit, moot).
[196] *Infra* Part V.A.
[197] *See* Rafaeli, LLC v. Oakland Cnty, 952 N.W.2d 434, 474–75 (Mich. 2020) ("Defendants' retention of those surplus proceeds . . . amounts to a taking of a vested property right requiring just compensation.").
[198] *See* Knick v. Twp. of Scott, 139 S. Ct. 2162, 2170 (2019) ("[C]ompensation must generally consist of the total value of property when taken . . . ."); *Rafaeli, LLC*, 952 N.W.2d at 482 ("the property 'taken' is the surplus proceeds from the tax foreclosure sale . . . . Therefore, plaintiffs are entitled to the value of the surplus proceeds.").
[199] *Infra* Part V.A.
[200] *Infra* Part V.A.

purchasers are state actors under either test, then original property owners have a right to surplus under the same legal principles as the government when third-party purchasers sell the original property owner's land for profit.[201] If there is no statute barring such recovery, third-party purchasers should pay surplus proceeds to the original property owners.

A. The State-Action Doctrine Applies to Third-Party Purchasers When Local Governments Deputize Them as Tax Collectors

The state-action doctrine holds private entities to the same standard as the government when they receive government-like benefits.[202] Essentially, the state-action doctrine applies when a private party engages in joint venture with the government, and the state authorized or encouraged the private entity to engage in regulatory activity exclusively and traditionally practiced by the government.[203] The purpose of the state-action doctrine is "to assure constitutional standards are invoked 'when it can be said the state is *responsible* for the specific conduct of which the plaintiff complains.'"[204] Three tests can determine a state actor: (1) whether a private entity is engaged in a public function; (2) if a private entity is overly "entangled" or "entwined" with the government; or (3) state-coercion test.[205] The state-coercion test likely does not apply here.[206] All three tests require a "fact-bound inquiry"[207] that requires "sifting through [the] facts and weighing circumstances"[208] to draw conclusions within the

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[201] *Infra* Part V.B.
[202] Manhattan Cmty. Access Corp. v. Halleck, 139 S. Ct. 1921, 1926 (2019).
[203] JOSEPH G. COOK & JOHN L. SOBIESKI, JR., 2 CIVIL RIGHTS ACTIONS ¶ 7.13[A].
[204] Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n., 531 U.S. 288, 295 (2001) (quoting Blum v. Yaretsky, 457 U.S. 991, 1004 (1982) (emphasis in original)).
[205] Gowri Ramachandran, *Private Institutions, Social Responsibility, and the State Action Doctrine*, 96 TEX. L. REV. ONLINE 63, 64–65 (2018).
[206] *See Manhattan Cmty. Access Corp*., 139 S. Ct. at 1928 (citing Blum v. Yaretsky, 457 U.S. 991, 1004 (1982)) (defining the state-coercion test as when the government compels a private company to act, which does not apply here with vast amount of power provided to third-party purchasers).
[207] Lugar v. Edmondson Oil Co., 457 U.S. 922, 939 (1982).
[208] Burton v. Wilmington Parking Auth., 365 U.S. 715, 722 (1961).

precedential goal posts of the state-action doctrine.[209] Third-party purchasers become state actors when local governments employ them as tax collectors.

1. Public Function Test

Third-party purchasers perform a duty exclusively and traditionally performed by the government when they collect taxes, even if those taxes are in the form of property as per se payment. The public function test classifies a private entity as a state actor if it performs a duty "traditionally and exclusively" reserved to the government.[210] In analyzing whether the private entity meets the requisite elements, the action must align with Supreme Court's public function test precedent.[211] There are "very few" functions that qualify as state-action since many state-action claims fail to meet the high threshold.[212] Under the public function test, running elections[213] and operating company towns are the only two activities that the Supreme Court found private parties to be state actors.[214]

Tax collection is a duty traditionally and exclusively performed by the government. Courts analyze the history of the duty in question when determining if that duty meet state action's high burden.[215] The

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[209] *See Brentwood Acad.*, 531 U.S. at 296 (using the examples in prior case law for the analysis, since prior examples are prominent in parsing through different factors); *see also Burton*, 365 U.S. at 722 (concluding that creating a precise formula for identifying state action is impossible).

[210] Jackson v. Metropolitan Edison Co., 419 U.S. 345, 352 (1974).

[211] *Manhattan Cmty. Access Corp.*, 139 S. Ct. at 1929.

[212] *See id.* (quoting Flagg Bros. Inc. v. Brooks, 436 U.S. 149, 158 (1978)) (illustrating the high burden necessary for a private entity to qualify as a public function); *see also Jackson*, 419 U.S. at 351–52 (finding an argument that the monopoly on electrical services constitute state-action as insufficient); Nat'l Collegiate Athletic Ass'n v. Tarkanian, 488 U.S. 179, 197 (1988) (concluding the suspension of a coach under national association does not qualify it as a state actor).

[213] Terry v. Adams, 345 U.S. 461, 468–69 (1953).

[214] Marsh v. Alabama, 326 U.S. 501, 505–09 (1946).

[215] *See Manhattan Cmty. Access Corp.*, 139 S. Ct. at 1929–30 (chronicling the short history of public access television to determine if it is a state action); *Terry*, 345 U.S. at 469 (looking through the history of voting and the Jaybird party to determine if

need for taxation appeared in nine of the Federalist Papers when Congress ratified the Constitution, including a near plenary taxing power.[216] Private tax collection is a relatively new practice, beginning in the late twentieth century.[217] The only prior time the government turned to private tax collection was for a tax collection experiment, which employed three men for private tax collection in 1872.[218] Congress repealed the failed program two years later after discovering fraudulent employee practices on a nationwide scale.[219] Congress concluded tax collection was a duty best performed by the government.[220] The federal government did not use private tax collection again until over 100 years later.[221] Since the government relies on itself for tax collection—and its few attempts at delegating to private entities concluded with a resounding repudiation of private tax collection—tax collection is a historically and exclusively performed government duty.

Flagg Bros., Inc. v. Brooks provided a blueprint for third-party taking analysis that could apply to the tax lien process. The Court addressed respondent's injunction claim to stop Flagg Bros. from

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the Jaybird's election practices constituted state action); *see, e.g.*, Evans v. Newton, 382 U.S. 296, 301 (1966) (documenting the history of a park and its impact on the community in deciding if the park's ownership constitutes state action).

[216] *Taxing Federalism*, TAXANALYSTS: TAX HIST. PROJ., http://www.taxhistory.org/www/website.nsf/Web/TaxingFederalism?OpenDocument (last visited May 2, 2022).

[217] Emily Rockwood, *Privatizing Tax Collection: A Case Study in the Outsourcing Debate*, 36 PUB. CONT. L.J. 423, 426 (2007).

[218] *Id.* at 425 (citing Joseph J. Thorndike, *Historical Perspective: The Unhappy History of Private Tax Collection*, TAX HIST. PROJ. (Sept. 20, 2004), http://www.taxhistory.org/thp/readings.nsf/cf7c9c870b600b9585256df80075b9dd/fd1f76a4af13135185256f17005d0a57?OpenDocument).

[219] *See* Joseph J. Thorndike, *Historical Perspective: The Unhappy History of Private Tax Collection*, TAX HIST. PROJ. (Sept. 20, 2004), http://www.taxhistory.org/thp/readings.nsf/cf7c9c870b600b9585256df80075b9dd/fd1f76a4af13135185256f17005d0a57?OpenDocument (chronicling John D. Sanborn's scheme of receiving payment from the federal government for falsely reporting delinquent taxes).

[220] *Id.*

[221] *See generally* Rockwood, *supra* note 217, at 425–26 (explaining that Congress discontinued private tax collection programs two years after authorizing them but has attempted to reinstate those programs in the last 26 years).

taking respondent's personal property for delinquent storage space fees.[222] The respondent claimed Flagg Bros., Inc. were state actors because the city used their facilities to store respondent's personal property after the city foreclosed on their apartment.[223] The Court concluded Flagg Bros., Inc. merely threatened to sell respondent's personal property, so no taking occurred.[224] Further, there was no state action because Flagg Bros., Inc's threat and subsequent sale involved no public official participation.[225] The petitioner's failed opportunity to resolve without government involvement conflicted with a foundational element of the public function test—that the state-actor has exclusive power and no outside remedies.[226] The Court concluded by giving examples of state and municipal functions administered with more exclusivity: "Among these are such functions as education, fire and police protection, and *tax collection*."[227] Unlike Flagg Bros., Inc., which had no government role in personal property sales, third-party purchasers benefit from a strong government relationship that upgrades their tax lien to a tax deed, collects their redemption money, and facilitates the sale.[228]

Third-party purchasers are performing an exclusive and traditional function of government, thus making them state actors. Third-party purchasers also enjoy the same exclusivity found in previous public function cases,[229] because once they own a tax lien, the

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[222] Flagg Bros., Inc. v. Brooks, 436 U.S. 149, 153 (1978).
[223] *Id.* at 156.
[224] *Id.* at 157.
[225] *Id.*
[226] *See id.* at 159–60.
[227] *Id.* at 163.
[228] *Compare Flagg Bros., Inc.*, 436 U.S. at 166 ("Here, the State of New York has not compelled the sale of a bailor's goods, but has merely announced the circumstances under which its courts will not interfere with a private sale.") *with* RAO, *supra* note 14, at 13 (explaining a third-party purchaser receives property after filing a specific tax deed with government official to receive transfer or initiate a court hearing, depending on the jurisdiction).
[229] *See* Terry v. Adams, 345 U.S. 461, 469–71 (1953) (concluding the Jaybird Association was a state-actor, because "all aspects of these primaries are exclusively controlled" by the private group); *see also* Marsh v. Alabama, 326 U.S. 501, 505 (1946) (indicating the company-owned town had all the necessary municipal functions for it to be a state actor).

only remedy original property owners can seek is paying the third-party purchaser.[230] A private party that cannot meet the exclusivity element is not a state actor, like when government enters into a contract with private party.[231] The third-party purchaser receives fundamentally different treatment than other private parties that just enter into a governmental contract, because third-party purchasers receive priority to deeds over other liens.[232] Third-party purchasers receive exclusive benefits by using the local government to facilitate the only remedy available to property owners with delinquent property taxes. Therefore, third-party purchasers are state-actors because they collect delinquent taxes, thus performing a duty exclusively and traditionally performed by the state.

2. Close Nexus or Entanglement Test

A private entity is a state actor under the entanglement test if their conduct is formally private, but becomes so entangled with government policies or governmental character that they become subject to the constitutional limitations on the state.[233] The issue here is whether a close nexus exists between the state and third-party purchaser of a tax lien, thus making a third-party purchaser's private behavior "be fairly treated as that of the State itself."[234] There is no rigid simplicity to this test, instead it is a matter of normative judgment.[235] The Court's precedent requires the private actor's

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[230] RAO, *supra* note 14, at 13.
[231] *See* Rendell-Baker v. Kohn, 457 U.S. 830, 840–41 (1982) (holding that providing education is a traditional function of government, but not an exclusive one because private institutions receiving public funds is similar to any other contract the government enters into).
[232] *See* RAO, *supra* note 14, at 12 ("These laws have been upheld on the grounds that priority [of third-party purchaser tax liens] is essential to the government collecting the revenue necessary to conduct its business."); *Rendell-Baker*, 457 U.S. at 840–41 (describing the nature of nursing homes and providing education to mentally disabled students as "not fundamentally different" than any other private contract the government enters into).
[233] Evans v. Newton, 382 U.S. 296, 299 (1966).
[234] Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n., 531 U.S. 288, 295 (2001) (quoting Jackson v. Metropolitan Edison Co., 419 U.S. 345, 351 (1974)).
[235] *Brentwood Acad.*, 531 U.S. at 295.

deprivation of a federal right to be fairly attributable to the government to illustrate this close nexus.[236] Fair attribution consists of two key elements: the party charged with the deprivation is a state actor and the deprivation results from the exercise of a right or privilege created by the state.[237] The government's role in facilitating, selling, and transferring land for the liens purchased by third-party purchasers satisfy the first element.

For the first element, state-action doctrine analyses derive from precedent, and it is the other entanglement cases that outline the factors to determine if a private entity is a state actor.[238] The Court's entanglement cases rely on analyzing the factors identified in past cases.[239] The precedential factors guide the Court to its conclusion; however, no one set of facts can lead the Court to decide in favor of state action.[240] Since the Court draws on its precedent to compare and analyze a current state-action claim, the next three cases are the most persuasive in analyzing third-party purchasers' role in the tax sale process.

First, *Evans v. Newton* held that a city cannot segregate a municipal park merely because the park's trustee devised the land to the city for such purpose.[241] In Macon, Georgia a former United States Senator devised his park to the city after the expiry of his family's life estate, but only if the city barred people of color from the park.[242] Launching a fact-based inquiry, the Court found state action through the entanglement test because the City of Macon performed maintenance for the park, the park was exempt from city taxes, and the nature of a park is to benefit the public as a whole.[243] The entanglement of the local government and devisor would cause the government to

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[236] Lugar v. Edmondson Oil Co., 457 U.S. 922, 937 (1982).
[237] *Id.*
[238] *Supra* text accompanying note 196.
[239] *See Brentwood Acad*., 531 U.S. at 296 ("Our cases have identified a host of facts that can bear on the fairness of such an attribution.").
[240] *See id* at 295. ("[N]o one fact can function as a necessary condition across the board for finding state action; nor is any set of circumstances absolutely sufficient . . . .").
[241] Evans v. Newton, 382 U.S. 296, 301 (1966).
[242] *Id*. at 297.
[243] *Id.* at 301.

appear as the authority segregating a park, instead of just fulfilling the will.[244] All these factors pointed towards entanglement because the private devisor would appear to hold state powers that were governmental in nature, which would make it subject to the state's constitutional limitations.[245]

Second, *Burton v. Wilmington Parking Authority,* a touchstone case for the entanglement test, established an example of state action between a private party and government entity as joint participants.[246] The joint participants were a state parking authority and its tenant coffee shop that refused to serve people of color.[247] The Court acknowledged different factors leading to its state-action conclusion: the coffee shop enjoyed the Parking Authority's tax exemption; the government owned the land and building; the building was for "'public uses' in performance of the Authority's 'essential government functions'"; and the Authority paid for the upkeep and maintenance out of government funds.[248] The Court acknowledged that the coffee shop's defense—which was serving people of color would harm business—further evidenced the close-nexus relationship, because when the coffee shop loses money, so does the government.[249] The Court narrowed this holding to only apply to governments acting with the same purpose as the Parking Authority.[250] Therefore, anytime the government leases property to fulfill its debt-service requirements, the private lessee is subject to the state-action doctrine.[251]

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[244] *See id.* at 300–01 (explaining that a private individual could discriminate in this situation, but much like other cases, just because a private person donated the land does not allow a local government to break other laws by discriminating).
[245] *Id.* at 301.
[246] Burton v. Wilmington Parking Auth., 365 U.S. 715, 725 (1961).
[247] *Id*. at 716, 722, 725.
[248] *Id.* at 719, 723–24.
[249] *Id.* at 724.
[250] *Id.* at 725.
[251] *See id.* at 719, 725 (explaining that parking alone could not fulfill its debt service to make bond financing practicable and profitable); *Debt Service*, BLACK'S LAW DICTIONARY (11th ed. 2019) ("The funds needed to meet a long-term debt's annual interest expenses, principal payments, and sinking-fund contributions").

Finally, *Lugar v. Edmonson Oil Co.* was the culmination of multiple state-action cases addressing property deprivation.[252] The Court noted that past cases "consistently held that constitutional requirements" apply to garnishment and prejudgment attachment procedures when state officers "act jointly with a creditor" in securing the disputed property.[253] *Lugar* addressed the petitioner's challenge that a private party misused a statute to sequester petitioner's land—with the aid of the state—to settle a debt. [254] Affirming its past holdings,[255] the Court held that a private party is jointly participating with the government when they use state officials to seize disputed property.[256] Since the private party wrongfully took the petitioner's property, and they used the government to facilitate this taking, the private party was subject to the state-action doctrine.[257] Thus, when a private party uses the government to facilitate a taking, such as a prejudgment attachment like a tax lien, the private party and government are working jointly together.

Third-party purchasers are state actors because their formally private behavior exists exclusively from their close-nexus relationship with the government, so they too should be subject to constitutional limitations. A local government facilitates the sale of the tax lien from start to finish.[258] The government's role in transferring property under

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[252] *See* Lugar v. Edmondson Oil Co., 457 U.S. 922, 927, 933 (1982) (recalling two wage garnishment cases where the court implicitly found private actors to be state actors and another case that fell short of state action because the storage company *only threatened* to take away property for unpaid storage bills).

[253] *Id*. at 922, 932–33.

[254] *Id.* at 941.

[255] *See* Fuentes v. Shevin, 407 U.S. 67, 93 (1972) ("Private parties, serving their own private advantage, may unilaterally invoke state power to replevy good from another."); N. Ga. Finishing v. Di-Chem, Inc., 419 U.S. 601, 607 (1975) (analyzing the impact of a garnishment placed by a private party that greatly limits any remedy outside of that private party); Mitchell v. W.T. Grant Co., 416 U.S. 600, 619–20 (1974) (holding sequestration violated the Due Process Clause because the private party employed the state to take property without first providing notice or opportunity for hearing).

[256] *Lugar*, 457 U.S. at 941.

[257] *Id.*

[258] *See* RAO *supra* note 14, at 13 (selling the tax lien to third-party purchasers,

the tax lien process is the same kind of joint participation seen in cases culminating to *Lugar,* because each case involves the state acting "jointly with a creditor" to secure disputed property.[259] The government has a mutually beneficial relationship with third-party purchasers similar to the relationship identified in *Burton*, because without third-party purchasers the government cannot pay its debts or maintain its budgets.[260] Much like *Newton*, tax collection is inherently governmental by nature.[261] The third-party purchaser and government act jointly together, which is comparable with other private party-government relationships the Court identified as state action.

In addition to the Court's precedent supporting an entangled relationship, third-party purchaser's actions are fairly attributable to the government.[262] By selling a tax lien, which in turn forces third-party purchasers to collect taxes, either through money or property, to recover their costs, the government is employing third-party purchasers to collect delinquent taxes. After purchasing the lien, the third-party purchasers can collect delinquent tax payments from the original property owner with a substantial interest rate or keep their

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collecting taxes from third-party purchasers, collecting redemption payments from original property owners, and eventually transferring property to third-party purchasers).

[259] *See Lugar*, 457 U.S. at 941 (holding joint participation between a private party and state officials in seizing disputed property as sufficient state action); *Fuentes*, 407 U.S. at 85–86 (recognizing state action in situations where a private company employs the sheriff to take merchandise that is not up to date on installment payments); Adickes v. S. H. Kress & Co., 398 U.S. 144, 152 (1970) (identifying collusion between a police officer and store owner as sufficient joint participation for state action).

[260] *NTLA Response*, *supra* note 25, at 1 (justifying that property taxes, through the tax lien process, allows local governments to fund programs like police and fire departments, school districts, and health centers).

[261] *See Tax*, BLACK'S LAW DICTIONARY (11th ed. 2019) ("A charge, usu. monetary, imposed by the government on persons, entities, transactions, or property to yield public revenue."); *see also* Evans v. Newton, 382 U.S. 296, 302 (1966) ("Mass recreation through the use of parks is plainly in the public domain, . . . and state courts that aid private parties to perform that public function . . . implicate the State in conduct . . . .").

[262] Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n., 531 U.S. 288, 295 (2001) (quoting Jackson v. Metropolitan Edison Co., 419 U.S. 345, 351 (1974)).

property.[263] Yet, exemplifying their close-nexus relationship, the original property owner must give their redemption payment to the government, who collects it on behalf of the third-party purchaser.[264] After the redemption period expires, the third-party purchaser takes an original property owner's land as per se payment through an almost identical process the government uses for the tax deed process.[265] Employing third-party purchasers to collect taxes, and taking land to satisfy debts by transferring property as per se payment shows the government's entangled relationship with third-party purchasers, and aligns with the Court's precedent on symbiotic and creditor-government relationships.

B. Since Third-Party Purchasers Are State-Actors/Tax Collectors, They Owe Surplus Proceeds to the Original Property Owner

Private parties that take land generally do not violate any constitutional provisions, because constitutional claims attempt to protect private action, while limiting government reach.[266] Determining whether a private party is a state actor is the threshold question that opens to door to constitutional liability usually reserved for government actors.[267] Therefore, a similar analysis to Part IV applies here: common law principles require third-party purchasers pay surplus where no statute precludes such recovery, because withholding surplus is an unconstitutional taking.[268]

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[263] *See* RAO, *supra* note 14, at 8 (detailing the structure of third-party purchasers buying a tax lien and estimating they collect on interest rates up to 20–50%).
[264] *See* NEB. REV. STAT. § 77-1824 (2021) ("Redemption shall be accomplished by paying the county treasurer for use of such [third-party] purchaser . . . ."); ALA. CODE § 40-10-193 ("Property may be redeemed under subdivision . . . by payment to the tax collecting official [in each county] of the amount specified on the tax lien certificate . . . ."); MONT. CODE ANN. § 15-18-113 (2021) ("The county treasurer shall execute a certificate of redemption . . . upon . . . payment to the county treasurer . . . .").
[265] *See* RAO, *supra* note 14, at 13 (comparing the basic steps of the tax deed sale and tax lien certificate sale); *supra* Part III.B.
[266] Manhattan Cmty. Access Corp. v. Halleck, 139 S. Ct. 1921, 1926 (2019).
[267] *Id.*; *Brentwood Acad.*, 531 U.S. at 302.
[268] *Supra* Part IV.

As state actors, third-party purchasers are subject to common law principles requiring surplus payment from excess tax payments when there is no statute barring surplus proceeds recovery. Third-party purchasers received title when the original property owner failed to redeem and payoff the third party's interest in their property; redemption can only occur when original property owners pay third-party purchaser.[269] Since, third-party purchasers acquire property for the failure to pay delinquent property taxes, they receive the land as per se payment.[270] Receiving the land for per se payment creates the same property interest structure as the tax deed process.[271] Third-party purchasers receive land to satisfy debt owed, therefore when third-party purchasers sell the property, common law requires original property owners receive surplus proceeds because common law principles protect people from paying more than their fair share in taxes.[272]

Original property owners still keep their vested property interest in surplus proceeds arising from the tax lien process since third-party purchasers are state actors. Just like local governments, third-party purchasers sell recently transferred properties quickly to recover costs from failure to collect.[273] This sale creates surplus proceeds.[274] Common law requires original property owners receive

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[269] *Supra* text accompanying notes 248–51.
[270] *See supra* Parts IV, VI.A.
[271] *Supra* Part IV.
[272] *See supra* Part IV.A; Rafaeli, LLC v. Oakland Cnty., 952 N.W.2d. 434, 454–56 (Mich. 2020) (chronicling the history of common law and its adoption in Michigan, thus requiring people only pay their taxes and not in excess).
[273] *See* RAO, *supra* note 14, at 17–18 (estimating that tax lien purchasers make upwards of 50% returns after expiration of redemption period); Andrew Kahrl, *Another Way Cities Can Protect Homeowners: End Tax Sales*, BLOOMBERG CITYLAB (Apr. 2, 2020), https://www.bloomberg.com/news/articles/2020-04-02/cities-should-end-the-unjust-practice-of-tax-sales (estimating tax lien investors will profit of $10 billion annually); PARK & DEERSON, *supra* note 63 (chronicling the story of Hennepin County, Minnesota selling an elderly woman's condo for $43,000 after taking from her for a $2,000 delinquent tax bill).
[274] *See* Emily L. Mahoney & Charles T. Clark, *Arizona Owners Can Lose Homes over as Little as $50 in Back Taxes*, AZCENTRAL (June 16, 2017), https://www.azcentral.com/story/money/real-estate/2017/06/12/tax-lien-foreclosures-arizona-maricopa-county/366328001/ (documenting a tax lien

surplus proceeds from the sale of their property to satisfy delinquent taxes.[275] Similar to the government's role in the tax deed process, third-party purchasers keep surplus proceeds from a sale meant to satisfy delinquent taxes.[276] This conflicts with the common law principles embedded in tax collection.[277] Without a statute precluding recovery of surplus proceeds, third-party purchasers are subject to the Takings Clause as state actors.

Third-party purchasers that retain surplus proceeds violate the Taking Clause by withholding just compensation from original property owners. The real property used for per se payment is likely for a public purpose, due to the deference given to state legislatures in their pursuit to fund themselves.[278] However, surplus is a separate vested interest.[279] Even as a separate interest, this taking is likely a public purpose. The public purpose definition is very broad, and the only way to prove otherwise is to prove the law promotes an irrational public purpose.[280] Despite meeting the first prong of a takings analysis, third-party purchasers cannot meet the second.

Third-party purchasers fail the second prong of a takings analysis by not providing just compensation to original property owners when they withhold surplus proceeds. Third-party purchasers receive a large surplus as the result of selling original property owner's

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purchaser paying $48.65, and after getting title, selling the home for $43,600); *Left with Nothing*, *supra* note 51 ("Heartwood has taken more than 20 houses through foreclosure and sold them all, including a brick duplex in Northwest Washington with a $535 lien for $169,610."); Chris Burrell, *Tax Lien Law Haunts Massachusetts Property Owners*, GBH NEWS (Jan. 21, 2018), https://www.wgbh.org/news/2018/01/21/local-news/tax-lien-law-haunts-massachusetts-property-owners (stating Boston-based tax lien firm, Tallage Lincoln, sold over 24 properties it received from the tax lien process since 2012 to quadruple its original investment).

[275] *See supra* Part IV.A.

[276] *Left with Nothing*, *supra* note 51 (discussing tax lien investors practices of selling off property quickly after receiving title because they make such a profit).

[277] *See supra* Part IV.A.

[278] *Supra* Parts IV.A, IV.C.

[279] *Supra* notes 196–98.

[280] *See* Haw. Hous. Auth. v. Midkiff, 467 U.S. 229, 241–42 (1984) (setting the standard to disprove a law's public purpose as irrational for all socioeconomic legislation).

land to recoup delinquent property taxes.[281] Since original property owners have a right to excess tax payments through common law, third-party purchasers violated the Fifth Amendment when they keep surplus proceeds without paying just compensation. Just compensation here would likely just be equal to the value of the surplus.[282] Third-party purchasers are state actors subject to constitutional limitations on their ability to take property, and without paying just compensation, their taking of original property owner's land for delinquent property taxes is a violation of the Takings Clause. Therefore, the only remedy is third-party purchasers pay surplus—profit received from sale after satisfying delinquent taxes, costs, and interest—to the original property owner.

VI. RECOMMENDATIONS

As more advocates begin fighting for the rights of property owners, state courts and legislatures are reforming their tax deed programs, and putting an end to the state profiting off tax sales.[283] Reforming or ending tax deed programs is a good first step towards preventing people from losing their homes over a couple of years of missed property taxes. Unfortunately, the tax lien process, where local governments put the onus on corporations to collect property taxes until they can take the property free and clear, is a growing industry.[284]

When courts recognize original property owner's right to surplus, it provides a check on the entire process and is progress to addressing the larger problems embedded in the tax sale process.[285]

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[281] *See supra* Parts IV, VI.A.

[282] *See* United States v. Commodities Trading Corp., 339 U.S. 121, 123 (1950) ("Fair market value has normally been accepted as a just standard.").

[283] Rafaeil, LLC v. Oakland Cnty., 952 N.W.2d 434, 458–59 (Mich. 2020); *see* Harrison v. Montgomery Cnty., 997 F.3d 643, 649 (6th Cir. 2021) (citing Knick v. Twp. of Scott, 139 S. Ct. 2162 (2019)) (allowing a § 1983 claim to continue on a Takings Clause argument because *Knick v. Township of Scott* expanded the breadth of takings claims); ERICKSON ET AL., *supra* note 40 (describing bills that would end home equity theft in North Dakota and Montana).

[284] *See* RAO, *supra* note 14, at 18 (discussing how counties are selling bulk tax lien to corporations wholesale to balance their budget).

[285] *See Rafaeli, LLC*, 952 N.W.2d at 441(recounting plaintiff's surplus request is still a small percentage of the fair market value of the property).

Third-party purchasers and local governments rely on selling tax sale property for low prices, but still astronomically higher than what they took the property for, which creates a wide profit margin.[286] In practice, this means surplus proceeds will not replenish what the original property owner, but surplus gets original property owners closer to balancing the equity lost.[287] In Gladys Wisner's case, providing her estate surplus rights would not let her keep her family farm of 70+ years or balance the equity lost in their land.[288] Yet, providing surplus rights would give her estate whatever price the third-party purchaser sold the property for (with a fair-market value exceeding $1 million) minus the tax debt of roughly $50,000 and additional fees.[289] While surplus proceeds would cut into third-party purchasers' profit, third party purchasers could still make money from the tax lien process without ruining people's lives in the process.[290] Providing surplus would also allow municipalities to continue using third-party purchasers to balance their budgets.

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[286] *See* RAO, *supra* note 14, at 8–9 (explaining the danger of the tax sale process is the drastic loss in equity because the tax sale process only costs the taxes owed, not fair-market value); Bridge v. Phoenix Bond & Indem. Co., 553 U.S. 639, 642 (2008) (contending property acquired in the tax sale process is often "sold at a significant profit" over the amount of taxes due); PARK & DEERSON, *supra* note 63 (calculating the average homeowner in Minnesota during 2014 and 2020 lost an average of $207,000 when they lost their home to the tax lien process).

[287] RAO, *supra* note 14, at 8; *see, e.g.*, David Murray, *Profiting on Misfortune: Tax Liens, Home Loss, and County Finance*, GREAT FALLS TRIB. (Sept. 30, 2016), https://www.greatfallstribune.com/story/news/local/2016/09/30/profiting-misfortune-tax-liens-home-loss-county-finance/91308830/ (documenting the tax lien process taking property worth $139,300 for a $667.20 tax lien payment, but providing the original property owner nothing); Christina Martin & Joshua Polk, *Tax Lien Foreclosures in Massachusetts or Legalized Home Theft*, JURIST (Feb. 5, 2021), https://www.jurist.org/commentary/2021/02/polk-martin-tax-theft/ (losing property worth $276,000 over a $4,300 tax lien and receiving nothing to mitigate loss of equity).

[288] *See generally* Duggan, *supra* note 8 (discussing how the Nebraska Legislature "established strict rules for the payment of real estate taxes and ramifications for the failure to pay those taxes").

[289] *See id.*

[290] RAO, *supra* note 14, at 8, 43 (detailing all the interest rates in tax lien states, ranging from 2% per month, to over 20% in some places).

While surplus proceeds mitigate the tax sale process's harm to original property owners, policy-based solutions would also help homeowners like Gladys avoid the harm altogether.[291] John Rao proposes a two-step foreclosure process that differentiates between abandoned and owner-occupied property to better distribute judicial resources to original property owners that would otherwise rarely see a courtroom before losing their home.[292] With a judge to oversee the process, original property owners receive proper notice, the court can appoint a guardian ad litum preemptively instead of after-the-fact, and there is a layer of protection against the county's priority of balancing their budget.[293] Courts would retain the right to withhold sale confirmation, and if the court approves the sale, then the original property owner would receive surplus.[294] In Gladys's case, providing a judicial hearing before taking her property would solve her notice issue and provide her son the opportunity to pay the county treasurer the tax debt that Vandelay refused to accept.[295]

Rao suggests another approach should focus on protecting at-risk homeowners, like the elderly and disabled, who often fall victim to the tax sale process at higher rates than other groups.[296] The crux of this policy change is that local governments already have systems in place that could ensure notice delivery outside of the formal avenues.[297] By reallocating notice services through Department of Health for the disabled or Department of Elderly Affairs, the local government could ensure notice for such vulnerable classes.[298] Most states have disability or elderly extensions for tax sale redemptions,

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[291] *Id.* at 19.
[292] *Id.* at 39; *see also* Poindexter et al., *supra* note 26, at 161 (explaining the positive public-policy reasoning behind the tax-sale process for taking abandoned property and giving it use again).
[293] RAO, *supra* note 14, at 39.
[294] *Id.*
[295] *See* Duggan, *supra* note 8 (discovering his mom lost the farm from the tax sale process, Gladys' son offered to pay the full debt to Vandelay to keep their family farm).
[296] RAO, *supra* note 14, at 29; *see* Martin & Polk, *supra* note 288 ("Most of these [tax lien] profits come at the expense of society's most vulnerable: the elderly and disabled.").
[297] RAO, *supra* note 14, at 29.
[298] *Id.*

but parties cannot take advantage of these extensions when they are unaware of their debt.[299] If Gladys had these protections, there would be adequate time to pay off her debt, in addition to the ability to preemptively raise a mental health extension.[300]

Many more policy-based solutions could greatly reform the tax sale process to protect original property owners, while allowing local governments to maintain fully functioning budgets.[301] Policy-based solutions would offer more protections to original property owners, however, the current trend is local governments using the tax sale process more than ever.[302] To combat this trend, the court system can be an inhibitor to the third-party purchaser cash flow arising from original property owner debt. Tax sale reform only occurs when the court system showcases the disproportionate costs to the public, who subsequently push for change.[303] Using the courts to provide surplus to original property owners can give the currently victimized a place to start again, while it can also be the spark for change that leads to meaningful reform.

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[299] *See id*. at 29–30 (proposing most states already have social service programs, like a Department of Elderly Affairs, which could navigate giving notice to the homeowners otherwise not able to receive it).

[300] *See* Duggan, *supra* note 8 (detailing the avenues Vandelay Investments used to notify Gladys Wisner and arguing that Gladys did not have the mental capacity to understand the notices she received); *see also* Donald L. Swanson, *A State-Sanctioned Fraudulent Transfer?*, MEDIATBANKRY (Sept. 6, 2018), https://mediatbankry.com/2018/09/06/a-state-sanctioned-fraudulent-transfer/ (posting the competency issues raised in Gladys Wisner's trial that Vandelay's expert testimony persuaded the court a 98-year-old woman with dementia and mini-strokes did not merit the disabled owner statutory extension).

[301] RAO, *supra* note 14, at 31–39.

[302] *See* Kahrl, *supra* note 36, at 200 (chronicling the growth of the tax lien process starting in the 1960s and culminating in tax lien securitization, corporate third-party purchasers, and bulk lien sales).

[303] *See Left with Nothing*, *supra* note 51 (changing D.C. law to preclude tax lien sales under $250 after public outcry resulting from Bennie's story); Kahrl, *supra* note 36, at 920 (discussing reform in Florida tax lien structure after national news documented a family losing their home for a $532 tax lien).

CONCLUSION

When local governments and government actors work in conjunction to keep surplus proceeds to pad their profits, they keep excess tax payments.[304] Selling property to balance tax debts should not allow third-party purchasers or local governments plenary power to profit. Original property owners have a right to the surplus.[305] This right arises from common law principles in the Magna Carta, but is contemporaneously evident in tax law.[306] Returning surplus payments is so common, the IRS gives most taxpayers a refund every year.[307] Property taxes should be no different.

The tax sale process as a whole is not the issue here, the issue is using the process to capitalize on delinquent property taxes for profit. Local communities rely on timely tax payments to fund important programs.[308] The tax sale process is also valuable to local governments because it allows private parties to reform property once condemned or abandoned.[309] Surplus proceeds do not disrupt local government functioning, or prevent third-party purchasers from profiting. Surplus proceeds allow original property owners to have something when the government took everything from them. Surplus can be the difference between people like Bennie Coleman living comfortably somewhere, and living in a homeless shelter two blocks from his home.[310]

The ultimate point of this note is to provide some protections for delinquent property tax owners, in turn mitigating large corporations' participation that is strictly profit driven. People like Gladys and Benny deserved far more protections than they received. People who own their property for decades, should not lose it because they failed to pay one bill. While local governments begin to provide more protections, those protections are not enough to keep people in

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[304] *See supra* Parts V.B, IV.
[305] *Supra* Part V.A.
[306] *Supra* Parts IV.A, IV.C.
[307] Segarra, *supra* note 171 (chronicling the history of the tax refund since its genesis in the 1940s because of an over-expansion of income tax).
[308] *NTLA Response*, *supra* note 25, at 1.
[309] Poindexter, *supra* note 26, at 161.
[310] *Left with Nothing*, *supra* note 51.

their homes and often only reactionary to a tragedy.[311] With the increase in bulk tax sales and cities struggling for money, more municipalities will turn to the tax sale process.[312] Short term solutions to funding deficiencies should not lead to long term problems by removing people from communities they lived most of their life in. The tax sale process is in dire need of reform, but until then, the least local governments and state actors can do is pay surplus proceeds original property owners deserve.

[311] *Id.*; *see also* Kahrl, *supra* note 36, at 200–01.

[312] *See* Kahrl, *supra* note 36, at 212 (noting a trend towards more tax sales and how, in recent years, local governments have turned to online tax auctions to drive up sales).