

REDEEMING WHAT IS LOST:  
THE NEED TO IMPROVE NOTICE FOR ELDERLY HOMEOWNERS  
BEFORE AND AFTER TAX SALES

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INTRODUCTION

Michael Hamilton, an elderly and retired resident of Louisiana, owned a home where he had lived his entire life.<sup>1</sup> In April 1995, Mr. Hamilton received a notice from the city government informing him that the 1994 property taxes on his house had not been paid.<sup>2</sup> The notice advised Mr. Hamilton that if he did not pay the taxes within twenty days, the city would “seize, advertise, and sell sufficient property to pay the taxes together with all interest, penalties and costs.”<sup>3</sup> Mr. Hamilton consulted his mortgage company and, believing that the company would settle the delinquent taxes, Mr. Hamilton took no further action.<sup>4</sup> The mortgage company, however, failed to satisfy the debt.<sup>5</sup> In June 1995, the city conducted a tax sale, which allowed it to sell the property of delinquent taxpayers to third-party purchasers for the amount in overdue taxes and expenses.<sup>6</sup> The city sold Mr. Hamilton’s house to a business corporation for only \$71.68, the amount of Mr. Hamilton’s unpaid taxes plus penalties and interest.<sup>7</sup>

At no point after the tax sale did Mr. Hamilton receive notice that his property had been sold or that the purchaser had executed a deed on his home.<sup>8</sup> Because Mr. Hamilton did not receive notice that

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<sup>1</sup> Petition for Writ of Certiorari at 4, *Hamilton v. Royal Int’l Petroleum Corp.*, 549 U.S. 1112 (2007) (No. 06-455), 2006 WL 2805041, at \*4 [hereinafter *Petition*].

<sup>2</sup> *Hamilton v. Royal Int’l Petroleum Corp.*, 934 So. 2d 25, 27 (La. 2006).

<sup>3</sup> *Id.*

<sup>4</sup> *Petition*, *supra* note 1, at 5.

<sup>5</sup> *Id.*

<sup>6</sup> *Hamilton*, 934 So. 2d at 27.

<sup>7</sup> *Petition*, *supra* note 1, at 5. The amount of the unpaid property taxes was \$27.09. *Id.*

<sup>8</sup> *Id.*

his house had been sold to pay off his taxes, he was unaware that he could reclaim his property by paying the delinquent taxes within a three-year period.<sup>9</sup> In 1998, after the three-year redemption period expired, a representative of the corporation that bought Mr. Hamilton's house informed him that he no longer owned his home of many decades.<sup>10</sup> Because of inadequate notice, Mr. Hamilton lost his home, which was worth approximately seventy thousand dollars in equity, for taxes originally totaling less than thirty dollars.<sup>11</sup>

For elderly homeowners such as Mr. Hamilton, a lack of proper notice regarding tax sales and their rights to redeem property can be devastating both financially and emotionally.<sup>12</sup> A tax sale allows the government to sell a delinquent taxpayer's actual property or to sell a right to foreclose on that property at a future date.<sup>13</sup> As in Mr. Hamilton's situation, a tax sale may provide a purchaser with the power to strip a homeowner of his home without compensating him for the equity lost from the transfer in ownership.<sup>14</sup> Although the home is a source of comfort, equity is often the primary or sole source of wealth and security for elderly homeowners living on fixed incomes.<sup>15</sup> Elderly homeowners are more vulnerable in tax sales because they likely face a higher risk of receiving inadequate notice or no notice at all.<sup>16</sup> Although Mr. Hamilton had no reported health problems, homeowners dealing with cognitive diseases such as Alzheimer's or dementia may not be able to comprehend the implications of a tax sale when they receive notice.<sup>17</sup> Other elderly homeowners might not receive actual notice of an impending tax sale because they suffer from mental or physical impairments that require them to be hospitalized while

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<sup>9</sup> *Id.*

<sup>10</sup> *Hamilton*, 934 So. 2d at 29.

<sup>11</sup> Petition, *supra* note 1, at 5-6.

<sup>12</sup> JOHN RAO, NAT'L CONSUMER LAW CTR., THE OTHER FORECLOSURE CRISIS: PROPERTY TAX LIEN SALES 1, 4-5 (2012) available at [http://www.nclc.org/images/pdf/foreclosure\\_mortgage/tax\\_issues/tax-lien-sales-report.pdf](http://www.nclc.org/images/pdf/foreclosure_mortgage/tax_issues/tax-lien-sales-report.pdf).

<sup>13</sup> See *Sheehan v. Suffolk Cnty.*, 490 N.E.2d 523, 525 (N.Y. 1986) (holding that the sale of properties for delinquent taxes without turning over surplus to owners was not a taking without just compensation).

<sup>14</sup> See *In re Otsus*, 545 N.E.2d 145, 145-46 (Ill. App. Ct. 1989) (the county conducted a tax sale where it sold a house worth \$100,000 for \$8,600 worth in property taxes).

<sup>15</sup> See RAO, *supra* note 12, at 4.

<sup>16</sup> See *id.* at 5.

<sup>17</sup> See *Donaghy v. Leighton*, 351 A.2d 125, 126 (Me. 1976) (holding that Maine's tax lien foreclosure statute did not violate due process when local officials gave notice to an elderly woman who was later involuntarily committed to a hospital).

notice is sent to their address.<sup>18</sup> Receiving actual notice may also be difficult for an elderly homeowner who must move in with a family member living at a different address.<sup>19</sup> Although a particular situation may present a tax collector with a greater challenge in affecting notice, it does not excuse the tax collector from exercising due diligence in locating the homeowner.<sup>20</sup>

This Comment argues that states should incorporate higher “adequate notice” standards for elderly homeowners who face divestment of their property from tax sales and subsequent foreclosures. The Fourteenth Amendment prohibits a homeowner from being stripped of his property without due process of law.<sup>21</sup> A homeowner cannot exercise his due process rights if he is not given sufficient notice to understand the consequences of a tax sale or that he has a right to pay the taxes and retain his property. At a minimum, notice should make a homeowner aware that there are certain measures he can take to recover his property. This Comment also argues that states should incorporate statutory provisions that make it easier for elderly citizens to recover full ownership rights of their homes before their homes become encumbered by tax sales. Although the Supreme Court has ruled that actual notice is not required,<sup>22</sup> this Comment argues that states should strive to make laws that achieve actual notice for elderly citizens who own homes.

Part I will review the burdens of homeownership on the elderly and provide an overview of the system of tax sales and the fundamental cases that have set the minimum standards for adequate notice. Part II addresses what should be the appropriate standard of notice on the state and local level and remedial measures to protect elderly citizens subject to real property divestment. For the purposes of this Comment, an elderly person or senior citizen refers to anyone who is at least sixty-five years of age.

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<sup>18</sup> See *In re Application of Cnty. Collector*, 867 N.E.2d 941, 952-53 (Ill. 2007).

<sup>19</sup> See *Sidun v. Wayne Cnty. Treasurer*, 751 N.W.2d 453, 456-57 (Mich. 2008) (holding that the county did not do its due diligence in locating an elderly woman who had moved in with her family and, thereby, violated her due process right to notice before a tax sale of her property).

<sup>20</sup> See *Plemons v. Gale*, 396 F.3d 569, 576 (4th Cir. 2005).

<sup>21</sup> U.S. CONST. amend. XIV, § IV.

<sup>22</sup> *Jones v. Flowers*, 547 U.S. 220, 226 (2006).

## I. BACKGROUND

There are senior citizens who spend their final years in nursing homes or with family members, but the majority of elderly Americans remain in the homes they inherited or purchased.<sup>23</sup> An American Association of Retired Persons (AARP) study found that elderly Americans “would prefer to stay in their current [homes] and never move.”<sup>24</sup> Their ability to remain in their homes depends on their mental and physical health, age, income, and health and housing support services.<sup>25</sup>

Section A will briefly discuss the challenges elderly homeowners face in keeping their homes and how failing to satisfy the burden of paying property taxes initiates tax sale procedures. Section B will provide a general overview of tax sale procedures at the state and local level. Section C will review Supreme Court cases that have established notice standards affecting these tax sale procedures. Lastly, this Comment will conclude that the quality, timing, and frequency of notice should be improved to provide elderly homeowners with the best opportunity to redeem their homes.

### A. *The Burdens of Home Ownership, Property Taxes, and Tax Liens on Elderly Citizens*

According to a Social Security Administration report, housing expenditures consumed the largest part of older Americans’ income.<sup>26</sup> Survey respondents sixty-five years and older spent approximately thirty-five percent of their income on property taxes, maintenance, utilities, and other household expenses.<sup>27</sup> Of the survey respondents who were fifty-five years and older, eighty percent owned a home, and the proportion owning a home without a mortgage increased with

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<sup>23</sup> Robert C. Christopherson, Note, *Missing the Forest for the Trees: The Illusory Half-Policy of Senior Citizen Property Tax Relief*, 13 ELDER L.J. 195, 200 (2005).

<sup>24</sup> COMM’N ON AFFORDABLE HOUS. & HEALTH FACILITY NEEDS FOR SENIORS IN THE 21ST CENTURY, A QUIET CRISIS IN AMERICA 1, 68 (2003), available at [http://govinfo.library.unt.edu/seniorscommission/pages/final\\_report/finalreport.pdf](http://govinfo.library.unt.edu/seniorscommission/pages/final_report/finalreport.pdf).

<sup>25</sup> *Id.*

<sup>26</sup> SOC. SEC. ADMIN., SSA PUBL’N NO. 13-11832, EXPENDITURES OF THE AGED CHARTBOOK, 2010, 14 (2013), available at [http://www.ssa.gov/policy/docs/chartbooks/expnditures\\_aged/2010/exp-aged-2010.pdf](http://www.ssa.gov/policy/docs/chartbooks/expnditures_aged/2010/exp-aged-2010.pdf).

<sup>27</sup> *Id.*

age.<sup>28</sup> The importance of this statistic is that the oldest homeowners own their homes free and clear of any encumbrances.<sup>29</sup> These homeowners have amassed substantial equity, a cornerstone of wealth that can be passed down or used for financial security.<sup>30</sup> Yet the rising costs of housing expenditures may erode the benefits of equity and jeopardize the ability of elderly homeowners to remain in their homes.<sup>31</sup> Rising property taxes can be particularly burdensome for elderly homeowners living on a fixed income.<sup>32</sup> If elderly homeowners cannot pay property taxes, they expose themselves to tax liens and possibly predatory actions to take their homes without notice.<sup>33</sup>

All homeowners bear the burden of paying property taxes, which are a primary source of revenue for local governments to operate and provide services such as education and law enforcement.<sup>34</sup> Most state and local governments assess *ad valorem* taxes on property, that is, taxes based on the value of the property.<sup>35</sup> For example, the tax bill may be calculated by applying a real property rate to the value of an individual property. The homeowner then owes the determined amount to the county or municipality, which handles property tax collection.<sup>36</sup> Because rising property taxes can be a burden for homeowners with limited or low income, states or localities combat this burden by making exemptions available or offering tax relief for targeted homeowners like senior citizens.<sup>37</sup> Nevertheless, for various reasons such as sickness, mental incapacitation, disabilities, or pov-

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<sup>28</sup> *Id.* at 17 (surveying collected data across three age groups: 55-64, 65-74, and 75 or older).

<sup>29</sup> See RAO, *supra* note 12, at 38.

<sup>30</sup> See Jaclyn Latessa, Note, *I Think We Need to Talk This Out: Congress Needs to Mandate Pre-Foreclosure Mediation*, 47 NEW ENG. L. REV. 747, 748 (2013).

<sup>31</sup> See Christopherson, *supra* note 23, at 196-97.

<sup>32</sup> *Id.* at 201.

<sup>33</sup> See, e.g., Parks v. Wells Fargo Home Mortg., Inc., 398 F.3d 937, 940 (7th Cir. 2005) (noting that the state court had vacated tax sale based on finding that tax purchaser had committed fraud).

<sup>34</sup> See Frank S. Alexander, *Tax Liens, Tax Sales, and Due Process*, 75 IND. L.J. 747, 755-56 (2000).

<sup>35</sup> Steven V. Melnik & David S. Cenedella, *Real Property Taxation and Assessment Processes: A Case for a Better Model*, 12 N.Y.U.J. LEGIS. & PUB. POL'Y 259, 265-66 (2009).

<sup>36</sup> William Weber, *Tax Foreclosure: A Drag on Community Vitality or A Tool for Economic Growth?*, 81 U. CIN. L. REV. 1615, 1617 (2013).

<sup>37</sup> Matthew J. Meyer, Note, *The Hidden Benefits of Property Tax Relief for the Elderly*, 12 ELDER L.J. 417, 421 (2004). Three of the most common forms of tax relief are homestead exemptions, circuit breaker programs, and property tax freezes. *Id.* at 422.

erty, senior citizens may be most at risk in becoming delinquent on their property taxes.<sup>38</sup>

When a homeowner misses a deadline for paying property taxes, a local government may place a lien on the homeowner's property in the amount of the unpaid taxes.<sup>39</sup> A tax lien gives the local government a right to foreclose on the residential property if the homeowner fails to satisfy the debt on the delinquent property taxes.<sup>40</sup> The local government may seize or sell the homeowner's property to satisfy the amount owed in unpaid taxes, accumulated interest, and penalties.<sup>41</sup> Unless the federal government has a claim against the homeowner's property, a tax lien for unpaid property taxes takes priority over other liens and interests, including mortgages.<sup>42</sup> A homeowner who has a tax lien on his property retains title to the house and land, but the local government has the power to terminate those ownership rights through foreclosure.<sup>43</sup>

Every state has laws implementing tax lien systems that enable local governments to sell a homeowner's property for unpaid taxes, even if the property is worth far more than the amount owed in taxes.<sup>44</sup> Although tax lien foreclosures may seem inequitable, their supporters argue they are necessary to compel homeowners to pay their property taxes.<sup>45</sup> Tax lien foreclosures enable local governments

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<sup>38</sup> Elderly homeowners who qualify for tax relief may not realize that they are eligible—many jurisdictions require homeowners who need tax relief to complete and send in applications for exemptions or tax deferral programs. *See, e.g.*, 35 ILL. COMP. STAT. 200/15-170 (2013); KY. REV. STAT. § 132.810 (2013); S.C. CODE ANN. § 12-37-250 (2012).

<sup>39</sup> Georgette C. Poindexter, Lizabethann Rogovoy & Susan Wachter, *Selling Municipal Property Tax Receivables: Economics, Privatization, and Public Policy in an Era of Urban Distress*, 30 CONN. L. REV. 157, 166-67 (1997). Generally, local governments submit the record of delinquent taxes to a county office where a judgment is passed to reduce the unpaid taxes to a claim against the delinquent taxpayer's property. *Id.* at 169. A municipal government may place a lien on a house for various forms of taxes such as unpaid utilities taxes or sewer taxes, but the taxes in this Comment refer to property taxes. *See id.* at 170.

<sup>40</sup> RAO, *supra* note 12, at 4.

<sup>41</sup> *See id.* at 13.

<sup>42</sup> Alexander, *supra* note 34, at 770.

<sup>43</sup> RAO, *supra* note 12, at 4.

<sup>44</sup> *Id.* States with the most tax liens in 2012 were Florida with 649,976, New Jersey with 154,414, Mississippi with 134,380, Arizona with 122,707, and Illinois with 96,811 liens. Alexia Campbell, Danielle DeCoursey, & Ted Mellnik, *Local Laws Do Little to Protect Homeowners*, WASHINGTON POST, Dec. 8, 2013, <http://www.washingtonpost.com/sf/investigative/2013/12/08/local-laws-do-little-to-protect-homeowners/>.

<sup>45</sup> *See* Michael G. Pellegrino & Ralph P. Allocca, *Tax Certificates: A Review of the Tax Sale Law*, 26 SETON HALL L. REV. 1607, 1608 (1996).

to enforce property tax collection and ensure a stream of revenue.<sup>46</sup> However, the problem with tax lien foreclosures is that a homeowner often receives inadequate notice that his property is subject to foreclosure.<sup>47</sup> A tax lien foreclosure is unfair if the homeowner is not given substantive notice that affords him an opportunity to protest the tax lien or to prevent foreclosure by paying off delinquent taxes.<sup>48</sup>

The difficulty in implementing consistent notice requirements is that no uniform property tax enforcement standards exist throughout the United States.<sup>49</sup> Tax enforcement measures differ among states and even within states.<sup>50</sup> Some jurisdictions follow a straightforward procedure where the sale of a house for overdue property taxes terminates the homeowner's rights, leaving him with no ability to reclaim his property after the sale.<sup>51</sup> Most jurisdictions, however, follow a multi-step foreclosure procedure under which a delinquent taxpayer has a window of opportunity to recover or redeem his property after a tax sale on his home.<sup>52</sup> Under the multi-step procedure, jurisdictions first impose a lien and notify the homeowner of the pending sale.<sup>53</sup> Second, they sell the tax lien or, in some jurisdictions, a tax deed.<sup>54</sup> Third, the jurisdictions perform a final enforcement of the lien or deed through foreclosure, thus transferring ownership to the tax sale purchaser and terminating the homeowner's ownership in the property.<sup>55</sup> The redemption period occurs anytime between the imposition of the tax sale and the foreclosure.<sup>56</sup>

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<sup>46</sup> RAO, *supra* note 12, at 4. Tax lien foreclosures are also an important tool in allowing local governments to sell abandoned, decrepit houses to buyers who will transform the property into a beneficial use for the community. James J. Kelly, Jr., *Bringing Clarity to Title Clearing: Tax Foreclosure and Due Process in the Internet Age*, 77 U. CIN. L. REV. 63, 67 (2008).

<sup>47</sup> RAO, *supra* note 12, at 5.

<sup>48</sup> See *Mennonite Bd. of Missions v. Adams*, 462 U.S. 791, 800 (1982).

<sup>49</sup> Alexander, *supra* note 34, at 770.

<sup>50</sup> *Id.*

<sup>51</sup> See, e.g., CAL. REV. & TAX. CODE § 3707 (West 2013); N.M. STAT. ANN. § 7-38-70 (2014); N.D. CENT. CODE § 57-28-09 (2013); VA. CODE ANN. § 58.1-3965 (2013); WASH. REV. CODE § 84.64.070 (2014); WIS. STAT. § 75.01 (2014).

<sup>52</sup> See, e.g., ARIZ. REV. STAT. ANN. § 42-18152 (2013); FLA. STAT. § 197.472 (2014); 35 ILL. COMP. STAT. 200/21-350 (2013); KAN. STAT. ANN. § 79-2401a (2013); MD. CODE ANN., TAX-PROP. § 14-830 (LexisNexis 2014); MISS. CODE ANN. § 27-45-3 (2013); N.J. STAT. ANN. § 54:5-54 (West 2014); TEX. TAX CODE ANN. § 34.21 (West 2013).

<sup>53</sup> Alexander, *supra* note 34, at 771-773.

<sup>54</sup> *Id.*

<sup>55</sup> *Id.*

<sup>56</sup> *Id.*

This Comment focuses on multi-step jurisdictions that conduct a tax sale followed by a redemption period allowing a delinquent taxpayer to pay off his debts to prevent foreclosure on his home. In this type of foreclosure procedure, the issue that jurisdictions are still trying to address is whether a homeowner is due notice after the tax sale and during the redemption period. Section B outlines the general tax sale and redemption procedures that are enforced before issuing foreclosure proceedings on homes for delinquent taxes.

## B. *Tax Sales*

A tax lien helps local governments enforce a legal claim against the property of a homeowner who neglects or fails to pay property taxes.<sup>57</sup> To dissolve a tax lien, the amount in delinquent taxes must be paid in addition to all interest and penalties that accrue on the debt.<sup>58</sup> If the taxpayer does not satisfy the outstanding balance within a statutory period, the local government may use its claim against his property to foreclose on his house.<sup>59</sup> In many jurisdictions, initiating a foreclosure is a lengthy process, taking several years to complete the transaction.<sup>60</sup> When payments are delayed or ignored, most jurisdictions conduct tax sales to avoid waiting long periods for much needed funds.<sup>61</sup> Tax sales allow a county or municipality to “receive cash up front for a nonperforming asset” by selling the locality’s interest in the property in the form of a tax lien or a tax deed.<sup>62</sup>

### 1. Tax Lien Sales

The sale of a property tax lien shifts the government’s burden of collecting taxes to any party interested in purchasing a tax lien.<sup>63</sup>

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<sup>57</sup> Michelle Z. Marchiony, Comment, *Making Debt Pay: Examining the Use of Property Tax Delinquency as a Revenue Source*, 62 EMORY L.J. 217, 223 (2012).

<sup>58</sup> Pellegrino & Allocca, *supra* note 45, at 1618. A tax lien is removed usually by paying the tax debt in full or working out a payment plan. *Id.*

<sup>59</sup> *Id.* at 1626-27.

<sup>60</sup> See ARIZ. REV. STAT. ANN. § 42-18152 (2013) (waiting period is three years); UTAH CODE ANN. § 59-2-1346(1)(a) (LexisNexis 2013) (county must wait at least four years before initiating foreclosure proceedings); WYO. STAT. ANN. § 39-13-108(e)(iv)(A) (2014) (minimum waiting period is four years).

<sup>61</sup> Poindexter, Rogovoy, & Wachter, *supra* note 39, at 157.

<sup>62</sup> *Id.* at 161. See RAO, *supra* note 12, at app. A., 43-46 for an overview of tax sale procedures among different states.

<sup>63</sup> Poindexter, Rogovoy, & Wachter, *supra* note 39, at 161-62.



According to the National Tax Lien Association, local governments benefit by transferring “potential liabilities for nonpayment of tax[es] to [the] private sector.”<sup>64</sup> The tax lien purchaser can, in return, reap potential gains from owning a claim against real property.<sup>65</sup> In exchange for receiving the amount a tax lien is worth in delinquent taxes plus accrued interest, penalties, and other associated costs, the government issues the purchaser a tax lien certificate.<sup>66</sup> The tax lien certificate provides the purchaser with priority over other property interests and the right to collect the outstanding amount owed by the delinquent taxpayer.<sup>67</sup> Tax lien certificates therefore give purchasers the power to collect taxes and charge interest and penalties related to the tax lien.<sup>68</sup> The rates of interest on a tax lien certificate can range from six percent to as high as fifty percent.<sup>69</sup>

Purchasers of a tax lien also have a right to foreclose on a delinquent taxpayer’s house if the amount owed is not satisfied within a statutory period, which is typically one to three years.<sup>70</sup> Upon foreclosure, ownership of the house usually transfers to the purchaser of the tax lien certificate.<sup>71</sup> Because of the potential benefits of being a holder of a tax lien certificate, investors look to capitalize on these

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<sup>64</sup> NAT’L TAX LIEN ASS’N, THE SALE OF TRANSFER LIENS: HOW EVERYONE BENEFITS, [http://c.ycmdn.com/sites/ntlainfo.site-ym.com/resource/resmgr/Benefits\\_8.5x11\\_flyer\\_\(1\).pdf](http://c.ycmdn.com/sites/ntlainfo.site-ym.com/resource/resmgr/Benefits_8.5x11_flyer_(1).pdf) (last visited Jan. 2, 2014).

<sup>65</sup> Alexander, *supra* note 34, at 760.

<sup>66</sup> *Id.* at 762.

<sup>67</sup> See, e.g., KY. REV. STAT. ANN. § 134.420(3) (West 2013) (“The lien shall include all interest, penalties, fees, commissions, charges, costs, attorney fees, and other expenses . . . that have been incurred by reason of delinquency in payment of the tax claim certificate of delinquency . . . and shall have priority over any other obligation or liability for which the property is liable.”); TEX. TAX CODE ANN. § 32.05(a) (West 2013) (“A tax lien on real property takes priority over a homestead interest in the property.”).

<sup>68</sup> See, e.g., CONN. GEN. STAT. ANN. § 12-157 (Supp. 2014); D.C. CODE § 47-1306 (LexisNexis 2012).

<sup>69</sup> See, e.g., N.J. STAT. ANN. § 54:5-32 (West 2014) (lienholder can charge up to eighteen percent interest per annum); MD. TAX-PROP. CODE ANN. § 14-820 (LexisNexis 2014) (interest rates range from six percent to fourteen percent depending on the county); TEX. TAX CODE ANN. § 34.21 (West 2013) (fifty percent of aggregate total if the property is redeemed during the second year of the redemption period).

<sup>70</sup> See ARIZ. REV. STAT. ANN. § 42-18101 (2013); MD. TAX-PROP. CODE ANN. § 14-820(c) (LexisNexis 2014); MONT. CODE ANN. § 15-17-212(g) (2013).

<sup>71</sup> RAO, *supra* note 12, at 17.

sales.<sup>72</sup> Tax lien sales from delinquent property taxes alone make up a twenty billion dollar market in the United States.<sup>73</sup>

Taxing authorities use auctions most often to dispose of tax liens or tax deeds.<sup>74</sup> Some jurisdictions sell tax liens through online auctions, allowing more out-of-state purchasers to bid.<sup>75</sup> Regardless of the method used in auctions—whether in person or online—the baseline price of a tax lien is its amount in delinquent taxes, penalties, and costs.<sup>76</sup> Tax liens are then sold to either the highest bidder or to the bidder who agrees to charge the lowest interest rate on the delinquent taxes.<sup>77</sup> The latter form of bidding is designed to protect delinquent taxpayers.<sup>78</sup> Tax lien purchasers want to charge the maximum interest rate that a state will allow because that is how they make a profit.<sup>79</sup> Because higher interest rates place a heavier burden on delinquent taxpayers, the goal of interest rate auctions is to drive down interest rates on tax liens through competitive bidding.<sup>80</sup> At tax auctions, however, there have been problems with investors colluding, and it is not uncommon for there to be only one bid, which usually starts at the highest interest rate.<sup>81</sup>

Aside from auctions, the other two primary ways municipalities dispose of tax liens is through negotiated bulk sales and securitization.<sup>82</sup> The purchasers of tax liens in these procedures are typically

<sup>72</sup> Charles D. Rittenhouse, Comment, *The True Costs of Not Paying Your Property Taxes in Ohio*, 36 U. DAYTON L. REV. 221, 222 (2011).

<sup>73</sup> Marchiony, *supra* note 57, at 231.

<sup>74</sup> See, e.g., LA. REV. STAT. ANN. § 47:2153(b)(5) (2013).

<sup>75</sup> See, e.g., N.J. STAT. ANN. § 54:5-19.1 (West 2014).

<sup>76</sup> See, e.g., ARIZ. REV. STAT. ANN. § 42-18114 (2013) (successful purchasers accept the lowest rate of interest).

<sup>77</sup> Marchiony, *supra* note 57, at 231.

<sup>78</sup> RAO, *supra* note 12, at 14.

<sup>79</sup> *Id.*

<sup>80</sup> *Id.* at 15.

<sup>81</sup> See *Phoenix Bond & Indem. Co. v. Pappas*, 741 N.E.2d 248 (Ill. 2000). In Illinois, Cook County conducted annual tax auctions where winning bidders were those who agreed to charge the smallest penalty percentage rates. *Id.* at 249. However, bidders “began making multiple, simultaneous, identical bids for the maximum statutory penalty percentage rate of 18%.” *Id.* at 250. Out of the identical bids, the county held a drawing and selected a winner. *Id.* As a result, ninety-five percent of the winning bids were for the maximum penalty percentage rate, and only five percent of the sales were conducted through a competitive bidding process. *Id.*

<sup>82</sup> Poindexter, Rogovoy, & Wachter, *supra* note 39, at 172. These sales benefit governments by shifting the burden and liabilities of collecting delinquent taxes to private entities. *Id.* at 157.

large companies that specialize in investing in property interests.<sup>83</sup> In negotiated bulk sales, instead of selling tax liens individually like at auctions, a local government contracts with a private entity to sell large quantities of tax liens at reduced rates instead of individually.<sup>84</sup> In a securitization, tax liens are pooled and re-packaged into interest-bearing securities such as bonds.<sup>85</sup>

## 2. Tax Deed Sales

A tax deed sale is different from a tax lien sale because it gives a purchaser full ownership of the property instead of just collateral.<sup>86</sup> Otherwise, tax deed procedures function similarly to tax lien procedures, allowing for a delinquent taxpayer to reclaim his property after a tax sale.<sup>87</sup> Tax deed purchasers may charge interest and penalties on a delinquent taxpayer who seeks to reclaim his property.<sup>88</sup> Finally, once a taxpayer's statutory period to redeem his property has passed, a tax deed purchaser owns the property free and clear against any other interests.<sup>89</sup>

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<sup>83</sup> RAO, *supra* note 12, at 16 (“The private entity essentially steps into the shoes of the taxing authority and becomes the owner of the liens.”).

<sup>84</sup> See CTR. FOR CMY. PROGRESS, ANALYSIS OF BULK TAX LIEN SALE, CITY OF ROCHESTER, 1 (2013). The purchase price, which may include the interest and penalties that investors can charge delinquent taxpayers, are negotiated before the sale, resulting in lower risks to the purchasers for a generous profit. *Id.* Local governments also tend to collect more from tax sales conducted through negotiated bulk sales than by auctions. See *id.* at 13. In 2009, the City of Rochester, New York stopped selling tax liens individually and initiated a negotiated bulk sale of agreements with American Tax Funding, LLC (“ATFS”). *Id.* at 1. From 2009 to 2012, the City of Rochester made 1.5 million dollars more through bulk sales with ATFS than it did selling tax liens individually from 2005 to 2008. *Id.*

<sup>85</sup> Frank S. Alexander, *Constitutional Questions about Tax Lien Foreclosures*, 16 GOV'T FIN. REV. 27, 28 (2000). In 1993, Jersey City, New Jersey was the first municipality to conduct a “large scale securitization of a delinquent property tax,” selling over forty-million dollars in tax liens to private entities. *Id.* Other cities such as New York, Washington, D.C., and Philadelphia joined suit. *Id.*

<sup>86</sup> See RAO, *supra* note 12, at 13.

<sup>87</sup> See, e.g., KAN. STAT. ANN. § 79-2306 (2013); R.I. GEN. LAWS § 44-9-8 (2013); TENN. CODE ANN. § 67-5-2501 (2013).

<sup>88</sup> See, e.g., COLO. REV. STAT. ANN. § 39-12-101 (2014); GA. CODE ANN. § 48-4-42 (2014).

<sup>89</sup> See MASS. GEN. LAWS ANN. ch. 60, § 65 (2014); TEX. TAX CODE ANN. § 34.01(n) (West 2013).

### 3. Right of Redemption

Most jurisdictions provide a homeowner with a “window of opportunity” to reclaim his property after a tax lien sale or a tax deed sale before foreclosure.<sup>90</sup> This time frame is called the redemption period, which generally lasts one to three years after the tax sale.<sup>91</sup> Some jurisdictions grant owners with residential property more time than other encumbered property such as vacant lots or abandoned buildings.<sup>92</sup> During the redemption period, homeowners may continue to occupy the house.<sup>93</sup>

Despite the extra time given to homeowners to get their affairs in order, waiting to pay delinquent property taxes during the redemption period can be risky.<sup>94</sup> The price of redemption includes not just the original amount in tax liens but also interest, penalties, and costs.<sup>95</sup> Many jurisdictions permit holders of tax lien certificates or tax deeds to charge high interest rates or penalties that increase the longer a taxpayer delays payment.<sup>96</sup> In Illinois, for example, the amount a homeowner must pay in penalties increases every six months until the right to redeem is foreclosed.<sup>97</sup> A homeowner may also have to incur the costs of a tax purchaser’s attorney fees in matters related to the

<sup>90</sup> William Weber, *Tax Foreclosure: A Drag on Community Vitality or A Tool for Economic Growth?*, 81 U. CIN. L. REV. 1615, 1619 (2013).

<sup>91</sup> D.C. CODE § 47-1304 (2012) (redemption period lasts six months after tax lien sale); GA. CODE ANN. § 48-4-40 (2014) (redemption period lasts one year after sale and until redemption right foreclosed by notice); MONT. CODE ANN. § 15-18-111 (2013) (redemption period three years after sale or sixty days after notice of foreclosure, whichever comes later); TEX. TAX CODE ANN. § 34.21 (West 2013) (two year redemption period for property used as a residence homestead).

<sup>92</sup> 35 ILL. COMP. STAT. 200/21-350 (2013) (six month redemption period for vacant or commercial property, two year redemption period for residential property); KAN. STAT. ANN. § 79-2401a (2013) (one year redemption period for abandoned property, two year redemption period for homestead property).

<sup>93</sup> MD. CODE ANN., TAX-PROP. § 14-830(a) (LexisNexis 2014) (“The owner of any property . . . shall have the right, during the period of redemption, to continue in possession of, and to exercise all rights of ownership over the property until the right of redemption has been finally foreclosed . . .”).

<sup>94</sup> RAO, *supra* note 12, at 4.

<sup>95</sup> *Id.*

<sup>96</sup> *See, e.g.*, TEX. TAX CODE ANN. § 34.21 (West 2013) (requires owner to pay “a redemption premium of 25 percent of the aggregate total if the property is redeemed during the first year of the redemption period or 50 percent of the aggregate total if the property is redeemed during the second year of the redemption period.”).

<sup>97</sup> 35 ILL. COMP. STAT. 200/21-355 (2013).

tax sale or preliminary foreclosure proceedings, which can be excessive.<sup>98</sup>

Elderly homeowners on fixed incomes cannot afford to wait to redeem their property.<sup>99</sup> Yet unintentionally, some elderly homeowners do delay.<sup>100</sup> Navigating what rights are available to a homeowner in a tax foreclosure process can be a difficult undertaking.<sup>101</sup> That challenge is compounded by deficient notice of those rights preceding and following a tax sale.<sup>102</sup> Section C maps the Supreme Court cases that have addressed notice and discusses issues that these cases have left unanswered in jurisdictions that conduct multi-level tax enforcement procedures.

### C. *The Supreme Court's Flexible Standards of Notice*

The Fourteenth Amendment provides that no person shall be deprived of property without due process of law.<sup>103</sup> This means that all persons with a significant property interest are entitled to notification of a legal action that threatens to diminish or destroy their property interest.<sup>104</sup> Jurisdictions that conduct tax sales often place the duty of providing notice of a final foreclosure on a tax lien or tax deed purchaser.<sup>105</sup> In the tax foreclosure process, receiving proper notice about the consequences of delinquent taxes can make the difference between losing a cherished family home and keeping it. A number of questions emerge, however, about what constitutes proper notice. What kind of notice is due? How must notice be delivered? What happens if notice is not received? These are questions courts have spent years attempting to answer. There are four precedents that bear on the standards of notice.

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<sup>98</sup> Rittenhouse, *supra* note 72, at 229-30. In counties in Ohio, some homeowners must pay up to \$2,500 for a tax purchaser's attorney fees to redeem their property. *Id.* at 230.

<sup>99</sup> See A. KIMBERLY DAYTON, JULIE ANN GARBER, ROBERT A. MEAD & MOLLY M. WOOD, 1 ADVISING THE ELDERLY CLIENT § 4:41 (2013).

<sup>100</sup> See RAO, *supra* note 12, at 5.

<sup>101</sup> *Id.*

<sup>102</sup> See discussion *infra* Part II.

<sup>103</sup> U.S. CONST. amend. XIV, § 1.

<sup>104</sup> See *Schroeder v. City of New York*, 371 U.S. 208, 211 (1962).

<sup>105</sup> See John W. Fisher II, *Delinquent and Non-Entered Lands and Due Process*, 115 W. VA. L. REV. 43, 85 (2012).

### 1. *Mullane v. Central Hanover Bank & Trust Company*

In 1950 in *Mullane v. Central Hanover Bank & Trust Company*, the Supreme Court held that notice solely by publication fails to satisfy due process when the address of a recipient is easily attainable.<sup>106</sup> In *Mullane*, a trustee initiated an action to settle the accounts of a common trust fund.<sup>107</sup> The trustee published notice of the pending action in a local newspaper even though the names and addresses of many of the beneficiaries were available.<sup>108</sup> The Court held that notice solely by publication was insufficient because it was not “reasonably calculated” to reach the intended audience.<sup>109</sup> The Court concluded that “[t]he means employed” for providing notice “must be such as one desirous of actually informing the absentee might reasonably adopt to accomplish it.”<sup>110</sup>

Thus, *Mullane* created a balancing test.<sup>111</sup> Notice “reasonably calculated” means that a person responsible for providing notice must make diligent efforts to inform an interested party so long as it does not incur excessive costs.<sup>112</sup> *Mullane* does not mandate actual notice, but the Supreme Court emphasized that “a State *must attempt to provide* actual notice.”<sup>113</sup> As long as there is a better way and the cost is insignificant, notice must be accomplished using the more reliable method.<sup>114</sup>

Since *Mullane* essentially held that notice by publication is not sufficient when the addresses of the intended recipients are ascertainable, states and localities changed their laws to provide individualized notice.<sup>115</sup> There are several methods of achieving notice that have been deemed reliable enough to be acceptable.<sup>116</sup> Jurisdictions may use one or a combination of the following: notice by first-class mail, notice by certified mail with return receipt requested, and notice by

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<sup>106</sup> *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 319-20 (1950).

<sup>107</sup> *Id.* at 309.

<sup>108</sup> *Id.*

<sup>109</sup> *Id.* at 319.

<sup>110</sup> *Id.* at 315.

<sup>111</sup> *See id.* at 314.

<sup>112</sup> *See Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 318 (1950).

<sup>113</sup> *Dusenbery v. United States*, 534 U.S. 161, 162 (2002) (emphasis in original).

<sup>114</sup> *See id.*

<sup>115</sup> Ellen F. Friedman, Note, *The Constitutionality of Request Notice Provisions in in Rem Tax Foreclosures*, 56 *FORDHAM L. REV.* 1209, 1219-20 (1988).

<sup>116</sup> *Mullane*, 339 U.S. at 318.

personal service which is usually delivered by the sheriff of a locality.<sup>117</sup> Notice by electronic mail may become more acceptable in the near future, but most jurisdictions follow at least one of the three types of notice just mentioned.<sup>118</sup>

## 2. *Covey v. Town of Summers*

A few years after *Mullane*, in *Covey v. Town of Summers*, the Court applied a special circumstances requirement to the *Mullane* test in determining whether particular methods of employing notice were reasonable.<sup>119</sup> In *Covey*, a town sent notice to a homeowner about an impending foreclosure of a lien on her house for delinquent taxes.<sup>120</sup> Although the homeowner lived alone, she did not have the “mental capacity to handle her affairs or to understand the meaning of any notice served upon her.”<sup>121</sup> Town officials knew of the homeowner’s mental condition yet appointed no guardian or conservator to look after the best interests of the homeowner.<sup>122</sup> Because the town sent notice with the knowledge that the notice would not properly inform the homeowner, the Court held that the town did not meet the requirement of notice “reasonably calculated” as set out in *Mullane*.<sup>123</sup>

## 3. *Mennonite Board of Missions v. Adams*

In 1983, the Supreme Court adapted the *Mullane* standard to property tax proceedings in *Mennonite Board of Missions v. Adams*.<sup>124</sup> In *Mennonite*, a homeowner became delinquent on her property taxes, so the county placed a tax lien on her house and sold the tax lien at auction.<sup>125</sup> The taxes remained unpaid, so pursuant to Indiana law, the tax lien purchaser initiated foreclosure on the house once the redemption period had expired.<sup>126</sup>

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<sup>117</sup> See *id.* at 318-19.

<sup>118</sup> Kelly, Jr., *supra* note 46, at 112.

<sup>119</sup> *Covey v. Town of Somers*, 351 U.S. 141, 146-47 (1956).

<sup>120</sup> *Id.* at 144.

<sup>121</sup> *Id.* at 146.

<sup>122</sup> *Id.*

<sup>123</sup> *Id.*

<sup>124</sup> *Mennonite Bd. of Missions v. Adams*, 462 U.S. 791, 798 (1982).

<sup>125</sup> *Id.* at 794.

<sup>126</sup> *Id.* at 795.

The tax foreclosure created a problem for a mortgagee because the homeowner had not paid off the mortgage on her house.<sup>127</sup> Because property tax liens defeat other interests and attachments, including mortgages, the transfer in title from the homeowner to the tax lien purchaser extinguished the mortgagee's claim on the house.<sup>128</sup> The county posted notice in the courthouse and sent actual notice regarding the tax sale to the homeowner, but no notice was ever sent to the mortgagee.<sup>129</sup> Since the homeowner's mortgage on the house represented a substantial property interest for the mortgagee, the Court held that the county's failure to attempt actual notice on the mortgagee violated due process.<sup>130</sup> Where there were reliable and inexpensive means to send notice directly to the mortgagee, "[n]either notice by publication and posting, nor mailed notice to the [original] property owner" was sufficient.<sup>131</sup>

*Mennonite* reaffirmed *Mullane* and clarified that a mortgagee's interest in a house entitles him to notice, but the case left an important question unanswered.<sup>132</sup> In *Mennonite*, the mortgagee asserted that it was entitled to both notice of the tax lien sale and notice of its right to redeem the property subsequent to the tax lien sale.<sup>133</sup> The Court refused to address the latter claim, which invites a host of questions.<sup>134</sup> These issues will be addressed in Part II.

#### 4. *Jones v. Flowers*

In 2006, in *Jones v. Flowers*, the Supreme Court again dealt with a case that arose from an issue involving notice requirements for delinquent property taxes.<sup>135</sup> The petitioner, Gary Jones, owned a home in Arkansas where he lived with his wife.<sup>136</sup> For thirty years, Mr. Jones made payments to his mortgage company for the house, and the mortgage company used a portion of those payments to pay Mr.

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<sup>127</sup> *Id.*

<sup>128</sup> *Id.* at 794.

<sup>129</sup> *Id.*

<sup>130</sup> *Mennonite Bd. of Missions v. Adams*, 462 U.S. 791, 798 (1982).

<sup>131</sup> *Id.* at 799.

<sup>132</sup> *Id.* at 800.

<sup>133</sup> *Id.* at 795.

<sup>134</sup> *Id.* at 800 n.6 ("Because we conclude that the failure to give adequate notice of the tax sale proceeding deprived appellant of due process of law, we need not reach this question.")

<sup>135</sup> *Jones v. Flowers*, 547 U.S. 220, 223 (2006).

<sup>136</sup> *Id.*



Jones's property taxes.<sup>137</sup> After Mr. Jones paid off his mortgage, he forgot to assume the property tax payments, so the property taxes went unpaid.<sup>138</sup> Pursuant to Arkansas law, the Commissioner of State Lands sent a notice by certified mail explaining that Mr. Jones's house would be sold for the delinquent taxes if they remained unpaid.<sup>139</sup> However, the certified mail was marked unclaimed and returned to the Commissioner because Mr. Jones had moved to a different address when notice was sent.<sup>140</sup> Although the Commissioner's Office was aware that Mr. Jones had not received the notice, it sold the house he owned for the amount in delinquent taxes.<sup>141</sup>

The Court held that when certified mail is returned undelivered, the government must take additional reasonable steps to attempt actual notice.<sup>142</sup> The Court recognized that achieving actual notice is not always possible, but it used the reasoning from *Mullane* and *Menonite* to conclude that there must be a good faith effort in achieving actual notice.<sup>143</sup> Because the Commissioner took no further action after the notice was returned unclaimed, the Commissioner failed to make a reasonable effort in achieving notice.<sup>144</sup> Chief Justice Roberts, speaking for the majority, stated, "We do not think that a person who actually desired to inform a real property owner of an impending tax sale of a house he owns would do nothing when a certified letter sent to the owner is returned unclaimed."<sup>145</sup> Like *Covey*, "due process entails further responsibility when the government becomes aware prior to the taking that its attempt at notice has failed."<sup>146</sup> The Court concluded that doing nothing when there are alternative ways of achieving actual notice is a violation of due process.<sup>147</sup>

The Court, however, declined to set any strict rules for what constituted additional reasonable steps.<sup>148</sup> It found that the "notice

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<sup>137</sup> *Id.*

<sup>138</sup> *Id.*

<sup>139</sup> *Id.*

<sup>140</sup> *Id.* at 223-24.

<sup>141</sup> *Jones v. Flowers*, 547 U.S. 220, 224 (2006).

<sup>142</sup> *See id.* at 224, 234, 239.

<sup>143</sup> *See id.* at 230-31.

<sup>144</sup> *See id.* at 229-30.

<sup>145</sup> *Id.* at 229.

<sup>146</sup> *Id.* at 227.

<sup>147</sup> *See Jones v. Flowers*, 547 U.S. 220, 234 (2006).

<sup>148</sup> *Id.* at 234-35.

required will vary with circumstances and conditions.”<sup>149</sup> In Mr. Jones’s particular case, the Court suggested that the Commissioner could have followed up by sending notice by regular mail or posting notice on the front door of the house.<sup>150</sup> However, the Court declined to rule that the Commissioner was required to look through the phone book or government records.<sup>151</sup> The Court found that “an open-ended search for a new address . . . imposes burdens on the State significantly greater than [ ] several relatively eas[er] options” like sending notice by regular mail.<sup>152</sup> Ultimately, the Court applied a balancing test between state interests and individual interests.<sup>153</sup>

## II. ANALYSIS

The Supreme Court has left much discretion to the states in deciding what methods of notice achieve due process in tax sale procedures.<sup>154</sup> At a minimum, “*Mullane* and its progeny teach that a party charged with giving notice must be reasonably diligent in doing so.”<sup>155</sup> The problem is that some jurisdictions take greater care in providing notice than others. An elderly homeowner’s right of receiving adequate notice “should not depend on the location of [his] property.”<sup>156</sup> The guidelines set out in the Supreme Court cases from *Mullane* to *Jones* still leave unresolved problems that make an elderly homeowner vulnerable to the tax sale process.<sup>157</sup> The issues to consider are: what information must be provided in a notice; whether notice should be provided at multiple points in the tax sale process; and how requirements of delivery may be improved to achieve actual notice. This Comment will tackle each of these issues in turn.

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<sup>149</sup> *Id.* at 227 (quoting *Walker v. City of Hutchinson*, 352 U.S. 112, 115 (1956)).

<sup>150</sup> *Id.* at 234-35.

<sup>151</sup> *Id.* at 235-36.

<sup>152</sup> *See id.*

<sup>153</sup> *See Jones v. Flowers*, 547 U.S. 220, 229-30 (2006); *see also* C. Jordan Myers, Comment, *Learning to Live with Jones v. Flowers: A “New Wrinkle” for an Old Standard*, 57 EMORY L.J. 463, 468-69 (2008).

<sup>154</sup> *See Tax Sales of Real Property - Notice and Opportunity to Be Heard*, 120 HARV. L. REV. 233, 233, 241 (2006) [hereinafter *Tax Sales*].

<sup>155</sup> *Plemons v. Gale*, 396 F.3d 569, 574 (4th Cir. 2005).

<sup>156</sup> Alexander, *supra* note 34, at 778.

<sup>157</sup> *See id.* at 763; *see also* Daniel Koen, *Trying to Protect Elderly and Mentally Incompetent Homeowners: One Tax Deed Case at a Time*, 14 PUB. INT. L. REP. 10, 11, 14-16 (2008).

### A. *The Quality of Notice*

The “reasonably calculated” test addresses methods of delivery, but it does not offer an express prescription for the quality of notice.<sup>158</sup> The content of a notice is just as important as the method employed to achieve that notice.<sup>159</sup> One factor that should determine the substance of a notice is the property at stake.<sup>160</sup> However, the reasonableness test first espoused in *Mullane* does not attempt to differentiate between the values of various types of properties.<sup>161</sup>

In *Jones*, the Court briefly touched on the importance of the type of property interest, but it did not elaborate further.<sup>162</sup> The Court noted the need for resending a notice returned unclaimed, particularly when “it concerns the important and irreversible prospect of losing a house.”<sup>163</sup> The Court’s statement was dictum and was limited to reviewing efforts at sending notice.<sup>164</sup> Yet the type of property involved in delinquent tax proceedings should be considered in determining what information gets put into a notice and how much care is taken to ensure that a property is redeemed.<sup>165</sup> For example, Illinois and Kansas give homeowners with delinquent property taxes a longer redemption period than owners of abandoned or vacant property.<sup>166</sup>

In recognizing the urgency of notice required for a homeowner, the Court in *Jones* seemed to imply that greater care in achieving notice should be taken regarding properties that are worth more.<sup>167</sup> The large property interest that hangs in the balance is why a government should apply due diligence in providing a homeowner with the best possible opportunity to recover full ownership of a house.<sup>168</sup> This

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<sup>158</sup> See *Tax Sales*, *supra* note 154, at 238 (“[W]hether one is ‘desirous’ of actually delivering a message has nothing to do with the content of the message.”).

<sup>159</sup> *See id.*

<sup>160</sup> See Koen, *supra* note 157, at 14.

<sup>161</sup> *Tax Sales*, *supra* note 154, at 237-38.

<sup>162</sup> See *Jones v. Flowers*, 547 U.S. 220, 234 (2006).

<sup>163</sup> *Id.*

<sup>164</sup> *See id.*

<sup>165</sup> See *Mathews v. Eldridge*, 424 U.S. 319, 334-35 (1976) (applying a three-pronged balancing test by weighing “[f]irst, the private interest that will be affected . . . second, the risk of an erroneous deprivation of such interest . . . and finally, the Government’s interest . . .”).

<sup>166</sup> See 35 ILL. COMP. STAT. 200/21-350 (2013); KAN. STAT. ANN. § 79-2401a (2013); *see also* MINN. STAT. § 281.17 (2013) (normal redemption period is three years); MINN. STAT. § 281.173 (2013) (providing a five-week redemption period for certain abandoned properties).

<sup>167</sup> See *Jones*, 547 U.S. at 230.

<sup>168</sup> *See id.*

means that notice should be clear and informative. However, it also begs the question what information is necessary to achieve proper notice and what information is superfluous. In particular, an important issue is whether notice of one's right to redeem is required for due process to be satisfied.<sup>169</sup>

No Supreme Court case, however, has addressed whether the power of a homeowner to redeem his property after a tax sale is a right that requires notice.<sup>170</sup> The Court in *Mennonite* was faced with the question but declined to answer.<sup>171</sup> Perhaps the Supreme Court has refrained from deciding the issue of whether a homeowner requires notice of his redemption rights because of the diversity and complexity in notice procedures across jurisdictions.<sup>172</sup> Another possible reason that the Court has not decided a uniform standard for notice of redemption is that it is hesitant in defining what property interests are substantial enough to merit due process. The Supreme Court has stated:

Property interests, of course, are not created by the Constitution. Rather they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law—rules or understandings that secure certain benefits and that support claims of entitlements to those benefits.<sup>173</sup>

The issue, thus, is whether the right to redeem property from a tax lien or tax deed sale is a significant property interest recognized by the state. If a state does recognize the right of redemption as a significant property interest, then notice of the right of redemption is required under due process.<sup>174</sup> The Court's reasoning above indicates that the laws, procedures, and legislative history of a state must be examined in determining whether redemption is a property interest

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<sup>169</sup> Alexander, *supra* note 34, at 778.

<sup>170</sup> Jessica Gladney, Note, *Stopping Short of Justice: Hamilton and Notice Requirements for the Redemption Period of Tax Sales*, 68 LA. L. REV. 263, 271 (2007).

<sup>171</sup> *Mennonite Bd. of Missions v. Adams*, 462 U.S. 791, 800 n.6 (1983) ("This appeal also presents the question whether, before the County Auditor executes and delivers a deed to the tax-sale purchaser, the mortgagee is constitutionally entitled to notice of its right to redeem the property . . . we need not reach this question.").

<sup>172</sup> See Alexander, *supra* note 34, at 778.

<sup>173</sup> *Bd. of Regents of State Colls. v. Roth*, 408 U.S. 564, 577 (1972).

<sup>174</sup> See *Mathews v. Eldridge*, 424 U.S. 319, 332–33 (1976).

entitled to due process protection.<sup>175</sup> The first step is to distinguish what jurisdictions provide a right of redemption after a tax sale and what jurisdictions issue a sale that is final. The stages of a tax foreclosure are factors that are determined by the jurisdiction and affect whether notice of redemption is required.<sup>176</sup> For example, in jurisdictions where there is no right to reclaim property after a tax deed is issued, a right of redemption is not necessarily recognized.<sup>177</sup>

Jurisdictions that provide a homeowner a right to redeem his property after a tax sale should provide a homeowner notice of his rights to redeem.<sup>178</sup> The purpose of providing the redemption period is to protect the taxpayer from being deprived of a substantial property interest.<sup>179</sup> Because of the short turnaround between notice and a tax sale in some jurisdictions, a delinquent taxpayer's ability to maintain ownership of his property is often dependent on the period of redemption.<sup>180</sup> Therefore, redemption should be treated as a significant property interest. The problem is that some jurisdictions recognize the right of homeowners to redeem property without requiring that homeowners be given notice of those rights.<sup>181</sup> Other jurisdictions demand that a property owner be informed of his right of redemption but do not require that the notice provide any details about when the right expires or how the right may be exercised.<sup>182</sup>

In 2012, in *Sneil, LLC v. Tybe Learning Center, Inc.*, the Missouri Supreme Court held that Missouri's statute requiring notice of redemption rights did not call for any details regarding redemption.<sup>183</sup> The Missouri statute provides that before a tax lien purchaser may

<sup>175</sup> See *Roth*, 408 U.S. at 577.

<sup>176</sup> See Alexander, *supra* note 34, at 777.

<sup>177</sup> In a procedure of this kind, there is no intermediate event—just a final sale that forecloses on the property. Citizens living in jurisdictions with only one event are given an opportunity before that event to “cure” their debt to prevent the event from occurring. See, e.g., CAL. REV. & TAX. CODE § 3707 (West 2013); N.M. STAT. ANN. § 7-38-70 (2014); N.D. CENT. CODE § 57-28-09 (2013); VA. CODE ANN. § 58.1-3965 (2013); WASH. REV. CODE § 84.64.070 (2014); WIS. STAT. § 75.01 (2014).

<sup>178</sup> RAO, *supra* note 12, at 26.

<sup>179</sup> See *id.* at 24, 26.

<sup>180</sup> See *id.* at 26.

<sup>181</sup> See, e.g., ARIZ. REV. STAT. ANN. § 42-18108 (2013) (requiring notice to homeowner of pending tax sale but no requirement to provide notice of redemption rights available after tax sale); DEL. CODE ANN. tit. 9, § 8723 (2014) (rights of redemption not required in notice form); GA. CODE ANN. § 48-3-9 (2014).

<sup>182</sup> See *Sneil, L.L.C. v. Tybe Learning Ctr., Inc.*, 370 S.W.3d 562, 571-73 (Mo. 2012) (en banc).

<sup>183</sup> *Id.* at 573.

foreclose on a delinquent taxpayer's property, the purchaser must send notice "of such person's right to redeem the property."<sup>184</sup> Appellate courts from two districts had interpreted the statute to require that notice have language informing an owner of when his right of redemption expired or the consequences of not redeeming.<sup>185</sup> The Missouri court disagreed, finding that due process did not require notice of the time frame or details of the remedial measures available to owners who faced tax foreclosure.<sup>186</sup> The court found that "[t]here is no rationale under due process that 'justifies requiring individualized notice of state-law remedies which . . . are established by published, generally available statutes and case law.'"<sup>187</sup> Because the laws regarding redemption were available through public sources, the court concluded that the "recipient of the notice 'must be held to a knowledge of the law.'"<sup>188</sup> Thus, the burden fell on the taxpayer to research his redemption rights.<sup>189</sup>

The problem with the Missouri court's reasoning is twofold. First, it disproportionately favors the efficiency of the government over the interest of the individual.<sup>190</sup> When there are additional inexpensive measures a government can take to make notice more effective, it has an obligation to implement those measures.<sup>191</sup> Second, the Missouri court ignores the fundamental purpose of *Mullane* and the Supreme Court cases that followed—"to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections."<sup>192</sup> Although those Supreme Court decisions dealt with the adequacy of delivery, the underlying reasoning of notice "reasonably calculated" should apply to the substance of the notice, and not

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<sup>184</sup> MO. REV. STAT. § 140.405(2) (2013).

<sup>185</sup> See *Keylien Corp. v. Johnson*, 284 S.W.3d 606, 613 (Mo. Ct. App. 2009) (holding "notice must indicate that the recipient has one year from the date of the tax sale to redeem."); *CedarBridge, L.L.C. v. Eason*, 293 S.W.3d 462, 465 (Mo. Ct. App. 2009) (holding "notice must inform the recipient that s/he has one year from the date of the tax sale to redeem the property or be forever barred from doing so."); *Hames v. Bellistri*, 300 S.W.3d 235, 239 (Mo. Ct. App. 2009) (holding "notice of the right to redeem must include the correct time in which to redeem the property.").

<sup>186</sup> *Sneil*, 370 S.W.3d at 573.

<sup>187</sup> *Id.* at 573 (quoting *City of West Covina v. Perkins*, 525 U.S. 234, 241 (1999)).

<sup>188</sup> *Id.* (quoting *Bishop v. Bd. of Educ. of Francis Howell Sch. Dist.*, 575 S.W.2d 827, 829 (Mo. App. 1978)).

<sup>189</sup> See *id.*

<sup>190</sup> See *Mathews v. Eldridge*, 424 U.S. 319, 334-35 (1976).

<sup>191</sup> See *id.* at 347-48.

<sup>192</sup> *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950).

just the procedure used to send the notice.<sup>193</sup> Homeowners who know when their right of redemption will expire are more equipped to prevent a foreclosure than those who are left unaware.<sup>194</sup> The Missouri court, however, found that omitting the date a redemption period expired was not a matter of life or death.<sup>195</sup> It reasoned that a concerned property owner could enlighten himself by using public sources.<sup>196</sup>

On some level, the Missouri court is correct. Property owners must take responsibility for their actions and be proactive in solving the potential problems that arise from delinquency. The United States Supreme Court implied this when it found that actual notice need not always be accomplished to satisfy due process.<sup>197</sup> When the government issues notice by mail, for example, it falls on the recipient to check his mailbox and read the mail.<sup>198</sup> If the government issues a notice of delinquency, it falls on the taxpayer to check his tax records.<sup>199</sup> Yet a homeowner still has the right to a fair and comprehensible process.

The whole purpose of a tax foreclosure procedure is to secure payment of delinquent property taxes, not to remove a person from his home.<sup>200</sup> Tax laws can be intimidating, and redemption rights are often crammed between hundreds of pages of statutory text.<sup>201</sup> Even experts have a difficult time understanding the full implications of a tax sale or of a redemption statute.<sup>202</sup> The Missouri court also assumed that because sources are available to the public, they must be

<sup>193</sup> See *Malone v. Robinson*, 614 A.2d 33, 38 (D.C. App. 1992) (per curiam).

<sup>194</sup> *RAO*, *supra* note 12, at 5.

<sup>195</sup> See *Sneil LLC v. Tube Learning Ctr., Inc.*, 370 S.W.3d 562, 573 (2012).

<sup>196</sup> See *id.*

<sup>197</sup> See *Dusenbury v. United States*, 534 U.S. 161, 162 (2002); *Mennonite Bd. of Missions v. Adams*, 462 U.S. 791, 795 (1983); *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. at 314-15.

<sup>198</sup> See *Jones v. Flowers*, 547 U.S. 220, 242 (2006) (Thomas, J., dissenting).

<sup>199</sup> See *id.* (Thomas, J., dissenting).

<sup>200</sup> See *Garcia v. Ted Parks, L.L.C.*, 195 P.3d 1269, 1280 (Okla. 2008).

<sup>201</sup> See *RAO*, *supra* note 12, at 5.

<sup>202</sup> The Missouri Supreme Court had to resolve a split among lower courts regarding when the redemption period actually expired for taxpayers. *Sneil LLC v. Tube Learning Ctr., Inc.*, 370 S.W.3d 562, 568 (2012). An appellate court from one district interpreted a statute to allow a property owner two years to redeem his property. *Boston v. Williamson*, 807 S.W.2d 216, 217 (Mo. App. W. Dist. 1991). The decision in that district stood for over twenty years although other districts had interpreted that the statute allotted only one year for redemption. *Sneil*, 370 S.W.3d at 568. The statute provided that owners had one year from the date of the sale to redeem their property. *Sneil*, 370 S.W.3d at 570 (discussing MO. REV. STAT. ANN. § 140.405

fairly accessible, which is not always the case. Not all elderly homeowners have the money to own their own computer or the means to get to a government office to look up information. Even assuming all elderly homeowners have access to a computer, there may still be elderly homeowners who are unfamiliar with searching the Internet, let alone using its databases to find legal information on complex procedures.

The decision to include or omit a small but important detail can make a difference in whether a person keeps his house or is left homeless. In both *Mullane* and *Mennonite*, the Court gave no credence to a claim that notice by publication in a newspaper was adequate because it was available to the public.<sup>203</sup> When other methods of delivery are more reliable and are not burdensome, the Court held that there is no excuse for not attempting to employ those methods.<sup>204</sup> The same should be true for the quality and substance of a notice, especially when the property is a house. As every state has recognized a house as an important property interest, every reasonable opportunity must be afforded in helping a homeowner keep his home.

In *First N.H. Bank v. Town of Windham*, the New Hampshire Supreme Court reached the opposite conclusion of the Missouri court.<sup>205</sup> The New Hampshire court held that under due process, a property owner must “receive actual notice of [his] right to redeem and the consequences of not doing so.”<sup>206</sup> The court acknowledged that neither *Mennonite* nor its forebears discussed the issue of due process in the context of redemption.<sup>207</sup> However, the court determined that, under *Mennonite*, “the due process inquiry, reduced to its core, is one of ‘fundamental fairness.’”<sup>208</sup> Because the right of redemption was a “protected property interest,” fundamental fairness dictated that the holder of the redemption right be given adequate

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(2013)). The complication was that tax lien purchasers could petition for a deed one year after the tax sale and before the second-year anniversary of the tax lien sale. *Id.*

<sup>203</sup> See *Mennonite Bd. of Missions v. Adams*, 462 U.S. 791, 798-99 (1983); *Mullane v. Cent. Hanover Bank & Trust*, 339 U.S. 306, 315 (1950).

<sup>204</sup> *Mennonite*, 462 U.S. at 799-800.

<sup>205</sup> See generally *First N.H. Bank v. Town of Windham*, 639 A.2d 1089 (N.H. 1994) (finding that notice is inadequate if it does not advise homeowners of their rights to redeem their properties).

<sup>206</sup> *Id.* at 1094.

<sup>207</sup> *Id.*

<sup>208</sup> *Id.*



notice.<sup>209</sup> The court concluded that adequate notice must contain the date that the right of redemption expired and a warning that an owner's property would be lost forever if not redeemed.<sup>210</sup>

With this opinion, the New Hampshire court reaches more to the heart of due process than the Missouri court. In *Mullane, Covey, Mennonite*, and *Jones*, the threshold question was whether there are additional reasonable measures that will increase the quality of notice.<sup>211</sup> The Supreme Court has indicated that when there are affordable ways to increase the accuracy of notice, precision trumps convenience.<sup>212</sup> Similarly, the New Hampshire court found that withholding information that could provide a recipient with a better understanding at no significant cost violates "fundamental fairness."<sup>213</sup> Whenever the substance of a notice can be improved to help a homeowner comprehend the implications of a property seizure, a party responsible for notice must attempt those higher standards.<sup>214</sup> In sum, jurisdictions that conduct tax sales with a subsequent redemption period must take special care in informing homeowners of their rights of redemption and the implications of a tax sale.<sup>215</sup>

### B. *Time When Notice of Redemption is Due*

It is clear that notice must be provided to an intended recipient some time before the recipient is deprived of a significant property interest.<sup>216</sup> The question is how far in advance must notice be given to apprise a person of his right to due process.<sup>217</sup> For multi-stage tax proceedings, an important question is whether notice should be required at each stage of the proceeding as opposed to notice that is

<sup>209</sup> *Id.*

<sup>210</sup> *Id.* at 207.

<sup>211</sup> See *Jones v. Flowers*, 547 U.S. 220, 238 (2006); *Mennonite Bd. of Missions v. Adams*, 462 U.S. 791, 798 (1983); *Covey v. Town of Somers*, 351 U.S. 141, 142 (1956); *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 307 (1950).

<sup>212</sup> See *Jones*, 547 U.S. at 238; *Mennonite*, 462 U.S. at 798-99; *Covey*, 351 U.S. 146; *Mullane*, 339 U.S. at 314-15.

<sup>213</sup> *First NH Bank v. Town of Windham*, 639 A.2d 1089, 1094 (1994).

<sup>214</sup> See *id.* at 1094-95.

<sup>215</sup> See IND. CODE § 6-1.1-25-4.5 (2014) for an example of an ideal notice statute. Indiana requires notice to include: (1) a statement about the tax deed, (2) the date the property was sold, (3) the tax purchaser's name, (4) a statement about redemption, and (5) when redemption expires. IND. CODE § 6-1.1-25-4.5(e).

<sup>216</sup> *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950).

<sup>217</sup> See *Alexander*, *supra* note 34, at 750.

given once only after a tax sale or just before foreclosure.<sup>218</sup> For purposes of this Comment, the ultimate question regarding multi-stage tax proceedings is when notice of a homeowner's right of redemption is required. *Mullane, Mennonite*, and *Jones* left these questions for states and localities to decide.<sup>219</sup> However, guidance from the Supreme Court's notice "reasonably calculated" test supports a rule that notice regarding a homeowner's redemption rights should be made toward the beginning of the tax procedure.<sup>220</sup>

All jurisdictions that conduct tax lien sales followed by a period of redemption require that notice be sent to interested parties before the locality sells the tax lien to a third party.<sup>221</sup> Jurisdictions, however, diverge when it comes to the timeliness of notifying a homeowner of his right to redeem his property.<sup>222</sup> Some jurisdictions require that notice of redemption be included in the notice of a pending tax lien certificate sale.<sup>223</sup> Other jurisdictions require that notice of redemption be provided within a certain number of days or months after a tax lien sale.<sup>224</sup> There are also jurisdictions that do not require notice of the right of redemption until a party sends notice that it intends to foreclose on the property.<sup>225</sup> The last category is problematic for a number of reasons discussed below.

In *McCann v. Scaduto*, the issue before the New York Court of Appeals was whether notice of a homeowner's right of redemption satisfied due process when notice was sent just before redemption expired.<sup>226</sup> The case concerned two homeowners who lost their homes after property tax liens were placed on their houses and sold at a tax lien auction.<sup>227</sup> The homeowners had two years from the date of the tax lien sale to redeem their homes.<sup>228</sup> However, they received no actual notice that a tax sale had been conducted or of their rights to

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<sup>218</sup> See *id.* at 749.

<sup>219</sup> See *Jones v. Flowers*, 547 U.S. 220, 238 (2006) ("The State can determine how to proceed in response to our conclusion that notice was inadequate here, and the States have taken a variety of approaches to the present question.").

<sup>220</sup> See *id.*

<sup>221</sup> RAO, *supra* note 12, at 24.

<sup>222</sup> See *id.*

<sup>223</sup> See *id.* at 28.

<sup>224</sup> See *id.* at 24, 35.

<sup>225</sup> See *id.* at 24, 26.

<sup>226</sup> See *McCann v. Scaduto*, 519 N.E.2d 309, 311 (1987).

<sup>227</sup> *Id.*

<sup>228</sup> *Id.*

redeem until three months before the redemption period expired.<sup>229</sup> In fact, “the property owners were afforded no right to a hearing and no right to return of the very substantial surplus over their indebtedness.”<sup>230</sup> One homeowner lost her home of thirty years, which was worth approximately \$175,000, for property taxes amounting to \$864.50.<sup>231</sup> The homeowner’s only source of income came from social security payments and a weekend job delivering magazines.<sup>232</sup> Another homeowner lost ownership of her house, which was worth over \$90,000, for a tax debt of \$463.92.<sup>233</sup>

The New York Court of Appeals held that notice sent toward the end of a tax foreclosure procedure informing homeowners of their redemption rights was insufficient to satisfy due process.<sup>234</sup> Calling on *Mullane*, the court found that the “fundamental requirement of due process . . . is notice reasonably calculated, under all circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.”<sup>235</sup> The court found that notice received so close to the termination of the redemption period did not provide the homeowners with a sufficient opportunity to recover their property.<sup>236</sup> In examining the purpose of the redemption period, the court found that notice sent three months before the period ended defeated the legislative intent of providing homeowners two years to redeem their property.<sup>237</sup> It was especially important to give the homeowners ample time because once the redemption period ended, the property could be forfeited at “the mere request of the tax lien purchaser.”<sup>238</sup>

The dissent, however, stressed that a tax lien purchaser could only petition a county for the deed to a homeowner’s house once the homeowner’s right of redemption expired.<sup>239</sup> Because the expiration of redemption terminated automatically and was not dependent on an

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<sup>229</sup> *Id.*

<sup>230</sup> *Id.*

<sup>231</sup> *Id.*

<sup>232</sup> *McCann v. Scaduto*, 519 N.E.2d 309, 311 (1987).

<sup>233</sup> *Id.*

<sup>234</sup> *See id.*

<sup>235</sup> *Id.* at 312 (quoting *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950)).

<sup>236</sup> *See id.* at 311.

<sup>237</sup> *Id.* at 315.

<sup>238</sup> *McCann v. Scaduto*, 519 N.E.2d 309, 314 (1987).

<sup>239</sup> *Id.* at 316 (Simons, J., dissenting).

act of the tax lien purchaser, the dissent found that there was no due process problem.<sup>240</sup> The dissent contrasted this case with *Mennonite*, where the Supreme Court held that a mortgagee was entitled to notice of a tax lien sale.<sup>241</sup> “Because . . . the consequence of a tax lien sale [is] the immediate subordination of the mortgagee’s interest,” the mortgagee was entitled to notice before and promptly after the tax lien sale.<sup>242</sup> Unlike the “immediate subordination” a tax sale has on a mortgagee’s claim, the dissent noted that a tax lien sale does not alter a homeowner’s rights in ownership until the redemption period has expired.<sup>243</sup> The dissent concluded that “a tax sale acquires no more than a lien for the delinquent taxes, penalties and interest.”<sup>244</sup>

The problem with the *McCann* dissent is that the absence of notice at the beginning of the redemption period may well diminish or destroy the opportunity a homeowner has to maintain his property.<sup>245</sup> Unlike the dissent, the majority found that tax lien sales “create immediate, substantial adverse consequences for the property holder.”<sup>246</sup> The *McCann* majority noted this when it examined the high interests, penalties, and expenses that accrue on the tax lien during the redemption period.<sup>247</sup> Keeping in mind the impacts that deficient notice could have on elderly homeowners, the majority stated:

These costs cannot be shrugged off as insignificant consequences, particularly for persons such as [a] petitioner . . . subsisting on Social Security payments and a weekend job delivering magazines, and particularly when measured against the negligible cost and burden that would be imposed on the County if it were required to mail notice to her.<sup>248</sup>

A homeowner must be served with notice before a substantial amount of time has passed in the redemption period to be in the best

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<sup>240</sup> See *id.* (Simons, J., dissenting).

<sup>241</sup> See *id.* at 317 (Simons, J., dissenting).

<sup>242</sup> *Id.* (Simons, J., dissenting) (“Because the successful [tax] [lien] bid constituted a prior claim on the property . . . if the bid price substantially exceeded the tax and penalties due, the sale might result in diminution or even extinguishment of the mortgagee’s interest.”).

<sup>243</sup> See *id.* (Simons, J., dissenting).

<sup>244</sup> *McCann v. Scaduto*, 519 N.E.2d 309, 317 (1987) (Simons, J., dissenting).

<sup>245</sup> *In re Pontes*, 310 F. Supp. 2d 447, 458 (D.R.I. 2004).

<sup>246</sup> *McCann*, 519 N.E.2d at 314.

<sup>247</sup> *Id.*

<sup>248</sup> *Id.*

position to redeem his home. The purpose of the Supreme Court's decision in *Mennonite* was to provide an interested party with the opportunity to protect his property interests. Similarly, in *Mullane*, the Supreme Court held that a party responsible for serving notice must act "as one desirous of actually informing" a recipient of his opportunity to protect his claims.<sup>249</sup> Although notice later on in the redemption period may inform an owner of his rights before his title has been forfeited, it does not provide a homeowner with an adequate opportunity to protect his claims. In overturning a state notice statute, a court stated that "not only does the Due Process Clause mandate notice, but it also dictates the *quality* of that notice."<sup>250</sup> Both the content of the notice and the time it is issued affect the quality of the notice.

Although *McCann* dealt with a tax foreclosure scheme that contemplated the automatic termination of redemption, in jurisdictions where redemption is not terminated automatically, the timing of a notice is even more crucial.<sup>251</sup> In such jurisdictions, the termination of the redemption period depends on an act of the tax lien purchaser.<sup>252</sup> Homeowners are guaranteed a certain amount of time to redeem their property after a tax sale.<sup>253</sup> Once that guaranteed redemption period ends, a tax sale purchaser may request the locality to issue a deed or he may submit a petition to foreclose on the property.<sup>254</sup> If a tax purchaser does not take any immediate action after the guaranteed redemption period ends, homeowners are still entitled to redeem their property until action is taken.<sup>255</sup> Because the period of redemption is essentially left at the discretion of the tax purchaser, this may cause

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<sup>249</sup> *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 315 (1950).

<sup>250</sup> *In re Pontes*, 310 F. Supp. 2d 447, 455 (D.R.I. 2004).

<sup>251</sup> See Alexander, *supra* note 34, at 781.

<sup>252</sup> GA. CODE ANN. § 48-4-40 (2014) (guaranteed twelve-month redemption period after tax sale with redemption right terminated by notice of foreclosure); NEB. REV. STAT. § 77-1824, 1902 (2014) (guaranteed three-year redemption period and redemption right terminated when tax lien purchaser files for tax deed. Currently, the tax lien purchaser must file within six months of the end of the redemption period, but this will change to nine months effective January 1, 2015); R.I. GEN. LAWS ANN. § 44-9-25 (2013) (right of redemption until redemption foreclosed no sooner than one year after tax lien sale); W. VA. CODE § 11A-3-19 (2013) (right of redemption until deed issued approximately eighteen months after tax lien sale).

<sup>253</sup> See, e.g., NEB. REV. STAT. § 77-1824, 1902 (2014).

<sup>254</sup> See e.g., *id.*

<sup>255</sup> See, e.g., IDAHO CODE ANN. § 63-1007 (2013); MASS GEN. LAWS ch. 60, § 62 (2014); NEB. REV. STAT. § 77-1824 (2014); OHIO REV. CODE ANN. § 5721.38(A) (LexisNexis 2014).

homeowners confusion about when they can exercise their rights of redemption.<sup>256</sup>

In jurisdictions where the end of the redemption period is predicated on a tax purchaser's actions, it is imperative that notice be provided more than once.<sup>257</sup> First, a homeowner should be made aware of his rights of redemption either before or immediately after a tax sale.<sup>258</sup> Notice of a pending tax sale is no substitute for adequate notice of one's right to redeem property or of the consequences of not redeeming.<sup>259</sup> Second, a tax sale purchaser should be obligated to give a homeowner substantial notice that he intends on taking action that would terminate a homeowner's right to redeem.<sup>260</sup> Tax sale purchasers must comply with due process, which "requires more than notice that you may lose your property rights for nonpayment of taxes at some unknown date in the future."<sup>261</sup> Again, a party must provide notice that affords a homeowner a meaningful opportunity to save his property.<sup>262</sup>

In *In re Pontes*, a federal district court struck down a Rhode Island statute that permitted a tax deed purchaser to initiate a procedure to foreclose a homeowner's right of redemption before sending notice.<sup>263</sup> Under Rhode Island law, a homeowner had a minimum of one year to redeem his property after a tax sale.<sup>264</sup> After one year, the expiration date of redemption depended on when a tax deed purchaser filed a petition with the local court to foreclose on the right of redemption.<sup>265</sup> In *Pontes*, a local taxing authority sold a homeowner's house in a tax deed sale for overdue property taxes.<sup>266</sup> The homeowner never received notice that his property had been sold, that he had a right to redeem it, or how long the period of redemption would

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<sup>256</sup> See *Sneil, LLC v. Tybe Learning Ctr., Inc.*, 370 S.W.3d 562, 570 (2012) ("[T]he implications of vesting a tax sale purchaser with the authority to set the deadline for a landowner to act to save that owner's own property by something as subjective and uncertain as the date the purchaser decides . . . [is] [n]ot only . . . completely arbitrary, but there also is great potential for error, uncertainty, and deception in allowing such a practice.").

<sup>257</sup> See *RAO*, *supra* note 12, at 24.

<sup>258</sup> *Id.* at 26.

<sup>259</sup> *Jones v. Flower*, 547 U.S. 220, 232-33 (2006).

<sup>260</sup> *In re Pontes*, 310 F. Supp. 2d 447, 458 (D.R.I. 2004).

<sup>261</sup> *Alexander*, *supra* note 34, at 781.

<sup>262</sup> See *Schwartz v. Dey*, 665 S.W.2d 933, 935 (Mo. 1984) (en banc).

<sup>263</sup> *In re Pontes*, 310 F. Supp. 2d at 458.

<sup>264</sup> *Id.* at 449.

<sup>265</sup> See *id.*

<sup>266</sup> *Id.*

last.<sup>267</sup> Over a year after the tax sale, the homeowner received notice from the tax deed purchaser that the purchaser had already initiated proceedings to foreclose on the homeowner's right of redemption.<sup>268</sup>

Like the court in *McCann*, the district court recognized the right of redemption as a property interest that was protected by due process.<sup>269</sup> The court also reached the same conclusion as the majority opinion in *McCann*—that delaying notice had a deleterious effect on a homeowner's right and opportunity to redeem property.<sup>270</sup> Like *McCann*, the court was concerned about how inadequate notice would impact elderly property owners, many of whom had low incomes and no advocates.<sup>271</sup> Describing the impact of late notice, the court stated:

[B]y the time the taxpayer receives this notice the right of redemption has become burdened with interest, penalties, attorneys' fees, and court costs associated with contesting the foreclosure petition. Due to the often substantial economic burden these expenses place on the taxpayer, the Court finds that waiting to provide notice of the right of redemption until the end of the tax sale process effectively deprives the taxpayer of the right itself. The taxpayer should be notified of the right of redemption *before* it is so burdened by the increased expenses . . . and constrained by time so as to make the "right of redemption" a mere shibboleth.<sup>272</sup>

Both the *McCann* court and the *Pontes* court applied the flexible standards of *Mullane* and *Mennonite* by reducing notice reasonably calculated to its bare form. Regardless of whether the issue is the method of delivery, the content, or the timing of a notice, states and local governments should always apply a balancing test.<sup>273</sup> Localities should take special care in examining the interests of homeowners when trying to relieve administrative burdens.<sup>274</sup> Informing a homeowner about redemption earlier in a multi-stage foreclosure process increases the quality of notice while imposing minimum costs on the

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<sup>267</sup> *Id.*

<sup>268</sup> *Id.* at 449-50.

<sup>269</sup> *In re Pontes*, 310 F. Supp. 2d at 454.

<sup>270</sup> *McCann v. Scaduto*, 519 N.E.2d 309, 315 (1987).

<sup>271</sup> *In re Pontes*, 310 F. Supp. 2d 477, 454 (D.R.I. 2004).

<sup>272</sup> *Id.*

<sup>273</sup> *See id.*

<sup>274</sup> Gladney, *supra* note 170, at 273.

state.<sup>275</sup> The primary goal of a locality is to collect delinquent taxes, and “[p]roviding earlier notice of the right of redemption will have little effect” on the locality’s ability in recovering money from tax sales.<sup>276</sup> As proof that the administrative burden is relatively low in serving notice, some jurisdictions require notice to be sent out multiple times before the redemption period expires.<sup>277</sup> Notice sent out multiple times is ideal, but at a minimum, notice of a homeowner’s right to redeem should be sent before and shortly after a tax sale.

### C. *Measures Taken to Find Interested Parties*

The Supreme Court’s decisions in *Covey* and *Jones* theoretically provide elderly homeowners with more protection.<sup>278</sup> Both cases hold that when a sender of notice has positive information that notice has not been accomplished the sender must take additional reasonable steps to ensure that notice is meaningful.<sup>279</sup> In *Covey*, the Court concluded that when a recipient of notice is known to be mentally incapacitated, notice may only be achieved by appointing a guardian or conservator.<sup>280</sup> In *Jones*, when mail is returned to the sender as unclaimed, the sender must attempt notice again by using means that are reliable in achieving notice.<sup>281</sup>

These cases prevent notice from being a mere gesture, but in actuality their standards may be difficult to enforce for two reasons.<sup>282</sup> First, *Jones* uses the “if at first you don’t succeed, try again” approach, but it does not apply a specific remedy for times when notice fails.<sup>283</sup> This problem is compounded by the lack of motive tax lien or tax

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<sup>275</sup> See *id.* at 279.

<sup>276</sup> *In re Pontes*, 310 F. Supp. 2d at 459.

<sup>277</sup> E.g., LA. REV. STAT. ANN. § 47:2156 (2013) (requiring tax collector to send notice each year during three-year redemption period); N.Y.C. ADMIN. CODE, tit. 11 § 11-320(b) (2013) (notice “shall be mailed to such owner and such other persons four times: not less than ninety, sixty, thirty and ten days prior to the date of sale”); R.I. GEN. LAWS § 44-9-10 (2013) (requiring notice by first-class mail ninety days before sale date and notice by certified mail forty days before sale date).

<sup>278</sup> See *Myers*, *supra* note 153, at 480.

<sup>279</sup> See *Jones v. Flowers*, 547 U.S. 200, 226 (2006); *Covey v. Town of Somers*, 351 U.S. 141, 146 (1956) (quoting *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 314-315 (1950)).

<sup>280</sup> See *Covey*, 351 U.S. at 146-47.

<sup>281</sup> *Jones v. Flowers*, 547 U.S. 220, 225 (2006).

<sup>282</sup> See *Myers*, *supra* note 153, at 487.

<sup>283</sup> One issue, for example, is whether initial notice by first-class mail is sufficient to satisfy due process if a later notice by certified mail comes back as unanswered. See *Luessenhop v. Clinton Cnty.*, 466 F.3d 259, 271-72 (2d Cir. 2006).



deed purchasers have in providing actual notice to homeowners.<sup>284</sup> In jurisdictions that require the tax purchaser to provide notice, the “due process inquiry creates a conflict of interest because the [tax purchaser] . . . has a countervailing interest in profiting from a property owner’s failure to redeem.”<sup>285</sup> Second, *Covey* is only applicable when a locality is aware that a recipient of notice is mentally impaired.<sup>286</sup> A locality may not know about an elderly homeowner’s disability before the right of redemption is foreclosed.<sup>287</sup>

The biggest strength of the decision in *Jones* is also its greatest weakness. The Court refused to ordain strict rules for providing notice, applying a flexible standard instead.<sup>288</sup> This standard allows the party responsible for notice to choose the most cost-effective means in a given situation.<sup>289</sup> However, the standard also leaves uncertainty about what additional reasonable steps to take.<sup>290</sup> As noted in Part I, the majority of senior citizens want to live in their homes, but for health reasons, some senior citizens move in with a family member or they must stay at a hospital.<sup>291</sup> What must a notice provider do when, instead of receiving a return notice marked unclaimed, a notice is returned with the annotation “resident moved” or “resident hospitalized?” In multi-stage tax foreclosure procedures, does achieving notice at one stage excuse a party from taking extra measures when notice is not achieved at another stage?<sup>292</sup>

In *Apex Tax Investments, Inc. v. Lowe (In re Application of the County Collector)*, the Illinois Supreme Court faced the question of what happens when a homeowner is hospitalized while a party is attempting to provide notice.<sup>293</sup> In *Lowe*, an elderly homeowner who lived alone and suffered from a mental disorder had trouble managing her finances, and she became delinquent on her property taxes.<sup>294</sup> The county sold a tax lien on the homeowner’s property to a company for

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<sup>284</sup> See Fisher II, *supra* note 105, at 85.

<sup>285</sup> *Id.* (discussing West Virginia law).

<sup>286</sup> *Covey v. Town of Somers*, 351 U.S. 141, 146-47 (1956).

<sup>287</sup> See Koen, *supra* note 157, at 10, 11.

<sup>288</sup> *Jones v. Flowers*, 547 U.S. 220, 238-39 (2006).

<sup>289</sup> See *id.* at 238.

<sup>290</sup> See Kelly, Jr., *supra* note 46, at 88.

<sup>291</sup> See *supra* notes 23-25 and accompanying text.

<sup>292</sup> See Alexander, *supra* note 34, at 782.

<sup>293</sup> *Apex Tax Invs., Inc. v. Lowe (In re Application of Cnty. Collector)*, 867 N.E.2d 941, 953 (Ill. 2007).

<sup>294</sup> *Id.* at 942, 944.

\$347.61.<sup>295</sup> During the redemption period the homeowner grew ill and was committed to a hospital.<sup>296</sup> The tax purchaser attempted to give notice by certified mail several times, but all the notices were returned unclaimed.<sup>297</sup> Notice was then sent by regular mail, but an envelope was returned with a note from the homeowner's postal carrier who wrote, "Person is Hospitalized."<sup>298</sup> The tax purchaser took no further action after the envelope was returned with the annotation.<sup>299</sup>

Distinguishing the case from *Jones*, the Illinois Supreme Court held that the tax purchasers acted reasonably in trying to achieve notice.<sup>300</sup> The court noted that in *Jones* the property owner had not received notice of a tax sale.<sup>301</sup> In contrast, the homeowner in *Lowe* had received notice of the pending tax sale, and the case only concerned notice of her right of redemption.<sup>302</sup> The court reasoned that because *Lowe* had already received notice about the tax sale, "the due process concerns in *Jones* [were] not at issue."<sup>303</sup> The court also concluded that the tax lien purchaser had no duty to determine whether the homeowner was actually hospitalized because it would lead to "an open-ended search [that] would impose a significantly greater burden than required under *Jones*."<sup>304</sup>

The Illinois court's opinion ignored the purpose of multi-stage tax procedures, which is to favor the redemption rights of a property owner.<sup>305</sup> As courts have established, when a state recognizes the significance of a property interest, due process requires the state to provide adequate notice to an owner so that the owner may protect that property interest.<sup>306</sup> In *Lowe*, the court neglected to examine the

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<sup>295</sup> *Id.* at 943.

<sup>296</sup> *Id.* at 945.

<sup>297</sup> *Id.* at 944.

<sup>298</sup> *Id.*

<sup>299</sup> *In re* Application of Cnty. Collector, 867 N.E.2d 941, 955 (Ill. 2007) .

<sup>300</sup> *Id.* at 952.

<sup>301</sup> *See id.* at 950-51.

<sup>302</sup> *See id.*

<sup>303</sup> *Id.* at 951.

<sup>304</sup> *Id.* at 952.

<sup>305</sup> *See* *Sneil, LLC v. Tybe Learning Ctr., Inc.*, 370 S.W.3d 562, 570 (2012) (recognizing "that public policy favors redemption and disfavors forfeiture and that the policy of the law is to give taxpayers every chance to redeem their property, compatible with the rights of the state."); *Garcia v. Ted Parks, L.L.C.*, 195 P.3d 1269, 1280 (Okla. 2008) ("The purpose of the statutory procedure for collecting delinquent taxes is twofold. It serves to provide an opportunity for the county treasurer to collect taxes which are due. It also serves to protect property owners and provide every opportunity possible for them to redeem their property before it is taken.")

<sup>306</sup> *See supra* Part II, sec. B.

property interest that the state of Illinois created in implementing a tax procedure that recognized redemption.<sup>307</sup> The court misapplied the adequate notice standards that stem from *Mullane* when it concluded that notice of a tax sale satisfied due process.<sup>308</sup> In jurisdictions that recognize redemption, notice of a tax sale does not qualify as notice of redemption, so reasonable measures must be taken to achieve notice at each stage of the procedure.<sup>309</sup>

The dissent in *Lowe* addressed the majority's silence on the right to redeem, stating that notice between the tax sale and foreclosure "provides the *final opportunity* for the property owner to preserve *any interest* in the property."<sup>310</sup> Because the property interest was so great, the dissent argued that the tax purchasers should have been held to the *Jones* standard and made additional attempts to achieve actual notice.<sup>311</sup> Although the issue in *Jones* was notice of a tax sale, the dissent found that the holding in *Jones* was meant to apply meaningful notice of each major event in a tax foreclosure procedure, including redemption.<sup>312</sup>

The kind of additional steps the tax purchasers in *Lowe* could have taken, however, was a more complicated issue. Although the tax purchasers appeared to be aware that the homeowner was hospitalized, medical information is not always easy to obtain. There are multiple hospitals and databases to search. In that respect, the majority was correct in finding that a note that merely said a homeowner was hospitalized would lead to an open-ended search.<sup>313</sup> Resending the notice by first-class mail would have also been unhelpful because it was apparent that the homeowner did not currently reside at her house.<sup>314</sup> However, the tax purchasers could have attempted to contact the postal carrier who made the annotations at no extra cost.<sup>315</sup> Those sending notice must target their efforts to fit the unique circumstances around them.<sup>316</sup>

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<sup>307</sup> Scott M. Edwards, *Illinois Court Reconsiders and Again Finds Adequate Notice of Tax Sale*, 17-JAN JMTAX 39, 42 (2008).

<sup>308</sup> *Id.*; *In re Application of Cnty. Collector*, 867 N.E.2d at 952.

<sup>309</sup> *See Alexander, supra* note 34, at 780-81.

<sup>310</sup> *In re Application of Cnty. Collector*, 867 N.E.2d at 954 (Kilbride, J., dissenting).

<sup>311</sup> *Id.* (Kilbride, J., dissenting).

<sup>312</sup> *See id.* at 954-56 (Kilbride, J., dissenting).

<sup>313</sup> *See id.* at 952.

<sup>314</sup> *See id.*

<sup>315</sup> *Id.* at 951.

<sup>316</sup> *In re Application of Cnty. Collector*, 867 N.E.2d at 956 (Kilbride, J., dissenting).

Part of determining what efforts are reasonable in ascertaining the whereabouts of a party is investigating sources that are readily available.<sup>317</sup> In *Akey v. Clinton County*, the Second Circuit examined what duties a county has when notice of a foreclosure to a property owner is returned as undeliverable.<sup>318</sup> The county sent notice of the foreclosure proceedings to the address where the property was located.<sup>319</sup> When the notice was returned as undeliverable, the county searched only the tax roll of the town where the property was located.<sup>320</sup> The court determined that the search of tax records of one town was insufficient, and a more reasonable measure would have been for the county to check the tax rolls of all of the towns within the county.<sup>321</sup> The court concluded that “an inclusive search of these public records, readily ascertainable to the County, would have represented a reasonably diligent attempt to find [a] correct address.”<sup>322</sup> Indeed, had the county conducted a more “inclusive search,” it would have revealed the property owner’s current address, which was in another town within the county.<sup>323</sup>

Unfortunately, reasonable efforts do not always achieve notice. Despite the protections of *Covey*, homeowners with mental or physical impairments are still vulnerable to tax foreclosures simply because a locality is not aware of their infirmities.<sup>324</sup> States and localities can implement procedures that prevent these vulnerable citizens from losing their homes. In Michigan, for example, at the initial stage of a tax proceeding, personal service must be served on a property owner.<sup>325</sup> If the owner appears to lack the ability to understand the notice, a tax lien sale can be nullified.<sup>326</sup> In Rhode Island, notice to senior citizens who have applied for age-based tax relief must also be sent to a locality’s department of elderly affairs to provide assistance.<sup>327</sup> Oklahoma dispenses with tax sales in counties with at least one hundred thousand residents if a homeowner is sixty-five years or older, resides in

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<sup>317</sup> *Plemons v. Gale*, 396 F.3d 569, 577 (4th Cir. 2005).

<sup>318</sup> *Akey v. Clinton Cnty.*, 375 F.3d 231, 236 (2d Cir. 2004).

<sup>319</sup> *Id.* at 234.

<sup>320</sup> *Id.* at 236.

<sup>321</sup> *See id.* at 236-37.

<sup>322</sup> *Id.* at 237.

<sup>323</sup> *Id.* at 236.

<sup>324</sup> *See RAO*, *supra* note 12, at 5.

<sup>325</sup> MICH. COMP. LAWS ANN. § 211.78i(3)(a) (2013).

<sup>326</sup> *See* MICH. COMP. LAWS ANN. § 211.78i(3)(d) (2013).

<sup>327</sup> R.I. GEN. LAWS ANN. § 44-9-10(d) (2013).

her home, and has an income that does not exceed the Poverty Guidelines of the Department of Health and Human Services.<sup>328</sup> Regardless of which procedure is the best, states can and should consider the special needs and circumstances of citizens to afford them the best chance of avoiding foreclosure.

## CONCLUSION

Elderly homeowners should be provided with every opportunity to escape the pitfalls of tax sales and inadequate notice. Notice should be provided informing an elderly homeowner of the tax sale, his right of redemption following the tax sale, and the date the redemption period expires. Elderly homeowners must be afforded due process in these tax procedures, and a significant factor that determines whether they have an opportunity to redeem their properties is receiving adequate notice.

Of course, the obligation of a notice provider to use reasonable measures to reach a homeowner does not diminish a homeowner's responsibility in exercising diligence concerning his property interests. All homeowners should take active measures to avoid complications that may jeopardize their ownership interest in their homes whenever it is in their control to take such measures. Yet a party's "constitutional obligation to provide notice is not excused by an owner's failure [or inability] . . . to take steps to safeguard [his] own interests."<sup>329</sup> The reasonableness test applied from *Mullane* to *Jones* and other due process cases is not dependent on a property owner's actions but the efforts of the party attempting notice.

The property at stake should be an essential factor in determining what qualifies as sufficient notice. As noted in Part I, many elderly homeowners have paid off or accumulated substantial equity on their homes. To lose that equity and a home for a few hundred dollars in property taxes or less would be detrimental. Proper notice of a homeowner's redemption rights and proper notice at every stage of a tax sale procedure will better protect elderly homeowners who are willing and capable of redeeming their properties.

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<sup>328</sup> OKLA. STAT. tit. 68, § 3105 (2013).

<sup>329</sup> *Sidun v. Wayne Cnty.*, 751 N.W.2d 453, 462 (Mich. 2008).

