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Someone to Lien on: Privatization of Delinquent Property Tax Liens and Tax Sale Surplus in Massachusetts

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SOMEONE TO LIEN ON: PRIVATIZATION OF DELINQUENT PROPERTY TAX LIENS AND TAX SALE SURPLUS IN MASSACHUSETTS

Abstract: In Massachusetts, as well as in twenty-eight other states in the nation, municipalities can sell delinquent property tax liens to private investors. In exchange for paying for the debt, the private entity can collect interest rates of up to sixteen percent and levy additional fees on the homeowner. If the homeowner is unable to pay the rapidly growing amount they owe, absolute title of the property, which includes any profits from the subsequent sale, passes to the private entity—providing them with the property for pennies on the dollar. This practice was introduced as a tool to enable municipalities to collect due property tax, but has had particularly devastating effects on vulnerable members of society and tends to cause economic distress in ways that have been largely ignored. This Note argues that such practices are unjust, inequitable, and likely unconstitutional. Legislative and pre-litigation solutions should be enacted to protect these members of society from predatory tactics.

INTRODUCTION

Bennie Coleman, a retired Marine sergeant suffering from dementia, lost his \$197,000 home that he had lived in for seventy-six years after failing to pay a \$134 property tax bill.¹ When Coleman's son learned that his father had missed some payments, he attempted to settle the delinquency.² Unfortunately, he discovered that the city's tax collector had sold the tax lien on the property to a private investor that had already initiated foreclosure proceedings.³ In order for Coleman to save his home, the investment company demanded \$4,999

¹ Coleman *ex rel.* Bunn v. District of Columbia, 70 F. Supp. 3d 58, 64 (D.D.C. 2014); Michael Sallah et al., *Left with Nothing*, WASH. POST (Sept. 8, 2013), <https://www.washingtonpost.com/sf/investigative/2013/09/08/left-with-nothing> [<https://perma.cc/QWK4-95LC>]. Coleman originally missed a property tax bill of \$133.88 in 2006 and the city added an additional \$183.47 in penalties. Coleman, 70 F. Supp. 3d at 64. The District of Columbia auctioned Coleman's tax lien of \$317.35 in July 2007 to private investors. *Id.* Coleman's tax lien was purchased by Embassy Tax Services, LLC. *Id.*

² Coleman, 70 F. Supp. 3d at 64. In September 2008, Coleman's son wrote to the court stating that he had found out that his father was living by himself and was not properly taking his medication. *Id.* He asked the court to give him about a week to submit most of the delinquent payments. *Id.* The court imposed a new deadline of May 2009 to complete the payments. *Id.* at 65.

³ *Id.* at 64. In September 2008, Coleman's son sent a letter to the court stating that he had just discovered his father's tax delinquency, but Embassy Tax Services filed the action to foreclose in February 2008. *Id.*

in fees and expenses in addition to the original missed property tax.⁴ Coleman and his son were unable to pay, so the court approved the foreclosure of Coleman's right of redemption in 2010.⁵ In the summer of 2011, federal marshals escorted Bennie Coleman out of his home, and he watched them empty all of his belongings onto the curb.⁶ In addition to losing his lifelong home, Coleman lost all equity in the property because tax lien purchasers take property title free of the former owner's equity interest.⁷

Coleman's story is too common—Vicki Valentine lost her Baltimore home due to her failure to pay a \$362 water bill.⁸ Paul and Michele Meaney lost their \$270,000 Worcester, Massachusetts home for failing to pay a \$224.58 utility bill while suffering numerous health crises and were financially crippled by the remaining mortgage.⁹ An elderly Rhode Island woman was evicted from

⁴ *Id.* Embassy Tax Services demanded \$4,999 in addition to the \$317.35 of the original lien, for "court costs, attorney's fees, expenses incurred for service of process by publication, and fees of title search." *Id.*

⁵ *See id.* at 65 (stating that Coleman's son paid off all owed taxes before the court's deadline, but had not paid the amount owed to Embassy Tax Services); *Statutory Right of Redemption*, BLACK'S LAW DICTIONARY (11th ed. 2019) ("A debtor's statutory right to reclaim property seized by a creditor either by paying to the creditor the entire debt plus any expenses incurred by the creditor or by reimbursing the buyer of the property for the purchase price. Also termed *right to redeem*."). Coleman's son had proposed that his father pay \$850 a month towards the amount owed to Embassy, which the court accepted. *Coleman*, 70 F. Supp. 3d at 65. The court set a status hearing in June 2009, but neither Mr. Coleman nor his son appeared, and the court could not contact his son. *Id.* The court then issued a judgment extinguishing Coleman's rights in the property and executed a deed to Embassy Tax Services free and clear of any prior encumbrances. *Id.* At that point, the home was worth approximately \$200,000. *Id.*

⁶ Sallah et al., *supra* note 1. Coleman slept on the front porch of his former home in a folding chair that night. *Id.* He lived on the front porch for months, frequently stopping neighbors or passing police officers for assistance, believing that he had accidentally locked himself out. Spencer S. Hsu, *D.C. to Pay \$1 Million to Settle Families' Claims for Homes Taken by Tax-Lien Program*, WASH. POST (Jan. 10, 2017), https://www.washingtonpost.com/local/public-safety/dc-to-pay-1-million-to-settle-families-claims-for-homes-taken-by-tax-lien-program/2017/01/10/6937c2b0-d68c-11e6-9f9f-5cdb4b7f8dd7_story.html [<https://perma.cc/L4PS-FEBD>].

⁷ Sallah et al., *supra* note 1.

⁸ Fred Schulte et al., *The Other Foreclosure Menace*, HUFFINGTON POST (Dec. 6, 2017), https://www.huffingtonpost.com/2010/05/18/the-other-foreclosure-men_n_579936.html [<https://perma.cc/K48L-WMKD>]. By the time Ms. Valentine became aware that she owed delinquent property taxes, the amount had increased tenfold to \$3,600. *Id.* She was unable to pay this amount and was ultimately evicted. *Id.* Her father had paid off the mortgage in 1984, but now an investment company owns her home. *Id.*

⁹ *Tallage LLC v. Meaney*, 23 LCR 375, 375–76 (Mass. Land Ct. 2015). The family was experiencing numerous health crises that derailed their lives. *Id.* at 379. Mrs. Meaney spent significant time in the hospital due to Multiple Sclerosis and celiac disease, which caused her to experience severe tingling, extreme fatigue, blurred vision, blinding headaches, and gastrointestinal issues that left her housebound. *Id.* Their two young children were diagnosed with a learning disability and a vision problem, and were seeing therapists from the trauma of dealing with a very sick mother. *Id.* In the past, the family's mortgage company monitored unpaid taxes and paid the amounts out of the escrow accounts. *Id.* at 378. Mr. Meaney assumed that this meant the mortgage company would always do this. *Id.* at 379. Additionally, the family received notices of the missing bills during their move to a new home,

her home of forty years for missing a sewer bill of \$474, and her home was bought at a tax sale for \$836.39.¹⁰ These are just a few examples of what occurs every year.¹¹

Every state has a law that enables municipal governments to sell real property through tax lien foreclosure when the homeowner does not pay property taxes, and some states also include delinquent utility bills.¹² Typically, a lien automatically forms on the property by operation of state statute after the taxes remain delinquent for a certain period of time.¹³ Local governments can enforce the liens themselves, but twenty-eight states currently have laws that allow municipalities to sell tax liens to private purchasers.¹⁴ The lienholder, whether it be the town or a private purchaser, collects interest, costs, and fees from the taxpayer and may ultimately acquire the property through the tax foreclosure process.¹⁵

Massachusetts is among the states in which municipalities can choose to sell tax liens to private buyers.¹⁶ Additionally, the Commonwealth's tax foreclosure approach has no requirement that the foreclosing party provide the surplus from the subsequent sale of the property to the original homeowner.¹⁷ Once the Massachusetts Land Court enters a judgment of foreclosure of the

and the court believed that the notices had been placed in boxes and accidentally overlooked. *Id.* at 378. Mr. Meaney's stress was acute, evidenced by letting rent checks go uncashed for months and the loss of several clients due to distraction from his work. *Id.* at 379.

¹⁰ JOHN RAO, NAT'L CONSUMER LAW CTR., *THE OTHER FORECLOSURE CRISIS: PROPERTY TAX LIEN SALES* 9 (2012). The woman was eighty-one years old and was evicted from her home two weeks prior to Christmas. *Id.* The corporation that bought her home resold the property at auction for \$85,000. *Id.*

¹¹ *See generally id.* (providing a variety of examples of low-income, elderly, and sick people who lost their homes due to this policy and showing investors taking a windfall).

¹² *Id.* at 8; *see Tallage*, 23 LCR at 375 (detailing how a family lost their home to tax foreclosure because of failure to pay a water and sewer bill, which falls under Massachusetts' definition of "taxes" and automatically generated a municipal lien that the city sold to an investor). A "municipal lien" is defined as: "A lien by a municipal corporation against a property owned for the owner's proportionate share of a public improvement that specially and individually benefits the owner." *Lien*, BLACK'S LAW DICTIONARY, *supra* note 5. A "lien" is defined as: "A legal right or interest that a creditor has in another person's property, lasting until a debt or duty that it secures is satisfied." *Id.* Each state's tax lien statute is unique, and the procedure varies from state to state. RAO, *supra* note 10, at 11.

¹³ *See* RAO, *supra* note 10, at 12 (stating that it is common for the statute to create liens on the property automatically when a certain period of time has lapsed after the tax obligation became delinquent). For example, the relevant Missouri statute reads, "[a]ll real estate upon which the taxes remain unpaid on the first day of January, annually, are delinquent, and the county collector shall enforce the lien of the state thereon . . ." MO. ANN. STAT. § 140.010 (West 2019).

¹⁴ RAO, *supra* note 10, at 43–46.

¹⁵ *Id.* at 17. Interest rates on the unpaid tax can be a very high rate, often between 18–50%. *Id.* at 4. When a lienholder acquires the property through a judgment of foreclosure, they obtain title free and clear of any other existing lien. *Id.* at 17.

¹⁶ *Id.* at 44.

¹⁷ *See* MASS. GEN. LAWS ANN. ch. 60, § 64 (West 2019) (stating that title after foreclosure is absolute); *Kelly v. City of Boston*, 204 N.E.2d 123, 125 (Mass. 1965) (holding that the statute intends for the surplus from a tax sale to belong to the municipality).

homeowner's right of redemption, the foreclosing party takes absolute title, free and clear of prior interests.¹⁸ Enormously inequitable outcomes occur as a result because property owners can lose all equity in their home for missing a single tax or utility payment.¹⁹ By allowing private entities to drive up costs and charge high interest rates, the privatization of delinquent property tax liens effectively enables investors to hold financially distressed taxpayers' homes hostage to create a windfall.²⁰

Property tax revenues are the primary source of income for local governments, so nonpayment or late payment of property taxes can present problems to local governments with an already tight budget.²¹ Local governments use tax revenues to finance numerous public services such as schools, police programs, and fire protection.²² Facing budgeting shortfalls increases uncertainty

¹⁸ Ch. 60, § 64; see Ralph D. Clifford, *Massachusetts Has a Problem: The Unconstitutionality of Tax Deed*, 13 U. MASS. L. REV. 274, 280–81 (2019) (noting that the tax foreclosure results in an absolute title, meaning that the former owner loses any claim to the property). “Absolute” is defined as “[f]ree from restriction, qualification, or condition.” *Absolute*, BLACK’S LAW DICTIONARY, *supra* note 5. Before the judgment of foreclosure is entered, the title to the land is held by the lienholder subject to the homeowner’s right of redemption, which means that the homeowner has the right to regain title to their property if they meet the statutory requirements, such as paying off the taxes owed plus interest, fees and expenses. Clifford, *supra*, at 280; see ch. 60, § 62 (stating that a person with an interest in land taken because of nonpayment of taxes is able to redeem before the filing of petition for foreclosure, and that a person may do so by paying the amount of tax owed, 16% interest, and all additional lawful charges in the tax title account).

¹⁹ See Clive McFarlane, *Real People Lose in Tax Lien Sales*, TELEGRAM.COM (Mar. 19, 2012), <https://www.telegram.com/article/20120319/column44/103199958> [<https://perma.cc/9YKZ-B5NS>] (describing some homeowners as “one tax bill away from being homeless” as a result of this policy); see, e.g., *Tallage*, 23 LCR at 375–76 n.3 (stating that the Meaneys lost all equity in their family home, valued at \$270,000, for missing a single water bill and sewer bill totaling \$1,052.84).

²⁰ See *Tallage*, 23 LCR at 377, 380 (detailing the redemption amounts for two properties as fourteen times and thirteen times the original municipal bills owed, within two years of the missed payment); see also *id.* at 382 (listing the itemized components of the redemption amount demanded by the private investor lienholder, for an original missed payment of \$492.51: “Principal paid at auction: \$626.24, Interest and fees paid at auction: \$552.04, Principal interest (post auction): \$75, Recording cost of collector’s deed: \$125, Recording cost-2011 tax payment certificate: \$75, Recording administrative fee (2011 tax certificate): \$75, Tax lien foreclosure petition deposit with the Land Court: \$515, Supplemental title and other services: \$137 . . . Administrative fee (final decree): \$200, Administrative fee (withdrawal/vacate): \$200, Closing costs (to HIGCO) (deed stamps, etc.): \$884, Legal fees-Law Offices of Daniel C. Hill: \$30,612, TOTAL: \$30,612.24”).

²¹ See Amicus Brief for Nat’l Tax Lien Ass’n at 8, *Popowicz v. City of Worcester*, No. 10 TL 141224 (Mass. Land Ct. Dec. 7, 2012) [hereinafter NTLA Amicus Brief] (explaining that property taxes are the main source of municipal funding and describing delinquent taxes as a “vital threat” to a city’s financial health). The National Tax Lien Association (NTLA) points out that delinquent property taxes can force municipalities to meet the budget in other ways: by cutting services or by raising rates for the taxpayers who do pay. *Id.* Additionally, when municipalities do not enforce taxes, people may realize the lack of consequences and respond by being less vigilant about paying their taxes, increasing the rate of delinquency in the municipality. *Id.*

²² *Id.* The NTLA discusses many important public services that municipalities provide, including public health services, infrastructure projects, library facilities, recreation programs, and local government activities such as zoning boards, judicial systems, and waste management programs. *Id.*

and decreases the quality of services that a town can offer to its citizens.²³ Although it is important to create mechanisms to encourage taxpayers to pay their property taxes, few states have adequate safeguards to protect the most vulnerable in society: the poor, sick, and elderly.²⁴ Selling tax liens may offer municipalities a quick way to get cash for outstanding liens,²⁵ however, regardless of the benefits, selling tax liens to private parties poses several policy issues.²⁶

The privatization of delinquent tax liens has disproportionality affected poor and minority communities on a national scale, beginning with its ugly history and deeply racist implications.²⁷ Throughout history, minority neighborhoods have been the subject of lowered property values due to segregation and red-lining practices.²⁸ Areas that have recently experienced gentrification and rapid increases in property values are particularly vulnerable as property taxes skyrocket.²⁹ Longtime property owners struggle to keep up with higher tax rates, and the tax liens are particularly appealing to investors because of the significant upside if they can foreclose.³⁰

²³ See *id.* (explaining the many services that local municipalities are responsible for providing and suggesting that the consequence of budget deficits would be harmful to the community).

²⁴ See, e.g., Sallah et al., *supra* note 1 (explaining that the District of Columbia's tax lien policy did not provide proper safeguards, as opposed to New York City, where tax liens cannot be sold on homes that are owned by veterans, low-income elderly people, or the disabled).

²⁵ NTLA Amicus Brief, *supra* note 21, at 7. By selling the liens, the municipality removes any risk of nonpayment because the purchaser takes on all of the responsibility of enforcing the liens. *Id.* Additionally, the municipality does not have to pay the costs and expenses of enforcing the liens. See Susan Spencer, *Towns Selling Liens for Unpaid Property Taxes*, TELEGRAM.COM (Nov. 5, 2011), <https://www.telegram.com/article/20111105/NEWS/111059960> [<https://perma.cc/9NTJ-C6EZ>] (stating that the collector's offices are able to forego the costly and time-consuming process of tax debt collection).

²⁶ See generally RAO, *supra* note 10 (describing the undesirable consequences that often occur when public welfare is in the hands of a private entity focused on profit).

²⁷ See Andrew W. Kahrl, *Unconscionable: Tax Delinquency Sales as a Form of Dignity Taking*, 92 CHI.-KENT L. REV. 905, 905–06 (2018) (highlighting the disproportionate cost of property tax throughout history in the United States and how property tax was a tool used to discriminate against African American property owners); *id.* at 910 (describing property tax assessment and enforcement procedures as tools used by white supremacists to purposely target African American communities, particularly in the South).

²⁸ See *id.* at 905–06 (describing the African American community's increased vulnerability to predatory tax buying as a result of decades of red-lining and over-taxation). This practice has affected the African American community by preventing involvement in real estate markets, contributing to the decline of black landownership, and intensifying the racial wealth gap. *Id.* at 906.

²⁹ *Id.* at 905.

³⁰ See *id.* at 914 (citing examples of predatory tax buying and racially motivated leveraging of the tax lien system to displace African Americans or strip people of their property). For example, Evelina Jenkins, an African American woman who owned an island on the coast of South Carolina, was duped by a white man who befriended her and convinced her to let him manage her finances. *Id.* He deliberately allowed the property to fall into tax delinquency, purchased the lien at auction, and then quickly sold the land to a developer and had Evelina evicted. *Id.* Evelina, left penniless and homeless, was forced to move into her daughter's trailer home where she later died with nothing. *Id.* Currently, the island is populated with dozens of homes, all valued at over half a million dollars. *Id.*

Massachusetts' privatization of delinquent tax liens and treatment of surplus is harmful public policy and likely unconstitutional because of the adverse outcomes the practice enables.³¹ There are safeguards and simple statutory changes that states can make to properly provide municipalities with the tools they need to collect outstanding property taxes without jeopardizing the homes of underprivileged and vulnerable citizens.³² Although the Massachusetts Land Court is able to catch egregious cases and prevent injustice in some instances, the citizens who are most likely to need protection are those who are least likely to have sufficient resources or the knowledge to get help.³³

Part I of this Note provides the history and overview of delinquent property tax liens in Massachusetts.³⁴ Part II discusses the effects that the privatization of delinquent property tax liens and the treatment of surplus have on homeowners and municipal budgets, and potential Takings Clause implications.³⁵ Part III argues that due to the disparate impact on vulnerable members of society and windfall benefits to investors, the privatization of delinquent property tax liens as it is currently practiced in Massachusetts is poor public policy and likely unconstitutional.³⁶

I. HISTORY AND OVERVIEW OF THE PRIVATIZATION OF DELINQUENT PROPERTY TAX LIENS

Privatizing delinquent property tax liens has conventionally been considered a resource for municipalities to collect due taxes and fund community services.³⁷ In reality, the privatization of these debts in various municipalities, including those in Massachusetts, have led to unfavorable results for some of the most vulnerable members of society—such as the sick and elderly.³⁸ Section A of this Part provides the background and procedure of the privatization

³¹ See generally RAO, *supra* note 10 (providing examples of vulnerable members of society exploited by this policy and discussing various harmful effects that privatization can cause across the United States); Clifford, *supra* note 18 (arguing that Massachusetts' tax lien statute's treatment of surplus from tax lien foreclosure sales is a violation of the Takings Clause).

³² See RAO, *supra* note 10, at 19–41 (suggesting multiple remedies for states to adopt to address these issues and provide additional protections for citizens without jeopardizing the municipalities' ability to collect delinquent property taxes).

³³ See *Tallage*, 23 LCR at 376 (stating that the Land Court has statutory authority to use its discretion to vacate judgments “after careful consideration and in instances where it is required to accomplish justice” if brought within one year of the judgment); RAO, *supra* note 10, at 5 (noting that tax sale procedures are excessively complicated and that “homeowners most at risk are those who have fallen into default because they are incapable of handling their financial affairs”).

³⁴ See *infra* notes 37–133 and accompanying text.

³⁵ See *infra* notes 134–207 and accompanying text.

³⁶ See *infra* notes 208–257 and accompanying text.

³⁷ See NTLA Amicus Brief, *supra* note 21, at 7–8 (describing the services provided by municipalities and funded primarily by property taxes).

³⁸ See *Tallage*, 23 LCR at 378–81 (detailing how this policy led a family to financial disaster when the wife and mother suddenly became severely ill).

of delinquent property tax liens in Massachusetts, detailing the statutory scheme that enables the system to operate, and highlighting recent trends within the state.³⁹ Section B describes solutions that other states have implemented in response to concerns about the potential harmful effects of this policy.⁴⁰

A. Overview of Tax Lien Sales in Massachusetts

All fifty states have adopted statutes that authorize the creation of a lien on residential property when the owner does not pay property taxes.⁴¹ Because municipalities rely primarily on property taxes for funding, it is important for towns and cities to be able to collect this money from their residents.⁴² Municipalities often have tight budgets and are responsible for critical services like schools, police, and firefighting services.⁴³ Twenty-eight states currently allow municipalities to sell tax liens to private entities to generate income, essentially trading the rights of collection to private investors in exchange for immediate cash.⁴⁴ The lien purchaser then takes on the costs and efforts of enforcement, freeing up municipal resources.⁴⁵

In Massachusetts, courts have historically recognized the reciprocal duties of the Commonwealth to protect the property within its limits and that of the resident to pay taxes proportional to its protection.⁴⁶ When a taxpayer fails to meet his tax obligation to the municipality, the legislature has created several

³⁹ See *infra* notes 41–102 and accompanying text.

⁴⁰ See *infra* notes 103–133 and accompanying text.

⁴¹ RAO, *supra* note 10, at 11. In some states, taxes include *ad valorem* property tax assessments, which are calculated based on a percentage of the value of the property. *Id.* Some states also allow municipalities to include sewer charges or unpaid water bills. *Id.*

⁴² NTLA Amicus Brief, *supra* note 21, at 8. The National Tax Lien Association reported that, in 2012 alone, tax investors provided over \$1.5 billion to municipalities in the United States. NAT'L TAX LIEN ASS'N, THE NATIONAL TAX LIEN ASSOCIATION'S RESPONSE TO THE NATIONAL CONSUMER LAW CENTER'S REPORT 2 (2012), https://cdn.ymaws.com/www.ntla.org/resource/resmgr/press_kit/the_national_tax_lien_associ.pdf [<https://perma.cc/5BD5-9DDS>].

⁴³ NTLA Amicus Brief, *supra* note 21, at 8. The NTLA points out that municipalities use real estate tax revenue to provide for services and programs such as: education, public safety services, public health construction and maintenance of infrastructure, park maintenance, public libraries, recreational programs, and local government services including planning and zoning, judicial systems, and waste management. *Id.*

⁴⁴ *Id.* at 7.

⁴⁵ See Memorandum in Response to the Court's Request, Dated November 5, 2012, for Amici Submissions in the Above Referenced Cases at 2–3, *Popowicz*, No. 10 TL 141224 (Mass. Land Ct. Nov. 5, 2012) [hereinafter *City of Worcester Amicus Brief*] (noting that, in Worcester, investors pay the \$125 cost to record the tax collector's deed, saving the city \$81,750 over 2010–2012). The city also saved \$379,320 over this time by avoiding the \$580 cost of making a deposit with the Land Court for each foreclosure complaint and recording the Notice of Filing the Complaint. *Id.* This amount is recoverable by the investor upon the homeowner's redemption of the tax title. *Id.*

⁴⁶ See *WB & T Mortg. Co. v. Bd. of Assessors*, 889 N.E.2d 404, 410 (Mass. 2008) (articulating the belief that individual citizens should contribute to society in proportion to the worth of their property derives from the long history of proportional and reasonable taxation).

remedies to enable the town to collect: levy by distress and sale of goods; a request for a hearing; commencement of an action, such as an action of contract; and an action to foreclose the right of redemption in the Land Court after establishing a tax title.⁴⁷ In the early 1990s, a budget crisis led legislators to allow private entities to purchase delinquent property tax liens.⁴⁸ The law was considered a creative way for municipalities to increase much-needed revenue.⁴⁹

There are 351 independent municipalities within the Commonwealth of Massachusetts, each with the power to pursue unpaid property taxes.⁵⁰ These municipalities are free to establish their own procedures and guidelines for tax collection, which allows for significant variation in how taxes are pursued and enforced.⁵¹ Additionally, tax collectors do not need any municipal approval to act or execute a tax deed, and no municipal entity has the authority to reverse or change decisions of the tax collectors.⁵²

The most popular form of delinquent property tax collection in Massachusetts is the foreclosure of the municipality's tax title or tax lien.⁵³ The pro-

⁴⁷ Ch. 60, §§ 24, 29, 35, 40–50, 53 (levy by distress and sale of goods, request for a hearing, commencement of action, tax sales, and tax deed sales to third parties, respectively). These remedies are cumulative, meaning they are not exclusive and can be used in conjunction with one another. *City of Boston v. Gordon*, 175 N.E.2d 377, 381 (Mass. 1961).

⁴⁸ Chris Burrell, *Tax Lien Law Haunts Massachusetts Property Owners*, WGBH NEWS (Jan. 21, 2018), <https://www.wgbh.org/news/2018/01/21/local-news/tax-lien-law-haunts-massachusetts-property-owners> [<https://perma.cc/587W-X7GU>]. The budget crisis left cities and towns desperate for a way to increase revenue and cash flow. *Id.*

⁴⁹ *Id.*

⁵⁰ See ch. 60, § 53 (providing that each municipality, through its tax collector, may take land for the town if property taxes on that land are unpaid); Clifford, *supra* note 18, at 297 (noting that the Commonwealth has 351 independent municipalities). Each municipality runs their taxation system separately. Clifford, *supra* note 18, at 297–98. Each municipality determines how to train and set standards for the tax collectors. *Id.* There is no statewide minimum standard for tax collectors. *Id.* at 298. In Gosnold, for example, the Tax Collector is a part-time position held by a teacher on Martha's Vineyard with no experience with tax deeds. *Id.* at 298.

⁵¹ See Clifford, *supra* note 18, at 298 (suggesting that due to the high degree of independence of tax collectors, there are a wide array of methods adopted). For example, in the small town of Russell, Massachusetts, there were no formal procedural guidelines for handling tax titles and staff members often had to take dual roles in the local government. *Town of Russell v. Barlow*, 24 LCR 404, 408 (Mass. Land Ct. 2016). The town treasurer served as both the collector and treasurer and had to manually record payments in a cashbook. *Id.* at 408–09. Before 2004, the treasurer monitored tax title properties by simply drawing a red check mark on the list to demonstrate that subsequent taxes were certified at the end of the year. *Id.* at 409. This method was not mandated by any formal policy or procedure; rather, it was used simply because it was the former collector's preferred method. *Id.*

⁵² Clifford, *supra* note 18, at 298. Another implication of this is that the taxpayer has no statutory avenue to challenge a decision that taxes are owed before title is taken by the tax collector. *Id.* at 300. Tax collectors can force the taxpayer out of their home and grant possession to the town immediately, without any prior judicial review. *Id.*

⁵³ Robert J. Kerwin, *Municipal Collection by Foreclosure of Tax Title*, 83 MASS. L. REV. 77, 77 (1988).

cess begins when a taxpayer does not pay the amount owed to the town.⁵⁴ Thirty days past due, interest begins to accrue at an annual rate of fourteen percent.⁵⁵ A statutory lien arises for delinquent property taxes on January first, after the year of assessment, in the amount of the tax due.⁵⁶ The municipality must make a formal demand to the taxpayer, and if the demand is not answered within fourteen days, the tax collector may then send a notice of tax taking.⁵⁷ Within sixty days of the notice, the municipality records an instrument of taking at the Registry of Deeds, which vests title in the municipality subject to the property owner's right of redemption.⁵⁸ The "taking" occurs when the instrument is recorded, and from that point, interest accrues at an annual rate of sixteen percent.⁵⁹

Traditionally, municipal tax collectors then proceed against the homeowner.⁶⁰ Municipalities can cooperate with taxpayers to enter into payment plans or reduce the amount owed in order to facilitate the taxpayer's redemption.⁶¹ The process allows for a measure of discretion, and local tax collectors tend to be responsive to their residents' special circumstances and needs.⁶² In the absence of an agreement, municipalities can bring action in the Land Court by filing a petition for foreclosure of the taxpayer's right of redemption.⁶³ The

⁵⁴ See *Tallage*, 23 LCR at 376–77 (explaining the enforcement framework regarding collection of unpaid taxes, which, obviously, begins when taxes are not paid).

⁵⁵ MASS. GEN. LAWS ANN. ch. 59, § 57 (West 2019).

⁵⁶ Ch. 60, § 37.

⁵⁷ *Id.* § 53 ("If a tax on land is not paid within fourteen days after demand therefor and remains unpaid at the date of the taking, the collector may take such land for the town, first giving fourteen days' notice of his intention to exercise such power of taking . . .").

⁵⁸ *Id.* §§ 54, 62. If the taking is not recorded within sixty days of the notice, it is not valid. *Id.* § 54. The right of redemption enables the owner, or otherwise interested party, to retrieve tax title of the property if they pay the entire amount owed. *Id.* § 62; Kerwin, *supra* note 53, at 79.

⁵⁹ Ch. 60 § 62; Kerwin, *supra* note 53, at 79. "Taking" is defined as "the act of seizing an article, with or without removing it, but with an implicit transfer or possession or control." *Taking*, BLACK'S LAW DICTIONARY, *supra* note 5. The instrument of taking must include cause, a description of the property, the name of the owner, amount of the tax due, and all costs and expenses associated with the taking. Ch. 60, § 54. Recording the taking also creates a lien for all later taxes that become due and unpaid. Kerwin, *supra* note 53, at 79.

⁶⁰ See *Tallage*, 23 LCR at 377 (explaining that, until relatively recently, foreclosure actions have been brought primarily by municipalities).

⁶¹ Ch. 60, § 62A (granting authority to municipalities to enter in agreements with the taxpayers attempting to redeem property subject to tax title). The statute imposes limits on the agreements that the municipalities may make, such as the maximum term is limited to five years, and agreements made after the taking has occurred must mandate an initial payment of at least 25% of the redemption amount. *Id.*

⁶² See *Tallage*, 23 LCR at 377 (comparing the role of a municipal tax collector to a District Attorney's office, because both are within the political process and operate with a level of discretion that allows officials to take circumstances into account).

⁶³ See ch. 60, § 62A (stating that the tax authority cannot bring an action during the payment agreement time frame if the taxpayer is in compliance with the terms of the agreement); *id.* § 65 (stating that municipalities can file a petition for foreclosure six months after the taking has occurred). If the land is deemed abandoned, cities and towns can bring a petition as soon as the taking occurs. *Id.*

Land Court has authority to impose terms and conditions of payment to allow the property owner to redeem “as justice and the circumstances warrant” and will issue a written finding.⁶⁴ If the taxpayer does not appear, the court will typically issue a default finding in favor of the municipality.⁶⁵ After the court issues its finding, the municipality must file a separate motion for entry of a decree or of a judgment of foreclosure stating that the taxpayer did not comply with the terms of the agreement.⁶⁶ The Land Court then issues a judgment of foreclosure, which extinguishes the former owner’s right of redemption and vests absolute title in the municipality.⁶⁷ The final step for a municipality is to sell the acquired property at public auction.⁶⁸

Rather than proceeding themselves, some municipalities prefer to sell tax deeds or receivables to private investors.⁶⁹ Currently, several dozen municipalities in Massachusetts choose to auction off tax lien debt to private entities.⁷⁰ Before the auction, the municipality must publish a notice describing the properties that have liens that they plan to sell.⁷¹ Then, a private investor purchases the taxpayer’s debt by paying the municipality the amount of the tax

The petition must include a description of the land, the assessed valuation, and the petitioner’s source of title. *Id.* For more information regarding the tax title foreclosure process, see Kerwin, *supra* note 53, at 80–81, which provides detail about the statutory procedures the Land Court will follow for a tax title petition.

⁶⁴ Ch. 60, § 68. This allows the court to consider whether the property owner can meet the financial burden and set the terms for an agreement within the statutory parameters. *Id.*

⁶⁵ *See id.* § 69 (permitting the Land Court to issue a default finding when the taxpayer fails to appear); Kerwin, *supra* note 53, at 81 (noting the frequency of these default findings).

⁶⁶ Kerwin, *supra* note 53, at 81.

⁶⁷ Ch. 60, § 64. After foreclosure, the municipality takes absolute title free and clear of any interest on the property, including mortgage interests, and the former owner’s equity interest. Kerwin, *supra* note 53, at 79. The property remains subject to easements and restrictions. *Id.* at 82.

⁶⁸ *See* ch. 60, § 77B (granting authority to the appointed custodian of a town or city to sell by public auction land that has been acquired through tax title foreclosure).

⁶⁹ *Id.* § 2C (allowing municipalities to sell tax receivables to third parties and defining “tax receivable” as “the right to receive payment of taxes assessed and due on real and personal property”); *id.* § 52 (permitting cities and towns to sell tax deeds to third parties). Municipalities are afforded significant discretion regarding whether or not to sell their tax liens and many choose to handle tax collection themselves. *See* Jennifer McKim, *Homeowners Sold Out by Cities? Investors Buy Tax Liens and Foreclose*, NECIR (Nov. 23, 2014), <https://www.necir.org/2014/11/23/tax-liens/> [<https://perma.cc/ZE82-QB8M>] (explaining that officials from Boston, Attleboro, and Norton prefer not to privatize tax liens due to ethical reasons). Some cities dislike the loss of control over the outcome of the foreclosure process that occurs when the city sells the liens. *Id.* Others, such as the treasurer of Attleboro, explained that selling the liens was more trouble than it was worth due to complications sales may pose in chains of title and the impacts they have on financially distressed homeowners. *Id.*

⁷⁰ Chris Burrell, *Some Cities Are Cashing in on Homeowners’ Tax Debts, and Making Foreclosure More Likely*, WGBH (Jan. 21, 2019), <https://www.wgbh.org/news/local-news/2019/01/21/some-cities-are-cashing-in-on-homeowners-tax-debts-and-making-foreclosure-more-likely> [<https://perma.cc/VX7C-RTPE>].

⁷¹ Ch. 60, § 2C. The municipality must publish the list at least sixty days prior to the sale. *Id.* The taxpayer’s failure to receive this notice does not affect the validity of the assignment of the title to the purchaser. *Id.* § 52.

account.⁷² The municipal tax collector records a collector's deed, rather than an instrument of taking, which assigns title to the purchaser subject to the homeowner's right of redemption.⁷³ To exercise the right of redemption, the taxpayer must pay the lienholder the delinquent taxes due plus interest, as well as the lienholder's costs, expenses, and fees.⁷⁴ If the taxpayer does not redeem within six months of the sale, the lienholder can file a petition in the Land Court to foreclose the right of redemption.⁷⁵ Interest on the delinquent tax still accrues at a rate of 14–16%, and after the Land Court enters a judgment of foreclosure, the former owner's right of redemption is extinguished and absolute title vests in the lienholder.⁷⁶

Regardless of whether the foreclosing party is a municipality or private entity, the tax title becomes absolute after the Land Court issues a final judgment of foreclosure.⁷⁷ The foreclosing party takes title free and clear of any existing interests in the property, including the prior owner's entire equity stake.⁷⁸ Unlike mortgage foreclosures, the foreclosing party does not have an obligation to give surplus proceeds from the sale to the former owner.⁷⁹

⁷² See *id.* § 52. (allowing a municipality to sell tax titles to third parties for an amount not less than the amount required for redemption).

⁷³ See *id.* § 45 (requiring the tax collector to issue a collector's deed to the purchaser, and stating, "the deed shall convey the land to the purchaser, subject to the right of redemption [and t]he title thus conveyed shall, until redemption or until the right of redemption is foreclosed . . . be held as security for the repayment of the purchase price, with all intervening costs, terms imposed for redemption and charges, with interest thereon").

⁷⁴ *Id.* § 62. The petitioning party can be awarded costs of the proceeding and "such counsel fee as the court deems reasonable." *Id.* § 68.

⁷⁵ *Id.* § 65; see *Tallage*, 23 LCR at 376 n.6 (stating that, in Massachusetts, the Land Court has exclusive jurisdiction over these types of actions).

⁷⁶ Ch. 59, § 57 (interest accrues at 14% before the taking); ch. 60, §§ 62, 64 (stating interest accrues at 16% after the taking has occurred and granting absolute title to tax deed holder after the court enters the foreclosure of the right of redemption). In the current economic climate, banks provide interest on savings accounts for a fraction of 1%. RAO, *supra* note 10, at 4. Tax liens, on the other hand, can earn returns of a national average of 18% and as high as 50%, in some states. *Id.*

⁷⁷ Ch. 60, § 64. Absolute tax title means that neither the property owner, nor any other party with an ownership interest, such as mortgagees, attaching creditors, or lienors, have any claim, then or in the future, to any or all of the property. *Tallage*, 23 LCR at 377.

⁷⁸ Ch. 60, § 64; *Town of Sandwich v. Quirk*, 566 N.E.2d 614, 616 (Mass. 1991) ("[T]he absolute title proclaimed by § 64 clears the record title so that the municipality may sell the property or keep it for municipal purposes, free of the claims of the prior owner and other persons whose rights are extinguished.").

⁷⁹ Compare ch. 60, § 64 (stating that title after tax foreclosure is absolute), and *Tallage*, 23 LCR at 377 (stating that the foreclosing party in a tax foreclosure is entitled to all surplus from the foreclosure), with MASS. GEN. LAWS ANN. ch. 183, § 27 (West 2019) (providing the framework for disposition of proceeds in a mortgage foreclosure and requiring the surplus from such foreclosure, after costs and expenses, to be returned to the former homeowner). For more information regarding the judicial foreclosure process, see Roman Ibragimov, Note, *Fighting the Undead: Why States Should Use Forced Vesting to Kill Zombie Mortgages*, 60 B.C. L. REV. 1279, 1285–86 (2019), which describes the judicial and non-judicial foreclosure processes.

After the foreclosure judgment is entered, the taxpayer can file a motion to vacate within one year of the judgment.⁸⁰ The Land Court has the authority to vacate the judgment in extreme circumstances if “required to show justice.”⁸¹ This remedy is rare—despite over two thousand redemption foreclosures filed annually, the Land Court has considered cases to vacate a judgement of foreclosure only sixteen times since 1993.⁸² This remedy is further limited because an aggrieved taxpayer must file the motion within one year, absent a violation of due process.⁸³ Failure to make a timely filing is an absolute bar on future petitions to vacate the judgment, no matter how inequitable the result.⁸⁴

Tax lien sales are prevalent in Massachusetts because they are lucrative for both municipalities and investors.⁸⁵ Because the tax deed holder keeps all surplus from the sale, this policy allows the town or private purchasers to ac-

⁸⁰ Ch. 60, § 69A; *Tallage*, 23 LCR at 377 (stating that the Land Court has the authority to grant a motion to vacate if it is brought within one year of the judgment).

⁸¹ *Tallage*, 23 LCR at 376–77 (quoting *Sharon v. Kafka*, 468 N.E.2d 656, 658 (Mass. App. Ct. 1984)) (explaining that the court has discretion “after careful consideration and in instances where it is required to accomplish justice” to vacate the judgement of foreclosure).

⁸² See *Sharon*, 468 N.E.2d at 658 (stating that vacating a decree of foreclosure is “extraordinary in nature and ought to be granted only after careful consideration and in instances where . . . [it is] required to accomplish justice”); Clifford, *supra* note 18, at 281–82 nn.39, 43 (stating that there were only sixteen instances of this issue in Land Court records and over 2,200 foreclosures filed in the year studied).

⁸³ See ch. 60, § 69A (providing aggrieved taxpayers one year to file a motion); *Barlow*, 24 LCR at 411 (quoting *Town of Andover v. State Fin. Servs., Inc.*, 736 N.E.2d 837, 841 (Mass. 2000)) (“Following this one-year period, the statute imposes an absolute bar on petitions to vacate.”). The strict one-year limit is designed to provide clarity of title by efficiently making final determinations on disputes about public takings. *Barlow*, 24 LCR at 411. A violation of due process excuses the one-year limit and is usually found based on failure of taxpayer’s ability to participate in litigation or inadequate notice. *Id.*

⁸⁴ Ch. 60, § 69A; see *Sharon*, 468 N.E.2d at 658 (interpreting the statute and holding that, although mental illness or incapacity may be sufficient for a judge to exercise discretion and vacate a judgment of foreclosure, it was insufficient to allow a judge to exercise this discretion past the one-year window). In *Sharon*, the trial judge granted petitions to vacate foreclosures in 1981 that had been entered in 1976. 468 N.E.2d at 657. The lower court’s grounds for vacating the foreclosure were that the taxpayer was an elderly widow who experienced severe disabilities that resulted in her prolonged hospitalization, brain surgeries, and, as a result, she was generally unable to handle her personal affairs. *Id.* The Massachusetts Appeals Court found that her failing health and mental incapacity were insufficient to vacate the decree based on the statutory language in § 69A. *Id.* at 658. To rise to the level of severity required to make a showing of violation of due process, a taxpayer must plead facts to meet the standard established by *Covey v. Somers*. *Id.* (citing *Covey v. Somers*, 351 U.S. 141, 146–47 (1956)). To do so, the petitioner must make a showing that the taxpayer was incompetent, without the protection of a guardian, and the municipal authorities knew that the petitioner was an unprotected incompetent when they sent the notice. *Id.*

⁸⁵ See, e.g., Mike Lawrence, *New Bedford Nets \$3.1 Million in First Sale of Property Tax Debts to Private Company*, SOUTHCOASTTODAY (June 17, 2016), <https://www.southcoasttoday.com/news/20160517/new-bedford-nets-31-million-in-first-sale-of-property-tax-debts-to-private-company> [https://perma.cc/ZAPW-E9NR] (stating that the town of New Bedford brought in \$3.1 million in its first auction, with one single investor buying up all 180 liens, and the investor will be able to collect 16% interest on these debts).

quire valuable property and earn significant returns on a small investment.⁸⁶ Through this process, municipalities in Massachusetts collect \$56 million more than they are owed in delinquent taxes *per year*, meaning municipalities collected \$42.87 for every delinquent dollar.⁸⁷

Municipalities also benefit from the ability to collect premiums from purchasers over the actual amount of the lien.⁸⁸ Worcester, for example, has collected \$2.6 million from investors over the amount of delinquent taxes actually owed in the past three years because of the competitive bidding process.⁸⁹ Worcester keeps the premium if the home is foreclosed, but returns the premium if the homeowner redeems.⁹⁰ This structure aligns the interests of the city with the private investor and incentivizes municipalities to promote tax delinquencies and foreclosures.⁹¹ In Massachusetts, the privatization of delinquent property tax liens has gone hand in hand with an increase in the rate of tax foreclosure.⁹²

⁸⁶ See Tallage, 23 LCR at 375 (describing the return on investment for these purchases as “astronomical”).

⁸⁷ Clifford, *supra* note 18, at 282–83. Clifford conducted a study in which he looked at Land Court records from August 1, 2013, through July 21, 2014. *Id.* at 282. The period of time was selected as a sample size as most cases were likely to have had a final judgment entered. *Id.* He found 2,260 redemption foreclosures filed in this time. *Id.* From this pool Clifford chose 5%—114 files—at random to be the sample size. *Id.* at 283. He found that Massachusetts municipalities collected \$57,963,000 to pay \$1,352,000 of outstanding taxes—\$56.6 million more than was owed by taxpayers. *Id.* at 284. The average value of tax liens being sold in the time period studied was \$4,177. *Id.* at 283. The range was \$26–\$66,642. *Id.* The average assessed property value was \$258,462. *Id.* The range was \$1,300–\$2,295,100 based on fair cash valuation. *Id.*

⁸⁸ See Burrell, *supra* note 70 (stating that, at Worcester’s 2018 auction, tax lien debts for small amounts set off bidding wars that resulted in investors paying much more to the city than was owed in delinquent taxes).

⁸⁹ *Id.*

⁹⁰ *Id.* The city returns the premium to the lien purchaser if the property is not ultimately foreclosed upon. *Id.* Lowell and Pittsfield, two Massachusetts towns, keep the premium regardless of whether the home is ultimately foreclosed. *Id.* In 2012 alone, Lowell received \$96,000 worth of premiums from private investors above and beyond what the taxpayers owed. *Id.*

⁹¹ See *id.* (explaining that critics dislike the practice for the incentives it creates for municipalities to side with private investors rather than promoting the interests of resident homeowners). Municipalities are incentivized to encourage tax delinquencies in order to sell them at auction for a premium. *Id.* For example, Michelle Cook, a Worcester resident, was laid off and fell behind on local property taxes for a duplex that had been owned by her family for generations. *Id.* Her tax bill of \$2,000 quickly multiplied and at auction the lien sold for a premium of \$15,000 over what Cook actually owed. *Id.* The investor sold her home for \$132,000, which meant that the city made a profit of \$15,000, and the investor took home a windfall on the investment. *Id.*

⁹² See McKim, *supra* note 69 (illustrating the trends in tax lien foreclosures since 2008). Since 2012, several private investment companies have brought over 1,100 claims to foreclose. *Id.* Although towns and cities also have the same ability to foreclose on the homes of delinquent taxpayers, profit driven companies have greater incentives to foreclose and charge high interest rates. *Id.* Once the liens are sold to private investors, the municipalities “lose[] all control over the fate of the properties.” *Id.*

The rate of foreclosure filings has steadily increased in the past years.⁹³ In Massachusetts, private investment companies have filed over one thousand cases seeking to foreclose on delinquent taxpayers since 2012.⁹⁴ One Boston tax lien company doubled its rate of foreclosures in Massachusetts over the past four years.⁹⁵ Since 2015, one investment company has brought over forty eviction cases in the state, half of which were in Quincy alone.⁹⁶ From these actions, 130 people faced eviction from their homes, often with little notice.⁹⁷ In 2010, lienholders filed sixty-three tax foreclosure petitions, but in 2013, the number jumped to 466.⁹⁸

Because of this influx, agencies offering free or low-cost legal services have noticed “a tidal wave of tax title problems” from low-income and elderly taxpayers.⁹⁹ Seniors are particularly vulnerable to increased tax rates because they typically survive on a fixed income after retirement.¹⁰⁰ Additionally, when faced with growing tax bills, many people are simply unaware of the crushing consequences.¹⁰¹ Others are confused and overwhelmed by the process, but do not know whom to contact about issues.¹⁰²

⁹³ *Id.* In 2008, there was one tax foreclosure filed in Massachusetts. *Id.* In 2012, there were 471, and in 2013, 466 according to Land Court records. *Id.*

⁹⁴ *Id.* Massachusetts cities such as Worcester, Lawrence, and Lowell suffered big losses after the 2008 housing crisis. *Id.* The executive director of a Lowell nonprofit, Homeowner Options for Massachusetts Elders, stated that there has been a “tidal wave of tax title problems.” *Id.*

⁹⁵ Burrell, *supra* note 48. In 2014, Tallage reported it had purchased over five hundred tax title accounts in Massachusetts. McKim, *supra* note 69. By 2018, Tallage had purchased over two thousand. Burrell, *supra* note 48.

⁹⁶ Burrell, *supra* note 48. In Lowell, real estate records indicate that Tallage LLC sold off dozens of properties that it purchased through the tax lien foreclosure process since 2012. *Id.* This has allowed Tallage to earn four times its initial investment. *Id.* Since 2016, Tallage has filed eighteen eviction cases in Quincy. *Id.*

⁹⁷ *Id.* Tallage contests this number, arguing that most properties acquired were unoccupied. *Id.* Tallage also claims that when the company evicts tenants, it volunteers to pay the costs of relocation. *Id.* Madeline Lahssak, a Quincy resident evicted by Tallage through the tax lien foreclosure process, says that she was unaware of the proceedings until someone came to her home and told her that she had twenty-four hours to accept an offer of \$10,000 to move out within sixty days. *Id.* Lahssak informed reporters that the cash offer would not be very helpful, as she was poor and relied on subsidized rent. *Id.* Rosa Silva and her family were unaware that their duplex, valued at \$389,000, had been foreclosed by Tallage for only \$31,000. *Id.* Silva was given only twenty-eight days of notice. *Id.*

⁹⁸ McKim, *supra* note 69.

⁹⁹ *Id.* (quoting Len Raymond, the executive director of the nonprofit organization Homeowner Options for Massachusetts Elders, based in Lowell).

¹⁰⁰ Burrell, *supra* note 48.

¹⁰¹ See McKim, *supra* note 69 (describing an increasing number of low-income and elderly clients seeking assistance who were “shocked” to learn the ramifications of inability to pay taxes).

¹⁰² See Burrell, *supra* note 48. (stating that fear and confusion are more prevalent in the tax lien foreclosure process than in typical mortgage proceedings because in the latter, the mortgagee at least knows who the owner is and who to contact).

B. State Remedies

Many states, including Massachusetts, have taken initiatives to implement changes to tax lien collection procedures in order to address some of the policy issues posed by privatizing delinquent property taxes.¹⁰³ Massachusetts has enacted three major safeguards to protect vulnerable homeowners.¹⁰⁴ First, the municipality has the discretion to reduce interest owed and structure payment plans for the owner.¹⁰⁵ Second, the municipality can reduce the principal amount owed by applying to the Commissioner of the Department of Revenue.¹⁰⁶ Third, the Legislature has given the Land Court the authority to establish a timeframe in which the property owner is allowed to redeem and to “impose such other terms as justice and the circumstances warrant.”¹⁰⁷ This includes the power to vacate a judgment of foreclosure if the motion is brought within a year after the judgement was entered.¹⁰⁸ Municipalities have also individually enacted certain initiatives aimed primarily at protecting elderly and low-income citizens.¹⁰⁹ Newburyport, for example, allows taxpayers who earn less than \$66,000 per year and are over the age of sixty to work for the city in exchange for a discount on their taxes.¹¹⁰ Newburyport’s program adequately allows senior citizens to meet rising tax obligations on fixed incomes.¹¹¹

Other states have enacted similar programs that decrease, or exempt certain individuals from, property taxes due to factors such as a taxpayer’s age, income level, or status as a veteran, police officer, or firefighter.¹¹² One option

¹⁰³ See RAO, *supra* note 10, at 19–41 (providing examples of various state initiatives to address privatizing tax liens). For example, towns in Tennessee may “freeze” the tax assessment at the amount it was valued at the latest of: when the town started the program, when the taxpayer turned sixty-five, or the year the person bought the property. Property Tax Freeze Act, TENN. CODE ANN. § 67-5-705 (2019). In New Hampshire, one remedy is to require tax collectors to make payment plans for redemption amounts. N.H. REV. STAT. ANN. § 80:33-a (2019).

¹⁰⁴ MASS. GEN. LAWS ANN. ch. 58, § 8 (West 2019); ch. 60, §§ 62A, 68; see *Tallage*, 23 LCR at 377 (describing these three statutes as safeguards).

¹⁰⁵ Ch. 60, § 62A.

¹⁰⁶ Ch. 58, § 8.

¹⁰⁷ Ch. 60, § 68. This discretion includes the ability to “determine whether the party seeking to redeem can meet the financial burdens imposed by statute, and if he can, on what terms payment to the town should be made.” *Town of Lynnfield v. Owners Unknown*, 492 N.E.2d 86, 89 (Mass. 1986).

¹⁰⁸ Ch. 60, § 69A; *Tallage*, 23 LCR at 377. Here, the court notes that the scope of its authority to act to prevent inequities has not been extensively discussed. *Tallage*, 23 LCR at 377. Municipalities largely handle the collection proceedings at a local level, so they are rarely brought to the attention of the state. *Id.* Typically, they are conducted through the local political process with a high amount of circumstantial consideration and discretion of local government agents. *Id.*

¹⁰⁹ See Burrell, *supra* note 48 (providing examples of towns and cities that have enacted their own programs to protect vulnerable homeowners).

¹¹⁰ *Id.* Michael Murphy is a seventy-three-year-old citizen of Newburyport who works about ninety-five hours per year sorting recyclables for the city in exchange for a \$1,500 reduction in taxes. *Id.*

¹¹¹ *Id.* Newburyport estimates that about eighty residents utilize this program. *Id.*

¹¹² RAO, *supra* note 10, at 19.

is a tax deferral program that allows taxpayers additional time to pay their taxes, but does not decrease the amount of revenue that the municipality will receive—it simply adjusts the timing of the revenue stream.¹¹³ Another option is an exemption program, such as the method adopted in Utah, in which the first \$200,000 of a disabled veteran's home is not taxed.¹¹⁴ Property taxes are reduced proportionally to the severity of the veteran's disability, which allows for flexibility based on individual circumstances.¹¹⁵

States have also implemented broad reforms in response to public backlash regarding the privatization of delinquent property tax liens.¹¹⁶ Rhode Island, for example, implemented the Madeline Walker Act in 2006, which is designed to help financially distressed taxpayers keep their homes.¹¹⁷ The new legislation imposes notice requirements and grants Rhode Island Housing, a quasi-public housing entity designed to help residents with housing problems, the first option to purchase property tax liens before they are sold at public auction.¹¹⁸ Once Rhode Island Housing purchases liens, homeowners have five years to redeem rather than the typical one-year redemption period.¹¹⁹ A dedi-

¹¹³ *Id.* at 20.

¹¹⁴ UTAH CODE ANN. § 59-2-1104 (West 2019). The code provides that any veteran who is not classified as “less than 10%” disabled or is listed as classified as individually unemployable, would qualify for this exemption. *Id.*

¹¹⁵ *See id.* § 59-2-1104(6)(a) (stating that the amount of property value exempt under this policy is the percent that the veteran is disabled, multiplied by the total value of the property); § 59-2-1105(3)(a)(i) (providing that the determination of percentage of disability is made by a military personnel's written decision).

¹¹⁶ *See* RAO, *supra* note 10, at 37 (detailing Rhode Island's amendments to its tax statute designed to address this issue and explaining that it was compelled by negative media coverage of tax lien foreclosure practices).

¹¹⁷ *See* 44 R.I. GEN. LAWS § 44-9-8.3(a) (2019) (granting the right of first refusal of tax liens sold on owner-occupied property of three or fewer units to the Rhode Island Housing and Mortgage Finance Corporation); *id.* § 44-9-10 (detailing notice requirements for the sale of tax liens). This amendment to the tax sale statute was named after an eighty-one-year-old woman who lost her home due to a missed sewer bill of \$496. Bill Hogan, *Predators Target Homes of Older Americans*, AARP BULL. (Apr. 2014), <https://www.aarp.org/money/taxes/info-2014/tax-liens-target-homeowners.html> [<https://perma.cc/38DX-C4KA>]. Investors purchased the lien and resold her home for \$125,000. *Id.* Governor Donald Carcieri explained in a news release that the bill was designed to assist vulnerable members of society and provide everyone with information necessary to protect their homes. Justin Sayles, *New Law Gives Homeowners Help from R.I. Housing*, PROVIDENCE BUS. NEWS (July 22, 2006), <https://pbn.com/new-law-gives-homeowners-help-from-ri-housing21020/> [<https://perma.cc/9XXW-27A7>].

¹¹⁸ RAO, *supra* note 10, at 37. During the notice period, Rhode Island Housing reaches out to the delinquent taxpayer, and if they respond, the agency will assess the cause of the delinquency and connect the taxpayer with resources such as legal or social services. *Id.* Rhode Island Housing is a quasi-public corporation that was formed to assist residents with housing issues. Sayles, *supra* note 117. The organization's goal is to cooperate with homeowners to refinance their homes and meet their tax obligations without excessive fees. *Id.*

¹¹⁹ Christine Dunn, *Through Madeline Walker Act, R.I. Housing Has Helped Thousands Stay in Their Homes*, PROVIDENCE J. (Nov. 26, 2015), <https://www.providencejournal.com/article/20151126/NEWS/151129444> [<https://perma.cc/EM28-FM5L>]. Between 2007 and 2015, Rhode Island Housing purchased 3,500 liens and most taxpayers were able to redeem within the five-year window. *Id.*

cated team works with the homeowners to pay off their debts, secure sources of financial aid, or find alternative affordable housing.¹²⁰ Additionally, if homeowners do not answer contact attempts, a staff-member from the agency will go to the taxpayer's home to ensure that the taxpayer is informed of the delinquency and pending proceedings.¹²¹ Prior to the change, Rhode Island Housing reported that the majority of serious bill delinquencies were the result of obstacles such as family issues, illness, or financial complications, rather than unwillingness to pay.¹²² The agency pledged to work with the residents to address these issues and either keep their homes or protect their equity interest.¹²³

The District of Columbia similarly amended its tax lien statute after national outrage regarding the adverse impact of the District's practices, brought to light by the *Washington Post* in 2013.¹²⁴ In response, the mayor of the District halted home sales of certain groups, such as the elderly and veterans, and the D.C. Council approved the change in 2014.¹²⁵ The amended statute prohibits sales of tax debts under \$2,500 and provides stringent notice requirements including invalidation of a tax sale if the District does not send one of the notices.¹²⁶ The most significant change to the statute, however, is that now when a judgement of foreclosure is entered, the purchaser of the tax lien is entitled to the lesser of either 10% of the surplus of the sale or \$20,000.¹²⁷ The rest of the surplus is returned to the individual whose home was foreclosed—this allows

¹²⁰ *Id.* The team includes two full-time lien specialists and a social-work oriented staff member who assists homeowners who need aid such as food stamps or heating. *Id.* This program has helped thousands of homeowners keep their homes. *Id.* The program has also helped struggling taxpayers sell their homes and find more affordable housing options. *Id.* Additionally, the agency will provide opportunities for the taxpayers to receive counseling and legal advice. Sayles, *supra* note 117.

¹²¹ RAO, *supra* note 10, at 37. Efforts were made to acknowledge the fact that many homeowners, such as Madeline Walker, will not respond to traditional contact attempts. *Id.*

¹²² Sayles, *supra* note 117.

¹²³ *Id.* The spokesperson of Rhode Island Housing stated that the agency was aware that the undertaking would be challenging, but was committed to protecting ownership when possible and equity interest when the taxpayer could not afford to keep the home. *Id.*

¹²⁴ See Debbie Cenziper & Michael Sallah, *Groundbreaking Protections Proposed for D.C. Homeowners Behind on Taxes*, WASH. POST (Mar. 18, 2014), https://www.washingtonpost.com/investigations/groundbreaking-protections-proposed-for-dc-homeowners-behind-on-taxes/2014/03/18/b527a5b0-aebb-11e3-9627-c65021d6d572_story.html [<https://perma.cc/6YQG-V7PW>] (stating that the proposed legislation was instigated by the *Washington Post*'s investigation that exposed pervasive abusive practices); Sallah et al., *supra* note 1 (detailing the pattern of detrimental impact on the poorest neighborhoods in Washington, D.C. that occurred as a result of the tax lien foreclosure process and enabled investors to snap up hundreds of homes for small tax obligations, leaving the most vulnerable citizens with nothing).

¹²⁵ Hsu, *supra* note 6.

¹²⁶ See D.C. CODE § 47-1332(c)(2) (2020) (prohibiting sale of tax liens under \$2,500); *id.* § 47-1366(b)(A) (requiring tax sale to be invalidated if the delinquent taxpayer can show that the tax collector failed to provide adequate notice).

¹²⁷ *Id.* § 47-1382.01(d)(4)(A).

investors to receive a return on the investment without enabling a windfall at the expense of homeowners.¹²⁸

New Hampshire has also recently confronted issues created by tax foreclosures.¹²⁹ Prior to 2001 in New Hampshire, it was common practice for the foreclosing party in a tax deed sale to keep all of the surplus proceeds.¹³⁰ This changed following the New Hampshire Supreme Court's decision in *Thomas Tool Services v. Town of Croydon*.¹³¹ The court stated that preventing a delinquent taxpayer from receiving the surplus proceeds from a tax sale is unduly harsh and an unconstitutional taking in violation of the state's constitution.¹³² The legislature amended the statute to reflect this decision and currently allows the municipality to retain only taxes owed, interest, costs, and fees from public sale of the property and granted the former homeowner a three-year window to bring an action in court to recover the proceeds.¹³³

II. DIAMETRICALLY OPPOSED OPINIONS ON POLICY AND CONSTITUTIONALITY

The discourse surrounding the privatization of delinquent property tax liens in Massachusetts centers around, first, whether it is sound public policy.¹³⁴ Proponents of privatization see the policy as a wholly beneficial tool to help struggling communities collect debts to improve public services, while

¹²⁸ *Id.* § 47-1382.01(d)(4)(B) (requiring municipalities to give surplus proceeds from the sale to the former homeowner).

¹²⁹ *See* *Thomas Tool Servs., Inc. v. Town of Croydon*, 761 A.2d 439, 441–42 (N.H. 2000) (testing the constitutionality of New Hampshire's statutory alternative tax lien procedure).

¹³⁰ Jeff Woodburn, *Losing Your Home: Ignoring Unpaid Taxes Can Lead to Big Trouble—Fast*, NH MAG. (Dec. 21, 2015), <https://www.nhmagazine.com/January-2016/Losing-Your-Home/> [<https://perma.cc/2Q9G-4RND>]. In New Hampshire, it is legal for municipal tax collectors to choose to sell tax liens to private individuals, but none currently elect to do so. *Id.*

¹³¹ 761 A.2d at 441 (holding the statutory alternative tax lien procedure unconstitutional under the state constitution's takings clause).

¹³² *Id.* The defendant town had acquired the property for a delinquent tax amount of \$370.26 and the plaintiff taxpayer had originally purchased the home for over \$65,000. *Id.*

¹³³ N.H. REV. STAT. ANN. § 80:88(I); *id.* § 80:89(7); *see* Woodburn, *supra* note 130 (noting that the legislature's amendment was in response to the N.H. Supreme Court decision in *Thomas Tool Services*). The amount that a municipality is entitled to is defined in N.H. REV. STAT. ANN. § 80:90. The new statute was challenged in *Polonsky v. Town of Bedford* in 2018. 190 A.3d 400 (N.H. 2018). There, the former homeowner argued that the three-year limit should be inapplicable because it encourages municipalities to wait three years before selling the property then retaining all proceeds. *Id.* at 406. The court held that the intent was clearly to create a three-year window in which the former homeowner had access to the proceeds. *Id.* The court called on the legislature to make any changes if unsatisfied with this outcome. *See id.* (explaining that if policy judgments are to be made, the legislature is better equipped to make those decisions due to their more extensive role).

¹³⁴ *Compare* RAO, *supra* note 10 (discussing harmful effects of the current policy and suggestions for change that would better serve the public interest), *with* NTLA Amicus Brief, *supra* note 21, at 8 (describing the benefits conferred upon municipalities by this policy).

critics contend that this policy enables predatory tactics that punish the most vulnerable in society.¹³⁵

This Part summarizes the current viewpoints on the privatization of delinquent property tax liens and its legal implications.¹³⁶ Section A describes the contrasting discourse regarding whether the system, as it currently operates in Massachusetts, is sound public policy.¹³⁷ Section B discusses recent scholarship that has suggested that allowing the foreclosing party to retain surplus proceeds from the tax sale may be an unconstitutional taking.¹³⁸

A. Policy Perspectives on the Privatization of Delinquent Property Tax Liens

Policy critics and advocates have conflicting viewpoints regarding whether the privatization of delinquent property tax liens is a useful tool to collect unpaid taxes or if it simply allows wealthy investors to prey on the sick, poor, and elderly.¹³⁹ Proponents of Massachusetts' current property tax lien policy emphasize the many advantages that privatization provides for municipalities and reject the notion that privatization necessarily results in unjust outcomes.¹⁴⁰ One of the main benefits of the privatization of delinquent property tax liens is that it allows for cash-strapped municipalities to get money quickly.¹⁴¹ In the past five years, Worcester, Lowell, New Bedford, Pittsfield, and

¹³⁵ See *supra* note 134 and accompanying text.

¹³⁶ See *infra* notes 139–207 and accompanying text.

¹³⁷ See *infra* notes 139–182 and accompanying text.

¹³⁸ See *infra* notes 183–207 and accompanying text.

¹³⁹ Compare McFarlane, *supra* note 19 (providing examples of individuals who suffered the loss of their home due to this policy), with Lawrence, *supra* note 85 (discussing the benefits of tax lien sales for towns such as New Bedford, and stating that the town made \$3.1 million on its first sale of this type).

¹⁴⁰ See Jeremy Shulkin, *In Worcester, Tax Auctions Are the Norm*, TELEGRAM.COM (June 11, 2017), <https://www.telegram.com/news/20170611/in-worcester-tax-auctions-are-norm> [<https://perma.cc/V68V-RCEV>] (stating that investors contacted were “lamenting the misconceptions around the industry” and describing the benefits for municipalities, such as the ability to collect quick revenue and not expend the resources to collect taxes themselves). See generally NTLA Amicus Brief, *supra* note 21 (defending the tax lien industry). The NTLA is an organization that considers itself to be a national voice for tax lien industry members within the United States. NTLA Amicus Brief, *supra* note 21, at 1. It lists its main functions as advising its members on best practices and judicial, legislative, and regulatory advocacy. *Id.* The NTLA prides itself on advising against unnecessary foreclosure and educating its members in compassion. *Id.* at 2. For more information on the NTLA, see NAT'L TAX LIEN ASS'N, <https://ntlainfo.site-ym.com/default.aspx> [<https://perma.cc/VB3M-7SQ9>].

¹⁴¹ See NTLA Amicus Brief, *supra* note 21, at 7 (explaining that the process creates a cash flow for the municipality from the outstanding tax liabilities). In Massachusetts, property tax is the first and foremost revenue source for local municipalities. *Id.* at 8. In 2012, tax lien investors provided over \$1.5 billion in capital to municipalities through the privatization procedure in the United States. *Id.*

Quincy were able to recover approximately \$10 million by selling 1,300 liens to investors.¹⁴²

Property taxes are the primary non-federal and non-state source of revenue for local towns and cities in Massachusetts.¹⁴³ Proponents argue that without this revenue, towns would not be able to provide libraries, recreational programs for children and the elderly, local government activities like planning and zoning, and other local services.¹⁴⁴ Because these services benefit all residents, proponents argue that it is fair to hold taxpayers accountable.¹⁴⁵ Delinquent taxes can result in budget shortfalls that leave the municipality with little choice but to raise taxes for the rest of the tax base or to decrease the services it provides.¹⁴⁶ Privatizing delinquent taxes also eliminates the costs that municipalities incur to collect due taxes.¹⁴⁷ Any administrative costs of pursuing the delinquent taxes and bringing a foreclosure action are no longer the responsibility of the municipality, but rather, the private entity will take on the expense.¹⁴⁸ Thus, privatization helps keep rates low for taxpayers who do pay their taxes on time.¹⁴⁹

Tax lien investors also dispute the assumption that every foreclosure results in a windfall.¹⁵⁰ Private investors cite risks involved, such as fluctuating market conditions and long timelines for these transactions—that make the outcome less predictable—and the homeowner seeking bankruptcy protection.¹⁵¹ The National Tax Lien Association (NTLA) argues that the high inter-

¹⁴² Burrell, *supra* note 48. Worcester stated that in the fiscal years of 2010–2012, the city collected \$9,796,306 from the sale of tax collector’s deeds. City of Worcester Amicus Brief, *supra* note 45, at 2. The city noted that this amount was equal to 133% of the city’s snowplow budget in 2010, the cost of fifty police officers in the fiscal year 2011, or fifty-two teachers in 2012. *Id.*

¹⁴³ NTLA Amicus Brief, *supra* note 21, at 8. Municipalities use this money to provide many essential services, such as education, public safety resources such as police officers and firefighters, and infrastructure like roads and bridges. *Id.*

¹⁴⁴ *See id.* (stating that delinquent taxes can force municipalities to reduce local services); Shulkin, *supra* note 140 (describing the ability to sell liens as a “godsend” for municipalities that are struggling).

¹⁴⁵ *See* Lawrence, *supra* note 85 (reporting that Worcester’s chief financial officer explained that the policy’s intent is to create a fair process to all taxpayers).

¹⁴⁶ NTLA Amicus Brief, *supra* note 21, at 8.

¹⁴⁷ *See id.* at 2 (describing that the cost of tax collection is borne by the lien purchaser rather than the municipality).

¹⁴⁸ *Id.*; *see* Shulkin, *supra* note 140 (describing a benefit to municipalities is the ability to avoid the “expensive and time-consuming slog” of bringing cases to court).

¹⁴⁹ *See* NTLA Amicus Brief, *supra* note 21, at 8 (explaining that this policy helps keep taxes low for responsible taxpayers by not leaving them to make up the difference from taxes owed by their neighbors). Unpaid taxes increase the tax burden on those who do pay by around \$250 per year. Spencer, *supra* note 25.

¹⁵⁰ *See* NTLA Amicus Brief, *supra* note 21, at 9 (stating that there is a common belief that tax liens result in windfalls for investors, but that there are actually a variety of hidden risks and expenses associated with the practice).

¹⁵¹ *Id.* at 9–10. Additionally, there is no right to inspection before the purchaser takes title to the home, so there is a real risk that the property will require significant repair before it is suitable to be

est rate and the possibility of taking absolute title is necessary in order to incentivize lien purchasers to participate in the market and allow the municipalities to obtain all of the benefits of this practice.¹⁵²

Finally, proponents of Massachusetts' tax lien policy argue that the current practice provides sufficient protection to property owners and prevents misconduct of private investors.¹⁵³ The taxpayer is entitled to notice of the delinquent tax before any collection activities can commence, which must be both published and posted at least fourteen days prior to the sale.¹⁵⁴ Additionally, the tax collector deed must be recorded at the Registry of Deeds, creating public notice of the sale.¹⁵⁵ Proponents claim that because of the significant safeguards that exist in Massachusetts, and the fact that a taxpayer in distress could "easily" get money to pay tax debt by borrowing against the property, it is unlikely that any significant equity interest will be lost.¹⁵⁶

On the other hand, critics, rights advocates, and some lawmakers have criticized the policy as predatory and unfair because it enables unconscionable outcomes for the sake of a profit.¹⁵⁷ Critics point out that the industry preys on people who are in financial distress, are elderly, disabled, or uneducated in the legal system and their rights.¹⁵⁸ Policy critics also argue that the negative con-

sold on the market. *Id.* at 9. Bankruptcy foreclosures tend to be less predictable, and at the minimum will significantly slow the pace of the transaction for the investor, which inserts additional risk into the price equation. *Id.* at 10.

¹⁵² See *id.* at 9, 16 (asserting that granting the court the ability to give the surplus from the foreclosure sale to the former homeowner would have a "chilling effect" on the market for tax liens).

¹⁵³ See *id.* at 11–12 (arguing that protections in Massachusetts are some of the highest in the country, pointing particularly to notice requirements and ability of the judiciary to intervene).

¹⁵⁴ MASS. GEN. LAWS ANN. ch. 60, §§ 16, 42 (West 2019); see also Burrell, *supra* note 48 (explaining that Worcester's tax lien process requires notice to be sent twelve times to homeowners prior to selling the lien).

¹⁵⁵ Ch. 60, § 45; see NTLA Amicus Brief, *supra* note 21, at 11 (arguing that such recording creates public notice).

¹⁵⁶ See NTLA Amicus Brief, *supra* note 21, at 13 (arguing that taxes never go unpaid "for lack of money"). "The taxpayer could easily obtain the money through the simple expediency of borrowing against the property. The court can ensure that all property owners, especially *pro se* taxpayers, are given this opportunity or other means of redeeming their property." *Id.*

¹⁵⁷ See Kahrl, *supra* note 27, at 931–32 (explaining that several years ago, a group of senators called on the Consumer Financial Protection Bureau to address these harmful policies, arguing that although "some state and local governments are struggling in the current economic climate . . . it is never acceptable to make up such a shortfall on the backs of some of our most vulnerable citizens"). Additionally, there is currently a bill before the Massachusetts state legislature that has not gained any traction in the past three years. Burrell, *supra* note 48. The proposed bill's goal is to improve notification requirements, limit fees and costs, and would divide the surplus between the homeowner and the municipality in the case of a tax sale. *Id.*

¹⁵⁸ See Burrell, *supra* note 48 (discussing the criticism that the policy has received from lawmakers and consumer advocates, as well as providing examples of the impact this policy can have on taxpayers); Jennifer McKim, *Healey Backs New Law Protecting Homeowners from Tax Lien Sales*, NECIR (June 9, 2015), <https://www.necir.org/2015/06/09/healey-backs-new-law-protecting-homeowners-from-tax-lien-sales/> [<https://perma.cc/B88H-AKBV>] (stating that the legislators were promoting a change to the current law because of the current law's risks to residents such as the elderly or disabled); Shulkin, *supra*

sequences from the privatization of the tax sale disproportionately afflicts people who are “house rich and cash poor.”¹⁵⁹ Because their property taxes are high, but home equity is an illiquid asset, these homeowners are more susceptible to falling behind on tax payments and less likely to be able to catch up as interest compounds.¹⁶⁰ This policy strips the former owner of their most valuable asset and leaves them with nothing, often for missing only a small tax bill.¹⁶¹

Critics also oppose this policy because municipalities lose any ability to control the outcome when they accept cash for the outstanding liens, and due to differing incentives, municipalities tend to be more lenient than investors when residents face special circumstances.¹⁶² A local tax authority’s primary goal is to collect missing tax payments in order to benefit the community they serve, but they likely do not have the resources to aggressively pursue foreclosure actions.¹⁶³ Municipal tax collectors are part of their local governments and are accountable to their residents.¹⁶⁴ These considerations are incentives against foreclosure and encourage municipalities to be more forgiving and work with the taxpayer on a payment plan.¹⁶⁵ Investors, on the other hand, seek to maximize return on investment, which increases costs to the delinquent

note 140 (describing the tax lien process’s benefits and harms, including the critique from State Rep. John J. Mahoney that current safeguards may not be adequate for people who cannot understand the “legalese”).

¹⁵⁹ Shulkin, *supra* note 140.

¹⁶⁰ See Andrea Riquier, *America Is House-Rich but Cash-Poor—and These Businesses See Opportunity*, MARKETWATCH (June 16, 2018), <https://www.marketwatch.com/story/america-is-house-rich-but-cash-poor-these-businesses-see-opportunity-2018-06-08/print> [<https://perma.cc/V3DV-RVG2>] (describing equity in a home as “worthless” because of its illiquidity when the homeowner needs money for expenses such as medical bills or home improvements). This is particularly challenging for a person who inherited the home or has paid off the mortgage and owns all of the equity, but does not have wealth in the form of cash in order to pay their taxes. See, e.g., Burrell, *supra* note 70 (describing the case of Michelle Cook, a recently unemployed woman with two daughters, whose Worcester home had been in her family for decades).

¹⁶¹ See McFarlane, *supra* note 19 (stating that because of this policy some homeowners are “one tax bill away from being homeless”); see, e.g., Sallah, *supra* note 1 and accompanying text.

¹⁶² See McKim, *supra* note 69 (stating that private investors have different incentives from municipalities); Shulkin, *supra* note 140 (stating that after selling tax liens to private parties, municipalities forego the ability to assist people in need). Investors essentially step into the role of the municipal tax collector and local governments lose all influence over enforcement. See Lawrence, *supra* note 85 (stating that the investor will step into the shoes of the town by bringing the cases in court and processing the tax debts).

¹⁶³ See Spencer, *supra* note 25 (stating that the town uses taxpayer money to meet its obligations to its residents and that towns do not typically have the financial or labor resources to aggressively pursue foreclosure actions).

¹⁶⁴ *Tallage LLC v. Meaney*, 23 LCR 375, 377 (Mass. Land Ct. 2015) (stating that the tax collection was previously conducted within the political process, similar to the District Attorney’s office).

¹⁶⁵ See *id.* (describing the tax foreclosure process as controlled by the political process when carried out by the municipality, done with a measure of discretion and awareness of special circumstances).

taxpayer and the rate of foreclosure.¹⁶⁶ First, investors are incentivized not to notify the property owner of delinquencies and pending foreclosures because the longer that taxes are delinquent, the higher the investor's profit due to rapidly compounding interest.¹⁶⁷ Additionally, because an investor keeps all surplus from a tax sale, investors are motivated to make it as difficult as possible for taxpayers to redeem before foreclosure.¹⁶⁸ This can be done by charging expenses and fees to make the redemption amount prohibitively high, providing limited notice, and refusing to be lenient.¹⁶⁹ Additionally, investment groups may have the resources to aggressively pursue foreclosure actions and sell the home on the market.¹⁷⁰ Investors are also not beholden to any political process and have no obligation to act in the best interests of the community.¹⁷¹ Because of these differing considerations, the privatization of delinquent property tax liens inflicts substantially greater harm than municipal enforcement.¹⁷²

Finally, critics point out that the privatization of tax lien foreclosures take more from the taxpayer than just their home—it takes away their dignity.¹⁷³ Taxpayers who fall behind on payments are disproportionately poor, elderly, or

¹⁶⁶ See Joshua J. Miller & Silda Nikaj, *The Response of Delinquent Taxpayers to More Aggressive Collection*, 69 NAT'L TAX J. 77, 81 (2016) (finding that privatization of tax liens increases the number of foreclosures). In one Ohio county, tax foreclosures were rare, but after the county sold its tax liens, 100 tax foreclosures were filed in two days. *Id.* Private tax foreclosures are also more expensive for the property owner because private investors can pass on expenses and costs such as the investor's attorney fees. *Id.* at 80.

¹⁶⁷ See Burrell, *supra* note 48 (describing one of investment companies' key strategies as keeping homeowners "in the dark," and using fear and confusion to prevent homeowners from redeeming).

¹⁶⁸ See Tallage, 23 LCR at 377 n.10 (explaining that investors have no incentive to compromise with the homeowner to reduce either the interest or principal to enable the homeowner to pay off the bill, and they are also incentivized to attempt to acquire the property itself through foreclosure); Burrell, *supra* note 70 (stating that this policy encourages local governments to "stack the odds" against delinquent taxpayers). Anticipation of higher returns is evidenced by the investors' willingness to pay premiums over the principal, which is the amount owed. Tallage, 23 LCR at 377 n.10. Additionally, the Land Court reports that some private investors outright refuse to enter into any voluntary payment plan, which forces the property owner to go to court and make the request. *Id.*

¹⁶⁹ See Burrell, *supra* note 70 (stating that the amount required to redeem grows rapidly due to interest, costs, and fees, making foreclosure more likely); see, e.g., Tallage, 23 LCR at 375, 382 (noting that the investor demanded \$30,612.24 for redemption for principal, costs and fees, including \$25,582.50 of attorney's fees, for missing water and sewer bills totaling \$492.51).

¹⁷⁰ See, e.g., Burrell, *supra* note 48 (describing the investment company Tallage LLC, which is one of the largest tax lien buyers in the state). Tallage's website states that it is run by a real estate investor, has general counsel, and a firm principal to oversee transactions. *Firm Profile*, TALLAGE, www.tallagellc.com/firm.html [<https://perma.cc/7SMN-94QJ>]; *Key Personnel*, TALLAGE, www.tallagellc.com/staff.html [<https://perma.cc/4F44-JYET>].

¹⁷¹ See Tallage, 23 LCR at 377 (stating that investment companies are not beholden to residents of municipalities, but rather to their investors).

¹⁷² See Miller & Nikaj, *supra* note 166, at 80–81 (stating that privatization of tax liens increases the number of foreclosures and is more costly for the property owner, thus causing more damage overall).

¹⁷³ See generally Kahrl, *supra* note 27 (characterizing tax takings through the foreclosure process as dignity takings).

do not understand the law and the ramifications of such actions.¹⁷⁴ People who have fallen behind in tax payments, whether due to personal, financial, or other reasons, often feel profoundly ashamed and humiliated at the prospect of being unable to manage their finances.¹⁷⁵ People who cannot pay taxes are ostracized and blamed for their predicament, often characterized as “dumb and dim-witted” for losing their homes to tax foreclosure.¹⁷⁶ Tax buyers are aware of this emotional burden and use it as leverage against homeowners.¹⁷⁷ Ashamed and distressed, unaware of the brutal consequences, and confused by the opaque legal maze, people are unlikely to seek critical legal assistance.¹⁷⁸ Eviction and potential loss of their most valuable possession is devastating, particularly if the person is already facing poverty or personal issues that contributed to the circumstances.¹⁷⁹ Furthermore, the “remedy” designed to prevent this type of abuse actually requires the victims to plead their own incompetence.¹⁸⁰ To seek relief, delinquent taxpayers must beg the court to declare that they are incapable of handling their own financial affairs.¹⁸¹ This policy degrades the delinquent taxpayer, stripping them of their dignity in order to save their home from foreclosure.¹⁸²

¹⁷⁴ Sallah et al., *supra* note 1. A judge in Michigan explained that delinquent taxpayers are typically not educated about the law and are not sophisticated parties, so they tend not to understand their rights. Kahrl, *supra* note 27, at 915. This allows for windfalls for more sophisticated tax buyers, who are aware of the knowledge disparity and are willing to exploit it. *Id.*

¹⁷⁵ Kahrl, *supra* note 27, at 907. The shame is typically due to the embarrassment of being unable to pay taxes or other particular circumstances that prevented them from doing so. *Id.*

¹⁷⁶ *See id.* at 916 (quoting Chicago attorney Robert Cushman testifying before the Illinois General Assembly in 1969).

¹⁷⁷ *Id.* at 907. In the 1970s, a study in South Carolina found that significantly more fraudulent tax lien foreclosures occur than are reported and attributed this disparity to the shame that victims feel. *Id.* at 915.

¹⁷⁸ *Id.* at 933; *see* McKim, *supra* note 69 (stating that a nonprofit legal services group has noticed that many of the individuals are low income and elderly, and have no awareness that they could lose their home).

¹⁷⁹ *See* Kahrl, *supra* note 27, at 922. The author provides the example of eighty-three-year-old Veronica Micetich, an immigrant widow who relied on her recently deceased husband to handle the financial affairs and taxes and was evicted from her home for failing to pay taxes. The neighbors reported that she stood in the yard, yelling “save my house.” *Id.*

¹⁸⁰ *See id.* at 907 (stating that victims have little choice but to beg for pity in front of the court and argue that they are incompetent to handle their own financial affairs). After a judgment of foreclosure has been entered, the former owner may bring an action to vacate the judgment within one year under ch. 60, § 69A “after careful consideration and in instances where it is required to accomplish justice.” Ch. 60, § 69A; Tallage, 23 LCR at 377.

¹⁸¹ Kahrl, *supra* note 27, at 919 (explaining that victims are forced to portray themselves as “ignorant, impoverished, and worthy of pity” in order to persuade the court to grant relief).

¹⁸² *See id.* (describing the doctrine of equity as a “Hail Mary” attempt in which the former owner must beg the court for relief, and the toll that this takes on a person).

B. Failing to Return the Excess Proceeds to the Former Homeowner May Be an Unconstitutional Taking

Massachusetts' tax lien foreclosure policy has also been criticized for being both inequitable and unconstitutional because the former owner does not receive surplus proceeds from the tax foreclosure sale.¹⁸³ The Supreme Judicial Court of Massachusetts has declared that, per the current tax foreclosure statute, the foreclosing party has no duty to give the surplus proceeds from the tax sale to the former homeowner.¹⁸⁴ The court reasoned that the legislature's intent in drafting the statute was clear—the surplus from a sale of property due to delinquent taxes is owned by the municipality.¹⁸⁵ Critics argue that this is an unconstitutional taking in violation of the Takings Clause of the Fifth Amendment of the U.S. Constitution that: “private property [shall not] be taken for public use, without just compensation.”¹⁸⁶

The Supreme Court first addressed Takings Clause implications of the surplus from tax sales in 1881 in *United States v. Taylor*, when it interpreted a Congressional statute as requiring surplus to be paid to the former owner.¹⁸⁷ Three years later, in *United States v. Lawton*, the Court declared it would be an unconstitutional taking to refuse to compensate a former homeowner for the surplus proceeds under the same statute.¹⁸⁸ In 1956, the Supreme Court revisit-

¹⁸³ See generally Clifford, *supra* note 18 (arguing that the Massachusetts tax deed sale is an unconstitutional taking).

¹⁸⁴ See *Kelly v. City of Boston*, 204 N.E.2d 123, 125 (Mass. 1965) (holding that the surplus proceeds from sale of the property belong to the tax lien purchaser).

¹⁸⁵ See *id.* (analyzing the legislature's 1941 amendment of ch. 60, § 79, which changed the treatment of the surplus of lands of low value that had been taken by the municipality without a foreclosure, and finding that the legislature added the requirement that the surplus funds be left with the municipality treasurer to be available to be paid to the former owner if requested within five years). The court found it indicative of legislative intent that they did not create a similar provision for cases where the right of redemption had been judicially foreclosed. *Id.*

¹⁸⁶ U.S. CONST. amend. V; see Clifford, *supra* note 18, at 291–92 (asserting that the privatization of delinquent tax liens is an unconstitutional taking).

¹⁸⁷ 104 U.S. 216, 218 (1881); see Clifford, *supra* note 18, at 284 (stating that this was the first case in which the Supreme Court explicitly discussed keeping excess proceeds from a tax foreclosure sale). The statute in question stated that any proceeds resulting from the sale of a property with delinquent taxes must be held by the U.S. Treasury until the former owner applied to receive such proceeds. *Taylor*, 104 U.S. at 218. The plaintiff brought suit under this statute to recover surplus proceeds from a tax sale. *Id.* at 216. The original landowner failed to pay a \$37 tax and the land was sold to a third party for \$3,000 in 1865. *Id.* at 216–17. The United States was entitled to \$70.50 after the tax, costs, and expenses of the sale. *Id.* at 217. In 1874, the ultimate beneficiary of the former owner's property interest applied to the Secretary of the Treasury for the surplus. *Id.* The Court found that the statute clearly requires the government to return the surplus, as long as the statute had not been overturned by subsequent legislation. *Id.* at 218. The Court held that it had not and, therefore, the surplus rightfully belonged to the plaintiff. *Id.* at 219.

¹⁸⁸ 110 U.S. 146, 150 (1884). In *Lawton*, land was bought by the United States in 1863 for \$1,100 due to \$88 in delinquent taxes. *Id.* at 148. The owner did not make an application to recover this surplus, so the government paid nothing. *Id.* The beneficiaries of the original owner sought to recover the surplus, but the Secretary of the Treasury denied their application. *Id.* The Court held that to “with-

ed the topic in the case of *Nelson v. City of New York*.¹⁸⁹ Unlike the prior two cases, the Supreme Court decided that the defendant's refusal to pay the surplus from a tax sale to the former owner was not an unconstitutional taking.¹⁹⁰ The Court differentiated this case on the basis that the New York statute in *Nelson* provided avenues to recover the surplus and did not explicitly mandate that surplus from tax sales be given to the owner.¹⁹¹

Lawton and *Nelson* create two distinct rules regarding the constitutionality of the treatment of surplus proceeds from tax lien sales.¹⁹² *Lawton* established that refusing to return surplus equity from a property in which the former homeowner has a statutory interest will give rise to a Takings Clause claim.¹⁹³ *Nelson* established that if a statute provides ways for the former homeowner to recover the surplus equity, but the homeowner fails to utilize these avenues in a timely manner, later refusal to give surplus equity to the former homeowner will not raise a Takings Clause claim.¹⁹⁴

Recently, the tax lien foreclosure policy came to national attention as a result of the *Washington Post*'s investigative work in Washington, D.C.—Bennie Coleman's story and his case *Coleman v. District of Columbia*.¹⁹⁵ In 2014, Coleman argued it was an unconstitutional taking for a third-party investment

hold the surplus from the owner would be to violate the fifth amendment to the constitution, and deprive him of his property without due process of law or take his property for public use without just compensation." *Id.* at 150. The Court stated that this money was set aside as belonging to the former owner, the same as if a third person or the government had purchased the property. *Id.*

¹⁸⁹ 352 U.S. 103, 103 (1956).

¹⁹⁰ *See id.* at 106, 110 (allowing the city to keep all profits from a foreclosure sale of a property due to four years of unpaid taxes although the sale of the property generated revenue that far exceeded the amount due).

¹⁹¹ *Id.* at 110. The statute requires notice to the property owner, and then if seven weeks pass, a judgement of foreclosure may be entered, and the person will lose all right to redemption, title, interest, and equity in the property. *Id.* at 105. The statute provides that the deed is executed in fee simple absolute to the city, and the city may keep the property to sell it and retain all proceeds. *Id.*

¹⁹² *See id.* at 110 (finding no unconstitutional taking because the statute provided a remedy for the taxpayer to recover surplus proceeds from a tax sale); *Lawton*, 110 U.S. at 150 (finding an unconstitutional taking because the statute required surplus proceeds to be returned to the former owner).

¹⁹³ *See Lawton*, 110 U.S. at 150 (stating "[t]o withhold the surplus from the owner would be to violate the fifth amendment to the constitution, and deprive him of his property without due process of law or take his property for public use without just compensation").

¹⁹⁴ *See Nelson*, 352 U.S. at 110 (deciding that the statute at issue is not unconstitutional because it does not "absolutely preclude[] an owner from obtaining the surplus proceeds of a judicial sale"). If the homeowner proved that the value of the property "substantially exceeded" the tax amount due, then a separate sale would be held so that the owner could receive the surplus. *Id.* The Court explains that the City of New York gives ample opportunity for the owner to recover the surplus, but if they do not do so in a timely manner, the City may retain the proceeds. *Id.*

¹⁹⁵ *Coleman ex rel. Bunn v. District of Columbia*, 70 F. Supp. 3d 58 (D.D.C. 2014); *see Sallah et al.*, *supra* note 1 (reporting on the effects of tax foreclosures in the District of Columbia, including the details of Bennie Coleman's story).

company to keep the surplus from the tax sale of his property.¹⁹⁶ D.C.'s tax lien foreclosure process extinguished the former owner's equity interest in the property upon tax foreclosure and allowed the foreclosing party to retain all surplus proceeds.¹⁹⁷

The district court determined that *Nelson* did not bar Mr. Coleman's claim because the D.C. statute does not provide an avenue in which a taxpayer can recover the surplus from a property tax sale.¹⁹⁸ Mr. Coleman's claim therefore raises an issue that the Court has not previously addressed.¹⁹⁹ Although the case settled before reaching a judgment, it opened the door to meaningful litigation regarding whether this policy amounts to an unconstitutional taking.²⁰⁰

Massachusetts's tax lien policy's critics argue that here, as in *Coleman*, a valid Takings Clause claim exists, whether under the Fifth Amendment of the U.S. Constitution or under the state constitution equivalent.²⁰¹ The Massachusetts statute provides no remedy for recovery of surplus, and homeowners have a valid property interest in the surplus equity, which meets the requirements discussed by the court in *Coleman*.²⁰² Additionally, the Massachusetts constitution mandates taxation equality and it is a violation of Massachusetts due pro-

¹⁹⁶ *Coleman*, 70 F. Supp. 3d at 63. The District of Columbia moved to dismiss for failure to state a claim and lack of subject matter jurisdiction. *Id.* The court ultimately held that the takings claim was sufficiently alleged to survive the motion to dismiss. *Id.* In 2015, the court allowed Coleman's case to proceed as a class action. *Coleman ex rel. Bunn v. District of Columbia*, 306 F.R.D. 68, 68–88 (D.D.C. 2015) (certifying Coleman's case as a class action). The case was later settled out of court. Hsu, *supra* note 6. In January 2017, the District agreed to pay up to 65% of a property's assessed value to the aggrieved taxpayer or the estate. *Id.* The *Washington Post* estimates that the District will ultimately pay out approximately \$1 million. *Id.*

¹⁹⁷ *Coleman*, 70 F. Supp. 3d at 62. In the District of Columbia, after the municipality sells the tax lien to a third party, a six-month period must pass before the purchaser may take action in the trial court to foreclose. *Id.* at 64. Before the six months have elapsed, the taxpayer may redeem by paying the taxes owed plus any penalties, interest, and costs. *Id.* at 63. The court can then enter a judgment granting the property title in fee simple to the lien purchaser. *Id.* at 64.

¹⁹⁸ *Id.* at 80.

¹⁹⁹ See *id.* (stating that Coleman's case raised a question not previously addressed: "What if the tax-sale statute does not provide a right to the surplus and the statute provides no avenue for recovery of any surplus?").

²⁰⁰ See Hsu, *supra* note 6 (stating that legal analysts believed that the settlement prior to trial left open some unsolved legal issues). The district court determined that in order to win his case, Mr. Coleman had to prove that the remaining elements of a Takings Clause claim are met: that he had a property interest in the surplus equity, the property was taken, he was not provided compensation, and the taking was not for a public purpose. *Coleman*, 70 F.3d at 81.

²⁰¹ See 70 F. Supp. 3d at 81 (finding that the plaintiff had shown enough to raise a possible Takings Clause claim); Clifford, *supra* note 18, at 291–92 (arguing that the Massachusetts tax deed foreclosure process is a violation of both the United States Constitution and the Massachusetts Constitution). The federal constitution acts as the "floor" for state constitutional rights, thus the Massachusetts Constitution must provide either equal or greater protection to its citizens. Clifford, *supra* note 18, at 292.

²⁰² Clifford, *supra* note 18, at 287. Clifford argues that, per *Coleman*'s logic, because a delinquent taxpayer has full ownership interest in his property before the tax deed is recorded, *Lawton* prohibits eliminating that interest. *Id.*

cess to impose on one person a greater or lower tax burden than others.²⁰³ By eliminating a taxpayer's equity interest in his home for failing to pay property taxes, this policy requires the delinquent taxpayer whose home is foreclosed to pay many multiples of his original tax debt, more than what others pay.²⁰⁴

On the other hand, proponents of the policy argue that the practice is constitutional and has been recognized as such by the courts.²⁰⁵ In 1969, the United States District Court for the Northern District of Illinois held that a statute allowing private entities to purchase tax deeds and retain all surplus from tax sales was constitutional.²⁰⁶ The court reasoned that the statutory two-year redemption period sufficiently provided the taxpayer with a remedy—they could sell the property within the time frame to pay off the debt and keep the remainder.²⁰⁷

III. THE MASSACHUSETTS LEGISLATURE SHOULD ELIMINATE OR MODIFY THE PRIVATIZATION OF DELINQUENT PROPERTY TAX LIENS

As it is currently written and practiced, Massachusetts' privatization of delinquent property tax liens is poor public policy with unconstitutional results.²⁰⁸ First, this policy is unacceptable because it creates improper incentives for investors to prey on unsophisticated litigants, which creates disproportionately unjust outcomes for the most vulnerable members of society.²⁰⁹ Additionally, the policy may be unconstitutional because the statute allows private investors to take the equity that rightfully belongs to the homeowner without just compensation.²¹⁰ Finally, there are a variety of large and small-scale steps the Commonwealth can take to improve outcomes for both its residents and municipalities.²¹¹

The policy is unsound because it creates detrimental and unfair outcomes that thoroughly outweigh any benefit to investors and municipalities.²¹² Propo-

²⁰³ See *In re* Opinion of the Justices, 126 N.E.2d 795, 800 (Mass. 1995) (interpreting the Massachusetts Constitution to forbid requiring some taxpayers to pay more or less than others).

²⁰⁴ Clifford, *supra* note 18, at 292. Based on the records that Clifford collected and analyzed, he determined that the delinquent taxpayer pays on average sixty-two times more than his original taxes owed when his equity stake is foreclosed. *Id.*

²⁰⁵ See NTLA Amicus Brief, *supra* note 21, at 4–5 (noting that the Supreme Court has declined to find the practice unconstitutional).

²⁰⁶ Balthazar v. Mari LTD, 301 F. Supp. 103, 106 (N.D. Ill. 1969).

²⁰⁷ See *id.* (suggesting that the delinquent taxpayer could convey the property to a purchaser, subject to the outstanding certificate, which would allow the owner to keep the surplus value).

²⁰⁸ See *infra* notes 212–257 and accompanying text.

²⁰⁹ See *infra* notes 212–232 and accompanying text.

²¹⁰ See *infra* notes 233–238 and accompanying text.

²¹¹ See *infra* notes 239–257 and accompanying text.

²¹² See, e.g., Tallage LLC v. Meaney, 23 LCR 375, 375–81 (Mass. Land Ct. 2015) (noting that a family facing numerous health crises was exceptionally vulnerable and is not the type of intentional

nents of the policy celebrate its ability to generate revenue for local municipalities and ensure compliance with tax obligations, but municipalities are not entitled to the property of a citizen above and beyond their tax obligation.²¹³ Studies have shown that this policy has resulted in towns collecting dozens of multiples over the amount that they were owed.²¹⁴ Although this money may be put towards public use, it cannot be ignored that it was sourced by imposing significant hardship on already financially distressed homeowners.²¹⁵ The liquidity benefit does not justify enabling investors to force a person onto the street, stripped of all equity in their most valuable asset.²¹⁶

Additionally, because municipalities and investors are driven by distinct incentives, allowing private investors to pursue delinquent property tax liens exacerbates the devastating effects of this policy.²¹⁷ Investors are more incentivized to foreclose than municipalities, thereby furthering the likelihood of this outcome when given the authority to do so.²¹⁸ Investors can drive redemption costs prohibitively high and are less inclined than municipalities to be cognizant of special circumstances, making it more difficult for taxpayers to recover their homes.²¹⁹ Interest accrues at a rate that is nearly impossible to find in alternative forms of investment, and tax buyers have a seemingly un-

tax delinquents that the statute is designed to catch); Burrell, *supra* note 48 (providing examples of how the policy has negatively affected some Massachusetts taxpayers).

²¹³ See *Tallage*, 23 LCR at 381–82 (stating that the only valid interest a town has in a tax foreclosure is to collect the taxes and costs that are due); Spencer, *supra* note 25 (discussing the benefits of this policy, including encouraging delinquent taxpayers to satisfy their debts and allowing municipalities to generate revenue quickly).

²¹⁴ See Clifford, *supra* note 18, at 282–83 (finding that municipalities in Massachusetts collected 42.87 times more than they were owed in delinquent taxes through this policy).

²¹⁵ Compare Spencer, *supra* note 25 (listing the public benefits that municipalities provide with tax funding), with *Tallage*, 23 LCR at 379 (describing the health crises that a local family faced that caused them to fall behind on one sewer and water bill and the significant financial and emotional hardship they endured adjudicating their case, costing them thousands of dollars and immeasurable stress).

²¹⁶ See Burrell, *supra* note 48 (reporting that an attorney had seen cases where a person had owned \$100,000–\$200,000 worth of equity in their home and it was all lost to the purchaser, describing it as “outrageous”); Spencer, *supra* note 25 (applauding the benefit of an infusion of cash for municipalities).

²¹⁷ See Miller & Nikaj, *supra* note 166, at 80–81 (stating that privatization of tax liens increases the number of foreclosures); McKim, *supra* note 69 (stating that private investors have different incentives from municipalities).

²¹⁸ *Tallage*, 23 LCR at 377 n.10 (suggesting that investors are not incentivized to help with the homeowner to pay off the bill, but rather, they are incentivized to keep rates high and attempt to take the property through foreclosure); Miller & Nikaj, *supra* note 166, at 80–81 (stating that privatization of tax liens increases the number of foreclosures).

²¹⁹ See *Tallage*, 23 LCR at 377 (stating that municipalities are more likely to take special circumstances into account, while private investors are incentivized to be less sympathetic); Burrell, *supra* note 70 (stating that this policy encourages local governments to “stack the odds” against delinquent taxpayers).

limited ability to tack on fees to inflate redemption costs.²²⁰ Also, privatization removes the tax lien foreclosure process from accountability to constituents.²²¹ A government entity enforcing these tax liens is answerable to the public, but private entities are beholden only to their investors with the goal of maximizing profit.²²² Despite the argument that privatization is beneficial because it increases taxpayer compliance, research has shown that, after a taxpayer reaches a certain level of financial hardship, privatization serves no means of deterrent.²²³ If a taxpayer, like Bennie Coleman, has dementia and does not understand he owes taxes, a stricter enforcement regime will not be more effective—it will only be more punitive.²²⁴ It does not make sense to harshly punish people facing already staggering hardship, and it is unacceptable to allow this policy to persist when we are aware of the harm it can inflict.²²⁵

Additionally, this policy tends to pit sophisticated parties, such as investors or cities, against individuals who are almost exclusively unrepresented.²²⁶

²²⁰ See RAO, *supra* note 10, at 4 (explaining that interest rates in banks are less than 1%); Burrell *supra* note 70 (describing Colin Roache's situation, in which a seventy-eight-year-old man was \$2,768 behind on taxes, and the investment company that purchased the lien demanded over \$22,000 for taxes, interest accrued, and fees). In 2018, Stage One Investors, a company that buys and enforces delinquent real estate tax liens in Massachusetts, was ordered to pay \$125,000 in restitution to 100 property owners due to claims that the company collected excessive fees from people seeking to redeem. George Barnes, *Stage One Investors of Worcester to Repay Fees to 100 Homeowners in Settlement of Tax Lien Case*, TELEGRAM.COM (Apr. 24, 2018), <https://www.telegram.com/news/20180424/stage-one-investors-of-worcester-to-repay-fees-to-100-homeowners-in-settlement-of-tax-lien-case> [<https://perma.cc/AL77-VHGW>].

²²¹ See Tallage, 23 LCR at 377 (explaining that municipal tax collectors operate within the political process and private investors do not).

²²² See *id.* (stating that municipal tax collectors, like a District Attorney, are part of local politics); Morgan Brennan, *Vulture Investing: What You Need to Know Before Bidding for Tax Liens*, FORBES (Dec. 10, 2012), <https://www.forbes.com/sites/morganbrennan/2012/11/26/vulture-investing-what-you-need-to-know-before-bidding-for-tax-liens> [<https://perma.cc/X5YB-KMDR>] (providing tax lien investment advice including the suggestion that to foreclose on property, one needs the “stomach to put Grandma out on the street”).

²²³ See Miller & Nikaj, *supra* note 166, at 98 (finding that in poor housing markets, taxpayers are no more likely to pay their taxes when enforced more strictly); Spencer, *supra* note 25 (stating that the investment firm Tallage reported that 40% of tax liens were redeemed prior to auction).

²²⁴ See Sallah et al., *supra* note 1 (describing the case of Bennie Coleman, an elderly veteran who had lived in his home his entire life, but suffered from dementia and missed a \$134 tax bill, which ultimately led to the foreclosure of his home and eviction). As Coleman's dementia progressed, he would sometimes forget to pay bills or buy groceries, so neighbors would bring him plates of food. *Id.*

²²⁵ See Tallage, 23 LCR at 375–81 (describing the case brought by the Meaney family to redeem their home that had been lost to private buyer through a tax foreclosure sale due to small unpaid utility bills that were missed during the family's numerous health crises experienced at the time); Sallah et al., *supra* note 1 (detailing the case of Bennie Coleman, a retired marine sergeant who suffered from dementia and lost his home to a private investor through the tax foreclosure process due to a \$134 property tax bill).

²²⁶ Amanda Zuretti, Tallage Adams, LLC et al.—*Massachusetts Land Court Case, No. 10 TL 141227*, 20 MASS. BAR ASS'N LAW. J., Mar. 2013, at 20, 22, <https://massbar.org/docs/default-source/publications-document-library/lawyers-journal/2013/march/march2013-.pdf?Status=Master&sfvrsn=>

Homeowners who have missed a tax payment due to failing health or a financial crisis are forced to either pay excessive redemption costs or pursue this issue in court.²²⁷ If they cannot afford the initial tax, the snowballing accumulation of interest and fees will almost certainly be prohibitively high.²²⁸ In order to dispute the tax lien foreclosure proceedings in court, homeowners may be forced to either pay unaffordable legal fees or proceed on their own, often without the resources—due to the same health issues or family crises that caused them to fall behind on taxes—to educate themselves on the law and argue on their own behalf in court.²²⁹ Homeowners are often completely unaware of the ramifications that result from failure to pay property taxes.²³⁰ These individuals are unlikely to be educated in the meaning of legal terms like right of redemption or how to defend their rights.²³¹ The system is complex, confusing, and can be impossible to navigate for someone who is unfamiliar with the legal system.²³²

In addition to being poor policy, failure of a municipality or a private entity to return the surplus proceeds from a tax foreclosure sale may be an unconstitutional taking because the Massachusetts statute does not provide the former homeowner with any avenue to recover the excess proceeds.²³³ The court

fcba01b6_2 [https://perma.cc/Z82Q-S3ED] (stating that the Land Court Judge adjudicating a tax lien foreclosure case commented that “nearly all of the taxpayers were *pro se* litigants”).

²²⁷ See Sallah et al., *supra* note 1 (describing a case in which an elderly man and his son could not afford to pay the \$4,999 demanded by the investment company in order to redeem his home, and discussing how attorney’s fees can be as high as \$450 an hour, making it highly unlikely that he could afford legal costs).

²²⁸ See Burrell, *supra* note 48 (stating that the Meaneys started out with \$492.51 of missed utility bills, but paid \$4,600 to redeem, plus tens of thousands of dollars in legal fees to their own lawyer for litigating their case).

²²⁹ MASS. ACCESS TO JUSTICE COMM’N, ANNUAL REPORT ON ACTIVITIES 3 (2019), <http://www.massaj.org/a2j/wp-content/uploads/2019/09/Access-to-Justice-Commission-Annual-Report-Aug.-2019-FINAL.pdf> [https://perma.cc/Y4BT-KM8M] (stating that, due to insufficient funding, legal aid organizations are unable to help 65% of eligible people who need legal assistance); see Kahrl, *supra* note 27, at 915, 933 (quoting a circuit court judge in Michigan who explained that most delinquent taxpayers are not sophisticated actors and describing the process as a confusing, opaque maze designed to be difficult to navigate).

²³⁰ See McKim, *supra* note 69 (describing the experience of an attorney for a nonprofit group in Lawrence that provides free legal services to low income and elderly residents). She reported that she noticed an increasing number of clients asking for help regarding tax lien foreclosures and they had no idea that they could lose their home. *Id.* She stated that they are shocked to hear what may happen to their homes. *Id.*

²³¹ See Shulkin, *supra* note 140 (discussing that, although some precautions are in place, he is worried about people who are not able to understand the legal language).

²³² See Kahrl, *supra* note 27, at 906 (describing the investors’ actions towards delinquent taxpayers when providing notice of proceedings as deliberately confusing and overwhelming). Kahrl argues that lienholders often leverage their knowledge to intimidate the taxpayers and make them believe that the full weight of government power is on the lienholder’s side in order to prevent them from seeking legal advice or questioning what rights they may have. *Id.* at 906–07.

²³³ See Coleman *ex rel.* Bunn v. District of Columbia, 70 F. Supp. 3d 58, 81 (D.D.C. 2014) (interpreting the holdings of *Nelson* and *Lawton* as leaving open the possibility of a Takings Clause viola-

in *Coleman v. District of Columbia* found that *United States v. Lawton* and *Nelson v. City of New York* left this question open, and because the government takes individuals' equity without just compensation, this process violates the Takings Clause.²³⁴ Investors tend to pursue tax liens more aggressively than government entities, thus increasing rates of property loss and constitutional infringement.²³⁵

Additionally, the Massachusetts Constitution mandates taxation equality, and requiring delinquent taxpayers whose homes have been foreclosed to pay many multiples of the taxes due is not only unfair, it is unconstitutional.²³⁶ Government benefit does not justify unconstitutionally stripping a person, especially those suffering from dire circumstances, of their most valuable asset.²³⁷ Municipal services are designed to benefit the community, so it does not make sense to allow governments to disproportionately fund these same services off the backs of their residents most in need of assistance.²³⁸

In other states, victims have brought cases to challenge the statutes that allow the lienholder to retain all surplus from a tax foreclosure sale.²³⁹ In Massachusetts, because property tax enforcement and sales are conducted independently at the municipal level, it would be difficult to aggregate the societal effects into one claim like the class action brought by *Coleman*.²⁴⁰ Courts have repeatedly recognized the harshness of this policy, but acknowledge that they are bound to enforce the law as written and call on the legislature to enact change.²⁴¹ Aggrieved citizens alternatively have the option to invoke the notion

tion when a statute does not provide a method to recover surplus proceeds); Clifford, *supra* note 18, at 289, 291 (arguing that tax deed sales are unconstitutional, per *Coleman's* conclusion that *Lawton* is still viable and the rest of the elements of a Takings Clause claim are met).

²³⁴ See *Coleman*, 70 F. Supp. 3d at 81 (holding that because *Lawton* and *Nelson* do not contradict one another, the plaintiff raised a valid Takings Clause claim and needed to prove the remaining elements).

²³⁵ See Burrell, *supra* note 70 (stating that privatization increases likelihood of tax foreclosure).

²³⁶ See Clifford, *supra* note 18, at 292–93 (discussing the taxation equality requirement of the Massachusetts Constitution, and finding that a delinquent taxpayer who is forced to pay the entire equity of their home grossly overpays their share of taxes as a result of this policy).

²³⁷ See Burrell, *supra* note 70 (providing the story of Pauline Desrosiers, who missed paying a \$400 water bill during a severe bout of pancreatitis, thought she paid off the bill, but later found out that Stage One Investors had purchased the tax lien and demanded \$25,000 to redeem the home in which she lived with her two adult daughters with cerebral palsy).

²³⁸ See Spencer, *supra* note 25 (stating that municipal budgets are used for providing services like public works and education).

²³⁹ See, e.g., *Coleman*, 70 F. Supp. 3d at 58 (challenging the tax lien foreclosure policy in the District of Columbia).

²⁴⁰ See *Coleman ex rel. Bunn v. District of Columbia*, 306 F.R.D. 68 (D.D.C. 2015) (certifying *Coleman's* case as a class action).

²⁴¹ See Kahl, *supra* note 27, at 917 (explaining that tax buyers know that courts generally find predatory tax buying unconscionable, so they are careful to follow procedure exactly because courts would void the tax deed at the slightest procedural error). See, e.g., *Balthazar v. Mari Ltd.*, 301 F.

of equity and beg the court to sympathize with their case in the name of justice.²⁴² Although this avenue can be effective, it is not a viable large scale solution because these cases are highly fact specific and the outcomes are dependent on the judge.²⁴³

Neighboring states, such as Rhode Island, have successfully implemented legislative reform.²⁴⁴ In Massachusetts, legislators have proposed changes, but progress has stalled in the past several years, likely in part because wealthy investors are able to spend significant amounts of money on lobbyists to influence legislators and protect their interests.²⁴⁵ Unfortunately, the people most often victimized by this policy are unlikely to have financial or political leverage to advocate for change on a similar level.²⁴⁶ Proponents of this policy argue that there is no crisis and the effects of this policy are minimal; however, if even one family is evicted and stripped of all their equity, the policy has inflicted too much harm.²⁴⁷ Homes are often the most important asset that people have—they are bound up with lifetimes of memories, making their intrinsic value priceless.²⁴⁸ The privatization of delinquent property tax liens allows wealthy and powerful investors to utilize fear tactics, intimidation, and shame to strong-arm the most vulnerable members of society into forfeiting their equity stake.²⁴⁹ A policy that has been proved to cripple underserved communities and

Supp. 103, 105 (N.D. Ill. 1969) (stating, “[o]ppressive statutes must be tempered by the legislature, not the court”).

²⁴² See MASS. GEN. LAWS ANN. ch. 60, § 69A (West 2019) (granting the court authority to vacate a decree of foreclosure); Kahrl, *supra* note 27, at 919 (describing the doctrine of equity as a “Hail Mary” that forces taxpayers to beg their own incapacity).

²⁴³ See Kahrl, *supra* note 27, at 919 (stating that these cases hinge on the judge’s sympathy and are unpredictable). They establish no rule for others to follow and, although these types of decisions can change the lives of those affected, it will not fix the underlying problem. *Id.* at 920.

²⁴⁴ See Dunn, *supra* note 119 (describing the Madeline Walker Act and the positive impact the new legislation has had on vulnerable homeowners in Rhode Island).

²⁴⁵ See Burrell, *supra* note 48 (stating that Tallage alone has spent \$46,000 lobbying the Massachusetts legislature to prevent reform); see also Kahrl, *supra* note 27, at 933 (stating that tax lien investors are often closely linked with members of local governments and quickly respond to negative press regarding the tax lien industry).

²⁴⁶ See Burrell, *supra* note 48 (quoting a Quincy resident, Madeline Lahssak, who risks losing her home to this policy). She describes herself as poor, stating that she relies on subsidized housing in order to pay rent. *Id.*

²⁴⁷ See McKim, *supra* note 69 (quoting Tallage LLC’s lawyer defending the policy and saying that there is no tax title foreclosure crisis). Brad Westover, the executive director of the NTLA, defended the industry, stating that it “shouldn’t be hindered because a ‘small percentage of homeowners’ lose their homes.” *Id.*

²⁴⁸ See Burrell, *supra* note 70 (interviewing Michelle Cook, a Worcester resident, who lost a home that had been in her family for three generations after she was laid off and became unable to pay a tax bill). She inherited the home and raised her two daughters there. *Id.* She stated that she could not bring herself to sell the home to satisfy the debt because of the emotional connection she felt to the home and neighborhood. *Id.*

²⁴⁹ Kahrl, *supra* note 27, at 906–07.

enable gross inequities, whether deliberate or as a side effect of gentrification, should not be allowed to persist in this state.²⁵⁰

Finally, the implementation of programs that address similar issues on a smaller scale could ameliorate some of the disparate impacts of this policy.²⁵¹ In 2018, the Massachusetts Access to Justice Commission (the Commission) began one-year housing and consumer debt pilot programs to address similar issues as are raised by the privatization of delinquent property tax liens.²⁵² In the housing pilot, organizations collaborated to create a Housing Stabilization Center in Lawrence that served residents by providing mediation services to tenants and landlords and directed parties to critical resources and funding.²⁵³ The program also worked with community outreach organizations to improve education for landlords and tenants about the resources available, and the Center took on some housing cases.²⁵⁴ The consumer debt pilot focused on “up-stream” resources available to debtors to help educate and train people about their rights and legal issues before their case becomes a crisis.²⁵⁵ The attorneys involved created online tools and forms for debtors and the service organizations that operate to assist these individuals and helped secure representation for dozens of consumer debtors.²⁵⁶ The lessons from these programs should serve to inform the Commission, the Legislature, or service organizations on

²⁵⁰ See *id.* at 905–06 (explaining the disproportionate impact that this policy has had on black and minority communities and detailing gross deliberate manipulations of the system that created unjust results). In Washington, D.C., prior to changing the policy, more than half of the tax lien foreclosures were in the District’s two poorest areas, Wards seven and eight. Sallah et al., *supra* note 1. The *Washington Post* reported that the most affected were elderly property owners who were sick or dying when the tax liens on their homes were purchased. *Id.*

²⁵¹ See MASS. ACCESS TO JUSTICE COMM’N, *supra* note 229, at 6–8 (summarizing the Commission’s many efforts and programs during the previous year to improve access to counsel within the Commonwealth, including the housing pilot program and consumer debt pilot program that address issues similar to the issues presented by tax lien foreclosure cases).

²⁵² See *id.* at 7–8 (describing the pilot programs, and the issues they aimed to tackle, which included improving housing stability by making emergency funding available, improving education and understanding of legal problems, access to representation in the housing program, education on the rights that the defendant has, making tools available online to assist a self-represented litigant, and access to legal advice in the debt program).

²⁵³ *Id.* at 7.

²⁵⁴ *Id.*

²⁵⁵ See MASS. ACCESS TO JUSTICE COMM’N, CONSUMER DEBT PILOT SUMMARY REPORT 1 (2019), <http://www.massa2j.org/a2j/wp-content/uploads/2019/10/Consumer-Debt-Pilot-Summary-Report.pdf> [<https://perma.cc/XQ4L-249K>] (stating that one of the major goals of the program was to help consumer debtors address and solve their own issues before coming to the court, by improving resources such as online tools or non-legal service providers).

²⁵⁶ See *id.* at 1–2 (describing the online resources and forms created for the debtor or service organizations to use prior to beginning a case in court or the next hearing, the relationships facilitated with service providers to experiment with different methodologies to determine best practices, and attorney involvement through limited representation programs or individual representation). The program’s pilot completed sixty cases and helped consumer clients save over \$68,000 worth of debt. *Id.*

how to create programs and tools to lessen the effects of the policy as it currently exists.²⁵⁷

CONCLUSION

Massachusetts' policy of the privatization of delinquent property tax liens creates unjust outcomes for the most vulnerable members of society. The policy that was originally created to benefit cities is instead being utilized to exploit the poor, sick, and elderly. The policy's negative impact on society often goes unnoticed or ignored, but far outweighs any marginal benefit that the municipalities can claim to support the policy. Homeownership and home stability are a fundamental part of a person's life, and this policy is unjust, unfair, and unconscionable. Although it is important for everyone to pay their share of property taxes, this draconian policy is not the proper solution and the Massachusetts legislature should act to implement change.

CAROLINE ENRIGHT

²⁵⁷ See, e.g., *id.* at 1–3 (detailing the improvements that the program was able to produce, addressing issues prevalent in tax lien foreclosure cases like access to representation, education, and self-help resources).

