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April 23, 2024

Senator Cameron Henry
President of the Senate
P.O. Box 94183
Baton Rouge, Louisiana 70804

**RE: SENATE RESOLUTION NO. 109 OF THE 2012 REGULAR SESSION
SENATE RESOLUTION NO. 40 OF THE 2013 REGULAR SESSION**

Dear Mr. President:

The Louisiana State Law Institute respectfully submits its report to the legislature relative to tax sales.

Sincerely,

Guy Holdridge
Director

GH/pc

Enclosure

email cc: David R. Poynter Legislative Research Library
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Secretary of State, Ms. Nancy Landry
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LOUISIANA STATE LAW INSTITUTE
TAX SALES COMMITTEE

REPORT TO THE LEGISLATURE IN RESPONSE TO 2012 SR NO. 109 AND 2013 SR NO. 40

Relative to tax sales

Prepared for the
Louisiana Legislature on

April 23, 2024

Baton Rouge, Louisiana

LOUISIANA STATE LAW INSTITUTE
TAX SALES COMMITTEE

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Regular Session, 2012 **ENROLLED**

SENATE RESOLUTION NO. 109

BY SENATOR MURRAY

A RESOLUTION

To request the Louisiana State Law Institute to study the laws regarding sheriff's tax sales in Orleans Parish and make recommendations relative to the feasibility of establishing a more expeditious process.

WHEREAS, Article VII, Section 25 of the Louisiana Constitution provides for the sale of property due to delinquent taxes, the redemption and annulment thereof, and the quieting of tax titles; and

WHEREAS, various laws implement the authority so provided by the constitution; and

WHEREAS, the sheriff's tax sales in Orleans Parish are unique and result in the potential for real property so obtained to be withdrawn from commerce for approximately five years; and

WHEREAS, great benefit would inure to the citizens of Orleans Parish by facilitating the confirmation of sheriff's tax sales more expeditiously than the present period of withdrawal from commerce; and

WHEREAS, the Louisiana State Law Institute was formed to promote and encourage the clarification and simplification of the laws of Louisiana and its better adaptation to present social needs; and

WHEREAS, the Louisiana State Law Institute should study needed improvements in present law relative to sheriff's tax sales in the parish of Orleans and advise the Senate of the Legislature of Louisiana regarding whether the process can and should be handled more expeditiously; and

WHEREAS, such study shall include review and discussion of present law and procedures in Orleans Parish and other parishes around the state relative to sheriff's tax sales.

THEREFORE, BE IT RESOLVED that the Senate of the Legislature of Louisiana does hereby request that the Louisiana State Law Institute study the laws regarding sheriff's tax sales in Orleans Parish and make recommendations for revising present law in the form of proposed legislation to effect such recommendations to the Senate before January 1, 2013.

BE IT FURTHER RESOLVED that a copy of this Resolution be transmitted to the director of the Louisiana State Law Institute.

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PRESIDENT OF THE SENATE

Regular Session, 2013 **ENROLLED**

SENATE RESOLUTION NO. 40

BY SENATOR ALLAIN

A RESOLUTION

To urge and request the Louisiana State Law Institute to study the feasibility of authorizing tax lien sales as a replacement or alternative to tax sale certificates.

WHEREAS, the failure to pay taxes due upon real estate may result in certain legal actions being taken by a taxing authority to collect real property taxes owed; and

WHEREAS, in most states such actions include: (1) the taxing authority may sell a tax lien to a person for the amount of taxes owed, with the delinquent taxpayer having a specified time period in which to pay their tax bill and extinguish the lien; or (2) the taxing authority may sell a tax deed to a person which makes such person the owner of the property, and the delinquent taxpayer has no redemptive period in which to reacquire the property; or (3) as a "hybrid" of the first two actions, the taxing authority may sell a tax deed to a person, with the delinquent taxpayer having a statutory time period of redemption in which to pay the tax bill and reacquire the property; and

WHEREAS, along with states such as Connecticut, Georgia, Texas, and Rhode Island, Louisiana is considered to be within the third category above as a "hybrid" state, as Article 7, Section 25, of the Louisiana Constitution and related laws authorize the sale of real estate for nonpayment of real property taxes with a right of redemption, generally for three years after the date of recordation of the tax sale; and

WHEREAS, the majority of other states appear to utilize either tax lien sales or tax deed sales without right of redemption to recover tax amounts owed upon real estate; and

WHEREAS, Louisiana's current system of selling tax deeds with a right of redemption, now known as tax sale certificates, has resulted through the years in costly and protracted litigation over rights and procedures involved in such sales, including but not limited to: constitutional questions of due process in notice, advertising and sale processes; issues involving annulment, quiet title, and foreclosures and effects upon mortgages, seizing creditors and subrogation; tax sales by municipalities and adjudications to political subdivisions and post-adjudication sales; issues involving blighted, abandoned, and vacant property; liability issues; and redemption processes and effects, including effects of

adjudication upon redemption; and

WHEREAS, the complex legal questions and litigation arising from these issues have necessitated numerous revisions to laws concerning tax sale certificates, and have increased public and private uncertainty regarding the efficacy and fairness of such system as providing a practical and reasonable way of collecting tax amounts owed; and

WHEREAS, to reduce litigation and promote fair and efficient means of collecting tax amounts owed, the Louisiana State Law Institute should study the present "hybrid" system in Louisiana and the feasibility of tax lien sales as a replacement or alternative to the current "hybrid" system of relying upon tax sale certificates; and

WHEREAS, such study should include any recommended revisions to the state constitution and laws as may be necessary in the form of specific proposed legislation.

THEREFORE, BE IT RESOLVED that the Senate of the Legislature of Louisiana does hereby urge and request the Louisiana State Law Institute to study the feasibility of authorizing tax lien sales as a replacement or alternative to tax sale certificates.

BE IT FURTHER RESOLVED that the Louisiana State Law Institute shall report to the Senate regarding the study no later than February 1, 2014, and provide its findings to date, including any recommendations regarding specific proposed legislation.

BE IT FURTHER RESOLVED that a copy of this Resolution be transmitted to the director of the Louisiana State Law Institute.

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PRESIDENT OF THE SENATE

April 23, 2024

To: Senator Cameron Henry
President of the Senate
P.O. Box 94183
Baton Rouge, Louisiana 70804

REPORT TO THE LEGISLATURE IN RESPONSE TO SR 109 OF THE 2012 REGULAR SESSION AND SR 40 OF THE 2013 REGULAR SESSION

I. Overview

In response to Senate Resolution No. 109 of the 2012 Regular Session and Senate Resolution No. 40 of the 2013 Regular Session, both of which request the Louisiana State Law Institute to study tax sales processes in Louisiana for purposes broadly related to achieving greater efficiency in the collection of delinquent taxes, the Law Institute formed its Tax Sales Committee, which was placed under the leadership of the Reporter, Mr. Stephen G. Sklamba, a New Orleans attorney with decades of experience as underwriting counsel for a title insurer and prior Law Institute involvement as a member of the Committee that drafted the 2008 tax sales revisions.[1] Possessing significant breadth and depth of relevant expertise, the Committee's membership comprised industry practitioners of every stripe, including title attorneys and attorneys representing both tax sale investors and delinquent taxpayers, real estate and lending experts, governmental stakeholders, and members of both the judiciary and the legislature. In addition to the Reporter, several Committee members had served on the Committee that drafted the 2008 revision, as well as the Adjudicated Properties Committee.

A. Background

Upon first convening, the Committee reviewed its dual charges in light of both the 2008 revision and revisions that had been enacted in the interim. Senate Resolution No. 109 requested the Law Institute to study "the laws regarding sheriff's tax sales in Orleans Parish" and to make recommendations for the purpose of "establishing a more expeditious process." The resolution highlighted as particularly notable the delays and other issues stemming from the law's provision of unique procedures for Orleans and listed the expeditious conclusion of the process as a primary objective. As for Senate Resolution No. 40, this resolution requested that the Law Institute study the feasibility of authorizing a "tax lien" system as an alternative to the present "hybrid" model. It highlighted a number of issues stemming – at that point in time – from the law, including questions of due process; costly litigation; confusion surrounding title, annulment, and the effects of the tax sale process on mortgages; and difficulties in returning adjudicated, blighted, abandoned, and vacant properties to commerce. In particular, Senate Resolution No. 40. asked the Law Institute to consider whether these concerns might be assuaged by the adoption of a lien model.

[1] *See generally* Acts 2008, No. 819.

B. Project History

i. 2008 revision

In addition to reorganizing the statutory law governing tax sales, the Law Institute's 2008 tax sales revision sought primarily to address issues of due process and at the same time reducing the procedural burden placed on municipal bodies[2] by allowing due process protections to be satisfied by private actors.[3] Perhaps most importantly, the revision sought to render pre-sale notice inessential for compliance with due process requirements.[4] Whereas under the law prior to the revision a lack of notice rendered a tax sale an absolute nullity,[5] the revision made a lack of notice a mere relative nullity,[6] which tax sale purchasers could cure by sending post-sale notice themselves.[7] Various evidentiary and procedural provisions were also added in order to protect against annulment and establish clearer chain of title.[8] To these same ends, the 2008 revisions further sought to clarify that a tax sale did not serve to transfer ownership of the underlying property,[9] but rather tax sale title only. Notably, these changes were effected absent any conforming constitutional amendments, resulting in certain instances of modestly inconsistent language, in particular, reference to the tax sale representing a sale of the property.[10] This landscape formed the backdrop of the Law Institute's work – both when it began and presently.

ii. Current revision, initially

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[2] *See* R.S. 47:2121(A)(5) and (6).
[3] *See* R.S. 47:2122(4) (allowing for notice to be given by either the collector or the tax sale purchaser, under any of a number of different statutory provisions).
[4] *Cf.* R.S. 47:2286, cmt. (b) ("In keeping with the emphasis of the revision, the important notice is a notice of the right to redeem" rather than a notice of the tax sale). Per the drafters, "[a] tax sale can no longer be set aside for minor procedural violations in noticing the tax sale". Defects such as lack of pre-sale notice are "relative nullities" and "can be cured". *Id.*, cmt. (c).
[5] *See Smitko v. Gulf South Shrimp, Inc.*, 94 So. 3d 750 (La. 2012); *Brookewood Investments Co., L.L.C. v. Sixty-Three Twenty-Four Chef Menteur Highway, L.L.C.*, 116 So. 3d 899 (La. App. 4 Cir. 2013).
[6] R.S. 47:2286, cmt. (c).
[7] R.S. 47:2156, cmt. (b)-(f) ("Subsection A allows, but does not require, a tax sale purchaser to give notice of the right to redeem to tax sale parties prior to the expiration of the applicable redemptive period" and "[t]o the extent a person is duly notified pursuant to other provisions of this Chapter and fails to take action in the applicable time period, the failure to give the notices provided in this Section do not give rise to an action based on a redemption nullity"). *But see Spain v. H&H Investors, L.L.C.*, 2023 WL 6224966, *4 (La. App. 4 Cir. 2023) ("[O]ur research has yielded no cases, to-date, that have presented a constitutionality challenge to" Louisiana's current tax sales law). This apparent lack of direct challenge is not as shocking as it may seem; because the construction of current law's *statutory* requirement incorporates due process, courts have significant room to sidestep the specific issue of constitutionality without sidestepping the general issue of sufficiency of notice. *See, e.g.*, *Central Properties v. Fairway Gardenhomes, LLC*, 225 So. 3d 441 (La. 2017). *Cf. Adair Asset Management, LLC v. Turney*, 195 So. 3d 501 (La. App. 2 Cir. 2016) ("[W]e must decide if the aggregate, diligent efforts by both the City and tax sale purchaser" satisfied due process).
[8] *See* R.S. 47:2123, cmt. (b) (explaining that the purpose of the affidavit filing provisions was to "evidence the[] facts" necessary for "conversion of tax sale title to a full ownership interest" in such a way that "a title examiner can rely to determine merchantability"); R.S. 47:2157, cmt. (e) (stating that the affidavit in this Section "will allow title examiners to rely on the information contained in the affidavit as evidencing that title to the property is merchantable"); R.S. 47:2121(D) and 2286, cmt. (b) (emphasizing that minor procedural defects do not render a tax sale an absolute nullity).
[9] R.S. 47:2121(B).
[10] *See, e.g.*, Louisiana Constitution Article VII, Section 25(B); R.S. 47:2154.

The Committee's early discussions regarding how best to effect the improvements contemplated in the relevant resolutions placed significant focus on the 2008 revision and intervening enactments. Because the Reporter and several other Committee members had been involved in the 2008 revision, the Committee generally took the position that any uncertainty under the revision was likely to fade over time as courts and practitioners grew accustomed to the new paradigm. The Committee identified several pieces of legislation enacted since the 2008 revision that had eliminated or modified certain components of the revision. For instance, the post-sale notice provisions drafted by the "old" Tax Sales Committee had been abandoned in lieu of mandatory post-sale notice by the tax collector.[11] Seeking to avoid delays and expense to collectors, the Committee began to explore the possibility of restoring the deleted concepts. Concurrent with these statutory revisions intended to address specific issues, the Committee also discussed the prospect of adopting a new tax sales model writ large, in accordance with Senate Resolution No. 40's suggestion.

As the Committee's work progressed, it coalesced around the idea of proposing broad constitutional amendments to achieve greater consistency with statutory law. In particular, the Committee sought to address due process concerns related to pre-sale notice in light of the Constitution's statement that "the collector … *after giving notice* … shall advertise … [and] sell …"[12] In light of this problematic language, the Committee began drafting constitutional amendments that conformed to statutory law. Pursuant to these amendments, the Committee also contemplated abandoning the percentage-ownership bidding contained in present law in favor of a premium bidding model. In connection with this change, the Committee further considered the implementation of a "strict foreclosure" model. As characterized by the Committee, each tax sale would convey the present law equivalent of tax sale title to a 100% interest for each tax sale property.

iii. Current revision, impact of jurisprudential developments

As the Committee continued its work drafting the constitutional amendments described above, the Louisiana Fourth Circuit issued a decision in *Surcouf v. Darling*.[13] Notably, the court in *Darling* characterized Louisiana tax sales as "proceeding[s] which will adversely affect [] liberty or property interests".[14] Consistent with this characterization, the court held that post-sale notice was insufficient to cure constitutionally deficient pre-sale notice.[15] In consideration of how due process might be further safeguarded, the Committee explored options such as enhanced pre-sale notice requirements and a mandatory action to foreclose. Ultimately, the Committee voted to adopt a constitutional requirement for a mandatory judicial proceeding to terminate the right to redeem.

After completing its drafting efforts with respect to the constitutional amendment and minor corresponding statutory revisions, the Committee presented its proposal to the Law Institute's Council. Notably, the Second Circuit decision in *Adair Asset Management, LLC v.*

[11] *See* Acts 2012, No. 836.
[12] Louisiana Constitution Article VII, Section 25(A)(1).
[13] 177 So. 3d 1085 (La. App. 4 Cir. 2015).
[14] *Id.* at 1091.
[15] *Id.* at 1092-93.

Turney[16] was issued immediately prior to this series of presentations. While this decision was a positive development relative to present law,[17] it nevertheless followed close on the heels of a contrary holding and thus served to highlight the shifting jurisprudential grounds with respect to due process in the tax sales context. This constitutional uncertainty was a primary consideration throughout the Committee's several presentations to the Council, ultimately prompting the addition of a number of due process and related safeguards to the Committee's proposal as it was gradually adopted by the Council. In light of these additions, however, the project was ultimately recommitted on the basis that it was too detailed for placement in the Constitution. More specifically, Council members reasoned that the adoption of overly detailed constitutional language should be avoided, particularly in an area of law subject to so much uncertainty and change. If the framework proved too rigid in light of future developments, the state could conceivably be locked into an unworkable system. Accordingly, the Council instructed the Committee to shift a large portion of the detail to statute and draft more generalized constitutional language.

One month after this recommittal, the Supreme Court of Louisiana granted writ in *Central Properties v. Fairway Gardenhomes*.[18] Accordingly, the Committee elected to wait for resolution, in the hope that the aforementioned due process issues might be resolved. Although the decision did support the intended operation of the 2008 revision, the court nevertheless sidestepped the constitutional issue.[19] The Committee therefore proceeded with its work, in accordance with the Council's directive. The Committee still contemplated a strict foreclosure scheme, eventually reaching determinations on issues such as the requirement for suit and an outer prescriptive period. The Committee's draft thus provided that, upon expiration of the tolling period, the certificate holder[20] would file a mandatory foreclosure suit, service of which upon the debtor would trigger a one-year period after which the debtor's right to redeem would be terminated. The Committee initially selected this model as a way of addressing the various title-related issues identified in Senate Resolution No. 40 and provided for mandatory suit (and thus mandatory service) as a balance of interests.

Nevertheless, earlier this year, the Supreme Court's decision in *Tyler v. Hennepin County* called into question the continued viability of this statutory scheme. Thus, after deliberation, the Committee elected to pursue the implementation of a "pure lien" model. While not every aspect of this regime has been adopted by clear consensus of the Committee, the Committee nevertheless agreed that the present status of tax sales law generally demanded feedback. To this end, the report begins with an analysis of *Tyler,* its holding, its effects on tax sales law generally, on current Louisiana law, and on the Committee's work; before proceeding to an overview of the Committee's recommendations; after which the report provides thorough analysis of a number of policy-related issues that the Law Institute ultimately determined required decisions of a type best left to the Legislature.

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[16] 195 So. 3d 501 (La. App. 2 Cir. 2016).
[17] In particular, *Adair* indicated that post-sale notice could, in fact, cure constitutionally deficient pre-sale notice.
[18] 214 So 3d. 857 (La. 2017).
[19] *Central Properties*, 225 So. 3d, at 443.
[20] Note that this report uses the terms "certificate holder" and "tax sale purchaser" variably throughout. While statutory definitions would likely consider these terms slightly disparate, they are used interchangeably for the purposes of the report. The report similarly uses both the term "redemption period" and "redemptive period", but no distinction is intended.

II. *Tyler v. Hennepin County*

On May 25, 2023, the United States Supreme Court issued the landmark decision in *Tyler v. Hennepin County*.[21] This decision sent shockwaves through the tax sales community, redefining the generally accepted rights of a tax debtor during and after the tax foreclosure process and thereby calling into question the constitutionality of the processes employed by many states. In particular, *Tyler* recognized a tax debtor's interest in the surplus value of their property in excess of the tax debt, thus bringing this surplus within the protections of the Takings Clause. Although *Tyler*'s recognition of home "equity" as a property right is straightforward on its face, it has major implications regarding the constitutionality of tax sales and tax foreclosure statutes, both currently and going forward: because this surplus value is now "property" for the purposes of the Takings Clause, it cannot be confiscated[22] (without just compensation) during the statutory process for tax foreclosure or the enforcement of tax sales rights. This serves to limit the statutory recovery of the foreclosing party in certain circumstances.[23] As the Supreme Court put it: "The [foreclosing party] ha[s] the power to sell [the debtor]'s home to recover the unpaid property taxes. But it c[an]not use the toehold of the tax debt to confiscate more property than was due."[24] These principles – which have already begun to reshape tax sales laws across the country[25] – have guided the Committee's work in the months following *Tyler*, as they now set the parameters of constitutionally sound collection of delinquent taxes. Notably, however, the precise bounds of these parameters are still largely untested jurisprudentially. A detailed examination of *Tyler* itself is thus paramount to ensuring constitutional compliance.

A. Holding and Analysis

In *Tyler v. Hennepin County*, the Supreme Court considered a Takings Clause challenge to the constitutionality of Minnesota's statutory procedure for the collection of delinquent taxes. In relevant part, the applicable statutes provide as follows:[26] Once annual property taxes become delinquent, the tax-imposing municipality obtains a judgment against the property recognizing a lien that secures the present delinquency and any future amounts that may accrue.[27] The debtor then has three years to "redeem" the property by paying the debt – thereby extinguishing the lien and restoring the debtor's full interest – or else "absolute title" to the property vests in the state and the debt is canceled.[28] Once the state obtains title, statute permits it to either keep the property

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[21] 598 U.S. 631 (2023).
[22] More accurately, it cannot be confiscated *without "just compensation"*. For the reasons discussed *infra*, however, the concept of "just compensation" is largely moot in this context.
[23] *Cf.* 2023 NJ S3997 (acknowledging that *Tyler* "has the effect of limiting what a lienholder can collect when a court forecloses the right of redemption of a lien on the lienholder's behalf to only the [tax debt]").
[24] *Tyler*, 598 U.S., at 639.
[25] *See* Part II(B)(i), *infra*.
[26] Although a number of bills were introduced in Minnesota's 2023 legislative session that sought to revise the statutory scheme that was held unconstitutional in *Tyler*, no such legislation was ultimately enacted. *See* 2023 MN S.F. Nos. 1109, 2607, 3283, and 3315; 2023 MN H.F. Nos. 1929, 2318, and 2812.
[27] Minn. Stat. §279.18. *See also Tyler*, 598 U.S., at 635 (summarizing the Minnesota tax sales process). The Supreme Court characterizes this judgment as "transferring limited title to the State." While the judgment grants the State authority to enter the property under certain limited circumstances, the term "limited title" does not appear in Minnesota's property tax statutes.
[28] Minn. Stat. §§281.18; 282.07.

for public use or sell it to a private party. The proceeds of any such sale go first towards satisfaction of the unpaid debt, after which any excess is split between the County, the town, and the school district.[29] The dispute at issue in *Tyler* arose when, pursuant to this procedure, Hennepin County seized and sold a tax debtor's condominium for $40,000, retaining not just the $15,000 necessary to satisfy her tax debt but also the $25,000 excess. In particular, the debtor alleged that the County's retention of this $25,000 excess constituted a "taking" within the meaning of the Fifth Amendment.

i. The debtor's interest in the surplus proceeds of a tax foreclosure sale

The substantive debate over the constitutionality of the above-described procedure centered on the meaning of "property" for purposes of the Takings Clause. Because the Takings Clause protects against the uncompensated confiscation of private property, the first step in evaluating a takings claim is to "identify the interest in private property that allegedly has been taken"[30] Notably, the *Tyler* debtor did not dispute the County's authority to seize and sell the property as a general matter[31] but rather alleged that it "illegally appropriated the $25,000 surplus beyond her $15,000 tax debt."[32] Thus, the validity of the debtor's claim turned on whether she "had a property interest in the surplus equity".[33] The Court summarized the case's central issue as follows:

> Here there was money remaining after Tyler's home was seized and sold by the County to satisfy her past due taxes, along with the costs of collecting them. The question is whether that remaining value is property under the Takings Clause, protected from uncompensated appropriation by the State.[34]

The County argued that, under Minnesota law, the debtor's failure to pay her delinquent tax debt despite adequate notice resulted in the forfeiture of her interest in the property and that, accordingly, she had no interest in the surplus proceeds of the tax foreclosure sale.[35] The Supreme Court disagreed, opining that "[h]istory and precedent say otherwise."[36]

"History and precedent" are relevant, here, because "[t]he Takings Clause does not itself define property."[37] Thus, to answer the question presented, the Supreme Court looked to traditional

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[29] Minn. Stat. §282.08.
[30] *Tyler v. Hennepin County*, 26 F. 4th 789, 792 (8th Cir. 2022) (hereinafter "Eighth Circuit decision").
[31] *Id. See also Tyler*, 598 U.S., at 637-38 (acknowledging that, "[i]n collecting [] taxes, the State may … seize and sell property, including land, to recover the amount owed").
[32] *Tyler*, 598 U.S., at 636.
[33] *Eighth Circuit decision*, 26 F. 4th, at 792.
[34] *Tyler*, 598 U.S., at 638.
[35] Brief for Respondents, 2023 WL 2759804, at *2. *See also Tyler*, 598 U.S., at 638-39 (noting that the County's argument that the debtor "ha[d] no property interest protected by the Takings Clause" was based on the fact that Minnesota law "purported to extinguish th[is] property interest by … providing that an owner forfeits her interest in her home when she falls behind on her property taxes"). *Cf. Eighth Circuit Decision*, 24 F. 4th, at 793 ("Where state law recognizes no property interest in surplus proceeds from a tax-foreclosure sale conducted after adequate notice to the owner, there is no unconstitutional taking").
[36] *Tyler*, 598 U.S., at 639.
[37] *Id.* at 638.

principles of property law, historical practice, and existing Supreme Court precedent.[38] In support of the conclusion that the debtor has a property interest in the surplus, this examination revealed hundreds of years and a wide range of authorities supporting "[t]he principle that a government may not take more from a taxpayer than she owes".[39] The application of this principle to the facts of *Tyler* is simple and straightforward: If the government may not take more from the taxpayer than the $15,000 she owes, this must mean that the taxpayer is entitled to the $25,000 surplus. Indeed, this result follows clearly from the various authorities highlighted by the Supreme Court. For example, early English common law dictated that "[i]f a tax collector seized a taxpayer's property, he was bound … when sold, to render back the overplus."[40] Similarly, Supreme Court "precedents have also recognized the principle that a taxpayer is entitled to the surplus in excess of the debt owed."[41] On the basis of this right – and because "Minnesota's scheme provides no opportunity for the taxpayer to recover the excess value" – the Supreme Court thus held that Hennepin County's retention of the $25,000 surplus constituted a taking within the meaning of the Fifth Amendment.[42]

ii. The debtor's right in the surplus value of the underlying property

Notably, the straightforward application of *Tyler*'s constitutional principles to the facts of the case is not necessarily illustrative of the full scope of the holding. Although *Tyler* itself concerned the taking of the surplus proceeds of a tax foreclosure sale, the Supreme Court's analysis indicates that the taxpayer's right to surplus is neither limited to the surplus proceeds of a foreclosure sale nor to situations in which the property has been sold at all. Rather, *Tyler* appears – at least to a majority of Committee members – to recognize the debtor's interest in the *surplus value of the property itself*. Under this reading, the right to the surplus proceeds of a tax foreclosure sale is in fact an *extension* of the corresponding interest in the underlying property: The surplus proceeds are simply the embodiment of "the excess value of [the debtor's] house once the State has sold it."[43]

This reading is further supported by the various authorities that the Supreme Court cites as reflecting "traditional property law principles" and "historical practice".[44] Indeed, the *Tyler* Court derives the "require[ment] that the excess value be returned to the taxpayer" from eighteenth- and nineteenth-century statutes imposing restrictions on the government's seizure of *land*.[45] Generally, the government could seize and sell "only 'so much of [a] *tract of land* … as may be necessary to satisfy the taxes due thereon[,]'"[46] and only where *more* than this amount of land was seized and sold – such that "the sale produced more than needed for the taxes" – did the reciprocal mandate

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[38] *Tyler,* 598 U.S., at 638. Both the Eighth Circuit and Hennepin County relied primarily on state law in support of the conclusion that the debtor had no property interest protected by the Takings Clause. However, "state law cannot be the only source" by which this determination is made. "Otherwise, a State could sidestep the Takings Clause by disavowing traditional property interests in assets it wishes to appropriate." *Id.* (internal quotations omitted).
[39] *Tyler,* 598 U.S., at 639.
[40] *Tyler,* 598 U.S., at 639-40.
[41] *Id.* at 642.
[42] *Id.* at 647.
[43] *Id.* at 645.
[44] *See Tyler*, 598 U.S., at 638.
[45] *See Tyler*, 598 U.S., at 639-42.
[46] *Id.* at 640 (quoting Act of July 14, 1798, §13, 1 Stat. 601) (emphasis added).

that "'such overplus of money' shall be paid to the owner" come into play.[47] This strengthens the conclusion that the surplus proceeds are attributable to the surplus value of the property itself: If there is no surplus of property seized – if "no more than the minimum amount of land" necessary "to satisfy the outstanding tax debt" is sold[48] – then the sale will generate no surplus and the debtor will have no interest in the proceeds of that sale.[49]

In the words of the Supreme Court, these statutes reflect the historical "consensus that a government could not take more *property* than it was owed".[50] Importantly, the *Tyler* Court treats this rule as one and the same with the "require[ment] that the excess value be returned to the taxpayer."[51] In support of this reading, the Supreme Court cites with approval *United States v. Lawton*,[52] an 1884 case in which the Supreme Court explicitly endorsed this same understanding of the debtor's right. In *Lawton*, the Supreme Court was tasked with determining whether a tax debtor's uncompensated forfeiture of tax-indebted property violated the Takings Clause where the relevant statute afforded the debtor a right to any surplus proceeds from the sale of the property but "did not mention paying the property owner the excess value where the Government *kept* the property for its own use instead of selling it."[53] Notwithstanding the statute's silence as to the result in these circumstances, the Supreme Court held that "[t]o withhold the surplus from the owner would be to violate the fifth Amendment to the constitution, and … take his property for public use without just compensation."[54]

Notably, this interpretation of *Tyler* is not unanimous among Committee members. While a close examination of the *Tyler* Court's analytical process provides – for the time being – the best indication of the decision's application going forward, any conclusions drawn should be viewed as just that: an *indication* of *Tyler*'s application. To this end, the Committee emphasizes that *Tyler* itself addresses the relatively narrow set of circumstances where a municipality has seized and sold tax-indebted property at public auction and retained the surplus proceeds of that sale. The Supreme Court's analysis should thus be viewed as instructive yet inconclusive of the likely outcome in related-but-distinct circumstances. Where, for example, underlying tax-indebted property has been seized and retained by the municipality, *Tyler*'s apparent endorsement of *Lawton*[55] is informative, but it should nevertheless be recognized as mere dictum.[56] For one, *Tyler* cites to *Lawton* in support

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[47] *Id.* (quoting 1797 Md. Laws ch. 90, §§4-5).
[48] *See Tyler*, 598 U.S., at 641.
[49] Consistent with this notion, the statutes at issue typically provided that "the land forfeited [in its entirety] to the State only if it failed to sell 'for want of bidders' because the land was worth less than the taxes owed." *Tyler*, 598 U.S., at 641, n.2 (quoting 1821 Ohio pp. 27-28 §§7, 10).
[50] *Tyler*, 598 U.S., at 641.
[51] *Tyler*, 598 U.S., at 642.
[52] 110 U.S. 146 (1884).
[53] *Tyler*, 598 U.S., at 643.
[54] *Lawton*, 110 U.S., at 149-150.
[55] *See Tyler*, 598 U.S., at 644-45.
[56] *See generally*, *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 125 (1996) (characterizing "dicta in the classic sense" as "speculation about what would happen in cases not before the court") (Souter, J., dissenting). *But see, e.g.*, *County of Allegheny v. American Civil Liberties Union, Greater Pittsburgh Chapter*, 492 U.S. 573, 668 (1989) ("[T]he principle of *stare decisis* directs us to adhere not only to the holdings of our prior cases, but also to their explications of the governing rules of law") (Kennedy, J., concurring and dissenting); *Sheet Metal Workers v. EEOC*, 478 U.S. 421, 490 (1986) ("Although technically dicta, … an important part of the Court's rationale for the result it reache[s] … is entitled to greater weight …") (O'Connor, J. concurring).

of "a taxpayer's right to surplus" broadly, rather than for *Lawton*'s application to any particular factual scenario. Also, *Lawton* differs slightly from the proffered hypothetical: In *Lawton*, the government "kept the property for itself"[57] but only after it was "'struck off for' and 'bid in' for the United States" at a price exceeding the tax debt.[58] *Lawton* may thus be fairly viewed as factually distinct from the more straightforward retention of property described above. In addition to this possible distinction, a second fact advanced during Committee discussions as potentially limiting *Tyler*'s constitutional reach is the identity of the party doing the taking. Proponents of a narrower reading argue that *Tyler* leaves unanswered the question of whether a taking results where foreclosure is effected not by the government but by a private party. If nothing else, these considerations establish the (currently) open-ended nature of the questions presented by *Tyler*; an abundance of caution dictates that definitive conclusions should be avoided under facts mirroring *Tyler*'s exactly. Notwithstanding the aforementioned uncertainty, it is the Committee's position that *Tyler*'s application most likely does extend to both sets of factual circumstances referenced in the preceding paragraph. This application will be discussed in greater detail in Part II(B)(ii), *infra*.

iii. Concurrence: Excessive Fines analysis

In addition to the Takings Clause issues discussed above, *Tyler* also involved a claim under the Excessive Fines Clause of the Eighth Amendment.[59] This claim was unsuccessful at each of the lower levels – as both the District and Circuit court held that "the forfeiture was not a fine because it was intended to remedy the State's tax losses, not to punish delinquent property owners"[60] – and was not addressed in the Supreme Court's majority opinion.[61] Nevertheless, Justice Gorsuch's concurring opinion, in which he was joined by Justice Jackson, is potentially illuminating with respect to the Supreme Court's general views regarding tax sales. The concurrence is dedicated primarily to chiding the lower courts for their analysis of the Excessive Fines issue, which "contains mistakes [that] future lower courts should not be quick to emulate."[62] Among these mistakes, Justice Gorsuch first highlights the District Court's reliance on the "primary purpose" of the tax sales scheme as being inconsistent with the Supreme Court's own instruction that the Excessive Fines Clause applies so long as the statute "serv[es] *in part* to punish."[63] Second, the concurrence characterizes as "legally irrelevant" the lower court's assertion that Minnesota's forfeiture statutes may in some cases confer a windfall on the tax debtor, where the debt exceeds the value of the property.[64] Third, Justice Gorsuch criticizes the logic employed by the lower courts in erroneously taking the fact that a focus on "culpability" may sometimes show punitive intent as an indication that a *lack of culpability* establishes a *nonpunitive* intent.

The concurring opinion is perhaps most notable for the fact that it is entirely unnecessary and expresses no difference in reasoning on any aspect of the majority opinion. Accordingly, many Committee members read the concurrence as signaling the baseline viability of an Excessive Fines

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[57] *Id.* at 643.
[58] *Lawton*, 110 U.S., at 149. Notably, this result was not automatic under the relevant statute, which only allowed for this result "unless some person should bid a higher sum".
[59] *Tyler*, 598 U.S., at 636.
[60] *Id.*
[61] *Id.* at 647-648.
[62] *Tyler*, 598 U.S., at 648 (Gorsuch, J., concurring).
[63] *Id.* (emphasis in original) (quoting *Austin v. United States*, 509 U.S. 602, 612 (1993)).
[64] *Id.* at 649.

challenge to certain tax sales processes. Indeed, the tenor of the concurrence's closing lines seems to evince a certain impatience with the arguments advanced by the lower courts.[65] Insofar as this apparent impatience pertains to the outcome in the lower courts in addition to their reasoning, the *Tyler* concurrence may indicate that the Supreme Court is primed to recognize further constitutional restrictions in the tax sales arena. The Supreme Court's unanimous disposition of *Tyler* further supports this speculation. In sum: While the Supreme Court's guidance on the Excessive Fines Clause in *Tyler* is largely insignificant from a substantive perspective, the potential future applications of this body of law to tax sales should be borne in mind. Compliance under the Takings Clause may not necessarily guarantee constitutionality in perpetuity.

B. Impact Across Country

i. Generally

While these issues remain largely untested, the principles elucidated above are instructive as to *Tyler*'s impending impact on tax sales laws across the country. *Tyler* itself provides the first example of this impact, establishing the unconstitutionality of statutes allowing for the government's sale of tax-indebted property without reimbursement to the debtor: Indeed, statutes that "preclud[e] an owner from obtaining the surplus proceeds of a [foreclosure] sale" violate the Takings Clause and will be held unconstitutional.[66] And because the debtor's interest in this surplus value arguably exists before – and independent of – the sale of the property, the same unconstitutionality may result even without a sale, from the uncompensated taking of the property itself. This latter application in particular would bring about a wave of state court declarations of unconstitutionality and necessitate widespread legislative revision of tax sales statutes.

The first swells of this wave of mass-invalidation and revision may already be here. For one, *Tyler* obviously established the unconstitutionality of the tax sales laws of Minnesota. But even before the U.S. Supreme Court weighed in, the Michigan Supreme Court in 2020 struck down tax sales laws analogous to Minnesota's on state law grounds but on reasoning analogous to the *Tyler* Court's,[67] prompting the Michigan legislature to revise the relevant statutory scheme.[68] While these decisions both involved municipalities' retention of the surplus proceeds of tax foreclosure sales, *Tyler* has also dictated reconsideration of tax sales regimes providing for confiscation of the underlying property itself: Less than two weeks after *Tyler* was decided, the U.S. Supreme Court vacated a pair of Nebraska Supreme Court decisions upholding the state's tax sales laws,

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[65] These lines read as follows: "[T]he District Court expressly approved the Minnesota tax-forfeiture scheme in this case in large part because 'the ultimate possibility of loss of property serves as a *deterrent* to those taxpayers considering tax delinquency.' Economic penalties imposed to deter willful noncompliance with the law are fines by any other name. And the Constitution has something to say about them: They cannot be excessive." *Id.* at 649-650 (emphasis in original) (internal citation omitted).

[66] *Tyler*, 598 U.S., at 644-45.

[67] *See Rafaeli, LLC v. Oakland County*, 952 N.W. 2d 434 (Mich. 2020). As was the case in *Tyler*, the taking alleged was the county's retention of the surplus proceeds of a tax foreclosure sale. It should be noted, however, that *Rafaeli* was decided on state law grounds. In particular, the taxpayer's right to recover the surplus proceeds was derived from Michigan common law, and the constitutional violation was to the Takings Clause analogue contained in the Michigan State Constitution. Nevertheless, the nature of the taxpayer's right was substantively identical to that in *Tyler*, and the relevant state constitutional provision was substantially similar to the Takings Clause of the U.S. Constitution. The court's reasoning and the outcome of the case thus represent a clear endorsement of *Tyler*.

[68] *See* 2020 Michigan Public Acts 253, 255, and 256.

remanding both cases "for further consideration in light of *Tyler*".[69] In apparent anticipation and eventual accommodation of these developments, Nebraska amended the relevant tax sales statutes for conformity with *Tyler*.[70] In a similar attempt to address *Tyler*'s "very important implications[,]" New Jersey legislators proposed 2023 legislation seeking to revise analogous provisions of New Jersey law – but the bill failed early in the legislative process.[71] Although the state court reconsideration of Nebraska's former tax sales regime has not yet occurred, New Jersey's equivalent procedures have since been struck down in state court on the basis of *Tyler*.[72] *Tyler* has also been relied upon by the Virginia Supreme Court for its determination that certain aspects of Virginia's tax sales law are unconstitutional.[73]

This may be just the beginning of *Tyler*'s reform of tax sales laws across the country. While *Tyler*'s application to the "strict foreclosure" model for enforcement of tax sale rights[74] – whereby the tax debtor forfeits the property entirely and without compensation for surplus equity[75] – has not yet been widely adjudicated at the state court level, this model is employed (or *was* employed, prior to *Tyler*) as the default rule in over a dozen states and Washington D.C. At least three other states allow for this form of foreclosure in certain cases.[76] These statutes are not fringe cases or outliers: Among states that provide for the sale of tax debt to private parties in some form – as opposed to requiring that collection and foreclosure be done by the municipalities themselves and tax-indebted property be sold outright – this model of foreclosure is (or was) the majority choice. If the earliest jurisprudential returns in New Jersey prove predictive, these statutory schemes will continue to produce unconstitutional results and risk subjecting municipalities to liability if not amended. Recent legislative activity across the country reflects the urgency of this issue. In

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[69] *Nieveen v. TAX 106*, 143 S. Ct. 2580 (Mem), 2023 WL 3799186 (2023); *Fair v. Continental Resources*, 143 S. Ct. 2580 (Mem), 2023 WL 3798629 (2023). *See also Nieveen v. TAX 106*, 974 N.W. 2d 15 (Neb. 2022); *Continental Resources v. Fair*, 971 N.W. 2d 313 (Neb. 2022).

[70] *See* 2023 NE LB727; Neb. Rev. Stat. §§ 77-1837, 1838. Notably, these reform efforts started prior to the decision in *Tyler*, as the bill effecting the revisions was introduced in January of 2023. The bill was heavily amended after the decision in *Tyler* was issued.

[71] 2023 NJ S3997.

[72] *20th Avenue Realty, LLC v. Roberto*, 2023 WL 8359623 (Sup. Ct. N.J. 2023).

[73] *McKeithen v. City of Richmond*, 893 S.E. 2d 369 (Va. 2023). Here, the court held that *Tyler*'s recognition of a property interest in the surplus proceeds of a tax foreclosure sale extends to lienholders. Although this holding represents nothing more than a straightforward reading of *Tyler* and was by no means a surprising outcome, it nevertheless serves to highlight the extent of *Tyler*'s impact on various state laws.

[74] "Strict foreclosure" as referenced here is distinct from the use of that term in Part IV(C), *infra*. Here, the term contemplates wholesale forfeiture of property with no possibility of compensation to the debtor. For the purposes of Part IV, the term simply contemplates that wholesale forfeiture without compensation occurs where the debtor fails to make a claim for surplus.

[75] *Cf.* Civil Code Article 3140 (invalidating as an absolute nullity any "clause in a contract obligating the owner of a thing to give it to an obligee in payment of a debt upon a future default in performance of an obligation"). Because "the law provides for the exclusive means of foreclosure of a mortgage", a contract providing for this type of complete forfeiture represents an "attempt to completely bypass and waive the laws concerning foreclosure" and thus "violates public policy." *Id.*, cmt. (d) (internal quotation omitted). *But see* R.S. 10:9-620 through 9-622 (providing for a creditor's acquisition of collateral in satisfaction of a secured obligation). The availability of "strict foreclosure" under the UCC, however, is conditioned on consent of both the debtor and the secured party. Moreover, parties with subordinate interests in the collateral can object and thereby force the disposition of the collateral via judicial sale.

[76] https://www.azcentral.com/story/opinion/op-ed/2023/06/26/foreclose-home-pay-small-tax-debt-unconstitutional/70351402007/ ("according to a report by … Pacific Legal Foundation (PLF)—20 states and Washington D.C. … allow this practice of home equity theft in some form"). It should be noted that the report referenced in this story is not perfectly accurate in all regards. Thus, these figures should be taken as estimates.

addition to the reform efforts referenced above, *Tyler* has prompted the enactment of tax sales legislation in Maine, which previously employed a tax foreclosure model substantially similar to Minnesota's.[77] Similar legislation is currently pending in Arizona.[78] By contrast, *Tyler*-related legislative efforts in Massachusetts[79] and New York[80] – states whose tax sales laws resemble those of (pre-revision) Nebraska and Minnesota, respectively – were unsuccessful. Now, class-action litigation premised on *Tyler*'s potential invalidation of New York's tax sales law is currently pending in U.S. District Court.[81] If successful, potentially hundreds of municipalities across the country could incur significant liability as a result of similar suits. In sum: *Tyler*'s potential effect is not limited merely to extreme, outlier statutes; over a dozen states may now be forced to reassess.

ii. Specific application to takings of property and takings by private parties

As noted above, the dual questions of *Tyler*'s applicability to takings of underlying property (rather than proceeds) and takings by private parties have not yet been answered conclusively. This lack of certainty should be borne in mind with respect to the continued validity of the statutory schemes described above, as these questions will determine the validity of the tax foreclosure models described in Part II(B)(i). If *Tyler* does establish a right in the surplus value of the underlying tax-indebted property and if *Tyler* is applicable even where foreclosure is effected by a private party, the laws of the aforementioned states will produce unconstitutional results. Upon evaluating these questions, the Committee answered both in the affirmative. Nevertheless, the lack of unanimity in these answers begs further analysis of each.

As for *Tyler*'s application to takings of actual property: While it is true that the property interest recognized in *Tyler* is the debtor's interest in surplus proceeds, the Supreme Court's analysis *does* suggest that this right stems from the debtor's right in the surplus value of the property itself.[82] And even if this suggestion is merely dicta,[83] its source lends it considerable weight.[84] In any event, the only other jurisprudential analysis on point jibes with this interpretation.

[77] 2023 ME H.P. 69, L.D. 101.
[78] 2024 AZ HB2098.
[79] 2023 MA S1876.
[80] 2023 NY S7549A.
[81] Complaint with Jury Demand, *Steele v. Saratoga County*, 1:23CV01615, 2023 WL 8931775 (U.S Dist. Ct. N.D.N.Y 2023).
[82] *Cf. Tyler*, 598 U.S., at 646-647 ("The County argues that [the debtor] has no interest in the surplus [proceeds] because she constructively abandoned *her home*") (emphasis added).
[83] *Cf. Seminole Tribe*, 517 U.S., at 66-67 (explaining that the binding precedent comprises "not only the result but also those portions of the opinion necessary to that result"). Insofar as the existence of a debtor's interest in the surplus proceeds after the sale of tax-indebted property is dependent upon the prior existence of an interest in the surplus value of the tax-indebted property itself before sale, the principle may be more than mere dicta. This, of course, begs the question: How can someone have an interest in the surplus proceeds from a sale if they did not have a corresponding interest in the thing sold?
[84] *United States v. City of Hialeah*, 140 F. 3d 968, 974 (11th Cir. 1998) (holding Supreme Court dicta to be of "considerable persuasive value"); *McCoy v. Mass. Inst. Of Tech.*, 950 F. 2d 13, 19 (1st Cir. 1991) (opining that "federal appellate courts are bound by the Supreme Court's considered dicta almost as firmly as by the Court's outright holdings, particularly when … a dictum is of a recent vintage and not enfeebled by any subsequent statement [to the contrary]"); *Winslow v. FERC*, 587 F. 3d 1133, 1135 (D.C. Cir. 2009) (explaining that Supreme Court dicta "generally must be treated as authoritative"); *Galli v. New Jersey Meadowlands Comm'n*, 490 F. 3d 265, 274 (3d Cir. 2007) ("[Supreme Court] dicta are highly persuasive"); *United States v. Montero-Camargo*, 208 F. 3d 1122, 1132 n.17 (9th Cir. 2000) ("We do not treat considered dicta from the Supreme Court lightly. Rather, we accord it appropriate

In the words of the Sixth Circuit, for instance, the proposition that a tax debtor's right to surplus proceeds does not indicate a prior right in the surplus value of the underlying property

> …overlooks the very reasons *why* a property owner has a right to the surplus. That right does not arise in manner akin to quantum mechanics, materializing suddenly without any apparent connection to anything that existed before. The owner's right to a surplus after a foreclosure sale instead follows directly from her possession of equitable title before the sale. The surplus is merely the embodiment in money of the value of that equitable title.[85]

This logic generally accords with that of the Committee's majority. Furthermore, while similar outcomes have been reached in other states,[86] research has failed to reveal any state that recognizes a tax debtor's interest in surplus proceeds of a tax foreclosure sale but nevertheless holds that confiscation and retention of a tax-indebted property exceeding the value of the tax debt is constitutionally permissible. When coupled with the various dicta of *Tyler*, this analysis indicates that it is more likely than not that *Tyler* extends to the underlying property.

As for the second apparent factual distinction – that *Tyler* may not apply where foreclosure is effected by private rather than public actors – a similar conclusion appears warranted. At the outset, it should be noted that this issue does not implicate the "public use" component of the Takings Clause.[87] Instead, the relevant question is whether there is "state action" of such a type that the deprivation of private property is subject to Fifth Amendment analysis. "Although the conduct of private parties lies beyond the Constitution's scope in most instances,"[88] it is nevertheless the case that "[c]onduct that is formally 'private' may become so entwined with governmental policies or so impregnated with a governmental character as to become subject to the constitutional limitations placed upon state action."[89] A determination of whether this is the case is a two-part inquiry: First, it must be determined "whether the claimed constitutional deprivation resulted from the exercise of a right or privilege having its source in state authority";

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deference"); *Wright v. Morris*, 111 F. 3d 414, 419 (6th Cir. 1997) ("Where there is no clear precedent to the contrary, we will not simply ignore the [Supreme] Court's dicta").

[85] *Hall v. Meisner*, 51 F. 4th 185, 195 (6th Cir. 2022), *cert. denied* (emphasis in original).

[86] *See, e.g.*, *Polonsky v. Town of New Bedford*, 173 N.H. 226, 237 (N.H. 2020) ("[W]hen the municipality acquires property by tax deed that is worth more than the amount owed, the municipality is required to pay just compensation to the former owner").

[87] The phrase "for public use" as found in the Takings Clause is not a limitation on the applicability of the Clause but rather a limitation on government conduct. The Takings Clause prohibits the taking of private property for a public use without just compensation, but it prohibits the taking of private property for a *private* use *even with* just compensation. *Lingle v. Chevron*, 544 U.S. 528, 543 (2005) (explaining that where a government action "fails to meet the 'public use' requirement … that is the end of the inquiry [and n]o amount of compensation can authorize such action"). In any event, the requirement for "public use" implicates "only the taking's purpose." *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229, 244 (1984). Here, the purpose of collecting delinquent taxes is very clearly public in nature. The "transfer [of] properties to private individuals" does not, by itself, "diminish[] the public character of the taking." *Kelo v. City of New London*, 545 U.S. 469, 482 (2005).

[88] *Edmonson v. Leesville Concrete Co., Inc.*, 500 U.S. 614, 620 (1991).

[89] *Evans v. Newton*, 382 U.S. 296, 299 (1966).

and second, it must be determined "whether the private party charged with the deprivation could be described in all fairness as a state actor".[90]

The first prong of this test is almost certainly satisfied in the present context, as the rights at issue are not only created via statute but are acquired by tax sale purchasers *from a government body*. The second prong is more involved, looking to such factors as (1) whether and to what extent the party relies on governmental assistance and benefits; (2) whether the party is performing a traditional government function; and (3) whether the injury is exacerbated by the incidents of governmental authority.[91] [92] Almost certainly, the collection of taxes is a traditional government function.[93] As for reliance on government assistance, "[p]rivate use of state-sanctioned private remedies or procedures does not rise to the level of state action."[94] Instead, a finding of state action typically requires the "overt, significant assistance of state officials."[95] In the present case, neither right nor remedy are private in nature.[96] As for assistance of state officials, this may be satisfied, for instance, where a private party "jointly participates with state officials in securing the seizure of property in which the private party claims to have rights."[97] Whether the purchase of a right from a state actor qualifies as the significant assistance of state officials appears to have no direct jurisprudential answer, but state action has been found in a number of debt-collection contexts.[98] The precise context at issue, however, seems never to have been directly addressed.

Notably, the absence of tax sales-related state-action jurisprudence has not prevented constitutional decisions in this context. *Tyler* has been applied to hold unconstitutional the foreclosure process provided under New Jersey's tax sales statutes, for instance, notwithstanding the fact that the statutes provide for foreclosure by a private party.[99] This opinion treated the state-action issue summarily, if at all, holding simply that the Takings Clause's protection of tax debtors' equity "stands whether the tax sale certificate holder is the taxing authority[] or a third-party purchaser proceeding with an interest conveyed by the taxing authority."[100] Research failed to reveal another instance where the state-action question was considered directly in tax sale context. By one interpretation, this lack of analysis indicates that the presence of state action has been

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[90] *Id. See Lugar v. Edmonson Oil Co.*, 457 U.S. 922, 937-942 (1982) (originating this framework).

[91] *Edmonson*, at 621-622. *See Tulsa Prof'l Collection Servs., Inc. v. Pope*, 485 U.S. 478 (1988); *Burton v. Wilmington Parking Authority*, 365 U.S. 715 (1961) (for the first factor). *See Terry v. Adams*, 345 U.S. 461 (1953); *Marsh v. Alabama*, 326 U.S. 501 (1946) (for the second factor).

[92] It should be noted that these inquiries (or "factors" or "considerations", etc.) need not necessarily all be answered in the affirmative (or "established" or "satisfied," etc.) in order to justify a finding of state action. While sometimes characterized as factors composing a single test, these are more frequently applied as distinct, standalone tests for state action or for the second prong of the state-action test. *Lugar*, 938-939 (noting that "the Court has articulated a number of different factors or tests in different contexts" and declining to resolve the question "[w]hether these different tests are actually different in operation or simply different ways of characterizing a necessarily fact-bound inquiry").

[93] *See Barrera v. Security Bldg. & Inv. Corp.*, 519 F. 2d 1166, 1174 (5th Cir. 1975) ("State action[] has indeed[] been found present in the exercise by a private entity of powers traditionally exclusively reserved to the state").

[94] *Tulsa Prof'l*, 485 U.S., at 485 (1988).

[95] *Edmonson*, 500 U.S., at 622 (quoting *Tulsa Prof'l*, 485 U.S., at 485).

[96] *Cf. Flagg Bros., Inc. v. Brooks*, 436 U.S. 149 (1978) (holding that state's authorization of foreclosure of warehouse's lien was not state action because it was a "means of resolving [a] purely private dispute).

[97] *Georgia v. McCollum*, 505 U.S. 42, 51 (1992) (internal quotations omitted).

[98] *See, e.g.*, *Lugar*, 457 U.S, at 924; *Fuentes v. Shelvin*, 407 U.S. 67, 69 (1972) (finding state action for issuance of writ of replevin even where the statute was applicable to "private dispute[s]").

[99] *See 20th Avenue Realty, LLC v. Roberto*, 477 N.J. Super. 339, 365 (N.J. Super. 2023).

[100] *Id.*

treated as self-evident in this context. By another, however, it simply establishes uncertainty. While the Committee's majority position is that *Tyler* likely does apply to private foreclosure on tax sale rights, this uncertainty should nevertheless be acknowledged.

C. Impact on Current Louisiana Law[101]

As for Louisiana, *Tyler*'s application is more complicated still. Unlike the dozen-plus states discussed in Part II(B)(i), Louisiana does not employ a "strict foreclosure" scheme. Rather, Louisiana is one of just three states that provides for the sale of tax certificates to the bidder who is willing to accept the "least quantity of property" if the certificate is not redeemed.[102] This procedure is calculated to guarantee a protection of the same nature as the historical tax sales statutes cited approvingly by the *Tyler* Court: namely, that "no more than the minimum amount" of property necessary "to satisfy the outstanding tax debt" will be taken.[103] Whereas most states seek Takings Clause compliance via these statutes' secondary mandate to return any surplus proceeds generated by the sale of the property – these surplus proceeds embodying "the excess value of [the property] once the State has sold it"[104] – Louisiana's statutory scheme seeks to reduce what is properly understood as "the property" to a mere fractional undivided interest in the actual underlying real estate. In theory, this ensures that the value of *the property taken* (i.e. the fractional interest) does not exceed the value of the tax debt.[105] If it does, a lower bid will presumably be entered. While the constitutional logic underlying this procedure is sound in theory – so long as no surplus property is taken, no Takings Clause violation results – the practical reality is more complicated.

This complication stems primarily from (or at least pertains to) the vehicle by which particular "amounts" of property are designated at tax sales under current Louisiana law. Notably, the current mechanics of Louisiana tax sales represent a slightly "updated" version of those provided by the historical statutes discussed in *Tyler*. These statutes, however, were designed to operate in a largely agrarian society, where properties subject to tax sales – typically farms and

[101] The analysis provided in this section is, obviously, subject to the uncertainty described in Part II(B)(ii) regarding *Tyler*'s application to foreclosures by private parties.
[102] R.S. 47:2153(B)(5). The others are Iowa and Rhode Island. Alabama law also imposes on the government a "duty … if practicable" to sell the least property necessary to satisfy the debt, but it is not readily apparent whether or how often this directive is determined to be practicable.
[103] *Tyler*, 598 U.S., at 641. *Cf.* Louisiana Constitution Article VII, Section 25(A)(1) (requiring that the tax sale be limited to "the least quantity of property which any bidder will buy for the amount of the taxes, interest, and costs").
[104] *Tyler*, 598 U.S., at 645.
[105] It should be acknowledged, of course, that current Louisiana law does not contemplate the actual transfer of the property at the tax sale. Insofar as this section refers to "the sale of the least amount of property" – or employs other phrases to this effect – it should not be understood to suggest that Louisiana tax sales actually convey property. Rather, these references reflect the fact that the procedures for bidding at tax sale are intended to *replicate* a sale of the actual underlying property and, accordingly, to produce bids commensurate with such sale. *Cf.* R.S. 47:2153(B)(5)(providing that, at a tax sale, "the tax collector shall *sell immediately the least quantity of the property* … which any bidder will buy for the amount of taxes, interest, penalties and costs")(emphasis added). This design, which is an artifact of prior law, reflects the fact that absent timely redemption, the tax sale *will* have operated to convey actual property, albeit in delayed fashion. This conception of the tax sale as an actual sale of property that is merely conditional and subject to delay is memorialized in the Louisiana Constitution. Indeed, the Constitution, in relevant part, provides that "the collector shall sell immediately the least quantity of property which any bidder will buy for the amount [due]" and later refers to "[t]he property sold" and to the "sale of property for taxes." Louisiana Constitution Article VII, Section 25(A)(1)-(2), (B)(1). *See* Part III(B), *infra*, for more.

other properties comprising significant acreage – were readily susceptible to physical, in-kind division.[106] Under these circumstances, the sale of "the least quantity of land" was both a fairly straightforward task and a sensible mechanism to ensure fairness: Statutes simply provided "that the land be sold to whichever buyer would 'pay [the tax debt] for *the least number of acres*'".[107] But because this paradigm is far less suitable for the twenty-first century, the underlying mechanism has been form-fitted to modern times, dictating instead that "the least quantity of property [be] determined by undivided interests".[108] While it is in no way substantively inaccurate to conceive of a fractional undivided interest as an "amount" of property, this modification nevertheless dictates that the certificate holder, upon having his interest confirmed via quiet-title suit,[109] must take an additional step in order to derive the value for which he bargained: Whereas a purchaser of one acre of a stranger's 100-acre tract can very easily and straightforwardly derive value from the property purchased, a 1% undivided interest in a property co-owned with a stranger is far less appealing as an end unto itself. Thus, as a practical matter, a tax sale purchaser under current Louisiana law must demand partition by licitation in order to obtain the desired value.[110] It is this "second sale" – the partition sale – that injects a measure of complication into the constitutionality of Louisiana's current tax sales regime under *Tyler*.

This complication stems from (or is revealed by) the fact that the partition sale creates a competing measurement of the "surplus value" of the property, often conflicting with the results dictated by the initial tax sale.[111] The theory underlying the constitutionality of Louisiana's tax sales procedure is that the bidding process ensures that the value of the undivided interest taken (upon failure to redeem) does not exceed the value of the tax debt, thereby protecting against the "confiscat[ion of] more property than was due."[112] An argument exists, however, that these protections are constitutionally insufficient in practice. This argument holds that the partition-sale price represents conclusive evidence of whether the aforementioned theory of constitutionality

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[106] *Cf.* Code of Civil Procedure Article 4606 (providing for partition in kind "unless the property is indivisible by nature or cannot be conveniently divided").
[107] *Tyler*, 598 U.S., at 641, n.2.
[108] R.S. 47:2153(B)(5). In colloquial terms, an "undivided interest" – also referred to as "ownership in indivision" (*see* Civil Code Article 797) – is essentially fractional co-ownership. Someone who holds, for instance, a 50% undivided interest in a piece of land is a 50% co-owner of 100% of the land. Subject to certain exceptions and limitations, this means that "a co-owner has the right to use and enjoy the [co-owned] thing as if he were its sole owner." Civil Code Article 802, cmt. (c). Notably, the "use and enjoyment" of property is a term of art and represents only one of the three incidents of ownership that form the basis of Louisiana property law: *usus*, *fructus*, and *abusus*. "*Usus*" generally comprises the aforementioned right of use and enjoyment and is afforded to all co-owners fully, irrespective of their fractional undivided share. *Fructus*, the right to the fruits and products of a thing, is shared by co-owners in proportion to their fractional interest. Civil Code Article 798. *Abusus*, the right to abuse, destroy, encumber, or otherwise dispose of a thing (including by sale), requires the consent of all co-owners, though a co-owner may alienate or encumber *his undivided interest* without such consent. Civil Code Article 805. *See also* Civil Code Article 802, cmt. (c) ("[A] co-owner has neither a right to exclusive use nor a right to dispose of the thing without the consent of his co-owners").
[109] *See* R.S. 47:2266. It should be noted that there is conflicting guidance as to whether the actual transfer of ownership of the undivided interest occurs simply by law, upon the expiration of the redemption period, or upon the judgment quieting title. *See* Part III(B), *infra*. Nevertheless, this ambiguity is of little importance to the present discussion.
[110] *See generally* Civil Code Articles 807-818. Partition by licitation refers to the division – or partition – of co-owned property via the sale of the property in its entirety and the distribution of the proceeds of the sale to the co-owners in proportion to their fractional co-ownership shares. Civil Code Article 811.
[111] To be more precise: The complication, to the extent it exists, *stems from* the ability or inability of the bidding procedures at the initial tax sale to properly identify the "least quantity of property …" in each instance; the partition sale's competing measurement merely provides evidence on the matter.
[112] *See Tyler*, 598 U.S., at 639.

aligns with reality. Stated otherwise: The tax sale bidding procedure provides a hypothetical valuation of the property – one that is likely, at least in a vacuum, to ensure compliance with *Tyler* – but the subsequent partition sale provides an *actual* valuation of the property.[113] Thus, where these values differ, unconstitutionality may result. This section will first describe the argument for the unconstitutionality of Louisiana law, before providing the corresponding counterarguments.

By way of illustration, consider a hypothetical in which Louisiana law is applied to the facts of *Tyler*: The tax debt (including all applicable interest, penalties, and costs) equals $15,000 upon foreclosure, and the property is sold for $40,000 at the ultimate public auction. In particular, consider the result if the winning bid at the initial tax sale is 75%: Upon the expiration of the redemption period, the 75% certificate holder petitions the court to quiet title as to the 75% interest and to have the property partitioned by licitation; the court then renders judgment declaring the certificate holder the owner of a 75% undivided interest in the property and ordering partition by licitation. Finally, as in *Tyler*, the auction produces a sale price of $40,000.[114] The question now becomes: To how much of the $40,000 proceeds is the tax debtor entitled? Louisiana law dictates that the debtor in this case receives $10,000 – the amount attributable to his 25% interest – while the certificate holder receives $30,000.[115] *Tyler*, by contrast, is clear as to the fact that the party enforcing a tax debt cannot "use the toehold of the tax debt to confiscate more property than was due."[116] In both *Tyler* and this hypothetical, the amount due was $15,000. Because "a taxpayer is entitled to the surplus in excess of the debt",[117] *Tyler* arguably requires that the debtor in these circumstances be permitted to recover $25,000, the amount of the surplus.[118] "To withhold the surplus from the owner would be to violate the fifth amendment to the constitution, and … take his property … without just compensation."[119] This is precisely what current Louisiana law would do in this scenario. Although limiting the amount of property forfeited to "the least amount" necessary to satisfy the debt – as Louisiana law intends – *does* in fact satisfy the requirements of *Tyler*, Louisiana law arguably fails to ensure such a limitation.

The first counterargument to this logic is fairly straightforward: The partition sale described above cannot serve to establish the relevant amount of surplus value because it technically occurs *after* and thus *independent of* the actual enforcement of the tax sale right, which is represented by the initial conveyance of the undivided interest rather than the subsequent recovery of its value via

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[113] For instance, consider the significance of a 50% winning bid in regard to a $1,000 tax debt: Under the constitutional theory underpinning Louisiana law, this establishes that a 50% interest in the property is the least possible amount of property that someone would be willing to accept in exchange for $1,000. In other words, the bidding serves to set equal the value of the interest bid and the value of the debt. If the 50% interest were worth more than $1,000, a lower bid would have been entered; if the 50% interest were worth less than $1,000, the bidding would not have reached 50%. However, once the partition sale occurs, the price obtained indicates the actual value of the property and the 50% interest.
[114] For the sake of simplicity, this analysis will assume that the $40,000 figure represents the price *after* deduction of the sheriff's costs.
[115] Civil Code Article 811.
[116] *Tyler*, 598 U.S., at 640.
[117] *Id.* at 642.
[118] This will be addressed *infra*, but it is worth noting that this result holds even where one conceives of the "property" as strictly the 75% interest. In this case, the total proceeds generated by the sale of "the property" is $30,000. This figure exceeds the $15,000 tax debt by $15,000, thus entitling the debtor to claim the $15,000 surplus. The $15,000 surplus plus the $10,000 attributable to the 25% interest retained by the debtor all along equals $25,000.
[119] *Lawton*, 110 U.S., at 150. *See also Tyler*, 598 U.S., at 643.

partition by licitation. Stated otherwise: The relevant forfeiture, here, is the transfer of the undivided co-ownership interest; the partition sale does not occur until after this has occurred and is thus irrelevant to any analysis regarding the value of the property allegedly taken. Because, at the time of the auction, the debtor no longer has an interest in the property forfeited (i.e. the 75% interest), the debtor in this case has no right to the proceeds from the sale of that property (again, the 75% interest). The alleged "taking" here is the taking of the undivided interest, and the tax sale bidding process operates to ensure that this interest is no more valuable than the tax debt; accordingly, constitutionality is indeed protected.

There are, however, counterarguments to this counterargument. First: The fact that statute contemplates that forfeiture actually occurs prior to the ultimate sale of the property does not change the calculus, as precisely the same was true – and to an even greater extent – of the sale of the property in *Tyler*. There, the statutory scheme provided for the debtor's forfeiture of "absolute title" *months* before the property was actually sold. Nevertheless, the Supreme Court *still* viewed the relevant "property" for Takings Clause purposes as being the surplus proceeds and still held that the debtor had an interest in the surplus proceeds of the eventual sale. By contrast, under Louisiana's procedure, partition by licitation is generally ordered *concurrently* with the judgment quieting title.[120] Logically, this suggests that *Tyler*'s reasoning and conclusion should apply even *more* strongly to Louisiana law. And second: Even accepting, *arguendo*, the above logic supporting the constitutionality of current Louisiana law – that is, that the distribution of the partition sale proceeds cannot be a "taking" because the forfeiture has already occurred by that point – Takings Clause analysis must nevertheless continue. In this case, the "property" forfeited would not be the proceeds of the partition sale but rather the actual 75% undivided interest itself. Constitutionality would thus hinge on whether the value of the 75% interest exceeded the value of the tax debt. Notably, this inquiry requires a determination of the fair market value of the 75% interest at the time of the alleged taking.[121] Ignoring for a moment the question of which sale mechanism promotes a more accurate market valuation in a vacuum, the temporal component of this analysis is better served by the partition sale price, given that the tax sale occurs at least three years prior to forfeiture. Comparison of the natures of the respective sales themselves strengthens this argument: The partition sale is an actual sale of the property by public auction – where bids are influenced strictly by bidders' desire to own the property and willingness to pay for it – whereas a tax sale involves bidding heavily influenced by the likelihood that the debtor will redeem and the bidder will never come to own the property, as well as the corresponding profit incentive associated with redemption.[122] Insofar as a court is inclined to agree with this logic, the partition sale price may ultimately determine the value of the 75% interest that was taken in lieu of the tax sale bid. If this is indeed the case, Louisiana law dictates forfeiture of property beyond the tax debt and the present hypothetical results in an unconstitutional taking.[123] As was the case in *Tyler*, "once. . .title

[120] *Cf.* Part III(B), (D) (discussing issues regarding the timing of transfer under current Louisiana law). Of course, it is true that a concurrent *order* still does not dictate a concurrent *sale*.
[121] *Kirby Forest Industries, Inc. v. United States*, 467 U.S. 1, 10 (1984).
[122] *Cf. 20th Avenue Realty, LLC v. Roberto*, 477 N.J. Super. 339, 359 (N.J. Super. 2023) ("Tax sale certificate holders know from the start that most tax certificate investments end not in windfall profits from foreclosure but rather in high yield interest returns upon redemption") (internal quotations omitted).
[123] To clarify: If the partition sale price is taken as evidence of the value of the 75% interest, the value is $30,000. Because this sum exceeds the tax debt, the 75% cannot be said to represent "the least amount of property necessary …". In sum: Either the property taken is the surplus sale proceeds, in which case the debtor should theoretically be entitled to $25,000 of the $40,000 total sale price; or the property taken is the 75% interest, for which the best available

has transferred to the [certificate holder], any excess value always remains with the [certificate holder]."[124]

Additional arguments exist on each side. As for the constitutionality of current Louisiana law, the characterization of the tax sale as a "sale" of the property[125] (with a right of redemption) suggests that the eventual transfer of ownership at the end of the process could conceivably be said to relate back to the day of the tax sale. Nevertheless, no Louisiana court of which the Committee is aware has ever held to this effect, and a Louisiana tax sale does not in practice operate as a sale subject to a right of redemption.[126] As for *un*constitutionality, the argument advanced above is at least as strong in the cases of 100% tax certificates and adjudicated properties – in particular the latter – as it is in hypothetical proffered above.[127] For one, both categories of tax sale outcome operate to "absolutely preclude" a debtor from recovering any surplus proceeds.[128] And because a debtor's ownership of adjudicated property does not terminate until the property is affirmatively disposed of,[129] the result is that particular context is that forfeiture necessarily occurs at the moment of disposition. Thus, in any case where the disposition of adjudicated property produces a sale price greater than the total tax debt – establishing that the value of the property taken at the time of the taking exceeds the debt – the debtor's inability to recover the surplus value renders the outcome unconstitutional. The Committee is unanimous in its position that this aspect of current Louisiana law offends *Tyler*.

Notably, concerns regarding the constitutionality of present law may not be limited to the interests of property owners: "[A] mortgagee clearly has a legally protected property interest" as well.[130] Moreover, a mortgagee's property interest manifests in precisely the same way as that of the owner-debtor in *Tyler*: as a right to claim the surplus proceeds from the sale of the property.[131] In regard to the owner-debtor, *Tyler* establishes that the right to claim surplus proceeds exists even where state law "purport[s] to extinguish that property interest by … providing that an owner forfeits her interest in her home when she falls behind on her property taxes."[132] This seems to be the result dictated by current Louisiana tax sales law with respect to mortgagees, lienholders, and

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estimate of value is $30,000, in which case the debtor should be entitled to recover $15,000 as just compensation for the taking in addition to retaining the $10,000 attributable to the remaining 25% interest.

[124] *Tyler*, 598 U.S., at 644.

[125] *Cf.* Part III(B), *infra*.

[126] *See generally* Civil Code Article 2567 et seq. The most obvious example of this dissimilarity is the fact that a tax sale purchaser does not own the property during the pendency of the redemptive period.

[127] Rough data compiled by Committee members indicates that the sale of 1% certificates – generally common, in light of the fact that 1% is the minimum possible bid and thus a default winner – is approximately as frequent as the sale of 100% certificates. In particular, these data reflect that, in 2019, Orleans Parish sold a total of 896 tax certificates, 210 of which were 1% certificates and 215 of which were 100% certificates.

[128] *See Tyler*, 598 U.S., at 644.

[129] R.S. 47:2197.

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

[131] Civil Code Article 3279, cmt. (b) (explaining that mortgage "gives the creditor … a preference to the proceeds ahead of the claims of others"). In the present context, the claim of a hypothetical mortgagee will be junior to that of the tax sale purchaser. Notably, the "ranking" of these two rights against one another is not entirely coherent, substantively, under Louisiana law, given that the right of the tax sale purchaser is not of the same nature as the mortgage. *See* Part III(B), *infra*, for more.

[132] *Tyler*, 598 U.S., at 639.

other parties with interests in tax sale property:[133] "For example, a judicial mortgage would be released as to the property affected by the tax sale".[134] By the logic above, this rule appears to conflict directly with *Tyler*. In *Tyler*, the mere failure to redeem – even when accompanied by sufficient due process notice – was insufficient to terminate the right to claim surplus. And neither *Tyler* nor any other cases revealed by research draw any meaningful distinction between the interests of owners and creditors for this purpose. While "[t]he 'bundle of rights' which accrues to a secured party is obviously smaller than that which accrues to an owner in fee simple", it is not the case that "differences such as these relegate the secured party's interest to something less than property."[135]

Instead, the Supreme Court's jurisprudence "militate[s] against such a proposition",[136] repeatedly finding that this type of termination constitutes a Fifth Amendment taking. Where the government's foreclosure on incomplete navy personnel boats and unused materials over which materialmen had liens, the Supreme Court explained: "The total destruction by the Government of all value of these liens, which constitute compensable property, has every possible element of a Fifth Amendment 'taking' and is not a mere 'consequential incidence' of a valid regulatory measure."[137] While this outcome may perhaps be obvious in circumstances where the windfall conferred by the taking inures to the benefit of the party "doing the taking" – for example, where a creditor takes from a debtor more than the creditor is entitled and thus impairs the rights of another creditor – it holds true even where the value lost by the creditor inures to the benefit of the debtor.[138] Similar holdings abound in the bankruptcy context, which provides a strong point of comparison to the tax sales context: Just as the authority to collect taxes is constitutional in nature, federal bankruptcy law "is a rational exercise of Congress' authority under Article I, Section 8, Clause 4 [of the U.S. Constitution]." Nevertheless, this "does not obviate the additional difficulty that arises when that power is sought to be used to defeat traditional property interests[.]"[139] Just as "bankruptcy power is subject to the Fifth Amendment's prohibition against taking private property without compensation",[140] *Tyler* instructs that the same is true of collecting delinquent

[133] *See* R.S. 47:2121(C) (providing that "tax sale title transfers to its holder ownership … free of … other interests, claims, or encumbrances held by all duly notified persons"), 2157(E) (providing for the "cancellation, termination, release, or erasure … of all interests, liens, mortgages, privileges, and other encumbrances"), 2266(A)(1) (listing as the proper parties to a quiet-title suit all "parties whose interests the petitioner seeks to be terminated").

[134] R.S. 47:2157, cmt. (g). Reference, here, to "the property affected by the tax sale" is included in contemplation of mortgages encumbering more than a single piece of property; in the case of a judicial mortgage, for example, the mortgage itself would still survive in regard to other property owned by the debtor. *See* Civil Code Articles 3285 and 3302. It is unclear whether this language is intended to suggest that the mortgage is extinguished only as to the extent of the undivided interest designated by the winning bidder. However, "[s]ince the share of a co-owner in a thing held in indivision is an incorporeal … such a share cannot be burned with a predial servitude or a conventional mortgage." Civil Code Article 812, cmt. (c). *See also* Civil Code Article 812 ("When a thing held in indivision is partitioned … a real right burdening the thing is not affected"). In other words, these articles seem to indicate that any mortgage cancellation contemplated by the tax sales statutes must be effective as to the full extent of the property, not merely as to the undivided interest – the latter would in many cases be a legal impossibility.

[135] *U.S. v. Security Indus. Bank*, 459 U.S. 70, 77 (1982).

[136] *Id.*

[137] *Armstrong v. United States*, 364 U.S. 40, 48 (1960). This outcome is perhaps obvious in circumstances where the windfall conferred by the taking inures to the benefit of the foreclosing party, but the fact that this is not the case under Louisiana law does not distinguish it for present purposes.

[138] *See Louisville Joint Stock Land Bank v. Radford*, 295 U.S. 555 (1935).

[139] *Security Indus. Bank*, 459 U.S., at 74.

[140] *Id.* at 75.

taxes. Furthermore, *Tyler* has already been applied in the context of creditors' rights.[141] In particular, the state Supreme Court of Virginia found that Virginia's tax-foreclosure regime offended the Takings Clause as applied to a junior lienholder whose right to unclaimed surplus proceeds was effectively extinguished by a provision that "unconstitutionally authorized the City to take these proceeds" even after it had been fully compensated.[142]

Insofar as these or other arguments are accepted by courts, they may prove constitutionally problematic for Louisiana's treatment of creditors in the tax sales process. Like in other contexts, however, the applicability of *Tyler* to creditors' rights has not yet been subject to robust jurisprudential consideration. As for the constitutionality of current Louisiana law, generally, as for both owners and creditors: Not only is the analysis of this section untested jurisprudentially, its viability is uncertain even within the Committee. Thus, the Committee does not represent that Louisiana law violates *Tyler*, or even that it *probably* violates *Tyler* – but merely that a legitimate possibility exists. Nevertheless, the Committee agrees that the prospect that problems may result under *Tyler* is sufficiently realistic to justify the revision of Louisiana tax sales law for compliance with the constitutional rule announced in *Tyler*.

D. Impact on Current Revision

As established, *Tyler* may render unconstitutional any tax sales model that provides for simple forfeiture of a tax-indebted property without allowing for reimbursement. In light of this fact, the Committee faced the question of how compliance with *Tyler* could be achieved, and the subsequent question of how compliance with *Tyler* could *best* be achieved. These questions, and the Committee's answers, are explored below.

i. Generally, potential solutions (need for second sale)

Notably, the Takings Clause does not impose a per se prohibition on "takings". Rather, it prohibits takings *without just compensation*.[143] Often seen in the eminent domain context, it is not uncommon for the government to take private property for public use in exchange for some measure of "just compensation." As a baseline matter, this establishes two broad avenues for compliance with *Tyler*: Tax sales statutes may either (1) protect against a Fifth Amendment taking; or (2) allow for a Fifth Amendment taking but provide for payment of just compensation for the property taken. Because *Tyler* establishes that a tax debtor has a property interest in the surplus value of the property in excess of the tax debt, constitutionality demands that the debtor be allowed to either retain that surplus (such that no taking occurs) or be repaid for its value (such that the debtor is paid "just compensation" for the property taken). These are the alternatives that were considered by the Committee.

[141] *McKeithen v. City of Richmond*, 893 S.E. 2d 369 (Va. 2023).
[142] *Id.* at 377-378. While this decision was technically grounded in Virginia's state constitution's analogue to the Takings Clause, the court emphasizes that its reasoning is consistent with analysis under the Fifth Amendment of the U.S. Constitution and that its decision is limited not due to any difference in outcome but merely in the interest of judicial restraint.
[143] United States Constitution, Amendment V.

Evaluation of the relative merits of these approaches first requires what "just compensation" entails. As noted above, Takings Clause jurisprudence instructs that just compensation is equal to the fair market value of the property taken.[144] "Under this standard, the owner is entitled to receive what a willing buyer would pay in cash to a willing seller."[145] Generally, this is determined by reference to appraisal evidence.[146] Thus, just compensation for the taking of a parcel of tax-indebted property effectively requires the seizing party to pay for the property outright, very nearly as though they were purchasing it via private sale. While viable constitutionally, as an avenue for compliance with *Tyler* this model is prohibitively costly to potential tax sale purchasers and thus impracticable as a mechanism for the collection of delinquent taxes. Accordingly, the Committee recommends pursuit of the alternative.

As for how to achieve this alternative – how to prevent a Fifth Amendment taking in the first place – *Tyler* provides valuable guidance. This guidance comes in the form of the Supreme Court's endorsement of *Nelson v. City of New York*.[147] *Nelson*, to which the Supreme Court dedicates more than a page of analysis in *Tyler*, involved a Takings Clause challenge to New York City's foreclosure on property for unpaid water bills.[148] As noted in *Tyler*, the New York City ordinance at issue provided a mechanism by which a debtor could claim the surplus proceeds of the sale of his property.[149] The *Tyler* Court emphasized that this mechanism served as the basis for the *Nelson* decision:[150] "Because the New York City ordinance did not 'absolutely preclud[e] an owner from obtaining the surplus proceeds of a judicial sale,' but instead simply defined the process through which the owner could claim the surplus, we found no Takings Clause violation."[151] *Nelson* thus stands for the principle that "no federal Takings claim will exist when there is a statutory path to recover the surplus proceeds".[152]

Recovery of surplus proceeds, of course, requires some form of foreclosure sale. As the *Tyler* Court notes regarding the *Nelson* debtors: Had they followed the appropriate procedures, "a 'separate sale' could have taken place 'so that they might receive the surplus.'"[153] For the reasons discussed in Part II(D), this "separate sale" is crucial to effective (and efficient) compliance with *Tyler*. Accordingly, the Committee recommends the adoption of what it colloquially refers to as a "pure lien" model for tax sales.

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[144] *Kirby*, 467 U.S., at 10 (1984).
[145] *Id.*
[146] *See, e.g.*, *U.S. v. 0.969 Acres of Land*, 7:20-cv-00402 (S.D. Tex. 2022); *U.S. v. 320.0 Acres of Land*, 605 F. 2d 762 (5th Cir. 1979); *U.S. v. 79.95 Acres of Land*, 459 F. 2d 185 (10th Cir. 1972).
[147] 352 U.S. 103 (1956).
[148] *Tyler*, 598 U.S., at 644. *See also Nelson*, 352 U.S., at 104-105.
[149] *Tyler*, 598 U.S., at 644. *See also Nelson*, 352 U.S., at 110.
[150] *Tyler*, 598 U.S., at 644.
[151] *Tyler*, 598 U.S., at 644 (quoting *Nelson*, 352 U.S., at 110). In *Nelson*, the owners challenging the ordinance failed to avail themselves of the statutory mechanism that would have allowed them to recover the surplus proceeds. *Nelson*, 352 U.S., at 110. Because they "did not take advantage of this procedure," the Supreme Court held that they had "forfeited their right to the surplus." *Id.*
[152] *Rafaeli*, 505 Mich., at 453 (2020). *See also Coleman through Bunn v. District of Columbia,* 70 F. Supp. 3d 58, 80 (D.D.C. 2014) ("*Nelson* makes clear that a Takings Clause violation regarding the retention of equity will not arise when a tax-sale statute provides an avenue for recovery of the surplus equity"); *Wasiluk v. City of Oneida*, 2022 WL 3716279, *12 (D. N.D.N.Y. 2022) (slip); *Hall v. Meisner*, 51 F. 4th 185, 196-197 (6th Cir. 2022).
[153] *Tyler*, 598 U.S., at 644.

ii. "Pure lien" model

As the term is used in this report, a "pure lien model" for tax sales[154] contemplates two sales: first, the sale of the lien for the collection of taxes (the tax sale); and second, the sale of the property for enforcement of the lien (the foreclosure sale).[155] The latter of these serves as the "separate sale" referenced in *Nelson* – the sale by which the debtor's right to the surplus value is protected. In concert with the addition of this procedural mechanism, the pure lien model treats the rights conveyed at tax sale as effectively identical to any other lien or mortgage right, enforceable by foreclosure pursuant to the existing rules of the Code of Civil Procedure (subject to certain modifications).[156] Not only does this reinforce an otherwise novel procedure with the support of familiar and well-established rules and settled jurisprudence, it also serves to protect the debtor's right to the surplus and ensure compliance with the rule that a foreclosing party "c[an]not use the toehold of the tax debt to confiscate more property than [i]s due."[157] Because a lien merely "entitles [the holder] to be preferred before other creditors" in the application of sale proceeds to satisfaction of the debt it secures,[158] and "become[s] extinct … [b]y the extinction of debt which gave birth to it"[159] – after which the sheriff "pay[s] to the debtor whatever surplus may remain"[160] – the right itself self-protects against the confiscation of any surplus value. By definition, the bounds of a lien right are coterminous with *Tyler*'s restrictions on recovery in tax foreclosure.

In the interest of assuaging all possible concerns, it is worthwhile to address the reason that this model – and, in general, the return of surplus proceeds to the debtor – suffices to guarantee compliance with *Tyler*. First, recall that, for the purposes of Takings Clause analysis, property is valued according to the price "a willing buyer would pay in cash to a *willing seller* at the time of the taking."[161] By contrast to this hypothetical voluntary sale, "a foreclosure sale is not an arms length [sic] transaction involving a willing buyer and a willing seller" and thus "is not evidence of

[154] The Committee uses the term "pure lien" model, as opposed to merely "lien model," in recognition of the fact that many states' tax sales statutes – Louisiana's included – somewhat misleadingly refer to the rights conveyed at tax sale as "lien" rights. *See, e.g.*, R.S. 47:1993(G). While these rights are perhaps comparable to a lien in the sense that they have the effect of "securing" payment of a debt, the label of "lien" is not substantively accurate. For example: Whereas Louisiana tax sale rights ultimately "mature" into *ownership*, a "lien" as traditionally understood simply allows the holder to have the proceeds of the sale of the underlying property applied to the satisfaction of the debt secured, in preference to other creditors. *Cf.* Civil Code Article 3186. In recognition of these distinct concepts (and the accuracy of the latter), the modifier "pure" is sometimes used in this report. It should further be noted that the proper Civilian terminology for this right is "privilege." Nevertheless, this report will use the term "lien" for ease of use and conformity with existing statutes and draft revisions. There is no meaningful distinction between the concepts implied by these terms. *See* R.S. 10:9-102(d)(10) ("'Lien' means a privilege …").

[155] Note that the restructuring of this framework is considered in Part IV(C), *infra*. In particular, this latter section examines the possibility of allowing for conclusion of the process without a second sale, in circumstances where the tax debtor fails to avail himself of the statutory procedure for claiming surplus. While the "pure lien" label may not be substantively accurate as applied to this alternative framework, it is nevertheless the case that the two operate identically in all respects up until the enforcement proceeding – and, even then, they operate identically unless the debtor fails to timely request surplus.

[156] These "modifications" are discussed in greater detail in Part IV(B)-(D)*, infra*.

[157] *Tyler*, 598 U.S., at 639.

[158] Civil Code Article 3186. *Cf.* n.154, *supra*.

[159] Civil Code Article 3277.

[160] Code of Civil Procedure Article 2373.

[161] *Kirby*, 467 U.S., at 10 (1984) (emphasis added).

fair market value."[162] On this basis – that the price obtained does not reflect the fair market value of the underlying property – one might express concern that the jurisprudential definition of just compensation renders a foreclosure sale definitionally insufficient to protect the interests recognized in *Tyler*. Fortunately, however, this does not impugn the constitutionality of the foreclosure-sale model. Although a hypothetical taking of the debtor's interest in the surplus value of the underlying property may (or may not) require compensation in excess of the surplus from the foreclosure sale, this is not the hypothetical taking being committed here. Rather, under the foreclosure-sale model, the relevant property interest – the one allegedly being "taken," the one in relation to which "just compensation" is calculated – is the debtor's interest in the *surplus proceeds of the foreclosure sale*. Whatever difficulty might exist in determining (and paying) "just compensation" with respect to a taking of the actual real estate is irrelevant to the constitutionality of the foreclosure-sale model: The fair market value of one dollar is one dollar. Thus, the return of the surplus proceeds to the debtor will, by definition, be sufficient to prevent violation of the Takings Clause.[163]

Notably, this logic has been endorsed jurisprudentially. The Michigan Supreme Court, for example, has explicitly addressed the issue in a case involving the same right at issue in *Tyler*.[164] In their words:

> [T]he property 'taken' is the surplus proceeds from the tax-foreclosure sale of plaintiffs' properties to satisfy their tax debts. While it could be said that plaintiffs have received at least some compensation, given that they are no longer liable for their delinquent taxes, satisfaction of plaintiffs' tax debts cannot constitute just compensation for the value of the property taken, i.e., the *surplus* proceeds. Therefore, plaintiffs are entitled to the value of those surplus proceeds. … We reject the premise that just compensation requires that plaintiffs be awarded the fair market value of their properties[.] … [T]his would run contrary to the general principle that just compensation is measured by the value of the property *taken*. In this case, the property improperly taken was the surplus proceeds, not plaintiffs' real properties. … Accordingly, when property is taken to satisfy an unpaid tax debt, just compensation requires the foreclosing governmental unit to return

[162] *79.95 Acres of Land*, 459 F. 2d, at 187.
[163] Notably, there is no need to identify the precise mechanism by which this model avoids violation of the Takings Clause. Where the property interest at issue is an interest in money – that is, the same form of property with which "just compensation" is paid – there is no meaningful distinction between ensuring that a taking is justly compensated and preventing a taking from occurring altogether. In *Tyler*, for example, the Supreme Court determined that the county's retention of the $25,000 surplus was a taking. "Just compensation" for the taking of $25,000 is, obviously, $25,000. If, hypothetically, the county had returned the $25,000 to the debtor before litigation, would this have represented the payment of just compensation for the taking of the $25,000? Or would it have meant that no taking had occurred in the first place? On a metaphysical level, perhaps, the answer may be relevant – but for the purposes of determining whether the Takings Clause has been violated, there is no difference.
[164] *See Rafaeli*, 952 N.W. 2d 434.

> any proceeds from the tax-foreclosure sale in excess of the delinquent [obligation] – no more, no less.[165]

The Sixth Circuit has also considered and dismissed the argument that a tax debtor is entitled to the fair market value of the underlying property in these circumstances, emphasizing that "neither this court nor the Supreme Court has ever held that a plaintiff whose property is foreclosed and sold at a public auction for failure to pay taxes is entitled to recoup the fair market value of the property."[166] Rather, the debtor "is entitled to the amount of the sale above his debt and no more."[167] This interpretation also jibes with the Supreme Court's own framing of the question presented in *Tyler* – whether "the *money remaining* after [the debtor's] home was seized and sold … is property under the Takings Clause".[168] Furthermore, this framing was not merely incidental: When presented with a contrary stance in oral arguments, Justice Sotomayor criticized this theory harshly, characterizing it as "a much more radical position" under which "the state is effectively required to become the seller's real estate agent."[169]

Importantly, this issue highlights not just the merits of the pure-lien model but also the difficulties associated with alternative frameworks. For these reasons, the Committee recommends the adoption of this so-called pure-lien model.

III. Consensus Revisions

In pursuit of both compliance with *Tyler* and resolution of the issues identified in Senate Resolution No. 40, the Committee has adopted a number of suggested revisions throughout the course of its work. The thrust of these revisions, and of the Committee's recommended tax sales model generally, is described in detail in this Part. These revisions are, unless otherwise indicated, strictly those on which the Committee was able to reach a clear consensus; matters that produced a fundamental disconnect, or that the Committee determined were primarily policy-based or were otherwise inextricably linked to policy considerations, are detailed in Part IV, *infra*.

A. Generally, Overview

With respect to the broad, overarching shape and structure of the Committee's recommended tax sales model, not much difference exists in relation to present law. Both present law and the Committee's recommended framework provide for a tax sale to be held ninety days after delinquency,[170] followed by a redemption period during which the debtor is entitled to satisfy

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[165] *Id.* at 465.
[166] *Freed v. Thomas*, 81 F. 4th 655, 658 (6th Cir. 2023).
[167] *Id.* at 659.
[168] *Tyler*, 598 U.S., at 638.
[169] Amy Howe, *Justices appear likely to side with homeowner in foreclosure dispute*, SCOTUSblog (Apr. 26, 2023), https://www.scotusblog.com/2023/04/justices-appear-likely-to-side-with-homeowner-in-foreclosure-dispute/.
[170] R.S. 47:2153(A)(1)(a).

the debt,[171] after which the certificate holder is entitled to enforce the tax sale right via suit[172] and a subsequent-but-related sale of the property by public auction;[173] similarly, both models contemplate some form of both pre-sale[174] and post-sale notice to the debtor.[175] [176] In particular, the Committee recommends the following overarching structure:

1. Delinquency date: The tax bill becomes delinquent on January 1st.

2. Pre-sale notice: Once taxes become delinquent and before tax sale, the debtor is notified of the delinquency, the impending tax sale, and the potential impacts thereof.

3. Tax sale: Ninety days after the tax bill becomes delinquent, the municipality may hold a tax sale for collection of the delinquent obligation.

4(a). Redemption period: Beginning after the tax certificate is recorded, the debtor is entitled to satisfy the debt during the pendency of the redemption period.

4(b). Post-sale notice: Between 90 and 180 days prior to filing suit, the certificate holder is required to send notice to the debtor, apprising the debtor of the delinquency, the right to redeem, and the impending foreclosure.

5. Suit for recognition of the lien: Once three years[177] have expired from the recordation of the certificate, the certificate holder may file suit.

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[171] Louisiana Constitution Article VII, Section 25(B)(1). *See also* R.S. 47:2122(10) and 2156(B)(1)(a) and (C)(1). Notably, it has been suggested that the term "redemption" is substantively inaccurate as applied to a "pure lien" model. Under a pure lien model, the "event" that would serve to reinstate the full interest of the owner-debtor is – like under current law and other models – the satisfaction of the outstanding tax debt. Under models other than the pure-lien model, however, the satisfaction of the debt has the effect of rolling back (i.e. "redeeming") the tax sale. Under the pure lien model, no such rollback would occur; rather, the "redemption" payment would be akin to the payment of any other secured debt, and no special terminology is necessary. In any event, the necessary action and the consequent effects are identical under either framework; thus, for ease of reference, the report will continue to reference the satisfaction of the debt as "redemption." Relatedly, most (if not all) states that employ a pure lien system still employ this terminology. While unnecessary and arguably inaccurate, the use of this label may lend the ultimate statutory scheme a measure of familiarity.

[172] *See* R.S. 47:2266.

[173] *See* Part II(C), *supra*; Part III(B), *infra*.

[174] R.S. 47:2153.

[175] R.S. 47:2156.

[176] It should be noted that, while current law purports to make both pre- and post-sale notice mandatory, courts have concluded that the failure to effect one or the other has no consequence, so long as some form of notice is effected at some point prior to deprivation of property. *See Central Properties*, 225 So. 3d, at 443 ("[W]e find the court of appeal erred in finding the failure of the tax collector, *though mandated to do so* by La. Rev. Stat. 47:2156(B), to mail or attempt to mail post-sale written notice of the tax sales to the mortgagee required the tax sales to be set aside") (emphasis added).

[177] The specific length of this period has been left open by the Committee. *See* Part IV(D)(i). Nevertheless, three years may be inserted in places simply for ease of reference.

6. Execution of judgment: Once the court renders judgment recognizing the lien, the certificate holder is entitled to execute the judgment via judicial sale.[178]

7. Recovery of surplus: After the property has been sold, the debtor is entitled to recover any surplus proceeds of the sale.[179]

8. Prescription: If suit has not been filed prior to the expiration of five years from the recordation of the certificate, the certificate holder's rights prescribe and the lien is extinguished.

Notwithstanding the aforementioned resemblance to present law, the Committee recommends a number of revisions to present law within the above framework.

The first and perhaps most pervasive of these is nonsubstantive in nature: namely, consistent use of the term "statutory impositions" throughout the statutes. Although the statutory scheme for tax sales is already applicable to all statutory impositions[180] – a term broader than the nonspecific term "taxes"[181] – many provisions in current law inaccurately reference "taxes."[182] Thus, to eliminate inconsistency and avoid ambiguity with respect to the intended application of these provisions,[183] the Committee recommends that "taxes" (and, in some cases, "ad valorem taxes") be replaced with "statutory impositions" where appropriate.[184] In addition to this

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[178] *Cf.* Part IV(B), *infra*.
[179] *Cf.* Part IV(C), *infra*.
[180] R.S. 47:2128. This statute provides that "[f]ailure to pay the statutory impositions in addition to the ad valorem taxes shall cause the immovable property to be subject to the same provisions of law that govern tax sales of immovable property."
[181] *See* R.S. 47:2122(14) ("'Statutory imposition' means ad valorem taxes and any imposition *in addition to* ad valorem taxes that are included on the tax bill sent to the tax debtor") (emphasis added). In other words, any amount due as part of the tax bill is a "statutory imposition." These amounts typically include charges such as code-enforcement fines, imposed for violations such as failure to "cut grass and obnoxious weeds" on the property. *See* R.S. 33:1236(21)(a)(i) (allowing municipalities to add these charges "to the annual ad valorem tax bill of the property involved if the charges remain unpaid"). Similar statutes are scattered throughout Title 33. *See, e.g.*, R.S. 33:2575, 3986, 4753, 4754, 4766.
[182] *See, e.g.*, R.S. 47:2127(B) (providing for the accrual of "interest on all *ad valorem taxes*" but making no mention of statutory impositions"). While one might argue that R.S. 47:2128 renders unambiguous the applicability of such provisions to statutory impositions even notwithstanding the use of the more limited term "taxes", there are two strong arguments that ambiguity persists: First, R.S. 47:2128's reference to the "provisions of law that govern tax sales of immovable property" can very reasonably be read as referring specifically to R.S. 47:2151 et seq. – that is, Subpart B ("Immovable property") of Part III ("Tax Sales and Redemptions") of Chapter 5 of Title 47 – and thus excluding statutes such as R.S. 47:2127, which appears in Part II ("Payment and Collection"). And second, the use of "taxes" is not consistent throughout; many provisions already use the term "statutory impositions". *Cf.* R.S. 47:2151 (referencing "the sale of the property to enforce collection of delinquent *taxes*") (emphasis added); R.S. 47:2153 (addressing circumstances where "the tax debtor has not paid all the *statutory impositions*") (emphasis added). In fact, some statutes are inconsistent even *internally*. *See, e.g.*, R.S. 47:2154 (referencing, in Subsection A, "the property … upon which the delinquent taxes are due" but later providing, in Subsection C, that the tax sale "price shall be the amount of statutory impositions due on the property, costs, and interest). Accordingly, the Committee views this as a legitimate textual inconsistency.
[183] Notably, the applicability of the full statutory scheme – including those provisions that reference only taxes, such as provisions regarding the accrual of interest – to all statutory impositions is consistent with industry practice.
[184] It is important to note that certain uses of "tax" and "ad valorem tax" should be maintained. For example, R.S. 47:2135 through 2137 provide rules for the proration of taxes relative to acquisitions and dispositions of property by tax-exempt entities. These provisions are intended to address *taxes* specifically. Thus, the Committee recommends

clarificatory change, the Committee recommends a number of more significant, substantive modifications of the law governing tax sales. These recommendations include changes to the following substantive aspects of present law: (1) the underlying nature of the rights conveyed at tax sale; (2) the notice requirements and additional mechanisms calculated to provide pre-deprivation notice to the debtor; (3) the timeline for maturity and enforcement of tax sales rights; (4) the mechanism for enforcement of tax sales rights. These recommendations are described in further detail below.

B. Change 1: Future Ownership versus Lien Right

The most significant substantive change to current tax sales law recommended by the Committee pertains to the nature of the right conveyed at a tax sale. In particular, the Committee recommends that present law's sale of conditional future fractional co-ownership at tax sale be replaced with the sale of a "true" or "pure" lien or mortgage right.[185] The general logic underlying this recommendation is that a lien right, by its nature, both guarantees compliance with *Tyler* and better suits the purpose it is intended to serve. Whereas present law essentially uses a (future) co-ownership interest to simulate security for the tax debt, the Committee's recommended model uses *actual security*[186] to secure the debt. This alignment of substance and function will enhance clarity, promote predictability, simplify rules for enforcement, and limit the potential for undesirable outcomes.

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that their present use of "taxes" be either retained or supplemented by the addition of the modifier "ad valorem" where appropriate, for the sake of clarification.

[185] Note that the proper Civilian term for a lien right is "privilege." *See* Civil Code Article 3186. More specifically, "the term 'privilege' is … synonymous with the term 'statutory lien,' which is used outside of Louisiana." *In re Green*, 793 F. 3d 463, 470 (5th Cir. 2015); Michael H. Rubin, *Ruminations on the Louisiana Private Works Act*, 58 La. L. Rev. 569, 572 (1998) ("Louisiana privileges are non-consensual security devices"). Nevertheless, in the interest of maintaining consistency with the terminology familiar to practitioners in this area both in Louisiana and in other states, this report generally uses the term "lien" in lieu of "privilege." Moreover, the term "lien" as used in this report is largely interchangeable with mortgage and refers to the right, upon default on the secured obligation – in this case, the debtor's failure to redeem prior to the expiration of the redemption period – to cause the property to be sold and the proceeds of the sale applied to the satisfaction of the debt in preference to all other creditors. *Cf.* Civil Code Article 3279 (describing the rights of a mortgagee). Insofar as a privilege (lien) on immovable property can be said, as a general matter, to differ from a mortgage on immovable property, those differences are immaterial in the present context. For example, one distinction between mortgage and privilege is the manner in which they (typically) arise; because there is no dispute as to the manner in which the present right arises, this distinction is inconsequential to the present discussion. *See* R.S. 47:1993(G). This is also true regarding the ranking of mortgages and privileges. The precise distinction between a privilege and a mortgage right – in particular, "the juridical nature of privileges and their classification as personal or real rights has prompted exhaustive discussion and controversies in the literature of civil law." Notwithstanding the difficulty of categorizing and describing the nature of privileges *generally*, it is the case that "special privileges on immovables … function as veritable mortgages." Yiannopoulos, *Real Rights in Louisiana and Comparative Law*, 23 La. L. Rev. 161, 223-224 (1963). Indeed, "the function of a recorded privilege on immovables is very similar to that of a real mortgage and could be regarded as a real right." Because the function and resulting classification – as a real right – of the privilege (or mortgage) with which this report is concerned are clear and unambiguous under the proposed statutory scheme, the use of the colloquial term "lien" as a label should not produce any substantive harm or confusion.

[186] Civil Code Article 3136, cmt. (a) ("[P]rivileges … are a form of security"). *See also* Civil Code Article 3138 ("Kinds of security include suretyship, privilege, mortgage, and pledge").

Under present law, the rights conveyed at tax sale are referred to by the term "tax sale title."[187] More specifically, the "tax sale [] convey[s], and the purchaser [] take[s], tax sale title in the undivided interest bid in the entirety of the property".[188] The term "tax sale title," however, is defined circularly, to essentially no effect, as meaning "the set of rights acquired by a tax sale purchaser".[189] Looking beyond statutory definitions, substantive provisions instruct that this "set of rights" does not include any immediate ownership interest,[190] nor does it include "the right of possession" or "to make improvements or charge rental or lease payments to the owner or occupants", as existing interests in the property remain unaffected during the pendency of the redemption period.[191] If, however, redemption is not made before the expiration of this period, then "tax sale title transfers to its holder ownership of the tax sale property".[192] Stated another way: By paying the tax debt on behalf of the debtor via the purchase price at the tax sale, the tax sale purchaser becomes the obligee of the delinquent tax obligation,[193] and transfer of ownership to the tax sale property is conditioned on the debtor's "defaulting" on the debt now owed to the tax sale purchaser:[194] If the outstanding obligation is not satisfied by timely payment of the redemption price, it is instead satisfied by transfer of the undivided ownership interest bid at the tax sale.[195]

In sum, tax sales under present law convey something *resembling* a lien right. Indeed, the right acquired by a tax sale purchaser is a real right[196] that essentially secures the payment of a debt:[197] Upon "default," judgment is obtained[198] and the "security" right is "enforced" in satisfaction of the underlying obligation. Notwithstanding this resemblance, however, the bundle of rights encompassed by tax sale title is *not*, in fact, a lien. A lien (or a mortgage) merely affords

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[187] R.S. 47:2122(17) ("'Tax sale' means the sale … of tax sale title to property"); 2121(C)(1) ("A tax sale confers on the tax sale purchaser … only tax sale title").
[188] R.S. 47:2153(B)(5). A tax sale with a winning bid of 1%, for instance, conveys tax sale title to a 1% undivided interest in the property.
[189] R.S. 47:2121(22).
[190] R.S. 47:2121(B).
[191] R.S. 47:2121(B)-(C).
[192] R.S. 47:2121
[193] *See* R.S. 47:2243 (providing for remittance of the redemption payment to the tax sale purchaser). The Committee recommends the addition of a defined term encompassing this obligation for ease of reference and clarity with respect to the amounts making up the overall debt. For instance: "'Delinquent obligation' means the obligation to pay all statutory impositions that are not paid by the deadline date, together with any interest, costs, penalties, and other amounts that may accrue in accordance with the provisions of this Chapter." The delinquent obligation is secured by the tax lien described in the present section of this report.
[194] R.S. 47:2121(B)-(C), 2266.
[195] *See* R.S. 47:2157(E) (providing for the "cancellation, termination, release, or erasure of record of all statutory impositions"). *Cf.* R.S. 47:2242, cmt. ("[R]edemption restores title as it was prior to the tax sale").
[196] *See* Yiannopoulos, 23 La. L. Rev., at 228-229 (characterizing a real right as one that "follow[s] the property … into the hands of a third person"); R.S. 47:2151 (providing that a subsequent "sale … or other alienation … of property . . . shall not affect the taxes … or the [tax sale] to enforce collection of delinquent taxes").
[197] *Cf.* Civil Code Articles 3186, 3280. *See also* Civil Code Article 3136 (defining "security").
[198] *Cf.* R.S. 47:2266 (providing for judgment "quieting and confirming the title [in the tax sale property] and the full ownership interest therein"); Code of Civil Procedure Article 3722 (providing, as a prerequisite to "enforc[ing] a conventional mortgage by an ordinary proceeding," that the mortgagee "must first obtain a judgment"). Although Article 3722 deals strictly with conventional mortgages enforced by ordinary process, the requirement of a judgment applies to all mortgages. *See* Code of Civil Procedure Article 3741 (providing for enforcement of legal mortgage "after judgment on the original obligation has been obtained"); Civil Code Article 3300 ("A judicial mortgage is created by filing a judgment with the recorder of mortgages"). Similarly, enforcement of mortgage through executory process requires a confession of judgment. Code of Civil Procedure Article 2631.

the holder the right to cause the property to be sold and the debt satisfied from the proceeds of the sale.[199] By contrast, Louisiana's tax sales statutes provide for some innominate form of quasi-security under which the obligation is secured by transfer of *ownership of the property itself*,[200] with any subsequent sale and recovery occurring (semi-)independently of this statutory regime.[201] Nonetheless, these rights are often characterized as or conflated with lien rights. For instance, present law provides that the delinquent obligation for payment of taxes acts as a lien or mortgage on the subject property.[202] This characterization is "well-recognized" in the jurisprudence.[203] Even the Louisiana Supreme Court has opined that at a Louisiana tax sale "it is the *tax lien* that is purchased in the form of a tax sale title".[204]Iowa and Rhode Island, the other two states that employ tax sales procedures analogous to Louisiana's, likewise refer to this right as a lien.[205] Whether a result of actual substantive conflation, mere overuse of casual shorthand, or both (or neither), this imprecise labeling has produced – or, alternatively, *is the product of* – a body of law rife with confusion.

Much of this confusion is centered on enforcement. Indeed, the substance of Louisiana tax sales rights belies their function. In lieu of the monetary recovery guaranteed by the lien rights these "quasi-liens" resemble,[206] the delinquent tax obligation is satisfied by the transfer of (ownership of) the tax-sale property itself. But the "property" transferred to the tax sale purchaser is not actual *corporeal property* but a fractional undivided co-ownership interest,[207] often as small as 1%.[208] In practice, the difficulty of deriving functional value from the actual *use* of this "property" makes partition of the property (by licitation) a necessary "extra step" in the overarching tax sales process.[209] The result is a system that provides for enforcement of a debt via forced sale of property but does so in a more roundabout and less precise manner than a typical

[199] Civil Code Articles 3186, 3280.
[200] *Central Properties*, 225 So. 3d, at 449 ("[I]t is the tax lien that is purchased in the form of a tax sale title, albeit with future rights of ownership after … the expiration of the redemptive period"). *Cf.* Civil Code Articles 2569 ("A sale with right of redemption is a simulation when the surrounding circumstances show that the true intent of the parties was to make a contract of security"), 2027, cmt. (c) ("[A] simulated sale with right of redemption may be a valid security contract"), 3138, cmt. (c) (citing as an unenumerated "form[] of security … a pignorative contract in the form of a sale with a right of redemption in favor of a seller who remains in possession").
[201] *See* R.S. 47:2157(E) (providing for cancellation of the underlying debt upon expiration of the redemptive period).
[202] R.S. 47:1993(G). *Cf.* R.S. 47:2130(L)(4) (providing that upon payment of an outstanding tax debt "the tax debtor may cancel the lien").
[203] *Stow-Serge v. Side by Side Redevelopment, Inc.*, 302 So. 3d 71, 76 (La. App. 4 Cir. 2020).
[204] *Central Properties*, 225 So. 3d, at 449 (emphasis added).
[205] RI Gen. Laws, §44-9-1 ("Taxes assessed … shall constitute a lien on the real estate"); Iowa Code Ann. § 446.16 ("The delinquent tax lien transfers with the tax sale certificate").
[206] *See* Civil Code Articles 3186, 3277 (describing the nature of and rights afforded by a privilege); Civil Code Article 3279 (describing the rights encompassed by a mortgage). Although a mortgage can secure the performance of an obligation other than for payment of money, it does so by securing the amount of damages that the mortgagee might suffer from the breach. "Since the right of the mortgagee is limited to the seizure and sale of the mortgaged property, it follows that his recourse must be measured by some amount of money." Civil Code Article 3294, cmt. In other words, a mortgagee's remedy is monetary recovery in all cases.
[207] Civil Code Article 812, cmt. (c) ("[T]he share of a co-owner in a thing held in indivision is an incorporeal").
[208] Data compiled by Committee members indicate that the most common winning bids are 1% and 100%, both of which occur – or occurred, in 2019 – similarly frequently.
[209] *See* Civil Code Articles 807, 811. "Partition by licitation" is the mechanism by which property is partitioned when the property at issue is not readily susceptible to in-kind division. This mode of partition is effected by selling the property at public auction and thereafter distributing the proceeds to the co-owners in proportion to their fractional shares of co-ownership.

foreclosure. Whereas a lienholder's recovery from the proceeds of a typical foreclosure sale is directly dictated by the value of the underlying debt at the time of enforcement,[210] a tax sale purchaser's recovery from the proceeds of a partition sale – recovery for the value of the fractional interest acquired via tax sale and subsequent quiet-title suit – is (theoretically[211]) dictated by the value of the tax debt *at the time of the initial tax sale*, and even so only indirectly.[212] Because the actual tax obligation – at least, the tax obligation *under Title 47* – is satisfied via the transfer of ownership and thus (one would think) already extinguished, it stands to reason that any subsequent recovery would, at least theoretically, come pursuant to the general principles of co-ownership. (Notably, this is not clear.) At least by this logic, the tax sale purchaser is "entitled to reimbursement from the other co-owners in proportion to their [co-ownership] shares"[213] for subsequent years' taxes paid on the debtor's behalf. As for subsequent interest and penalty, however, the articles on co-ownership provide no specific recovery beyond the generally applicable imposition of judicial interest.[214] Accordingly, the aggregate of these amounts falls short of the total tax debt as calculated under Title 47.

If this measure of recovery seems illogical, that is because it *is* illogical, at least as a mechanism to "enforce" tax debts. Under the reasoning applied above, tax sale purchasers are forced to reroute their rights through a second, unrelated legal regime in an attempt to *approximate* this recovery. This is not, however, the reasoning typically applied. In lieu of strict adherence to the outcome dictated by either the co-ownership articles or Title 47, courts seemingly mix and match: The right to reimbursement for subsequent taxes stems from the Civil Code, but the amounts included in that reimbursement are still dictated (at least in part) by Title 47.[215] Furthermore, the necessary accounting becomes far more complex under the co-ownership regime. A 1% co-owner, for instance, is entitled to recover *99%* of taxes paid on behalf of another co-owner[216] – for which proper calculation requires repayment of the full, 100% amount, but as costs

[210] *See* Civil Code Article 3186 (describing privilege as a right to preferential payment of a debt); Civil Code Article 3282 (providing for enforcement of a mortgage "to the extent that [the mortgagee] may enforce any obligation it secures"). *See also* Civil Code Article 3288, cmt. (c) (noting that "a mortgage may secure … [the] running balance of the debtor's obligations outstanding from time to time"). *See also* Code of Civil Procedure Article 2373 (providing for distribution of the proceeds of a judicial sale by "first pay[ing] the amount due the seizing creditor").
[211] *See* Part II(C), *supra*.
[212] To clarify: The proceeds from a partition sale are "distributed to the co-owners in proportion to their shares." Civil Code Article 811. Therefore, the tax sale purchaser's share of these proceeds is attributable to the value of the interest acquired via tax sale (and the subsequent expiration of the redemption period). The undivided interest for which the tax sale purchaser paid at the initial tax sale is the same property for which the tax sale purchaser is *being paid* from the proceeds of the partition sale. Because this interest theoretically represents the "least amount of property", its value corresponds with the price paid at the initial tax sale. *See* Part II(C), *supra*.
[213] Civil Code Article 806. *See also* Civil Code Article 527, cmt. (b) ("[T]he notion of necessary expenses includes property taxes"), Code of Civil Procedure Article 4626 (providing for judgment ordering partition to order "reimbursement to a co-owner of the amount … for the payment of taxes on the property").
[214] *See* R.S. 9:3500 (providing for judicial interest "on all sums which are the object of a judicial demand"); R.S. 13:4202 (fixing the rates of judicial interest).
[215] In particular, courts award this reimbursement on the basis of the Civil Code rules for reimbursement of necessary expenses by co-owners, while determining the amount of those expenses – namely, the availability of the five-percent penalty and one-percent-per-month interest – by reference to the tax sales statutes.
[216] The 99% figure reflects the fact that 1% of the taxes would properly be considered the responsibility of a 1% co-owner.

of sale.[217] Predictably, this amalgamation of separate recoveries leads to seemingly strange results. In particular, Louisiana courts often (likely in a majority of cases) order repayment of the full tax debt, including year-one taxes – that is, the taxes forming the basis of the tax sale price; the purchase price for the undivided interest – to the tax purchaser *as costs of sale*.[218] Thus, the tax sale purchaser is reimbursed for the full amount of the debt, including the amount paid to acquire the undivided interest, after which the tax sale purchaser is *further* compensated for the sale value of his undivided interest. While this measure of recovery may appear erroneous on its face, given that it provides double compensation for the value of the undivided interest, at least some tax sale purchasers maintain that it is no mistake. The statutes, for their part, set out that the "filing of the affidavit [under R.S. 47:2157(D)] cancels all statutory impositions due prior to the recordation of the tax sale certificate since the purchase price paid was the amount of those statutory impositions".[219] This award does seem to reflect the most common outcome, though Louisiana courts have not addressed the issue directly. Interestingly, the issue is common to Iowa, whose courts *have* given guidance on point.[220] As one such court framed the issue:

> Adair, as a tenant in common,[221] … is entitled to contribution from co-tenants … for property taxes paid on the entire parcel after issuance of the tax deed. Adair's right of contribution does not, however, include the amount of taxes paid at the tax sale. Adair acquired its fractional interest by virtue of a valid tax deed, and has therefore received the benefit of the consideration paid at the tax sale. In other words, Adair got what it paid for. Adair cannot have it both ways. Adair is not entitled to both contribution for the amount of taxes paid at the tax sale and the fractional interest in the property acquired in exchange for that payment.[222]

This logic, at least, appears valid on its face. While Iowa's regime undoubtedly diverges from Louisiana's in certain respects, the source of the difference in outcome here is not readily apparent.

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[217] *Sharp v. Zeller*, 38 So. 449 (La. 1905). *See also Ainsworth v. Ainsworth*, 860 So. 2d 104 (La. App. 4 Cir. 2003) (discussing in greater detail the logic of *Sharp v. Zeller*). This seemingly roundabout accounting is necessary for two reasons: (1) The amount due, being a charge on the property rather than a personal obligation, cannot create personal liability beyond the (proceeds from the sale of the) property itself. Were it imposed after the distribution of each co-owner's pro rata share of proceeds, circumstances could arise under which a co-owner's liability for the taxes (or other necessary expenses) was greater than the amount of proceeds attributable to his co-ownership share. (2) Responsibility for the debt – a community debt attributable to a community asset – is shared by the co-owners in equal proportion to their fractional co-ownership shares. In order to properly apportion this responsibility, the full amount of taxes must be deducted from the aggregate total of the proceeds. This distribution of responsibility is perhaps easiest conceived of by considering the most logical outcome where the taxes are paid by someone *other than* one of the co-owners. In this case, it is easy to intuit that the taxes should be deducted "off the top" to reduce the overall pool of proceeds to be distributed amongst the co-owners; because the proceeds themselves are distributed according to the co-owners' proportional ownership, the distribution of a debt from the total pool reduces each co-owner's ultimate share proportionally by default. Thus, each co-owner would have paid their proportionate share. The same is true where the debt is paid by a co-owner.

[218] *See, e.g.*, EBR Suits Nos. C-671897, C-674600, 691497.

[219] R.S. 47:2157, cmt. (f).

[220] *See Adair v. Duwa*, 2004 WL 1161591 (Ct. App. Iowa).

[221] A "tenant in common" is analogous to a co-owner. *See Van Veen v. Van Veen*, 238 N.W. 718, 723 (1931) (defining tenants in common as those who hold property "by several and distinct titles, but by unity of possession").

[222] *Duwa*, 2004 WL 1161591, at *4.

Regardless of the "correct" outcome under Louisiana law, the notion that a matter so fundamental to the overall regime should be the subject of disagreement – as it was throughout Committee discussions – speaks to the general incongruity of fractional ownership as de facto security.

This is not, however, the sole uncertainty pertaining to the measurement of a tax sale purchaser's recovery: Perhaps in light of the apparent disconnection of the rules governing ultimate recovery from the rules governing the tax sales process, no clear statutory indication exists as to whether interest and penalty accruing pursuant to R.S. 47:2127 – part of the tax sales regime – are properly recoverable *at all* in this context.[223] Again, here, courts have been largely consistent in permitting tax sale purchasers to recover the full tax debt, including interest and penalties. Such an outcome is eminently reasonable; setting aside any potential double-counting of the initial tax sale price, the award of interest and penalty in accordance with the tax sales statutes, as opposed to the co-ownership statutes, (theoretically) produces the same recovery that would result had there been timely redemption.[224] And based on the conditions imposed for the effectivity of nullity judgments,[225] this seems to have been the intended outcome as well.

This intent is important, as it establishes the needlessness of the confusion described above. Indeed, insofar as it can be accurately said that the interest bid at tax sale legitimately represents "the least amount of property",[226] then this "intended" recovery is no different than a tax sale purchaser's recovery upon enforcement of a "true" lien right: Both result in the tax sale purchaser's recovery of the precise amount of the tax debt (including interest and penalties), together with any applicable costs.[227] And insofar as it *cannot* be said that the tax sale purchaser's undivided interest represents "the least amount of property" – that is, insofar as the value of the property does not align with the price paid to acquire it – then recovery either (a) falls short of making the tax sale purchaser whole (because the value of the property is less than the price paid); or (b) gives rise to

[223] *Cf.* EBR Suit No. C-706411 (answer contesting the demand for interest, costs, and penalty on this basis). *See also* EBR Suit No. C-707027 (awarding no subsequent interest, costs, or penalty where tax sale purchaser quieted title on a full 100% ownership interest). Notably, such amounts are typically claimed pursuant to the Civil Code co-ownership articles discussed *supra*; these articles do not, however, provide for the accrual of 1% interest per month or 5% penalty. Perhaps the strongest argument against the recovery of these amounts subsequent to the transfer of ownership is the outcome where a 100% tax certificate is sold. Recovery of these amounts in those circumstances would result in personal liability for property taxes beyond the loss of the property on which they were assessed – an incorrect result under established law. *See Mooring Tax Group, LLC v. James*, 156 So. 3d 1143 (La. 2014). There, the Louisiana Supreme Court discussed at length "the in rem nature of the obligation imposed by ad valorem real estate taxes", noting that it "has long recognized that taxes levied on real property are a charge laid exclusively upon the property assessed, and collectible only out of said property, and neither the owner of said property, nor any other property of his, is liable for said taxes."

[224] To clarify: If the undivided interest bid is indeed the "least amount of property" then this establishes that the value of the interest is (largely) equivalent to the value of the tax debt at the time of the tax sale (i.e. the tax sale price). Thus, when partition is ultimately effected, the tax sale purchaser's recovery will include: (1) the value of his undivided interest, which is theoretically equivalent to the tax debt at the time of the tax sale, and (2) all subsequent taxes paid, subsequent interest, and subsequent penalties. These are the same amounts included in the redemption price.

[225] *See, e.g.*, R.S. 47:2290(B) (requiring, as a prerequisite to the effectivity of a judgment declaring a redemption nullity, the payment of (a) all statutory impositions forming the basis of the initial tax sale, (b) all subsequent statutory impositions, (c) all costs, and (d) a five percent penalty and twelve percent per annum interest on all statutory impositions).

[226] *Cf.* R.S. 47:2153(B)(5); Louisiana Constitution Article VII, Section 25(A)(1); *Tyler*, 598 U.S., at 641.

[227] This calculation contemplates only singular compensation for the undivided interest.

an argument for violation of *Tyler*[228] by providing recovery *in excess of* the tax debt (because the converse is true). In other words: The primary difference between using a "pure" lien right and Louisiana's current quasi-lien right (aside from the *Tyler* issues discussed in Part II(C), *supra*), is that the latter injects potential ambiguity and complication into the enforcement process.

Nor is this ambiguity limited to the question of determining the extent of the tax sale purchaser's recovery. Indeed, Louisiana tax sales law is also unclear as to the precise *timing* of recovery. More specifically, there is conflicting guidance as to whether judgment in a quiet-title suit under R.S. 47:2266 *effects* the transfer upon its issuance or merely *confirms* the transfer that has already occurred automatically by operation of law upon expiration of the redemption period. R.S. 47:2121(C), which describes the concept and effects of tax sale title, states that if there is no timely redemption "then *at the termination of the redemptive period*, tax sale title transfers to its holder ownership of the tax sale property".[229] This position finds further support in Subsection D of the same Section[230] and in the legislative commentary to the 2008 revision, which instructs that "[i]t is the giving of notice and the passage of time that converts tax sale title to … full ownership".[231] By contrast, R.S. 47:2266 – in providing guidelines for instituting a quiet-title suit – seems to contemplate that the transfer has not yet occurred at the time suit is filed. In particular, this Section refers to action being brought against the "parties whose interests the petitioner *seeks to be terminated*."[232] The Louisiana Supreme Court has endorsed this latter view, albeit somewhat obliquely, characterizing a tax debtor whose redemption period had terminated two years prior as "the 100% property owner at the time this action to quiet title was instituted".[233] Unfortunately, the precise circumstances of the case, and the precise analytical process reflected in the opinion, render it difficult to discern whether this principle was relied upon or even consciously considered by the court.[234] While most appellate decisions appear to accord with the Louisiana Supreme

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[228] *See* Part II(C), *supra*

[229] R.S. 47:2121(C) (emphasis added).

[230] R.S. 47:2121(D) (referring to "[t]he transfer *at the end of the redemptive period* of the ownership of [the] property") (emphasis added). *But see* R.S. 47:2121(B) ("No tax sale shall transfer or terminate the property interest … until … both the redemptive period *and* any right … to assert a payment or redemption nullity under R.S. 47:2286 have terminated"). Notably, the right to assert a nullity effectively survives until judgment is rendered quieting title. It is, however, possible to notify a tax sale party of the right to assert a nullity during the pendency of the redemptive period, such that the right to bring such action is temporally coterminous with the right to redeem, at least theoretically. *See* R.S. 47:2157(A) and cmt. (b). Practically speaking, the nullity action component of this notice is by definition ineffectual in most cases: On the one hand, the sending of this notice defeats a claim of redemption nullity even without the information regarding nullity actions; on the other hand, any nullity action presupposes, as a necessary fact, the lack of this notice, so such action will always be susceptible to being brought in a suit under R.S. 47:2266, should a tax sale party wish to bring it. There are, of course, other nullity actions that can be foreclosed via this notice.

[231] R.S. 47:2123, cmt. (b).

[232] R.S. 47:2266(A)(1) (emphasis added).

[233] *NAR Solutions, Inc. v. Kuhn*, 354 So. 3d 1176, 1178 (La. 2022).

[234] In particular, this case was centered on an alleged lack of notice to individuals who were previously co-owners of the tax sale property along with the aforementioned "100% property owner" but had since transferred their ownership shares to that owner. At the time of the tax sale, the property had been co-owned by three siblings. More than three years after the sale was recorded – that is, after the expiration of the redemption period – two of the siblings transferred their interests to the third, against whom the quiet title action was eventually brought as the "current" 100% owner. This defendant failed to take timely action to raise any claim for nullity, resulting in default judgment declaring the tax sale purchaser the 100% owner of the property. In light of an apparent lack of pre-sale notice to the two former co-owners, it seemed that the court would finally be tasked with answering the ever-elusive question of whether a lack of pre-sale notice is fatal to the validity of a post-2008 revision tax sale – and, antecedent to that question, would have to provide guidance regarding the timing of transfer. Nevertheless, the court seemingly sidestepped these issues,

Court's (apparent) perspective – including one in which the Supreme Court denied writ[235] at least some other Louisiana courts seem to have reached the opposite conclusion (perhaps also unwittingly) even after the Supreme Court's statement on the matter.[236] The Committee was similarly unable to reach a definitive conclusion.

This represents yet another enforcement-related ambiguity inherent in Louisiana's current tax sales scheme. As with the prior issues, this uncertainty is also resolved by shifting to a lien system: Because a lienholder's recovery is entirely dependent upon execution via seizure and sale – for which judgment is a necessary prerequisite – the finality of the process is clear in all cases. Moreover, the enforcement process, the timeline for enforcement, and the substance of the rights being enforced under a "pure lien" model are all well-established and familiar to courts. Whereas the current statutory scheme "treats a tax sale as a sui generis concept,"[237] a lien system is supported by a well-settled body of jurisprudence.

Even beyond newly imported jurisprudence, the extent to which adhering more closely to procedures for "typical" foreclosures will make the enforcement process clearer and more familiar to courts represents another improvement upon present law that would result from the lien model contemplated by the Committee. Moreover, a not-insignificant portion of the uncertainty surrounding tax sales derives from the use of ambiguous, inconsistent, and ultimately misleading terminology to describe the sui generis tax sale. Present law, for example, gives the following instruction regarding the conduct of a tax sale: "On the day of the sale, the tax collector *shall sell the portion of the property*".[238] This same misrepresentation is memorialized in the Constitution of Louisiana, which makes reference to "[t]he property sold" and the "sale of property for taxes", among other similar phrases.[239] Although the "principles" Section sets out that the process

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relying instead on the nature of the evidence provided by the tax certificate. In particular, because the tax certificate stands as prima facie evidence of the validity of the tax sale and the regularity of all related proceedings – even where the certificate did not list all of the proper parties as owners – the court held that the defendant's failure to raise a nullity claim meant that the presumption of regularity stood with respect to the tax sale's effect on the unnamed co-owners; thus, the court reinstated the district court's judgment confirming the tax sale purchaser as the 100% owner of the property. Theoretically, such holding must presuppose tax debtors' retention of their interests until judgment is granted quieting title: If title transferred immediately upon expiration of the redemptive period, then the *Kuhn* co-owners' purported transfer of their interests to their third co-owner would have come *after* those interests had been terminated and thus had no effect. In that case, the tax sale purchaser would still be the 100% owner (in light of the automatic transfer at three years), but title would only have been quieted as to the defendant's 50% interest; the remaining 50% interest would still be subject to surviving causes of action for nullity. Notably, though, the court's opinion does not even acknowledge this issue.

[235] *See Cooley v. Williams*, 358 So. 3d 127 (La. App. 4 Cir. 2023), *writ denied*, 358 So. 3d 978 (Mem) (La. 2023). *See also, e.g.*, *LPR, L.L.C. v. Naquin*, 319 So. 3d 369, 376 (La. App. 1 Cir. 2021); *Libertas Tax Fund I, LLC v. Laiche*, 340 So. 3d 236, 244 (La. App. 1 Cir. 2021). *But see Strategic Capital Holdings, LLC v. Bennett*, 366 So. 3d 255 (La. App. 4 Cir. 2022) (holding, where a "tax sale certificate was recorded … on February 2, 2010", that the debtor's "interest transferred to the holder of the tax sale title on February 2, 2013"), *writ denied*, 352 So. 3d 983 (Mem) (La. 2023). Notably, the opinion in *Bennett* is rife with error and fundamental misunderstanding of the basic tenets of Louisiana's present statutory system for tax sales, to such an extent that it is difficult to determine precisely what the court intends to hold.

[236] *See,* La. Atty. Gen. Op. No. 15-0132, 2016 WL 695664, at *5 (La. A.G. 2016); *Flag Boy Properties, LLC v. Dickerson*, 291 So. 3d 241 (La. App. 4 Cir. 2020).

[237] R.S. 47:2131, cmt. (b).

[238] R.S. 47:2153(B)(5) (emphasis added). *Cf. Central Properties*, 225 So. 3d, at 449 (explaining that, at Louisiana tax sales, "it is the *tax lien* that is purchased in the form of a tax sale title") (emphasis added).

[239] Louisiana Constitution Article VII, Section 25(B), (C).

ultimately "transfers … ownership of the *tax sale property*"[240] – "tax sale property" being defined as "the property for which tax sale title is sold pursuant to R.S. 47:2154"[241] – the statutes later drop the use of this defined term, simply providing that "title and full ownership *in the property* will be confirmed unless a proceeding to annul is instituted".[242] The result if such a proceeding is not instituted is that "judgment shall be rendered quieting and confirming the title and the full ownership interest therein."[243] This neglect for the defined term "tax sale property" is not limited to certain select provisions either. Aside from the definitions Section[244] and the purposes-and-principles Section,[245] the term "tax sale property" appears in only a single statute in the entire Chapter.[246] By contrast, the nonspecific phrase "the property" is used dozens of times throughout,[247] often in apparent reference to the undivided interest bid at tax sale.[248] In some instances, "the property" is used to describe both the actual underlying property *and* the undivided interest, alternatively, *in the same statute*.[249] Still more confusion is injected via the Constitution's distinct sets of requirements regarding tax deeds and "notice of sale"[250] – terms either eschewed or used differently or both in the statutes.[251]

Because they describe relatively niche procedures, these inconsistencies and imprecisions create real confusion – confusion that extends to the judiciary. To wit: A cursory review of Louisiana appellate court decisions reveals multiple instances where a district court entered judgment awarding full, 100% ownership to a tax sale purchaser on the basis of a 1% tax

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[240] R.S. 47:2121(C)(1) (emphasis added).
[241] R.S. 47:2122(20).
[242] R.S. 47:2266(A)(1).
[243] R.S. 47:2266(A)(2).
[244] *See* R.S. 47:2122(1), (20), and (21).
[245] *See* R.S. 47:2121(B) through (D).
[246] *See* R.S. 47:2158.1. Perhaps ironically, the term as used here appears to refer to the actual underlying property, as opposed to the undivided interest bid at auction.
[247] *See* R.S. 47:2121, 2122, 2126, 2127, 2130, 2132 through 2135, 2137, 2151, 2153 through 2156, 2158 through 2163, 2245, 2246, 2266, 2289, and 2291.
[248] *See, e.g.*, R.S. 47:2155 (providing that the tax sale certificate "shall describe *the property* … and the bid made for *the property*") (emphasis added); R.S. 47:2156 (requiring notice informing of the consequences for "failure to redeem *the property*" and of the fact "that tax sale title to *the property* has been sold") (emphasis added).
[249] *See, e.g.*, R.S. 47:2153. *Compare* R.S. 47:2153(A)(1)(c)(i)(cc) (directing the tax collector to search public records for "any other transactions pertaining to *the property*") (emphasis added) *with* R.S. 47:2153(A)(2)(b) (stating that "tax sale title *to the property* will be sold") (emphasis added). The first of these phrases uses "the property" to mean the actual underlying real estate, whereas the latter refers to the undivided interest bid by the tax sale purchaser. *See also* R.S. 47:2161(A) (providing that, after a tax sale, "all taxes *on the property* shall…be assessed to and paid by the tax sale purchaser") (emphasis added) *and* (B) (providing instructions for a "person redeeming *the property*") (emphasis added).
[250] Louisiana Constitution Article VII, Section 25(C) ("A notice of sale shall not be served until the final day for redemption has ended" and "must be served within five years after the date of the recordation of the tax deed if no notice is given"). This issue is discussed at greater length in Part III(B) and (C), *infra*.
[251] *See, e.g.*. R.S. 47:2155(C) ("The tax sale certificate contemplated by this Section is a tax deed for purposes of Article VII, Section 25 of the Louisiana Constitution"); R.S. 47:2155, cmt. (b) ("The old concept of tax deed is replaced with the concept of tax sale certificate … [which] transfers tax sale title only. The tax sale certificate, however, constitutes a tax deed for purposes of the Louisiana Constitution"); R.S. 47:2157, cmt. (b) ("When the notice is given [between the expiration of the redemptive period and five years after the filing of the tax sale certificate], the notice constitutes a notice of sale and the sending of the notice constitutes service of the notice under Louisiana Constitution Article VII, § 25").

certificate.[252] In one such case, counsel for the tax sale purchaser argued that "all tax sale certificates confer a 1% interest" at the time of sale "and that the remaining 99% is confirmed for the tax sale purchaser through an action to quiet title."[253] Astonishingly, "[t]he district court agreed" with this line of logic.[254] A nearly identical issue of statutory terminology went all the way to the Nebraska Supreme Court (prior to Nebraska's abandonment of the ownership-bid-down tax-sales system).[255] As that court put it: "The dispositive issue on appeal is the extent of [the tax sale purchaser's] interest in the property when it acquired the tax sale certificate after bidding down to a 1-percent interest."[256] The relevant statute provided, like Louisiana law, that the "person [who] designates the smallest portion of the real property for which he or she will pay the amount of taxes assessed" is the winning bidder and "acquires…an interest in the undivided percentage of the real estate."[257] The court ultimately rejected the tax sale purchaser's argument that reference to "the real property" in another statute allowed it to obtain ownership to the *whole* property, holding that "the real property" referenced in this other statute referred to the fractional undivided interest bid. And this is not merely a matter of well-established principles being described imprecisely; the inconsistencies described above create legitimate substantive ambiguity. Consider, for instance, the following use of the nondescript term "the property": "A transfer, mortgage, lien, privilege, or other encumbrance filed after the filing of [a] notice of lis pendens shall not affect *the property*."[258] The meaning ascribed to "the property" here is critical to the effect of the filing.[259] A similarly uncertain outcome arises from the statement that "[t]he tax sale purchaser … shall be presumed to be a good faith possessor of the property."[260]

The extent of this disconnect – and the fact that it pervades other jurisdictions with analogous statutes – highlights both the imprecision inherent in the text of these statutes and the general lack of familiarity with the statutes' intended operation. Once again, these issues are resolved in their entirety by a shift to a "pure lien" system for tax sales. The "thing" sold under such system is precisely what it is labeled: a lien that secures payment of the delinquent tax obligation. There is no need for a delineation between one form of notice and "notice of sale," given that no sale of the property is contemplated – not even a conditional, delayed sale. The concept of a "tax deed" becomes obsolete for the same reason. And as noted above, the substance of the "thing" that *is* sold is tied directly to its function, allowing for direct enforcement and precise recovery. Finally, the shift from a fractional-ownership/quasi-lien interest to a true lien moves Louisiana out of a very small minority of states into much more robust company. Not only will

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[252] *See, e.g.*, *Johnson v. Palazzo*, 353 So. 3d 1022 (La. App. 4 Cir. 2022); *Montana v. Jordan*, 135 So. 3d 1212 (La. App. 4 Cir. 2014). *See also Community Associates, Inc. v. Taylor*, 364 So. 3d 1, (La. App. 4 Cir. 2019), *writ denied*, 282 So. 3d 1069 (Mem) (La. 2019) (overturning a district court decision quieting title to a 100% interest on the basis of a 75% tax certificate).
[253] *Palazzo*, 353 So. 3d, at 1023.
[254] *Id.*
[255] *See Adair Asset Management, L.L.C. v. Terry's Legacy, LLC*, 293 Neb. 32, 875 N.W. 2d 421 (Neb. 2016).
[256] *Id.* at 424.
[257] *Id.*
[258] R.S. 47:2266(C). *See also* Code of Civil Procedure Articles 531, 532, 3751 et seq.
[259] *Cf. Campbell v. Melton*, 817 So. 2d 69 (La. 2002) (holding that a notice of lis pendens has the effect of making the outcome of the suit identified therein binding on third parties).
[260] R.S. 47:2291(B)(1). *Cf.* Civil Code Articles 3478 (providing special rules for adverse possession between co-owners), 3480-3482 (describing the effect of good faith on adverse possession and acquisitive prescription), and 3483-3484 (describing the effects of just title on acquisitive prescription and distinguishing just title to an undivided interest from just title to the whole).

such model produce far less ambiguity, but there will be a far greater body of informative case law with which to resolve any ambiguities that *do* arise.

C. Change 2: Notice

The next substantive change that would be effected via the Committee's recommendation pertains to notice. Under present law, the notice provisions are simultaneously simple and quite complicated. On the one hand, the only *true* statutory *requirement* regarding notice is that there must be a statutorily and due-process compliant post-sale notice effort at least six months prior to the expiration of the redemption period;[261] so long as these criteria are met, these efforts can be undertaken at any time,[262] by either private party or public official,[263] pursuant to any one of the several notice statutes,[264] and need not even result in actual notice to the intended recipient.[265] In other words: "The issue is whether a particular tax sale party was duly notified regardless of who sent the notice or how the notice was sent."[266] In this way, the notice requirement under current law is simple. On the other hand, however, the statutes (purport to) provide a jumble of various "mandatory" and permissive notice alternatives, each with its own set of rules and guidelines and distinctions. Notably, these provisions are not always simple to untangle. In all, there are seven alternatives: R.S. 47:2156(A) and (B), 2157, 2206, 2236, 2275, and (in a sense) 2266. For present purposes, R.S. 47:2206, 2236, and 2275 can be set aside, as these deal with adjudicated properties (2206, 2236) and monition proceedings (2275), and the Committee recommends that both of these regimes be repealed or replaced entirely.[267]

As for the others, notwithstanding the specialized details of each, their requirements can generally be distilled to the notion that the tax collector is required to send post-sale notice in compliance with R.S. 47:2122(4) and (10), and the tax sale purchaser is permitted to take this step himself in an effort to cure any defect in the collector's notice.[268] This post-sale notice is the relevant "due process notice" under current law.[269] Any tax sale party who is not "duly notified" under these provisions retains a claim for redemption nullity to set aside the tax sale,[270] which can be raised (essentially) any time until the requisite period has expired after service in a quiet-title

[261] *See* R.S. 47:2122(4), (10).
[262] R.S. 47:2122(4)(c).
[263] R.S. 47:2122(4)(b). *See Central Properties*, 225 So. 3d, at 450 (holding that it is "irrelevant whether the requisite post-sale redemption notice is provided by a public official or a private party" and that the requirement can be satisfied notwithstanding "the failure of the taxing authority to give notice").
[264] R.S. 47:2122(4)(intro. par.).
[265] R.S. 47:2122(4)(a). *Cf. Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313-314 (1950) (reasoning that a due process construction requiring actual notice in all cases "could not be justified" and instead holding that "[t]he means employed must be such as one desirous of actually informing the absentee might reasonably adopt to accomplish it").
[266] R.S. 47:2157, cmt. (f).
[267] As for monitions proceedings, the Committee recommends that this concept be deleted in favor of the single-track enforcement process described below. *See* Part III(E), *infra*. Similarly, the existence of an entirely separate regime for collecting delinquent taxes where the initial tax sale fails to satisfy the delinquency is rendered unnecessary – at least in large part – by the implementation of a pure-lien system. Instead, the enforcement procedures for these properties can be integrated into this same "single-track" enforcement mechanism. To this end, the Committee likewise recommends the (eventual) repeal of the statutes dealing with adjudicated properties. *See* Part III(E), *infra*.
[268] R.S. 47:2156, 2286, cmt. (b).
[269] *Central Properties*, 225 So. 3d, at 450.
[270] R.S. 47:2122(10).

suit or notice of a monition proceeding.[271] Notably, the obligation of the tax collector to send post-sale notice is two-fold; one notice must be sent "within thirty days of the filing of the tax sale certificate, or as soon as practical thereafter,"[272] while the other must be sent "within ninety days of the expiration of the redemptive period".[273] As currently written, only the former is capable of satisfying the post-sale notice requirement, as the latter fails to "duly notify" the recipient six months prior to the expiration of the redemption period.[274] This odd construction appears to be the artifact of the requirement imposed by the statute as originally written in 2008 – to provide a subsequent notice annually, and in some cases twice annually – which was later revised, perhaps as too onerous.[275] Importantly, this original requirement for annual notice is reminiscent of the Committee's primary recommended change to the notice rules.

In total, the Committee recommends several changes to present law's rules for notice. First, the Committee recommends the deletion of the 2008 rule that the tax sale purchaser is to be listed as property owner on the tax roll,[276] as well as the corresponding rule that subsequent years' taxes are assessed in the name of and paid by the tax sale purchaser.[277] Although not a direct revision of rules for notice, these changes will nevertheless have the effect of ensuring annual notice to the tax debtor, in the form of the annual tax bill. In furtherance of this goal, the Committee also urges that the concern expressed alongside the 2008 revision – that a debtor receiving a tax bill might incorrectly assume that the taxes on the property were up to date and that no threat to his ownership existed[278] – can be addressed by revision of the statutory safe-harbor form provided in R.S. 47:2127. In particular, the Committee recommends that this form be revised to incorporate an indication that the property had previously been subject to a tax sale. With this modification, the tax bill will serve as an annual notice with regard to any outstanding lien on the property. Moreover, by affording the tax debtor the opportunity, even where the property is subject to an outstanding tax lien, to pay each subsequent year's taxes as they come, this also allows the debtor to prevent

[271] R.S. 47:2266, 2275. *See also* n. 231, *supra*.
[272] R.S. 47:2156(B)(1)(a).
[273] R.S. 47:2156(B)(1)(b).
[274] Although ambiguously worded, this notice is required to be sent no more than ninety days prior to expiration of the redemption period. *Id.* By contrast, proper notice must be effected at least six months prior to the expiration of the redemption period in order to avoid a redemption nullity. R.S. 47:2121(10). Similarly, R.S. 47:2157 is listed under R.S. 47:2121(4) as a means by which someone can be "duly notified," but by rule this notice cannot be sent until the end of the redemption period.
[275] *See* Acts 2012, No. 836 (replacing requirement for annual post-sale notice during redemptive period with requirement for single post-sale notice within thirty days of recordation of the tax certificate); Acts 2019, No. 384 (imposing requirement for second post-sale notice "within ninety days of the expiration of the redemptive period"). More specifically, the second post-sale notice requirement – which fails to "duly notify" the noticed party under R.S. 47:2122(4) – is the product of impromptu legislative efforts to reintroduce some portion of the noticing safeguards provided prior to the 2012 revision. Acts 2019, No. 384, which originated as House Bill No. 466, initially sought merely to clarify the standard of care for pre-sale notice under R.S. 47:2153. During the legislative process, the bill was amended several times, with one amendment inserting (in R.S. 47:2153) an additional requirement that the collector send notice "before the three year [sic] redemption period expires". In the process of reconciling the various amendments to House Bill No. 466, this rule was relocated to R.S. 47:2156(B)(1)(b) but without any conforming revision to the text of current R.S. 47:2156(B)(1)(a) or reconsideration of the general timeframe in light of R.S. 47:2122(4). The end result is the peculiar structure and substance of R.S. 47:2156(B) and its partial redundancy with R.S. 2153(A)(1)(a).
[276] *See* R.S. 47:2126.
[277] *See* R.S. 47:2161.
[278] R.S. 47:2161, cmt. (c).

the redemption price from growing unmanageably large. Because partial redemptions are proscribed,[279] the assessment of subsequent taxes in the name of the tax sale purchaser ensures that all subsequent taxes will be subjected to the accrual of interest – additional indebtedness that could otherwise be avoided by a tax debtor who is not yet able to pay the full redemption price. In sum, these modifications not only provide additional notice to the debtor regarding the status of the outstanding debt, but also help prevent the debt growing larger.

The second major change to the current notice rules recommended by the Committee is a general, overarching simplification. Whereas present law contemplates several apparently distinct categories of notice without providing much delineation – for example, R.S. 47:2157 notice "constitute[s] a notice of sale"[280] under the Constitution, whereas R.S. 47:2156 notice is referred to as a "notice of the right to redeem"[281] – the Committee instead recommends imposing upon the tax sale purchaser a simple, straightforward post-sale notice requirement. In lieu of present law's various intersecting timelines and conditioning of enforcement on when and how notice is effected,[282] R.S. 47:2156 should provide a single, clear requirement with a single effect and a single timeline. The Committee recommends that the requirement incorporate a "reasonable diligence" standard and a temporal window of three and six months prior to the expiration of the three-year tolling period.[283] To incentivize this notice, the Committee suggests two mechanisms: first, that some fixed sum for the cost of this notice be made recoverable as part of the redemption price;[284] and second, that recovery of attorney fees and court costs in an ultimate enforcement action can be conditioned on satisfaction of the post-sale notice requirement. While these and other

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[279] *See* R.S. 47:2243, cmt. (c).
[280] R.S. 47:2157(A)(2).
[281] R.S. 47:2156, cmt. (b).
[282] *See, e.g.*, R.S. 47:2157, cmt. (b) ("If the notice is given between the expiration of the redemptive period and five years after filing of the tax certificate, the tax sale party has six months to bring a nullity action. When the notice is given during this time period, the notice constitutes a notice of sale … under Louisiana Constitution Article VII, § 25. If the notice is given after five years has elapsed from the filing of the tax sale certificate, the tax sale party is given at least sixty days to bring a nullity action"). *But see* Louisiana Constitution Article VII, Section 25(C) (requiring that an action for nullity be brought "within five years after the date of the recordation of the tax deed" for redemption nullities). *See also Carrier v. Nyeki*, 316 So. 3d 1136 (La. App. 1 Cir. 2020) (holding that this five-year period is *peremptive*). Notably, peremptive periods are not subject to interruption or extension of any kind.
[283] This timeframe was conceived of in consideration of data regarding the most common timeline for redemption. The Committee noted that redemptions are most densely clustered (1) immediately following the tax sale, (2) immediately following post-sale notice, and (3) immediately prior to the expiration of the three-year period. Between the tax sale and post-sale notice, redemptions continue at a modest rate. Based on these patterns, the Committee reasoned that the aforementioned placement of post-sale notice would maximize its effect on expected redemptions. While this paradigm was contemplated prior to the Committee's revisitation of the structuring of the redemptive period and the question of whether the right to redeem should survive for some period after service in suit, the same general logic should remain applicable regardless of how the redemption period is ultimately structured.
[284] The Committee recommends that this recovery be statutorily fixed for two related reasons, both of which comport with policy considerations underlying the 2008 revision: By virtue of the 2008 revision, "[r]edemptions may no longer be made through or by negotiation with the tax sale purchaser, particularly since the tax sale purchaser is no longer entitled to costs. This change eliminates the potential of abuse by a tax sale purchaser by overwhelming the redeeming person with so called costs and other fees." R.S. 47:2243, cmt. (a). After lengthy deliberation, the Committee eventually concluded for similar reasons that the inclusion of costs in the redemption price would either (a) have to be standardized in some form or fashion, or (b) require the tax collector to adjudicate the sufficiency of evidence, even if in small part. The Committee representative for tax collectors expressed strong opposition to any reimbursement model that would impose any such duty on the collector. Thus, the Committee concluded that a statutorily fixed or statutorily capped recovery was optimal.

granular details of this requirement, and of additional noticing rules, may depend upon decisions regarding the issues discussed in Part IV, *infra*, the Committee maintains that the requirement itself should be straightforward in all cases.[285]

Finally, the Committee recommends significant updates to the language contained in the various notice safe-harbor forms. In relation to the debtor, the notice language should be geared towards making more readily apparent the threat to ownership faced by the debtor, to the end of promoting timely redemption. Similarly, the various safe-harbor forms should include more robust information. For instance, the tax lien certificate and redemption certificates should provide a more detailed breakdown of the various components of the payments and outstanding debts. The Committee also recommends the addition of a redemption form – a form by which to *make* redemption – to ensure that the tax collector is properly alerted where the redeeming party is redeeming as the holder of an outstanding lien on the property (as opposed to redeeming as the property owner), thereby allowing the collector to properly track the relevant redemption price.

D. Change 3: Timeline

The Committee further recommends revision of the overarching timeline of events under the tax sales statutes. As with the aforementioned changes, this recommendation similarly serves to streamline the overall statutory process. As discussed in Part III(B), *supra* present law is unsettled as to whether the expiration of the redemption period causes an automatic transfer of ownership. If this result does in fact flow from the mere passage of time (assuming proper notice) and does not require judgment quieting title, the effect is the further disconnection of transfer of ownership from actual "enforcement" mechanism – in this case, either quiet title, partition, or both. The result is clouded title wherever a tax sale purchaser does not bring suit immediately upon expiration of the redemption period. Furthermore, ownership cannot be extinguished by prescription of nonuse;[286] the action for partition is likewise imprescriptible.[287] Thus, if a tax sale purchaser neglects or declines to "enforce" his interest, there may be no obvious end point, nor any "default" way of clearing title. Even if ownership does *not* transfer, "tax sale title" and the attendant ability to *cause* ownership to transfer by quieting title can remain outstanding in perpetuity. By contrast, lien rights *can* prescribe – and *do* prescribe, under the Committee's recommendation. In particular, the Committee recommends providing that the tax lien is extinguished if an action for enforcement under R.S. 47:2266 is not initiated within five years of the recordation of the tax certificate.[288] This has the dual effect of ensuring clear title in the long run and incentivizing (or rather *requiring*) timely resolution of the overarching process – which in turn results in more merchantable titles and more properties returned to taxpaying status.

E. Change 4: Enforcement

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[285] In particular, the precise contours of the post-sale notice requirement may depend on the Legislature's preference between a "fixed-period" redemption model and an "execution-based" model. *See* Part IV(B), *infra*. For instance: Because the execution-based model incorporates a number of protective redundancies pertaining to notice, post-sale notice of the type contemplated here is not required for the satisfaction of due process.
[286] Civil Code Article 3448 and cmt. (d).
[287] Civil Code Article 817.
[288] *Cf.* R.S. 47:2266 (providing for the quiet title action).

The Committee's final major substantive recommendation is closely connected to the recommended shift to a lien system and the simplification of the statutory timeline. In keeping with the general objective of streamlining the tax sales process, the Committee would the eliminate the various "alternate tracks" for enforcement under present law in favor of a single all-encompassing enforcement mechanism.[289] Specifically, the Committee recommends that a foreclosure action under R.S. 47:2266 – which (absent timely redemption or claim for nullity) would result in judgment recognizing the lien and fixing the total debt owed to the certificate holder – be made both necessary and sufficient for enforcement in all cases. [290] Thus, enforcement via affidavit under R.S. 47:2157 would be omitted; the concept of tax sales-specific monitions proceedings would likewise be eliminated. Even more significantly, this change would eliminate the need for a separate regime for "adjudicated properties": Rather than subjecting these delinquencies to entirely distinct procedures, unsold tax liens could be treated the same way as any other tax lien – only with the relevant municipality as the certificate holder. In particular, the Committee recommends that municipalities be afforded a number of options for selling unsold tax liens[291] but that these liens ultimately be enforceable via the same generally applicable procedures as all others.[292] While the precise contours of the ultimate enforcement mechanism will depend on policy decisions[293] and may either contemplate an abundance of specific detail or allow the Code of Civil Procedure to fill the gaps, the Committee emphasizes the opportunity to simplify the major substantive checkpoints for the overarching process.

IV. Nonconsensus and Policy Issues

In addition to the recommendations laid out above, the Committee discussed a number of issues on which it reached no clear consensus. These issues are considered in the present section. In particular, this section addresses issues that the Committee determined were either (a) primarily questions of policy, with answers mostly or entirely dependent on the Legislature's policy priorities; or (b) mixed questions of law and policy on which the Committee was divided. Because these issues are either partially or entirely tied to policy, the Law Institute agreed that it would be inappropriate to provide a recommendation on the issues absent a definitive consensus. Instead, the Law Institute concluded that its function would be best served by providing a thorough analysis of each issue and all competing viewpoints, proposals, and policy considerations – while leaving to the Legislature the decision how best to prioritize those policies. This section first provides an overview of the competing policies involved, then proceeds to discuss each of the aforementioned

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[289] *See, e.g.*, R.S. 47:2157 (providing for enforcement via filing of affidavit); R.S. 47:2271 et seq. (providing for monitions proceedings).

[290] Because the Committee determined the ultimate enforcement procedures to be inextricably linked to policy, it leaves to the Legislature the decision of how this Section should be structured. *See* Part IV(B)-(C), *infra*. Insofar as the preferred framework involves permissive strict foreclosure as described in Part IV(C)(ii), *infra*, need will arise for more than just the single track contemplated here.

[291] *Cf.* Part IV(E)(iv), *infra*. The Committee contemplates that municipalities could be permitted to sell these liens privately, allowing flexibility to negotiate price and sell in bulk, while still retaining the option to reoffer them at a subsequent tax sale.

[292] Notably, the Committee recommends that this procedure be made available irrespective of whether the unsold certificate has subsequently been assigned or remains held by the municipality. As further incentive for investors to purchase and extinguish unsold certificates, these can even be subjected to an enforcement process more favorable to the certificate holder. For example, the timeline for enforcement could be shortened or the mechanism for protection of surplus modified. *See, e.g.*, Part IV(C), (D)(i).

[293] *See generally* Part IV(A)-(D).

issues from all angles. Discussion of each issue includes summary and analysis of the issue itself, the primary approaches considered by the Committee, and the tradeoffs associated with each approach.

A. Policy Considerations

As noted, the Committee identified a number of competing policies at play in the tax sales context. The policies identified by the Committee, in no particular order, are as follows:

> 1. Effective collection of taxes: The capacity of municipalities to collect delinquent taxes is the fundamental precept of this statutory scheme. This capacity is impacted by every policy concern listed below, each of which is essential to a functioning tax sales system. For example, if the profit incentive is insufficient to attract investors, liens will go unpurchased at sale and the taxes will remain receivables for municipalities. Similarly, inadequate due-process protection will lead to litigation and annulments that will similarly deter participation. These, and the other considerations listed below, must be balanced at least to the extent necessary to ensure the effective collection of taxes.
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> 2. Economic viability for tax-lien investors: Without sufficient economic incentive, prospective tax-lien investors will be unwilling to participate in tax sales, and municipalities will be left unable to collect unpaid taxes.[294] In light of *Tyler*'s requirement that tax debtors be afforded the opportunity to claim surplus proceeds from the sale of tax-indebted property at public auction,[295] the impact of any further reduction or restriction on tax sale purchasers' actual or expected return is magnified. This return – and any related shifts in either costs or revenues – must be carefully accounted for in crafting the present statutory scheme to ensure economic incentive sufficient to drive investment in tax liens.
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> 3. Due process: The above (and below) interests must nevertheless be balanced against the guarantee of due process of law. While due process is generally calculated to protect the rights of an individual facing loss of property – in this case, the delinquent taxpayer – the failure to satisfy due process harms not only this individual but municipalities, tax-lien investors, and prospective homeowners as well. Robust due-process safeguards help reduce litigation, annulments, potential liability, delays in payment, and clouds on title that make it difficult or costly to obtain title insurance and thus keep properties out of commerce.

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[294] *See Fransen v. City of New Orleans*, 988 So. 2d 225 (holding that the tax sales procedures described in Article VII, Section 25 of the Constitution of Louisiana are the exclusive mechanism for the collection of delinquent taxes).

[295] The court's recognition of this right serves as an effective limitation on tax sale purchasers' recovery in tax-foreclosure proceedings, thereby increasing the marginal impact of each dollar of costs added and revenues lost under a new statutory scheme. Notwithstanding the rights recognized in *Tyler*, though, the certificate holder's recovery under certain statutory schemes may nevertheless exceed the value of the tax debt in certain circumstances. *See* Part IV(B)(iv), *infra*. In particular, where a debtor fails to take the requisite procedural steps to claim the surplus, statute may presumably provide for this surplus to revert to the certificate holder. *Cf. Nelson*, 352 U.S. 103 (holding that the municipality's confiscation of property exceeding the value of the relevant debt was not an unconstitutional taking where the debtor failed to avail himself of the statutory procedure by which surplus could be claimed).

4. General fairness: Beyond the minimum requirements of due process, the system should also seek fairness for all parties involved. Protection of investors' economic incentive should not compromise the equitable treatment of delinquent taxpayers, nor should protections for taxpayers negate the economic viability of tax-lien investment for prospective purchasers. To the extent practicable, the tax sales process should minimize property loss to debtors and provide reasonable protections against unfair and extreme outcomes.

5. Simplicity and efficiency: A system that is efficient and easy to navigate benefits all parties. Under such a system, individuals lacking significant legal or financial sophistication are protected against negative outcomes due to misunderstanding or confusion. Simplicity likewise reduces the need for these parties to incur costs associated with retaining an attorney or other expert to assist them through the process. For the same reasons, simplicity reduces the need for litigation. In this way, sophisticated parties like institutional investors also benefit via reduction in overhead costs and the volume and complexity of work necessary to recoup an investment. A straightforward system lowers the barrier to entry and allows for greater participation and more competition.

6. Familiarity: General familiarity, among stakeholders, with the applicable procedures further confers the benefit of predictability. The use of familiar procedures reduces mistakes, disputes, and the need for external support in navigating the process. It likewise lends the benefit of established jurisprudential and supporting statutory rules, thereby protecting against undesirable outcomes in unexpected or unaccounted for circumstances.

7. Ease of administration: The ease (or difficulty) with which the statutory scheme can be administered serves as a potential bottleneck, even for an otherwise-optimized system. Thus, the statutory roles and duties of public officials must be considered. This includes the tax collector, the sheriff, and the courts (and potentially the clerks of court). Where procedures are overly cumbersome, costly, or confusing, they will not be implemented effectively. This harms all parties via costly litigation, failure of due process, and the like. Accordingly, any statutory revision must account for the capacities of each public body upon which responsibilities are placed and should seek to ease those burdens to the extent practicable.

B. Enforcement Process: Termination of Right to Redeem

i. The issue

Primary among the issues on which the Committee's opinions diverged is the structure and substance of the procedure for enforcing tax sale rights, an issue which itself comprises several sub-issues. The present subsection will address the first of these sub-issues: namely, the structure of the redemptive period and the mechanism by which the right to redeem is terminated.

Prior to the Supreme Court's decision in *Tyler*, the Committee had contemplated addressing the concerns identified in Senate Resolution No. 40 regarding due process, constitutionality, and the insurability of title by providing that the right of redemption could only be terminated by judgment of court in an action under R.S. 47:2266. Under this framework, the debtor's ability to pay the debt and avoid loss of property would necessarily survive beyond service of process in the action. In particular, the debtor would have one additional year to redeem after service, after which the court would render judgment.[296] The logic underlying this rule was that mandatory judicial oversight of this series of events – specifically, service of process and termination of the right to redeem – would guarantee the satisfaction of due process in all cases: Proper service would ensure constitutionally sufficient notice under the Due Process Clause,[297] and prior to judgment the court would ensure the adequacy of service.[298] Of course, this enhanced due process protection was not without tradeoffs. For example, tying the termination of the redemption period to judgment increases the cost and inconvenience of enforcement by requiring more suits to be filed.[299] In light of *Tyler*'s limitation on creditors' recovery in tax foreclosure proceedings, this added costliness called into question the continued viability of the aforementioned framework. Accordingly, the framework was revisited by the Committee. The resulting deliberations produced two distinct alternatives regarding the structure of the redemptive period.

The primary distinction – and thus the decision point – between these models is the treatment of the right to redeem upon expiration of the tolling period for suit. In general: The first alternative contemplates that the right to redeem as a matter of course[300] is extinguished at the conclusion of the tolling period, regardless of whether any additional actions have been taken toward enforcement of the tax lien; by contrast, the second model contemplates the right to redeem survives beyond expiration of the tolling period, until the conclusion of the enforcement process. These alternatives are considered in greater detail below. (Note: The length of the various periods involved – in particular, the tolling period prior to suit – is a related but ultimately separate issue that is addressed in Part IV(D)(i), *infra*; nevertheless, for ease of reference and clarity of

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[296] This iteration of the Committee's draft contemplated a one-year tolling period after recordation of the tax sale certificate before suit could be brought under R.S. 47:2266. Thus, the minimum redemption period would have been two years: One year from recordation of the certificate to initiation of suit, and another year from service in suit until judgment. The Committee selected this minimum two-year redemption period in furtherance of the stated objective of reducing the volume of outstanding tax-encumbered properties after a fifty-state survey of redemption periods. The Committee concluded that a two-year minimum period was closer in length to the average redemption period employed by other states.

[297] *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313 (1950). "[T]here can be no doubt that at a minimum [the Due Process Clause] require[s] that deprivation of life, liberty or property by adjudication be preceded by notice and an opportunity for hearing". As for satisfying this requirement, "[p]ersonal service of written notice within the jurisdiction is the classic form of notice always adequate in any type of proceeding."

[298] This framework allowed for service to be completed through a curator in instances where the debtor could not be located. *See* Code of Civil Procedure Article 5091.

[299] Although present law does require the filing of suit to quiet title, the termination of the right to redeem prior to suit dictates that many matters are resolved via private settlement without need for suit. This incentive for settlement is discussed in greater detail in Part IV(B)(iv).

[300] The phrase "the right to redeem *as a matter of course*" is intended to account for the fact that (a form of) redemption is still permitted if a successful claim for nullity is raised. When the redemption period expires, the debtor is no longer entitled to redeem without any prior action, but upon raising and prevailing on a claim for nullity, the debtor is afforded one year in which to satisfy the outstanding debt. *See* R.S. 47:2290 and 2291.

comparison, the present section will assume periods that accord with present law to the extent possible. Thus, for example, the tolling period will be referenced as being three years.[301])

ii. First alternative: "Fixed" redemption period

The first model contemplates a redemption period that is fixed, definite, and terminates via the passage of time. Its treatment of the timeline for redemption and enforcement is essentially identical to current Louisiana law. That timeline proceeds as follows:

> 1. Redemption period: Once the tax sale certificate is recorded, the debtor has three years to redeem. Upon the expiration of this period, two effects flow: (1) The debtor's right to redeem as a matter of course is extinguished; and (2) the certificate holder is permitted to bring suit under R.S. 47:2266.
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> 2. Suit under R.S. 47:2266: Suit is initiated as an ordinary proceeding. Each tax sale party must be served.[302] After being served with suit, the debtor[303] has six months in which to assert a claim for nullity.[304] The three grounds for nullity are a payment nullity,[305] a "forbidden-purchase" nullity,[306] and a redemption nullity.[307] [308] The availability of this nullity action – in particular, the action for redemption nullity[309] – serves, in part, to safeguard due process: If proper notice is not effected during

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[301] *See* Louisiana Constitution Article VII, Section 25(B)(1) ("The property sold shall be redeemable for three years"); R.S. 47:2266(A)(1) ("After expiration of the redemptive period, an acquiring person may institute an ordinary proceeding …").

[302] This rule exists in present law. R.S. 47:2266. For example, a mortgagee who is not served retains the right to bring an action for nullity. *Cf.* R.S. 47:2266, 2289. Furthermore, a tax sale party who is neither served *nor* properly notified prior to the expiration of the redemptive period retains their interest in the property. *See* R.S. 47:2121. As a result, "[i]f the tax sale purchaser desires to take the property subject to any tax sale party's interest, then the tax sale purchaser may elect not to send notice to that tax sale party." R.S. 47:2157, cmt. (b). Because, however, a "pure lien" right is enforced via judicial sale rather than by transfer of (an undivided interest in) property, the option (or consequence) of taking the property subject to an existing right is no longer available. Thus, all tax sale parties must be notified and served in suit under R.S. 47:2266.

[303] Although the present rules apply to all tax sale parties, analysis in this section will refer simply to "the debtor" as the tax sale party of primary concern, simply to avoid undue complication. Nevertheless, for the purpose of Steps 1 through 4 of this model, all rules applicable to the debtor apply with equal force to other tax sale parties.

[304] R.S. 47:2287(A)(1). The shorter sixty-day period provided in R.S. 47:2287(A)(2) is no longer applicable in light of the prescriptive period imposed on the tax lien. *See* Part III(D), *supra*.

[305] *See* R.S. 47:2121(8). A payment nullity arises where a tax sale was held notwithstanding prior payment of the statutory impositions forming the basis of the tax sale.

[306] *Cf.* R.S. 47:2162. Although a nullity under R.S. 47:2162 is not given a particular name under current law, the Committee's recommendation labels it a forbidden-purchase nullity. A forbidden-purchase nullity arises where the tax certificate is acquired by either the tax collector or the assessor (or any other agent of the political subdivision whose duties involve the assessment or collection of taxes), each of whom is forbidden from acquiring tax sale rights.

[307] *Cf.* R.S. 47:2122(10). A "redemption nullity" arises where there is not proper notice during the pendency of the redemptive period.

[308] R.S. 47:2286.

[309] A "redemption nullity" occurs where there is not proper notice during the pendency of the redemptive period. *Cf.* R.S. 47:2122(10). Tax sales can also be annulled for payment nullities – the product of circumstances where the tax sale was held notwithstanding prior payment of the taxes – or under R.S. 47:2162, where the tax sale purchaser is a party (namely, the collector or assessor) whose participation in tax-sale bidding is forbidden. The Committee's recommendation characterizes this latter nullity as a "forbidden-purchase nullity;" nevertheless, it is not given a name under current statute.

the pendency of the redemptive period, the debtor can raise this claim and (if successful) obtain a judgment declaring a redemption nullity. This judgment affords the debtor another year to "redeem."[310] In other words, either (a) there is constitutionally sufficient notice during the redemptive period, in which case due process has been satisfied prior to suit; or (b) there is no constitutionally sufficient notice during the redemptive period and the debtor can raise a nullity claim, which effectively reinstates the rights that are typically terminated by the combination of notice and the passage of time. The procedure for adjudicating a nullity claim is largely the same as under present law.[311]

3. Judgment under R.S. 47:2266:[312] If the action for nullity is unsuccessful or is not raised within the requisite timeframe, the court renders judgment confirming the tax debt, the lien, and the termination of any remaining recourse for the debtor.

4. Execution of judgment: From there, the judgment is executed via some form of judicial sale. While the execution process as a general matter follows the established rules for seizure and sale pursuant to writ of fieri facias,[313] this model contemplates the modification or omission of a number of these rules. Most significantly, this model contemplates the inapplicability of Code of Civil Procedure Article 2340, which permits a judgment debtor to prevent the sale of the property at any time prior to adjudication by paying the judgment debt, together with interest and reimbursement for any costs incurred during the pre-sale process. In the present case, the debtor is not permitted to take this step, as the expiration of the fixed three-year redemptive period terminated the right to redeem or otherwise pay the debt as a matter of course. Other rules that may be modified include the requirement for appraisal,[314] which is discussed in Part IV(D)(ii), *infra*, and the related rules pertaining to minimum bids and their effects.[315] As a general matter, the present model contemplates a greater divergence from the Code of Civil Procedure's rules for ordinary process[316] than does the execution-based model described below. In any event, the rules for executing judgment can be modified wherever and to whatever extent necessary and appropriate to achieve a given policy goal or set of goals.

5. Distribution of proceeds: After the sale and deduction of the sheriff's costs, the tax sale purchaser recovers the debt from the proceeds of the sale, after which the

[310] *See* R.S. 47:2290 and 2291 (giving the debtor one year from the date of preliminary order in which to satisfy the outstanding tax debt). Although payment of the tax debt pursuant to a nullity judgment is not referred to as "redemption" under the statutes, it amounts to largely the same thing.
[311] *See* R.S. 47:2286 et seq.
[312] Note that Steps 3 through 5 may either be modified or eliminated altogether, depending on the treatment of the issue discussed in Part IV(C), *infra*.
[313] *See* Code of Civil Procedure Articles 2291 et seq.
[314] *Cf.* Code of Civil Procedure Article 2332.
[315] *See, e.g.*, Code of Civil Procedure Article 2336 (preventing sale and requiring a second offering if the minimum bid is not obtained, upon which the seizing creditor's recovery is reduced).
[316] *See* 1 PETER S. TITLE, La. Prac Real Est. § 16:3 (2d ed. 2023) (describing foreclosure by ordinary process). *See also* Code of Civil Procedure Articles 3722 and 2291 et seq.

proceeds are referred to the claims of any junior creditors and any surplus is distributed to the debtor. If there is dispute among these subordinate claims, the sheriff may deposit the remaining proceeds in the registry of the court and convoke a concursus proceeding against the inferior creditors;[317] the tax sale purchaser will have no involvement in this proceeding.

Additional characteristics: Notably, the structure of the fixed-period model dictates that progression through the full series of steps described above is unnecessary in many cases. In particular, the matter is frequently resolved via private settlement either before or during suit (Step 2 above). Because the redemptive period expires before the R.S. 47:2266 suit is initiated,[318] any resolution prior to loss of property – save for a nullity claim – must necessarily occur outside of the judicial process, incentivizing settlement prior to suit or judgment in suit. In essence, the "single-track" nature of the suit under this model encourages the tax debtor to take action to avoid the track altogether. This outcome must be accounted for as "part of" the fixed redemption period model.

iii. Second alternative: "Execution-based" redemption[319] period

The second model considered by the Committee employs an indefinite, conditional redemption period that terminates only by execution of judgment by judicial sale. This model's treatment of redemption and enforcement essentially mirrors the rules for debts secured by liens and mortgages generally, outside of the tax sales context. It contemplates the following timeline:

1. Tolling period: This initial period is identical to the "fixed" model. For three years after the recordation of the tax sale certificate, the debtor has the right to redeem at any time. Under this model, however, only one effect flows from the period's expiration: The certificate holder is permitted to file suit. In other words, the debtor's right to redeem is unaffected by the expiration of this period: Until the certificate holder initiates the action for enforcement under R.S. 47:2266, the debtor is able to redeem in precisely the same manner, even after three years.

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[317] Code of Civil Procedure Article 2377.

[318] Theoretically, these events can be simultaneous – under this model, the tolling period for suit is coterminous with the redemptive period – but because filing suit is an action that takes time to achieve, whereas the redemptive period is terminated by operation of law, suit will in practice be filed some amount of time after expiration of the period.

[319] It should be noted that "redemption" is arguably substantively imprecise as a label for the payment of the tax debt in some instances under this model. In particular, where this step is taken after the debt has been reduced to judgment (in a suit pursuant to R.S. 47:2266), it is not necessarily accurate to say that a "sale" has been "redeemed;" rather, a judgment debt has simply been satisfied. Labels notwithstanding, however, both the action (the full amount of the debt is paid) and the result (the lien is extinguished, the unencumbered ownership of the debtor is restored, and the certificate holder obtains full recovery) are precisely the same as they would have been had they occurred prior to judgment or prior to suit. The only differences are (1) the party through whom the debt is paid, which prior to suit is the tax collector and after suit is the sheriff (i.e. the judicial division); and (2) the *amount* of the debt, which after judgment includes (a) attorney fees, (b) court costs, plus (c) any costs incurred by the sheriff to execute the writ, and (d) judicial interest on the judgment amount, all amounts that were not owed prior to suit. Thus, for ease of reference, this section will refer to the payment of the debt as "redemption" regardless of when in the process it occurs. It should be noted that other states that employ similar models likewise refer to this payment as "redemption."

2. Initiation of suit under R.S. 47:2266: In order to begin the enforcement process, the certificate holder must first request and obtain from the tax collector a certification of the present redemption price and the rates of the continuing accrual of interest going forward.[320] This request alerts the collector to the fact that suit is being initiated, at which point redemption may only be made pursuant to a court order fixing the price. Thus, the request commences a short period in which the debtor is temporarily unable to redeem. The action is then initiated via ex parte petition to which the tax certificate and the aforementioned certification are attached. Upon determining that the petition contains all necessary information, the court issues a rule to show cause why the debt and the lien should not be confirmed; the petition, the attachments, and the rule are then served on the debtor. Under this model, tax sale parties other than the debtor need not be parties to the suit.[321]

3. Suit under R.S. 47:2266: Once suit is filed, redemption must include reimbursement to the certificate holder for attorney fees and court costs, provided that post-sale notice requirements were satisfied. (If they were not, the certificate holder is not entitled to these amounts.) This is the reason for the temporary suspension of the debtor's ability to redeem, as described in Step 2: These amounts are uncertain – that is, they differ depending on the circumstances – so they must be determined and fixed by the court in each case. The suit itself proceeds as follows: Upon being served with the rule to show cause, the debtor has a certain period of time to file a responsive pleading objecting to the confirmation requested in the petition. The grounds for objection are limited: The debtor may either assert a payment or forbidden-purchase nullity or (where the certificate holder has claimed attorney fees and costs) allege that the certificate holder is not entitled to recover attorney fees and costs for failure to provide sufficient post-sale notice. If an objection is timely raised, a hearing is set and the matter is decided by summary proceeding. Except where there is a successful claim for nullity (in which case the matter will proceed according to the rules provided by present law[322]), the court then issues a preliminary order deciding the issue, fixing the amount of attorney

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[320] The Committee has referred to this certification, alternatively, as the "redemption schedule."

[321] Because the redemptive period remains open even after judgment in suit, due process for other tax sale parties can be satisfied via the notice of seizure that is effected during the execution process. Code of Civil Procedure Article 2293.

[322] *See* R.S. 47:2290-2291. The present procedure is, in fact, based in part on present law's procedures for nullity judgments: At the conclusion of the action for nullity, the court either renders judgment dismissing the nullity action (if the claim fails) or issues a preliminary order stating that the sale will be declared a nullity. Because the effectivity of a nullity judgment is conditioned upon the debtor's payment of all statutory impositions, interest, penalty, and costs, the court must fix the amount of costs to which the certificate holder is entitled. Thus: Upon the issuance of the preliminary order, the party claiming costs has fifteen days to submit proof of costs, after which the opposing party has fifteen days to contest the amount claimed. If contested, the court sets a hearing. After the hearing, or if costs are not contested, the court then renders a final judgment, declaring the sale a nullity and fixing the costs that must be paid. From the date of judgment, the debtor then has one year in which to pay the requisite amounts (to the tax collector, from whom payment is remitted to the tax sale purchaser). If the amounts are not paid within this period, the judgment is vacated and the matter dismissed with prejudice; otherwise, the debtor may apply for an ex parte order confirming payment of the debt. In the R.S. 47:2266 action contemplated by the present model, the rule to show cause takes the place of the preliminary order and is followed by a period where costs may be contested (though for different reasons); once the court decides the issue of costs (except in the case of a successful nullity claim), both models then afford the debtor a period in which to pay the outstanding debt, after the expiration of which the matter is finalized.

fees and court costs to which the certificate holder is entitled (if any), and setting the date on which final judgment will be rendered. If an objection is *not* timely raised, the certificate holder may submit an affidavit or other evidence of attorney fees and costs, and the court will issue the same preliminary order. Upon the issuance of the preliminary order, the debtor will have a period during which redemption can be made pursuant to the preliminary order. Such redemption must be accompanied by the applicable order; absent such order, the tax collector will reject any attempted redemption payment.[323] No action is required from the certificate holder during this period.

4. Judgment under R.S. 47:2266: If redemption is made during the aforementioned period, the court (upon being presented with a redemption certificate) will issue a final judgment dismissing the action and confirming extinguishment of the lien. If redemption is not made, the court will issue a final judgment fixing the debt and recognizing the lien.

6. Execution of judgment: Judgment is then executed by judicial sale under writ of fieri facias. As with the "fixed" model, this model contemplates that certain rules for the execution of judgments may be modified or omitted. Here, however, Code of Civil Procedure Article 2340 remains applicable. Thus, the debtor may prevent the sale by paying the judgment debt, together with judicial interest and any costs incurred to execute the judgment, at any point prior to the ultimate adjudication.[324] Otherwise, the property is sold in accordance with the rules for judicial sales, as modified for the present context.

7. Distribution of proceeds: The proceeds of the sale are then distributed in the same manner described above in relation to the "fixed" redemption model.

Additional characteristics: Under this alternative, the procedure for the suit under R.S. 47:2266 is modeled on current law's procedures for nullity actions (in part) and monition proceedings (in part).[325] The rule to show cause, and the service of that rule on the debtor along with the petition, serves the same function as the monitions statutes' requirement that the petitioner send notice (strongly) resembling a rule to show cause.[326] After service, the suit then proceeds similarly to a nullity action under current law: First, the rule is issued and served on the debtor,[327] after which the debtor has an opportunity to raise certain issues;[328] the court then decides

[323] Note that this process may also be carried out through the clerk of court, rather than the collector. *See* "Additional characteristics," Part IV(B)(ii), *infra*.
[324] "[A]djudication", as used in this context, refers to the actual transfer of the property via the judicial sale. *See* Code of Civil Procedure Article 2371. Adjudication occurs, essentially, at the moment "the gavel comes down."
[325] *See generally* R.S. 47:2278 (providing that, after the court renders monition, "[i]f opposition is made to the homologation, the provisions regarding actions to annul under this Chapter shall apply").
[326] *See* R.S. 47:2275(A)(1)(Intro. Par.), 2276 (requiring notice "calling on all tax sale parties … to *show cause* within the [applicable] time period *why* …") (emphasis added).
[327] *Cf.* R.S. 47:2291(A)(1) (providing for the issuance of a preliminary order).
[328] *Cf.* R.S. 47:2291(B)(3) (allowing the debtor to contest costs).

those issues and fixes the amount of costs,[329] and the debtor is afforded a period in which to pay the outstanding debt as fixed by the court.[330] Notably, however, this process is susceptible to modification in a few ways: For one, the temporary "suspension" of the debtor's ability to redeem can be avoided by allowing a statutorily fixed award of attorney fees. A debtor without desire to contest any issues would be able to redeem immediately upon being served; redemption would be made pursuant to the petition and rule, rather than the preliminary order, thus eliminating the "gap" where redemption cannot be made. Additionally, this model may be modified to require that redemption after initiation of suit must be made directly through the clerk of court. These alternate provisions can be implemented independently or in tandem.

iv. Comparison of the alternatives

Both of the aforementioned models have their own benefits and detriments. While this section takes no stance as to which is preferable on the whole, the tradeoffs associated with these models and the corresponding arguments for and against each model, respectively, are detailed in this section, beginning with the various arguments in favor of the fixed-period model.

<u>Argument #1 in favor of the fixed-period model:</u> The fixed-period model requires fewer changes to present law than the execution-based model.

As noted, the fixed-period model is largely identical to current law in its treatment of the redemption period and the right to redeem. This confers the benefit of familiarity to practitioners who are already well-acquainted with Louisiana tax sale enforcement procedures. The parties tasked with administering these procedures likewise benefit; for example, tax collectors are accustomed to the existing duties and functions under this system. By contrast, the execution-based model contemplates a modified redemption timeline, new functions and duties for collectors, and a novel system for accepting redemption in certain circumstances.

<u>Argument #2 in favor of the fixed-period model:</u> The fixed-period model will result in fewer suits being filed and less strain on judicial resources than the execution-based model.

Because the fixed-period model makes the redemptive period coterminous with the tolling period, all redemptions must necessarily occur prior to the filing of suit. Obviously, deadlines are a powerful incentive. Just as a hypothetical three-year redemptive period will – with all else held constant – produce more redemptions within three years than a five-year redemptive period, a fixed three-year redemptive period will produce more redemptions within three years than a redemptive period that lasts three years plus however much time it takes to file suit, obtain judgment, and execute the judgment. Similarly, hard deadlines are an even more powerful incentive than soft deadlines. Under the fixed-period model, the expiration of the tolling period represents a hard deadline, carrying the consequence of termination of the right to redeem. The execution-based

[329] *Cf.* R.S. 47:2291(B)(4) ("[T]he court shall render a judgment of nullity, and the judgment shall fix the costs allowed").
[330] *Cf.* R.S. 47:2291(C) (providing that the debt must "be paid within one year from the date of the judgment"). In the present context, a shorter period may be preferable.

model, by contrast, makes this a much softer deadline, permitting the debtor to redeem as a matter of course even after the period's expiration; instead, the debtor simply faces the threat that the redemption price will be increased by the filing of suit.

Furthermore: Even among cases where there would be no redemption during the tolling period under either alternative, fewer suits will be required under the fixed-period model than under the judgment-based model. Under the fixed-period model, the consequence to the debtor of allowing the process to continue progressing towards its conclusion remains greater at every step in the process, including after the expiration of the tolling period: Whereas redemption remains available to a debtor under the execution-based model, an action for nullity is the only way a debtor under the fixed-period model can hope to avoid foreclosure and loss of property. This consequence, coupled with the expense and uncertainty of litigating any fact-intensive issue, creates a significant incentive for pre-suit settlement between debtor and certificate holder under the fixed-period model. Far less incentive exists under the execution-based model, where the debtor may simply redeem as a matter of course even after suit is filed.

The most direct impact of the increased need for lawsuits under the execution-based model is an increased strain on judicial resources. Louisiana courts' frequent inability to satisfy statutory timelines for special proceedings stands as evidence of already overcrowded dockets. As between the present alternatives, the execution-based model carries greater risk of exacerbating this issue. While the increase in suits for tax-lien enforcement is indeed a drawback of the execution-based model, however, the impact of this drawback may be mitigated in part by the fact that lack of notice is not a grounds for nullity under the execution-based model. In particular, the concept of a redemption nullity is rendered obsolete under this model by virtue of the right of redemption's survival until after service in suit. Because redemption nullities are the most commonly litigated issue under current law, their elimination may serve to counteract the judicial strain caused by an increase in suits filed by eliminating certain instances of actual *contested litigation*. While it is the case that the underlying *issue* – an alleged lack of notice – is still grounds for litigation under the execution-based model, the cost-benefit analysis for the litigation is dramatically altered: Under the execution-based model, the debtor stands to gain far less by litigating the issue of notice (a reduced redemption price[331]) than under the fixed-period model (the ability to redeem at all, and thereby prevent loss of property[332]). Without as much to gain, it is logical to suggest that debtors will be less likely to incur the expense of litigation in order to raise this issue. It should be noted, nonetheless, that the existence of this mitigating effect is speculative and its effect uncertain.

<u>Argument #3 in favor of the fixed-period model:</u> The fixed-period model provides greater financial incentive to prospective tax-lien investors than the execution-based model.

Increased need for filing of suit also represents an added expenditure of time and money by investors. Although these expenditures are reimbursable under both models, they would in some cases be avoided via settlement under the fixed-period model. In these cases, recovery via suit not

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[331] In particular, if the debtor prevails on this issue, the redemption price will not include reimbursement to the certificate holder for attorney fees and costs.

[332] At this point in the process under the fixed-period model, the right to redeem has already been extinguished; thus, the only way for the debtor to ensure retention of the property is to successfully litigate a nullity claim, after which the debtor has one year to "redeem" by paying the outstanding debt. *See* R.S. 47:2290.

only requires an increased upfront expenditure, it delays and directly reduces the investor's return, by eliminating opportunity for a settlement premium. Although settlement is not prohibited under the execution-based model, the debtor has very little incentive to do so – at least as compared to the fixed-period model. Moreover, in light of the mandatory reimbursement of attorney fees and costs, the reduction of the investor's net profit may not even inure entirely to the benefit of the debtor, who avoids paying a premium but must now pay this reimbursement in its place. These economic effects also impact the system's overall calculus: Even notwithstanding mandatory reimbursement, the upfront expenditures necessary to bring suit may be sufficiently large in relation to the value of some lower-value properties as to disincentivize suit altogether. Where redemption appears unlikely, and the underlying property is unappealing, it may be more cost-effective for the certificate holder to simply decline to file suit. In many cases, properties such as these are precisely the ones that stand to benefit – and thus provide benefit to the general public – by being returned into commerce.[333]

Argument #4 in favor of the fixed-period model: Once suit is filed, the fixed-period model contemplates a less complex set of procedures than the execution-based model.

The fixed-period model avoids all complication related to calculation of the redemption price and the process of redeeming pursuant to a preliminary order. The court's only duties in this process are to adjudicate any nullity claims (or determine that none were timely brought) and to then fix the price of the debt as of a single moment in time. Furthermore, the court is required to determine an award of attorney fees and court costs only upon reaching final judgment. And, absent a successful nullity claim, the tax collector has no duty or involvement at all. By contrast, the execution-based model contemplates a multi-step process involving both the court and the collector and at least some level of coordination between them. The court must issue an initial rule to show cause, adjudicate two categories of claims – nullity claims and objections to the certificate holder's claim for attorney fees and costs[334] – and render (absent redemption) two separate judgments, both of which require some determination regarding the current value of the debt. Moreover, the tax collector must coordinate functions with ongoing litigation so as to determine whether to accept an attempted redemption. Whereas the fixed-period model allows the collector to discern, essentially from the face of the tax certificate, whether the certificate is redeemable, the execution-based model requires that the collector maintain records tracking the certificate holders to which a certification of the redemption price has been issued. For tax collectors that are understaffed or underfunded or have less resources at their disposal, these enhanced duties may prove problematic and increase the rate of error or delay as compared to the fixed-period model and present law. Similarly, this model requires tax debtors to navigate, if only on a limited basis, the complexities of the court system.[335]

[333] *Cf.* n.340.

[334] It should be clarified that this model does not contemplate litigation over the *amount* of attorney fees and costs but rather the entitlement to their recovery generally. In essence, the issue being litigated is the sufficiency of post-sale notice; if there is sufficient notice, the certificate holder is entitled to attorney fees and court costs, but absent sufficient notice they cannot be recovered.

[335] This is a "limited basis" because the debtor need not actually litigate over any issue. Instead, the debtor is free to eschew response to the rule to show cause and simply await the preliminary order fixing costs before redeeming. *See* Code of Civil Procedure Article 2593 (providing, relative to summary proceedings, that "[a]n answer is not required, except as otherwise provided by law").

Although the execution-based model unquestionably requires a more complicated set of procedures, it should be noted that these procedures are deliberately modeled on existing procedures for monitions proceedings and nullity actions.[336] As administered under current law, these procedures have not, as a general matter, proven unduly cumbersome or produced excessive confusion. This is not, however, a one-to-one comparison: The procedures at issue are currently used far less frequently than they would be under the execution-based model, and, when used, they are not combined into a single hybrid proceeding as contemplated. In any event, the Committee representative for tax collectors indicated throughout Committee deliberations that the execution-based model as proposed is not overly burdensome on the collector. While valuable, this insight should be acknowledged as being particular to certain jurisdictions and thus potentially nonrepresentative with respect to the tax collectors of jurisdictions with less resources.

Furthermore, as noted above, the complexities associated with the execution-based model may be eliminated in part by providing for post-suit redemption through the clerk of court. This would remove a large portion of the added burden placed on the collector under the execution-based model; the collector would simply accept redemption as usual until alerted to the fact that an enforcement action has been initiated under R.S. 47:2266.[337] This modification does, however, give rise to new complications with respect to the calculation and payment of the redemption price. Redemption through the tax collector – even pursuant to the more complicated procedures of the execution-based model – makes simultaneous (or near-simultaneous) calculation and payment of the redemption price relatively easy: The collector simply calculates the amount of statutory impositions, interest, and penalty due as of the present day, then adds to that amount the amount of costs and fees identified by the court's preliminary order. The court's official calculation, however, requires a judgment or order, which necessarily takes time to issue, to reach the relevant party, and to respond to. These delays are important given that if payment is not made within the necessary timeframe, additional interest or costs will accrue, rendering the prior determination obsolete (and incorrect). While this particular inconvenience can be managed via some sort of (temporal) "payment window," it nevertheless represents an added complication and a further drain on judicial resources. Additionally, requiring redemption through the court forces tax debtors to navigate a more sophisticated setting.

Another mechanism by which some of these difficulties might be alleviated is a statutorily fixed award for attorney fees and court costs. As noted above, this would close the "gap" in the redemption period under the execution-based model by eliminating uncertainty regarding the amount due for costs and fees and thus eliminating need for the court's input. It would likewise reduce the extent to which the debtor is forced to navigate the court system. On the other hand, however, a one-size-fits-all remedy would risk undercompensating certificate holders in cases requiring particularly complex or time-consuming work. Although this undercompensation would theoretically be balanced out by overcompensation in straightforward cases, it could potentially

[336] *See* "Additional Characteristics", Part IV(B)(ii), *supra*.

[337] This "alert" could come in either the form described above in relation to the execution-based model – that is, via the certificate holder's request for a certification of the redemption price – or simply via an explicit requirement that the certificate holder notify the collector prior to filing suit. In either case, the responsibility would fall on the interested party.

serve to disincentivize enforcement with respect to labor-intensive cases – a category of cases that overlaps significantly with properties in greatest need of being returned to commerce.[338]

Summary of arguments in favor of fixed-period model: In sum, the primary benefits of the fixed-period model stem from its clear, bright-line rules and the finality with which it treats the parties' rights and obligations. It is easily administered and leaves very little room for ambiguity or optionality. Moreover, its termination of the right of redemption prior to suit ensures the maximum possible rate of pre-suit redemption and, where redemption is not made, strongly incentivizes delinquent taxpayers' avoidance of suit via private, extrajudicial settlement. Finally, it provides greater profit opportunity to prospective tax-lien investors than the execution-based model.

As for the execution-based model, its primary benefits represent a general inversion of those provided by the fixed-period model. These are discussed below.

Argument #1 in favor of the execution-based model: The execution-based model mirrors the typical process for foreclosure and execution of judgments more closely than the fixed-period model.

Much of the substantive confusion resulting under present Louisiana tax sales law is related to the enforcement process. While the recommended shift to a "pure lien" system would eliminate most of this confusion, the possibility exists – as it does with any new body of law – that new, unforeseen issues may emerge even under that system. Because the execution-based model adheres more closely than the fixed-period model to ordinary process under the Code of Civil Procedure,[339] it reduces this possibility. Certainly, this reduction is not complete – litigation still arises in this and any context – but insofar as these rules and procedures are more familiar to practitioners and more directly supported by the robust jurisprudential base, they will serve to limit margins for dispute and increase predictability for the execution-based model.

It is nevertheless notable that the tax sale context differs from the typical foreclosure context – the context in which the aforementioned rules and procedures were designed to operate. Insofar as this difference justifies divergence in procedure, the execution-based model's close mirroring of the process for, say, a mortgage foreclosure may represent more detriment than benefit. To wit: The dollar-value of a tax lien is much lower on average than a conventional mortgage; thus, the necessary expenses associated with enforcement are greater in relation to the debt in the present context. Accordingly, any increase (or decrease) in those expenses or in overall inconvenience will be more impactful than it would with respect to a mortgage foreclosure, where the cost of enforcement is typically small in comparison to the debt being enforced. In this sense, the fixed-period model's greater simplification of the existing enforcement process is a positive

[338] For example, a case that requires a complicated title search might qualify as "labor intensive." Correspondingly, the complexity of this title search indicates uncertainty in the chain of title. This uncertainty (a) makes the property less appealing to prospective buyers, which in turn (b) disincentivizes investment in the property by the current owner. As a result, the property is de facto excluded from commerce, which often causes it to become blighted – which continues the feedback loop. Because properties subject to these circumstances provide no value to the general public and in fact may decrease surrounding home values, they both derive and provide the biggest potential benefit from and to the tax sales process, in such case as it returns them to taxpaying status and establishes clear title.

[339] *See generally*, 1 PETER S. TITLE, La. Prac Real Est. § 16:3 (2d ed. 2023) (describing foreclosure by ordinary process). *See also* Code of Civil Procedure Article 2291 et seq.

attribute as compared to the execution-based model. From the opposing perspective, however, it is notable that the value of the tax lien is also much lower in comparison to the property being seized and sold than in the mortgage context. In this sense, the execution-based model's retention of more of the redundancies and assurances baked into existing foreclosure process is a positive attribute as compared to the fixed-period model.

Argument #2 in favor of the execution-based model: It provides a greater guarantee of due process and more robust protections to debtors generally than the fixed-period model.

The most significant benefit conferred by the execution-based model in relation to the alternative is the enhanced protections provided to delinquent taxpayers. For one, the survival of the right of redemption until execution – in particular, until after service in the enforcement suit – serves as a near-guarantee of due process.[340] In the rare case where due process notice is not effected during the tolling period, a debtor under the fixed-period model will not receive notice until *after* the right to redeem has been terminated. Rather than affording this unlucky debtor the opportunity to redeem as a matter of course upon being haled into court, the fixed-period model dictates that they must either undertake costly and uncertain litigation in the hopes of winning the right to pay the debt, or else pay a premium to settle the matter privately. By contrast, the execution-based model simply allows a debtor who wishes to pay the debt to do so.

Although the tenor of current jurisprudence indicates that present law satisfies due process,[341] the issue is still contested and has not been resolved with finality.[342] To the extent that this issue is not resolved via the Committee's recommendations detailed in Part III, *supra*, the fixed-period model more thoroughly assuages any remaining concerns by ensuring that notice is provided in all cases prior to termination of the right to redeem. While certain changes recommended in Part III, *supra*, are calculated to help ensure the constitutionality of the system under either of the present alternatives, the execution-based model can nevertheless be said to provide further certainty on the matter, even if only in small part. In fact, the redundancies built into the execution-based model dictate that post-sale notice under R.S. 47:2156 is unnecessary to ensure due process: Any failure or omission of post-sale notice is cured via service in suit or notice of seizure.[343] Insofar as one seeks to streamline the execution-based model, a loosening or altogether elimination of post-sale noticing requirements – in regard to creditors, for example – is one avenue by which this can be accomplished without compromising due process.

Moreover, the enhanced protections conferred under the execution-based model serve as practical safeguards in addition to constitutional guarantees. Under the execution-based model, the debtor is ensured more robust notice throughout the process. More specifically, these notices are

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[340] *See Mullane*, 339 U.S., at 313.
[341] *Cf. Central Properties*, 225 So. 3d 441. In *Central Properties*, the Louisiana Supreme Court held that post-sale notice by a tax sale purchaser could cure a lack of notice by the tax collector but clarified that its holding was only intended "to answer this narrow question" with respect to the statutory requirements. Although this is an issue related to due process, the court emphasized that "neither the district court nor the court of appeal reached the constitutional issues raised by the mortgagee" and explained that it was "revers[ing] the judgment of the court of appeal, and remand[ing] the case to that court for consideration of the issues pretermitted by the court of appeal's reasoning."
[342] *See Spain v. H&H Investors, L.L.C.*, 2023 WL 6224966, *4 (La. App. 4 Cir. 2023) ("[O]ur research has yielded no cases, to-date, that have presented a constitutionality challenge to" Louisiana's current tax sales law).
[343] *See* Code of Civil Procedure Article 2293.

provided at points in time when the debtor still has the ability to act and thereby avoid the consequence of which the debtor is being notified. Whereas service in the enforcement suit stands as notice of the right to assert a nullity claim under the fixed-period model, it apprises the debtor of a "greater" right – the unconditional right to redeem – under the execution-based model. Similarly, notice provided during the post-judgment execution process confers little to no protection under the fixed-period model, as the debtor has no right to take action to avoid the consequence of which the debtor is being notified. By contrast, each successive notice under the execution-based model is an additional reminder of the debtor's ability to avoid the loss of property by paying the debt. This ability is a policy similarly advanced in the context of "typical" foreclosures.[344]

Comparison to these non-tax foreclosures further supports the inclusion of the enhanced protections contemplated by the execution-based model. With a conventional mortgage, for instance, the transaction is entered knowingly and voluntarily by the parties, and the procedures for enforcement are negotiated and agreed upon in advance. In other words, debtors in the context of a mortgage foreclosure are armed with greater knowledge of the circumstances and their rights, remedies, and recourses vis a vis the creditor than tax debtors in the present context. This suggests that the need for the protection conferred by the ability to prevent sale by paying the debt is even greater in the tax foreclosure context than other contexts. Of course, this is not a one-to-one comparison, as tax sales statutes may also preclude certain protections for creditors that might otherwise be negotiated in relation to a conventional mortgage.

On the other hand, tax foreclosure already contemplates detailed mandates of notice to the debtor to account for this need for protection. Moreover, the survival of the right to redeem throughout so many successive notices and stages in the process may serve to do more harm than good. Whereas the fixed-period model provides a single, clear, hard deadline with clear, unequivocal effects, the conditional nature of the initial deadlines under the execution-based model reduce the incentive for timely payment and afford more opportunity for debtors to allow their debts to grow unmanageable. Stated otherwise: A debtor may intend to redeem and have sufficient funds to do so but elect to wait in light of the fact that redemption can still be effected at later points in time; the same debtor may then be unable to afford the redemption price after inclusion of the attorney fees and costs during the enforcement suit. This risk may be mitigated in part by the use of intentional language in the various statutory notice forms – for example, by stating that the right to redeem is only *guaranteed* until three years have expired, or alternatively by making abundantly clear the likely magnitude of the increase in price upon filing of suit – but, ultimately, human nature dictates that the aforementioned risk will nevertheless be borne out in some cases. Thus, although as an objective factual matter the execution-based model affords the debtor a greater opportunity to redeem, this apparent abundance of opportunity may lead some debtors to neglect the matter to their ultimate detriment.

<u>Argument #3 in favor of the execution-based model:</u> The execution-based model provides greater incentive for proper post-sale notice than the fixed-period model.

As discussed above, a debtor's only recourse upon being served with suit in an enforcement action under the fixed-period model is to litigate a claim for nullity or settle privately with the

[344] *See* Code of Civil Procedure Article 2340.

certificate holder. Furthermore, even if the nullity action is successful, the outcome is simply that the debtor is entitled to pay the debt – including all of the applicable interest and penalties. Thus, unless the certificate holder demands a settlement premium far in excess of the cost of litigation, the debtor's best course of action is typically to settle privately and avoid the expense and uncertainty of litigation. This holds true even where the nullity claim has an extremely high likelihood of success. It is therefore notable that the settlement price represents a greater recovery for the certificate holder than recovery via timely redemption. Insofar as post-sale notice increases the likelihood of timely redemption, this means that sending notice may result in a *lesser recovery* for the certificate holder, even with reimbursement of notice costs.[345] For the subset of cases where notice does lead to redemption: Either notice is sent and the redemption price is paid and recovered by the certificate holder, or notice is *not* sent and the redemption period expires and the certificate holder recovers the redemption price plus a settlement premium. By contrast, the execution-based model allows for the debt to be paid as a matter of course even after service, thus providing no opportunity for the certificate holder to obtain a recovery greater than the statutory amount.[346]

Of course, it is nevertheless the case that most tax-lien investors are seeking simply to turn over their investments in timely fashion without need to expend additional labor negotiating a settlement. Capital is not unlimited, so timely redemption allows further investment and continued participation in the system. This serves effectively, as a general rule, to incentivize post-sale notice – and, in any event, good faith operation is the general rule for tax-lien investors. Nevertheless, for whatever minority might otherwise make a calculated decision to omit notice in order to extract greater profits, the execution-based model eliminates any potential adverse incentive to do so. This stands as another benefit of the execution-based redemption model as compared to the alternative.

<u>Argument #4 in favor of the execution-based model:</u> The execution-based model does not, per se, require that inferior creditors be served in the enforcement action.

This advantage is not a definitive, fundamental component of the execution-based model but rather is optional. Because the right of redemption survives beyond judgment in the enforcement suit and until execution of the judgment via judicial sale, the notice procedures required during the execution process are effective to satisfy due process, insofar as they are properly carried out.[347] The result is that, even without attaching creditors as parties to the enforcement suit, due process is still satisfied to the same extent it is satisfied in regard to junior creditors in a typical mortgage foreclosure. By contrast, the failure to serve these parties in the enforcement suit under the fixed-period model results in the survival of their right to bring an action for nullity. Although the execution-based model contemplates a far more involved and cumbersome procedure, the ability to exclude creditors from the enforcement suit may serve to counteract some measure of the aforementioned complexity.

As noted above, this permissive rule can just as easily be excluded from the execution-based model. Indeed, mandatory inclusion of these parties may nevertheless be preferable as a further guarantee of due process and a safeguard against eleventh-hour complication of the process. Making junior creditors parties to the enforcement action further operates to reduce the

[345] Notably, present law does not permit reimbursement for costs of notice. R.S. 47:2156, cmt. (b).
[346] *Cf.* Part IV(E), *infra*.
[347] *See* Code of Civil Procedure Article 2293 (providing for notice of seizure).

amount of unnecessary work undertaken during the execution process by encouraging redemption prior to judgment. Additionally, the above statement that, without these parties' inclusion in the enforcement action, the execution-based model satisfies due process *to the same extent that a typical mortgage foreclosure would* was not an insignificant clarification: If the notice procedures during the execution process do not result in proper notification of the interested parties who were not served in suit, it may create liability on the part of the certificate holder.[348] Although statute makes it quite difficult for the party who did not receive notice to obtain recovery against the certificate holder,[349] the prospect of further litigation nevertheless represents a significant inconvenience..

<u>Summary of arguments in favor of execution-based model:</u> In general, the advantages provided by the execution-based model manifest in the form of enhanced protections for property owners and for the validity of the process. The execution-based model affords an extended opportunity for redemption, more robust notice of the right to redeem, and greater procedural and practical safeguards throughout the process.

<u>Relationship to other issues:</u> Finally, the interconnectivity between the present issue and others considered in this Part must be noted. While all of the issues described in this Part are part of the same overall balancing of interests, an evaluation of the relative merits of the alternative approaches to *structuring* the redemptive period should be undertaken with careful consideration for the *length* of the redemptive and tolling periods and the likely effects of the latter issue on the former. Analysis of this latter issue is provided in Part IV(D)(i), *infra*.

C. Enforcement Process: Treatment of Surplus

The next major issue on which there was no consensus is likewise related to the enforcement of tax sales rights: namely, the mechanism by which the debtor's interest in "the excess value of her home above her tax debt"[350] is protected. As discussed in Part II(A) and (C), *supra*, *Tyler* establishes that a Fifth Amendment taking occurs where statute "absolutely preclud[es] an owner from obtaining the surplus proceeds of a judicial sale".[351] This affords room for the legislature to "define[] the process through which the owner c[an] claim the surplus" without running afoul of the Takings Clause.[352] The present section addresses the question of precisely *how* this process should be defined. As with the prior issue, the Committee considered two potential answers to this question: (a) requiring a judicial sale as the default mechanism for the enforcement of tax sale rights; or (b) allowing for "strict foreclosure" absent a timely request for surplus by the debtor. Each of these alternatives is described below:

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[348] *See* Code of Civil Procedure Article 2338; R.S. 13:3886.1.

[349] *See* R.S. 13:3886.1. In particular, a successful claim for lack of notice not only requires the claimant to establish that due process was violated – including that the claimant's name and address were reasonably ascertainable through reasonable diligence and that the claimant lacked actual knowledge of the seizure – but also the ranking and value of the claimant's interest, the value of the underlying property, that the claimant suffered a loss by virtue of the sale, and that had the claimant been notified, the claimant would have bid on the property in such an amount as to have prevented the damages, either by winning the auction or by causing the price to have been sufficient to satisfy the claimant's interest and avoid the alleged damages.

[350] *Tyler*, 598 U.S., at 636.

[351] *See Tyler*, 598 U.S., at 644 (quoting *Nelson*, 352 U.S., at 110).

[352] *Tyler*, 598 U.S., at 644.

i. Mandatory judicial sale

The first alternative is the alternative generally referenced throughout this report. This model contemplates that judgment in the enforcement suit confirms the debt owed to the certificate holder and recognizes the lien securing it. The sole mechanism for enforcement of this judgment is a judicial sale of some sort:[353] The property is seized and sold at public auction, after which the sheriff is reimbursed for costs and the remaining proceeds are distributed to the certificate holder and other creditors, with any surplus going to the debtor.[354] Under this alternative, unclaimed proceeds are deposited into the registry of the court for some period, where they may be claimed by the debtor. If they remain unclaimed upon expiration of the applicable period, they are dealt with in accordance with statute. Notably, many statutorily created interests are subject to special rules regarding the treatment of unclaimed surplus: Most are held for either six months[355] or a year,[356] but some are held for as long as two years;[357] after the expiration of these periods, the funds either escheat to some government body,[358] are subjected to the provisions of Louisiana's Unclaimed Property Act,[359] or become the property of the person to whom the debt was initially owed.[360] Determination of how these funds should be dealt with is another policy-based issue.

ii. "Strict" foreclosure

The second alternative considered by the Committee for the enforcement of tax sale rights allows for strict foreclosure where a tax debtor fails to make a timely request for a judicial sale. In essence, this model entitles the debtor to recover surplus proceeds but requires that the debtor make an affirmative request for a judicial sale so that the proceeds can be claimed; if the debtor fails to take timely action, judgment is rendered in favor of the certificate holder transferring ownership of the property to the certificate holder and extinguishing the debt. Presumably, the period in which to make the claim for proceeds would somewhat resemble the six-month period for nullity actions under present law, though it could be made shorter or longer or structured differently in accordance with policy preference and related decisions pertaining to statutory framework.

iii. Comparison of the alternatives

The distinction between the aforementioned models pertains, obviously, to the measure of the debtor's loss and the certificate holder's recovery; the primary policies implicated by the decision between the two similarly concern the relative standing of the debtor and creditor under the tax sales process.

<u>The strict-foreclosure model provides several benefits:</u> First and foremost, it affords tax-lien investors a greater measure of recovery in cases where the debtor fails to file the appropriate

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353 *Cf.* Part IV(B)(ii), Step 4 (contemplating modifications to the typical process for execution of judgments).
354 *See* Code of Civil Procedure Article 2374.
355 *See* R.S. 9:4502, 4512, 4688.
356 *See* R.S. 9:4703.
357 *See* R.S. 9:4759.
358 *See* R.S. 9:4502 (the state treasury), 4512 (the clerk of court), 4688 (the parish treasurer).
359 *See* R.S. 9:4759.
360 *See* R.S. 6:327; R.S. 9:4797.

request. This increases the overall profit opportunity for the investor, thereby encouraging participation in the tax sales process, but it also serves to shift incentives on a more granular level: In particular, the prospect of obtaining ownership of the property incentivizes certificate holders to bring the tax sale process to a timely conclusion in circumstances where redemption is not necessarily expected. As noted, *supra*, these circumstances often correspond with the properties at the greatest risk of abandonment or blight and thus provide the greatest benefit upon reaching the terminus of the statutory scheme.[361] Under a mandatory-sale model, the prospect of a complicated title search may disincentivize enforcement in cases where the property owner is difficult to identify, locate, or contact and redemption is not expected; in these circumstances, the process requires more labor and greater upfront expense but affords no greater recovery (beyond reimbursement). By contrast, permitting strict foreclosure in circumstances where the debtor fails to take the necessary step to force a judicial sale serves to change the economic calculus for certificate holders in precisely the circumstances where the economic calculus might need changing. In regard to these circumstances, however, the following should be noted: The Committee's recommendation requires service prior to judgment – even under the fixed-period model – and requires that service be made on a curator where it cannot be made on the debtor.[362] Thus, in cases where a property has uncertain title or has effectively been abandoned by the owner, who cannot be located, it is, presumably, likely that a curator will take the necessary step to request the judicial sale. This serves to counteract the added incentive conferred by this model.

The second major advantage of the strict-foreclosure model is that it serves to simplify the enforcement process. It is self-evident that the process of seizure and sale demands resources and time; these demands, and the corresponding costs, can be avoided in some instances under the strict foreclosure model. Moreover, a system whereby title to the property is transferred in full to the certificate holder renders the process of untangling the claims of junior creditors far less cumbersome: As is the case under present law, a certificate holder may – in cases where judgment results in strict foreclosure – simply take the property subject to any existing interests.[363] This further serves to conserve judicial resources and avoid potential undesirable outcomes and consequent litigation.

<u>The mandatory-sale model arguably provides greater assurance of constitutionality than the strict-foreclosure model.</u> Although the majority opinion among Committee members is that both of these models ensure compliance with *Tyler*, this stance is not unanimous with respect to the strict-foreclosure model. Notably, *Tyler*'s seeming endorsement of *Nelson*[364] – in which the Supreme Court found that no unconstitutional taking had occurred as a result of New York City's seizure of property for unpaid water bills because the applicable ordinance provided a mechanism by which surplus proceeds could be recovered[365] – indicates that a strict-foreclosure model as described above would satisfy the Takings Clause.[366] To wit: The strict-foreclosure model

[361] *See* n.340 and accompanying text.
[362] *Cf.* Code of Civil Procedure Article 5091.
[363] *See* R.S. 47:2157, cmt. (b).
[364] *Tyler*, 598 U.S., at 644.
[365] *Nelson*, 352 U.S., at 110.
[366] *See also Rafaeli*, 505 Mich., at 453 (characterizing *Nelson* as standing for the principle that "no federal Takings Clause claim will exist when there is a statutory path to recover the surplus proceeds"); *Coleman through Bunn,* 70 F. Supp. 3d, at 80 ("*Nelson* makes clear that a Takings Clause violation regarding the retention of equity will not arise when a tax-sale statute provides an avenue for recovery of the surplus equity").

described above mirrors the model at issue in *Nelson* in virtually all relevant ways. It is perhaps notable, however, that the *Tyler* Court's reference to *Nelson* was not made in explicit support of its own argument but rather in rejection of Hennepin County's argument. Indeed, the court's discussion of *Nelson* was geared toward *distinguishing* it from the facts at issue in *Tyler*.[367] This means that *Tyler* was not ultimately dependent upon *Nelson*'s continued jurisprudential good standing: Because the court was explaining why *Nelson* was *not* controlling, it need not have provided any answer to the question of whether *Nelson* remains good law. Accordingly, it is not unreasonable to read the court's treatment of *Nelson* as persuasive but less than wholly conclusive as to the viability of the strict-foreclosure model:[368] *Tyler* allows the conclusion that the *lack of* a mechanism to claim surplus proceeds renders a tax sales statute *un*constitutional, but a measure of caution should be applied to the question of whether the *presence* of such mechanism renders a statute per se constitutional under the Takings Clause. *Tyler* does, however, seem to indicate that *Nelson* remains good law.

The Committee ultimately reached a similar opinion regarding the Eighth Amendment's Excessive Fines Clause. As noted in Part II(A)(iii), *supra*, the *Tyler* Court declined to address a related argument that Minnesota's tax sales scheme violated the Excessive Fines Clause. Nevertheless, for the reasons set forth in Justice Gorsuch's *Tyler* concurrence, at least one Committee member expressed concern regarding the viability of the strict-foreclosure model under the Excessive Fines Clause. While the *Tyler* concurrence stops short of drawing a definitive conclusion, it suggests that Eighth Amendment challenges to overly punitive tax sales regimes may find success in certain scenarios. Notably, the availability of a mechanism to claim surplus renders such success far less likely – as, logically, it indicates nonpunitive intent.[369] This view was shared by the strong majority of the Committee; nevertheless, the issue demands mention. No such questions of constitutionality arise with respect to the mandatory-sale model.

<u>The mandatory-sale model likewise advances certain policy interests:</u> Its primary benefit is the assurance of fairness to delinquent taxpayers and enhanced protection of home equity. Notwithstanding the legitimate benefits, described above, that would be derived from implementation of a strict-foreclosure model, strict foreclosure also allows for the seizure of properties worth many multiples of the corresponding debts for which they are seized. In *Nelson*, for example – the case cited by the *Tyler* Court for the principle that no unconstitutionality will result so long as the debtor is afforded an opportunity to claim the surplus – properties assessed at $6,000 and $46,000 were seized for debts of $65 and $814, respectively.[370] The property owners most likely to suffer these losses are the ones for whom the losses will be most sorely felt. As compared to the strict-foreclosure model, the mandatory-sale model affords greater protection for these individuals' economic interests.

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[367] *Tyler*, 598 U.S., at 643 ("The County argues that *Taylor* and *Lawton* were superseded by *Nelson* … but that case is readily distinguished").

[368] *Cf. Kokkonen v. Guardian Life Ins. Co. of America*, 511 U.S. 375, 379 (1994) ("It is to the holdings of our cases, rather than their dicta, that we must attend").

[369] *Cf. United States v. Bajakajian*, 524 U.S. 321, 329 (1998) (considering whether the scheme serves a "goal of punishment" such as "[d]eterrence"). Given that the debtor, even after failure to pay taxes, is able to claim the surplus, it is difficult to say that the consequence is intended to deter the nonpayment of taxes.

[370] *Nelson*, 110 U.S., at 105.

Additionally, the mandatory-sale model provides a system that is more easily navigable for debtors. As a general matter, delinquent taxpayers who have reached this point in the enforcement timeline are disproportionately likely to lack legal sophistication. As compared to the strict-foreclosure model, the mandatory-sale model eases the procedural burden placed on the debtor. Because no affirmative procedural step or filing is required of the debtor, the debtor is less likely to lose the value of their home equity on the basis of mistake or misunderstanding. On the other hand, whatever procedural burden does result from the strict-foreclosure model can be alleviated in part via a statutory safe-harbor form, aimed towards simplifying the necessary procedural step to the greatest extent practicable. However simple, the requirement for a filing may still indicate to the debtor that they must retain counsel – another significant financial hurdle. Strict foreclosure will result in instances where a lack of sophistication leads to a significant loss of home equity.

In sum, the advantage conferred by the mandatory-sale model over the strict-foreclosure model is an added protection for potentially vulnerable citizens against extreme results. It is true – to the contrary – that this "added protection" is just that: additional, at least for the purposes of due process. So long as sufficient notice of the right to claim surplus proceeds is given, the Constitution deems that the debtor has already been afforded due process of law. But the Due Process Clause serves not as a limitation on statutory protections but as a minimum threshold.[371] The mandatory-sale model advances the policy interest in fairness and preventing significant adverse results. Thus, this interest should be balanced against the competing interests described above.

D. Enforcement Process: Additional Issues

In deliberating over the enforcement process for tax sale rights, the Committee ultimately identified several additional policy-centric issues of comparatively less complexity. The Committee concluded that decisions on these matters were almost exclusively policy based. Thus, these issues are described in the present section, below.

i. Length of tolling period

The first such issue – the one most closely tied to the foregoing analysis – is the question of how long the applicable tolling period and the other statutorily mandated delays should be. As for the tolling period, several competing policy interests are implicated. (Note: Insofar as the present issue is being considered in tandem with the "fixed-period model" for the redemptive period,[372] the Legislature should bear in mind that the tolling period is synonymous with the redemptive period; both begin and end at precisely the same time. Because this is not true in all cases, the present section will refer to the period strictly as a "tolling period".).

A shorter tolling period, generally, allows for quicker turnover of the overall tax sales process. This, in turn, produces several effects. First, it means that properties are returned to taxpaying status sooner. Because less time elapses between the initial delinquency and the ultimate

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[371] *Nelson*, 352 U.S., at 110 ("[The] New York Court of Appeals … spoke of the 'extreme hardships' resulting from the application of the [strict foreclosure] statute in this case. But it held, as we must, that relief from hardship imposed by a state statute is the responsibility of the state legislature").
[372] *See* Part IV(B).

foreclosure, less opportunity exists for additional delinquencies to accrue in the interim. If a delinquent taxpayer's nonpayment of taxes is ongoing, a shorter tolling period allows less opportunity for the certificate holder to miss a payment and cause the sale of a subsequent certificate. Thus, the shorter period serves generally to reduce the frequency with which competing tax certificates are issued on a given property, keeping title comparatively free of additional encumbrances. Where these or other additional encumbrances do exist, the shorter period likewise promotes the earlier cleansing of title. From the municipality's perspective, a shorter tolling period – assuming that robust participation in the tax sales process can be achieved – serves to remedy issues of clouded title and return at-risk or otherwise problematic properties to commerce sooner than under a lengthier period.

Moreover, a shorter tolling period allows investors to "turn over" their capital more rapidly. Whereas interest will continue to accrue at the same rate regardless of whether the basis for the accrual is a new or existing outlay of funds, the imposition of a five-percent penalty makes new investment more attractive.[373] Tax-lien investors who are interested in participating at the ultimate judicial sale at the conclusion of the process will also have greater opportunity to do so under a shorter overall timeline. Finally, the shorter tolling period affords greater flexibility to tax-lien investors. Because the tolling period dictates only the *minimum* timeframe for enforcement – rather than a *mandatory* timeline – certificate holders have greater optionality with a shorter tolling period. For instance: With a hypothetical six-month tolling period,[374] a certificate holder has a four-and-a-half-year window in which to initiate the enforcement process before the lien prescribes; by contrast, a hypothetical four-year tolling period[375] affords only a one-year enforcement window.

By contrast, a longer tolling period generally benefits delinquent taxpayers. Not only does an extended period afford debtors more time in which to redeem;[376] it also ensures that the debtor receives more instances of notice, in the form of the annual tax bill. Accordingly, to the extent that the period is extended by enough time to dictate receipt of a subsequent tax bill indicating the existence of an outstanding tax lien, the extension helps to guarantee due process and thus avoid litigation and annulment. Finally, in regard to the execution-based model for the redemptive right, an extended tolling period delays the point in time at which court costs and attorney fees are added to the redemption price. This effect – postponement of increased cost to the debtor to avoid loss of property – also applies to the fixed-period model by delaying the point at which settlement (with premium) is the debtor's only recourse. By providing a greater opportunity for redemption or settlement prior to suit, a longer redemptive period further serves to reduce the number of lawsuits

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[373] To clarify by illustration: Upon purchase, a $1,000 tax certificate accrues an immediate 5% ($50) penalty, and 1% ($10) noncompounding interest per month. Subsequent to the imposition of the initial $50 penalty, the rate of return on this $1,000 investment remains steady at $10 per month. With a shorter tolling period, this $1,000 can be reinvested sooner, allowing for recovery of another $50 penalty; with a longer tolling period, the $10 per month remains the only return.

[374] Notably, the Committee does not recommend a reduction of the tolling period to six months.

[375] Likewise, the Committee does not recommend a four-year tolling period.

[376] This is the case under both the "fixed-period" model and the "execution-based" model of the redemptive period. Under the fixed-period model, the redemptive period is coterminous with the tolling period; thus, any extension of the tolling period results in an identical extension of the redemptive period. Under the execution-based model, the length of the redemptive period is effectively equal to the length of time prior to filing of suit plus the length of time between filing of suit to the final judicial sale. Extending the tolling period increases the minimum timeframe in which suit can be filed, thereby increasing the minimum guaranteed redemptive period.

filed. On the other hand: As was discussed above in regard to the execution-based model for the redemptive period, however, it may be the case that *too much* opportunity to redeem may work against delinquent taxpayers. In other words: It is likely that, given the opportunity to put off making the redemption payment, some tax debtors who would otherwise act in a more timely fashion will, in fact, put off the redemption; as a result, the debt may grow unmanageable and prevent the debtor from redeeming when the deadline ultimately approaches. Although this effect may be reduced in the present context – by virtue of the fact that the increase is gradual, rather than a significant one-time jump – it should nevertheless be considered.

ii. Requirement for appraisal

The next of these issues was whether and under what terms the enforcement procedure should require appraisal prefatory to execution of judgment by judicial auction. Beyond the baseline issue of whether appraisal should be required, the Committee's consideration of this issue also comprised discussion of related questions regarding responsibility for costs and the impact of appraisal on bidding.

Throughout the Committee's deliberations, proponents of mandatory appraisal characterized this requirement as a relatively inexpensive safeguard to help protect against major loss of home equity by tax debtors. They reasoned that appraisal provides the market with additional information, thereby promoting bidding more closely aligned with the property's value and maximizing the debtor's surplus. Notably, these alleged benefits were disputed as speculative and biased by tax lien investors, who questioned whether appraisal has any impact on auction price. Opponents of mandatory appraisal argued that the added cost serves as a significant disincentive to investors. Present law, however, already contemplates that these costs may be borne by (and later reimbursed to) either the sheriff or the appraiser themselves,[377] thus requiring no capital outlay by the certificate holder. Similar rules could be employed in the present context to mitigate the impact of the added expense.[378] Another disadvantage of appraisal is added delay. For the reasons set forth above, the impact of such delay is magnified in the present context, where the debts being foreclosed upon are lower in value than those in an average foreclosure on a conventional mortgage.

This delay serves as an even greater detriment where a second sale must occur because the property failed to sell for two-thirds of the appraised value. The process of readvertisement and second sale can produce delays in the order of six months in some parishes. Notably, statutory interest – that is, interest under Title 47 – does not accrue during this period, as money judgments instead accrue judicial interest, a lower rate.[379] For these reasons, the minimum-bid rule presents an obstacle to mandatory appraisal with respect to judicial sales for the enforcement of tax liens. Insofar as appraisal is made mandatory, the Legislature should consider implementing special rules to adapt the requirement to the tax-foreclosure context.

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[377] *See* R.S. 13:4363-4364, 4366. In particular, Title 13 provides that, absent appointment of an appraiser by the parties, "the sheriff shall appoint an appraiser for [them]." Subsequently, "[t]he fees of appraisers shall be taxed as costs."
[378] It should be noted that the maximum allowable fee for an appraiser under the general rules is $350, absent extraordinary circumstances. R.S. 13:4366.
[379] *See* R.S. 9:3500 (providing for judicial interest "on all sums which are the object of a judicial demand"); R.S. 13:4202 (fixing the rates of judicial interest).

One such rule considered by the Committee was a provision allowing any interested party to request an appraisal at their own expense. The logic underlying this proposal was that holders of conventional mortgages or other creditors stand to benefit from an increased auction price – as the increased price would increase the likelihood and magnitude of their recovery – and may thus be willing to take on such costs, the advantage of which would likewise inure to the benefit of the debtor. So long as the property sells at the first auction, this rule would not impact the certificate holder's recovery. Any such rule, however, – should the Legislature find it appropriate – should be considered in light of the issues described above and should account for the disadvantages created where the property does not sell at the first auction.

E. Tax Sale Bidding Process

In addition to the aforementioned issues pertaining to the enforcement of tax sale rights, the Committee likewise identified the bidding process at the initial tax sale as a policy-centered issue. In considering the issue, the Committee discussed several alternative models by which tax liens can be sold. Notably, not all of these models contemplate the existence of a "tax sale" as generally conceived. These alternatives, as well as their benefits and drawbacks, are discussed below:

i. Premium bidding or "overbid" model

Perhaps the most straightforward of the mechanisms for determining to whom a tax lien will be sold is the premium-bidding model. After an opening bid is entered for the total amount of the debt (including costs) as of the day of sale,[380] this model operates effectively in the same way as any other traditional auction: The highest bidder wins. In particular, the highest bidder "wins" – that is, purchases – the tax lien. The amount by which the winning bid exceeds the opening bid is the "premium" and does not form part of the redemption price. The premium can be handled in a few different ways: It can be retained by the tax-imposing authorities,[381] used to *offset* the

[380] Notably, this excludes the five-percent penalty. Although the penalty is levied prior to the tax sale, the Committee's recommendation contemplates that the collector will make an adjusting accounting entry to remove the penalty prior to the tax sale, after which it will be recoverable as part of the redemption price. This ensures that the penalty represents profit for the investor, rather than an amount for which the investor is simply reimbursed. The Committee's decision to impose the penalty at ninety days – rather than *at* the tax sale, as contemplated under present law – was calculated to reduce due-process concerns with respect to insufficient pre-sale notice. In particular, the Committee reasoned that attaching the penalty to the tax sale itself bolstered the argument that tax sales, even of liens, are invalid without prior notice sufficient to satisfy due process. Notably, the safeguard recommended by the Committee is largely in the vein of "extra, no-downside protection," as the Committee views the aforementioned argument's chances of finding favor with a court as fairly remote.

[381] Note that the municipality's retention of *this* surplus is entirely different from the surplus at issue in *Tyler* and discussed in Part II, *supra*. In *Tyler*, the "item" being sold was the underlying tax-indebted property. Before forfeiture, this property – in *Tyler*, a condominium – was owned by the tax debtor; thus, the tax debtor had a property interest in its value in excess of the tax debt. Accordingly, the court found that the County's retention of that excess value (in the form of the surplus proceeds of the sale of the property) was a Fifth Amendment taking. By contrast, the "item" being sold in the present context is the *debt* and the *lien itself*. The tax debtor *does not* have any property interest in the lien; rather, before it is sold, the lien is the property *of the municipality*. Because the debtor has no property interest in the lien, the debtor has no property interest in the surplus value of the lien in excess of the tax debt, either. Thus, the municipality's retention of the premium generated by the sale of the lien is not a Fifth Amendment taking.

redemption price, or refunded to the tax sale purchaser. In the latter two cases, the premium is typically paid to the tax debtor as (part of the) compensation for loss of property.

In instances where the surplus is nonrefundable to the tax sale purchaser, this bidding mechanism presents at least one major disadvantage when applied to the sale of "true" liens. Because the value of the rights being purchased is the right to be paid the redemption price (either by the debtor or via seizure and sale of the debtor's property), and because the redemption price is uncertain and dependent upon the timing of redemption, premium bidding allows for potential losses for tax sale purchasers. In particular, where redemption is made immediately or soon after the tax sale, the premium paid by the purchaser will exceed the amount of interest that has accrued in his favor and may also exceed the five percent penalty as well. For example: Consider the sale of a $1,000 tax debt (and corresponding lien). If the winning bid is for $1,100, the tax sale purchaser will not reach even the nominal[382] breakeven point until five months later. The addition of the five-percent penalty entitles this purchaser to a $1,050 redemption price immediately following the sale, with $10 (i.e. 1% of $1,000) of interest to accrue each month thereafter. Any redemption prior to the five-month mark fails to produce even a nominal return. Moreover, the real breakeven point – the breakeven point after accounting for overhead, operating expenses, and the like – is even further out. This uncertainty dictates that prospective tax-lien investors are unlikely to participate in the process, thus rendering delinquent taxes uncollectable.

As for the advantages of premium bidding: It is generally the only competitive-bidding model without a built-in price control. Because, however, it disincentivizes participation by many investors, it may nevertheless be unlikely to produce a particularly efficient marketplace. An additional benefit of premium bidding is the premium itself. Where retained by the municipality, the premium can be used to offset costs, either in this context or others, or to fund various government programs or functions. Although the sums may not be significant, this can provide an opportunity to advance policy goals external to tax sales, via statutory provision that the premiums be disbursed to a particular government body or organization. Alternatively, the premium can be used to offset the redemption price owed by the tax debtor or serve as a small measure of additional compensation where property is lost.[383]

As noted above, the premium can also be refunded to the tax sale purchaser upon redemption by the debtor. Notably, this system operates quite differently under a "pure lien" system

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In essence: *Tyler* involved the sale of the debtor's property; thus, the debtor had an interest in the surplus proceeds generated. The present context deals with the sale of the *municipality*'s property; thus, the municipality is entitled to retain any surplus proceeds generated. No property has been "taken" from the debtor in this case.

This represents yet another reason that present Louisiana law's characterization of the tax sale interest as a "lien" is misleading: The "item" that is actually being sold is the property itself (i.e. the fractional interest in the property); the actual perfection of the sale simply does not occur until the occurrence of an uncertain condition (i.e. the expiration of the redemptive period without redemption).

[382] "[N]ominal," as used here, refers to the "face value" of the return; that is, the outcome prior to factoring in any considerations beyond raw purchase price and raw redemption price. A nominal rate of return stands in opposition to a "real" rate of return – which is the ultimate return after considering all relevant inputs, including overhead, operating costs, interest expense (for funds borrowed by the investor), inflation and the time-value of money, taxes paid on profits, etc.

[383] As illustrated by the preceding hypothetical, this amount will be quite small in the vast majority of cases. It should also be noted that the refund of this "surplus" to the debtor does not satisfy the requirements of *Tyler*. See n.383.

than under a "hybrid" system of the type employed Indiana law.[384] Under this latter model, a tax "lien" is sold to the highest bidder at the initial tax sale, but (unlike with a true lien) the ultimate foreclosure provides for the tax sale purchaser to become the full 100% owner of the property. If the sale is redeemed, the purchaser is repaid the premium; if not, the premium is paid to the tax debtor as compensation for the forfeiture of property. By making the premium refundable, this statutory scheme ensures that tax sale purchasers are only "on the hook" for the full price paid in circumstances where they become the owner of the property. Thus, the initial tax sale operates more like an actual sale of the property than a sale of a lien, and the price obtained is more closely tied to the value of the underlying property than to the value of a mere lien.[385] As applied to the sale of a pure lien, however, this refund simply serves to drive down costs for investors, increasing their profit incentive and mitigating the issues described above. On the other hand, this also alters the competitive aspect of the auction, shifting the incentives for bidding away from pure valuation.

ii. Bid-down interest rate (and/or penalty)

The next model contemplates that the bidding mechanism is the rate at which interest accrues on the debt. Stated otherwise, the opening bid is for the maximum allowable statutory rate of interest, with each successive bid representing an offer to purchase the debt at a lower rate of return. For instance, the opening bid may be for 12% annual interest; subsequently, a bidder might bid 10%, then 8%, then 6%, and so-on. Typically, the minimum increments for bidding are either 0.1% or 0.5% increments. This procedure can also be applied to the statutory penalty in lieu of the interest rate. If multiple bidders are willing to pay the delinquency at the same interest rate, the tie can be broken in a number of ways. Some states provide for the winner to be drawn at random from among the relevant bidders;[386] others allow bidding to continue via premium bidding.[387] Bidding down of the total rate of return may also be permitted to continue on the penalty (or, if the penalty was the initial basis, on the interest rate).[388] Upon determining a winner, the winning bidder is awarded the lien in exchange for paying the amount of taxes due. The certificate issued to the winning bidder then provides for the accrual of interest and penalty at the rate identified by the winning bid.

In essence, this bidding model resembles the premium model in the sense that both models contemplate that each successive bid serves to reduce the ultimate net profit to the winning bidder. This model, however, provides certain advantages in relation to the premium model. For one, it caps the potential loss to the purchaser; although real losses may still result after factoring in operating expenses and the like, the bid-down model at least ensures that the actual purchase price

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[384] *See* Ind. Code 6-1.1-24-1 et seq.

[385] Connecticut uses a similar procedure and characterizes more clearly the nature of the process. *See* Conn. Gen. Stat. § 12-157. Notably, this procedure does not provide a foolproof solution to the *Tyler* problem. Given the necessary gap in time between the tax sale and the forfeiture of property, the price obtained may in some cases prove insufficient as a measure of "just compensation" under the Takings Clause. Where the interest accruing on the premium is lower than a reasonable market rate of return, this issue is exacerbated, as the opportunity cost of setting aside such funds is increased. Connecticut provides a relatively moderate solution, depositing the premium into an interest-bearing account, the full balance of which is paid out to the appropriate party. By contrast, Indiana's system provides for the accrual of penalties on the premium amounts, payable as part of the redemption price. While these penalties make higher bidding more palatable, they may also serve as a significant obstacle to redemption.

[386] *See, e.g.*, Fla. Stat. § 197.432(6).

[387] *See, e.g.*, N.J. Stat. § 54:5-32.

[388] This mechanism is employed in legislation currently pending in the 2024 Regular Session. *See* Senate Bill No. 286.

will not exceed the redemption price. Second, the sale's competition inures to the benefit of the tax debtor, by reducing the effective rate of interest and thus helping keep the debt smaller and more manageable. From the debtor's perspective, the present model produces a more efficient market: Tax sale participants are effectively competing to determine who is willing to "lend" money to the debtor at the lowest interest rate. Nevertheless, the impact of this benefit may be discounted when viewed in light of lending markets generally: Lower interest rates are offered on the basis of likelihood of repayment, which in this context means that the benefit of cheaper redemption will be more likely to operate in favor of taxpayers who need it the least. Of course, this does not prevent the benefit altogether. As for negative effects, this model has similar disadvantages to premium bidding. By reducing the expected return for investors, this model makes the tax sale process less economically attractive and risks driving out investors. Interest-rate bidding can also discourage participation by large institutional investors who may be participating using borrowed funds on which they themselves must pay interest.

An additional issue for consideration in concert with this model is the rate of interest on subsequent years' taxes. States that employ interest-rate bidding most commonly provide that subsequent years' taxes accrue interest at the statutory maximum rate, rather than the rate bid at sale. This helps to bolster expected returns for investors and also provides another small incentive for debtors to make timely redemptions. It should be noted, however, that maintaining the low interest rate for subsequent years' taxes – insofar as it can be done without compromising the necessary profit incentive for investors – can confer benefit. In particular, if the interest rate on subsequent years' taxes does not represent a clear positive return, this encourages certificate holders to initiate and conclude the enforcement process in timely fashion upon expiration of the tolling period. Notably, however, this likely requires some additional modification to mitigate the reduction in expected return.[389]

iii. Lottery and round robin

The next tax sale models discussed by the Committee are the "lottery" and "round robin" models. These models eliminate competitive bidding and simply offer the tax liens for sale individually, according to a random or preset order. The lottery model contemplates that each tax lien is offered for sale to the purchaser identified by random drawing; if the first offeree declines, another is drawn. Similarly, the round-robin model makes offers of sale in a predetermined order, with each tax sale participant getting one opportunity before any single participant has the chance to buy a second lien.

The primary benefit of these models is the guarantee of a "full" rate of return for the tax sale purchaser. On the issue of fairness, these models can be viewed as beneficial or detrimental. On the one hand, they ensure that all participants have equal opportunity to invest; on the other hand, they eliminate market-based competition. Another potential detriment of these models is that they encourage "gaming" of the system by investors registering many "separate" entrants, thereby increasing their ability to purchase more liens. This concern can certainly be mitigated, however. For example, a registration fee can be required, or some proof of identity can be mandated as a prerequisite to registration.

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[389] *See* Part IV(F), *infra*., for further discussion related to this issue.

iv. Negotiated sale and sale by lots

The final framework considered by the Committee eschews the concept of a "tax sale" entirely. Rather than selling tax liens at some form of public sale, statute can allow municipalities to sell liens privately, directly to purchasers and without any public offering. This permits negotiation of price, benefitting both municipality and purchaser. Furthermore, the terms of negotiation need not be limited by statute. A municipality that wishes to prioritize the ability of its taxpayers to redeem over maximizing revenue, for instance, might negotiate a lower interest rate on the liens. Furthermore, these negotiated sales may – and typically do – involve the sale of liens in bulk. (Notably, sale by lots can be incorporated into any of the above models.) This is advantageous to the municipality for several reasons. For one, it significantly streamlines the process; less costs are incurred and less manpower required than under a model requiring a public sale. Secondly, the ability to sell in bulk makes it easier for the municipality to collect on low-value liens, thereby increasing the likelihood that at-risk properties are returned to tax-paying status. Finally, it affords both municipality and investor greater flexibility in adjusting to changes in financial circumstances. Investors further benefit from the fact that bulk purchases help assure ultimate financial benefit. Finally, the private-sale process provides opportunity for municipalities to develop synergies with tax-lien investors and select trustworthy entities that operate with integrity. The primary disadvantage of this system is the lack of public participation and the consequent potential for opacity and increased reliance on the discretion of collectors. Transparency can, however, be achieved to significant extent through specific rules on point. As for public participation, similar modifications can protect this interest – for example, a limitation on the number of liens that can be purchased by any given purchaser, or a requirement that some percentage of liens be sold through public sale.

F. Compensation Generally

The final issue on which the Committee elected to provide no specific recommendation is one that is purely policy-based in nature. In particular, the Committee agreed that consideration of the constitutionally and statutorily mandated rates of compensation is warranted in connection with any broad revision effected by the Legislature. Because *Tyler* may in many cases serve to limit the recovery for tax-lien investors, it is important that the economic effects of any additional statutory revisions be limited to the extent necessary to protect and maintain robust participation – or, otherwise, be offset by modifications of the statutory rates of return. Similarly, for issues described in this Part that implicate legal issues or important policy considerations beyond the economic incentive for investors, it should be considered whether altering the facial rates of return might enable a decision that advances other policy goals but would prove otherwise impractical under the current limitations regarding interest and penalty.

Notably, the analysis provided above posits that in some cases, enhanced protections for due process or for property owners may cause impairment of the necessary financial incentive for investors. For instance, the execution-based redemption model reduces or eliminates the ability, afforded under present law and the fixed-period model, for tax-lien investors to obtain recoveries greater than those provided by statute.[390] Insofar as it is determined that this or any other reduction in expected return is so large as to require either remedy or avoidance, the Committee suggests

[390] *See* Part IV(B)(iv), *supra*, text accompanying n.347-348.

that modification of the constitutionally permitted rates of interest and penalty should be considered as a mechanism by which to provide this remedy. In other words: Rather than ensuring necessary profit incentive by removing protections, it may be preferable to ensure necessary profit incentive by directly increasing the statutorily provided profit incentive. Of course, it may be determined that modification of the interest and penalty rates is unnecessary, impracticable, or undesirable. The Committee provides no recommended answer regarding these questions but merely suggests that this alternative be borne in mind given the currently shifting landscape for tax sales and the importance of ensuring sufficient compensation for the valuable public service of paying delinquent taxes.

In light of the current uncertainty in this area of the law, the need for flexibility is increased. To this end, the Committee notes that, in its prior drafting efforts – efforts that were ultimately rendered obsolete by *Tyler* – it had contemplated changing the constitutional rates of interest and penalty from mandated rates to maximum limits. This represents one way that the Legislature may afford itself a measure of flexibility regarding provisions for tax-lien compensation. Moreover, this further lends greater ability to account for recent fluctuations in interest-rate environment. And interest may not be the only mechanism by which these incentives are shifted. For example, a statutory scheme requiring a mandatory lawsuit for enforcement may derive greater benefit by modification of penalty provisions than interest. If the cost of filing suit represents a financial disincentive for enforcement, increasing interest rate may encourage *further* delay before filing; by contrast, the imposition of an additional penalty upon the filing of suit represents a tool more specialized to the task. These ideas should be considered in tandem with any decisions pertaining to issues discussed in this Part.