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ABSTRACT

The predominant method for collecting delinquent real estate taxes in Massachusetts is the use of the "tax deed" as authorized by Chapter 60, Sections 53-54. Under the authorized procedures, each municipality's tax collector can execute and record a deed that transfers fee simple title to the real estate to the municipality subject to the taxpayer's statutorily created redemption right. If the redemption right is or cannot be exercised, all of the taxpayer's rights in the property, as well as other's rights created by encumbrances such as mortgages, are terminated by the foreclosure process provided for in the statute. Importantly, the municipality does not obtain title to the taxpayer's land by foreclosure; instead, it merely frees itself of any remaining claim by the taxpayer.

The problem with the tax deed procedure is that it fails to provide both procedural and substantive due process to the taxpayer. Procedurally, although adequate notice is given, title to the taxpayer's real estate is taken by the government without a hearing. Based on an unreviewed decision by a municipal tax collector, the taxpayer immediately loses title to the land. Substantively, by using a tax deed, the municipality engages in the taking of property without providing reasonable compensation. The value of the land taken for payment of the tax debt is not evaluated in the context of the debt owed. Empirical evidence shows that the property's value significantly exceeds the debt owed, giving the municipality the ability to collect almost fifty dollars for every dollar of delinquent real estate tax owed, on average. Each year, approximately $56,000,000 is unconstitutionally appropriated from taxpayers. This Article will explore these problems

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I. INTRODUCTION

Municipalities must be able to collect overdue real estate taxes efficiently, but must do so in a constitutional way. Unfortunately, significant due process problems subsist in the primary method used to collect these unpaid taxes in Massachusetts.[1] This paper discusses these problems.

Most commonly, a Massachusetts municipality[2] uses a "tax deed" that is executed by the tax collector and recorded on the land records.[3] Using this document, the municipal officer transfers title to the land from the taxpayer to the town, subject to a right to redeem title if the taxpayer satisfies the tax debt and associated costs.[4] If the tax debt is not paid, Massachusetts law uses strict foreclosure to extinguish the remaining title held by the taxpayer, known as the right of redemption.[5] The result of this process is that the municipality acquires title to the land free and clear of all other claims being made against

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1 *See generally* MASS. GEN. LAWS ch. 60 (2012) (outlining the procedures available to collect real estate taxes).

2 As is common throughout the United States, real estate taxes are imposed at the local level. *See* Glenn W. Fisher, *History of Property Taxes in the United States*, ECON. HIST. ASS'N, https://eh.net/encyclopedia/history-of-property-taxes-in-the-united-states/ (last visited Mar. 1, 2018) [https://perma.cc/Q5Z9-GXUL]. In Massachusetts, this is the city or town in which the property is located. *See* MASS. GEN. LAWS ch. 59, § 2A (2012) (imposing duties on the "assessor[] of each city and town").

3 *See* ch. 60, § 54.

4 *See id.*

5 *See id.* § 53 ("If a tax on land is not paid . . . the collector may take such land for the town . . . ."). Where a lien holder is given title to the property affected by the security device rather than having the property sold and taking the money generated, it is known as a "strict foreclosure." *See, e.g.*, Wornat Dev. Corp. v. Vakalis, 529 N.E.2d 1329, 1330 n.4 (Mass. 1988) ("Generally, in a decree of strict foreclosure of a mortgage, a court determines the amount a defaulting mortgagor owes and orders the mortgagor to pay this amount to the mortgagee within a specific time. If the mortgagor fails to make the payment, the decree extinguishes the mortgagor's right of redemption and vests title absolutely in the mortgagee. No sale of the property takes place." (citations omitted)). In the minority of states recognizing the remedy, it is generally limited to those circumstances where a foreclosure by sale is unlikely to generate a financial return to the fee title holder. *Cf.* Bradford Realty Corp. v. Beetz, 142 A. 395, 397 (Conn. 1928) ("As no equity in the property over and above the first mortgage [existed] . . . the trial court wisely refused, in the exercise of its discretion, to impose upon the plaintiff the additional cost and expense of a foreclosure by sale.").

the property.[6] While this process is not fundamentally unsound in theory, as implemented in Massachusetts, it leads directly to an unconstitutional taking of property by the municipality. A hypothetical will illustrate:

> *Assume a taxpayer owes a small amount of money to the municipality, say $400.00.[7] Also assume that the real estate has a market value of about $375,000.[8] For whatever reason, the property owner fails to pay the $400.00 bill.[9] Following the procedures described below, the municipality takes tax title and then forecloses any redemption rights that the taxpayer may have had.[10] The town now has absolute title to the property and all of the taxpayer's rights have been terminated. In other words, to satisfy a $400.00 debt, the taxpayer will surrender property worth almost 1,000 times more and the town obtains a windfall of $374,600.*

Of course, as a general matter, the government is not allowed to appropriate private property without due process of law.[11] A failure of

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6 *See generally* Robert J. Kerwin, *Municipal Collection by Foreclosure of Tax Title*, 83 MASS. L. REV. 77 (1998).

7 This small of a claim is not unusual as unpaid municipal water and utility bills can be treated as property taxes under Massachusetts law. *See* MASS. GEN. LAWS ch. 164, § 58B & ch. 60, §§ 23, 43 (2012). In the empirical study [hereinafter "Foreclosure Data"] done as part of this project, the smallest tax debt that was enforced by a tax deed was $26. This file, 13 TL 147312, resulted in the foreclosure of the taxpayer's redemption rights on a property with an assessed value of $24,100, a ratio of 927 to 1. *See* Foreclosure Data (available upon request to the author).

8 The median price of a single-family house in Massachusetts as of June 30, 2017, was $375,500.00. *Massachusetts Home Prices & Values*, ZILLOW, http://www.zillow.com/ma/home-values/ (last visited Aug. 1, 2017) [https://perma.cc/A7LU-K9PW].

9 A common reason for not paying a bill this small is that the property owner has become incompetent due to age or illness. *See, e.g.*, Tallage LLC v. Meaney, 2015 WL 4207424, at *2, 23 LCR (Landlaw) 375 (Mass. Land Ct. 2015).

10 *See infra* Part II.

11 Two federal constitutional provisions establish due process rights, the Fifth Amendment for federal actions, *see, e.g.*, Richardson v. Belcher, 404 U.S. 78, 81 (1971), and the Fourteenth Amendment for state actions, *see, e.g.*, Paul v. Davis, 424 U.S. 693, 710-11 (1976). In Massachusetts, Articles 1, 10, and 12 of the Declaration of Rights and Part II, ch. 1 of the Constitution provide these rights.

due process can result from insufficient procedures where either proper notice is not given or an opportunity to be heard by a neutral magistrate is not provided.[12] A due process deprivation can also occur when private property is taken without just compensation.[13] As this article will establish, the Massachusetts tax deed procedure fails to satisfy these requirements. Although the tax deed statute requires notice to the taxpayer before the taking, it allows the taking to be effectuated without a hearing. Further, if the municipality subsequently forecloses the right of redemption, property significantly higher in value than the tax debt is taken without cause. In summary, of the three due process requirements—notice, hearing and compensation—Massachusetts satisfies only the first.

The next section contains a description of the process used to collect unpaid property taxes. Then, empirical evidence defining the scope of the problem is presented. The final section compares the Massachusetts procedure with constitutional norms and finds tax deeds under Chapter 60 lacking.

II. THE MASSACHUSETTS "TAX DEED" PROCESS

The procedures available for collecting delinquent real estate taxes owed to the municipality of the locus are set out in Chapter 60 of the General Laws.[14] There are multiple remedies provided including bringing suit on the debt,[15] presenting the claim against the estate of a deceased taxpayer,[16] placing a lien on the property and selling that lien,[17] taking title for nonpayment of taxes,[18] and even arresting the

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See, e.g., Moe v. Sec'y of Admin. & Fin., 417 N.E.2d 387, 390 (Mass. 1981); Pinnick v. Cleary, 271 N.E.2d 592, 601 n.8 (Mass. 1971).

12 *See, e.g.*, Mullane v. Cent. Hanover Bank & Tr. Co., 339 U.S. 306, 313 (1950) (requiring "that deprivation of . . . property by adjudication be preceded by notice and opportunity for hearing . . . .").

13 *See, e.g.*, Armstrong v. United States, 364 U.S. 40, 48-49 (1960) (requiring compensation when property value is destroyed).

14 *See generally* MASS. GEN. LAWS ch. 60 (2012); *see generally* DOUGLAS A. RANDALL & DOUGLAS F. FRANKLIN, *Municipal Law and Practice*, *in* 18B MASSACHUSETTS PRACTICE SERIES ch. 37(C) (5th ed. 2006).

15 *See* § 35.

16 *See id.* § 36.

17 *See id.* § 37.

18 *See id.* § 53.

taxpayer.[19] The choice of which remedy to pursue is the tax collector's; indeed, a tax collector can pursue multiple avenues simultaneously.[20] The most common remedy used—and the subject of this article—is the process by which the municipality seizes title to the taxpayer's land using a tax deed.[21]

The procedure set forth for a municipality to use a tax deed to take title for nonpayment of real estate taxes is straightforward. The relevant statute is Section 53 of Chapter 60, which starts:

> *If a tax on land is not paid within fourteen days after demand therefor and remains unpaid at the date of taking, the collector may take such land for the town, first giving fourteen days' notice of his intention to exercise such power of taking, which notice may be served in the manner required by law for the service of subpoenas on witnesses in civil cases or may be published, and shall conform to the requirements of section forty. He shall also, fourteen days before the taking, post a notice so conforming in two or more convenient and public places.*[22]

In other words, a demand for payment of the outstanding taxes must be made, fourteen days must pass, formal notice that a taking will occur must be served,[23] and then fourteen days later the "collector may take such land for the town."[24]

It is important to recognize that the municipality is not asserting a security device under Section 53; instead, title to the property is taken outright and the former title holder's interest (most commonly a fee

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19 *See id.* § 29.

20 *See* Forbes & Wallace, Inc. v. City of Springfield, 486 N.E.2d 1134, 1137 (Mass. App. Ct. 1985) ("The remedies for the collection of a real estate tax are cumulative.").

21 William P. Cowin & Daniel C. Hill, *Tax Title Sales & Tax Title Issues*, MASS. COLLECTORS & TREASURERS SCHOOL 3 (Aug. 13, 2015), http://mcta.virtualtownhall.net/pages/MCTA_AnnualSchool/required/Course-1006-2015.pdf [https://perma.cc/53QY-6F52].

22 § 53.

23 *See generally* Mennonite Bd. of Missions v. Adams, 462 U.S. 791 (1983) (noting that the standards for service apply and individualized notice must be used whenever possible).

24 § 53; *see generally* RANDALL & FRANKLIN, *supra* note 14, at § 37.40.

simple absolute) is reduced to a right of redemption.[25] The town can take "immediate possession" of the property.[26] If the taxpayer seeks to regain possession, a suit can be brought in equity, but the full burden of proof is placed on the title holder.[27] The town is not liable for any damages that occur during the town's possession of the land.[28] If the property generates any rents or other income, the town may keep the money.[29] Based on the statute's words and its effect, the government has taken almost complete title from the former property owner. Significantly, there will have been no hearing held by a magistrate to determine the validity of the taking. The signature of the municipality's tax collector is factually conclusive and immediately deprives the property owner of any interest.[30]

Although title has transferred to the municipality, the taxpayer, as the former title holder, maintains a right of redemption.[31] This right survives until such time as the Massachusetts Land Court[32] enters a judgment foreclosing it.[33] Until foreclosed, the taxpayer can redeem the property by paying the outstanding delinquent tax, at an interest rate of sixteen percent, and all charges lawfully added.[34] As part of the judgment, the Land Court may add attorney's fees if the taxpayer can afford to pay them.[35] If not redeemed, however, because title to the land was taken without regards for the amount of taxes owed, the foreclosure gives the municipality the full value of the real estate and the taxpayer is left with nothing.

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[25] *See* § 53; RANDALL & FRANKLIN, *supra* note 14, at § 37.40 ("Title to the land taken will vest in the city or town, subject to the right of redemption . . . .").

[26] § 53.

[27] *Id.* The statute only references regaining possession; regaining title is discussed below.

[28] *Id.*

[29] *Id.*

[30] *See id.* ("[T]he collector may take such land for the town . . . ."); *see also id.* § 54 ("The instrument of taking shall be under the hand and seal of the collector . . . ."). The job duties of a tax collector are set forth in Section 2 of Chapter 60. There are no job qualifications statutorily imposed, leaving each municipality to hire whomever it wishes to serve in the job. *See id.* § 2.

[31] *See id.* § 62.

[32] *Id.* § 76 (giving exclusive jurisdiction over redemption to the Land Court).

[33] *See id.* § 62.

[34] *Id.*

[35] *Id.* § 65.

After foreclosure, the municipality's title is absolute and the judgment forever bar[s] future attempts to redeem the property.[36] In reality, however, for the first year after the foreclosure judgment is entered, it can be vacated by the Court.[37] The statute does not enunciate the grounds that must be satisfied for a court to do so,[38] but the Supreme Judicial Court ("SJC") has indicated that "[t]he granting of the petition to vacate . . . rest[s] largely but not entirely in the discretion of the trial judge [and s]uch petitions are extraordinary in nature and ought to be granted only after careful consideration and in instances where they are required to accomplish justice."[39]

In summary, to recover delinquent taxes, the municipality takes the land without a hearing. No court or judicial officer determines if the municipality's claim of a tax deficiency is accurate before the property is taken. Subsequently, should the taxpayer not redeem the property, its full value becomes the property of the town. The taxpayer cannot claim the difference between the amount that is owed and the amount that was taken. As the next section demonstrates, this difference is not small.

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36 *Id.* § 64.

37 *Id.* § 69A.

38 Section 69A is written as a statute of limitations indicating when the right to bring a petition ends rather than as a section defining the right. *See id.*; Town of Easton v. Sprague & Reynolds Co., TL Case No. 91984, 7 LCR (Landlaw) 96 (Mass. Land Ct. 1999). Despite this limit, where the challenge is raised on due process grounds, the courts have recognized an exception and allowed the challenge after the deadline passes. *See, e.g.*, Town of Barnstable v. Unknown Owners, 2004 WL 2191215 at *5, 12 LCR (Landlaw) 390 (Mass. Land Ct. 2004).

39 Lynch v. City of Boston, 48 N.E.2d 26, 27 (Mass. 1943). There are not many cases where this section has been used. A search of the Landlaw's LAND COURT REPORTER online case searching service, http://www.landlaw.com (fee based), returned 16 occasions that the Land Court, which has exclusive jurisdiction over tax foreclosures and redemptions, considered the section since 1993. Several cases where the Land Court did allow a redemption under Section 69A generally involved due process notice problems that had not been discovered before the judgment was entered; *see, e.g.*, Town of Russell v. Barlow, 2016 WL 3745960, 24 LCR (Landlaw) 404 (Mass. Land Ct. 2016); Others involved extreme health challenges faced by the former title holder that caused them to default; *see, e.g.*, Tallage LLC v. Meaney, 2015 WL 4207424, 23 LCR (Landlaw) 375 (Mass. Land Ct. 2015).

III. THE SCOPE OF THE PROBLEM: HOW MUCH PROPERTY IS BEING TAKEN?

To determine the scope of the problem, a small empirical study was undertaken based on the public records of the Massachusetts Land Court.[40] The Foreclosure Data comprises information from the files that are associated with every foreclosure that follows the tax taking. The data from one typical year[41] are included; those redemption foreclosures filed on or after August 1, 2013 and on or before July 31, 2014. This period was chosen to make the data set reflective of the current status of the foreclosure system based on a period where most of the suits associated with the tax taking were concluded with a final judgment so that complete data would be available.[42] Because the number of foreclosures filed within the year was larger than could be practically processed,[43] a random sample of just over five percent of these files were included in the Foreclosure Data. Overall, 114 files from the year were examined and detailed information about each case was extracted to build the database.[44]

With the Foreclosure Data built, the scope of the problem being discussed in this article became apparent. For the year, Massachusetts municipalities collected approximately $56,600,000 more from their

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40 The Land Court has exclusive jurisdiction in Massachusetts to foreclose the right of redemption that follows a tax taking. *See* § 64. Its foreclosure records, therefore, are comprehensive of all tax titles that entered the court system for the termination of the right of redemption. *Id.*

41 Interview with Deborah J. Patterson, Land Court Recorder (Feb. 20, 2017) (stating that the tax foreclosures that occurred in the test period were typical for what the Land Court normally processes). The Recorder is the judicial officer within the Land Court who is responsible for hearing tax foreclosure and redemption matters. *See* MASS. GEN. LAWS ch. 185, § 6 (2012).

42 This was largely successful as 78.1% of the files in the sample had concluded. *See* Foreclosure Data, *supra* note 7.

43 There were approximately 2,260 files within the year. This number was obtained by processing the docket numbers used by the Court, which are assigned sequentially. Consequently, the docket number of the last case in the year less the docket number of the first case gives the numbers of files opened. Because it is possible, though extremely unlikely, that a docket number was missed, there could be slightly fewer files than this. The files are on paper. Each docket number has a separate file folder that is available from the Land Court's Clerk's Office by that number. Processing each file to extract the data needed for this limited study took five to fifteen minutes each, excluding the time it would take for the Clerk to retrieve each file. *Id.*

44 *Id.*

taxpayers than was owed. In other words, the towns and cities collected $42.87 for every dollar they were owed. The details follow. The average size of the tax lien being collected was $4,177 with a range from a low of $26 to a high of $66,642. The assessed property value[45] averaged $258,462 with a range from $1,300 to $2,295,100. On average, the tax lien represented 1.62% of the assessed value of the property, with a range from 0.05% to 48.87% of the assessed value. Because a random sample of cases was used, an estimate of the overall value can be calculated.[46] Thus, the taxes claimed in foreclosure cases during the year studied were approximately $9,439,000 against an assessed value of $584,125,000.[47]

However, not every claim filed resulted in a foreclosure. Only 15.79% of the foreclosure suits resulted in a judgment for the municipality.[48] The overall estimated assessed value of those matters

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45 Massachusetts law requires assessments at "fair cash valuation." MASS. GEN. LAWS ch. 59, § 38 (1979); *see* Tremont & Suffolk Mills v. City of Lowell, 39 N.E. 1028, 1029 (Mass. 1895) (describing how to determine value by estimating current market valuation); Bennett v. Bd. of Assessors of Whitman, 237 N.E.2d 7, 9 (Mass. 1968) (finding that assessing tax "at less than 100% of full fair cash value" was illegal); *see generally* RANDALL & FRANKLIN, *supra* note 14, at § 36.24. Reassessments are done annually. *See* MASS. GEN. LAWS ch. 59, § 2A(a) (2008) ("The assessors of each city and town shall determine the fair cash valuation of . . . real property . . . on the first day of January of each year."). Consequently, as a matter of law, the appraised value should serve as a fair estimate of the actual market value of the property. If it does not, then the amount demanded as taxes is also incorrect.

46 The 114 files examined were 5.04% of the total files, so multiplying the values determined in the random sample by the inverse of .0504—19.84—will give an approximation of the size of the data element within the entire sample set. *See* *Estimating the Population Mean Using a Random Sample* (Sept. 8, 2003), http://www.stat.wmich.edu/s216/book/node75.html [https://perma.cc/B4VW-5ZM5].

47 Utilizing the formulae in *Estimating the Population*, the standard error figures calculated for these two approximations are $760 and $29,375 respectively. The standard error measures the chances that the estimate is incorrect because only a random sample was used. It is calculated by dividing how internally consistent the data in the sample was (the standard deviation of the data) by the sampling size used to create the data set. *See id.* If the data set has little internal variation, its standard deviation will be low leading to a small estimated error. Likewise, a larger sample size will decrease the chance of error as the data used is more likely to be typical of the data within the data set.

48 Almost twenty-two percent of the cases in the Foreclosure Data were not resolved at the time the study was concluded (February 17, 2017). *See* Foreclosure Data, *supra* note 7. The rest of the cases were resolved by the municipality withdrawing the complaint—usually an indication that the

that did foreclose was $57,963,000. These properties were taken to pay an outstanding tax liability of $1,352,000, a difference of $56,611,000 in excess recovery for the towns *in the year*.

To summarize, based on an examination of a typical year, the data show that Massachusetts municipalities are receiving almost $43.00 for each dollar owed by taking tax title to recover delinquent taxes. It is no wonder why taking tax title is the remedy of choice. Unfortunately, it is a remedy that fails to pass constitutional muster for two reasons as the next section discusses.

IV. CONSTITUTIONAL INFIRMITIES

There are two major constitutional problems with the Massachusetts tax deed under Section 53.[49] First, the procedure results in the municipalities taking far more of the taxpayers' property than is necessary to pay the debt owed, resulting in a taking of property without just compensation. Second, the procedure fails to satisfy procedural due process because a hearing is not provided on a *timely* basis. Each problem is discussed in turn.

A. By Keeping More Than Is Owed, a Tax Deed Takes the Property of the Taxpayer Without Providing Adequate Compensation

1. As a Violation of the Federal Constitution

The Supreme Court has only directly visited the issue of a government entity keeping the excess proceeds from a tax seizure twice.[50] The first case, *United States v. Lawton*, was decided in 1884.[51] In *Lawton*, the United States "purchased" land being sold for a tax

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delinquent taxes and collection expenses had been paid or the matter has otherwise been settled.

49 MASS. GEN. LAWS ch. 60, § 53 (2012).

50 The issue was also indirectly referenced in *Chapman v. Zobelein*. *See* Chapman v. Zobelein, 237 U.S. 135 (1915). There, the taking issue was not presented to the Court as the plaintiff was seeking to have a conveyance to a third party cancelled eight years after tax title was taken and more than three years after the title was conveyed to the defendant. *See id.* at 137-38. *Chapman*, therefore, was not a challenge to the taking by the state, it was a challenge to the subsequent disposal of the property by the state. *See id.* at 139 ("this is a bill attacking the title of the purchaser who bought at the second sale . . . ."). Whatever rights the plaintiff had to the surplus property had been surrendered by his failure to use the procedures provided to him by California law. *See id.* at 137-38.

51 United States v. Lawton, 110 U.S. 146 (1884).

deficiency for a stated value of $1,100.00 even though the taxpayer only owed $170.50 in taxes and associated costs.[52] The taxpayer's estate demanded the surplus, but the government refused – *Lawton* clearly establishes that such retention is inappropriate:

> *To withhold the surplus from the owner would be to violate the [F]ifth [A]mendment to the [C]onstitution, and deprive him of his property without due process of law or take his property for public use without just compensation. If he affirms the propriety of selling or taking more than enough of his land to pay the tax and penalty and interest and costs, and applies for the surplus money, he must receive at least that.*[53]

The issue was revisited in *Nelson v. City of New York*.[54] As in *Lawton*, a government entity, this time the City of New York, took two parcels of real estate that had far more value than the amounts owed.[55] The taxpayer defaulted on both seizures and was denied any of the excess proceeds obtained.[56] The Supreme Court upheld the government's right to keep the proceeds, but in a manner that did not contradict the holding in *Lawton*:

> *[W]e do not have here a statute which absolutely precludes an owner from obtaining the surplus proceeds of a judicial sale. In City of New York v. Chapman Docks Co., 149 N.Y.S.2d 679 (App. Div. 1956), an owner filed a timely answer in a foreclosure proceeding, asserting his property had a value substantially exceeding the tax due. The Appellate Division construed . . . the statute to mean that upon proof of this allegation a separate sale should be directed so that the owner might receive the surplus.*[57]

Nelson recognizes, therefore, that a taxpayer can procedurally waive a claim to the excess valuation as long as—and this is a critical

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52 *See id.* at 149. The U.S. did not pay the purchase price; instead, it kept the land at the $1,100.00 value. *Id.*

53 *Id.* at 150.

54 Nelson v. City of New York, 352 U.S. 103 (1956).

55 *See id.* at 105-06 (finding one parcel valued at $6,000 was taken for a $65.00 charge; another parcel valued at $46,000 was taken for a $814.50 charge).

56 *See id.*

57 *Id.* at 110 (footnote omitted).

requirement—such a claim can be made at some point in the proceedings. Consequently, both *Lawton* and *Nelson* stand for the proposition that any surplus property taken must be returned to the taxpayer upon an appropriately made demand.

Nelson was decided in 1956.[58] Although there has not been additional litigation in this area in the Supreme Court,[59] *Lawton* and *Nelson* have been considered more recently in a few lower federal court and state court decisions. An examination of two of the federal cases will highlight the debate that has recently developed about the meaning of *Lawton* and *Nelson* and will show the continuing viability of the doctrine announced in *Lawton*.[60]

A few years ago, the district court in D.C. agreed with the interpretation of *Lawton* and *Nelson* and found the holdings consistent, continuing the viability of *Lawton*. The district court stated in *Coleman*:

> *This Court draws two clear principles from the Supreme Court's decisions in Lawton and Nelson. Nelson makes clear that a Takings Clause violation regarding the retention of equity will not arise when a*

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[58] *See id.* at 103.

[59] The only Supreme Court case that cites to *Nelson* is *Mennonite Board of Missions*, which addressed providing notice of a foreclosure, not the distribution of excess proceeds from one. Mennonite Bd. of Missions v. Adams, 462 U.S. 791, 799 (1983). *Lawton* has not been cited by the Supreme Court since the *Nelson* decision.

[60] A detailed discussion of the state cases does not add to the discussion as the differences in interpretation are adequately presented by the two federal district court opinions. The principal state cases that require the excess to be available to the taxpayer include: Bogie v. Town of Barnet, 270 A.2d 898, 903 (Vt. 1970); City of Anchorage v. Thomas, 624 P.2d 271, 274 (Alaska 1981); & Thomas Tool Servs., Inc. v. Town of Croydon, 761 A.2d 439, 441 (N.H. 2000) (discussing the state constitution). The state cases not finding such a requirement include: City of Auburn v. Mandarelli, 320 A.2d 22, 32 (Me. 1974) & Ritter v. Ross, 558 N.W.2d 909, 910 (Wis. Ct. App. 1996). Another federal case is Balthazar v. Mari Limited, 301 F. Supp. 103, 105 (N.D. Ill. 1969), *aff'd per curiam*, 396 U.S. 114 (1969) (finding no due process problem as excess was available to taxpayer).

The Supreme Judicial Court has considered the statute that is the subject of this article. *See* Kelly v. City of Boston, 204 N.E.2d 123 (Mass. 1965). The SJC determined that the statute reserves the excess value from the tax taking to the municipality. *See id.* at 125. Apparently, no constitutional challenge was raised by the parties to the statute and the SJC made no constitutional ruling in the case. *See id.* at 123–26.

> *tax-sale statute provides an avenue for recovery of the surplus equity. Lawton makes clear that a Takings Clause violation will arise when a tax-sale statute grants a former owner an independent property interest in the surplus equity and the government fails to return that surplus. The question [the current] case presents is: What if the tax-sale statute does not provide a right to the surplus and the statute provides no avenue for recovery of any surplus? A property interest in equity could conceivably be created by some other legal source. In that circumstance, failure to provide an avenue for recovery of the equity would appear to produce a result identical to Lawton: Property to which an individual is legally entitled has been taken without recourse.*[61]

In summary, the *Coleman* court recognized that once a state recognizes a property interest in the taxpayer, it cannot summarily remove that interest. Under this logic, a Massachusetts delinquent taxpayer has a full ownership interest in the land before the tax deed is used, so making that interest simply disappear deprives the taxpayer of that interest, which *Lawton* prohibits.[62]

The view that *Lawton* has continuing viability is not unanimous as the District of Oregon found the opposite in *Reinmiller v. Marion*

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61 Coleman v. D.C., 70 F. Supp. 3d 58, 80 (D.D.C. 2014) (footnote and citations omitted).

62 *Cf.* Langlois v. Langlois, 93 N.E.2d 264, 265 (Mass. 1950) (finding that limitations on the use of the financial value of a property was inconsistent with holding fee simple in it). For the analysis of a taking, the property owner's entire interest is considered. *See* Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 130–31 (1978) ("'Taking' jurisprudence does not divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated. In deciding whether a particular governmental action has effected a taking, this Court focuses . . . on the . . . parcel as a whole . . . ."); Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency, 535 U.S. 302, 326–27 (2002) (same); Concrete Pipe & Prods. v. Constr. Laborers Pension Tr., 508 U.S. 602, 644 (1993) ("[A] claimant's parcel of property [sh]ould not first be divided into what was taken and what was left for the purpose of demonstrating the taking of the former to be complete and hence compensable. To the extent that any portion of property is taken, that portion is always taken in its entirety; the relevant question, however, is whether the property taken is all, or only a portion of, the parcel in question.").

Cty.[63] When the decision is examined, however, its weakness becomes apparent. According to the *Reinmiller* court, a state is apparently free to impose any system of taxation it wishes.[64] Even if you accept the court's statement that the "States have a very wide discretion"[65] to design its system of taxation, this cannot imply that such systems are free from *constitutional* scrutiny.[66] As a farfetched example, could a state only tax a racial or religious minority on the basis of membership in that group?[67] If, as is clearly the case in this example, the Equal Protection Clause of the Fourteenth Amendment applies to the structure and functioning of a taxing system, its Due Process Clause must likewise apply.

After indicating that constitutional limits might not be relevant in any case, *Reinmiller* nevertheless limited *Nelson* to only requiring

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63 *See* Reinmiller v. Marion Cty., No. 05-1926-PK, 2006 WL 2987707 (D. Or. Oct. 16, 2006).

64 *See Reinmiller*, 2006 WL 2987707, at *3 (analyzing the validity of the due process claim being made with the statement, "The law is well-settled that '[t]he States have a very wide discretion in the laying of their taxes.'" Weissinger v. White, 733 F.2d 802, 805–06 (11th Cir. 1984), quoting Allied Stores v. Bowers, 358 U.S. 522, 526 (1959)). Of course, the *Weissinger* case relied upon by *Reinmiller* continued, "To protect the states' fundamental taxing authority, federal *equal protection* challenges to state tax laws are reviewed with a minimal level of scrutiny." *Weissinger*, 733 F.2d at 806 (emphasis added). The case before the court in *Reinmiller* was not an equal protection claim.

65 *Reinmiller*, 2006 WL 2987707, at *3 (citation and internal quotation marks omitted).

66 *See id.* ("Federal courts have not been willing to disturb state tax laws and find constitutional violations."). The *Reinmiller* Court ultimately dismissed the action "with prejudice." *Id.* at *4. *Reinmiller* may have been correct that, as a matter of comity, the federal courts will not review the constitutionality of a state taxation statute, particularly on equal protections grounds, but significantly, this imposes no limitation of the evaluation of constitutionality in the state court, a process that must be available for the abstention to apply. *See* Fair Assessment in Real Estate Ass'n v. McNary, 454 U.S. 100, 116 (1981) ("we hold that taxpayers are barred by the principle of comity from asserting § 1983 actions against the validity of state tax systems in federal courts. Such taxpayers must seek protection of their federal rights by state remedies, *provided of course that those remedies are plain, adequate, and complete*, and may ultimately seek review of the state decisions in this Court." (emphasis added)). The *Reinmiller* Court may have been right to dismiss the case as it belonged in state court under an abstention doctrine, but it completely lacked the authority to deny the plaintiff an opportunity to have a state court review the constitutionality of the provision as its dismissal with prejudice attempts to do. *See* Levin v. Commerce Energy, 560 U.S. 413, 421–22 (2010) (discussing comity).

67 *See, e.g.*, Adarand Constructors v. Pena, 515 U.S. 200, 227 (1995).

procedural due process.[68] To support this, the *Reinmiller* court quoted a final part of the *Nelson* discussion of the substantive issue, specifically "nothing in the Federal Constitution prevents *this* where the record shows adequate steps were taken to notify the owners of the charges due and the foreclosure proceedings."[69] However, the highlighted "this" in the quoted sentence from *Nelson*, refers to the previous sentence of the opinion which qualified the reason that no constitutional violation had been found by using the clause, "in the absence of timely action to redeem or to recovery any surplus . . . ."[70] Therefore, *Nelson* says that the procedural due process that was provided was adequate specifically because the taxpayer had failed to seek a recovery of the surplus through the method that was provided by the law.[71] Consequently, this does not mean that the constitutional requirements found in *Lawton* no longer existed or that a state needs to provide no more than procedural due process.

Finally, the *Reinmiller* Court attempted to dismiss the *Lawton* constitutional holding as being *dicta* in a purely statutory construction case.[72] This is simply not true. The Supreme Court was using an *argumentum ad absurdum* to construe the *Lawton* statute.[73] The absurdity it established was that the alternate interpretation proposed for the statute – the taxpayer is not entitled to the surplus – would cause the statute to be unconstitutional.[74] Thus, the argument's substance on constitutionality was not only necessary for the decision, it was critical as without the argument, the Court would not have been able to construe the statute at bar. The argument is holding, not *dicta*.[75]

Of the two district court cases on point, therefore, only *Coleman*, is sound. As *Coleman* recognized, the constitutional limitation created by *Lawton* retains viability. This conclusion is reinforced by the Supreme

68 *See Reinmiller*, 2006 WL 2987707, at *3.

69 *Id.* (quoting Nelson v. City of New York, 352 U.S. 103, 110 (1956)) (emphasis added).

70 Nelson v. City of New York, 352 U.S. 103, 110 (1956).

71 *See id.*

72 *See Reinmiller,* 2006 WL 2987707, at *3.

73 *See* United States v. Lawton, 110 U.S. 146, 150 (1884).

74 *See id.*

75 *See Obiter Dictum*, BLACK'S LAW DICTIONARY (8th ed. 2004) ("[a] judicial comment made while delivering a judicial opinion, but one that is unnecessary to the decision in the case and therefore not precedential."); *see generally* Michael Abramowicz & Maxwell Stearns, *Defining Dicta*, 57 STAN. L. REV. 953 (2005).

Court's most recent discussion of takings in 2017, *Nelson v. Colorado*.[76]

Colorado is not a tax foreclosure case; instead, it addresses whether a state is required to refund money collected pursuant to a criminal conviction if that conviction is later permanently overturned on appeal.[77] In one of the two consolidated cases, the defendant had been convicted, was fined over $8,000.00, saw the conviction overturned on appeal, and was ultimately acquitted in the subsequent retrial.[78] In the other case, the fine was over $4,000.00, the convictions were also struck down, and the state elected not to retry the defendant after appeal.[79] In both cases, despite having been judicially exonerated, the state refused to return all of the money that had been paid by or collected from the defendants to pay the fines and associated court costs.[80]

The Supreme Court used the three-part *Mathews v. Eldridge*[81] due process test to require the state to refund the full amount collected.[82] As described by the Court in *Colorado*, the three parts are, "(A) the private interest affected; (B) the risk of erroneous deprivation of that interest through the procedures used; and (C) the governmental interest at stake."[83] Consequently, each of these factors will be briefly described and then compared to the Massachusetts tax deed procedures in dealing with the failure to return the excess value of the property seized to the taxpayer.

For the first factor – the private interest affected – the Court stated, "[the state] may not retain funds taken from [the defendants] solely because of their now-invalidated convictions, for [the state] may not presume a person, adjudged guilty of no crime, nonetheless guilty *enough* for monetary exactions."[84] Thus, and similar to the excess proceeds kept following the use of a Massachusetts tax deed, the government had no articulable title to the money taken after the

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76 *See* Nelson v. Colorado, 137 S. Ct. 1249 (2017).

77 *See id.* at 1252.

78 *See id.* at 1252–53.

79 *See id.* at 1253.

80 *See id.* at 1253–54. One defendant was denied any refund; the other was only given a partial refund. *See id.*

81 *See* Mathews v. Eldridge, 424 U.S. 319 (1976).

82 *See Colorado*, 137 Sup. Ct. at 1252.

83 *Id.* at 1255.

84 *See id.* at 1256.

convictions were voided in *Colorado* and has no claim to the excess property seized from the delinquent taxpayer here. For tax deeds, this first factor weighs against constitutionality.

For the second factor – the risk of erroneous deprivation – the risk is higher for a tax deed taking than it was for the two exonerated criminal defendants. The defendants in *Colorado* could obtain the return of their property, but were subject to a high evidentiary burden to do so.[85] Requiring any trial, much less one with a high burden of proof, raised too great of a risk of an incorrect result as the defendants were presumed innocent.[86] Further, the Court noted that one exonerated from a misdemeanor charge had no remedy as Colorado law did not allow them to claim a refund.[87] The Massachusetts tax deed procedure for returning the excess property to the taxpayer is as extreme as Colorado's treatment of misdemeanors as no recovery is available. There is a 100% chance that the taxpayer's property will not be returned.[88] Again, for tax deeds, this factor weighs against constitutionality.

For the final factor – the government interest at stake – an easier evaluation occurred as the *Colorado* Court could find no such interest.[89] This analysis applies with equal force to the Massachusetts tax deed process as a municipality has no interest in the money beyond that necessary to pay the taxes owed with the associated costs of collection. Once again, the statute is unsustainable.

Consequently, although *Colorado* derives from criminal cases, its analysis of due process teaches much about the Massachusetts statute allowing municipalities to appropriate the excess valuation following a tax deed seizure. It shows that all three of the *Mathews v. Eldridge* factors disfavor the tax deed procedure. This leads directly to the conclusion that tax deeds violate the Due Process Clause.

Whether the analysis is performed under *Lawton* or *Colorado*, the result is the same. A municipality that does not return the excess

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85 *See id.* (requiring the defendant to prove innocence based on clear and convincing evidence).

86 *See id.* at 1257.

87 *See id.* The Court also took note of the costs of litigation as a factor standing against the state's position. *See id.*

88 *See supra* text accompanying notes 46-48.

89 *See Colorado*, 137 Sup. Ct. at 1257 ("Colorado has no interest in withholding from Nelson and Madden money to which the State currently has zero claim of right.").

property to the taxpayer engages in a taking in violation of the Due Process Clause of the Fourteenth Amendment.

2. As a Violation of the Massachusetts Constitution

The Massachusetts Constitution has its own provisions that guarantee due process: Articles 1, 10, and 12 of the Declaration of Rights and Part II, ch. 1 of the Constitution.[90] The analysis under the Massachusetts Constitution starts with the same analysis that is presented elsewhere in this article, as a violation of the federal due process clause would also constitute a violation of the state constitutional right.[91] Consequently, the Massachusetts tax deed would violate both procedural and substantive due process as discussed.[92] It is important to recognize, however, the federal right is the minimum protection provided.[93] The Massachusetts due process right can go farther; indeed, for taxation, it does.

A well-established requirement of the Massachusetts Constitution is a requirement of taxation equality. "[The Massachusetts Due Process Right] forbid[s] the imposition upon one taxpayer of a burden relatively greater or relatively less than that imposed upon other taxpayers."[94] Requiring a delinquent taxpayer to surrender all of the value of the taxpayer's real estate would appear to do this. Unlike "regular" taxpayers, the delinquent ones would be required to pay a tax many times higher than all others in the municipality. Based on the averages found in the empirical study reported above, rather than paying $4,177 as others would, the delinquent taxpayer would pay $258,462, an amount almost sixty-two times higher.[95]

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90 *See, e.g.*, Moe v. Sec'y of Admin. & Fin., 417 N.E.2d 387, 390 (Mass. 1981); Pinnick v. Cleary, 271 N.E.2d 592, 601 n.8 (Mass. 1971).

91 *See, e.g.*, Lowell Gas Co. v. Dep't of Pub. Util., 84 N.E.2d 811, 816 (Mass. 1949) ("The Constitution of this Commonwealth contains safeguards against deprivation of property without due process of law at least as strong as those of the Fourteenth Amendment to the United States Constitution.") (internal quotation marks omitted).

92 *See infra* Section IV.B (discussing procedural due process violations); *see supra* Section IV.A.1 (discussing substantive due process violations).

93 *See Lowell Gas*, 84 N.E.2d at 816.

94 In re Opinion of the Justices, 126 N.E.2d 795, 800 (Mass. 1955); *accord* Bettigole v. Assessors of Springfield, 178 N.E.2d 10, 14 (Mass. 1961) (applying *Opinion of the Justices*).

95 *See* Foreclosure Data, *supra* note 7 at C3 & D3.

The SJC has been very strict in its interpretation of this provision. For example, the SJC disapproved a proposal to allow the towns to use estimated rather than actual tax bills.[96] As the court stated:

> *Under the proposed [section] the estimated tax bill is to be precisely the amount of one fourth of the tax assessed the preceding year under § 57. There is to be no new assessment. In consequence, no attention is to be given to changes in valuation during the preceding year. This means that the destruction of buildings or the erection of new ones prior to January 1 of the current year cannot be taken into account. Assessments of less, or more, than 100% of full fair cash value in some cases necessarily would be the basis upon which the taxes would be computed. The estimated taxes, which would not be proportional, would violate Part II, ch. 1, § 1, art. 4, of the Constitution of the Commonwealth which empowers the General Court "to impose and levy proportional and reasonable assessments, rates and taxes, upon all the inhabitants of, and persons resident, and estates lying, within the said Commonwealth."*[97]

Similarly, the court ruled against an exemption of $5,000 that was to be given to owner-occupiers of residential property as an income tax credit.[98] According to the court, this provision would violate taxation equality as someone who rented the real estate would not receive it, thus establishing a difference.[99]

If a $5,000 tax exemption is sufficient to trigger a tax equality problem—an amount that would only change someone's tax by $255[100]—a difference of several hundred thousand dollars must likewise be problematic. Massachusetts tax deeds violate the state constitutional requisite of tax equality.

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96 Opinion of the Justices, 249 N.E.2d 23 (Mass. 1969).

97 *Id.* at 24 (citation omitted).

98 Opinion of the Justices, 181 N.E.2d 793 (Mass. 1962).

99 *See id.* at 795.

100 Massachusetts current income tax rate is 5.1%; 5.1% of $5,000 is $255. *2017 Personal Income Tax Changes*, MASS.GOV, https://www.mass.gov/guides/2017-personal-income-tax-changes (last visited Feb. 22, 2018) [https://perma.cc/CG2P-5AN6].

B. Procedural Due Process and the Tax Deed

1. Normally, a Hearing Must Be Provided *Before* Property Is Taken

It is axiomatic that state "deprivation[s] of . . . property by adjudication be *preceded* by notice and opportunity for hearing . . . ."[101] As the U.S. Supreme Court has consistently held, a deprivation of property requires its owner to be given "some kind of notice and afforded some kind of hearing."[102] Almost always, the notice and hearing must precede the deprivation,[103] but there are two recognized exceptions. First, if "the potential length or severity of the deprivation does not indicate a likelihood of serious loss *and* . . . the procedures underlying the decision to act are sufficiently reliable to minimize the risk of erroneous determination, government may act without providing additional advance procedural safeguards."[104] Second, the existence of "an exigent circumstance permit[s] postponing any notice or hearing until after the [taking] is effected."[105]

When the Massachusetts statutory procedure using tax deeds is examined under these standards, it fails. Although the pre-seizure notice provided to the taxpayer seems adequate,[106] there is no hearing

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[101] Mullane v. Cent. Hanover Bank & Tr. Co., 339 U.S. 306, 313 (1950) (emphasis added).

[102] Goss v. Lopez, 419 U.S. 565, 579 (1975); *see also* Fuentes v. Shevin, 407 U.S. 67, 83-84 (1972); Zinermon v. Burch, 494 U.S. 113, 127-28 (1990); Wolff v. McDonnell, 418 U.S. 539, 557-58 (1974); Memphis Light, Gas & Water Div. v. Craft, 436 U.S. 1, 19 (1978).

[103] *Mullane*, 339 U.S. at 313.

[104] *Memphis Light*, 436 U.S. at 19 (emphasis added) (internal quotation marks and citations omitted).

[105] Connecticut v. Doehr, 501 U.S. 1, 16 (1991).

[106] The notice requirements of the Due Process Clause appear to be satisfied by the tax deed process. Before the property can be taken by tax deed, the tax collector must give notice to the taxpayer by individualized service as would be done for the service of a witness subpoena. *See* MASS. GEN. LAWS ch. 60, § 53 (2012). This requires service in hand, by exposition, or by abode. MASS. R. CIV. P. 45(c). Additionally, section 53 requires that the notice of intent to take the property be posted in two public places. *See* § 53.

If the taxes remain unpaid fourteen days after the notice is given, the deed taking title can be recorded. *See* § 53. If an action to foreclose the redemption period is brought, the normal rules for commencing a civil action in Massachusetts are followed. *See* MASS. R. CIV. P. 4. All of this is reasonably designed to give actual notice to an interested party where his or her identity and location are known and to provide generalized notice to others who are either provided before the property is taken (nor immediately afterwards). As neither of the two recognized exceptions to a pre-seizure hearing applies, Massachusetts tax deeds cause a procedural due process violation.

Under Section 53, the town's tax collector can "take such land" after providing notice, but without a hearing.[107] No pre-taking hearing is required or even available.[108] This leaves the taxpayer without title to his or her property for a substantial period of time.[109] As the Supreme Court held in *Mullane*, however, a hearing must, in general, occur before the taking.[110] Thus, the basic requirement of the Due Process Clause that a property owner be given a hearing before that property is taken has failed.[111] Consequently, unless one or both of the two exceptions that allow a hearing to occur after the seizure are satisfied, the Massachusetts tax deed process fails constitutional muster.

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unknown or known without location. *See* Mennonite Bd. of Missions v. Adams, 462 U.S. 791 (1983).

[107] *See* § 53.

[108] *See id.* Apparently, no taxpayer has challenged the lack of a pre-seizure hearing in Land Court. *See* Interview with Deborah J. Patterson, *supra* note 41. Most taxpayers assert their redemption rights as pro se litigants. *See id.*; *see also* Foreclosure Data, *supra* note 7 (showing 6.1% of taxpayers represented by attorneys). As such, they may be unaware of the larger constitutional problem.

[109] *See infra* Part II. The empirical study that was done as part of this article was concluded on February 17, 2017. It examined data from files opened between August 1, 2013 and July 31, 2014. For the majority of these files (78.1%), it took the court just over a year on average (398 days) to conclude the case. Of course, 21.9% of the files were still unresolved in February of 2017. For these files, the taxpayer's title was appropriated for a period of at least 2.5 to 3.5 years. None of these times include the period from when the tax deed was executed and recorded to the time of filing of the foreclosure suit. It seems fair to conclude from the data that the average taxpayer against whom a tax deed is executed loses title to the property for at least a year and a half. *See* Foreclosure Data, *supra* note 7.

[110] Mullane v. Cent. Hanover Bank & Tr. Co., 339 U.S. 306, 313 (1950).

[111] Importantly, no post-seizure hearing is provided by the statute unless the municipality decides to foreclose the taxpayer's right of redemption or unless the taxpayer brings a suit in equity to recover the property taken from him. Massachusetts's equity jurisdiction is somewhat guarded but seems broad enough to include this kind of claim, for example in Bernbaum v. Town of Nantucket, 646 N.E.2d 739, 740 (Mass. 1995), particularly where constitutional rights are invoked. *See* Bettigole v. Assessors of Springfield, 178 N.E.2d 10, 17 (Mass. 1961).

2. Exception One Fails: Weighing the Seriousness of the Deprivation and Likelihood of Mistake

The first exception has two parts. The necessity of a pre-seizure hearing is excused where the deprivation is not likely to be serious *and* the pre-seizure decision-making is reliable and unlikely to be erroneous.[112] The Court's use of the conjunction "and" indicates that both requisites must be met.[113] For Massachusetts tax deeds, neither is.

i. First Infirmity: Taking Title from the Taxpayer Is a Serious Deprivation of Property Rights

The "seriousness" of the loss created by Section 53 is enormous. The tax collector is not taking some form of security in the taxpayer's property; instead, title is taken.[114] After the tax deed is executed and recorded, the municipality owns the real estate, subject only to a right of redemption that provides the possibility that the taxpayer can reclaim title in the future.[115] Most aspects of property ownership transfer to the municipality immediately, including the rights of possession and profit.[116] Under Section 53, a taxpayer can be notified of a claimed deficiency, and fourteen days later be disposed of almost all aspects of title and possession except a limited right of redemption. All of this would be done without a hearing. Upon petition, the taxpayer can be put back into *possession* of the property,[117] but still would not have title to the real estate. Further, the taxpayer could have the right of possession blocked for a significant period of time as the

112 *See* Memphis Light, Gas & Water Div. v. Craft, 436 U.S. 1, 19 (1978).

113 *See id.*; *see also* Gallagher v. Reliance Standard Life Ins. Co., 305 F.3d 264, 270 (4th Cir. 2002) (finding that "each and every" meant "all"); McCormick v. Dep't of A. F., 307 F.3d 1339, 1341-42 (Fed. Cir. 2002) (construing "or" to mean alternatives).

114 *See* MASS. GEN. LAWS ch. 60, § 54 (2012) ("*Title* to the land so taken shall thereupon vest in the town, subject to the right of redemption.") (emphasis added); West v. Bd. of Selectmen of Yarmouth, 188 N.E.2d 473, 474 (Mass. 1963) (recognizing that title was taken by tax collector).

115 *See* § 54.

116 *See id.* § 53 ("[T]he collector of taxes . . . may, in the name and on behalf of said city or town, take immediate possession of such land and, until the tax title so acquired is redeemed, collect the rent and other income from such land . . . .").

117 *See id.* ("Upon petition of any person having a right to redeem such tax title, the superior court for the county within which the land lies, if it adjudges justice and the circumstances so warrant, may, upon such terms as it shall deem equitable, enjoin a taking of possession under this section or command the surrender of a possession taken.").

petition action is heard by the Superior Court.[118] If rental income that is owed to the taxpayer from the land is not collected, or if the municipality causes any kind of injury to the property while it is in its possession, the taxpayer has no remedy.[119]

In summary, a taxpayer could find title and possession gone, and the property destroyed, all based on a tax delinquency that is claimed but not established. The extent of the deprivation, particularly with the almost sacred regard given real estate title,[120] is clearly "serious."[121]

ii. Second Infirmity: There Are Significant Chances of Mistakes (or Worse) Being Made in the Process

Evaluating the possibility of mistake has to start with the fact that the system is run separately in each municipality in Massachusetts, each of which has its own capabilities and operating characteristics.[122] Each municipality is responsible for the hiring, training and

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118 *See* Memphis Light, Gas & Water Div. v. Craft, 436 U.S. 1, 19-20 (1978) (holding that the deprivation of utility services without a pre-termination hearing violates due process).

119 *See* § 53. ("Neither said city or town nor any of its officers, agents or employees shall be liable or accountable to the owner or to any other person having an interest in such land for failure to collect rent or other income therefrom; and neither said city or town nor any of its officers, agents or employees shall be liable for injury or damage caused by the possession of land under the section to such land or to the person or property of any person.").

120 *See* Equator Mining & Smelting Co. v. Hall, 106 U.S. 86, 87 (1882) (describing real estate title as "important" and "almost . . . sacred").

121 *See Memphis Light*, 436 U.S. at 19.

122 There are 351 municipalities in Massachusetts, thirty-nine cities and 312 towns. *Information and Historical Data on Cities, Towns and Counties in the Commonwealth of Massachusetts*, SEC'Y OF THE COMMW. OF MASS., https://www.sec.state.ma.us/cis/cisctlist/ctlistidx.htm (last visited Feb. 22, 2018) [https://perma.cc/2HZE-932A]. The smallest community by population is Gosnold; the largest, not surprisingly, is Boston. *See id.* According to the 2010 census, Gosnold has seventy-five residents and Boston has 617,594. *Id.* Despite its small size and limited amount of land, Gosnold has its own tax collector. Telephone Interview with Lisa Wright, Town Clerk, Town of Gosnold (June 26, 2017). The current Gosnold Collector is a part-time employee of the Town. *Id.* The scale of Boston's tax collection apparatus is considerably larger. The collection department for Boston has twenty-eight employees listed as of 2015. *See Employee Earnings Report 2015*, ANALYZE BOSTON, https://data.boston.gov/dataset/employee-earnings-report/resource/2ff6343f-850d-46e7-98d1-aca79b619fd6 (last updated Jan. 11, 2017) [https://perma.cc/9ZFL-2C6W].

supervision of its tax collector.[123] This aggravates several areas of potential mistake in the system.

First, state law imposes no minimum standards for the individuals chosen by the municipality as its tax collector, and requires no training before the individual assumes the tax collector's office.[124] Clearly, there are no assurances in this process. This is particularly true in the many smaller communities in Massachusetts, where the individual employed may not have any experience or background in Massachusetts real estate tax law, or even in basic accounting or governmental operations.[125] With unsupervised municipal employment being used, it is probable that at least a few of the 351 tax collectors in Massachusetts lack the skills needed to perform the job without error.[126] Therefore, the lack of minimum job qualifications constitutes the first source of mistake introduced into the due process analysis.

Second, the continuing supervision of the tax collectors as they do their jobs in the 351 communities is also problematic. The power granted by the statute to execute and record a tax deed is given to the tax collector directly.[127] The tax collector needs no approval from any other municipal officer or board before executing and recording a tax deed. Further, no municipal entity has the authority under the statute to reverse or modify the decision of the collector.[128] Under the statutory tax deed scheme, the tax collector operates without direct supervision when a tax deed is created and used. Whether a mistake happens because of inexperience found in a smaller town,[129] or results from the

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123 *See* § 2. In Gosnold, the Tax Collector works with the Town's Manager. *See* Telephone Interview with Lisa Wright, *supra* note 122. In Boston, the data reveal a typical government bureaucracy based on the job titles in the database. *See Employee Earnings Report 2015*, *supra* note 122.

124 *See* § 2.

125 In Gosnold, the elected Treasurer was also appointed Tax Collector. Telephone Interview with Lisa Wright, *supra* note 122. She is paid as a part-time employee in the role. *Id.* Professionally, she is a teacher on Martha's Vineyard. *Id.*

126 There have been challenges raised in the Land Court to a tax deed redemption foreclosure on the grounds of a mistake made in the calculation of the tax owed. Interview with Deborah J. Patterson, *supra* note 41.

127 *See* § 53 ("[T]he *collector* may take such land for the town . . . .") (emphasis added).

128 *See id.* Similarly, no judicial entity has the express power to undue a tax deed.

129 In Gosnold, for example, the part-time Tax Collector has not had any experience with tax deeds. *See* Telephone Interview with Lisa Wright, *supra* note 122 (indicating that the Town of Gosnold has not executed a tax deed for at least fifteen years). If Gosnold now needs to collect a real estate tax debt, the Tax

inflexibility found in the entrenched bureaucracy that comprises a major municipality's tax collection operation,[130] significant errors are likely. Even the software used may be untrustworthy.[131]

Third, employee fraud does occur at the municipal level both within and without the tax collection department.[132] Equally, tax collectors soliciting bribes or engaging in other misconduct to affect a taxpayer's taxes has occurred.[133] Consequently, although apparently fairly rare, tax collector criminal malfeasance is another source of potential error.

In summary, the process of collecting taxes on the thousands of real estate parcels in arrears within the Commonwealth is a complicated enough bureaucratic activity that occasional problems will occur. These problems could be as simple as the tax collector's

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Collector would be entering territory that has not been explored by anyone in the Town in a decade and a half.

130 It seems highly unlikely that Boston's Tax Collector drafts tax deeds; instead, the bureaucracy that reports to the Collector is likely to draft the documents in the ordinary course of business of the department and present them to the Collector for signature.

131 *See* Lauren Feiner, *Over 2,000 Massachusetts Taxpayers Billed Incorrectly Due to Software Error*, BOSTON GLOBE (July 26, 2017), http://www.bostonglobe.com/business/2017/07/26/over-massachusetts-taxpayers-billed-incorrectly-due-software-error/bDzfCKwXeomzV6uVhfsgDJ/story.html [https://perma.cc/5ABQ-T3V3].

132 *See, e.g.*, Commonwealth v. Canon, 368 N.E.2d 1181, 1182 (Mass. 1977); *see also* MASS. GEN. LAWS ch. 268A, §§ 2–3, 17–21B (2012); *see generally* Brian C. Mooney, *Probe Targets Excise Collection*, BOSTON GLOBE, Feb. 5, 1995, at (Metro) 1,1995 WLNR 2136957 ("One reason is that deputies—often appointed by local tax collectors on the basis of personal, political or family connections—surface with embarrassing regularity in embezzlement, tax or other corruption cases."); *Ex-tax Collector to Forfeit Funds*, MASS. LAW. WKLY., Nov. 30, 2017, at 3 (reporting restitution after tax collector embezzlement).

133 *See* Finnegan v. United States, 204 F.2d 105, 108 (8th Cir. 1953) (upholding conviction for conflict of interest where an IRS collector represented a taxpayer before the agency); Commonwealth v. Goldbard, 419 A.2d 161, 162-64 (Pa. Super. Ct. 1980) (upholding conviction for bribery where a tax collector solicited a bribe so that taxpayer would not have to pay tax). *Cf.* Coleman v. State *ex rel.* Mitchell, 182 So. 627, 629 (Fla. 1938) (finding that a deputy tax collector could not be convicted of soliciting a bribe under the Florida statute as the statute did not include deputy tax collectors). *See generally* MacLean v. Delinsky, 556 N.E.2d 60, 61-63 (Mass. 1990) (describing some of the factual background of the *Barczak* matter); *Businessmen Say Barczak Acted on Own*, BOSTON GLOBE, Dec. 20, 1983 (reporting on a scheme by a Massachusetts revenue officer to solicit bribes so that a business's tax problems could be resolved for significantly less money than was owed).

office crediting a received payment to the wrong property to as complex as a criminal scheme to enrich a member of the tax collector's office. Of course, with 351 separately operated tax collection operations, the risk of error multiplies because of the operational inexperience introduced, particularly in the smaller towns. In any case, the pre-seizure decision-making is *not* completely reliable.[134]

This is particularly true with tax deeds because the law has no option for the taxpayer to challenge the determination that taxes are owed before title to the property is removed. If a tax collector demands a payment that the taxpayer asserts is not owed, the taxpayer has no way to challenge the order. If the demand is not met, the real estate is taken; if it is met, the taxpayer's money is taken. Either way, the taxpayer is deprived of his or her property without due process.

3. Exception Two Fails: No Exigent Circumstances Require Action Before a Hearing

In the early 1990s, the Supreme Court decided *Connecticut v. Doehr*.[135] The case reviewed the prejudgment attachment procedure authorized by Connecticut law in civil suits that allowed a security interest to be obtained against the real estate of a defendant without requiring pre-seizure notice and a judicial hearing.[136] The court, in striking down the Connecticut provision, held that:

> *[p]ermitting a court to authorize attachment merely because the plaintiff believes the defendant is liable, or because the plaintiff can make out a facially valid complaint, would permit the deprivation of the defendant's property when the claim would fail to convince [the ultimate fact-finder], when it rested on factual allegations that were sufficient to state a cause of action but which the defendant would dispute, or in the case of a mere good-faith standard, even when the*

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134 *See* Memphis Light, Gas & Water Div. v. Craft, 436 U.S. 1, 19 (1978).

135 Connecticut v. Doehr, 501 U.S. 1 (1991).

136 *See id.* at 4. The original plaintiff in the Connecticut state suit in *Doehr* was John F. DiGiovanni who had obtained a pre-trial, *ex parte* attachment of the defendant, Brian K. Doehr's home in Meriden, Connecticut. *See id.* at 5. DiGiovanni obtained the attachment as part of his suit against Doehr seeking recovery for an alleged assault and battery. *See id.* Doehr brought an independent suit in federal court challenging the constitutionality of the attachment process. *See id.* at 7.

> *complaint failed to state a claim upon which relief could be granted. The potential for unwarranted attachment in these situations is self-evident and too great to satisfy the requirements of due process absent any countervailing consideration.*[137]

As the Connecticut attachment process struck down in *Doehr* has many similarities to the procedure authorized by Massachusetts tax deeds, the case instructs well on the inappropriateness of the tax deed process that does not require a hearing and makes no showing of a "countervailing consideration" of exigent circumstances to justify its lack.[138]

Under the Connecticut procedures in *Doehr*, a prejudgment real estate attachment could be obtained by the plaintiff based on an affidavit submitted to a judge for review.[139] The judge was to evaluate the affidavit to determine if there was "probable cause to sustain the validity of the plaintiff's claims . . . ."[140] The defendant was not given notice that the plaintiff was seeking an attachment nor was any hearing required before the attachment was authorized.[141] Only after the attachment was recorded, which served to encumber the defendant's real estate, was the defendant notified of the suit and attachment.[142] Although the Connecticut procedures did not provide a pre-seizure notice or hearing, the statute did give the defendant an immediate post-seizure right to challenge the attachment as lacking in probable cause.[143] If a challenge to the attachment's validity was filed, the court was required to conduct a prompt hearing (within seven business days) on its validity.[144]

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137 *Id.* at 13-14.

138 *See id.* at 14.

139 *See id.* at 5-6. *Doehr* involved a claim in tort, but the statute under attack was available for all civil actions and it was struck down on a facial attack rather than an as-applied challenge. *See id.* at 5; *see also* Pinsky v. Duncan, 898 F.2d 852, 858 (2d Cir. 1990), *aff'd sub nom.*, 501 U.S. 1 (1991).

140 *Doehr*, 501 U.S. at 5 (quoting CONN. GEN. STAT. § 52-278(e) (1991) (amended 1993)).

141 *See id.*

142 *See id.* at 7.

143 *See id*. The defendant could also petition to replace the property attached with an alternate object or with a bond.

144 CONN. GEN. STAT. § 52-278(e).

As with the Connecticut procedure, a Massachusetts tax deed effectuates a taking of the defendant's property without a hearing,[145] but the property deprivation is more extreme and the procedural safeguards are lower. Under the procedure, while the statute does require the taxpayer to be notified that a taking is imminent,[146] no hearing, indeed no judicial review, is required.[147] The tax collector, strictly on his or her own decision, takes title to the property. Also, unlike the less extreme Connecticut attachment procedure found deficient in *Doehr*, the Massachusetts statute provides no way to challenge the validity of the taking even after it is effectuated.[148] In other words, based solely on the unreviewed decision of a municipality's tax collector, the taxpayer's land is taken with no mechanism provided to challenge the validity of the taking.[149] Most

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145 *See* MASS. GEN. LAWS ch. 60, § 53 (2012) ("If a tax on land is not paid within fourteen days after demand therefor and remains unpaid at the date of taking, the collector may take such land for the town . . . .").

146 *See id.* ("[T]he collector . . . [must] first giv[e] fourteen days' notice of his intention to exercise such power of taking . . . .").

147 *See id.* ("[T]he *collector* may take such land for the town . . . .") (emphasis added).

148 *See id.* The only grant of power to the courts in the statute deal with the possession of the real estate, not title to it. *See id.* ("Upon petition of any person having a right to redeem such tax title, the superior court for the county within which the land lies, if it adjudges justice and the circumstances so warrant, may, upon such terms as it shall deem equitable, enjoin a taking of possession under this section or command the surrender of a possession taken."). The statute does not grant the court the power to return title to the taxpayer. The authority of the Land Court in the foreclosure of the redemption suit seems likewise circumspect. The taxpayer is allowed to seek to redeem the property but only for the amount fixed by the court. *See id.* § 68. The court is not authorized to evaluate the legality of the taking itself. *See id.*

149 There are at least two possible non-statutory remedies available to a taxpayer to attempt to recover title to the property, neither of which may prove adequate. First, should the tax collector choose to foreclose the right of redemption associated with the tax deed, the taxpayer will be heard about the amount that is owed, but most other challenges to the tax assessment will not be cognizable by the court. *See* Howard v. Dunster, 120 N.E. 849, 849 (Mass. 1918) ("[I]t is only when the tax is wholly without validity that it can be disputed by way of defense to an action to recover the tax . . . ."). Second, a Massachusetts court may have sufficient general equitable powers to order a tax collector to return the real estate to the taxpayer, *see, e.g.*, Johnson v. Superintendent, Mass. St. Police, 624 N.E.2d 542, 544 (Mass. 1993), but many grounds for the challenge to the tax deed title may have already been waived, *see, e.g.*, Tax Collector of Braintree v. J.G. Grant & Sons, Inc., 532 N.E.2d 79, 81-82 (Mass. App. 1989). As the Supreme Judicial Court stated in *Sydney v. Commissioner of Corps. & Taxation*,

significantly, the tax deed does not assert a security interest as was done by the Connecticut procedure; instead, fee simple title is taken.[150] Should the tax collector choose, the taxpayer can be ousted immediately and the town can take possession of the property.[151] All of this can occur without *any* judicial review.

As discussed in more depth above,[152] there are some systematic problems in the structure of the Massachusetts real estate tax collection apparatus that raise the possibility of an error occurring. Of all of the possible mistakes described, the most common is likely to be the misdirection of a payment. Consider this hypothetical:

> *A taxpayer comes into town hall to make a real estate tax payment. The tax collector mistakenly credits the payment to another taxpayer's account. Subsequently, when the taxpayer's account is flagged as delinquent, the tax collector sends notice that the property will be taken by tax deed. The taxpayer goes to town hall to object, but cannot convince the tax collector that a mistake has been made. The tax collector executes and records the tax deed and takes title to the real estate.*

The kind of mistake highlighted in the hypothetical is exactly the kind of mistake that can be corrected with a hearing before a taking is done. Correcting the mistake after the fact is not sufficient,[153]

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356 N.E.2d 460, 463 (Mass. 1976), "Unless the administrative remedy is 'seriously inadequate' under all the conditions of the case, it should not be displaced by an action for a declaration . . . and care must be taken lest allowance of a judicial substitute disrupt unduly the orderly collection of tax." The conclusion is that challenging the title transferred to the municipality by a tax deed will be daunting, at best, and impossible, at worst.

150 *Compare* Connecticut v. Doehr, 501 U.S. 1, 11 (1991) (describing the security interest provided by the Connecticut procedure), *with* MASS. GEN. LAWS ch. 60, § 53 (authorizing the tax collector to take both "title" and "possession").

151 *See* § 53.

152 *See supra* Section IV.B.2.b.

153 *See* Fuentes v. Shevin, 407 U.S. 67, 86 (1972) ("The Fourteenth Amendment draws no bright lines around three-day, 10-day or 50-day deprivations of property. Any significant taking of property by the State is within the purview of the Due Process Clause. While the length and consequent severity of a deprivation may be another factor to weigh in determining the appropriate form of hearing, it is not decisive of the basic right to a prior hearing of some kind.").

particularly considering the high penalties imposed on a taxpayer who redeems the property after the taking.[154]

This demonstrates that the exigency existing in the appropriation of real estate title by a tax deed is significantly lower than that of a Connecticut attachment; in fact, it barely exists. Taxes assessed against real estate in Massachusetts automatically become a lien on the real estate making the municipality a secured creditor of the taxpayer.[155] Even if there is a sale of the real estate against which taxes are owed, the subsequent owner consequently takes title subject to the taxes.[156] This stands in stark contrast to the attachment process in *Doehr* as, without the attachment, a defendant is free to convey the property without concern for any desire the plaintiff may have to use it to satisfy the debt. The net result is that a municipality in Massachusetts has no exigency to justify taking the taxpayer's property without a hearing.

4. Conclusion

Even recognizing that "[t]he formality and procedural requisites for the hearing can vary, depending upon the importance of the interests involved and the nature of the subsequent proceedings,"[157] Massachusetts tax deeds procedurally fail as they allow the municipality to take the taxpayer's property without providing a pre-seizure hearing; indeed, no procedure is provided for the taxpayer to obtain an immediate post-seizure hearing. As no exigency justifies this lack, the tax deed is procedurally deficient under the Due Process Clause.

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[154] *See* §§ 15 & 55. The interest charges are particularly onerous. *See id*; *see also* MASS. GEN. LAWS ch. 59, § 57 (2007) (imposing a fourteen percent rate from nonpayment to taking); ch. 60, § 62 (imposing a sixteen percent rate from the taking to the foreclosure of the redemption); *see also* Tallage LLC v. Meaney, 2015 WL 4207424, at *2, 23 LCR (Landlaw) 375 (Mass. Land Ct. 2015).

[155] *See* ch. 60, § 37.

[156] *See* City of Boston v. Quincy Mkt. Cold Storage & Warehouse Co., 45 N.E.2d 959, 964 (Mass. 1942) ("The real estate of the owner in fact is charged with a lien for the payment of the tax thereon irrespective of the person to whom the tax is assessed, though the person to whom it is assessed is primarily liable therefor."); Hanna v. Town of Framingham, 802 N.E.2d 1061, 1066 (Mass. App. Ct. 2004) ("[T]he town's lien securing payment of real estate taxes arises automatically.").

[157] Boddie v. Connecticut, 401 U.S. 371, 378 (1971).

V. CONCLUSION

Massachusetts tax deeds fail federal and state due process scrutiny for two reasons. First, they allow the municipalities to keep property that is significantly beyond the amount for which they have a claim. Second, they allow a municipality to take title from the taxpayer without providing a pre-seizure hearing. Neither problem is acceptable under constitutional analysis.

Because of the seriousness of the problem, tax deeds under Chapter 60 of the General Laws should no longer be recognized; instead, one of the alternate methods of tax collection should be required. When presented with a tax deed or the foreclosure of the right of redemption flowing from them, the courts should refuse to enforce them as they violate the taxpayer's due process rights and should declare that they are not sufficient to convey title from the taxpayer to the municipality. Whether a party who has received title via a tax deed has obtained a valid interest or whether a Section 1983 action is appropriate to recover for the due process violations that have already occurred is left for evaluation by the affected parties and their counsel.