Forfeited and Delinquent Lands: Resolving the Due Process Deficiencies

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FORFEITED AND DELINQUENT LANDS:
RESOLVING THE DUE PROCESS DEFICIENCIES

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I. INTRODUCTION

The *West Virginia Law Review* published an article in its Summer Issue of Volume 89 in which Professor John W. Fisher, II discussed the constitutional problem of due process involved in West Virginia's laws regarding the disposition of forfeited and delinquent lands.1 As Professor Fisher explained, inherent problems in West Virginia's procedure to enforce tax liens against real property, including due process considerations, have plagued the state for a considerable portion of its history, precipitating a plethora of case law and statutory changes and more than a few law review articles.2

Specifically, Professor Fisher concluded that (1) adequate notice must be afforded to a delinquent property owner before the state may enforce its tax lien at the sheriff's sale,3 and (2) adequate notice should also be afforded to an owner before land is forfeited and certified to the deputy commissioner for sale.4 Because West Virginia's laws did not adequately reflect these standards of notice, Professor Fisher ended his discussion with an entreaty to the Supreme Court of Appeals of West Virginia to seize the opportunity and resolve the issue.5

In 1990, a related event developed: The West Virginia Law Institute (WVLI) commissioned the Tax Forfeited Property Project under a grant from the West Virginia Legislature.6 The purpose of the project was to "engage in a lengthy, scholarly examination of West Virginia's system of tax sales, and to eventually propose statutory, and, if necessary, constitutional changes which would enable the [s]tate to conduct

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2. Id. at 961.
3. Id. at 994.
4. Id. at 994-95.
5. Id. at 995-96.
tax sales in an efficient, yet constitutional, manner.\textsuperscript{7} The WVLI's efforts have resulted, to date, in state constitutional amendments to Article XIII of the West Virginia Constitution, and in a proposal to replace Articles 3 and 4 of Chapter 11A of the West Virginia Code with a single, comprehensive article, Article 5.\textsuperscript{8}

The purpose of this Note is threefold. First, it will present a background familiarizing the reader with the historical due process problems inherent in our tax sales system. Second, it will present an update of the West Virginia case law on this topic and explain the contributions of the Supreme Court of Appeals of West Virginia since 1988 in resolving a portion of the constitutional issue. Third, it will examine the WVLI's proposed legislation designed to accompany the constitutional amendments to Article XIII, and will discuss the substantive changes the legislation proposes to make from the current state tax sales procedure set out in Articles 3 and 4 of Chapter 11A of the West Virginia Code. The WVLI believes these changes will resolve the perplexing milieu in which West Virginia's state tax sales law has existed essentially since the state's inception.

II. BACKGROUND\textsuperscript{9}

A. Overview of the Tax Sales

At issue in West Virginia's tax sale statutes is due process, and more specifically the extent to which the United States Constitution limits the ability of a state to take title from a property owner for delinquency or forfeiture. At the risk of duplicating Professor Fisher's commentary on the history of the state land sales law, an abbreviated

\textsuperscript{7} Id. at 1.
\textsuperscript{8} Id.
\textsuperscript{9} To more fully understand the due process problems examined in this article, the reader is encouraged to refer first to Professor Fisher's 1987 article in which he discusses the complete history of West Virginia's forfeited and delinquent land sales law and points out each area in the law where lack of adequate notice has been a persistent problem. Without that background, the reader cannot fully appreciate the scope of this article which reports the advances the state is making to resolve its due process deficiencies. See Fisher, \textit{supra} note 1.
background is generally discussed, as well as an overview of the state land sales procedure.

To begin the discussion, consider the land sales procedure. It involves two distinct sales: (1) the sheriff’s sale, and (2) the deputy commissioner’s sale. When land becomes delinquent due to nonpayment of real property taxes it is sold at a sheriff’s sale to the highest bidder, provided the bid is sufficient to cover all taxes, interest, and related charges due on the land. If no bid is made sufficient to cover these costs, the sheriff purchases the property for the state.

Whether the property is purchased by an individual or by the state, the sheriff’s sale is followed by an eighteen-month redemption period. During the redemption period a former owner can redeem the property by paying a sum equivalent to all taxes, interest, and related charges due on the land. If the land is not redeemed during the eighteen-month redemption period, the former owner loses the right to redeem.

After the redemption period has expired and the individual purchaser has completed the requisite steps to survey the land, examine the title, and provide adequate notification, the purchaser receives title to the land relating back to the date the taxes were first attached to the property in the hands of the former owner. If the state purchased the land and the redemption period expires, title becomes absolutely vested in the state and is subsequently certified to the county deputy commissioner for sale.

15. Id.
16. Id.
The deputy commissioner institutes a sale of the state land by means of a circuit court proceeding, the proceeds of which are remitted to the school fund. At this point, the former owner of the property can still petition the circuit court for the opportunity to redeem the land. However, the former owner’s opportunity to redeem is termed a mere “privilege of redemption” extended as an act of grace by the legislature. The “privilege to redeem” is distinguishable from the “right to redeem” that a former owner possesses prior to the expiration of the eighteen-month redemption period following the sheriff’s sale.

B. Prior Case Law

In summary, the state’s disposition of forfeited and delinquent lands involves two sales. Prior to 1983, notification to the property owner of either sale was provided solely by publication in the local newspaper. However, in 1950, the United States Supreme Court in Mullane v. Central Hanover Bank & Trust Co. criticized the giving of notice by publication and specifically condemned such notice where the names and addresses of interested parties were known or easily ascertainable. The Mullane case involved a New York statute that afforded trust beneficiaries only published notice of a court proceeding instituted to settle the accounts of a common trust fund. Representing the beneficiaries of the trust income, Mullane objected to the notice by publication as a violation of due process.

The Supreme Court established that “[a]n elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and

afford them an opportunity to present their objections." 27 Although the Mullane Court would not commit itself to a rigid formula against which to measure the "reasonableness" of the efforts to provide adequate notice, it did lay out a balancing test that accomplishes the same. The adequacy-of-notice test balances a state's interest against the individual interest sought to be protected. 28

Applying the facts of the Mullane case, the Supreme Court balanced the state's interest in reaching a final settlement as to its fiduciary duties against the beneficiaries' interests in protecting their property rights to the trust income. The conclusion reached was that statutory notice by publication was inadequate to beneficiaries whose name and address were known. 29 The notice was inadequate "not because in fact it fail[ed] to reach everyone, but because under the circumstances it [was] not reasonably calculated to reach those who could easily be informed by other means at hand." 30 The Mullane decision established a standard of adequate notice upon which the resolution of West Virginia's due process deficiencies would eventually be founded.

In the 1975 case of Pearson v. Dodd, 31 the Supreme Court of Appeals of West Virginia was asked to determine adequacy of notice by publication. Although at that time statutory notice of both the sheriff sale and the deputy commissioner sale was by publication, only the adequacy of notice prior to the deputy commissioner's sale was challenged. 32 The notice prior to the sheriff's sale, i.e., the initial sale, was not.

In Pearson, an oil and gas property interest had become delinquent for nonpayment of taxes and was sold to the state at the sheriff's sale. The property was not redeemed during the eighteen-month redemption period and was later sold at the deputy commissioner's sale. The former owner asserted that notification by

27. Id. at 314.
28. Id. at 313-14.
29. Id. at 320.
30. Id. at 319.
32. Id. at 178-79.
publication alone of the deputy commissioner’s sale violated the due process clause, basing the argument primarily on Mullane.

In formulating its decision, the Pearson court chose not to focus on whether or not such notice by publication violated due process. Instead the court framed the pertinent issue as whether, at the point in the state tax sales procedure constituting the deputy commissioner’s sale, a former owner was an “interested party” deserving of adequate notice. The court stated:

[The Mullane due process requirement, that notice be reasonably calculated to apprise “interested parties” of the pendency of the action, presupposes under the Fourteenth Amendment that the parties retain or have some property interest to be affected by the action. In other words, if a person has no interest in the land that is being sold for the school fund, then he has no constitutional right to receive the kind of notice that Mullane demands.

The court concluded that a former owner was not such an interested party in the circuit court proceeding of the deputy commissioner’s sale to invoke the constitutional protection of due process and based its conclusion on the following rationale.

Namely, that a former owner possesses a statutory entitlement in the form of a right to redeem at any time within eighteen months of the date of the state’s purchase at the sheriff’s sale. If redemption does not occur during this period, the former owner’s statutory entitlement no longer exists because absolute title has vested in the state. Subsequently, at the deputy commissioner’s sale and related circuit court proceeding the state still holds absolute title to the property so that the former owner has no ownership at all. The sole option left for the former owner is a chance to petition the court for the opportunity to redeem the property. This opportunity, however, is deemed a

33. Id. at 181.
34. Id.
35. Id. at 183.
36. Id. at 182.
37. Id.
38. Id. at 183.
39. Id. at 182.
mere "privilege" extended to the former owner by the legislature as an act of grace.\textsuperscript{40} Because a former owner's mere opportunity to redeem is not a significant property interest, the court held that a former owner is not such an interested party deserving of due process protection under \textit{Mullane}.\textsuperscript{41}

In summary, the court distinguished a former owner's interests between (1) a right to redeem during the eighteen-month period following the sheriff's sale, and (2) an opportunity to petition the circuit court to redeem after the land is certified to the deputy commissioner for sale, and concluded that the former is an interest deserving of due process protection while the latter is not.\textsuperscript{42} Although this was not an incorrect statement of the law at that time, Professor Fisher points out in his 1987 article the flaw in the court's rationale. Namely, if due process protection of an owner's property rights is ever to occur, it must occur prior to the state's initial "taking" of the owner's land, i.e., the sheriff's sale, rather than prior to the deputy commissioner's sale.\textsuperscript{43}

Although the \textit{Pearson} case was admitted to the United States Supreme Court by a grant of certiorari, the case was dismissed for lack of a substantial constitutional question.\textsuperscript{44} This occurred because the appellant continued to contest only the adequacy of notice at the deputy commissioner's sale, or the point at which the former owner no longer holds an interest worthy of due process protection.\textsuperscript{45} Following

\begin{itemize}
\item \textsuperscript{40} \textit{Id.} See \textit{W. VA. CODE} § 11A-4-12 (1991).
\item \textsuperscript{41} \textit{Id.} at 183.
\item \textsuperscript{42} \textit{Id.} at 173. Specifically in Syllabus Point 9, the Court held:
\begin{quote}
\textit{W. Va. Code} 1931, 11A-3-8, as amended, gives a former owner of delinquent land whose interest is not otherwise saved and protected, a statutory entitlement, that is, a right to redeem the land which he formerly owned, at any time within eighteen months of the date of the State's purchase of the property. If redemption does not occur within such period, then his right no longer exists, because absolute title has vested in the State.
\end{quote}
\item \textsuperscript{43} Fisher, \textit{supra} note 1, at 988.
\item \textsuperscript{44} \textit{Pearson v. Dodd}, 429 U.S. 396 (1977) (per curiam).
\item \textsuperscript{45} \textit{Id.} at 397-98. See Fisher, \textit{supra} note 1, at 989 (commenting that the United States Supreme Court wanted the opportunity to address the sheriff's sale, because inadequate notice to a former owner after the state acquired the title did not present a substantial fed-
Pearson, lack of due process remained an inherent flaw in our state law. The decisions handed down by the Supreme Court of Appeals of West Virginia on this topic continued to avoid the very issue as to what level of notice was constitutionally required prior to the sheriff's sale for delinquent taxes.\footnote{46}

In 1983, the United States Supreme Court was presented with an opportunity to address a state's initial "taking" of property rights in \textit{Mennonite Board of Missions v. Adams}.\footnote{47} The Supreme Court concluded that notice by certified mail must be afforded an interested

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\item 46. In Syllabus Point 1 of Don S. Co. v. Roach, 285 S.E.2d 491 (W. Va. 1981), a case in which an ill-educated property owner's land fell delinquent due to his lack of understanding of the obligation to pay property taxes, the court held:
  
  A landowner whose property is to be sold for delinquent taxes [at the sheriff's sale] under Chapter 11A, article 3 of the West Virginia Code, is an interested party, by virtue of the statutory entitlement to redeem delinquent property contained in article 3, who must be afforded the protection of the due process guarantees contained in the West Virginia and United States Constitutions.
  
  \textit{Id.} at 492.

  In his examination of the \textit{Roach} case, Professor Fisher explained that the decision focused narrowly on a specific class of property owners who suffered from illiteracy, thereby significantly reducing the precedential value of the case. Fisher, \textit{supra} note 1, at 990.

  In the case of Cook v. Duncan, 301 S.E.2d 837 (W. Va. 1983), property located in West Virginia, but owned by a nonresident, fell delinquent due to nonpayment of property taxes and was sold at the sheriff's sale. Mailed notice of the owner's right to redeem was attempted but never reached the nonresident. The Court held in Syllabus Point 2 that "W.Va. Code § 11A-3-24 requires a county clerk to use 'due diligence' in determining whether a property owner is an in- or out-of-state resident before notification of the right to redeem property." \textit{Id.}

  Professor Fisher explained that the \textit{Cook} decision did not address due process considerations \textit{per se} but rather, focused on the \textit{statutory} requirement by the county clerk to use "due diligence" in ascertaining an owner's residence for notification of the right to redeem. Fisher, \textit{supra} note 1, at 991-92.

  In a statement regarding these cases, Professor Fisher commented:

  In light of the guidance provided by the [United States Supreme Court's per curiam decision] in \textit{Pearson}, the decisions of the Supreme Court of Appeals of West Virginia in \textit{Cook} and \textit{Roach} were somewhat surprising. While the decisions resolved the conflict between the party litigants, they did little to clarify the issues or address the fundamental issue presented to the [West Virginia Supreme Court of Appeals].

  Fisher, \textit{supra} note 1, at 992.

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party prior to the initial “taking” of its property by the state if the name and address of the party are reasonably ascertainable.48 Otherwise the party can not be divested of its property rights.49

The Mennonite case involved a due process challenge to an Indiana tax sale statute under which notice of the initial delinquent tax sale was provided to all parties by publication and posting. The property owner was additionally provided notice by certified mail, but there was no provision for notice by mail or personal service to mortgagees of the property. Therefore, when property on which the Mennonite Board of Missions held a mortgage became delinquent for nonpayment of taxes, the property was sold at the tax delinquency sale without the Board of Missions ever having received certified mailed notice of the same.

Because the Board had no knowledge of the tax delinquency or of the sale of the property, the two-year redemption period following the tax sale ran without the Board exercising its right to redeem. By the time the Board finally learned that the former owner had permitted the land to fall delinquent, the Board’s mortgage on the property had been supplanted by the tax sale purchaser’s deed, while the former owner still owed money to the Board on the mortgage.

Relying on the Mullane decision, the Supreme Court held that adequate notice requires more than mere publication to an interested party if the address of the interested party is “reasonably ascertainable.”50 Moreover, the Court reasoned that because the tax sale immediately provides the purchaser with a priority lien that takes precedence over a mortgage, the mortgagee possesses a substantial property interest significantly affected by the sale.51 Therefore, the Supreme Court held that a lienholder, in this case the Mennonite Board of Missions, is such an interested party entitled to notice by certified mail before a tax deed is issued for real property encumbered by its lien.52

48. Id. at 800.
49. Id.
50. Id. at 795-97.
51. Id. at 798.
52. Id.
It has been noted that the majority opinion failed to consider the burdens this rule impliedly imposed upon state tax authorities. In fact, as Justice O’Connor pointed out in her own dissenting opinion in *Mennonite*, “[u]nder the [majority’s] decision . . . it is not clear how far the state must go in providing for reasonable efforts to ascertain the name and address of an affected party.” Justice O’Connor reminded the Court of the adequacy-of-notice balancing test first established in *Mullane* to discern what constituted a reasonable effort on the part of state authorities. The Justice felt the majority opinion lacked an analysis measuring the reasonableness of the state’s efforts to provide adequate notice. Fundamentally, however, the *Mennonite* decision yielded a just and indispensable rule of law in the constitutional protection of individual property rights, and set a precedent that would lead the Supreme Court of Appeals of West Virginia to address the lack of adequate notice allowed by our state land sales law.

## III. UPDATE OF THE CASE LAW—LILLY AND ITS PROGENY

In apparent response to the *Mennonite* decision, the West Virginia Legislature passed amendments to the West Virginia Code to bring the language into compliance regarding notice prior to the sheriff’s sale. In 1983, Section 2, Article 3, Chapter 11A was amended to provide for notice by certified mail to the landowner of the delinquency and of the pending sale of the land. In 1985, the same section was amended to provide for notice by certified mail of the same to lienholders.

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53. Fisher, *supra* note 1, at 995 (asserting that the majority decision may have placed an unreasonable burden on the state); Tax Project, *supra* note 6, at 3-4 (expressing apprehension that the decision, taken literally, would require a title search before any state sale of land).


55. *Id.* at 801-07.

56. *Id.* at 805.


58. *Id.*
A. Lilly v. Duke

In the 1988 case of Lilly v. Duke, the Supreme Court of Appeals of West Virginia was presented with an opportunity to squarely address the level of notice constitutionally required prior to the sheriff’s sale.\(^{59}\) Although the statutory amendments had effectively cured the due process problem, the court contributed to the state of the law on this issue by declaring in Syllabus Point 2 that “W. Va. Code, 11A-3-2 (1967), was, prior to its amendments in 1983 and 1985, constitutionally invalid insofar as it permitted the sale of real property without personal notice to affected owners and others having an interest in the property.”\(^{60}\)

In point of fact, Lilly is West Virginia’s own Mennonite. Even the material facts are analogous to those considered by the United States Supreme Court in Mennonite. In both, the initial state tax sale of delinquent land was constitutionally challenged by a lienholder for lack of adequate notice. In the Lilly case, the Lillies themselves were the lienholders on property acquired by Cecil and Faye Taylor. The Taylors had executed a deed of trust on the property and named the Lillies as beneficiaries of the deed of trust. Monthly installments were to be remitted to the Bank of Sissonville.

The Taylors did not pay real property taxes on the land for the year of 1980 and the tract subsequently became delinquent. As required by the statutes in effect at that time, the sheriff posted and published in the local newspaper an initial notice of the tax delinquency,\(^{61}\) and a second notice announcing that the tract would be offered for auction at the sheriff’s sale.\(^{62}\) There were no bids received at the sale and the sheriff purchased the tract for the state.

The tract was not redeemed during the eighteen-month redemption period following the sheriff’s sale and became irredeemable. Thereafter, the defendant, Duke, purchased the tract at the deputy

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60. Id. at 123.
commissioner’s sale and was delivered a tax deed for the property on December 28, 1983. As lienholders, the Lillies filed suit to set aside the tax deed on August 2, 1984 relying on the United States Supreme Court’s decision in *Mennonite*.

The first issue addressed by the *Lilly* court was whether a property owner or a mortgagee may be deprived of their property interests without adequate notice prior to the sheriff’s sale. The court agreed with the plaintiffs and directly applied *Mennonite*, concluding (1) that the beneficiary of a deed of trust, i.e., a lienholder, possesses a significant property interest warranting application of due process, and (2) that where such a party having an interest in the property can reasonably be identified from public records or otherwise, due process requires that such party be provided notice by mail or other means as certain to ensure actual notice. Therefore, the *Lilly* case brought West Virginia common law up to date with the law laid out in *Mennonite* regarding adequate notice.

The second issue identified by the *Lilly* court was whether such a suit challenging the sufficiency of notice in a sheriff’s sale is barred unless filed before the property is sold by the deputy commissioner. The *Lilly* court acknowledged that this issue was considered in *Pearson v. Dodd*, where it was concluded that once the eighteen-month redemption period following the sheriff’s sale expired, the owner no longer had a property interest deserving of due process. The *Lilly* court conceded, however, that *Pearson* was decided without the benefit of *Mennonite* and a more recent United States Supreme Court case, *Tulsa Professional Collection Services v. Pope*.

In *Pope*, estate creditors brought a due process challenge against an Oklahoma probate statute that provided for constructive notice to certain estate creditors. The statute barred creditors’ claims against

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63. *Lilly*, 122 S.E.2d at 125.
64. *Id.* at 123 (referring to Syllabus Point 1).
65. *Id.* at 126.
66. *Id.* (citing *Pearson v. Dodd*, 221 S.E.2d 171 (W. Va. 1975)).
67. *Id.* at 126 (citing *Tulsa Professional Collection Services v. Pope*, 485 U.S. 478 (1988)).
an estate if the claims were not filed within two months of the published notice. The Court established that a creditor’s cause of action against an estate for an unpaid bill constitutes a sufficient property interest protected by the due process clause, although the due process clause protects such interest only from a deprivation by state action.69

In examining the extent of the state action in probate court proceedings, the Supreme Court found that unlike mere statutes of limitation,70 the state is so intimately involved in the proceedings in an ongoing nature, and so substantial and pervasive is this state action, that the proceedings are subject to due process restrictions.71 Therefore, the Supreme Court invalidated the Oklahoma probate statute for violation of the Due Process Clause because it did not provide adequate notice by certified mail to the creditors whose addresses were ascertainable.72 Further, the Court held that because of the due process violation, the two-month limitation on instituting claims against the estate was ineffective, and thus, did not bar claims brought by such creditors.73

In Lilly, the Supreme Court of Appeals of West Virginia drew an analogy between the Oklahoma state involvement in probate court proceedings and West Virginia’s state involvement in the tax sales procedure. The Court concluded (1) that the state’s involvement in the tax sales process is substantial and ongoing thereby subject to due process scrutiny, (2) that published notice prior to the sheriff’s sale fails due process scrutiny and is constitutionally deficient, (3) and that because the statute is constitutionally deficient, an interested party’s due process challenge to the sheriff’s sale is, therefore, not barred, even if filed after the expiration of the eighteen-month redemption period following the sheriff’s sale.74

69. Id. at 485.
70. Id. at 486 (citing Texaco, Inc. v. Short, 454 U.S. 516 (1982); Flagg Bros., Inc. v. Brooks, 436 U.S. 149, 166 (1978)).
71. Id. at 487.
72. Id. at 491.
73. Id. at 487-88.
74. Lilly, 122 S.E.2d at 126 n.10 (stating that “[c]learly, under Pope, our redemption statute, W. Va. Code, 11A-3-8, is only a step in the overall procedure which involves continued state action.”).
The Lilly court noted that Mennonite also implicitly answered this same question. The court stated:

In Mennonite, suit [challenging the sufficiency of notice at the initial delinquent tax sale] was not instituted until after the redemption period had expired and the deed to the property had been delivered to the purchaser. Despite the fact that Mennonite, as the mortgagee, had its property interest extinguished under the Indiana statute, the Supreme Court nevertheless found that the lack of personal notice was a due process violation that vitiated the sale.75

Therefore, the court held that “the holding of Syllabus Point 9 of Pearson v. Dodd . . . is overruled insofar as it precludes a landowner or other party having an interest in real property from bringing suit to set aside the sale of the property based on a constitutionally defective notice at the sheriff’s sale for delinquent taxes.”76

As the Lilly court commented, there is a basic rationality to this result. “If one’s property has been wrongfully taken because of a constitutional due process violation, it is hardly an answer to say that such person cannot bring suit because he now lacks an interest in the property.”77

In summary, the Lilly case brought West Virginia case law in line with the Mennonite decision regarding adequate notice. However, two matters were left insufficiently resolved by the Lilly court. First, the court did not explain what level of reasonableness is appropriate in a state’s attempt to identify an interested party’s name and address. Second, although the court justifiably held that an interested party’s right to challenge the constitutionality of the sheriff’s sale could not be

75. Id. at 126. The Lilly court went on to say:
    In three post-Mennonite cases challenging a state tax sale statute, suit was filed after the initial delinquent tax sale and after the redemption period had ended. In each instance, the court had no difficulty in applying Mennonite to the original notice deficiency and did not hold that the expiration of the redemption period operated as a bar to any subsequent suit.
    Id. at 126-27 (citations omitted).

76. Id. at 127.

77. Id.
barred, the court left open whether the *Mennonite* rule of law—now the *Lilly* rule of law—would be applied retroactively.

Regarding the first matter, the court did briefly address the appropriate level of reasonableness required in identifying interested parties, but only by way of illustration:

[W]e believe the plaintiffs' name and address were reasonably ascertainable. While the address did not appear on the face of the deed of trust, a handwritten notation in the margin thereof did provide an address. Furthermore, other identifying information was reasonably available. The deed of trust specifically named . . . [the] trustee and notice could have been given to him in that capacity. The deed of trust also stated that note payments were to be remitted to the Bank of Sissonville, which was the collection agent for the plaintiffs. A simple inquiry at the bank presumably would have provided the necessary address.78

This discussion settled only the specific facts of the *Lilly* case, however, and did not present a more general standard against which "reasonableness" could be measured, much like the *Mennonite* majority decision had omitted limits on the state's obligation to "reasonably ascertain" interested parties deserving of certified notice.

Interestingly, the *Pope* case provides a useful discussion on the *Mullane* adequacy-of-notice balancing test.79 However, although the *Lilly* court applied *Pope* in its discussion of the bar to claims, the case was unfortunately not used as authority regarding the measure of reasonableness. Absent consideration of such a balancing test, the *Lilly* decision insufficiently resolved the question to what extent and cost must the state proceed in order to satisfy due process requirements.

Regarding whether the *Mennonite* rule would be applied retroactively, the court did not address the issue. By not addressing the issue, however, the court left the state legal community with the task of discerning for itself whether the ruling would receive retroactive application, an answer that if affirmative would disrupt the integrity of land titles in West Virginia.80

78. *Id.* at 125-26.
80. Considered at the same time as *Lilly* but handed down one month later was the
B. Prospective Application of Lilly

Fortunately, the retroactivity question of the Lilly holding was not to be as long-lived as the due process problem it had effectively remedied. In its 1991 decision in Geibel v. Clark, the Supreme Court of Appeals of West Virginia expressly ruled that the Mennonite rule of law is not to be applied retroactively. In Syllabus Point 1, the court stated:

Mennonite Board of Missions v. Adams ..., the constitutional due process teachings of which this Court followed in Lilly v. Duke ..., is not to be applied with general retroactive effect to invalidate virtually all sheriffs’ tax sales of real property, with mere constructive notice, which were conducted before Mennonite Board of Missions was decided on June 22, 1983.

In Geibel, the Wrights owned land that was returned delinquent for nonpayment of real property taxes. Pursuant to the requirements of the statute effective at that time, notice of the pending sheriff’s sale was made by publication and posting alone. The land was purchased at the sheriff’s sale by the state and the Wrights did not redeem the case of Anderson v. Jackson in which the court reached the same conclusion as Lilly regarding the standard of notice required prior to the sheriff’s sale and which also did not speak to the issue of retroactivity. Anderson v. Jackson, 375 S.E.2d 827 (W. Va. 1988).

In the Anderson case, the plaintiff’s land had become delinquent in 1975, due to nonpayment of real property taxes. The plaintiff was notified of the pending sheriff’s sale by publication in a local newspaper in accordance with the statutory provisions in effect at that time. At the sheriff’s sale, the land was purchased by the state and later certified to the deputy commissioner. The defendant, Jackson, subsequently bought the property at the deputy commissioner’s sale, but the plaintiff brought suit to set aside the deed for insufficient notice of the sheriff’s sale.

In this decision, the court additionally considered whether the doctrine of laches could act as a bar to such suits challenging the sufficiency of notice of the sheriff’s sale. Based on the specific facts of the Anderson case the court did not bar the plaintiff’s claim. However, the crux of the Anderson decision is not that it applied the doctrine of laches, but rather that it reached the same result as the Lilly decision, including the fact that it did not address the issue of retroactivity. Id. In this respect, the significance of the Anderson decision should not be too overstated.

82. Id. at 85.
property during the eighteen-month redemption period following the sale. The Clarks purchased the land at the deputy commissioner sale and were delivered a deed to the property on January 20, 1969.

The Wrights and their daughter, Ruth, the plaintiff, continued to occupy the property throughout the years after the 1965 tax sale to the state, but paid no rent or property taxes during this time. The Wrights did, however, pay for paving assessments and insurance against the property. The defendants, on the other hand, paid all of the real property taxes on the land from the time the land was purchased in 1969 and also insured the same from that time.

By 1987, both of Ruth Wright’s parents had died and she was named the executrix and sole beneficiary of her father’s will. In August 1988, she filed an action to set aside the tax deed to the defendants. In an amended complaint, the plaintiff asserted that the sheriff’s tax sale and the subsequent deed to the defendants were void because her parents, the Wrights, were not mailed notice of the initial sheriff’s tax sale or of their right of redemption.84

In the discussion of this case, the court admitted that the Lilly decision was silent as to the retroactive effect of the Mennonite rule.85 Applying a five-part test for determining whether to give full retroactive effect to a new rule,86 the court determined that giving such effect to the Mennonite rule would disrupt a traditionally settled area of law, namely property law, and would broadly impact a significant number of parties—factors strongly disfavoring retroactivity.87

Furthermore, the court looked to other jurisdictions that had expressly addressed the general retroactive/prospective effect of Mennonite and its progeny, and each held that such decisions were to be applied prospectively only.88 Additionally, because thousands of sheriffs’ tax sales involving deficient notice by publication have oc-

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84. Geibel, 408 S.E.2d at 87.
85. Id. at 88.
86. Id. at 89-90 (applying a five-part test set forth in Syllabus Point 5 of Bradley v. Appalachian Power Co., 256 S.E.2d 879 (W. Va. 1979)).
87. Id.
88. Id. at 90 (citing McCann v. Scaduto, 519 N.E.2d 309 (N.Y. 1987); Hanesworth v. Johnke, 783 P.2d 173, 176-77 (Wyo. 1989)).
curred in this state between 1941 and 1983, a retroactive application of Mennonite to invalidate all of these sheriffs' tax sales would create extreme uncertainties in thousands of land titles in this state containing a tax deed in the chain of title during that time period. Therefore, the court concluded that Mennonite was not to be applied retroactively to sheriffs' tax sales conducted before the Mennonite decision was handed down on June 22, 1983.

By way of the Geibel decision, the court finally closed a chapter in the history of the state's tax sales proceedings involving the persistent violation of due process prior to the sheriff's sale.

C. Limitations on the State's Obligation to Notify

Although not as significant as the Geibel decision, Citizens National Bank v. Dunnaway made its own contribution to the law as set forth in Lilly. Specifically, the Dunnaway decision expounded upon what state efforts are reasonable and appropriate in identifying an interested party’s name and address. Whereas in Lilly the court did not include in its discussion of “reasonableness” the adequacy-of-notice balancing test set out in Mullane and Pope, the Dunnaway court expressly employed the balancing test.

In Dunnaway, Constance L. Persinger purchased land in 1975. This land was recorded under her name for tax purposes. Ms. Persinger later married Troy E. Dunnaway, and together, the couple executed a deed of trust on the property naming the plaintiff, Citizens National Bank, as beneficiary. The deed of trust was recorded specifying the grantors as “Troy E. Dunnaway and Constance L. Dunnaway (formerly Constance L. Persinger).” However, the instrument was indexed only under the name Dunnaway and not Persinger. The Bank’s deed of trust, then, could only be located in the index under the name of Dunnaway, although the name used to identify the property for tax purposes was Persinger.
In 1982, the Dunnaway property was returned delinquent due to nonpayment of property taxes. Pursuant to the statutory requirements in effect at that time, the sheriff mailed notice of the pending tax sale to the Dunnaways. However, because the deed was not properly indexed, the Bank was not identified as an interested party and was not provided certified mailed notice of the sheriff’s sale.

At the sheriff’s sale, the property was purchased for the state and was later certified to the deputy commissioner for sale. The deputy commissioner published notice of the pending sale in the newspaper but because the deputy commissioner did not know of the Bank’s deed of trust due to the error in indexing, none of the publications named the Bank as having an interest in the property and the Bank received no other notice.

The land was sold at the deputy commissioner’s sale in 1986 and a tax deed was delivered to the purchaser, Hughes, shortly thereafter. The Bank filed suit to set aside the tax deed asserting that the Bank did not receive constitutionally required notice of the sheriff’s sale.

In this decision, the Dunnaway court reiterated that where a party having an interest in the property can reasonably be identified from public records or otherwise, due process requires that such party be provided notice by mail or other means as certain to ensure actual notice. As Justice O’Connor pointed out in her dissent in Mennonite, however, to end the due process discussion without considering the adequacy-of-notice balancing test would leave open the question to what extent and cost the state must proceed in order to ascertain the name and address of an affected party.

Taken literally, Mennonite would bar all tax sales, including sales of tax liens, until all interested parties have been notified of the proceeding by mail or similar means. However, the only means of discovering parties entitled to notice is a title search. Thus, both Mennonite and Lilly would bar all tax sales, including a sale of the tax lien, until a title search has been performed and all interested parties have been notified. Given the limited financial and human resources the state

93. 791 U.S. at 800-01.
94. Tax Project, supra note 6, at 3.
has historically been able to devote to the administration of its tax sale proceedings, both Mennonite and Lilly mandate a somewhat unrealistic standard for the state to obtain.\textsuperscript{95}

Fortunately, the Dunnaway decision clarified Lilly a step further and applied the adequacy-of-notice balancing test, setting a standard of reasonableness by which to judge a state’s efforts in ascertaining an interested party’s name and address.\textsuperscript{96} Balancing the state’s interest against the individual interest sought to be protected in the Dunnaway case, the court concluded the following:

\textquote[It is undisputed that the Bank’s deed of trust was publicly recorded but improperly indexed so that the existence of the deed of trust could not be ascertained by reasonably diligent efforts. Although extraordinary efforts might have discovered the deed of trust, extraordinary efforts are not constitutionally required.

Furthermore, because the State has a compelling interest in an effective system for the collection of taxes and in assuring good title to the purchasers of delinquent property from the State, we find the constructive notice that was given to be reasonable under these circumstances.\textsuperscript{97}]

Therefore, the court held that the lack of personal notice to the Bank did not invalidate the tax sale because the lack of personal notice was caused by an improperly indexed deed of trust that could not be located by reasonably diligent efforts.\textsuperscript{98}

Although perhaps not as significant as Geibel, the Dunnaway case made a necessary contribution to the state tax sales law. By establishing parameters against which to gauge tax authorities efforts toward due process, the court has set some meaningful limitations on the state’s obligation to notify, thereby adding a more reasonable, cost-benefit dimension to the Lilly decision.

The Supreme Court of Appeals of West Virginia, through Lilly and its progeny, has done its part in improving the state tax sales law by establishing the standard of adequate notice by certified mail re-

\textsuperscript{95} Id.
\textsuperscript{96} Dunnaway, 400 S.E.2d at 892.
\textsuperscript{97} Id. at 892-93.
\textsuperscript{98} Id. at 893.
quired prior to the sheriff’s sale. It is time now for the Legislature to follow through with the teachings of Lilly and address the back log of forfeited and delinquent lands as well as potential future problems of due process and economic inefficiency in the state tax sales statutes. The very challenge to meet due process requirements at limited expense has been confronted by the WVLI in compiling its Tax Forfeited Property Project.

IV. PROPOSED LEGISLATION

The West Virginia Law Institute’s Tax Forfeited Property Project advocates the repeal of Articles 3 and 4 of Chapter 11A of the West Virginia Code, and the adoption of a new article, to be designated Article 5 of Chapter 11A. If enacted, the proposed legislation encompassed in Article 5 would govern all tax sales of real property in the state.99

In this discussion the substantive effects of the Institute’s proposal are laid out in a narrative format. This section proceeds through an overview of the present state tax sales procedure with attention drawn to each point in the procedure where lack of due process or lack of a reasonable economy of means is still problematic. Where a problem is identified, the WVLI’s particular remedy to that area will be presented.

A. Constitutional Problems in the Current Tax Sales System: The Proposed Statutory Remedies

1. The Sheriff’s Sale

Under the current statute, when property becomes delinquent due to nonpayment of taxes,101 the sheriff posts and publishes in the lo-

99. Tax Project, supra note 6, at 1.
100. Id.
101. For a more meaningful discussion, the following definitions are provided: Escheated Lands: In American law escheat signifies a reversion of property to the state because of the lack of any person competent to inherit it. Escheated lands signify those lands which were owned by a person who died without a will and
cal newspaper an initial list of delinquency. In September of each year, a second delinquent list is published. Additionally, the 1983 and 1985 amendments to the code require that the second notice of delinquency be also sent by certified mail both to the delinquent landowner and to anyone having a lien against the land.

At the sheriff's sale, one of two events can occur. Either the land is sold to the highest bidder, provided the bid is sufficient to cover the cost of taxes, interest, and related charges due on the land; or if no bid is made sufficient to cover these costs, the land is purchased by the sheriff for the state. In either case, the tax sale is followed by the eighteen-month redemption period during which the owner, or any other person who was entitled to pay the taxes on the property, may redeem the property.

left no heirs or next of kin. These lands escheat to the state. It has been pointed out that as a practical matter there will seldom ever be any escheated land. Such lands would probably be returned delinquent and sold for taxes before it was determined they had been escheated to the state.

Waste and Unappropriated Land: Lands which were owned by the state at its formation and which have never been granted to anyone are waste and unappropriated.

Delinquent Lands: Delinquent lands are those upon which the owner failed to pay taxes and which have been listed as delinquent by the county sheriff and purchased by him for the state at public sale. Delinquent land is purchased by the state for the amount of taxes unpaid. The terms "delinquent" and "forfeited" are vastly different.

Forfeited Lands: Lands become forfeited when the owners fail to enter them for taxation on the land books of the proper counties and no taxes are paid on them for five consecutive years. This land is forfeited to the state by operation of law and no formalities are necessary to convey title to the state. Lands are forfeited only for non-entry, not for non-payment of taxes.

a. Purchase by an Individual

(1) Current Statutory Scheme

If the land is purchased by an individual, the purchaser acquires a receipt at the sale that essentially constitutes a lien against the property, superior to all prior liens and subject to the eighteen-month redemption period. To acquire a deed at the end of the redemption period, the purchaser (1) must secure and file a survey of the property with the county clerk, (2) must examine the title in order to prepare a list of those to be served with notice to redeem, and (3) must leave a deposit with the clerk to cover the cost of notification.

The clerk prepares the notice to redeem and secures adequate notice to any interested parties identified in the title search that their right to redeem is soon to expire. If the property is not redeemed, the clerk delivers a deed of the land to the purchaser who then receives title to the land relating back to the date the taxes were first attached to the land in the hands of the former owner.

With the statutory changes made in 1983 and 1985 requiring certified mailed notice to both owners and lienholders, the code provisions regarding the sheriff's sale no longer contain due process deficiencies. Not only are the former interested parties properly notified prior to the sheriff's sale of their delinquency and of the pending sale of their land, but also the former interested parties are notified of their right to redeem before they are finally deprived of their property rights.

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measure against property owners, an impression the project reporters did not wish to convey. Tax Project, supra note 6, at 16.


109. W. VA. CODE § 11A-3-20 (1991). The proposed legislation eliminates the requirement by the purchaser to procure a survey of the land. "Members of the advisory committee saw no merit in maintaining this requirement . . . [because although] it is certainly useful for a purchaser to survey the property . . . it does not rise to the level of a legal necessity." Tax Project, supra note 6, at 17.


In practice, however, the initial notice by certified mail to lienholders is, in most cases, simply not done because sheriffs lack the resources to conduct title searches. This constitutes a continuing violation of the *Mennonite* and *Lilly* interpretations of due process.\(^{114}\) In devising a functional, cost-effective means for sheriffs to provide lienholders with adequate notice, the WVLI’s proposed legislation includes a workable solution using a “lien filing” system.\(^{115}\)

\section*{(2) Proposed Legislation}

The lien-filing system under the proposed legislation is modeled after a Tennessee statute\(^{116}\) and will require lienholders to annually file a statement with the sheriff in order to receive notice of pending tax sales.\(^{117}\) The statement will have to specify the lien claimed, the map and parcel number of the encumbered property, the party charged with taxes on the property, and an address for notice of the tax sale.\(^{118}\) Statements of lien will be filed each July in order for lienholders to receive notice of the pending sheriff’s sale in the fall.\(^{119}\) The proposal sets up an annual filing so that notices will not accumulate for particular parcels over several years.\(^{120}\)

This lien filing system withstands the adequacy-of-notice balancing test because it reasonably balances the interest of the state against the individual interest sought to be protected by the constitution. By illustration, on the one hand, “[t]he state has a vital interest in the collection of its tax revenues in whatever reasonable manner that it chooses . . . [and it] has an equally strong interest in avoiding the burden imposed by the requirement that it must exercise ‘reasonable’ efforts to ascertain the identity and location of any party with a legally protected interest.”\(^{121}\) The lienholder on the other hand, has a significant inter-

\begin{itemize}
  \item \(^{114}\) Tax Project, *supra* note 6, at 5.
  \item \(^{115}\) *Id.* at 10-11.
  \item \(^{117}\) Tax Project, *supra* note 6, at 10.
  \item \(^{118}\) *Id.* at 14.
  \item \(^{119}\) *Id.* at 14-15.
  \item \(^{120}\) *Id.* at 14-15.
  \item \(^{121}\) *Mennonite*, 462 U.S. at 806 (quoting Justice O’Connor’s dissent); see *Tulsa Professional Collection Servs. v. Pope*, 485 U.S. 479 (1988) (in which Justice O’Connor deliv-
est in the property encumbered by its lien but the lienholder can safeguard its interest in several ways with a minimum amount of effort: (1) by requiring the mortgagor to provide it with copies of paid tax assessments, (2) by requiring the mortgagor to deposit tax moneys in an escrow account, or (3) by checking the public records, itself, to determine whether or not the taxes have been paid each year.\textsuperscript{122}

On balance, the requirement of lienholders to file their address with the sheriff is not so cumbersome as to outweigh the state's interest in collecting tax revenue without costly and unrealistic burdens to identify parties for notification. The net result of the proposed filing system is that adequate notice will be provided to lienholders at a reasonable cost to the state. Besides the addition of the lien filing system, the proposed legislation does not materially alter the current statutory framework regarding the purchase of delinquent property by an individual at the sheriff's sale.

b. Purchase by the State

(1) Current Statutory Scheme

Under the current statute, if no adequate bid is made at the sheriff's sale by an individual, the land is purchased by the sheriff on behalf of the state.\textsuperscript{123} Due process considerations arise at this step in the current tax sales procedure that present a constitutional deficiency. Immediately after the purchase by the sheriff on behalf of the state, title to the land vests in the state subject to the eighteen-month redemption period.\textsuperscript{124} Whereas before the end of the redemption period an individual purchaser is required to ensure that interested parties are notified by certified mail of the ensuing termination of their redemption rights,\textsuperscript{125} the state is obliged to give no such mailed notice to

\begin{footnotes}
\item[122] Mennonite, 462 U.S. at 808-09 (citation omitted); see also Tulsa Professional Collection Servs. v. Pope, 485 U.S. 479 (1988).
\end{footnotes}
FORFEITED AND DELINQUENT LANDS

The land becomes irredeemable and title absolutely vests in the state without the former interested parties receiving adequate notice of their right to redeem.

Therein lies the due process problem at this stage of the current tax sales procedure and the problem's companion paradox: The state cannot constitutionally acquire title to property without adequately notifying the owner or other interested parties, but the expense of such notice is excessive in light of the benefits of fee simple ownership. For example, if no one bids on the property at the sheriff's sale, nor redeems the land within the generous eighteen-month redemption period, the property is most likely not worth owning. The potential revenue, or more appropriately the lack thereof, from the sale of such worthless property would not justify the cost of notifying interested parties of the pending termination of their property rights.

(2) Proposed Legislation

The WVLI resolves this paradox by never allowing the state to acquire fee simple title to the property. Under the proposed legislation, the sheriff will no longer "purchase" property at the sheriff's sale on behalf of the state. Instead, the sheriff will "certify to the

127. Tax Project, supra note 6, at 11.
128. Id. In an interview with the Huntington Herald-Dispatch, state Auditor Glen Gainer commented about the low value of the land the state is carrying on the forfeited and delinquent land books. Excerpts of his comments from the article are provided:

We've got about 5,000 parcels of forfeited land in the state that have little or no value. We have to carry them on the books and try to sell them but there's no reason for anyone to want to buy these parcels. Any parcels are of minerals long since removed, mostly in major coal-producing counties like Mingo, Wyoming, Raleigh and Harrison. Someone else usually owns the surface rights to the land and pays those property taxes promptly. We also have some unusual tracts such as a parcel one foot wide by a mile long. And unless the abutting property owners decide they want that extra foot of land, it's tough to sell the parcel.

Tom D. Miller, Forfeitures Owned by State Have Little Value, THE HERALD-DISPATCH, August 11, 1993, at 3C.
129. Tax Project, supra note 6, at 11.
130. Id.
131. Id. at 15.
state auditor” any property remaining unsold following the sheriff’s sale.132 “The use of ‘purchase’ or ‘certify’ is really a matter of semantics, the true issue being whether notice is given before property owners are divested of their rights.”133

The proposal also provides a workable method to supply adequate notification by requiring the purchaser at either sale to secure notice. Under proposed Article 5, the only time property will become irredeemable is after an individual purchaser makes a bid on the property, secures a title examination to identify all parties entitled to notice, and pays a fee to the state sufficient to cover the cost of notification.134 This is the same essential procedure followed in our current statutory framework regarding the purchase by an individual at the sheriff’s sale. The proposed legislation will require of a purchaser both at the deputy commissioner’s sale and at the sheriff’s sale primarily the same obligations the current statute now imposes on one who buys land at the sheriff’s sale. Because title to land will never automatically vest in the state under the proposal, an interested party will never lose its right to redeem until first receiving adequate notice of the same from the purchaser.

Under the proposal, not only will due process be achieved, but it will be achieved without imposition of a costly, unrealistic burden on the state. Instead the cost will be transferred to the purchaser135 who will still get a good deal. Even though the purchaser will incur the cost of notification, property purchased through a tax sale is generally cheaper than property purchased in a conventional real estate transaction.

132. Id.
133. Id.
134. Id. at 11.
135. Id. at 12.
2. Forfeited land

a. Current Statutory Scheme

Yet another troublesome spot in our current statute appears in the language regarding forfeited land. Land becomes forfeited when a landowner fails for five successive years to enter his property on the land books in order to be charged with taxes. If the land is not entered as such, then “by operation of law, without any proceedings therefor” the land is automatically forfeited to the state. The state’s automatic “taking” of forfeited lands without any notice at all to the landowner or other interested parties can most accurately be labeled a blatant contradiction to due process requirements, because it strips owners of property rights without notice. The current code does provide that forfeited lands may be redeemed prior to the deputy commissioner’s sale, but it provides no notice to owners of their right to redeem.

b. Proposed Legislation

Under the proposed legislation, property left unentered on the land books for five successive years will still be forfeited to the state. However, the land will not become irredeemable until after a purchaser at the deputy commissioner sale has taken the appropriate steps to provide notification to former interested parties of the termination of their redemption rights. Here again due process requirements are met by legitimately transferring the costs of notification from the state to the individual purchaser.

137. Id.
139. Tax Project, supra note 6, at 15.
140. Id. at 11.
3. The Deputy Commissioner’s Sale

a. Current Statutory Scheme

The final stage in the state’s current land sales procedure includes certification by the state auditor to the deputy commissioner in each county of a list of land in that county subject to sale for the benefit of the school fund. Types of land eligible for this list include: (1) delinquent land that has been purchased by the state and not redeemed by a former owner, (2) forfeited land, (3) waste and unappropriated land, and (4) escheated land.

After receipt of the certified list, the deputy commissioner institutes a suit in circuit court to sell the certified lands and compiles a list of the parties to be made defendants in the suit. This list includes the former owner. A due process consideration arises in this situation because although the deputy commissioner is required to compile the list of defendants, the current statutory language provides that failure to name an interested party as a defendant in no way affects the validity of the deputy commissioner’s sale. The code’s justification for this potential lack of notice rests on the fact that the state is deemed to have absolute title to certified land while the former owner is deemed to have no further rights to it, except a privilege of redemption extended to the former owner as an “act of grace” by the legislature.

In other words, the current code language justifies lack of adequate notice to former interested parties of the deputy commissioner’s sale by concluding that the state has absolute vested title to the land that is up for sale. However, as mentioned in the preceding sections,

142. Id.
145. Id.
147. Id.
the validity of the state's title at this point in the current procedure is in question for two reasons. First, in the case of delinquent land, title has become "vested" in the state because the redemption period afforded the former owner expired, but it expired without any notice to the former owner that the right to redeem was about to be terminated.\footnote{148} Second, in the case of forfeited land, title has become "vested" in the state not only because the right to redeem expired without notice to interested parties, but also because the initial "taking" of the land by the state occurred without any notice of the same being given to interested parties.\footnote{149} In both instances, deprivation of due process exists.

Aside from due process considerations, the current circuit court proceeding required in the deputy commissioner's sale has proven to be an inefficient use of the court's time and resources as well as an unnecessary element in the deputy commissioner's sale.\footnote{150} Both the constitutional and the economic inefficiency issues are corrected in the proposed legislation.

b. Proposed Legislation

Because the state will never acquire fee simple title to forfeited and delinquent land under the proposed legislation, land certified to the deputy commissioner will always remain redeemable until sold to an individual purchaser who will ensure adequate notice.\footnote{151} Additionally, the proposal eliminates the circuit court suit from the deputy commissioner's proceedings and sets up the sale at an auction similar to the sheriff's sale.\footnote{152}

Although the role of the sheriff remains the same under the proposal, the role of the deputy commissioner changes a great deal.\footnote{153}
The deputy commissioner will act as a state land agent in each county in charge of the disposition of "orphan" property\textsuperscript{154} and will be required to conduct one public auction every year.\textsuperscript{155} Regarding the proposed deputy commissioner proceeding, the tax project report states:

Property which remains unsold from year to year [will be] offered at the next auction, until it has been offered for sale three times. After three auctions, that parcel will be subject to private sales indefinitely. Property owners and persons entitled to pay taxes on the property may redeem the property at any time until it is sold and the purchaser checks the title and causes the requisite notices to be issued.\textsuperscript{156}

If the proposed legislation is passed by the legislature, there will be an initial point of implementation in which parcels of delinquent and forfeited land will be caught in the various stages of the current tax sales system.\textsuperscript{157} The proposed legislation is designed to plug each parcel into its appropriate stage in the new system.\textsuperscript{158} First, land that has been purchased by the state at a sheriff’s sale but that has not yet been redeemed from the auditor nor certified to the circuit court for sale by the deputy commissioner will be reported back to the sheriff of the appropriate county and reentered on the land books in the name of the person charged with taxes on the land.\textsuperscript{159} The land will be charged with all back taxes and costs and interested parties will re-

\textsuperscript{154} Id. at 12-13.
\textsuperscript{155} Id. at 16.
\textsuperscript{156} Id. The report further states:
Unlike the sheriff’s sales, deputy commissioners’ sales will not be subject to any “minimum bid” requirements. Instead, the auditor must approve the sales, and may exercise absolute discretion in granting his approval. The purpose of deputy commissioners’ sales is not to collect delinquent taxes, but to convey the property to a responsible owner. Property which has reached the deputy commissioner will have been delinquent for two years, or unentered for five. Where such long periods of delinquency have already elapsed, the sale loses much of its clout as an enforcement mechanism, and exists primarily as a means of generating future revenue and economic activity. Therefore, the sales price loses much of its importance. Id. at 16-17.
\textsuperscript{157} Telephone interview with Colin M. Cline; Huddleston, Bolen, Beatty, Porter & Copen (November 17, 1993).
\textsuperscript{158} Id.
\textsuperscript{159} W. VA. CODE § 11A-5-61 (Proposed Legislation Draft).
ceive adequate notice pursuant to the new law.\textsuperscript{160} Second, land that has been forfeited to the state but that has not yet been certified to the circuit court for sale by the deputy commissioner will be deemed forfeited pursuant to the new legislation and will remain both redeemable and subject to sale according to the new law.\textsuperscript{161} Third, land that has already been certified to the circuit court for sale by the deputy commissioner will be deemed certified to the deputy commissioner and will remain both redeemable and subject to sale under the new law.\textsuperscript{162} Essentially, any parcel of land that is caught in the current procedure, short of imminent issuance of a tax deed, will be plugged into the new process and will be subject to redemption and sale pursuant to the new law. Therefore, the proposed legislation will provide a relatively smooth transition from the current tax sales procedure.\textsuperscript{163}

Finally, as to lands that are and will be perpetually carried on the state auditor's forfeited and delinquent land books, the tax project report comments:

It is expected that some property will remain with the deputy commissioner indefinitely. Although this is not a neat way to dispose of the property,

\begin{itemize}
\item \textsuperscript{160} Id.
\item \textsuperscript{161} Id.
\item \textsuperscript{162} Id.
\item \textsuperscript{163} This section in the proposed legislation, i.e., the section that sets out the manner in which land caught in the current system will be plugged into the new tax sales procedure, does not clearly address what is to be done with the current back log of land that has accumulated and been perpetually carried in the state auditor's office to date. At least two possibilities exist to effectively handle the back log.

One option would be to reenter each parcel in the appropriate county land books and hold each parcel subject to disposition under the new law. However, because these lands are essentially worthless property, they would most likely progress through the new tax sales procedure only to end up on the orphan property list once again. Thus, this option would be an expensive and time consuming effort for state and county tax officials, especially in light of the low value of the back log properties.

Therefore, a second and better option in handling the current back log would be to directly transfer the lands to the deputy commissioner's orphan property list. This would be a more economically efficient way to bring these properties into the new tax sales system, and it would still afford constitutional protection to former property owners and lienholders. This orphan property will be carried subject to private sales indefinitely during which time an interested party can always redeem the property. Should a purchaser ever be interested in one of the back log parcels, the purchaser will first search the title for interested parties and pay for the requisite certified mailed notice.
and will do little to clear up land titles, it is much cheaper than performing title searches on what is likely to be worthless property. Ultimately, the market will determine whether such property is redeemed and put to use. Truly valuable property is not likely to languish in the deputy commissioner's office for an extended period.  

B. The 1993 Constitutional Amendments

In conjunction with the statutory change, the WVLI advocated the repeal of Sections 3, 4, and 6 of Article XIII of the West Virginia Constitution. Members of the WVLI believed procurement of these constitutional amendments would be the most difficult hurdle to overcome in changing the state tax sales scheme. Nonetheless, the amendments repealing Sections 3, 4, and 6 were ratified November 3, 1992, at the general election and became effective July 1, 1993. The amendments and reasons for repealing them are discussed below.

Article XIII, Section 6 mandated forfeiture to the state of land that had not been entered on the land books for five successive years, and Section 3 mandated automatic transfer of such forfeited property—as well as escheated lands, waste and unappropriated lands, and delinquent lands purchased by the state and become irredeemable—to certain classes of persons who had paid taxes on the property for various periods of time. Current Section 11A-4-2 of the West Virginia Code derives from former Sections 3 and 6 of Article XIII of the West Virginia Constitution. As discussed in the above overview of the current tax statutes, these constitutional provisions stripped owners of forfeited and delinquent land of their property rights without notice, and violated the due process requirements set out in Mennonite and Lilly.

164. Id. at 13.
165. Id. at 1.
166. Telephone Interview with Larry L. Skeen, Skeen & Skeen (September 23, 1993).
167. W. VA. CONST. art. XIII, §§ 3, 4, & 6 (repealed 1993). The amendments repealing these sections were proposed by House Joint Resolution No. 109, 1992 Regular Session. Section 5 was also repealed.
170. See discussion supra part IV.A.
171. A point made in the Tax Project Report is that waste and escheated property do
Article XIII, Section 4 mandated that any land where title had absolutely vested in the state was to be sold by circuit court proceedings. Because the Constitution mandated use of a circuit court proceeding, the legislature was prohibited from departing from this scheme. Therefore, until this section was repealed, the legislature had no power to change the method of deputy commissioners’ sales, and the state was stuck with the burdensome and unnecessary court proceeding. In addition, Section 4 required title to the property to be absolutely vested in the state before the deputy commissioner could institute the circuit court suit for the sale of the property. The mandate in Section 4 was constitutionally flawed, because as mentioned in the overview of the current tax statutes, the accompanying statutory scheme provides no means for the state to notify owners and lienholders of the expiration of their right to redeem before the deputy commissioner’s sale. Therefore, the validity of vested title in the state formerly mandated by Section 4, is questionable and constitutes a due process violation under Mennonite and Lilly.

In summary, former Sections 3, 4, and 6 of Article XIII of the West Virginia Constitution, as a collective, conflicted with due process under the Fourteenth Amendment of the United States Constitution, necessitating the constitutional amendments that repealed those sections. Furthermore, repeal of these sections finally removed tax sales from the domain of the state constitution, giving the legislature a freer hand in developing a workable tax sales scheme and eliminating the “guesswork” as to whether proposed changes in the statutory lan-

not present problems because, by definition, they cannot be subject to claims of ownership or liens. Thus, no persons may be entitled to notice regarding such property. Tax Project, supra note 6, at 9.


173. Id. Professor Fisher commented that the legacy of West Virginia’s case law had left the state with an ill-defined role of the court in these mandated circuit court proceedings. Fisher, supra note 1, at 971.

174. Id. See State v. Farmers Coal Co. 43 S.E.2d 625 (1947).

175. See discussion supra part IV.A.

176. Tax Project, supra note 6, at 7-9. The report explained that sections 3 and 6 were in such direct conflict with the U.S. Constitution that the two sections would not require amendment because they were essentially nullified.
language conflicted with the state constitution. Fortunately, the amendments to the West Virginia Constitution were easily ratified and became effective on July 1, 1993. The adoption of these amendments has opened the door for the next step in the WVLI’s Tax Forfeited Property Project; that is, the state Legislature’s adoption of the WVLI’s proposed Article 5 of Chapter 11A.

C. An Attempt at the 1993 Legislative Session

Interestingly, a bill modeled after the Institute’s own proposed Article 5 was passed at the 1993 session of the West Virginia Legislature. However, the Legislature modified the WVLI’s version, adding in particular one provision that would have required the state auditor to hire a private attorney to examine the title for each delinquent parcel of land currently in the possession of the state. This provision would have placed a costly burden on the state when, at the same time, many of the forfeited parcels of land are of little or no value. In light of the economic ramifications of the provision and upon the request of state Auditor Glen Gainer, the governor vetoed the bill.

It is expected that the Legislature will revisit this issue in its 1994 session. The hope is that by presenting the WVLI’s proposed legislation, a product of over fourteen months of study and discussion regarding tax sales, this article will provide an impetus to the Legislature to remain truer to the substance of the Institute’s proposal in its next consideration of it.

177. Id. at 9-10.
180. Id. Governor Caperton vetoed the bill because “[it would require] the State Auditor to perform thousands of title searches without providing the $2 million in resources necessary to perform those searches.” DAILY JOURNAL OF THE SENATE, VETO OF H.B. 2781, at 76 (April 24, 1993). See also Tom D. Miller, Forfeitures Owned by State Have Little Value, THE HERALD-DISPATCH, August, 11, 1993, at 3C.
181. Tax Project, supra note 6, at 11.
183. Tax Project, supra note 6, at 1.
V. CONCLUSION

Since 1983, West Virginia has made considerable progress in correcting the due process considerations that have historically plagued this state. In response to Mennonite, the West Virginia Code was amended in 1983 and 1985 to provide notice of the sheriff's initial tax delinquency sale to both landowners and lienholders, respectively. Without this measure the state's disposition of forfeited and delinquent lands presented an inherent due process violation.

Lilly v. Duke is West Virginia's own Mennonite and effectively mirrors in the case law what the state has done by statute in its 1983 and 1985 revisions, further fine-tuning the constitutional improvements in our state law. Nonetheless, there are inherent due process deficiencies still present in West Virginia's system for the disposition of forfeited and irredeemable delinquent lands. Also, the law requiring notice to lienholders is proving to be burdensome and costly as well because many counties simply do not have the necessary resources or manpower.

In light of the above, adoption of the WVLI's proposed Article 5 of Chapter 11A of the West Virginia Code is the next logical step in the state's progression toward a more constitutionally compliant, yet cost efficient, state tax sales system. The Institute's solution, to keep title to forfeited and delinquent lands from ever vesting in the state, means that land will never become irredeemable while in the hands of the state. Instead land will become irredeemable only after a purchaser at the sheriff's or deputy commissioner's sales ensures adequate notice to the former owner of the expiration of the right to redeem. In this way, due process will efficiently be met by shifting the costs to the tax purchaser. A final feature of the proposed legislation that makes it such a workable solution is its plan to keep intact the bulk of the current statutory scheme.\textsuperscript{184} The proposal maintains the current

\textsuperscript{184}. Telephone Interview with Colin M. Cline; Huddleston, Bolen, Beatty, Porter & Copen (September 13, 1993). Mr. Cline stated that he and the other reporters were concerned that instituting a completely new statutory tax sales scheme would necessitate a lag time during which state and county tax personnel would have to learn and implement new
statute's major taxing authorities—the sheriff, the state auditor, and the
deputy commissioner. By keeping the current system primarily intact,
transition to proposed Article 5 should occur relatively efficiently, at
least more smoothly than would a move toward complete modification
of the state tax sales system. In conclusion, although the state has
made much progress in resolving the constitutional deficiencies histori-
cally a part of the state tax sales procedure, adoption of the WVLI's
proposed Article 5 is a necessary final step in the resolution.

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185. Id.

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