RESTORING THE AMERICAN DREAM: *TYLER V. HENNEPIN COUNTY* AND HOME EQUITY THEFT IN NEW JERSEY

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INTRODUCTION

Owning a home is one of the major facets of the American Dream. Despite various modern barriers to owning a house, once you own it, you typically get to keep it. Only in extreme circumstances, like when the government invokes the Takings Clause of the Fifth Amendment, may someone's property be unwillingly taken from them. Even then, the property owner's equity is preserved as the government must give just compensation in exchange for the property. Until recently, however, the government was allowed to seize and sell property for delinquent property taxes without returning the homeowner's surplus equity after

* J.D. Candidate, May 2025, Rutgers Law School—Camden. I would like to dedicate this Note to my friends, family, and Rachel. Thank you all for putting up with me throughout this process and for your unwavering support. Special thanks to my faculty advisor, Professor John Oberdiek, for helping me come up with the idea for this Note.

the sale. This is called home equity theft, and it was permitted in ten states, including New Jersey.

The topic of this Note is the recent Supreme Court decision *Tyler v. Hennepin County*.[1] In *Tyler*, the Supreme Court grappled with the issue of home equity theft, or the doctrine that allows local governments to seize the entire value of a property to pay off a smaller property tax delinquency. Geraldine Tyler filed suit against Hennepin County, Minnesota after the county seized her home when she failed to pay off certain taxes and fees.[2] The county then sold the property and kept the entire value for itself, even the value in excess of her tax burden, which was permitted by state law.[3] Tyler's complaint alleged that the county's retention of the surplus funds constitutes an unlawful taking under the Takings Clause of the Fifth Amendment.[4] The Supreme Court eventually sided with Tyler, holding that home equity theft is unconstitutional under the Takings Clause of the Fifth Amendment.[5]

The Takings Clause was massively instrumental in the decision to outlaw home equity theft. It was originally designed to protect property rights from the government, after all.[6] The Takings Clause states, "nor shall private property be taken for public use, without just compensation."[7] Takings cases typically revolve around the language of "public use" and "just compensation." More recently, takings cases have focused on the word "taken" and what actually constitutes a taking. *Tyler* continues this trend of classifications, and, in this case, the Court is trying to further parse out what a taking is and what just compensation should be. The Court ultimately concludes that seizing a property for an outstanding tax debt, selling it, and retaining the excess value is, in fact, a taking.[8] The just compensation for this taking would be the remaining value of the property after the tax burden is satisfied.

While *Tyler* advanced the interpretation of takings under the Takings Clause, it also bolsters the power of property rights themselves. The Court in *Tyler* made an important distinction in the state's ability to redefine property.[9] The Court made it impermissible for a state to

1. 598 U.S. 631 (2023).
2. *Id.* at 635–36.
3. *Id.* at 635.
4. *Id.* at 635–36.
5. *Id.* at 647–48.
6. *Interpretation: The Fifth Amendment Takings Clause*, NAT. CONST. CTR., https://constitutioncenter.org/the-constitution/amendments/amendment-v/clauses/634 (last visited Oct. 27, 2024).
7. *Id.*; *see also* U.S. CONST. amend. X.
8. Tyler v. Hennepin County, 598 U.S. 631, 639 (2023).
9. *Id.* at 638–39.

redefine property to skirt around the Takings Clause.[10] In the *Tyler* context, Minnesota passed a law that did not recognize home equity as property when the homeowner failed to pay property taxes and forfeited their property.[11]

Tyler v. Hennepin County changed the way we think about property rights. In Part I, I will discuss the background surrounding property rights, the Takings Clause, and home equity theft. In Part II, I will analyze the *Tyler* decision and discuss criticisms for and against it. I also offer my own criticism that suggests that home equity theft is still possible after this ruling. In Part III, I apply *Tyler* to New Jersey law and give recommendations on how New Jersey, my home state, can combat home equity theft. I ultimately conclude that New Jersey should increase the statutory redemption period, decrease the statutory maximum interest rate at auction, and increase notice requirements.

I. BACKGROUND

A. Takings Clause Background

Before we delve into the *Tyler* case, it would first be helpful to explore the background of the Takings Clause. The Takings Clause, or more generally, the idea that the government should not take more than what is owed, is deeply rooted in Anglo-American history.[12] When played out, the history underscores how important the takings system is for the governance of a country and the fundamental rights of the people.

The idea that the government should not take more than what is owed can be traced back to the year 1215 with the introduction of the Magna Carta. The Magna Carta put into writing the principle that the king and his government were not above the law.[13] Before this declaration, when a man died with debt, the sheriffs and bailiffs would enter his manor and essentially take everything they could find.[14] They would do so under the pretense that they were satisfying the man's debt when, in reality, they would be keeping any surplus for themselves.[15]

10. *Id.* at 639.
11. *Id.* at 638–39.
12. *See* CASS R. SUNSTEIN, THE PARTIAL CONSTITUTION 128–29 (1993).
13. *See* R.H. Helmholz, *Magna Carta and the* ius commune, 66 U. CHI. L. REV. 297, 298 (1999).
14. WILLIAM SHARP MCKECHNIE, MAGNA CARTA: A COMMENTARY ON THE GREAT CHARTER OF KING JOHN 322 (2d ed. 1914).
15. *Id.*

Thus, the Magna Carta set forth a procedure to collect debts.[16] The sheriff and bailiffs of the Crown were prohibited from touching any property of the deceased man until a warrant was procured by the Crown.[17] Only then could the sheriff and his bailiffs enter the deceased man's manor and reasonably seize chattels that would satisfy his debt.[18] They were permitted to take only what was owed, and the rest of his property was to be left to his executors.[19]

The common law of England reflects the same principle. In Blackstone's *Commentaries*, William Blackstone wrote about the rights of things under contract.[20] Blackstone details that a landlord can seize a tenant's goods for rent, and a parish officer can seize them for taxes, but only for a reasonable time.[21] The landlord and bailiffs are bound by implied contracts to return the tenant's property when the debt is satisfied, or, when the property is sold, to return the overplus back to them.[22]

Even contemporary philosophical thinkers, like John Locke, advanced the idea that the government should not take more than what is owed. Locke was a social contract theorist[23] and originated the labor theory of property, or the concept that when you work on something, you imbue your labor with that object, and the object thus becomes your property.[24] Locke believed that governments exist to protect individual's rights, and he believed that one of those fundamental rights was the right to own property.[25]

Locke also thought that the government's power should not be limitless.[26] In terms of regulating private property, Locke suggested that property rights cannot be taken from citizens without just compensation.[27] While citizens consented to governmental power under social contract theory, there were limits to the consent given, and when

16. *Id.*
17. *Id.*
18. *Id.*
19. *Id.* at 322–23.
20. "The rights of things" meaning property rights. *See* 1 WILLIAM BLACKSTONE, COMMENTARIES *16.
21. *Id.* at *452.
22. *Id.*
23. *See* JOHN LOCKE, TWO TREATISES OF GOVERNMENT 169 (Thomas I. Cook ed., Hafner Publ'g Co. 1947) (1690) ("[T]hus every man, by consenting with others to make one body politic under one government, puts himself under an obligation . . . to submit to the determination of the majority . . . .").
24. *See id.* at 146.
25. *See id.* at 191–92.
26. *Id.* at 192–93.
27. *See id.*; *see also* Jeffrey M. Gaba, *John Locke and the Meaning of the Takings Clause*, 72 MO. L. REV. 525, 550 (2007).

the government acted, their legislation needed to promote the public good.[28] In theory, Locke believed that governments should have inherent limitations on when they can take private property.

Blackstone and Locke's writings became standard references for English colonialists and the early American government.[29] The Declaration of Independence itself reflected Locke's view that government should be limited and can be overthrown if it infringes upon natural rights.[30]

Around the time the Constitution was adopted, many newly established states instituted policies that were similar to the Fifth Amendment.[31] Generally, the state governments could, in collecting taxes, only seize and sell enough land to satisfy those taxes.[32] Ten states, including Maryland and Virginia, sanctioned something similar in kind to this policy.[33]

The Constitution was ratified in 1788 in order to create a new unified government.[34] However, after its adoption, the party of Anti-Federalists led by Thomas Jefferson was intimidated by the potential for a too-powerful federal government.[35] Thus, Thomas Jefferson and his faction advocated for the adoption of the Bill of Rights, or the first ten amendments to the Constitution.[36] The Fifth Amendment reads: "No person shall . . . be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."[37] It is apparent that Jefferson and the other drafters of the Bill of Rights took inspiration from thinkers like Blackstone and Locke.

The Bill of Rights, along with the Fifth Amendment, was eventually ratified, but this does not end the inquiry. There still remains the two hundred years of case law parsing out what the language "nor shall

28. *See* LOCKE, *supra* note 23, at 164 ("[F]or hereby he authorizes the society or . . . the legislative thereof, to make laws for him as the public good of the society shall require . . . .").

29. Garvey Schubert Barer, *A Brief History of the Takings Clause*, FOSTER GARVEY (Nov. 11, 2013), https://www.foster.com/newsroom-publications-A_Brief_History_of_the_Takings_Clause.

30. *Id.*

31. *See, e.g.*, 1797 Md. Laws 2561; *see also* 1781 Va. Acts 153.

32. Act of July 14, 1798, ch. 75, § 13, 1 Stat. 597, 601.

33. *See* Tyler v. Hennepin County, 598 U.S. 631, 639–41 (2023) (citing various state takings laws); *see also supra* note 31.

34. *The Constitution: The Constitutional Convention*, WHITE HOUSE, https://www.whitehouse.gov/about-the-white-house/our-government/the-constitution/ (last visited Oct. 27, 2024).

35. Barer, *supra* note 29.

36. *Id.*

37. U.S. CONST. amend. V.

private property be taken for public use, without just compensation"[38] means. This period includes thousands upon thousands of cases, so for the sake of brevity, I will address five of the most influential takings cases that encapsulate the significance and scope of the Takings Clause.

We begin in 1896 with the decision of *United States v. Gettysburg Electric Railway Co*.[39] At this time, Congress enacted legislation that used eminent domain to condemn the Gettysburg Battlefield in order to preserve its historic value.[40] Gettysburg Electric Railway, who owned the land, tried to challenge the action by questioning its public purpose.[41] The Supreme Court sided with the government, reasoning that as long as Gettysburg Electric Railway was paid just compensation for the land, this was constitutional.[42] In terms of public use, the majority wrote: "No narrow view of the character of this proposed use should be taken. Its national character and importance, we think, are plain."[43] Public use is expanded to include purposes such as historic preservation.

Pennsylvania Coal Co. v. Mahon, decided in 1922, is considered the origin of the regulatory takings doctrine.[44] Pennsylvania Coal conveyed the surface rights of a plot of land it owned to Mahon.[45] In the conveyance, Pennsylvania Coal retained the right to mine underneath the property, and there was an express provision in the deed that Mahon was taking on any risks associated with the mining operations.[46] In 1921, Pennsylvania enacted a statute barring coal mining operations that would affect the structural integrity of the surface land.[47] As a result, Mahon sued Pennsylvania Coal in an attempt to cease their mining operations.[48]

In due course, the case made it up to the Supreme Court, which sided with Pennsylvania Coal.[49] The coal mining company was permitted to keep mining since Mahon accepted the risks associated with mining.[50] The Court reasoned that the use of property may be regulated, but

38. *Id.*
39. 160 U.S. 668 (1896).
40. *Id.* at 679–80.
41. *Id.* at 679, 685.
42. *Id.* at 680.
43. *Id.* at 683.
44. 260 U.S. 393, 412 (1922); Robert Brauneis, *"The Foundation of Our 'Regulatory Takings' Jurisprudence": The Myth and Meaning of Justice Holmes's Opinion in* Pennsylvania Coal Co. v. Mahon, 106 YALE L.J. 613, 616 (1996).
45. *Mahon*, 260 U.S. at 412.
46. *Id.*
47. *Id.* at 412–13.
48. *Id.* at 412.
49. *Id.* at 416.
50. *See id.* at 414.

overregulation will be deemed a taking.[51] If the state of Pennsylvania wanted Pennsylvania Coal to stop mining, they would need to pay them just compensation.[52]

The next case, decided in 1943, dissected an issue regarding just compensation. In *United States v. Miller*, the federal government used eminent domain to condemn a strip of land in order to relocate railroad tracks.[53] The government estimated that the fair market value of the land being taken, including Miller's, was $2,550 in total.[54] At the eminent domain trial, the landowners submitted evidence that the value of the land increased given the plan to add railway tracks.[55] The government objected to this evidence, and the court sustained the objection.[56] The case made it to the Supreme Court, which sided with the government.[57] The Court opined that just compensation means the amount that a willing buyer would pay a willing seller for the property, and it does not include any value increase from government projects.[58]

The following case, *Penn Central Transportation Co. v. City of New York*,[59] is seen to be the first modern iteration of takings cases. In this case, New York City instituted the Landmarks Preservation Law, which allowed the city to designate certain buildings and neighborhoods as historical landmarks.[60] Grand Central Terminal was designated to be one of these historical landmarks.[61] Penn Central Transportation, who owned Grand Central Terminal, needed money and attempted to lease the airspace above the building to another company to build an office.[62] Their request to build the office was denied by the New York City Commission due to the Landmarks Preservation Law.[63] Penn Central brought suit.[64]

For this case, the Supreme Court established a new multi-factor balancing test to do away with the ad hoc approach. The Court was frustrated with the fact that precedent decisions had been decided on a

51. *Id.* at 415.
52. *Id.*
53. 317 U.S. 369, 371 (1943).
54. *Id.*
55. *Id.* at 372.
56. *Id.*
57. *Id.* at 382.
58. *Id.* at 374–75.
59. 438 U.S. 104 (1978).
60. *Id.* at 104.
61. *Id.* at 115–16.
62. *Id.*
63. *Id.* at 117.
64. *Id.* at 119.

case-by-case basis based on their individual factual inquiries.[65] As a result, the Court instilled a multi-factor balancing test, creating a more uniform means of determining whether there has been a taking that requires just compensation.[66] The factors to be considered are the economic impact of the regulation on the owner, the extent to which the regulation has interfered with the owner's reasonable investment-backed expectations, and the character of the government action involved in the regulation.[67] Applying this test to Penn Central, the Court determined that the factors weighed in favor of the city of New York, and this was not considered a taking.[68]

The most recent case, *Kelo v. City of New London*,[69] was decided in 2005 and dealt with a regulation that was supposed to improve the city. New London, Connecticut, approved a new development project that involved using its eminent domain authority to seize private property and sell it to private developers.[70] New London believed that this venture would create jobs and increase tax revenue.[71] Kelo, a resident whose property was being condemned, challenged the action under the Fifth Amendment Takings Clause, saying that this did not constitute a public use.[72]

The Court disagreed, siding with New London.[73] The Court looked to precedent cases that permitted states to use eminent domain to take property from private individuals and redistribute it to other private individuals.[74] Since the overarching purpose of eminent domain is to promote general welfare, this was seen as a valid public use.[75] Likewise, taking private property and selling it to private developers for the general welfare is also a justified public use.[76] Just because New London confers some sort of economic benefit on private entities from the project does not matter, it is still promoting the general welfare.[77]

65. *Id.* at 124 ("[T]his Court, quite simply, has been unable to develop any set formula for determining when justice and fairness require that economic injuries caused by public action be compensated by the government, rather than remain disproportionately concentrated on a few persons." (internal quotation marks omitted)).
66. *Id.*
67. *Id.*
68. *See id.* at 130–35.
69. 545 U.S. 469 (2005).
70. *Id.* at 472–73.
71. *Id.* at 472.
72. *Id.* at 475.
73. *Id.* at 489–90.
74. *See id.* at 480–83.
75. *Id.* at 483–85.
76. *Id.* at 484–86.
77. *Id.* at 485.

B. Home Equity Theft and Tyler *Background*

You cannot talk about the end of home equity theft without discussing the Pacific Legal Foundation. Pacific Legal Foundation is a nationwide public interest law firm devoted to ensuring property rights, equality and opportunity, and separation of powers.[78] It sues the government when there is an overreach of power.[79] Property rights have been a specific area of interest for the foundation, winning fifteen Supreme Court cases since its founding in 1973.[80] It believes that "[t]he right to own, enjoy, and put property to productive use is a source of personal security, dignity, and prosperity, protecting the freedom of individuals to shape their destiny,"[81] which is why it advocates so vehemently for property rights.

In addition to being practically efficient in protecting property rights, the Pacific Legal Foundation also provides relevant data and statistics on home equity theft.[82] These statistics are extremely helpful in identifying and exposing the scope of the problem of home equity theft in the ten states and the District of Columbia that permit the practice.[83] Since I am zeroing in on New Jersey, it would be useful to shed light on home equity theft data there.

To begin, it should be noted that Pacific Legal Foundation's statistics only include the most populated regions of New Jersey,[84] so it should be presumed that these numbers worsen when you consider them state-wide. New Jersey is the second worst state for home equity theft, behind Illinois, with the 638 homeowners in Pacific Legal's dataset having lost around $102 million worth of home equity.[85] In New Jersey, homeowners were forced to pay out on average thirty times more than the original tax debt owed.[86] The people purchasing the properties at tax sales "were able to keep $52 million more than what was owed to them."[87]

78. *About Pacific Legal Foundation: Fight Back and Win*, PAC. LEGAL FOUND., https://pacificlegal.org/about/ (last visited Oct. 27, 2024).

79. *Id.*

80. *Property Rights*, PAC. LEGAL FOUND., https://pacificlegal.org/property-rights/ (last visited Oct. 27, 2024).

81. *Id.*

82. *See generally End Home Equity Theft*, PAC. LEGAL FOUND., https://homeequitytheft.org/ (last visited Oct. 27, 2024).

83. *Id.*

84. *New Jersey*, PAC. LEGAL FOUND., https://homeequitytheft.org/new-jersey [https://web.archive.org/web/20240424131327/https://homeequitytheft.org/new-jersey] (last visited Oct. 27, 2024).

85. *Id.*

86. *Id.*

87. *Id.*

On the topic of the effects of home equity theft, it is important to note that home equity theft disproportionately affects unemployed individuals, low-income individuals, and racial minorities.[88] For example, home equity left is the most prevalent in the state of New Jersey in the Newark and East Orange areas. In these areas ninety-seven percent of the residents are Black and/or Hispanic, there are low median incomes and unemployment rates are five times the state average.[89]

We then turn to the case at hand: *Tyler v. Hennepin County*.[90] The facts of *Tyler* are relatively simple. At the time of the case, Geraldine Tyler was a ninety-four-year-old African American woman.[91] In 1999, she bought a condominium in Hennepin County, Minnesota and lived there for over a decade.[92] As Tyler grew older, she and her family thought it best that she move into a senior-living community.[93] Tyler did just that in 2010.[94] However, no one paid the property taxes on her Hennepin County condo in her absence.[95] By 2015, Tyler accumulated $2,300 in unpaid taxes and $13,000 in interest and fees on the property.[96] Hennepin County eventually seized the property under Minnesota's forfeiture statute and sold it for $40,000.[97] This tax sale extinguished her $15,000 tax debt, but Hennepin County kept the remaining $25,000 from the sale.[98]

As a result, Tyler filed a putative class action against Hennepin County and its officials, bringing claims under the Takings Clause of the Fifth Amendment and the Excessive Fines Clause of the Eighth Amendment.[99] She alleged that the county unconstitutionally retained the excess value of her home.[100]

88. *See Vulnerable Communities Hurt by Home Equity Theft*, PAC. LEGAL FOUND., https://homeequitytheft.org/communities [https://web.archive.org/web/20240424122323/https://homeequitytheft.org/communities/] (last visited Oct. 27, 2024).

89. *Id.*

90. 598 U.S. 631 (2023).

91. *Id.* at 635; *see also* Ilya Somin, *Supreme Court Strengthens Federal Protections for Property Rights*, STATE CT. REP. (May 30, 2023), https://statecourtreport.org/our-work/analysis-opinion/supreme-court-strengthens-federal-protections-property-rights.

92. *Tyler*, 598 U.S. at 635.

93. *Id.*

94. *Id.*

95. *Id.*

96. *Id.*

97. *Id.*

98. *Id.*

99. *Id.* at 635–36.

100. *Id.* at 635.

The district court dismissed Tyler's suit for failure to state a claim,[101] and the Eighth Circuit affirmed,[102] rejecting both of Tyler's claims. Under the Takings Clause claim, the court found that a taking did not occur since Minnesota did not recognize a property interest in surplus proceeds from tax sales.[103] Under the Excessive Fines Clause claim, the court determined that it was not a fine because the sale of property was intended to remedy state tax losses and not to punish the delinquent taxpayer.[104] The Supreme Court then granted certiorari.[105]

II. ANALYSIS OF *TYLER*

A. The Definition of Property

The majority decision in *Tyler* effectively serves two important functions: it outlaws home equity theft and it denies states the ability to redefine property to circumvent the Takings Clause.[106] In this section, I will separate each conclusion and discuss their individual rationales. I also plan to offer criticisms of each one, weighing whether the criticism is valid or not. Towards that end, I present my own criticism that ties into my plan for New Jersey.

The majority starts its opinion by prefacing that the Takings Clause of the Fifth Amendment is applicable to the states through the Fourteenth Amendment.[107] It then turns to the question of what constitutes property under the Takings Clause.[108] States have long been permitted to impose taxes on property, and they are not seen as takings in the context of the Takings Clause because they are seen as "mandated 'contribution[s]'" to the government.[109] States are allowed to seize and sell property in order to recover delinquent taxes, fees, or interest when individuals fall behind on them.[110] In Tyler's case, the question is whether the remaining value in the house, otherwise known as home equity, is considered property and is therefore protected from unreimbursed confiscation from the state.[111]

101. *Id.* at 636.
102. *Id.*
103. *Id.*
104. *Id.*
105. *Id.*
106. *See id.* at 638–39.
107. *Id.* at 637.
108. *Id.* at 637–38.
109. *Id.* at 637 (quoting County of Mobile v. Kimball, 102 U.S. 691, 703 (1881)).
110. *Id.* at 637–38.
111. *Id.* at 638.

This is where the Court turns to what property is. In short, it does not give an exact answer. It leaves the definition of property up to each state, but it places certain limitations on the state's ability to change existing principles.[112] In totality, to define property the Court will look towards state law, traditional property law principles, historical practice, and the Court's precedent.[113] However, the Court makes a point to warn that state law alone cannot be the source of property's definition.[114] If this were the case, "a [s]tate could 'sidestep the Takings Clause by disavowing traditional property interests' in assets it wishes to appropriate."[115] Such is the case when Minnesota codified into law that falling behind on property taxes is equivalent to an abandonment of your property.[116] The Court ultimately concludes that equity is considered property in Minnesota given Minnesota law and traditional property law principles.[117]

One of the glaring concerns that arises from the *Tyler* decision is based on federalism. Federalism is a principle advanced in the Tenth Amendment of the Constitution, which states that "powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."[118] Put simply, federalism is the balance of power between state and federal governments, and state governments get all powers not expressly delegated to the federal government. Federalism has several advantages, including the diffusion of power, increasing accountability of local officials, and allowing states to experiment with local programs.[119] The Supreme Court often extolls the virtues of federalism, proclaiming in a recent case:

> Federalism secures the freedom of the individual. It allows States to respond, through the enactment of positive law, to the initiative of those who seek a voice in shaping the destiny of their own times without having to rely solely upon the political processes that control a remote central power.[120]

112. *See id.*
113. *Id.*
114. *Id.*
115. *Id.* (quoting Phillips v. Wash. Legal Found., 524 U.S. 156, 165–68 (1998)).
116. *See id.* at 639.
117. *Id.* at 638–39.
118. U.S. CONST. amend. X.
119. Cong. Rsch. Serv., *Federalism and the Constitution*, CONST. ANNOTATED, https://constitution.congress.gov/browse/essay/intro.7-3/ALDE_00000032/ (last visited Oct. 27, 2024).
120. Bond v. United States, 564 U.S. 211, 221 (2011).

Yet, in *Tyler*, an issue regarding the intersection of taxation and property, both traditionally topics reserved to the states,[121] was decided by the highest court of the federal government. Not only this, but the Court tells the states that state law alone cannot determine the definition of property.[122] Many opponents of *Tyler* believe that this ruling unfairly shifts power from state governments to the federal government, upsetting the balance of power.[123]

Despite these warnings, the *Tyler* ruling does not upset the balance of power between state and federal governments, or at the very least, the argument has no bite. The crux of the federalism argument focuses on this language in *Tyler*: "State law is one important source [for property rights]. But state law cannot be the only source."[124] While seemingly concerning, this language alone does not capture the entire context in which the Supreme Court provided its opinion. Recall that the Court gave multiple factors that should be considered in determining what property is in any given case: state law, traditional property law principles, historical practice, and the Court's precedent.[125] Three of those four principles will almost always give deference to states.

State law is created by the States. Traditional property law principles, or concepts like the right to exclude, the right to use, and the right to transfer, and historical practice are almost always going to be reflected in state authority since the federal government does not create property law.[126] The Constitution does not create property interests, it protects existing ones, and "the existence of a property interest is determined by reference to 'existing rules or understandings that stem from an independent source such as state law.'"[127] If anything, the *Tyler* ruling expands the scope of how states can define property. The consideration goes beyond just black letter law now, giving thought to

121. *See* Daniel Shaviro, *An Economic and Political Look at Federalism in Taxation*, 90 MICH. L. REV. 895, 895–96 (1992); *see also* Ilya Somin, *Federalism and Property Rights*, 2011 U. CHI. LEGAL F. 53, 53–54 (2011).

122. *Tyler*, 598 U.S. at 638.

123. *See, e.g.*, Brief of Minnesota et al. as Amici Curiae in Support of Respondents at 3–4, Tyler v. Hennepin County, 598 U.S. 631 (2023) (No. 22-166) [hereinafter Brief of Minnesota et al.]; Brief of the Michigan Association of Counties & the Michigan Association of County Treasurers as Amici Curiae in Support of Respondents at 16–19, Tyler v. Hennepin County, 598 U.S. 631 (2023) (No. 22-166).

124. *Tyler*, 598 U.S. at 638 (citations omitted).

125. *Id.*

126. *See* Stop the Beach Renourishment, Inc. v. Fla. Dep't of Env't Prot., 560 U.S. 702, 732 (2010).

127. Timothy M. Harris, *Backwards Federalism: The Withering Importance of State Property Law in Modern Takings Jurisprudence*, 75 RUTGERS U. L. REV. 571, 577 (2023) (quoting Phillips v. Wash. Legal Found., 524 U.S. 156, 164 (1998)).

traditional property law principles and historical practices that are rooted in state authority as well. Presumably, the reason that the Court includes all four factors is to protect against the most egregious situations, like the one in *Tyler*. Most of the time, the state's authority will be respected. Only in very few situations where the state has infringed on some fundamental right of property will this not be the case.

The fourth factor, the Court's precedent, should be discussed. Admittedly, this section of the test does favor the federal government, but it does not change much. The Court has and will always be involved in cases where anyone infringes on the substantive rights of another individual, regardless of whether the state perpetuated it or not. This portion of the test is merely codifying an existing understanding that the Court will always interfere when a substantive right has been infringed upon. In addition, the Court will defer to state law, tradition, and history when defining property.[128] So long as nothing is egregiously violated, the Court will allow the states to make their own property law. It is essentially the last resort that the Court will use in weighing all the factors together. The inclusion of the Court's precedent serves as a necessary and proper check on state power, and it does not change anything that is not already in the system.

When I say the argument has no bite, I mean that even if we were to accept that this decision unevenly shifts the balance of power between state and federal government, it ultimately does not matter. One of the many end goals of federalism is to ensure individual liberties.[129] When federalism stands in the way of its own goal, something has gone awry. Not to suggest that one concept is more important than the other, but when the end of liberty cannot be met due to the means of federalism, a correction needs to be made to achieve balance. *Tyler* makes the right correction and adds balance to the system. It was a necessary decision to balance individual rights with federalism.

B. Outlawing Home Equity Theft

The Court next turns to whether home equity theft violates the Takings Clause. The Court looks at traditional property principles, historical practice, and precedent, principles they set forth in their analysis of property, to determine if the government has taken more than the taxpayer owed in Tyler's case.[130]

128. *See Tyler*, 598 U.S. at 638.

129. Patrick M. Garry, *A One-Sided Federalism Revolution: The Unaddressed Constitutional Compromise on Federalism and Individual Rights*, 36 SETON HALL L. REV. 851, 852 (2006).

130. *See Tyler*, 598 U.S. at 638–39, 642, 645.

The majority opinion begins by recounting the origins of the takings doctrine, going all the way back to 1215.[131] In the Magna Carta, King John swore that once a dead man's debt is repaid to him, the excess amount is to be paid out to the executors of his will.[132] This idea of not taking more than what is owed continued into English law.[133] The Crown was bestowed "the power to seize and sell a taxpayer's property to recover a tax debt."[134] However, the "[o]verplus" was to be given back to the taxpayer.[135]

This trend of not taking more than is owed survived into the colonial era in America.[136] Many young states, including Maryland and Virginia, ratified laws that would return overplus back to the taxpayer when the states collected taxes.[137] By the time the Fourteenth Amendment was passed, more states had been annexed and most of them incorporated this principle.[138] The Court notes that all but three states returned the excess amount when collecting on a tax debt.[139] In those three states that deemed a failure to pay taxes as an entire forfeiture of property, only one of those laws survived.[140] Traditional property principles and historical practice, therefore, lead us to conclude that home equity theft is a traditional taking.[141]

Further, the Court moves on to an analysis of its own precedent with respect to whether the retention of Tyler's excess home value is a taking.[142] The majority opinion considers two cases: *United States v. Taylor* and *United States v. Lawton*, both of which were decided in the 1800s.[143] In *Taylor*, Congress passed a statute that imposed a nationwide tax to raise money for the Civil War.[144] The 1861 statute allowed the government to seize and sell property if anyone did not pay the tax, but the surplus after the sale was to be returned to the homeowner.[145] The following year, Congress passed another piece of legislation that included

131. *Id.* at 639.
132. *Id.*
133. *Id.*
134. *Id.*
135. *Id.*
136. *Id.* at 640.
137. *Id.* at 640–41.
138. *Id.* at 641–42.
139. *Id.* at 642.
140. *Id.*
141. *See id.* at 639–42.
142. *Id.* at 642.
143. *Id.* at 642–43; *see also* United States v. Lawton, 110 U.S. 146 (1884). *See generally* United States v. Taylor, 104 U.S. 216 (1881).
144. *Tyler*, 598 U.S. at 642.
145. *Id.* (citing Act of Aug. 5, 1861, § 36, 12 Stat. 304 (repealed 1872)).

a fifty percent penalty to states that did not enforce the tax but made no mention of the right to the surplus.[146] Mr. Taylor had his property seized and sold, but he did not retain the surplus amount, so he sued under the 1861 Act.[147] The Court held that Taylor was entitled to the surplus amount because the 1861 Act afforded him the right to excess proceeds of the sale of his land and nothing in the 1862 Act took away that right.[148]

In *Lawton*, the property owner had a delinquent tax bill under the 1862 Act.[149] The federal government seized their property, but instead of selling it off, the government kept it for themselves at a much higher value than the taxpayer owed.[150] When the property owner tried to recover the excess value, the government rejected their request.[151] Different from *Taylor*, the issue in *Lawton* was whether the property owner was entitled to the surplus value when the government keeps the property, rather than selling the property off.[152] The Court held that, under the 1861 statute, the property owner was entitled to the surplus as if the government had sold the property.[153] In both *Taylor* and *Lawton*, the Court opined that the taxpayer was entitled to the excess value of their property beyond their tax burden, regardless of whether the government sells or keeps the property.[154]

Lastly, the Court looked at other Minnesota laws to determine whether Tyler was entitled to the surplus in her case.[155] In Minnesota, a private creditor may sell the real property of a debtor to enforce a judgment, but they can only sell up to the amount of the debt and are not entitled to anything further.[156] Additionally, when a bank forecloses on a home for falling behind on its mortgage, the homeowner is empowered to receive the surplus value beyond the mortgage.[157] Thus, it seems that Minnesota law requires that surplus value be returned to the owner in the context of private loaning. In terms of other tax schemes, Minnesota law also supports this conclusion.[158] The state is permitted to seize and sell personal property when an individual falls behind on income taxes,

146. *Id.* at 642–43 (citing Act of June 7, 1862, § 1, 12 Stat. 422 (repealed 1872)).
147. *Id.* at 643.
148. *Id.* (citing *Taylor*, 104 U.S. at 218–19).
149. *Id.* (citing United States v. Lawton, 110 U.S. 146, 148 (1884)).
150. *Id.* (citing *Lawton,* 110 U.S. at 148).
151. *Id.* (citing *Lawton,* 110 U.S. at 148).
152. *Id.*
153. *Id.* (citing *Lawton*, 110 U.S. at 149–50).
154. *See id.* at 642–43.
155. *Id.* at 645.
156. *Id.* (citing MINN. STAT. §§ 550.20, 550.08 (2022)).
157. *Id.* (citing MINN. STAT. § 580.10 (2022)).
158. *Id.*

but the state must return the excess value.[159] All other facets of Minnesota law point to the conclusion that Tyler is entitled to the surplus value of her home, so the Court concludes that a taking has occurred and that Tyler is entitled to the surplus value of her home.

In general, it is hard to see how the outcome of this ruling is negative. It sets out a guideline for how property is to be defined, reinforces a fundamental property right, and checks an overstep of governmental power. Given the relevant statistics, home equity theft has negatively impacted local communities for a very long time.[160] In New Jersey alone, at least 638 homes between 2014 and 2021 have been stolen, along with over $100 million in equity.[161] This is an absurdly concerning value. Not to mention that it disproportionately affects unemployed individuals, low-income individuals, and racial minorities.[162] The Supreme Court agrees with this generality, coming together in a unanimous 9–0 decision,[163] a circumstance that can be rare in the court's modern era.[164]

Although it was a unanimous decision, it is not without valid criticisms. The opponents of *Tyler* point out multiple weaknesses in the ruling. One criticism proclaims that property taxes are an important function of local government, and this decision negatively affects local governments' ability to collect on them, which will have an impact on the community.[165] While this is rooted in the federalism argument that I have already discussed,[166] this argument still has some merit on its own. It begins with the foundation that property taxes are the "primary source of revenues controlled by our local governments."[167] They fund essential services such as: building safety, education, public health, public housing, public parks, police and fire, and other vital public resources.[168] According to the U.S. Census Bureau, property taxes account for seventy-

159. *Id.* (citing MINN. STAT. §§ 270C.7101, 270C.7108, subd. 2. (2022)).

160. *See End Home Equity Theft*, *supra* note 82.

161. *New Jersey*, *supra* note 84.

162. *Vulnerable Communities Hurt by Home Equity Theft*, *supra* note 88.

163. Tyler v. Hennepin County, Minnesota, SCOTUSBLOG, https://www.scotusblog.com/case-files/cases/tyler-v-hennepin-county-minnesota/ (last visited Oct. 27, 2024).

164. *See* Kimberly Strawbridge Robinson, *Supreme Court Achieves Historic Unanimity but Tougher Cases Loom*, BLOOMBERG LAW (May 8, 2024, 4:45 AM), https://news.bloomberglaw.com/us-law-week/supreme-court-unanimity-is-fleeting-with-tougher-cases-looming-37.

165. *See* Brief of Amici Curiae Local Government Legal Center et al. in Support of Respondents at 4, Tyler v. Hennepin County, 598 U.S. 631 (2023) (No. 22-166) [hereinafter Brief of Local Government Legal Center et al.].

166. *See supra* notes 121–27 and accompanying text.

167. Brief of Local Government Legal Center et al., *supra* note 165 at 25 (quoting Frank S. Alexander, *Tax Liens, Tax Sales, and Due Process*, 75 IND. L.J. 747, 748 (2000)).

168. *Id.* at 25–26.

two percent of local governments' tax revenue and account for forty-six percent of general revenue nationwide.[169]

Property taxes are extremely important for the function of local governments, as they make up a majority of their budgets.[170] As such, it is equally important for individuals to pay their fair share of property taxes. Delinquent taxpayers negatively impact the vital functions of local governments, and they increase the taxes of the individuals who actually pay their taxes.[171] The opponents of *Tyler* suggest that home equity theft is an important tool that local governments can use to recover delinquent property taxes and fund local governments.[172]

This argument is unpersuasive. Property taxes are very important for the function of local governments and not paying your property taxes is harmful to the community as a whole. However, to say this decision interferes with a local government's ability to administer and collect taxes is a stretch. Local governments are still allowed to seize properties that fall behind on property taxes within a reasonable parameter.[173] Now, what local governments cannot do is keep the surplus proceeds once they sell the taxpayer's property.[174] That way, the tax debt is still being satisfied, but the taxpayer's equity in the property is still protected. In no way does this affect the government's ability to administer and collect taxes; it just disallows the government to take more than what is owed.

A more convincing argument was advanced by the National Tax Lien Association. In their brief, they warn of the implications of a broad ruling in favor of Tyler under the Eighth Amendment.[175] The Eighth Amendment wards against excessive fines.[176] If decided under the Eighth Amendment, tax-sale purchases would be questioned whether they constitute excessive fines or not.[177] This would involve the government

169. *Id.* at 26 (citing *2020 State & Local Government Finance Historical Datasets and Tables*, U.S. CENSUS BUREAU (June 29, 2023), https://www.census.gov/data/datasets/2020/econ/local/public-use-datasets.html).

170. *Id.* at 26–27.

171. *Id.* at 24.

172. *See id.* at 29.

173. *See, e.g.*, WIS. STAT. ANN. § 75.19 (West 2023); *see also* FLA. STAT. ANN. § 197.432 (West 2024).

174. *Tyler*, 598 U.S. at 647 ("Minnesota cares only about the taxpayer's failure to contribute her share to the public fisc. The County cannot frame that failure as abandonment to avoid the demands of the Takings Clause.").

175. Brief of Amici Curiae National Tax Lien Association et al. in Support of Respondents at 6, Tyler v. Hennepin County, 598 U.S. 631 (2023) (No. 22-166) [hereinafter Brief of National Tax Lien Association et al.].

176. U.S. CONST. amend. VIII.

177. Brief of National Tax Lien Association et al., *supra* note 175, at 32–33.

evaluating the debt-value ratio of every single purchase to confirm that it is not an excessive fine.[178]

In their opinion, the majority refuses to address Eighth Amendment issues since finding in favor of the plaintiff on the takings issue fully remedied her harm.[179] However, both concurring justices, Justice Gorsuch and Justice Jackson, tried to address the excessive fines issue.[180] They believe the Eighth Circuit erred in dismissing Tyler's claim under the Excessive Fines Clause.[181] The Eighth Circuit court opined that the Excessive Fines Clause did not apply given a distinction between punitive and remedial purposes.[182] Justice Gorsuch and Justice Jackson say that this distinction does not matter, and they infer that the Eighth Amendment could possibly apply to *Tyler*.[183]

This all but muddies the excessive fines issue. The concurring Justices believe that the lower court was incorrect, but they do not say whether or not the Eighth Amendment can apply. If it does, it would put an incredible amount of stress on local governments to evaluate each tax-sale.[184] It would also presumably swamp the courts with Eighth Amendment cases.[185] By then, tax-sales would become so inefficient that it would render them ineffective for local governments and non-taxpayers would be able to get away with not paying tax.[186] Luckily, this part of the opinion is not binding. We can rely on the majority's takings opinion and circumvent the Eighth Amendment issue for now.

Another criticism suggests that this decision weakens the forfeiture and abandonment doctrines, other traditional property law principles.[187] Forfeiture refers to losing a right to your property due to violating the law, such as not paying taxes.[188] Abandonment, a much stronger concept than vacancy, refers to relinquishing the right to your property through certain steps with the intent of never getting it back.[189] Refusal to pay taxes and abandonment are correlated, and it is possible to have cases in which there is forfeiture by abandonment.[190] In the context of *Tyler*,

178. *Id.*
179. *Tyler*, 598 U.S. at 647–48.
180. *Id.* at 648 (Gorsuch, J., concurring).
181. *Id.*
182. *Id.* at 648–49.
183. The concurring opinion is merely criticizing the lower court's reasoning on the Excessive Fines issue. They never say that the Eighth Amendment is out of play. *Id.*
184. Brief of National Tax Lien Association et al., *supra* note 175, at 33.
185. *See id.*
186. *Id.*
187. *See* Brief of Local Government Legal Center et al., *supra* note 165, at 27–29.
188. *See id.* at 27.
189. *See Id.* at 28.
190. *Id.* at 28–29.

Respondents pleaded that Tyler forfeited her property under the Minnesota tax forfeiture statute and that she abandoned her property.[191]

The critics of *Tyler* believe that forfeiture and abandonment are important doctrines and the ruling in *Tyler* weakens them.[192] Admittedly, they do serve important functions. Local governments incur many costs from abandoned properties and the properties are associated with decrepit and decaying buildings that become eyesores to the community.[193] The decision in *Tyler* requires states to change their tax forfeiture laws, even in the states that allow property to be forfeited through neglect.[194] The opponents of *Tyler* believe that this makes it harder for people to forfeit their property, thereby weakening the doctrine.[195]

While this criticism has some merit, it lacks enough weight to change the Court's decision. It is already hard to forfeit or abandon real property as is.[196] The Minnesota statute made it so that individuals were constructively forfeiting their property when they did not pay property taxes for a certain amount of time.[197] With the *Tyler* ruling, tax forfeitures are essentially impossible now.

Despite this, forfeitures and abandonments still exist in other contexts.[198] Tax forfeitures are but a small subset of forfeitures. Weakening the forfeiture doctrine is not necessarily a bad thing either. The *Tyler* decision reinforces a positive property right, that is, recognizing the right of ownership over something. Individuals should have a property interest in the equity they build into their homes. Forfeiture and abandonment address negative property rights, or when you are not entitled to ownership over something. In this way, forfeiture and abandonment are not so much as liberties as they are constraints. As a society, I think it is more important to maximize positive property rights than it is to strengthen negative property rights. While takings seem to fall into the negative connotation since it allows the government to take away property, it actually realizes a property owner's positive right as it entitles them to just compensation.

191. Brief for Respondents at 9–11, Tyler v. Hennepin County, 598 U.S. 631 (2023) (No. 22-166).

192. *See* Brief of Local Government Legal Center et al., *supra* note 165, at 27–29.

193. Brief of Minnesota et al., *supra* note 123, at 22.

194. Tyler v. Hennepin County, 598 U.S. 631, 647 (2023).

195. And by extension, abandonment doctrine. *See* Brief of Local Government Legal Center et al., *supra* note 165, at 27–29.

196. *See generally* Lior Jacob Strahilevitz, *The Right to Abandon*, 158 U. PA. L. REV. 355, 399 (2010) (discussing prohibition regimes).

197. *See* MINN. STAT. §§ 281.18, 282.07 (West 2024).

198. *See, e.g.*, N.J. STAT. ANN. § 2A:18-72 (West 2024); *see also* MINN. STAT. ANN. § 345.75 (West 2024).

The final criticism that I will address, possibly the most well-founded criticism, deals with the administrability of *Tyler*.[199] Respondents set out this argument in their brief to the Supreme Court.[200] They indicate that some states, including Minnesota, take title of land before any sale occurs.[201] Tyler argues that a taking occurs at the exact time title transfers from the taxpayer to the government.[202] At that moment, it would mean that Tyler is entitled to just compensation. But what is just compensation at this moment?

Historical takings cases would say that the fair market value of the home is just compensation.[203] On the other hand, the government is not going to sell the home for fair market value; most of the time, they sell it for much less than that.[204] Consequentially, "former owners will likely claim *more* than the government will be able to recover from the property."[205] In addition, Respondents believe that this may also expose local governments to more litigation centered around maximizing the sale price.[206]

On the one hand, history has proven that just compensation works. On the other hand, the government should not have to overpay, per se, for a taking. Respondents point out that the United States recognizes this problem.[207] As a solution, the United States believes the Court could redefine just compensation to mean something other than fair market value in a context such as this, as well as delay the right to compensation until the moment of sale.[208] Respondents believe this solution would give rise to more problems, namely, government-created value between the time of forfeiture and sale of land.[209]

There is no obvious solution to this criticism. We must respect the long-standing history of takings cases that have led us to the conclusion that just compensation is the fair market value of the property. However, it seems unfair to force the government to compensate the owner at the transfer of the property interest only to go and sell the property for less than that amount. We cannot interfere with the history of takings cases, nor should we subject the states to overpay for property.

199. Brief for Respondents, *supra* note 191, at 42.
200. *Id.*
201. *Id.*
202. *Id.*
203. *See* United States v. Miller, 317 U.S. 369, 374 (1943).
204. Brief for Respondents, *supra* note 191, at 42.
205. *Id.*
206. *Id.* at 42–43.
207. *Id.* at 43.
208. *Id.*
209. *Id.*

Seemingly, the only solution is for the Supreme Court to adjudicate the problem and create an exception that allows post-sale proceeds to count towards just compensation. Here, the Supreme Court must be very precise and calculated in its discourse and ensure that this would become the exception to the rule and not the rule itself. It would need to only apply to home equity theft takings as well.

An alternative would allow the states to legislate away from forced sales. This problem only occurs because there is a disparity between the fair market value of a property and the amount received after a forced sale. This difference occurs because the sale is forced; the value is almost always going to be less than the fair market value because no one wants to pay the actual market value of the property. By allowing states to wait for the right opportunity to sell the land for around fair market value, there will be a smaller difference between the fair market value and the sale price. It also helps to quell the federalism argument.[210] This does create problems of its own, namely, the government holding property potentially indefinitely. But this is just an alternative. Regardless, it will be interesting to see how a solution to this problem plays out.

Lastly, I would like to offer my own criticism of *Tyler*. As I have previously explained, *Tyler* is without a doubt a beneficial ruling. It outlaws home equity theft, but does it truly end the practice? If states do nothing, I do not think it will.

I attribute this to how the modern housing market has panned out. Home prices in the United States have risen for twelve consecutive years ever since the housing market crash in 2008.[211] In 2021 alone, during the COVID-19 pandemic, housing prices shot up eighteen percent.[212] While the markets have slowed down since then, they show no signs of stopping, with an annual increase of 4.8% in 2022 and 6.5% in 2023.[213] Real estate has thus become a lucrative career for many.

Who would not want a piece of the pie, then? It seems especially easy to acquire discounted real estate when the government is permitted by law to take properties that are even slightly behind on property taxes and sell them.[214] Home equity theft is still technically allowable; the government just has to pay "fair compensation" now. Local governments

210. *See supra* notes 121–27 and accompanying text.

211. *Freddie Mac House Price Index Price Appreciation from 1990 to 2023*, STATISTA , https://www.statista.com/statistics/275159/freddie-mac-house-price-index-from-2009/ (Sept. 27, 2024).

212. *Id.*

213. *Id.*

214. *See* Angela C. Erickson, *The Size and Scope of Home Equity Theft: Shining a Spotlight on New Jersey*, PAC. LEGAL FOUND. (Nov. 15, 2021), https://pacificlegal.org/size-and-scope-of-home-equity-theft-new-jersey/.

can seize property and sell it to themselves or their acquaintances at auction.[215] The price of the property, either fair market value or discounted, does not matter since the prices of homes increase year after year, and the government pays just compensation all the same. They or their acquaintances can then hold or flip the property for profit. In this way, it should not be called home equity theft anymore, but simply home theft.

This effort is entirely dependent on ill-minded government officials, cronyism, and the just compensation problem, but it remains possible. These government officials need people to buy the property from the government, or they can even buy it themselves. As mentioned, price is a non-factor since even if it costs fair market value, the buyer can hold the property and its value may increase over time.[216] If the property is sold at a discount, the profit increases since whoever bought it can then, in turn, sell it for the fair market value or higher. The crafty officials then split the profit with their acquaintances. Given the nature of real estate and the low bar for "public purpose" under the Takings Clause,[217] this is relatively low risk.

One may say that this would be a very rare case, and it would be difficult to carry out. However, it has happened before.[218] While home equity theft was permitted, a mayor in Michigan set up his own LLC to purchase properties from tax sales at discounted rates.[219] The government would provide almost no notice to allow others to bid at the auction.[220] The mayor would then purchase the homes under his company and flip them for profit.[221] The company generated as much as ten million dollars.[222] It was most likely easier to do this while home equity theft was permitted, but this example shows that this level of ill-will is possible. Even if home equity theft gets harder, there will still be people who take advantage of it.

My hypothetical argument exemplifies the importance of home equity theft regulations. Fee and cost requirements, regulated redemption periods, notice requirements, and resale requirements are all

215. *See infra* notes 218–22.
216. *See id.*
217. *See supra* notes 74–77 and accompanying text.
218. *See* John Stossel, *Stealing Homes,* YOUTUBE, at 2:27 (May 3, 2022), https://www.youtube.com/watch?v=ghCMel8Z_Z8&pp=ygURaG9tZSBlcXVpdHkgdGhlZnQ%3D.
219. *Id.* at 2:33.
220. *Id.* at 1:58.
221. *Id.* at 2:17.
222. *Id.* at 2:41.

paramount in combating home equity theft.[223] If these conditions, among others, are present, the likelihood that home equity theft occurs declines substantially.[224]

It also goes to show that, while home equity is still important, the property and home itself are the most important part. People need homes to live in and care for their families. Home equity theft displaces people out of their homes and forces them to try and make ends meet another way.

III. HOW NEW JERSEY SHOULD CHANGE

The strengths and weaknesses of *Tyler* have been weighed, but how does the ruling apply in practice? More specifically, how can state legislatures craft new legislation that targets their individual home equity theft regimes and properly protects property owners? Every state tax sale statute is different, so it is important to hone in on individual statutes and how they function to ensure these goals. I am focusing on New Jersey because it is my home state, and its tax sale statute is unique.

Before we jump into analyzing New Jersey's tax sale statute, it would be helpful to parse out the different types of tax sale methods generally. Typically, these methods fall within one of three categories: the overbid method, the interest-rate method, and the percentage-ownership method.[225]

In states that utilize the overbid method, the state holds an auction and allows bidders to bid on the property.[226] The starting amount of the bid is usually about equal to the delinquent taxes, interest, and penalties.[227] Bidders can compete by placing bids up until around the fair market value of the property.[228] The winning bidder is awarded a lien on the property.[229] From there, a redemption period follows, which is a set time period in which the delinquent taxpayer is allowed to redeem the property by paying the winning bid amount plus interest.[230] The winning bidder gains title of the property if the taxpayer fails to redeem within the redemption period.[231]

223. *Ending Home Equity Theft in Courts and Statehouses*, PAC. LEGAL FOUND., https://homeequitytheft.org/solutions (last visited Oct. 27, 2024).
224. *See id.*
225. Brief of National Tax Lien Association et al., *supra* note 175, at 7.
226. *Id.*
227. *Id.*
228. *Id.*
229. *Id.* at 8.
230. *Id.* at 7.
231. *Id.* at 8.

Under the interest-rate method, past-due taxes become a lien on the property.[232] The government then auctions off the lien with the bids being a percentage of the delinquent taxes.[233] The percentage multiplied by the amount of delinquent taxes becomes the penalty that the winning bidder demands from the taxpayer to clear the lien on the property.[234] To win the auction, bidders must bid down the percentage—the lowest bidder being the winner.[235] Sometimes, the lowest bid amount is zero-percent interest,[236] which means that the winning bidder is offering to just pay the amount of the delinquent taxes in exchange for the lien. Once again, the taxpayer has a redemption period in which they are allowed to redeem the property by paying the lien amount.[237] If they fail to redeem after a certain period, the winning bidder receives title to the property.[238]

The percentage-ownership method, which has been described as a "statutory relic,"[239] entails bids representing a percentage of ownership in the property.[240] Bidders compete by bidding down the percentage ownership in the delinquent property and the lowest bidder wins.[241] Winning bidders pay off the delinquent taxes and bring a partition action to request a forced sale of the property.[242] Once the property is sold, the winning bidder and the property owner receive their pro rata interest from the sale's proceeds.[243] This is a rare regime–only two states still use this method.[244]

New Jersey is unique in that it incorporates a combination of the overbid method and the interest rate method. Under N.J.S.A § 54:5-32, a bidder includes the interest rate that it is willing to accept upon the redemption of the certificate in its bid.[245] The highest interest rate permitted by the statute is eighteen percent, so the bidding essentially begins there.[246] The winning bidder is the one who bids the lowest rate of

232. *Id.* at 8 (citing BCS Servs., Inc. v. Heartwood 88, LLC, 637 F.3d 750, 752 (7th Cir. 2011)).
233. *BCS Servs.*, 637 F.3d at 752.
234. *Id.*
235. *Id.*
236. Brief of National Tax Lien Association et al., *supra* note 175, at 8.
237. *BSC Servs., Inc.*, 637 F.3d at 752.
238. *Id.*
239. Brief of National Tax Lien Association et al., *supra* note 175, at 8 (quoting Adair Asset Mgmt., LLC v. Terry's Legacy, LLC, 875 N.W.2d 421, 424–25. (Neb. 2016)).
240. *Id.* at 8–9.
241. *Id.* at 9.
242. *Id.*
243. *Id.*
244. *Id.* (citing Rhode Island and Iowa).
245. N.J. STAT. ANN. § 54:5-32 (West 2024).
246. *See id.*

interest.[247] In this way, the statute operates as an interest-rate method. However, the statute additionally authorizes those who are willing to accept an interest rate of one percent or lower—even no interest at all—to offer to pay "a premium over and above the amount of taxes, assessments or other charges. . .due the municipality."[248] At this point, the property is then "struck off and sold to the bidder who offers to pay the amount of such taxes, assessments or charges, plus the highest amount of premium."[249] The inclusion of this premium adds an overbid aspect to New Jersey tax sale procedure.

It would be easy to criticize the structure of any given tax sale regime and recommend a more efficient alternative. However, changing the entirety of a tax sale regime would be extremely inefficient in itself. Compliance costs associated with changing and adhering to a completely new regime would be very high,[250] and that time, effort, and money could be better spent elsewhere.

Even so, New Jersey's tax sale method is quite efficient in combatting home equity theft as is.[251] It incentivizes property owners and the state to work together towards a more productive outcome. By allowing bidders to bid premiums at very low interest rates, the state's interest is aligned with the property owner's interest. Premiums mean that more money goes to the state and lower interest rates provide for an easier route towards recovering property. Other methods, like an outright interest rate method, incentivize the state to get rid of properties as fast as possible to recuperate delinquent taxes, regardless of the interest rate or bid amount, which may be impossible for the property owner to overcome.

On July 10, 2024, a bill from the New Jersey State Assembly revising the tax sale law became effective.[252] The bill was a direct response to the *Tyler* ruling.[253] Before making an assessment of the new bill, I think it is important to discuss principles that I believe would help adequately redress home equity theft:

247. *Id.*
248. *Id.*
249. *Id.*
250. *See* Brief of National Tax Lien Association et al., *supra* note 175, at 32–33.
251. I am referring to the system itself. At the time of writing, New Jersey did not statutorily recognize an ownership interest in surplus equity. Since then, they have passed legislation that recognizes ownership over surplus equity.
252. Assemb. 3772, 221st Leg., Reg. Sess. (N.J. 2024).
253. ASSEMB. APPROPRIATIONS COMM. STATEMENT ON A3772, 221st Leg., Reg. Sess., at 1 (N.J. 2024).

A. Recognize Right to Equity

First and foremost, the most surefire way of combating home equity theft is to recognize the homeowner's right to equity in their home. This is guaranteed by the *Tyler* decision.[254] Accordingly, New Jersey will need to change their statute to reflect this important decision. Many states statutorily recognize a homeowner's right to the equity in their home,[255] so there are many models for New Jersey to base their statute on. New Jersey just needs to incorporate language along the lines of: If the property is purchased for an amount in excess of the statutory bid, the surplus must be paid back to the delinquent taxpayer.

Before proceeding, the following recommendations are adjustments to the New Jersey statutes as they were before recent legislation was passed. New Jersey recently passed a statute that implemented their own changes; these are merely my recommendations. It should be noted that these recommendations are entirely theoretical and solely geared toward reducing the likelihood of home equity theft. In practice, I cannot guarantee certain outcomes, but I think these suggestions are worth a try.

B. Extend Redemption Period

New Jersey should extend the redemption period for municipalities. When a tax sale occurs and there are no bidders, the property gets transferred to the township.[256] In this event, the delinquent taxpayer only has six months to redeem their property.[257] For many people, and especially those who succumb to home equity theft, six months is too short of a period to redeem their property. Not only is it hard to provide proper notice within that time, but it would be hard for people to come up with the money to redeem in such a short time. Even in the event that their tax delinquency is small, say between $100 to $10,000, it could be difficult for people to come up with that amount given they still need to pay for other necessities like food, clothing, or even the house itself.

I recommend increasing the redemption period to two or three years. This period would allow for proper notice and would give delinquent taxpayers an adequate amount of time to come up with the money. Also, bear in mind that the redemption period for non-municipalities is two

254. *See Tyler*, 598 U.S. at 645.

255. *See, e.g.*, WIS. STAT. ANN. § 75.36(3)(c) (West 2024); FLA. STAT. ANN. § 197.582(2)(a) (West 2024).

256. N.J. STAT. ANN. § 54:5-34 (West 2024).

257. N.J. STAT. ANN. § 54:5-86(a) (West 2024).

years in New Jersey.[258] The law should treat municipalities and individuals equally. The redemption period should be the same (regardless of whether the period is two or three years).

One may say that this is a preposterous recommendation; the reason no one bids on these properties is because they are lost causes. Therefore, the municipality should be able to appropriate the property in a short period of time to turn it into something useful. The longer the township must wait, the more money they will lose. These criticisms are valid; the township is going to lose money. However, once appropriated, the municipality will have to pour even more capital into the property to make it useful. This amount would be far more expensive than it would be to simply wait for the taxpayer to pay the redemption cost. The township should wait a longer period of time so that there is a higher probability the taxpayer will pay to recuperate their costs, and, as a result, the township does not have to manage the property.

Additionally, I am trying to safeguard against the criticism I mentioned in Part II.[259] Home equity theft, or home theft as I called it, is still possible. Having a six-month redemption period for municipalities exasperates this problem. Six months is far too short of a time for notice requirements, and that period allows too much finagling to occur if the township is intentionally trying to appropriate certain properties.

C. Lower Maximum Interest Rate

My next recommendation is to lower the maximum interest rate allowable when bidding at tax sales. Recall that the current maximum interest rate in New Jersey is eighteen percent.[260] Principally, an eighteen percent return is far too much on a single investment. I understand the risk is high, and therefore the return should be high, but eighteen percent is still too high. Practically, most delinquent taxpayers are not going to be able to redeem at this rate. If the goal is to allow for delinquent taxpayers to redeem, the statutory maximum interest rate should reflect this.

At the same time, I recognize that the maximum interest rate cannot be too low. We still need to incentivize potential investors with reasonable profits so that they actually bid at these tax auctions. Hence, I recommend changing the statutory maximum rate to anywhere between thirteen and fifteen percent. That way, there is still the potential for substantial returns in addition to a higher likelihood that a

258. N.J. STAT. ANN. § 54:5-86(a) (West 2024).
259. *See supra* notes 207–17 and accompanying text.
260. N.J. STAT. ANN. § 54:5-32 (West 2024).

delinquent taxpayer will be able to redeem even at the statutory maximum. Theoretically, this lower interest rate would protect against aforementioned home theft as well.[261]

I believe this rate will also cause potential investors to go into deeper cost-benefit analysis for any given auction. The deeper the investors go into their analysis, the more competitive they will be when bidding. More competition leads to better outcomes at auction. Ideally, the average interest rate of state auctions taken altogether should be in the ballpark of the Federal Reserve rate.

D. Increase Notice

My final recommendation revolves around notice. More efforts should be made to give notice to property owners who are delinquent on their property taxes, and more notice should be given before tax sale auctions. Currently, New Jersey only gives notice to property owners for tax lien sales and foreclosure proceedings.[262] In addition to notice for tax liens and foreclosure proceedings, New Jersey should also notify delinquent taxpayers that they are falling behind on their taxes and explain the consequences if they do not pay. All of this should happen before the tax lien sale occurs. Reasonable efforts should be taken to actually notify these taxpayers of their delinquencies. If the argument that most of these properties are abandoned is true, then proper efforts should be taken in order to find and notify those property owners. Perhaps if Geraldine Tyler knew that she was falling behind on taxes, she may have paid them.

Additionally, there should be a statutory increase in notice for tax sales. The more people who know about tax sales, the more people will participate in them. More participation means competitive bidding, which leads to better outcomes for all. That way, everyone is happy. For the same reason, tax sales should be conducted online by verified vendors. Holding these sales online expands the scope of potential bidders. Once again, more bidders mean more competition, leading to better outcomes.

IV. WHAT NEW JERSEY HAS DONE

As mentioned, a bill was recently passed by the New Jersey State Assembly that revises the current tax sale law. Importantly, the bill establishes a property owner's right to surplus proceeds.[263] More

261. *See supra* notes 215–22 and accompanying text.
262. *See* N.J. STAT. ANN. §§ 54:5-26, -27, -86, -90, -104.48 (West 2024).
263. Assemb. 3772, 221st Leg., Reg. Sess. (N.J. 2024).

specifically, the law recognizes a property owner's right to surplus when there is a judicial sale or internet auction.[264] The process of an auction or judicial sale is initiated by a demand from the property owner or one of their heirs.[265] In the event that the property owner or their heirs do not demand an auction or sale within forty-five days of receiving the foreclosure complaint, the property will be deemed abandoned.[266] For abandoned properties, internet auctions or judicial sales are not required, and the property owners are barred from receiving surplus proceeds.[267]

The bill also creates enhanced notice requirements.[268] When lienholders give notice to property owners, the notice must "advise the owner that the owner or the owner's heirs have the right to request a judicial sale or an Internet auction of the property to preserve any equity in the property."[269] The notice must be sent to the last known address of every owner who has a right to redeem the tax sale certificate.[270] The lienholder must provide at least thirty days' notice.[271]

First, it is good that New Jersey is finally recognizing a property owner's right to surplus proceeds from a judicial sale of their property. Despite this, it is surprising that New Jersey elected to protect the doctrine of abandonment as much as it did. The fact that a property owner must elect to hold a judicial sale or auction, or they effectively abandon their property, goes against many traditional property principles that were previously discussed in this Note.[272] Namely, it should be much harder to abandon real property, and even in the event that one can abandon real property, it should be much harder than waiting for a grace period to end.

Simply put, I do not think that this provision of the bill is adequate to properly protect property owner's interests. The property owner should not have to elect to hold a judicial sale; judicial sales should be required, and surplus proceeds should be held in escrow until the property owner claims them or enough time lapses that they functionally abandon the surplus proceeds. Requiring a judicial sale in every instance also ensures

264. *Id.*
265. *Id.*
266. *Id.*
267. *Id.*
268. *Id.*
269. ASSEMB. APPROPRIATIONS COMM. STATEMENT ON A3772, 221st Leg., Reg. Sess., at 4 (N.J. 2024).
270. Assemb. 3772, 221st Leg., Reg. Sess. (N.J. 2024).
271. *Id.*
272. *See supra* notes 126–47, and accompanying text.

that fair market value for the property is achieved. It additionally allows for fair opportunity to bid on the property.

Further, I think that the advanced notice procedures introduced by the bill are very good. The more stringent notice requirements there are, the more likely that a property owner or their heirs will be able to protect their property interest. Also, once all notice procedures have been exhausted and the property owner still does not make a claim for the surplus proceeds, it is harder to make an argument that the property owner is entitled to the property. This is in line with my recommendation in the previous section.[273]

One aspect of the bill that was not previously discussed, but is particularly interesting, is the fact that the bill requires "municipalities…to refund to the holder of a tax sale certificate the full amount of the premium bid offered by the certificate holder if a property is scheduled for a judicial sale or Internet auction within five years of the date of the tax sale."[274] This provision is very good in that it incentivizes auction bidders to bid a premium. This lowers the interest rates for property owners trying to redeem their property. It also creates an environment for more competitive bidding since bidders are incentivized to bid a premium. I say this provision is particularly interesting because it ultimately loses the municipality money, something that goes against a premium bidding method. While the municipality can presumably do things with the money within those five years, the New Jersey Assembly admits that it would lose townships money.[275] Even so, the fiscal impact of refunding premium bids would not hurt the municipalities that much, and the overall strengths far outweigh the weaknesses of the provision.

CONCLUSION

The Supreme Court's ruling in Tyler represents an important step forward in protecting property owners from the unjust practice of home equity theft. Though, *Tyler* does have its flaws. It can make it harder for states and local governments to administer taxes; the Excessive Fines issue remains unsettled; it weakens state abandonment and forfeiture doctrines; and it will be hard to administer with the just compensation piece. On each criticism, I weighed the pros and cons, adding my own insight along the way. After analyzing all arguments, I offered my own warning and concluded that home equity theft, or as I called it, simply

273. *See* discussion Part III.D.

274. ASSEMB. APPROPRIATIONS COMM. STATEMENT ON A3772, 221st Leg., Reg. Sess., at 5 (N.J. 2024).

275. *Id.*

home theft, is still possible under the right circumstances without proper legal reforms. Despite its imperfections, ultimately I have found that the benefits of *Tyler* outweigh its drawbacks. With this in mind, I turned to analyze and recommend changes to New Jersey tax sale law. There were three quintessential recommendations: increase the redemption period for municipalities, reduce the maximum interest rate on bids, and increase notice requirements across the board. Increasing the redemption period to two or three years will allow more time for property owners to redeem their property, thereby protecting their property rights. It will also protect against home theft. Decreasing the maximum interest rate from eighteen percent to between thirteen and fifteen percent will make auctions more competitive and allow for more manageable interest rates so that property owners will not get destroyed by interest payments. Increasing notice requirements will prevent property owners from falling behind on their taxes in the first place and make online auctions more competitive. Following my recommendations, I examined how the procedures from New Jersey's recent legislation compare with my proposed changes. Simply put, while *Tyler* outlawed home equity theft, there is still a long way to go to completely ending the practice and preserving the American Dream.