


In the Wake of *Tyler*, Questions Remain

by Andrew Wilford

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In this installment of Commerce Crossroads, Wilford discusses concerns about the aftereffects of *Tyler v. Hennepin County*.

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It is a question that most taxpayers hope they never need to know the answer to: If you fall behind on a tax debt, just how much of your property is the government entitled to seize? Logic would dictate that the answer would be somewhere in the range of only enough to cover what you owe. But in many states, the answer is the entirety of the property covered by the government's tax lien.

In May 2023 the Supreme Court definitively answered that question in *Tyler v. Hennepin County*.¹ In a unanimous decision, the Court ruled that the practice of "home equity theft," or the seizure of foreclosed home value over the outstanding tax debt, is unconstitutional. While governments have the power to seize a delinquent taxpayer's property and sell it to recoup unpaid tax revenue, failure to refund the excess beyond taxes, penalties, and interest due represents an unconstitutional taking under the Fifth Amendment.

Yet while the highest court in the land has ruled on the issue, the practice of home equity theft has not been eradicated. Some states have not yet gotten around to updating their laws to conform with the Supreme Court's decision, while others continue to face questions about how far backward *Tyler* controls.

Background

Before *Tyler*, 12 states — Alabama, Arizona, Colorado, Illinois, Maine, Massachusetts, Minnesota, Nebraska, New Jersey, New York, Oregon, and South Dakota — and the District of Columbia enforced home equity theft rules. Ten other states allowed home equity theft in some circumstances — most often by failing to compensate taxpayers when their foreclosed homes were taken for public use instead of being put on the market.

The Pacific Legal Foundation was able to identify more than 6,400 cases of home equity theft between 2014 and 2021, accounting for more than \$780 million in home equity lost above and beyond these homeowners' tax liabilities.² On average, the taxes, penalties, and interest owed represented just 14 percent of the home equity that these homeowners lost.

Geraldine Tyler, the plaintiff in *Tyler*, had purchased a condominium in Minneapolis in 1999, remaining up to date on her property tax payments for a decade. In 2010 she chose to move to a rental apartment in a different neighborhood. In the meantime, she failed to pay property taxes on her condominium.

By 2015 Tyler had racked up \$2,300 in unpaid property taxes, though penalties and interest brought her total liability up to \$15,000. Hennepin

¹*Tyler v. Hennepin County*, 598 U.S. 631 (2023).

²Pacific Legal Foundation, "Thousands Lose Their Wealth to Home Equity Theft" (2022).

County then seized her condominium and sold it for \$40,000. However, instead of keeping \$15,000 to satisfy the debt and returning the remaining \$25,000 to Tyler, Hennepin County kept all \$40,000 for itself.

Tyler filed suit, alleging an unconstitutional taking under the Fifth Amendment and an excessive fine under the Eighth Amendment. She lost at both the district court level and the Eighth Circuit, but Tyler appealed to the Supreme Court.

On the Fifth Amendment claim, Hennepin County argued that Tyler's failure to pay her property taxes and to take advantage of a three-year "redemption period" in which she could have protected ownership of the surplus value by paying off her tax debt constituted an abandonment that entitled the county to seize full possession of the property.³ The Supreme Court definitively rejected this argument, noting that "Minnesota's forfeiture scheme is not about abandonment at all. It gives no weight to the taxpayer's use of the property."

With the abandonment claim out of the way, the Court went on to find that Hennepin County's choice to keep the remaining \$25,000 represented a clear taking under the Fifth Amendment for which the taxpayer must be compensated. As Chief Justice John G. Roberts Jr. wrote for the unanimous Court, "the taxpayer must render unto Caesar what is Caesar's, but no more."

While the plaintiff also claimed relief under the excessive fines clause of the Eighth Amendment, the majority of the Court did not reach this portion of Tyler's argument. Nevertheless, Justice Neil M. Gorsuch, joined by Justice Ketanji Brown Jackson, authored a concurring opinion arguing that Hennepin County's actions also violated the Eighth Amendment.

The Legislative Response

Though the Court's ruling was definitive, that does not mean that practices like those at issue in *Tyler* disappeared overnight. Many states still have work to do. Before *Tyler* was handed down, states were beginning to change their position on

³ Brief in Response to the Petition for a Writ of Certiorari at 4, *Tyler*, 598 U.S. 631.

home equity theft. Wisconsin had already passed legislation to remove itself from the list of states with similar policies in 2022,⁴ while North Dakota did the same in 2021.⁵ Michigan's Supreme Court struck down the state's scheme in *Rafaelli v. Oakland County* in 2020.⁶

Even so, with *Tyler*'s first birthday coming up in just a few months, only two of the 12 states that had home equity theft schemes on the books before *Tyler* have updated their laws: Nebraska and Maine passed legislation soon after *Tyler* was handed down.⁷ The situation in other states remains more fluid.

State-level courts cannot simply ignore the outcome of *Tyler* in the meantime, but states still have an obligation to bring their laws into conformity with the Constitution. Of the 10 remaining states with full-fledged home equity theft laws still on the books, reform legislation has been introduced in only Arizona,⁸ Colorado,⁹ Minnesota,¹⁰ New Jersey,¹¹ and South Dakota.¹² The remaining five and D.C. still must address the issue.

What Questions Remain?

There remain plenty of unresolved issues that future legislation should seek to answer. Without clear and consistent legislative guidance, relief from home equity theft is likely to be uneven across states.

Some questions are more fundamental. For instance, Massachusetts's Land Court issued a request for amici submissions regarding how it should handle a case under Massachusetts's now-unconstitutional tax foreclosure law in the absence of changes by the Massachusetts legislature.¹³ The court asked if there is a method

⁴ S.B. 829, 2021-2022 Leg., 105th Sess. (Wis. 2023).

⁵ H.B. 1199, 67th Leg. Assemb. (N.D. 2021).

⁶ *Rafaelli LLC v. Oakland County*, 952 N.W.2d 434 (Mich. 2020).

⁷ L.B. 727, 108th Leg. (Neb. 2023); L.D. 101, 131st Leg. (Me. 2023).

⁸ H.B. 2098, 56th Leg. (Ariz. 2024).

⁹ H.B. 1056, 74th Leg. (Colo. 2024).

¹⁰ S.F. 3315, 93d Leg. (Minn. 2023).

¹¹ S. 3997, 220th Leg. (N.J. 2023).

¹² H.B. 1090, 99th Leg. (S.D. 2024).

¹³ Notification and Request for Amici Submissions, *Town of Tyngsborough v. Recco*, 18 TL 001223 (Mass. Land Ct. Oct. 16, 2023).

under which it could strike down the Massachusetts tax foreclosure law but apply eminent domain law instead to allow the town at issue to apply similar home equity theft rules (it cannot).

Other questions are more about process. For instance, Colorado and New Jersey, when they seize a delinquent taxpayer's property, transfer the lien to a private buyer willing to pay the outstanding tax, interest, and penalties tied to the property. This private buyer can then convert this lien into a deed, becoming the true beneficiary of the taking of the delinquent taxpayer's surplus home equity.

In these cases, who is responsible for compensating the taxpayer — the private buyer, who legally purchased the lien on the expectation of greater returns in the case that the lien matured, or the county, which engaged in an unconstitutional taking without compensation in the first place?

This is a question about when the taking actually takes place. Is it when the lien is sold by the county, or when a deed is issued? Guidance from the Colorado attorney general says it is the latter, which would implicate private buyers among the parties responsible for providing compensation to victims of home equity theft.¹⁴ A variation on this question, regarding who should bear the loss if the government seizes property but its value changes between then and the auction, was raised by the county during Supreme Court oral argument but found little sympathy from the justices.

Another difficult question concerns cases in which the government does not sell the seized property, instead keeping it for public use. In that case, a sale never takes place, and a market price for the property — and consequently the surplus value taken from the delinquent taxpayer — is never definitively established. Determining “just compensation” for victims of home equity theft in these circumstances is less straightforward.

Then there is a question that the *Tyler* Court briefly touched on, but did not provide clear guidance on: Exactly how much of an opportunity must the government provide delinquent taxpayers to recover their surplus home equity?

The *Tyler* Court cited *Nelson v. City of New York*,¹⁵ a 1956 case in which a property owner lost their interest in a property over unpaid water bills, even though the property's value was many times that of those bills. In this case, the property owner had nearly three months to claim an interest in the surplus but failed to do so.

That holding will tempt states and localities to try to replicate these circumstances by offering a brief period for taxpayers to make a claim for the surplus before permanently forfeiting their interest in the property. Proposed legislation in New Jersey would do just that, offering delinquent taxpayers just 45 days to claim the surplus from a home foreclosure sale; after that, the state would keep it.¹⁶

But that is a risky path to take. While the court in *Tyler* did not overturn *Nelson*, it also cited it only to distinguish the circumstances in that case from those at issue in *Tyler*. It by no means gave Supreme Court approval to a taking without compensation so long as a period — no matter how short — was made available for a taxpayer to claim an interest in the taken property.

Conclusion

Tyler set an important precedent in favor of some of the most vulnerable taxpayers, protecting Americans who are struggling financially from being subjected to disproportionate punishment for falling behind on their property tax payments. Nevertheless, significant questions remain unanswered.

The easiest way to address them is clear, straightforward legislation in states with practices like those struck down as unconstitutional in *Tyler*. This legislation should seek to not only rectify laws out of step with *Tyler* but also provide guidance to courts on these thornier questions. ■

¹⁴ 23 Op. Colo. Att'y Gen. 1 (2023).

¹⁵ *Nelson v. City of New York*, 352 U.S. 103 (1956).

¹⁶ S. 4142, 220th Leg. (N.J. 2023).