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EQUITY AND CLARITY: THE IMPACT OF *TYLER V. HENNEPIN COUNTY* ON PROPERTY TAXATION AND HOMEOWNERS' RIGHTS

Analy Feigel†

This Note explores the implications of the U.S. Supreme Court's ruling in Tyler v. Hennepin County, *which significantly impacts property taxation and foreclosure laws. The Court ruled that property owners are entitled to surplus proceeds following a tax foreclosure, setting a new precedent by deeming it unconstitutional for governments to retain surplus proceeds without just compensation.* Tyler *clarified property rights under the Fifth Amendment, affirming that owners have a constitutional right to the surplus value of their foreclosed properties, even if local statutes do not explicitly allow it.*

Further, this Note also addresses unresolved issues following Tyler*'s ruling, including how the ruling affects the privatization of tax lien sales and whether just compensation should be based on fair market value or surplus proceeds. Moreover, it highlights that private third parties purchasing tax liens may now be held accountable under the Takings Clause, adding a layer of complexity to foreclosure procedures. Ultimately,* Tyler *reshapes the landscape of property tax foreclosures, ensuring stronger protections for homeowners while raising questions about the future of related legal practices.*

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INTRODUCTION

Tyler v. Hennepin County, a recent landmark decision by the U.S. Supreme Court, has reshaped the landscape of property taxation in the United States. In *Tyler*, the Court held that property owners have a right to surplus proceeds from tax foreclosure.[1] Post-*Tyler*, governments that withhold such proceeds may face valid Fifth Amendment takings claims.[2] This ruling represents a significant step toward fairer treatment of property owners in tax foreclosures.

Property taxes are payments that real estate owners make to local tax authorities, determined by the appraised value of their property and the applicable state tax rate.[3] Local governments collect property taxes with the aim of funding essential local services.[4] In many localities, property

1 598 U.S. 631, 643, 647 (2023) ("[W]e find that Tyler has plausibly alleged a taking under the Fifth Amendment, and . . . agree[] that relief under 'the Takings Clause would fully remedy [her] harm . . . .'").

2 *Id.*; *see* U.S. CONST. amend. V.

3 Victoria Araj, *Property Taxes by State: A Comparative Look at the Highest to Lowest States*, ROCKET MORTG. (Jan. 30, 2024), https://www.rocketmortgage.com/learn/property-taxes-by-state [https://perma.cc/5989-XGU8].

4 *See* Tracy Gordon, *Critics Argue the Property Tax Is Unfair. Do They Have a Point?*, TAX POL'Y CTR. (Mar. 9, 2020), https://www.taxpolicycenter.org/taxvox/critics-argue-property-tax-unfair-do-they-have-point [https://perma.cc/AEC4-WEJ8] (explaining that such funds are used to finance services such as "schools, roads, parks, and police protection").

taxes account for a substantial portion of tax revenue, making up about three-quarters of locally generated tax income, excluding financial support from state and federal sources.[5]

In the United States, real estate taxes create a lien on properties retained by state governments that is generally superior to other liens and can only be removed once all taxes are paid.[6] All states have statutes authorizing local authorities to initiate public tax lien foreclosures in cases where the owner neglects property tax payments.[7] In some instances, municipalities may elect to sell such liens to private buyers or investors.[8] These regulations play a crucial role in guaranteeing that local governments collect the necessary tax funds essential for delivering fundamental governmental services.[9] Before foreclosure by the state, property owners typically have a chance to redeem their property by paying the taxes they owe or, in some instances, the opportunity to enter into a payment agreement.[10] Similarly, before foreclosure resulting from a tax lien owned by a private buyer or investor, the delinquent property owners can avoid foreclosure by paying the purchase amount of the tax certificate, interest, penalties, and fees within a specific time frame and following particular procedures outlined by their respective state statutes.[11]

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5 *Id.*

6 *See, e.g.*, Gietz v. Webster, 50 P.2d 573, 575–76 (Ariz. 1935); 2 WEBSTER'S REAL ESTATE LAW IN NORTH CAROLINA § 20.45 (6th ed. 2024); 4 CALIFORNIA REAL ESTATE LAW & PRACTICE § 92.11 (2024). *But see* 44 R.I. GEN. LAWS § 44-9-1 (2024) (stating that a tax lien is "superior to any other lien . . . except easements, restrictions, and prior tax title(s) held by the Rhode Island housing and mortgage finance corporation").

7 *See* JOHN RAO, NAT'L CONSUMER L. CTR., THE OTHER FORECLOSURE CRISIS: PROPERTY TAX LIEN SALES 8 (2012), https://www.nclc.org/wp-content/uploads/2022/09/tax-lien-sales-report.pdf [https://perma.cc/95FT-CQWT]; Julia Kagan, *Tax Lien Foreclosure: Definition, How It Works, vs. Tax Deed Sale*, INVESTOPEDIA (Feb. 1, 2024), https://www.investopedia.com/terms/t/tax-lien-foreclosure.asp [https://perma.cc/L6W2-ME5V].

8 RAO, *supra* note 7, at 8.

9 *Id.*

10 *See, e.g.*, MINN. STAT. §§ 281.01, 281.17 (2024). For example, in Minnesota, the period of redemption to pay taxes and avoid foreclosure is three years. § 281.17.

11 RAO, *supra* note 7, at 8; *see, e.g.*, N.J. STAT. ANN. §§ 54:5-104.29 to -104.75 (West 2024); *see also* N.J. STAT. ANN. § 54:5-98 (West 2024) (detailing the criteria, fees, costs, and timeline for redeeming tax-forfeited property); N.Y. REAL. PROP. TAX LAW §§ 1110, 1138 (McKinney 2024) (stating that that a notice to redeem must generally be served by registered mail to the record owner and any mortgagee before initiating foreclosure on a tax lien, and outlining procedures for reinstating withdrawn foreclosure proceedings); FLA. STAT. §§ 197.432, 197.472 (2024) (outlining the procedures for the sale of tax certificates, and providing methods for property owners to redeem tax certificates). Usually, the purchase amount of the tax lien equals the tax due. RAO, *supra* note 7, at 9. State statutes often include procedures that allow homeowners to avoid foreclosure even after the private sale of tax liens. *See, e.g.*, N.Y. REAL. PROP. TAX LAW § 1110. These procedures involve

If a property owner does not redeem their property from either the municipality or a private actor, foreclosure follows.[12] In most states, the process aims to protect property owners by distributing surplus funds after settling the tax debt.[13] However, some states keep all proceeds, denying property owners their rightful surplus funds.[14] In various jurisdictions across the United States, different procedures have led to varying outcomes concerning the treatment of surplus equity following tax foreclosures until *Tyler*.[15]

The issue of depriving property owners of surplus funds following a foreclosure is not new.[16] However, for the first time, the Supreme Court clarified in *Tyler* that, per the Takings Clause, property owners are entitled to the surplus, if any, resulting from a tax foreclosure sale.[17] Even though *Tyler* is a step in the right direction to allow property owners to recoup proceeds from foreclosure sales of their properties, some issues remain unsolved, such as the potential negative consequences for property owners when tax liens are sold to private parties to satisfy a property owner's tax debts as well as just compensation.[18] Moreover, there is the issue of what should happen in instances in which the state retains a property after a foreclosure is unsuccessful, such as when it produces no bidders.[19]

Homeowners now have the right to receive surplus proceeds from foreclosure sales, even in the absence of specific legal provisions.[20] In

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paying specific amounts of money within a particular time before tax lien holders have the right to initiate foreclosure; fees and the period allowed vary by statute. *See, e.g.*, *id.*; N.J. STAT. ANN. § 54:5-98 (2024); MINN. STAT. § 282.007(3) (2024); FLA. STAT. § 197.472 (2024).

12 RAO, *supra* note 7, at 8–9.

13 *See, e.g.*, FLA. STAT. § 45.032 (2024); NEB. REV. STAT. § 77-1916 (2024); MO. STAT. ANN. § 140.230 (2018).

14 *See, e.g.*, Auburn v. Mandarelli, 320 A.2d 22, 30 (Me. 1974) (holding that after the redemption period expires, homeowners forfeit all property rights and thus are not entitled to surplus following foreclosure); MASS. GEN. LAWS ch. 60, § 64A (2024); MINN. STAT. § 282.08 (2024).

15 In Minnesota, homeowners were denied surplus proceeds following a foreclosure because the statute was silent, while in Florida, the statute that governs tax foreclosures has always created a rebuttable presumption that former homeowners are entitled to the distribution of surplus. *Compare* MINN. STAT. § 282.08 (2024), *with* FLA. STAT. § 45.032 (2024).

16 *See, e.g.*, United States v. Taylor, 104 U.S. 216 (1881); Bennett v. Hunter, 76 U.S. 326 (1869).

17 Tyler v. Hennepin County, 598 U.S. 631, 639 (2023).

18 *See* Jackson v. Southfield Neighborhood Revitalization Initiative, No. 361397, 2023 WL 6164992 (Mich. Ct. App. Sept. 21, 2023); John Rao, *Supreme Court Stops Equity Theft in Property Tax Foreclosures*, DIGIT. LIBR.: NAT'L CONSUMER L. CTR. (June 1, 2023), https://library.nclc.org/article/supreme-court-stops-equity-theft-property-tax-foreclosures [https://perma.cc/Y4N9-KPXM]; *see also infra* Section II.A (discussing issues related to the process of the sale of property tax liens to private third parties).

19 *See infra* Sections III.A–III.B.

20 *See, e.g.*, NEB. REV. STAT. § 77-1916 (2024); FLA. STAT. § 45.032 (2024); IND. CODE § 6-1.1-24-7 (2024); WIS. STAT. § 846.162 (2024).

cases where a foreclosure sale does not occur, homeowners should still be entitled to compensation if a municipality retains their property by enforcing a tax lien. Typically, this compensation is calculated as any surplus remaining after covering expenses.[21] However, when there is no foreclosure sale, and the county takes ownership of the property, there should be an exception allowing homeowners to claim compensation based on the fair market value. Additionally, third-party purchasers of tax liens should be treated as state actors, requiring them to return any surplus proceeds to the former property owners.

This Note explores how *Tyler* affects the ability of governments to keep excess proceeds from tax foreclosure sales in situations where statutes omit property owners in their designation of distribution of surplus proceeds. It also addresses ongoing unresolved issues that remain significant in the context of tax foreclosures, such as the implications of local governments auctioning property tax liens to private parties. Part I of this Note provides background on relevant Supreme Court precedent regarding takings claims resulting from government surplus proceeds retention after foreclosure proceedings. Part I then discusses *Tyler*'s facts and procedural history. It further analyzes court interpretations of statutes that lack provisions for surplus distribution to property owners, such as the one disputed in *Tyler*. Part II explores other related issues present in property tax foreclosure statutory schemes: state tax lien systems, foreclosure procedures, and the potential consequences for property owners when municipalities auction tax liens to private entities. Then, Part II introduces the concept of just compensation based on the fair market value of foreclosed properties, which has been discussed in important precedent but not adopted in any state. Part III evaluates the constitutionality of statutes, such as the Minnesota statute, that are silent on surplus distribution after foreclosure sales, considers precedents, and explores the concept of just compensation based on fair market value. It further examines whether, in light of *Tyler*, property owners should receive surplus proceeds when private individuals, rather than municipalities, conduct tax foreclosures on their properties.

I. BACKGROUND

A. *Pre*-Tyler v. Hennepin County *Case Law*

Before *Tyler*, the Supreme Court had recognized that property owners were entitled to any surplus amount beyond the debt owed on

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21 *See, e.g.*, MICH. COMP. LAWS § 211.78m (2024); N.C. GEN. STAT. § 45-21.31 (2024).

federal taxes after a foreclosure.[22] However, it was not until *Tyler* that the Supreme Court expressly held that property owners have a right to the surplus generated through state tax foreclosures and that state schemes that deprive owners of such surplus are unconstitutional.[23] Important Supreme Court decisions regarding federal taxes influenced the Court's reasoning in *Tyler*.[24]

The first relevant case that the Supreme Court relied on was *United States v. Taylor*.[25] Charles Taylor brought the suit because he was denied surplus proceeds after his property was sold for failure to pay taxes under an 1862 tax law ("the 1862 Act").[26] But an 1861 law ("the 1861 Act") provided that surplus proceeds should be distributed to property owners upon foreclosure.[27] The Supreme Court determined that the property owner had a right to surplus proceeds, but *only* because the federal government had a statutory obligation to provide the former owner with such surplus and not because the owner had an independent interest in the surplus besides the statutory protection.[28] Three years later, in *United States v. Lawton*, a property owner had unpaid taxes, and, again, under the 1862 Act, the federal government seized the property but this time kept the property for itself instead of selling it.[29] The Supreme Court held that if a statute requires the surplus proceeds of a tax sale to be provided to former owners, withholding funds that would otherwise compensate delinquent property owners would violate the Fifth Amendment regardless of whether there was an actual sale of the property because property owners are entitled to just compensation.[30]

Years later, the Court denied a takings claim that arose from a New York City tax sale statute that allowed the City to deny property owners surplus proceeds following a foreclosure sale if statutory requirements were not met because the statute provided for methods that allowed for recovery of surplus.[31] In *Nelson v. City of New York*, the property owner, William Nelson, was tax delinquent due to unpaid water bills.[32] The City initiated foreclosure proceedings against the property owner, assessing

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22 *Tyler*, 598 U.S. at 642.

23 *Id.* at 639.

24 *Id.* at 642–43.

25 104 U.S. 216 (1881).

26 *Id.* at 216–17; *Tyler*, 598 U.S. at 642–43. The 1861 Act was enacted "by Congress . . . to raise funds for the Civil War." *Tyler*, 598 U.S. at 642.

27 *Taylor*, 104 U.S. at 217–18; Act of Aug. 5, 1861, ch. 45, 12 Stat. 292; Act of June 7, 1862, ch. 98, 12 Stat. 422.

28 *Taylor*, 104 U.S. at 219, 221–22.

29 110 U.S. 146, 149 (1884).

30 *Id.* at 149–50.

31 Nelson v. City of New York, 352 U.S. 103, 109–11 (1956).

32 *Id.* at 105.

the property's value at $46,000 while the owner owed only $814.50 in taxes.[33] The New York City ordinance implicated in *Nelson* required that owners in a foreclosure proceeding timely assert that the value of their property substantially exceeds the tax due in order to claim surplus proceeds.[34] Without such a contention from the property owners, the City was free to retain all proceeds.[35] In *Nelson*, the City satisfied the statutory notice requirement.[36] Still, because the property owner failed to file a timely answer asserting that the value of his property exceeded the amount of his debt, he was denied recovery of the surplus.[37] The Supreme Court rejected the property owner's takings challenge, holding that because the statute at issue allowed property owners to claim surplus equity through specific procedures, no takings violation occurred just because the owner had failed to do so.[38]

Prior to *Tyler*, *Taylor* and *Lawton* controlled in matters involving takings challenges for federal tax foreclosures,[39] while *Nelson* was the controlling precedent for state tax foreclosures.[40] *Taylor* stood for the proposition that if a statute requires distribution of surplus to former property owners, failure by the federal government to distribute such surplus constituted a taking.[41] *Lawton* established that a taking occurs if a federal tax statute grants former property owners a distinct property interest in the surplus and the federal government neglects to return it even in the absence of a foreclosure sale.[42] While *Taylor* and *Lawton* both

33 *Id.* at 106. The discrepancy between the assessed value of a property and the taxes owed highlights a scenario where an owner could potentially lose ownership of a property valued at a higher amount and be unable to recover any surplus beyond the $814.50 owed in taxes due to non-compliance with a statute. This situation poses a challenge for individuals who receive adequate notice to comply but, due to individual circumstances, such as cognitive impairment like Alzheimer's disease or dementia, fail to do so for reasons unrelated to negligence. *See* RAO, *supra* note 7, at 8–9.

34 City of New York v. Chapman Docks Co., 149 N.Y.S.2d 679 (1956). The Code implicated in *Nelson* was title D of chapter 17 of the New York City Administrative Code, which was later recodified as Section 11-424 of the Code. *See Nelson*, 352 U.S. at 104; N.Y.C. ADMIN CODE § 11-424 (1985) (amended 1996).

35 *Chapman Docks*, 149 N.Y.S.2d at 681.

36 *Nelson*, 352 U.S. at 110.

37 *Id.*

38 *Id.* at 109–10.

39 Tyler v. Hennepin County, 598 U.S. 631 (2023); United States v. Taylor, 104 U.S. 216 (1881); United States v. Lawton, 110 U.S. 146 (1884); Wasiluk v. City of Oneida, No. 19-cv-280, 2022 WL 3716279, at *11 (N.D.N.Y. Aug. 29, 2022).

40 *Nelson*, 352 U.S. 103; Reinmiller v. Marion County, No. cv 05-1926, 2006 WL 2987707, at *3 (D. Or. Oct. 16, 2006).

41 *Taylor*, 104 U.S. at 221.

42 *Lawton*, 110 U.S. at 150; *see also* Coleman v. District of Columbia, 70 F. Supp. 3d 58, 77 (D.D.C. 2014) (relying on *Lawton* and indicating that in *Lawton*, because the statute explicitly

dealt with federal statutes in the context of state property tax delinquency, *Nelson* emphasized that if a state tax statute provides an avenue to recover surplus and former property owners fail to adhere to the requirements, there is no violation of the Takings Clause concerning surplus retention.[43] Significantly, because the ordinance in dispute in *Nelson* provided a way to recover the surplus, the Court failed to determine whether a statute that absolutely precludes recovery of surplus would be unconstitutional.[44]

B. Tyler v. Hennepin County

Geraldine Tyler purchased a one-bedroom condominium in Minneapolis in 1999 and moved to a senior community in 2010.[45] During her absence, property taxes on the condo went unpaid, accumulating around $2,300 in taxes and $13,000 in interest and penalties by 2015.[46] Hennepin County took possession of the apartment and sold it for $40,000, settling the $15,000 debt and retaining the remaining $25,000.[47] Tyler initiated a putative class action lawsuit invoking the Fifth Amendment's Takings Clause against Hennepin County, alleging that "the County had unconstitutionally retained the excess value of her home above her tax debt."[48] In particular, Tyler claimed that "the County violated [both] the United States and Minnesota Constitutions" through three allegations: "(1) by effecting a taking without just compensation; (2) by imposing an excessive fine; and (3) by depriving her of substantive due process."[49]

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stated that surplus should be granted to the owner, withholding such surplus would violate the Fifth Amendment of the Constitution).

43 *Nelson*, 352 U.S. at 110 ("We hold that nothing in the Federal Constitution prevents [retention of surplus if a statute does not preclude the owner from obtaining surplus] where the record shows adequate steps were taken to notify the owners of the charges due and the foreclosure proceedings."); *see also* Balthazar v. Mari Ltd., 301 F. Supp. 103, 105 & n.6 (N.D. Ill. 1969) (rejecting a takings violation claim because "[r]ather than taking private property for a public purpose, Illinois [was] here collecting taxes which [were] admittedly overdue"); *Coleman*, 70 F. Supp. 3d at 77–78 (distinguishing *Coleman* from *Nelson*, since *Nelson* upheld surplus retention when property owners had a legal avenue to recover excess funds but failed to act, whereas D.C. law provided no such opportunity (citing *Nelson*, 352 U.S. at 110)).

44 *Nelson*, 352 U.S. at 110; *see also* Petition for Writ of Certiorari, Tyler v. Hennepin County, 598 U.S. 631 (2023) (No. 22-166), 2022 WL 3648406, at *21 ("*Nelson* declined commenting on whether government's retention of the windfall would be a taking where state law 'precludes an owner from obtaining the surplus proceeds of a judicial sale.'" (quoting *Nelson*, 352 U.S. at 110)).

45 Tyler v. Hennepin County, 598 U.S. 631,635 (2023).

46 *Id.*

47 *Id.*

48 *Id.* at 635–36.

49 *Tyler*, 505 F. Supp. 3d 879, 889 (D. Minn. 2020).

1. United States District Court for the District of Minnesota

Tyler brought her challenge in federal court in the District of Minnesota and did not challenge the procedural or notice requirements in her claim against the County.[50] Rather, Tyler "alleg[ed] that the County's retention of the 'surplus'—that is, the value of her condo in excess of her $15,000 tax debt—[was] unconstitutional."[51]

The main issue was whether Tyler had a legitimate "property interest in the surplus equity" left after the County sold her property.[52] Evaluating precedents, the United States District Court for the District of Minnesota noted that in *Lawton*, the federal statute gave the property owner a right to the surplus, while in *Nelson*, the ordinance provided property owners with "a conditional right to the surplus."[53] Distinguishing the Minnesota tax statutory scheme, the court noted that the statute at issue did not give property owners either a conditional or an absolute right to recover the surplus.[54] The court stated that the Supreme Court had ruled that a property owner has no fundamental right to the surplus proceeds after their property is sold for unpaid taxes "by virtue of [their] prior ownership of the forfeited property."[55] Instead, the right to the surplus typically depends on state laws.[56] The court concluded that the Minnesota statute, which governs how the proceeds from the sale of forfeited properties are distributed, did not provide a property owner any right to the surplus.[57] The court held that based on precedent and Minnesota law, Tyler did not have a valid property interest in the surplus equity from her condo.[58] Therefore, her takings claim could not stand.[59] In other words, the court concluded that Tyler did not legally own the surplus.[60] Thus, there was no violation of her constitutional rights when the County failed to compensate her for the surplus generated through foreclosure.[61]

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50 *Id.* at 889–90.
51 *Id.* at 885.
52 *Id.* at 890.
53 *Id.* at 891.
54 *Id.* at 892.
55 *Id.* at 893.
56 *Id.* at 894.
57 *Id.* at 892, 894 (citing MINN. STAT. § 282.08 (2024)).
58 *Id.* at 894–95.
59 *Id.*
60 *Id.*
61 *Id.*

2. United States Court of Appeals for the Eighth Circuit

The Court of Appeals for the Eighth Circuit affirmed the district court's decision.[62] On appeal, the court held that because the Minnesota statute at issue mandated surplus distribution and did not grant former owners any entitlement to the excess amount, Tyler did not have a property interest in the surplus equity.[63] Relying on *Nelson*, the court concluded that when a governmental entity lawfully acquires title after providing the owner with adequate notice and an opportunity to recover any excess funds, retaining the surplus proceeds from the sale does not constitute a violation of the Takings Clause.[64] Moreover, even though the Minnesota statute does not provide for the distribution of surplus to property owners,[65] Tyler could have redeemed such surplus by taking steps to avoid foreclosure altogether, granting her enough opportunities to recover similarly to *Nelson*.[66]

The court acknowledged that Tyler received adequate notice before her property was foreclosed, and in combination with her opportunity to take action, the County did not offend the Takings Clause by retaining the surplus generated from her foreclosed property.[67] The Supreme Court granted certiorari.[68]

3. United States Supreme Court

The U.S. Supreme Court decided on whether retention by the County of the $25,000 generated through Tyler's property foreclosure sale constituted a taking without just compensation.[69] The Court explained that the Takings Clause prohibits government property seizure without fair compensation.[70] Even though "[t]he Takings Clause does not itself define property," state law and "traditional property law principles" play a role in defining property.[71] In Tyler's case, the Court held that a

62 *Tyler*, 26 F.4th 789, 794 (8th Cir. 2022).

63 *Id.* at 793.

64 *Id.* at 794.

65 MINN. STAT. § 282.08 (2024).

66 *Tyler*, 26 F.4th at 793–94. The decision emphasized that "[w]here state law recognizes no property interest in surplus proceeds from a tax foreclosure sale conducted after adequate notice to the owner, there is no unconstitutional taking." *Id.* at 793.

67 *Id.* at 793–94.

68 *Tyler*, 598 U.S. 631, 636 (2023).

69 *Id.* at 634.

70 *Id.* at 637.

71 *Id.* at 638–39.

homeowner "[has] an interest in the excess value of her home above the debt owed" for unpaid property taxes despite a state law that seeks to "extinguish that . . . interest."[72] The Court determined that the government's appropriation of these surplus funds constitutes a taking, entitling the homeowner to just compensation.[73]

The Court provided a historical view on the matter, explaining that the legal principle that a government cannot take more from a taxpayer than what is owed has historical roots dating back to the Magna Carta.[74] The opinion noted that this principle was established in English law and carried over to the United States, where the government could seize only as much property as necessary to satisfy tax debts.[75] It further stated that the majority consensus among states has always been that the surplus value, if any, should be returned to the taxpayer.[76] This held true as of May 2023, with thirty-six states and the federal government requiring the excess value to be refunded.[77]

The opinion highlighted legal precedents, affirming the principle that taxpayers have the right to surplus funds when their property is sold to cover tax debts.[78] The Court relied on cases applicable only to the federal government.[79] Moreover, the Court stated that even in cases where the federal government retained the property, the surplus should be granted to the taxpayer.[80] The County argued that *Nelson* superseded those precedents.[81] However, the Court distinguished Tyler's circumstances from those in *Nelson* because *Nelson* concerned an ordinance that allowed property owners to reclaim surplus funds, while Minnesota's scheme lacked such a provision.[82] The Court emphasized that Minnesota's system did not provide any means for taxpayers to recover excess value once the state took possession of their property.[83]

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72 *Id.*

73 *Id.* at 639.

74 *Id.*

75 *Id.* at 639–40.

76 *Id.* at 641–42.

77 *Id.* at 642.

78 *Id.* at 642–43. The Court mentioned *United States v. Taylor*, 104 U.S. 216 (1881), and *United States v. Lawton*, 110 U.S. 146 (1884); however, these precedents only apply to federal tax foreclosure sales. *Id.*

79 This is because the Court relied on both *Taylor* and *Lawton*, which were applicable only at a federal level. *Id.*

80 *Id.* (mentioning that even though the federal statute in *Lawton* did not mention what would happen with the surplus if the government retained the property, calculated surplus should nonetheless be granted to property owners as it is their right under the Fifth Amendment).

81 *Id.* at 643.

82 *Id.* at 643–44.

83 *Id.* at 644–45.

The Court further noted that under Minnesota law, property owners are entitled to any surplus funds beyond their outstanding debt in certain circumstances, such as creditor enforcement, mortgage foreclosure, income tax, and personal property tax cases.[84] Historically, this surplus-returning principle applied to real property sales as well.[85] The exception for Minnesota in real property tax cases, where the state keeps the surplus, does not align with the recognition of property rights in other contexts.[86] The Court explained that Minnesota cannot dismiss property rights when it is the one taking property without just compensation.[87]

The County argued that Tyler effectively abandoned her property by failing to make tax payments on her condo, and, therefore, Tyler had no property interest in the surplus generated through foreclosure.[88] The Court rejected the County's argument, concluding that failure to pay taxes does not constitute an abandonment of the property.[89] Moreover, the Court recognized that "[t]he County had the power to sell Tyler's home to recover the unpaid property taxes[,]"[90] but because the County took more property than was owed, Tyler had the right to fair compensation.[91]

Other state statutes have been interpreted the same way as the District Court for the District of Minnesota interpreted the Minnesota statute.[92] However, after *Tyler*, interpreting silence as deliberate authority to withhold surplus proceeds following a foreclosure is no longer viable. It is worth noting that these statutes are the minority; most granted property owners surplus proceeds even before *Tyler*.

C. *Comparison Between Minnesota's Statute and Other Similar State Statutes*

Unlike Minnesota, most states protect a property owner's right to surplus equity following a tax foreclosure.[93] Some states have procedures

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84 *Id.* at 645.

85 *Id.*

86 *Id.*

87 *Id.*

88 *Id.* at 646.

89 *Id.* at 646–47.

90 *Id.* at 639.

91 *Id.*

92 Kelly v. City of Boston, 204 N.E.2d 123, 124–26 (Mass. 1965); Butkus v. Charles L. Silton, Inc., 125 N.E.3d 799 (Mass. App. Ct. 2019) (unpublished table decision); Cont'l Res. v. Fair, 971 N.W.2d 313 (Neb. 2022), *cert. granted, judgment vacated*, 143 S. Ct. 2580 (2023) (mem.).

93 *See, e.g.*, ALASKA STAT. § 29.45.480 (2024); ARK. CODE ANN. § 26-37-205 (2024); COLO. REV. STAT. § 39-10-111 (2024); CONN. GEN. STAT. § 12-157 (2024); D.C. CODE § 47-1307 (2024).

and requirements to protect property owners' rights even after foreclosure.[94] For example, Utah implements several safeguards to protect owners of real property in tax delinquent foreclosures.[95] Measures adopted by Utah include a lengthy redemption period before foreclosure, installment payment options, and adjustments to delinquent taxes based on individual circumstances, which particularly benefit low-income property owners.[96] Additionally, Utah's statutory scheme provides that distribution of foreclosure proceeds should be made to the former property owner after payment of liens and costs associated with the sale.[97] Similarly, Florida's statute explicitly addresses and mandates the allocation of surplus funds to property owners after a foreclosure.[98]

In contrast, other state foreclosure statutes remain silent, omitting property owners from the list of eligible recipients for such surplus distribution.[99] Before *Tyler*, courts in a minority of states followed the interpretation of *Lawton*, that a property interest in the surplus is only created if a statute grants the property owner such an interest and a lack of such statutory requirement is a deliberate neglect of such property interest.[100] The Minnesota statute was silent regarding distributing surplus to property owners following a public tax foreclosure.[101] Therefore, the District Court for the District of Minnesota and the Eighth Circuit Court of Appeals concluded that absent such a provision, property owners did not have any means of recovering such surplus.[102]

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94 *Tyler*, 598 U.S. at 642 ("The minority rule then remains the minority rule today: Thirty-six States and the Federal Government require that the excess value be returned to the taxpayer.").

95 *See* UTAH CODE ANN. § 59-2-1346 (West 2024).

96 §§ 59-2-1346 to -1347.

97 § 38-1a-704(3).

98 FLA. STAT. § 45.032(2) (2024); It is worth noting that states, other than Florida, have similar statutory schemes. *See, e.g.*, TEX. TAX CODE ANN. § 34.04(c)(5) (West 2023) (mandating that proceeds be distributed to the former owner of the property, even though they are fifth in terms of priority); MICH. COMP. LAWS § 211.78t (2024) (outlining methods in which a former property owner can claim surplus proceeds from a tax foreclosure sale by filing a timely claim and motion through a prescribed process involving notification and judicial review); CAL. PUB. RES. CODE § 4181 (West 2024) (indicating explicitly that after satisfying the lien and foreclosure costs, excess funds, if any, should be distributed to the former property owner).

99 *Compare* FLA. STAT. § 45.032 (2024) (explicitly stating that there is a rebuttable presumption that former property owners are entitled to surplus proceeds), *with* N.Y. REAL PROP. ACTS. LAW §§ 1354(4), 1361(1) (McKinney 2024) (making no mention of former owners when directing distribution of surplus proceeds).

100 *See* Ritter v. Ross, 558 N.W.2d 909, 912–13 (Wis. Ct. App. 1996).

101 MINN. STAT. § 282.08 (2024)

102 *See* Tyler v. Hennepin County, 505 F. Supp. 3d 879, 884 (D. Minn. 2020) ("Minn. Stat. § 282.08 directs that the net proceeds must be distributed in the following order: First, any expenses incurred for municipal improvements and environmental cleanup that increased the value of the property must be paid. Second, any special assessments must be paid. Third, the county may choose

Similar to the Minnesota statute, several state statutes have been silent regarding the distribution of surplus to former property owners,[103] and courts have held that the municipality is allowed to retain the surplus.[104] For example, Massachusetts's statutory scheme was silent regarding the distribution of surplus to property owners.[105] Before *Tyler*, Massachusetts courts construed the lack of specificity to signify the legislature's deliberate intention to exclude former property owners from any claim to surplus proceeds following a public foreclosure.[106] Similarly, Nebraska laws are silent on surplus distribution to property owners after tax foreclosure sales.[107] Nebraska courts had constantly ruled against property owners' claims to surplus based on previous decisions and in the absence of specific statutory provisions.[108] Under *Tyler*, the denial of surplus to property owners rooted in interpreting silent statutes as a willful omission by the legislature is unconstitutional.[109] *Tyler* likely impacts other states with statutory procedures similar to Minnesota's.[110]

to designate a portion of the proceeds to help fund forest development or county parks or recreational areas. And finally[,] 40 percent of what remains must be distributed to the county, 40 percent to the school district, and 20 percent to the town or city. Minnesota's statutory tax-foreclosure scheme does not provide former property owners with any means to claim the proceeds of the sale in excess of the tax debt."); *Tyler*, 26 F.4th 789, 791 (8th Cir. 2022).

103 *See* N.Y. REAL PROP. ACTS. LAW §§ 1354, 1361 (McKinney 2024); NEB. REV. STAT. § 77-1916 (2024).

104 *See* Kelly v. City of Boston, 204 N.E.2d 123 (Mass. 1965).

105 *See id.* 124–26; MASS. GEN. LAWS ch. 60, § 64A (2024). Massachusetts added this section and amended chapter 60, section 64 of the Massachusetts General Laws as a response to *Tyler*. *See* Statement, Gordon H. Piper, Chief. J., Trial Ct. of Mass. Land Ct., & Jill K. Ziter, Deputy Ct. Adm'r., Trial Ct. of Mass. Land Ct. Land Court Statement on *Tyler v. Hennepin County, Minnesota* (Aug. 2023), https://www.mass.gov/doc/land-court-statement-on-tyler-v-hennepin-county-minnesota-08-2023/download [https://web.archive.org/web/20240724223948/https://www.mass.gov/doc/land-court-statement-on-tyler-v-hennepin-county-minnesota-08-2023/download].

106 *See, e.g.*, *Kelly*, 204 N.E.2d at 125–26; Butkus v. Charles L. Silton, Inc., 125 N.E.3d 799 (Mass. App. Ct. 2019) (unpublished table decision).

107 *See* NEB. REV. STAT. § 77-1916 (2024) ("If a surplus remains after satisfying all costs and taxes against any particular item of real property, the excess shall be applied in the manner provided by law for the disposition of the surplus in the foreclosure of mortgages on real property."); Cont'l Res. v. Fair, 971 N.W.2d 313, 316 (Neb. 2022), *vacated*, 143 S. Ct. 2580 (2023) (mem.). The United States Supreme Court remanded the case to the Supreme Court of Nebraska in light of *Tyler*. Fair v. Cont'l Res., 143 S. Ct. 2580 (2023) (mem.).

108 *See Cont'l Res.*, 971 N.W.2d at 322–26 (citing Nelson v. City of New York, 352 U.S. 103, 109–11 (1956), among other Nebraska cases).

109 Tyler v. Hennepin County, 598 U.S. 631, 647–48 (2023).

110 *See supra* note 99. Before *Tyler*, Massachusetts law did not include a provision to allocate surplus proceeds to former tax-delinquent property owners. *See* MASS. GEN. LAWS ch. 60, § 64 (2024). However, Massachusetts added one as a response to *Tyler*, and now explicitly specifies how to dispose of surplus and lists former owners. *See* MASS. GEN. LAWS ch. 60, § 64A (2024). Other states have silent statutes. *See, e.g.*, NEB, STAT. § 77.1916 (2024) (indicating that surplus should be allocated "in the manner provided by law for the disposition of the surplus"; however, not detailing

These statutes have practices that have proven to be contentious because they have resulted in denying property owners surplus proceeds after a tax foreclosure.[111]

A silent statute by itself is not unconstitutional. Instead, it is the result of denying homeowners surplus and courts validating such practice under the interpretation of silent statutes that result in an unconstitutional violation of homeowners' Fifth Amendment rights. Therefore, some of these statutes will likely withstand constitutional scrutiny. *Tyler* has already catalyzed the invalidation of such interpretation that denies homeowners surplus, driving a significant legal transformation in this domain.[112]

There are instances in which the local government is not foreclosing a property. Instead, the local government sells tax liens to private entities, who can then foreclose on the property following statutory provisions. This presents an additional layer of problems to property owners since private entities are not liable under the Fifth Amendment.[113]

II. OTHER ISSUES BEYOND RETENTION OF SURPLUS IN TAX FORECLOSURE PROCEEDINGS

A. *Private Sale of Tax Liens*

Several jurisdictions authorize local governments to sell property tax liens to private third parties.[114] This process differs from the sale of the

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how to dispose of it); OR. REV. STAT. §§ 312.100, 312.120, 312.230 (2024) (failing to reference how to distribute surplus proceeds after a foreclosure); *see also* Cont'l Res. v. Fair, 10 N.W.3d 510, 513, 526 (Neb. 2024) (reversing and remanding a Nebraska district court's decision in *Continental Resources v. Fair*, 971 N.W.2d 313, 316 (Neb. 2022), in light of *Tyler*); Rao, *supra* note 18 (indicating that *Tyler* will have broad implications for states that have windfall tax foreclosure schemes beyond just Minnesota).

111 *See* Petition for Writ of Certiorari, *supra* note 44, at *20; Rao, *supra* note 18.

112 *See Cont'l Res.*, 10 N.W.3d at 513.

113 *See, e.g.*, Children's Health Def. v. Facebook, Inc., 546 F. Supp. 3d 909 (2021) (holding that private corporations could not be liable under the Fifth Amendment since they are not state actors); D.L. Cromwell Invs., Inc. v. NASD Regul. Inc., 279 F.3d 155 (2002) (stating that the Fifth Amendment restricts only governmental conduct and applies to private entities only when their ations are "fairly attributable" to the government).

114 *See, e.g.*, *In re* Pryor, 841 A.2d 943, 947 (N.J. Super. Ct. App. Div. 2004) (indicating that if a property owner defaults on their taxes, the municipality can sell a tax lien to a third party who will have the same rights as the municipality to foreclose the property (citing N.J. STAT. ANN. §§ 54:5-19, -46 (2024))); Nayeri v. Mohave County, 452 P.3d 720, 723 n.1 (Ariz. Ct. App. 2019) (pointing out that "county treasurers are authorized to sell tax liens; third parties who purchase the liens receive certificates of purchase" (citing ARIZ. REV. STAT. ANN. §§ 42-18101(A), 18118(A) (2024))); D.C. CODE § 47-1303.04 (2024) (allowing explicitly the District of Columbia to sell tax liens to private parties).

property itself through a foreclosure auction.[115] A tax lien is a legal claim by the government placed on a property when the owner fails to satisfy a tax obligation.[116] Local governments can initiate a tax lien due to delinquency in property tax payment, encompassing penalties, interest, and associated expenses.[117] Generally, a tax lien sale is a process by which a tax purchaser buys the lien on a property from the municipality due to unpaid taxes.[118] In some jurisdictions, local governments have the authority to sell tax liens to an agency, a local tax lien entity, or themselves.[119] Tax liens are sold either at interest rates or for a dollar amount.[120] In states that conduct tax lien auctions at interest rates, investors pay the amount of taxes owed and bid on the interest rate they are willing to accept for paying the delinquent taxes on a property.[121] The investor who offers the lowest interest rate wins the auction.[122] In states that sell tax liens to the highest bidder for a dollar amount, investors participate in auctions where they bid a premium on the total amount of delinquent taxes owed for a property, and the highest bidder wins the auction.[123] The sale of tax liens to private entities continues to be constitutional even post-*Tyler*.

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115 *Compare* D.C. CODE § 47-1303.04 (2024) (authorizing the sale of tax liens to a "third party"), *with* 35 ILL. COMP. STAT. 200/21-75 (2024) (defining a tax lien and laying out how it might lead to foreclosing the property, without mentioning the sale of such liens to third parties).

116 Clarkston Fire Serv. Area #6 v. Lemieux, 519 P.3d 825 (Mont. 2022) (unpublished table decision).

117 *Id.*

118 Boso v. Rollyson, No. 22-cv-17, 2023 WL 7107114, at *1 (N.D.W. Va. Sept. 5, 2023), *report and recommendation adopted in part, rejected in part*, No. 22-cv-17, 2024 WL 943454 (N.D.W. Va. Mar. 5, 2024).

119 *See, e.g.*, N.Y. PUB. AUTH. LAW § 2435-c (McKinney 2024).

120 Mark P. Cussen, *Investing in Property Tax Liens*, INVESTOPEDIA (Aug. 25, 2024), https://www.investopedia.com/articles/investing/061313/investing-property-tax-liens.asp [https://perma.cc/KC9U-2884].

121 In Brevard County, Florida, tax liens are auctioned to the bidder who agrees to pay the taxes due and bids the lowest interest rate for redeeming the delinquent taxes from the property owner. *Tax Deeds / Auctions*, CLERK CT. & COMPTROLLER BREVARD CNTY., FLA., https://www.brevardclerk.us/tax-deeds [https://perma.cc/Z93B-7SPP]. The certificate represents an interest-bearing lien, with interest rates ranging from 0% to 18%. *Id.* Property owners may redeem the certificate by paying the taxes owed, penalties, advertising fees, and the interest rate agreed upon during the auction. *Id.*

122 *Id.* Investors bid on the interest rate they will charge on the lien. *Id.* The tax-delinquent property owner is responsible for paying the interest rate. *Id.* Local authorities sell tax liens at a low interest rate to allow property owners to avoid foreclosure. *Id.*

123 Cussen, *supra* note 120; Joanne Musa, *Are You Bidding Premium for Tax Liens?*, TAX LIEN INVESTING TIPS (Oct. 21, 2022), https://taxlieninvestingtips.com/2022/10/21/are-you-bidding-premium-for-tax-liens [https://perma.cc/B9Y4-VRBR]; W. VA. CODE § 11A-3-2 (2024). In Indiana, bidding on highly desirable properties can be aggressive, often reaching up to 80% of their assessed value, with a potential 10% return on investment. *Understanding Tax Liens—Indiana*, TED

When purchasing a tax lien, there are two possible results for purchasers of those liens: regaining the initial investment plus interest if the homeowner redeems the tax lien or, if the homeowner does not pay their property taxes, gaining the right to foreclose.[124] After a private party acquires a tax lien, the property owner usually has the opportunity to "redeem[]" the overdue taxes within a specific amount of time to prevent "the issuance of a tax deed" by the tax lien holder.[125] The purchase of a tax lien is attractive to investors since the law allows the holders of such liens to collect interest on the amount paid when the property owner redeems.[126] Depending on the applicable statute, "[r]edemption periods range from 6 months to 3 years."[127] After the redemption period expires, a tax lien holder can exercise their right to foreclose on the lien, resulting in foreclosure of the property.[128] Alternatively, in some states, if the property owner fails to redeem the overdue taxes by paying the tax amount owed plus any interest or related expenses, the holder of a tax lien can acquire a valid tax deed for the property.[129] A tax deed extinguishes the title of the original owner's property, creating a new title for the tax deed holder.[130] After a tax sale, when a tax deed is granted to the new owner, no interests from before the issuance of the tax deed remain valid.[131]

THOMAS, https://tedthomas.com/is-indiana-a-tax-lien-state [https://perma.cc/KX2N-KXHU]; *Tax Liens and Tax Sales in Indiana*, L. OFFS. WAYNE GREESON, https://www.greesonlaw.com/tax-liens [https://perma.cc/E38S-HHRN]. The owner has a one-year redemption period to pay back taxes plus interest. *Id.* Interest rates start at 10% for the first six months and increase to 15% for months seven through twelve, paid to the certificate holder, who gains ownership if not repaid in full. *Id.*

124 Miranda Crace, *Tax Lien Investing: What You Need to Know*, ROCKET MORTG. (Apr. 9, 2024), https://www.rocketmortgage.com/learn/tax-lien-investing [https://perma.cc/NU3V-RVRM].

125 Boso v. Rollyson, No. 22-cv-17, 2023 WL 7107114, at *1–2 (N.D.W. Va. Sept. 5, 2023).

126 Jay Romano, *YOUR HOME; Tax Liens Can Enrich Investors*, N.Y. TIMES (Aug. 15, 1999), https://www.nytimes.com/1999/08/15/realestate/your-home-tax-liens-can-enrich-investors.html [https://perma.cc/GL8D-QGD6]; Vidhi Shukla & Carol Coutinho, *Tax Lien Investing in 2024: What You Need to Know?*, HOUZEO (May 30, 2024), https://www.houzeo.com/blog/tax-lien-investing [https://perma.cc/DF4L-929Y] ("Tax lien investing is a lucrative option to earn a good [return on investment]. Its returns surpass those of conventional investments such as equities and bonds. Making it an ideal investment choice for investors looking to diversify their portfolio."); Cussen, *supra* note 120 (indicating that investors that "buy liens can generate substantial profits over time"); Crace, *supra* note 124 ("Tax lien investing . . . allows investors to buy tax lien certificates on properties with unpaid property taxes, with investors earning a significant profit when a homeowner pays their overdue tax bill.").

127 *Tax Lien Facts*, U.S. TAX LIEN ASS'N, https://ustaxlienassociation.com/tax-lien-facts/#9a [https://perma.cc/7TK8-WFUS].

128 State *ex rel.* U.S. Bank Tr., Nat'l Ass'n v. Cuyahoga County, 223 N.E.3d 438, 438 (Ohio 2023).

129 *Boso*, 2023 WL 7107114, at *1–2.

130 Clarkston Fire Serv. Area #6 v. Lemieux, 519 P.3d 825 (Mont. 2022) (unpublished table decision).

131 Rahimi v. Global Discoveries, Ltd., 252 So. 3d 804, 808 (Fla. Dist. Ct. App. 2018).

In Minnesota, tax liens are not sold at auction to private parties.[132] Instead, when a property owner fails to pay delinquent taxes, public notice of delinquency is published in the newspaper,[133] private notice is mailed to interested parties,[134] and in the absence of an answer by the owner, the parcels are "bid in for the state" subject to redemption by the owner.[135] During the period of redemption, usually three years, the owner may redeem the property by paying the taxes owed or entering into a payment agreement to avoid forfeiture.[136] If the owner does not redeem the property, title is forfeited to the state, which may sell the property or transfer it to a governmental agency.[137]

Some states, such as Florida, have a tax lien system aimed at protecting property rights.[138] Florida maximizes value for delinquent homeowners by auctioning tax liens to the private party bidder who offers the lowest interest rate to the homeowner.[139] Moreover, after a two-year redemption period, the new lienholder may apply for a tax deed, triggering a sale of the real property to the highest bidder, with surplus proceeds returned to the former owner, ensuring the preservation of homeowner value throughout the process.[140]

Unlike Florida and similar state systems that protect homeowners, Nebraska's statutory scheme does not provide such protections.[141] Nebraska allows the sale of tax liens for delinquent property taxes, enabling a private party to obtain a deed to the property if the owner fails to pay taxes.[142] Acquiring a tax lien in Nebraska gives the purchaser a tax certificate, which is essentially a document representing the tax lien entitling the holder to the first lien on the property.[143] Under this statutory scheme, multiple outcomes can arise. First, the county board may initiate a tax foreclosure proceeding if a tax lien sale is unsuccessful and no certificates are purchased for a property.[144] Second, when a tax

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132 *See* MINN. STAT. § 280.001 (2024).

133 § 279.09.

134 § 279.091.

135 § 280.001.

136 §§ 281.19, 281.17.

137 §§ 280.41, 282.01.

138 FLA. STAT. § 45.032 (2024) (explicitly mentioning that surplus proceeds should be allocated to former property owners following foreclosure).

139 § 197.432. When a private party purchases a tax lien, they earn interest on it. *Id.* Additionally, when the homeowner wishes to redeem the lien to avoid foreclosure, the private party holding the lien receives the principal amount paid for such lien. *Id.*

140 §§ 197.502, 197.542, 197.582.

141 *Compare* FLA. STAT. § 45.032 (2024), *with* NEB. REV. STAT. § 77-1901 (2024).

142 Cont'l Res. v. Fair, 971 N.W.2d 313, 316 (Neb. 2022), *vacated*, 143 S. Ct. 2580 (2023) (mem.).

143 *See id.* at 321; NEB. REV. STAT. § 77-1818 (2024).

144 NEB. REV. STAT. § 77-1901 (2024).

lien sale is successful, but the property remains unredeemed for three years, the tax certificate holder can request a conveyance deed, also known as a tax deed.[145] To obtain the tax deed, the tax certificate holder must serve a notice to the tax-delinquent property owners or any other person with interest at least three months before applying for a tax deed, stating that the deed will be sought after three months from the notice date.[146] The notice must contain specific information, such as a prominent warning, the purchase date, property description, assessed owner, taxes owed, the right of redemption, and expiration.[147] The redemption involves paying owed taxes and interest to the county treasurer, and it expires three months after the notice is served.[148] If the property owners fail to redeem, the tax deed holder can initiate a claim in a district court compelling foreclosure of the property.[149] Nebraska's tax certificate sale process dates back to 1879, allowing investors to purchase tax certificates on delinquent properties.[150]

In *Continental Resources v. Fair*, Kevin Fair and his spouse failed to pay property taxes in 2014.[151] A tax certificate was sold to Continental Resources, a private third party, and after three years, Continental applied for a tax deed.[152] Despite receiving notice, the property owners did not redeem the property.[153] Continental then obtained a tax deed, leading to a quiet title action.[154] Fair argued that the issuance of a tax deed to Continental violated the Takings Clauses of the U.S. and Nebraska Constitutions and parts of the Nebraska Constitution.[155] He contended that it constituted "a taking of his property for a private . . . purpose" and alternatively asserted a right to compensation for surplus equity.[156] The Nebraska Supreme Court rejected Fair's claims, stating that the power to impose and collect taxes is not subject to the Takings Clause.[157]

Unlike Nebraska, in New Jersey, private owners of tax certificates need a final judgment by the Supreme Court of New Jersey in order to

145 Wisner v. Vandelay Invs., LLC, 916 N.W.2d 698, 708 (Neb. 2018).

146 NEB. REV. STAT. § 77-1831 (2024).

147 *Id.*

148 *Id.*

149 *Wisner*, 916 N.W.2d at 708; Neun v. Ewing, 863 N.W.2d 187, 191 (Neb. 2015).

150 Cont'l Res. v. Fair, 971 N.W.2d 313, 316–17 (Neb. 2022), *vacated*, 143 S. Ct. 2580 (2023) (mem.).

151 *Id.* at 317.

152 *Id.*

153 *Id.*

154 *Id.* at 317–18.

155 *Id.* at 318.

156 *Id.* at 322.

157 *Id.* at 322–23.

acquire title by foreclosure.[158] New Jersey has allowed property owners' equity to be confiscated through tax sale foreclosures since the early 1900s, a practice codified in the Tax Sale Revision Act of 1918.[159] Examining the historical context of New Jersey's Tax Sale Law ("TSL"), it is clear that the legislature intended it to be a remedial statute with two public policy goals: encouraging tax sale foreclosures to enhance municipal tax collection and protecting property owners from the dire consequences of foreclosure.[160] The TSL allows municipalities to place a continuous lien on real property for unpaid taxes, penalties, and collection costs when property owners fail to pay property taxes.[161] Consequently, the municipality can sell these tax liens, and holders of the liens will become tax certificate holders.[162] The basis of a certificate holder's claim is the property owner's responsibility to pay taxes and the lien associated with the certificate is a tax lien.[163] Tax sale certificates can be sold at auction by the municipalities, with bidding starting at an 18% annual interest yield rate, representing an opportunity for low-risk, high-reward private investments.[164] The person who bids the lowest interest rate will be awarded the tax certificate.[165] However, the rights of the tax sale certificate holder remain secondary to the property owner's right to redeem such property.[166] If the property owner fails to redeem the property within a specified period, the certificate holder can initiate foreclosure proceedings to extinguish the owner's right of redemption.[167] The tax certificate holder can acquire title to the property through participating in the foreclosure proceeding.[168] For a foreclosure to be successful, the Superior Court of New Jersey has to give a final judgment in favor of the tax certificate holder.[169]

158 Cherokee LCP Land, LLC v. City of Linden Plan. Bd., 191 A.3d 597, 604 (N.J. 2018).

159 257-261 20th Ave. Realty, LLC v. Roberto, 307 A.3d 19, 28 (N.J. Super. Ct. App. Div. 2023).

160 *Id.*

161 *Id.* at 29.

162 N.J. STAT. ANN. §§ 54:5-54, -26 (West 2024) (describing that property owners can redeem their outstanding tax lien and, if property owners fail to do so, explaining how to properly provide notice to owners about a tax sale directing to publicize such notice in a local newspaper).

163 *Roberto*, 307 A.3d at 29.

164 *Id.*; *see* N.J. STAT. ANN. § 54:5-32 (West 2024); Brief of Amici Curiae States of Utah, Arkansas, Kansas, Kentucky, Louisiana, North Dakota, Texas, and West Virginia in Support of Petitioner, Tyler v. Hennepin County, 598 U.S. 631 (2023) (No. 22-166), 2023 WL 2477940, at *11.

165 N.J. STAT. ANN. § 54:5-32 (West 2024).

166 *Roberto*, 307 A.3d at 30 (quoting Simon v. Cronecker, 915 A.2d 489 (N.J. 2007)).

167 *Roberto*, 307 A.3d at 31.

168 *Id.*

169 Cherokee LCP Land, LLC v. City of Linden Plan. Bd., 191 A.3d 597, 604 (N.J. 2018).

New Jersey's bidding, starting at an 18% interest rate, represents a high interest rate for tax lien certificates in comparison to other states.[170] Investing in tax liens in New Jersey becomes appealing due to the potential for significant returns and risk mitigation, which contrasts with traditional real estate or stock market investments.[171] While this benefits investors, it makes it harder for tax-delinquent property owners facing high interest rates and other associated costs to prevent foreclosure and reclaim their properties.[172]

Lastly, New York City has a similar approach through its Third Party Transfer Program (TPT), which is a partnership between the Department of Finance and the Department of Housing Preservation and Development (HPD) aimed at rehabilitating properties with unpaid municipal charges and "poor housing conditions."[173] Under the TPT, property owners who fail to pay taxes on their properties may face foreclosure.[174] The program was initiated in 1996 to tackle "abandoned, distressed, and tax-delinquent properties."[175] The program's framework allows subjective property selection, limited notice requirements, and minimal opportunities for property owners to reclaim their properties.[176] The TPT program allows the City's Commissioner of Finance to transfer title to tax-delinquent properties directly to third-party non-profit organizations designated by the New York City HPD.[177] Once a property is deemed tax delinquent, entry of a judgment of foreclosure may be granted.[178] If the judgment of foreclosure is successful, tax-delinquent homeowners are entitled to a four-month redemption period in which they can settle the tax debt in full or arrange a payment plan with the Commissioner of Finance to avoid possible foreclosure.[179] If, after the four months provided, the homeowner fails to redeem, the Commissioner can transfer title to a third party approved by the HPD,

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170 *Roberto*, 307 A.3d at 29. Compare this rate to that of states like Alabama, Colorado, Kentucky, Louisiana, Missouri, Montana, South Carolina, Vermont, and West Virginia, in which the highest rate limit is 12%. *Tax Sale State Map & State Info*, SECRETS OF TAX LIEN INVESTING, https://www.secretsoftaxlieninvesting.com/tax-sale-map [https://perma.cc/L48L-GX3N].

171 *Tax Deed Sales in NJ: New Jersey Investment Opportunities*, TED THOMAS, https://tedthomas.com/tax-deed-sales-in-nj-opportunities-in-new-jersey [https://perma.cc/DZ7G-6S85].

172 RAO, *supra* note 7, at 31–33.

173 *Third Party Transfer (TPT) In Rem Program*, N.Y.C. DEP'T OF FIN., https://www.nyc.gov/site/finance/taxes/property-in-rem-forclosure.page [https://perma.cc/3G85-N8GC].

174 *Id.*

175 Joseph Mottola, Note, *Theft of the American Dream: New York City's Third-Party Transfer Program*, 96 ST. JOHN'S L. REV. 737, 738 (2022).

176 *Id.* at 744–47.

177 *In re* Tax Foreclosure Action No. 53, 189 N.Y.S.3d 692, 694 (App. Div. 2023).

178 N.Y.C. ADMIN. CODE § 11-412.1 (West 2024).

179 *Id.*; *In re* Tax Foreclosure Action No. 53, 189 N.Y.S.3d 686, 689–90.

nullifying the owner's rights.[180] The program has faced constitutional challenges due to its failure to allow property owners to recover surplus following foreclosure.[181]

New York courts have failed to declare the TPT program unconstitutional under the Takings Clause.[182] For example, in *Dorce v. City of New York*, three individuals had their properties seized under the TPT program and were inadequately informed about foreclosure proceedings, with no compensation for their surplus equity.[183] The plaintiffs in *Dorce* claimed that "there [was] no real mechanism for a former owner to seek or regain their surplus equity after the property [had] been transferred under the TPT Program."[184] The United States District Court for the Southern District of New York recognized the *potential* violation of the Takings Clause due to the absence of a proper process for former property owners to recover their surplus equity.[185] *Dorce* continues to be litigated.[186]

Later, in *In re Tax Foreclosure Action No. 53*, the Appellate Division referred to *Dorce* but stopped short of declaring the TPT program unconstitutional.[187] Instead, it ruled that even if there was surplus money after the foreclosure, the corporate defendant was not entitled to it under the TPT program.[188] The court held that because the defendant did not timely answer or redeem the property during the four months following foreclosure, it was not entitled to receive any surplus.[189] Therefore, the defendant's claim of being deprived of its property without fair compensation was not subject to review.[190] The court did acknowledge potential problems with the application of the TPT program but concluded that the defendant's specific contentions regarding compensation were not reviewable.[191]

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180 *In re* Tax Foreclosure Action No. 53, 189 N.Y.S.3d 686, 689–90.

181 Mottola, *supra* note 175, at 758–60; *see In re* Tax Foreclosure Action No. 53, 189 N.Y.S.3d 692, 694–95. The program has further faced criticism for its indiscriminate property selection process, transferring properties, often with minimal tax arrears, to third-party developers. Mottola, *supra* note 175, at 758–60.

182 *See In re* Tax Foreclosure Action No. 53, 189 N.Y.S.3d 692, 693.

183 Dorce v. City of New York, 608 F. Supp. 3d 118, 131 (S.D.N.Y. 2022).

184 *Id.* at 129.

185 *Id.* at 139–40.

186 *See Dorce*, No. 19 Civ. 2216, 2024 WL 139546 (S.D.N.Y. Jan. 12, 2024).

187 *In re* Tax Foreclosure Action No. 53, 189 N.Y.S.3d 692, 694–95.

188 *Id.*

189 *Id.*

190 *Id.* at 695.

191 *Id.* The court further noted concerns about the potential discriminatory application of the TPT program. *Id.*

B. *Just Compensation*

The Fifth Amendment requires that compensation granted to property owners subject to a taking financially restore the owner of the confiscated property to a position equivalent to if their property had not been taken.[192] In takings cases, the Supreme Court has ruled that compensation should be based on "the property owner's loss rather than the government's [profit,]" following the principle of indemnity.[193] In numerous states, properties can be auctioned for just the amount of taxes owed.[194] Consequently, a $200,000 home can be sold for as little as $1,200 in a tax lien sale, resulting in homeowners losing not only their residences but also substantial equity, which could be their primary savings and retirement security.[195] Tax foreclosure sales present additional problems for property owners because their property is usually not sold at market value but rather in an auction to the highest bidder with no incentive to start the bid high enough to generate a surplus.[196]

In states that recognize homeowners' entitlement to surplus proceeds following a foreclosure, courts have consistently rejected the idea that compensation should be based on the fair market value of homeowner's properties.[197] In *Rafaeli, LLC v. Oakland County*, the Supreme Court of Michigan rejected the argument that just compensation required the plaintiffs to be awarded the fair market value of their properties, stating that just compensation is to be measured by "the value of the property taken," meaning the surplus proceeds, if any, and not plaintiffs' real property.[198] Relying on *Rafaeli*, states that allow for distribution of surplus to former homeowners have nevertheless consistently denied compensation following a foreclosure that does not generate surplus.[199]

In *Freed v. Thomas*, the United States Court of Appeals for the Sixth Circuit held that Donald Freed, a homeowner, was not entitled to claim just compensation based on the fair market value of his foreclosed

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192 3 NICHOLS ON EMINENT DOMAIN § 8.06 (2024).

193 Brown v. Legal Found. of Wash., 538 U.S. 216, 235–36 (2003); Rao, *supra* note 18.

194 RAO, *supra* note 7, at 9.

195 *Id.*

196 *Id.*

197 *See, e.g.*, Rafaeli, LLC v. Oakland County, 952 N.W.2d 434, 465 (Mich. 2020).

198 *Id.*

199 *See, e.g.*, Hall v. Meisner, 565 F. Supp. 3d 953 (E.D. Mich. 2021) (holding that although the city purchased the disputed properties for the minimum bid, the plaintiffs were not entitled to the fair market value of the properties, and because the foreclosure sale did not generate any surplus proceeds, no Takings Clause violation occurred when former property owners did not receive anything following foreclosure).

property because "neither this court nor the Supreme Court has ever held that a plaintiff whose property is foreclosed and sold at a public auction for failure to pay taxes is entitled to recoup the fair market value of the property."[200] One explanation for this is that foreclosure sales are forced and usually do not achieve market value because the foreclosure process inherently lowers the property's value, as it must be sold according to state-mandated procedures.[201] Such properties typically fetch lower prices because buyers are less willing to pay as much for them compared to real estate sold under normal market conditions.[202] Due to the naturally lower prices yielded in foreclosure sales, mandating compensation to homeowners based on fair market value might lead governments to refrain from partaking in such sales, fearing potential lawsuits from previous owners who argue that the sale proceeds were insufficient.[203] Just compensation based on fair market value would divert funds from the public and enable homeowners to profit from their tax delinquency.[204]

III. Analysis

There are several notable issues left open after *Tyler*: (1) the constitutionality of statutes similar to the one in dispute in *Tyler*; (2) whether just compensation should ever be calculated based on the fair market value of the tax-defaulted property rather than the remaining surplus; (3) the consequences of a county retaining tax-delinquent properties if foreclosure is not successful; and (4) the implications of municipalities selling tax liens to private entities with the power to foreclose if the tax-delinquent property owner does not redeem the property. This Note will discuss each issue in turn.

200 81 F.4th 655, 658–59 (6th Cir. 2023).

201 BFP v. Resol. Tr. Corp., 511 U.S. 531, 548–49 (1994).

202 *Id.*

203 *See generally Rafaeli*, 952 N.W.2d 434; Hungate v. L. Off. of David B. Rosen, 391 P.3d 1, 15–16 (Haw. 2017), *abrogated by* State ex rel. Shikada v. Bristol-Myers Squibb Co., 526 P.3d 395 (Haw. 2023).

204 *BFP*, 511 U.S. at 564–65.

A. *Assessing the Constitutional Viability of State Statutes in the Post-*Tyler *Landscape*

Tyler's ruling deems unconstitutional the practice of interpreting silent statutes as denying homeowners the right to surplus proceeds.[205] When state legislatures fail to designate distributions for surplus proceeds or omit homeowners as eligible recipients, court interpretations suggesting legislative intent to exclude homeowners upholding retention of surplus are no longer valid post-*Tyler*.[206] *Tyler* recognizes a constitutional right of ownership in such surplus, regardless of the state legislature's statutory intent, designation of surplus to eligible recipients by a statute, or municipal practices resulting in denial of surplus to homeowners.[207] The Court in *Tyler* noted that "*Lawton* had suggested that withholding the surplus from a property owner always violated the Fifth Amendment," suggesting that regardless of whether a statute mentions distribution to former owners, former owners have a right to the surplus.[208] The Court further distinguished *Nelson* because, in *Nelson*, the property owners did have an opportunity to recover the surplus but failed to follow the required procedures to recoup such proceedings, forfeiting their right to surplus.[209] Therefore, the statute was not silent.[210]

Post-*Tyler*, the absence of a provision to recover surplus by a homeowner does not necessarily make a statute unconstitutional per se.[211] Only if the silence is interpreted as an indication that the former owner should not get the surplus does it violate homeowners' constitutional rights.[212] Accordingly, courts and municipalities should construe a silent statute as entitling homeowners to a claim in the surplus following a foreclosure sale, even if a statute does not explicitly indicate

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205 *See* Statement, *supra* note 105 (informing homeowners that they now possess the right to claim compensation for the equity in their homes, encompassing any surplus value of the property exceeding the amount of the tax debt); Tyler v. Hennepin County, 598 U.S. 631, 642–43 (2023) (citing *Lawton* for the proposition that the Court's precedent had "recognized the principle that a taxpayer is entitled to the surplus in excess of the debt owed" and mentioning that in *Lawton* it "extended a taxpayer's right to surplus even further").

206 *See* Statement, *supra* note 105 .

207 *Tyler*, 598 U.S. at 638–39.

208 *Id.* at 644. However, until *Tyler*, this proposition from *Lawton* applied only to federal tax schemes. *Id.* at 644–45 (discussing *Lawton* and *Nelson* and further applying *Lawton*, which was about a seizure by the federal government, to Minnesota law).

209 *Id.*

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

211 *See* Butkus v. Charles L. Silton, Inc., 125 N.E.3d 799 (Mass. App. Ct. 2019) (unpublished table decision).

212 *See supra* Section I.C.

so, in order to avoid constitutional violations. This interpretation of silent statutes should have been in place after *Nelson* since if a municipality chooses to keep the surplus proceeds of a foreclosure sale and the statute is silent as to distribution to the former property owner, the statute does not provide any actual means for recovering such surplus.

Rather than overrule *Nelson* and *Lawton*, *Tyler* expanded on the two cases by acknowledging property owners' rights to surplus in foreclosure sales in every state, regardless of whether a state or federal tax is at issue, or whether the statute provides for distribution to property owners, deeming proceedings such as the one found in Massachusetts's statutory framework unconstitutional.[213] *Nelson*'s holding still applies in that if homeowners fail to follow statutorily required procedures to claim their rightful surplus, they forfeit their right to such surplus.[214]

However, whether any avenue for recovering surplus, irrespective of its reasonableness, would align with both *Nelson* and *Tyler*'s requirements remains to be determined. For example, in *Nelson*, homeowners had the opportunity to file an answer stating that their property "value substantially exceed[ed] the tax due[,]" and only then were they able to petition to recover surplus.[215] Following *Tyler*, homeowners have a constitutionally recognized interest in the surplus regardless of whether the property value far exceeds the tax due and should not be denied their rightful surplus for failure to meet such threshold as required in *Nelson*.[216] Therefore, requiring that property value substantially exceed the amount of taxes due in order to allow for recovery of surplus is most likely an unconstitutional condition after *Tyler* because every property owner has a right of such surplus.[217] If property owners fail to adhere to a constitutional, statutory procedure,

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213 *See Tyler*, 598 U.S. at 639; Statement, *supra* note 105.

214 *See Tyler*, 598 U.S. at 644–45. For example, similar to *Nelson*, if a statute requires homeowners to file an answer within a specified period of time and tax-delinquent homeowners fail to do so, the municipality can retain surplus proceeds due to the fact that homeowners failed to adhere to the statute's requirement to reclaim such surplus. *See, e.g.*, Tupaz v. Clinton County, 499 F. Supp. 2d 182, 192 (N.D.N.Y. 2007); Griffin v. Bierman, 941 A.2d 475, 487–88 (Md. 2008); Metro T. Props., LLC v. County of Wayne, No. 23-cv-11457, 2024 WL 644515, at *4 (E.D. Mich. Feb. 15, 2024).

215 *Nelson*, 352 U.S. at 110; *see* City of New York v. Chapman Docks Co., 149 N.Y.S.2d 679 (App. Div. 1956) (noting that homeowners filed a timely answer asserting that their property's value exceeded the tax due and providing an interpretation of the property tax statute at issue in both *Chapman* and *Nelson*, which the *Nelson* Court later adopted).

216 *Tyler*, 598 U.S. at 645.

217 *But see id.* at 644 (mentioning the procedural requirements to recover surplus discussed in *Nelson* but not addressing the process's constitutionality, maintaining that, if a statute allows a process in which the owner could claim the surplus, no violation of the Takings Clause occurs).

then the municipality can retain all proceeds of the sale and deny the homeowner surplus.[218]

Moreover, schemes such as New York City's TPT program are probably unconstitutional in light of *Tyler*. As established in *Dorce*, TPT provides no real mechanism for former homeowners to recover their surplus equity other than paying their taxes due and redeeming within the four-month redemption period.[219] Unlike *Nelson*, the program does not provide an avenue for recovering surplus proceeds following foreclosure.[220] It only allows the opportunity to reclaim the property by bidding in the foreclosure action or by paying outstanding debts.[221]

Regarding fair market value, it is unlikely that the Supreme Court will require surplus from foreclosure sales to be based on fair market value or to set a minimum bid at that level. Recent cases suggest that the core concept outlined in *Rafaeli* remains intact: "[J]ust compensation" means any surplus left after a foreclosure sale to the highest bidder, with no obligation to align with market value.[222]

The issue of what could happen if a municipality retains property due to tax delinquency and does not conduct a foreclosure sale or is unsuccessful in trying to conduct one is less clear since the government is not generating any actual surplus proceeds. Per *Rafaeli*, the former property owners can claim a takings violation when denied surplus proceeds following the sale of their properties, meaning that their entitlement to just compensation within the context of a tax foreclosure sale is understood as the surplus proceeds, the right does not arise from the interest in the property or ownership.[223] Recently, some courts have distinguished *Rafaeli* and relied on *Tyler*'s implications and interpretation of *Lawton* to determine that if no foreclosure sale occurs, the former owner is entitled to "'surplus' owed on the property by reference to the value of the property, less what [a property owner] owed on it when the foreclosure occurred."[224] The result is that if a county does not successfully conduct a foreclosure sale on a tax-delinquent property but instead executes a tax deed to itself or another entity, property owners are entitled to the value of the property minus taxes and other associated

218 *Nelson*, 352 U.S. at 109–10.

219 Dorce v. City of New York, 608 F. Supp. 3d 118, 140 (S.D.N.Y 2022).

220 *Id.*

221 *Id.*

222 *See* Jackson v. Southfield Neighborhood Revitalization Initiative, No. 361397, 2023 WL 6164992, at *11, *15 (Mich. Ct. App. Sept. 21, 2023).

223 Rafaeli, LLC v. Oakland County, 952 N.W.2d 434, 484–85 (Mich. 2020).

224 Yono v. County of Ingham, No. 362536, 2023 WL 9007093, at *4 (Mich. Ct. App. Dec. 28, 2023) (distinguishing *Rafaeli* because the county retained property without conducting a sale, while in *Rafaeli*, a foreclosure sale occurred but did not generate any surplus proceedings); *see Jackson*, 2023 WL 6164992, at *13–14, *16–17.

costs due.[225] This presents newfound hope for property owners. However, it is only under this specific set of circumstances, where the county is unable or declines to conduct a foreclosure sale, that homeowners may be entitled to a surplus calculated by the fair market value of their properties.[226] But when a property is foreclosed through a traditional auction to the highest bidder, homeowners that receive nothing from such an auction will not be entitled to claim a takings violation if the foreclosure did not result in any available surplus.[227]

B. *Analysis of Private Tax Lien Sales*

State actors may be liable for claims brought under the Takings Clause of the Fifth Amendment as it applies to the States through the Fourteenth Amendment.[228] Consequently, the Takings Clause regulates the actions of the government, not individuals or private entities.[229] However, under some circumstances, private actors can be held liable under 42 U.S.C. § 1983 for takings if they are "willful participant[s] in joint activity with the State or its agents."[230] If a private individual collaborates with a government official to violate someone's constitutional rights, the private individual may be liable under § 1983.[231] The absence of limitations on private individual purchasers of tax liens

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225 *Yono*, 2023 WL 9007093, at *1, *3–4, *6. This outcome is improbable because, if governments are forced to pay tax-delinquent property owners a surplus calculated by fair market value, they will likely either sell the property or not take the title over the property to avoid payment.

226 *See* Hall v. Meisner, 51 F.4th 185, 187–88 (6th Cir. 2022); Mettler Walloon LLC v. Charlevoix Cnty. Treasurer, No. 362484, 2024 WL 56161, at *4 (Mich. Ct. App. Jan. 4, 2024); *Yono*, 2023 WL 9007093, at *4; *Jackson*, 2023 WL 6164992, at *15.

227 *See Rafaeli*, 952 N.W.2d at 484–85. Suppose the foreclosure did, in fact, result in a surplus sufficient to cover all the costs and penalties associated with such a procedure and there is money left. In that case, homeowners will be entitled to that residue, which is not calculated at fair market value but at the price of foreclosure minus associated costs. *See* Kakalia Mgmt., LLC v. Otsego Cnty. Treasurer, No. 361621, 2023 WL 2938769, at *4 (Mich. Ct. App. Apr. 13, 2023); Freed v. Thomas, 81 F.4th 655, 659 (6th Cir. 2023); State *ex rel.* US Bank Trust Nat'l Ass'n v. Cuyahoga County, No. 110297, 2021 WL 3121395, at *6 (Ohio Ct. App. July 19, 2021); Dorce v. City of New York, 608 F. Supp. 3d 118, 139–40 (S.D.N.Y 2022).

228 Cedar Point Nursery v. Hassid, 594 U.S. 139, 147 (2021); U.S. CONST. amend. XIV, § 1.

229 *See* Landgraf v. USI Film Prods., 511 U.S. 244, 266 (1994); Wells Fargo Bank v. Mahogany Meadows Ave. Tr., 979 F.3d 1209, 1214 (9th Cir. 2020).

230 Gibson v. Regions Fin. Corp., 557 F.3d 842, 846 (8th Cir. 2009) (quoting Lugar v. Edmondson Oil Co., 457 U.S. 922, 941 (1982)); 42 U.S.C. § 1983 (providing that any individual who, acting under the authority of a state, territory, or District of Columbia law, violates the rights of a U.S. citizen or anyone under its jurisdiction as protected by the Constitution and laws, can be held accountable in a legal action).

231 Harrell v. N.Y. State Dep't of Corr. & Cmty. Supervision, No. 15-cv-7065, 2019 WL 3821229, at *6–7 (S.D.N.Y Aug. 14, 2019).

calls for establishing effective regulations for the privatization of tax liens to protect homeowners.[232] *Tyler* did not deal with the question of privatization of tax liens.[233]

Third-party purchasers of tax liens are subject to the Takings Clause as state actors.[234] It follows that the practice of third-party tax lien holders retaining surplus proceeds after a tax foreclosure sale should be deemed unconstitutional. When states transfer tax liens to private parties, those parties become "willful participant[s] in a joint activity with the [s]tate" by collecting and further transferring an interest in a private property.[235] Thus, under *Tyler*, third-party purchasers should provide surplus proceeds from foreclosures to the original property owners because of their potential coverage through § 1983.[236]

Former property owners have the right to surplus funds when their land is sold for profit by third-party purchasers, just like they would if the government was involved.[237] The Supreme Court alluded to this conclusion by stating that a "taxpayer [is] still entitled to the surplus under [a] statute, just as if the [g]overnment had sold the property."[238] Even if the circumstances of the government keeping the property differ from those in which a government sells tax liens to which private parties can exercise their right to foreclosure, they should be treated similarly since, in both instances, actions that the government initiate deprive a homeowner of property, in this case, the surplus, that they should be entitled to. Hence, if the government sells a tax lien on a property, the homeowner should be compensated based on the equitable interest the homeowner holds in the property, the surplus, even without a foreclosure sale to which the government is a party.[239]

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232 *See, e.g.*, RAO, *supra* note 7, at 19 (indicating that lack of oversight results in inflated bills for homeowners due to lawyer's fees); *id.* at 27 (arguing that there should be a requirement of post-sale notices of the right of redemption, by private parties, to tax-delinquent homeowners).

233 *See* Tyler v. Hennepin County, 598 U.S. 631 (2023). The opinion does not mention the implications of tax lien sales to private third parties. *Id.*

234 Michael Taddonio, *The Common Law Remedy to the Tax Deed and Tax Lien's Disparate Impact on Communities*, 46 VT. L. REV. 642, 671 (2022).

235 *See Gibson*, 557 F.3d at 846 (quoting *Lugar*, 457 U.S. at 941)

236 Taddonio, *supra* note 234, at 671.

237 *Id.* at 671–72.

238 *Tyler*, 598 U.S. at 643 (citing United States v. Lawton, 110 U.S. 146, 149–50 (1884)). The Court in *Tyler* was referring to the circumstances found in *Lawton*, in which the statute mandated the distribution of surplus after the government sold the property to private parties but did not mention what would happen if the government kept the property and did not conduct a sale. *Id.* The Court concluded that withholding compensation violated the Fifth Amendment regardless of whether there was an actual sale. *Id.*; *see Lawton*, 110 U.S. at 149–50.

239 Yono v. County of Ingham, No. 362536, 2023 WL 9007093, at *4 (Mich. Ct. App. Dec. 28, 2023).

On the other hand, for states that allow for tax lien sales to private parties, when a private party purchases the tax lien, arguably, no taking has occurred since the delinquent tax property owner still holds title and ownership of the property.[240] Accordingly, the sale of a tax lien does not necessitate just compensation to a homeowner. For the same reasons, if the municipality is profiting from the tax lien auctions, property owners would not be entitled to the surplus between the tax lien sale and their tax due because property owners retain ownership.[241] The municipality is selling the tax lien that belongs to the municipality, and profiting from such practice would not be unconstitutional.[242] However, when a private entity seeks a tax deed and further foreclosure on the property, the governmental entity must mandate the distribution of surplus, if any, from the foreclosure to the former property owner since the title in the property of the tax-delinquent homeowner will be extinguished as the result of the foreclosure.[243] Regardless of whether the government or a private entity is initiating foreclosure, a homeowner will lose ownership of their property due to actions undertaken by the government.[244]

Analogizing the cases, such as *Lawton*, where the government retains the property without a foreclosure and property owners are

240 *See supra* Section II.A. "[M]unicipal tax liens attach to the land and are not assessed against a property owner." *In re* Pryor, 841 A.2d 943, 946 (N.J. Super. Ct. App. Div. 2004).

241 *See Pryor*, 841 A.2d at 946–47.

242 *See, e.g.*, *id.*; Clarkston Fire Serv. Area #6 v. Lemieux, 519 P.3d 825 (Mont. 2022) (unpublished table decision); Frank S. Alexander, *Tax Liens, Tax Sales, and Due Process*, 75 IND. L.J. 747, 760 (2000).

243 Rafaeli, LLC v. Oakland County, 952 N.W.2d 434, 466 (Mich. 2020); Rahimi v. Glob. Discoveries, Ltd., 252 So. 3d 804, 805 (Fla. Dist. Ct. App. 2018) (indicating that "the determination of who is entitled to the surplus" from a foreclosure sale occurs "at the time of the tax deed sale," meaning that the property owner is entitled to these proceeds, as they are the ones holding ownership of the property until the sale is completed). This should hold true since "[a] 'taking' for purposes of inverse condemnation means that the government has permanently deprived the property owner of any possession or use of the property without the commencement of formalized condemnation proceedings." *Rafaeli*, 952 N.W.2d at 454. When an owner of a tax certificate seeks a tax deed and foreclosure as an actor of the government, the tax certificate holder is depriving the property owner of possession of their property. *See, e.g.*, Mayor & City Council of Baltimore v. Thornton Mellon, LLC, 274 A.3d 1079 (Md. 2022) (holding that, in Maryland, after foreclosing the right of redemption and fulfilling post-judgment obligations, a tax sale certificate holder can obtain a deed, gaining a marketable title to the property); Lato v. Rockaway Twp., 16 N.J. Tax 355 (1997) (holding that, in New Jersey, a tax sale certificate holder can foreclose the right to redeem and acquire fee simple title, extinguishing the property owner's rights).

244 *Supra* Section II.A; Alexander, *supra* note 242, at 760; Tallage Lincoln, LLC v. Williams, 151 N.E.3d 344, 350–52 (Mass. 2020) (indicating that, in Massachusetts, strict foreclosure allows a municipality, as well as a private party, to take full ownership of the property if the homeowner does not redeem the property); Pappas v. E. Sav. Bank, FSB, 911 A.2d 1230 (D.C. 2006). In the case of a foreclosure initiated by a third party, the action taken by the government was the initial sale of a tax lien; in any case, the county is the ultimate responsible party for the transfer of ownership and should compensate a homeowner so as to not violate the Constitution. *Pappas*, 911 A.2d at 1237.

entitled to surplus based on market value if a tax certificate holder is granted a tax deed, but foreclosure does not follow, the former property owner should be entitled to just compensation measured at the fair market value of their property minus taxes owed and other costs.[245] Former homeowners should be entitled to compensation since granting a tax deed extinguishes the property owner's interest and title in the property. While it is true that compensation to former property owners arises from the surplus of a foreclosure,[246] the principles of *Lawton*, reenforced by *Tyler*, should apply, and if the government takes action, whether it is keeping the property for itself or selling a tax lien that results in a transfer of ownership, property owners should be entitled to just compensation.[247] Because governments allow the issuance of tax deeds, regulate foreclosures, and sell tax liens in the first place, subsequent action by third parties should be determined as collaborating with the government to violate an individual's rights when a property owner's interest in their property is extinguished without just compensation, violating their Fifth Amendment rights.[248] *Tyler* supports this argument by acknowledging a homeowner's entitlement to surplus funds from their property's foreclosure by the government and holding that, while the Takings Clause pertains to governments rather than individuals, denying surplus after a private foreclosure—initiated due to governmental action for auctioning tax liens—violates a homeowner's constitutional rights.[249]

Treating tax lien holders like local governments might discourage tax lien purchases. However, investors can still profit from interest payments, though they will not collect surplus proceeds, which former homeowners have a right to receive.[250] In *257-261 20th Avenue Realty, LLC v. Roberto*, the Appellate Division of New Jersey's Superior Court concluded that *Tyler*'s application extends to third-party tax sale certificate holders and that third-party purchasers are subject to

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245 *See* United States v. Lawton, 110 U.S. 146, 149–50 (1884); *see also* Yono v. County of Ingham, No. 362536, 2023 WL 9007093, at *4 (Mich. Ct. App. Dec. 28, 2023) (concluding that, even if no foreclosure occurs, a property owner is still entitled to just compensation).

246 *See Rafaeli*, 952 N.W.2d at 482.

247 If the government keeps the property or sells a tax lien that results in the private purchaser obtaining title to the property, the result is the same, in that there was no foreclosure, but the former property owner is left without title to their property and no compensation resulting thereof. Recognition of the principles of *Lawton*, in the *Tyler* Court's opinion, should be instructive in that regardless of whether a foreclosure occurs, homeowners should be entitled to compensation if their properties are taken as a result of tax delinquency. It still holds true, however, that if a foreclosure occurs, the only thing a former homeowner will be entitled to is the surplus of such foreclosure, if any. *See* Tyler v. Hennepin County, 598 U.S. 631, 643 (2023); *Lawton*, 110 U.S. 146, 149–50.

248 *See* Taddonio, *supra* note 234, at 671–72; Harrell v. N.Y. State Dep't of Corr. & Cmty. Supervision, No. 15-cv-7065, 2019 WL 3817190, at *2 (S.D.N.Y Aug. 14, 2019).

249 *See Tyler*, 598 U.S. at 643, 647.

250 *See generally id.*

violations of the Fifth Amendment.[251] The court noted that the New Jersey Constitution safeguards homeowners beyond the protections of the Fifth Amendment by providing that private individuals or entities cannot be authorized to take private property without just compensation.[252] The court stated that the TSL's framework allowing equity forfeiture after final judgment violates the Fifth Amendment Takings Clause in light of *Tyler*.[253] Although *Roberto* relies on protections from both the Fifth Amendment and New Jersey's Constitution, its interpretation should be applied to other states under the Fifth Amendment.[254]

Whether other states would use a New Jersey decision as persuasive authority for similar outcomes is yet to be determined. If other states follow suit, schemes like New York's TPT program may face constitutional challenges. The current structure of such programs denies homeowners the possibility to claim surplus proceeds by only allowing the option to reclaim the property by redeeming it, but does not give a surplus right following a private foreclosure.[255] The program does not allow owners the right to surplus following the transfer of the property to a third party.[256] However, per *Nelson*, withholding surplus following an in rem foreclosure does not constitute a taking so long as an opportunity to obtain such surplus is provided.[257]

CONCLUSION

Post-*Tyler*, *Taylor*'s holding is less relevant since homeowners now enjoy the right to surplus proceeds even in the absence of a statutory provision.[258] *Lawton* may now apply to states as a result of *Tyler* because some states have held that, even in the absence of a foreclosure sale, if a municipality retains property due to its exercise of foreclosure of a tax

251 307 A.3d 19, 32 (N.J. Super. Ct. App. Div. 2023).

252 *Id.*

253 *Id.*

254 *Id.*

255 *See In re* Tax Foreclosure Action No. 53, 189 N.Y.S.3d 692, 694 (App. Div. 2023).

256 *See Third Party Transfer (TPT) In Rem Program*, N.Y.C. DEP'T FIN., https://www.nyc.gov/site/finance/taxes/property-in-rem-forclosure.page [https://perma.cc/3G85-N8GC] (providing general information about the TPT program but not making mention of the rights of property owners after foreclosure).

257 *See* Nelson v. City of New York, 352 U.S. 103, 109–10 (1956).

258 *Compare* United States v. Taylor, 104 U.S. 216, 221–22 (1881) (emphasizing that property owners have an interest in surplus proceeds because a federal statute mandates the distribution of such surplus), *with* Tyler v. Hennepin County, 598 U.S. 631, 643, 647 (2023) (not requiring the existence of a statute for property owners to have a recognized interest).

lien, the homeowner will be entitled to compensation.[259] However, *Nelson* remains untouched since the Supreme Court acknowledged that if a statute provides procedures to claim surplus but property owners fail to adhere, the municipality may retain all the proceeds from a foreclosure sale.[260]

Tyler's impact underscores homeowners' rights in tax foreclosure proceedings and the complexities surrounding surplus claims in such scenarios. *Tyler* establishes that interpreting silent statutes to deny homeowners the right to surplus proceeds from tax foreclosures is unconstitutional, invalidating court interpretations suggesting legislative intent to exclude homeowners from surplus claims and upholding surplus retention by municipalities. Notably, *Nelson*'s holding remains applicable; homeowners must follow statutory procedures to claim surplus, and municipalities may retain such surplus if they fail to do so. Just compensation will likely continue to be measured as any remaining surplus, if available after interests and other associated costs have been paid out. The only instance in which a homeowner might be able to claim compensation calculated based on fair market value is if a foreclosure sale fails to occur and the county retains the property. Moreover, *Tyler* suggests that third-party purchasers of tax liens should be treated as state actors, obligating them to provide surplus proceeds to former property owners. However, the interpretation of *Tyler* and its application to private tax lien foreclosures remains uncertain in jurisdictions other than New Jersey. Ultimately, whether a non-government private entity can be held liable under the Takings Clause post-*Tyler* depends on the specifics of each case and the respective statute.

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259 *See* Yono v. County of Ingham, No. 362536, 2023 WL 9007093, at *4 (Mich. Ct. App. Dec. 28, 2023); United States v. Lawton, 110 U.S. 146, 149–50 (1884).

260 *Tyler*, 598 U.S. at 644.