

**Property Rights v. Taxpayer Rights:
The Battle Over Tax Foreclosures**

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INTRODUCTION

Local governments rely on property taxes to fund many essential public services. Owners who do not pay the taxes impose an increased burden on their taxpaying neighbors. To what extent can local governments interfere with the property rights of delinquent owners in order to safeguard the interests of ordinary taxpayers? In particular, can the government use the foreclosure process in ways that threaten the equity of delinquent property owners? The Supreme Court confronted that issue in *Tyler v. Hennepin County*,¹ and will confront it again this term in *Pung v. Isabella County*.²

In *Tyler*, the Court held that when a municipality forecloses on property for nonpayment of taxes, the Federal Constitution’s Takings Clause precludes the municipality from retaining any surplus between what the successful bidder pays for the property and the amount the delinquent owner owes; those surplus proceeds

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1. 598 U.S. 631 (2023).
2. No. 25-95 (U.S. cert. granted Oct. 3, 2025).

are the owner's property, and must go to the owner.³ In *Pung*, the federal district court, even before the Supreme Court's decision in *Tyler*,⁴ ordered the county to return the surplus to the owner, but the delinquent owner seeks more. The owner contends that as a result of the foreclosure sale, the county took the owner's property and is required to compensate the owner based on the property's market value which, according to the owner, was in excess of the successful bid at the foreclosure sale.⁵

In both cases, the foreclosed property owner has received significant support both from the political left and the political right. Organizations filing briefs from the left have expressed concerns that the targets of foreclosure tend to be disproportionately poor, old, or disabled.⁶ On the right, the concern has been the sanctity of property rights against government interference.⁷

In focusing on the rights of delinquent owners, however, these strange bedfellows ignore the rights of taxpayers who must make up the difference when delinquent owners fail to pay their share of the local tax burden. In *Tyler*, the Court attempted to balance those interests with Chief Justice Roberts' pithy remark that "[t]he taxpayer must render unto Caesar what is Caesar's, but no more."⁸ But what is Caesar's? Collecting taxes from a recalcitrant taxpayer is not cost-free. To what extent can a municipality use processes that reduce the cost of collection, even if those processes have an adverse impact on delinquent taxpayers? That is the issue the Court will have to address in *Pung*.

3. 598 U.S. at 642–45.

4. *Pung v. Cnty. of Isabella*, 632 F. Supp. 3d 743 (E.D. Mich. 2022), *aff'd sub nom. Pung v. Kopke*, No. 22-1919, 2025 WL 318222 (6th Cir. Jan. 28, 2025), *cert. granted sub nom. Pung*, No. 25-95.

5. Brief for Petitioner, *Pung*, No. 25-95, 2025 WL 3489419.

6. *See, e.g.*, Brief for New Disabled South and Emory Law School Disabled Law Students Association as Amici Curiae in Support of Petitioner, *Pung*, No. 25-95, 2025 WL 3555109.

7. *See, e.g.*, Brief of Citizen Action Defense Fund, Manhattan Institute, Reason Foundation, and Oregon Property Owners Association as Amici Curiae in Support of Petitioner, *Pung*, No. 25-95, 2025 WL 3669487.

8. *Tyler v. Hennepin Cnty.*, Minn., 598 U.S. 631, 647 (2023).

In both *Tyler* and *Pung*, the municipality conducted a foreclosure sale to recover delinquent taxes. If *Pung* holds that, upon foreclosure, tax delinquent owners are entitled to compensation based on fair market value even when that value exceeds the price realized at a foreclosure sale, municipalities may be forced to abandon use of foreclosure sales, to the detriment of taxpaying residents. Of course, municipalities might use different processes to ensure timely collection of property taxes and to reduce the cost of collection, as municipalities in many states do.⁹ But the Court has yet to consider how the constitutional analysis it developed in *Tyler* would apply to those processes.

This essay explores the challenges facing the Court as it attempts to reconcile the interests of taxpayers and property owners, and the challenges facing municipalities as they attempt to comply with the Court's constitutional commands. Part I focuses on the Court's opinion in *Tyler*. Part II lays out the alternatives facing the Court in *Pung*. Part III expands the discussion to explore additional issues raised by constitutionalizing the tax foreclosure process.

I. *TYLER V. HENNEPIN COUNTY*

In 2010, Geraldine Tyler, past age 80, moved from her one-bedroom condominium into a senior community.¹⁰ Beginning in 2011, she stopped paying real estate taxes on the condominium.¹¹

Under Minnesota law, once real estate taxes become delinquent, penalties and interest begin to accrue.¹² Then, in the year following a missed payment, the county auditor brings a lawsuit against the delinquent property.¹³ The county provides

9. See Section III.B, *infra*, concerning tax lien sales used in many states.

10. See Brief for Petitioner at 2, *Tyler*, 598 U.S. 631 (No. 22-166), 2023 WL 2339362.

11. *Id.*

12. MINN. STAT. ANN. § 279.01(1) (West 2025) (detailing penalties for late payment); *id.* § 279.03 (provision for interest on delinquent property taxes and penalties).

13. *Id.* § 279.05.

notice to the owner,¹⁴ and if the owner does not file an answer, the court enters a judgment, establishing a lien on the property.¹⁵ In May of that year, the county auditor transfers limited title to the state, subject to the owner's right to redeem by paying back taxes, interest, and penalties.¹⁶ The owner has three years to redeem.¹⁷ The county auditor provides notice to the owner 120 days before expiration of the time for redemption.¹⁸

Apparently, Geraldine Tyler did not respond to the auditor's lawsuit, and did not exercise the right to redeem.¹⁹ As a result, in 2015, under Minnesota law, absolute title vested in the state.²⁰ By that time, about \$2,300 in unpaid taxes had accrued, and the total due, including interest and penalties, totaled \$15,000.²¹ A year later, the county sold the Tyler condominium for \$40,000. Pursuant to Minnesota statutes, the government kept all \$40,000.²²

Tyler then brought suit, alleging that the county's retention of the surplus (the difference between the \$40,000 sale price and the \$15,000 due in taxes, interest, and penalties) constituted an unconstitutional taking of her property.²³ She also alleged that retention of the surplus constituted an excessive fine in violation of the Eighth Amendment's prohibition on excessive fines.²⁴ The District Court dismissed for failure to state a claim, and the Eighth Circuit affirmed, reasoning that because Minnesota's statutory scheme recognized no property interest in surplus proceeds, no property was taken, unconstitutionally or otherwise.²⁵ The District

14. *Id.* § 279.091.

15. *Id.* § 279.16.

16. *Id.* § 280.01.

17. *Id.* § 281.17(a).

18. *Id.* § 281.23.

19. Brief for Respondents, at 8, *Tyler v. Hennepin Cnty.*, Minn., 598 U.S. 631 (2023) (No. 22-166), 2023 WL 2759804.

20. *Id.*

21. *Tyler v. Hennepin Cnty.*, Minn., 598 U.S. 631, 635 (2023).

22. *Id.*

23. *Id.* at 635-36.

24. *Id.*

25. *Tyler v. Hennepin Cnty.*, 26 F.4th 789, 793 (8th Cir. 2022), *rev'd sub nom. Tyler*, 598 U.S. 631 (2023).

Court also concluded that retention of the surplus did not violate the Excessive Fines Clause because retention was designed to remedy the state's tax losses, not to punish the delinquent taxpayer.²⁶

A unanimous Supreme Court reversed in an opinion by Chief Justice Roberts. The Court held that Minnesota could not extinguish an owner's property interest by enacting a law providing for forfeiture of a property interest by falling behind on tax obligations. While conceding that the Takings Clause itself does not define "property," the Court reaffirmed the principle that, for taking purposes, state law cannot be the only source of property rights.²⁷ Looking to history and precedent, the Court held that use of tax debt to confiscate more property than was due effected a "classic taking in which the government directly appropriates private property for its own use."²⁸ Because relief under the Takings Clause would remedy the harm to Geraldine Tyler, the Court did not have to decide whether her excessive fines claim should have been dismissed. In a concurring opinion, Justice Gorsuch, joined by Justice Jackson, concluded that the Eighth Circuit erred in dismissing that claim.²⁹

In holding that the Minnesota statute effected a taking of Geraldine Tyler's property, the Court distinguished *Nelson v. City of New York*,³⁰ an earlier case in which the Court had rejected constitutional claims of landowners who received no surplus after the city had foreclosed on their property for unpaid water bills. The *Tyler* Court emphasized that the New York procedures at issue in *Nelson* would have entitled the owners to recover the surplus if they had "filed a timely answer in [the] foreclosure proceeding,

26. *Tyler v. Hennepin Cnty.*, 505 F. Supp. 3d 879, 896 (D. Minn. 2020), *aff'd*, 26 F.4th 789 (8th Cir. 2022), *rev'd sub nom. Tyler*, 598 U.S. 631 (2023) (affirming dismissal of excessive fines claim based on District Court opinion).

27. 598 U.S. at 638 (citing *Phillips v. Washington Legal Foundation*, 524 U.S. 156, 167 (1998)).

28. *Id.* at 639 (quoting *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 535 U.S. 302, 324 (2002)).

29. *Id.* at 648 (Gorsuch, J., concurring)

30. 352 U.S. 103 (1956).

asserting [the] property had a value substantially exceeding the tax due.”³¹ By contrast, the Minnesota statute provided no opportunity for the owner to receive surplus value once the redemption period expired.

In its takings analysis, the Court’s focus was on the taking Tyler identified: the county’s retention of surplus moneys resulting from sale of the apartment for more than the amount she owed. Tyler did not challenge, and the Court did not address, the interest and penalties assessed as a result of her delinquency, although the interest and penalties dwarfed the amount of the tax due.³² And Tyler did not allege that, because the county’s auction sale brought less than the fair market value of her apartment, her compensation should be measured by the difference between fair market value and the tax obligation she has failed to satisfy. Finally, because her claim was focused on the Minnesota scheme, neither her complaint nor the Court’s opinion addressed other tax collection mechanisms used by states and municipalities, some of which could result in loss of equity by defaulting owners.

II. *PUNG V. ISABELLA COUNTY*

In *Pung*, the Court will have the opportunity to opine on one of those issues: the measure of compensation when the market value of a delinquent owner’s property exceeds the price realized at a foreclosure sale. The argument for basing compensation on market value is straightforward: when the government exercises dominion over the defaulting owner’s property by holding a foreclosure sale, the government has taken property; the standard measure of just compensation for a taking is fair market value. Awarding that measure, however, would seriously complicate the ability of local governments to collect delinquent taxes.

A. *Background*

31. 598 U.S. at 644 (citing 352 U.S. at 110).

32. See *infra* Section III.C (discussing interest and penalty charges).

Pung is an appealing case for the property owner because there were no delinquent taxes and there should have been no foreclosure. Michigan affords a homeowner an exemption from some local property taxes if the owner submits an affidavit that the home is a primary residence. Timothy Pung applied for and received this Principal Residence Exemption.³³ After Timothy's unexpected death in 2005, his wife lived in the home until she died in 2008.³⁴ After her death, the couple's son continued to live in the home.³⁵ Timothy's uncle, Michael Pung, served as executor of Timothy's estate and did not resubmit an affidavit that the home was a primary residence. As a result, in 2010, the township assessor retroactively revoked the exemption for the years 2007–09³⁶.

When Michael challenged the revocation, the Michigan tax court held that resubmission of the affidavit was unnecessary and that the Pungs were entitled to the exemption for the tax years 2007–2011³⁷. Although the initial 2012 tax bill included the exemption, the assessor ignored the tax court's decision and revoked the exemption for the 2012 tax year.³⁸ When Michael paid the amount due on the initial 2012 bill, the assessor reported the property as delinquent and the county brought foreclosure proceedings while simultaneously appealing the tax court's holding that the Pungs were entitled to the exemption.³⁹ The county sent several notices of the foreclosure proceedings to Timothy Pung at Michael's address, but Michael inexplicably did not respond.⁴⁰ The county made no mention of the foreclosure proceedings to Michael

33. Brief for Petitioner, *Pung v. Isabella County*, No. 25-95 (U.S. *cert. granted* Oct. 3, 2025), 2025 WL 3489419.

34. *Id.* at 4.

35. *Id.* at 3–4.

36. *Id.* at 4.

37. *Id.*

38. *Id.* at 5.

39. *Id.* at 5–6.

40. Joint Appendix at JA-86, JA-90–91, *Pung v. Isabella countyCnty.*, No. 25-95 (U.S. *cert. granted* Oct. 3, 2025), 2025 WL 3516487 (Michigan Court of Appeals opinion).

or his lawyer when they came into contact at the January 2015 oral argument in the Michigan Court of Appeals on the county's appeal of the tax court's decision.⁴¹

On February 10, 2015, the Michigan Court of Appeals affirmed the tax court's determination that the Pungs were entitled to the exemption for the years 2007–2011.⁴² Ten days later, the county obtained a judgment of foreclosure based on the alleged deficiency in 2012 taxes, but did not send notice of the judgment to Michael Pung until April 30, after the estate's redemption rights had expired.⁴³ The county took title to the property. Michael Pung then brought a proceeding challenging the foreclosure, and the trial court invalidated the foreclosure, holding that Pung had not received constitutionally adequate notice of the foreclosure proceedings.⁴⁴ The trial court reasoned that the county had constructive notice that Pung had not received adequate notice because Pung would not have been arguing against the county's appeal of the 2010–2011 taxes if the appeal would have been moot a month later when the foreclosure was concluded.⁴⁵ That constructive notice, the trial court held, obligated the county to make additional efforts to ensure that Pung had notice of the foreclosure proceedings.⁴⁶ However, the Michigan Court of Appeals reversed, holding that the notice was constitutionally adequate.⁴⁷ Pung did not seek review of that determination. On remand, in June 2018, the county obtained a final judgment of foreclosure, taking absolute title to the Pung home.⁴⁸

In short, the Michigan courts upheld a foreclosure for a deficiency in 2012 taxes because Pung did not respond to the

41. *Id.* at 6, Pung v. Isabella County, No. 25-95, 2025 WL 3489419.

42. *Id.*

43. *Id.*

44. Joint Appendix, at JA-94–106., Pung, No. 25-95, 2025 WL 3516487.

45. *Id.* at JA-104.

46. *Id.* at JA-105105–106.

47. *Id.* at JA-84–85.

48. Pung v. Cnty. of Isabella, 632 F. Supp. 3d 743, 744 (E.D. Mich. 2022), *aff'd sub nom.* Pung v. Kopke, No. 22-1919, 2025 WL 318222 (6th Cir. Jan. 28, 2025), *cert. granted sub nom.* Pung, No. 25-95.

county's foreclosure notices—even though the courts had established that the Pungs were entitled to an exemption for the years 2007–2011 on grounds that would have been equally applicable to the 2012 tax year.

Subsequently, the county conducted an auction sale which brought a sale price of \$76,008.⁴⁹ The assessed fair market value of the property was \$194,400, and the auction sale purchaser resold the property for \$195,000.⁵⁰ Michael Pung then brought an action in federal district court, alleging an unconstitutional taking and a violation of the Excessive Fines Clause. The District Court awarded summary judgment to Pung on the claim for the surplus between the auction sale price and the taxes allegedly due, but denied his claim for loss in the property's equity.⁵¹ The Sixth Circuit affirmed.⁵²

B. The Court's Options

The county's treatment of the Pungs was inexcusable. The question for the Court is what constitutional remedy the Pungs are entitled to receive—the surplus proceeds awarded by the District Court and the Sixth Circuit, or the difference between fair market value and the amount of the tax delinquency. This Part examines the case for each of the options available to the Court.

1. Affirm the Sixth Circuit

The Court's first option in *Pung* is to affirm the Eighth Circuit's decision, holding that *Tyler* entitled defaulting taxpayers to surplus proceeds derived from the sale of tax-delinquent property, and no more. Although the Court in *Tyler* did not

49. *Id.*

50. Brief for Petitioner at 8, *Pung*, No. 25-95, 2025 WL 3489419.

51. *Pung*, 632 F. Supp. 3d at 751–752.

52. *Pung v. Kopke*, No. 22-1919, 2025 WL 318222 (6th Cir. Jan. 28, 2025), *cert. granted sub nom. Pung*, No. 25-95. The Sixth Circuit also dismissed the excessive fines claim because the Michigan statute was not designed to be punitive.

explicitly address whether an owner might obtain recovery based on fair market value when that value exceeds the proceeds of a foreclosure sale, its analysis indicates that recovery is limited to surplus proceeds.⁵³

First, the Court relied on history to establish the contours of the owner's property right. The Chief Justice started by citing English statutes and Blackstone for the proposition that when a tax collector seized a taxpayer's property, the collector was obligated to restore the "overplus" to the taxpayer when the property is sold.⁵⁴ He then turned to a Civil War-era statute imposing a nationwide tax but providing that if the tax were not paid the property would be sold and the "surplus" would be paid to the owner, and to a later case entitling an owner to surplus even though a subsequent statute did not explicitly mention the surplus.⁵⁵

Second, the Court focused on contemporary Minnesota law in other contexts. Minnesota law permitted seizure and sale of property to satisfy income tax debts, but provided for refund to the owner of any surplus proceeds from the sale.⁵⁶ The Chief Justice also cited Minnesota law with respect to mortgages, which, like the law of every other state, entitles the property owner to any surplus proceeds of a foreclosure sale.⁵⁷ The Court did not even suggest that in these instances, the taxing authority or the foreclosing mortgagee would be required to restore the fair market value of the property to the defaulting taxpayer or borrower.

If affirmance seems unfair to the Pungs, it is probably because the foreclosure in the *Pung* case was not the garden variety

53. In addition to the Sixth Circuit in *Pung* itself, the Sixth Circuit reached the same conclusion in *Freed v. Thomas*, 81 F.4th 655 (6th Cir. 2023), as did a district court in *Reado v. City of New Orleans*, No. CV 24-2451, 2025 WL 3250901 (E.D. La. Nov. 21, 2025), and the Michigan Supreme Court in *Yono v. Cnty. of Ingham*, No. 166791, 2025 WL 1957960 (Mich. July 16, 2025). In *Yono*, there were no surplus proceeds because the public auction brought no bidders, at which point the county treasurer sold the property to a land bank for \$1. *Id.*

54. 598 U.S. at 639–40.

55. *Id.* at 642–43.

56. *Id.* at 645.

57. *Id.*

tax foreclosure at issue in *Tyler*. Unlike most defaulting property owners, the Pungs were consistently willing and able to pay all taxes due; the dispute was about whether taxes were in fact due. The problem was a process failure: if the Pungs had known about the impending foreclosure, they certainly would have successfully challenged the foreclosure, as they had successfully challenged rejection of the tax exemption for prior years. If the county failed to provide adequate notice of the foreclosure sale, the Supreme Court's opinion in *Jones v. Flowers*⁵⁸ establishes that the Pungs would have a due process claim for invalidating the foreclosure sale.

For two reasons, however, the Court cannot invoke due process to provide the Pungs a more complete remedy. First, it appears that the county provided Michael Pung, who held legal title to the property as executor, with notice reasonably calculated to apprise him of the impending foreclosure. The county sent notices to his home address and those notices were not returned undelivered. The county also posted a notice on the door of the tax delinquent property. Second, even if the notice to Michael Pung was constitutionally inadequate, Pung raised those issues in the earlier Michigan state court proceeding, persuading the trial court, but not the Michigan Court of Appeals. Because Pung did not appeal the Michigan Court of Appeals decision, *res judicata* principles would bar the Supreme Court from considering those issues anew.

2. Reverse and Hold the County Liable for a Taking of Fair Market Value

The case for basing an award to the Pungs on fair market value of their property is straightforward. The first step is identifying the taking, which occurred when the county took title to the property in the foreclosure proceeding. The Sixth Circuit said

58. 547 U.S. 220 (2006) (holding that due process requires reasonable steps to provide owner with notice of impending tax sale).

as much in *Hall v. Meisner*,⁵⁹ a case cited by the Court in *Tyler*. Other courts have indicated, in somewhat different contexts, that once a state officer authorizes a permanent physical occupation, a taking occurs.⁶⁰ The second step is measuring compensation, and the Court has said, in *Brown v. Legal Foundation of Washington*, that when the government takes property, just compensation is measured by the owner's loss, not the government's gain.⁶¹

This approach avoids questions that arise if the government elects to retain the property rather than selling it to a third party,⁶² or if the property's value increases or decreases before the government conducts the sale. And if the taking occurs at the moment the municipality forecloses, it avoids questions about the defaulting owner's rights between that moment and the time of the foreclosure sale.⁶³

From the perspectives of fairness and efficiency, however, awarding compensation based on fair market value has a huge downside: it would cripple government efforts to collect delinquent property taxes—at the expense of taxpaying residents. If a municipality faced a lawsuit seeking fair market value every time it foreclosed on delinquent property, foreclosures would become impractical. Rather than providing the municipality with a reliable mechanism for collecting unpaid taxes, foreclosure would leave the municipality with negative revenue whenever a foreclosure sale

59. 51 F.4th 185, 196 (6th Cir. 2022) (concluding that the county's taking of absolute title was the taking, because "[b]efore that event, the plaintiffs held equitable title; after it, they held no title at all.>").

60. See *Kidd v. Pappas*, No. C 7061, 2025 WL 3507374, at *18 (N.D. Ill. Dec. 8, 2025) (citing *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982) and *Cedar Point Nursery v. Hassid*, 594 U.S. 139 (2021)), (in the context of invalidating Illinois tax lien sale procedures, court concludes that by authorizing permanent physical occupation by tax lien purchaser, county treasurer authorized a taking).

61. 538 U.S. 216, 235–36 (2003).

62. See *Jackson v. Southfield Neighborhood Revitalization Initiative*, No. 166320 (Mich. July 16, 2025) (holding that delinquent taxpayer has a taking claim when government exercises statutory right of first refusal rather than holding public sale).

63. See *Ramsey v. City of Newburgh*, No. 23-CV-8599, 2024 WL 4444374 (S.D.N.Y. Oct. 8, 2024) (holding taking claim unripe upon foreclosure because city had not yet sold the delinquent property).

brought less than market value (or when the cost of litigation over fair market value exceeded the taxes collected through the foreclosure process). One or both of these circumstances are the norm. In that environment, no sensible municipality would use tax foreclosures. Of course, government could turn to other mechanisms for collecting delinquent taxes, as many governments do, but those mechanisms, too, could engender taking claims (as Part IIIB illustrates).

Moreover, the scope of a holding that requires government to reimburse a defaulting property owner for the market value of property upon foreclosure could threaten basic understandings of property law. Such a holding would seem to apply equally to federal efforts to execute judgments for unpaid income taxes against the property of delinquent taxpayers and to mortgage foreclosures in those states that require judicial supervision of those foreclosures. If a municipality or state were required to reimburse a property owner for the difference between fair market value and taxes owed even though the municipality did not benefit from that market value, why wouldn't a bank (or the state that authorized the foreclosure) be required to reimburse a mortgagor for the difference between fair market value and amounts owed on the mortgage, even if the bank's foreclosure sale brought less than market value?

The *Tyler* opinion's citation to Blackstone suggests a way out of the dilemma: owners hold property subject to an implied contract that allows the government to treat the property as security for tax obligations.⁶⁴ Blackstone focused on the flip side of the implied contract—the government's obligation “to render back the overplus” upon sale—but that obligation arises only if there is an implied understanding that the government may sell the property in the first place. On the implied contract theory, the government's obligations with respect to a tax sale parallel the obligations of a lender foreclosing on a security interest: ensure

64. 598 U.S. 631, 640 (2023).

that any sale incorporates procedural safeguards for the defaulting owner and restore any surplus to that owner.⁶⁵

3. Reverse and Hold that the County Imposed an Excessive Fine on the Pungs

Another option for providing relief to the Pungs would be to hold that the forfeiture of their property constituted an excessive fine in violation of the Eighth Amendment. Justices Gorsuch and Jackson endorsed that approach in *Tyler*.⁶⁶ The excessive fines approach would avoid the need to determine when a taking occurred and precisely what property interest the county took. Unfortunately for the Pungs, the case for finding an excessive fines violation when government denies the owner surplus from a foreclosure sale is far stronger than when the owner demands fair market value of the property.

Unlike other Eighth Amendment protections, the excessive fines provision applies in civil actions as well as criminal proceedings, and it applies in particular to civil forfeitures.⁶⁷ But the Court has indicated that the provision applies only to forfeitures that are intended, at least in part, to punish.⁶⁸ Applying that standard, the court has invalidated a statute providing for forfeiture of real property used to commit drug crimes,⁶⁹ and a statute mandating forfeiture of funds transported abroad in violation of a reporting violation.⁷⁰ But in *United States v. Bajakian*,⁷¹ the Court distinguished traditional in rem forfeitures involving forfeiture of goods imported without payment of duties,

65. The implied contract theory would presumably also impose on the foreclosing government entity an obligation to sell the property of the defaulting owner; government could not simply retain the property and avoid payment of any surplus. *See, e.g. Jackson*, slip op.

66. 598 U.S. 631 at 648 (Gorsuch, J., concurring).

67. *Austin v. United States*, 509 U.S. 602 (1993).

68. *Id.* at 609–11.

69. *Id.*

70. *United States v. Bajakian*, 524 U.S. 321 (1998).

71. *Id.*

concluding that that those forfeitures were not considered punishment, but instead served “the remedial purpose of reimbursing the government for the losses accruing from the evasion of customs duties,”⁷² even though the property forfeited far exceeded the customs duties the government was owed. In light of cases permitting forfeiture for nonpayment of duties (a form of tax),⁷³ forfeiture of land to reimburse government for nonpayment of property tax might also be conceptualized as remedial rather than punitive.

Even if forfeiture of land were treated as punishment for nonpayment of taxes, it would be much more difficult to treat as punishment a foreclosure process in which the foreclosed owner is paid the surplus resulting from the government’s sale of the tax-delinquent property. Although the prospect of foreclosure may have a deterrent effect, when government commits to paying the surplus to the former owner, it is quite clear that the animating purpose behind the foreclosure is collection of tax due.

Finally, even if a tax foreclosure were treated as a fine for purposes of the excessive fines clause, it would be difficult to characterize the fine as excessive when the government retains only so much money as necessary to satisfy the tax obligations associated with the property, returning the balance to the owner. For the Pungs, the most plausible path to reversal on an excessive fine theory would be to focus on what the county did before a court held that they were entitled to the surplus from the foreclosure sale. That is, until court decisions established that the county was obligated to return any surplus to property owners, the county was prepared to retain all of the proceeds from the foreclosure sale. Perhaps the Court could treat that as an excessive fine, and then conclude that the remedy for the excessive fine was restoration of the Pung property or its value. That approach, however, would be inconsistent with the Court’s opinion in *Bajakian*, where upon concluding that forfeiture of all funds transported in violation of a

72. *Id.* at 342.

73. *See, e.g.,* *Stockwell v. United States*, 80 U.S. 531 (1871).

reporting violation constituted an excessive fine, the Court then upheld decisions of the courts below ordering forfeiture of a lesser amount.⁷⁴

4. Summary

As Chief Justice Roberts observed in *Tyler*, paying property taxes is a reasonable condition on property ownership.⁷⁵ Those who fail to satisfy that condition impose greater burdens on those who do. Tax foreclosures have provided a time-honored mechanism for protecting taxpaying members of the public. Nothing in *Tyler* suggests that states and municipalities must abandon tax foreclosures; indeed the most sensible reading of the Court's opinion suggests an implicit bargain between municipalities and taxpayers: government may treat property as security for tax obligations, but government must hold procedurally fair foreclosure sales and turn over any surplus to the delinquent taxpayer. A reversal in *Pung* could threaten that bargain at the expense of taxpaying members of the public.

III. BEYOND *PUNG*: WHAT CONSTITUTIONAL LIMITS ON PROPERTY TAX COLLECTION?

Pung presents an attractive case for property rights advocates on the right and foreclosure opponents on the left. The behavior of local officials showcased government at its worst; the town and county treated the Pungs outrageously. *Pung*, however, is not the typical case of a delinquent owner whose failure to pay taxes imposes a greater burden on other taxpayers. And the tax sale process at issue in *Tyler* and *Pung* is only one of the mechanisms states and municipalities have developed for dealing with those delinquencies. Many government entities collect taxes

74. *Bajakian*, 524 U.S. 321 at 326 (noting that trial court had ordered forfeiture of \$15,000, and that the property owner had not appealed from that order).

75. *Tyler v. Hennepin Cnty.*, 598 U.S. 631, 646 (2023).

on delinquent properties by selling tax liens to private parties, who acquire the right to collect from the defaulting taxpayer, a process that raises constitutional questions not addressed in *Tyler*.⁷⁶ Other states have recently revised, or are in the process of revising, their statutes in light of *Tyler*.⁷⁷ As a consequence, *Pung* is unlikely to be the last word in the conflict between taxpayers and delinquent owners. This Part sketches some of the unresolved issues.

A. Procedural Issues

Geraldine Tyler sought surplus proceeds five years after the county sold the property to a third-party buyer. Because Minnesota law held that she was not entitled to the proceeds in any event, timing and process were irrelevant to the Court's taking analysis. But suppose Minnesota gave a delinquent owner 30 days, or six months, to make a claim to surplus proceeds and provided that the county could keep the proceeds if no claim were made. Would the statute have worked a taking? Put another way, must the foreclosing government entity arrange for automatic payment to the delinquent taxpayer, or may government impose an affirmative burden on the taxpayer to make a claim within a reasonable period?

The *Tyler* Court's citation to *Nelson v. City of New York*⁷⁸ suggests that so long as the foreclosing entity provides a mechanism for recovering the surplus, a defaulting taxpayer who

76. See generally Lawrence Ponoroff, *The Curious Case of Tyler v. Hennepin County*, 48 VA. TAX REV. 181 (2023); Cameron M. Bartlett & Christopher G. Bradley, *Property Tax Privateers*, 41 VA. TAX REV. 89 (2021); Michelle Z. Marciony, *Making Debt Pay: Examining the Use of Property Tax Delinquency as a Revenue Source*, 62 EMORY L.J. 217 (2012); Frank S. Alexander, *Tax Liens, Tax Sales, and Due Process*, 75 IND. L. J. 747, 761–62 (2000); Georgette C. Poindexter, Elizabethann Rogovy & Susan Wachter, *Selling Municipal Property Tax Receivables: Economics, Privatization, and Public Policy in an Era of Urban Distress*, 30 CONN. L. REV. 157 (1997).

77. See, e.g. S.B. 1431, 56th Leg., 2d Sess. (Ariz. 2024); OR. REV. STAT. § 77.3 (mandating study to ensure compliance with *Tyler*); H.B. 2062, 102nd Gen. Assemb., 2d Sess. (Mo. 2024).

78. *Tyler*, 598 U.S. 631 at 643–44, citing *Nelson v. City of New York*, 352 U.S. 103 (1956).

fails to use the mechanism would lose any taking claim. In *Nelson*, the city ordinance conditioned recovery of the surplus on answering the foreclosure proceeding with an assertion that the property's value exceeded the tax due.⁷⁹ The *Tyler* court concluded that because the New York procedure "simply defined the process through which the owner could claim the surplus, we found no Takings Clause violation."⁸⁰

In many cases, the foreclosing entity will not know precisely who has what interests in the defaulted property. For instance, in *Tyler* itself, there were allegations that mortgages were outstanding on Tyler's condominium unit.⁸¹ A mortgagee's interest would generally enjoy priority over the fee owner's interest. But without costly investigation, the foreclosing entity would have no way to know how much was outstanding on a mortgage. Reflexively paying out surplus proceeds to the fee owner might constitute a taking of the mortgagee's interest.

Even if the Court were to hold in *Pung* that a foreclosing municipality's liability to the defaulting owner must be based on fair market value rather than surplus proceeds, questions would arise about the state's power to limit the time during which a defaulting owner must assert the claim for compensation. Every state already gives the defaulting owner a redemption period during which the owner can free the property from government claims by paying the taxes due. When the owner does not redeem during that period, how long must the state give the owner to claim just compensation before the municipality can acquire title free of a taking claim? Inverse condemnation claims, even when styled as federal claims under 42 U.S.C. §1983, are subject to statutes of limitations.⁸² Even if the state could not specify a short statute of

79. *Nelson*, 352 U.S. 103 at 110.

80. *Tyler*, 598 U.S. 631 at 644.

81. *Id.* at 636 (public records indicated that the condominium might be subject to a mortgage and a lien for unpaid homeowners' association fees)

82. Section 1983 includes no statute of limitations, but the Court has held that section 1983 claims should be treated as personal injury claims for statute of limitations purposes,

limitations targeting claims by defaulting taxpayers, could it accomplish the same result by shortening the redemption period so that the taking that triggers compensation comes earlier in the collection process?

For example, the redemption period at issue in *Tyler* was three years; much longer than the period in *Pung*. If Minnesota shortened its redemption period from three years to three months and the Court concluded that the taking occurred at the expiration of the redemption period, triggering a claim to fair market value, would a defaulting taxpayer lose any just compensation claim at the expiration of the state's statute of limitations for personal injuries?

Precisely what processes will survive scrutiny after *Tyler* (and potentially *Pung*) will remain an open question,⁸³ especially as states amend their statutes in light of Supreme Court precedent.

B. Tax Lien Sales

The tax foreclosure processes at issue in *Tyler* and *Pung* resemble the familiar mortgage foreclosure process. When the government entity forecloses, it sells the property at auction and transfers a deed to the auction sale purchaser. Many states, however, use an entirely different process to collect delinquent property taxes: they sell tax liens. Sale of tax liens raises constitutional questions the Court did not consider in *Tyler* and that are not at issue in *Pung*, but that have started to arise in lower courts.

Although the process for selling tax liens differs materially from state to state, the basic principle is that the taxing entity, which holds a lien against delinquent property for taxes due, sells

subject to the general statute of limitations applicable to those claims. *Wilson v. Garcia*, 471 U.S. 261 (1985).

83. See *Wright v. Rollyson*, No. 2:24-cv-00474, 2025 WL 835040 (S.D. W. Va. March 17, 2025) (upholding statute that gives delinquent owner two years to seek surplus value before surplus is forfeited to the state).

that lien, usually at a public auction.⁸⁴ The purchaser acquires the right to collect the taxes due, together with interest, from the delinquent owner, and to foreclose on the property after a specified period if the delinquent owner does not pay the taxes.⁸⁵ In some states, the lien is awarded to the highest bidder at the auction.⁸⁶ In others, bidding is by interest rate, and the lien goes to the bidder who accepts the lowest interest rate on the delinquent owner.⁸⁷ Sometimes, the municipality avoids the public sale of tax liens and instead engages in a bulk sale to a third party trust that issues bonds backed by tax lien receivables.⁸⁸

From the municipality's perspective, selling the tax lien generates immediate revenue; the purchase price fills the revenue gap caused by the tax delinquency.⁸⁹ For the investor who purchases tax liens, the primary incentive is the interest that accrues on the tax lien, which typically exceeds market rates.⁹⁰ If, however, the defaulting owner does not pay the taxes and interest within a statutory redemption period, the investor has the right to foreclose, and in some states statutory foreclosure provisions authorize the tax lien purchaser to obtain a tax deed without a public sale.⁹¹ In an increasing number of states, especially since the

84. See generally, *Alexander*, supra note 74, at 770–75 (noting variation of procedures from state to state, and outlining major approaches).

85. *Id.* at 775–76 (describing general processes).

86. See, e.g. COLO. REV. STAT. § 39-11-115 (2024).

87. See, e.g. ARIZ. REV. STAT. § 42-18114 (2024).

88. See, e.g. N.Y. PUB AUTH LAW § 2345-b (authorizing municipality to enter into contract for sale of tax liens to municipal bond bank or its tax lien entity). See generally *Poindexter et al.*, supra note 74, at 185–86.

89. See *Marchiony*, supra note 74, at 222 (noting that tax delinquencies create revenue uncertainty). *Marchiony* notes that traditional foreclosure procedures generate unpredictable cash flow for municipalities, who might have to use debt financing to even out cash flow. *Id.* at 227–28.

90. See, e.g. ARIZ. REV. STAT § 42-18053(A) (providing for 16% interest on all delinquent taxes).

91. See, e.g. IND. CODE § 6-1.1-25-4.6.

Tyler decision, foreclosure of the tax lien requires a public auction.⁹²

If a delinquent taxpayer loses title through the tax lien process, when (if at all) does a taking occur? When the government sells the tax lien, title to the property does not change hands. The delinquent taxpayer still holds title to the property and has a right to redeem by paying the back taxes. If, at the expiration of the redemption period, the municipality transfers title to the lien purchaser without a public sale, there is no surplus, raising questions about what the delinquent taxpayer is entitled to recover. And if there is a public sale, it will be because the lien purchaser—typically not a government entity—has foreclosed. Finally, who is liable to provide just compensation to the delinquent owner—the municipality, or the lien purchaser?

These issues have begun to percolate through the lower courts. In *Edmundson Community Organization v. Mayor and City Council of Baltimore*,⁹³ a federal district court rejected the argument advanced by the city and tax lien purchasers that tax delinquent owners receive adequate compensation when they receive the surplus between the amount the lien purchaser pays at the tax lien sale and the amount of the tax delinquency. In denying a motion to dismiss the taking claim, the court concluded that the delinquent owners had adequately alleged that by providing only the value of the lien, rather than the value of the property, the city and the purchasers had failed to provide just compensation.⁹⁴ At the motion to dismiss stage, the court expressed no opinion on the ultimate calculation of just compensation.⁹⁵

In *Continental Resources v. Fair*,⁹⁶ the Nebraska Supreme Court held that a tax delinquent owner stated a taking claim when

92. See, e.g. FLA. STAT. § 197.502. In some states, a public sale is required only if the defaulting taxpayer requests it and a court deems the request reasonable. See, e.g. ARIZ. REV. STAT § 42-18204 (2024) (amended in 2024 in light of the *Tyler* decision).

93. 797 F. Supp. 3d 497 (D. Md. 2025).

94. *Id.* at 524, 528.

95. *Id.* at 525.

96. 10 N.W.3d 510 (Neb. 2024).

the county treasurer issued a tax deed to a tax lien purchaser, but as in the *Edmundson* case, the court did not indicate how compensation should be computed. The court also held that the tax lien purchaser—not the county—was liable for just compensation to the tax delinquent owner, reasoning that it was the purchaser’s request for a tax deed that extinguished the tax delinquent owner’s title, and that in the circumstances of tax lien foreclosures, a private entity can qualify as a state actor.⁹⁷ By contrast, other courts have held that a municipality may be held liable for a taking when it issues a tax deed even if the municipality receives no excess equity from the property.⁹⁸ They did not decide how compensation should be measured because the cases held only that the municipal defendants’ motions to dismiss should be denied.

Because the tax lien sale process is market driven—unlike the government foreclosure followed by sale of a tax deed process at issue in *Tyler* and *Pung*—finding that a state’s tax lien sale process works a taking may disadvantage defaulting owners in other ways. In jurisdictions that entitle a lien holder to a tax deed upon expiration of the defaulting owner’s redemption period, that entitlement is one of the financial incentives that lead investors to purchase tax liens. In jurisdictions where investors bid for tax liens in dollars, municipalities might seek to compensate for that lost incentive by raising the interest rate and penalties on unpaid tax—to the detriment of defaulting owners who want to redeem. Similarly, in jurisdictions where the successful bidder at a tax lien sale is the investor who bids the lowest interest rate, the interest rates bidders are willing to accept may rise, increasing the defaulting owner’s tax burden and reducing the value of the owner’s equity.

97. *Id.* at 407. *See also* 257-261 20th Ave., Realty, LLC v. Roberto, 327 A.3d 1177 (2025) (holding that lienholders can be treated as state actors and are not entitled to surplus equity that exceeds the value of certificates they purchased plus interest and related costs).

98. *See* Grady v. Wood Cnty. W. Va., 786 F. Supp. 3d 984, 994 (S.D.W. Va. 2025) *appeal dismissed*, No. 25-1606, 2025 WL 3488765 (4th Cir. Aug. 28, 2025); Kidd v. Pappas, No. 22 C 7061, 2025 WL 3507374 (N.D. Ill. Dec. 8, 2025); Top Metal Buyers Inc. v. Lopinot, No. 3:24-CV-1073, 2025 WL 2780046 (S.D. Ill. Sept. 30, 2025).

Of course, reducing the incentive to bid on tax liens might have other effects. It might leave some tax liens unpurchased, resulting in an increased burden on non-defaulting taxpayers. The actual effect a particular legal rule might have is uncertain, but if markets do respond, increasing the takings protection for defaulting owners is likely to have an adverse effect, either on taxpaying property owners or on the defaulting owners themselves.

C. Interest and Penalties

Neither *Tyler* nor any of the post-*Tyler* decisions has challenged the right of a municipality or a private tax-lien purchaser to retain statutorily authorized interest or penalties on taxes due. Currently, Connecticut authorizes municipalities to collect 18% interest on delinquent taxes;⁹⁹ other states authorize less.¹⁰⁰ But money is fungible. If a state or municipality responds to *Tyler* (or to the prospect of limitations on tax lien sales) by increasing the interest or penalties on overdue taxes, would that increase be subject to a takings analysis? Surely the Court would not want to impose a constitutional maximum on statutory interest rates. If a local government were not permitted to authorize penalties and interest that substantially exceed market interest rates, the government would be forced, in effect, to provide long-term loans to defaulting owners at the expense of taxpaying neighbors. But at some point, in sorting out the limits on local government's tax collection mechanisms, the Court may have to confront the claim that interest and penalties constitute takings or excessive fines.

99. CONN. GEN. STAT. § 12-146 (2024).

100. Minnesota statutes, for instance, authorize interest based on the prime rate. See MINN. STAT. §§ 279.03(1a), 270C.40(5) (2025). The current rate set by the Minnesota Department of Revenue is seven percent. See *IntErest Rates for Minnesota Counties*, MINN. DEPT OF REVENUE <https://www.revenue.state.mn.us/interest-rates-minnesota-counties> [https://perma.cc/U8FV-HDLY]. In addition to interest, Minneosta authorizes penalties on unpaid property taxes, but the aggregate penalties may not exceed eight percent in the case of homestead property. MINN. STAT. § 279.01(1) (2025).

CONCLUSION

It is easy to portray the disputes in *Tyler* and *Pung* as David v. Goliath battles between a small property owner and the government. But when tax collection is at issue, Goliath is just an amalgam of other Davids who, unlike the defaulting owners, have paid their share of the costs of local government. The balance the Court struck in *Tyler* does not unfairly impair the interests of taxpaying property owners because requiring disgorgement of surplus proceeds does not significantly interfere with tax collection processes. By contrast, holding that a delinquent taxpayer is entitled to fair market value whenever a municipality requires a transfer of title to remedy tax defaults could force local governments to abandon a traditional mechanism for property tax collection while calling into question some prominent alternatives, leaving the debt uncollected. One hopes that as the Court approaches the *Pung* case it focuses at least as much on the taxpaying public as on the plight of property owners who have defaulted on their tax obligations.