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## HOME EQUITY THEFT: A RIGHT WITHOUT A JUST REMEDY

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### ABSTRACT

*Several local governments throughout the country have confiscated homeowners' real property for overdue real property taxes, sold those properties to investors at a discount, and pocketed millions of dollars in profits from the sales.<sup>1</sup> The victims of such "home equity theft" are disproportionately elderly, African American homeowners in gentrified urban communities.<sup>2</sup> One such victim, Geraldine Tyler, a*

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1. See generally *Ending Home Equity Theft*, PAC. LEGAL FOUND., <https://pacificlegal.org/property-rights/home-equity-theft> [https://perma.cc/4V8D-AE9X].

2. For a discussion of state surplus/equity-retention systems and their disproportionate effects on vulnerable populations such as the elderly, see generally Jenna Christine Foss, *State Theft in Real Property Tax Foreclosure Procedures*, 54 REAL PROP. TR. & EST. L.J.

*vulnerable ninety-four-year-old African American woman living in a nursing home, claimed that the government’s taking of her property’s value violated the U.S. Constitution.*<sup>3</sup> *In response, both a federal district court and a federal appellate court denied her claim, declaring that she lacked a cause of action.*<sup>4</sup> *However, the U.S. Supreme Court in Tyler v. Hennepin County held that Ms. Tyler does have a cause of action,*<sup>5</sup> *based on the Fifth Amendment’s Takings Clause,*<sup>6</sup> *noting that the state’s enabling statute effected a “classic taking.”*<sup>7</sup>

*This essay argues that the Tyler Court failed to provide Ms. Tyler with a just remedy as dictated by the U.S. Constitution, as well as by a fundamental principle of common law jurisprudence, which states that for every right, there is a remedy (hereinafter “the rights/remedy principle”).*<sup>8</sup>

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93 (2019).

3. See *Tyler v. Hennepin Cnty.*, 505 F. Supp. 3d 879, 885 (D. Minn. 2020).

4. *Tyler v. Hennepin Cnty.*, 143 S. Ct. 1369, 1374 (2023); see *The Supreme Court, 2022 Term—Leading Cases—Constitutional Law—Fifth Amendment—Takings Clause: Tyler v. Hennepin County*, 137 HARV. L. REV. 310, 311-12 (2023) [hereinafter *Harvard Law Review*].

5. 143 S. Ct. at 1373.

6. See U.S. CONST. amends. V, XIV (applying the Takings Clause to state and local governments).

7. See 143 S. Ct. at 1376.

8. See 3 WILLIAM BLACKSTONE, COMMENTARIES \*23, \*109 (“[I]t is a general and indisputable rule, that where there is a legal right, there is also a legal remedy, by suit or action at law, whenever that right is invaded.... For it is a settled and invariable principle in the laws of England, that every right when with-held must have a remedy, and every injury it’s [sic] proper redress.”). This principle was recognized and adopted by Chief Justice Marshall in *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163-66 (1803). The rule reflects the well-known Latin maxim “*ubi jus, ibi remedium*.” See *Ubi jus ibi remedium*, OXFORD REFERENCE, <https://www.oxfordreference.com/display/10.1093/oi/authority.20110803110448446> [<https://perma.cc/5JTM-TTX5>]; see also JOHN NORTON POMEROY, 2 A TREATISE ON EQUITY JURISPRUDENCE AS ADMINISTERED IN THE UNITED STATES OF AMERICA ADAPTED FOR ALL THE STATES AND TO THE UNION OF LEGAL AND EQUITABLE REMEDIES UNDER THE REFORMED PROCEDURE § 423 (Spencer W. Symons ed., 5th ed. 1941); cf. Benjamin Plener Cover, *The First Amendment Right to a Remedy*, 50 U.C. DAVIS L. REV. 1741, 1747 (2017) (“[T]he remedial interpretation: that the [First Amendment] right to petition includes the limited right of a person who suffers legal injury (or a sufficient threat thereof) to obtain a minimally adequate remedy from the courts. In short, I argue that the First Amendment guarantees a right to a remedy.”).

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## INTRODUCTION

This Article asserts that the *Tyler* decision poses a jurisprudential quagmire. On the one hand, the *Tyler* Court recognized that property owners have a right to the equity/profit from tax adjudication sales, holding that Ms. Tyler had a cause of action to pursue a remedy.<sup>9</sup> On the other hand, the Court failed to establish a meaningful remedy for those homeowners who were wrongfully affected.<sup>10</sup> This quagmire will be analyzed in several parts. Part I provides the context of Ms. Tyler's claim by presenting how the property tax adjudication sale process functions to confiscate the ownership of homeowners' property. Part II tells the story of how a vulnerable, elderly, African American woman lost both the ownership and the value of a condominium via a government adjudication sale for past-due property taxes and of her claim of a wrongful taking of the equity in her condo, alleging a violation of both the U.S. Constitution and the Minnesota State Constitution. Part III presents the Supreme Court's holding and dicta in *Tyler*.<sup>11</sup> Part IV argues that the Court's granting of a procedural remedy—that is, a cause of action—ignores both the Takings Clause's expressed remedy for a taking and the time-honored fundamental principle of common law jurisprudence. This Article concludes that both the Takings Clause expressly provides for just compensation and the rights/remedy principle calls for a substantive remedy for the *Tyler* victims: the immediate, national cessation of the taking of people's equity in tax foreclosures of real estate and an aggressive compensatory response to *Tyler*.

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9. See *Tyler*, 143 S. Ct. at 1380.

10. See *id.*

11. The author intentionally omits discussion of the Ms. Tyler's Eighth Amendment claim of Excessive Fines, which was dismissed by most of the justices, as well as the question of the constitutionality of the Minnesota enabling statute, which was not discussed in the Court's opinion. While the unanimous decision failed to address Ms. Tyler's claim of excessive fines under the Eighth Amendment, Justice Gorsuch, with whom Justice Jackson joined, issued a concurring opinion relative to that issue. See *id.* at 1381-82 (Gorsuch, J., concurring).

## I. GOVERNMENT'S ADJUDICATED TAX SALE LAW/PRACTICE

Several state governments throughout the country have enacted laws enabling local governments to foreclose on delinquent property taxes of homeowners, sell those adjudicated properties in a public auction, and retain any profits from the sale for governmental purposes.<sup>12</sup> To the contrary, Ms. Tyler argued that the profits from the sales are arguably the homeowners' equity, which is the positive difference between the auctioned sale price minus the delinquent taxes and penalties.<sup>13</sup>

Relative to the *Tyler* case, Hennepin County (the County) relied on the State of Minnesota's tax adjudication law to cancel the plaintiff's ownership of the condo in controversy.<sup>14</sup> In Minnesota, the tax adjudication process and subsequent tax auction take place over several years, with required notice to be provided to the property owner and opportunities for the owner to redeem the lien and retain title by paying the past-due taxes and penalties.<sup>15</sup> The process is triggered by a taxpayer's failure to pay property taxes on their property.<sup>16</sup> In Minnesota, unpaid property taxes become a lien against the subject property at the time the taxes are assessed.<sup>17</sup> Property taxes that are not paid during the year in which they are due become delinquent on January 1 of the following year.<sup>18</sup> The property tax procedure then jumps through several procedural hoops, such as the county auditor identifying properties that are delinquent, filing a delinquent tax list as well as a notice of action (which are published twice) and then ultimately a judgment against a property.<sup>19</sup> After the judgment against the property occurs, each parcel with an unsatisfied judgment is sold to the state through a

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12. See generally Foos, *supra* note 2. Minnesota is not alone in its retention of surplus equity following a tax-foreclosure sale of real property. At the time of the decision, twelve states and D.C. retained surplus equity in cases such as Ms. Tyler's. See *Ending Home Equity Theft*, *supra* note 1.

13. See *Tyler v. Hennepin Cnty.*, 505 F. Supp. 3d 879, 885 (D. Minn. 2020).

14. See *id.* at 883-85.

15. MINN. STAT. § 272.31 (2024).

16. *Id.*

17. *Id.*

18. See MINN. STAT. § 279.03(1) (2024).

19. See *Tyler*, 505 F. Supp. 3d at 883.

procedure by which the county (acting on behalf of the state) “bid[s] in” (i.e., purchases the property for) the amount of delinquent taxes, penalties, costs, and interest.<sup>20</sup> The title is then vested in the state, and the county notifies the delinquent taxpayer and anyone who may claim an interest in the property of their right to redeem the property by paying all the taxes and fees.<sup>21</sup>

Subsequently, the property owner has two options: (1) the owner may make a “confession of judgment,” which consolidates their delinquency and pays installments over five-to-ten years, or (2) alternatively, the owner may not exercise this right of redemption, and a final forfeiture will ensue.<sup>22</sup> If a final forfeiture occurs, absolute title to the property arguably vests in the state, and all taxes, penalties, costs, interest, and special assessments are canceled, along with all other liens against the property.<sup>23</sup> Consequently, in her lawsuit against the County, Ms. Tyler challenged these foreclosure practices and the laws that authorized them, as will be discussed next.

## II. A VULNERABLE CITIZEN’S CLAIM OF GOVERNMENTAL EQUITY THEFT

Geraldine Tyler, at the time of the case, was a ninety-four-year-old African American woman who had purchased a condominium in Minneapolis in 1999.<sup>24</sup> For years, she had lived in the condo as her primary residence until she moved to a senior community in 2010.<sup>25</sup> Unfortunately, she fell behind in paying the annual real estate property taxes on the condo that was due to the defendant, Hennepin County.<sup>26</sup>

By 2015, Ms. Tyler had accumulated approximately \$2,000 in unpaid taxes and \$13,000 in accrued interest and penalties.<sup>27</sup> Pursuant to Minnesota’s tax forfeiture procedures, the County

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20. MINN. STAT. § 280.01 (2024).

21. *See Tyler*, 505 F. Supp. 3d at 884.

22. *Id.*

23. *Id.*

24. *See Tyler v. Hennepin Cnty.*, 143 S. Ct. 1369, 1374 (2023).

25. *Id.*

26. *Id.*

27. *Id.*

seized ownership of Ms. Tyler’s condo.<sup>28</sup> Again, following state adjudication laws, the County auctioned the title to the condo, sold it for \$40,000, and kept the overdue taxes, penalties, and fees, as well as the surplus or equity beyond the sum of money in default.<sup>29</sup> In 2019, Ms. Tyler sued the County and its officials in federal court.<sup>30</sup> She argued that the County’s retention of the surplus/equity value of her condo, in the amount of \$25,000, constituted a wrongful taking, without just compensation, in violation of the Takings Clause of the Fifth Amendment<sup>31</sup> and imposed an excessive fine in violation of the Excessive Fines Clause of the Eighth Amendment.<sup>32</sup> In her amended complaint, Ms. Tyler additionally alleged that:

Defendants’ actions are arbitrary and capricious and fail to comport with substantive due process under the United States Constitution as it [sic] and the relevant Minnesota statutes providing for seizure of the *surplus* are not necessary or even rationally related to the objective sought to be achieved—collection of delinquent taxes—and are not a reasonable means to a permissible objective.<sup>33</sup>

She also brought “the same challenge under the Minnesota Constitution.”<sup>34</sup> Further, she claimed “that the County was unjustly enriched when it seized and sold her condo and retained the surplus equity.”<sup>35</sup>

The County defended their actions by arguing that both the tax adjudication laws as well as the adjudication sale properly followed prescribed state laws.<sup>36</sup> They argued that the alleged taking of Ms. Tyler’s equity did not occur because Ms. Tyler no longer owned the

28. *Id.*

29. *Id.*

30. Tyler v. Hennepin Cnty., 505 F. Supp. 3d 879, 889 (D. Minn. 2020); *see also* U.S. CONST. amends. V, VIII.

31. U.S. CONST. amend. V. Ms. Tyler argued this was a wrongful taking pursuant to the Takings Clause of the Fifth Amendment to the United States Constitution and to Article 1, Section 13 of the Minnesota State Constitution, which states that “[p]rivate property shall not be taken, destroyed or damaged for public use without just compensation therefor, first paid or secured.” MINN. CONST. art. 1, § 13.

32. Tyler, 505 F. Supp. 3d at 889; U.S. CONST. amend. VIII.

33. Tyler, 505 F. Supp. 3d at 897 (quoting Amended Complaint ¶ 119, Tyler v. Hennepin Cnty., 505 F. Supp. 3d 879 (D. Minn. 2020)).

34. *Id.*

35. *Id.* at 899.

36. *See id.*

property at the time of the auction because the title to the property had been properly transferred to the County several years prior.<sup>37</sup> Hence, the County alleged that Ms. Tyler failed to present a claim for which the law provided a cause of action.<sup>38</sup> That is, Ms. Tyler was not entitled to the equity from the sale because she did not own the property at the time of the sale.<sup>39</sup>

Further, the County argued that Ms. Tyler did not have standing to bring her takings claim.<sup>40</sup> They cited *Lujan v. Defenders of Wildlife*<sup>41</sup> to support the proposition that a plaintiff must plead an injury in fact attributable to the defendant's conduct that is redressable by the court.<sup>42</sup> They argued that, when Ms. Tyler tried to claim standing—by saying that the equity on her house was her property—she lacked standing because she did not affirmatively “disclaim the existence of other debts or encumbrances” on her home worth more than the \$25,000 surplus.<sup>43</sup> The County cited their public record stating that the condo may have been subject to a \$49,000 mortgage and a \$12,000 lien for unpaid homeowners association fees.<sup>44</sup> Since the potential encumbrances exceeded the value of any financial interest that Ms. Tyler had in her home above her \$15,000 tax debt, the County claimed that she had suffered no financial harm and thus had no standing to sue.<sup>45</sup> In response to the County's argument, the Court noted that precedent cases, such as *United States v. Taylor*<sup>46</sup> and *United States v. Lawton*,<sup>47</sup> recognize the principle that a taxpayer is entitled to the equity in excess of the debt owed.<sup>48</sup> Next, the County argued that the *Taylor* and *Lawton*

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37. *See id.* at 885, 894-95.

38. *Id.* at 889.

39. *Id.* at 892 (citing MINN. STAT. § 282.08 (2024)). Minnesota is not alone in its retention of surplus equity following a tax-foreclosure sale of real property. At the time of the decision, twelve states and D.C. retained surplus equity in cases such as Ms. Tyler's. *See Ending Home Equity Theft*, *supra* note 1.

40. These facts are drawn from the Supreme Court's recitation of the arguments of the case. *See Tyler v. Hennepin Cnty.*, 143 S. Ct. 1369, 1374 (2023).

41. 504 U.S. 555, 560-61 (1992).

42. *Tyler*, 143 S. Ct. at 1374.

43. *Id.*

44. *Id.*

45. *Id.*

46. 104 U.S. 216, 219, 222 (1881).

47. 110 U.S. 146, 150-51 (1884).

48. *See Tyler*, 143 S. Ct. at 1378.



cases were superseded by *Nelson v. City of New York*<sup>49</sup> and are easily distinguishable from Ms. Tyler's claim.<sup>50</sup> Further, the County argued that Ms. Tyler had no interest in the surplus because she had constructively abandoned her home by failing to pay her taxes.<sup>51</sup> Lastly, the County argued that a reasonable condition on property ownership is paying property taxes<sup>52</sup> and, by neglecting that reasonable condition, the owner can be considered to have abandoned the property and, therefore, is not entitled to any compensation for its taking.<sup>53</sup> The Court noted that it heard the County's argument on this point but stated that "the County cites no case suggesting that failing to pay property taxes is itself sufficient for abandonment."<sup>54</sup>

Ultimately, as to Ms. Tyler's claim to the equity from the sale, the federal district court dismissed her suit for failure to state a claim.<sup>55</sup> Judge Schiltz agreed with the County's position that at the time of the sale of the property, Ms. Tyler no longer had a property interest in the property and therefore was not entitled to the equity.<sup>56</sup> Further, the court stated that Minnesota's tax-forfeiture scheme gave property owners no right to the equity in consideration for extinguishing any outstanding tax obligations on a piece of property.<sup>57</sup> Additionally, Minnesota statutory law had expressly abrogated Minnesota's common law that had previously recognized an interest in the equity in the "tax-foreclosure context."<sup>58</sup> Hence, the court ruled that without a source defining a legal right to the equity, Ms. Tyler had failed to state a viable claim and granted the County's motion to dismiss.<sup>59</sup>

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49. 352 U.S. 103, 110 (1956) (holding that "nothing in the Federal Constitution prevents [the City's retention of surplus in the absence of timely redemption] where the record shows adequate steps were taken to notify the owners of the charges due and the foreclosure proceedings").

50. *See Tyler*, 143 S. Ct. at 1378.

51. *Id.* at 1379-80.

52. *Id.* at 1380; *see also* *Texaco, Inc. v. Short*, 454 U.S. 516 (1982).

53. *See Tyler*, 143 S. Ct. at 1380.

54. *Id.*

55. *Id.* at 1374.

56. *Tyler v. Hennepin Cnty.*, 505 F. Supp. 3d 879, 885 (D. Minn. 2020).

57. *Id.* at 892.

58. *Id.* at 893.

59. *Id.* at 899.

Consequently, Ms. Tyler's attorneys filed an appeal to the Eighth Circuit. However, that court affirmed the lower court's decision against her.<sup>60</sup> The appellate court noted that the State had abrogated any right to the equity under Minnesota common law and did not constitute a wrongful taking if the sale was conducted after adequate notice.<sup>61</sup> Further, because Ms. Tyler had notice of the sale and multiple chances to avoid forfeiture, her failure to avail herself of the opportunities provided by the State precluded her takings claim.<sup>62</sup>

### III. A CLASSIC TAKINGS CASE

On August 19, 2022, Ms. Tyler's legal counsel petitioned the Supreme Court to hear her case. The Court granted certiorari on January 13, 2023, and handed down a decision on May 25, 2023. In *Tyler*, the Supreme Court opined on two novel questions: (1) whether a local government's enjoyment of the profit or equity from the public sale of adjudicated real property constitutes a taking protected by the Fifth and Fourteenth Amendments, and (2) whether the local government's actions violated the Eighth Amendment's Excessive Fines Clause.<sup>63</sup> Writing for a unanimous Court, Chief Justice Roberts held that Ms. Tyler had standing to sue, stated a claim under the Takings Clause, and was entitled to compensation.<sup>64</sup> On a side note, while concurring with the Court's decision, Justice Gorsuch criticized the lower courts' reasoning in dismissing Ms. Tyler's Eighth Amendment claim.<sup>65</sup> The Court then reversed

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60. *Tyler v. Hennepin Cnty.*, 26 F.4th 789, 793 (8th Cir. 2022) (holding 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").

61. *Id.*

62. *Id.*

63. *Tyler v. Hennepin Cnty.*, 143 S. Ct. 1369, 1373-74 (2023). As Ms. Tyler agreed that relief under the Takings Clause was sufficient, the Court did not decide her excessive-fines claim. *Id.* at 1381.

64. *Id.* at 1375-76. The County argued that Ms. Tyler lacked standing to bring her takings claim, but the Court concluded that the appropriation of her condo surplus in excess of her tax debt constituted a "classic pocketbook injury sufficient to give her standing." *Id.* at 1374. Because Ms. Tyler could have used the surplus to extinguish her other personal debts should they have existed, the withholding of her surplus inflicted a cognizable financial injury. *Id.* at 1374-75.

65. *Id.* at 1381-82 (Gorsuch, J., concurring).

and remanded the lower courts' decisions to the contrary, solely based upon Ms. Tyler's Fifth Amendment claim.<sup>66</sup>

Writing for the Court, the Chief Justice presents two lines of attack against Minnesota's forfeiture laws. First, he provided a thorough historical assessment of how Ms. Tyler's Fifth Amendment claim represented a "classic taking[s]" case.<sup>67</sup> He referred to the Magna Carta, where King John proclaimed that when collecting debts owed to him by a deceased person, any surplus "shall be left to the executors."<sup>68</sup> He noted that Parliament had endorsed this principle, giving the Crown the power to seize and sell a taxpayer's property to satisfy a tax debt but required the surplus to be returned to the original owner.<sup>69</sup> Following these principles, the Founding Fathers adopted provisions that require the government to sell only the amount of property equal in value to the taxpayer debt.<sup>70</sup> He concluded that a taxpayer's entitlement to the surplus/equity in excess of debt was a well-recognized principle and that Minnesota's scheme entirely precluded owners from obtaining the equity once absolute title had transferred to the State, suggesting a taking had occurred.<sup>71</sup>

To put this into context, one should note that the protection of private property, along with that of life and liberty, is one of the fundamental building blocks of our Nation.<sup>72</sup> Yet, the Founders memorialized the federal government's eminent domain power to take private property for public purposes.<sup>73</sup> Notwithstanding, in the Takings Clause of the Fifth Amendment, the Founders provided that any such governmental expropriation must provide just compensation to the property owner.<sup>74</sup> With the passage of the Fourteenth Amendment, state governments became subject to this constitutional provision.<sup>75</sup> The jurisprudence of the Takings Clause ranges from a *classic taking*, where the government expropriates

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66. *Id.* at 1380-81 (majority opinion).

67. *See id.* at 1376-78.

68. *Id.* at 1376.

69. *Id.*

70. *Id.*

71. *Id.* at 1376-78.

72. *See* U.S. CONST. amend. V.

73. *See id.*

74. *See id.*

75. *See* U.S. CONST. amend. XIV.

title to private property for public purposes,<sup>76</sup> to *regulatory takings*, where the government regulates the use of private property for public purposes.<sup>77</sup>

In addition to fundamental and constitutional principles, the Chief Justice looked to state law principles and practices in the foreclosure of other debts and the owner's right to retain the equity.<sup>78</sup> Here, the justice compared how the state laws have established protection of a real property owner's equity when there is a foreclosure of a defaulted-upon mortgage.<sup>79</sup> Further and consistent with this protection, the Court noted that, in all other cases, Minnesota recognizes a property owner's entitlement to the equity in excess of debt in two instances: (1) when nongovernmental entities such as private creditors are the sellers,<sup>80</sup> and (2) when the property subject to the state tax is income and personal property.<sup>81</sup>

Hence, the Court in *Tyler* provides an eloquent history of the Takings Clause and how it should apply to instances where local governments benefit from the equity that may result from an adjudicated tax sale.<sup>82</sup> In the end, the Court's dicta provides a convincing argument for why the County's confiscation of Ms. Tyler's equity constituted a "classic taking" of private property.<sup>83</sup> However, the Court's remedy was to find that Ms. Tyler was merely entitled to a cause of action, which meant that she would have the right to return to the federal district court in Minnesota to process her claim for compensation and nothing more.<sup>84</sup>

#### IV. WHY A PROCEDURAL REMEDY IS INADEQUATE AND UNJUST

In the *Tyler* case, the Court adopted the procedural approach to providing a remedy to the violation of a constitutional right.<sup>85</sup> That is, the Court held that, contrary to the lower courts' decisions, Ms.

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76. *See Tyler*, 143 S. Ct. at 1376.

77. *See Harvard Law Review*, *supra* note 4, at 310.

78. *Tyler*, 143 S. Ct. at 1375.

79. *Id.* at 1379.

80. *Id.*

81. *Id.*

82. *Id.* at 1376-78.

83. *Id.* at 1376.

84. *Id.* at 1381.

85. *Id.* at 1376.

Tyler had a cause of action to bring a lawsuit for damages. I contend that the Court's decision in *Tyler* was intentionally or unintentionally deficient. That deficiency is that the Court limited its finding that Ms. Tyler has a cause of action based on the Takings Clause. I argue that if the Court truly believed that a classic taking had occurred, as its dicta articulates, then it should have held that Ms. Tyler was entitled to just compensation, which is arguably the equity in the market value of the condo at the time of the auction. Such an outcome, in my opinion, is justified by two principles, one constitutional and the other fundamental.<sup>86</sup>

The Constitution provides limited specific remedies for violations of its provisions and the rights it protects. One notable exception is the Takings Clause of the Fifth Amendment.<sup>87</sup> There, the Founders are very specific in their provision of a remedy: that where the government exercised its eminent domain powers to take private property for governmental purposes, the property owner is entitled to "just compensation."<sup>88</sup> As the Court in *Tyler* went to great lengths to conclude that the Minnesota tax adjudication law was a classic taking case, one wonders how or why the Court decided to ignore the express remedy. That remedy was, and is, to provide Ms. Tyler just compensation for the taking.

Then there is the fundamental principle that the Court arguably should have adopted. That is, the rights/remedy principle. While this fundamental principle is not codified in federal law, it has been formally recognized and adopted in past Court decisions.<sup>89</sup> One noted legal constitutional scholar argues that the First Amendment guarantees a remedy for every right.<sup>90</sup> However, there is authority

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86. Cf. Ann Woolhandler, Julia D. Mahoney & Michael G. Collins, *Takings and Implied Causes of Action*, 2024 CATO SUP. CT. REV. 249, 260-66 (noting, in the abstract, that while there is a "long tradition of takings remedies," the Court has not implied damages remedies against the sovereign states).

87. U.S. CONST. amend. V.

88. *Id.*

89. This principle was recognized and adopted by Chief Justice Marshall in *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163-66 (1803). The rule reflects the well-known Latin maxim "*ubi jus, ibi remedium*." See *Ubi jus ibi remedium*, *supra* note 8. See generally POMEROY, *supra* note 8.

90. Cover, *supra* note 8, at 1747 ("[T]he remedial interpretation: that the [First Amendment] right to petition includes the limited right of a person who suffers legal injury (or a sufficient threat thereof) to obtain a minimally adequate remedy from the courts. In short, I argue that the First Amendment guarantees a right to a remedy.").

that the remedy required to redress a wrong might only need to be procedural, while others argue that such a remedy be substantive.<sup>91</sup> Relative to the taking of the equity of homeowners, I argue that a procedural remedy, such as the declaration of a cause of action, is inequitable, unjust, and inefficient. In the *Tyler* case, the Court's procedural remedy required that Ms. Tyler, an elderly woman living in a nursing home, go back to the federal district court to adjudicate her claim, to show that the State's enabling statute was unconstitutional ab initio or that the County failed to comply with the specific provisions of the State statute. This unfairly puts the burden of a wrongful taking on the victim, which I believe is not the spirit of the Fifth Amendment or of the right/remedy principle. Further, the Court's decision leaves three important collateral questions unanswered: (1) In addition to her equity, which the County took, should Ms. Tyler be entitled to the equity that the investor received from the tax sale? (2) Are all Tyler-like victims entitled to reimbursement for the taking of their equity? And (3) If there was a mortgage on the adjudicated property, is the mortgage lending entitled to the equity?

#### CONCLUSION

In summary, this Article argues that the *Tyler* Court's limited holding of granting the plaintiff a cause of action fails to provide a substantive just remedy, as dictated by the Takings Clause, and is inconsistent with the rights/remedy principle. Instead, I believe that, at a minimum, the Court should have found the state-enabling statute that authorizes local governments to profit from the taking of homeowners' equity, when it occurs via an adjudicated tax sale, to be unconstitutional, void ab initio. Further, I believe that, consequently, states that have enacted such legislation have a constitutional duty to repay the millions of dollars that have been wrongfully taken from injured homeowners and should be ordered to abandon such unfair practices. Notwithstanding the Court's lukewarm enforcement of the dictates of the Fifth Amendment, I plead that the offending states and municipalities take to heart the

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91. *See id.*

Supreme Court's finding that the use of tax liens to take homeowners' equity violates the Takings Clause of the Fifth Amendment and do the right thing by the victims of home equity theft, including Ms. Tyler.

Hence, state and local governments that use tax-adjudicated public auctions to profit from the equity of homeowners should heed the constitutional analysis of the Court in *Tyler* and stop taking owners' equity. I believe that ignoring the Court's analysis would also disregard the Takings Clause and the right/remedy principle. Further, in good conscience, they should also move immediately to return to those owners their ill-gotten gains.

In response to the *Tyler* decision, a few states or local governments have made procedural changes to their adjudication laws. Additionally, since the *Tyler* decision, three law firms have reportedly filed a class-action lawsuit on behalf of other Minnesotans who, in similar fashion, failed to recoup their home's equity after it was seized for unpaid property taxes.<sup>92</sup> In conclusion, justice demands that these enabling laws be rescinded, that their exercise be immediately stopped, and that all present and past takings be summarily reimbursed with interest and title restored to their original owners.

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92. See Kirsti Marohn, *U.S. Supreme Court's Property Forfeiture Decision Spurs Class-Action Lawsuit in Minnesota*, MPRNEWS (July 5, 2023, 4:00 AM) <https://www.mprnews.org/story/2023/07/05/us-supreme-courts-property-forfeiture-decision-spurs-classaction-lawsuit-in-minnesota> [https://perma.cc/2MQN-39XP]; Michelle Griffith, *Minnesota to Pay \$109 Million in Property Forfeiture Class Action Settlement*, MINN. REFORMER (Mar. 25, 2024, 6:00 AM), <https://minnesotareformer.com/2024/03/25/minnesota-to-pay-109-million-in-property-forfeiture-class-action-settlement/> [https://perma.cc/2G6H-8JHH].