TAX FORFEITURES AND THE EXCESSIVE FINES MUDDLE

Jessica L. Asbridge

ABSTRACT—The federal government and state governments increasingly rely upon fines and forfeitures to enforce civil laws ranging from simple land-use laws to complex securities laws. The U.S. Supreme Court, however, has failed to clearly articulate when these sanctions are considered punitive, such that they qualify for scrutiny under the Excessive Fines Clause of the Eighth Amendment. The Court recently decided Tyler v. Hennepin County, which involved the forfeiture of a home for unpaid property taxes worth a fraction of the home’s value. The Tyler Court declined to address the excessive fines claim, despite the forfeiture having multiple punitive characteristics, and instead resolved the case only as it related to the Takings Clause of the Fifth Amendment. Ultimately, the Court’s decision may best be understood as a recognition that property tax delinquency absent fraud or willful misconduct is such that any punitive fine or forfeiture is constitutionally barred.

AUTHOR—Associate Professor of Law, Baylor Law School. I am grateful for helpful conversations about this Essay with Christina M. Martin, who represented Geraldine Tyler in her case before the U.S. Supreme Court. The arguments and viewpoints presented herein, however, are my own. Thank you to Nicholas Almendares and Julia Mahoney, as well as Christopher Brett Jaeger and Rachel Kincaid for thoughtful comments and suggestions. I also thank Haylie English, for her excellent research assistance, as well as the staff of the Northwestern University Law Review Online for their outstanding editorial work.

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INTRODUCTION

The U.S. Supreme Court has only rarely addressed the Eighth Amendment’s Excessive Fines Clause such that multiple questions exist regarding its application and scope. The need for guidance from the Court has become more pressing following its 2019 decision in *Timbs v. Indiana*,¹ holding that the provision applies to the states. The Court recently decided *Tyler v. Hennepin County*,² which involved the forfeiture of Geraldine Tyler’s $40,000 home to pay a $15,000 tax debt and related interests and costs.³ Tyler argued that retaining the surplus proceeds following the foreclosure sale of the home violated the Fifth Amendment Takings Clause and the Excessive Fines Clause.⁴ Thus, the case presented difficult questions regarding when a forfeiture triggers excessive fines scrutiny and the interplay between takings and punitive forfeitures. The Court, however, resolved the case on the takings ground, sidestepping the excessive fines claim altogether, because Tyler agreed that “relief under the Takings Clause would fully remedy [her] harm.”⁵

The Court’s decision to avoid the excessive fines claim is a significant oversight. If the forfeiture of the surplus were punitive, then paying just compensation for the punishment would, at least at first glance, seem illogical. Whether the forfeiture was punitive is no easy question, as the Court’s excessive fines jurisprudence can only be described as a muddle, involving multifactorial tests and contradictory decisions.⁶ In this article, I map out the argument as to the punitive characteristics of the forfeiture. I then suggest that long-established contract law principles may bear on the constitutional limits of punishment for certain offenses.

This Essay proceeds in three parts. Part I provides background on the *Tyler* case and describes the circuit split that has developed on the Excessive Fines Clause’s application to civil fines more generally outside of the tax forfeiture setting. Part II describes the Court’s contradictory case law regarding when a civil fine is punitive and maps out the argument as to why the forfeiture in *Tyler* may be punitive under the Court’s excessive fines doctrine. Part III argues that the historical contract law bar on penalties may

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¹ 139 S. Ct. 682, 687 (2019).
² 143 S. Ct. 1369 (2023).
³ Id. at 1373.
⁴ Id. at 1371–72.
⁵ Id. at 1381 (internal quotation marks omitted).
⁶ This confusion is similar to the muddle that exists under the Fifth Amendment’s regulatory takings doctrine, which scholars have also criticized as a muddle due to the lack of doctrinal clarity as to how to apply the multifactor test and the unpredictability in outcomes that result under the test. *See* David Owen, *The Realities of Takings Litigation*, 47 BYU L. REV. 577, 593–94 (2021).
play a role in the original understanding of the constitutional limits on punishment, such that the forfeiture of the surplus, even if punitive, was nevertheless unconstitutional.

I. BACKGROUND

The Tyler case centered on Hennepin County’s foreclosure of the condominium home of Tyler, a 94-year-old widow, after she failed to pay her delinquent property taxes. Tyler owed approximately $2,300 in taxes and $12,700 in statutory interest, penalties, and costs associated with her debt. The county sold her home for $40,000, but rather than returning to her the $25,000 worth of equity in the home (the amount remaining from the sale proceeds after deducting the taxes and related expenses), the county kept the full amount.

Thirty-six states and the federal government require the return of surplus funds from a property tax foreclosure sale to the previous owner, but Minnesota is not one of those states. Instead, Minnesota and the remaining states allow the government to retain the equity in a home even if the tax debt was small and the windfall to the government is significant.

Tyler did not object to the county’s collection of the debt she owed, but she objected to the county keeping the amount of the sale proceeds in excess of the debt, claiming that the county’s action violated the Takings Clause and the Excessive Fines Clause. The district court rejected Tyler’s takings claim, determining that Minnesota law does not recognize a taxpayer’s right to a surplus following a tax forfeiture. Thus, she lacked a property interest in the surplus proceeds, meaning that no taking of private property occurred. The court also dismissed Tyler’s Excessive Fines Clause claim on the basis that the “tax-forfeiture scheme bears none of the hallmarks of punishment” and, thus, does not constitute a fine within the meaning of the Eighth Amendment.

The Eighth Circuit affirmed, and Tyler then filed a petition for certiorari seeking review on both the Takings Clause and the Excessive Fines

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7  Tyler, 143 S. Ct. at 1374.
8  See Petition for Writ of Certiorari at 3, Tyler, 143 S. Ct. 1369 (2023) (No. 22-166).
10 Tyler, 143 S. Ct. at 1377–78.
11 See id.
12 See Brief for Petitioner at 6–8, 33 n.16, Tyler, 143 S. Ct. 1369 (2023) (No. 22-166).
14 Id.
15 Id. at 897.
16 See generally Tyler v. Hennepin County, 26 F.4th 789 (8th Cir. 2022) (dismissing Tyler’s takings claim and excessive fines claim).
Clause claims. Before the Supreme Court, Tyler argued that the tax forfeiture scheme implicated both the Takings Clause and the Excessive Fines Clause, but she argued that only “one remedy will be necessary, because paying her just compensation should eliminate the challenged fine.” Thus, the primary focus of her arguments was on the Takings Clause. The United States also filed an amicus curiae brief, arguing that, although Tyler had plausibly stated a takings claim, the retention of the tax debt did not constitute a fine that triggered excessive fines scrutiny.

In an opinion authored by Chief Justice Roberts, the Court unanimously held that Tyler had a property interest in the surplus proceeds following the foreclosure sale of her home and that she therefore had plausibly stated a takings claim under the Fifth Amendment. The Court declined to address the excessive fines claim, in light of Tyler’s acknowledgment that the Takings Clause would fully remedy her harm. In a concurring opinion, Justice Gorsuch, joined by Justice Jackson, criticized the district court’s excessive fines analysis, noting that it contained “mistakes future lower courts should not be quick to emulate,” but Gorsuch did not directly resolve whether the forfeiture of the surplus was punitive such that it triggered excessive fines scrutiny.

The Court’s decision to only address the takings claim is perhaps not that surprising. The Court’s interest in the Takings Clause issue fits neatly with the Roberts Court’s interest in property rights as demonstrated by a series of recent decisions strengthening the Takings Clause.

By contrast, the Court has not taken much of an interest in the Excessive Fines Clause, which it has only rarely applied. Indeed, it was not until 2019 in Timbs that the Court finally held that the provision applies to the states. After Timbs, numerous questions regarding the Excessive Fines Clause’s scope remain open, including: (1) whether the Excessive Fines Clause applies to civil penalties unconnected to criminal proceedings; (2) even if the

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17 See generally Petition for Writ of Certiorari, supra note 8 (arguing that the Takings Clause or the Excessive Fines Clause should provide a remedy for Tyler).
18 Brief for Petitioner, supra note 12, at 33 n.16.
19 See Brief for the United States as Amicus Curiae Supporting Neither Party at 6–9, Tyler v. Hennepin County, 143 S. Ct. 1369 (2023) (No. 22-166).
20 Tyler, 143 S. Ct. at 1375–76.
21 Id. at 1381.
22 Id. at 1381–82 (Gorsuch, J., concurring).
Excessive Fines Clause applies to a civil penalty, when such a penalty is “punitive” such that it triggers excessive fines scrutiny; and (3) what factors a court should consider in determining whether a civil or criminal punitive fine is excessive, including whether the court should consider the individual’s ability to pay as a factor in determining excessiveness.

The confusion that exists as to these questions is illustrated by the petition for certiorari filed in Toth v. United States, which the Court denied shortly after granting the Tyler petition. Toth did not involve any takings issues but rather clearly presented the question of whether the Excessive Fines Clause applies to civil penalties unconnected to criminal proceedings to qualify for constitutional protection. The circuits are currently split on this issue.

The Court’s avoidance of the excessive fines question in Tyler will likely only add to the confusion with respect to the Court’s Eighth Amendment jurisprudence. If the Court had affirmatively concluded that the surplus forfeiture was not punitive, then no conflict with the Fifth Amendment Takings Clause could arise. However, the Court simply did not address whether the forfeiture was punitive or not, leaving open the possibility that it is, in fact, punitive. Although Justice Gorsuch in his concurrence did not directly resolve the question, he pointed to various characteristics of the surplus forfeiture that suggested it may be punitive.

If the forfeiture is punitive in nature (such that it still must be reviewed to determine if it is excessive), requiring just compensation (in the form of return of the surplus) would undermine any legislative intent to punish. Further, the forfeiture of Tyler’s home occurred due to failing to pay her property taxes. Thus, this case simply is not like most other takings cases where the government’s decision to take private property is directly triggered for reasons other than the action (or inaction) of the property owner.

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27 Id. at 552–53 (Gorsuch, J., dissenting).
28 Id. at 553.
29 One amicus curiae brief urged the Court to first address which of the two clauses was implicated by the tax forfeiture scheme and argued that the forfeiture scheme may not implicate both constitutional provisions. See Brief of Monica Toth as Amica Curiae Supporting Petitioner at 4–7, Tyler v. Hennepin County, 143 S. Ct. 1369 (2023) (No. 22-166).
30 Tyler, 143 S. Ct. 1369, 1381–82 (2023) (Gorsuch, J. concurring).
31 See Lingle v. Chevron U.S.A., Inc., 544 U.S. 528, 537 (2005) (noting that the Takings Clause’s purpose is “to secure compensation in the event of otherwise proper interference amounting to a taking”) (internal quotation marks omitted).
II. PUNISHMENT UNDER THE EXCESSIVE FINES CLAUSE

The Court has clearly stated that whether a “fine” (which includes within its scope a forfeiture) constitutes punishment is the crucial test for determining the applicability of the Excessive Fines Clause, but it has been unclear as to the relevant inquiry for determining when a fine constitutes punishment.\(^{32}\) Thus, whether the forfeiture of the surplus in *Tyler* constitutes punishment for excessive fines purposes is also unclear, but overall, a strong argument exists that the forfeiture is at least partly punitive.

A. The Court’s Contradictory Precedent

Although the Court’s excessive fines jurisprudence is sparse, it is contradictory and centers on the struggle as to whether to utilize a functionalist approach to punishment or follow a more formalist approach, which classifies laws as punitive based on their connection to criminal proceedings. Thus, in *Austin v. United States*, the Court found that whether a fine is punitive turns not on the underlying procedure used, but rather on multiple factors designed to determine whether it is punitive in design and effect, including the relationship between the amount of the fine and the government’s damages.\(^{33}\) By contrast, *United States v. Bajakajian* suggests that civil fines unconnected to criminal proceedings may not qualify for constitutional protection even if the relationship between the fine and harm caused is disproportionate.\(^{34}\) Thus, when a fine is punitive such that it qualifies for excessive fines scrutiny is an unsettled question.

In *Austin v. United States*, the Court recognized that a civil forfeiture of real property could constitute a fine for purposes of the Excessive Fines Clause if partly punitive (and regardless of whether it also serves remedial purposes).\(^{35}\) Although the forfeiture proceeding itself was civil, the forfeiture of property was triggered due to its connection to the owner’s commission of a drug-related crime.\(^{36}\) The proceeding was in rem (against the property,

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\(^{32}\) See *Austin v. United States*, 509 U.S. 602, 610 (1993) (“[T]he question is not, as the United States would have it, whether forfeiture under [the relevant statutes] is civil or criminal, but rather whether it is punishment.”); see also id. at 619 (examining the text and legislative history of the forfeiture statutes to determine whether they were designed to be punitive in nature); id. at 621 (noting that the “dramatic variations in the value of conveyances and real property forfeitable” under the statutory scheme undercut the government’s argument that the forfeiture was remedial and constituted liquidated damages).

\(^{33}\) *Id.*

\(^{34}\) 524 U.S. 321, 331 (1998) (noting that civil in rem forfeitures historically were “not considered punishment against the individual for an offense” and that, “[b]ecause they were viewed as nonpunitive, such forfeitures were considered to occupy a place outside the domain of the Excessive Fines Clause”); *id.* at 331–32 (distinguishing historic civil in rem forfeitures from the forfeiture involved in *Bajakajian* because that forfeiture arose in the context of the defendant’s criminal proceedings).

\(^{35}\) *Austin*, 509 U.S. at 621–22.

\(^{36}\) *Id.* at 604–06.
rather than against its owner) based on the legal fiction that the property itself was guilty of the drug offense.\textsuperscript{37}

The Court found that the civil nature of the proceeding, by itself, did not disqualify the forfeiture from being punitive, stressing that “the notion of punishment . . . cuts across the division between the civil and criminal law” and that “civil proceedings may advance punitive as well as remedial goals.”\textsuperscript{38} The question “is not . . . whether forfeiture under [the statutory scheme] is civil or criminal, but rather whether it is punishment.”\textsuperscript{39}

The Court ultimately concluded that the forfeiture was punitive by examining multiple factors. The Court observed that one factor relevant to its inquiry was whether the forfeited property’s value under the statutory scheme correlated to “the damages sustained by society or to the cost of enforcing the law.”\textsuperscript{40} The Court found that “dramatic variations in the value of conveyances and real property forfeitable” under the scheme undercut any argument that the forfeiture constituted a reasonable form of liquidated damages, as opposed to punishment.\textsuperscript{41} Other factors weighing in favor of the forfeiture being punitive included: (1) the Court’s determination that in rem forfeitures proceeding under the guilty property theory had historically been regarded as punishment;\textsuperscript{42} (2) the statute included facial hallmarks of punishment (as the statute focused on the culpability of the owner by including an innocent owner defense and was tied directly to the commission of certain drug offenses);\textsuperscript{43} and (3) the legislative history showed that Congress intended to deter or punish those involved in drug activity.\textsuperscript{44}

Following \textit{Austin}, the Court complicated matters in \textit{Bajakajian}, as it seemingly backed away from the \textit{Austin} approach. Specifically, in \textit{Bajakajian}, the Court found the forfeiture (which was in personam) to be punitive because it was imposed at the “culmination of a criminal proceeding and require[d] conviction of an underlying felony.”\textsuperscript{45} Despite finding the forfeiture triggered excessive fines scrutiny, the decision nevertheless cast doubt on the broad language in \textit{Austin} indicating that a forfeiture could be punitive even if unrelated to a criminal offense.

\textsuperscript{37} \textit{Id.} at 606.
\textsuperscript{38} \textit{Id.} at 610 (internal quotation marks omitted).
\textsuperscript{39} \textit{Id.} at 621.
\textsuperscript{40} \textit{Id.} (quoting United States v. Ward, 448 U.S. 242, 254 (1980)).
\textsuperscript{41} \textit{Id.} at 621.
\textsuperscript{42} \textit{Id.} at 615, 618.
\textsuperscript{43} \textit{Id.} at 619.
\textsuperscript{44} \textit{Id.} at 620.
The *Bajakajian* Court suggested that forfeitures unconnected to criminal proceedings are not punitive even if the government receives more than necessary to make it whole. The Court observed that the First Congress had enacted statutes requiring full forfeiture of goods and, sometimes, ships involved in customs offenses. These forfeitures proceeded directly against the property itself—in rem—and were unconnected to a criminal proceeding against the owner of the goods or ship (unlike *Austin*, which did involve in rem proceedings but still involved a connection to criminal proceedings).

The Court observed that the customs forfeitures were not historically considered punishment for purposes of the Eighth Amendment, but they were instead fully remedial in character.

As Justice Kennedy’s dissenting opinion observed, these historic civil in rem forfeitures often involved the forfeiture of goods and ships that had values that outweighed the amount of unpaid customs and the related costs of collection (which would seemingly make them punitive under the *Austin* approach). Thus, he warned that the majority’s opinion appeared to remove an important class of fines and forfeitures from constitutional scrutiny.

The *Bajakajian* majority’s musings on the remedial nature of civil in rem forfeitures are reflective of what one scholar termed the “formal procedural approach” that finds that, if the procedural mechanism for obtaining the property was historically civil, then the fine or forfeiture itself is not punitive. This approach is consistent with *United States v. Hudson*, decided months before *Bajakajian*, where the Court held that punishment for purposes of the Double Jeopardy Clause meant criminal punishment and a court should determine whether punishment was criminal on the face of the applicable statute. Yet, the *Hudson* Court also suggested that punishment might be broader for excessive fines purposes, as it observed that “[t]he Eighth Amendment protects against excessive civil fines, including forfeitures.” Recognizing that the meaning of punishment may vary depending on the constitutional provision at issue may release much of the

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46 Id. at 340.
47 Id. at 341.
48 Id. at 341–42.
49 Id. at 344–45 (Kennedy, J., dissenting).
50 Id.
53 Id. at 103 (emphasis added).
tension in the Court’s constitutional law jurisprudence relating to punishment.54

The approach in Bajakajian not only conflicts with Austin, but also conflicts with the Court’s earlier decision in Browning-Ferris Industries v. Kelco Disposal, where it traced the history and development of civil punitive damages.55 The Court found that civil punitive damages “advance the interests of punishment and deterrence” and constitute punishment as that term is used in the excessive fines context.56 The Court ultimately did not apply excessive fines scrutiny to the award of punitive damages at issue, but only because they were awarded to a private party.57

It may be that the Bajakajian majority’s musing on the nonpunitive nature of civil in rem proceedings is best dismissed as dicta, inconsistent with prior precedent.58 In any event, following Bajakajian, the Court’s excessive fines doctrine is unsettled, as the circuit split underlying the Toth petition demonstrates.

B. The Tyler Forfeiture

Because of the contradictory nature of the Court’s precedent, whether the Tyler forfeiture is punitive under the Excessive Fines Clause is by no means clear. However, provided that the Bajakajian dicta relating to criminal proceedings is disregarded, there is a strong argument that the forfeiture was, in fact, punitive.59

54 Caleb Nelson, The Constitutionality of Civil Forfeiture, 125 YALE L.J. 2446, 2492–94 (2016) (explaining that because the Excessive Fines Clause is not limited to criminal punishment, it should apply to “all types of punishment,” not just those related to criminal cases).
56 Id.
57 Id. at 275–76.
58 David Pimentel, Forfeitures and the Eighth Amendment: A Practical Approach to the Excessive Fines Clause as a Check on Government Seizures, 11 HARV. L. & POL’Y REV. 541, 560 (2017) (classifying the discussion in Bajakajian regarding civil in rem forfeitures typically not being subject to an excessive fines analysis as dicta and observing that the dicta “flies in the face of the explicit holding of Austin, that civil in rem forfeiture [sic] can and usually do contain some element of punishment, and therefore are subject to the Excessive Fines Clause”).
59 I do not address here questions about whether a fine must be paid to the government to qualify for excessive fines scrutiny, as the Court has previously held. See Browning-Ferris Indus. v. Kelco Disposal, 492 U.S. 257, 275 (1989). Others have found that such a finding rests on “shaky” ground. See Beth A. Colgan, The Excessive Fines Clause: Challenging the Modern Debtors’ Prison, 65 UCLA L. REV. 2, 25 (2018). That question was not at issue in Tyler because the surplus was forfeited to the government, and that question is beyond the scope of this Essay. The Court also has repeatedly suggested that, for a sanction to constitute punishment, it must be imposed for violation of a “public law.” I assume, for my purposes here, that a failure to pay property taxes constitutes a violation of a public law. See Brief of Professor Beth A. Colgan as Amicus Curiae in Support of Petitioner at 2, 15–19, Tyler v. Hennepin County, 143 S. Ct. 1369 (2023) (No. 22-166) (arguing that it is the public nature of the offense that renders a penalty punitive, not the procedure used).
To qualify as punitive, the tax forfeiture must not be “solely... remedial,” such as by constituting a reasonable form of liquidated damages.\(^\text{60}\) Here, the forfeiture cannot be described as remedial under the *Austin* test because the value of Tyler’s home did not correlate to the “damages sustained by society or to the cost of enforcing the law.”\(^\text{61}\) Specifically, the value of the home was $40,000, but the damages sustained to society were the tax debt of $2,300.\(^\text{62}\) The costs of enforcing the debt are more difficult to quantify, but the Minnesota statutes provided that within the first few weeks of delinquency, the penalties increased the debt by roughly 4% to 8% and then an additional 1% per month until the end of the calendar year.\(^\text{63}\) Subsequent delinquency is charged interest of 10% to 28% on the outstanding taxes and penalties.\(^\text{64}\) In addition to the penalties and interest, the county also assessed a “service fee” that included costs associated with collecting the debt, which the county was entitled to collect with interest.\(^\text{65}\) The penalties and service fee appear to more than cover any costs associated with the collection of the debt and function as liquidated damages.\(^\text{66}\) Keeping the additional surplus following a foreclosure sale in addition to the penalties and costs does not relate to the damages or costs of collection.

Relatedly, like in *Austin*, the tax forfeiture scheme involved “dramatic variations in the value of conveyances and real property forfeitable,” which undercuts any claim that the forfeitures are remedial.\(^\text{67}\) Under the scheme, any real property for which property taxes are not paid is forfeitable—without regard to the value of the property (which could be significant) or the size of the tax debt (which could be extremely small).

Moreover, the difficulty of determining the amount of the loss to society and the costs of collection are slight, suggesting the retention of the surplus equity functioned as punishment as opposed to liquidated damages. Liquidated damages provisions are generally justified on efficiency grounds. The Minnesota Supreme Court has expressly recognized that liquidated damages serve efficiency purposes, stating that it


\(^{61}\) *Id.* (quoting United States v. Ward, 448 U.S. 242, 254 (1980)).

\(^{62}\) See Petition for Writ of Certiorari, supra note 8, at 3.

\(^{63}\) *Minn. Stat.* § 279.01 subdiv. 1(a) (2022).

\(^{64}\) *Id.* § 279.03 subdiv. 1(a).

\(^{65}\) *Id.* § 279.092.

\(^{66}\) Tyler’s total tax debt (including penalties, fees, and interest) was $15,000. See Petition for Writ of Certiorari, supra note 8, at 5 n.1. Because Tyler’s case was dismissed before she could conduct discovery, the trial court record did not reflect the exact breakdown of the $15,000, but Tyler asserted that public records indicated that only $2,311 was property taxes.

look[s] with candor, if not with favor, upon a contract provision for liquidated damages when entered into deliberately between parties who have equality of opportunity for understanding and insisting upon their rights, since an amicable adjustment in advance of difficult issues saves the time of courts, juries, parties, and witnesses and reduces the delay, uncertainty, and expense of litigation.  

Yet, these efficiency interests can hardly justify the government’s retention of a surplus where the harm caused by an action is easily measured and the government has already accounted for (and received) the costs of enforcement, as was the case in *Tyler*.

The Solicitor General argued in *Tyler* that the forfeiture was not punitive because the statutory scheme overall could potentially result in a windfall to an owner. The statutory scheme provided that no personal liability would occur even where the forfeited property’s value was less than the debt, such that a deficit on the tax debt remained. Thus, a particular application of a statute should not be found to be punitive if it is possible for the application of the statute in another’s case to result in a windfall to the property owner.

However, the Court has previously endorsed a case-by-case approach in deciding whether a statute is punitive in the context of determining whether disgorgement constituted a penalty for the purposes of applying a statute of limitations. There, it found that the disgorgement of illegal profits *in the petitioner’s case* was punitive because it resulted in a loss to him even if the statute on its face was remedial, as its purpose was to restore the status quo prior to the violations. Further, as the *Austin* Court recognized, “it appears to make little practical difference whether the Excessive Fines Clause applies to all forfeitures under [the statutory scheme] or only to those that cannot be characterized as purely remedial” because “the Clause prohibits only the imposition of ‘excessive’ fines, and a fine that serves purely remedial purposes cannot be considered ‘excessive’ in any event.”

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68 Gorco Constr. Co. v. Stein, 99 N.W.2d 69, 74 (Minn. 1959); see Restatement (Second) of Conts. § 356 cmt. a (Am. L. Inst. 1981) (“The enforcement of such provisions for liquidated damages saves the time of courts, juries, parties and witnesses and reduces the expense of litigation,” which is “especially important if the amount in controversy is small.”).

69 See Brief for the United States as Amicus Curiae Supporting Neither Party, supra note 19, at 28.

70 See id. at 30 (arguing that Minnesota’s tax forfeiture could not be punitive because the statute could, in theory, be purely remedial or even result in a windfall to the taxpayer).


72 Austin v. United States, 509 U.S. 602, 622 n.14 (1993). Justice Scalia disagreed, writing in a separate concurrence that “puniteness ‘in part’ is established by showing that at least in some cases the affected property owners are culpable. That is to say, the statutory forfeiture must always be at least ‘partly punitive,’ or else it is not a fine.” Id. at 625 n.* (Scalia, J., concurring).
As for legislative intent, the county defended the tax forfeiture scheme originally on the grounds that “the ultimate possibility of loss of property serves as a deterrent to those taxpayers considering tax delinquency.”73 The Court has typically viewed deterrence as a punitive purpose.74 However, the exact role legislative intent plays in the Court’s inquiry is unclear. Examining legislative motive opens the door to legislative manipulation especially in the context of fines and forfeitures, which can increase revenues and therefore involve self-interest. Legislative drafters can attempt to disguise punitive fines as remedial in nature, and legislative history may be less than reliable with respect to the motives for setting a particular fine.75 Justice Kagan recognized just this possibility during oral argument in Tyler when she observed that “you can call anything anything” and questioned whether affirmatively labeling the tax forfeiture scheme a “penalty scheme” should impact the Court’s analysis.76

Finally, Austin suggested that whether a fine or forfeiture has historically been recognized as punitive in nature may play some role in the analysis.77 I return to this issue in Part III below, but note that, the Court previously recognized in 1870 that allowing a state to retain the surplus proceeds following a foreclosure sale of property due to failure to pay property taxes would be “highly penal” in nature.78 All of these factors together suggest that the forfeiture of the surplus in Tyler is punitive in nature.

III. THE HISTORIC BAR ON CONTRACT PENALTIES

Even if the forfeiture is punitive, this, by itself, does not answer the question of whether it is excessive, or for that matter, whether punishment for delinquency—absent fraudulent or willful misconduct—is constitutionally permissible at all. I suggest that the historic bar on penalties in the contract law setting relating to debt may play a role in evaluating these questions. As the Court has stressed, it looks to historical practice to determine whether a Fifth Amendment taking has occurred.79 The Court has

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74 Austin, 509 U.S. at 610 (describing that a sanction that serves a deterrent purpose “is punishment, as we have come to understand the term” (internal quotation marks omitted) (quoting United States v. Halper, 490 U.S. 435, 448 (1989)).
75 See Halper, 490 U.S. at 453 (Kennedy, J., concurring) (rejecting a subjective inquiry into a legislature’s motives for setting a particular fine).
76 Transcript of Oral Argument at 13–14, Tyler, 143 S. Ct. 1369 (No. 22-166).
77 Austin, 509 U.S. at 618–19.
78 See Bennett v. Hunter, 76 U.S. 326, 335–36 (1870).
79 Tyler, 143 S. Ct. 1369, 1375 (2023).
also relied upon history in interpreting the Excessive Fines Clause. In Tyler, the Court again indicated history plays a role, but it failed to fully contextualize its supporting historical examples. I do not seek to be exhaustive or conclusive as to contract law’s historic role, but rather to simply outline the arguments in favor of its relevance to constitutional limits on punishment.

Courts frequently must distinguish between invalid penalties and reasonable liquidated damages provisions in the contract law setting because contract remedies’ purpose is compensatory—not punitive—in nature. The bar on penalties for breach of contract has its roots in early English legal history when the Court of Chancery became focused on policing recovery of penalties for delinquency on fairness grounds in the contract law setting. Defeasible bonds were often used to secure performance under contracts. These bonds generally provided for an amount that would be forfeited upon default. When a breach occurred under a contract, the holder of the bond could bring the action in debt, allowing the holder to avoid proving his actual damages and also allowing for him to obtain substantially more than his loss.

Although the common law courts would enforce the bonds as written, the chancery court, as early as the sixteenth century, would grant relief from these forfeitures in exceptional cases (such as where there was duress or violence related to the making of the bond).

The chancery court gradually expanded this practice, such that, by the seventeenth century, the chancery court routinely enjoined creditors from recovering penalties against debtors in cases involving late payments of

81 Tyler, 143 S. Ct. at 1375 (2023).
83 See William H. Loyd, Penalties and Forfeitures: Before Peachy v. The Duke of Somerset, 29 HARV. L. REV. 117, 125–26 (1915); Cortney E. Lollar, Reviving Criminal Equity, 71 ALA. L. REV. 311, 318–19 (2019) (explaining that parties appealed to the Court of Chancery to “relieve the petitioner from an alleged injustice that would result from rigorous application of the common law” and that the chancellors were required to “consider the larger moral issues and questions of fairness” in adjudicating the claims before them (internal quotation marks omitted) (quoting Stephen N. Subrin, How Equity Conquered Common Law: The Federal Rules of Civil Procedure in Historical Perspective, 135 U. PA. L. REV. 909, 920 (1987))).
84 Larry A. DiMatteo, An Examination of Judicial Reasoning—When a Penalty Is Not a Penalty, 85 GEO. WASH. L. REV. 1846, 1850 (2017); See Edith G. Henderson, Relief from Bonds in the English Chancery: Mid-Sixteenth Century, 18 AM. J. LEGAL HIST. 298, 299 (1974) (observing that “[t]he conditional bond was the normal method of assuring the performance of contracts” and money debts were assured by either simple or conditional bond).
85 Henderson, supra note 84, at 200.
86 DiMatteo, supra note 84, at 1850.
87 See id.; Henderson, supra note 84, at 298.
monetary debts. Although the bond amount would be for a higher amount than the debt, the chancery court would enjoin the penal bond and instead require the creditor to proceed to trial in the common law court to recover only his actual damages, without penalizing the debtor for failure to timely pay.

By the end of the seventeenth century, in light of the chancery court’s practice, common law courts began to stay proceedings on a penal bond unless the plaintiff was willing to accept just the actual amount of the debt coupled with interests and costs. This practice was formally recognized by two statutes enacted in 1696 and 1705. Debtors, therefore, no longer had to seek relief in the chancery court from penalties, and, instead, the common law courts limited relief to actual damages and costs. 

The chancery court also scrutinized the common law mortgage, which resulted in the forfeiture of property to the mortgagee when the mortgagor failed to timely pay the debt. By the end of the seventeenth century, the chancery court recognized that, as a matter of course, a mortgagor’s right to redeem the property by paying the amount due within a reasonable period of time following the due date by paying the debt and interest. This right to pay late evolved into what is known now as the debtor’s equity of redemption. American courts later relied on the equity of redemption to develop the rule that a mortgagee must return any surplus proceeds following a foreclosure sale.

Implied contract theory was another important equitable development occurring in the eighteenth century. Blackstone endorsed implied contract theory in his Commentaries, finding that implied contracts were “such as reason and justice dictate, and which therefore the law presumes that every man has contracted to perform . . . .” Blackstone stated that a plaintiff is entitled to recover on an implied contract theory where “money [is] paid by mistake, or on a consideration which happens to fail, or through imposition, extortion, or oppression, or where any undue advantage is taken of the

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89 id.
90 Cavendish Square Holding BV v. El Makdessi, [2016] 2 All ER (Comm) 1, at [6]–[7].
91 id.
92 id.
93 RESTATEMENT (THIRD) OF PROP.: MORTGAGES § 3.1 (AM L. INST. 1997).
94 id.
95 id.
96 id. at §§ 3.1 cmt. a, 7.4 cmt. a.
97 2 WILLIAM BLACKSTONE, COMMENTARIES *443–44 (William Draper Lewis ed., 1902).
plaintiff’s situation.”

Notably, Blackstone recognized that, if a tax collector seized a taxpayer’s property to pay taxes, he was “bound by an implied contract in law to restore [the property] on payment of the debt, duty, and expenses, before the time of sale; or when sold, to render back the overplus.”

This equitable tradition from English law also influenced American courts’ formation of private contract law. This influence, however, was not just limited to private contracts, but influenced courts’ review of fines and forfeitures. This is demonstrated by *Goodall v. Bullock*, a 1798 Virginia case, which involved whether the court of equity’s jurisdiction extended to relief from “excessive, or otherwise unrighteous” fines. Notably, the language of the Eighth Amendment was based on an analogous provision in the Virginia Declaration of Rights of 1776 (which in turn was based on a similar provision in the 1689 English Bill of Rights).

*Goodall* involved a sheriff who had “neglect[ed] to do what he had obliged himself to do” when he failed to properly effectuate service of a writ of execution on goods. He thus had a statutory fine assessed against him, despite the complaining party’s lack of any injury. The *Goodall* court relied on contract law principles to determine that imposition of the fine would be unjust. First, the court found that it could apply contract law principles to its review of a fine for a statutory violation, reasoning that the two deserved similar treatment because the “obligation to pay the conventional mulct,” that is a fine, “is unquestionably derived from the same source, consent of the obligors,” either through contract or through “an act of his representative, the legislature.”

The court ultimately found that the fine was unjust. In doing so, the court relied upon the equitable practice of relieving from forfeitures, such as

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98 3 BLACKSTONE, supra note 97, at *163.
99 2 BLACKSTONE, supra note 97, at *453.
101 GEORGE WYTHE, DECISIONS OF CASES IN VIRGINIA BY THE HIGH COURT OF CHANCERY, WITH REMARKS UPON DECRESSES, BY THE COURT OF APPEALS, REVERSING SOME OF THOSE DECISIONS 332–33 (2d ed. 1852) (emphasis added).
104 WYTHE, supra note 101, at 334–47.
105 Id.
106 Id. at 337.
107 Id. at 343.
that only actual damages due to a neglect of duty were recoverable.\textsuperscript{108} The court observed that forfeitures were irrational, because, at the times when they are fixed, they cannot be subjects of isometrical computation; and that they are odious, because being extensive enough to cover the detriment in any event, they must be extravagant in almost every event.

This is believed to be the rationale of the daily practice of relieving against forfeitures, by the court of equity, which, if no detriment hath been suffered, exonerates from the forfeiture, entirely [sic], and if detriment hath been suffered, exonerates from so much of the forfeiture as exceeds [sic] the detriment.\textsuperscript{109}

Rufus Waples, in his nineteenth-century treatise on in rem forfeitures, similarly looked to the law applicable to private debts when examining the validity of state laws’ requiring forfeiture of real property due to failure to pay property taxes.\textsuperscript{110} Waples stated that, because the tax forfeitures arose due to a debt, a state was only entitled to sell the property to satisfy the tax debt and was not entitled to any surplus remaining (just like with respect to other private debts).\textsuperscript{111} Waples explained:

\begin{quote}
[p]roperty assessed at a thousand dollars could, in such case, be forfeited for the non-payment of a debt of ten . . . . How clearly would the wrong appear were a private citizen thus to take land without giving a quid pro quo? If government does so there is this difference: what would be fraud in the citizen is tyranny in the government.\textsuperscript{112}
\end{quote}

Waples distinguished tax forfeitures from guilty property forfeitures, such as the forfeiture at issue in \textit{Austin} that occurred due to the owner’s drug offense conviction and those discussed in \textit{Bajakajian} that related to in rem forfeitures of ships and goods due to the owners’ violations of the customs and revenues laws.\textsuperscript{113} Specifically, Waples observed that the government was entitled to retain the surplus from any sale of guilty property because the forfeiture occurred due to some sort of fraudulent or otherwise wrongful behavior.\textsuperscript{114} By contrast, a failure to pay property taxes could not be treated as a fraud, as

\begin{itemize}
\item \textsuperscript{108} \textit{Id.} at 336–37.
\item \textsuperscript{109} \textit{Id.}
\item \textsuperscript{110} \textit{See Rufus Waples, A Treatise on Proceedings in Rem} § 233 (1882) (observing that “[i]t is well settled that a thing, for debt, cannot be condemned beyond its indebtedness, when the libellant is a private person, as will be fully seen in our fourth book, in which indebted things are treated”).
\item \textsuperscript{111} \textit{Id.} §§ 233, 455–56.
\item \textsuperscript{112} \textit{Id.} § 233.
\item \textsuperscript{114} \textit{Waples, supra} note 110, § 235.
\end{itemize}
it only involved a debt for failure to pay property taxes, such that a state was entitled to only the tax debt and costs.\textsuperscript{115}

This history outlined above has two potential implications with respect to the issues in\textit{Tyler}. First, it illustrates that a historic bar on penalties and forfeitures existed for certain private conduct, such as financial delinquency absent fraud or similar misconduct. Second, Blackstone,\textit{ Goodall}, and Waples suggest that notions of fairness applicable in the private contract setting might also have, historically, played a role with respect to limiting the fines and forfeitures that could be imposed for certain offenses of a public nature.

In\textit{Tyler}, the Court sidestepped these questions altogether by not addressing whether the forfeiture was punitive and instead addressing only whether a property interest existed in the surplus proceeds that the county had taken.\textsuperscript{116} The Court supported its decision by quick references to: (1) Blackstone’s recognition under the common law that a tax collector who sells a taxpayer’s property to satisfy a tax debt must return the surplus;\textsuperscript{117} and (2) Minnesota’s recognition that a mortgagee must return any surplus proceeds to a mortgagor following a foreclosure sale of the mortgagor’s home.\textsuperscript{118} Missing from the Court’s discussion was recognition as to the reason why the Blackstone tax collector and the mortgagee were historically not permitted to retain the surplus proceeds: because to allow such a practice would be to allow unfair and unjust penalties in relation to a debt absent any fraud or other willful misconduct.

If the Minnesota forfeiture of the surplus is punitive as set out above, then\textit{Tyler} may, perhaps, be rationalized on the basis that punitive fines and forfeitures are constitutionally impermissible for a failure to pay property taxes—at least absent fraud or other willful misconduct.\textsuperscript{119} This would be highly significant. If this limitation on punishment is found in the Excessive Fines Clause (such that any fine or forfeiture for a failure to pay taxes is excessive), it would mirror the Court’s interpretation of the Cruel and Unusual Punishment Clause, where the Court previously found that certain

\begin{footnotesize}
\begin{enumerate}
\item Id.
\item Tyler v. Hennepin County, 143 S. Ct. 1369, 1376 (2023).
\item Id.
\item Id. at 1379.
\item Cf. Gregg v. Georgia, 428 U.S. 153, 172 (1976) (observing that there are “substantive limits imposed by the Eighth Amendment on what can be made criminal and punished”).
\end{enumerate}
\end{footnotesize}
offenses were of such a nature that imprisonment was constitutionally barred.\footnote{Leo P. Martinez, Taxes, Morals, and Legitimacy, 1994 BYU L. REV. 521, 566 (1994) (suggesting that “[p]erhaps the tax laws are only meant to deter independently ‘wrong’ conduct like fraud and deliberate disobedience: as long as the taxpayer honestly attempts to comply with the Code’s requirements, she will not be punished but need only compensate the government”).}

Regardless, the Court should only have reached the takings question after determining whether the forfeiture was punitive. If not punitive, the case becomes a relatively straightforward violation of the Takings Clause, especially when considered in light of the historic bar on penalties in the debt collection setting. This limit arose due to the chancery court’s notions of fairness and justice—key concerns underlying the Takings Clause. The Court has often stated that the Takings Clause is “designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.”\footnote{Armstrong v. United States, 364 U.S. 40, 49 (1960).}

Retaining the surplus of the proceeds following the foreclosure sale results in Hennepin County enriching itself at the expense of Tyler and those similarly situated without political accountability. According to Tyler, “between 2014 and 2021, Hennepin County foreclosed on at least 326 homes worth approximately $60 million to recover $6.8 million in delinquent taxes, interest, and fees.”\footnote{See Petitioner’s Reply in Support of Petition at 11 n.2, Tyler v. Hennepin County, 143 S. Ct. 1369 (2023) (No. 22-166). Hennepin County argued that these numbers were incorrect and relied “on extraneous, untested, and undisclosed proprietary property valuations,” such that they did “not reflect reality on the ground.” Brief for Respondent at 42, Tyler, 143 S. Ct. 1369 (No. 22-166).}

Tax forfeiture schemes like those at issue in \textit{Tyler} have a disproportionate impact on those already struggling to make ends meet. Specifically, such schemes have a disproportionate impact on elderly and minority property owners, as the financial loss due to forfeiture of a home in relationship to their overall assets tends to be more significant as compared to other property owners.\footnote{Brief for Wisconsin Realtors Association as Amicus Curiae Supporting Petitioner at 17, Tyler, 143 S. Ct. 1369 (No. 22-166).} Failure to pay property taxes often arises from conditions beyond one’s direct control, such as illness, job loss, or divorce.\footnote{Id. at 16.} Loss of the home exacerbates these problems and creates challenges for finding new housing, as well as imposing a significant emotional toll.\footnote{Id. at 15–18.} In light of these fairness concerns coupled with the historic bar on penalties in the debt collection setting, perhaps the forfeiture of the surplus, even if punitive in nature, is best viewed as violative of the Fifth Amendment Taking Clause after all, as the Court found. Waples, in his nineteenth-century...
treatise, found just that—he observed that the Fifth Amendment was “undoubtedly applicable” to such tax forfeiture schemes.126

The Court’s decision in Tyler ensures that tax forfeitures are not immune from constitutional scrutiny and will protect vulnerable homeowners from self-interested government action. Yet, by shortcutting its analysis, the Court has further muddled its excessive fines jurisprudence.

CONCLUSION

The Court’s decision in Tyler avoided resolving the tension between punishment and takings for which just compensation is due. Even if punitive, the forfeiture nevertheless may have been unconstitutional in light of the historic bar on penalties for delinquency. However, by failing to clarify its excessive fines jurisprudence, the decision leaves the door open to further government abuse as to civil fines and forfeitures outside of the tax setting.

126 WAPLES, supra note 110, § 233.