Article

Reconceptualizing "Background Principles" in Takings Law

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Both libertarians and progressives rejoiced in the result reached by the Supreme Court in the 2023 matter of Tyler v. Hennepin County. *This Article asserts that such unified celebration has overshadowed the extent to which the Supreme Court's reasoning calls into question even our most foundational assumptions about the meaning of property and the takings protections the Constitution affords to it. Followed to its literal end,* Tyler *remarkably suggests that owners may well need to ground their expectations in the background principles of property laws endorsed by a majority of states rather than in those underpinning the laws of their own state.*

Suspicious that the Court intended such a revolutionary upheaval of the state variations that have characterized our federalist system for more than two centuries, the Article contends that Tyler *is better interpreted as an epic failure in judicial transparency: The opinion reflects a sly reticence to acknowledge the reality that resolving competing claims to property demands moral judgment regarding the background principles of property law. In following this deceptive course,* Tyler *invites a race to legislative homogeneity and erects a dangerous barrier to states' abilities to innovate in the face of evolving social, economic, and environmental conditions.*

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INTRODUCTION

When octogenarian Geraldine Tyler fell $15,000 behind on her property taxes, she understood that the state could foreclose upon her condominium to remediate its revenue losses.[1] But when the state kept the entire $40,000 that it reaped at a foreclosure sale, Ms. Tyler cried foul.[2] Her challenge to the state's action ultimately reached the U.S. Supreme Court. The Court's unanimous finding that the state's retention of the $25,000 overage in this instance might amount to an unconstitutional taking has been hailed across the ideological spectrum. One analyst deemed the 2023 decision in *Tyler v. Hennepin County* a "major victory" that both protects "traditional conservative and libertarian interest[s] in property rights" and shows reverence to the "left-liberal solicitude for the interests of the poor, the elderly, and minorities."[3] Another coined it "a simultaneous victory for odd bedfellows—both economically disadvantaged homeowners as well as libertarian-oriented property rights advocates."[4] Widespread reactions of this sort led one Supreme Court reporter to describe *Tyler* as "a true unicorn of a case" that "made just about everyone happy."[5]

This Article contends that these bipartisan celebrations of the relief afforded to Ms. Tyler detract attention from the decision's potentially transformative effect on our understanding of property and the takings protections that the Constitution affords. Before examining in a takings case whether a regulation is fair and just absent compensation, it is incumbent on courts to identify the scope of the property interest at issue; that is, they must determine whether the claimants in actuality have an ownership stake

1. *See* Tyler v. Hennepin County, 143 S. Ct. 1369, 1374 (2023).

2. *Id.*

3. Ilya Somin, *Major Unanimous Supreme Court Victory for Property Rights in* Tyler v. Hennepin County, REASON: THE VOLOKH CONSPIRACY (May 25, 2023), https://reason.com/volokh/2023/05/25/major-unanimous-supreme-court-victory-for-property-rights-in-tyler-v-hennepin-county [https://perma.cc/NJQ6-MA3X].

4. David Wilkes, *Supreme Court Forfeiture Ruling Spells Victory for Homeowners*, BLOOMBERG TAX (May 26, 2023), https://news.bloombergtax.com/tax-insights-and-commentary/supreme-court-forfeiture-ruling-spells-victory-for-homeowners [https://perma.cc/C68B-T4Z9].

5. Noah Lanard, *The Supreme Court Made Just About Everyone Happy for Once*, MOTHER JONES (May 25, 2023), https://www.motherjones.com/politics/2023/05/tyler-v-hennepin-supreme-court-roberts-jackson-gorsuch [https://perma.cc/W3P7-YU9G].

in what the state is professed to have taken. This task requires individual judges to inquire into the "background principles" that give property its meaning.[6] They have long searched for these background principles in the history and traditions of the common law.[7] More recently, the Court has suggested that statutory laws also may be a fertile source of such principles.[8] *Tyler* makes this turn to statutory laws for this purpose explicit. In so doing, though, the opinion counsels that these statutory laws are not limited to those of the jurisdiction in which property allegedly has been taken. Rather, the Court indicated that principles "rooted" in the majority view of state legislatures define the claimant's property, *even when they diverge from the principles underpinning statutory law of the state in which the takings claim has been filed*.

Taking the Court's language to its literal end, owners in Ms. Tyler's shoes apparently should generate expectations about the scope of their property interests by looking to the property laws of other states rather than by looking to the property laws of their own state (and that government entities should in turn conduct themselves accordingly). On these terms, property rights

6. *See, e.g.*, Bush v. Gore, 531 U.S. 98, 115 n.1 (2000) (Rehnquist, J., concurring) ("[O]ur jurisprudence requires us to analyze the 'background principles' of state property law to determine whether there has been a taking of property in violation of the Takings Clause." (quoting Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1031 (1992))).

7. *See, e.g.*, Severance v. Patterson, 370 S.W.3d 705, 710 (Tex. 2012) ("In some states, background principles of property law governing oceanfront property provide a basis for public ownership or use of the beachfront property. Such principles are not extant in the origins of Texas. Indeed, the original, unrestricted transfer by the Republic to private parties leaves little occasion for the argument that background principles in Texas common law at the inception of this jurisdiction provide a basis for impressing the West Beach area with a public easement, absent appropriate proof.").

8. *See, e.g.*, Palazzolo v. Rhode Island, 533 U.S. 606, 629 (2001) (indicating that a legislative enactment can be deemed a background principle of state law, but declining to articulate the "precise circumstances" for when this might be the case); Ark. Game & Fish Comm'n v. United States, 568 U.S. 23, 38 (2012) (referring to the bearing of Arkansas water-rights law on determining whether a taking occurred); Murr v. Wisconsin, 137 S. Ct. 1933, 1945 (2017) (indicating that a restriction that predates a landowner's acquisition, such as a prospective zoning ordinance, can inform a court's assessment of the landowner's reasonable expectations about their property).

become static once a majority rule emerges.[9] The Takings Clause, that is, effectively serves to create both a floor and a ceiling for property. A majority law—such as one protecting a tax debtor's right to demand any tax sale overage—might provide a floor beneath which a state cannot provide "lesser" protections to tax debtors without implicating takings law. Meanwhile, another majority law—say, one limiting construction in ecologically vulnerable coastal areas—presumably might create a ceiling above which states cannot provide "more" protections to waterfront owners that are secured by takings remedies. Indeed, accepting *Tyler* at face value, the decision pitches takings law as dictating to states what even the most localized of property-based policies must and must not include.

Skeptical that the Court had such a sea change in mind, this Article asserts that a more plausible reading of *Tyler* demonstrates the Court's uneasiness with stating forthrightly what is necessarily so about property as an institution. Yes, a common conception of property as security against collective interference grips the hearts and minds of many Americans. However, the property system in operation takes account of the *tensions* between individual and collective interests and acknowledges that approaches to resolving those tensions vary across democratic states and can change with societal needs over time.[10] Takings

9. Ownership rights also can be understood as static under natural rights or other pre-political theories of property. At least according to particularly hardened pre-political views, regulation—indeed, all positive law—is not *relevant* to the meaning of property. Instead, the contours of property have some pre-determined meaning that is separate and apart from politics. It is conceivable that at least some members of the current Supreme Court endorse such a view and that, from their standpoint, such pre-political contours are somehow so specific as to include an unadorned opportunity to recoup any overage reaped at any tax foreclosure sale. From this perspective, *Tyler*'s reference to majority rule could be seen as a clumsy grasp for cover for the Justices' chosen view of property; more charitably, perhaps one might claim that the opinion simply sought to pat state legislators' backs for having come to the divine understanding of property that, according to the Court, has forever and will forever be accurate. Without foreclosing the possibility that at least some members of the current Court might support some version of such a pre-political understanding of property, this Article proceeds on the assumption that the Court engaged in the detailed discussion of state legislative majorities in which it did because it believed that such majorities bear at least some modicum of legal significance in the takings arena.

10. *See, e.g.*, Francis S. Philbrick, *Changing Conceptions of Property in Law*, 86 U. PA. L. REV. 691, 696 (1938) ("[T]he concept of property never has

law, after all, does not afford compensation for just any government alterations in property laws; rather, it seeks to sift out only those alterations that are unfair and unjust absent compensation.[11] It follows that a background principle of property is appropriately considered "rooted" for takings purposes only when, in all fairness and justice, that principle *deserves* legal and moral recognition. On this view, *Tyler* stands for the couched proposition that looking to other states' statutes has virtue only to the extent that those statutes can help us understand the moral justifications for a given state's choice as to how property interests should be allocated in a given moment in the face of competing claims.[12]

In an effort to shift the discourse surrounding *Tyler* from one of results-oriented celebration to one of theoretical and jurisprudential critique, the Article proceeds in three steps. Part I explains the traditional role of background principles in takings jurisprudence before detailing what, on its face, is the seemingly revolutionary shift portended in *Tyler*. Part II illustrates that while the Court's tack resulted in what might be considered an

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been, is not, and never can be of definite content . . . . Changing culture causes the law to speak with new imperatives, invigorates some concepts, devitalizes and brings to obsolescence others."); Eric Freyfogle, *Property and Liberty*, 34 HARV. ENV'T L. REV. 75, 115 (2010) ("How private property's effects are evaluated overall—what is considered a cost, what is considered a benefit, and how they all sum up—depends on the surrounding society, with its circumstances, values, and hopes. Change the society, change the circumstances and values, and a property system that once made sense might no longer do so."); Timothy M. Mulvaney, *Progressive Property Moving Forward*, 5 CAL. L. REV. CIR. 349, 363 (2014) ("Recognizing a baseline of established property interests and the societal values underlying those interests cannot explain in what circumstances that baseline must or should give way to the reality of changing and competing societal values.").

11. *See* Armstrong v. United States, 364 U.S. 40, 49 (1960) ("The Fifth Amendment's guarantee that private property shall not be taken for a public use without just compensation was 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."); Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 124 (1978) (describing takings law as tasked with "determining when 'justice and fairness' require that economic injuries caused by public action be compensated by the government, rather than remain disproportionately concentrated on a few persons").

12. On understanding property as an allocative system, see Timothy M. Mulvaney & Joseph William Singer, *Essential Property*, 107 MINN. L. REV. 605, 629–35 (2022); Timothy M. Mulvaney, *Compulsory Terms in Property*, 117 NW. U. L. REV. 191, 204–05 (2022).

expansion of property rights in *Tyler*, it could just as easily result in a mechanical contraction of property rights in other circumstances. Suspicious that the Court intended such a categorical transformation, the Part offers an alternative interpretation of the decision. On this interpretation, the Court is understood to have tacitly endorsed the proposition that looking to other states' statutes is not a dispositive marker but, rather, can be useful in answering the normative question of whether the principles underpinning a statute in the claimant's jurisdiction are *deserving* of legal and moral recognition.

Part III contends that, on this more plausible reading of *Tyler*, the decision's folly lies in its concealing the moral judgment demanded of the judiciary in determining whether the imposition of regulatory safeguards or obligations are unfair and unjust absent the payment of compensation. The Article concludes that *Tyler* presents a missed opportunity for transparency on this score and, in the process, incentivizes state legislatures to mirror the property-based policies of their sister states rather than pursue innovations responsive to localized social, economic, and environmental challenges of the day.

I. TAKINGS AND BACKGROUND PRINCIPLES

The Fifth Amendment's Takings Clause provides that "private property [shall not] be taken for public use, without just compensation."[13] Though this provision originally applied only to physical appropriations resulting from governmental conduct,[14] it

13. U.S. CONST. amend. V.

14. *See* Aziz Z. Huq, *Property Against Legality: Takings After* Cedar Point, 109 VA. L. REV. 233, 248–49 (2023) ("In *Pennsylvania Coal Co. v. Mahon*, Justice Holmes declared that when government regulation of property use goes 'too far,' a taking may occur notwithstanding the absence of formal appropriation or physical invasion by government. This marked a break from 150 years of constitutional jurisprudence." (footnotes omitted)); William Michael Treanor, *The Original Understanding of the Takings Clause and the Political Process*, 95 COLUM. L. REV. 782, 798 (1995) ("The predecessor clauses to the Fifth Amendment's Takings Clause, the original understanding of the Takings Clause itself, and the weight of early judicial interpretations of the federal and state takings clauses all indicate that compensation was mandated only when the government physically took property."); Bernard Schwartz, *Takings Clause—"Poor Relation" No More?*, 47 OKLA. L. REV. 417, 418–19 (1994) (presenting the originalist claim that the Takings Clause was intended to cover only direct, physical takings). The Supreme Court has acknowledged as much. Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1014 (1992) ("Prior to Justice Holmes's exposition in

since has been interpreted to constrain as well the state's imposition of regulatory safeguards and obligations that interfere with property interests in a manner that is unfair and unjust absent payment.[15] The very notion of constitutional liability in this context creates a contradiction. A court examining whether a regulatory decision rises to the level of a taking naturally must determine in the first instance whether the claimant holds a property interest that is capable of being taken.[16] Yet it is generally understood that states have the authority to define property interests.[17] If states have the authority to define property interests, how could the exercise of that authority amount to an unconstitutional act?[18]

Pennsylvania Coal Co. v. Mahon . . . it was generally thought that the Takings Clause reached only a 'direct appropriation' of property . . . or the functional equivalent of a 'practical ouster of [the owner's] possession . . . .'" (alteration in original) (first citing Legal Tender Cases, 79 U.S. (12 Wall.) 457, 551 (1870); and then citing Transp. Co. v. Chicago, 99 U.S. 635, 642 (1879))); Cedar Point Nursery v. Hassid, 141 S. Ct. 2063, 2071 (2021) ("Before the 20th century, the Takings Clause was understood to be limited to physical appropriations of property.").

15. *See Penn Cent.*, 438 U.S. at 131–38; Pa. Coal Co. v. Mahon, 260 U.S. 393, 415–16 (1922).

16. *See, e.g.*, Phillips v. Wash. Legal Found., 524 U.S. 156, 172 (1998) (concluding that interest generated via funds held in an attorney's trust fund is private property and remanding for a determination as to whether legislation took that interest); M&J Coal Co. v. United States, 47 F.3d 1148, 1155 (Fed. Cir. 1995) (dismissing takings challenge to a mining restriction on the ground that the claimant "never acquired the right to mine in such a way as to endanger the public health and safety"); *see also* Eric T. Freyfogle, *The Owning and Taking of Sensitive Lands*, 43 UCLA L. REV. 77, 120 (1995) ("When deciding takings cases, courts should keep distinct the issues of 'property' and 'taking.'").

17. This decidedly positivist view traces at least to Jeremy Bentham. JEREMY BENTHAM, THEORY OF LEGISLATION 68–69 (R. Hildreth trans., London, Trübner & Co. 1871) (1840); *see also* Frank I. Michelman, *Property as a Constitutional Right*, 38 WASH. & LEE L. REV. 1097, 1110 (1981) [hereinafter Michelman, *Property as a Constitutional Right*] (depicting the "puzzle" resulting from "an implicit premise of the constitutional system that individual holdings are always subject to the risk of occasional redistribution of values through popularly ordained operations of governments . . . and an explicit premise of the system that people can have property, be owners, not only as among themselves but also vis-à-vis the people as a whole organized as the State").

18. Frank I. Michelman, *Property, Federalism, and Jurisprudence: A Comment on* Lucas *and Judicial Conservatism*, 35 WM. & MARY L. REV. 301, 305 (1993) [hereinafter Michelman, *Judicial Conservatism*] ("If one grants . . . the legal-positivist view of constitutional 'property' . . . then it follows logically that effective national judicial protection for property must mean giving federal

In the face of this contradiction, takings jurisprudence hedges via what is at times an awkward and imprecise combination of positivist and naturalist paths. Section A below outlines takings law's hedge as it has traditionally been understood to center on principles emanating from the common law. Sections B and C turn to *Tyler*'s extending the range of sources of background principles to include, respectively, intrastate and interstate statutory laws.

A. TAKINGS LAW'S HEDGE

The Supreme Court has declared that, for takings purposes, "property interests . . . are created and their dimensions are defined" not *by* the law of the state in which property allegedly has been taken but, rather, by "existing rules or understandings that stem from an independent source *such as* state law."[19] "State law," the Court has asserted, "is *one* important source [of property rights]. . . . But state law cannot be the *only* source."[20] This hedge seemingly leaves room for two things to happen at once. It allows for the possibility that a regulation deemed a taking in one state may not be considered a taking in another state where the background property laws of that other state are justifiably distinct.[21] The hedge simultaneously, though, preserves

judges the last word on questions of the meanings of laws emanating from state authorities."); Michelman, *Property as a Constitutional Right*, *supra* note 17, at 1109 (describing the Constitution as reflecting the "conflicting . . . ideals" of protecting "popular government" and protecting "property rights"); Nestor M. Davidson & Timothy M. Mulvaney, *Takings Localism*, 121 COLUM. L. REV. 215, 227 (2021) ("Centering the state's definitional role in property risks circularity—how can a regulatory change to a property interest contravene the Takings Clause if the state is empowered to define property interests?").

19. Ruckelshaus v. Monsanto Co., 467 U.S. 986, 1001 (1984) (emphasis added); *see also* PruneYard Shopping Ctr. v. Robins, 447 U.S. 74, 81 (1980); Kelo v. City of New London, 545 U.S. 469, 482 (2005); Drye v. United States, 528 U.S. 49, 58 (1999).

20. Tyler v. Hennepin County, 143 S. Ct. 1369, 1375 (2023) (emphasis added); *see also* Murr v. Wisconsin, 137 S. Ct. 1933, 1944 (2017) ("[P]roperty interests *have their foundations* in state law . . . ." (emphasis added)). The Supreme Court has declared that "[a] State's highest court is unquestionably 'the ultimate expositor of state law,'" yet noted in its next breath that "the prerogative of [a state court] to say what [state] law is" merely "merits *respect* in federal forums." Riley v. Kennedy, 553 U.S. 406, 425 (2008) (emphasis added) (quoting Mullaney v. Wilbur, 421 U.S. 684, 691 (1975)).

21. *See* Stewart E. Sterk, *The Federalist Dimension of Regulatory Takings Jurisprudence*, 114 YALE L.J. 203, 223 (2004) (explaining that "an owner of

breathing space for the judiciary to protect against a state's "manipulating" its property laws in a manner that unjustifiably defines away those interests that it decides it would like to appropriate for free.[22]

In an attempt to operationalize this framework, the Court has declared that it "assuredly would permit" without compensation a regulation that codifies a regulatory safeguard or obligation that "inhere[s] in the title itself," i.e., one that is already present "in the restrictions that background principles of the State's law of property and nuisance . . . place[] upon land ownership."[23] A takings claim fails at the outset, the Court has

property along the New Hampshire shoreline has a stronger constitutional claim than a similarly situated Oregon landowner" in challenging an identical development restriction given that New Hampshire common law does not recognize customary public beach access rights while Oregon does). On the conceptual distinctions in beach access policies across jurisdictions, see generally Timothy M. Mulvaney, *Walling Out: Rules and Standards in the Beach Access Context*, 94 S. CAL. L. REV. 1 (2021).

22. *See, e.g.*, Maureen E. Brady, Penn Central *Squared: What the Many Factors of* Murr v. Wisconsin *Mean for Property Federalism*, 166 U. PA. L. REV. ONLINE 53, 69 (2017) ("The benefits of constitutional property federalism—the democracy-enhancing, welfare-enhancing, and efficiency-enhancing effects of competition and innovation among the states—are blunted by the threat that the Constitution will protect only a uniform set of interests with the weight of multistate law and regulation behind them."). For decisions pitching takings law as curbing the manipulation of property interests to avoid compensatory liability, see, for example, Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1014 (1992) (lamenting that if state lawmakers are able to redefine property absent compensation at their whim, they will do so until "at last private property disappear[s]"); Phillips v. Wash. Legal Found., 524 U.S. 156, 167 (1998) (declaring that states may not "sidestep the Takings Clause by disavowing traditional property interests long recognized under state law"); Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 439 (1982) ("[T]he government does not have unlimited power to redefine property rights."); Webb's Fabulous Pharmacies, Inc. v. Beckwith, 449 U.S. 155, 164 (1980) ("[A] State, by *ipse dixit*, may not transform private property into public property without compensation . . . ."); Quinn v. Syracuse Model Neighborhood Corp., 613 F.2d 438, 448 (2d Cir. 1980) ("[T]he state may not magically declare an interest to be '*non* property' after the fact for Fourteenth Amendment purposes if, for example, a longstanding pattern of practice has established an individual's entitlement to a particular governmental benefit."); Hall v. Meisner, 51 F.4th 185, 190 (6th Cir. 2022) ("[T]he Takings Clause would be a dead letter if a state could simply exclude from its definition of property any interest that the state wished to take.").

23. *Lucas*, 505 U.S. at 1028–29; *see also* J. Peter Byrne, *Regulatory Takings and "Judicial Supremacy,"* 51 ALA. L. REV. 949, 957 (2000) ("[R]egulatory takings rulings tend to elevate an idealized common law concept of property over

explained, "if the logically antecedent inquiry into the nature of the owner's estate shows that the proscribed use interests were not part of [the claimant's] title to begin with."[24]

Such breezy rhetoric can prompt one to overlook the actuality that determining whether a particular *restriction* is inherent in a *principle* is no easy task.[25] Principles, after all, are not ordinarily subject to rote application.[26] Rather, they are ideas that serve as the foundation for a chain of reasoning. From which "independent sources" might we divine these ideas—these background principles—to help determine whether a regulatory restriction reflects a legitimate lawmaking exercise or, rather, a manipulative one? While takings law historically has turned to the common law[27] and a collection of traditions,[28] "fundamental" laws,[29] "long recognized" conventions,[30] and customary practices[31] in search of background principles, since the turn of the century the Court has indicated that state statutory laws also may be a fertile source. It is this issue to which the next two Sections turn.

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the reach of statutes and regulations."); Timothy M. Mulvaney, *Foreground Principles*, 20 GEO. MASON L. REV. 837, 837 (2013) ("[T]he Court has exhibited a strong normative preference for a certain type of independent source—'background principles' of the common law—over others, namely state statutory and administrative law.").

24. *Lucas*, 505 U.S. at 1027.

25. Michelman, *Judicial Conservatism*, *supra* note 18, at 326 ("'Principles' in the law don't typically prohibit, dictate, or brand as unlawful specific classes of actions. 'That is, after all, what makes them principles rather than rules.'").

26. *Id.*

27. *Lucas*, 505 U.S. at 1029.

28. Palazzolo v. Rhode Island, 533 U.S. 606, 630 (2001) (asserting that property interests are determined with reference to "common, shared understandings . . . derived from a State's legal tradition"); Murr v. Wisconsin, 137 S. Ct. 1933, 1945 (2017) ("[W]hole of our legal tradition.").

29. Mugler v. Kansas, 123 U.S. 623, 631 (1887) (discussing when a statute may be a "palpable invasion of rights secured by the fundamental law").

30. Phillips v. Wash. Legal Found., 524 U.S. 156, 167 (1998) ("[A]t least as to confiscatory regulations (as opposed to those regulating the use of property), a State may not sidestep the Takings Clause by disavowing traditional property interests long recognized under state law.").

31. PruneYard Shopping Ctr. v. Robins, 447 U.S. 74, 84 (1980) (recognizing the states' "residual authority that enables [them] to define 'property' in the first instance").

B. INTRASTATE STATUTORY BACKGROUND PRINCIPLES

In its 2001 decision in *Palazzolo v. Rhode Island*, the Supreme Court rejected the notion that the claimant's being on constructive notice of an existing Rhode Island statute precluding development in sensitive wetlands offered the state a categorical defense to a takings challenge.[32] However, it demurred in remarking on "the precise circumstances when a legislative enactment can be deemed a background principle."[33] A decade later in *Arkansas Game & Fish Commission v. United States*, the Court left open the possibility that, had the federal government provided evidence that its dam operation alterations were consistent with principles set forth in Arkansas statutory law surrounding water rights, the State would not have had a viable takings claim when those alterations flooded state-owned lands.[34] Most recently, the Court intimated in *Murr v. Wisconsin* that an ordinance requiring the merger of small neighboring lots enacted eighteen years prior to the claimants' acquisition of two such lots amounted to a background principle that posed a significant hurdle to—if it did not foreclose entirely—a takings challenge to that ordinance's prohibition on constructing homes on both lots.[35]

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32. *Palazzolo*, 533 U.S. at 628 (Kennedy, J., concurring) ("A blanket rule that purchasers with notice have no compensation right when a claim becomes ripe is too blunt an instrument to accord with the duty to compensate for what is taken . . . . It would be illogical, and unfair, to bar a regulatory takings claim because of the post-enactment transfer of ownership where the steps necessary to make the claim ripe were not taken . . . by a previous owner."). Of course, however, as two commentators recently noted, "[c]ourts could conclude that a landowner who purchased with notice of a regulatory restriction might [for that very reason] not be considered similarly situated to one without notice." Michael C. Blumm & Rachel G. Wolfard, *Revisiting Background Principles in Takings Litigation*, 71 FLA. L. REV. 1165, 1176 n.51 (2019) (internal quotation marks omitted).

33. *Palazzolo*, 533 U.S. at 629.

34. The Court concluded that temporary flooding of state-owned lands resulting from alterations to the water release schedule of a federal dam could amount to a regulatory taking committed, peculiarly, by one government entity (the federal government) against another (a state government). *See* Ark. Game & Fish Comm'n v. United States, 568 U.S. 23 (2012). It noted, though, that it was "not equipped to address the bearing, if any, of Arkansas water rights law on this case" because the lower courts had not analyzed the issue. *Id.* at 38.

35. Blumm & Wolfard, *supra* note 32, at 1181–82. The Murr siblings accepted a developed parcel known as "Lot F" as a gift from their parents in 1994 and the adjacent undeveloped parcel, "Lot E," as a gift from their parent's

The Court's 2023 opinion in *Tyler v. Hennepin County* makes clear that, as *Palazzolo, Arkansas Game*, and *Murr* had suggested, statutes in place in the state in which the claimant alleges a taking occurred are on the list of "independent sources" to which courts can turn in uncovering the background principles that define property interests.[36] The origin of the legal dispute in *Tyler* dates to the nineteenth century. In 1884, the Minnesota Supreme Court interpreted a state statute enacted in 1881 to require that "any surplus realized" from a property tax

corporation one year later. Murr v. Wisconsin, 137 S. Ct. 1933, 1956 (2017). Both lots fronted a nationally designated "Wild and Scenic River." *See* 16 U.S.C. § 1274(a)(6), (9) (2012). In accordance with state regulations and a parallel local ordinance enacted in the 1970s to "guarantee the protection of the wild, scenic and recreational qualities of the river for present and future generations," neither lot in isolation had a sufficiently large area on which to erect an occupied structure. *Murr*, 137 S. Ct. at 1940 (quoting WIS. STAT. § 30.27(*l*) (1973)). However, to the extent the lots remained in separate ownership, they could be developed under the ordinance's hardship exemption. *Id.* at 1940–42. Once they came into common ownership, though, the hardship was alleviated because the Murrs at that point had options for development of, if they so chose, an especially large home spanning the two lots. Therefore, the exemption no longer applied, such that Lots E and F were now "merged" and could not be "sold or developed as separate lots." *Id.* The Murrs—allegedly unaware of this merger ordinance when they acquired Lot E and frustrated that they were prohibited from moving forward with their plan to sell it to fund improvements to the home on Lot F (which had been the victim of repeated riverine flooding events)—filed a takings suit against the State of Wisconsin and St. Croix County. *Id.* at 1940–41. The case boiled down to a question of how to define the scope of the property interest with which application of the merger ordinance allegedly interfered. The Murrs contended that lot lines presumptively should determine the relevant "parcel" in takings cases (such that the fact that the Murrs owned Lot F was irrelevant to a takings charge involving Lot E). *Id.* at 400; *see also* Transcript of Oral Argument at 17 ll.12–14, *Murr*, 137 S. Ct. 1933 (No. 15-214) ("[Counsel for the Murrs:] [Y]ou look to the State law, not the whole body of State law, you look to the State law that governs the creation that's the legal recognition of lots . . . ."). Meanwhile, the State asserted that the merger ordinance itself defined the Murrs' interest. *Murr*, 137 S. Ct. at 1946. While the court rejected these categorical approaches in favor of a more contextualized analysis, it placed special emphasis on the fact that the lots had merged under the ordinance. *Id.* at 400–05 ("The merger provision here is . . . a legitimate exercise of government power, as reflected by its consistency with a long history of state and local merger regulations that originated nearly a century ago.").

36. Select lower courts had reached this conclusion some time ago. *See, e.g.*, Kim v. City of New York, 681 N.E.2d 312, 315 (N.Y. 1997) ("It would be an illogical and incomplete inquiry if the courts were to look exclusively to common-law principles to identify the preexisting rules of State property law, while ignoring statutory law in force when the owner acquired title . . . .").

foreclosure sale "must revert to the owner."[37] However, in 1935, the state legislature changed course in an apparent effort to incentivize property tax payments and stabilize property tax revenues.[38] Under this approach, the state initially gains a limited title over the property for which property taxes have gone unpaid.[39] From that point, the statute allows delinquent taxpayers to remain in possession for three years and offers them the opportunity to redeem title *en toto* during this period by paying their delinquency in full or entering into a payment plan.[40] Where a delinquent taxpayer does not move by these means to preserve their interest within this period, the statute converts the state's limited title to full title and the tax debt is extinguished.[41] Before the state resells the property, though, the former owner can apply to repurchase it for the amount of the prior outstanding tax debt, which the state can grant to correct "undue hardship or injustice."[42] Where the property is not repurchased and is ultimately sold by the state at a tax sale, one of two outcomes is at hand. If the sales price is lesser than the tax debt, the debtor effectively receives a windfall.[43] Alternatively, if the sale price plus the costs of administering the forfeiture regime is greater than the tax debt, the County reaps an overage that it puts towards remediating lost tax revenues from those properties that are underwater.[44]

Here, Ms. Tyler purchased a condominium in Minneapolis in 1999.[45] She resided there and dutifully paid her property

37. Farnham v. Jones, 19 N.W. 83, 85 (Minn. 1884) (interpreting 1881 Minn. Laws 176, 176–79).

38. 1935 Minn. Laws 710, 713–14.

39. In Ms. Tyler's case, her 2010 property taxes came due in January of 2011. Tyler v. Hennepin County, 143 S. Ct. 1369, 1374 (2023). In January of 2012, those taxes became delinquent. *Id.*

40. Under Minnesota law, these payment plans can extend up to ten years in the ordinary course and may be extended beyond ten years for qualifying seniors. MINN. STAT. §§ 279.37, 290B.03 (2024).

41. *Tyler*, 143 S. Ct. at 1373 (citing MINN. STAT. §§ 281.18, 282.07 (2022)).

42. MINN. STAT. § 282.241 subdiv. 1 (2024).

43. *Id.* § 282.07 ("Immediately after forfeiture to the state of any parcel of land . . . the county auditor shall *cancel* all taxes and tax liens . . . ." (emphasis added)).

44. *Id.* § 282.08 (2012). In *Tyler*, the Supreme Court held that the claimant "plausibly alleged" that this provision amounted to "a taking under the Fifth Amendment." *Tyler*, 143 S. Ct. at 1374.

45. *Id.* at 1374.

taxes until deciding to move into a senior community in 2010.[46] Upon this move, Ms. Tyler retained the condominium as a second home but ceased paying the property taxes on it.[47] Over time, and despite repeated notices from the County regarding the potential consequences of her failure to pay her tax bill, Ms. Tyler's property tax debt rose to $15,000.[48] She did not respond to the County's offer to arrange a payment plan, nor did she avail herself of any of the social services available under the County's "Navigator Program" to assist taxpayers in need.[49] In 2015, the County, by operation of law, became the full titleholder and thereby extinguished Ms. Tyler's tax debt.[50] When she did not—in the course of the ensuing year—seek to re-purchase the property for the amount of her prior debt, the state sold it at auction for $40,000 and retained the proceeds of that sale.[51] In 2021, Ms. Tyler filed suit, alleging that the County was not entitled to any of the overage—$25,000 less the state's costs—without affording her a post-sale opportunity to request a rebate.[52]

To determine whether Ms. Tyler held a property interest in any tax sale overage that was capable of being taken, the Supreme Court set out to examine the "traditional property law principles" that informed her title.[53] The particular principle on which the opinion focused was, in the Court's words, the idea that "a government may not take more from a taxpayer than she owes."[54] The value of this articulation is limited by its circularity, for the takings question in the case rested on competing views of *what Ms. Tyler actually owed*. Ms. Tyler claimed that she owed the $15,000 in back taxes.[55] Meanwhile the County contended that, in accordance with state statutory law, Ms.

46. *Id.*

47. *Id.* ("Nobody paid the property taxes on the condo in Tyler's absence . . . .").

48. *Id.* (noting an unpaid principle of $2,300 and approximately $13,000 in interest and penalties).

49. Brief for Respondents at 6, 11, *Tyler*, 143 S. Ct. 1369 (No. 22-166), 2023 WL 2759804.

50. *Tyler*, 143 S. Ct. at 1373–74.

51. *Id.*

52. *Id.*

53. *Id.* at 1375 (citing Phillips v. Wash. Legal Found., 524 U.S. 156, 165–68 (1998)).

54. *Id.* at 1376.

55. *Id.* at 1373–74.

Tyler as a result of her own neglect no longer held title to the property and thereby effectively owed nothing at all.[56] From the County's perspective, then, it was free to reap whatever it may via sale of the property that it now owned, less its costs. It was in the face of these competing views as to what Ms. Tyler owed that the Court held that, according to "history and precedent," a claim to the overage was "rooted" in her title.[57]

As noted above, *Tyler* reflects the Court's firmest declaration to date that the principles underpinning state statutes can serve as the source of background principles. Why, though, did the Court decide that the principle that debtors are entitled to the overage in a tax foreclosure sale underpinning Minnesota's since-repealed 1881 statute is rooted in the claimant's title, while the principle underpinning the currently-on-the-books 1935 statute that debtors are not entitled to any overage in these circumstances is not?[58] To answer this question, as the next Section explains, the Court turned to a source on which it had not relied in prior takings cases: The extent to which the property laws of the state in question—Minnesota—aligned across various moments in time with the majority view among state legislatures nationwide.[59]

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56. *Id.* at 1379–80.

57. *Id.* at 1376.

58. For a reference point, the Supreme Court did not even discuss in another recent prominent takings decision why the access afforded to union organizers via a forty-year-old California statute, which was in place long before the plaintiff landowners commenced their agricultural business operations, did not inform their title. *See* Cedar Point Nursery v. Hassid, 141 S. Ct. 2063 (2021). One could query what would have come of *Cedar Point* had a majority of states had in place an access law akin to the one in place in California.

59. Tea leaves for this turn arguably were evident in the Court's 2017 decision in *Murr v. Wisconsin*. 137 S. Ct. 1933 (2017). The *Murr* Court seemingly sought to buttress its position that an eighteen-year-old Wisconsin statute shaped the reasonability of the claimant's expectations by noting that the statute mirrored nearly 100-year-old statutes from other jurisdictions. *See, e.g.*, Maureen E. Brady, *The Illusory Promise of General Property Law*, 132 YALE L.J.F. 1010, 1045 n.213 (2023) [hereinafter Brady, *Illusory Promise*] ("The fact that a Wisconsin law merging their parcels predating the plaintiffs' ownership by eighteen years could likely have yielded the same outcome under state-specific positive law, but the Court's approach sure made the plaintiffs look more unreasonable for ignoring a century's worth of regulation."); Maureen E. Brady, *Property Convergence in Takings Law*, 46 PEPP. L. REV. 695, 707, 711–13 (2019) [hereinafter Brady, *Property Convergence*] (citing *Murr*, 137 S. Ct. at 1933 and two lower court decisions—Hawkeye Commodity Promotions, Inc. v. Vilsack,

C. INTERSTATE STATUTORY BACKGROUND PRINCIPLES

The *Tyler* Court explained at the outset that Minnesota's 1881 statute mirrored "similar statutes" adopted by ten state legislatures "shortly after the founding,"[60] as well as a statute

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486 F.3d 430, 442 (8th Cir. 2007) and Int'l Ass'n of Machinists Dist. 10 & Its Local Lodge 1061 v. State, 903 N.W.2d 141, 151 (Wis. Ct. App. 2017)—as "using interstate comparisons to create the background law" against which the "reasonableness" of an owner's expectations are judged).

Turning to the positive law of other states, rather than some conceived federal norm, could facially shield the Court from charges of anti-federalism. On the challenge of endorsing a theory of regulatory takings that respects the tenets of federalism, see Michelman, *Judicial Conservatism*, *supra* note 18. At the same time, though, the *Tyler* Court looked to its own precedents involving cases requiring interpretations of federal or state statutory laws relating to tax sale overage. The discussion on this score in the opinion is not particularly illuminating. While the Court was technically correct in declaring that "[o]ur precedents have . . . recognized the principle that a taxpayer is entitled to the surplus" reaped in a tax sale "in excess of the debt owed," *Tyler*, 143 S. Ct. at 1378, those precedents merely described statutes that rested on this principle or interpreted state laws as implicitly resting on this principle when those laws were silent or ambiguous on the issue. In *United States v. Taylor*, the Court enforced an 1861 statute explicitly entitling the tax debtor to the overage reaped at auction when an 1862 revision to that statute to impose a fifty percent penalty on defaulters "[made] no mention of the right of the owner of the lands to receive the surplus proceeds of their sale." 104 U.S. 216, 218 (1881). In *United States v. Lawton*, the federal government seized a delinquent taxpayer's land under the same statute, but did not sell it. 110 U.S. 146 (1884). While the statute referred only to the overage reaped upon a sale, the Court interpreted the statute to implicitly provide that the tax debtor was entitled to the excess "where the Government kept the property for its own use." *Tyler*, 143 U.S. at 1378 (citing *Lawton*, 110 U.S. at 149–50). Finally, in *Nelson v. City of New York*, the Court upheld against a takings charge a New York City ordinance affording the overage from a tax sale to the city when tax debtors did not make timely post-sale filings to assert their claim to the overage. 352 U.S. 103 (1956). Those holdings said nothing about state laws, like the 1935 Minnesota law at issue in *Tyler*, which explicitly rested on the view that, for various reasons, title—and thus any proceeds reaped at a future tax sale—belongs to the state at some defined point prior to a tax sale. It is unclear why the fact that the Court's precedents happened to include cases involving a federal statute and a New York statute that provided to the delinquent taxpayer an opportunity to attain any surplus reaped in a tax sale (or, in *Lawton*, to attain any "surplus" at stake when the state decides to retain rather than sell foreclosed property) is evidence in and of itself that Minnesota's statute—which did not provide that opportunity—is problematic for takings purposes.

60. *Tyler*, 143 S. Ct. at 1376 n.1 (citing An Act Providing for the Collection and Payment of Rates or Taxes, §§ 32, 36, 1796 Conn. Pub. Acts 349, 356–57; An Act for the Valuation of Real and Personal Property Within this State, ch. 98, § 26, 2 Del. Laws 1247, 1260 (1797); Act of Dec. 22, 1791, 1791 Ga. Laws 9,

passed by Congress in 1798 regarding the recovery of federal tax debts.[61] One state legislature of this era, though, posed a puzzle for the Court. Virginia originally had followed the course laid by other colonial jurisdictions when, in 1781, it declared the overage reaped in a foreclosure sale to be the property of the debtor.[62] However, experience prompted the state's lawmakers to change their minds shortly thereafter. The state had sought to promote settlement by selling 100-acre tracts at bargain fares, and grew concerned when foreign speculators began purchasing wide swaths of land, leaving them undeveloped, and regularly neglecting to pay their property taxes.[63] To discourage this behavior, the state's legislature passed a statute in 1790 that, moving forward, "provided for the forfeiture of any [tax-]delinquent land to the Commonwealth" with no opportunity to recover any overage reaped at a future tax sale.[64] The *Tyler* Court could have described Virginia's statutory approach allowing the state to assume title and retain any overage, which remained in place for more than twenty-five years, as reflecting the diversity of viewpoints endorsed via various early American states' property statutes.[65] Yet, instead, the Court deemed what it dubbed Virginia's "harsh forfeiture regime" an "exceptional" and "temporary"

14; Act of Dec. 19, 1801, ch. 49, § 4, 1801 Ky. Acts 77, 78–79; Act of Jan. 20, 1798, ch. 90, §§ 4–5, 1797 Md. Laws 81, 81–82; Act of Feb. 5, 1786, ch. 1, 1786 Mass. Acts 358, 360–61; An Act Declaring the Duty and Defining the Power of Collectors of Taxes, 1792 N.H. Laws 191, 194; Act of Nov. 15, 1792, ch. 2, § 5, 1792 N.C. Sess. Laws 23, 23; Act for the Assessment and Collection of Taxes, ch. 179, § 17, 1801 N.Y. Laws 493, 498–99; An Act for Collecting and Paying of Rates, 1787 Vt. Acts & Resolves 125, 126).

61. Act of July 14, 1798, ch. 75, § 13, 1 Stat. 597, 601.

62. *Tyler*, 143 S. Ct. at 1377 (citing An Act for Ascertaining Certain Taxes and Duties, and for Establishing a Permanent Revenue, ch. 40, 1781 Va. Acts 151, 153).

63. *Id.* (citing McClure v. Maitland, 24 W. Va. 561, 564–65 (1884)).

64. *Id.* (citing *McClure*, 24 W. Va. at 564). The *Tyler* Court did not note that an 1801 Kentucky law similarly provided that, without affording an opportunity to request any overage resulting from a tax sale, persons "claiming land in this state, and failing to list the same for taxation . . . shall for, and in consequence of such failure, forfeit his or her claim to this commonwealth." *See* 2 WILLIAM LITTELL, THE STATUTE LAW OF KENTUCKY 463–64 (1810).

65. Michael Allan Wolf, *2023 Supreme Court Update* ("[Chief Justice] Roberts and his colleagues could have cited Virginia's experiment as an indication that the original understanding of the relationship between eminent domain and tax sales during the framing and ratification era was uncertain or subject to state variation."), *in* POWELL ON REAL PROPERTY (LexisNexis 2024) (1949).

aberration that "carries little weight against the overwhelming consensus of its sister States."[66]

The Court followed a similar tack in addressing state approaches in place upon the 1868 ratification of the Fourteenth Amendment, through which the Takings Clause was incorporated as applicable against the states.[67] It noted that most states had, at that time, deemed any overage to be the property of the tax debtor.[68] However, it was forced to concede that at least three had not.[69] The Court, though, brushed aside this inconvenience with some creative sleuthing. Maine's iteration was no matter, said the Court, for its state legislature had, as in Virginia fifty years prior, later changed its mind and reversed course.[70] That a Mississippi statute had allowed the state to retain any overage reaped in a tax foreclosure sale also was no longer relevant, explained the Court, for the Mississippi Supreme Court had later struck down that statute on state constitutional grounds.[71] And, finally, the Court dismissed a Louisiana statute that afforded the overage to the state because the County had not put forth evidence that the statute had been enforced in circumstances akin to Ms. Tyler's situation.[72]

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66. *Tyler*, 143 S. Ct. at 1377.

67. *Id.* at 1377–78.

68. *Id*. *But see* HENRY CAMPBELL BLACK, A TREATISE ON THE LAW OF TAX TITLES §§ 194–95, at 241–42, 242 nn.1 & 3 (St. Paul, West Publ'g Co. 2d ed., rev. and enlarged 1893) (1888) (noting total forfeiture as one late-nineteenth-century method of collecting taxes); ROBERT S. BLACKWELL, A PRACTICAL TREATISE ON THE POWER TO SELL LAND FOR THE NON-PAYMENT OF TAXES 460 (Boston, Little, Brown, & Co. 3d ed., rev. and enlarged 1869) (noting that legislatures were free to decide upon "forfeiture[] for the neglect of the owner of an estate to list his land, or pay the tax assessed upon it"); THOMAS M. COOLEY, A TREATISE ON THE LAW OF TAXATION 318 (Chicago, Callaghan & Co. 1879) (recognizing that "there is no imperative principle" requiring the legislature "to fix upon those [rules] which would be most for the advantage of a negligent or defaulting citizen").

69. *Tyler*, 143 S. Ct. at 1377.

70. *Id.*

71. *Id.* The Mississippi Supreme Court found that the forfeiture at issue occurred "without hearing, without inquiry, without notice." Griffin v. Mixon, 38 Miss. 424, 451–52 (1860).

72. *Tyler*, 143 S. Ct. at 1377. The Court relegated to a footnote an 1842 North Carolina statute declaring that owners who failed to pay property taxes on "swamplands" within twelve months "shall forfeit and lose all right, title and interest." An Act Concerning the Swamp Lands, ch. 36, 1842 N.C. Sess. Laws 64. Moreover, it did not reference the West Virginia Supreme Court's 1884

Turning to the contemporary era, the Justices highlighted that thirty-six states today require that the government offer delinquent taxpayers an opportunity to redeem any overage reaped in a tax sale.[73] But they were unable to shrug off the current legislative practices of the other fourteen states through the same mechanisms they used to dismiss efforts of what they had deemed "exceptional" legislatures of the past.[74] Unlike the Virginia legislature in the Founding era and the Maine legislature decades later, the legislatures in these fourteen states had not repealed their laws forfeiting title to the state and thereby entitling it to any overage upon a tax foreclosure sale.[75] Unlike in Mississippi in the 1860s, the state courts in these fourteen states had not struck down these laws as violative of their respective state constitutions.[76] And unlike Louisiana in that same period,

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assertion that the payment of the overage recouped in a tax sale did not recognize an ownership interest in that overage but, rather, reflected "a simple matter of grace, a gift without any consideration therefor." McClure v. Maitland, 24 W. Va. 561, 580 (1884); *see also* Fox v. Wright, 91 P. 1005, 1007 (Cal. 1907) (deeming the conferral of "surplus moneys" reaped in a tax sale "an act of generosity" rather than "a constitutional duty").

73. *Tyler*, 143 S. Ct. at 1378. Ms. Tyler had not emphasized this point in her merits brief; rather, she dedicated only a single line to it at the very end of a section otherwise focused exclusively on Minnesota law. Brief for Petitioner at 23, *Tyler*, 143 S. Ct. 1369 (No. 22-166), 2023 WL 2339362 ("Indeed, most states protect equity when collecting property taxes."). Her reply brief, though, directed greater attention to the fact that Minnesota's 1935 statute diverged from the "majority view" that "protected equity." Reply Brief at 12, *Tyler*, 143 S. Ct. 1369 (No. 22-166), 2023 WL 2974504.

74. *Tyler*, 143 S. Ct. at 1377.

75. In most of these states, the state legislatures have affirmatively declared that the state is entitled to any overage reaped at a tax foreclosure sale. *See, e.g.*, OR. REV. STAT. § 312.270 (2024); N.Y. REAL PROP. TAX LAW § 1131 (McKinney 2024); MASS. GEN. LAWS ch. 60, § 64 (2024); ME. STAT. tit. 36, §§ 949, 943-C (2024); 35 ILL. COMP. STAT. 200/22-40, 200/22-55 (2024); NEB. REV. STAT. §§ 77-1807(2)(c), 77-1916 (2024); COLO. REV. STAT. § 39-11-115(1) (2024); N.J. STAT. ANN. § 54:5-32 (2024); ARIZ. REV. STAT. ANN. § 42-18303(C) (2024); *see also* D.C. CODE § 47-1382(g), (h) (2024). In others, state courts have deemed state legislation silent on the question, and concluded that the state's decision to retain the overage in the face of this silence did not amount to an unconstitutional taking. *See, e.g.*, Ritter v. Ross, 558 N.W.2d 909, 912–13 (Wis. Ct. App. 1996).

76. Indeed, many state courts had, prior to *Tyler*, affirmatively *rejected* constitutional challenges to tax forfeiture laws that did not offer an opportunity to recover any post-sale overage. *See* Cont'l Res. v. Fair, 971 N.W.2d 313, 323 (Neb. 2022), *vacated*, 143 S. Ct. 2580 (2023) (finding that the "county's tax collection efforts were not subject to the Takings Clauses"); Automatic Art, LLC v.

there was ample evidence in the record that the overage laws in these fourteen states—including, of course, Minnesota's iteration—had been routinely enforced.[77] The Court was simply left to hang its hat on the fact that "[t]he minority rule" of the past "remains the minority rule today."[78]

The Court concluded from this analysis that, in light of its reflecting a minority view that the state owns any overage in a tax foreclosure sale, Minnesota's 1935 statute warranted short shrift in determining the contours of Ms. Tyler's property interest.[79] The logical deduction therefrom is that parties in Ms.

Maricopa County, No. CV 08-1484-PHX, 2010 WL 11515708, at *4 (D. Ariz. Mar. 18, 2010) (finding no grounds under Arizona law for "the recovery of any funds by a previous owner after a tax sale"); *Ritter*, 558 N.W.2d at 912–13 (finding state law silent regarding tax sale overage, so the state did not violate the federal takings clause by retaining the excess proceeds); City of Auburn v. Mandarelli, 320 A.2d 22, 32 (Me. 1974) ("No duty arose in the municipality to restore to the defendant the windfall which the city reaped from the taxpayer's and the defendant's negligent noncompliance with the statutory prerequisites for the avoidance of a forfeiture."). *But see* Rafaeli, LLC v. Oakland County, 952 N.W.2d 434, 459 (Mich. 2020) ("We conclude that our state's common law recognizes a former property owner's property right to collect the surplus proceeds that are realized from the tax-foreclosure sale of property."); Polonsky v. Town of Bedford, 238 A.3d 1102, 1109 (N.H. 2020) ("[W]e conclude that a clear and substantial conflict exists between the termination of the municipality's duty to pay excess proceeds to the former owner and . . . the New Hampshire Constitution."); Bogie v. Town of Barnet, 270 A.2d 898, 899–900 (Vt. 1970) ("The relationship of the taxing authority to the taxpayer . . . is not truly arms-length, but has fiduciary aspects . . . . The objective [of a tax sale proceeding] is to recover taxes and costs incurred in the process of collection, not to operate a real estate business for profit.").

77. *See, e.g.*, *supra* note 76.

78. *Tyler*, 143 S. Ct. at 1378.

79. The *Tyler* Court noted that Minnesota entitles the tax debtor to the overage in other debt recovery contexts, such as following the seizure of land to cover private debts, the seizure of property to recover income tax debt, and the seizure of personal property to recover personal property tax debt. The Justices maligned Minnesota for "mak[ing] an exception only for itself, and only for taxes on real property." *Tyler*, 143 S. Ct. at 1379. However, it is not immediately obvious how whether Minnesota's affording the overage to the tax debtor in other contexts should have informed Ms. Tyler's expectations here or, more generally, is of special relevance to the question of whether the failure to afford to the tax debtor the overage in a property tax foreclosure is unfair and unjust absent compensation. Considering the reverse scenario illuminates as much: Had Minnesota decided to entitle the *creditor* to the overage in all those other contexts (private debts, income taxes, personal property taxes), should that decision make it less likely that Ms. Tyler's challenge to a law entitling the state to the overage in the property tax foreclosure context would survive takings review? A

Tyler's shoes should have generated stronger expectations about the scope of their property interests by looking to the property laws of *other states* than by looking to the property laws *of their own state*, and that a government entity in Hennepin County's position should have conducted itself accordingly.[80]

II. INTERPRETING *TYLER V. HENNEPIN COUNTY*

Taking the Court's course of analysis at face value, the prior Part offered an account of *Tyler* that can be summarized as follows: *In identifying the scope of the property interest at stake in a takings case, courts are to comb both common and statutory law in the search for property law's background principles. In performing this task, they are not at all limited to examining statutory laws that are jurisdictionally circumscribed; indeed, principles "rooted" in the majority view of state legislatures nationwide*

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recent provocative Comment in the Harvard Law Review seems to suggest as much. *The Supreme Court, 2022 Term—Leading Cases*, 137 HARV. L. REV. 310, 310 (2023) ("*Tyler*'s implicit requirement of internal consistency in a state's statutory treatment of a property interest . . . eliminates the need to debate the influence of state property law in takings jurisprudence . . . ."). While the Comment plausibly suggests that federal courts are equipped to determine whether a property interest is treated in contradictory fashion across a given state's property laws, see *id.* at 318, it does not explain how federal courts are equipped to determine—or how they might go about determining—in which direction such contradictions should be resolved. For instance, consider a takings claimant's allegation that state law A treats her property interest in tax sale overage in a manner inconsistent with the ways in which state laws B and C treat that property interest. Federals courts nationwide may well agree that an inconsistency exists. However, that does not mean that they agree that the enforcement of A necessarily is unfair and unjust, while the enforcement of B and C is not. They might just as easily see the reverse as true. Alternatively, they may find that all or none of the laws are unfair and unjust absent compensation. It therefore is not evident how leaning on whether a state's property laws are internally consistent is any less "indeterminate" than the "judicial cherry-picking" that underpins efforts to craft a "general property law" that the author of the Comment maligns. *See id.* at 317; *see also* Brady, *Illusory Promise*, *supra* note 59, at 1048 ("[A]ppeals to uniformity do not always cut in favor of individual rights.").

80. At an academic symposium on property rights convened shortly after the *Tyler* decision came down, Ms. Tyler's counsel—Christina Martin of the Pacific Legal Foundation—was asked how property owners are to know in what circumstances they should ground their expectations in the property laws of other jurisdictions. Ms. Martin responded that, at least in the case of her client, one simply had to "ask anybody on the street." Christina Martin, Roundtable at the Brigham-Kanner Property Rights Conference: Emerging Issues (Oct. 27, 2023).

uncompromisingly define the claimant's property, even when they diverge from the principles underpinning statutory law of the state in which the takings claim is filed.[81] This Part, after navigating that facially textual course to its logical end, expresses a skepticism that the Court had such a sea change in mind.

The Part asserts that a more plausible if veiled reading of *Tyler* demonstrates the Court's uneasiness with stating forthrightly what is necessarily so about property as an institution. A common, one-dimensional conception of property as security against collective interference grips the hearts and minds of many Americans. However, the property system in operation takes account of the *tensions* between individual and collective interests and acknowledges that approaches to resolving these tensions vary and can change with societal needs over time.[82] On the former, common account, basing background principles on an ostensibly objective source like the majority legislative approach seems readily feasible—once a rule's majority status becomes clear, that rule locks in. On the latter, operative account, though, normative judgment is required to determine whether a given background principle is contemporarily deserving of legal and moral recognition. Against the backdrop of *Tyler*, the two Sections below take up these common and operative conceptions of property in turn.

A. THE COMMON CONCEPTION OF PROPERTY

On the surface, the move in *Tyler* sounds appealing in its seemingly effortless application. According to the opinion's plain terms, interests that are "rooted" in the claimant's title are protected against public interference and thus cannot be taken absent compensation.[83] When one merely needs to determine

81. *Tyler*, 143 S. Ct. at 1376.

82. *See supra* note 10 (citing sources on property and changing cultural values).

83. Considering whether a principle is "rooted" in a claimant's title calls to mind similarly simplistic verbiage from the first major takings case to come before the Court in the Roberts era. *Tyler*, 143 S. Ct. at 1376. In the 2010 matter of *Stop the Beach Renourishment, Inc. v. Florida Dep't of Environmental Protection*, a four-Justice plurality asserted that takings liability is appropriate where a state declares that "what was once an *established* right of private property" at common law "no longer exists." 560 U.S. 702, 715 (2010) (plurality opinion) (emphasis added). Two other Justices suggested in a concurrence that deprivation of an "established" common law property interest amounts not to a taking

whether an interest is "rooted," and some objective measure—like the majority view among the states—is available to make that determination, property law sounds pretty easy to implement.[84] Such an approach relieves the judiciary of having to engage on substantive matters of political morality. Courts merely need to look to what someone else has—for whatever reasons or even no apparent reason at all—already decided is or is not, seemingly for all time, property.[85]

This course is of a kin with what Laura Underkuffler has helpfully described as the "common conception" of property.[86] On this conception, property both *identifies* individual interests and *protects* them against collective power.[87] It, of course, is not completely bounded off from politics. After all, the dimensions of individual interests are the product of collectively derived laws.

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requiring compensation but, rather, a violation of due process that triggers injunctive relief. *Id.* at 735 (Kennedy, J., concurring).

84. Joseph William Singer, *The Ownership Society and Takings of Property: Castles, Investments, and Just Obligations*, 30 HARV. ENV'T L. REV. 309, 325 (2006) (explaining that, on this conception of property, "the rights of investors are defined *ex ante* on the basis of objective rules, traditions, and norms").

85. Michelman, *Property as a Constitutional Right*, *supra* note 17, at 1099–100 (questioning whether the Constitution protects only those "derivative rights" reflected in the "standing law" of the states); *id.* at 1104 ("Does the Constitution's category of protected property automatically encompass *whatever* entitlements respecting external objects [of] state law may at a given moment officially establish and sanction, regardless of their nature?"). Michelman offers the Supreme Court's decision in *Kaiser Aetna* as illustrating that the Takings Clause protects "direct constitutional rights[]" that are not recognized in extant state law. *Id.* at 1106–07 ("The circumstances of the case . . . all apparently conspired to make the Court decide that, regardless of whether the standing law warranted any secure expectation on Kaiser Aetna's part of legal respect for its exclusive right, Kaiser Aetna was *constitutionally* entitled to just such an expectation."). According to Michelman, the decision routinely understood to dawn the very idea of regulatory takings law—*Pennsylvania Coal Co. v. Mahon*—sowed the seeds of this idea. *Id.* at 1108 ("[T]he *Pennsylvania Coal* case was both the Waterloo of the police-power servitude doctrine and the irrefutable demonstration of the impossibility of derivative constitutional property rights without direct ones lurking somewhere behind them."); *see also* LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 469 (1978) ("At stake must be not only what people *in fact expect* upon examining the body of positive law, but also what they are *entitled* to expect, positive law to the contrary notwithstanding.").

86. *See* LAURA UNDERKUFFLER, THE IDEA OF PROPERTY: ITS MEANING AND POWER 38–46 (2003).

87. *Id.*; *see also* PruneYard Shopping Ctr. v. Robins, 447 U.S. 74, 93 (1980) (Marshall, J., concurring) (describing property as "establishing a sphere of private autonomy which government is bound to respect").

However, the conception's defining feature lies in the claim that once property's dimensions are selected—per *Tyler* via the majority rule among the states—the sphere of individual autonomy and control is established and secured against infringement.[88]

Contra the impression left by the Court's opinion, *Tyler*'s majority-rule approach is not uni-directional. It is the case that turning to the property statutes of "sister States" in the search for background principles allowed the *Tyler* Court to *expand* the scope of Ms. Tyler's property interest in a manner that the Minnesota statute in force denied.[89] Some analysts explicitly praised *Tyler* for setting a floor of property rights in this way, which Minnesota was precluded from subverting absent compensation.[90] This same approach, however, could allow courts to *contract* the scope of a property owner's interest in mechanical fashion and, in effect, construct a ceiling on property.[91] To illustrate, we can revisit what is perhaps the most well-recognized takings dispute of the modern era: *Lucas v. South Carolina Coastal Council*.[92]

In 1986, after reaping significant returns through his development company's sale of more than 1,000 residential units in a subdivision on a narrow barrier island in South Carolina, David

88. *See* UNDERKUFFLER, *supra* note 86, at 38–46 (referring to property as a "bounded sphere").

89. Tyler v. Hennepin County, 143 S. Ct. 1369, 1376–78 (2023).

90. *See, e.g.*, Ilya Somin, *My New Brennan Center Article on* Tyler v. Hennepin County *and the Cross-Ideological Case for Stronger Judicial Protection for Constitutional Property Rights*, REASON: THE VOLOKH CONSPIRACY (May 30, 2023), https://reason.com/volokh/2023/05/30/my-new-brennan-center-article-on-tyler-v-hennepin-county-and-the-cross-ideological-case-for-stronger-judicial-protection-for-constitutional-property-rights [https://perma.cc/6BCB-B2JY] (praising *Tyler* for "set[ting] a vital floor below which states must not fall").

91. *Cf.* DAVID DANA & THOMAS W. MERRILL, PROPERTY: TAKINGS 64–67 (2002) (remarking on the prospect of a federal constitutional ceiling on property to prevent states from manipulating property interests to expand the range of government actions that can generate takings liability); Maureen E. Brady, *Property's Ceiling: State Courts and the Expansion of Takings Clause Property*, 102 VA. L. REV. 1167, 1172 (2016) (discussing what the author deems "the worrisome potential for overbroad or ever-expanding constitutional property rights to inflict extraordinary administrative costs and freeze beneficial regulatory interventions").

92. 505 U.S. 1003 (1992). The description of *Lucas* that follows draws from Timothy M. Mulvaney, *Property-as-Society*, 2018 WIS. L. REV. 911, 915–16 (2018).

Lucas acquired from the company two such lots for himself.[93] This barrier island—the Isle of Palms—is especially dynamic due to sand-shifting patterns attributable to a nearby inlet.[94] At various points in the four decades before the suit, accretion resulted in these two lots resting hundreds of feet landward of the ocean's mean high-water line; at other points in this period, though, erosion placed them completely underwater.[95] While the State's coastal region had been extensively regulated for some time, these lots were considered developable under South Carolina law when Mr. Lucas acquired them.[96]

Shortly after Mr. Lucas's acquisition, the state legislature passed the 1988 South Carolina Beachfront Management Act.[97] Relying on new scientific evidence revealing the impacts of erosion resulting from development of the state's coastline, this statute served in many respects as a last-ditch measure to preserve a beach and dune system that protects the public from harm.[98] The Act established a coastal setback line based on historic high-water episodes and prohibited new development or reconstruction of existing development on any lots—including the two recently acquired by Mr. Lucas—seaward of that line.[99] Mr. Lucas filed suit seeking compensation for an alleged three

93. *Lucas*, 505 U.S. at 1006–08; *see* Vicki Been, Lucas v. The Green Machine*: Using the Takings Clause to Promote More Efficient Regulation?* (detailing Lucas's purchases), *in* PROPERTY STORIES 299, 304 (Gerald Korngold & Andrew P. Morriss eds., 2d ed. 2009).

94. Jan Goldman-Carter, *Protecting Wetlands and Reasonable Investment-Backed Expectations in the Wake of* Lucas v. South Carolina Coastal Council, 28 LAND & WATER L. REV. 425, 431 (1993) ("Lucas' lots came within the erosion baseline, primarily because they were located adjacent to tidal inlets which had not been secured with groins, rip-rap, or other structural erosion control measures."); James G. Titus, *Rising Seas, Coastal Erosion, and the Takings Clause: How to Save Wetlands and Beaches Without Hurting Property Owners*, 57 MD. L. REV. 1279, 1335 (1998) (noting that David Lucas's "lots were about 300 feet from the beach, but because they were near an inlet, the shore had advanced and retreated several times in the preceding few decades").

95. Been, *supra* note 93, at 311.

96. *Lucas*, 505 U.S. at 1008.

97. *Id.* at 1007 (recalling the passage of the Act and its "direct effect" of preventing residential development on Lucas's two lots).

98. *Id.* at 1010 (detailing the State's intentions behind the Act); *see also* Richard J. Lazarus, Lucas *Unspun*, 16 SE. ENV'T L.J. 13, 29 (2007) ("The Beachfront Management Act sought to put an end to the human folly of placing people, lives, livelihoods, and homes in those places most exposed to the destructive forces of nature.").

99. *Lucas*, 505 U.S. at 1008–09.

million dollar diminution in his properties' value that he attributed to what he deemed an unconstitutional regulatory taking.[100]

The South Carolina Supreme Court concluded that legislative restrictions on land uses that seek to prevent harm do not give rise to takings liability even where they render a property interest devoid of economic value.[101] The U.S. Supreme Court, though, reversed and remanded.[102] In accord with what the Court deemed a new "categorical" approach to takings disputes, the State must pay takings compensation, without "inquiry into the public interest advanced," where a regulation eliminates "all economically productive or beneficial uses" of property in a manner not previously foreclosed by the state's common law.[103]

On remand, the South Carolina Supreme Court determined that the above-referenced legislation enacted after Mr. Lucas's acquisition of the two lots at issue went beyond merely replicating development restrictions inherent in principles of South Carolina's common law tradition.[104] In its view, Mr. Lucas had a reasonable expectation that he could develop his lots at the time he acquired them.[105] Therefore, the court concluded that the state legislature's enforcement of the statutory development restriction gave rise to a compensable taking where that restriction eliminated all economically viable uses of Mr. Lucas's parcels.[106]

But enter *Tyler*, and the picture looks decidedly different.

Against the backdrop of *Tyler*'s assertion that a property owner's expectations are shaped by statutory laws in place in the majority of states, the analysis on remand in *Lucas* may well

100. Lucas advocated for a new rule by which the sheer weight of the economic impact resulting from a development restriction of this nature categorically triggers takings liability regardless of whether it mirrors a common law prohibition or otherwise serves an important public interest, such as health and safety or environmental protection. Lucas v. S.C. Coastal Council, 404 S.E.2d 895, 898 (S.C. 1991), *rev'd*, 505 U.S. 1003 (1992) ("Lucas maintains that if a regulation operates to deprive a landowner of 'all economically viable use' of his property, it has worked a 'taking' for which compensation is due, regardless of any other consideration.").

101. *Id.* at 899–902 (citing Mugler v. Kansas, 123 U.S. 623 (1887)).

102. *Lucas*, 505 U.S. at 1030–31.

103. *Id.* at 1015–21, 1030.

104. Lucas v. S.C. Coastal Council, 424 S.E.2d 484, 486 (S.C. 1992).

105. *Id.* at 485.

106. *Id.* at 486.

have followed a different course. At the time of the case, Mr. Lucas's lots were—in light of prevailing currents, the contours of the ocean floor, and the natural profile of the beach and dune system—two of a small handful of lots among the hundreds of oceanfront properties along this South Carolinian barrier island where erosion was especially severe.[107] And while at the time of Mr. Lucas's acquisition, South Carolina statutory law may not have precluded development on ecologically vulnerable lots of this nature, environmental legislation in place in most other states by that time did.[108]

Accepting *Tyler*'s assertions on their face suggests that Ms. Tyler should have, at the time she acquired her condominium in Minnesota, operated on the following expectation: The state would not retain any overage reaped at a future foreclosure sale because, despite a seventy-five-year-old Minnesota law asserting otherwise, the majority of statutory laws in place in other states at the time declared so. In other words, she should be understood to have sustained a constitutionally compensable loss of a property interest that she was led by the statutory law not of her own state but the statutory laws of the majority of other states to count upon as hers to keep. It logically follows from this course of analysis, then, that it may well have been unreasonable for Mr. Lucas to ground his expectations in the fact that South Carolina statutory law did not preclude development on the oceanfront lots he was seeking to purchase. Why? Well, that would be because development on similarly situated lots in most other jurisdictions was so proscribed.[109]

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107. *See* Josh Eagle, Professor, Panel at the University of South Carolina School of Law Conference on Takings and Coastal Management: Coastal Management After *Lucas* (Nov. 3, 2017).

108. *See, e.g.*, City of Virginia Beach v. Bell, 498 S.E.2d 414, 415 (Va. 1998) (rejecting a takings challenge to a "Coastal Primary Sand Dune Zoning" ordinance enacted in 1980); *see also* Carol M. Rose, *The Story of* Lucas*: Environmental Land Use Regulation Between Developers and the Deep Blue Sea* ("South Carolina had been relatively slow off the mark in establishing a coastal regulation. . . . [By] 1972, . . . all of the Atlantic seaboard states had already passed legislation at least protecting coastal wetlands—all except South Carolina."), *in* ENVIRONMENTAL LAW STORIES 237, 258 (Richard J. Lazarus & Oliver A. Houck eds., 2005).

109. When taken literally, *Tyler*'s approach calls into question a range of longstanding Supreme Court decisions in the takings realm. The famous case of *Mugler v. Kansas* is one example of the Court's finding no taking when the law in the state in which the claim was filed was a minority rule. Mugler v.

It strains credulity to think that the entire Supreme Court sought to call into question Mr. Lucas's takings compensation award. Instead, what follows from this discussion is that *Tyler*'s primary shortcoming lies in its failure to acknowledge directly that the common, seemingly objective conception of property, on which both its musings about majority rules and this recasting of *Lucas* rest, diverges from the dynamism with which property ordinarily operates on the ground. Operating a private property system in a democracy is not focused exclusively on protecting individual interests, once established, against the collective. Instead, it requires accounting for the *tensions between* individual and collective interests and acknowledging that approaches to resolving those tensions vary and can fluctuate with societal needs.[110] Such a characterization is not to suggest that property is simply up for grabs in America; there are, indeed, myriad easy cases where the common and operative conceptions of property yield the same result. Yet, as the next Section explains, the "rooted" nomenclature in *Tyler* masks the prevalence of hard cases, including those in which the relative power of individual and collective interests may shift across time.[111]

Kansas, 123 U.S. 623, 668 (1887); *see also* Andrea L. Peterson, *The Takings Clause: In Search of Underlying Principles Part II—Takings As Intentional Deprivations of Property Without Moral Justification*, 78 CALIF. L. REV. 53, 113 (1990) (explaining that the Kansas legislature's moral judgment underpinning the State's prohibitory liquor law at issue in *Mugler* "was not in line with national values at the time"). *Keystone Bituminous Coal Ass'n v. DeBenedictis* offers another example, as Justice Rehnquist, in dissent, noted the peculiarity of Pennsylvania's separation of parcels into subjacent and support estates in advocating for takings liability. 480 U.S. 470, 515–20 (1987) (Rehnquist, J., dissenting). Contra *Tyler*, both *Mugler* and *Keystone* involved an instance in which the law of the state in which the claim was filed stood in the minority in restricting property rights, yet the Court found no compensable taking.

110. *Id.* at 52. Underkuffler's description of the common conception of property mirrors, in important respects, Joseph William Singer's articulation of what he dubs the "castle model." Singer, *supra* note 84, at 325 ("The castle model focuses on allocating power based on a clear definition of the scope of property rights that does not change because of evolving values or social conditions; the goal is to define the borders of ownership and to protect the rights of those who stay within the lines.").

111. UNDERKUFFLER, *supra* note 86, at 75 (describing hard cases as those in which "the core values that underlie the claimed [property] right and the core values that underlie the competing public interest are the same in kind," such that "[t]he conflict between them is a struggle that is internal to . . . that right's definition, scope, and meaning").

B. AN OPERATIVE CONCEPTION OF PROPERTY

The actuality that property is a social and evolving creation means that hard cases require reflection on the values and ways of life that contemporary society embraces.[112] Societal views evolve in the face of rising populations, technological developments, new scientific insights, and refined value structures. There were eras, for instance, when anti-pollution laws, anti-predation laws, anti-discrimination laws, and equitable distribution laws were inconceivable.[113] Later, though, issues surrounding pollution, predation, discrimination, and marital equity became hard cases, as new generations came to new moral understandings on the relational responsibilities of emitters to the public, lenders to borrowers, businesses to customers, and one partner in a marriage to the other. Today, consensus has brought us to the point where we often take these laws for granted, but it bears remembering that we did not get to this point through some objective means. Rather, the ills of pollution, lending predation, discrimination in the marketplace, and marital inequities rose to consciousness—and, ultimately, to law—only through the blood, sweat, and tears of brave advocates who prompted the polity to engage in moral reevaluation.

A strict interpretation of *Tyler*'s emphasis on deriving background principles from state legislative majorities would foreclose the aforementioned stories of moral advent, for the state legislatures that first championed anti-pollution laws, anti-predation laws, anti-discrimination laws, and equitable distribution laws were in a prior day decidedly and necessarily in the minority.[114] This reading of *Tyler* would pitch the Court's decision as denying that property laws reflect evaluative commitments about our social order. It would deny that democratically elected officials are empowered to adopt new property laws that advance

112. Singer, *supra* note 84, at 312–14.

113. MARTHA C. NUSSBAUM, JUSTICE FOR ANIMALS: OUR COLLECTIVE RESPONSIBILITY, at xvi (2022) ("Law is built by humans using the theories they have. When those theories were racist, laws were racist. When theories of sex and gender excluded women, so too did law.").

114. Margaret Radin has observed that legislative changes that seem sudden and unusual are often perceived as more disruptive—and, thus, more likely to be perceived as compensable takings—than those that develop gradually and spread in small steps across jurisdictions. MARGARET JANE RADIN, *Government Interests and Takings: Cultural Commitments of Property and the Role of Political Theory*, *in* REINTERPRETING PROPERTY 166, 172–77 (1993).

the common welfare in new directions when society comes to believe that old ways of thinking no longer reflect the moment. And it would deny that it is the judiciary's task to exercise judgment in determining whether such democratic efforts single out select property owners to bear burdens that are more appropriately born by the whole through the provision of takings compensation.

The "rooted" descriptor cannot be understood as so detached from reality. Rather, it seems *Tyler* is, in its best light, subliminally maintaining that a principle is appropriately considered "rooted" for takings purposes when that principle *deserves* legal and moral recognition.[115] After all, takings law does not afford compensation for each and every alteration in property law. Rather, it seeks to filter out only those alterations that are *unfair and unjust* absent compensation.[116] Courts cannot avoid exercising judgment in implementing this constitutional directive, for no norm-insensitive formula can dictate whether a legal alteration is fair or whether a legal alteration is just without payment.

Determining whether a chosen principle deserves legal and moral protection does not require adopting some sort of naturalistic general law of property.[117] Variation across states has, of

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115. *See* Joseph William Singer, *Justifying Regulatory Takings*, 41 OHIO N.U. L. REV. 601, 611 (2015) (contending that takings law revolves around identifying which "property rights deserve constitutional protection in which contexts"); *see also* Jeremy Paul, *The Hidden Structure of Takings Law*, 64 S. CAL. L. REV. 1393, 1406 n.34 (1991) ("[R]igid [takings] compensation practices derive from unreflective judicial allegiance to models of property law aimed at avoiding the courts' role as expositors of human values.").

116. *See* Armstrong v. United States, 364 U.S. 40, 49 (1960) ("The Fifth Amendment's guarantee that private property shall not be taken for a public use without just compensation was 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."); Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 124 (1978) (describing takings law as tasked with "determining when 'justice and fairness' require that economic injuries caused by public action be compensated by the government, rather than remain disproportionately concentrated on a few persons").

117. Michelman, *Judicial Conservatism*, *supra* note 18, at 306 (discussing the possibility of a "federal judicial resolve to vindicate against state legal machination a national constitutional norm of regard for a specified class of individual rights"); Thomas W. Merrill, *The Landscape of Constitutional Property*, 86 VA. L. REV. 885, 942–43 (2000) (discussing the prospect of adopting a "patterning definition" that "would first establish federal constitutional criteria for identifying protected property interests, and then look to nonconstitutional sources

course, long been valued in property law.[118] This enduring reverence does not exist merely out of respect for federalism as an abstract concept.[119] There also is, in a pragmatic sense, some virtue in allowing states room to innovate in attending to changing circumstances in the context of their own landscapes—mountains versus plains, urban settlement patterns versus rural ones, essentiality of land for farmers versus commodification of land by capitalists, and the like.[120] In turn, the flexibility to innovate encourages states to learn from one another's experiences.[121] That said, determining whether a chosen principle deserves legal and moral protection *also* does not require eschewing national policies in situations in which local variations pose challenges. But while determining whether a chosen principle

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of law to determine whether any such interest exists"); Brady, *Illusory Promise*, *supra* note 59, at 1015 ("The idea behind patterning is to provide a baseline, uniform constitutional standard across the states . . . without having courts make a confusing national law of property specifically for federal purposes.").

118. From adverse possession to beach access, estates and future interests, landlord-tenant relations, servitudes, nuisance, land use and environmental regulation, and far beyond, property laws across states routinely diverge in response to local conditions, needs, values, and preferences. *See, e.g.*, Brady, *Property Convergence*, *supra* note 59, at 700–02 (listing a series of topics on which state property laws vary). Were minority property rules not considered background principles simply because they are or were minority rules, this variation undoubtedly would begin to fall away.

119. An extensive array of scholarly works explores the interplay between takings, property, and federalism. A list of the most prominent works includes, but is by no means limited to, Abraham Bell & Gideon Parchomovsky, *Of Property and Federalism*, 115 YALE L.J. 72 (2005); Merrill, *supra* note 117; Michelman, *Judicial Conservatism*, *supra* note 18; Michael H. Schill, *Intergovernmental Takings and Just Compensation: A Question of Federalism*, 137 U. PA. L. REV. 829, 831 (1989).

120. On the Supreme Court, it was Justice Louis Brandeis who most famously spoke to the ability of a "single courageous" state to serve as a "laboratory" to conduct "novel social and economic experiments." New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting); *see also* Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n, 576 U.S. 787, 817 (2015) (asserting that deference to policy decisions of the States "allows local policies 'more sensitive to the diverse needs of a heterogenous society,' permits 'innovation and experimentation,' enables greater citizen 'involvement in democratic processes,' and makes government 'more responsive by putting the States in competition for a mobile citizenry'" (quoting Bond v. United States, 546 U.S. 211, 221 (2011))).

121. *See, e.g.*, Michael C. Dorf & Charles F. Sabel, *A Constitution of Democratic Experimentalism*, 98 COLUM. L. REV. 267, 314–15 (1998) (explaining how jurisdictions look to one another to solve problems).

deserves legal and moral protection does not require adopting a naturalistic general law of property or eschewing federal policies delineating property rights, it *does* demand—as the next Part explains—an inquiry into the *adequacy of the justifications* at hand for that principle's application in a given context in which the state has not afforded compensation up front.

III. SEARCHING FOR FAIRNESS AND JUSTICE

The foregoing Parts have staked a number of claims. Part I contended that *Tyler*, in expanding the sources of background principles to include both intrastate and interstate statutes, suggested on its face that the majority view of state legislatures defines a takings claimant's property even when statutory law of the jurisdiction in which the claim was filed suggests otherwise.[122] Suspicious that the Court had in mind such a massive disruption of the property law system, Part II asserted that *Tyler* is more plausibly interpreted as hesitant to acknowledge the reality that determining whether background principles deserve recognition is a normative inquiry.[123] The very nature of property, after all, involves both courts and legislatures making judgments about the contemporarily legitimate scope of property rights. And takings law, in turn, seeks to ensure that alterations in property rights in the face of evolving social, economic, and environmental conditions align the scales of justice absent compensation.[124]

Even very crudely dividing arguments about justice into just two categories—which, drawing on the descriptions of a commentator invoked in the Introduction, we can refer to as "libertarian" and "left-liberal"[125]—reveals what *Tyler*'s emphasis on legislative majorities papers over. Section A reveals that *Tyler* poses internal frictions for libertarian theorists by pitting an emphasis on freely retaining the fruits of one's labor (including, as here, any overage that results following a foreclosure sale)

122. *See supra* Part I.A–II.C.

123. *See supra* Part II.A–II.B.

124. *See* Timothy M. Mulvaney, *Non-Enforcement Takings*, 59 B.C. L. REV. 145, 158 (2018) ("[R]egulatory takings law offers space not to routinely provide compensation to parties economically impacted by adjustments in property laws, but rather . . . to vindicate impacted parties' 'right to justification' regarding the fairness of the responsibilities compelled by those adjustments.").

125. *See* Somin, *supra* note 3 (describing the cross-political coalition embracing the holding in *Tyler*).

versus elevating the freedom to "contract" by electing legislators who advance a policy that one's failure to pay taxes could result in the forfeiture of real property. Section B explains how *Tyler* is similarly fraught for left-liberal theorists, in the sense that it juxtaposes an approach focused on avoiding disparate impacts through the tax foreclosure system with one that stresses how paying taxes is a legitimate obligation to one's community.

A. LIBERTARIAN TENSIONS

Only the libertarian argument underpinning the majority view among the states featured prominently in the Court's decision in *Tyler*.[126] Why should the state, the Court wonders, be able to sweep away debtors' equity at its discretion to line its own pockets?[127] In a Lockean sense, the state has done nothing to earn any overage reaped at a tax sale, and is thus unjustly enriching itself by adopting a law affording it that overage.[128] According to the perspective on which the Court's decision is based, the folly of Minnesota's approach is evident in the fact that Ms. Tyler's loss would have been arbitrarily greater had her tax debt been lower or her property value higher.[129]

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126. Tory L. Lucas, Reassessing Tyler v. Hennepin County: A Critical Examination of the Supreme Court's Federalist Overreach in Discovering a Constitutionally Protected Property Right in a Takings Case Involving a Sovereign State's Real Property Tax-Foreclosure Sale, 18 LIBERTY U. L. REV. 473, 499 (2024) (suggesting that the Tyler Court "appeared curiously uncurious as to why [select] states deviated from the norm").

127. Tyler v. Hennepin County, 143 S. Ct. 1369, 1379 (2023) ("[I]f a bank forecloses on a home because the homeowner fails to pay the mortgage, the homeowner is entitled to the surplus from the sale . . . . The State . . . makes an exception only for itself . . . .").

128. *See, e.g.*, Mark Bartholomew, *Protecting the Performers: Setting A New Standard for Character Copyrightability*, 41 SANTA CLARA L. REV. 341, 357 n.94 (2001) ("Locke's argument that property rights should be tied to labor is a precursor of the common law doctrine of unjust enrichment.").

129. At oral argument in *Tyler*, counsel for the claimant referenced the matter of *Rafaeli, LLC v. Oakland County*, 952 N.W.2d 434, 440 (Mich. 2020), in which a Michigan locality reaped $24,500 at a tax sale prompted by a mere $8 delinquency. Amy Howe, *Justices Appear Likely to Side with Homeowner in Foreclosure Dispute*, SCOTUS BLOG (Apr. 26, 2023), https://www.scotusblog.com/2023/04/justices-appear-likely-to-side-with-homeowner-in-foreclosure-dispute [https://perma.cc/VY9D-CBYB]; *see also* Hall v. Meisner, 51 F.4th 185, 196 (6th Cir. 2022) (likening the retention of "property worth vastly more than the debts" to "theft").

Not all libertarians, though, would agree. On an alternative view, Minnesota's legislative choice to retain the overage at a tax sale offers both a risk and a reward. Purchasers of land in Minnesota assume the risk that their land will be forfeited if they fail to pay their property taxes and do not take advantage of opportunities to preserve their equity for more than three years. In assuming this risk, consumers are rewarded in the real estate market with sales prices that are lower than they otherwise would be. It is not takings law's job to retroactively provide perfect national insurance against a free choice of this nature, made with full knowledge of the consequences, that happens to go wrong.[130] Rather, it is up to consumers to choose whether or not to take the risk-reward proposition: buy in Minnesota at a price that reflects the possibility of forfeiture or buy in another state

130. For discussions on the intersections of takings compensation and insurance, see, for example, Steve P. Calandrillo, *Eminent Domain Economics: Should "Just Compensation" Be Abolished, and Would "Takings Insurance" Work Instead?*, 64 OHIO ST. L.J. 451, 500–01 (2003) (discussing takings insurance as a viable option to takings law); Barton H. Thompson, Jr., *The Endangered Species Act: A Case Study in Takings & Incentives*, 49 STAN. L. REV. 305, 348 (1997) ("Although property owners normally protect themselves through private insurance, adverse selection and other distortions might preclude private insurance against governmental regulation, creating a need for governmental insurance in the form of takings compensation."); Eric Kades, *Avoiding Takings "Accidents": A Tort Perspective on Takings Law*, 28 U. RICH. L. REV. 1235, 1240–42 (1994) (arguing takings insurance is reasonable when insuring large and infrequent losses); Daniel A. Farber, *Economic Analysis and Just Compensation*, 12 INT'L REV. L. & ECON. 125, 127 (1992) (raising the question of "why the government should be the supplier of takings insurance"); Daniel A. Farber, *Public Choice and Just Compensation*, 9 CONST. COMMENT. 279, 284 (1992) (discussing some advantages of private insurers providing takings insurance); William A. Fischel & Perry Shapiro, *Takings, Insurance and Michelman: Comments on Economic Interpretations of "Just Compensation" Law*, 17 J. LEGAL STUD. 269, 286–87 (1988) (examining problems with private market takings insurance); David A. Arrensen, Note, *Compensation for Regulatory Takings: Finality of Local Decisionmaking and the Measure of Compensation*, 63 IND. L.J. 649, 666 (1988) (describing the argument that "an appropriate level of compensation for regulatory takings acts as a sort of after-the-fact insurance plan for developers"); Louis Kaplow, *An Economic Analysis of Legal Transitions*, 99 HARV. L. REV. 509, 528 (1986) (discussing the mechanics of spreading the risk of a takings through insurance); Robert Cooter, *Unity in Tort, Contract, and Property: The Model of Precaution*, 73 CALIF. L. REV. 1, 24 (1985) ("A rule of strict liability for takings could be justified as a type of insurance that reallocates the risk of large losses from individuals to all taxpayers."); Lawrence Blume & Daniel L. Rubinfeld, *Compensation for Takings: An Economic Analysis*, 72 CALIF. L. REV. 569, 571–72 (1984) (assessing the efficiencies of takings insurance).

at a price that is higher due to the fact that forfeiture is disallowed.[131]

Affording perfect national insurance against state forfeiture laws not only would interfere with consumers' freedom of choice in the marketplace; by centralizing property as a one-size-fits-all institution, it also would interfere with voters' freedom of choice at the ballot box.[132] Kentucky—which the *Tyler* Court deemed among the majority of states with a tax collection scheme that does not trigger takings concerns[133]—effectively provides property owners one year to redeem their property after missing the deadline to pay their taxes, followed by a brief window after a future tax sale to apply for any overage reaped in that sale.[134] Minnesota law, on the other hand, offers a much longer redemption period—three years—but does not include a post-sale option to apply for any tax sale overage.[135] It is an affront to electoral freedom to suggest that the manner in which Minnesota residents' local governments encourage property owners to pay their fair share of property taxes must align with whatever manner the residents of Kentucky and a majority of other states have chosen for that purpose.[136]

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131. Robert G. Natelson, Tyler v. Hennepin County*: Why this Seemingly Innocent Decision Is Disquieting*, FEDERALIST SOC'Y: FEDSOC BLOG (June 20, 2023), https://fedsoc.org/commentary/fedsoc-blog/tyler-v-hennepin-county-why-this-seemingly-innocent-decision-is-disquieting [https://perma.cc/AD6L-TEQJ].

132. *See What* Tyler v. Hennepin County *Means for the Future of Property Tax Foreclosure Systems Across the Country*, CTR. FOR CMTY. PROGRESS: BLOG (May 26, 2023), https://communityprogress.org/blog/tyler-hennepin-future-property-tax-foreclosure [https://perma.cc/2QT7-PFCU] [hereinafter *What* Tyler v. Hennepin County *Means*] ("The Court has now made clear that state tax foreclosure processes *must* provide an opportunity for property owners to recover any 'excess value' in their property that might exist beyond the amount of unpaid taxes, interest, fees, and costs *at the conclusion of the foreclosure*." (emphasis added)).

133. Tyler v. Hennepin County, 143 S. Ct. 1369, 1377 n.1 (2023).

134. KY. REV. STAT. ANN. §§ 134.546(1), 426.500 (West 2024).

135. MINN. STAT. § 281.17(a) (2023). Additionally, unlike Kentucky, Minnesota offers delinquent taxpayers the opportunity to apply to repurchase their property in the period between the date on which title vests in the State and a tax sale. *Id.* § 282.241(1) (2023).

136. Rummel v. Estelle, 445 U.S. 263, 282 (1980) (declaring "constitutionally imposed uniformity" to be "inimical to traditional notions of federalism"). It is not evident that, post-*Tyler*, a state can set *any* deadline for the post-sale request of any overage reaped at a tax sale that is shorter than the statute of limitations for filing a takings claim.

B. LEFT-LIBERAL TENSIONS

Though largely absent from the Court's discussion in *Tyler*, there is a formidable left-liberal argument against Minnesota's approach that centers on its highly regressive effect. According to this view, forfeiture laws affording overage to the state prey upon the residents of communities in poverty, particularly the elderly poor who own their homes but lack disposable income to consistently pay their taxes.[137] As a result of decades of discriminatory policies and disinvestment,[138] the most pronounced impact of such a policy falls on those poor communities in which the majority of the residents are, like Ms. Tyler, persons of color.[139] These laws produce a damning one-two punch: Poor

137. *See, e.g.*, Emily L. Mahoney & Charles T. Clark, *Arizona Owners Can Lose Homes over as Little as $50 in Back Taxes*, AZ CENT. (June 16, 2017), https://www.azcentral.com/story/money/real-estate/2017/06/12/tax-lien-foreclosures-arizona-maricopa-county/366328001 [https://perma.cc/97M2-R3QE] (documenting how the weight of tax foreclosures in Arizona are concentrated in high-poverty neighborhoods).

138. *See, e.g.*, Palma Joy Strand & Nicholas A. Mirkay, *Racialized Tax Inequity: Wealth, Racism, and the U.S. System of Taxation*, 15 NW. J.L. & SOC. POL'Y 265, 271 (2020) ("[L]ocally segregated neighborhoods and discrimination in access to housing were brought to national scale by redlining and federal mortgage policies beginning in the 1930s."); Bernadette Atuahene & Christopher Berry, *Taxed Out: Illegal Property Tax Assessments and the Epidemic of Tax Foreclosures in Detroit*, 9 U.C. IRVINE L. REV. 847, 849, 885–86 (2019) (deeming it likely, upon review of a large data set on assessment ratios and subsequent foreclosures, that "thousands of Detroit home owners—mostly African-Americans" lost their property in the wake of the Great Recession due to tax assessment procedures that were unjust and likely violated the Michigan Constitution); Daria Roithmayr, *Them that Has, Gets*, 27 MISS. COLL. L. REV. 373, 383 (2008) (explaining that intergenerational disparities in wealth resulting from discriminatory policies of the past account for a quarter of the sizable racial gap in home ownership).

139. *See, e.g.*, Cameron LaPoint, Property Tax Sales, Private Capital, and Gentrification in the U.S. 40 (Sept. 2023) (unpublished manuscript) (on file with Minnesota Law Review) (finding that, in Washington, DC., homeowners with significant property tax debt subject to foreclosure are significantly more likely to be Black); Nick Thieme & Sophie Kasakove, *Tax Sale Nightmare: How an Unpaid Bill Can Cost Baltimore Homeowners Thousands, or Even Their Homes*, BALT. BANNER (Jan. 26, 2023), https://www.thebaltimorebanner.com/community/housing/baltimore-tax-sale-lien-auction-64APUHOPUFB6VJ4Z6IX6WC7NMU [https://perma.cc/UMV7-PKDU] (finding that, controlling for income, poverty rates, home sales prices, and population, the rate of tax foreclosures and subsequent tax sales decreases as the percentage of white residents in a neighborhood increases). Such policies also can disproportionately impact persons with disabilities. *See, e.g.*, Brief for New Disabled S. & Emory L. Sch.

persons of color are first disproportionately deprived of their homes, and thereafter are made even poorer when the state declines to rebate the amount of the tax sale price that is over and above the tax delinquency.[140] This combination is particularly nefarious in a case like Ms. Tyler's, where late fees and interest consumed all but $2,300 of her $15,000 debt.[141] The state should not in good conscience be able to profit from such a predatory, discriminatory, and confiscatory scheme. Indeed, one might think that the state should be tasked with making reasonable efforts to *maximize* for the debtor's benefit the overage reaped at a tax foreclosure sale.[142] But, at the very least, that an owner

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Disabled L. Students Ass'n as Amici Curiae in Support of Petitioners at 2, Tyler v. Hennepin County, 143 S. Ct. 1369 (2023) (No. 22-166), 2023 WL 2477938.

140. The impact of this one-two punch is not merely experienced by the debtor. Forfeiture laws of this sort can have multigenerational effects on the economic wellbeing of affected families. *See, e.g.*, Amicus Curiae Brief of the Wis. Realtors Ass'n in Support of Petitioner at 2, *Tyler*, 143 S. Ct. 1369 (No. 22-166), 2022 WL 4467246.

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

142. States are permitted in some jurisdictions to sell properties at foreclosure sales for as little as twenty percent of market value, a practice that the Third Restatement of Property approves. *See* RESTATEMENT (THIRD) OF PROP. (MORTGAGES) § 8.3 (AM. L. INST. 1997) ("[A] court is warranted in invalidating a sale where the price is less than 20 percent of fair market value and, absent other foreclosure defects, is usually not warranted in invalidating a sale that yields in excess of that amount."). *Tyler* conceivably could call this practice into question. The decision declares that the state has an obligation to afford debtors a meaningful opportunity following a foreclosure sale to demand any amount above and beyond the debt (minus the state's costs) that is reaped at that sale. This obligation would be rather feeble if the state had free reign to put a debtor's property up for sale at the mere price of the debt and its costs.

The Supreme Court recently took up an analogous issue in the matter of United States v. Washington. In the mid-1800s, several Indian Tribes signed a series of treaties in which they relinquished large tracts of land in what is today the State of Washington. United States v. Washington, 853 F.3d 946, 953–54 (9th Cir. 2017). The treaties included a "fishing clause" that guaranteed the Tribes "the right of taking fish, at all usual and accustomed grounds and stations . . . in common with all citizens of the Territory." *Id.* at 954. In 1979, the Supreme Court had affirmed a Washington Supreme Court ruling that the treaty authorized the Tribe to take up to fifty percent of the harvestable fish in the relevant area. See Washington v. Wash. State Com. Passenger Fishing Vessel Ass'n, 443 U.S. 658, 686 (1979). In this latest case, the Tribes alleged that Washington violated this provision by constructing and maintaining culverts in a manner that, while allowing water to flow beneath roadways, inhibited the passage of salmon and, thus, interfered with their breeding patterns and caused populations to decline. *Washington*, 853 F.3d at 954. The question thus centered

may be unable to pay property taxes or otherwise decide not to do so does not relieve the state of its responsibility to avoid taking more than the amount of the original tax debt.

Yet as with the libertarian perspective, the moral question surrounding the justice of a policy that circumstantially allows the state to retain the overage in a tax sale is, from a left-liberal perspective, not necessarily one-sided. Property ownership, after all, is not absolute. Owners are not kings and queens; rather, their ownership interests are subject to safeguards and obligations out of concern and respect for the ownership interests and overall welfare of others. These safeguards and obligations are appropriately understood as conditions of ownership.[143] Here, the community collectively conditioned ownership on the obligation that property owners pay property taxes to fund essential services in their neighborhoods, including but by no means limited to schools, police and fire, hospitals, and the preservation of parks and natural areas. As such, the obligation to pay property taxes is a commitment to endow the common good. The property tax system thus serves as a component of the social contract that characterizes and fortifies these communities.[144]

The obligation underpinning Minnesota's property tax system is not defensible against a takings charge merely because society, through the state legislators in office in 1935, demanded its inclusion in the social contract. Rather, an obligation to pay

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on whether, as the State insisted, the treaty simply protected the Tribes' share of the supply of fish or, rather, also preserved the Tribes' supply of fish. *Id.* at 959–60. A federal district court concluded that the State was prohibited from threatening the fish supply. *Id.* at 961. It explained that, otherwise, while the Tribe would hold the right to take up to fifty percent of the available harvest, the State could undertake land use operations that called into question whether any fish at all actually would be available for harvest. *Id.* at 962. After the Ninth Circuit Court of Appeals upheld this decision, the U.S. Supreme Court granted certiorari. Washington v. United States, 583 U.S. 1089 (2018) (mem.). However, with Justice Anthony Kennedy recused given his involvement in related proceedings while serving on the Ninth Circuit, the Court split four-four, leaving the appellate court's finding intact. Washington v. United States, 138 S. Ct. 1832 (2018) (per curiam).

143. *See, e.g.*, Gregory S. Alexander, *Property as Propriety*, 77 NEB. L. REV. 667, 668 (1998) (outlining property's role as furthering commonly held notions of the public good).

144. *Cf.* Singer, *supra* note 84, at 329 ("Part of what it means to be a member of society, to be an owner among owners, is to be part of a real or imagined social contract that limits liberty to enlarge liberty, that limits property to secure property.").

property taxes is, like any other property-based obligation, defensible against a takings charge when it is fair and just absent compensation. And exploring the fairness and justice of such an obligation necessarily is a relational inquiry.[145]

Where select neighbors decide against fulfilling their obligation to pay their share of property taxes, it is other neighbors who bear the brunt of that neglect in the form of lesser services or higher tax rates. Minnesota's legislature recognized back in 1935 that circumstances arise that may cause property owners to fall behind. For this reason, its statutory law provided time and various opportunities following the initial delinquency for property owners to catch up on their taxes or sell their properties.[146] It is important to acknowledge, though, that affording these opportunities for redemption is not cost-free. The longer these opportunities remain available, the longer the period of time within which the debtors' neighbors must bear the burden of the debtors' neglect. The moral question here is not when in the process—prior to the title transferring to the state, prior to the tax sale, following the tax sale, etc.—redemption opportunities exist. Rather, the question revolves around whether these opportunities are meaningful and, if so, whether they are readily available for a reasonable period of time. In other words, is the length of time in which the state favors the interests of the property owners who walk away from their obligations of ownership—by affording them meaningful opportunities to protect themselves at the expense of the interests of those community members who fulfill their ownership obligations—fair and just to these delinquent taxpayers?

Minnesota set this length of time at three years.[147] Within this three-year period, the state notifies debtors of the consequences of non-payment and offers programs for taxpayers who are in financial need. Such plans include ten-year payment plans in the ordinary case and, for qualifying seniors, longer-term plans that include the possibility of a complete deferral of the tax

145. *See* UNDERKUFFLER, *supra* note 86, at 157–58. As Nestor Davidson has thoughtfully recounted, "[t]he legal realists, particularly Felix Cohen, Morris Cohen, and Robert Hale, laid the groundwork for our modern understanding of the role of social relations in property." Nestor M. Davidson, *Property and Relative Status*, 107 MICH. L. REV. 757, 771 (2009).

146. *See, e.g.*, MINN. STAT. §§ 281.18, 282.07, 282.241 subdiv. 1 (2024).

147. *Id.* §§ 281.17(a), 281.18.

debt until the debtor's death.[148] Only when for this entire three-year period debtors fail to pay their property taxes and disregard statutory safeguards for preserving their equity does Minnesota move to protect the community's interest in the continued provision of essential services. The state does so by endeavoring to recoup a portion of its lost property tax revenues through assuming title and, thereafter, retaining any overage reaped in a tax sale.[149] The state's retention of the overage is not a greedy, money-making enterprise. Indeed, for Hennepin County, the system is a sizable net negative—it is costly to maintain properties and to administer tax sales, and many such sales do not cover these costs and the original tax debt, let alone generate an overage.[150] Even for a hypothetical government official who is exclusively economically-minded, tax sales are very much a last resort to cut the state's losses. And in the relatively unlikely events in which tax sales *do* generate an overage, the state uses that overage to partially subsidize properties that need more money in repairs than their market value or are otherwise underwater.[151]

It certainly is the case that many a thoughtful analyst have pushed against the general idea of the states' relying on local

148. *See id.* §§ 279.37, 290B.03.

149. MINN. STAT. § 282.08 (2023).

150. *See* Daniel Rogan, *Tax Forfeiture in Hennepin County*, HENNEPIN CNTY. 2–3 (Feb. 2023), https://www.hennepin.us/-/media/hennepinus/residents/property/tfl/tax-forfeiture-3-6-2023.pdf [https://perma.cc/D56H-RPYM] (documenting that the costs of uncollected property taxes and administering the statutory forfeiture system exceed the revenues generated by the sales of tax-foreclosed properties); *see also* Dan Immergluck et al., *The Cost of Vacant and Blighted Properties in Pittsburgh: A Conservative Analysis of Service, Tax Delinquency, and Spillover Costs*, CTR. FOR CMTY. PROGRESS 7–8 (Mar. 2017), https://communityprogress.org/wp-content/uploads/2021/08/2017-03-The-Cost-of-Vacant-and-Blighted-Properties-in-Pittsburgh-2-TA-Report.pdf [https://perma.cc/GA9R-GCNY] (asserting that the value of properties within 500 feet of vacant tax distressed properties in 2015–2016 sustained an annual loss of $266 million in value, which correlated to a $4.8 million reduction in property tax revenue). *But see* Ralph D. Clifford, *Massachusetts Has a Problem: The Unconstitutionality of the Tax Deed*, 13 U. MASS. L. REV. 274, 282–83 (2018) (contending that, in 2013–2014, "Massachusetts municipalities collected approximately $56,600,000 more from their taxpayers than was owed").

151. *See, e.g.*, Sam Wells, *The Impact in Albany of the US Supreme Court's Decision in* Tyler v. Hennepin County, HISTORIC ALBANY FOUND. (Aug. 25, 2023), https://www.historic-albany.org/news/2023/8/25/the-impact-in-albany-of-the-us-supreme-courts-decision-in-tyler-v-hennepin-county-by-sam-wells [https://perma.cc/G35T-GYPZ].

property taxes to fund essential services at the local level.[152] Assuming, though, that such a property tax-based system—long in place in all fifty states[153]—will continue for the foreseeable future, there are myriad opportunities to make it more likely that property taxpayers will remain above water from the start. States might, for instance, reformulate their property assessment practices, which to date often suffer from both conscious and unconscious bias;[154] provide affirmative mechanisms to help the destitute, such as deeper tax breaks and exemptions, grants, low-interest loans, and payment plan options;[155] and take aim at untoward aspects of real estate practice, such as the ease with which lenders can issue predatory loans that target communities of color and with which speculators can swoop in to acquire properties well below market rates at tax lien certificate sales.[156] It

152. *See, e.g.*, Tracy Gordon, *Critics Argue the Property Tax Is Unfair. Do They Have a Point?*, TAX POL'Y CTR.: TAXVOX (Mar. 9, 2020), https://www.taxpolicycenter.org/taxvox/critics-argue-property-tax-unfair-do-they-have-point [https://perma.cc/P4M8-UCEG].

153. *See, e.g.*, Timothy M. Mulvaney, *Beneath the Property Taxes Financing Education*, 123 COLUM. L. REV. 1325, 1332 (2023) ("[P]roperty tax revenues make up the bulk of local government budgets . . . ."); JOAN YOUNGMAN, A GOOD TAX: LEGAL AND POLICY ISSUES FOR THE PROPERTY TAX IN THE UNITED STATES, at ix (2016) ("The property tax is a mainstay of independent local government revenue in this country. It is the largest single local tax and supplies nearly half of all general revenue from local sources.").

154. *See, e.g.*, Bernadette Atuahene & Timothy R. Hodge, *Stategraft*, 91 S. CAL. L. REV. 263, 270 (2018) (discussing the claim that property assessments in Detroit are racially discriminatory); Shayak Sarkar & Josh Rosenthal, *Exclusionary Taxation*, 53 HARV. C.R.-C.L. L. REV. 619, 621 (2018) ("Assessment may seem at first blush to be a purely technical or ministerial matter. Under this perception, a taxing jurisdiction mechanically assesses the property value, and then applies a mandated rate to determine the property tax. However, property taxes, through their underlying assessments, may fuel exclusion."); Lee Harris, *'Assessing' Discrimination: The Influence of Race in Residential Property Tax Assessments*, 20 J. LAND USE & ENV'T L. 1, 3–4 (2004) ("[M]inority homeowners in some cases may also suffer from relatively high tax assessments.").

155. *See, e.g.*, Henry Holland, Note, *Confronting the Land-Shortage Problem in Detroit: A Proposal for Land Readjustment*, 64 WAYNE L. REV. 841, 864 (2019) (noting existing mechanisms aimed at reducing the number of property tax foreclosures in Detroit, "such as payment plans, [access to] foreclosure advice, and financial aid").

156. Andrew W. Kahrl, *Unconscionable: Tax Delinquency Sales as a Form of Dignity Taking*, 92 CHI.-KENT L. REV. 905, 920 (2017) (asserting that investors lobbied the Illinois legislature to "remove[] many of the legal hurdles tax buyers had to complete before being granted a tax deed" while "vastly narrow[ing] the

is changes of this nature that would lessen the property tax system's problematic outcomes.[157] A forfeiture law that allows myriad meaningful opportunities for tax debtors to redeem the equity in their homes over a lengthy period of time does not foreclose these courses. Rather, it appropriately targets those persons who are on ample notice of their property taxes and have the means to pay those taxes or sell their properties out of concern and respect for their neighbors who dutifully pay their fair share to support their community's literal and figurative infrastructure. Such a course is particularly fitting for properties that, as was true in Ms. Tyler's case, are being used as second homes.

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From one libertarian perspective, allowing the state to retain the overage in a tax sale unjustly lines the state's pockets by depriving private parties of the fruits of the labor they invested to build up equity in their homes; from another, though, delinquent taxpayers knowingly took a risk that they freely engineered via the ballot box for which they must, in all fairness, pay the consequences. Meanwhile, from one left-liberal perspective, allowing the state to retain the overage in a tax sale unjustly imposes a disproportionate impact on traditionally marginalized populations; from another, though, it places a justifiable obligation on owners to timely take advantage of opportunities to protect their own interests and contribute their fair share to their community's well-being. A comprehensive assessment on the question of whether a state legislature's decision to allow the state to retain any overage in a tax sale is fair and just absent compensation requires wrestling with the morality of these competing perspectives.[158] The Court's box-checking exercise of simply identifying the majority viewpoint of state legislatures at various moments in time conceals this challenging but indispensable exercise of judgment as to what members of society—owners and non-owners alike—owe one another.

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range of legal options a tax delinquent property owner could employ in preventing loss of title.").

157. *See What* Tyler v. Hennepin County *Means*, *supra* note 132 (describing *Tyler*'s effective elimination of policies that afford the overage in a tax sale to the state as "closing the barn door after the horses have already escaped").

158. *Cf.* Singer, *supra* note 84, at 336 ("The question of fairness and justice does not relieve us of the burden of judgment . . . .").

CONCLUSION

Leading up to the release of its opinion in *Tyler v. Hennepin County* in the spring of 2023, the Supreme Court had not decided a major takings case in unanimous fashion since its 2005 decision in *Lingle v. Chevron*.[159] The Court's opinion in *Lingle*, which rejected the notion that the state must prove that a property regulation "substantially advances" a government interest to avoid takings liability, is imbued with forthrightness about property as an evolutionary institution and the challenging normative task of determining which changes to property laws are unfair and unjust absent the payment of compensation.[160] Regrettably,

159. Lingle v. Chevron U.S.A. Inc., 544 U.S. 528 (2005).

160. *See, e.g.*, *id.* at 537–38 ("In Justice Holmes' storied but cryptic formulation, 'while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking.' The rub, of course, has been—and remains—how to discern how far is 'too far.' In answering that question, we must remain cognizant that 'government regulation—by definition—involves the adjustment of rights for the public good' . . . ." (first quoting Pa. Coal Co. v. Mahon, 260 U.S. 393, 415 (1922); and then quoting Andrus v. Allard, 444 U.S. 51, 65 (1979))); *id.* at 539 (conceding that the regulatory takings framework laid out in *Penn Central* "has given rise to vexing subsidiary questions"); *see also* Mark Fenster, *The Stubborn Incoherence of Regulatory Takings*, 28 STAN. ENV'T L.J. 525, 530 (2009) ("The *Penn Central* test in a post-*Lingle* world . . . offers an explicitly realist solution to the multi-tiered field of land use and environmental regulation, a tool that grants courts discretion to make their way through the fact-intensive conflicts that hard cases present."); Jane B. Baron, *Winding Toward the Heart of the Takings Muddle:* Kelo*,* Lingle*, and Public Discourse About Private Property*, 34 FORDHAM URB. L.J. 613, 616 (2007) (praising *Lingle* for "engaging directly with public unease about the relationship between government and private property"); J. Peter Byrne, *Due Process Land Use Claims After* Lingle, 34 ECOLOGY L.Q. 471, 480 (2007) ("*Lingle* emphatically rejected any heightened scrutiny for property regulation warning that it would lead to evaluation of a 'vast array' of statutes and ordinances and force courts to 'substitute their predictive judgments for those of elected legislatures and expert agencies.'" (quoting *Lingle*, 544 U.S. at 544)); John D. Echeverria, *The Death of Regulatory Takings*, 34 ECOLOGY L.Q. 291, 292 (2007) ("By jettisoning one distinct line of takings analysis supported by prior Supreme Court precedent, and in the process honing what remains of the doctrine, '*Lingle* brought a remarkable coherence to the Court's confused regulatory takings doctrine.'" (quoting Robert G. Dreher, Lingle*'s Legacy: Untangling Substantive Due Process from Takings Doctrine*, 30 HARV. ENV'T L. REV. 371, 372 (2006))); Bradley C. Karkkainen, *The Police Power Revisited: Phantom Incorporation and the Roots of the Takings "Muddle*,*"* 90 MINN. L. REV. 826, 828 (2006) ("The *Lingle* opinion is . . . a remarkably candid admission that the Court had lost its way in the takings thicket."); Dreher, *supra* at 397 ("[T]he Court . . . essentially brought to a close the Court's prolonged period of uncertainty and conflict regarding the proper

the unanimous decision in *Tyler* offers no corresponding measure of transparency.

The opinion in *Tyler* is not without its bright spots. Most importantly, after circling around the issue for some time, the Court confirmed that statutes can serve as the source of background principles that inform determinations on the scope of the alleged property interest at stake in a takings case.[161] Moreover, it declared that statutory background principles need not be limited to legislation in place in the jurisdiction in which the claim is filed; principles underpinning statutes in place in other jurisdictions can inform property owners' expectations, too.[162]

Remarkably, though, the *Tyler* Court suggested that property owners and government entities alike should rigidly ground their expectations in the background principles underpinning the majority view among state legislatures, even when statutory law in the state in which the claimant alleges an unconstitutional deprivation of property took place says otherwise. Tying the background principles inquiry to an "objective" source like the majority legislative approach fails to recognize that the ultimate question in a takings case is a normative one, namely whether it is fair and just to alter property rights in a certain way in a given context without compensation. Such a course insinuates that it is unnecessary for a court to make a judgment as to whether a principle that happens to underpin the majority rule *should be* treated as a background principle.

Accepting the Court's declaration at face value, the potential ramifications are unnerving. Consider, for example, the first state legislatures to decide that their residents should not be exposed to undesirable fumes emanating from industrial plants, that vulnerable parties should not be subject to unconscionable loan terms, that no person should be discriminated against in places of public accommodation, or that husbands should not get favorable treatment over their wives in distributing property upon divorce. On *Tyler*'s rationale, were the first anti-pollution laws, anti-predation laws, anti-discrimination laws, and

meaning of its early land use decisions for modern takings jurisprudence."); *The Supreme Court, 2004 Term—Leading Cases*, 119 HARV. L. REV. 297, 298 (2005) ("*Lingle*'s most lasting contribution may be the Court's comprehensive survey of regulatory takings doctrine, which sheds light on the Court's understanding of the purpose and theoretical justification of the Takings Clause.").

161. Tyler v. Hennepin County, 143 S. Ct. 1369, 1375 (2023).

162. *Id.* at 1375–78.

equitable distribution laws at risk of triggering takings compensation because they were, at that time, minority rules and, thus, not sufficiently "rooted" in the "consensus" view among state legislatures?[163]

Property is a set of powers and obligations that are defined to be compatible with the rights of others and the community as a whole. Given as much, we cannot hold entitlements that are fixed and perpetually immune from change simply because they reflect the view of a majority of state legislatures at certain moments in time. Instead, the very nature of property involves making judgments about the legitimate scope of property rights, judgments that are exercised both by courts and by legislatures and evolve over time. It follows that answering the background principles inquiry in a takings case requires focusing not in a one-sided manner on identifying the claimant's expectations but, rather, on the many contextual considerations that come into play in determining whether the claimant's expectations are justified.

It is difficult to imagine that the unanimous *Tyler* Court actually intended to open the door to revisiting the many decisions rejecting takings challenges to the likes of anti-pollution laws, anti-predation laws, anti-discrimination laws, and equitable distribution laws at a time when those laws championed views that the majority of state legislatures did not share. It seems at least equally unlikely that the Court intended to open the door to revisiting the takings findings in *Lucas* and myriad other cases that defined property based on state statutes that diverged from the then-majority view nationwide. It is therefore hard to read *Tyler* as in fact adopting a rigid rule that the majority legislative approach should unbendingly create a floor and a ceiling from which other states cannot deviate. Rather, the more plausible interpretation is to see *Tyler* as supporting the proposition that looking to other states' statutes can be *useful* where those statutes help us understand the moral justifications for a given state choice as to how property interests should be allocated in a given moment in the face of competing claims. On this interpretation, *Tyler* apparently deemed the principles underpinning the majority view among state legislatures on the tax sale overage question here as *deserving* of protection and those underpinning Minnesota's statutory scheme—which did not afford debtors a post-

163. *Id.* at 1376–77.

foreclosure-sale opportunity to recover any overage reaped at that sale—as not.

On these terms, the problem with *Tyler* lies in its effort to conceal, via a facially objective "majority rules" rule, these decidedly moral judgments. Determining whether a principle deserves legal and moral protection requires forthrightly inquiring into the adequacy of the justifications at hand for that principle's application in a given context. Maybe that inquiry will align in a given case with the majority view among "sister States."[164] But, then again, maybe it will not. Hard cases reveal that desert is not an objective question but a normative one. The *Tyler* Court allowed an opportunity to articulate this complexity of our property system in one voice to slip through its fingers.

164. *Id.* at 1377.

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