An *Erie* Taking: *Tyler v. Hennepin County* and the General Common Law Revival

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The Supreme Court's recent decision in Tyler v. Hennepin County *seemed unsurprising. But the Court's opinion unabashedly adopted an approach to claims under the Takings Clause that looks to a general law of property, even when there was an available resolution resting on state law. This Article aims to elucidate the ways in which the Court's opinion in* Tyler *effects a sea change in takings law. It also poses portentous questions about the effect the decision will have on the scope of the Takings Clause, the source of property law, and the viability of the general common law as a basis for rights claims in other areas of the Court's jurisprudence.*

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INTRODUCTION

Where's Waldo? is a seemingly facile game. It merely requires a reader to consider an illustration and locate Waldo,[1] who wears clothes that one should spot with ease: a red-and-white striped sweater, a similarly eye-catching cap, distinctive glasses, and jeans. But as most learn at an early age, finding Waldo can become exasperating.[2] The game is particularly maddening because Waldo evades detection by the oldest trick in the book—hiding in plain sight. He takes shelter among a sea of red (and white and striped) herrings, and our eyes slip right over his flamboyant garb and wry smile. Waldo's ploy "is a venerable trick, but the nature of tricks that become 'venerable' is that they work."[3]

Tyler v. Hennepin County[4] is the Supreme Court's latest "Waldo." The case is ostensibly about ninety-four-year-old Geraldine Tyler's Takings Clause claim. After Ms. Tyler moved into a retirement home in 2010, she stopped paying property taxes on her condominium. By 2015, Ms. Tyler had accumulated about $2,300 in unpaid taxes and an eye-popping $13,000 in penalties and interest. Minnesota's Hennepin County foreclosed on her condominium and sold it for $40,000.[5] Although Ms. Tyler owed about $15,000 in total, Hennepin County kept all $40,000 for itself; it did not remit to Ms. Tyler the $25,000 in excess of her outstanding obligations.[6]

A casual observer could not be faulted for assuming that the case was an easy one. Perhaps given the emotional reaction to the County's retention of $25,000 that

1. Or Wally, in most parts of the world.

2. One article describes *Where's Waldo?* as "maddeningly simple, and simply maddening." Paul Bignell, *Where's the Brains Behind Wally?*, INDEPENDENT (Nov. 12, 2011, 8:00 PM), https://www.independent.co.uk/arts-entertainment/books/news/where-s-the-brains-behind-wally-6261459.html [perma.cc/2W6W-L29K].

3. Jay S. Bybee, *Printz, the Unitary Executive, and the Fire in the Trash Can: Has Justice Scalia Picked the Court's Pocket?*, 77 NOTRE DAME L. REV. 269, 269 (2001).

4. Tyler v. Hennepin Cnty., Minnesota, 598 U.S. 631 (2023).

5. *See id.* at 635–36.

6. *See id.* at 635.

potentially belonged to the aging Ms. Tyler, the case had received the attention of many amici—the overwhelming majority of whom supported Ms. Tyler's Takings Clause claim.[7] The case was argued on April 26, 2023, and the Court's opinion was issued less than a month later. The Supreme Court's vote was even more lopsided than the support of amici: the Court ruled 9-0 in favor of Ms. Tyler.[8]

Do not be fooled: there is more to this case than meets the eye. The opinion is draped in red-and-white striped trappings, but *Tyler*'s true significance has for the most part evaded academic and judicial attention.[9] Such inattention is understandable. The Court lobbed several landmines in 2023, ending affirmative action[10] and invalidating student loan forgiveness[11] among them. In contrast to the controversy surrounding *Students for Fair Admissions v. Harvard* and *Biden v. Nebraska*, the unanimous outcome in *Tyler* seems unremarkable and unobjectionable. But like Waldo, *Tyler* hides in plain sight, and it will continue avoiding attention until observers know precisely what they're looking for.

In a shockingly terse 17-page opinion, the Court wrought a fundamental shift in the constitutional law of property. Traditionally, states have been entrusted with the definition of property rights for purposes of claims under the Takings Clause.[12] But the Court's opinion in *Tyler* altered this longstanding assumption, giving new life, at least in the Takings Clause context, to a general common law of property. This Essay leaves for another day a full normative evaluation of the new direction taken in the case. It certainly does not bemoan Ms. Tyler's victory. But we are surprised that it has burst into the law without serious attention or comment, and we therefore hope to point out what has been hiding in plain view.

This Essay proceeds as follows: In Part I, we describe the pre-*Tyler* landscape defining the legal concept of property as protected by the Takings Clause. The states are the protagonists of that story, enjoying broad autonomy to define and regulate property interests with little comment or interference from the federal courts. As part of that description, we detail the rise and fall of the general common law from *Swift* to *Erie*. Part II demonstrates just how the Supreme Court altered that landscape in Ms. Tyler's case. We conclude in Part III by contemplating the potential implications of the Court's opinion in *Tyler* for property and other constitutionally protected rights.

I. THE SOURCE OF PROPERTY LAW BEFORE *TYLER*

A. The Source of Property Interests Protected by the Takings Clause

Before *Tyler*, state law generally determined the existence, scope, and effect of property rights. We start this section by tracing the historical pedigree of state

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7. *See* Tyler v. Hennepin County, Minnesota, SCOTUSBLOG, https://www.scotusblog.com/case-files/cases/tyler-v-hennepin-county-minnesota/ [perma.cc/6V32-ZTXZ] (last visited Sept. 24, 2023).

8. *See Tyler*, 598 U.S. at 632.

9. In a late-breaking piece, Eric Claeys recently observed the general-law flavor of the Court's decision in *Tyler*. Eric R. Claeys, *Takings and Choice of Law After* Tyler v. Hennepin County, J.L., ECON. & POL'Y (forthcoming).

10. *See generally* Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll., 600 U.S. 181 (2023).

11. *See generally* Biden v. Nebraska, 600 U.S. 477 (2023).

12. *See infra* notes 42–44 and accompanying text.

control over property rights. We then explain the modest outer limit that federal courts have come to recognize on states' ability to abrogate state-created property interests vis-à-vis the Takings Clause.

1. State Law as the Historical Touchstone of Property Rights

Property is one of those rights that many Americans locate somewhere near the center of our constitutional rights pantheon. It was certainly prominent in Founding-era political thought.[13] In popular imagination, the right operated "to define and limit legislative power and to preserve individual liberty by providing a defense against the arbitrary and intrusive power of the state."[14] Indeed, at the time, one could hardly decouple the concept of property from that of liberty itself.[15]

But as rhetorically central as the idea of property rights was to the Founding generation, the content of those rights was deeply ambiguous.[16] And perhaps surprisingly, the Framers of the Constitution made no effort to dispel that ambiguity. The document's text has very little to say about property at all, much less what the right to it entails. As first ratified, the only direct reference to property in the text was to that of the federal government.[17] Indirectly, the document addressed the individual right to private property primarily through contract enforcement[18]

13. *See* Johnathan O'Neill, *Property Rights and the American Founding: An Overview*, 38 J. SUP. CT. HIST. 309, 317–19 (2013); Eric R. Claeys, *Takings, Regulations, and Natural Property Rights*, 88 CORNELL L. REV. 1549, 1553 (2003) ("One need not look very far to find examples of Founding Era treatises or cases saying that property rights should be 'sacredly protected.'"); Laura S. Underkuffler, *On Property: An Essay*, 100 YALE L.J. 127, 132–33 (1990); Michael W. McConnell, *Contract Rights and Property Rights: A Case Study in the Relationship between Individual Liberties and Constitutional Structure*, 76 CALIF. L. REV. 267, 270–71 (1988).

14. David Schultz, *The Locke Republican Debate and the Paradox of Property Rights in Early American Jurisprudence*, 13 W. NEW ENG. L. REV. 155, 159 (1991).

15. *See, e.g.*, THOMAS PAINE, *Common Sense*, *in* THE COMPLETE WRITINGS OF THOMAS PAINE 3, 29 (Philip S. Foner ed., 1945) (calling for continental government, the highest priority of which should be "[s]ecuring freedom and property to all men"); 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787 533 (Max Farrand ed., 1911) [hereinafter FARRAND'S RECORDS] (recording the following statement of Gouverneur Morris during the Philadelphia Convention: "Life and liberty [are] generally said to be of more value, than property. An accurate view of the matter would nevertheless prove that property [is] the main object of Society."); THE FEDERALIST NO. 54, at 339 (James Madison) (Clinton Rossiter ed., 1961) ("Government is instituted no less for protection of the property than of the persons of individuals."); THE FEDERALIST NO. 85, at 521 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (promoting the Constitution for the "additional securities to republican government, to liberty, and to property" that it would provide).

16. *See* Schultz, *supra* note 14, at 159–60 (describing the varying conceptions of leading Framers on the role and breadth of property rights).

17. U.S. CONST. art. IV, § 3.

18. *Id.* art. I, § 10; *see also* Ogden v. Saunders, 25 U.S. (12 Wheat.) 213, 354–55 (1827) (Marshall, C.J., dissenting) ("The power of changing the relative situation of debtor and creditor, of interfering with contracts, a power which comes home to every man, touches the interest of all, and controls the conduct of every individual in those things which he supposes to be proper for his own exclusive management, had been used to such an excess by the State legislatures, as to break in upon the ordinary intercourse of society, and destroy all confidence between man and man."); William Michael Treanor, *The Original Understanding of the Takings Clause and the Political Process*, 95 COLUM. L. REV. 782, 843 (1995); Douglas W. Kmiec & John O. McGinnis, *The Contract Clause: A Return to the Original Understanding*, 14 HASTINGS CONST. L.Q. 525, 532 (1987) ("Madison emphasized that the [Contract] Clause was designed to prevent property rights from being displaced by legislation 'contrary to the first principles of the social compact and to every principle of sound legislation.'").

but also through the security of currency,[19] comity of privileges enjoyed by citizens in the various states,[20] and—quietly—the obligation to return fugitive slaves to their masters.[21]

It was not until 1791 that the Fifth Amendment would expressly limit the federal government's ability to take private property, in textual commitment to the idea that there is no "just government, nor is property secure under it, where the property which a man has in his personal safety and personal liberty, is violated by arbitrary seizures of one class of citizens for the service of the rest."[22] The amendment required due process whenever the government was to deprive someone of their property and just compensation prior to a taking of private property for public use.[23] This rule imitated similar ones included in the constitutions of the various states—though the experience and commitments of the states with respect to compensating private individuals for public takings of property was far from monolithic.[24] The Framers of the Federal Constitution were content to rest on that divergent experience in invoking a term as vague as property; no further definition or textual guidance on what constituted private property would be forthcoming.

This was a feature of the system, not a bug or a glaring omission. The Framers were well aware that the property law of the states varied drastically. They resisted redrawing state borders for purposes of representation based on that understanding.[25] But the costs of homogenization were not the main theoretical motive behind eschewing a general definition of property for constitutional purposes. Rather, the Framers saw virtue in leaving to more directly representative governments—principally the states—the power to define and protect the set of property rights that their citizens understood as worthy of protection.[26] Luther

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19. U.S. CONST. art. I, § 8, cl. 5.

20. *Id.* art. IV, § 2, cl. 1.

21. *Id.* art. IV, § 2, cl. 3; *see also* 3 FARRAND'S RECORDS, *supra* note 15, at 325 ("Another clause secures us that property which we now possess. At present, if any slave elopes to any of those states where slaves are free, he becomes emancipated by their laws. For the laws of the states are uncharitable to one another in this respect.").

22. JAMES MADISON, *Property*, *in* 6 THE WRITINGS OF JAMES MADISON 101, 102 (Gaillard Hunt ed., 1906).

23. U.S. CONST. amend. V.

24. Land was the primary, if not exclusive, concern of property regulation in colonial America, and so the historical antecedents of the Takings Clause are often traced back to the "Highway Acts" that governed compensation when the colonies took private land to build roads. Maureen E. Brady, *The Failure of America's First City Plan*, 46 URB. LAW. 507, 525 (2014). For an overview of the diversity of compensation regimes arising out of disparate social conditions in the colonies, see generally John F. Hart, *Takings and Compensation in Early America: The Colonial Highway Acts in Social Context*, 40 AM. J. LEGAL HIST. 253 (1996).

25. 1 FARRAND'S RECORDS, *supra* note 15, at 321 ("The dissimilarities [sic] existing in the rules of property, as well as in the manners, habits and prejudices of the different States, amounted to a prohibition of the attempt.").

26. *See* Michael W. McConnell, *Federalism: Evaluating the Founders' Design*, 54 U. CHI. L. REV. 1484, 1500–07 (1987) (citing James Madison's theory of faction in The Federalist No. 10 as evidence of an intent to create a "hybrid system in which states retain a major role in the protection of individual liberties"); *see* Treanor, *supra* note 18, at 784 (describing the originalist model of protecting property rights as one that exhibited "appropriate deference to majoritarian decisionmaking [sic]"). It ought to be noted that the concern for protecting local prerogatives of property definition was most sharply evident in the discussion of slavery and the risk that "the States not interested in that property and

Martin, in addressing the Maryland legislature, justified the preference for state autonomy in this way: "Many of the members, and myself among the number, thought, that the States were much better judges of the circumstances of their citizens . . . ."[27] In addition to being better tailored to local preferences, this diversified regime of property rights would also prevent abuse of the awesome power to define and redefine fundamental liberties by officials at the federal level.[28] States were the more "immediate and visible guardian of life and property."[29]

With the intentional dispersion of property law came autonomy for the states in regulating it. Indeed, the Takings Clause did not limit state governments at all as to their treatment of private property; like all provisions of the Bill of Rights, it was a limit that operated exclusively on the federal government.[30] In announcing this principle, Chief Justice John Marshall noted that the clause's limited application was consistent with the wisdom of the Constitution's design. Said he:

> [T]he [F]ifth [A]mendment must be understood as restraining the power of the general government, not as applicable to the states. In their several constitutions they have imposed such restrictions on their respective governments, as their own wisdom suggested, such as they deemed most proper for themselves. It is a subject on which they judge exclusively, and with which others interfere no farther than they are supposed to have a common interest.[31]

Marshall went on to say that the "common interests" that restrained state self-determination were those having to do with "subjects entrusted to the general government, or in which the people of all the states feel an interest," specifically those enumerated in Article I, Section 10 of the Constitution.[32] "In these alone were the whole people concerned."[33] The implication was clear: areas of law that did not implicate national security or unity—like property—were left largely to state discretion. The Constitution did not circumscribe that discretion through general rules.

Of course, most states had Takings Clause analogues in their own constitutions, but these provisions were crafted and enforced according to the unique political landscape of each polity.[34] The laboratories of democracy were thus left largely to their own devices, without any general rules governing the taking or regulation of private property. Their freedom in the realm of property included the

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prejudiced against it" would seek to legislatively eradicate it if given a say. 2 FARRAND'S RECORDS, *supra* note 15, at 559.

27. 3 FARRAND'S RECORDS, *supra* note 15, at 203–06.

28. McConnell, *supra* note 26, at 1504 (underscoring Madison's belief that "powers that are most likely to be abused by self-aggrandizing officials should be left in the states, where direct popular control is stronger").

29. THE FEDERALIST NO. 17, at 120 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

30. Barron *ex rel.* Tiernan v. Mayor of Baltimore, 32 U.S. (7 Pet.) 243, 247–48 (1833).

31. *Id.*

32. *Id.* at 249.

33. *Id.*

34. Treanor, *supra* note 18, at 825 ("Because of faith in majoritarian decisionmakers, the early state constitutions did not contain substantive protections of property rights. They simply contained procedural protections—land could be taken only with the consent of the individual *or* of the legislature."); *see also id.* at 825–34 (describing how several states in the revolutionary period adopted constitutional property protections based on their unique experiences and judgments of the vulnerability of property).

power to regulate and condition property for the general welfare, establish procedures by which states could take possession of property, set terms for determining compensation, and deem property rights waived under specified circumstances.[35] Recent scholarship has aptly pointed to some important limits on state curtailment of property rights, such as fundamental principles derived from general law.[36] However, these limits largely instantiated a rule of reasonableness, aimed at preventing arbitrary departures from long-established norms but otherwise leaving state regulation intact.[37] Importantly, such rules were not incorporated as requirements of the Federal Constitution and were therefore mostly administered by state courts.[38] State autonomy in the law of property, especially from federal court adjudication, thus remained the rule of the day.

Even after the Takings Clause was incorporated against the states through the Fourteenth Amendment,[39] complaints of unconstitutional takings against a State were predicated on state law definitions of property. A successful takings action against a State required a showing that the claimant had a vested property interest under state law.[40] As recently as 2010, a Supreme Court plurality clearly stated that "[t]he Takings Clause only protects property rights as they are established under state law."[41] In debates over whether a property right is established under state law, federal courts owe "a considerable degree of deference" to state court determinations.[42] From this and myriad other cases, it is evident that the federalization of the right to security in property did not federalize the definition of property.

So it is that we must look beyond the Takings Clause itself to determine what property rights are protected by it. As the Supreme Court has traditionally explained it, "the Constitution protects rather than creates property interests."[43] For creation and definition of those interests, courts look to "existing rules or understandings that stem from an independent source such as state law."[44] While state law is

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35. *See* 2 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1956, at 673 (Boston, Little, Brown & Co. 4th ed. 1873) (1833); D. Benjamin Barros, *The Police Power and the Takings Clause*, 58 U. MIAMI L. REV. 471, 479–80 (2004).

36. William Baude, Jud Campbell & Stephen Sachs, *General Law and the Fourteenth Amendment*, 76 STAN. L. REV. 1185, 1193–96 (2024).

37. *See, e.g.*, Commonwealth v. Alger, 61 Mass. (7 Cush.) 53, 85 (1851) ("Rights of property, like all other social and conventional rights, are subject to such reasonable limitations in their enjoyment, as shall prevent them from being injurious, and to such reasonable restraints and regulations established by law, as the legislature, under the governing and controlling power vested in them by the constitution, may think necessary and expedient.").

38. Baude, Campbell & Sachs, *supra* note 36, at 1203 ("For the most part, the Constitution left the enforcement of general fundamental rights to state institutions.").

39. Chicago, B. & Q. R. Co. v. City of Chicago, 166 U.S. 226 (1897).

40. *See, e.g.*, *id.* at 254 (looking to state judicial confirmation of the property interest of shareholders in railroads); Nelson v. City of New York, 352 U.S. 103, 110–11 (1956) (interpreting state law as denying an interest in tax sale proceeds for claimants who had failed to reclaim those proceeds); Goss v. Lopez, 419 U.S. 565, 573–74 (1975) (looking to state law to determine if a party had a property interest in state education); PruneYard Shopping Ctr. v. Robins, 447 U.S. 74, 92–93 (1980) (concluding that a storeowner lacked an interest under state law to exclude certain speakers from his property).

41. Stop the Beach Renourishment, Inc. v. Fla. Dep't of Env't Prot., 560 U.S. 702, 732 (2010) (plurality opinion).

42. *Id.* at 726 n.9.

43. Phillips v. Wash. Legal Found., 524 U.S. 156, 164 (1998).

44. Bd. of Regents of State Colls. v. Roth, 408 U.S. 564, 577 (1972); *see also* United States *ex rel.* Tenn. Valley Auth. v. Powelson, 319 U.S. 266, 279 (1943) ("'Though the meaning of 'property' as used

admittedly only one among several potential sources for the identification of protected property rights,[45] it is considered the primary one given the traditional prerogatives of the states over this area of the law.[46]

2. The Outer Limit on States' Property-Rights Powers: Webb's, Phillips, *and* Texaco

Although the scope of the Takings Clause has always been circumscribed by the reach of state-law property interests, states have never been free to immunize themselves from Takings Clause liability by self-servingly extinguishing property rights. Before *Tyler*, the Supreme Court had yet to crystallize a standard dividing a valid exercise of state power over property rights from an impermissible use of that power to shield a state from Takings Clause claims. But a pair of cases—*Webb's Fabulous Pharmacies, Inc. v. Beckwith*[47] and *Phillips v. Washington Legal Foundation*[48]—illustrate that the outer limits of a state's authority to regulate property interests existed independently of the general common law.

We'll start with *Webb's*—a case Thomas Merrill calls "one of the quirkiest of the modern decisions to raise a question about the meaning of constitutional property."[49] There, Eckerd's of College Park, Inc., agreed to purchase nearly all the assets of Webb's for nearly $2 million. But at the closing, Webb's debts appeared greater than the purchase price, so Eckerd's interpleaded Webb's and Webb's' creditors and tendered the purchase price to the Circuit Court of Seminole County.[50] The Circuit Court, in turn, directed that the tendered money be paid to the clerk of court, who was instructed to deposit it in an interest-bearing account.[51] Nearly a year later, the Circuit Court appointed a receiver for Webb's, who sought an order compelling the clerk of court to deliver the balance of the interpleader fund to him.[52] The Circuit Court granted the motion, and the clerk paid to the receiver the principal of the fund (less a statutory fee for services rendered and additional money that had already been distributed by court order).[53]

The interpleader fund had earned interest while held by the clerk—over $90,000—but the clerk did not deliver the interest to the receiver.[54] Upon motion, the Circuit Court instructed the clerk to pay the accumulated interest to the receiver.

in . . . the Fifth Amendment is a federal question, it will normally obtain its content by reference to local law.").

45. *See, e.g.*, Mathews v. Eldridge, 424 U.S. 319, 332 (1976) (acknowledging a property interest in federal welfare benefits created by federal statute).

46. RICHARD H. FALLON, JR., JOHN F. MANNING, DANIEL J. MELTZER & DAVID L. SHAPIRO, HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 516–17 (7th ed. 2015) [hereinafter HART & WECHSLER]; Henry Paul Monaghan, *Of "Liberty" and "Property*,*"* 62 CORNELL L. REV. 405, 435 (1977) ("[Property] interests must be located in some other source, principally state law . . . . [T]herefore, the due process clause threw a federal constitutional shield around property interests initially created by state law.").

47. Webb's Fabulous Pharmacies, Inc. v. Beckwith, 449 U.S. 155 (1980).

48. Phillips v. Wash. Legal Found., 524 U.S. 156 (1998).

49. Thomas W. Merrill, *The Landscape of Constitutional Property*, 86 VA. L. REV. 885, 936 (2000).

50. *Webb's*, 449 U.S. at 156–57.

51. *Id.* at 157.

52. *Id.* at 157–58.

53. *Id.* at 158.

54. *Id.*

Seminole County and the clerk appealed, and the action was subsequently transferred to the Supreme Court of Florida.[55]

The Florida Supreme Court reversed. In a per curiam opinion, the court opined, "The notion that title to the interest flows from title to the principal is erroneous. As all other funds in that account, these funds are considered 'public money' from the time they are deposited in the general registry of the court to the time they leave the account."[56] The court rejected Webb's Takings Clause argument on that basis: "There is no unconstitutional taking because interest earned on the clerk of the circuit court's registry account is not private property."[57]

The United States Supreme Court granted certiorari, and in reversing the Florida Supreme Court, reified the principle that state law forms the touchstone of Takings Clause analysis. The Supreme Court—and all parties—agreed that the principal deposited into the interpleader was private property, not public property.[58] As the Court emphasized, "This is the rule in Florida," and "[w]e do not understand that the appellees contend otherwise."[59] The Court also recognized that, "apart from statute, Florida law does not require that interest be earned on a registry deposit."[60] But because the Takings Clause protects rights created by state law, "[t]he creditors thus had a state-created property right to their respective portions of the fund," including the accrued interest.[61] The mere fact that the state had created a private property right did not entitle the state "to assume ownership of the interest" without more.[62]

The question then became, "What would justify the county's retention of that interest?"[63] Most important for our purposes, the Court declared, "No police power justification is offered for the deprivation. Neither the statute nor appellees suggest *any reasonable basis* to sustain the taking of the interest earned by the interpleader fund."[64] Without a rational basis, "[n]either the Florida Legislature by statute, nor the Florida courts by judicial decree, may accomplish the result the county seeks simply by recharacterizing the principal as 'public money' because it is held temporarily by the court."[65]

Perhaps the most quotable line of *Webb's* for Takings Clause purposes is prone to misreading absent the foregoing context. The Court elaborated, "[A] State, by *ipse dixit*, may not transform private property into public property without compensation . . . . This is the very kind of thing that the Taking[s] Clause of the Fifth Amendment was meant to prevent."[66] Taken in isolation, this reasoning might be understood to limit a state's ability to define or narrow the scope of vested state-law property interests. But that limit is, at least in terms of *Webb's*, quite capacious—

55. *Id.*

56. Beckwith v. Webb's Fabulous Pharms., Inc., 374 So. 2d 951, 952 (Fla. 1979), *rev'd*, 449 U.S. 155 (1980).

57. *Id.* at 953.

58. *Webb's*, 449 U.S. at 160.

59. *Id.*

60. *Id.* at 161.

61. *Id.*

62. *Id.*

63. *Id.* at 162.

64. *Id.* at 163 (emphasis added).

65. *Id.* at 164.

66. *Id.*

because there, Florida had offered no rational basis at all to recharacterize private property as public money. Put differently, *Webb's* did not establish a general common law floor for the scope of state-law property rights.[67]

Phillips did even less to cabin states' ability to narrow the scope of state-created property interests vis-à-vis the general common law. At issue in that case was whether client funds placed in Interest on Lawyers Trust Accounts (IOLTAs) is private property of the client or the attorney for Takings Clause purposes.[68] Texas's IOLTA rules required that interest accumulated on funds deposited in an IOLTA account was to be directed to the Texas Equal Access to Justice Foundation.[69] The Washington Legal Foundation—composed of Texas citizens opposed to the IOLTA program—sued, claiming that the program violated the Takings Clause.[70]

The district court granted summary judgment to the Texas Equal Access to Justice Foundation, concluding that the Washington Legal Foundation had no property rights to the interest accumulated in an IOLTA account. The Fifth Circuit reversed, holding that "any interest that accrues belongs to the owner of the principal."[71]

The Supreme Court affirmed and held that interest generated from funds deposited in an IOLTA account belongs to the client.[72] The entire dispute turned on whether Texas followed the English common law rule that interest follows the principal.[73] As part of its reasoning, the Court surveyed briefly the general common law rule,[74] but only to aid in its assessment about whether Texas had incorporated that principle into state law. The majority answered that question in the affirmative, holding that "Texas also follows this rule."[75] The petitioners had presented several examples where, under Texas law, interest does not follow the principal.[76] But the Court found "these examples insufficient to dispel the presumption of deference given the views of a federal court as to the law of a State within its jurisdiction."[77] In fact, the Court even emphasized that two of the judges on the Fifth Circuit panel below were Texans.[78]

Like *Webb's*, *Phillips* includes language susceptible to misinterpretation. In particular, the Court noted that "petitioners point to no 'background principles' of property law" that support their position.[79] But these "background principles" refer not to the general common law, but to state law. The Court's citation to *Lucas v. S.C. Coastal Council*[80] bears this out. The *Lucas* Court discussed "background

67. *See* Merrill, *supra* note 49, at 937–38 (discussing how the Court arbitrarily cabined its view of applicable state law in determining the definition of property in *Webb's* concluding that the Court was, at bottom, following the *Roth* approach to property by focusing on state law as its definitional source).
68. Phillips v. Wash. Legal Found., 524 U.S. 156, 160 (1998).
69. *Id.* at 162.
70. *Id.* at 162–63.
71. *Id.* at 163 (citation omitted).
72. *Id.* at 160.
73. *Id.* at 165.
74. *Id.*
75. *Id.* at 166.
76. *See id.* at 167.
77. *Id.*
78. *See id.* at 165–66.
79. *Id.* at 168 (quoting Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1030 (1992)).
80. Lucas v. S.C. Coastal Council, 505 U.S. 1003 (1992).

principles of *the State's law of property*"—not some background principles of Anglo-American property law.[81] In other words, as the *Phillips* Court elaborated in discussing *Webb's*, "a State may not sidestep the Takings Clause by disavowing traditional property interests long recognized under *state law*."[82] But that does not suggest that the general common law can independently create property interests not recognized under state law for Takings Clause purposes.

Reading the foregoing cases alongside *Texaco, Inc. v. Short*[83] lays bare the power of a state to narrow the scope of state-law property rights—without regard to the general common law. Indiana enacted in 1971 a statute providing for the automatic lapse of mineral rights after twenty years of inactivity, unless the mineral owner filed a statement of claim with the county recorder's office.[84] After this period of inactivity, and in the absence of a statement of claim, the statute "extinguished" the owner's interest in the mineral rights and directed that "ownership shall revert to the then owner of the interest out of which it was carved."[85]

The appellants in *Texaco* had not used their mineral interests for a period greater than twenty years, so their mineral rights reverted to the surface owner under the Indiana statute. The appellants brought suit alleging various causes of action, including a Takings Clause claim.[86] The Indiana Supreme Court rejected that argument on appeal, concluding that "the Mineral Lapse Act was a permissible exercise of the police power of the State."[87] The court further identified at least a rational basis justifying the lapse statute, noting "that the purpose of the statute was to encourage the development of mineral interests."[88]

The Supreme Court affirmed. It began its analysis by tracing the state-law origin of the mineral rights at issue: "The State of Indiana has defined a severed mineral estate as a 'vested property interest,' entitled to 'the same protection as are fee simple titles.'"[89] The appellants' property rights in the minerals, then, were equivalent to an interest in fee simple. But Indiana subsequently limited the scope of that right by "declar[ing] that this property interest is of less than absolute duration."[90] The Court had "no doubt that, just as a State may create a property interest that is entitled to constitutional protection, the State has the power to condition the permanent retention of that property right on the performance of reasonable conditions."[91]

The general common law did not constrain Indiana's authority to narrow the duration of a state-created interest in mineral rights—far from it. In fact, the *Texaco*

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81. *Id.* at 1029 (emphasis added); *see also id.* at 1030 ("[I]t was open to the State at any point to make the implication of those background principles of nuisance and property law explicit."); *id.* at 1031 ("The question, however, is one of state law to be dealt with on remand.").

82. *Phillips*, 524 U.S. at 167 (emphasis added).

83. Texaco, Inc. v. Short, 454 U.S. 516 (1982).

84. *See id.* at 518.

85. Ind. Code §§ 32-5-11-1 to -8 (1976).

86. *See Texaco*, 454 U.S. at 522.

87. *Id.* at 524; *compare id.*, *with* Webb's Fabulous Pharms., Inc. v. Beckwith, 449 U.S. 155, 163 (1980) ("No police power justification is offered for the deprivation.").

88. *Texaco*, 454 U.S. at 524–25.

89. *Id.* at 525–26 (citation omitted).

90. *Id.* at 526.

91. *Id.*

Court made explicit that there existed no national floor on property interests that would prevent a state from labeling certain property as abandoned: "It is clear that the subject is one over which every community is at liberty to make a rule for itself."[92] To be sure, as in *Webb's* and *Phillips*, a state must exercise this power rationally; *Texaco* emphasized that "the State has not exercised this power in an arbitrary manner."[93] Instead, "[e]ach of the actions required by the State to avoid an abandonment of a mineral estate furthers a legitimate state goal."[94] As to the Takings Clause issue in particular, the Supreme Court held that the extinguishment of the mineral rights under the Indiana statute was the product of the owner's negligence rather than an affirmative taking by the State.[95]

Given the states' broad power to modify the scope of property rights, injured property owners may vindicate their rights through the Due Process Clause. As the majority in *Texaco* surmised, "the full procedural protections of the Due Process Clause . . . must be provided."[96] The Due Process Clause thus operated as an external constraint on the ability of states to restrict the scope of property interests. As discussed in the following Section, the general common law played no role in further constraining states in this capacity.

B. From Swift *to* Erie

To understand the rise and fall of the general common law, it is first necessary to grapple with the Judiciary Act of 1789. Section 34 of the Act provided, "[T]he laws of the several states, except where the constitution, treaties or statutes of the United States shall otherwise require or provide, shall be regarded as rules of decision in trials at common law in the courts of the United States in cases where they apply."[97] In the absence of a conflicting federal law, then, federal courts were instructed to rely on the "laws of the several states" as substantive rules of decisions.[98] Whether "the laws of the several states" referred to only state positive law, on the one hand, or included state common law, on the other hand, was unclear until the Court's seminal decision in *Swift v. Tyson*.[99]

Swift involved a dispute over the enforceability of a bill of exchange executed as consideration for the purchase of real estate.[100] Tyson, a resident of New York, had ostensibly purchased land with this negotiable promissory note. The sellers,

92. *Id.* at 526 n.19 (quoting Hawkins v. Barney's Lessee, 30 U.S. (5 Pet.) 457, 467 (1831)).

93. *Id.* at 529.

94. *Id.*

95. *See id.* at 530 ("In ruling that private property may be deemed to be abandoned and to lapse upon the failure of its owner to take reasonable actions imposed by law, this Court has never required the State to compensate the owner for the consequences of his own neglect . . . . It is the owner's failure to make any use of the property—and not the action of the State—that causes the lapse of the property right; there is no 'taking' that requires compensation.").

96. *Id.* at 534; *see also* Nelson v. City of New York, 352 U.S. 103, 110 (1956) ("We hold that nothing in the Federal Constitution prevents [the retention of surplus equity] where the record shows adequate steps were taken to notify the owners of the charges and the foreclosure proceedings.").

97. Act to Establish the Judicial Courts of the United States, ch. 20, § 34, 1 Stat. 73 (1789) [hereinafter Judiciary Act of 1789].

98. *Id.*

99. Swift v. Tyson, 41 U.S. (16 Pet.) 1 (1842), *overruled by* Erie R.R. Co. v. Tompkins, 304 U.S. 64 (1938); *see* Caleb Nelson, *A Critical Guide to* Erie Railroad Co. v. Tompkins, 54 WM. & MARY L. REV. 921, 925–27 (2013) [hereinafter Caleb Nelson].

100. *Swift*, 41 U.S. at 15.

however, had never actually owned the land; nevertheless, they transferred the bill of exchange to Swift, a Maine resident, as payment for a preexisting debt. When Swift presented the promissory note to Tyson, Tyson refused to pay, arguing that the bill of exchange was executed under fraudulent circumstances.[101]

Swift sued under diversity jurisdiction in a federal court sitting in New York. He contended that the bill of exchange was enforceable despite the fraudulent circumstances as he was a bona fide purchaser—i.e., he had acquired the promissory note for value without knowledge of the fraudulent land-sale transaction.[102] Tyson countered, arguing that many New York state courts had recognized an exception to this bona fide purchaser rule for cases where a promissory note was obtained as payment for a preexisting debt, as in Swift's case.[103]

The outcome of the case thus turned on whether New York's common law exception to the bona fide purchaser rule bound the federal court as part of the "laws of the several states" under the Judiciary Act of 1789.[104] Justice Joseph Story, writing for the Court, concluded that state common law decisions were not "laws" within the meaning of the Judiciary Act: "In the ordinary use of language, it will hardly be contended, that the decisions of courts constitute laws. They are, at most, only evidence of what the laws are, and are not, of themselves, laws."[105] The Court concluded that "state court decisions were . . . merely persuasive on matters of general law,"[106] so federal courts were "free to analyze the data for [themselves] and reach [their] own conclusions about the meaning of general law."[107] Put differently, federal courts could reach conclusions contrary to state common law by reference to "the general principles and doctrines of commercial jurisprudence."[108]

Notably, this general common law was not synonymous with federal law.[109] The Supreme Court, in fact, subsequently determined that the general common law

101. *See id.* at 14–15.

102. *Id.* at 15 ("There is no doubt, that a *bonâ fide* holder of a negotiable instrument, for a valuable consideration, without any notice of facts which impeach its validity, as between the antecedent parties, if he takes it under an indorsement made before the same becomes due, holds the title unaffected by these facts, and may recover thereon, although, as between the antecedent parties, the transaction may be without any legal validity.").

103. *Id.* at 16 ("And then it is further contended, that by the law of New York, as thus expounded by its courts, a pre-existing debt does not constitute, in the sense of the general rule, a valuable consideration applicable to negotiable instruments.").

104. *See id.* at 18 ("But, admitting the doctrine to be fully settled in New York, it remains to be considered, whether it is obligatory upon this court, if it differs from the principles established in the general commercial law . . . . It is, however, contended, that the 34th section of the judiciary act of 1789, ch. 20 [sic], furnishes a rule obligatory upon this court to follow the decisions of the state tribunals in all cases to which they apply."); Allan Erbsen, Erie*'s Four Functions: Reframing Choice of Law in Federal Courts*, 89 NOTRE DAME L. REV. 579, 594 (2013) ("The issue for the Supreme Court was whether these state decisions were an authoritative source of law that bound federal courts.").

105. *Swift*, 41 U.S. at 18.

106. Erbsen, *supra* note 104, at 594; *see also* Caleb Nelson, *supra* note 99, at 926 ("With respect to questions of 'general' law, however, federal judges saw no need to follow precedents established by the courts of any particular state.").

107. Erbsen, *supra* note 104, at 595; *see also* Kermit Roosevelt II, *Choice of Law in Federal Courts: From* Erie *and* Klaxon *to CAFA and* Shady Grove, 106 NW. U. L. REV. 1, 5 (2012) ("Federal courts could come to their own conclusions about the content of the general common law, and so could the courts of the several states, with neither exerting any more than persuasive influence on any other.").

108. *Swift*, 41 U.S. at 19.

109. *See* Caleb Nelson, *supra* note 99, at 929 ("[I]t is clear that they did *not* regard it as *federal* law."); William A. Fletcher, *The General Common Law and Section 34 of the Judiciary Act of 1789: The*

did not trigger federal question jurisdiction.[110] Instead, the general common law found its source in a variety of authorities, such as treatises, an aggregation of state common-law decisions, judicial custom, prudential considerations, the English common law, and natural law reasoning.[111] *Swift* made practical sense for the time period in which it arose—it was often difficult to discern precisely the scope of a state's particular common-law rules "[g]iven the paucity of reported decisions and the difficulties of establishing the grounds of unreported ones."[112] It was thus easier for federal judges to rely on "[a] conception of the [general] common law as a single system" pervading diversity cases than to identify the particular common law of a given state.[113]

Swift's reliance on the general common law created (or at least aggravated) all-too-familiar difficulties. For one, because the general common law did not bind states, "*Swift*'s rule introduced uncertainty over legal rules and obligations at a time when interstate commerce was growing rapidly."[114] And of course, "*Swift*'s rule had led to aggressive forum shopping."[115] More than anything, though, concern proliferated that *Swift*'s reasoning and conclusion were constitutionally infirm.[116]

Enter *Erie Railroad Company v. Tompkins*.[117] Tompkins, a Pennsylvania citizen, was injured by a train belonging to Erie, a New York corporation, while walking alongside the tracks at night.[118] He sued Erie in the Southern District of New York, alleging that Erie had been negligent in its operation of the train such that a protruding door caused his injury. Erie defended by invoking a rule of the Pennsylvania common law that people using pathways adjoining a railroad right of way are trespassers, and that the railroad is not liable for injuries suffered by such trespassers unless caused by wanton or willful negligence.[119] Tompkins responded by invoking the *Swift* doctrine—namely, that since there was no statute codifying the Pennsylvania common law, the district court was to adjudicate the dispute based on the rules of the general common law.[120]

The Supreme Court overturned *Swift*. It first concluded that Justice Story's interpretive conclusion on Section 34 of the Judiciary Act was erroneous: "[T]he purpose of the section was merely to make certain that, in all matters except those in which some federal law is controlling, the federal courts exercising jurisdiction in diversity of citizenship cases would apply as their rules of decision the law of the

Example of Marine Insurance, 97 HARV. L. REV. 1513, 1521–25 (1984) (tracing the historical distinction between the general common law and federal common law).

110. *See, e.g.*, City and Cnty. of San Francisco v. Itsell, 133 U.S. 65, 67 (1890).

111. *See* Caleb Nelson, *supra* note 99, at 931–37.

112. HART & WECHSLER, *supra* note 46, at 578.

113. *Id.* at 580.

114. Diane P. Wood, *Back to the Basics of* Erie, 18 LEWIS & CLARK L. REV. 673, 680 (2014); *see also* HART & WECHSLER, *supra* note 46, at 580–81 ("[*Swift*] appears to have had the effect of leaving people uncertain about such matters—of telling them that the rules by which they are to be judged, with respect even to basic obligations and powers, will depend upon the unpredictable circumstance of what court they can get into, or may be haled into.").

115. Wood, *supra* note 114, at 683.

116. *See id.* at 681.

117. Erie R.R. Co. v. Tompkins, 304 U.S. 64 (1938).

118. *Id.* at 69.

119. *See id.* at 70.

120. *See id.*

state, unwritten as well as written."[121] In other words, the *Erie* Court understood "the laws of the several states" to refer to both state statutory law and the state common law.

The Court could have stopped there. Correcting *Swift*'s misinterpretation of the Judiciary Act would have disposed entirely of the controversy in *Erie*, as the federal district court would have been bound to apply the Pennsylvania common law defense.[122] But Justice Brandeis, writing for the majority, went further; *Erie*'s second ground rested upon policy considerations. The Court recognized that *Swift* had engendered disuniformity in the application of law and encouraged forum shopping that introduced "grave discrimination by noncitizens against citizens."[123]

Most consequently, however, *Erie*'s third basis was constitutional in nature.[124] The Court expressly disclaimed the power of federal courts to create a general common law, especially to the extent that such a power could usurp or ignore substantive state common law.[125] Justice Brandeis opined, "[T]here stands . . . the Constitution of the United States, which recognizes and preserves the autonomy and independence of the states—independence in their legislative and independence in their judicial departments."[126] He continued:

> Supervision over either the legislative or the judicial action of the states is in no case permissible except as to matters by the constitution specifically authorized or delegated to the United States. Any interference with either, except as thus permitted, is an invasion of the authority of the state, and, to that extent, a denial of its independence.[127]

On these bases, the Court abolished the general common law. On this point, the Court was unequivocal: "There is no federal general common law."[128] The majority emphasized the "fallacy underlying the rule declared in *Swift v. Tyson*"—namely, "the assumption that there is 'a transcendental body of law outside of any particular State but obligatory within it unless and until changed by statute,' [and] that federal courts have the power to use their judgment as to what the rules of common law are."[129] The Court summarized, the general common law "invade[s] rights which . . . are reserved by the Constitution to the several states."[130]

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121. *Id.* at 72–73.

122. *But see id.* at 77 ("If only a question of statutory construction were involved, we should not be prepared to abandon a doctrine so widely applied throughout nearly a century.").

123. *Id.* at 74.

124. The scope and meaning of *Erie*'s constitutional holding have produced much controversy. *See* HART & WECHSLER, *supra* note 46, at 590 ("From the time of its rendition to the present day, controversy has surrounded the scope and meaning of [*Erie*] as a constitutional holding."); Henry J. Friendly, *In Praise of* Erie—*And of the New Federal Common Law*, 39 N.Y.U. L. REV. 383, 385 (1964).

125. *See Erie*, 304 U.S. at 78 ("And whether the law of the state shall be declared by its Legislature in a statute or by its highest court in a decision is not a matter of federal concern . . . . And no clause in the Constitution purports to confer such a power upon the federal courts.").

126. *Id.* at 78–79.

127. *Id.* at 79.

128. *Id.* at 78.

129. *Id.* at 79.

130. *Id.* at 80.

On *Erie*'s terms, then, the Constitution contains no room for the general common law—regardless of the meaning of Section 34 of the Judiciary Act. Judge Friendly once commented that "[t]he constitutional argument for *Erie* is of rather stark simplicity."[131] Indeed, though Congress's lawmaking authority is constrained by certain enumerated powers in the Constitution, the general common law gave judges the power to legislate judicially even as to those issues in which states have their greatest powers. "[I]t would be . . . unreasonable to suppose that the federal courts have a law-making power which the federal legislature does not."[132] What's more, such a broad judicial power would be essentially unreviewable by Congress, as Congress's power to legislatively correct an errant judicial decision would remain constrained by Article I limits.[133]

A word of caution to the unfamiliar reader: though *Erie* ostensibly eliminated the general common law, it did not foreclose federal common law.[134] A uniform definition of the federal common law has proved somewhat elusive.[135] For our purposes, it suffices to conceptualize the federal common law as "federal rules of decision whose content" are not directly traceable to traditional statutory or constitutional interpretation;[136] such federal common law rules apply when there are "uniquely federal interests"[137] at play—like when the United States is itself a party, or in cases involving foreign relations.[138] The federal common law might have a role to play, for example, in a case involving the contractual rights and obligations of the United States.[139] Another example is federal common law immunity defenses for federal officers, such as qualified immunity.[140]

The federal common law has no role to play for the purposes of our analysis below; in cases like *Tyler v. Hennepin County*, no one supposes that there are uniquely federal interests that would compel the creation of federal common law property rights independent of state-law property rights. As described in the following Part, *Tyler*'s reasoning rests on *general* common law theories rather than on the *federal* common law.

To summarize the preceding Part's description of the pre-*Tyler* landscape, the reach of the Takings Clause was directly circumscribed by the scope of property rights as defined under state law. States had long-held authority to alter those property rights, so long as modifications thereto were rational and comported with

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131. Friendly, *supra* note 124, at 394. For a summary of criticism of Judge Friendly's position, see Robert R. Gasaway & Ashley C. Parrish, *In Praise of* Erie*—and Its Eventual Demise*, 10 J.L. ECON. & POL'Y 225, 231–33 (2013). *See, e.g.*, Craig Green, *Can* Erie *Survive As Federal Common Law?*, 54 WM. & MARY L. REV. 813, 824 (2013) ("Problems with *Erie*'s constitutional arguments are obvious.").

132. Friendly, *supra* note 124, at 395.

133. *See id.* ("The spectacle of federal judges being able to make law without possibility of Congressional correction would not be a happy one.").

134. *See* HART & WECHSLER, *supra* note 46, at 643 ("Recall that [*Erie*] . . . announced that '[t]here is no federal general common law.' It did not, however, hold that there is no federal common law at all. Rather, [*Erie*] held that there was no federal *general* common law of the sort applied in [*Swift*]." (citation omitted)).

135. Jay Tidmarsh & Brian J. Murray, *A Theory of Federal Common Law*, 100 NW. U. L. REV. 585, 589–90 (2006).

136. HART & WECHSLER, *supra* note 46, at 635.

137. Boyle v. United Techs. Corp., 487 U.S. 500, 504 (1988) (citation omitted).

138. Tidmarsh & Murray, *supra* note 135, at 593.

139. *See, e.g.*, United States v. Little Lake Misere Land Co., 412 U.S. 580, 592–94 (1973).

140. *See Boyle*, 487 U.S. at 505.

due process. That state power was especially potent given *Erie*'s repudiation of the general common law—federal courts had no constitutional power to create general common law rights above those established under state law. Though the Court has acknowledged the validity of the federal common law in cases involving uniquely federal interests, nobody seriously believed that the Court would revive the ability of federal courts to invoke a "transcendental body of law outside of any particular State but obligatory within it" in the absence of a federal statute.[141]

And then came *Tyler*.

II. HERE'S WALDO: *TYLER V. HENNEPIN COUNTY* AND THE COURT'S DOCTRINAL SHIFT

A. Geraldine Tyler: Erie*'s Trojan Horse*

The story of Geraldine Tyler presented an opportunity for many interests that decried a state-law practice that is pejoratively called "home equity theft."[142] The practice consisted of laws that allowed state and municipal governments to retain the surplus proceeds from the sale of tax-forfeited properties. Despite broad freedom in the realm of tax enforcement, only a minority of states in the years leading up to Ms. Tyler's case had adopted such a tax regime—nine to fourteen, depending on who was counting.[143] In addition to private organizations on the right and the left, many of the states that rejected such a scheme voiced opposition to the minority practice.[144] Many of these opponents advocated litigation raising constitutional objections to the retention policies based on the Takings Clause all the way to the Supreme Court.[145] Federal courts began to pay attention to and side with homeowners who lost significant amounts of equity when the tax forfeiture statutes operated against them.[146] So when the district court for the District of Minnesota rejected Ms. Tyler's takings claim and the Eighth Circuit agreed, the chance at last came to resolve the issue at the highest level of the federal judiciary.

Eager advocates would be hard pressed to find a more sympathetic figure than Ms. Tyler for their cause. A ninety-four year-old widow and grandmother, she had

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141. Erie R.R. Co. v. Tompkins, 304 U.S. 64, 79 (1938).

142. *Statement of Principles on Ending Home Equity Theft*, AM. LEGIS. EXCH. COUNCIL (Dec. 16, 2021), https://alec.org/model-policy/statement-of-principles-on-ending-home-equity-theft/ [perma.cc/D659-F473]; *Thousands Lose Their Wealth to Home Equity Theft*, PAC. LEGAL FOUND., https://homeequitytheft.org/size-and-scope [perma.cc/GY6G-5TUJ] (last visited Feb. 8, 2025).

143. *Compare* Petition for Writ of Certiorari at 3, Tyler v. Hennepin County, 598 U.S. 631 (2023) (No. 22-166), 2022 WL 3648406, at *3 (giving the number of states allowing equity confiscation as fourteen), *with* PAC. LEGAL FOUND., *supra* note 142 (listing nine states that allowed what the Foundation termed as home equity theft). *See also* Jenna Foos, *State Theft in Real Property Tax Foreclosure Procedures*, 54 REAL PROP. TR. & EST. L.J. 93, 102 (2019) ("Approximately nine states use a surplus retention system for property tax foreclosure."); AM. LEGIS. EXCH. COUNCIL, *supra* note 142 ("Twelve States' Current Laws Facilitate Government Theft of Home Equity").

144. *See generally* Brief of Amici Curiae States of Utah, Arkansas, Kansas, Kentucky, Louisiana, North Dakota, Texas, and West Virginia in Support of Petitioner, *Tyler*, 598 U.S. 631 (No. 22-166), 2023 WL 2477940 (providing multiple policy rationales supporting the constitutional objections to surplus retention regimes).

145. *See, e.g.*, Brittany Hunter, *A Timeline of PLF's Fight to End Home Equity Theft*, PAC. LEGAL FOUND. (Apr. 18, 2023), https://pacificlegal.org/home-equity-theft-timeline/ [perma.cc/WJQ7-DU8Q].

146. *See, e.g.*, Hall v. Meisner, 51 F.4th 185, 196 (6th Cir. 2022).

purchased her condominium in Minneapolis in 1999.[147] In 2010, she was driven from her home after "a frightening confrontation with a neighbor," so she relocated to a senior living community.[148] When she failed to pay $2,300 in delinquent taxes on the condominium, she was soon staring at a $15,000 bill that included her tax debt, interest, and fees.[149] That amount she could not pay. So when Hennepin County notified her in 2012 that her condominium would soon be sold to satisfy her outstanding debt, Ms. Tyler did nothing.[150]

A word on the operation of Minnesota's tax forfeiture statute is appropriate here. Pursuant to Minnesota law, counties commence actions each year against all properties with delinquent taxes from the previous year.[151] If the property owner makes no answer, judgment is entered for the county and the county auditor purchases the property on the state's behalf by paying the amount of the delinquent taxes and related charges.[152] Title then vests in the state "subject only to the [former owner's] rights of redemption" during the statutory redemption period of three years.[153]

The county must notify the former owner of the right to redeem the property[154] and provide an opportunity to reclaim the property through various statutory means.[155] If the former owner does not take any of the available avenues to redeem the property, the state takes "absolute title" at the end of the redemption period and the former owner's obligations are canceled.[156] The county may then decide to retain the property for public use or sell it to a private buyer.[157] If the county sells the property, proceeds "must be apportioned" in accordance with the provisions of Minnesota Statute § 282.08. At that point, the former owner cannot reclaim the surplus equity from the sale proceeds.[158]

When Ms. Tyler failed to exercise her right to redeem, Hennepin County foreclosed on and sold her condominium in 2015.[159] The County brought in $40,000 for the property, which it distributed to various government entities as required by statute.[160] Ms. Tyler was deprived of the $25,000 difference between what she owed the government and the value received by the government for her surplus equity.

In 2019, Ms. Tyler brought a lawsuit alleging that the County's retention of the surplus sale proceeds constituted an uncompensated taking in violation of the Takings Clause as incorporated against the states.[161] She also alleged that the County

147. Petition for Writ of Certiorari at 4, *Tyler*, 598 U.S. 631 (No.22-166), 2022 WL 3648406, at *4.

148. *Id.* at 4–5.

149. *Id.* at 5.

150. Tyler v. Hennepin County, 26 F.4th 789, 792 (8th Cir. 2022).

151. Minn. Stat. § 279.05.

152. *Id.* § 280.01.

153. *Id.* § 280.41.

154. *Id.* § 281.23.

155. *Id.* §§ 279.37 (confession of judgment), 281.01–281.02 (redemption), 282.241 (repurchase after forfeiture).

156. *Id.* § 281.18.

157. *Id.* § 282.01.

158. *See id.*

159. Petition for Writ of Certiorari at 5, Tyler v. Hennepin County, 598 U.S. 631 (2023) (No. 22-166), 2022 WL 3648406, at *5.

160. *Id.*

161. *Id.* at 7; *see also* Tyler v. Hennepin County, 505 F. Supp. 3d 879, 889 (D. Minn. 2020).

had levied an excessive fine against her in violation of the Eighth Amendment and had violated her due process rights.[162] The federal district court dismissed all her claims.[163] The dismissal of the Takings Clause claim turned on exactly what the Supreme Court had previously established as the relevant legal terrain: state law. After reviewing Minnesota's tax statute and its common law, the district court concluded that Ms. Tyler had failed to establish that she had a property interest in the surplus sale proceeds under Minnesota law.[164] Nor had she pointed to any other source of law, state or federal, that conferred such an interest.[165] "Without such a right," the court concluded, "Tyler [did] not have a viable takings claim . . . ."[166]

On appeal, the Eighth Circuit affirmed the district court, agreeing with the latter's conclusion that Minnesota law did not recognize the property interest underlying Ms. Tyler's takings claim.[167] The appellate court underscored the primacy of state autonomy in making and remaking its property law as the state sees fit. Ms. Tyler argued that in an 1884 case called *Farnham v. Jones*,[168] the Minnesota Supreme Court had announced a state common law interest in surplus tax sale proceeds.[169] The Eighth Circuit responded that the State's 1935 tax statute abrogated any previously existing right at common law.[170] It also cited *Nelson v. City of New York*,[171] where the Supreme Court held that "nothing in the Federal Constitution prevents [surplus retention] where the record shows adequate steps were taken to notify the owners of the charges due and the foreclosure proceedings."[172] Of course, the *Nelson* Court had left open the possibility that a tax forfeiture scheme could violate the Takings Clause if it "absolutely precludes an owner from obtaining the surplus proceeds of a judicial sale."[173] Ms. Tyler seized upon that language to distinguish *Nelson* and to argue that her case was one of absolute preclusion.[174] The Eighth Circuit found that argument unconvincing. Ms. Tyler had her chance to redeem the property and retain the surplus for herself; by failing to do so, she lost the state's recognition of any right in the property or its value.[175] Without the support of current state law, Ms. Tyler's takings argument was dead on arrival.

B. The Briefing

The pieces were set. Centuries of precedent, applied predictably by the lower courts, had clearly marked Minnesota state law as the only feasible battleground.

162. *Tyler*, 505 F. Supp. 3d at 889. The substantive due process claim was not raised before the Supreme Court, and the Court did not reach the excessive fines claim because the case was resolved on the takings claim. *Tyler*, 598 U.S. at 647–48.

163. *Tyler*, 505 F. Supp. 3d at 899.

164. *Id.* at 891–94.

165. *Id.* at 894.

166. *Id.* at 894–95.

167. Tyler v. Hennepin County, 26 F.4th 789, 793 (8th Cir. 2022) ("Where state law recognizes no property interest in surplus proceeds from a tax-foreclosure sale conducted after adequate notice to the owner, there is no unconstitutional taking.").

168. Farnham v. Jones, 19 N.W. 83 (Minn. 1884).

169. Appellant's Brief at 31–32, *Tyler*, 26 F.4th 789 (No. 20-3730), 2021 WL 1199278, at *31–32.

170. *Tyler*, 26 F.4th at 793.

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

172. *Id.* at 110.

173. *Id.*

174. Appellant's Brief at 31–32, *Tyler*, 26 F.4th 789 (No. 20-3730), 2021 WL 1199278, at *31–32.

175. *Tyler*, 26 F.4th at 793–94.

Federal law was appropriately quiet on whether a Minnesota property owner had any interest in surplus tax sale proceeds, and *Erie* foreclosed any dream of invoking general common law as a source for such an interest. If any taking were to be found in Ms. Tyler's case, it would necessarily be predicated on an interest created by Minnesota law.

In view of this, the focus of the merits briefing before the Supreme Court presents a puzzle. It also helps explain how the Court effectuated such a seismic doctrinal shift without much hesitation or scrutiny. In arguing that home equity is private property, Ms. Tyler contended that "[s]tate law is a common but *not* exclusive source of constitutionally recognized property interests," citing to *Phillips*.[176] After surveying several Supreme Court cases recognizing that future interests may be considered property for Takings Clause purposes, Ms. Tyler argued that the "nation's history and tradition confirm that [her] equity is 'private property' within the meaning of the Takings Clause."[177] Her authorities on this issue included Magna Carta, Sir William Blackstone, and early American treatises.[178] Only then did Ms. Tyler argue that Minnesota law itself historically recognized that home equity is a property interest.[179]

Surprisingly, rather than challenging the validity of the source of Ms. Tyler's purported property interest, the County primarily contested her reading of the general common law.[180] The County's very first contention in its argument section was that "Minnesota's forfeiture law is deeply rooted in Anglo-American history."[181] It argued that Minnesota's tax-foreclosure statute was consistent with the long Anglo-American tradition of "notice and a meaningful opportunity to act to avert forfeiture."[182] Far from questioning the relevance of Anglo-American tradition, the County invoked the Statute of Gloucester,[183] the law of colonial America,[184] the law of Founding-era states,[185] and the laws of other states up through the present.[186] The County then scrutinized Ms. Tyler's own authorities, pressing that they actually supported the County's position.[187]

Even after that historical exposition, the County did not turn immediately to Minnesota common law. In citing *Texaco* for the proposition that states may place reasonable affirmative conditions on the retention of property interests, the County again relied on references to the general common law: "A long Anglo-American tradition confirms that States may treat an entire interest in land as forfeited for failure to comply with reasonable conditions on ownership . . . ."[188] The County noted that laws providing for forfeiture following an owner's negligence "were

176. Brief for Petitioner at 9, Tyler v. Hennepin County, 598 U.S. 631 (2023) (No. 22-166).

177. *Id.* at 14.

178. *See id.* at 14–16.

179. *See id.* at 17–18.

180. *See* Brief for Respondents at 1, *Tyler*, 598 U.S. 631 (No. 22-166) ("That has never been a universal common-law or constitutional rule—not for centuries of Anglo-American history.").

181. *Id.* at 17 (heading-style capitalization omitted).

182. *Id.*

183. *Id.* at 17–18.

184. *Id.* at 18–19.

185. *Id.* at 20–22.

186. *Id.* at 22–25.

187. *See id.* at 25–29.

188. *Id.* at 2; *see id.* at 3 (citing Texaco, Inc. v. Short, 454 U.S. 516, 526 (1982)).

prominent in Colonial America, were present and approved of at the Founding, and have persisted ever since."[189]

Only in a section entitled "Petitioner's remaining arguments are wrong" did the County discuss property rights as construed under Minnesota law.[190] There, the County argued that "Minnesota law had no contrary tradition" to the Anglo-American tradition that failure to act could cause an owner's property rights to lapse.[191] Though the County acknowledged that "before 1902, Minnesota [had] provided a *statutory* right to claim surplus proceeds in some circumstances," it contested the notion that Minnesota common law ever recognized such a right.[192]

Throughout its briefing, the County breathed nary a word on the appropriate source of a property interest protected by the Takings Clause; it took for granted Ms. Tyler's suggestion that a state-law property right is not necessary to a successful Takings Clause claim. The County took a gamble that it would prevail on its reading of Anglo-American tradition (a gamble it ultimately lost). And it footnoted a discussion of Minnesota's common law history. For whatever reason, the parties looked past what centuries of law and the lower courts in this case had viewed as dispositive, namely state law.

C. The Opinion

The Supreme Court still had to confront the longstanding reality of state-law primacy in the realm of property definition, notwithstanding what the parties thought relevant. And that reality did not seem to be too great a barrier to whichever result the Court preferred. If predisposed to arrive at the sympathetic and owner-friendly outcome, the Supreme Court had all the tools it needed. *Webb's* and *Phillips* offered a way around the state's almost ninety-year-old statutory regime that had denied the existence of an owner's interest in surplus tax sale proceeds. The Court could, without inordinate twistification, reason that the pre-1935 Minnesota common law, as evident in the *Farnham* case, had adopted a longstanding "background principle" that could not be summarily abrogated by legislation.

Of course, even if there were an interest, the state could impose reasonable conditions on its continuing viability. So the Court would have to consider whether the statutory scheme's absolute preclusion of a post-sale refund was a "reasonable condition" under *Texaco*. The dicta in *Nelson* provided an open door for the Court to walk through: all it had to say was that no such statute could be reasonable. Having thus deprived Ms. Tyler of a traditional property interest long established under Minnesota law by imposing an unreasonable condition on its maintenance, Hennepin County effected an unconstitutional taking. This was the fairly simple analysis available to the Court; it required little stretching of the Court's doctrine, even if it necessitated a slightly stretched reading of the history of Minnesota law. Even if the Court wanted to point at Magna Carta or the storied tradition of the surplus right in English law, it could have done so as it had in *Phillips*, as evidence of the content of Minnesota's law, which had incorporated the English common

189. *Id.* at 2–3.
190. *Id.* at 36.
191. *Id.* at 37.
192. *Id.*; *see also id.* at 38 ("Tellingly, Petitioner cites no case where Minnesota courts actually applied a common-law rule to award a former owner any proceeds.").

law at the state's inception.[193] The outcome therefore seemed certain. And no one but Hennepin County—and a few other similarly situated states—was complaining.

And certain the outcome soon proved. To the surprise of none, the Court held in favor of Ms. Tyler. And all of the predictable moves were present: there was a discussion of *Farnham* and the general principle of surplus refund evident from other areas of Minnesota law,[194] a distinction between the reasonable conditions in *Texaco* and the onerous conditions here,[195] and an acknowledgment that Ms. Tyler faced the very sort of statute that *Nelson* assumed was constitutionally infirm.[196] In short, all nine justices agreed that there was a basis in Minnesota law for the property interest Ms. Tyler claimed was taken from her. And the manner in which Minnesota permitted Hennepin County to appropriate that interest was per se unconstitutional because the state otherwise recognized the validity of the interest.[197] Again, this was all to be expected. What was less expected was the point in the opinion that all this analysis took place—and even more surprising was what preceded it.

At the outset of the takings discussion, the Court acknowledged the state's taxing prerogatives—as relevant to this case, the state's power to take and sell property to satisfy past due taxes.[198] This framed the relevant question: "whether [the surplus] value is property under the Takings Clause, protected from uncompensated appropriation by the State."[199]

The Court then explained how to go about answering that question. Uncontroversially, the Court reiterated its past statement that "[t]he Takings Clause does not itself define property."[200] For definition, the judiciary looks to "'existing rules or understandings' about property rights."[201] Among potential sources for those rules, state law is "one important" option.[202] So far so good. Nothing shocking to this point. The Court seemed poised to initiate its analysis of Minnesota law.

But the Court demurred on state law. Instead, it qualified its statement about the "importan[ce]" of state law when it comes to defining property. "But state law cannot be the only source. Otherwise, a State could 'sidestep the Takings Clause by disavowing traditional property interests' in assets it wishes to appropriate."[203] Here the Court first intimated that something had changed. Rather than reading *Phillips* as plumbing the history of a given state's property law for *internal* constraints on legislative abrogation, the Court suggested that something *external* to state law must be at work to prevent state abuses.

What then was to serve as limitation on state discretion in defining property rights? The answer was direct: "'traditional property law principles,' plus historical practice and this Court's precedents."[204] In quickly quoting the *Phillips* Court's

193. Dutcher v. Culver, 24 Minn. 584, 591 (1877).

194. Tyler v. Hennepin County, 598 U.S. 631, 638–39 (2023).

195. *Id.* at 646–47.

196. *Id.* at 644–45.

197. *Id.* at 645 ("Minnesota may not extinguish a property interest that it recognizes everywhere else to avoid paying just compensation when it is the one doing the taking.").

198. *Id.* at 637–38 (citing Jones v. Flowers, 547 U.S. 220, 234 (2006)).

199. *Id.* at 638.

200. *Id.*

201. *Id.* (quoting Phillips v. Wash. Legal Found., 524 U.S. 156, 164 (1998)).

202. *Id.*

203. *Id.* (quoting *Phillips*, 524 U.S. at 167).

204. *Id.*

reference to "traditional property law principles," the Court looked past all that *Phillips* did to contextualize that inquiry as a search for the meaning of state law. No reference was made to the critical piece of the *Phillips* analysis, namely that "traditional property interests" were protected only because they were "long recognized under state law."[205]

For further support of this general historical approach to finding property interests, the Court cited, without elaboration, two other cases. First up was *United States v. Causby*,[206] a case involving a claim of taking against the United States for the use of airspace over lands abutting a federally leased airport. In resolving the dispute, the *Causby* Court did indeed (disparagingly) refer to the "ancient doctrine that at common law ownership of the land extended to the periphery of the universe."[207] The Court also cited various treatises and the common law of multiple jurisdictions to point to a tradition recognizing some limited right to the exclusive use and enjoyment of airspace above one's land.[208]

But this discussion was only necessitated by the unique federal aspects of the case. The United States asserted Congress's federal prerogatives over interstate air travel to claim the power to allow use of airspace without running afoul of the Takings Clause.[209] If correct, federal law would preempt any state-law property interest the landowners could claim. But once the government conceded at oral argument that some authorizations of airspace use would require compensation, the Court began attempting to draw a line around Congress's ability to preempt property interests conferred by state law.[210] *As a matter of federal common law*, the Court held that Congress could permit "incidental damages arising from a legalized nuisance" but it could not "completely destroy[]" a landowner's "right to possess and exploit the land."[211] References to "obvious" maxims of property law and various authorities followed to legitimate the Court's decision to draw the line at effective appropriation or "direct invasion" of land.[212]

It was not that the Court derived a property interest from a general principle or tradition; in fact, the Court explicitly disclaimed any such reliance.[213] Rather, it surveyed historical property practice to announce the content and limits of federal law—much as the *Phillips* Court did with respect to Texas law. And then to emphasize that its analysis did not upset the previous takings rule that the meaning of "property . . . will normally obtain its content by reference to local law,"[214] the Court demonstrated how its reasoning comported with North Carolina's treatment of the boundary between federal and state authority over private airspace.[215] In the final accounting, the Court held that "[t]he airspace, apart from the immediate

205. *Phillips*, 524 U.S. at 167.

206. U.S. v. Causby, 328 U.S. 256 (1946).

207. *Id.* at 260.

208. *Id.* at 264–65.

209. *Id.* at 260 ("The United States concludes that when flights are made within the navigable airspace without any physical invasion of the property of the landowners, there has been no taking of property.").

210. *Id.* at 261.

211. *Id.* at 262.

212. *Id.* at 264–65.

213. *Id.* at 261 ("[T]hat general principle does not control the present case.").

214. *Id.* at 266 (quoting United States v. Powelson, 319 U.S. 266, 279 (1943)).

215. *Id.*

reaches above the land, is part of the public domain."[216] The federal government's claim to that airspace was superior to any claim by the states or the individuals in whom land ownership was vested thereby. Yet the interests of individual landowners supplied a judicially imposed limit on federal use of its prerogatives: flights could not be "so low and so frequent as to be a direct and immediate interference with the enjoyment and use of the land."[217] The Court drew that principle from a general survey of landowners' interests, but applicable state law still governed whether individuals had an interest in land such that they could invoke the limit on federal power.

The *Tyler* Court's second citation in support of the general traditions approach to property definition, *Ruckelshaus v. Monsanto Company*,[218] fares even worse. *Ruckelshaus* posed the question of whether data submitted to the Environmental Protection Agency was property protected by the Takings Clause.[219] Monsanto explicitly made its argument a matter of Missouri law, which recognized trade secrets as property.[220] The Court wondered if intangible trade secrets were the sort of property covered by the Takings Clause. So it looked to the Restatement of Torts, its own precedents, and learned treatises to determine "the extent of the property right" in an intangible property like trade secrets.[221] Ultimately, the Court concluded that "to the extent that Monsanto ha[d] an interest in its health, safety, and environmental data cognizable as a trade-secret property right *under Missouri law*, that property right is protected by the Taking[s] Clause of the Fifth Amendment."[222] *Ruckelshaus* therefore considered the meaning of the term "property" as used in the Takings Clause only to reject the view that the clause has its own free-standing definition that can be used to deny constitutional protection to property recognized under state law.[223] All the talk of Blackstone, Locke, and the Court's own treatment of property was only meant to supply premises to support the conclusion that we have already belabored in this Essay: "property" is a broad term that is left to the states for detailed definition.

So much for the *Tyler* Court's attempt to distract readers from the man behind the curtain. This was clearly *not* business as usual. But then what was it? How would the Supreme Court (and the lower federal courts in cases to follow) extrapolate property interests from traditional property law principles, historical practice, and its own precedents? *Tyler* provides the model.

It began as one might expect any inquiry into the tradition of Anglo rights would: with an appeal to Magna Carta. The Court ascribed the general principle that "a government may not take more from a taxpayer than she owes" to that sacrosanct

216. *Id.*

217. *Id.*

218. Ruckelshaus v. Monsanto Co., 467 U.S. 986 (1984).

219. *Id.* at 1000–01.

220. *Id.* at 1001.

221. *Id.* at 1002–03.

222. *Id.* at 1003–04 (emphasis added).

223. *Id.* at 1003 ("It is conceivable that [the term 'property' in the Taking Clause] was used in its vulgar and untechnical sense of the physical thing with respect to which the citizen exercises rights recognized by law. On the other hand, it may have been employed in a more accurate sense to denote the group of rights inhering in the citizen's relation to the physical thing, as the right to possess, use and dispose of it. In point of fact, the construction given the phrase has been the latter.") (alteration in original) (quoting United States v. Gen. Motors Corp., 323 U.S. 373, 377–78 (1945)).

document.[224] What followed was a historical tracing of the principle's acceptance into the English common law and its migration across the Atlantic where it became embedded in the shared sensitivities of the American colonists.[225] In that story, Minnesota was just one player among many. After independence, the federal and most state governments limited property confiscation to only "so much . . . as may be necessary to satisfy the taxes due thereon."[226] Deviations from this shared norm were few and short-lived.[227] The Court scoffed at the County's measly evidence that there was a significant counter-trend; by the mid-nineteenth century, "just three States . . . deemed delinquent property entirely forfeited for failure to pay taxes."[228] Persistent "consensus" among the states was emphasized as the justification for recognizing the principle's enduring force.[229] It was not how these traditions bore on the likely content of Minnesota law that interested the Court. It was rather how they ought to limit Minnesota in deviating therefrom.

Next, the Court bolstered its historical analysis by citing its own cases that, in its view, evinced a similar tradition of surplus refund. In related cases from the nineteenth century, *United States v. Taylor*[230] and *United States v. Lawton*,[231] the Court interpreted a federal tax statute to confer a right to surplus tax-sale proceeds such that withholding the surplus would be an unconstitutional taking.[232] Under normal circumstances, these cases would have very little relevance to the issue of whether Ms. Tyler had a right to the surplus under Minnesota law. But in a search for general property law principles, these cases became persuasive evidence of a tradition that may limit state autonomy.

It was during this discussion of its own precedents that the Court grappled with *Nelson*. Despite the considerable way in which *Nelson* itself devalued *Taylor* and *Lawton*,[233] the Court batted the problem away by noting that the case was "readily distinguished."[234] *Nelson*, the Court reasoned, stood only for the state's power to "define[] the process through which the owner could claim the surplus."[235] It did not—indeed could not, consistent with the Takings Clause—permit circumvention of the traditional right to a surplus refund by "absolutely preclud[ing] an owner from obtaining the surplus proceeds of a judicial sale."[236] In doing the one thing that *Nelson* had suggested would be impermissible, Hennepin County had violated the Takings Clause.

By this time, the reader should be feeling that this approach is *Erie*-ly familiar. The Court was not recovering a traditional property interest buried in the recesses of Minnesota state law. Rather, it was reaching a conclusion on the existence of a

224. Tyler v. Hennepin County, 598 U.S. 631, 639 (2023).
225. *Id.* at 639–42.
226. *Id.* at 640.
227. *Id.* at 640–41.
228. *Id.* at 642.
229. *Id.* at 641–42.
230. U.S. v. Taylor, 104 U.S. 216 (1881).
231. U.S. v. Lawton, 110 U.S. 146 (1884).
232. *Taylor*, 104 U.S. at 218–19; *Lawton*, 110 U.S. at 150.
233. Nelson v. City of New York, 352 U.S. 103, 110 (1956) (characterizing the *Taylor*-*Lawton* issue "as purely one of statutory construction without constitutional overtones").
234. *Tyler*, 598 U.S. at 643.
235. *Id.* at 644.
236. *Id.*

property interest by reference to "the general principles and doctrines of [property] jurisprudence."[237] At the outset, it eschewed the state statutes and court opinions that might give insight into the content of Minnesota property law in favor of plumbing the depths of English common law and broad historical practices of the several states since the Founding.[238] It placed a premium on general principles that can be extracted from its own precedents. In short, the Court embraced anew the very notion disavowed in *Erie*, that the federal judiciary has power to enunciate "a transcendental body of law outside of any particular State but obligatory within it."[239]

Only after its broad survey of government tax sale refund policies throughout English and American history and a review of its own relevant precedents did the Court finally come to a discussion of Minnesota law. It highlighted how in other contexts, Minnesota "recognizes that . . . a property owner is entitled to the surplus in excess of her debt."[240] These included private foreclosure sales and collection of income taxes.[241] Because this had also been the rule for real property taxes under early Minnesota common law—and here the Court cites *Farnham*—it was evident that the state, in amending its tax code in 1935, was manipulating its own law to carve out an exception to a longstanding principle only "when it is the one doing the taking."[242] This sort of self-dealing the Takings Clause would not countenance.

As conclusion to its takings analysis, the Court rebuffed Hennepin County's attempt to characterize the surplus retention as appropriation of abandoned property. Citing *Texaco*, the County argued that the payment of property taxes was a reasonable condition for maintaining one's interest in property.[243] The Court engaged the County on its own turf. It cited Minnesota common law to rebut the idea that non-payment of taxes was sufficient to abandon property.[244] Because Ms. Tyler had an interest in the tax sale proceeds—not derived from Minnesota law but from general law—that she had not abandoned, the County had violated her rights under the Takings Clause.

So the Supreme Court came to the anticipated outcome with many of the anticipated moves, but it also recognized for the first time that "traditional property law principles" were an independent source of property interests external to state law. In doing so, it fundamentally altered the way that property is defined for constitutional purposes, all the while insisting that it was not doing anything particularly remarkable.

III. BEYOND *TYLER*

In this Part, we discuss two ways in which *Tyler* might rear its head in future doctrinal developments. We first explain *Tyler*'s significance for the Takings Clause

237. Swift v. Tyson, 41 U.S. 1, 19 (1842).

238. *Cf. id.* at 20–22 (surveying treatises, English common law, various state court decisions, and Supreme Court precedent to extrapolate general principles of law).

239. Erie R.R. Co. v. Tompkins, 304 U.S. 64, 79 (1938).

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

241. *Id.*

242. *Id.*

243. *Id.* at 646.

244. *Id.* at 646–47.

and property rights more generally. We then situate *Tyler* within the broader academic source-of-rights discourse.

A. Property Rights

Professor Maureen Brady raised a prescient observation in the months before *Tyler* was decided: The Supreme Court had begun to "turn[ ] to unmoored multistate law to construct property rights in ways theoretically at odds with how state-specific positive law might have defined them."[245] By this point, we hope that the reader has been convinced that the Supreme Court has consummated this doctrinal development in *Tyler v. Hennepin County*. The Court has now unequivocally acknowledged the validity of deriving property interests from a general common law of property—based on the shared traditions and history of Anglo-American law and entirely independent of state law—and covering those interests with constitutional protections under the Takings Clause. We now elucidate the significance of this shift.

In this connection, it is first important to emphasize what *Tyler* does not do: it does not erase *Erie*'s rejection of the general common law as a rule of decision in federal diversity cases. We are not witnessing a full-blown resurrection of *Swift*. Federal courts sitting in diversity will continue to apply state substantive law, including state common law, eschewing the development of a federal general common law for federal courts to apply in such cases. *Tyler* disrupts *Erie* only in that *Erie* categorically denied the existence of a body of general common law for any purpose.[246] Whereas the *Erie* Court disclaimed any congressional or judicial power under the Constitution to "declare substantive rules of common law applicable in a state,"[247] the *Tyler* Court effectively held the opposite by finding a property interest outside of Minnesota law that Minnesota is bound to honor for Takings Clause purposes. *Tyler* has apparently overruled the constitutional dimension of *Erie*'s holding—and only that dimension—*sub silentio*, suggesting that rather than prohibiting federal courts from deciding cases on the basis of general common law, the Constitution requires such considerations, at least in deciding claims brought under the Takings Clause.

This sea change opens up new opportunities for would-be takings claimants and new vulnerabilities for states attempting to fend them off. Perhaps the most concrete consequence of *Tyler* will be that putative property owners will have more ammunition to assert takings even when the State has by statute clearly abrogated or curtailed the property interest at stake. In the post-*Tyler* world, even a near century of state statutory law could be destabilized if a claimant can prove that prior to the adoption of the current statute, the English common law or a plurality of American states had recognized the property interest now asserted. The case opens the door to myriad new takings claims based on very old law. And the State can now be subject to takings claims based entirely on the law of other jurisdictions.

245. Maureen Brady, *The Illusory Promise of General Property Law*, 132 YALE L.J. F. 1010, 1043–44 (2023) (citing Murr v. Wisconsin, 582 U.S. 383 (2017), and Cedar Point Nursery v. Hadid, 594 U.S. 139 (2021), as harbingers of this development).

246. Erie R.R. Co. v. Tompkins, 304 U.S. 64, 78 (1938) ("There is no federal general common law.").

247. *Id.*

The state's new susceptibility to new-old takings arguments also has prospective effects for state autonomy. States may no longer deviate from longstanding consensus practices in taxing or property regulation. They are bound to adopt shared historical practices even if they have good reason to tailor or condition property interests to unique incentives and circumstances faced by their citizens. Not even by clear statute can a state overcome or opt-out of a general practice of the states as distilled by the federal judiciary. Autonomy in taxation and property law—two of the quintessential realms of state police power—is greatly reduced on questions where there is broad interstate agreement. *Tyler* forces the states to homogenize their approach to such questions lest the innovating states face liability for uncompensated takings. The federalism concerns raised in *Erie* are nowhere discussed in *Tyler*, suggesting that the Court no longer sees any constitutional infirmity in what it once termed "an invasion of the authority of the state."[248]

As another practical matter, the pocket of general common law created by *Tyler* brings with it the selfsame concerns expressed in *Erie*. By creating a much more solicitous takings forum in the federal courts, *Tyler* encourages the forum shopping lamented by the *Erie* Court.[249] Furthermore, the indeterminacy of the historical analysis under the general common law approach to defining property interests leaves lower federal courts broad discretion with minimal guidance as to how property interests are to be ascertained in the historical record of Anglo-American law.[250] This indeterminacy may in turn generate unpredictability and variation across jurisdictions even though the courts will ostensibly be evaluating the same history and applying the same law. In short, "[i]n attempting to promote uniformity of law throughout the United States, the [*Tyler*] doctrine [may] prevent[ ] uniformity in the administration of the law"[251] that it purports to apply.

Tyler also raises important questions about the relationship of property interests and individual rights. For one, do people have a property interest in individual rights—rights that existed at general common law, but which were not incorporated into the federal Constitution or state constitutions? James Madison famously noted that property "[i]n its larger and juster meaning . . . embraces every thing to which a man may attach a value and have a right."[252] He continued, "as a man is said to have a right to his property, he may be equally said to have a property in his rights."[253] As Professors William Baude and James Y. Stern have elaborated, "all legal rights can be thought of as 'things' that are owned by their holders."[254] On this theory, one may be able to state a takings claim where a state cabins an individual right that existed more broadly at the general common law.

248. *Id.* at 79.

249. *Id.* at 74–75.

250. *See* HART & WECHSLER, *supra* note 46, at 580–81.

251. *See Erie*, 304 U.S. at 75.

252. James Madison, *Property*, NAT'L GAZETTE, Mar. 27, 1792.

253. *Id.*

254. William Baude & James Y. Stern, *The Positive Law Model of the Fourth Amendment*, 129 HARV. L. REV. 1821, 1843 (2016).

B. Source of Rights

Looking beyond property, *Tyler* might have implications for the source of individual rights more broadly. Today, of course, the proper source of individual rights has become a—maybe *the*—hotly contested area of Supreme Court jurisprudence. *Dobbs v. Jackson Women's Health Organization*,[255] for example, repudiated *Roe v. Wade*'s[256] notion that there might be a free-floating penumbral right to privacy forming the foundation of a right to obtain an abortion.[257] At the same time, the Court has been explicit that historical context might supplement the plain meaning of other constitutional provisions.[258] And in still other contexts, the Court has accepted that the Constitution contains inherent structural limitations far broader than any specific textual provision. Take, for instance, state sovereign immunity. The Court has reified a conception of state sovereign immunity far broader than what the text of the Eleventh Amendment seems to protect: "In proposing the [Eleventh] Amendment, 'Congress acted not to change but to restore the original constitutional design.' . . . The 'sovereign immunity of the States,' we have said, 'neither derives from, nor is limited by, the terms of the Eleventh Amendment.'"[259]

In a recent article, Professors William Baude, Jud Campbell, and Stephen Sachs offer an account of the general common law as a source of fundamental rights that once operated as a limit on the powers of state government.[260] But they acknowledge that subsequent developments in the law—not least of which was the Supreme Court's decision in *Erie*—have complicated the pursuit of a general common law approach to rights today.[261] They posit three possible statuses that the general common law may inhabit now in light of such developments. The first possibility is that "the general-law view is *now* legally dead," excised entirely from the corpus of law available to rights claimants.[262] The second is that "the general law as a whole persists as background even in the face of today's neglect," simply waiting for renewed recognition.[263] The third and final possibility that these scholars imagine is that the general law has been translated into unenumerated rights.[264]

Tyler suggests that we are firmly in the second reality. The Court has displayed a willingness to wade back into the previously disavowed body of general common law as a new source of individual rights. Much as certain general common law property rights are protected (though not created) by the Takings Clause, and much as state sovereign immunity is protected (though not created) by the Eleventh

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255. Dobbs v. Jackson Women's Health Org., 597 U.S. 215 (2022).

256. Roe v. Wade, 410 U.S. 113 (1973).

257. *See Dobbs*, 597 U.S. at 234–35 ("*Roe*, however, was remarkably loose in its treatment of the constitutional text."); *see also Roe*, 410 U.S. at 152–53 ("The Constitution does not explicitly mention any right of privacy. In a line of decisions, however . . . the Court has recognized that a right of personal privacy . . . does exist under the Constitution . . . [including] in the penumbras of the Bill of Rights.").

258. *See, e.g.*, N.Y. State Rifle & Pistol Ass'n, Inc. v. Bruen, 597 U.S. 1, 25 (2022) ("But reliance on history to inform the meaning of constitutional text—especially text meant to codify a *pre-existing* right—is, in our view, more legitimate, and more administrable, than [the alternative].").

259. Franchise Tax Bd. of Cal. v. Hyatt, 587 U.S. 230, 243 (2019) (quoting Alden v. Maine, 527 U.S. 706, 722, 713 (1999)).

260. *See generally* Baude, Campbell & Sachs, *supra* note 36.

261. *Id.* at 1250–51.

262. *Id.* at 1251.

263. *Id.* at 1251.

264. *Id.* at 1252.

Amendment, other individual rights found at common law might conceivably be protected by other constitutional provisions, even if not created by those provisions. Take, as an illustration, the Fourth Amendment. Some have proposed a theory of Fourth Amendment jurisprudence that asks not "whether it is 'reasonable' to expect privacy in a given situation," but "whether government officials have engaged in an investigative act that would be unlawful for a similarly situated private actor to perform."[265] This approach "has been kicking around in Fourth Amendment case law for some time, though it is also the subject of periodic judicial denunciations."[266] Under this model of the Fourth Amendment, positive law would set the baseline privacy rights protected by the Fourth Amendment—the Fourth Amendment would not *create* a privacy right. Using the Takings Clause as an analogy, proponents of this positive law model "show that it is possible to bottom constitutional rights on ordinary positive law, and that this is indeed the chosen approach when it comes to other related areas of constitutional law."[267]

This Fourth Amendment example reifies *Tyler*'s significance. When initially advocating the positive law model of the Fourth Amendment, Professors Baude and Stern emphasized that "the property protected by the Due Process and Takings Clauses" was not, in 2016 at least, "defined by the property law of the Founding era but rather by modern law."[268] But what happens when the modern positive law conceives of certain property interests or privacy rights differently (or more narrowly) than at the general common law? Could *Tyler* suggest a general common law floor for certain interests protected by the Fourth Amendment, especially as the Court begins to face the limits of its "reasonable expectation of privacy" jurisprudence?[269] And even when the general common law does not conflict with modern positive law, courts might look to background positive law principles in assessing the scope of Fourth Amendment protections.[270] In Baude and Stern's

265. Baude & Stern, *supra* note 254, at 1825; *cf.* Danielle D'Onfro & Daniel Epps, *The Fourth Amendment and General Law*, 132 YALE L.J. 910, 914 (2023) ("[T]his approach would ask courts to resolve Fourth Amendment questions not by looking to the common law of 1791, but instead by using the tools of the common law to determine the general law of the country *today*.").

266. Baude & Stern, *supra* note 254, at 1825.

267. *Id.* at 1843.

268. *Id.* The authors' point is not necessarily that Founding era property rights had no role to play in Takings Clause jurisprudence at the time the article was published. Instead, the authors elaborated that modern law "recognizes property in intangibles" that did not exist at the Founding, such as rights in "trade secrets, bank accounts, and even welfare benefits." *Id.*

269. *See id.* at 1828–29 ("[T]he positive law approach is supported from many directions. It is consistent with the treatment of similar issues of constitutional property under the Fifth Amendment . . . [and it] establishes a better framework to analyze Fourth Amendment problems involving novel technologies."); *see also* D'Onfro & Epps, *supra* note 265, at 913 ("Recent cases have revealed interest among some originalist Justices in restoring a supposed pre-*Katz* regime under which Fourth Amendment protections turn on concepts of property . . . . Aided by scholarly efforts, and perhaps by recent changes in the Court's membership, some kind of 'positive law' approach might be poised to flourish."); *cf.* Richard M. Re, *The Positive Law Floor*, 129 HARV. L. REV. F. 313, 332 (2016) ("[C]ourts might treat privacy laws directed toward private parties as a presumptive floor on the Fourth Amendment's prohibition against 'unreasonable searches.'").

270. Baude & Stern, *supra* note 254, at 1843 ("When looking to background positive law, what matters is the structure of the right, not the label that positive law affixes to it.").

terms, "Constitutional property clauses could generate . . . rights against government interference broader than the background law of property."[271]

Perhaps the shift signaled by *Tyler* will eventually give rise to a Privileges or Immunities Clause theory of general law rights. As Baude, Campbell, and Sachs elaborate, "Section One [of the Fourteenth Amendment] secures rights supplied by *general law*."[272] They continue, "The Privileges or Immunities Clause did not confer general citizenship rights; rather, it recognized a restriction on state power to *abridge* them."[273] To be sure, those general law rights sometimes overlap with enumerated rights.[274] But there potentially exist other general law rights not created by the Constitution. Those rights might include a "federal guarantee of equality" that is different in nature and scope than the rights protected by the Equal Protection Clause.[275] The general law rights protected by the Privileges or Immunities Clause might also encompass other "[f]undamental rights" that the Court has since repudiated in the context of equal protection.[276] That is especially true since "[t]he general law is shaped by legally recognized custom and practice; its contours can change as those practices change."[277]

Even setting aside the Privileges or Immunities Clause, the general common law as a source of rights may have a role to play. "The Privileges or Immunities Clause recognizes rights . . . that bound *private* actors as a matter of general law . . . . Private individuals are capable of violating general-law rights, but only states were capable of violating the Fourteenth Amendment."[278] To make this more concrete, hypothesize a set of facts comparable to those in *Tyler* but where the foreclosing entity is a private actor. If Geraldine Tyler had a general law right to surplus equity, could she pursue legal relief against a foreclosing bank that retained such surplus? At least on this view of the general law, the answer seems to be "yes."

This is not to say that the Court will surely rely on the general common law as the source of freestanding rights, especially those unmoored from any constitutional provision whatsoever. After all, there is a salient difference between a property interest that existed under the general common law and an individual right entitled to constitutional protection (setting aside the issue of whether an individual has a property interest in any such individual right). But at a time when the Court is tightening the sources of individual rights, litigants, advocates, judges, and the like may turn to new theories of constitutional protections that have not yet been robustly tested in a judicial forum.

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271. *Id.* at 1842–43. Baude and Stern questioned the descriptive accuracy of this view in 2016 when property protections were defined primarily by the modern law, not the law of the Founding era. *See id.* at 1843. But *Tyler* perhaps opens the door to this view by suggesting that modern positive law is far from dispositive in an analysis of the interests protected by the Constitution.

272. Baude, Campbell & Sachs, *supra* note 36, at 1235.

273. *Id.* at 1237 (emphasis added).

274. *See id.* at 1236.

275. *Id.* at 1241.

276. *Id.*

277. *Id.* at 1248. This is just one view of the Privileges or Immunities Clause. Another posits that "privileges or immunities . . . were inherently backward-looking." *Id.* at 1249.

278. *Id.* at 1246 (emphasis added).

CONCLUSION

In writing that there is no general common law, Justice Brandeis had this to say in *Erie*:

> I admit that learned judges have fallen into the habit of repeating this doctrine as a convenient mode of brushing aside the law of a state in conflict with their views. And I confess that, moved and governed by the authority of the great names of those judges, I have, myself, in many instances, unhesitatingly and confidently, but I think now erroneously, repeated the same doctrine. But . . . there stands, as a perpetual protest against its repetition, the constitution of the United States, which recognizes and preserves the autonomy and independence of the states.[279]

Perhaps *Tyler* is a similarly unhesitating and confident—though erroneous—invocation of the general common law. As we have noted, we do not mean to foretell a complete renaissance of that doctrine. On the other hand, *Tyler* is a faithful and deliberate application of the general common law as a valid source of rights in the American legal tradition. Either way, it would be naïve to suppose that we have seen the last of *Tyler*. The Court's willingness to invoke, in so many words, the general common law in the face of a narrower avenue for resolution raises more questions than answers, and we have endeavored to put at least some of those questions on the table.

279. Erie R.R. Co. v. Tompkins, 304 U.S. 64, 78 (1938).