

Fifth Amendment — Takings Clause — Tyler v. Hennepin County

In *Pennsylvania Coal Co. v. Mahon*,¹ Justice Holmes observed that “while property may be regulated to a certain extent, if a regulation goes too far it will be recognized as a taking.”² And so articulated was a tension between countervailing forces: a state’s regulatory power and the Fifth Amendment’s Takings Clause. In the century since, permitting regulation of property appeared to be the rule, not the exception.³ But in recent decades, courts have increasingly used the Takings Clause to strike down legislation,⁴ in part due to a fear of states manipulating existing property interests to avoid paying compensation for their appropriations of private property.⁵ In response, the Supreme Court has diminished the role of state law in defining the relevant interest, instead appealing to what resembles a “general law of property”: jurisdictionless understandings of history and tradition, as well as other states’ laws.⁶

This past Term, in *Tyler v. Hennepin County*,⁷ the Supreme Court unanimously held that a Minnesota statutory scheme depriving a property owner of her condominium’s surplus equity in excess of her tax debt effected a “classic taking,” providing sufficient grounds to state a claim under the Takings Clause.⁸ In concluding that Geraldine Tyler had a property interest in the surplus equity, the Court not only cited historic understandings and traditions but also emphasized the inconsistency of Minnesota’s statutory law — property interests in surplus equity were extinguished only when the state sold real property.⁹ *Tyler*’s implicit requirement of internal consistency in a state’s statutory treatment of a property interest offers a new mechanism for courts to correct bad faith manipulation of property rights by states. This eliminates the need to deflate the influence of state property law in takings jurisprudence and desirably avoids the disadvantages of a general law of property.

Hennepin County, Minnesota, taxes real property annually.¹⁰ If a taxpayer does not timely pay the tax, the tax obligation to the County accrues interest and penalties.¹¹ The County can then obtain a judgment

¹ 260 U.S. 393 (1922).

² *Id.* at 415.

³ *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104 (1978), was the seminal Supreme Court case cementing this rule. *See id.* at 130–31; *see also, e.g.*, *Cedar Point Nursery v. Hassid*, 141 S. Ct. 2063, 2072 (2021) (noting that the Court “has generally applied” the *Penn Central* test to “determine whether a use restriction effects a taking”).

⁴ *See, e.g.*, *Cedar Point Nursery*, 141 S. Ct. at 2072.

⁵ *See Murr v. Wisconsin*, 137 S. Ct. 1933, 1944–45 (2017).

⁶ Maureen E. Brady, *The Illusory Promise of General Property Law*, 132 YALE L.J.F. 1010, 1015 (2023).

⁷ 143 S. Ct. 1369 (2023).

⁸ *Id.* at 1376.

⁹ *Id.* at 1375, 1379.

¹⁰ *Id.* at 1373 (citing MINN. STAT. § 273.01 (2022)).

¹¹ *Id.* (citing §§ 279.03, 279.18, 280.01).

against the property and the State receives limited title;¹² the taxpayer can redeem the property and regain title if she pays off her tax obligation within three years.¹³ If the tax obligation remains unpaid after three years, the debt is extinguished, but the State gains absolute title.¹⁴ As the State now owns the property, if the property is then sold, the former owner cannot recover the surplus in excess of the tax debt.¹⁵

Geraldine Tyler, a ninety-four-year-old woman,¹⁶ purchased her condominium in Minneapolis in 1999, where she lived until she moved to a senior community in 2010.¹⁷ Tyler retained the condo but failed to pay the property taxes on it.¹⁸ By 2015, she had accumulated approximately \$2,000 in unpaid taxes and \$13,000 in accrued interest and penalties.¹⁹ Acting pursuant to Minnesota’s forfeiture procedures, the County seized the condo, sold it for \$40,000, and kept the proceeds.²⁰ Tyler sued the County and its officials in Minnesota federal court.²¹ She argued that the County’s retention of the surplus value of her condo effected a taking without just compensation in violation of the Takings Clause and imposed an excessive fine in violation of the Excessive Fines Clause.²²

The district court dismissed Tyler’s suit for failure to state a claim.²³ Judge Schultz found that Tyler no longer had a property interest in the surplus equity.²⁴ Minnesota’s tax-forfeiture scheme gave property owners no right to the surplus — in return for extinguishing any outstanding tax obligations on a piece of property, absolute title to the property was vested in the State.²⁵ Even if the Minnesota common law once recognized an interest in surplus equity in the “tax-foreclosure context,”²⁶ Minnesota abrogated that interest by enacting its forfeiture scheme.²⁷

¹² *Id.* at 1373. Title is limited because it is “subject only to the rights of redemption” permitted by statute. § 280.41.

¹³ *Tyler*, 143 S. Ct. at 1373 (citing §§ 281.17(a), .18).

¹⁴ *Id.* (citing §§ 281.18, 282.07).

¹⁵ *Id.* (citing § 282.08). Minnesota is not alone in its retention of surplus equity following a tax-foreclosure sale of real property. At the time of the decision, twelve states and D.C. retained surplus equity in cases such as Tyler’s. See *Ending Home Equity Theft*, PAC. LEGAL FOUND., <https://pacificlegal.org/property-rights/home-equity-theft> [<https://perma.cc/4V8D-AE9X>].

¹⁶ That Tyler is a particularly sympathetic plaintiff should not be surprising given her representation by the Pacific Legal Foundation (PLF), a nonprofit legal organization with a history of effective strategic litigation to protect private property rights. See *What We Fight For: Property Rights*, PAC. LEGAL FOUND., <https://pacificlegal.org/property-rights> [<https://perma.cc/Q3BM-6F6L>] (detailing PLF’s representation of plaintiffs such as a “Nebraska widower”).

¹⁷ *Tyler*, 143 S. Ct. at 1374.

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Id.*

²² *Tyler v. Hennepin County*, 505 F. Supp. 3d 879, 889 (D. Minn. 2020); see also U.S. CONST. amends. V, VIII.

²³ *Tyler*, 505 F. Supp. 3d at 883.

²⁴ See *id.* at 885, 892.

²⁵ *Id.* at 892.

²⁶ *Id.* at 893.

²⁷ *Id.* at 894.

Without a source defining a legal right to the surplus, Tyler had failed to state a viable takings claim.²⁸

Judge Schultz also concluded retaining the surplus did not constitute an excessive fine because Minnesota's tax-forfeiture scheme was not a "fine" governed by the Excessive Fines Clause.²⁹ Having rejected all of Tyler's claims, Judge Schultz granted the County's motion to dismiss.³⁰

The Eighth Circuit affirmed.³¹ Writing for the panel, Judge Colloton³² found that Tyler had no interest in the surplus equity after the County acquired her condo.³³ Judge Colloton acknowledged that "independent source[s] such as state law" determine a property interest's existence.³⁴ Like the district court, he concluded that the state had abrogated any right to surplus equity under Minnesota common law.³⁵ Furthermore, he reasoned that state laws that fail to provide a property interest in surplus equity following a tax-foreclosure sale do not effect takings if the sale was conducted after adequate notice.³⁶ Because Tyler indeed had notice of the sale and multiple chances to avoid forfeiture, her failure to avail herself of the opportunities provided by the State precluded her takings claim.³⁷ The Eighth Circuit also rejected Tyler's excessive-fines claim, endorsing the district court's reasoning.³⁸

The Supreme Court reversed.³⁹ Writing for a unanimous Court,⁴⁰ Chief Justice Roberts held that Tyler had standing to sue,⁴¹ stated a

²⁸ *Id.* at 894–95.

²⁹ *Id.* at 897. The court agreed with the three reasons provided by the County: the scheme's purpose was remedial, it conferred a windfall on delinquent taxpayers when the amount of taxes owed exceeded the value of the forfeited property, and it provided opportunities for the taxpayer to avoid forfeiture. *Id.* at 896. The court also added that the scheme did not condition the loss of surplus equity on criminal behavior. *Id.* at 897.

³⁰ *Id.* at 899.

³¹ *Tyler v. Hennepin County*, 26 F.4th 789, 790 (8th Cir. 2022).

³² Judge Colloton was joined by Judges Shepherd and Kelly.

³³ *Tyler*, 26 F.4th at 793.

³⁴ *Id.* at 792 (quoting *Phillips v. Wash. Legal Found.*, 524 U.S. 156, 164 (1998)).

³⁵ *Id.* at 793.

³⁶ *Id.*

³⁷ *Id.* at 793–94.

³⁸ *Id.* at 794.

³⁹ *Tyler*, 143 S. Ct. at 1381.

⁴⁰ That the decision was unanimous may reflect cross-ideological agreement regarding "home equity theft," a derogatory term for surplus retention. Amicus briefs supporting Tyler boasted such authors as the Claremont Institute, as well as the ACLU and the Cato Institute, who jointly wrote a brief. Ilya Somin, *Unusual Cross-Ideological Agreement in Tyler v. Hennepin County*, REASON: VOLOKH CONSPIRACY (Apr. 26, 2023, 2:12 PM), <https://reason.com/volokh/2023/04/26/unusual-cross-ideological-agreement-in-tyler-v-hennepin-county> [<https://perma.cc/5BY2-JU7G>]. For a discussion of state surplus-retention systems and their disproportionate effects on vulnerable populations such as the elderly, see generally Jenna Christine Foos, *State Theft in Real Property Tax Foreclosure Procedures*, 54 REAL PROP. TR. & EST. L.J. 93 (2019).

⁴¹ *Tyler*, 143 S. Ct. at 1375. The County argued that Tyler lacked standing to bring her takings claim, but the Court concluded that the appropriation of Tyler's condo's surplus in excess of her tax debt constituted a "classic pocketbook injury sufficient to give her standing." *Id.* at 1374. Because Tyler could have used the surplus to extinguish her other personal debts should they have existed, the withholding of her surplus inflicted a cognizable financial injury. *Id.* at 1374–75.

claim under the Takings Clause, and was entitled to compensation.⁴² In determining whether Tyler had a property interest in the surplus, Chief Justice Roberts recognized that the inquiry “draws on ‘existing rules or understandings’ about property rights” from state law.⁴³ But he qualified that state law is not the exclusive source of property rights.⁴⁴ Otherwise, a state could jettison takings liability by “‘disavowing traditional property interests’ in assets it seeks to appropriate.”⁴⁵ Thus, Chief Justice Roberts looked to “traditional property law principles” and historical practices, as well as Supreme Court precedent.⁴⁶

Beginning with traditional principles, Chief Justice Roberts suggested that a property interest in surplus equity had English origins — King John proclaimed in the Magna Carta that when collecting debts owed to him by a deceased person, any surplus “shall be left to the executors.”⁴⁷ Parliament endorsed this principle, giving the Crown the power to seize and sell a taxpayer’s property to satisfy a tax debt but requiring the surplus to be returned to the original owner.⁴⁸ And according to Blackstone, the English common law required the same.⁴⁹

So too did historic and contemporary American laws. Following the Founding, the new federal government and ten states adopted provisions requiring the government to sell only the amount of property equal in value to the taxpayer debt.⁵⁰ These laws foreshadowed the approach taken by the federal government and the majority of states today, in which surplus is returned to the taxpayer.⁵¹ Precedent provided further support — a taxpayer’s entitlement to surplus in excess of debt was a well-recognized principle.⁵² Unlike statutory schemes upheld by the Court in other instances, Minnesota’s scheme entirely precluded owners from obtaining the surplus once absolute title had transferred to the state, suggesting a taking had occurred.⁵³

Chief Justice Roberts concluded with Minnesota statutory law more broadly. In all other cases, Minnesota recognizes a property owner’s entitlement to surplus in excess of debt: First, when nongovernmental

⁴² *Id.* at 1376.

⁴³ *Id.* at 1375 (quoting *Phillips v. Wash. Legal Found.*, 524 U.S. 156, 164 (1998)).

⁴⁴ *Id.*

⁴⁵ *Id.* (quoting *Phillips*, 524 U.S. at 167) (citing *Webb’s Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 164 (1980); *Hall v. Meisner*, 51 F.4th 185, 190 (6th Cir. 2022)).

⁴⁶ *Id.* (citing *Phillips*, 524 U.S. at 165–68; *United States v. Causby*, 328 U.S. 256, 260–67 (1946); *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1001–04 (1984)).

⁴⁷ *Id.* at 1376 (quoting WILLIAM SHARP MCKECHNIE, *MAGNA CARTA: A COMMENTARY ON THE GREAT CHARTER OF KING JOHN* 322 (2d ed. 1914)).

⁴⁸ *Id.* (quoting *An Act for Granting to Their Majesties an Aid of Four Shillings in the Pound for One Year for Carrying on a Vigorous War Against France*, (1692) § 12, 3 *STATUTES AT LARGE* 483, 488–89 (Eng.)).

⁴⁹ *Id.* (quoting 2 WILLIAM BLACKSTONE, *COMMENTARIES* *453).

⁵⁰ *Id.* (quoting *Act of July 14, 1798*, Pub. L. No. 5-75, § 13, 1 *Stat.* 597, 601).

⁵¹ *Id.* at 1378.

⁵² *Id.*

⁵³ *See id.* at 1379.

entities such as private creditors are the sellers.⁵⁴ Second, when the property subject to the state tax is income and personal property.⁵⁵ The only exception was in cases such as *Tyler*'s — when the government sells real property to satisfy a tax debt.⁵⁶ Such inconsistent treatment indicated that Minnesota's forfeiture regime was an attempt by the legislature to manipulate property rights and avoid paying compensation for its appropriation of property. Retention of the surplus therefore effected a taking, and *Tyler* had plausibly alleged a claim under the Fifth Amendment.⁵⁷ As *Tyler* agreed that relief under the Takings Clause was sufficient, the Court did not decide her excessive-fines claim.⁵⁸

Justice Gorsuch concurred.⁵⁹ Agreeing with the Court's takings holding, he criticized the district court's analysis of *Tyler*'s excessive-fines claim. First, he suggested that the tax-forfeiture scheme was punitive, as the Excessive Fines Clause applies so long as the law does not "solely . . . serve a remedial purpose."⁶⁰ Second, he argued that the possibility of delinquent taxpayers receiving a windfall is legally irrelevant.⁶¹ Finally, he claimed that a failure to consider culpability did not render Minnesota's scheme nonpunitive. A statutory scheme may still be punitive if it serves another "goal of punishment" like deterrence.⁶² Because the district court "expressly approved" of the deterrent effect of Minnesota's scheme, the Excessive Fines Clause applied.⁶³

While the *Tyler* Court continued the trend of a robust Takings Clause, it introduced novel evidence of a taking: a lack of internal consistency in Minnesota's statutory regime. The majority's discussion of analogous statutory contexts (where a property owner has an interest in surplus equity) exemplifies the longstanding concern justifying the Court's diminishing of the role of state law in takings jurisprudence — state legislatures manipulating property interests to insulate themselves

⁵⁴ *Id.* (quoting MINN. STAT. §§ 550.08, .20 (2022)).

⁵⁵ *Id.* (citing § 580.10).

⁵⁶ *Id.* ("The State now makes an exception only for itself, and only for taxes on real property."). Chief Justice Roberts rejected the County's argument that *Tyler* had constructively abandoned her home by failing to pay her taxes. *Id.* at 1380. He noted the absence of cases equating failure to pay property taxes with abandonment, *id.* (citing *Krueger v. Market*, 145 N.W. 30, 32 (Minn. 1914)), and that abandonment required the owner to fail to make "any use of the property," *id.* (quoting *Texaco, Inc. v. Short*, 454 U.S. 516, 530 (1982)). Here, Minnesota's forfeiture scheme did not consider a taxpayer's use of the property and permitted delinquent taxpayers to live on their properties until sold by the government. *Id.* (citing § 281.70).

⁵⁷ *Id.* at 1376.

⁵⁸ *Id.* at 1381.

⁵⁹ Justice Gorsuch was joined by Justice Jackson.

⁶⁰ *Tyler*, 143 S. Ct. at 1381 (Gorsuch, J., concurring) (emphasis omitted) (quoting *Austin v. United States*, 509 U.S. 602, 610 (1993)).

⁶¹ *Id.* ("Some prisoners may better themselves behind bars But punishment remains punishment all the same.")

⁶² *Id.* at 1381–82 (quoting *United States v. Bajakajian*, 524 U.S. 321, 329 (1998)).

⁶³ *Id.* at 1382.

from takings liability.⁶⁴ It also suggests that ordinary judicial review of positive state law may better identify and correct legislative gamesmanship than an evaluation of history and tradition can.⁶⁵ Indeed, courts searching state property law for contradictory treatment will make it harder for a state to manipulate property interests. *Tyler*'s internal-consistency requirement permits the Court to restore state property law's primacy and avoids the complications associated with the Court's current approach of a "jurisdictionless" property law.

As early as *Board of Regents of State Colleges v. Roth*⁶⁶ in 1972, the Court has recognized state law's crucial role in articulating the "rules or understandings" defining property interests.⁶⁷ Yet, throughout the Court's case law, a theme persists: a fear of gamesmanship and the possibility that affirming the importance of state law incentivizes states to insulate themselves from takings liability.⁶⁸ The worry is that, left to its own devices, a state might "transform private property into public property" via legislative enactment⁶⁹ or define a property interest so broadly as to render regulations paltry in their interference.⁷⁰

Pre-*Tyler*, this concern appeared overstated. In one of its more prominent opinions concerned with gamesmanship, the Court failed to cite any prior examples of a state "improperly . . . fortify[ing]"⁷¹ itself against takings claims by passing legislation that defined land parcels strategically.⁷² In fact, Chief Justice Roberts had once emphatically argued that in most circumstances, state law *should* define the relevant parcel to be considered in a takings claim, and that worries surrounding state gamesmanship were unfounded.⁷³ States do not operate in a vacuum. State legislatures are composed of officials who are elected and are accountable to their constituencies.⁷⁴ Given the unpopularity of governmental

⁶⁴ See *Murr v. Wisconsin*, 137 S. Ct. 1933, 1944–45 (2017).

⁶⁵ See Thomas W. Merrill, *Choice of Law in Takings Cases*, 8 BRIGHAM-KANNER PROP. RTS. J. 45, 63–65 (2019).

⁶⁶ 408 U.S. 564 (1972).

⁶⁷ *Id.* at 577.

⁶⁸ See *Palazzolo v. Rhode Island*, 533 U.S. 606, 627 (2001) ("Were we to accept the State's rule, the postenactment transfer of title would absolve the State of its obligation to defend any action restricting land use, no matter how extreme or unreasonable."); see also *Murr*, 137 S. Ct. at 1945 ("If a court defined the parcel according to state law requiring consolidation, this improperly would fortify the state law against a takings claim . . ."); *Cedar Point Nursery v. Hassid*, 141 S. Ct. 2063, 2076 (2021) ("The Board cannot absolve itself of takings liability by appropriating the growers' right to exclude in a form that is a slight mismatch from state easement law. . . . [P]roperty rights 'cannot be so easily manipulated.'" (quoting *Horne v. Dep't of Agric.*, 576 U.S. 351, 365 (2015)) (citing *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 164 (1980))).

⁶⁹ *Webb's Fabulous Pharmacies*, 449 U.S. at 164.

⁷⁰ See *Murr*, 137 S. Ct. at 1944–45 (quoting *Palazzolo*, 533 U.S. at 626).

⁷¹ *Id.* at 1945.

⁷² Merrill, *supra* note 65, at 63.

⁷³ See *Murr*, 137 S. Ct. at 1953 (Roberts, C.J., dissenting) ("[S]uch obvious attempts to alter the legal landscape in anticipation of a lawsuit are unlikely . . .").

⁷⁴ See Timothy M. Harris, *Backwards Federalism: The Withering Importance of State Property Law in Modern Takings Jurisprudence*, 75 RUTGERS U. L. REV. 571, 576 (2023).

appropriations of property, this dynamic checks state legislatures' ability to eschew takings claims.⁷⁵ For instance, in response to the Court's decision in *Kelo v. City of New London*,⁷⁶ which affirmed a capacious understanding of states' eminent domain powers,⁷⁷ forty-five states amended their laws to provide greater protections against governmental takings of property.⁷⁸ The real-world behavior of state legislatures indicates the rarity of manipulation, and correction via judicial intervention too looms in the background as a check.⁷⁹ But at the same time, Minnesota's contradictory statutory regime represents a state appearing to extinguish traditionally recognized property rights in bad faith. *Tyler* therefore lends credence to the Court's concern of legislative chicanery.

The Court's response has been to acknowledge state law's role, but over time, diminish that role and supplement it with an analysis of history and tradition.⁸⁰ This approach has been characterized as a move toward a "general property law" because the Court has relied on laws outside the state responsible for the challenged law, as well as concepts that are not particular to any state such as historical understandings of property interests.⁸¹ *Tyler* does not waver from this path. After acknowledging that state law is an important source for defining property rights,⁸² Chief Justice Roberts moved beyond state law to ascertain the scope of Tyler's asserted interest, citing the Magna Carta, Blackstone, and historic and contemporary laws outside Minnesota.⁸³

The general-law approach has many benefits over the existing patchwork of state positive and common law. It has been argued that general law permits courts to identify attempts by states to deviate from federal statutes — courts can more readily infer federal preemption when a state law is an outlier amongst other states' rules.⁸⁴ Courts could similarly infer that a state is attempting to deviate from the prescriptions of

⁷⁵ See Merrill, *supra* note 65, at 63; cf. Gary M. Dreyer, Note, *After Patel: State Constitutional Law & Twenty-First Century Defense of Economic Liberty*, 14 N.Y.U. J.L. & LIBERTY 800, 801 (2021) (reporting public dissatisfaction with the Supreme Court's "chipping away of constitutionally guaranteed property rights").

⁷⁶ 545 U.S. 469 (2005).

⁷⁷ See *id.* at 483.

⁷⁸ Dreyer, *supra* note 75, at 801; see also Merrill, *supra* note 65, at 63.

⁷⁹ Cf. *Stop the Beach Renourishment, Inc. v. Fla. Dep't of Env't Prot.*, 560 U.S. 702, 724 (2010) (plurality opinion) ("The only realistic incentive that subjection to the Takings Clause might provide to any court would be the incentive to get reversed, which in our experience few judges value.")

⁸⁰ Brady, *supra* note 6, at 1044–45; see also, e.g., *Murr v. Wisconsin*, 137 S. Ct. 1933, 1956 (2017) (Roberts, C.J., dissenting) ("[T]oday's decision knocks the definition of 'private property' loose from its foundation on stable state law rules and throws it into the maelstrom of multiple factors . . .").

⁸¹ Brady, *supra* note 6, at 1043–45. For more on the general law, see generally Caleb Nelson, *The Persistence of General Law*, 106 COLUM. L. REV. 503 (2006); and Stephen E. Sachs, *Pennoyer Was Right*, 95 TEX. L. REV. 1249 (2017).

⁸² See also *Cedar Point Nursery v. Hassid*, 141 S. Ct. 2063, 2076 (2021) ("[I]t is true that the property rights protected by the Takings Clause are creatures of state law." (citing *Phillips v. Wash. Legal Found.*, 524 U.S. 156, 164 (1998); *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1030 (1992))).

⁸³ *Tyler*, 143 S. Ct. at 1376–78.

⁸⁴ Nelson, *supra* note 81, at 560.

the Takings Clause where its laws conflict with general property law. Moreover, general law accumulates “principles and customs of multiple jurisdictions . . . across different substantive areas of common law.”⁸⁵ General property law can therefore serve a gap-filling role, answering questions where a state’s written law and common law are insufficient.⁸⁶ In the Fourth Amendment context, general property law is also praised for its consistency and objectivity; relying on jurisdictionless principles instead of positive law, it creates uniform rules that avoid “untethered and speculative”⁸⁷ inquiries by judges.⁸⁸ And, in operationalizing relevant common law principles, the general-law approach recognizes private law’s importance as a mode of legal analysis and incorporates its “philosophic commitments, social values, customs, and mores.”⁸⁹

But general property law has several weaknesses due to the nature of property law. Many of the supposed benefits of general law apply to areas of unique federal competence.⁹⁰ But property law demands “local expertise,” such as knowledge of the physical conditions of the land.⁹¹ By embodying common practices of many jurisdictions, general property law is antithetical to property law’s originally conceived status.⁹² Furthermore, property law is positive-law dependent because of the desirability of clearly establishing the obligations of third parties who may interact with regulated property in the future.⁹³ However, general property law has been notably indeterminate.⁹⁴ In invoking this approach, the Court has often failed to consider state-specific statutory law and selectively chosen whether certain statutes define an asserted property interest.⁹⁵ For instance, the Court in *Murr v. Wisconsin*⁹⁶ justified its treatment of the property at issue by referring to New York law, notwithstanding the property being in Wisconsin.⁹⁷ This susceptibility to judicial cherry-picking undermines general law’s supposed benefit of limiting judicial discretion.⁹⁸ The resulting indeterminacy leaves the scope of property interests unclear to property owners and permits

⁸⁵ Recent Case, *Douglass v. Nippon Yusen Kabushiki Kaisha*, 46 F.4th 226 (5th Cir. 2022) (*en banc*), 136 HARV. L. REV. 2176, 2180 (2023).

⁸⁶ Cf. Nelson, *supra* note 81, at 565.

⁸⁷ Danielle D’Onfro & Daniel Epps, *The Fourth Amendment and General Law*, 132 YALE L.J. 910, 915 (2023).

⁸⁸ *Id.* at 915, 917–18.

⁸⁹ Brady, *supra* note 6, at 1012; *see also id.* at 1013.

⁹⁰ *See* Nelson, *supra* note 81, at 565.

⁹¹ Brady, *supra* note 6, at 1025.

⁹² *See id.*

⁹³ *See* Thomas W. Merrill & Henry E. Smith, *Optimal Standardization in the Law of Property: The Numerus Clausus Principle*, 110 YALE L.J. 1, 8 (2000).

⁹⁴ *See* Nelson, *supra* note 81, at 519.

⁹⁵ *See* Brady, *supra* note 6, at 1044–47.

⁹⁶ 137 S. Ct. 1933 (2017).

⁹⁷ *See id.* at 1947; *see also* Brady, *supra* note 6, at 1045.

⁹⁸ *See* D’Onfro & Epps, *supra* note 87, at 953.

courts to articulate general property principles that cut against rights of both property owners and ordinary citizens.⁹⁹

However, Chief Justice Roberts intimated a requirement of internal consistency, undertaken via a search for contradictory treatment of a property interest by a state's positive law.¹⁰⁰ This was absent in the Court's prior takings cases. *Tyler's* requirement is an improvement for several reasons. First, it allows the Court to identify and correct gamesmanship with ordinary judicial review, without diminishing the role of state law in takings inquiries.¹⁰¹ Federal courts have not balked at the task of examining state law in the takings context.¹⁰² For instance, government-authorized physical invasions consistent with "background restrictions on property rights" do not amount to takings.¹⁰³ Determining whether such consistency exists depends on "background restrictions" that include state property laws.¹⁰⁴ *Tyler's* internal-consistency requirement demands similar analysis of state property law, but additionally requires courts to identify mismatches between the treatment of the asserted interest by the law at issue and the state's law generally.¹⁰⁵

Federal courts have conducted this state law gamesmanship analysis in other instances.¹⁰⁶ Where state courts are suspected of using state law to evade federal law or deliberately impede federal claims, the Court overrides its usual deference to state court interpretations of state law and searches for misconduct by the courts.¹⁰⁷ Misconduct can be inferred from "grossly unfair or unsubstantiated alteration[s] of state law" or anomalous applications of local practices.¹⁰⁸ Chief Justice Roberts himself confirmed the Court's role in combating attempts at evasion by state courts in *Moore v. Harper*.¹⁰⁹ The Court's use of judicial review to analyze the substantive content of state law, both in the takings context as well as in other contexts, suggests it is well-equipped to enforce *Tyler's* internal-consistency requirement.

⁹⁹ See Brady, *supra* note 6, at 1048–49; see also Nikolas Bowie, *The Supreme Court, 2020 Term — Comment: Antidemocracy*, 135 HARV. L. REV. 160, 198–200 (2021).

¹⁰⁰ See *Tyler*, 143 S. Ct. at 1379.

¹⁰¹ See *Murr*, 137 S. Ct. at 1953 (Roberts, C.J., dissenting) (arguing that attempts by states to avoid takings liability are "not particularly difficult to detect and disarm").

¹⁰² See, e.g., *Stop the Beach Renourishment, Inc. v. Fla. Dep't of Env't Prot.*, 560 U.S. 702, 726 (2010) (plurality opinion).

¹⁰³ *Cedar Point Nursery v. Hassid*, 141 S. Ct. 2063, 2079 (2021).

¹⁰⁴ See Michael C. Blumm & Rachel G. Wolfard, *Revisiting Background Principles in Takings Litigation*, 71 FLA. L. REV. 1165, 1169 (2019); see also *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1028–30 (1992).

¹⁰⁵ See *Tyler*, 143 S. Ct. at 1379.

¹⁰⁶ See *Stop the Beach*, 560 U.S. at 726 (citing *Bd. of Regents of State Colls. v. Roth*, 408 U.S. 564, 577–78 (1972)).

¹⁰⁷ See E. Brantley Webb, *How to Review State Court Determinations of State Law Antecedent to Federal Rights*, 120 YALE L.J. 1192, 1208 (2011).

¹⁰⁸ *Id.* at 1209; see also *id.* at 1215.

¹⁰⁹ 143 S. Ct. 2065, 2088 (2023) (citing, *inter alia*, *Tyler*, 143 S. Ct. at 1375) ("[W]e have an obligation to ensure that state court interpretations of that law do not evade federal law.").

Second, it is harder for a state actor to manipulate various unrelated state property entitlements than a particular rule in isolation. Disruption of a property interest defined by a lone statute requires a state legislature to pass any positive law altering that particular statutory entitlement, but when a property interest is defined with regard to the entirety of a state's law, more legislative change is required.¹¹⁰ Drawing understandings regarding property from state-specific general property law thus decreases the likelihood that a state circumvents takings liability, unless the state manipulates property entitlements broadly. Legislatures making such a broad change would more likely put constituents on notice and enable them to contest the change if they disagree.

Third, courts can use *Tyler*'s internal-consistency requirement to restore the role of state law in articulating protected property interests. The requirement permits courts to eschew any worries about legislative manipulation and correct manipulation, when it occurs,¹¹¹ through judicial review. In undermining the primary justification for the Court's skepticism of state law, *Tyler* promises to once again allow states to use their local expertise to regulate property interests.¹¹² Regulating property is considered a quintessential local endeavor, as the immediate effects of land uses are felt locally.¹¹³ By diminishing the role of state law, federal courts prevent state legislatures, "state[s'] major policy arm[s],"¹¹⁴ from experimenting with land use controls to manage their resources.¹¹⁵ A requirement of internal consistency and its emphasis on state positive law instead allows locally elected decisionmakers to craft land use policies responsive to the desires of their constituents.¹¹⁶

While *Tyler* perhaps shows that the Court's preoccupation with gamesmanship is not entirely unfounded, it does not follow that general property law is the answer. Instead, *Tyler* provides the possibility of changing course. *Tyler*'s internal-consistency requirement restores the status of state property law and protects property owners from the negative consequences of general property law, allowing states to shape property interests using positive law with the looming threat of judicial review to combat gamesmanship. By appealing to broader state property law and searching for contradictions within the monolith of state statutes, the Court can move toward striking a better balance between the competing tensions articulated by Justice Holmes at the inception of the regulatory takings doctrine.

¹¹⁰ See Brady, *supra* note 6, at 1032.

¹¹¹ Merrill, *supra* note 65, at 63.

¹¹² See Maureen E. Brady, *Property Convergence in Takings Law*, 46 PEPP. L. REV. 695, 698 (2019).

¹¹³ Melvyn R. Durchslag, *Forgotten Federalism: The Takings Clause and Local Land Use Decisions*, 59 MD. L. REV. 464, 465–66 (2000).

¹¹⁴ *Id.* at 492.

¹¹⁵ *Id.* at 491–94.

¹¹⁶ See Harris, *supra* note 74, at 576.