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Reassessing *Tyler v. Hennepin* County: A Critical Examination of the Supreme Court's Federalist Overreach in Discovering a Constitutionally Protected Property Right in a Takings Case Involving a Sovereign State's Real Property Tax-Foreclosure Sale

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ABSTRACT

This Article features the case of a real property owner who disclaimed all her burdens under state law for over six years yet later claimed substantial benefits under federal law. Because this distorts any rational burden-benefit analysis, this Article scrutinizes the U.S. Supreme Court's groundbreaking decision in *Tyler v. Hennepin County* that radically reinterpreted the Takings Clause of the U.S. Constitution. In *Tyler*, a unanimous Supreme Court departed from the consensus among the lower federal courts and discovered a novel property right—the constitutional entitlement to surplus proceeds from a sovereign State's real property tax-foreclosure sale. Despite Minnesota's clear and comprehensive foreclosure process, which affords property owners ample opportunities to bear minimal burdens to fulfill their tax obligations or relinquish their property interests, *Tyler* involved a property owner who remained unresponsive for nine years, effectively transferring her burdens to the State. If the tax sale proceeds failed to cover the property owner's tax liability, the State would bear the entire loss, and the property owner's tax liability would be canceled. In contrast, in cases of a surplus, as happened in this case, the property owner would reap all benefits. Even though the taxpayer had every right to sell her property, pay her taxes, and reap the benefits, the Supreme Court reached a counterintuitive conclusion that endorsed this "heads-I-win, tails-you-lose"

game that the property owner had played with a sovereign State over an extended period. Scrutinizing the Court's analysis of historical context, federal precedent, and Minnesota statutory law, this Article grapples with the enigmatic question of precisely where and how the Court unearthed this newfound federal constitutional right that disrupts the delicate federalism equilibrium carefully developed over the past 250 years. While designating surplus proceeds as the taxpayer's property may appear to align with sound public policy, this Article raises doubts that the U.S. Constitution has historically been the guardian of such a right. Through a critical examination of *Tyler*, this Article invites readers to evaluate the boundaries of Takings Clause protections and their implications for federalism in the United States.

AUTHOR

Tory L. Lucas, Professor of Law, Liberty University School of Law. At the Fourth Annual Supreme Court Review in the magnificent Supreme Courtroom at Liberty University School of Law, I presented the case of *Tyler v. Hennepin County*. Starting with this issue, the LIBERTY UNIVERSITY LAW REVIEW has begun a new tradition by publishing articles that are based on those reviews. I am humbled and excited to be part of this new tradition by publishing this Article. I express my gratitude to my research assistant, Joanna Boyer, for her outstanding contributions to this Article. I also express my appreciation for Joshua Davis, Editor-in-Chief of LAW REVIEW and former research assistant, for his enthusiasm and unwavering dedication to establishing this valuable tradition. Lastly, I commend Dr. Timothy M. Todd, Associate Dean for Faculty Development and Scholarship, for his original vision to host an annual review of significant Supreme Court opinions that has now blossomed into the publishing of articles from those oral presentations.

ARTICLE

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Tory L. Lucas[†]

ABSTRACT

This Article features the case of a real property owner who disclaimed all her burdens under state law for over six years yet later claimed substantial benefits under federal law. Because this distorts any rational burden-benefit analysis, this Article scrutinizes the U.S. Supreme Court's groundbreaking decision in Tyler v. Hennepin County *that radically reinterpreted the Takings Clause of the U.S. Constitution. In* Tyler*, a unanimous Supreme Court departed from the consensus among the lower federal courts and discovered a novel property right—the constitutional entitlement to surplus proceeds from a sovereign State's real property tax-foreclosure sale. Despite Minnesota's clear and comprehensive foreclosure process, which affords property owners ample opportunities to bear minimal burdens to fulfill their tax obligations or relinquish their property interests,* Tyler *involved a*

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property owner who remained unresponsive for nine years, effectively transferring her burdens to the State. If the tax sale proceeds failed to cover the property owner's tax liability, the State would bear the entire loss, and the property owner's tax liability would be canceled. In contrast, in cases of a surplus, as happened in this case, the property owner would reap all benefits. Even though the taxpayer had every right to sell her property, pay her taxes, and reap the benefits, the Supreme Court reached a counterintuitive conclusion that endorsed this "heads-I-win, tails-you-lose" game that the property owner had played with a sovereign State over an extended period. Scrutinizing the Court's analysis of historical context, federal precedent, and Minnesota statutory law, this Article grapples with the enigmatic question of precisely where and how the Court unearthed this newfound federal constitutional right that disrupts the delicate federalism equilibrium carefully developed over the past 250 years. While designating surplus proceeds as the taxpayer's property may appear to align with sound public policy, this Article raises doubts that the U.S. Constitution has historically been the guardian of such a right. Through a critical examination of Tyler*, this Article invites readers to evaluate the boundaries of Takings Clause protections and their implications for federalism in the United States.*

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I. INTRODUCTION

In *Tyler v. Hennepin County*, a unanimous Supreme Court broke new ground under the centuries-old Takings Clause of the U.S. Constitution by discovering a federally protected property right to the surplus that followed a sovereign State's lengthy tax-foreclosure process and sale.[1] Hennepin County in the State of Minnesota bore significant burdens to navigate a complex tax-foreclosure statute that stemmed from the decision of a real property owner to vacate her condominium and neglect to satisfy over $15,000 in outstanding tax liability.[2] After many years that afforded numerous opportunities for the taxpayer to pay her tax debts, the title to the condominium vested in the State, and the taxpayer's tax debts were forever canceled.[3] Many months later, the State sold the condominium in a private sale for $40,000.[4] Even though the taxpayer enjoyed the statutory right to repurchase the condominium for $15,000 and then sell it herself for $40,000, she instead opted to allow the County to bear those burdens. But stunningly, she claimed a federal constitutional right to receive benefits from the burdens that she forced the County to bear. After failing to exercise her significant statutory rights, the taxpayer asserted that the $25,000 surplus from the tax sale that exceeded her tax liability was a property right protected by the U.S. Constitution.[5]

Although legislatively granting such a property right might be a public policy backed by popular opinion, this Article takes the unpopular position to agree with the unanimous lower federal courts that there is no constitutionally protected property right to surplus proceeds from a state's tax-foreclosure sale.[6] This Article critically examines the Supreme Court's unanimous decision that discovered such a groundbreaking right, albeit

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[1] *See* Tyler v. Hennepin County, 598 U.S. 631, 647 (2023).

[2] Tyler v. Hennepin County, 505 F. Supp. 3d 879, 883–85 (D. Minn. 2020), *aff'd*, 26 F.4th 789 (8th Cir. 2022), *rev'd*, 598 U.S. 631 (2023).

[3] *Id.*

[4] *Id.* at 883, 885.

[5] *Id.*

[6] *See id.* at 892–95; Tyler v. Hennepin County, 26 F.4th 789, 790–91 (8th Cir. 2022), *rev'd*, 598 U.S. 631 (2023).

through obscure reasoning. One criticism is that in discovering this new constitutionally protected property right, the Supreme Court did so with less than full transparency. No matter how many times one studies the Court's rationale, it remains exceedingly difficult to know precisely where and how the Court discovered this new right under the U.S. Constitution. Additionally, in finding a federally protected right to the surplus proceeds from a tax-foreclosure sale, the Supreme Court failed to appreciate or acknowledge the delicate balance of benefits and burdens that existed between the State and the property owner during a lengthy foreclosure process to collect delinquent tax liability. The Supreme Court focused exclusively on the property owner's rights and benefits without considering her responsibilities and burdens in the slightest. Finally, the Supreme Court ignored significant federalism issues by discovering a new federally protected property interest over two centuries after the original Takings Clause was adopted and more than a century after the Takings Clause was applied to the states through the Fourteenth Amendment.[7] Even though it might be a popular policy choice to guarantee a right to surplus proceeds that result from a tax-foreclosure sale, this Article takes on the onerous burden to criticize the Supreme Court's decision in *Tyler* that embedded such a right in the U.S. Constitution.[8]

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[7] U.S. CONST. amend. V, XIV; *see generally* Chicago, Burlington & Quincy R.R. v. Chicago, 166 U.S. 226 (1897) (incorporating the right against the states through the Fourteenth Amendment).

[8] Of the forty-four *amicus* briefs filed in this case, less than one-quarter opposed the discovery of a newly protected constitutional right to surplus proceeds from a tax-foreclosure sale. *See* Docket Entry for Amicus Briefs Filed, SUPREME COURT OF THE UNITED STATES, https://perma.cc/4FUX-D3GL (last visited Dec. 14, 2023) (listing all *amicus* briefs filed in *Tyler*). It seems self-evident that popular opinion would readily back the Supreme Court if people were asked for their public policy preferences.

II. FACTUAL AND PROCEDURAL BACKGROUND

A. Tyler's Fateful Decision to Stop Bearing Any Tax Burdens on Her Real Property

In 1999, Geraldine Tyler purchased a condominium in Minneapolis, Minnesota.[9] A little more than a decade later, in 2010, she moved out of the condominium and into an apartment.[10] In vacating the condominium, Tyler made a fateful decision to stop paying property taxes.[11] And Tyler would never again make any effort to pay her taxes.[12] In response to Tyler's dereliction of her duty to pay property taxes on her real property, the State of Minnesota, acting through Hennepin County, was forced to initiate its burdensome tax-collection process.[13] Over the course of the next five years, the County bore significant burdens as it painstakingly pursued its rights to recover the $15,000 in Tyler's unpaid state property taxes, penalties, costs, and interest.[14] During that half-decade, Tyler enjoyed statutory protections that afforded her multiple opportunities to respond to the County's tax-collection efforts, to pay her tax liability, or even to sell her condominium to pay her tax liability and recover any surplus that might remain.[15] Tyler chose to do nothing—ever—content with allowing the County to bear all of her burdens.[16] Ironically, after forcing the County to bear all of her burdens and long after her tax liability had been canceled entirely, Tyler sought to

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[9] *Tyler*, 505 F. Supp. 3d at 883.

[10] *Id.* As a matter of historical fact, the national economy for real estate soured after the 2008–2009 Financial Crisis that caused the Great Recession, which resulted in plummeting real estate values across the country. *See* Kamille Wolff Dean, *Foreclosures and Financial Aid: Mind Over Mortgages in Closing the Plus Loan Gap*, 4 COLUM. J. RACE & L. 129, 134–36 (2014) (citing David Luttrell, et al., *Assessing the Costs and Consequences of the 2007–09 Financial Crisis and Its Aftermath*, 8 ECONOMIC LETTER (Sept. 2013), http://dallasfed.org/assets/documents/research/eclett/2013/el1307.pdf)).

[11] *Tyler*, 505 F. Supp. 3d at 883.

[12] *See id.* at 883, 885.

[13] *See id.* at 883–85.

[14] *See id.*

[15] *See id.*

[16] *See id.*

reap all of the benefits from the tax-foreclosure scheme as a federally protected constitutional right to any surplus.[17] After the County ultimately sold the condominium in late-2015 for $40,000, Tyler acted for the very first time by filing a lawsuit in 2019 that claimed that the $25,000 surplus above her tax liability of $15,000 was her constitutionally protected property.[18] This brief synopsis reveals the essence of this case, but there is much more detail to this story.

B. State's Use of the Burdensome Statutory Tax-collection Procedures to Recover Tyler's Delinquent Property Tax Liability

Although we do not know why Tyler vacated her condominium and ceased to bear the burdens of paying her property taxes, we do know that the County picked up those burdens to initiate the cumbersome tax-collection procedures codified in an extensive state law that includes dozens of procedural steps.[19] The County was forced to navigate three distinct stages of the Minnesota tax-foreclosure scheme.[20] At every turn and during every stage, Tyler enjoyed multiple opportunities to reap the benefits of exercising her real property rights relating to her tax liability.[21] She never exercised a single statutory right, content to let the County work for her benefit for over five years.

At the outset and before going into greater detail, it is crucial to recognize a simple juxtaposition of competing benefits and burdens between the County and Tyler that played out over many years forming part of the constitutional dispute. When Tyler stopped paying her taxes and forced the County to bear her burdens to foreclose on and ultimately sell

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[17] Tyler v. Hennepin County, 505 F. Supp. 3d 879, 883, 885 (D. Minn. 2020), *aff'd*, 26 F.4th 789 (8th Cir. 2022), *rev'd*, 598 U.S. 631 (2023).

[18] *Id.* at 885; *see also* Amended Complaint, Tyler v. Minnesota, District Court, Second Judicial District, No. 0:20-cv-00889-PJS-BRT (Dist. Ct., Second Jud. Dist., Apr. 7, 2020).

[19] *Tyler*, 505 F. Supp. at 883–84; *see* MINN. STAT. § 279.01–.37 (Delinquent Real Estate Taxes); MINN. STAT. § 280.01–.43 (Real Estate Tax Judgment Sales); MINN. STAT. § 281.01–.70 (Real Estate Tax Sales, Redemption); MINN. STAT. § 282.01–.41 (Tax-Forfeited Land Sales).

[20] *See Tyler*, 505 F. Supp. 3d at 883, 885.

[21] *See id.* at 883–85.

her property, if the proceeds of the sale had come up short of Tyler's tax liability, Tyler would not have owed a single cent of the deficiency and would bear no further tax burdens.[22] Only the County and the State would forever bear the burdens of Tyler's tax deficiency. On the other hand, if the County bore the statutory burdens that later unlocked a surplus from the tax sale, as happened in this case, then Tyler would claim that she had a federally protected right to reap those benefits. In essence, the County worked entirely for Tyler's benefit. This inequitable juxtaposition empowered Tyler to play a half-decade game with the County called "heads-I-win, tails-you-lose." That game began when Tyler vacated her condominium and stopped bearing any burdens on her real property.

In Minnesota, real property taxes are imposed annually and become a lien against the property the moment they are assessed.[23] When Tyler failed to pay her real property taxes in 2010 when they were due, they became delinquent in January 2011.[24] Under the first stage of Minnesota's tax-foreclosure scheme, on or before February 15, 2011, the County Auditor created a delinquent tax list that detailed that Tyler's property owed delinquent taxes and penalties in the amount of $15,000.[25] This filing was crucial because it automatically commenced a foreclosure lawsuit against Tyler's property.[26] Tyler received notice of this foreclosure action twice by publication and once by mail.[27] Tyler did not exercise her right to file an answer. Because Tyler failed to answer, in April 2012, a judgment was entered against her property for the taxes due.[28] Once that judgment was entered, Tyler's condominium was sold to the State through a procedure in which the County purchased it for the "amount of delinquent taxes,

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22 *Id.* at 884.

23 *Id.* at 883.

24 *Id.*

25 *Id.*

26 Tyler v. Hennepin County, 505 F. Supp. 3d 879, 883 (D. Minn. 2020), *aff'd*, 26 F.4th 789 (8th Cir. 2022), *rev'd*, 598 U.S. 631 (2023).

27 *Id.* at 883–84.

28 *Id.* at 885.

penalties, costs, and interest."[29] Once the County purchased Tyler's condominium, title vested in the State subject to Tyler's generous rights set out in the second stage of Minnesota's tax-foreclosure scheme.[30]

Under the second stage of Minnesota's tax-foreclosure scheme, Tyler enjoyed an extensive statutorily protected right of redemption for *three years*.[31] The County notified Tyler that she enjoyed that statutory right to redeem her property and provided the date on which that right expired.[32] For the next three years, Tyler had the unfettered right to redeem her property by paying "the delinquent taxes, penalties, costs, and interest."[33] Tyler did nothing.[34]

Even if a delinquent taxpayer cannot afford to redeem the property by paying her tax liability, the taxpayer enjoys another beneficial statutory right. If a taxpayer still wishes to avoid strict foreclosure of her property, she has the right to make a "confession of judgment."[35] Tyler could have agreed "to the entry of judgment for all delinquent taxes, penalties, costs, and interest," which would have triggered a valuable right to "consolidate her entire delinquency . . . into a single obligation to be paid in installments *over five to ten years*."[36] Tyler enjoyed a right not to bear all of her tax burdens at one time; instead, she enjoyed the benefit of paying them off over time under an installment plan.[37] In addition to not exercising her right to redeem her property, Tyler also chose not to confess judgment and seek an extended payment plan to meet her tax burdens.[38] It is noteworthy that Tyler could have confessed judgment for her taxes, entered into an

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[29] *Id.* at 883.

[30] *Id.* at 883–84.

[31] *See id.*

[32] Tyler v. Hennepin County, 505 F. Supp. 3d 879, 883–84 (D. Minn. 2020), *aff'd*, 26 F.4th 789 (8th Cir. 2022), *rev'd*, 598 U.S. 631 (2023).

[33] *Id.* at 884.

[34] *Id.* at 885.

[35] *Id.* at 884.

[36] *Id.* (emphasis added).

[37] *Id.*

[38] Tyler v. Hennepin County, 505 F. Supp. 3d 879, 885 (D. Minn. 2020), *aff'd*, 26 F.4th 789 (8th Cir. 2022), *rev'd*, 598 U.S. 631 (2023).

installment plan to pay her taxes, and then sold her condominium when its value exceeded her tax burdens. Tyler bore none of these burdens either.

After Tyler ignored and evaded any responsibility to bear her tax burdens or exercise her statutory rights, her property entered the third and final phase of Minnesota's tax-foreclosure scheme—final forfeiture.[39] Once final forfeiture occurred, after years of Tyler's bearing no burdens relating to her real property, *absolute title* in the condominium vested in the State in July 2015.[40] Once absolute title vested in the State, Tyler reaped significant benefits from the five-year burdensome process initiated by the County. Upon final forfeiture, *all* of Tyler's tax liability, totaling $15,000, was *canceled*.[41] In July 2015, many years after Tyler moved out of her condominium, stopped exercising her real property rights, and never again bore any burdens relating to her tax liability, Tyler's tax burdens were eliminated forever.[42]

One of the most intriguing parts of this story is that we are never told how much Tyler's condominium was worth in 2010 when she vacated her property and stopped paying taxes, in 2011 when the County initiated tax-foreclosure proceedings, during the three years in which Tyler enjoyed the right to redeem her property or confess judgment, or in July 2015 when all of her tax burdens were canceled forever. Although these material facts are mysteriously missing, they form a critical foundation of how property rights work in Minnesota. A simple example will illustrate this point. If the condominium's market value had been less than Tyler's tax burdens, then at the precise moment of final forfeiture when absolute title vested in the State, Tyler's burdens would have been forever eliminated and she would not have owed even a single cent to make up the deficiency. Under this scenario, it can be deduced with near certainty that Tyler would never have complained that she had forced the County, the State, and other taxpayers to bear her burdens. Because Tyler assuredly would never have asserted that she had a

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[39] *Id.* at 884.

[40] *Id.* at 885.

[41] *See id.* at 883–84.

[42] Tyler v. Hennepin County, 26 F.4th 789, 791 (8th Cir. 2022), *rev'd*, 598 U.S. 631 (2023).

constitutional *responsibility* to bear the burdens of her tax deficiency when the proceeds came up short of her liability, it is inherently implausible that she nevertheless proclaims a constitutional *right* to any benefits from surplus proceeds.

One would think that Tyler's rights ended here, but Minnesota granted another valuable right to delinquent taxpayers even *after* final forfeiture. Even though Tyler's tax burdens ended at final forfeiture in July 2015, her rights to her property were still not yet extinguished. Following final forfeiture of her condominium and the vesting of absolute title in the State, Tyler enjoyed *six more months* to exercise her right to repurchase her condominium.[43] To repurchase her condominium, Tyler would not have had to pay the 2015 market price; instead, the price to repurchase her property would have simply been to pay her tax burdens of $15,000.[44] Specifically, Tyler's repurchase price for her condominium would have been "the taxes, penalties, costs, interest, and special assessments owing at the time of forfeiture, along with any taxes that would have been collected if the property had not been forfeited."[45] Once again, Tyler enjoyed the right to not bear those burdens all at once, because state law afforded her the right to spread her repurchase price over time through an installment plan.[46] Tyler did not exercise her right to repurchase her condominium in the amount of her delinquent taxes, whether in a lump sum or over time.[47] Tyler also chose not to sell the condominium to use the proceeds to meet her tax obligations. Instead, Tyler waited another sixteen months to see how the County fared in the marketplace when it ultimately tried to sell the condominium.

Because Tyler did not seek to bear any burdens to regain her property rights, final forfeiture of her title forced the County to hold a public reclassification hearing to determine if Tyler's forfeited condominium

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43 *Id.*

44 *Tyler*, 505 F. Supp. 3d at 884.

45 *Id.*

46 *Id.*

47 *Id.* at 885.

"should be sold to private parties or retained for public use."[48] This, too, is a critical juncture in the County's burdensome journey to comply with the statutory foreclosure procedures. If the County chose to sell the property to a private party, the purchase price would be the condominium's "appraised value"; if a public entity were to purchase it, the price might be "less than its appraised value," or astonishingly, it could "even [be] transferred at no cost."[49]

Sixteen months after taking absolute title in late-2015, and without ever hearing from Tyler, the County sold the condominium in November 2016 in a private sale for $40,000.[50] Because Tyler's $15,000 in total tax deficiencies had long since been canceled, the proceeds of the sale were not applied to satisfy those debts.[51] The $25,000 surplus above Tyler's total tax liability lies at the heart of the dispute, because "Minnesota's statutory tax-foreclosure scheme does not provide former property owners with any means to claim the proceeds of the sale in excess of the tax debt" after the County satisfies the cumbersome statutory procedures.[52] Of the fifty sovereign states, it appears that only a handful—Minnesota, Indiana, Oregon, and Montana—have statutes that require "the surplus to be distributed to recipients other than the former property owner."[53] In

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[48] *Id.* at 884.

[49] *Id.*

[50] Tyler v. Hennepin County, 505 F. Supp. 3d 879, 885 (D. Minn. 2020) *aff'd*, 26 F.4th 789 (8th Cir. 2022), *rev'd*, 598 U.S. 631 (2023); Tyler v. Hennepin County, 26 F.4th 789, 791 (8th Cir. 2022), *rev'd*, 598 U.S. 631 (2023).

[51] *Tyler*, 505 F. Supp. 3d at 884. For those who are curious as to how the proceeds are distributed, they go first to "any expenses incurred for municipal improvements and environmental cleanup that increased the value of the property," second to "any special assessments," third to "designate a portion of the proceeds to help fund forest development or county parks or recreational areas," and fourth, "40 percent of what remains must be distributed to the county, 40 percent to the school district, and 20 percent to the town or city." *Id.*

[52] *Id.*

[53] *Id.* (citing IND. CODE § 6-1.1-25-9 (prescribing the order of distribution of proceeds similar to Minn. Stat. § 282.08); Or. Rev. Stat. § 275.275 (same); and MONT. CODE ANN. § 15-17-322 (directing that any surplus "must be deposited to the credit of the county general fund")).

contrast, "the majority of states 'require the foreclosing government unit to return surplus funds from a property tax foreclosure sale to the previous property owner.'"[54] The Supreme Court would later assign constitutional significance to this state-by-state disparity.[55]

C. *Tyler Rises for the First Time to File a Lawsuit to Assert a Constitutionally Protected Right to the Surplus Proceeds from the Tax-foreclosure Sale*

After nearly a decade of Tyler's inaction during which the County meticulously bore the burdens to navigate procedural complexities to safeguard her numerous statutory rights, Tyler finally did something. In August 2019, Tyler filed a lawsuit to assert her constitutionally protected property right to the surplus value of her condominium beyond her $15,000 tax debt.[56] Tyler alleged that when the County retained the $40,000 in proceeds from the sale of the condominium, particularly the $25,000 surplus, it violated the Takings Clause of the Fifth Amendment of the U.S. Constitution, made applicable to the states through the Fourteenth Amendment.[57] As relevant here, the Takings Clause states, in relevant part, "nor shall private property be taken for public use, without just compensation."[58]

Tyler's pleading is revealing in its selective focus, emphasizing her benefits under federal law while largely disregarding any burdens under

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[54] *Id.* at 884, 885 (citing Jenna Fools, Comment, *State Theft in Real Property Tax Foreclosure Procedures*, 54 REAL. PROP. TR. & EST. L.J. 93, 99–103 & n.38 (2019)).

[55] Tyler v. Hennepin County, 598 U.S. 631, 641–42 (2023).

[56] *See* Amended Complaint, *supra* note 18, at ¶ 19.

[57] *See Tyler*, 505 F. Supp. 3d at 889. Tyler also alleged that the County's retention of the surplus proceeds violated the Takings Clause of the Minnesota Constitution and other parts of the U.S. and Minnesota Constitutions "by imposing an excessive fine [and] . . . depriving her of substantive due process." Tyler also alleged "that the County [was] unjustly enriched." *Id.* This Article focuses only on Tyler's Takings Clause claim under the U.S. Constitution.

[58] U.S. CONST. amend. V; Chicago, Burlington & Quincy R.R. v. Chicago, 166 U.S. 226, 241 (1897) (incorporating the Takings Clause to the states through the Due Process Clause of the Fourteenth Amendment). The Takings Clause of the Minnesota State Constitution similarly states: "Private property shall not be taken, destroyed or damaged for public use without just compensation therefore, first paid or secured." MINN. CONST. art. I, § 13.

state law. If one scours Tyler's 25-page complaint, at no point does Tyler recognize that she could have enjoyed substantial rights under state law if she had borne the most minimal of burdens; instead, Tyler shifted all burdens to the State so she could enjoy substantial constitutional benefits.[59] Two inferior federal courts unanimously held for the State because they could find no authority to support Tyler's assertion that she enjoyed a constitutionally protected property interest to the surplus from the tax-foreclosure sale.[60] In rejecting the unanimous holdings of the two inferior federal courts, one federal court—the U.S. Supreme Court—unanimously discovered such a novel property right.[61]

III. FEDERAL DISTRICT COURT IN MINNESOTA FOUND NO PROTECTED PROPERTY RIGHT

The United States District Court for the District of Minnesota dismissed Tyler's Takings claim with prejudice after determining that "nothing in the constitutions of the United States or Minnesota, nothing in any federal or state statute, and nothing in any federal or state common law gives the former owner of a piece of property that has been lawfully forfeited to the state and then sold to pay delinquent taxes a right to any surplus."[62] After scouring the sources cited by Tyler, the District Court could not find any support for her claim that she had a private property right that was constitutionally protected.

Before searching in vain for such a right, the District Court firmly addressed what Tyler was not complaining about and what was not in dispute. The District Court stressed that Tyler never disputed any of the following: "the sufficiency of the notice or process that she received," "that she received notice of how much in taxes she owed and the deadline by which she had to pay those taxes," "that she received notice that her condo was added to the delinquent tax list triggering a lawsuit against the

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[59] *See* Amended Complaint, *supra* note 18.

[60] *Tyler*, 505 F. Supp. 3d at 898; Tyler v. Hennepin County, 26 F.4th 789, 793–94 (8th Cir. 2022), *rev'd*, 598 U.S. 631 (2023).

[61] Tyler v. Hennepin County, 598 U.S. 631, 647–48 (2023).

[62] *Tyler*, 505 F. Supp. 3d at 894.

property," "that she received notice of her right to redeem and the date on which the redemption period expired," "that she had multiple opportunities to avoid the forfeiture of the surplus equity," that she "could have paid her taxes on time," that she "could have paid her taxes after receiving notice that her condo was on the delinquent tax list," that she "could have redeemed her property by paying her taxes any time during the three-year redemption period," that she "could have made a confession of judgment" and made payments under an installment plan, and that even after "final forfeiture of the condo—which occurred more than four years after her first missed payment—she could have applied to repurchase the condo for the amount of the delinquency."[63] After recognizing that "Tyler had opportunity after opportunity to avoid the forfeiture of the surplus equity," the District Court praised Tyler for "wisely" not asserting that her procedural due process rights were violated.[64] To be sure, the District Court recognized that Tyler's core argument rested on her assertion that, despite her desire to avoid any burdens, she believed that she nevertheless possessed a constitutional right to reap the benefits from the County's substantial burdens.

In pivoting to Tyler's Takings claim, the District Court framed the issue as "whether Tyler retained a property interest in the surplus equity after absolute title to the condo passed from Tyler to the County."[65] Understanding that "the Constitution protects rather than creates property interests,"[66] the District Court recognized that any "existence of a property interest is determined by reference to existing rules or understandings that stem from an independent source such as state law."[67] Because Tyler made two essential arguments supporting her position that she enjoyed a

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63 *Id.* at 889–90.

64 *Id.* at 890.

65 *Id.*

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

67 *Id.* at 883, 890–91.

protected property right to the surplus proceeds, the District Court addressed each extensively in turn.[68]

Tyler first argued that she owned the right to the surplus because she owned the condominium.[69] In addressing that contention, the District Court considered two Supreme Court cases, *United States v. Lawton* and *Nelson v. City of New York*, that involved the government's selling property due to unpaid bills.[70] After a detailed analysis of the reasoning and holdings of both cases, the District Court concluded that the "Supreme Court has *unambiguously* declined to recognize a former property owner's 'fundamental interest in the surplus' by virtue of her prior ownership of the forfeited property."[71] Instead, the District Court interpreted Supreme Court precedent precisely the opposite way, concluding that a "former owner has a property interest in the surplus *only if* a provision of a constitution, statute, or municipal code creates such an interest."[72] The District Court further added that "nothing in the Federal Constitution prevents [a state's retention of the surplus] . . . where the record shows adequate steps were taken to notify the owners of the charges due and the foreclosure proceedings."[73] Ultimately, the District Court distinguished Supreme Court precedent that discovered property rights to surplus proceeds of foreclosure sales based on express statutory grants from Tyler's lack of any property rights to the surplus under Minnesota's tax-foreclosure statute.[74] Focusing on the plethora of rights available to Tyler, the District Court held that

> although Minnesota law provides multiple opportunities for the property owner to avoid forfeiture—and even to repurchase the property for the amount of the tax debt *after*

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[68] Tyler v. Hennepin County, 505 F. Supp. 3d 879, 891 (D. Minn. 2020), *aff'd*, 26 F.4th 789 (8th Cir. 2022), *rev'd*, 598 U.S. 631 (2023).

[69] *Id.* at 883, 891.

[70] *Id.* at 891–93.

[71] *Id.* at 893 (emphasis added).

[72] *Id.* (citing Nelson v. New York, 352 U.S. 103 (1956)) (emphasis added).

[73] *Id.* at 891–92 (citing Nelson v. New York, 352 U.S. 103, 110 (1956)).

[74] Tyler v. Hennepin County, 505 F. Supp. 3d 879, 884, 892 (D. Minn. 2020), *aff'd*, 26 F.4th 789 (8th Cir. 2022), *rev'd*, 598 U.S. 631 (2023).

> final forfeiture—if the property owner fails to avail herself of these opportunities and her property is sold, she has no right to the surplus proceeds.[75]

Relying on *Farnham v. Jones*,[76] an 1884 case, Tyler's second argument was that she enjoyed a state common law right to the surplus in the tax-foreclosure context.[77] Turning to this common law claim, the District Court conducted a detailed analysis of *Farnham*, ultimately concluding that it "cannot bear the weight that Tyler attempts to place on it."[78] Unsurprisingly, the District Court's interpretation of *Farnham* was consistent with its earlier interpretation of *Lawton* and *Nelson*, concluding that *Farnham*, too, "turned on the interpretation of the words of a particular statute."[79] But even if *Farnham* somehow had, in 1884, created a common law right to surplus proceeds from a tax-foreclosure sale, the District Court recognized that the current "comprehensive and detailed" Minnesota tax-foreclosure statute would abrogate any such common law.[80] Holding that Tyler "does not have a viable takings claim" under any of her theories, the District Court dismissed her claim with prejudice.[81]

IV. UNANIMOUS EIGHTH CIRCUIT ALSO FOUND NO PROTECTED PROPERTY RIGHT

Twelve years after Tyler stopped bearing burdens regarding her condominium, she continued to argue that she nonetheless enjoyed a constitutionally protected right to reap substantial benefits, this time before the U.S. Court of Appeals for the Eighth Circuit.[82] The Eighth Circuit

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75 *Id.* at 892 (emphasis in original).

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

77 *Tyler*, 505 F. Supp. 3d at 893.

78 *Id.* at 894.

79 *Id.* (citing Nelson v. New York, 352 U.S. 103, 110 (1956)).

80 *Id.*

81 *Id.* at 894–95.

82 *See* Tyler v. Hennepin County, 26 F.4th 789 (8th Cir. 2022), *rev'd*, 598 U.S. 631 (2023). As a brief point of privilege, I am eternally grateful for the opportunity to have clerked for Judge William Jay Riley and Judge Pasco M. Bowman II of the Eighth Circuit.

explained that to prove her Takings claim, Tyler "must show that she had a property interest in the surplus equity after the county acquired the condominium."[83] While Tyler contended that Minnesota common law granted her that property interest in the tax-foreclosure context, a unanimous three-judge panel of the Eighth Circuit searched in vain but could not find any such right.[84]

Like the District Court, the Eighth Circuit addressed whether Tyler's reliance on the 1884 *Farnham* case based on an 1881 tax-collection statute was the source of her property right in this Takings case.[85] The Eighth Circuit concluded that regardless of whether the Supreme Court of Minnesota in 1884 in *Farnham* had recognized a common-law right to surplus equity, it was abrogated by the 1935 statute that created the detailed tax-forfeiture plan that applied to Tyler's condominium.[86]

After concluding that Minnesota state law did not recognize a property interest in surplus proceeds, the Eighth Circuit declared "there is no unconstitutional taking."[87] The court nonetheless reviewed federal precedent for support of Tyler's claim. To that end, the Eighth Circuit analyzed the Supreme Court's decision in *Nelson* that "addressed the constitutionality of a tax-forfeiture scheme under which the City of New York foreclosed real property for delinquent taxes, and retained the entire proceeds of the sale."[88] In that case, even though state law granted the property owners a right to redeem the property or recover the surplus proceeds, they failed to do so.[89] Like the District Court, the Eighth Circuit reiterated the Supreme Court's holding that "nothing in the Federal

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Both men were amazing bosses, mentors, and friends. I am heartbroken that Judge Riley's incomparable life ended on January 20, 2023. Through a special ceremony, the Eighth Circuit honored his life, service, and legacy on November 17, 2023.

[83] *Id.* at 792.

[84] *Id.* at 792–93.

[85] *Id.* at 792.

[86] *Id.* at 793.

[87] *Id.*

[88] Tyler v. Hennepin County, 26 F.4th 789, 793 (8th Cir. 2022), *rev'd*, 598 U.S. 631 (2023); *see* Nelson v. City of New York, 352 U.S. 103 (1956).

[89] *See Nelson*, 352 U.S. 103.

Constitution prevents the government from retaining the surplus where the record shows adequate steps were taken to notify the owners of the charges due and the foreclosure proceedings," and the owners simply failed to respond.[90]

The Eighth Circuit recognized that in *Nelson*, state law gave property owners the right "to file an action to redeem the property *or to recover the surplus*," while Minnesota did not provide the explicit right to file a lawsuit to recover the surplus.[91] The Eighth Circuit considered Minnesota's lack of a specific statutory grant to file a lawsuit to recover the surplus to be immaterial, however, because Tyler received adequate notice of the forfeiture action and enjoyed multiple opportunities "to recover[] the surplus by redeeming the property and selling the condominium, or by confessing judgment, arranging a payment plan for the taxes due, and then selling the property."[92] The Eighth Circuit put great weight on Tyler's failure to "avail herself of these opportunities."[93] An additional-yet-unique opportunity for Tyler was that even after absolute title passed to the State, she still had "six more months to apply to repurchase the condominium."[94] The Eighth Circuit concluded that *Nelson* held "that once title passes to the State under a process in which the owner first receives adequate notice and opportunity to take action to recover the surplus, the governmental unit does not offend the Takings Clause by retaining surplus equity from a sale."[95] The Eighth Circuit found it insignificant "[t]hat Minnesota law required Tyler to do the work of arranging a sale in order to retain the surplus" as opposed to forcing the County to do so.[96] Because Tyler had numerous statutory rights to meet her tax obligations, redeem her property, and reclaim the surplus through her efforts, the Eighth Circuit found no

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90 *Tyler*, 26 F.4th at 793; *Nelson*, 352 U.S. at 110.

91 *Tyler*, 26 F.4th at 793 (emphasis added).

92 *Id.*

93 *Id.*

94 *Id.* at 793–94.

95 *Id.* at 794.

96 *Id.*

constitutional right to the surplus gained through years of effort by the County.[97]

V. UNANIMOUS SUPREME COURT FOUND A LONG-HELD PROPERTY RIGHT BUT HAD TROUBLE EXPLAINING PRECISELY WHERE IT WAS LOCATED

When the Supreme Court went digging to unearth the precise location of a constitutional right to surplus proceeds from a tax-foreclosure sale, it struggled. The Court's three main foundational justifications for its surprising discovery each bear little weight. Before critically analyzing the Court's three-part rationale for its holding, however, it is important to recognize how the Court viewed the case initially.

A. Supreme Court Framed the Issue and Recited the Story in a Way that Tyler Could Not Lose

Thirteen years after failing to bear a single burden to exercise significant statutory rights, Tyler still sought to gain the benefits derived from the County's burdensome tax-foreclosure efforts. Tyler convinced the Supreme Court of the United States to grant certiorari to consider her case framed in this way:

> QUESTION PRESENTED:
>
> Hennepin County confiscated 93-year-old Geraldine Tyler's former home as payment for approximately $15,000 in property taxes, penalties, interest, and costs. The County sold the home for $40,000, and, consistent with a Minnesota forfeiture statute, kept all proceeds, including the $25,000 that exceeded Tyler's debt as a windfall for the public. In all states, municipalities may take real property and sell it to collect payment for property tax debts. Most states allow the government to keep only as much as it is owed; any surplus proceeds after collecting the debt belong to the former owner. But in Minnesota and a dozen other

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[97] Tyler v. Hennepin County, 26 F.4th 789, 794 (8th Cir. 2022), *rev'd*, 598 U.S. 631 (2023).

> states, local governments take absolute title, extinguishing the owner's equity in exchange only for cancelling a smaller tax debt, code enforcement fine, or debt to government agencies.
>
> The question[] presented [is]:
>
> [w]hether taking and selling a home to satisfy a debt to the government, and keeping the surplus value as a windfall, violates the Takings Clause?[98]

By presenting the surplus as a *windfall* to the government, any court would be hard-pressed to then find no protected property interest. But the way the Supreme Court framed the initial question speaks volumes. Noticing the narrative in the question presented, in the first two sentences of the actual *Tyler* decision, the Supreme Court stated that the County sold "Tyler's home for $40,000 to satisfy a $15,000 tax bill," and "[i]nstead of returning the remaining $25,000, the County kept it for itself."[99]

As an initial criticism, the Supreme Court ignored the fact that the County bore all of Tyler's burdens, and over the course of many years, she carried no burdens to exercise her substantial statutory rights.[100] Tyler had numerous opportunities over many years to take action to recover any surplus that she desired, but she wanted the County to bear those burdens. Additionally, in the event that a financial housing crisis could force real

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[98] Petition for Writ of Certiorari at i, *Tyler*, 598 U.S. 631 (No. 62-CV-19-6012), *cert. granted*, 143 S. Ct. 644 (2023) (setting out the questions presented later adopted by the Court). The Supreme Court also granted certiorari to consider "[w]hether the forfeiture of property worth far more than needed to satisfy a debt plus, interest, penalties, and costs, is a fine within the meaning of the Eighth Amendment." *Id.* Because the Supreme Court found "that Tyler has plausibly alleged a taking under the Fifth Amendment" that "would fully remedy [her] harm," the Court did "not decide whether she has also alleged an excessive fine under the Eighth Amendment." Tyler v. Hennepin County, 598 U.S. 631, 647–48 (2023).

[99] *Tyler*, 598 U.S. at 634. The Supreme Court's narrative on the proceeds of the sale differed wildly from the Eighth Circuit's recognition that "the proceeds of the sale do not satisfy any of the former owner's tax debt because the tax deficiency was cancelled at final forfeiture." *Tyler*, 26 F.4th at 791.

[100] *See generally Tyler*, 598 U.S. 631.

property values to plummet as demand dried up, Tyler's tax liability could have exceeded any fair market value of her condominium. In that scenario, it is an absolute certainty that neither she nor the Supreme Court would have ever addressed her rights or *responsibilities*. For example, what would have been the result if the County had sold Tyler's home for $15,000 to satisfy a $40,000 tax bill? Would the Court have written, "Instead of paying the remaining $25,000, Tyler kept it for herself as a windfall"? Because Tyler would not have complained had she reaped the benefits, the answer is no. Tyler would only complain, of course, if she ended up on the losing end of the tax-foreclosure scheme.

After framing the issue in a way that favored Tyler, the Supreme Court then dismissively took a mere one paragraph to describe Minnesota's complex and burdensome tax-foreclosure statute that resulted in the surplus after six long years. The Court fairly recognized that Tyler had a right to redeem the property for three years after title was transferred to the County, during which she even enjoyed the right to "continue to live in her home."[101] Unfortunately, the Supreme Court was then dismissive of the County's extensive burdens under Minnesota's tax-foreclosure process and made light of the many substantial statutory rights Tyler enjoyed, if she would only bear the burdens to exercise them.[102] Without citing authority, the Supreme Court boldly stated that after the County sold the property, "[t]he former owner has no opportunity to recover this surplus."[103] That is not true. As the Eight Circuit recognized and the Supreme Court ignored, Tyler still had six months after the sale to repurchase her condominium, and her purchase price was simply her half-decade tax delinquency rather than the market price.[104] If Tyler had repurchased the condominium after it was sold, for example, she could have borne the burdens to satisfy her tax debts and reaped the benefits of the surplus. In addition to ignoring Tyler's right to recover the surplus by taking *any* action to bear the most minimal of burdens, the Supreme Court also did not mention Tyler's right to confess

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101 *Id.* at 635.

102 *Id.*

103 *Id.*

104 *Tyler*, 26 F.4th at 791.

judgment and establish a payment plan long before the County actually bore the burden to go through a public sale.[105]

After an incomplete recitation of Tyler's substantial rights under a complex tax-foreclosure statute, the Supreme Court then recounted immaterial facts as it began to tell the story of the case. The Court made sure that everyone knew that Tyler was 94 years old in 2023 when the case ended up in our nation's highest court.[106] The Court further explained that "as Tyler aged, she and her family decided that she would be safer in a senior community, so they moved her to one in 2010."[107] Although those facts might pull on the heartstrings, the Court would reveal how legally insignificant they were when they never showed up in the Court's analysis.[108] Additionally, the Court deftly used passive language to explain, "Nobody paid the taxes on the condo in Tyler's absence and, by 2015, it had accumulated" about $15,000 in tax liability.[109] Notice that the Court in no way recognized that Tyler vacated her condominium, that Tyler failed to pay her taxes, or that Tyler had any tax liability whatsoever.[110] This introduction holds significance as it underscores the Court's exclusive emphasis on Tyler's beneficial rights without recognizing that state property law might justly impose certain burdens on her to receive the desired benefits.

When the Supreme Court searched for the precise location of Tyler's property right to the surplus under the Takings Clause, it struggled. Three paragraphs in, the Court was unable to cite authority that showed how the District Court and the Eighth Circuit had committed error in finding no property right.[111] Basing its holding on "[h]istory and precedent," the Court

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105 *Tyler*, 598 U.S. at 635. *But see Tyler*, 26 F.4th at 791 (recognizing that Minnesota law afforded her such a right).

106 *See Tyler,* 598 U.S. at 635.

107 *Id.* It would have been equally immaterial to give Tyler's age in 2010, when she stopped bearing any burdens relating to her property rights in her condominium.

108 *See generally id.*

109 *Id.* at 635.

110 *See generally id. But see Tyler*, 26 F.4th at 790–91 (recounting Tyler's actions).

111 *Tyler,* 598 U.S. at 635.

declared that the U.S. Constitution prohibited Minnesota from using "the toehold of [Tyler's] tax debt to confiscate more property than was due."[112] The Court declared that this case presents a "classic taking in which the government directly appropriates private property for its own use."[113] Surprisingly, the Court needed ten pages to analyze history, federal caselaw, and Minnesota law to cobble together support for what it deemed a classic example of a taking.[114]

B. The Supreme Court's Historical Justification for Finding a Constitutional Right Seems Off

In attempting to identify the precise location of the authority that supports this *classic example* of a taking, the Court traveled back in time over eight centuries to declare that in 1215, the Magna Carta established the governing "principle that a government may not take from a taxpayer more than she owes."[115] Rapidly moving through time, the Court then traced this firmly rooted English principle from the Magna Carta in 1215 to a 1692 Parliamentary grant of such a right to Blackstone's writings in 1771 that recognized such an English right.[116] Leaping through time and space, the Court then transported this principle across the Atlantic Ocean. The Court explained that in 1798, the newly established United States of America codified this principle in federal law while ten states adopted similar statutory rights to surplus proceeds from tax sales.[117] How does this historical analysis reveal a federally protected right in this case? The direct answer to that consequential question remains elusive.

The Supreme Court's history lesson propelled it to declare that the right to surplus proceeds from government tax sales had been the law in England for centuries and instantly became firmly rooted in American law at our

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[112] *Id.* at 639.

[113] *Id.* (quoting Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Plan. Agency, 535 U.S. 302, 324 (2002)).

[114] *Id.* at 640–50.

[115] *Id.* at 639. It is worth noting that the Court persisted in using the term *principle* as it unearthed a constitutionally protected property *right*.

[116] *Id.* at 639–40.

[117] Tyler v. Hennepin County, 598 U.S. 631, 640 (2023).

founding.[118] But cracks instantly formed in this historical foundation. By stating in the body of its opinion that ten states followed the federal government in granting statutory rights to surplus proceeds from tax sales, the Court relegated to three inconvenient footnotes that several states apparently did not adhere to what the Court deemed to be a long-recognized principle, if not right. In footnote one, the Court admitted that Kentucky adopted a statutory scheme in 1801 that provided for absolute forfeiture of land.[119] In footnote two, the Court described how "many" of the new states authorized strict forfeiture of land when the land "failed to sell 'for want of bidders' because the land was worth less than the taxes owed."[120] These states adopted their strict statutory foreclosure laws in 1821, 1837, 1844, 1859, and 1860, which were apparently inconvenient for the Court to recount, explore, or explain.[121] Perhaps Minnesota, which did not even gain its sovereignty as a state until 1858, had adopted a similar policy preference because arguably its strict foreclosure regime cancels a property owner's entire tax liability regardless of whether there are "bidders" who can pay more than the tax liability. But the Court did not consider this possibility because its historical curiosity had bounds. Finally, in footnote three and without elaboration, the Court was forced to record how North Carolina had amended its laws in 1842 to permit the strict forfeiture of "unregistered 'swamp lands.'"[122]

What might be the rationale as to why states settled on different tax-foreclosure policies? It seems apparent that each situation reveals the possibility that a taxpayer might force the state to bear burdens for the sole benefit of the taxpayer without reciprocity. Not only does the Supreme Court dismiss these glaring inconsistencies in its historical analysis, but it also appeared curiously uncurious as to why those states deviated from the norm. Even though the Court dedicated nearly two pages to England's history, it exhausted no effort to understand American history, dismissing

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118 *See id.* at 639–40.

119 *Id.* at 640 n.1.

120 *Id.* at 641 n.2.

121 *See id.*

122 *Id.* at 642 n.3.

the public policy intentions of American legislatures as irrelevant to a discussion of real property rights under the U.S. Constitution.

Even after relegating to a footnote states' differing treatment of surplus proceeds, the Supreme Court contradicted its own history lesson when it described how Virginia addressed surplus proceeds from tax sales at its founding. The Court explained that in 1781, before the United States was constituted and the federal Takings Clause was adopted, Virginia passed a statute that authorized the state to sell land but only to collect the actual taxes owed.[123] Apparently, the Court recounted this historical lesson—that even before there was a U.S. Constitution with a Takings Clause, a sovereign state legislated a statutory right to surplus proceeds—to somehow support its revelation of a longstanding-yet-amorphous right to surplus proceeds.

In spectacularly confusing fashion, however, the Court confessed that a mere ten years after granting a statutory right to surplus proceeds, Virginia changed course to address the evils that were wrought from its "loose, cheap and unguarded system of disposing of her public lands" that was established immediately following its statehood.[124] To encourage settlement of its lands after its founding, Virginia statutorily granted individuals the right to gain title to as much unappropriated real property as they desired by paying "40 pounds per 100 acres."[125] Even though Virginia's statutory scheme to lure investors to purchase real property resulted in the claiming of nearly all of Virginia's valuable real property within two decades, it also led to rampant speculation in which most of the real property was purchased "by nonresidents who did not live on or farm the land but instead hoped to sell it for a profit."[126]

As could be anticipated, because many nonresidents recognized that they were personally beyond the jurisdictional reach of Virginia, they "wholly neglected to pay the taxes" on the real property that they purchased in

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123 Tyler v. Hennepin County, 598 U.S. 631, 640 (2023).

124 *Id.* at 640–41 (quoting McClure v. Maitland, 24 W.Va. 561, 564 (1884)).

125 *Id.* at 641 (citing 1179 VA. ACTS p. 95, § 2).

126 *Id.* (citing *McClure*, 24 W. Va. at 564).

speculation of making a quick buck.[127] That is, if the speculation paid off and the value of the land increased, the property owners would sell the property, pay the taxes, and pocket the surplus as a benefit.[128] In contrast, if the speculation failed miserably and the value of the land decreased, the property owners would shirk their tax liability and force the state to bear those burdens.[129]

In response to the disastrous result of a poorly thought-out public policy decision, Virginia abandoned its earlier statutory commitment to ensuring that taxpayers received any surplus from tax sales.[130] In its place, Virginia adopted a new statutory scheme in 1790 that took away any such right, legislating "that title to any taxpayer's land was completely 'lost, forfeited and vested in the Commonwealth' if the taxpayer failed to pay taxes within a set period."[131] The Supreme Court smugly designated Virginia's 1790 law as a "harsh forfeiture regime."[132] What does this historical lesson have to do with the issue of whether a real property owner in a state has a constitutionally protected right to surplus proceeds from a state tax sale? It calls into question the reliability of the Court's historical analysis.

Initially, the Supreme Court relied heavily on its historical search for a longstanding principle that favored paying surplus proceeds to individuals to guard against government overreach.[133] Astonishingly, the Court was then reluctant to delve into the historical reasons why sovereign states like Virginia might have enacted laws that departed from such a normative principle.[134] Entirely glossing over whether Virginia's decision to adopt such a statute was a legitimate use of the state's sovereign authority unlimited by federal overreach, the Court smeared it as a "harsh forfeiture regime" and

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127 *Id.*

128 *See id.*

129 Tyler v. Hennepin County, 598 U.S. 631, 641 (2023).

130 *Id.*

131 *Id.*

132 *Id.* at 640.

133 *See id.* at 639–41.

134 *See id.* at 640–42.

moved on.[135] Instead of digging deep into Virginia's reasons for its significant change to its public policy, the Court was content to find limitations to Virginia's power based on what had happened to the King of England at Runnymede in 1215.[136]

A deeper historical dive might have provided a better insight into why Virginia and other states used their authority under our federalist system to regulate tax-foreclosure sales differently at different times from other states and the federal government. Before federalizing a property right to surplus proceeds from a tax sale, the Supreme Court might have asked one straightforward historical question—why did Virginia change course in its tax-foreclosure policy? In the early years of Virginia's independence as a separate sovereign state, nonresidents were playing a harsh and brutal game with Virginia as it enjoyed limited authority over them. Like vultures, out-of-state real property speculators circled Virginia to buy up its newly offered land, anticipating easy money.[137] If real property values skyrocketed, these nonresidents would reap hefty windfalls by selling their properties and gladly paying any tax burden from the surplus proceeds.[138] But if their speculative bets failed miserably, the nonresidents would abandon both their land rights and associated tax burdens.[139] Virginia was in the unenviable position that it could only collect taxes against nonresidents if the residents enjoyed capital gains; when those speculators lost, Virginia lost, too.

Had the Supreme Court inquired into the historical rationale behind Virginia's tax-foreclosure policy, the Court might have learned lessons that it could have applied to the historical reason Minnesota also changed course to its longstanding statutory grant of surplus rights. It is telling that Minnesota changed course in 1935 during the Great Depression.[140] Perhaps

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135 Tyler v. Hennepin County, 598 U.S. 631, 640 (2023).

136 *Id.* at 639.

137 *See id.* at 641.

138 *See id.*

139 *See id.* at 645.

140 *Id.*

Minnesota was experiencing what Virginia had experienced more than a century before. But the Court's historical curiosity only went so far.

Instead of directly confronting the essential question of why Virginia enacted a harsh foreclosure scheme—which might be the same question as to why Minnesota followed suit—the Supreme Court was content to declare that Virginia's "solution was short-lived," because it "repealed the forfeiture scheme in 1814" and reverted to its original statutory grant of rights in foreclosure sales.[141] Nearly giddy that it had learned a valuable history lesson in constitutional terms, the Court brushed off "Virginia's 'exceptional' and temporary forfeiture scheme" as carrying "little weight against the overwhelming consensus of its sister States."[142] Sadly, that ended the Court's historical foray into discovering a federally protected right to surplus proceeds from tax sales. But one more critical historical point is worth making.

It is peculiar how the Court found a federally protected right to surplus proceeds that applied to the states long before the states were even governed by the U.S. Constitution.[143] The Court took considerable effort to examine historical precedent from King John's acceptance of the terms of the Magna Carta at Runnymede in 1215 to the ratification of the Fourteenth Amendment to the U.S. Constitution in 1868.[144] Delighted that it had aced its history exam, the Court boldly declared, "The consensus that a government could not take more property than it was owed held true through the passage of the Fourteenth Amendment," because "States, including Minnesota, continued to require that no more than the minimum amount of land be sold to satisfy the outstanding tax debt."[145] That is all well and good, but it remains unclear when, why, and how that historical treatment of surplus proceeds by various sovereigns became enshrined in federal constitutional law. This is particularly troubling given that some

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141 Tyler v. Hennepin County, 598 U.S. 631, 641 (2023).

142 *Id.*

143 *Id.* at 639.

144 *Id.* at 639–41.

145 *Id.* at 641.

states, including Virginia, had bucked this policy "consensus" long before the passage of the Fourteenth Amendment.[146]

Somewhat embarrassingly, the Supreme Court admitted that, at the adoption of the Fourteenth Amendment, three states had deemed "delinquent property entirely forfeited for failure to pay taxes."[147] When confronting Louisiana's total-forfeiture statute that remained on the books through the Fourteenth Amendment, the Court mocked the County for not being able to cite a single "case showing that the statute was actually enforced against a taxpayer to take his entire property."[148] Again, the Court's historical curiosity was aimed only in the direction that aided its finding of a federally protected property right. One could surmise that there might have been no litigated cases in Louisiana because taxpayers who enjoyed surpluses most likely sold their properties, paid their tax liability, and pocketed the rest rather than bringing constitutional claims for the surplus on the back of Louisiana's efforts. Blissfully unaware of why a sovereign state would regulate its real property in a way to deny surplus proceeds from tax sales, the Court was content to diminish those states because they broke ranks with the public policy consensus that was forming in the legislatures of other states and the federal government.[149]

The overall result of the Supreme Court's history lesson was to triumphantly announce, "The minority rule then [after the Civil War] remains the minority rule today: Thirty-six States and the Federal Government require that the excess value be returned to the taxpayer."[150] The weight of this historical finding is obscured by the Court's confusing rationale. One wonders if the Court's statement on a growing consensus among the states unveils a new historical lesson.[151] Did the Court announce that whenever seventy percent of the states join the federal government in statutorily granting a property right, then that consensus amends the U.S.

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146 *Id.* at 640–42.

147 Tyler v. Hennepin County, 598 U.S. 631, 642 (2023).

148 *Id.*

149 *Id.*

150 *Id.*

151 *See id.* at 641–42.

Constitution, limits the authority of all sovereign states, and enshrines that right in the U.S. Constitution's Takings Clause?

During the Supreme Court's historical excursion that spanned 653 years from the Magna Carta to the Fourteenth Amendment, it unearthed what it deemed to be a well-established right to surplus proceeds.[152] Despite its best effort at reciting history, the Court could not cite any authority that required that a state pay surplus proceeds from tax sales to delinquent taxpayers, because there were none.[153] Even though the Fifth Amendment Takings Clause was incorporated into the Fourteenth Amendment and applied to the states at the dawn of the twentieth century,[154] it is indisputable as a matter of historical precedent that the Court's history lesson through the adoption of the Fourteenth Amendment was an absolute federal overreach.

During the historical period from 1215 to 1868, in which the Supreme Court in *Tyler* discovered a constitutional right to surplus proceeds that limited the sovereign authority of states, there was another Supreme Court decision that calls into question the constitutional validity of this new discovery. In 1833, the Supreme Court in *Barron v. City of Baltimore*[155] confronted a claim that challenged the governing authority of the State of Maryland under the Takings Clause of the Fifth Amendment.[156] The plaintiff in that case tried to argue that there was a generally recognized principle that limited Maryland's authority under the U.S. Constitution.[157] On its face, the plaintiff in *Barron* asked the Supreme Court to do what the Court would later do in *Tyler*—discover a federal constitutional right that existed in the middle of the nineteenth century that limits a state's authority

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[152] *See id.* at 639–42.

[153] Tyler v. Hennepin County, 598 U.S. 639–42 (2023).

[154] *See* Chicago, Burlington & Quincy R.R. v. Chicago, 166 U.S. 226 (1897). If it is not apparent, this Article does not relitigate any of the Supreme Court's incorporation jurisprudence. Instead, it simply disputes that there was a generally applicable right to surplus proceeds in the middle of the nineteenth century that limited how states could enforce tax-foreclosure statutes.

[155] Barron v. City of Baltimore, 32 U.S. 243 (1833).

[156] *Id.* at 247.

[157] *Id.*

under the Takings Clause.[158] The plaintiff insisted that, because the Fifth Amendment was "in favor of the liberty of the citizen, [it] ought to be so construed as to restrain the legislative power of a state, as well as that of the United States."[159] The Court responded that although the "question thus presented is . . . of great importance," it is "not of much difficulty."[160] And how the Court in *Barron* answered this question in 1833 challenges the Court's assertion in *Tyler* in 2023 that a constitutionally protected property right to surplus proceeds existed well before the Fourteenth Amendment was even adopted.[161] To that end, it is enlightening to compare how a unanimous Court in *Tyler* answered this consequential question of historical limitations on state power in 2023 with how a unanimous Court in *Barron* answered this same question in 1833. This exercise is intended solely to reexamine the Court's historical justification for its holding in *Tyler*, inviting a critical scrutiny of the Court's rationale and opening the door for a thoughtful reassessment of the historical lessons that can be learned.

In *Tyler*, Chief Justice Roberts issued a unanimous decision for the Supreme Court that used historical precedent from 1215 to 1868 to find a right under the U.S. Constitution's Takings Clause that limited Minnesota's authority to implement its complex tax-foreclosure statute.[162] The Court intimated that the governing principle was clearly established in federal and state law even before the Civil War and the ratification of the Fourteenth Amendment.[163] But in *Barron*, another Chief Justice—Chief Justice Marshall—authored a unanimous decision that rejected any contention that the U.S. Constitution's Takings Clause contained some implicit principle that in any way limited a sovereign state's power to regulate land.[164]

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158 *Id.*

159 *Id.*

160 *Id.*

161 Barron v. City of Baltimore, 32 U.S. 243, 247 (1833).

162 Tyler v. Hennepin County, 598 U.S. 631, 639–41, 647 (2023).

163 *Id.* at 641.

164 *Barron*, 32 U.S. at 247.

In a sharply worded rebuke to the notion that Maryland's sovereign authority was limited under the Takings Clause, Chief Justice Marshall wrote:

> The [U.S. C]onstitution was ordained and established by the people of the United States for themselves, for their own government, *and not for the government of the individual states*. Each state established a constitution for itself, and, in that constitution, provided such limitations and restrictions on the powers of its particular government, as its judgment dictated.[165]

Revealing a clear-minded consensus that nothing in pre-Civil War history proves that states were under some generally applicable principle under the Takings Clause, Chief Justice Marshall minced no words to declare that "*the fifth amendment must be understood as restraining the power of the general government, not as applicable to the states*."[166] This simple sentence rebukes any notion that pre-Fifth Amendment history could be used to discover a long-running governing principle that limits the authority of states.

Chief Justice Roberts used obscure historical precedent predating the Fourteenth Amendment to identify the location of the right that the Supreme Court ultimately revealed.[167] But Chief Justice Marshall did not obscure the precise location of principles that limit the authority of states, unmistakably declaring that each state imposed its own restrictions on its authority under its constitution.[168] In 1833, states were to be judged "exclusively" under those state constitutional limitations without any interference from other states or the general government.[169] The Court in *Barron* unanimously rejected the alluring notion that historical principles limited the authority of the states under the U.S. Constitution:

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165 *Id.* (emphasis added).

166 *Id.* (emphasis added).

167 *See Tyler*, 598 U.S. at 639–40.

168 *Barron*, 32 U.S. at 247–48.

169 *Id.* at 248.

> Had the framers of [the Takings Clause of the Fifth Amendment] intended [it to limit] the powers of the state governments, they would have imitated the framers of the original constitution, and have expressed that intention. Had Congress engaged in the extraordinary occupation of improving the constitutions of the several states by affording the people additional protection from the exercise of power by their own governments, in matters which concerned themselves alone, they would have declared this purpose in plain and intelligible language.[170]

The Court deemed it "universally understood" at the founding as "a part of the history of the day, that the great revolution which established the constitution of the United States" was not focused on limiting the authority of the states.[171] As patriotic statesmen "watched over the interests of our country" to offer "amendments to guard against the abuse of power" that could "be exercised in a manner dangerous to liberty," the amendments that were "deemed essential to union" only "demanded security against the apprehended encroachments of the general government—not against those of the local governments."[172] Notably, when the states adopted limitations on the federal government through the amendments, there was "no expression indicating an intention to apply them to the state governments."[173]

In directly confronting the current Supreme Court's unanimous walk down history lane to find a federally protected right that predated the Fourteenth Amendment, Chief Justice Marshall countered, "We are [unanimously] of opinion, that the provision in the fifth amendment to the constitution, declaring that private property shall not be taken for public use without just compensation, is intended solely as a limitation on the exercise of power by the government of the United States, and is not

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170 *Id.* at 250.

171 *Id.*

172 *Id.*

173 *Id.*

applicable to the legislation of the states."[174] And because there were no federal authorities or "historical principles" that limited Maryland's sovereignty over its land within its jurisdiction, the Court dismissed the claim against it under the Takings Claim of the Fifth Amendment.[175]

The proper—and perhaps undisputed—historical lesson is that there is no governing principle, authority, or precedent from the 653 years between 1215 to 1868 that in any way limited the sovereign authority of any state to regulate its real property tax liability. It is odd to rely on that history. When Chief Justice Roberts and a unanimous Court used historical precedent to unearth a universal principle that always has bound states like Minnesota in their tax-foreclosure policies, it did so on a faulty foundation.[176] That is most revealing when one recognizes that if the Court's reliance on over six centuries of English and early American law was the precise location of this newly found constitutional right, then the Court could have ended its decision at that point. But the search continued.

C. The Supreme Court's Second Justification for Its Holding Relied on Federal Statutory Law that Provides Little Additional Support

After the Supreme Court led with an unconvincing historical justification for federalizing a property right to surplus proceeds from a tax sale, it kept searching for a more precise location for this right. The Court then posited that its own "precedents have also recognized the *principle* that a taxpayer is

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[174] Barron v. City of Baltimore, 32 U.S. 243, 250–51 (1833).

[175] *Id.*

[176] One of the most significant challenges that will result from the Court's murky discovery of a property right in *Tyler* is that inferior courts are ill-equipped to find such rights going forward. The Fifth Circuit recently recounted how the Supreme Court "has increasingly intimated that history and tradition, including historical precedents, are of central importance when determining the meaning of the Takings Clause." Baker v. City of McKinney, 84 F.4th 378, 383 (5th Cir. 2023). The Fifth Circuit used *Tyler* as such an example, explaining that the Supreme Court "determine[ed] the applicability of the Takings Clause from '[h]istory and precedent' reaching back to the Magna Carta." *Id.* Because both the District Court and Eighth Circuit could not scour history and precedent from the past 808 years to discover Tyler's claimed property right, it is foreseeable that many other courts will struggle to follow the Supreme Court's history lesson. Perhaps judges need to brush up on their understanding of Blackstone.

entitled to the surplus in excess of the debt owed."[177] The precedent that the Court discussed was equally as unconvincing as the historical justification. Two of the cases dealt with Civil War-era federal statutory grants of rights to surplus proceeds, and one case dealt with a state's statutory grant of surplus proceeds.[178] In all three cases, the Court held that there were no Takings Clause violations due to the statutorily protected property rights involved.[179] Citing these three cases as the basis to overturn the unanimous decisions of the four lower court judges raises questions about the Court's use of authority.

To support its holding, the Court held out its 1881 decision in *United States v. Taylor* as a source of Tyler's property rights in 2023.[180] In 1861, the United States imposed a nationwide tax to fund the Civil War.[181] Congress statutorily guaranteed that if a taxpayer failed to pay taxes and the taxpayer's property was sold to satisfy the debt, the surplus from the tax sale would belong to the taxpayer.[182] The following year, Congress added a huge, 50% penalty on the rebelling states but did not otherwise disturb the original 1861 statute that created the tax and granted the right to the surplus.[183] The Court in *Taylor* held that because the original 1861 statutory grant was undisturbed by the 1862 statute that created a penalty, the taxpayer was still entitled to the surplus proceeds under the 1861 federal statutory grant.[184] *Taylor* can be easily distinguished because that case involved the federal government explicitly granting a statutory right to the surplus proceeds from a tax sale, which should have no constitutional significance to how a state develops its tax-foreclosure policies. More

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177 Tyler v. Hennepin County, 598 U.S. 631, 642 (2023) (emphasis added). It is telling that instead of specifically referring to a protected property right to support a Takings claim, the Court continued to use the term "principle" to support its holding.

178 *Id.* at 642–44.

179 *Id.*

180 *See generally id.*

181 *Id.* at 642.

182 United States v. Taylor, 104 U.S. 216, 217–18 (1881).

183 *Id.* at 218–19.

184 *See id.* at 221.

importantly, however, it is vital to recognize the irony here. The Supreme Court in *Tyler* built its foundation upon a federal statutory grant of a right to surplus proceeds from a Civil War statute that included a national tax hike with massive penalties against certain states.[185] During the Civil War, of course, nothing that the federal government did or did not do had any preclusive or limiting effect on the states.[186] Not only did the facts in *Taylor* arise before the Fourteenth Amendment, the *Taylor* decision itself even predated the incorporation of the Takings Clause into the Fourteenth Amendment, which was the first time that any interpretation of a property right against a state could be limited by the U.S. Constitution.[187] The Court's use of *Taylor* as authority for finding a constitutionally protected property right is vexing, at best.

The Supreme Court next interpreted its 1884 case of *United States v. Lawton* as "extend[ing] a taxpayer's right to surplus."[188] This case did not involve some new right or even arise at a different time. Instead, *Lawton* litigated the exact same 1861 Civil War-era federal tax statute at issue in *Taylor*.[189] The difference was that in *Lawton*, when the federal government seized private property for failure to pay taxes, instead of selling the property, the government kept it for itself.[190] Under those circumstances, the Court interpreted the 1861 statute as requiring that surplus proceeds be distributed to the taxpayer, whether or not the property was actually sold.[191] Given the statutory right to the surplus, the Court held that there was a taking if those proceeds were not distributed.[192] It is difficult to comprehend how the Court used a federal statutory grant of a property right to surplus proceeds from a tax sale during the Civil War to embed that right in the

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185 *See Tyler*, 598 U.S. at 642–43.

186 Chicago, Burlington & Quincy R.R. v. Chicago, 166 U.S. 226, 228, 241 (1897).

187 *Id.*

188 *Tyler*, 598 U.S. at 643.

189 United States v. Lawton, 110 U.S. 146, 149 (1884).

190 *Id.*

191 *See id.* at 149–50.

192 *Id.*

Fourteenth Amendment to the U.S. Constitution to limit Minnesota's sovereign authority.

The Supreme Court then addressed *Nelson v. City of New York*, dismissing the District Court's and Eighth Circuit's reliance on *Nelson* as central to their holdings that Minnesota's tax-foreclosure sale of Tyler's property did not violate the Takings Clause.[193] The Court recapped how New York City, in *Nelson*, had foreclosed on and sold properties for unpaid water bills.[194] Under New York City's ordinance, a taxpayer had about two months after the city filed for foreclosure to pay the tax liability and then twenty additional days after a tax sale to ask for the surplus.[195] Because property owners did not exercise this statutory right to recover the surplus, the Court held that there was no violation of the Takings Clause.[196]

Applying *Nelson* to Tyler's case, the Supreme Court maintained that "Minnesota's scheme provides no opportunity for the taxpayer to recover the excess value; once absolute title has transferred to the State, any excess value always remains with the State."[197] The Court then addressed the County's argument that Tyler had the right as a property owner to sell her condo to pay her tax debt.[198] Without analysis or citation to any authority, the Court disposed of this argument in one sentence: "But requiring a taxpayer to sell her house to avoid a taking is not the same as providing her an opportunity to recover the excess value of her house once the State has sold it."[199] Consistent with its incessant focus on Tyler's rights without any recognition of her responsibilities, the Court conflated the point that the County made. Nothing in Minnesota's law required that Tyler sell her house to pay her taxes. In sharp contrast, Minnesota granted Tyler

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193 *Tyler*, 598 U.S. at 643–45; *see also* Tyler v. Hennepin County, 26 F.4th 789, 793-794 (8th Cir. 2022), *rev'd*, 598 U.S. 631 (2023); *see generally* Nelson v. City of New York, 352 U.S. 103 (1956).

194 *Tyler*, 598 U.S. at 643–44; *Nelson*, 352 U.S. at 105.

195 *See id.* (citing *Nelson*, 352 U.S. at 106).

196 *Nelson*, 352 U.S. at 110.

197 *Tyler*, 598 U.S. at 644.

198 *See id.* at 644–45.

199 *Id.* at 645.

numerous statutory rights, including the implicit right to sell her house to satisfy her tax burdens.[200] It is helpful to review the statutory rights afforded to property taxpayers like Tyler in Minnesota with the statutory rights afforded to delinquent water users in New York City in *Nelson*.

The citizens who failed to pay their water bills under New York City's foreclosure ordinance enjoyed fewer substantial rights than a property owner like Tyler, who failed to pay her property taxes.[201] In *Nelson*, a delinquent water bill payer had less than two months after the city filed its foreclosure action to pay the debt.[202] In contrast, under Minnesota's extensive tax-foreclosure scheme, a delinquent property owner enjoyed three years to redeem the property by paying her taxes.[203] Instead of having to pay her taxes in less than two months or risk foreclosure, Tyler had thirty-six months.[204] And even if Tyler did not wish to accept Minnesota's generous offer to pay her taxes within three years of foreclosure, she enjoyed another substantial statutory right. She had the opportunity to confess judgment that she owed the taxes, unlocking the right to spread out the payment of those taxes over a five-to-ten-year period.[205] Rather than confronting the imminent foreclosure of her property rights in less than two months like in *Nelson*, Tyler enjoyed a significantly extended time frame that spanned sixty to one hundred twenty months.

Additionally, in New York City in *Nelson*, the taxpayer only had less than three weeks—twenty days—to file a pleading to seek the surplus.[206] As quoted above, the Court boldly, yet inaccurately, claimed that in Minnesota, taxpayers enjoyed "no opportunity" to recover the surplus after a sale because "once absolute title has transferred to the State, any excess value

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200 *Id.* at 644–45.

201 *See generally Nelson*, 352 U.S. 103.

202 *Id.* at 106.

203 *Tyler*, 598 U.S. at 635.

204 *Id.*

205 Tyler v. Hennepin County, 26 F.4th 789, 791 (8th Cir. 2022), *rev'd*, 598 U.S. 631 (2023).

206 *Nelson*, 352 U.S. at 104 n.1.

always remains with the State."[207] Because that assertion is untrue, it cannot carry the consequential weight the Court placed on it. In *Tyler*, final foreclosure took place five years—or sixty months—after Tyler failed to pay her taxes.[208] Importantly, at final foreclosure, Tyler's tax liability was canceled forever, regardless of whether the sale of her condominium would pay off her tax debt.[209] During those sixty months, Tyler took no action to pay her taxes, redeem her property, confess judgment, or anything else.[210] She was content to do nothing.

Yet even after final foreclosure, Tyler enjoyed another statutory right that was far more valuable than what New York City granted. Following the final forfeiture of her condominium and the vesting of absolute title in the State, Tyler still enjoyed *six more months* to exercise her right to repurchase her condominium.[211] To repurchase her condominium, Tyler would not have had to bear the burden of paying the 2015 market price.[212] To regain her ownership of the condominium and enjoy all of the benefits of any surplus value, all she had to do was bear her tax burdens by paying off the $15,000 liability that led to the absolute forfeiture of her rights to the property in the first place.[213] The Court inaccurately maintained that Tyler had no opportunity to seek excess value and that the excess value always would remain with the State after absolute title was transferred to the State.[214] Unlike the burdens that other taxpayers bear, Tyler enjoyed a valuable statutory right—even sixty months after she refused to bear her tax burden—to spread her repurchase price (i.e., her tax liability) over time through an installment plan.[215]

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[207] *Tyler*, 598 U.S. at 644.

[208] *Tyler*, 26 F.4th at 791.

[209] *Id.*

[210] *Id.*

[211] *Id.*

[212] Tyler v. Hennepin County, 505 F. Supp. 3d 879, 884 (D. Minn. 2020), *aff'd*, 26 F.4th 789 (8th Cir. 2022), *rev'd*, 598 U.S. 631 (2023).

[213] *Id.*

[214] *Id.*

[215] *Id.*

Further, if the value of Tyler's condominium exceeded her tax liability, she had every opportunity to sell it to reap the benefits of the excess value. She also could have simply sought a loan to repurchase her home after absolute title was transferred to the State because title had not yet vested in the State. When the fair market value of Tyler's condominium was $40,000, she enjoyed the statutory right to repurchase it for $15,000 without having to pay it all at once.[216] She could have set up an installment plan.[217] It is absolutely untrue that Tyler enjoyed no rights to the excess value or surplus after final forfeiture. Tyler enjoyed tremendously valuable statutory benefits; she simply chose not to bear any burdens to exercise them.

D. The Supreme Court's Final Obscure Location for Finding a Constitutionally Protected Property Right Was Minnesota's Own Statutes

After rummaging through historical precedent and federal caselaw to pick out helpful principles and anecdotes, the Supreme Court then searched, in all places, in Minnesota's own statutes to reveal the precise location of Tyler's constitutionally protected property right. The Court conscripted "Minnesota law itself" as proof that a "property owner is entitled to the surplus in excess of her debt."[218] To carry that burden of proof, the Court directed our attention to other aspects of Minnesota statutory law that protect an individual's right to a surplus. The Court explained that Minnesota had *always* statutorily guaranteed that delinquent taxpayers enjoyed rights to surplus, even in real property tax-foreclosure cases.[219] Well, not always, because the Court was forced to dramatically recount that in 1935, Minnesota changed its property tax-foreclosure policy on guaranteed rights to surplus.[220] But the Court was not the least bit interested in understanding why Minnesota shifted ground on an important policy matter, instead characterizing this change as a constitutionally

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216 *Id.* at 885.

217 *Id.* at 884.

218 Tyler v. Hennepin County, 598 U.S. 631, 645 (2023).

219 *See id.*

220 *Id.*

sinister act that tried to make "an exception only for itself, and only for taxes on real property."[221] Unconcerned with the historical reason why Minnesota may have made this policy change in 1935, the Court declared that "property rights cannot be so easily manipulated."[222]

By this final point in the opinion, one might expect that the Supreme Court's precise rationale would be readily understood when it eagerly proclaimed that retention of the surplus is a state property right that cannot be so easily manipulated through the repeal of a statute that created the right in the first place. It is not. Ending its wandering decision with a bold declaration of property rights, however, the Court reprimanded the Sovereign State of Minnesota by proclaiming that it "may not extinguish a property interest that it recognizes everywhere else to avoid paying just compensation when it is the one doing the taking."[223]

That conclusory-and-circular reasoning finds itself coming and going. It is unfathomable to claim that because a state passed a statute at one point in time and then repealed that statute later, the first statutory grant of a property right embedded itself in the U.S. Constitution as an inalienable right and enduring limitation on the state's ongoing sovereignty. Again, the most important and compelling historical analysis would have been to comprehend the reasons why various states like Virginia and Minnesota have gone back and forth with statutorily granting—and then repealing—rights to surplus from tax sales. No matter how many times one reads the decision in *Tyler*, it is difficult to fully grasp the rationale as to why states are forever limited in making those challenging tax policy decisions under the U.S. Constitution.

Ponder for a moment what might happen if another Great Depression returns. Assume that in the coming years, an economic crisis hits Minnesota, causing skyrocketing unemployment and poverty along with plummeting real property values. Further assume that many Minnesotans simply walk away from their real property responsibilities, vacate their properties, and quit paying taxes. With a panicked and tight property

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221 *Id.*

222 *Id.* (quoting Cedar Point Nursery v. Hassid, 141 S. Ct. 2063, 2076 (2021)).

223 *Id.*

market with massive supply-and-demand imbalances, there might be few buyers for property that had become state property through strict foreclosure. Because the Court in *Tyler* struck down Minnesota's strict foreclosure statute, it becomes frighteningly apparent that this federalist overreach could wreak havoc on the state. Just like what happened in Virginia in the early nineteenth century, taxpayers could hoist all burdens on the State while awaiting the possibility of reaping benefits.[224] This perverse effect of exalting rights over responsibilities would damage Minnesota without any sound fundamental support to do so. By blessing this type of entitled behavior to reap benefits without bearing any corresponding burdens, many thousands of taxpayers could rise up to assert similar rights if difficult times reappear. That is unthinkable.

There is one final criticism against using Minnesota's own law against it in this case. If Minnesota's overall statutory scheme is the source—or precise location—of Tyler's immutable and constitutionally protected property right to the surplus proceeds from the tax sale, then why did the Supreme Court lead with a historical discussion of English principles starting in 1215 and federal caselaw from the Civil War? If the Court truly interpreted state law as clearly granting its taxpayers such a valuable property right, one would expect the Court to lead its decision and analysis with those citations to authority as its rationale. Because the Court waited until the very end of its decision to broach the subject of state law as the source of Tyler's property right, it obscures the Court's authority. More pointedly, it creates an appearance that the Court was grasping for any authority to affirm its blind faith that there is an enduring principle embedded in English and American law that guarantees a right to surplus proceeds from tax sales.

E. The Court Fundamentally Misbalanced a Proper Burdens-and-Benefits Analysis

Throughout its decision, the Court never considered Minnesota's authority to require Tyler to carry burdens during the six years in which the State painstakingly navigated its cumbersome tax-foreclosure statute that

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[224] *Supra* Section V.B.

afforded Tyler significant benefits. Carrying this oversight to the end, the Court used its penultimate paragraph to explain how it balanced the distribution of benefits and burdens in this case:

> The Takings Clause "was designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." A taxpayer who loses her $40,000 house to the State to fulfill a $15,000 tax debt has made a far greater contribution to the public fisc than she owed.[225]

And here lies the most pressing criticism of the Court's holding. It is a mischaracterization to depict Tyler as a victim who bore too many burdens on behalf of the public while Minnesota reaped windfall benefits. As recognized by the four lower court judges, Tyler enjoyed tremendous statutory opportunities to bear burdens to reap significant windfall benefits for herself.[226] But Tyler and the Court only focused on Tyler's beneficial rights while ignoring her burdensome responsibilities. As soon as Tyler moved out of her condominium, she violated her duty to bear a public burden by avoiding any responsibility to pay one penny in taxes on her vacated condominium. Tyler was content to have other members of the public bear her tax burden. She also was content to hoist her burdens onto the County to collect those taxes.

To illustrate how Tyler focuses only on her rights without any appreciation for corresponding responsibilities, paragraph 37 of her complaint lays out the following hypothetical:

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[225] Tyler v. Hennepin County, 598 U.S. 631, 647 (2023) (quoting Armstrong v. United States, 364 U.S. 40, 49 (1960)). The court in Armstrong also stated that "[t]he Fifth Amendment's guarantee that private property shall not be taken for a public use without just compensation was designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Armstrong*, 364 U.S. at 49.

[226] *See* Tyler v. Hennepin County, 505 F. Supp. 3d 879, 883–84 (D. Minn. 2020), *aff'd*, 26 F.4th 789 (8th Cir. 2022), *rev'd*, 598 U.S. 631 (2023); Tyler v. Hennepin, 26 F.4th 789, 791 (8th Cir. 2022), *rev'd*, 598 U.S. 631 (2023).

> To cite a hypothetical, but illustrative, example, assume a homeowner's failure to pay taxes results in $10,000 in unpaid taxes and associated charges on a property worth $100,000. The property is seized by the State and ultimately sold for $100,000. The owner receives nothing, even though the sale price far exceeds the total of unpaid taxes and associated costs. The State gets a windfall of $90,000, while the homeowner receives no compensation for any [of] the excess equity in their property.[227]

Tyler claims a right to reap the benefits to which she believes that she is entitled, but at no point does she recognize any of her burdens, content to allow the County to bear *all* of them. To demonstrate that this is true, a simple rearranging of Tyler's illustrative hypothetical will suffice:

> To cite a hypothetical, but illustrative, example, assume a homeowner's failure to pay taxes results in $100,000 in unpaid taxes and associated charges on a property worth $10,000. The property is seized by the State and ultimately sold for $10,000. The State receives almost nothing from the sale price because it is far exceeded by the total amount of unpaid taxes and associated costs. The homeowner gets a massive windfall benefit of $90,000, while the State receives no compensation for any of the excess tax burdens from the forfeited property.[228]

Tyler makes no mention of this possibility, even if unlikely. Under both hypotheticals, Tyler would *always* enjoy the benefits while the State would *always* bear the burdens. From Tyler's vantage point, if the State ends up holding the bag for her tax liability, then all is well. But if the State works for many years to recover Tyler's tax liability and uncovers a surplus despite Tyler's complete relinquishment of all burdens, then the State must deliver that bag full of cash containing the surplus to Tyler. She wins regardless of the outcome.

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227 *See* Amended Complaint, *supra* note 18, at ¶ 37.

228 *See id.*

Even if it were unlikely that Tyler's tax liability would exceed the value of her condominium such that she could forever shirk her tax burdens, it is alarming to think that Tyler could have a federal right to not bear any burdens whatsoever. As the Eighth Circuit recognized, Tyler had multiple statutory opportunities over many years to bear burdens to reap the benefits of the surplus value of her condominium above her delinquent tax liability.[229]

Tyler's first statutory right was to respond to the tax-foreclosure lawsuit with some kind of an answer.[230] For example, Tyler could have filed an answer asking the County to be sure to deliver her a large check in five years or so if they recovered a surplus from a tax sale. Tyler ignored that filing opportunity.[231] Once a tax-deficiency judgment was entered against her and the County purchased the condominium in the amount of all delinquent taxes, Tyler enjoyed a generous and unfettered statutory right to redeem the condominium for the next three years.[232] During this three-year period, if the value of the condominium exceeded her tax liability, Tyler could sell her property, pay her tax liability, and reap the excess surplus benefits. If Tyler wanted to continue to own the condominium despite having vacated it years before, she could have paid her taxes after seeking a loan secured by the excess value of the condominium. Even if Tyler did not wish to bear any of those burdens, she could have made a confession of judgment, recognizing her civic responsibilities to pay her property taxes.[233] This valuable statutory benefit would have afforded Tyler the luxury of paying off her tax liability over a generous period of five to ten years.[234] And if the value of her condominium skyrocketed during that decade, Tyler always had the opportunity to sell it to meet her tax obligations or borrow against it. Tyler did not wish to bear any burdens to exercise her rights but was

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229 *See Tyler*, 26 F.4th at 791.

230 *See id.*

231 *Id.*

232 *Id.*

233 *Id.*

234 *Id.*

always content to allow the State to bear those burdens for her continuing benefit.

Even after the July 2015 final forfeiture canceled Tyler's tax burdens forever,[235] regardless of whether her tax liability had been satisfied, Tyler enjoyed another statutory benefit. Tyler had the right to repurchase the property at any time over the next six months, and she did not have to pay the fair market value or pay the taxes all at once.[236] Instead, after five years of doing nothing, Tyler had the right to repurchase the condominium for the price of her ongoing delinquent tax liability.[237] As an additional right, she could delay paying the full amount by embracing a payment plan that allowed her to meet her tax liability over time.[238]

It might be helpful to use Tyler's illustrative hypothetical above to reveal another way of balancing the benefits and burdens in this case. If Tyler's tax liability in 2015 was $10,000 and the condominium was worth $100,000, then Tyler had the statutory right to pay $10,000 to regain title to her condominium. She could then delay paying that full price all at once, because she had the right to pay it off in installments over time. To reap the windfall benefits of the surplus $90,000, as she refers to them, all she had to do was carry some burden. For six years, Tyler was content with dumping her burdens onto the County. She and the Court are adamant that only the County had the responsibility to sell the property to meet Tyler's tax burdens. But had the County sold the condominium for less than Tyler's $15,000 in tax liabilities, it is a certainty that Tyler would not have sued asking to bear the excess burdens. Tyler only sued seeking the excess benefits. If there was a windfall benefit to be earned from the sale of the condominium, what principle requires the State to bear that burden for the benefit of the taxpayer rather than placing that burden on the taxpayer? It is hard to realize that when the Court considered the distribution of benefits

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235 Tyler v. Hennepin County, 26 F.4th 789, 791 (8th Cir. 2022), *rev'd*, 598 U.S. 631 (2023).

236 *Id.*

237 Tyler v. Hennepin County, 505 F. Supp. 3d 879, 884 (D. Minn. 2020), *aff'd*, 26 F.4th 789 (8th Cir. 2022), *rev'd*, 598 U.S. 631 (2023).

238 *Tyler*, 26 F.4th at 791.

and burdens under the Takings Clause, it had in mind perverse situations in which taxpayers could foist upon states all burdens with enduring and unlimited benefits flowing to the taxpayer.

In paragraph 19 of the complaint, Tyler exposed that her sole focus was on her rights to benefits without recognizing her responsibility to bear any burdens.[239] Tyler extensively quoted *Olson v. United States* for the proposition that the "U.S. Supreme Court has recognized that a homeowner is *entitled* to any equity he or she may have realized since the purchase of the property."[240] Blinded by an incessant focus on her rights and benefits, Tyler was unable to see that the Court in *Olson* also made significant pronouncements on responsibilities and burdens.[241] In *Olson*, the Court confronted a case that involved the condemnation of land in Minnesota by the United States to acquire easements for the overflow of water onto private property for a power-generating dam.[242] In determining the value of the real property that was invaded by the federal government that required just compensation, the Court made this general observation:

> [The fair] market value of the property at the time of the taking . . . may be more or less than the owner's investment. He may have acquired the property for less than its worth or he may have paid a speculative and exorbitant price. Its value may have changed substantially while held by him. The return yielded may have been greater or less than interest, taxes, and other carrying charges. The public may not by any means confiscate the benefits, or be required to bear the burden, of the owner's bargain. He is entitled to be put in as good a position pecuniarily as if his property had not been taken. He must be made whole but is not entitled

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239 *See* Amended Complaint, *supra* note 18, at ¶ 19.

240 *Id.* at ¶ 19 (emphasis added) (citing Olson v. United States, 292 U.S. 246, 255 (1934)).

241 *Olson*, 292 U.S. 246.

242 *Id.* at 248.

> to more. It is the property and not the cost of it that is safeguarded by state and federal constitutions.[243]

There is an implicit lesson in *Olson* that Tyler overlooks. When Tyler vacated her property in 2010 and stopped bearing any tax burdens, she forced the State to pick up her burdens. Over time, the fair market value of her property likely fluctuated. This would have been particularly acute during the Great Recession and the global financial crisis that depressed real property values. If there had been no buyers in the market for her condominium, for example, then its fair market value would have been zero. But the point is that Tyler could not have expected to enjoy only the surplus value of her real property when the fair market value rose while not bearing the burdens of a deficiency if the value of her real property plummeted. And that is precisely what Tyler sought and the Court approved—an inalienable right to reap the benefits without bearing any burdens and regardless of the fair market value of her property.

One final criticism of how Tyler disclaims all responsibility while claiming all rights is found in her allegation that "Minnesota seize[d] the property of [Tyler] with unpaid real property taxes and/or other charges, transfer[ed] title to the State, and upon the sale of the property, retain[ed] all the excess equity or value in the property even after taxes and associated charges [had] been fully satisfied."[244] Tyler added that the State does "not provide any means or mechanism for the owner to reclaim the excess equity or value, sometimes referred to as the surplus."[245] This is untrue. Tyler enjoyed many opportunities over many years to reclaim the surplus for herself. But Tyler's case has never been simply about the surplus. Tyler's most basic contention is that she had every right to abandon all responsibility as a property owner and taxpayer without losing any potential benefits that might arise in the years after such a fateful decision. It might be fair to characterize her argument—and the Court's ultimate holding—this way:

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243 *Id.* at 255.

244 Amended Complaint, *supra* note 18, at ¶ 14.

245 *Id.* at ¶ 18.

> Tyler enjoyed a federally protected constitutional right to bear absolutely no real property or tax burdens for nearly a decade, foist those burdens onto the County, dismiss every opportunity to exercise her generous statutory rights to meet her tax burden and enjoy any surplus that might exist, and still nevertheless enjoy any benefits that may have ultimately resulted from forcing the County to sell her foreclosed property.

One of the *amicus* briefs effectively renounced the contention that Tyler had a right to the surplus from the tax sale. Frank S. Alexander, the Sam Nunn Professor of Law at Emory University School of Law, explained that there can never be a right to a surplus when property has undergone strict foreclosure because of the differences between the enforcement of mortgage liens, borne of English common law, and the enforcement of property tax liens, borne from the balance between the Due Process Clause and the government's need to collect property taxes.[246] When Minnesota enforced its tax-foreclosure statute against Tyler, it was seeking payment, not property.[247] In that sense, the Due Process Clause protected Tyler's rights, not the right to redemption of existing property interests.[248]

And when it comes to the possibility that a taxpayer has a property right to the surplus of a tax-foreclosure sale, if such a right did exist, that right would be determined at the time that absolute title is transferred from the property owner to the government.[249] When Tyler's title was foreclosed and vested in the State to cancel all of her tax liability to release all tax liens on the property, that strict foreclosure could never yield a fair market value because the property is "functionally dead to the market" at that point.[250]

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[246] Brief for Frank S. Alexander as Amici Curiae Supporting Respondents at 20–21, Tyler v. Hennepin County, 598 U.S. 631 (2023) (No. 22–166).

[247] *Id.*

[248] *Id.*

[249] *Id.*; Brief for James J. Kelly, Jr. as Amici Curiae Supporting Respondents at 6, Tyler v. Hennepin County, 598 U.S. 631 (2023) (No. 22–166).

[250] Brief for Frank S. Alexander as Amici Curiae, *supra* note 246, at 27.

As applied here, at the moment that Tyler claims a constitutionally recognized property right to the surplus, there was no value to the property because there was no sale of the condominium that could have created such a surplus. Because only the marketplace can determine the fair market value of real property, any assertion to create such a right attached to some mysteriously made-up value is illogical. And any subsequent sale by the State after it initiated strict foreclosure against Tyler's rights and obtained absolute title to the condominium could not relate back as an ongoing property right to Tyler anyway. The reason is simple. Any "arm's length negotiated transaction fifteen months after the date of an involuntary forced transfer, which is the claim made" by Tyler, could not create any similar right to the surplus to the sale.[251] The two events are incongruently disconnected. This final point underscores why Tyler's desire to seek the excess value of her condominium over her tax liability would be best to leave in her hands rather than harvesting a right that foists that burden onto the State to administer for over half a decade.

F. The Supreme Court Cited the Wrong Biblical Teaching in Considering Tyler's Rights

As final authority for its understanding of the proper distribution of benefits and burdens in tax-foreclosure cases under the Takings Clause of the U.S. Constitution, the Court inserted a reference to Scripture, preaching that taxpayers "must render unto Caesar what is Caesar's, but no more."[252] Undoubtedly, the Court powerfully referenced Jesus' teachings in the Gospels in which He declared, "Render therefore unto Caesar the things which are Caesar's; and unto God the things that are God's."[253] Bypassing the theological relevancy of this Scripture that focuses on God's sovereignty and authority, however, perhaps there is a more relevant and material

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[251] *Id.* at 25.

[252] *Tyler*, 598 U.S. at 647 (2023).

[253] *Matthew* 22:21 (King James); *see also Luke* 20:20–26 (King James); *Mark* 12:17 (King James).

lesson from Jesus that better informs how to think about the proper balancing of burdens and benefits in this case.[254]

Fifteen chapters before Jesus uttered His famous *Render unto Caesar* admonition, He declared the central lesson of His ministry: "Therefore all things whatsoever ye would that men should do to you, do ye even so to them."[255] This commandment eloquently encompasses the Golden Rule. Tellingly, Jesus declared that this rule, rather than the Caesar admonition, is essential to His teachings because this Golden Rule "*is* the law."[256] And the Golden Rule does not mean whoever has the gold makes the rules, which might be at the heart of Caesar's sovereignty over the gold coin that Jesus held when he referenced Caesar. Instead, the Golden Rule fosters a sense of mutual reciprocity among people who appreciate the importance of not imposing exclusive burdens on others in order to secure exclusive benefits.

Therefore, the Supreme Court would have been better served by stating the Golden Rule as a more appropriate lesson than the Caesar proclamation. There is no better example of how the Golden Rule plays out in the distribution of benefits and burdens than the corresponding balance between rights and responsibilities. And the Supreme Court inherently

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[254] Because God created humankind in His image, in contrast to the gold coins created in the image of Emperor Tiberius, there is an unmistakable lesson in Jesus' teachings as to how we relate to one another:

> The Holy Bible contains the blueprint establishing the standards of justice under the moral principles of Judeo-Christian ethics. The foundation of the biblical blueprint defining justice is the creation account in the Book of Genesis, which reveals God to be the only supreme being and the sole creator of all humankind in his image. Every human being bearing the image of God theologically renders the commandments "love the Lord your God with all your heart and with all your soul and with all your strength" and "love your neighbor as yourself" as inseparable, thereby establishing an ironclad and unbreakable bond linking a proper relationship with God to a proper relationship with all other human beings.

Susan P. Hamill, *An Evaluation of Federal Tax Policy Based on Judeo-Christian Ethics*, 25 VA. TAX REV. 671, 683–84 (2006).

[255] *Matthew* 7:12 (King James).

[256] *Id.*

recognized that the Golden Rule's fair distribution of benefits and burdens forms the philosophical construct of the Takings Clause when it explained that the Takings Clause "was designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole."

This Article's most ferocious criticism of the Court's decision in *Tyler* is its unwillingness to properly balance the competing rights and responsibilities in this case. As you devour the materials that directly follow, ponder how Tyler was content to disclaim all burdens and lay them at the County's feet to later claim all benefits that resulted. That result is a perverse interpretation of the Takings Clause.

In his enlightening article elegantly entitled *Rights and Responsibilities*, Utah Supreme Court Justice Dallin H. Oaks proposed "to speak about rights and responsibilities, and their relation to law and the legal profession" by suggesting that our culture has "tried to promote too many societal goals through rights and have given too little attention to responsibilities."[257] Justice Oaks wisely counseled that "responsibility is just the duty side of someone else's right."[258] He regaled a speech at an American Bar Association meeting after the Watergate scandal in which the impassioned speaker bemoaned that "the drumbeat accompanying the steady forward march of rights during the past decade" has been so loud "that the voice of obligations has scarcely been heard."[259] Tyler's steady drumbeat of her constitutional rights that resounded after she moved out of her condominium and quit paying taxes deafened the Court's ability to hear any voice that spoke of her obligations. During the last thirteen years, Tyler has made no mention of a single responsibility; she has marched into every federal court loudly banging on the drum of her rights.

But this drumbeat of rights without responsibilities creates a harmful imbalance in our society. Justice Oaks turned to A.J.M. Milne, an English legal philosopher, to contend "for the primacy of responsibilities as a

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257 Dallin H. Oaks, *Rights and Responsibilities*, 36 MERCER L. REV. 427, 428 (1985).

258 *Id.*

259 *Id.* at 429.

rational matter."[260] He explained that "in any joint activity or enterprise, responsibility takes priority over justice," because "justice is highly individual and takes no account of the common enterprise and the problems of a group as a whole."[261] But because "no group enterprise can prosper unless it is advanced by its participants, a member of a group 'can never be entitled to insist on doing or having done anything which weakens or undermines the common enterprise.'"[262] Justice Oaks pronounced that "while it is rational to be just, it is more rational to be responsible and to interpret justice from the wider perspective of responsibility."[263]

When the Supreme Court regaled Tyler's rights and condemned Minnesota's response, it perverted justice. To be fair, the Court balanced rights and responsibilities in proclaiming that Minnesota could not force Tyler to bear more burdens in taxes than the value of her property.[264] But because the Court only listened to Tyler's drumbeat of rights, it refused to hear the State's claim that Tyler had some responsibility to reap the excess value of her property. This point forms a crucible of criticism of the notion that Tyler could enjoy a constitutionally protected right to the possibility of proceeds after the County bore the entire burden to painstakingly comply with numerous procedures that guaranteed Tyler with generous rights if she would only exercise them.

As a final matter, recall how the Supreme Court in *Tyler* spent considerable effort studying the historical march from 1215 through the founding of our nation to the Civil War to unearth and reveal an overarching and timeless principle that delinquent taxpayers enjoy a right to the surplus proceeds from tax sales conducted by sovereign states.[265] This is the central theme of the Court's decision. Revisiting Justice Oaks for a moment, his perspective of history markedly diverges from the Court's. When Justice Oaks examined the historical development of rights versus

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260 *Id.*

261 *Id.* (quoting A.J. MILNE, FREEDOM AND RIGHTS 99 (1968)).

262 *Id.* (quoting A.J. MILNE, FREEDOM AND RIGHTS 98 (1968)).

263 Oaks, *supra* note 257, at 429 (quoting A.J. MILNE, FREEDOM AND RIGHTS 99 (1968)).

264 Tyler v. Hennepin County, 598 U.S. 631, 647 (2023).

265 *Id.* at 639–43.

responsibilities at our nation's founding, he recognized that "[t]he performance of personal responsibility was such an important part of English and American citizen consciousness in the eighteenth and nineteenth centuries that rights like freedom were justified on the basis that they secured citizens in the performance of their responsibilities."[266] He quoted Lord Acton's 1877 view of liberty as the "assurance that every man shall be protected in doing what he believes to be his duty."[267] Justice Oaks further posited that the Western tradition of the law was formed with an idea that freedom was not simply about individual rights, but instead carried "a personal moral responsibility to perform their duties and to exercise their corresponding rights."[268] In prophetic language that implicitly criticizes the Court's holding in *Tyler*, Justice Oaks wrote, "[h]ow different this is from the modern formulation in which the exercise of individual rights is the focus, and responsibilities gain mention, if at all, only as an expression of the obligations of those against whom rights are enforced."[269]

The Supreme Court's decision in *Tyler* is a case study on Justice Oaks's admonition to not overdose on rights without a corresponding appreciation of responsibilities. This admonition forms enduring values that are engrained into the foundation of American law which carry out the Golden Rule's distribution of benefits and burdens by creating a corresponding balance between rights and responsibilities. The Golden Rule reinforces the proper balance between the two to inform a just society. To enjoy the benefits of this society, we all must bear the burdens of citizenship and civic duty. Similarly, for governments to benefit from the massive authority granted to them by the people, they must bear the burdens of protecting individual rights. The importance of this delicate balance can be seen most clearly when it is abandoned. Regrettably, that happened in *Tyler* when the

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[266] Oaks, *supra* note 257, at 434.

[267] *Id.* at 434 (quoting Lord Acton, *History of Freedom, in* FREEDOM AND THE LAW 25 (1961)).

[268] *Id.* (quoting Walter Lippman, *Education vs. Western Civilization, in* 10 THE AMERICAN SCHOLAR 184, 193 (1941)).

[269] *Id.*

Supreme Court joyfully enshrined yet another right in the U.S. Constitution while neglecting a proper consideration of personal responsibility.[270]

VI. CONCLUSION

This Article contends that the Supreme Court's unanimous decision in *Tyler* unwisely carved into the U.S. Constitution a novel property right to surplus proceeds from a state's tax-foreclosure sale that distorts the delicate balance between individual rights and personal responsibilities. The Court's newfound constitutional right encourages a real property owner to disclaim all tax burdens for more than a decade, heap those burdens onto the state to meticulously follow a cumbersome foreclosure statute that affords a delinquent taxpayer with substantial rights, and then claim all benefits from any surplus that might arise. To arrive at this perverse result, the Court erroneously leaned on historical principles formulated 653 years before the Fourteenth Amendment, drew from Civil War caselaw, and misconstrued various rights outlined in Minnesota's own statutes. None of these authorities firmly house this newly discovered right. Even more disturbing than the Supreme Court's inability to clearly articulate precisely when, where, and how the right to surplus proceeds from state tax-foreclosure sales found its way into the U.S. Constitution's Takings Clause, the Court perverted the delicate balance between rights and responsibilities that forms the heart of our societal values.

In conclusion, this Article wishes to make clear that, when the federal government or various state governments legislatively recognize and grant a

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[270] It is notable that Tyler and the Court never consider how Tyler's decision to vacate her condominium and quit paying taxes impacted her community. That was left to a Friend of the Court:

> Across the country the overwhelming majority of property taxes are paid by the due date. Of the small percentage of property taxes that are not paid by the due date, the majority of these delinquent taxes are paid prior to the final enforcement event. For those parcels of property for which the taxes remain delinquent for years, the greatest costs are not the lost revenues themselves, but the costs imposed on the neighborhood and community at large.

Brief for Frank S. Alexander as Amici Curiae, *supra* note 246, at 10.

right to the surplus proceeds from a tax-foreclosure sale, such widespread recognition may be indicative of public policy supported by the majority rule. But it is a stunning leap to move from a generally recognized public policy decision to federalizing that right in the U.S. Constitution as a limitation on the sovereign power of a state. This is particularly acute when, in economic downturns, property owners could force their states to bear all of the risk of unpaid taxes, while in economic expansions, the taxpayers would reap the windfall. Such a right distorts the Takings Clause.