TAKINGS AND CHOICE OF LAW AFTER *TYLER V. HENNEPIN COUNTY*

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ABSTRACT

This Essay contributes to a symposium on the future of regulatory takings, and it studies choice of law in eminent domain disputes. When claimants bring eminent domain claims in federal courts, the courts must determine whether the claimants have constitutional "private property" in the entitlements allegedly taken. Should that determination be made with federal law, with the law of the state taking property, or law from some other source?

The 2023 Supreme Court decision *Tyler v. Hennepin County* addressed that issue.[1] Under *Tyler*, it is a federal question whether an eminent domain claimant has constitutional private property[2]. To answer the question, federal courts usually consult the law of the state where the alleged taking took place. But that presumption applies only if state law seems to secure and not to circumvent the federal right. If that reservation is not satisfied, federal courts may consult a wide range of legal sources—Anglo-American history, early general law, federal court precedents, and a broad cross-section of law from the state allegedly taking property. That approach resembles the approach taken generally for federal constitutional rights—especially in *Indiana* ex rel. *Anderson v. Brand* (1938))—but varies from the general approach in the sources it makes relevant for private property under the Fifth Amendment.[3] This Essay interprets *Tyler*. It dispels misconceptions about what *Tyler* held and what it means for choice of law analysis in future eminent domain litigation. And it offers a qualified normative justification for *Tyler*'s approach to choice of law.

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

[2] *Id.* at 637.

[3] Indiana ex rel. Anderson v. Brand, 303 U.S. 95, 112-13 (1938).

INTRODUCTION

Imagine that a state land-use restriction stops land owners from putting their lots to some specific use. The owners bring federal inverse-condemnation claims against the state[4] that issued the restriction. To avoid having their claims dismissed, the owners must prove that the restriction adversely affects constitutional property rights. After all, the Takings Clause[5] in the Fifth Amendment to the U.S. Constitution (as incorporated by the Fourteenth Amendment Due Process Clause[6]) applies only when "private property" is "taken" by government action.[7] But what law determines whether the plaintiffs have "private property"? Federal law, the law of the state that issued the restriction, or some other source?

That question raises an issue in choice of law doctrine. This conference asks contributors to imagine the future of regulatory takings doctrine. As I show here, the U.S. Supreme Court is already starting to reimagine the future of choice of law in regulatory takings. This Essay studies the Court's most recent pronouncement on eminent domain choice of law, and it argues that that recent pronouncement makes a considerable amount of sense normatively and practically.

In 2023, the Supreme Court handed down *Tyler v. Hennepin County, Minnesota*.[8] On the merits, *Tyler* held that an owner of real estate has a colorable takings claim when a government extinguishes any right she might have to the residual or equitable interest left over after a judicial sale to pay off tax arrearage on the lot.[9] (In this Essay, I'll call that residual interest "surplus equity.") To reach that merits holding, however, *Tyler* rendered a choice of law holding. Hennepin County had argued that, to determine whether

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[4] Or municipality, or state administrative agency.

[5] U.S. CONST. amend. V ("[N]or shall private property be taken for public use, without just compensation.").

[6] U.S. CONST. amend. XIV, sec. 1. *See* Cedar Point Nursery v. Hassid, 594 U.S. 139, 147 (2021).

[7] U.S. CONST. amend. V. In this Essay, I assume that the U.S. Constitution protects property rights from takings as the Supreme Court assumes it does. For my own part, I doubt those foundations; I doubt that the Fourteenth Amendment "incorporates" rights declared in the Bill of Rights. *See* Eric R. Claeys, *Takings and Private Property on the Rehnquist Court*, 99 NW. U. L. REV. 187, 196 (2004). Like Justice Clarence Thomas, however, I suspect that the federal Constitution protects against state-sponsored inverse condemnations via the Privileges or Immunities Clause, *see* U.S. CONST. amend. XIV, sec. 1; Murr v. Wisconsin, 582 U.S. 383, 419 (2017) (Thomas, J., dissenting). And if Justice Thomas and I are right, almost everything I say in this essay about property rights as "private property" under the Fifth Amendment applies with equal force to "privileges" and "immunities" under the Fourteenth Amendment. The sole exception: If property rights are privileges and immunities under the Fourteenth Amendment, the precise scopes of those rights are determined in reference to how property, privileges, and immunities were understood circa 1868, at the drafting and ratification of that Amendment. If property rights are protected via incorporation, it needs to be settled whether their scopes are determined in reference to understandings circa 1790 or 1868, the dates for ratification (respectively) of the Fifth or the Fourteenth Amendments.

[8] Tyler v. Hennepin County, Minnesota, 598 U.S. 631.

[9] *See id.* at 637–44.

Tyler had constitutional "private property" in the surplus equity in dispute, the federal courts could look only to Minnesota property law. That argument was rejected firmly by the Court: "[S]tate law . . . cannot be the only source" of law for constitutional private property, the Court warned, because "[o]therwise[] a state could 'sidestep the Takings Clause by disavowing traditional property interests' in assets it wishes to appropriate.'"[10] So the Court looked past the Minnesota statutes challenged by Tyler—to its own precedents, to English history, to the practice of the federal government and the several states shortly after the ratification of the U.S. Constitution, and a wide range of Minnesota statutes and doctrines on property, debt, or foreclosure.[11] All of those sources confirmed that "a property owner is entitled to the surplus in excess of her debt," and that the surplus constitutes "private property" capable of supporting an eminent domain claim.[12]

The Court did not explain in express terms why it relied on the sources it relied on to hold that surplus equity constitutes private property. In part, the Court was following a choice of law doctrine—one associated with its decision *Indiana ex rel. Anderson v. Brand*—familiar from federal constitutional law and federal courts doctrine. But the Court departed from *Brand* in a few interesting details.[13]

Here is how *Tyler* tracks *Brand*. After *Tyler*, the question whether a claimant has private property is ultimately a question of federal law.[14] Federal law identifies a few core interests that clearly must be private property, and it also assumes that other property rights must satisfy a few broad and inchoate expectations. In most cases in practice, the law of the relevant state makes clear whether the plaintiff's interest fits the federal expectations, and in those cases federal courts consult the law of that state and that law only. When state law does not seem a reliable guide to eminent domain claimants' federal property rights, however, federal courts should look past state law.

Tyler broke new ground on what happens when state law does *not* seem a reliable guide to federal private property.[15] Under *Brand*, when a federal court doubts that the most relevant state sources are applying state law reliably, it analyzes that state's law independently, without deferring to any one statute or to the decisions of that state's courts.[16] In *Tyler*, the U.S. Supreme Court is encouraging federal courts to determine what "private property" consists of from a broad collection of sources in and beyond that state. As in *Brand*'s approach, federal courts can and should consult state law looking not only at the state law under challenge but also other relevant and more

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10 *Id.* at 631 (quoting Phillips v. Washington Legal Found., 524 U.S. 156, 167 (1998)).

11 *See id.* at 639–44.

12 *Id.* at 644.

13 Indiana ex rel. Anderson v. Brand, 303 U.S. 95 (1938).

14 Campo v. United States, 169 Fed. Cl. 502, 528 (2024).

15 Tyler v. Hennepin County, Minnesota, 598 U.S. 631, 638.

16 Indiana ex rel. Anderson v. Brand, 303 U.S. 95, 98.

generally-applicable laws.[17] Under *Tyler*, however, federal courts should also consult federal precedent on private property, Anglo-American legal history, and the general law of the several United States.[18] In other words, post-*Tyler*, federal courts should triangulate, using history and general law sources as cross-checks on what seems to be the relevant law in the relevant state.

In this Essay I study the implications of *Tyler* for eminent domain choice of law doctrine.[19] The Essay has three main goals. First, this Essay conducts a close doctrinal analysis of *Tyler* and other recent eminent domain choice of law cases. Like the other contributors to this Symposium, I write this Essay as much for the bar and bench as for fellow academics. I suspect that the bar and bench have not thought very hard about choice of law issues in eminent domain litigation, and I hope this Essay gives them a helpful primer. In particular, I suspect that property lawyers and scholars will not be familiar with the principles from federal courts and choice of law *Tyler* relied on, and I suspect that federal appellate litigators and federal courts scholars will not appreciate some quirks from property and eminent domain law. I hope this Article helps both sets of readers understand what *Tyler* held and how it innovated.

Second, I hope to make clear what is at stake doctrinally in *Tyler*. To date, *Tyler* has been criticized in rather strong tones, and the criticisms are a bit overdrawn. Timothy Mulvaney reads the case to "call[] into question … our most foundational assumptions about the meaning of property,"[20] and Tory Lucas warns that the decision "radically reinterpreted the Takings Clause."[21] *Tyler* is original, but it is not revolutionary. *Tyler* follows a few earlier precedents by the Court on choice of law in eminent domain litigation. It makes clearer than those precedents how the Court understands the relevant choice of law principles, and it connects eminent domain choice of law doctrine to the doctrine for federal constitutional rights generally. But that is all the case does. And, if *Tyler* is read in context of other Court precedents on eminent domain and choice of law, the *Tyler* strategy is binding only in a relatively narrow range of takings challenges. In cases in that range, a state modifies its law in relation to some entitlement that (on one hand) might

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17 *Supra* note 17 at 640.

18 *Id.*

19 Since this Essay focuses on choice of law issues raised by *Tyler*, it focuses on when and why federal and state law supply the content for "private property" in takings litigation—and not the contents for "takings," "public use," or "just compensation."

20 Timothy M. Mulvaney, *Reconceptualizing 'Background Principles' in Takings Law*, 109 MINN. L. REV. 689, 689 (2024).

21 Tory L. Lucas, *Reassessing* Tyler v. Hennepin County*: A Critical Examination of the Supreme Court's Federalist Overreach in Discovering a Constitutionally Protected Property Right in a Takings Case Involving a Sovereign State's Real Property Tax-Foreclosure Sale*, 18 LIBERTY U. L. REV. 473, 473 (2024). *See also* Jaden Lessnick & T. Hunter Mason, *An* Erie *Taking:* Tyler v. Hennepin County *and the General Common Law Revival*, -- U.C. IRVINE L. REV. – (forthcoming), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4660783, p. 1 (describing *Tyler* as working a "sea change" in choice of law principles)

count as a nonpossessory property interest at law but (on the other hand) might not count as "private property" under the Fifth Amendment. For those interests, the *Tyler* strategy gives federal courts a heuristic to help settle whether the interest at stake is constitutional private property. Russell Bogue warns that this heuristic is "rife with uncertainty and ambiguity, promising to provoke more litigation."[22] For the cases to which the *Tyler* strategy applies, however, there *is* no more certain or ambiguity-free strategy. *Tyler* supplies an anticircumvention principle for a hard set of cases, and anticircumvention principles inescapably entail uncertainty and ambiguity.

Last, I offer a modest normative defense of *Tyler*'s innovations. I offer that defense primarily against the best-known alternative, which I call here "the creatures of state law view." That term comes from a passage in the 2021 Supreme Court decision *Cedar Point Nursery v. Hassid*: "As a general matter, . . . the property rights protected by the [Fifth Amendment] Takings Clause are creatures of state law."[23] The creatures of state law view is endorsed most often and most strongly by property scholars.[24] In scholarship, there is an alternative to the creatures of state law view, and I'll call it here a "federal patterning" approach. That approach comes from scholarship by Henry Monaghan about a wide range of federal constitutional issues,[25] and Thomas Merrill has applied it insightfully to choice of law determinations in eminent domain litigation.[26] The creatures of state law view is defensible as a rule of thumb for choice of law determinations, but not as a categorical and exceptionless approach. Merrill has argued as much, and to that extent I agree with him. I also agree with Merrill that the patterning approach is the best way to determine federal law when some core property right is at issue—especially the right of exclusive possession.[27] But the *Tyler* strategy seems preferable for legal interests that seem borderline rights, nonpossessory legal interests that might be private property but are not clearly so. The right at issue in *Tyler*, the right to surplus equity, is such a borderline right, and it

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[22] Russell C. Bogue, "The Takings Traps: Constitutional Limits on State Power over Property," https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4718965 (last accessed February 18, 2025), manuscript at 6.

[23] *Cedar Point Nursery*, 594 U.S. at 155. *See also* Ruckelshaus v. Monsanto Co., 467 U.S. 986, 1001 (1984) (calling this view a "basic axiom" of federal takings doctrine).

[24] *See* Bradley C. Karkkainen, *The Police Power Revisited: Phantom Incorporation and the Roots of the Takings 'Muddle,'* 90 MINN. L. REV. 826, 833 (2006); Lucas, *supra* note 21, at 479; Frank I. Michelman, *Property, Federalism, and Jurisprudence: A Comment on* Lucas *and Judicial Conservatism*, 35 WM. & M. L. REV. 301 (1993); Mulvaney, *supra* note 20, at 689; Stewart E. Sterk, *The Federalist Dimension of Regulatory Takings Jurisprudence*, 114 YALE L.J. 203, 206 (2004).

[25] Henry Paul Monaghan, *Of "Liberty" and "Property,"* 62 CORNELL L. REV. 405, 435–36 (1977).

[26] Thomas W. Merrill, *The Landscape of Constitutional Property*, 86 VA. L. REV. 885, 934–42 (2000). *See also* Maureen E. Brady, *The Illusory Promise of General Property Law*, 132 YALE L.J. FORUM 110 (2023).

[27] Not every property right entitles proprietors to rights of exclusive possession. The most basic rights in realty and personalty do, but rights in many intangible resources do not. I assume that rights of exclusive possession are fundamental to property because in the eminent domain context the rights litigated most often are rights in realty and personalty.

was reasonable for the Court to consult a wide range of sources to ensure that the right is indeed part of "private property" under the U.S. Constitution.

This Essay proceeds as follows. Part I surveys the existing strategies for choice of law determinations. Part II studies *Tyler*. Part II shows how *Tyler* relies on the anticircumvention strategy associated with *Brand*. And Part II studies *Tyler*'s innovations, its recommendations what sources federal courts should consult when state law does not seem a reliable guide to the claimant's private property. Part III continues the doctrinal study of *Tyler*, by relating *Tyler* to other recent and prominent eminent domain choice of law cases. And Part IV offers a qualified but supportive normative justification for *Tyler*'s strategy. Part IV explains why *Tyler*'s strategy should complement the patterning approach, and it responds to the most familiar arguments for the creatures of state law view.[28]

I. PRIVATE PROPERTY AND CHOICE OF LAW: FOUR VIEWS

Few legal academics, and fewer judges or lawyers, have thought much about choice of law issues in eminent domain cases. In this Part, I want to introduce the four views that have at least a little traction in the law and scholarship.

Three of those views were at work in *Tyler*. *Tyler* arose out of litigation over the residue of the proceeds of a judicial sale to pay tax arrearage on a lot of land. Geraldine Tyler owed $2,300 in taxes to Hennepin County for a condominium she had lived in from 1999 to 2010 and owned in absentia thereafter.[29] She did not pay the taxes and by 2015 she owed another $13,000 in interest and penalties.[30] Under the relevant tax statutes, when an owner does not pay real estate taxes on time to the county of jurisdiction, Minnesota obtains a judgment against the property and acquires title in it subject to a three-year redemption period.[31] If the owner/tax debtor does not pay the tax arrearage within three years, however, her interests are forfeit and title vests

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[28] The policy arguments in Part IV are relevant to most theories of constitutional interpretation, with only slight adjustments for theories in different families. Nonoriginalists can consider Part IV's arguments on their normative merits. For originalists, federal courts should apply the original meaning of "private property" when that meaning is clear, but the arguments restated here become relevant when that meaning is underdetermined and needs to be filled in.

Similarly, the arguments in Part IV are relevant to normative justifications for property however grounded. In consequentialist frameworks, there are error costs in overfederalizing property, and there are also error costs in leaving property rights susceptible to expropriation by state and local governments. In rights-based frameworks, any moral right to property needs to be institutionalized in doctrine, and it needs to be reconciled to just powers of government to regulate, tax, and take property. Part IV summarizes the considerations relevant in all frameworks.

[29] Tyler v. Hennepin Cty., Minn., 598 U.S. 631, 634.

[30] *Id.* at 635.

[31] *See* Minn. Stat. §§ 279.18, 280.01, *cited in Tyler*, 598 U.S. at 635; *see* Minn. Stat. § 281.70, *cited in Tyler*, 598 U.S. at 635.

in the state.[32] If the state sells the property after it takes title, the sale proceeds are used first to pay off the tax arrearage.[33] Any proceeds left over are apportioned among the county, town, and school district of jurisdiction.[34] Pursuant to those statutes, in 2015 Hennepin County seized Tyler's condominium, sold it for $40,000, extinguished her $15,000 tax debt, and kept the leftover $25,000.[35]

Tyler brought a class action against the county and its officials, and she alleged that the relevant laws effected violations of the Takings Clause and the Excessive Fines Clause. And as her case made its way to the Supreme Court, judges, litigants, and *amici curiae* pressed three different answers to the choice of law question.[36]

The district and circuit court opinions both illustrate the creatures of state law view. When the U.S. District Court for the District of Minnesota dismissed Tyler's complaint, it explained: "'Because the Constitution protects rather than creates property interests, the existence of a property interest is determined to reference to existing rules or understandings that seem from an independent source such as state law.'"[37] And when the U.S. Court of Appeals for the Eighth Circuit affirmed the judgment of dismissal, it relied on the same view: "Where state law recognizes no property interest in surplus proceeds from a tax-foreclosure sale conducted after adequate notice to the owner, there is no unconstitutional taking."[38] Tyler was not entitled to any federal constitutional property, both courts concluded, because the relevant state foreclosure statutes did not recognize her as having any property.

In her brief to the Supreme Court, Tyler illustrated a second view—that any state law on property is subject to *some* sort of anticircumvention principle.[39] In her brief, Tyler argued that the Minnesota foreclosure statutes should not settle whether she had constitutional private property.[40] To argue that surplus equity was constitutional private property, Tyler cited many of the same authorities as the ones the Court later relied on in its opinion.[41] But she was far more reticent about why those authorities were relevant. Tyler reminded

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32 *See* Minn. Stat. §§ 281.18, 282.07, *cited in Tyler*, 598 U.S. at 635.

33 *Id.*

34 *See* Minn. Stat. § 282.08(4)(iii), *cited in Tyler*, 598 U.S. at 635 (summarizing how, under the statute, the residue is apportioned after paying off charges attributable to special assessments, increased value attributable to public improvements, or increased value attributable to state cleanup).

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

36 Tyler v. Hennepin Cty., Minn., 505 F. Supp.3d 879, 891(D. Minn.. 2020); Tyler v. Hennepin Cty., Minn., 26 F.4th 789, 793 (8th Cir. 2022), *reversed*, 598 U.S. at 632; Tyler v. Hennepin Cty., Minn., No. 22-166, Brief for Petitioner (Feb. 27, 2023), at 9–23.

37 Tyler v. Hennepin Cty., Minn., 505 F. Supp.3d 879, 890-91 (D. Minn. 2020) (quoting Phillips v. Wash. Leg. Found., 524 U.S. 156, 164 (1998)), *affirmed*, 26 F.4th 789, 793 (8th Cir. 2022), *reversed*, 598 U.S. at 632.

38 Tyler v. Hennepin Cty., Minn., 26 F.4th 789, 793 (8th Cir. 2022), *reversed*, 598 U.S. at 632.

39 Tyler v. Hennepin County, Minnesota, 598 U.S. 631, Brief For the Appellant at 15-17.

40 *Id.*

41 *See* Tyler v. Hennepin Cty., Minn., No. 22-166, Brief for Petitioner (Feb. 27, 2023), at 9–23.

the Court that in earlier cases it had warned states against "'transform[ing] private property into public property without compensation' by mere say-so"[42] and against "'sidestep[ping] the Takings Clause by disavowing traditional property interests long recognized under state law.'"[43] But she did not explain why state-based property rules might be subject to an anticircumvention principle, or when a state law seems to "sidestep" federal eminent domain guarantees.

Some of the amicus curiae briefs argued that Tyler's private property was determined by common law. The CATO Institute and four other amici curiae read the Supreme Court's case law to "demonstrate[] its commitment to protecting common-law property rights against legislative takings."[44] Three members of the U.S. House of Representatives (all from Minnesota) argued that "the common law (as reflected in England, the States, and the federal courts) is essential to identifying" whether an eminent domain claimant has private property.[45] But those briefs did not explain why common law could fill in the meaning of a constitutional right.

Tyler did *not* showcase one final possible view, the view that federal law determines whether a claimant has constitutional private property. This view could be expressed forcefully or with qualification. The most forceful expression goes like this: Since "private property" is a term of art in the U.S. Constitution, why shouldn't its meaning be determined by federal law? Merrill's patterning approach also relies on federal law, though with more qualifications than the forceful expression just considered. The patterning approach starts with federal law because it starts "with the language of the Constitution itself."[46] It "pays a great deal of attention to understandings grounded in independent sources such as state law," but it does so "to determine if interests have been created that correspond to the federal criteria for the identification of constitutional property."[47]

One illustration of the patterning approach comes from the 1979 decision *Kaiser Aetna v. United States*.[48] Kaiser Aetna built a subdivision around a pond in Hawaii. Post-construction, the body of water was no longer a pond and was instead a marina open to the Pacific Ocean. The U.S. Army Corps of Engineers argued that the conversion made the marina a navigable waterway and subject to a navigational servitude, and Kaiser Aetna claimed that the Corps' position effected a taking. Writing for the Court, Justice William

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42 *Id.* at 16 (quoting Webb's Fabulous Pharmacies, Inc. v. Beckwith, 449 U.S. 155, 164 (1980)).

43 *Id.* (quoting Phillips v. Washington Legal Foundation, 524 U.S. 156, 167 (1998)); *see also id.* at 25–27.

44 *See* Tyler v. Hennepin Cty., Minn., No. 22-166, Brief of the CATO Institute et al. (Mar. 2, 2023), at 11.

45 *See* Tyler v. Hennepin Cty., Minn., No. 22-166, Brief of U.S. Representatives Tom Emmer et al. (Mar. 6, 2023), at 5 n.2.

46 Merrill, *supra* note 26, at 952.

47 *Id.*

48 Kaiser Aetna v. United States, 444 U.S. 164 (1979).

Rehnquist made passing references to Hawaii law,[49] and he did so to establish that the policy that the Corps was carrying into effect had the same effects in substance as condemning an easement.[50] For Rehnquist, however, the right taken by the Corps' policy was clearly a right no matter what Hawaii law said. The Corps policy was condemning a right of exclusive possession, the "'right to exclude' [is] universally held to be a fundamental element of the property right" and that right "falls within [a] category of interests that the Government cannot take without compensation."[51] For Rehnquist, Hawaii law made clear what entitlements Kaiser Aetna held before the Corps' policy took effect, but a federal pattern determined whether those entitlements were private property under the federal Constitution.[52]

II. *TYLER*'S APPROACH TO CHOICE OF LAW

The Supreme Court reversed the Eighth Circuit's judgment in *Tyler*, and Chief Justice John Roberts's opinion for the Court made clearer when and why it relies on each of the views introduced in the last Part. The Chief Justice's opinion makes considerable sense if one already knows the relevant principles of choice of law and federal courts. But the opinion assumes those principles more than it demonstrates them. As I'll show, *Tyler* makes considerable sense when read in light of *Brand*. In this Part, then, I'll interpret the Chief Justice's opinion using *Brand* as a guide.

In *Brand*, Anderson had taught as a public school teacher in Indiana for nine years, and for the last two of those years her teaching contracts contained language giving her tenure under a 1927 Indiana statute.[53] When the trustee of her school threatened to terminate her, she sued for a writ of mandate compelling him to continue her in employment. The state courts granted a demurrer to the trustee, and the Indiana Supreme Court sustained that judgment in part because in 1933 the Indiana legislature had revised substantially the 1927 statute and the revisions made Anderson ineligible for continued tenure.[54] Anderson argued that the 1933 statute violated the Contracts Clause of the U.S. Constitution.[55] But the Indiana Supreme Court concluded (and Brand then argued to the U.S. Supreme Court) that Anderson had no contractual right at issue. Indiana law, the argument went, did not entitle Anderson or other public school teachers to contractual rights to tenure.

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49 *See id.* at 179.

50 *See id.* at 180.

51 *Id.* at 179–80.

52 *Id.* at 179.

53 *See Brand*, 303 U.S. 95, 97 (1938) (citing The Teachers' Tenure Law, Acts Ind. 1927, ch. 97).

54 *See* State *ex rel.* Anderson v. Brand, 7 N.E.2d 777, 778 (Ind. 1937) (citing Burns' Ann. St. § 28-4307).

55 U.S. CONST. art. I § 10 ("No State shall . . . pass any . . . Law impairing the Obligation of Contracts.").

Brand's argument was a serious one. Under black-letter federal courts doctrine, when the U.S. Supreme Court reviews judgments by state courts, ordinarily it reviews only federal legal questions and leaves state law questions to the state courts.[56] If Anderson's employment status were entirely a matter of Indiana law, she had no Contracts Clause claim because she did not have a valid contractual right to impair. But there are exceptions to that black letter, and Associate Justice Owen Roberts, writing for the Court, thought one applied in *Brand*. At the outset of his legal analysis for the Court, (the earlier) Roberts acknowledged that, since the question whether public school teachers could get tenure under Indiana statutes was "one primarily of state law," the Court would "accord respectful consideration and great weight to the views of the state's highest court."[57] "[B]ut," Roberts warned immediately, "in order that the constitutional mandate may not become a dead letter, [the U.S. Supreme Court was] bound to decide for [itself] whether a contract was made . . . and whether the State has, by later legislation, impaired its obligation."[58] Roberts thereupon concluded for the Court that the bulk of Indiana statutes and court decisional law had recognized public school teachers as being capable of acquiring contractual rights to tenure.[59]

Brand now stands for an important exception to the general rule against the Supreme Court's reviewing questions of state law. As one casebook reads *Brand*, the Contracts Clause challenge "obviously presents a federal question," "state law governs whether there was a contract in the first place," but "[i]f there were no limits on the freedom of state courts to determine whether contractual obligations had been created, the federal limitation on impairment of those obligations might be easily evaded."[60] To solve that problem in *Brand*, the Court recognized that the question whether Anderson had a contractual right to tenure was a question of state law but then asked whether state law "had uniformly held that the teacher's right to continued employment . . . pursuant to the [1927] Act was contractual" before the litigation in the case at bar.[61] In short, under *Brand* federal constitutional rights are determined with state law, subject to an anticircumvention principle protecting the litigant's federal right.

In *Tyler*, Chief Justice (John) Roberts approached the Takings Clause in a spirit similar but not identical to *Brand*'s. Roberts began by observing that "there was money remaining after Tyler's home was seized and sold by the County to satisfy her past due taxes" and arrearage; he asked "whether that remaining value is property under the Takings Clause."[62] Roberts

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56 *See* Murdock v. City of Memphis, 87 U.S. 590, 632–33 (1875).

57 *Brand*, 303 U.S. at 100.

58 *Id.*

59 *See id.* at 100–07.

60 PETER W. LOW ET AL., FEDERAL COURTS AND THE LAW OF FEDERAL-STATE RELATIONS 87-88 (7th ed. 2011).

61 *Brand*, 303 U.S. at 105.

62 *Tyler*, 598 U.S.at 637.

restated the text of the Takings Clause, and he noted that it was "applicable to the States through the Fourteenth Amendment."[63] When he mentioned the Fourteenth Amendment, and a legal guarantee "applicable to the States" via that amendment, Roberts identified a federal right and federal questions analogous to the Contracts Clause questions litigated in *Brand*.

To fill out the meaning of private property under the Fifth and Fourteenth Amendments, Roberts recognized, the Supreme Court "draws on 'existing rules or understandings' about property rights."[64] And Roberts granted that "[s]tate law is one important source" of the existing rules and understandings that inform the federal right to private property.[65] But he hastened to add that "state law cannot be the only source," and for emphasis he quoted from a Sixth Circuit opinion (by Judge Raymond Kethledge) warning that "the Takings Clause would be a dead letter if a state could simply exclude from its definition of property any interest that the state wished to take."[66]

There, Roberts and Kethledge were both applying to the Takings Clause *Brand*'s choice of law framework for the Contracts Clause. Neither Roberts nor Kethledge quoted or cited *Brand*. But imagine that a passage in a federal court opinion says, without citation, "It is a constitution we are expounding," "I know it when I see it," or "a brooding omnipresence in the sky." Masterful readers know the references without the cites.[67] The "dead letter" argument is not quite as familiar as any of those quotes, but it comes close. For masterful federal courts practitioners, a mention of a "dead letter" expresses an understanding like the following: When a federal constitutional right is filled in with state law, federal courts consult state law when it seems a reliable guarantor of the federal right. But the federal question resurfaces when new state statutes or regulations, or new interpretations of state case law, threaten to evade the federal right.

Although *Tyler*'s approach resembles *Brand*'s, it differs in one important respect. Again, to determine whether Indiana was trying to circumvent the substance of the Contracts Clause, in *Brand* the Court had studied Indiana public teacher tenure law in statutes and case law before Anderson sued for her writ of mandate. Chief Justice Roberts did study Minnesota law in *Tyler* as *Brand* had studied Indiana law. For the Court, Roberts concluded that Minnesota recognized that surplus equity was private property—when foreclosing creditors are private parties and not counties or other state actors, and when the creditor is a state actor foreclosing on a tax debt *besides* arrearages on realty. Roberts was confident that surplus equity was private property because the statutes Tyler was challenging made "an exception only for

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63 *Id.*

64 *Id.* at at 637 (quoting *Phillips*, 524 U.S. at 164).

65 *Id.*

66 *Id.* (quoting Hall v. Meisner, 51 F.4th 185, 190 (6th Cir. 2022)).

67 Respectively, to McCulloch v. Maryland, 17 U.S. 316, 407 (1819); Jacobellis v. Ohio, 378 U.S. 184, 197 (1964) (Stewart, J., concurring); Southern Pacific Co. v. Jensen, 244 U.S. 205, 222 (1917) (Holmes, J., dissenting).

[Minnesota], and only for taxes on real property."[68] But Roberts canvassed sources beyond Minnesota law. In particular, Roberts consulted "'traditional property law principles,' plus historical practice and this Court's precedents."[69] The historical practice came from England, such as a passage from the Magna Carta entitling the executors of testamentary estates to any residue left over after sheriffs sold property from the estates to pay the decedents' debts.[70] Two Supreme Court precedents showed that "a taxpayer is entitled to the surplus in excess of debt."[71] And as for traditional property law principles, Roberts canvassed the general law of the several states on private property, especially in the period before the Civil War. That law manifested "an overwhelming consensus" that "a government could not take more property than it was owed."[72]

To be sure, the Court needed to work through many other arguments to conclude that Tyler had federally-protected constitutional private property. But all the other issues in play turned on whether Minnesota state law was constrained by a more fundamental federal right. In particular, the Court needed to consider and slalom around *Nelson v. City of New York*,[73] which upheld a scheme deeming foreclosure-sale surpluses forfeit if tax debtors did not claim the surpluses. *Nelson* was relevant but not completely dispositive in *Tyler*. The New York ordinances at issue in *Nelson* gave tax debtors a (twenty-day) opportunity to demand back surplus equity.[74] Since the Minnesota statutes at issue in *Tyler* give tax debtors no opportunity to that period for reclamation, they could have been distinguished on that ground.

That distinction made no difference to the Eighth Circuit. But the circuit court reached that conclusion thanks to the creatures of state law view. In its opinion, "any common-law right to surplus equity [had] been abrogated by statute" in Minnesota, and New York and Minnesota were entitled to structure rights to surplus equity as they chose.[75] For the Supreme Court, however, the relevant Minnesota statutes went against the federal right, as traced against a broad pattern of sources. Against that pattern, a right to surplus equity was normal and the denial of such a right was exceptional. The twenty-

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

69 *Id.* at 638 (quoting *Phillips*, 524 U.S. at 157).

70 *Id.* at 639.

71 *Id.* at 643.

72 *Id.* at 641. On "general law," see Will Baude, Jud Campbell, & Steven Sachs, *General Law and the Fourteenth Amendment*, 76 STAN. L. REV. 1185 (2024). Will Baude reads *Tyler* primarily as a general law case. Will Baude, "The Source of Law in *Tyler v. Hennepin County*," THE VOLOKH CONSPIRACY, May 31, 2023, https://reason.com/volokh/2023/05/31/the-source-of-law-in-tyler-v-hennepin-county/ (last accessed September 10, 2024). As this Part makes clear, *Tyler* relies on the general law of the states on property and tax debts to fill in the substance of a distinct federal guarantee.

73 352 U.S. 103, 108–09 (1956).

74 *See id*. at 104–05.

75 Tyler v. Hennepin County, 26 F. 4th 789, 793 (8th Cir. 2022).

day reclamation period in *Nelson* respected the norm; the Minnesota scheme challenged in *Tyler* did not.[76]

Tyler puts in proper perspective each of the views studied in Part I. Roberts gave the creatures of state law view its due when he granted that "[s]tate law is one important source" of the existing rules and understandings that inform the federal right to private property.[77] But Roberts' restatement construes the creatures of state law view more narrowly that it is usually understood. If state law is (just) "one important source for the federal right," the federal right is not reducible solely to state law. And *Tyler* makes clear what Tyler did not in her brief—why precisely eminent domain doctrine has an anticircumvention principle. That principle follows from the federal structure of the U.S. Constitution—consistent with *Brand*'s warning about dead letters.

Tyler also makes clearer than did CATO and its fellow amici, or the Minnesota congressmen, why common law is relevant to eminent domain choice of law inquiries. Common law sources are not relevant simply because they are common law. They are relevant if and when they help reconstruct the substance of constitutional private property—because the most relevant state law seems not to determine and instead to circumvent the right.

And when *Tyler* draws on common law it reconstructs what "private property" is differently from the patterning approach. In the patterning approach, federal courts protect (as a matter of federal law) substantive legal interests satisfying "general criteria that serve to differentiate property rights from other types of interests."[78] That approach is easy to administer for interests that seem central to property and are the subject of frequent litigation—like the right of exclusive possession tested in *Kaiser Aetna*.[79] As Part IV will explain, however, the patterning approach may not be so easy to administer for rights not obviously central to property and not frequently litigated. For those kinds of rights, it may be better to ask whether an interest is consistently recognized as property in practice across a wide range of sources. That is why *Tyler* consulted common law, and also federal eminent domain precedent, Anglo-American history, and a wider, more representative, and less self-serving set of state sources.[80]

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76 *Tyler*, 598 U.S. at 642–44.

77 *See supra* note 65 and accompanying text. Roberts authored the Court opinion in *Cedar Point Nursery*, so he is responsible for the "creatures of state law" soundbite. *Cedar Point Nursery*, 594 U.S. at 142, 155.

78 Merrill, *supra* note 26, at 952.

79 *See supra* notes 48–51 and accompanying text.

80 *Tyler* does not canvass all of the sources that the Court has considered in similar cases. In particular, on a few occasions, the Court has also consulted natural law or higher law to say whether some entitlement on the borders of private property belongs inside or outside the borders. *See, e.g.*, Horne v. Dep't of Agric., 576 U.S. 351, 367 (2015); Palazzolo v. Rhode Island, 533 U.S. 606, 627 (2001); Ruckelshaus v. Monsanto, 467 U.S. 986, 1003 (1984). *See* Eric R. Claeys, *Natural Property Rights—An Introduction*, 9 TEXAS A&M J. PROP. L. 415, 453–54, 454 n.158 (2023).

III. *TYLER* AND OTHER RECENT CHOICE OF LAW EMINENT DOMAIN CASES

The last Part explained what the U.S. Supreme Court was trying to accomplish in *Tyler*. This Part situates *Tyler*'s holding and approach in relation to the Court's recent practice in eminent domain choice of law inquiries. I hope a few lessons become clear in the course of the Part. *Tyler*'s restatement provides a surer guide to choice of law inquiries than the creatures of state law view. *Tyler* complements the federal patterning approach. *Tyler*'s holding applies primarily in close cases, ones in which states are tinkering with a nonpossessory legal entitlement that might be but is not sure to be "private property" under federal takings guarantees. And in that context, *Tyler* is not revolutionary.[81]

Quite often, the Court does not even raise choice of law issues about the scope of private property in eminent domain cases. In those cases, however, the choice of law issue is not litigated because it seems clear beyond any doubt that the state action being challenged adversely affects constitutional private property. Whether or not the action effects a constitutional "taking," it clearly implicates private property under federal law and the law of the relevant state. Consider as one example *Penn Central Transportation Co. v. City of New York*.[82] A New York City preservation commission designated Grand Central Terminal a historical site and a valuable city landmark, and the designation made it illegal for the Penn Central company to build office space on top of the terminal. Penn Central argued that the designation took for constitutional purposes servitudes in airspace over the terminal. When the company argued that "the airspace above the Terminal is a valuable property interest," the Court assumed the company's argument for the sake of analysis.[83] Although the Court held against the company—on the ground that the landmark designation did not "take" the servitude in question[84]—there was no question that the company was suing to protect private property.

Other cases suggest that the question whether a claimant has private property is primarily a question of federal law. *Kaiser Aetna* reads that way;[85] although the Court noted that Hawaii law protected "the right to exclude," it emphasized far more heavily that the right was "one of the most essential sticks in the bundle of rights that are commonly characterized as property."[86] Those cases follow the patterning approach. In such cases, the Court is sure that the substantive interest at issue is clearly part of the pattern of property

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81 *But cf.* Lucas, *supra* note 21; Mulvaney, *supra* note 20; *supra* notes 20 and 21 and accompanying text.

82 Penn Central Transportation Co. v. City of New York, 438 U.S. 104 (1978).

83 *Id.* at 130. *Accord id.* at 142–43 (Rehnquist, J., dissenting) (noting that New York City and the other appellees did not dispute that the appellants were claiming constitutional private property).

84 *See id.* at 138.

85 *See supra* notes 48–51 and accompanying text.

86 Kaiser Aetna v. United States, 444 U.S. 164, 176 (1979).

assumed in the federal Constitution. *Cedar Point Nursery* also relies on a federal patterning approach. (Even though that case is responsible for the "creatures of state law" soundbite![87]) In *Cedar Point Nursery* the Court held that a California regulation took property when it granted unions rights to access land owned by agricultural employers, to recruit farm workers on the property. The Court drew analogies between the unions' rights of entry and "a servitude or an easement,"[88] and those analogies bolstered its conclusion that the rights inflicted *per se* takings under Court precedents about government-sponsored interference with the right to exclude.[89]

When the Court does consider the choice of law issue seriously, it relies on the creatures of state law view more often than any other view. But that is because state law usually makes fairly clear that the plaintiff *has* private property. Consider *Pennsylvania Coal Co. v. Mahon*,[90] a case Stewart Sterk cites to support the creatures of state law view.[91] *Mahon* does not support Sterk's argument unequivocally. No one was denying that the claimants in *Mahon* were litigating over private property, so the case doesn't raise choice of law issues analogous to the issues in *Brand* (for the Contracts Clause) or *Tyler* (for the Takings Clause). In *Mahon*, the Pennsylvania legislature enacted an act that barred mining for coal where such mining would cause subsidence beneath residential homes, and coal companies argued that the act extinguished mineral rights they had acquired.[92] The Court noted that the challenged act "purports to abolish what is recognized in Pennsylvania as an estate in land—a very valuable estate."[93] The coal companies did not suffer inverse condemnations simply because the challenged act abolished their mineral estates; the Court needed to inquire whether the act was in substance a taking and not a police regulation. But Pennsylvania law made clear "that the defendant had . . . property rights protected by the Constitution of the United States."[94]

When state law ceases to seem a reliable guide to the scope of a claimant's property, however, federal courts can consult other sources of law. Sometimes, state law is not reliable because of plaintiff-side opportunism.

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87 *See supra* note 23 and accompanying text.

88 *Cedar Point Nursery,* 594 U.S. 139, 150 (2021).

89 *See id.* at 147–152.

90 Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922). For sticklers for doctrine, *Mahon* was not a regulatory takings case but a substantive due process case about a property regulation. I assume that distinction makes no difference for the relevant choice of law questions.

91 *See* Sterk, *supra* note 24, at 208–14.

92 *See Penn. Coal Co.*, 260 U.S. at 412.

93 *Id.* at 414.

94 *Id.* at 412.

In some cases, federal courts consult state law to say whether claimants have private property, when the federal government has allegedly taken the entitlement at issue. *See, e.g.*, Ruckelshaus v. Monsanto Corp., 467 U.S. 986, 1000–04 (1984); United States v. Causby, 328 U.S. 256, 260 (1946). The choice of law principle studied here applies the same whether the government actor is a state or federal actor.

As Merrill shows,[95] that opportunism played a substantial role in the 2017 decision *Murr v. Wisconsin*.[96] In *Murr* the Court needed to settle whether two adjacent lots of land were in substance one parcel or two for the purposes of federal takings analysis. (If they were two separate parcels, the Murrs would probably have suffered a *per se* regulatory taking on one lot, under the rule of *Lucas v. South Carolina Coastal Council*;[97] if they were in substance one parcel, the takings inquiry would proceed under the balancing test from *Penn Central* and there was probably no regulatory taking.) In his Court opinion, Justice Kennedy concluded that the question could be settled only with a multi-factor inquiry.[98] Since the parties[99] (and Chief Justice Roberts, in a dissent[100]) had all argued that the question should be settled with state law, it is reasonable to infer that Justice Kennedy's multi-factor inquiry sounded in federal law. Kennedy resorted to federal law because, if property rights tracked lot lines, there was a substantial "risk of gamesmanship by landowners, who might seek to alter the lines in anticipation of regulation that seems likely to affect only part of their property."[101] Understood that way, however, *Murr* does not institute a broad preference for federal law, and it does not undermine the creatures of state law view, either. Rather, as Kennedy's mention of "gamesmanship" suggests, *Murr* declares an anticircumvention principle to deal with opportunism by owners, just as *Tyler* enforces such a principle against states.

The other cases worth discussing accord with *Tyler*. And those cases deal with an issue as thorny as the constitutional status of surplus equity, namely the status of interest produced from money "pooled" coercively. Consider first *Webb's Fabulous Pharmacies v. Beckwith*.[102] *Webb's Fabulous Pharmacies* might be read as supporting the creatures of state law view. The case was decided just two years after *Penn Central*, the "polestar" regulatory takings case for almost 50 years now,[103] and it came at the end of a decade-long experiment by the Court in "procedural due process" doctrine[104] protecting the recipients of government benefits (especially government workers, and entitlement beneficiaries) from the revocation of those benefits.[105] To say whether plaintiffs had "property" for procedural due process purposes, the Court had warned in the 1972 case *Board of Regents v. Roth* that "[p]roperty

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95 Thomas W. Merrill, *Choice of Law in Takings Cases*, 8 BRIGHAM-KANNER PROP. RTS. J. 45, 61–66 (2019).

96 Murr v. Wisconsin, 582 U.S. 383 (2017).

97 Lucas v. South Carolina Coastal Council, 505 U.S. 1003 (1992).

98 *See Murr*, 582 U.S. at 397–402.

99 *See id.* at 398–99.

100 *See id.* at 411 (Roberts, C.J., dissenting).

101 *Id.* at 402.

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

103 Palazzolo v. Rhode Island, 533 U.S. 606, 633 (2001) (O'Connor, J., concurring).

104 *See* U.S. CONST. amend. XIV § 1 ("[N]or shall any State deprive any person of life, liberty, or property, without due process of law.").

105 *See, e.g.*, Mathews v. Eldridge, 424 U.S. 319 (1976); Goldberg v. Kelly, 397 U.S. 254 (1970).

interests . . . are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law."[106] *Webb's Fabulous Pharmacies* quoted that passage from *Roth* and brought its choice of law instructions into regulatory takings doctrine.[107]

But *Webb's Fabulous Pharmacies* did not endorse the creatures of state law view wholeheartedly. Although the decision is cryptic, it relied on an inchoate version of the choice of law principles *Tyler* just restated and applied. The Eckerd's drugstore chain bought out the Webb's Fabulous Pharmacies chain, which was insolvent and close to bankruptcy. To protect itself from post-acquisition debt litigation, Eckerd's submitted the purchase price to a Florida county court clerk's office and interpleaded the creditors of Webb's Fabulous Pharmacies.[108] The court clerk deposited Eckerd's purchase price in an interest-bearing account as required by state law.[109] The account produced more than $100,000 in interest, and the receiver administering the interpleader fund requested that the clerk deliver the interest to him to pass on to the creditors of Webb's Fabulous Pharmacy. But state law also specified that any interest produced from an interpleader fund was kept by the clerk overseeing the fund.[110] When the receiver brought an eminent domain claim for the fund's interest, the Florida state courts rejected it, arguing that "the statute takes only what it creates."[111]

Although the Court respected *Roth* and the creatures of state law view,[112] it applied an anticircumvention principle and then consulted some of the same sources as *Tyler* just did. The Court echoed *Brand*'s warnings about constitutional dead letters—"a State, by *ipse dixit*, may not transform private property without compensation."[113] The Court identified a "usual and general rule . . . that any interest on an interpleaded and deposited fund follows the principal."[114] Merrill calls *Webb's Fabulous Pharmacies* "one of the quirkiest" recent choice of law decisions on property, and he criticizes the case for not "establish[ing] that the creditors had a property right in the interest on the fund.[115] Merrill may not be convinced by the Court's legal argument. But the Court did make a legal argument, and Merrill is refusing to credit it as being a genuine argument. For the Court, the receiver and creditors had legal property rights to the interest in the fund (first) because general principles of

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106 408 U.S. 564, 577 (1972).

107 *See Webb's Fabulous Pharmacies*, 449 U.S. at 161; *see also* Ruckelshaus v. Monsanto Co., 467 U.S. 986, 1001 (1984).

108 *See Webb's Fabulous Pharmacies*, 449 U.S. at 156–57.

109 *See id.* at 157 (citing FLA. STAT. § 676.106(4) (1977)).

110 *See id.* at 156 (citing FLA. STAT. § 28.33 (1977)).

111 Beckwith v. Webb's Fabulous Pharmacies, Inc., 374 So.2d 951, 953 (Fla. 1979), *cited in Webb's Fabulous Pharmacies, Inc.*, 449 U.S. at 158.

112 *See supra* notes 104-107 and accompanying text.

113 *Id.* at 164.

114 *Id.* at 162.

115 Merrill, *supra* note 26, at 936, 937.

property law recognize interest as property belonging to the holder of the principal and (second) because those general principles were applied as law in many U.S. jurisdictions.[116] And the Court was drawing implicitly the conclusion it made explicit in *Tyler*—that general law could inform the substance of the federal right to private property.

Phillips v. Washington Legal Foundation[117] considered a takings challenge to another interest-bearing account, namely an Interest on Lawyers Trust Account ("IOLTA"). A Texas statute reserved the interest from state IOLTA accounts for foundations that provide legal services to low-income Texas residents; a Texas lawyer and a Texas client sued to recover the interest from their IOLTA accounts.[118] The Court concluded that the owners of the principal had constitutional private property pursuant to the "interest follows principal" rule.[119] The Court reached that conclusion on two overlapping grounds. The Court believed that the interest follows principal rule was good law in Texas.[120] But the supporters of the IOLTA program pointed to several Texas programs that did not follow the rule. The Court should have concluded, they argued, that the holders of the principal in IOLTA accounts were no more entitled to interest than were the participants in those other programs.[121] The Court answered that interest is private property for federal constitutional purposes, thanks to *Webb's Fabulous Pharmacies*.[122] And consistent with *Brand* and with *Webb's Fabulous Pharmacies*, the Court warned readers that "a state may not sidestep the Takings Clause by disavowing traditional property interests long recognized under state law."[123]

In short, on those (rare) occasions when the Court stops and explains its approach to choice of law in eminent domain disputes, it follows a consistent approach. The Court assumes that state law determines whether claimants have constitutional private property as long as (*Murr*) the claimants are not gaming state law and (*Webb's Fabulous Pharmacies*, *Phillips, Cedar Point Nurseries,* and now *Tyler*) state legislators and regulators are not trying to convert state rights into dead letters. If either of those conditions applies, then federal courts look to other sources of law. For claimant-side gamesmanship, they look (*Murr*) to all relevant circumstances. For corresponding state-side conduct, courts assume that the claimants' interest is federally-protected private property (*Kaiser Aetna* and *Cedar Point Nursery*) if it seems central or fundamental to property—meaning in particular a right of exclusive possession. If the interest is not so fundamental—*i.e.*, if it might be a non-

116 *See Webb's Fabulous Pharmacies*, 449 U.S. at 162–63 (citing sources applying California law, Idaho law, North Carolina law, Oregon law, Idaho law, interstitial principles under federal bankruptcy law, and general principles of law for multiparty and -state federal litigation).

117 Phillips v. Washington Legal Foundation, 524 U.S. 156 (1998).

118 *See id.* at 162–63.

119 *See id.* at 164.

120 *See id.* at 164–65 & sources cited n.5.

121 *See id.* at 167.

122 *See id.*

123 *Id.* at 167; *see id.* at 165–67.

possessory property right, but it might *not* be a property right in law—courts inquire whether the interest seems (*Webb's Fabulous Pharmacies*, *Phillips*, and now *Tyler*) treated as private property consistently across a wide range of sources including relevant Anglo-American history, general law, and the practice in the state whose law is under challenge.

IV. A MODEST CASE FOR *TYLER*

As the last Part showed, *Tyler* contributes to a broader framework for takings choice of law analyses, and that framework is indeed convoluted. But the framework makes considerable practical sense. And *Tyler*'s strategy makes considerable sense for the cases it covers. Those are cases in which a particular legal entitlement might be but isn't clearly "private property" under the federal Constitution—especially cases involving nonpossessory legal interests in resources.

In Part II, I reminded readers of a few well-known soundbites—"It is a constitution we are expounding," "I know it when I see it," and "a brooding omnipresence in the sky."[124] Those soundbites express challenges the Court needs to address in cases like *Webb's Fabulous Pharmacies*, *Phillips*, and now *Tyler*. In such cases, a state has modified a legal entitlement. The interest *might* constitute private property under the federal Constitution, specifically because it might constitute a nonpossessory property right. But the phrase "private property" is not self-explanatory. On one hand, it is settled, and it seems right, that "private property" covers some non-possessory interests. "Private property" encompasses not only rights of possession and exclusive control over resources but also a wide variety of *in rem* and irrevocable non-possessory rights in relation to the resources typically covered by property.[125] That is why (for example) easements[126] and mortgages[127] are both regarded as constitutional "private property." On the other hand, in neither case law nor scholarship is there a settled consensus about which non-possessory entitlements count as private property and which do not. And, legal systems might inter some entitlements that were regarded as property at an earlier time (like fees tail). Or, they might recognize as property entitlements that were not known when the Fifth Amendment was ratified (covenants running with the land, or property rights in confidential data). In these borderline cases, the phrase "private property" needs to be construed mindful that "it is a Constitution we are expounding"—*i.e.*, it needs to be construed in a sense supple enough to adapt to changing laws and social conditions. Since we lack a comprehensive account of what "private property" was originally meant to cover, however, judicial efforts to fill in the details of that phrase might devolve into

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124 *See supra* note 67.

125 *See* Eric R. Claeys, *Property, Concepts, and Functions*, 60 B.C. L. REV. 1, 62–64 (2019).

126 *See, e.g.*, Kaiser Aetna v. United States, 444 U.S. 164, 180 (1979).

127 *See, e.g.*, Louisville Joint Stock Land Bank v. Radford, 295 U.S. 555, 596-601 (1934).

"I know it when I see it" judgments. In context, it is reasonable for judges to look past their own spot judgments—and use that "brooding omnipresence in the sky" as an objective measure for whether a particular entitlement constitutes constitutional private property.

When a constitution declares a right, the clause protecting the right should be construed such that its substance stays the same over time and over all the jurisdictions in which it is supreme law. But one single right can be protected with many different institutional arrangements. And in a federal system, hard questions arise when to rely on the law of the relevant local jurisdiction and when on the law of the central jurisdiction. Neither local law nor central law will seem satisfying across the board; the tradeoffs between them cannot be resolved completely or happily.[128]

On one hand, if federal courts rely entirely on state law to determine what federal rights cover, they run the risk that states will circumvent the federal rights. The phrase "private property" has some core of meaning, and federal courts should ensure that that meaning is conserved. On the other hand, if federal courts totally disregard state law, they might create serious problems. Federal courts might misclassify as constitutional property entitlements that are not really such property. Property rights get institutionalized in many different specific forms. Different jurisdictions may recognize different forms—some future interests but not others, and so on with security interests, servitudes, and limited possessory rights. Different jurisdictions may also approach differently property in intangible resources (business information, or personal data). Which of those interests constitute private property and which not?

To answer that question, judges might try to work top-down. In other words, they might consult works of analytical or normative theory working out what property is and should consist of.[129] But works like those are not to everyone's tastes, and especially not to the tastes of many judges. Judges may want to know what "private property" originally meant in the Constitution. As William Stoebuck explained more than 50 years ago, however, "[d]own to the time when the United States and early state constitutions were adopted, the few writings there were on eminent domain spoke of the taking of 'property." Never, in these sources . . . was there any attempt to describe or define what was meant by 'property,' [and t]hat was basically the situation when the [F]ifth [A]mendment . . . referred to the taking of 'property.'"[130] Stoebuck's account makes the historical record seem less informative than it is. Lawyers

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128 The following account of the relevant tradeoffs draws on LOW ET AL., *supra* note 60, at 87–88; Merrill, *supra* note 26, at 942–954.

129 *See* ERIC R. CLAEYS, NATURAL PROPERTY RIGHTS 75–78, 105–24 (forthcoming 2025). *See also* J.W. HARRIS, PROPERTY AND JUSTICE (1996); ADAM MACLEOD, PROPERTY AND PRACTICAL REASON (2015); STEPHEN R. MUNZER, A THEORY OF PROPERTY (1990); J.E. PENNER, THE IDEA OF PROPERTY IN LAW (1997).

130 William B. Stoebuck, *A General Theory of Eminent Domain*, 47 WASH. L. REV. 553, 599–600 (1972).

and judges can look not only at Founding Era writings about eminent domain but also at the practice of property, and specifically at whether different specific legal interests were classified as property. Still, Stoebuck has a point: The historical record does not spell out clearly what "private property" meant when the Fifth Amendment was ratified or how different proprietary interests at common law or in statutes relate to the phrase "private property."

In that state of uncertainty, a lot can be said for having the federal law of private property slipstream on state law. State law fills in the details in the broad contours of a term of art like "private property." More often than not in practice—as it was in *Penn Central*[131]—it seems obvious that a government policy adversely affected "private property." Or, that a particular entitlement has never been regarded as private property in a state. In these cases, by consulting state law courts can secure private property appropriately and also respect federalism at the same time.

In unusual cases, however, state law might not seem a fair guide for the federal right. There may not be any clear state law. Some sudden and unforeseeable development might force a state to modify that law.[132] Or, there may be gamesmanship by private litigants or by states. But when courts apply anticircumvention doctrines like those of *Brand*, *Webb's Fabulous Pharmacies*, and *Tyler*, those doctrines might cause more problems than they solve. Federal courts might judge challenged state laws against what they *think* are the most basic elements of property law . . . but be wrong about those elements.

No strategy avoids all of these dangers perfectly in all cases, In *Tyler*, the Court consulted a wide range of evidence. Some of that evidence came from Minnesota's own law and practices regarding surplus equity—when state actors weren't foreclosing on real estate. But other evidence came from Anglo-American legal history, federal precedent, and early general law. If enough of those sources suggested that the entitlement in dispute was consistently being treated as property, the Court could then override the presumption that the entitlement was one that states could modify freely without triggering federal eminent domain protections. That broad approach seems sensible. In most cases, state law seems a reliable guide to claimants' constitutional entitlements. When it is, the concerning dangers are

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131 *See infra* notes 82–84 and accompanying text.

132 For example, air travel and transportation forced courts to consider more closely than they had before whether property rights in the air columns over lots of land were specified completely or only partly by the maxim *cuius est solum ejus usque ad coelum et ad inferos*. *See, e.g.*, United States v. Causby, 328 U.S. 256 (1946); Hinman v. Pacific Air Transp. Co., 84 F.2d 755 (9th Cir. 1936); STUART BANNER, WHO OWNS THE SKY? THE STRUGGLE TO CONTROL AIRSPACE FROM THE WRIGHT BROTHERS ON (2008); Eric R. Claeys, *On the Use and Abuse of Overflight-Column Doctrine*, 2 BRIGHAM-KANNER PROP. RTS. J. 61 (2013). In the nineteenth century, federal territorial acts made riparian rights the law of the land in western territories, which were arid and developed prior appropriation rights by local custom. *See, e.g.*, Coffin v. Left Hand Ditch Co., 6 Colo. 443 (1886); DAVID SCHORR, THE COLORADO DOCTRINE: WATER RIGHTS, CORPORATIONS, AND DISTRIBUTIVE JUSTICE ON THE AMERICAN FRONTIER (2012); *see* Eric R. Claeys, *supra* note 125, at 24–33.

overfederalization and mistakes by federal courts, and the response is for federal courts to consult state law.

In a few cases, it seems clear beyond doubt that the entitlement in question is central to private property—like the right of exclusive and permanent occupancy, at issue in *Kaiser Aetna*.[133] In those cases, Merrill's patterning approach seems appropriate.

In cases like *Webb's Fabulous Pharmacy*, *Phillips*, and *Tyler*, the entitlement at issue is not private property as clearly as the permanent right of exclusive occupancy is. And, the state in question classifies the entitlement as property in some contexts but not consistently in all contexts. In those cases, it is sensible for a federal court to look past the most immediately relevant law in the state, in concern that the state is trying to make a dead letter of federal property rights. To hedge against the dangers of overfederalizing federal property, however, a court can consult other legal sources. Consistent with *Brand*, a federal court could cross-check the most relevant state law against other law in the same state—especially state law specifying how the entitlement is treated as between private parties. But a court can also inquire whether the entitlement has consistently been treated as property in sources probative of the general law. The more sources the court checks, the more confident it can be that it is filling in the substance of the federal right and not relying solely on its own private speculations.[134]

Those broad categories leave borderline cases—like *Cedar Point Nursery*, and the regulations forcing companies to let unions protest on company premises.[135] But a sensible approach cannot eliminate hard cases, it can only minimize them.

To date, however, most of the scholarly commentary on choice of law and eminent domain supports the creatures of state law view. That commentary is too sanguine about state law and too casual about what *Brand* called the "dead letter" problem. Consider a similar argument raised by a state-side litigant, in *Dolan v. City of Tigard*.[136] *Dolan* was an early case recognizing the doctrine of "exactions"—the branch of unconstitutional-conditions doctrine covering exercises of the eminent domain power when governments bargain too hard to get some land from owners who want permissions to use other land.[137] The City of Tigard argued that, assuming that the Constitution

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133 *See supra* notes 48–51 and accompanying text.

134 Different approaches to choice of law may rely on each of these sources to different degrees, depending on whether they rely on originalist or non-originalist premises. Founding and pre-Founding history will matter much more in originalist approaches, and federal precedent and state practice less so, than in non-originalist approaches. And in originalist approaches, Founding and pre-Founding common law will matter more than later common law. In originalist approaches, however, sources released after the Founding may still be relevant if and when "private property" seems underdetermined in relation to a particular legal issue and the relevant sources help fill in the details left underdetermined by the constitutional term of art.

135 *See supra* notes 88–89 and accompanying text.

136 Dolan v. City of Tigard, 512 U.S. 374 (1994).

137 *See* Koontz v. St. John's River Water Mgmt. Co., 570 U.S. 595, 603–06 (2013).

did enforce some sort of exactions doctrine, the doctrine did not apply to general business regulations. On behalf of the Court, however, Chief Justice William Rehnquist reminded readers that business regulations could violate constitutional search-and-seizure and free-speech protections. Rehnquist saw "no reason why the Takings Clause of the Fifth Amendment, as much a part of the Bill of Rights as the First Amendment or Fourth Amendment, should be relegated to the status of a poor relation in these comparable circumstances."[138]

What Rehnquist said of efforts to limit the exactions doctrine applies with equal force to the main arguments in scholarship for the creatures of state law. None of those arguments consider expressly the problem that arose (under the Contracts Clause) in *Brand* or (under the Takings Clause) in cases from *Webb's Fabulous Pharmacies* to *Tyler*—that state legislation, regulations, or judicial decisions might convert what is in substance a right of private property into a dead letter. Read charitably, none of these scholarly arguments deny that federal courts should look past the specific state law at issue when states are trying to defeat the substance of property rights. If I am misreading those scholars, however—*i.e.*, if they mean to deny that eminent domain law has an anticircumvention principle similar to *Brand*'s—they owe readers explanations why (in *Dolan*'s words) they are not converting the Takings Clause into a poor constitutional relation.

According to Bradley Karkainnen, for example, "[i]n our post-*Erie v. Tompkins*[139] world, the ordinary legal presumption is that property law—like the law of tort and contract—is principally a matter of state law."[140] In substance, this is the warning about the general law being an "omnipresence in the sky," "brooding" over federal takings law.[141] In context, however, the warning is misplaced. *Erie* addresses choice of law issues in federal diversity cases. We can have a debate about whether federal courts should rely on general law in diversity jurisdiction. *Tyler* is not an appropriate venue for that debate. *Tyler* implicated a federal constitutional right. As *Brand* shows, when constitutional rights are in play, federal courts determine the scope of those rights with state law subject to an anticircumvention principle. *Tyler* is the latest and most thorough case applying the same presumption and exception to eminent domain litigation. If Karkkainen means to say *Erie Railroad* should take priority over *Brand* in eminent domain choice of law determinations, he seems to make a poor relation of the Takings Clause, and he should explain why the Clause deserves that status.

According to Sterk, where "the First Amendment and the Equal Protection Clause provide federal constitutional standards against which state and local enactments are to be measured, the Takings Clause furnishes no comparable constitutional baseline [*and*] protects primarily against *change* in

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138 *Dolan,* 512 U.S. at 392.

139 Erie v. Tompkins, 304 U.S. 64, 78–80 (1938).

140 Karkkainen, *supra* note 24, at 833.

141 *See supra* note 67 and accompanying text.

background state law."[142] As Part II showed, though, when federal courts consult state law to determine federal rights, they do so subject to an anticircumvention principle like *Brand*'s. If Sterk meant to deny that the *Brand* principle applies in eminent domain litigation, that would be another argument that the Clause is a poor relation.

Frank Michelman argues that judicial conservatives border on hypocrisy when they support robust eminent domain protections, because judicial conservatives are supposed to be committed to federalism.[143] But it is principled and not hypocritical to respect federalism and constitutional property rights each when the Constitution calls for doing so. Courts can respect federalism generally as a general matter. They should disregard federalism and protect property rights when the Fifth and Fourteenth Amendments entitle proprietors to federal protection. Even then, though, courts can respect federalism by determining property rights consistent with state law—except when state law does not seem to specify the relevant rights reliably. There is no hypocrisy in such an approach, and *Brand*'s status and general applicability prove as much. If the if the argument were that the Takings Clause should not be covered by the rule applied in *Brand* in respect for federalism, that would be another argument that the Takings Clause is a poor relation.

CONCLUSION

Four perspectives on choice of law are familiar from eminent domain litigation: Rights of private property are wholly creatures of state law; rights of private property are determined by federal law; constitutional property rights get their content from common law; and constitutional property rights sound in state law but are subject to some open-ended safety valve.

All four of those perspectives are partly right. In eminent domain litigation, rights of private property under the Takings Clause usually are determined in reference to state law. But the choice for state law is subject to the same anticircumvention principle as the one that *Brand* applied to the Contracts Clause. And when that anticircumvention principle applies, federal courts can respond in two ways. If the entitlement at issue seems fundamental to private property, they can rely on federal precedent confirming that the right is a federally-protected right. If it is not clear whether the entitlement at issue is private property, however, federal courts can consult the "common law" understood in the broad sense relied on in *Tyler*—relevant federal precedent, relevant Anglo-American property history, the general law of property in the several states, and a wide-lens look at the law of the state being sued.

That understanding is perfectly sensible as a matter of general principles of law from choice of law, federal courts, and federal constitutional law. *Tyler v. Hennepin County* made that understanding clearer going forward than

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142 Sterk, *supra* note 24, at 206.

143 *See* Michelman, *supra* note 24, at 302–04.

any eminent domain case by the Supreme Court in recent memory. *Tyler* made clearer than any other recent case has what sources of law federal courts may consult to cross-check unreliable state law. *Tyler*'s choice of law holding explains and makes sense of the Court's practice in choice of law eminent cases. And *Tyler*'s choice of law strategy also stands up well to possible scholarly criticism. That strategy balances the relevant federalism policies fairly. It relies on state law to determine property rights when it can. It lets federal courts cross-check state law against other relevant sources of property law when they must.