LOUISIANA STATE LAW INSTITUTE

MEETING OF THE COUNCIL

March 15, 2024

Friday, March 15, 2024

Persons Present:

Barham, Rebecca
Belanger, Kathryn (Katie)
Breard, L. Kent
Breaux, Alexander M.
Byers, John Paul "Beau", III
Caldwell, N. Kordell
Castille, Melissa
Crochet, Anne J.
Cromwell, L. David
Forrester, William R., Jr.
Girouard, Destiny F.
Hall, Senae D.
Hamilton, Leo C.
Hampton, Bruce
Hawthorne, George "Trippe"
Hayes, Thomas M., III
Hogan, Lila T.
Holdridge, Guy
Koch, Patricia E.
Kunkel, Nick
Lee, Amy Allums
Lovett, John A.
Manning, C. Wendell
Melerine, Michael
Mengis, Joseph W.
Miller, Gregory A.
Morel, Stephen
Philips, Harry "Skip", Jr.
Price, Donald W.
Procell, Christopher A.
Ramsey, Regina
Sklamba, Stephen G.
Smith, Baylee M.
Smith, Kenya J.H.
Sossamon, Meera U.
Stuckey, James A.
Talley, Susan G.
Thibaut, Martha A.
Thibeaux, Robert P.
Tucker, Zelda W.
Uschold, Jim
Waller, Mallory C.
Weems, Charles S., III
Ziober, John David

President L. David Cromwell called the March Council meeting to order at 10:00 a.m. on Friday, March 15, 2024 at the Lod Cook Alumni Center in Baton Rouge. After asking Council members to briefly introduce themselves, the President called on Mr. Charles S. Weems, III, Reporter of the Constitutional Laws Committee, to begin his presentation of materials.

Constitutional Laws Committee

Mr. Weems began his presentation by reminding the Council of the Law Institute's duty pursuant to R.S. 24:204(A)(10) "[t]o make recommendations to the legislature on a biennial basis for the repeal, removal or revision of provisions of law that have been declared unconstitutional by final and definitive court judgment." The Reporter noted that a draft of the Law Institute's fifth report on this topic would be considered by the Council today, and after reviewing the structure of the report and content of the introduction, a motion was made and seconded to adopt these introductory pages as presented. The motion passed with no objection, and Mr. Weems then directed the Council to the report's table of contents and to consider the provisions that were not included in previous reports, followed by the provisions that were included in previous reports but have not been addressed by the legislature.

Turning to page 1 of the draft report, the Council first considered Code of Criminal Procedure Article 930.10 concerning post conviction plea agreements, which had been declared unconstitutional by the Louisiana Supreme Court in *State v. Lee* as an infringement on the separation of powers doctrine and the governor's exclusive pardon power. The Reporter then explained that this provision and decision had also been reviewed by the Law Institute's Code of Criminal Procedure Committee, and that although that group had considered whether to amend Paragraph B to remove the word "conviction," they had ultimately agreed to take a "wait and see" approach after discussion concerning the language of the case providing that nothing prevents district attorneys, in their broad discretion, from cooperating in a collateral challenge to the conviction and sentence. As a result, the Constitutional Laws Committee agreed to defer making a formal recommendation pending further substantive study by the Code of Criminal Procedure Committee. A motion was made and seconded to adopt the recommendation on page 2 as presented, and the motion passed with no objection.

Mr. Weems then directed the Council to R.S. 14:106.1, on page 3 of the report, concerning the promotion of obscene devices, which had been declared unconstitutional by the Louisiana Supreme Court in *State v. Brenan* as the suppression of all obscene devices without the procedural safeguards required by *State v. Miller* of an evaluation mechanism, an adversarial process, and exceptions for certain entities. As a result, the Committee recommends amending the provision to incorporate these procedural safeguards similar to what has been done in R.S. 14:106 or repealing the provision in its entirety. A motion was made and seconded to adopt the recommendation on page 4 as presented, and the motion passed with no objection.

Next, the Council considered R.S. 42:1113, on page 5 of the report, concerning prohibited contractual arrangements for members of boards and commissions who are "in any way interested in" the contract, which was declared unconstitutional by the Louisiana Supreme Court in *Cartesian Company v. Division of Administrative Law Ethics Adjudicatory Board Panel A* as overly broad and vague. Pursuant to the Louisiana Supreme Court's suggestion to strike this language from Subsection B of the statute, the Committee recommends amending the provision to delete "or be in any way interested in" as reflected on line 40 of page 5. A motion was made and seconded to adopt this recommendation as presented, and the motion passed with no objection.

Turning to R.S. 9:2800.54, on page 6 of the report and in the handout distributed to the Council, Mr. Weems explained that this provision and the substantive inadequate warning provision in R.S. 9:2800.57 were found by the Second Circuit in *Green v. BDI Pharmaceuticals* to be preempted because they would impose upon manufacturers of nonprescription drugs additional and more burdensome labeling requirements than prescribed by the federal Food, Drug, and Cosmetic Act. The Reporter noted that the Committee's initial recommendation with respect to this provision had been updated to include R.S. 9:2800.57 in addition to R.S. 9:2800.54, and a motion was made and seconded to adopt the handout version of the discussion and recommendation, which passed with no objection.

Next, the Reporter asked the Council to consider the section of the report containing provisions that were previously included but had not yet been addressed by the legislature, noting that he would only be reviewing the provisions that had been newly added to this section or updated in some way, but would then seek approval of the remaining provisions *in globo*. With that introduction, he directed the Council's attention to Children's Code Article 305, on page 16 of the report, and discrepancy between this provision and the Constitution with respect to whether a juvenile who commits a first offense aggravated battery with a firearm can be tried as an adult. Mr. Weems then explained that the Note to the Legislature on page 18 acknowledges that the legislature had amended this provision since the issuance of the last report but concludes that the constitutional infirmity has not been resolved and, therefore, the Law Institute's recommendation remains unchanged. The staff attorney then noted that a bill had been introduced during the 2024 Regular Session – House Bill No. 203 by Representative Villio – would resolve this issue by providing that the legislature can specify which crimes to which special juvenile procedures would not apply. A motion was then made and seconded to adopt the Note to the Legislature and recommendation on pages 18 and 19 as presented, and the motion passed with no objection.

Mr. Weems then directed the Council's attention to R.S. 14:91.5, on page 30 of the report, concerning the unlawful use of a social networking website, and specifically the Note to the Legislature on pages 32 and 33 explaining that since the issuance of the Law Institute's last report, the Second Circuit decided *State v. McMahon*, which contradicts the Fourth Circuit's decision in *State v. Mabens* with respect to the constitutionality of this provision. Whereas the Fourth Circuit had determined that R.S. 14:91.5 was unconstitutional under the United States Supreme Court's decision in *Packingham v.*

North Carolina, the Fourth Circuit determined that this provision differs from the North Carolina statute at issue in *Packingham* because it is directed toward a narrower group of registered sex offenders, contains additional exclusions to the definition of social networking website, and does not prevent access to social networking websites but rather use of these websites. As a result, the Fourth Circuit found that Louisiana's statute is more narrowly tailored than the North Carolina statute, does not violate the First Amendment, and is therefore constitutional. Further, the Louisiana Supreme Court denied writs in this case, but the Chief Justice noted that he would grant to resolve the perceived circuit split regarding the constitutionality of R.S. 14:91.5. In light of these developments, the Committee updated its recommendation to suggest revising the validity note to recognize the Second Circuit's decision in *State v. McMahon*. A motion was made and seconded to adopt the updated recommendation on page 33, and after the President suggested adding a note concerning the writ denial in the citation on line 34 of that page, the motion passed with no objection.

After a brief discussion concerning submitting a list of these suggestions concerning validity notes to the publishers and to the legislature if the publishers do not comply, the Reporter then noted that the remaining provisions highlighted in this section of the report – R.S. 40:1321 on page 50, R.S. 45:1163 on page 56, and R.S. 47:301 on page 61 – were simply being recategorized as not having been addressed by the legislature since the issuance of the Law Institute's last report. A motion was made and seconded to adopt this characterization for all three of these provisions, as well as the resubmission of all of the provisions in this section to the legislature, and the motion passed with no objection.

Next, Mr. Weems directed the Council's attention to the report's appendix, which contains all of the provisions that have been addressed by the legislature, and noted that he would be reviewing the provisions that were newly added to this section since the issuance of the Law Institute's last report but would then ask for approval of all of the provisions in the appendix. Turning to Article I, Section 10 of the Constitution, on page A-2 of the appendix, concerning the right to vote, the Reporter explained that the Law Institute's recommendation had been followed and House Concurrent Resolution No. 51 of the 2022 Regular Session had directed the Law Institute to direct the printers to cease printing the unconstitutionally adopted language, which they had done. After one Council member noted that "52" should be changed to "51" on line 37 of page A-5, a motion was made and seconded to adopt the inclusion of this provision in the appendix and the Note to the Legislature on page A-5 as amended, which passed with no objection.

Turning the page, the Reporter asked the Council to consider Article IX, Section 9 of the Constitution, on page A-6 of the appendix, concerning the First Use Tax Trust Fund, which had been declared unconstitutional and repealed years ago. Mr. Weems explained that in 2023, a proposal to repeal this section of the Constitution had been adopted by the legislature and submitted to and approved by the voters, so as a result, this provision had been moved to the appendix. A motion was made and seconded to adopt this action and the Note to the Legislature on page A-8 as presented, and the motion passed with no objection.

Next, Mr. Weems directed the Council to Code of Civil Procedure Article 3662, on page A-9 of the appendix, and its liberative prescriptive period that was declared to be unconstitutional as applied to the state. The Reporter explained that this issue had been addressed in the Law Institute's revision on petitory and possessory actions, which was enacted by the legislature in 2023, and as a result, the constitutional infirmity had been resolved. A motion was made and seconded to adopt the inclusion of this provision in the appendix as well as the Note to the Legislature on page A-11 as presented, and the motion passed with no objection.

Turning to R.S. 14:87, on page A-39 of the appendix, concerning abortion, Mr. Weems explained that this provision was repealed in its entirety during the 2022 Regular Session, and as a result, had been included in the appendix. A motion was made and seconded to adopt this action and the Note to the Legislature on page A-42 as presented, and the motion passed with no objection. Similarly, with respect to R.S. 47:33 on page A-51 of the appendix concerning credit for taxes paid in other states, the unconstitutional portion of this provision, Paragraph (A)(4), was deleted by the legislature during the 2023 Regular Session. As a result, the Committee moved this provision to the appendix, and a motion was made and seconded to adopt this action and the Note to the Legislature on page A-55 as presented, which passed with no objection.

Finally, Mr. Weems directed the Council's attention to R.S. 47:337.102, on page A-56 of the appendix, concerning the funding mechanism for the Louisiana Uniform Local Sales Tax Board, which was held unconstitutional but later changed by the board and legislatively amended to reflect those changes in 2022 and 2023. As a result, it appears that the legislature intended to remedy the constitutional deficiency, and a motion was made and seconded to adopt the Committee's action to include this provision in the appendix as well as the Note to the Legislature, on page A-58. After the President suggested updating the citation on line 9 of page A-57, which the Reporter and staff attorney accepted, the motion passed with no objection, as did the motion to adopt the remaining provisions in the appendix.

Having reached the end of the report and appendix, Mr. Weems concluded his presentation, and the President called on Ms. Mallory Waller, the Law Institute's Coordinator of Research, to provide an update on the Law Institute's proposed legislation for the 2024 Regular Session.

Legislative Update

Ms. Waller began her presentation by noting that the Law Institute had introduced 16 bills during the 2024 Regular Session – the most since COVID-19 and even in the years prior to the pandemic – and explained that staff would be circulating a chart with updates periodically throughout the Session. She noted that several of the Law Institute's bills had already been heard in Committee, including factory-built homes, limited continuing tutorship, appointment of interpreters, and small successions, and two more bills were scheduled to be heard next week – Children's Code continuous revisions and the bill on expert testimony. After reviewing the remaining bills and their legislative committee assignments, Ms. Waller reminded the Council that links to all of these bills were available on the Law Institute's website and that a late May or early June meeting of the Council may be scheduled to review what is ultimately adopted by the legislature. Finally, Ms. Waller announced the tentative Fall 2024 Council dates, which include two one-day meetings and two two-day meetings and will take place at the Louisiana Supreme Court in New Orleans.

Ms. Waller then concluded her presentation, and the President called on Mr. Stephen Sklamba, Reporter of the Tax Sales Committee, to begin his presentation of materials.

Tax Sales Committee

Mr. Sklamba began by explaining that the Committee's presentation pertained to its draft report to the legislature, of which the Committee sought Council adoption. Mr. Sklamba noted that the report contained the Committee's ultimate recommendations regarding the revision of the Louisiana law of tax sales and represented the culmination of many years of work. He then provided an overview of those years of work, emphasizing the many twists and turns taken by the jurisprudential landscape in that period:

The Committee was formed and in 2014 convened in response to 2012 and 2013 legislative resolutions. Agreeing that the issues identified in the resolutions stemmed largely from misapplication of the 2008 revision (which had no occasion to be jurisprudentially tested until 2011) – and would thus be rectified as a matter of course through increased familiarity with and understanding of the revision – the Committee initially resolved to draft largely clarificatory revisions that would conform existing constitutional language to the substance and verbiage of the statutes enacted in 2008. The resulting proposal was presented to the Council in the fall of 2016 and was adopted (with certain modifications) in its near entirety before the project was ultimately recommitted with instructions that the detail the proposal would have added to the Constitution instead be moved to the Revised Statutes, and a new, more generalized constitutional amendment be drafted. In the ensuing months, the Louisiana Supreme Court granted writ in a case that appeared primed to resolve the constitutional question on which the project was centered, and the Committee therefore elected to pause its efforts to await the court's decision, lest its drafting efforts be rendered moot or otherwise inapposite by virtue of the decision. The decision, however, ultimately sidestepped the constitutional question and resolved the matter on other, more limited, less helpful (to the constitutional certainty of the regime) grounds. Upon reconvening in late 2017, the Committee thereafter obtained Council approval of a new constitutional amendment in early 2019 and of the bulk of the corresponding statutory revisions over the fall and winter of 2019. The Committee's progress was then interrupted again by the COVID-19 pandemic in 2020 and once more, subsequently, by the Reporter's illness in 2020 and 2021. Notwithstanding these delays and intervening substantive complications that necessitated a rewrite of much of the already approved statutory revision, the Committee's efforts across 2021 and 2022 brought the project into its final stages in early 2023, with expectations that the Committee would return to the Council with its final proposal in the fall. Before this could happen, however, the U.S. Supreme Court issued a landmark decision in *Tyler v. Hennepin County*, radically altering the legal landscape with respect to tax sales and thereby threatening the constitutional viability of both the Committee's proposal and many states' existing tax sales laws. Accordingly, Mr. Sklamba concluded, the Committee had spent the past nine months working to address the *Tyler* holding – a process that ultimately produced the report proposed for adoption at the day's meeting.

The Reporter then provided a brief overview of *Tyler v. Hennepin County*. Noting that the case centered on Minnesota's tax sales law, he explained that the statutory scheme at issue afforded tax debtors a certain period of delinquency before "absolute title" to the tax-indebted property would be forfeited to the relevant municipality. After this forfeiture, the law granted the municipality the option to either keep and use the property or sell the property and retain the proceeds. In *Tyler*, Hennepin County had seized and sold a tax debtor's condominium for the satisfaction of a $15,000 tax debt; the property sold for $40,000, and the county had ultimately retained the full $40,000 sale price obtained at auction. The taxpayer argued that the county had violated the Takings Clause of the U.S. Constitution by retaining the $25,000 in sale proceeds that remained after the $15,000 debt had been satisfied. Conversely, the county maintained that, by failing to pay the delinquent taxes even after constitutionally sufficient notice, the debtor had forfeited all interest in the property and therefore had no interest in the sale proceeds. The case, according to the Reporter, hinged on whether a tax debtor has a property interest in the surplus proceeds of a tax-foreclosure sale that remain after satisfaction of the debt. The Supreme Court answered this question in the affirmative, thus finding that the county's retention of the $25,000 in surplus proceeds violated the Takings Clause. The Reporter added that the Committee was largely of the opinion that the existence of the debtor's interest in the surplus proceeds necessarily implied the existence of a corresponding interest in the surplus "equity" value of the tax-indebted property itself, prior to or absent any ultimate foreclosure sale. For this reason, the Committee had reassessed its draft revisions and, given the persistence of uncertainty and disagreement regarding various potential alternative courses of action, ultimately decided to make its recommendations to the legislature in the form of a report rather than proposed legislation. Mr. Sklamba noted that the Law Institute staff attorney for the Tax Sales Committee, Mr. Nick Kunkel, had undertaken the task of preparing this report and would therefore be the one to provide an overview of its contents and the Committee's thought process in composing it.

Taking the podium, Mr. Kunkel thanked the Reporter and greeted the Council. He began with an overview of the Committee's progress prior to *Tyler*, its discussions in the wake of *Tyler*, and the decisions and disagreements those discussions produced. Adding to the information relayed by the Reporter, Mr. Kunkel noted that, prior to the decision in *Tyler*, the Committee had been working to complete a draft revision that would have implemented a "strict foreclosure" procedure (which the Council had adopted in principle) for delinquent tax collection – a model that, as conceived by the Committee, operated as follows: Upon purchasing a tax certificate at tax sale, the certificate holder's initiation of the enforcement process was forestalled for the pendency of an initial tolling period, during which the debtor would be entitled to redeem by paying the debt at any time; after the tolling period's expiration, the certificate holder could bring suit to enforce the certificate; once the tax debtor and any other relevant parties had been served in the suit, the redemptive period would remain open for one additional year; if the debt was not satisfied prior to the expiration of this period, the certificate holder was entitled to judgment declaring it the owner of the property and terminating the debtor's ownership. The staff attorney explained that the Committee had coalesced around this model specifically for the cleanliness and finality with which it addressed the various issues identified in the legislative resolutions: By requiring service and judgment of court as conditions precedent to the termination of the debtor's right of redemption (and consequent forfeiture of the property), it eliminated questions of potential unconstitutionality and annulment for deficient notice and due process, thereby clarifying and enhancing the insurability and merchantability of title to tax sale properties, among other effects. While the ultimate consequence to a tax debtor under this system would in some cases be more severe than under current law, the Committee reasoned that the potential severity of outcome would be offset by the enhanced noticing requirements, which would better protect the debtor against such an outcome. After the *Tyler* decision, however, the Committee (eventually) agreed that such a system – though employed in some form by around twenty states at the time – would run afoul of the Takings Clause in scenarios where the value of the tax-indebted property forfeited by the debtor exceeded the value of the debt.

Mr. Kunkel continued: Upon reaching this conclusion, the Committee set out to identify alternative systems that would adhere to the strictures of both the Due Process and Takings clauses. The Committee's Takings Clause research identified two broad paths towards constitutionality: A statute could either allow a Fifth Amendment "taking" to occur but mandate appropriate (that is, "just") compensation, or the system could prevent the occurrence of a taking in the first place. The "just compensation" standard – which equates to fair market value, or the likely price obtained by a willing seller from a willing buyer in a voluntary transaction – rendered impractical any system under which the property interest "taken" was the entire underlying property itself; in such a case, the party doing the "taking" would effectively be required to purchase the property outright as though it were listed on the open market. Accordingly, the Committee concluded that achieving both constitutional *and* practical viability required some mechanism that would ensure that the property taken was limited to "the least amount of property" necessary to satisfy the debt – in other words, a mechanism by which to establish the value of the underlying property and thereby ensure that the value of the "property" forfeited by the debtor would not exceed the value of the debt. The two primary alternatives considered by the Committee were (1) a "pure lien" system, under which the bundle of rights acquired at tax sale would be substantively equivalent to an ordinary mortgage, lien, or privilege right, entitling the holder (upon default) to force the sale of the property and have the proceeds of the sale applied to the satisfaction of the secured debt in preference to other claims (after which the debtor would be entitled to any remaining proceeds); and (2) a "fractional ownership" system – the system employed by current Louisiana law – whereby the tax sale would convey an inchoate ownership right equal to the fractional ownership share bid by the tax sale purchaser, a right that would become full-fledged ownership upon default. Under the lien system, the ultimate judicial sale served as the mechanism for valuing the "property" taken, converting nonfungible property (real estate) into fungible property (money), so that the secured party could recover ("take") precisely as much "property" (money) as necessary to satisfy the debt, and no more. Under the fractional-ownership model, this function – of "setting equal" the value of the property taken with the value of the debt – was in theory served by the bidding process at the initial tax sale, with bidders reducing the amount of property (fractional ownership of the property) that would be forfeited until its value was commensurate with the debt.

Mr. Kunkel emphasized, however, that the constitutional efficacy of this latter mechanism was less certain in practice than in principle: Because the modern real-estate ecosystem does not readily allow for the *actual physical division* of properties into fractional portions – and because, therefore, the "least amount" of property must be determined by sequential reductions to the fractional share of *ownership in indivision* to be conveyed, as opposed to reductions in actual physical acreage to be conveyed, as was the case when the system was initially conceived – tax sale purchasers under such a system were effectively required, in order to realize the value of their investment, to take the additional step of partitioning the property by licitation. Highlighting the potential constitutional pitfalls of such a system, Mr. Kunkel characterized the partition sale as providing a superseding determination of the property's value (and thus of the "least amount of property necessary" to satisfy the debt). He reasoned that the partition sale thereby called into question the adequacy of the initial determination of value as a constitutional safeguard. By way of illustration, he gave the following hypothetical: A tax sale purchaser holds a fifty-percent tax certificate that "secures" a tax debt amounting, at the absolute terminus of the process (i.e. including any amounts awarded in the quiet-title suit), to $15,000. Judgment is rendered quieting title to the fifty-percent interest and ordering partition, and the property sells for $100,000. Reminding the Council of *Tyler*'s holding – that a tax debtor has a property interest in the surplus proceeds of a tax-foreclosure sale – Mr. Kunkel inquired rhetorically as to the amount of "surplus proceeds" generated in the present hypothetical. He wagered that the near universal answer would be $85,000: that is, the quantity by which the $100,000 sale price exceeded the $15,000 debt. Nevertheless, Mr. Kunkel explained, Louisiana law would dictate the tax debtor's recovery of only fifty percent, or $50,000, of the total $100,000 sale price in this case – thereby effecting an uncompensated "taking" of the remaining $35,000, in which *Tyler* confirmed that the tax debtor had a vested property interest. Mr. Kunkel further called upon Council members, insofar as this hypothetical had failed to convince them of the potential unconstitutionality of current Louisiana law, to consider instead a scenario with the same $15,000 debt but a winning bid of 100% and an ultimate partition-sale price of $40,000; under these facts, he emphasized, Louisiana law dictated *precisely* the outcome held unconstitutional by the Supreme Court in *Tyler*: the foreclosing party's retention of the full $40,000 sale price in satisfaction of a $15,000 tax debt.

The staff attorney next addressed what he characterized as the primary counterargument to this line of logic, namely that *Tyler* was inapplicable because the relevant "property" for a Takings Clause analysis of Louisiana tax sales was not the proceeds of the partition sale but rather the (undivided interest in the) property itself. In response to this argument, the staff attorney first reminded the Council that the statutory procedure at issue in *Tyler* – in the same way Louisiana law contemplates that the conveyance of the (undivided interest in the) property to the certificate holder occurs prior to partition and the consequent distribution of proceeds – provided for the forfeiture of "absolute title" to the municipality *before* any sale could take place. He further emphasized that the interval in *Tyler* between the transfer of absolute title to the municipality and the ultimate sale of the property and retention of the proceeds was in fact much *greater* than the corresponding interval (between judgment quieting title and ordering partition and the ultimate partition) typically was under Louisiana law; thus, if the tax debtor retained a property interest in the surplus proceeds of the ultimate sale under the facts of *Tyler* – such that the relevant "property" for the purposes of Takings Clause analysis was the proceeds, as the Supreme Court held – it followed *a fortiori* that the same analysis would apply and the same result would obtain under Louisiana law. The staff attorney added that *even if* this first counterargument to the counterargument was unsuccessful, the counterargument nevertheless fell short of establishing the constitutionality of the "fractional ownership" system; instead, Takings Clause analysis must proceed. He explained: If the time between the quiet-title judgment and the actual partition of the property differentiated these facts from *Tyler* such that the relevant Takings Clause forfeiture was the debtor's forfeiture of the fractional interest on which the tax sale purchaser quieted title, the Takings Clause demanded that the value of this fractional interest be compared to the debt, and, if the value of the former exceeded the latter – that is, if more than "the least amount of property necessary to satisfy the debt" was taken – a taking had occurred and just compensation was required. The staff attorney reminded the Council that the relevant value, here, was the fair market value of the property taken at the time it was taken.

Rhetorically, he then queried which of the two potential "valuation events" served as stronger evidence of the value of the property at the time it was taken: the initial tax sale, conducted a minimum of three years prior? Or the partition sale, conducted as soon following the quieting of title as practicality permitted? The staff attorney reasoned that, even ignoring questions of methodology, the partition sale price clearly conformed more closely to the jurisprudential measure of value in this context, by virtue of the fact that it occurred much closer in time to the actual taking. Moreover, he emphasized that the methodology favored this conclusion as well: Whereas bidders at a tax sale compete to purchase a debt, typically with little expectation of ever becoming the owner of the underlying property – the value of the underlying property in such cases therefore representing a secondary consideration, if a consideration at all, in formulating a bid – bidders at the *public auction of the property* are competing to purchase, directly, the property itself. He wagered that almost all would agree that the (applicable fraction of the) partition sale price thus stood as a more accurate representation of the value of the (fraction of the) property taken at the time of the taking than did the winning bid at the tax sale three-plus years prior. Thus, if the amount of proceeds attributable to the undivided ownership interest taken exceeded the value of the debt, the process would produce an unconstitutional taking.

Notwithstanding this analysis, Mr. Kunkel pointed out that the Committee was not unanimous in its opinion regarding the constitutionality of Louisiana's current "fractional ownership" system: While the Committee's majority agreed, for the previously proffered reasons, that the system was constitutionally questionable, at least one Committee member maintained that the system was constitutionally sound, or at least that the concerns should be viewed as minimal. Mr. Kunkel further noted that industry practitioners representing U.S. Assets, LLC, a large multi-state tax sale purchaser, had attended and participated in the Committee's meetings and had expressed strong skepticism for the aforementioned logic, disagreeing with the notion that any cause for constitutional concern existed in the cases described. Mr. Kunkel explained, however, that unanimous agreement as to the unconstitutionality of the system did exist in another context – namely, the context of adjudicated properties. He explained that a property was "adjudicated" under current Louisiana law where there were no bidders at tax sale; after expiration of the redemptive period (and proper notice), statute allowed the political subdivision to sell the property, either publicly or privately, or to retain or even donate the property. Mr. Kunkel highlighted scenarios in which an adjudicated property sold for a price greater than the tax debt as violating the Takings Clause: In such a case, the political subdivision seized and sold property worth more than the tax debt and retained the surplus proceeds of the sale, without recourse to the tax debtor, thereby effecting an unconstitutional "taking". Although he posited that these circumstances differed from those previously mentioned only in the conspicuousness of the constitutional defect, not in its existence or root cause, he nevertheless reiterated that the Committee's unanimity of opinion regarding the unconstitutionality of the system in the adjudicated-properties context did not translate to unanimity of opinion regarding the system's (un)constitutionality in other contexts.

Before moving on from the constitutional question, Mr. Kunkel mentioned one final concern discussed by the Committee regarding the current "fractional ownership" tax sales system. Noting that the issue stemmed not from the statutory scheme itself but from the peculiar application – or, arguably, misapplication – of the scheme by Louisiana courts, he pointed to the manner in which courts distributed the proceeds from the partition sale as potentially offensive to the Takings Clause. Mr. Kunkel explained that Louisiana courts typically awarded as costs of sale – that is, prior to distribution of the remaining proceeds according to the fractional ownership – the total amount of delinquent taxes paid by the tax sale purchaser on behalf of the debtor. According to Mr. Kunkel, the inclusion of the first year's delinquent taxes in particular – the first year's taxes serving as the price paid at tax sale – in the calculation of reimbursable costs was constitutionally problematic. Acknowledging that *subsequent* years' taxes were appropriately taxed as costs, he reminded the Council that the argument *for* the constitutionality of the "fractional ownership" model depended entirely on the notion that the tax sale price operated in essence as a market-based purchase price for the (fractional undivided interest in the) property that would eventually be conveyed to the tax sale purchaser upon quieting title. Thus, he continued, reimbursement of this amount as costs operated to compensate the tax sale purchaser for both the purchase price *and* the thing purchased; the tax debtor would therefore forfeit the value of the unpaid tax debt once in the form of the repayment of the tax sale purchase price as "costs" of sale and a second time in the form of the co-ownership interest conveyed to the purchaser (and/or the sale proceeds attributable to that interest). Mr. Kunkel reasoned that it could not be the case that (1) a property interest equal in value to the tax debt, *plus* (2) the value of the debt in cash, in sum, totaled the "least amount of property necessary" to satisfy the tax debt. He further reasoned that the proper measure of compensation to tax sale purchasers under the current regime would entail recovery of the proceeds attributable to the fractional co-ownership interest conveyed, *without* a duplicative refunding of the amount paid to acquire this interest in the first place.

By way of further illustration, Mr. Kunkel asked the Council to consider a hypothetical in which the winning bid at tax sale was 100%: Per the constitutional theory underpinning the fractional-ownership model, this bid established that the bidder was willing to pay the tax debt in exchange for complete 100% ownership of the tax-indebted property; he suggested that it would be unreasonable to conclude that the winning bidder was entitled to full ownership of the property *and* repayment of the purchase price (tax debt) from the tax debtor. Again, however, the staff attorney acknowledged that this position was not universally held, as the representatives of U.S. Assets had disagreed with these conclusions and argued instead that there was no basis on which to suggest that a court that rendered judgment ordering repayment of the year-one tax debt paid by the tax sale purchaser, as well as compensating the tax sale purchaser for the fractional interest acquired via that payment, had misapplied the relevant statute.

In any event, Mr. Kunkel continued, the Committee had eventually voted unanimously to work towards implementing the "pure lien" model. The staff attorney reasoned that, even if the fractional-ownership system *was* constitutionally sound and *was* in fact being properly applied, the fact that disagreement arose on these points established at least the existence of confusion and uncertainty surrounding present law, providing the impetus for the Committee's decision to pursue the alternative. Mr. Kunkel explained, however, that further disagreements arose as the Committee worked to modify its draft statutes in accordance with this decision. In particular: Because the shift to a "pure lien" system would significantly limit the financial upside to tax sale purchasers, certain aspects of the overarching statutory scheme that the Committee previously viewed as uncontroversial or on which the Committee had previously reached compromises now became problematic to some. Mr. Kunkel highlighted a few such issues, listing for example the bidding process at tax sale, the structure and timing of the redemptive period vis a vis the foreclosure process, and the precise procedures employed for foreclosure. He emphasized that these disagreements were primarily policy-based, centered on questions of how best to balance the various competing interests – for example: ensuring sufficient profit motive for prospective investors, ensuring effective collection of taxes, alleviating burden on public servants tasked with administering the system, and protecting the rights and property interests of tax debtors. In light of (1) the inherently political nature of many of these practical questions, (2) the importance of addressing the constitutional questions raised by *Tyler* in the 2024 legislative session, and (3) the quickly shortening timeframe to do so, the Committee ultimately decided that the optimal course of action was to submit its final work product in the form of a report.

Mr. Kunkel noted that the Committee further agreed that the report would contain a comprehensive analysis of all of the relevant issues and would make recommendations regarding matters on which the Committee was able to reach a clear consensus, while providing detailed summaries and assessments of the pros and cons of each alternative position taken regarding matters on which there was no consensus. He explained that this decision was reached after lengthy discussion of several such issues failed to produce satisfactory compromise. Rather than forcing each of these questions to a vote, such that the Committee's ultimate work product would be actively opposed by a segment of the Committee when it eventually reached the legislature, the Committee reasoned that it would be more productive to present "all sides" of the discussion to the legislature and allow the legislature to make the determination of how to prioritize the various policy considerations involved. Thus, the Committee agreed that the report would contain – and, Mr. Kunkel clarified, did contain now – a full explication and analysis of both the proposals preferred by the Committee's majority and those favored by the minority, with no expression of preference for any particular alternative. Finally, although its recommendation would be in the form of a report rather than proposed legislation, the Committee had nevertheless voted to attach, as part of its report, suggested statutory revisions implementing its consensus recommendations. In sum, Mr. Kunkel concluded, the Committee's goal in drafting the report had been to aid interested legislators to the greatest extent practicable in any legislative efforts undertaken to address the issues identified in the legislative resolutions, making concrete recommendations where both possible and appropriate and providing as much relevant analysis and information where not, while ultimately leaving to the legislature all questions of pure policy that were, as such, properly the provenance of the legislature.

Mr. Kunkel then asked the Council to turn its attention to the materials circulated in advance of the meeting, identifying these materials as the two parts of the Committee's draft report to the legislature. He explained that the first document contained the first four sections of the draft report, while the second contained report's fifth section. Assuring the Council that he did not plan to review the lengthy documents page by page, Mr. Kunkel provided an overview of the report's contents: Part I of the report summarized the project's history and the contents of the following sections; Part II discussed the Supreme Court's recent decision in *Tyler v. Hennepin County*, assessing both the opinion itself and its impact on the laws of other states, the laws of Louisiana, and the Committee's own work; Part III provided a summary and substantive analysis of the Committee's recommended revisions to Louisiana law; Part IV addressed the various issues on which the Committee elected not to make any specific recommendations due to either the policy-centric nature of the issue or the lack of clear consensus amongst Committee members or both, synthesizing and analyzing each issue in turn, including the policy considerations implicated by the issue, the various proposals considered by the Committee in response to the issue, the arguments for and against each proposal, and the likely effects of each proposal on the relevant policy considerations, both pro and con; finally, Part V of the report contained the actual statutory revisions suggested by the Committee for the implementation of the substantive recommendations contained in Part III.

Next, Mr. Kunkel addressed Part IV of the report in more detail, prefacing his comments by noting that his introduction had already touched on the items discussed in Parts I through III. He stated that the issues covered in Part IV – those on which the Committee reached no specific conclusion and made no specific recommendation – largely fell into two categories: those pertaining to the enforcement process, and those not pertaining to the enforcement process. Within the former category, he identified first the issue of how to structure the redemptive period. According to Mr. Kunkel, the central question here was whether the tax debtor's right to redeem should terminate prior to the filing of an enforcement suit, strictly by virtue of the passage of time, or should instead terminate some period of time after service of the suit upon the debtor. He explained that the former alternative served to maintain a comparatively streamlined process, arguably requiring the filing of fewer suits by giving the tax sale purchaser significant leverage to settle the matter extrajudicially and thereby allow the tax debtor to avoid loss of property – thus favoring the tax sale purchaser by enhancing their ability to obtain a premium for settlement – whereas the latter required a more involved process but ultimately conferred greater protection on the tax debtor by ensuring notice prior to termination of the right to redeem, thereby preventing manipulation of the process by bad-faith actors. Mr. Kunkel then turned to the next enforcement-related issue covered in Part IV, the mechanism for enforcement of the tax sale rights. He explained that one option was to treat the tax sale rights like an ordinary mortgage or privilege, enforceable through ordinary process and consequent judicial sale pursuant to a writ of fieri facias, while the other was to provide for "strict foreclosure" – under which ownership of the property would vest in the tax sale purchaser in its entirety – as the default remedy, avoidable only if the tax debtor made an affirmative request to the court to "claim their equity" via judicial sale and recovery of the surplus proceeds thereof. Mr. Kunkel noted that representatives of tax sale purchasers favored the "fixed" redemptive period and the allowance for strict foreclosure. He then informed the Council that the two remaining enforcement-related issues discussed in Part IV were the length of the tolling period prior to enforcement suit (and by extension the length of the redemptive period) and whether appraisal would be required prefatory to any judicial sale for the enforcement of tax sale rights.

In regard to the aforementioned issues related to enforcement of the tax sale rights, Mr. Kunkel further clarified that neither these issues nor any of the various alternative modes for addressing them were part of the Committee's recommendation for the adoption of a "pure lien" system. Rather, he explained, the Committee's actual recommendation was deliberately limited in scope to the mere modification of the substantive nature of the "bundle of rights" conveyed at tax sale; in particular, the Committee was recommending that the concept of "tax sale title", often characterized as a "lien" but in fact constituting a sui generis inchoate ownership interest, be abandoned in favor of a right much more closely resembling an ordinary lien or mortgage. As for the particulars of how the lien right should be enforced – the procedural rules, timeframes, administration, foreclosure mechanisms, and the like – Mr. Kunkel reiterated that the Committee had not reached a clear consensus in its discussions and had thus elected to make no recommendations; instead, these issues had been addressed, as noted, in Part IV of the report, which summarized and analyzed each issue and each alternative method of implementation considered by the Committee without drawing any conclusion as to which was preferable. As for the remaining issues addressed in Part IV – those unrelated to the enforcement process – Mr. Kunkel noted that these included the various procedures for bidding at the tax sale and the potential for modification of the constitutional and statutory measures of compensation in light of the general shift in profit incentive that would likely result if the recommended "pure lien" model were to be enacted.

Here, Mr. Kunkel made a brief note regarding the procedural posture in which the report was being presented to the Council. He explained that, because the Committee had been operating under extreme time constraints in drafting and finalizing the report, the process by which the Committee had considered and adopted the report had occurred in slightly nontraditional fashion. Once the Committee adopted a proposed outline for the report's general structure and contents, Parts I through III of the report were drafted and circulated to the Committee and all other interested parties for feedback to be incorporated in advance of the meeting at which these portions would be discussed and put to a vote. This feedback was incorporated, and the resulting revised draft of Parts I through III was circulated as materials for consideration in advance of the Committee's February meeting, but a handful of disagreements with and objections to this partial draft remained and were raised at the meeting. After discussion, the Committee voted to conditionally adopt this portion of the report, subject to incorporation of certain agreed-upon revisions. As for Part IV of the report, the Committee's meetings during this period were largely confined to discussing and deciding upon the ultimate substantive contents of this section. At the Committee's March meeting, it reviewed a series of additional suggestions from guest-attendees representing U.S. Assets, a large institutional tax sale investor, with corresponding proposals for revisions accommodating these suggestions. After incorporating these revisions, the Committee voted unanimously to adopt Part IV of the report, with the guest-attendees likewise expressing concurrence with this action. As for Parts I through III of the report, the staff attorney ensured that the previously agreed-upon revisions would be incorporated as discussed; the Committee therefore voted, again unanimously and with the support of the guest-attendees, to formally adopt Parts I through III of the report for circulation to the Law Institute's Council, with the plan that any objections or commentary that remained after circulation of the final version could be passed along to the Reporter and staff attorney to be mentioned and addressed as appropriate during the Council presentation. Mr. Kunkel explained that the final draft of Parts I through III had been provided to the Committee and all other interested parties earlier in the week, with the agreed-upon revisions highlighted for ease of review, and that no further feedback regarding this last round of revisions had been submitted for mention during the presentation.

Returning to the substance of the report, Mr. Kunkel clarified once more that, notwithstanding the Committee's decision to refrain from making recommendations in Part IV of the report, the issues addressed therein were analyzed in no less detail and at no shorter length than those covered in the report's other sections. Nevertheless, he noted, a few additional documents had been circulated to the Council – one of which was either drafted or endorsed by a Committee member – objecting to the report's treatment of many of the items discussed in, and allegedly omitted from, Part IV of the report and the report as a whole. Mr. Kunkel stated that he had read these materials thoroughly, in particular the materials styled a "Minority Report", and was entirely satisfied that their criticisms mischaracterized the contents of the report – for instance, labeling (and on that basis objecting to) certain points of discussion as "recommendations", in spite of the report's clarifications to the contrary, and taking issue with the apparent omission or oversight of other points that were, in fact, included and discussed at length in the report. To this point, Mr. Kunkel acknowledged that the great length and density of the report undoubtedly represented a significant obstacle to its complete consumption and synthesis by the audience to whom it was directed, adding that he had not entirely expected that the report's audience would have read and digested the report in its entirety prior to the day's presentation. He conceded that the difficulty of doing so was surely exacerbated by the slightly shorter-than-typical interval between the report's circulation and the present meeting; for this failing, he took responsibility, apologizing to the Council for the inconvenience of the shortened period for preparation and any avoidable controversies and complications that might have arisen as a result. Nevertheless, he again highlighted the fact that the report had been adopted by unanimous vote of the Committee.

For these reasons, Mr. Kunkel expressed hope that many if not all of the objections contained in the aforementioned materials would, in fact, ultimately prove to be products of misunderstandings stemming from the sheer volume of information contained in the report and would thus be susceptible to relatively straightforward resolution. To this end, he reasoned that the authors of the Minority Report and other written objections would be better equipped than he to elucidate the objections, and accordingly he promised to cede the floor for this purpose momentarily. Before doing so, however, Mr. Kunkel first solicited any questions the Council might have regarding the report itself and also informed the Council that he had compiled an extensive, and to his reading exhaustive, compendium of cross-references to the report, which identified precisely where in the report each of the apparently omitted or mishandled issues, arguments, or points of discussion appeared, including where, exactly, the report clarified the posture in which it treated each of the points of discussion objected to by the "Minority Report" on the grounds that they constituted "recommendations" of the Committee. Accordingly, for any such objection that the Council deemed concerning, he urged the Council not to hesitate to confirm via these cross-references that the matter was, in fact, addressed satisfactorily in the report. At this, Mr. Kunkel thanked the Council and ceded the floor.

The President then turned to a guest-attendee, Ms. Melissa Castille, of U.S. Assets, LLC. Ms. Castille greeted the Council and stated that she and other representatives of her firm, together with two members of the Tax Sales Committee, had prepared the "Minority Report" that had been circulated to the Council and referenced by the staff attorney. At this, the President made a brief note regarding the Law Institute procedures for minority reports, expressing his understanding that the statutory protocol for so-called "minority reports" authorized the submission of a minority position regarding *proposed legislation* specifically and did not in fact provide any comparable mechanism for a *report* to the legislature. Thus, he suggested that the document's characterization as a "Minority Report" may not be technically accurate, in which case the statutory procedures for such reports would not apply in the present circumstances. Nevertheless, he acknowledged that he was less than entirely certain about the matter and urged that Ms. Castille should present her materials regardless, after which the Council, if necessary, could make a determination as to the proper treatment of those materials vis a vis the Tax Sales Committee's report. He apologized for the brief interruption and turned the floor back to Ms. Castille.

Ms. Castille began her presentation by emphasizing the importance of the Minority Report as a mechanism for memorializing minority positions taken regarding Law Institute recommendations. With this in mind, she proceeded to the substance of her presentation. She noted that, during the time since the legislative resolution that prompted the Tax Sales Committee to begin its work, the then-troubling jurisprudential landscape had undergone significant shifts. Among the major inflection points in the law's development in this area, Ms. Castille highlighted the Louisiana Supreme Court's decision in *Central Properties v. Fairway Gardenhomes, LLC*. She characterized this case as confirming that pre-tax sale notice was not necessary to ensure adequate constitutional due process for tax debtors and stated that many other cases had held similarly in its wake. In light of these decisions, she reasoned that the overall status of Louisiana's tax sales jurisprudence and the constitutionality of its tax sales procedures were presently the subject of far less uncertainty than the Tax Sales Committee's report suggested. Ms. Castille bolstered this claim by noting that title insurers now regularly insured title to tax sale properties.

Ms. Castille then turned from the issue of constitutional Due Process to the more recent *Tyler* decision and Takings Clause issue. Pointing to the aforementioned "least amount of property necessary..." standard as the critical inquiry in this context, she urged that most Louisiana tax sales resulted in the sale of only a "1% lien". She reasoned that this was a sufficiently small proportion of the property to satisfy the standard outlined in *Tyler* and, by extension, the Takings Clause. Expanding upon this contention, she explained the result where the process resulted in loss of property for the tax debtor whose property was subject to a 1% tax sale certificate: Upon expiration of the redemptive period, the tax sale purchaser would become a 1% co-owner of the previously tax-indebted property and would then file a petition to quiet title on the 1% and requesting partition by licitation. Upon the sale of the property, Ms. Castille concluded, the tax debtor would receive the share of the proceeds attributable to the 99% ownership share, which she opined would represent the "surplus" required by *Tyler* to be returned to the debtor.

At this, a Council member posed a question. Noting that the Tax Sales Committee's report had explained that under current Louisiana law the tax sale purchaser typically recovered the amount attributable to the 1% co-ownership interest *plus* the amount of the initial taxes paid on behalf of the debtor in the form of the tax sale purchase price – and had highlighted this measure of recovery as constitutionally problematic under *Tyler* – the member queried whether in fact tax sale purchasers in such case would merely recover "the 1%" or would instead recover "the 1% plus the amount paid at tax sale". Ms. Castille indicated that the latter formulation was the recovery typical under current Louisiana law. The Council member opined that this seemed a clear contravention of the constitutional principle announced in *Tyler*. Ms. Castille disagreed, emphasizing that *Tyler* did not involve foreclosure by a private party and opining that this issue – whether *Tyler* remained applicable if the political subdivision sold its foreclosure rights rather than foreclosing itself – remained jurisprudentially untested. Moreover, she highlighted the Sixth Circuit's decision in *Freed v. Thomas*, arguing that it established *Tyler*'s limited applicability to takings of foreclosure-sale proceeds and its corresponding inapplicability to takings of *property*, which she reasoned the present case would represent.

Ms. Castille then turned to her more specific objections to the Committee's report. She first expressed that the information she had previously relayed was either misrepresented in or omitted from the report. She then listed several additional substantive grounds on which she disagreed with the report. Beginning with the report's treatment of redemption, she highlighted the length of the redemptive period as a major issue but characterized it as having gone wholly unaddressed in the report. She added that significant difficulties would arise from involving the tax collector in the redemption process to the degree that she suggested was recommended by the report. Returning to the length of the redemptive period, Ms. Castille then stated that the report recommended shortening the redemptive period, urging that this would prejudice tax debtors to an unfair degree. Finally, she argued that the adoption of a lien system would require extensive updates to the foreclosure process. On this issue, Ms. Castille alleged that the report recommended the use of more traditional foreclosure procedures – for instance, some form of ordinary process. She maintained that ordinary process was unworkable in the tax sales context for the reason that tax sales did not involve contractual rights and were categorically distinct from the rights typically enforced by such procedures. On these bases, Ms. Castille asked that the Council reject the Tax Sales Committee's report; she urged that consideration of the aforementioned issues was an absolute necessity before adoption of a lien system and maintained that these matters had not been considered by the Committee or addressed in the report.

Upon the conclusion of Ms. Castille's overview, a Council member pushed back on her characterization of the law as clear and unambiguous, noting that she had recently dealt with tax sales-related issues and found the process to be opaque and incredibly challenging to navigate. In keeping with this perspective, she asked Ms. Castille for further clarity regarding the process of partition and the subsequent distribution of sale proceeds. In particular, she sought confirmation of her understanding that, upon partition, a tax sale purchaser would be reimbursed the tax sale price *and* thereafter be entitled to recover the portion of the remaining proceeds attributable to their fractional co-ownership interest. She further queried whether, if indeed her understanding was correct, this would not present a problem identical to that in *Tyler* – namely, that the debtor would be subject to a taking of proceeds in excess of the debt owed. Lastly, she asked Ms. Castille to explain how the situations differed, if indeed they did differ. Ms. Castille acknowledged the reasonableness of this line of logic but emphasized the fact that there had not yet been a jurisprudential decision confirming the member's position and argued that it would be inappropriate for the Law Institute to comment or recommend action on the matter until some such decision were rendered. The Council member disagreed with this notion, reasoning that identifying and addressing potentially problematic aspects of the law before they caused negative consequences for the state was precisely the Law Institute's purview. Accordingly, she suggested that in light of *Tyler* the Law Institute should take the opportunity to recommend remedial changes to the law. Returning to Ms. Castille's suggestion that current Louisiana law already satisfied *Tyler* by limiting the property taken to a one-percent fractional co-ownership interest, another Council member inquired as to the *highest* percentage interest that current Louisiana law allowed to be taken. Ms. Castille answered that a one-hundred-percent interest was the highest that could be taken.

Following some brief discussion amongst Council members regarding these issues and the optimal course of action for addressing them, one Council member sought to recenter the conversation, noting that Ms. Castille's central complaint – or at least the first complaint ripe for discussion – seemed not so much to be the underlying substantive law as the prospect that the topics discussed in Ms. Castille's "Minority Report" had not been discussed prior to the Committee's adoption of the report. In response, Ms. Castille further alleged that the Committee had neither reviewed nor discussed nor even been aware of Part IV of the report.

This prompted a tangentially related question from a Council member as to whether and how the Council planned to review and adopt the Committee's recommended statutory revisions contained in Part V of the report. The member expressed concern that there was insufficient time in which to conduct an appropriately thorough review of such extensive revisions. Another member agreed with this sentiment; while acknowledging that the recommended revisions might demand somewhat less scrutiny than typical statutory revisions given that they would merely be part of a report, as opposed to actual Law Institute-recommended legislation, he nevertheless maintained that he would feel uncomfortable including them in a recommendation – even in report form – without the Council having had a chance to engage in something at least resembling its ordinary line-by-line review. After further discussion, the Council agreed for the time being to proceed, and carry on its discussions regarding the report writ large, under the assumption that Part V's statutory appendix would be excluded; a formal decision as to how to treat Part V could be made if and when an ultimate vote was taken regarding the report.

Returning to the central discussion, one Council member then asked to say a few words. Acknowledging first for the sake of transparency that she did legislative outreach for the Louisiana Land Title Association and was therefore not a perfectly impartial or disinterested participant in the present conversation, the member took issue with a number of statements made by Ms. Castille and in the "Minority Report". First among these, she opined that Ms. Castille's descriptions of the jurisprudential landscape and those contained in the aforementioned document were inaccurate. Most notably, she contended that Ms. Castille was incorrect in her characterization of *Fairway Gardenhomes* as establishing that the requirements of constitutional Due Process could be satisfied by post-sale notice in the absence of proper pre-sale notice, as the Louisiana Supreme Court, in its opinion, had explicitly clarified that it was *not* addressing this question but rather deciding the case on other more limited statutory grounds. She likewise urged that the thrust of the Louisiana Supreme Court's decision in *NAR Solutions, Inc. v. Kuhn* had been misrepresented in the "Minority Report". In sum, the Council member asserted that the Due Process-related concerns representing the original impetus for the Tax Sales Committee's formation had not, as Ms. Castille had suggested, been resolved. She insisted therefore that changes to the current Louisiana tax sales system were indeed necessary. She further argued that replacing the present system with a "lien" system, as recommended by the Committee's report, was the optimal course of action. On this point she expanded, opining that the report was incredibly thorough and, contrary to Ms. Castille's statements and the statements contained in the "Minority Report", addressed in great detail virtually every issue raised by Ms. Castille and the "Minority Report". The Council member also clarified that many of the issues on which Ms. Castille had expressed disagreement with the report's "recommendations" were in fact issues as to which the report explicitly refrained from taking a position or making a recommendation, instead detailing each competing position on the issue and providing an objective analysis of the benefits and drawbacks of each alternative.

Another Council member voiced agreement with many of these sentiments. In particular, she expressed that she had long believed that a "lien-based" system would be much preferable to the current inchoate-ownership system, which she characterized as confusing and poorly understood. Listing a number of complications, complex issues, and contradictions implicated by the present co-ownership system – the need to employ a less-familiar sale procedure in the form of partition, the arguable distribution of proceeds, the even more complicated prospect of determining the proper distribution of products of the property (as in the case of a revenue-producing property) and similar complexities pertaining to commercial property, among others – she reasoned that, for someone who comes forward and pays delinquent taxes on another's behalf, it makes sense to simply subrogate that person to ordinary lien rights previously held by the tax-imposing body. Turning then from practical to legal considerations, the Council member asked the staff attorney if he could explain again the constitutional concerns raised by *Tyler* with respect to the current Louisiana system.

Mr. Kunkel answered that, in the wake of *Tyler*, there were either three or four components of current Louisiana tax sales law that were potentially problematic under *Tyler*'s new Takings Clause rule – the number depending on whether one considered the fourth to be its own separate and distinct issue or rather a mere subset of one of the preceding three. First among these he listed the issue identified by the Council member earlier in the discussions: Even assuming that Louisiana's fractional-interest bidding sufficed to identify an ownership interest theoretically equal in value to the tax debt being paid (in the form of the tax sale price), allowing a tax sale purchaser to become the owner of such interest (or recover a monetary sum attributable to its sale) – an interest theoretically equal in value to the tax debt – while *also* reimbursing the purchaser for the purchase price paid to acquire that interest at tax sale would necessarily mean that the value of the property taken from the tax debtor exceeded the value of the tax debt. In essence: The debtor would lose both (a) a property interest of equivalent value to the tax debt; and (b) the cash value of that interest – or, in total, property worth two times the value of the debt. Mr. Kunkel then described the second potential problem as essentially resulting from a scenario where the value of the fractional interest itself exceeded the value of the tax debt. He expounded further upon this notion: Even assuming the soundness of the *theory* underlying Louisiana's fractional-interest tax sale bidding system – that the bidding successfully identified the fractional interest that was equally valuable as the tax debt, with the market theoretically dictating that, where the interest bid was *more* valuable than the tax debt (i.e. the price), some market participant would be willing to accept a smaller interest in exchange for the same price, and would bid accordingly, until equilibrium was reached – the fact that the subject of the bidding was an undivided co-ownership share, rather than a physical portion of a larger tract, effectively ensured that the veracity of this underlying theory was tested in practice in almost all cases, when the property was subjected to a second sale for partition at the terminus of the process. Mr. Kunkel illustrated this point by asking the Council to consider a hypothetical tax sale at which a twenty-five percent tax certificate was sold in exchange for the payment of a one-thousand-dollar tax debt, after which title to the twenty-five percent interest was quieted and partition by licitation granted, with the partition resulting in a forty-thousand-dollar sale price. He emphasized that, while the initial tax sale established a "hypothetical" one-thousand-dollar value for the one-fourth interest, the later sale of the property established a much more tangible valuation for the one-fourth interest – a *ten-thousand-dollar* valuation – with this this latter valuation more accurately representing the *actual* value taken from the debtor. Accordingly, Mr. Kunkel concluded, even if in a vacuum the tax sale could effectively establish a valuation of the fractional interest taken from the debtor, the process did not occur in a vacuum; accordingly, in circumstances where the ultimate partition sale valued the fractional interest in excess of the debt, Louisiana's system was at risk of a successful Takings Clause challenge.

According to Mr. Kunkel, the third potential problem for Louisiana's tax sales law under *Tyler* was the treatment of junior creditors: Because *Tyler* established that property interests survive even where taxes are not paid, Louisiana law's provision for all outstanding mortgages, liens, and other encumbrances to be extinguished upon the rendering of a judgment quieting title on a tax sale property potentially gave rise to Takings Clause claims on behalf of the creditors whose interests were extinguished without compensation. Lastly, Mr. Kunkel identified sales and donations of adjudicated properties as the fourth and final potential constitutional problem with Louisiana's current tax sales regime. In particular, he explained that sales of adjudicated property treated the tax debtor as though they retained no interest in the property at all, affording no mechanism by which to recover sale proceeds in excess of the unpaid tax debt: For instance, if an adjudicated property subject to an outstanding two-thousand-dollar tax debt was sold for ten thousand dollars, the municipality was entitled to retain all ten thousand dollars of the sale price, thereby committing a taking akin to the one at issue in *Tyler*. Mr. Kunkel highlighted this as the one aspect of current Louisiana law that all attendees of the Committee's meetings had agreed unquestionably violated the Takings Clause. Nevertheless, referring back to his earlier comment, he suggested that this result was in fact no more than a particularly clear-cut example of the second category of issue discussed previously: a subsequent, actual sale of the property that established a valuation superseding the "hypothetical" valuation established by the initial tax sale. The only differences, according to Mr. Kunkel, were cosmetic – the tax sale bidding in the present case (i.e. the lack of bids) simply established that the entire property was worth less than the tax debt, and the subsequent sale establishing the "true" value of the property was a sale pursuant to the adjudicated properties statutes rather than a sale for partition by licitation. The actual circumstances, outcomes, and analyses, though, were functionally identical.

The Council member who had posed the question thanked Mr. Kunkel for providing such a thorough answer, reiterating and emphasizing her increased certainty in her prior stance that the current tax sales system was at risk of a successful constitutional challenge and ought be replaced. Another Council member echoed this sentiment. Ms. Castille argued in opposition, again suggesting that it would be inappropriate for the Law Institute to modify or recommend modification of the system until it had been conclusively declared unconstitutional. Urging the Council once more to reject the Committee's report, she further stated that the report provided a thorough overview of only one side of the aforementioned constitutional arguments and neglected entirely to consider or address the importance of the tax sale investor to the process or the numerous practical implications that a lien system would have for such investors. In response, Council member and state Senator Greg Miller pushed back on this sentiment, concurring with Ms. Castille's comments regarding the important niche filled by tax sale investors in the tax-collection process but nevertheless praising the Tax Sale Committee's report as excellent and noting that it did in fact acknowledge, and even emphasized, the role of these investors and the importance of ensuring the economic viability of their investments. In support of this point, he read directly from the report: "[T]he Committee agreed that consideration of the constitutionally and statutorily mandated rates of compensation is warranted in connection with any broad revision [of the tax sales law] effected by the Legislature. Because *Tyler* may in many cases serve to limit the recovery for tax-lien investors, it is important that the economic effects of any additional statutory revisions be limited to the extent necessary to protect and maintain robust participation—or, otherwise, be offset by modifications to the statutory rates of return. ... Notably, the analysis provided above posits that in some cases, enhanced protections for due process or for property owners may cause impairment of the financial incentive for investors. ... Insofar as it is determined that this or any other reduction in expected return is so large as to require either remedy or avoidance, the Committee suggests that modification of the constitutionally permitted rates of interest and penalty should be considered as a mechanism by which to provide this remedy. ... The Committee provides no recommended answer regarding these questions but merely suggests that this alternative be borne in mind given the currently shifting landscape for tax sales and the importance of ensuring sufficient compensation for the valuable public service of paying delinquent taxes." Senator Miller opined that considerations such as these were present throughout the report, reiterating his position that the report was thorough, informative, and even-handed and did not suffer from the defects alleged.

At this time, the Council recessed for lunch, and upon returning, the President reminded the Council that the motion on the floor was for the adoption of Parts I through IV of the Tax Sales Committee's proposed report to the legislature, adding again by way of reminder that the motion omitted Part V of the draft, which contained the Committee's recommended statutory revisions. Reopening the floor for discussion on the motion, the President inquired as to whether anyone else wished to provide further commentary. In response to such a request, he then recognized and ceded the floor to a guest-attendee.

The guest-attendee thanked the President and introduced himself as Beau Byers, the president of US National Title Insurance Company. Mr. Byers informed the Council that his company provided title insurance, emphasizing that it was the first and at present only company to insure title to tax sale properties in Louisiana. He further noted that he had previously served as general counsel for Civic Source – a company hosting and providing a portal for online sales of adjudicated properties by Louisiana municipalities, among other tax sale-related functions – and in his time there interacted with many tax collectors and local officials and had come to learn that many people, including those involved in the day-to-day process, were uncertain as to how the tax sales process works in Louisiana. Turning to the Tax Sales Committee's proposed report, he explained that his primary objection to the report's adoption was that it was to his reading very vague, also characterizing it as pointedly misleading. Mr. Byers added that the Law Institute had taken too long to provide its recommendations, further arguing that the report ought not be adopted given how rushed the drafting process had been. He contended that legislators would not read the report, given the massive volume of detail it contained, and as a result would mistakenly interpret it as an endorsement of the tax sales legislation that had recently been pre-filed in advance of the 2024 Regular Session. With no questions for Mr. Byers, he concluded his presentation.

The President then recognized another guest-attendee, who introduced himself as Jim Uschold. Mr. Uschold identified himself as a member of the Tax Sales Committee and stated that he was not being paid or receiving compensation for his comments. He urged that, notwithstanding his opposition to the report and the adoption of a lien system for Louisiana tax sales, he did not wish to see vulnerable homeowners lose their homes. Mr. Uschold added, however, that loss of property ultimately ought not be deemed a concern, as *McKesson*, a U.S. Supreme Court decision, had established that pre-deprivation notice was constitutionally unnecessary so long as the law provided an adequate post-deprivation remedy. In keeping with this principle, he argued that *Tyler* merely recognized that a tax debtor must be afforded *an opportunity to claim* the surplus proceeds of a tax-foreclosure sale – a standard to which he maintained Louisiana law already adhered. In any event – even if Louisiana law did *not* satisfy the requirements of *Tyler* – Mr. Uschold opined that it was unnecessary to mandate the return of surplus value to tax debtors, as merely creating a mechanism by which they could themselves initiate a suit to force a sale of the property in such case as they could not satisfy the debt would suffice to ensure compliance with the Takings Clause. He further suggested that *Central Properties v. Fairway Gardenhomes* could realistically be read as permitting a regime even more liberal than the one just described. Accordingly, Mr. Uschold expressed support for the model detailed in Part (IV)(C)(i) of the report, further advocating for the Council's rejection of the report.

Upon the conclusion of Mr. Uschold's remarks, the Council returned to its consideration of the motion on the floor, which was to adopt the report as proposed, excluding Part V. One Council member voiced disagreement with Mr. Uschold's analysis of Louisiana law's constitutionality and his corresponding recommendations. This was followed by a brief aside by another Council member in which he identified a few minor technical issues with certain footnotes contained in the report, which Mr. Kunkel resolved to fix prior to the report's ultimate submission, should it be adopted. Next, another guest attendee commented, identifying himself as Stephen Morel, a member of the Tax Sales Committee and practitioner in the tax sales space. Mr. Morel urged the Council against the report's adoption, arguing that accurate reporting required an acknowledgment of the Tax Sales Committee's lack of consensus on a number of key issues. On this point, he opined that the report was ambiguous as to whether it was recommending the various regimes it discussed and advocated that the report ought not be adopted without the addition of a disclaimer to the effect that the report was *not* making recommendations on the issues where the Committee failed to reach a consensus. Finally, Mr. Morel suggested that the "Minority Report" could be submitted as a part of or an addendum to the report, so as to reflect the minority positions he alleged went unmentioned in the report as proposed. A Council member noted that the report in fact *did* include disclaimers of precisely this sort, but ultimately there was no further commentary on this issue, and the Council returned to the motion on the table.

In advance of a vote, the President clarified once more that the motion on the table was to adopt the report as proposed, absent Part V, the statutory appendix. He added that the issue of whether to add the "Minority Report" as an addendum to the end of the report itself could be taken up as a separate item once the initial vote was completed. After brief uncertainty as to whether a motion to this effect had been made, an identical motion was made and seconded for certainty's sake. The Council then voted to adopt the report, with all members present voting in favor with the exception of one – the member who had identified herself earlier as part of the LLTA's legislative team – who abstained as a good-faith acknowledgment of her partiality and her corresponding desire to avoid the appearance of any conflict of interest.

A second motion was then made and seconded to include the "Minority Report" as part of the submission to the legislature, together with a brief statement explaining what, exactly, the addendum represented and the procedural posture in which it was being included. One Council member expressed support for the motion, acknowledging that there appeared to be some dispute as to the veracity of the statements made in opposition to the report but nevertheless maintaining that the inclusion of the "Minority Report" could cause no harm, as it would simply ensure that the entire discussion was reflected in the Law Institute's submission to the legislature. A few other Council members supported this notion, reasoning that its presentation alongside the existing report would allow readers to draw their own conclusions regarding the content of and any alleged omissions from either. These thoughts prompted another Council member to wonder aloud whether such a submission would set a concerning precedent for the Institute. Emphasizing the frequency with which the Council altered Committee proposals prior to their submission to the legislature – and the role of the Council as the ultimate arbiter of the Law Institute's recommendations – she expressed reluctance over opening the door to allow for a *Committee* to now submit a "minority report" to the *Council*. She reasoned that this held a number of potentially troubling implications for the overarching Law Institute process and suggested the Council vote against including the "Minority Report." Nevertheless, the Council member acknowledged that she could be mistaken as to the typical procedural posture occupied by a "minority report" and stated that if she had misunderstood the manner in which the procedure was intended to function she would withdraw her objection. Another Council member who had previously supported the inclusion of the "Minority Report" together with the report admitted that he would be strongly opposed to allowing such an atypical submission process were the Council currently discussing actual proposed legislation. Mr. Uschold emphasized that the Committee had agreed, during its meetings, to incorporate the minority views on non-consensus issues in the report itself and therefore argued that the report itself ought be rewritten to incorporate the substance of the "Minority Report" as part of the "majority" report, rather than merely appending it to the end of the report and retaining its label as reflecting a "minority" position. After brief discussion of whether this substance was already included in the Tax Sales Committee's report as proposed and now adopted, a Council member urged against inclusion of the "Minority Report", highlighting the fact that the report as written already contained much if not all of the allegedly omitted substance and advocating against a course of action that would suggest that there was dissention within the Council itself as to its submission to the legislature.

This prompted further, broader discussion of precisely what aspects of and how the "Minority Report" could be included in the Law Institute's submission without giving unintended impressions or creating undesirable procedural precedent. After a Council member confirmed the President's earlier suggestion that the statutory minority report procedure was applicable specifically to proposed legislation, another member argued that the proper remedy in the present scenario was for the proponents of the "Minority Report" to simply submit their report directly to the legislature, through the traditional channels open to the public. Others praised this as an admirable solution, and ultimately the motion on the floor – to append the "Minority Report" to the report for submission to the legislature – was withdrawn by its proponent. Senator Miller emphasized that he did not wish for this action to prevent the proponents of the "Minority Report" from providing information to the legislature and encouraged them to submit their report as suggested. In the hopes of ensuring the achievement of this end, Ms. Mallory Waller, the Law Institute 's Coordinator of Research and Revisor of Statutes, promised to provide the proponents of the "Minority Report" with the contact information of the parties to whom the Law Institute typically submitted its own reports.

At this time, the Tax Sales presentation was concluded, and there being no additional business, the March 2024 Council meeting was adjourned.

Nick Kunkel

Mallory C. Waller