

No. 20-855

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In The  
**Supreme Court of the United States**

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MARYLAND SHALL ISSUE, INC., et al.,

*Petitioners,*

v.

LAWRENCE HOGAN, IN HIS CAPACITY  
OF GOVERNOR OF MARYLAND,

*Respondent.*

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**On Petition For A Writ Of Certiorari  
To The United States Court Of Appeals  
For The Fourth Circuit**

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**BRIEF OF *AMICUS CURIAE* FIREARMS POLICY  
COALITION IN SUPPORT OF PETITIONERS**

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January 28, 2021

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**INTEREST OF THE *AMICUS CURIAE*<sup>1</sup>**

**Firearms Policy Coalition (FPC)** is a nonprofit organization devoted to advancing individual liberty and defending constitutional rights. FPC accomplishes its mission through legislative and grassroots advocacy, legal and historical research, litigation, education, and outreach programs. FPC’s legislative and grassroots advocacy programs promote constitutionally based public policy. Its historical research aims to discover the founders’ intent and the Constitution’s original meaning. And its legal research and advocacy aim to ensure that constitutional rights maintain their original scope. Since its founding in 2015, FPC has emerged as a leading advocate for individual liberty in state and federal courts.

**SUMMARY OF ARGUMENT**

Personal property has been intertwined with the concept of liberty since medieval England and it has been secured against arbitrary seizure or control since Magna Carta.

Leading English legal authorities and philosophers influential in both England and America—including Edward Coke, William Blackstone, and John Locke—all viewed property rights as protecting personal

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<sup>1</sup> All parties received timely notice and consented to this brief. No counsel for any party authored the brief in any part. Only *amicus* funded its preparation and submission.

property on equal terms with real property. Lord Camden expressed the general view Englishmen traditionally held: “[t]he great end for which men entered into society was to secure their property,” and “every invasion of private property, be it ever so minute, is a trespass.”

From the first days of permanent English settlement in America, colonists had the express right to possess goods, in addition to the rights of Englishmen guaranteed by colonial charters. Colonial laws and case law consistently secured personal property rights. And when the colonists’ property rights were violated by acts of Parliament—including the Stamp Act and Townshend Acts—as well as arms confiscation efforts, they risked their lives to defend their rights.

Determined to prevent the types of takings that had sparked the Revolution, Americans forbade such takings at every turn. Robust protections for real and personal property were included in early state constitutions, the Northwest Ordinance, the United States Constitution, and every additional state constitution through the Fourteenth Amendment’s ratification.

American tradition and the English tradition that it builds upon require the government to pay just compensation for the taking of personal property, including the taking at issue here.



## ARGUMENT

### **I. Personal property is entitled to full constitutional protection.**

This Court held that “[t]he Takings Clause . . . protects ‘private property’ without any distinction between different types.” *Horne v. Dep’t of Agric.*, 576 U.S. 350, 358 (2015) (quoting U.S. Const. amend. V). Yet the Fourth Circuit here denied that “per se regulatory takings apply equally to real property and personal property.” *Maryland Shall Issue, Inc. v. Hogan*, 963 F.3d 356, 366 (4th Cir. 2020). Rather, the court held that personal property receives as much protection as real property only when the owner is forced “to turn [the personal property] over to the Government or to a third party.” *Id.*

The Fourth Circuit’s holding is contrary to history and fails to provide personal property the protections the founders intended.

### **II. Since medieval England, the right to property—both personal and real—has been protected against arbitrary seizure or control.**

“The principle reflected in the [Takings] Clause goes back at least 800 years to Magna Carta.” *Horne*, 576 U.S. at 358. A central purpose of Magna Carta was to protect property against arbitrary seizure or control. Chapter 39 provided that “[n]o free man shall be . . . stripped of his rights or possessions . . . except by the lawful judgment of his equals or by the law of the land.” G.R.C. Davis, *MAGNA CARTA* 21 (1963). Chapter

28 forbade any “constable or other royal official” to “take corn or other movable goods from any man without immediate payment, unless the seller voluntarily offers postponement of this.” *Id.* at 20. And Chapter 26 ensured that “[i]f no debt is due to the Crown” when someone died, “all the movable goods shall be regarded as the property of the dead man” to be distributed as he desired. *Id.*

Sir Edward Coke explained that Chapter 39 of Magna Carta “is intended” to ensure “that lands, tenements, goods, and chattells shall not be seised into the kings hands.” And that no “man shall be disseised of his lands, or tenements, or dispossessed of his goods, or chattels, contrary to the law of the land.” Edward Coke, *THE SECOND PART OF THE INSTITUTES OF THE LAWS OF ENGLAND* 46 (E. & R. Brooke eds., 1797). “Upon this chapter,” Coke added, “as out of a roote, many fruitfull branches of the law of England have sprung.” *Id.* at 45.

Speaking to the House of Lords about Magna Carta in 1628, Sir Dudley Digges—whose son Edward served as Virginia’s governor from 1655–1656—explained that “[i]t is an undoubted and fundamental point of this so ancient a Law of England, that the subjects have a true property in their goods, lands and possessions. . . . Without this . . . there can be neither Law nor Justice in a Kingdom; for this is the proper object of both.” 4 *THE NEW CAMBRIDGE MODERN HISTORY* 124 (J.P. Cooper ed., 1970).

William Blackstone explained that Magna Carta reflected the principle that the right to “property” is an

“absolute right, inherent in every Englishman.” 1 William Blackstone, *COMMENTARIES* 138–39 (3d ed. 1768). This right, “probably founded in nature,” includes “the free use, enjoyment, and disposal of all his acquisitions.” *Id.* “The laws of England are therefore, in point of honor and justice, extremely watchful in ascertaining and protecting this right” by ensuring “that no man’s lands or goods shall be seized into the king’s hands, against the great charter, and the law of the land.” *Id.* at 138–39. “So great . . . is the regard of the law for private property, that it will not authorize the least violation of it; no, not even for the general good of the whole community.” *Id.* at 139.

John Locke, the preeminent political philosopher of the American Revolution, believed that property rights were natural rights and that “the great and chief end” of government “is the preservation of . . . property.” John Locke, *TWO TREATISES OF GOVERNMENT* 261 (Awnsham & Churchill eds., 1698).

William Molyneux—“Mr. Locke’s Acquaintance, Correspondent, and bosom Friend,” 1 Josiah Tucker, *A TREATISE CONCERNING CIVIL GOVERNMENT* ii (1781)—published a popular pamphlet defending Irish rights in 1698 that became influential in America during the 1760s. Molyneux wrote, “I have no other Notion of Property, but a Power disposing of my Goods as I please, and not as another shall command: Whatever another may rightfully take from me without my Consent, I have certainly no Property in.” *THE CASE OF IRELAND BEING BOUND BY ACTS OF PARLIAMENT IN ENGLAND STATED* 129 (J. Almon ed., 1770).

Lord Camden, who was also influential in colonial America, agreed. He stated that “[t]he great end for which men entered into society was to secure their property,” and believed that “every invasion of private property, be it ever so minute, is a trespass.” *Boyd v. United States*, 116 U.S. 616, 627 (1886) (quoting *Entick v. Carrington*, 19 How. St. Tr. 1029 (1765)).

Jean Louis De Lolme’s treatise on political liberty in England was important in both England and America—John Adams described it as “the best defence of the political balance of three powers that ever was written.” 1 John Adams, A DEFENCE OF THE CONSTITUTIONS OF GOVERNMENT 70 (1787). According to De Lolme, “One of the principal effects of the right of property is, that the King can take from his subjects no part of what they possess . . . this right, which, as we have seen before, is, by its consequences, the bulwark that protects all the others, has moreover the immediate effect of preventing one of the chief causes of oppression.” J.L. De Lolme, THE CONSTITUTION OF ENGLAND 113 (John Parker ed., 1775).

Coke, Digges, Blackstone, Locke, Molyneux, Camden, De Lolme, and the text of Magna Cart all viewed property rights as protecting personal property on equal terms with real property.

### **III. American colonists consistently resisted takings of their personal property.**

#### **A. From the first colonial charter to the First Continental Congress, property rights were guaranteed.**

From the first days of permanent English settlement in America, colonists had the right to possess goods. Binding his “Heirs and Successors,” King James I in 1606 granted the “Southern Colony” (Virginia was originally the entire South) the right to import from Great Britain, “the Goods, Chattels, Armour, Munition, and Furniture, needful to be used by them, for their said Apparel, Food, Defence or otherwise.” 7 FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS, AND OTHER ORGANIC LAWS OF THE STATES, TERRITORIES, AND COLONIES 3787–88 (Francis Thorpe ed., 1909). The 1620 Charter of New England (originally the entire North) similarly guaranteed the right “to take, load, carry, and transports in . . . Shipping, Armour, Weapons, Ordinances, Munition, Powder, Shott, Victuals, and all Manner of Cloathing, Implements, Furniture, Beasts, Cattle, Horses, Mares, and all other Things necessary for the said Plantation, and for their Use and Defense, and for Trade with the People there.” 3 *id.* at 1834–35.

Additionally, colonial charters guaranteed Americans the “rights of Englishmen.” 7 *id.* at 3788 (Southern colony, Virginia, 1606); 3 *id.* at 1839 (Northern colony, New England, 1620); *id.* at 1681 (Maryland); *id.* at 1857 (Massachusetts Bay); 1 *id.* at 533 (Connecticut); 2 *id.* at 773 (Georgia); 5 *id.* at 2747 (Carolina; later



North Carolina, South Carolina, and Georgia); 6 *id.* at 3220 (Rhode Island).

Property rights were thus cherished from the beginning in America, and Magna Carta inspired many colonial laws. Massachusetts's 1641 Body of Liberties was part of what Governor John Winthrop called "a body of grounds of laws, in resemblance to a Magna Charta" that constituted "fundamental laws." 1 John Winthrop, HISTORY OF NEW ENGLAND, 1630–1649, at 151 (James Hosmer ed., 1908). The Body of Liberties required that owners be compensated for takings of goods or cattle.

No mans Cattel or goods of what kinde soever shall be pressed or taken for any publique use or service, unlesse it be by warrant grounded upon some act of the generall Court, nor without such reasonable prices and hire as the ordinarie rates of the Countrie do afford. And if his Cattle or goods shall perish or suffer damage in such service, the owner shall be sufficiently recompenced.

THE EARLIEST NEW ENGLAND CODE OF LAWS, 1641, at 3 (Hart & Channing eds., 1896).

A 1657 case from Essex County, Massachusetts, *Giddings v. Browne*, demonstrated the importance of personal property. The plaintiff sued a constable for seizing his "pewter dishes or platters" to satisfy a debt. Justice Symonds ruled for the plaintiff, calling the right to property "a fundamentall law . . . that God and nature have given to a people." Thus, "it is in the trust

of their governors in highest place and others, to preserve, but not in their power to take away from them.” So “every subject shall and may enjoy what he hath a civell right or title unto . . . it cannot be taken from him . . . without his owne free consent.” 2 THE HUTCHINSON PAPERS 287–88 (Joel Munsell ed., 1865).

When a New Hampshire sheriff went house-to-house attempting to collect money and seize goods to cover taxes that had been imposed without consent in 1684, “the sheriff was resisted and driven off with clubs; the women having prepared hot spits and scalding water to assist in the opposition . . . he was beaten, and his sword was taken from him; then he was seated on an horse, and conveyed out of the province to Salisbury with a rope about his neck and his feet tied under the horse’s belly.” 1 Jeremy Belknap, THE HISTORY OF NEW HAMPSHIRE 110–11 (John Farmer ed., 1831); see also 1 DOCUMENTS AND RECORDS RELATING TO THE PROVINCE OF NEW HAMPSHIRE 1623–1686, at 551 (Nathaniel Bouton ed., 1867) (Deposition of Thomas Thurton). None of the townspeople involved in running the sheriff out of town were convicted. *Id.* at 551–54.

In the Boston Revolt of 1689, American colonists overthrew Sir Edmund Andros—the Dominion of New England Governor whom King James II had appointed—and elected their own governor. A contemporary described the revolt as the result of Andros having “[i]nvaded *Liberty* and *Property* after such a manner, as that no Man could say anything was *his own*.” 1 Cotton Mather, THE ECCLESIASTICAL HISTORY OF NEW-ENGLAND, 1620–1698, at 197 (1853). Most

controversially, Andros enforced the Navigation Acts, which regulated the commerce of goods.

When customs officers searched a New York City home in 1698 for illegally imported East India goods, “a Tumult of the Merchants was made who came to [the] house, and . . . the said officers were locked up and imprisoned for three hours.” 4 DOCUMENTS RELATIVE TO THE COLONIAL HISTORY OF THE STATE OF NEW YORK 324 (E.B. O’Callaghan ed., 1854).

**B. The Stamp Act and Townshend Acts were considered unlawful takings and led to the Revolutionary War.**

The Stamp Act of 1765 implemented a tax—without the consent of the colonists—on printed materials such as newspapers, pamphlets, broadsides, legal documents, and playing cards. To prove that the tax had been paid, a stamp was affixed to the document.

Proponents defended the Stamp Act as a gift to the Crown. But most Americans saw it as a taking of their personal property. While taxation itself was noncontroversial, a tax that colonists had not consented to was perceived as a violation of their property rights in the taxed goods. Indeed, taxation without representation had long been viewed as a violation of property rights. For example, a 1623 Virginia statute provided that “the Governor shall not lay any taxes or ympositions upon the colony their lands or commodities other way than by the authority of the General Assembly.” 1 William Waller Hening, THE STATUTES AT LARGE; BEING A

COLLECTION OF ALL THE LAWS OF VIRGINIA 124 (1823). The New York Assembly of 1708 resolved “first, that every freeman in the colony had perfect and entire property in his goods and estate; and, second, that the imposing and levying of any moneys upon Her Majesty’s [Queen Anne’s] subjects of this Colony, under any pretense or color whatsoever, without consent in General Assembly, is a grievance and a violation of the people’s property.” JOURNAL OF THE ASSEMBLY OF THE STATE OF NEW YORK AT THEIR ONE HUNDRED AND SECOND SESSION 239 (Charles Van Benthuyzen & Sons eds., 1879).

Delegates from nine colonies formed the Stamp Act Congress. It declared on October 19, 1765 that the colonists “are entitled to all the inherent rights and privileges of his natural born subjects within the kingdom of Great Britain,” and that “it is unreasonable and inconsistent with the principles and spirit of the British constitution for the people of Great Britain to grant to His Majesty the property of the colonists.” Thomas Hutchinson, 3 THE HISTORY OF THE PROVINCE OF MASSACHUSETTS BAY, FROM THE YEAR 1750, UNTIL JUNE, 1774, at 479 (1828).

Complaining about the Stamp Act, Virginia’s House of Burgesses claimed as a natural right “that no Power on Earth has a Right to impose Taxes upon the People or to take the smallest Portion of their Property without their Consent. . . . [N]o Man can enjoy even the shadow of Freedom; if his property, acquired by his own Industry and the sweat of his brow, may be wrested from him at the Will of another without his

own Consent.” *Letter to The Right Honorable The Lords Spiritual and Temporal in Parliament Assembled*, in *JOURNALS OF THE HOUSE OF BURGESSES OF VIRGINIA, 1766–1769*, at 166 (John Pendleton Kennedy ed., 1906).

Benjamin Franklin, writing as “The Colonist’s Advocate,” denounced the Stamp Act as “a Scheme, whose declared Intention is, to take from them [the colonists] their Property . . . contrary to their Inclination.” *The Colonist’s Advocate, III*, *THE PUBLIC ADVERTISER*, Jan. 11, 1770.

Franklin’s fellow Pennsylvanian John Dickinson agreed, writing that “we cannot enjoy Liberty without Property, both in our Lives and Estates.” Thus, because “we can have no Property in that which another may of Right take and dispose of as he pleases, without our Consent,” until the repeal of the Stamp Act, “we cannot enjoy freedom.” 2 *LIFE AND WRITINGS OF JOHN DICKINSON* 416 (Paul Leicester Ford ed., 1895).

The reaction to the Townshend Acts—which taxed imported lead, glass, tea, paint, and paper—was similar. For example, the New Hampshire House of Representatives protested that the “taxes being imposed on us . . . without our consent must necessarily terminate in the total loss of our Liberty and Distruction of our property.” 7 *DOCUMENTS AND RECORDS RELATING TO THE PROVINCE OF NEW-HAMPSHIRE, FROM 1764 TO 1776*, at 249 (Nathaniel Bouton ed., 1873).

John Dickinson called the Townshend Acts an “engine of oppression,” because “the officers of the customs [were] impowered to . . . seize prohibited or

unaccustomed goods.” John Dickinson, LETTERS FROM A FARMER IN PENNSYLVANIA, TO THE INHABITANTS OF THE BRITISH COLONIES 70–71 (Books on Demand 2020).

A Virginia Nonimportation Resolution prepared by George Mason and introduced by George Washington called “the late unconstitutional [Townshend] Act . . . injurious to Property, and destructive to Liberty.” JOURNALS OF THE HOUSE OF BURGESSES, at xl.

In 1772, Boston’s “Committee of Correspondence”—twenty-one patriots including Samuel Adams, James Otis, and Dr. Joseph Warren—created “The Boston Pamphlet.” “[S]tat[ing] the Rights of the Colonists,” the Boston Pamphlet articulated rights later identified in the Declaration of Independence and the Constitution, and complained of “the Infringements and Violations thereof.” *The Votes and Proceedings of the Freeholders and Other Inhabitants of the Town of Boston, In Town Meeting Assembled, According to Law*, at iii (1772). The rights included the right to life, liberty, and property, “together with the Right to support and defend them.” *Id.* at 2.

The Pamphlet explained that, “The Supreme Power cannot justly take from any Man, any Part of his Property without his consent.” *Id.* at 10. For the government to “have a Right, at Pleasure, to give and grant the Property of the Colonists” was “utterly irreconcilable to the[] Principles” of “natural Law and Justice, and the great Barriers of all Free States.” *Id.* “What Liberty can there be,” the Pamphlet asked,

“where Property is taken away without Consent?” *Id.* at 11.

Parliament passed the Tea Act in 1773 to help enforce the Townshend Acts’ tax on tea. To protest these violations of their property rights, Bostonians destroyed an entire shipment of tea at the Boston Tea Party. Parliament responded by closing the Port of Boston. Eighty-nine members of Virginia’s late House of Burgesses condemned the closing of the port for “most violently and arbitrarily depriv[ing] them [Bostonians] of their property, in wharfs erected by private persons, at their own great and proper expence, which act is, in our opinion, a most dangerous attempt to destroy the constitutional liberty and rights of all North America.” 1 Peter Force, *AMERICAN ARCHIVES: FOURTH SERIES* 351 (1837).

The First Continental Congress in 1774 complained that “[t]he several acts of [Parliament] which impose duties” on private goods “are subversive of American rights,” because they allow “goods [to be] seized, before” the owner has the opportunity to “defend his property.” *Id.* at 912. The Congress’s declaration of rights began by asserting that Americans “are entitled to life, liberty and property: and they have never ceded to any foreign power whatever, a right to dispose of either without their consent.” *Id.* at 911.

The British property violations on private goods were a leading cause of the American Revolution.

### **C. British seizures of gunpowder and arms led to the Revolutionary War.**

In colonial towns, because the black gunpowder of the eighteenth century was volatile, large quantities were often stored in central “powder houses” or “magazines.” Massachusetts’s royal governor Thomas Gage desired to disarm the colonists and decided that the simplest approach was to deprive them of gunpowder. Gage “order’d the Keeper of the Province’s Magazine not to deliver a kernel of powder (without his express order) of either public or private property.” John Andrews, *LETTERS OF JOHN ANDREWS, ESQ., OF BOSTON 19–20* (Winthrop Sargent ed., 1866).

Gage then dispatched Redcoats to the Charlestown, Massachusetts powder house to seize hundreds of barrels of gunpowder on September 1, 1774, setting off the “Powder Alarm” throughout New England. Colonists “began to collect in large bodies, with their arms, provisions, and ammunition, determining by some means to give a check to a power which so openly threatened their destruction” and to “rob them of the means of their defence.” Unsigned Report, Sept. 5, 1774, *in* 1 *AMERICAN ARCHIVES*, at 762. Because the British had taken the gunpowder in a pre-dawn raid, there was no violence, and war was temporarily averted.

When a ship smuggling gunpowder arrived on September 21, 1774, Boston merchant John Andrews noted it had been “five or six weeks since the Governor has allow’d any to be taken out of the magazine here.” *LETTERS OF JOHN ANDREWS*, at 52.



After a British seizure of imported arms in New York, a note was “secretly conveyed into almost every house in town” asking, “when Slavery is clanking her infernal chains . . . will you supinely fold your arms, and calmly see your weapons of defence torn from you?” 1 AMERICAN ARCHIVES, at 1071. In addition to violating the colonists’ right to keep and bear arms, the British were violating their property rights by taking personal property.

Defying a ban on public meetings, residents of Suffolk County (including Boston) convened in September 1774. The resulting Suffolk Resolves stated that Gage’s “hostile intention” was demonstrated when he “in a very extraordinary manner” took the Charlestown powder, and forbade “the keeper of the magazine at Boston to deliver out to the owners the powder which they had lodged in said magazine.” THE JOURNALS OF EACH PROVINCIAL CONGRESS OF MASSACHUSETTS IN 1774 AND 1775 AND OF THE COMMITTEE OF SAFETY 603 (William Lincoln ed., 1838).

“Paul Revere rushed copies of the Suffolk Resolutions to the Continental Congress in Philadelphia . . . which unanimously denounced ‘these wicked ministerial measures.’” The “Suffolk Resolves” were reprinted verbatim in the Journal of the Continental Congress, and disseminated throughout America. 1 JOURNALS OF THE CONTINENTAL CONGRESS 1774–1789, at 39 (1904).

The Massachusetts Provincial Congress—also meeting in defiance of Gage—twice condemned Gage for “unlawfully seizing and retaining large quantities

of ammunition.” THE JOURNALS OF EACH PROVINCIAL CONGRESS, at 31 (Oct. 25, 1774), 47 (Oct. 29, 1774).

Americans risked their lives to reclaim their property. On September 14, 1774, Abigail Adams informed John that “about 200 Men . . . marched down to the powder house from whence they took the powder” and hid it from the British. THE BOOK OF ABIGAIL & JOHN: SELECTED LETTERS OF THE ADAMS FAMILY 1762–1784, at 72 (L.H. Butterfield ed., 2002). In December 1774, Americans reclaimed previously confiscated arms, many of which were held at Fort William and Mary in New Hampshire. The Boston Committee of Correspondence learned that two British ships were to pick up seized arms from the fort. Paul Revere delivered the news to New Hampshire; then, “about four hundred men were collected together, and immediately proceeded to his Majesty’s castle . . . and forcibly took possession thereof.” Letter from Gov. Wentworth to Gov. Gage (Dec. 14, 1774), *in* 18 THE PARLIAMENTARY HISTORY OF ENGLAND, FROM THE EARLIEST PERIOD TO THE YEAR 1803, at 145 (1813). The patriots took “upwards of 100 barrels of powder, 1500 stand of small arms, and several pieces of light cannon.” LETTERS OF HUGH EARL PERCY FROM BOSTON AND NEW YORK, 1774–1776, at 46 (Charles Bolton ed., 1902).

The taking of arms reached its culmination when Gage sent 700 soldiers to seize American munitions at Concord on April 18, 1775. Paul Misencik, THE ORIGINAL AMERICAN SPIES: SEVEN COVERT AGENTS OF THE REVOLUTIONARY WAR 28 (2013). The Americans resisted

with arms, “the shot heard round the world” was fired, and the American Revolution commenced.

It did not matter to the Americans whether the British took possession of the arms or just prevented their access to them. They were willing to defend their property with their lives all the same.

#### **IV. America’s founders protected personal property at every turn.**

##### **A. State Constitutions.**

Determined to prevent the types of takings that had sparked the Revolution, most states expressly forbade such takings in their constitutions. The constitutions of Virginia (1776), Pennsylvania (1776), Delaware (1776), Maryland (1776), Vermont (1777), North Carolina (1777), Georgia (1778), South Carolina (1778), Massachusetts (1780), and New Hampshire (1784) all provided robust protections for real and personal property.<sup>2</sup>

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<sup>2</sup> Virginia: “all men . . . cannot be taxed or deprived of their property for publick uses, without their own consent, or that of their representatives.” 37 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 112 (John P. Kaminski, et al. eds., 2020).

Pennsylvania: “no part of a man’s property can be justly taken from him.” THE CONSTITUTIONS OF THE SEVERAL INDEPENDENT STATES OF AMERICA 109, 110 (E. Oswald ed., 1786).

Delaware: “no part of a man’s property can be justly taken from him.” *Id.* at 130.

Maryland: “no freeman ought to be . . . desseised of his freehold . . . or in any manner destroyed, or deprived of his . . .

Virginia, Pennsylvania, Vermont, Massachusetts, and New Hampshire echoed Blackstone in referring to property ownership as a natural right.<sup>3</sup> Pennsylvania,

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property.” PROCEEDINGS OF THE CONVENTIONS OF THE PROVINCE OF MARYLAND HELD AT THE CITY OF ANNAPOLIS IN 1774, 1775, & 1776, at 298 (Lucas & Deaver eds., 1836).

Vermont: “no part of a man’s property can be justly taken from him.” 37 DOCUMENTARY HISTORY, at 107.

North Carolina: “no Freeman ought to be . . . disseised of his Freehold . . . or in any Manner destroyed, or deprived of his . . . Property.” 23 THE STATE RECORDS OF NORTH CAROLINA LAWS, 1715–1776, at 977 (Walter Clark ed., 1904).

Georgia: “no freeman of this state shall be . . . disseized of his freehold . . . or in any manner destroyed, or deprived of his . . . property.” CONSTITUTIONS OF THE SEVERAL INDEPENDENT STATES, at 217.

South Carolina: “no freeman of this State be . . . disseized of his freehold . . . or in any manner destroyed or deprived of his . . . property.” SOUTH CAROLINA: A DOCUMENTARY PROFILE OF THE PALMETTO STATE 199 (Johnson & Sloan eds., 1971)

Massachusetts: “no part of the property of any individual, can, with justice, be taken from him.” 37 DOCUMENTARY HISTORY, at 78.

New Hampshire: “no part of a man’s property shall be taken from him.” CONSTITUTIONS OF THE SEVERAL INDEPENDENT STATES, at 3, 6.

<sup>3</sup> Virginia: “all men . . . have certain inherent rights . . . namely . . . the means of acquiring and possessing property.” 37 DOCUMENTARY HISTORY, at 111.

Pennsylvania: “all men . . . have certain natural, inherent, and unalienable rights,” including “acquiring, possessing, and protecting property.” CONSTITUTIONS OF THE SEVERAL INDEPENDENT STATES, at 109, 110.

Vermont: “all men . . . have certain natural, inherent and unalienable rights,” including “acquiring, possessing and protecting property.” 37 DOCUMENTARY HISTORY, at 106.

Delaware, Maryland, Massachusetts, and New Hampshire required the consent of the property owner before property could be taken.<sup>4</sup> And Vermont and Massachusetts required compensation for takings.<sup>5</sup>

Some state constitutions allowed for takings by “the law of the land,” but as Alexander Hamilton later explained, this did not include an act of the legislature, and instead reflected the continuing influence of Magna Carta. *See* 3 John Hamilton, LIFE OF ALEXANDER

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Massachusetts: “All men . . . have certain natural, essential, and unalienable rights” including “acquiring, possessing, and protecting property.” *Id.* at 76.

New Hampshire: “acquiring, possessing, and protecting property” is a “natural, essential, and inherent right[.]” CONSTITUTIONS OF THE SEVERAL INDEPENDENT STATES, at 3, 6.

<sup>4</sup> Pennsylvania: “without his own consent or that of his legal representative.” THE CONSTITUTIONS OF THE SEVERAL INDEPENDENT STATES, at 109, 110.

Delaware: “without his own consent or that of his legal Representatives.” *Id.* at 130.

Massachusetts: “no part of the property of any individual, can, with justice, be taken from him, or applied to public uses, without his own consent, or that of the representative body of the people.” 37 DOCUMENTARY HISTORY, at 78.

New Hampshire: “no part of a man’s property shall be taken from him, or applied to public uses, without his own consent, or that of the representative body of the people.” CONSTITUTIONS OF THE SEVERAL INDEPENDENT STATES, at 3, 6.

<sup>5</sup> Vermont: “whenever any particular man’s property is taken for the use of the public, the owner ought to receive an equivalent in money.” 37 DOCUMENTARY HISTORY, at 106.

Massachusetts: “whenever the public exigencies require, that the property of any individual should be appropriated to public uses, he shall receive a reasonable compensation therefor.” *Id.* at 78.

HAMILTON 207–08 (1879) (“Lord Coke, that great luminary of the law, in his comment upon a similar clause, in Magna Charta, interprets the law of the land to mean presentment and indictment . . . if there were any doubt upon the [United States] constitution, the bill of rights enacted in this very session removes it” by calling it “due process.”).

The Northwest Ordinance of 1787 also protected property and required compensation for takings:

No man shall be deprived of his liberty or property, but by the judgment of his peers or the law of the land; and, should the public exigencies make it necessary, for the common preservation, to take any person’s property, or to demand his particular services, full compensation shall be made for the same.

32 JOURNALS OF THE CONTINENTAL CONGRESS, at 340.

## **B. United States Constitution**

At the Constitutional Convention, “most of the members of that great body were familiar with, and they were no doubt greatly influenced by, Blackstone’s analysis of the English governmental system.” David Lockmiller, *SIR WILLIAM BLACKSTONE* 174 (1938). Thus, the influence of Blackstone and Magna Carta were evident throughout the various proposals.

North Carolina’s proposed amendments began by declaring that “there are certain natural rights” that

can never be denied, “among which are . . . acquiring, possessing, and protecting property.” It further declared that “no freeman ought to be . . . disseized of his freehold, liberties, privileges or franchises . . . or in any manner destroyed or deprived of his life, liberty, or property but by the law of the land.” 37 DOCUMENTARY HISTORY, at 264–65. Virginia’s and Rhode Island’s proposed amendments regarding property were nearly identical. 37 DOCUMENTARY HISTORY, at 251–52 (Virginia); *id.* at 271–72 (Rhode Island).

James Madison’s proposed amendments included a declaration establishing “[t]hat government is instituted, and ought to be exercised for the benefit of the people; which consists in the enjoyment of life and liberty, with the right of acquiring and using property. . . .” Madison then proposed an amendment providing that: “No personal shall be . . . deprived of life, liberty, or property without due process of law; nor be obliged to relinquish his property, where it may be necessary for public use, without a just compensation.” 37 DOCUMENTARY HISTORY, at 316–17.

Madison provided additional insight in a 1792 essay, drafted soon after the ratification of the Bill of Rights. Madison identified two definitions of “property.” First, “that dominion which one man claims and exercises over the external things of the world, in exclusion of every other thing”—including among other things, “land, or merchandise, or money.” Second, “a larger and juster meaning . . . embraces every thing to which a man may attach a value and have a right”—including “opinions and the free communication of

them.” 6 THE WRITINGS OF JAMES MADISON, 1790–1802, at 101 (Gaillard Hunt ed., 1906). As an example of a property violation, Madison offered a scenario in which wool was forbidden but linen permitted. *Id.* at 102–03. Madison then concluded by stating that a government “which provides that none [property] shall be taken directly even for public use without indemnification to the owner,” and then even “*indirectly* violates their property, in their actual possessions . . . is not a pattern for the United States.” *Id.* at 103.

To interpret the Takings Clause, this Court has looked to St. George Tucker, “the author of the first treatise on the Constitution.” *Horne*, 576 U.S. at 359. Tucker believed the Clause was “probably intended to restrain the arbitrary and oppressive mode of obtaining supplies for the army, and other public uses, by impressment, as was too frequently practised during the revolutionary war, without any compensation whatever.” 1 St. George Tucker, BLACKSTONE’S COMMENTARIES, App. 305-306 (1803).

An example of what Tucker referred to was the April 11, 1777 resolution of the Continental Congress that called for the confiscation of Philadelphians’ personally owned provisions to “prevent[] the same from falling into the hands of the enemy.” 7 JOURNALS OF THE CONTINENTAL CONGRESS, at 254. After Philadelphians’ goods were seized by the Pennsylvania Board of War, and then, ironically, by the British from the Board of War, a property owner sued Pennsylvania for compensation, in *Respublica v. Sparhawk*, 1 (1 Dall.) U.S. 357 (1788). Sparhawk



owned 227 barrels of flour and other goods that the Board of War seized and eventually fell to the British. Citing Blackstone's *Commentaries*, Sparhawk emphasized that "in a season of peace, the law had so great a regard for private property, that it would not authorize the least violation of it; no, not even for the general good of the whole community," and argued that "the principle, with respect to the rights of property, is immutably the same, in war as well as peace." *Id.* at 358.

Pennsylvania pointed out that it never intended to take ownership of the goods from the owners, but "conceded, indeed, that the law does not, *in peace*, acknowledge any authority to violate the rights of property, or to interfere with the possessions of individuals." But it argued that there was an exception for times of war. *Id.* at 360.

The Pennsylvania Supreme Court determined that the taking of personal property was permissible in a time of war, but that it would not have been permissible in a time of peace.

The Transaction, it must be remembered, happened *flagrante bello* [during hostilities]; and many things are lawful in that season, which would not be permitted in a time of peace. The seizure of the property in question, can, indeed, only be justified under this distinction; for otherwise, it would clearly have been a trespass."

*Id.* at 362.

As this Court noted in *Horne*, other states during the war provided compensation for private property. “Virginia allowed the seizure of surplus ‘live stock, or beef, pork, or bacon’ for the military, but only upon ‘paying or tendering to the owner the price so estimated by the appraisers.’” 576 U.S. at 358–59 (quoting 1777 Va. Acts ch. XII). “South Carolina authorized the seizure of ‘necessaries’ for public use, but provided that ‘said articles so seized shall be paid for agreeable to the prices such and the like articles sold for on the ninth day of October last.’” *Id.* at 359 (quoting 1779 S.C. Acts §4). And New York “provided for compensation for the impressment of horses and carriages.” *Id.* (citing 1778 N.Y. Laws ch. 29).

The inviolability of property rights—for both real and personal property—persisted beyond the ratification of the Fourteenth Amendment. Thomas Cooley explained that the protection of property, inspired by Magna Carta, “is to be found in each of the State constitutions.” Thomas Cooley, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION 351 (1868); *id.* at 351–52 n.2 (listing examples). Both real and personal property were protected by the state constitutions.

Nothing in American history or the English tradition from which it builds suggests that personal property deserves less protection than real property.

The Government should be required to pay just compensation for the taking of either type.



**CONCLUSION**

The petition for a writ of certiorari should be granted.

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