

AMERICAN CONSTITUTIONALISM
VOLUME II: RIGHTS AND LIBERTIES
Howard Gillman • Mark A. Graber • Keith E. Whittington

Supplementary Material

Chapter 4: The Early National Era – Individual Rights/Property/Takings and Due Process

Crenshaw & Crenshaw v. The Slate River Company, 6 Rand. 245 (VA 1828)

Ashley and Thomas Crenshaw owned a water gristmill on the Slate River in Virginia. In 1819, the Virginia legislature authorized the Slate River Company to make the Slate River navigable. The act incorporating the Slate River Company required all mill owners to either build locks through existing dams or build a canal around their mill. Mill owners were also required to give persons free passage on the river through their land. The Crenshaws asked a lower Virginia Court for an injunction, forbidding the Slate River Company from implementing that law. The Crenshaws claimed the state law unconstitutionally deprived them of property. The Slate River Company claimed that laws promoting the common good did not violate individual rights.

The Supreme Court of Appeals in Virginia declared the Virginia law unconstitutional. Judge Carr ruled that the Virginia law took the Crenshaw mill without compensation. Given that the state did not physically take possession of the mill, what was the taking? Did the taking consist of the legal requirement that the Crenshaws build on their property or the legal obligation to allow people to pass through their property? Did the taking consist of the probability that the law would make the mill worthless? To what extent do you believe Justice Carr was influenced by his judgment that the community was better off with the mill than with the improvements to the Slate River?

JUDGE CARR

...
[F]ew things contribute more to the convenience, comfort and prosperity of a country, than good mills well regulated. . . . The evidence shows, that this mill has proved a signal benefit to the country; and all the witnesses, who speak to that point, say, that (if they cannot have both,) they had much rather have the mill without navigation, than navigation without the mill.

After this mill had thus been in successful operation for seventeen years, a Law is passed, raising a Company for the purpose of rendering the river navigable; directing these millers (and all others, of whom there are four,) to erect locks through their dams, and keep constant attendance, to give free and ready passage; and that on failure, their dams shall be destroyed as nuisances. The evidence shows, that to build such a lock at the mill of the Plaintiffs as would answer, will cost \$7,000. The cost of keeping them in order, and of giving constant attendance, is not so easily estimated. It seems probable, also, that in some seasons, the water required for the locks will interfere materially with the grinding; and upon the whole, it seems doubtful whether it would not be better for the Plaintiffs to suffer their mill to go down, than to keep it up on the terms imposed by the Law. It is the decided opinion of the witnesses, that none of the other four millers on the stream above, could afford to keep up their mills on the terms of the Law. Here then, is a Law, imposing upon the citizen a burthen, which would render his property worthless, or destroying the property in case he refuses to comply. The question forces itself upon us: Can such a Law bind? That the *eminent domain* of the Sovereign Power, extends to the taking private property for public purposes, I am free to admit. But then, to render the exercise of this power lawful, a fair compensation must always be made to the individual, under some equitable assessment established by Law. This is laid down by the writers on Natural Law, Civil Law, Common Law, and the Law of every civilized country. . . . Far be it from me to intimate, that the Legislature intended to violate this great principle. I am well assured that they had no such idea. They thought they were promoting the public good, without trenching at all on private right; and *they* may be right, and *I* wrong. Each of us acts under the highest

sanction, and must walk by the light of our own understanding. Following this guide, I must declare it as my solemn conviction, that whether we judge this Law by the principles of all Civilized Governments, by the Federal Constitution, or that of our own State, it is unconstitutional and void.

JUDGE GREEN

...
Mills have always been treated as public establishments, subject to public control in various ways; and the building of them has been encouraged by condemning the property of others, for the use of one wishing to build, and allowing him to overflow the lands of others, upon making just compensation; privileges, which were forfeited, if the mill was not kept up for the use and ease of those who were customers to it. When the Legislature thus invited and encouraged individuals to vest their money in establishments so eminently useful to the public, it cannot be doubted that they intended to give them an indefeasible inheritance in the property so acquired, and all its incidents and appurtenances, as complete as in the soil granted to them by their patents.

...
The Legislature of the State is declared by our Constitution to be a complete Legislature, and consequently has all the powers of Sovereignty, except so far as they are limited by the Constitutions of Virginia and the United States. Our Bill of Rights is a part of our Constitution; and the general principles thereby declared are Fundamental Laws, except so far as they are modified by the Constitution itself. They limit the powers of the Legislature, and prohibit the passing any Law violating those principles. The first Article of this declares, "That all men are by nature free and independent, and have certain inherent rights, of which, when they enter into a state of society, they cannot by any compact deprive or divest their posterity, *namely*, the *enjoyment* of life and liberty, with the means of acquiring and *possessing property*, and pursuing and *obtaining happiness* and safety." To deprive a citizen of any property already legally acquired, without a fair compensation, deprives him . . . of the means of *possessing property*, and of the only means, so far as the Government is concerned, besides the security of his person, of *obtaining happiness*. *Liberty* itself consists essentially, as well in the security of private property, as of the persons of individuals; and this security of private property is one of the primary objects of Civil Government, which our ancestors, in framing our Constitution, intended to secure to themselves and their posterity, effectually, and forever.

The Legislature, in passing the Act of 1819, did not intend to invade private rights, but proceeded, no doubt, upon the belief that the rights of the owners of mills generally, were subordinate to the public right of navigation and particularly in respect to the Slate River; a question, on which there may well be a difference of opinion. The Constitution, however, declares, that the Legislative and Judicial Departments, shall be distinct and separate; so that, neither shall exercise the powers properly belonging to the other. The questions, whether the rights of the owners of mills, or of the public, for the purposes of navigation, are preferred by Law generally, or in any particular case, are emphatically Judicial in their nature, depending on the effect and construction of former Laws; and, if upon a full and careful consideration, we conscientiously differ in opinion in any particular case from the Legislature, we are bound by the highest obligations of duty to ourselves and our country, to pursue our own judgment.

JUDGE COALTER, concurring

[omitted]

JUDGE CABELL, concurring

[omitted]