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Property Rights in John Marshall's Virginia: The Case of Crenshaw and Crenshaw v. Slate River Company, 33 J. Marshall L. Rev. 1175 (2000)

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PROPERTY RIGHTS IN JOHN MARSHALL'S VIRGINIA: THE CASE OF *CRENSHAW AND CRENSHAW V. SLATE RIVER COMPANY*

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As Jim Ely has reminded us, historians have long associated John Marshall with the twin causes of constitutional nationalism and the protection of property rights.[1] However, it would be a mistake to assume that these two concepts were inseparable or that it was Marshall's embrace of both that set him apart from his opponents. Nowhere is the severability of the two propositions more apparent than with Marshall's critics in his home state of Virginia.

It is well known that opposition to Marshall's view of the United States Constitution was intense in Virginia where advocates of state sovereignty such as Spencer Roane, John Taylor of Caroline, John Randolph of Roanoke, William Branch Giles, Beverley Tucker, and Able Upshur aggressively criticized what they viewed as Marshall's unwarranted efforts to expand the authority of the central government. However, their opposition did not automatically extend to Marshall's efforts to protect the rights of property owners. While the Marshall Court opinions in *Martin v. Hunter's Lessee*,[2] *McCulloch v. Maryland*,[3] and *Cohens v. Virginia*,[4] produced a firestorm of criticism in the Old Dominion, the more or less contemporary "property" decisions of *Fletcher v. Peck*,[5] *Terrett v. Taylor*,[6] *Dartmouth College v. Woodward*,[7] *Sturges v. Crowninshield*,[8] and *Green v. Biddle*[9] did not, even though the latter cases limited the sovereign authority of states to regulate their own economic affairs. While the second set of cases may have seemed less directly

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1. James W. Ely Jr., *The Marshall Court and Property Rights: A Reappraisal*, 33 J. MARSHALL L. REV. 1023 (2000).
2. 14 U.S. (1 Wheat.) 304 (1816).
3. 17 U.S. (4 Wheat.) 316 (1819).
4. 19 U.S. (6 Wheat.) 264 (1821).
5. 10 U.S. (6 Cranch.) 87 (1810).
6. 13 U.S. (9 Cranch.) 43 (1815).
7. 17 U.S. (4 Wheat.) 518 (1819).
8. 17 U.S. (4 Wheat.) 122 (1819).
9. 21 U.S. (8 Wheat.) 1 (1823).

threatening to state sovereignty than the former, many of Marshall's Virginia critics were also sympathetic to the results achieved in the "property rights" cases.[10]

In fact, while Marshall's Virginia critics may have questioned the legitimacy of his views on the reviewability of the final decisions of state supreme courts by the federal judiciary, they, by and large, shared his belief that the protection of property rights was one of the primary responsibilities of the republican state. Concern that a powerful central government would trample on the rights of individual property owners had motivated Anti-Federalist opposition to the new United States Constitution in the 1780s and 1790s, and the protection of individual, as opposed to corporate, property remained a vital component of "old republican" political thought in Virginia in the 1810s and 1820s.[11] The fact that a distant central government could not be trusted to protect the property rights of individual citizens was a primary reason for insisting that sovereign authority properly resided at the state and local level. While a powerful central government might pose the greatest threat to individual property rights, legislatively sanctioned interference with property rights at the state level was no less objectionable.[12]

A Marshall-like concern for the constitutional protection of property rights was evident in the 1828 decision of the Supreme Court of Appeals of Virginia in *Crenshaw and Crenshaw v. Slate*

10. For the general Virginia reaction to the nationalizing tendencies of the Marshall Court, see F. THORNTON MILLER, JURIES AND JUDGES VERSUS THE LAW: VIRGINIA'S PROVINCIAL LEGAL PERSPECTIVE, 1783-1828 (1994); WILLIAM G. SHADE, DEMOCRATIZING THE OLD DOMINION: VIRGINIA AND THE SECOND PARTY SYSTEM 56, 62, 228, 229 (1996); and G. EDWARD WHITE, THE MARSHALL COURT AND CULTURAL CHANGE, 1815-35, at 485-524 (1987). For the specific attack on the Marshall Court launched by Spencer Roane, see Samuel R. Olken, *John Marshall and Spencer Roane: An Historical Analysis of their Conflict over U.S. Supreme Court Appellate Jurisdiction*, 1990 J. SUP. CT. HIST. 125 (comparing Marshall's judicial nationalism with Roane's states' rights interpretation of judicial review); JOHN MARSHALL'S DEFENSE OF MCCULLOCH V. MARYLAND (Gerald Gunther ed, 1969); *Virginia Opposition to Chief Justice Marshall—Reprints from Richmond Enquirer, 1821*, 2 JOHN P. BRANCH HISTORICAL PAPERS OF RANDOLPH-MACON COLLEGE 78-102 (1906).

11. On Virginia Anti-Federalists in the founding era, see J. Gordon Hylton, *Virginia and the Ratification of the Bill of Rights, 1789-91*, 25 U. RICH. L. REV. 33 (1991); J. Gordon Hylton, *James Madison, Virginia Politics, and the Bill of Rights*, 31 WM. & MARY L. REV. 275 (1989). On the continuation of Anti-Federalist ideas into the antebellum period, see NORMAN RISJORD, THE OLD REPUBLICANS: SOUTHERN CONSERVATISM IN THE AGE OF JEFFERSON (1965) and SAUL CORNELL, THE OTHER FOUNDERS: ANTI-FEDERALISM AND THE DISSENTING TRADITION IN AMERICA, 1788-1828, at 274-88 (1999).

12. On the relationship between states' rights constitutionalism and the protection of property rights in Virginia during the early nineteenth century, see generally ROBERT E. SHALHOPE, JOHN TAYLOR OF CAROLINE: PASTORAL REPUBLICAN (1980); MILLER, *supra* note 10; SHADE, *supra* note 10.

River Company,[13] in which the state's highest court was asked to nullify an act of the Virginia General Assembly authorizing the improvement of the Slate River, a previously non-navigable waterway in central Virginia.[14] The January 29, 1819 Act incorporated a joint stock company for purposes of improving the navigation of the Slate River "from its junction with the James River, to the highest practicable point of improvement." Once the river was navigable "in ordinary seasons, by vessels drawing one foot water," the river was to be declared a public highway and the company was entitled to collect tolls."[15] To facilitate the transformation to navigability, the Act also required mill owners to erect locks through their dams or else construct canals around them sufficient for the use of loaded boats. Such alterations had to be made within six months of the time that the river had been made navigable to the site of the dam, and the mill owner was charged with responsibility for maintaining the locks or canal once constructed.

Those who failed to comply with the Act were subject to a fine of twenty dollars each time a boat could not pass over or around their dam. In addition, mill owners were made civilly liable for any damages that the boat owner might incur. If the mill owner still failed to construct locks or a canal within eighteen months after the river had been made navigable to his location, the mill-dam was to be declared a nuisance, and the Trustees of the Slate River Company were authorized to clear it away and charge the expense of doing so to the mill owner.

Ashbury and Thomas B. Crenshaw were the owners and operators of a water-grist mill located approximately a mile and a half from the mouth of the Slate River in Buckingham County in central Virginia. The mill had been constructed by a previous owner, Charles A. Scott, with the necessary permission of the local county court in 1802. In 1807, Scott sold the mill and dam to John Cunningham for $20,000. Then, on July 28, 1824, the Crenshaws purchased the mill from Cunningham's daughter and her husband. The Crenshaw purchase occurred more than five years after the chartering of the Slate River Company. According to the testimony, the mill-dam was seventeen feet high and valued at $3,000, and was one of five such dams on the Slate River.

Having spent five years raising capital through the sale of stock, the company began work on the river in early 1824. In addition to beginning at the mouth of the river, the company also apparently began work on a portion of the river beyond the Crenshaw dam. Having completed improvements to navigation up

13. 27 Va. (6 Rand.) 245 (1828).

14. *Act to improve the navigation of the Slate River*, VA. ACTS, 68-73 (1818).

15. *Crenshaw*, 27 Va. at 247. Unless otherwise indicated, facts pertaining to the dispute in *Crenshaw* are taken from the text of the case itself.

to the Crenshaw dam, the Slate River Company notified the Crenshaws in late 1824 or early 1825 that six months had now passed, and they were obligated to begin construction of the locks. According to subsequent testimony, the Crenshaws concluded that a canal was impractical and estimated that the cost of constructing the necessary locks would be $7,000, plus the cost of maintaining it. Moreover, they were apparently concerned that their mill could not be operated properly once the locks were constructed.

Rather than comply with the statute, the Crenshaws filed suit against the Trustees in the Superior Court of Chancery for the Richmond District on March 28, 1825. In their request for an injunction, the mill owners asked that the Trustees be enjoined from prosecuting them for fines or from destroying their dam. The injunction was granted the following day with the stipulation that it would be permanent unless the company could show why the court's action was inappropriate. The Chancellor subsequently granted the company an extension of time to file its answer, and the following August the company filed it formal response. Hearings were conducted over a ten-month period in which numerous witnesses were called. Although virtually every resident of the affected area testified that they would rather have the mill than a navigable river, the judge ruled in favor of the company and dissolved the injunction in June of 1826. The Crenshaws, then, brought the case to the Court of Appeals.

In arguing for the propriety of the injunction, the Crenshaws insisted that imposing the cost of construction of locks and canals on the mill owners constituted "an unjust and grievous burthen [sic]" and would improperly interfere with their rights as the owners of the bed of the watercourse. Essentially, they argued that the public retained no interest in the Slate River once the construction of the mill had been authorized by the lawful authorities; consequently, the state-sanctioned destruction of their dam constituted a taking of their property without compensation.

This argument faced a number of potential problems. First of all, it was widely recognized that the public retained an interest in navigable waterways and that a private landowner's rights to use the water were inferior to those of the public. Whether this principle applied to formerly non-navigable streams being made navigable had apparently not been resolved in Virginia. Furthermore, the Crenshaws' "takings" argument was undercut by the fact that the Virginia Constitution of 1776, still in force, lacked a takings clause of the sort contained in the Fifth Amendment of the United States Constitution and in the constitutions of many states. While Section 1 of the Virginia Declaration of Rights (which was generally afforded constitutional status although technically not part of the state's constitution) did provide that all men had the right to "the enjoyment of life and liberty, with the means of acquiring and

possessing property," that clause did not speak directly to the right to compensation when property was taken for a public purpose.[16] The only other provision pertaining to property rights was Section 11 of the Declaration of Rights, which encouraged trial by jury in "controversies respecting property."[17]

Moreover, while the principle of judicial review had been recognized in Virginia as of 1828, Virginia's highest court had shown little evidence of a willingness to second guess the legislature on issues of constitutionality.[18] As of that year, the state's highest courts had struck down an act of the legislature on only one occasion in 1793, and that case had involved a technical question pertaining to the equity powers of the newly created district court judges. Moreover, that decision had been handed down, not by the Supreme Court of Appeals, but by the lower ranking General Court.[19]

In 1828, the Supreme Court of Appeals of Virginia consisted of five members. Three members, President Francis Brooke, John Coalter, and William Cabell, had been appointed to the court in 1811. The remaining two members, John Williams Green and Dabney Carr, joined in 1822 and 1824, respectively, with Williams replacing the legendary Spencer Roane.[20] All were natives of the state, and all five appear to have been identified with the cause of states' rights constitutionalism.

Brooke appears to have been the most Whiggish of the group. He and Henry Clay were confidants for more than 50 years, and in the 1820's, Brooke lent his name to a number of anti-Andrew Jackson political movements, in the process indicating his support not just for his friend Clay but for John Quincy Adams as well. On the other hand, in 1815, Brooke denied that the United States

16. For the Virginia Constitution of 1776 and the Declaration of Rights, see 10 SOURCES AND DOCUMENTS OF UNITED STATES CONSTITUTIONS 48-56 (Swindler ed., 1979). For the clause quoted, see *id.* at 49. A taking clause, resembling the Fifth Amendment to the United States Constitution, was added to the Virginia Constitution of 1830. *Id.* at 62 (inserted as a limitation on legislative power).

17. *Id.* at 50.

18. *See generally*, THOMAS R. MORRIS, THE VIRGINIA SUPREME COURT: AN INSTITUTIONAL AND POLITICAL ANALYSIS 9-13 (1975) and MARGARET NELSON, A HISTORY OF JUDICIAL REVIEW IN VIRGINIA, 1789-1928, at 1-34 (1947).

19. Kemper v. Hawkins, 1 Va. Cases 31 (1793).

20. There is surprisingly little biographical information available on the careers of these five justices. *See* S.S.P. Patteson, *The Supreme Court of Appeals of Virginia*, 5 GREEN BAG 310, 322-29, 361-62 (1893) (describing brief sketches of all five justices); Lyon G. Tyler, ed., 2 ENCYCLOPEDIA OF VIRGINIA BIOGRAPHY 47-48, 62-63 (1915); William R. Shands, *Francis Taliferro Brooke*, ANNUAL REPORTS OF THE VIRGINIA STATE BAR ASSOCIATION 407-22 (1928); John Stewart Bryan, *John Coalter*, ANNUAL REPORTS OF THE VIRGINIA STATE BAR ASSOCIATION 460-68 (1929); Henry C. Reily, *William H. Cabell*, ANNUAL REPORTS OF THE VIRGINIA STATE BAR ASSOCIATION 581-612 (1930). *See also* RICHARD BEALE DAVIS, FRANCIS WALKER GILMER: LIFE AND LEARNING IN JEFFERSON'S VIRGINIA (1939) (discussing numerous references to Dabney Carr and to a lesser extent, Coalter and Cabell).

Supreme Court had the constitutional authority to review decisions of the state supreme courts. In an opinion in *Hunter v. Martin, Devisee of Fairfax*,[21] Brooke argued, like his colleague Spencer Roane, that Section 25 of the 1789 Judiciary Act that permitted Supreme Court review of state court decisions was unconstitutional. (The *Hunter* case eventually resulted in the United States Supreme Court's landmark opinion in *Martin v. Hunter's Lessee*.[22])

Cabell was a strong states' rights advocate who had voted for the Virginia Resolutions in 1798 as a member of the Virginia legislature. He also served as a presidential elector for Jefferson in 1800 and 1804, and his opinion, not Roane's or Brooke's, was actually the lead opinion in *Hunter v. Martin* and thereby the first to announce the unanimous decision of the court. Coalter did not participate in *Hunter*, but there was nothing in his long career to suggest that he, a close friend and in-law of states' rights paragons John Randolph of Roanoke and Beverley Tucker, disagreed with the reasoning of his colleagues in that case. The two younger justices also seemed to share the states' rights views of their more senior colleagues. Green was chosen to replace Spencer Roane because he was widely assumed to hold similar views to those of his illustrious predecessor, and Carr was an active participant in the intellectual world of Virginia republicanism.[23]

While Brooke might have been somewhat sympathetic to the position of the Slate River Company, given his Whiggish inclinations, he did not participate in the resolution of the appeal. For the other four judges, however, the answer was clear. The provisions of the Act requiring mill owners either to assume the costs of constructing the locks and canals or to acquiesce in the destruction of their dams had exceeded the bounds of constitutional authority.

The judges issued their opinions in seriatim form, which was the custom of the era. The first opinion, written by Dabney Carr, concluded that the Slate River had not been navigable; therefore, its bed was owned by the owner of the land on each side. Carr then reasoned that the requirement of building the locks would effectively render the Crenshaw mill worthless, since it was unclear whether the mill could be operated with the locks in place. While Carr did not deny that the state had the authority through its power of eminent domain to take the Crenshaws' property for a public purpose, he insisted that this could only be done with the payment of "a fair compensation." Such a principal, he insisted, is "laid down by the writers on Natural Law, Civil Law, Common Law, and the Law of every civilized country."[24] Although Carr noted that he was sure that the legislature had not intended to take property without

21. 18 Va. (4 Munf.) 1 (1815).
22. 14 U.S. (1 Wheat.) 304 (1816).
23. *See generally* DAVIS, *supra* note 20.
24. *Crenshaw*, 27 Va. at 265.

paying compensation, he concluded 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."[25]

For Coalter, the key was that the owners of the mill and their predecessors had lawfully erected the mill and the dam pursuant to the requirements of law. Virginia clearly, and in his mind correctly, operated on the premise that mills provided a great public benefit. Having authorized the building of the mill through the Acts of its agents in Buckingham County and the owners having made a substantial investment in its creation, Coalter reasoned, the state could not now effectively retract its permission to operate the mill without paying compensation.

For Green, the key was that the state had clearly transferred the public right to the stream to the landowners, and it could not now reclaim it without paying compensation. However, unlike his colleagues who found the source of the principle they were invoking in the unwritten common law of the state, Green turned to the text of the Virginia Declaration of Rights. While he insisted that the United States Constitution had no bearing on this case —which Carr seemed to have suggested— Green found that the language pertaining to "the means of acquiring and possessing property" in the Virginia Declaration of Rights implicitly created a right to "fair compensation" when property was taken for a public purpose. Although Green conceded that the legislature no doubt assumed that the rights of the landowner here were subordinate to the rights of the public, he characterized this as a judicial question which the doctrine of separation of powers dictated be resolved by the courts and not the legislature. Cabell concurred in a one-paragraph opinion in which he agreed that whatever the rights of the public in a non-navigable watercourse might be, those rights had been transferred to the owners of the mill when they undertook to construct it pursuant to a court order. While such a decision could be reversed, he concluded, it could not be done without paying just compensation.

Consequently, the normally deferential Supreme Court of Appeals was unanimously unwilling to ignore the potential injury to the Crenshaws and their property. In a manner quite reminiscent of their contemporary, John Marshall, they were willing to engage in a broad reading of the law to protect the interests of an aggrieved property owner. Lacking a specific provision in their state constitution dictating the result that they felt justice required, the judges imaginatively reread their own constitution and the common law tradition to find a right to fair or just compensation —and more importantly to impose a limit on the state legislature's power to authorize internal improvements. Whether the source be the

25. *Id.* at 266.

common law, natural law, or a broad reading of "the means of acquiring and possessing property" language in the Virginia Declaration of Rights, the judges were unwilling to let a legislative finding of social utility over-ride the rights of property owners. While their ideas regarding the purpose behind the protection of property rights have differed from those of Marshall, the judges of the Supreme Court of Appeals of Virginia were just as committed to the protection of property rights as their more nationally-minded contemporary on the federal bench.