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JUSTICE DOUGLAS, THE CHESAPEAKE & OHIO CANAL, AND MARYLAND LEGAL HISTORY

Professor John A. Lynch, Jr.¹

On a hot, sunny, spring day in May 1977, a crowd, including senators and Supreme Court Justices, gathered at Lock Number One of the Chesapeake & Ohio Canal in Georgetown, Washington, D.C. The center of attention was an old man in a wheelchair, retired Supreme Court Justice William O. Douglas. The occasion was the unveiling of a bronze bust of Justice Douglas in commemoration of the establishment of the canal towpath from Washington to Cumberland, Maryland as a national park in his name.²

Justice Douglas, impaired by a stroke that forced his retirement from the Court nearly two years earlier, had trouble speaking, but concluded: “[M]any presidents and numerous public officials have helped with this canal project. I thank you all for coming. I thank all those who have no portfolio but have two strong legs and like to hike.”³

The occasion was a bittersweet reminder of another spring day twenty-three years earlier, in 1954, when Justice Douglas and others glided into Georgetown on the Canal Clipper, a canal boat, at the conclusion of a famous hike from Cumberland that saved the canal and the towpath.⁴

In January 1954, a *Washington Post* editorial endorsed a government plan to build a motorway from Cumberland to Washington that was to supplant the canal towpath.⁵ In a letter to the editor, Justice Douglas described the towpath as

[A] refuge, a place of retreat, a long stretch of quiet and peace at the Capitol’s back door – a wilderness area where man

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² See BRUCE ALLAN MURPHY, *WILD BILL: THE LEGEND AND LIFE OF WILLIAM O. DOUGLAS* 582 (2003) (hereinafter *WILD BILL*).

³ *Id.* at 583.

⁴ *Id.* at 333.

⁵ *Id.* at 336.

can be alone with his thoughts, a sanctuary where he can commune with God and with nature, a place not yet marred by the roar of wheels and the sound of horns.⁶

He challenged the editors to hike the canal with him. The challenge was accepted; the *Post* recanted its “error” and, in 1971, the towpath became a national park.⁷

Justice Douglas’s intervention in, nay creation of, a non-judicial public controversy was extraordinary,⁸ but Justice Douglas was an extraordinary, sometimes trail-blazing Justice who did not shy from controversy. He granted stays against the execution of the Rosenbergs⁹ and against United States military operations in Cambodia.¹⁰ In both instances, his actions were quickly overturned by his colleagues.

Justice Douglas holds the record for length of service on the Court and for the number of divorces by a Justice – three – each followed by remarriages to successively younger women.¹¹ The latter gave him an almost tabloid aura that many found amusing, though many did not. He was also a poker pal of FDR.

He nearly became an “accidental” President of the United States.¹² In 1944, President Roosevelt indicated a willingness to replace Vice President Henry Wallace with Douglas or Senator Harry Truman. Through a bit of chicanery, Democratic Party boss Robert Hannegan convinced party leaders, perhaps incorrectly, that Roosevelt preferred Truman.¹³ Four years later, Douglas infuriated Truman when he refused Truman’s pleas that he serve as the 1948 Democratic vice presidential candidate. In 1970, he was the subject of a lengthy impeachment inquiry.¹⁴

⁶*Id.* at 330.

⁷JAMES F. SIMON, *INDEPENDENT JOURNEY: THE LIFE OF WILLIAM O. DOUGLAS* 329 (hereinafter SIMON).

⁸Not unprecedented, perhaps – Chief Justice Warren reluctantly presided over the official investigation of the death of President Kennedy and Justice Robert Jackson eagerly prosecuted the Nazi miscreants at Nuremburg – but extraordinary nonetheless.

⁹*Rosenberg v. United States*, 346 U.S. 273 (1953) (appendix to Opinion of Douglas, J., at 321).

¹⁰*Holtzman v. Schlesinger*, 414 U.S. 1316 (1973) (opinion in chambers of Douglas, J.).

¹¹WILD BILL at 513.

¹²See DAVID McCULLOUGH, *TRUMAN* 306-08 (1992).

¹³*Id.* at 306.

¹⁴This was instigated primarily by then House Minority Leader Gerald Ford and was

On the Court, Justice Douglas left important constitutional footprints. For example, he authored *Skinner v. Oklahoma*,¹⁵ which established strict scrutiny of classifications involving fundamental rights and *Griswold v. Connecticut*,¹⁶ establishing the constitutional right of privacy. By the end of his years on the Court, he attacked the Internal Revenue Service, usually in dissent, with a gusto that would warm the hearts of today's most extreme tax protestors.¹⁷ Though famous for his abrasive independence, he could "schmooze" colleagues when necessary. His backstage maneuvering was perhaps crucial in stiffening Justice Blackmun's resolve in formulating his abortion decision in *Roe v. Wade*.¹⁸

In a dissenting opinion that attracted considerable attention at the time, Douglas appeared to suggest that trees should have standing in an action involving an attempt to turn a forest into a theme park.¹⁹ The critical passage of the opinion read:

Inanimate objects are sometimes parties in litigation. A ship has a legal personality, a fiction found useful for maritime purposes So it should be as respects valleys, alpine meadows, rivers, lakes, estuaries, beaches, ridges, groves of trees, swampland, or even air that feels the destructive pressures of modern technology and modern life. The river, for example, is the living symbol of all the life it sustains or nourishes – fish, aquatic insects, water ouzels, otter, fisher, deer, elk, bear, and all other animals, including man, who are dependent on it or who enjoy it for its sight, its sound, or its life.

motivated by revenge for the failure of the Senate to confirm two Nixon Supreme Court nominees, Justice Douglas' questionable nonjudicial income, and the sophomoric radicalism of his "quickie" book, *Points of Rebellion*. See SIMON at 400-06.

¹⁵316 U.S. 535 (1942).

¹⁶381 U.S. 479 (1965).

¹⁷See BERNARD WOLFMAN, JONATHAN L.F. SILVER AND MARJORIE A. SILVER, *DISSENT WITHOUT OPINION: THE BEHAVIOR OF JUSTICE WILLIAM O. DOUGLAS IN FEDERAL TAX CASES*, 1973.

¹⁸410 U.S. 113 (1973). See BOB WOODWARD AND SCOTT ARMSTRONG, *THE BROTHERS* 184-85 (1979).

¹⁹*Sierra Club v. Morton*, 405 U.S. 727, 743 (1972).

The river as plaintiff speaks for the ecological unit of life that is part of it. Those people who have a meaningful relation to that body of water – whether it be a fisherman, a canoeist, a zoologist, or a logger – must be able to speak for the values which the river represents and which are threatened with destruction.

Whatever its merit concerning the law of standing, this passage manifests what was likely Douglas' greatest passion – America's natural wonders, including the largely unspoiled Potomac Valley.

Assessment of the legacy of any Supreme Court justice must usually await the passage of many years. Changing judicial and political tides often erode the significance of what seem at the time to be "landmark" decisions. For Justice Douglas, however, the C&O Canal, which he nearly single-handedly preserved from obliteration, is a legacy that can never be diminished. As the C&O is contained entirely in Maryland, Marylanders are the primary beneficiaries. This legacy is not limited to the physical features of the canal – the old ditch that is 185 miles long, the adjacent towpath on which mules slowly pulled barges, or what remains of the locks that lifted the boats the gentle 600 feet from sea level into the Appalachians – nor is it simply the dramatic Potomac vistas. It is also a rich history. The canal was incubated in the late eighteenth century by "Founding Fathers," mostly Virginians. It was birthed mainly by leading citizens of Maryland and Virginia in the early nineteenth century. Its existence was nurtured – some might say kept on life support – by the Maryland Court of Appeals through that century and into the next.

If the canal *had* been obliterated by the proposed motorway, its history might be unworthy of much consideration; but, it *is* here, and as with respect to anything so magnificent in our midst, it is worth pondering how it *got* here. 2004 marked the fiftieth anniversary of Justice Douglas's famous hike. As one who has appreciated and enjoyed the canal for so many years, I thought it would be appropriate to retrace his footsteps, to take time to enjoy the entire legacy all at once, and to ponder the legal history conjured up by natural and man-made landmarks along the way. Thus, over three wonderful days in the fall of 2004, I bicycled from the eastern end of the C&O Canal to Cumberland. What follows is a description of this trip and some reflections on how the places I saw came to be as they are.

Day 1 – Suburban D.C. to Harpers Ferry

Starting at my back door in Kensington, I took the Capital Crescent Trail and MacArthur Boulevard to the canal at Widewater, twelve miles from Georgetown (deliberately avoiding the Georgetown Sunday joggers). Within a few minutes, I was at Great Falls, fourteen miles from Georgetown.

Great Falls is a good jumping-off point for any discussion of the history (legal or otherwise) of the C&O because it is “Exhibit A” of why any serious scheme of Potomac River navigation requires substantial human “improvements” to the river’s natural channel. Notwithstanding their beauty, the falls and gorge below are the most significant obstacle to navigation on the river.

George Washington had a vision about Potomac River navigation; moreover, he was able to lock the good citizens of Maryland into that vision, by a remarkable sequence of events, until the twentieth century! Washington was familiar with the land west of the Alleghenies from his days as a surveyor and soldier and viewed it as “key . . . to the entire American experiment.”²⁰ The motives of “the Father of his Country” were not entirely altruistic – he amassed significant landholdings in the backcountry, the value of which depended on improved transportation from the seaboard colonies.²¹ The closing of the frontier by the war-weary British in 1763 perhaps first stirred anti-British notions in his mind.²² When the British were vanquished in the Revolution and he resigned his commission as leader of the American forces, Washington turned his attention to other matters. One of the principal of these was Potomac River navigation.²³

His dedication to alleviating the flow of commerce to the western lands was strengthened by an arduous journey to inspect his own lands in the fall of 1784.²⁴ Later that year, he appeared before the Virginia legislature to present a plan for Potomac navigation and to seek a charter

²⁰JOEL ACHENBACH, *THE GRAND IDEA: GEORGE WASHINGTON’S POTOMAC AND THE RACE TO THE WEST* 93 (2004).

²¹*Id.* at 38-39 (hereinafter ACHENBACH).

²²*Id.*

²³On this subject Madison wrote to Jefferson: “The earnestness with which he espouses the undertaking is hardly to be described, and shows that a mind like his, capable of grand views and which has long been occupied with them, cannot bear a vacancy.” *Id.* at 129.

²⁴RICHARD L. STANTON, *POTOMAC JOURNEY* 48 (1993) (hereinafter STANTON).

for what was then called the Patowmack Company. James Madison simultaneously presented the same plan to the Maryland legislature.²⁵ Maryland adopted the Patowmack Company's charter on January 22, 1785.²⁶ Acknowledging that "Patowmack" navigation required substantial modifications to or diversion from the river channel, this charter, *inter alia*, allowed the company "to cut such canals, and erect such locks, and perform such other works, as they shall judge necessary, for opening, improving and extending, the navigation of the said river above the tide water to the highest part of the north branch to which navigation can be extended . . ."²⁷ The charter contained an expeditious provision for taking from private owners "any land through which [any necessary] canal is intended to pass."²⁸

At Washington's invitation, Maryland and Virginia dispatched commissioners to Mount Vernon to formulate the Mount Vernon Compact which was adopted by the Maryland General Assembly on March 12, 1786.²⁹ It provided, in part, that "the river Patowmack shall be considered as a common highway for the purpose of navigation and commerce to the citizens of Virginia and Maryland, and of the United States, and to all other persons in amity with the said states trading to or from Virginia or Maryland."³⁰

Since this compact and the Patowmack Company charter violated the Articles of Confederation, a convention was required. The convention was finally assembled in Philadelphia in 1787,³¹ and, of course, it addressed matters other than Patowmack navigation. The Patowmack Company first met in Alexandria on May 17, 1785. Washington was elected its first president. Former Maryland Governor Thomas Johnson was elected as a director.³² Despite his prestige and enthusiasm for the cause of making the Potomac navigable, Washington could not alter the fact that because of river conditions and notwithstanding the company's improvements, boatmen were "unable or

²⁵*Id.* at 50.

²⁶1784 Md. Laws XXXIII.

²⁷*Id.* at IV.

²⁸*Id.* at XI.

²⁹1785 Md. Laws I.

³⁰*Id.* It is somewhat sad to note that this former spirit of Potomac Valley cooperation was sadly lacking in Maryland's recent attempt to export its zoning philosophy across the river by limiting Fairfax County's use of river water, an attempt that was rejected by the Supreme Court in *Virginia v. Maryland*, 540 U.S. 56 (2003).

³¹STANTON at 51.

³²*Id.* at 50-51.

unwilling to carry freight” on the Potomac more than forty-five days per year.³³

In 1799, capital contributed by the State of Maryland permitted blasting at Great Falls, Virginia to complete a canal that skirted the falls.³⁴ Washington’s memory was invoked to obtain this support for the Patowmack Company.³⁵

In February 1802, the first boat was locked through the canal at Great Falls on the Virginia side.³⁶ The last great barrier to navigation removed, the company, later in 1802, declared its first and last dividend.³⁷ In 1823, a joint commission appointed by the states of Virginia and Maryland transmitted a report to their legislatures concluding that the Patowmack Company failed to comply with its charter and that it could not do so.³⁸ This report led to a call for a convention in Washington of delegates from Virginia, Maryland, Pennsylvania, and Ohio to consider the report’s proposal – a canal that would hug the shore of the Potomac from Washington to Cumberland and continue across the Appalachians to Ohio.³⁹

The new canal’s most vigorous advocate, Virginia Congressman Charles Fenton Mercer, strongly invoked Washington’s memory: “[U]nder this hallowed influence, we are about to combine all our energies, in fulfilling the early suggestions of his wisdom, in rendering imperishable this proud monument of his glory.”⁴⁰

The charter for the new Chesapeake & Ohio Canal Co. was first adopted by Virginia and then confirmed by Maryland on January 31, 1825.⁴¹ President Monroe signed the federal act confirming the C&O charter on the last day of his administration, March 3, 1825.⁴² The estimate of an engineer engaged by Maryland of the cost of completing the canal from Georgetown to Cumberland was about \$1,574,000.⁴³

The desire for a new canal was not shared by all in Maryland. Baltimore’s assent was secured only briefly and only with the prospect of

³³*Id.* at 73.

³⁴ACHENBACH at 214.

³⁵*Id.* at 214.

³⁶*Id.*

³⁷*Id.* at 215.

³⁸THOMAS J. SCHARF, III, HISTORY OF MARYLAND 155 (1967) (hereinafter SCHARF).

³⁹ACHENBACH at 242.

⁴⁰*Id.* at 244.

⁴¹1824 Md. Laws ch. 79.

⁴²*Id.* at 49.

⁴³*Id.* at 51.

a branch canal to Baltimore from Washington,⁴⁴ which never came to pass. The counties which stood most to gain from such a project – Allegany, Washington, Frederick, and Montgomery – were able to gather support on Maryland’s eastern shore by promising state support for dredging rivers and draining marshes there.⁴⁵

Washington’s vision for Potomac navigation was probably not sound Maryland public policy when it chartered the C&O in 1825 for reasons Washington could not have anticipated. First, the Louisiana Purchase and the Lewis and Clark expedition had transformed the Potomac into “a regional river in the East, a tributary of the Chesapeake.”⁴⁶ The lifeline for “western” commerce was the Ohio and Mississippi, not the Potomac. Second, poking over the horizon was the Iron Horse – the railroad. The capabilities of steam power were still unproven in 1825,⁴⁷ but the prospects that the railroad could make Baltimore a center of eastern commerce generated great enthusiasm there. “Compared to railroad mania, canal fever was perfect health.”⁴⁸

Competition with the railroad was not the only problem facing the canal – another was “sticker shock.” A surveyor appointed by President Monroe estimated the cost of the entire canal across the Alleghenies at over twenty-two million dollars, and the eastern section, to Cumberland, at over eight million.⁴⁹ This report sparked a meeting of leading citizens in Baltimore that led to the grant of a charter by the legislature for the B&O Railroad on February 28, 1827.⁵⁰ This date would become important because the charter of the canal company provided that it would not be effective until one quarter of its stock was subscribed.⁵¹ This did not occur until May, 1828 when Congress, followed by the Maryland legislature, made subscriptions to the stock of the canal company.⁵²

President John Quincy Adams turned the first shovel full of earth at the canal groundbreaking amid great fanfare at Great Falls on July 4,

⁴⁴FREDERICK GUTHEIM, *THE POTOMAC* 163 (1949) (hereinafter GUTHEIM).

⁴⁵ROBERT J. BRUGGER, *MARYLAND: A MIDDLE TEMPERAMENT 1634-1980*, 203 (1988) (hereinafter BRUGGER).

⁴⁶ACHENBACH at 229.

⁴⁷BRUGGER at 204.

⁴⁸*Id.*

⁴⁹SCHARF at 161.

⁵⁰*Id.* at 165-66.

⁵¹1824 Md. Laws ch. 79, § 3.

⁵²This was not until surveyors appointed by President Adams provided a “second opinion” estimating the cost of completion of the canal to Cumberland at \$4,500,000. SANDERLIN at 56.

1828. By an odd coincidence, on that same day Charles Carroll of Carrollton, 91, and the last surviving signer of the Declaration of Independence, participated in the laying of the first stone of the B&O Railroad.⁵³ Both ventures thus began their trek toward collision and legal Armageddon at scruffy little Point of Rocks, Maryland.

In addition to the ghosts of Washington and John Quincy Adams, Great Falls is haunted by many tourists and sightseers, particularly on a Sunday morning. The crowd thins out after a while as one proceeds westward. On one's right are steep cliffs; on the left, the Potomac widens. At Seneca, it is as wide as any lake in this part of the country. At mile twenty is the Dierssen Waterfowl Sanctuary where, twenty-five years ago, after looking for years, I saw an Eastern bluebird for the first time. It just hopped onto a branch right near me. Many "momentous" events along the canal have little to do with Founding Fathers.

At mile twenty-two, Violette's Lock, the canal bed narrows and it is dry, except for algae-laden, collected rain water. Beyond Seneca the canal has been dry for so long that it contains towering trees. This is true most of the way to Cumberland except for some areas that have been rewatered or somehow remained full of water. Between Seneca and Point of Rocks, the quiet extolled by Justice Douglas is disturbed only by jets to and from Dulles Airport in Virginia and the great clatter of a power plant at Dickerson; however, history is never far away. At mile thirty, site of the former Edwards Ferry, Union soldiers crossed the Potomac, in October 1861, only to meet disaster at the Battle of Balls Bluff.⁵⁴ At mile thirty-five is White's Ferry, the only remaining ferry on the Potomac. The ferry boat is named for Confederate General Jubal Early, who led a raiding party into the District of Columbia in July, 1864. Today, the ferry is a quaint alternative to the Capital Beltway.

Above Edwards Ferry I saw signs of flooding from an unremarkable recent hurricane that did not quite reach the towpath. It provided some insight into the difficulties the uncontrolled Potomac provided for the canal company. At mile forty-two is the imposing Monocacy Aqueduct, which is today shored up by metal brackets as it undergoes renovation.

At Point of Rocks, at mile forty-eight, one encounters other people again, at least on a Sunday afternoon. It is one of those surprising places along the canal, seemingly in the middle of nowhere, where large numbers of apparently local people come to hike, bike, fish, watch birds

⁵³BRUGGER at 168.

⁵⁴MIKE HIGH, *THE C&O CANAL COMPANION* 136 (1997) (hereinafter HIGH).

and so forth. It is hard to imagine that such a place as Point of Rocks could have sparked a legal battle involving Daniel Webster and Roger Taney (until he became President Jackson's Attorney General) that culminated in a decision of the Maryland Court of Appeals that comprised 272 pages!⁵⁵ Hard to imagine, until one looks at the squinch of a ledge west of town that separates the Catoctins from the Potomac.

It is difficult to imagine how a double track railroad and a canal intended to be sixty feet wide at its surface⁵⁶ can coexist much of the way along the Potomac between Point of Rocks and Harper's Ferry, where the railroad crosses into Virginia. Alternatives to that route were impractical or prohibitively expensive. Though compromise ultimately enabled accommodation of both, neither canal nor railroad was inclined to abet its competitor in 1829 as both moved westward. Each attempted to deny the other the ability to acquire necessary land. Each claimed an absolute legal right to do so.

On June 10, 1828, the canal company filed suit against the B&O in Washington County Circuit Court seeking an injunction preventing the railroad from constructing its road on the route it had adopted. The injunction was ultimately granted.⁵⁷ On June 23, 1828, the B&O filed an action to prevent the canal company from acquiring any land from parties to prior contracts with agents of the railroad or lying within land surveyed for the railroad.⁵⁸ It later filed supplemental bills claiming "a right to construct a road in the valley of the Potomac, along the Maryland shore, from Point of Rocks to Cumberland."⁵⁹

The canal company answered, asserting "a prior and paramount right to the choice of a route and the site for the canal, in the valley of the Potomac"⁶⁰ This paramount right derived from the surrender of its charter by the Patowmack Company to the canal company.⁶¹ The canal company asserted that if the railroad obtained the land it claimed, the cost of constructing the canal outside "the valley of the Potomac" would be so enormous as to render the undertaking "a canal impracticability."⁶²

⁵⁵*Chesapeake & Ohio Canal Co. v. Baltimore & Ohio Rail Road Co.*, 4 G. & J. 1 (1832).

⁵⁶SANDERLIN at 64.

⁵⁷*Chesapeake & Ohio Canal*, 4 G. & J. at 84.

⁵⁸*Id.*

⁵⁹*Id.* at 85.

⁶⁰*Id.* at 85-86.

⁶¹*Id.* at 85.

⁶²*Id.* at 86.

The railroad contended it had priority in acquiring the land it needed in that it was formally organized on April 23, 1827, and had completed a survey calling for the road to enter the Potomac valley at Point of Rocks before the canal company was formally organized on May 26, 1828. The railroad obtained an injunction against the canal company that halted canal construction at Point of Rocks *pendente lite*.

The Court of Appeals viewed the issue as whether “[t]he Chesapeake and Ohio Canal Company, has a priority of right, in the choice or selection of ground for the route and site of the canal in the valley of the Potomac.”⁶³ Chief Judge Buchanan, speaking for the majority and serving also as Chief Judge of the Fifth Judicial Circuit – comprised of Frederick, Washington, and Allegany Counties – professed an almost unnerving frankness about the potential consequences of the court’s decision:

Should the decision of this cause, have the effect to arrest the progress of the great work [the canal], commenced by the party against whose claim it is pronounced, it will be a matter of regret. But it is the business of a judge to endeavor in every case — to arrive at a correct conclusion; and that done, to the conviction at least of his own mind, his duty, though sometimes [] unpleasant, is a very plain one, and admits of no hesitation in the discharge of it.⁶⁴

To determine whether the canal company had a prior right to exploit the Potomac valley route, the court looked to the charter of the Potomac Company,⁶⁵ which had been surrendered to the canal company on September 17, 1828. The court viewed the 1785 charter of the Potomac Company as establishing, when necessary to open and extend navigation on the river, a power “to *cut canals and erect locks and other works*, on both sides of the river.”⁶⁶ The court viewed the right to make

⁶³*Id.*

⁶⁴*Id.* at 87.

⁶⁵This was George Washington’s Patowmack Company, which “mysteriously” had begun referring to itself as the Potomac Company. ACHENBACH at 241.

⁶⁶*Id.* at 80 (emphasis in original).

canals and to purchase and condemn land for that purpose as a contract.⁶⁷

It held that these rights of contract could not be impaired by the grant of the railroad's charter, which, of course, was itself a legislative enactment.⁶⁸ As authority, it cited the venerable *Trustees of Dartmouth College v. Woodward*.⁶⁹

This represented the nineteenth century view of the sanctity of contract. The court's invocation of *Woodward* must have stung B&O counsel Daniel Webster, who was successful on behalf of Dartmouth in that case. The application of a principle that reflexively prohibits a legislature from adapting to new circumstances on account of an earlier legislative "contract" with an entity is a good deal more troublesome in a case like the canal case than it was in *Woodward*. In that case, the New Hampshire legislature, in 1816, expanded the board of trustees of Dartmouth, a private institution chartered by King George III in 1769. The legislative amendments allowed the governor of the state to appoint additional trustees and created a board of overseers over the trustees comprised in part of public officials.

Chief Justice Marshall noted the Supreme Court's "high and solemn duty of protecting, even from legislative violation, those contracts which the constitution of our country has placed beyond legislative control."⁷⁰ The Court also noted that the funds of the college consisted of private donations⁷¹ and that it was not a state instrument.⁷² There could be an impairment of Dartmouth's charter rights only if public policy might "so imperiously demand."⁷³ The Court found no such demand.

In 1785, the Patowmack Company charter provided significant power over a great state resource, the Potomac River, and adjacent lands. The canal company sought from that grant the authority to construct a massive improvement in the state, not only in the face of a competing new technology, but also amid legitimate qualms about the cost of a canal. In the course of the legal struggle, the legislature came to favor the railroad as a *purely* Maryland institution.⁷⁴

To the Court, none of that seemed to matter. The rights of the canal company as acquired from its predecessor which antedated the

⁶⁷*Id.* at 108.

⁶⁸*Id.*

⁶⁹17 U.S. 518 (1819).

⁷⁰*Id.* at 626.

⁷¹*Id.* at 632.

⁷²*Id.* at 636-37.

⁷³*Id.* at 645.

⁷⁴SANDERLIN at 75.

railroad charter, were *property* rights that could not be impaired.⁷⁵ The railroad could not *constitutionally* be permitted to select a route which would make the canal impracticable.⁷⁶

The Maryland Court of Appeals assumed that the legislature, in chartering the railroad and providing that the railroad should “strike the Potomac, at some point between the mouth of the Monocacy River and the town of Cumberland,” did not intend “to alter or repeal any part of the canal law.”⁷⁷ It concluded that the railroad charter, although it required construction in Frederick, Washington, and Allegany Counties, did not require it along the path of the Potomac. This may not have been an appealing prospect for the railroad in light of the topography of those counties above the river valley — particularly in the days before dynamite — but it was a means of avoiding finding that the legislature repealed the powers of the canal company by a later enactment, or worse, that it intended to start a race between the two franchisees, with bets of half a million dollars on each, and the loser forfeiting its franchise.⁷⁸

The primary dissenting opinion of Judge Archer, who was also Chief Judge of the Sixth Judicial Circuit, comprising Baltimore and Harford Counties, contended that there indeed had been a race and that the railroad had won! The railroad was incorporated, with statutory guidance concerning its route, eight months before Maryland and Congress subscribed to the requisite amount of the canal company’s stock to make its charter effective.⁷⁹ Thus, all acts of the railroad in selecting the ground for its road were vested and entitled to priority.⁸⁰

Judge Archer saw no breach of faith on the part of the Maryland legislature in changing horses in light of the foot-dragging of Congress in making its contribution to the canal.

[I]t must be admitted that the whole work was entirely contingent on the possible subscription by the United States of \$1,000,000. And when the uncertainty of such an event was looked to, it must have been doubted by all, even the most sanguine, whether it ever could progress.

⁷⁵*Chesapeake & Ohio Canal*, 4 G. & J. at 146.

⁷⁶*Id.* at 149.

⁷⁷*Id.* at 158.

⁷⁸*Id.* at 160.

⁷⁹*Id.* at 196 (dissenting opinion, Archer, J.)

⁸⁰*Id.*

Under such discouraging circumstances . . .
. . . can it be said that there could be any
breach of faith in the state undertaking to
make her grants to the Rail Road
Company, as she has done, and of
interfering with her previous offer to the
extent which she did do by that grant?⁸¹

According to Judge Archer, this grant to the railroad left any legislature on *this* side of the Atlantic without power to save the earlier rights of the Patowmack Company: “It would require the famed omnipotence of an English Parliament to give life to incidents or franchises, and then put them in abeyance, before the principal or corporation was created.”⁸²

What is remarkable about both the court’s opinion and Judge Archer’s dissent is that both saw the state as having irrevocably ceded, to one party or the other, any power to determine the most efficacious mode of transportation in the Potomac valley west of Point of Rocks. Judge Archer was appalled that such a cession could have occurred in the distant past,⁸³ but he relied on a similar tyranny of contract in dissent – namely, the grant of the railroad’s charter arising in 1827.⁸⁴

In fact, 1827 was a point at which Maryland might well have rethought making a financial commitment to the C&O Canal. The “failure” of the Patowmack Company to achieve its objectives, the uncertainty about the cost of the venture, and the increasing feasibility of the railroad all might have given the citizens and legislature cold feet about the canal. It might well have seemed that, from his tomb at Mount Vernon, the “Father of his Country” was selling Maryland the Brooklyn Bridge – *again!!* Under the court’s decision in *C&O Canal*, the canal was an offer she could not refuse.⁸⁵

⁸¹*Id.* at 206.

⁸²*Id.* at 194.

⁸³*Id.* at 187-88.

⁸⁴*Id.* at 221-25.

⁸⁵“Not long afterward, then Supreme Court Chief Justice Taney took a distinctly different view of the power of a state to respond to changed circumstances notwithstanding the implied ‘contracts’ entailed in prior franchises. In upholding the power of Massachusetts to allow construction of a Charles River Bridge in 1828 that allegedly impaired the value of a franchise granted Harvard College in 1640, Taney held “[T]he object and end of all government is to promote the happiness and prosperity of the community by which it is established; and it can never be assumed, that the government intended to diminish its power of accomplishing the end of which it was created. And in a country like ours, free, active, and enterprising, continually

For most of the way between Point of Rocks and Harper's Ferry, the canal and railroad share what is often a narrow space between the Catoctins, South Mountain, and finally the Blue Ridge. Today the railroad moves away from the river at times. In their litigation, the railroad and canal companies asserted that the narrow passage could not accommodate both. Freed of the injunction, the parties reached a compromise: the railroad stopped at Point of Rocks until 1840.⁸⁶

In 1832, the canal company faced labor shortages,⁸⁷ cholera outbreaks,⁸⁸ and whiskey-fueled brawling among its Irish immigrant canal diggers.⁸⁹ There were also serious financial challenges. The original funding was sufficient only to get the canal to Point of Rocks.⁹⁰ The canal needed more money and Maryland found itself deserted, for the most part, by its two erstwhile partners, Virginia and the United States. In 1834, Maryland bought \$125,000 of additional stock.⁹¹ In December 1834, it made a two million dollar loan to the canal company.⁹² In 1835, Maryland was authorized to subscribe to an additional three million dollars in the stock of both the canal and the railroad.⁹³

Maryland made her contribution to the canal in state bonds, but because of economic conditions, her representatives were not able to borrow the funds the state's obligations represented.⁹⁴ By 1840, the State had invested nearly 7.2 million dollars in the canal⁹⁵—awfully close to the cost estimate that had nearly scuttled it, and that investment took the canal only to Dam Six, fifty miles short of Cumberland.⁹⁶ At that time, Maryland had fifteen million dollars in debt for “internal improvements.”⁹⁷

advancing in numbers and wealth; new channels of communication are daily found necessary, both for travel and trade; and are essential to the comfort, convenience and prosperity of the people.” *Charles River Bridge v. Warren Bridge*, 36 U.S. 420, 547 (1827).

⁸⁶GUTHEIM at 261-62.

⁸⁷SANDERLIN at 71.

⁸⁸HIGH at 155.

⁸⁹ACHENBACH at 257-61.

⁹⁰GUTHEIM at 160-61.

⁹¹SCHARF at 182.

⁹²*Id.* at 186.

⁹³*Id.*

⁹⁴*Id.* at 208.

⁹⁵BRUGGER at 231.

⁹⁶HIGH at 222.

⁹⁷BRUGGER at 231.

Unfortunately, the canal company hypothecated the Maryland bonds the state contributed, getting what it could for them. This action, the State general debt burden, and poor economic conditions caused Maryland to flirt with bankruptcy or repudiation of her debts in the 1840's.⁹⁸ In March 1843, a law was passed calling for sale of the state's interest in the canal and the railroad.⁹⁹ Somehow the state overcame the crisis with a combination of taxes (no slots back then) and curtailment of expenditures.¹⁰⁰

At Harper's Ferry, where the Shenandoah joins the Potomac, I crossed over the foot bridge into West Virginia. When one gets over that bridge, the first ghost encountered is John Brown, who raided Harper's Ferry in an attempt to spark a slave rebellion in 1859 but was routed by forces under Col. Robert E. Lee. Lee's forces, of course, had a different agenda at Harper's Ferry, the site of a federal arsenal a couple of years later. At the end of the first day's ride, I had enough aches and pains to wonder how I would be able to ride another third of the canal the next day.

Day 2 – Harper's Ferry to Hancock

The next day, I crossed back over to the Maryland side of the canal and found it a good deal less crowded on Monday morning than it was on a Sunday afternoon. The Potomac was high, and out in the middle a great blue heron stood defiantly against the current. Such moxie! A short time later, a wild turkey landed a short distance away to my right. I always thought they were too timid for that. A little while later, I was astounded, well – maybe a little embarrassed – when a man obviously in his eighties whizzed by me as if his bike were a Harley.

At mile eighty-four, owing to damage to the canal from floods, it is necessary to detour onto picturesque country roads. The detour can be as short as four miles, but the rolling Washington County pastures enticed me to remain on Maryland Route 63 to one of Maryland's great little gems – the town of Williamsport. I suppose the first ghost one meets there is "Hooper" Wolfe, former proprietor of Wolfe's On the Square (still there), who was a mule driver as a boy and who wrote a delightfully sentimental book about it.¹⁰¹

⁹⁸*Id.* at 232.

⁹⁹SCHARF at 211.

¹⁰⁰*Id.* at 214.

¹⁰¹GEORGE "HOOPER" WOLFE, *I DROVE MULES ON THE C&O CANAL* (1969).

Williamsport was, for a time, the western terminus of the canal.¹⁰²

Unlike other towns along the canal, such as Hancock or Cumberland, there was no railroad in Williamsport,¹⁰³ so it really was a *canal* town. Charming little Williamsport “coulda been a contender;” it was even considered as a site for the national capital. It lost out, of course, to what we now know as Washington, D.C.¹⁰⁴

About six-and-one-half miles above Williamsport is feeder Dam Five. In December, 1861 Stonewall Jackson and his men attempted to breach the dam but could not do so.¹⁰⁵ Today there is a power plant at the dam. Above the dam, the slackwater somewhat resembles a lake. Canal barges navigated the river here for a short distance. At mile one 112 is Fort Frederick State Park, which includes a campground, a muzzle-loader firing range and a restored French and Indian era fort. At the same place, Big Pool, a natural pool that parallels the canal for two miles, begins. Beginning at mile 120, another natural pool, Little Pool, a fine fishing hole, parallels the canal for about a mile. For about ten miles east of Hancock, the canal towpath has a new rival for bicycle traffic. The former Western Maryland Railroad right-of-way, between the canal and Interstate 70, is now a paved bicycle path. After rumbling along the canal from Williamsport, I couldn’t resist the smooth ride to the bright lights of Hancock, where Maryland is pinched to its narrowest point. The Little Tonoloway Reservation Area between the town and the river is undoubtedly one of the best places to sit for hours and just watch the river go by. Not really enough daylight for that on this day, however.

Day 3 – Hancock to Cumberland

As I started out at about 7:00 a.m., I saw that I was going to have some female companionship for the final day — Tropical Depression Jeanne. The driving rain transformed the towpath into a puddle sixty miles long and two inches deep, but under those conditions, I had the place to myself. For about seven hours and forty-five miles, I saw not a single other person. In the foulest weather, one can most appreciate the serenity that Justice Douglas so desperately wanted to preserve, and maybe under those circumstances one is the most grateful for his efforts; but my goodness, that was one sloppy ride!

¹⁰²SANDERLIN at 166.

¹⁰³HIGH at 194.

¹⁰⁴ACHENBACH at 171-82.

¹⁰⁵HIGH at 201.

Nine miles above Hancock, the Cacapon, a gentle whitewater river that disappears under a Virginia mountain as the Lost River then re-emerges as the Cacapon, joins the Potomac. Spanning the Cacapon at its confluence is a B&O bridge, an earlier incarnation of which was burned by Stonewall Jackson's men in 1862.¹⁰⁶ Also at the mouth of the Cacapon are the ruins of Fort Dawson, built by Washington in French and Indian War times.¹⁰⁷

About a mile above the Cacapon is what remains (not much) of feeder Dam Six, where the canal stopped in 1839 until opened in its entirety on October 10, 1850. Of the remaining fifty miles, only eighteen miles were uncompleted in 1839, but that included the tunnel at Paw Paw and a stretch west of the tunnel, at which point the canal had to be cut through rock.

Between the time it was completed to Dam Six and the time it opened in 1850, the condition of the canal deteriorated seriously. The State of Virginia, which had turned its back on the canal financially after its original capital contribution, guaranteed \$300,000 in repair bonds issued in 1849. In 1870, which was the beginning of the canal's traffic and financial "heyday," it actually made a little money. As Judge Miller described the situation for the Maryland Court of Appeals:

After a persistent and successful struggle of more than forty years with many disasters and innumerable difficulties, the Chesapeake and Ohio Canal Company has at last received from its tolls and revenues a surplus over and above its ordinary expenses, applicable to the payment of its preferred or lien creditors . . . [T]he immediate question now to be decided is, to whom shall this fund be paid?¹⁰⁸

Notwithstanding that Maryland had advanced millions more than Virginia in the 1830s to the canal, Virginia sought repayment preference concerning funds it had to pay pursuant to its guarantee of the repair bonds. In this effort, Virginia was represented by John Prentis Poe, later

¹⁰⁶*Id.* at 220.

¹⁰⁷*Id.*

¹⁰⁸*Virginia, supra*, 32 Md. at 527.

Maryland Attorney General and author of one of Maryland's most famous legal treatises.¹⁰⁹

The canal company was given the power to issue bonds by the Maryland legislature in 1843.¹¹⁰ In 1844, the legislature waived its lien in favor of bonds to complete construction of the canal from Dam Six to Cumberland.¹¹¹ The Maryland Court of Appeals held that the waiver applied also to repair bonds. The canal company could allow the guarantor of repair bonds – the State of Virginia – to jump the line of other creditors, including Maryland herself, for distribution of canal revenues.

The sovereignties that created this corporation . . . designed the construction and perpetual maintenance of a great public channel of internal and inter-state commerce, which they declared should be forever “esteemed and taken to be navigable as a public highway . . .” and it would be strange if there could be found in any law passed for the express purpose of aiding its construction and maintenance, any provision restraining its power to avail itself of its revenues and resources in such a way as to secure its existence. . . .¹¹²

As it had nearly four decades earlier, the Maryland Court of Appeals again protected the existence and upkeep of the canal. Nevertheless, Virginia's victory was only partial. The following year, the Court of Appeals, in an appeal after remand, held that this preference applied only to amounts on the principal and not to interest paid. Holders of preference under the 1844 act would have to pay back to the company distributions representing interest.¹¹³

Just past mile 140, and just off the canal, is what is somewhat grandiosely called the “town” of Little Orleans. It is made up of a couple of buildings. Formerly, there was an old store/restaurant/pool hall called

¹⁰⁹See POE'S PLEADING AND PRACTICE (4th ed. 1906).

¹¹⁰1843 Md. Laws ch. 124.

¹¹¹1844 Md. Laws ch. 281.

¹¹²*Virginia, supra*, 32 Md. at 536.

¹¹³*Virginia v. Chesapeake & Ohio Canal Co.*, 35 Md. 1, 13-14 (1871).

“Bill’s.” When I asked Bill one day what time it closed, he replied, “when everybody leaves.” The old Bill’s burned down and has been replaced by a somewhat less quaint establishment, but last time I checked, Bill was still there. This area is adjacent to the Green Ridge State Forest, which has rugged trails and primitive campsites for serious outdoors persons.¹¹⁴

The eastern end of the Paw Paw Tunnel is at mile 155.2. It seems to me that 10,000 or so years from now, when people explore what was Maryland, the Paw Paw Tunnel will be one of the most difficult man-made objects to explain. First, it will unquestionably still be there, unlike any sort of bridge or professional football stadium, and it will appear then, as it does today, that there was absolutely nothing else near it. Will they have any idea that it was in use for only about seventy-five years and in heavy use for less than forty years?

Even today, one is overwhelmed by the scale of the project, which is seven-eighths of a mile long and was intended to save five miles of canal digging. It took twelve years to build,¹¹⁵ and thus held up the opening of the canal to Cumberland. As one enters and walks along the towpath, the other end is a spooky “light at the end of the tunnel.” As I passed through on this trip, it provided a welcome, if chilly, twenty minutes out of the deluge and a dry place to have lunch. The ghosts at this landmark are the many Irish workers who were the main canal workforce and who inhabit a primitive “cemetery” near the western end of the tunnel.

The section between Paw Paw and Oldtown, at mile 166, is one of the most remote, and beautiful stretches of the canal. In several places one loses sight of the Potomac completely and is treated instead to ruggedly splendid meadows and marshes. The town of Oldtown is at mile 166. Its most famous eighteenth century denizen was “Rattlesnake Colonel” Thomas Cresap, the frontiersman and Indian trader.¹¹⁶ Today it is the site of the only toll bridge over the Potomac. The canal adjacent to Oldtown has been rewatered for recreational purposes.

At mile 169 I saw a group of campers who had biked in a remarkable amount of gear to set up a campsite that, I assume, kept them warm and dry. At most campsites along the canal there is access only by bicycle or on foot. This allows campers to pack in only enough gear to provide a rustic level of comfort – nothing like a KOA. Then, as I

¹¹⁴HIGH at 228.

¹¹⁵*Id.* at 234.

¹¹⁶ACHENBACH at 70-71.

approached Cumberland, I first heard the factory whistles from across the river in West Virginia, and then caught the scent of the factories. The canal travels on the edge of subdivisions in the “suburbs” of Cumberland.

The canal achieved great success in the early 1870s. There were up to 500 barges on it at any one time¹¹⁷ causing backups at the tunnel and in Georgetown where boats unloaded. As a commercial route, however, it was doomed. Settlement and deforestation of the Potomac watershed led to unprecedented “freshets,” as floods in that era were charmingly called. In November 1877, the worst flood recorded to that time left the canal “almost a total wreck.”¹¹⁸ Repairing the canal left the company with a substantial debt,¹¹⁹ which allowed the B&O to acquire a majority interest with an intent to acquire the canal property.¹²⁰

On May 30–June 1, 1889, another devastating flood wrecked the canal.¹²¹ The B&O, a majority holder of the 1844 construction, as well as the 1878 repair bonds, wanted to restore the canal in order to keep its property out of the hands of the Western Maryland Railroad, a B&O competitor. Not all creditors of the canal company agreed, thus setting the stage for the last protracted legal battle involving the canal. The question in this last struggle was whether the State of Maryland could sell the canal property in order to recoup some of the investment it made long before.

After the 1889 flood, the trustees of the bondholders of 1844 and 1878 representing, in essence, the B&O, sought to have receivers appointed to repair and operate the canal. The State intervened and sought sale of the canal property. The Maryland Court of Appeals acknowledged the equities of the State

Now it can hardly be necessary to say that in this, as in many other like public improvements, the hopes and expectations of its promoters have never been realized.

With the exception of a brief interval, the revenues of the canal, during the forty years of its operation, have barely been sufficient to meet its current expenses, and the State to-day has never received a

¹¹⁷BRUGGER at 281.

¹¹⁸SANDERLIN at 241.

¹¹⁹*Id.* at 143.

¹²⁰*Id.* at 254.

¹²¹*Id.* at 256.

dollar, either on its loans, or its subscriptions to the capital stock.¹²²

Hope sprung, if not eternal, at least a little while longer for the canal. Whether it could be brought into a condition to earn revenue, said the Court, was “a question in regard to which fair, impartial and competent persons may honestly differ.”¹²³ It resolved such differences in favor of giving the canal more time to operate.¹²⁴

In 1894 the trustees sought an extension of the operation of the canal, which they represented as “now in better condition as a waterway than ever before in its history.” This was granted for five years, effective May 18, 1895, by the Circuit Court for Washington County and the state appealed. The Maryland Court of Appeals affirmed this new lease on the canal’s life.¹²⁵ Noting that the receivers had incurred additional debt for the company – in essence, digging a deeper hole – Judge Bryan stated in dissent that “the experiment, which the Court considered a hazardous one, has utterly failed.”¹²⁶ In 1902, the Court of Appeals affirmed a further decree, over the state’s objection, keeping the canal in operation through January 1, 1906.¹²⁷

In 1904, the State sold its investment in the canal, \$5 million in stock, and its loan rights for \$155,000.¹²⁸ A flood in 1924 provided the excuse for the B&O to cease its operations.¹²⁹ During the Depression, the B&O, itself having fallen on hard times, sought a loan from the Federal Reconstruction Finance Corp.¹³⁰ In partial consideration for the loan, the federal government acquired the canal in September 1938. It was dedicated as a public park in 1939,¹³¹ but its fate was never clearly determined until Justice Douglas’ intervention. The last word of the Maryland Court of Appeals pertaining to the canal came in 1939 in

¹²²*Maryland v. Brown et al, Trustees*, 73 Md. 484, 504, 21 A. 374, 375 (1891).

¹²³*Id.* at 514, 21 A. at 378.

¹²⁴The court was not entirely ostrich-like about the interests of the B&O in the litigation: “A good deal was said about the veil which concerns the *real motives* that have prompted this litigation. Whatever they may be, we must deal with the case, as it is presented by the record.” *Id.* at 516, 21 A. 378 (emphasis in original).

¹²⁵*The Canal Company’s Case*, 83 Md. 549, 35 A. 161 (1896).

¹²⁶*Id.* at 593, 35 A. at 169.

¹²⁷*Maryland v. Cowen, et al., Trustees*, 94 Md. 487, 51 A. 171 (1902).

¹²⁸SANDERLIN at 274.

¹²⁹*Id.* at 277.

¹³⁰*Id.* at 279.

¹³¹*Id.*

affirming the lower court's distribution of the sale proceeds, mostly to the B&O.¹³²

The court began by invoking the vision one last time. In its inception it was one of the greatest enterprises that was ever inaugurated, sanctioned, or promoted by the State of Maryland. It brought to the State, and to many people, financial losses and disappointments; nevertheless, in its day it served a great and beneficial use. In its conception, and promotion, the plan was to establish a great waterway for transportation, connecting the Chesapeake Bay and the Ohio River. The ultimate design was never perfected, but it did serve a great use in transportation from the far western port of our State to the Tidewater country of Maryland.¹³³

The canal did not become the principal route of commerce to the west as Washington had imagined. By the 20th century, it was of no value as a route of commerce. Indeed, most of the financial burden of that failure fell on Maryland; yet, in the way we look at the world today, Maryland had the last laugh. One hundred and eighty miles of the north bank of a largely untamed river will never be disturbed or molested. The towpath provides only such access to that domain as is consistent with the preservation of its beauty. Such a circumstance could never have been planned. It took the happy accident that combined star-crossed dreams of Potomac navigation and the stalwart refusal of the Maryland judiciary to let those dreams die.

While Maryland expended millions of nineteenth century dollars on the canal without any financial return, the towpath today is maintained and patrolled (both in a limited way) by the United States Parks Service. The Potomac still floods from time to time requiring the federal government to spend millions to restore the towpath.¹³⁴ Somehow,

¹³²*Cohill v. Chesapeake & Ohio Canal Co.*, 177 Md. 412, 10 A.2d 316 (1939).

¹³³*Id.* at 414, 10 A.2d at 317.

¹³⁴*See Babbitt Joins Hike for C&O*, WASH. POST, Apr. 18, 1996, at B6 (over \$20 million cost to restore towpath from 1996 flooding); *Towpath Damage Put at \$580,000*, WASH. POST, Mar. 3, 1984, at B2 (damage from 1984 flood).

federal budgetary vicissitudes of the last generation have not prevented the Parks Service from keeping most of the towpath in a tolerably passable condition.

If the towpath in a hurricane is not exactly a yellow brick road, then Cumberland is not exactly the Emerald City, but it was a welcome sight. The river and canal come right into the downtown area. The towpath ends just before the Western Maryland Railroad station, which is now the Canal Place Visitor's Center. From there, excursion trains run to Frostburg.

Though I suppose any devotee of the C&O Canal must resent the heavy-handedness of the B&O in its dealings with the canal, I was glad that day that the railroad made it to Cumberland. I am not sure these tired old legs could have turned me around and cycled me back home. The train trip home was a nice way to retrace the bicycle trip. It offered an opportunity to reflect in comfort not only on Justice Douglas' obstinacy, but on the twists and turns of Maryland legal history that resulted in the building and presentation of this precious landmark.