Recent Decisions

Follow this and additional works at: http://digitalcommons.law.umd.edu/mlr

Recommended Citation
Recent Decisions, 41 Md. L. Rev. 137 (1981)
Available at: http://digitalcommons.law.umd.edu/mlr/vol41/iss1/12
Recent Decisions

ENFORCEMENT OF THE MARYLAND WETLANDS ACT
"BOGS DOWN" IN THE COURT OF APPEALS

Hirsch v. Maryland Department of Natural Resources

I. INTRODUCTION

In Hirsch v. Maryland Department of Natural Resources1 the Maryland Court of Appeals held that an Anne Arundel waterfront landowner2 could not be required to restore wetlands filled in violation of rules and regulations3 promulgated under the Maryland Wetlands Act4 by the Department of Natural Resources.5 The Court of Appeals held that the Department had failed to comply with the Act's filing requirements6 and that this failure rendered void and unenforceable the rules and regulations for Anne Arundel County's wetlands.7

The Hirsch opinion is somewhat obscure. It is unclear whether the court held Anne Arundel County regulations void as to all private wetlands owners,8 or only as to those who, like Hirsch, purchased subse-

2. The appellants in the case were three brothers, John, William and Robert Hirsch, and their respective wives, Mary, Elizabeth and Glenda Hirsch. In keeping with the practice in the Court of Appeals' opinion, id. at 98, 416 A.2d at 11, this recent decision will refer to the members of the Hirsch family collectively as Hirsch. The property involved was five waterfront lots on Cornfield Creek, a tributary of the Magothy River. Id. at 104, 416 A.2d at 15.
5. For an overview of the Maryland Wetlands Act, the problems it addressed and those it created, see Comment, Maryland's Wetlands: The Legal Quagmire, 30 MD. L. REV. 240 (1970).
6. MD. NAT. RES. CODE ANN. § 9-302(a) (1974) empowers the Secretary of Natural Resources to "promulgate rules and regulations governing dredging, filling, removing, or otherwise altering or polluting private wetlands." Further, § 9-301(a) requires that "[t]he Secretary shall promptly delineate the landward boundaries of any wetlands in the state" and display such delineations on suitable maps.
7. 288 Md. at 118, 416 A.2d at 22.
8. See notes 77 to 81 and accompanying text infra.
quent to the filing failure and without notice of the regulations. If the latter interpretation of the court's holding is correct, the court's decision is justified. If, however, the former interpretation is correct, then the decision presents significant problems.

The *Hirsch* opinion also leaves unsettled other important questions. What weight is to be accorded administrative findings in a subsequent circuit court enforcement action? What is the Department's burden of proof in establishing the boundary between state and private wetlands when the landowner has obscured the boundary, and what must the Department establish in order to meet that burden? An overview of the Wetlands Act provides a useful introduction to an analysis of these questions.

*Maryland Wetlands Act*

With approximately 3,200 miles of coastline, primarily along the perimeter of the estuarian system formed by the Chesapeake Bay and its tributaries, Maryland has an abundance of land covered or affected by tidal waters. Recognizing that such areas could be threatened by unregulated landfill, dredging or other activities, the Maryland General Assembly enacted the Wetlands Act of 1970. The preamble to the Act declares that "is therefore the public policy of the state, taking into account varying ecological, economic, developmental, recreational, and aesthetic values, to preserve the wetlands and prevent their despoliation and destruction." The Act creates a bipartite regulatory system that distinguishes "state wetlands" from "private wetlands." State wetlands include all land under navigable waters of the state at mean high tide, excepting any such land that has been transferred by valid grant. Private wetlands are any lands bordering on or lying beneath tidal waters that support aquatic growth and that do not qualify as state wetlands. The use restrictions applicable to state wetlands are concise and direct:

9. See notes 82 to 96 and accompanying text infra.
10. See notes 117 to 125 and accompanying text infra.
11. See notes 105 to 116 and accompanying text infra.
13. In addition to the 1.6 million acres of land under the Bay, its tributaries and the Atlantic coast estuaries, there are more than 300,000 acres of swamps and marshes subject to at least intermittent submersion or inundation by tidal action. *Maryland State Planning Dep't, Wetlands in Maryland - Technical Report II-5* (1970), cited in Comment, supra note 4, at 240.
14. See note 4 supra.
16. *Id.* § 9-101(m).
17. *Id.* § 9-101(j).
"A person may not dredge or fill on state wetlands, without a license."18 Such simplicity and directness is possible because state wetlands are, by definition, state property and completely subject to state control.19

Restrictions on private wetlands, which limit the use of private interests in land, must be promulgated in accordance with a more complex procedure. After completing boundary maps20 of, and adopting proposed rules and regulations21 for, all wetlands in each political subdivision, the Secretary of Natural Resources22 must hold a public hearing in each county with such wetlands. The Secretary is required to provide published public notice of the hearing and individual notice to each person shown on the tax records as an owner of land containing designated wetlands.23 After considering the rights of every affected property owner, the testimony at the hearing, and any other pertinent facts, the Secretary must establish by order the landward bounds of each wetland area and the rules and regulations applicable to each.24 The order and a copy of the map depicting the wetlands' boundary lines are to be filed among the county's land records.25 Finally, the Secretary must notify each recorded owner26 of designated wetlands by sending each a copy of the order by registered or certified mail. He

18. Id. § 9-202(a). For license procedure, see id. § 9-202(b)-(e).
19. The Court of Appeals recently has traced the history of the property interest in state wetlands:
The lands in Maryland covered by water were granted to the Lord Proprietor by Section 4 of the Charter from King Charles I to Caecilius Calvert, Baron of Baltimore, his heirs, successors and assigns, who had the power to dispose of such lands, subject to the public rights of fishing and navigation. By virtue of Art. 5 of the Declaration of Rights in the Maryland Constitution, the inhabitants of Maryland became entitled to all property derived from and under the Charter and thereafter the State of Maryland had the same title to, and rights in, such lands under water as the Lord Proprietor had previously held. These lands were held by the State for the benefit of the inhabitants of Maryland and this holding is of a general fiduciary character. Kerpelman v. Board of Public Works, 261 Md. 436, 445, 276 A.2d 56, 61 (citation omitted), cert. denied, 404 U.S. 858 (1971).
21. Id. § 9-302.
22. Although the Act refers to "the Secretary" as the acting party in its provisions, the actual work is of course largely completed by agency staff personnel. In this discussion, "Secretary" and "Department" are used to refer to actions of the various Department of Natural Resources personnel.
24. Id. § 9-301(c).
25. Id. See note 84 infra.
26. Note that notice to the "owner of record" is required, id. (emphasis added), rather than the "owner shown on tax records" as required for the hearing notice, id. § 9-301(b) (emphasis added).
must also publish the order in a local newspaper.\footnote{27}{Id. § 9-301(c).}

The Act also prescribes procedures for an extensive appeal process. Any person with a recorded interest in land affected by a rule or regulation may appeal the rule or regulation, or the land's designation as wetland, to a departmental review board, and if still dissatisfied, may petition for relief in that county's circuit court.\footnote{28}{Id. §§ 9-304, 9-305.} Both the Secretary and the landowner have standing to appeal an adverse decision to the Court of Special Appeals.\footnote{29}{Id. § 9-305 (d).}

\textit{Factual Setting and Proceedings Below}

In accordance with the requirements of the Act,\footnote{30}{See notes 20 to 27 and accompanying text \textit{supra}.} the Department\footnote{31}{Id. See note 22 \textit{supra}.} inventoried all state and private wetlands, prepared boundary maps,\footnote{32}{In 1971, the Department contracted with Raytheon Corporation to identify wetlands using aerial photographs. Raytheon subcontracted with Dr. Jack McCormack, an ecology expert and botanist, to interpret Anne Arundel County's photographs identifying the wetlands by the presence of certain vegetation. McCormack was not required to differentiate between state and private wetlands. State Dep't of Natural Resources v. Hirsch, Equity No. 22763 at 3 (Md. Cir. Ct., Anne Arundel County, June 14, 1978).} and developed proposed rules and regulations. In 1972, the task was completed, and on October 25, 1972, the Department sent individual notices of the Anne Arundel County hearing and copies of the proposed regulations to all persons listed on the tax records as owners of Anne Arundel County private wetlands.\footnote{33}{288 Md. at 104, 416 A.2d at 15.} Although the land at issue in \textit{Hirsch} actually had been transferred to Hirsch's predecessor in interest at this time, the transfer was not recorded until October 31, 1972. As a result, the notice was sent to the owner then listed on the tax records, a Maryland corporation.\footnote{34}{Id.} Apparently, neither the corporation nor the actual owner, who was both the secretary-treasurer of the corporation and the wife of its president, received the hearing notice.\footnote{35}{Although no notice was received, the Department had complied with the requirement of \textit{MD. NAT. RES. CODE ANN.} § 9-301(b) that "each owner \textit{shown on tax records} as an owner of [designated wetlands]" (emphasis added) be notified. As of October 25, 1972, the corporation, Emerson Development Company, was listed on the tax records as owner of the lots, and Hirsch's predecessor in interest, a Mrs. Szymanski, did not record until October 31, 1972. 288 Md. at 104, 416 A.2d at 15. The Department sent notice to the corporation's listed resident agent, who had moved from his listed address four years earlier, without notifying the state of the change of address as required by \textit{MD. CORP. & ASS'NS CODE ANN.} § 2-108(b) (1975). Therefore the failure of notification would seem to fall squarely on the corporation and its agent, and on Mrs. Szymanski for failing to record in a timely fashion.}
After the hearing, the Secretary signed the final order on January 25, 1973, establishing the boundaries of Anne Arundel County's wetlands and adopting the applicable rules and regulations. The Department again used the tax record mailing list to send copies of the finalized order to the wetlands landowners in September, 1973. Notice was again sent to the corporation, and Hirsch's immediate predecessor, who by then had recorded the transfer and was thus entitled to notice, failed to receive notice that the lots in question contained wetlands subject to use regulation. A representative of the Department delivered a copy of the order, with maps showing designated wetlands, to the clerk of the Circuit Court for Anne Arundel County in August, 1973. Subsequently, the order and the copy of the wetlands regulations were misplaced, and the maps were put in a file cabinet inaccessible to the public and to a title searcher.

Hirsch purchased the land in question in July, 1974. Since neither the professional title searcher hired by Hirsch nor Hirsch's predecessor apparently knew of or discovered the wetlands designation, neither informed Hirsch of any wetlands restrictions on the land. In July and August, Hirsch began to clear brush and debris from the land in preparation for a filling operation. After receiving a complaint about possible wetlands violation, a representative from the Department contacted Hirsch. Although Hirsch contended otherwise at trial, he apparently received a warning, before or during the time wetlands were being filled, that such filling would be in violation of wetlands regulations. Because Hirsch continued to fill even after several

36. 288 Md. at 104-05, 416 A.2d at 15.
37. Id. at 105, 416 A.2d at 15. Since the Act required that the "owner of record" be notified, see note 26 supra, and the Department's list was compiled from the tax records some 10 months previously, the second notice was not in compliance with Md. Nat. Res. Code Ann. § 9-301(c).
38. 288 Md. at 105, 416 A.2d at 15. There was some evidence that the corporation's resident agent's secretary may have received the notice, id., but the owner of record, Mrs. Szymanski, did not receive notice as required by Md. Nat. Res. Code Ann. § 9-301(c). See note 26 and accompanying text supra.
39. 288 Md. at 105, 416 A.2d at 15.
40. Id.
41. Id. at 106, 416 A.2d at 16.
42. Id.
43. Id. at 117, 416 A.2d at 22.
44. Id. at 106, 416 A.2d at 16.
45. Id.
46. See id.
47. The Court of Appeals found that
[T]he trial court did not at any time expressly resolve the credibility issue presented by the dispute in the testimony about the actual content of the telephone conversation [between Hirsch and the Department's Representative]. . . . [I]t cannot be determined
visits by inspectors from the Department, the Department issued an administrative order on December 12, 1974, requiring Hirsch to cease filling and submit a plan for restoring wetlands already filled. At Hirsch's request, the Department held an administrative hearing. After finding that Hirsch had filled both state and private wetlands in knowing violation of the regulations, the Department reaffirmed its administrative order.

When Hirsch failed to comply with the reaffirmed order, the Department asked the Circuit Court for Anne Arundel County to enjoin any further filling and to order Hirsch to restore the filled wetlands. Judge Wray determined that wetlands had been filled, but concluded that the state had not produced sufficient evidence to prove that Hirsch had filled state, as opposed to private, wetlands. Consequently, he treated all the filled wetlands on the Hirsch property as private, rather than state, wetlands. Moreover, Judge Wray held that the Department's maps, rules, regulations and orders had to be recorded among the land records in accordance with the Maryland Recording Act. He from the trial court's opinion, and the evidence is in conflict, whether Hirsch had received actual notice before he began filling wetlands.

Id. at 110 n.8, 416 A.2d at 18 n.8. However, as noted by the Court of Special Appeals, although it is not entirely clear from the record how much of the wetlands had been filled at the various times when contact was had with the State officials, both sides agree that no wetlands had been filled prior to Mr. Smith's [the Department's representative] inspection of the site on August 9, 1974, or, thusly, prior to the telephone conversation, it is also clear that any wetlands filled were filled after actual notice. The filling of the "property" prior to the warning mentioned by the circuit court could refer to the uncontested fact that some brush had been cut and piled on the property above the wetlands. 42 Md. App. 457, 468, 401 A.2d 491, 497-98.

48. 288 Md. at 106, 416 A.2d at 16.
50. See 288 Md. at 107, 416 A.2d at 16.
53. State Dep't of Natural Resources v. Hirsch, Equity No. 22763 (Md. Cir. Ct., Anne Arundel County, June 14, 1978); see 288 Md. at 107, 416 A.2d at 16.
54. Equity No. 22763, slip op. at 4.
55. Id. at 5. See notes 16 & 17 and accompanying text supra.
56. Equity No. 22763, slip op. at 5. But see notes 105 to 116 and accompanying text infra.
57. Equity No. 22763, slip op. at 7. The circuit court held that the filing requirement of
reasoned that such compliance was a prerequisite to enforcing the Department's rules and concluded that because the Department had not formally recorded these documents in Anne Arundel County, Hirsch could not be ordered to restore his wetlands. The court held, however, that further filling by Hirsch would require a permit.\textsuperscript{58}

Though the Court of Special Appeals agreed that the Department had failed to satisfy the Act's notice and filing requirements,\textsuperscript{59} Judge Wilner, writing for the court, held that Hirsch did not have standing to assert the Department's failure to notify his predecessor.\textsuperscript{60} Moreover, he concluded that Hirsch's receipt of actual notice before the wetlands were filled cured the lack of constructive notice to him when he bought the property.\textsuperscript{61} On this basis, the Court of Special Appeals reversed and remanded for an order compelling Hirsch to restore the filled wetlands.\textsuperscript{62}

\textbf{COURT OF APPEALS' OPINION}

Like both lower courts, the Court of Appeals found that the Department had failed to comply with the Act's notice and filing requirements.\textsuperscript{63} The Court of Appeals, however, held that Hirsch had standing to assert the Department's filing failure and that the Department's error rendered void the rules and regulations governing Anne Arundel County wetlands.\textsuperscript{64}

Finding that the Act's filing requirement demanded more than mere delivery to the Clerk of the Court in each county,\textsuperscript{65} the court con-
strued the Act to require some form of permanent record "among the land records" and accessible to anyone checking title to the property.\(^6^6\) Because the Court of Appeals found that the filing requirement was intended to protect and provide notice to subsequent purchasers,\(^6^7\) it reasoned that Hirsch, as a subsequent purchaser, had standing to assert the Department's failure to comply.\(^6^8\) As the court noted, at the time Hirsch took title, he had neither actual nor constructive notice; accordingly, notice subsequent to the purchase could not cure the Department's omission.\(^6^9\)

Having established Hirsch's standing, the court next considered the effect of the Department's failure to comply with the Act's filing requirements. The Department argued that despite the filing defects, the rules and regulations were nonetheless valid and enforceable because the legislature had not expressly conditioned their validity on compliance with the requirements.\(^7^0\) The Court of Appeals rejected this argument,\(^7^1\) concluding that the statutory language "shall be filed among the land records" indicated the legislature's intent to mandate filing of the rules and regulations. The court reasoned that the legislature must have intended to condition the rules' enforceability on satisfaction of the filing requirement; otherwise, the court noted, "little

\(^{66}\) Id. at 111-12, 416 A.2d at 18-19.

\(^{67}\) Id. at 113-14, 416 A.2d at 19.

\(^{68}\) Id. at 114, 416 A.2d at 20. The court also noted that the Wetlands Act gives standing to challenge a rule or regulation to "'[a]ny person who has a recorded interest in land affected by any rule or regulation promulgated under this subtitle.'" \(^{66}\) Id. at 114-15, 416 A.2d at 20 (quoting MD. NAT. RES. CODE ANN. § 9-304). In addition, the Court of Appeals strongly suggested that the Department's failure to notify the previous owner properly also might give Hirsch standing. 288 Md. at 117 n.9, 416 A.2d at 22 n.9.

\(^{69}\) The Court of Appeals noted that had actual notice after purchase been significant, the case should have been remanded for clarification of whether such notice in fact had been given prior to the filling. 288 Md. at 110 n.8, 416 A.2d at 18 n.8. \textit{But see} notes 46 & 47 and accompanying text \textit{supra}.

\(^{70}\) 288 Md. at 113, 115, 416 A.2d at 19, 21.

\(^{71}\) The Court of Appeals also found unpersuasive the Department's argument that wetlands regulations, like zoning laws, could be imposed even without notice. The court noted that zoning restrictions are not required to be filed "among the land records" and that the wetlands regulations apply only to specific tracts of land, rather than to large general areas as zoning laws do. \(^{68}\) Id. at 115, 416 A.2d at 20-21. The Department's citation to Quynn v. Brooke, 22 Md. 288 (1864) (cited incorrectly in the opinion and briefs as Quynn v. Carroll's Adm'r), in which the Court of Appeals held that the failure to file a certificate attesting to the oath of a public commissioner did not invalidate the effect of the oath-taking, was also unpersuasive to the Court. The Court of Appeals quoted with approval from the Court of Special Appeals' opinion that "'there is a significant difference between assuring that adequate public notice is given of restrictions on the use of land and seeing to it that some record is made of the fact that a minor functionary has taken an oath of office.'" 288 Md. at 116, 416 A.2d at 21, \textit{quoting} 42 Md. App. at 482, 401 A.2d at 505.
purpose would be served by the statutory requirement."\textsuperscript{72} The court also observed that conditioning the validity of the rules and regulations on such compliance was the only effective sanction for failure to comply with the requirements.\textsuperscript{73} Accordingly, the Court of Appeals held that the failure to comply with the filing requirements voided the rules and regulations during the time in question.\textsuperscript{74} Because Hirsch had not violated any valid rules or regulations, the Department could not compel him to restore the filled wetlands.\textsuperscript{75} The Court of Appeals, therefore, reversed the judgment of the Court of Special Appeals and remanded the case with instructions to affirm the circuit court's dismissal of the Department's suit against Hirsch.\textsuperscript{76}

\textit{The Ambiguity of the Hirsch Opinion}

Part of the \textit{Hirsch} opinion suggests that the court held the Anne Arundel County wetlands regulations totally void; part suggests that the court held them void only as against landowners in Hirsch's position. The court refers to the rules and regulations as "invalid during the times pertinent to this case,"\textsuperscript{77} "totally void,"\textsuperscript{78} or "totally inva-

\textsuperscript{72} 288 Md. at 116, 416 A.2d at 21.
\textsuperscript{73} \textit{Id. } It is hard to see that invalidating the rules and regulations \textit{in toto} is the only effective sanction. One narrower sanction would be to hold that the Department is estopped from enforcing the rules and regulations against those without constructive or actual notice. Under this standard, Hirsch could not be required to restore wetlands filled prior to actual notice, but would be responsible for any filling after such notice.

Hirsch might also have a cause of action for any demonstrable injury sustained as a result of the failure of notice, such as excess consideration paid for the property over the property's actual value with such restrictions. The intent of the Wetlands Act, to protect the wetlands against unregulated despoliation, would be fulfilled to a greater degree by such an interpretation. \textit{See} notes 83 to 104 and accompanying text \textit{infra}.

\textsuperscript{74} 288 Md. at 118, 416 A.2d at 22.
\textsuperscript{75} \textit{Id. } MD. NAT. RES. CODE ANN. § 9-501(d) provides that "[a]ny person who knowingly violates any provision of this title is liable to the state for restoration of the affected wetland to its condition prior to the violation if possible." MD. NAT. RES. CODE ANN. §§ 9-510(a) and (b) provide fines and imprisonment for violations "of this title." Section 9-510(c) extends the penalties of §§ 9-510(a) and (b) to "violation[s] of any rule or regulation adopted \ldots \ldots this title." However, § 9-510(d), which authorizes restoration of affected wetlands for knowing violations "of this title," does \textit{not} include violations of rules and regulations, at least by its terms. The Court of Appeals noted in \textit{Hirsch} "that as originally enacted \ldots of this title the Act provided for restoration upon a knowing violation of either the rules and regulations or any provision of this subheading," and "the Revisor's Note [for the recodification] does not contain any indication that a substantive change was intended." 288 Md. at 103 n.5, 416 A.2d at 14 n.5 (quoting MD. NAT. RES. CODE ANN. § 9-305 (1974 & Cum. Supp. 1980)). In light of its holding in \textit{Hirsch}, it was not necessary for the Court of Appeals to determine whether restoration could be ordered for a knowing violation of rules and regulations, and the court reserved judgment on the point. \textit{Id.}

\textsuperscript{76} 288 Md. at 118, 416 A.2d at 22.
\textsuperscript{77} \textit{Id. } at 110, 416 A.2d at 18.
\textsuperscript{78} \textit{Id. } at 114, 416 A.2d at 20.
Although these terms are used to describe Hirsch's argument, the court found his argument "dispositive." The court's conclusion also suggests that the court meant to hold the regulations void as to all Anne Arundel County wetlands owners:

[W]e believe that administrative compliance with the notification and filing requirements of § 9-301(c) is a condition precedent to the validity of the regulations governing private wetlands. Because § 9-301(c) had not been complied with at the time Hirsch filled his property, these 1973 purported regulations for Anne Arundel County private wetlands furnished no basis for ordering a restoration of the land to its prior condition.

On the other hand, the court's reasoning focused on the Department's failure to file as that affected subsequent purchasers; thus the court may have intended to hold the Anne Arundel County regulations void only as to subsequent bona fide purchasers for value and without notice, such as Hirsch.

The Court's Appraisal of Legislative Intent

Although it is unclear whether the Court of Appeals held the regulations void as to all Anne Arundel County wetland owners, or void only as to owners in Hirsch's position, it is clear that the court claimed to base its decision on the legislature's intent. The court, however, faced a serious obstacle in attempting to determine the legislature's intent, for the Act is silent as to the effect of non-compliance with its filing requirements. In the face of this silence, the court focused on the language of the filing requirement and reasoned that by mandating

79. Id. at 115, 416 A.2d at 20.
80. Id. at 110, 416 A.2d at 18.
81. Id. at 118, 416 A.2d at 22 (footnote omitted).
82. Id. at 113-15, 416 A.2d at 20-21.
83. See id. at 118, 416 A.2d at 22.
84. The statute provides in pertinent part:

(c) Order establishing bounds, rules and regulations; notice of order. — After considering the testimony at the hearing and any other pertinent fact, considering the rights of every affected property owner, and the purposes of this subtitle, the Secretary shall establish by order the landward bounds of each wetland and the rules and regulations applicable to it. A copy of the order, together with a copy of the map depicting the boundary lines, shall be filed among the land records in every county affected after final appeal has been completed. The Secretary shall give notice of the order to each owner of record of any land designated as wetlands by mailing a copy of the order to the owner by registered or certified mail. The Secretary shall also publish the order in a newspaper published within and having a general circulation in every county where the wetlands are located.

Md. Nat. Res. Code Ann. § 9-301(c). This is the language of the 1974 volume, as considered by the court. The 1981 Cumulative Supplement contains the modified language, ad-
compliance, the legislature must have intended to establish compliance as a condition precedent to the validity of rules and regulations promulgated under the Act.

If the court meant to suggest that the legislature intended the regulations for an entire county to be invalidated by the Department's failure to comply with the filing requirement, the court's conclusion is questionable at best. First, the express purpose of the statute was to protect Maryland's wetlands from unregulated despoliation. This underlying purpose would have been poorly served by a scheme that contemplated completely invalidating regulations because of technical defects. Second, had the legislature intended the overall validity of the Department's regulations to depend on compliance with the filing requirements, it might easily have said so. In a number of other statutes, the legislature has expressly conditioned the validity of adminis-

85. The Court of Appeals put great emphasis on the presumption that mandatory intent derived from the use of the word "shall" in the Act's filing requirement. 288 Md. at 116, 416 A.2d at 21. While use of the word "shall" is generally presumed to indicate a mandatory intent, this presumption will yield if the context of the statute indicates otherwise. See, e.g., Resetar v. State Bd. of Educ., 284 Md. 537, 548, 399 A.2d 225, 231, cert. denied, 444 U.S. 838 (1979); Maryland State Bar Ass'n v. Frank, 272 Md. 528, 533, 325 A.2d 718, 721 (1974). In Pope v. Secretary of Personnel, 46 Md. App. 716, 420 A.2d 1017 (1980), the Court of Special Appeals noted that in recent years, the Court of Appeals has applied the principle with increasing rigidity, raising the presumption of mandatory intent to an almost conclusive level. In Hirsch, there was no discussion of the context of the Act as affecting the mandatory intent presumed from the use of "shall." Although the court's inference that the filing requirement was intended to be mandatory is reasonable, a fuller discussion of the Act as a whole would have been more appropriate, in light of the standards set forth in Resetar and Frank. See note 87 infra.

86. MD. NAT. RES. CODE ANN. § 9-102.

87. The provisions of the Act provide some support for the inference that the legislature was concerned about preserving the general validity of wetlands regulations. For instance, when a landowner successfully challenges a rule or a regulation as an unreasonable exercise of the state's police power, the Act limits the reviewing court to "enter[ing] a finding that the rule or regulation does not apply to the petitioner [and] the finding may not affect any land other than that of the petitioner." Id. § 9-305(c). It is evident that the legislature required the court to apply the narrowest corrective measure, presumably to leave unimpaired the challenged rule's general validity.

Further, two specific provisions of the Act were apparently included to avoid the chance that the Act or rules and regulations promulgated thereunder would be held to constitute an uncompensated taking in unreasonable exercise of the state's police power. MD. NAT. RES. CODE ANN. § 9-103 states that "[t]he provisions of this title do not transfer the title or ownership of any land or interest in land," and id. § 9-303 says that, "[n]otwithstanding any rule or regulation promulgated by the Secretary to protect private wetlands, the following uses are lawful on private wetland." If title to wetlands was transferred, or if the owner was denied all reasonable use of the property, this would amount to an uncompensated taking in violation of constitutional protections. See U.S. CONST. amend. V, XIV; Comment, supra note 4, at 256-59.
trative actions on compliance with filing or other procedural requirements. 88

In fact, the court cited cases 89 involving these statutes for the proposition that failure to comply with specific notice requirements invalidates administrative action. The court, however, failed to note the difference between these statutes and the Wetlands Act. Each of these statutes expressly established compliance with procedural requirements as preconditions for the validity of an administrative action.

For example, in Board of County Commissioners of Garrett County v. Bolden, 90 a taxpayer's suit challenged the action of the County Commissioners in setting the property tax rate in excess of the constant yield rate. 91 The Court of Appeals affirmed the trial court's conclusion that the action was invalid. It stressed that the commissioners had not followed proper notice procedures 92 and that the statute at issue specified "[a] tax rate in excess of the constant yield tax rate may not be levied until the taxing authority implements the following [notice] procedure." 93 The validity of the Commissioner's action, therefore, was conditioned expressly on compliance with the notice requirements. In each of the other cases cited, the applicable statute unambiguously prescribed that compliance with the notice requirements was a condition precedent to valid administrative action. 94

88. See statutes cited note 94 infra.
89. Board of County Comm'rs v. Bolden, 287 Md. 440, 413 A.2d 190 (1980); Williams v. Public Service Comm'n, 277 Md. 415, 354 A.2d 437 (1976); Bethesda Management Servs., Inc. v. Department of Licensing & Regulation, 276 Md. 619, 350 A.2d 390 (1976); Rasnake v. Board of County Comm'rs, 268 Md. 295, 300 A.2d 651 (1973); Maryland Tobacco Growers' Ass'n v. Maryland Tobacco Auth., 267 Md. 20, 296 A.2d 578 (1972).
90. 287 Md. 440, 413 A.2d 190 (1980).
91. Id. at 441, 413 A.2d at 190-91.
92. Id. at 448, 413 A.2d at 194.
94. In Williams v. Public Serv. Comm'n, 277 Md. 415, 354 A.2d 437 (1976), the statute at issue provided that "[t]he [Public Service] Commission may by regulation passed after due notice and opportunity for interested parties to be heard prescribe standards . . . ." Md. Ann. Code art. 78, § 73(a) (1981) (emphasis added). Furthermore, "[e]very . . . regulation of the Commission shall be prima facie correct and shall be affirmed unless clearly shown to be . . . (3) made upon unlawful procedure . . . ." Md. Ann. Code art. 78, § 73(a) (1981) (emphasis supplied). In Bethesda Management Serv's. Inc. v. Department of Licensing & Regulation, 276 Md. 619, 350 A.2d 390 (1976), the statute at issue provided that "the decision . . . shall not be made until a proposal for decision . . . has been served upon the parties . . . ." Md. Ann. Code art. 41 § 253 (1978) (emphasis supplied). In Rasnake v. Board of County Comm'rs, 268 Md. 295, 300 A.2d 651 (1973), the statute at issue provided that "[t]he regulations . . . set forth in this ordinance may from time to time be amended . . . provided however that no such action may be taken until after a public hearing . . . . At least fifteen day's notice . . . . shall be published in a newspaper . . . ." Cecil County, Md. Code §§ 47-49(a) (Michie Supp. 1980) (emphasis added). Finally, in Maryland Tobacco
The Wetlands Act contains no comparable language. Arguably the absence of such language reflects a legislative decision not to condition the overall validity of Wetland regulations on compliance with the filing requirement.

Finally, it seems reasonable to suppose that the legislature intended the Act's filing requirement to have the same effect as the statutory requirement that conveyances of land be recorded. In fact, the court noted that although the purpose of the notice requirement was to inform existing landowners of encumbrances on their land, the purpose of the Wetland's filing requirement, like those of other recording statutes, was to alert persons with a prospective interest in the land.

Although the court did not explore all the implications of this analogy, it would have been fruitful to do so. Because the Act permits the Department to impose rules and regulations similar to restrictive covenants or easements, the Department might be viewed as a "purchaser" of an interest in private wetlands at the time of rulemaking. If the transfer was effective, a subsequent purchaser of the wetlands would take subject to the interest acquired by the Department. The issue posed in Hirsch, then, is what effect an improperly "recorded" prior transfer of an interest in land has on a subsequent transfer. In Maryland, an unrecorded conveyance of an interest in land has been described as a conveyance of an equitable interest that, despite the mandatory nature of the recording acts, is effective as between the parties and against all persons with actual knowledge of the conveyance, but ineffective against a subsequent bona fide purchaser for value and without notice of the defect at the time he takes title, who records before the prior purchaser. In Hirsch, the Department completed the "conveyance" by issuing the order establishing the rules and regulations, but failed to "record" by filing as required by the Act. Hirsch, therefore, took legal title to the property without constructive or actual notice of the Department's prior interest at the time he took title; and as a bona fide purchaser, he was entitled to priority. Under this analysis, the Court of Appeals was correct in asserting that Hirsch could not be

Grows' Ass'n v. Maryland Tobacco Auth., 267 Md. 20, 296 A.2d 5788 (1972), the statute at issue, provided that "[e]very . . . agency of the State government . . . who has the power to make, promulgate, adopt or enforce rules and regulations shall file copies thereof [in specified locations]. No rule or regulation . . . is effective until after compliance with this section." Md. Ann. Code art. 41 § 9 (1978) (emphasis supplied).

95. 288 Md. at 113, 416 A.2d at 20.
96. Id. at 113-14, 416 A.2d at 20.
98. Id. at 634-35.
bound by the regulations or required to restore the areas filled. The
appropriate sanction for the Department’s failure to properly file, how-
ever, would be limited to declaring that the rules and regulations were
unenforceable as to Hirsch. If the court meant to hold the Anne Arun-
del regulations entirely void, then under this analysis, its holding seem-
ingly is unjustified.\textsuperscript{99}

Whatever the precise scope of the court’s holding in \textit{Hirsch}, the
Court of Appeals seemed to be signalling its concern with protecting
private property interests that are threatened by administrative action.
If the court was concerned primarily with landowners in Hirsch’s posi-
tion, its decision seems reasonable. Arguably Hirsch was injured by
the Department’s failure to file properly, because any loss of a property
interest is considered injury per se.\textsuperscript{100} If, however, the court meant to
hold the rules and regulations entirely void, its concern presumably ex-
tended to all Anne Arundel County wetlands owners. Those landown-
ers who received notice of the hearing and were afforded an
opportunity to be heard in the rulemaking process, however, had no
valid claim on the court’s concern. The Department had observed all
the procedures designed to protect these landowners.\textsuperscript{101}

99. The question whether this holding could be justified may depend on the nature of
the “transfer.” If the state’s exercise of its police powers is viewed as affecting a gratuitous
transfer, the “totally void” interpretation of \textit{Hirsch} is consistent with the rule of Berman v.
Berman, 193 Md. 614, 69 A.2d 271 (1949), which held that a gratuitous unacknowledged and
unrecorded deed of land is void even as between the parties thereto. Thus, until the Depart-
ment “records” its “gratuitous” transfer, the transfer would be totally void. After “recording,”
the rules and regulations would still be unenforceable against a subsequent purchaser,
such as Hirsch, who recorded first. This would be so even if the subsequent purchaser knew
of the rules and regulations, since until properly recorded, the rules are ineffective even
against the current landowner, who is free to transfer the property unencumbered by restric-
tions.

Perhaps the better view is that, since a valid exercise of the police power does not
require compensation, the lack of compensation for the transfer should not be used to im-
pair its effect. This would be more consistent with the protective purpose of the Act. See
notes 86 & 87 and accompanying text \textit{supra}.

100. See, e.g. 3 H. TIFFANY, \textsc{Real Property} § 714, at 97 (3d ed. 1939) (interference with
natural rights in land would be an injury to the owner). In discussing standing, the court
speculated on what Hirsch “may have” or “may not have” done had notice been given. 288
Md. at 114, 416 A.2d at 20. But Hirsch did not allege either that he would not have
purchased the property, or that he paid more for the property than he would have, had he
received notice.

101. Landowners at the time of the rulemaking were properly notified of the hearing, see
notes 33 to 35 and accompanying text \textit{supra}, and were afforded an opportunity to be heard.
Although there were some defects in the procedures used by the Department to give the
second notice, see note 37 and accompanying text \textit{supra}, such defects could easily be cured
by a subsequent notice. The defects were not directly at issue in \textit{Hirsch}, although the court
noted that they might provide standing for Hirsch to sue. See note 68 \textit{supra}. 
In response to the *Hirsch* opinion,\(^\text{102}\) the Maryland legislature amended the Wetlands Act during the 1981 session.\(^\text{103}\) The principal modification was the addition of language declaring wetlands regulations to be valid and enforceable despite a failure to file them properly, if the property owner had actual notice before filling or dredging wetlands.\(^\text{104}\) The effect of a Departmental failure to comply with the Act's filing requirement has thus been clarified by the legislature.

*Other Problems in Interpreting the Act*

Other difficulties in interpreting the Wetlands Act remain. Two arose in the *Hirsch* case, but the court chose not to address them directly. For instance, in a footnote the court concluded simply that the circuit court was not clearly in error when it found that all the wetlands at issue were private, rather than state, wetlands.\(^\text{105}\) Because the validity of restrictions on state wetlands does not rest on compliance with any rulemaking procedures,\(^\text{106}\) the question whether wetlands are state or private wetlands is crucial when, as in *Hirsch*, the restrictions on private wetlands are invalidated by a notice or filing defect. If the standards used to determine the question in the circuit court were appropriate and proper, effective enforcement of the Act will be difficult, if not impractical.

The circuit court concluded that the Department had failed to establish that state rather than private wetlands were filled.\(^\text{107}\) In an attempt to identify the mean high water line, the boundary between state

---

\(^{102}\) Senate Bill 187, an emergency bill introduced by Senator McGuirk at the request of the Department, specifically identifies the *Hirsch* opinion in the preamble, noting that it "left unclear whether the provisions of Natural Resources Article, § 9-301, *et seq.*, and regulations adopted thereunder, are enforceable against persons who may have acquired title to properties at a time when wetlands maps and regulations pertaining to such properties were not properly filed among the land records." Thomas Deming, Counsel to the Department, testified in support of the bill, and the Department filed a Bill Report which identified the *Hirsch* decision as the necessitating factor for the legislation. Bill Report, S.B. 187, Md. Gen. Assembly Sess. (1981).

\(^{103}\) 1981 Md. Laws, ch. 102.

\(^{104}\) The amendment added subsection (e) to **MD. NAT. RES. CODE ANN.** § 9-501:

The provisions of this title are enforceable against any person charged with dredging or filling private wetlands without a permit, notwithstanding a defense that pertinent wetlands maps and regulations had not been properly filed among the land records, if the court finds that the person charged had actual notice of the applicable regulatory requirements before he dredged or filled the private wetlands. The subsection shall apply only to dredging or filling activities occurring after July 1, 1981. Section 9-301 was also amended to clarify the proper procedure for filing "among the land records," as required by § 9-301(c), by adding subsection (d).

\(^{105}\) 288 Md. at 118-19 n.10, 416 A.2d at 22 n.10.

\(^{106}\) *See* notes 18 & 19 and accompanying text *supra*.

\(^{107}\) *See* notes 54 & 55 and accompanying text *supra*. 
and private wetlands, the Department introduced testimony regarding vegetation, tidal activity, and soil samples at the site, as well as calculations of the contour of the land under the fill.\textsuperscript{108} The court nonetheless found the state had failed to carry its burden of proof because it had established "neither the exact contours of the site nor the degree to which the soil compacted."\textsuperscript{109} In discussing the Department's burden of proof, the circuit court disregarded Hirsch's role in increasing the difficulty of demonstrating the exact contours of the site before the fill.\textsuperscript{110} If by finding the circuit court's standard not "clearly erroneous," the Court of Appeals in fact endorsed that standard, the department's burden will be increased markedly whenever a wetlands violator ignores the Department's orders and acts to obscure the "exact contours" of the land.

In \textit{Hawkins v. Alaska Freight Lines, Inc.},\textsuperscript{111} the Alaska Supreme Court adopted a standard more attuned to the purpose of the Maryland Wetlands Act. Like \textit{Hirsch}, the \textit{Hawkins} case turned on the location of a mean high water line that had been obscured by a filling operation. Holding that a surveyor's "high water meander line," which approximated the actual contours, was adequate proof even without soil borings, the \textit{Hawkins} court noted that

\begin{quote}
[s]ince appellees, by their own actions, made it impracticable for appellant to establish the seaward boundary of her property, it would be unfair to place the burden on appellant to establish that boundary in order to prove that the beach road crossed her property. In such a situation we hold that it will be presumed that the meander line approximates the line of mean high water mark and establishes appellant's seaward boundary, and that the burden was upon appellees to rebut the presumption.\textsuperscript{112}
\end{quote}

In an analogous situation, the Maryland Court of Appeals has applied a similar standard. In \textit{Hanley v. Stulman},\textsuperscript{113} a property owner's grading operation obscured all evidence of a right of way through the property.\textsuperscript{114} While affirming the general rule that the plaintiff carries the burden of proving all elements relied upon to establish a proper claim for relief, including the location of a claimed right of way, the Court of Appeals observed that the plaintiff "was prevented from

\begin{footnotes}
\item[108] Equity No. 22763, slip op. at 5.
\item[109] \textit{Id.} (emphasis added).
\item[110] \textit{See id.} at 2-5.
\item[111] 410 P.2d 991 (Alaska 1966).
\item[112] \textit{Id.} at 994.
\item[113] 212 Md. 273, 129 A.2d 132 (1957).
\item[114] \textit{Id.} at 275, 129 A.2d at 134.
\end{footnotes}
showing this ‘exact’ location, because the [landowner] completely obliterated its former location by bulldozing and grading operations.”

The court held that the lower court should have located “the roadway . . . in such a manner as to provide the appellant and the public a substantially equivalent road or way . . . .”

There is Maryland precedent, therefore, for modifying the plaintiff's burden of proof when the defendant has made that burden more difficult to satisfy. This approach appears more consistent with the purposes of the Wetlands Act than the approach adopted by the circuit court and ratified by the Court of Appeals in Hirsch.

The Court of Appeals did not address the question whether the circuit court properly ignored the Department's administrative findings of fact. Although the Department had found in its administrative hearing that Hirsch had filled both state and private wetlands, the trial court did not formally consider the administrative findings; rather, it treated the factual issues de novo. The Act mandates de novo review. In Department of Natural Resources v. Linchester Sand & Gravel Corp., however, the Court of Appeals held such de novo judicial review unconstitutional. Though Linchester concerned a differ-

115. Id. at 279, 129 A.2d at 136.
116. Id. The Court of Appeals overturned the Chancellor's dismissal, which had been based on the fact that the appellant could not, from the evidence, place 'the complete and exact location' of the road . . . . [The Chancellor] held that even though the [landowner] had wrongfully destroyed the road, and the appellant and the public improperly had been deprived of its use, the appellant had not met the burden of 'establishing by his evidence the exact location, description, width and course of the entire road.'

Id. at 276-77, 129 A.2d at 134.

Noting the ancient maxim, "Equity will not suffer a wrong without a remedy," the court cited an earlier case for the proposition that '[c]ourts of equity are not, in the dispensation of justice, subject to those strict technical rules, which in other Courts are sometimes found in the way, and so difficult to surmount. The remedies here are moulded, so as to reach, if practicable, the real merits of the controversy, and justice will not be suffered to be entangled in a web of technicalities.'

Id. at 227, 129 A.2d at 134 (citation omitted).

117. The briefs submitted to the Court of Appeals and the Court of Special Appeals do not more than mention the administrative hearings and the resulting order. However, Hirsch did characterize the "so-called informal hearing" as a "farce," Brief for Appellant, App., at 2, apparently to justify disregarding the subsequent order.

118. See Findings of Fact and Conclusion, Administrative Hearing re: WRA Order C-0-75-205 (1975).

119. MD. NAT. RES. CODE ANN. § 9-305(b).
120. 274 Md. 211, 334 A.2d 514 (1975).
ent section within the Act, the section pertinent to *Hirsch* is worded identically, and the court noted in *Linchester* that this section likely would be unconstitutional for the same reasons. Some weight, therefore, should have been accorded to the administrative findings below.

The Court of Appeals may have avoided this question purposefully, because the parties neither raised it below nor on appeal. In light of *Linchester*, however, it perhaps would have been appropriate for the court to raise this issue *sua sponte*, if only to hold that the issue had been waived by the failure to raise it at the trial court level. Because the court chose not to address it in *Hirsch*, the question whether *Linchester* would have applied to this section of the Act, had it been raised, must go unresolved.

**CONCLUSION**

Both the legislature and the courts will be called on to interpret and modify the Wetlands Act to realize the Act's goal — protection of Maryland's delicate and valuable wetlands resources. *Hirsch* provided an opportunity for the Court of Appeals to interpret the Act, and its interpretation prompted a legislative response modifying the Act. Although some questions were resolved in the process, further attention

122. Md. Nat. Res. Code Ann. § 9-308(b) deals with review of decisions to grant or deny licenses to use *state* wetlands, whereas § 9-305(b) deals with review of decisions about permits to use *private* wetlands, any other rule or regulations affecting private wetlands, or designation as private wetlands.


124. 274 Md. at 229 n.6, 334 A.2d at 525 n.6.

125. It is not entirely clear what weight the administrative findings should receive: Whichever of the recognizing tests the court uses - [whether it be the arbitrary, capricious, unreasonable or illegal standard, or the tests of] substantially of the evidence on the record as a whole, clearly erroneous, fairly debatable or against the weight or preponderance of the evidence on the entire record — its appraisal . . . must be of the agency's factfinding results and not an independent original estimate of or decision on the evidence . . . There are differences [among the tests] but they are slight and under any of the standards the judicial review essentially should be limited to whether a reasoning mind reasonably could have reached the factual conclusion the agency reached. *Id.* at 225, 334 A.2d at 523, (quoting Insurance Comm'r v. National Bureau, 248 Md. 292, 236 A.2d 282 (1966).

126. See note 117 supra. In an informal interview, Judge Eldridge recalled that the *Linchester* question was posed from the bench during oral argument before the Court of Appeals. Both parties maintained that the issue was not raised by the case, since the informal administrative hearing did not meet the requirements of Md. Nat. Res. Code Ann. § 9-304. Interview with Judge John C. Eldridge of the Maryland Court of Appeals, in Annapolis, Maryland (June 9, 1981). This would explain why the court did not have to address or decide the issue.
will be necessary to provide guidance in answering the questions left unresolved by *Hirsch*. 
SHOULD PUBLIC WORKS PROJECTS ANCHOR THE
NAVIGATION SERVITUDE—

Kaiser-Aetna v. United States

I. INTRODUCTION

In Kaiser Aetna v. United States, the Supreme Court held that unless the federal government paid just compensation, it could not open to public access a private marina that the lessee, Kaiser Aetna, had rendered navigable-in-fact. Kaiser Aetna represents a rare setback in governmental attempts to invoke the navigation servitude to avoid compensating riparian landowners whose property has been adversely affected by federal action in navigable waters.

The federal government enjoys a navigation servitude in the navigable waters of the United States. Because of this servitude, a riparian landowner generally must bear the consequences of federal projects to improve navigation on water bordering his land. In contrast, the owner of land bound property sometimes is entitled to compensation under the fifth amendment when government action decreases the value of

2. Id. at 180. Traditionally, only waters "susceptible of being used, in their ordinary condition, as highways for commerce, over which trade and travel are or may be conducted in the customary modes" were regarded as navigable-in-fact. Id.
5. U.S. Const. amend. V provides in pertinent part: "No person shall be . . . deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation." The compensation clause of the fifth amendment does not apply directly to the States. Barron v. City of Baltimore, 32 U.S. (7 Pet.) 243, 250-51 (1833). The due process clause of the fourteenth amendment, however, incorporates the fifth amendment's compensation clause and requires that the owners of property taken
his property. In such cases, the government is considered to have taken something from the landowner. When land bound property is involved, the question is whether the government action should be viewed as a taking or as a valid exercise of the police power.

When the government is entitled to exercise its navigation servitude, however, there is no question of a fifth amendment taking, for the federal government has a dominant property-like interest in navigable waters. This interest flows from the federal government's power to regulate commerce, and when the federal government acts to aid navigation, the government's interest supersedes most private property interests. Thus when riparian land is affected by federal action in a navigable waterway, the question is whether the government can invoke the navigation servitude. Before Kaiser Aetna, the courts recognized only one limitation on the federal government's power to exercise the navigation servitude. If federal navigation projects involved physical invasion of private land above the mean high water mark, the riparian owner was entitled to compensation under the fifth amendment.

Because Kaiser Aetna suggested that there might be other circumstances in which the navigation servitude would not apply, one might view the decision as evidence of a fundamental change in the court's view of the proper balance between the variant interests served by the commerce clause and the fifth amendment. Yet from one perspective, Kaiser Aetna marks nothing more than a refusal to extend the navigation servitude beyond its traditional application in the context of federal public works projects.

II. History

The concept of the navigation servitude evolved from Chief Jus-
tice Marshall's landmark opinion in *Gibbons v. Ogden*.

In *Gibbons*, the Court held that commerce comprehends navigation, and that under the commerce clause, Congress may exercise regulatory control over the nation's navigable waters. Chief Justice Marshall thus laid the foundation for the navigation servitude.

In *Gibson v. United States* the Court introduced the theory that the federal government possesses a dominant interest in navigable interstate waters and began to develop the accompanying "no compensation rule." In *Gibson*, a riparian landowner sought compensation from the United States because a federal project to improve navigation on the Ohio River had deprived her of access to the river. The Court concluded that the damage "was not the result of a taking of appellant's property, and was merely incidental to the exercise of a servitude to which her property had always been subject."

On numerous occasions since the late nineteenth century the Court has held that, despite the fifth amendment, riparian landowners may be denied compensation for damages from federal actions to further navi-

12. Id. at 193.
13. Id. at 192-93.
14. 166 U.S. 269 (1897).
15. Id. at 276.
16. Id. This rule also has been referred to as the "rule of governmental non-liability." See, e.g., United States v. Commodore Park, 324 U.S. 386, 391 (1945).
17. Petitioner raised fruit on a farm located on an island in the Ohio River and shipped her products upriver to markets in Pittsburgh and Allegheny, Pennsylvania. She had 1000 feet of frontage on the river, but only one landing could be used for shipping produce and receiving supplies. When the federal government constructed a dike to improve the flow of the water in the main channel of the river, the depth of the water along petitioner's property was lowered, thereby preventing free access to the landing during seven months of the year. 166 U.S. at 269-71 (1897).
18. Id. at 276. The Court noted that the dike was not upon petitioner's land, nor did it cause the waters of the Ohio River to inundate any of her property. Id. at 271.

Since the Court did not view the riparian landowner's loss of access to navigable waters as a taking and there was no physical invasion of the land, the Court denied her claim for compensation. The value of the petitioner's property, however, did plummet an estimated one hundred and fifty to two hundred dollars per acre as a result of the dike's construction. Id. at 270.

The Court reaffirmed this view four years later in *Scranton v. Wheeler*, 179 U.S. 141 (1900). In *Scranton* a riparian landowner sought compensation when construction of a pier by the federal government blocked his access to a navigable river. The pier rested on submerged rather than fast land and was constructed to improve navigation. Id. at 153. Because construction of the pier was viewed as consonant with the Government's dominant interest in navigation, the Court concluded that compensation was not required for the ensuing loss of access suffered by the riparian landowner. Id. at 164-65. See also United States v. Commodore Park, 324 U.S. 386 (1945) (Government not required to compensate when deposits of dredged materials blocked a riparian landowner's access to navigable waters).
For example, the Court has denied compensation to plaintiffs asserting an interest in oyster beds and to owners of structures erected in navigable waterways, all damaged or destroyed by federal water projects. Additionally, in cases where federal projects resulted in actual physical invasion of riparian landowners' property, as a general rule, the Court recognized their fifth amendment claims only for damages caused by inundation above the high-water mark.

In United States v. Chandler-Dunbar Co. the Court first confronted the issue whether the fifth amendment entitles a riparian landowner to compensation when the government interferes with his interest in the flow of a navigable waterway. In Chandler-Dunbar the defendant, a riparian landowner, argued that the appropriation of his property by the federal government entitled him to compensation under the fifth amendment and that the compensation ought to include the value of the water's potential to supply power in excess of navigational needs. The Court reasoned that because of the government's navigation servitude, the locational value of defendant's property that was attributable to the water power inherent in the stream's flow was not value which he could claim as a private property owner. In the words of Justice Lurton, the "[o]wnership of a private stream wholly upon the lands of an individual is conceivable; but that the running water in a great navigable stream is capable of private ownership is inconceivable."

The Court has refused to retreat from its position in Chandler-Dunbar. Years later, the Court decided a similar valuation issue in

---

20. See, e.g., Lewis Blue Point Oyster Co. v. Briggs, 229 U.S. 82 (1913) (Government dredging to improve navigation in a bay, the bed of which was used for oyster cultivation, did not constitute a fifth amendment taking of the property of the lessee in the oyster beds).
24. Id. at 61. The defendant had, pursuant to federal permit, constructed a power facility on the St. Mary's River rapids in Michigan and was selling electricity. Subsequently, the government diverted the flow of the river for use in canals that had been constructed to avoid its rapids, thus facilitating commerce on the Great Lakes.
25. Id. at 76.
26. Id. at 69.
United States v. Twin City Power Co. 28 The riparian landowner in Twin City sought to recover, as an element of just compensation, the value of fast land as a site for hydroelectric power operations. 29 A sharply divided Court refused to award that amount to the power company. 30 Citing Chandler-Dunbar as controlling, the Court stated that what the power company actually sought was "a value in the flow of the stream, a value that inheres in the Government's servitude and one that under our decisions the Government can grant or withhold as it chooses." 31

The Twin City decision kindled considerable comment, questioning the Court's expansive interpretation of the navigation servitude. 32 Nevertheless, in United States v. Virginia Electric Co. 33 where valuation was once again an issue, the Court adhered to the rule of Twin City. 34 Justice Stewart, writing for the majority, stated that the lower court was "clearly right in excluding all value attributable to the riparian location of the land." 35 Finally, in United States v. Rands 36 the Court held that claims for the enhanced value of riparian land as a port site are not assertable against the superior rights of the United States. 37 The Court said that economic advantages stemming from riparian location "are not property within the meaning of the Fifth Amendment, and need not be paid for when appropriated by the United States." 38

Thus, since the nineteenth century the case law concerning the
navigation servitude has been rooted in an extremely broad interpretation of federal power. *Kaiser Aetna* indicates, however, that federal power to invoke the navigation servitude is limited.\(^\text{39}\)

### III. The *Kaiser Aetna* Decision

#### A. The Facts

Kuapa Pond, in its natural state, was a shallow 523 acre body of water adjacent to Maunalua Bay\(^\text{40}\) on the Island of Oahu in Hawaii. The Hawaiians used it only as a fishpond.\(^\text{41}\) However, in 1961 the Bishop Estate leased the development rights to a 6000 acre tract of land, including Kuapa Pond, to Kaiser Aetna.\(^\text{42}\) Pursuant to the terms of that agreement and upon notice to the Corps of Engineers,\(^\text{43}\) Kaiser Aetna dredged Kuapa Pond to create a private marina.\(^\text{44}\) Following construction of the marina, Kaiser Aetna chose to exclude all but one commercial vessel, which was operated primarily as a means of showing the marina to prospective purchasers of marina lots.\(^\text{45}\)

In 1972 the Corps of Engineers announced that it considered Kuapa Pond to be a navigable waterway, signifying that no further improvements could be commenced without Corps approval.\(^\text{46}\) Kaiser Aetna acquiesced in part by applying for a Corps permit, but the com-

---

\(^{39}\) It is worth noting that the Court recently has taken a rather conservative view of the scope of federal power in other contexts as well. *See, e.g.*, National League of Cities v. Usery, 426 U.S. 833 (1976) (holding that principles of federalism limit congressional authority to regulate commerce).

\(^{40}\) *Kaiser Aetna* v. United States, 444 U.S. at 166.

\(^{41}\) *Id.* A barrier beach, which separated Kuapa Pond from the Maunalua Bay, acted as only a partial barrier to seawater. As a result, Kuapa Pond has always been subject to the ebb and flow of the tides. The Hawaiians, who fished the pond, used the tides by constructing sluice gates, which permitted the natural flow of seawater in and out of the pond to flush and enrich the water, but at the same time, prevented large fish from escaping.

\(^{42}\) *Id.* at 167. The title to fishponds passed in the same manner as title to fast land according to the culture of nineteenth century Hawaii. Title to Kuapa Pond passed to Bernice Pauahai Bishop and, thereby, to the defendant Estate. *Id.* at 166-67. Fishponds, such as the original Kuapa Pond, are considered private property under Hawaiian law. Application of Kamakana, 58 Hawaii 632, 574 P.2d 1346 (1978).

\(^{43}\) 444 U.S. at 167. The Corps advised that no permit would be required for the proposed improvements. *Id.*

\(^{44}\) *Id.* at 167-68. Dredging of Kuapa Pond by Kaiser Aetna increased the average depth from two to six feet, including an eight foot main channel. *Id.* at 167.

\(^{45}\) *Id.* at 168. Over six hundred pleasure boats enjoyed the privilege of operating within the newly constructed marina and used its fueling and mooring facilities. United States v. Kaiser Aetna, 584 F.2d 378, 381 (9th Cir. 1978), *rev'd*, 444 U.S. 164 (1979).

\(^{46}\) 444 U.S. at 168. Authority to issue permits for such activities is vested in the Corps of Engineers pursuant to section 10 of the Rivers and Harbors Appropriation Act of 1899, 33 U.S.C. § 403 (1976).
pany refused to concede the navigability of Kuapa Pond. Subsequently, the United States brought suit on behalf of the Corps of Engineers against Kaiser Aetna and the Bishop Estate. The Government sought a declaration that the waters of Kuapa Pond, by then known as the Hawaii Kai Marina, were navigable waters of the United States and an order directing Kaiser Aetna to obtain a permit from the Corps prior to any future construction, excavation, or filling of the marina. In addition, the Government requested an injunction to prevent Kaiser Aetna from denying the public access to the marina and to require that public notice be given of its accessibility.

The district court held that the waters of the marina were navigable for the purpose of defining the scope of federal regulatory powers. But the court held that the Government could not force Kaiser Aetna to open the marina to the public without paying just compensation because the navigation servitude did not extend to a privately constructed waterway.

The Court of Appeals for the Ninth Circuit affirmed the lower court on the issue of navigability and regulatory power. The two courts, however, differed on the issue of public access. The court of appeals noted that "[i]t is the public right of navigational use that renders regulatory control necessary in the public interest." Therefore, the court concluded that because the marina was a navigable waterway, it was subject to the federal government's navigation servitude, which guaranteed the public a right of access without any need for compensation.

49. Id. at 168.
50. Id. Kaiser Aetna, on the other hand, argued that the pond, in its improved state, was not within the navigable waters of the United States. It asserted that because the Corps acquiesced to the dredging prior to 1972, the Government was estopped from securing the relief it sought in its complaint. Finally, Kaiser Aetna argued that a declaration opening the marina to public access was a taking of private property for public use, for which the Government was compelled to pay just compensation under the fifth amendment. 408 F. Supp. at 45.
52. The district court explicitly rejected Kaiser Aetna's estoppel argument. Id. at 54-55.
53. United States v. Kaiser Aetna, 584 F.2d at 381.
54. Id.
55. Id.
B. Decision of the Supreme Court

A divided Supreme Court\(^56\) reversed the court of appeals on the compensation issue. Speaking for the majority in *Kaiser Aetna*, Justice Rehnquist noted that, contrary to the Government's assertions,\(^57\) the definition of navigability may vary according to the context in which it is used.\(^58\) Justice Rehnquist then implied that navigability is more broadly defined in a regulatory setting than in the context of the navigation servitude.\(^59\) Ultimately, this distinction allowed the Court to conclude that the question whether the Government may exercise its regulatory power to provide for public access to the Hawaii-Kai Marina\(^60\) is totally separate from the issue whether such an exercise of power would amount to a "taking" requiring just compensation.

The Court began its discussion of the compensation issue by noting that fifth amendment questions generally have been resolved by an *ad hoc* factual inquiry.\(^61\) The majority recognized that the navigation servitude frequently has nullified the requirement of just compensation where taking questions have concerned the public right to navigate interstate waterways.\(^62\) Justice Rehnquist stated: "The navigational servitude, which exists by virtue of the Commerce Clause in navigable streams, gives rise to an authority in the Government to assure that such streams retain their capacity to serve as continuous highways for

\(^{56}\) Justice Rehnquist wrote for a six to three majority. Justice Blackmun was joined in dissent by Justices Brennan and Marshall.

\(^{57}\) See 444 U.S. at 170 (outlining the government's position).

\(^{58}\) Id. at 170-72.

\(^{59}\) Id. at 170-73. Regulatory powers certainly are broader than the scope of the navigation servitude since federal regulatory authority is asserted over waterways for a variety of purposes other than safeguarding navigation. See, e.g., United States v. Appalachian Power Co., 311 U.S. 377, 426-27 (1940). As the Court noted, "congressional authority over the waters of this Nation does not depend on a stream's 'navigability.'" 444 U.S. at 174. This alone, however, does not support a finding that navigability is more broadly defined in a regulatory setting than when the term is used to ascertain the scope of the "no compensation" rule of the navigation servitude.

\(^{60}\) 444 U.S. at 174. The Court indicated that Congress clearly had the power to guarantee the public free access to the marina. Id.

\(^{61}\) Id. at 174-75. Justice Rehnquist noted that the Court generally has "been unable to develop any 'set formula' for determining when 'justice and fairness' require that economic injuries caused by public action be compensated by the government, rather than remain disproportionately concentrated on a few persons." Id. (quoting Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 124 (1978)). See also Michelman, *Property, Utility and Fairness: Comments on the Ethical Foundations of 'Just Compensation' Law*, 80 Harv. L. Rev. 1165 (1967). Michelman postulates that judicial efforts to formulate decisional rules have not provided satisfactory means for the resolution of compensation issues. According to Michelman, "the only 'test' for compensability that is 'correct' in the sense of being directly responsive to society's purpose in engaging in a compensation practice is the test of fairness . . . ." Id. at 1171-72.

\(^{62}\) 444 U.S. at 175.
the purpose of navigation in interstate commerce." Thus the Court emphasized that the rationale for the navigation servitude was to safeguard the public interest in unencumbered waterborne commerce.

The Court reviewed the existing case law, but found none of its dispositive of the issues in *Kaiser Aetna*. Justice Rehnquist then engaged in an *ad hoc* factual inquiry, concluding that the navigation servitude was inapplicable and that the Government would have to exercise its power of eminent domain to assure public access to the marina. Several factors mentioned by the Court seemed to control its decision to require compensation. First, in its natural state Kuapa Pond was incapable of supporting navigation for the purpose of interstate commerce. Second, the majority emphasized that the pond had been considered private property under traditional Hawaiian law. The Court noted that the Corps of Engineers had expressly consented to the improvements to Kuapa Pond without requiring a permit and that the pond was rendered navigable solely through Kaiser Aetna's efforts. Finally, the Court seemed to attach significance to the suggestion that imposition of the navigation servitude would lead to physical invasion of what it considered to be a privately-owned marina.

C. *Analysis of the Kaiser Aetna Decision*

In holding that the navigation servitude did not apply to the marina in *Kaiser Aetna*, the Court appeared to raise doubts concerning several previously well-settled matters. First, the Court's conclusion that the Government must exercise its eminent domain power and pay compensation rests on the assumption that securing public access to the Hawaii Kai Marina would constitute a "taking" of some "property" interest held by Kaiser Aetna. But the Court repeatedly has held that

---

63. *Id.* at 177.
64. *Id.* at 175.
65. *Id.* at 175-78.
66. See note 61 and accompanying text *supra*.
67. 444 U.S. at 176-80.
68. *Id.* at 178-79. Since Kuapa Pond had a maximum depth of only two feet prior to the dredging operations of Kaiser Aetna, the Court did not view it as comparable to the kinds of waterways which it had previously subjected to the navigation servitude. *Id*.
69. See note 42 *supra*. In his dissent, Justice Blackmun attacked the notion that state law has any significance in determining the scope of the navigation servitude. He argued, instead, that "state-created interests in the waters or beds of such navigable water are secondary" to the navigation servitude. 444 U.S. at 191-92 (Blackmun, J., dissenting). See also Lewis Blue Point Oyster Co. v. Briggs, 229 U.S. 82 (1913).
70. 444 U.S. at 179.
71. *Id.* at 180.
72. Justice Rehnquist apparently felt that the characterization of the right to exclude others as a "property" interest was somewhat self-evident. 444 U.S. at 176. No Supreme
there can be no "property" interest in any of the navigable waters of the United States. It would seem, therefore, that there can also be no "taking" of an asserted private interest in a navigable waterway. Nevertheless, despite the marina's navigability following the improvements by Kaiser Aetna, the Court concluded that requiring public access would, indeed, be a "taking."

The apparent contradiction is, however, illusory. Prior to Kaiser Aetna's improvements, Kuapa Pond was incapable of supporting navigation for the purpose of interstate commerce. No prior cases dealing with the navigation servitude concerned a waterway that had been made navigable by the efforts of a private party. Because Kaiser Aetna had made the marina navigable, it was reasonable for Kaiser Aetna to assume that this waterway was private property. In addition, Kuapa Pond traditionally had been considered private property under Hawaiian law and was far less substantial than the waterways generally associated with the navigation servitude. Therefore, the majority

Court decisions were cited in support of the right to exclude. See 444 U.S. at 180 n.11. However, the theory of trespass law suggests that the right to exclude is historically accepted as an incident of private ownership of real property. A number of states have both criminal penalties, see, e.g., MD. ANN. CODE art. 27, § 577 (1975), and civil remedies for trespassory violations, see, e.g., Brazerol v. Hudson, 262 Md. 269, 273, 277 A.2d 585, 587 (1971); Gusdorff v. Duncan, 94 Md. 160, 169, 50 A. 574, 576 (1901).


74. 444 U.S. at 171. The Court was willing to state only that "Kuapa Pond may fit within definitions of 'navigability' articulated in past decisions of this Court." Id. There can be little doubt, however, that under the Court's traditional definition of navigability, Kuapa Pond, as improved by Kaiser Aetna, was navigable. See United States v. Appalachian Power Co., 311 U.S. 377, 407; The Daniel Ball, 77 U.S. (10 Wall.) 557, 563 (1870).

75. 444 U.S. at 178.

76. Id. Prior case law established three disparate tests of navigability: "navigability in fact," "navigable capacity," and "ebb and flow" of the tide. Id. at 181-84 (Blackmun, J., dissenting). See also The Daniel Ball, 77 U.S. (10 Wall.) 557, 563 (1870); Propeller Genesee Chief v. Fitzhugh, 53 U.S. (12 How.) 443, 454-55 (1851). Based on the third and oldest test, a product of the English common law, Justice Blackmun reasoned that Kuapa Pond always had been a navigable waterway because, in its natural state, it had been subject to the ebb and flow of the tides.

For a thorough treatment of the historical development of the "navigability" concept, see MacGrady, The Navigability Concept in the Civil and Common Law: Historical Development, Current Importance, and Some Doctrines That Don't Hold Water, 3 FLA. ST. U.L. REV. 510 (1975). The refusal of the Court to adopt Justice Blackmun's position casts further doubt on the possibility that "ebb and flow" will again be considered a viable test for navigability. See also Bartke, supra note 3, at 6-9.


78. See note 42 supra.

79. See 444 U.S. at 178-79.
seemingly was justified in concluding that Kaiser Aetna's assumption that it possessed a property interest in the newly created marina was both reasonable and sufficiently important to be compensable. Unfortu-80
nately, the majority opinion failed to define clearly the exact na-
ture and scope of the property interest recognized in Kaiser Aetna. D. Kaiser Aetna and the Future of the Navigation Servitude

It is possible to view Kaiser Aetna as an initial step in a general retreat from the historically broad application of the navigation servitude. Undoubtedly there will be some lower courts that will seize upon this opportunity to begin dismantling the doctrine. To do so, however, would be to read far too much into the Court's language in Kaiser Aetna.

There are at least two reasons to view Kaiser Aetna narrowly. First, Justice Rehnquist clearly recognized the Government's authority to invoke the navigation servitude under proper circumstances. Second, the majority conscientiously avoided giving the impression that it was modifying or overruling well-settled principles in this area. Indeed, the thrust of the majority opinion was to distinguish the facts of Kaiser Aetna from those of previous cases.

It also is worth noting that the Court might have, but did not, hold that the navigation servitude does not extend to waters rendered navigable solely through the efforts of private actors. This narrow holding would undoubtedly have limited conflicting interpretations of Kaiser Aetna by lower courts without overruling established precedent. Additionally, the predictability inherent in such a rule could have eliminated the title concerns of some riparian landowners. This rule, however, would be undesirable. It would unnecessarily restrict the


81. A related issue is the scope of the navigation servitude under the Court's analysis in Kaiser Aetna. In his dissent Justice Blackmun maintained that the navigation servitude extends to all navigable waters of the United States. 444 U.S. at 184-87 (Blackmun, J., dissenting). He saw the matter as governed by broadly defined precedent rather than by the exception carved out by the majority. Id. at 186. The scope of the majority's exception to the traditionally broad application of the servitude remains unclear.

82. 444 U.S. at 175-76
83. Id. at 175-79.
84. See notes 76 to 79 and accompanying text supra.
power of the federal government to exercise its dominant servitude in
the event that a small watercourse rendered navigable by some private
entity fell within the scope of an important federal water project.

Although the Court did not identify the rationale for its decision,
the *Kaiser Aetna* decision can be justified in terms of the underlying
purpose of the navigation servitude. The doctrine was developed to
enable the federal government to minimize the cost of exercising its
power of eminent domain when engaging in public works in navigable
waterways. The navigation servitude, therefore, has been invoked
principally in the context of federal public works projects, not in the
context of regulating private actions. The result in *Kaiser Aetna*
could thus be justified as a restriction of the servitude's "no compensation"
rule to its traditional area of application — federal public works
projects in navigable waterways.

IV. Conclusion

The navigation servitude has been the subject of increasing criti-
cism from legal commentators in recent years. Arguably, both the
Executive and the Congress have the power to blunt some of the most
severe criticism of the doctrine. The Court has indicated that the gov-

86. Consider a situation in which the federal government embarks upon a major federal
water project that requires the condemnation of several large tracts of riparian land. A rule
exempting waters rendered navigable by private actors from the coverage of the navigation
servitude would permit a riparian landowner who had rendered certain waters along his
property navigable to receive compensation for the value of some proprietary interest in
those waters based upon *Kaiser Aetna*. A second riparian landowner who invested substan-
tial funds developing an already navigable waterfront would not receive any compensation
for his interest in the waters. This anomalous situation quickly would prove to be unwork-
able. 444 U.S. at 180.

87. See, e.g., United States v. Rands, 389 U.S. 121 (1967) (lock and dam project author-
authorized construction of dam and reservoir); United States v. Twin City Power Co., 350
U.S. 222 (1956) (federal project for the improvement of the Savannah River basin); United
States v. Willow River Co., 324 U.S. 499 (1945) (construction of a dam by the federal gov-
ernment to raise the water level of a river); United States v. Commodore Park, 324 U.S. 386
(1945) (dredging operation by the federal government); United States v. Chicago, M., St. P.
& Pac. R.R., 312 U.S. 592 (1941) (construction of a dam by the federal government to raise
the water level of a river); Greenleaf Lumber Co. v. Garrison, 237 U.S. 251 (1915) (partial
removal of a wharf by federal government to widen a harbor); Lewis Blue Point Oyster Co.
v. Briggs, 229 U.S. 82 (1913) (Congressionally authorized dredging of a bay to improve
navigation); United States v. Chandler-Dunbar Co., 229 U.S. 53 (1913) (federal construction
of canals to facilitate commerce on the Great Lakes); Union Bridge Co. v. United States, 204
U.S. 364 (1907) (removal of a bridge by federal government to prevent the obstruction of
navigation); Scranton v. Wheeler, 179 U.S. 141 (1900) (construction of a pier by federal
government to improve navigation); Gibson v. United States, 166 U.S. 269 (1896) (construction
of a dike by the federal government to improve flow of river in main channel).

88. See, e.g., Morreale, *supra* note 80, at 76-77; Morris, *supra* note 85.
ernment has the option, but no duty, to deny fifth amendment claims when the "no compensation" rule of the servitude is available. Additionaly, statutory restriction of the "no compensation" rule would mitigate some of the harshness of the doctrine and spread the cost of federal navigation projects more evenly among those who ultimately enjoy the benefits of these projects. The Kaiser Aetna decision could serve as the basis of another, fundamentally more sound approach to the navigation servitude. In short, restricting the "no compensation" rule to cases involving federal public works projects in navigable waterways would provide a concrete basis for making future decisions, be responsive to the original purpose of the doctrine, and yet require the government to compensate a riparian landowner if it interferes with his property for some other purpose.

90. See Morris, supra note 85, at 195-98.
In Re Randolf T. and In Re Bobby C. — THE STANDARD OF PROOF IN A JUVENILE WAIVER HEARING AND THE PROBLEM OF UNREPORTED OPINIONS

The Maryland Court of Appeals has granted certiorari in two juvenile cases decided last term by the Court of Special Appeals, In re Randolf T.¹ and In re Bobby C.² In both cases, the Court of Special Appeals held that the preponderance standard satisfies due process requirements in the context of juvenile waiver hearings.³ Although these decisions are not inconsistent with any United States Supreme Court holding, they are inconsistent with the principles that guided the Supreme Court in United States v. Kent,⁴ In re Gault,⁵ In re Winship,⁶ and Addington v. Texas.⁷ Furthermore, unless overturned by the Court of Appeals, Randolf T. and Bobby C. will subvert the juvenile justice system's principle goal — the rehabilitation of juvenile delinquents.

Maryland law provides that a juvenile court may waive its exclusive jurisdiction over an allegedly delinquent child⁸ if the child is at

---

³. Id. at 254, 426 A.2d at 439; No. 645, slip op. at 6.
⁸. MD. CTS. & JUD. PROC. CODE ANN. § 3-801(d) (1980) defines child as a person under 18 years of age. The juvenile court has "exclusive original jurisdiction over a child alleged to be delinquent, in need of supervision, or in need of assistance." Id. § 3-804(a). The Code further provides, however, that the court does not have jurisdiction over:
   (1) A child 14 years old or older alleged to have done an act which, if committed by an adult, would be a crime punishable by death or life imprisonment, as well as all other charges against the child arising out of the same incident, unless an order removing the proceeding to the court has been filed pursuant to § 594A of Article 27;
   (2) A child 16 years old or older alleged to have done an act in violation of any provision of the Transportation Article or other traffic law or ordinance except an act that prescribes a penalty of incarceration;
   (3) A child 16 years old or older alleged to have done an act in violation of any provision of law, rule, or regulation governing the use or operation of a boat except an act that prescribes a penalty of incarceration;
   (4) A child 16 years old or older alleged to have committed the crime of robbery with a deadly weapon or attempted robbery with a deadly weapon as well as all other charges against the child arising out of the same incident, unless an order removing the proceeding to the court has been filed pursuant to § 594A of Article 27.
Id. at § 3-804(d).
least fifteen years old or is charged with a sufficiently serious crime.\(^9\) Before waiving jurisdiction to the adult criminal court, the juvenile court must find by a preponderance of the evidence that the child is an "unfit subject for juvenile rehabilitative measures."\(^10\)

Randolf T. and Bobby C. were both older than fifteen when they allegedly committed delinquent acts.\(^11\) Accordingly, they were candidates for waiver. A juvenile court waived jurisdiction over each of the boys after determining that he was not amenable to rehabilitative treatment as a juvenile.\(^12\) Each appealed his waiver, arguing that the due process clause of the fourteenth amendment mandates that the waiver decision be controlled by the standard of clear and convincing proof.\(^13\) An understanding of the social and constitutional principles that inform the juvenile justice system is important to any analysis of the issue presented by Randolf T. and Bobby C.

**THE JUVENILE JUSTICE SYSTEM**

The fundamental premise of the juvenile justice system is that children should be protected from the trauma and stigma of criminal convictions.\(^14\) Unlike the adult criminal justice system, which focuses on punishing guilty defendants,\(^15\) the juvenile system regards the state as a benevolent paternal figure dispensing rehabilitative care to correct the antisocial tendencies of its children.\(^16\)

---

9. *Id.* § 3-804(a). The Code provides:
   
   (a) The court may waive the exclusive jurisdiction conferred by § 3-804 with respect to a petition alleging delinquency by:
   
   (1) A child who is 15 years old or older, or
   
   (2) A child who has not reached his 15th birthday, but who is charged with committing an act which if committed by an adult, would be punishable by death or life imprisonment.

10. *Id.* § 3-804(c).

11. 48 Md. App. at 250, 426 A.2d at 437; No. 645, slip op. at 2.

   Randolf was alleged to be a juvenile delinquent because of his arrest for possessing and discharging an unregistered short-barreled shotgun. *Id.* At the time of his waiver hearing, he was awaiting trial in adult criminal court for an unrelated homicide charge. *Id.* at 3. Although Randolf had no prior juvenile or criminal record, the nature of his alleged offenses and the pending homicide charge prompted the state to seek waiver of juvenile jurisdiction. *Id.*

   Bobby was alleged to be a juvenile delinquent based on charges of two attempted murders, assault, and illegal use of a handgun. 48 Md. App. at 250, 426 A.2d at 437.

12. 48 Md. App. at 251, 426 A.2d at 437; No. 645, slip op. at 3.

13. 48 Md. App. at 250, 426 A.2d at 436; No. 645, slip op. at 1.


15. *Id.* at 106.

16. The concept of the state as the ultimate protector was derived from the doctrine that viewed the state as *pars pro patriae*. In In re Gault, 387 U.S. 1, 16 (1967), the Supreme Court noted that "[t]he Latin phrase proved to be a great help to those who sought to rationalize
In keeping with the rehabilitative goals of juvenile justice, juvenile proceedings are conducted in an informal fashion. The underlying notion is that the judge, the state, and the accused delinquent share the same goal — to serve the best interests of the child. Accordingly, or so the theory goes, the juvenile does not require the same protections that we afford adults in an adversarial criminal trial. Moreover, juvenile proceedings are civil, not criminal, and thus the juvenile cannot automatically claim the constitutional rights guaranteed a criminal defendant.

Since 1966, however, the United States Supreme Court has been receptive to claims that juveniles are entitled to certain due process protections in juvenile proceedings. In Kent, for example, the Court held that, under the District of Columbia waiver statute, the juvenile court's decision to waive jurisdiction over Kent was invalid. The waiver decision could not stand because the judge held no hearing, gave no statement of reasons for his decision, and denied the juvenile access to the social and probation reports that the judge presumably considered. Several times the Court referred to the waiver hearing as "critically important," and its importance apparently dictated that the juvenile be protected from an arbitrary decision.

Although the Court stressed that its decision was based on the District of Columbia statute, it also indicated that its interpretation of the statute was affected by constitutional considerations. The Court said, "[T]here is no place in our system of law for reaching a result of such tremendous consequences without ceremony . . . . " Furthermore, one year later in Gault, the Court referred to the Kent case, saying, "Although our decision turned upon the language of the statute, we emphasized the necessity that 'the basic requirements of due process
and fairness' be satisfied in such proceedings.\textsuperscript{27}

In both \textit{Gault}\textsuperscript{28} and \textit{Winship}\textsuperscript{29} the Court held that specific due process rights attach to juvenile adjudicatory proceedings. Under these decisions, the juvenile accused in an adjudicatory hearing has constitutional rights to be represented by counsel,\textsuperscript{30} to receive notice of charges,\textsuperscript{31} to avoid self-incrimination,\textsuperscript{32} to confront and cross-examine witnesses,\textsuperscript{33} and to be proved delinquent beyond a reasonable doubt.\textsuperscript{34}

Although \textit{Kent}, \textit{Gault}, and \textit{Winship} established that juveniles have due process rights that the juvenile system must respect, none of these decisions dealt with the question whether the Constitution mandates any particular standard of proof in a juvenile waiver hearing. In the absence of any Supreme Court decision of this question, the state courts have upheld an assortment of standards for the waiver decision. For example, the Indiana Court of Appeals\textsuperscript{35} and the Illinois Supreme Court\textsuperscript{36} have upheld statutes that allow waiver if waiver will best serve the interests of the child and the state. The Court of Criminal Appeals of Oklahoma determined that the judge must base his waiver decision on "substantial evidence" — defined as more than a scintilla.\textsuperscript{37} An Ohio court upheld a statute requiring "reasonable grounds" for transfer.\textsuperscript{38}

Other jurisdictions have required more stringent checks on the judge's discretion. For example, the Massachusetts waiver statute declares that a judge must grant waiver based on clear and convincing evidence.\textsuperscript{39} The Appeals Court of Massachusetts noted that the statute provided "extra measures of evidentiary protection" in keeping with the language in \textit{Kent} emphasizing the seriousness of the waiver process.\textsuperscript{40} No jurisdiction, however, has critically examined the function of a standard of proof in the context of the waiver process. As the

\begin{itemize}
  \item \textsuperscript{27} 387 U.S. at 12.
  \item \textsuperscript{28} \textit{Id}. at 30.
  \item \textsuperscript{29} 397 U.S. 358, 368 (1970).
  \item \textsuperscript{30} In re Gault, 387 U.S. at 41.
  \item \textsuperscript{31} \textit{Id}. at 33.
  \item \textsuperscript{32} \textit{Id}. at 55.
  \item \textsuperscript{33} \textit{Id}. at 57.
  \item \textsuperscript{34} United States v. Winship, 397 U.S. at 364.
  \item \textsuperscript{36} People v. Taylor, 76 Ill.2d 289, 302-04, 391 N.E.2d 366, 372 (1979).
  \item \textsuperscript{37} In re J.W.N., 620 P.2d 1341, 1344 (Okla. Crim. App. 1980).
  \item \textsuperscript{38} State v. Carmichael, 35 Ohio St. 2d 1, 6, 298 N.E.2d 568, 572 (1973).
  \item \textsuperscript{39} \textit{MASS. GEN. LAWS ANN.} ch. 119, § 61 (Supp. 1981 West).
\end{itemize}
appellants argued in *Randolf T.* and *Bobby C.*, the recent Supreme Court decision of *Addington v. Texas*41 arguably requires this analysis.

*Addington v. Texas*

*Addington* held that, in civil commitment proceedings, the proof by clear and convincing evidence satisfies constitutional due process requirements.42 The Court noted, however, that the preponderance standard is constitutionally inadequate in this context.43 Its reasoning rested on an analysis of the function of a standard of proof. The Court said:

The function of a standard of proof, as that concept is embodied in the Due Process Clause . . . , is to "instruct the fact finder concerning the degree of confidence our society thinks he should have in the correctness of factual conclusions for a particular type of adjudication." . . . The standard serves to allocate the risk of error between the litigants and to indicate the relative importance attached to the ultimate decision.44

The Court then explored the three traditional standards of proof and the types of proceedings to which each is appropriate.45 The Court indicated that the preponderance standard, which requires the litigants to share equally the risks of error, is appropriate in cases involving private monetary disputes because society has only a minimal concern with the outcome.46 Proof by clear and convincing evidence, the Court noted, is the standard that governs civil cases47 in which more substantial individual interests are at stake and in which public policy therefore favors protection of those interests.48 For instance, this standard usually applies in cases involving allegations of civil fraud, and it serves to reduce the risk of injury to the defendant's reputation.49 Finally, the Court observed that the reasonable doubt standard is gener-

41. 441 U.S. 418 (1979). The appellant in *Addington* was committed to a mental hospital based on clear and convincing evidence that commitment would best protect him and others. The appellant, however, claimed that use of the clear and convincing evidence standard violated his due process rights. *Id.* at 421-22.
42. *Id.* at 433.
43. *Id.* at 427.
44. *Id.* at 423 (citation omitted).
45. *Id.* at 423-25.
46. *Id.* at 423.
47. Juvenile proceedings are technically civil actions although they are quasi-criminal in nature. In *Winship*, the Supreme Court eschewed the rigidity of the civil/criminal classifications, and, as noted, prescribed the criminal standard of proof (beyond a reasonable doubt) for juvenile adjudicatory proceedings. *See* note 33 and accompanying text supra.
48. 441 U.S. at 424.
49. *Id.*
ally reserved for criminal cases. In these cases, the interests of the criminal defendant are of such magnitude that society has chosen to nearly exclude the possibility of an error that would prejudice those interests.

After examining the roles of the various standards in allocating the risks of erroneous decisions, the Court indicated that the societal and individual interests at stake in a particular type of case should determine the standard of proof employed in that type of case. While considering the interests involved in Addington, the Court pointed out that an individual threatened with commitment has a strong interest in preserving his liberty and in avoiding the stigma attached to commitment. On the other hand, the Court noted that the government has no interest in civilly committing anyone not mentally ill, although it has an interest in protecting society from the dangerously ill. The Court decided that in this situation the individual should not be required to share equally with society the risk of error. It concluded that "due process requires the state to justify confinement by proof more substantial than a mere preponderance of the evidence."

The Addington analysis seems to apply to any judicial proceeding. The notion of balancing interests is a familiar one. The more interesting aspect of Addington is its suggestion that fundamental fairness demands that the risks of judicial proceedings be skewed to favor the more substantial of the interests at stake.

In response to Addington, several state courts have held that due process requires a clear and convincing standard of proof in cases determining parental and custodial rights. Similarly, several have adopted that standard for proceedings dealing with the sterilization of incompetent minors, although as Judge Wilner noted, "[I]t is difficult to imagine any lesser test ever being valid in such a case."

50. Id. at 423-24.
51. Id.
52. Id. at 423-25.
53. Id. at 425-26.
54. Id. at 426.
55. Id. at 427.
56. Id.
The Maryland Court of Special Appeals refused to use the Addington analysis in Randolf T. and Bobby C. Because Addington involved a civil commitment proceeding, the court found it neither authoritative nor persuasive in the context of juvenile waiver proceedings. The court stressed that a civil commitment proceeding determines whether someone will be deprived of his liberty and that the waiver hearing does not reach this question. The court asserted that no stigma attaches to a waived juvenile until and unless he is found guilty in adult court. Finally, the court concluded that, in the absence of any Supreme Court determination of which standard satisfies due process in a waiver hearing, it was unwilling to overturn the legislative judgment that the preponderance standard is adequate. Accordingly, it upheld the legislatively prescribed standard.

Although the Court of Special Appeals adopted the same reasoning in both Randolf T. and Bobby C., the unreported Randolf opinion contained a strong dissent by Judge Wilner. He argued that the Addington analysis applied to the waiver process. Relying in part on Kent, he characterized waiver as a critical event involving substantial individual and societal interests. Although he mentioned that preserving public safety is a legitimate societal interest, he pointed out that the public has an equal interest in maintaining the juvenile court's jurisdiction over all children amenable to juvenile rehabilitative treatment. He characterized the child's interest as definite and substantial, noting that a decision to waive the child to adult court exposes him to the risk of incarceration in an adult prison and to the consequences of having a criminal record. Wilner concluded that the waiver decision should be based on clear and convincing evidence.

Indeed, the waiver process does determine vitally important

60. 48 Md. App. at 253, 426 A.2d at 438; No. 645, slip op. at 9-10.
61. 48 Md. App. at 253, 426 A.2d at 438; No. 645, slip op. at 9-10.
62. 48 Md. App. at 254, 426 A.2d at 439; No. 645, slip op. at 11.
63. 48 Md. App. at 254, 426 A.2d at 439; No. 645, slip op. at 11-12.
65. No. 645, slip op. at 1 (Wilner, J., dissenting).
66. Id. at 6.
67. Id. at 6-7.
68. Id. at 6.
69. Id.
70. Id. at 7-8.
rights.\textsuperscript{71} Juvenile jurisdiction protects the youth from publicity,\textsuperscript{72} limits confinement up to the age of majority,\textsuperscript{73} and protects against the consequences of an adult conviction.\textsuperscript{74} Even if the accused is acquitted by a criminal court, his adult arrest record may produce employment problems.\textsuperscript{75} Although waiver does not automatically deprive the juvenile of his liberty, it does expose him to the risk of pre-trial confinement in an adult facility for up to 180 days.\textsuperscript{76} In contrast, a child awaiting a delinquency adjudication can be detained no more than sixty days\textsuperscript{77} and cannot be confined in an adult detention facility.\textsuperscript{78} Moreover, the juvenile who has been waived to criminal court has been stigmatized as an “unfit subject for juvenile rehabilitative measures.”\textsuperscript{79} In sum, as the fourth circuit has said, “[I]t seems . . . nothing can be more critical to the accused than determining \textit{whether there will be a guilt determining process in an adult-type criminal trial.”\textsuperscript{80}

The standard of clear and convincing proof would reinforce the theoretical presumption that every child should remain in the juvenile court system. The presumption of amenability to rehabilitation has been recognized by the Maryland legislature,\textsuperscript{81} the Maryland courts,\textsuperscript{82} the Supreme Court,\textsuperscript{83} and the social philosophy that justifies a separate juvenile justice system.\textsuperscript{84} Despite this theoretical presumption, as a practical matter the state’s petitions for waiver are rarely denied, at least in Baltimore City. Statistics demonstrate that of 326 waiver hearings held during the calendar year 1980, only 46 waiver petitions were
In short, the principle merit of a higher standard of proof is that it might help to preserve the presumption of amenability to rehabilitation in fact as well as in theory.

An increased standard of proof might also serve to fortify a process that otherwise might be regarded as perfunctory. Witnesses are rarely produced in waiver hearings, and the average length of a waiver hearing is approximately fifteen minutes. This sort of proceeding does not bespeak the critical importance that the Supreme Court has attributed to waiver hearings. Increasing the burden of proof at least might impress the juvenile judge with the gravity of his decision.

The Addington analysis was framed in language that makes its reasoning applicable to any judicial proceeding. Other courts have responded to Addington by re-evaluating the standard of proof in a variety of legal proceedings. Unfortunately the Maryland Court of Special Appeals refused to follow this trend.

Its refusal is contrary to the spirit of both Addington and the Kent, Gault, Winship trilogy of juvenile cases. It is also inconsistent with the basic thrust of the juvenile justice system — to seek the rehabilitation rather than the punishment of juvenile offenders. Because the Court of Appeals has granted certiorari in Randolf T. and Bobby C., it may still reclaim the important social and constitutional principles that the Court of Special Appeals rejected.

**Significance of the Court's Decision Not to Publish**

In Re Randolf T.

Randolf T. is significant, not only because of the substantive issue with which it deals, but also because its non-publication raises questions regarding a court's responsibility to publish dissenting opinions. When a Maryland court chooses not to report an opinion, the unreported opinion may "not be cited by a court or party for any purpose,

---


Ms. Daily noted that 128 scheduled waiver hearings resulted in court-controlled commitments in which the juvenile admitted the charges in exchange for the state withdrawing its waiver petition. Although it seems somewhat inappropriate for prosecutors to use the waiver petition as leverage in plea bargaining, the ethical propriety of that practice is beyond the scope of this paper.


88. See notes 57 and 58 and accompanying text supra.
in any unrelated action or proceeding."\textsuperscript{89}

The proponents of non-publication advance two primary justifications for not reporting opinions: (1) non-publication reduces the cost of producing published opinions; and (2) non-publication reduces the time devoted to opinion writing.\textsuperscript{90} Critics of non-publication, however, have noted that the practice of not reporting opinions "will effect a pernicious diminution in both judicial responsibility and judicial accountability."\textsuperscript{91} This criticism does not apply to the Court of Special Appeals' decision not to publish \textit{Randolf T.}, because by publishing \textit{Bobby C.}, the court made itself publicly accountable for the majority's reasoning in \textit{Randolf T.}. Indeed, \textit{Bobby C.}, a unanimous opinion, is practically indistinguishable from the majority opinion in \textit{Randolf T.}.\textsuperscript{92} However, the non-publication of \textit{Randolf} does raise a significant problem, for it has removed from public scrutiny Judge Wilner's well-reasoned dissent.

As Chief Justice Hughes once noted, a dissent is "an appeal to the brooding spirit of the law."\textsuperscript{93} It affords a dissatisfied member of the court an opportunity to criticize the position taken by the majority and to ask "for correction from those with power to do so — a higher court, the Congress, or 'the intelligence of a future day.'"\textsuperscript{94} Thus, a dissent may help shape the course of the law not only by influencing later judicial decisions, but also by inspiring constitutional amendments or

\textsuperscript{89} MD. R.P. 1092(c).


\textsuperscript{91} Reynolds & Richman, \textit{The Non-Precedential Precedent — Limited Publication and No-Citation Rules in the United States Courts of Appeals}, 78 COLUM. L. REV. 1167, 1199 (1978). The article notes that because superior courts can review only a limited number of cases, the real check on intermediate appellate courts comes from the bench, the bar, the scholars, and the public. "Unpublished opinions . . . will generally not receive critical commentary from those groups for the obvious reason that they will go unnoticed." \textit{Id.} at 1203. Thus, non-publication significantly diminishes judicial accountability by rendering this type of control less effective. \textit{Id.} at 1202. See also Reynolds & Richman, \textit{An Evaluation of Limited Publication in the United States Courts of Appeals: The Price of Reform}, 48 U. CHI. L. REV. 573, 581 (1981).

\textsuperscript{92} See note 64 and accompanying text supra.

\textsuperscript{93} C. HUGHES, \textit{THE SUPREME COURT OF THE UNITED STATES} 68 (1928), quoted in Stephens, \textit{The Function of Concurring and Dissenting Opinions in Courts of Last Resort}, 5 U. FLA. L. REV. 394, 404 (1952). See also New York Times Co. v. Sullivan, 376 U.S. 254, 270 (1964) ("[R]ight conclusions are more likely to be gathered out of a multitude of tongues, than through any kind of authoritative selection. To many this is, and always will be, folly; but we have staked upon it our all." (quoting United States v. Associated Press, 52 F.Supp. 362, 372 (S.D.N.Y. 1943) (L. Hand, J.))

\textsuperscript{94} Reynolds & Richman, \textit{Limited Publication in the Fourth and Sixth Circuits}, 1979 DUKE L.J. 807, 829 (quoting C. HUGHES, \textit{THE SUPREME COURT OF THE UNITED STATES} 68 (1928)).
changes in statutory law.95

Perhaps a risk analysis is appropriate in this context, as it was in Addington. By choosing not to publish an opinion that contains a dissent, the court maximizes the risk that an erroneous decision will be regarded as controlling — by the bench, the bar, and the legislature. On the other hand, publication entails no real risk. Only a small minority of opinions contain dissents;96 thus the financial cost of publishing these opinions is negligible. Furthermore, in any case in which the court is split, surely it is not wasting judicial energy to require the judges to articulate their opposing views carefully for presentation to the public.

It is clear that if a dissenting opinion remains unpublished, the value of the opinion will most certainly be lost. Thus the question arises whether courts should be required to publish all decisions accompanied by a dissent. William Reynolds and William Richman addressed this question in a recent article.97 They argued that courts should adopt rules mandating publication of both dissenting and concurring opinions. Such rules would not only serve to guide the proper evolution of the law, but would also "assure a forum for any issue about which a judge feels strongly enough to dissent or concur."98 Even those cases that the court would characterize as lacking legal significance or public importance probably warrant publication when they are accompanied by dissents.99 Reynolds and Richman noted that "[w]hile such opinions break no new ground, they do reveal the presence of intellectual ferment and independent thought on the court[,] . . . phenomena that the bar and the public should be able to observe."100

The Maryland courts should consider adopting such a rule, for without rules requiring the publication of dissenting and concurring opinions, it is possible that many valuable opinions will be forever hidden from the public eye. Judge Wilner's dissent from Randolf T. is a case in point.

95. See Stephens, supra note 93, at 405-07.
96. Each year approximately ten unreported Court of Special Appeals decisions contain dissents. Interview with David L. Terzian, Deputy Clerk of the Maryland Court of Special Appeals, in Annapolis, (Oct. 6, 1981).
97. Reynolds & Richman, supra note 91.
98. Id. at 832-33.
99. Id. at 832.
100. Id.
CONCLUSION

The Maryland Court of Appeals will be considering the substantive question raised by *Randolph T.* and *Bobby C.*, for the court has granted certiorari in both cases. The only appeal that lies from the Court of Special Appeals' decision not to report *Randolph T.*, however, is an appeal to the conscience of the court.

ADDENDUM

Since this issue of the Maryland Law Review went to the printer, the Court of Appeals announced its decisions in *Bobby C.* and *Randolph T.* In re *Bobby C.*, No. 47 (Md. Dec. 7, 1981); In re *Randolph T.*, No. 25 (Md. Dec. 4, 1981). The *Bobby C.* decision was issued without opinion, presumably because the *Randolph T.* opinion contained the court's reasoning in resolving both cases. In *Randolph T.* the court seemed to be concerned primarily with Randolph's argument that the waiver proceeding ought to be governed by the reasonable doubt standard. No. 25, Slip op. at 16-20. The court did not deal adequately with the question whether the waiver hearing determines such important issues that the clear and convincing standard ought to apply. The court merely said:

*[T]he juvenile is in a much different position than the individual about to be committed to a mental institution as in Addington, the parent to be permanently separated from his child, the young woman who is to be sterilized, or the persons subject to deportation or denaturalization which the Chief Justice mentioned in his discussion for the Court in Addington. The court proceeding in each of those cases is a final determination of the person's status. Randolph T. is being removed from the juvenile justice system, but that removal does not determine his ultimate status. That will come only after due trial.*

*[Id.* at 20-24.

The weakness in the court's position is immediately apparent. Although waiver does not determine a juvenile's ultimate status, the waived juvenile ordinarily cannot reopen the question at issue in the waiver proceeding — the question of his fitness for juvenile rehabilitative measures. Once waived to the adult court, he will be treated as an adult; and if he is found guilty, he probably has forever lost his opportunity for treatment in accordance with juvenile rehabilitative measures. Accordingly, an erroneous waiver decision does affect important individual and societal interests. The court should have evaluated whether, in light of those interests, the waiver standard adequately minimizes the risk of an erroneous decision.
A majority of states have discarded the common law doctrine of interspousal immunity either partially or completely but Maryland courts have been reluctant to break with the past. In Schlesinger v. Schlesinger, the Maryland Court of Special Appeals continued to resist any significant change in this state's position on interspousal immunity, and the Court of Appeals denied certiorari in the case. Because the traditionally proferred rationales no longer persuasively support the doctrine, the Court of Appeals should have heard Schlesinger and abrogated interspousal immunity, a vestige of outdated common law. Although Maryland precedent supports the doctrine, the Court of Appeals is bound by common law principles only to the extent that those principles enjoy continuing viability in modern society.

THE STATUS OF THE DOCTRINE IN MARYLAND

In Schlesinger v. Schlesinger, Mrs. Schlesinger alleged six counts of willful, malicious, or intentional conversion of her property and incorporated them into the final allegation of her complaint — intentional infliction of emotional distress. Mrs. Schlesinger asserted that the various acts committed against her property interests were part of

2. Article V of the Maryland Declaration of Rights provides: “That the inhabitants of Maryland are entitled to the Common Law of England, . . . and to the benefit of such of the English statutes as existed on the Fourth day of July, seventeen hundred and seventy-six . . . .” Md. Const. art. V. Because interspousal immunity comprised part of the common law of England as of July 4, 1776, the doctrine was incorporated into Maryland law under Article V. See 1 W. Blackstone, Commentaries *443. Thus, the doctrine of interspousal immunity has prevented tort suits between Maryland spouses since 1867, when the Maryland Constitution was adopted.
4. Maryland has permitted only a narrowly limited exception to the general rule that spouses may not sue one another in tort. In Lusby v. Lusby, 283 Md. 334, 390 A.2d 77 (1978), the Maryland Court of Appeals permitted a woman to sue her husband for an outrageous, intentional tort. See notes 33 to 43 and accompanying text infra.
6. See notes 53 to 78 and accompanying text infra.
7. See notes 29 to 43 and accompanying text infra.
10. Mrs. Schlesinger alleged that her husband “intentionally, maliciously and wilfully converted” $292,000 worth of her property to his own personal use. Brief for Appellant at 4.
her husband's plan to intentionally inflict such mental distress as to cause her hospitalization for both mental and physical conditions. ¹¹

To support her claim of intentional infliction of emotional distress, Mrs. Schlesinger not only cited two incidents of assault committed by her husband, ¹² but she also alleged that he "falsified her signatures; concealed her records; made false charges against her; ousted her from her home; retained her property . . .; caused her hospitalization . . .; and knowing of her illness, . . . persisted in such continuing acts. . . ." ¹³ The Court of Special Appeals later found that Dr. Schlesinger's conduct was not sufficiently "outrageous" ¹⁴ to fall within the exception created by Lusby v. Lusby, ¹⁵ in which the Court of Appeals had permitted an interspousal suit for an outrageous, intentional tort. ¹⁶

Under traditional common law a tort obligation could not exist between spouses because marriage was considered to create a single legal entity. ¹⁷ A wife could sue and be sued only with her husband; she could not sue her spouse in either tort or contract because he necessarily would be a party to both sides of the action. ¹⁸ Similarly, a husband's liability was always substituted for his wife's; thus, if he brought a tort action against his spouse, he would be suing himself. ¹⁹


¹¹ Brief for Appellant at 7.

¹² Mrs. Schlesinger alleged that on November 3, 1975, her husband arrived home while she was in the family room reading and drinking a glass of liqueur. She claimed that Dr. Schlesinger "took the glass from her hand; poured the liqueur over her head; broke the glass against the wall; threatened her by holding a piece of glass to her throat; and demanded with a fireplace poker that she choose one of three ultimata regarding the course of their future relationship." Schlesinger v. Schlesinger, No. 1197, slip op. at 3, 4 (Md. Ct. Spec. App. May 26, 1980). (This appeal followed the divorce action Mrs. Schlesinger filed against her husband in Montgomery County Circuit Court.) Mrs. Schlesinger also alleged that her husband attempted to both rape and choke her later that same evening. Id. at 4.

According to Mrs. Schlesinger, the second assault occurred on November 30, 1975, when her husband began to beat her without provocation. Mrs. Schlesinger's attempts to obtain help were unsuccessful but a neighbor eventually alerted the police who arrived later that evening. Id. at 5.

¹³ Brief for Plaintiff at 8, Schlesinger v. Schlesinger, No. 50649 (Md. Cir. Ct., Montgomery County Nov. 28, 1979). The Circuit Court later dismissed Mrs. Schlesinger's claims without leave to amend.

¹⁴ No. 1646, slip op. at 7-8.


¹⁶ Id. at 335, 390 A.2d at 77.


¹⁸ Prosser, supra note 17, § 122, at 859-61.

¹⁹ Id.
The Married Women’s Emancipation (or Property) Acts\(^{20}\) revised the common law in all fifty states,\(^{21}\) including Maryland. These statutes generally have been interpreted to give married women the right to own and control property and to sue and be sued with respect to property disputes without joinder of their husbands.\(^{22}\)

Although the statutes give married women the right to sue in tort as if they were unmarried,\(^{23}\) only a few states have interpreted them to enable women to sue and be sued for all torts.\(^{24}\) A majority,\(^{25}\) including Maryland,\(^{26}\) determined that the Acts did not affect the common law doctrine of interspousal immunity.\(^{27}\) These courts reasoned that such a radical change in the well-established common law rule could be

---


\(^{21}\) *Personal Injury Torts*, supra note 20, at 310.

\(^{22}\) F. HARPER & F. JAMES, supra note 17, at 643-44; PROSSER, supra note 17, § 122, at 865.

\(^{23}\) Maryland’s Act typifies these statutes:

Married Women shall have power to engage in any business and to contract, whether engaged in business or not, and to sue upon their contracts, and also to sue for the recovery, security or protection of their property, and for torts committed against them, as fully as if they were unmarried.

MD. ANN. CODE art. 45, § 5 (1957) (emphasis added).

\(^{24}\) See Johnson v. Johnson, 201 Ala. 41, 77 So. 335 (1917); Fitzpatrick v. Owens, 124 Ark. 167, 186 S.W. 832 (1916); Rains v. Rains, 97 Colo. 19, 46 P.2d 740 (1935); Brown v. Brown, 88 Conn. 42, 89 A. 889 (1914); Wait v. Pierce, 191 Wis. 202, 209 N.W. 475 (1926).

At least two courts initially interpreted the Acts so literally that they permitted women to sue their husbands in tort but forbade husband's tort actions against their wives. They reasoned that the statutory language specifically conferred rights only to women and could not include men. Scholtens v. Scholtens, 230 N.C. 149, 52 S.E.2d 350 (1949); Fehr v. General Accident Fire & Life Assur. Corp., 246 Wis. 228, 16 N.W.2d 787 (1944).

After these decisions, both states' legislatures quickly enacted corrective statutes. In response to Scholtens, the North Carolina legislature adopted 1951 N.C. Sess. Laws ch. 263, § 52-10.1 (current version at N.C. GEN. STAT. § 52-5 (1976)). The statute provides that "husband and wife have a cause of action against each other to recover damages sustained to their person or property as if they were unmarried."

After Fehr, the Wisconsin legislature in 1947 enacted WIS. STAT. ANN. § 246.075 (West 1957) (current renumbered version at WIS. STAT. ANN. § 766.075 (West 1981 Supp.)) This statute provides: "A husband shall have and may maintain an action against his wife for the recovery of damages for injuries sustained to his person caused by her wrongful act, neglect or default." See Campbell, *Wisconsin Law Governing Automobile Accidents—Part II*, 1962 WIS. L. REV. 557, 592.

\(^{25}\) See, e.g., Austin v. Austin, 136 Miss. 61, 100 So. 591 (1924); Rogers v. Rogers, 265 Mo. 200, 177 S.W. 382 (1915).


\(^{27}\) See Annot., 29 A.L.R. 1482 (1924).
accomplished only through clear and unequivocal statutory language.  

Because the statutes did not express a clear legislative intent to abrogate, interspousal immunity remained intact.

In Furstenburg v. Furstenburg, 29 the Maryland Court of Appeals denied Mrs. Furstenburg the right to sue her husband for injuries she incurred as a result of his negligent operation of their automobile.  

The court concluded that Maryland’s legislature did not intend the Married Women’s Property Act to authorize interspousal suits.  

According to the court, the Act was designed to permit a woman to institute, in her own name, suits she was previously required to bring in that of her husband.  

Lusby v. Lusby 33 represents the only step taken by the Maryland Court of Appeals to abrogate interspousal immunity. In Lusby, the court permitted an interspousal suit for an “outrageous, intentional tort.”  

The plaintiff, Diana Lusby, alleged that while she was driving her automobile on a public highway, her husband, Gerald, pulled his truck alongside her vehicle and aimed a rifle in her direction.  

Another truck, occupied by two men who Mrs. Lusby did not know, forced her vehicle off the road and to a stop.  

Mr. Lusby then forced his way into her car and began to drive, followed by the two unidentified men.  

Shortly thereafter, Mrs. Lusby was compelled to enter her


The Supreme Court also adopted this reasoning in Thompson v. Thompson, 218 U.S. 611 (1910). In Thompson, the Court held that the District of Columbia’s Married Women’s Act, ch. 854, § 1155, 31 Stat. 1374 (1901) (repealed D.C. Code Ann. § 30-208 (Supp. IV 1977)), permitted a wife to maintain only those actions that the common law required be brought jointly by spouses, 218 U.S. at 617. The Court refused to allow an interspousal suit, which was barred by common law. The majority reasoned that “such radical and far-reaching changes should only be wrought by language so clear and plain as to be unmistakable evidence of the legislative intention.” Id. at 618.

Several courts that held that the Acts did not affect interspousal immunity cited Thompson for support. See, e.g., Austin v. Austin, 136 Miss. 61, 73, 100 So. 591, 593 (1924); Rogers v. Rogers, 265 Mo. 200, 177 S.W. 382, 384 (1915).


30. Id. at 252-53, 136 A. at 535-36.

31. Id., 136 A. at 536.

32. Id. The court reasoned that the Property Act of 1898 could only have dealt with married women’s property interests, because if the 1898 statute concerned other areas of the law, the Act of 1900, which granted women the right to sue in contract actions, would have been superfluous.


34. 283 Md. at 335, 390 A.2d at 77.

35. Id.

36. Id.

37. Id. at 336, 390 A.2d at 77.
husband's truck where Mr. Lusby struck her, "tore [her] clothes off and did forcefully and violently, despite [her] desperate attempts to protect herself, carnally know her against her will and without her consent." Mr. Lusby then aided his two companions in their attempts to rape his wife.

The Court of Appeals permitted Mrs. Lusby's action for her husband's outrageous conduct, but emphasized that it was not overruling previous decisions which had precluded interspousal suits. The court distinguished these prior decisions from Lusby because only Lusby involved allegations of intentional tort. However, by doing so, the Lusby majority ignored language in prior decisions stating that the doctrine of interspousal immunity applied regardless of whether the tort was intentional or not. Thus, the Lusby court implicitly modified several holdings it ostensibly preserved and created an exception, albeit limited, to Maryland's interspousal immunity doctrine.

In her appeal, Mrs. Schlesinger characterized the real issue in her case as the application of the Lusby exception to intentional torts generally. Thus, although the plaintiff did not ask the court to abandon interspousal immunity in interspousal tort suits involving negligence, she did ask the court to apply Lusby to intentional torts which were not outrageous. In its per curiam opinion, however, the court flatly refused to expand the Lusby decision to encompass "mere" intentional torts.

38. Id.
39. Id. However, no criminal charges are pending against Mr. Lusby, because in Maryland and 43 other states it is legal for a husband to rape his wife if the couple is living together. Griffin, In 44 States It's Legal to Rape Your Wife, STUDENT LAW., Sept., 1980, at 58.
40. 283 Md. at 335, 390 A.2d at 77.
41. Id. at 358, 390 A.2d at 89. See also 8 U. BALT. L. REV. 584 (1979).
42. 283 Md. at 335, 390 A.2d at 89. See Stokes v. Taxi Operators Ass'n, 248 Md. 690, 237 A.2d 762 (1968) (Maryland court refused to allow wife, a paying customer in a cab operated by her husband, to recover for damages resulting from his negligence); David v. David, 161 Md. 532, 157 A. 755 (1932) (Maryland wife denied right to sue her husband and the business in which he was a partner for negligence); Furstenburg v. Furstenburg, 152 Md. 247, 136 A. 534 (1927) (interspousal suit arising from auto accident not permitted).
43. The Lusby majority concluded that "[f]or purposes of our decision here today, however, we need not be involved with statutory construction nor need we be involved with our prior cases other than for dicta appearing in them to the effect that one spouse may not sue another for tort." 283 Md. at 357-58, 390 A.2d at 89. However, the Lusby court failed to acknowledge that the doctrine of interspousal immunity was recited in various Maryland cases as a common law rule which applied regardless of whether the tort was intentional. See Stokes v. Taxi Operators Ass'n, 248 Md. 690, 691-92, 237 A.2d 762, 763 (1968); David v. David, 161 Md. 532, 534, 157 A. 755, 756 (1932); Furstenburg v. Furstenburg, 152 Md. 247, 249, 136 A. 534, 534 (1927).
44. Reply Brief for Appellant at 5.
45. No. 1646, slip op. at 7-8 (Md. Ct. Spec. App. Apr. 7, 1981). However, the Court of Special Appeals reversed the lower court's decision regarding Mrs. Schlesinger's property.
The court reasoned that had the Court of Appeals intended *Lusby* to apply "indiscriminately in every case involving an intentional tort," it would have said so.\(^46\) Although the *Schlesinger* court failed to interpret *Lusby* as an indication that the Court of Appeals wanted to eliminate interspousal immunity in Maryland, the *Lusby* majority's expansive language arguably suggested that the court was preparing to abolish interspousal immunity. For instance, the *Lusby* court quoted at length from Justice Harlan's dissent in *Thompson v. Thompson*,\(^47\) in which the justice criticized the majority for upholding the doctrine despite the passage of the District of Columbia's Married Women's Property Act.\(^48\) The *Lusby* majority also discussed the "parade of cases in which courts have altered the previous common law rule"\(^49\) and noted legal commentators' nearly unanimous disapproval of interspousal immunity.\(^50\) Finally, the *Lusby* majority concluded by observing that "[t]he General Assembly has not heeded suggestions by this Court that a new statute be enacted."\(^51\) Thus, one could argue that *Lusby*'s tone reflected a greater willingness on the part of the Court of Appeals to abrogate the doctrine than was recognized by the Court of Special Appeals in *Schlesinger*.

However, the Court of Special Appeals held in *Schlesinger* that *Lusby* must be construed narrowly to allow recovery only for outrageous and intentional conduct of the type illustrated by that case.\(^52\) The appellate court's interpretation of *Lusby* and the refusal of the Court of Appeals to grant certiorari are unfortunate because the doctrine no longer serves a useful purpose in modern society, and, therefore, should be discarded.

\(^46\) No. 1646, slip op. at 7.
\(^47\) 218 U.S. 611 (1910) (Harlan, J., dissenting).
\(^48\) 283 Md. at 353-57, 390 A.2d at 86-88 (quoting *Thompson*, 218 U.S. at 621-24 (Harlan, J., dissenting)).
\(^49\) *Id* at 346, 390 A.2d at 83.
\(^50\) *Id* at 350, 390 A.2d at 84.
\(^51\) *Id* at 357, 390 A.2d at 88.

On January 14, 1981, Senator Crawford introduced a bill into the Maryland Senate which proposed to abolish interspousal immunity with respect to *intentional* torts "under certain circumstances." S.B. 188, Md. S. (1981) (emphasis added). The bill, however, died in committee during the 1981 legislative session.

\(^52\) No. 1646, slip op. at 8.
CRITIQUE OF THE RATIONALES SUPPORTING THE DOCTRINE

Throughout the last fifty years, Maryland courts have maintained that only the legislature may alter the doctrine of interspousal immunity.53 Other jurisdictions, however, have proffered additional justifications for the continued prohibition of interspousal tort suits. First, some courts have reasoned that allowing such actions would violate public policy by promoting marital disharmony.54 Second, other courts have contended that because the criminal and divorce laws already provide the disgruntled spouse with adequate remedies, married couples have no reason to sue each other in tort.55 Finally, some have maintained that the danger of collusion between spouses is great enough to preclude interspousal suits.56

A majority of jurisdictions have now recognized that courts and legislatures can neither create, nor preserve, harmonious marital relations through the doctrine of interspousal immunity.57 The Washington Supreme Court summarized this reasoning in Freehe v. Freehe:58

If a state of peace and tranquility exists between the spouses, then the situation is such that . . . the spouses — who are, after all, the best guardians of their own peace and tranquility — will allow the action to continue only so long as their personal harmony is not jeopardized. If peace and tranquility are nonexistent or tenuous to begin with, then the law’s imposition of a technical disability seems more likely to be a bone of contention than a harmonizing factor.59

Some courts have cited the widespread availability of insurance to counter the proposition that an action between spouses will impair domestic harmony.60 Although an insured defendant will have to pay a

53. See note 79 and accompanying text infra.
54. See, e.g., Burns v. Burns, 111 Ariz. 178, 526 P.2d 717 (1974); Corren v. Corren, 47 So. 2d 774 (Fla. 1950).
55. See, e.g., Austin v. Austin, 136 Miss. 61, 100 So. 591 (1924) (Divorce and criminal laws are remedies). See also Mims v. Mims, 305 So. 2d 787 (Fla. Dist. Ct. App. 1974) (Divorce laws provide adequate remedies).
56. See, e.g., Lyons v. Lyons, 2 Ohio St. 2d 243, 208 N.E.2d 533 (1965).
58. 81 Wash. 2d 183, 500 P.2d 771 (1972) (en banc).
59. Id. at 187, 500 P.2d at 774. See also Varholla v. Varholla, 56 Ohio St. 2d 269, 383 N.E.2d 888 (1978) (W. Brown, J., dissenting).
premium, he will not be required to pay any judgment rendered against him. Thus, when insurance coverage is available, an interspousal suit cannot violate public policy by promoting marital discord.\textsuperscript{61} At least one court has hypothesized that potential threats to domestic harmony may actually be greater if an existing cause of action between spouses is disallowed when insurance is present.\textsuperscript{62} This reasoning has prompted a suggestion that interspousal suits should be permitted only where insurance coverage is available.\textsuperscript{63} According to this view, when insurance is unobtainable, compelling the married couple to assume adversary positions or ordering the payment of a judgment to one spouse from the couple's joint assets will necessarily create marital discord.\textsuperscript{64} 

Proponents of interspousal immunity also contend that when a couple lacks insurance coverage, divorce and criminal laws offer more appropriate remedies to the unhappy spouse than does the common law of torts;\textsuperscript{65} but this proposal is illogical and internally inconsistent. Neither of the forementioned remedies compensate the injured party.\textsuperscript{66} Moreover, once a spouse is driven to file a divorce or criminal action, there is little marital harmony left to protect.\textsuperscript{67} Thus, it is inconsistent to deny uninsured spouses the right to sue one another in tort and yet encourage the couple to reconcile their differences using more drastic methods. If a spouse would choose to avail oneself of the divorce or criminal remedy, one must conclude that marital harmony no longer prevails. Therefore, denying the couple the right to sue in tort would serve no useful purpose.

The availability of insurance also has been cited to support the continuing viability of interspousal immunity.\textsuperscript{68} Some courts reason that the more intimate the parties are, the greater the possibility of collusion and exaggerated claims designed to defraud an insurance company.\textsuperscript{69} These jurisdictions have apparently accepted insurance


\textsuperscript{63} 11 \textit{Suffolk L. Rev.} 1214, 1226 (1977).

\textsuperscript{64} \textit{Id.} at 1227.

\textsuperscript{65} \textit{Id.} at 1228.

\textsuperscript{66} \textit{Prosper, supra} note 17, § 122, at 862. Prosser also notes that ordinary negligence is neither a crime nor a ground for divorce. \textit{Id.} § 122, at 863 n.45.

\textsuperscript{67} \textit{Id.} at 863.


company contentions that insurers have justifiably relied on interspousal immunity and are not prepared to adequately defend themselves against fraudulent claims.  

A majority of courts, however, refuse to assume that the judiciary is so ineffectual that it cannot distinguish fraudulent from legitimate claims. By abolishing interspousal immunity, these courts have shown that they consider the plight of an injured, insured spouse to be more significant than an insurer's reliance. In the majority's view, the insurance company is not tactically disadvantaged: because the company is free to attack the spouses' credibility, and because the couple's testimony is extremely vulnerable to impeachment, the odds are remote that a couple will successfully pursue a fraudulent claim.

Insurance companies have reacted to the majority's viewpoint by voicing increasing concern over their newly imposed liability. In an attempt to protect themselves, insurance companies in several states have inserted interspousal exclusion clauses in their policies. Nevertheless, their concern continues because such non-negotiable clauses are vulnerable to attack as violative of a state's public policy. Furthermore, at least one state court has hinted that such exclusions warrant


In Klein v. Klein, 58 Cal. 2d 692, 376 P.2d 70, 26 Cal. Rptr. 102 (1962) (Schauer, J., dissenting), the dissent expressed the view that courts should abrogate interspousal immunity with respect to intentional torts but not with respect to negligence. Because insurance policies are much less likely to cover intentional torts, the dissent reasoned that there is necessarily less chance of fraud in the case of an intentional tort, and thus less compulsion to continue to recognize interspousal immunity. Id. at 699-700, 376 P.2d at 75-76, 26 Cal. Rptr. at 107-08. See also Burns v. Burns, 111 Ariz. 178, 526 P.2d 717 (1974).

Clearly this position is without merit. Courts are currently asked to deal with fraud on a daily basis. Thus, it makes little sense to deny a valid claim simply because there is a possibility that some future claim will be found in fraud.


73. See 12 NEW ENG. L. REV. 333, 346 (1976). At least one commentator has noted that complete abrogation of interspousal immunity would, in fact, benefit insurance companies because expanded liability exposure would encourage families to purchase liability insurance to ensure that necessary financial resources are available to injured family members. However, this author also observes that abolishing the doctrine may cause insurance companies to reduce or restrict the availability of such coverage. See, e.g., 10 RUT.-CAM. L.J. 661, 681 (1971).


76. 10 RUT.-CAM. L.J. 661, 681 (1979).
closer scrutiny if interspousal immunity is abolished. Upon such examination, an exclusion clause could be held to violate a state's public policy to encourage the compensation of innocent, injured victims by permitting interspousal tort suits.

The Case for Judicial Modification of the Doctrine in Maryland

Resolving the issue whether interspousal immunity should be abolished does not solve all controversies; jurisdictions disagree on who is the proper party to make this change. Maryland courts have continually insisted that only the legislature can alter the doctrine of interspousal immunity. Unfortunately, this attitude assumes that abrogation of the doctrine is necessarily a legislative task.

Maryland courts are simply incorrect in their belief that only the legislature can properly decide this issue. There is no sound reason why interspousal immunity, a doctrine which sprang from the common law and has been maintained and preserved by the courts, may not properly be modified or abandoned by the courts. As a judicially created doctrine, it may be judicially destroyed.

Courts across the country have not hesitated to abandon interspousal immunity without the benefit of legislative action. For example, in Immer v. Risko, the New Jersey Supreme Court interpreted that state's Married Women's Act as leaving the common law of in-

77. State Farm Mut. Auto. Ins. Co. v. Leary, 168 Mont. 482, 544 P.2d 444 (1975). In this case, the Montana Supreme Court suggested that any invalidation of interspousal immunity would require close examination of an insurance policy's spousal exclusion clause to determine its validity. Id. at 488, 544 P.2d at 448. However, the Montana court refused to abolish interspousal immunity.


An acceptable exclusion clause would eliminate only the liability of insurance companies. It could not prevent husbands and wives from suing one another; it could only preclude them from collecting from an insurer.


83. N.J. STAT. ANN. § 37:2-1 to -30 (West 1968). The act provides that: "Nothing in this chapter contained shall enable a husband or wife to contract with or to sue each other, except as heretofore, and except as authorized by this chapter." Id. at § 37:2-5.
interspousal immunity untouched.\textsuperscript{84} The court nevertheless maintained that it could abolish the doctrine because the doctrine was part of the state's common law, which has an inherent capacity for change.\textsuperscript{85} Similarly, the Washington Supreme Court concluded in \textit{Freehe v. Freehe}\textsuperscript{86} that because interspousal immunity had always depended upon the common law for its continued vitality, the court would be neglecting its judicial function if it waited for the legislature to change the doctrine.\textsuperscript{87} In \textit{Brooks v. Robinson},\textsuperscript{88} the Indiana Supreme Court noted that it could not ignore society's social and legal needs, and therefore, it "should not hesitate to alter, amend, or abrogate the common law when society's needs so dictate."\textsuperscript{89}

Maryland courts need not, however, look to other states to support the argument that abrogation of interspousal immunity can and should emanate from the judiciary. Maryland courts do not always feel bound to wait for legislative action to initiate change in the common law. For instance, the court accepted strict liability for injury from defective products although neither Maryland common law nor any Maryland statute previously had adopted that theory of products liability.\textsuperscript{90}

Moreover, in \textit{Pope v. State},\textsuperscript{91} the Court of Appeals noted that the Maryland Constitution adopted English common law "only so far as it could be made to fit and adjust itself to our local circumstances and

\textsuperscript{84} 56 N.J. 482, 267 A.2d 481 (1970). The court concluded that the New Jersey legislature had not intended to codify the common law doctrine of interspousal immunity through the New Jersey Married Women's Act, but instead intended to leave the common law intact. \textit{Id.} at 485-87, 267 A.2d at 483-84.

The Massachusetts Supreme Court expressed similar views in \textit{Lewis v. Lewis}, 370 Mass. 619, 351 N.E.2d 526 (1976), when it abrogated interspousal immunity with respect to automobile negligence. In \textit{Brown v. Brown}, 1980 Mass. Adv. Sh. 1779, 409 N.E.2d 717 (1980), the Massachusetts court extended \textit{Lewis} to all forms of negligence. Thus, the doctrine of interspousal immunity has been abolished in negligence actions in Massachusetts, with the exception of certain as yet undefined areas which the \textit{Brown} court left to be developed on a case-by-case basis.

\textsuperscript{85} 56 N.J. at 487, 267 A.2d at 483.
\textsuperscript{86} 81 Wash. 2d 183, 500 P.2d 771 (1972).
\textsuperscript{87} \textit{Id.} at 189, 500 P.2d at 775-76.
\textsuperscript{88} 259 Ind. 16, 284 N.E.2d 794 (1972).
\textsuperscript{89} \textit{Id.} at 23, 284 N.E.2d at 797. The Indiana court went on to abrogate interspousal immunity, allowing a wife to sue her husband for negligence that occurred before they were married.

\textsuperscript{90} \textit{Phipps v. General Motors Corp.}, 278 Md. 337, 353, 363 A.2d 955, 963 (1976). The \textit{Phipps} majority stressed that "we disagree with General Motors' argument that adoption of strict liability would result in such a radical change of the rights of sellers and consumers that the matter should be left to the Legislature." \textit{Id.} at 350, 363 A.2d at 962. The Court of Appeals discussed this issue by implication in \textit{Grinder v. Bryans Road Building & Supply Co.}, 290 Md. 687, 432 A.2d 453 (1981), when it observed that revision of common law "is traditionally a matter for a state court of highest resort." \textit{Id.} at 707, 432 A.2d at 464.

\textsuperscript{91} 284 Md. 309, 396 A.2d 1054 (1979).
peculiar institutions." The Pope court then applied this reasoning to eliminate the common law crime of misprision. In Grinder v. Bryans Road Building & Supply Co., the Court of Appeals invoked similar reasoning to abrogate the common law rule that a final judgment against a principal or his agent operates as an election and precludes recovery from the other. Finally, the court observed in Adler v. American Standard Corp. that common law doctrines are "of course, subject to modification by judicial decision where this Court finds that [they are] no longer suitable to the circumstances of our people." The Adler court then held that Maryland would recognize a cause of action for abusive discharge, despite the common law rule that an employment contract may be terminated at will.

Although other jurisdictions have recognized the speciousness of traditional rationales supporting interspousal immunity, Maryland courts have refused to follow this "parade of cases." Perhaps the reticence of Maryland's judiciary stems from an unwillingness to accept its duty to change antiquated common law principles. Because the General Assembly has shown little inclination to modify the doctrine and because traditional justifications for interspousal immunity are no longer viable, the Court of Appeals should abolish the doctrine. By denying certiorari in Schlesinger v. Schlesinger, the Court of Appeals ignored a prime opportunity to perform that task.

92. Id. at 341-42, 396 A.2d at 1073. It is interesting to note that the Pope court cited with approval the decision of Flores v. Flores, 84 N.M. 601, 506 P.2d 345 (Ct. App. 1973). 284 Md. at 342-43, 396 A.2d at 1073. In Flores, the Court of Appeals of New Mexico held that the judiciary and not the legislature should abolish interspousal immunity.
93. 284 Md. at 352, 396 A.2d at 1078.
95. Id. at 707-08, 432 A.2d at 464.
97. Id. at 42-3, 432 A.2d at 471.
98. Id. at 47, 432 A.2d at 473.