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Note

AN ALTERNATIVE ANALYSIS OF LAW OF THE CASE—RETHINKING LOVEDAY v. STATE

In Loveday v. State¹ the Court of Appeals of Maryland held that a litigant's failure to petition for writ of certiorari immediately after the first of two appeals to the Court of Special Appeals in the same case does not preclude the Court of Appeals, upon granting the writ after the second appeal, from reviewing the entire record.² Maryland joins a growing number of states in concluding that law of the case is inapplicable to the state's highest court when that court reviews a decision of a subordinate appellate court.³ After Loveday, if

2. Id. at 234, 462 A.2d at 62.


Alaska, Arizona, Arkansas, Florida, Hawaii, Idaho, Oregon, Washington, and
the Court of Special Appeals remands a case to the trial court for further proceedings, the losing litigant may petition for certiorari either immediately or after the remand and second appeal to the Court of Special Appeals.

In declining to adopt law of the case, the Court of Appeals neglected to consider the doctrine's objectives of finality and efficiency. Instead, the court relied on two rationales commonly espoused by courts that have chosen to reject law of the case. Those two rationales, and those used by courts that have chosen to adopt law of the case, are analytically inadequate for deciding whether to adopt law of the case because they do not directly address the doctrine's true objectives. This Note discusses the rationales against and in support of law of the case and offers an alternative analytical framework to resolve the question of whether to adopt or reject the law of the case doctrine. The court should use its rule-making authority and consider the factors that this Note sets

Wisconsin apparently have not resolved the issue. The Supreme Court once followed law of the case, see, e.g., Himley v. Rose, 9 U.S. (5 Cranch) 312 (1809), but no longer does so, Hamilton-Brown Shoe Co. v. Wolf Bros. Co., 240 U.S. 251 (1916).

4. Although finality is a commonly espoused objective of law of the case, see, e.g., Case Comment, Application of "Law of the Case" on Remand Given Intervening Statutory Change, 24 ARIZ. L. REV. 993, 995 (1982); Note, The Law of the Case Doctrine in Kentucky, 60 KY. L.J. 419, 419 (1972) [hereinafter cited as Note, The Law of the Case Doctrine] (But see Note, Law of the Case, 5 STAN. L. REV. 751, 755 (1953) (law of the case is more than a rule of finality of judgments) [hereafter cited as Note, Law of the Case]), finality is created only by applying law of the case. By precluding review of issues already litigated in the appellate court, the doctrine attributes finality to prior decisions. In contrast, if law of the case is not applied, courts characterize the prior appellate decision as interlocutory, see, e.g., Walker v. Gerli, 257 A.D. 249, 251, 12 N.Y.S.2d 942, 944 (1939).

5. Conway v. Chemical Leaman Tank Lines, Inc., 644 F.2d 1059, 1061 (5th Cir. 1981) (law of the case addresses the interests of judicial efficiency); see also United Dredging Co. v. Industrial Accident Comm'n, 208 Cal. 705, 714, 284 P. 922, 925 (1930) (the rule avoids subjecting the other litigant to delays and expense); Foley v. Roche, 86 A.D.2d 887, 887, 447 N.Y.S.2d 528, 529 (1982) (the rule fosters orderly convenience); 1B J. MOORE, J. LUCAS & T. CURRIER, MOORE'S FEDERAL PRACTICE § 0.404[1], at 118, 121 n.19 (2d ed. 1983) [hereinafter cited as MOORE] (efficient disposition of the case demands that each stage of the litigation build on the last and not afford an opportunity to reargue every previous ruling; it would be inefficient and unjust if the Court of Appeals should regard its first decision as merely tentative when the result of its order is often expensive and time consuming); Note, Law of the Case, 40 COLUM. L. REV. 268, 268 (1940) (the doctrine rests on the need for "orderly procedure and for an end to litigation") [hereinafter cited as Note, Law of the Case]; Note, Law of the Case, supra note 4, at 757 (law of the case promotes a "quicker end to litigation"); Note, Appeal and Error— "Law of the Case" in the Intermediate Appellate Courts, 14 TEX. L. REV. 511, 518 (1963) (law of the case promotes economy and convenience) [hereinafter cited as Note, Appeal and Error].

6. The Court of Appeals implicitly relied on the interlocutory theory, 296 Md. at 231, 462 A.2d at 60, and the structural theory, id. at 234, 462 A.2d at 61.
forth to develop a general rule governing application of the doctrine.

I. LOVEDAY v. STATE

Harry Loveday was found guilty of robbery and other related offenses by the criminal court of Baltimore City. Following a jury trial, the State requested that the court impose the mandatory twenty-five year sentence, which is required for persons who have been convicted of two violent crimes and incarcerated for at least one of those crimes. The trial court did not impose the mandatory sentence in accordance with the statute, but sentenced Loveday to ten years, reasoning that it was unfair for the State to invoke the recidivist statute without notifying the defendant of its intention during plea negotiations. The Court of Special Appeals rejected Loveday's due process argument that the State's failure to notify was prosecutorially vindictive, vacated the sentence, and remanded the case to the trial court for imposition of the mandatory sentence. Loveday did not petition the Court of Appeals for certiorari. At the subsequent sentencing hearing, the parties stipulated that Loveday had been convicted and incarcerated twice before. Accordingly, the trial court found that the requirements of the recidivist statute were satisfied and imposed the mandatory sentence.

Loveday appealed to the Court of Special Appeals asserting that the State, by invoking the mandatory sentence, had violated the due process clause of the Maryland Declaration of Rights and the fourteenth amendment, which was virtually the same argument he had made on the first appeal. The Court of Special Appeals held,

7. Id. at 228, 462 A.2d at 58.
Third conviction of crime of violence—Any person who (1) has been convicted on two separate occasions of a crime of violence where the convictions do not arise from a single incident, and (2) has served at least one term of confinement in a correctional institution as a result of a conviction of a crime of violence, shall be sentenced, on being convicted a third time of a crime of violence, to imprisonment for the term allowed by law, but, in any event, not less than 25 years.
9. 296 Md. at 228, 462 A.2d at 59.
11. 296 Md. at 229, 462 A.2d at 59.
12. Id.
13. Id.
15. 296 Md. at 229, 462 A.2d at 59.
in an unreported per curiam opinion, that law of the case precluded reconsideration of the issues decided in the prior appeal.\textsuperscript{16}

The Court of Appeals granted Loveday's certiorari petition and affirmed the Court of Special Appeals' first decision;\textsuperscript{17} the Court of Special Appeals had remanded the case to the trial court with directions to impose the mandatory sentence pursuant to the recidivist statute.\textsuperscript{18} The court held that it is not bound by law of the case when it reviews a decision of the Court of Special Appeals in the same case.\textsuperscript{19} The court rejected the law of the case for two reasons: (1) review by the Court of Appeals after the first appeal to the Court of Special Appeals would have been premature because the issues were not finally determined (the interlocutory theory);\textsuperscript{20} and (2) the Court of Appeals should not be bound by an unreviewed decision of the intermediate court because the Court of Appeals has the authority to review lower court decisions (the structural theory).\textsuperscript{21} 

Loveday thus limits the application of law of the case in Maryland to courts of coordinate jurisdiction.\textsuperscript{22}

\section*{II. The Law of the Case Doctrine\textsuperscript{23}}

Law of the case requires that rulings of law made by an appellate court when remanding a case for further proceedings be considered binding in all subsequent stages of the litigation.\textsuperscript{24} Law of the

\begin{footnotesize}
\textsuperscript{16} Loveday v. State, No. 759 (Feb. 17, 1982) (per curiam).
\textsuperscript{18} 296 Md. at 241, 462 A.2d at 65.
\textsuperscript{19} Id. at 234, 462 A.2d at 62.
\textsuperscript{20} Id. at 231, 462 A.2d at 60.
\textsuperscript{21} Id. at 234, 462 A.2d at 61.
\textsuperscript{22} Courts of coordinate jurisdiction are courts that occupy the same discrete level in the judicial hierarchy of one state; trial courts constitute one separate coordinate jurisdiction, intermediate appellate courts another, and the highest appellate court constitutes yet another. Law of the case arises within one court's coordinate jurisdiction when it reconsiders its own prior decision in the same case. New York courts only apply law of the case to courts of coordinate jurisdiction. \textit{E.g.}, Martin v. City of Cohoes, 37 N.Y.2d 162, 165, 332 N.E.2d 867, 869, 371 N.Y.S.2d 687, 689-90 (1975); see Note, \textit{Law of the Case}, supra note 5, at 276. \textit{But see infra} note 34.
\textsuperscript{23} This note addresses the law of the case doctrine in state appellate court systems with intermediate appellate courts. For a discussion of law of the case in state court systems with only one appellate court, see Vestal, \textit{Law of the Case: Single-Suit Preclusion}, 1967 \textit{UTAH L. REV.} 1, 10-15. For a discussion of the doctrine in federal courts, see Moore, \textit{supra} note 5, \S 0.404.
\textsuperscript{24} Law of the case has been held to apply to both civil and criminal cases. People v. Van Houten, 113 Cal. App. 3d 280, 289-90, 170 Cal. Rptr. 189, 195 (1980) (criminal cases), \textit{cert. denied}, 454 U.S. 844 (1981); accord People v. Watson, 57 A.D.2d 143, 145, 393 N.Y.S.2d 735, 737 (1977) (criminal cases).
\end{footnotesize}
case does not preclude review of new issues that arise on remand because the appellate court has not yet ruled on those issues. In courts of coordinate jurisdiction, law of the case binds an appellate court to its rulings in the prior appeal. In a two-tiered system, law of the case binds the highest court to rulings made in unappealed decisions of an intermediate appellate court when the case reaches the highest court after a second appeal to the intermediate court. Thus, law of the case requires that a litigant appeal immediately or be barred from obtaining review of the intermediate court’s first decision.

The definition of law of the case is elusive; it has been described as ill-defined and amorphous and as a hybrid doctrine that reflects elements of both res judicata and stare decisis. In modern application, the rule is discretionary, but initially, appellate courts questioned their authority to review a prior decision in the same case. Subsequently, courts have recognized that law of the case does not inhibit an appellate court’s power but is a discretionary doctrine.

25. E.g., People v. Shuey, 13 Cal. 3d 835, 533 P.2d 211, 120 Cal. Rptr. 83 (1975) (en banc).


27. Topps-Toeller, Inc. v. City of Lansing, 47 Mich. App. 720, 727, 209 N.W.2d 843, 847 (1973) (“law of the case is a hybrid which lies within the twilight zone between res judicata and stare decisis. . . [t]he precise nature of this creature flows from the fact that it reflects elements of each theory’’); Lummus, The ‘Law of the Case’ in Massachusetts, 9 B.U.L. Rev. 225, 225 (1929) (“The doctrine called ‘law of the case’ lies halfway between stare decisis and res judicata.’’). Law of the case resembles res judicata because it attributes finality to the prior appellate decision and renders it unreviewable; it resembles stare decisis because it promotes consistency and predictability by prohibiting a court from reconsidering its prior decision in the same case.

The analogies to stare decisis and res judicata, however, are limited. Law of the case is not based upon stare decisis because the court would not be bound by the decision if it were rendered in another case, Note, Appeal and Error, supra note 5, at 512, and law of the case applies to decisions within one case. The prior decision cannot be res judicata unless there is a final judgment and the doctrine is only applied when there is a remand by the appellate court to the trial court. Id.; see also Note, The Doctrine of Law of the Case, 17 Miss. L.J. 170, 170-71 (1945) (Law of the case is not the same as stare decisis because that principle applies to decisions involving different parties; it is not the same as res judicata because the prior appellate decision is not final).

28. Killeen v. Community Hosp. at Glen Cove, 101 Misc. 2d 367, 369, 420 N.Y.S.2d 990, 992 (1981) (law of the case is applied as a matter of judicial discretion); Note, supra note 24, at 286, 287 (law of the case is discretionary); Note, supra note 27, at 172 (law of the case is discretionary in most courts).

29. Note, Law of the Case, supra note 4, at 754 (“In early cases the courts often said that they simply had no power to change their views.”).

30. Messinger v. Anderson, 225 U.S. 436, 444 (1912); DiGenova v. State Bd. of
which demands judicial self-restraint.

A. Law of the Case Within a Coordinate Jurisdiction

Within its coordinate jurisdiction, the Court of Appeals of Maryland has applied law of the case to preclude review of any issue, properly presented on appeal, that it previously had decided. Such rulings are binding on the court and litigants unless challenged or modified after reargument. The doctrine bars review of issues that could have been raised and of issues that implicitly were decided in the prior appeal. Although the Court of Appeals did not address the issue, after Loveday, the doctrine of law of the case will continue to bind the Court of Appeals within its coordinate jurisdiction.

The Court of Special Appeals, within its coordinate jurisdiction, frequently has applied law of the case to avoid reviewing its own decisions. Applying the doctrine prevents inconsistent decisions by the Court of Special Appeals in the same case. Inconsistent decisions are more likely in the Court of Special Appeals because the thirteen judges who constitute that court sit in panels of three; more than one panel may review the case if the case is appealed more than once. In some jurisdictions law of the case binds a trial judge to prior rulings in the same case. In the Maryland trial courts, however, law of the case generally is inapplicable, and

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32. Fidelity Baltimore Bank, 217 Md. at 372, 142 A.2d at 798.

33. E.g., Davis Sand & Gravel Corp. v. Buckler, 231 Md. 370, 373, 190 A.2d 531, 532 (1962); Pasarew Constr. Co. v. Tower Apartments, 208 Md. 396, 402, 118 A.2d 678, 680 (1955); Brindendolph v. Zeller, 5 Md. 58, 64 (1855).

34. E.g., Van Der Vlugt v. Scarborough, 51 Md. App. 134, 137, 441 A.2d 1105, 1107 (1982); see also Loveday v. State, No. 759 (Feb. 17, 1982) (per curiam). The Court of Special Appeals, however, inaccurately has referred to a case in which it is bound by an unappealed judgment of the trial court as law of the case. See Acting Director, Dept. of Forests & Parks v. Walker, 39 Md. App. 298, 302, 385 A.2d 806, 809 (1978), aff'd, 284 Md. 357, 396 A.2d 262 (1979). The trial court's judgment becomes final and binding on the appellate court because the time for an appeal has expired, not because the law of the case doctrine prohibits the litigant from appealing.


accordingly, trial judges often reconsider their own and other judges' decisions in the same case.

B. Law of the Case Binds the Highest Court to an Intermediate Court Decision

Applying law of the case in a two-tiered appellate system binds the highest court to rulings made in an unappealed intermediate court decision. The decision whether to apply law of the case in a two-tiered system is more difficult than in a one-tiered system in which law of the case is applied only within the highest court's coordinate jurisdiction. Unlike application of the doctrine in a coordinate jurisdiction when a court simply refuses to reconsider its prior ruling, in a two-tiered appellate system, the highest court foregos review of the subordinate court's decision. Moreover, in a system with only one appellate court, the highest court usually must review the case; but in a two-tiered appellate system, the litigant's right to an appeal has been satisfied in the intermediate court and review by the highest court is discretionary.9

III. Existing Analysis

In deciding whether to review an intermediate appellate court's unappealed prior decision in the same case, courts arbitrarily have adopted or rejected law of the case. Typically, a court's decision lacks adequate analysis or is premised upon one or more commonly articulated rationales. When a court relies on these rationales, it often superficially applies them to the facts in the particular case; in-depth analysis based on these rationales is precluded because the rationales will support the court's decision not to apply law of the case in some situations, but will contradict its prior holding and dictate an application of the doctrine when it is applied in other situations. Hence, these rationales can justify any result a court desires.

38. R. Martineau, supra note 3, at 15.
A. The Rationales

There is a split of authority in states that have considered the issue of whether to adopt or reject law of the case when reviewing an intermediate court's prior decision in the same case.\textsuperscript{41} Courts that reject law of the case reason that the intermediate court's decision is not sufficiently "final" to warrant immediate review (the interlocutory theory)\textsuperscript{42} and that the highest court has a statutory and constitutional obligation to review intermediate court decisions (the structural theory).\textsuperscript{43} Courts that have adopted law of the case reason that the losing litigant waives,\textsuperscript{44} or is estopped from asserting,\textsuperscript{45} the right to petition the highest court for review. Suitable theoretical analysis of law of the case has been stymied because these competing rationales are not comparable; present analysis lacks a single framework in which to compare the four rationales.

1. The Interlocutory Theory.—To support a decision not to apply law of the case, some courts argue that a court should not be precluded from reviewing an earlier decision that is interlocutory in character even if that decision was from an intermediate court from which no appeal was taken.\textsuperscript{46} Because the intermediate court's decision is not final but is interlocutory, the highest court should not review it until the trial court has resolved all the issues in the case.\textsuperscript{47} The intermediate court's decision is not final until the trial court has acted in accordance with the remanding court's order.\textsuperscript{48} Thus, the

\textsuperscript{41} See supra note 3.
\textsuperscript{42} E.g., Walker v. Gerli, 257 A.D. 249, 251, 12 N.Y.S.2d 942, 944 (1939) (interlocutory theory).
\textsuperscript{43} E.g., Jones v. Keetch, 388 Mich. 164, 177, 200 N.W.2d 227, 233 (1972) (the state's highest court has the constitutional authority to review intermediate court decisions); New York Life Ins. Co. v. Holsbrook, 130 Ohio St. 101, 106, 196 N.E. 888, 890 (1935) (the doctrine is repugnant to the state's established system for providing for a supreme court as the last court of review, and also to the state constitution which expressly empowers the supreme court with authority to review the judgments of the court of appeals).
\textsuperscript{44} Note, Law of the Case, supra note 5, at 276; see People v. Shuey, 13 Cal. 3d 835, 848, 533 P.2d 211, 218, 120 Cal. Rptr. 83, 92 (1975) (en banc); R.O.A. Motors, Inc. v. Taylor, 220 Ga. 122, 126-27, 137 S.E.2d 459, 462-63 (1964).
\textsuperscript{45} E.g., Gohman v. City of St. Bernard, 111 Ohio St. 726, 733, 146 N.E. 291, 293 (1924).
failure to petition immediately for review does not preclude review. The premise for this rationale is that review by the highest court immediately following the first appeal to the intermediate court is premature because all proceedings in the lower courts have not yet been exhausted. The interlocutory theory emphasizes the highest court's preference for waiting until all legal and factual issues have been resolved conclusively by the trial and intermediate courts before granting certiorari.49 On remand, the trial court may resolve the contested issue, obviating further review, or it may find facts that will aid the highest court in resolving the case. Furthermore, an additional appeal to the intermediate court may clarify and narrow the issues.50

Although the decision not to apply law of the case often will assist the highest court, a court's reliance on the interlocutory theory is not always valid; the premise of the interlocutory theory is that the former appeal to the intermediate court is premature, yet often the case has developed sufficiently to permit immediate review after the intermediate court's first decision. Review should not be delayed when the issues that are to be determined on remand have no bearing on the substantive issues before the highest court. If the factual and legal issues were sufficiently concrete for the intermediate court to decide the case, the issues should be sufficiently "final" to permit the highest court to review the intermediate court's decision immediately. For example, when the intermediate court reverses the trial court's decision that the defendant is not liable in tort, holds that the defendant is strictly liable, and remands the case to the trial court for determination of the amount of damages, the trial court's finding on the amount of damages will not assist the highest court when it reviews the issue of strict liability. If the issues on remand are separable from and independent of the issues decided on appeal, encouraging further proceedings in the lower courts will not assist the highest court when it reviews the initial decision of the intermediate court.

Rejecting law of the case is inconsistent with the interlocutory theory to the extent that the litigant would have the option of either


50. "The opinion of the intermediate court, by eliminating unimportant issues from the case, focuses the attention of the litigants and reviewing courts on the more significant issues that remain" and the prior review by the intermediate court assists the highest court in its own decision making. Reynolds, The Court of Appeals of Maryland: Roles, Work and Performance—Part I, 37 Md. L. Rev. 1, 20-21 (1977).
waiting until after the remand to appeal or appealing immediately after the adverse intermediate court's decision. If the litigant chooses to appeal immediately, the issues will not be resolved conclusively by the lower courts. But by rejecting law of the case, the highest court would be able to grant certiorari immediately if the litigant petitions immediately and the issues are sufficiently resolved. If the issues are not sufficiently "final," the court would be able to deny the petition, but review the case later, if the litigant petitions for review following the remand hearing and the second appeal to the intermediate court.

Despite the advantages of a case-by-case determination by the highest court as to whether it should review immediately, rejecting law of the case so that lower courts may fully develop the issues for appeal significantly burdens the lower courts. The interlocutory theory encourages lower courts finally and conclusively to resolve the issues before the highest court reviews the case, but this procedure benefits only the highest court; the lower courts must sustain an increased workload for the benefit of the highest court. If the subsequent remand proceedings would not benefit the highest court, the burdens on the lower courts created by the subsequent proceedings outweigh the benefits to the highest court in delaying review. For example, if the highest court reverses the intermediate court's initial decision and reinstates the trial court's decision, both the remand hearing and the second appeal to the intermediate court are superfluous.

2. The Structural Theory.—Another reason courts give for not applying law of the case is that it would thwart the purpose of the statutory scheme which grants the highest court power to review judgments of the intermediate court.51 This "structural" theory is based on the notion that the highest court should not be bound by an unreviewed decision of a lower court. Under a state's constitution, and statutes enacted thereunder, the highest court is given the power to review—to affirm, modify, or reverse—the decisions of the lower courts.52 The court's implicit argument is that application of law of the case conflicts with the structure of the judicial system because the highest court would then be prevented from exercising its statutory function of reviewing a lower court's decision in the same case.

51. 296 Md. at 234, 462 A.2d at 61.
A court's reliance on the structural theory is misplaced. First, in most cases, review by the highest court is discretionary.\textsuperscript{53} By denying certiorari, the court may decline to exercise its power of review;\textsuperscript{54} by applying law of the case, the court is merely declining to review an earlier decision of the intermediate court. The structural theory supports an argument which addresses the \textit{power} of the highest court to review the intermediate court's decision; law of the case addresses the \textit{propriety} of the highest court's exercising its discretion not to review the case. The doctrine emphatically addresses the prudence and self-restraint of the court, not its authority to review decisions of lower tribunals. If the objectives of finality and efficiency are furthered by refusing to review an unappealed intermediate court's decision, then law of the case should be applied. But the structural theory does not attempt to reconcile the rejection of law of the case with any of the articulated objectives of the doctrine. Moreover, if the structural theory is important, the highest court should emphasize the need to review the case by justifying its decision to grant certiorari. If the highest court cannot justify its decision to accept certiorari in the particular case, then the structural reason for rejecting law of the case is flawed. Once again, the reasons for rejecting law of the case will be apparent in the cases in which the criteria for accepting certiorari are met, but are questionable in cases in which there is no need to accept certiorari.

The structural theory supports a decision not to apply law of the case only if a litigant fails to petition for certiorari. By failing to petition for review, the litigant deprives the highest court of the opportunity to review the case immediately. To review the case, the highest court must wait until a litigant petitions after remand. If a litigant petitions and the highest court denies certiorari, the court's prior opportunity to exercise its constitutional role weakens the structural justification for permitting the highest court to review the case after the remand and another appeal to the intermediate court. Because the highest court has had an opportunity to review the case,

\textsuperscript{53} A majority of the states with intermediate courts allow no appeals of right to the highest courts; some states limit the appeal to specific classes of cases. R. Martineau, \textit{supra} note 3, at 15. In Maryland, the Court of Appeals' jurisdiction is discretionary. \textit{See supra} note 39.

\textsuperscript{54} \textit{See} Reynolds, \textit{supra} note 50, at 8-14. There are two functions of the Court of Appeals in reviewing certiorari petitions, a "private" function, and a "public" or institutional function; the private function ensures that the individual case is correctly decided, \textit{id.} at 9, whereas the public function ensures that inconsistent decisions of the lower courts are harmonized and that cases that are important to the development of state law are reviewed, \textit{id.} at 10.
the structural function of review has been satisfied although the highest court has chosen, in its discretion, not to review.

In summary, a court's reliance on the structural theory in deciding to reject law of the case is unfounded because review by the highest court is discretionary and in some cases certiorari will not or should not be granted. Law of the case addresses the propriety of denying review, not the power of the court to review lower court decisions; when a litigant petitions for certiorari and review is denied, the highest court has been given the opportunity to fulfill its statutory role.

3. The Waiver Theory.—Waiver and estoppel are the two main rationales that courts commonly use to support application of law of the case.\(^5\) Courts that rely on the waiver theory reason that if dissatisfied with the intermediate court's decision, the losing party should have appealed.\(^6\) By failing to appeal, the litigant waives his right to petition for review in the highest court. Because the party waives his right to object to the original adverse ruling, he is precluded from later appealing the intermediate court's resolution of the issue.\(^7\) The courts justify this preclusion on the ground of fairness: The losing litigant has had an opportunity to seek review; giving the litigant a second chance is unfair to the opposing party.

The waiver theory is limited because it cannot support a decision to apply law of the case when the losing litigant petitions for certiorari and the writ is denied. By petitioning, the litigant has not manifested an intent, by an act or omission, to relinquish the right to petition for review. Furthermore, if the waiver theory is the sole justification for applying law of the case, review by the highest court should be permitted despite an arguable waiver if the unreviewed decision is clearly erroneous: It would be unfair to the litigant to

\(^5\) Note, Law of the Case, supra note 5, at 276 ("If an appeal is taken from a ruling or order to an intermediate court of review, and if the unsuccessful litigant abides by that court's decision without pursuing his appeal to the court of last resort, there is a conflict between the states as to whether he has waived his right to appeal to the court of last resort . . . "); Note, Law of the Case, supra note 4, at 756 ("since each party has relied on the previous appellate ruling, the other is estopped to question it"); Note, The Law of the Case Doctrine, supra note 4, at 423 ("once a court has handed down an opinion and the parties have relied on it as being final, then neither party should be allowed to question it").


\(^7\) E.g., People v. Shuey, 13 Cal. 3d 835, 848-49, 533 P.2d 211, 218, 120 Cal. Rptr. 83, 92 (1975) (en banc).
apply the doctrine if the first intermediate court's decision is clearly wrong.58 In jurisdictions that apply law of the case, many courts make an exception and review an intermediate court's decision if the decision is "clearly erroneous."59 Those courts reason that the equities that weigh in favor of the waiver theory are overcome by the injustice of allowing an erroneous decision to stand if the highest court has had an opportunity to correct it.

4. The Estoppel Theory.—Some courts rely on the estoppel theory to support the application of law of the case.60 The estoppel theory differs from the waiver theory in that the party opposing the review (and thus arguing for application of the law of the case) must have reasonably relied on the petitioner's failure to seek judicial review and that reliance must be detrimental.61 On remand, the lower court must follow the appellate court's directive and must rely on the intermediate court's accuracy; the trial court has no authority to ignore the appellate court's mandate.62 Litigants also will rely on the intermediate court's decision in developing their strategy for the remand hearing and will assume that the intermediate court will not later be reversed.

Estoppel shares waiver's limitations, but it differs from waiver because estoppel requires reasonable reliance. Significant reliance will exist only in those cases in which one or more issues decided on appeal form the basis for subsequently adjudicated issues in the same case. If law of the case is applied, one issue would be conclu-

59. Note, supra note 24, at 295; e.g., Connecticut Gen. Life Ins. Co. v. Bryson, 148 Tex. 86, 89, 219 S.W.2d 799, 800 (1949) (often the duty to administer the law accurately overcomes the duty to be consistent); Greene v. Rothschild, 68 Wash. 2d 1, 9-10, 414 P.2d 1013, 1016 (1966) (en banc) (There is no case in which this court has recognized a prior decision as erroneous and has refused to override it.). Courts also reconsider the prior appellate decision if it was manifestly unjust. See White v. Commonwealth, 360 S.W.2d 198, 202 (Ky. 1962) (erroneous decision is overturned where substantial injustice might result).
60. Note, Law of the Case, supra note 4, at 756 (since each party has relied on the previous appellate ruling, the losing litigant on the prior appeal is estopped from questioning it); e.g., Gohman v. City of St. Bernard, 111 Ohio St. 726, 733, 146 N.E. 291, 293 (1924).
61. Restatement (Second) of Contracts § 84b (1981) ("'Waiver' is often inexacty defined as 'the voluntary relinquishment of a known right.' When the waiver is reinforced by reliance, enforcement is often said to rest on 'estoppel.'").
62. R. Martineau, supra note 3, § 17.2, at 262. See also Md. R.P. 1076(d).
sively determined, while issues that may depend upon that issue, such as the amount of damages or the length of sentence, are still unresolved. Issues decided later will become intertwined with those decided in the prior, unreviewed appellate decision. Applying the estoppel theory to preclude review is especially appropriate in cases in which there are multiple issues; it is then more reasonable for the litigants to rely on the unreviewed decision of the intermediate court when making tactical decisions. For example, in determining whether there has been a valid assignment of a contract after the intermediate court has reversed the trial court and has held that there was a valid contract which could be assigned, the trial court necessarily relies on the intermediate court’s holding. If, after the second appeal to the intermediate court, the highest court reviews the prior decision and holds that the contract was not assignable, then the time and effort of the trial and intermediate courts in finding that the assignment was validly executed was needlessly. As the number and complexity of issues in the case increase, the lower courts and litigants increasingly rely to their potential detriment on the prior unreviewed decision of the intermediate court.\textsuperscript{63}

B. Analysis of the Rationales

The interlocutory, structural, waiver, and estoppel rationales fail to provide an adequate analytical framework for deciding whether to adopt or reject law of the case because the efficacy of each rationale depends upon the nature of the particular case before the court. For example, in some cases, application of the interlocutory theory is justifiable because the highest court benefits from the subsequent proceedings. In other cases, the highest court gains nothing from the subsequent proceedings and it would be less efficient to apply law of the case. One factor which contributes to the irrationality of the current analysis is that each individual rationale is inherently contradictory because it dictates a different result, depending on the nature of the case in which the rationale is applied.\textsuperscript{64}

Furthermore, a rationale that supports a decision to apply law of the case and a rationale that supports a decision to reject it may apply with equal force in the same case. For example, a court may hold that a litigant who does not appeal immediately to the highest court following an adverse decision in the intermediate court has

\textsuperscript{63} It is fairer to the parties who shaped their case after remand in conformity to the rulings made on the first appeal. Note, supra note 24, at 289.

\textsuperscript{64} See supra notes 46-63 and accompanying text. Obviously, not all reasons for applying law of the case pertain to all situations. Note, supra note 24, at 289.
waived his right to review. If the highest court would have benefited from subsequent findings in the trial and intermediate court, the interlocutory theory dictates that the court reject law of the case and review the lower court's decision. Because the two rationales cannot be compared, the waiver rationale cannot be balanced against the interlocutory rationale.

Although the existing rationales suggest that courts should apply each one depending on the nature of the case, law of the case cannot be applied on a case-by-case basis. If the issue of whether to apply law of the case were resolved on a case-by-case basis, a court could choose to follow one of the many rationales and apply law of the case when it would be efficacious. But case-by-case application creates unpredictable appellate procedure; litigants will not know when the highest court will apply law of the case to preclude review. As a result, they will be encouraged to petition for certiorari after every intermediate court decision. Because one factor influencing whether to apply law of the case is whether the highest court will reverse or affirm the intermediate court, the highest court would have to review the merits of every certiorari petition after the first intermediate decision. After the second appeal to the intermediate court, the highest court would make a post hoc decision as to whether the first intermediate court decision will bind the highest court. The court would have to consider the merits of the case again when deciding whether to adopt the substantive holdings of the first decision of the intermediate court.

Thus, the advantages of predictability in applying or rejecting law of the case as a general rule outweigh a case-by-case application of the doctrine. The first intermediate court decision would be tentative until the highest court decides whether to apply law of the case; the substantive and procedural issues in each case would be uncertain until the highest court makes that determination. Any efficiency that could be gained by applying law of the case is lost in a case-by-case application of the rule because the highest court could then be forced to consider the law of the case issue in every case that it reviews.

Moreover, if law of the case is applied on a case-by-case basis, a litigant will be uncertain whether he will be foreclosed from petitioning for review in the highest court if he fails to petition for review immediately following the first intermediate court decision. Consequently, because the rationales that the courts currently use

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65. See infra text accompanying notes 76-79.
to analyze the applicability of law of the case are useful only in a case-by-case analysis, those rationales should be abandoned.

Application of the traditional analysis to *Loveday* illustrates the ambiguity and result-oriented nature of that analysis. The *Loveday* court relied on the interlocutory and structural theories, neither of which, upon closer examination, supports rejecting law of the case in *Loveday*. Of the two rationales not mentioned by the court, one supports applying law of the case, one supports rejecting it. *Loveday* exemplifies the illusiveness of the traditional analysis.

Although the Court of Appeals implicitly relied on the interlocutory theory to support its decision to reject law of the case, the goals of the interlocutory theory were not served by rejecting the doctrine. The issues determined by the trial court on remand, and by the intermediate court in the second appeal, did not aid the court in resolving the substantive issues on appeal. After the first decision by the Court of Special Appeals, the issues were sufficiently concrete and “final” for the Court of Appeals to make an informed and rational determination of the issues. In *Loveday*, following the interlocutory theory did not benefit the Court of Appeals.

More important, the subsequent remand proceeding did not materially enhance the record or narrow the issues; therefore, the Court of Appeals did not benefit by having review postponed until after the remand and the second appeal to the Court of Special Appeals. In order for the case to become moot and to obviate further appellate review, *Loveday* needed to prove on remand that he did not qualify for the recidivist statute. Because the parties stipulated on remand that *Loveday* had the requisite convictions and incarceration, the issue was resolved without dispute. Furthermore, the facts concerning *Loveday*’s prior criminal record were irrelevant to the question of whether the State could properly invoke the recidivist statute without notifying the defendant during plea negotiations. When the case finally reached the Court of Appeals, the substantive issues had been conclusively determined in the first appeal to the Court of Special Appeals; *Loveday*’s prior convictions, the issue on remand, was not an issue on appeal. The findings of the trial court on remand were irrelevant to the substantive issues to be determined by the Court of Appeals and were unhelpful to the

66. 296 Md. at 231-34, 462 A.2d at 60-62. The holding is implied by the court’s quotation from and citation of cases in which the interlocutory theory was the supporting rationale for the decision not to apply law of the case.
67. Id. at 229, 462 A.2d at 59.
court in reaching an accurate decision when the case was finally before it.

The Court of Appeals also based its decision to reject law of the case on the structural theory—that the Court's authority to review a case requires it to reject a doctrine that might preclude review. Although this concern may be legitimate, there was no compelling reason to review the intermediate decision in Loveday. It is unclear why the Court of Appeals granted certiorari: Recent decisions by the Court of Special Appeals concerning the issues raised in Loveday were in harmony and the Court of Special Appeals had applied law of the case and resolved the issues consistently with its first ruling. Furthermore, the Court of Appeals recently had resolved the substantive issues in Loveday, finding that a prosecutor's good faith modification of his approach to a case from that which was presented during plea negotiations does not constitute prosecutorial vindictiveness and that the statutory sentence under the recidivist statute is mandatory. Finally, resolution of the prosecutorial vindictiveness issue followed almost directly from a line of recent Supreme Court decisions previously adhered to by the Court of Appeals. These precedents disposed of all substantive issues on appeal.

The two theories that the court did not consider suggest conflicting results. Loveday could have been held to have waived his right to object to the first decision of the Court of Special Appeals

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68. See supra notes 51-54 and accompanying text.
69. See supra note 54.
70. The Court of Appeals affirmed the Court of Special Appeals' decision. 296 Md. at 241, 462 A.2d at 65-66.
because he failed to petition immediately for review. Because the litigants and lower courts did not detrimentally rely on the first intermediate decision, however, the estoppel theory does not support an application of law of the case. The facts found on remand, that Loveday had the requisite convictions and incarceration, were separable from the substantive issue of prosecutorial vindictiveness. The trial court was required to impose the twenty-five year sentence on remand only if the state showed that the defendant had been convicted and incarcerated in accordance with the statute. The remand hearing, however, did not alter the Court of Appeals' resolution of the prosecutorial vindictiveness issue on appeal; thus, there was no detrimental reliance on Loveday's failure to appeal following the Court of Appeals' decision.

V. A Suggested Analysis

In analyzing the effect of law of the case on the state's entire judicial system, the effects of the rule on the highest court and the lower courts must be considered. The highest court usually will benefit from not applying law of the case because the highest court has an interest in having factual and legal issues determined prior to its review of the case.\(^7\) If the rules of appellate procedure, when law of the case is not applied, encourage a litigant to wait until after remand to appeal, then the trial court may expand the factual record and the proceedings in the second intermediate court decision will serve to frame the issues for the highest court. That process should facilitate a more accurate resolution of the case by the highest court.

Although beneficial to the highest court, expanded proceedings in the lower courts may place a formidable burden on the dockets of the lower courts. In a two-tiered appellate system the highest court reviews only a small percentage of all cases.\(^7\) Requiring the lower courts to prepare all cases for review, because the lower court will not know whether the case will be appealed, inordinately burdens them without correlatively benefiting the highest court. Thus in Maryland, the Court of Special Appeals and the trial courts would have to sustain a larger workload to serve the Court of Appeals.

\(^7\) See supra notes 49-50 and accompanying text.

\(^7\) For example, in Maryland, the Court of Appeals granted approximately 19\% of the certiorari petitions filed in the 1983 fiscal year. Judicial Special Projects, Research and Planning Services Unit, Annual Report of the Maryland Judiciary, 1982-1983 Statistical Abstract 10 (1983) [hereinafter cited as Annual Report]. Thus, in at least 81\% of the cases, the Court of Appeals did not review the case. This figure excludes the cases in which the losing litigant never petitions for review.
In contrast to the highest court, the interests of the lower courts—intermediate and trial—would be furthered by applying law of the case. The doctrine would require litigants who desire review to appeal immediately to the highest court or forego the opportunity for review. If a losing litigant immediately appeals, the highest court promptly can correct any errors made by the lower courts. Lower courts and litigants would then be able to conduct the remand proceedings without fear that the intermediate courts will be reversed later in the case. If the losing litigant does not appeal immediately, then the intermediate court’s decision is conclusive, and the courts and the litigants again will be able to rely on that decision. This analysis recognizes the principle underlying the estoppel theory—that the lower courts and litigants reasonably rely on the correctness of the unreviewed intermediate court’s decision. Reliance on an intermediate court’s decision that has become final because the losing litigant has failed to petition for certiorari is more reasonable than reliance on an intermediate court’s decision that later may be reversed. If the highest court reviews the case and clarifies the issues immediately, the lower courts will be assisted in their subsequent decisions. Otherwise, the intermediate appellate court’s decision is merely tentative and has only slight persuasive value.

In analyzing whether to apply law of the case, a decisionmaker should initially determine how much weight should be given to the interests of the courts in various levels of the judicial system. If the decisionmaker decides that favoring the interests of the highest court over the lower courts increases the efficiency of the judicial system, then law of the case should be rejected. If the interests of the lower courts are favored, then law of the case should be applied. Which court’s interests should be preferred is best resolved by considering the effect of law of the case on the state’s judicial system as a whole; the question cannot be rationally resolved on a case-by-case basis because the outcome in any particular case plainly depends upon facts that are peculiar to that case.

The time and energy of any state’s judiciary is expensive and limited; obviously, judicial resources should be used efficiently. Although the effect of a procedural rule on the state’s entire judicial system should be considered, analysis of all possible situations in

76. The law of the case doctrine rests on the necessity for orderly procedure and prevention of the dilution of respect for judicial tribunals. Note, Law of the Case, supra note 5, at 268 n.3; cf. Manley, “Law of the Case” as a Pitfall, 34 Cornell L.Q. 397, 397 (1949) (“Relitigation of issues before coordinate courts would be wasteful of judicial effort, and might be harmful to judicial reputations.”).
which law of the case might be applied would be cumbersome. Consideration of two distinct procedural situations will illustrate when it is more efficient to apply the doctrine.

First, if the intermediate court reverses and remands the case to the trial court and the highest court would affirm the intermediate court, applying law of the case is not efficient. (The application of law of the case requires that the appeal be heard immediately or not at all.) If the highest court had affirmed the intermediate court’s first decision, the case still would have to be remanded to the trial court. On remand, the parties might raise additional issues that could permit another appeal.\(^7\) In this situation, the highest court would have to review the case twice. If law of the case is rejected in the jurisdiction and the losing litigant appeals immediately to the highest court, the court can deny certiorari, if it will benefit either from additional facts or from a narrowing of the issues by the intermediate court in the second appeal. That is, if the facts to be found on remand are material to the issues to be decided in the first appeal, or if the scope of the remand is so broad that new issues probably will arise on remand,\(^7\) then certiorari can be denied and review granted after the second appeal.\(^7\) In contrast, applying the law of the case would preclude the possibility of review because a denial of certiorari would establish the intermediate court’s decision as the law of the case. Thus, when the highest court is affirming the intermediate court, a review of all the issues in the case together is more efficient: The parties only argue once before the court and it is easier for the highest court to resolve all issues that are based on one set of facts at one time. Therefore, if the highest court would affirm the intermediate court, law of the case should not be applied.

In the second situation, in which the intermediate court reverses and remands the case to the trial court and the highest court would reverse the intermediate court and would reinstate the trial court’s decision, applying law of the case would be efficient. Waiting until after the remand and another appeal to the intermedi-

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\(^7\) Law of the case, when applied, only precludes relitigation of issues that have been ruled upon by an appellate court, Vestal, supra note 23, at 5, so if new issues are raised on remand, they can be reviewed on appeal because the appellate court has not yet ruled on those issues.

\(^7\) For example, if the intermediate appellate court remands the case for a new trial, a host of new appealable issues may arise in the new trial.

\(^7\) It may be preferable for the highest court to deny certiorari after the first appeal to the intermediate court because it will benefit from the subsequent proceedings in the lower courts.
ate court\textsuperscript{80} will not assist the highest court because the remand pro-
cedings will become superfluous when the first decision of the trial
court is reinstated.\textsuperscript{81} Reversing the intermediate court immediately
will conserve the resources of the intermediate court because the
remand hearing and the second appeal to the intermediate court
will be avoided. Therefore, it is more efficient to apply law of the
case to require an immediate appeal to the highest court.

The only distinction between these two hypothetical situations
is the highest court’s disposition of the case. In the first example,
the highest court affirms the intermediate court; in the second ex-
ample, the highest court reverses the intermediate court. Because
the highest court will not know, prior to review, whether it will re-
verse a particular case, it cannot know whether applying the law of
the case would be efficient. To determine whether applying law of
the case is efficient, the court would be required to decide the merits
of a case before it decides whether to grant or deny certiorari. If
statistics indicate that the highest court reverses more frequently
than it affirms the intermediate court, law of the case should be
adopted as a rule in order to encourage immediate appeals to the
highest court. Immediate appeals would maximize efficiency be-
cause superfluous remands and second appeals to the intermediate
court would be avoided. In Maryland, the Court of Appeals reverses
almost as frequently as it affirms the Court of Special Appeals.\textsuperscript{82}
Hence, on that basis alone, it is difficult to determine whether it
would be more efficient to apply law of the case than to reject it.

An additional consideration in analyzing the efficacious use of
judicial resources is the impact of the rule on the workload of each
court. Currently, the Court of Special Appeals carries a heavy bur-
den; in 1981, its workload was characterized as “an avalanche of
cases.”\textsuperscript{83} According to one study, the major problem in Maryland’s
appellate system is the workload of the Court of Special Appeals.\textsuperscript{84}
In addition, trial court filings and dispositions have increased in re-

\textsuperscript{80} On the second appeal, the intermediate court will not reconsider the issues that
it decided on the first appeal if it follows law of the case within its coordinate jurisdic-
tion. See supra text accompanying note 34.

\textsuperscript{81} E.g., Williams v. State, 292 Md. 201, 438 A.2d 1301 (1981); Hensel v. Beckward,
273 Md. 426, 330 A.2d 196 (1974). In both of these cases the Court of Special Appeals
reversed the trial court’s decision and remanded the case for further proceedings and
the Court of Appeals immediately granted certiorari and overturned the Court of Spe-
cial Appeals’ reversal.

\textsuperscript{82} \textit{Annual Report}, supra note 75, at 11 (cases filed in fiscal 1983).

\textsuperscript{83} \textit{Report of the Commission to Study the Judicial Branch of Government} 13

\textsuperscript{84} \textit{Id.} at 14.
cent years.\textsuperscript{85} It may be more efficient for the entire judicial system if law of the case is applied to minimize lower court proceedings. If the doctrine is applied, the record for review in the highest court will be more limited and there will be less opportunity for the intermediate court to narrow the issues; the burden on the lower courts would be lessened. Although this results in a disadvantage for the highest court, the benefit that would result from not applying law of the case is small when compared to the resulting burden. Requiring the lower courts to prepare every case for review would appear to be inefficient.\textsuperscript{86} To resolve the issue, the advantages to the Court of Appeals in postponing review until after the remand in the trial court and the second appeal to the Court of Special Appeals must be compared to the added burden on the lower courts that would be created by additional proceedings. In an efficiency analysis, the savings to the comparatively more burdened lower courts in applying law of the case may be greater than the advantages to the Court of Appeals in rejecting it.

Minimizing delay is also a goal of efficient judicial administration and is a commonly articulated reason for applying law of the case.\textsuperscript{87} In general, both the courts and litigants have an interest in ensuring the rapid termination of a case. Delays between the trial court's judgment, the intermediate appeal, and the final appeal to the highest court may seem endless.\textsuperscript{88} If law of the case is not applied, the losing litigant has a choice of when to appeal and may choose not to appeal immediately even though that would be judicially efficient.\textsuperscript{89} Because the litigant may have an incentive to delay

\textsuperscript{85} Id.

\textsuperscript{86} Not every losing litigant petitions for certiorari, and of those that do, the Court of Appeals only grants approximately 19\% of the petitions, see supra note 75.

\textsuperscript{87} United Dredging Co. v. Industrial Accident Comm'n, 208 Cal. 705, 714, 284 P. 922, 925 (1930) (law of the case avoids subjecting the other litigant to delays and expense); Cunningham v. Hiles, 439 N.E.2d 669, 676 (Ind. App. 1982) (law of the case "furthers timely termination of disputes and avoids otherwise endless litigation"); Moore & Oglebay, The Supreme Court, Stare Decis and Law of the Case, 21 Tex. L. Rev. 514, 548 (1943) (efficient disposition of court business in a manner fully approximating "justice" is better than a tardy disposition); Vestal, supra note 23, at 31. ("'law of the case' should be considered in light of the ultimate goals of the judicial process, and the expeditious adjudication of the controversy on the merits.").

The Court of Appeals of Maryland has justified law of the case as a means of minimizing the costs of successive appeals and preventing prolonged litigation. Bredendolph v. Zeller, 5 Md. 58, 65 (1853).

\textsuperscript{88} See infra note 92.

\textsuperscript{89} The losing litigant will not be concerned with efficiency. Moreover, the litigant cannot predict whether the Court of Appeals will reverse or affirm the intermediate court before he petitions for certiorari.
the termination of the case, the delays that are built into an overburdened judicial system often are extended. The civil litigant who suffers an adverse decision below will appeal as often as possible if only to delay payment or force settlement. Similarly, in a criminal case, it may be in the defendant's best interest to delay incarceration by appealing as often as permitted.

Delay is increased when law of the case is not applied to encourage an immediate appeal from the intermediate court. The time from the trial court's disposition of the case to final decision in the highest court may be doubled. The additional delay cannot be avoided by applying law of the case if the remand proceeding presents new appealable issues; but if the highest court reverses the intermediate court and reinstates the trial court's decision, then the time interval will be halved by requiring an immediate appeal. In appropriate circumstances, therefore, law of the case can promote efficiency by shortening the time between the first judgment in the trial court and the ultimate resolution of the case in the highest court, or if review has been waived, in the intermediate court.

In summary, depending on whether the state's highest court reverses more often than affirms its intermediate court, depending on whether the lower courts have a heavier workload than the highest court, and depending on the amount of delay between appellate hearings, it may be more efficient to apply law of the case. Because the court cannot foresee the procedural outcome of the case, and because other factors affecting the decision depend upon extra-judicial facts which the parties may not be qualified to brief, the decision whether to apply law of the case should not be resolved on a case-by-case basis.

In addition to benefit-burden and efficiency analysis, fairness to litigants in general should be considered when deciding whether to apply law of the case. If a losing litigant has been given the opportunity to appeal immediately to the highest court, it may be unfair to

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90. *Bridendolph*, 5 Md. at 65.


92. In Maryland, the time interval for an appeal from a final decision in the trial court to an ultimate resolution in the Court of Appeals averages approximately 11 months. *Annual Report, supra* note 75, at 18. The time interval for an appeal from disposition in the trial court to a decision in the Court of Special Appeals also averages approximately 11 months. *Id.* at 30. If an appeal is not taken directly from the first decision in the Court of Special Appeals, but is taken after the remand hearing, then the total average time interval would be about 22 months.
his adversary to wait until after the remand to appeal.\textsuperscript{93} The extended delay and expense created by multiple court appearances may be excessively burdensome to the winning litigant. The principle underlying the waiver theory, that the losing litigant has had an opportunity to seek review in the highest court after the first appeal to the intermediate court and that the forfeiture of the right to petition for review in the highest court is fair, underlies this analysis. The difficulty with the waiver rationale—it demands a case-by-case application—does not affect the validity of the analysis, only the method of its application.

In addition to the above considerations, alternative appellate procedures affect the balancing inherent in the efficiency analysis that this Note suggests. Use of alternative procedures may mitigate the burdens on the intermediate court and litigants that occur when law of the case is not applied, but the added burdens on the trial court cannot be avoided by using these procedures. All but one of the alternative procedures do not avoid the remand hearing. The procedures merely shorten the time before the Court of Special Appeals, the time between the Court of Special Appeals' decision and the Court of Appeals review of the case, or serve to avoid review by the Court of Special Appeals altogether. The alternative procedures, however, may increase the efficient operation of the courts by allowing the litigants to bypass certain steps in the review process. In Maryland, there are four ways in which the appeals process can be expedited without applying law of the case: (1) the "fast track" procedure, which allows the use of unreported opinions, a summary calendar, and a pretrial hearing conference by the Court of Special Appeals, can enable the parties to elect a less expensive, more rapid method of appellate review;\textsuperscript{94} (2) the Court of Appeals, through its bypass authority, can issue a writ of certiorari on its own motion thereby avoiding review in the Court of Special Appeals;\textsuperscript{95} (3) the Court of Special Appeals can certify a question of law, or the entire controversy, to the Court of Appeals pursuant to the authority of the Court of Appeals to issue a writ of certiorari on its own motion;\textsuperscript{96} and (4) the litigants can petition for certiorari in the Court of Appeals after an order for appeal has been filed in the Court of Spec-

\textsuperscript{93} See Bridendolph v. Zeller, 5 Md. 58, 65 (1853).
\textsuperscript{94} REPORT OF THE COMMISSION, supra note 83, at 35 (citing former Md. R.P. 13 (1977)).
\textsuperscript{95} MD. CTS. & JUD. PROC. CODE ANN. § 12-203 (1984).
\textsuperscript{96} Md. R.P. 1015, 815.
cial Appeals, but before it has rendered a decision. These procedures may reduce the workload of the lower courts and the delay and expense to the litigants.

VI. CONCLUSION

The decision whether to apply law of the case should be made by the Court of Appeals in its rule-making capacity. The problem is best resolved by rulemaking because (1) the decision cannot be made by applying general principles to specific facts; (2) the relevant considerations are beyond the ken of the immediate parties in a case and the parties do not have adequate resources or sufficient interest to argue the pertinent facts; (3) the analysis requires intelligent forward planning, a prediction of future events or consequences, a rational consideration of major options and alternatives, and should reflect a concern for the aggregate effect of the rule; and (4) the court itself has a strong interest in the outcome of the analysis.

Whether to adopt law of the case as a general rule cannot be decided by applying general principles to the specific facts of a particular case before the court. The interlocutory, structural, waiver, and estoppel theories have proven to be deficient in providing a reasoned basis for application of law of the case in particular cases. Moreover, when balancing the benefits to the highest court against the burdens on the lower courts while also considering the efficiency of the rule and its procedural alternatives, facts that are beyond the interest, knowledge, and resources of a litigant must be addressed. Typically, adjudication is the favored method for ascer-

98. REPORT OF THE COMMISSION, supra note 83, at 35-36.
100. See Boyer, Alternatives to Administrative Trial-Type Hearings for Resolving Complex Scientific, Economic and Social Issues, 71 Mich. L. Rev. 111, 120 (1972); Cramton, A Comment on Trial-Type Hearings in Nuclear Power Plant Siting, 58 Va. L. Rev. 585, 588 (1972).
102. See Cramton, supra note 100, at 589-90.
103. Cf. id. at 589 (a trial-type hearing is disfavored when an administrative agency has an interest in carrying out its policies).
104. See supra notes 46-73 and accompanying text.
105. The pertinent facts include the outcome of the individual case, the general bene-
taining facts because the parties often have the best access to the disputed facts, their resources are not significantly drained by discovering the truth, and they have a strong interest in the outcome of the disputed issue. To analyze rationally the benefits, burdens, and efficiency of the rule, however, the decisionmaker must consider facts that do not pertain to the parties before the court; the court must consider the effect of the rule for all cases, not just the individual case before it. The decisionmaker also must predict the future consequences of adopting the rule and therefore must engage in forward planning. To plan rationally for the effect of the rule on future cases, consideration should be given to the major procedural alternatives to the rule in order to determine the aggregate effect of the doctrine on the state's entire judicial system. Furthermore, the highest court will not be deciding as an independent tribunal because the effect of law of the case on the highest court is part of the analysis: The court has a strong interest in achieving accurate decisions and an efficient use of its resources.

The issue of fairness, in contrast, can be represented by the litigants in an individual case. The litigants have an interest in ensuring that the case is decided fairly. Furthermore, they are able to brief and argue the procedural fairness of the rule in the context of the concrete factual situation. Nevertheless, the decisionmaker should consider fairness for future litigants, not just for the litigants in the immediate case. To protect future litigants, fairness also should be considered by a rule-making body. The certainty afforded appellate procedure by adopting law of the case as a rule will help guide the conduct of future litigants. If the decision whether to adopt or reject law of the case is to be rational, the fairness and efficiency of the rule, together with its benefits and burdens, should be analyzed by a rule-making body.

The Court of Appeals has the authority to promulgate a rule governing the application of the law of the case. The doctrine affects the administration of a state's judicial system, and the rule-
making power of a court is inherent and undisputed for rules affecting the administration of the judiciary. The scope of judicial rule-making power depends on the purpose for which a rule is promulgated and the pervasiveness of its impact. When the purpose of a rule is to promote the efficient administration of the judiciary, the rule-making power of a court is "complete and supreme." The suggested analysis assesses the effect of law of the case on appellate procedure as a whole; this analysis of law of the case is an appropriate task for the court in its rule-making capacity.

After Loveday, litigants need not be diligent in appealing from an adverse ruling in the Court of Special Appeals. They may choose to wait until the Court of Special Appeals issues a decision without a remand order before petitioning to the Court of Appeals. Alternatively, litigants can choose to petition the Court of Appeals immediately. The court may accept the case for review so long as the petitioner complies with the 800 rules. By rejecting law of the case, the Court of Appeals has increased the burden on both the intermediate appellate court and the trial court; the court also may have created inefficiency in Maryland's appellate procedure. In addition, it is unclear whether the Court of Appeals will benefit significantly from having rejected law of the case. The Court of Appeals, in its rule-making capacity, should employ the suggested analysis to consider the relevant factors and conclusively determine the effect of law of the case on Maryland's judicial system. Hopefully, the court will adopt a rule, consistent with Loveday, that statutorily abrogates law of the case, but retains the rule within a court's coordinate jurisdiction. Perhaps then other state courts will follow and approach the issue in their rule-making capacity.

111. Id.
112. Id. at 630.
113. 296 Md. at 234, 462 A.2d at 62.